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In 1984, Congress passed the first in a series of amendments to the forfeiture provisions of the federal criminal code, including RICO,[1] designed to strengthen prosecutors' ability to take the profit out of crime by forfeiting a convicted criminal's assets. The Comprehensive Crime Control Act of 1984[2] added the relation back doctrine, vesting title to forfeitable property in the government at the date the crime is committed and giving third parties limited rights to assert claims against forfeited property. In 1986, Congress passed the substitute assets provision that it had rejected in 1984.[3] Under this new doctrine, the federal government can, in certain circumstances, satisfy a criminal forfeiture order out of any assets of a defendant, even if the specific property ordered forfeited is no longer in existence. Finally, from 1984 to the present, Congress has passed legislation extending forfeiture as a penalty for an increasing number of federal crimes. The Money Laundering Control Act of 1986[4] as a practical matter made forfeiture available for almost every federal crime, including most white collar crimes, since the deposit in a financial institution of money derived from criminal activity renders the money forfeitable.[5] These legislative enhancements and expansions have made forfeiture the penalty of choice for law enforcement officials.

The increasing use of forfeiture creates serious pitfalls for legitimate businesses engaged in transactions with persons accused of criminal activity. The pervasiveness of the penalty, combined with the breadth and flexibility of the statutory definitions and the severe impact of the relation back or "taint" doctrine, make it extremely difficult to predict what property will be forfeited to the government in any particular case. Innocent persons who exchange legitimate goods or services for what turns out to be "tainted" property run the risk that they will not get good title to that property and may ultimately lose the benefit of a normal commercial transaction. In its effort to take the profit out of crime, the government often takes the profit from those with whom the criminal has dealt. In short, criminal law has invaded the marketplace.[6]

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1 Racketeer Influenced and Corrupt Organizations Act of 1974, 18 U.S.C. §§ 1961-68 (1988).

2 Pub. L. No. 98-473, tit. II, 98 Stat. 1837, 1976-2194 (1984).

3 Department of Justice Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99-570, tit. I, subtit. D., §§ 1151-53, 100 Stat. 3207-12 to 13 (codified as amended in scattered sections of U.S.C., titles 28, 19, 18, and 21, including 18 U.S.C. § 1963(m) (1988)). *See infra* note 31 and accompanying text.

4 Pub. L. No. 99-570, tit. I, §§ 1351-67, 100 Stat. 3207-18 (codified as amended in scattered sections of U.S.C., titles 12, 18, and 31).

5 *Id.* at § 1366 (codified at 18 U.S.C. §§ 981-82 (1988)).

6 One might well say that criminal law has always been a part of the marketplace in that it regulates and sets the outer bounds for acceptable commercial conduct. But the invasion of the forfeiture penalty is a different kind of intrusion. Unlike a criminal statute that directly defines proscribed conduct, the forfeiture penalty has collateral consequences for persons who have conformed

How does the new forfeiture offensive affect legitimate businesses? What rights does a business have when faced with the forfeiture of property belonging to a customer, a borrower, or an investment partner? What are the obstacles to the assertion of property rights, and how can a business evaluate and limit its exposure to collateral forfeiture? This Article will survey the remedies available to a business asserting rights in forfeitable property of a defendant charged with violations of RICO. In the course of the survey, an effort will be made to identify and discuss those aspects of RICO forfeiture that make the third party remedies weak and uncertain. Finally, the Article will focus on the statutory requirement that the government trace forfeitable property. This requirement may provide a third party the means to determine which of a RICO defendant's assets can be used to satisfy legitimate commercial obligations without danger of ultimate forfeiture to the government.

I. RICO Forfeiture and Third Party Rights

A. *A Survey of Obstacles to Third Party Rights*

As a legitimate business evaluates its exposure to forfeiture orders that may be entered against a customer or business partner, a two-fold problem arises. First, the forfeiture provisions are draconian and are motivated by the desire to make a criminal sanction severe and sure. They are not driven by the desire to protect the rights of third parties, although they make allowance for third party rights. Nor do they have the objective, as the Uniform Commercial Code does, of establishing a set of bright-line rules to make commercial relationships clear and certain. Under forfeiture law, the deck is stacked against the defendant and against the business that deals with him.

Second, RICO is extremely vague in many important respects; the outcome in any particular situation is highly dependent on the manner in which a prosecutor exercises his discretion. The substantive provisions that define predicate crimes may apply in many different ways to the same underlying conduct. These different applications can have dramatically different consequences for third parties who have claims against the defendant or interests in the defendant's property. The procedural provisions that control the manner in which rights in forfeited property are determined, albeit less vague, are extremely stingy and restrictive in allowing third parties to assert claims against forfeited property. Consequently, when a business attempts to evaluate its exposure to forfeiture, it is faced with a task that is formidable and unlikely to produce much comfort or certainty.

