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RICO: An Abridged 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. Despite 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 that Congress felt characterized the conduct of organized crime, no matter who actually engages in them.

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

In simple terms, RICO condemns

(1) any person

(2) who

(a) uses for or 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) the forfeiture of any property acquired through a RICO violation and of any property interest in the enterprise involved in the violation, (b) imprisonment for not more than 20 years, or for life if one of the predicate offenses carries such a penalty, and/or (c) 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 ($500,000 for organizations). RICO has generally survived constitutional challenges, although its forfeiture provisions are subject to an excessive fines clause analysis and perhaps a 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 often criticized and, at one time, commentators urged Congress to amend its provisions. 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) provisions as part of the Organized Crime Control Act of 1970.[1] Despite 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 that Congress felt characterized the conduct of organized crime, no matter who actually engages in them.

RICO builds on other crimes. It enlarges the civil and criminal consequences of the patterned commission of other state and federal offenses (otherwise known as predicate offenses or racketeering activity), making it a crime to be a criminal, under certain circumstances.

In simple terms, RICO condemns

(1) any person

(2) who

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(b) acquires or maintains an interest in, or
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(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.

RICO violations subject the offender to a range of criminal penalties: (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. RICO shares predicate offenses with the federal money laundering statute and to a limited extent with the Travel Act, so that conduct constituting a RICO violation or a RICO predicate offense violation may also trigger criminal liability under the Travel Act and money laundering provisions. Federal law also features a kind of RICO-enterprise's "hitman" offense that outlaws committing various crimes of violence at the behest of a RICO enterprise.

RICO violations may also subject the offender to civil liability. The courts may award anyone injured in his 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.

The RICO provisions also provide (1) for service of process in RICO criminal and civil cases, and for venue in civil cases; (2) for expedited judicial action in certain RICO civil cases brought

[1] This report is an abridged version of CRS Report 96-950, RICO: A Brief Sketch, by Charles Doyle, without the footnotes, attributions, citations to authority, or appendixes found in the parent version.

by the United States; (3) for in camera proceedings in RICO civil cases initiated by the United States; and (4) for the Department of Justice's use of RICO civil investigative demands. RICO prosecutions and civil actions have been attacked on a host of constitutional grounds and have generally survived.

II. A Closer Look at the Elements

A. Any person

Any person may violate RICO. 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. Although the "person" and the "enterprise" must be distinct in the case of a subsection 1962(c) violation (a person, employed by an enterprise, conducting the 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. Conversely, 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.

Even though governmental entities may constitute a corrupted RICO enterprise or in some instances the victims of a RICO offense, they are not considered "persons" capable of committing a RICO violation either because a governmental entity does not have *mens rea* capacity or by virtue of sovereign immunity.

B. Conduct

1. Invest or Use: RICO addresses four forms of illicit 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. "The essence of a violation of §1962(a) is not commission of predicate acts but investment of racketeering income." Section 1962(a), which has been described as the most difficult to prove, has several elements. Under its provisions, it is unlawful for (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) an enterprise in or affecting commerce.

The "person," the pattern of predicate offenses, 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." The person must have committed usury or a pattern of predicate offenses or aided and abetted in their commission, have received income that would not otherwise have been received as a result, and used those proceeds to acquire or operate an enterprise in or whose activities have an impact on interstate or foreign commerce. That is, "[t]o state a claim under 18 U.S.C. § 1962(a), Plaintiffs must allege that: (1) 'the Defendants derived income [through the collection of an unlawful debt; [and] (2) the income was used or invested, directly or indirectly, in the establishment or operation; (3) of an enterprise; (4) which is engaged in or the activities of which affect interstate or foreign commerce.'"

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.

As in the case of subsection 1962(a), the "person" and the "enterprise" may be one and the same. There must be a nexus between the predicate offenses and the acquisition of control. 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 unnecessary. In summary as one court explained, "To establish a violation of § 1962(b), Plaintiffs musts allege that: '(1) the Defendants engaged in [collection of an unlawful debt]; (2) in order to acquire or maintain, directly or indirectly; (3) any interest or control over an enterprise; (4) which is engaged in, or the activities of which affect interstate or foreign commerce.'"

