



RICO: A Brief Sketch

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Summary

Congress enacted the federal Racketeer Influenced and Corrupt Organization (RICO) provisions as part of the Organized Crime Control Act of 1970. In spite of its name and origin, RICO is not limited to “mobsters” or members of “organized crime” as those terms are popularly understood. Rather it covers those activities which Congress felt characterized the conduct of organized crime no matter who actually engages in them.

RICO proscribes no conduct that is not otherwise prohibited. Instead it enlarges the civil and criminal consequences, under some circumstances, of a list of state and federal crimes.

In simple terms, RICO condemns:

- (1) any person
- (2) who
 - (a) invests in, or
 - (b) acquires or maintains an interest in, or
 - (c) conducts or participates in the affairs of, or
 - (d) conspires to invest in, acquire, or conduct the affairs of
- (3) an enterprise
- (4) which
 - (a) engages in, or
 - (b) whose activities affect, interstate or foreign commerce
- (5) through
 - (a) the collection of an unlawful debt, or
 - (b) the patterned commission of various state and federal crimes.

Violations are punishable by (a) forfeiture of any property acquired through a RICO violation and of any property interest in the enterprise involved in the violation, and (b) imprisonment for not more than 20 years, or life if one of the predicate offenses carries such a penalty, and/or a fine of not more than the greater of twice the amount of gain or loss associated with the offense or \$250,000 for individuals and \$500,000 for organizations. RICO has generally survived constitutional challenges, although its forfeiture provisions are subject to an excessive fines clause analysis and perhaps to cruel and unusual punishment disproportionality analysis.

RICO violations also subject the offender to civil liability. The courts may award anyone injured in their business or property by a RICO violation treble damages, costs and attorneys’ fees, and may enjoin RICO violations, order divestiture, dissolution or reorganization, or restrict an offender’s future professional or investment activities. Civil RICO has been controversial. At one time commentators urged Congress to amend its provision. Congress found little consensus on the questions raised by proposed revisions, however, and the issue seems to have been put aside at least for the time being.

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I. Introduction

Congress enacted the federal Racketeer Influenced and Corrupt Organization (RICO) provisions¹ as part of the Organized Crime Control Act of 1970.² In spite of its name and origin, RICO is not limited to “mobsters” or members of “organized crime” as those terms are popularly understood.³ Rather it covers those activities which Congress felt characterized the conduct of organized crime no matter who actually engages in them.⁴

RICO proscribes no conduct that is not otherwise prohibited.⁵ Instead it enlarges the civil and criminal consequences, under some circumstances, of a list of state and federal crimes, a list to which Congress has added offenses on a fairly regular basis.

In simple terms, RICO condemns:

- (1) any person
- (2) who
 - (a) invests in, or
 - (b) acquires or maintains an interest in, or
 - (c) conducts or participates in the affairs of, or
 - (d) conspires to invest in, acquire, or conduct the affairs of
- (3) an enterprise
- (4) which
 - (a) engages in, or
 - (b) whose activities affect, interstate or foreign commerce
- (5) through
 - (a) the collection of an unlawful debt, or
 - (b) the patterned commission of various state and federal crimes.⁶

¹ 18 U.S.C. 1961 -1968 (text is appended).

² 84 Stat. 941 (1970).

³ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 236 (1989).

⁴ “To avoid classifying defendants according to such ancillary characteristics as group association and national origin, the Act basically says ‘racketeer is as racketeer does’ and then tries to define what a racketeer does indeed do.” Bridges, *Private RICO Litigation Based Upon “Fraud” in the Sale of Securities*, 18 *GEORGIA LAW REVIEW* 43, 49 (1983); see also, Lynch, *RICO: The Crime of Being a Criminal: Parts I & II*, 87 *COLUMBIA LAW REVIEW* 661, 686-88 (1987).

⁵ Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 *COLUMBIA LAW REVIEW* 920, 938-39 (1987); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations(RICO): Basic Concepts—Criminal and Civil Remedies*, 53 *TEMPLE LAW QUARTERLY* 1009, 1021 n.71 (1980).

⁶ In exact terms, it declares:

“(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of (continued...)

Violations are punishable by (a) forfeiture of any property acquired through a RICO violation and of any property interest in the enterprise involved in the violation, and (b) imprisonment for not more than 20 years, or life if one of the predicate offenses carries such a penalty, and/or a fine of not more than the greater of twice of amount of gain or loss associated with the offense or \$250,000 for individuals and \$500,000 for organizations.⁷

RICO violations also subject the offender to civil liability. The courts may award anyone injured by a RICO violation treble damages, costs and attorneys' fees,⁸ and may enjoin RICO violations, order divestiture, dissolution or reorganization, or restrict an offender's future professional or investment activities.⁹

RICO also makes provision (1) for venue and service of process in criminal and civil cases;¹⁰ (2) for expedited judicial action in certain civil cases brought by the United States;¹¹ (3) for in camera proceedings in civil cases initiated by the United States;¹² and (4) for the Department of Justice's use of civil investigative demands.¹³

(...continued)

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

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

“(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct, or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

“(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” 18 U.S.C. 1962.

⁷ 18 U.S.C. 1963, 3571.

⁸ 18 U.S.C. 1963(c).

⁹ 18 U.S.C. 1964(a).

¹⁰ 18 U.S.C. 1965.

¹¹ 18 U.S.C. 1966.

¹² “In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.” 18 U.S.C. 1967.

¹³ 18 U.S.C. 1968. The civil investigative demand process, borrowed from antitrust law like so many of the other features of RICO, permits the Attorney General to demand the production of documentary evidence from anyone prior to the initiation of civil or criminal RICO provisions.

II. A Closer Look at the Elements

A. Any person

Any person may violate RICO.¹⁴ The “person” need not be a mobster or even a human being; “any individual or entity capable of holding a legal or beneficial interest in property” will do.¹⁵ Although the “person” and the “enterprise” must be distinct in the case of a subsection 1962(c) violation (conducting an enterprise’s activities through racketeering activity), a corporate entity and its sole shareholder are sufficiently distinct to satisfy the enterprise and person elements of a subsection (c) violation,¹⁶ and the “person” and “enterprise” need not be distinct for purposes of subsection 1962(a) (investing the racketeering activity proceeds in an enterprise) or subsection 1962(b) (acquiring or maintaining an enterprise through racketeering activity) violations.¹⁷ On the other hand, even though governmental entities may constitute or participate in a RICO enterprise¹⁸ and may bring a RICO cause of action, they are not considered capable of a RICO violation.¹⁹

B. Conduct

1. Invest

RICO addresses four forms of illicit commercial activity reflected in the four subsections of section 1962: (a) acquiring or operating an enterprise using racketeering proceeds; (b) controlling an enterprise using racketeering activities; (c) conducting the affairs of an enterprise using racketeering activities; and (d) conspiring to so acquire, control or conduct.

The first, 18 U.S.C. 1962(a), was designed as something of a money laundering provision.²⁰ It introduces several features of its own and has been described as the most difficult to prove.²¹ Under its provisions, it is unlawful for

¹⁴ 18 U.S.C. 1962(a), (b), (c), (d).

¹⁵ 18 U.S.C. 1961(3).

¹⁶ *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001); *Living Designs, Inc. v. E.I. DuPont de Nemours*, 431 F.3d 353, 361 (9th Cir. 2005); *First Capital Asset Management v. Satinwood, Inc.*, 385 F.3d 159, 173 (2d Cir. 2004).

¹⁷ *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 907 (3d Cir. 1991); *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995); *In re Managed Care Litigation*, 150 F.Supp.2d 1330, 1351 (S.D.Fla. 2001); *cf.*, *Churchill Village v. General Electric*, 361 F.3d 566, 574-75 (9th Cir. 2004).

¹⁸ *United States v. Urban*, 404 F.3d 754, 770-71 (3d Cir. 2005)(city department); *United States v. Cianci*, 378 F.3d 71, 83 (1st Cir. 2004)(mayor’s office); *Ferluga v. Eickhoff*, 408 F.Supp.2d. 1153, 1162 (D.Kan. 2006)(municipality).

¹⁹ *Keller v. Central Bank*, 277 F.3d 811, 821 (6th Cir. 2002)(foreign sovereign); *Brown v. Nationsbank Corp.*, 188 F.3d 579, 587 (5th Cir. 1999)(Federal Bureau of Investigation); *Pedrina v. Chun*, 97 F.3d 1296, 1300 (9th Cir. 1996); *McNeily v. United States*, 6 F.3d 343, 350 (5th Cir. 1993)(Federal Deposit Insurance Corp.); *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991)(Federal Insurance Administration); *Wood v. Incorporated Village of Patchogue*, 311 F.Supp.2d 344, 354 (E.D.N.Y. 2004); *Lathrop v. Juneau & Associates, Inc.*, 220 F.R.D. 330, 334 (S.D.Ill. 2004)(municipality); *Donahue v. Federal Bureau of Investigation*, 204 F.Supp.2d 169, 173-74 (D.Mass. 2002).

²⁰ *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991), citing 116 Cong.Rec. 35199 (1970)(remarks of Rep. St. Germain), 116 Cong.Rec. 607 (1970) (remarks of Sen. Byrd), and 115 Cong.Rec. 6993 (1969)(remarks of Sen. Hruska); ABRAMS, THE LAW OF CIVIL RICO, 206 (1991); *Sadighi v. Daghighfekr*, 36 F.Supp.2d 279, 286 (D.S.C. (continued...))

