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# "On the Waterfront": RICO and Labor Racketeering

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*Labor racketeering in America is a pervasive, persistent problem not easily controlled by conventional criminal statutes. The authors examine the applicability of the Racketeer Influenced and Corrupt Organizations statute (RICO) to the problem of labor racketeering, and look at the recent case of United States v. Scotto as an example of the Act's application in this area. The authors conclude that to the extent that it is used appropriately and with discretion, RICO provides the flexibility to be an important law enforcement tool against labor racketeers.*

"Trucking, construction, and waterfront entrepreneurs have been persuaded, for labor peace, to countenance gambling, loan sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business so, too, it cannot be tolerated here."<sup>1</sup>

## I. INTRODUCTION: THE CHALLENGE OF LABOR RACKETEERING

Labor racketeering, the use of union power for personal benefit, has been aptly characterized as a pervasive and dreaded disease, a "cancer that almost destroyed the American trade union movement."<sup>2</sup> The McClellan Committee in the 1950's uncovered systematic racketeering in the Butchers, Bakers, Distillery Workers, Operating Engineers, Carpenters, Textile Workers, Hotel and Restaurant Employees, and Teamsters Unions, among others.<sup>3</sup> Of the fifty-eight persons arrested at the 1957 Apalachin conference, twenty-two were involved in "labor or labor-management relations."<sup>4</sup> Law enforcement officials report that, at least in some localities, organized crime's misuse of

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1. S. Rep. No. 617, 91st Cong., 1st Sess. 78 (1969).

2. D. DUBINSKY & A. RASKIN, DAVID DUBINSKY: A LIFE WITH LABOR 145 (1977).

3. Hutchinson, *The Anatomy of Corruption in Trade Unions*, 8 INDUSTRIAL RELATIONS 136 (1969).

4. R. KENNEDY, THE ENEMY WITHIN 228 (Popular Library ed. 1960). The Apalachin meeting, held in upstate New York in 1951, has been described as a "conclave of the high chiefs of the mob." A. SCHLESINGER, ROBERT KENNEDY AND HIS TIMES, 175 (1978).

union power has multiplied since the Apalachin meeting,<sup>5</sup> and Attorney General Benjamin Civiletti estimated that 300 union locals "are severely influenced by racketeers."<sup>6</sup>

The tribute exacted by labor racketeers is reflected in higher prices to the consuming public. The social cost of union corruption, however, cannot be counted solely in dollars and cents. The public inconvenience occasioned by illicit strikes and work slowdowns, the violence that frequently punctuates the operation of labor rackets, especially where organized crime is involved,<sup>7</sup> and the loss of union democracy as a treasured value must also be recognized. Most important are the long-term effects of labor racketeering on the nation's overall well-being. Reputable firms may be completely driven from racket-infested industries,<sup>8</sup> and those that stay necessarily compromise their business ethics. Racketeering undermines public confidence in the collective bargaining system and jeopardizes the reputations of all honest trade unionists. The persistence of racketeering in certain segments of the economy (transportation and construction, for instance) advertises an apparent structural flaw in our political institutions,<sup>9</sup> and is, as stated by Mr. Civiletti, "a very serious national problem."<sup>10</sup>

This article will examine the phenomenon of labor racketeering in America. Part I A examines the most common forms of contemporary labor racketeering, misuse of fringe benefit funds, "sweetheart" contracts, strike insurance schemes, and other attempts to reduce competition in industry. The article next examines an important statutory weapon used against this problem, the Racketeering Influenced and Corrupt Organization statute, and looks at the recent case of *United States v. Scotto* as an example of the statute's application against labor racketeering activities.

#### A. LABOR RACKETEERING

Despite the revelations of the McClellan Committee,<sup>11</sup> the traditional labor rackets—fund misuse, sweetheart deals, and strike insurance—continue to operate. The primary developments of the last twenty years involve merely an increased sophistication by labor racketeers in the conduct of these rackets and a recognition that union power can serve to promote a variety of licit and illicit syndicate activities.

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5. See, e.g., *Labor Management Racketeering: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 9, 77 (1978) [hereinafter cited as *1978 Hearings*]; IIT RESEARCH INSTITUTE, *A STUDY OF ORGANIZED CRIME IN ILLINOIS* 220 (1971) (labor racketeering now "the prime activity" of organized crime in East Saint Louis) [hereinafter cited as *ILLINOIS*].

6. *1978 Hearings*, *supra* note 5, at 9.

7. See, e.g., *N. GAGE, MAFIA, U.S.A.* 329-30 (1972) (two A & P store managers killed, and several A & P outlets burned, when company resisted racketeers' demands to market their detergent soap).

8. See, e.g., *ILLINOIS*, *supra* note 5 at 221; *N.Y. Times*, Feb. 9, 1975, § A at 29, col. 1.

9. An Assistant District Attorney concluded his summation in a recent racketeering prosecution by asking for a verdict "that lets the [victims] of this world know that it is America, a verdict which lets the [defendant Teamster officials] know that they are not a government unto themselves." *N.Y. Times*, May 20, 1979, § A, at 37, col. 6.

10. *1978 Hearings*, *supra* note 5, at 9.

11. *L. VELIE, LABOR U.S.A.* 198 (1959).

### 1. Fringe Benefit Fund Misuse

The great increase in fringe benefit remuneration in the last twenty years and the resulting increase in labor pension, health and welfare trust funds has made the potential for racketeering substantial. There are approximately 75,000 union locals in the United States,<sup>12</sup> and many locals maintain more than a single benefit fund. The Teamsters organization controls more than a thousand funds, with total assets of \$9 billion.<sup>13</sup> Their Central States Pension Fund, which investigations have shown to be the favorite bank of organized crime, contains more than a billion dollars.<sup>14</sup> Although some corrupt unionists still steal members' dues,<sup>15</sup> it is, as a practical matter, unnecessary; the opportunities are greater and the risks slighter in manipulating welfare and pension funds.

Benefit funds derive their assets primarily from employers, in amounts determined by the collective bargaining agreement. While in principle, income is invested and the total assets are used to benefit the membership, this is not always the case. Corrupt trustees may draft the governing trust agreement to keep legitimate pay-out well below income. It is a common practice in the pension fund area to keep the number of pensions that "vest" at approximately ten percent.<sup>16</sup> Racketeers in a New York mason tenders union found a better way: they took the checks earmarked for the welfare fund and cashed them.<sup>17</sup> The rank and file were too intimidated to complain.

Disposition of the accumulated surplus is accomplished through a variety of devices. Payments may be made to lawyers, accountants, or "consultants" for fictitious services, or for the purchase of goods intended for the exclusive use of fund racketeers.<sup>18</sup>

Misuse of investment discretion is, however, the major conduit for diverting union funds into racketeer pockets. These illicit loans are of two types. First are those intended primarily as income for the racketeers. Sometimes these loans constitute simple embezzlement, circuitous ways of distributing spending money to fund insiders. The borrower functions as a "bag man," and the loan is never repaid.<sup>19</sup> More commonly, the borrower is solvent and well-intentioned, but the racketeer exacts a commission, or kickback, for arranging the deal.<sup>20</sup> The second type of loan is designed primarily

12. 1978 Hearings, *supra* note 5, at 9 (statement of Benjamin Civiletti).

13. J. KWITNY, *VICIOUS CIRCLES* 159 (1979).

14. D. MOLDEA, *THE HOFFA WARS* 289 (1978).

15. See 1978 Hearings, *supra* note 5, at 95.

16. ILLINOIS, *supra* note 5, at 181. See L. VELIE, *supra* note 11, at 202-04; J. KWITNY, *supra* note 13, at 161-65.

17. NEW YORK STATE COMMISSION OF INVESTIGATION, *An Investigation of Racketeer Activities in Mason Tenders' Union Locals in the New York Metropolitan Area*, ELEVENTH ANNUAL REPORT 233-40 (1970) [hereinafter cited as ELEVENTH ANNUAL REPORT]. Mason tenders, or hod carriers, do the heavy manual labor on construction sites, supplying bricks and mortar to the more skilled craftsmen.

18. See 1978 Hearings, *supra* note 5, at 94.

19. See, e.g., NEW YORK STATE COMMISSION OF INVESTIGATIONS, *Report of an Investigation Concerning the Infiltration and Financial Investments by Organized Crime Elements in Legitimate Businesses and the Improper Use of Union Welfare Funds*, SEVENTEENTH ANNUAL REPORT, 353-73 (1975) [hereinafter cited as SEVENTEENTH ANNUAL REPORT].

20. Anthony "Tony Pro" Provenzano, who took over New Jersey Teamsters Local 560 in 1961 after the murder of incumbent Tony Castellito, was sentenced to four years in prison "for conspiring to split a \$230,000 kickback on a \$2.3 million loan from his local's pension funds." Provenzano's co-defendant was Anthony Bentro, the principal in a Wall Street investment firm. Wall St. J., July 12, 1978, at 45, col. 2.

to underwrite the speculations of the borrower. While the fund racketeer may demand a kick-back, the transaction is better understood as a contribution to capital, or even as a gift. Favored insiders, moreover, tend to have little difficulty in securing the desired loan.<sup>21</sup>

## 2. The "Sweetheart" Contract

While the underlying crime in labor-management collusion varies in specific cases from bribery to extortion, the economic nexus in all these sweetheart deals is the low price, not the supply, of labor. Labor-management collusion is most pervasive in the construction industry,<sup>22</sup> with trucking a close second.<sup>23</sup> Illicit payments may also be made to union representatives for the privilege of using non-union labor,<sup>24</sup> and for not organizing workers within the union's jurisdiction.<sup>25</sup>

A more sophisticated use of the sweetheart arrangement enables the employer to choose with whom he will negotiate, rather than dealing with the officials his employees select. The consequences are clearly beneficial to both employer and the employee negotiator he selects, and the potential for personal gain is not lost on organized crime. Use of the "racket" unionist is also advantageous to the employer: once contractual relations are established between the employer and the union, rival legitimate unions are ordinarily barred from organizing activity for three years.<sup>26</sup> Labor law is thus sometimes more effective than an army of professional sluggers.

