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Racketeer Influenced & Corrupt Organizations

A Manual For Federal Prosecutors

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

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PREFACE

This manual is intended to assist federal prosecutors in the preparation and litigation of cases involving the Racketeer Influenced and Corrupt Organizations Act (RICO). Prosecutors are encouraged to contact the Organized Crime and Racketeering Section (OCRS) early in the preparation of their case for advice and assistance.

All pleadings alleging a violation of RICO or 18 U.S.C. § 1959 (Violent Crimes in Aid of Racketeering), including indictments, informations, and criminal and civil complaints, must be submitted to OCRS for review and approval before being filed with the court. Also, all pleadings alleging forfeiture under RICO, as well as pleadings relating to an application for a temporary restraining order pursuant to RICO, must be submitted to OCRS for review and approval prior to filing. Prosecutors must submit to OCRS a prosecution memorandum and a draft of the pleadings to be filed with the court in order to initiate the Criminal Division approval process. The submission should be approved by the prosecutor's office before being submitted to OCRS. Due to the volume of submissions received by OCRS, the prosecutor should submit the proposal three weeks prior to the date final approval is needed. Prosecutors should contact OCRS regarding the status of the proposed submission before finally scheduling arrests or other time-sensitive actions relating to the submission.

Finally, prosecutors should refrain from finalizing any guilty plea agreement containing a RICO-related charge until final approval has been obtained from OCRS.

The policies and procedures set forth in this manual and elsewhere relating to RICO are internal Department of Justice policies and guidance only. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

TABLE OF CONTENTS

SECTIONS **PAGE**

I. INTRODUCTION/OVERVIEW.....1

II. DEFINITIONS: 18 U.S.C. § 1961 8
A. Racketeering Activity 8
1. State Offenses 10
2. Federal Title 18 Offenses 16
a. Mail & Wire Fraud 18
b. Obstruction Of Justice 23
c. Representative Cases Charging Title 18 Predicate Offenses.....25
3. Federal Title 29 Offenses.....29
4. Generic Federal Offenses 30
5. Title 31 Offenses (Currency Reporting Violations).....33
6. Immigration and Nationality Act Offenses 34

B. State 34

C. Person 35

D. Enterprise 37
1. Types of Enterprises.....39
2. Establishing A Legal Enterprise 46
3. Establishing an Association-In-Fact Enterprise--The Bledsoe Case And Its Progeny 47
4. Variance In Proof From The Charged Enterprise ..61
5. Profit-Seeking Motive Is Not Required 64
6. Defendant As Enterprise -- Identity Between Defendant and Enterprise 67
a. Corporate Defendants 67
b. Individual Defendants 72

E. Pattern Of Racketeering Activity 75
1. Continuity And Relationship--Sedima S.P.R.L. And Its Progeny 76
2. Single Episode Rule 83
a. Revised Single Episode Rule 84
b. Examples Where Multiple Racketeering Acts May Be Charged 86
c. Examples Where Multiple Racketeering Acts May Not Be Charged 87
d. Conclusion.....89

SECTIONS **PAGE**

3. Relationship Of Predicate Offenses To Pattern...90

F. Unlawful Debt 98

G. Racketeering Investigator (18 U.S.C. § 1961(7)).....101

H. Racketeering Investigation (18 U.S.C. § 1961(8))....102

I. Documentary Materials (18 U.S.C. § 1961(9)).....102

J. Attorney General (18 U.S.C. § 1961(10)).....102

III. RICO OFFENSES -- SECTION 1962 104

A. Section 1962(a)-Acquire An Interest In An Enterprise 104

B. Section 1962(b)-Maintain An Interest In An Enterprise.....108

C. Section 1962(c)-Conduct or Participate In Enterprise.....110

1. Employed By Or Associated With 111
2. Conduct Or Participate In The Conduct Of The Enterprise's Affairs--Reves Test.....114
3. Effect On Interstate Commerce 126
4. Through A Pattern Of Racketeering Activity Or Collection Of Unlawful Debt 131

D. Section 1962(d)-RICO Conspiracy.....134

1. General Considerations 134
2. Comparison With Standard Conspiracy Law 137
3. No Requirement of Agreement Personally To Commit Two Predicate Acts 145
4. Overt Acts 146
5. Other RICO Conspiracy Issues 147

IV. PENALTIES--SECTION 1963 149

A. Sentencing Guidelines 149

1. Base Offense Level And Relevant Conduct 149
2. Other Guidelines Considerations 154

B. Forfeiture 156

1. Section 1963(a) -- Criminal Penalty 157

SECTIONS **PAGE**

2. Section 1963(a)(1) -- Interest Acquired Or Maintained -- "But For Test".....159
3. Section 1963(a)(2) Interest In And/Or Affording Influence Over An Enterprise 162
4. Section 1963(a)(3) Proceeds.....165
5. Substitute Assets.....169
6. Pre Trial Restraints 173
   a. General Consideration 173
   b. When To File A Pre-Trial Restraining Order 180
7. Drafting Forfeiture Allegations 186
8. Burden of Proof 189
9. Bifurcation of Trial 190
10. Forfeiture Special Verdicts 192
11. Joint And Several Liability 194
12. Attorneys' Fees 195
13. Eighth Amendment -- Excessive Fines 197
14. The Relation Back Doctrine.....203
15. Post-Trial Forfeiture Issues.....205
   a. Section 1963(e).....207
   b. Section 1963(g).....207
   c. Section 1963(k).....208
   d. Section 1963(l).....209

V. GUIDELINES FOR USE OF RICO 217

A. RICO Policy 217

B. Drafting The Indictment 219
1. Drafting The Substantive RICO Count.....219
2. Drafting The RICO Conspiracy Count 222
3. Other Drafting Considerations 225
   a. Multiplicity 225
   b. Duplicity 226
   c. Variance: Single And Multiple Conspiracies 229
   d. Severance, Misjoinder, And Prejudicial Spillover 232
   e. Statute Of Limitations And Withdrawal 238
   f. Double Jeopardy And Collateral Estoppel ..243
      a. Double Jeopardy 243
      b. Collateral Estoppel 246
   g. Surplusage 248

VI. OTHER ISSUES IN CRIMINAL RICO CASES 250

A. Liberal Construction Clause 250

SECTIONS **PAGE**

B. Wharton's Rule 251

C. Mens Rea 253

D. Connection To Organized Crime 254

E. Constitutionality Of RICO 255
1. Vagueness Challenges.....255
2. Tenth Amendment Challenges.....257
3. First Amendment Challenge..... 258
4. Ex Post Facto Clause Challenges.....259

F. RICO And Electronic Surveillance 262

G. Special Verdicts And Unanimous Verdicts.....263
1. Special Verdicts.....263
2. Unanimous Verdicts 266

H. Venue 272

I. Admissibility Of Evidence Of Uncharged Crimes.....274

J. Expert Testimony.....276

VII. CIVIL RICO SUITS FOR EQUITABLE RELIEF BROUGHT BY THE UNITED STATES 278

A. Overview Of Equitable Relief Pursuant to 18 U.S.C. § 1964 278

B. The Government's Burden Of Proof To Obtain Equitable Relief 280

C. Scope Of Equitable Relief 283
1. Preliminary and Permanent Injunctions 283
2. Court Appointed Monitors, Trusteeships and Officers.....284
3. Divestiture.....285
4. Disgorgement.....286

D. Civil RICO Cases Against Labor Unions And Related Entities Brought By The United States 289

E. Civil RICO Cases Not Involving Labor Unions

Brought By The United States 294

SECTIONS **PAGE**

F. Miscellaneous Procedures 297

1. Civil Investigative Demands..... 297
2. Venue.....298
3. Doctrine of Laches and Statute Of Limitations .299
4. Collateral Estoppel.....299
5. Fifth Amendment Privilege.....300
6. Jury Trial.....301

APPENDICES **PAGE**

A. RICO Approval Guidelines.....302

B. Temporary Restraining Order Under 18 U.S.C. § 1963(d)....306

C. Tax Division Guidelines for Charging Mail or Wire Fraud Count Involving Federal Tax Laws.....308

INDEX.....314

TABLE OF AUTHORITIES

FEDERAL CASES

Abelson v. Strong,644 F. Supp. 524 (D. Mass. 1986) . 90,106
Acampora v. Boise Cascade Corp.,635 F. Supp. 66 (D.N.J. 1986) 91
Aetna Casualty Surety Co. v. P&B Autobody,43 F.3d 1546 (1st Cir. 1994) 112, 119
Agathos v. Mullenberg,932 F. Supp. 636 (D.N.J. 1996) .. 293
Alexander v. United States,509 U.S. 544 (1993) ... 197, 198
American Manufacturers Mutual Insurance Co. v. Townson, 912 F. Supp. 291 (E.D. Tenn. 1995) 74
Anderson v. United States,70 U.S. 481 (1898) 266
Anton Motors Inc. v. Powers,644 F. Supp. 299 (D. Md. 1986) 90, 91
Aronson v. City of Akron,116 F.3d 804 (6th Cir. 1997) . 182
Ashe v. Corley,992 F.2d 540 (5th Cir. 1993) 73
In re Assets of Martin,1 F.3d 1351 (3d Cir. 1993) 176
Atena Casualty & Surety v. Liebowitz,570 F. Supp. 908 (E.D.N.Y. 1983), aff'd on other grounds, 730 F.2d 905 (2d Cir. 1984) 280
Azrielli v. Cohen Law Offices,21 F.3d 512 (2d Cir. 1994) 121
Bachmeir v. Bank of Ravenswood,663 F. Supp. 1207 (N.D. Ill. 1987) 108
Banks v. Wolk,918 F.2d 418 (3d Cir. 1990) 68, 69
Bast v. Cohen, Dunn & Sinclair, PC,59 F.3d 492 (4th Cir. 1995) 8
Baumer v. Pachl, 8 F.3d 1341 (9th Cir. 1993) 121, 144
Beck v. Manufacturers Hanover Trust Co.,820 F.2d 46 (2d Cir. 1987), cert. denied, 484 U.S. 1005 (1988) 48
Bennett v. Berg,685 F.2d 1053 (8th Cir.), aff'd in part, rev'd in part, 710 F.2d 1361 (8th Cir. 1982), cert. denied, 464 U.S. 1008 (1983) 38, 68, 115
Bergen v. L.F. Rothschild, 648 F. Supp. 582 (D.D.C. 1986).74
In re Billman,915 F.2d 916 (4th Cir. 1990), cert. denied, 500 U.S. 952 (1991) 176
Blockburger v. United States,284 U.S. at 304, 52 S. Ct. at 182 244
Board of County Comm'rs of San Juan County v. Liberty Group, 965 F.2d 879 (10th Cir.), cert. denied, 506 U.S. 918 (1992) 67, 69, 105

Bonner v. Henderson,147 F.3d 457 (5th Cir. 1998) 48
Bourjaily v. United States,483 U.S. 171 (1987) 138
Brady v. Dairy Fresh Products, Co.,974 F.2d 1149
(9th Cir. 1992) 106
Brennan v. Chestnut,973 F.2d 644 (8th Cir. 1992) 20
Brittingham v. Mobil Corp.,943 F.2d 297
(3d Cir. 1991) 67, 69, 105
Brouwer v. Raffensperger, Hughes & Co.,199 F.3d 961
(7th Cir. 2000) 125
Bseirani v. Mahshie,881 F. Supp. 778 (N.D.N.Y. 1995) .. 257
Buck Creek Coal, Inc. v. United Workers of America,
917 F. Supp. 601 (S.D. Ind. 1995) 20
In re Burzynski,989 F.2d 733 (5th Cir. 1993) 72
Busby v. Crown Supply, Inc.,896 F.2d 833 (4th Cir. 1990),
aff'd, 948 F.2d 1280 (1991) ..... Pasim
*Butchers' Union, Local No. 498, United Food &
Commercial Workers v. SDC Investment, Inc.*,
631 F. Supp. 1001 (E.D. Cal. 1986) 20
Callanan v. United States,
881 F.2d 229 (6th Cir. 1989), cert. denied,
494 U.S. 1083 (1990) 22, 265
Caplan & Drysdale v. United States,491 U.S. 617 (1989) 195
Carpenter v. United States,484 U.S. 19 (1987) 21, 22
United States v. Carter,721 F.2d 1514 ..... 115, 144, 156
Chambers Development Co. v. Browning-Ferris Indus.,
590 F. Supp. 1528 (W.D. Pa. 1984) 280
Chang v. Chen,80 F.3d 1293 (9th Cir. 1996) 48, 53
*Chicago District Council of Carpenters Pension Fund v.
Ceiling Wall Systems, Inc.*,915 F. Supp. 939
(N.D. Ill. 1996) 20
City of Chicago Heights v. LoBue, 841 F. Supp. 819
(N.D. Ill. 1994) 37
City of New York v. Joseph L. Balkan, Inc.,
656 F. Supp. 536 (E.D.N.Y. 1987) 37
Collins v. Youngblood,497 U.S. 37 (1990) 259
Columbia Natural Resources, Inc. v. Tatum,
58 F.3d 1101 (6th Cir. 1995),
cert. denied, 516 U.S. 1158 (1996) 256
*Commodity Futures Trading Com'n v. American Metals Exchange
Corp.*,991 F.2d 71 (3d Cir. 1993) 288
*Commodity Futures Trading Com'n v. Co Petro Marketing Group,
Inc.*,680 F.2d 573 (9th Cir. 1982) 288
Commodity Futures Trading Com'n. v. Hunt, 591 F.2d 1211
(7th Cir. 1979) 281, 282

Commonwealth of Pennsylvania v. Cianfrani,
600 F. Supp. 1364 (E.D. Pa. 1985) 37, 43
Computer Services v. Ash, Baptie & Co.,
883 F.2d 48 (7th Cir. 1989) 80
Conkling v. Turner,18 F.3d 1285 (5th Cir. 1994) 280
Cooper v. United States,639 F. Supp. 176
(M.D. Fla. 1986) 29
County of Oakland v. City of Detroit,
784 F. Supp. 1275 (E.D. Mich. 1992) 36, 37
Cox v. Administrator U.S. Steel & Carnegie,
17 F.3d 1386 (11th Cir. 1994),
cert. denied, 513 U.S. 1110 (1995) 256
Crowe v. Henry,43 F.3d 198 (5th Cir. 1995) 54, 67
Cullen v. Margiotta,811 F.2d 698 (2d Cir.),
cert. denied, 483 U.S. 1021 (1987) 69
Dammon v. Folse,846 F. Supp. 36 (E.D. La. 1994) 36
Dan River, Inc. v. Icahn,701 F.2d 278 (4th Cir. 1983) . 280
Davis v. Mutual Life Insurance Co. of New York,
6 F.3d 367 (6th Cir. 1993),
cert. denied, 510 U.S. 1193 (1994) 67
Diamond Plus, Inc. v. Kolber, 960 F.2d 765(8th Cir. 1992).58
Discon, Inc. v. Nynex Corp.,93 F.3d 1055 (2d Cir. 1996) 67
Durante Brothers & Sons, Inc. v. Flushing National Bank,
755 F.2d 239 (2d Cir.), cert. denied, 473 U.S. 906
(1985) 100
Eisenberg v. Gagnon,564 F. Supp. 1347 (E.D. Pa. 1983) .. 40
Elliott v. Foufas,867 F.2d 877 (5th Cir. 1989) 38, 55
Emery v. American General Finance, Inc.,
134 F.3d 1321 (7th Cir.),
cert. denied, 525 U.S. 818 (1998) 67
Entre Computer Centers, Inc. v. FMG of Kansas City, Inc.,
819 F.2d 1279 (4th Cir. 1987),
rev'd in part, *United States v. Busby*, 896 F.2d 833
(4th Cir. 1990) 70
FTC v. Gem Merchandising Corp., 87 F.3d 466
(11th Cir. 1996) 288
Firestone,926 F.2d 279 (6th Cir. 1992) 257
Firestone v. Galbreth,747 F. Supp. 1556
(S.D. Ohio 1990) 256
*First Federal Savings & Loan Association v.
Oppenheim, Appel, Dixon & Co.*,629 F. Supp. 427
(S.D.N.Y. 1986) 92
Fleischhauer v. Feltner,879 F.2d 1290 (6th Cir. 1989),
cert. denied, 493 U.S. 1074 (1990) 194

Fort Wayne Books, Inc. v. Indiana,485 U.S. 933 (1989) .. 76
Fort Wayne Books, Inc. v. Indiana,
489 U.S. 46 (1989) 11, 183, 256, 258, 273
Gagan v. American Cablevision, Inc.,77 F.3d 951
(7th Cir. 1996) 48
Garbade v. Great Divide Mining & Milling Corp.,
831 F.2d 212 (10th Cir. 1987) 68, 69
Garrett v. United States,471 U.S. 773 (1985) 156
Genty v. Resolution Trust Corp.,937 F.2d 899
(3d Cir. 1991) 67, 68, 105
Govern v. Meese,811 F.2d 1405 (11th Cir. 1987) 208
Griffin v. United States,502 U.S. 46 (1991) 267
Guaranty Trust Co. v. United States,304 U.S. 126 (1938) 299
Guidry v. Bank of LaPlace,954 F.2d 278
(5th Cir. 1992) 38, 73
H.J. Inc. v. Northwestern Bell Telephone Co.,492 U.S. 229
(1989) ..... Pasim
H.J. Inc. v. Northwestern Bell Telephone Co.,
829 F.2d 648 (8th Cir. 1987), rev'd, 492 U.S. 229
(1989) ..... Pasim
Haroco, Inc. v. American National Bank & Trust Co.,
747 F.2d 384 (7th Cir. 1984), aff'd on other grounds,
473 U.S. 606 (1985) 67, 68, 71
Heller Financial, Inc. v. Grammco Computer Sales,
71 F.3d 518 (5th Cir. 1996) 93
Hofstetter v. Fletcher,860 F.2d 1079 (6th Cir. 1988) ... 19
Hofstetter v. Fletcher,905 F.2d 897 (6th Cir. 1988) 57
Holmberg v. Armbrecht,327 U.S. 392 (1946) 299
Holmes v. Securities Investor Protection Corp.,
503 U.S. 258 (1992) 250
Hubbard v. United Airlines, Inc.,
927 F.2d 1094 (9th Cir. 1991) 20
Hudson v. LaRouche,579 F. Supp. 623 (S.D.N.Y. 1983) 42
Humana v. Forsyth,525 U.S. 299 (1999) 21
Iannelli v. United States,420 U.S. 770 (1975) 251, 252
Illinois Department of Rev. v. Phillips,
771 F.2d 312 (7th Cir. 1985) 37
Illinois v. Flisk,702 F. Supp. 189 (N.D. Ill. 1988) 19, 22
Interstate Commerce Com'n v. B&T Transport Co.,
613 F.2d 1182 (1st Cir. 1980) 288
Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.,
46 F.3d 258 (3d Cir. 1995) 120, 119
Jiffy Lube Intern., Inc. v. Jiffy Lube of Pennsylvania, Inc.,
848 F. Supp. 569 (E.D. Pa. 1994) 105
Jones v. United States,120 S. Ct. 1904 (2000) 130

Karel v. Kroner,635 F. Supp. 725 (N.D. Ill. 1986) 129
Kaushal v. State Bank,556 F. Supp. 576 (N.D. Ill. 1983) 280
Khurana v. Innovative Health Care Systems, Inc.,
130 F.3d 143 (5th Cir. 1997), cert. granted;
vacating and remanding with instructions to
dismiss as moot on remand 67, 71
Klein v. Boyd,949 F. Supp. 280 (E.D. Pa. 1996),
aff'd in part and rev in part, 1998 WL 55245
(3d Cir.), on reh'g en banc judgment vacated
No 97-1143 (Mar. 9, 1998) 126
Laborers' International Union of North America v. Caruso,
197 F.3d 1195 (7th Cir. 1999) 294
Lancaster Community Hospital v. Antelope Valley Hospital
District,940 F.2d 397 (9th Cir. 1991) 254
Landry v. Airline Pilots Association International AFL-CIO,
901 F.2d 404 (5th Cir.), cert. denied, 498 U.S. 895
(1990) 54, 68
Libertad v. Welch,53 F.3d 428 (1st Cir. 1995) 57
Libretti v. United States,516 U.S. 29 (1995) 189, 190, 193
Lightning Lube, Inc. v. Witco Corp.,4 F.3d 1153
(3d Cir. 1993) 67, 69, 109
Lincoln House, Inc. v. Dupre,
903 F.2d 845 (1st Cir. 1990) 280
Louisiana Power & Light Co. v. United Gas Pipe Line Co.,
642 F. Supp. 781 (E.D. La. 1986) 108
MCM Partners, Inc. v. Andrews-Bartlett & Associates,
62 F.3d 967 (7th Cir. 1995) 123
Magic Toyota v. Southeast Toyota Distributorship,
784 F. Supp. 306 (D.S.C. 1992) 299
Mann v. Air Line Pilots Association,
848 F. Supp. 990 (S.D. Fla. 1994) 20
Marshall-Silver Construction Co. v. Mendel,
894 F.2d 593 (3d Cir. 1990) 80
McCullough v. Suter,757 F.2d 142 (7th Cir. 1985) .... Pasim
McNally v. United States,483 U.S. 350 (1987) 21, 22
Miller Brewing Co. v. Landau,
616 F. Supp. 1285 (D. Wis. 1985) 299
Mitchell v. Robert DeMario Jewelry, Inc.,
361 U.S. 288 (1960) 286
Modern Settings v. Prudential-Bache Securities,
629 F. Supp. 860 (S.D.N.Y. 1986) 35
Moffatt Enterprises, Inc. v. Borden, Inc.,
763 F. Supp. 143 (W.D. Pa. 1990) 110

In re Moffitt, Zwerling & Kemler, P.C.,
83 F.3d 660 (4th Cir. 1996), cert. denied,
519 U.S. 1101 (1997) 197
In re Moffitt, Zwerling & Kemler, P.C.,
864 F. Supp. 527 (E.D. Va. 1994) 196
Morin v. Tupin,835 F. Supp. 126 (S.D.N.Y. 1993) 61
Moss v. Morgan Stanley, Inc.,719 F.2d 5 (2d Cir. 1983),
cert. denied, 465 U.S. 1025 (1984) 38
Mruz v. Caring, Inc.,991 F. Supp. 701 (D.N.J. 1998) 27
Napoli v. United States,32 F.3d 31 (2d Cir. 1994),
cert. denied, 115 S. Ct. 900 (1995),
reh'g granted, 45 F.3d 680, 683 (2d Cir.) 120
National Organization for Women, Inc. v. Scheidler,
510 U.S. 249 (1994) ..... Pasim
Neibel v. Trans World Assurance Co.,108 F.3d 1123
(9th Cir. 1997) 125
Nevada v. United States,463 U.S. 110 (1983) 299
Nolte v. Pearson,994 F.2d 1311 (8th Cir. 1993) 121
Northeast Women's Center, Inc. v. McMonagle,
868 F.2d 1342 (3d Cir.), cert. denied,
493 U.S. 901 (1989) 251, 259
Nu-Life Construction Corp. v. Board of Education of New York,
779 F. Supp. 248 (E.D.N.Y. 1991) 36, 254
Ocean Energy II, Inc. v. Alexander & Alexander, Inc.,
868 F.2d 740 (5th Cir. 1989) 54, 55
Old Time Entertainment, Inc. v. International Coffee Corp.,
862 F.2d 1213 (5th Cir. 1989) 71
Palmer v. Nationwide Mutual Insurance Co.,
945 F.2d 1371 (6th Cir. 1991) 67
Parcoil Corp. v. NOWSCO Well Service Ltd.,
887 F.2d 502 (4th Cir. 1989) 80
Parker and Parsley Petroleum v. Dresser Industries,
972 F.2d 580 (5th Cir. 1992) 67
Pedrina v. Chun,97 F.3d 1296 (9th Cir. 1996) 35, 120
Pharmcare, et al. v. Caremark, et al., 965 F. Supp.
1141, 1421-23 (D. Haw. 1996).....53
Plains Resources, Inc. v. Gable,
782 F.2d 883 (10th Cir. 1986) 38
*Planned Parenthood of the Columbia Willamette, Inc., et al. v.
American Coalition of Life Activists, et al.*,
945 F. Supp. 1355 (D. Or. 1996) 53
Pohlot v. Pohlot,664 F. Supp. 112 (S.D.N.Y. 1987) ... 9, 14
Porter v. Warner Holding Co.,328 U.S. 395 (1946) 286
R.A.G.S. Couture, Inc. v. Hyatt,
774 F.2d 1350 (5th Cir. 1985) 92

Religious Technology Center v. Wollersheim,
796 F.2d 1076 (9th Cir. 1986), cert. denied,
479 U.S. 1103 (1987) 280
Reno v. Condon,120 S. Ct. 666 (2000) 131
Resolution Trust Corp. v. Stone,
998 F.2d 1534 (10th Cir. 1993) 120
Reves v. Ernst & Young
507 U.S. 170 (1993) ..... Pasim
Richardson v. United States,526 U.S. 813 (1999) .. 268, 269
Richmond v. Nationwide Cassel L.P.,
52 F.3d 640 (7th Cir. 1995) 67
Riverwoods Chappaqua v. Marine Midland Bank,
30 F.3d 339 (2d Cir. 1994) 67, 69
Roberts v. United States,
141 F.3d 1468 (11th Cir. 1998) 180
Rolo v. City Investing Co. Liquidating Trust,
845 F. Supp. 182 (D.N.J. 1993), aff'd, 43 F.3d 1462
(3d Cir. 1994), judgment vacated on reh'g,
66 F.3d 312 (3d Cir. 1995), on remand,
897 F. Supp. 826 (D.N.J. 1995) 8
Rose v. Bartle,871 F.2d 331 (3d Cir. 1989) 68
Russello v. United States,
464 U.S. 16 (1983) ..... Pasim
S.E.C. v. Advance Growth Capital Corp.,
470 F.2d 40 (7th Cir. 1972) 281
S.E.C. v. Bilzerian,29 F.3d 689 (D.C. Cir. 1994) 281
S.E.C. v. Commonwealth Chemical Securities Inc.,
574 F.2d 90 (2d Cir. 1978) 281
S.E.C. v. First City Financial Corp., Ltd.,
890 F.2d 1215 (D.C. Cir. 1989) 281, 286, 288
S.E.C. v. Management Dyn. Inc.,
515 F.2d 801 (2d Cir. 1975) 281
S.E.C. v. Manor Nursing Centers, Inc.,
458 F.2d 1082 (2d Cir. 1972) 286
S.E.C. v. Stratton Oakmont Inc.,
878 F. Supp. 250 (D.D.C. 1998) 282
S.E.C. v. Texas Gulf Sulphur Co.,
446 F.2d 1301 (2d Cir. 1971) 288
Schad v. Arizona,501 U.S. 624 (1991) 267, 268
Schofield v. First Commodity Corp.,
793 F.2d 28 (1st Cir. 1986) 68, 69
Schrag v. Donges,788 F. Supp. 1543 (D. Kan. 1992) 256
Securitron Magnalock Corp. v. Schnabolk,65 F.3d 256
(2d Cir. 1995), cert. denied,
516 U.S. 1114 (1996) 40, 67

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985) ..... Pasim
Serpico v. Laborers' International Union of North America,
97 F.3d 995 (7th Cir. 1996) 294
Sever v. Alaska Pulp Corp.,978 F.2d 1529 (9th Cir. 1992) 67
Snider v. Lone Star Art Trading Co.,
659 F. Supp. 1249 (E.D. Mich. 1987) 40, 45
South Carolina Electrical & Gas v. Westinghouse Elec.,
826 F. Supp. 1549 (D.S.C. 1993) 109
State Farm Fire & Casualty Co. v. Estate of Caton,
540 F. Supp. 673 (N.D. Ind. 1982) 41
State of Maryland v. Buzz Berg Wrecking Co.,
496 F. Supp. 245 (D. Md. 1980) 45
State of New York v. O'Hara,
652 F. Supp. 1049 (W.D.N.Y. 1987) 43
Sterling Suffolk Racecourse v. Burrillville Racing Association,
802 F. Supp. 662 (D.R.I. 1992), aff'd, 989 F.2d 1266
(1st Cir.), cert. denied, 510 U.S. 1024 (1993) ... 280
Stone v. Kirk,8 F.3d 1079 (6th Cir. 1993) 121
Sun Savings & Loan Association v. Dierdorff,
825 F.2d 187 (9th Cir. 1987) 92
Superior Oil Co. v. Fulmer,785 F.2d 252 (8th Cir. 1986) 77
Sutherland v. O'Mally,882 F.2d 1196 (7th Cir. 1989) 80
Tabas v. Tabas,47 F.3d 1280 (3d Cir. 1995) 81, 250
Talbot v. Robert Matthews Distributing Co.,
961 F.2d 654 (7th Cir. 1992) 20
Tamburello v. Committee-Tract Corp.,
67 F.3d 973(1st Cir. 1995), cert. denied,
116 S. Ct. 1852 (1996) 20
Teamsters Local 372 v. Detroit Newspapers,
956 F. Supp. 753 (E.D. Mich. 1997) 16, 20
Temple University v. Salla Brothers, Inc.,
656 F. Supp. 97 (E.D. Pa. 1986) 106
Temporaries, Inc. v. Maryland National Bank,
638 F. Supp. 118 (D. Md. 1986) 92
Thompson v. Paasche,950 F.2d 306 (6th Cir. 1991) 80
Trak Microcomputer Corp. v. Wearne Brothers,
628 F. Supp. 1089 (N.D. Ill. 1985) 40, 71
Tran Co. v. O'Connor Securities,
718 F.2d 26 (2d Cir. 1983) 280
Trautz v. Weisman,809 F. Supp. 239 (S.D.N.Y. 1992) 109
Tryco Trucking Co. v. Belk Store Services,
634 F. Supp. 1327 (W.D.N.C. 1986) 91, 254
Turner v. United States,396 U.S. 398 (1990) 266

Underwood v. Venango River Corp.,995 F.2d 677
(7th Cir. 1993), overruled on other grounds by
Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994) 20
United Fish Co. v. Barnes,627 F. Supp. 732 (D.N.J. 1986) 92
United States International Brotherhood of Teamsters,
907 F.2d 277 (2d Cir. 1990) 285, 291
United States Local 30, United Slate, Tile, et al.,
871 F.2d 401 (3d Cir. 1989) 282
United States v. $21,282.00 in U.S. Currency,
47 F.3d 972 (8th Cir. 1995) 201
United States v. $288,933.00 in U.S. Currency,
838 F. Supp. 367 (N.D. Ill. 1993) 201, 203
United States v. A Parcel of Land Known as 92 Buena Vista,
113 S. Ct. 1126 (1993) 204
United States v. A Parcel of Land Known as 92 Buena Vista Avenue,
507 U.S. 111 (1993) 213
United States v. Acosta,881 F.2d 1039
(11th Cir. 1989) 170, 169
United States v. Aguilar,515 U.S. 593 24
United States v. Aimone,715 F.2d 822 (3d Cir. 1983),
cert. denied,468 U.S. 1217 (1984) 39, 45
United States v. Aleman,609 F.2d 298 (7th Cir. 1979),
cert. denied, 445 U.S. 946 (1980) 38, 225
United States v. Alexander,108 F.3d 853 (8th Cir. 1997) 201
United States v. Alexander,869 F.2d 91 (2d Cir. 1989) . 194
United States v. Alkins,925 F.2d 541 (2d Cir. 1991) ... 261
United States v. Alkins,925 F.2d 552 (2d Cir. 1991) 81
United States v. Allen,155 F.3d 35 (2d Cir. 1998) 221
United States v. Allen,656 F.2d 964 (4th Cir. 1981) ... 128
United States v. Alonso,740 F.2d 862 (11th Cir. 1984),
cert. denied, 469 U.S. 1166 (1985) 43, 61
United States v. Altomare,625 F.2d 5
(4th Cir. 1980) 43, 44, 45
United States v. Alvarez,860 F.2d 801 (7th Cir. 1988),
cert. denied, 490 U.S. 1020 (1989) 43, 44
United States v. Amato,15 F.3d 230
(2d Cir. 1994) 64, 135, 137
United States v. Ambrose,740 F.2d 505 (7th Cir. 1984),
cert. denied, 472 U.S. 1017 (1985) 43, 129
United States v. Amend,791 F.2d 1120 (4th Cir.),
cert. denied, 479 U.S. 930 (1986) 188, 193, 266
United States v. Amodeo,44 F.3d 141 (2d Cir. 1995) 292
United States v. Anderson,
782 F.2d 908 (11th Cir. 1986) 13, 61, 163

United States v. Anderson,809 F.2d 1281 (7th Cir. 1987) 265
United States v. Angelilli,660 F.2d 23 (2d Cir. 1981),
cert. denied,455 U.S. 945 (1982) 39, 43, 45
United States v. Angiulo,847 F.2d 956 (1st Cir.),
cert. denied, 488 U.S. 852 (1988) 100, 277
United States v. Angiulo,897 F.2d 1169 (1st Cir.),
cert. denied, 498 U.S. 845 (1990) ..... Pasim
United States v. Antar,53 F.3d 568 (3d Cir. 1995) ... Pasim
United States v. Argie,907 F.2d 627 (7th Cir. 1990) ... 166
United States v. Arnold,773 F.2d 823 (7th Cir. 1985) ... 24
United States v. Arocena,778 F.2d 943 (2d Cir. 1985),
cert. denied, 475 U.S. 1053 (1986) 238
United States v. Ashman,979 F.2d 469
(7th Cir. 1992) 231, 256
United States v. Aucoin,964 F.2d 1492 (5th Cir.),
cert. denied, 506 U.S. 1023 (1992) 38, 100, 256
United States v. Aulicino,44 F.3d 1102 (2d Cir. 1995) .. 81
United States v. Austin,509 U.S. 602 (1993) ..... Pasim
United States v. BCCI Holdings (Luxembourg) S.A. et al.,
46 F.3d 1185 (D.C. Cir. 1995) 205, 214
United States v. BCCI Holdings (Luxembourg)S.A. et al.,
69 F. Supp. 2d 36 (1999) 212, 214, 215
*United States v. BCCI Holdings (Luxembourg) S.A.
(Petition of American Express Bank)*,941 F. Supp. 180
(D.D.C. 1996) 212
*United States v. BCCI Holdings (Luxembourg) S.A.
(Petition of B. Gray Gibbs)*,916 F. Supp. 1270
(D.D.C. 1996) 211
*United States v. BCCI Holdings (Luxembourg), S.A.
(Petition of General Secretariate of the
Organization of American States)*,73 F.3d 403
(D.C. Cir.), cert. denied, 117 S. Ct. 50 (1996) .. 215
*United States v. BCCI Holdings (Luxembourg) S.A.
(Petition of ICIC Investments)*,795 F. Supp. 477
(D.D.C. 1992) 209
*United States v. BCCI Holdings (Luxembourg) S.A.
(Petition of Indozuez Bank)*,916 F. Supp. 1276
(D.D.C. 1996) 211
*United States v. BCCI Holdings (Luxembourg) S.A.
(Petition of Richard Eline)*,916 F. Supp. 1286
(D.D.C. 1996) 210, 211
*United States v. BCCI Holdings (Luxembourg) S.A.
(Petitions of General Creditors)*,919 F. Supp. 31
(D.D.C. 1996) 210

United States v. Bacheler,611 F.2d 443 (3d Cir. 1979) .. 43
United States v. Bagaric,706 F.2d 42 (2d Cir.)
cert. denied, 464 U.S. 840 (1983) ..... Pasim
United States v. Bagnariol,665 F.2d 877 (9th Cir. 1981),
cert. denied, 456 U.S. 962 (1982) 60, 127, 128
United States v. Bajakajian,524 U.S. 321
(1998) 199, 200, 201
United States v. Baker,617 F.2d 1060 (4th Cir. 1980) Pasim
United States v. Baker,63 F.3d 1478 (9th Cir. 1995) . Pasim
United States v. Balzano,916 F.2d 1273
(7th Cir. 1990) 44, 234
United States v. Barber,119 F.3d 276 (4th Cir. 1997) .. 152
United States v. Barber,476 F. Supp. 182 (S.D. W. Va. 1979),
aff'd, 668 F.2d 778 (4th Cir.), cert. denied,
459 U.S. 829 (1982) 39, 45
United States v. Barnes,604 F.2d 121 (2d Cir. 1979),
cert. denied, 446 U.S. 907 (1980) 107
United States v. Barnette,10 F.3d 1553 (11th Cir.),
cert. denied, 513 U.S. 816 (1994) 296
United States v. Barton,647 F.2d 224 (2d Cir.),
cert. denied, 454 U.S. 857 (1981) 127
United States v. Bascaro,742 F.2d 1335 (11th Cir. 1984),
cert. denied, 472 U.S. 1017 (1985) 84
United States v. Beale,921 F.2d 1412 (11th Cir.),
cert. denied, 502 U.S. 829 (1991) 137, 237
United States v. Beasley,72 F.3d 1518 (11th Cir.),
cert. denied, 517 U.S. 1027 (1996) ..... Pasim
United States v. Beatty,587 F. Supp. 1325 (E.D.N.Y. 1984).25
United States v. Beckham,562 F. Supp. 488
(E.D. Mich. 1983) 174
United States v. Bello,470 F. Supp. 723
(S.D. Cal. 1979) 173
United States v. Bellomo,176 F.3d 580 (2d Cir. 1999) .. 190
United States v. Benevento,836 F.2d 129 (2d Cir.),
cert. denied, 486 U.S. 1043 (1988) 194
United States v. Benevento,836 F.2d 60 (2d Cir. 1986); 243
United States v. Bennett,147 F.3d 912 (9th Cir. 1998) . 206
United States v. Bennett,984 F.2d 597 (4th Cir.)
cert. denied, 508 U.S. 945 (1993) 143, 256
United States v. Benny,786 F.2d 1410 (9th Cir.),
cert. denied, 479 U.S. 1017 (1986) 41, 74
United States v. Berardi,675 F.2d 894 (7th Cir. 1982) . 229
United States v. Berg,710 F. Supp. 438 (E.D.N.Y. 1989) . 22

United States v. Bertoli,854 F. Supp. 975 (D.N.J.), aff'd in part, vacated in part, 40 F.3d 1384 (3d Cir. 1994) 265
United States v. Bethea,672 F.2d 407 (5th Cir. 1982) .. 239
United States v. Biaggi,672 F. Supp. 112 (S.D.N.Y. 1987) 17, 227, 233
United States v. Biaggi,675 F. Supp. 790 (S.D.N.Y. 1987) 22, 228
United States v. Biaggi,705 F. Supp. 864 (S.D.N.Y. 1988), aff'd in part and rev'd in part, 909 F.2d 662 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991) 270
United States v. Biaggi,909 F.2d 662 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991) 82, 83, 264
United States v. Biasucci,786 F.2d 504 (2d Cir.), cert. denied, 479 U.S. 827 (1986) ..... Pasim
United States v. Bissell,866 F.2d 1343 (11th Cir. 1989) 178
United States v. Blackwood,768 F.2d 131 (7th Cir.), cert. denied, 474 U.S. 1020 (1985) 37, 43, 90
United States v. Blandford,33 F.3d 685 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995) 26, 28, 42
United States v. Bledsoe,674 F.2d 647 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1983) ..... Pasim
United States v. Blinder,10 F.3d 1468 (9th Cir. 1993) Pasim
United States v. Bloom,777 F. Supp. 208 (E.D.N.Y. 1991) 166, 195
United States v. Boffa,513 F. Supp. 444 (D. Del. 1980) 226, 252
United States v. Boffa,688 F.2d 919 (3d Cir. 1982), cert. denied, 460 U.S. 1022 (1983) ..... Pasim
United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411 (E.D.N.Y. 1985), aff'd, 879 F.2d 20(2d Cir. 1989) ..... Pasim
United States v. Bonanno Organized Crime Family, 695 F. Supp. 1426 (E.D.N.Y. 1988) 290
United States v. Bonanno Organized Crime Family, 879 F.2d 20 (2d Cir. 1989) 35, 36, 290
United States v. Boney,977 F.2d 624 (D.C. Cir. 1992) .. 152
United States v. Borromeo,954 F.2d 245 (4th Cir. 1992) 256
United States v. Boylan,620 F.2d 359 (2d Cir.), cert. denied, 449 U.S. 833 (1980) 253
United States v. Boylan,898 F.2d 230 (1st Cir.), cert. denied, 498 U.S. 849 (1990) 83, 231
United States v. Bracy,67 F.3d 1421 (9th Cir. 1995) ... 238
United States v. Brady,26 F.3d 282 (2d Cir. 1994) 148, 275

Unites States v Branch,850 F.2d 1080 (5th Cir. 1988) ... 24
United States v. Brennan,867 F.2d 111 (2d Cir.),
cert. denied, 490 U.S. 1022 (1989) 265
United States v. Bright,630 F.2d 804
(5th Cir. 1980) 44, 90, 232
United States v. Brooklier,685 F.2d 1208 (9th Cir. 1982),
cert. denied, 459 U.S. 1206 (1983) ..... Pasim
United States v. Brown,555 F.2d 407 (5th Cir. 1977),
cert. denied, 435 U.S. 904 (1978) ..... Pasim
United States v. Brown,583 F.2d 659 (3d Cir. 1978),
cert. denied, 440 U.S. 909 (1979) 40
United States v. Bucuvales,
970 F.2d 937 (1st Cir. 1992) 202
United States v. Burke,700 F.2d 70 (2d Cir.),
cert. denied, 464 U.S. 816 (1983) 25
United States v. Burns,683 F.2d 1056 (7th Cir. 1982),
cert. denied, 459 U.S. 1173 (1983) 44
United States v. Burnsed,566 F.2d 882 (4th Cir. 1977),
cert. denied, 434 U.S. 1077 (1978) 44
United States v. Busacca,936 F.2d 232 (6th Cir.),
cert. denied, 502 U.S. 985 (1991) 26, 81
United States v. Busher,817 F.2d 1409
(9th Cir. 1987) 19, 26, 63
United States v. Bustamante,45 F.3d 933 (5th Cir.),
cert. denied, 516 U.S. 973 (1995) 25
United States v. Butler,954 F.2d 114(2d Cir. 1992).....Pasim
United States v. Cagnina,697 F.2d 915 (11th Cir.),
cert. denied, 464 U.S. 856 (1983) ..... Pasim
United States v. Caldwell,594 F. Supp. 548
(N.D. Ga. 1984) 237
United States v. Callanan,810 F.2d 544 (6th Cir.),
cert. denied, 484 U.S. 832 (1987) 137, 244
United States v. Campanale,518 F.2d 352 (9th Cir. 1975),
cert. denied, 423 U.S. 1050 (1976) ..... Pasim
United States v. Campos,859 F.2d 1233 (6th Cir. 1988) . 212
United States v. Candelaria-Silva,166 F.3d 19
(1st Cir. 1999) 201
United States v. Caporale,806 F.2d 1487 (11th Cir. 1986),
cert. denied, 482 U.S. 917 (1987) 194, 237, 261
United States v. Cappetto,502 F.2d 1351
(7th Cir. 1974) 282, 286, 296
United States v. Cardall,885 F.2d 656 (10th Cir. 1989) 264
United States v. Carlberg,602 F. Supp. 583
(W.D. Mich. 1984) 262
United States v. Carlock,806 F.2d 835 (5th Cir. 1986) .. 30

United States v. Carneglia,795 F.2d 1005 (2d Cir. 1986) 220
United States v. Carpenter,961 F.2d 824 (9th Cir.),
cert. denied, 506 U.S. 919 (1992) 28
United States v. Carrozza,4 F.3d 70 (1st Cir. 1993),
cert. denied, 511 U.S. 1069 (1994) ..... Pasim
United States v. Carrozza,728 F. Supp. 266
(S.D.N.Y. 1990) 226
United States v. Carson,52 F.3d 1173
(2d Cir. 1995) 282, 287, 292
United States v. Casamayor,837 F.2d 1509
(11th Cir. 1988), cert. denied,488 U.S. 1017
(1989) 12, 16, 238
United States v. Casamento,887 F.2d 1141 (2d Cir. 1989),
cert. denied, 493 U.S. 1081 (1990) 9, 237
United States v. Casey,158 F.3d 993 (8th Cir. 1998) ... 152
United States v. Castellano,610 F. Supp. 1359
(S.D.N.Y. 1985) ..... Pasim
United States v. Castro,89 F.3d 1443 (11th Cir. 1996),
cert. denied, 117 S. Ct. 1905 (1997) 125, 144
United States v. Cauble,706 F.2d 1322 (5th Cir. 1983),
cert. denied, 465 U.S. 1005 (1984) ..... Pasim
United States v. Cervone,907 F.2d 332
(2d Cir. 1990) 234, 237
United States v. Chang An-Lo,851 F.2d 547 (2d Cir.),
cert. denied, 488 U.S. 966 (1988) 270
United States v. Chatham,677 F.2d 800 (11th Cir. 1982) . 13
United States v. Chinn,687 F. Supp. 125 (S.D.N.Y. 1988) 181
United States v. Church,955 F.2d 688 (11th Cir.),
cert. denied, 506 U.S. 881 (1992) 55, 81, 144
United States v. Church,955 F.3d 688 (11th Cir. 1992) .. 63
United States v. Ciancaglini,858 F.2d 923
(3d Cir. 1988) 246
United States v. Cianci,154 F.3d 106 (3d Cir. 1998) ... 152
United States v. City of San Francisco,
310 U.S. 16 (1940) 282
United States v. Clark,646 F.2d 1259 (8th Cir. 1981) Pasim
United States v. Clark Beach Field,62 F.3d 246
(8th Cir. 1995) 176
United States v. Clemente,22 F.3d 477 (2d Cir.),
cert. denied, 513 U.S. 900 (1994) 275
United States v. Clemones,577 F.2d 1247 (5th Cir. 1978),
cert. denied, 445 U.S. 927 (1980) 29, 49, 63
United States v. Cody,722 F.2d 1052 (2d Cir. 1983),
cert. denied, 467 U.S. 1226 (1984) 30

United States v. Coia,719 F.2d 1120 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984) 241, 242
United States v. Coiro,922 F.2d 1008 (2d Cir. 1991) 82, 256
United States v. Colacurcio,659 F.2d 684 (5th Cir. 1981), cert. denied, 455 U.S. 1002 (1982) 84
United States v. Collins,927 F.2d 605 (6th Cir.) (group of corporations), cert. denied, 502 U.S. 858 (1991) 45
United States v. Computer Sciences Corp.,689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983) 19, 26, 35
United States v. Conn,769 F.2d 420 (7th Cir. 1985) 43, 90, 128
United States v. Conner,752 F.2d 566 (11th Cir.), cert. denied, 474 U.S. 821 (1985) 29
United States v. Console,13 F.3d 641 (3d Cir. 1993), cert. denied, 511 U.S. 1076 (1994) ..... Pasim
United States v. Coonan,938 F.2d 1553 (2d Cir. 1991), cert. denied, 503 U.S. 941 (1992) ..... Pasim
United States v. Corona,885 F.2d 766 (11th Cir. 1989), cert. denied, 494 U.S. 1091 (1990) 264
United States v. Crockett,979 F.2d 1204 (7th Cir. 1992), cert. denied, 507 U.S. 998 (1993) 94, 133, 234
United States v. Crosby,20 F.3d 480 (D.C. Cir. 1994), cert. denied, 514 U.S. 1052 (1995) 244
United States v. Crosby,789 F. Supp. 440 (D.D.C. 1992), aff'd, 20 F.3d 480 (D.C. Cir.), cert. denied, 513 U.S. 883 (1994) 33
United States v. Crozier,674 F.2d 1293 (9th Cir. 1982), vacated, 468 U.S. 1206 (1984), on remand, 777 F.2d 1376 (9th Cir. 1985) 174, 181
United States v. Crozier,777 F.2d 1376 (9th Cir. 1985) 173, 176, 183
United States v. Cryan,490 F. Supp. 1234 (D.N.J.), aff'd, 636 F.2d 1211 (3d Cir. 1980) 16, 44, 233
United States v. Cusack,901 F.2d 29 (4th Cir. 1990) ... 155
United States v. Daly,535 F.2d 434 (8th Cir. 1976) 262
United States v. Daly,842 F.2d 1380 (2d Cir. 1988) 277
United States v. Damico,99 F.3d 1431 (7th Cir. 1996) 151, 153
United States v. Darden,70 F.3d 1507 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996) ..... Pasim
United States v. Davidoff, 845 F.2d 1151 (2d Cir. 1988) 224, 276

United States v. Davidson,122 F.3d 531 (8th Cir.),
cert. denied, 118 S. Ct. 639 (1997) 58
United States v. Davis,576 F.2d 1065 (3d Cir.),
cert. denied, 439 U.S. 836 (1978) 11, 45
United States v. Davis,576 F.2d 1066 (3d Cir.),
cert. denied, 439 U.S. 836 (1978) 13
United States v. Davis,707 F.2d 880 (6th Cir. 1983) 43
United States v. DeFries,129 F.3d 1293
(D.C. Cir. 1997) ..... Pasim
United States v. DePalma,461 F. Supp. 778
(S.D.N.Y. 1978) 225, 234
United States v. DePeri,778 F.2d 963 (3d Cir. 1985),
cert. denied, 475 U.S. 1109 (1986) 43, 90
United States v. DeVincent,632 F.2d 155 (1st Cir. 1980),
cert. denied, 450 U.S. 984 (1981) 29
United States v. Dean,647 F.2d 779 (8th Cir.),
modified on other grounds, 667 F.2d 721
(8th Cir. 1981) 246
United States v. Dela Espriella,781 F.2d 1432
(9th Cir. 1986) 107
United States v. Delano,55 F.3d 720 (2d Cir. 1995) 16
United States v. Delker,757 F.2d 1390 (3d Cir. 1985) ... 16
United States v. Dellacroce,625 F. Supp. 1387
(E.D.N.Y. 1986) ..... Pasim
United States v. Dennis,458 F. Supp. 197
(E.D. Mo. 1978),aff'd on other grounds, 625 F.2d 782
(8th Cir. 1980) 134
United States v.Deshaw,974 F.2d 667 (5th Cir. 1994) ... 244
United States v. DiCaro,772 F.2d 1314 (7th Cir. 1985),
cert. denied, 475 U.S. 1081 (1986) 72, 73
United States v. DiDomenico,78 F.3d 294 (2d Cir.),
cert. denied, 117 S. Ct. 507 (1996) 137
United States v. DiGilio,667 F. Supp. 191
(D.N.J. 1987) 30, 71
United States v. DiNome,954 F.2d 839 (2d Cir.),
cert. denied,506 U.S. 830 (1992) 237
United States v. DiSalvo,34 F.3d 1204 (3d Cir. 1994) .. 275
United States v. Diaz,176 F.3d 52 (2d Cir. 1999) 243
United States v. Diaz,190 F.3d 1247 (11th Cir. 1999) .. 186
United States v. Dickens,695 F.2d 765 (3d Cir. 1982),
cert. denied, 460 U.S. 1092 (1983) ..... Pasim
United States v. Dicter,198 F.3d 1284 (11th Cir. 1999) 201
United States v. Diecidue,603 F.2d 535 (5th Cir. 1979),
cert. denied, 445 U.S. 946 (1980) 25, 226

United States v. Dischner,974 F.2d 1502 (9th Cir. 1992), cert. denied, 507 U.S. 923 (1993) 19, 256
United States v. District Council,778 F. Supp. 738 (S.D.N.Y. 1991) 292
United States v. District Council of New York City, 941 F. Supp. 349 (S.D.N.Y. 1993) 285, 292
United States v. Doherty,786 F.2d 491 (2d Cir. 1986) ... 26
United States v. Doherty,867 F.2d 1352 (2d Cir. 1989) .. 22
United States v. Doherty, 867 F.2d 47 (1st Cir. 1989) 37, 127, 234
United States v. Dorfman,542 F. Supp. 345 (N.D. Ill.), aff'd, 690 F.2d 1217 (7th Cir. 1982) 263
United States v. Doyle,121 F.3d 1078 (7th Cir. 1997) .. 244
United States v. Dozier,672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943 (1982) 16, 28, 44
United States v. Duarte,950 F.2d 1255 (7th Cir. 1991) . 152
United States v. Echeverri,854 F.2d 638 (3d Cir. 1988) . 31
United States v. Edgecomb,910 F.2d 1309 (6th Cir. 1990) 155
United States v. Eisen,974 F.2d 246 (2d Cir. 1992), cert. denied, 507 U.S. 1029 (1993) ..... Pasim
United States v. Elliott,571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978) ..... Pasim
United States v. Ellison,793 F.2d 942 (8th Cir.), cert. denied, 479 U.S. 937 (1986) ..... Pasim
United States v. Errico,635 F.2d 152 (2d Cir. 1980), cert. denied, 453 U.S. 911 (1981) 38, 49, 63
United States v. Erwin,793 F.2d 656 (5th Cir.), cert. denied, 479 U.S. 991 (1986) ..... Pasim
United States v. Esposito,912 F.2d 60 (3d Cir. 1990) .. 244
United States v. Eufrasio,935 F.2d 553 (3d Cir.), cert. denied, 502 U.S. 925 (1991) ..... Pasim
United States v. Fagan,821 F.2d 1002 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988) 22
United States v. Farmer,924 F.2d 647 (7th Cir. 1991) .. 127
United States v. Faulkner,17 F.3d 745 (5th Cir.), cert. denied, 513 U.S. 870 (1994) 136, 161, 233
United States v. Feldman,853 F.2d 648 (9th Cir. 1988), cert. denied, 489 U.S. 1030 (1989) 45, 191, 192
United States v. Feliziani,472 F. Supp. 1037 (E.D. Pa. 1979), aff'd, 633 F.2d 580 (3d Cir. 1980) 27
United States v. Ferguson,758 F.2d 843 (2d Cir.), cert. denied, 474 U.S. 841 (1985) 15, 55
United States v. Fernandez,576 F. Supp. 397 (E.D. Tex. 1983), aff'd, 777 F.2d 248 (5th Cir. 1985), cert. denied, 476 U.S. 1096 (1986) 33

United States v. Fernandez,797 F.2d 943 (11th Cir. 1986), cert. denied, 483 U.S. 1006 (1987) 92
United States v. Ferrantino,738 F.2d 109 (6th Cir. 1983) 173
United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir.), cert. denied, 439 U.S. 801 (1978) 41, 240, 261
United States v. Fineman,434 F. Supp. 189 (E.D. Pa. 1977), aff'd, 571 F.2d 572 (3d Cir.), cert. denied, 436 U.S. 945 (1978) 11
United States v. Firestone,816 F.2d 583 (11th Cir.), cert. denied, 484 U.S. 948 (1987) 14, 33, 274
United States v. Finley,705 F. Supp. 1297 (N.D. Ill. 1988) 22
United States v. Fiore,178 F.3d 917 (7th Cir. 1999) ... 221
United States v. Fiorelli,133 F.3d 218 (3d Cir. 1998) . 153
United States v. Floyd,992 F.2d 498 (5th Cir. 1993) 176, 250
United States v. Flynn,852 F.2d 1045 (8th Cir.), cert. denied, 488 U.S. 974 (1988) 58, 61, 276
United States v. Forsythe,560 F.2d 1127 (3d Cir. 1977) ..... Pasim
United States v. Freeman,6 F.3d 586 (9th Cir. 1993), cert. denied, 511 U.S. 1077 (1994) ..... Pasim
United States v. Friedman,849 F.2d 1488 (D.C. Cir. 1988) 196
United States v. Friedman,854 F.2d 535 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989) 13, 16, 231
United States v. Frumento,563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978) ..... Pasim
United States v. Fry,413 F. Supp. 1269 (E.D. Mich. 1976), aff'd, 559 F.2d 1221 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978) 274
United States v. Gabriele,63 F.3d 61 (1st Cir. 1995) 112, 122, 123
United States v. Gallo,668 F. Supp. 736 (E.D.N.Y. 1987) 236
United States v. Gambale,610 F. Supp. 1515 (D. Mass. 1985) ..... Pasim
United States v. Garner,837 F.2d 1404 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988) 15, 25
United States v. Garver,809 F.2d 1291 (7th Cir. 1987) . 113
United States v. Gelb,881 F.2d 1155 (2d Cir.), cert. denied, 493 U.S. 994 (1989) 93
United States v. Giampa,904 F. Supp. 235 (D.N.J. 1995) 233

United States v. Gigante,166 F.3d 75
(2d Cir. 1999) 139, 141, 142
United States v. Gigante,737 F. Supp. 292 (D.N.J. 1990) 291
United States v. Gigante,982 F. Supp. 140
(E.D.N.Y. 1997) 141
United States v. Gillock,445 U.S. 360 (1979) 42
United States v. Giovanelli,747 F. Supp. 875
(S.D.N.Y. 1989) 273
United States v. Giovanelli,945 F.2d 479
(2d Cir. 1991) 100, 101
United States v. Glecier,
923 F.2d 496 (7th Cir. 1991) 223, 256
United States v. Goldin of Alabama, Inc., et al.,211 F.3d
1339 (11th Cir. 2000) 69
United States v. Gonzales,620 F. Supp. 1143
(N.D. Ill. 1985) 16, 108
United States v. Gonzalez,21 F.3d 1045 (11th Cir. 1994) 15
United States v. Gonzalez,921 F.2d 1530
(11th Cir. 1991) ..... Pasim
United States v. Goot,894 F.2d 231 (7th Cir.),
cert. denied, 498 U.S. 811 (1990) 44
United States v. Gottesman,724 F.2d 1517
(11th Cir. 1984) 38, 90
United States v. Gotti,155 F.3d 144 (2d Cir. 1998) 176
United States v. Grammatikos,633 F.2d 1013
(2d Cir. 1980) 187
United States v. Grayson,795 F.2d 278 (3d Cir. 1986),
cert. denied, 481 U.S. 1018 (1987) 16, 92, 156
United States v. Griffin,660 F.2d 996 (4th Cir. 1981),
cert. denied, 454 U.S. 1156 (1982) ..... Pasim
United States v. Griffith,85 F.3d 284
(7th Cir. 1996) 28, 149
United States v. Groff,643 F.2d 396 (6th Cir.),
cert. denied, 454 U.S. 828 (1981) 26, 128
United States v. Grubb,11 F.3d 426 (4th Cir. 1993) .. Pasim
United States v. Grzywacz,603 F.2d 682 (7th Cir. 1979),
cert. denied, 446 U.S. 935 (1980) 44
United States v. Guiliano,644 F.2d 85 (2d Cir. 1981) .. 236
United States v. Haley,504 F. Supp. 1124 (E.D. Pa. 1981) 29
United States v. Ham,58 F.3d 78 (4th Cir.), cert. denied,
516 U.S. 986 (1995) 192
United States v. Hampton,786 F.2d 977 (10th Cir. 1986) . 28
United States v. Hartley,678 F.2d 961 (11th Cir. 1982),
cert. denied, 459 U.S. 1170 (1983) ..... Pasim

United States v. Harvey,560 F. Supp. 1040 (S.D. Fla. 1982), aff'd, 789 F.2d 1492 (11th Cir.), cert. denied, 479 U.S. 854 (1986) 32, 169, 174
United States v. Harvey,814 F.2d 905 (4th Cir. 1987) 176, 183
United States v. Hawkins,516 F. Supp. 1204 (M.D. Ga. 1981), aff'd, 671 F.2d 1383 (11th Cir.), cert. denied, 459 U.S. 943 (1982) 72, 252
United States v. Hawkins,658 F.2d 279 (5th Cir. 1981) . 156
United States v. Haworth,941 F. Supp. 1057 (D.N.M. 1996) 256
United States v. Hernandez,730 F.2d 895 (2d Cir. 1984) 24, 25
United States v. Herring,602 F.2d 1220 (5th Cir. 1979), cert. denied, 444 U.S. 1046 (1980) 18
United States v. Hess,691 F.2d 188 (4th Cir. 1982) 194
United States v. Hewes,729 F.2d 1302 (11th Cir. 1984), cert. denied, 469 U.S. 1110 (1985) 49, 56, 63
United States v. Hobson,893 F.2d 1267 (11th Cir. 1990) . 82
United States v. Hocking,860 F.2d 766 (7th Cir. 1988) . 129
United States v. Hocking,860 F.2d 769 (8th Cir. 1988) 15, 44
United States v. Holzer,840 F.2d 1343 (7th Cir.), cert. denied, 486 U.S. 1035 (1988) 264
United States v. Hooker,841 F.2d 1225 (4th Cir. 1988) . 130
United States v. Horak,633 F. Supp. 190 (N.D. Ill. 1986) 16, 166
United States v. Horak,833 F.2d 1235 (7th Cir. 1987) Pasim
United States v. Hotel Employees and Restaurant Employees, International Union,974 F. Supp. 411 (D.N.J. 1997) 285, 293
United States v. Houlihan,92 F.3d 1271 (1st Cir. 1996), cert. denied, 117 S. Ct. 963 (1997) 119, 190
United States v. Huber,603 F.2d 387 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980) ..... Pasim
United States v. Hunt,749 F.2d 1078 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985) 28, 38
United States v. Hurley,63 F.3d 10 (1st Cir. 1995), cert. denied, 116 S. Ct. 1322 (1996) 142
United States v. Hurley,63 F.3d 1 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996) ..... Pasim
United States v. Ianniello,621 F. Supp. 1455 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986) 114, 187, 248

United States v. Ianniello,646 F. Supp. 1289 (S.D.N.Y. 1986) ..... Pasim
United States v. Ianniello,677 F. Supp. 233 (S.D.N.Y. 1988) 22
United States v. Indelicato,865 F.2d 1370 (2d Cir.), cert. denied, 493 U.S. 811 (1989) 55, 59, 81
United States v. Infelise,159 F.3d 300 (7th Cir. 1998) 194
United States v. Infelise,928 F. Supp. 1352 (N.D. Ill. 1996) 212
United States v. Infelise,938 F. Supp. 1352 (N.D. Ill. 1996) 210, 212
United States v. International Brotherhood of Teamsters, 708 F. Supp. 1388 (S.D.N.Y. 1989) 19, 291
United States v. International Brotherhood of Teamsters, 708 F. Supp. 1389 (S.D.N.Y. 1989) 287, 299
United States v. International Brotherhood of Teamsters, 723 F. Supp. 203 (S.D.N.Y. 1989), aff'd 285, 291
United States v. International Brotherhood of Teamsters, 725 F. Supp. 162 (S.D.N.Y. 1989), aff'd, 905 F.2d 610 (2d Cir. 1990) 291, 300
United States v. International Brotherhood of Teamsters, 743 F. Supp. 155 (S.D.N.Y. 1990) 300
United States v. International Brotherhood of Teamsters, 777 F. Supp. 1133 (S.D.N.Y. 1991), aff'd, 970 F.2d 1132 (2d Cir. 1992) 300
United States v. International Brotherhood of Teamsters, 782 F. Supp. 243 (S.D.N.Y. 1992) 285
United States v. International Brotherhood of Teamsters, 803 F. Supp. 761 (S.D.N.Y. 1992) 285
United States v. International Brotherhood of Teamsters, 899 F.2d 143 (2d Cir. 1990) 285, 291
United States v. International Brotherhood of Teamsters, 905 F.2d 610 (2d Cir. 1990) 285, 291
United States v. International Brotherhood of Teamsters, 948 F.2d 98 (2d Cir. 1991) 285
United States v. Jackson,72 F.3d 1370 (9th Cir. 1995), cert. denied, 116 S. Ct. 1546 (1996) 15, 28
United States v. Jacobson,691 F.2d 110 (2d Cir. 1982) 109, 110
United States v. James Daniel Good Real Property,510 U.S. 43 (1993) 182
United States v. Jannotti,501 F. Supp. 1182 (E.D. Pa. 1980), rev'd on other grounds, 673 F.2d 578 (3d Cir.) 40

United States v. Jeffers,532 F.2d 1101 (7th Cir. 1976),
aff'd in part, vacated in part, 432 U.S. 137 (1977) 167
United States v. Jennings,842 F.2d 159 (6th Cir. 1988) 229
United States v. Johnson,971 F.2d 562 (10th Cir. 1992) 152
United States v. Jones,160 F.3d 641 (10th Cir. 1998) .. 178
United States v. Joseph,526 F. Supp. 504
(E.D. Pa. 1981) 43, 72
United States v. Joseph,781 F.2d 549 (6th Cir. 1986) ... 17
United States v. Joseph,835 F.2d 1149
(6th Cir. 1987) 15, 144
United States v. Juvenile Male,118 F.3d 1344
(9th Cir. 1997) 126
United States v. Kaplan,886 F.2d 536 (2d Cir. 1989),
cert. denied, 493 U.S. 1076 (1990) 13, 82
United States v. Karas,624 F.2d 500 (4th Cir. 1980),
cert. denied, 449 U.S. 1078 (1981) 44, 85
United States v. Kaye,556 F.2d 855 (7th Cir.),
cert. denied, 434 U.S. 921 (1977) 30, 41, 91
United States v. Kaye,586 F. Supp. 1395
(N.D. Ill. 1984) 128, 130
United States v. Keller,730 F. Supp. 151
(N.D. Ill. 1990) 177
United States v. Keltner,147 F.3d 662
(8th Cir. 1998) 148, 256
United States v. Keltner,147 F.3d 662-68 (8th Cir. 1998) 58
United States v. Kenny,973 F.2d 339 (4th Cir. 1992) 24
United States v. Khan,53 F.3d 507 (2d Cir. 1995) 80
United States v. Killip,819 F.2d 1542 (10th Cir.),
cert. denied, 484 U.S. 865 (1987) 90
United States v. King,827 F.2d 864 (1st Cir. 1987) 276
United States v. Kirk,844 F.2d 660 (9th Cir.),
cert. denied, 488 U.S. 890 (1988) 40, 46
United States v. Kirschenbaum,156 F.3d 784
(7th Cir. 1998) 179
United States v. Kopituk,690 F.2d 1289 (11th Cir. 1982),
cert. denied, 461 U.S. 928 (1983) 28
United States v. Korando,29 F.3d 1114 (7th Cir.),
cert. denied, 513 U.S. 993 (1994) ..... Pasim
United States v. Kotvas,941 F.2d 1141 (11th Cir. 1991),
cert. denied, 506 U.S. 1055 (1993) 15, 83
United States v. Kragness,830 F.2d 842
(8th Cir. 1987) ..... Pasim
United States v. Kramer,73 F.3d 1067 (11th Cir.),
cert. denied, 117 S. Ct. 516 (1996) 168
United States v. Kramer,912 F.2d 1257 (11th Cir. 1990) 211

United States v. Kravitz,738 F.2d 102 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985) ..... Pasim
United States v. Krout,66 F.3d 1420 (5th Cir. 1995), cert denied, 516 U.S. 1136 (1996) ..... Pasim
United States v. Ladmer,429 F. Supp. 1231 (E.D.N.Y. 1977) 42
United States v. Ladum,141 F.3d 1328 (9th Cir. 1998) ... 24
United States v. Langella,804 F.2d 185 (2d Cir. 1986) . 246
United States v. Lawton,193 F.3d 1087 (9th Cir. 1999) . 152
United States v. Le Compte,599 F.2d 81 (5th Cir. 1979), cert. denied, 445 U.S. 927 (1980) 235
United States v. LeQuire,931 F.2d 1539 (11th Cir. 1991), cert. denied, 505 U.S. 1223 (1992) 244
United States v. LeQuire,943 F.2d 1554 (11th Cir. 1991) 234, 241
United States v. LeRoy,687 F.2d 610 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983) 41
United States v. Lee Stoller Enterprise,652 F.2d 1313 (7th Cir.), cert. denied, 517 U.S. 1155 (1981) 39, 44
United States v. Legrano,659 F.2d 17 (4th Cir. 1981) ... 29
United States v. Leisure,844 F.2d 1347 (8th Cir. 1987), cert. denied, 488 U.S. 932 (1988) 58
United States v. Lemm,680 F.2d 1193 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983) 37, 60
United States v. Lester,749 F.2d 1288 (9th Cir. 1984) .. 24
United States v. Lewis,115 F.3d 1531 (11th Cir. 1997) . 152
United States v. Lewis,759 F.2d 1316 (8th Cir.), cert. denied, 474 U.S. 994 (1985) 169, 186
United States v. Licavoli,725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984) ..... Pasim
United States v. Link,921 F.2d 1522 (11th Cir. 1991) .. 244
United States v. Link,921 F.2d 1523 (11th Cir. 1991) ... 82
United States v. Lizza Industries, Inc.,775 F.2d 492 (2d Cir. 1985), cert. denied, 475 U.S. 1082 (1986) 167
United States v. Local 1804-1, International Longshoreman's Association,812 F. Supp. 1303 (S.D.N.Y. 1993) .. Pasim
United States v. Local 1804-1, International Longshoreman's Association,831 F. Supp. 177 (S.D.N.Y. 1993), aff'd in part and reversed in part on other grounds, ... 284, 299
United States v. Local 1804-1, International Longshoreman's Association, AFL-C10,44 F.3d 1091 (2d Cir. 1995) 285, 292
United States v. Local 1804-1, International Longshoremen's Association,745 F. Supp. 184 (S.D.N.Y. 1990) 292

United States v. Local 1804-1, International Longshoremen's Association,831 F. Supp. 192 (S.D.N.Y. 1993) 285
United States v. Local 282 International Brotherhood of Teamsters,13 F. Supp. 2d 401 (E.D.N.Y. 1998) 293
United States v. Local 295 of International Brotherhood of Teamsters,295 F. Supp. 15 (E.D.N.Y. 1992) 292
United States v. Local 295 of International Brotherhood of Teamsters,784 F. Supp. 15 (E.D.N.Y. 1992) 280, 282, 284
United States v. Local 30, United Slate, Tile, et al., 686 F. Supp. 1239 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989) ..... Pasim
United States v. Local 359,705 F. Supp. 894 (S.D.N.Y.), aff'd in part and rev'd in part, 899 F.2d 1232 (2d Cir. 1989).....281, 291
United States v. Local 359, United Seafood Workers, 55 F.3d 64 (2d Cir. 1995) 285, 291
United States v. Local 359, United Seafood Workers, 889 F.2d 1232 (2d Cir. 1989) 290
United States v. Local 560 (I.B.T.),694 F. Supp. 1158 (D.N.J. 1988) 283
United States v. Local 560 (I.B.T.),754 F. Supp. 395 (D.N.J. 1991) 284
United States v. Local 560, International Brotherhood of Teamsters,780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986) ..... Pasim
United States v. Local 560, International Brotherhood of Teamsters,581 F. Supp. 279 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985) ..... Pasim
United States v. Local 6A,832 F. Supp. 674 (S.D.N.Y. 1993) 285
United States v. Local 6A, Cement & Concrete Workers, 663 F. Supp. 192 (S.D.N.Y. 1986) ..... Pasim
United States v. Locascio,6 F.3d 924 (2d Cir. 1993), cert. denied, 511 U.S. 1070 (1994) ..... Pasim
United States v. Loften,518 F. Supp. 839 (S.D.N.Y. 1981), aff'd, 819 F.2d 1129 (2d Cir. 1987) 106, 107
United States v. Lombardi,5 F.3d 568 (1st Cir. 1993) .. 153
United States v. London, 66 F.3d 1227 (1st Cir. 1995), cert. denied, 517 U.S. 1155 (1996) ..... Pasim
United States v. Long,651 F.2d 239 (4th Cir.), cert. denied, 454 U.S. 896 (1981) 42, 43, 45
United States v. Long,654 F.2d 911 (3d Cir. 1981) 173

United States v. Long,697 F. Supp. 651 (S.D.N.Y. 1988) 273
United States v. Long,917 F.2d 691 (2d Cir. 1990) 277
United States v. Lopez,514 U.S. 549 (1995) 131,129
United States v. Lopez,6 F.3d 1281 (7th Cir. 1993) 235
United States v. Lopez,803 F.2d 969 (9th Cir. 1986), cert. denied, 481 U.S. 1030 (1987) 265
United States v. Luong,201 F.3d 445, 1999 WL 993692 (9th Cir. 1999) 127
United States v. Madeoy,652 F. Supp. 371 (D.D.C. 1987) 177
United States v. Madrid,842 F.2d 1090 (9th Cir.), cert. denied, 488 U.S. 912 (1988) 238
United States v. Mageean,649 F. Supp. 820 (D. Nev. 1986) 212
United States v. Malatesta,583 F.2d 748 (5th Cir. 1978), cert. denied, 440 U.S. 962 (1979) 12, 76
United States v. Maloney,71 F.3d 645 (7th Cir. 1995) Pasim
United States v. Mandel,408 F. Supp. 679 (D. Md. 1976) 173, 174
United States v. Mandel,415 F. Supp. 997 (D. Md. 1976), rev'd on other grounds, 591 F.2d 1347 (4th Cir.), aff'd on reh'g, 602 F.2d 653 (4th Cir. 1979) 42, 254, 261
United States v. Mandel,591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S. 959, 961 (1980) 115
United States v. Mandel,672 F. Supp. 864 (D. Md. 1987), aff'd, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989) 264
United States v. Mandel,862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989) 22
United States v. Manzella,782 F.2d 533 (5th Cir.), cert. denied, 476 U.S. 1123 (1986) ..... Pasim
United States v. Marmolejo,89 F.3d 1185 (5th Cir. 1996), aff'd sub nom. 15, 144
United States v. Marrapese,826 F.2d 145 (1st Cir. 1987) 24
United States v. Marrone,48 F.3d 735 (3d Cir.), cert. denied, 516 U.S. 836 (1995) 153
United States v. Marrone,746 F.2d 957 (3d Cir. 1984) 155, 244
United States v. Martin,611 F.2d 801 (10th Cir. 1979), cert. denied, 444 U.S. 1082 (1980) 29
United States v. Martino,648 F.2d 367 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982) ..... Pasim
United States v. Martino,681 F.2d 952 (5th Cir. 1982), aff'd sub nom 161