- (1) any person
- (2) who is liable as a principal
 - (a) in the collection of an unlawful debt or
 - (b) in a pattern of predicate offenses
- (3) to use or invest
- (4) the income from such misconduct
- (5) to acquire, establish or operate
- (6) a commercial enterprise.²²

The “person,” the pattern of predicate offense, and the enterprise elements are common to all of the subsections. For purposes of 1962(a), however, a legal entity that benefits from the offense may be both the “person” and the “enterprise.”²³ The person must have committed usury or a pattern of predicate offenses or aided and abetted in their commission,²⁴ and have received income that would not otherwise have been received as a result.²⁵ Some courts have also held that in a civil RICO case 1962(a) only applies to legitimate enterprises and does not include instances where the proceeds of a racketeering activity are simply plowed back into the corrupt enterprise.²⁶

(...continued)

1999).

²¹ *BCCI Holdings (Luxembourg) Societe Anonyme v. Khalil*, 56 F.Supp.2d 14, 63 (D.D.C. 1999); Goldstock, *On the Waterfront: RICO and Labor Racketeering*, 17 AMERICAN CRIMINAL LAW REVIEW 341, 356 (1980).

²² *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir. 2000); *Sadighi v. Daghighfekr*, 36 F.Supp.2d at 286; *United States v. Vogt*, 910 F.2d 1184, 1194 (4th Cir. 1990); *Lachmund v. ADM Investor Services, Inc.*, 191 F.3d 777, 785 (7th Cir. 1999).

More precisely, the subsection declares, “(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection, if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.” 18 U.S.C. 1962(a).

²³ *Churchill Village v. General Electric*, 361 F.3d 566, 574 (9th Cir. 2004); *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 907 (3d Cir. 1991); *Official Publications, Inc. v. Kable News*, 884 F.2d 664, 668 (2d Cir. 1989); *Downing v. Halliburton & Associates, Inc.*, 812 F.Supp. 1178 (M.D.Ala. 1995), aff’d without written op., 13 F.3d 410 (11th Cir. 1995).

²⁴ *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1152 (9th Cir. 1992); *United States v. Wyatt*, 807 F.2d 1480, 1482 (9th Cir. 1987).

²⁵ *National Organization for Women v. Scheidler*, 968 F.2d 612, 625 (7th Cir. 1992), *rev’d on other grounds*, 510 U.S. 249 (1994); *In re Burzynski*, 989 F.2d 733, 744 (5th Cir. 1993); *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 264 (2d Cir. 2004), *rev’d on other grounds*, 126 S.Ct. 1991 (2006).

²⁶ *Tuscano v. Tuscano*, 403 F.Supp.2d 214, 227-28 (E.D.N.Y. 2005) (“The ‘enterprise’ in subsection (a) refers not to the (continued...)”).

2. Acquire or Maintain

The second proscription, 18 U.S.C. 1962(b), is much the same except that it forbids acquisition or control of an enterprise through the predicates themselves rather than through the income derived from the predicates. It makes it unlawful for

- (1) any person
- (2) to acquire or maintain an interest in or control of
- (3) a commercial enterprise
- (4) through
 - (a) the collection of an unlawful debt or
 - (b) a pattern of predicate offenses.²⁷

As in the case of subsection 1962(a), the “person” and the “enterprise” may be one and the same.²⁸ There must be a nexus between the predicate offenses and the acquisition of control.²⁹ Exactly what constitutes “interest” or “control” is a case by case determination. The defendant must be shown to have played some significant role in the management of the enterprise but a showing of complete control is not necessary.³⁰

3. Conduct of Affairs

Subsection 1962(c) makes it unlawful for

- (1) any person,

(...continued)

‘racketeering enterprise,’ but contemplates investment in some other, legitimate business”); *USA Certified Merchants, LLC v. Koebel*, 262 F.Supp.2d 319, 331 (S.D.N.Y. 2003)(“Where investment of racketeering proceeds back into the same RICO enterprise is alleged, the injuries stem proximately not from the investment, but from the predicate acts that make up the racketeering activity”); *Kaczmarek v. IBM Corp.*, 30 F.Supp2d 626, 628 (S.D.N.Y. 1998)).

²⁷ “(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.” 18 U.S.C. 1962(b); *Advocacy Organization for Patients and Providers v. Auto Club Insurance Association*, 176 F.3d 315, 322 (6th Cir. 1999).

²⁸ *Churchill Village v. General Electric*, 361 F.3d 566, 574 (9th Cir. 2004); *Landry v. Air Line Pilots Ass’n*, 901 F.2d 404, 425 (5th Cir.1990); *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 907 (3d Cir. 1991); *Whaley v. Auto Club Insurance Association*, 891 F.Supp. 1237, 1241-242 (E.D.Mich. 1995).

²⁹ *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 830 (9th Cir. 2003); *Advocacy Organization for Patients and Providers v. Auto Club Insurance Association*, 176 F.3d at 329; *Banks v. Wolk*, 918 F.2d 418, 421 (3d Cir. 1990).

³⁰ *Ikuno v. Yip*, 912 F.2d 306, 310 (9th Cir. 1990), citing *Sutliff, Inc. v. Donovan Co.*, 727 F.2d 648, 653 (7th Cir. 1984), and *Cincinnati Gas & Elec.Co. v. General Electric Co.*, 656 F.Supp. 49, 85 (S.D.Ohio 1986); *Nafta v. Fenisk International House of Trade (USA), Inc.*, 932 F.Supp. 422, 428 (1996); *Griffin v. NBD Bank*, 43 F.Supp.2d 780, 791-92 (W.D.Mich. 1999)(includes the control evidenced by the ability to select one or more of members of a corporation’s board of directors). Control may also be indirect as for example where the defendant exercises a measure of control over a subsidiary by virtue of his control over its parent organization, *BCCI Holding (Luxembourg) Societe Anonyme v. Khalil*, 56 F.Supp.2d 14, 51 (D.D.C. 1999).

- (2) employed by or associated with,
- (3) a commercial enterprise
- (4) to conduct or participate in the conduct of the enterprise's affairs
- (5) through
 - (a) the collection of an unlawful debt or
 - (b) a pattern of predicate offenses.³¹

Although subsection 1962(c) might appear facially less demanding than subsections 1962(a) and (b), the courts have not always read it broadly. Thus, in any charge of a breach of its provisions, the “person” and the “enterprise” must ordinarily be distinct.³² The requirement cannot be avoided by charging a corporate entity as the “person” and the officers and employees through whom it must act as an “association in fact” enterprise.³³ A corporate entity and its sole shareholder, however, are sufficiently distinct for purposes of subsection 1962(c).³⁴

Moreover, the Supreme Court has identified an entrepreneurial stripe in the “conduct or participate in the conduct” element of 1962(c) under which only those who participate in the operation or management of the enterprise itself meet the definition.³⁵ Nevertheless, conviction requires neither an economic predicate offense nor a predicate offense committed with an economic motive.³⁶

³¹ “(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct, or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” 18 U.S.C. 1962(c).

³² *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001); *Living Designs, Inc. v. E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 361 (9th Cir. 2005); *First Capital Management v. Satinwood, Inc.*, 385 F.3d 159, 173 (2d Cir. 2004); *Whalen v. Winchester Production Co.*, 319 F.3d 225, 229 (5th Cir. 2003); *Branon v. Boatmen’s First National Bank*, 153 F.3d 1144, 1146 (10th Cir. 1998); *United States v. London*, 66 F.3d 1227, 1244 (1st Cir. 1995).

³³ *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992); *Glessner v. Kenny*, 952 F.2d 702, 711-12 (3d Cir. 1991); but see, *Webster v. Omnitrition International, Inc.*, 79 F.3d 776 (9th Cir. 1996) (holding a corporation could be guilty of conspiring with its officers and employees to violate RICO in a case in which the corporation appears to have been considered both the enterprise and a person).

³⁴ *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001).

³⁵ *Reves v. Ernst & Young*, 507 U.S. 170, 184-85 (1993); see also, *United States v. Swan*, 250 F.3d 495, 498 (7th Cir. 2001). Liability, however, is not limited to the “upper management” of an enterprise, but extends as well to those within the enterprise who exercise broad discretion in carrying out the instructions of upper management, *United States v. Diaz*, 176 F.3d 52, 92 (2d Cir. 1999); *United States v. Owens*, 167 F.3d 739, 753-54 (1st Cir. 1999); *United States v. Urban*, 404 F.3d 754, 769-70 (3d Cir. 2005).

³⁶ *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256-61 (1994).

C. Racketeering Activity

1. a. Predicate Offenses

The heart of most RICO violations is a pattern of racketeering activities, i.e., the patterned commission of two or more designated state or federal crimes. The list of state and federal crimes upon which a RICO violation may be predicated includes:

(A) any act or threat involving—

murder	arson
kidnaping	bribery
gambling	extortion
robbery	

dealing in obscene material, and

dealing in controlled substances or listed chemicals

chargeable under state law and punishable by imprisonment for more than one year;