1. The Determination of What Crime May Be Charged

When a business first learns that a customer may be the subject of a RICO investigation, it will want to determine what the likely conse-

their conduct to the requirements of the criminal law. Although not charged with a crime, such persons may nevertheless by damaged, in certain circumstances, by a criminal penalty imposed upon someone else.

quences of the investigation will be and how various possible outcomes might affect the business. The first problem will be to obtain a reliable account of the facts. Typically, the target of the investigation will be unwilling to provide much, if any, information about the case. The target will likely disclose only general and exculpatory information. Likewise, the government will not reveal any details about its investigation, and whatever information is released will be general and condemnatory. The business will very likely have to proceed with its evaluation with a minimal factual record.[7]

Even if all the facts were known, however, the evaluation of the business' exposure would still be difficult. The first problem is determining which RICO violation the government will charge. RICO gives the government tremendous flexibility in deciding how to charge criminal activity. A violation of RICO occurs when a person acquires, maintains or operates an enterprise through a pattern of racketeering activity.[8] A "pattern" is at least two predicate acts, which for purposes of white collar criminal activity includes the standard white collar substantive crimes of mail and wire fraud.[9] Although there has been extensive litigation over what combination of predicate crimes is necessary to satisfy the pattern requirement, the government faces a very low hurdle and can usually be expected to meet the statutory requirement that the predicate acts are related to a common purpose and demonstrate a threat of continued criminal activity.[10]

A very significant source of uncertainty arises from the enterprise requirement. An enterprise can be an individual or an entity, such as a corporation or a partnership, or it can be an association-in-fact enterprise, defined as "any union or group of individuals associated in fact although not a legal entity."[11] One set of facts can often be characterized

7 Third parties dealing with a potential RICO defendant will rarely, if ever, have a complete or reliable understanding of the facts upon which the prosecutor will base his decision. Of course, the prosecutor will not share the fruits of the investigation with a third party for a variety of reasons, including grand jury secrecy obligations. *See* Fed. R. Crim. P. 6(e). Potential defendants are very likely to deny all allegations of wrongdoing, to demand performance of commercial obligations by third parties, and to assert that the third parties have no basis on which to renege. As third parties increasingly become embroiled in criminal forfeiture proceedings, one can anticipate that commercial agreements will contain cooperation clauses or other provisions designed to protect third parties by requiring full disclosure of facts pertaining to potential criminal charges.

8 18 U.S.C. § 1962(b) (1988).

9 18 U.S.C. § 1961 (1988).

10 The universe of predicate crimes encompasses more than 50 crimes, including most of the substantive crimes of the federal criminal code, as well as certain state law crimes such as bribery. The commission of any two of these crimes can constitute a "pattern" for purposes of section 1962. A stream of litigation, which focused on whether two predicate crimes are sufficient to make out a "pattern" culminated in the Supreme Court's decision in H.J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893, 2899-900 (1989), requiring that the predicate crimes have both relatedness and continuity to constitute a pattern. Lower court interpretation of *H.J., Inc.* has failed to significantly restrict the pattern requirement.

11 18 U.S.C. 1961(4) (1988). There has been some litigation over whether an association-in-fact enterprise is limited to an association of "individuals," or whether it can also include corporations or other entities. *See, e.g.*, Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146, 1151 (D.N.J. 1983) (two corporations and two individuals *may not* combine to form an association-in-fact enterprise), *aff'd in part and rev'd in part* 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); Radionic Indus., Inc. v. GTE Prod. Corp., 665 F. Supp. 622, 627-29 (N.D. Ill. 1987) (corporation and its employees *may not*). Notwithstanding the statutory language, which refers to an associ-

by a prosecutor in different ways with respect to the enterprise charged. For example, where predicate crimes have been committed in a corporate context, a prosecutor could charge that the corporate entity is the enterprise, or he could charge that the enterprise is an association-in-fact of the corporate entity or entities and various individuals—including officers, directors, and others who may have dealt with the corporation or its customers. The enterprise concept is inherently plastic because it is a statutory invention and does not refer exclusively to preexisting concepts of legal entities and individuals. This plasticity gives prosecutors tremendous flexibility and makes it very difficult for third parties, who have no control over the charging decision, to predict exactly what consequences will flow from a given set of facts.

