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“HIT THEM WHERE IT HURTS”: RICO CRIMINAL FORFEITURES AND WHITE COLLAR CRIME*

KARLA R. SPAULDING**

In 1984 and 1986, the criminal forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act,¹ known as the RICO Act, were amended to improve procedures for implementing the forfeiture provisions of the Act and to clarify the broad scope the statute was always intended to have.² This penalty statute, 18 U.S.C. 1963, as amended, will be of ever-increasing importance in the prosecution of traditional white collar crimes such as fraud and political corruption. The reason is obvious. One of the the most severe penalties which can be inflicted on white collar criminals is to take from them the proceeds of their illegal activity and businesses which provided the economic base for their crimes.³ Mandatory separation of the convicted felon from the business which he corrupted and from the “ill-gotten gains” of his illegal activities is the primary purpose of the RICO forfeiture provisions.⁴ In addition, strong measures in the white collar crime area are intended to deter others who may determine that the risk normally inherent upon con-

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¹ 18 U.S.C. §§ 1961-1968 (1986).

² S. REP. No. 224, 98th Cong., 1st Sess. 15, 21 (1983).

³ For example, compare basic prison sentences for drug dealers with those for “racketeers.” Under title 21 of the United States Code, a five-year (60 months) minimum mandatory period of incarceration is imposed for mere possession of as little as five grams of substances containing cocaine base. 21 U.S.C. § 844. Under the federal sentencing guidelines effective for offenses committed after November 1, 1987, an individual convicted of racketeering would serve, based on the base level offense category, between 30 and 37 months in jail.

⁴ The RICO Act “attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains.” 116 CONG. REC. 591 (1970).

viction of a white collar crime is well worth the monetary gain possible from these criminal activities.⁵ Consequently, Congress adopted a broad "hit them where they hurt" philosophy when it enacted the RICO Act forfeiture provisions.⁶

Initially the RICO Act forfeiture provisions were seldom invoked following their enactment in 1970.⁷ However, clarification of the broad scope of the provisions by the 1984 and 1986 amendments to the Act, coupled with the increasing use of it in the white collar crime area, makes knowledge of the scope and procedures for use of the forfeiture provisions vital to lawyers involved in federal criminal cases today. Case law is developing in many aspects of forfeiture law including the rights of innocent third parties, pretrial restraining orders and forfeitability of attorney's fees. The following is an examination of the legislative and legal history of the RICO forfeiture provisions; a review of the law to date; a discussion of issues regarding the constitutionality of the forfeiture provisions; and procedures for charging and implementing criminal forfeiture under RICO.

I. THE HISTORY OF RICO ACT FORFEITURE PROVISIONS

A. LEGISLATIVE HISTORY OF THE RICO ACT

Case law interpreting the RICO forfeiture provisions has turned time and again to a review of the legislative history of the statute for guidance as to the scope and meaning of the statute.⁸ Accordingly, it is appropriate to understand the legislative history underlying section 1963 before analyzing the interpretation of the statute by the courts.

Under the English common law, "in many cases of felonies, the party forfeited his goods and chattels to the crown . . . [as] a part, or at least a consequence, of the judgment or conviction." It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offense; but the

⁵ "If corporate officers are fined, imprisoned and divested of their interests in the enterprise, their successors are unlikely to imitate their misconduct." *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 769 (9th Cir. 1980)(footnote omitted.)

⁶ *United States v. Martino*, 681 F.2d 952, 957 n.17 (5th Cir. 1982)(en banc), *aff'd sub nom.* *Russello v. United States*, 464 U.S. 16 (1983).

⁷ *Forfeiture in Drug Cases: Hearings on H.R. 2646, H.R. 2910, H.R. 4110 and H.R. 5371 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st and 2d Sess. 1 (1981, 1982).

⁸ *E.g.*, *Russello v. United States*, 464 U.S. 16 (1983); *United States v. Dean*, 647 F.2d 779, 786-87 (8th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982); *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 767-68 (9th Cir. 1980); *United States v. L'Hoste*, 609 F.2d 796, 811-12 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); *United States v. Rogers*, 602 F. Supp. 1332, 1340-42 (D.Colo. 1985).

right attached only by the conviction of the offender.⁹

This type of forfeiture, termed *in personam*, was abolished in the United States by the First Congress in 1790.¹⁰ The Act of April 20, 1790, as amended, provided that "[n]o conviction or judgment shall work corruption of blood or any forfeiture of estate."¹¹

A second type of common law forfeiture, termed *in rem*, arose from the concept of "deodand."¹² "At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand."¹³ After the deodand was abolished in 1846,¹⁴ English law continued to provide "for statutory forfeitures of offending objects used in violation of the customs and revenue laws Statutory forfeitures were most often enforced under the *in rem* procedure"¹⁵ In the United States, the 1790 law forbidding forfeiture of estate did not affect the *in rem* forfeitures provided for by statute. Statutory forfeiture was used to seize property used in violation of the law, such as ships used for smuggling and slave-running.¹⁶ Since 1790, however, "the Federal Government has applied the ameliorative policy . . . of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred 'without willful negligence' or an intent to commit the offense."¹⁷

The forfeiture provision proposed by the Ninety-First Congress as part of the RICO Act was the first *in personam* forfeiture for violation of a criminal statute since 1790.¹⁸ The legislation was part of a

⁹ The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827).

¹⁰ Act of April 20, 1790, ch. 9, § 24, 1 Stat. 117 (1790). The only exception to the Act of April 20, 1790 before 1970 was "the Confiscation Act passed by the Radical Republican Congress in 1862 which authorized President Lincoln to forfeit the property of Confederate sympathizers." *United States v. Schmalfeldt*, 657 F. Supp. 385, 387 (W.D. Mich. 1987).

¹¹ *Measures Relating to Organized Crime: Hearings on S.30 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 407 (1969) [hereinafter *Measures Relating to Organized Crime Hearings*].

¹² "Deodand (L.Lat. *Deo dandum*, a thing to be given to God.) In English Law, any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown to be applied to pious uses, and distributed in alms by the high almoner." *Black's Law Dictionary* 392 (5th ed. 1979).

¹³ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974) (footnote omitted.)

¹⁴ *Id.* at 681 n.19.

¹⁵ *Id.* at 682.

¹⁶ *Id.* at 683.

¹⁷ *Id.* at 689-90 n.27 (citation omitted.)

¹⁸ See *Measures Relating to Organized Crime Hearings*, *supra* note 11, at 407 (Deputy Attorney General Richard G. Kleindienst) (quoting 18 U.S.C. § 3563 (repealed November 1, 1986)). "Corruption of blood" refers to early English law under which "the complete forfeiture of all real and personal property followed as a consequence of conviction of a

number of bills aimed at curbing the criminal activity of organized crime, specifically the Mafia or La Cosa Nostra families. The first bill proposed in this area was the Organized Crime Control Act introduced as Senate Bill S. 30 by Senator John L. McClellan on March 11, 1969.¹⁹ The Bill contained the predecessor provisions of the formal immunity statute.²⁰ Senator McClellan also introduced a second Bill, S. 1861, to be considered in conjunction with S. 30.²¹ S. 1861, entitled the Corrupt Organizations Act of 1969, was the forerunner of the RICO Act enacted in 1970.²² Section 1963 of S. 1861 set forth the proposed criminal forfeiture provision.²³

In his remarks regarding S. 1861, Senator McClellan cited testimony before the subcommittee regarding infiltration of legitimate business by "racketeers."²⁴ He further noted:

Criminals use racketeering methods in legitimate fields of endeavor. They corrupt others, instead of becoming legitimized. The only way in which this cancer can be removed from our economy is by direct attack, by forceable removal and prevention of return.

.....
This bill uses the most direct route to accomplish this result. If an organization is acquired or run by the proscribed racketeering

felony or treason." *United States v. Grande*, 620 F.2d 1026, 1038 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980). "In addition, when convicted of treason or a felony, the defendant's 'blood was corrupted' so that nothing could pass by inheritance through his line." *Id.*

¹⁹ 115 CONG. REC. 5872 (1969).

²⁰ 18 U.S.C. §§ 6001-05 (1986).

²¹ *Measures Relating to Organized Crime Hearings*, *supra* note 11, at 61.

²² 115 CONG. REC. 9566 (1969).

²³ § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this Chapter shall be fined not more than \$10,000 or imprisoned not more than 20 years, or both, and shall forfeit to the United States all interest in the enterprise engaged in, or the activities of which affect, interstate or foreign commerce.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including but not limited to, the acceptance of satisfactory performance bonds, in connection with property subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General, or any Assistant Attorney General designated by the Attorney General, to seize all property declared forfeited under this section upon such terms and conditions as the court shall deem proper. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this Chapter by the Attorney General, or any Assistant Attorney General designated by the Attorney General.

Id. at 9569.

²⁴ *Id.* at 9567.

method, then the persons involved are removed from the organization.²⁵

Specifically regarding the forfeiture provisions of S. 1861, Senator McClellan stated:

Section 1963 provides that any violation of section 1962 provable beyond a reasonable doubt will result in a forfeiture of the violators' interest in the organization to the United States. This is a powerful weapon, which will, I hope, effectively remove the organized crime element from a particular field of activity, as well as remove the illegal profit potential which makes certain fields so attractive today. Precedent for forfeitures, of course, runs deep in our common law heritage. It thus calls on the past to meet the problems of today.²⁶

S. 1861 also contained civil remedies allowing for orders directing the defendant to divest his direct or indirect interests in an enterprise, prohibiting him from engaging in the same type of business or activity as the enterprise engaged in or ordering dissolution of the enterprise.²⁷ As to the civil divestiture power, Senator McClellan observed:

If Dupont and other related companies can be forced to rid themselves of General Motors ownership, almost without regard for the economic consequences, [*United States v. DuPont & Co.*, 366 U.S. 316, 326-27 (1961)], then it most surely follows that the removal of criminal elements from the organizations of our society by divestiture is justified The criminal surely can lose his right to own a business or other enterprise as easily as can the essentially honest, but potentially too powerful businessman.²⁸

During the continuation of the hearings on S. 30 and related bills before the Senate subcommittee,²⁹ S. 1861 was specifically addressed. At first, the Justice Department called S. 1861 "so innovative" that it would need more time to explore all its ramifications.³⁰ Nevertheless, Attorney General John Mitchell recognized that strong measures were necessary to fight organized crime:

McClellan: . . . But you say the fact that you may finally arrest and convict the top man in a family does not destroy the family. Someone else just moves up to take his place.

Mitchell: That is correct, sir.

McClellan: And they continue to operate.

Mitchell: That is correct, sir.

McClellan: And your thought is that we have to find some way to at-

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 9569.

²⁸ *Id.* at 9567-68.

²⁹ *Measures Relating to Organized Crime Hearings*, *supra* note 11, at 404.

³⁰ *Id.* at 388.

tack the source of the revenues that constitute the attraction to them to continue their activities?

Mitchell: Yes, sir. To remove the illegal activity, the business or whatever the source of those funds is.³¹

Subsequently, the Justice Department sent a letter to the subcommittee setting forth the Department's view on S. 1861, specifically commenting on the proposed forfeiture provisions.³² The letter distinguished between *in rem* forfeitures and the *in personam* forfeiture proposed in section 1963 of S. 1861. The Department of Justice noted that the civil forfeiture provisions contained in section 1964 of S. 1861 would be "the principal utility of S. 1861."³³ As to criminal forfeiture, the Department observed:

It is felt that this revival of the concept of forfeiture as a criminal penalty, limited as it is in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of Congressional wisdom, rather than of Constitutional power.³⁴

³¹ *Id.* at 116.

³² *Id.* at 406-08.

³³ *Id.* at 407.

³⁴ *Id.* The majority of the text of the letter is set forth below:

Section 1963 contains criminal penalties for violations of Section 1962. These include, in addition to a fine of not more than \$10,000, or imprisonment for not more than 20 years, or both, forfeiture of all interest in the enterprise. The concept of forfeiture as a criminal penalty which is embodied in this provision differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is *in rem* against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and the forfeiture is no part of the punishment for the criminal offense. Examples of such forfeiture provisions are those contained in the customs, narcotics and revenue laws. Such statutes have been uniformly upheld against the objection that they violate due process on the grounds that they are wholly preventive and remedial and are designed to aid the enforcement of the particular laws in question and to restrain violations thereof. In upholding such a statute in *Goldsmith-Grant Company v. United States*, 254 U.S. 505 (1921), the Supreme Court held at 511: "But whether the reason for Section 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisdiction of this Country to be now displaced."

Under the criminal forfeiture provision of Section 1963, however, the proceeding is *in personam* against the defendant who is the party to be punished upon conviction of violation of any provision of the Section, not only by fine and/or imprisonment, but also by forfeiture of all interest in the enterprise. The concept is derived from the practice well known in the early law where upon conviction of treason and certain other felonies the party forfeited his goods and chattels to the crown. *The Palmyra*, 12 Wheat. 1, 25 U.S. 1 (1827), opinion of Mr. Justice Story at 14. According to Blackstone, the only valid reason for this type of forfeiture is that since all property is derived from society, any member of society who violates the fundamental contract of his association by transgressing society's laws forfeits his right to that property, and the state may justly resume that portion of the property which the laws have previously assigned him. *Commentaries*, Ch. 8, 299-300. XVI.

While there is some indication that this concept of criminal forfeiture was in usage in the colonies, the First Congress by Act of April 20, 1790, abolished forfeiture of estate and corruption of blood, including in cases of treason. That statute, as revised, is found in 18 U.S.C. 3563 which states: "No conviction or judgment

The only opposition to the provisions of S. 1861 expressed to the subcommittee were those of Lawrence Spieser representing the ACLU. Mr. Spieser's concern was that "[l]ike many Sections of S. 30, which we have previously discussed in detail, the substantive sections of S. 1861, would be applicable in areas far removed from that which we traditionally define as 'organized crime'."³⁵ Mr.

shall work corruption of blood or any forfeiture of estate." From that date to the present, therefore, no Federal statute has provided for a penalty of forfeiture as a punishment for violation of a criminal statute of the United States. Section 1963(a), therefore, would repeal 18 U.S.C. 3563 by implication.

It is felt that this revival of the concept of forfeiture as a criminal penalty, limited as it is in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of Congressional wisdom rather than of Constitutional power. See *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), opinion of Mr. Justice Frankfurter at 441, holding that whether proscribed conduct is to be visited by a criminal prosecution or by other remedies is a matter of legislative choice.

While the criminal penalties provided in Section 1963 will doubtless have a deterrent effect on racketeer infiltration of legitimate business enterprises, the principal utility of S. 1861 may well be found to exist in its civil remedies provisions—injunction, divestiture and dissolution—contained in section 1964, supported as they are by the broad discovery and procedural devices contained in Sections 1965 through 1968. We have no objection to these provisions, and note that they are substantially identical to existing provisions of the antitrust laws. There is ample precedent for application of these civil remedies to the conduct sought to be prohibited by this bill in decisions of the Supreme Court upholding similar civil remedies in antitrust cases. The remedy of divestiture of interest was upheld in the landmark decision in *United States v. DuPont and Company*, 366 U.S. 316, 326-27 (1961). Prohibition against engaging in certain types of legitimate activities was approved in such cases as *United States v. Swift and Company*, 286 U.S. 106 (1932), and *Deveau v. Braisted*, 363 U.S. 144 (1960). Authority for dissolution may be found in *International Boxing Club of New York v. United States*, 358 U.S. 242 (1959). See also the recent decision of the Supreme Court in *Utah Public Service Commission v. El Paso Natural Gas Company*, [394 U.S. 1009 (1969)] decided June 16, 1969, a Clayton Act case where the Court decreed complete divestiture "without delay", emphasizing at p. 7 of the slip opinion that "the pinch on private interests is not relevant to fashioning an antitrust decree, as public interest is our sole concern."

These time tested remedies, particularly when used in conjunction with the civil investigative demand contained in Section 1968, should enable the Government to intervene in many situations which are not susceptible to proof of a criminal violation. Thus, in contrast to a criminal proceeding, the civil procedure under which Section 1964 actions are governed, with its lesser standard of proof, non-injury adjudication process, amendment of pleadings, etc., will provide a valuable new method of attacking the evil aimed at in this bill. The relief offered by these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity. Finally, these remedies are flexible, allowing of several alternate courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the Court to insure that its decrees are not violated.

With the amendments which I have suggested, then, the Department favors the enactment of this bill and believes that it can make a substantial contribution to the Government's program for eliminating the serious threat which organized crime's entry into legitimate business poses to the proper functioning of the American economic system.

Id. at 406-08.

³⁵ *Id.* at 475.

Spieser's only comment on the proposed forfeiture provision came during his discussion of hypothetical situations in which he feared misuse of the Act. He postulated:

The corner grocer accepts money for food from individuals known to be involved with a criminal syndicate who patronized his store. He knows that money is derived from illegal activities. Must he refuse to sell his wares, or inquire specifically as to where his customer got the money, on pain of subjecting himself to forfeiture or fine or imprisonment when he subsequently invests that money.

Punishment for aiding and abetting involves a stake in the venture under *United States v. Falcone*, 109 F.2d 579 (2nd Cir. 1939), *aff'd*, 311 U.S. 205 (1940). Here the same result is reached without regard to any interest or stake on the part of the grocer. The same may be said for the doctor who treats the suspect individual or anyone else who provides him with services.

Moreover there are difficulties with both the prohibition and penalty provided even in the context of what is classically termed organized crime. It is certainly clear that not all income which can be defined as derived "directly or indirectly" from a pattern of racketeering activity should be subject to forfeiture and that anyone knowingly receiving such income should be subjected to penalties provided without regard to the circumstances of his receipt thereof.³⁶

In his discussion of potential overreaching under the forfeiture provision, he addressed the question of forfeiture of attorney's fees:

For example, if a lawyer is retained to defend an individual charged with an organized crime offense, and is paid in cash for his services, surely he has reason to know that the money with which he is paid may be or has been directly or indirectly derived from racketeering activity. Indeed, he may know this to a certainty just as he may know that his client is guilty. Nevertheless under our law, even the guilty are entitled to an adequate defense. Yet this legislation would require this lawyer or any lawyer either to refuse to undertake the defense or accept the fee on pain of forfeiture and criminal indictment. Whatever the ethical considerations involved in whether a lawyer undertakes a given case, it is not the proper role of the Congress to legislate what amounts to a virtual denial of the right to counsel of one's choice to any one engaged in organized crime activity or reduce him to the situation where he has no choice save to rely on appointed counsel.³⁷

Despite Mr. Spieser's hypotheticals, no limiting language was added to S. 1861 to restrict its application solely to "organized crime,"³⁸ or to limit the breadth of the forfeiture provisions.

By November 17, 1969, S. 1981 as well as six other bills had

³⁶ *Id.* at 476.

³⁷ *Id.*

³⁸ "It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime." 116 CONG. REC. 35,204 (1970)(statement of Rep. Poff).

been consolidated into S. 30.³⁹ On December 18, 1969, the Senate issued its report on S. 30.⁴⁰ The report recommended approval of the bill, as amended.⁴¹ The committee stated:

It is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal provisions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.⁴²

The report noted that S. 30, of which S. 1861 was now Title IX, had been circulated for comment to various groups and individuals before being reported in its final form.⁴³ As reported, the criminal forfeiture provision of S. 1861 modified the language originally proposed. Initially, section 1963 had provided for forfeiture of "all interest in the enterprise." As revised, "any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise" was subject to forfeiture.⁴⁴ A second category of interests not expressly tied to the en-

³⁹ 115 CONG. REC. 34,389 (1969).

⁴⁰ S. Rep. No. 617, 91st Cong., 1st Sess. (1969).

⁴¹ *Id.* at 1.

⁴² *Id.* at 2.

⁴³ *Id.* at 47.

⁴⁴ See *supra* note 23. The text of Section 1963 as reported by the Senate is set forth below:

1963. Criminal penalties.

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Id. at 23-24.

terprise was also included. This category was described as "any interest . . . acquired or maintained in violation of Section 1962 [the substantive RICO offense]." There is no specific indication in the legislative history regarding the reason for the changed language in this provision.

The report contained an extensive discussion of organized crime, including tables outlining the leadership of the La Cosa Nostra families.⁴⁵ In the discussion of the specific provisions of S. 30, the report noted that "title IX has . . . as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce. It seeks to achieve this objective by the fashioning of new criminal and civil remedies and investigative procedures."⁴⁶ The report discussed examples of the extent of organized crime's control of various industries and the effect of that infiltration.⁴⁷ The new remedies provided by the RICO Act were designed to attack organized crime's sources of economic power on all fronts.⁴⁸ The report stated:

Title IX recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

Criminal approach

Fine and imprisonment as criminal sanctions are not new. The use of criminal forfeiture, however, represents an innovative attempt to call on our common law heritage to meet an essentially modern problem. In English law, goods and chattels were automatically forfeited to the Crown upon conviction of felony; lands were forfeited upon attainder, and this common law rule was carried into the New World by the colonists. Instances of criminal forfeiture, moreover, are noted in early American reports. The use of the ancient doctrine of criminal forfeiture embodied in title IX may be aptly explained by reference to the Department of Justice comments on the proposed statute.⁴⁹

After quoting extensively from the Justice Department's letter

⁴⁵ *Id.* at 36-40.

⁴⁶ *Id.* at 76.

⁴⁷ *Id.* at 76-78.

⁴⁸ *Id.* at 79.

⁴⁹ *Id.* (footnotes omitted).

discussing the forfeiture provisions,⁵⁰ the report concluded: "Through this new approach, it should be possible to remove the leaders of organized crime from their sources of economic power. Instead of their positions being filled by successors no different in kind, the channels of commerce can be freed of racketeering influence."⁵¹ In its indepth review of each of the provisions of S. 30, the report added:

Section 1963 provides criminal penalties for the violation of section 1962, above. Subsection (a) provides the remedy of criminal forfeiture. Forfeiture trials are to be governed by the Fed. R. Crim. P. But see Fed. R. Crim. P. 54(a)(5). The language is designed to accomplish a forfeiture of any "interest" of any type in the enterprise acquired by the defendant or in which the defendant has participated in violation of section 1962. For the purposes of this section, 18 U.S.C. § 3563, insofar as it is applicable to forfeiture is no longer the law. . . . A \$25,000 fine and imprisonment for not more than 20 years are also provided.⁵²

S. 30 was considered by the full Senate on January 21 through January 23, 1970.⁵³ In explaining the forfeiture provisions of Title IX, Senator McClellan stated: "Title IX . . . would forfeit the ill-gotten gains of criminals where they enter or operate an organization through a pattern of racketeering activity."⁵⁴ Co-sponsor of S. 30, Senator Hruska, spoke of Title IX as follows: "Title IX of this act is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods."⁵⁵ S. 30 was passed by the Senate on January 23, 1970.⁵⁶ No opposition to the forfeiture provisions of Title IX was expressed in the Senate debate on S. 30.

S. 30 next proceeded to the House of Representatives, where it was referred to the Committee on the Judiciary.⁵⁷ Hearings were held on S. 30 from May through August 1970.⁵⁸ Senator McClellan

⁵⁰ See *supra* note 34 and accompanying text.

⁵¹ S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969).

⁵² *Id.* at 160. It is interesting to note that the Senate referred to interests acquired in an enterprise in this discussion even though the revised language of Section 1963 deleted the "in an enterprise" limitation from section 1963(a)(1).

⁵³ 116 CONG. REC. 511, 575-607, 972 (1970).

⁵⁴ *Id.* at 592.

⁵⁵ *Id.* at 602.

⁵⁶ *Id.* at 972.

⁵⁷ *Id.* at 1103.

⁵⁸ *Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. (1970).*

introduced S. 30 to the House subcommittee. As to the forfeiture provisions, he stated:

[T]itle IX would provide an effective adjunct to a criminal prosecution: it would punish the criminal appropriately by forfeiting to the government his ill-acquired interests in a legitimate business, and directly aid the business community by expelling him from the legitimate business he had abused. The government would have to dispose of the forfeited interest as soon as reasonably possible, and could sell the property in such a manner as to ensure that the enterprise was not again infiltrated by the convict or his criminal associates. Since the convict would not be compensated for the forfeited interest, the forfeiture would be a criminal one, and could be applied only if the individual's guilt were proven beyond a reasonable doubt in a criminal trial.⁵⁹

Attorney General Mitchell also presented the views of the Justice Department on S. 30 to the House subcommittee.⁶⁰ As to the forfeiture penalties, the Attorney General stated: "We think that the revival of the concept of forfeiture as a criminal penalty, limited as it is herein to an offender's interest which is the subject of the criminal offense, is a matter subject only to Congressional discretion, not constitutional limitation."⁶¹

Others also expressed approval of the proposed law. Senator Steiger applauded the forfeiture provisions of Title IX, noting:

Criminal forfeiture, which was used extensively in England and to a limited degree in the colonies but has found virtually no application in the United States, would punish a criminal found to have violated title IX appropriately by forfeiting his ill-acquired business interests, and it would directly aid the business community by expelling the racketeer from the legitimate business he had abused.⁶²

Charles Rogovin, Administrator of the U.S. Law Enforcement Assistance Administration, wrote, "Title IX will allow the courts actually to extract corrupt influences from legitimate commerce, and to ensure that they do not return."⁶³

Not everyone spoke positively concerning the forfeiture provisions before the House, however. Sheldon Elsen, chairman of the Committee on Federal Legislation, Association of the Bar of the City of New York, called the criminal remedies of Title IX "illusory."⁶⁴ The report of the committee on federal legislation of the New York County Lawyers' Association was more vocal in its dislike

⁵⁹ *Id.* at 107.

⁶⁰ *Id.* at 151.

⁶¹ *Id.* at 171.

⁶² *Id.* at 519.

⁶³ *Id.* at 687.

⁶⁴ *Id.* at 370.

of the forfeiture provisions:⁶⁵

The substantial question raised is whether the 91st Congress of 1970 is prepared to reverse the 1st Congress of 1790 which abolished all forfeiture of estate and corruption of blood—even in cases involving treason. “No conviction or judgment shall work corruption of blood or any forfeiture of estate.” 18 U.S.C. 3563. Quite simply, what is sought in Section 1963 is a proceeding *in personam* against the racketeer’s estate, not a proceeding *in rem* against the thing which has been declared unlawful or which has been used for an unlawful purpose. This is an unwarranted departure from existing law.⁶⁶

The Association also expressed concern about the provision’s impact on third parties. For example:

The Chase Bank lends an officer of a large off-shore mutual fund a substantial sum of money and receives as collateral blocks of marketable securities. Thereafter, it is learned that the off-shore fund is guilty of two acts of fraud in the sale of securities, and as a controlling person, the officer is personally liable. The United States obtains forfeiture of the controlling person’s assets insofar as they can be vaguely related to the securities fraud. At that point, the bank is at the government’s mercy whether it gets paid or becomes an unsecured creditor of the “racketeer.”⁶⁷

The Association further argued that the language requiring the Attorney General to make “due provision for the rights of innocent persons” was probably unconstitutionally vague.⁶⁸

Finally, Lawrence Spieser of the ACLU continued his opposition to Title IX. He speculated that:

Title IX must be read as applying to an individual who in the 1930’s “participated,” but not as a principal, in an offense “involving” some sort of “bankruptcy fraud,” and, entirely on his own, thirty-five years later, participated as a principal in a minor mail fraud. Title IX would appear to subject such a person to a possible 20 year sentence, \$25,000 fine, and forfeiture of any interstate business interest he may have acquired *to any degree*, even “indirectly,” with the proceeds of the mail fraud—all of this in addition to the penalties provided by law for the underlying offenses. While such a case may not necessarily arise, it is the duty of the draftsman to provide limitations in the law itself, and not leave the matter to the possible benevolence or abuse of a prosecutor.⁶⁹

The House Committee on the Judiciary issued its report on S. 30 on September 30, 1970.⁷⁰ It recommended approval of S. 30 as

⁶⁵ *Id.* at 402.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 499.

⁷⁰ H. Rep. No. 1549, 91st Cong., 2d Sess. (1970).

amended. The amendments did not alter the language of the forfeiture provision of Title IX. The House report described the penalty provisions of Title IX as providing for punishment "by forfeiture to the United States of all property and interests, as broadly described, which are related to the violations."⁷¹

Representatives Conyers, Mikva and Ryan filed a dissent to the House report. They expressed concern about the far-reaching potential for forfeiture of interests "indirectly" acquired through racketeering.⁷² In their view, innocent third parties who might have an interest in property subject to forfeiture were inadequately protected.⁷³ Finally, they noted that "the potential scope for deprivation of property by criminal forfeiture constitutes a threat to legitimate business far beyond what should be the ken of a bill aimed at organized crime."⁷⁴

⁷¹ *Id.* at 57.

⁷² *Id.* at 187-88. Specifically, the Congressman noted:

Section 1962 opens the door to 20 years in prison, a \$25,000 fine, and forfeiture of property, all because a man won \$1,000 on two separate instances in a gambling game. It does so by prohibiting the use or investment of funds either directly or indirectly. The so-called racketeer need not directly use this \$1,000 to buy a business in order to run afoul of the title. The mere fact that this \$1,000 enabled him to utilize another, legally obtained \$1,000 to buy the business, rather than necessary food and clothing, brings him within the ambit of "indirect" use.