(B) violation of—

18 U.S.C. 201 (bribery of federal officials)

18 U.S.C. 224 (bribery in sporting contests)

18 U.S.C. 471,472, 473 (counterfeiting)

18 U.S.C. 659 (theft from interstate shipments)(if felonious)

18 U.S.C. 664 (theft from employee benefit plan)

18 U.S.C. 891-894 (loansharking)

18 U.S.C. 1028 (fraudulent identification documents)(if for profit)

18 U.S.C. 1029 (computer fraud)

18 U.S.C. 1084 (transmission of gambling information)

18 U.S.C. 1341 (mail fraud)

18 U.S.C. 1343 (wire fraud)

18 U.S.C. 1344 (bank fraud)

18 U.S.C. 1425 (procuring nationalization unlawfully)

18 U.S.C. 1426 (reproduction of naturalization papers)

- 18 U.S.C. 1427 (sale of naturalization papers)
 - 18 U.S.C. 1461-1465 (obscene matter)
 - 18 U.S.C. 1503 (obstruction of justice)
 - 18 U.S.C. 1510 (obstruction of criminal investigation)
 - 18 U.S.C. 1511 (obstruction of state law enforcement)
 - 18 U.S.C. 1512 (witness tampering)
 - 18 U.S.C. 1513 (witness retaliation)
 - 18 U.S.C. 1542, 1543, 1544, 1546 (passport or similar document fraud)
 - 18 U.S.C. 1581-1592 (peonage & slavery)
 - 18 U.S.C. 1951 (Hobbs Act)
 - 18 U.S.C. 1952 (Travel Act)
 - 18 U.S.C. 1953 (transportation of gambling paraphernalia)
 - 18 U.S.C. 1954 (bribery to influence employee benefit plan)
 - 18 U.S.C. 1955 (illegal gambling business)
 - 18 U.S.C. 1956, 1957 (money laundering)
 - 18 U.S.C. 1958 (murder for hire)
 - 18 U.S.C. 1960 (illegal money transmitters)
 - 18 U.S.C. 2251, 2251A, 2252, 2260 (sexual exploitation of children)
 - 18 U.S.C. 2312, 2313 (interstate transportation of stolen cars)
 - 18 U.S.C. 2314, 2315 (interstate transportation of stolen property)
 - 18 U.S.C. 2318-2320 (copyright infringement)
 - 18 U.S.C. 2321 (trafficking in certain motor vehicles or motor vehicle parts)
 - 18 U.S.C. 2341-2346 (contraband cigarettes)
 - 18 U.S.C. 2421-2424 (Mann Act)
- (C) indictable violations of—
- 29 U.S.C. 186 (payments and loans to labor organizations)

- 29 U.S.C. 501(c) (embezzlement of union funds)
- (D) any offense involving—
 - fraud connected with a case under title 11 (bankruptcy)
 - fraud in the sale of securities
 - felonious violations of federal drug law
- (E) violation of the Currency and Foreign Transactions Reporting Act [31 U.S.C. 5311-5332],
- (F) violation (for profit) of the Immigration and Nationality Act, section 274 (bringing in and harboring aliens), section 277 (helping aliens enter the U.S. unlawfully), or section 278 (importing aliens for immoral purposes), and .
- (G) violation of [a statute identified as a federal crime of terrorism in 18 U.S.C. 2332b(g)(5)(B)]—
 - 18 U.S.C. 32 (destruction of aircraft or aircraft facilities)
 - 18 U.S.C. 37 (violence at international airports)
 - 18 U.S.C. 81 (arson within special maritime and territorial jurisdiction)
 - 18 U.S.C. 175 or 175b (biological weapons)
 - 18 U.S.C. 175c (variola virus)
 - 18 U.S.C. 229 (chemical weapons)
 - 18 U.S.C. 351(a),(b),(c), or (d) (congressional, cabinet, and Supreme Court assassination and kidnaping)
 - 18 U.S.C. 831 (nuclear materials)
 - 18 U.S.C. 832 (participating in foreign nuclear program)
 - 18 U.S.C. 842(m) or (n) (plastic explosives)
 - 18 U.S.C. 844(f)(2) or (3) (arson and bombing of Government property risking or causing death)
 - 18 U.S.C. 844(i) (arson and bombing of property used in interstate commerce)
 - 18 U.S.C. 930(c) (killing or attempted killing during an attack on a Federal facility with a dangerous weapon)
 - 18 U.S.C. 956(a)(1) (conspiracy to murder, kidnap, or maim persons abroad)
 - 18 U.S.C. 1030(a)(1) (protection of computers)

- 18 U.S.C. 1030(a)(5)(A)(i)(damage to protected computers under 1030(a)(5)(B)(ii) through (v))
- 18 U.S.C. 1114 (killing or attempted killing of officers and employees of the United States)
- 18 U.S.C. 1116 (murder or manslaughter of foreign officials, official guests, or internationally protected persons)
- 18 U.S.C. 1203 (hostage taking)
- 18 U.S.C. 1361 (destruction of government property)
- 18 U.S.C. 1362 (destruction of communication lines, stations, or systems)
- 18 U.S.C. 1363 (injury to buildings or property within special maritime and territorial jurisdiction of the United States)
- 18 U.S.C. 1366(a) (destruction of an energy facility)
- 18 U.S.C. 1751(a),(b),(c), or (d) (presidential and presidential staff assassination and kidnaping)
- 18 U.S.C. 1992 (attacks on trains or mass transit)
- 18 U.S.C. 2155-2156 (destruction of national defense materials, premises, or utilities)
- 18 U.S.C. 2280 (violence against maritime navigation)
- 18 U.S.C. 2281 (violence against maritime fixed platforms)
- 18 U.S.C. 2332 (homicide and other violence against United States nationals occurring outside of the United States)
- 18 U.S.C. 2332a (use of weapons of mass destruction)
- 18 U.S.C. 2332b (acts of terrorism transcending national boundaries)
- 18 U.S.C. 2332f (bombing public places and facilities)
- 18 U.S.C. 2332g (anti-aircraft missiles)
- 18 U.S.C. 2332h (radiological dispersal devices)
- 18 U.S.C. 2339 (harboring terrorists)
- 18 U.S.C. 2339A (providing material support to terrorists)
- 18 U.S.C. 2339B (providing material support to terrorist organizations)
- 18 U.S.C. 2339C (financing terrorism)

- 18 U.S.C. 2339D (receipt of training from foreign terrorist organization)
- 18 U.S.C. 2340A (torture)
- 21 U.S.C. 960A (macro-terrorism)
- 42 U.S.C. 2122 (atomic weapons)
- 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel)
- 49 U.S.C. 46502 (aircraft piracy)
- 49 U.S.C. 46504 (2d sentence) (assault on a flight crew with a dangerous weapon)
- 49 U.S.C. 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft)
- 49 U.S.C. 46506 (if homicide or attempted homicide is involved, application of certain criminal laws to acts on aircraft)
- 49 U.S.C. 60123(b) (destruction of interstate gas or hazardous liquid pipeline facility).³⁷

To constitute “racketeering activity”, the predicate offense need only be *committed*; there is no requirement that the defendant or anyone else have been *convicted* of a predicate offense before a RICO prosecution or action may be brought.³⁸ Conviction of a predicate offense, on the other hand, does not preclude a subsequent RICO prosecution, nor is either conviction or acquittal a bar to a subsequent RICO civil action.³⁹

1. b. Pattern

The pattern of racketeering activities element of RICO requires (1) the commission of two or more predicate offenses, (2) that the predicate offenses be related and not simply isolated events, and (3) that they are committed under such circumstances that suggest either a continuity of criminal activity or the threat of such continuity.

i. Predicates: The first element is explicit in section 1961(5): “‘Pattern of racketeering activity’ requires at least two acts of racketeering activity.” The two remaining elements, relationship and continuity, flow from the legislative history of RICO. That history “shows that Congress indeed had a fairly flexible concept of a pattern in mind. A pattern is not formed by sporadic activity. . . . [A] person cannot be subjected to the sanctions [of RICO] simply for committing two widely separate and isolated criminal offenses. Instead, the term ‘pattern’ itself requires the showing of a

³⁷ 18 U.S.C. 1961(1). Paragraph 1961(1)(G) simply states that the crimes listed in 18 U.S.C. 2332b(g)(5)(B) are predicate offenses; thus, whenever a crime is added to subparagraph 2332b(g)(5)(B) it becomes a RICO predicate offense, sub silentio.

³⁸ *Sedima, S.P.L.R. v. Imrex Co.*, 473 U.S. 479, 488 (1985); *American Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 233 (4th Cir 2004).

³⁹ *Appley v. West*, 832 F.2d 1021 (7th Cir. 1987); *McCarthy v. Pacific Loan, Inc.*, 629 F.Supp. 1102, 1108 (D.Haw. 1986); see discussion of double jeopardy constitutional issue *infra* at 13.

relationship between the predicates and of the threat of continuing activity. It is this factor of *continuity plus relationship* which combines to produce a pattern.”⁴⁰

ii. Related predicates: The commission of predicate offenses forms the requisite related pattern if the “criminal acts . . . 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.”⁴¹

iii. Continuity: “Continuity” is a question of time. “A party alleging a RICO violation may demonstrate continuity . . . 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.”⁴² But this does not mean that no RICO violation has occurred in the absence of continuity. “Often a RICO action will be brought before continuity can be established. . . . In such cases, liability depends on whether the *threat* of continuity is demonstrated.”⁴³ The Court characterized a pattern, extending over a period of time but which posed no threat of reoccurrence, as a pattern with “closed-end” continuity; and a pattern marked by a threat of reoccurrence as a pattern with “open-ended continuity.”⁴⁴

In the case of a “closed-ended” pattern, the lower courts have been reluctant to find predicate activity extending over less than a year sufficient for the “substantial period[s] of time” required to demonstrate continuity.⁴⁵ Whether the threat of future predicate activity is sufficient to recognize an “open-end” pattern of continuity depends upon the nature of the predicate offenses

⁴⁰ *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989)(emphasis of the Court), citing S.Rep.No. 617, 91st Cong., 1st Sess. at 158 (1969) and 116 Cong.Rec. 18940 (1970)(remarks of Sen. McClellan).

⁴¹ *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 240, quoting 18 U.S.C. 3575(e); see also, *United States v. Corrado*, 227 F.3d 543, 554 (6th Cir. 2000), quoting, *United States v. Locascio*, 6 F.3d 924, 943 (2d Cir. 1993) (“The relatedness requirement can be satisfied by proof that: (1) the defendant was enabled to commit the offense solely by virtue of his position in the enterprise; or (2) the offense was related to the activities of the enterprise”); *Wisdom v. First Midwest Bank*, 167 F.3d 402, 406 (8th Cir. 1999); *United States v. Bruno*, 383 F.3d 65, 83-4 (2d Cir. 2004); *United States v. Cianci*, 378 F.3d 71, 88 (1st Cir. 2004); *United States v. Delgado*, 401 F.3d 290, 298 (5th Cir. 2005); *United States v. Smith*, 413 F.3d 1253, 1269 (10th Cir. 2005); *Roger Whitmore’s Automotive Services, Inc. v. Lake County*, 424 F.3d 659, 672 (7th Cir. 2005).