## 3. Strike Insurance

While the strike threat has increasingly been used by organized crime as a means to advance licit and illicit syndicate enterprises, both professionals and amateurs in a number of industries continue to profit from the sale of labor peace for cash. For example, in a continuing Justice Department investigation into "all aspects of illegal activity" on the docks, Fred Field, general organizer for the International Longshoreman Association (ILA) and Presi-

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21. A 1977 audit of the Culinary Workers Pension Fund revealed that over 60% of the Funds' \$43 million was lent to Morris Shenker. Shenker also owed the Teamsters \$164 million at mid-1976, and \$23.5 million to Pipefitters Local 562. N.Y. Times, March 4, 1977, § A at 10, col. 1. Shenker operates the Dunes Hotel and Casino, and was also attorney and confidant of Jimmy Hoffa. L.A. Times, April 20, 1977, at 22, col. 1.

22. See, e.g., Washington Post, May 13, 1978, at 1, col. 1 (builders paid \$4.50 per hour to truckers on the job site where prevailing rate was \$7.00 per hour); ELEVENTH ANNUAL REPORT, *supra* note 17, at 224-25 (contractors skip benefit payments to members by paying off union officers).

23. See J. KWITNY, *supra* note 13, at 174 (trucking executives estimate that 80% of the truckers in the New York metropolitan area "are receiving pay and benefits below the National Market Freight Standard").

24. See, e.g., N.Y. Times, Nov. 25, 1969, at 34, col. 4 (by paying to use non-union help, builders saved \$1.3 million); Wall St. J., March 28, 1973, at 12, col. 3 (furriers' union officers received \$35,000 to allow unionized manufacturers to sub-contract with non-union shops).

25. N.Y. Times, Sept. 24, 1970, at 54, col. 1 (Laborers Union business manager accepted \$16,500 "loan" from employer in return for not organizing employer's workers).

26. This rule is referred to as the contract-bar rule. See American Seating Co., 106 NLRB 250 (1953); AMERICAN BAR ASSOCIATION, SECTION OF LABOR RELATIONS LAW, THE DEVELOPING LABOR LAW, 167-69 (C. Morris ed. 1971).

dent of the New York District Council, was convicted in 1977 for extorting \$124,500 from the United Brands Company.<sup>27</sup> Witnesses testified that Field received \$500 for each shipload of bananas unloaded during walkouts, and \$35,000 for insuring labor peace in 1974.<sup>28</sup> Among the union leaders and shipping executives indicted as a result of that probe are Anthony Scotto (President of ILA Local 1814) and Anthony Anastasio (Executive Vice President of Local 1814).<sup>29</sup>

Strike insurance has also surfaced since the McClellan hearings in the meat retailers industry,<sup>30</sup> the building services,<sup>31</sup> the garment trades,<sup>32</sup> and, of course, the trucking industry,<sup>33</sup> which share a similar economic vulnerability to delay.

While payments for labor peace are a factor in many industries, they are a nation-wide institution in the construction industry. In fact, the only relevant development in the industry since the turn of the century has been an increase in contractor vulnerability due to the cost inflation of walkouts.<sup>34</sup>

Particularly significant to investigators is the increasingly sophisticated method of payment for strike insurance. No longer is cash received in the booth of a hotel bar.<sup>35</sup> Today, with varying degrees of expertise, payments are camouflaged among the countless checkbook transactions of the victim's business. A common device is the "phantom" employee, in which a victim pays strike insurance to a racketeer through his payroll system.<sup>36</sup> Although frequently effective, careless racketeers may render this technique perilous; for example, the head of a mason tender's local was paid for 111 hours in a single week;<sup>37</sup> David Kaye, chief steward of the McCormick Place Teamsters, was on 15 payrolls simultaneously, and one day was paid for 66 hours of work.<sup>38</sup>

#### 4. Racketeering in Licit Business

The modern racketeer enjoys a competitive advantage in licit businesses through illicit practices, including the misuse of union power. Control of a union and its assets allows the new mobster to manipulate the supply and cost of labor to his own businesses, and more importantly, to those of his competitors.

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27. Wall St. J., Dec. 5, 1977, at 19, col. 1.

28. N.Y. Times, Sept. 24, 1977, § A, at 24, col. 2.

29. N.Y. Times, Jan. 18, 1979, § A, at 1, col. 2. The Scotto indictment is considered in Part IV of this article as an example of the application to the problem of labor racketeering of the Racketeer Influenced and Corrupt Organizations Chapter of the Organized Crime Control Act of 1970. [Hereinafter referred to as RICO], 18 U.S.C. §§ 1961-68 (1976). See note 177 *infra*.

30. N.Y. Times, March 25, 1969, § A, at 38, col. 2.

31. N.Y. Times, July 28, 1977, § B, at 5, col. 3.

32. Wall St. J., Oct. 16, 1975, at 12, col. 1 (business agent of I.L.G.W.U. Truckers Local 102 indicted with five others for shaking down an undercover garment trucking concern).

33. N.Y. Times, Feb. 23, 1979, § A, at 28, col. 5 (five individuals indicted for receiving \$76,000 from New Jersey trucking companies in exchange for "labor peace").

34. See 1978 Hearings, *supra* note 5, at 47 (statement of Robert Stewart).

35. R. CHRISTIE, EMPIRE IN WOOD 234 (1951).

36. See, e.g., N.Y. Times, Feb. 23, 1979, § B, at 2, col. 1.

37. ELEVENTH ANNUAL REPORT, *supra* note 17, at 223.

38. Wall St. J., June 30, 1976, at 5, col. 1.

Mob-controlled businesses have also used mob-dominated unions to secure needed capital at favorable rates, unavailable to others in similar business situations. This has been accomplished directly through benefit-fund loans<sup>39</sup> or indirectly through legitimate lending institutions. The President of the United Paperworkers International, Joseph Tonelli, was indicted in 1978 for "depositing union pension funds in various banks to induce those banks to lend money to various customers."<sup>40</sup> Leaders of the New Jersey Teamsters and Retail Store Employees Unions "busted," or bankrupted, four banks by arranging loans to a "parade of characters whose names read like the index to the Valachi hearings."<sup>41</sup> One borrower, a twice convicted armed robber, got his loan while serving seven-to-ten years in Trenton State Prison. He applied one day while he was on work release.<sup>42</sup>

Since 1900, labor racketeers have periodically, and for diverse reasons, attempted to reduce or eliminate competition within their industry.<sup>43</sup> By threatening to strike recalcitrant employers, the union "enforces" a price-fixing scheme or an anti-competitive allocation of work, thus selling labor peace for the ability to dictate the victim-firm's business practices. Their methods need not necessarily involve an elaborate bid-rigging operation; instead, they simply remove firms they do not like. Racketeers in East St. Louis, Illinois for example, have driven all the reputable builders from their domain. "No contractor from outside the area has ever made a profit" on a job in East St. Louis "due to the prevailing labor racketeering practices."<sup>44</sup>

A combination of Teamster strike threats and sweetheart deals has been used extensively to establish monopolies for mob-controlled companies. A monopoly may be established by the use of a "whip" company, which, because it is permitted to use non-union help, can underbid competitors for contracts.<sup>45</sup> If that is ineffective, pressure may be applied directly to the customer. The regnant monopolists can then "name their own price, provide bad to indifferent service, and otherwise put a squeeze on the customers within their control."<sup>46</sup>

## II. SOCIAL CONTROL OF LABOR RACKETEERING THROUGH LAW

While there have been numerous legislative attempts to control labor racketeering at both the state and federal levels,<sup>47</sup> a major prosecutorial

39. See notes 19-21 *supra*, and accompanying text.

40. Wall St. J., July 20, 1978, at 16, col. 1.

41. Wall St. J., Sept. 14, 1977, at 1, col. 6.

42. *Id.*

43. P. TAFT, CORRUPTION AND RACKETEERING IN THE LABOR MOVEMENT 10 (1958).

44. ILLINOIS, *supra* note 5, at 221.

45. L. VELIE, *supra* note 11, at 171.

46. *Interim Report of the Select Committee on Improper Activities in the Labor or Management Field*, 85th Cong., 2d Sess., 330 (1958).

47. Prior to the adoption of RICO, a number of legislative schemes were employed to combat labor racketeering. Various federal statutes were used to prosecute certain activities that reflect symptoms of a criminal syndicate's infiltration and control of a labor union. For example, the Hobbs Act, 18 U.S.C. § 1951 (1976), has been applied to extortion by union officials. See, e.g., *United States v. Palmotti*, 254 F.2d 491 (2d Cir. 1958) (Hobbs Act applies to threatening employers with strikes and work slowdowns).

problem has been the difficulty in demonstrating the nature of the charged illegal activity in the context of syndicated crime.<sup>48</sup> Labor racketeering is not a single crime; it includes the infiltration, domination, and use of a union for personal benefit, generally by members of various organized criminal groups.<sup>49</sup> Labor racketeering thus comprises both traditional overt physical crime and more sophisticated covert white-collar offenses.<sup>50</sup> The challenge of law enforcement has been to demonstrate that relationship—the invidious nature of white-collar crime when committed by a criminal group as an element of a pattern of racketeering activity.

Traditionally, the relationships among the various acts and participants of racketeering were not the proper subject of proof.<sup>51</sup> Except for the restrictive federal conspiracy statute,<sup>52</sup> criminal law was concerned with the commission of specific illegal acts by named individuals.<sup>53</sup> The notion that the defendant

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Illegal conversion of union funds is prohibited by 29 U.S.C. § 501(c) (1976) (prohibits embezzlement from labor organizations), and 18 U.S.C. § 664 (1976) (prohibits embezzlement from employee benefit plans). Statutory provisions which attempt to prevent the corruption of labor officials by parties who are not members of the union include 18 U.S.C. § 1954 (1976) (provides for federal sanctions against the bribery of employee benefit plan operators), the Taft-Hartley Act, 29 U.S.C. § 186 (intended to limit illegitimate employer interference in the collective bargaining process).