.....

The erection of the penalty of forfeiture represents similar over-reaching, made that much more severe by the "indirect use" bootstrap which can lift the prosecution into a conviction. The convicted offender is to be compelled to forfeit all interest, direct or indirect, in any enterprise which he has obtained, controls, or in which he participates, by use of funds derived from a "pattern of racketeering activity" or collection of an "unlawful debt."

Id.

⁷³ *Id.* at 188. Examples of unprotected third parties were given in the dissent's report.

Moreover, not only does criminal forfeiture unduly penalize the man who may simply have engaged in two separate poker games and thereby subjected himself to accusation for having engaged in a "pattern of racketeering activity." It also leaves far too uncertain the rights of entirely blameless citizens and organizations. A minor legislative bow in their direction is made in section 1963(c), which states that "The United States shall dispose of all such property (which has been forfeited to it) as soon as commercially feasible, making due provision for the rights of innocent persons." But the seizure and sale by the Government of property which was used as collateral by the offender for a legitimate loan may well leave an unsecured creditor out of luck, or sale by the Government of a forfeited business on a stagnant market may well undercut innocent competitors or customers.

⁷⁴ *Id.* The Congressman also commented on the Department of Justice's letter in support of the forfeiture provision.

Even the Justice Department's comment on this measure establishing criminal forfeiture—a measure which overturns an act of the same Congress which proposed to the States for ratification the Bill of Rights—is pallid endorsement, compared to its espousal of numerous other repressive features of this bill. By letter of August 11, 1969, from Richard Kleindienst, Deputy Attorney General, to the Honorable John L. McClellan, chairman, Subcommittee on Criminal Laws and Procedures, Commit-

The full House debated S. 30 as amended in early October, 1970.⁷⁵ In presenting the bill to the House, Representative Cellar noted that Title IX "also authorizes forfeiture of any interest which has been attained in violation of the criminal provision."⁷⁶ During the debates, Representative Poff addressed the minority view complaints set forth in the House report:

The use of the ancient doctrine of criminal forfeiture embodied in title IX, therefore, will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.⁷⁷

Representatives Mikva and Ryan nevertheless continued to assert their opposition to the forfeiture provision.⁷⁸

Now, it would be nice to get the syndicates out of legitimate business and to get organized crime away from the fruits of legitimate enterprises; but we should not do it in a way in which we throw out all of these deep-seated traditions about protection of private property and about limiting the penalty to what it says in the statute books without any forfeiture of property or corruption of blood.⁷⁹

The Bill was approved by the House on October 7, 1970.⁸⁰ The Senate agreed to the House amendments on October 13, 1970.⁸¹ The Bill was signed into law as Public Law 91-452 by the President on October 15, 1970.⁸²

B. EARLY FORFEITURE CASES

Between the enactment of the law in 1970 and the commencement of new hearings regarding criminal forfeiture provisions in

tee on the Judiciary, U.S. Senate, the Justice Department's position was stated thusly:

It is felt that this revival of the concept of forfeiture as a criminal penalty, limited as it is in section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of congressional wisdom rather than a constitutional power.

We perceive little "wisdom" in reviving criminal forfeiture after its 180-year dormancy, particularly when it is couched in the loose language of title IX. We seem to fight corruption of business with corruption of blood, which is neither wise nor constitutional.

⁷⁵ 116 CONG. REC. 35,191-217, 35,287-364 (1970).

⁷⁶ *Id.* at 35,196 (statement of Rep. Cellar).

⁷⁷ *Id.* at 35,193 (statement of Rep. Poff).

⁷⁸ *Id.* at 35,205-08.

⁷⁹ *Id.* at 35,205 (Rep. Mikva).

⁸⁰ *Id.* at 35,364.

⁸¹ *Id.* at 36,296, 36,415.

⁸² Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

September 1981, only twenty-eight forfeiture cases were reported, twenty-two under the RICO forfeiture provisions and six under the virtually identical continuing criminal enterprise or CCE forfeiture provisions, 21 U.S.C. 848.⁸³ Between the beginning of the 1981 hearings and the issuance of the Senate report in support of the forerunner to the 1984 forfeiture amendments on September 14, 1983, eleven additional RICO forfeiture cases and four additional CCE forfeiture cases were reported.⁸⁴ Many of these cases dealt with procedural application of forfeiture laws. The cases included discussion of: adequate notice under Federal Rule of Criminal Pro-

⁸³ *United States v. Long*, 654 F.2d 911 (3d Cir. 1981); *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981), *vacated in part*, 686 F.2d 356 (5th Cir. 1982)(Unit B), *cert. denied*, 464 U.S. 965 (1983); *United States v. Martino*, 648 F.2d 367 (5th Cir. 1981), *cert. denied*, 456 U.S. 943 (1982); *United States v. Dean*, 647 F.2d 779 (8th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982); *United States v. Webster*, 639 F.2d 174 (4th Cir.), *cert. denied*, 454 U.S. 857 (1981); *United States v. Mannino*, 635 F.2d 110 (2d Cir. 1980); *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980); *United States v. Grande*, 620 F.2d 1026 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980); *United States v. McNary*, 620 F.2d 621 (7th Cir. 1980); *United States v. Marubeni Am. Corp.*, 611 F.2d 763 (9th Cir. 1980); *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. Smaldone*, 583 F.2d 1129 (10th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978); *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978); *United States v. Jeffers*, 532 F.2d 1101 (7th Cir. 1976), *aff'd in part, vacated in part and remanded*, 432 U.S. 137 (1977); *United States v. Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Romano*, 523 F. Supp. 1209 (S.D. Fla. 1981); *United States v. Loftin*, 518 F. Supp. 839 (S.D.N.Y. 1981), *aff'd mem.*, 819 F.2d 1130 (2d Cir. 1987); *United States v. Computer Sciences Corp.*, 511 F. Supp. 1125 (E.D. Va. 1981), *rev'd*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir. 1982); *United States v. Bello*, 470 F. Supp. 783 (S.D. Cal. 1979); *United States v. Scharf*, 436 F. Supp. 177 (E.D. Mo. 1977), *aff'd*, 568 F.2d 106 (8th Cir. 1978); *United States v. Meyers*, 432 F. Supp. 456 (W.D. Pa. 1977); *United States v. Bergdoll*, 412 F. Supp. 1308 (D.Del. 1976); *United States v. Scalzitti*, 408 F. Supp. 1014 (W.D. Pa. 1975), *appeal dismissed mem.*, 556 F.2d 569 (3d Cir. 1977); *United States v. Mandel*, 408 F. Supp. 679 (D. Md. 1976); *United States v. Amato*, 367 F. Supp. 547 (S.D.N.Y. 1973).

⁸⁴ *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983); *United States v. Walsh*, 700 F.2d 846 (2d Cir.), *cert. denied*, 464 U.S. 85 (1983); *United States v. Sheeran*, 699 F.2d 112 (3d Cir.), *cert. denied*, 461 U.S. 931 (1983); *United States v. Hess*, 691 F.2d 188 (4th Cir. 1982); *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982); *United States v. Godoy*, 678 F.2d 84 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983); *United States v. Crozier*, 674 F.2d 1293 (9th Cir. 1982), *vacated and remanded*, 468 U.S. 1206 (1984); *United States v. Bethea*, 672 F.2d 407 (5th Cir. 1982)(Unit B); *United States v. Chagra*, 669 F.2d 241 (5th Cir.), *cert. denied*, 459 U.S. 846 (1982); *United States v. Tunnell*, 667 F.2d 1182 (5th Cir. 1982); *United States v. Beckham*, 562 F. Supp. 488 (E.D. Mich. 1983); *United States v. Harvey*, 560 F. Supp. 1040 (S.D. Fla. 1982), *aff'd sub. nom.* *United States v. Van Horn*, 789 F.2d 1492 (11th Cir.), *cert. denied*, 479 U.S. 854 (1986); *United States v. Veon*, 538 F. Supp. 237 (E.D. Cal. 1982).

cedure 7(c);⁸⁵ bifurcated trials and special verdicts forms;⁸⁶ and how to construe the different categories of forfeited property set forth in Section 1963.⁸⁷ Additionally, basic constitutional challenges were made to the new statutes.⁸⁸

The issues arising in the case law which troubled the legislators who worked on the RICO amendments fell into four categories: 1) how to construe subsection 1963(a)(1) dealing with interests acquired and maintained in violation of section 1962; 2) the standards for implementation of the restraining order provisions of sections 1963 and 848; 3) protection of the rights of third parties; and 4) dissipation, transfer or concealment of forfeitable assets by defendants. Each of these categories arose from a separate set of cases.

1. Subsection 1963(a)(1)

In 1979, district courts in the Central District of California⁸⁹ and in the Northern District of Georgia⁹⁰ held that the language of subsection 1963(a)(1) must be limited to interests acquired or maintained *in an enterprise* and thus the forfeiture provisions of section 1963 did not "extend to fruits or profits generated from the enterprise."⁹¹ The California decision was affirmed by the Ninth Circuit

⁸⁵ United States v. Grammatikos, 633 F.2d 1013 (2d Cir. 1980); United States v. Smaldone, 583 F.2d 1129 (10th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978); United States v. Lofton, 518 F. Supp. 839 (S.D.N.Y. 1981), *aff'd mem.*, 819 F.2d 1130 (2d Cir. 1987); United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979); United States v. Bergdoll, 412 F. Supp. 1308 (D.Del. 1976).

⁸⁶ United States v. Grande, 620 F.2d 1026 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980); United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980); United States v. L'Hoste, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); United States v. Lofton, 518 F. Supp. 839 (S.D.N.Y. 1981), *aff'd mem.*, 819 F.2d 1130 (2d Cir. 1987); United States v. Mandel, 408 F. Supp. 679 (D.Md. 1976).

⁸⁷ United States v. L'Hoste, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); United States v. Rubin, 559 F.2d 975 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978); United States v. Romano, 523 F. Supp. 1209 (S.D. Fla. 1981); United States v. Computer Sciences Corp., 511 F. Supp. 1125 (E.D. Va. 1981), *rev'd*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979); United States v. Meyers, 432 F. Supp. 456 (W.D. Pa. 1977); United States v. Mandel, 408 F. Supp. 679 (D.Md. 1976), *aff'd in part*, 591 F.2d 1347 (4th Cir. 1979).

⁸⁸ United States v. Long, 654 F.2d 911 (3d Cir. 1981); United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); United States v. Amato, 367 F. Supp. 547 (S.D.N.Y. 1973).

⁸⁹ United States v. Marubeni Am. Corp., Cr. No. 78-1060 HP (C.D. Cal., March 30, 1979)(cited in United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979)).

⁹⁰ United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979).

⁹¹ *Id.* at 142.

in 1980 in the case of *United States v. Marubeni America Corporation*.⁹² In *Marubeni*, the defendants were convicted in a white collar crime case of obtaining large supply contracts through bribes and kick-backs in violation of 18 U.S.C. 1963(c). The government sought forfeiture of "amounts paid or payable for performance of a contract procured through a pattern of racketeering activity"⁹³ under the interests acquired or maintained language of subsection 1963(a)(1). The *Marubeni* court held that the term "interest" as used in subsection 1963(a)(1) must be interpreted in the same fashion as "interest" was used in section 1962. Because "interest" in section 1962 was expressly limited to an interest "in an enterprise," the court reasoned that subsection 1963(a)(1) must be similarly limited by implication.⁹⁴

Relying on the district court opinion in *Marubeni*, the Georgia court in *United States v. Thevis* case similarly limited subsection 1963(a)(1) to interests in an enterprise. It held that "[t]hrough Congress recognized that income and profits could be generated by a pattern of racketeering activity, it chose to require forfeiture only of the interest in, and not the income of a Section 1962 enterprise."⁹⁵ The *Thevis* court did, however, read interest in an enterprise to include property the defendant contributed to the enterprise, here an association-in-fact, and the defendant's interest in the undistributed profits of the enterprise.⁹⁶

Many subsequent cases followed this restrictive reading of subsection 1963(a)(1) although some of these courts disagreed with the analysis of earlier decisions.⁹⁷ During the course of the legislative hearings on this issue, the Fifth Circuit, sitting in an *en banc* review of a panel decision in *United States v. Martino*, broke with the Ninth Circuit's holding in *Marubeni*.⁹⁸

Martino involved an illegal association-in-fact of individuals who

⁹² 611 F.2d 763 (9th Cir. 1980).

⁹³ *Id.* at 764.

⁹⁴ *Id.* at 766.

⁹⁵ *Thevis*, 474 F. Supp. at 142.

⁹⁶ *Id.* at 143.

⁹⁷ *United States v. McManigal*, 708 F.2d 276 (7th Cir.), *vacated and remanded*, 464 U.S. 979 (1983); *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983); *United States v. Godoy*, 678 F.2d 84 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983); *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981), *vacated in part*, 686 F.2d 356 (5th Cir. 1982)(Unit B), *cert. denied*, 456 U.S. 965 (1983); *United States v. Martino*, 648 F.2d 367 (5th Cir. 1981), *modified*, 681 F.2d 952 (5th Cir. 1982)(*en banc*), *aff'd sub nom.* *Russello v. United States*, 464 U.S. 16 (1983); *United States v. Romano*, 523 F. Supp. 1209 (S.D. Fla. 1981).

⁹⁸ 681 F.2d 952 (5th Cir. 1982)(*en banc*), *aff'd sub nom.* *Russello v. United States*, 464 U.S. 16 (1983).

engaged in an arson scheme to collect insurance proceeds. The government sought forfeiture of the insurance money as interests acquired in violation of section 1962. The *Martino* court distinguished *Thevis* and *Marubeni*, stating "[t]hat the enterprise concept is the overriding concept in RICO . . . does not necessarily mean that the enterprise concept is also a limitation on the type of property interest subject to forfeiture under 1963(a)(1)."⁹⁹ After a review of the legislative history of the 1970 Act, the *Martino* court held:

RICO is a powerful and flexible weapon designed to break economic power of organized crime and hence to undermine its ability to disrupt and drain the national economy. We acknowledge that its breadth supplies a potential for great abuse. The harshness of the statute's impact, however, cannot debate the proper construction of its provisions. Congress was aware of the far-reaching measures it was enacting to deal with the unprecedented problem of organized crime. The plain language of the statute, the remedial and deterrent purposes, and the legislative history all compel the conclusion that Section 1963(a)(1) encompasses forfeiture of the income or proceeds of racketeering activity.¹⁰⁰

The Supreme Court eventually resolved the issue of whether profits and proceeds of racketeering activity could be forfeited under subsection 1963(a)(1) in its decision in *Russello v. United States*,¹⁰¹ which affirmed the *en banc* decision in *Martino*. The legislative history of the 1984 amendments indicates, however, that even without the *Russello* holding, Congress intended to correct what it perceived as an erroneous reading of subsection 1963(a)(1) by the *Marubeni* and *Thevis* courts.¹⁰²

2. Restraining Orders

Discussions on implementation of the restraining order provisions of section 1963 were triggered by the Ninth Circuit in its opinion in *United States v. Crozier*.¹⁰³ Prior to *Crozier*, the district courts had split on the standard to be met to warrant the court's issuance of a restraining order. In *United States v. Mandel*,¹⁰⁴ the court required the government to make the four-part showing necessary for issuance of a preliminary injunction in civil cases as set forth in Federal Rule of Civil Procedure 65.¹⁰⁵ In *United States v. Bello*,¹⁰⁶ how-

⁹⁹ *Id.* at 955 n.15.

¹⁰⁰ *Id.* at 961.

¹⁰¹ 464 U.S. 16 (1983).

¹⁰² See *infra* notes 205-207 and accompanying text.

¹⁰³ 674 F.2d 1293 (9th Cir. 1982), *vacated and remanded*, 468 U.S. 1206 (1984).

¹⁰⁴ 408 F. Supp. 679 (D. Md. 1976).

¹⁰⁵ *Id.* at 682.

In determining whether a preliminary injunction should issue in a civil case, a court

ever, the court found that the indictment itself provided probable cause to believe that the defendant had committed a violation of section 1962. Therefore, the *Bello* court apparently required only that the government show that the assets sought to be restrained would be subject to forfeiture to warrant issuance of the restraining order.¹⁰⁷

The courts also dealt with the question of what type of hearing, if any, the defendant was entitled to before and following entry of a restraining order. In *United States v. Scalzitti*,¹⁰⁸ the court, apparently without a hearing, entered a restraining order under subsection 1963(b) against the defendant's business. When the defendant challenged the order on due process grounds, the court rejected the challenge stating that "the restraining order serves only to maintain the *status quo* and thus is neither illegal nor unconstitutional."¹⁰⁹ In *United States v. Long*,¹¹⁰ the court granted the government a temporary restraining order *ex parte*. Before a permanent restraining order could issue, however, the court required the government to establish that it was likely to convince a jury beyond a reasonable doubt that the defendant had violated the CCE statute and that the properties or profits sought to be restrained would be subject to forfeiture. "[T]hese determinations must be made on the basis of a full hearing; the government cannot rely on indictments alone."¹¹¹ Similarly, in *United States v. Veon*,¹¹² the court held in a CCE case that it was proper to issue a restraining order of limited duration without a hearing but that an adversary hearing must follow "concerning the propriety of continuing the restraining order until trial."¹¹³

Both issues came to a head in the *Crozier* case. In *Crozier*, the Ninth Circuit followed the *Mandel* court's decision in holding that the district court "must apply the standards of Rule 65 of the Federal Rules of Civil Procedure" in determining whether a restraining

usually considers four factors: (1) Has the petitioner made a strong showing that he is likely to prevail on the merits at trial? (2) Has irreparable harm in the absence of relief been shown? (3) Would the issuance of the injunction substantially harm other parties interested in the proceedings? and (4) Where does the public interest lie?

Id.

¹⁰⁶ 470 F. Supp. 723 (S.D. Cal. 1979).

¹⁰⁷ *Id.* at 724.

¹⁰⁸ 408 F. Supp. 1014 (W.D. Pa. 1975).

¹⁰⁹ *Id.* at 1015.

¹¹⁰ 654 F.2d 911 (3d Cir. 1981).

¹¹¹ *Id.* at 915.

¹¹² 538 F. Supp. 237 (E.D. Cal. 1982).

¹¹³ *Id.* at 243. The court also held that the rules of evidence would be applicable at hearings regarding the issuance of restraining orders. *Id.* at 249.

order should issue.¹¹⁴ It also agreed with the *Long* and *Veon* conclusions that "an immediate hearing [is required] whenever a temporary restraining order has been granted *ex parte*."¹¹⁵ Further, the *Crozier* court rejected the argument that the hearing following issuance of the restraining order should be limited to whether the property sought to be restrained would be subject to forfeiture should the government prevail on the merits of its case at trial rather than the broader issue under Rule 65 of whether the government was likely to prevail on the merits of its case at trial. In this regard, the court stated that "[A] grand jury determination is not an adequate substitute for an adversary proceeding."¹¹⁶ The *Crozier* holding was subsequently reiterated in the Ninth Circuit decision in *United States v. Spilotro*.¹¹⁷

Variations on the *Crozier* holding followed, but no court in these early cases rejected the *Crozier* conclusion that due process required a post-indictment restraining order hearing in CCE and RICO cases. For example, in *United States v. Harvey*,¹¹⁸ an *ex parte* restraining order was issued upon the affidavit of the prosecutor. The *Harvey* court questioned whether the restraining order was a "taking" sufficient to trigger a due process hearing but held that "it is considered the better practice to grant a hearing after entry of the *ex parte* order."¹¹⁹ The court held that the government must make a showing by a preponderance of the evidence that it is likely to convince a jury beyond a reasonable doubt both that the defendant violated the CCE statute and that the property sought to be restrained is forfeitable.¹²⁰ The rules of evidence would not apply at this hearing according to the *Harvey* court.¹²¹

In *United States v. Beckham*,¹²² however, the court rejected the civil injunction standard used in *Crozier*. Instead, it held that the government must prove by clear and convincing evidence that the property sought to be restrained would be forfeitable under the statute, that the property was involved in a RICO violation, and that the government had reason to believe that the defendant was likely

¹¹⁴ *United States v. Crozier*, 674 F.2d 1293, 1297 (9th Cir. 1982), *vacated and remanded*, 468 U.S. 1206 (1984).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 680 F.2d 612 (9th Cir. 1982).

¹¹⁸ 560 F. Supp. 1040, 1083 (S.D. Fla. 1982), *aff'd sub nom.* *United States v. Van Horn*, 789 F.2d 1492 (11th Cir.), *cert. denied*, 479 U.S. 854 (1986).

¹¹⁹ *Id.* at 1086.

¹²⁰ *Id.* at 1088.

¹²¹ *Id.*

¹²² 562 F. Supp. 488 (E.D. Mich. 1983).

to make the property inaccessible.¹²³ In focusing on the role of the property, rather than whether the defendant committed the offense, the *Beckham* court hoped to avoid "a mini 'jury' trial on the issue of [the] defendant's guilt."¹²⁴

3. *Third Party Interests*

Protection of the rights of third parties also became an issue. Under the 1970 Act, third parties affected by a forfeiture order had to petition the Department of Justice for remission or mitigation of the forfeiture. The statute did not expressly provide for judicial review of the administrative decision. The issue became a matter of concern in the case of *United States v. Mandel*.¹²⁵ In the criminal trial of defendant Mandel and others, the jury determined that 240,765 shares of stock, held in the name of Irving Schwartz, were actually owned by one of Mandel's co-defendants and were subject to forfeiture.¹²⁶ Based upon this jury verdict, in 1981 the court ordered the stock forfeited.¹²⁷ Schwartz, who was not a party in the criminal case, contested the forfeiture by both filing a petition for remission or mitigation of forfeiture with the Attorney General and filing a civil action seeking a declaratory judgment that the stock belonged to him.¹²⁸ In 1983, his declaratory judgment case was finally set for trial. Meanwhile, Congress considered how to deal in a more efficient fashion with future third party claims.

4. *Dissipation of Proceeds*

Finally, prosecutors' complaints about defendants concealing forfeited assets to avoid execution of a forfeiture judgment were addressed. Cases which prompted these considerations included *United States v. Long*,¹²⁹ in which the defendant transferred assets to his attorney pre-indictment.

C. THE 1984 AND 1986 AMENDMENTS TO THE RICO ACT

1. *Proposals and Hearings in 1981 and 1982*

Congress began considering the issues raised by these early forfeiture cases in hearings before the Subcommittee on Crime of

¹²³ *Id.* at 490.

¹²⁴ *Id.*

¹²⁵ 505 F. Supp. 189 (D. Md. 1981), *aff'd and remanded mem.*, 705 F.2d 455 (4th Cir. 1983).

¹²⁶ *Id.* at 190.

¹²⁷ *Id.*

¹²⁸ *Schwartz v. United States*, 582 F. Supp. 224, 226 (D. Md. 1984).

¹²⁹ 654 F.2d 911 (3d Cir. 1981).

the House Committee on the Judiciary in September, 1981.¹³⁰ Although these hearings focused upon cases involving controlled substances under the RICO and CCE statutes, commentators urged broader application of the proposed forfeiture provisions.¹³¹

Congress designed H. R. 4110,¹³² one of the bills under consideration by the subcommittee, to "make clear that forfeiture under the RICO Act Statutes reaches all profits and proceeds of illegal activity covered by the RICO statute regardless of the form in which they are held, and whether such assets are held directly or indirectly by the violator."¹³³ Representative Zeferetti, sponsor of H.R. 4110, further differentiated the terms "profits" and "proceeds" as used in the CCE statute as follows:

The difficulty with the [CCE] statute as presently structured is that the concept of "profits" may not include the costs of operating a narcotics enterprise and hence only the net profits instead of the gross proceeds from trafficking may be forfeitable. . . . Forfeiture will obviously be more effective when it encompasses all proceeds rather than merely profits.¹³⁴

H.R. 4110 was also designed to deal with the issue of assets transferred prior to conviction to avoid forfeiture. "[H.R. 4110] would allow the forfeiture of any assets a trafficker has in his posses-

¹³⁰ *Forfeiture in Drug Cases: Hearings on H.R. 2646, H.R. 4110, and H.R. 5371 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. (1981, 1982) [hereinafter *Forfeiture in Drug Cases Hearings*].*

¹³¹ *Id.* at 217 (statement of Irvin B. Nathan).

¹³² H.R. 4110 proposed adding the following language to 18 U.S.C. § 1963:

(b) In addition to any other penalties prescribed by this section, whoever violates any provision of section 1962 shall forfeit to the United States (1) any profits and proceeds, regardless of the form in which held, that are acquired, derived, used, or maintained in violation of section 1962, and (2) any profits and proceeds, regardless of the form in which held, that are acquired, indirectly or directly, as a result of a violation of section 1962.

(c) Assets forfeitable under this section include those interests, proceeds, or profits owned by an individual convicted of violating section 1962 and acquired by him, indirectly or directly, through the use of an illegitimate enterprise or illicit association, or through a combination of individuals.

(d) To the extent that assets, interests, profits, and proceeds forfeitable under this section—

(1) cannot be located;

(2) have been transferred, sold to, or deposited with third parties; or

(3) have been placed beyond the jurisdiction of the United States,

the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsections (a) and (b) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection, provided the assets described in subsections (a) and (b) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court.

Forfeiture in Drug Cases Hearings, supra note 130 at 9.

¹³³ *Id.* to 26 (statement of Rep. Leo C. Zeferetti).

¹³⁴ *Id.*

sion that are not otherwise subject to forfeiture to the extent that illicit assets identified for forfeiture are unreachable.”¹³⁵

The Government Accounting Office concurred in the need for amendments to the RICO and CCE forfeiture provisions.¹³⁶ In its statement to the subcommittee, it noted issues raised by the case law: whether profits are forfeitable; what is forfeitable from an enterprise which constitutes an “association in fact;” whether tracing funds is required; and whether assets transferred prior to conviction are subject to forfeiture.¹³⁷ GAO informed the subcommittee that these problems, along with the “lack of leadership by the Department of Justice” in the forfeiture area, had resulted in few forfeitures since the enactment of the forfeiture statutes ten years earlier.¹³⁸

After the initial round of hearings, H.R. 5371¹³⁹ was introduced, incorporating elements of the bills previously referred to the subcommittee.¹⁴⁰ Also proposed was S. 2320,¹⁴¹ a bill drafted by

¹³⁵ *Id.* at 26-27.

¹³⁶ *Id.* at 32.

¹³⁷ *Id.*

¹³⁸ *Id.* at 35.

¹³⁹ The text of H.R. 5371 was not included in the hearing transcript.

¹⁴⁰ *Forfeiture in Drug Cases Hearings*, *supra* note 130 at 155.

¹⁴¹ The text of S. 2320 was as follows:

“§ 1963. Criminal penalties

“(a) Whoever violates any provision of section 1962 of this chapter—

“(1) shall be fined not more than \$25,000 or imprisoned for not more than twenty years, or both; and

“(2) shall forfeit to the United States any property, irrespective of any provision of State law—

“(A) constituting, or derived from, any interest in or contribution to an enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 of this chapter;

“(B) constituting a means by which he has exerted influence or control over any enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the acquisition, maintenance, establishment, operation, conduct or control of, in violation of section 1962 of this chapter; and

“(C) constituting, or derived from, any proceeds which he obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962 of this chapter.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this section, that he forfeit to the United States all property described in paragraph (2).

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

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

“(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities including, but not limited to—

“(A) any position, office, appointment, tenure, commission, or employment contract of any kind which the incumbent acquired or maintained in violation of section 1962 of this chapter, through which the incumbent conducted,

the Department of Justice. In a letter proposing S. 2320 to the Senate, Assistant Attorney General Robert McConnell stated that S.

or participated in or facilitated the conduct of, the affairs of an enterprise in violation of section 1962 of this chapter, or which afforded the incumbent a source of influence or control over the affairs of an enterprise which was exercised in violation of section 1962 of this chapter;

"(B) any compensation, right or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in subparagraph (A) which the incumbent obtained, directly or indirectly, through a pattern of racketeering activity or unlawful debt collection in violation of section 1962 of this chapter, or which accrued to the incumbent during the period that he controlled, influenced, conducted, or participated in or facilitated the conduct of, the affairs of the enterprise in violation of section 1962 of this chapter; and

"(C) any amount payable or paid under any contract for goods or services which was awarded or performed through a pattern of racketeering activity or unlawful debt collection.

"(c) All right, title, and interest in property described in subsection (a)(2) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is held in the name of, or possessed by, a person other than the defendant may be subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States: *Provided*, That the Attorney General shall not direct disposition of any such property if the person establishes to the Attorney General by evidence contained in a petition pursuant to subsection (h) that—

"(1) he was a bona fide purchaser of the property for value; and

"(2) he was reasonably without cause to believe that the property was of the type described in subsection (a)(2).