⁴² *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 242.

⁴³ *Id.* (emphasis added); *United States v. Richardson*, 167 F.3d 621, 626 (D.C.Cir. 1999) (“fortuitous interruption of racketeering activity such as by arrest does not grant defendants a free pass to evade RICO charges”).

⁴⁴ *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 242.

⁴⁵ *First Capital Asset Management v. Satinwood, Inc.*, 385 F.3d 159, 181-82 (2d Cir. 2004)(7 months insufficient; “this Court has never found a closed-ended pattern where the predicate acts spanned fewer than two years”); *AllWaste, Inc. v. Hecht*, 65 F.3d 1523, 1527-528 (9th Cir. 1995)(13 months sufficient; in dicta the court indicated it could not say that a period less than 1 year would always be insufficient); *Jackson v. Bellsouth Telecommunications*, 372 F.3d 1250, 1267 (11th Cir. 2004)(9 months, insufficient); *Wisdom v. First Midwest Bank*, 167 F.3d 402, 407 (8th Cir. 1999)(6 months, insufficient), citing, *Primary Care Investors, Seven v. PHP Healthcare Corp.*, 986 F.2d 1208, 1215 (8th Cir. 1993)(10-11 months, insufficient)(citing cases finding several years sufficient and several periods of less than a year insufficient); *United States v. Hively*, 437 F.3d 753, 764-65 (over year and indications of intent to continue, sufficient); *Roger Whitmore’s Automotive Services, Inc. v. Lake County*, 424 F.3d 659, 672-74 (7th Cir. 2005)(2 years with relatively limited activity involving a relatively few individuals, insufficient); *GE Investment Private Placement Partners II v. Parker*, 247 F.3d 543, 550 (4th Cir. 2001)(2 years, insufficient; 5 years, sufficient); *North Bridge Associates, Inc. v. Boldt*, 274 F.3d 38, 43 (1st Cir. 2001)(4 months, insufficient).

“When considering whether a closed period of related conduct is sufficient to establish continuity,” the Seventh Circuit considers “the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries,” *Corley v. Rosewood Care Center, Inc.*, 142 F.3d 1041, 1049 (7th Cir. 1998).

and the nature of the enterprise. “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 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.”⁴⁶

D. Collection of an Unlawful Debt

Collection of an unlawful debt may be the only instance in which the commission of a single predicate offense will support a RICO prosecution or cause of action. No proof of pattern seems to be necessary.⁴⁷

The predicate covers both usury and the collection of gambling debts:

“[U]nlawful debt” means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.⁴⁸

E. Enterprise in or Affecting Interstate or Foreign Commerce

1. Enterprise

The statute defines “enterprise” to include “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”⁴⁹ The enterprise may be devoted to entirely legitimate ends or totally corrupt objectives,⁵⁰

⁴⁶ *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 242; *Jackson v. Bellsouth Telecommunications*, 372 F.3d 1250, 1267 (11th Cir. 2004) (open-ended continuity must involve either predicate offenses that are part of the defendant’s regular way of doing business or predicate offenses whose repetition is threatened); *United States v. Delgado*, 399 F.3d 290, 298 (5th Cir. 2005); *United States v. Connolly*, 341 F.3d 16, 30 (1st Cir. 2003); *DeFalco v. Bernas*, 244 F.3d 286, 323 (2d Cir. 2001); *GE Investment Private Placement Partners II v. Parker*, 247 F.3d 543, 549 (4th Cir. 2001).

⁴⁷ *United States v. Aucoin*, 964 F.2d 1492, 1495-497 (5th Cir. 1992), quoting dicta in *H.J., Inc.*, 492 U.S. at 232 (1989); *United States v. Giovanelli*, 945 F.2d 479, 490 (2d Cir. 1991); *United States v. Eufrazio*, 935 F.2d 553, 563 n.12 (3d Cir. 1991); but see, *Wright v. Shepard*, 919 F.2d 665, 673 (11th Cir. 1990); *United States v. Oreto*, 37 F.3d 739, 751 (1st Cir. 1994).

Oreto also rejected the argument to the effect that the equal protection clause precludes requiring proof of only a single loansharking violation while demanding proof of the patterned commission of at least two violations for every other predicate offense, 37 F.3d at 751-52 (“Congress could rationally have decided that collections of unlawful debt were central to the evils at which RICO was directed. Accordingly, it could rationally have chosen to make guilt more easily provable in unlawful debt cases than in cases involving other forms of racketeering activity”).

⁴⁸ 18 U.S.C. 1961(6); *Cannarozzi v. Fiumara*, 371 F.3d 1, 3-4 (1st Cir. 2004).

⁴⁹ 18 U.S.C. 1961(4); *United States v. Johnson*, 440 F.3d 832, 840 (7th Cir. 2006), citing *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) (“The hallmark of an enterprise is structure. It includes informal organizations such as criminal gangs, and there must be some structure, to distinguish an enterprise from a mere conspiracy, but there need not be much. A RICO enterprise is an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making. The continuity of an informal (continued...)”).

and RICO reaches efforts involving both governmental and nongovernmental enterprises.⁵¹ Finally as noted earlier, a corporation or other legal entity may be both the defendant and the required “enterprise” under some circumstances.

2. In or Affecting Interstate or Foreign Commerce

To satisfy RICO’s jurisdictional element, the corrupt or corrupted enterprise must either engage in interstate or foreign commerce or engage in activities that affect interstate or foreign commerce.⁵² An enterprise that orders supplies and transports its employees and products in interstate commerce is “engaged in interstate commerce” for purposes of RICO.⁵³ As a general rule, the impact of the enterprise on interstate or foreign commerce need only be minimal to satisfy RICO requirements.⁵⁴ Where the predicate offenses associated with an enterprise have an affect on interstate commerce, the enterprise is likely to have an affect on interstate commerce.⁵⁵ However, “where the enterprise itself [does] not engage in economic activity, a minimal effect on commerce will not do.”⁵⁶

(...continued)

enterprise and the differentiation among roles can provide the requisite structure to prove the element of enterprise”); *United States v. Lee*, 374 F.3d 637, 647 (8th Cir. 2004) (“three elements must be proven to show that a RICO enterprise exists: (1) a common purpose that animates the individuals associated with it; (2) an ongoing organization with members who function as a continuing unit; and (3) an ascertainable structure distinct from the conduct of a pattern of racketeering”); *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 830 (9th Cir. 2003); *United States v. Smith*, 413 F.3d 1253, 1266 (10th Cir. 2005); *United States v. Richardson*, 167 F.3d 621, 625 (D.C.Cir. 1999)(an enterprise must have “some structure, to distinguish an enterprise form a mere conspiracy”); *but see, Chang v. Chen*, 80 F.3d 1293, 1297-299 (9th Cir. 1996) (noting also that two circuits have held to the contrary that an “enterprise” need have no structure other than that provided by the predicate offenses, *e.g., United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983)); *United States v. Cianci*, 378 F.3d 71, 82 (1st Cir. 2004)(noting that an enterprise must “function as an ongoing unit” whose participants “share a common purpose,” but that an ascertainable structure is not a prerequisite); *United States v. Pipkins*, 378 F.3d 1281 (11th Cir. 2004)(ongoing organization of participants with a common purpose).

Although the statute refers to “individuals associated in fact,” the courts have consistently held that an enterprise may be composed in whole or in part of legal entities associated in fact, *United States v. London*, 66 F.3d 1227, 1243 (1st Cir. 1995) and cases cited therein.

⁵⁰ *United States v. Turkette*, 452 U.S. 575, 580-93 (1981); *United States v. Cianci*, 378 F.3d 71, 83 (1st Cir. 2004).

⁵¹ *United States v. Cianci*, 378 F.3d 71, 83 (1st Cir. 2004)(mayor’s office); *DeFalco v. Bernas*, 244 F.3d 286, 307-9 (2d Cir. 2001)(town); *United States v. Massey*, 89 F.3d 1433, 1440 (11th Cir. 1995)(state court); *Pelfresne v. Village of Rosemont*, 22 F.Supp.2d 756, 761-62 (mayor’s office) (N.D.Ill. 1998); cf., *Salinas v. United States*, 522 U.S. 52 (1997) (sheriff’s office).

⁵² 18 U.S.C. 1962(a), (b), (c).

⁵³ *United States v. Robertson*, 514 U.S. 669, 671-72 (1995); *see also, United States v. Keltner*, 147 F.3d 662, 669 (8th Cir. 1998)(multistate travel by the participants in furtherance of enterprise’s activities; RICO predicates committed in more than one state); *United States v. Pipkins*, 378 F.3d 1281, 1294-295 (11th Cir. 2004)(same).

⁵⁴ *United States v. Johnson*, 440 F.3d 832, 841 (7th Cir. 2006); *United States v. Cianci*, 378 F.3d 71, 98 (1st Cir. 2004); *United States v. Rodriguez*, 360 F.3d 949, 955 (9th Cir. 2004); *United States v. Riddle*, 249 F.3d 529, 536-37 (6th Cir. 2001).

⁵⁵ *United States v. White*, 116 F.3d 903, 925-26 (D.C.Cir. 1997); *United States v. Miller*, 116 F.3d 641, 673-74 (2d Cir. 1997).

⁵⁶ *Waucaush v. United States*, 380 F.3d 251, 256 (6th Cir. 2004).

