CIVIL USES OF RICO

A Fitting Stepchild of the Broadest Criminal Statute in American History

By Harvey A. Silverglate and Charles W. Rankin

Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. §§1961-1968, commonly known as RICO (an acronym for Racketeer Influenced and Corrupt Organizations), has become an increasingly popular weapon in the hands of the Department of Justice. In 1975, evidently troubled that a potent tool added to the government's arsenal in the Nixon years was gathering dust, the Justice Department sent a team of attorneys around the country to lecture United States Attorneys about the utility of the statute. Local prosecutors had evidently been disturbed by the statute's complexity and seemingly unlimited scope of coverage.[1]

Following that tour, the Government's use of RICO increased dramatically. The rise in popularity of the criminal provisions of RICO has been paralleled by increasing reliance on the civil cause of action of Title IX, 18 U.S.C. §1964. RICO is an extremely powerful weapon in the hands of the government and private civil plaintiffs. As such, it is of utmost concern to the criminal defense bar. Indiscriminate civil applications of RICO will lead to further abusive distortions of the Act. This in turn may provide an opportunity to limit by judicial interpretation and/or legislative reform, the range of activities to which RICO can be directed.

Expansive and abusive uses of RICO's civil provisions could prompt much-needed restrictions on the statute's overall scope. The reasons are elegantly simple. The scope of the civil and criminal provisions is essentially the same. Any definition controlling the scope of the criminal applications would apply to the scope of civil applications, both governmental and private, and *vice versa*. Once the civil uses of RICO are fully recognized by the civil plaintiffs' bar, large numbers of treble-damage RICO lawsuits will begin clogging the federal courts -- lawsuits which previously would have been routine state causes of action growing out of rather ordinary commercial disputes. Then the parade of horribles unleashed by this nightmarish piece of legislation will undoubtedly be more fully appreciated.

Section 1964 sets out the right both of the United States and of private parties to bring a civil action against those who violate the criminal provisions of RICO. Subsection (b) gives the United States a civil cause of action to secure equitable relief upon a showing that the defendant has violated §1962. The court is authorized to issue a broad range of orders, including, but not limited to, an order for the defendant to divest himself of an interest acquired in violation of §1962 and an order barring the defendant from engaging in the profession or industry in which the violation was committed.

Subsection (c) of §1964 authorizes anyone injured as a result of violations of §1962 to sue for treble damages, costs and attorneys' fees. (A criminal *conviction or even an indictment,* however, is not a necessary prerequisite to success in a civil RICO action.) Subsection (d) of §1964 states that a judgment of conviction in any criminal proceeding under § 1962 operates with collateral effect in any subsequent civil action filed by the government.[2]

What constitutes a violation of § 1962? There are essentially three ways to violate this section. Subsection (a) prohibits the use of any income derived from a "pattern of racketeering activity" to acquire an interest in an "enterprise" affecting interstate commerce. Subsection (b) prohibits the use of a "pattern of racketeering activity" to acquire an interest in an "enterprise". Subsection (c) prohibits the operation of an "enterprise" via the use of a "pattern of racketeering activity. Finally, subsection (d) prohibits a conspiracy to violate subsection (a)-(c).

A "pattern of racketeering activity" is defined as two or more acts of "racketeering activity" within the prior ten years, at least one of which occurred after the effective date of the statute in 1970. "Racketeering activity" is defined to mean any act involving murder, robbery, dealing in drugs, or a variety of other crimes, which is "chargeable" under state law, or any act which is "indictable" under Federal law concerning interstate theft, securities fraud, mail or wire fraud, dealing in drugs, or a variety of other crimes. "Enterprise" is defined to include any individual, corporation or other entity, or a union or a group of individuals associated in fact although not a legal entity.

Interpretation of the meaning of "enterprise" is currently the focus of considerable debate among scholars, courts and attorneys. The Supreme Court recently granted *certiorari* (at the government's urging) in *United States v. Turkette,* 632 F.2d 869 (1st Cir. 1980) to consider whether a group of individuals associated in fact for wholly illegal purposes can constitute an enterprise as

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1 *See United States* v. *Anderson,* 626 F.2d 1358, 1364 n. 8 (8th Cir. 1980).

2 Exclusion of private parties from §1964 (d) may apply a congressional intent to preclude collateral estoppel in favor of private plaintiffs. This interpretation is supported by Congress' rejection of earlier bills that specifically permitted collateral estoppel in all civil suits. *See* H. 19586, 91st Cong. 2d Sess. (1970); S.2049, 90th Cong., 1st Sess. (1967).