On the state level, various criminal codes contain provisions used to prosecute activities associated with labor racketeering, which can be categorized into four areas of criminal activity:

—Extortion, *see, e.g.*, ALA. CODE tit. 13A, §§ 8-13 to 15 (1975); N.J. STAT. ANN. § 2A:105-4 (West 1969);

—Embezzlement, *see, e.g.*, ALASKA STAT. § 11.20.280 (1970) (embezzlement by employee); CAL. PENAL CODE §§ 518-519 (West 1970);

—Bribery, *see, e.g.*, N.M. STAT. ANN. § 50-2-3(1) (1978) (bribery of labor representative); PA. CONS. STAT. ANN. tit. 18, § 4108 (Purdon 1973) (commercial bribery and soliciting commercial bribery); and

—Infiltration, *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-2312(A) (1978) (illegal control of an enterprise); HAW. REV. STAT. § 842-2 (1976).

48. Address by G. Robert Blakey, *Legislative Approaches to Organized Crime Control*, at National Association of Attorneys General, Committee on the Office of Attorney General (Mar. 19, 1974) [hereinafter cited as Blakey Speech].

49. U.S. TASK FORCE ON ORGANIZED CRIME, TASK FORCE REPORT: ORGANIZED CRIME, ANNOTATIONS AND CONSULTANT'S PAPERS 5 (1967); McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 140 (1970).

50. U.S. TASK FORCE ON ORGANIZED CRIME, TASK FORCE REPORT: ORGANIZED CRIME, ANNOTATIONS AND CONSULTANT'S PAPERS 5 (1967).

51. *See* note 47 *supra*; J. MCCLELLAN, CRIME WITHOUT PUNISHMENT 268 (1962). Although conceivable that general conspiracy law could be used against organized labor racketeering activity, under the federal conspiracy statute, 18 U.S.C. § 371 (1976), "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objectives." *Braverman v. United States*, 371 U.S. 49, 53 (1943). This principle severely limits conspiracy prosecutions against the diversified criminal groups that infiltrate and control unions. It is extremely difficult to infer a singular agreement or common objective from the commission of diverse crimes by apparently unconnected individuals. *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978); *cf. Blumenthal v. United States*, 332 U.S. 539 (1947) ("chain conspiracy" requires awareness of single unified purpose and knowledge of existence of remote links); *Kotteakos v. United States*, 328 U.S. 750 (1946) ("wheel conspiracy" requires interaction and agreements between spokes as to common illegal object). Consequently, conspiracy law has been of limited utility in the context of labor racketeering.

52. *Id.*

53. *See* note 47 *supra*. A prosecution concerned only with convicting an individual for one underlying



was a member of a criminal group was thought to be not only irrelevant but prejudicial.<sup>54</sup> That the defendant had committed a related offense in the past was likewise excluded from jury consideration.<sup>55</sup> Yet it was precisely those relationships—of crime to crime, and defendant to group—which distinguished organized crime from conventional acts.

These dual realizations, that such relationships were the crucial factor in demonstrating the existence of syndicated crime, and that syndicated crime by its very nature was significant, formed the philosophical foundation of the Racketeer Influenced and Corrupt Organizations Chapter of the Organized Crime Control Act of 1970 (RICO). Conviction under RICO requires that the prosecution must prove, not only that the defendant committed an offense, but also that he did so as a member of a group engaged in a pattern of racketeering activity.<sup>56</sup>

What follows is an overview of RICO as a statutory scheme designed to combat the realities of syndicated crime and as a remedial tool for the control of labor racketeering.

### III. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE

#### A. AN OVERVIEW

The RICO statute, enacted as Title IX of the Organized Crime Control Act of 1970, is primarily, but not exclusively, intended to halt organized crime's incursion into legitimate organizations.<sup>57</sup> The statute is exceptional in many respects. RICO prohibits "racketeering activities," which are defined by reference to twenty-four separate types of federal crimes and eight different state felonies.<sup>58</sup> RICO does not make illegal any specific action which was previously legal, since all acts punishable under RICO are also punishable under either state or federal statutes. Rather RICO states that if a person commits two of these offences he is guilty of "racketeering activity"<sup>59</sup> and is therefore subject to additional penalties. The umbrella effect of the RICO statute adds the concept of "enterprise" to a criminal prosecution, requiring additional proof of a "pattern" of racketeering activity and its relationship to

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offense deemphasizes the crime's severity when committed by a member of a criminal group as part of a pattern of racketeering activity. More importantly, conviction of one syndicate member for an underlying offense fails to loosen the syndicate's hold on the labor union. Note, *Title IX, Racketeer Influenced and Corrupt Organizations*, 4 J.L. REF. 614, 622 (1970). Instead, conviction of one member leads to use of the "promotion system," whereby other members of the criminal group replace the convicted individual. S. REP. NO. 617, 91st Cong., 1st Sess. 78 (1969).

54. *Kotteakos v. United States*, 328 U.S. 750 (1946) (prejudice found); *contra* *Benger v. United States*, 295 U.S. 78 (1935) (prejudice not found). Cf. *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286, 73 N.Y.S. 806 (1901) (the state cannot prove any crime against the defendant not alleged in the indictment to aid in proving that the defendant was guilty of the crime charged).

55. WIGMORE ON EVIDENCE, §§ 300-373 (1961).

56. 18 U.S.C. § 1962(a) (1976).

57. Statement of Findings and Purpose of the Organized Crime Control Act, 84 Stat. 922 (1970). See S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969) (legitimate businesses in which organized crime is reportedly involved includes advertising, florist shops, car dealerships, football franchises, real estate, and securities).

58. A listing of these crimes is contained in 18 U.S.C. § 1961 (1)(A)(B) (1976).

59. 18 U.S.C. § 1961(1) (1976).

an "enterprise" in addition to that required to prove the individual crimes alleged. The statute is broad and varied in its application and is designed to meet the variety of crimes utilized by organized criminals who invest in, acquire, infiltrate, and use legitimate and illegitimate organizations.

RICO has been effective as a weapon against organized crime since it allows the government to attack such crime not only by focusing on individual offenses, but also enterprises or patterns of racketeering. Prior to RICO only isolated incidents of criminal activity were prosecuted and it was nearly impossible to reach legitimate businesses which served to launder money.

The criminal provisions of RICO delineate four crimes: (1) investment of income derived from a pattern of racketeering activity in an enterprise;<sup>60</sup> (2) acquisition of an interest in any enterprise through racketeering activity;<sup>61</sup> (3) participation in any enterprise through racketeering activity;<sup>62</sup> and (4) conspiring to violate any of the above proscriptions.<sup>63</sup>

Violation of any of the prohibitions of section 1962 may result in a fine of \$25,000, imprisonment for twenty years, or both, plus forfeiture of ill-gotten gains,<sup>64</sup> as well as any interest the defendant has acquired or maintained in a business in violation of Title IX.<sup>65</sup> The statute also allows imposition of broad civil remedies, modeled after the antitrust laws.<sup>66</sup> RICO thus permits the harshest penalty authorized by Title 18 of the United States Code, except for homicide offenses.<sup>67</sup>

An unusual feature of RICO is its language providing that "provisions of this title shall be liberally construed to effectuate its remedial purposes."<sup>68</sup> This appears to reject the traditional canon of statutory construction that penal statutes should be narrowly interpreted, and any ambiguity should be resolved in favor of leniency.<sup>69</sup> Such an appearance, however, is misleading in light of the canon that statutes be reasonably construed.<sup>70</sup> The purpose of

60. 18 U.S.C. § 1962(a) (1976).

61. 18 U.S.C. § 1962(b) (1976).

62. 18 U.S.C. § 1962(c) (1976).

63. 18 U.S.C. § 1962(d) (1976).

64. *But see* United States v. Marubeni America Corp., No. 79-1327 (9th Cir. Jan. 10, 1980) (§ 1963(a)(1) forfeiture provision applies only to interests "in an enterprise" conducted illegally and not to income derived from illegal operation of the enterprise (ill-gotten gains)). *Marubeni* appears to be wrongly decided. The statute states that "all property or other interest" is to be forfeited. 18 U.S.C. § 1963 (1976).

65. 18 U.S.C. § 1963(c) (1976) (restores the sanction of criminal forfeiture which was abolished by the first Congress, Act of April 30, 1790, ch. 9 § 24, 1 Stat. 117 (1790)). *See* Taylor, *Forfeiture under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379 (1980).

66. 18 U.S.C. § 1964(c) (1976) (court may impose treble damages, may order the divesting of interest, or may order injunctive relief).

67. *See*, Schultz, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491, 1493 n.16 (1974).

68. Organized Crime Control Act, Pub. L. No. 91-452 § 904, 84 Stat. 922 (1970).

69. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 38-41 (2d ed. 1947); *see* United States v. Mandel, 415 F. Supp. 997, 1021 (D. Md. 1976), *aff'd per curiam by an equally divided court*, 602 F.2d 653 (1979) (*en banc*) (district court in construing RICO held that state government was not an enterprise) (in the absence of clear congressional intent, courts traditionally should be reluctant to give a broad construction to a criminal statute which would transform matters primarily of local concern into federal felonies); *cf.* United States v. Emmons, 410 U.S. 396, 411 (1973) (Hobbs Act does not reach the use of violence to achieve legitimate union objectives such as higher wages).

70. C. SANDS, STATUTES AND STATUTORY CONSTRUCTION, § 45.12 (1973).

RICO is to build another remedy upon other criminal offenses.<sup>71</sup> Because the Act deals with degrees of criminality there is no reason to limit its construction by resort to judicial maxims narrowly construing criminal statutes.