III. Conspiracy

Conspiracy under subsection 1962(d) is

- (1) the agreement of
- (2) two or more
- (3) to invest in, acquire, or conduct the affairs of
- (4) a commercial enterprise
- (5) in a manner which violates 18 U.S.C. 1962(a), (b), or (c).⁵⁷

The heart of the crime lies in the agreement rather than any completed, concerted violation of the other three RICO subsections. In fact, unlike the general conspiracy statute, RICO conspiracy is complete upon the agreement even if none of the conspirators ever commit an overt act towards the accomplishment of its criminal purpose.⁵⁸ Moreover, contrary to the view once held by some of the lower courts, there is no requirement that a defendant commit or agree to commit two or more predicate offenses himself.⁵⁹ It is enough that the defendant, in agreement with another, intended to further an endeavor which, if completed, would satisfy all of the elements of a RICO violation.⁶⁰

IV. Consequences

The commission of a RICO violation exposes offenders to a wide range of criminal and civil consequences: imprisonment, fines, restitution, forfeiture, treble damages, attorneys fees, and a wide range of equitable restrictions.

A. Criminal Liability

RICO violations are punishable by fine *or* by imprisonment for life in cases where the predicate offense carries a life sentence, and by imprisonment for not more than 20 years in all other cases.⁶¹ Although an offender may be sentenced to *either* a fine *or* a term of imprisonment under

⁵⁷ “(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” 18 U.S.C. 1962(d).

⁵⁸ *Salinas v. United States*, 522 U.S. 52, 63 (1997); *United States v. Tocco*, 200 F.3d 401, 426 (6th Cir. 2000); *United States v. Harriston*, 329 F.3d 779, 783 (11th Cir. 2003); *United States v. Smith*, 413 F.3d 1253, 1265 (10th Cir. 2005).

⁵⁹ *Salinas v. United States*, 522 U.S. at 65-6; *United States v. Saadey*, 393 F.3d 669, 676 (6th Cir. 2005); *United States v. Cianci*, 378 F.3d 71, 90 (1st Cir. 2004); *United States v. Pipkins*, 378 F.3d 1281, 1288 (11th Cir. 2004) (“To prove that the defendants conspired to participate in an enterprise, the Government must show agreement on the overall objective or that the defendants agreed personally to commit two predicate acts”).

⁶⁰ *Salinas v. United States*, 522 U.S. at 65; *United States v. Fernandez*, 388 F.3d 1119, 1228 (9th Cir. 2004); *United States v. Warneke*, 310 F.3d 542, 547-48 (7th Cir. 2003); *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998).

⁶¹ 18 U.S.C. 1963(a).

the strict terms of the statute, the operation of the applicable sentencing guidelines makes it highly likely that offenders will face *both fine and imprisonment*.⁶² The maximum amount of the fine for a RICO violation is the greater of twice the amount of the gain or loss associated with the crime, or \$250,000 for an individual, \$500,000 for an organization.⁶³ Offenders sentenced to prison are also sentenced to a term of supervised release of not more than 3 years to be served following their release from incarceration.⁶⁴ Most RICO violations also trigger mandatory federal restitution provisions, *i.e.*, the RICO offense will involve a crime of violence, drug trafficking, or a crime with respect to which a victim suffers physical injury or pecuniary loss.⁶⁵ Moreover, property related to a RICO violation is subject to confiscation.⁶⁶

B. Civil Liability

RICO violations may result in civil as well as criminal liability. “Any person injured in his business or property by reason” of a RICO violation has a cause of action for treble damages and attorneys’ fees.⁶⁷ No prior criminal conviction is required.⁶⁸

Although the United States is apparently not a “person” that may sue for damages under RICO,⁶⁹ the term does include local governments,⁷⁰ state agencies,⁷¹ and foreign governments.⁷² On the

⁶² U.S.S.G. §2E1.1. Federal courts were at one time required to sentence an offender within the range provided by the United States Sentencing Guidelines, unless the court found that the case involved factors not sufficiently considered in the Guidelines, 18 U.S.C. 3553(b)(2000 ed.). The once mandatory Guidelines are now advisory, but continue to carry considerable weight, *United States v. Booker*, 543 U.S. 220, 264 (2005) (“The district courts, while not bound by the Guidelines, must consult those Guidelines and take them into account when sentencing”).

⁶³ 18 U.S.C. 1963(a), 3571.

⁶⁴ 18 U.S.C. 3583(a) (“The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor may include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment. . .”); 3559(a)(3). Although the language of the statute is discretionary, the Sentencing Guidelines require a term of supervised release in cases in which the term of imprisonment imposed is more than a year, U.S.S.G. §5D1.1(a).

⁶⁵ 18 U.S.C. 3663A. Restitution in other cases is discretionary, 18 U.S.C. 3663.

⁶⁶ 18 U.S.C. 1963(a) (“Whoever violates any provision of section 1962 . . . 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 (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. . .”).

⁶⁷ 18 U.S.C. 1964(c) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence 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”).

⁶⁸ *Sedima S.P.R.L. v. Imrex Co, Inc.*, 473 U.S. 479, 493 (1985); *Smith v. Husband*, 376 F.Supp.2d 603, 613 (E.D.Va. 2005).

⁶⁹ *United States v. Bonanno Organized Crime Family*, 879 F.2d 20, 21-7 (2d Cir. 1989); *Peia v. United States*, 152 F.Supp.2d 226, 234 (D.Conn. 2001).

⁷⁰ *Indiana ex rel. Carter v. Pastrick*, 384 F.Supp.2d 1261, 1266 (N.D.Ind. 2005); *City of Chicago Heights v. LoBue*, 841 F.Supp. 819, 822-23 (N.D.Ill. 1994); *County of Oakland v. City of Detroit*, 866 F.2d 839, 851 (6th Cir. 1989); *Frooks v. Town of Cortlandt*, 997 F.Supp. 438, 457 (S.D.N.Y. 1998); *City of New York v. Joseph L. Balkan, Inc.*, 656 F.Supp. 536, 541 (E.D.N.Y. 1987).

other hand, private parties may not bring a RICO suit for damages against the United States or other governmental entities.⁷³

In order to recover, the plaintiff must establish an injury to his or her business or property directly or proximately caused by the defendant's RICO violation.⁷⁴ The injury must involve a "concrete financial loss," a "mere injury to a valuable intangible property interest" such as a right to pursue employment will not do.⁷⁵ The courts agreed generally that section 1964(c) does not permit recovery for personal injuries since they are not injuries to "business or property,"⁷⁶ but they sometimes disagree on what constitutes an unqualified injury.⁷⁷ If the underlying violation involves subsection 1962(a), it is the use or investment of the income rather than the predicate offenses that must have caused the injury.⁷⁸ If the underlying violation involves subsection

(...continued)

⁷¹ *Illinois Department of Revenue v. Phillips*, 771 F.2d 312, 316-17 (7th Cir. 1985).

⁷² *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1358 (9th Cir. 1988); *European Community v. RJR Nabisco, Inc.*, 150 F.Supp.2d 456, 486-92 (E.D.N.Y. 2001); *Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc.*, 103 F.Supp.2d 134, 146-50 (N.D.N.Y. 2000). A RICO prosecution of a scheme to defraud the Canadian government of tax revenues does not constitute a derogation of the "revenue rule" that bars the enforcement of foreign tax laws, *Pasuantino v. United States*, 544 U.S. 349, 353 (2005).

⁷³ *Pedrina v. Chun*, 97 F.3d 1296, 1300 (9th Cir. 1996)(municipality); *McNeily v. United States*, 6 F.3d 343, 350 (5th Cir. 1993)(Federal Deposit Insurance Corp.); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 908-14 (3d Cir. 1991)(municipality); *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991)(Federal Insurance Administration); *Smith v. Babbitt*, 875 F.Supp. 1353, 1365 (D.Minn. 1995), *aff'd*, 100 F.3d 556 (8th Cir. 1996)(Indian tribal government); *McMaster v. State of Minnesota*, 819 F.Supp. 1429, 1434 (D.Minn. 1993), *aff'd*, 30 F.3d 976 (8th Cir. 1994)(state); *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002) (foreign governmental entity); *Donahue v. Federal Bureau of Investigation*, 204 F.Supp.2d 169, 173-74 (D.Mass. 2002); *Banks v. Dept. of Motor Vehicles*, 419 F.Supp.2d 1186, 1192 (C.D.Cal. 2006).

⁷⁴ 18 U.S.C. 1964(c); *Anza v. Ideal Steel Supply Corp.*, 126 S.Ct. 1991, 1998 (2006) (competitors, claiming Anza could lower prices because he failed to collect sales tax from cash customers and then covered the evasion by mail and wire fraud, did not suffer a direct or proximate RICO injury); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992)(Corporation, that reimbursed the customers of defaulting brokers following the defendant's alleged stock manipulation, did not suffer a direct or proximate RICO injury); see generally, Little, *Civil RICO and Standing: Anza v. Ideal Steel Supply Corp.*, CRS Report RS22470, *Civil RICO and Standing: Anza v. Ideal Steel Supply Corporation*.

⁷⁵ *Guerrero v. Gates*, 357 F.3d 911, 920 (9th Cir. 2004); *Diaz v. Gates*, 380 F.3d 480, 483-85 (9th Cir. 2004); *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991).