"(d) If any of the property described in subsection (a)(2)—

"(1) cannot be located,

"(2) has been transferred to, 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 by any act or omission of the defendant, or

"(5) has been commingled with other property which cannot be divided without difficulty,

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

"(e)(1) Upon application of the United States, the court may, after a hearing with respect to which any adverse parties have been given reasonable notice and opportunity to participate, enter a restraining order or injunction, require the execution of a satisfactory performance bond, to take any other action to preserve the availability of property described in subsection (a)(2) for forfeiture under this section—

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

"(B) prior to the filing of such an indictment or information, if the court determines—

"(i) that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that the property is in the possession or control of the party against whom the order is to be entered, and

"(ii) that the party against whom the order is to be entered has failed to demonstrate that the entry of the requested order would result in substantial and irreparable harm or injury to him that outweighs the need to preserve the availability of the property through the entry of the requested order:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause

2320 was drafted to address the forfeitability of proceeds from rack-

shown or unless an indictment or information described in subparagraph (A) has been filed.

“(2) Upon application of the United States, a temporary restraining order to preserve the availability of property described in subsection (a)(2) for forfeiture under this section may be granted without notice to the adverse party or his attorney if—

“(A) an indictment or information described in paragraph (1)(A) has been filed or if the court determines that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that the property is in the possession or control of the party against whom the order is to be entered; and

“(B) the court determines that the nature of the property is such that it can be concealed, disposed of, or placed beyond the jurisdiction of the court before the adverse party may be heard in opposition.

A temporary order granted without notice to the adverse party shall expire within such time, not to exceed ten days, as the court fixes, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. If a temporary restraining order is granted without notice to the adverse party, a hearing concerning the entry of an order under paragraph (1) shall be held at the earliest possible time and prior to the expiration of the temporary order.

“(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. No property forfeited pursuant to this section may be ordered applied to offset any claims against, or obligations or expenses of, the defendant. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from an enterprise, or an interest in an enterprise, ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

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

“(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

“(1) grant petitions for mitigation, or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to

eteering activities prohibited in *Martino*.¹⁴² He stated that S. 2320: would address this problem by providing specifically that the proceeds of racketeering activity are subject to an order of criminal forfeiture. Other types of property now clearly subject to forfeiture under 18

protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

"(2) compromise claims arising under this chapter;

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

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

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

"(i) The Attorney General shall within one hundred and eighty days of the enactment of this Act promulgate regulations with respect to—

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

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

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

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

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

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

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

"(j) Except as provided in this section, 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, prior to or during the trial or appeal of the criminal case, or during the period in which any petition for remission or mitigation of forfeiture is pending before the Attorney General.

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

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

DEA Oversight and Budget Authorization Hearing before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 97 Cong., 2d Sess. 57-69 (1982).

¹⁴² 128 CONG. RECORD. 6216-18 (1982)(letter from Assist. Atty. Gen. McConnell).

U.S.C. 1963 are also described, with great specificity, in proposed subsection 1963(a)(2), and proposed subsection 1963(b) emphasizes that both real property and tangible and intangible personal property are subject to forfeiture, and that, in appropriate cases, forfeitable property may also include offices, positions, appointments, as well as amounts paid under contracts awarded or performed through racketeering activity.¹⁴³

In continuing hearings on amendment of the forfeiture provision, Deputy Associate Attorney General Jeffrey Harris also commented on S. 2320:

The major changes in RICO forfeiture provisions that are incorporated in our proposal address two problem areas. The first is our present inability to obtain the forfeiture of proceeds of racketeering because of court decisions that have held that such proceeds do not constitute a forfeitable interest under the RICO statute since they are not interests in an enterprise. These decisions have severely inhibited realization of the intended purpose of the RICO criminal forfeiture provisions, which was to separate racketeers from their sources of economic power. To address this problem, our proposal amends the RICO statute to provide specifically for the criminal forfeiture of the proceeds of racketeering activity. H.R. 5371 has a similar provision, although we have some reservations about the way in which it is drafted.¹⁴⁴

Mr. Harris pointed out that S. 2320 contained provisions to deal with the "problem of defendants defeating forfeiture by transferring, removing, and concealing their forfeitable property so that it may no longer be reached by the Government at the time of conviction."¹⁴⁵ These provisions included codification of the "recognized principle that the U.S. interest in property relates back to the time of the acts [giving] rise to the forfeiture, and that thus, subsequent transfers of the property are considered void in the context of a criminal forfeiture action;"¹⁴⁶ expansion of the court's restraining order power to the pre-indictment stage;¹⁴⁷ and a provision permitting the court "to order the defendant to forfeit substitute assets when particular property subject to forfeiture is no longer available at the time of conviction because it has been transferred, concealed, placed beyond the jurisdiction of the court, or commingled with

¹⁴³ *Id.* at 6216.

¹⁴⁴ *Forfeiture in Drug Cases Hearings*, *supra* note 130 at 156 (statement of Deputy Assoc. Atty. Gen. Harris).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 157. Mr. Harris noted that H.R. 5371 would also allow the government to seek pre-indictment restraining orders. However, the government expressed concern that the preliminary injunction standard used in the civil context might be unworkable in the criminal setting. *Id.*

other property.”¹⁴⁸

As to the forfeitability of proceeds, Mr. Harris specifically cited the *Martino* case, which was then awaiting the Fifth Circuit’s *en banc* decision.¹⁴⁹ Harris noted that regardless of the outcome in *Martino*, “it is our view that the purpose of the RICO forfeiture statute—to deprive racketeers of their sources of economic power¹⁵⁰—cannot be fully realized if the profits gained through racketeering activity are beyond the reach of the statute.”¹⁵¹

S. 2320 also addressed measures to deal with concealment of ownership and transfers of property to circumvent forfeiture. First, the relation back doctrine, known as the “taint” theory in civil forfeiture proceedings, was codified to discourage sham transfers of property to defeat forfeitures.¹⁵² Second, S. 2320 proposed expanding the court’s restraining order authority to the pre-indictment stage “if the government can present sufficient evidence to establish probable cause to believe that a RICO violation has been committed and that the property for which the order is sought is subject to forfeiture as a result.”¹⁵³ This order could initially be entered *ex parte* but thereafter “the affected parties would . . . be given notice and an opportunity to contest the order in the context of an adversary hearing.”¹⁵⁴ Finally, in those instances where the defendant was successful in concealing or removing his assets, the statute provided for forfeiture of substitute assets. “[T]his proposal would prevent a defendant from escaping the economic impact of a forfeiture order by disposing of his property prior to conviction.”¹⁵⁵

S. 2320 also provided that the Attorney General develop regulations to deal with disposal of forfeited property. It retained, as under the 1970 laws, “the responsibility of the Attorney General to protect the rights of innocent persons and to grant, in appropriate

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 165.

¹⁵⁰ In his earlier references to Congressional purpose Harris noted that forfeiture was aimed at the need “to remove the wealth generated by, and used to maintain, racketeering and drug trafficking.” *Id.* at 160 (statement of Deputy Assoc. Atty. Gen. Harris). It was also designed “to deprive racketeers of the property acquired and controlled through patterns of serious criminal activity,” *id.* at 161, and finally to forfeit the “property. . . [racketeers and drug traffickers] have amassed through, or used to facilitate, the commission of these crimes.” *Id.* at 162.

¹⁵¹ *Id.* at 165-66. It should be noted that in this discussion, Mr. Harris used the words “profits” and “proceeds” interchangeably.

¹⁵² *Id.* at 167 (citing *United States v. Long*, 654 F.2d 911 (3d Cir. 1981))(transfer to defendant’s attorney six months prior to indictment).

¹⁵³ *Id.* at 168.

¹⁵⁴ *Id.* at 169.

¹⁵⁵ *Id.* at 170.

cases, petitions of innocent parties for remission or mitigation of forfeiture, and to provide for the return of forfeited property that was obtained from victims of a RICO offense.”¹⁵⁶ This was in opposition to H.R. 5371 which provided third parties with a remedy before the court, which remedy, Harris pointed out, resulted in delays in *Mandel*.¹⁵⁷

Harris also engaged in a question and answer session with the committee. He indicated that a bona fide purchaser for value of property ultimately subject to forfeiture would be protected by the administrative remedy of S. 2320 or the judicial remedy in H.R. 5371. “In that case in which an asset was transferred to a bona fide purchaser, we believe the Government ought to have the right to go after other assets of an equivalent value,” including assets acquired legitimately.¹⁵⁸ Harris emphasized the need for criminal versus civil forfeiture.

[T]he courts and the Government should not be put to [the] expense of a separate civil lawsuit, and the philosophy . . . is that certainty and swiftness of punishment is the principal deterrent in crime and it is far preferable to have that jury walk in the room with the relative speed that Federal criminal trials take place and say not only are you guilty and you may be going to jail, but all of the fruits of your illegal labors are gone.¹⁵⁹

Harris also addressed the forfeitability of corporate assets. According to Harris, in the case of a bank involved in money laundering, if the officers of the corporation or others acting in the “corporate form” were involved, the assets of the bank, not including depositor’s accounts held in a fiduciary capacity, could be forfeited.¹⁶⁰ In such an instance, the bank’s shareholders would have to petition for remission. Harris argued that this was reasonable in that “some of the stockholders in south Florida banks and other financial institutions engaged in this sort of business might take a little more interest in the way that their board of directors conduct their banking business than they do now.”¹⁶¹ Such forfeiture would, of course, be limited to situations where the “bank as an institution [was] a defendant in the criminal action.”¹⁶²

¹⁵⁶ *Id.* at 171.

¹⁵⁷ *Id.* at 180.

¹⁵⁸ *Id.* at 183.

¹⁵⁹ *Id.* at 182.

¹⁶⁰ *Id.* at 184-85.

¹⁶¹ *Id.* at 185.

¹⁶² *Id.* Mr. Harris and his associate Ms. Warlow, also pointed out the seizure warrant provision of the Bill, which was designed to prevent pretrial transfer of assets. *Id.* at 180. They also noted that unlike the CCE statute, under RICO land legitimately ac-

A private attorney, William W. Taylor, III,¹⁶³ advocated restraint in regard to the expansion of forfeiture provisions especially as "[i]t is being applied to prosecutions of business and economic crime with increasing frequency."¹⁶⁴ He cited the cases of *Marubeni*,¹⁶⁵ *United States v. Weiss*,¹⁶⁶ *Uni Oil*,¹⁶⁷ *United States v. Computer Science Corporation*¹⁶⁸ and *Mandel*¹⁶⁹ as examples of the extension of RICO into white collar crime. Taylor posited that the taint concept would severely curtail a corporation's ability to function in the market place prior to conviction because it might be called upon to prove each transaction was legitimate.¹⁷⁰ Congressmen, however, pointed out that buyers might be bona fide purchasers and thus not subject to forfeiture.

Taylor also expressed concerns about the sweep of the proceeds concept in white collar crime. "The decisions in *Marubeni*, *Martino* and *Thevis* have no doubt prompted concerns that racketeers are continuing to get away with ill-gotten gains and were not being hit in the pocketbook as hard as if they were compelled to disgorge profits or proceeds."¹⁷¹ However:

[p]articularly in RICO cases involving legitimate businesses, profits are the joint product of legitimate and illegitimate activity. Unraveling the trail of dollars can well be as complex and difficult as in some antitrust and securities matters The hearings which are going to occur to trace and unravel profits from a complex commercial venture, when part of the proceeds are legitimate and part illegitimate, are going to provide a fertile field for litigation and tie up prosecutors, agents, judges and defense attorneys in a way which a simple sentencing proceeding would never do.¹⁷²

Trying to decide what property was "tainted" in the commercial arena could "disrupt commerce," Taylor suggested.¹⁷³ Further,

quired which was thereafter used as a storage place for drugs would not be forfeitable. *Id.* at 177.

¹⁶³ Mr. Taylor authored one of the earliest articles on criminal forfeiture. Taylor, *Forfeiture Under 18 U.S.C. § 1963 - RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379 (1980).

¹⁶⁴ *Forfeiture in Drug Cases Hearings*, *supra* note 130 at 200 (statement of William W. Taylor, III).

¹⁶⁵ 611 F.2d 763 (9th Cir. 1980).

¹⁶⁶ 579 F. Supp. 1224 (S.D.N.Y. 1983), *aff'd*, 752 F.2d 777 (2d Cir. 1985).

¹⁶⁷ 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982).

¹⁶⁸ 511 F. Supp. 1125 (E.D. Va. 1980), *rev'd*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

¹⁶⁹ 408 F. Supp. 679 (D. Md. 1976).

¹⁷⁰ *Forfeiture in Drug Cases Hearings*, *supra* note 130 at 201 (statement of William W. Taylor, III).

¹⁷¹ *Id.* at 209.

¹⁷² *Id.* at 210, 215.

¹⁷³ *Id.* at 204.

"[f]orfeiture . . . is a greater threat to the white collar criminal than it is to the underworld figure. In the underworld there is always going to be secrecy, money going out of the country and coming back into the country. In the white collar area it is not nearly so difficult to get at."¹⁷⁴

Taylor also commented on a discussion draft of S. 2320 which provided for "forfeiture of proceeds or profits derived from any interest, security, claim or rights" in narcotics and enterprises engaged in illegal activities.¹⁷⁵ He noted that the language of S. 2320 was designed to achieve the results of H.R. 4110 "without overturning the result of *Marubeni America Corp.* with respect to legitimate businesses."¹⁷⁶ Taylor questioned "why racketeers who corrupt legitimate businesses are entitled to keep their profits when those who band together for wholly illegal activity may not. Furthermore, the language does not guarantee the result. When is an enterprise engaged in illegal activity? Arguably, a legitimate enterprise is engaged in illegal activity when its officers use bribery or extortion to obtain a contract."¹⁷⁷

Finally, Irvin B. Nathan, former Deputy Assistant Attorney General, addressed the proposed changes. Nathan felt that concerns about overreaching forfeiture in the white collar area were unwarranted. "Investigators do not have the time and resources to make the detailed asset analysis which are required to secure a successful forfeiture."¹⁷⁸ Nathan expressed concern that there were inadequate protections for innocent third parties. He advocated a procedure immediately following the issuance of a restraining order for:

[T]he defendant and for other parties to come before the court to state a claim in the property and have the court adjudicate the question of which has the superior right and whether irreparable injury is going to be caused and whether there are less drastic means available to preserve the assets for later use.¹⁷⁹

As to forfeiture of proceeds in the white collar crime area, Nathan noted that proceeds of illegal activities are tainted funds whether the illegal activity involved arson, extortion, drugs or brib-

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 211-12.

¹⁷⁶ *Id.* at 212.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 216 (statement of I. Nathan.) Nathan also acknowledged, however, that "some investigations of assets can be conducted simultaneously and synergistically with investigations of criminal activity. Financial investigations may in fact be a potent source of evidence of guilt or for sentencing." *Id.* at 223.

¹⁷⁹ *Id.* at 218.

ery in the business world.¹⁸⁰ Further, he argued that forfeiture should not turn on whether or not the enterprise appears to be a legitimate business.¹⁸¹ As an example, Nathan used the *Marubeni* factual situation in which "an American company [paid] a series of bribes to public officials for government contracts and thereby [reaped] substantial profits."¹⁸² He concluded that "[t]here is no conceivable justification for permitting the so-called 'legitimate' enterprise to keep the fruits of its violations of RICO, which may be in the millions of dollars, while limiting its possible exposure to a fine of only \$25,000."¹⁸³ Such a distinction would, he argued, create "considerable confusion and potential disrespect for the law . . . by skew[ing] the criminal justice system for a certain kind of offense and not for other equally serious types of offenses which may have even more devastating long-term effects on our society."¹⁸⁴

Nathan also suggested that Congress amend the RICO statute to permit the government to establish the existence of forfeitable assets by use of a net worth theory in which the likely source of the forfeitable assets is shown to be the racketeering activity.¹⁸⁵ As to pre-indictment seizures, Nathan advocated the four-part preliminary injunction standard of the Federal Rules of Civil Procedure.¹⁸⁶ In addition, Nathan advocated against *ex parte* restraining orders absent a showing of attempted "concealment, disposition or dissipation of the property in question."¹⁸⁷ Nathan noted in his question and answer session that by definition defendants and all third parties are

¹⁸⁰ *Id.* at 226-27.

¹⁸¹ *Id.* at 226-27. Nathan observed, moreover, that distinguishing a legitimate from an illegitimate business is not always easy.

Nor should it matter, in my judgment, whether the enterprise is essentially a legitimate or an illegitimate one. In the first place, the distinction is often hard to discern or prove. For example, a duly chartered corporation may simply be a front for wholly illegal activities. Conversely, a company which engages in a variety of legitimate activities may as one sideline engage in racketeering activities, such as selling stolen property or issuing worthless securities. Second, the Supreme Court has recently made clear in the *Turkette* case [*United States v. Turkette*, 101 S. Ct. 2524 (1981)] that the RICO statute is designed to cover "any" enterprise, whether lawful or unlawful.

Since there is no reason under the existing statute to draw distinctions between legal and illegal enterprises, Congress should not engender further litigation on this fine distinction for purposes of forfeiture.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 228. Specifically, Nathan observed: "If we are willing, as I think we should be, to impose the drastic remedy of forfeiture on drug pushers, we should be just as willing to impose forfeiture on other types of serious offenders, whether they be arsonists for hire, extortionists, fraud artists or corrupt public officials." *Id.*

¹⁸⁵ *Id.* at 229.

¹⁸⁶ *Id.* at 231-32.

¹⁸⁷ *Id.* at 233.

innocent because they are presumed innocent. Therefore, the burden should be on the government to prove taint not on the third party.¹⁸⁸

Additionally, Nathan stated:

There is no reason to retain the result in the *Marubeni* case. If a corporation engages in bribes in order to secure large profits, the shareholders should bear the burden for that. They elected that management and there is no reason that they should reap a windfall and receive the benefits from the bribes.

They should be deprived of those profits so that they will elect a management in the future which will be lawful

Mr. Hughes. Suppose the president of a company is engaged in illegal activity, but the proceeds are going into his own pockets?

Mr. Nathan. The only defendant would be the individual and the proceeds that he has received would be all that would be forfeited and nothing of the corporate assets would be forfeiteable under that circumstance.¹⁸⁹

Jeffrey Harris also commented on S. 2320 at the DEA Oversight and Budget Authorization Hearings before the Senate Subcommittee on Security and Terrorism.¹⁹⁰ His general comments on the bill were the same as his previous testimony. He did shed some light on the application of the taint theory in the proceeds context, however:

Senator Denton. Suppose in the case of the Mafia, they buy a legitimate business or a big building, and only part of it is drug related. Can you snatch the whole thing away from them if it is fairly clear that the profit which obtained that building is from drug traffic?

Mr. Harris. You could, but innocent parties would have a right to have their portion severed out and given to them. Obviously, if it was an unseverable piece of property, the law would deal with it like it does, for example, in domestic relation cases. The house would be sold, and the portion would be returned to the innocent party that represented their interest; and the rest would be forfeited to the Government.¹⁹¹

Harris also noted that the new law would help alleviate the time consuming and complicated nature of criminal forfeiture. First, the innocent third party would be required to continue to seek administrative relief. Second, the substitute asset provision would eliminate the time lost in the hunt for concealed assets. Third, the ability to restrain property at an early stage would be beneficial. The bill "would allow us to go after proceeds and real property. That au-

¹⁸⁸ *Id.* at 237.

¹⁸⁹ *Id.* (statements of I. Nathan and Rep. Wm. Hughes).

¹⁹⁰ *DEA Oversight and Budget Authorization: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 34 (1982).

¹⁹¹ *Id.* at 37 (statement of Sen. Denton and J. Harris).

thority is not now clear, and the bill would make it clear.”¹⁹²

S. 2320, with minor modifications, was presented to the Senate in the form of another bill, S. 2572, the “Violent Crime and Drug Enforcement Improvements Act of 1982,” on May 26, 1982.¹⁹³ The purpose of the forfeiture amendments contained in S. 2572 was to clarify that “property which constitutes, or is derived from, the proceeds of racketeering activity punishable under 18 U.S.C. 1962 is subject to an order of criminal forfeiture.”¹⁹⁴ It also included pre-indictment restraining orders and forfeitability of substitute assets.¹⁹⁵ S. 2572 also provided several amendments to the drug forfeiture laws. Specifically subsection 1963(a)(2) under S. 2572 provided:

for the forfeiture of the profits generated by racketeering activity that serves as the basis for a RICO prosecution. Several courts have held that such profits are not currently forfeitable under RICO, and this limiting interpretation has significantly diminished the utility of the statute’s criminal forfeiture sanction. The criminal forfeiture provisions of the criminal code reform bill also provided for the forfeiture of proceeds. See S. Rept. 97-301, page 948.¹⁹⁶

Subsection 1963(b), as proposed, emphasized that the term “property” was to be broadly construed.¹⁹⁷ Subsection 1963(c) codified the relation back principle. “This subsection makes it clear, however, that in the case of a bona fide purchaser for value, the Attorney General may not proceed with disposition of the property. Such persons may obtain a return of their property by filing a petition for remission or mitigation of forfeiture.”¹⁹⁸ Subsection 1963(d), the substitute asset provision, was also part of S. 2572.¹⁹⁹

Analysis of the Bill revealed that the proposed drug statute was “in virtually all respects, identical to the RICO criminal forfeiture statute as amended.”²⁰⁰ The Senate added S. 2572 to H.R. 3963, “An Act to Amend the contract services for Drug Dependent Federal Offenders Act of 1978” on September 30, 1982.²⁰¹

Meanwhile, on August 10, 1982, the Senate Committee on the Judiciary issued Report No. 97-520, entitled *The Comprehensive Crimi-*

¹⁹² *Id.* at 39 (statement of J. Harris).

¹⁹³ 128 CONG. REC. 11,817, 11972 (1982).

¹⁹⁴ *Id.* at 12,020.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

nal Forfeiture Act of 1982, which recommended passage of S. 2320.²⁰² The Report initially stated that “[p]rofit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows.”²⁰³ The Report further noted that in the Ninety-Sixth Congress, Senator Biden held hearings on narcotics proceeds as well as this committee’s hearings on S. 2320.²⁰⁴ The issues which these hearings considered were forfeitability of proceeds, use of pre-indictment restraining orders and the substitute asset provision.

As to proceeds, the report specifically cited the limitations imposed in *Marubeni*, *Martino* and *Thevis*.²⁰⁵ Subsections 1963(a)(2)(A) and (B) under the Bill were essentially the same as case law interpretations of then current subsections 1963(a)(1) and (2): “[I]nterests in enterprises acquired or conducted in violation of the RICO statute and interests through which enterprises are influenced or controlled.”²⁰⁶ The Bill’s description of these two types of property was somewhat more detailed than those in the 1970 law, however, to avoid problems of limiting construction which courts might graft onto the statute.²⁰⁷

²⁰² S. REP. NO. 520, 97th Cong., 2d Sess. (1982).

²⁰³ *Id.* at 1.

²⁰⁴ *Id.* at 2.

²⁰⁵ *Id.* at 6-7.

²⁰⁶ *Id.* at 7.

²⁰⁷ For example, subparagraph (A) included not only interests in, but also contributions to, enterprises to make it clear that property which the defendant contributes to an enterprise conducted in violation of the RICO statute is subject to forfeiture, regardless of whether it gives rise to a legally cognizable interest, such as a partnership or equity interest, in the enterprise itself. This provision would be particularly helpful in cases involving criminal enterprises or groups “associated in fact,” where contributed property would not give rise to such an interest.

Subparagraph (C) was the new provision specifying the forfeiture of proceeds of racketeering activity. To come within the scope of this provision, the property must constitute, or be derived from, proceeds the defendant obtained through the racketeering activity or unlawful debt collection involved in the RICO violation. Thus, for example, if only a part of a corporation’s affairs were conducted through a pattern of racketeering activity, the gain produced through this activity would be subject to forfeiture under subparagraph (C), but the legitimately produced profits of the corporation would not.

In subparagraph (C), the term “proceeds” has been used in lieu of the term “profits” in order to alleviate the unreasonable burden on the government of proving net profits. It should not be necessary for the prosecutor to prove what the defendant’s overhead expenses were.

Subsection (B) of the bill, amending 18 U.S.C. § 1963, simply emphasizes that property subject to criminal forfeiture under the RICO statute may be either real property or tangible or intangible personal property. The types of property described in subparagraph (A), (B) and (C) are examples of kinds of personal property that may, in a RICO case, be subject to forfeiture and fall generally into the categories of positions or offices used or acquired in the offense, any compensation or benefit derived from such a position or office, and the proceeds of contracts awarded or performed through racketeering.

In essence, the purpose of this subsection is to underscore an intent that the concept of “property,” as used in section 1963, is to be broadly construed. It should be noted that although the examples of forfeitable property described in subparagraphs (A), (B), and (C) of subsection (b)(2) parallel the language used in

Subsection 1963(c) codified the taint theory, specifically citing *Long*.²⁰⁸ It noted that "where [a] third party is an innocent *bona fide* purchaser of the property for value, . . . [that] circumstance should not, consistent with existing precedent, serve to bar the government's forfeiture action, but should generally be the basis for the granting of the third party's petition for remission or mitigation of the forfeiture."²⁰⁹

The substitute asset provision was limited to five circumstances and:

[t]he amount of substitute assets which may be forfeited under this subsection is limited to the value of property described in subsection (a)(2) that is unavailable The substitute assets provision of this subsection would come into play when tracing is impossible or difficult, or where there has been no exchange of properties but rather removal or concealment of the property.²¹⁰

The report noted in a footnote, however, that "[t]here may be little distinction between tracing and forfeiture of substitute assets . . . where the forfeited property is a fungible asset such as money."²¹¹

The report rejected the contentions in *Scalzitti*,²¹² *Bello*²¹³ and *Mandel*²¹⁴ that the RICO restraining order provision is inconsistent with the presumption of innocence:²¹⁵

The sole purpose of the bill's restraining order provision, like that in the current RICO and CCE statutes, is to preserve the status quo In the Committee's view, the availability of restraining orders is essential in the area of criminal forfeiture and pretrial restraining orders for the purpose of preserving assets does not impinge on the trial concept of a presumption of innocence.²¹⁶

The permissibility of postponing notice and hearing until after a restraining order is entered was also discussed. Citing Supreme Court due process cases, *Calero-Toledo v. Pearson Yacht Leasing Co.*²¹⁷ and *Fuentes v. Shevin*²¹⁸, the Report found that such postponement

proposed section 1963(a), it is section 1963(a) which is to control when the finder of fact makes a determination of whether particular property is subject to forfeiture.

Id. at 7-8.

²⁰⁸ 654 F.2d 911 (3d Cir. 1981).

²⁰⁹ S. Rep. No. 520 at 9.

²¹⁰ *Id.* at 9.

²¹¹ *Id.* at 9 n.17.

²¹² 408 F. Supp. 1014 (W.D. Pa. 1975), *appeal dismissed mem.*, 556 F.2d 569 (3d Cir. 1977).

²¹³ 470 F. Supp. 723 (S.D. Cal. 1979).

²¹⁴ 408 F. Supp. 679 (D. Md. 1976).

²¹⁵ S. Rep. No. 520 at 10 n.19.

²¹⁶ *Id.* at 10-11.

²¹⁷ 416 U.S. 663 (1974).

²¹⁸ 407 U.S. 67 (1971).

would be permissible.²¹⁹ Before a temporary restraining order could issue, however, the government would have to establish two things. "First, either an indictment or information charging a RICO offense and alleging that the property is subject to criminal forfeiture must have been filed, or the court must make its own probable cause determination to the same effect"; and second, the government must show that if notice were given the property could be disposed of, concealed or removed from the jurisdiction of the court before an adversary hearing could be held.²²⁰ The Report further noted that this temporary order must be followed by a hearing within the limits of subsection 1963(e)(1).²²¹

While the Senate was considering S. 2320, H.R. 7140 was proceeding through the House. On September 28, 1982, H.R. 7140, dealing only with forfeitures under Title 21, was passed.²²² On October 1, 1982, H.R. 7140 came before the Senate for consideration. Upon the motion of Senator Baker, the text of H.R. 7140 was replaced by the text of S. 2320. The Senate adopted a motion to request a conference with the House on the two bills.²²³ The term of the Ninety-Seventh Congress expired without enactment of any of these bills.

2. *Proposals and Hearings in 1983 Through 1986*

In May, 1983, the Senate held hearings on the Comprehensive Crime Control Act of 1983, Senate Bill S. 829.²²⁴ The Comprehensive Crime Control Act of 1983 sought far reaching criminal law reforms. Part of the proposed Bill was Title IV which was "designed to enhance the use of forfeiture, and in particular the sanction of criminal forfeiture, as a law enforcement tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking."²²⁵ Title IV was based with minor modifications on the "Senate-passed comprehensive drug enforcement and violent crime bill of last Congress, S. 2572," which was based on S.

²¹⁹ S. REP. NO. 520 at 11.

²²⁰ *Id.* at 11-12.

²²¹ *Id.* at 12.