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sed in §1962(c). (For a discussion of ıe merits of that debate, *see* last month's ısue of *The Champion.*) Later in this rticle we address the impact of this ebate on civil RICO.

Thus to establish a case under the ivil RICO provisions, the plaintiff must how that the defendant has committed wo acts within the past ten years at least ne of which occurred after the effective ate of the statute which are chargeable r indictable under a variety of state or ederal laws, and that the defendant ither used the pattern of racketeering ctivity to operate or acquire an interest ı the enterprise. Once that showing has een made, the government, as a civil laintiff, can seek a court order that the efendant divest whatever interest is ıvolved, that the defendant be barred rom future participation in a similar ind of enterprise, that the enterprise self be dissolved, or that whatever ther equitable remedies are normally t the disposal of a Federal District ourt be granted. A private plaintiff an recover three-fold damages, costs nd attorneys' fees upon the above howing, if he or she is a "person injured ı his business or property."

While there are few reported deci- ions under the civil RICO section, the otential for abuse seems clear from ıose cases which have been decided ome of which resulted in written but nreported opinions). Even though the laintiff must prove two acts which are hargeable or indictable under an array f state and federal laws, courts have eld that a civil action can go forward in he absence of a criminal charge or con- one must perform at least two acts which are chargeable or indictable under a variety of criminal laws. Thus, through the use of civil proceedings, a preponderance of the evidence standard, civil discovery, equitable remedies, amendable pleadings and appealable rulings, the government now has new ways to impose harsh sanctions upon a civil defendant, against whom it may not be able to establish a criminal case. Indeed, the government may avoid the grand jury process by using, instead, a civil investigative demand. One court has even held that the statute's specific authorization for preliminary injunctions in civil cases allows the government to secure temporary relief without having to show the irreparable injury which would otherwise be required.

Thus far, civil cases have been brought under RICO alleging violations of the gambling, mail fraud, securities and commodities laws. A quick look at the cases which have been brought under the criminal section reveal the potential abuses of civil RICO, because civil RICO can be employed at the behest of the government or a private plaintiff whenever a criminal violation can be said to have occurred, even if the criminal violation is neither prosecuted nor proven.

Widespread application of civil RICO would seem to be limited only by the imagination of a prosecutor or plaintiff's attorney. Thus, defendants have been charged with violations of the criminal section of RICO for conduct involving bribery, labor law violations, drug cases, tax fraud, securities violations, mail and wire fraud, counterfeiting, weapons offenses, and even the against a minority religion. The claim is cloaked in a variety of common law and statutory causes of action -- fraud, breach of fiduciary duty, unfair trade practices, breach of contract, violation of the Fair Labor Standards Act. In addition, plaintiff has appended a RICO claim, which purports to be a class action, and a variety of other alleged predicate crimes. A motion to dismiss as to all of the counts, including RICO, is presently pending before the District Court. If RICO can be used against a church which has many thousands of adherents worldwide, it is difficult to envision a situation where the statute can no longer be used.

One does not have to be very old to understand that the tactics used by the Government to harass or suppress political or other dissidents have changed over time. In the 1940s and 1950s the Smith Act and various other so-called anti-subversive laws were used to imprison leaders of radical movements *as well as* to limit their acceptability to the public. In the 1950s and 60s congressional and other legislative investigating committees made wide use of their own subpoena power to force people to either "rat" on their colleagues or else face imprisonment for contempt. In the late 1970s the Nixon Justice Department made widespread use of the grand jury as a tool to harass various movements for social change. Given the wide range of uses to which RICO has been put in recent years, it is not at all inconceivable that it will all too soon become a new device for furthering the presently building repressive atmosphere of the 1980s. Few tools, after all, which have their genesis in the supposed fight against any *legitimate* business organization. The issue has been addressed in a number of other Circuits. Only the Eighth Circuit, in *United States* v. *Anderson,* 626 F.2d 1358 (8th Cir. 1980), has agreed with the First Circuit's interpretation. The Second, Fourth, Fifth, Sixth, Seventh and Ninth Circuits have come out the other way, holding that an association of individuals for wholly illegal purposes can be an "enterprise" within the meaning of RICO.

Turkette is perhaps not the best case factually for the Supreme Court to consider with regard to this issue. the overreaching by the government in this case is not as clear as in a number of other reported decisions. On the other hand, *Turkette* does illustrate the extent to which RICO can be stretched. Turkette was the only individual who was named in each of the nine counts of the indictment. He alone linked together the Government's alleged case, which charged Turkette and a number of other defendants with such diverse crimes as illegal trafficking in drugs, committing arson and insurance fraud, influencing the outcome of state trials, and bribing police officers. These charges were tied together with a count charging a violation of §1962(d), the RICO conspiracy statute.