⁷⁶ *Evans v. City of Chicago*, 434 F.3d 916, 924-26 (7th Cir. 2006); *Diaz v. Gates*, 420 F.3d 897, 900-903 (9th Cir. 2005); *Hughes v. Tobacco Inst. Inc.*, 278 F.3d 417, 422 (5th Cir. 2001); *Hamm v. Phone-Poulenc Rorer Pharm., Inc.*, 187 F.3d 941, 954 (8th Cir. 1999); *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir. 1995); *Libertad v. Welch*, 53 F.3d 428, 437 (1st Cir. 1995); *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 918-19 (3d Cir. 1991); *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 643-44 (6th Cir. 1986); *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 515 (2d Cir. 1984); *McCormick v. City of Lawrence*, 325 F.Supp.2d 1191, 1209 (D.Kan. 2004); *cf.*, *Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1076 (D.C. Cir. 2001).

⁷⁷ *Evans v. City of Chicago*, 434 F.3d 916, 924-26 (7th Cir. 2006)(malicious prosecution injuries are personal and cannot provide the basis for a civil RICO suit); *Diaz v. Gates*, 420 F.3d 897, 900-903 (9th Cir. 2005)(false imprisonment injuries may provide the basis for a civil RICO suit).

⁷⁸ *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 264 (2d Cir. 2004), *rev'd on other grounds*, 126 S.Ct. 1991 (2006); *Churchill Village v. General Electric*, 361 F.3d 566, 574 (9th Cir. 2004); *Nolen v. Nucentrix Broadband Networks Inc.*, 293 F.3d 926, 929 (5th Cir. 2002); *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 778-79 n.6 (7th Cir. 1994)(citing cases for the proposition but noting that the Seventh Circuit had yet to take a position); *Bridges v. Blue Cross and Blue Shield Ass'n*, 935 F.Supp. 37, 43 (D.D.C. 1996); *BCCI Holdings (Luxembourg) Societe Anonyme v. Khalil*, 56 F.Supp.2d 14, 63 (D.D.C. 1999); *but see, Sadighi v. Daghighfekr*, 36 F.Supp.2d 279, 288 (D.S.C. 1999)(citing a disagreement among the circuits in footnote 9 of the opinion while observing that "[u]nder Fourth Circuit case law, plaintiffs have standing to sue if they allege that their injuries were either (1) proximately caused by (continued...)

1962(b), it is the access or control of the RICO enterprise rather than the predicate offenses that must have caused the injury.⁷⁹

While a criminal prosecution requires no overt act, the courts demand that RICO plaintiffs whose claim is based on a conspiracy under subsection 1962(d) prove an overt act since a mere agreement cannot be the direct or proximate cause of an injury.⁸⁰ Moreover, the overt act itself must constitute a predicate offense.⁸¹

Notwithstanding the apparent inability of the United States to sue for damages under RICO, the Attorney General may seek to prevent and restrain RICO violations under the broad equitable powers vested in the courts to order disgorgement, divestiture, restitution, or the creation of receiverships or trusteeships.⁸² This authority has been invoked relatively infrequently, primarily to rid various unions of organized crime and other forms of corruption.⁸³ There is some question

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the predicate acts underlying the §1962(a) violation, or (2) proximately caused by the investment and use of the illegally obtained income”).

⁷⁹ *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 830 (9th Cir. 2003).

⁸⁰ *Morganroth & Morganroth v. Norris, McLaughlin & Marcus*, 331 F.3d 406, 415 (3d Cir. 2003); *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 958-59 (7th Cir. 1996); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 387-88 (8th Cir. 1993).

⁸¹ *Beck v. Prupis*, 529 U.S. 494, 504-5 (2000); *Smith v. Berg*, 247 F.3d 532, 535 (3d Cir. 2001).

⁸² 18 U.S.C. 1964(“(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 orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper”).

“Ordinarily, the disgorgement of gains ill-gotten long in the past will not serve the goal of “preventing and restraining future violations unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose,” *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995). *United States v. Local 560*, 780 F.2d Cir. 267 (3d Cir. 1985); *Richard v. Hoechst Celanese Chemical Group, Inc.*, 355 F.3d 345, 354-55(5th Cir. 2003); in fact one circuit has concluded that disgorgement is not a remedy available under RICO under any circumstances, *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1197-1202 (D.C.Cir. 2005); see *Equity Up in Smoke: Civil RICO, Disgorgement, and United States v. Philip Morris*, 74 FORDHAM LAW REVIEW 2461 (2006).

⁸³ E.g., *United States v. Private Sanitation Industry Association*, 995 F.2d 375 (2d Cir. 1993); *United States v. Local 560*, 974 F.2d 315 (3d Cir. 1992); *United States v. Local 30*, 871 F.2d 401 (3d Cir. 1989); *United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers (IBT)*, 931 F.2d 177 (2d Cir. 1991).

The *Teamsters* case, perhaps the best known and most heavily litigated of these instances, has involved issues arising under the consent decree negotiated to settle the government’s RICO suit rather than issues as to the government’s prerogatives under civil RICO, *United States v. IBT*, 172 F.3d 217 (2d Cir. 1999); *United States v. IBT*, 170 F.3d 136 (2d Cir. 1999); *United States v. IBT*, 168 F.3d 645 (2d Cir. 1999); *United States v. Boggia*, 167 F.3d 113 (2d Cir. 1999); *United States v. IBT*, 156 F.3d 354 (2d Cir. 1998); *United States v. IBT*, 141 F.3d 405 (2d Cir. 1998); *United States v. IBT*, 120 F.3d 341 (2d Cir. 1997); *United States v. IBT*, 86 F.3d 271 (2d Cir. 1996); *United States v. IBT*, 19 F.3d 816 (2d Cir. 1994); *United States v. IBT*, 12 F.3d 360 (2d Cir. 1993); *United States v. IBT*, 3 F.3d 634 (2d Cir. 1993); *United States v. IBT*, 998 F.2d 1101 (2d Cir. 1993); *United States v. IBT*, 998 F.2d 120 (2d Cir. 1993); *United States v. IBT*, 986 F.2d 15 (2d Cir. 1993); *United States v. IBT*, 981 F.2d 1362 (2d Cir. 1992); *United States v. IBT*, 970 F.2d 1132 (2d Cir. 1996); *United States v. IBT*, 968 F.2d 1506 (2d Cir. 1992); *United States v. IBT*, 968 F.2d 1472 (2d Cir. 1992); *United States v. IBT*, 965 F.2d 15 (2d Cir. 1993); *United States v. IBT*, 964 F.2d 1224 (2d Cir. 1992); *United States v. IBT*, 964 F.2d 180 (2d Cir. 1992); *United States v. IBT*, 955 F.2d 171 (2d Cir. 1992); *United States v. IBT*, 950 F.2d 94 (2d Cir. 1991); *United States v. IBT*, 948 F.2d 98 (2d Cir. 1992); 931 F.2d 177 (2d Cir. 1991).

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whether private plaintiffs, in addition to the Attorney General, may seek injunctive and other forms of equitable relief.⁸⁴

On the procedural side, the Supreme Court has held that: (1) state trial courts of general jurisdiction have concurrent jurisdiction over federal civil RICO claims;⁸⁵ (2) under the appropriate circumstances parties may agree to make potential civil RICO claims subject to arbitration;⁸⁶ (3) the Clayton Act's four year period of limitation applies to civil RICO claims as well,⁸⁷ and the period begins when the victim discovers or should have discovered the injury;⁸⁸ and (4) in the absence of an impediment to state regulation, McCarran-Ferguson Act does not bar civil RICO claims based on insurance fraud allegations.⁸⁹

V. Constitutional Questions

Over the years various aspects of RICO have been challenged on a number of constitutional grounds. Most either attack the RICO scheme generally or its forfeiture component. The general challenges have been based on vagueness, ex post facto, and double jeopardy. Attacks on the constitutionality of RICO forfeiture have been grounded in the right to counsel, excessive fines, cruel and unusual punishment, and forfeiture of estate. While the challenges have been unsuccessful by and large, some have helped to define RICO's outer reaches.

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The United States has also sought to invoke it in its RICO litigation against various tobacco companies, *United States v. Philip Morris Inc.*, 396 F.3d 1190, 1191 (D.C.Cir. 2005).

⁸⁴ *NOW v. Scheidler*, 267 F.3d 687, 695-700 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003); *In re Managed Care Litigation*, 298 F.Supp.2d 1259, 1282-283 (S.D.Fla. 2003)(concluding that private RICO plaintiffs are entitled to equitable relief); *contra, Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1080-89(9th Cir. 1986); *In re Fredeman Litigation*, 843 F.2d 821, 828-30 (5th Cir. 1988); *Sedima, S.P.R.L. v. Imrex*, 741 F.2d 482, 489 n.20 (2^d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985); *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co., Inc.*, 221 F.3d 924, 927 n.2 (6th Cir. 2000); *Dan River v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *In re Tobacco/Government Health Care Costs Litigation*, 76 F.Supp.2d 5, 7 n.4 (D.D.C. 1999); *Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Ass'n, Inc.*, 802 F.Supp. 662, 671 (D.R.I. 1992); *Curley v. Cumberland Farms Dairy, Inc.*, 728 F.Supp. 1123, 1137-138 (D.N.J. 1990).

⁸⁵ *Tafflin v. Lavitt*, 493 U.S. 455, 458 (1990). An injured party may also have a cause of action under an applicable state "baby RICO" statute, citations appended.

⁸⁶ *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 242 (1987); *Pacificare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003).

⁸⁷ *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 156 (1987); *Klehr v. A.O.Smith Corp.*, 521 U.S. 179, 183 (1997). The Court also held that a plaintiff must have exercised due diligence to discover the violation before statute of limitations will be tolled because of the defendant's fraudulent concealment, *Klehr v. A.O.Smith Corp.*, 521 U.S. at 194, and that unlike the statute of limitations in criminal cases, a civil cause of action does not date from the "last predicate act" of the RICO violation, *Klehr v. A.O.Smith Corp.*, 521 U.S. at 186-87.