²²² 128 CONG. REC. H7,664-70 (daily ed. Sept. 28, 1982).

²²³ 128 CONG. REC. S13,161-65 (daily ed. Oct. 1, 1982).

²²⁴ *Comprehensive Crime Control Act of 1983: Hearing Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 812 (1983)[hereinafter *Comprehensive Crime Control Hearings*]. The text of S. 829 can be found at 129 CONG. REC. S.3,077. Other virtually identical forfeiture bills also under consideration during this time period were S. 948 and S. 830. See S. REP. NO. 224, 98th Cong., 1st Sess. 10 (1983).

²²⁵ *Comprehensive Crime Control Hearings*, *supra* note 224 at 148 (formal statement of Department of Justice.).

2320.²²⁶

Under the proposed RICO forfeiture provision S. 829, Congress clearly would have made proceeds of racketeering activity forfeitable. This issue was, at the time, pending before the Supreme Court in *Russello*.²²⁷ It also would have strengthened restraining order powers and allowed for avoidance of transfers to avoid forfeiture and for forfeiture of substitute assets.

The ABA's Section of Criminal Justice expressed great concern about the potential impact of the new forfeiture provisions in the area of white collar crime:

Its concern is stimulated by the fact that RICO and its forfeiture provisions are being applied to a wide range of commercial behavior. RICO prosecutions are being brought not only against individuals associated with inherently criminal activity, e.g. narcotics, arson, murder for hire and loan sharking, but also against persons charged with corporate misbehavior and commercial frauds. In these latter circumstances, the economic consequences of illegal activity are usually intertwined with those of legal activity. The broad sweep of the forfeiture provisions and the accompanying provisions for restraining orders raise potentially serious problems of overbreadth, disproportionality of punishment implicating the eighth amendment, denial of due process where third parties are concerned, and the inhibition of legitimate commerce.²²⁸

The first concern was that forfeiture of proceeds would not allow defendants in white collar crime cases to deduct the costs incident to obtaining the forfeitable property. For instance, in cases where RICO would be applied to contracts obtained by fraud or bribery, "the 'proceeds' would include the defendant's costs in performing the contract. Those costs could be substantial."²²⁹ To alleviate the "unfairness" of the proceeds forfeiture in white collar crime cases, several alternatives were suggested such as forfeiting only "profits" from "those crimes in which the defendant renders a socially acceptable service, at a cost to himself, but there is criminality involved."²³⁰

The Criminal Justice Section of the ABA also objected to the "derived from" language in the new forfeiture provision:

If the intent is to make it clear that profits are forfeitable, it seems to be surplusage. If "derived from" means a more attenuated relationship, but nevertheless a casual connection, then there should be concern again about the danger of disproportionate and unintended

²²⁶ *Id.* at 149.

²²⁷ 464 U.S. 16 (1983).

²²⁸ *Comprehensive Crime Control Hearing*, *supra* note 224 at 803-04.

²²⁹ *Id.* at 806.

²³⁰ *Id.*

forfeitures. If tainted money is invested in a sandwich shop and, by hard work and ingenuity, the investor parlays his operation into a restaurant chain, arguably the final product of all his labors is "derived from" the tainted money. In short, "derived from" is not a useful concept because it would carry the forfeiture beyond interests in an enterprise and profits and proceeds from criminality. We recommend that Congress focus on the fact that in the case of legitimate businesses, a piece of property or an investment may be the product of both clean and tainted money.²³¹

The Criminal Justice Section also called for bifurcated guilt and forfeiture proceedings in which the government "should not be permitted to offer evidence relevant only to forfeiture in the guilt phase."²³²

The Section further argued that the taint theory has never been part of RICO's *in personam* forfeitures. It was not, in the section's view, fair to require third parties to bear the burden of proof that they are bona fide purchasers for value:

Particularly in cases involving legitimate businesses, profits, proceeds and property are the joint product of legitimate and illegitimate activity. Requiring the businessman to unravel the trail of dollars prior to purchasing securities, real estate or other property is not only unfair, but it may in fact impose unintended impediments to the free flow of commerce.²³³

The Section also questioned whether the government's right to forfeiture which rests upon commission of the illegal act means the first predicate crime or the last one.²³⁴

The Criminal Justice Section questioned the substitute assets provision as it might be applied in the white collar crime forum:

A RICO offense may span many years. Property obtained during it may increase or decrease in value and businesses may fall on hard times. In short, this section would result in orders of forfeiture far in excess of property actually available to the defendant at the time of his indictment, or it might result in forfeiture so disproportionate to the amounts attributable to the illegal conduct as to raise eighth amendment considerations.²³⁵

As to restraining orders, the ABA reiterated its previous calls for:

forcing the government to establish more than the return of an indictment in order to obtain a restraining order. Regarding post-indictment restraints on a defendant's property, S. 830 provides for a hearing with reasonable notice and opportunity for participation by

²³¹ *Id.* at 807 (Formal statement of the ABA Section of Criminal Justice).

²³² *Id.* at 808.

²³³ *Id.* at 809.

²³⁴ *Id.* at 809-10.

²³⁵ *Id.* at 811.

adverse parties. By negative implication, S. 829 does not. This omission renders S. 829 fatally defective in constitutional terms.²³⁶

In support, the Section cited due process cases such as *Fuentes*²³⁷ and *Sniadach v. Family Finance Corp.*²³⁸ as well as RICO and CCE restraining order cases, *Crozier*,²³⁹ *Spilotro*,²⁴⁰ *Long*²⁴¹ and *Veon*.²⁴² The Section opposed the apparent intent of S. 829 to limit the defendant's opportunity to contest the validity of the restraint on his property until the trial itself. This, the Section asserted, was not a due process hearing "at a meaningful time and in a meaningful manner."²⁴³

Despite these objections, the Senate committee adopted a compromise of S. 829 and two very similar bills, S. 948 and S. 830. This compromise, originally denominated S. 1762, was favorably reported as S. 948 in Senate Report 98-224 on August 4, 1982.²⁴⁴

Much of the basis of Senate Report 98-224 was drawn from hearings before earlier Congresses. For instance, the report noted that "[p]rofit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows."²⁴⁵ The Senate described the scope of the new provisions as follows:

For the most part, this bill's forfeiture amendments do not focus on significant expansion of the scope of property subject to forfeiture. (Authority to civilly forfeit real property used in drug trafficking and clarification of the forfeitability of proceeds of racketeering is provided, however.) Instead, they focus primarily on improving the procedures applicable in forfeiture cases. The more significant of these amendments includes measures to prevent pre-conviction transfers of assets in criminal forfeiture cases [and] allows forfeiture of substitute

²³⁶ *Id.* at 811-12.

²³⁷ *Fuentes v. Shevin*, 407 U.S. 67 (1972).

²³⁸ 395 U.S. 337 (1969).

²³⁹ *United States v. Crozier*, 674 F.2d 1293 (9th Cir. 1982), *vacated and remanded*, 468 U.S. 1206 (1984).

²⁴⁰ *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982).

²⁴¹ *United States v. Long*, 654 F.2d 911 (3d Cir. 1981).

²⁴² *United States v. Veon*, 538 F. Supp. 237 (E.D. Cal. 1982).

²⁴³ *Comprehensive Crime Control Hearings*, *supra* note 224, at 812 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

²⁴⁴ S. Rep. No. 224, 98th Cong., 1st Sess. (1983). S. 948, S.829, and S. 830 were originally combined in the "Comprehensive Crime Control Act of 1983, (S. 1762)." *Id.* at 13. Subsequently, the text of S. 1762 was substituted for the text of S. 948. *Id.* Consequently, Senate Report 98-224 deals with a bill denominated S. 948, the body of which is a compromise of the original S. 948 combined with S. 829 and S. 830. Senate Report 98-225, issued on the same day as Senate Report 98-224, reports on S. 1762 in language virtually identical to the language in Senate Report 98-224. S. REP. No. 225, 98th Cong., 1st Sess. (1983). For the sake of minimizing confusion, this compromise bill will be referred to hereafter as S. 1762.

²⁴⁵ S. Rep. No. 224 at 13.

assets where transfer or concealment of assets does occur.²⁴⁶

The Report noted that RICO forfeiture was too limited in two important respects. Courts had interpreted the RICO forfeiture provisions "so as to prevent the criminal forfeiture of a defendant's ill-gotten profits, even though other of his interests used or acquired in violation of the RICO statute would be forfeitable."²⁴⁷ Second, the RICO and CCE statutes "fail adequately to address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction."²⁴⁸

Current law allowed for post-indictment restraining orders but did not set forth the standard to be applied by the court in issuing such orders. Cases such as *Crozier*

have required the government to meet essentially the same stringent standard that applies to the issuance of temporary restraining orders in the context of civil litigation and have also held the Federal Rules of Evidence to apply to hearings concerning restraining orders in criminal forfeiture cases. In effect, such decisions allow the courts to entertain challenges to the validity of the indictment, and require the government to prove the merits of the underlying criminal case and forfeiture counts and put on its witnesses well in advance of trial in order to obtain an order restraining the defendant's transfer of property alleged to be forfeitable in the indictment. Meeting such requirements can make obtaining a restraining order—the sole means available to the government to assure the availability of assets after conviction—quite difficult. In addition, these requirements may make pursuing a restraining order inadvisable from the prosecutor's point of view because of the potential for damaging premature disclosure of the government's case and trial strategy and for jeopardizing the safety of witnesses and victims in racketeering and narcotics trafficking cases who would be required to testify at the restraining order hearing.²⁴⁹

Section 1963(a)(1) and (2), as revised, "carry forward (but in clearer format) the description of forfeitable property appearing in current 18 U.S.C. 1963(a)(1) and (2). Paragraph (3) is new, and specifically provides for the forfeiture of proceeds derived from prohibited racketeering activity or unlawful debt collection. Both direct and derivative proceeds are forfeitable."²⁵⁰

To be forfeitable under 1963(a)(3), the proceeds must be attributable to the racketeering activity. "For example, if only part of a corporation's affairs were conducted through a pattern of racketeering activity, the gain produced through this activity would be

²⁴⁶ *Id.* at 15.

²⁴⁷ *Id.* at 17.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 18.

²⁵⁰ *Id.* at 21.

subject to forfeiture but the legitimately produced profits of the corporation would not.”²⁵¹ Additionally, “proceeds” rather than “profits” was used to “alleviate the unreasonable burden on the government of proving net profits. It should not be necessary for the prosecution to prove what the defendant’s overhead expenses were.”²⁵² The court in *United States v. Jeffers*, a CCE case, noted the “‘extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits.’”²⁵³ S. 1762 also clarified that section 1963 is mandatory and that “its criminal forfeiture provisions are to apply irrespective of any contrary provisions in state law.”²⁵⁴

Subsection 1963(b) underscored the concept that the term “property” is to be broadly construed. Congress had dropped the list of forfeitable property submitted by the Department of Justice in S. 2320 from the statute but adopted it as part of the legislative history. “The Committee agrees that forfeiture of the right to exercise or benefit from such interests is fully consistent with the purposes of the RICO forfeiture sanction.”²⁵⁵

The “relation back” provision of subsection 1963(c) was viewed as a codification of the taint theory. “The interest of the United States in the property is to vest at [the time of the acts which give rise to the forfeiture], and is not necessarily extinguished simply because the defendant subsequently transfers his interest to another.”²⁵⁶ This provision “should not operate to the detriment of innocent *bona fide* purchasers of the defendant’s property Such purchasers are entitled to relief under the new ancillary hearing procedure in section 1963(m) which was adopted by amendment by the Committee.”²⁵⁷

Under this provision, the jury could render a special verdict of forfeiture with respect to property used or acquired by the defendant in a manner rendering it subject to the forfeiture, irrespective of the fact that it may have been transferred to a third party subsequent to the acts of the defendant giving rise to the forfeiture. Resolution of claims of third parties asserting that they are innocent *bona fide* purchasers, claims that will determine whether a transfer is ultimately voided, may be reserved for the post-trial ancillary hearing. This pro-

²⁵¹ *Id.*

²⁵² *Id.* at 21, 22 (citing *United States v. Jeffers*, 532 F.2d 1101 (7th Cir. 1976), *aff’d in part, vacated in part*, 432 U.S. 137 (1977)).

²⁵³ S. Rep. No. 224, 98th Cong., 1st Sess. 22 n.24 (1983)(quoting *United States v. Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), *aff’d in part, vacated in part*, 432 U.S. 137 (1977)).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 23.

²⁵⁷ *Id.*

cedure provides for more orderly consideration both of the forfeiture issue and the legitimacy of third party claims. Moreover, even if a transfer is sustained at the ancillary hearing, the fact that the jury will have determined that the property would have been forfeitable if it had remained in the hands of the defendant will allow the court to order the forfeiture of substitute assets of the defendant as provided in 18 U.S.C. 1963(d), as amended, to assure that the defendant does not retain the gain received from this pre-conviction transfer.²⁵⁸

Subsection 1963(d) was a new provision providing for forfeiture of substitute assets. The Committee noted that "[w]here it is clear that a forfeitable asset has been sold for value to an innocent purchaser, the Committee expects that the government would seek forfeiture of substitute assets of the defendant, as provided in Section 1963(d), at the conclusion of trial and avoid the necessity of the purchaser petitioning for a post-trial hearing."²⁵⁹ Forfeiture of assets of equivalent value was provided for in five instances:

[W]here property found subject to forfeiture under Section 1963(a), as amended, (1) cannot be located; (2) has been transferred to, 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 by any act or omission of the defendant; or (5) has been commingled with other property that cannot be divided without difficulty.²⁶⁰

Provision (2) must be read in conjunction with 1963(c) which allows the voiding of certain transfers to third parties. "The bill does not permit the government to obtain forfeiture both of the transferred property and of substitute assets. Instead, it permits the government to reach substitute assets where the property cannot be reached once transferred or where such action is a preferable alternative to seizure of property sold to an innocent purchaser."²⁶¹ Provision (3) was directed toward "combatting the problem of use of offshore banks as safe havens for crime-related assets."²⁶² Finally, provision (4) "will be of utility where a defendant substantially depletes a forfeitable asset in anticipation of its being ordered forfeited. It is phrased, however, so that it will not apply where the value of the property has been subject to minimal or ordinary depreciation."²⁶³

The restraining order power of the court was set forth in subsection 1963(e).²⁶⁴ It expanded authority to enter restraining or-

²⁵⁸ *Id.* at 23.

²⁵⁹ *Id.* at 23 n.29.

²⁶⁰ *Id.* at 24.

²⁶¹ *Id.* at 24 n.30.

²⁶² *Id.* at 24 n.31.

²⁶³ *Id.* at 24 n.32.

²⁶⁴ *Id.* at 24-25.

ders to certain pre-indictment situations. The Committee also set forth the standard for post-indictment restraining orders. After indictment, a restraining order may issue based solely on the probable cause finding made by the grand jury provided that the indictment charges a RICO violation and alleges "that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under [section 1963].'"²⁶⁵ Thus, a hearing prior to entry of the restraining order was not authorized. After issuance of a restraining order, the court was authorized to conduct a hearing to modify the order or to vacate the order as to "property restrained [which] was not among the property named in the indictment."²⁶⁶ The Committee was adamant that such a hearing should not consider the question of whether the government was likely to prevail on the merits of the RICO charge at trial. "For the purpose of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based."²⁶⁷

Prior to indictment a restraining order could issue:

[I]f, after notice and an opportunity for a hearing, the court determines that "there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture," and also determines "that the need to preserve the availability of the property

²⁶⁵ *Id.* at 25. The Committee was very specific about this issue.

Paragraph (1)(a) provides that a restraining order may issue "upon the filing of an indictment or information charging a violation of section 1962 of this chapter [18 U.S.C. 1962] and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section." Thus, the probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order. While the court may consider factors bearing on the reasonableness of the order sought, it is not to "look behind" the indictment or require the government to produce additional evidence regarding the merits of the case as a prerequisite to issuing a post-indictment restraining order. Since a warrant for the arrest of the defendant may issue upon the filing of an indictment or information, and so the indictment or information is sufficient to support a restraint on the defendant's liberty, it is clear that the same basis is sufficient to support a restraint on the defendant's ability to transfer or remove property alleged to be subject to criminal forfeiture in the indictment.

In contrast to the pre-indictment restraining order authority set out in paragraph (1)(B), the post-indictment restraining order provision does not require prior notice and opportunity for a hearing. The indictment or information itself gives notice of the government's intent to seek forfeiture of the property. Moreover, the necessity of quickly obtaining a restraining order after indictment in the criminal forfeiture context presents exigencies not present when restraining orders are sought in the ordinary civil context.

²⁶⁶ *Id.*

²⁶⁷ *Id.* The Committee "stressed that at such a hearing the court is not to entertain challenges to the validity of the indictment."

through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.”²⁶⁸

The committee stressed, however, “that this stringent standard applies only in this context; it is not to be extended to restraining orders sought after indictment.”²⁶⁹

Subsection 1963(e)(2) also provided for pre-indictment restraining orders to issue, on a temporary basis, without prior notice:

In order to obtain such an *ex parte* order the government must establish probable cause to believe that the property is subject to forfeiture and that provision of notice would jeopardize the availability of the property. Certain types of property, particularly highly liquid assets forfeitable as proceeds of drug trafficking or cash producing racketeering schemes, may be easily moved, concealed or disposed of even in the relatively short period of time that may elapse between the giving of notice and the holding of an adversary hearing concerning the entry of a restraining order. In such cases, there may be a compelling need for a temporary *ex parte* order.²⁷⁰

The Committee rejected the arguments in *Scalzitti*,²⁷¹ *Bello*,²⁷² and *Mandel*,²⁷³ that the restraining order provisions impinged on the defendant's presumption of innocence at trial.²⁷⁴ Finally, subsection 1963(e)(3) provided that the Federal Rules of Evidence do not apply at a hearing concerning a restraining order.²⁷⁵

The forfeiture statute additionally incorporated other miscellaneous provisions. Subsection 1963(f) allowed for the appointment of receivers or trustees following a jury verdict of forfeiture and permitted use of income to offset the ordinary and necessary expense of the enterprise in order to preserve the value of the assets until their disposal.²⁷⁶ Subsection 1963(g) specifically prohibited re-acquisition by the defendant of property he had forfeited.²⁷⁷ Administrative remission or mitigation of the forfeiture was set forth in subsection 1963(n).²⁷⁸ Subsection 1963(j) prohibited third parties from intervening in the criminal case by filing a simultaneous civil suit. Rather, third parties were required to follow the ancillary hear-

²⁶⁸ *Id.* (quoting 18 U.S.C. § 1963 (e)(1)(B)).

²⁶⁹ *Id.* at 25-26.

²⁷⁰ *Id.* at 26.

²⁷¹ *United States v. Scalzitti*, 408 F. Supp. 1014 (W.D. Pa. 1975), *appeal dismissed mem.*, 556 F.2d 569 (3d Cir. 1977).

²⁷² *United States v. Bello*, 470 F. Supp. 723 (S.D. Cal. 1979).

²⁷³ *United States v. Mandel*, 408 F. Supp. 679 (D. Md. 1976).

²⁷⁴ *Comprehensive Crime Control Hearing*, *supra*, note 224 at 27.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 27-28.

²⁷⁷ *Id.* at 28.

²⁷⁸ *Id.*

ing procedure set forth in Section 1963(m).²⁷⁹

Congress provided third parties who assert a legal rather than an equitable basis for relief from forfeiture a judicial avenue for relief in subsection 1963(m).²⁸⁰ "Thus, if a third party can demonstrate that his interest in the forfeited property is exclusive of or superior to the interest of the defendant, the third party's claim renders that portion of the order of forfeiture reaching his interest invalid."²⁸¹ The procedure for providing notice to third parties who may claim an interest in the forfeited property was set forth in subsection 1963(m).²⁸² Under this provision, the third party bears the burden of proving by a preponderance of the evidence either that at the time the illegal acts were committed he had a legal interest in the property superior to that of the defendant or that he was "a bona fide purchase[r] for value and had no reason to believe that the property was subject to forfeiture."²⁸³ After adjudicating any third-party claims, clear title to any property not released to third parties would pass to the United States.

If the third party loses under subsection 1963(m), he or she may still seek equitable relief from the Attorney General. The Attorney General petition, however, shall not be subject to judicial review.

S. 1762 was discussed as part of the Comprehensive Crime Control Act by the Senate on February 2, 1984.²⁸⁴ The Senate approved the Comprehensive Crime Control Act on that day.²⁸⁵ The

²⁷⁹ *Id.* at 29.

²⁸⁰ *Id.* at 4.

²⁸¹ *Id.* at 30.

²⁸² *Id.* at 31. The Committee described the procedures as follows:

Under the new ancillary hearing procedure, the government, following the entry of an order of forfeiture is to publish notice of the order of forfeiture and its intent to dispose of the property. Direct written notice to interested third parties may serve as a substitute for published notice. Within thirty days after publication of notice or receipt of direct notice, any third party asserting a legal interest in the property ordered forfeited may petition the court (the court having heard the criminal case) for a hearing to adjudicate the validity of his alleged interest. This hearing is to be held before the court alone.

If possible, the hearing is to be held within thirty days of the filing of the petition, and the court may hold a consolidated hearing to resolve all or several petitions arising out of a single case. At the hearing, both the petitioner and the United States may present evidence and witnesses, and cross-examine witnesses who appear. In addition to evidence and testimony presented at the hearing, the court may consider relevant portions of the record of the criminal case. This will allow the court to quickly dispense with claims that have already been considered at trial, as for example, where the jury has already determined that the third party held the property only as a nominee of the defendant or that a transfer to the third party was a sham transaction.

²⁸³ *Id.*

²⁸⁴ 130 CONG. REC. S758 (daily ed. Feb. 2, 1984)(statement of Sen. Laxalt).

²⁸⁵ *Id.* at S759.

House passed the Act without debate on September 25, 1984.²⁸⁶ Inexplicably, certain provisions of the forfeiture bill, most notably the substitute assets section, were omitted from the law as passed. The substitute assets provision was restored, however, in a technical amendments bill passed in 1986.²⁸⁷

II. SCOPE OF FORFEITURE

The present RICO forfeiture statute has three basic categories of forfeitable property: (a)(1) interests acquired or maintained through racketeering; (a)(2) interests in or providing a source of influence over the racketeering enterprise; and (a)(3) proceeds of racketeering activity. The breadth of each of these provisions is discussed below.

A. "TAINT"—SUBSECTIONS 1963(A)(1) AND 1963(A)(2)(A)

Subsection 1963(a)(1) provides for forfeiture of "[i]nterests acquired and maintained in violation of section 1962." As previously discussed²⁸⁸, courts initially interpreted this provision as limited to interests acquired "in an enterprise." That limitation was expressly rejected by the Supreme Court in *Russello v. United States*.²⁸⁹ By comparison, subsection 1963(a)(2)(A) is expressly limited to interest "in an enterprise." This subsection provides for forfeiture of "any interest in . . . any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962."²⁹⁰

Prior to *Russello*, many debates arose regarding whether the predecessor provisions to the present subsections 1963(a)(1) and 1963(a)(2)(A) were redundant in that courts read both as limited to interests in an enterprise.²⁹¹ This redundancy question was initially

²⁸⁶ *Id.* Cong. Rec. H10,131 (daily ed. September 25, 1984). The Act became Pub. L. No. 98-473. The effective date of the Act was October 12, 1984.

²⁸⁷ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1153(a)(1986). The substitute assets provision was originally designated subsection 1963(d). When it was omitted in 1984, subsequent subsections were renumbered. Thus, for instance, the provision for third party petitions became 1963(l) rather than 1963(m). In 1986, the substitute asset provision was added to subsection 1963 as subsection 1963(n), however. Accordingly, at present no subsection 1963(m) exists.

²⁸⁸ See *supra* text accompanying notes 89-102.

²⁸⁹ 464 U.S. 16 (1983). Nevertheless, courts and counsel improperly continue to apply "in an enterprise" limitations to subsection 1963(a)(1) forfeitures based, in part, on reliance upon pre-*Russello* case law. See, e.g., *United States v. Horak*, 633 F. Supp. 190, 198-99 (N.D. Ill. 1986), *aff'd in part, vacated and remanded in part*, 833 F.2d 1235 (7th Cir. 1987).

²⁹⁰ 18 U.S.C. § 1963 (a)(2)(A).

²⁹¹ Compare *United States v. Marubeni Am. Corp.*, 611 F.2d 763 (9th Cir. 1980), and

erroneously resolved in cases holding that subsection 1963(a)(1) was "directed towards the forfeiture of a minority interest in an enterprise controlled by others."²⁹² The Supreme Court in *Russello* corrected this misinterpretation. It stated that:

[s]ubsection (a)(1) reaches "any interest," whether or not in an enterprise, provided it was "acquired . . . in violation of section 1962." Subsection (a)(2), on the other hand, is restricted to an interest in an enterprise, but that interest itself need not have been illegally acquired. Thus, there are things forfeitable under one, but not the other, of each of the subsections.²⁹³

The distinction between the two subsections turns on the need to prove "taint." Under subsection 1963(a)(2)(A) a defendant's entire interest in the enterprise named in the RICO charge is forfeitable irrespective of whether he actually used all of his holdings in the enterprise to facilitate the illegal conduct. So, for example, in *United States v. Anderson*,²⁹⁴ the defendant's entire interest in the enterprise, Lee & M, Inc., d/b/a/ Gentleman's Quarters, d/b/a She Club, was forfeited even though the defendant argued that the basement of the She Club "was rented to other businesses as storage area, and not used as a part of the [racketeering activity]." ²⁹⁵ The Eleventh Circuit correctly observed that "[a] defendant's conviction under the RICO statute subjects *all* his interests in the enterprise to forfeiture 'regardless of whether those assets were themselves 'tainted' by use in connection with the racketeering activity.'" ²⁹⁶ Similarly, in *United States v. Roberts*,²⁹⁷ the government sought forfeiture of a Packard automobile purchased with funds of the enterprise corporation pursuant to a plea agreement. The court rejected forfeiture pursuant to subsection 1963(a)(1) because the bulk of the money used to purchase the car was paid before the corporation began engaging in the illegal activity. However, the court found that to the extent that the defendant purchased the Packard with enterprise funds, "a jury would have been justified in finding that it [was] the

United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979), *with United States v. Martino*, 681 F.2d 952 (5th Cir. 1982)(en banc), *aff'd sub nom. Russello v. United States*, 464 U.S. 16 (1985).

²⁹² *United States v. Thevis*, 474 F. Supp. 134, 143 n. 14 (N.D. Ga. 1979); *accord United States v. Horak*, 633 F. Supp. 190, 198-99 (N.D. Ill. 1986), *aff'd in part, vacated and remanded in part*, 833 F.2d 1235 (7th Cir. 1987).

²⁹³ *Russello*, 464 U.S. at 24.

²⁹⁴ 782 F.2d 908 (11th Cir. 1986).

²⁹⁵ *Id.* at 917.

²⁹⁶ *Id.* at 918 (quoting *United States v. Cauble*, 706 F.2d 1322, 1359 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984))(emphasis in original); *accord United States v. Hess*, 691 F.2d 188 (4th Cir. 1982)(forfeiture of defendant's entire interest in enterprise corporation.).

²⁹⁷ 749 F.2d 404 (7th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985).

property of the enterprise.”²⁹⁸ As such, the car was held to be forfeitable “under 18 U.S.C. § 1963 (a)(2), as an asset of an enterprise conducted in violation of the racketeering provisions of the Act.”²⁹⁹

By comparison, where the defendant uses racketeering funds to acquire assets which are not part of the charged enterprise, or uses such assets to facilitate the racketeering activity, these non-enterprise assets can be forfeited under subsection 1963(a)(1) because they are “tainted” by their use in the illegal activity. Thus, in *United States v. Boffa*,³⁰⁰ the court ordered forfeiture of the defendants’ interests in corporations which were not part of the association-in-fact enterprise. In *Boffa*, the racketeering activity involved manipulation of leasing contracts to subvert collective bargaining agreements and rights guaranteed by labor laws. The corporations controlled by the individual members of the enterprise were used as a “corporate ‘shell game,’ ”³⁰¹ allowing the defendants to move leasing contracts among the various corporations without disclosing that each corporation was in reality controlled by the defendants. Thus, the defendants’ interests in the corporations were tainted by use of the corporations in the illegal activity. Although the court did not discuss the taint issue, it nevertheless correctly held that the defendants must “forfeit to the United States their interests in the corporations associated with the enterprise.”³⁰²

The Seventh Circuit in *United States v. Horak*,³⁰³ acknowledged the “taint”/“no taint” distinction between subsections (a)(1) and (a)(2):

Section (a)(1) focuses on the *racketeering activity* and divests the convicted defendant of all interests “acquired or maintained” by that activity. It is apparently irrelevant whether such interests are part of the charged enterprise. Section (a)(2), on the other hand, . . . focuses on the *enterprise*, not the specific racketeering activity, and divests the convicted defendant of all interests in the enterprise. It would therefore seem irrelevant (at least in terms of the structure of the statute) whether (a)(2) interests were directly related to the racketeering activity of which the defendant was convicted.³⁰⁴

In *Horak*, the government sought to forfeit the defendant’s interest

²⁹⁸ *Id.* at 410.