United States v. Marubeni America Corp.,611 F.2d 763 (9th Cir. 1980) 161
United States v. Mason Tenders District Council of Greater New York,909 F. Supp. 882 and 891 (S.D.N.Y. 1995) 293
United States v. Masotto,73 F.3d 1233 (2d Cir.), cert. denied, 117 S. Ct. 54 (1996) 119
United States v. Massey,89 F.3d 1433 (11th Cir. 1996), cert. denied, 117 S. Ct. 983 (1997) 144
United States v. Masterpol,940 F.2d 760 (2d Cir. 1991) 24, 25
United States v. Masters,924 F.2d 1362 (7th Cir.), cert. denied, 500 U.S. 919 (1991) ..... Pasim
United States v. Masters,978 F.2d 281 (7th Cir. 1992), cert. denied, 508 U.S. 906 (1993) 243
United States v. Mauro,80 F.3d 73 (2d Cir. 1996) 63
United States v. Mazzei,700 F.2d 85 (2d Cir.), cert. denied, 461 U.S. 945 (1983) 28, 55, 60
United States v. Mazzio,501 F. Supp. 340 (E.D. Pa. 1980), aff'd, 681 F.2d 810 (3d Cir.), cert. denied, 451 U.S. 1134 (1982) 240, 250
United States v. McCaskey,9 F.3d 368 (5th Cir. 1993) .. 152
United States v. McCollom,651 F. Supp. 1217 (N.D. Ill.), aff'd on other grounds, 815 F.2d 1087 (7th Cir. 1987) 231
United States v. McDade,28 F.3d 283 (3d Cir.), cert. denied, 514 U.S. 1003 (1995) 42, 52, 53
United States v. McDade,827 F. Supp. 1153 (E.D. Pa. 1993), aff'd, 28 F.3d 283 (3d Cir. 1994) 74, 231
United States v. McDonnell,696 F. Supp. 356 (N.D. Ill. 1988) 220
United States v. McKeithen,822 F.2d 310 (2d Cir. 1987) 164
United States v. McLaurin,557 F.2d 1064 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978) 15
United States v. McManigal,708 F.2d 276 (7th Cir.), vacated on other grounds, 464 U.S. 979 (1983), modified on other grounds on remand, 723 F.2d 580 (7th Cir. 1983) 84, 127
United States v. McNary,620 F.2d 621 (7th Cir. 1980) 107, 108
United States v. Melton,689 F.2d 679 (7th Cir. 1982) 15, 41
United States v. Melvin,91 F.3d 1218 (9th Cir. 1996) .. 144
United States v. Miller,116 F.3d 641 (2d Cir. 1997), cert. denied, 118 S. Ct. 2063 (1998) ..... Pasim

United States v. Miller,471 U.S. 130 (1985) 266
United States v. Minicone,960 F.2d 1099 (2d Cir.),
cert. denied, 503 U.S. 950 (1992) 94, 143, 262
United States v. Mitchell,777 F.2d 248 (5th Cir. 1985),
cert. denied, 476 U.S. 1184 (1986) 46
United States v. Mokol,957 F.2d 1410 (7th Cir.),
cert. denied, 506 U.S. 899 (1992) ..... Pasim
United States v. Monsanto,491 U.S. 600 (1989) 195
United States v. Monsanto,924 F.2d 1186 (2d Cir. 1991) 178
Unites States v. Moody,977 F.2d 1420 (11th Cir. 1992) .. 24
United States v. Moore,811 F. Supp. 112
(W.D.N.Y. 1992) 225, 228
United States v. Morelli,643 F.2d 402 (6th Cir.),
cert. denied, 453 U.S. 912 (1981).....85
United States v. Morgano,39 F.3d 1358 (7th Cir. 1994) Pasim
United States v. Morrison,120 S. Ct. 1740 (2000) 130
United States v. Moscony,927 F.2d 742
(3d Cir. 1991) 155, 262
United States v. Murphy,768 F.2d 1518 (7th Cir. 1985),
cert. denied, 475 U.S. 1012 (1986) ..... Pasim
United States v. Muskovsky,863 F.2d 1319 (7th Cir. 1988),
cert. denied, 489 U.S. 1067 (1989) ..... Pasim
United States v. Musson,802 F.2d 384
(10th Cir. 1986) 176, 181
United States v. Myers,21 F.3d 826 (8th Cir. 1984) 203
United States v. Nabors,45 F.3d 238 (8th Cir. 1995) 46, 63
United States v. Napoli,45 F.3d 680 (2d Cir.),
cert. denied, 115 S. Ct. 1796 (1995) 123, 124
United States v. Neapolitan,791 F.2d 489 (7th Cir.),
cert. denied, 479 U.S. 940 (1986) ..... Pasim
United States v. Nelson,851 F.2d 976 (7th Cir. 1988) .. 169
United States v. Nerone,563 F.2d 836 (7th Cir. 1977),
cert. denied, 435 U.S. 951 (1978) 134
United States v. Norton,867 F.2d 1354 (11th Cir.),
cert. denied, 491 U.S. 907 (1989) 28, 41, 127
United States v. O'Malley,796 F.2d 891
(7th Cir. 1986) 28, 238
United States v. Ofchinick,883 F.2d 1172 (3d Cir. 1989),
cert. denied, 493 U.S. 1034 (1990) ..... Pasim
United States v. Ohlson,552 F.2d 1347
(9th Cir. 1971) 252, 261
United States v. Olsen,22 F.3d 783 (8th Cir.),
cert. denied, 513 U.S. 929 (1994) 149, 202
United States v. Orena,32 F.3d 704 (2d Cir. 1994) ... Pasim

United States v. Oreto,37 F.3d 739 (1st Cir. 1994), cert. denied, 513 U.S. 1177 (1995) ..... Pasim
United States v. Orozco-Prada,732 F.2d 1076 (2d Cir.), cert. denied, 469 U.S. 845 (1984) 107
United States v. Ostrer,481 F. Supp. 407 (S.D.N.Y. 1979) 26
United States v. Paccione,948 F.2d 851 (2d Cir. 1991) . 194
United States v. Paccione,949 F.2d 1183 (2d Cir. 1991), cert. denied, 505 U.S. 1220 (1992) 26
United States v. Padgett,78 F.3d 580 (4th Cir.), cert. denied, 116 S. Ct. 1887 (1996) 127
United States v. Palmeri,630 F.2d 192 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981) 28
United States v. Palumbo Brothers, Inc.,145 F.3d 850 (7th Cir.), cert. denied, 119 S. Ct. 375, 376 (1998) 20, 21, 26
United States v. Paone,782 F.2d 386 (2d Cir. 1986), cert. denied, 483 U.S. 1019 (1987) 11, 13, 220
United States v. Parise,159 F.3d 790 (3d Cir. 1998) 45
United States v. Parness,503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975) ..... Pasim
United States v. Payden,623 F. Supp. 1148 (S.D.N.Y. 1985) 187
United States v. Peacock,654 F.2d 339 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983) 15, 27
United States v. Pecora,798 F.2d 614 (3d Cir. 1986), cert. denied, 479 U.S. 1064 (1987) 30
United States v. Peeples,23 F.3d 370 (11th Cir. 1994) . 155
United States v. Pellulo,14 F.3d 881 (3d Cir. 1994) 190, 248
United States v. Pellulo,964 F.2d 193 (3d Cir. 1992) 52, 83
United States v. Pepe,747 F.2d 632 (11th Cir. 1984) . Pasim
United States v. Perholtz,622 F. Supp. 1253 (D.D.C. 1985) ..... Pasim
United States v. Perholtz,836 F.2d 554 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988) 22
United States v. Perholtz,842 F.2d 343 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988) ..... Pasim
United States v. Perkins,596 F. Supp. 528 (E.D. Pa.), aff'd, 749 F.2d 28 (3d Cir. 1984), cert. denied, 471 U.S. 1015 (1985) 25, 39, 40
United States v. Persico,621 F. Supp. 842 (S.D.N.Y. 1985) ..... Pasim
United States v. Persico,646 F. Supp. 752 (S.D.N.Y. 1986), aff'd and rev'd on other grounds, 832 F.2d 705 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988) 25

United States v. Persico,832 F.2d 705 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988) ..... Pasim
United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982) ..... Pasim
United States v. Phillips,874 F.2d 123 223
United States v. Piteo,726 F.2d 53 (2d Cir.), cert. denied, 467 U.S. 1206 (1984) 25
United States v. Porcelli,865 F.2d 1352 (2d Cir.), cert. denied, 493 U.S. 80 (1989) 19, 22, 202
United States v. Posada-Rios,158 F.3d 832 (5th Cir. 1998) 119, 123, 234
United States v. Pray,452 F. Supp. 788 (M.D. Pa. 1978) . 33
United States v. Premises Known as 3301 Burgundy Road, 728 F.2d 655 (4th Cir. 1984) 194
United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc.,793 F. Supp. 1114 (E.D.N.Y. 1993) ..... Pasim
United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc,811 F. Supp. 808 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 2d Cir. 1993) 287, 292, 300
United States v. Private Sanitation Industry Association, 899 F. Supp. 974 (E.D.N.Y. 1994) ..... Pasim
United States v. Private Sanitation Industry Association, 914 F. Supp. 895 (E.D.N.Y. 1996) 287
United States v. Private Sanitation Industry Association, 995 F.2d 373 (2d Cir. 1993) 282, 284, 300
United States v. Private Sanitation Industry Association of Suffolk/Nassau Inc.,44 F.3d 1082 (2d Cir. 1995) 292
United States v. Provenzano, 620 F.2d 985 (3d Cir.), cert. denied, 449 U.S. 899 (1980) 38
United States v. Provenzano,688 F.2d 194 (3d Cir.), cert. denied, 459 U.S. 1071 (1982) 41, 115
United States v. Pryba,674 F. Supp. 1504 (E.D. Va. 1987) 27, 40, 45
United States v. Pryba,674 F. Supp. 1518 (E.D. Va. 1987) 190, 191
United States v. Pryba,900 F.2d 748 (4th Cir. 1990) 16, 144, 259
United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991) ..... Pasim

United States v. Qaoud,777 F.2d 1105 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986) ..... Pasim
United States v. Quintanilla,2 F.3d 1469 (7th Cir. 1993) ..... Pasim
United States v. Ragonese,607 F. Supp. 649 (S.D. Fla. 1985), aff'd, 784 F.2d 403 (11th Cir. 1986) 165
United States v. Raimondo,721 F.2d 476 (4th Cir. 1983), cert. denied, 469 U.S. 837 (1984) 187
United States v. Rainone,32 F.3d 1203 (7th Cir. 1994), cert. denied, 115 S. Ct. 2245 (1995) 135, 154
United States v. Rastelli,653 F. Supp. 1034 (E.D.N.Y. 1986) 248
United States v. Rastelli,870 F.2d 822 (2d Cir.), cert. denied, 493 U.S. 982 (1989) ..... Pasim
United States v. Real Prop. Known & Numbered As 429 S. Main Street,52 F.3d 1416 (6th Cir. 1995) .. 203
United States v. Real Property Located at 1808 Diamond Springs Road, Virginia Beach, Virginia, 816 F. Supp. 1077 (E.D. Va. 1993) 192
United States v. Reckmeyer,628 F. Supp. 616 (E.D. Va. 1986) 212
United States v. Regan,706 F. Supp. 1087 (S.D.N.Y. 1989) 19, 22
United States v. Regan,858 F.2d 115 (2d Cir. 1988) 175, 181
United States v. Riccobene,709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983).....Pasim
United States v. Richardson,167 F.3d 621 (D.C. Cir. 1999) 81
United States v. Riley,78 F.3d 367 (8th Cir. 1996) .. Pasim
United States v. Ripinsky,20 F.3d 359 (9th Cir. 1994) . 176
United States v. Risken,788 F.2d 1361 (8th Cir. 1986) .. 24
United States v. Robertson,15 F.3d 862 (9th Cir.), rev'd on other grounds, 514 U.S. 669 (1995) 61
United States v. Robertson,15 F.3d 862 (9th Cir. 1994) 129
United States v. Robertson,514 U.S. 699 (1995) 129
United States v. Robertson,73 F.3d 249 (9th Cir.), cert. denied, 517 U.S. 1162 (1996) 154
United States v. Robie,166 F.3d 444 (2d Cir. 1999) 152
United States v. Robilotto,828 F.2d 940 (2d Cir. 1987), cert. denied, 484 U.S. 1011 (1988) ..... Pasim
United States v. Robinson,763 F.2d 778 (6th Cir. 1985) 127, 128
United States v. Robinson,8 F.3d 398 (7th Cir. 1993) ... 67
United States v. Roemer,703 F.2d 805 (5th Cir.), cert. denied, 464 U.S. 935 (1983) 85

United States v. Rogers,602 F. Supp. 1332
(D. Colo. 1985) 183
United States v. Rogers,89 F.3d 1326 (7th Cir.),
cert. denied, 117 S. Ct. 495 (1996) 54, 60
United States v. Roman,728 F.2d 846 (7th Cir.),
cert. denied, 466 U.S. 977 (1984) 130
United States v. Romano,684 F.2d 1057 (2d Cir.),
cert. denied, 459 U.S. 1016 (1982) 27
United States v. Romano,736 F.2d 1432 (11th Cir. 1985) . 38
United States v. Rone,598 F.2d 564 (9th Cir. 1979),
cert. denied, 445 U.S. 946 (1980) ..... Pasim
United States v. Rosenfield,651 F. Supp. 211
(E.D. Pa. 1986) 206
United States v. Rosenthal,793 F.2d 1214 (11th Cir.),
modified in part, 801 F.2d 378 (11th Cir. 1986),
cert. denied, 480 U.S. 919 (1987) 230
United States v. Rovetuso,768 F.2d 809 (7th Cir. 1985) . 24
United States v. Rubin,559 F.2d 975 (5th Cir. 1977),
vacated and remanded, 439 U.S. 810 (1978),
aff'd in part and rev'd in part on other grounds,
591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864
(1979) 41, 164
United States v. Rubin,591 F.2d 278 (5th Cir.),
cert. denied, 444 U.S. 864 (1979) 30
United States v. Ruggiero,100 F.3d 284 (2d Cir.),
cert. denied, 118 S. Ct. 1102 (1996) 153
United States v. Ruggiero,726 F.2d 913 (2d Cir.),
cert. denied, 469 U.S. 831 (1984) ..... Pasim
United States v. Ruggiero,754 F.2d 927 (11th Cir.),
cert. denied, 471 U.S. 1127 (1985) 15, 245, 246
United States v. Ruiz,905 F.2d 499
(1st Cir. 1990) 38, 95, 142
United States v. Runnels,833 F.2d 1183 (6th Cir. 1987),
vacated, 877 F.2d 481 (6th Cir. 1989) 22
United States v. Russo,646 F. Supp. 816 (S.D.N.Y. 1986) 273
United States v. Russo,796 F.2d 1443
11th Cir. 1986) 237, 238
United States v. Russo,890 F.2d 924 (7th Cir. 1989) ... 156
United States v. Russotti,717 F.2d 27 (2d Cir. 1983),
cert. denied, 465 U.S. 1022 (1984) 15, 27, 246
United States v. Rutledge,33 F.3d 671
(6th Cir. 1994) 152
United States v. Ryland,806 F.2d 941 (9th cir 1986),
cert. denied, 48 U.S. 1057 (1987) 31
United States v. Sacco,899 F.2d 149 (2d Cir. 1990) 150

United States v. Saccoccia,58 F.3d 754 (1st Cir. 1995), aff'g, 823 F. Supp. 994 (D.R.I. 1993) ..... Pasim
United States v. Saccoccia,913 F. Supp. 129 (D.R.I. 1996) 209
United States v. Salerno,108 F.3d 730 (7th Cir. 1997) 148, 247
United States v. Salerno,868 F.2d 524 (2d Cir.), cert. denied, 493 U.S. 811 (1989) 136, 137, 239
United States v. Salerno,868 F.2d 534 (2d Cir.) cert denied, 491 U.S. 907 (1989) 242
United States v. Salinas,522 U.S. 52 (1997) ..... Pasim
United States v. Salinas,564 F.2d 688 (5th Cir. 1977), cert. denied, 435 U.S. 951 (1978) 10, 99
United States v. Sanders,905 F.2d 940 (10th Cir.), cert. denied, 502 U.S. 845 (1991) 54, 60
United States v. Sanders,928 F.2d 940 (10th Cir.), cert. denied, 502 U.S. 845 (1991) 53
United States v. Sanders,929 F.2d 1466 (10th Cir.), cert. denied, 502 U.S. 846 (1991) 135
United States v. Sanders,962 F.2d 660 (7th Cir. 1992) . 256
United States v. Sandini,816 F.2d 869 (3d Cir. 1987) .. 191
United States v. Santoro,647 F. Supp. 153 (E.D.N.Y. 1986), aff'd, 880 F.2d 1319 (2d Cir. 1989) ..... Pasim
United States v. Sarbello,985 F.2d 716 (3d Cir. 1992) . 186
United States v. Scalzitti,408 F. Supp. 1014 (W.D. Pa. 1975), appeal dismissed, 556 F.2d 569 (3d Cir. 1977) 173, 174
United States v. Scarpa,913 F.2d 993 (2d Cir. 1990) ... 248
United States v. Schell,775 F.2d 559 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986) 16, 238
United States v. Schwimmer,968 F.2d 1570 (2d Cir. 1992) 215
United States v. Scotto,641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981) 41, 114, 253
United States v. Seigal,974 F. Supp. 55 (D. Mass. 1997) 179
United States v. Sessa,125 F.3d 68 (2d Cir. 1997), cert. denied, 118 S. Ct. 731(1998) 243
United States v. Shakur,560 F. Supp. 347 (S.D.N.Y. 1983) 15, 263
United States v. Sheeran,699 F.2d 112 (3d Cir.), cert. denied, 461 U.S. 931 (1983) 26
United States v. Shenberg,89 F.3d 1461 (11th Cir.), cert. denied, 118 S. Ct. 598 (1997) 154, 247, 265
United States v. Shifman,124 F.3d 31 (1st Cir. 1997), cert. denied, 118 S. Ct. 1053 (1998) 17, 26

United States v. Simmons,154 F.3d 765
(8th Cir. 1998) 167, 194
United States v. Simmons,923 F.2d 934 (2d Cir.),
cert. denied, 500 U.S. 919 (1991) 137
United States v. Sisk,476 F. Supp. 1061 (M.D. Tenn. 1979),
aff'd, 629 F.2d 1174 (6th Cir. 1980) 42
United States v. Smith,574 F.2d 308 (5th Cir.), cert. denied,
439 U.S. 931 (1978) 27
United States v. Southland Corp.,760 F.2d 1366 (2d Cir.),
cert. denied, 474 U.S. 825 (1985) 238
United States v. Spillone,879 F.2d 514 (9th Cir. 1989),
cert. denied, 498 U.S. 864 (1990) 98
United States v. Spilotro,680 F.2d 612
(9th Cir. 1982) 174, 184
United States v. Srulowitz,681 F. Supp. 137
(E.D.N.Y. 1988) 239
United States v. Srulowitz,819 F.2d 37 (2d Cir.),
cert. denied, 479 U.S. 843 (1987) 238
United States v. Standard Drywall Corp.,617 F. Supp. 1283
(E.D.N.Y. 1985) ..... Pasim
United States v. Starnes,644 F.2d 673 (7th Cir.),
cert. denied, 454 U.S. 826 (1981) 84, 91
United States v. Starrett,55 F.3d 1524 (11th Cir. 1995),
cert. denied, 116 S. Ct. 1335 (1996) 240
United States v. Starrett,55 F.3d 1525 (11th Cir. 1995),
cert. denied, 517 U.S. 1111 (1996) ..... Pasim
United States v. Stefan,784 F.2d 1093 (11th Cir.),
cert. denied, 479 U.S. 1009 (1986) 46
United States v. Stern,858 F.2d 1241
(7th Cir. 1988) 28, 202
United States v. Stillo,57 F.3d 553 (7th Cir.),
cert. denied, 516 U.S. 945 (1995) 234
United States v. Stofsky,409 F. Supp. 609 (S.D.N.Y. 1973),
aff'd, 527 F.2d 237 (2d Cir. 1975), cert. denied,
429 U.S. 819 (1976) 42, 91
United States v. Stolfi,889 F.2d 378 (2d Cir. 1989) 45
United States v. Story,891 F.2d 988 (2d Cir. 1989) 155
United States v. Stratton,649 F.2d 1066
(5th Cir. 1981) ..... Pasim
United States v. Summerlin,310 U.S. 414 (1990).....299
United States v. Sutherland,656 F.2d 1181 (5th Cir. 1981),
cert. denied, 455 U.S. 949 (1982) ..... Pasim
United States v. Sutton,642 F.2d 1001 (6th Cir. 1980),
cert. denied, 453 U.S. 912 (1981) 38

United States v. Swiderski,593 F.2d 1246 (D.C. Cir. 1978),

cert. denied, 441 U.S. 993 (1979) ..... Pasim
United States v. Tackett,113 F.3d 603 (6th Cir. 1997) .. 24
United States v. Tashjian,660 F.2d 829 (1st Cir.),
cert. denied, 454 U.S. 1102 (1981) 32
United States v. Teitler,802 F.2d 606
(2d Cir. 1986) 92, 237
United States v. Tellier,83 F.3d 578 (2d Cir.),
cert. denied, 519 U.S. 955 (1996) 138, 139, 140
United States v. Thai,29 F.3d 785 (2d Cir.), cert. denied,
115 S. Ct. 456 (1994) 120, 132, 275
United States v. Thevis,474 F. Supp. 134 (N.D. Ga. 1979),
aff'd, 665 F.2d 616 (5th Cir.), cert. denied,
456 U.S. 1008 (1982) 164
United States v. Thevis,665 F.2d 616 (5th Cir.),
cert. denied, 456 U.S. 1008 (1982) 37, 39, 46
United States v. Thier,801 F.2d 1463 (5th Cir. 1986),
modified, 809 F.2d 249 (1987) 175, 176, 183
United States v. Thomas,114 F.3d 228
(D.C. Cir. 1997) 124, 135
United States v. Thomas,757 F.2d 1359 (2d Cir.),
cert. denied, 474 U.S. 819 (1985) 155
United States v. Thompson,685 F.2d 993 (6th Cir. 1982),
cert. denied, 459 U.S. 1072 (1983) 42
United States v. Thordarson,646 F.2d 1323 (9th Cir.),
cert. denied, 454 U.S. 1055 (1981) 30
United States v. Tille,729 F.2d 615 (9th Cir.),
cert. denied, 469 U.S. 845 (1984) 15, 41, 113
United States v. Tillem,906 F.2d 814 (2d Cir. 1990) 95
United States v. Tillett,763 F.2d 628 (11th Cir. 1984),
cert. denied, 472 U.S. 1017 (1985) 31, 53, 54
United States v. Tilley,18 F.3d 295 (5th Cir. 1994) ... 201
United States v. To,144 F.3d 737
(11th Cir. 1998) 28, 119, 145
United States v. Tom,787 F.2d 65 (2d Cir. 1986) . 9, 15, 92
United States v. Torres Lopez,851 F.2d 520 (1st Cir. 1988),
cert. denied, 489 U.S. 1021 (1989) ..... Pasim
United States v. Traitz,871 F.2d 368 (3d Cir.),
cert. denied, 493 U.S. 821 (1989) 12, 15
United States v. Trans-Missouri Freight Association,
166 U.S. 290 (1897) 259
United States v. Tripp,782 F.2d 38 (6th Cir.),
cert. denied, 475 U.S. 1128 (1986) 15
United States v. Trost,152 F.3d 715 (7th Cir. 1998) ... 201
United States v. Tsang,632 F. Supp. 1336 (E.D.N.Y. 1986) 11
United States v. Tunnell,667 F.2d 1182

(5th Cir. 1982) 163, 202, 266
United States v. Turkette,452 U.S. 576 (1981) ..... Pasim
United States v. Uni Oil, Inc.,646 F.2d 946 (5th Cir. 1981),
cert. denied, 455 U.S. 908 (1982) 38
United States v. Unimex,991 F.2d 546
(9th Cir. 1993) 174, 182
United States v. Vaccaro,115 F.3d 1211 (5th Cir. 1997),
cert. denied, 118 S. Ct. 689 (1998) 12, 146
United States v. Valera,845 F.2d 923 (11th Cir. 1988),
cert. denied, 490 U.S. 1046 (1989) 143
United States v. Van Dorn,925 F.2d 1331
(11th Cir. 1991) 256
United States v. Van Horn,789 F.2d 1492 (11th Cir.),
cert. denied, 479 U.S. 854 (1986) 263
United States v. Vastola,670 F. Supp. 1244
(D.N.J. 1987) ..... Pasim
United States v. Vastola,899 F.2d 211 (3d Cir.),
cert. granted and vacated on other grounds,
497 U.S. 1001 (1990) ..... Pasim
United States v. Veliotis,586 F. Supp. 1512
(S.D.N.Y. 1984) 164, 174
United States v. Vignola,464 F. Supp. 1091 (E.D. Pa.),
aff'd, 605 F.2d 1199 (3d Cir. 1979) 43, 257
United States v. Viola,35 F.3d 37 (2d Cir. 1994),
cert. denied, 115 S. Ct. 1270 (1995) ..... Pasim
United States v. Vitale,635 F. Supp. 194 (S.D.N.Y. 1985),
dismissed on other grounds, 795 F.2d 1006
(2d Cir. 1986) 27
United States v. Vogt,910 F.2d 1184 (4th Cir. 1990),
cert. denied, 498 U.S. 1083 (1991) ..... Pasim
United States v. Voigt,89 F.3d 1050 (3d Cir. 1996) 190
United States v. Walsh,700 F.2d 846 (2d Cir.), cert. denied,
464 U.S. 825 (1983) ..... Pasim
United States v. Walters,711 F. Supp. 1435
(N.D. Ill. 1989) 231
United States v. Washington,782 F.2d 807 (9th Cir.),
modified on other grounds, 797 F.2d 1461
(9th Cir. 1986) 163
United States v. Watchmaker,761 F.2d 1459 (11th Cir. 1985),
cert. denied, 474 U.S. 1100 (1986) ..... Pasim
United States v. Watts,519 U.S. 148 (1997) 152
United States v. Weatherspoon,581 F.2d 595
(7th Cir. 1978) ..... Pasim

United States v. Webster,639 F.2d 174 (4th Cir.),

cert. denied, 454 U.S. 857 (1981) 40, 115
United States v. Wei,862 F. Supp. 1129 (S.D.N.Y. 1994) . 13
United States v. Weinberg,852 F.2d 681 (2d Cir. 1988) .. 74
United States v. Weiner,3 F.2d 17 (1st Cir. 1993) 120
United States v. Weiner,3 F.3d 17 (1st Cir. 1993) . 99, 101
United States v. Weisman,624 F.2d 1118 (2d Cir.),
cert. denied, 449 U.S. 871 (1980) ..... Pasim
United States v. Weissman,899 F.2d 1111 (11th Cir. 1990) 62
United States v. Welch,656 F.2d 1039 (5th Cir. 1981),
cert. denied, 456 U.S. 915 (1982) ..... Pasim
United States v. Wellman,830 F.2d 1453 (7th Cir. 1987) . 22
United States v. Wesley,748 F.2d 962 (5th Cir. 1984) ... 24
United States v. West,877 F.2d 281 (4th Cir.),
cert. denied, 493 U.S. 959 (1989) ..... Pasim
United States v. White,116 F.3d 903 (D.C. Cir.),
cert. denied, 118 S. Ct. 390 (1997) 56, 60
United States v. White,386 F. Supp. 882
(E.D. Wis. 1974) 19, 91
United States v. Wild,47 F.3d 669 (4th Cir. 1995) 201
United States v. Williams,809 F.2d 1072 (5th Cir.),
cert. denied, 484 U.S. 896 (1987) 31, 54
United States v. Wilson,742 F. Supp. 905 (E.D. Pa. 1989),
aff'd, 909 F. 2d 1478 (3d Cir.), cert. denied,
498 U.S. 1016 (1990) 195
United States v. Winter,663 F.2d 1120 (1st Cir. 1981),
cert. denied, 460 U.S. 1011 (1983) 25, 60, 235
United States v. Wong,40 F.3d 1347 (2d Cir. 1994),
cert. denied, 516 U.S. 870 (1995) ..... Pasim
United States v. Woods,915 F.2d 854 (3d Cir. 1990) 256
United States v. Workman,80 F.3d 688 (2d Cir.),
cert. denied, 117 S. Ct. 319 (1996) 119
United States v. Wuagneux,683 F.2d 1343 (11th Cir. 1982),
cert. denied, 464 U.S. 814 (1983) 26
United States v. Wyly,193 F.2d 289 (5th Cir. 1999) 201
United States v. Yarbrough,852 F.2d 1522 (9th Cir.),
cert. denied, 488 U.S. 866 (1988) ..... Pasim
United States v. Yin Poy Louie,625 F. Supp. 1327
(S.D.N.Y. 1985), appeal dismissed sub nom .. 9, 15, 92
United States v. Yonan,622 F. Supp. 721 (N.D. Ill. 1985),
rev'd on other grounds, 800 F.2d 164 (7th Cir. 1986),
cert. denied, 479 U.S. 1055 (1987) 75
United States v. Yonan,800 F.2d 164 (7th Cir. 1986),
cert. denied, 479 U.S. 1055 (1987) 44, 75
United States v. Zambrano,776 F.2d 1091 (2d Cir. 1985) 107
United States v. Zang,703 F.2d 1186 (10th Cir. 1982),

cert. denied, 464 U.S. 828 (1983) 40
United States v. Zanghi,189 F.3d 71 (1st Cir. 1999) ... 152
United States v. Zauber,857 F.2d 137 (3d Cir. 1988),
cert. denied, 489 U.S. 1066 (1989) 265
United States v. Zemek,634 F.2d 1159 (2d Cir. 1980),
cert. denied, 450 U.S. 916 (1981) 28, 40
United States v. Zielie,734 F.2d 1447 (11th Cir. 1984),
cert. denied, 469 U.S. 1189 (1985) 31, 33, 164
United States v. Zingaro,858 F.2d 94 (2d Cir. 1988) ... 276
United States v. Zizzo,120 F.3d 1338 (7th Cir.),
cert. denied, 118 S. Ct. 566 (1997) 26, 154, 241
University of Maryland v. Peat, Marwick, Main,
996 F.2d 1534 (3d Cir. 1993) 121
Utah Power & Light Co. v. United States,243 U.S. 389
(1917) 299
Van Dorn Co. v. Howington,623 F. Supp. 1548
(N.D. Ohio 1985) 46
Vemco, Inc. v. Camardella,23 F.3d 129 (6th Cir.),
cert. denied, 115 S. Ct. 579 (1994) 80
Vietnam Veterans of America v. Guerdon Industrial,
644 F. Supp. 951 (D. Del. 1986) 280
Volkmann v. Edwards,642 F. Supp. 109 (N.D. Cal. 1986) . 280
Waters-Pierce Oil Co. v. Texas,212 U.S. 86 (1909) 259
Webster v. Omnitrition, Int. Inc.,79 F.3d 776 (9th Cir.),
cert. denied, 117 S. Ct. 174 (1996) 121
Weft, Inc. v. G.C. Investment Associates,630 F. Supp. 1138
(E.D.N.C. 1986), aff'd, 822 F.2d 56
(4th Cir. 1987) 131
Whaley v. Automobile Club Insurance Ass'n,891 F. Supp.
1237(E.D. Mich.), cert. denied, 115 S. Ct. 1107
(1995) 110
Witt v. South Carolina National Bank,613 F. Supp. 140
(D.S.C. 1985) 70
*Yellow Business Lines, Inc. v. Drivers, Chauffeurs & Helpers
Local Union 639*,839 F.2d 782 (D.C. Cir. 1988),
vacated and remanded, 492 U.S. 914 (1989),
on remand, 883 F.2d 1132 (D.C. Cir. 1989) 68
*Yellow Business Lines, Inc. v. Drivers, Chauffeurs & Helpers
Local Union 639*,883 F.3d 132 (D.C. Cir. 1989),
cert. denied, 501 U.S. 1222 (1991) 80

Zafiro v. United States,506 U.S. 534 (1993) 234
Zahra v. Charles,639 F. Supp. 1405 (E.D. Mich. 1986) ... 75
Zerman v. E.F. Hutton & Co.,628 F. Supp. 1509
(S.D.N.Y. 1986) 92

MISCELLANEOUS

S. Rep. 91-617, 91st Congress, 1st Sess. p. 158 260
S. Rep. No. 98-225, 98th Cong., 1st Sess. 202(1983) ... 182
S. Rep. No. 617, 91st Cong., 1st Sess. 81 and 160(1969) 279
S. Rep. No. 617, 91st Cong., 1st Sess. at 79(1969) 280
S. Rep. No. 617, 91st Cong., 1st Sess. at 77-83(1969) . 289
S. Rep. No. 617, 91st Cong. 1st Sess. at 78-79 (1969) (footnote omitted) 289
Prosecutors Handbook on Sentencing Guidelines & Other Provisions of the Sentencing Reform Act of 1984 (November 1, 1987) 154
United States Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress (December 1984) 187

I. INTRODUCTION/OVERVIEW

This Manual concentrates mainly on the criminal aspect of the Racketeer Influenced and Corrupt Organizations statute (RICO), 18 U.S.C. §§ 1961-1968, providing discussions of important legal issues and offering practical advice for preparing indictments that conform to the Criminal Division's legal requirements and approval guidelines. In addition, prosecutors are urged to contact the Organized Crime and Racketeering Section (OCRS) for advice concerning a particular situation prior to submitting complaints, indictments or informations for approval. As explained infra, all RICO cases, civil and criminal, brought by the United States must be approved in advance by the Organized Crime and Racketeering Section.

RICO was enacted October 15, 1970, as Title IX of the Organized Crime Control Act of 1970[1] and is codified at 18 U.S.C. §§ 1961-1968. The statute was amended in some respects in 1978,[2] 1984,[3]

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

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

[3] The 1984 amendments occurred in three stages. First, Congress amended the forfeiture provisions of Section 1963 to clarify proceeds forfeiture and other matters, and amended Section 1961 to add as predicate acts dealing in obscene matter (under state law (continued...)

1986,[4] 1988,[5] 1989,[6] 1990,[7] 1994,[8]

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[3](...continued)
and 18 U.S.C. §§ 1461-1465) and currency violations under Title 31. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, §§ 302, 901(g), 1020, 2301, 98 Stat. 2040, 2136, 2143, 2192 (1984) (effective October 12, 1984). Second, Congress added as predicate offenses three automobile-theft violations, 18 U.S.C. §§ 2312, 2313, and 2320 (now § 2321), Pub. L. No. 98-547, Title II, § 205, 98 Stat. 2770 (1984) (effective Oct. 25, 1984). Third, Congress deleted some expedition-of-action language from the civil provisions in §§ 1964(b) and 1966, Pub. L. No. 98-620, Title IV, § 402(24), 98 Stat. 3359 (1984).

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

[5] The 1988 amendments provided for a life sentence where a RICO violation is based on a racketeering activity that itself carries a life sentence, made minor typographical corrections, and added three new predicate offenses: 18 U.S.C. § 1029 (credit card fraud); 18 U.S.C. § 1958 (murder for hire, formerly designated § 1952A); and 18 U.S.C. §§ 2251-52 (sexual exploitation of children). Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (Nov. 18, 1988).

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

[7] The 1990 amendment deleted 18 U.S.C. §§ 2251-52 (sexual exploitation of children) as a predicate offense and made minor typographical corrections. Crime Control Act of 1990, Pub. L. No. 101-647, Title XXV, §§ 3560-61, 104 Stat. 4927 (Nov. 29, 1990).

1995,[9] and 1996.[10]

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[8] The 1994 amendment substituted the term "controlled substance or listed chemical" for "narcotics or other dangerous drug" in Section 1961. The amendment added a new RICO predicate for importing into the United States sexually explicit depictions of minors and restored 18 U.S.C. §§ 2251-2252 as RICO predicate acts. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title IX, § 90104, Title XVI, § 160001(f), Title XXXII, § 33021(1), 108 Stat. 1987, 2037, 2150 (Sept. 13, 1994). Another amendment excluded Section 157 of Title 11 as a RICO predicate act. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, Title III, § 312(b), 108 Stat. 4140 (Oct. 22, 1994).

[9] The 1995 amendment revised Section 1964(c) to provide that a civil RICO suit could not be based upon fraud in the purchase or sale of securities. This limitation does not apply to an action "against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final." Private Securities Reform Act of 1995, Pub. L. No. 104-67, Title I, § 107, 109 Stat. 758 (Dec. 22, 1995).

[10] A 1996 amendment added several new predicate acts related to immigration fraud and alien smuggling: 18 U.S.C. §§ 1542-1544 and 1546 (relating to false statements in or false use of passports and visas), if these offenses were committed for financial gain offenses; 18 U.S.C. §§ 1581-1588 (relating to peonage and slavery); and Sections 274, 277 and 278 of the Immigration and Nationality Act (8 U.S.C. §§ 1324, 1327, and 1328), relating to alien smuggling and harboring certain aliens if these offenses were committed for the purposes of financial gain. Pub. L. No. 104-132, Title IV, § 433, 110 Stat. 1274 (April 24, 1996). A second amendment added several predicate acts relating to counterfeiting: 18 U.S.C. § 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works); 18 U.S.C. § 2319 (relating to criminal infringement of a copyright); 18 U.S.C. § 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances); and 18 U.S.C. § 2320 (relating to trafficking in goods or services bearing counterfeit marks). Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, § 3, 110 Stat. 1386 (July 2, 1996). A third amendment deleted the requirement that violations of 18 U.S.C. §§ 1028, 1542-1544, and 1546, which were added by Pub. L. No. 104-132, be

(continued...)

RICO provides powerful criminal and civil penalties for persons who engage in a "pattern of racketeering activity" or "collection of an unlawful debt"[11] and who have a specified relationship to an "enterprise" that affects interstate commerce. Under the statute, "racketeering activity" includes state offenses involving murder, robbery, extortion, and several other serious offenses, punishable by imprisonment for more than one year, and more than seventy serious federal offenses including extortion, interstate theft, narcotics violations, mail fraud, securities fraud, currency reporting violations, and certain immigration offenses when committed for financial gain. A "pattern" may be comprised of any combination of two or more of these state or federal crimes committed within a statutorily prescribed time period. Moreover, the predicate acts must be related and amount to or pose a threat of, continued criminal activity. An "unlawful debt" is a debt that arises from illegal gambling or loansharking activities. An "enterprise" includes any

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[10](...continued)
committed for the purpose of financial gain. This amendment also added the following predicate acts: Section 1425 (relating to the procurement of citizenship or nationalization unlawfully); Section 1426 (relating to the reproduction of naturalization or citizenship papers); and Section 1427 (relating to the sale of naturalization or citizenship papers) of Title 18, United States Code. Pub. L. No. 104-208, § 202, 110 Stat. 3009 (September 30, 1996). A fourth amendment corrected a typographical error. Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (October 11, 1996).

[11] Collection of unlawful debt is an alternate ground for RICO liability and proof of a pattern is not required.

individual, partnership, corporation, association, or other legal entity, and any group of individuals associated in fact although not a legal entity. For example, an arson ring can be a RICO enterprise, as can a small business or government agency.

Four different criminal violations, including RICO conspiracy, are proscribed by RICO. Section 1962(a) makes it a crime to invest the proceeds of a pattern of racketeering activity or from collection of an unlawful debt in an enterprise affecting interstate commerce. For example, a narcotics trafficker violates this provision by purchasing a legitimate business with the proceeds of a pattern of multiple drug transactions.

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

Section 1962(c) makes it a crime to conduct the affairs of an enterprise affecting interstate commerce "through" a pattern of racketeering activity or through the alternative theory of collection of an unlawful debt. For example, an automobile dealer violates this provision by using the dealership's facilities to operate a stolen car ring through a pattern of predicate violations.

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

Depending on the underlying racketeering activity, Section 1963(a) provides criminal penalties ranging from a maximum life sentence[12] or up to twenty years imprisonment and/or a fine under Title 18. In addition, Sections 1963(a)(1) through (a)(3) provide for forfeiture of the defendant's interest in the enterprise connected to the offense, and his interests acquired through or proceeds derived from racketeering activity or unlawful debt collection.[13] Section 1963 also permits the government to seek pre-trial and, in some cases, pre-indictment restraining orders to prevent the dissipation of assets subject to forfeiture.

Section 1964 provides civil remedies for violations of the RICO offenses set forth in Section 1962. Section 1964(a) permits the United States to obtain any appropriate relief to prevent and restrain any RICO violations, including divestiture or, subject to

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[12] Convictions under Section 1962 may result in life imprisonment when the violation "is based on a racketeering activity for which the maximum penalty includes life imprisonment."

[13] In 1984, Congress increased the maximum fines for all federal felonies occurring on or after January 1, 1985, to $250,000 for individuals, $500,000 for organizations, or twice the proceeds of the offense. Pub. L. No. 98-596, § 6(a), 98 Stat. 3137 (1984), now codified at 18 U.S.C. § 3571 (formerly codified at 18 U.S.C. § 3623). Section 1963 originally provided for a fine of $25,000 or up to twice the gross profit of the offense, but was amended in 1988 to provide for a fine under Title 18. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7058, 102 Stat. 4403 (Nov. 18, 1988).

the rights of innocent persons, dissolution of an enterprise and injunctions prohibiting further violations. Section 1964(c) permits any person whose property or business has been injured by a RICO violation to recover treble damages, plus costs of the suit and reasonable attorneys' fees. Most courts have held that equitable relief is available solely to the government, whereas damages actions have, with few exceptions, been limited to actions by private plaintiffs.

The remaining sections of the statute provide for civil investigative demands issued by the government or concern other procedural matters in connection with civil RICO suits.

II. DEFINITIONS: 18 U.S.C. § 1961

A. Racketeering Activity

Section 1961(1) defines "racketeering activity" as any crime enumerated in subdivisions A, B, C, D, E or F of that subsection.[1] No crime can be a part of a RICO "pattern of racketeering activity" unless it is included in this subsection.[2] Subdivision A includes "any act or threat involving" the listed types of state offenses; subdivisions B, C, E, and F include "any act which is indictable under" the listed federal statutes; and subdivision D includes "any offense involving" three categories of federal offenses. The different introductory wording of the subdivisions is significant. For example, courts have held that conspiracies or attempts to commit subdivision A[3] and D[4] crimes may be proper RICO predicates

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[1] The listed crimes occasionally are called "predicate crimes," because they make up the "predicate" for a RICO violation. See, e.g., United States v. Pepe, 747 F.2d 632, 645 (11th Cir. 1984); United States v. Ruggiero, 726 F.2d 913, 918 (2d Cir.), cert. denied, 469 U.S. 831 (1984).

[2] See Bast v. Cohen, Dunn & Sinclair, PC, 59 F.3d 492, 495 (4th Cir. 1995); Rolo v. City Investing Co. Liquidating Trust, 845 F. Supp. 182, 225 n.28 (D.N.J. 1993), aff'd, 43 F.3d 1462 (3d Cir. 1994), judgment vacated on reh'g, 66 F.3d 312 (3d Cir. 1995), on remand, 897 F. Supp. 826 (D.N.J. 1995); United States v. Private Sanitation Industry Ass'n, 793 F. Supp. 1114, 1129 (E.D.N.Y. 1993).

[3] See United States v. Darden, 70 F.3d 1507, 1524-25 (8th Cir. 1995) (conspiracy to possess, distribute, and possess with intent to distribute controlled substances constitutes a RICO predicate, but simple possession of cocaine is not a RICO predicate), cert. denied, 517 U.S. 1149 (1996); United States v. Pungitore, 910 F.2d 1084, 1135 (3d Cir. 1990)(conspiracy to murder and attempted murder in violation of state law proper in RICO predicates), cert. denied,

(continued...)

because these crimes cover offenses "involving" certain types of conduct. Courts interpret "involving" broadly and do not limit these predicate offenses to specified crimes. Similarly, solicitation may be considered an "act involving" specified offenses under subdivisions A and D.[5] A conspiracy, however, or

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[3](...continued)
500 U.S. 915 (1991); United States v. Manzella, 782 F.2d 533 (5th Cir.) (conspiracy to commit state law arson proper RICO predicate), cert. denied, 476 U.S. 1123 (1986); United States v. Ruggiero, 726 F.2d 913, 919 (2d Cir.) (conspiracy to murder in violation of state law is an "act or threat involving murder" under 18 U.S.C. § 1961(1)(A)), cert. denied, 469 U.S. 831 (1984); United States v. Licavoli, 725 F.2d 1040, 1045 (6th Cir.) (same), cert. denied, 467 U.S. 1252 (1984); United States v. Welch, 656 F.2d 1039, 1063 n.32 (5th Cir. 1981) (same) (dictum), cert. denied, 456 U.S. 915 (1982); United States v. Gambale, 610 F. Supp. 1515 (D. Mass. 1985) (same).

[4] See United States v. Darden, 70 F.3d 1507, 1524-25 (8th Cir. 1995) (conspiracy to possess, distribute, and possess with intent to distribute controlled substances constitutes a RICO predicate, but simple possession of cocaine is not a RICO predicate), cert. denied, 517 U.S. 1149 (1996); United States v. Casamento, 887 F.2d 1141, 1165-66 (2d Cir. 1989)(conspiracy to import and distribute narcotics), cert. denied, 493 U.S. 1081 (1990); United States v. Phillips, 664 F.2d 971, 1015 (5th Cir. 1981) (conspiracy to import marijuana), cert. denied, 457 U.S. 1136 (1982); United States v. Weisman, 624 F.2d 1118, 1124 (2d Cir.) (conspiracies to commit securities fraud and bankruptcy fraud), cert. denied, 449 U.S. 871 (1980).

[5] See United States v. Welch, 656 F.2d 1039, 1048 (5th Cir. 1981) (solicitation of and conspiracy to commit murder), cert. denied, 456 U.S. 915 (1982); United States v. Yin Poy Louie, 625 F. Supp. 1327, 1332 (S.D.N.Y. 1985) (conspiracy, solicitation, or attempt to murder), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986); Pohlot v. Pohlot, 664 F. Supp. 112, 116-17 (S.D.N.Y. 1987) (criminal solicitation of murder in violation of state law constitutes proper RICO predicate). See also United States v. Miller, 116 F.3d 641, 674-75 (2d Cir. 1997) (act involving murder need not be actual murder as long as the act directly concerned murder and facilitation of murder was a proper (continued...)

attempt to commit an offense listed within subdivisions B, C, E, or F could not be a RICO predicate unless attempt or conspiracy is expressly included within the terms of the listed statutory offense.[6]

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

> any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year.

The language "chargeable under State law" means that the offense must be one that "generically" was chargeable under state law at the time it was committed.[7] Thus a state offense may be charged as

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[5](...continued)
RICO predicate because accessorial offenses described in the New York State statutory provisions involved murder within the meaning of RICO where defendant provided information he knew would enable inquirer to commit murder), cert. denied, 118 S. Ct. 2063 (1998).

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

[7] See United States v. Miller, 116 F.3d 641, 674-75 (2d Cir. 1997) (act involving murder need not be actual murder as long as the act directly concerned murder; facilitation of murder was a proper RICO predicate because accessorial offenses described in the New York State statutory provisions involved murder within the meaning of RICO), cert. denied, 118 S. Ct. 2063 (1998); United States v. (continued...)

a RICO predicate even if a state procedural provision has rendered the offense unprosecutable under state law.[8] In general, even if a defendant were convicted or acquitted of an offense in state court, the offense may be charged as a RICO predicate.[9] Obviously, there is no requirement that the defendant be previously convicted

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

[8] See United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989); United States v. Erwin, 793 F.2d 656 (5th Cir.), cert. denied, 479 U.S. 991 (1986); United States v. Paone, 782 F.2d 386 (2d Cir. 1986), cert. denied, 483 U.S. 1019 (1987); United States v. Tsang, 632 F. Supp. 1336 (S.D.N.Y. 1986); United States v. Licavoli, 725 F.2d 1040, 1046-47 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); United States v. Davis, 576 F.2d 1065, 1067 (3d Cir.), cert. denied, 439 U.S. 836 (1978); United States v. Fineman, 434 F. Supp. 189, 194-95 (E.D. Pa. 1977), aff'd, 571 F.2d 572 (3d Cir.), cert. denied, 436 U.S. 945 (1978).

[9] See United States v. Coonan, 938 F.2d 1553, 1563-65 (2d Cir. 1991)(acquittal on state murder charge did not bar its use as a RICO predicate act), cert. denied, 503 U.S. 941 (1992); United States v. Licavoli, 725 F.2d 1040, 1047 (6th Cir.) (same), cert. denied, 467 U.S. 1252 (1984); United States v. Frumento, 563 F.2d 1083, 1086-89 (3d Cir. 1977) (same), cert. denied, 434 U.S. 1072 (1978); United States v. Castellano, 610 F. Supp. 1359, 1414 (S.D.N.Y. 1985).

of, or charged with, any of the predicate offenses.[10]

Notably, a state criminal statute that does not classify the offense in the exact same manner as the offense is classified in the RICO statute might still be used as a RICO predicate: state law is incorporated into RICO for definitional purposes,[11] and any

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[10] See Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 61 (1989); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488 (1985).

[11] See United States v. Vaccaro, 115 F.3d 1211, 1221 (5th Cir. 1997)(rejecting defendants' challenge to the sufficiency of the evidence and upholding their convictions for cheating at gambling (marked cards), the court, quoting United States v. Welch, 656 F.2d 1039, 1058 (5th Cir. 1981), noted that "[t]he reference to state law in the federal statute is for the purpose of defining the conduct prohibited and for the purpose of supplementing, rather than preempting, state gambling laws."), cert. denied, 118 S. Ct. 689 (1998); United States v. Pungitore, 910 F.2d 1084, 1131 (3d Cir. 1990) (sustaining defendant's conviction for extortion finding that "proof of extortion need not satisfy all of the peculiarities of state law, as the state offenses enumerated in section 1961(1) are merely definitional" but "must establish extortion, generically defined"), cert. denied, 500 U.S. 915 (1991); United States v. Casamayor, 837 F.2d 1509, 1514-15 (11th Cir. 1988)(rejecting defendant's claim that district judge was required to instruct jury on specific elements of state bribery when defendant was a public official accused of accepting a bribe rather than a person charged with offering a bribe, noting that the court had previously held that references to state law served a definitional purpose to identify generally the kind of activity made illegal by the RICO statute), cert. denied, 488 U.S. 1017 (1989); United States v. Licavoli, 725 F.2d 1040, 1047 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978), cert. denied, 440 U.S. 962 (1979); United States v. Frumento, 563 F.2d 1083, 1087 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); United States v. Forsythe, 560 F.2d 1127, 1137-38 (3d Cir. 1977); United States v. Brown, 555 F.2d 407, 418 n.22 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Dellacroce, 625 F. Supp. 1387 (E.D.N.Y. 1986). See United States v. Traitz, 871 F.2d 368 (3d Cir.) (analyzing and approving district court's instructions on state law), cert. denied, 493 U.S. 821 (1989).

conduct that falls within one of the nine listed categories of offenses can give rise to a predicate crime. Moreover, mis-citation of the state statute is not fatal, absent prejudice to the defendant.[12] State procedural and evidentiary rules are not incorporated into the RICO statute,[13] and the applicable state law is that which was in force at the time the state offense was committed.[14]

The language "punishable by imprisonment for more than one year" means so punishable at the time the offense was committed, not at the time the RICO indictment is brought.[15]

The language, "act or threat involving," has been construed

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[12] See United States v. Chatham, 677 F.2d 800, 803 (11th Cir. 1982). See also Rule 7 (c)(3), Fed. R. Crim. P.

[13] See United States v. Kaplan, 886 F.2d 536, 541 (2d Cir. 1989), cert. denied, 493 U.S. 1076 (1990); United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989); United States v. Friedman, 854 F.2d 535 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989); United States v. Erwin, 793 F.2d 656 (5th Cir. 1986); United States v. Anderson, 782 F.2d 908 (11th Cir. 1986); United States v. Paone, 782 F.2d 386 (2d Cir. 1986), cert. denied, 483 U.S. 1019 (1987); United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986); United States v. Wei, 862 F. Supp. 1129 (S.D.N.Y. 1994).

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

[15] See United States v. Davis, 576 F.2d 1066, 1067 (3d Cir.), cert. denied, 439 U.S. 836 (1978). In United States v. Ruggiero, 726 F.2d 913, 920 (2d Cir.), cert. denied, 469 U.S. 831 (1984), the Second Circuit explained that, in order to amount to a predicate act under 18 U.S.C. § 1961(1)(A), a state charge must "include those elements which make the chargeable offense punishable by more than one year in prison."

rather broadly, in accordance with its plain meaning. Thus, courts have held[16] or stated in dictum[17] that conspiracy to murder in violation of state law is a proper RICO predicate. In view of this authority, it is the Criminal Division's policy that attempts, conspiracies, and solicitations to commit a listed state offense may be charged as a RICO predicate, as long as the attempt, conspiracy, or solicitation was chargeable under state law when committed. The proposed use of these predicate offenses, however, may not be approved in every case. However, "accessory after the fact" to the commission of the underlying offense is not "an act involving that offense."

Representative cases charging state-law predicate offenses:

Murder

United States v. Miller, 116 F.3d 641 (2d Cir. 1997), cert.

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[16] See United States v. Miller, 116 F.3d 641, 674-75 (2d Cir. 1997) (act involving murder need not be actual murder as long as the act directly concerned murder; facilitation of murder was a proper RICO predicate because accessorial offenses described in the New York State statutory provisions involved murder within the meaning of RICO), cert. denied, 118 S. Ct. 2063 (1998). Accord United States v. Pungitore, 910 F.2d 1084, 1134-35 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991); United States v. Ruggiero, 726 F.2d 913, 919 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Licavoli, 725 F.2d 1040, 1044-45 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); United States v. Gambale, 610 F. Supp. 1515, 1547 (D. Mass. 1985); cf. United States v. Manzella, 782 F.2d 533 (5th Cir.) (conspiracy to commit arson proper RICO predicate), cert. denied, 476 U.S. 1123 (1986); Pohlot v. Pohlot, 664 F. Supp. 112, 116-17 (S.D.N.Y. 1987) (criminal solicitation of murder constitutes proper RICO predicate).

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

denied, 118 S. Ct. 2063 (1998); United States v. Coonan, 938 F.2d 1553 (2d Cir. 1991), cert. denied, 503 U.S. 941 (1992); United States v. Finestone, 816 F.2d 583 (11th Cir.), cert. denied, 484 U.S. 948 (1987); United States v. Licavoli, 725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); United States v. Russotti, 717 F.2d 27 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); United States v. Yin Poy Louie, 625 F. Supp. 1327 (S.D.N.Y. 1985), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986).

Kidnapping

United States v. Ferguson, 758 F.2d 843 (2d Cir.), cert. denied, 474 U.S. 841 (1985); United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978); United States v. Shakur, 560 F. Supp. 347 (S.D.N.Y. 1983).

Gambling

United States v. Joseph, 835 F.2d 1149 (6th Cir. 1987); United States v. Tripp, 782 F.2d 38 (6th Cir.), cert. denied, 475 U.S. 1128 (1986); United States v. Tille, 729 F.2d 615 (9th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Ruggiero, 754 F.2d 927 (11th Cir.), cert. denied, 471 U.S. 1127 (1985).

Arson

United States v. Ellison, 793 F.2d 942 (8th Cir.), cert. denied, 479 U.S. 937 (1986); United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); United States v. Melton, 689 F.2d 679 (7th Cir. 1982).

Robbery

United States v. Gonzalez, 21 F.3d 1045 (11th Cir. 1994); United States v. Ferguson, 758 F.2d 843 (2d Cir.), cert. denied, 474 U.S. 841 (1985); United States v. Ruggiero, 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984).

Bribery

United States v. Marmolejo, 89 F.3d 1185 (5th Cir. 1996), aff'd sub nom. Salinas v. United States, 118 S. Ct. 469 (1997); United States v. Jackson, 72 F.3d 1370 (9th Cir. 1995), cert. denied, 116 S. Ct. 1546 (1996); United States v. Freeman, 6 F.3d 586 (9th Cir. 1993), cert. denied, 511 U.S. 1077 (1994); United States v. Mokol, 957 F.2d 1410 (7th Cir.),

cert. denied, 506 U.S. 899 (1992); United States v. Kotvas, 941 F.2d 1141 (11th Cir. 1991), cert. denied, 506 U.S. 1055 (1993); United States v. Traitz, 871 F.2d 368 (3d Cir.), cert. denied, 493 U.S. 821 (1989); United States v. Hocking, 860 F.2d 769 (8th Cir. 1988); United States v. Garner, 837 F.2d 1404 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988); United States v. Friedman, 854 F.2d 535 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989); United States v. Casamayor, 837 F.2d 1509 (11th Cir. 1988), cert. denied, 488 U.S. 1017 (1989); United States v. Kravitz, 738 F.2d 102 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985); United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Dozier, 672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943 (1982); United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114 (E.D.N.Y. 1992); United States v. Horak, 633 F. Supp. 190 (N.D. Ill. 1986); United States v. Gonzales, 620 F. Supp. 1143 (N.D. Ill. 1985).

Extortion[18]

United States v. Delker, 757 F.2d 1390 (3d Cir. 1985); United States v. Cryan, 490 F. Supp. 1234 (D.N.J.), aff'd, 636 F.2d 1211 (3d Cir. 1980); United States v. Brooklier, 685 F.2d 1208 (8th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); Teamsters Local 372 v. Detroit Newspapers, 956 F. Supp. 753 (E.D. Mich. 1997).

Dealing in Obscene Matter

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

Dealing in Narcotic or Other Dangerous Drugs

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996); United States v. Grayson, 795 F.2d 278 (3d Cir. 1986), cert. denied, 481 U.S. 1018 (1987); United States v. Schell, 775 F.2d 559 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986).

2. Federal Title 18 Offenses: Section 1961(1)(B) defines

[18] See United States v. Delano, 55 F.3d 720, 727 (2d Cir. 1995)(New York larceny by extortion statute requires forcing a person to surrender property; extortion of services did not constitute a violation of larceny by extortion statute; and court reversed RICO predicate acts based on extortion of services theory).

racketeering activity as "any act which is indictable under" any of a list of federal criminal statutes. This provision is narrower than Section 1961(1)(A) because the federal offense must be an "act" that is "indictable under" one of the listed statutes; attempts and conspiracies cannot be used as predicate offenses unless they are expressly included within the terms of the statute. For example, a conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, is a RICO predicate[19] because Section 1951(a) expressly makes conspiracy a crime. On the other hand, a conspiracy to conduct an illegal gambling business under 18 U.S.C. § 1955 cannot be a RICO predicate[20] because 18 U.S.C. § 1955 does not expressly make such a conspiracy a crime. Because of the effect of 18 U.S.C. § 2, however, one who aids and abets the commission of a federal crime is treated as if he had committed the crime as a principal and can be charged under RICO if the crime is one listed under

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

[20] See United States v. Joseph, 781 F.2d 549 (6th Cir. 1986); United States v. Ruggiero, 726 F.2d 913, 913-20 (2d Cir.), cert. denied, 469 U.S. 831 (1984).

Section 1961(1)(B).[21]

Each statute listed in Section 1961(1)(B) is accompanied by a parenthetical phrase that gives a brief description of the conduct proscribed by the statute. These descriptions are included only for convenience and do not limit the conduct that can be charged as a RICO predicate.[22]

Although legal issues concerning federal predicate offenses often are the same as those arising in non-RICO prosecutions, some federal offenses chargeable under RICO present issues that relate particularly to RICO prosecutions.

a. Mail & Wire Fraud

A frequently used federal RICO predicate offense is the mail fraud statute, 18 U.S.C. § 1341. Courts have generally held that the mail fraud statute may be used as a RICO predicate even though

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[21] See United States v. Shifman, 124 F.3d 31, 36 (1st Cir. 1997)("aiding and abetting one of the activities listed in Section 1961(1) as racketeering activities makes one punishable as a principal and amounts to engaging in that racketeering activity"), cert. denied, 118 S. Ct. 1053 (1998); United States v. Pungitore, 910 F.2d 1084, 1132-34 (3d Cir. 1990) (explaining principle of aiding and abetting and applying it to the facts of a RICO predicate offense), cert. denied, 500 U.S. 915 (1991); United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114, 1133-34 (E.D.N.Y. 1992); United States v. Rastelli, 870 F.2d 822, 831-33 (2d Cir.), cert. denied, 493 U.S. 982 (1989).

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

the conduct charged is also covered by another, more specific, statute that is not a RICO predicate offense.[23] In limited

[23] See United States v. Porcelli, 865 F.2d 1352, 1357-58 (2d Cir.) (rejecting defense argument that mail fraud predicates could not be used for state sales tax violations because state had not criminalized such violations), cert. denied, 493 U.S. 80 (1989); Hofstetter v. Fletcher, 860 F.2d 1079 (6th Cir. 1988) (mailing of fraudulent tax return proper mail fraud RICO predicate and not improper because tax fraud is not RICO predicate); United States v. Busher, 817 F.2d 1409, 1412 (9th Cir. 1987) (same; relied on by court in Hofstetter, supra); United States v. Computer Sciences Corp., 689 F.2d 1181, 1186-88 (4th Cir. 1982) (mail fraud and wire fraud charges could be brought even though conduct was also charged under False Claims Act, 18 U.S.C. § 287), cert. denied, 459 U.S. 1105 (1983); United States v. Boffa, 688 F.2d 919, 931-33 (3d Cir. 1982) (mail fraud statute not preempted by labor statutes, despite some overlap in statutes' coverage), cert. denied, 460 U.S. 1022 (1983); United States v. Hartley, 678 F.2d 961, 990 n.50 (11th Cir. 1982) (use of mail fraud as RICO predicate not foreclosed where conduct could be prosecuted under False Claims Act), cert. denied, 459 U.S. 1170 (1983); United States v. Weatherspoon, 581 F.2d 595, 599-600 (7th Cir. 1978) (upholding use of mail fraud statute against acts also prosecuted under false statements statute); United States v. International Brotherhood of Teamsters, 708 F. Supp. 1388 (S.D.N.Y. 1989) (RICO suit not preempted by the LMRDA, 29 U.S.C. § 483); United States v. Regan, 706 F. Supp. 1087 (S.D.N.Y. 1989) (tax evasion prosecuted under mail fraud statute); Illinois v. Flisk, 702 F. Supp. 189 (N.D. Ill. 1988) (tax fraud charged under mail fraud statute); United States v. Standard Drywall Corp., 617 F. Supp. 1283, 1295-96 (E.D.N.Y. 1985) (allowed mail fraud predicates based on fraudulent mailings relating to tax liability); see also United States v. Local 560, Int'l Brotherhood of Teamsters, 780 F.2d 267, 282-83 (3d Cir. 1985) (LMRDA does not pre-empt Hobbs Act), cert. denied, 476 U.S. 1140 (1986); United States v. Dischner, No. A87-160 Cr (D. Alaska July 19, 1988) (allowed use of commercial bribery statute as RICO predicate even though conduct also could be covered by public bribery statute), aff'd, 974 F.2d 1502 (9th Cir. 1992); United States v. White, 386 F. Supp. 882, 884-85 (E.D. Wis. 1974) (proper to charge interstate transportation of stolen motor vehicles under 18 U.S.C. § 2314 rather than specific statute, 18 U.S.C. § 2312). Note, with respect to the White case, three specific motor vehicle violations--18 U.S.C. §§ 2312, 2313, and 2320--were made RICO predicates in an amendment effective October 25, 1984.

situations, for example when it is necessary to resort to federal labor statutes to determine illegality, some courts have ruled that mail fraud predicates are preempted by another statute.[24]

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[24] See Underwood v. Venango River Corp., 995 F.2d 677, 684-86 (7th Cir. 1993)(mail and wire fraud predicates depending solely upon interpretation of rights created by collective bargaining agreement preempted by RLA), overruled on other grounds by Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994); Talbot v. Robert Matthews Distributing Co., 961 F.2d 654, 662 (7th Cir. 1992)(RICO suit involving conduct prohibited by labor laws was preempted by the NLRA); Hubbard v. United Airlines, Inc., 927 F.2d 1094, 1098 (9th Cir. 1991)(mail and wire fraud predicates involving rights created by collective bargaining agreement preempted by RLA); Chicago District Council of Carpenters Pension Fund v. Ceiling Wall Systems, Inc., 915 F. Supp. 939, 944 (N.D. Ill. 1996)(mail fraud predicate preempted by LMRA, but not by NLRA); Mann v. Air Line Pilots Ass'n, 848 F. Supp. 990, 995 (S.D. Fla. 1994)(mail and wire fraud predicates preempted by RLA because court needed to look to federal labor statute to determine whether fraud had occurred); United States v. Juell, No. 84 C 7467 (N.D. Ill. June 30, 1987) (mail and wire fraud predicates preempted by NLRA § 8, 29 U.S.C. § 158; but for labor laws, those acts would not be fraud); Butchers' Union, Local No. 498, United Food & Commercial Workers v. SDC Investment, Inc., 631 F. Supp. 1001, 1011 (E.D. Cal. 1986) (mail and wire fraud predicates pre-empted by labor laws because liability is wholly dependent on labor laws); But see, e.g., United States v. Palumbo Brothers, Inc., 145 F.3d 850, 867-72 (7th Cir.) (mail fraud predicates charged in a criminal RICO prosecution, as distinguished from a civil RICO suit, were not pre-empted by the NLRA or Section 301 of the LMRA), cert. denied, 119 S. Ct. 375, 376 (1998).

Pre-emption has also been applied to extortion and other types of predicate acts. See, e.g., Tamburello v. Comm-Tract Corp., 67 F.3d 973, 979 (1st Cir. 1995)(RICO suit alleging Hobbs Act extortion pre-empted by NLRA), cert. denied, 116 S. Ct. 1852 (1996); Brennan v. Chestnut, 973 F.2d 644, 647 (8th Cir. 1992)(RICO suit alleging Hobbs Act extortion predicates pre-empted by NLRA); Teamsters Local 372 v. Detroit Newspapers, 956 F. Supp. 753 (E.D. Mich. 1997)(certain extortion predicate acts were pre-empted by NLRA, but robbery, arson, and other extortions were not pre-empted because these acts were unlawful without need to resort to the federal labor statutes to determine their illegality); Buck Creek

(continued...)

Moreover, in 1987 problems arose concerning the scope of the mail fraud statute. Two Supreme Court decisions, McNally v. United States, 483 U.S. 350 (1987), and Carpenter v. United States, 484 U.S. 19 (1987), held that the mail fraud statute was limited to schemes to defraud a victim of tangible or intangible property rights and therefore did not cover schemes to defraud a victim of a right to honest services. Under these decisions, it became impossible to use the mail fraud statute (or the very similar wire fraud statute) to reach schemes such as those involving public corruption, where a defendant defrauds a citizen of his/her right to honest services. In response to the Supreme Court's decision, Congress enacted 18 U.S.C. § 1346 in 1988, which expressly defines "scheme or artifice to defraud," for purposes of the mail fraud and

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[24](...continued)
Coal, Inc. v. United Workers of America, 917 F. Supp. 601, 611 (S.D. Ind. 1995)(RICO predicate acts relating to intimidation and harassment and to failure to control individual union members with the purpose of forcing third parties to cease doing business with Buck Creek were pre-empted by federal labor statutes, predicate acts relating to theft and vandalism were dismissed on other grounds).

But see Humana v. Forsyth, 525 U.S. 299 (1999) (holding that the McCarran-Ferguson Act, 15 U.S.C. § 1011, et seq., does not pre-empt a civil RICO lawsuit that did not frustrate or impair state law regulating the business of insurance); United States v. Palumbo Brothers, Inc., 145 F.3d 850, 860-73 (7th Cir. 1998) (holding that the National Labor Relations Act did not pre-empt RICO and mail fraud charges arising from schemes by an employer to defraud its union-member employees of money they were owed pursuant to the terms of the applicable collective bargaining agreements even assuming that the acts underlying the charges constituted unfair labor practice).

wire fraud statutes, to include a "scheme or artifice to deprive another of the intangible right of honest services."[25] Thus, McNally is an issue only when the fraudulent conduct occurred before November 18, 1988, the date Congress enacted Section 1346. For cases not covered by Section 1346, where there is some question whether property rights are involved in the fraud, prosecutors should refer to McNally and Carpenter and relevant circuit case law.[26]

Because of legitimate concerns about the possible overuse of the mail fraud statute to generate RICO cases out of relatively minor conduct, the Criminal Division has imposed policy limitations on its use as a predicate offense. First, the use of mail fraud as a predicate is not generally encouraged, particularly in cases

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[25] Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508 (Nov. 18, 1988).

[26] See Callanan v. United States, 881 F.2d 229 (6th Cir. 1989), cert. denied, 494 U.S. 1083 (1990); United States v. Rastelli, 870 F.2d 822 (2d Cir.), cert. denied, 492 U.S. 982 (1989); United States v. Doherty, 867 F.2d 1352 (2d Cir. 1989); United States v. Porcelli, 865 F.2d 1352 (2d Cir.), cert. denied, 493 U.S. 810 (1989); United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989); United States v. Perholtz, 836 F.2d 554 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988); United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987), vacated, 877 F.2d 481 (6th Cir. 1989) (en banc) (convictions overturned on McNally grounds); United States v. Wellman, 830 F.2d 1453 (7th Cir. 1987); United States v. Fagan, 821 F.2d 1002 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); United States v. Berg, 710 F. Supp. 438 (E.D.N.Y. 1989); United States v. Regan, 706 F. Supp. 1087 (S.D.N.Y. 1989); United States v. Finley, 705 F. Supp. 1297 (N.D. Ill. 1988); Illinois v. Flisk, 702 F. Supp. 189 (N.D. Ill. 1988); United States v. Ianniello, 677 F. Supp. 233 (S.D.N.Y. 1988); United States v. Biaggi, 675 F. Supp. 790 (S.D.N.Y. 1987).

where other predicate crimes are charged, or where the conduct can be more accurately charged under some other RICO predicate offense, such as a state bribery statute. This policy, however, does not preclude charging mail fraud or wire fraud predicate offenses where the gravamen of the offense is a traditional fraud. Second, the Organized Crime and Racketeering Section will not approve a proposed RICO indictment that contains mail fraud predicates involving federal tax evasion or other offenses arising under the federal internal revenue laws unless previously approved by the Criminal Section of the Tax Division.[27]

b. Obstruction of Justice

Another problem is presented by RICO predicates involving 18 U.S.C. §§ 1503 through 1513 of the federal obstruction-of-

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[27] According to the Tax Division there are, in general, three circumstances in which it can be said that an offense arises under the internal revenue laws: "when it involves (1) an evasion of some responsibility imposed by the Internal Revenue Code, (2) an obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for filing of internal revenue documents or the payment, collection, or refund of taxes." Tax Division Directive No. 99 at 1-2.

Thus, the Department requires Tax Division authorization for the charging of mail fraud counts, either independently or as RICO predicates (1) when the only mailing charged is a federal tax return or other internal revenue form or document, or (2) when the mailing charged is a mailing used to promote or facilitate a scheme which is essentially only a tax fraud scheme arising under the federal tax laws. See Appendix C of this Manual setting out the full text of Section 6-4.211(1) (July 19, 1989) of the United States Attorneys' Manual, which describes the Department's policy regarding the use of mail fraud charges in tax cases.

justice statutes, which were amended, effective October 12, 1982, by the Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248-58. The amendments changed Section 1503 so that it no longer expressly covered witness intimidation. Nevertheless, all the courts of appeals that have decided the issue, except for the Second Circuit, have held that § 1503 still applies to endeavoring to obstruct justice in judicial proceedings through witness tampering and that § 1512 is not the exclusive vehicle for prosecuting such witness tampering.[28] The Second Circuit alone has held that witness tampering must be prosecuted under 18 U.S.C. § 1512, and not § 1503. [29]

Unfortunately, Section 1512 was not added to the list of RICO predicates until November 10, 1986. Witness intimidation crimes occurring before November 10, 1986, however, should be covered by 18 U.S.C. § 1503, which contains an omnibus provision prohibiting

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[28] See United States v. Ladum, 141 F.3d 1328, 1337-38 (9th Cir. 1998); United States v. Tackett, 113 F.3d 603, 601-11 (6th Cir. 1997) (collecting cases); United States v. Maloney, 71 F.3d 645, 658-59 (7th Cir. 1995); Unites States v. Moody, 977 F.2d 1420, 1424 (11th Cir. 1992); United States v. Kenny, 973 F.2d 339, 342 (4th Cir. 1992); Unites States v Branch, 850 F.2d 1080, 1082 (5th Cir. 1988); United States v. Marrapese, 826 F.2d 145, 148 (1st Cir. 1987); United States v. Risken, 788 F.2d 1361, 1365-68 (8th Cir. 1986); United States v. Arnold, 773 F.2d 823, 831-32 (7th Cir. 1985); United States v. Rovetuso, 768 F.2d 809, 823-24 (7th Cir. 1985); United States v. Lester, 749 F.2d 1288, 1292-95 (9th Cir. 1984); United States v. Wesley, 748 F.2d 962 (5th Cir. 1984). See also, United States v. Aguilar, 515 U.S. 593, 600 and n.1 (1995).