3. Conduct of Affairs: Subsection 1962(c) makes it unlawful for (1) any person; (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.

Subsection 1962(c) is the most common substantive basis for RICO prosecution or civil action. Although on its face subsection 1962(c) might appear to be 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. A corporate entity and its sole shareholder, however, are sufficiently distinct for purposes of subsection 1962(c).

The Supreme Court has identified a managerial stripe in the "conduct or participate in the conduct" element of subsection 1962(c) under which only those who direct the operation or management of the enterprise itself satisfy the "conduct" element. 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. Conviction requires neither an economic predicate offense nor a predicate offense committed with an economic motive.

4. 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).

The heart of the crime lies in the agreement rather than any completed, concerted violation of the other three RICO subsections. Unlike the general conspiracy statute, RICO conspiracy is complete upon the agreement, even if none of the conspirators ever commit an overt act toward the accomplishment of its criminal purpose. 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. 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. In some circuits, both the government and private litigants may be required to prove the existence of a RICO qualified enterprise.

A conspirator is liable not only for the conspiracy but for any foreseeable substantive offenses committed by any of the conspirators in furtherance of the common scheme, until the objectives of the plot are achieved, abandoned, or the conspirator withdraws. The statute of limitations for a RICO conspiracy runs until the scheme's objectives are accomplished or abandoned, or until the defendant withdraws. As a general rule, "[t]o withdraw from a conspiracy, an individual must take some affirmative action either by reporting to authorities or communicating his intentions to his coconspirators." The individual bears the burden of showing he has done so.

C. Pattern of Racketeering Activity

1. Predicate Offenses: The heart of most RICO prohibitions is a pattern of racketeering activity, that is, the patterned commission of two or more designated state or federal crimes such as murder, kidnapping, arson, gambling, bribery, extortion, robbery, dealing in obscene material, or dealing in controlled substances.

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. 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.

2. 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 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 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."

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."

iii. Continuity: The law recognizes continuity in two forms, pre-existing ("closed-ended") and anticipated ("open-ended"). The first is characterized by "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." The second exists when a series of related predicates has begun and, but for intervention, would be a threat to continue in the future. The Supreme Court has characterized a pattern extending over a period of time but which posed no threat of reoccurrence as a pattern with "closed-ended" continuity; and a pattern marked by a threat of reoccurrence as a pattern with "open-ended continuity."

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.

Whether the threat of future predicate activity is sufficient to recognize an "open-ended" pattern of continuity depends upon the nature of the predicate offenses 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." The threat "is generally presumed when the enterprise's business is primarily or inherently unlawful."

D. Collection of an Unlawful Debt

Collection of an unlawful debt may trigger RICO criminal and civil liability in either of two ways. First, each of the substantive RICO offenses is predicated on either "a pattern of racketeering activity" or upon the "collection of an unlawful debt." Collection of an unlawful debt appears to 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. The predicate covers only the collection of usurious debts or unlawful gambling debts.

Second, the collection of an unlawful debt, when coupled with the threat of harm, constitutes an extortionate credit transaction (loan sharking), a separate criminal offense. This criminal offense falls within the definition of racketeering activity and thus as a predicate offense may trigger RICO liability *when* part of a "pattern of racketeering activity."

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." The enterprise may be devoted to entirely legitimate ends or to totally corrupt objectives. It may be governmental as well as nongovernmental. As noted earlier, an entity may not serve as both the "person" and the "enterprise" whose activities are conducted through a pattern of racketeering activity for a prosecution under subsection 1962(c). No such distinction is required, however, for a prosecution under either subsection 1962(a) (investing the racketeering activity proceeds in an enterprise) or subsection 1962(b) (acquiring or maintaining an enterprise through racketeering activity) violations. Even under subsection 1962(c), a corporate entity and its sole shareholder are sufficiently distinct to satisfy the "enterprise" and "person" elements of a subsection (c) violation.