²⁹⁹ *Id.*

³⁰⁰ 513 F. Supp 444 (D. Del. 1980)(pretrial hearings); 688 F.2d 919 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983).

³⁰¹ *Boffa*, 513 F. Supp. at 456 n.11.

³⁰² *Boffa*, 688 F.2d at 925; *accord* *United States v. Martino*, 681 F.2d 952, 962 n.35 (5th Cir. 1982)(en banc), *aff’d*, 464 U.S. 16 (1983)(forfeiture of two non-enterprise corporations under subsection 1963(a)(2) because both “were active in the enterprise”).

³⁰³ 833 F.2d 1235 (7th Cir. 1987).

³⁰⁴ *Id.* at 1243 (emphasis in original).

in his job, pension and profit sharing plan, salary, bonuses, and shares of stock in the enterprise. The district court ordered forfeiture of defendant's pension and profit sharing plan, salary and bonuses under section (a)(1) because the defendant's racketeering activities "enhanced" these interests.³⁰⁵ The Seventh Circuit remanded for a taint finding. It phrased the taint test as requiring the district court to determine "what portion of [defendant's] interests would not have been acquired or maintained '*but for*' his racketeering activities."³⁰⁶

In practice, the "taint"/"no taint" distinction has often eluded both attorneys and courts. Occasionally, courts have held that no "taint" showing is required under subsection 1963(a)(1) merely because the interest to be forfeited is part of the charged enterprise. In *United States v. Cauble*,³⁰⁷ the enterprise was a partnership, Cauble Enterprises. The government showed that assets of Cauble Enterprises were used in conducting illegal racketeering activity, in this case drug trafficking. Accordingly, the defendant's entire interest in the enterprise was subject to forfeiture under subsection 1963(a)(2)(A). The defendant's interest in Cauble Enterprises was also forfeitable to the extent Cauble Enterprises had been used to facilitate drug trafficking under the "taint" concept of subsection 1963(a)(1). The Fifth Circuit reached the right result—forfeiture of defendant's entire interest in the enterprise—but in the process intermingled subsection 1963(a)(1) and subsection 1963(a)(2)(A) analyses. The *Cauble* court held that RICO forfeiture "deprives that defendant of all of the assets that allow him to *maintain* an interest in a RICO enterprise, regardless whether those assets are themselves 'tainted' by use in connection with the racketeering activity."³⁰⁸ "Interests maintained," like "interests acquired," is a subsection 1963(a)(1) concept. Yet, because the interests sought to be forfeited were enterprise assets, the court did not make a taint determination. The result, forfeiture of all of the defendant's interest in the enterprise, was correct under subsection 1963(a)(2)(A), but the rationale using subsection 1963(a)(1) language was faulty.³⁰⁹

³⁰⁵ 633 F. Supp at 200.

³⁰⁶ 833 F.2d at 1243 (emphasis added). The Seventh Circuit did not preclude forfeiture of these interests as interests in the enterprise, without a taint determination, under subsection 1963(a)(2). However, the court expressed some possible eighth amendment concerns if forfeiture of all interests the government sought was ordered under subsection 1963(a)(2). See discussion of the constitutionality of forfeiture provisions *infra* text accompanying notes 522-51.

³⁰⁷ 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

³⁰⁸ *Id.* at 1349 (emphasis added).

³⁰⁹ The special interrogatories submitted to the jury in *Cauble* referred to both subsec-

In other instances, prosecutors have created a self-imposed burden of showing taint by seeking forfeiture of enterprise assets solely under subsection 1963(a)(1). In *United States v. Zang*,³¹⁰ the defendants "fraudulently miscertified" lower grade crude oil, which was price controlled, as higher grade oil "resulting in an illegal profit of nearly 7.5 million dollars."³¹¹ The RICO charge was investing income acquired through a pattern of racketeering activity in an enterprise, Dalco Investments, in violation of Title 18, United States Code, Section 1962(a). "The government sought forfeiture of the [defendants'] respective interests in Dalco Investments, including its sole asset, the Dalco Building, pursuant to § 1963(a)(1)."³¹² Because subsection 1963(a)(1) was the only forfeiture provision relied upon, the *Zang* court correctly concluded that only the interest in Dalco Investments acquired by tainted funds was subject to forfeiture.³¹³ As to the Dalco Building, the government was required to show what portion of the building was "acquired by racketeering funds."³¹⁴ If the prosecution had also sought forfeiture pursuant to subsection 1963(a)(2)(A), however, this "taint" showing would have been obviated. The court would have required the defendants to forfeit their entire interest in the Dalco Building, irrespective of what portion of the enterprise and the building were acquired with tainted funds.³¹⁵

B. INTERESTS MAINTAINED—SUBSECTION 1963(A)(1)

The RICO Act does not define the term "maintained" as used in subsection 1963(a)(1). The legislative history also sheds little light on the interpretation of this provision. Throughout the legislative history, subsection 1963(a)(1) is generally referred to by its

tion 1963(a)(1), interests maintained, and subsection 1963(a)(2), interests affording a source of influence over the enterprise. *Cable*, 706 F.2d at 1346 n.90.

³¹⁰ 703 F.2d 1186 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983).

³¹¹ *Id.* at 1189.

³¹² *Id.* at 1193. The *Zang* court incorrectly limited subsection 1963(a)(1) to interests in an enterprise. This error does not affect the accuracy of the court's "taint" reasoning, however.

³¹³ *Id.* at 1195.

³¹⁴ *Id.* When dealing with forfeiture of corporate or other business entity interests, it is important to distinguish whether the defendant's interests in a corporation are forfeited or whether the corporation's assets are themselves forfeited. *See, e.g., United States v. Mageean*, 649 F. Supp. 820 (D. Nev. 1986); *Forfeiture in Drug Cases: Hearings on H.R. 2646, H.R. 2910, H.R. 4110 and H.R. 5371 before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st and 2d Sess. 184-85 (1982).

³¹⁵ In *United States v. Veliotis*, 586 F. Supp. 1512 (S.D.N.Y. 1984), the court allowed the government to change its theory regarding forfeitability post-indictment. The better practice would be to charge theories in the alternative. *See infra*, text accompanying notes 392-408.

statutory language "acquired or maintained." However, in Senator McClellan's explanation of the first RICO Act bill, S. 1861, he referred to forfeiture of an organization "acquired or *run by* defined racketeering methods. . . ."³¹⁶ Similarly, Senator McClellan's co-sponsor of the RICO Act, Senator Hruska, described the aim of the forfeiture Bill as directed at "businesses which have been acquired or *operated by* unlawful racketeering methods."³¹⁷ This lack of a clear definition for the term "maintained" may explain the paucity of case law addressing this clause.³¹⁸ Of the six reported cases dealing with the "maintained" theory, five do not attempt to interpret the maintained provision.³¹⁹

Recently, however, the district court in *United States v. Horak* did address the "maintained" provision. Defendant Horak operated the enterprise, Waste Management Inc., including its subsidiaries and divisions ("WMI"), using bribery to obtain garbage contracts from a village in Illinois in violation of section 1962(c).³²⁰ The government sought forfeiture of the defendant's positions in WMI, and his interests in WMI's profit sharing and pension plans under the "acquired," "maintained" and "source of influence" theories. In pretrial pleadings, Horak's counsel argued that "acquired and maintained" boiled down to "got" or "kept." The defense contended that the defendant did not "keep," or "maintain," his stock, salary, bonuses or profit sharing and pension benefits merely because he increased the company's profitability through racketeering activ-

³¹⁶ *Organized Crime Control: Hearings on S. 30 and Related Proposals before Subcomm. on Federal Legislation of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 401 (1970)(emphasis added).

³¹⁷ 116 CONG. REC. 602 (1970)(emphasis added). The use of "run by" and "operated by" in these descriptions is the closest to a definition of "maintained" found in the legislative history.

³¹⁸ Only six reported cases specifically refer to the "maintained" theory. *United States v. Washington*, 782 F.2d 807 (9th Cir.), *vacated on other grounds and remanded*, 797 F.2d 1461 (9th Cir. 1986); *United States v. Kravitz*, 738 F.2d 102 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *United States v. McManigal*, 708 F.2d 276 (7th Cir.), *vacated and remanded*, 464 U.S. 979 (1983); *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); *United States v. Horak*, 633 F. Supp. 190 (N.D. Ill. 1986), *aff'd in part, vacated and remanded in part*, 833 F.2d 1235 (7th Cir. 1987).

³¹⁹ *United States v. Washington*, 782 F.2d 807 (9th Cir.), *vacated on other grounds and remanded*, 797 F.2d 1461 (9th Cir. 1986); *United States v. Kravitz*, 738 F.2d 102 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *United States v. McManigal*, 708 F.2d 276 (7th Cir.), *vacated and remanded*, 464 U.S. 979 (1985); *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

³²⁰ 833 F.2d 1235 (7th Cir. 1987).

ity.³²¹ Rather, the defense emphasized that the government had failed to show that Horak would have "lost" rather than "kept" these interests if the bribe-obtained contracts had not been awarded to WMI.³²²

The district court rejected this defense argument.³²³ It stated:

Horak's criminal activity (bribing public officials) enhanced his position as manager of HOD disposal, [a division of WMI]. The award of a garbage contract by the Village to HOD unquestionably increased HOD's revenue. All of the interests identified by the government depended (in part or whole) upon Horak's performance as manager of HOD. Thus, Horak "maintained" his job, salaries, bonuses, and pension and profit sharing plans through his position as manager of HOD and his racketeering activity in violation of § 1962(c).³²⁴

On appeal, the Seventh Circuit narrowed the district court's interpretation of the "maintained" language in keeping with the argument originally proposed by the defense.³²⁵ The court stated:

We do not believe that it is sufficient under section (a)(1) for the court to determine that Horak's racketeering activities "enhanced" his performance as H.O.D manager, thus affecting the enumerated interests. Instead, on remand, the court must determine what portion of Horak's interests would not have been acquired or maintained "but for" his racketeering activities. That is, in order to win a forfeiture order, the government must show on remand that Horak's racketeering activities were a cause in fact of the acquisition or maintenance of these interests or some portion of them.³²⁶

The circuit court followed with an example of how the defendant may have "maintained" his job through racketeering:

For example, if the government can prove that Horak would have been fired in 1981 but for his landing the Fox Lake contract (which he accomplished by violating section 1962), the court should order forfeiture of his entire salary thereafter and such other emoluments of his employment as would have been lost by the firing.³²⁷

Use of the "interests maintained" provision rather than the "proceeds" language of section 1963(a)(3) may, in certain circumstances, alleviate significant proof problems. Consider the example

³²¹ Brief for the Appellant at 6-10, *United States v. Horak*, 633 F. Supp. 190 (N.D. Ill. 1986), *aff'd in part, vacated and remanded in part*, 833 F.2d 1235 (7th Cir. 1987).

³²² *Id.*

³²³ The "maintained" theory as it applies to the stock for which forfeiture was sought was inexplicably not addressed by the court.

³²⁴ *Horak*, 633 F. Supp. at 200.

³²⁵ *United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987).

³²⁶ *Id.* at 1243.

³²⁷ *Id.* Recently a district court in *United States v. Regan*, 699 F. Supp. 36 (S.D.N.Y. 1988), applied the "but for" test to determine whether a defendant's salary was forfeitable. The *Regan* court did not specifically cite the "interest maintained" language or the *Horak* decision in its analysis.

of an alcoholic beverage license obtained through racketeering activity, specifically bribery of public officials. The license itself was acquired through racketeering activity and is subject to forfeiture under subsection 1962(a)(1). Money received by virtue of alcoholic beverage sales made by a bar which operates by virtue of the license would also be forfeitable as "acquired" interests under subsections 1963(a)(1) or (a)(3). More importantly, however, the entire business of the bar was "maintained" by the license because "but for" the alcoholic beverage license the bar could not operate. Therefore, rather than trying to prove how much income was generated from alcoholic beverage sales and seeking forfeiture of "interests acquired" or "proceeds," the defendant could be required to forfeit his or her entire interest in the bar because that interest was "maintained" through racketeering activity.³²⁸

Other cases provide further examples of uses for the "maintained" theory. The court found that shares of stock were "maintained" by racketeering activity in *United States v. Kravitz*.³²⁹ The enterprise was a health care delivery business known as AHP. One defendant, the sole shareholder of AHP, obtained renewals of health care contracts through racketeering activity involving bribery. The jury, in response to special interrogatories, found that the defendant had maintained his interest in his AHP stock by violation of the racketeering laws and that his position in AHP had afforded him a source of influence over the enterprise.³³⁰

These facts indicate that AHP was "run by" racketeering activity. Based upon this finding alone, the *Kravitz* court ordered the stock forfeited.³³¹ This was a premature decision. In addition to the "run by" finding, the "maintained" provision of subsection 1963(a)(1) requires a "taint" determination, especially in light of the defendant's contention that the racketeering activities "were, at most, a minor or remote part of AHP's medical practice."³³² If the *Kravitz* court had applied the *Horak* court's "but for" definition of "taint," the court would have required a factual determination to ascertain the effect of the inability to obtain the contract renewals

³²⁸ As will be described in the Procedures section, *infra* notes 390-437 and accompanying text, forfeiture theories may be charged alternatively. That is, the government can allege both that proceeds of the racketeering activity are forfeitable pursuant to subsection 1963(a)(3) and that an interest maintained in a business through racketeering is subject to forfeiture under subsection 1963(a)(1).

³²⁹ 738 F.2d 102 (3d Cir. 1984).

³³⁰ *Id.* at 103.

³³¹ *Id.* at 105 n.4.

³³² *Id.* at 106. In this regard, it should be noted that the "source of influence" finding by the jury applied to defendant's position in the company not to his stock ownership.

obtained through racketeering activity. If, contrary to the defendant's contention, the evidence established that AHP would have gone bankrupt without the contract renewals, all of the stock of AHP was "maintained" by racketeering activity. Otherwise, only those assets which the defendant would have lost but for the illegal activity could have been forfeited under the "maintained" theory.³³³

Another example of the "maintained" theory is suggested by reference in *United States v. Godoy*³³⁴ to the use of coercive tactics and corruption of local officials to gain an unfair competitive advantage.³³⁵ Suppose that through a public bribery racketeering scheme the owner of a business obtained an excavation permit closer to the construction site of an interstate highway than his non-racketeering competitors could obtain by legal means. If the proximity of the excavation site to the project allowed the defendant to underbid his competitors, who would have had to haul dirt from greater distances, the contract was "acquired" through racketeering and would be forfeitable.³³⁶ However, if the defendant merely fulfilled a legally acquired construction contract by use of dirt from the excavation site, his "contractual right" nevertheless was maintained through racketeering and would be forfeitable to the extent the government could show "taint." The "taint" question—what portion of the construction contract was "maintained" by use of one illegally-acquired excavation permit—could turn, among other things, on proof of the amount of dirt contributed from the site with the illegally acquired permit as a percentage of the total amount of dirt required to fulfill the contract.

C. SUBSECTION 1963(A)(2) AND "SOURCE OF INFLUENCE"

Courts have read qualifying language into subsection 1963(a)(2), just as they grafted "in an enterprise" language onto subsection 1963(a)(1) prior to *Russello*.³³⁷ Originally, subsection 1963(a)(2) provided for forfeiture of "any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which [the defendant] has established, operated, controlled, conducted, or participated in the

³³³ Of course, the entire taint question would have been eliminated if the government had sought forfeiture of the defendant's interest in the enterprise, AHP, under subsection 1963(a)(2)(A-C).

³³⁴ 678 F.2d 84 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983).

³³⁵ *Id.* at 89.

³³⁶ This is similar to the factual situation involved in *United States v. Marubeni Am. Corp.*, 611 F.2d 763 (9th Cir. 1980).

³³⁷ See *supra* text accompanying notes 90-102.

conduct of, in violation of section 1962.”³³⁸ Despite the punctuation of the provision, some courts read “source of influence” to apply to each type of property interest named in subsection 1963(a)(2), that is, to interests, securities, claims, and property or contractual rights.³³⁹

The 1984 amendments to the RICO Act were designed to give subsection 1963(a)(2) a “clearer format,”³⁴⁰ by expressly creating subdivisions of subsection 1963(a)(2). These subdivisions, separated by semicolons, leave no doubt that the “source of influence” condition applies only to “property or contractual rights.” The subsection, as revised, provides for forfeiture of: “(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.”³⁴¹

Applying “source of influence” to qualify only property or contractual rights is entirely appropriate. The first three categories of subsection 1963(a)(2) all relate to enterprise assets—interest in an enterprise, security of an enterprise, and claims against an enterprise. Thus, the nexus between the illegal activity and forfeitable property is provided by the fact that only assets of the illegal enterprise are forfeited.³⁴² For non-enterprise assets, the government must show some other nexus. In subsection 1963(a)(1), the nexus is “taint.” In subsection 1963(a)(2)(D), the nexus is “source of influence.”³⁴³

“Properties that are owned by a RICO participant and used by him to further the affairs of a RICO enterprise afford the

³³⁸ 18 U.S.C. § 1963(a)(2) (1970).

³³⁹ *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *United States v. Martino*, 684 F.2d 367, 409 (5th Cir. 1981) (pages 407 through 409 of the opinion were included in the advance sheets but deleted prior to final publication of the opinion); *United States v. Horak*, 633 F. Supp. 190 (N.D. Ill. 1986), *aff'd in part, vacated and remanded in part*, 833 F.2d 1235 (7th Cir. 1987); *United States v. Veliotis*, 586 F. Supp. 1512 (S.D.N.Y. 1984). *But see United States v. Thevis*, 474 F. Supp. 134, 143 (N.D. Ga. 1979).

³⁴⁰ S. Rep. No. 224, 98th Cong., 1st Sess. 21 (1983).

³⁴¹ 18 U.S.C. § 1963(a)(2) (1986).

³⁴² In other words, the requisite “nexus” between the illegal conduct and the property sought to be forfeited is built into the statute. *See, e.g., United States v. Thevis*, 474 F. Supp. 117, 126 (N.D. Ga. 1979) (sufficient nexus between enterprise and corporate defendants that were alleged to be members of the illegal enterprise.).

³⁴³ Thus, the district court’s concern in *Horak*, that “Congress could require the forfeiture of assets which have no connection to the underlying racketeering activity” is unfounded. *Horak*, 633 F. Supp. at 199.

owner/participant a source of influence over the enterprise."³⁴⁴ In *United States v. Zielie*, the court held stash houses and money-counting houses which had contributed to the association-in-fact marijuana distribution enterprise forfeitable under subsection 1963(a)(2).

Companies which provided funds for arson and fraud ventures gave the defendant which owned them a source of influence over the association-in-fact enterprise in *United States v. Martino*.³⁴⁵ Assets of a corporate defendant have also been deemed forfeitable under the source of influence provision "[i]f the government carries its burden and shows that each of [the defendant's] assets were contributed to or utilized by the association [-in-fact enterprise] to forward its goals."³⁴⁶ Similarly, "the retention of voting rights in securities of the enterprise or a management contract between the defendant and the enterprise would be subject to forfeiture under [section 1963(a)(2)] if utilized to afford a continuing source of influence over the § 1962 enterprise."³⁴⁷ "[C]ontract rights which afford one defendant a source of influence over another defendant may also afford a source of influence over the association-enterprise of which they are both members."³⁴⁸

By virtue of its connection to the enterprise, property which falls within the "source of influence" rubric must also be considered "tainted."³⁴⁹ In *United States v. McKeithen*, forfeiture of three parcels of real property was sought in a continuing criminal enterprise case. One of the parcels contained two buildings, only one of which had been used by the narcotics enterprise. In response to a special interrogatory, the jury found that only 43% of this parcel of land afforded the defendant a source of influence over the enterprise. Upon a motion by the government, the district court ignored the jury's factual finding and ordered forfeiture of the entire piece of property.³⁵⁰ The Second Circuit reversed this decision. The court stated, "we are persuaded that the statutory language 'any . . . property . . . affording a source of influence over' a criminal enterprise, 21 U.S.C. § 848(a)(2) (1982), means, at least in the context of realty

³⁴⁴ *United States v. Zielie*, 734 F.2d 1447, 1459 (11th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

³⁴⁵ *United States v. Martino*, 648 F.2d 367, 409 (5th Cir. 1981), *cert. denied*, 456 U.S. 943 (1982).

³⁴⁶ *United States v. Thevis*, 474 F. Supp. 134, 145 (N.D. Ga. 1979).

³⁴⁷ *Id.* at 144.

³⁴⁸ *Id.* at 145.

³⁴⁹ See, e.g., *United States v. McKeithen*, 822 F.2d 310 (2d Cir. 1987); *United States v. Ragonese*, 607 F. Supp. 649 (S.D. Fla. 1985), *aff'd*, 784 F.2d 403 (11th Cir. 1986).

³⁵⁰ 822 F.2d at 312.

subject to forfeiture, that specific portion of a defendant's property affording a source of influence over the enterprise. In other words, 'to forfeit property a connection must be shown with that which offends.'"³⁵¹

The court in *United States v. Ragonese*³⁵² also considered the taint issue in connection with "sources of influence" forfeitures. In that case, the government argued for forfeiture of a defendant's interest in the Cypress Villas Apartments and R.J. Louis & Company because this property afforded the defendant a source of influence over the association-in-fact enterprise. The court made factual findings³⁵³ that the defendant had attempted to prohibit drug dealing at the apartments. It also found that airplanes purchased by R.J. Louis & Company for legitimate business purposes had been used for drug trafficking. Based on these findings of facts, the court concluded that Cypress Villas Apartments had not furnished the defendant a source of influence over the enterprise.³⁵⁴ Moreover, the court held that the use of a corporate airplane in drug smuggling did not "justify forfeiture of [defendant] Ragonese's entire interest in R.J. Louis Company as it [was] clear that most of his interest in that entity was not used to further the activities of the enterprise."³⁵⁵ Thus, only the airplane "or its proceeds"³⁵⁶ were forfeited. In reaching this decision, the *Ragonese* court relied on a subsection 1963(a)(1) "taint" case, *United States v. Zang*.³⁵⁷

D. INTERESTS ACQUIRED AND PROCEEDS—SUBSECTIONS 1963(A)(1) AND 1963(A)(3)

As detailed in the legislative history discussion,³⁵⁸ Congress enacted subsection 1963(a)(3) in 1984 to override case law interpreting the "acquired or maintained" language of subsection 1963(a)(1) to preclude forfeiture of "proceeds" of racketeering activity. Subsequently, the Supreme Court held that subsection 1963(a)(1) did encompass forfeiture of such "proceeds."³⁵⁹ Thus, subsections

³⁵¹ *Id.*, 822 F.2d at 315 (quoting *United States v. About 151.682 Acres of Land*, 99 F.2d 716, 720 (7th Cir. 1938)). Subsection 848(a)(2) uses the same language as subsection 1963(a)(2)(D).

³⁵² 607 F. Supp. 649 (S.D. Fla. 1985), *aff'd mem.*, 784 F.2d 403 (11th Cir. 1986).

³⁵³ The parties waived jury consideration of the forfeiture issues. *Id.* at 650.

³⁵⁴ *Id.* at 652.

³⁵⁵ *Id.*

³⁵⁶ See discussion of "tracing" and the substitute asset provisions *infra* text accompanying notes 361-69.

³⁵⁷ See discussion of taint findings relative to subsection 1963(a)(1) *supra* text accompanying notes 288-315.

³⁵⁸ See *supra* notes 227-54 and accompanying text.

³⁵⁹ *Russello v. United States*, 464 U.S. 16 (1983).

1963(a)(1) and 1963(a)(3) are redundant. Nevertheless, both subsections should be cited in forfeiture pleadings because of the existence of pre-*Russello* case law which engrafted "in an enterprise" limitations on subsection 1963(a)(1) forfeitures.³⁶⁰

1. *Tracing and Joint and Several Liability*

Two issues have arisen regarding "proceeds" forfeitures. The first involved whether fungible forfeitable proceeds, such as money, had to be traced or whether the forfeiture order would be in the nature of a general money judgment against the defendant. Early case law in the Seventh Circuit held that if, for instance, the defendant had spent forfeitable money at the time the forfeiture verdict was rendered, nothing remained in the defendant's possession which could be forfeited.³⁶¹ The Eleventh Circuit broke with this reasoning in its 1985 opinion in *United States v. Conner*.³⁶² In *Conner*, the defendants were convicted of receiving kickbacks in connection with a series of real estate transactions. The jury found the defendants guilty of racketeering and ordered the kickback money forfeited pursuant to subsection 1963(a)(1). The Eleventh Circuit rejected the defendants' argument that the government must trace the kickback money and forfeit only such portion of the money as was in the defendants' custody or control at the time of conviction. The court stated:

Since the forfeiture is *in personam*, it follows the defendant as a part of the penalty and thus it does not require that the government trace it, even though the forfeiture is not due until after conviction. Money is a fungible item. It matters not that the government received the identical money which the defendants received as long as the *amount* that was received in violation of the racketeering statute is known.³⁶³

Subsequently, other courts followed the *Conner* court's reasoning, including the Seventh Circuit which reversed its earlier opinions.³⁶⁴ In reversing its prior decisions, the Seventh Circuit relied

³⁶⁰ See *supra* text accompanying notes 89-102.

³⁶¹ *United States v. Alexander*, 741 F.2d 962 (7th Cir. 1984), *overruled*, 773 F.2d 802 (7th Cir. 1985)(en banc), *cert. denied*, 475 U.S. 1011 (1986); *United States v. McManigal*, 708 F.2d 276 (7th Cir. 1983), *vacated and remanded*, 464 U.S. 979 (1985).

³⁶² 752 F.2d 566 (11th Cir. 1985).

³⁶³ *Id.* at 576 (emphasis in original).

³⁶⁴ *United States v. Robilotto*, 828 F.2d 940 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 711 (1988); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 3265 (1987); *United States v. Amend*, 791 F.2d 1120 (4th Cir.) *cert. denied*, 479 U.S. 930 (1986); *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985)(en banc), *cert. denied*, 475 U.S. 1011 (1986); *United States v. Navarro Ordas*, 770 F.2d 959 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *United States v. Benevento*, 663 F. Supp. 1115

on the "relation back doctrine."³⁶⁵ That doctrine, codified in 1984 in subsection 1963(c), provides that "[a]ll right, title, and interest in [forfeitable] property . . . vests in the United States upon the commission of the act giving rise to forfeiture."³⁶⁶ Thus, according to the Seventh Circuit's decision in *United States v. Ginsburg*:³⁶⁷

while the government's interest in the profits or proceeds of racketeering activity does not *attach* until conviction, its interest *vests* at the time of the act that constitutes the section 1962 violation and cannot subsequently be defeated, as far as section 1963(a)(1) is concerned, if the defendant dissipates or transfers away the proceeds subject to forfeiture.³⁶⁸

The substitute assets provision enacted in 1986 rendered the tracing issue moot by specifically providing that other assets could be forfeited in place of forfeitable property dissipated, transferred or concealed by the defendant.³⁶⁹

A sub-category of the tracing issue also arose. It involved joint and several liability of co-defendants for forfeitable assets. The district court in *United States v. Benevento*³⁷⁰ has best explained the joint and several liability theory in the criminal context. In *Benevento*, one defendant collected money from the sale of heroin and then paid it to co-conspirators working in the enterprise. The defendant argued that only his proportional share of the profit from the sale of the heroin was forfeitable from him. The court rejected this theory:

The phrase "any property constituting . . . any proceeds obtained, directly or indirectly, as the result of [such narcotics law violation]" under its clear meaning is not limited to property acquired solely or wholly by the defendant but encompasses property derived by the defendant indirectly from those who acted in concert with him in furthering the criminal enterprise and produced the property derived from the violation. Once it is established that the defendant received the proceeds sought to be forfeited it matters not whether his actions produced the entire property or a portion thereof. . . . Any person claiming a legitimate interest in the illicit proceeds is free to assert his claim. But the sweep of the statute is broad enough to impose joint and several liability upon those who engaged in and furthered the criminal enterprise that produced the funds subject to forfeiture.³⁷¹

(S.D.N.Y. 1987), *aff'd*, 836 F.2d 129 (2d Cir. 1988); *United States v. Romano*, 523 F. Supp. 1209 (S.D. Fla. 1981).

³⁶⁵ *United States v. Ginsburg*, 773 F.2d at 803.

³⁶⁶ 18 U.S.C. § 1963(c) (1988).

³⁶⁷ 773 F.2d 798 (7th Cir. 1985)(en banc), *cert. denied*, 475 U.S. 1011 (1986).

³⁶⁸ *Id.* at 801 (emphasis in original).

³⁶⁹ 18 U.S.C. § 1963(n) (1988).

³⁷⁰ 663 F. Supp. 1115 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 129 (2d Cir. 1988).