2. Determining What Property Is Forfeitable

RICO permits the government to obtain two distinct kinds of forfeiture as a result of a RICO conviction. The government may require a convicted RICO defendant to forfeit all of his interest in any property affording a source of influence over the enterprise ("enterprise forfeiture")[12] and/or to forfeit any proceeds of racketeering activity or any property "derived from" such proceeds ("proceeds forfeiture").[13]

Third parties have difficulty evaluating the possible scope of enterprise forfeiture for several reasons. The first is the above-mentioned plasticity of the statutory definition of enterprise. Because the prosecutor's decision as to how to define the enterprise directly affects what property may be forfeited, the secrecy of that decision inhibits the third party's ability to analyze the likely scope of forfeiture. For example, if individuals are charged with operating a corporation, defined as an enterprise, through a pattern of racketeering activity, then each individual

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ation of "individuals," the weight of authority is that entities can be part of an association-in-fact enterprise. *See, e.g.*, United States v. Perholtz, 842 F.2d 343, 352-53 (D.C. Cir.) (individuals, corporations, and other entities *may* constitute an association-in-fact enterprise), *cert. denied*, 488 U.S. 821 (1988); United States v. Navarro-Ordas, 770 F.2d 959, 969 n.19 (11th Cir. 1985) (a group of corporations *may*), *cert. denied*, 475 U.S. 1016 (1986); United States v. Aimone, 715 F.2d 822, 828 (3d Cir. 1983) (individuals and a corporation *may*), *cert. denied*, 468 U.S. 1217 (1984); United States v. Thevis, 665 F.2d 616, 625-26 (5th Cir.) (individuals and corporations *may*), *cert. denied*, 456 U.S. 1008 (1982); United States v. Huber, 603 F.2d 387, 393-94 (2d Cir. 1979) (a group of corporations *may*), *cert. denied*, 445 U.S. 927 (1980); Fustok v. Conticommodity Serv., Inc., 618 F. Supp. 1074, 1075-76 (S.D.N.Y. 1985) (three corporations *may*).

12 Section 1963(a)(1) & (2) provide that a convicted defendant shall forfeit:

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any —

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. § 1963(a) (1988).

13 Section 1963(a)(3) provides that the convicted defendant shall forfeit:

any property constituting, or derived from, any proceeds which the person obtained, directly, or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

18 U.S.C. § 1963(a)(3) (1988).

defendant's interest in the corporation will be forfeited upon conviction. Persons doing business with the corporation could anticipate a change in ownership and control in the event of conviction, but they would still be able to look to the corporation and its assets to satisfy business obligations. On the other hand, if the enterprise charged is an association-in-fact enterprise, including the corporation, the possibility exists that the assets of the corporation would be forfeitable either as proceeds derived from illegal activity or as property affording a source of influence over the association-in-fact enterprise. In this event, a business' claim against the corporation would be in jeopardy. The prosecutor's decision as to what enterprise to charge in an indictment—a very discretionary decision—can accordingly have a dramatic impact on a third party's exposure to loss.

Forfeiture presents another danger to the third party because it often operates counter-intuitively. A business dealing with a person under threat of RICO conviction may not expect that property which is not tainted—i.e. not derived from or the proceeds of any criminal activity—may be subject to enterprise forfeiture. Once a RICO violation has been proven, the defendant's interest in the enterprise is forfeited. A further trap for the unwary or unsophisticated third party is that a very small amount of illegal activity conducted through an enterprise may result in the forfeiture of the entire enterprise, subject only to the statutory and constitutional limitation that the forfeiture be proportional to the magnitude of the crime.[14]

Another uncertainty derives from the ambiguity of the requirement that any "source of influence" over the enterprise be forfeited.[15] There are many ways in which a person may have "influence." The statute does not define what degree or kind of influence is required to trigger forfeiture, nor does it define what constitutes a source of influence.[16] Although this provision has not been used frequently by prosecutors, it is

14 Challenges to RICO forfeitures on the ground that the forfeiture is wholly disproportionate to the magnitude of the offense have met with limited success. *See, e.g.*, United States v. Angiulo, 897 F.2d 1169, 1211-12 (1st Cir. 1990); United States v. Porcelli, 865 F.2d 1352, 1364-65 (2d Cir.), *cert. denied* 110 S. Ct. 53 (1989); United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). These decisions distinguish between forfeitures of the enterprise itself, which are not limited by a proportionality principal, and forfeitures of interests "outside" the enterprise, which must be proportional to the magnitude of the offense.

15 *See supra* note 12.