What follows is a discussion of the developing case law under RICO and some of the issues that remain to be resolved by the courts.

## B. THE DEFINITIONAL CONCEPTS

To determine how broadly RICO applies it is necessary to define and construe its elements. In general, to prove a RICO violation, the prosecution must show that a person through a pattern of racketeering activity or collection of unlawful debt directly or indirectly invested, maintained an interest, or participated in an enterprise whose activities affect interstate commerce.

The building block concepts of RICO which are most often litigated are: "person," "enterprise," and "pattern of racketeering."

### 1. Person

Section 1961(3) provides that "person" includes "any individual or entity capable of holding a legal or beneficial interest in property."<sup>72</sup> As a matter of statutory construction courts will generally afford "includes" a broader interpretation than the word "means."<sup>73</sup> This canon of construction is premised on the assumption that "including" is not a restrictive term, but one of enlargement.<sup>74</sup> Such an interpretation conveys the conclusion that items not specifically enumerated may still be "included" in the statute.<sup>75</sup>

Specifically construing RICO, the Ninth Circuit found that the statute was intended to reach individuals and associations as well as organized crime<sup>76</sup> and that there are no restrictions as to particular persons.<sup>77</sup>

### 2. Enterprise

To establish a RICO violation, a person must acquire or maintain an interest in, or control of, an enterprise, or conduct or participate in the

71. Statement of Findings and Purpose of the Organized Crime Control Act, 84 Stat. 922 (1970).

72. See Atkinson, *Racketeer Influenced and Corrupt Organizations*, 69 J. CRIM. L. 1 (1978).

73. Highway & City Freight Drivers, Local 600 v. Gordon Trans., Inc., 576 F.2d 1285 (8th Cir. 1978) ("person" held to include a labor union under Bankruptcy Act, 11 U.S.C. § 1(23) (1970)), *cert. denied*, 439 U.S. 1002 (1978).

74. American Fed'n of Television and Radio Artists, Washington-Baltimore Local v. NLRB, 462 F.2d 887, 890 (D.C. Cir. 1972) (statutory interpretation of person in National Labor Relations Act of 1947, 29 U.S.C. § 152(1), (1970)).

75. *Argosy Ltd. v. Hennigan*, 404 F.2d 14 (5th Cir. 1968) ("including" is not a restrictive term, but should be considered in relation to the rest of a phrase).

76. *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975) (includes small business enterprises, and is not limited to people involved in organized crime), *cert. denied*, 423 U.S. 1050 (1976); *cf. United States v. Amato*, 367 F. Supp. 547 (S.D.N.Y. 1973) (persons not in violation of RICO merely by being "reputed to be an organized crime member"; there must be a § 1962 violation).

77. *United States v. Roselli*, 432 F.2d 879 (9th Cir. 1970) (RICO not limited to persons who specifically intend to utilize interstate facilities), *cert. denied*, 401 U.S. 924 (1971).

conduct of an enterprise's affairs.<sup>78</sup> The statutory provision provides that an "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, though not a legal entity." This definition, like the one of "person," is one of illustrative expansion, not limitation.

Since its passage in 1970, RICO has been consistently applied not only to illegal, racketeer controlled enterprises, but also to legitimate enterprises.<sup>79</sup> The recent case of *United States v. Swidski* involved a defendant who owned all of the stock of a corporation which operated as a restaurant in Washington, D.C.<sup>80</sup> The corporate records were kept in a room on the third floor of the building in which the restaurant was located.<sup>81</sup> It was established that over a period of several months narcotics trading had occurred in this room.<sup>82</sup> The United States Circuit Court for the District of Columbia found that the defendant, while engaged in the food business, also used the restaurant as a cover or front for illegal trafficking of cocaine.<sup>83</sup>

In analyzing the concept of an "enterprise" the court initially turned to the statutory definition of section 1961(4) and held that the restaurant fell within the statutory definition.<sup>84</sup> Secondly, the court looked at the congressional intent to liberally construe the entire RICO statute.<sup>85</sup> Citing *United States v. Stofsky*<sup>86</sup> the court found that a legitimate business may take many forms and that the original goals may be perverted or may continue while the enterprise becomes a front for an unrelated criminal activity.<sup>87</sup>

In a further exploration of the "enterprise" element the Second Circuit in *United States v. Parness* held that a hotel, clearly within the definition of "enterprise," was not excludable because of its location in a foreign country.<sup>88</sup> An "enterprise," therefore, is not to be limited to a domestic corporation.

Arguments attempting to limit the scope of enterprise which exclude government agencies from its reach have been unsuccessful in the courts.<sup>89</sup> In

78. 18 U.S.C. § 1262(b) (1976).

79. *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978) (legitimate restaurant served as a front for narcotics trafficking), *cert. denied*, 99 S. Ct. 2056 (1979); *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978) (auto dealership), *cert. denied*, 440 U.S. 909 (1979); *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978) (beauty college); *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974) (foreign corporation an enterprise within meaning of statute), *cert. denied*, 419 U.S. 1105 (1975); *United States v. DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978) (theater).

80. 593 F.2d 1246, 1247 (D.C. Cir. 1978).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1248.

85. *Id.* at 1248-49.

86. 409 F. Supp. 609, 613 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975).

87. 593 F.2d at 1248-49.

88. 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

89. *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977) (Pennsylvania Bureau of Cigarette and Beverage Taxes is an "enterprise" as defined in RICO), *cert. denied*, 434 U.S. 1072 (1978); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977) (police department is an "enterprise" under RICO), *cert. denied*, 435 U.S. 904 (1978). The only aberration is the district court opinion in *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), where one of the enterprises in the indictment was the government of the State of Maryland. The district court stated (incorrectly) that the legislative history was silent with regard to whether governments were included in the word "enterprise." It concluded that Congress had only private entities in mind when defining enterprise and it dismissed the RICO count which utilized the government

*United States v. Brown*, the Police Department of the City of Macon, Georgia, was found to be an "enterprise."<sup>90</sup> The district court noted that at the very least the police department consisted of a group of individuals associated in fact and suggested, but did not definitively hold, that they were a "legal entity."<sup>91</sup> Secondly, the court noted that there was no statutory distinction between public and private entities.<sup>92</sup> The language of the statute was held to be broad enough to include both.<sup>93</sup> Based on the statutory language, legislative history, and case law, the court concluded that a government agency was properly classifiable as an enterprise under RICO.<sup>94</sup>

Very similar reasoning was followed by the Third Circuit in finding a state cigarette and beverage bureau to be an enterprise within the meaning of RICO.<sup>95</sup> To support its conclusion, the court pointed to the congressional concern over the increasing number of ways racketeers were infiltrating into legitimate organizations,<sup>96</sup> which thus should include private and public organizations.

In *United States v. Campanale*, the court upheld RICO against an argument that the statutory definition of "enterprise" was unconstitutionally vague and ambiguous.<sup>97</sup> In that case, members of a local Teamsters union were found to be an enterprise.<sup>98</sup>

Recently courts have been asked to determine whether RICO applies to an enterprise or organization which is criminal in nature. Four circuits have found that an illegal enterprise may be prosecuted through the use of RICO.<sup>99</sup>

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of the State of Maryland as the "enterprise."

We would cite the following from the Statement of Findings and Purpose for P.L. 91-452 (Organized Crime Control Act of 1970):

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and wide-spread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption; . . .

(3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to *subvert and corrupt our democratic processes*;

(4) organized crime activities in the United States . . . threaten the domestic security, and undermine the *general welfare of the nation and its citizens*; . . . (emphasis supplied) 1 U.S. CODE CONG. & AD. NEWS 1073 (1970).

90. 555 F.2d 407, 415 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 416.

95. *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

96. *Id.* at 1090-92.

97. 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

98. *Id.*

99. Second Circuit: *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979) (RICO not unconstitutionally vague and can be applied toward illegal enterprises; however, court cautioned against undue prosecutorial zeal in invoking RICO); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976) (exempting illegal enterprises from RICO would leave loophole), *cert. denied*, 429 U.S. 1039 (1977).

Fifth Circuit: In five decisions since 1976, the court has found "enterprise" to have broad meaning that is not limited to legitimate enterprises. *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978) (court would "deny society the protection intended by Congress were [they] to hold that the Act does not reach those enterprises nefarious enough to diversify their criminal activity"), *cert. denied*, 439 U.S. 953 (1978); *United*

A discussion of the Second Circuit's decision in *United States v. Altese*<sup>100</sup> illustrates the rationale of the other circuit courts. The enterprise in question consisted of a large-scale gambling business. The district court found section 1962(c) to apply only in the case of legitimate enterprises infiltrated by persons connected with organized crime.<sup>101</sup> The decision was reversed on appeal. The court of appeals first noted that the statute referred to any "enterprise." The majority reasoned that the word "any" is explicit and then cited the Webster's Dictionary definition to include illegal enterprises under RICO's provisions.<sup>102</sup> Furthermore, the court reasoned that if Congress wanted to eliminate illegal enterprises from the scope of RICO it could have inserted a restrictive word, however, they failed to do so.<sup>103</sup> Consequently, the Second Circuit held that an illegal enterprise was not exempt from the strictures of RICO, and stated that to hold otherwise would be contrary to legislative design.<sup>104</sup>

In dissent, Judge Van Graafeiland claimed that the court "radically extends federal jurisdiction to virtually every criminal venture affecting interstate commerce."<sup>105</sup> The dissent in its discussion did not give weight to the argument that "any" expands the meaning of "enterprise,"<sup>106</sup> and felt that a review of the legislative history left no doubt that Congress never intended that "enterprise" extend beyond legitimate businesses or organizations.<sup>107</sup> The dissent contended that the entire "raison d'etre" of the enterprise was to carry on criminal conduct, and therefore, since the defendants did not invest in, acquire control, or employ the resources of a legitimate business enterprise,<sup>108</sup> part of the indictment should be dismissed.<sup>109</sup>

The Sixth Circuit in deciding *United States v. Sutton* found that section 1962(c) *does not* apply to illegal enterprises.<sup>110</sup> The decision steered away from the precedent set in other circuits and found for the appellants. This court interpreted section 1962(c) as pertaining to an enterprise "organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized."<sup>111</sup> This interpretation was supported by the court's

*States v. McLaurin*, 557 F.2d 1064 (5th Cir. 1977) (prostitution ring), *cert. denied*, 434 U.S. 1020 (1978); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977) (police taking bribes), *cert. denied*, 435 U.S. 904 (1978); *United States v. Morris*, 532 F.2d 436, 442 (5th Cir. 1976) (cheating at cards); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976) (gambling).