What would a reversal of *Turkette* mean? As outlined in Barry Tarlow's article in last month's *The Champion,* a reversal in *Turkette* would mean that RICO can be used by the government to prosecute virtually any defendant who is accused of violating a state law, thus altering the Federal-State balance which has existed in the country for over 200 years. In addition, it would authorize

ction for the predicate offenses, and at each element of the predicate criminal acts need be proven by only a preponderance of the evidence. Indeed, one court has held that an acquittal in state court on similar charges arising from e same scheme does not bar a subsequent RICO prosecution using as predate crimes for RICO purposes the tivities which were the subject of the ate prosecution. *United States v. Frumento*, 409 F.Supp.136 (E.D.Pa. 1976).[3]

Congress has justified this use of ICO as a civil remedy by reference to perficial parallels in the anti-trust ea. It is true that the criminal provions of the anti-trust laws have their vil counterparts. And yet this comparon fails to recognize that anti-trust ws are essentially regulatory in nature d address economic problems. RICO, the other hand, is fundamentally a atutory scheme addressed to problems criminal justice -- as Congress put it, e difficulty of prosecuting and conicting "organized crime" figures. In ite of the acknowledged impact that rganized crime" may have on the conomy, Congress has chosen a crimial scheme to address the problem.

Because of this difference, civil antiust violations are provable without ference to criminal provisions -- that , one need not prove a violation of the iminal anti-trust statute in order to cover civil damages. On the other and, the civil action in RICO is congent upon proof of what is in effect a ouble layer of criminal violations. First 1964 states that a civil action is availale when the criminal provision of RICO, operation of such activities as a mobile home park, prostitution rings, and card games.

The dissenting members of the House Judiciary Committee were prescient in their fears of the abuses to which RICO would be subject, when they stated:

> Indeed, another section of the title -- Section 1964 (c) -- provides invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce by authorizing private damage suits. A competitor need only raise the claim that his rival has derived gains from two games of poker, and, because this title prohibits even the 'indirect use' of such gains - a provision with tremendous outreach - litigation is begun. What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish -- destruction of the rival's business.

1970 U.S. Code cong. & Ad. News 4007, 4083. *Compare United States v. Morris*, 532 F.2d 436 (5th Cir. 1976), where the court upheld the conviction under RICO of the organizer of a series of allegedly rigged card games.[4]

The authors have been associated with the defense of a suit asserting a civil claim for violation of the RICO statute. *Van Schaick* v. *Church of Scientology of California, et al.*, No. 79-2491-G (D. Mass., filed December 1979). The case demonstrates perfectly the absurd lengths to which RICO can be pushed. In *Van Schaick* the plaintiff is asserting essentially a "brainwashing" claim "organized crime", are likely to remain restricted to their original purpose. One merely has to look to the uses and abuses of paid, threatened, cajoled, and relocated informants and witnesses to understand the myriad targets who can get caught, often innocently, in the latest law enforcement snares and fads.

It would be possible, for example, for the Government to use civil RICO to enjoin the activities of an anti-nuclear power group such as the Clamshell Alliance in New England, claiming that the group members have conspired to violate various laws (e.g., extortion, obstruction of justice, interference with commerce) and have used various means of interstate commerce between Massachusetts and New Hampshire to effectuate that conspiracy as part of an illegal enterprise in violation of §1962. While the government might have a problem convincing a jury that the Clamshell Alliance should be declared a part of "organized crime", the Justice Department may well be able to convince a Federal judge that the precedents support the application of RICO to such activities, because of the expansive judicial readings of the statute in recent years.[5]

One of the major RICO concerns which must confront the criminal defense bar is pending before the United States Supreme Court at the moment. On January 26, 1981 the Court granted *certiorari* in *United States* v. *Turkette, supra*. The First Circuit in *Turkette* held that the term "enterprise," as used in RICO, does not include organizations whose activities are wholly unrelated to the imposition of the severe sanctions which a RICO conviction carries, upon proof of the commission of two crimes under state law unrelated in any way to infiltration by "organized crime" into legitimate business enterprises. (That, after all, was the purpose of RICO, according to its legislative history.)

A reversal of *Turkette* would pose even more severe dangers for criminal defendants when the Government chooses to employ civil RICO in situations in which it does not think it can obtain a criminal conviction. There it

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3 By citing a case like *Frumento*, or similar outrageous decisions, the authors do not wish to imply that these cases accurately interpret the law. We cite them to give readers an idea of the extent to which RICO can be carried. Their validity should be challenged at every opportunity.