16 The "contribution" theory, which some courts have accepted in the continuing criminal enterprise ("CCE") context, adds further uncertainty to the third party's analysis of what property may be forfeited by persons with whom the third party does business. *See, e.g.*, United States v. McKeithen, 822 F.2d 310 (2d Cir. 1987); United States v. Zielie, 734 F.2d 1447, 1458-59 (11th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); United States v. Thevis, 474 F. Supp. 134, 143 (N.D. Ga. 1979), *aff'd on other grounds*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982); United States v. Ragonese, 607 F. Supp. 649, 652 (S.D. Fla. 1985), *aff'd mem.* 784 F.2d 403 (11th Cir. 1986). Under this theory, any property that has contributed to the success of the association-in-fact enterprise is deemed to be the defendant's contribution to the enterprise and is forfeitable as "source of influence" property or "interest in" property. This theory could potentially be used broadly in the commercial context to determine what property constitutes an interest in an association-in-fact enterprise.

so ambiguous and undefined that it can fairly be characterized as a minefield for the unwary (and even the wary) third party.[17]

Proceeds forfeiture, as opposed to enterprise forfeiture, focuses on benefits derived from illegal activity and therefore is more consistent with a layperson's understanding of what property would be subject to forfeiture. Nevertheless, there are some traps for the third party in proceeds forfeiture as well. Not only are proceeds themselves forfeitable, but so also is property derived from such proceeds. In a commercial context, derivative proceeds are inherently ambiguous. Cash received from a tainted commercial transaction goes into a common fund and is used to make purchases and to satisfy obligations of the business. Although the language and structure of the statute would seem to require some kind of tracing in order to demonstrate the derivative nature of any particular asset,[18] it is not at all certain that the courts will implement the apparent tracing requirement with any vigor.

3. The Relation Back Doctrine and Post-Conviction Proceedings

The risk inherent in evaluating what property may be forfeited is increased by the draconian nature of the penalty and by the limited ability of third parties to assert rights in such property once it has been forfeited. If a defendant is convicted of RICO violations, title to any property forfeited to the government as a result of the conviction is deemed to have passed to the government as of the date of the criminal activity. Accordingly, if a third party takes a security interest in or is paid with what is eventually found out to be forfeitable property, title to that property was held by the government and was therefore never effectively transferred to the third party.

Although RICO provides for the assertion of third party claims against forfeited property, the statutory procedure for making such claims is narrowly restricted. Section 1963(l) permits a person to file a petition asserting an interest in forfeited property following a conviction and notice by the government of the forfeiture. The third party has the burden of demonstrating at a post-conviction hearing on the petition that: (i) he has an interest in the forfeited property; and (ii) either (a) his interest was superior to the defendant's at the time of the commission of the crime, or (b) he acquired an interest in the property after the crime was committed but is a bona fide purchaser who was, at the time he obtained the interest, "reasonably without cause to believe" that the property was forfeitable.[19]

17 One of the unanswered questions about the source of influence prong is whether the source must have been used to affect the conduct of the enterprise through a pattern of racketeering activity. If, for example, X Corp. owns 10% of the stock of Y Corp., and also has an employee who serves as the president of Y Corp. and engages in racketeering activity through Y Corp., what is the source of influence: the officer position occupied by the president, the stock in Y Corp., or both? Does it matter whether the Y Corp. stock was ever used by X Corp. to "influence" Y Corp. to commit illegal acts? These questions remain unanswered.

18 *See infra* notes 29-44 and accompanying text.

19 18 U.S.C. § 1963(l) (1988).

RICO appears to make the post-conviction proceeding the sole method for asserting rights in forfeited property.[20] Third parties have no way of establishing whether they are at risk of losing a property interest in a defendant's property prior to the outcome of the criminal trial. Once a third party arrives at the post-conviction hearing, there are significant obstacles to the vindication of the claim. The third party may be barred by the criminal conviction from litigating the propriety of the forfeiture of the defendant's property, even though the third party had no opportunity to appear at the proceeding to contest the forfeiture.[21] The third party may not be entitled to a jury trial.[22] Finally, the third party may not be permitted to make a claim against forfeited assets based on an unsecured claim against the defendant because an unsecured third party claim may not constitute an "interest" in the forfeited property.[23]

4. Restraining Orders

Section 1963 also permits the government to obtain a restraining order precluding the transfer of forfeitable assets.[24] The government can obtain the restraining order either before or after indictment. A hearing is required for a pre-indictment restraining order,[25] unless the government can satisfy the conditions for an *ex parte* restraining order.[26] Post-indictment, a court may issue a restraining order without any prior hearing, based solely upon the finding of probable cause in the indictment.[27] Although the legislative history makes plain that a subsequent

20 Section 1963(i) provides:

> Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—
>
> (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
>
> (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

18 U.S.C. § 1963(i) (1988).

21 *Id.*

22 18 U.S.C. § 1963(l)(2) (1988).

23 Courts have split on the question of whether an unsecured creditor may make a claim against forfeited assets in post-conviction proceedings. *Compare* United States v. Campos, 859 F.2d 1233 (6th Cir. 1988) (unsecured creditors not bona fide purchasers) *with* United States v. Reckmeyer, 836 F.2d 200, 207 (4th Cir. 1987) *and* United States v. Mageean, 649 F. Supp. 820 (D. Nev. 1986), *aff'd mem.* 822 F.2d 62 (9th Cir. 1987) (general unsecured creditors considered bona-fide purchasers).