As for "associated in fact" enterprises, the Supreme Court in *Boyle* rejected the suggestion that such enterprises must be "business-like" creatures, having discernible hierarchical structures, unique modus operandi, chains of command, internal rules and regulations, regular meetings regarding enterprise activities, or even a separate enterprise name or title. The statute demands only "that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."

"Although the evidence establishing an enterprise and a pattern of racketeering activity 'may in particular cases coalesce,' the two elements themselves remain 'at all times' distinct.

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. An enterprise that orders supplies and transports its employees and products in interstate commerce is "engaged in interstate commerce" for purposes of RICO, as is an enterprise that uses telephones, the mail, or internet communications. Generally, the impact of the enterprise on interstate or foreign commerce need only be minimal to satisfy RICO requirements. Where the predicate offenses associated with an enterprise have an effect on interstate commerce, the enterprise is likely to have an effect on interstate commerce. However, "where the enterprise itself [does] not engage in economic activity, a minimal effect on commerce" may not be enough.

III. RICO Abroad

Generally, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. … When a statute gives no clear indication of an extraterritorial application, it has none." The Supreme Court in *RJR Nabisco, Inc.* provided guidance on the application of this general presumption to RICO. The Court held that RICO's criminal prohibitions apply abroad when they are grounded on a predicate offense that has extraterritorial application, but that RICO's civil liability provision applies only to injuries suffered domestically.

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, *or* by imprisonment for not more than 20 years in all other cases. Although an offender may be sentenced to *either* a fine *or* a term of imprisonment under 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. 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. Offenders sentenced to prison are also sentenced to a term of supervised release of not more than three years to be served following their release from incarceration. Most RICO violations also trigger mandatory federal restitution provisions; that is, one of the RICO predicate offenses will be a crime of violence, drug trafficking, or a crime with respect to which a victim suffers physical injury or pecuniary loss. Finally, property related to a RICO violation is subject to confiscation.

Even without a completed RICO violation, committing any crime designated a RICO predicate offense opens the door to additional criminal liability. It is a 20-year felony to launder the proceeds from any predicate offense (including any RICO predicate offense) or to use them to finance further criminal activity. Moreover, the proceeds of any RICO predicate offense are subject to civil forfeiture (confiscation without the necessity of a criminal conviction) by virtue of the RICO predicate's status as a money laundering predicate.

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. No prior criminal conviction is required, except in the case of certain security fraud based causes of action.

Liability begins with a RICO violation under subsections 1962(a), (b), (c), or (d). If the underlying violation involves subsection 1962(a) (use of predicate-offense-tainted proceeds to acquire an interest in an enterprise), it is the use or investment of the income rather than the predicate offenses that must have caused the injury.

If the underlying violation involves subsection 1962(b) (use of predicate offenses to acquire an enterprise), it is the access or control of the RICO enterprise rather than the predicate offenses that must have caused the injury.

If the underlying violation involves subsection 1962(c) (use of the patterned commission of predicate offenses to conduct the activities of an enterprise), it is the use of the patterned commission of the predicate offenses to operate the enterprises' activities that must have caused the injury.

If the underlying violation involves subsection 1962(d) (conspiracy to violate subsections 1962(a), (b), or (c)), the injury must flow from the conspiracy. Although a criminal conspiracy prosecution under subsection 1962(d) requires no overt act, RICO plaintiffs whose claim is based on a conspiracy under subsection 1962(d) must prove an overt act that is a predicate offense or one of the substantive RICO offenses, since a mere agreement cannot be the direct or proximate cause of an injury.