[29] See United States v. Masterpol, 940 F.2d 760, 763 (2d Cir. 1991); United States v. Hernandez, 730 F.2d 895, 898-99 (2d Cir. 1984).

obstruction of the "due administration of justice." See supra n. 28, Section II. The preferable course appears to be to charge conduct occurring before November 10, 1986 under Section 1503 in jurisdictions other than the Second Circuit.[30]

c. Representative Cases Charging Title 18 Predicate Offenses

Section 201 (relating to bribery)

United States v. Bustamante, 45 F.3d 933 (5th Cir.), cert. denied, 516 U.S. 973 (1995); United States v. Garner, 837 F.2d 1404 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988); United States v. Persico, 646 F. Supp. 752 (S.D.N.Y. 1986), aff'd and rev'd on other grounds, 832 F.2d 705 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); United States v. Perholtz, 622 F. Supp. 1253 (D.D.C. 1985); United States v. Perkins, 596 F. Supp. 528 (E.D. Pa.), aff'd, 749 F.2d 28 (3d Cir. 1984), cert. denied, 471 U.S. 1015 (1985); United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981); United States v. Licavoli, 725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984).

Section 224 (relating to sports bribery)

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

Sections 471-473 (relating to counterfeiting)

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

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[30] See United States v. Masterpol, 940 F.2d 760, 762-63 (2d Cir. 1991) (Section 1512 rather than 1503 was applicable to defendant's conduct that involved urging a witness to make false statements without resorting to intimidation or harassment); United States v. Hernandez, 730 F.2d 895, 898 (2d Cir. 1984); but see United States v. Beatty, 587 F. Supp. 1325, 1333 (E.D.N.Y. 1984) (Congress did not mean to limit Section 1503 insofar as it sought to prevent obstruction of justice). See also U.S. Attorneys' Manual § 9-69.010, Criminal Resource Manual, at 1721-33 (discussing Sections 1503 through 1512).

Section 659 (relating to theft from an interstate shipment)

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

Section 664 (relating to embezzlement from pension and welfare funds)

United States v. Busacca, 936 F.2d 232 (6th Cir.), cert. denied, 502 U.S. 985 (1991); United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983); United States v. Ostrer, 481 F. Supp. 407 (S.D.N.Y. 1979).

Sections 891-894 (relating to extortionate credit transactions)

United States v. Shifman, 124 F.3d 31 (1st Cir. 1997), cert. denied, 118 S. Ct. 1053 (1998); United States v. Zizzo, 120 F.3d 1338 (7th Cir.), cert. denied, 118 S. Ct. 566 (1997); United States v. Doherty, 786 F.2d 491 (2d Cir. 1986); United States v. Persico, 621 F. Supp. 842 (S.D.N.Y. 1985); United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Groff, 643 F.2d 396 (6th Cir.), cert. denied, 454 U.S. 828 (1981).

Section 1028 (relating to fraud in connection with identification documents)

Section 1029 (relating to fraud in connection with access devices)

Section 1084 (relating to illegal transmission of wagering information)

Section 1341 (relating to mail fraud)

United States v. Palumbo Brothers, Inc., 145 F.3d 850 (7th Cir.), cert. denied, 119 S. Ct. 375 (1998); United States v. Blandford, 33 F.3d 685 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995); United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991), cert. denied, 505 U.S. 1220 (1992); United States v. Horak, 833 F.2d 1235 (7th Cir. 1987); United States v. Busher, 817 F.2d 1409 (9th Cir. 1987); United States v. Standard Drywall Corp., 617 F. Supp. 1283 (S.D.N.Y. 1985); United States v. Martino, 648 F.2d 367 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); United States v. Sheeran, 699 F.2d 112 (3d Cir.), cert. denied, 461 U.S. 931 (1983).

Section 1343 (relating to wire fraud)

United States v. Blinder, 10 F.3d 1468 (9th Cir. 1993); United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983); United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

Section 1344 (relating to financial institution fraud)

Sections 1425-1427 (relating to the unlawful procurement of citizenship or nationalization)

Sections 1461-1465 (relating to obscene matter)

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

Section 1503 (relating to obstruction of justice)

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

Section 1510 (relating to the obstruction of a federal criminal investigation)

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

Section 1511 (relating to the obstruction of state or local law enforcement)

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

Sections 1512-1513 (relating to witness/victim/informant tampering or retaliating against a witness, victim or informant)

Mruz v. Caring, Inc., 991 F. Supp. 701 (D.N.J. 1998).

Sections 1542-1544 (relating to false and forged statements in application and use of passport, misuse of passport)

Section 1546 (relating to fraud, misuse of visas and related documents)

Sections 1581-1588 (relating to peonage and slavery)

Section 1951 (Hobbs Act extortion or robbery)

United States v. To, 144 F.3d 737 (11th Cir. 1998); United States v. Blandford, 33 F.3d 685 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995); United States v. Carpenter, 961 F.2d 824 (9th Cir.), cert. denied, 506 U.S. 919 (1992); United States v. O'Malley, 796 F.2d 891 (7th Cir. 1986); United States v. Hampton, 786 F.2d 977 (10th Cir. 1986); United States v. Walsh, 700 F.2d 846 (2d Cir.), cert. denied, 464 U.S. 825 (1983); United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); United States v. Dozier, 672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943 (1982).

Section 1952 (relating to interstate or foreign travel or use of such facilities or the mail in aid of unlawful activity)

United States v. Griffith, 85 F.3d 284 (7th Cir. 1996); United States v. Stern, 858 F.2d 1241 (7th Cir. 1988); United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 109 S. Ct. 1319 (1989); United States v. Hunt, 749 F.2d 1078 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); United States v. Mazzei, 700 F.2d 85 (2d Cir.), cert. denied, 461 U.S. 945 (1983).

Section 1953 (relating to interstate transportation of wagering paraphernalia)

Section 1954 (relating to kickbacks to influence employee benefit plan)

United States v. Norton, 867 F.2d 1354 (11th Cir.), cert. denied, 491 U.S. 907 (1989); United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), cert. denied, 461 U.S. 928 (1983); United States v. Palmeri, 630 F.2d 192 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981).

Section 1955 (prohibiting illegal gambling businesses)

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

Sections 1956-1957 (relating to money laundering)

United States v. London, 66 F.3d 1227 (1st Cir. 1995), cert. denied, 517 U.S. 1155 (1996); United States v. Jackson, 72 F.3d 1370 (9th Cir. 1995), cert. denied, 116 S. Ct. 1546 (1996).

Section 1958 (relating to murder for hire)

Sections 2251-2252 (relating to sexual exploitation, abuse and buying and selling children)

Sections 2312-2313(relating to the transportation, sale or receipt of stolen vehicles)

Section 2314 (relating to transportation of stolen goods and other property)

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

Section 2315 (relating to sale or receipt of stolen goods and other property)

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

Sections 2318-2320 (relating to copyright infringement and counterfeiting in the performance and entertainment and audiovisual and computer industries)

Section 2321 (trafficking in motor vehicles and motor vehicle parts with obliterated or altered vehicle identification numbers)

Sections 2341-2346 (trafficking in contraband cigarettes)

United States v. Baker, 63 F.3d 1478 (9th Cir. 1995); United States v. Legrano, 659 F.2d 17 (4th Cir. 1981).

Sections 2421-2424 (relating to transportation for illegal sexual activity)

United States v. Clemones, 577 F.2d 1247 (5th Cir. 1978),

cert. denied, 445 U.S. 927 (1980).

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

Representative cases charging Title 29 predicate offenses:

Section 186 (dealing with restrictions on payments and loans to labor organizations)

United States v. Carlock, 806 F.2d 835 (5th Cir. 1986); United States v. Pecora, 798 F.2d 614 (3d Cir. 1986), cert. denied, 479 U.S. 1064 (1987); United States v. Kaye, 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977); United States v. Cody, 722 F.2d 1052 (2d Cir. 1983), cert. denied, 467 U.S. 1226 (1984); United States v. Local 1804-1, International Longshoreman's Ass'n, 812 F. Supp. 1303 (S.D.N.Y. 1993); United States v. DiGilio, 667 F. Supp. 191 (D.N.J. 1987).

Section 501(c) (relating to embezzlement from union funds)

United States v. Butler, 954 F.2d 114 (2d Cir. 1992); United States v. Boffa, 688 F.2d 919 (3d Cir. 1982), cert. denied, 460 U.S. 1022 (1983); United States v. Thordarson, 646 F.2d 1323 (9th Cir.), cert. denied, 454 U.S. 1055 (1981); United States v. Rubin, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979); United States v. Local 1804-1, International Longshoreman's Ass'n, 812 F. Supp. 1303 (S.D.N.Y. 1993).

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

> any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in

> the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States.

Because this subdivision uses the language "any offense involving," it includes attempts and conspiracies.[31]

One issue that occasionally arises in RICO cases involving federal narcotics violations is whether marijuana offenses are proper RICO predicates. Under the federal drug statutes, marijuana is considered a controlled substance but not a narcotic drug. This problem was resolved in 1994, however, by an amendment to Section 1961(1)(D) substituting "controlled substance or listed chemical" for "narcotics or other dangerous drug." Thus, a marijuana offense occurring after the 1994 amendment may be a proper RICO predicate. Offenses occurring prior to the 1994 amendment may be proper RICO predicates as well: court decisions addressing the propriety of a pre-1994 marijuana offense as a RICO predicate have held in the

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[31] See United States v. Darden, 70 F.3d 1507, 1524-25 (8th Cir. 1995) (conspiracy to possess, distribute, and possess with intent to distribute controlled substances constitutes a RICO predicate, but simple possession of cocaine is not a RICO predicate), cert. denied, 517 U.S. 1149 (1996); United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988) (conspiracy to possess and distribute a controlled substance is a RICO predicate act); United States v. Phillips, 664 F.2d 971, 1015 (5th Cir. 1981) (conspiracy to commit offense involving narcotics and dangerous drugs is a RICO predicate act), cert. denied, 457 U.S. 1136 (1982); United States v. Weisman, 624 F.2d 1118, 1123-24 (2d Cir.) (conspiracy to commit offense involving bankruptcy fraud or securities fraud is a RICO predicate act), cert. denied, 449 U.S. 871 (1980).

government's favor.[32] Accordingly, it is the position of the Criminal Division that marijuana offenses may be proper RICO predicates.[33]

Another issue that has arisen in RICO cases involving federal narcotics offenses is whether mere possession of illegal narcotics for personal consumption is a RICO predicate. At least one court has held that such mere possession is not a proper RICO predicate, but that possession with intent to distribute is a proper RICO predicate. United States v. Darden, 70 F.3d 1507, 1524 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996). The Organized Crime and Racketeering Section will not approve possession of a *de minimis* amount of drugs as a RICO predicate. Possession of a larger amount may be approved if it could be inferred from the quantity and other relevant facts that the drugs were for distribution and not merely for personal consumption.

Representative cases charging federal generic predicate

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[32] See United States v. Williams, 809 F.2d 1072 (5th Cir.), cert. denied, 484 U.S. 896 (1987); United States v. Ryland, 806 F.2d 941 (9th cir 1986), cert. denied, 48 U.S. 1057 (1987); United States v. Tillett, 763 F.2d 628 (11th Cir. 1984), cert. denied, 472 U.S. 1017 (1985); United States v. Zielie, 734 F.2d 1447, 1462 n.11 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Castellano, 610 F. Supp. 1359, 1424-25 (S.D.N.Y. 1985); United States v. Harvey, 560 F. Supp. 1040, 1050 (S.D. Fla. 1982), aff'd, 789 F.2d 1492 (11th Cir.), cert. denied, 479 U.S. 854 (1986).

[33] Marijuana offenses under state law also may be RICO predicates provided that the charged state marijuana offenses carry a penalty of imprisonment in excess of one year. Section 1961(1)(A) requires that state offenses be punishable by more than one year imprisonment.

offenses:

Title 11 (relating to bankruptcy fraud)

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

Securities Fraud

United States v. Blinder, 10 F.3d 1468 (9th Cir. 1993); United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1983); United States v. Pray, 452 F. Supp. 788 (M.D. Pa. 1978).

Narcotics

United States v. Crosby, 789 F. Supp. 440 (D.D.C. 1992), aff'd, 20 F.3d 480 (D.C. Cir.), cert. denied, 513 U.S. 883 (1994); United States v. Kragness, 830 F.2d 842 (8th Cir. 1987); United States v. Firestone, 816 F.2d 583 (11th Cir.), cert. denied, 484 U.S. 948 (1987); United States v. Zielie, 734 F.2d 1447 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Fernandez, 576 F. Supp. 397 (E.D. Tex. 1983), aff'd, 777 F.2d 248 (5th Cir. 1985), cert. denied, 476 U.S. 1096 (1986).

5. Title 31 Offenses (currency reporting violations):

Section 1961(1)(E), added by amendment October 12, 1984, includes as racketeering activity "any act which is indictable under the Currency and Foreign Transactions Reporting Act." Those violations, codified at 31 U.S.C. §§ 5311-5324, are of considerable use as predicate offenses involving money laundering in narcotics prosecutions. In drafting a RICO indictment that includes Title 31 predicate acts, it is important to be aware of the policy against charging several predicate acts from a single, short-lived criminal

transaction.[34] In addition, it is important to be aware of the ex post facto issue that may arise if an indictment alleges Title 31 predicate acts that occurred on or before the dates those offenses were added to the list of RICO predicates.[35]

Representative cases charging Title 31 offenses:

United States v. London, 66 F.3d 1227 (1st Cir. 1995), cert. denied, 517 U.S. 1155 (1996); United States v. Hurley, 63 F.3d 1 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996).

6. Immigration and Nationality Act Offenses.

Section 1961(1)(F), added by several amendments in 1996, includes as racketeering activity:

> any act which is indictable under the Immigration and Nationality Act, i.e., section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of aliens for immoral purposes) if the act indictable under such section of such Act was committed for the purpose of financial gain.

These violations are codified, respectively, at 8 U.S.C. §§ 1324, 1327 and 1328.

Representative cases charging Immigration and Nationality Act offenses: none reported as of this writing

B. State

The statutory definition of "state" includes any of the fifty states, as well as the District of Columbia, Puerto Rico, and United States territories, possessions, political subdivisions, and

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[34] See infra Section II (E)(2).

[35] See infra Section VI (E)(4).

their departments, agencies, and instrumentalities. 18 U.S.C. § 1961(2). The primary importance of this definition is its connection with the state law predicate crimes listed in Section 1961(1)(A) and the definition of "unlawful debt" in Section 1961(6). To date, this has not been a significant factor in RICO litigation.

C. Person

The definition of "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." This definition also has not had a significant impact on criminal litigation; it is broad enough to include any individual or corporation that is a potential criminal RICO defendant.[36] In the civil context, however, the definition is of more importance. Under Section 1964(c), treble damages are available to "[a]ny person injured in his business or property by reason of a violation

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[36] The definition uses the word "includes" rather than "means"; this usage could be construed as indicating that the definition is a broad, expansive one. But see United States v. Bonanno Organized Crime Family, 879 F.2d 20, 27-30 (2d Cir. 1989), in which the Second Circuit upheld the dismissal of the government's civil RICO complaint against defendant Bonanno Crime Family because, as a mere association of individuals, the Bonanno Family could not be a "person" within the meaning of the RICO statute and thus was not a proper RICO defendant. See also United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982) (in dictum, concluding that a corporate division could not be a RICO "person" chargeable as a RICO defendant, but noting that the division could be a RICO "enterprise"), cert. denied, 459 U.S. 1105 (1983); Modern Settings v. Prudential-Bache Securities, 629 F. Supp. 860, 863 (S.D.N.Y. 1986) (corporation cannot be a "person" under respondeat superior theory of liability).

of Section 1962 . . . ."[37] Of major importance to government attorneys is the question of whether the United States is a "person" entitled to sue for treble damages under RICO. This question has not been conclusively resolved by the courts. The Second Circuit has held that the United States may not recover treble damages in civil RICO actions because it is not a "person" within the meaning of 18 U.S.C. § 1964(c).[38] The Second Circuit's decision in that regard is well supported by RICO's legislative history. Thus, RICO suits for treble damages should not be sought in the Second Circuit. None of the other circuits have addressed this issue. However, it is unlikely that the Organized Crime and

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[37] Some district courts have held that a state or municipal government may not be a RICO defendant because a governmental entity is incapable of forming the criminal intent necessary to commit a predicate act. Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996)(affirming dismissal of civil RICO claim against City and County of Honolulu because governmental entities are incapable of forming necessary malicious intent); Dammon v. Folse, 846 F. Supp. 36, 39 (E.D. La. 1994)(school board is municipal entity incapable of forming necessary criminal intent); County of Oakland v. City of Detroit, 784 F. Supp. 1275, 1283 (E.D. Mich. 1992)(civil RICO suit dismissed because governmental entity is incapable of forming necessary criminal intent); Nu-Life Construction Corp. v. Board of Education of New York, 779 F. Supp. 248, 251-52 (E.D.N.Y. 1991)(municipal corporation is a "person" since it can hold interest in property, but plaintiff must still show that defendant had the requisite mens rea to commit predicate acts).

[38] See United States v. Bonanno Organized Crime Family, 879 F.2d 20, 27 (2d Cir. 1989) (relying in part on analogous provision in Clayton Act, which does not recognize standing of United States to recover treble monetary damages in antitrust cases). The government did not seek further review of this decision. Accord United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, 793 F. Supp. 1114, 1149 (E.D.N.Y. 1992) (dismissing United States' claim for treble damages under civil RICO lawsuit).

Racketeering Section will approve RICO suits by the United States for treble damages in other circuits.

Some reported cases have involved suits under Section 1964(c) by state and local governments. Several courts have ruled that state and other local government entities have standing to sue for treble damages under RICO,[39] while other courts have permitted a state to sue for treble damages, but did not address the issue whether the state was a "person" within the meaning of 18 U.S.C. § 1964 (c).[40]

D. Enterprise

The term "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). (For a full discussion of the enterprise's required relationship to interstate and foreign commerce, see infra Section III(C)(3)). It is now settled that the term "enterprise" encompasses both legitimate and illegitimate

[39] See County of Oakland v. City of Detroit, 866 F.2d 839, 851 (6th Cir. 1989), cert. denied, 497 U.S. 1003 (1990); Illinois Dept. of Rev. v. Phillips, 771 F.2d 312, 316 (7th Cir. 1985); City of Chicago Heights v. LoBue, 841 F. Supp. 819, 822, 823 (N.D. Ill. 1994); City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 541 (E.D.N.Y. 1987).

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

enterprises. United States v. Turkette, 452 U.S. 576 (1981).[41] Prosecution under RICO, however, does not require proof that either the defendant or the enterprise was connected to organized crime.[42]

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[41] See also United States v. Doherty, 867 F.2d 47, 68 (1st Cir. 1989); United States v. Blackwood, 768 F.2d 131 (7th Cir.), cert. denied, 474 U.S. 1020 (1985); United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Lemm, 680 F.2d 1193, 1198 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); United States v. Bledsoe, 674 F.2d 647, 662 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1983); United States v. Thevis, 665 F.2d 616, 626 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); United States v. Martino, 648 F.2d 367, 380-81 (5th Cir. 1981), rev'd in part on other grounds, 681 F.2d 952 (5th Cir.) (en banc), cert. denied, 456 U.S. 949 (1982); United States v. Clark, 646 F.2d 1259, 1267 n.7 (8th Cir. 1981); United States v. Sutton, 642 F.2d 1001, 1006-09 (6th Cir. 1980) (en banc), cert. denied, 453 U.S. 912 (1981); United States v. Errico, 635 F.2d 152, 155 (2d Cir. 1980), cert. denied, 453 U.S. 911 (1981); United States v. Provenzano, 620 F.2d 985, 992-93 (3d Cir.), cert. denied, 449 U.S. 899 (1980); United States v. Aleman, 609 F.2d 298, 304-05 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Rone, 598 F.2d 564, 568-69 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Swiderski, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), cert. denied, 441 U.S. 993 (1979).

An enterprise, however, cannot be an inanimate object such as a bank account, Guidry v. Bank of LaPlace, 954 F.2d 278, 283 (5th Cir. 1992), or an apartment building, Elliott v. Foufas, 867 F.2d 877, 881 (5th Cir. 1989).

[42] See National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 260 (1994); H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 245, 248-49 (1989); United States v. Aucoin, 964 F.2d 1492, 1496 (5th Cir.), cert. denied, 506 U.S. 1023 (1992); United States v. Ruiz, 905 F.2d 499, 502 (1st Cir. 1990); Plains Resources, Inc. v. Gable, 782 F.2d 883, 886-87 (10th Cir. 1986); United States v. Hunt, 749 F.2d 1078, 1088 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); United States v. Romano, 736 F.2d 1432, 1441 (11th Cir. 1985); United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). (continued...)

1. Types of Enterprises

The courts have given a broad reading to the term "enterprise." Noting that Congress mandated a liberal construction of the RICO statute in order to effectuate its remedial purposes and pointing to the expansive use of the word "includes" in the statutory definition of the term, courts have held that the list of enumerated entities in Section 1961(4) is not exhaustive but merely illustrative.[43] Thus public and governmental entities as well as

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[42](...continued)
See also United States v. Gottesman, 724 F.2d 1517, 1521 (11th Cir. 1984); Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984); Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir.), aff'd in part, rev'd in part, 710 F.2d 1361 (8th Cir. 1982), cert. denied, 464 U.S. 1008 (1983); United States v. Bledsoe, 674 F.2d 647, 663 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1984); United States v. Uni Oil, Inc., 646 F.2d 946, 953 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982); United States v. Aleman, 609 F.2d 298, 303 (7th Cir. 1979), cert. denied, 423 U.S. 946 (1980); United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

[43] See United States v. London, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (association-in-fact enterprise consisting of bar and check cashing business), cert. denied, 116 S. Ct. 1542 (1996); United States v. Aimone, 715 F.2d 822, 828 (3d Cir. 1983), cert. denied, 468 U.S. 1217 (1984); United States v. Thevis, 665 F.2d 616, 625 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); United States v. Angelilli, 660 F.2d 23, 31 (2d Cir. 1981), cert. denied, 455 U.S. 945 (1982). See also United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); United States v. Perkins, 596 F. Supp. 528, 530-31 (E.D. Pa.), aff'd, 749 F.2d 28 (3d Cir. 1984), cert. denied, 471 U.S. 1015 (1985). Cf. United States v. Turkette, 452 U.S. 576, 580 (1981) ("[t]here is no restriction upon the associations embraced by the definition [of enterprise]").

private entities may constitute a RICO "enterprise",[44] including commercial entities such as corporations[45] or groups of corporations[46] (both foreign and domestic),[47] partnerships,[48] sole

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[44] See United States v. Lee Stoller Enterprise, 652 F.2d 1313, 1318 (7th Cir.), cert. denied, 517 U.S. 1155 (1981); United States v. Clark, 646 F.2d 1259, 1263 (8th Cir. 1981); United States v. Frumento, 563 F.2d 1083, 1090-92 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); see also United States v. Brown, 555 F.2d 407, 415-16 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Barber, 476 F. Supp. 182 (S.D. W. Va. 1979), aff'd, 668 F.2d 778 (4th Cir.), cert. denied, 459 U.S. 829 (1982).

[45] See United States v. Kravitz, 738 F.2d 102, 113 (3d Cir. 1984) (health care delivery corporation), cert. denied, 470 U.S. 1052 (1985); United States v. Hartley, 678 F.2d 961, 988 n.43 (11th Cir. 1982) (corporation producing seafood products), cert. denied, 459 U.S. 1170 (1983); United States v. Webster, 639 F.2d 174, 184 n.4 (4th Cir.) (tavern and liquor store), cert. denied, 454 U.S. 857 (1981); United States v. Zemek, 634 F.2d 1159, 1167 (9th Cir. 1980) (taverns), cert. denied, 450 U.S. 916 (1981); United States v. Weisman, 624 F.2d 1118, 1120 (2d Cir.) (theater), cert. denied, 449 U.S. 871 (1980); United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978) (restaurant serving as front for narcotics trafficking), cert. denied, 441 U.S. 933 (1979); United States v. Brown, 583 F.2d 659, 661 (3d Cir. 1978) (auto dealership), cert. denied, 440 U.S. 909 (1979); United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977) (bail bond agency).

[46] See Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 262-64 (2d Cir. 1995) (defendant and two corporations constituted the RICO enterprise), cert. denied, 516 U.S. 1114 (1996); United States v. Kirk, 844 F.2d 660, 664 (9th Cir.)(group of corporations), cert. denied, 488 U.S. 890 (1988); United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979) (group of corporations can be an enterprise within meaning of RICO), cert. denied, 445 U.S. 927 (1980); United States v. Perkins, 596 F. Supp. 528, 530-31 (E.D. Pa.), aff'd, 749 F.2d 28 (3d Cir. 1984) (group of corporations set up by defendant to defraud government constituted a RICO enterprise), cert. denied, 471 U.S. 1015 (1985); United States v. Pryba, 674 F. Supp. 1504, 1508 (E.D. Va. 1987) (enterprise could consist of group of individuals and corporations); Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1253 (E.D. Mich. 1987)(combination of individuals and corporations meets enterprise definition); Trak

(continued...)

proprietorships[49] and cooperatives;[50] benevolent and non-profit organizations such as unions and union benefit funds,[51]

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[46](...continued)
Microcomputer Corp. v. Wearne Bros., 628 F. Supp. 1089, 1094-95 (N.D. Ill. 1985) (group of corporations can constitute RICO enterprise).

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

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

[49] See United States v. Benny, 786 F.2d 1410, 1414-15 (9th Cir.), cert. denied, 479 U.S. 1017 (1986); McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985); United States v. Tille, 729 F.2d 615, 618 (9th Cir.), cert. denied, 471 U.S. 1064 (1984); United States v. Melton, 689 F.2d 679, 685 (7th Cir. 1982); State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 676 (N.D. Ind. 1982). However, the sole proprietorship is not favored as a RICO enterprise. See cases infra at pp. 73-75.

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

[51] See United States v. Norton, 867 F.2d 1354, 1359 (11th Cir. 1989) (the Laborers International Union of North America, its subordinate local unions and its affiliated employee benefit funds); United States v. Robilotto, 828 F.2d 940, 947 (2d Cir. 1987) (Local 294 of the International Brotherhood of Teamsters), cert. denied, 484 U.S. 1011 (1988); United States v. Provenzano, 688 F.2d 194, 199-200 (3d Cir.) (Local 560 of the Teamsters Union), cert. denied, 459 U.S. 1071 (1982); United States v. LeRoy, 687 F.2d 610, 616-17 (2d Cir. 1982) (Local 214 of Laborers International Union of North America), (continued...)

schools,[52] and political associations;[53] governmental units such as the offices of governors, state and congressional legislators,[54]

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[51](...continued)
cert. denied, 459 U.S. 1174 (1983); United States v. Scotto, 641 F.2d 47, 51, 54 (2d Cir. 1980) (Local 1814 of the International Longshoremen's Association), cert. denied, 452 U.S. 961 (1981); United States v. Rubin, 559 F.2d 975, 989 (5th Cir. 1977) (unions and employees welfare benefit plans), vacated and remanded, 439 U.S. 810 (1978), aff'd in part and rev'd in part on other grounds, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979); United States v. Kaye, 556 F.2d 855, 861-62 (7th Cir.) (Local 714 of the International Brotherhood of Teamsters), cert. denied, 434 U.S. 921 (1977); United States v. Campanale, 518 F.2d 352, 355 (9th Cir. 1975) (applying RICO without discussion to Local 626 of the International Brotherhood of Teamsters), cert. denied, 423 U.S. 1050 (1976); United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 335 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985) (Local 560 and its benefit fund), cert. denied, 476 U.S. 1140 (1986); United States v. Field, 432 F. Supp. 55, 57-58 (S.D.N.Y. 1977) (International Longshoremen's Association), aff'd, 578 F.2d 1371 (2d Cir.), cert. denied, 439 U.S. 801 (1978); United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977) (applying RICO without discussion to the International Production Service & Sales Employees Union, but dismissing action for failure to establish a pattern of racketeering activity); United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973) (applying RICO to a union representing workers in New York's fur garment manufacturing industry), aff'd, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976).

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

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

[54] See United States v. Blandford, 33 F.3d 685, 703 (6th Cir.) (Office of the Representative for House District 14 together with individuals employed therein), cert. denied, 514 U.S. 1095 (1995); United States v. McDade, 28 F.3d 283, 295-96 (3d Cir.) (Congressman McDade and his Congressional offices in Washington, D.C. and in the 10th Congressional District of Pennsylvania), cert. denied, 514 (continued...)

courts and judicial offices,[55] police departments and sheriffs'

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[54](...continued)
U.S. 1003 (1995); United States v. Freeman, 6 F.3d 586, 596-97 (9th Cir. 1993)(Offices of the 49th Assembly District), cert. denied, 511 U.S. 1077 (1994); United States v. Thompson, 685 F.2d 993 (6th Cir. 1982) (en banc) (applying RICO to the Tennessee Governor's Office, but questioning the wisdom of not defining the enterprise in the indictment as a "group of individuals associated in fact that made use of the office of Governor of the State of Tennessee"), cert. denied, 459 U.S. 1072 (1983); United States v. Long, 651 F.2d 239, 241 (4th Cir.) (office of Senator in the South Carolina legislature), cert. denied, 454 U.S. 896 (1981); United States v. Sisk, 476 F. Supp. 1061, 1062-63 (M.D. Tenn. 1979), aff'd, 629 F.2d 1174 (6th Cir. 1980) (Tennessee Governor's Office), cert. denied, 449 U.S. 1084 (1981); see also United States v. Gillock, 445 U.S. 360, 373 n.11 (1979) ("[o]f course, even a member of Congress would not be immune under the federal Speech or Debate Clause from prosecution for the acts which form the basis of the . . . [RICO] charges here"). But see United States v. Mandel, 415 F. Supp. 997, 1020-22 (D. Md. 1976), rev'd on other grounds, 591 F.2d 1347 (4th Cir.), aff'd on reh'g, 602 F.2d 653 (4th Cir. 1979) (en banc) (state of Maryland not an "enterprise" for RICO purposes), cert. denied, 445 U.S. 961 (1980). Mandel, however, has been discredited by all courts that have considered the issue, including the Fourth Circuit. See, e.g., United States v. Angelilli, 660 F.2d 23, 33 n.10 (2d Cir. 1981), cert. denied, 455 U.S. 945 (1982); United States v. Long, 651 F.2d 239, 241 (4th Cir.), cert. denied, 454 U.S. 896 (1981); United States v. Clark, 646 F.2d 1259, 1261-67 (8th Cir. 1981); United States v. Altomare, 625 F.2d 5, 7 n.7 (4th Cir. 1980); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980); see also United States v. Powell, No. 87 CR 872-3 (N.D. Ill. February 27, 1988) (City of Chicago proper enterprise for purposes of RICO); State of New York v. O'Hara, 652 F. Supp. 1049 (W.D.N.Y. 1987) (in civil RICO suit, City of Niagara Falls proper enterprise); Commonwealth v. Cianfrani, 600 F. Supp. 1364 (E.D. Pa. 1985) (Pennsylvania Senate).

[55] See United States v. Grubb, 11 F.3d 426, 438 (4th Cir. 1993)(Office of the 7th Judicial Circuit); United States v. Conn, 769 F.2d 420, 424-25 (7th Cir. 1985) (Cook County Circuit Court); United States v. Blackwood, 768 F.2d 131, 137-38 (7th Cir.) (Cook County Circuit Court), cert. denied, 474 U.S. 1020 (1985); United States v. Angelilli, 660 F.2d 23, 30-34 (2d Cir. 1981) (New York City Civil Court), cert. denied, 455 U.S. 945 (1982); United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981) (applying RICO without (continued...)

offices,[56] county prosecutors'

offices,[57] tax bureaus,[58]

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[55](...continued)
discussion to Municipal Court of El Paso, Texas), cert. denied, 455 U.S. 949 (1982); United States v. Stratton, 649 F.2d 1066, 1074-75 (5th Cir. 1981) (judicial circuit); United States v. Bacheler, 611 F.2d 443, 450 (3d Cir. 1979) (Philadelphia Traffic Court); United States v. Joseph, 526 F. Supp. 504, 507 (E.D. Pa. 1981) (Office of the Clerk of Courts of Lehigh County, Pennsylvania); United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa.), aff'd, 605 F.2d 1199 (3d Cir. 1979) (same), cert. denied, 444 U.S. 1072 (1980).

[56] See United States v. DePeri, 778 F.2d 963 (3d Cir. 1985) (Philadelphia Police Department), cert. denied, 475 U.S. 1109 (1986); United States v. Alonso, 740 F.2d 862, 870 (11th Cir. 1984) (Dade County Public Safety Department, Homicide Section), cert. denied, 469 U.S. 1166 (1985); United States v. Ambrose, 740 F.2d 505, 512 (7th Cir. 1984) (Chicago Police Department), cert. denied, 472 U.S. 1017 (1985); United States v. Davis, 707 F.2d 880, 882-83 (6th Cir. 1983) (Sheriff's Office of Mahoning County, Ohio); United States v. Lee Stoller Enterprise, Inc., 652 F.2d 1313, 1316-19 (7th Cir.) (Sheriff's Office of Madison County, Illinois), cert. denied, 454 U.S. 1082 (1981); United States v. Bright, 630 F.2d 804, 829 (5th Cir. 1980) (Sheriff's Office of DeSoto County, Mississippi); United States v. Karas, 624 F.2d 500, 504 (4th Cir. 1980) (Office of County Law Enforcement Officials), cert. denied, 449 U.S. 1078 (1981); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (Sheriff's Department of Wilson County, North Carolina); United States v. Grzywacz, 603 F.2d 682, 685-87 (7th Cir. 1979) (Police Department of Madison, Illinois), cert. denied, 446 U.S. 935 (1980); United States v. Burnsed, 566 F.2d 882 (4th Cir. 1977) (applying RICO without discussion to the Vice Squad of the Charleston, South Carolina Police Department), cert. denied, 434 U.S. 1077 (1978); United States v. Brown, 555 F.2d 407, 415-16 (5th Cir. 1977) (Macon, Georgia Municipal Police Department), cert. denied, 435 U.S. 904 (1978); United States v. Cryan, 490 F. Supp. 1234, 1239-44 (D.N.J.) (applying RICO to Sheriff's Office of Essex County, New Jersey, but limiting RICO culpability to only those defendants who actually committed or authorized the acts charged in the indictment), aff'd, 636 F.2d 1211 (3d Cir. 1980).

[57] See United States v. Goot, 894 F.2d 231, 239 (7th Cir.), cert. denied, 498 U.S. 811 (1990); United States v. Yonan, 800 F.2d 164, 167-68 (7th Cir. 1986) (Cook County State's Attorney's Office), (continued...)

fire departments,[59] and executive departments and agencies.[60] An enterprise may also be comprised of a combination of entities[61]

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[57](...continued)
cert. denied, 479 U.S. 1055 (1987); United States v. Altomare, 625 F.2d 5, 7 n.7 (4th Cir. 1980) (Office of Prosecuting Attorney of Hancock County, West Virginia).

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

[59] See United States v. Balzano, 916 F.2d 1273, 1290 (7th Cir. 1990)(Chicago Fire Department).

[60] See United States v. Hocking, 860 F.2d 769, 778 (8th Cir. 1988) (Illinois Department of Transportation); United States v. Dozier, 672 F.2d 531, 543 and n.8 (5th Cir.) (Louisiana Department of Agriculture), cert. denied, 459 U.S. 943 (1982); United States v. Angelilli, 660 F.2d 23, 33 n.10 (2d Cir. 1981), cert. denied, 455 U.S. 945 (1982); United States v. Long, 651 F.2d 239, 241 (4th Cir.), cert. denied, 454 U.S. 896 (1981); United States v. Clark, 646 F.2d 1259, 1261-67 (8th Cir. 1981); United States v. Altomare, 625 F.2d 5, 7 n.7 (4th Cir. 1980); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980); United States v. Davis, 576 F.2d 1065, 1067 (3d Cir.) (warden of county prison), cert. denied, 439 U.S. 836 (1978); State of Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245, 247-48 (D. Md. 1980) (Construction and Building Inspection Division of the Department of Housing and Community Development for the City of Baltimore); United States v. Barber, 476 F. Supp. 182, 191 (S.D. W. Va. 1979) (West Virginia Alcohol Beverage Control Commission).

[61] See United States v. Parise, 159 F.3d 790, 794-95 (3d Cir. 1998) (enterprise consisted of four organizations); United States v. London, 66 F.3d 1227, 1243-44 (1st Cir. 1995)(two or more legal entities), cert. denied, 511 U.S. 1155 (1996); United States v. Console, 13 F.3d 641, 652 (3d Cir. 1993)(law firm and medical practice), cert. denied, 511 U.S. 1076 (1994); United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993)(six corporations); United States v. Butler, 954 F.2d 114, 120 (2d Cir. 1992)(broad enterprise consisting of Local 200, the pension funds, and Local
(continued...)

called an association-in-fact.[62]

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[61](...continued)
362); United States v. Collins, 927 F.2d 605 (6th Cir.)(Table)(group of corporations), cert. denied, 502 U.S. 858 (1991); United States v. Masters, 924 F.2d 1362, 1366 (7th Cir.)(law firm, two police departments, and three individuals who are defendants), cert. denied, 500 U.S. 919 (1991); United States v. Stolfi, 889 F.2d 378, 379-80 (2d Cir. 1989) (local union and its welfare benefit fund); United States v. Feldman, 853 F.2d 648, 655-59 (9th Cir. 1988) (association of five corporations and two individuals, including the defendant), cert. denied, 489 U.S. 1030 (1989); United States v. Perholtz, 842 F.2d 343, 352-54 (D.C. Cir.) (group of individuals, corporations, and partnerships), cert. denied, 488 U.S. 821 (1988); United States v. Pryba, 674 F. Supp. 1504, 1508 (E.D. Va. 1987) (enterprise could consist of group of individuals and corporations); Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1253 (E.D. Mich. 1987) (group of individuals and corporations proper enterprise); United States v. Dellacroce, 625 F. Supp. 1387, 1390 (E.D.N.Y. 1986) (two "crews" of the Gambino Crime Family and their supervisor sufficient RICO enterprise); United States v. Aimone, 715 F.2d 822, 826 (3d Cir. 1983) (enterprise may be comprised of a combination of "illegal" entities and a group of individuals associated in fact), cert. denied, 468 U.S. 1217 (1984); United States v. Thevis, 665 F.2d 616, 625-26 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); United States v. Huber, 603 F.2d 387, 393-94 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); United States v. Campanale, 518 F.2d 352, 357 n.11 (9th Cir. 1975) (enterprise composed of two corporations and a union), cert. denied, 423 U.S. 1050 (1976).

[62] See United States v. Turkette, 452 U.S. 576, 581 (1981); United States v. Nabors, 45 F.3d 238 (8th Cir. 1995)(association-in-fact consisting of the defendants); United States v. Stefan, 784 F.2d 1093, 1103 (11th Cir.) (enterprise consisting of a group of individuals associated in fact sufficient where individuals identified by name), cert. denied, 479 U.S. 1009 (1986); United States v. Mitchell, 777 F.2d 248, 259 (5th Cir. 1985) (group of individuals associated together for the purpose of importing marijuana sufficient for RICO enterprise), cert. denied, 476 U.S. 1184 (1986); United States v. Local 560, Int'l Brotherhood of Teamsters, 780 F.2d 267, 273 (3d Cir. 1985) ("Provenzano group," group of individuals, could constitute enterprise), cert. denied, 476 U.S. 1140 (1986); United States v. Santoro, 647 F. Supp. 153, 176 (E.D.N.Y. 1986) ("Luchese Family" alleged as association-in-fact enterprise), aff'd, 880 F.2d 1319 (2d Cir. 1989); Van Dorn Co.
(continued...)

2. Establishing A Legal Enterprise

Usually, there is little difficulty in proving the existence of an enterprise consisting of a legal entity: proof that the entity in question has a legal existence satisfies the enterprise element.[63]

Proof that a RICO enterprise consisting of a governmental office, such as a state office or police department, is a legal entity can be established in various ways. For example, if the governmental office or department was created by statute, regulation, or ordinance, the court can take judicial notice of the statute, regulation, or ordinance authorizing the office or department. If the governmental entity was created by a charter or contract (e.g., a joint task force), the charter or contract should be introduced into evidence. If the governmental entity is incorporated (e.g., a township), the articles of incorporation should be introduced into evidence.

Testimony from the appropriate representative of the governmental entity could establish the existence of hierarchy or organizational structure and functions of the governmental entity,

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[62](...continued)
v. Howington, 623 F. Supp. 1548, 1554 (N.D. Ohio 1985) (unnamed association of defendants could constitute proper enterprise).

[63] See United States v. Kirk, 844 F.2d 660, 664 (9th Cir.), cert. denied, 488 U.S. 890 (1988); United States v. Cauble, 706 F.2d 1322, 1340 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

as well as explain the defendant's relationship to the governmental entity and his position or function within the governmental entity. Employment records could also be used to establish the defendant's position in the governmental entity.

As one court has noted, the definition of the term "enterprise" is of necessity a shifting one, given the fluid nature of criminal associations.[64]

3. Establishing an Association-in-Fact Enterprise--the Bledsoe Case and Its Progeny

The existence of an association-in-fact enterprise is proven "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583 (1981).[65] Although it

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

[65] See also Bonner v. Henderson, 147 F.3d 457, 459 (5th Cir. 1998) (an association-in-fact enterprise consists of personnel who share a common purpose and collectively form a decision-making structure); Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996) (entity must exhibit some sort of structure for making decisions that provides mechanism for controlling and directing affairs of group); Gagan v. American Cablevision, Inc., 77 F.3d 951, 964 (7th Cir. 1996) (enterprise requires ongoing structure of persons associated through time, joined in purpose, and organized in manner amenable to hierarchical or consensual decision-making); United States v. Console, 13 F.3d 641, 651 (3d Cir. 1993)(government must demonstrate that each person performed role in group consistent with organizational structure that furthered activities of organization), cert. denied, 511 U.S. 1076 (1994); United States v. Kragness, 830 F.2d 842, 855-56 (8th Cir. 1987) (enterprise proper under Turkette test); But see Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 51 (2d Cir. 1987) (not proper enterprise where group had one, short-lived goal), cert. denied, 484 U.S. 1005 (continued...)

is more difficult to establish the existence of an association-in-fact enterprise, there are no restrictions on the type of association necessary to prove the enterprise,[66] and the association-in-fact enterprise may change its membership during the course of its activity.[67] The courts of appeals, however, have adopted somewhat different approaches on the proof required to establish the existence of an association-in-fact enterprise.

In United States v. Turkette, 452 U.S. 576 (1981), the Supreme Court stated that the enterprise element and pattern of racketeering

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[65](...continued)
(1988).

[66] United States v. Turkette, 452 U.S. 580 (1980). See also United States v. London, 66 F.3d 1227, 1243 (1st Cir. 1995)(an association-in-fact enterprise is not limited to individuals but can include legal entities), cert. denied, 116 S. Ct. 1542 (1996); United States v. Beasley, 72 F.3d 1518, 1525 (11th Cir.) (religious cult held to constitute an enterprise), cert. denied, 517 U.S. 1027 (1996); United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993)("a group of corporations should be able to constitute the entire enterprise"); United States v. Perholtz, 842 F.2d 343, 353 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988).

[67] See United States v. Coonan, 938 F.2d 1553, 1560-61 (2d Cir. 1991) (providing that the power structure endures, an association-in-fact enterprise continues to exist even though it undergoes changes in membership), cert. denied, 112 S. Ct. 1486 (1992); United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); United States v. Hewes, 729 F.2d 1302, 1310-11 (11th Cir. 1984), cert. denied, 469 U.S. 1110 (1985); United States v. Cagnina, 697 F.2d 915, 922 (11th Cir.), cert. denied, 464 U.S. 856 (1983); United States v. Riccobene, 709 F.2d 214, 223 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Errico, 635 F.2d 152, 155 (2d Cir. 1980), cert. denied, 453 U.S. 911 (1981); United States v. Clemones, 577 F.2d 1247, 1253 (5th Cir.), modified on other grounds, 582 F.2d 1373 (5th Cir. 1978), cert. denied, 445 U.S. 927 (1980).

element of RICO were separate elements and that an association-in-fact enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases 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. The existence of an enterprise at all times remains a separate element which must be proved by the Government." 452 U.S. at 583.

Applying these standards, the Supreme Court rejected the lower court's conclusion that including wholly criminal associations within the definition of the term enterprise would amount to making the "pattern of racketeering activity" the enterprise. The Court found sufficient government allegations that the enterprise consisted of a "group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings." Id. at 579.

Since the Turkette decision, the circuits have issued numerous opinions analyzing the necessary degree of distinctness required to exist between an association-in-fact enterprise and the pattern of racketeering activity. The Eighth Circuit, in United States v. Bledsoe, 674 F.2d 647 (8th Cir.), cert. denied, 459 U.S. 1040 (1983), set a strict standard for measuring the degree of separateness and distinctness required before an association-in-fact enterprise is established under RICO. The court construed Turkette to require that the enterprise exhibit three basic characteristics: (1) a common or shared purpose which animates those associated with the enterprise, (2) some continuity of structure and personality, and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity. Id. at 665. As to the third element, the court noted that the distinct structure might be demonstrated by proof that the group engaged in a diverse pattern of crimes or that it had an organizational pattern or system of authority beyond that necessary to perpetrate the predicate crimes. Id.[68]

The alleged Bledsoe enterprise consisted of numerous individuals, including the defendants, who fraudulently sold

[68] Thus, the Bledsoe court also rejected "minimal association" as sufficient to prove the existence of an enterprise and required that an enterprise possess a "distinct structure" such as the "command system of a Mafia family" or the "hierarchy, planning and division of profits within a prostitution ring;" an enterprise must be more than an informal group created to perpetrate the acts of racketeering. Bledsoe, 674 F.2d at 665.

securities of agricultural cooperatives. Defendants Phillips and Gibson formed a cooperative called UFA-Mo to facilitate the fraudulent scheme and agreed to share illicit profits generated by the scheme, but dissolved their agreement a short time later. Gibson continued to operate UFA-Mo and Phillips formed a new cooperative called PFA. While UFA-Mo and PFA employed some of the same defendants and operated in a similar manner, the two cooperatives were otherwise unrelated. Phillips continued to initiate similar schemes in other states consisting of varied participants, some of whose participation was concealed from other participants. These facts, the court found, demonstrated only that various schemes were conducted using the same modus operandi, that Phillips had initiated these schemes, and that some of the other defendants had some connection with these co-ops. The court held that the association contained insufficient structure, and that the evidence merely demonstrated the existence of separate associations of individuals without any overarching structure or common control. The court, finding no evidence of structure, a pattern of authority or control, continuity in the pattern of association, or a common purpose among all the defendants, reversed the defendants' RICO convictions. Id. at 665-67.

In another influential case, United States v. Riccobene, 709 F.2d 214, 223-24 (3d Cir.), cert. denied, 464 U.S. 849 (1983), the

Third Circuit adopted a test similar to the Bledsoe test.[69] Contrary to suggestions in Bledsoe, however, the Third Circuit recognized that the evidence used to establish the pattern of racketeering activity may also be used to establish the existence of the enterprise.[70] The Fourth, Seventh, Ninth, and Tenth Circuits have adopted the Bledsoe/Riccobene test requiring that the enterprise have an existence beyond that necessary to establish the pattern of racketeering activity.[71] Of these, the Fourth, Seventh,

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[69] United States v. Riccobene, 709 F.2d 214, 222 (3d Cir.) (holding enterprise must have ongoing organization, formal or informal: i.e., various associates of the enterprise must function as a continuing unit and enterprise must have an existence "separate and apart from the pattern of racketeering activity" and government must show hierarchical or consensual structure exists within the group for making decisions, and there "must be some mechanism for controlling and directing the affairs of group on an ongoing . . . basis"; but unnecessary to show enterprise has function wholly unrelated to racketeering activity, only that enterprise existed beyond that necessary merely to commit each of the racketeering acts), cert. denied, 464 U.S. 849 (1983).

[70] See United States v. Pellulo, 964 F.2d 193, 198, 211-12 (3d Cir. 1992) (holding that Riccobene applies to both "lawful and unlawful" enterprises and that in appropriate cases, enterprise can be inferred from proof of the pattern). See also United States v. Console, 13 F.3d 641, 648-52 (3d Cir. 1993), cert. denied, 511 U.S. 1076 (1994) (following Riccobene); United States v. McDade, 28 F.3d 283, 295 (3d Cir. 1994), cert. denied, 514 U.S. 1003 (1995) (following Riccobene).

[71] See United States v. Tillett, 763 F.2d 628, 631-32 (4th Cir. 1985) (finding enterprise evidence sufficient where leader and his financiers had common purpose of making money trafficking in illegal marijuana and that operational structure existed despite fact that changes in personnel occurred during conspiracy where evidence showed organization existed in intervals between actual drug importations); United States v. Korando, 29 F.3d 1114, 1117-19 (7th Cir.)(holding RICO enterprise must have structure and goals (continued...)

and Tenth Circuits have also concluded that proof of the existence of the enterprise may overlap with the proof of the pattern of racketeering activity.[72]

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[71](...continued)
separate and apart from the predicate acts themselves and structure sufficient to distinguish it from mere conspiracy with continuity of an informal enterprise, but also differentiation of roles could provide necessary structure to satisfy enterprise element; evidence establishing differentiation in roles between participants in the arson ring and the enterprise found sufficient), cert. denied, 513 U.S. 993 (1994); Chang v. Chen, 80 F.3d 1293, 1296-1301 (9th Cir. 1996)(holding that the enterprise allegations were deficient where the civil complaint did not allege an organization with structure beyond that which was inherent in the alleged acts of racketeering or the existence of a system of authority that guided the operation of the alleged enterprise, but merely alleged that each defendant conducted his role in the alleged fraudulent real estate transactions autonomously); Pharmacare, et al. v. Caremark, et al., 965 F. Supp. 1141, 1421-23 (D. Haw. 1996) (holding association-in-fact enterprise that includes a corporation satisfies Chang's requirement that enterprise must have existence beyond that necessary to commit acts of racketeering because corporate entities had legal existence separate and apart from participation in racketeering activity); Planned Parenthood of the Columbia Willamette, Inc., et al. v. American Coalition of Life Activists, et al., 945 F. Supp. 1355, 1383-84 (D. Or. 1996) (holding that national organization, a legal entity, composed of individuals who endorsed violence and intimidation as means of furthering anti-abortion message constituted enterprise satisfying the test set forth in Chang that enterprise have an existence beyond that which is necessary to commit acts of racketeering); United States v. Sanders, 928 F.2d 940, 943-44 (10th Cir.) (found enterprise sufficient where evidence established a constant decision making structure with leader in charge of maintaining heroin supplies with other members in charge of street distributions, even though membership changed and the leader instructed his members from prison where the group continued to exist and thrive on the proceeds of heroin sales), cert. denied, 502 U.S. 845 (1991).

[72] See United States v. Tillett, 763 F.2d 628, 631-32 (4th Cir. 1985); United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981); United States v. Rogers, 89 F.3d 1326, 1336 (7th Cir.), cert. denied, 117 S. Ct. 495 (1996); United States v. Sanders, 905 F.2d (continued...)

The Fifth Circuit appears to have taken somewhat different positions on the Bledsoe issue in several cases.[73] The Second,[74] Eleventh,[75] and

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[72](...continued)
940, 944 (10th Cir.), cert. denied, 502 U.S. 845 (1991).

[73] See Crowe v. Henry, 43 F.3d 198, 204-05 (5th Cir. 1995) (holding that plaintiff had successfully pled an ongoing association-in-fact enterprise to operate a farming venture consisting of Crowe and Henry with existence separate and apart from the pattern of racketeering and whose members operated under an hierarchical or consensual decision making structure); United States v. Williams, 809 F.2d 1072, 1094 (5th Cir.)(rejecting Bledsoe and finding sufficient jury instructions complying with Turkette and Elliott, infra, which instructions distinguished between enterprise and racketeering elements and conveyed that jury must find both existence of an enterprise and a pattern of racketeering activity), cert. denied, 484 U.S. 896 (1987); United States v. Elliott, 571 F.2d 880, 898 (5th Cir.) (holding enterprise sufficient where evidence established informal association of several individuals who carried out diversified criminal activity to make money), cert. denied, 439 U.S. 953 (1978); but also see a line of recent Fifth Circuit cases appearing to apply Bledsoe/Riccobene test but without explicitly overruling prior Fifth Circuit cases: Landry v. Airline Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 433-34 (5th Cir.) (holding that pilots who brought civil RICO suit against airline, pilots union, and pilot who represented the union in negotiations with the airline, failed to adequately allege an association-in-fact enterprise), cert. denied, 498 U.S. 895 (1990); Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 748-49 (5th Cir. 1989) (ruling plaintiff demonstrated the enterprise existed separate and apart from the racketeering activity where evidence established that defendants had associated together to commit the same predicate acts on at least one other occasion, indicating enterprise had continuity); Elliott v. Foufas, 867 F.2d 877, 881 (5th Cir. 1989) (holding that plaintiff in civil RICO suit failed to adequately allege the existence of an association-in-fact enterprise because the civil complaint failed to assert continuity--that the association existed for any purpose other than to commit the predicate offenses).

[74] See United States v. Mazzei, 700 F.2d 85, 88-90 (2d Cir. 1982) (rejecting Bledsoe and finding enterprise consisting of group of (continued...)

(...continued)
individuals associated together for common purpose of perpetuating college basketball point shaving scheme, which enterprise functioned as a continuing unit and enterprise existed separate and apart from the pattern of racketeering activity), cert. denied, 461 U.S. 945 (1983); followed by United States v. Coonan, 938 F.2d, 1553, 1559-61 (2d Cir. 1991) (holding existence of association-in-fact enterprise more readily proven by what it does rather than by abstract analysis of its structure; proof of various racketeering acts may establish the existence of enterprise), cert. denied, 112 S. Ct. 1486 (1992); see also United States v. Ferguson, 758 F.2d 843, 847-53 (2d Cir.) (holding that "RICO charges may be proven even when enterprise and predicate acts are functionally equivalent, and proof used to establish them coalesces") cert. denied, 474 U.S. 1032 (1985); United States v. Indelicato, 865 F.2d 1370, 1384 (2d Cir.) (recognizing that RICO enterprise and pattern of racketeering activity are separate elements of RICO offense but these elements may be proven by the same evidence), cert. denied, 493 U.S. 811 (1989); United States v. Bagaric, 706 F.2d 42, 55-56 (2d Cir.) (finding that, in prosecution of members of terrorist organization engaged in acts involving murder and extortion, enterprise may be established by same evidence used to prove pattern of racketeering activity; enterprise may be "in effect no more than the sum of the predicate acts of racketeering") cert. denied, 464 U.S. 840 (1983).

[75] See United States v. Church, 955 F.2d 688, 698-99 (11th Cir.) (found sufficient enterprise devoted to making money from repeated criminal activity and protecting that money by any means necessary even though enterprise membership was not the same from beginning to end, but "[a]s participants left the enterprise, others joined, each becoming involved in multiple aspects of the enterprise"), cert. denied, 506 U.S. 881 (1992); United States v. Hewes, 729 F.2d 1302, 1311 (11th Cir. 1984) (following Cagnina, infra, and holding evidence sufficient to establish association-in-fact enterprise even though enterprise consisted of "group of persons who had committed a variety of unrelated offenses with no agreement as to any particular crime" but who were "associated for the purpose of making money from the repeated criminal activity") cert. denied, 469 U.S. 1110 (1985); United States v. Cagnina, 697 F.2d 915, 921-22 (11th Cir.) (holding Turkette "did not suggest that the enterprise must have a distinct, formalized structure" and "[a]lthough both an enterprise and a pattern of racketeering activity must be shown, the proof used to establish the two elements may in particular cases coalesce," and rejecting the (continued...)

D.C. Circuits[76] have rejected the more rigid Bledsoe/Riccobene approach, holding instead that the existence of the enterprise may be inferred from the evidence establishing the pattern of racketeering activity. The Sixth Circuit has generally followed the approach of the Second, Eleventh, and D.C. Circuits in evaluating the sufficiency of association-in-fact enterprises.[77] The First

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(...continued)
Eighth Circuit's requirement that government must prove an enterprise distinct from evidence showing a pattern of racketeering and finding enterprise evidence sufficient where evidence showed an informal association with a common purpose, i.e., making money from repeated criminal activity, and association functioned several years under leadership of one defendant), cert. denied, 464 U.S. 856 (1983).

[76] See United States v. White, 116 F.3d 903, 923-25 (D.C. Cir.) (holding, where the enterprise was a drug distribution crew, the evidence established structure that extended beyond the predicate drug offenses where: (1) the crew protected a geographic marketing area and ran centralized crack storage and preparation operations, (2) two defendants occupied supervisory positions over retail-level drug sellers, (3) leaders used others to sell to buyers that they did not know and supplied crack to middle-men who resold it at the retail level, and (4) leaders shared income and cocaine supplies and one leader substituted for primary leader while he was incarcerated), cert. denied, 118 S. Ct. 390 (1997); United States v. Perholtz, 842 F.2d 343, 362-63 (D.C. Cir.)(rejecting Bledsoe and finding Turkette satisfied by evidence that associates who shared common purpose were "bound together by some form of organization so that they function[ed] as a continuing unit and thus constitut[ed] an enterprise"; existence of enterprise could be inferred from proof of pattern)(internal quotation marks omitted), cert. denied, 488 U.S. 821 (1988).

[77] See United States v. Qaoud, 777 F.2d 1105, 1115-16 (6th Cir. 1985) (holding that, although the enterprise and pattern of racketeering activity are separate elements, they may be proved by same evidence), cert. denied, 475 U.S. 1098 (1986); Hofstetter v.
(continued...)

Circuit has not adopted either the Bledsoe or Riccobene enterprise test and has specifically declined to follow Bledsoe.[78]

Moreover, recent Eighth Circuit decisions suggest that it is relaxing its view of the evidence required to establish Bledsoe's third element (i.e., whether the enterprise is distinct and separate from the pattern of racketeering activity). In particular, recent Eighth Circuit decisions appear to focus on evidence demonstrating the enterprise has an existence beyond that necessary to commit the pattern of racketeering activity, regardless of whether such evidence was also used to establish the commission of the predicate

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(...continued)
Fletcher, 905 F.2d 897, 902-03 (6th Cir. 1988) (same).

[78] See United States v. London, 66 F.3d 1227, 1244, 1230-31, 1243-45 (1st Cir. 1995)(declining to follow Bledsoe but nevertheless finding enterprise sufficient, even if Bledsoe were applicable, where bar and check cashing business used by defendant to launder money for illegal bookmakers, which also conducted significant amount of legitimate business separate from alleged racketeering activity, functioned as continuing unit and had ascertainable structure distinct from conduct in pattern of racketeering; also rejecting claim of identity between the defendant and the enterprise where business employed at least one other individual in addition to the defendant), cert. denied, 517 U.S. 1155 (1996); Libertad v. Welch, 53 F.3d 428, 444 (1st Cir. 1995)(neither Bledsoe nor Riccobene mentioned in affirming dismissal of RICO against some appellees where record showed nothing more than their participation in one blockade without continued association with other appellees; but finding sufficient evidence of enterprise in the case of two anti-abortion groups who publicly claimed their affiliation, had leaders in common, shared a common purpose and information and strategy in obtaining goals, and who participated together in five blockades and announced, more than a year after last blockade, their plans to continue combined efforts). Note: Libertad is significant because it addresses an association-in-fact enterprise consisting of a coalition of various groups which also act independently of the enterprise.

offenses.[79] Most notably, the Eighth Circuit, in United States v.

[79] See United States v. Keltner, 147 F.3d 662-68, 669 (8th Cir. 1998) (finding enterprise existed separate and apart from pattern where evidence established defendant participated in and directed activities of co-defendants and others, including several burglaries, robberies, attempted murder-for-hire, and acts of retaliation, intimidation and solicitation of perjury to protect identities); United States v. Davidson, 122 F.3d 531, 535 (8th Cir.)(upholding sufficiency of enterprise where "small but prolific" organization involved in stealing property, defrauding insurers, distributing narcotics, and committing arson and murder and leader financed activities of underlings over a period of several years; court found group had a common purpose, pattern of roles and continuing system of authority), cert. denied, 118 S. Ct. 639 (1997); Diamond Plus, Inc. v. Kolber, 960 F.2d 765, 769-70 (8th Cir. 1992) (finding enterprise sufficient where attorney and two individuals defrauded plaintiff company and facts established enterprise contained organizational pattern beyond that necessary to perpetrate predicate crimes); United States v. Flynn, 852 F.2d 1045, 1051 (8th Cir.) (finding enterprise sufficient), cert. denied, 488 U.S. 974 (1988); United States v. Leisure, 844 F.2d 1347, 1363 (8th Cir. 1987)(upholding sufficiency of enterprise where members of multi-member group demonstrated common purpose to dominate local labor unions for profit, structure and personnel were continuous and consistent throughout period of racketeering activity; structure in family and social relationships between members and their efforts to gain control of the unions was distinct from the pattern of racketeering activity), cert. denied, 488 U.S. 932 (1988); United States v. Kragness, 830 F.2d 842 (8th Cir. 1987) (enterprise consisting of numerous individuals involved in narcotics distribution organization found sufficient to establish an association-in-fact enterprise where defendants shared common purpose to import, receive, and otherwise deal in narcotics; continuity of structure found sufficient despite some personnel changes because organizational system of authority provided mechanism for directing the group's affairs on continuing, rather than ad hoc basis; enterprise structure distinct from pattern because enterprise had existence beyond that necessary to commit predicate offenses where there was evidence of other activities undertaken by enterprise aside from the commission of pattern of racketeering activity, e.g., investing in assets not exhausted with single drug run but used repeatedly over course of a number of criminal episodes); United States v. Ellison, 793 F.2d 942, 950 (8th Cir.) ("evidence . . . of the enterprise and the pattern of racketeering activity may in some cases coalesce"), cert. denied,

(continued...)

Darden, 70 F.3d 1507, 1521 (8th Cir. 1995), cited United States v. Coonan, 938 F.2d 1553, 1559 (2d Cir. 1991) and United States v. Indelicato, 865 F.2d 1370, 1384 (2d Cir. 1989), for the proposition that the same evidence could establish both the existence of the enterprise and the pattern of racketeering activity.[80]

To the extent that the Eighth Circuit's original position is premised on a requirement that the "enterprise must have an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity," Bledsoe, 674 F.2d at 663, and that the evidence establishing the enterprise must be distinct from the evidence establishing the pattern of racketeering, OCRS believes that the Eighth Circuit was too restrictive. The Supreme Court has clearly stated that while the pattern of racketeering activity and the enterprise are separate **elements** of a RICO violation, the government need not adduce different **proof** for each element since the proof to establish the enterprise and pattern elements "may in particular cases coalesce." United States v.

(...continued)
479 U.S. 937 (1986).

[80] The Darden court also relied on an early Eighth Circuit case applying the Third Circuit's Riccobene test (709 F.2d at 223-24, discussed supra), to determine whether the pattern and the enterprise were distinct and separate. See United States v. Kragness, 830 F.2d 842, 857 (8th Cir. 1987) (enterprise structure distinct from pattern because enterprise had existence beyond that necessary to commit predicate offenses).

Turkette, 452 U.S. 576, 583 (1981).[81]

Likewise, contrary to some interpretations of Bledsoe, 674 F.2d at 665, Turkette did not require proof that a RICO enterprise have a hierarchical structure or any particular structure "beyond what was necessary to perpetrate the predicate crimes." Rather, to prove an enterprise, Turkette merely required evidence of an ongoing organization, formal or informal" and evidence that "various associates function as a continuing unit." Turkette, 452 U.S. at 583.

On the other hand, to the extent the Eighth Circuit has

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[81] Indeed, in United States v. Lemm, 680 F.2d at 1199, and United States v. Ellison, 793 F.2d at 950, the Eighth Circuit readily admitted that the proof as to these two elements may coalesce in particular cases. See also United States v. White, 116 F.3d 903, 924 (D.C. Cir.) (while the enterprise is an entity separate and apart from the pattern of racketeering activity, the existence of the enterprise may be inferred from proof of the pattern), cert. denied, 118 S. Ct 390 (1997); United States v. Rogers, 89 F.3d 1326, 1336 (7th Cir.) (proof of an enterprise is separate and apart from proof of a pattern of racketeering activity, but proof used to establish the enterprise and the racketeering activity may in particular cases coalesce), cert. denied, 117 S. Ct. 495 (1996); United States v. Coonan, 938 F.2d 1553, 1559-60 (2d Cir. 1991) (holding that "proof of various racketeering acts may be relied on to establish the existence of the charged enterprise"), cert. denied, 112 S. Ct. 1486 (1992); United States v. Sanders, 905 F.2d 940, 944 (10th Cir.) (enterprise may be established by proof that the organization has an existence beyond that which is necessary to commit the predicate acts of racketeering, but the proof establishing the enterprise and the racketeering activity may be the same), cert. denied, 502 U.S. 845 (1991); United States v. Kragness, 830 F.2d 842, 856 and n.11 (8th Cir. 1987); United States v. Mazzei, 700 F.2d 85, 89 (2d Cir.), cert. denied, 461 U.S. 945 (1983); United States v. Bagnariol, 665 F.2d 877, 890-91 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); United States v. Winter, 663 F.2d 1120, 1135 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1982).

attempted to restrain the indiscriminate application of RICO, its warnings should be heeded.[82]

In light of the differences among the courts of appeals on this enterprise issue, a prosecutor obviously needs to carefully follow the law in his/her particular circuit. Thus far, the Supreme Court has not addressed the somewhat different approaches taken by the courts of appeals on the "Bledsoe" issue.

4. Variance in Proof from the Charged Enterprise

The government need not specify in a RICO indictment whether the enterprise charged is a "legal entity" or a "group of individuals associated in fact," provided that the indictment is otherwise sufficient.[83] If, however, the government in its

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[82] The courts have on several occasions indicated sensitivity to possible government abuse of the RICO statute. See, e.g.,United States v. Robertson, 15 F.3d 862, 877 (9th Cir.) ("The RICO statute seems particularly susceptible to prosecutorial abuse . . . ."), rev'd on other grounds, 514 U.S. 669 (1995); United States v. Flynn, 852 F.2d 1045, 1054 (8th Cir. 1988) (RICO statute has "tremendous potential for guilt by association"); United States v. Russotti, 717 F.2d 27, 34 n.4 (2d Cir.), cert. denied, 465 U.S. 1022 (1984); United States v. Weisman, 624 F.2d 1118, 1123 (2d Cir.), cert. denied, 449 U.S. 871 (1981); United States v. Huber, 603 F.2d 387, 395-96 (2d Cir. 1979)(RICO's broad reach "poses a danger of abuse [through] attempts to apply the statute to situations for which it was not primarily intended"), cert. denied, 445 U.S. 927 (1980); Morin v. Tupin, 835 F. Supp. 126, 131 (S.D.N.Y. 1993)("Expanding the scope of RICO beyond congressional intent is judicial legislation violative of the separation of powers doctrine established in the United States Constitution".) (quoting United States v. Anderson, 626 F.2d 1358, 1365 n.11 (8th Cir. 1980)).

[83] See United States v. Alonso, 740 F.2d 862, 870 (11th Cir. 1984), cert. denied, 469 U.S. 1166 (1985); United States v. Hartley, 678 (continued...)

indictment and at trial clearly elects one enterprise theory over another, it must prove the existence of the enterprise upon which it has based its case.[84] For example, in one case a RICO conspiracy conviction was reversed on the ground the trial court constructively amended the indictment when the trial court, responding to a question from the jury during deliberations, instructed that the government was not required to prove that the enterprise was a particular organized crime family, even though the indictment alleged that a specific crime family identified by name was the enterprise.[85]

In appropriate circumstances, it is for the jury to decide whether there was a material variance in proof from the single enterprise charged in the indictment or whether the proof showed

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

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

[85] See United States v. Weissman, 899 F.2d 1111, 1114-16 (11th Cir. 1990).

multiple enterprises rather than the single one charged.[86] Evidence of change in membership in the enterprise and temporary disruption and hiatus in the enterprises' criminal activities, however, does not necessarily preclude a finding of a single ongoing enterprise.[87]

It is important to note that a single enterprise may be found even where members of an association-in-fact enterprise form opposing factions. For example, in United States v. Orena, 32 F.3d 704, 710 (2d Cir. 1994), the indictment alleged that the RICO enterprise was an association-in-fact consisting of "members and associates of the Colombo Organized Crime Family." The indictment also referred to an internal war between two competing factions of the Colombo Family. On appeal, the defendant argued that the

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[86] See United States v. DeFries, 129 F.3d 1293, 1310-11 (D.C. Cir. 1997); United States v. Mauro, 80 F.3d 73,77 (2d Cir. 1996); United States v. Console, 13 F.3d 641, 650 (3d Cir. 1993), cert. denied, 511 U.S. 1076 (1994); United States v. Riccobene, 709 F.2d 214, 222 (3d Cir.), cert. denied, 465 U.S. 849 (1983).

[87] See United States v. Mauro, 80 F.3d 73,77 (2d Cir. 1996); United States v. Nabors, 45 F.3d 238, 241 (8th Cir. 1995); United States v. Church, 955 F.3d 688, 697-700 (11th Cir. 1992); United States v. Coonan, 938 F.2d 1553, 1560-61 (2d Cir. 1991) (providing that the power structure endures, an association-in-fact enterprise continues to exist even though it undergoes changes in membership), cert. denied, 112 S. Ct. 1486 (1992); United States v. Perholtz, 842 F.2d 343, 354 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); United States v. Hewes, 729 F.2d 1302, 1310-11 (11th Cir. 1984), cert. denied, 469 U.S. 1110 (1985); United States v. Cagnina, 697 F.2d 915, 922 (11th Cir.), cert. denied, 464 U.S. 856 (1983); United States v. Riccobene, 709 F.2d 214, 223 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Errico, 635 F.2d 152, 155 (2d Cir. 1980), cert. denied, 453 U.S. 911 (1981); United States v. Clemones, 577 F.2d 1247, 1253 (5th Cir.), modified on other grounds, 582 F.2d 1373 (5th Cir. 1978), cert. denied, 445 U.S. 927 (1980).

indictment failed to allege the existence of an ongoing enterprise because of the Family's infighting. The Second Circuit concluded, however, that the allegations and subsequent proof of the internecine war presented the question whether the enterprise was sufficiently proven, not whether the enterprise was adequately pled, and held that the enterprise element was sufficiently pled.

The Second Circuit also ruled that the existence of an internal dispute did not necessarily mean the end of the enterprise, especially where control of the enterprise was the objective of the dispute. Orena, 32 F.3d at 710. The court also found the evidence sufficient to establish that the Colombo Family members remained associated together for a common purpose even after the eruption of conflict between the two factions based in part on proof of the enterprise members' expectation of reconciliation after their dispute was settled and the efforts of other crime families to mediate the dispute. Orena, 32 F.3d at 710.[88]

5. Profit-Seeking Motive Is Not Required

In National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994), the Supreme Court held that the RICO statute contains no economic motive requirement, thereby overruling the district

[88] See also United States v. Amato, 15 F.3d 230, 234 (2d Cir. 1994) ("Rivalry and dissension, however violent, do not necessarily signify dissolution of a [RICO] conspiracy. An internal dispute among members of a conspiracy can itself be compelling evidence that the conspiracy is ongoing and that the rivals are members of it.").

court's holding that a profit-seeking motive for either the RICO enterprise or predicate acts was required, and reversing the district court's dismissal of the plaintiff's civil RICO claim.[89]

In reaching its decision to reverse, the Supreme Court opined that the enterprise in Sections 1962(a) and (b) might "very well be a profit-seeking entity,"[90] but noted that the RICO statute does not mandate that either the enterprise or the racketeering activity have an economic motive. Rather, the statute requires only that the entity be acquired through the use of illegal activity or by money obtained from illegal activities. By contrast, subsection (c) describes a "vehicle through which the unlawful pattern of racketeering activity is committed, rather than a victim of that activity." Therefore, the Court reasoned, a subsection (c) association-in-fact enterprise need not have a property interest that could be acquired or an economic motive for engaging in racketeering activity; nor do subsections (a) and (b) direct a contrary conclusion as claimed by respondents and found by the courts below. The Court concluded that neither the definitional language nor the operative language of the RICO statute required

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[89] See National Organization for Women v. Scheidler, 765 F. Supp. 937, 941-44 (N.D. Ill. 1991), aff'd, 968 F.2d 612 (7th Cir. 1992). According to the district court, neither donations made by members of the defendant organization nor the defendants causing economic injuries to the victims (clinics, doctors, and patients) through acts of extortion satisfied the requirement for a profit-making motive.

[90] NOW, 510 U.S. at 259.

that a subsection (c) enterprise have an economic or profit-seeking motive.[91] The Court also discounted the reliance by the courts below on congressional findings, noting that rather than limiting the prosecutions to [traditional] "'organized crime, Congress enacted a general statute, which although it focused on organized crime, was not limited in approach to organized crime.'"[92] Similarly, the Court was not moved by the argument that former internal Justice Department guidelines prohibited naming an association as the enterprise unless it had an economic goal, particularly when 1984 internal guidelines provided that an association-in-fact enterprise be "'directed toward an economic or other identifiable goal.'"[93] The Court declined to impose limitations not expressed in the RICO statute, finding instead parallels with the conclusion in Turkette that the statute covered the wholly illegal as well as legitimate enterprise and looked to Turkette's instruction that there were "no restriction[s] on the associations embraced by the definition" of the enterprise: i.e., the enterprise also includes "any union or group of individuals associated-in-fact."[94]

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[91] NOW, 510 U.S. at 258-59.

[92] NOW, 510 U.S. at 260 (quoting H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 299, 248 (1989)).

[93] NOW, 510 U.S. at 260.

[94] NOW, 510 U.S. at 260-61.

The lack of an economic motive requirement is important. It permits the government to use RICO against groups that do not have a financial purpose--for example, political terrorists and other groups that commit violent crimes, such as murder or bombings, but without an economic motive.