24 18 U.S.C. § 1963(d) (1988).

25 Section 1963(d)(1)(B) allows the court to issue a preindictment restraining order if, after notice is given to persons with an interest in the property, the court finds that: (1) the government is likely to prevail on forfeiture, (2) the restraining order is necessary to preserve the property, and (3) that the need to preserve the property outweighs the hardship on any party affected by the order.

26 Section 1963(d)(2) allows the government to obtain an *ex parte* restraining order if it demonstrates that there is probable cause to believe that the property is subject to forfeiture and that notice would jeopardize the availability of the property for forfeiture. The order can be obtained for a maximum of 10 days, unless it is extended for good cause.

27 The question whether the indictment is sufficient to satisfy constitutional standards of due process for issuance of a restraining order without a prior hearing has generated much litigation. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678-80 (1974); United States v. Moya-Gomez, 860 F.2d 706, 725-31 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3221 (1989); United States v. Musson, 802 F.2d 384, 387 (10th Cir. 1986); United States v. Keller, 730 F. Supp. 151, 162-63 (N.D. Ill. 1990); United States v. Draine, 637 F. Supp. 482, 485 (S.D. Ala. 1986); United States v. Rogers, 602 F. Supp. 1332, 1345 (D. Colo. 1985). Where a defendant or a third party claimant

hearing is not foreclosed, it does not articulate the precise contours of such a hearing.[28]

B. *The Tracing Requirement and Third Party Interests*

The extent to which the statute requires the government to trace assets can dramatically affect third party interests. If the government is unable to restrain assets because it cannot show they are forfeitable as proceeds or enterprise interests, and if it cannot take advantage of the relation back doctrine with respect to such property interests, then there may be certain assets that a defendant may safely use to pay or secure ordinary business obligations.

1. Pre-1984 Tracing Decisions

The focus of litigation over asset tracing under RICO has changed since the passage of the 1984 Comprehensive Crime Control Act, which added the relation back doctrine to criminal forfeiture and made a defendant's substitute assets forfeitable in certain circumstances.[29] Prior to the 1984 amendments there was, in effect, no third party forfeiture, and the only tracing issue was whether forfeiture could be obtained from a defendant when the specific tainted asset was no longer in his possession because he had transferred or otherwise disposed of it.[30] The 1984 amendments added the substitute assets provision, which provided statutory authority for a court to order forfeiture of a defendant's non-tainted assets in the event the tainted property had disappeared or diminished in value.[31] As a result of the 1984 amendments, the tracing issue is of little importance to a defendant because a conviction operates as a judgment

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creates any significant doubt about the propriety or extent of a restraining order, courts will ordinarily entertain a challenge and, if necessary, hold an evidentiary hearing. *See, e.g.*, United States v. Roth, 912 F.2d 1131 (9th Cir. 1990); United States v. Harvey, 814 F.2d 905, 928-29 (4th Cir. 1986), *modified*, 837 F.2d 637 (4th Cir. 1988), *aff'd sub nom.* Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2546 (1989); United States v. Thier, 801 F.2d 1463, 1468-69 (5th Cir. 1986), *modified*, 809 F.2d 249 (1987); United States v. Lewis, 759 F.2d 1316, 1324-25 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985); United States v. Spilotro, 680 F.2d 612, 616 (9th Cir. 1982); United States v. Crozier, 674 F.2d 1293, 1296 (9th Cir. 1982), *vacated and remanded*, 468 U.S. 1206 (1984); United States v. Long, 654 F.2d 911, 915 (3rd Cir. 1981). *Cf.* United States v. Friedman, 849 F.2d 1488, 1491 (D.C. Cir. 1988) (acknowledging that where forfeiture is based only on the indictment and the connection between the property and the illegal venture remains to be proved, "it is not entirely clear who owns the property").

The Supreme Court has reserved judgment on the whether or not a hearing is required under the Due Process clause. United States v. Monsanto, 109 S. Ct. 2657, 2666 n.10 (1989). *See also* Baird & Vinson, *RICO Pretrial Restraints and Due Process: The Lessons* of Princeton/Newport, 65 NOTRE DAME L. REV. (1990); Note, *Criminal Forfeitures and the Necessity for a Post-Seizure Hearing: Are CCE and RICO Rackets for the Government?*, 57 ST. JOHN'S L. REV. 776, 782 n.28 (1983).

28 *See* H. R. REP. No. 98-103D, 98th Cong., 2d Sess. 206 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, at 3389 n.42 ("This provision is not intended to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order, however.").

29 *See supra* note 2 and *infra* note 31.