³⁷¹ *Id.* at 1118. This is certainly no more egregious a holding than the *Pinkerton* rule which makes a defendant liable for substantive crimes committed by his co-conspirators. *Pinkerton v. United States*, 328 U.S. 640 (1946).

The Eleventh Circuit reached a similar conclusion in *United States v. Caporale*.³⁷² In *Caporale*, kickbacks were paid to union officials in exchange for the award of insurance contracts for union members. The kickbacks were funnelled to eight defendants through various companies. The government sought forfeiture of kickback money in reliance, in part, on a joint and several liability theory because it could not prove how the kickback money had been allocated between four of the defendants. The court upheld use of joint and several liability in this context, noting:

[if] the government were required to determine the precise allocation of racketeering proceeds between two offenders before the court could impose forfeiture, the effectiveness of the remedy would be impaired substantially. . . . There is no question that the monies paid to the conduit corporations are forfeitable proceeds: joint and several liability in this context is simply a collection device.³⁷³

Therefore, at least to the extent that tracing of forfeitable property between defendants is impossible, forfeiture of the total amount of money or property can be sought from each defendant. The next issues courts will have to face regarding joint and several liability are likely to be how many times a sum of money can be forfeited and who will pay the judgment. For example, in *Benevento*, defendant Benevento was ordered to forfeit \$1,238,000, of which the government's evidence at trial established at least \$738,000 was paid by Benevento to co-conspirators Scapula and Altieri.³⁷⁴ If the government brought a subsequent indictment against Scapula and Altieri, \$738,000 would constitute narcotics proceeds which defendant Scapula and Altieri should forfeit. If the United States had collected the full sum of \$1,238,000 from Benevento at the time Scapula and Altieri were convicted, would the government be entitled to a forfeiture verdict and collection of the \$738,000 essentially a second time from Scapula and Altieri? If so, and assuming further that no proof was available as to the allocation of the \$738,000 between Scapula and Altieri, could the government collect the full amount from Scapula if Altieri was judgment proof?

In the civil context, the Eleventh Circuit has answered the first of these questions affirmatively. In the *United States v. Four Million*,

³⁷² 806 F.2d 1487 (11th Cir. 1986), *cert. denied*, 107 S.Ct 3265 (1987).

³⁷³ *Id.* at 1508. The *Caporale* court also held that forfeiture was warranted after conviction of only a racketeering conspiracy violation. *Id.* at 1509. It also upheld forfeiture of money funnelled to a defendant's son-in-law because the evidence established that this money was really disguised payments to the defendant. *Id.* at 1506.

³⁷⁴ *Benevento*, 663 F. Supp. at 1117 (\$300,000 and \$438,000 advanced payments to co-conspirators Scapula and Altieri).

Two Hundred Fifty-Five Thousand Dollars,³⁷⁵ a hypothetical situation was presented to which the court responded as follows:

A drug dealer has a drug-generated \$100 bill. He asks a cohort to exchange the \$100 bill for five \$20 bills. According to the government's argument, both the \$100 bill in the cohort's hands and the five \$20 bills in the dealer's hands are "proceeds" subject to forfeiture. Although only \$100 was drug-generated, \$200 are now forfeitable. If the cohort goes to a second cohort and changes the \$100 bill for ten \$10 bills, \$300 is now forfeitable—the five \$20 bills in the dealer's hands, the ten \$10 bills in the first cohort's hands, and the \$100 bill in the second cohort's hands.

We perceive no problem with the hypothetical. . . . In our view, those who knowingly do business with drug dealers do so at their own risk. [The defendant's] proposed interpretation of 21 U.S.C. § 881(a)(6) would completely insulate money-launderers, and others who knowingly do business with drug dealers, from possible forfeiture of their ill-gotten gains. We reject such an unduly restrictive interpretation of the statute, and hold that the forfeited money here constituted the "proceeds" of narcotics transactions.³⁷⁶

Questions of joint and several liability are not foreign to white-collar crime scenarios. The issue of who will pay and in what amount could arise in a public corruption case in which the evidence might show that a businessman paid a lawyer known to have connections to the local "old boy" network \$5,000 to "fix" a case, from which money the lawyer paid a \$3,000 bribe to a judge. In separate trials of the lawyer and the judge, the \$5,000 could be forfeited from the lawyer if the evidence established he was hired because of his reputation for the ability to "fix" cases and thus gained his fee indirectly from his illegal activity. The \$3,000 could be forfeited from the judge because it constitutes proceeds of racketeering activity. Yet, in doing so, the government would have forfeited the same \$3,000 twice.

This example as well as the *Benevento* facts also provide a basis for consideration of the second issue in the "proceeds" context: whether a defendant should forfeit his gross proceeds from illegal activity or whether he may first deduct his costs of doing business and thus forfeit only his "profit."

2. *Costs of Doing Business*

When the "proceeds" language of subsection 1963(a)(3) was drafted, Congress specifically considered the "profits" versus "proceeds" issue. The ABA Criminal Justice Section argued that white-

³⁷⁵ 762 F.2d 895 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

³⁷⁶ *Id.* at 905.

collar crime should be treated differently from "real" crime, suggesting that only "profits" rather than "proceeds" be forfeited in the case of "those crimes in which the defendant renders a socially acceptable service, at a cost to himself, but there is criminality involved."³⁷⁷ Former Deputy Assistant Attorney General Nathan, however, asserted that "there is no reason under the existing statute to draw distinction between legal and illegal enterprises."³⁷⁸

Congress ultimately chose the term "proceeds" rather than "profits" to alleviate the unreasonable burden on the government of proving net profits.³⁷⁹ This choice was premised upon a narcotics case, *United States v. Jeffers*,³⁸⁰ in which the court noted the " 'extreme difficulty in this conspiratorial criminal area of finding hard evidence of net profits.' "³⁸¹ Nevertheless, defendants continue to argue that their "costs of doing business" should be deducted from forfeitable proceeds, provided the defendant can prove what those costs were.

The only case to date to directly address the costs issue is *United States v. Lizza Industries, Inc.*³⁸² In *Lizza Industries*, the defendants were found guilty of RICO charges arising out of their participation in a bid-rigging conspiracy. The parties stipulated to defendants' gross profits as a result of their criminal acts. The trial court went a step further, however, and held that "the defendants could deduct direct costs incurred on each project for which they had been indicted, but could not deduct general overhead and business expenses that otherwise would have been incurred in the operation of their business."³⁸³ On appeal, the defendants argued that overhead expenses and taxes should also have been deducted from the forfeitable amount.³⁸⁴ The United States did not appeal the direct costs deduction.

The Second Circuit noted that the deduction of direct costs incurred in performing the illegally-acquired contracts was "consistent with the purposes of the RICO statute."³⁸⁵ It rejected any further deductions, however:

Concededly, this method of calculation leaves open a possibility that

³⁷⁷ *Comprehensive Crime Control Hearings*, *supra* note 224, at 806.

³⁷⁸ *Forfeiture in Drug Cases Hearings*, *supra* note 130 at 226-27 (statement of Deputy Asst. Atty. Gen. Nathan).

³⁷⁹ S. Rep. No. 224, 98th Cong., 1st Sess. 22 n.24 (1983).

³⁸⁰ 532 F.2d 1101 (7th Cir. 1976), *aff'd in part, vacated and remanded in part*, 432 U.S. 137 (1977).

³⁸¹ *Id.* at 1117 (quoting *United States v. Jeffers*, 532 F.2d at 1117).

³⁸² 775 F.2d 492 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

³⁸³ *Id.* at 495.

³⁸⁴ *Id.* at 498.

³⁸⁵ *Id.*

defendants will be forfeiting profits that they would have made outside of their criminal activities. This should not cause us to scuttle the method of computing forfeiture. Forfeiture under RICO is a punitive, not a restitutive, measure. Often proof of overhead expenses and the like is subject to bookkeeping conjecture and is therefore speculative. RICO does not require the prosecution to prove or the trial court to resolve complex computations, so as to ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced. RICO's object is to prevent the practice of racketeering, not to make the punishment so slight that the economic risk of being caught is worth the potential gain. Using net profits as the measure for forfeiture could tip such business decisions in favor of illegal conduct.³⁸⁶

One must question whether the *Lizza Industries* court would have so generously awarded the direct cost deduction if faced with the factual situation presented in *Benevento*. In the white collar world of the *Lizza Industries* case, presumably direct costs involved purchase or excavation of materials to build the roads pursuant to the illegally-acquired contracts, hourly wages for employees, and equipment rental fees. But in *Benevento*, the narcotics business also had inventory costs for purchases of heroin, salaries for heroin distributors, and transportation expenses for delivery of the product being sold. Either the court should have permitted the defendant in *Benevento* to prove up and deduct these direct costs or the court in *Lizza Industries* should have required the defendant to absorb the costs of fulfilling its illegally-acquired contracts.³⁸⁷ While the thought of giving a drug dealer credit for money used to buy drugs is repugnant, it is no less a cost of doing business than the costs involved in *Lizza Industries*.

Even in the white collar arena, deduction of direct costs will not always be palatable. Consider the hypothetical posed above involving a lawyer who pays a bribe to a judge to "fix" a case for his client. If the lawyer is convicted of racketeering based on a series of predicate acts involving bribery, can he be allowed to deduct the bribe amount from his forfeitable fees because it was a "direct cost" of performing the service for his client? Surely not. Case law in other contexts has historically held that "[a] convicted briber forfeits any

³⁸⁶ *Id.* at 498-99.

³⁸⁷ In a hearing on the 1984 amendments to § 1963, former Assistant Attorney General Irvin B. Nathan noted: "we are headed for considerable confusion and potential disrespect for the law if we skew the criminal justice system for a certain kind of offense and not for other equally serious types of offenses which may have even more devastating long-term effects on our society." *Forfeiture in Drug Cases Hearing*, *supra* note 130, at 226-27. See *supra* note 134 and accompanying text.

right he had to bribe money.”³⁸⁸ Yet the *Lizza Industries* holding would appear to permit the court to give the lawyer credit for money expended in the performance of his illegal activities. Placing the defendant at risk of losing all he has acquired through illegal acts, irrespective of whether part of the gross profit is spent on wine, women and song,³⁸⁹ illegal drugs, bribe payments, or “legitimate” business expenses, is more in line with the use of the word “proceeds” in the statute, the legislative history and the punitive purposes of the forfeiture statute than is the solution reached in *Lizza Industries*.

III. PROCEDURES

Following enactment of the RICO Act, the Supreme Court promulgated procedural rules to be used in the implementation of the Act’s forfeiture provisions.³⁹⁰ These Rules are 7(c)(2), 31(e) and 32(b)(2) of the Federal Rules of Criminal Procedure, dealing with notice, special verdicts and execution of forfeiture orders respectively. Other procedures for restraining orders and protection of the rights of third parties were incorporated into the Act itself.³⁹¹ Following is a discussion of each of these procedural devices.

A. NOTICE

Rule 7(c)(2) of the Federal Rules of Criminal Procedure as initially promulgated in 1972 provided: “*Criminal Forfeiture*. When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.”³⁹² This rule, along with the changes to Rules 31 and 32, were based upon the common law requirement that a defendant be given “notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction.”³⁹³

Because of the mandatory wording of Rule 7(c)(2), however, the Ninth Circuit in 1975 granted a motion to dismiss an indictment merely because it did not allege that forfeiture would be sought as

³⁸⁸ *United States v. Iovenelli*, 403 F.2d 468, 469 (7th Cir. 1968); *accord* *Clark v. United States*, 102 U.S. 322 (1880); *United States v. Thomas*, 75 F.2d 369 (5th Cir. 1935).

³⁸⁹ See *United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985)(en banc), *cert. denied*, 475 U.S. 1011 (1986).

³⁹⁰ 406 U.S. 979-1000.

³⁹¹ 18 U.S.C. 1963(e), (1) (1988).

³⁹² 56 F.R.D. 143 (1972).

³⁹³ FED. R. CRIM. P. 7(c)(2) advisory committee note.

part of the criminal proceeding. In *United States v. Hall*,³⁹⁴ the defendant was charged with smuggling merchandise in violation of custom laws.³⁹⁵ The criminal charge was a violation of 18 U.S.C. section 545 which provided that upon conviction the smuggled merchandise would be forfeited to the United States.³⁹⁶ However, no reference to forfeiture was made in the indictment. The district court held that failure to give notice of forfeiture would not "vitiating the indictment if the court ruled, in advance, that the Government would be prohibited from invoking the criminal forfeiture penalty of 18 U.S.C. § 545 in the event that Hall was convicted."³⁹⁷ The Ninth Circuit, although agreeing in principle with the district court's decision, held that the indictment "deprived Hall of the mandatory notice to which he was entitled under Rule 7(c)(2) and the concomitant opportunity to defend against a forfeiture."³⁹⁸ Consequently, the Ninth Circuit ordered that the indictment should be dismissed.

The Supreme Court amended Rule 7(c)(2) in 1979 in response to the *Hall* decision.³⁹⁹ The rule now forbids a court from ordering forfeiture if notice is not contained in the indictment, but it does not make notice an essential element of the charge. Rule 7(c)(2) now reads as follows: "*Criminal Forfeiture*. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture."⁴⁰⁰

The next issue which arose regarding Rule 7(c)(2) was the specificity with which the government must "allege the extent of the interest or property subject to forfeiture." The majority of courts considering the issue to date have held, consistent with the liberal pleading requirements of Rule 7 in general, that broad allegations which track the language of section 1963 are sufficient.⁴⁰¹ If such a

³⁹⁴ 521 F.2d 406 (9th Cir. 1975).

³⁹⁵ *Id.* at 407.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 408.

³⁹⁹ FED. R. CRIM. P. 7(c)(2) advisory committee note.

⁴⁰⁰ *Id.*

⁴⁰¹ *United States v. Possick*, 849 F.2d 332 (8th Cir. 1988); *United States v. Amend*, 791 F.2d 1120 (4th Cir.), *cert. denied*, 479 U.S. 930 (1986); *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1983), *cert. denied*, 469 U.S. 837 (1984); *United States v. Chagra*, 669 F.2d 241 (5th Cir.), *cert. denied*, 459 U.S. 846 (1984); *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980); *United States v. Collins*, No. 84-20715 (E.D. Mich., Feb. 27, 1987); *United States v. Loftin*, 518 F. Supp. 839 (S.D.N.Y. 1981), *aff'd mem.*, 819 F.2d 1130 (2d Cir. 1987); *United States v. Thevis*, 474 F. Supp. 134, 145 (N.D. Ga. 1979); *United States v. Bergdoll*, 412 F. Supp. 1308, 1318 n.17 (D. Del. 1976). *Cf.* *United States v. Ianniello*, 621 F. Supp. 1455 (S.D.N.Y. 1985) (failure to use statutory language held to be insufficient notice; allegation sought forfeiture of "any interest ob-

general pleading is used, however, most courts will require the government, prior to trial, to identify the specific assets subject to forfeiture in a bill of particulars.⁴⁰² A bill of particulars in which the government delineates its theory of forfeiture proof—for example “acquired or maintained” versus “source of influence”—would not be appropriate, however. It has long been accepted that a bill of particulars should not be used to provide legal theories⁴⁰³ nor should it ordinarily be granted if it would unduly restrict the government in presenting its proof. Forcing the government to state its theory of proof would unduly hinder its case in light of the decision in *United States v. Veliotis* which expressly permitted the government to change its theory of proof regarding post-indictment forfeiture.⁴⁰⁴

There are practical concerns which favor a specific listing of forfeitable property in the indictment. As discussed hereafter,⁴⁰⁵ to the extent that the government presents the grand jury with information regarding forfeitability of specifically enumerated assets and, as part of its deliberations the grand jury finds probable cause to believe such assets are forfeitable, no separate hearing is required before a court can issue a pretrial restraining order as to the listed assets.⁴⁰⁶ Furthermore, a defendant may be precluded from payment of his attorney's fees from assets specifically identified as forfeitable in an indictment.⁴⁰⁷ Even if specific assets are listed, however, that listing should be premised by the general language of section 1963 with the specific assets identified at the time of indictment as part of an “including, but not limited to” qualification.⁴⁰⁸

tained in violation of Title 18, United States Code, Section 1963”), *aff'd*, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S.Ct 3229 (1987).

⁴⁰² *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1983), *cert. denied*, 469 U.S. 837 (1984); *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980); *United States v. Rogers*, 617 F. Supp. 1024 (D. Colo. 1985); *cf.* *United States v. Amend*, 791 F.2d 1120 (4th Cir. 1986) (open discovery provides sufficient specificity), *cert. denied*, 479 U.S. 930 (1986); *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983) (requires sufficient notice to prepare defense but does not discuss if bill of particulars would be sufficient in this regard), *cert. denied*, 465 U.S. 1006 (1985). *But see* *United States v. Navarro Ordas*, 770 F.2d 959 (11th Cir. 1985) (need not allege what assets will be forfeited if proceeds cannot be traced to specifically identified asset), *cert. denied*, 475 U.S. 1016 (1986).

⁴⁰³ *United States v. Addonizio*, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972).

⁴⁰⁴ 586 F. Supp. 1512 (S.D.N.Y. 1984).

⁴⁰⁵ *See infra* notes 520-21 and accompanying text.

⁴⁰⁶ *See infra* text accompanying note 519.

⁴⁰⁷ *Caplin & Drysdale, Chartered v. United States*, 57 U.S.L.W. 4836 (June 22, 1989); *United States v. Monsanto*, 57 U.S.L.W. 4826 (June 22, 1989).

⁴⁰⁸ *E.g.*, *United States v. Nichols*, 654 F. Supp. 1541, 1544 (D. Utah 1987), *rev'd on other grounds and remanded*, 841 F.2d 1485 (10th Cir. 1988). The author proposes the following forfeiture allegations:

Through the pattern of racketeering activity described in Count () of this Indict-

In this manner, specific assets identified after indictment should be forfeitable so long as a supplemental notice of intent to forfeit these assets is given in a bill of particulars.

B. JURY TRIAL AND BIFURCATION

The advisory notes to Federal Rule of Criminal Procedure 7(c)(2) indicated that at common law factual issues regarding forfeiture were decided by a jury.⁴⁰⁹ Likewise, a jury trial is contemplated by the special verdict requirement of Federal Rule of Evidence 31(e).⁴¹⁰ The Eleventh Circuit in *United States v. Garrett*⁴¹¹ has further held that a jury trial on the issue of forfeiture is constitutionally required. The defendant can, of course, waive the right to a jury trial.⁴¹² The *Garrett* court required, however, that the defendant write and sign such a waiver and that it be made a part of the record of the case.⁴¹³

Frequently, courts have used a bifurcated proceeding, allowing the jury to first decide the question of guilt followed, if appropriate, by a hearing on the issues of forfeiture.⁴¹⁴ "Such a bifurcated trial—

ment, which allegations are hereby realleged and incorporated by reference as if set forth herein, the defendant did acquire, maintain, possess and control certain interests in property, as defined in Title 18, United States Code, Section 1963(b), and proceeds, namely:

1. Interests acquired and maintained in violation of Title 18, United States Code, Section 1962;
2. Interests in, securities of and claims against the enterprise, as set forth in Count () herein, which enterprise the defendant established, operated, controlled, conducted and participated in the conduct of in violation of Title 18, United States Code, Section 1962;
3. Property and contractual rights of any kind affording the defendant a source of influence over the enterprise, as set forth in Count () herein, which enterprise the defendant established, operated, controlled, conducted and participated in the conduct of in violation of Title 18, United States Code, Section 1962;
4. Property constituting and derived from any proceeds which the defendant obtained directly or indirectly from the aforementioned racketeering activity in violation of Title 18, United States Code, Section 1962;

The property subject to forfeiture as described above includes, but is not limited to the following:

....
All of which property is subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963.

⁴⁰⁹ FED. R. CRIM. P. 7(c)(2) advisory committee note.

⁴¹⁰ FED. R. CRIM. P. 31(e).

⁴¹¹ 727 F.2d 1003, 1012 (11th Cir. 1984), *aff'd*, 471 U.S. 773 (1985).

⁴¹² *Id.*; *United States v. Kopituk*, 690 F.2d 1289, 1343 (11th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *United States v. Ragonese*, 607 F. Supp. 649, 650 (S.D. Fla. 1985), *aff'd mem.*, 784 F.2d 403 (11th Cir. 1986).

⁴¹³ *Garrett*, 727 F.2d at 1012.

⁴¹⁴ *E.g.*, *United States v. Anderson*, 782 F.2d 908, 910 (11th Cir. 1986); *United States v. Conner*, 752 F.2d 566, 569 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985); *United States v. Schmalfeldt*, 657 F. Supp. 385, 289 (W.D. Mich. 1987); *United States v. Draine*, 637 F. Supp. 482, 486 (S.D. Ala. 1986).

using, of course, only one jury—is not only convenient for the judge and fairer to the defendant. It also prevents the potential penalty of forfeiture from influencing the jurors' deliberations about guilt or innocence."⁴¹⁵ No court has held that such bifurcation is constitutionally required, however. Rather, the District of Columbia Circuit, in *United States v. Perholtz* specifically held that the Constitution does not require bifurcated proceeding in RICO forfeiture cases.⁴¹⁶ The *Perholtz*⁴¹⁷ approach has the advantage of notifying the jury that they must decide additional issues along with the guilt of the defendant. Without notification, jurors will undoubtedly be dismayed to learn after completing a lengthy trial and deliberations that they are still faced with more issues to resolve. Further, a unitary proceeding allows "presentation of other related evidence on guilt and punishment at the same time, [ensuring that] protracted proceedings would not become lengthier, thereby serving the salutary purpose of promoting the efficient use of judicial resources."⁴¹⁸

C. SPECIAL VERDICTS

Federal Rule of Criminal Procedure 31(e) provides: "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."⁴¹⁹ In accordance with this rule, courts should require juries to render factual decisions regarding the extent of the defendant's interest in property described in section 1963. Because forfeiture is mandatory, however, discretion should not be left with the jury to determine which of the defendant's interests in property described in section 1963 should actually be forfeited.⁴²⁰

In *United States v. Kravitz*, the court presented special interrogatories to the jury which required the jury to determine both whether

⁴¹⁵ *United States v. Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *accord* *United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987)(invoking supervisory powers to require bifurcation.).

⁴¹⁶ *United States v. Perholtz*, 842 F.2d 343, 367 (D.C. Cir. 1988). A defendant may waive a bifurcated proceeding by failure to object to non-bifurcation. *E.g.*, *United States v. Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

⁴¹⁷ *Perholtz*, 842 F.2d at 367.

⁴¹⁸ *Id.* at 368. The burden of proof standard in the forfeiture portion of RICO trials appears to be reasonable doubt. *United States v. Pryba*, 674 F. Supp. 1518, 1521 (E.D. Va. 1987).

⁴¹⁹ FED. R. CRIM. P. 31(e).

⁴²⁰ *See, e.g.*, *United States v. L'Hoste*, 609 F.2d 796, 812-14 (5th Cir.)("[T]he jury met the requirements of rule 31(e) by determining the extent of L'Hoste's interest or property subject to forfeiture, and all that remained for the district court was to order forfeiture under section 1963"), *cert. denied*, 449 U.S. 833 (1980).

the defendant held an interest in property as described in section 1963, in this case a company known as American Health Programs, Inc. ("AHP"), and if so, whether that property should be forfeited.⁴²¹ The jury found that "Kravitz had used his ownership position in AHP to engage in a pattern of racketeering activity."⁴²² Despite this factual finding, the jury found that the defendant should not forfeit the interest in AHP.⁴²³ The district court "refused to follow the jury's recommendation and ordered forfeiture of Kravitz's stock and position in AHP."⁴²⁴ The Third Circuit affirmed this ruling.⁴²⁵

The appellate court concluded "as have all other courts to decide the question, that forfeiture is mandatory."⁴²⁶ Because the jury made the factual finding "that Kravitz's interest in AHP, both as stockholder and officeholder, were maintained in violation of the racketeering laws,"⁴²⁷ the court held that "not even the district court has the authority to refrain from ordering forfeiture."⁴²⁸ The court further rejected the defendant's arguments that his right to jury trial somehow encompassed the right to have the jury consider the ultimate forfeiture issue, citing *United States v. Del Toro*,⁴²⁹ a Fifth Circuit case which held that the "function of [a] jury is to determine facts and guilt or innocence; [the] function of [a] judge is to impose sentence."⁴³⁰

Other courts, in accordance with *Kravitz*, have used the special interrogatory procedure to determine the factual issues precedent to entry of a forfeiture order by the court.⁴³¹ These factual issues

⁴²¹ 738 F.2d 102, 103 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). The court submitted the following questions to the jury:

- (1) Did the defendant own any shares of stock in American Health Programs?
- (2) Did he maintain this interest in violation of the racketeering laws?
- (3) Shall such shares of stock be forfeited to the United States?
- (4) Did the defendant hold a position in American Health Programs which gave him a source of influence over the company?
- (5) Did he use the position to conduct the affairs of American Health Programs through a pattern of racketeering activity?
- (6) Shall the defendant be required to forfeit his position to the United States?.

Id. at 103.

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.* at 104.

⁴²⁵ *Id.* at 107.

⁴²⁶ *Id.* at 103. That holding is now codified in section 1963(a), which states: "The court, in imposing sentence . . . shall order . . . that the person forfeit to the United States all property described in this subsection." 18 U.S.C. § 1963(a) (1988)(emphasis added).

⁴²⁷ *Kravitz*, 738 F.2d at 105 n.4.

⁴²⁸ *Id.* at 106.

⁴²⁹ 426 F.2d 181, 184 (5th Cir.), *cert. denied*, 400 U.S. 829 (1970).

⁴³⁰ *Kravitz*, 738 F.2d at 106 (citing *Del Toro*, 426 F.2d at 184.)

⁴³¹ *But see* *United States v. Washington*, 782 F.2d 807, 822-23 (9th Cir.)(special inter-

have included the question of which businesses were part of the charged association-in-fact enterprise,⁴³² the extent or percentage of the defendant's ownership of specified businesses and property⁴³³ and whether defendant's interest in certain assets was acquired through her criminal activity.⁴³⁴ It should be noted, however, that some Circuit Court pattern jury instructions still indicate that the jury should make the decision as to whether assets should be forfeited.⁴³⁵

Parties can waive their rights to a special verdict in forfeiture cases.⁴³⁶ Some courts have found such a waiver where the defendant failed to request a special verdict prior to submission of the case to the jury.⁴³⁷

IV. RESTRAINING ORDERS

As discussed in the legislative history section, prior to the 1984 amendments to section 1963, the majority of courts considering the procedure for entry of a restraining order under subsection 1963(e) required a full-blown evidentiary hearing.⁴³⁸ The leading cases, *Crozier*,⁴³⁹ *Long*,⁴⁴⁰ *Spilotro*,⁴⁴¹ and *Veon*,⁴⁴² required the government to comply with the four-part showing for entry of a permanent injunction set forth in Federal Rule of Civil Procedure 65.⁴⁴³ This holding caused great consternation among prosecutors who envisioned "mini-trials" at these hearings resulting, among other things, in pre-

rogatory presenting ultimate issue of forfeiture to jury was not challenged), *vacated on other grounds and remanded*, 797 F.2d 1461 (9th Cir. 1986).

⁴³² *United States v. Huber*, 603 F.2d 387, 393-94 (2d Cir. 1979), *cert. denied*, 465 U.S. 927 (1980).

⁴³³ *United States v. McKeithen*, 822 F.2d 310, 313 (2d Cir. 1987); *United States v. Cauble*, 706 F.2d 1322, 1346 n.90 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

⁴³⁴ *United States v. Amend*, 791 F.2d 1120, 1128 n.8 (4th Cir.), *cert. denied*, 479 U.S. 930 (1986). Of course, none of these cases prohibit the jury from finding, as a factual matter, that certain assets do not fall within section 1963. *See, e.g.*, *United States v. Williams*, 809 F.2d 1072 (5th Cir.), *cert. denied*, 108 S. Ct. 228 (1987).

⁴³⁵ *See, e.g.*, Eleventh Circuit Pattern Jury Instruction 51.3.

⁴³⁶ *See, e.g.*, *United States v. Zang*, 703 F.2d 1186, 1194-95 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983); *United States v. Hess*, 691 F.2d 188, 191 (4th Cir. 1982); *United States v. Schmalfeldt*, 657 F. Supp. 385, 396 (W.D. Mich. 1987).

⁴³⁷ *See Zang*, 703 F.2d at 1194-95.

⁴³⁸ *See supra* text accompanying notes 103-24. The courts approved the issuance of *ex parte* restraining orders, but required a prompt notice and hearing thereafter.

⁴³⁹ *United States v. Crozier*, 674 F.2d 1293 (9th Cir. 1982), *vacated and remanded*, 468 U.S. 1206 (1984).

⁴⁴⁰ *United States v. Long*, 654 F.2d 911 (3d Cir. 1981).

⁴⁴¹ *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982).

⁴⁴² *United States v. Veon*, 549 F. Supp. 274 (E.D. Cal. 1982).