6. Defendant as Enterprise -- Identity Between Defendant and Enterprise

a. Corporate defendants

One issue that has split the circuits is whether a corporation can be both a defendant and an enterprise in either a criminal prosecution or a civil action brought pursuant to 18 U.S.C. § 1962(c). The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits have concluded that 18 U.S.C. § 1962(c) requires separate entities as the liable "person" and as the "enterprise."[95] In Haroco, Inc. v. American National Bank &

[95] See Emery v. American General Finance, Inc., 134 F.3d 1321, 1324-25 (7th Cir.), cert. denied, 525 U.S. 818 (1998); Khurana v. Innovative Health Care Systems, Inc., 130 F.3d 143, 154-55 (5th Cir. 1997), cert. granted; vacating and remanding with instructions to dismiss as moot on remand, 525 U.S. 979 (1998), dismissing as moot, 164 F.3d 900 (5th Cir. 1999); Discon, Inc. v. Nynex Corp., 93 F.3d 1055, 1063-64 (2d Cir. 1996); Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 262-63 (2d Cir. 1995), cert. denied, 116 S. Ct. 916 (1996); Crowe v. Henry, 43 F.3d 198, 205-06 (5th Cir. 1995); Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 646-47 (7th Cir. 1995); Riverwoods Chappaqua v. Marine Midland Bank, 30 F.3d 339, 344 (2d Cir. 1994); Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 377 (6th Cir. 1993), cert. denied, 510 U.S. 1193 (1994); Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190-91 (3d Cir. 1993); United States v. Robinson, 8 F.3d 398, 406-07 (7th Cir. 1993); Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1533-34 (9th Cir. 1992); Parker and Parsley Petroleum v. Dresser Industries, 972 (continued...)

Trust Co., 747 F.2d 384 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985), the Seventh Circuit explained the rationale for this rule as follows: By using "employed by or associated with" to describe the relationship between the "person" and the "enterprise", Section 1962(c) contemplates that the "enterprise" is an entity distinct from the "person". Haroco, 747 F.2d at 400. The Haroco court also reasoned that allowing a corporation to be named as a

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[95](...continued)
F.2d 580, 583 (5th Cir. 1992); Board of County Comm'rs of San Juan County v. Liberty Group, 965 F.2d 879, 885 (10th Cir.), cert. denied, 506 U.S. 918 (1992); Brittingham v. Mobil Corp., 943 F.2d 297, 301-03 (3d Cir. 1991); Palmer v. Nationwide Mutual Insurance Co., 945 F.2d 1371, 1373-74 (6th Cir. 1991); Genty v. Resolution Trust Corp., 937 F.2d 899 (3d Cir. 1991); Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990), aff'd, 948 F.2d 1280 (1991); United States v. Vogt, 910 F.2d 1184, 1197 n.5 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991); Banks v. Wolk, 918 F.2d 418, 421 (3d Cir. 1990); Landry v. Air Line Pilots Ass'n Intern. AFL-CIO, 901 F.2d 404, 425 (5th Cir.), cert. denied, 498 U.S. 895 (1990); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782 (D.C. Cir. 1988), vacated and remanded, 492 U.S. 914 (1989), on remand, 883 F.2d 1132 (D.C. Cir. 1989); Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 213 (10th Cir. 1987); Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir. 1986); Bennett v. Berg, 685 F.2d 1053, 1061-62 (8th Cir. 1982), rev'd in part, aff'd in part, 710 F.2d 1361 (8th Cir.) (affirming dismissal of count naming identical defendant and enterprise, but permitting amendment on remand), cert. denied, 464 U.S. 1008 (1983). But see Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989) (permitting Republican Party to be charged as both defendant and enterprise in light of facts, particularly the party's victimization by its own agents); United States v. Local 560, Int'l Brotherhood of Teamsters, 581 F. Supp. 279, 329-30 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985) (while RICO requires the showing of a "person" as a separate element apart from the "enterprise," these elements need not be mutually exclusive), cert. denied, 476 U.S. 1140 (1986); Bennett v. Berg, 710 F.2d 1361, 1365 (8th Cir. 1982) (McMillian, J., dissenting), cert. denied, 464 U.S. 1008 (1983).

defendant and the charged enterprise would illogically and unfairly subject a corporation to liability, not only in those instances where the corporation was the major perpetrator or central figure in a criminal scheme, but also in those instances where it was only a passive instrument or even a victim of the racketeering activity. Haroco, 747 F.2d at 401.[96]

The Eleventh Circuit is the only circuit to hold that a corporation can be both the defendant "person" and the "enterprise" for purposes of Section 1962(c). See United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), cert denied, 459 U.S. 1170 (1983). However, in United States v. Goldin of Alabama, Inc., et al., 211 F.3d 1339 (11th Cir. 2000) (en banc hearing granted) (decision pending), the Department of Justice conceded that Hartley was wrongly decided and that Section 1962(c) requires the RICO "person" to be distinct from the RICO "enterprise."

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[96] However, the Haroco court noted that a corporate entity could be the defendant "person" and the "enterprise" for purposes of a RICO action based on Section 1962(a) rather than Section 1962(c). Haroco, 747 F.2d at 402. Accord Riverwoods Chappaqua v. Marine Midland Bank, 30 F.3d 339, 345 (2d Cir. 1994); Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190 (3d Cir. 1993); Brittingham v. Mobil Corp, 943 F.2d 297, 303 (3d Cir. 1991); United States v. Vogt, 910 F.2d 1184, 1197 n.5 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991); Banks v. Wolk, 918 F.2d 418, 421 (3d Cir. 1990); Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990), aff'd after remand, 948 F.2d 1280 (4th Cir. 1991) (Table); Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir. 1986). But see Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 213 (10th Cir. 1987) (corporation could not be both enterprise and defendant under Section 1962(a) because corporation received no benefit from racketeering activity).

However, depending on the particular circumstances, a corporation may be both a defendant and a member of an association-in-fact enterprise. For example, in Cullen v. Margiotta, 811 F.2d 698, 729-30 (2d Cir.), cert. denied, 483 U.S. 1021 (1987), the Second Circuit ruled that an entity could be both the RICO "person" and part of the "enterprise" where the RICO enterprise is comprised of the entity and other distinct entities. But, in Entre Computer Centers, Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279, 1287 (4th Cir. 1987), rev'd in part, United States v. Busby, 896 F.2d 833 (4th Cir. 1990),[97] the Fourth Circuit assumed, arguendo, that a corporation could be part of an association-in-fact enterprise under RICO, but found that a corporate defendant "is already the 'person' the Act is designed to punish" and therefore could not associate with its franchises to form the RICO enterprise and also be the defendant. Similarly, in United States v. Standard Drywall Corp., 617 F. Supp. 1283 (E.D.N.Y. 1985), the alleged enterprise was a group of corporations consisting of Standard Drywall and three of its shell companies. The district court rejected the government's argument that the defendant and the enterprise were separate and distinct entities, finding the assertion "particularly tenuous" since the shell companies were non-functioning. Because there was

[97] The Busby court overruled a previous holding that required an enterprise to be different from the person for 1962(a) claims, but upheld a previous holding that required an enterprise and the person to be different for 1962(c) claims.

no real distinction between the defendant corporation and the enterprise, the indictment was dismissed.

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

It is well established, of course, that an individual may be charged both as a defendant and as a member of an association-in-fact enterprise.[98] In fact, virtually every association-in-fact case follows this pattern. There is no reason that the same rule should not apply to corporate defendants, as long as the distinction between the enterprise and the defendant corporation is real. Problems should arise only where all members of the alleged association-in-fact enterprise are not sufficiently distinct

[98] See United States v. Perholtz, 842 F.2d 343, 352-54 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 401 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985); United States v. DiGilio, 667 F. Supp. 191, 195 (D.N.J. 1987); Trak Microcomputer Corp. v. Wearne Brothers, 628 F. Supp. 1089, 1095 (N.D. Ill. 1985).

entities.[99] In cases that present close questions, however, it is best to follow the Seventh Circuit's suggestion in Haroco, and charge the corporate defendant with a Section 1962(a) violation.

b. Individual defendants

A related issue is whether an individual person, as distinguished from a corporation, may properly be charged in a RICO prosecution as both an enterprise and a defendant. Some courts have said that an individual person can occupy such a dual role, at least in some circumstances.[100] Indeed, in United States v. Salinas, 522 U.S. 52, 65 (1997), the Supreme Court arguably implied in dictum that a sole defendant could also be a RICO enterprise, stating

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[99] See Khurana v. Innovative Health Care Systems, Inc., 130 F.3d 143, 154-55 (5th Cir. 1997) (finding distinctness requirement not met where appellant named a corporation and its legal subsidiary as the enterprise and alleged as well that employees of the enterprise committed the predicate acts and that the acts were committed in the course of their employment and on behalf of the corporation), cert. granted; vacating and remanding with instructions to dismiss as moot, 525 U.S. 979 (1998); Old Time Entertainment, Inc. v. International Coffee Corp., 862 F.2d 1213 (5th Cir. 1989) (held, enterprise consisting of, inter alia, corporation and defendant directors, officers, and employees is not an association-in-fact enterprise distinct from the corporation itself).

[100] See In re Burzynski, 989 F.2d 733, 743 (5th Cir. 1993) (enterprise and person can be same for Section 1962(b) claim); Busby v. Crown Supply, Inc., 896 F.2d 833, 841 (4th Cir. 1990)(for violation of Section 1962(a), enterprise and defendant may be identical) aff'd after remand, 948 F.2d 1280 (4th Cir. 1991) (Table); United States v. Hartley, 678 F.2d 961, 989 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); United States v. Joseph, 526 F. Supp. 504, 507 (E.D. Pa. 1981); see also United States v. Hawkins, 516 F. Supp. 1204, 1206 (M.D. Ga. 1981), aff'd, 671 F.2d 1383 (11th Cir.), cert. denied, 459 U.S. 943 (1982); United States v. Elliott, 571 F.2d 880, 898 n.18 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

"though an enterprise under § 1962(c) can exist with only one actor to conduct it, in most instances it will be conducted by more than one person or entity . . . ."

However, in United States v. DiCaro, 772 F.2d 1314, 1319-20 (7th Cir. 1985), cert. denied, 475 U.S. 1081 (1986), the Seventh Circuit reversed a conviction on a Section 1962(c) count where the defendant was also the enterprise--a one-man criminal operation that carried out four actual or attempted armed robberies, two thefts, and an attempted murder. The DiCaro court held that its previous decision in Haroco, supra, holding that the corporation could not be both the defendant and the RICO enterprise, controlled and found no merit in the government's argument that this case was different because it involved an individual rather than a corporation.[101]

Similarly, depending on the circumstances, a sole proprietorship may be charged as the RICO enterprise where the proprietor is charged as the defendant. For example, in McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985), the Seventh Circuit in a civil RICO suit held that a sole proprietorship could be an "enterprise" with which the proprietor-defendant could be "associated." The McCullough court emphasized that there had to be

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[101] See also Ashe v. Corley, 992 F.2d 540, 544 (5th Cir. 1993) (holding that the Montgomery County Sheriff's Department, the alleged enterprise, and Montgomery County, the defendant, were one in the same); Guidry v. Bank of LaPlace, 954 F.2d 278, 283 (5th Cir. 1992) (complaint dismissed where court found no distinction between enterprise and defendant who was only person in sole proprietorship).

some separate and distinct existence for the person liable under RICO (the sole proprietor) and the enterprise (the sole proprietorship). The court found such a separate existence because the sole proprietor had employees working for his proprietorship with whom he "associated," and the court reasoned therefore that the enterprise was distinct from the sole proprietor. McCullough, 757 F.2d at 143-44. However, the court added that, "if the sole proprietorship were strictly a one-man show," then the required distinctness would be lacking. McCullough, 151 F.2d at 144. The First Circuit in United States v. London, 66 F.3d 1227 (1st Cir. 1995), cert denied, 517 U.S. 1155 (1996), followed McCullough in finding that defendant London's sole proprietorship was an "enterprise," with which he could be associated. The court emphasized that London had at least one other employee and held that no more was required to establish the separation of an enterprise and a defendant under RICO. London, 66 F.3d at 1244-45. Similarly, the Ninth Circuit in United States v. Benny, 786 F.2d 1410 (9th Cir.), cert. denied, 479 U.S. 1017 (1986), affirmed a RICO conviction where one of the defendants was associated with his own enterprise. The court reasoned that the co-defendant's association with the sole proprietorship made it a "troupe, not a one-man show." Benny, 786 F.2d at 1416.[102]

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[102] See also United States v. Weinberg, 852 F.2d 681 (2d Cir. 1988) (defendant conducted affairs through his real estate business, (continued...)

By contrast, in United States v. Yonan, 622 F. Supp. 721, 722-26 (N.D. Ill. 1985), rev'd on other grounds, 800 F.2d 164 (7th Cir. 1986), cert. denied, 479 U.S. 1055 (1987), the district court dismissed a Section 1962(c) count against a sole-practitioner attorney who employed one secretary, holding that employing only one secretary was not enough to transform an attorney into an enterprise. The district court also expressed reluctance to follow the Seventh Circuit's ruling in McCullough. The Seventh Circuit did not consider the merits of this holding on appeal. Yonan, 800 F.2d at 165 (dismissing appeal because government failed to appeal issue timely).[103]

E. Pattern of Racketeering Activity

The definition of a "pattern of racketeering activity" is one of the most important in the RICO statute because it defines a key

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[102](...continued)
which employed several persons and included partnerships and corporations); American Mfrs. Mut. Ins. Co. v. Townson, 912 F. Supp. 291, 295-96 (E.D. Tenn. 1995)(holding that a marriage was an "enterprise" sufficiently distinct from two married defendants); United States v. McDade, 827 F. Supp. 1153, 1180-82 (E.D. Pa. 1993), aff'd, 28 F.3d 283 (3d Cir. 1994) (holding that congressional office was an enterprise sufficiently distinct from the defendant congressman), cert. denied, 514 U.S. 1003 (1995); Bergen v. L.F. Rothschild, 648 F. Supp. 582, 589-90 (D.D.C. 1986)(defendant may be same as enterprise under Section 1962(c) where defendant is partnership).

[103] See also United States v. Roth, No. 85 CR 763, 1987 WL 12906 (N.D. Ill. June 15, 1987)(dismissing all alleged racketeering acts occurring after defendant's law firm became sole proprietorship); Zahra v. Charles, 639 F. Supp. 1405, 1407 (E.D. Mich. 1986) (individual could not be person and enterprise under § 1962(c)).

element of each substantive RICO offense under Section 1962. Section 1961(5) provides that a pattern of racketeering activity "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering."

The two violations may both be state offenses, federal offenses, or a combination of the two; they may be violations of the same statute, or of different statutes; and the acts need not have previously been charged.[104] The Supreme Court, however, has concluded that the pattern provision means "there is something to a RICO pattern beyond simply the number of predicate acts involved."[105]

1. Continuity and Relationship--Sedima S.P.R.L. and its Progeny

In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 n.14 (1985), the Supreme Court stated that the RICO pattern element required more

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[104] See United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978), modified on other grounds, 590 F.2d 1379 (5th Cir.), cert. denied, 440 U.S. 962 (1979); United States v. Parness, 503 F.2d 430, 441 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Cf. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985) (reversing circuit court's requirement that plaintiff prove prior criminal convictions on underlying predicate offenses in order to bring a civil RICO action under 18 U.S.C. § 1964(c)); Fort Wayne Books, Inc. v. Indiana, 485 U.S. 933 (1989)(same).

[105] H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 238 (1989).

than merely proving two predicate acts of racketeering. The Court pointed to legislative history indicating that the RICO pattern was not designed to cover merely sporadic or isolated unlawful activity, but rather was intended to cover racketeering activity that demonstrated some "relationship" and "the threat of continuing [unlawful] activity." Accordingly, the Supreme Court ruled that proof of such "continuity plus relationship" was required to establish a RICO pattern in addition to proof of two acts of racketeering.

Following Sedima, the Eighth Circuit formulated the strictest test, holding that multiple acts of racketeering activity did not constitute a "pattern" under RICO when the acts were all related to a single scheme or criminal episode.[106]

In H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989), the Supreme Court unanimously rejected the Eighth Circuit's multiple-scheme requirement to establish a pattern of racketeering activity and reversed the lower court's affirmation of the dismissal of a civil RICO claim for failure to allege a pattern of racketeering activity.[107] The case involved an alleged bribery scheme by Northwestern Bell designed to illegally influence members

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[106] See H.J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1987), rev'd, 492 U.S. 229 (1989); Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986).

[107] H.J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 684 (8th Cir. 1987), rev'd, 492 U.S. 229 (1989).

of the Minnesota Public Utilities Commission in the performance of their duties as regulators of Northwestern Bell. The Eighth Circuit affirmed the dismissal, holding that the petitioner's allegations were insufficient to establish the requisite "continuity" prong because the complaint alleged only a series of fraudulent acts committed in furtherance of a single scheme to influence the Commissioners. In light of the division among the circuits, the Supreme Court granted certiorari to determine whether proof of multiple separate schemes was necessary to establish a RICO pattern of racketeering activity.

The Supreme Court held that RICO does not require proof of multiple schemes, stating in part as follows: "The Eighth Circuit's test brings a rigidity to the available methods of proving a pattern that simply is not present in the idea of continuity itself; and it does so, moreover, by introducing a concept--the scheme --that appears nowhere in the language or legislative history of the Act." 492 U.S. at 240-41.

The Court concluded that a prosecutor must prove "continuity of racketeering activity, or its threat, simpliciter." 490 U.S. at 241. Because the proof could be made in many ways, the Court declined to formulate in the abstract a general test for continuity but provided the following delineation:

> "Continuity" is both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. . . . It is, in either case, centrally

a temporal concept--and particularly so in the RICO context, where **what** must be continuous, RICO's predicate acts or offenses, and the **relationship** these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the **threat** of continuity is demonstrated. [emphasis in original]

Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the field of possibilities--preferring to deal with this issue in the context of concrete factual situations presented for decision--we offer some examples of how this element might be satisfied. **A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit.** Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage". Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. **In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.** Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime". The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."

492 U.S. at 241-43 (citations omitted)(emphasis added).

Following the decision in H.J. Inc., courts of appeals have ruled that "continuity plus relationship" may not turn on the number of racketeering acts charged above the minimum requirement of two acts. Instead, the dispositive issue is whether, in light of the enterprise and the racketeering acts, the facts establish the requisite continuity or threat of continuity of criminal activity. For example, multiple mailings or wire transmissions may not establish the requisite continuity, and hence, may not constitute a RICO pattern.[108]

On the other hand, courts have found a short-lived course of racketeering activity may establish the requisite continuity and

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[108] See Parcoil Corp. v. NOWSCO Well Service Ltd., 887 F.2d 502 (4th Cir. 1989) (holding that mailing seventeen false reports over four months was not sufficient to established continuity); Vemco, Inc. v. Camardella, 23 F.3d 129 (6th Cir.) (upholding dismissal of RICO claim for lack of pattern where defendant engaged in several different forms of fraud for purpose of defrauding single victim through activities surrounding one project), cert. denied, 115 S. Ct. 579 (1994); Thompson v. Paasche, 950 F.2d 306, 311 (6th Cir. 1991) (finding that defendant's fraudulent scheme to sell nineteen lots of land over a few months was an inherently short-term affair, and by its very nature was insufficiently protracted to qualify as a pattern); Marshall-Silver Construction Co. v. Mendel, 894 F.2d 593 (3d Cir. 1990) (on remand after H.J. Inc., court found pattern lasting from June to December insufficient, refusing to focus solely on duration of acts where acts lasted relatively short time and did not threaten future criminal conduct); Sutherland v. O'Mally, 882 F.2d 1196 (7th Cir. 1989) (alleged extortion and mail fraud over five-month period did not pose sufficient threat of continuing criminal activity); Computer Services v. Ash, Baptie & Co., 883 F.2d 48 (7th Cir. 1989) (rejecting contention that each instance of alleged unauthorized copying of computer software was a separate predicate act; crimes were more like installments of one crime, and not a pattern of racketeering activity).

pattern,[109] especially where the activity was conducted by or related to a long term criminal enterprise.[110] Moreover, the requisite continuity may be proven by facts external to the defendant's own racketeering acts such as the nature of the enterprise and racketeering activities by other members or associates of the enterprise.[111]

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[109] See Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.3d 132 (D.C. Cir. 1989) (on remand after H.J. Inc., holding that pattern of acts over four days could establish a "distinct threat of long-term racketeering activity, either implicit or explicit"), cert. denied, 501 U.S. 1222 (1991).

[110] See United States v. Darden, 70 F.3d 1507, 1524-25 (8th Cir. 1995) (finding pattern sufficient where the defendant's two racketeering acts of possession of narcotics with intent to distribute and conspiracy to distribute narcotics were committed as part of a broader ongoing drug distribution network); United States v. Khan, 53 F.3d 507, 515 (2d Cir. 1995) (rejecting the defendant's claim of lack of continuity because he worked at a clinic for only nine weeks where the clinic regularly engaged in defrauding Medicaid through multiple acts of mail fraud); United States v. Church, 955 F.2d 688, 694-95 (11th Cir. 1990) (defendant's participation in two sales of cocaine over a three-month period satisfied the continuity requirement where it was pursuant to a drug enterprise that existed over thirteen years); United States v. Indelicato, 865 F.2d 1370, 1383-84 (2d Cir.) (en banc), cert. denied, 493 U.S. 811 (1989) (held sufficient continuity where organized crime group committed three simultaneous murders); United States v. Aulicino, 44 F.3d 1102, 1110-14 (2d Cir. 1995) (where the acts of defendant or the enterprise were inherently unlawful and were in pursuit of unlawful goals, courts have generally concluded that the requisite threat of continuity has been established, even if the period of racketeering activity was short; finding therefore that pattern occurring over relativity short period of three-and-one half months was sufficient in case involving kidnapping ring).

[111] See United States v. Richardson, 167 F.3d 621, 625-26 (D.C. Cir. 1999) (continuity may be established by the totality of all the codefendants' unlawful conduct); Tabas v. Tabas, 47 F.3d 1280, (continued...)

Prosecutors should pay particular attention to one unfavorable continuity decision issued after H.J. Inc., in which the Second Circuit reversed the RICO conviction of a defendant whose pattern

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[111](...continued)
1294-95 (3d Cir. 1995) (en banc) (continuity based on mail fraud predicates may be established by the overall nature of the underlying fraudulent scheme in addition to the alleged predicate acts); United States v. Busacca, 936 F. 2d 232, 238 (6th Cir. 1991) (The defendant, a union president and trustee of a benefit fund, embezzled $258,435 from the fund by issuing six checks to himself over a 2 ½ month period. The court said that "the threat of continuity need not be established solely by reference to the predicate acts alone; facts external to the predicate acts may, and indeed should be considered." The court found the requisite threat of continuity from the defendant's control of the union and the fund, the acts of concealment and disregard for proper procedures, and that there was nothing to stop the defendant's unlawful conduct until he was found liable.); United States v. Alkins, 925 F.2d 552, 551-53 (2d Cir. 1991) (the requisite continuity may be established against a defendant by evidence of crimes by other members of the enterprise not charged in the indictment); United States v. Coiro, 922 F.2d 1008, 1017 (2d Cir. 1991) (continuity established where a corrupt attorney's bribery of public officials and money laundering spanning approximately four months was part of a long term drug enterprise that engaged in other unlawful activities that was likely to continue "absent outside intervention"); United States v. Gonzalez, 921 F.2d 1530, 1544-45 & n.23 (11th Cir. 1991) (evidence of continuity was not limited to the defendant's single short lived episode of interstate travel to possess or import drugs and the act of importation and possession of the drugs on the same day, but rather was adequately established by evidence of ongoing drug trafficking by other members of the enterprise); United States v. Link, 921 F.2d 1523, 1527 (11th Cir. 1991) (evidence of continuity was not limited to the defendant's two acts of possessions of drugs with the intent to distribute, but rather was adequately established by evidence of the other unlawful drug trafficking by other members of the enterprise); United States v. Hobson, 893 F.2d 1267 (11th Cir. 1990) (continuity established where the defendant's two racketeering acts for importation of a load of marijuana and possession of the **same** load of marijuana were committed pursuant to an enterprise's ongoing drug trafficking); United States v. Kaplan, 886 F.2d 536, 543 (2d Cir. 1989) (continuity may be established by "external facts" in addition to the defendant's racketeering acts and the nature of the enterprise).

of racketeering activity, as established at trial, consisted only of accepting a bribe and, later, obstructing justice by falsely denying his acceptance of the bribe.[112] The court held that these two acts were not sufficient to constitute a pattern of racketeering activity and distinguished a situation in which a defendant accepts a bribe and then persuades another person to lie about it.[113] This decision should be limited to its somewhat unusual facts, but it does indicate the need for continued vigilance when examining a "pattern" based on a single short-lived transaction.

Prosecutors should also note that jury instructions should include a discussion of continuity. While failure to do so may not constitute plain error, the risk of reversal is substantial.[114]

2. Single Episode Rule

In response to case law and, in part, to concerns involving the potential use of a single isolated transaction to establish a

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[112] See United States v. Biaggi, 909 F.2d 662, 685-87 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991).

[113] Biaggi, 909 F.2d at 685-87.

[114] See United States v. Pellulo, 964 F.2d, 207-10 (3d Cir. 1992) (where continuity can be inferred from the jury's findings, an erroneous instruction may constitute harmless error; however, court did not reach issue of harmless error as it had already determined reversal was required on evidentiary grounds) (citing United States v. Kotvas, 941 F.2d 1141, 1144-45 (11th Cir. 1991) (although jury instructions did not instruct jury on continuity as required by H.J., Inc., defendant was not prejudiced where predicate offenses established threat of continuity)); United States v. Boylan, 898 F.2d 230, 248-51 (1st Cir.) (not plain error where serial schemes covered lengthy time frame), cert. denied, 498 U.S. 849 (1990).

defendant's pattern of racketeering activity, the Organized Crime and Racketeering Section developed a policy referred to as the "single episode rule." Decisions such as Biaggi, supra, and the need to ensure that the requisite continuity is satisfied, reinforced the need for such a policy even though the courts have not mandated a single-episode rule. Therefore, OCRS will continue to implement its single episode policy, as revised below:[115]

a. Revised Single Episode Rule

The new single episode rule is as follows:

> When a single act or course of conduct may be charged as multiple offenses or counts under the law governing those particular offenses, it will be presumed that multiple racketeering acts may be charged corresponding to those multiple offenses.

Thus, the revised single episode rule creates a presumption in favor of charging multiple predicate acts when the law permits charging multiple offenses or multiple counts for a given act or course of conduct. Historically, most courts addressing this issue in criminal cases held that two offenses can be separate RICO predicates if they were prosecutable as individual offenses.[116] The

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[115] In June 1998, OCRS revised its single episode rule for determining whether single-episode policy applies to a proposed pattern. The application of these guidelines necessarily depends on the facts of each case and rigid adherence to these should not be expected. In addition, prosecutors are urged to contact OCRS if continuity and single episode policy issues are likely to arise in a prosecution.

[116] See United States v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985)(three separate attempted murders), cert. denied, 474 U.S. (continued...)

principal exception to the revised single episode rule is as follows:

> When a single discrete short-lived course of conduct or act gives rise to multiple offenses, those offenses must be subpredicated and multiple racketeering acts may not

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[116](...continued)
1100 (1986); United States v. Pepe, 747 F.2d 632, 661-63 (11th Cir. 1984)(using extortionate means to collect extension of credit in violation of 18 U.S.C. § 894 and traveling in interstate commerce with intent to carry out the same extortionate collection in violation of 18 U.S.C. § 1952); United States v. Bascaro, 742 F.2d 1335, 1360-61 (11th Cir. 1984)(importation of and possession with intent to distribute marijuana), cert. denied, 472 U.S. 1017 (1985); United States v. McManigal, 708 F.2d 276, 282 (7th Cir.) (mailings in furtherance of same mail fraud scheme), vacated on other grounds, 464 U.S. 979 (1983), modified on other grounds on remand, 723 F.2d 580 (7th Cir. 1983); United States v. Starnes, 644 F.2d 673, 678 (7th Cir.)(Travel Act, arson, and mail fraud charges all related to a single arson scheme), cert. denied, 454 U.S. 826 (1981); United States v. Phillips, 664 F.2d 971, 1039 (5th Cir. 1981)(attempted drug importation and related travel in aid of racketeering), cert. denied, 457 U.S. 1136 (1982); United States v. Colacurcio, 659 F.2d 684, 688 n.4 (5th Cir. 1981)(multiple briberies), cert. denied, 455 U.S. 1002 (1982); United States v. Welch, 656 F.2d 1039, 1069 (5th Cir. 1981)(conspiracy to facilitate gambling under 18 U.S.C. § 1511 and accepting bribes to permit gambling in violation of state law), cert. denied, 456 U.S. 915 (1982); United States v. Martino, 648 F.2d 367, 402-03 (5th Cir. 1981)(arson and related acts of mail fraud), cert. denied, 456 U.S. 949 (1982); United States v. Morelli, 643 F.2d 402, 411-12 (6th Cir.)(telephone call in violation of wire fraud statute and related wiring of money), cert. denied, 453 U.S. 912 (1981); United States v. Karas, 624 F.2d 500, 504 (4th Cir. 1980)(payment of a bribe in three installments), cert. denied, 449 U.S. 1078 (1981); United States v. Weatherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978)(multiple mailings in furtherance of same overall scheme to defraud); United States v. Roemer, 703 F.2d 805 (5th Cir.)(mail fraud and wire fraud acts related to the same bribery scheme), cert. denied, 464 U.S. 935 (1983).

But see United States v. Phillips, 664 F.2d 971, 1038-39 (5th Cir. 1981)(holding that possession with intent to distribute and distribution of marijuana could not be separate predicate crimes because the two crimes would merge into a single violation of 21 U.S.C. § 841(a)), cert. denied, 457 U.S. 1136 (1982).

be charged.

It bears emphasis that in most instances where the law permits multiple offenses to be charged for a single course of conduct or a single act, then OCRS will permit charging multiple racketeering acts corresponding to the permissible offenses. The exception to the general rule is intended to be a narrow exception that covers truly short-lived sporadic activity which may not be charged as multiple predicate acts.

The following examples illustrate the revised single episode rule and the general exception, but are not intended to be exhaustive. Rather, the examples are intended to give some guidance. Of course, each case must be considered on its own particular facts.

b. Examples Where Multiple Racketeering Acts May Be Charged

The following are a few examples of circumstances that often arise where it will be presumed that multiple racketeering acts may be charged, provided that the law governing the particular offenses at issue allows charging multiple offenses or counts:

(1) Money laundering offense and the offense for the specified unlawful activity that generated the money that was laundered.

(2) Multiple money laundering transactions arising from the same scheme or related schemes, but multiple financial transactions moving the same sum of money must be subpredicated under one predicate act. For example, defendant deposits $10,000 into a bank account, then transfers it shortly thereafter to another account. The

conduct may not be charged as multiple predicate acts.

(3) Gambling offense and an offense involving the collection of the debt that arose from the gambling activity.

(4) A conspiracy and its object offenses where the conspiracy is broader than any of the object offenses.

a. For example, a conspiracy to murder rival LCN or gang members and four murders pursuant to that conspiracy may constitute five predicate acts.

b. Also, e.g., a broad ongoing conspiracy to distribute drugs and four separate acts of distribution may constitute five predicate acts.

(5) Importation and distribution of the same load of drugs where the transactions are part of an ongoing, more extensive drug trafficking network.

(6) Ongoing extortion or bribe schemes involving the same victim or bribe recipient in which the defendant repeatedly bribes or extorts the victim over a period of time may constitute separate racketeering acts for each payment.

a. For example, the defendant periodically collects "juice" payments from a drug dealer, operator of a gambling business, or a legitimate businessman. Multiple racketeering acts for each payment will likely be permitted.

b. Multiple payments under the "installment" theory of bribery or extortion, however, may not be charged as multiple predicate acts. See section c(2) below.

(7) Interstate travel (ITAR--18 U.S.C. 1952) or transportation of stolen goods taken by fraud (18 U.S.C. § 2314) and the criminal activity that underlies the interstate travel or that resulted in the goods being transported may constitute separate racketeering acts.

(8) Alien smuggling and related offenses of extortion, robbery, extortionate credit transactions (ECT) and

kidnapping generally may constitute separate racketeering acts.

(9) Kidnapping, robbery and extortion of the same victim may generally be charged as separate racketeering acts, but where the kidnapping is of very brief duration and is incidental to the robbery or extortion, the kidnapping may not be charged as a separate racketeering act. For example, in some states a brief detention for only a few minutes it may take to rob the victim may constitute kidnapping and robbery. In such circumstances the kidnapping may not be charged as a separate racketeering act. The brief detention that underlies the kidnapping is no more than is necessary to carry out the robbery or extortion, since such offenses must involve some degree of interference with the victim's freedom of movement.

c. Examples Where Multiple Racketeering Acts May Not Be Charged

The following are a few of the circumstances that often arise where separate racketeering acts may not be charged, but where subpredicate acts may be charged:

(1) A single act or very short-lived course of conduct that gives rise to multiple offenses must be charged as one racketeering act:

a. A defendant enters a bank, points a gun at the bank teller, robs the bank and shoots the teller, wounding the teller. The robbery, shooting, and use of a gun (assuming a RICO predicate applied) may not be charged as separate racketeering acts, but may be charged as subpredicates.

b. A single short-lived act of arson that causes physical injury and property damage and ensuing offenses, such as the arson, use of explosive devices, and offenses causing injury and damage may not be charged as separate racketeering acts, but may be charged as subpredicates.

c. Distribution and possession with intent to distribute the same load of drugs may not be

charged as separate racketeering acts.

(2) Bribery or extortion of a sum of money under the installment theory of payment: for example, the defendant demands a bribe or makes an extortionate demand in the amount of $10,000, but agrees to accept $1,000 a month. The ten payments may not be charged as ten racketeering acts, but must be charged as one predicate act.

(3) Multiple mailings or wire transmissions pursuant to a single discrete scheme to defraud the same victim may not be charged as multiple predicate acts, but depending on the particular facts, multiple racketeering acts may be charged where there is more than one victim; or even where it involves the same victim, and the mailing or wire transmission at issue has a particular significance, rather than being one of many such routine mailings or wire transmissions to execute the scheme to defraud.

(4) A narrow conspiracy to achieve a single-object offense and the object offense may not be charged as multiple racketeering acts: For example, a conspiracy to rob bank X and the robbery of bank X may not be charged as separate racketeering acts.

(5) A telephone call to facilitate a specific drug transaction and the subsequent transaction may not be charged as separate racketeering acts although separate racketeering acts may be charged for drug charges and a telephone call where the telephone call does not relate to a specific drug transaction that is already charged as a separate racketeering act.

d. Conclusion

Simply put, to determine whether multiple predicate acts may be charged for a single act or course of conduct, if the law governing the offenses at issue allows charging multiple offenses or multiple counts, then it will be presumed that multiple predicate acts may be charged, unless the circumstances fall within the narrow exception designed to preclude short-lived sporadic activity from being charged as multiple predicate acts.

It cannot be overemphasized, however, that, even if numerous racketeering acts are charged, in some instances the requisite continuity or threat of continuity may be lacking nonetheless. Therefore, OCRS will carefully analyze the facts of each case to determine whether the requisite continuity or threat of continuity has been established.

Of course, approval may be granted if the single-episode problem is remedied. One remedy is to drop one of the overlapping predicates. Another remedy is to charge the overlapping predicates as sub-parts of a single predicate act. If this remedy is employed, however, the indictment should be worded to clearly show that one or more of the sub-parts amount to only one racketeering act. With regard to special verdict forms, discussed infra at Section VI(G), they should set forth the jury's unanimous decision with respect to each sub-predicate.

3. Relationship of Predicate Offenses to Pattern

Another issue regarding the requisite pattern of racketeering activity concerns whether two racketeering acts are too different to be considered part of the same pattern. This issue was not very troublesome for the government in the past, because most courts did not require that predicate acts have a close relationship to each other.[117] Instead, courts focused on satisfying the technical

[117] See United States v. Gottesman, 724 F.2d 1517 (11th Cir. 1984)(two "isolated" sales of pirated movies sufficient to (continued...)

requirements of a "pattern" and whether the predicate acts related in some way to the affairs of the enterprise.[118] Courts generally rejected defense arguments that the lack of a specific requirement of relatedness between predicate acts rendered the definition of a "pattern" unconstitutionally vague,[119] although some courts required

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[117](...continued)
constitute pattern); United States v. Bright, 630 F.2d 804, 830 n.47 (5th Cir. 1980)(predicate crimes in pattern need only be related to affairs of enterprise, not to each other); United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.) (same), cert. denied, 439 U.S. 953 (1978); United States v. Weisman, 624 F.2d 1118, 1122-23 (2d Cir.)(enterprise itself supplies unifying links among predicate acts), cert. denied, 449 U.S. 871 (1980).

[118] See United States v. Robilotto, 828 F.2d 940, 947-48 (2d Cir. 1987), cert. denied, 484 U.S. 1011 (1988); United States v. Killip, 819 F.2d 1542, 1549 (10th Cir.), cert. denied, 484 U.S. 865 (1987); United States v. DePeri, 778 F.2d 963, 974-75 (3d Cir. 1985), cert. denied, 475 U.S. 1110 (1986); United States v. Conn, 769 F.2d 420, 424-25 (7th Cir. 1985); United States v. Blackwood, 768 F.2d 131, 137-38 (7th Cir.), cert. denied, 474 U.S. 1020 (1985); United States v. Qaoud, 777 F.2d 1105, 1116 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Santoro, 647 F. Supp. 153, 175-76 (E.D.N.Y. 1986), aff'd, 880 F.2d 1319 (2d Cir. 1989); Abelson v. Strong, 644 F. Supp. 524, 534 (D. Mass. 1986); Anton Motors Inc. v. Powers, 644 F. Supp. 299, 301-02 (D. Md. 1986); Acampora v. Boise Cascade Corp., 635 F. Supp. 66, 69-70 (D.N.J. 1986); Tryco Trucking Co. v. Belk Store Services, 634 F. Supp. 1327, 1333 (W.D.N.C. 1986); United States v. Dellacroce, 625 F. Supp. 1387, 1390 (E.D.N.Y. 1986); United States v. Castellano, 610 F. Supp. 1359, 1392 (S.D.N.Y. 1985).

In United States v. Erwin, 793 F.2d 656, 671-72 (5th Cir. 1986), cert. denied, 479 U.S. 991 (1987), the court, in reversing the RICO conspiracy conviction of one defendant for failure to prove certain predicates, held that the nexus of the predicate acts to the enterprise was insufficient because his acts related to a separate organization from the enterprise.

[119] See United States v. Qaoud, 777 F.2d 1105, 1116 (6th Cir. (continued...)

that predicate acts bear some relationship to each other.[120]

The Court first discussed the possibility of such a relationship requirement in a footnote in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985), noting that the definition of a "pattern" in the Dangerous Special Offender provision, 18 U.S.C. § 3575(e), might be a helpful model.[121] Some courts took the Sedima footnote as an indication of how the law should develop and held that the racketeering acts must be interrelated in some way.[122] Most courts

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[119](...continued)
1985), cert. denied, 475 U.S. 1098 (1986); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

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

[121] 18 U.S.C. § 3575(e), provides, in pertinent part:

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

[122] See Sun Savings & Loan Ass'n v. Dierdorff, 825 F.2d 187, 192-93 (9th Cir. 1987); United States v. Teitler, 802 F.2d 606, 612 (2d Cir. 1986); United States v. Grayson, 795 F.2d 278, 290 (3d Cir. 1986), cert. denied, 479 U.S. 1054 (1987); United States v. (continued...)

that did so, however, did not find the pattern to be lacking the requisite relationship.[123]

The Supreme Court confronted this issue directly in its decision in H.J. Inc., holding that the definition of a "pattern" from the Dangerous Special Offender provision sets forth a proper standard for relatedness between RICO predicate acts. In that respect, the Supreme Court stated:

> A pattern is an "arrangement" or order of things or activity . . . . It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or arranged.
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> * * * * *
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> Criminal conduct forms a pattern if it embraces criminal acts

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[122](...continued)
Ellison, 793 F.2d 942, 950 (8th Cir.), cert. denied, 479 U.S. 937 (1986); United States v. Fernandez, 797 F.2d 943, 951 n.5 (11th Cir. 1986), cert. denied, 483 U.S. 1006 (1987); United States v. Qaoud, 777 F.2d 1105, 1116 (6th Cir.), cert. denied, 475 U.S. 1098 (1986); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985); Temporaries, Inc. v. Maryland Nat'l Bank, 638 F. Supp. 118, 122 n.1 (D. Md. 1986); United States v. Yin Poy Louie, 625 F. Supp. 1327, 1333-34 (S.D.N.Y. 1985), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986); First Federal Savings & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 629 F. Supp. 427, 446 (S.D.N.Y. 1986); Zerman v. E.F. Hutton & Co., 628 F. Supp. 1509, 1512 (S.D.N.Y. 1986); United Fish Co. v. Barnes, 627 F. Supp. 732, 734-35 (D.N.J. 1986).

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

> that have the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated acts.

492 U.S. at 238, 240 (citations omitted).

The few cases to discuss the relatedness requirement after H.J. Inc., however, have not found problems under this broad definition.[124] In general, the courts have found a sufficient nexus or relationship between RICO predicate acts, even if the predicate acts were not directly related to each other, but were related to the RICO enterprise since their nexus to the enterprise provides the "external organizing principle that renders them [a pattern]."[125]

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[124] See, e.g., United States v. Gelb, 881 F.2d 1155 (2d Cir.), cert. denied, 493 U.S. 994 (1989); but see Heller Financial, Inc. v. Grammco Computer Sales, 71 F.3d 518, 523-25 (5th Cir. 1996) (holding acts insufficiently related based on finding of dissimilarities of purpose, results, methods, victims, and players in bribery and fraud case).

[125] See United States v. Maloney, 71 F.3d 645, 661 (7th Cir. 1995) (finding racketeering acts involving fixing cases properly joined since they related to same enterprise, a corrupt court, even though the acts were not directly related to each other), cert. denied, 117 S. Ct. 295 (1996); United States v. Locascio, 6 F.3d 924, 943 (2d Cir. 1993) (holding "that the relatedness requirement is satisfied even if the predicate acts are not directly related to each other so long as both are related to the RICO enterprise in such a way that they become indirectly connected to each other"), cert. denied, 511 U.S. 1070 (1994); United States v. Minicone, 960 F.2d 1099, 1106-07 (2d Cir.) (enterprise provided requisite nexus between bookmaking and extortion racketeering acts), cert. denied, 503 U.S. 950 (1992); United States v. Eufrasio, 935 F.2d 553, 566-67 (3d Cir.) (separately performed, functionally diverse and directly unrelated predicate acts and offenses form single pattern of racketeering, as long as all had been undertaken in furtherance of one of varied purposes of a common organized crime enterprise), cert. denied, 502 U.S. 925 (1991); United States v. Gonzalez, 921 (continued...)

Racketeering acts have been found to relate to the enterprise when (1) the alleged offenses advanced the goals or benefitted the enterprise;[126] (2) the enterprise or defendant's role was made possible or facilitated by the commission of the racketeering acts;[127] (3) the racketeering acts had some effect on the enterprise;[128] or (4) the acts were the means by which the defendant

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[125](...continued)
F.2d 1530, 1540 (11th Cir.) (irrelevant that defendants and predicate crimes were different, or even unrelated, as long as it could be reasonably inferred that each crime was intended to further the enterprise), cert. denied, 502 U.S. 860 (1991) (quoting United States v. Elliott, 571 F.2d 880, 900-02 (5th Cir. 1978)).

[126] See United States v. Wong, 40 F.3d 1347, 1374-75 (2d Cir. 1994) (pattern of racketeering activity found although racketeering acts involving murder, armed robbery and extortion were varied in type, because they were all designed to earn money for, or increase the prestige of, enterprise and had the same cast of characters), cert. denied, 516 U.S. 870 (1995).

[127] See United States v. Beasley, 72 F.3d 1518, 1525-26 (11th Cir.)(racketeering acts involving murder and arson were related in that all involved the simple purposes of eradicating dissension, eliminating opposition from the community, and confirming the members' belief in "death angels" and Yahweh's prophecies), cert. denied, 517 U.S. 1027 (1996); United States v. Crockett, 979 F.2d 1204, 1213-14 (7th Cir. 1992)(defendant's role as leader of association-in-fact crew that collected street tax facilitated the charged extortion), cert. denied, 507 U.S. 998 (1993); United States v. Ruiz, 905 F.2d 499, 504 (1st Cir. 1990) (relatedness inquiry satisfied where predicate acts shared similar purposes and methods of commission and the "collocation of so many characteristics"); United States v. Tillem, 906 F.2d 814, 822 (2d Cir. 1990)(defendant was enabled to commit the extortion from food service restaurants by reason of his position as an inspector and supervisor at the City Health Department, the enterprise).

[128] See United States v. Grubb, 11 F.3d 426, 438 (4th Cir. 1993)(enterprise was the office of Judge of the 7th Judicial Circuit).

participated in the enterprise.[129]

The statutory definition of a "pattern" also sets forth technical requirements regarding the time when the predicate acts were committed. To avoid violating the ex post facto clause,[130] the RICO statute requires that one act have been committed after October 15, 1970, the effective date of RICO.[131] See infra, Section VI (E)(4). Also, the last act must have been committed within ten years of a prior act, excluding any period of imprisonment. This ten-year requirement has occasionally led to the mistaken view that RICO has a ten-year limitations period. In fact, this requirement means only that the last racketeering act must have occurred within ten years after commission of a prior racketeering act that is

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[129] See United States v. Starrett, 55 F.3d 1525, 1548-49 (11th Cir. 1995) (finding that defendant motorcycle club members participated in the enterprise (the motorcycle club) through a pattern of racketeering activity; and predicate acts involving narcotics were clearly related to the enterprise), cert. denied, 517 U.S. 1111 (1996); United States v. Yarbrough, 852 F.2d 1522, 1544 (9th Cir.) (finding that defendant's participation in three predicate acts were the means "through" which he participated in the enterprise's affairs), cert. denied, 488 U.S. 866 (1988).

[130] U.S. Const. art. I, § 9, cl. 3.

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

essential to establish the requisite two acts.[132] For example, if only two racketeering acts constitute the pattern and the first act occurred in 1986, the last act must have occurred within ten years after 1986. If more than two acts constitute the pattern, it is permissible to have a time span longer than ten years between the first and last racketeering acts as long as there is another racketeering act within ten years of each racketeering act, that is, acts must not be more than ten years apart.[133]

Courts have held that the requirement that one act of racketeering be committed after the effective date of RICO eliminates any ex post facto problems, even if some acts of racketeering occurred before the effective date.[134] As a practical matter, this requirement is not likely to present problems for prosecutions in the twenty-first century. However, a related problem exists with respect to predicate offenses added to the RICO statute by amendment over the past several years.[135] For example, 1984 legislation added to the definition of "racketeering activity" two new categories of offenses: dealing in obscene matter under state or federal law, 18 U.S.C. §§ 1461-1465, and federal currency

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[132] See United States v. Pungitore, 910 F.2d 1084, 1129 n.63 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991).

[133] See Pungitore, 910 F.2d at 1129 n.63.

[134] See infra Section VI (E)(4) (Ex Post Facto Clause Challenges).

[135] See supra notes 2-10 Section I and infra Section VI (E)(4).

violations under the Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5311-5324. The 1986 legislation added witness, victim and informant tampering, 18 U.S.C. §§ 1512 and 1513, and money laundering, 18 U.S.C. §§ 1956 and 1957, as RICO predicates. The effective date of the 1984 additions was October 12, 1984 and the 1986 amendments, October 27, 1986 (money laundering) and November 10, 1986 (victim, witness and informant intimidation).[136] The question may arise whether a RICO indictment returned after these dates can include racketeering activity that violates the newly included statues when that activity occurred on or before the effective dates of the amendment(s). It is the policy of the Criminal Division that at least one act of racketeering charging the newly added predicate offense must have occurred after the effective date of the amendment adding the pre-existing statute. Otherwise, the Criminal Division will not approve charging any racketeering act pre-dating the amendment. For example, in a RICO indictment returned in 1986, it would be permissible to include as racketeering acts Title 31 violations occurring in September 1984 only if at least one other Title 31 violation were charged that occurred on or after October 12, 1984, the effective date of the amendment adding Title 31 offenses. Of course, for statutes (e.g., 18 U.S.C.

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

§§ 1956 and 1957 (involving money-laundering)), that were newly enacted at the same time they became RICO predicates, it is not possible to charge violations occurring entirely before the time they became RICO predicates. For example, if the predicate offense was newly enacted and added to the RICO statue on January 1, 1998, the indictment could not include any violation of that offense that was completed prior to January 1, 1998.

F. Unlawful Debt

The definition of "unlawful debt" is significant where a defendant is charged under RICO for "collection of an unlawful debt," rather than with engaging in a pattern of racketeering activity.[137] Participating in the affairs of an enterprise through the collection of an unlawful debt is an alterative ground for imposing liability under 1962(a), (b), (c) and (d), and the government is not required to prove a pattern of racketeering activity in such cases, that is, the collection of a single unlawful debt satisfies the statute's "collection of unlawful debt" requirement. See United States v. Oreto, 37 F.3d 739, 751 (1st Cir.

[137] For a case involving numerous instances of unlawful debt collection, see United States v. Pepe, 747 F.2d 632 (11th Cir. 1984). Note that it is possible to have two Section 1962(c) counts, one based on a pattern of racketeering and one based on an unlawful debt collection. United States v. Vastola, 670 F. Supp. 1244 (D.N.J. 1987). See also United States v. Spillone, 879 F.2d 514 (9th Cir. 1989) (not plain error to define "collection" of unlawful debt through the definition of that term in the extortionate credit transactions statute, 18 U.S.C. § 891), cert. denied, 498 U.S. 864 (1990).

1994), cert. denied, 513 U.S. 1177 (1995); United States v. Weiner, 3 F.3d 17, 24 (1st Cir. 1993); United States v. Eufrasio, 935 F.2d 553, 559 and n.3 (3d Cir.), cert. denied, 502 U.S. 925 (1991). The definition includes debts that are incurred in connection with an illegal gambling business or an illegal money-lending business. If the unlawfulness is based on usury laws, the usurious rate charged must be at least twice the enforceable rate.[138]

The definition of unlawful debt has not been the subject of extensive RICO litigation, partly because collection of an unlawful debt is not often charged in RICO counts. One court has clarified the role of state law in determining the applicability of the definition, finding that for a gambling debt it is not necessary that the state specifically outlaw the "business of gambling." Instead, it is sufficient that gambling is illegal under state law.[139] Another court has held that, where a debt is unlawful

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[138] Section 1961(6)(b). See United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1432-33 (E.D.N.Y. 1985) (dismissing collection of unlawful debt charge where complaint failed to allege that defendant charged an interest rate that was twice the enforceable rate), aff'd, 879 F.2d 20 (2d Cir. 1989).

[139] See United States v. Salinas, 564 F.2d 688 (5th Cir. 1977), cert. denied, 435 U.S. 951 (1978). For a general discussion of the unlawful debt definition, particularly its "in the business of" aspect, see Durante Brothers & Sons, Inc. v. Flushing National Bank, 755 F.2d 239 (2d Cir.), cert. denied, 473 U.S. 906 (1985). See also United States v. Aucoin, 964 F.2d 1492, 1495-96 (5th Cir.) (unlawful gambling activity was a state misdemeanor; unlike definition of a racketeering act, unlawful debt collection need not carry one year penalty), cert. denied, 506 U.S. 1023 (1992); United States v. Giovanelli, 945 F.2d 479, 490 (2d Cir. 1991)(collection

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because of usury laws, the defendant need not have knowledge of the specific interest rate charged, as long as he knew the loan was unlawful and the rate charged was, in fact, usurious by virtue of being at least twice the legal rate.[140] Furthermore, the collection of unlawful debt does not require use of fear or intimidation.[141]

An instructive example of a major racketeering prosecution involving unlawful debt collections is United States v. Vastola, 899 F.2d 211, 226-29 (3d Cir.), cert. granted and vacated on other grounds, 497 U.S. 1001 (1990). The court found that a RICO charge based on an unlawful debt collection does not require proof of extortionate activity,[142] and that the government need only prove one collection, rather than the multiple acts required under the "pattern of racketeering activity" prong of RICO.[143] After carefully

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[139](...continued)
of losing wager); United States v. Angiulo, 847 F.2d 956 (1st Cir.) (holding that gambling debts in illegal poker games clearly were contemplated under the definition of "unlawful debt" in 18 U.S.C. § 1961(6)), cert. denied, 488 U.S. 852 (1988).

[140] See United States v. Biasucci, 786 F.2d 504 (2d Cir.), cert. denied, 479 U.S. 827 (1986).

[141] See United States v. Eufrasio, 935 F.2d 553, 577 (3d Cir.), cert. denied, 502 U.S. 925 (1991).

[142] Vastola, 899 F.2d at 226 n.18.

[143] Vastola, 899 F.2d at 228 n.21. See also United States v. Oreto, 37 F.3d 739, 751-52 (1st Cir. 1994), cert. denied, 513 U.S. 1177 (1995); United States v. Weiner, 3 F.3d 17, 24 (3d Cir. 1993); United States v. Giovanelli, 945 F.2d 479, 490 (2d Cir.), cert. denied, 111 S. Ct. 72 (1991); United States v. Eufrasio, 935 F.2d 553, 576 (3d Cir.), cert. denied, 502 U.S. 925 (1991); United
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examining the evidence, the court also concluded that the evidence was insufficient to show that the defendant had actually participated in, or supervised, an actual debt collection. The court held, however, that Vastola was properly convicted of RICO conspiracy because he was aware of one debt collection and encouraged coconspirators to collect it. Under this analysis, the defendant agreed to the commission of one debt collection on behalf of the enterprise, which was found sufficient to establish liability under a RICO conspiracy theory.[144]

G. Racketeering Investigator (18 U.S.C. § 1961(7))

A racketeering investigator is any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect the RICO statute. This definition has been of little significance in RICO litigation to date. It applies in connection with the requirements of preserving records that have been received in response to a civil investigative demand under Section 1968.

H. Racketeering Investigation (18 U.S.C. § 1961(8))

This definition covers any inquiry conducted by any racketeering investigator for the purpose of determining whether any

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[143](...continued)
States v. Pepe, 747 F.2d 632, 674 (11th Cir. 1984).

[144] Vastola, 899 F.2d at 228-29.

person has been involved in any violation of the RICO statute or of any duly entered final order, judgment, or decree of any court of the United States in any case or proceeding arising under the statute. Like the preceding definition, this definition applies only in the case of the issuance of a civil investigative demand. To date, such demands have been rarely used in RICO investigations.

I. Documentary Materials (18 U.S.C. § 1961(9))

This definition, which includes any "book, paper, document, record, recording, or other material," also is of significance only in connection with the issuance of civil investigative demands under Section 1968. It is worthy of note that such demands can require production only of documentary materials, and not of testimony, in contrast to the broader civil investigative demand available to the government under the antitrust laws.[145]

J. Attorney General (18 U.S.C. § 1961(10))

Section 1961 of Title 18 U.S.C. § 1961 (10) defines "Attorney General" as follows:

> "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter.

This definition is particularly important regarding civil RICO

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[145] See 15 U.S.C. §§ 1311-14.

lawsuits brought by the United States. In that respect, 18 U.S.C. § 1964 (b) authorizes the "Attorney General" to initiate civil RICO lawsuits; Section 1966 authorizes the "Attorney General" to certify that a civil RICO lawsuit merits expedited consideration by the district court; and Section 1968 authorizes the "Attorney General" to issue civil investigative demands. However, the "Attorney General" need not personally authorize such matters. Rather, pursuant to the above-referenced definition of "Attorney General," such matters may be authorized by the Deputy Attorney General, the Associate Attorney General of the United States and any Assistant Attorney General of the United States, **or** any other employee of the Department of Justice, or of any department or agency of the United States "so designated by the Attorney General to carry out the powers conferred on the Attorney General by the 'RICO Statute.'"

III. RICO OFFENSES -- SECTION 1962

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

A. Section 1962(a) - Acquire An Interest In An Enterprise

Section 1962(a) provides, in part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

In order to establish a violation of Section 1962(a), the government must prove the following elements beyond a reasonable doubt:

1. Existence of an enterprise;
2. The enterprise engaged in, or its activities affected, interstate or foreign commerce;
3. The defendant derived income, 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;
4. The defendant used or invested, directly or indirectly, any part of that income, or the proceeds of that income, in the acquisition of an interest in, or the establishment or

operation of, the enterprise.[1]

This provision makes it illegal to invest the proceeds of racketeering activity in an enterprise that affects interstate commerce.[2] A classic example is a narcotics dealer using the proceeds of his narcotics trafficking acts to invest in or operate a business.[3]

Several issues are of importance in applying this section. First, it is not entirely clear from the face of the statute whether a violation of Section 1962(a) requires a defendant to have "participated as a principal" in the underlying pattern of racketeering activity. Some courts have interpreted the phrase "participated as a principal" to apply only to collection of an unlawful debt, and not to a pattern of racketeering activity.[4] The issue most often arises where an attorney or financial adviser

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[1] See United States v. Cauble, 706 F.2d 1322, 1331 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).

[2] See Brittingham v. Mobil Corp., 943 F.2d 297, 303 (3d Cir. 1991); Jiffy Lube Intern., Inc. v. Jiffy Lube of Pennsylvania, Inc., 848 F. Supp. 569, 582 (E.D. Pa. 1994)(legislative history indicates that primary purpose of provision was to halt investment of racketeering proceeds into legitimate businesses).

[3] See United States v. Cauble, 706 F.2d 1322, 1342-43 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). As noted in connection with the discussion of the "enterprise" element, some courts have held that, unlike the situation under Section 1962(c), the defendant and the enterprise can be the same entity for purposes of a Section 1962(a) violation. See supra note 96, Section II and accompanying text.

[4] See Genty v. Resolution Trust Corp., 937 F.2d 899, 907-08 (3d Cir. 1991).

assists a narcotics dealer in investing racketeering proceeds in an enterprise. Depending on how the language of Section 1962(a) is interpreted, the adviser may or may not be liable as a RICO violator.[5] However, as a matter of policy, a RICO prosecution under this provision will not be approved unless the RICO defendant is actually charged with the underlying pattern of racketeering activity. Recent case law supports this policy. For example, in Brady v. Dairy Fresh Products, Co., 974 F.2d 1149, 1152 (9th Cir. 1992), a group of investors appealed a district court's grant of summary judgment in favor of corporations and individuals involved in various investments. The Brady court found no evidence that the defendants participated as principals in the alleged pattern of racketeering and held that "the person who receives and invests the racketeering income must have participated as a principal in the racketeering activities."

Notably this policy does not mean that in a Section 1962(d) conspiracy to violate Section 1962(a), the defendant must agree

[5] See, e.g., United States v. Loften, 518 F. Supp. 839, 851 (S.D.N.Y. 1981), aff'd, 819 F.2d 1129 (2d Cir. 1987). Cf. Temple University v. Salla Bros., Inc., 656 F. Supp. 97, 103 (E.D. Pa. 1986)(possible for corporation to receive income derived from pattern of racketeering in which it had participated as a principal and use the proceeds in its own operation, in violation of Section 1962); Abelson v. Strong, 644 F. Supp. 524, 534 (D. Mass. 1986) (corporation could be held liable under § 1962(a) for using the proceeds of racketeering activity in its operations).

personally to commit the charged racketeering acts.[6] Moreover, the policy does not mean that financial advisers can never be prosecuted for assisting a criminal to launder money; under existing precedent, the government can argue that money launderers can be charged with substantive narcotics violations, on the theory that money laundering is essential to the narcotics trafficking business.[7]

Another issue that arises in connection with Section 1962(a) prosecutions is the tracing of investment money. Although defendants may argue that the government must trace to the enterprise any monies charged as being invested in violation of Section 1962(a), rigorous tracing is not required.[8]

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[6] See Salinas v. United States, 522 U.S. 52, 63-65 (1997); United States v. Loften, 518 F. Supp. 839, 851-52 (S.D.N.Y. 1981), aff'd, 819 F.2d 1130 (2d Cir. 1987).

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

[8] See United States v. Vogt, 910 F.2d 1184, 1194-95 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991). In United States v. Cauble, 706 F.2d 1322, 1342 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984), the court noted: "[T]he prosecution need prove only that illegally derived funds flowed into the enterprise; it need not follow a trail of specific dollars from a particular criminal act." In United States v. McNary, 620 F.2d 621, 628-29 (7th Cir. 1980), the court upheld a conviction under Section 1962(a), holding that "evidence of indirect investment of the proceeds of racketeering activity into an enterprise affecting interstate

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Finally, the term "income" has been construed to have its "common usage and meaning."[9] It also has been held that a Section 1962(a) count is viable even though some of the "dirty" money coming from racketeering activity came from the FBI in an undercover operation.[10]

B. Section 1962(b) -- Maintain An Interest In An Enterprise

Section 1962(b) provides:

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

In order to establish a violation of Section 1962(b), the government must prove the following elements beyond a reasonable

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

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

[10] United States v. Gonzales, 620 F. Supp. 1143, 1145 (N.D. Ill. 1985).

doubt:

> 1. Existence of an enterprise;
> 2. The enterprise engaged in, or its activities affected, interstate or foreign commerce;
> 3. The defendant acquired or maintained, directly or indirectly, an interest in or control of the enterprise;
> 4. The defendant acquired or maintained the interest through a pattern of racketeering activity or through collection of an unlawful debt.[11]

This provision has been the least used of the four RICO subsections. Section 1962(b) essentially makes it unlawful to take over an enterprise that affects interstate commerce through a pattern of racketeering activity or collection of an unlawful debt. The cases under this subsection have involved defendants fraudulently or forcibly acquiring interests in ongoing businesses.[12] Courts have held that a Section 1962(b) claim must allege a specific nexus between control of the named enterprise and the alleged racketeering activity.[13] Although the language of the statute lends itself to broad applications, policy considerations

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[11] See Trautz v. Weisman, 809 F. Supp. 239, 245 (S.D.N.Y. 1992).

[12] See United States v. Biasucci, 786 F.2d 504, 506-07 (2d Cir.) (acquisition of interests in and control over four businesses through loansharking activities involving collection of unlawful debts), cert. denied, 479 U.S. 827 (1986); United States v. Jacobson, 691 F.2d 110, 112 (2d Cir. 1982)(acquisition of bakery's lease as security for usurious loan); United States v. Parness, 503 F.2d 430, 438 (2d Cir. 1974)(acquisition of interest in corporation by illegally preventing owner from paying off loan to avoid foreclosure), cert. denied, 419 U.S. 1105 (1975).

[13] See Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190 (3d Cir. 1993); South Carolina Elec. & Gas v. Westinghouse Elec., 826 F. Supp. 1549, 1561-62 (D.S.C. 1993); Trautz v. Weisman, 809 F. Supp. 239, 245 (S.D.N.Y. 1992).

discourage creative use of this subsection. Thus, for example, a Section 1962(b) prosecution probably will not be approved where the leader of an outlaw motorcycle gang "maintained control" of an enterprise through a pattern of murders and extortions that intimidated its members. Such activity is more easily addressed as a Section 1962(c) violation. In general, Section 1962(b) should be reserved for the classic cases involving infiltration of legitimate businesses by organized criminal groups.

In construing the statute, courts have held that the term "interest" is in the nature of a proprietary interest, such as the acquisition of stock, and that the term "control" is in the nature of controlling the acquisition of sufficient stock to affect the composition of a board of directors.[14]

C. Section 1962(c) - Conduct Or Participate In Enterprise

Section 1962(c) provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's

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[14] See Whaley v. Auto Club Ins. Ass'n, 891 F. Supp. 1237, 1240-41 (E.D. Mich.)(citing Teague v. Bakker, 35 F.3d 978, 994-95 n.23 (4th Cir. 1994)), cert. denied, 115 S. Ct. 1107 (1995), which upheld a jury instruction that the "interest" contemplated by Section 1962(b) means acquiring stock or ownership equity and also gaining "actual day-to-day involvement in the management and operation" of the enterprise). See also Moffatt Enterprises, Inc. v. Borden, Inc., 763 F. Supp. 143, 147 (W.D. Pa. 1990); United States v. Jacobson, 691 F.2d 110, 112-13 (2d Cir. 1982)(term "interest" is broad enough to encompass all property rights in an enterprise, including a lease).

affairs through a pattern of racketeering activity or collection of unlawful debt.

In order to establish a violation of Section 1962(c), the government must prove the following elements beyond a reasonable doubt:

1. Existence of an enterprise;
2. The enterprise engaged in, or its activities affected, interstate or foreign commerce;
3. The defendant was employed by or was associated with the enterprise;
4. The defendant conducted or participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and
5. The defendant participated in the affairs of the enterprise through a pattern of racketeering activity or collection of unlawful debt.[15]

This provision is by far the most often used, and consequently the most important, of the substantive RICO offenses. Several issues arising under Section 1962(c) have been litigated extensively. While some of these issues have been resolved authoritatively, others remain unresolved, or are the subjects of conflicts among the federal courts of appeals. Several of the elements of a Section 1962(c) offense are discussed in connection with this manual's section on RICO definitions, supra, including those sections defining "person," "enterprise," "racketeering activity," and "pattern of racketeering activity." The present discussion addresses several other important issues.

1. Employed By or Associated With

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[15] See United States v. Starrett, 55 F.3d 1525, 1541 (11th Cir. 1995), cert. denied, 517 U.S. 1111 (1996).

A person cannot be convicted of violating Section 1962(c) unless he or she is "employed by or associated with" the enterprise. In the case of a legitimate enterprise, a defendant's employment by the enterprise can be established by evidence that he or she was on the payroll, had an ownership interest in the enterprise, or held some position in the enterprise.[16] It also is not very difficult to establish that a defendant is "associated with" a legitimate business. For example, a body shop owner is "associated with" an insurance company being defrauded,[17] and in cases involving bribery, a sheriff is "associated with" the vendor bribing him,[18] and a judge is "associated with" his or her judicial office or the court.[19]

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[16] See United States v. Gabriele, 63 F.3d 61, 68 (1st Cir. 1995)(defendant integral to carrying out operations of enterprise was employed by the enterprise); United States v. Console, 13 F.3d 641, 654 (3d Cir. 1993)(partner of law firm was employed by or associated with enterprise-firm), cert. denied, 511 U.S. 1076 (1994).

[17] See Aetna Casualty Surety Co. v. P&B Autobody, 43 F.3d 1546, 1557 (1st Cir. 1994)(persons who were either insureds or claimants under automobile policies or owners or operators of body shop involved in repairing insured automobiles were "associated with" the insurer for purposes of RICO liability).

[18] See United States v. Mokol, 957 F.2d 1410, 1416-18 (7th Cir.) (deputy sheriff who accepted bribes in exchange for providing police protection was "associated with" amusement company which operated illegal gambling business), cert. denied, 506 U.S. 899 (1992).

[19] See United States v. Grubb, 11 F.3d 426, 438-39 (4th Cir. 1993) (state judge was charged with using his judicial office to influence elections by illegally raising campaign contributions. (continued...)

In the case of an association-in-fact enterprise, the issue of a defendant's association with the enterprise merges into the issue of the enterprise's identity.[20] Thus, if the evidence adequately establishes the existence of an enterprise consisting of all the defendants, each defendant is necessarily "associated with" the enterprise. Ordinarily, the indictment will allege that the enterprise consists of all the RICO defendants and, in some cases, other persons known and unknown to the grand jury. In a case where a given defendant is not alleged to be a member of the enterprise, his or her association with the enterprise is not very difficult to establish. Given that the defendant must commit at least two acts of racketeering activity in order to be charged with a substantive violation of RICO, and often is charged with more than two racketeering acts, proof of these acts often will establish his or her association with the enterprise. However, it is preferable to introduce additional proof of the defendant's association in order to defeat a defense argument that this element has not been established separately from the pattern of racketeering activity.[21]

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[19](...continued)
The court stated that "[w]e also have a defendant who undeniably is employed by and operates or manages the enterprise within the meaning of Reves v. Ernst & Young." (citation omitted)).

[20] See United States v. Orena, 32 F.3d 704, 710 (2d Cir. 1994) (finding defendants "associated with" crime family despite internal family dispute).

[21] See discussion supra Section II (D)(3).

The case law is fairly favorable to the government in this area, in that it holds that RICO reaches peripheral figures as well as the central insiders in the enterprise.[22]

2. Conduct or Participate in the Conduct of the Enterprise's Affairs -- Reves Test

A Section 1962(c) violation also requires that a defendant participate in the conduct of an enterprise's affairs. This requirement is often considered in conjunction with the related requirement that an enterprise conduct its affairs "through a pattern of racketeering activity," as discussed below.

Prior to 1993 it was relatively easy to show that an "outsider" -- one merely "associated with" an enterprise -- was guilty of "participating in the conduct" of the enterprise's affairs. Some early cases held that the "conduct or participate" requirement was met by evidence that the defendant merely

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[22] See United States v. Garver, 809 F.2d 1291, 1301 (7th Cir. 1987); United States v. Tille, 729 F.2d 615, 620 (9th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Dickens, 695 F.2d 765, 779 (3d Cir. 1982), cert. denied, 460 U.S. 1092 (1983); United States v. Elliott, 571 F.2d 880, 903 (5th Cir.)("RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise"), cert. denied, 439 U.S. 953 (1978); United States v. Ianniello, 621 F. Supp. 1455, 1477 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986). Note that the Supreme Court has imposed an "operation or management" test on the "conduct or participate" clause of Section 1962(c) with the result that "sec. 1962(c) cannot be interpreted to reach complete outsiders." Reves v. Ernst & Young, 507 U.S. 170, 185 (1993). See discussion infra Section III (C)(2).

associated with individuals involved in the enterprise.[23] Other circuits applied slightly stricter tests,[24] while others required proof that the defendant's activities were related to the management of the affairs of the enterprise.[25]

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[23] See United States v. Elliott, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

[24] The Second Circuit held that a person conducted the affairs of an enterprise through a pattern of racketeering activity "when (1) one is able to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise." United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981). The Second Circuit test was adopted by the Third Circuit and the Ninth Circuit. United States v. Provenzano, 688 F.2d 194, 200 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Yarbrough, 852 F.2d 1522, 1544 (9th Cir.), cert. denied, 488 U.S. 866 (1988). The Fifth Circuit test modified Scotto. United States v. Cauble, 706 F.2d 1322, 1332-33 (5th Cir. 1983)(defendant conducts or participates in the conduct of an enterprise if his or her position in the enterprise facilitated his or her commission of the racketeering acts and the predicate acts had some effect on the enterprise), cert. denied, 465 U.S. 1005 (1984). The Sixth and Seventh Circuits adopted the Cauble formulation. United States v. Mokol, 957 F.2d 1410, 1417-18 (7th Cir.), cert. denied, 506 U.S. 899 (1992); United States v. Qaoud, 777 F.2d 1105, 1115 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986). The Eleventh Circuit adopted a less restrictive test than Cauble. United States v. Carter, 721 F.2d 1514, 1525-27 and n.16 (11th Cir.), cert. denied, 469 U.S. 819 (1984).

[25] See, e.g., Yellow Bus Lines v. Drivers, Chauffeurs, and Helpers Local Union 639, 913 F.2d 948, 952-56 (D.C. Cir. 1990)(en banc)(requiring significant control over or within an enterprise), cert. denied, 501 U.S. 1222 (1991); Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir.)(requiring some participation in the "operation or management of the enterprise itself"), cert. denied, 464 U.S. 1008 (1983); United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979)(requiring some involvement in the operation or management of the business), cert. denied, 445 U.S. 959, 961 (1980). A later Fourth Circuit decision applied RICO to a defendant who did not (continued...)

In 1993, the Supreme Court decided the case of Reves v. Ernst & Young, 507 U.S. 170, which directly addressed the conduct or participate requirement. In Reves, the Supreme Court held that a person is not liable for a substantive RICO violation under Section 1962(c) unless the person "participates in the operation or management of the enterprise itself." Reves, 507 U.S. at 185.[26]

In describing its "operation or management" test, the Supreme Court stated:

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs.

Reves, 507 U.S. at 179. Applying the "operation or management" test, the Court found defendant Ernst & Young's participation in the financial audits of an enterprise was insufficient to establish that it played any part in directing the affairs of the enterprise,

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(...continued)
operate or manage the enterprise. United States v. Webster, 639 F.2d 174 (4th Cir.), cert. denied, 454 U.S. 857 (1981), modified on rehearing, 669 F.2d 185, 187 (4th Cir.)(upholding RICO conviction where defendant used facilities of club to sell narcotics), cert. denied, 456 U.S. 935 (1982).

[26] The defendant in Reves was Ernst & Young, a firm that provided accounting services to the alleged RICO enterprise, a farmer's cooperative. Thus, the defendant was not an employee or member of the enterprise, but rather was an outsider that was merely "associated with" the enterprise. The plaintiffs alleged Ernst & Young misled investors by preparing and explaining the cooperative's financial information through a pattern of false and misleading statements, particularly regarding the fair market value of the cooperative's principal asset, a gasohol plant.

and hence it could not be liable under Section 1962(c).[27]

Although the Supreme Court clearly indicated that the dispositive factor for liability under Section 1962(c) is whether the defendant had "some part in directing the enterprise's affairs," the Court explicitly declined to decide what degree of direction of the enterprise's affairs was sufficient. Reves, 507 U.S. at 184 n.9. Nevertheless, the Supreme Court made several statements indicating that it was not adopting an unduly restrictive test that would limit RICO liability to persons who performed significant roles in directing the enterprise's affairs.

For example, the Court found that "RICO liability is not limited to those with primary responsibility for the enterprise's affairs" and therefore "we disagree with the suggestion of the Court of Appeals for the District of Columbia Circuit that § 1962(c) requires significant control over or within an enterprise." Reves, 507 U.S. at 179 n.4 (citing Yellow Bus, 913 F.2d at 954).