30 Although courts have permitted the forfeiture of assets held by a third party in some circumstances, *see* United States v. Long, 654 F.2d 911 (3d Cir. 1981) (restraining order issued under Continuing Criminal Enterprise statute against airplane transferred by defendant to attorney), the statute did not provide for third party forfeiture and these cases dealt primarily with sham transactions.

31 Section 1963(m) provides:

against him for the value of the property ordered forfeited, and that judgment can be satisfied out of any property, not just tainted property. Nonetheless, the tracing requirement can significantly determine the outcome of third party claims against the defendant or his assets, because the relation back doctrine and the restraining order provisions do not apply to substitute assets.

Section 1963(a) specifically sets out what property is forfeitable. The consequence of a criminal RICO conviction is that the defendant forfeits any "interest in" or "property . . . affording a source of influence over" an enterprise, and "property constituting, or derived from" proceeds obtained from racketeering activity.[32] Although the nature of property interests that may be forfeited is broadly defined in subsection (b),[33] these property interests are forfeitable only if they have the kind of relationship to illegal activity set forth in subsection (a). In other words, the property must be an enterprise interest or proceeds of racketeering activity. If the specific subsection (a) property is not in the defendant's hands, then there is nothing to forfeit, unless that specific property can be located in the hands of a third party.

Nevertheless, some courts prior to the 1984 amendments found that tracing was not a requirement of forfeiture from a convicted defendant. In *United States v. Ginsburg*,[34] the en banc Seventh Circuit held that an attorney convicted of RICO, based on bribes paid to a local board of tax appeals, could be ordered to forfeit his one-half interest in legal fees that his law firm generated from the illegal conduct. The defendant argued that no forfeiture could be ordered because the government had failed to prove that the fees were still in existence. The court rejected this argument.[35]

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

(1) cannot be located upon the exercise of reasonable diligence;
(2) has been transferred or sold to, or deposited with, a third party;
(3) has been placed beyond the jurisdiction of the court;
(4) has been substantially diminished in value; or
(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order forfeiture of any other property of the defendant up to the value of the property described in paragraphs (1) through (5).

18 U.S.C. § 1963(m) (1988).

32 Upon conviction, section 1963(a) directs the court to order all "property" described in subsection (a) forfeited to the U.S. Some courts have held that forfeiture of the covered property is mandatory. United States v. Busher, 817 F.2d 1409, 1414 (9th Cir. 1987); United States v. Navarro-Ordas, 770 F.2d 959, 970 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); United States v. Kravitz, 738 F.2d 102, 106 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

33 Section 1963(b) defines property subject to forfeiture as:

(1) real property, including things growing on, affixed to, and found in land; and
(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

18 U.S.C. § 1963(b) (1988).

34 773 F.2d 798 (7th Cir. 1985).

35 *See also* United States v. Conner, 752 F.2d 566 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985); United States v. Navarro-Ordas, 770 F.2d 959, 969-70 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); United States v. Robilotto, 828 F.2d 940 (2d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988); United States v. Amend, 791 F.2d 1120 (4th Cir.), *cert. denied*, 479 U.S. 930 (1986).

The *Ginsburg* court's analysis rests on a number of dubious propositions. First, the court claimed that the statute is unambiguous in not requiring a forfeitable interest to be in existence at the time of the conviction and that the remedial purposes of Congress demonstrate no intent to limit the forfeiture remedy to assets in existence at the time of conviction. Second, it noted that requiring the government to trace forfeitable assets such as cash would severely undermine the effectiveness of forfeiture. Finally, it concluded that because money is fungible, a forfeiture judgment against money could be satisfied out of any of the defendant's money. To support its conclusion, the court reasoned that because the criminal forfeiture is *in personam*, the judgment follows the individual. These rationales do not withstand scrutiny.

The fact that criminal forfeiture is *in personam* has no obvious bearing on whether forfeiture operates on property that no longer exists. Forfeiture is still forfeiture and, by definition, requires something to be forfeited.[36] To be sure, it is entirely possible that a statute authorizing *in personam* criminal forfeiture could define the object of forfeiture to include any or all assets of a defendant so that the forfeiture order would operate like a money judgment against the defendant. In contrast, a money judgment against an individual defendant would not be possible in an *in rem* forfeiture action where jurisdiction attaches to the property, and the individual is not before the court. The fact that a money judgment type forfeiture *could* have been accomplished in a criminal forfeiture statute does not lead inexorably to the conclusion that it was so intended in RICO.