⁸⁸ *Rotella v. Wood*, 528 U.S. 549, 551 (2000); *Potomac Electric Power Co. v. Electric Motor and Supply, Inc.*, 262 F.3d 260, 266 (4th Cir. 2001); *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 244-50 (3^d Cir. 2001); *Indiana ex rel. Carter v. Pastrick*, 384 F.Supp.2d 1261, 1269-270 (N.D.Ind. 2005).

⁸⁹ *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999); *American Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.*, 367 F.3d 212, 230-32 (4th Cir. 2004); *Bankoklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1198-1100 (10th Cir. 1999); *LeBarre v. Credit Acceptance Corp.*, 175 F.3d 640, 642-43 (8th Cir. 1999).

A. General

1. Double Jeopardy

Even a sketchy description of RICO evokes double jeopardy and ex post facto questions. RICO rests on a foundation of other crimes. At a glance, double jeopardy might appear to block any effort to base a RICO charge on a crime for which the accused had already been tried. By the same token, ex post facto might appear to bar a RICO charge built upon a predicate offense committed before RICO was enacted or before the crime was added to the list of RICO predicates. On closer examination, neither presents insurmountable obstacles in most instances.

The Constitution's double jeopardy clause commands that no person "be subject for the same offense to be twice put in jeopardy of life or limb."⁹⁰ In general terms, it condemns multiple prosecutions or multiple punishments for the same offense. The Supreme Court has long adhered to the so-called "*Blockburger*" test under which offenses are considered the same when they have the same elements, i.e., unless each requires proof of an element not required of the other.⁹¹

RICO defendants have raised three double jeopardy arguments, none with much success. The courts have held that prosecution for a predicate offense does not bar prosecution for a RICO violation⁹² nor does it bar prosecution for both a RICO conspiracy and the substantive RICO violation which is the object of the conspiracy,⁹³ nor successive RICO prosecutions of the same defendant on charges of involving different predicate offenses, enterprises, or patterns.⁹⁴

2. Ex post facto

The ex post facto clauses preclude punishment of past conduct which was not a crime when it was committed, increased punishment over that which attended a crime when it was committed, and punishment made possible by elimination of a defense which was available when a crime was committed.⁹⁵ RICO ordinarily survives ex post facto attack because it is considered a continuing offense. As long as the pattern of racketeering activity straddles the date of legislative action, there is no ex post facto problem.⁹⁶

⁹⁰ U.S.Const. Amend.V.

⁹¹ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

⁹² *United States v. Marino*, 277 F.3d 11, 39 (1st Cir. 2002); *United States v. Coonan*, 938 F.2d 1553, 1566 (2d Cir. 1991); *United States v. Beale*, 921 F.2d 1412, 1437 (11th Cir. 1991); *United States v. Massino*, 311 F.Supp.2d 316, 318 (E.D.N.Y. 2004).

⁹³ *United States v. Kehoe*, 310 F.3d 579, 587-88 (8th Cir. 2002); *United States v. Marino*, 277 F.3d 11, 39 (1st Cir. 2002); *United States v. Diaz*, 176 F.3d 52, 115-16 (2d Cir. 1999); *United States v. Rone*, 598 F.2d 564, 569-71 (9th Cir. 1979); *United States v. Dionisio*, 415 F.Supp.2d 191, 195-200 (E.D.N.Y. 2006).

⁹⁴ *United States v. DeCologero*, 364 F.3d 12, 17-9 (1st Cir. 2004); *United States v. Urso*, 369 F.Supp.2d 254, 261-62 (E.D.N.Y. 2005).

⁹⁵ U.S.Const. Art.I, §9, cl.3; Art.I, §10, cl.1; *Collins v. Youngblood*, 497 U.S. 37, 52 (1990).

⁹⁶ *United States v. Harris*, 79 F.3d 223, 228-29 (2d Cir. 1996); *United States v. Caporale*, 806 F.2d 1487, 1516 (11th Cir. 1986).

The fact that the defendant may be adversely affected by a procedural change likewise does not trigger ex post facto concerns. Thus, when Congress amended RICO to permit the confiscation of substitute assets should the forfeitable property become unavailable, ex post facto did not preclude application of the new procedure to cases arising before the amendment, *United States v. Reed*, 924 F.2d 1014, 1016-17 (11th Cir. 1991); *United States v. Martenson*, 780 (continued...)

3. Vagueness

“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁹⁷ Vagueness became a more common constitutional object to RICO, after Justice Scalia and three other justices implied its vulnerability to such an attack.⁹⁸ Subsequent lower courts appear to have uniformly rejected the suggestion that RICO is unconstitutionally vague either generally or as applied to the facts before them.⁹⁹

B. Forfeiture

1. Eighth Amendment

RICO forfeitures can be severe. The Eighth Amendment supplies the constitutional bounds within which criminal sentences must be drawn. Under its directives, fines may not be excessive nor punishments cruel and unusual.¹⁰⁰ Any more precise definition becomes somewhat uncertain. A majority of the Supreme Court appears to believe that the Eighth Amendment’s cruel and unusual punishment clause forbids sentences which are “grossly disproportionate” to the seriousness of the crimes for which they are imposed.¹⁰¹ Prior to *Harmelin*, the lower courts felt that at some point RICO forfeitures might be so disproportionate as to constitute cruel and unusual

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F.Supp. 492, 495 (N.D.Ill. 1991).

⁹⁷ *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994), quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

⁹⁸ *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 255 (Scalia, J., concurring in the judgment) (“Four terms ago . . . we gave lower courts . . . four clues concerning the meaning of the enigmatic term ‘pattern of racketeering activity. . . . Today, four years and countless millions in damages and attorney’s fees later (not to mention prison sentences under the criminal provisions of RICO), the Court does little more than repromulgate those hints as to what RICO means It is, however, unfair to be so critical of the Court’s effort, because I would be unable to provide an interpretation of RICO that gives significantly more guidance concerning its application. . . . Today’s opinion has added nothing to improve our prior guidance, which has created a kaleidoscope of Circuit positions, except to clarify that RICO may additionally be violated when there is a ‘threat of continuity.’ It seems to me this increases rather than removes the vagueness”).

⁹⁹ *United States v. Keltner*, 147 F.3d 662, 667 (8th Cir. 1998); *United States v. Krout*, 66 F.3d 1420, 1432 (5th Cir. 1995); *Bingham v. Zolt*, 66 F.3d 553, 566 (2d Cir. 1995); *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1106-109 (6th Cir. 1995); *United States v. Oreto*, 37 F.3d 739, 752 (1st Cir. 1994); *United States v. Korando*, 29 F.3d 1114, 1119 (7th Cir. 1994); *Cox v. Administrator, U.S. Steel & Carnegie*, 17 F.3d 1386, 1398 (11th Cir. 1994); *United States v. Bennett*, 984 F.2d 597, 606 (4th Cir. 1993); *United States v. Dischner*, 974 F.2d 1502, 1509-510 (9th Cir. 1992); *United States v. Woods*, 915 F.2d 854, 862-64 (3d Cir. 1990).

¹⁰⁰ “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S.Const. Amend. VIII.

¹⁰¹ *Harmelin v. Michigan*, 501 U.S. 957 (1991), upheld the imposition of a state mandatory term of life in prison without the possibility of parole upon conviction for possession of more than 650 grams of cocaine. Of the nine Justices, two (Justice Scalia and Chief Justice Rehnquist) voted to affirm and would limit proportionality analysis to capital punishment cases; three others (Justices O’Connor, Kennedy and Souter) voted to affirm but pursuant to a proportionality analysis where the seriousness of the offense carried the day, 501 U.S. at 996; and the remaining four (Justices White, Marshall, Blackmun and Stevens) dissented in favor of a proportionality test placing greater emphasis on the comparative harshness of the penalty and a comparison with the penalties imposed for other crimes, 501 U.S. at 1009, 1027, 1028.

punishment.¹⁰² Perhaps understandably, especially in light of developments under the excessive fines clause, the argument seems to have been rarely pressed since *Harmelin*.¹⁰³

The Eighth Amendment's excessive fines clause is slightly more instructive. Historically, the clause was only infrequently invoked. The Supreme Court changed that when it identified the clause as one of the frontiers of permissible criminal forfeiture,¹⁰⁴ and indicated that the point at which a forfeiture becomes "grossly disproportionate to the gravity of the offense" is the appropriate line of demarkation.¹⁰⁵ The gravity of most RICO violations, however, would seem to weigh heavily against most excessive fines clause challenges.¹⁰⁶

2. First Amendment

Alexander also raised a First Amendment issue. The First Amendment guarantees the right of free speech and freedom of the press.¹⁰⁷ It generally precludes government prior restraint of expression.¹⁰⁸ In contrast to prior restraint, however, it generally permits punishment of the unlawful distribution of obscene material.¹⁰⁹ In the view of a majority of the Justices in *Alexander*, the application of RICO's provisions to confiscate the inventory of an adult entertain business as punishment for a RICO conviction based upon obscenity predicates does not offend the First Amendment.¹¹⁰

3. Right to the Assistance of Counsel

In two cases decided under the criminal forfeiture provisions of the federal drug law, the Supreme Court held that a criminally accused's Sixth Amendment right to the assistance of counsel does not invalidate statutory provisions which call for the confiscation of forfeitable property paid as attorneys' fees or which permit the court, upon a probable cause showing, to freeze assets which the accused had intended to use to pay attorneys' fees.¹¹¹ The same can be said of the RICO forfeiture provisions.¹¹²

¹⁰² *United States v. Busher*, 817 F.2d 1409, 1413-414 (7th Cir. 1987); *United States v. Feldman*, 853 F.2d 648, 663 (9th Cir. 1988); cf., *United States v. Vriner*, 921 F.2d 710, 712-13 (7th Cir. 1991) (criminal forfeiture under 21 U.S.C. 853).