Seventh Circuit: *United States v. Capetto*, 502 F.2d 1351 (7th Cir. 1974) (statutory language and legislative history of RICO would include within its reach an illegal enterprise actually connected with a legitimate billiards hall), *cert. denied*, 420 U.S. 925 (1975). *Capetto* was extended by *United States v. Winstead*, 421 F. Supp. 295 (N.D. Ill. 1976), where the court held that § 1964 could be invoked to prevent or restrain illegal enterprises not otherwise connected with legitimate businesses.

Ninth Circuit: *United States v. Rome*, 598 F.2d 564, 568, 569 (9th Cir. 1979) ("enterprise" has a "broad and unrestricted use" which includes illegal enterprises).

100. 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

101. *Id.* at 106.

102. *Id.*

103. *Id.*

104. *Id.* at 106-07.

105. *Id.* at 107.

106. *Id.*

107. *Id.* at 108.

108. *Id.* at 109.

109. *Id.* at 111.

110. 605 F.2d 260, 270 (6th Cir. 1979).

111. *Id.*

understanding of the legislative history. The court found the Act's definition of enterprise to be vague and inadequate.<sup>112</sup> Moreover, the court rejected the government's statutory interpretation in favor of one that gave meaning to each element of the crime.<sup>113</sup>

The opinion cited Senator McClellan's explanation that the purpose of the statute was "to prevent racketeers from infiltrating . . . legitimate businesses."<sup>114</sup> The court met the loophole argument of *Altese* by noting that the appellants did not engage in the "form of racketeering activity for which RICO was exclusively designed."<sup>115</sup>

*United States v. Sutton* was wrongly decided. Congress had intended to include both legitimate and illegitimate enterprises, as clearly indicated in the title of the Act.<sup>116</sup>

### 3. Pattern of Racketeering

Under section 1961(5) "pattern of racketeering activity" is limited so that it must involve "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." There is a conflict in the circuits as to whether the underlying acts in the pattern of racketeering activity must share an interdependence among themselves. The Fifth Circuit in *United States v. Elliot* found a violation of section 1962(c) where each defendant participated in the enterprise's affairs through different unrelated crimes.<sup>117</sup> No relationship among the predicate acts themselves was required other than the requisite nexus to the affairs of the enterprise.<sup>118</sup> On the other hand, within the Second Circuit, a district court in *United States v. Stofsky* found a violation of section 1962(c) where the defendant's acts consisted of one continuous course of conduct in which the defendants shared duties and worked closely together.<sup>119</sup> The *Stofsky* court construed "pattern" to require that the racketeering acts must have been connected with each other by some kind of common scheme, plan, or motive so as to constitute a pattern and not simply a series of unconnected acts.<sup>120</sup> A pattern has been found where the

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112. *Id.* at 265-66.

113. *Id.* at 269.

114. *Id.* at 267. Senator McClellan's remarks may be found at *Bills Relating to Organized Crime Activities and Related Areas of Criminal Laws and Procedures: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 394 (1969).

115. *Id.* at 268.

116. *Racketeer Influenced and Corrupt Organizations*, 84 Stat. 941, 91st Cong. 2d Sess. (1970) (emphasis added); see C. SANDS, *STATUTES AND STATUTORY CONSTRUCTION*, § 45.12 (1973) (title of statute relevant in construing legislative intent).

117. 571 F.2d 880 (5th Cir. 1978). See *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979); *United States v. DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978) (no reference to the requirement of relatedness in statute or legislative history).

118. 571 F.2d at 899.

119. 409 F. Supp. 614.

120. *Id.* at 609. The court in defining a pattern of racketeering activity relied on the definition found in the Organized Crime Control Act of 1970, 18 U.S.C. § 3575(e) (1976).

separate acts have had a similar purpose,<sup>121</sup> results,<sup>122</sup> participants,<sup>123</sup> victims,<sup>124</sup> or methods of commission.<sup>125</sup>

*United States v. Elliot* is correctly decided. The notion that two predicate crimes can be related by reference to a common enterprise is consistent with the legislative history, which defines "pattern" as not "isolated."<sup>126</sup>

### C. PROSCRIBED ACTIVITIES

#### 1. Section 1962(a): Legal Acquisition with Illegal Funds

Section 1962(a) provides, in part, that: "it is unlawful for any person who has received any income derived . . . from a pattern of racketeering activity or through collection of an unlawful debt, . . . to use or invest . . . such income . . . in the acquisition of any enterprise which is engaged in . . . interstate or foreign commerce."

The section explicitly exempts from its prohibition a purchase of securities of any one class if less than one per cent is purchased, and such purchase does not confer upon the purchaser the power to elect one or more directors.

The objective of this provision is to prevent criminal syndicates from obtaining a foothold in legitimate enterprises by using funds from racketeering activities for investment purposes.<sup>127</sup> The critical element of the offense is the illegitimate source of investment capital. The acquisition of the enterprise may otherwise be totally legal. Thus, this section is distinct from section 1962(b) which criminalizes the illegal acquisition or maintenance of an enterprise through a pattern of racketeering activity. The prerequisite for the application of subsection (a) is the use of *income* from racketeering activity to attain control of a business. Subsection (b) does not demand the use of income for the procurement of the business. For example, foreclosing on a usurious loan is a mechanism for attaining control over an enterprise.<sup>128</sup> Because this

121. *United States v. DeFrancesco*, 604 F.2d 769 (2d Cir. 1979) (where activity included multiple acts of arson and use of mails to defraud insurance company); *United States v. Clemmes*, 577 F.2d 1247 (5th Cir. 1978) (activity involved interstate transportation of prostitutes and establishment of prostitution business); *United States v. Burnsed*, 566 F.2d 882 (4th Cir. 1977) (police accepted money and services of prostitutes in return for protection of illegally operated clubs and gambling establishments).

122. *United States v. Nacrelli*, 468 F. Supp. 241 (E.D. Pa. 1979) (mayor was involved in protection racket for gambling activities).

123. *United States v. Morris*, 532 F.2d 436 (5th Cir. 1976) (defendants engaged in several card games over nineteen-month period to defraud tourists).

124. *United States v. Chavanec*, 467 F. Supp. 41 (S.D.N.Y. 1979) (one victim defrauded six times).

125. *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978) (five acts of mail fraud); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977) (repeated solicitation and acceptance of bribes to protect gambling, prostitution and illicit manufacture, distribution and sale of whiskey); *United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977) (shop steward received money from employer for four and one-half years); *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975) (officials of trade union accepted payments from employers).

126 S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969).

127. Note, *Title IX—Racketeer Influenced and Corrupt Organizations*, note 53 *supra*.

128. See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 190 (1967) (four principal methods by which organized crime gains control of legitimate business are cited: (1) extortion; (2) investment of profits acquired from gambling and other illegal activities; (3) acceptance of interests in business as payment for the owner's gambling debts; (4) foreclosure on usurious loans).



would not involve a take over by means of the income from the unlawful debt, section 1962(a) would be inapplicable. Section 1962(b), on the other hand, would ban this conduct.<sup>129</sup>

Section 1962(a) can be employed to curb the infiltration of organized crime into labor unions. *United States v. Alvarado*<sup>130</sup> is an example of section 1962(a)'s applicability when the funds invested in an enterprise are derived from labor racketeering activities. The defendant, a trustee of the San Diego County Construction Laborer's Pension Fund, was indicted for a section 1962(a) violation.<sup>131</sup> The pattern of racketeering activity involved multiple allegations of embezzlement from the Pension Fund. The defendant and other Pension Fund trustees voted themselves "deferred compensation" to which they were not entitled, and fraudulent "expense" advances which were not repaid.

The prosecution's theory was that the embezzled funds were invested in the defendant's own company, the Fringe Benefits Administration Services, Incorporated ("FBAS"). The defendant then arranged for the payment of huge fees by the Pension Fund to FBAS for the administration of the trust funds.

A section 1962(a) violation was based on the funneling of funds gained through labor racketeering activity into an enterprise.<sup>132</sup> If convicted the defendant would be subject to RICO's criminal forfeiture provisions,<sup>133</sup> and would forfeit his 100% ownership of FBAS.

This case illustrates that section 1962(a) is relevant to labor racketeering in two circumstances: (1) where the underlying crimes used to show the pattern of racketeering activity are labor racketeering offenses; or (2) where the illicit funds are infused into an enterprise that is associated with or interferes with union activities. In *Alvarado* both of these circumstances existed.

Despite section 1962(a)'s apparent applicability to the investment of funds gained through corrupt labor practices, the section is very rarely used in prosecutions. This is because of the extreme difficulty of proving that income invested in an enterprise had as its origin racketeering practices.<sup>134</sup> Direct proof linking the invested income to racketeering activity is available only on rare occasions,<sup>135</sup> because of money's fungible nature. This problem is

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129. See, e.g., *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974) (§ 1962(b) conviction for defendant's obtaining control of a casino through fraudulent inducement of a foreclosure action against the original owner), *cert. denied*, 419 U.S. 1105 (1975).

130. Cr. No. 76-318 (S.D. Cal. 1976). This case is abstracted in DEPT. OF JUSTICE, CRIMINAL DIVISION, RACKETEER INFLUENCED AND CORRUPT ORGANIZATION STATUTE (4th ed. 1978).