4 The court's opinion in *United States* v. *Turkette, supra*, posed an interesting hypothetical:

> Although it is an extreme example, there could be a RICO prosecution against a prostitute for two acts of solicitation within the ten-year period, if she travels interstate in plying her trade. 632 F.2d at 904.

5 This scenario, in fact, dovetails nicely with Senator Strom Thurman's announced intention to reincarnate the old Un-American Activities Committee in the form of an anti-terrorism committee. It also coincides with the increasingly apparent abuses of the Federal Witness Protection Program, which program was enacted as part of the Organized Crime Control Act of 1970.

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will merely have to convince a judge rather than a jury, using a lower standard of proof, and having available civil discovery mechanisms. While a violation of civil RICO does not carry a jail term, the violation of an injunction, or a reporting requirement under civil RICO, does carry the threat of jail for contempt. Furthermore, an order that a defendant no longer engage in his or her profession is quite a severe sanction. Indeed, such an order by the Securities and Exchange Commission to an investment advisor is presently being challenged before the Supreme Court in *Steadman* v. *Securities and Exchange Commission,* 603 F.2d 1126 (5th Cir. 1979), *cert. granted* 100 S.Ct. 1850 (1980). There, defendant claims that the SEC can issue such an order only if its finding is based upon a clear and convincing showing rather than a mere preponderance of the evidence. It does not appear that such an issue has been litigated under civil RICO, but those courts which have addressed the standard of proof in civil cases under RICO have said that a preponderance of the evidence standard applies.

Thus, a reversal in *Turkette* will mean that whenever the government does not feel it can secure a criminal conviction, it can use civil RICO to secure an injunction ordering the dissolution of an association in fact which has wholly illegal ends. The ancient maxim that equity will not enjoin the commission of a crime will be discarded, and those persons whom the government would like to convict, but cannot, will nevertheless be subject to substantial penalties. The private plaintiffs will add a RICO count to virtually any claim involving fraud or commercial litigation. For instance, a civil action claiming securities fraud could well be dressed up with the addition of a RICO count, thereby entitling a prevailing plaintiff to treble damages as well as attorneys' fees and costs. There being no requirement that the entity be connected to organized crime, it is conceivable that major corporations in the United States that are found to have violated securities or other regulatory laws, have also violated RICO and thus can be deemed "racketeer influenced" to "corrupt organizations." Whatever one thinks of America's leading corporations, it can hardly be supposed that those members of Congress who voted for RICO in 1970 suspected that they were authorizing our courts to declare the leading monopolies to be organized criminals! It can be expected that a rash of such claims will be brought in the near future. An article appeared in a recent issue of *Legal Times of Washington,* describing civil RICO as a weapon for business victims. One of the sessions of an up-coming seminar sponsored by the *New York Law Journal* includes a session devoted to civil RICO. It is only now dawning on both corporate counsel and lawyers who prosecute such suits, that RICO can be a potent tool in business litigation. Indeed, one can imagine the reaction of corporate defendants as well as the media when RICO charges are added to an otherwise unremarkable complaint for securities fraud.

Because the predicate crimes upon which the pattern of racketeering activ-

Regardless of the Supreme Court's decision in *Turkette,* it does not appear that RICO will be so limited as to curtail the potential use of civil RICO in business litigation. Indeed, as the statute is presently worded, it may be that the only way the Court could eliminate such broad claims would be to read into the statute a requirement that in order to be actionable, the activities must be connected in some way to "organized crime." That, of course, might run afoul of the constitutional prohibition against punishing people for their status. In addition, there is no recognized definition of "organized crime," in the statute or elsewhere.

Given this difficulty of narrowing the uses of the current statute to exclude such abuses of civil RICO, it is possible that big business interests will pressure the Congress to modify RICO to exclude their defalcations from the parameters of the statute -- civil and criminal. Indeed, in today's era it is likely that Congress will be more responsive to such entreaties, than to the entreaties of criminal defendants or the criminal defense or civil liberties bar.

There seem to be several ways in which the statute could be narrowed by the Congress. Obviously, the Congress could require more convincing proof that a criminal pattern of long duration has emerged than the mere commission of two predicate crimes within the prior ten years. In addition, it could narrow the range of predicate crimes so as to exclude those which are more unlikely to be unconnected to "organized crime." In addition, Congress might be well advised to require that a criminal con-

ing. As a result, it was alleged, the owner defaulted on a mortgage that was held by the defendant, thereby giving the defendant the opportunity to foreclose on the mortgage and gain ownership of the casino. Shortly after the conviction, the alleged victim of the fraud, who was the government's key (and virtually only) witness to the alleged fraud, accused the government of reneging on its promise to use the criminal forfeiture provision of RICO to seize the casino and return it to the witness upon Parness' conviction.