To recover, a plaintiff must establish an injury to his or her business or property directly and proximately caused by the defendant's RICO violation. The presence of an intervening victim or cause of the harm is fatal. A couple of lower federal appellate courts "have identified in [*Holmes*, *Anza*, and *Hemi*] three functional factors" that may foretell the absence of proximate cause under RICO. "These are (1) 'concerns about proof' because the less direct an injury is the more difficult it becomes to ascertain the amount of the plaintiff's damages attributable to the violation, as distinct from other independent factors; (2) concerns about admissibility and the avoidance of multiple recoveries; and (3) a societal interest in deterring illegal conduct and whether that interest would be served in a particular case." Thus, "a link between the RICO predicate acts and plaintiff's injuries that is 'too remote,' 'purely continent,' or 'indirect' is insufficient to show proximate cause." The courts agree generally that personal injuries may not form the basis for recovery, since they are not injuries to "business or property."

"Fraud in the sale of securities" is a RICO predicate offense. However, the Private Securities Litigation Reform Act amended the civil RICO cause of action to bar suits based on allegations of fraud in the purchase or sale of securities. In other private civil RICO cases, Rule 9(b) of the Federal Rules of Civil Procedure demands that plaintiffs plead allegations of fraud with particularity.

Although the United States is apparently not a "person" that may sue for treble damages under RICO, the term does include state and local governmental entities. On the other hand, private parties have enjoyed scant success when they have sought to bring a RICO suit for damages against the United States or other governmental entities. Nor in most instances have the courts been receptive to RICO claims based solely on allegations that the defendant aided and abetted commission of the underlying RICO violation.

Notwithstanding the inability of the United States to sue for treble 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. The government has invoked this authority relatively infrequently, primarily to rid various unions of organized crime elements and other forms of corruption. There is some question whether private plaintiffs, in addition to the Attorney General, may seek injunctive and other forms of equitable relief for RICO violations.

On the procedural side, RICO's long-arm jurisdictional provisions authorize nationwide service of process. In addition, the Supreme Court has held that: (1) state trial courts of general jurisdiction have concurrent jurisdiction over federal civil RICO claims; (2) under the appropriate circumstances, parties may agree to make potential civil RICO claims subject to arbitration; (3) in the absence of an impediment to state regulation, the McCarran-Ferguson Act does not bar civil RICO claims based on insurance fraud allegations; and (4) the Clayton Act's four-year period of

limitation applies to civil RICO claims as well, and that the period begins when the victim discovers or should have discovered the injury.

V. Violent Crimes in Aid of Racketeering (VICAR)

Violence in aid of racketeering (VICAR), under 18 US.C. §1959 is a series of RICO-related federal proscriptions that ban committing, attempting to commit, or conspiring to commit, any of several specific violent state or federal predicate offenses with an eye to a reward from a RICO enterprise. "To support a VICAR conviction, the government must show: '(1) that the criminal organization exists; (2) that the organization is a racketeering enterprise; (3) that the defendants committed [or attempted or conspired to commit] a violent crime; and (4) that they acted for the purpose of promoting their position in [or gaining entrance to] the racketeering enterprise.'"

The list of predicate state and federal offenses consists of: murder; kidnapping; maiming; assault with a deadly weapon; assault resulting in serious bodily injury; threat to commit a crime of violence; attempt or conspiracy to commit a predicate offense. The penalties for a VICAR violation turn upon the nature of the predicate offense: murder—death or life imprisonment; kidnapping—any term of years or life; maiming—not more than 30 years' imprisonment; assault with a deadly weapon—not more than 20 years' imprisonment; assault resulting in serious bodily injury—not more than 20 years' imprisonment; threat to commit a crime of violence—not more than 5 years' imprisonment; attempt or conspiracy to commit a predicate offense (other than a threat)—not more than 10 years' imprisonment (murder or kidnapping); not more than 3 years' imprisonment (maiming or assault). Accomplices face the same sanctions.

VICAR uses the RICO definition of "racketeering activity" and the RICO description of "enterprise," but VICAR does not define murder or any of the other predicate offenses. The omission introduces uncertainty as to whether the predicate offenses should be defined by reference to federal law, the law of jurisdiction that provides the predicate offense, the common law, or some generic definition reflecting the consensus of U.S jurisdictions.