⁴⁴³ The four-part test is set forth in note 105 *supra*.

mature disclosure of their witnesses and prosecutorial theories.⁴⁴⁴

The 1984 amendments to section 1963 were designed to specifically address the problems raised by *Crozier* hearings. In the Senate report on S. 948, one of the bills which became the 1984 amendment to section 1963, the Senate specifically rejected both the Rule 65 standard for issuance of restraining orders and the notion that hearings following the issuance of restraining orders should address the issue of whether the government is likely to prevail on the merits of the substantive offense at trial.⁴⁴⁵

Rather, the probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order. While the court may consider factors bearing on the reasonableness of the order sought, it is not to 'look behind' the indictment or require the government to produce additional evidence regarding the merits of the case as a prerequisite to issuing a post-indictment restraining order.⁴⁴⁶ Pre-indictment restraining orders, by contrast, require a hearing to determine that " 'there is a substantial probability that the United States will prevail on the issue of forfeiture.' " ⁴⁴⁷ The Senate report "stressed, however, that this stringent standard applies only in this [pre-indictment] context; it is not to be extended to restraining orders sought after indictment." ⁴⁴⁸

Courts considering restraining orders after the 1984 amendments to the Act basically followed two lines of analysis. Some stubbornly continued to insist that pretrial restraining order hearings must be held, and that the standards to govern the hearings would be those in Federal Rule of Civil Procedure 65.⁴⁴⁹ Others recognized from the legislative history and the statute itself that Congress did not intend for a post-indictment, pretrial restraining order hearing to be held. Of these courts, some found that this lack of a hearing rendered the restraining order provisions unconstitutional.⁴⁵⁰ Others upheld the constitutionality of the restraining order

⁴⁴⁴ See *United States v. Beckham*, 562 F. Supp. 488 (E.D. Mich. 1983).

⁴⁴⁵ S. Rep. No. 224, 98th Cong. 1st Sess. 18 (1983). This portion of the Senate report is quoted in the text at *supra* note 249.

⁴⁴⁶ *Id.* at 25.

⁴⁴⁷ *Id.* (quoting U.S.C. § 1963(e)(1)(b)).

⁴⁴⁸ *Id.*

⁴⁴⁹ See, e.g., *United States v. Thier*, 801 F.2d 1463, 1468 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987); *United States v. Perholtz*, 622 F. Supp. 1253, 1256 (D.D.C. 1985); *United States v. Rogers*, 602 F. Supp. 1332, 1342 (D. Colo. 1985).

⁴⁵⁰ See, e.g., *United States v. Harvey*, 814 F.2d 905, 931 (4th Cir. 1987), *modified en banc sub. nom In Re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988), *aff'd*, 57 U.S.L.W. 4836 (U.S. June 22, 1989) (No. 87-1729); *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988).

provisions.⁴⁵¹

The first case to hold that Rule 65 hearings were still required after the 1984 amendment was *United States v. Rogers*,⁴⁵² decided in February, 1985. The district court in *Rogers* engaged in a masterful, albeit disingenuous, attempt to interpret the legislative history of subsection 1963(e) in a fashion which would allow the holding of a full evidentiary hearing in conjunction with the entry of post-indictment restraining orders. The court began by acknowledging that the statute provided for a less stringent showing for issuance of a post-indictment restraining order than for a pre-indictment restraining order.⁴⁵³ Nevertheless, because the statute also gave the court discretion in entering a restraining order, the *Rogers* court concluded that some evidentiary presentation was necessary to provide a factual basis for exercising that discretion.⁴⁵⁴

The *Rogers* court next acknowledged that Congress had specifically precluded a full-blown evidentiary hearing as a prerequisite to the entry of a post-indictment restraining order.⁴⁵⁵ To circumvent this legislative history, the *Rogers* court seized upon the phrase "restraining order or injunction" in subsection 1963(e).⁴⁵⁶ The court noted that,

"[i]n interpreting these terms, I apply the commonly understood uses of the terms traditionally used in equity and the common law." Thus, as in the context of federal civil suits, the statute provides for the entry of an *ex parte* restraining order on the government's showing of the probability of irreparable loss.⁴⁵⁷ It is axiomatic that a restraining order is a temporary precursor to an injunction. An injunction, with longer duration, may be entered only upon good cause demonstrated in an adversary context. . . . The probable cause provided by the indictment is sufficient to support the entry of a restraining order on a temporary basis. The statute, however, requires the government to make a more detailed presentation of its claim before a judge can exercise his discretion in entering an injunction.⁴⁵⁸

Contrary to the *Rogers* court's assertion, the legislative history of subsection 1963(e) does not indicate that a restraining order is a

⁴⁵¹ See, e.g., *United States v. Musson*, 802 F.2d 384, 387 (10th Cir. 1986); *United States v. Draine*, 637 F. Supp. 482, 486 (S.D. Ala. 1986).

⁴⁵² 602 F. Supp. 1332 (D. Colo. 1985).

⁴⁵³ *Id.* at 1342-43.

⁴⁵⁴ *Id.* at 1343. Specifically, the court stated, "to suggest that a judicial officer should act blindly without the benefit of some evidentiary presentation is ludicrous. Such would be a non-judicial function, clearly beyond the authority of Congress to enact." *Id.*

⁴⁵⁵ *Rogers*, 602 F. Supp. at 1343.

⁴⁵⁶ *Id.*

⁴⁵⁷ It is interesting to note that the *Rogers* court does not state the basis upon which it concludes that the government must show "the probability of irreparable loss."

⁴⁵⁸ *Rogers*, 602 F. Supp. at 1343 (citations omitted).

"temporary precursor to an injunction."⁴⁵⁹ Rather, when a temporary order was contemplated, Congress expressly called it a "temporary restraining order" as in subsection 1963(e)(2). Moreover, the Senate Report on the 1984 amendments to subsection 1963(e) refers to "*restraining orders* to preserve the availability of forfeitable assets *until the conclusion of trial*."⁴⁶⁰ Finally, the notion that the statute requires the government to make a "more detailed presentation of its claim" before a permanent restraining order or injunction can issue is apparently drawn from the fact that entry of the order lies within the court's discretion. Because the *Rogers* court determined a hearing was necessary to exercise discretion, it read this "detailed presentation" requirement into the statute.⁴⁶¹

The *Rogers* court attempted to bolster its strained reading of subsection 1963(e) by concluding that Congress intended to adopt the holdings of *Spilotro*, *Long* and other cases in the spirit of *Crozier*, because it had not "specified to the contrary."⁴⁶² This rationale failed to deal with Congress' express criticism of the *Crozier* line of cases, as noted previously.⁴⁶³ By its definition of restraining orders and injunctions, as well as its assumption that the *Crozier*-type cases were part of the precedent for subsection 1963(e) as amended, the court avoided having to decide the more difficult issue of whether procedural due process required a hearing in conjunction with the entry of a post-indictment restraining order.

After concluding that a hearing was required, the court considered what burden of proof should be applied at such hearings. It concluded:

In the absence of explicit congressional description of the character of post-indictment hearings, as a matter of statutory construction, the procedure followed in an analogous context should be applied in pref-

⁴⁵⁹ See *supra* notes 264-69 and accompanying text.

⁴⁶⁰ S. REP. NO. 224, 98th Cong., 1st Sess. 24 (1983). This section of legislative history, as well as other sections quoted in the text, rebut the *Rogers* court's assertion that its "interpretation of the statute is consistent with legislative history." *Rogers*, 602 F. Supp. at 1343.

⁴⁶¹ Another reason for leaving the entry of a restraining order in the court's discretion would be the situation in which there appears to be little likelihood that the forfeitable assets would be unavailable at the time of conviction. This reading of the statute is in keeping with the purpose of the restraining order provision which "is to preserve the status quo, *i.e.*, to assure the availability of the property pending disposition of the criminal case." S. REP. NO. 224 at 24. Discretion also permits the court to consider questions such as whether the restraining order is improper because the restrained assets are not legally forfeitable, see *United States v. Veliotis*, 586 F. Supp. 1512 (S.D.N.Y. 1984), or whether living expenses should be exempted from the order, see, *e.g.*, *United States v. Madeoy*, 652 F. Supp. 371 (D.D.C. 1987).

⁴⁶² *Rogers*, 602 F. Supp. at 1343.

⁴⁶³ See *supra* text accompanying notes 249 and 265.

erence to procedures tailored to different types of problems. . . . Thus, to justify the entry of an injunction, following termination of a restraining order, the government must comply with the requirements of § 1963[(d)](1)(B).⁴⁶⁴

The requirements of subsection 1963(d)(1)(B) are those for entry of a pre-indictment restraining order, namely that:

- (i) [T]here is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable; and
- (ii) [T]he need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.⁴⁶⁵

Congress emphasized that this "stringent standard applie[d] only in [the pre-indictment] context; it is not to be extended to restraining orders after indictment."⁴⁶⁶ The *Rogers* court's attempt to circumvent this clear prohibition on Rule 65 hearings for post-indictment restraining orders by distinguishing a restraining order from an injunction provides little reason to view the case favorably when considering how to implement subsection 1963(e).⁴⁶⁷

The next case to conclude that a Rule 65 hearing remained applicable to subsection 1963(e) as amended was *United States v. Perholtz*.⁴⁶⁸ In *Perholtz*, a District of Columbia district court concluded that a post-indictment restraining order pursuant to subsection 1963(e) violated the defendant's fifth amendment due process rights unless the defendant was given the opportunity for a hearing within ten days from entry of the order.⁴⁶⁹ The court did not analyze the applicability of due process concerns to subsection 1963(e). Further, the court held, as had the *Rogers* court, that the standards of subsection 1963(d)(1)(B) would be applicable at hearings concerning post-indictment restraining orders.⁴⁷⁰ This holding was based solely upon pre-amendment cases as well as *Rogers*.⁴⁷¹

A second line of cases held that the restraining order provisions

⁴⁶⁴ *Rogers*, 602 F. Supp. at 1345.

⁴⁶⁵ 18 U.S.C. § 1963(d)(1)(B) (1988).

⁴⁶⁶ S. REP. NO. 224, 98th Cong., 1st Sess. 25-26 (1983)(emphasis added).

⁴⁶⁷ Similarly, in *United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987), the court reached the same conclusion as the *Rogers* court did, following the *Rogers* rationale. For the reasons outlined above, the *Thier* decision is unpersuasive.

⁴⁶⁸ 622 F. Supp. 1253 (D.D.C. 1986). *United States v. Lewis*, 759 F.2d 1316 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985), while decided in 1985 was submitted to the court of appeals before the effective date of the 1984 amendments to subsection 1963(e).

⁴⁶⁹ *Perholtz*, 622 F. Supp. at 1256.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

absent a hearing were unconstitutional. The first of these decisions came in *Crozier*, the same case which had led the challenge against the restraining order provisions prior to the 1984 amendments.⁴⁷² The original decision in *Crozier*, holding that a Rule 65 hearing was required, was vacated by the Supreme Court.⁴⁷³ The Supreme Court remanded the case for reconsideration in light of *United States v. \$8,850*.⁴⁷⁴

United States v. \$8,850 involved the issue of "whether the Government's 18-month delay in filing a civil proceeding for forfeiture of the currency [seized by law enforcement authorities violates] the claimant's right to due process of law."⁴⁷⁵ The Court held that no due process violation occurred based on a *Barker v. Wingo*⁴⁷⁶ speedy trial analysis.⁴⁷⁷ Noting that procedural due process requires the "right to a hearing 'at a meaningful time,'" the Supreme Court stated in *United States v. \$8,850* that "there is no obvious bright line dictating when a post-seizure hearing must occur."⁴⁷⁸ The Court analogized the right to a post-seizure hearing to a defendant who, when released on bail has "his liberty . . . subject to the conditions required by his bail agreement."⁴⁷⁹

[T]he Fifth Amendment claim here—which challenges only the length of time between the seizure and the initiation of the forfeiture trial—mirrors the concern of undue delay encompassed in the right to a speedy trial The flexible approach of *Barker*, which "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis," . . . is thus an appropriate inquiry for determining whether the flexible requirements of due process have been met.⁴⁸⁰

The *Barker v. Wingo* test requires a balancing of four factors: 1) the length of the delay; 2) the reason for the delay; 3) whether a request for a hearing is made; and 4) whether the defendant has been prejudiced by the delay.⁴⁸¹ In *\$8,850*, the Supreme Court found the 18-month delay between seizure of the money and filing

⁴⁷² *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985).

⁴⁷³ *United States v. Crozier*, 468 U.S. 1206 (1984).

⁴⁷⁴ 461 U.S. 555 (1983).

⁴⁷⁵ *Id.* at 556.

⁴⁷⁶ 407 U.S. 514 (1972).

⁴⁷⁷ *\$8,850*, 461 U.S. at 564.

⁴⁷⁸ *Id.* at 562.

⁴⁷⁹ *Id.* at 564.

⁴⁸⁰ *Id.* at 564-65 (quoting *Barker*, 407 U.S. at 530). Further, the Court noted:

[t]he deprivation in *Barker*—loss of liberty—may well be more grievous than the deprivation of one's use of property at issue here. Thus, the balance of the interests, which depends so heavily on the context of the particular situation, may differ from a situation involving the right to a speedy trial.

Id. at 565 n.14.

⁴⁸¹ *Barker*, 407 U.S. at 530.

of the civil forfeiture action "quite significant."⁴⁸² The reason for the delay was that the government needed time to investigate following seizure in combination with the fact that a criminal action seeking forfeiture was pending.⁴⁸³ The Court concluded that "the Government's diligent pursuit of pending administrative and criminal proceedings indicates strongly that the reasons for its delay in filing a civil forfeiture procedure were substantial."⁴⁸⁴ The claimant in *\$8,850* had not taken steps to get an early judicial hearing nor had she "shown that the delay affected her ability to defend against the impropriety of the forfeiture on the merits."⁴⁸⁵ Based upon these four factors, the Court held that the 18-month delay in *United States v. \$8,850* was reasonable.⁴⁸⁶

On remand, the *Crozier* court first acknowledged that no post-indictment, pretrial restraining order hearing was contemplated after the 1984 amendment to the restraining order provision of the CCE statute.⁴⁸⁷ It then referenced a balancing test different than that used in *United States v. \$8,850*. The *Crozier* court referred to balancing "the risk of an erroneous deprivation, the state's interest in providing specific procedures and the strength of the individual's interest."⁴⁸⁸ Yet, the *Crozier* court did not use this balancing test either. Instead, it concluded that the statute was unconstitutional on its face:

The statutory forfeiture provisions do not satisfy due process. We believe that the absence of any hearing on the imposition of a restraining order on a defendant's property, or a hearing for parties with a third party interest which takes place months or years after a restraining order is issued, cannot be construed as a hearing provided "at a meaningful time."⁴⁸⁹

To read the statute as constitutional, the *Crozier* court once again held that "Rule 65 of the Federal Rules of Civil Procedure governs the restraining order and that the district court erred in denying without a hearing the motions . . . to dissolve the restraining order."⁴⁹⁰

Subsequently, the Fourth Circuit approached the balancing test analysis for due process in post-indictment restraining orders.

⁴⁸² *\$8,850*, 461 U.S. at 565.

⁴⁸³ *Id.* at 561-62.

⁴⁸⁴ *Id.* at 568.

⁴⁸⁵ *Id.* at 569.

⁴⁸⁶ *Id.*

⁴⁸⁷ *United States v. Crozier*, 777 F.2d 1376, 1382-83 (9th Cir. 1985).

⁴⁸⁸ *Id.* at 1383.

⁴⁸⁹ *Id.* at 1383-84 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

⁴⁹⁰ *Id.* at 1384.

*United States v. Harvey*⁴⁹¹ was a consolidated appeal of three cases, *United States v. Bassett*,⁴⁹² *United States v. Caplin & Drysdale (Reckmeyer)*⁴⁹³ and *United States v. Harvey*.⁴⁹⁴ In each of these cases, the issue of forfeitability of attorney's fees was raised. Only the *Harvey* case, however, involved a post-indictment restraining order. The *Harvey* appellate court began by recognizing that "[a]fter indictment . . . restraining orders may be issued on the basis alone of the indictment's allegation that the property described would be subject to forfeiture upon conviction; no special judicial hearing either before or after entry of the order is required."⁴⁹⁵ However, *Harvey* completely ignored the Supreme Court's reference to *United States v. \$8,850* in its remand of the *Crozier* case. Instead of doing any kind of balancing, the *Harvey* court, like the *Crozier* decision after the remand, held that "neither the indictment itself nor a criminal trial held, as here, three months after issuance of an *ex parte* restraining order affords the procedural due process guaranteed by the fifth amendment."⁴⁹⁶

Finally, two recent cases have found no violation of procedural due process despite the lack of a pretrial hearing.⁴⁹⁷ In *United States*

⁴⁹¹ 814 F.2d 905 (4th Cir. 1987), *modified sub. nom. In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988)(en banc), *aff'd*, 57 U.S.L.W. 4836 (U.S. June 22, 1989) (No. 87-1729).

⁴⁹² 632 F. Supp. 1308 (D. Md. 1986).

⁴⁹³ 631 F. Supp. 1191 (E.D. Va. 1986), *aff'd sub nom. United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987), *rev'd en banc sub nom. In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988), *aff'd* 57 U.S.L.W. 4836 (U.S. June 22, 1989) (No. 87-1729).

⁴⁹⁴ *Harvey*, 814 F.2d at 912.

⁴⁹⁵ *Id.* at 910.

⁴⁹⁶ *Id.* at 928. In 1988, the Seventh Circuit held that, at least where assets to pay attorney's fees are being restrained, due process requires a post-indictment, pretrial hearing concerning the issuance of a restraining order. *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988).

⁴⁹⁷ A third case recently held that the only thing required by due process is that the government "articulate a cogent thesis or theory of its entitlement, thereby affording defendants sufficient notice of the government's claim to enable them to prepare a defense." *United States v. Regan*, 699 F. Supp. 36, 38 (S.D.N.Y. 1988). Despite this statement, however, the court also suggested that if a post restraining order, pretrial hearing were to be held it would be "the defendants' burden at such hearing to establish the insufficiency of the indictment and of the government's theory as a matter of law and/or fact." *Id.* To be consistent with the language and legislative history of subsection 1963(e), this statement by the *Regan* court should be read to contemplate only a hearing on whether the property restrained is the property subject to forfeiture named in the indictment, not a hearing on the validity of the indictment. The hearing might also contemplate the question of whether, assuming the facts as alleged are true, forfeiture would be legally appropriate under the subsection of 1963 set forth in the indictment. See, e.g., *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983); *supra* text accompanying note 405. But see discussion in the text at *supra* text accompanying notes 401 through 404.

v. Draine,⁴⁹⁸ the State of Alabama seized \$11,400 pursuant to a search warrant. The United States contended that these funds were forfeitable pursuant to 18 U.S.C. section 853 which provides for forfeiture of narcotics proceeds.⁴⁹⁹ Before the United States proceeded on its claim, it allowed the State of Alabama to proceed with its civil forfeiture action. After Alabama abandoned its action, the United States obtained an indictment of Draine followed by the issuance of a protective order authorizing the United States Marshal to take custody of the funds.⁵⁰⁰

The *Draine* court applied the *Barker v. Wingo* balancing test to the due process issue. It first excluded from the period of delay the time the money was held by local authorities.⁵⁰¹ Second, it excluded delay following the transfer of the money to the United States which the defendant had occasioned himself, "in that on motions of the defendant, his criminal trial was first continued from its January 13, 1986 setting and then again continued from its March 10, 1986 setting. Consequently, defendant's criminal trial shall now proceed . . . [a] little more than five months following the defendant's federal indictment. . . ." ⁵⁰²

Regarding the reasons for the remaining period of delay, the court noted:

The criminal forfeiture provisions were intended to provide prosecutors the option to consolidate the forfeiture action with the criminal prosecution and thereby avoid being forced to prove the merits of the underlying criminal case in a separate civil proceeding against the defendant's property well in advance of trial in order to obtain an order restraining the defendant's transfer of property alleged to be forfeitable in the indictment.⁵⁰³

The *Draine* court did not discuss the prejudice, if any, arising from the restraint. Nonetheless, the court held that requiring the defendant to wait until trial to challenge the restraining order did not violate due process.⁵⁰⁴

In *United States v. Musson*,⁵⁰⁵ a post-indictment restraining order was issued. A pretrial hearing was held at which the defendant challenged the order's impact on third parties, challenged the failure of the indictment to describe the nexus between the illegal acts and the

⁴⁹⁸ 637 F. Supp. 482 (S.D. Ala. 1986).

⁴⁹⁹ *Id.* at 483.

⁵⁰⁰ *Id.* at 484-85.

⁵⁰¹ *Id.* at 484.

⁵⁰² *Id.* at 485.

⁵⁰³ *Id.* at 486.

⁵⁰⁴ *Id.*

⁵⁰⁵ 802 F.2d 384, 385 (10th Cir. 1986).

property in question, and claimed exemptions for certain property.⁵⁰⁶ On appeal, the defendants argued that they should also have been given "an evidentiary hearing . . . at which the government should be required to demonstrate through factual submissions a reasonable probability that forfeiture will be ultimately obtained, and that such a restraining order can only be issued after meeting the requirements of Rule 65 of the Federal Rules of Civil Procedure."⁵⁰⁷

The *Musson* court held that the statute and legislative history clearly provided that the grand jury's finding of sufficient probable cause to include forfeiture language in an indictment is all that is required to support issuance of a restraining order.⁵⁰⁸

The statute expressly requires that the indictment returned by the grand jury include an express allegation that the specified property would be subject to forfeiture in the event of a criminal conviction. This was done in this instance in the statutory language with little more [I]t must be assumed that there was submitted to the grand jury evidence to support the determination.⁵⁰⁹

As to whether procedural due process was violated, the court noted that the restraining order would merely be "a restraint upon its free alienation which it must be conceded is far less intrusive than a physical seizure of the subject property."⁵¹⁰ Based upon this fact along with the grand jury's finding of probable cause to forfeit the property in question, the *Musson* court held that the defendant had been afforded due process.⁵¹¹ Once again, the court did not apply the *Barker v. Wingo* balancing test.

Despite the protestations of the *Rogers*⁵¹² court, the issue to be faced in future cases is not whether the statute requires a pretrial restraining order hearing—it does not. The issue is whether the Constitution requires such a hearing when subsection 1963(e) is applied in any given factual situation. The Supreme Court has pointed to the *Barker v. Wingo* test to resolve the issue.⁵¹³ The length of delay between issuance of the order and commencement of trial, a necessary determination under factor one of the *Barker v. Wingo* test, will be difficult to compute at the time the restraining order is granted. However, a defendant can certainly raise the delay issue at

⁵⁰⁶ *Id.* at 385.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 387.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985).

⁵¹³ *Barker v. Wingo*, 407 U.S. 514 (1972).

any point prior to trial if he or she feels an unconstitutionally long period of time has elapsed. Additionally, the period of delay will likely include delay occasioned by the defendant, such as delay resulting from the filing of pretrial motions. This delay cannot be balanced against the United States.⁵¹⁴

Factor two of the *Barker v. Wingo* test which examines the reason for the delay, should take into account the otherwise unauthorized discovery which the defendant would receive if a pretrial evidentiary hearing were held. The solicitor general of the United States asserted this factor in his petition for writ of certiorari in *United States v. Crozier*:

Also pertinent here is the long-established policy of the Congress, embodied in the Federal Rules of Criminal Procedure, to provide only limited discovery in criminal cases, confined to specific, narrowly defined classes of items enumerated in Fed. R. Crim. P. 16. Illustrative of this policy is the refusal of Congress in 1974 to adopt a proposed version of Rule 16 providing for pretrial exchange of witness lists in criminal cases. In explaining its rejection of this expanded form of discovery, the Conference Committee stated:

[I]t is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

Factor three of the test requires the defendant to request a pretrial hearing. Failure to make the request would not preclude a finding that due process was not afforded, but it would weigh against such a conclusion.⁵¹⁵

Factor four, actual prejudice, is significant when coupled with concerns such as the need to use restrained property to pay basic living expenses.⁵¹⁶ Where no such concern is present, however, in general the defendant is not deprived of money or property, as is the case with seizure warrants. The defendant can, therefore, continue to maintain his or her property and use certain items of the property, for example living in a residence or driving a car, subject to forfeiture. Some courts have also alleviated any potential prejudice incident to a restraining order by expressly providing in the order that the defendant can post a performance bond in lieu of

⁵¹⁴ *E.g.*, *United States v. Draine*, 637 F. Supp. 482 (S.D. Ala. 1986).

⁵¹⁵ *See* *United States v. \$8,850*, 461 U.S. at 569.

⁵¹⁶ One court limited actual prejudice in the sixth amendment context to situations in which the delay "impaired his [the defendant's] ability to provide a meaningful defense." *United States v. Solomon*, 686 F.2d 863 (11th Cir. 1982).

forfeiture.⁵¹⁷ Rarely, applying the *Barker v. Wingo* factors, will any restraining orders be found to violate procedural due process.⁵¹⁸

One last practical consideration remains. Suppose a grand jury describes the property subject to forfeiture using only statutory language, without reference to any specific item or property. Suppose further that the United States thereafter seeks an order restraining the transfer of \$100,000 of the defendant's money or a piece of real estate owned by the defendant, asserting that the money and real estate are property described in 18 U.S.C. section 1963(a) and, thus, are within the general description of property subject to forfeiture as alleged in the indictment. In this hypothetical situation one cannot assume, as the *Musson*⁵¹⁹ court did, that the grand jury found probable cause to believe that the money and the real estate are property described in subsection 1963(a). In this instance, due process seems to require some hearing in which the government would have to establish a nexus between the specific property it seeks restrained and the illegal acts. Such a hearing was contemplated by Congress:

This provision [18 U.S.C. section 1963(e)] does not exclude, however, the authority to hold a hearing subsequent to the initial entry of the order and the court may at that time modify or vacate an order that was clearly improper (e.g., where information presented at the hearing shows that the property restrained was not among the property named in the indictment). However, it is stressed that at such a hearing the court is not to entertain challenges to the validity of the indictment.⁵²⁰

Accordingly, when the government seeks a restraining order, it behooves the United States attorney to present evidence of the forfeitability of specific items of property to the grand jury. The grand jury should thereafter be encouraged to specifically list each item of property it finds probable cause to believe is forfeitable in the indictment.⁵²¹ Obtaining a restraining order as to such specifically identified forfeitable property should not require a "nexus" hearing.

⁵¹⁷ This is suggested in 18 U.S.C. § 1963(e)(1).

⁵¹⁸ Other "fine-tuning" of restraining orders may also be possible. See, e.g., *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988); *United States v. Gelb*, 826 F.2d 1175 (2d Cir. 1987).

⁵¹⁹ *United States v. Musson*, 802 F.2d 384 (10th Cir. 1986).

⁵²⁰ S. REP. NO. 224, 98th Cong., 1st Sess. 25 (1983). The Supreme Court declined to decide the issue of when, if at all, a pretrial hearing is required in connection with a restraining order. *United States v. Monsanto*, 57 U.S.L.W. 4826 (U.S. June 22, 1989) (No. 88-494). However, the Supreme Court stated in *Monsanto* that "assets in a defendant's possession may be restrained . . . based on a finding of probable cause to believe that the assets are forfeitable." *Id.*

⁵²¹ For a paradigm forfeiture allegation, see *supra* note 408.

V. CONSTITUTIONALITY OF FORFEITURE PROVISIONS

The forfeiture provision of the RICO Act has received a number of constitutional challenges. By and large the courts have rejected these challenges. The three major areas of challenge have included violation of the fifth, sixth and eighth amendments to the Constitution.

A. CRUEL AND UNUSUAL PUNISHMENT

White collar RICO defendants have argued that forfeiture of all their interests in companies found to be RICO enterprises is so grossly disproportionate to their criminal acts as to violate the eighth amendment.⁵²² Others have argued that even forfeitures tied specifically to certain acts of a crime, such as forfeiture of illegally-acquired money, also constitute cruel and unusual punishment.⁵²³ No defendant has prevailed to date, although a remand for further hearing was ordered in *United States v. Busher*.⁵²⁴ However, the Seventh and Ninth Circuits have left the possibility open that at least subsection 1963(a)(2) forfeitures may violate the eighth amendment.⁵²⁵

The eighth amendment challenges began with unsuccessful arguments that the RICO Act forfeiture provisions were unconstitutional on their face.⁵²⁶ A defendant in a medicare fraud RICO case, *United States v. Huber*,⁵²⁷ then argued that forfeiture of his interests in enterprise corporations was cruel and unusual punishment. The Second Circuit found no constitutional violation, noting:

⁵²² See, e.g., *United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987); *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987); *United States v. Kravitz*, 738 F.2d 102 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *United States v. Walsh*, 700 F.2d 1322 (5th Cir. 1983); *United States v. Tunnell*, 667 F.2d 1182 (5th Cir. 1982); *United States v. Grande*, 620 F.2d 1026 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980); *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

⁵²³ *United States v. Robilotto*, 828 F.2d 940 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 711 (1988); *United States v. Conner*, 752 F.2d 566 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985); *United States v. LeRoy*, 687 F.2d 610 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983).