In fact, the statute is straightforward in defining what may be forfeited: proceeds, derivative proceeds, or interests in the enterprise itself. It also clearly describes the form and type of property interests that are included in forfeitable property. The *Ginsburg* court's analysis simply ignores the statutory language, relying instead on the interpretation that the statute does not explicitly state that the property to be forfeited must be in existence at the time of the conviction. This is hardly surprising; indeed, one might have thought it obvious that what does not exist cannot be forfeited. What is more surprising, and more significant for purposes of legal analysis, is that at the time *Ginsburg* was decided the statute did not state that a forfeiture judgment would operate as a general claim against any and all of the defendant's assets. Instead, the statute defined *particular categories* of property that could be forfeited.[37]

The further rationale that forfeiture would be more effective if it operated as a money judgment is, of course, no justification for reading the statute contrary to its plain terms. Where the statute explicitly defines what can be forfeited, the argument that it would be more effective if it permitted broader forfeiture is more properly addressed to Congress.

36 Forfeiture is the divestiture of property without compensation. Its effect is "to transfer the title to the *specific thing* from the owner to the sovereign." 36 AM. JUR. 2D *Forfeitures and Penalties* § 1 (1968) (emphasis added).

37 See the discussion of the 1986 substitute assets amendments, *supra* notes 29-31 and accompanying text.

Nor is the argument that money is fungible a basis for allowing a lower court to order non-specific forfeiture with respect to subsection (a) assets. Fungibility is merely a characteristic of money which makes it difficult to trace. But this characteristic casts no light on what the statutory language requires in order to forfeit subsection (a) proceeds. To say that because money is fungible, any money of a defendant can be forfeited, reads out of the statute the language that makes property derived from illegal proceeds forfeitable. If any property may be forfeited, there is no need for a provision that makes derivative property forfeitable.

Moreover, the use of the commercial concept of fungibility is completely foreign to criminal law. Fungibility is defined in the Uniform Commercial Code ("UCC") as goods "of which any unit is . . . the equivalent of any other like unit."[38] Money, corn, and wheat meet this description, and the consequences of their fungibility are defined by commercial statutes. The quality of fungibility determines the obligations of a seller of goods to deliver,[39] and of a party holding fungible goods as security.[40] These consequences of fungibility were developed by years of commercial practice embodied in the common law and various statutory codifications of the law of sales before they were codified in the U.C.C. But, contrary to the view of the Seventh Circuit, the criminal law has no analogous history of common law or statutory special treatment of fungibility.

The decision of the Seventh Circuit is even more puzzling in light of the fact that, subsequent to the indictment in *Ginsburg*, Congress amended the statute to add the substitute assets provision. As a result of the amendment, if the government cannot find the specific forfeitable property, it may satisfy the judgment out of other assets of the defendant. The policy rationale for this amendment is similar to the policy rationale offered by the Seventh Circuit in support of its holding, namely that it would make the remedy more effective.[41] Some argue that the

38 U.C.C. § 1-201(17) (1989).

39 A seller can satisfy a contract for the sale of fungible goods by delivery of any unit. U.C.C. § 8-107(1) (1989). Likewise, a seller may agree to sell a portion of fungible goods even if the precise quantity is unknown, and the warranty of merchantability requires delivery of fungible goods of "fair average quality." U.C.C. §§ 2-105(3), 2-314(2)(b) (1989).

Also, where there is a casualty to non-fungible goods, and the seller is without fault but still bears the risk of loss, he may avoid a contract for the sale of goods identified to the contract. U.C.C. § 2-613(a) (1989). But the seller may not avoid the contract in these circumstances if the contract is for the sale of fungible goods, unless the parties have agreed to the sale of specific goods. Valley Forge Flag Co. v. New York Dowel & Moulding Import Co., 90 Misc. 2d 414, 395 N.Y.S.2d 138, 139 (N.Y. Civ. Ct. 1977).

40 A secured party may commingle fungible property held as security for a debt. UCC § 9-207(2)(d) (1989).

41 Mr. President, I am pleased that the bill we are about to approve contains provisions allowing the Federal Government to seize and obtain forfeiture of substitute assets. . . . In combination with the money laundering provision in S. 2878, we will make it more difficult for drug dealers to keep the profits of their criminal activities.

132 CONG. REC. S14,270 (daily ed. Sept. 30, 1986) (statement of Sen. DeConcini).

In addition, this package contains provisions aimed at striking at the financial underpinnings of organized crime and drug trafficking syndicates, through the use of forfeiture of substitute assets provisions and a new crime against money laundering, both of which will assist law enforcement agencies in seizing the proceeds of drug traffickers.

132 CONG. REC. S14,270 (daily ed. Sept. 30, 1986) (statement of Sen. Biden).

amendment simply clarified what the statute was originally intended to mean. This view ignores the legislative history that explicitly states that the amendment was necessary because a defendant could avoid forfeiture where he had disposed of or wasted the forfeitable property.[42] This view also fails to explain why subsection (m) was necessary if forfeiture operated as a judgement against any assets of a convicted defendant, and disregards the structure of the statute, which distinguishes between the treatment of subsection (a) assets and substitute assets under subsection (m).