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[27] In that regard, the Supreme Court stated:

> Thus, we only could conclude that Arthur Young participated in the operation or management of the co-op itself if Arthur Young's failure to tell the co-op's board that the [gasohol] plant should have been given its fair market value constituted such participation. We think that Arthur Young's failure in this respect is not sufficient to give rise to liability under § 1962(c).

Reves, 507 U.S. at 186.

The Court further stated:

> We agree that liability under § 1962(c) is not limited to upper management, but we disagree that the "operation or management" test is inconsistent with this proposition. An enterprise is "operated" not just by upper management but also by **lower-rung** participants in the enterprise who are under the **direction** of upper management. An enterprise also might be "operated" or "managed" by others "**associated with**" the enterprise who exert control over it as, for example, by bribery.

Reves, 507 U.S. at 184 (emphasis added).

Finally, the Court noted that subsections (a) and (b) of Section 1962 were broader than subsection (c), in that subsections (a) and (b) were not restricted to persons "employed by or associated with" an enterprise as was subsection (c), and hence, (a) and (b) also applied to outsiders. The Court added:

> § 1962(c) cannot be interpreted to reach complete "outsiders" because liability depends on showing that the defendants conducted or participated in the conduct of the "enterprise's affairs," not just their own affairs. Of course, "outsiders" may be liable under § 1962(c) if they are "associated with" an enterprise and participate in the conduct of its affairs--that is, participate in the operation or management of the enterprise itself.

Reves, 507 U.S. at 185.

Thus, under the Reves test, Section 1962(c) liability attaches to an insider or outsider of an enterprise who has some part in directing the enterprise's affairs, such as exerting control over it by bribery, and liability also attaches to "lower rung

participants in the enterprise who are under the direction of upper management." Reves, 507 U.S. at 180, 184.

Following Reves, the circuit courts have made it clear that a defendant need not be among the enterprise's "control group" to be liable for a substantive RICO violation; rather, a defendant need only intentionally perform acts that are related to, and foster, the operation or management of the enterprise.[28]

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[28] See United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998) (finding that Reves does not require that defendant have decision-making power, only that defendant "take part in" the operation of the enterprise and holding that the defendant was liable under Reves since he bought multi-kilogram amounts of cocaine from the drug enterprise on a regular basis); United States v. To, 144 F.3d 737, 747 (11th Cir. 1998) (holding that Reves test was satisfied by evidence that the defendant planned and carried out a robbery with other members of an Asian crime gang that committed a series of robberies targeting Asian-American business owners and managers); United States v. Houlihan, 92 F.3d 1271, 1298 (1st Cir. 1996)(upholding instruction that jury could find defendant participated in conduct of enterprise even though he had no part in the management or control of enterprise where defendant was an "insider" integral to carrying out enterprise racketeering activity), cert. denied, 117 S. Ct. 963 (1997); United States v. Workman, 80 F.3d 688, 695-98 (2d Cir.)(reversal not required of instruction that "conduct and participate" includes acts "helpful" in operation of enterprise in light of compelling proof that one defendant was important figure in enterprise's drug trafficking network and another had participated in murder conspiracy and was major street level narcotics trafficker for enterprise), cert. denied, 117 S. Ct. 319 (1996); United States v. Masotto, 73 F.3d 1233, 1237-39 (2d Cir.)(failure to give Reves "operation and management" instruction harmless error when evidence established defendant was leader of an LCN crew), cert. denied, 117 S. Ct. 54 (1996); United States v. Maloney, 71 F.3d 645, 660-61 (7th Cir. 1995)(denying Reves challenge by defendant who claimed he was conducting his own affairs through acts of obstruction), cert. denied, 117 S. Ct. 295 (1996); United States v. Darden, 70 F.3d 1507, 1526, 1542-43 (8th Cir. 1995)(holding Reves was satisfied by evidence that the defendant participated in several murders and (continued...)

(...continued)
murder conspiracies and at least three drug trafficking transactions in an association-in-fact drug enterprise; confirming that defendant need not participate in control of enterprise as lower rung participation may satisfy Reves), cert. denied, 116 S. Ct. 1449 (1996); United States v. Hurley, 63 F.3d 1, 8-9 (1st Cir. 1995)(evidence that defendants were employees of the enterprise who helped carry out its illegal activities satisfied Reves), cert. denied, 116 S. Ct. 1322 (1996); Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 269 (3d Cir. 1995)(holding corporate officers and employees liable under Section 1962(c) as persons operating and managing the affairs of the corporate enterprise); Aetna Cas. Sur. Co. v. P.&.B. Autobody, 43 F.3d 1546, 1559-60 (1st Cir. 1994)(finding that by acting with purpose of inducing insurer to make payments on false claims, automobile repair shop, its employees and insurance claimants exerted sufficient control to satisfy Reves); United States v. Wong, 40 F.3d 1347, 1371-74 (2d Cir. 1994)(Reves test satisfied by evidence that defendants were members of gang, the "Green Dragons," and that they committed various crimes of violence "at the core of the criminal activities of the Green Dragons," even though they were not the leaders of the enterprise), cert. denied, 115. S. Ct. 1968 (1995); United States v. Oreto, 37 F.3d 739, 751-53 (1st Cir. 1994)(finding that Congress intended to reach all who participated in the conduct of that enterprise, whether they were "generals or foot soldiers" and holding that Reves test was satisfied by evidence that the defendant collected extortion payments under the direction of leaders of an extortion collection enterprise), cert. denied, 115 S. Ct. 116 (1995); Napoli v. United States, 32 F.3d 31, 36 (2d Cir. 1994) (overwhelming evidence that attorneys, although "of counsel" to the law firm enterprise, were not merely providing peripheral advice, but participated in the core activities that constituted the affairs of the firm), cert. denied, 115 S. Ct. 900 (1995), reh'g granted, 45 F.3d 680, 683 (2d Cir.)(upholding convictions of law firm investigators who were "lower-rung participants" whose racketeering activities were conducted "under the direction of upper management"), cert. denied, 115 S. Ct. 1796 (1995); United States v. Thai, 29 F.3d 785, 816 (2d Cir.)(finding liable defendant Quang who ordered and organized a series of robberies because "plainly he was not at the bottom of the management chain" of an enterprise involved in robberies), cert. denied, 115 S. Ct. 456 (1994); United States v. Grubb, 11 F.3d 426, 439 n.24 (4th Cir. 1993)(holding state judge participated in the operation or management of the enterprise, his judicial office); Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 380 (6th Cir. 1993)(finding
(continued...)

These acts include carrying out the directions of higher-ups in the enterprise or implementing their decisions to accomplish objectives

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(...continued)
life insurance company exercised sufficient control over the affairs of the enterprise (which sold insurance policies for several companies) to withstand scrutiny under Reves), cert. denied, 510 U.S. 1193 (1994); United States v. Weiner, 3 F.2d 17, 24 (1st Cir. 1993)(upholding instruction under Reves that "the terms 'conduct' and 'participate' in the conduct of the affairs of the enterprise include the intentional and deliberate performance of acts, functions or duties related to the operation or management of the enterprise"); Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1541-42 (10th Cir. 1993)(finding sufficient evidence to support jury's verdict that insurance parent company participated in the conduct of RICO enterprise). But see Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996)(finding that mayor who received bribes from real estate developer did not manage the enterprise but had been controlled by the enterprise); Webster v. Omnitrition, Int. Inc., 79 F.3d 776, 788 (9th Cir.)(holding that an attorney in a purely ministerial role was not liable under RICO), cert. denied, 117 S. Ct. 174 (1996); United States v. Viola, 35 F.3d 37, 41 (2d Cir. 1994)(finding defendant who performed light clean-up and maintenance work for leader of drug and stolen property distribution enterprise did not have a "part in directing the enterprise's affairs"), cert. denied, 115 S. Ct. 1270 (1995); Azrielli v. Cohen Law Offices, 21 F.3d 512, 521 (2d Cir. 1994)(holding that an attorney representing other defendants and who had no role in the conception, creation, or execution of fraudulent stock scheme did not participate in management or direction of enterprise); Baumer v. Pachl, 8 F.3d 1341, 1343-46 (9th Cir. 1993)(finding that preparation of two letters, a partnership agreement, and assistance in a Chapter 7 proceeding did not impute liability under Reves); Stone v. Kirk, 8 F.3d 1079, 1093 (6th Cir. 1993)(holding that a sales representative for a recording company engaged in pattern of racketeering activity when he repeatedly violated the anti-fraud provisions of the securities laws, but did not participate in operation or management of the company); Univ. of Maryland v. Peat, Marwick, Main, 996 F.2d 1534, 1539 (3d Cir. 1993)(finding that providing goods and services that ultimately benefitted the enterprise did not result in RICO liability); Nolte v. Pearson, 994 F.2d 1311, 1317 (8th Cir. 1993)(finding no evidence that attorneys participated in the operation or management of the enterprise).

of the enterprise and its members.[29]

The courts have also emphasized that Reves was primarily concerned with the RICO liability of "outsiders" of an enterprise who may only remotely assist the enterprise's affairs. For example, in United States v. Oreto, 37 F.3d 739, 743 (1st Cir. 1994), cert. denied, 115 S. Ct. 1161 (1995), the indictment alleged that the RICO enterprise consisted of a group of individuals who were charged with 74 acts of extortionate lending or collection transactions and 62 acts of usurious lending. Defendant Oreto, Jr. contended that the evidence did not satisfy Reves because he was not a leader of the enterprise and "was a mere collector for a short period of time" who was involved in only four of the charged transactions. Oreto, 37 F.3d at 753. The court rejected this claim, stating that RICO "requires neither that a defendant share in the enterprise's profits nor participate for an extended period of time, so long as the predicate act requirement is met." The court further explained:

> Reves is about the liability of **outsiders** who may assist

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[29] See United States v. Starrett, 55 F.3d 1525, 1548 (11th Cir. 1995)(holding that those who implement decisions made by others are liable under the operation or management test), cert. denied, 116 S. Ct. 135 (1996); United States v. Oreto, 37 F.3d 739, 750-51 (1st Cir. 1994)(holding generals and foot soldiers who conduct the affairs of an enterprise are liable), cert. denied, 115 S. Ct. 1161 (1995); United States v. Wong, 40 F.3d 1347, 1373-74 (2d Cir. 1994)(finding that a defendant acting under the direction of supervisors in a RICO enterprise participates in the operation of the enterprise within the meaning of § 1962(c)), cert. denied, 115 S. Ct. 2568 (1995).

> the enterprise's affairs. Special care is required in translating Reves' concern with "horizontal" connections-focusing on the liability of an outside adviser-into the "vertical" question of how far RICO liability may extend within the enterprise but down the organizational ladder. In our view, the reason the accountants were not liable in Reves is that, while they were undeniably involved in the enterprise's decisions, they neither made those decisions nor carried them out; in other words, the accountants were outside the chain of command through which the enterprise's affairs were conducted.

Oreto, 37 F.3d at 750.

Similarly, in United States v. Gabriele, 63 F.3d 61 (1995), the First Circuit rejected defendant Gabriele's claim that the evidence did not satisfy Reves because he was merely a low-rung employee in an extensive money laundering enterprise. The enterprise was led by Gabriele's co-conspirator, Stephen Saccoccia, who, from the mid-1980's until late 1991, laundered over $136 million for Colombian drug traffickers through thousands of diverse transactions. Defendant Gabriele had helped Saccoccia transfer large sums of cash and was convicted of offenses involving six monetary transactions carried out on behalf of the Saccoccia-led enterprise. The Court found the evidence sufficient to satisfy Reves, stating that:

> The government introduced ample evidence . . . that Gabriele, unlike the accounting firm in Reves, was not an independent "outsider" but a full-fledged "employee" of the Saccoccia enterprise . . . . Even employees not engaged in directing the operations of the RICO enterprise are criminally liable if they are "plainly integral to carrying [it] out."

Gabriele, 63 F.3d at 68 (citations omitted).

It is also noteworthy that the Second, Fifth, Seventh, and Eleventh Circuits have held that Reves does not require proof that the defendant agreed personally to participate in the operation or management of the enterprise,[30] while the Third and Ninth Circuits hold that the Reves' operation or management test applies to a RICO conspiracy.[31] The minority circuits reason that the defendant cannot be held liable for a conspiracy to violate RICO unless there is specific evidence the defendant conspired personally to operate or manage the enterprise under Reves. Under such reasoning, the defendant who merely conspires to violate RICO with an individual who is operating or managing a RICO enterprise cannot be held guilty of violating the RICO conspiracy statute.

Such a conclusion is contrary to the general legal principles of conspiracy law relied on by the majority of circuits, which draw a sharp distinction between RICO's substantive offenses, at 18

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[30] See Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961 (7th Cir. 2000); United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998); United States v. Castro, 89 F.3d 1443, 1451-52 (11th Cir. 1996), cert. denied, 117 S. Ct. 1905 (1997); MCM Partners, Inc. v. Andrews-Bartlett & Associates, 62 F.3d 967, 979-81 (7th Cir. 1995); United States v. Starrett, 55 F.3d 1525, 1547-48 (11th Cir. 1995), cert. denied, 116 S. Ct. 135 (1996); United States v. Napoli, 45 F.3d 680, 683-84 (2d Cir.), cert. denied, 115 S. Ct. 1796 (1995); United States v. Viola, 35 F.3d 37, 43-44 (2d Cir. 1994), cert. denied, 115 S. Ct. 1270 (1995); United States v. Quintanilla, 2 F. 3d 1469, 1484-85 (7th Cir. 1993). See also United States v. Thomas, 114 F.3d 228, 243 (D.C. Cir. 1997) (declining to resolve the issue).

[31] See Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1128 (9th Cir. 1997); United States v. Antar, 53 F.3d 568, 579-81 (3d Cir. 1995).

U.S.C. § 1962(a), (b), and (c), and RICO conspiracy, which "merely makes it illegal to conspire to violate" any of these sections. United States v. Quintanilla, 2 F.3d 1469, 1484 (7th Cir. 1993). Thus, "a RICO conspiracy requires only an agreement to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity." Quintanilla, 2 F.3d at 1484. The government need establish, therefore, only that the defendant agreed to the commission of two predicate offenses by any coconspirator on behalf of the enterprise, regardless of whether the defendant agreed personally to commit the predicate offenses or actually participated in those offenses. Quintanilla, 2 F.3d at 1484. Put another way, "one's agreement must be to knowingly facilitate the activities of the operators or managers to whom subsection (c) applies. One must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner." Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 967 (7th Cir. 2000).

Furthermore, the reasoning of the majority circuits is consistent with the Supreme Court's decision in Salinas v. United States, 522 U.S. 52, 61-66 (1997), which held that, in a RICO conspiracy prosecution, the government was not required to establish that the defendant agreed personally to commit two acts of racketeering. The Court emphasized that the well-established principles of conspiracy law govern in the RICO context, e.g., a

person may be held liable for committing a conspiracy offense even though he was incapable of committing the underlying substantive offense that was the objective of the conspiracy. Salinas, 522 U.S. at 63-65. The Court also noted that, if anything, the RICO conspiracy provision was "even more comprehensive than the general conspiracy offense in § 371." Salinas, 522 U.S. at 63. Therefore, under the rationale of Salinas, a defendant may be liable for a RICO conspiracy by conspiring to violate RICO with a person who is operating or managing a RICO enterprise within the meaning of Reves even though the defendant himself was not operating or managing the enterprise.[32]

3. Effect on Interstate Commerce

The federal authority to prohibit RICO violations stems from the Commerce Clause of the United States Constitution. See United States Const. art. 1, § 8, cl. 3. Accordingly, Section 1962(c) requires that the enterprise be engaged in, or that its activities

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[32] The decisions of the Third and Ninth Circuits in Antar and Neibel, supra n.31, Section III, ruling that the Reves' operation or management test applies to RICO conspiracy charges, were decided before the Supreme Court's decision in Salinas. In Klein v. Boyd, 949 F. Supp. 280 (E.D. Pa. 1996), aff'd in part and rev in part, 1998 WL 55245 (3d Cir.), on reh'g en banc judgment vacated No 97-1143, No. 97-1261 (Mar. 9, 1998), OCRS filed an amicus brief on rehearing en banc arguing that the Third Circuit's decision in Antar was no longer good law in light of Salinas. However, the private litigants settled the case before the en banc court ruled. Similarly, in United States v. Luong, 201 F.3d 445, 1999 WL 993692 (9th Cir. 1999) (Table), OCRS argued in a government appeal that the Ninth Circuit's decision in Neibel was no longer good law in light of Salinas. However, the Ninth Circuit did not decide the issue.

affect, interstate or foreign commerce. In practice, this requirement is not difficult to meet. Most courts have held that a slight effect on interstate commerce is all that is required.[33]

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[33] See United States v. Juvenile Male, 118 F.3d 1344, 1348-49 (9th Cir. 1997)(interstate commerce nexus for RICO prosecution is de minimis; interstate commerce nexus satisfied by robbery of Subway sandwich shop because the shop sent part of its profits to its out-of-state corporate headquarters, the robbers took food items that were made with ingredients purchased from out-of-state suppliers, and the firearms used in commission of the robbery traveled in interstate commerce); United States v. Miller, 116 F.3d 641, 674 (2d Cir. 1997)(interstate commerce nexus satisfied where RICO enterprise's business was narcotics trafficking (crack cocaine), even if individual acts of racketeering occurred solely within a state); United States v. Padgett, 78 F.3d 580 (4th Cir.)(Table) (interstate commerce nexus satisfied where defendants stipulated that firearms used in offenses traveled in interstate commerce), cert. denied, 116 S. Ct. 1887 (1996); United States v. Beasley, 72 F.3d 1518, 1526 (11th Cir.)(effect on commerce sufficient where religious cult tried to establish national and international influence by distributing its publications using its own truck and the mails and members traveled interstate extensively), cert. denied, 116 S. Ct. 2570 (1996); United States v. Farmer, 924 F.2d 647, 651 (7th Cir. 1991)(interstate commerce nexus satisfied where cocaine was flown directly from South America to Illinois and where drug scales used in Illinois were manufactured in New Jersey); United States v. Norton, 867 F.2d 1354 (11th Cir.) (effect on commerce sufficient where labor organizations represented many employees in building industry, and union officials traveled interstate in furtherance of the conspiracy), cert. denied, 491 U.S. 907 (1989); United States v. Doherty, 867 F.2d 47 (1st Cir.) (in case involving thefts of police exams, effect on interstate commerce shown by evidence that out-of-state consultant developed and graded some of the exams), cert. denied, 492 U.S. 918 (1989); United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988) (use of interstate telephone system and use of supplies purchased from companies in other states), cert. denied, 489 U.S. 1067 (1989); United States v. Alvarez, 860 F.2d 801 (7th Cir. 1988)(heroin came from another country), cert. denied, 493 U.S. 829 (1989); United States v. Murphy, 768 F.2d 1518, 1531 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986); United States v. Robinson, 763 F.2d 778, 791 (6th Cir. 1985); United States v. McManigal, 708 F.2d 276, 283 (7th Cir.), vacated on other grounds, 464 U.S. 979 (1983); (continued...)

To establish the requisite effect on interstate commerce, the government may prove the enterprise itself was engaged in or its activities affected interstate or foreign commerce.[34] For example, in United States v. Robertson, 514 U.S. 699 (1995),[35] the Supreme Court reversed the Ninth Circuit's reversal of a defendant's RICO conviction based on a finding that the enterprise--an Alaska gold mine purchased with drug proceeds--lacked a sufficient nexus to

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[33](...continued)
United States v. Dickens, 695 F.2d 765, 781 (3d Cir.), cert. denied, 460 U.S. 1092 (1983); United States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); United States v. Allen, 656 F.2d 964 (4th Cir. 1981); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981); United States v. Barton, 647 F.2d 224, 233-34 (2d Cir.), cert. denied, 454 U.S. 857 (1981); United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

[34] See United States v. Maloney, 71 F.3d 645, 662-64 (7th Cir. 1995)(upholding jury instruction that interstate commerce nexus was satisfied if the jury found "that the Circuit Court of Cook County [the RICO enterprise] ha[d] any impact, regardless of how small or indirect, on the movement of any money, goods, services, or persons from one state to another"), cert. denied, 117 S. Ct. 295 (1996); United States v. Qaoud, 777 F.2d 1105, 1116 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Murphy, 768 F.2d 1518, 1531 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986); United States v. Robinson, 763 F.2d 778, 781 (6th Cir. 1985); United States v. Conn, 769 F.2d 420, 423-24 (7th Cir. 1985); United States v. Dickens, 695 F.2d 765, 781 (3d Cir.), cert. denied, 460 U.S. 1092 (1983); United States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981); United States v. Groff, 643 F.2d 396, 400 (6th Cir.), cert. denied, 454 U.S. 828 (1981); United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Kaye, 586 F. Supp. 1395, 1399 (N.D. Ill. 1984).

[35] The Supreme Court reversed United States v. Robertson, 15 F.3d 862(9th Cir. 1994).

interstate commerce. Contrary to the lower court's focus on whether the action of the gold mine "affected" interstate commerce, the Court looked instead to whether the gold mine "engaged" in interstate commerce. Enterprise activities proven at trial included: (1) evidence the defendant transported supplies and equipment from California to Alaska for use in the mine, (2) on more than one occasion, the defendant hired workers from out of state to work in the mine, and (3) that the defendant personally transported fifteen percent of the mine's total gold output out of Alaska. The Court concluded that it was not necessary to determine whether these activities had any effect on commerce since they "assuredly brought the gold mine within [the statute's] alternative criterion of any enterprise . . . engaged in . . . interstate or foreign commerce." 514 U.S. at 671-72. A corporation, the Court said, is "generally engaged in commerce when it is itself engaged in the production, distribution, or acquisition of goods and services in interstate commerce." 514 U.S. at 672 (citations omitted).

In the case of an illegitimate association-in-fact enterprise, however, the enterprise's effect on interstate commerce may, and most likely will, be established by evidence that the acts of racketeering activity affected commerce.[36] The indictment need not

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[36] See United States v. Alvarez, 860 F.2d 801 (7th Cir. 1988)(sufficient that heroin sold by defendant to undercover agent (continued...)

set forth details of the effect on commerce--it is sufficient to track the statutory language.[37] Failure to allege an effect on interstate commerce, however, has been held to be a fatal defect.[38]

Although establishing the requisite interstate commerce nexus for RICO offenses has not posed significant problems thus far, prosecutors should nevertheless take considerable care to introduce sufficient evidence to establish the requisite interstate commerce nexus, particularly in light of the Supreme Court's focus in recent

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[36](...continued)
came from Mexico), cert. denied, 493 U.S. 829 (1989); United States v. Dickens, 695 F.2d 765, 781 (3d Cir. 1982), cert. denied, 460 U.S. 1092 (1983). See also United States v. Ambrose, 740 F.2d 505, 511-12 (7th Cir. 1984), cert. denied, 472 U.S. 1017 (1985); Karel v. Kroner, 635 F. Supp. 725, 728 (N.D. Ill. 1986).

In RICO cases based upon Hobbs Act predicate offenses, the interstate commerce nexus for the Hobbs Act was satisfied by the extortion of a business involved in interstate commerce. United States v. Morgano, 39 F.3d 1358, 1371 (7th Cir. 1994)(street tax extorted from restaurant owner reduced the money available to purchase out-of-state natural gas); United States v. Hocking, 860 F.2d 766, 777 (7th Cir. 1988)(interstate commerce nexus for Hobbs Act extortion satisfied under a depletion of assets theory where the extortion victim was a business that purchased supplies manufactured or otherwise originating out-of-state).

[37] See United States v. Kaye, 586 F. Supp. 1395, 1399 (N.D. Ill. 1984); cf. United States v. Roman, 728 F.2d 846, 850 (7th Cir.), cert. denied, 466 U.S. 977 (1984).

[38] See United States v. Hooker, 841 F.2d 1225 (4th Cir. 1988). The indictment should allege the enterprise's effect on interstate commerce or facts from which interstate commerce could be inferred. See, e.g., Weft, Inc. v. G.C. Investment Associates, 630 F. Supp. 1138, 1142 (E.D.N.C. 1986) (dismissing a claim in RICO complaint for failure to allege enterprise's effect on interstate commerce or facts from which interstate commerce could be inferred), aff'd, 822 F.2d 56 (4th Cir. 1987).

years on the requisite interstate commerce nexus concerning various criminal offenses and statutes.[39]

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

One of the most important elements of Section 1962(c) is that the affairs of the enterprise be conducted "through" a pattern of racketeering activity or collection of unlawful debt. The word "through" has given rise to considerable litigation, and its meaning has not been firmly resolved. As noted earlier, it is difficult to separate the "through" element from the "conduct or participate in the conduct of the enterprise's affairs" element, and the cases discussing the latter should be considered with

[39] See United States v. Morrison, 120 S. Ct. 1740, 1754 (2000) (holding that enactment of a federal civil remedy for the victims of gender-motivated violence exceeded Congress' authority under the Commerce Clause. The Court stated: "We accordingly reject the argument that Congress may regulate noneconomic , violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local . . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."). See also Jones v. United States, 120 S. Ct. 1904, 1908 (2000) (holding that because an owner-occupied residence not used for any commercial purpose does not qualify as property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" within the meaning of 18 U.S.C. § 844(i), the defendant was not subject to prosecution under § 844(i) for tossing a Molotov Cocktail into such residence); Reno v. Condon, 120 S. Ct. 666 (2000); United States v. Lopez, 514 U.S. 549 (1995).

analysis of the former.[40] However, some cases have analyzed the "through" requirement separately.

The Eleventh Circuit rule regarding the "through" element was recently explained in United States v. Starrett, 55 F.3d 1525, 1542-43 (11th Cir. 1995), cert. denied, 116 S. Ct. 135 (1996). The Starrett court found two components to the requirement that a defendant participate in an enterprise "through a pattern of racketeering activity." First, the defendant's predicate acts must be related to the enterprise charged. Second, the predicate acts must form a pattern.[41] Starrett, 55 F.3d at 1542. The Starrett court described the first component as the "relationship requirement." Starrett, 55 F.3d at 1542. Although the Court found that it had "not defined . . . [the] exact contours [of the] relationship requirement," it rejected the proposition that the government must show that the racketeering activity affected the "everyday operations of the enterprise." Starrett, 55 F.3d at 1542. The court concluded that the relationship requirement is also satisfied by "proof that the facilities and services of the enterprise were regularly and repeatedly utilized to make possible the racketeering activity." Starrett, 55 F.3d at 1542 (quoting United States v. Carter, 721 F.2d 1514, 1527 (11th Cir.), cert. denied, 469 U.S. 819 (1984)).

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[40] See supra notes 28 and 29, Section III and accompanying text.

[41] See supra Section II (E).

Other circuits have held that the relationship requirement may be satisfied through similar tests. For example, the Second and Ninth Circuits have found that the relationship requirement may be satisfied by showing either that the defendant was able to commit the predicate offenses "solely by virtue of his position in the enterprise" or that the predicated offenses are related to the activities of the enterprise.[42] Similarly, the Fifth Circuit requires a "sufficient nexus between the racketeering activities and the affairs of the enterprise" and rejects the requirement that the racketeering acts benefit the enterprise.[43] The Fourth Circuit has rejected any requirement that the racketeering activity must always benefit the enterprise.[44] Finally, in United States v. Crockett, 979 F.2d 1204, 1213 (1992), cert. denied, 507 U.S. 998 (1993), the Seventh Circuit adopted a three part test for determining whether there is a nexus between the acts of racketeering and the affairs of the enterprise:

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[42] See United States v. Thai, 29 F.3d 785, 815 (2d Cir.), cert. denied, 115 S. Ct. 456 (1994); United States v. Locascio, 6 F.3d 924, 943 (2d Cir. 1993), cert. denied, 114 S. Ct. 1645 (1994); United States v. Yarbrough, 852 F.2d 1522, 1544 (9th Cir.), cert. denied, 488 U.S. 866 (1988).

[43] United States v. Welch, 656 F.2d 1039, 1059-62 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982)(predicate acts must have some effect on the enterprise).

[44] See United States v. Grubb, 11 F.3d 426, 438-39 (4th Cir. 1993)(holding the manner in which Grubb used his judicial office, i.e., the telephones and the physical office, and the prestige and power of the office itself, provided a sufficient nexus between the enterprise and racketeering activity).

> To establish a nexus, it is required that (1) [t]he defendant must have committed the racketeering acts; (2) the defendant's position in or relationship with the enterprise facilitated the commission of the acts; and (3) the acts had some effect on the enterprise. Effect on the enterprise is established by proof that the racketeering acts affected the enterprise in some fashion.

The "through" requirement is by no means a mere formality. In some cases, RICO prosecutions have failed because the government did not establish a sufficient nexus between the affairs of the enterprise and the pattern of racketeering activity.[45]

D. Section 1962(d) -- RICO Conspiracy

The RICO conspiracy statute, 18 U.S.C. § 1962(d) makes it a separate offense to conspire to violate any of the substantive

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[45] See United States v. Erwin, 793 F.2d 656, 671 (5th Cir.) (finding, as an alternate ground for reversing RICO conspiracy conviction, that defendant's racketeering activity was not connected to the affairs of the narcotics enterprise alleged where facts established little more than defendant was an independent dealer to multiple suppliers), cert. denied, 479 U.S. 991 (1986); United States v. Nerone, 563 F.2d 836, 851-52 (7th Cir. 1977)(finding government failed to attach significance to the word "through," included in both the statute and the indictment and reversing RICO conviction for failure to show sufficient connection between mobile-home park enterprise and gambling operation conducted on its premises), cert. denied, 435 U.S. 951 (1978); United States v. Dennis, 458 F. Supp. 197, 198 (E.D. Mo. 1978)(dismissing RICO count for insufficient nexus between enterprise and predicate acts where indictment alleged that defendant conducted affairs of General Motors Corporation through collection of unlawful debts by making usurious loans to fellow employees), aff'd on other grounds, 625 F.2d 782 (8th Cir. 1980). See also United States v. Rainone, 32 F.3d 1203, 1209 (7th Cir. 1994)(upholding RICO but finding arsons were "outside activity" unrelated to RICO conspiracy even though defendant had permission from enterprise leader to engage in outside activities), cert. denied, 115 S. Ct. 2245 (1995).

provisions of RICO. Prosecutors often plead RICO conspiracy in conjunction with a substantive RICO charge. Although Section 1962(d) is short and uncomplicated on its face, its application has generated considerable litigation, particularly regarding conspiracies to violate Section 1962(c).

1. General Considerations

Before discussing the law of RICO conspiracy, it is useful to examine some practical considerations. Prosecutors often ask whether it is preferable to charge Section 1962(c) or Section 1962(d). The advantages of charging the RICO conspiracy offense are the advantages associated with general conspiracy prosecutions--ease of joinder,[46] as well as the fact that district courts will more readily admit coconspirators' statements.[47] Charging a RICO substantive offense may also facilitate joinder.[48] In addition, as in other conspiracy prosecutions, it is not necessary to show that any coconspirator actually committed the substantive violation--only that the defendant agreed that a

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[46] See United States v. Darden, 70 F.3d 1507, 1526-28 (8th Cir. 1995), cert. denied, 116 S. Ct. 1449 (1996); United States v. Faulkner, 17 F.3d 745, 758-59 (5th Cir.), cert. denied, 513 U.S. 870 (1994); United States v. Amato, 15 F.3d 230, 236-37 (2d Cir. 1994); United States v. Sanders, 929 F.2d 1466, 1469-70 (10th Cir.), cert. denied, 502 U.S. 846 (1991).

[47] See United States v. Orena, 32 F.3d 704, 711-14 (2d Cir. 1994) (affirming district court's admission of testimony concerning the overall affairs of the Colombo Family, the RICO enterprise, during internal "war" between enterprise members).

[48] See infra Section V (B)(3)(d).

coconspirator would do so.[49] Possible disadvantages to charging Section 1962(d) are the danger of confusing the jury with the added complexities of instructions on conspiracy law and the need to prove an additional element: that is, each defendant agreed with other conspirators to commit the substantive RICO offense. Conversely, the advantage of charging Section 1962(c) is that the offense is somewhat more concrete and understandable than the conspiracy offense. In practice, many prosecutors choose to charge both the conspiracy and the substantive offense. This method of charging has the effect of potentially leading to consecutive sentences for the two counts.[50]

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[49] See Salinas v. United States, 522 U.S. 52, 61-66 (1997); United States v. Thomas, 114 F.3d 228, 250 (D.C. Cir. 1997); United States v. Beasley, 72 F.3d 1518, 1526 (11th Cir.), cert. denied, 116 S. Ct. 2570 (1996); United States v. Maloney, 71 F. 3d 645, 664 (7th Cir. 1995), cert. denied, 117 S. Ct. 295 (1996); United States v. Blinder, 10 F.3d 1468, 1477 (9th Cir. 1993).

[50] See United States v. Pungitore, 910 F.2d 1084, 1115-17 (3d. Cir. 1990)(consecutive sentences for substantive RICO and RICO conspiracy offenses are permissible under the Double Jeopardy Clause because they are statutorily authorized and consistent with congressional intent), cert. denied, 500 U.S. 915 (1991); United States v. Salerno, 868 F.2d 524, 542-43 (2d Cir.) (consecutive sentences for RICO and RICO conspiracy upheld for LCN members even when total sentence equaled one hundred years), cert. denied, 493 U.S. 811 (1989); United States v. West, 877 F.2d 281, 292 (4th Cir.)(relying on Blockburger test, court upheld consecutive RICO and RICO conspiracy sentences), cert. denied, 493 U.S. 959 (1989); United States v. Yarbrough, 852 F.2d 1522, 1545 (9th Cir.) (consecutive sentences upheld in face of defendant's policy based challenge), cert. denied, 488 U.S. 866 (1988); United States v. Biasucci, 786 F.2d 504, 515-16 (2d Cir.)(different elements of RICO and RICO conspiracy allow court to impose consecutive sentences), cert. denied, 479 U.S. 827 (1986); United States v. Watchmaker, 761 (continued...)

The essence of a Section 1962(d) conspiracy is the agreement to commit a substantive violation of Section 1962 (a), (b), or (c).[51] Most RICO conspiracy litigation, however, has concerned conspiracies to violate Section 1962(c), and this discussion concentrates on the issues arising under that charge. RICO conspiracy law continues to be developed by the courts, and it should be expected that the doctrines discussed here will continue to evolve. The following issues are those that have attracted the most judicial attention to date.

2. Comparison with Standard Conspiracy Law

a. A RICO conspiracy is broader than other conspiracy provisions applicable to federal crimes, such as 18 U.S.C. § 371, which, unlike RICO conspiracy, requires commission of an overt

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(...continued)
F.2d 1459, 1477 (11th Cir. 1985)(consecutive sentences allowed pursuant to Blockburger test), cert. denied, 474 U.S. 1100 (1986); see also United States v. Carrozza, 4 F.3d 70 (1st Cir. 1993) (applying sentencing guideline principles to RICO and RICO conspiracy convictions), cert. denied, 511 U.S. 1069 (1994). Cf. United States v. Callanan, 810 F.2d 544, 545-47 (6th Cir. 1987) (under the Blockburger test, sentences for RICO substantive and conspiracy offenses do not merge; upheld concurrent sentences for both convictions). See also infra Section V (B)(3)(f).

[51] See Salinas v. United States, 522 U.S. 52, 63-66 (1997); United States v. Antar, 53 F.3d 568, 580-81 (3d Cir. 1995); United States v. Carrozza, 4 F.3d 70, 79 (1st Cir. 1993), cert. denied, 511 U.S. 1069 (1994); United States v. Quintanilla, 2 F.3d 1469, 1484 (7th Cir. 1993); United States v. Riccobene, 709 F.2d 214, 224 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

act,[52] and "may encompass a greater variety of conduct."[53] In other respects the two categories of offenses are similar. For example, both types of conspiracy allow for the admissibility of coconspirators' statements.[54]

However, the Second Circuit has indicated that the traditional rules governing admission of coconspirator statements may apply somewhat differently to RICO conspiracy offenses. For example, in United States v. Tellier, 83 F. 3d 578 (2d Cir.), cert. denied, 519 U.S. 955 (1996), three individuals burglarized a marijuana dealer's apartment, taking eight pounds of marijuana. Two of the burglars were Orlando Rodriguez and Robin Tellier, the defendant's brother. They decided to sell the marijuana. The government maintained that the defendant was involved in the selling process. The defendant was convicted of RICO substantive and conspiracy charges based upon two racketeering acts, one of which was a conspiracy to distribute

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[52] See Salinas v. United States, 522 U.S. 52, 63 (1997)(RICO conspiracy more comprehensive than Section 371).

[53] See United States v. Starrett, 55 F.3d 1525, 1543 (5th Cir. 1995) (citing United States v. Pepe, 747 F.2d. 632, 659 (11th Cir. 1984)).

[54] See United States v. DiDomenico, 78 F.3d 294, 303-04 (2d Cir.), cert. denied, 117 S. Ct. 507 (1996); United States v. Orena, 32 F.3d 704, 712-13 (2d. Cir. 1994); United States v. Amato, 15 F.3d 230, 234-35 (2d Cir. 1994); United States v. Mokol, 957 F.2d 1410, 1419-20 (7th Cir.), cert. denied, 506 U.S. 899 (1992); United States v. Simmons, 923 F.2d 934, 945 (2d Cir.), cert. denied, 500 U.S. 919 (1991); United States v. Beale, 921 F.2d 1412, 1421-23 (11th Cir.), cert. denied, 502 U.S. 829 (1991); United States v. Pungitore, 910 F.2d 1084, 1145-48 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991); United States v. Angiulo, 897 F.2d 1169, 1201-04 (1st Cir.), cert. denied, 498 U.S. 845 (1990).

stolen marijuana. The government admitted that the only evidence linking defendant Tellier to the marijuana conspiracy was the testimony of Rodriguez (who had participated in the theft of the marijuana) that the defendant's brother had told Rodriquez that the defendant sold the stolen marijuana.

The Second Circuit stated that, although under Bourjaily v. United States, 483 U.S. 171 (1987), the trial court may consider the hearsay statement itself in determining its admissibility, "since Bourjaily all of the circuits addressing the issue have explicitly held, absent some independent, corroborating evidence of a defendant's knowledge of and participation in the conspiracy, that the out-of-court statements remain inadmissible." 83 F.3d at 580. The Second Circuit concluded that, since the hearsay statement of the defendant's brother was the only evidence implicating the defendant in the marijuana conspiracy, the required corroboration was lacking, and hence the hearsay statement was inadmissible against the defendant on the marijuana conspiracy. Therefore, the evidence against him on that racketeering act was insufficient.

The court then held that the disputed hearsay statement was not admissible against the defendant to prove the RICO conspiracy charge because the government did not prove the defendant's membership in the RICO conspiracy. This was so because, in light of the inadequate proof on the marijuana conspiracy predicate act,

the government had failed to prove that the defendant had agreed to participate in two racketeering acts as charged in the indictment. However, Tellier left open the question in a RICO conspiracy case whether the corroboration is sufficient if it merely connects the defendant to the overall RICO conspiracy or enterprise, or whether it must corroborate the defendant's knowledge of, and participation in, the particular predicate act for which admission of the coconspirator statement at issue is sought. United States v. Gigante, 166 F. 3d 75 (2d Cir. 1999) answered that question, ruling that as a general proposition the corroboration must link the defendant to the predicate act to which the coconspirator statement relates.

The RICO enterprise in Gigante was an association-in-fact comprised of the Genovese, Gambino, Luchese and Colombo LCN families, and Local 560 of the Ornamental and Architectural Ironworkers Union, along with the window manufacturing and installment companies that sought control of the window replacement market in the New York metropolitan area. The district court had found that "there is a general overriding conspiracy among all of these alleged mafia groups," and then admitted several coconspirator statements "based solely on this finding of a general conspiracy." 166 F.3d at 83. The Second Circuit stated that:

> This was error. The district court's rationale would allow the admission of any statement by any member of the mafia regarding any criminal behavior of any other member of the mafia. This is not to say that there can never be

> a conspiracy comprising many different mafia families; however, it must be a conspiracy with some specific criminal goal in addition to a general conspiracy to be members of the mafia. It is the unity of interests stemming from a specific shared criminal task that justifies Rule 801(d)(2)(E) in the first place--organized crime membership alone does not suffice.

166 F.3d at 83.

To limit the potential scope of Rule 801 (d)(2)(E) in RICO LCN cases, the Second Circuit set forth the following rule:

> The district court in each instance must find the existence of a specific criminal conspiracy beyond the general existence of the mafia. **And when a RICO conspiracy is charged, the defendant must be linked to an individual predicate act by more than hearsay alone before a statement related to that act is admissible against the defendant under Rule 801(d)(2)(E).** See Tellier, 83 F.3d at 581.

166 F.3d at 82-83 (emphasis added).

Applying this rule, the Second Circuit upheld the admission of coconspirators' statements that Gigante was aware of and had approved of plots to murder Peter Savino and John Gotti, stating that:

> [T]here was substantial corroborating evidence that could support findings by Judge Weinstein that Gigante was boss of the Genovese family, that the Genovese family was involved in the conspiracies to murder Savino and Gotti, and that Gigante, as boss, was necessarily involved in these conspiracies.

166 F.3d at 83. However, the opinion does not identify this corroboration evidence; but, the district court opinion summarized the evidence as follows:

> Testimony revealed that Mr. Gigante and other Commission

> members agreed that those who murdered [Paul] Castellano had to be hunted down and killed as punishment for the unsanctioned murder. When it was learned that the Gotti brothers, with the help of Gravano, were responsible for Castellano's death, arrangements were made by Mr. Gigante and the rest of the Commission to kill John and Gene Gotti.
>
> ***
>
> Savino had been ordered killed by Mr. Gigante because he had become a government informant.

United States v. Gigante, 982 F. Supp. 140, 151-52 (E.D.N.Y. 1997).

The Second Circuit also held that the trial court had erroneously admitted a tape recording of coconspirators John Gotti and Sammy Gravano and others discussing a conspiracy to murder Corky Vastola and stating that they needed to obtain Gigante's permission to use one of Gigante's men to kill Vastola, who was a member of another family. 166 F.3d at 83. The evidence indicated that Gigante refused his permission. The government argued in its brief that it is because La Cosa Nostra and its rules were in force that Gigante's approval was needed and solicited. That his refusal was obeyed also confirmed his role and power in La Cosa Nostra.

The Second Circuit rejected this argument, stating that "these [tape recorded] discussions were not 'in furtherance' of a specific criminal purpose, and the fact that Gigante might have conspired with Gotti and Gravano to commit other crimes on other occasions is irrelevant." The Second Circuit went on to hold that the admission of these and any other coconspirator statements (which were not specified) that were erroneously admitted was harmless error. 166

F.3d at 83.

The full implications of the Second Circuit's decisions in this area are not clear at this juncture. Therefore, prosecutors, especially in the Second Circuit, should closely watch for developments in the Second Circuit's evolving doctrine on the admission of coconspirator statements in RICO cases.

b. Neither RICO nor other conspiracy offenses require proof that the defendant know the full scope of the conspiracy or the identity of all co-conspirators.[55] Further, courts apply traditional conspiracy principles to the issue of withdrawal from

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[55] See United States v. Castro, 89 F.3d 1443, 1451 (11th Cir. 1996)(government need not prove each conspirator agreed with every other conspirator, knew of his fellow conspirators, was aware of all details of the conspiracy or contemplated participating in the same related enterprise), cert. denied, 117 S. Ct. 965 (1997); United States v. Hurley, 63 F.3d 10 (1st Cir. 1995)(defendants need only be aware of the enterprise and its general character), cert. denied, 116 S. Ct. 1322 (1996); United States v. Viola, 35 F.3d 37, 44 (2d Cir. 1994)(sufficient that government established defendant knew general nature of enterprise and that enterprise extended beyond defendant's individual role in RICO conspiracy, but reversing conviction of handyman who previously sold stolen goods for enterprise leader on two occasions where evidence failed to establish defendant knew there was a broader conspiracy, i.e., that enterprise extended beyond his role), cert. denied, 513 U.S. 1198 (1995); United States v. Ruiz, 905 F.2d 499, 505 (1st Cir. 1990); United States v. Rastelli, 870 F.2d 822, 827 (2d Cir.)(government need only show that defendant agreed to violate RICO through two predicates and knew the general nature of the conspiracy and that it extended beyond his role), cert. denied, 493 U.S. 982 (1989); United States v. Valera, 845 F.2d 923, 929 (11th Cir. 1988)(evidence that defendant was aware other persons were using the same enterprise to import drugs into the United States and defendant agreed to participate in such activities by using services of the enterprise for his own drug smuggling venture was sufficient to uphold RICO conspiracy conviction), cert. denied, 490 U.S. 1046 (1989).

a RICO conspiracy. Therefore, a defendant proven to be a member of a RICO conspiracy is presumed to continue to be a member of the conspiracy until the conspiracy has ended or the defendant establishes that he withdrew from the conspiracy prior to its end.[56] (For OCRS policy on withdrawal from a RICO conspiracy, see infra Section V(B)(3)(e)). As with traditional conspiracy law, RICO conspiracy also requires more than "mere presence" or "mere knowledge." Rather, it is necessary to introduce "some evidence of participation in the conspiracy in order to sustain a conviction."[57]

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[56] See United States v. Maloney, 71 F.3d 645, 654-56 (7th Cir. 1995)(applying traditional withdrawal principles to RICO conspiracy), cert. denied, 117 S. Ct. 295 (1996); United States v. Starrett, 55 F.3d 1525, 1550-51 (11th Cir. 1995)(same), cert. denied, 116 S. Ct. 1335 (1996); United States v. Antar, 53 F.3d 568, 582-584 (3d Cir. 1995) (noting that RICO conspiracy "long has been interpreted against the backdrop of traditional conspiracy law and thus the same analysis applies both to the RICO and Section 371 conspiracies," and finding therefore that defendant failed to withdraw from the conspiracy even though he resigned from enterprise, because he failed to sever all ties with the enterprise); United States v. Wong, 40 F.3d 1347, 1367 (2d Cir. 1994) (defendant liable for participation in a RICO conspiracy for predicate acts the separate prosecution of which would be time-barred, so long as that defendant had not withdrawn from the conspiracy during the limitations period), cert. denied, 514 U.S. 1113 (1995); United States v. Bennett, 984 F.2d 597, 609-10 (4th Cir.)(applying general traditional withdrawal principles) cert. denied, 508 U.S. 945 (1993); United States v. Eisen, 974 F.2d 246, 268-69 (2d Cir. 1992)(applying general traditional withdrawal principles), cert. denied, 507 U.S. 1029 (1993); United States v. Minicone, 960 F.2d 1099, 1108 (2d Cir.)(defendant did not withdraw from conspiracy given defendant requested ammunition from enterprise member and tipped off mob boss to existence of investigation subsequent to date of alleged withdrawal), cert. denied, 503 U.S. 950 (1992).

[57] See United States v. Melvin, 91 F.3d 1218, 1225 (9th Cir. 1996); (continued...)

c. The major principle emerging with some force is that, although general conspiracy law applies, the objective of a RICO conspiracy to violate Section 1962(c) is broader than, or at least different from, the objective of a general conspiracy under 18 U.S.C. § 371 because the object of the RICO conspiracy, i.e., the substantive RICO offense, is so broad.[58] Instead of creating a new law of conspiracy, RICO merely created a new objective for traditional conspiracy law, a violation of Section 1962 (a), (b), or (c).

3. No Requirement of Agreement Personally To Commit Two Predicate Acts

In Salinas v. United States, the Supreme Court held that RICO

(...continued)
United States v. Morgano, 39 F.3d 1358, 1376-77 (7th Cir. 1994), cert. denied, 515 U.S. 1133 (1995); United States v. Locascio, 6 F.3d 924, 944 (2d Cir. 1993), cert. denied, 511 U.S. 1070 (1994).

[58] See United States v. Massey, 89 F.3d 1433, 1440-41 (11th Cir. 1996), cert. denied, 117 S. Ct. 983 (1997); United States v. Marmolejo, 89 F.3d 1185, 1196 (5th Cir. 1996), aff'sub nom. Salinas v. United States, 522 U.S. 52 (1997); United States v. Maloney, 71 F.3d 645, 664 (7th Cir. 1995), cert. denied, 117 S. Ct. 295 (1996); United States v. Antar, 53 F.3d 568, 581 (3d Cir. 1995); United States v. Viola, 35 F.3d 37, 43 (2d Cir. 1994), cert. denied, 115 S. Ct. 1270 (1995); Baumer v. Pachl, 8 F.3d 1341, 1346 (9th Cir. 1993); United States v. Carrozza, 4 F.3d 70, 79 (1st Cir. 1993), cert. denied, 511 U.S. 1069 (1994); United States v. Church, 955 F.2d 688, 694 (11th Cir.), cert. denied, 506 U.S. 881 (1992); United States v. Pyrba, 900 F.2d 748, 760 (4th Cir.), cert. denied, 498 U.S. 924 (1990); United States v. Joseph, 835 F.2d 1149, 1151-52 (6th Cir. 1987); United States v. Neapolitan, 791 F.2d 489, 497 (7th Cir.), cert. denied, 479 U.S. 939 (1986); United States v. Carter, 721 F.2d 1514, 1529 (11th Cir.), cert. denied, 469 U.S. 819 (1984); United States v. Riccobene, 709 F.2d 214, 224-25 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

conspiracy does not require proof of an agreement personally to commit two predicate acts of racketeering:

> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.
>
> It makes no difference that the substantive offense under subsection (c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.

522 U.S. 52, 65 (1997) (citation omitted).[59] Thus, a RICO conspiracy is established by evidence of an agreement among the conspirators to conduct the affairs of the enterprise through a pattern of racketeering activity, which includes the agreement that a conspirator will commit two or more racketeering acts constituting such a pattern.

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[59] See also United States v. To, 144 F.3d 737, 744-46 (11th Cir. 1998)(proof that the defendants either personally agreed to commit two racketeering acts or agreed to an overall objective of the conspiracy knowing that other persons were conspiring to participate in the same enterprise through a pattern of racketeering activity was sufficient to sustain RICO conspiracy conviction); United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir.)(agreeing to a prescribed objective is sufficient), cert. denied, 479 U.S. 939, 940 (1986); United States v. Vaccaro, 115 F.3d 1211, 1221 (5th Cir. 1997)(to be guilty of a RICO conspiracy, the conspirator must simply agree to the objective of a violation of RICO; he need not agree to personally violate the statute).

4. Overt Acts

A final difference between a RICO conspiracy offense and many other conspiracy offenses is that RICO does not require proof of an overt act.[60] In appropriate cases, however, it may be desirable to include overt acts in the indictment in order to present a full picture of the scope of the conspiracy.[61] It is important to note in drafting the indictment that an overt act is **not** an allegation of a racketeering act. The indictment **must** allege that the defendants conspired to conduct the affairs of the enterprise through a pattern of racketeering activity; it **may** allege the commission of overt acts in furtherance of the conspiracy. An act of racketeering must be a violation of one or more of the offenses listed in 18 U.S.C. § 1961. An overt act should be a discrete action, for example, a meeting, a conversation, or other distinct event. Although it may be criminal in nature, the overt act, unlike racketeering activity, should not be alleged as a criminal offense.

For example, if a defendant is accused of conspiring to extort payment of a gambling debt as part of his pattern of racketeering activity, an overt act might allege that on a particular date "the

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[60] See Salinas, 522 U.S. at 63.

[61] Usually a general or introductory allegation in the narrative is more effective in describing the scope of a conspiracy; however, overt acts are permissible in certain circuits when drafted properly.

defendant struck the victim." It would be unnecessary, and inappropriate, to couch this physical act in the legal charging language of 18 U.S.C. § 894. Rather, an overt act relates to a specific discrete act or event, almost invariably physical in nature, that does not encompass statutory terminology, legal conclusions or multiple acts.

5. Other RICO Conspiracy Issues

Issues involving RICO conspiracy continue to arise as the government charges Section 1962(d) violations. Those of particular interest include the following:

(a) Whether the Supreme Court's "operation or management test" for participation in the conduct of an enterprise's affairs applies to RICO conspiracy.[62] A split has developed among the circuits with the Second, Fifth, Seventh and Eleventh Circuits holding that Reves does not require proof that a defendant agreed to personally participate in the operation or management of the enterprise, while the Third and the Ninth Circuits held, prior to Salinas, that the Reves' test applies to a RICO conspiracy (see supra pp. 123-27).

(b) Whether the racketeering acts comprising a RICO conspiracy may themselves be conspiracies;[63] and

(c) Whether proof of crimes committed by other members of a RICO enterprise or conspiracy is relevant to show the existence

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[62] See Reves v. Ernst & Young, 507 U.S. 170 (1993).

[63] See supra notes 3-6, Section II.

and/or nature of the enterprise, or the requisite threat of continuity.[64]

[64] See supra note 111, Section II, and infra, notes 35-36, Section VI. See also United States v. Keltner, 147 F.3d 662, 667-68 (8th Cir. 1998) (uncharged criminal conduct by coconspirator admissible to prove the enterprise); United States v. Salerno, 108 F.3d 730, 738-39 (7th Cir. 1997) (uncharged extortionate collections by defendants admissible to prove the enterprise); United States v. Brady, 26 F.3d 282, 287-88 (2d Cir. 1994) (uncharged murders by other members of the enterprise admissible to prove the enterprise); United States v. Gonzalez, 921 F. 2d 1530, 1545-47 (11th Cir. 1991) (uncharged crimes by defendant and other conspirators admissible to prove the enterprise and continuity) (collecting cases).

IV. PENALTIES--SECTION 1963

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

A. Sentencing Guidelines

1. Base Offense Level and Relevant Conduct

The United States Sentencing Commission has issued Sentencing Guidelines for RICO offenses that are applicable to crimes committed after November 1, 1987.[1] The base offense level for a RICO violation is the greater of either the offense level applicable to the underlying racketeering activity, or nineteen.[2] The commentary suggests that the offense level "usually will be determined by the offense level of the underlying conduct."[3]

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

[2] United States Sentencing Commission, Guidelines Manual (hereafter Sentencing Guidelines or Guidelines) Section 2E1.1 (November 1994). See United States v. Morgano, 39 F.3d 1358, 1378 (7th Cir.)(applying base level of nineteen despite defendant's contention that underlying offenses only warranted base level of twelve), cert. denied, 515 U.S. 1133 (1995); United States v. Olsen, 22 F.3d 783, 786-87 (8th Cir.) (reversing district court's decision to sentence RICO defendants at base level lower than nineteen, the minimum required by the sentencing guidelines), cert. denied, 513 U.S. 929 (1994); United States v. Butler, 954 F.2d 114, 120 (2d Cir. 1992) (same).

[3] Sentencing Guidelines § 2E1.1, (introductory comment). See United States v. Griffith, 85 F.3d 284, 288 (7th Cir.), cert. denied, 117 S. Ct. 272 (1996) (base offense level of 29 for (continued...)

Pursuant to USSG § 2E1.1, "the underlying racketeering activity" that determines the base offense level for a RICO violation must be limited to "any act, whether or not charged against defendant personally, that qualifies as a RICO predicate act under 18 U.S.C. § 1961(1) and is otherwise relevant conduct under § 1B1.3." United States v. Carrozza, 4 F.3d 70, 77 (1st Cir.), cert. denied, 511 U.S. 1069 (1994).[4] However, "relevant conduct" for other sentencing

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(...continued)
conviction of RICO counts derived from the money laundering guideline); see also United States v. Korando, 29 F.3d 1114, 1119 (7th Cir.)(emphasizing that court must apply offense level applicable to underlying racketeering activity if greater than nineteen), cert. denied, 513 U.S. 993 (1994); United States v. Sacco, 899 F.2d 149, 150 (2d Cir. 1990).

[4] In Carrozza, 4 F.3d at 74-83, the court went on to hold that in determining the defendant Patriarca's base offense level for a RICO conspiracy conviction the sentencing court may consider murders that either were not charged against the defendant in the indictment or were not charged at all in the indictment, provided the murders were reasonably foreseeable to the defendant and were in furtherance of jointly undertaken criminal activity.

However, the court also held that because these murders did not constitute charged conduct that provided the basis for the defendant Patriarca's conviction, Patriarca could not be sentenced to life imprisonment; rather his guidelines sentence could not exceed the statutory maximum penalty of 20 years' imprisonment. The court explained that "[t]he RICO statute sets the maximum prison sentence at 20 years unless 'the **violation** is based on a racketeering activity for which the maximum penalty includes life imprisonment.'" Id. at 81 (quoting 18 U.S.C. § 1963(a)) (emphasis in original). Because Patriarca's RICO "violation" was not based on any of the uncharged murders, the maximum penalty of life imprisonment did not apply. But see United States v. Darden, 70 F.3d 1507, 1544-45 (8th Cir. 1995) (affirming a RICO defendant's sentence for life imprisonment because he was held accountable for a foreseeable murder that was not charged against the defendant).

purposes for a RICO conviction is not limited to an act that qualifies as a RICO predicate act under 18 U.S.C. § 1961(1). For example, § 1B1.3 states that relevant conduct is to be considered in determining specific offense characteristics and Chapter Three adjustments, which are used to arrive at the defendant's adjusted offense level.[5] Because there is no corresponding RICO predicate limitation in these areas, the full scope of relevant conduct could be applied to these adjusted offense level calculations. See United States v. Damico, 99 F.3d 1431, 1437-38 (7th Cir. 1996).[6]

In that regard, relevant conduct includes all "acts and omissions . . . caused by the defendant." USSG § 1B1.3(a)(1)(A). In the case of joint criminal conduct, relevant conduct is defined as "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." USSG §

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[5] Each offense has a base offense level "and may have one or more specific offense characteristics that adjust the offense level upward or downward." USSG Ch. 2, introductory comment. Chapter Three adjustments, which can also raise or lower the offense level, include victim-related adjustments (hate crime motivation or vulnerable victim, official victim, restraint of victim, and terrorism), role in the offense adjustments (aggravating role, mitigating role, abuse of position of trust or use of special skill, and use of a minor to commit a crime), and adjustments for obstruction of justice or reckless endangerment during flight.

[6] In Damico, the court noted that "§ 2E1.1's sole purpose is to establish the base offense level for a RICO offense, not the adjusted offense level." 99 F.3d at 1437. It then found that the § 3B1.1(a) enhancement for a leadership role was to be applied to the defendant's role in the RICO count of conviction and all relevant conduct within the scope of § 1B1.3. Id. at 1437-38.

1B1.3(a)(1)(B). The relevant conduct includes all acts in furtherance of the joint criminal activity, whether charged or uncharged, and even includes conduct upon which a defendant has been tried and acquitted;[7] and therefore relevant conduct for determining specific offense characteristics and Chapter Three adjustments is not limited to conduct that qualifies as a RICO predicate act.

Applying the Sentencing Guidelines to RICO violations creates the same issues that arise in multiple count indictments. When determining the offense level based on the underlying conduct, the sentencing court should treat each underlying offense for each act of racketeering as if contained in a separate count of conviction

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[7] See, e.g., USSG § 1B1.3, comment, backg'd (stating that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range"); United States v. Watts, 519 U.S. 148, 157 (1997) (allowing consideration of conduct for which the defendant was acquitted as relevant conduct); United States v. Zanghi, 189 F.3d 71, 84 (1st Cir. 1999); United States v. Robie, 166 F.3d 444, 456 (2d Cir. 1999); United States v. Cianci, 154 F.3d 106, 112 (3d Cir. 1998); United States v. Barber, 119 F.3d 276, 284 (4th Cir. 1997); United States v. McCaskey, 9 F.3d 368, 377 (5th Cir. 1993); United States v. Rutledge, 33 F.3d 671, 673 (6th Cir. 1994); United States v. Duarte, 950 F.2d 1255, 1263 (7th Cir. 1991); United States v. Casey, 158 F.3d 993, 996 (8th Cir. 1998); United States v. Lawton, 193 F.3d 1087, 1094 (9th Cir. 1999); United States v. Johnson, 971 F.2d 562, 575 (10th Cir. 1992); United States v. Lewis, 115 F.3d 1531, 1536-37 (11th Cir. 1997); United States v. Boney, 977 F.2d 624, 633 (D.C. Cir. 1992).

See also United States v. Carrozza, 4 F.3d 70, 74 (1st Cir. 1993) ("Relevant conduct in a RICO case includes all conduct reasonably foreseeable to the particular defendant in furtherance of the RICO enterprise to which he belongs.").

and apply the adjustment guidelines of Chapter Three of the Sentencing Guidelines to determine the final offense level.[8] Where state law violations are alleged as predicate acts, the offense level "corresponding to the most analogous federal offense is to be used."[9]

It is important to consider the Sentencing Guidelines when drafting a RICO indictment.[10] Because the offense level is dependent, to a certain extent, on the acts of racketeering, it is

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[8] Sentencing Guidelines § 2E1.1 (Application Notes). See United States v. Fiorelli, 133 F.3d 218, 220 (3d Cir. 1998) (USSG § 3D1.2 provides the governing rules for grouping of extortion offenses even when extortions are a part of a pattern of racketeering activity); United States v. Ruggiero, 100 F.3d 284, 292 (2d Cir.)(district court properly determined the final offense level by not grouping two attempted kidnappings admitted during plea allocutions with three additional kidnapping incidents proven at sentencing), cert. denied, 118 S. Ct. 1102 (1996); United States v. Damico, 99 F.3d 1431, 1437 (7th Cir.) (adjustment for role in the offense as described in Section 3B1.1 properly applied to base offense level when determined by the underlying racketeering activity), cert. denied, 117 S. Ct. 1086 (1997); United States v. Lombardi, 5 F.3d 568, 570-571 (1st Cir. 1993) (discussing method for grouping predicate acts together in context of RICO case).

[9] Sentencing Guidelines § 2E1.1 (Application Notes). See also United States v. Miller, 116 F.3d 641, 677-678 (2d Cir.), cert. denied, 118 S. Ct. 2063 (1998) (upholding the district court's use of the Guidelines offense level for aiding and abetting [murder] under § 2X2.1 as the guideline offense which most closely resembles the state offense of conviction [facilitation of murder]).

[10] See, e.g., United States v. Marrone, 48 F.3d 735, 739 (3d Cir.) (RICO predicate act for which defendant was previously convicted should be factored into defendant's criminal history score rather than the base offense level; i.e., the prior conviction may be used as the basis for added criminal history points and can be used to determine status as a career offender), cert. denied, 516 U.S. 836 (1995).

extremely important to consider what the base offense level would be under alternative patterns of racketeering.[11] Courts will consider upward departures in RICO prosecutions in certain circumstances.[12]

2. Other Guidelines Considerations

For those cases falling outside the Sentencing Guidelines (i.e., crimes completed before November 1, 1987), 18 U.S.C. § 1963(a) provides the basis for imprisonment and fines.[13] However, when a majority of racketeering acts occurred prior to November 1, 1987, but the defendant continued to participate in the enterprise after that date, the court should sentence the defendant under the Sentencing Guidelines because RICO is a "straddle crime" much like

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

[12] See United States v. Zizzo, 120 F.3d 1338, 1361 (7th Cir.)(defendants engaged in organized crime), cert. denied, 118 S. Ct. 566 (1997); United States v. Rainone, 32 F.3d 1203 (7th Cir.) (same), cert. denied, 515 U.S. 1102 (1995). See also United States v. Shenberg, 89 F.3d 1461, 1475 (11th Cir.)(court upheld a five-level upward departure pursuant to section 5K2.0 when the combined offense level did not adequately reflect the systematic and pervasive corruption of the Dade County judiciary and loss of public confidence in government), cert. denied, 118 S. Ct. 598 (1997).

[13] Under Section 1963(a), violation of any provision of 18 U.S.C. § 1962 may result in a term of imprisonment of not more than 20 years or a fine, or both. Under 18 U.S.C. § 3571, the maximum fine is $250,000 for an individual defendant, $500,000 for a corporate defendant, or twice the gross profits of the illegal RICO activity.

criminal conspiracy.[14] Moreover, "if the dates for a series of offenses straddle a charge in the Guidelines, the date of the last offense should control. . . . [Therefore] where a harsher Guideline becomes effective during the course of the conspiracy, a defendant who does not withdraw from the conspiracy before the effective date of the more severe Guideline should be sentenced pursuant to the more recent Guideline."[15]

Notably, courts have held that consecutive sentences for violations of one of the substantive RICO sections (18 U.S.C. § 1962(a), (b) or (c)) and for conspiring to violate one of these sections (18 U.S.C. § 1962(d)) are permissible,[16] as are consecutive

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[14] See United States v. Robertson, 73 F.3d 249, 252 (9th Cir.), cert. denied, 517 U.S. 1162 (1996); United States v. Morgano, 39 F.3d 1358, 1370-71 (7th Cir. 1994); United States v. Peeples, 23 F.3d 370, 373 (11th Cir. 1994); United States v. Butler, 954 F.2d 114, 120 (2d Cir. 1992); United States v. Moscony, 927 F.2d 742 (3d Cir. 1991); United States v. Cusack, 901 F.2d 29, 32 (4th Cir. 1990); United States v. Edgecomb, 910 F.2d 1309, 1311 (6th Cir. 1990); United States v. Story, 891 F.2d 988, 994 (2d Cir. 1989).

[15] United States v. Korando, 29 F.3d 1114, 1119-20 (7th Cir. 1994).

[16] See United States v. Pungitore, 910 F.2d 1084, 1115-17 (3d Cir.), cert. denied, 500 U.S. 915 (1991); United States v. West, 877 F.2d 281, 292 (4th Cir.), cert. denied, 493 U.S. 1070 (1989); United States v. Watchmaker, 761 F.2d 1459, 1477 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986); United States v. Thomas, 757 F.2d 1359, 1370-71 (2d Cir.), cert. denied, 474 U.S. 819 (1985); United States v. Marrone, 746 F.2d 957, 958-59 (3d Cir. 1984); United States v. Bagaric, 706 F.2d 42, 63-64 and n. 18 (2d Cir.), cert. denied, 464 U.S. 840 (1983). See also infra, Section V(B)(3)(f). But see United States v. Qaoud, 777 F.2d 1105, 1118-19 (6th Cir. 1985) (remanding for possible resentencing on RICO (c) and (d) charges despite concurrent sentences, in light of Ball v. United States, 470 U.S. 856 (1985)), cert. denied, 475 U.S. 1098 (continued...)

sentences for violations of two substantive RICO subsections.[17] Courts have also upheld consecutive sentences for a RICO conviction and for conviction of an underlying predicate offense.[18] Under the Sentencing Guidelines, however, there is a partiality towards concurrent sentences unless consecutive sentences are necessary to achieve the applicable Guideline range.[19]

B. Forfeiture

The RICO statute's forfeiture provisions, 18 U.S.C. § 1963(a)(1)-(3), are comprehensive and authorize the forfeiture of

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(...continued)
(1986).

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

[18] See United States v. Morgano, 39 F.3d 1358, 1366-68 (7th Cir. 1994)(not double jeopardy to sentence defendant for RICO and underlying substantive count); United States v. Pungitore, 910 F.2d 1084, 1107-10 (3d Cir.)(RICO and state murder), cert. denied, 500 U.S. 915 (1991); United States v. Russo, 890 F.2d 924, 935-36 (7th Cir. 1989) (RICO conspiracy and tax conspiracy based on same facts); United States v. Erwin, 793 F.2d 656, 669 (5th Cir.), cert. denied, 479 U.S. 991 (1986); United States v. Grayson, 795 F.2d 278 (3d Cir. 1986), cert. denied, 479 U.S. 1054 (1987); United States v. Hartley, 678 F.2d 961, 991-92 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); United States v. Hawkins, 658 F.2d 279, 286-88 (5th Cir. 1981) (in enacting RICO, Congress intended to permit cumulative sentences for substantive RICO offenses and the underlying predicate offenses); United States v. Carter, 721 F.2d 1514, 1535-36 (11th Cir.), cert. denied, 105 S. Ct. 89 (1984); United States v. Licavoli, 725 F.2d 1040, 1049-50 (6th Cir.), cert. denied, 467 U.S. 1252 (1984). Cf. Garrett v. United States, 471 U.S. 773 (1985) (upholding prosecution for CCE and its underlying predicates).

[19] Sentencing Guidelines § 5G1.2(c)-(d). See also United States v. Morgano, 39 F.3d 1358, 1365-69 (7th Cir. 1994).

not only proceeds and interests obtained by the defendant from any racketeering activity but also all of the defendant's various interests in the charged "enterprise." The relationship between the defendant and the enterprise can thus result in sweeping forfeitures. In cases where the defendant is the sole owner of the enterprise, or in which the enterprise is a company that is also named as a defendant, the entire company may be subject to forfeiture. Because of the potential scope of RICO's forfeiture provisions, it is OCRS's policy to apply them with circumspection.

1. Section 1963(a)-- Criminal Penalty

After the first Congress abolished the penalty of "corruption of the blood" for all convictions and judgments,[20] criminal forfeitures were unheard of in the United States for 180 years (though the first Congress did enact civil forfeitures under the customs laws). In 1970, Congress resurrected the criminal forfeiture concept by inserting forfeiture provisions into two federal criminal statutes: RICO and the Continuing Criminal Enterprise (CCE) statute.[21] The forfeiture provisions in these two statutes are in personam actions directed against a criminal

[20] 1 Stat. 117, ch. 9, § 24, codified at 18 U.S.C. § 3563, repealed by Pub. L. 98-473, 98 Stat. 1987 (1984) (effective Nov. 1, 1986).

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

defendant and are dependent upon convicting the defendant of the underlying RICO or CCE offense. Unlike civil in rem forfeiture statutes requiring separate civil proceedings against the property,[22] the RICO and CCE statutes impose forfeiture directly on an individual as part of the defendant's sentence.

As a result of amendments to the RICO statute in the Comprehensive Crime Control Act of 1984, the RICO forfeiture statute has three distinct sections. Section 1963(a) provides that

> [w]hoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law –
>
> (1) any interest the person has acquired or maintained in violation of section 1962;
>
> (2) any –
>
> (A) interest in;
> (B) security of;
> (C) claim against; or
> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

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

> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.
>
> The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection . . . .

The following sections will analyze the application and scope of each of these provisions in detail.

2. Section 1963(a)(1) -- Interest Acquired Or Maintained - - "But For Test"

Section 1963(a)(1) provides that anyone who violates any provision of Section 1962 must forfeit to the United States "any interest the person has acquired or maintained in violation of section 1962." This section clearly applies to interests in any enterprise, legitimate or illegitimate, which were acquired or maintained in the course of engaging in racketeering activity or through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(a) or (b), respectively.[23] For example, if a

[23] See United States v. West, 877 F.2d 281, 292 (4th Cir.) (by using automobile as collateral for drug purchases, defendant "maintained" it in violation of RICO, making it forfeitable under 18 U.S.C. § 1963(a)(1)), cert. denied, 493 U.S. 959 (1989); United States v. Horak, 833 F.2d 1235, 1242-44 (7th Cir. 1987) (holding that the defendant's job was "acquired and maintained" through racketeering activity, and remanding the case to district court to determine whether defendant's salary, bonuses, and pension and profit-sharing plans were "acquired and maintained" as a result of racketeering (continued...)

defendant uses extortion in the course of his racketeering pattern to obtain ownership or control over a legitimate business, his interest in that business may be forfeited.

Generally, the interest to be forfeited under Section 1963 (a)(1) must have been acquired or maintained as a result of the racketeering violation. However, the courts have not uniformly specified what degree of causality is required to establish that the forfeited property was acquired or maintained as a result of the racketeering activity. Some courts have held that there must be a "but for" relationship between the offense and the acquisition or maintenance of the interest.[24] However, in United States v. DeFries, 129 F.3d 1293, 1312-13 (D.C. Cir. 1997), the court ruled that the "but for" test requires only an adequate "causal link between the property forfeited and the RICO violation" that should

(...continued)
activity).

[24] See United States v. Ofchinick, 883 F.2d 1172, 1183-1184 (3d Cir. 1989), cert. denied, 493 U.S. 1034 (1990) (holding that the government failed its burden of proving that the defendant's "racketeering activities were a cause in fact of his acquisition of or maintenance of an ownership interest in the [forfeited] stock"); United States v. Horak, 833 F.2d 1235, 1242 (7th Cir. 1987)(remand to determine whether the defendant's salaries and bonuses subject to forfeiture were obtained solely from the unlawfully obtained contract or were in part obtained through lawful activities); United States v. Angiulo, 897 F.2d 1169, 1213 (1st Cir. 1990)(reversed forfeiture of property obtained before the defendant committed his second racketeering act).

be determined on the facts of each case.[25] Another court has stated that the amount subject to forfeiture pursuant to Section 1963(a)(1) need not be directly linked or traced to specific racketeering acts, but should merely reflect the scope of the offense.[26]

Prior to the enactment of Section 1963(a)(3), it was unclear whether Section 1963(a)(1) would apply to forfeiture of income or

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[25] In DeFries, the defendant argued that the government failed to establish an adequate causal nexus between the defendants' unlawful union ballot tampering scheme and the salaries they obtained as union officers following their successful elections because the government did not prove that the election results would have been different absent their alleged election fraud. The court of appeals rejected this argument, finding a sufficient causal nexus between the defendants' racketeering activities and the forfeited salaries because the fraudulent activities were extensive and infected the entire union election process. DeFries, 129 F.3d at 1313.