¹⁰³ Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?* 53 UNIVERSITY OF PITTSBURGH LAW REVIEW 1 (1991).

¹⁰⁴ *Alexander v. United States*, 509 U.S. 544 (1993).

¹⁰⁵ *United States v. Bajakajian*, 522 U.S. 321, 334-37 (1998).

¹⁰⁶ See e.g., *United States v. Najjar*, 300 F.3d 466, 485-86 (4th Cir. 2002)(confiscation of \$2.76 million was not excessive in light of the seriousness of the offense and the extent of the wrong doing); *United States v. Segal*, 339 F.Supp.2d 1039, 1044-45 (N.D.Ill. 2004)(confiscation of \$30 million in proceeds and the defendant's 60% interest in a business enterprise was similarly not excessive); *Castro v. United States*, 248 F.Supp.2d 1170, 1183 (S.D.Fla. 2003); *United States v. Coleman Commercial Carrier, Inc.*, 232 F.Supp.2d 201, 204-5 (S.D.N.Y. 2002).

¹⁰⁷ "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S.Const. Amend.I.

¹⁰⁸ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *Alexander v. United States*, 509 U.S. at 550.

¹⁰⁹ *Ginzburg v. United States*, 383 U.S. 463, 464-65 (1966); *Smith v. United States*, 431 U.S. 291, 296 (1977).

¹¹⁰ *Alexander v. United States*, 509 U.S. at 550-58.

¹¹¹ *United States v. Monsanto*, 491 U.S. 600, 614-16 (1989); *Caplin & Drysdale v. United States*, 491 U.S. 617, 624-32 (1989).

¹¹² *United States v. Borromeo*, 954 F.2d 245, 249 (4th Cir. 1992); *In re Assets of Tom Billman*, 915 F.2d 916, 922 (4th Cir. 1990); *United States v. Wingarter*, 369 F.Supp.2d 799, 810-12 (E.D.Va. 2005).

4. Right to Jury Trial

At one time, the scant case law on point suggested that defendants enjoyed a statutory – not a constitutional – right to have a jury decide factual issues in a RICO forfeiture case, but that nevertheless the constitutional standard for waiver of the right applied.¹¹³ At least for criminal forfeitures in drug cases, the Supreme Court concluded that the right was indeed not constitutionally based, but that a voluntary waiver was sufficient even if made without full knowledge of the waiver’s consequences.¹¹⁴ After *Libretti* had been decided, the Court’s announced view of the role of the jury as a fact finder changed somewhat, first in *Apprendi*, then in *Blakely*, and finally in *Booker*.¹¹⁵ There the Court redefined the line between sentencing factors that the Constitution allows to be assigned to the court and factors which the it insists be found by the jury as a matter of right. Henceforth, “any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved by a jury beyond a reasonable doubt.”¹¹⁶ Dicta in *Booker* might be construed as an indication that property owners are still bound bound by the holding in *Libretti* – there is no constitutional right to have a jury decide factual questions in criminal forfeiture.¹¹⁷ Thus far, the lower courts appear to agree.¹¹⁸

5. Forfeiture of Estate

The “forfeiture of estate” argument was among the first constitutional challenges raised and dispatched. Article III, in its effort to protect against misuse of the law of treason, empowers Congress to set the punishment for treason but only with the understanding that “no attainder of treason shall work corruption of blood, or forfeiture.”¹¹⁹

Article III speaks only of treason, but due process would likely preclude this type of forfeiture of estate as a penalty for lesser crimes as well. RICO forfeiture, however, is not properly classified as a forfeiture of estate which attached to all of the defendant’s property regardless of the absence of any nexus between the property and the crime which triggered the forfeiture. RICO forfeiture is, by contrast, a “statutory” forfeiture which turns on the relationship of the property to the crime and consequently is not forbidden by Article III.¹²⁰

¹¹³ *United States v. Robinson*, 8 F.3d 418, 420-22 (7th Cir. 1993)(right “can only be waived voluntarily and knowingly”).

¹¹⁴ *Libretti v. United States*, 516 U.S. 29 (1995).

¹¹⁵ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).

¹¹⁶ *United States v. Booker*, 543 U.S. at 244.

¹¹⁷ “Most of the statute [(the Sentencing Reform Act)]is perfectly valid. See, e.g., 18 U.S.C. . . . 3554 (forfeiture)” *Id.* at 258. Section 3554 declares that “The *court*, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 [RICO] of this title . . . shall order . . . that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title. . . .” 18 U.S.C. 3554 (emphasis added).

¹¹⁸ *United States v. Hively*, 437 F.3d 752, 763 (8th Cir. 2006); *United States v. Fruchter*, 411 F.3d 377, 382-83 (2d Cir. 2005); *United States v. Rodriguez*, F.Supp.2d , (D.N.J. May 12, 2006).

¹¹⁹ U.S.Const. Art.III, §3, cl.2.

¹²⁰ *United States v. Thevis*, 474 F.Supp. 134, 140-41 (N.D.Ga. 1979); *United States v. Grande*, 620 F.2d 1026, 1037-39 (4th Cir. 1980).

Appendix A. Text of Rico Statutory Provisions

18 U.S.C. 1961 Definitions

As used in this chapter –

(1) “racketeering activity” means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in 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; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 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), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act

which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) 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, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, 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 alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) “person” includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) “enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

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

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

(7) “racketeering investigator” means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) “racketeering investigation” means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) “documentary material” includes any book, paper, document, record, recording, or other material; and

(10) “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. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. 1962
Prohibited activities

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

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

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. 1963
Criminal penalties

(a) Whoever 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

(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. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes –

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (1) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section –

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that –

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that 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

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to –

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to –

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (1), no party claiming an interest in property subject to forfeiture under this section may –

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(1)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or

interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant –

(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 described in paragraphs (1) through (5).

18 U.S.C. 1964 Civil remedies

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

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

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

except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence 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.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States..

18 U.S.C. 1965 **Venue and process**

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

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

(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, subpoenas 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 subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

18 USCA Sec. 1966, Expedition of actions

18 U.S.C. 1966 **Expedition of actions**

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

18 U.S.C. 1967 **Evidence**

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

18 U.S.C. 1968
Civil investigative demand

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

(b) Each such demand shall—

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

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

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

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

(c) No such demand shall—

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

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

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

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

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

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

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

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

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

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

(5) Upon the completion of—

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

(ii) any case or proceeding arising from such investigation,

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

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon

written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

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

(i) designate another racketeering investigator to serve as custodian thereof, and

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

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

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

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

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

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

Appendix B. Selected Bibliography

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Notes and Comments

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Appendix C. State Baby RICO Citations¹²¹

ARIZ.REV.STAT.ANN. §§13-2312 to 13-2317;
 CAL.PENAL CODE §§186 to 186.8;
 COLO.REV.STAT. §§18-17-101 to 18-17-109;
 CONN.GEN.STAT.ANN. §§53-393 to 53-403;
 DEL.CODE tit.11 §§1501 to 1511;
 FLA.STAT.ANN. §§895.01 to 895.09;
 GA.CODE ANN. §§16-14-1 to 16-14-15;
 HAWAII REV.STAT. §§842-1 to 842-12;
 IDAHO CODE §§18-7801 to 18-7805;
 IND.CODE ANN. §§35-45-6-1 to 35-45-6-2;
 IOWA CODE ANN. §§706A.1 to 706A.5;
 KY.REV.STAT. §506.120;
 LA.REV.STAT.ANN. §§15:1351 to 15:1356;
 MICH.COMP.LAWS ANN. §§750.159f to 750.159x;
 MINN.STAT.ANN. §§609.901 to 609.912;
 MISS.CODE §§97-43-1 to 97-43-11;
 NEV.REV.STAT. §§207.350 to 207.520;
 N.J.STAT.ANN. §§2C:41-1 to 2C:41-6.2;
 N.M.STAT.ANN. §§30-42-1 to 30-42-6;
 N.Y.PENAL LAW §§460.00 to 460.80;
 N.C.GEN. STAT. §§75D-1 to 75D-14;
 N.D.CENT.CODE §§12.1-06.1-01 to 12.1-06.1-08;
 OHIO REV.CODE §§2923.31 to 2923.36;
 OKLA.STAT.ANN. tit.22 §§1401 to 1419;
 ORE.REV.STAT. §§166.715 to 166.735;
 PA.STAT. ANN. tit.18 §911;
 R.I.GEN.LAWS §§7-15-1 to 7-15-11;
 TENN.CODE ANN. §§39-12-201 to 39-12-210;
 TEX.PENAL CODE §§71.01 to 71.05;
 UTAH CODE ANN. §§76-10-1601 to 76-10-1610;
 VA. CODE §§18.2-512 to 18.2-517;
 WASH.REV.CODE ANN. §§9A.82.010 to 9A.82.170;
 WIS.STAT.ANN. §§946.80 to 946.88.

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¹²¹ For a comparative analysis of the content of many of the state RICO provisions, see Blakey & Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"*, 43 VANDERBILT LAW REVIEW 851, 988-1011 (1990); see also Floyd, RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES (1998).

Several of the states that do not have "baby RICO" statutes have enacted provisions which enhance the penalties and provide procedural tools against various forms of commercialized criminal activity, frequently modeled after the federal drug kingpin statute, 21 U.S.C. 848, see e.g., ARK.CODE ANN. §§5-74-101 to 5-74-109 (criminal gangs, organizations or enterprises); ILL.COMP. LAWS ANN. ch.725 §§175/1 to 175/9 (narcotics racketeering); LA.REV.STAT.ANN. §§15:1351 to 15:1356 (narcotics racketeering); MD.CODE ANN. art.27 §286(g)(drug kingpin); VA.CODE §18.2-248 (drug kingpin).