131. The defendant was also indicted for multiple counts of embezzling funds under 18 U.S.C. § 664 (1976).

132. An alternative theory of prosecution under § 1962(a) is that the administrative fees paid by the pension fund to FBAS was embezzlement, adding to the net worth of the defendant's company. DEPT. OF JUSTICE, CRIMINAL DIVISION, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE 7 (4th ed. 1978).

133. 18 U.S.C. § 1963 (1976).

134. Schultz, *supra* note 67, at 1510 (difficulties of proving a § 1962(a) violation cripple prosecutions).

135. For a case where direct evidence was employed to prove the investment of dirty money in an enterprise, see *United States v. McNary*, Cr. No. 77 CR 1023 (N.D. Ill. 1976). The former mayor of Lansing, Illinois, allegedly received substantial sums of money to approve the rezoning of property and to process building permits. The bribery payments were in the form of checks deposited directly to the account of the B & M Manufacturing Company, the defendant's enterprise. This case is abstracted in DEPT. OF JUSTICE, CRIMINAL DIVISION, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE 10 (4th ed. 1978).

compounded by evidence that criminal syndicates keep records demonstrating their income has legitimate origins.<sup>136</sup>

Therefore, the government is generally forced to rely on inferences drawn from the circumstances surrounding investments. An inference that income invested in a business was attained through racketeering would be valid only if it could be proven that the defendant had insufficient legitimate funds for the investment. On occasion the government achieves the requisite information concerning the defendant's finances to draw this inference. For example, in *United States v. McPartland*,<sup>137</sup> Internal Revenue Service agents could trace the channeling of funds derived from narcotics sales into a restaurant business. The defendants' legitimate net worth was computed and found to be significantly lower than the amount of money invested in the business.<sup>138</sup> Thus, it was more likely than not that funds invested in the enterprise were derived from racketeering activity.

Ordinarily, however, the government does not have the information necessary for an analysis of how much of an investor's income is legitimately gained and how much is rooted in racketeering activities.<sup>139</sup> As a result, it is not often possible to infer from the circumstances of an investment that funds were derived from racketeering activity. The only alternative available to the government is to establish that some of the income claimed to be legitimate is in fact derived from an investment of "dirty" money. Unfortunately, it is also very difficult to establish that specific funds were "laundered."<sup>140</sup>

The trouble the government has in establishing a link between racketeering activity and investments severely limits the number of successful prosecutions under section 1962(a). As a result, any intended remedial or regulatory effect of the prohibition on investing dirty money<sup>141</sup> is negligible. In addition, because of its evidentiary limitations section 1962(a) has been overshadowed as a weapon against labor racketeering by the prohibitions on acquisitions of enterprises<sup>142</sup> and the conducting of enterprises<sup>143</sup> through patterns of racketeering activity.

136. See D. CRESSEY, *THE THEFT OF THE NATION* (1976); SENATE COMM. ON THE JUDICIARY, REPORT ON ORGANIZED CRIME CONTROL ACT OF 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 44-45 (1969).

137. Cr. No. 76-52 (D. Or. 1976). This case is abstracted in DEPT. OF JUSTICE, CRIMINAL DIVISION, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE 5 (4th ed. 1978).

138. *Id.*

139. Schultz, *supra* note 67, at 1512.

140. See generally Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1, 8-34 (1966).

141. The legislative history for this section is slim. It can be argued, however, that criminalization of investing dirty money was meant as a social policy to deter corruption of business and to remove obstacles to fair economic competition. See Pub. L. No. 91-452 § 1, 84 Stat. 941 (Finding 4) (finding that organized crime activities harm innocent investors and competing businesses); Note, *Organized Crime and the Infiltration of Business: Civil Remedies for "Criminal Activity"*, 124 U. PA. L. REV. 192, 212 (1975) (§ 1962(a) can be interpreted as a regulatory measure to promote commerce by guaranteeing fair competition for investment funds within an industry).

142. 18 U.S.C. § 1962(b) (1976); notes 144-52 *infra* and accompanying text.

143. 18 U.S.C. § 1962(c) (1976); note 153 *infra* and accompanying text.

## 2. 1962(b)—Illegal Acquisition Through Illegal Means

Section 1962(b) provides, in part, that "it is unlawful through a pattern of racketeering activity or through collection of an unlawful debt, to acquire or maintain directly or indirectly any interest, or control of any enterprise which is engaged in . . . interstate or foreign commerce."

This section outlaws the acquisition or maintenance of any interest or control in any enterprise through illegal activity. The gravamen of the crime is the illegal acquisition or maintenance of an interest or control. Common proscribed methods include acquisitions through extortion or a scheme to defraud. An interest may, for example, be maintained through bribery. As in the other subsections of the statute, the words "directly or indirectly" are used here. Thus, acquisition, maintenance, or control of an enterprise may be direct or indirect.

For example, in *United States v. Parness*,<sup>144</sup> Milton Parness was convicted under section 1962(b) and on three counts of interstate transportation of stolen property.<sup>145</sup> The latter three counts formed the pattern of racketeering activity which consisted of transporting money and a victim across state lines to perpetuate a scheme to defraud the victim of his ninety percent stock interest in a foreign hotel and casino.<sup>146</sup>

Parness gained control of the casino operation by his dominance of all gambling junkets from the United States to the foreign hotel-casino.<sup>147</sup> Since the hotel's continued financial success depended on the additional income from gambling junkets to the casino, he controlled the revenue which was the life blood of the hotel-casino operation.<sup>148</sup> His scheme to defraud the victim involved withholding collections from the hotels, thereby placing them in a position where they had to borrow from third parties to meet their day-to-day obligations.<sup>149</sup> Rather than paying the hotels the money due them, Parness through straw men loaned the hotel funds to meet their third-party obligations.<sup>150</sup> The straw men foreclosed, and Parness seized control of the hotels.<sup>151</sup> Although Parness thus acquired control indirectly, the court found his activities violated section 1962.<sup>152</sup>

## 3. 1962(c)—Illegal Use of Enterprise

Section 1962(c) of RICO makes it unlawful for any person employed by or associated with any enterprise engaged in interstate commerce to conduct or participate in that enterprise's affairs through a pattern of racketeering activity or the collection of an unlawful debt.<sup>153</sup> The constitutionality of this provision has been upheld.<sup>154</sup> To violate this section, an individual must be

144. 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

145. 18 U.S.C. § 2314 (1976).

146. 503 F.2d at 438.

147. *Id.* at 434.

148. *Id.* at 436.

149. *Id.* at 430.

150. *Id.* at 434-35.

151. *Id.* at 436.

152. *Id.* at 437.

153. 18 U.S.C. § 1962(c) (1976).

154. *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

“employed or associated with”<sup>155</sup> an enterprise. This language has been construed broadly by the district courts to include both formal and informal associations<sup>156</sup> and silent partners.<sup>157</sup>

The acts proscribed by section 1962(c) apply to “any enterprise.”<sup>158</sup> “Enterprise” is defined in section 1961(4) as including “any individual partnership, corporation, association, or other legal entity, in any union or group of individuals associated in fact although not a legal entity.”<sup>159</sup> This definition has been read to include the various forms an enterprise can take. In *United States v. Stofsky*,<sup>160</sup> the court stated that “the perversion of a legitimate business may take many forms . . . . No good reason suggests itself as to why Congress should want to cover some but not all these forms.”<sup>161</sup> The statutory language itself supports this view; it imposes no limiting language on the word “enterprise.”<sup>162</sup> It has been interpreted to encompass legitimate and illegitimate enterprises,<sup>163</sup> and public and private enterprises.<sup>164</sup> The lower courts have also broadly construed the term “interstate and foreign commerce.”<sup>165</sup>

This section prohibits individuals from conducting or participating in an enterprise’s affairs in a pattern of racketeering activity. The words “conduct” and “participate” have been interpreted as requiring some involvement in the operation or management of the enterprise,<sup>166</sup> either directly or indirectly.<sup>167</sup>

155. 18 U.S.C. § 1962(c) (1976).

156. *United States v. McMangle*, 437 F. Supp. 721 (E.D. Pa. 1977) (persons handling embezzled checks for illegal check cashing enterprise are an association).

157. *United States v. Forsythe*, 429 F. Supp. 715 (N.D. Pa. 1977) (silent partner of enterprise considered inside and part of enterprise). *But see id.* (magistrates who received commission from illegal bond service not considered associated with enterprise).

158. 18 U.S.C. § 1962(c) (1976).

159. 18 U.S.C. § 1961(4) (1976).

160. *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff’d*, 527 F.2d 237 (2d Cir. 1975).

161. 409 F. Supp. at 613.

162. *See United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979).

163. *United States v. Roe*, 598 F.2d 564 (9th Cir. 1979) (illegitimate enterprise conducted through pattern of racketeering falls within RICO); *United States v. Elliot*, 571 F.2d 880 (5th Cir. 1978) (enterprise includes those organized for illicit purposes); *United States v. McLaurin*, 557 F.2d 1064 (5th Cir. 1977) (illicit prostitution activity constitutes enterprise); *United States v. Hanson*, 422 F. Supp. 430 (E.D. Wis. 1976) *aff’d*, 583 F.2d 325 (7th Cir.) (defrauding insurance companies by mail and acts of arson constitutes an enterprise), *cert. denied*, 439 U.S. 912 (1978). *Contra*, *United States v. Moeller*, 402 F. Supp. 49 (D. Conn. 1975) (legislative history shows that Congress only meant to extend statute to legitimate businesses and did not intend to include illegitimate ones).