[26] See United States v. Faulkner, 17 F.3d 745, 775 (5th Cir.), cert. denied, 513 U.S. 870 (1994). In Faulkner, three defendants involved in a real estate scheme using "flip transactions," which caused the collapse of a savings and loan, were convicted under RICO and ordered to forfeit $40 million, $38 million, and $22 million, respectively, pursuant to Section 1963(a)(1). These amounts reflected monies received by the defendants, their companies, and their families, but were "acquired or maintained" as a result of the racketeering violation because the defendants controlled the disbursements of the proceeds of the land transactions and directed the disbursements after the funds were deposited in an account of the defendant's choosing. But cf. United States v. Riley, 78 F.3d 367, 370 (8th Cir. 1996)(where RICO enterprise was an association-in-fact of several companies, allegation that the defendant used the enterprise to violate RICO is not sufficient to make the entire enterprise subject to forfeiture under Section 1963(a)(1); only the defendant's interest in the enterprise, not the enterprise itself, was forfeitable because RICO forfeiture is *in personam*).

cash proceeds from racketeering activity.[27] This issue was resolved by the Supreme Court when, in Russello v. United States, 464 U.S. 16 (1983), the Court held that interests subject to forfeiture under Section 1963(a)(1) included proceeds derived from any violation of Section 1962. Under Russello, Section 1963(a)(1) is applicable to violations of any subsection of Section 1962 and is not limited to violations of Section 1962(a) or (b). While Russello was pending, in October 1984, Congress enacted Section 1963(a)(3), which codified Russello by specifically including proceeds or property derived from proceeds as forfeitable interests under the RICO statute.[28] The Organized Crime and Racketeering Section recommends that the indictment allege both Section 1963(a)(1) and Section 1963(a)(3) when the forfeiture of proceeds is sought.

3. Section 1963(a)(2) -- Interests in and/or Affording Influence Over An Enterprise

Section 1963(a)(2) includes under its forfeiture provisions any:

(A) interest in;
(B) security of;
(C) claim against; or

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

[28] See infra Section IV (B)(4) for further discussion of Section 1963(a)(3).

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

Section 1963(a)(2) is directed toward the forfeiture of the defendant's sources of power, other than capital or money, which for example, might include personal stock ownership in a corporation or an interest in a partnership. Under Section 1963(a)(2), when a defendant has conducted the affairs of an enterprise in violation of Section 1962, the defendant's entire interest in the enterprise can be forfeited, subject to the court's Eighth Amendment proportionality review, even though some parts of the enterprise may not be "tainted" by racketeering activity.[29] For example, one court has held that interests purchased with the funds from a corporate enterprise that were in an individual defendant's name are interests in the enterprise and therefore subject to forfeiture under Section 1963(a)(2).[30]

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[29] See United States v. Anderson, 782 F.2d 908 (11th Cir. 1986); United States v. Walsh, 700 F.2d 846, 857 (2d Cir.), cert. denied, 464 U.S. 825 (1983); United States v. Cauble, 706 F.2d 1322, 1349 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Tunnell, 667 F.2d 1182, 1188 (5th Cir. 1982). But see United States v. Busher, 817 F.2d 1409 (9th Cir. 1987) (holding that forfeiture of defendant's interest in corporation could be so grossly disproportionate to offense as to violate Eighth Amendment, and remanding to district court for determination of proportionality); see also infra, Section IV (B)(13), Eighth Amendment -- Excessive Fines.

[30] See United States v. Washington, 782 F.2d 807 (9th Cir.), (continued...)

While subsections A, B, and C of Section 1963(a)(2) are limited to interests in, securities of, or claims against the enterprise, subsection D is much broader and makes forfeitable any property or contractual right affording a source of influence over an enterprise. Under subsection D, any property or interest of a defendant that is not directly part of an enterprise, but which allows the defendant to exert control or influence over the enterprise, is subject to forfeiture.[31] Such interests might include voting rights in securities of an enterprise, a management contract between the defendant and the enterprise, or even the right to hold a political or union office.[32] Moreover, subsection D applies to instrumentalities used in the offense, such as buildings or vehicles used in narcotics transactions, or an interest in a bank involved in laundering drug money, if these interests afforded a source of influence over the illegal enterprise.[33] These forfeitures are subject to the court's

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modified on other grounds, 797 F.2d 1461 (9th Cir. 1986).

[31] See United States v. Thevis, 474 F. Supp. 134, 144 (N.D. Ga. 1979), aff'd, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); see also United States v. Veliotis, 586 F. Supp. 1512, 1518-19 (S.D.N.Y. 1984).

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

[33] See United States v. West, 877 F.2d 281 (4th Cir.)(two houses used for storage and sales of drugs afforded defendant a source of (continued...)

determination of the extent to which they actually afford a source of influence over the enterprise, the so-called "taint" analysis. In United States v. McKeithen, 822 F.2d 310 (2d Cir. 1987), a CCE forfeiture case, the appellate court held that where a set of buildings only partially (43%) afforded a defendant a source of influence over an enterprise, the buildings should be subdivided so that forfeiture would be proportional. OCRS supports such apportionments in RICO cases as a matter of policy, in order to avoid excessive forfeitures.

Notably, in at least two cases the government has been unsuccessful in obtaining forfeiture of certain assets under the "source of influence" theory. In one instance, a trial court ruled that the punctuation and grammar of Section 1963(a)(2) required that the phrase "affording a source of influence over" be read to modify all prongs of Section 1963(a)(2), so that an "interest in" the enterprise is not subject to forfeiture unless it also affords the defendant a source of influence over the enterprise. Although this interpretation was arguably inconsistent with the plain language of the statute, the appellate court declined to order

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(...continued)
influence over the enterprise), cert. denied, 493 U.S. 959 (1989); United States v. Zielie, 734 F.2d 1447 (11th Cir. 1984) (government successfully forfeited property that was used for storing marijuana and for counting money from marijuana sales), cert. denied, 469 U.S. 1189 (1985).

forfeiture of the defendant's interest in the enterprise.[34] The statute was subsequently modified to correct this interpretation. Nonetheless, prosecutors must be wary of such of such strict views of RICO in formulating forfeiture theories and pleadings.

4. Section 1963(a)(3) - - Proceeds

Section 1963(a)(3), which was added to RICO in 1984, codifies the holding in Russello v. United States, 464 U.S. 16 (1983). As noted in discussing 1963(a)(1) above, Congress specifically enacted Section 1963(a)(3) to include forfeiture of proceeds or property derived from proceeds. Because of this specificity, any proceeds subject to forfeiture should be alleged under this subsection as well as Section 1963(a)(1).[35] The effect of a forfeiture order involving proceeds is similar to that of a money judgment, in that a defendant is required to forfeit the amount of illicit proceeds as determined by the court even if the funds used to satisfy the

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[34] See United States v. Horak, 633 F. Supp. 190, 198-200 (N.D. Ill. 1986), aff'd in part, vacated in part, 833 F.2d 1235 (7th Cir 1987); see also United States v. Ragonese, 607 F. Supp. 649 (S.D. Fla. 1985), aff'd, 784 F.2d 403 (11th Cir. 1986) (holding that defendant's interest in an apartment complex did not afford him a source of influence over the enterprise because he disapproved of drug dealings there, and instead, used it as a tax shelter and improved it).

[35] See United States v. Argie, 907 F.2d 627, 629 (7th Cir. 1990)(holding that portion of a car lease received as payment for an unlawful debt was forfeitable under 18 U.S.C. § 1963(a)(3)); United States v. Bloome, 777 F. Supp. 208, 210 (E.D.N.Y. 1991)(Section 1963(a)(3) forfeiture is not limited to cash proceeds; jewelry and watches stolen in robberies were also forfeitable under this section).

forfeiture are not tainted. This procedure obviates the need for tracing the defendant's assets. If the defendant cannot provide funds to satisfy the forfeiture, the court may order forfeiture of substitute assets up to the value of the forfeited proceeds if substitute asset forfeitures were included in the indictment's forfeiture pleadings. In that instance, unlike a money judgment, the forfeiture of substitute assets permits the government to seize the forfeited assets and address third party claims – including creditors – through the ancillary claims process, discussed in Section IV(B)(15)(d) infra.

Case law provides that, in general, RICO forfeitures under Section 1963(a)(3) should encompass the gross, not net, proceeds of racketeering activity,[36] although some direct costs, such as the costs of carrying out contracts, may be deducted from the amounts subject to forfeiture under certain circumstances.[37] One court has

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[36] See United States v. Simmons, 154 F.3d 765 (8th Cir. 1998)(defendant liable for gross amount of bribe money and not allowed to deduct overhead expenses); United States v. DeFries, 129 F.3d 1293, 1314-15 (D.C. Cir. 1997)(RICO forfeiture includes federal taxes paid on salaries earned through racketeering activity); United States v. Lizza Industries, Inc., 775 F.2d 492 (2d Cir. 1985) (district court properly refused to deduct overhead operating expenses or taxes paid on profits received from illegal bid rigging contracts, although direct costs incurred in performing the contracts were deducted), cert. denied, 475 U.S. 1082 (1986); see also United States v. Jeffers, 532 F.2d 1101, 1116-17 (7th Cir. 1976), aff'd in part, vacated in part, 432 U.S. 137 (1977) (holding in a CCE case that jury instructions defining "income" as "gross income or gross receipts" were entirely proper).

[37] See United States v. Lizza Industries, Inc., 775 F.2d 492, 498- (continued...)

stated that "proceeds" are something less than the gross receipts of the defendant's insurance business because the gross receipts included amounts needed to pay policyholders' claims.[38] However, the defendant has the burden of going forward on this issue, i.e., the government need not prove the absence of direct costs.[39] Another court has said that the term "proceeds" means the entire amount realized from the racketeering activity, including all proceeds obtained by the defendant, as well as all proceeds obtained by co-conspirators in furtherance of the racketeering activity to the extent reasonably foreseeable by the defendant.[40]

The Eleventh Circuit has held that property subject to

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99 (2d Cir. 1985) (district court properly refused to deduct overhead operating expenses or taxes paid on profits received from illegal bid rigging contracts, although direct costs incurred in performing the contracts were deducted), cert. denied, 475 U.S. 1082 (1986); see also United States v. Jeffers, 532 F.2d 1101, 1116-17 (7th Cir. 1976), aff'd in part, vacated in part, Jeffers v. United States, 432 U.S. 137 (1977) (holding in a CCE case that jury instructions defining "income" as "gross income or gross receipts" were entirely proper).

[38] See United States v. Riley, 78 F.3d 367, 371 (8th Cir. 1996).

[39] See United States v. Ofchinick, 883 F.2d 1172, 1182 (3d Cir. 1989), cert. denied, 493 U.S. 1034 (1990).

[40] See United States v. Saccoccia, 58 F.3d 754, 785 (1st Cir. 1995), aff'g, 823 F. Supp. 994, 1001-03 (D.R.I. 1993)(holding that the defendants were jointly and severally liable for the entire amount ($136 million) laundered by the conspirators on behalf of drug traffickers, and rejecting the argument that the $136 million they laundered merely passed through their hands and was not "obtained" by them and that the forfeiture should have been limited to the laundering fees they had obtained).

forfeiture under Section 1963(a)(3) is limited to property that a defendant obtains directly or indirectly as a result of racketeering activity.[41] Under this holding, a defendant's interest in a casino is not forfeitable as proceeds where the defendant acquired the interest prior to the time of the racketeering acts charged in the indictment. It should be noted, however, that such an interest might be subject to forfeiture under Section 1963(a)(2) if it constituted an interest in or afforded a source of influence over the enterprise. Prosecutors are reminded to consider all available theories of forfeiture in order to avoid narrowing the scope of forfeiture unnecessarily.

One court has held that "double counting" or "double recovery" through forfeiture is not permissible, and therefore it is improper to forfeit more than the total value of the defendant's unlawfully obtained proceeds.[42] In addition, forfeitures may give rise to issues regarding the relationship of forfeiture to other penalties or costs associated with the criminal activity, such as fines, restitution, and taxes.

In proceeds cases, the assets sought for forfeiture should be traced and described with as much specificity as possible. Bank account numbers, legal descriptions of property, and registration

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[41] See United States v. Kramer, 73 F.3d 1067, 1076 (11th Cir.), cert. denied, 117 S. Ct. 516 (1996).

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

numbers of cars, airplanes or boats will facilitate the forfeiture process. If tracing the proceeds proves difficult, it may be possible to use the "net worth" method of circumstantial proof to establish that the defendant had no legitimate or alternative sources of income, making his proceeds subject to forfeiture.[43]

5. Substitute Assets

Section 1963(m), in pertinent part, provides that

> [i]f any property [subject to forfeiture], as a result of any act or omission of the defendant –
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> > (1) cannot be located upon the exercise of due diligence;
> >
> > (2) has been transferred or sold to, or deposited with, a third party;
> >
> > (3) has been placed beyond the jurisdiction of the court;
> >
> > (4) has been substantially diminished in value; or
> >
> > (5) has been commingled with other property which cannot be divided without difficulty;
>
> the court shall order the forfeiture of any other property of the defendant up to the value of any property [subject to forfeiture].

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[43] See United States v. Nelson, 851 F.2d 976, 980-981 (7th Cir. 1988) (upholding net worth approach for CCE forfeiture); United States v. Harvey, 560 F. Supp. 1040, 1089-90 (S.D. Fla. 1983) (based on a net worth analysis, court granted a pre-trial restraining order in CCE case preventing the defendant from selling or transferring his interest in thirteen specific assets), aff'd, 789 F.2d 1492 (11th Cir.), cert. denied, 479 U.S. 854 (1986); United States v. Lewis, 759 F.2d 1316, 1327-29 (8th Cir.)(upholding CCE forfeiture using net worth theory), cert. denied, 474 U.S. 994 (1985).

This provision, known as the "substitute assets" provision per its companion section in 21 U.S.C. § 853(p), permits the forfeiture of a defendant's otherwise untainted assets when he has dissipated or otherwise disposed of directly forfeitable property of any kind. As previously discussed in Section IV(B)(4), substitute assets also provide a means to enforce "money judgment" forfeitures ordered pursuant to Section 1963(a)(3). If the court enters an order of forfeiture in the amount of the defendant's illicit proceeds proved at trial and the defendant cannot pay that amount, the government may seek the forfeiture of substitute assets up to the amount of proceeds ordered forfeited.

In order to comply with Federal Rule of Criminal Procedure 7(c)(2), the exact statutory provisions of Section 1963(m) should be included in the indictment's forfeiture pleadings in order to put the defendant on notice of the government's intent to seek such forfeitures. Such language also puts all potential parties on notice of the government's intent and may be of particular legal significance in defeating claims by persons who have received tainted assets from the defendant after indictment.

As discussed in Section IV(B)(6) infra, only the Fourth Circuit currently permits the pretrial restraint of potential substitute assets. In other circuits, the government must make an informed decision whether to name potential substitute assets in the indictment. Identifying such assets effectively notifies the

defendant of exactly which assets the government will seek if the underlying forfeiture cannot be satisfied, thus affording the defendant an opportunity to transfer those items in an attempt to defeat eventual forfeiture. Absent some means of restraining such assets, listing potential substitute assets in the indictment may be of little value. However, if real property represents a potentially valuable substitute asset, the government should consider naming the property in the indictment and filing a lis pendens against it. If a third party then buys the property from the defendant, the government could seek to void the transfer and obtain forfeiture because the buyer had constructive knowledge of the government's asserted interest.

If the issue of forfeiture is presented to the jury for its special verdict (see Section IV(B)(10)infra), no mention of substitute assets is made. Under Section 1963(m), it is solely within the court's authority to order the forfeiture of substitute assets. The issue of substitute assets can only be reached after the jury renders a special verdict that certain assets of the defendant are subject to forfeiture under 1963(a), e.g., the proceeds of racketeering activity or property affording a source of influence over the enterprise. If those assets are not available by the defendant's act or omission per 1963(m), only then may substitute assets be sought for forfeiture.

If the jury has ordered forfeiture and those assets are

unavailable through the defendant's acts or omissions, the government should file a motion for forfeiture of substitute assets. The motion should include, as an attachment, an affidavit stating that the forfeited property is unavailable, that the unavailability is due to the defendant's actions within one of the statutory categories of Section 1963(m), that the defendant has an interest in the asset to be substituted, and the approximate value of the substitute asset. The affidavit may be executed by either the government's counsel or a case agent. If post-trial depositions have been taken (see the discussion of 1963(k) in Section IV(B)(15)(c) infra), relevant excerpts may be provided to the court.

Note that if substitute assets are declared forfeited by the court, the government must still carry out the ancillary claims process. See Post-Trial Proceedings, Section IV(B)(15)(d) infra.

6. Pre-trial Restraints

a. General Considerations

A critical step in the forfeiture process involves preserving the availability of the property subject to forfeiture. When a defendant or prospective defendant learns that his assets may be subject to forfeiture, the defendant may dispose of or transfer assets to conceal them from the government or attempt to transfer

a portion to his attorney in anticipation of attorney fees.[44] To prevent disposal of forfeitable property, 18 U.S.C. § 1963(d) authorizes the district courts to enter restraining orders or take other action necessary to preserve the availability of the property. **The United States Attorneys' Manual requires that all proposed restraining orders under § 1963(d) be reviewed and approved by OCRS before being submitted to any federal judge or magistrate for consideration.**

Challenges on the ground that the entry of a pre-trial restraining order is inconsistent with the presumption of innocence have been rejected by most courts.[45] Prior to the 1984 amendments, RICO contained no guidelines for courts to follow in implementing pre-trial restraining orders. As a result, courts differed as to whether an adversarial hearing on the propriety of a restraining order was constitutionally mandated,[46] and if so, what kind of

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[44] See United States v. Long, 654 F.2d 911 (3d Cir. 1981); United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979).

[45] See United States v. Ferrantino, 738 F.2d 109, 110 (6th Cir. 1983); United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975), appeal dismissed, 556 F.2d 569 (3d Cir. 1977); United States v. Bello, 470 F. Supp. 723, 724 (S.D. Cal. 1979). But see United States v. Crozier, 777 F.2d 1376, 1383-84 (9th Cir. 1985) (holding parts of 1984 CCE forfeiture amendments unconstitutional because they permit freezing of assets without providing a hearing to defendants or third parties); United States v. Mandel, 408 F. Supp. 679, 682 (D. Md. 1976) ("entry of a restraining order at this time . . . would be substantially prejudicial to the defendants").

[46] See United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975), appeal dismissed, 556 F.2d 569 (3d Cir. 1977) (defendant's (continued...)

evidence would be allowed[47] and what burden the government needed to meet to sustain the order.[48] The 1984 amendments specified and broadened the authority of the courts to take pre-trial measures, but left unresolved related issues, such as the government's burden of proof when seeking a temporary restraining order for potentially forfeitable property.[49]

(...continued)
"contention that he has been deprived of his property without due process is premature"); United States v. Crozier, 674 F.2d 1293, 1298 (9th Cir. 1982), vacated, 468 U.S. 1206 (1984), on remand, 777 F.2d 1376 (9th Cir. 1985) (sanctions under civil and criminal statutes involve questions of due process); United States v. Unimex, 991 F.2d 546 (9th Cir. 1993) (holding, without specifically overruling Crozier, that before a hearing on a pretrial, post-indictment TRO is required, the defendant must show the need to use the assets to retain counsel).

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

[48] Compare United States v. Harvey, 560 F. Supp. 1040, 1087-88 (S.D. Fla. 1982) (government must establish by a preponderance of the evidence that it is likely to convince a jury beyond a reasonable doubt that the defendant is guilty of violating RICO or CCE and that the property at issue is subject to forfeiture) with United States v. Veliotis, 586 F. Supp. 1512, 1521 (S.D.N.Y. 1984) (government must demonstrate probable cause to believe that defendant's property is subject to forfeiture); see also United States v. Beckham, 562 F. Supp. 488, 490 (E.D. Mich. 1983) (government must prove by clear and convincing evidence that the property was involved in a RICO violation, that it would be subject to forfeiture under the statute, and that there are reasonable grounds to believe that the defendant is likely to make the property inaccessible to the government prior to the conclusion of the trial); United States v. Mandel, 408 F. Supp. 679, 681-82 (D. Md. 1976) (the guidelines governing the issuance of a preliminary injunction in a civil case should be applied to provide minimal guidance as to entry of a restraining order under RICO).

[49] See United States v. Riley, 78 F.3d 367, 370 (8th Cir. (continued...)

One appellate court initially held that potential substitute assets could be restrained pre-trial.[50] However, every court that has since considered that issue has denied the restraint of potential substitute assets due to the language of Section 1963(d)(1), which does not expressly incorporate the substitute asset provisions of Section 1963(m).[51] In those circuits that do not permit pretrial restraint, prosecutors may ask the court to require the execution of a satisfactory performance bond equal to the value of the substitute assets.

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1996)(holding that "the government must demonstrate in a hearing that the RICO defendant is likely to be guilty and that the property to be restrained is subject to forfeiture . . . . The preconviction restraining order should include specific findings permitting an appellate court to determine whether the property restrained is subject to forfeiture."); United States v. Perholtz, 622 F. Supp. 1253, 1259 (D.D.C. 1985) (government must show "substantial likelihood that failure to enter order will result in property being destroyed, removed, or otherwise made unavailable for forfeiture, and that the need to preserve the availability of the property outweighs the hardship on defendant"); United States v. Thier, 801 F.2d 1463, 1470 (5th Cir. 1986) (grand jury findings contained in indictment have weight, but are rebuttable on issue of commission of offense and forfeitability of assets), modified, 809 F.2d 249 (1987).

[50] See In re Billman, 915 F.2d 916, 920 (4th Cir. 1990), cert. denied, 500 U.S. 952 (1991); see also United States v. Regan, 858 F.2d 115, 121 (2d Cir. 1988)(holding limited to pretrial restraint of proceeds by United States v. Gotti, 155 F.3d 144 (2d Cir. 1998)).

[51] See United States v. Gotti, 155 F.3d 144 (2d Cir. 1998); United States v. Riley, 78 F.3d 367, 371 (8th Cir. 1996); United States v. Ripinsky, 20 F.3d 359, 362-63 (9th Cir. 1994); In re Assets of Martin, 1 F.3d 1351, 1357-61 (3d Cir. 1993); United States v. Floyd, 992 F.2d 498, 502 (5th Cir. 1993)(21 U.S.C. § 853). See also United States v. Clark Beach Field, 62 F.3d 246, 248 (8th Cir. 1995)(construing 18 U.S.C. § 982).

Two courts of appeals have held that portions of the virtually identical CCE forfeiture amendments unconstitutionally deny due process in that they permit the district court to freeze assets without a hearing until after the defendant is convicted.[52] The Tenth Circuit has ruled, however, that a temporary restraining order for a CCE forfeiture case is proper without a hearing where there is an indictment that supplies the probable cause for the restraint.[53] Note, also, that the Organized Crime and Racketeering Section requires that the temporary restraining order be drafted to permit the defendant's access, upon motion to the court and with notice to the United States, to reasonable living expenses[54] and, in certain cases involving legitimate businesses, to reasonable business expenses. In this vein, government counsel should not

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[52] See United States v. Harvey, 814 F.2d 905, 928 (4th Cir. 1987) (ex parte temporary restraining order after indictment without any post-deprivation hearing other than trial violates Fifth Amendment due process guarantees); United States v. Crozier, 777 F.2d 1376, 1382-84 (9th Cir. 1985) (unconstitutional to freeze assets without hearing); but cf. United States v. Thier, 801 F.2d 1463, 1466-70 (5th Cir. 1986) (forfeiture under a temporary restraining order issued in CCE case proper where adversarial hearing conforming to Fed. R. Civ. P. 65 held promptly after ex parte order granted), modified, 809 F.2d 249 (5th Cir. 1987); United States v. Perholtz, 622 F. Supp. 1253, 1256 (D.D.C. 1985) (temporary restraining order can issue after hearing where government shows likelihood of prevailing on RICO charge and that property is likely forfeitable).

[53] See United States v. Musson, 802 F.2d 384, 385 (10th Cir. 1986). See also United States v. Keller, 730 F. Supp. 151, 162 (N.D. Ill. 1990) (need for hearing on pre-trial TRO is determined by balancing government's interests against those of defendant; here, where there was no factual dispute about probable cause, no hearing was required).

[54] See United States v. Madeoy, 652 F. Supp. 371, 376 (D.D.C. 1987).

oppose a defendant's reasonable requests for such provisions.

In appropriate cases, a pre-trial restraining order is an effective means of preventing the defendant from liquidating or otherwise removing forfeitable property from the court's jurisdiction. Whether a pre-trial restraining order should be sought usually involves balancing between the need to separate the defendant from his illegally acquired property and the need to protect innocent third persons. Because such orders can have, or appear to have, a substantial negative impact on individuals and entities who may not have committed any wrongdoing, the Criminal Division in mid-1989 issued guidelines to ensure that the pre-trial RICO Temporary Restraining Order provisions are used fairly.[55] Under these guidelines, which are reprinted in full at Appendix B to this Manual, before seeking a temporary restraining order, a prosecutor must make a careful assessment of whether freezing the defendant's assets would do more damage than good when the interests of innocent persons are weighed in the balance. This assessment is particularly important when a legitimate business is involved. In addition, the prosecutor must make certain public statements that clarify the exact nature of the restraints being sought to minimize the negative impact on legitimate interests. Also, under the guidelines (and as noted above), the United States Attorneys' offices are required to timely submit any proposed RICO

[55] See Criminal Resources Manual at § 2084 (reprinted at Appendix B, infra).

Temporary Restraining Order to the Organized Crime and Racketeering Section for review and approval prior to filing the TRO.

Pretrial restraint may also affect the defendant's ability to retain counsel. Though courts have interpreted RICO to permit pre-trial restraint without a hearing in both pre-indictment and post-indictment settings,[56] courts have routinely permitted post-restraint pretrial hearings if the restraint implicates the defendant's Sixth Amendment right to counsel.[57]

As noted above, pretrial restraint may also affect third parties who have an interest in the seized property. Section 1963(i) provides that third parties generally may not litigate their interest in property prior to the entry of the order of forfeiture. However, due process considerations may permit third parties whose property is subject to restraint to be heard on the reasonableness of the restraint. For example, one district court has permitted a third party to challenge an ex parte restraining order.[58] In that case, a non-RICO defendant held funds jointly with

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[56] See United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991); United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989).

[57] Monsanto, 924 F.2d at 1195-97 (post-restraint hearing required if defendant needs restrained property to retain counsel in criminal case); see also, e.g., United States v. Jones, 160 F.3d 641 (10th Cir. 1998)(if defendant meets initial burden showing he has no funds other than restrained assets to retain counsel, hearing is required). See also infra Section IV (B)(12).

[58] See United States v. Seigal, 974 F. Supp. 55, 58 (D. Mass. 1997).

her husband, who was a RICO defendant. While the third party could not challenge the validity of the indictment, the district court held that, based in part on the complexity of the trial and the expected length of the proceedings, due process afforded third parties a limited but timely pretrial opportunity to challenge the restraining order as "clearly improper" on the ground that the property was not available for forfeiture. The district court also held that, under Section 1963, the court had the statutory discretion to modify a restraining order if it is "clearly improper" in light of the congressional goals of preserving only that property which is available for forfeiture.

Currently, the prevailing view is that property held by third parties may be restrained to preserve the government's interest.[59] Nonetheless, some courts have declined to restrain property held by third parties or to make restraining orders applicable to third parties.[60] And while pretrial restraint may be issued, third parties are often permitted to have a hearing on the restraint of

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[59] See United States v. Kirschenbaum, 156 F.3d 784 (7th Cir. 1998)(court restrains property held in name of defendant's wife after finding defendant to be true owner).

[60] See United States v. Riley, 78 F.3d 367 (8th Cir. 1996)(court may not appoint receiver where only the defendant's interest in the corporation, but not the corporation itself, is subject to forfeiture).

their property.[61]

b. When to file a pre-trial restraining order

The prosecutor can seek a pre-trial restraining order at one of three stages:

(1) Upon the filing of an indictment or information

Under Section 1963(d)(1)(A), a court may take appropriate action upon the filing of an indictment or information that charges a violation of Section 1962 and alleges that property sought to be forfeited would, in the event of conviction, be subject to forfeiture. For example, the court may, at the government's request, issue an order enjoining a defendant from destroying, concealing, or transferring any property that is subject to forfeiture. Notably, one court has held that such an order cannot be issued to restrain property that is not itself subject to forfeiture, even though that property may later be used to satisfy a forfeiture judgment under the fungibility doctrine.[62] A court may, however, impose reasonable restraints on third parties, such as banks, when necessary to preserve the status quo.[63] Of course, any restraint must be tailored to cause the least intrusion

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[61] See Roberts v. United States, 141 F.3d 1468 (11th Cir. 1998) (if third party's property is restrained and defendant is a fugitive, third party's remedy is to ask court for order amending restraint and file interlocutory appeal if unsuccessful).

[62] See United States v. Chinn, 687 F. Supp. 125, 127 (S.D.N.Y. 1988).

[63] See United States v. Regan, 858 F.2d 115, 119-22 (2d Cir. 1988).

possible and should be sought only when absolutely necessary.

The Senate Report on the 1984 amendments states that the "probable cause established in the indictment or information is, in itself, a sufficient basis for issuance of a restraining order."[64] This statement responded to a series of Ninth Circuit cases beginning with United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982), vacated, 486 U.S. 1206 (1984), on remand, 777 F.2d 1376 (9th Cir. 1985), which held that the due process clause requires an evidentiary hearing on the issue of probable cause before a restraining order can be issued.[65]

However, many due process issues can be avoided simply by employing legal alternatives to restraining the property. In a 1993 civil forfeiture case, the Supreme Court held that (absent exigent circumstances) the seizure of real property always requires notice to the property owner and an opportunity to be heard as a

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[64] S. Rep. No. 98-225, 98th Cong., 1st Sess. 202 (1983). See also United States v. Musson, 802 F.2d 384, 385 (10th Cir. 1986) (indictment supplied probable cause for restraint).

[65] The Ninth Circuit has since modified its position concerning hearings required to restrain assets necessary to pay attorney's fees. The defendant must first show the need to use the assets to retain counsel. After such a need is established, a hearing is required, where the moving papers, including affidavits, are sufficiently specific and detailed to permit the court to conclude that a claim is present. Only if the allegations are sufficient and a factual basis is raised is a hearing required. United States v. Unimex, Inc., 991 F.2d 546, 551 (9th Cir. 1993).

matter of due process.[66] Notwithstanding the apparent breadth of this decision, however, the Court in dicta suggested alternatives to the government's seizing real property, notably the use of a lis pendens under relevant state law. The Court drew a distinction between a "seizure" and a lis pendens, in that the latter merely puts the world on notice of the government's claimed interest in the property but otherwise does not impair the owner's use and enjoyment of the real property. Because use of the lis pendens avoids the due process issue entirely, filing a notice of lis pendens either with a copy of the indictment attached or by express reference to the existing indictment and posting a copy at the property site (the "post and walk" method) has become the prevalent method of preserving real property for forfeiture,[67] and obviates the need for a hearing unless a third party can demonstrate that the lis pendens itself imposes extreme hardship.

Though the Court's lis pendens suggestion has proven helpful in real property seizures, situations will arise involving personal property in which restraint might still be necessary. Because criminal forfeiture statutes such as RICO include specific procedures for injunctions and restraining orders, courts have

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[66] See United States v. James Daniel Good Real Property, 510 U.S. 43 (1993).

[67] See Aronson v. City of Akron, 116 F.3d 804, 810 (6th Cir. 1997) (because lis pendens is not a taking, filing lis pendens without prior notice did not violate defendant's due process).

tended to order restraint under those procedures and only then consider post-restraint challenges. Whether such challenges warrant a hearing is often fact-dependent. Several courts have concluded that some type of evidentiary hearing is required.[68] Notwithstanding the statements in the Senate Report, prosecutors should consult with the Organized Crime and Racketeering Section whenever due process issues arise regarding a pre-trial restraining order hearing.

If a court requires a hearing regarding the issuance of a restraining order, the prosecutor will be faced with a strategic decision, i.e., whether to chance premature disclosure of the government's case or forego the restraining order. Various decisions, such as that in Crozier, allow courts to entertain challenges to the validity of the indictment and thus require that the government prove the merits of the underlying criminal case and forfeiture count, and possibly, to put on witnesses well in advance of trial.[69] Although Section 1963(d)(3) was enacted to ease the

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[68] See United States v. Harvey, 814 F.2d 905, 928 (4th Cir. 1987); United States v. Thier, 801 F.2d 1463, 1466-69 (5th Cir. 1986), modified, 809 F.2d 249 (5th Cir. 1987); United States v. Crozier, 777 F.2d 1376, 1383-84 (9th Cir. 1985); United States v. Perholtz, 622 F. Supp. 1253, 1256 (D.D.C. 1985); United States v. Rogers, 602 F. Supp. 1332, 1344 (D. Colo. 1985). See also Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 64-67 (1989) (in a case involving an obscenity prosecution under a state RICO statute, it violated the First Amendment to permit pre-trial seizure of expressive materials presumptively protected by the First Amendment based only on probable cause that a RICO violation had occurred).

[69] See United States v. Spilotro, 680 F.2d 612, 616-18 (9th Cir. (continued...)

government's burden by providing that a court may receive and consider evidence and information at a pre-trial hearing that would be inadmissible under the Federal Rules of Evidence, thereby allowing for the presentation of hearsay evidence, meeting the requirements of Crozier and similar cases can make obtaining a restraining order potentially risky to the government's case in chief. Accordingly, the prosecutor's decision whether to pursue a pre-trial restraining order after a court orders a hearing depends on a case-by-case analysis of the nature and circumstances of the case and the requirements placed on the government by the court.

(2) Prior to filing an indictment

Section 1963(d)(1)(B) provides for pre-indictment restraining orders under certain circumstances. First, as discussed above, there must be notice to persons appearing to have an interest in the property and an opportunity for a hearing. Second, the court must determine that:

1) there is a substantial probability that the United States will prevail on the issue of forfeiture;

2) failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

3) the need to preserve the availability of the property through the entry of the requested order outweighs the

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(...continued)
1982).

hardship on any party against whom the order is to be entered. Pre-indictment orders obtained under Section 1963 (d)(1)(B) are effective for ninety days unless the order is extended for good cause or an indictment or information is filed within that time.

(3) Ex parte pre-indictment restraining order

A temporary ex parte pre-indictment restraining order may be obtained by the government pursuant to Section 1963(d)(2) if the government can demonstrate that:

1) there is probable cause to believe that the property involved is subject to forfeiture; and

2) the provision of notice will jeopardize the availability of the property for forfeiture.

A temporary restraining order under Section 1963(d)(2) is valid for only ten days, unless extended for good cause or the party against whom it is entered consents to an extension. Section 1963(d)(2) also provides that, where a hearing is requested concerning the ex parte order, it must be held at the earliest possible time and prior to the expiration of the temporary order.[70] **NOTE: Prosecutors are required to obtain approval from the Organized Crime and Racketeering Section prior to making ex parte application for temporary restraining orders or similar relief under the criminal**

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

RICO statute.[71]

7. Drafting Forfeiture Allegations

Rule 7(c)(2) of the Federal Rules of Criminal Procedure provides that

> [n]o judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

By including the proposed forfeiture in the indictment or information, the defendant is put on notice of the forfeitures that may be imposed if conviction on the underlying charge occurs.

In drafting forfeiture allegations, the wording of the RICO statute should be followed as closely as possible.[72] While broad forfeiture allegations have been upheld,[73] interests and property subject to forfeiture should be described with as much specificity

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[71] For cases involving TROs under other criminal forfeiture provisions, contact the Asset Forfeiture and Money Laundering Section. See United States Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress (December 1984).

[72] See United States v. Diaz, 190 F.3d 1247 (11th Cir. 1999)(government complies with Rule 7(c)(2) and due process if the indictment tracks the language of the forfeiture statute); United States v. Sarbello, 985 F.2d 716, 718 (3d Cir. 1992)("conclusory forfeiture allegation in the indictment that recognizably tracks the language of the applicable criminal forfeiture statute satisfies Rule 7(c)(2); minor incongruities in the tracking of allegations under RICO § 1963 will not fatally flaw forfeiture notice.").

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

as possible.[74] If certain interests or property cannot be described with specificity, it is better to include them in the forfeiture allegations to the extent possible (such as a street address without the attendant plat description). While specificity is preferred, appropriate qualification language should be used to describe certain assets such as the sum of the defendant's RICO proceeds, e.g., "approximately $500,000 in U.S. currency."

It should be noted that, because forfeiture allegations are merely notice pleadings (unlike the offenses charged), they may be clarified or even supplemented by a bill of particulars with the trial court's approval.[75] When used in this fashion, the government can correct errors in the initial forfeiture allegations (such as flawed VIN numbers or property descriptions) without having to supersede the indictment. Bills of particulars are also useful in cases where specific forfeitable assets are identified after the indictment has been returned. If, for example, the indictment named several vehicles for forfeiture as proceeds of the defendant's crime and another vehicle is subsequently identified,

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[74] See United States v. Payden, 623 F. Supp. 1148 (S.D.N.Y. 1985) (CCE).

[75] See United States v. Amend, 791 F.2d 1120, 1125 (4th Cir.) (CCE), cert. denied, 479 U.S. 930 (1986); United States v. Grammatikos, 633 F.2d 1013, 1024 (2d Cir. 1980) (CCE); United States v. Ianniello, 621 F. Supp. 1455, 1478 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987).

the government (with the court's permission[76]) can file a bill of particulars naming the newly-discovered vehicle for forfeiture without having to supersede the indictment.

Finally, the forfeiture allegations should clearly state the forfeiture theory (i.e., Section 1963(a)(1), (2) or (3)) applicable to each interest. As previously noted, property can be subject to forfeiture under more than one subsection of Section 1963(a). Each theory of forfeiture can then be considered by the jury in rendering special verdicts of forfeiture, discussed in Section IV (B)(10) infra.

Note that a new proposed Rule 32.2, Fed. R. Crim. P., is scheduled to take effect on December 1, 2000, that will substantially affect criminal forfeiture proceedings. The new rule requires, among other matters, that "the indictment or information contain[] notice to the defendant that the government will seek the forfeiture of property as part of the sentence," but does not require that the indictment or information allege "the extent of the interest subject to forfeiture," as does current Rule 7(c)(2), Fed. R. Crim. P. The proposed new rule also limits the jury's role in criminal forfeiture to determining "whether the government has established the requisite nexus between the property and the offense committed by the defendant."

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[76] Rule 7(f), Fed. R. Crim. P. ("The court may direct the filing of a bill of particulars . . . ."). The government must obtain leave of the court to file a bill of particulars.

8. Burden of Proof

In Libretti v. United States, 516 U.S. 29 (1995), the Supreme Court held that the forfeiture penalties provided pursuant to 21 U.S.C. § 853 were elements of the sentence and were not elements of the drug offense to which the defendant pled guilty. Therefore, the Supreme Court also held that: (1) Rule 11(f), Fed. R. Crim. P., which requires the district court to determine a factual basis for a plea of guilty to an offense, does not require a district court to inquire into the factual basis for a stipulated forfeiture of assets embodied in a guilty plea agreement regarding a drug offense; and (2) the right to a jury determination of forfeiture pursuant to Rule 31(e), Fed. R. Crim. P., is statutorily based and is not required by the United States Constitution.

Following Libretti, some courts have ruled that, because forfeiture is part of the sentence and is not an element of the offense, the burden of proof on the issue of RICO forfeiture is a preponderance of the evidence, which governs other sentencing matters, and not proof beyond a reasonable doubt.[77] However, in

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[77] See United States v. Bellomo, 176 F.3d 580, 595 (2d Cir. 1999); United States v. DeFries, 129 F.3d 1293, 1312-13 (D.C. Cir. 1997). Cf. United States v. Houlihan, 92 F.3d 1271, 1299 n. 33 (1st Cir. 1996) (indicating, without deciding, that the preponderance of the evidence test may apply to RICO forfeitures).

Prior to Libretti, the following courts either ruled or implied that the burden of proof for RICO forfeiture was proof beyond a reasonable doubt: United States v. Pellulo, 14 F.3d 881, 901-06 (3d Cir. 1994); United States v. Horak, 833 F.2d 1235, 1243 (continued...)

United States v. Voigt, 89 F. 3d 1050, 1083-84 (3d Cir. 1996), decided after Libretti, the Third Circuit in dictum reaffirmed its pre-Libretti decision in Pellulo, supra n.77 Section IV, that as a matter of statutory construction the proof beyond a reasonable doubt standard applies to RICO forfeiture, even though the Third Circuit went on to hold that the preponderance of the evidence standard applies to money laundering related forfeiture pursuant to 18 U.S.C. § 982(a)(1).

In light of this continuing conflict, prosecutors should consult with the Organized Crime and Racketeering Section before seeking RICO forfeiture under a standard less than beyond a reasonable doubt.

9. Bifurcation of Trial

While there is no statutory provision requiring a separate hearing to present additional evidence related specifically to forfeiture, forfeiture practice has evolved to include bifurcated trial proceedings in which criminal forfeiture is considered only after conviction. The procedure is akin to death penalty cases in which punishment is considered separately from the merits to avoid either confusion or prejudice by the jury. The Fifth Circuit expressed its preference for bifurcation shortly after the current criminal forfeiture statutes were enacted (see United States v.

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[77](...continued)
(7th Cir. 1987); United States v. Cauble, 706 F. 2d 1322, 1347-48 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Pryba, 674 F. Supp. 1518, 1521 (E.D. Va. 1987).

Cauble, 706 F.2d 1322, 1348 (5th Cir. 1983)), and bifurcation is clearly the trend, particularly in complex cases. The Third Circuit has since held that forfeiture proceedings must be bifurcated from the case in chief of criminal trials.[78] Other circuits, however, have given the trial courts more discretion with respect to bifurcation.[79] In many instances, it is to the government's advantage to request bifurcation in order to simplify the case for the jury.

In many instances, the government will present much of the evidence pertaining to forfeiture during the guilt phase of the trial as it relates to an element of an offense at issue. For example, if the defendant is charged with a racketeering act involving money laundering for purchasing a residence using proceeds from the racketeering activity, the facts giving rise to forfeiture and the property deed reflecting the defendant's

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[78] See United States v. Ofchinick, 883 F.2d 1172, 1182 n.8 (3d Cir. 1989), cert. denied, 493 U.S. 1034 (1990); United States v. Sandini, 816 F.2d 869 (3d Cir. 1987); see also United States v. Pryba, 674 F. Supp. 1518 (E.D. Va. 1987) (example of bifurcated trial).

[79] See United States v. West, 877 F.2d 281, 292 (4th Cir.) (order of proof within discretion of trial court, where defendant had ample opportunity to argue and present evidence on forfeiture issues), cert. denied, 493 U.S. 869 (1989); United States v. Feldman, 853 F.2d 648, 662 (9th Cir. 1988) (sufficient bifurcation can be achieved with separate jury deliberations and additional argument; new evidence can be introduced in trial court's discretion), cert. denied, 489 U.S. 1030 (1989); United States v. Perholtz, 842 F.2d 343, 367 (D.C. Cir.)(due process not violated by district court's refusal to hold a bifurcated forfeiture proceeding, where jury instructions provided safeguards), cert. denied, 488 U.S. 821 (1988).

purchase will be introduced during the case in chief to prove the offense. In a bifurcated proceeding, however, the government will not actually seek forfeiture of the property unless and until the jury has found the defendant guilty of the relevant offense giving rise to forfeiture.

During the forfeiture portion of the trial, the parties can make opening statements, present testimony and evidence, and make closing arguments.[80]

10. Forfeiture Special Verdicts

Special verdict forms must be used so that the jury can make specific findings as to the proposed forfeiture.[81] The jury is asked whether the property at issue is subject to forfeiture under each applicable theory, and asked to record its verdict on the form provided. Note that jurors are not permitted to apportion or mitigate the proposed forfeiture. As in the case in chief, it is the jury's role to make findings of fact. Questions of

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[80] See United States v. Feldman, 853 F.2d 648, 662 (9th Cir. 1988); United States v. Real Property Located at 1808 Diamond Springs Road, Virginia Beach, Virginia, 816 F. Supp. 1077, 1084 (E.D. Va. 1993)(dicta).

[81] See Fed. R. Crim. P. 31(e). See also United States v. Saccoccia, 58 F.3d 754, 785 (1st Cir. 1995)(special verdict forms not required if forfeiture phase is not tried by a jury), cert. denied, 517 U.S. 1105 (1996); United States v. Ham, 58 F.3d 78, 83 (4th Cir.)(district court cannot enter order of forfeiture unless the jury has entered a special verdict regarding the extent of the defendant's interest in the property), cert. denied, 516 U.S. 986 (1995); United States v. Kravitz, 738 F.2d 102, 103 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985); United States v. Cauble, 706 F.2d 1322, 1346 n.90 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).

proportionality of the forfeiture and similar issues are questions of law addressed to the court only after the jury has ordered an asset forfeited.

The special verdict form must clearly and precisely describe the forfeitable interests under consideration. Notably, one court has struck down a forfeiture of property that was insufficiently described in a special verdict form.[82]

It is also possible for both sides to stipulate to having the forfeiture issue decided by the court instead of by a special jury verdict, or even to stipulate to the extent of forfeiture in the event of conviction.[83]

11. Joint and Several Liability

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[82] See United States v. Amend, 791 F.2d 1120, 1127-29 (4th Cir.) (CCE forfeiture), cert. denied, 479 U.S. 930 (1986).

[83] See Libretti v. United States, 516 U.S. 29, 38-52 (1995)(Fed. R. Crim. P. 11 does not require a district court to inquire into the factual basis for a stipulated forfeiture of assets contained in a plea agreement; Fed. R. Crim. P. 31(e) right to a jury determination of the forfeitability of property is statutory; plea agreement need not make specific reference to Rule 31(e) and district court does not need to inform the defendant that a guilty plea will result in a waiver of a Rule 31(e) right); United States v. Paccione, 948 F.2d 851, 855-56 (2d Cir. 1991)(where government enters into forfeiture agreement, the government waives its right to seek substitute assets); United States v. Hess, 691 F.2d 188 (4th Cir. 1982). But see United States v. Premises Known as 3301 Burgundy Road, 728 F.2d 655, 657 (4th Cir. 1984) (where there is no evidence indicating that defendant possessed any interest in property that he agreed to forfeit, Consent Judgment for Forfeiture is improperly entered and case must be remanded for a hearing to determine the rightful owner of the property). See also United States v. Alexander, 869 F.2d 91, 94 (2d Cir. 1989) (where defendant pleads guilty to RICO and agrees to disclose assets, but fails to do so fully, court may issue order requiring him to comply with the disclosure agreement).

Every court that has considered the issue has held that each defendant convicted on a RICO charge is jointly and severally liable for the entire amount of forfeiture that was reasonably foreseeable to the defendant. As the Eighth Circuit recently held in United States v. Simmons, 154 F.3d 765, 769-70 (8th Cir. 1998):

> Codefendants are properly held jointly and severally liable for the proceeds of a RICO enterprise . . . . The government is not required to prove the specific portion of proceeds for which each defendant is responsible. Such a requirement would allow defendants "to mask the allocation of the proceeds to avoid forfeiting them altogether." (citation deleted).[84]

12. Attorney's Fees

Property subject to forfeiture pursuant to 18 U.S.C. § 1963(a) includes attorney's fees paid by the RICO defendants. **However, pursuant to Sections 9-119.104 and 9-119.200 of the United States Attorneys' Manual and the Criminal Resource Manual § 2304, et seq., "no criminal or civil forfeiture proceeding may be instituted to forfeit an asset transferred to an attorney as fees for legal**

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[84] Accord United States v. Infelise, 159 F.3d 300, 301 (7th Cir. 1998); United States v. Hurley, 63 F.3d 1, 22 (1st Cir. 1998); United States v. Saccoccia, 58 F.3d 754, 785 (1st Cir. 1995); United States v. Masters, 924 F.2d 1362, 1367-70 (7th Cir.), cert. denied, 500 U.S. 919 (1991); Fleischhauer v. Feltner, 879 F.2d 1290, 1301 (6th Cir. 1989), cert. denied, 493 U.S. 1074 (1990); United States v. Benevento, 836 F.2d 129, 130 (2d Cir.), cert. denied, 486 U.S. 1043 (1988); United States v. Caporale, 806 F.2d 1487, 1506-09 (11th Cir. 1986), cert. denied, 482 U.S. 917 (1987); United States v. Bloom, 777 F. Supp. 208, 211 (E.D.N.Y. 1991); United States v. Wilson, 742 F. Supp. 905, 909 (E.D. Pa. 1989), aff'd, 909 F. 2d 1478 (3d Cir.), cert. denied, 498 U.S. 1016 (1990).

services without the prior approval of the Assistant Attorney General, Criminal Division." These provisions also set forth procedures and policies governing such forfeiture proceedings that must be followed.

In United States v. Monsanto, 491 U.S. 600 (1989) and Caplan & Drysdale v. United States, 491 U.S. 617 (1989), the Supreme Court held that there was no exemption from 21 U.S.C. § 853's forfeiture or pretrial restraining order provisions for assets that a defendant wishes to use to retain an attorney, and that such restraining orders and forfeiture did not violate a defendant's Sixth Amendment right to counsel or the Fifth Amendment guarantee of due process.[85]

To be sure, forfeiture of attorney's fees is a sensitive matter. In one noteworthy case, a defendant paid over $100,000 in attorney fees with money found to constitute drug proceeds that was forfeitable pursuant to 21 U.S.C. § 853. See In re Moffitt, Zwerling & Kemler, P.C., 864 F. Supp. 527 (E.D. Va. 1994). The court found that the law firm accepting the fees did not meet its burden of proving that the firm, when it accepted payment, was without reasonable cause to believe the payments were subject to forfeiture. The firm dissipated most of the payment, however, and

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[85] Pursuant to Criminal Resource Manual § 2084, **all** proposed restraining orders in RICO cases seeking forfeiture of any kind must be approved by the Organized Crime and Racketeering Section.

the court could not compel the law firm to forfeit substitute assets. Thus, forfeiture was limited to those proceeds in the law firm's possession, only $3,695. In a related decision, the Fourth Circuit held that the government could recover property traceable to the forfeited property but transferred to a third party and that the government could conduct discovery to locate the traceable property.[86]

Prosecutors are advised to check the latest decisions in their circuits for further development of the law in this area, and to carefully follow the governing guidelines.

13. Eighth Amendment -- Excessive Fines

In Alexander v. United States, 509 U.S. 544 (1993), the defendant was convicted of tax offenses, 17 substantive obscenity offenses, three RICO offenses and other offenses. The evidence showed that the defendant had sold adult entertainment materials through 13 retail stores, generating millions of dollars in annual revenues. "As a basis for the obscenity and RICO convictions, the jury determined that four magazines and three video tapes were obscene." Id. at 547. The defendant was sentenced to six years in prison, a $100,000 fine and ordered to pay the cost of prosecution,

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[86] See In re Moffitt, Zwerling & Kemler, P.C., 83 F.3d 660, 670-671 (4th Cir. 1996), cert. denied, 519 U.S. 1101 (1997). See also United States v. Friedman, 849 F. 2d 1488, 1490 (D.C. Cir. 1988) (denying request for release of forfeited assets to pay for indigent defendant's attorney to represent him on appeal from his conviction because defendant had no right to have counsel of choice appointed and paid for with government funds).

incarceration, and supervised release. Following the jury's forfeiture verdict, the district court ordered the defendant to forfeit "10 pieces of commercial real estate and 31 current or former businesses, all of which had been used to conduct his racketeering enterprise . . . and almost $9 million in moneys acquired through racketeering activity." Id. at 548.

The defendant argued that this forfeiture order, considered atop his six year prison sentence and $100,000 fine, was disproportionate to the gravity of his offense and therefore violated the Eighth Amendment, either as "cruel or unusual punishment" or as an "excessive fine." The Supreme Court held that the "in personam criminal forfeiture" was analogous to a fine and therefore the forfeiture "should be analyzed under the Excessive Fines Clause" of the Eighth Amendment, and not under the Cruel and Unusual Punishment Clause. Id. at 558-59. The Supreme Court remanded to the Eighth Circuit the issue whether the forfeiture at issue constituted an "excessive fine" under the Eighth Amendment, but did not articulate a comprehensive standard to govern the lower court's decision in that regard. However, the Court stated that:

> It is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question of whether or not the forfeiture was "excessive" must be considered.

Id. at 559. In a related case, United States v. Austin, 509 U.S. 602 (1993), decided the same day as Alexander, the Supreme Court

held that the Eighth Amendment's Excessive Fines Clause applied to a civil in rem forfeiture of a mobile home and auto body shop that were used to facilitate drug transactions under 21 U.S.C. § 881(a)(4) and (a)(7). The Court indicated that a forfeiture which "serves solely a remedial purpose" does not constitute punishment within the coverage of the Eighth Amendment, but that since the forfeiture at issue included a punitive purpose to punish those involved in drug trafficking and was not solely remedial, the Eighth Amendment applied. Id. at 619-22.[87] The Supreme Court explicitly declined to adopt a particular test to determine whether a civil forfeiture violates the Excessive Fines Clause of the Eighth Amendment, but instead remanded the case to the lower court to formulate an appropriate standard. Id. at 622.[88]

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[87] However, the Court stated that "the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society." Austin, 509 U.S. at 621. The Court also stated that it had previously "upheld the forfeiture of goods involved in customs violations as 'a reasonable form of liquidated damages.'" Id. (citation omitted). The Court indicated that such forfeiture is remedial, and hence not punishment, insofar as it correlates to "damages sustained by society or to the cost of enforcing the law." Id. (citation omitted).

[88] In his concurring opinion in Austin, Justice Scalia indicated that the excessiveness analysis for a civil in rem forfeiture may be different from that applicable to monetary fines and a criminal in personam forfeitures. Id. at 627. Justice Scalia stated that the sole measure of whether an in rem forfeiture was excessive in violation of the Eighth Amendment should be the relationship between the forfeited property and the offense. Id. at 627-28. Justice Scalia stated, in relevant part, that:

> Unlike monetary fines, statutory **in rem**

(continued...)

In United States v. Bajakajian, 524 U.S. 321 (1998), the Supreme Court held that the forfeiture of $357,144, with which the defendant was attempting to leave the United States without reporting as required by 31 U.S.C. § 5316(a)(1)(h), upon his conviction for violating the reporting requirement was "grossly disproportionate to the gravity of [the] defendant's offense" and constituted an excessive fine in violation of the Eighth Amendment. Id. at 334. The Supreme Court explained that the lower courts "must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." Id. at 336-37.

In applying this standard and concluding that the forfeiture was unconstitutional, the Supreme Court found it significant that: (1) the defendant's violation was unrelated to any other illegal activities [and] "[t]he money was the proceeds of legal activity and was to be used to repay a lawful debt"; (2) the maximum

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(...continued)

> forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been "tainted" by unlawful use, to which issue the value of the property is irrelevant . . . . The question is not how much the confiscated property is worth, but whether the confiscated property has a close relationship to the offense.

Id. at 627-28 (emphasis added).

sentence that could have been imposed under the Sentencing Guidelines was six months imprisonment and a $5,000 fine; and (3) the harm that the defendant caused was "minimal"; there was no fraud or loss to the government. Id. at 338-39.[89]

In the wake of these Supreme Court decisions, the lower courts have made a critical distinction between the forfeiture of proceeds of unlawful activity, and other bases for forfeiture. Thus, the lower courts have held that the forfeiture of illegal proceeds can never constitute impermissible punishment in violation of the Eighth Amendment because a person does not, and cannot, have any recognizable legitimate interest in unlawfully obtained proceeds. Therefore, forfeiture of illegal proceeds is entirely remedial and can never constitute "punishment" or an excessive fine within the meaning of the Eighth Amendment.[90]

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[89] However, the Supreme Court distinguished "traditional civil in rem forfeitures that . . . were historically considered nonpunitive," and hence are "outside the domain of the Excessive Fines Clause." 524 U.S. at 330-31. The Court explained that such civil in rem forfeitures that do not implicate the Excessive Fines Clause include: (1) forfeiture directed at the "guilty property" itself, wholly unaffected by any **in personam** criminal proceeding; (2) "forfeiture of goods imported in violation of customs laws" id. at 330-31; and (3) "'Instrumentality' forfeitures . . . limited to the property actually used to commit an offense." Id. at 333 n.8.

[90] See United States v. Candelaria-Silva, 166 F.3d 19, 44 (1st Cir. 1999); United States v. Alexander, 108 F.3d 853, 855, 858 (8th Cir. 1997); United States v. $21,282.00 in U.S. Currency, 47 F.3d 972, 973 (8th Cir. 1995); United States v. Wild, 47 F.3d 669, 674 n.11 (4th Cir. 1995); United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994); United States v. Tilley, 18 F.3d 295, 300 (5th Cir. (continued...)

Applying Bajakajian, the courts of appeals have rejected Excessive Fines claims in a variety of criminal forfeiture cases.[91] The courts of appeals have also repeatedly rejected claims that RICO forfeiture violated the Eighth Amendment.[92]

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[90](...continued)
1994); United States v. Horak, 833 F.2d 1235, 1246 n.4 (7th Cir. 1987) (dictum); United States v. $288,933.00 in U.S. Currency, 838 F. Supp. 367, 370 (N.D. Ill. 1993).

[91] See United States v. Dicter, 198 F.3d 1284, 1292 (11th Cir. 1999) (holding that forfeiture, pursuant to 21 U.S.C. § 853(a)(2), of a medical license from a physician who unlawfully sold prescriptions for 2 million milligrams of Percodan was not excessive where the Sentencing Guidelines authorized a $1 million fine); United States v. Wyly, 193 F.2d 289, 303 (5th Cir. 1999) (rejecting corporate defendant's claim that forfeiture, pursuant to 18 U.S.C. § 982, of $4 million was grossly disproportionate because the amount alleged in the money laundering counts was $175,000, where: (1) the defendant was convicted of a comprehensive criminal conspiracy involving bribery of the highest ranking law enforcement officer in the parish, (2) the scheme continued for six years and involved manipulating various financial accounts and institutions, and (3) the forfeited property was closely related to the money laundering offenses); United States v. Candelaria-Silva, 166 F.3d 19, 43-44 (1st Cir. 1999) (forfeiture order holding each defendant, including relatively minor participants, jointly and severally liable for $140 million in drug trafficking proceeds did not violate Excessive Fines Clause); United States v. Trost, 152 F.3d 715, 720-21 (7th Cir. 1998) (upholding forfeiture, pursuant to 18 U.S.C. § 982, of $57,412 which was the total of all the illegally procured money the defendant was convicted of obtaining).

[92] See United States v. Saccocia, 58 F.3d 754, 787-89 (1st Cir. 1995) (each defendant jointly and severally liable for the forfeiture of the entire amount, $136 million, laundered by all the coconspirators); United States v. Olson, 22 F.3d 783, 785-86 (8th Cir. 1984) (forfeiture of 100% of defendants' salaries and bonuses earned as officers of a savings and loan association as proceeds of racketeering activity on the basis that the defendants operate the business through illegal ventures); United States v. Bucuvales, 970 F.2d 937, 945-46 (1st Cir. 1992)(forfeiture of nightclubs and other (continued...)

Moreover, the trial court, and not the jury, decides the legal issue whether forfeiture violates the Eighth Amendment, and the defendant has the burden of establishing an Eighth Amendment violation.[93] It is particularly significant that the courts have noted that a successful Eighth Amendment "challenge to criminal forfeiture will be a rare occasion." United States v. Myers, 21 F.3d 826, 830 (8th Cir. 1984).

The case law on the issue whether criminal forfeiture violates the Excessive Fines Clause continues to develop rapidly. Prosecutors should carefully review the relevant case law in their circuit before seeking criminal forfeiture. Moreover, prosecutors

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[92](...continued)
entertainment businesses valued at $2.3 million, because of RICO convictions, which arguably substantially "exceeded the value of the licenses and back taxes of which [the authorities were] deprived"); United States v. Ofchinick, 883 F. 2d 1172, 1184 n.10 (3d Cir. 1989) (forfeiture of $2,591,620 obtained through fraudulent activities), cert denied, 493 U.S. 1034 (1990); United States v. Porcelli, 865 F.2d 1352, 1366 (2d Cir.) (forfeiture requiring defendant to pay twice the amount of taxes owed to the authorities), cert. denied, 493 U.S. 810 (1989); United States v. Stern, 858 F.2d 1241, 1250 (7th Cir. 1988) (forfeiture of condominium used solely to facilitate illegal prostitution business "as a telephone call transfer location and mail drop"); United States v. Tunnell, 667 F.2d 1182, 1188 (5th Cir. 1982)(forfeiture of defendant's entire interest in hotel used as a place for prostitution business); United States v. Huber, 603 F.2d 387, 396-97 (2d Cir. 1979) (forfeiture of defendant's interest in corporate entities comprising the RICO enterprise).

[93] See Alexander, 32 F. 3d at 1237; Bucuvalas, 970 F. 2d at 946; United States v. Walsh, 700 F. 2d 846, 857 (2d Cir.), cert. denied, 464 U.S. 825 (1983). Cf. United States v. Real Prop. Known & Numbered As 429 S. Main Street, 52 F.3d 1416, 1421-22 (6th Cir. 1995); United States v. $288,930.00 In U.S. Currency, 838 F. Supp. at 371.

should be wary of applying Excessive Fines analysis in civil forfeiture cases to criminal RICO forfeiture because the Supreme Court, especially Justice Scalia's concurring opinion in Austin (see supra, n.88 Section IV), has indicated that not all civil forfeitures fall within the scope of the Excessive Fines Clause and the Excessive Fines analysis for civil forfeitures that fall within the Clause's purview may be different from criminal in personam forfeitures.

14. The Relation Back Doctrine

Under 1963(c), "[a]ll right, title, and interest in property [subject to forfeiture] vests in the United States upon commission of the act giving rise to forfeiture." This section is known as the "relation back" doctrine, under which the government's interest "relates back" to the time of the underlying offense that results in forfeiture.

Historically, the government occasionally relied on identical provisions in civil forfeiture statutes to seek dismissal of civil forfeiture claims by arguing that such claimants had no standing because the government already "owned" the property by operation of the relation back doctrine. This practice was put to rest by the Supreme Court in United States v. A Parcel of Land Known as 92 Buena Vista, 113 S.Ct. 1126 (1993), which held that the relation back doctrine takes effect only after forfeiture is awarded to the government, that is, once the government is awarded title to the

property through forfeiture, that title is deemed to date back to the date of the criminal acts that gave rise to forfeiture.

Because criminal forfeiture is in personam and is only imposed on the defendant as part of the sentence, and because third parties have no right to intervene in criminal proceedings until forfeiture is ordered (see Section 1963(i)), the relation back doctrine and the Supreme Court's interpretation have had little impact on RICO forfeiture practice. Nonetheless, the relation back doctrine is viable in the context of attempts by a defendant to transfer forfeitable property to third parties. For example, if the government were to learn of the impending sale of a defendant's home that had been purchased with racketeering proceeds and which was identified for forfeiture in the indictment as proceeds of racketeering, the government might seek to block the sale by noting both the potential forfeitability of the property due to its inclusion in the indictment and the applicability of the relation back doctrine vis-a-vis the buyer's potential claim in the event that forfeiture is eventually ordered. One appellate court has recognized this relationship between the relation back doctrine and forfeiture's ancillary claims process. See United States v. BCCI Holdings (Luxembourg) S.A. et al., 46 F.3d 1185, 1190 (D.C. Cir. 1995) ("Congress intended that as far as [the ancillary claims process] is concerned, a third party's claim is to be measured not as it might appear at the time of litigation, but rather as it

existed at the time the illegal acts were committed.").

15. Post-trial Forfeiture Issues

Rule 32(d)(2) of the Federal Rules of Criminal Procedure currently provides, in pertinent part, that

> [i]f a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order . . . .

It is usually at this juncture that the defendant will raise objections to a forfeiture on Eighth Amendment grounds. If no such objections are made or are granted in part, the court will enter the preliminary order of forfeiture expressly authorizing the Attorney General to seize all property ordered forfeited under such terms and conditions as the court deems proper, as further provided by Rule 32, Fed. R. Crim. P.[94] It should be noted that the preliminary order is final as to the defendant and must be timely appealed even if the forfeiture order is not yet final with respect to third parties.[95] Various subsections of Section 1963 govern the

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[94] See United States v. Kravitz, 738 F.2d 102, 104 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985); see generally United States v. Rosenfield, 651 F. Supp. 211, 214 (E.D. Pa. 1986) (district court in criminal RICO case refused to issue money judgment for forfeiture, but court in civil suit granted summary judgment and issued money judgment in amount of criminal forfeiture against defendant).

[95] See United States v. Bennett, 147 F.3d 912, 914 (9th Cir. (continued...)

proceedings after a preliminary forfeiture order is issued.

Prosecutors should note that, at this writing, the proposed new Rule 32.2, Fed. R. Crim. P., to take effect on December 1, 2000, will have substantial impact on post-trial forfeiture proceedings in cases pending at the time the rule is implemented. In particular, the new Rule 32.2 codifies the notion that a criminal forfeiture judgment may include a personal money judgment; it reserves to the ancillary proceeding any determination of the defendant's interest in the forfeited property with respect to third parties; and it sets forth a procedure for amending the order of forfeiture to include later-discovered property traceable to the offense and substitute assets. The new rule also provides that the preliminary order of forfeiture becomes final as to the defendant upon sentencing. If the defendant appeals either the conviction or the forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the forfeited property is preserved pending appellate review. However, the stay will not prevent the court from proceeding with the ancillary claims process. Notably, prosecutors will find that the Rules Committee's notes suggest in numerous instances that issues currently dividing the courts should be resolved in ways that the government finds favorable.

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1998)(holding that the district court lacked jurisdiction to hear appeal by the defendant brought one and one-half years after preliminary order of forfeiture was issued).

a. Section 1963(e)

Section 1963(e) governs matters arising during the period from the entry of the forfeiture order until the time the Attorney General directs disposition of the property. During this period the court may, upon application of the government, enter appropriate restraining orders, require the execution of a performance bond, appoint receivers, trustees, appraisers, or accountants, or "take any other action to protect the interest of the United States in the property ordered forfeited."[96] Section 1963(j) provides that the district courts have jurisdiction to enter such orders without regard to the location of any of the property subject to forfeiture.

b. Section 1963(g)

Under Section 1963(g), the Attorney General is authorized to grant petitions for mitigation or remission, compromise claims, restore forfeited property to victims of RICO violations, award compensation to persons providing information resulting in forfeiture,[97] and take appropriate measures to safeguard and

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[96] 18 U.S.C. § 1963(e).

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

maintain forfeited property pending its disposition.[98] The statute also authorizes the Attorney General to promulgate regulations for carrying out the responsibilities delegated to him or her concerning the forfeited property, although no regulations have yet been proposed. Pending the promulgation of such regulations, the currently applicable provisions of the customs laws, 19 U.S.C. § 1602, et seq., remain in effect.

c. Section 1963(k)

Section 1963(k) provides that after the entry of a forfeiture order, the court can order depositions and production of documents that will facilitate the identification and location of property and will facilitate the disposition of petitions for remission or mitigation. Fed. R. Crim. P. 15 is to be followed for the manner in which such depositions are taken. One district court has ruled that a defendant must be afforded the opportunity to be present during such depositions, and the court granted the defendant's motion to quash a deposition subpoena where the government failed to arrange for the defendant's presence during the deposition.[99]

d. Section 1963(l)

Section 1963(l), known as the "ancillary claims process,"

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[98] See generally Govern v. Meese, 811 F.2d 1405, 1407-1408 (11th Cir. 1987) (denying defendant's motion to have IRS tax liens credited from forfeited property, reasoning that the suit was barred by sovereign immunity).

[99] See United States v. Saccoccia, 913 F. Supp. 129, 131-32 (D.R.I. 1996).

provides the exclusive judicial procedure by which a third party may claim an interest in property subject to forfeiture. Third parties may not intervene in the criminal case or commence an action at law or equity against the United States concerning the validity of their alleged interest in the property subsequent to the filing of an indictment.[100] Under Section 1963(f), however, the court may, upon application of a person other than the defendant or a person acting in concert with or on behalf of the defendant, stay the sale or disposition of the property pending the outcome of any appeal of the criminal case. The applicant must demonstrate to the court that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to the applicant.

Under the provisions of Section 1962(l)(1)-(3), following the entry of an order of forfeiture and the seizure of the forfeited property, the government must publish a public notice of the order of forfeiture and of its intent to dispose of the property.[101] The

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[100] See United States v. BCCI Holdings (Luxembourg) S.A. (Petition of ICIC Investments), 795 F. Supp. 477, 479 (D.D.C. 1992)(holding that third party lacks standing to object to entry of order of forfeiture); United States v. Pelullo, Crim No. 91-00060, 1996 WL 257345 (E.D. Pa. 1996)(Section 1963(i) carves out RICO forfeiture from the jurisdiction of bankruptcy court and the defendant cannot block the government's efforts to enforce a forfeiture order for a money judgement through bankruptcy proceedings), aff'd, 178 F.3d 196 (3d Cir. 1999).

[101] 18 U.S.C. § 1963(l)(1). Third parties may also contest the forfeiture of substitute assets in an ancillary proceeding. See United States v. Infelise, 938 F. Supp. 1352 (N.D. Ill. 1996)(defendant's wife and children contested forfeiture of substitute assets).

government may also, to the extent practicable, provide direct written notice to any third parties known to have an interest in the property. Within thirty days after the last publication of notice or actual receipt of notice, any party other than the defendant may petition the court for a hearing to determine the validity of his or her interest in the property.[102] There is no particular format for the petition, but it must be signed by the petitioner (not counsel) under penalty of perjury and it must set forth the "nature and extent of the petitioner's right, title, or interest in the property."[103] No hearing is necessary if the court can dismiss the claim on the pleadings for lack of standing or failure to state a claim.[104] Untimely and defective claims may also be dismissed without a hearing.[105]

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[102] 18 U.S.C. § 1963(l)(2).

[103] 18 U.S.C. § 1963(l)(3). See also United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Richard Eline), 916 F. Supp. 1286, 1289 (D.D.C. 1996)(a petition containing random legal phrases and a blanket statement that $6 million belongs to the claimant did not state a proper claim).

[104] See United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of General Creditors), 919 F. Supp. 31, 36 (D.D.C. 1996)(holding that court may dismiss the petition if the party failed to allege all elements necessary for recovery, including those related to standing).

[105] See United States v. BCCI Holdings (Luxembourg) S.A. (Petition of B. Gray Gibbs), 916 F. Supp. 1270 (D.D.C. 1996)(dismissing claim as untimely under Section 1962(l)(2)); United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Richard Eline), 916 F. Supp. 1286, 1289 (D.D.C. 1996)(dismissing claim for failure to set forth nature and extent of legal interest as required by Section 1963(l)(3)). But see United States v. BCCI Holdings (Luxembourg)

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If a hearing is necessary, it should be held within thirty days of the filing of the petition if practicable.[106] The court may hold a consolidated hearing to resolve all or several petitions arising out of a single case. At the hearing, both the petitioner and the United States may present evidence and witnesses, and cross-examine witnesses who appear. The court may also consider relevant portions of the criminal trial record.[107]

In order to prevail, the petitioner, who has the burden of proof, must establish by a preponderance of the evidence either: (1) that he had a legal right, title, or an interest in the property[108] superior to the defendant's interest at the time of the

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S.A. (Petition of Indozuez Bank), 916 F. Supp. 1276, 1284-85 (D.D.C. 1996)(court may "equitably toll" time for filing claim if claimant demonstrates due diligence).

[106] 18 U.S.C. § 1963(l)(4). See also United States v. Kramer, 912 F.2d 1257, 1260-61 (11th Cir. 1990)(error for district court not to hold a hearing within statutory thirty-day period or a reasonable time thereafter; court cannot continue restraint on property ad infinitum without a showing of necessity).

[107] 18 U.S.C. § 1963(l)(5).

[108] The court must look to state property law to determine the nature of the claimant's legal interest. See United States v. Infelise, 928 F. Supp. 1352, 1357 (N.D. Ill. 1996)(state law determined whether the defendant's wife and children have a superior interest to the government based upon express oral trust); United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank), 941 F. Supp. 180, 189 (D.D.C. 1996)(court looks to state banking law to determine whether claimant bank has a legal interest in defendant-depositor property under right of set-off).

acts giving rise to the forfeiture;[109] or (2) that he is a bona fide purchaser for value of the property and at the time of the purchase did not know that the property was subject to forfeiture.[110] If, after the hearing, the court determines that the petitioner has a legal right or interest in the property that renders the order of forfeiture invalid in whole or in part, the court will amend the order of forfeiture in accordance with its determination.[111]

The standards of Section 1963(l)(6) for prevailing in the criminal ancillary claims process are substantially higher than those for civil forfeiture claimants. First, unlike civil forfeiture's lesser standing requirements which permit claimants to

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[109] Nominal ownership is not sufficient to establish a superior interest. See United States v. Infelise, 938 F. Supp. 1352, 1368-69 (N.D. Ill. 1996)(defendant's wife and mother-in-law were straw owners who were unable to establish a superior legal interest under Section 1963(l)(6)(A)).

[110] 18 U.S.C. § 1963(l)(6). See also United States v. Mageean, 649 F. Supp. 820, 822-24 (D. Nev. 1986) (tort claimants from airplane crash lacked any interest in forfeited plane, but creditors had interest under Section 1963(l)); see also United States v. Reckmeyer, 628 F. Supp. 616, 621-23 (E.D. Va. 1986) (in CCE forfeiture, court construed provisions liberally and awarded some assets to third parties claiming good faith lack of knowledge of criminal activity when defendant's entire estate was forfeited).

[111] See United States v. Campos, 859 F.2d 1233, 1238-40 (6th Cir. 1988) (denying claims of unsecured creditors under analogous provision of narcotics forfeiture statute, 21 U.S.C. § 853(n)(6)); accord United States v. BCCI Holdings (Luxembourg)S.A. et al., 69 F. Supp. 2d 36 (1999) (summarizing prior decisions describing forfeiture procedures).

assert equitable claims,[112] criminal forfeiture claimants must demonstrate a legal right, title, or interest in the forfeited property. Second, a claimant who acquired ownership of forfeitable property after the property was tainted by the defendant's crime must show both that 1) the claimant is a "bona fide purchaser for value" of the property, and 2) at the time of purchase, the claimant had no knowledge of the property's forfeitability – - in other words, the claimant must have acquired the property through a commercially reasonable, arms-length transaction.