⁵²⁴ 817 F.2d 1409, 1416 (9th Cir. 1987).

⁵²⁵ See *United States v. Horak*, 833 F.2d 1235, 1251 (7th Cir. 1987); *United States v. Busher*, 817 F.2d 1409, 1416 (9th Cir. 1987). See also *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987) (forfeiture provision facially constitutional; applied constitutionality must be considered on a case-by-case basis). But see *United States v. Stern*, 858 F.2d 1249, 1250 (7th Cir. 1988) (forfeiture of condominium based on use of telephone not grossly disproportionate).

⁵²⁶ *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987); *United States v. Boffa*, 513 F. Supp. 444, 464 (D. Del. 1980); *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979).

⁵²⁷ 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

We do not say that no forfeiture sanction may ever be so harsh as to violate the Eighth Amendment. But at least where the provision for forfeiture is keyed to the magnitude of a defendant's criminal enterprise, as it is in RICO, the punishment is at least in some rough way proportional to the crime.⁵²⁸

The *Huber* court suggested that subsection 1963(c) gave a court leeway to mitigate a forfeiture which might be "draconian (and perhaps potentially unconstitutional)."⁵²⁹ The notion that a court can ameliorate forfeiture was subsequently rejected by cases which held that forfeiture as provided in section 1963 was mandatory.⁵³⁰ Following *Huber*, each court that considered an eighth amendment challenge to RICO forfeiture categorically rejected it until 1987. The most egregious of the factual situations considered was in *United States v. Kravitz*.⁵³¹ In *Kravitz*, a dentist, the sole stockholder in AHP corporation, obtained the renewal of a dental contract between AHP and the City of Philadelphia police through a \$7,000 and a \$1,000 bribe.⁵³² He was convicted of violating the RICO Act and ordered to forfeit all of his shares in AHP. Defendant argued that "forfeiture constitutes a disproportionate penalty because AHP's contract with the [police] expired prior to indictment" and that "only a small per cent of AHP was used to promote racketeering."⁵³³ The court rejected this argument, holding:

In the instant case, the property seized was used to promote Kravitz's racketeering scheme—as the *Huber* court suggested, "keyed to the magnitude of a defendant's criminal enterprise," . . . —and certainly was as integral to the racketeering schemes as in other cases where forfeiture was imposed under RICO.⁵³⁴

In 1987, however, two courts reopened the possibility that proportionality considerations may be appropriate at least in subsection 1963(a)(2) forfeitures, where the government need not show "taint."⁵³⁵ In *United States v. Horak*⁵³⁶ forfeiture was sought both under subsection 1963(a)(1) and subsection 1963(a)(2). As to subsection 1963(a)(1) forfeitures, the *Horak* court noted that "we think

⁵²⁸ *Id.* at 397.

⁵²⁹ *Id.*

⁵³⁰ *E.g.*, *United States v. Kravitz*, 738 F.2d 102 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). *See also* *United States v. Pryba*, 674 F. Supp. 1504, 1517 n.36 (E.D. Va. 1987) ("whether this court has authority to mitigate or adjust the jury's forfeiture verdict is unclear").

⁵³¹ 738 F.2d 102 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

⁵³² *Id.* at 103.

⁵³³ *Id.* at 103 n.4 and 106.

⁵³⁴ *Id.* at 107.

⁵³⁵ *United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987); *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987).

⁵³⁶ 833 F.2d 1235, 1237 (7th Cir. 1987).

it highly unlikely that criminal forfeiture orders properly entered under (a)(1) reaching proceeds of racketeering activity could constitute cruel and unusual punishment violating the Eighth Amendment."⁵³⁷ As to subsection 1963(a)(2) forfeitures, however, the *Horak* court was more equivocal. The government sought forfeiture of all the defendant's stock in an eight million dollar company as a result of RICO acts involving \$12,000 in bribes to obtain a contract worth \$700,000.⁵³⁸ The district court in *Horak*, which decided the forfeiture issues without a jury by agreement of the parties, held that the stock was not forfeitable.⁵³⁹ The Seventh Circuit rejected the government's argument that the court's forfeiture order was appealable. In dictum, the appellate court discussed the application of the eighth amendment to subsection 1963(a)(2) forfeitures.⁵⁴⁰ It noted that the corporation which was named as the enterprise in a superseding indictment was the holding company of the corporation named as the enterprise in the original indictment. By virtue of this change in the enterprise entity, the prosecution may have increased the property subject to forfeiture under subsection 1963(a)(2).⁵⁴¹ The court noted:

It is at least arguable that disparities in monetary value or prosecutorial caprice in the choice of the enterprise could, in some circumstances, implicate the Eighth Amendment. We are not insensitive to the concern that vast prosecutorial discretion in combination with potentially enormous forfeiture orders might in some circumstances threaten Eighth Amendment rights.⁵⁴²

The *Horak* court relied upon an earlier Ninth Circuit decision in *United States v. Busher*.⁵⁴³ In *Busher*, the defendant argued that it was unconstitutional to order him to forfeit all of his interest in a company which obtained only three of 14 defense contracts, or \$335,000 of \$27 million, illegally.⁵⁴⁴ The *Busher* court held that:

RICO's forfeiture provision affords the trial court no discretion. Once the jury determines that property was acquired, maintained or operated in violation of section 1962, it must find forfeitable the defendant's entire interest in that property. . . . Moreover, the statute gives the district judge no authority to exclude from the forfeiture order any of the property the jury finds is covered by the liberal language of sec-

⁵³⁷ *Id.* at 1241 n.4.

⁵³⁸ *Id.* at 1251.

⁵³⁹ *Horak*, 633 F. Supp. at 200.

⁵⁴⁰ *Horak*, 833 F.2d at 1251.

⁵⁴¹ *Id.*

⁵⁴² *Id.*

⁵⁴³ 817 F.2d 1409 (9th Cir. 1987).

⁵⁴⁴ *Id.* at 1414.

tion 1963(a).⁵⁴⁵

The court further stated, however, that:

Even though the statute provides no discretion, the district court must avoid unconstitutional results by fashioning forfeiture orders that stay within constitutional bounds. We therefore hold that where, as here, plaintiff makes a prima facie showing that the forfeiture may be excessive, the district court must make a determination, based upon appropriate findings, that the interest ordered forfeited is not so grossly disproportionate to the offense committed as to violate the eighth amendment.⁵⁴⁶

The *Busher* court ordered a remand to the district court for a determination regarding eighth amendment concerns. The district court was ordered to consider: "(1) the harshness of the penalty in light of the gravity of the offense; (2) sentences imposed for other offenses in the federal system; and (3) sentences imposed for the same or similar offenses in other jurisdictions."⁵⁴⁷ However:

[F]orfeiture is not rendered unconstitutional because it exceeds the harm to the victims or the benefit to the defendant. After all, RICO's forfeiture provisions are intended to be punitive. The eighth amendment prohibits only those forfeitures that, in light of all the relevant circumstances are *grossly* disproportionate to the offense committed.⁵⁴⁸

Despite the earlier recognition that the statute provides no discretion to the court in the area of forfeitures, the *Busher* court instructed that if disproportionality was found on remand the court

must limit the forfeiture to such portion of the interest as it deems consistent with these principles; or it may condition the forfeiture upon payment of such sum or relinquishment of such other property as seems just under the circumstances, or it may limit or eliminate other punishment it would otherwise impose so as to bring the total sanction within constitutional boundaries.⁵⁴⁹

It thus appears that if the government proves "taint" or "sources of influence" proportionately, a violation of the eighth amendment will not exist. Where forfeiture of all a defendant's interest in an enterprise is sought, however, eighth amendment arguments may apply. These problems will probably be "limited to the situation where the convicted defendant owns substantially all of the stock of a corporation [enterprise], or where the enterprise is a sole proprietorship."⁵⁵⁰ However, if the court finds that the forfeiture is

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.* at 1415.

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.* (emphasis in original).

⁵⁴⁹ *Id.* at 1416.

⁵⁵⁰ *Id.* at 1413 n.7.

so disproportionate as to be unconstitutional, its only remedy available is to so hold. Contrary to the conclusions of *Huber* and *Busher*, nothing in section 1963 gives a court an avenue to read "conditional" forfeiture into the RICO Act. If a court cannot interpret a statute to be constitutional as applied, a court must declare it unconstitutional.⁵⁵¹

B. DUE PROCESS RIGHTS OF THIRD PARTIES

Third parties who claim an interest in property ordered forfeited by a defendant in a criminal case have raised constitutional arguments concerning denial of procedural due process in violation of the fifth amendment. Initially, the law provided that the only remedy for third parties was to petition the Attorney General for remission or mitigation of the forfeiture.⁵⁵² This was not a unique procedure. Customs laws have long provided for seizure of property, for instance a boat carrying marijuana, without a pre-seizure notice or hearing for the owner.⁵⁵³ The owner's remedy after such a seizure was to seek remission or mitigation of the forfeiture from the seizing authorities. The Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*⁵⁵⁴ held that this procedure did not violate the procedural due process requirements of the fifth amendment.

Nevertheless, in response to criticism of this procedure, the 1984 amendments to RICO provided third parties with a judicial forum to present their claims.⁵⁵⁵ Under subsection 1963(i), third parties are prohibited from pursuing a claim to property subject to forfeiture by intervening in the criminal case or by filing a civil suit prior to a forfeiture order being entered in the criminal case.⁵⁵⁶ In exchange for this forbearance, subsection 1963(l) provides that following an order of forfeiture the United States shall give general notice of its intent to dispose of the forfeited property and "direct written notice to any person known to have alleged an interest in the

⁵⁵¹ See, e.g., *Lowe v. Securities and Exchange Commission*, 472 U.S. 181, 212-13 (1985) (White, J., concurring).

⁵⁵² See, e.g., *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

⁵⁵³ See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

⁵⁵⁴ *Id.*

⁵⁵⁵ With regard to third-party interests, RICO and drug law forfeiture provisions are the same. *United States v. Bassett*, 632 F. Supp. 1308, 1309 (D. Md. 1986), *aff'd sub nom. United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987).

⁵⁵⁶ Case law has held that the restraining order provision of section 1963 cannot bind a third party without a hearing, however. *United States v. Ambrosio*, 575 F. Supp. 546, 550 (E.D.N.Y. 1983).

property that is the subject of the order of forfeiture."⁵⁵⁷ Thereafter, a third party must timely file a petition signed under penalty of perjury stating specific facts supporting his or her claim against the property in the form set forth in subsection 1963(l)(3). If the petition adequately states a claim,⁵⁵⁸ the court will hold an adversarial non-jury hearing using the federal rules of evidence to adjudicate the third party's interest in the forfeitable property.⁵⁵⁹ The burden of proof lies with the third party. This party must establish by a preponderance of the evidence that he or she has a right, title or interest in the property superior to the defendant's or which renders the forfeiture invalid or that he or she was "a bona fide purchaser for value of the right, title or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section."⁵⁶⁰ If the third party does not prevail at this hearing, he or she may still petition the Attorney General for remission or mitigation of the forfeiture on equitable grounds.⁵⁶¹ No procedural due process challenge has prevailed as to the adequacy or timeliness of a subsection 1963(l) hearing.

Judicial circumvention of these third party procedures have been routinely quashed. For example, the Fifth Circuit in *United States v. L'Hoste*⁵⁶² overturned a district court's decision to exempt marital community property from a forfeiture order. More recently, the Ninth Circuit overturned an order exempting one house and one car from forfeiture in *United States v. Murillo*.⁵⁶³ One area in which lower courts had not resolved the question of exemption, however, was payment of attorney's fees from forfeitable property. At least one court held that attorneys, like other third parties, must present their claims for fees in a petition pursuant to subsection 1963(l), while others exempted attorney's fees from the forfeiture provisions.⁵⁶⁴ On June 22, 1989, the Supreme Court resolved the issue by holding that attorney's fees are not exempt from forfei-

⁵⁵⁷ 18 U.S.C. § 1963 (l) (1986).

⁵⁵⁸ A hearing can be denied if the third-party petition fails to state a claim. *United States v. Mageean*, 649 F. Supp. 820, 825 (D. Nev. 1986), *aff'd mem.*, 822 F.2d 62 (9th Cir. 1987).

⁵⁵⁹ 18 U.S.C. § 1963(l),(2),(4),(5) (1988).

⁵⁶⁰ *Id.* at § 1963(l)(6).

⁵⁶¹ *Id.* at § 1963(g).

⁵⁶² 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); *accord* *United States v. Possick*, 849 F.2d 332, 340-41 (8th Cir. 1988).

⁵⁶³ 709 F.2d 1298 (9th Cir. 1983).

⁵⁶⁴ *E.g.*, *United States v. Raimondo*, 721 F.2d 476, 478 (4th Cir. 1983), *cert. denied*, 469 U.S. 837 (1984). *See* cases cited in *United States v. Nichols*, 841 F.2d 1485, 1490 (10th Cir. 1988).

ture.⁵⁶⁵ Thus, attorneys stand in the same position as other third-party claimants with regard to claims against assets subject to forfeiture.

Two additional issues in the third party claim area are also worthy of note. The first is forfeiture of property held in the name of someone other than the defendant. In *United States v. Mandel*,⁵⁶⁶ 241,000 shares of stock in a RICO enterprise corporation were found to belong to defendant Kovens even though they were held in the name of a third party, Irving Schwartz. Schwartz was nevertheless required to present his claim to the property through third-party procedures.⁵⁶⁷ Similarly, in *United States v. Reckmeyer*,⁵⁶⁸ forfeiture was sought of a parcel of real estate purchased by the defendant's father based upon his sons' CCE convictions. The father successfully pursued his claim to the property under the drug forfeiture equivalent of subsection 1963(l).⁵⁶⁹

Where the government has proved that property held by someone other than the defendant is a forfeitable interest of the defendant's, it is appropriate to require the nominee owner to pursue his claim through third party channels. Without this protection, defendants could too easily circumvent forfeiture by the use of straw purchasers. While the substitute assets provision would allow the United States to seek the value of this property from a defendant's non-forfeited assets, this remedy will be insufficient if the defendant's remaining assets do not equal the value of the property held by the third party.

The next issue faced by the courts was who has standing to assert a claim against forfeited property. The United States has argued that only third parties with a secured or specifically identifiable interest in a particular piece of forfeited property have standing to assert a claim against the property.⁵⁷⁰ However, courts have allowed general, unsecured creditors of a defendant to pursue third party claims against forfeited property, reasoning that trade credi-

⁵⁶⁵ *Caplin & Drysdale, Chartered, v. United States*, 57 U.S.L.W. 4836 (U.S. June 22, 1989); *United States v. Monsanto*, 57 U.S.L.W. 4826 (U.S. June 22, 1989).

⁵⁶⁶ 505 F. Supp. 189 (D. Md. 1981).

⁵⁶⁷ Schwartz pursued his claim prior to the enactment of subsection 1963(l). His plight is a good example of why the subsection 1963(l) procedures are needed. Schwartz filed both a petition for remission and mitigation of forfeiture and a civil suit for a declaratory judgment. *Schwartz v. United States*, 582 F. Supp. 224 (D. Md. 1984). Pending resolution of his claims, the court stayed execution of the forfeiture. *Mandel*, 505 F. Supp. at 192. Case law does not report the outcome of Schwartz's claim.

⁵⁶⁸ 628 F. Supp. 616 (E.D. Va. 1986).

⁵⁶⁹ *Id.* at 617.

⁵⁷⁰ *Id.*

tors are bona fide purchasers for value of the property by virtue of the expenditure of their services.⁵⁷¹ One court has held that claimants in a tort action pending against the defendant, however, do not have standing to assert a third-party claim against forfeited assets.⁵⁷²

C. FORFEITURE OF ATTORNEY'S FEES

The issue of whether attorney's fees are subject to forfeiture and, if so, whether such forfeiture is in violation of defendant's sixth amendment right to counsel probably has been the most analyzed area in RICO forfeiture law.⁵⁷³ The question has arisen both with regard to pre-trial, post-indictment restraining orders⁵⁷⁴ and post-conviction forfeitures.⁵⁷⁵ Many courts attempted to sidestep the constitutional issue with respect to forfeiture of attorney's fees under section 1963.⁵⁷⁶ More recently, however, decisions have noted that this conclusion is not a reasonable interpretation of the law.⁵⁷⁷ The question to be addressed, therefore, was whether forfeiture of attorney's fees, and restraining orders pending forfeiture, violated a defendant's qualified sixth amendment right to counsel of his choice or his fifth amendment rights.⁵⁷⁸

The Supreme Court held on June 22, 1989, that attorney's fees are not exempt from forfeiture or from pretrial restraining orders.⁵⁷⁹ A review of the discussions of the lower courts which were

⁵⁷¹ *United States v. Mageean*, 649 F. Supp. 820, 829 (D. Nev. 1986), *aff'd mem.*, 822 F.2d 62 (9th Cir. 1987); *United States v. Reckmeyer*, 628 F. Supp. 616, 621-22 (E.D. Va. 1986).

⁵⁷² *United States v. Mageean*, 649 F. Supp. 820, 824 (D. Nev. 1986), *aff'd mem.*, 822 F.2d 62 (9th Cir. 1987).

⁵⁷³ See, e.g., articles discussed in *United States v. Nichols*, 841 F.2d 1485, 1490 n.3 (10th Cir. 1988).

⁵⁷⁴ E.g., *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988); *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987), *modified sub. nom. In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988)(en banc), *aff'd* U.S.L.W. (U.S. June 22, 1989) (No. 87-1729); *United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986); *United States v. Bello*, 470 F. Supp. 723 (S.D. Cal. 1979).

⁵⁷⁵ E.g., *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1983); *United States v. Long*, 654 F.2d 911 (3d Cir. 1981).

⁵⁷⁶ E.g., *United States v. Estevez*, 645 F. Supp. 869 (E.D. Wis. 1986); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985).

⁵⁷⁷ E.g., *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988); *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988); *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988)(en banc), *aff'd* 57 U.S.L.W. 4836 (U.S. June 22, 1989) (No. 87-1729).

⁵⁷⁸ *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1989) (fifth amendment due process issue).

⁵⁷⁹ *Caplin & Drysdale, Chartered, v. United States*, 57 U.S.L.W. 4836 (U.S. June 22,

resolved by these Supreme Court opinions will provide a basis for understanding these new cases.

The clearest analyses of the sixth amendment constitutional issue prior to the Supreme Court's rulings were presented in *United States v. Monsanto*,⁵⁸⁰ *United States v. Nichols*,⁵⁸¹ *United States v. Harvey*,⁵⁸² and *In Re Forfeiture Hearing as to Caplin & Drysdale, Chartered*.⁵⁸³ Although these courts ultimately reached different results, their reasoning processes were similar. Each of these courts held that the RICO forfeiture provisions did not exempt attorney's fees from forfeiture. Each court further recognized that the defendant's right to counsel of choice was only a qualified right which had to be balanced against any countervailing governmental interests. The courts differed, however, on the outcome of the balancing.

Initially, the Fourth Circuit held in *United States v. Harvey*, that the governmental interests in preserving the availability of forfeitable assets and "stripping racketeers and drug dealers of their 'economic power base' upon conviction" were outweighed by "an accused's right legitimately (i.e. without sham or fraud) to use his property, even that ultimately proven to be tainted by criminal conduct, to employ private counsel to defend him against criminal charges."⁵⁸⁴ On *en banc* review, however, this decision was reversed.

The *en banc* panel, in a case entitled *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, held that "there is no established Sixth Amendment right to pay an attorney with . . . illicit proceeds."⁵⁸⁵ The *Caplin & Drysdale* court held that any balancing of a defendant's right to counsel of his or her choice against governmental interests is "presumptively a matter of legislative prerogative,"⁵⁸⁶ not an issue for the courts. Thus, the Fourth Circuit held that "forfeiture defendants may be required to rely on appointed counsel if they do not have sufficient uncontested assets to hire a private attorney."⁵⁸⁷

By contrast, both the *Nichols* court and the original panel decision in *Monsanto*, found the balancing test a proper subject for judicial resolution. Further, both agreed that, at least in some

1989) (No. 87-1729); *United States v. Monsanto*, 57 U.S.L.W. 4826 (U.S. June 22, 1989) (No. 88-494).

⁵⁸⁰ 836 F.2d 74 (2d Cir. 1987), *rev'd*, 852 F.2d 1400 (2d Cir. 1988) (en banc), *rev'd and remanded*, 57 U.S.L.W. 4826 (U.S. June 22, 1989) (No. 88, 494).

⁵⁸¹ 841 F.2d 1485 (10th Cir. 1988).

⁵⁸² 814 F.2d 905 (4th Cir. 1987).

⁵⁸³ 837 F.2d 637 (4th Cir. 1988) (en banc).

⁵⁸⁴ *Harvey*, 814 F.2d at 924.

⁵⁸⁵ *Caplin & Drysdale*, 837 F.2d at 640.

⁵⁸⁶ *Id.* at 648.

⁵⁸⁷ *Id.* at 646.

circumstances, governmental interests in deterrance, preservation of assets, and separation of a defendant from his or her ill-gotten gains, outweighed a defendant's qualified right to counsel of his choice.⁵⁸⁸ These cases differed, however, as to when the balance weighed in favor of forfeiture. The Tenth Circuit held that "[t]hose who have access to assets can retain private counsel. Those who have no access to assets must rely on appointed counsel."⁵⁸⁹

The Second Circuit in the panel decision in *Monsanto* was more concerned about restraining assets prior to an offer of proof by the government that the assets would be subject to forfeiture. The court noted that unlike a bank robbery where the stolen money is clearly contraband or a "buy-bust" drug deal where the defendant is caught with drug proceeds in hand, property alleged to be subject to forfeiture cannot always be clearly and easily identified as "tainted."⁵⁹⁰ The *Monsanto* court reasoned:

As disinclined as we are to establish an absolute rule exempting property earmarked for attorney's fees from forfeiture, we are equally disinclined to postulate an absolute rule allowing the government to impose indigence and deprive RICO and CCE defendants of the opportunity to retain private counsel merely by obtaining an indictment. Such a rule would give the government "the ultimate tactical advantage of being able to exclude competent counsel as it chooses" simply by "appending a charge of forfeiture to an indictment under RICO" or CCE.⁵⁹¹

To resolve this dilemma, the *Monsanto* court required a post-indictment pretrial hearing in each instance in which forfeiture of assets used to pay attorney's fees would be sought.

Requiring an adversarial hearing, at which the government has the burden to demonstrate the likelihood that the assets are forfeitable, will provide a procedural check against the government's discretion to limit CCE and RICO defendants' choice of counsel simply by obtaining a forfeiture charge in the indictment. If the government cannot demonstrate the likelihood that a jury would find the assets to be the proceeds of crime, the interest of the defendant in using the property to retain counsel of choice should prevail.⁵⁹²

The *en banc* decision in *Monsanto* reversed this panel decision.⁵⁹³

⁵⁸⁸ *Nichols*, 841 F.2d at 1505; *Monsanto*, 836 F.2d at 80-81.

⁵⁸⁹ *Nichols*, 841 F.2d at 1508.

⁵⁹⁰ *United States v. Monsanto*, 836 F.3d 74, 82 (2d Cir. 1987), *rev'd*, 852 F.2d 1400 (2d Cir. 1988)(*en banc*), *rev'd and remanded*, 57 U.S.L.W. 4826 (U.S. June 22, 1989) (No. 88-454).

⁵⁹¹ *Id.* (quoting *United States v. Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985)).

⁵⁹² *Id.* at 84.

⁵⁹³ *United States v. Monsanto*, 852 F.2d 1400 (2d Cir.)(*en banc*), *rev'd and remanded*, 57 U.S.L.W. 4826 (U.S. June 22, 1989) (No. 88-494).

In doing so, the court illustrated the divergent reasoning in this area of the law.

[A] majority of the members of the in banc court, albeit for varying reasons, agree that the order of the district court denying Monsanto's motion should be vacated and the case remanded with instructions to modify the restraining order to permit Monsanto access to restrained assets to the "extent necessary to pay legitimate (that is, non-sham) attorney's fees in connection with the criminal charges against him. A majority of the members of the court also agree that any such fees paid to Monsanto's defense counsel are exempt from subsequent forfeiture pursuant to 21 U.S.C. § 853(c).⁵⁹⁴

A lengthy dissenting opinion presented a detailed rebuttal to each of the varying rationales of the majority judges. The dissent noted that the rationales ran the gamut from concluding "that the statute requires this result," "the sixth amendment requires it," "both the fifth and sixth amendments require it," and "the panel majority exceeded its authority by adding a hearing requirement to the statute, although if the statute called for a hearing it would pass constitutional muster."⁵⁹⁵

The Supreme Court concurred with these lower court decisions to the extent that it held that attorney's fees are not exempt from forfeiture.⁵⁹⁶ As to the balancing test under the sixth amendment "qualified" right to counsel, the Supreme Court held that the lower courts had not given sufficient weight to the governmental interest in forfeiture.⁵⁹⁷ In *Caplin & Drysdale, Chartered*, the Court listed three important governmental interests in forfeiture. 1) a pecuniary interest in funding law-enforcement activities with forfeitable assets; 2) preservation of forfeitable assets to pay restitution to victims of the crime; and 3) "to lessen the economic power of organized crime and drug enterprises."⁵⁹⁸ These "strong governmental interest[s] in obtaining full recovery of all forfeitable assets" is sufficient, according to the Supreme Court, to override "any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense."⁵⁹⁹

In reaching this conclusion, the Court emphasized that under the "relation back" principle,⁶⁰⁰ forfeitable assets do not belong to

⁵⁹⁴ *Id.* at 1402.

⁵⁹⁵ *Id.* at 1412.

⁵⁹⁶ *Caplin & Drysdale, Chartered v. United States*, 57 U.S.L.W. 4836 (U.S. June 22, 1989) (No. 87-1729); *United States v. Monsanto*, 57 U.S.L.W. 4826 (U.S. June 22, 1989) (No. 88-494).

⁵⁹⁷ *Caplin & Drysdale, Chartered*, 57 U.S.L.W. at 4837; *Monsanto*, 57 U.S.L.W. at 4830.

⁵⁹⁸ *Id.* at 4839.

⁵⁹⁹ *Id.* at 4840.

⁶⁰⁰ See *supra* text accompanying notes 256 and 368.

the defendant.⁶⁰¹ Thus, “[p]ermitting a defendant to use assets for his private purposes that, under this [forfeiture] provision, will become the property of the United States if a conviction occurs, cannot be sanctioned.”⁶⁰² Accordingly, the Court held that “[a] defendant has no Sixth Amendment right to spend another person’s money for services rendered by an attorney, even if those funds are the only way the defendant will be able to retain the attorney of his choice.”⁶⁰³

Because forfeiture of attorney’s fees does not violate the sixth amendment, pretrial restraining orders freezing funds which might have been used to pay attorney’s fees likewise is not in violation of a defendant’s qualified constitutional right to counsel.⁶⁰⁴ Nor is the potential for prosecutorial abuse of the restraining order provision sufficient to rise to the level of a fifth amendment violation.⁶⁰⁵ The Court did not decide, however, what procedural due process rights a defendant may have to a hearing after issuance of a pretrial restraining order.⁶⁰⁶

Despite the breadth of these Supreme Court rulings, federal prosecutors will still be limited with regard to forfeiture of attorney’s fees by Department of Justice guidelines.⁶⁰⁷ Those guidelines, which are not enforceable by defendants,⁶⁰⁸ provide that an Assistant United States Attorney cannot seek forfeiture of assets used to pay attorney’s fees unless it can be shown that the attorney had specific knowledge, other than through confidential communications with his client, that the asset was subject to forfeiture at the time he agreed to accept it as payment.⁶⁰⁹

VI. CONCLUSION

The RICO forfeiture laws are applicable to, and appropriate in, white collar criminal prosecutions. To prevail on such forfeitures, however, careful analysis, drafting and grand jury work is necessary to insure that forfeiture is sought of appropriate assets under a correct theory. Both prosecutors and defense attorneys must also be aware of the constitutional ramifications of forfeiture and the need

⁶⁰¹ *Monsanto*, 57 U.S.L.W. at 4830.

⁶⁰² *Id.*

⁶⁰³ *Caplin & Drysdale, Chartered*, 57 U.S.L.W. at 4838.

⁶⁰⁴ *Monsanto*, 57 U.S.L.W. at 4830.

⁶⁰⁵ *Id.*

⁶⁰⁶ *Id.*

⁶⁰⁷ 38 Crim. L. Rep. (BNA) 3001 (Oct. 2, 1985) (United States Attorney’s Manual (U.S.A.M.) 9-111.100 — 630).

⁶⁰⁸ *Id.* at 3003 (U.S.A.M. 9-111.400).

⁶⁰⁹ *Id.* at 3004 (U.S.A.M. 9-111.500).

to evaluate third party claims, preservation of assets, and exemptions of assets to pay living expenses. Consequently, RICO forfeiture in general and as applied in white collar criminal cases, is a developing area of law with which all federal criminal practitioners should be familiar.