164. *United States v. Frumento*, 563 F.2d 1083 (3rd Cir. 1977) (state agency charged with enforcing tax laws is an enterprise); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977) (city of Macon police department is an enterprise); *United States v. Salvitti*, 451 F. Supp. 195 (E.D. Pa. 1978) (Philadelphia Redevelopment Authority is an enterprise). *Contra*, *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976) (RICO does not include public entities and a state is not a legal entity or enterprise for purposes of this statute), *aff’d*, 591 F.2d 1347 (4th Cir. 1979).

165. *United States v. Vignola*, 464 F. Supp. 1091 (E.D. Pa. 1979) (Philadelphia municipal traffic court affects interstate commerce); *United States v. Fineman*, 434 F. Supp. 189 (E.D. Pa. 1977) (bribes paid to state legislator to insure entrance to state medical schools have an impact on interstate commerce because out-of-state applicants may not be accepted).

166. *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979) (transfer of partnership interest did not constitute the conduct of the business through a pattern of racketeering activity even if transfer is part of an alleged pay-off and mail fraud scheme).

167. *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977) (where defendant charged with illegal payments and loans to labor union, prosecution only needs to show defendant did the acts and does not have to prove that he advanced union by illegal means or that union authorized defendant to do acts).

Moreover, the pattern of racketeering activities alleged must be proven to be related to the affairs of the enterprise in question.<sup>168</sup>

The crux of a section 1962(c) prosecution lies in the proof of a "pattern of racketeering activity."<sup>169</sup> As mentioned earlier, there is a conflict in the circuits on the issue of whether such a pattern may be shown by unrelated crimes.<sup>170</sup>

#### 4. Section 1962(d)—Conspiracy

Section 1962(d) provides that it is unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c). This section prohibits conspiracies to violate the substantive sections of the statute. It is an important prosecutorial tool because it makes conspiracy subject to the same severe penalties and sanctions as the substantive offenses.

Courts have determined that the general federal conspiracy law<sup>171</sup> makes a common agreement or objective an essential element of a single conspiracy.<sup>172</sup> As a consequence, there is a diminished likelihood that multi-faceted, syndicated criminal activity would be found to be one conspiracy.<sup>173</sup> RICO removes this prosecutorial barrier by formulating racketeering offenses which support the connection between crimes and parties that courts had previously been less willing to recognize. RICO extends the reach of prior conspiracy law by criminalizing the maintenance or infiltration of an "enterprise" through a pattern of racketeering activity. Section (d) then allows the prosecution of the huge and diversified pattern as a single conspiracy.<sup>174</sup> As a result, section (d) suggests the concept of an "enterprise" conspiracy in addition to the more limited "wheel" and "chain"-type conspiracies.<sup>175</sup>

168. *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979) (convictions reversed as appellants' acts of racketeering not shown to be related to affairs of enterprise); *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977) (proof of connection between racketeering activities and business in question required to make out violation of § 1962(c)); *United States v. Dennis*, 458 F. Supp. 197 (E.D. Mo. 1978) (defendant's unlawful collection of debts from fellow employees at place of work did not establish a nexus between the prohibited activity and the conduct of the enterprise's affairs).

169. 18 U.S.C. § 1962(c) (1976).

170. See notes 117-25 *supra* and accompanying text.

171. 18 U.S.C. § 371 (1976).

172. See, e.g., *Canella v. United States*, 157 F.2d 470 (9th Cir. 1946); *Marcante v. United States*, 49 F.2d 156 (10th Cir. 1931); *Jezewski v. United States*, 13 F.2d 599 (6th Cir.), *cert. denied*, 273 U.S. 735 (1926).

173. Cf. *Parnell v. United States*, 64 F.2d 234 (10th Cir. 1932) (employee of still operator not part of conspiracy); *Jezewski v. United States*, 13 F.2d 599 (6th Cir.), *cert. denied*, 273 U.S. 735 (1926) (employee of brewery owner not proven to have sufficient knowledge of the owner's intention to manufacture with an illegally high alcohol content). *Contra*, *United States v. Anderson*, 101 F.2d 325 (7th Cir.) (single conspiracy found with statewide efforts to unionize coal fields by obstructing movement of railroads), *cert. denied*, 307 U.S. 625 (1939).

174. *United States v. Elliot*, 571 F.2d 880, 902 (5th Cir.), *cert. denied*, 439 U.S. 1050 (1978). The evidence presented at trial implicated the six defendants and thirty-seven unindicted co-conspirators in more than twenty different criminal schemes. *Id.* at 884. As the court noted, "the enterprise involved in this case probably could not have been successfully prosecuted as a single conspiracy under the general federal conspiracy statute." *Id.* at 902.

175. The "wheel" metaphor was used to describe a situation in which one person (the "hub") participated in a number of otherwise separate conspiracies (the "spokes"). Courts using this rationale required the prosecution to show that the people forming the spokes were aware of one another and had done something to further a single, illegal enterprise. This interaction between the conspirators was the

Because of the breadth of the "enterprise" offenses, it is less essential for the court to discover a specific uniform objective on the part of interdependent conspirators. It is sufficient if there exists a broad conspiratorial objective to become involved in and conduct an enterprise through a pattern of corrupt activities. Clearly, there must still be an agreement. But an agreement merely to commit the predicate crimes establishing a pattern of racketeering would not be enough to support a RICO conspiracy conviction.<sup>176</sup> Rather, the statute has simply defined the objective of the agreement more broadly by establishing broad substantive racketeering prohibitions. Conspiracy can therefore be established where the defendants have agreed to participate in the furtherance of an enterprise's affairs by committing the underlying offenses.<sup>177</sup> That the underlying offenses may be totally unrelated need not be a barrier to a successful prosecution for conspiracy under RICO. Instead, the key element is proof that the various crimes were performed in order to assist the enterprise's involvement in corrupt endeavors. Since the broad objective necessary to establish an enterprise conspiracy allows the tying together of seemingly unrelated crimes, section (d) has added an important weapon to the prosecutorial arsenal and filled a void left by the narrowness of the general conspiracy statute.

Section 1962(d) provides a powerful tool for the prosecution of labor racketeering, particularly when the conspiracy is to violate sections 1962(b) and (c). As noted, the syndicates involved with labor unions may not be amenable to prosecution under the federal conspiracy law. Their increased vulnerability under section 1962(d) was demonstrated in *United States v. Campanale*.<sup>178</sup> Officials of the Los Angeles Teamsters Local 626 were convicted for a RICO conspiracy, Hobbs Act extortion,<sup>179</sup> unlawful payments to a labor organization,<sup>180</sup> and obstruction of justice,<sup>181</sup> as components of a general scheme to monopolize the meat loading business in that city. These activities constituted a pattern of racketeering activity. The ordinary conspiratorial prerequisite for the commission of overt acts in furtherance of the

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"rim" that enclosed the spokes and completed the wheel. See *Kotteakos v. United States*, 328 U.S. 750, 755 (1946) (eight separate conspiracies existed where the only connection between the different groups was the fact that each had used the same broker to handle fraudulent applications for housing loans); *Canella v. United States*, 157 F.2d 470 (9th Cir. 1946) (five separate conspiracies existed where the only thing that they had in common was the involvement of the same Army Quartermaster).

The "chain" concept was used in cases in which each defendant was a necessary "link" in a "chain" of criminal activity. It allowed persons who had no contact with each other to be jointly prosecuted as co-conspirators, provided that the nature of the conspiracy was such that participation in one of its stages necessarily implied an awareness of the other stages. See *Blumenthal v. United States*, 332 U.S. 539 (1947) (the owner, sales manager, and salesman of a liquor store were held to be co-conspirators in a plot to sell whiskey at prices higher than those allowed by the Office of Price Administration); *United States v. Cirillo*, 468 F.2d 1233, 1233 (2d Cir. 1972) ("This case is the archetype of a 'chain' conspiracy with links connecting the conspirators at the critical nexus points of exportation, transportation, and distribution of narcotics."); *United States v. Bruno*, 105 F.2d 921, 922 (2d Cir. 1939) (a group of narcotics smugglers, retailers and buyers were all part of a single conspiracy). For an excellent discussion of the "wheel," "chain" and "enterprise" rationales, see *United States v. Elliot*, 571 F.2d 880, 900-03 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

176. See *id.*

177. *Id.* at 902.

178. 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

179. 18 U.S.C. § 1951 (1976).

180. 29 U.S.C. § 186 (1976).

181. 18 U.S.C. §§ 1503, 1510 (1976).

conspiracy was satisfied by the perpetration of the substantive underlying offenses. The defendants' agreement was to commit these offenses in the course of their association with the Teamsters Union, the relevant enterprise. Therefore, the required "common overall objective" was the conspirators' intention to further the union's participation in the monopolization scheme.

#### D. CIVIL REMEDIES

Broad civil remedies and harsh civil penalties may also be imposed under RICO.<sup>182</sup> Patterned after antitrust legislation, section 1964 provides for "appropriate" injunctive relief for engaging in conduct prohibited by the statute.<sup>183</sup> The court may enjoin any individual or corporation from investing in or operating the prohibited type of enterprise in the future, and is specifically authorized to order divestiture or dissolution.<sup>184</sup> The statute also provides for treble damages for any injured person.<sup>185</sup> Civil remedies have been rarely used, generally, and have virtually never been employed in racketeering cases.<sup>186</sup>

### III. RICO AND THE *Scotto* DECISION

The indictment against Anthony Scotto for corrupt activities in connection with the operation of the International Longshoremen's Association (ILA)<sup>187</sup> furnishes an excellent example of the application of RICO to labor racketeering activities.

Scotto, president of Local 1814 (Brooklyn) of the ILA, was "a rising star in the labor world where it was assumed he would soon succeed Thomas W. Gleason as president of the 16,000 member ILA, and perhaps eventually . . . take the reigns of the AFL-CIO."<sup>188</sup> Named in the Senate Report accompanying Title IX as a *capodecina* in the Carlo Gambino "family,"<sup>189</sup> Scotto was

182. 18 U.S.C. § 1964 (1976). In *United States v. Cappetto*, the court upheld the scheme of parallel civil enforcement of the Act against the claim that it was punitive, not remedial in nature, and therefore unconstitutional. 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

183. Blakey Speech, *supra* note 47, at 17-18.

184. 18 U.S.C. § 1964(a) (1976).