For many years after the enactment of the criminal forfeiture statutes, these claims provisions were subject to various interpretations. However, in 1991, the United States filed RICO charges against the Bank of Credit and Commerce International, S.A. ("BCCI") and its officers for offenses in the United States relating to the bank's fraudulent international activities. Pursuant to a plea agreement, BCCI agreed to forfeit all of its assets in the United States, which initially totaled approximately $347 million. Approximately 77 claimants immediately filed over $1 billion in claims to the forfeited assets under Section 1963(l). Subsequent rounds of forfeiture eventually totaled approximately $1.2 billion in forfeited assets, with 175 claims ultimately filed.

Given the enormity of the forfeitures claims and complexity of

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[112] See United States v. A Parcel of Land Known as 92 Buena Vista Ave., 507 U.S. 111, 124 (1993) (mere donees have standing to assert innocent owner defense).

the legal issues involved, the BCCI ancillary claims process became, as the trial court later described in entering its final order of forfeiture, "a crucible for modern forfeiture law."[113] In over 40 published decisions, the trial court reconciled earlier ancillary claims decisions under RICO and related statutes and established numerous precedents in forfeiture proceedings.

Notably, none of the trial court's decisions was disturbed on appeal. One BCCI appellate case, which actually extended the trial court's holding, involved three petitions -- two from persons claiming to represent a class of worldwide depositors and one from a person appointed by Sierra Leone as conservator over BCCI's affairs in that country.[114] All three petitioners alleged that they had a right superior to the government's based on a constructive trust theory; the class petitioners alleged that they had superior rights based upon their status as general creditors. The D.C. Circuit found that while third parties could assert equitable as well as legal interests in the property,[115] the court held that a constructive trust, a legal fiction imposed by a court, could not

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[113] See United States v. BCCI Holdings (Luxembourg) S.A. et al., 69 F. Supp. 2d 36, 43 (D.D.C. 1999).

[114] United States v. BCCI Holdings (Luxembourg), S.A., 46 F.3d 1185 (D.C. Cir.), cert. denied, 515 U.S. 1160 (1995).

[115] BCCI, 46 F.3d at 1190.

be used to defeat the government's forfeiture claim.[116] The court further held that a general creditor "can never have an interest in specific forfeited property, no matter what the relative size of his claim vis-a-vis the value of the defendant's post-forfeiture estate."[117] Finally, sustaining several of the trial court's related holdings, the appellate court held that a general creditor is not a bona fide purchaser for value and lacks standing.

While various BCCI ancillary claims cases are cited herein for specific holdings, the trial court's final opinion serves both as an excellent guide to the criminal forfeiture claims process and as an index to the case's various decisions.[118] Prosecutors who anticipate forfeiture claims in criminal cases, particularly in complex prosecutions, will find the court's final opinion especially helpful in planning case forfeiture strategies.

Following a court's disposition of all petitions filed under

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[116] BCCI, 46 F.3d at 1190-91. But see United States v. Schwimmer, 968 F.2d 1570, 1581 (2d Cir. 1992)(applying Section 1963(l)(6)(A) to constructive trusts, but finding that a constructive trust theory did not warrant remission because the trial court could not trace the assets ordered forfeited into the trust).

[117] BCCI, 46 F.3d at 1191. See also United States v. BCCI Holdings (Luxembourg), S.A. (Petition of General Secretariate of the Organization of American States), 73 F.3d 403, 405-06 (D.C. Cir.)(holding that bank depositors were general creditors who had no particular interest in assets ordered forfeited, unless the depositors could establish that they had a secured judgment against the debtor and a perfected lien against a particular item), cert. denied, 117 S. Ct. 50 (1996).

[118] See United States v. BCCI Holdings (Luxembourg) S.A. et al., 69 F. Supp. 2d 36 (D.D.C. 1999).

Section 1963(l), the United States has clear title to the forfeited property and may warrant good title to any subsequent purchaser or transferee. The Attorney General may direct the disposition of the property by sale or any other commercially feasible means. Neither the defendant nor any person acting in concert with or on his behalf is eligible to purchase the forfeited property.[119]

[119] 18 U.S.C. § 1963(f).

V. GUIDELINES FOR THE USE OF RICO

A. RICO Policy

Although RICO did not make criminal any conduct not previously a crime, RICO created a new substantive offense even though acts punishable under RICO were also punishable under existing state and federal statutes. Since RICO encompasses a variety of state and federal offenses that can serve as predicate acts of racketeering, RICO can be used in wide-ranging circumstances. While RICO provides an effective and versatile tool for prosecuting criminal activity, injudicious use of RICO may reduce its impact in cases where it is truly warranted. For this reason, it is the policy of the Criminal Division that RICO be selectively and uniformly used. In order to ensure uniformity, all RICO criminal and civil actions brought by the United States must receive prior approval from the Organized Crime and Racketeering Section in Washington, D.C., in accordance with the approval guidelines at Section 9-110.100 et seq. of the United States Attorneys' Manual. The guidelines, which are reprinted at Appendix A of this Manual were drafted with careful consideration to comments received from the Advisory Committee to the United States Attorneys.[1]

Not every case that meets the technical requirements of a RICO violation will be authorized for prosecution. For example, a RICO

[1] Memorandum of the United States Attorneys' Manual Staff, Executive Office for United States Attorneys' (January 30, 1981) at 1.

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

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

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

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

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

5. use of RICO would provide a reasonable expectation of forfeiture that is not grossly disproportionate to the underlying criminal conduct;

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

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

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

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

B. Drafting the Indictment

While every indictment must be drafted according to the nature of the individual case, there are certain drafting guidelines that, if followed, will facilitate the RICO review process. These guidelines were developed from successful prosecutions and are intended to promote effective RICO indictments that, in turn, should promote favorable developments in RICO case law. Sample RICO indictments are available from the OCRS staff.

1. Drafting the Substantive RICO Count

It is a cardinal rule in drafting any complex indictment, such as a RICO, to keep the pleadings as clear and simple as possible.

For example, if the pattern of racketeering in a substantive RICO count consists of offenses that are also alleged in separate counts of the indictment, these counts may be incorporated by reference into the RICO count.

If the racketeering acts consist of state offenses, or federal offenses that are not incorporated from separate counts, then they must be alleged in the RICO count. In such a case, each racketeering act should be alleged as if it were a separate count of an indictment: i.e., the act should include venue, the date of the offense, the names of the defendants charged with that offense, the elements of the charge against the defendants, and citation to the statutory violation.[2] In most cases, it is appropriate to set

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[2] RICO does not incorporate state pleading requirements. For example, even if a state conspiracy statute requires that an overt act be alleged, a RICO predicate based on that statute need not allege an overt act. See United States v. Orena, 32 F.3d 704, 713-14 (2d Cir. 1994); United States v. Dellacroce, 625 F. Supp. 1387, 1391(E.D.N.Y.) (same), aff'd sub nom. United States v. Carneglia, 795 F.2d 1005 (2d Cir. 1986) (table). See also United States v. Paone, 782 F.2d 386, 393-94 (2d Cir. 1986) (Congress did not intend to incorporate state procedural and evidentiary rules into RICO statute); United States v. Bagaric, 706 F.2d 42, 62-64(2d Cir.) (accurate generic definitions of crimes were sufficient in jury instructions), cert. denied, 464 U.S. 840 (1983).

Failure to adequately allege the predicate racketeering act could lead to dismissal of that act. See United States v. McDonnell, 696 F. Supp. 356, 358-59 (N.D. Ill. 1988) (the court dismissed a racketeering act that alleged multiple acts of bribery over a three-year period, which did not name the payors or the cases the bribes were meant to influence); United States v. Neopolitan, 791 F.2d 489, 500-01 (7th Cir. 1986) (defendant entitled to an indictment that states all elements of charged offense, informs defendant of the nature of the charge so that a defense can

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out the facts pertinent to the offense (generally, the "manner and means").

Each racketeering act must be distinguished with a number or letter of the alphabet so that the structure of the pattern of racketeering is evident. This also avoids jury confusion. Additionally, if any of the acts of racketeering are divided into sub-parts ("sub-predicated") to solve single episode problems (see supra Section II(E)(2)), care should be taken to ensure that the sub-parts are not treated as independent acts of racketeering.[3] The Organized Crime and Racketeering Section will recommend appropriate language to introduce this concept to the jury.

If there are multiple defendants who are not charged with each of the racketeering acts, it is useful, but not required, to incorporate a chart (to follow the RICO count) indicating the acts with which each defendant is charged. The chart may make it easier for the judge and the jury to grasp the nature of the RICO violation.

The scope of the RICO allegations should be confined to the

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be prepared and enables defendant to evaluate double jeopardy concerns). It is also important to consider state defenses that would render the conduct alleged unchargeable as an act of racketeering. See United States v. Fiore, 178 F.3d 917, 923 (7th Cir. 1999); United States v. Allen, 155 F.3d 35, 43-44 (2d Cir. 1998).

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

facts of the case, especially with respect to organized crime figures or other persons who may, during the course of their criminal careers, be charged in more than one RICO indictment. This rule is most important in RICO conspiracy counts and in allegations relating to venue and to dates of the RICO offense.

The pattern of racketeering should be drafted to allege that it "consists of" rather than "includes" the acts of racketeering to avoid double jeopardy problems in the event a RICO defendant is charged with a subsequent RICO violation,[4] and to clearly indicate the charged predicate acts that may be relied upon to establish the requisite pattern of racketeering activity.[5]

2. Drafting the RICO Conspiracy Count

If both a substantive RICO count and a RICO conspiracy count are charged, the pattern of racketeering activity from the substantive RICO count may be incorporated by reference into the RICO conspiracy count. This approach is preferable to incorporating portions of the conspiracy count into the substantive count. Conspiratorial agreements and other features of RICO conspiracy law may be viewed by the court as an additional element

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[4] See infra Section V (B)(3)(f) (double jeopardy).

[5] Some courts have held that only acts of racketeering specifically alleged in the RICO count may constitute the requisite pattern to support a RICO conviction. See United States v. Neapolitan, 791 F.2d 489, 500-01 (7th Cir.), cert. denied, 479 U.S. 939 (1986); United States v. Cauble, 706 F.2d 1322, 1344 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).

of the substantive RICO count to be proved in the government's case-in-chief. Such unnecessary and improper language may also confuse the jury. For the same reasons, it is preferable to position the substantive count before the RICO conspiracy count in the indictment, although some prosecutors opt to place the RICO conspiracy count first--for example, in a RICO/fraud indictment.

The RICO conspiracy count may pose special drafting problems. For example, there is no clear **legal** requirement that a RICO conspiracy count allege specific acts of racketeering that were the object of the RICO conspiracy.[6] However, failure to provide

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[6] While the majority of the appellate courts have not addressed this issue, the Seventh, Fifth and Third circuits require only that a RICO conspiracy count allege the existence of a RICO enterprise, the defendant's association with the enterprise, and that the defendant agreed that at least two acts of racketeering of the type described in the indictment would be committed by an enterprise coconspirator in the conduct of the affairs of the enterprise. See United States v. Glecier, 923 F.2d 496, 498-500 (7th Cir. 1991) (affirming conviction and finding sufficient indictment that--after identifying a proper enterprise and the defendant's association with that enterprise--alleged that "the defendant knowingly joined a conspiracy, the objective of which was to operate that enterprise through an identified pattern of racketeering activity (here, the 'pattern' being multiple acts of bribery prohibited by specified provisions of the Illinois criminal code)" and that "[b]y specifying the time period during which the alleged conspiracy operated, the locations and courts, the principal actors, and with some detail, the specific types of predicate crimes to be committed and the modus operandi of the conspiracy, the indictment adequately enabled [the defendant] to prepare a defense" and protected him against "subsequent prosecution for RICO conspiracy during the same period and involving the same coconspirators, enterprise and racketeering activities"); United States v. Phillips, 874 F.2d 123, 127-28 and n.4 (3d Cir. 1989) (rejecting defendant's challenge to the sufficiency of the RICO conspiracy count that generally alleged a pattern consisting of multiple acts of bribery and extortion that

(continued...)

adequate notice of the full scope of racketeering activity that is the object of the RICO conspiracy could pose problems. Cf. United States v. Davidoff, 845 F.2d 1151, 1154-55 (2d Cir. 1988) (RICO conspiracy conviction reversed for lack of adequate notice where government proved extortionate racketeering activity not alleged in indictment and not provided in a bill of particulars). Moreover, such lack of adequate notice of the racketeering activity that is the object of the conspiracy could also provoke a double jeopardy challenge against subsequent RICO prosecutions because it may be unclear exactly what conduct was charged in the earlier RICO conspiracy case.[7] **It is the policy of the Organized Crime and Racketeering Section, therefore, that details sufficient to meet notice and double jeopardy challenges be included in the RICO counts and set forth in detail in the government's prosecutive memorandum.** To avoid delays in the review and approval of an indictment, the prosecutor is urged to timely consult the RICO Unit of the Organized Crime and Racketeering Section for guidance and

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[6](...continued)
were listed as overt acts); United States v. Sutherland, 656 F.2d 1181, 1197 (5th Cir. 1981) (rejecting "lack of specificity" challenge to RICO conspiracy count where indictment identified the pattern of racketeering activity as a number of bribes that occurred over a four-year period, and it tracked and cited the relevant state bribery statute).

[7] Cf. United States v. Neapolitan, 791 F.2d 489, 500 (7th Cir. 1989) (upholding conviction but noting that the failure to specify the underlying criminal activity in the indictment can effectively preclude the exact identification of what is being charged).

assistance on this or any other issue related to RICO (and Section 1959) prosecutions.[8]

3. Other Drafting Considerations

a. Multiplicity

Multiplicity is the charging of a single offense in several counts. This issue may arise when defendants are charged with violations of a substantive RICO, RICO conspiracy, and with underlying predicate offenses in non-RICO counts. The danger in charging a multiplicity of offenses is that it may lead to multiple sentences for a single offense or may prejudice the defendant by creating the impression that several offenses were committed where there was but one. Courts have repeatedly held that RICO and RICO conspiracy charges require proof of facts different from a single underlying predicate offense.[9] Accordingly, such charges do not

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[8] Prosecutions under 18 U.S.C. § 1959, the Violent Crimes in Aid of Racketeering statute, also must be timely submitted for review and approval by the Organized Crime and Racketeering Section.

[9] See United States v. Aleman, 609 F.2d 298, 306 (7th Cir. 1979) (RICO, RICO conspiracy, and interstate transportation of stolen property), cert. denied, 445 U.S. 946 (1980); United States v. Moore, 811 F. Supp. 112, 116-17 (W.D.N.Y. 1992); United States v. Dellacroce, 625 F. Supp. 1387, 1391-92 (E.D.N.Y. 1986) (RICO and RICO conspiracy); United States v. Persico, 621 F. Supp. 842, 856 (S.D.N.Y. 1985) (RICO and RICO conspiracy), aff'd on other grounds, 832 F.2d 705 (2d Cir. 1987); United States v. Castellano, 610 F. Supp. 1359, 1392-96 (S.D.N.Y. 1985) (RICO and RICO conspiracy); United States v. Standard Drywall Corp., 617 F. Supp. 1283 (E.D.N.Y. 1985) (RICO conspiracy and 18 U.S.C. § 371 conspiracy to defraud the United States); United States v. Gambale, 610 F. Supp. (continued...)

implicate multiplicity issues and separate convictions and sentences are permissible for each charge.[10]

b. Duplicity

Duplicity is the joining of two or more distinct and separate offenses into a single count. The two principal problems posed by a duplicitous pleading are: (1) a general verdict of not guilty does not reveal whether the jury found the defendant not guilty of one crime or not guilty of both; (2) a general verdict of guilty does not disclose whether the jury found the defendant guilty of

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(...continued)
1515, 1546 (D. Mass. 1985) (RICO, RICO conspiracy, gambling, obstruction of justice, and loansharking); United States v. Boffa, 513 F. Supp. 444, 476 (D. Del. 1980) (RICO, RICO conspiracy, and Taft-Hartley violations); United States v. DePalma, 461 F. Supp. 778, 786 (S.D.N.Y. 1978) (RICO, securities fraud, and bankruptcy fraud).

[10] See United States v. Baker, 63 F.3d 1478, 1494 (9th Cir. 1995), cert. denied, 116 S. Ct. 824 (1996) (multiple convictions and sentences for violating RICO conspiracy and predicate offense of conspiring to traffic in contraband did not violate double jeopardy or constitute multiplicitous pleading); United States v. Angiulo, 897 F.2d 1169, 1206-07 (1st Cir. 1990) (upheld charging five predicate acts for five separate gambling businesses since they were not one overall gambling business); United States v. Cauble, 706 F.2d 1322, 1334-1335 (5th Cir. 1983)(charges of investment in the enterprise and conduct of the enterprise are different offenses and not multiplicitous), cert. denied, 465 U.S. 1005 (1984); United States v. Boffa, 688 F.2d 919, 935-36 (3d Cir. 1982), cert. denied,(four monthly payments for a lease of a car constituted four Taft-Hartley predicate acts; pleading not multiplicitous), cert. denied, 460 U.S. 1022 (1983); United States v. Carrozza, 728 F. Supp. 266, 273-275 (S.D.N.Y. 1990)(five separate conspiracy counts relating to ECT were not multiplicitous since each count required different proof; likewise, two gambling counts were not multiplicitous since one involved sports gambling, the other numbers gambling and the time periods were different).

one crime or both. See United States v. Pungitore, 910 F.2d 1084, 1135 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991). The duplicity argument has not been raised often in the RICO context.

In United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980), defendants challenged a RICO conspiracy count, arguing that it was duplicitous because it encompassed several substantive offenses. The Fifth Circuit found that the count was not duplicitous because the various substantive offenses were merely descriptive of a single overall agreement to conduct and participate in the conduct of an enterprise's affairs through a pattern of racketeering activity.

Similarly, it is not error for a RICO conspiracy count to allege predicate acts of racketeering that are in themselves conspiracies because a RICO conspiracy and the predicate conspiracies are distinct offenses with entirely different objectives.[11] The objective of a RICO conspiracy is to agree to further the overall object of the RICO enterprise and its conspiratorial members. In contrast, the objective of the conspiracy charged as an act of racketeering is confined to the goals and commission of that particular offense.[12]

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[11] See United States v. Pungitore, 910 F.2d 1084, 1135 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991).

[12] See Pungitore, 910 F. 2d at 1135; United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Biaggi, 672 F. Supp. 112, 122 (S.D.N.Y. 1987); United
(continued...)

In United States v. Pepe, 747 F.2d 632 (11th Cir. 1984), defendants argued that the indictment was unclear and duplicitous because the substantive RICO count presented alternate grounds of RICO liability--a pattern of racketeering activity and also the collection of unlawful debt. While the court agreed that alleging the two RICO prongs in separate counts could simplify matters, it held that the use of alternative grounds of RICO liability did not contravene the RICO statute or any of the defendants' constitutional rights. Pepe, 747 F.2d at 673.[13]

The duplicity argument also may arise where an act of racketeering consists of several sub-parts. For example, a pattern of racketeering activity may consist of five separate bribery schemes, each of which involves the payment of several individual bribes. Even though each racketeering act in this hypothetical consists of component acts of bribery, courts should not consider

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States v. Persico, 621 F. Supp. 842, 856 (S.D.N.Y. 1985), aff'd on other grounds, 832 F.2d 705 (2d Cir. 1987). See also United States v. Yarbrough, 852 F.2d 1522 (9th Cir.) (not duplicitous for RICO count to charge multiple predicate acts concerning the same conduct), cert. denied, 488 U.S. 866 (1988).

[13] See also United States v. Moore, 811 F. Supp. 112, 115-16 (W.D.N.Y. 1992) (allowing two theories of RICO liability--unlawful debt collection and a pattern of racketeering based on providing usurious loans); United States v. Vastola, 670 F. Supp. 1244, 1253-54 (D.N.J. 1987) (allowing two Section 1962(c) counts, one based on pattern of racketeering and the other on unlawful debt collection).

this racketeering act duplicitous.[14]

c. Variance: Single and Multiple Conspiracies

A material variance between the indictment and the government's evidence may be created when the indictment alleges a single overall conspiracy, but the evidence at trial shows multiple

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[14] See United States v. Pungitore, 910 F.2d 1084, 1135-36 (3d Cir. 1990)(holding that, even if charging alternative theories of murder, attempt, and conspiracy to murder under one act of racketeering constituted duplicitous pleading, no prejudicial error occurred where special verdicts were used and jury decided on sub-predicates unanimously), cert denied, 500 U.S. 915 (1991); United States v. Biaggi, 675 F. Supp. 790, 799 (S.D.N.Y. 1987) (court refused to dismiss subpredicated racketeering act charging extortion, bribery, mail fraud and receipt of a gratuity arising from same conduct where any duplicity problem could be solved by use of a special verdict form and adequate jury instructions); United States v. Dellacroce, 625 F. Supp. 1387, 1390-91 (E.D.N.Y. 1986) (potential duplicity problem solved by instructing jury that it may not find guilt based on one of the racketeering acts charged unless the jurors all agree on at least one of the proposed alternative theories of culpability); United States v. Castellano, 610 F. Supp. 1359, 1424 (S.D.N.Y. 1985) (by joining several criminal acts arising out of a single event in one racketeering act, the government protects the defendant from being found guilty of a pattern of racketeering activity based on a single episode and a special verdict form will specify which acts the jury found unanimously); see also United States v. Jennings, 842 F.2d 159 (6th Cir. 1988) (government may show that two predicate acts occurred although they are pleaded in one count; here, two separate telephone calls made in furtherance of unlawful narcotics activity). Cf. United States v. Kragness, 830 F.2d 842, 860-61 (8th Cir. 1987) (sub-predicates could have been treated as multiple racketeering acts). For a discussion of duplicity in a non-RICO case, see United States v. Berardi, 675 F.2d 894 (7th Cir. 1982).

During the RICO review process, every effort is made to identify and adequately specify "acts of racketeering." Once an act of racketeering consisting of "sub-predicates" has been approved, the prosecution may not thereafter argue to the court or to the jury, as separate acts of racketeering, that which has been authorized as one act of racketeering.

separate conspiracies that do not include the charged single overall conspiracy.[15] If a defendant can show that such a variance affected his or her "substantial" rights, a new trial may be warranted.

Defendants have frequently used the variance argument to attack RICO conspiracy convictions because RICO conspiracy charges often name numerous defendants and a wide variety of criminal activities. In many cases, not every defendant is involved in every act of racketeering. Moreover, a single conspiracy to violate a substantive RICO provision may be comprised of a pattern of sub-agreements that, absent RICO, might constitute separate multiple conspiracies. Nevertheless, courts have upheld even the most complicated RICO conspiracy charges, reasoning that Congress' purpose in enacting RICO was to allow for a single prosecution of a multifaceted, diversified criminal enterprise.[16] Accordingly, a pattern of diverse racketeering acts or sub-agreements that might

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[15] See United States v. Starrett, 55 F.3d 1525, 1552-53 (11th Cir. 1995); United States v. Quintanilla, 2 F.3d 1469, 1480-81 (7th Cir. 1993); United States v. Sutherland, 656 F.2d 1181, 1189 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982). For an analysis of the relationship between "variance" and "misjoinder," see also infra Section V (B)(3)(d).

[16] See United States v. Eufrasio, 935 F.2d 553, 566 (3d Cir.) cert. denied, 502 U.S. 925 (1991); United States v. Rosenthal, 793 F.2d 1214 (11th Cir.), modified in part, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987); United States v. Riccobene, 709 F. 2d 214, 224-26 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Elliott, 571 F.2d 880, 901-02 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

otherwise constitute acts in furtherance of separate multiple conspiracies may be joined in a single RICO conspiracy count if the defendants have agreed to participate in the affairs of the same enterprise through a pattern of racketeering activity and these racketeering acts and sub-agreements relate to the same enterprise.[17]

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[17] See United States v. Maloney, 71 F.3d 645, 664 (7th Cir. 1995) (government's evidence establishing a series of agreements between judge and differing third parties, with common objective being to corrupt the court system, was evidence of a single RICO conspiracy rather than multiple conspiracies); United States v. Carrozza, 4 F.3d 70, 79 (1st Cir. 1993) (for Sentencing Guidelines purposes, RICO conspiracy is treated as a single enterprise conspiracy even when evidence demonstrates a series of agreements which would constitute multiple conspiracies under pre-RICO law), cert. denied, 114 S. Ct. 1644 (1994); United States v. Alvarez, 860 F.2d 801 (7th Cir. 1988) (evidence showed that defendant participated in the affairs of overall conspiracy, not just smaller conspiracy), cert. denied, 490 U.S. 1051 (1989); United States v. Friedman, 854 F.2d 535 (2d Cir. 1988) (fact that various defendants participated in affairs of enterprise through different crimes did not mean that there were multiple conspiracies, as long as all acts furthered the enterprise's affairs), cert. denied, 490 U.S. 1004 (1989); United States v. Ashman, 979 F.2d 469, 483-85 (7th Cir. 1992) (upheld jury's finding of single RICO conspiracy involving 10 defendants and 320 counts arising from numerous fraudulent acts by traders and brokers of soybean futures contracts at the Chicago Board of Trade); United States v. Boylan, 898 F.2d 230, 244-48 (1st Cir. 1990) (finding a single RICO conspiracy arising from extensive scheme of different acts of bribery of police officers and related activity); United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.) (a RICO conspiracy, supported by acts of racketeering activity that are in themselves conspiracies, does not violate the prohibition against conviction for multiple conspiracies when the indictment charges a single conspiracy), cert. denied, 469 U.S. 831 (1984); United States v. McDade, 827 F. Supp. 1153, 1183 (E.D. Pa. 1993), aff'd in part, 28 F.3d 283 (3d Cir. 1994), cert. denied. 115 S. Ct. 1312 (1995); United States v. Walters, 711 F. Supp. 1435 (N.D. Ill. 1989) (court rejected defense argument that alleging multiple conspiracies as predicate acts amounted to improperly alleging (continued...)

The government, of course, still must establish the existence of one overall agreement to participate in the affairs of the same enterprise or a conviction may be subject to the variance argument.[18] Although most RICO conspiracies meet the "single conspiracy" requirement, courts have found multiple conspiracies in a few cases. For example, in United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982), the Fifth Circuit found that a RICO conspiracy count consisted of two separate, unrelated schemes to bribe a judge. Nonetheless, the court upheld the convictions after finding that the variance did not affect the "substantial" rights of the defendants. Similarly, in United States v. Bright, 630 F.2d 804 (5th Cir. 1980), the Fifth Circuit found that one defendant was not a member of the alleged conspiracy, but instead, was part of a limited conspiracy with one other defendant. Again, the court held that the variance did not require the conviction to be reversed because the differences

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multiple conspiracies); United States v. McCollom, 651 F. Supp. 1217 (N.D. Ill.) (denying defendant's severance motion and holding that although there were related conspiracies, there was one grand overall scheme), aff'd on other grounds, 815 F.2d 1087 (7th Cir. 1987); United States v. Persico, 621 F. Supp. 842, 856-57 (S.D.N.Y. 1985) (a RICO conspiracy is broader than a conspiracy to commit a particular crime).

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

between the indictment and the proof presented at trial did not affect the defendant's "substantial" rights.[19]

d. Severance, Misjoinder, and Prejudicial Spillover

The issues of severance and misjoinder arise in RICO cases just as they do in any large-scale criminal prosecution and, as in any prosecution, Rule 8 of the Federal Rules of Criminal Procedure governs the joinder of both defendants and offenses. Rule 8(b) provides substantial leeway to prosecutors who wish to join racketeering defendants in a single trial,[20] and permits joinder if the defendants participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.[21] The requirements of Rule 8(b) are satisfied simply by

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[19] See also United States v. Manzella, 782 F.2d 533 (5th Cir.) (although evidence supported existence of two small conspiracies rather than one overall conspiracy, the variance was harmless because there was no actual prejudice to the defendants), cert. denied, 476 U.S. 1123 (1986); but see United States v. Cryan, 490 F. Supp. 1234 (D.N.J.)(district court dismissed an improperly charged RICO conspiracy count because it could not conclude which of two conspiracies found by the court was intended to be indicted by grand jury), aff'd without opinion, 636 F.2d 1211 (3d Cir. 1980).

[20] See United States v. Eufrasio, 935 F.2d 553, 567 (3d Cir.), cert. denied, 502 U.S. 925 (1991) (joinder permissible where defendants were charged with participating in same enterprise, even when defendants were charged with different acts, as long as indictment alleged all acts charged against each joined defendant were acts of racketeering undertaken in furtherance of, or in association with, the charged enterprise).

[21] See Zafiro v. United States, 506 U.S. 534, 537 (1993); United States v. Krout, 66 F.3d 1420, 1429 (5th Cir. 1995), cert denied, 516 U.S. 1136 (1996); United States v. Faulkner, 17 F.3d 745, 758 (continued...)

establishing the existence of an enterprise and by showing that each defendant participated in the same enterprise through the commission of the charged predicate offenses.[22] In addition, defendants not named in the RICO count may be joined in the indictment if they participated in non-RICO offenses that were related to the enterprise.[23]

Despite the lenient nature of Rule 8 and the preference in the federal system for joint trials, Rule 14 permits a court to sever a properly joined defendant where it appears that joinder would prejudice the defendant. When a defendant has been properly joined under Rule 8(b), a district court should grant a Rule 14 severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or would prevent the jury from making a reliable judgment concerning guilt or

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(5th Cir.), cert. denied, 513 U.S. 870 (1994); United States v. Giampa, 904 F. Supp. 235, 263 (D.N.J. 1995).

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

[23] United States v. DePalma, 461 F. Supp. 778, 790-91 (S.D.N.Y. 1978).

innocence.[24]

Moreover, in considering a request for severance under Rule 14, less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.[25] For example, in United States v. Stillo, 57 F.3d 553 (7th Cir.), cert. denied, 516 U.S. 945 (1995), the Seventh Circuit upheld a district court's joinder of defendants even though one of the defendants claimed that he was prejudiced by evidence of pervasive corruption from predicate RICO offenses in which he was not involved. The court opined that the defendant failed to rebut the presumption that a jury can capably sort through the evidence and follow a court's limiting instructions to consider each defendant separately.[26] Id. at 557.

Similarly, in United States v. Le Compte, 599 F.2d 81 (5th Cir. 1979), cert. denied, 445 U.S. 927 (1980), two defendants argued on appeal that they were the victims of prejudicial

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[24] See Zafiro v. United States, 506 U.S. 534, 539 (1993).

[25] See Zafiro v. United States, 506 U.S. 534, 539 (1993); United States v. Posada-Rios, 158 F.3d 832, 863-65 (5th Cir. 1995); United States v. Krout, 66 F.3d 1420, 1429 (5th Cir. 1995); United States v. Crockett, 979 F.2d 1204, 1217-18 (7th Cir. 1992); United States v. LeQuire, 943 F. 2d 1554, 1562-63 (11th Cir. 1991); United States v. Balzano, 916 F.2d 1273, 1279-84 (7th Cir. 1990); United States v. Cervone, 907 F.2d 332, 340-42 (2d Cir. 1990); United States v. Doherty, 867 F. 2d 47, 63-64 (1st Cir. 1989).

[26] See also United States v. Lopez, 6 F.3d 1281, 1286 (7th Cir. 1993)(defendant did not rebut "dual presumptions" that a jury will capably sort through the evidence and that a jury will follow instructions from the court to consider each defendant separately).

spillover from testimony concerning the acts of co-defendants. The Fifth Circuit affirmed their convictions, holding that "the Constitution does not require that in a charge of group crime a trial be free of any prejudice but only that the potential for transferability of guilt be minimized to the extent possible." Id. at 83.

Moreover, in United States v. Eufrasio, 935 F.2d 553, 567-69 (3d Cir.), cert. denied, 502 U.S. 925 (1991), the court rejected the defendants' claim of prejudicial joinder because their codefendant was charged with a predicate act involving murder in which they had no knowledge or involvement.

However, in United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), the First Circuit reversed the convictions of two defendants on a RICO conspiracy count and then found that it must also reverse the defendants' conviction on two independent substantive counts. The court reasoned that it was too prejudicial to the defendants, whose involvement in the enterprise was limited, to be tried on the two substantive counts when there was extensive, unrelated evidence introduced at the trial involving a massive race-fixing RICO conspiracy. Id. at 1138-39.[27]

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[27] See also United States v. Guiliano, 644 F.2d 85 (2d Cir. 1981), where the two defendants were convicted of RICO and two predicate counts of bankruptcy fraud. The appellate court reversed one of the bankruptcy fraud counts of one of the defendants for lack of (continued...)

At least two district courts have granted a defendant's severance motion due to the complexity of the case.[28] By contrast, the Second Circuit, in affirming convictions in the massive "Pizza Connection" prosecution, held that the seventeen-month trial of 21 defendants with more than 275 witnesses was not so complex as to violate due process. In recognition of the disadvantages of such trials, the Second Circuit in its supervisory capacity established rules for future complex multi-defendant cases in that circuit: (1) the district court must elicit a good-faith estimate of trial time

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

[28] See United States v. Vastola, 670 F. Supp. 1244, 1262-63 (D.N.J. 1987) (separated RICO and non-RICO defendants); United States v. Gallo, 668 F. Supp. 736, 749-50 (E.D.N.Y. 1987) (held joinder proper, but severed case due to unmanageable complexity). The Gallo case involved the RICO prosecution of sixteen members of the Gambino LCN Family. In considering the defendants' motions for severance, the district court examined a number of factors to determine whether "substantial prejudice" would result from a joint trial: the complexity of the indictment; the estimated length of trial; disparity in the amount or types of proof offered against the defendants; disparity in the degree of involvement by defendants in the overall scheme; possible conflicts between various defense theories and trial strategies; and, particularly, the prejudice from evidence admissible against some defendants but inadmissible as to other defendants. After weighing these factors, the court determined that a single jury could not render a fair verdict as to all defendants and granted, in part, the motions for severance.

from the prosecutor; (2) if the trial time is likely to exceed four months, the prosecutor must provide the court with a reasoned basis for concluding that a joint trial is proper; (3) the judge must consider separate trials, particularly for peripheral defendants; and (4) the prosecutor would be required to make an especially compelling justification for a joint trial of more than ten defendants.[29] Despite these rulings, other courts generally have upheld joinder in multi-defendant cases [30] and the joinder of RICO and non-RICO charges.[31]

e. Statute of Limitations and Withdrawal

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[29] See United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990).

[30] See, e.g., United States v. Krout, 66 F. 3d 1420 (5th Cir. 1995), cert. denied, 516 U.S. 1136 (1996); United States v. DiNome, 954 F.2d 839, 842-45 (2d Cir.), cert. denied, 506 U.S. 830 (1992); United States v. Beale, 921 F.2d 1412, 1428-29 (11th Cir.), cert. denied, 502 U.S. 829 (1991); United States v. Cervone, 907 F.2d 332, 340-42 (2d Cir. 1990), cert. denied, 498 U.S. 1028 (1991); United States v. Caporale, 806 F.2d 1487, 1509-11 (11th Cir. 1986), cert. denied, 483 U.S. 1021 (1987); United States v. Teitler, 802 F.2d 606, 615-17 (2d Cir. 1986); United States v. Russo, 796 F.2d 1443, 1449-50 (11th Cir. 1986); United States v. O'Malley, 796 F.2d 891, 894-96 (7th Cir. 1986); United States v. Arocena, 778 F.2d 943, 949 (2d Cir. 1985), cert. denied, 475 U.S. 1053 (1986); United States v. Manzella, 782 F.2d 533, 539-41 (5th Cir.), cert. denied, 476 U.S. 1123 (1986); United States v. Schell, 775 F.2d 559, 569 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Watchmaker, 761 F.2d 1459, 1476-77 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986).

[31] United States v. Casamayor, 837 F.2d 1509 (11th Cir. 1988) (RICO and income tax charges), cert. denied, 488 U.S. 1017 (1989); United States v. Qaoud, 777 F.2d 1105, 1118 (6th Cir.) (perjury and RICO charge joined because based on same evidence), cert. denied, 475 U.S. 1098 (1986).

The general federal five-year limitations period (18 U.S.C. § 3282) is applicable to RICO prosecutions under each of the subsections of 18 U.S.C. § 1962.[32] Thus, for example, in a substantive RICO charge under Section 1962(c), each defendant must have committed at least one act of racketeering within five years of the date of the indictment.[33] However, pursuant to 18 U.S.C.

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[32] The statute of limitations generally is calculated using the date when an indictment is "found" under Fed. R. Crim. P. 6(e), and for statute of limitations purposes, an indictment is found when the grand jury returns it. See United States v. Bracy, 67 F.3d 1421, 1426 (9th Cir. 1995) (Section 1959 case); United States v. Srulowitz, 819 F.2d 37, 40 (2d Cir.), cert. denied, 479 U.S. 843 (1987); United States v. Southland Corp., 760 F.2d 1366, 1379-80 (2d Cir.), cert. denied, 474 U.S. 825 (1985). Where an indictment is sealed under Fed. R. Crim. P. 6(e)(4), if the defendant can show "substantial actual prejudice occurring between the date of sealing and the date of unsealing, the expiration of the statute of limitations period before the latter event warrants dismissal of the indictment." United States v. Srulowitz, 819 F.2d 37, 40-41 (2d Cir.) (citing United States v. Muse, 633 F.2d 1041, 1042 (2d Cir.) (en banc), cert. denied, 450 U.S. 984 (1981)), cert. denied, 479 U.S. 843 (1987). Other courts have considered whether the statute of limitations has been tolled in RICO cases. See United States v. Madrid, 842 F.2d 1090, 1096 (9th Cir.) (statute tolled where later indictment alleged essentially same facts as first), cert. denied, 488 U.S. 912 (1988); United States v. Robilotto, 828 F.2d 940, 949 (2d Cir. 1987) (superseding indictment made only minor technical changes to indictment, and therefore statute tolled by original indictment even though superseding indictment added a murder predicate act against the defendant), cert. denied, 484 U.S. 1011 (1988).

[33] See United States v. Maloney, 71 F.3d 645, 662 (7th Cir. 1995), cert. denied, 117 S. Ct. 295 (1996); United States v. Darden, 70 F.3d 1507, 1525 (8th Cir. 1995), cert. denied, 116 S. Ct. 1449 (1996); United States v. Starrett, 55 F.3d 1525, 1544-45 (11th Cir. 1995), cert. denied, 116 S. Ct. 1335 (1996); United States v. Wong, 40 F.3d 1347, 1367 (2d Cir. 1994), cert. denied, 115 S. Ct. 1968 (1995); United States v. Eisen, 974 F.2d 246, 263-64 (2d Cir. 1992), cert. denied, 507 U.S. 998 (1993); United States v. Salerno, (continued...)

§ 3293, a ten-year statute of limitations applies to RICO charges where the racketeering activity involves a violation of 18 U.S.C. § 1344 -- bank fraud. If there is more than one defendant in the case, the statute of limitations must be satisfied as to each defendant charged under RICO.[34]

A timely-brought RICO charge may include state and federal predicate offenses that would otherwise be barred by state or federal statutes of limitation if brought as non-RICO counts rather than acts of racketeering in a RICO count.[35] Indeed, in United

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868 F.2d 524, 534 (2d Cir.), cert. denied, 491 U.S. 907 (1989); United States v. Torres Lopez, 851 F.2d 520, 522 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989); United States v. Persico, 832 F.2d 705, 714 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); United States v. Walsh, 700 F.2d 846, 851 (2d Cir.), cert. denied, 464 U.S. 825 (1983); United States v. Srulowitz, 681 F. Supp. 137 (E.D.N.Y. 1988). See also United States v. Bethea, 672 F.2d 407, 419 (5th Cir. 1982); United States v. Forsythe, 560 F.2d 1127, 1134 (3d Cir. 1977).

[34] See United States v. Salerno, 868 F.2d 524, 534 (2d Cir.), cert. denied, 491 U.S. 907 (1989); United States v. Torres Lopez, 851 F.2d 520, 525 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989); United States v. Persico, 832 F.2d 705, 714-15 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); United States v. Castellano, 610 F. Supp. 1359, 1383 (S.D.N.Y. 1985).

[35] See United States v. Starrett, 55 F.3d 1524, 1550-51 (11th Cir. 1995), cert. denied, 116 S. Ct. 1335 (1996); United States v. Wong, 40 F.3d 1347, 1365-68 (2d Cir. 1994), cert. denied, 115 S. Ct. 1968 (1995); United States v. Gonzalez, 921 F.2d 1530, 1547-48 (11th Cir. 1991); United States v. Pungitore, 910 F. 2d 1084, 1129 n.63 (3d Cir. 1990); United States v. Torres Lopez, 851 F. 2d 520, 522-25 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989); United States v. Castellano, 610 F. Supp. 1359, 1383-84 (S.D.N.Y. 1985); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir.), cert. denied, 439 U.S. 801 (1978).

States v. Mazzio, 501 F. Supp. 340, 343 (E.D. Pa. 1980), aff'd, 681 F.2d 810 (3d Cir.), cert. denied, 451 U.S. 1134 (1982), the district court held that the state statute of limitations was irrelevant to a federal RICO prosecution. Note, however, that, if a substantive RICO count under Section 1962(c) is based on collection of an unlawful debt rather than a pattern of racketeering activity, the general five-year statute of limitations is applicable to each act of collection.[36] Therefore, a RICO conviction based on unlawful debt collection must consist of a debt collection that occurred within five years of the indictment.

In the case of a RICO conspiracy charge, the date of the last racketeering act, or if overt acts are alleged, the date of the last overt act, may be used to determine the limitations period. Some courts, however, have held that the statute of limitations does not begin to run until the RICO conspiracy agreement is terminated.[37]

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

[37] In United States v. Coia, 719 F.2d 1120, 1124-25 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984), the district court dismissed an indictment charging a RICO conspiracy because no sufficient overt acts were found to have taken place within the limitations period. The appellate court vacated and remanded, holding that a RICO conspiracy charge does not require overt acts and that the indictment was sufficient because it alleged that the conspiracy continued into the limitations period. Accord United States v. Starrett, 55 F.3d 1525, 1545 (11th Cir. 1995), cert. denied, 116 S. Ct. 1335 (1996); United States v. Eisen, 974 F.2d 246 (2d Cir. 1992), cert. denied, 507 U.S. 998 (1993); United

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Even if a defendant is not liable for a substantive RICO violation because he did not commit at least one racketeering act within five years of the indictment, the defendant remains liable for a RICO conspiracy offense if the evidence establishes that he was a member of the RICO conspiracy, the conspiracy continued within five years of the indictment and the defendant did not establish that he withdrew from the conspiracy more than five years before the indictment.[38] Although it is not necessary for the government to establish that, within the five-year period the defendant agreed to the commission of additional racketeering acts, absent special circumstances, the Organized Crime and Racketeering

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States v. Gonzalez, 921 F.2d 1530, 1547-48 (11th Cir.), cert. denied, 502 U.S. 806 (1991); United States v. Persico, 832 F.2d 705, 713-14 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); United States v. Torres Lopez, 851 F.2d 520, 525 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989).

[38] See United States v. Zizzo, 120 F.3d 1338, 1357-58 (7th Cir. 1997); United States v. Maloney, 71 F.3d 645, 654-56 (7th Cir. 1995), cert. denied, 117 S. Ct. 295 (1996); United States v. Morgano, 39 F.3d 1358, 1370-71 (7th Cir. 1994); United States v. Eisen, 974 F.2d 246, 263-64 (2d Cir. 1992), cert. denied, 507 U.S. 998 (1993); United States v. LeQuire, 943 F.2d 1554, 1563-64 (11th Cir. 1991), cert. denied, 505 U.S. 1223 (1992); United States v. Masters, 924 F.2d 1362, 1368 (7th Cir.), cert. denied, 500 U.S. 919 (1991); United States v. Gonzalez, 921 F.2d 1530, 1547-48 (11th Cir. 1991); United States v. Rastelli, 870 F.2d 822, 838 (2d Cir.), cert. denied, 493 U.S. 982 (1989); United States v. Salerno, 868 F.2d 534, 534 (2d Cir.), cert denied, 491 U.S. 907 (1989); United States v. Torres Lopez, 851 F.2d 520, 522-25 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989); United States v. Persico, 832 F. 2d 705, 712-15 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); United States v. Coia, 719 F. 2d 1120, 1124-25 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984).

Section may not approve a RICO conspiracy count against a defendant who has not actively participated in the conspiracy or reaffirmed his association with it within five years of the indictment.

For a RICO charge under Section 1962(a) or 1962(b), the limitations analysis is different from that for cases under Section 1962(c). For example, the gravamen of the Section 1962(a) offense is the use or investment of racketeering income in the operation or establishment of an enterprise. A Section 1962(a) offense is not complete until the use or investment has occurred, which, ordinarily, will be some time after the commission of the racketeering acts that generated the income. Thus, according to one appellate court, the limitations period for a Section 1962(a) offense does not begin to run until the last act of use or investment has occurred.[39] A similar analysis should be used for cases under Section 1962(b).

f. Double Jeopardy and Collateral Estoppel

a. Double Jeopardy

The Double Jeopardy Clause is implicated in three different types of RICO scenarios. The first involves whether a substantive RICO offense is a separate offense from a RICO conspiracy to commit that substantive RICO offense and can be either separately

[39] See United States v. Vogt, 910 F.2d 1184, 1195-97 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991).

prosecuted or cumulatively punished. The second involves multiple prosecutions for RICO and for offenses that also are charged as racketeering acts underlying the RICO offense. The third deals with charging multiple substantive RICO offenses or multiple RICO conspiracy offenses.

Every court that has decided the issue has held that a substantive RICO offense and a RICO conspiracy to commit that substantive RICO offense are separate offenses for double jeopardy purposes, and that, therefore, those offenses may be prosecuted consecutively and cumulatively punished. [40] In United States v. Pungitore, 910 F.2d at 1115, the Third Circuit explained the rationale for these holdings, stating:

> We reasoned [previously] that sections 1962(c)

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[40] See United States v. Diaz, 176 F.3d 52, 115-16 (2d Cir. 1999); United States v. Sessa, 125 F.3d 68, 71-73 (2d Cir. 1997), cert. denied, 118 S. Ct. 731(1998); United States v. Masters, 978 F.2d 281, 285-86 (7th Cir. 1992), cert. denied, 508 U.S. 906 (1993); United States v. Coonan, 938 F.2d 1553, 1566-67 (1st Cir. 1991), cert. denied, 503 U.S. 941 (1992); United States v. Pungitore, 910 F.2d 1084, 1115-17 (3d Cir. 1990), cert. denied, 500 U.S. 915(1991); United States v. West, 877 F.2d 281, 292 (4th Cir.), cert. denied, 493 U.S. 869 (1989); United States v. Yarbrough, 852 F.2d 1522, 1545 (9th Cir.), cert. denied, 488 U.S. 866 (1988); United States v. Benevento, 836 F.2d 60, 72-73 (2d Cir. 1986); United States v. Callanan, 810 F.2d 544, 545-48 (6th Cir.), cert. denied, 484 U.S. 832 (1987); United States v. Biasucci, 786 F.2d 505, 515-16 (2d Cir. 1986); United States v. Watchmaker, 761 F.2d 1459, 1477 (11th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); United States v. Marrone, 746 F.2d 957, 959 (3d Cir. 1984); United States v. Bagaric, 706 F.2d 42, 63 (2d Cir.), cert. denied, 464 U.S. 840 (1983); United States v. Cagnina, 697 F.2d 915, 923 (11th Cir.), cert. denied, 464 U.S. 856 (1983); United States v. Rone, 598 F.2d 564, 569-71 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

> and (d) define distinct offenses under the test of Blockburger v. United States, 284 U.S. at 304, 52 S. Ct. at 182, as each requires proof of a fact which the other does not. Given that the offenses are distinct and no legislative intent against consecutive sentencing is discernible from RICO's text or legislative history, we inferred that Congress intended to authorize consecutive sentencing.

Likewise, the courts have held that a RICO substantive or conspiracy offense and its underlying predicate racketeering acts are separate offenses for double jeopardy purposes and may be consecutively prosecuted and cumulatively punished.[41]

The resolution of a double jeopardy claim is not so clear cut when a defendant has been charged with two or more RICO conspiracy or two or more RICO substantive offenses. Most courts apply a multi-factor test to determine whether the two RICO offenses are separate for double jeopardy purposes. For example, in United States v. Ruggiero, 754 F.2d 927 (11th Cir.), cert. denied, 471

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[41] See United States v. Doyle, 121 F.3d 1078, 1091 (7th Cir. 1997); United States v. Baker, 63 F.3d 1478, 1494 (9th Cir. 1995), cert. denied, 516 U.S. 1097 (1996); United States v. Morgano, 39 F.3d 1358, 1365-71 (7th Cir. 1996); United States v. Crosby, 20 F.3d 480, 483-84 (D.C. Cir. 1994), cert. denied, 514 U.S. 1052 (1995); United States v.Deshaw, 974 F.2d 667, 671 (5th Cir. 1994); United States v. LeQuire, 931 F.2d 1539, 1540 (11th Cir. 1991), cert. denied, 505 U.S. 1223 (1992); United States v. Gonzalez, 921 F.2d 1530, 1535-39 (11th Cir. 1991); United States v. Link, 921 F.2d 1522, 1529-30 (11th Cir. 1991); United States v. Esposito, 912 F.2d 60, 62-67 (3d Cir. 1990); United States v. Pungitore, 910 F.2d 1084, 1107-12 (3d Cir. 1990); United States v. Persico, 832 F.2d 705, 709-12 (2d Cir. 1987); United States v. Kragness, 830 F.2d 842, 863-64 (8th Cir. 1987).

U.S. 1127 (1985), defendants moved to dismiss on double jeopardy grounds a RICO indictment in Florida that arose from conduct used against them in a prior RICO indictment in New York. The issue on appeal was whether the activities set out in the two indictments constituted one pattern of racketeering activity or two different patterns. In conducting its inquiry, the court considered five factors:

> (1) whether the activities constituting the two "patterns" occurred during the same time period;
>
> (2) whether the activities occurred in the same places;
>
> (3) whether the activities involved the same persons;
>
> (4) whether the two indictments alleged violations of the same criminal statutes; and
>
> (5) whether the overall nature and scope of the activities set out in the two indictments were the same.

Id. at 932-33. While the court found some overlap between the two cases, including the use of one racketeering act in both patterns of racketeering activity, the court concluded that, on balance, the indictments charged two different patterns of racketeering activity, and, therefore, did not violate double jeopardy.[42]

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[42] See also United States v. Marren, 890 F.2d 924, 935-36 (7th Cir. 1989) (under five-factor test upheld successive RICO conspiracy prosecutions where the racketeering acts were different); United States v. Pungitore, 910 F.2d 1084, 1112-15 (3d Cir. 1990) (upholding successive RICO conspiracy prosecutions against (continued...)

b. Collateral Estoppel

Collateral estoppel issues typically require a more difficult analysis because the inquiry is largely fact-bound. A party raises a claim of collateral estoppel usually when he seeks to exclude evidence or foreclose an issue. The claimant bears the burden of showing that an ultimate issue of fact was necessarily litigated in his favor in prior litigation involving the same parties. In the RICO context, the collateral estoppel issue typically arises when a defendant has been previously acquitted of conduct that is subsequently charged as, or relates to, a RICO predicate act. In United States v. Ruggiero, 754 F.2d 927, 935 (11th Cir.), cert. denied, 471 U.S. 1127 (1985), defendant Cerasini was acquitted of RICO charges in the Southern District of New York, wherein he was alleged to have been a member of the Bonanno Family of La Cosa Nostra. Thereafter, he and ten others were indicted in the Middle District of Florida on RICO charges with racketeering acts that were different from those contained in the Southern District of New

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defendants where the enterprise was the same, but the predicate acts were different); United States v. Ciancaglini, 858 F.2d 923, 930 (3d Cir. 1988) (same); United States v. Langella, 804 F.2d 185, 186-90 (2d Cir. 1986) (upholding successive RICO conspiracy prosecutions against defendants where the enterprises were different and only three of nine predicate acts overlapped); United States v. Russotti, 717 F.2d 27, 33 (2d Cir. 1983) (upholding successive RICO substantive prosecutions where the racketeering acts were different); United States v. Dean, 647 F.2d 779, 788 (8th Cir.) (same), modified on other grounds, 667 F.2d 721 (8th Cir. 1981) (en banc), cert. denied, 456 U.S. 1006 (1982).

York indictment, but that were alleged to have been committed by members of certain La Cosa Nostra Families, including the Bonanno Family. Cerasini sought dismissal of the Florida indictment, alleging that the previous acquittal constituted a finding that he was not a member of the Bonanno Family. The trial judge refused to dismiss and the court of appeals affirmed, stating that the jury that acquitted Cerasini in New York did not necessarily decide that he was not a member of the Bonanno Family. Rather, said the Eleventh Circuit, the previous acquittal could have been based upon a conclusion that, although Cerasini was a member of the Bonanno Family, he did not participate in the particular pattern of racketeering activity alleged in the New York indictment. Therefore, in Florida the government was not seeking to persuade a second jury to determine anew a fact necessarily decided in the New York acquittal.[43]

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[43] See also United States v. Salerno, 108 F.3d 730, 740-42 (7th Cir. 1997)(at trial on charge of murder in aid of racketeering, where defendant had been previously acquitted of two extortion charges, proof that the racketeering enterprise with which he was associated engaged in extortion was admissible, since in a Section 1959(a)(1) prosecution, a defendant's personal involvement in extortion is irrelevant and is not an ultimate issue); United States v. Shenberg, 89 F.3d 1461, 1478-81 (11th Cir. 1996)(on retrial of a substantive RICO count, collateral estoppel doctrine barred the government from proving acquitted counts that corresponded to various RICO predicate acts; however, collateral estoppel did not bar use of the evidence as to another defendant's RICO conspiracy charge, particularly since actual commission of the predicate act is not an essential element of conspiracy), cert. denied, 117 S. Ct. 961 (1997); United States v. Console, 13 F.3d 641, 662-65 (3d Cir. 1993)(where jury could not agree on a verdict (continued...)

g. Surplusage

On occasion, particularly in organized crime cases, RICO defendants have argued that the inclusion of certain terms in the indictment such as "mob," "mafia," "racketeering," and "capo," was prejudicial, and that courts should strike those terms as surplusage. Generally, where such terms are relevant to the charges in the indictment and have a legitimate, evidentiary purpose, courts have not ordered them stricken.[44] One court,

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at the first trial, collateral estoppel doctrine was inapplicable at the retrial, since no fact had been necessarily resolved against the government at the first trial), cert. denied, 511 U.S. 1076 (1994); cf. United States v. Pelullo, 14 F.3d 881, 889-92(3d Cir. 1994)(at defendant's RICO trial, where a prior wire fraud conviction served as a racketeering act and the government used the judgment of conviction to prove that racketeering act, the Third Circuit held that (a) the district judge erred in holding that defendant was collaterally estopped from contesting that element of the RICO offense and (b) the collateral estoppel doctrine cannot be employed against a defendant in a criminal case when it violates his right to have a jury decide his case).

[44] See United States v. Scarpa, 913 F.2d 993, 1011-13 (2d Cir. 1990); United States v. Vastola, 670 F. Supp. 1244, 1255-56 (D.N.J. 1987); United States v. Rastelli, 653 F. Supp. 1034, 1055-56 (E.D.N.Y. 1986); United States v. Santoro, 647 F. Supp. 153, 177 (E.D.N.Y. 1986), aff'd, 880 F.2d 1319 (2d Cir. 1989); United States v. Dellacroce, 625 F. Supp. 1387, 1392 (E.D.N.Y. 1986); United States v. Ianniello, 621 F. Supp. 1455, 1479 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987); United States v. Persico, 621 F. Supp. 842, 860-61 (S.D.N.Y. 1985); United States v. Gambale, 610 F. Supp. 1515, 1544-45 (D. Mass. 1985); United States v. Castellano, 610 F. Supp. 1359, 1428-29 (S.D.N.Y. 1985).

In Vastola, 670 F. Supp. at 1255-56, the court granted motions to strike parts of the preamble to the indictment containing information not contained in the body of the indictment, the word "loansharking," and terms "and others," "and with others," and

however, expressed concern where the indictment named a criminal enterprise based on a defendant's name (the "Vastola Organization"). Although the court did not reverse the case, it urged the use of caution in future cases to avoid undue prejudice.[45]

"other criminal means"; but refused to strike the term "racketeering." Id. at 1255.

[45] See United States v. Vastola, 899 F.2d 211, 232 (3d Cir. 1990).

VI. OTHER ISSUES IN CRIMINAL RICO CASES

A. Liberal Construction Clause

Section 904(a) of Title IX of the Organized Crime Control Act of 1970 (Pub. L. 91-452, enacting RICO), states that "the provision of this title shall be liberally construed to effectuate its remedial purposes." Referring to this provision, the Supreme Court has stated in both civil and criminal cases that RICO must be liberally construed to achieve its remedial purposes.[1]

However, in Reves v. Ernst & Young, 507 U.S. 170, 183 (1993), the Supreme Court ruled that the liberal construction provision "is not an invitation to apply RICO to new purposes that Congress never intended." The Court reasoned that the clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." Id. at 182.[2]

With these limitations in mind, prosecutors can use the liberal construction clause to argue for favorable interpretations

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[1] See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 492 n. 10, 497-98 (1985); Russello v. United States, 464 U.S. 16, 27 (1983); United States v. Turkette, 452 U.S. 576, 587, n.10 (1981). See also Tabas v. Tabas, 47 F.3d 1280, 1291 (3d Cir. 1995); United States v. Floyd, 992 F.2d 498, 501 (5th Cir. 1993); United States v. Mazzio, 501 F. Supp. 340, 342 (E.D. Pa. 1980), aff'd, 681 F.2d 810 (3d Cir.), cert. denied, 457 U.S. 1134 (1982); United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977).

[2] See also Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 274 (1992)(refusing to use liberal construction clause to expand standing of RICO plaintiffs).

of RICO provisions in order to achieve RICO's remedial purpose.[3]

B. Wharton's Rule

Defendants have unsuccessfully argued that separate convictions for RICO substantive and conspiracy offenses are barred by "Wharton's Rule." As the Supreme Court explained in Iannelli v. United States, 420 U.S. 770, 785-86 (1975), Wharton's Rule creates a rebuttable presumption that, "absent legislative intent to the contrary," a conspiracy offense merges into a substantive offense "that **require[s]** concerted criminal activity, a plurality of criminal agents." The Supreme Court added that it "adopted a narrow construction of [Wharton's] Rule that focuses on the statutory requirements of the substantive offense rather than the evidence offered to prove those elements at trial." Id. at 780. Moreover, the Court noted that the federal courts of appeals have applied a third-party exception, holding that Wharton's Rule is inapplicable where the conspiracy offense involved more persons than required for the commission of the substantive offense. Id.

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[3] See United States v. Perholtz, 842 F.2d 343, 353 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); United States v. Neapolitan, 791 F.2d 489, 495 (7th Cir.), cert. denied, 479 U.S. 939 (1986); United States v. Frumento, 563 F.2d 1083, 1091 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978). Other courts have held that RICO is not to be burdened with judicial constraints that defeat the broad congressional purpose. See, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499-500 (1985); Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348 (3d Cir.), cert. denied, 493 U.S. 901 (1989).

at 775, 782 n.15.[4]

Under the foregoing principles, every court that has decided the issue has held that Wharton's Rule does not require merger of RICO substantive and conspiracy convictions on one or more of the following three independent grounds:[5] First, since a substantive RICO offense may be committed by a single person, a substantive RICO offense does not **require** concert of action, and hence Wharton's Rule is inapplicable to RICO offenses. Second, even assuming arguendo that the RICO substantive offense required concert of action of at least two persons, Wharton's Rule does not apply where the RICO conspiracy offense involved more participants than required for the commission of the substantive offense (i.e., more than two persons). Third, even if Wharton's Rule otherwise applied, the legislative history underlying RICO conclusively establishes that Congress intended to create "new" and "enhanced sanctions" to eradicate organized crime, and therefore Congress did

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[4] The Iannelli court held that Wharton's Rule did not bar separate convictions for conducting a gambling business, in violation of 18 U.S.C. § 1955, and conspiring to commit that offense, in violation of 18 U.S.C. § 371, even though the substantive gambling offense required the participation of "five or more persons", since Congress did not intend the two offenses to merge.

[5] See United States v. Pungitore, 910 F.2d 1084, 1108 n.24 (3d Cir. 1990); United States v. Rone, 598 F.2d 564, 569-71 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Ohlson, 552 F.2d 1347, 1349-50 (9th Cir. 1971); United States v. Gambale, 610 F. Supp. 1515, 1546-47 (D. Mass. 1985); United States v. Hawkins, 516 F. Supp. 1204, 1206-08 (M.D. Ga. 1981); United States v. Boffa, 513 F. Supp. 444, 477-78 (D. Del. 1980).

not intend to merge RICO substantive and conspiracy convictions, which would be inconsistent with its intent in adopting RICO. See generally Russello v. United States, 464 U.S. 16, 26-28 (1983); United States v. Turkette, 452 U.S. 576, 587-93 (1981).

C. Mens Rea

Every court that has considered the issue has held that RICO does not require any **mens rea** or scienter element beyond what the predicate offenses require.[6] Therefore, wilfulness or other specific intent is not an element of a RICO offense; however, if any of the predicate offenses require proof of wilfulness or specific intent then such requirement must be met regarding that predicate offense.[7] Nevertheless, it is the policy of the Organized Crime and Racketeering Section to allege and prove at least that the RICO defendant acted knowingly or intentionally to eliminate any issue that the RICO defendant did not have a requisite criminal intent.

Moreover, in the civil context courts have usually held that government entities, such as municipal corporations, cannot be RICO

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[6] See United States v. Baker, 63 F.3d 1478, 1492-93 (9th Cir. 1995); United States v. Blinder, 10 F.3d 1468, 1477 (9th Cir. 1993); United States v. Biasucci, 786 F.2d 504, 512-13 (2d Cir. 1986); United States v. Pepe, 747 F.2d 632, 675-76 (11th Cir. 1984); United States Scotto, 641 F.2d 47, 55-56 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir.), cert. denied, 449 U.S. 833 (1980).

[7] See Baker, 63 F.3d at 1492-93; Scotto, 641 F.2d at 55-56. Moreover, knowledge of the federal nature of a RICO offense is not an element of RICO. See Baker, 63 F.3d at 1491 n.16.

defendants because they cannot form the requisite specific intent to satisfy the **mens rea** requirement of a predicate offense.[8] Nor can the necessary intent of a government entity's agents be imputed to the entity under a respondeat superior theory.[9] However, courts have not had the opportunity to address this issue in a criminal setting.

D. Connection to Organized Crime

In 1989, the Supreme Court confirmed the generally accepted principle that the government need not prove that a RICO defendant or a RICO offense had any nexus to "organized crime."[10] One district court noted that if application of RICO were limited solely to members of organized crime, it would probably be unconstitutional. See United States v. Mandel, 415 F. Supp. 997, 1018-19 (D. Md. 1976). RICO proscribes specific conduct, not the status of being involved in organized crime. In fact, RICO does

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[8] See Lancaster Community Hospital v. Antelope Valley Hospital Dist., 940 F.2d 397, 404 (9th Cir. 1991); Genty v. Resolution Trust Corp., 937 F.2d 899, 909-14 (3d Cir. 1991); Nu-Life Construction Corp. v. Board of Educ. of New York, 779 F. Supp. 248, 251 (E.D.N.Y. 1991).

[9] See Lancaster Community Hospital v. Antelope Valley Hospital Dist., 940 F.2d 397, 404-405 (9th Cir. 1991); Genty v. Resolution Trust Corp., 937 F.2d 899, 909-914 (3d Cir. 1991); Nu-Life Construction Corp. v. Board of Educ. of New York, 779 F. Supp. 248, 251 (E.D.N.Y. 1991); cf. Tryco Trucking Co. v. Belk Stores Services, 634 F. Supp. 1327, 1334 (W.D.N.C. 1986) ("RICO envisions respondeat superior liability.").

[10] See H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 243-49 (1989). See also cases cited supra, n.42, Section II.

not even contain a definition of organized crime.

E. Constitutionality of RICO

1. Vagueness Challenges

In H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989), the Supreme Court reversed the Eighth Circuit's holding that required proof of multiple schemes in order to establish the pattern-of-racketeering element of RICO. In a concurring opinion written by Justice Scalia, four Justices expressed their concern about the difficulty in defining a pattern of racketeering activity stating:

> No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.[11]

This comment has prompted numerous defendants to attack the RICO statute on vagueness grounds. Those attacks have not fared well in the courts. All ten of the courts of appeals that have addressed the issue since H.J. Inc. was decided have rejected the vagueness argument. These courts have held that vagueness claims must be considered on the facts of the particular case in which the claim is asserted and in each case the court found that the defendants had adequate notice that their conduct fell within the proscriptions of RICO and that consequently their vagueness

[11] 492 U.S. at 255-56 (Scalia, J., concurring).

challenges were meritless.[12]

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[12] See United States v. Angiulo, 897 F. 2d 1169, 1179 (1st Cir.), cert denied, 498 U.S. 845 (1990); United States v. Otero, 37 F.3d 739, 752 (1st Cir. 1994); United States v. Coiro, 922 F.2d 1008, 1017 (2d Cir. 1991); United States v. Coonan, 938 F. 2d 1553, 1561-62 (2d Cir. 1991), cert. denied, 503 U.S. 941 (1992); United States v. Pungitore, 910 F.2d 1084, 1102-05 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991); United States v. Woods, 915 F.2d 854, 862-64 (3d Cir. 1990); United States v. Borromeo, 954 F.2d 245, 248 (4th Cir. 1992); United States v. Bennett, 984 F.2d 597, 605-06 (4th Cir.), cert. denied, 508 U.S. 945 (1993); United States v. Aucoin, 964 F.2d 1492, 1497-98 (5th Cir. 1992); United States v. Krout, 66 F.3d 1420, 1432 (5th Cir. 1995), cert. denied, 516 U.S. 1136 (1996); Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1106 (6th Cir. 1995), cert. denied, 516 U.S. 1158 (1996); United States v. Glecier, 923 F.2d 496, 497-98 n.1 (7th Cir. 1991); United States v. Masters, 924 F.2d 1362, 1367 (7th Cir. 1991); United States v. Sanders, 962 F.2d 660, 678 (7th Cir. 1992); United States v. Ashman, 979 F. 2d 469, 487 (7th Cir. 1992), cert. denied, 510 U.S. 814 (1993); United States v. Dischner, 974 F. 2d 1502, 1508 (9th Cir. 1992), cert. denied, 507 U.S. 923 (1993); United States v. Freeman, 6 F.3d 586, 597 (9th Cir. 1993); United States v. Blinder, 10 F.3d 1468, 1475-76 (9th Cir. 1993); United States v. Keltner, 147 F. 3d 662, 667 (8th Cir.), cert. denied, 525 U.S. 1032 (1998); United States v. Van Dorn, 925 F.2d 1331, 1334 n. 2 (11th Cir. 1991); Cox v. Administrator U.S. Steel & Carnegie, 17 F. 3d 1386, 1398 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995).

Although the Tenth Circuit has not yet decided the issue, two district courts in that circuit have rejected vagueness contentions. See United States v. Haworth, 941 F. Supp. 1057, 1060 (D.N.M. 1996); Schrag v. Donges, 788 F. Supp. 1543, 1553 (D. Kan. 1992). The District of Columbia Circuit has not discussed the vagueness question since H.J. Inc. was decided. Prior to H.J. Inc., however, that court of appeals rejected claims of vagueness and overbreadth. See United States v. Swiderski, 593 F. 2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979). See also Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 58 (1989), where the Supreme Court held that Indiana's RICO law, which was modeled after the federal statute, was not unconstitutionally vague as applied to obscenity predicate offenses.

Only one court has sustained a vagueness argument. In Firestone v. Galbreth, 747 F. Supp. 1556, 1581 (S.D. Ohio 1990), the district court ruled that in a private civil lawsuit the

(continued...)

2. Tenth Amendment Challenges

Defendants also have challenged the constitutionality of RICO prosecutions on the ground that they infringed upon powers the Tenth Amendment reserved for the states. In United States v. Freeman, 6 F.3d 586, 598 (9th Cir. 1993), cert. denied, 511 U.S. 1077 (1994), the court of appeals rejected a contention that prosecuting a state legislative aide infringed upon the state's right to control its electoral processes. In United States v. Vignola, 464 F. Supp. 1091, 1098-99 (E.D. Pa.), aff'd, 605 F.2d 1199 (3d Cir. 1979), cert. denied, 444 U.S. 1072 (1980), the court ruled that Congress had the power to regulate intrastate activities that had an effect on interstate commerce. The Vignola court reasoned that since there was a rational basis for believing that state racketeering activities affected interstate commerce, using RICO to regulate those intrastate activities was permissible. The court concluded that Congress had properly exercised its federal commerce power when enacting RICO and rejected the defendant's claim that RICO did not properly cover his receipt of bribes as a purely local traffic court judge.

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[12](...continued)
pattern requirement was unconstitutionally vague as to the defendants. On appeal, the Sixth Circuit declined to review the holding because it determined that the only defendants who had raised the issue lacked standing to do so. Firestone, 926 F.2d 279, 285 (6th Cir. 1992). No other court supports the district court's decision in Firestone. See Bseirani v. Mahshie, 881 F. Supp. 778, 787 (N.D.N.Y. 1995).

In United States v. Martino, 648 F.2d 367 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982), defendants argued that the RICO statute intruded upon state sovereignty because it did not require that each act of racketeering affect interstate commerce. The Martino court found that this argument ignored the essence of Section 1962(c) violations, which involve conducting an enterprise's affairs through a pattern of racketeering activities, rather than merely committing racketeering crimes. The court of appeals reasoned that, where an enterprise engaged in or affected interstate commerce, and the acts of racketeering were related to the operation of the enterprise, the acts were chargeable under the federal RICO statute even though the individual acts of racketeering did not affect interstate commerce. Martino, 648 F. 2d at 381.

3. First Amendment Challenges

In Fort Wayne Books, Inc. v. Indiana, et al., 489 U.S. 46, 57-60 (1989), the Supreme Court held that the Indiana RICO statute, patterned after the federal RICO statute, was not unconstitutionally vague as applied to obscenity predicate offenses where the predicate offenses complied with the governing Supreme Court standards, and that the state RICO criminal penalties were not so "draconian" so as to chill First Amendment rights.[13]

[13] See also United States v. Freeman, 6 F.3d 586, 597 (9th Cir. 1993)(RICO's application to state legislator's office and (continued...)

4. Ex Post Facto Challenges

The Ex Post Facto Clause of the Constitution prohibits Congress from "punish[ing] as a crime an act previously committed, which was innocent when done," or "mak[ing] more burdensome the punishment for a crime, after its commission." Collins v. Youngblood, 497 U.S. 37, 52 (1990). It has long been the law that it does not violate the Ex Post Facto Clause to impose criminal liability for a course of conduct that was lawful when it began, but which continued after a statute made such conduct unlawful.[14]

Congress was well aware of the foregoing ex post facto principles when it enacted RICO and explicitly provided that a RICO offense may include predicate acts committed before RICO's effective date. In that regard, RICO's definition of "pattern of

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[13](...continued)
legislative aide's bribery scheme did not infringe on states' rights to control their electoral process or chill First Amendment rights regarding solicitation of campaign contributions); United States v. Pryba, 900 F.2d 748, 753-58 (4th Cir. 1990) (RICO forfeiture of non-obscene books and videos and other property acquired in violation of RICO did not violate First Amendment); United States v. Yarbrough, 852 F.2d 1522, 1540-41 (9th Cir. 1988) (RICO conspiracy conviction of a member of a white-supremacist group for predicate acts involving violence did not violate his First Amendment rights of political advocacy and association). Cf. Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348-49 (3d Cir.) (upholding private civil suit against anti-abortion protesters who had damaged abortion clinic's equipment and thereby extorted its right to do business, but noting that the First Amendment would preclude a RICO suit based solely on expression of dissenting political opinions), cert. denied, 493 U.S. 901 (1989).

[14] See United States v. Trans-Missouri Freight Association, 166 U.S. 290, 342 (1897); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 100-102, 107-108 (1909).

racketeering activity" provides (18 U.S.C. § 1961(5)):

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

In explaining this RICO provision, the Senate Judiciary Committee Report stated:

> 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. Anyone who has engaged in the prohibited activities before the effective date of the [RICO] legislation is on prior notice that only one further act may trigger the increased penalties and new remedies of this Chapter.

S. Rep. 91-617, 91st Congress, 1st Sess. p. 158.

Thus, in enacting RICO, Congress explicitly provided that predicate offenses that were committed prior to RICO's effective date may be included in the charged pattern of racketeering activity, provided that at least one racketeering act was committed after RICO's effective date.

In accordance with Congress' intent in enacting RICO and with well-settled ex post facto principles, every court that has considered the question has held that it does not violate the Ex Post Facto Clause to include racketeering acts committed before RICO's effective date, provided that in the case of a RICO

substantive charge, at least one racketeering act was committed after RICO's effective date, and in the case of a RICO conspiracy charge, the conspiracy and the defendant's membership in it continued after RICO's effective date.[15]

As the court explained in Campanale, 518 F.2d at 365:

> [A]ppellants were not convicted of conspiracy under 18 U.S.C. § 1962(d) for acts committed prior to October 15, 1970 [RICO's effective date]; rather they were convicted for having performed post October 15, 1970, acts in furtherance of their continued racketeering conspiracy after being put on notice that these subsequent acts would combine with prior racketeering acts to produce the racketeering pattern against which this section is directed.