2. Tracing After the 1984 Amendments

Although, at first blush, one might conclude that the addition of subsection (m) eliminates whatever tracing requirement might have existed with respect to forfeitable assets, that is not the case. The substitute assets provision does not get rid of tracing. Instead, it gives the government an alternative remedy where tracing is impossible or ineffective. As a result of the substitute assets provision, tracing is usually of little importance to the defendant. Likewise, the government no longer has any great motivation to seek forfeiture of specific property because it can achieve the full impact of forfeiture by seizing either specified assets or substitute assets.

Nevertheless, tracing is critical to the rights of third parties, because two of the government's most powerful tools—the relation back doctrine and the restraining order provisions—do not apply to substitute assets. Subsection (c) vests title in the United States as of the date of the crime only with regard to "property described in subsection (a)."[43] Title to substitute property forfeitable under subsection (m) is not affected by the relation back doctrine. Likewise, the restraining order provisions may be invoked only "to preserve the availability of property described in subsection (a) for forfeiture under this section."[44] The restraining order provisions make no reference to subsection (m) assets.

In light of the government's ability to obtain the value of forfeitable assets from any of the defendant's assets, indictments often do not spec-

42 The question before us now is whether or not we should have the ability to go after substitute assets. That is, if they have been successful in hiding their assets or transferring their assets, could we not go after a similar amount of other assets they might have in which they have hidden their previous ones? Why do we do this? Because we are dealing with tough, smart people who try to stay one step ahead of the law try to hide their assets whenever they can.

Some will say we do not need this. The Justice Department has asked for it. In fact it was part of the Comprehensive Crime Control Act when it left this House several years ago similarly was passed in the other body. Somehow it got dropped out in conference.

132 CONG. REC. H6,679 (daily ed. Sept. 11, 1986) (statement of Rep. Lungren).

The bill also closes a loophole in the current law, by permitting the seizure and forfeiture of substitute assets if a drug trafficker has transferred his profits to a third party or placed them beyond the jurisdiction of the court.

132 CONG. REC. S14,270 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).

43 Subsection (c) provides that:

All right title, and interest in property described in subsection (a) vests in the United States upon the commisison of the act giving rise to forfeiture under this section.

18 U.S.C. § 1963(c) (1988).

44 18 U.S.C. § 1963(d)(1) (1988).

ify the property that will be forfeited upon conviction. In white collar cases, the proceeds are often cash. Although the government may be able to specify the amount of the cash, it is frequently not in a position to identify specific cash or derivative property that is forfeitable. An indictment that merely states that cash in the amount of three million dollars is forfeitable does not entitle the government to the benefit of the relation back doctrine or to the use of the restraining order provisions. Accordingly, since the government could only reach assets transferred to a third-party business if it could trace them to tainted property, businesses dealing with indicted customers may be in a relatively strong position in taking payment from assets not specifically identified in the indictment as forfeitable.[45]

II. Conclusion

A tracing requirement, while not a panacea, would give some certainty to third parties with claims against a RICO defendant. The government could not seize interests not directly tied to wrongdoing in an indictment, and third parties would not have to contend with the relation back doctrine regarding payments out of substitute assets. When the government does not specify all property or any property subject to forfeiture, the third party could, for example, obtain payment on its loan or on its accounts payable after the indictment is handed down.

This enhanced certainty would not, of course, ameliorate all of the problems facing a third party claimant. The government may still specify all property of the defendant as forfeitable, seek to restrain non-forfeitable assets in order to protect forfeitable assets,[46] deny standing to an unsecured creditor, and take positions with respect to secured creditors that are contrary to commercial principles and expectations. Third party proceedings will still be conducted in a manner that severely disadvantages the claims of third parties. Although the tracing requirement may provide a ray of light, it will still behoove a business dealing with a potential or actual RICO defendant to exercise extreme caution lest the third party business become an innocent victim of the government's war on crime.

45 *But see* United States v. McKinney (*In re* Billman), No. 90-7029 (4th Cir. Oct. 3, 1990) (LEXIS, Genfed library, USAPP File), in which the Fourth Circuit held that the government could restrain funds transferred by a RICO defendant to a co-defendant not charged with RICO violations. Although the government was unable to prove at a hearing on its request for a restraining order that the transferred funds were tainted, the court concluded that the transferred funds were the substitute assets of the RICO defendant, and the transferee was entitled to keep them only if she could show that she was a bona fide purchaser without notice that the funds were subject to forfeiture. Accordingly, the court concluded that the assets transfered to her could be restrained pending the outcome of the criminal trial.

46 *See* United States v. Regan, 858 F.2d 115 (2d Cir. 1988).