VICAR "'requires that an animating purpose of the defendant's action was to maintain or increase his position' in the gang," a requirement that may be satisfied by a defendant's position of "shooter" in the gang, by obligations imposed by virtue of membership in gang, or by expectations of a leader of an enterprise. That purpose, however, need not be the sole purpose or even the main purpose.

Juveniles convicted of murder in aid of racketeering have sometimes challenged their sentences on grounds of Eighth Amendment limitations. In *Miller*, the Supreme Court held that the Eighth Amendment's ban on cruel and unusual punishments precludes a mandatory sentence of life imprisonment without any possibility of parole for an offense the defendant committed while a juvenile. However, Congress has largely abolished parole, and the VICAR provision states that murder "shall be" punished by one of two sentences—death or life imprisonment. The Fifth Circuit resolved the issue under a similarly worded statute by concluded that in the case of juveniles the language establishes alternative maximum penalties and "provides discretion to the sentencing judge to sentence anywhere between no penalty and the maximum penalty." Most recently, the Supreme Court in *Jones v. Mississippi* observed that a juvenile who commits a homicide when under the age of 18 may be sentenced to life imprisonment without the possibility of parole as long as the sentencing authority did so as a matter of discretion and might have imposed a less severe sentence. A number of other lower federal courts have rejected *Miller* protection claims from over-aged VICAR murder defendants.

The Eighth Amendment also cabins sentencing authority in capital cases. It forbids imposing the death penalty upon juveniles; execution of the mentally "retarded"; and forbids sentencing to

death those convicted of felony-murder who neither killed, attempted to kill, nor intended to kill. In *United States v. Savage*, the Third Circuit upheld a sentence of death for a drug dealer convicted of RICO conspiracy, twelve counts of murder in aid of racketeering, conspiracy to commit murder in aid of racketeering, witness retaliation, and fire bombing. Savage, who ordered the firebombing that killed his intended victim and five other occupants of the house, argued unsuccessfully that the *Enmund* felony-murder limitation should be extended to accomplices who incur liability by operation of the transferred intent doctrine.

VI. 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.

A. General

1. Legislative Authority Under the Commerce Clause: The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," and "to make all Laws which shall be necessary and proper for carrying to Execution" that authority. The powers which the Constitution does not confer upon the federal government, it reserves to the states and the people, U.S. CONST. amend. X. Although RICO deals only with enterprises "engaged in, or the activities of which affect, interstate or foreign commerce," some have suggested that RICO has been applied beyond the scope of Congress's constitutional authority to legislate under the commerce clause. The courts have yet to agree.

2. Double Jeopardy: Even a general 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." In general terms, it condemns multiple prosecutions or multiple punishments for the same offense. The bar on multiple punishments is a precautionary presumption. Unless a contrary intent appears, it presumes that Congress does not intend to inflict multiple punishments for the same misconduct. Nevertheless, the courts have concluded that Congress did intend to authorize "consecutive sentences for both predicate acts and the RICO offense," as well as for both the substantive RICO offense and the RICO conspiracy to commit the substantive RICO offense.

The bar on multiple prosecutions is more formidable. For it, 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, that is, unless each requires proof of an element not required of the other. In the RICO context, the courts have held that the Double Jeopardy Clause does not bar successive RICO prosecutions of the same defendants on charges of involving different predicate offenses, enterprises, or patterns. They have been more receptive to double jeopardy concerns in the case of successive prosecutions of the same enterprise. There, they have invoked a totality of the

circumstances test which asks: "(1) the time of the various activities charged as parts of [the] separate patterns; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the activities took place under each charge." The Supreme Court's confirmation in *Gamble v. United States* of the continued validity of the dual sovereign doctrine makes clear that the Double Jeopardy Clause does not preclude successive state-federal prosecutions.

3. Ex post facto: The ex post facto clauses preclude (1) punishment of past conduct which was not a crime when it was committed, (2) increased punishment over that which attended a crime when it was committed, and (3) punishment made possible by elimination of a defense which was available when a crime was committed. Yet because RICO offenses are thought to continue from the beginning of the first predicate offense to the commission of the last, a RICO prosecution survives ex post facto challenge even if grounded on pre-enactment predicate offenses as long as the pattern of predicate offenses straddles the date of legislative action. Moreover, as time goes on, prosecutions are less likely to rely on pre-RICO enactment predicate offenses.