In the same vein, the Ex Post Facto Clause is not violated by charging a racketeering act where the underlying conduct began before the racketeering act was added to RICO, but continued after the racketeering act was added to RICO. See, e.g., United States v. Alkins, 925 F. 2d 541, 548-49 (2d Cir. 1991).

Likewise, the courts have held that the Ex Post Facto Clause is not violated by application of a revised sentencing guideline to a RICO violation that disadvantages a defendant where the RICO

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[15] See United States v. Caporale, 806 F.2d 1487, 1516 (11th Cir. 1986); United States v. Boffa, 688 F.2d 919, 937 (3d Cir. 1982); United States v. Brown, 555 F.2d 407, 417 (5th Cir. 1977); United States v. Ohlson, 552 F.2d 1347, 1348 (9th Cir. 1977); United States v. Campanale, 518 F.2d 352, 364-65 (9th Cir. 1975); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir. 1978) (Table); United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976), aff'd, 591 F.2d 1347 (4th Cir. 1979).

offense began prior to the effective date of the guideline revision but continued after its effective date.[16]

F. RICO and Electronic Surveillance

Section 2516(1)(c) of Title 18, as amended in 1970, permits the interception of any wire, oral, or electronic communications when that interception may provide, or has provided, evidence of any offenses punishable under 18 U.S.C. § 1963. Because a RICO violation is based on violations of other statutes, conduct involving violations of these other statutes can also serve as a basis for electronic surveillance, even if not specifically authorized in 18 U.S.C. § 2516, as long as these other offenses are within the scope of RICO. For example, in United States v. Daly, 535 F.2d 434 (8th Cir. 1976), the defendant argued that the wiretap authorization was used for a purpose (mail fraud) not authorized by 18 U.S.C. § 2516. The court rejected this argument because mail fraud is a predicate offense under 18 U.S.C. § 1961 and the wiretap order authorized interception of conversations relating to mail fraud racketeering activities violative of 18 U.S.C. § 1962, which is authorized by section 2516.

Daly underscores the importance of specifying in the wiretap application exactly what offenses form the basis for the

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[16] See United States v. Hurley, 63 F.3d 1, 19 (1st Cir. 1995); United States v. Korando, 29 F.3d 1114, 1119-20 (7th Cir. 1994); United States v. Eisen, 974 F.2d 246, 268 (2d Cir. 1992); United States v. Minicone, 960 F.2d 1099, 1111 (2d Cir. 1992); United States v. Moscony, 927 F.2d 742, 755 (3d Cir. 1991).

interception. In United States v. Carlberg, 602 F. Supp. 583 (W.D. Mich. 1984), RICO counts were dismissed when the government used evidence for its indictment from wiretaps which had been authorized only for Title 21 drug offenses. The court held that 18 U.S.C. § 2517(5) required judicial authorization before the government could use the drug wiretap evidence for purposes of a RICO indictment. A prosecutor should not use electronic surveillance evidence to prove an offense not specified in the wiretap application without first obtaining a Section 2517(5) order.[17]

G. Special Verdicts and Unanimous Verdicts

1. Special Verdicts

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

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

fail if the appellate court cannot determine that each defendant's substantive RICO conviction is supported by at least two valid predicate offenses.[18] In United States v. Ruggiero, 726 F.2d 913, 922 (2d Cir.), cert. denied, 469 U.S. 831 (1984), the court reversed a RICO conspiracy conviction after striking one of the eight acts of racketeering. The court noted that the use of a special verdict would have avoided this result.[19] A similar outcome was avoided in United States v. Pepe, 747 F.2d 632 (11th Cir. 1984), because the RICO count incorporated other substantive counts in addition to the acts of racketeering listed in the RICO count. While the Pepe court struck one act of racketeering, the RICO count was affirmed because verdicts on the incorporated counts operated as special verdicts; by finding guilt on those counts, the jury

[18] See also United States v. Biaggi, 909 F.2d 662, 692-93 (2d Cir. 1990) (reversing a RICO conviction even though special verdicts clearly established the defendant's commission of two mail fraud predicates, because the jury, if it had heard the evidence that was improperly excluded, might have concluded that the mail fraud acts were not committed as part of a RICO pattern with a nexus to the affairs of a RICO enterprise), cert. denied, 499 U.S. 904 (1991).

[19] See also United States v. Holzer, 840 F.2d 1343 (7th Cir.)(RICO conviction reversed where jury might have relied on invalid mail fraud counts), cert. denied, 486 U.S. 1035 (1988); United States v. Mandel, 672 F. Supp. 864, 877 (D. Md. 1987)(RICO convictions vacated on petition for writ of error coram nobis; in the absence of special verdicts, court could not determine "with a high degree of probability" whether jury relied on mail fraud predicates, which were invalid under McNally decision, or bribery charges for guilty verdict), aff'd, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989).

also found that two predicate acts had been established.[20]

Thus, even though special verdicts are generally not favored in criminal prosecutions, their use has been endorsed in RICO cases.[21] It should be emphasized that the discretionary use of

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[20] See also United States v. Cardall, 885 F.2d 656 (10th Cir. 1989) (upholding RICO conviction on the basis of numerous valid predicate acts, where some were ruled invalid); United States v. Corona, 885 F.2d 766 (11th Cir. 1989)(upholding RICO conviction based on Travel Act predicates after mail fraud predicates were found invalid), cert. denied, 494 U.S. 1091 (1990); Callanan v. United States, 881 F.2d 229 (6th Cir. 1989) (where mail fraud racketeering acts were invalidated, analysis of remaining acts allowed court to uphold conviction of one defendant, cert. denied, 494 U.S. 1083 (1990); United States v. Brennan, 867 F.2d 111 (2d Cir.) (valid Travel Act predicates, also charged as counts, "operated like special verdicts"), cert. denied, 490 U.S. 1022 (1989); United States v. Zauber, 857 F.2d 137 (3d Cir. 1988)(analysis of evidence showed that jury must have relied on valid racketeering), cert. denied, 489 U.S. 1066 (1989); United States v. Anderson, 809 F.2d 1281, 1284-85 (7th Cir. 1987) (RICO conviction affirmed where jury convicted defendant of four of twelve charged predicates because jury must have relied on two or more of the valid predicates to convict on RICO charges); United States v. Lopez, 803 F.2d 969, 976 (9th Cir. 1986) (upholding RICO conviction where defendant was acquitted on one act; court could determine that jury did not rely on acquitted racketeering act by looking at crimes conviction), cert. denied, 481 U.S. 1030 (1987).

[21] See United States v. Console, 13 F.3d 641, 663-665 (3d Cir. 1993)(district court did not abuse its discretion in asking jury to return special verdicts as to some predicate acts but not others), cert. denied, 114 S. Ct. 1660 (1994); United States v. Pungitore, 910 F.2d 1084, 1136 n.74 (3d Cir. 1990)(upholding special verdicts, but holding in the alternative that the defendants failed to timely object), cert. denied, 500 U.S. 915 (1991); United States v. Ruggiero, 726 F.2d 913, 922-23 (2d Cir. 1983) (in dictum, urged other courts to use special verdicts to specify the racketeering acts found by the jury to avoid unnecessary reversals where some acts are found invalid), cert. denied, 469 U.S. 831 (1984); United States v. Bertoli, 854 F. Supp. 975, 1068-69 (D.N.J.)(use of special verdict forms that contained neither descriptions nor extraneous language was not improperly suggestive, since their use (continued...)

special verdicts in the guilt or innocence phase of the trial must be distinguished from the mandatory use of special verdicts in the forfeiture phase of the trial.[22]

2. Unanimous Verdicts

It has long been the general rule that when a jury returns a general guilty verdict on a substantive count charging several criminal acts in the conjunctive, the verdict stands **if the evidence is sufficient with respect to any of the acts charged**, and the jury need not specify which act it found.[23] Similarly, a

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(...continued)
was necessary to indicate which predicate acts were proven), aff'd in part, vacated in part, 40 F.3d 1384 (3d Cir. 1994); but see United States v. Shenberg, 89 F.3d 1461, 1472 (11th Cir. 1996)(denial of request for use of special verdict forms upheld where district court properly instructed the jury on the elements of RICO conspiracy).

[22] See Fed. R. Crim. P. 31(e). See supra Section IV (B)(10). See generally United States v. Cauble, 706 F.2d 1322, 1347-48 (5th Cir. 1983) (upholding special verdicts on forfeiture issue), cert. denied, 465 U.S. 1005 (1984); United States v. Boffa, 688 F.2d 919, 938-940 (3d Cir. 1982) (same), cert denied, 460 U.S. 1022 (1983); United States v. Tunnell, 667 F.2d 1182 (5th Cir. 1982) (affirming forfeiture of motel used in prostitution enterprise even though special verdict form did not require jury to discern what portion of motel was used for prostitution and what portion was used for legitimate purposes). Cf. United States v. Amend, 791 F.2d 1120 (4th Cir.) (in CCE case, forfeiture of assets specifically listed in special verdict affirmed, while forfeiture of bank account and purebred horse, pursuant to general catch-all category of assets, vacated as impermissible), cert. denied, 479 U.S. 930 (1986).

[23] See United States v. Miller, 471 U.S. 130 (1985) (evidence established one charged means of executing a mail fraud scheme, but did not establish an alternative charged means); Turner v. United States, 396 U.S. 398, 420 (1990)(since the evidence established that the defendant possessed heroin as charged, it was immaterial (continued...)

general guilty verdict on a multiple-object conspiracy offense may not be set aside if the evidence is insufficiant to support a conviction as to one of the objects, **provided the evidence is sufficient to support one of the objects.**[24] However, a general guilty verdict is not valid where one of the possible bases for conviction was **legally inadequate.**[25]

In accordance with these principles, in Schad v. Arizona, 501 U.S. 624 (1991) (plurality opinion), the Supreme Court upheld the constitutionality of an Arizona statute that permitted a jury to convict a defendant of first-degree murder without requiring unanimity on whether the defendant engaged in premeditated murder or felony murder -- two alternative bases for finding first degree murder. But, the Court concluded that it was impossible to establish a single test for determining when an alternative fact underlying a conviction constituted an element of the offense about which a jury must be unanimous. Id. at 637-38. However, the Court offered three general considerations. First, because decisions

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[23](...continued)
to the conviction whether evidence established the alternative means of liability that he purchased and distributed the heroin); Anderson v. United States, 70 U.S. 481, 503-04 (1898)(where indictment charged that death occurred through both shooting and drowning, it was immaterial to the validity of the conviction which means the jury found).

[24] See Griffin v. United States, 502 U.S. 46, 49 (1991).

[25] See Griffin v. United States, 502 U.S. 46, 51-56 (1991) (collecting cases).

about what facts are necessary to constitute the crime, and what facts are mere means, "represent value choices more appropriately made in the first instance by a legislature," a court must give the legislature's choice great deference. Id. at 638. Second, when the legislature's way of defining a crime has a long history or is in widespread use, it would be difficult to challenge, while a "freakish" definition without an analogue in history would be subject to greater scrutiny. Id. at 640. Third, if two means could rationally be perceived as reflecting equal degrees of blameworthiness, it would support the legislature's judgement to treat them as means rather than elements, but if the two means could not be reasonably viewed as morally equivalent, the legislature's choice would be more suspect. Id. at 643. Ultimately, a legislature's definition of the elements of the offense "is usually dispositive." Id. at 639 (internal quotation marks omitted).

Thereafter, in Richardson v. United States, 526 U.S. 813 (1999), the Supreme Court held that the jury must be instructed that it must agree unanimously on which particular drug violations constituted the "continuing series of violations" required for conviction for conducting a continuing criminal enterprise "CCE", in violation of 21 U.S.C. § 848. The Court explained that "[t]o hold that each 'violation' here amounts to a separate element is consistent with a tradition of requiring unanimity where the issue

is whether a defendant has engaged in conduct that violates the law. To hold the contrary is not." Id. at 818-19. The Court also noted the CCE statute's breadth argued in favor of requiring unanimity on the specific violations which comprise the series. In that regard, the Court stated that approximately ninety different statutory violations could be alleged as "violations" underlying a CCE charge and that those ninety violations varied widely in seriousness from penalties for removing drug labels to distribution of large quantities of drugs. The Court was troubled by the absence of a unanimity agreement that would allow some jurors to premise the requisite series of violations on relatively minor violations, while other jurors may have found more serious violations. Id. at 819. The Court further explained that the government's proposed lack of unanimity "risks serious unfairness and lacks support in history or tradition." Id. at 820. The Court also rejected the government's argument that a jury-unanimity requirement would make it too difficult to prove a CCE violation, stating that the government could easily rely on evidence of cooperating witnesses "who could point to specific incidents" as well as evidence of controlled buys. Id. at 823. Significantly, the Court added that "a federal jury need not always decide unanimously which of several possible sets of underlying brute

facts make up a particular element." Id. at 817.[26]

Although the full implications of the Richardson decision are not at all clear, even before Richardson, it was the policy of the Organized Crime and Racketeering Section that, for RICO substantive offenses, the jury be instructed that it must agree unanimously on which racketeering acts each defendant committed. Therefore, for RICO substantive offenses the jury should be instructed, whether in a general verdict or a special verdict, that it must be unanimous as to not only all the RICO elements, but also as to which specific racketeering acts each defendant committed.[27]

Where there are sub-parts or sub-predicates, to an act of racketeering, the prosecutor should request a unanimity instruction as to each sub-predicate. If the jury should, for some reason, find a particular racketeering act proven for one RICO count but not for another RICO count, such inconsistency in the verdict

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[26] The Richardson Court did not decide whether the jury had to agree unanimously about other elements of the CCE offense such as the identity of which five persons the defendant supervised or the facts that establish that "substantial income" requirement; but the Court said that those elements "differ in respect to language, breadth, tradition, and the other factors we have discussed". Richardson, 526 U.S. at 824.

[27] See United States v. Pungitore, 910 F.2d 1084, 1136 (3d Cir. 1990) (special interrogatories indicated theory on which jury relied for each predicate act and finding district court sufficiently informed the jury of its duty to deliver unanimous verdict as to a particular theory in a multi-part act of racketeering), cert. denied, 500 U.S. 915 (1991).

should not vitiate the RICO convictions.[28] Indeed, in one case, a court ruled that inconsistent verdicts did not require reversal of a RICO conviction, even though the jury acquitted the defendant of substantive counts that were identical to the RICO predicates.[29]

Thus far, no published decision has decided whether Richardson's jury-unanimity requirement applies to the predicate acts in a RICO conspiracy charge. It may be argued that it does not apply to a RICO conspiracy charge, particularly a "Glecier" RICO conspiracy charge that does not allege that a defendant personally agreed to commit any specific racketeering act. See supra n.6 Section V, and accompanying text. First, a RICO conspiracy offense, unlike a CCE offense, does not require proof that a defendant committed any predicate act. Indeed, a RICO conspiracy offense does not require proof that a conspirator personally agreed to commit any specific predicate racketeering act. Rather, it is sufficient that the defendant agreed to further or facilitate some of the conduct leading to a substantive RICO offense, and agreed that at least one coconspirator would commit

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[28] See United States v. Biaggi, 705 F. Supp. 864, 865 (S.D.N.Y. 1988), aff'd in part and rev'd in part, 909 F.2d 662 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991). See also United States v. Chang An-Lo, 851 F.2d 547, 560 (2d Cir.) (defendants could not attack verdict on ground that RICO conspiracy convictions were inconsistent with RICO substantive acquittals), cert. denied, 488 U.S. 966 (1988).

[29] See United States v. Vastola, 899 F.2d 211, 222-26 (3d Cir.), vacated on other grounds, 497 U.S. 1001 (1990).

two racketeering acts in the conduct of the affairs of the enterprise. See supra pp. 125-26.

Second, in a RICO conspiracy offense, unlike in a CCE offense which is premised on specific completed violations, it would be anomalous to require a jury to agree unanimously on racketeering acts that have not been committed or even specified.[30] Moreover, under Schad and Richardson, supra, that Congress in enacting RICO conspiracy did not intend to require proof of an agreement to personally commit a specific racketeering act, militates in favor of concluding that Congress did not intend to create an element of a RICO conspiracy offense requiring jury unanimity on specific racketeering acts to be committed in furtherance of the conspiracy.

Therefore, absent any adverse judicial decisions resolving the Richardson issue, it may be argued that Richardson's jury-unanimity requirement does not apply to predicate acts in a RICO conspiracy charge, especially Glecier-type conspiracy charges. However, it would be prudent to apply the jury-unanimity requirement to non-

[30] Consider, for example, the following hypothetical: A leader of an LCN family-RICO enterprise recruits an LCN associate to join his extortion crew, telling the associate that the LCN family will pay the associate a weekly salary for his assistance in extorting weekly payments over the next two years from numerous unspecified gamblers, drug dealers, and businesses that are engaged in interstate commerce. The associate agrees to join the LCN crew and assist others to carry out the unspecified extortions, including to commit whatever violence that is necessary. Plainly, the above facts are sufficient to establish a RICO conspiracy between the LCN leader and the associate, and yet there are no specific racketeering acts upon which the jury could unanimously agree.

Glecier conspiracy charges where the RICO conspiracy charge alleges, and the government's theory of the case pursued at trial was, that the defendant personally agreed to commit specific charged racketeering acts. Until the Richardson issue is resolved by authoritative decisions, prosecutors are urged to consult with the Organized Crime and Racketeering Section regarding this difficult jury-unanimity issue.

H. Venue

The RICO statute does not contain a specific provision governing venue in criminal cases.[31] Venue for RICO prosecutions is governed by 18 U.S.C. § 3237(a), permitting prosecution of a continuing offense "in any district in which such offense was begun, continued, or completed."[32] Thus, a RICO prosecution may be brought in any district where some of the enterprise's criminal activity occurred.[33] The RICO charge may include racketeering acts

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[31] The venue provision for civil RICO suits is found in 18 U.S.C. § 1965(a).

[32] See also United States v. Persico, 621 F. Supp. 842, 857-58 (S.D.N.Y. 1985); United States v. Castellano, 610 F. Supp. 1359, 1388 (S.D.N.Y. 1985) (venue proper in any district where offense was begun, continued, or completed, even though virtually every racketeering act occurred in another district); United States v. Russo, 646 F. Supp. 816 (S.D.N.Y. 1986) (refusing to transfer indictment charging obstruction of justice from district where defendants indicted for RICO).

[33] See Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 61 (1989) (under state RICO statute patterned after federal RICO statute, there is no requirement that all predicate acts be committed in jurisdiction where prosecution is brought; such a requirement (continued...)

that occurred in districts other than the district of venue, and if venue for the overall charge is proper, it is not necessary that each defendant participate in conduct within the district of indictment.[34] Venue for a RICO offense also lies in any district where the RICO enterprise conducted business. See Persico, 621 F. Supp. at 858.

I. Admissibility of Evidence Of Uncharged Crimes

In RICO cases, courts typically admit evidence of crimes not specifically charged against a defendant or not committed by the defendant. For example, in United States v. Finestone, 816 F.2d

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(...continued)
"would essentially turn the RICO statute on its head: barring RICO prosecutions of large national enterprises that commit single predicate offenses in numerous jurisdictions"); United States v. Giovanelli, 747 F. Supp. 875, 884 (S.D.N.Y. 1989) (venue proper in district where predicate illegal gambling business conducted); United States v. Long, 697 F. Supp. 651, 655-56 (S.D.N.Y. 1988) (venue proper in district where at least one overt act and one predicate act occurred); United States v. Persico, 621 F. Supp. 842, 858 (S.D.N.Y. 1985) (conspiracy venue proper in any district where an overt act occurred).

[34] See United States v. Pepe, 747 F.2d 632, 660 n.44 (11th Cir. 1984) (venue in RICO case for extortionate debt collection that occurred in New York proper in Southern District of Florida where other racketeering activities occurred); United States v. Persico, 621 F. Supp. 842, 858 (S.D.N.Y. 1985) (holding that it makes no difference whether any individual defendant was in the district, as long as the government establishes that the defendant participated in an enterprise that conducted illegal activities in the district); see United States v. Fry, 413 F. Supp. 1269 (E.D. Mich. 1976)(finding venue proper in CCE case against a defendant who never committed any component crimes in the district, where defendant participated in one component crime, a conspiracy, and some overt acts were committed in the district of indictment), aff'd, 559 F.2d 1221 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978).

583, 585-87 (11th Cir.), cert. denied, 484 U.S. 948 (1987), the Eleventh Circuit upheld the admission of evidence of coconspirators' commission of a murder, kidnaping and narcotics trafficking that the RICO defendant did not commit because: (1) it showed the continuation of the RICO conspiracy within the five year statute of limitations period, (2) was admissible to prove the coconspirators' pattern of racketeering activity, and, (3) their participation in the RICO conspiracy and overt acts in furtherance of it.[35]

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[35] See also United States v. Miller, 116 F.3d 641, 682 (2d Cir. 1997) (admission of evidence of uncharged murders committd by some defendants and other enterprise members to show the existence of the enterprise and acts in furtherance of the conspiracy); United States v. Krout, 66 F.3d 1420, 1425 (5th Cir. 1995)(admission of uncharged murders committed by the defendants was not prejudicial when admitted to establish that murder and extreme violence were part of the enterprise's objectives and manner and means), cert. denied, 516 U.S. 1136 (1996); United States v. DiSalvo, 34 F.3d 1204, 1221 (3d Cir. 1994)(upholding admission of defendant's uncharged acts to establish the existence of the enterprise and the defendant's participation in and knowledge of the enterprise); United States v. Thai, 29 F.3d 785, 812-13 (2d Cir. 1994) (admission of uncharged extortion, robbery and murder plans by defendants to prove the RICO conspiracy and acts in furtherance of it); United States v. Brady, 26 F.3d 282, 286-88 (2d Cir. 1994) (admission of uncharged murders committed by non-defendant members of the Colombo LCN family to prove the Colombo family enterprise and the charged conspiracy by a faction of the Colombo family to kill members of a rival faction of the Colombo family); United States v. Clemente, 22 F.3d 477, 483 (2d Cir.)(upholding admission of defendant's uncharged acts for purpose of establishing existence of RICO enterprise), cert. denied, 513 U.S. 900 (1994); United States v. Coonan, 938 F.2d 1553, 1561 (2d Cir. 1991)(admission of evidence of murders by enterprise members occurring prior to the defendant's joining the enterprise was proper to show the existence of the enterprise), cert. denied, 503 U.S. 941 (1992); United States v. Eufrasio, 935 F.2d 553, 572-73 (3d Cir.)(upholding (continued...)

However, admission of uncharged crimes can pose problems in some circumstances. For example, in United States v. Neapolitan, 791 F.2d 489, 501 (7th Cir.), cert. denied, 479 U.S. 940 (1986), the Seventh Circuit ruled that although uncharged crimes committed by the defendant would be admissible to prove the defendant's membership in the RICO conspiracy, it would be error for such crimes to serve as predicate acts to establish that the defendant committed or agreed to commit the requisite pattern of racketeering activity.[36]

(...continued)
admission of uncharged murders and other mafia crimes to show the existence and nature of the RICO enterprise and conspiracy), cert. denied, 502 U.S. 925 (1991); United States v. Ellison, 793 F.2d 942, 949 (8th Cir. 1986) (uncharged crimes of violence by other members of the enterprise admitted to establish existence of enterprise), cert. denied, 479 U.S. 937 (1987); United States v. Murphy, 768 F.2d 1518, 1534-35 (7th Cir. 1985)(proper to admit evidence of uncharged bribes paid to defendant to prove overt acts in furtherance of the conspiracy and to prove a common plan and absence of mistake to rebut defendant's character evidence), cert. denied, 475 U.S. 1012 (1986). See also supra n.111 Section II and n.64 Section III, for discussion of additional cases admitting uncharged crimes not committed by the defendant to prove the enterprise and the threat of continuity of unlawful activity.

[36] See also United States v. Zingaro, 858 F.2d 94 (2d Cir. 1988) (holding that admission of an uncharged loan that did not relate to the loansharking activities specifically charged in the indictment resulted in a constructive amendment of the indictment and was reversible error); United States v. Flynn, 852 F.2d 1045 (8th Cir.) (error, although harmless here, to admit evidence of murders in which defendant did not participate to prove nature of enterprise; this evidence was unnecessary and prejudicial), cert. denied, 488 U.S. 974 (1988); United States v. Davidoff, 845 F.2d 1151 (2d Cir. 1988) (RICO conspiracy conviction reversed where trial court did not require bill of particulars on identity of victims of extortion acts not specified in the indictment even though those acts were
(continued...)

J. Expert Testimony

The courts have repeatedly upheld the admission of expert testimony regarding organized crime matters in RICO cases, particularly where the enterprise is comprised of one or more organized crime groups. Thus, in RICO cases, the courts have upheld admission of expert testimony concerning the structure and nature of organized crime groups, their terminology, rules and modus operandi.[37] The courts have even upheld expert testimony identifying defendants and coconspirators as members of the RICO enterprise and organized crime group and identifying their positions in the LCN.[38]

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[36](...continued)
not used as RICO predicates, but just to prove the nature of the enterprise and the evidence of the extortions was disclosed to the defendant prior to trial in Jencks Act material); United States v. King, 827 F.2d 864 (1st Cir. 1987) (affirming the district court's deletion of a charged predicate act of murder committed by co-defendants not on trial on the ground that under Fed. R. Evid. 403, the probative value of the excluded evidence was substantially outweighed by the danger of unfair prejudice).

[37] See United States v. Saccoccia, 58 F.3d 754, 774-76 (1st Cir. 1995); United States v. Locascio, 6 F.3d 924, 936-59 (2d Cir. 1993); United States v. Long, 917 F.2d 691, 701-03 (2d Cir. 1990); United States v. Pungitore, 910 F.2d 1084, 1148-49 (3d Cir. 1990); United States v. Angiulo, 897 F.2d 1169, 1187-90 (1st Cir. 1990); United States v. Angiulo, 847 F.2d 956, 973-75 (1st Cir. 1988); United States v. Daly, 842 F.2d 1380, 1387-89 (2d Cir. 1988); United States v. Riccobene, 709 F.2d 214, 230-31 (3d Cir. 1983).

[38] See United States v. Locascio, 6 F.3d 924, 937-39 (2d Cir. 1993); United States v. Pungitore, 910 F.2d 1084, 1148-49 (3d Cir. 1990); United States v. Angiulo, 897 F.2d 1169, 1187-90 (1st Cir. 1990); United States v. Angiulo, 847 F.2d 956, 973-75 (1st Cir. 1988).

It is also noteworthy that in United States v. Locascio, 6 F.3d 924, 937-38 (2d Cir. 1993), the court rejected the claim that failure to disclose confidential informant information the expert relied upon violated Rule 703, Fed. R. Evid., and the Confrontation Clause of the Sixth Amendment.[39]

[39] See also United States v. Angiulo, 847 F.2d 956, 974 (1st Cir. 1988) (holding that failure to require expert to disclose the identities of informants did not violate the Confrontation Clause or Rule 705, Fed. R. Evid., which authorizes the district court to require disclosure of facts and data underlying the expert's opinion on cross-examination, where the district court instructed the expert "that he not answer any questions on direct examination that will be based upon information provided by informants whose identity he could not disclose on cross-examination"); United States v. Angiulo, 897 F.2d 1169, 1187-88 (1st Cir. 1990) (same).

VII. CIVIL RICO SUITS FOR EQUITABLE RELIEF BROUGHT BY THE UNITED STATES

A. Overview Of Equitable Relief Pursuant To 18 U.S.C. § 1964

The primary focus of this Manual is on criminal RICO prosecutions, which comprise the vast majority of RICO cases brought by the United States. However, recently the United States increasingly has been bringing civil RICO lawsuits to obtain equitable relief to prevent and restrain RICO violations and to eliminate corruption from labor unions and other legal entities. Therefore, this last Section of the Manual is intended to serve as a brief summary of equitable relief under RICO until the Organized Crime and Racketeering Section completes a separate, more comprehensive manual on civil RICO lawsuits seeking equitable relief brought by the United States.

Section 1964 of Title 18 provides, in relevant part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, **including, but not limited to:** ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining order or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall

deem proper. (emphasis added).

These provisions explicitly authorize the Attorney General to bring civil RICO lawsuits to "prevent and restrain" RICO violations and to obtain equitable relief of divestiture, restraining orders, and "dissolution or reorganization of any enterprise."

However, by its plain language § 1964(a) does not limit the court's remedial authority to the types of equitable relief specifically listed. Indeed, the Senate Committee Report emphasized the expansive and flexible nature of the equitable relief authorized under § 1964(a), stating:

> [I]t must be emphasized that these remedies are not exclusive, and that [RICO] seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil.
>
> Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provisions for the rights of innocent persons.

S. Rep. No. 617, 91st Cong., 1st Sess. 81 and 160 (1969). Accord H.R. Rep. No. 1549, 91st Cong., 2d Sess. 57(1970). Moreover, the Committee Report noted that to achieve RICO's remedial purposes, the courts would need broad equitable powers:

> Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach . . . or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from

illicit activity.

S. Rep. No. 617, 91st Cong., 1st Sess. at 79 (1969).

Thus, in suits brought by the United States, 18 U.S.C. § 1964 confers upon the district courts very broad discretion to fashion appropriate remedies, whether or not explicitly listed in § 1964, to eliminate corruption and to prevent and restrain RICO violations.[1]

B. The Government's Burden Of Proof To Obtain Equitable Relief

The burden of proof in government civil RICO lawsuits for equitable relief is a preponderance of the evidence.[2] Therefore,

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[1] The Organized Crime and Racketeering Section agrees with the view expressed by the majority of courts that have decided the issue that private parties may **not** obtain equitable relief under 18 U.S.C. § 1964. See Conkling v. Turner, 18 F.3d 1285, 1296 (5th Cir. 1994) (collecting cases); Lincoln House, Inc. v. Dupre, 903 F.2d 845, 848 (1st Cir. 1990); Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1080-89 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); Sterling Suffolk Racecourse v. Burrillville Racing Ass'n, 802 F. Supp. 662, 671 (D.R.I. 1992), aff'd, 989 F.2d 1266 (1st Cir.), cert. denied, 510 U.S. 1024 (1993); Vietnam Veterans of America v. Guerdon Indus., 644 F. Supp. 951, 960-61 (D. Del. 1986); Volkmann v. Edwards, 642 F. Supp. 109, 115 (N.D. Cal. 1986). Cf. Tran Co. v. O'Connor Securities, 718 F.2d 26, 28-29 (2d Cir. 1983); Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983); Kaushal v. State Bank, 556 F. Supp. 576, 583 (N.D. Ill. 1983). For the minority view that private parties may obtain equitable relief under § 1964, see Chambers Dev. Co. v. Browning-Ferris Indus., 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984); Atena Casualty & Surety v. Liebowitz, 570 F. Supp. 908, 909-11 (E.D.N.Y. 1983), aff'd on other grounds, 730 F. 2d 905, 909 (2d Cir. 1984).

[2] See United States v. Local 560 of International Brotherhood of Teamsters, 780 F.2d 267, 279 n.12 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); United States Local 1804-1, International Longshoremen's Ass'n, 812 F. Supp. 1303, 1311-12 (S.D.N.Y. 1993); (continued...)

to obtain equitable relief, the government must establish by a preponderance of the evidence that unless relief is granted there is a reasonable likelihood of future violations by the defendant.[3] Typically, the government has carried its burden in that regard by, inter alia, proving a pattern of past violations, although such proof of past violations is not necessarily required. Thus, federal courts have held that evidence of past violations may establish the requisite reasonable likelihood of future violations in view of the totality of the circumstances, particularly where the defendant's past violations were: (1) "part of a pattern" and not isolated; (2) were "deliberate" and not "merely technical in nature"; and (3) "the defendant's business will present opportunities to violate the law in the future."[4]

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[2](...continued)
United States v. Local 295 of International Brotherhood of Teamsters, 784 F. Supp. 15, 19 (E.D.N.Y. 1992); United States v. Local 359, 705 F. Supp. 894, 897 (S.D.N.Y.), aff'd in part and rev'd in part, 899 F.2d 1232 (2d Cir. 1989); United States v. Local 30, United Slate, Tile, Etc., 686 F. Supp. 1139, 1165 (E.D. Pa. 1988), aff'd, 871 F. 2d 401 (3d Cir.), cert. denied, 493 U.S. 953 (1989); United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 329-30 (D.N.J. 1984) (collecting cases).

[3] See cases cited supra n.2 Section VII and infra n.5 Section VII.

[4] S.E.C. v. First City Financial Corp., Ltd., 890 F.2d 1215, 1228-29 (D.C. Cir. 1989). Accord S.E.C. v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994); Commodity Futures Trading Com'n. v. Hunt, 591 F.2d 1211, 1220-21 (7th Cir. 1979); S.E.C. v. Commonwealth Chemical Securities Inc., 574 F.2d 90, 98-100 (2d Cir. 1978); S.E.C. v. Management Dyn. Inc., 515 F.2d 801, 807-08 (2d Cir. 1975); S.E.C. v. Advance Growth Capital Corp., 470 F.2d 40, 53 (7th Cir. 1972).
(continued...)

In accordance with these principles, courts have granted the United States injunctive and other equitable relief in many civil RICO cases based on past violations and have rejected arguments that injunctive relief was not necessary because the unlawful activity had supposedly ceased. In these cases, courts ordered injunctive relief even though many of the wrongdoers had been convicted of crimes and were not in a position to continue their unlawful conduct because they were imprisoned or removed from office in the corrupt enterprise.[5] Many of these courts found it

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[4](...continued)

Moreover, where the United States seeks equitable relief to protect the public against wrongdoing, as is the case in government civil RICO suits for equitable relief, the United States need not show an inadequate remedy at law, irreparable injury, or that the harm suffered in the absence of injunctive relief outweighs the harm the defendant will suffer if the injunction is granted, as is required for a private litigant to obtain equitable relief. See United States v. City of San Francisco, 310 U.S. 16, 30-31 (1940); Hunt, 591 F.2d at 1220; United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974); S.E.C. v. Stratton Oakmont Inc., 878 F. Supp. 250, 255 (D.D.C. 1998). See also cases cited infra n.5 Section VII.

[5] See United States v. Carson, 52 F.3d 1173, 1183-85 (2d Cir. 1995); United States v. Private Sanitation Industry Ass'n, 995 F.2d 373, 377-78 (2d Cir. 1993); United States Local 30, United Slate, Tile, et al., 871 F.2d 401, 405-09 (3d Cir. 1989); United States v. Local 295 of International Brotherhood of Teamsters, 784 F. Supp. 15, 18, 21-22 (E.D.N.Y. 1992); United States v. Local 30, United Slate, Tile, et al., 686 F. Supp. 1239, 1262-74 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989); United States v. Ianniello, 646 F. Supp. 1289, 1299-1300 (S.D.N.Y. 1986); United States v. Local 560, International Brotherhood of Teamsters, et al., 581 F. Supp. 279, 319-26 (D.N.J. 1984), aff'd, 780 F.2d 269, 292-94 (3d Cir. 1986); United States v. Mason Tenders District Council, 1995 WL 679245, at * 7-13 (S.D.N.Y. Nov. 15, 1995).

particularly significant that these cases involved the corrupt influence of organized crime because the threat of future violations "may virtually be presumed" from such organized crime involvement. See United States v. Local 1804-1, International Longshoremen's Ass'n, 812 F. Supp. 1303, 1316 (S.D.N.Y. 1993) (citing cases).

C. Scope Of Equitable Relief

1. Preliminary and Permanent Injunctions

Section 1964(b) of Title 18 explicitly authorizes district courts to impose preliminary injunctions prior to trial, restraining racketeering activity and other unlawful conduct. Frequently, preliminary relief is granted on an expedited basis, particularly where the government relies on transcripts of criminal trials and judgments of convictions regarding the charged underlying predicate offenses and tape recorded conversations.[6] Likewise, courts have relied upon such evidence to grant permanent injunctions, after a bench trial, that not only enjoined defendants from engaging in unlawful activity, but also enjoined them from participating in businesses related to the corrupt enterprise, removed corrupt defendants from positions in the enterprise, and

[6] See United States v. Local 30, United Slate, Tile, et al., 871 F.2d 401, 404 (3d Cir. 1989); United States v. Local 560 (I.B.T.), 694 F. Supp. 1158, 1191-92 (D.N.J. 1988); United States v. Local 6A, Cement & Concrete Workers, 663 F. Supp. 192 (S.D.N.Y. 1986); United States v. Ianniello, 646 F. Supp. 1289, 1299-1300 (S.D.N.Y. 1986).

imposed court monitorships to eliminate corruption within the enterprise.[7]

2. Court-Appointed Monitors, Trusteeships and Officers

In order to eliminate corruption within an enterprise and to prevent racketeering activity, courts have frequently appointed officers, also referred to as monitors or trustees, to supervise activities of the enterprise. These officers have exercised broad powers, including the following: (1) conduct the legitimate business of the enterprise; (2) review and approve hiring, certain contracts and financial expenditures; (3) impose and implement ethical practices codes governing members of the enterprise; (4) investigate, prosecute and adjudicate in civil proceedings allegations of violations of the ethical practices codes and other

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[7] See United States v. Private Sanitation Industry Ass'n, 995 F. 2d 375, 377-78 (2d Cir. 1993); United States v. Local 30, United Slate, Tile et al., 871 F.2d 401, 403-07 (3d Cir. 1989); United States v. Local 560 of International Brotherhood of Teamsters, 780 F.2d 267, 295-96 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); United States v. Private Sanitation Industry Ass'n, 899 F. Supp. 974, 979-85 (E.D.N.Y. 1994); United States v. Local 1804-1, International Longshoreman's Ass'n, 831 F. Supp. 177, 191-92 (S.D.N.Y. 1993), aff'd in part and reversed in part on other grounds, United States v. Carson, 52 F.3d 1173 (2d Cir. 1995); United States v. Local 1804-1, International Longshoreman's Ass'n, 812 F. Supp. 1303, 1308, 1311-15 (S.D.N.Y. 1993); United States v. Local 295 of International Brotherhood of Teamsters, 784 F. Supp. 15, 19-23 (E.D.N.Y. 1992); United States v. Local 560 (I.B.T.), 754 F. Supp. 395, 407-08 (D.N.J. 1991); United States v. Local 30, United Slate, Tile, et al., 686 F. Supp. 1139, 1142-62 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989); United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 283-87, 321-26, 337 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986).

rules; (5) imposition of fines, discipline or removal from the enterprise for individuals found guilty of such violations; and (6) implement various reforms in the enterprise, including election reform for corrupt union enterprises. Courts have imposed such court appointed officers and trusteeships following contested trials in government civil RICO lawsuits,[8] and pursuant to court-approved consent decrees upon settlement agreements among the parties to such RICO lawsuits.[9]

3. Divestiture

Section 1964(a) explicitly authorizes district courts to order a person "to divest himself of any interest, direct or indirect, in any enterprise." Divestiture requires the owner to

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[8] See cases cited supra n.7 Section VII.

[9] See United States v. Local 359, United Seafood Workers, 55 F.3d 64 (2d Cir. 1995); United States v. Local 1804-1, International Longshoreman's Ass'n, AFL-C10, 44 F.3d 1091, 1093-95 (2d Cir. 1995); United States v. International Brotherhood of Teamsters, 948 F.2d 98, 106 (2d Cir. 1991); United States International Brotherhood of Teamsters, 907 F.2d 277, 279-81 (2d Cir. 1990); United States v. International Brotherhood of Teamsters, 905 F.2d 610, 613-17 (2d Cir. 1990); United States v. International Brotherhood of Teamsters, 899 F.2d 143, 145-46 (2d Cir. 1990); United States v. Hotel Employees and Restaurant Employees, International Union, 974 F. Supp. 411 (D.N.J. 1997); United States v. District Council of New York City, 941 F. Supp. 349, 355 (S.D.N.Y. 1993); United States v. Local 6A, 832 F. Supp. 674, 677 (S.D.N.Y. 1993); United States v. Local 1804-1, International Longshoremen's Ass'n, 831 F. Supp. 192, 193-95 (S.D.N.Y. 1993); United States v. International Brotherhood of Teamsters, 803 F. Supp. 761, 766-71 (S.D.N.Y. 1992); United States v. International Brotherhood of Teamsters, 782 F. Supp. 243, 248-51 (S.D.N.Y. 1992); United States v. International Brotherhood of Teamsters, 723 F. Supp. 203 (S.D.N.Y. 1989), aff'd as modified, 931 F. 2d 177 (2d Cir. 1991).

liquidate his interest in the enterprise.[10]

4. Disgorgement

Disgorgement requires the wrongdoer to surrender to the United States the proceeds of his RICO violations. The primary purpose of disgorgement is to deter others from violating the law by depriving the wrongdoer of his unlawful proceeds. See generally S.E.C. v. First City Financial Corp. Ltd., 890 F.2d 1215, 1231 (D.C. Cir. 1989); S.E.C. v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1104-05 (2d Cir. 1972). 18 U.S.C. § 1964 does not explicitly list disgorgement as an available remedy. However, the Supreme Court has held that a statutory grant of equitable jurisdiction must be interpreted to include "all the inherent equitable powers of the District Court" unless the statute "in so many words or by necessary and inescapable inference restricts the court's jurisdiction in equity."[11] Section 1964 does not limit the court's exercise of equity jurisdiction to the remedies explicitly listed. On the contrary, the plain text of § 1964 and its legislative

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[10] See United States v. Private Sanitation Industry Ass'n, 899 F. Supp. 974, 983-84 (E.D.N.Y. 1994), aff'd, 47 F.3d 1158 (2d Cir.), cert. denied, 516 U.S. 806 (1995); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1443-47 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989); United States v. Ianniello, 646 F. Supp. 1289, 1297 (S.D.N.Y. 1986), aff'd, 824 F. 2d 203 (2d Cir. 1987). Cf. United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

[11] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). Accord Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-92 (1960).

history make clear that § 1964 is not limited to the relief explicitly listed and was intended to vest district courts with broad authority to impose whatever equitable relief that is necessary to eliminate unlawful activity from the channels of commerce (see supra, pp. 278-79). Therefore, section 1964 must be interpreted to include the equitable remedy of disgorgement. In accordance with RICO's legislative history and these principles of statutory construction, all the courts that have considered the issue have consistently held that disgorgement is a remedy available to the United States under § 1964.[12]

However, in United States v. Carson, 52 F.3d 1173, 1181 (2d Cir. 1995), the Second Circuit held that since § 1964(a) authorizes district courts "to prevent and restrain violations" of RICO, it creates remedies that are "forward looking, and calculated to prevent RICO violations in the future." Therefore, the court concluded that disgorgement must be limited to the amount designed "solely to 'prevent and restrain' future RICO violations," and hence must be limited to unlawful proceeds that "are being used to

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[12] See United States v. Carson, 52 F.3d 1173, 1180-82 (2d Cir. 1995); United States v. Private Sanitation Industry Ass'n, 914 F. Supp. 895, 900-01 (E.D.N.Y. 1996); United States v. Private Sanitation Industry Ass'n, 899 F. Supp. 974, 983-84 (E.D.N.Y. 1994), aff'd, 47 F.3d 1158 (2d Cir. 1995); United States v. Private Sanitation Industry Ass'n, 811 F. Supp. 808, 818 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. International Brotherhood of Teamsters, 708 F. Supp. 1389, 1408 (S.D.N.Y. 1989); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1446-49 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989).

fund or promote the illegal conduct, or constitute capital available for that purpose." Id. at 1182.

In United States v. Philip Morris, et al., Civ. No. 1:99 CV02496 (filed September 22, 1999, D.D.C.) (decision pending) (see infra pp. 294-95), the Department of Justice recently argued that Carson's limitations on the scope of disgorgement was wrongly decided for the following reasons: Carson's limitation on the scope of disgorgement would significantly impair disgorgement's intended deterrent effect because it could allow a wrongdoer to retain significant amounts of ill-gotten gains. The Second Circuit's limitation is contrary to established canons of statutory construction regarding the scope of courts' equitable powers,[13] and cannot be reconciled with the legislative history of § 1964(a), which establishes that RICO's equitable remedies were designed to eliminate corruption from the channels of commerce and to "divest [an enterprise] of the fruits of its ill-gotten gain." United States v. Turkette, 452 U.S. 576, 585 (1981). Moreover, Carson is inconsistent with the interpretations of other statutes affording equitable relief that is forward looking, which have not imposed

[13] See FTC v. Gem Merchandising Corp., 87 F.3d 466, 468-69 (11th Cir. 1996); Commodity Futures Trading Com'n v. American Metals Exchange Corp., 991 F.2d 71, 76-77 (3d Cir. 1993); S.E.C. v. First City Financial Corp. Ltd., 890 F.2d 1215, 1228-32 (D.C. Cir. 1989); Commodity Futures Trading Com'n v. Co Petro Marketing Group, Inc., 680 F.2d 573, 583-84 (9th Cir. 1982); Interstate Commerce Com'n v. B&T Transp. Co., 613 F.2d 1182, 1183-86 (1st Cir. 1980); S.E.C. v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307-08 (2d Cir. 1971). See also cases cited supra n.11 Section VII.

Carson's limitation on the scope of disgorgement. See cases cited supra n.13, Section VII.

D. Civil RICO Cases Against Labor Unions And Related Entities Brought By The United States

RICO's legislative history makes clear that Congress specifically intended the civil RICO remedies provided in 18 U.S.C. § 1964 to be used vigorously by the United States to eliminate organized crime's control and influence over labor unions. See S. Rep. No. 617, 91st Cong., 1st Sess. at 77-83 (1969); H.R. Rep. No. 1574, 90th Cong., 2d Sess. at 5-9 (1968). For example, the Senate Report states:

> Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here.
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> [RICO] recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal

> law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

S. Rep. No. 617, 91st Cong. 1st Sess. at 78-79 (1969)(footnote omitted).

In accordance with Congress' expressed intent, the United States has brought nineteen civil RICO suits against labor unions, related entities and various corrupt individuals to eliminate organized crime's corrupt influence and control over labor unions. Those nineteen civil RICO lawsuits in the order that they were filed and principal related decisions are as follows:

(1) United States v. Local 560, International Brotherhood of Teamsters, et al., No. Civ. 82-689 (filed March 9, 1992, D.N.J.) ("Local 560").

See United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1141 (1986).

(2) United States v. Local 6A, Cement and Concrete Workers, Laborers International Union of North America, et al., No. 86 Civ. 4819 (filed June 19, 1986, S.D.N.Y.).

See United States v. Local, 6A, Cement & Concrete Workers, 663 F. Supp. 192 (S.D.N.Y. 1986).

(3) United States v. The Bonanno Organized Crime Family of La Cosa Nostra, Philip Rastelli, et al., No. Civ. 87-2974 (filed August 25, 1987, E.D.N.Y).

See United States v. Bonanno Organized Crime Family, et al., 683 F. Supp. 1411 (E.D.N.Y. 1988); United States v. Bonanno Organized Crime Family, 695 F. Supp. 1426 (E.D.N.Y. 1988); United States v. Bonanno Organized

Crime Family of La Cosa Nostra, 879 F.2d 20 (2d Cir. 1989).

(4) United States v. Local 359, United Seafood Workers, Etc., et al., No. 87 Civ. 7351 (filed October 15, 1987, S.D.N.Y.).

See United States v. Local 359, et al., 705 F. Supp. 894 (S.D.N.Y. 1989); United States v. Local 359, United Seafood Workers, 889 F.2d 1232 (2d Cir. 1989); United States v. Local 359, United Seafood Workers, 55 F.3d 64 (2d Cir. 1995).

(5) United States v. Local 30, United Slate Tile and Composition Roofers, Damp and Waterproof Workers Association, et al., Civil Action No. 87-7718 (filed December 2, 1987, E.D. Pa.).

See United States v. Local 30, United Slate, Tile, Etc., 686 F. Supp. 1139 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989).

(6) United States v. John F. Long, et al., No. 88 Civ. 3289(filed May, 1988 S.D.N.Y.).

(7) United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al., No. 88 Civ. 4486 (filed June 28, 1988, S.D.N.Y.) ("IBT Case").

See the following selected decisions, all entitled United States v. International Brotherhood of Teamsters: 708 F. Supp. 1388 (S.D.N.Y. 1989); 723 F. Supp. 203 (S.D.N.Y. 1989); 725 F. Supp. 162 (S.D.N.Y. 1989); 728 F. Supp. 1032 (S.D.N.Y. 1990); 899 F.2d 143 (2d Cir. 1990); 905 F.2d 610 (2d Cir. 1990); 907 F.2d 277 (2d Cir. 1990); 931 F.2d 117 (2d Cir. 1991); 941 F.2d 1292 (2d Cir. 1991); 964 F.2d 180 (2d Cir. 1992); 12 F.3d 260 (2d Cir. 1993).

(8) United States v. Vincent Gigante, et al., No. Civ. 88-4316 (filed October 13, 1988, D.N.J.).

See United States v. Gigante, 737 F. Supp. 292

(D.N.J. 1990).

(9) United States v. Private Sanitation Industry, Association et al., No. Cv. 89-1848 (filed June 6, 1989, E.D.N.Y.).

See United States v. Private Sanitation Industry Ass'n, 793 F. Supp. 1114 (E.D.N.Y. 1992); United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 811 F. Supp. 808 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. Private Sanitation Industry Ass'n of Suffolk/Nassau Inc., 44 F.3d 1082 (2d Cir. 1995).

(10) United States v. Local 1804-1, International Longshoremen's Association, AFL-CIO, et al., No. 90 Civ. 0963 (filed February 14, 1990, S.D.N.Y.).

See United States v. Local 1804-1, International Longshoremen's Ass'n, 745 F. Supp. 184 (S.D.N.Y. 1990); United States v. Local 1804-1 International Longshoremen's Ass'n, 812 F. Supp. 1303 (S.D.N.Y. 1993); United States v. Local 1804-1, International Longshoremen's Ass'n, 44 F.3d 1091 (2d Cir. 1995); United States v. Carson, 52 F.3d 1173 (2d Cir. 1995).

(11) United States v. Local 295, International Brotherhood of Teamsters, et al., No. Civ. 90-0970(filed March 20, 1990, E.D.N.Y.).

See United States v. Local 295 of International Brotherhood of Teamsters, 295 F. Supp. 15 (E.D.N.Y. 1992).

(12) United States v. District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America, et al., No. 90 Civ. 5722 (filed September 6, 1990, S.D.N.Y.).

See United States v. District Council, 778 F. Supp. 738 (S.D.N.Y. 1991); United States v. District Council of New York City, 941 F. Supp. 349 (S.D.N.Y. 1996).

(13) United States v. Edward T. Hanley, et al., Civil

Action No. 90-5017 (filed December 19, 1990, D.N.J.).

(14) United States v. Anthony R. Amodeo, Sr., et al., No. 92 Civ.7744 (filed October 23, 1992, S.D.N.Y.).

See United States v. Amodeo, 44 F.3d 141 (2d Cir. 1995).

(15) United States v. Local 282 of the International Brotherhood of Teamsters, et al., No. Cv. 94-2919(filed June 21, 1994, E.D.N.Y.).

See United States v. Local 282 International Brotherhood of Teamsters, 13 F. Supp. 2d 401 (E.D.N.Y. 1998).

(16) United States v. Mason Tenders District Council of New York and Vicinity of LIUNA, No. 94 Civ. 6487 (filed September 7, 1994, S.D.N.Y.).

See United States v. Mason Tenders District Council of Greater New York, 1994 WL 742637 (S.D.N.Y. 1995); United States v. Mason Tenders District Council of Greater New York, 909 F. Supp. 882 and 891 (S.D.N.Y. 1995).

(17) United States v. Edward T. Hanley and Hotel Employees and Restaurant Employees International Union and General Executive Board of the Hotel Employees and Restaurant Employees International Union, Cv. No. 95-4596 (GEB) (filed September 5, 1995, D.N.J.).

See United States v. Hotel Employees and Restaurant Employees, International Union, 974 F. Supp. 411 (D.N.J. 1997); Agathos v. Mullenberg, 932 F. Supp. 636 (D.N.J. 1996).

(18) United States & Laborers' International Union of North America (LIUNA) v. Construction & General Laborers' District Council of Chicago & Vicinity, an affiliated entity of LIUNA, Civil No. 99C 5229 (filed August 8, 1999, N.D. Ill.).

(19) United States v. Laborers Local 210 of LIUNA, Buffalo, New York, Civil No. 99 CV-0915A, (filed

November 18, 1999, W.D.N.Y.).[14]

These civil RICO lawsuits have led to the appointment of independent officers by the district courts who have implemented various union reform measures that have resulted in: (1) adoption of ethical practices codes governing governing union members; (2) removal of over one thousand persons from positions of influence in unions for organized crime related corruption and other misconduct; (3) improvements in fiscal matters; (4) union election reform, including direct election of national and international officers by rank and file members; and (5) other reforms that have restored union democracy to rank and file union members.

E. Civil RICO Cases Not Involving Labor Unions Brought By The United States

The United States also has brought at least seventeen other civil RICO cases seeking equitable relief that did not involve labor unions. For example, in United States v. Philip Morris, et al., Civ. No. 1:99 CV 02496 (filed September 22, 1999, D.D.C.), the United States brought a civil RICO suit against nine tobacco

[14] A proposed twentieth civil RICO lawsuit against the Laborers' International Union of North American (LIUNA) was settled in February 1995 by an agreement between LIUNA and the United States just before the suit was to be filed. Pursuant to the settlement agreement, LIUNA implemented a program of internal reform that resulted in the removal of over 200 individuals for corruption and misconduct and the implementation of election reform, including for the first time direct election of LIUNA's President and other International Officers by rank and file union members. See Laborers' International Union of North America v. Caruso, 197 F.3d 1195 (7th Cir. 1999); Serpico v. Laborers' International Union of North America, 97 F.3d 995 (7th Cir. 1996).

companies and two affiliated entities, alleging a pattern of mail and wire fraud predicate offenses from the early 1950's to the present to defraud consumers of tobacco products through false and misleading information about, among other matters, the health effects of smoking, tobacco products' addictiveness and the targeting of underage consumers to buy tobacco products.

The RICO lawsuit seeks disgorgement of the defendants' proceeds derived from the RICO violations. The relief sought also includes a permanent injunction to, among other matters: prohibit the defendants and others acting in concert with them from committing any act of racketeering and from making false, misleading or deceptive representations concerning cigarettes, the health risks from smoking, and the addictive nature of nicotine; order the defendants to disclose documents and information regarding the health consequences of cigarette smoking and nicotine addiction; and order the defendants to fund programs to assist smokers to stop smoking.

In United States v. International Boxing Federation (IBF), et al., Civ. No. 99-5442 (JWB) (filed November 22, 1999, D.N.J.), the United States brought a civil RICO lawsuit against the International Boxing Federation, United States Boxing Association ("UBA") and the Executive Committee of the International Boxing Federation ("IBF")/United States Boxing Association, as nominal defendants, and against Robert W. Lee, Sr., Robert Lee, Jr., Don

William Brennan and Francisco Fernandez. The alleged enterprise is a group of entities associated in fact consisting of the USBA, the IBF non-profit, IBF for-profit and the IBF International, including its leadership, members and associates. The complaint alleged that the defendants falsely represented that the enterprise maintained fair and unbiased systems for ratings of boxers and, based on these false representations, the defendants obtained annual dues from the IBF - USBA memberships, registration fees from boxing promoters, sanction fees from boxers and their promoters and other contributions. However, in truth, the defendants solicited and accepted bribes from certain boxing promoters and managers and others, in order to alter these ratings and to provide other favorable treatment to those who paid bribes.

On January 12, 2000, the district court granted a preliminary injunction restraining the defendants from, among other matters, committing any act of racketeering, and the court appointed a monitor to conduct the legitimate business of the enterprise. The suit also seeks a permanent injunction and an order requiring the defendants to divest their interests in the enterprise and to disgorge all the proceeds of their violations.

Other civil RICO lawsuits brought by the United States to obtain equitable relief include suits to enjoin illegal gambling

businesses,[15] to recover money obtained through defrauding the United States,[16] and to enjoin defendants from operating restaurants and to divest their interests in a restaurant (Umberto's Clam House) from which they skimmed proceeds.[17]

F. Miscellaneous Procedures

1. Civil Investigative Demands

18 U.S.C. § 1968 provides, in relevant part, as follows:

> (a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.
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> (b) Each such demand shall --
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> (1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

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[15] See: (1) United States v. Leonard L. Cappetto, et al., Civ. No. 74-C-503 (filed February 22, 1974, N.D.Il.); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); (2) United States v. Winstend, et al. Civ. No. 76-C-2513 (filed July 1976, N.D.Il.); and (3) United States v. Lummi Indian Tribe, Civ. No. C83-94C (filed January 27, 1983, W.D. Wash.)

[16] See United States v. Larry D. Barnette, et al., Civ. No. 85-0754-Civ-J-16 (filed May 16, 1985, M.D.Fl.); United States v. Barnette, 10 F.3d 1553 (11th Cir.), cert. denied, 513 U.S. 816 (1994).

[17] See United States v. Matthew Ianniello, et al., Civ. No. 86 Civ. 1552 (LSH) filed February, 1986, S.D.N.Y.); United States v. Ianniello, 646 F. Supp. 1289 (S.D.N.Y. 1986), aff'd, 824 F. 2d 203 (2d Cir. 1987).

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

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

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

(c) No such demand shall --

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

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

This section has not been the subject of much litigation.

2. Venue

Specific venue for civil RICO cases is provided in 18 U.S.C. § 1965, which provides as follows:

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

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

judicial district of the United States by the marshal thereof.

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

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

These provisions are not exclusive. Rather, they were intended to supplement and liberalize existing venue provisions.[18]

3. Doctrine of Laches and Statute Of Limitations

It is well established that the statute of limitations and the doctrine of laches do not apply to equitable suits by the government to enforce a public right or to protect the public's interest.[19] In accordance with this authority, every court that has decided the issue has held that the statute of limitations and doctrine of laches do not apply to civil RICO lawsuits for

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[18] See Magic Toyota v. Southeast Toyota Distributorship, 784 F. Supp. 306, 319-21 (D.S.C. 1992); Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1288-91 (D. Wis. 1985).

[19] See Nevada v. United States, 463 U.S. 110, 141 (1983); Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946); United States v. Summerlin, 310 U.S. 414, 416 (1990); Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917).

equitable relief brought by the United States.[20]

4. Collateral Estoppel

18 U.S.C. § 1964(d) provides:

> (d) A final judgement or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

See also Fed R. Evid. 803(22) (authorizing the use of a final judgment of conviction "to prove any fact essential to sustain the judgement" in a civil case).

Use of these collateral estoppel provisions has significantly facilitated the government's ability to satisfy its burden of proof in civil RICO cases.[21]

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[20] See United States v. Local 1804-1, International Longshoreman's Ass'n, 831 F. Supp. 177, 186 n.8 (S.D.N.Y. 1993); United States v. Private Sanitation Industry Ass'n, 793 F. Supp. 1114, 1152 (E.D.N.Y. 1992); United States v. International Brotherhood of Teamsters, 708 F. Supp. 1389, 1402 (S.D.N.Y. 1989); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1458 (E.D.N.Y. 1988).

[21] See United States v. Private Sanitation Industry Ass'n, 995 F. 2d 375, 377 (2d Cir. 1993); United States v. Private Sanitation Industry Ass'n, 899 F. Supp. 974, 980-81 (E.D.N.Y. 1994); United States v. Private Sanitation Industry Ass'n, 811 F. Supp. 808, 813-14 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. International Brotherhood of Teamsters, 777 F. Supp. 1133, 1137 (S.D.N.Y. 1991), aff'd, 970 F.2d 1132 (2d Cir. 1992); United States v. International Brotherhood of Teamsters, 743 F. Supp. 155, 166-67 (S.D.N.Y. 1990); United States v. International Brotherhood of Teamsters, 725 F. Supp. 162, 167 (S.D.N.Y. 1989), aff'd, 905 F.2d 610 (2d Cir. 1990); United States v. Local 30, United Slate, Tile, et al., 686 F. Supp. 1139, 1156, 1165-66 (E.D.Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989). United States

(continued...)

5. Fifth Amendment Privilege

In government civil RICO cases, the fact-finder may draw an adverse inference from the assertion of the Fifth Amendment privilege against self-incrimination by a defendant[22] or a defense witness who is an agent or coconspirator of the defendant.[23]

6. Jury Trial

The Seventh Amendment to the United States Constitution guarantees a party in a civil suit "at common law" a right to a jury trial. However, a government civil RICO suit for equitable relief is not a suit "at common law"; rather, it is an action in equity. Therefore, a defendant in a government civil RICO suit for

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[21](...continued)
v. Local 6A, Cement & Concrete Workers, 663 F. Supp. 192, 194 (S.D.N.Y. 1986).

[22] See United States v. Private Sanitation Industry Ass'n, 995 F.2d 375, 377 (2d Cir. 1993); United States v. Private Sanitation Industry Ass'n, 899 F. Supp. 974, 982 (E.D.N.Y. 1994); United States v. Private Sanitation Industry Ass'n, 811 F. Supp. 808, 812-13 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. Local 30, United Slate, Tile, Etc., 686 F. Supp. 1139, 1170 (E.D. Pa. 1988), aff'd, 871 F. 2d 401 (3d Cir. 1989); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1449-52 (E.D.N.Y. 1988), aff'd, 879 F.2d 20(2d Cir. 1989); United States v. Iannielli, 646 F. Supp. 1289, 1296-98, 1300 (S.D.N.Y. 1986); United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 305-06 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir.), cert. denied, 476 U.S. 1180 (1986).

[23] See United States v. District Council of New York City & Vicinity, 832 F. Supp. 644, 651-52 (S.D.N.Y. 1993); Local 560, 581 F. Supp. at 305-06.

equitable relief does not have a right to a jury trial.[24]

[24] See United States v. International Brotherhood of Teamsters, 708 F. Supp. 1388, 1409-08 (S.D.N.Y. 1989). Cf. Katchen v. Landy, 382 U.S. 323, 335-39 (1965); In Re Evangelist, 760 F. 2d 27, 29-31 (1st Cir. 1985); S.E.C. v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 94-97 (2d Cir. 1978); United States v. Ferro Corp., 627 F. Supp. 508, 509 (M.D. La. 1986).

INDEX

Aiding and abetting 17
Approval of RICO Cases 217
Burden of proof to obtain equitable relief 281
Chargeable under state law 10
Civil RICO suits for equitable relief
brought by the United States 278
Civil investigative demands 298
Civil RICO cases against labor unions and
related entities brought by the United States . . . 289
Civil RICO cases not involving labor unions
brought by the United States 295
Collateral estoppel 246, 300
Court-appointed monitors, trusteeships and officers . . 285
Disgorgement 287
Divestiture 286
Doctrine of laches and statute of limitations 300
Fifth Amendment privilege 301
Government's burden of proof to obtain
equitable relief 281
Jury trial 302
Miscellaneous procedures 298
Overview of equitable relief pursuant to
18 U.S.C. § 1964 278
Preliminary and permanent injunctions 284
Scope of equitable relief 284
Venue 299
Collection of unlawful debt 228
Consecutive sentences 155
Conspiracy and substantive charges 136
Conspiracy - RICO
Advantages of charging 134
Agreement - Salinas and Gleceir Issues . . . 145-46, 223-24
Coconspirators statements 137-142
Consecutive sentences for conspiracy
and substantive charges 136
Decision to charge 134
Differences from standard conspiracy law 137
Disadvantages of charging 135
General considerations 134
Multiple vs. single 230
Objective of 144
Other RICO conspiracy issues 147
Overt Act 146
Personally commit two predicate acts 145
Practical considerations 134
Section 1962(d) 134

Withdrawal 238
Constitutionality of RICO
Ex post facto challenges 259
First Amendment challenges 257
Generally 255
Tenth Amendment challenges 258
Vagueness 91
Continuity and relationship--Sedima S.P.R.L.
and its progeny 76
Definitions: 18 U.S.C. § 1961 8
Attorney General (18 U.S.C. § 1961(10)) 102
Continuity and relationship--Sedima S.P.R.L.
and its progeny 76
Documentary materials (18 U.S.C. § 1961(9)) 102
Enterprise 37
Pattern of racketeering activity 75
Person 35
Racketeering investigation (18 U.S.C. § 1961(8)) 102
Racketeering investigator (18 U.S.C. § 1961(7)) . . . 101
State 34
State offenses 10
Single episode rule 83
Unlawful debt 98
Disgorgement 287
Divestiture 286
Double jeopardy 243
Drafting of indictment
Incorporation by reference 223
Sub predicate racketeering acts 229
Duplicity 227
Economic motive-profit-seeking motive is
not required 64
Eighth Amendment-excessive fines 197
Enterprise 37
Admissibility of evidence to establish existence
or nature, etc. 274, 276
Corporations and other businesses 39
Corporate defendants 67
Change in Membership 48-49
Defendant as enterprise -- identity between
defendant and enterprise 67
Establishing a legal enterprise 46
Establishing an association-in-fact enterprise-
the Bledsoe case 47
Evidence of 47
Governmental entities 39
Group of entities 39
Individual defendants 72

Partnership 40
Enterprise (continued)
Profit-seeking purpose 64
Types of enterprises 39
Sole proprietorship 40
Split in enterprise structure 63
Evidence
Admissibility of uncharged crimes 80-82, 274
Connection to organized crime 254
Expert testimony 276
To establish existence or nature of enterprise . . 274, 276
Ex post facto issues 95-98, 259-262
Fifth Amendment privilege re: civil RICO 301
First Amendment challenges 258
Forfeiture 156
Bifurcation of proceedings 190, 191
Burden of proof 189
Drafting forfeiture allegations 185
Eighth Amendment -- excessive fines 197
Gross vs. net proceeds 167
In personam contrasted with in rem 157
Section 1963(a)(1) -- interest acquired or
Maintained - - "But For Test" 159-62
Interests in or affording influence over enterprise . . 163
Net-worth method of proof 169
Petitions for mitigation or remission 208
Post-trial forfeiture issues 205
Pre trial restraints 172
Proceeds 162, 166
Provisions of Section 1963(a) 157
Rights of third parties 209
Special verdicts 192
Stipulation 193
Tracing 169
Guidelines for the use of RICO 217
Collateral estoppel 246, 300
Double jeopardy 243
Drafting the indictment 220
Drafting the RICO conspiracy count 223
Drafting the substantive RICO count 220
Duplicity 227
Multiplicity 225
Other drafting considerations 225
RICO policy 217
Severance, misjoinder, and prejudicial spillover 233
Statute of limitations and withdrawal 238
Surplusage 248
Variance: single and multiple conspiracies 230

Income
Section 1962(a) prosecutions 108
Inconsistency 270
Incorporation by reference 223
Intent 253
Interstate commerce requirement 126
Jurisdictional element 126
Jury trial 302
Liberal construction clause 250
Mens rea 253
Multiplicity 225
Organized crime
Requirement of showing connection to 254
Organized Crime and Racketeering Section 1, 219
Approval of RICO charges 217
Overt acts 146
Pattern of racketeering activity 75-98
Continuity and relationship 76
Single episode rule 76
Peripheral figures within reach of RICO 114
Policy limitations
Mail fraud 22
Single Episode Rule 83
Section 1962(a) prosecutions 106
Tax prosecutions 23
Use of RICO 217
Pre-emption by specific statutes 20
Predicate offenses (See Racketeering Activity)
Preliminary and permanent injunctions 284
Racketeering activity 8
Arson 15
Attempts as predicate offenses 31
Bribery 15
Conspiracies as predicate offenses 31
Currency violations 33, 34
Dealing in narcotic or other dangerous drugs 16
Dealing in obscene matter 16
Extortion 16
Federal Title 18 Offenses 16
Federal Title 29 Offenses 29
Gambling 15
Generic federal offenses 30
Immigration and nationality act offenses 34
Kidnapping 15
Mail & wire fraud 18
Marijuana

Predicate offense involving 31
Money-laundering 33, 34
Murder 14
Racketeering activity (continued)
Narcotics 33
Obstruction of justice 23
Representative cases charging federal generic predicate offenses 32
Representative cases charging Immigration and Nationality Act offenses 34
Representative cases charging state-law predicate offenses 14
Representative cases charging Title 18 predicate offenses 25
Representative cases charging Title 29 predicate offenses 30
Representative cases charging Title 31 offenses 34
Robbery 15
Section 1028 (relating to fraud in connection with identification documents) 26
Section 1029 (relating to fraud in connection with access device) 26
Section 1084 (relating to illegal transmission of wagering information) 26
Section 1341 (relating to mail fraud) 26
Section 1343 (relating to wire fraud) 26
Section 1344 (relating to financial institution fraud) . 27
Section 1503 (relating to obstruction of justice) . . . 27
Section 1510 (relating to the obstruction of a federal criminal investigation) 27
Section 1511 (relating to the obstruction of state or local law enforcement) 27
Section 1546 (relating to fraud, misuse of visas and related documents) 27
Section 186 (dealing with restrictions on payments and loans to labor organizations) 30
Section 1951 (Hobbs Act extortion or robbery) 28
Section 1952 (relating to interstate or foreign travel or use of such facilities or the mail in aid of unlawful activity) 28
Section 1953 (relating to interstate transportation of wagering paraphernalia) 28
Section 1954 (relating to kickbacks to influence employee benefit plan) 28
Section 1955 (prohibiting illegal gambling businesses) 28
Section 1958 (relating to murder for hire) 29
Section 201 (relating to bribery) 25
Section 224 (relating to sports bribery) 25

Section 2314 (relating to transportation of stolen goods and other property) 29
Section 2315 (relating to sale or receipt of stolen goods and other property) 29
Racketeering activity (continued)
Section 2321 (trafficking in motor vehicles and motor vehicle parts with obliterated or altered vehicle identification numbers) 29
Section 501(c) (relating to embezzlement from union funds) 30
Section 659 (relating to theft from an interstate shipment) 25
Section 664 (relating to embezzlement from pension and welfare funds) 26
Sections 1425-1427 (relating to the unlawful procurement of citizenship or nationalization . . . 27
Sections 1461-1465 (relating to obscene matter) 27
Sections 1512-1513 (relating to witness/victim/informant tampering or retaliating against a witness, victim or informant) 27
Sections 1542-1544 (relating to false and forged statements in application and use of passport, misuse of visas and related documents) 27
Sections 1581-1588 (relating to peonage and slavery) . 27
Sections 1956-1957 (relating to money laundering) . . . 28
Sections 2251-2252 (relating to sexual exploitation, abuse and buying and selling children) 29
Sections 2312-2313(relating to the transportation, sale or receipt of stolen vehicles) 29
Sections 2318-2320 (relating to copyright infringement and counterfeiting in the performance and entertainment and audiovisual and computer industries 29
Sections 2341-2346 (trafficking in contraband cigarettes) 29
Sections 2421-2424 (relating to transportation for illegal sexual activity) 29
Sections 471-473 (relating to counterfeiting) 25
Sections 891-894 (relating to extortionate credit transactions) 26
Securities fraud 33
Sentencing 149
Base offense level and relevant conduct 149
Other guidelines considerations 154
Sentencing guidelines 149
Severance, misjoinder, and prejudicial spillover 233
Single episode rule 83
Examples where multiple racketeering acts

may be charged 86
Examples where multiple racketeering acts
may not be charged 87
Statute of limitations and withdrawal 238
Surplusage 248
Reves test 114
RICO
Enactment date 1
RICO and electronic surveillance 262
RICO offenses -- Section 1962 104
Comparison with standard conspiracy law 137
Conduct or participate in the conduct of the affairs
of the Enterprise - - Reves test 114
Effect on interstate commerce 126
Employed by or associated with 112
General considerations 134
No Requirement of agreement personally to commit
two predicate acts 145
Other RICO conspiracy issues 147
Overt acts 146
Section 1962(a) -- acquire an interest in an enterprise 104
Section 1962(b) -- maintain an interest
in an enterprise 108
Section 1962(c) -- conduct or participate in an
enterprise 110
Section 1962(d) -- RICO conspiracy 134
RICO policy 217
Scienter 253
Section 1962 (c)
"Through" a pattern of racketeering activity or
collection of unlawful debt 131
Section 1962(a)
Participation as principal in racketeering acts 106
Tracing 107
Section 1962(b) 108
Section 1962(d) 134
Single episode rule 76
Special verdicts 263
Forfeiture 192, 266
State and local governments
Suits by 36
State offenses 10
Act or threat involving 13
Arson 15
Attempt 14
Bribery 15
Chargeable under state law 10
Conspiracy 13

Dealing in narcotic or other dangerous drugs 16
Dealing in obscene matter 16
Definitional classification 12
Gambling 15
Kidnaping 15
Mis-citation of statute 12
State offenses (continued)
Prior acquittal 11
Prior conviction 11
Procedural and evidentiary rules 13
Punishable by imprisonment for more than one year . . . 13
Robbery 15
Solicitation 14
State statute of limitations 241
Statute in force at time of offense 13
Statute of limitations 238
Collection of unlawful debt 241
Sub-predicate offenses 222
Tax division
Policy limitations on RICO-tax cases 23
Tax offenses
Policy limitations on use in RICO prosecutions 23
Tenth Amendment challenges 257
Temporary restraining order
Requirement of hearing 181
Through a pattern of racketeering activity 131
Time period of racketeering acts 96
Tracing
Forfeiture 169
Section 1962(a) 107
Unanimous verdicts 263, 266
United States Attorneys' Manual
Chapter 9-110 219
Unlawful debt
Definition 98
Vagueness challenges 255
Variance
Variance in proof from the charged enterprise 61
Single and multiple conspiracies 230
Venue 272, 299
Verdicts 266
Inconsistency 270
Special verdicts 255
Unanimous 263
Victim and witness protection act 23
Wharton's rule 251
Withdrawal 238