185. 18 U.S.C. § 1964(c) (1976).

186. Blakey suggests that civil actions, which require a lesser burden of proof, are often overlooked by prosecutors who are experienced in criminal prosecutions. Blakey Speech, *supra* note 47, at 19.

187. Indictment, *United States v. Scotto*, Cr. No. S-79 CR32, Nov. 15, 1979 [hereinafter cited as *Scotto* Indictment]. Anthony Scotto was convicted and sentenced to five years imprisonment and a \$75,000 fine. Anthony Anastasio was also convicted and sentenced to two years imprisonment and a \$5,000 fine. N.Y. Times, Jan. 24, 1980, § B at 1, col. 5. *Barron's* reported that the crucial evidence in Scotto's conviction was the thirty-two court-ordered wiretaps and bugs. Welling, *On the Waterfront*, BARRON'S, Jan. 21, 1980, at 4. The recordings played for the jury apparently outweighed the favorable testimony given by Governor Hugh L. Cary, former New York Mayors Robert Wagner and John V. Lindsay and Lane Kirkland, President of the AFL-CIO. *Id.* at 28.

The *Scotto* case is used in this article for illustrative purposes and for that reason is treated in great detail. Nothing herein should be viewed as a comment on the defendants' guilt or innocence, or as a statement on the merits of the legal issues which may be raised during the course of the appellate process.

188. Welling, *On the Waterfront*, BARRON'S, Jan. 21, 1980, at 8.

189. S. Rep. No. 617, 91st Cong., 1st Sess. 39 (1969). A *capodecina* is a division chief within an organized crime family. *Id.*

indicted as part of a continuing, massive investigation into waterfront corruption by the Justice Department's UNIRAC (acronym for union racketeering) unit involving more than 100 FBI agents.<sup>190</sup> The indictment charges that Scotto, as a representative of ILA employees received numerous unlawful payments totalling over \$300,000 from employers of ILA members, in violation of 29 U.S.C. § 186(b).<sup>191</sup> Scotto allegedly accepted \$210,000 on eighteen separate occasions from John A. McGrath Corporation,<sup>192</sup> \$94,000 in cash and merchandise on fourteen occasions from Quin Marine Services, Inc.,<sup>193</sup> \$3,000 from C.C. Lumber Co. and American Navigation Co.,<sup>194</sup> \$15,000 on three occasions from Joseph Vinal Ship Maintenance Inc. and Marina Repair Services, Inc.,<sup>195</sup> and \$11,500 on four occasions from Marina Repair Services Inc.<sup>196</sup> These payments were made to Scotto for a number of purposes. First, they represented an effort to reduce the number of fraudulent and exaggerated accident claims filed by ILA members against their employers.<sup>197</sup> Second, the payments were made to prevent employers from losing waterfront related business.<sup>198</sup> Finally, the employers sought to secure additional business in exchange for the payments to Scotto.<sup>199</sup>

The indictment also alleges that Scotto committed various fraudulent acts in violation of 18 U.S.C. §§ 1341 and 1342.<sup>200</sup> Scotto devised a scheme to defraud Prudential Lines, Inc., of the services of one of its officers in order to obtain cash payments.<sup>201</sup> Further, the scheme entailed the fraudulent procurement of a lease between Prudential Lines and the owner of a warehouse.<sup>202</sup>

Finally, the indictment points to numerous meetings between Scotto and codefendants and employers in an effort to demonstrate the existence of sufficient overt acts in furtherance of a conspiracy charged pursuant to section 1962(d).<sup>203</sup>

These activities were sufficient to support an indictment against Scotto for violation of section 1962(c), which prohibits a person associated with or employed by an enterprise from conducting the affairs of the enterprise through a pattern of labor racketeering. Clearly, Scotto is a "person" within the meaning of the statute.<sup>204</sup> Moreover, Scotto is employed as president by the relevant enterprise, the ILA.<sup>205</sup> Labor unions ordinarily are considered "enterprises."<sup>206</sup> The ILA is, of course, an enterprise which affects interstate

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190. Welling, *On the Waterfront*, BARRON'S, Jan. 21, 1980, at 4.

191. *Id.*

192. *Id.* at 5.

193. *Id.* at 20.

194. *Id.* at 9.

195. *Id.* at 11.

196. *Id.* at 12.

197. *Id.* at 1.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 19.

202. *Id.*

203. *Id.* at 14.

204. 18 U.S.C. § 1961(3) (1976); see notes 72-77 *supra* and accompanying text.

205. Scotto Indictment at 14.

206. 18 U.S.C. § 1961(4) (1976); see notes 78-98 *supra* and accompanying text. See also *United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977) (evidence that defendant conducted affairs of a local union by serving



and foreign commerce, the jurisdictional requirement for RICO's application.<sup>207</sup> Finally, the prerequisite that the enterprise be conducted through a pattern of racketeering activity<sup>208</sup> is satisfied by the discovery of at least two acts of racketeering.<sup>209</sup> The alleged violations by Scotto of 29 U.S.C. § 186(b) and 18 U.S.C. § 1341<sup>210</sup> are specifically enumerated within the definition of those actions qualifying as racketeering activities.<sup>211</sup> These violations occurred after the effective date of the statute and the last act occurred within ten years after the commission of a prior act.<sup>212</sup>

Although not explicitly required by the Act, courts have demanded that there be some nexus or relationship between the individual activities in order for a pattern of racketeering activity to exist.<sup>213</sup> Proof of such a nexus is not difficult in this case. First, the huge number of similar fraud and kickback violations evidence the existence of an organized plan among ILA officers to use the union to maximize personal profits.<sup>214</sup> The indictment furnishes another nexus between the violations in the allegation that Scotto enlisted many members and employers of ILA labor to assist him in the ongoing pattern of racketeering activity.

Scotto's activities, in coordination with those of his codefendants, are also sufficient to support an indictment for a violation of section 1962(d), which prohibits conspiracies to violate substantive provisions of the Act.<sup>215</sup> Such a conspiracy requires an agreement, either overt or implicit, to conduct an enterprise's affairs through a pattern of racketeering activity. The alleged consensus between Scotto and Anthony Anastasio,<sup>216</sup> the vice president of ILA, to conduct ILA's affairs by unlawfully obtaining money from employers<sup>217</sup> and by devising schemes to defraud Prudential Shipping Lines,<sup>218</sup> provides the necessary agreement element of the conspiracy charge. Numerous activities outlined in the indictment qualify as the overt acts that must be committed in furtherance of the conspiracy. For example, the meetings between Scotto and an officer of Prudential Shipping Lines concerning the bribe-induced lease for a warehouse<sup>219</sup> is an overt act pursuant to the agreement to defraud Prudential Lines. These acts demonstrate a conspiracy

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as chief steward and accepted payment as a union steward from contractors for services which were not rendered was sufficient to show that his actions were in the conduct of the union's affairs and that he thus was engaged in an "enterprise").

207. 18 U.S.C. § 1962(c) (1976).

208. 18 U.S.C. § 1962 (1976).

209. 18 U.S.C. § 1961(5) (1976).

210. *Scotto* Indictment at 1.

211. 18 U.S.C. § 1961(1) (1976).

212. 18 U.S.C. § 1961(5) (1976); see notes 115-19 *supra* and accompanying text. The *Scotto* Indictment alleges continual racketeering activity from Jan. 1, 1974 until the date of the indictment. *Scotto* Indictment, Intro.

213. See notes 115-25 *supra* and accompanying text.

214. See *United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977) (evidence that defendant engaged in prohibited activity for a period of four and one-half years was sufficient to show a "pattern of racketeering activity"); *United States v. Morris*, 532 F.2d 436 (5th Cir. 1976) (evidence that defendant engaged in numerous identical fraudulent card games over a nineteen-month period was sufficient to show a "pattern of racketeering activity").

215. 18 U.S.C. § 1962(d) (1976).

216. Anastasio also is a codefendant. *Scotto* Indictment at 11.

217. *Id.*

218. *Id.* at 14.

219. *Id.*

to use the union as a mechanism of the commission of criminal acts that form a pattern of racketeering activity. As a final note, it should be observed that any interest in and contractual rights Scotto may have with the ILA are subject to the forfeiture provisions provided by the criminal penalties section of RICO.<sup>222</sup> This forfeiture penalty supplements the more usual criminal sanction of incarceration.

#### IV. CONCLUSION

Clearly, control of syndicated crime and labor racketeering will not be achieved by standard law enforcement practices. It is not sufficient for the police to investigate isolated crimes, solve them and present them to a prosecutor for formal proceedings. The concepts of investigation, prosecution and incarceration must be employed as part of predetermined strategy if they are to be effective in an organized crime context.

Such a strategy must be based on a very real understanding of the nature of the illicit activity. Economic analysis, historical perspective and an inquiry into the structure of affected institutions are essential aspects of an analysis of the factors which result in certain unions being dominated by the underworld.<sup>221</sup> The development of any such strategy must also recognize the need to utilize a variety of legal remedies as a means of reinstating democratic processes within syndicate-dominated unions.

RICO provides the flexibility required to implement a comprehensive strategy in the labor racketeering area. To the extent that it is used appropriately and with discretion, it offers significant potential to affect what is clearly a national problem.

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220. 18 U.S.C. § 1963(a) (1976) (whoever violates RICO shall be fined and shall forfeit any interest he has acquired in violation of § 1962, and any interest in, security of, claim against or property or contractual right over the applicable "enterprise"). See generally Taylor, *supra* note 65.

221. Such a study has been conducted by the Cornell Institute on Organized Crime. See G. BLAKEY, R. GOLDSTOCK, & G. BRADLEY, LABOR RACKETEERING—BACKGROUND MATERIALS (1979).