4. 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." Vagueness became a more common constitutional object to RICO, after Justice Scalia and three other Justices implied its vulnerability to such an attack. 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.

5. Cruel and Unusual Punishment: The Eighth Amendment's Cruel and Unusual Punishment Clause precludes imposition or execution of punishment that is disproportionate to the crime of conviction. It accordingly bars imposition of a *mandatory* sentence of life imprisonment without the possibility of parole for a homicide committed when the accused was under 18 years of age, but not if the sentencing authority has the *discretion* impose a less severe sentence.

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. Any more precise definition becomes somewhat uncertain. When presented with the issue in *Harmelin*, a majority of the Supreme Court appeared 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. Prior to *Harmelin*, the lower courts felt that at some point RICO forfeitures might be so disproportionate as to constitute cruel and unusual punishment. Perhaps understandably, especially in light of developments under the Excessive Fines Clause, the argument seems to have been rarely pressed since *Harmelin*.

The Eighth Amendment's Excessive Fines Clause jurisprudence follows the same path and is slightly more instructive. Historically, the clause was only infrequently invoked. The Supreme Court changed that when it noted that the clause marks one of the boundaries of permissible RICO criminal forfeiture. In *Bajakajian*, the Court explained that forfeiture offends the Excessive Fines Clause when it is "grossly disproportionate to the gravity of the offense." Looking to *Bajakajian*, lower courts "weigh a number of factors in determining whether a forfeiture was grossly disproportional, including: (1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of criminal activity; (3) the relationship between the

charged crime and other crimes; and (4) the harm caused by the charged crime. . . ."). Although the gravity of most RICO violations would seem to weigh heavily against most excessive fines clause challenges, at least one circuit holds that the appropriate excessive fines analysis must include consideration of the impact of confiscation upon the property owner's livelihood. One federal district court has found the confiscation of a motorcycle gang's trademark of its logo would constitute an excessive fine in light of the other sanctions imposed upon the gang and First Amendment implications.

2. First Amendment: Forfeiture may raise First Amendment issues. The First Amendment guarantees the right of free speech and freedom of the press. It generally precludes government prior restraint of expression. In contrast to prior restraint, however, it generally permits punishment of the unlawful distribution of obscene material. In the view of a majority of the Justices in *Alexander*, the application of RICO's provisions to confiscate the inventory of an adult entertainment business as punishment for a RICO conviction based upon obscenity predicates does not offend the First Amendment.

The district court in *Mongol Nation*, however, rejected a proposed preliminary forfeiture order for the confiscation of the trademark covering a motorcycle gang's logo. Although the gang had been convicted of substantive and conspiracy RICO violations, the court held that the proposed order would violate the First Amendment's protections of expression and association.

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 of forfeitability, to freeze assets which the accused had intended to use to pay attorneys' fees. The same can be said of the RICO forfeiture provisions. The Sixth Amendment right to the assistance of counsel of choice does preclude the pre-trial restraint of untainted property needed to retain and compensate counsel, but does not require post-conviction access to confiscated substitute assets.

4. Right to Jury Trial: The Supreme Court concluded in *Libretti* that a property owner had no right to have a jury decide factual disputes in a forfeiture case, because forfeiture was a sentencing matter and the Sixth Amendment right to jury trial did not apply to sentencing questions. 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*. In *Booker* the Court redefined the line between sentencing factors that the Constitution allows to be assigned to the court and factors that 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 to a jury beyond a reasonable doubt." Dicta in *Booker* might be construed as an indication that property owners are still bound by the holding in *Libretti*—there is no constitutional right to have a jury decide factual questions in criminal forfeiture. The lower courts appear to agree.

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."

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. Forfeiture of estate occurs, when as a consequence of an offense, all of an

offender's property is subject to confiscation, 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 the due process corollary of Article III.

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