Needless to say, situations such as that suggested by the *Parness* case, can be expected to proliferate. Some prosecutors may be counted on to promise witnesses the fruits of subsequent forfeiture actions, or to assist in a separate private civil RICO action, after a criminal conviction is obtained. Even where no promise is made, a witness may well see much to be gained from aiding the government in its criminal case. Such uses and abuses of the criminal forfeiture and civil treble-damage RICO provisions threaten to open up a whole new method to induce a prospective government witness to testify in a criminal RICO case. And the nature and existence of inducements for that witness' testimony may be very hard for defense counsel to discover or to use as impeachment material at the criminal trial. In short, such uses of RICO threaten to eviscerate much of the *Brady* rule requiring the government to disclose any exculpatory or impeachment evidence in the government's possession.

CONCLUSION

The criminal forfeiture and private civil provisions of the RICO statute

normal protections afforded criminal defendants will be beyond their reach, because of the contortions the courts have undergone in order to transform a statute aimed at "organized crime" into a weapon against those whom the government would like to, but cannot under more traditional notions and methods, convict.

To date, the Justice Department has provided few guidelines for the civil use of RICO. The only caution in the United States Attorneys' Manual is that care should be taken in using civil RICO, because defendants would then have use of civil discovery mechanisms in order to learn about, and possibly depose, government informants. With the expanded use of RICO that would follow a reversal in *Turkette,* one can expect further use by the Government of civil RICO, especially in those cases where informants are not involved or where their use is not admitted.

There is a second issue that concerns civil RICO which will remain unaffected by the Supreme Court's decision in *Turkette.* This is the possibility that ity is based can be so diverse, and may consist of only the alleged fraud combined with a couple of phone calls or letters, it is possible that RICO will become a standard count in any business litigation. Indeed, it is likely to become a standard weapon for disgruntled competitors or investors.

The civil RICO provisions provide an artful way for business competitors to bring a garden variety state commercial law dispute in federal court. In addition, the possibility of federalizing much of state commercial and tort law raises the possibility of evading short statutes of limitations. As the court noted in *United States* v. *Turkette, supra,* 632 F.2d at 902:

> If RICO can be applied to any series of criminal acts as the government urges, it would encompass, *inter alia,* the commission within a ten-year period of any two aspects of gambling affcting interstate commerce, thus allowing the complete circumvention of the gambling statute's tightly drawn limitations.

viction be secured before any civil action is allowed. While that may run counter to the recent trend in Congress to allow private damage actions to play an important role in the enforcement of regulatory schemes, (*compare* Title VII of the Civil Rights Act of 1964), it would provide a substantial safeguard against some of the abuses to which RICO has been and can be put.

Of course, such an amendment to the law could produce a nightmare of yet another sort, as disgruntled competitors first take their gripes to eager prosecutors, offering their testimony in a criminal case, in the hopes of then reaping their just reward -- trebled -- on the civil side.

Even under the current law, precisely such a situation appears to have occurred. In *United States* v. *Parness,* 503 F.2d 430 (2d Cir. 1974), the first reported appellate opinion broadly construing the statute, the court upheld a criminal conviction where the defendant was alleged to have defrauded the owner of a gambling casino by having refused to pay the owner monies belonging to the owner which the defendant was hold-

pose a substantial threat of devastating and multiple punishments for potential civil defendants as well as those whose conduct may make them criminally liable. These onerous provisions threaten the defendant with bankruptcy and with prohibitions against his or her earning a living. They might well be used to deprive a defendant of the resources to mount an adequate defense, and they might provide dangerous financial incentives to prospective government witnesses.

Fortunately, perhaps, these provisions also threaten to clog federal court dockets with thousands of essentially business tort/civil damage actions under RICO, and threaten the well-being of thousands of companies and businesspeople who might be counted on to add their weight to the rising chorus of criticism of this ill-considered, poorly-drafted, and Draconian statute. Meanwhile, however, the criminal practitioner must keep his or her eye on the forfeiture and civil provisions of RICO, since those provisions pose a serious threat to the life and property of the defendant and potential defendant.

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(137) ***People of the State of Illinois vs. Alvin Moses Abrams***
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Punishment: Arbitrarily imposed
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Statute: Vague and ambiguous in violation of due process and equal protection
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(138) ***Gary L. Silvernail vs. State of Washington***
(Harvey Grad)
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(Petition for Writ of Certiorari)
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