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## RICO--Criminal Forfeiture of Proceeds of Racketeering Activity Under RICO

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## RICO—CRIMINAL FORFEITURE OF PROCEEDS OF RACKETEERING ACTIVITY UNDER RICO

Russello v. United States, 104 S. Ct. 296 (1983).

### I. INTRODUCTION

In response to widespread concern,<sup>1</sup> Congress in 1970 passed the Organized Crime Control Act (OCCA) to attack the problems arising from the growing influence of organized crime in America.<sup>2</sup> The Racketeer Influenced and Corrupt Organizations (RICO) chapter of OCCA (Title IX)<sup>3</sup> created a new substantive vehicle to reach racketeering activity and provided for both civil and criminal remedies, including criminal forfeiture.<sup>4</sup> In *Russello v. United States*,<sup>5</sup> the Supreme Court resolved a split of authority in the courts of appeals<sup>6</sup> by holding that profits and proceeds derived from racketeering activity constitute "interests" within the meaning of the RICO criminal forfeiture provision<sup>7</sup> and, therefore, are subject to forfeiture.<sup>8</sup>

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<sup>1</sup> See *infra* notes 92, 167-71 and accompanying text.

<sup>2</sup> Act of Oct. 15, 1970, Pub. L. No. 91-452, 84 Stat. 941. Three titles in the OCCA created substantive offenses: Title VIII (illegal gambling operations), Title IX (racketeering), and Title XI (importation, distribution, and storage of explosive materials). See *United States v. Turkette*, 452 U.S. 576, 589 (1981).

<sup>3</sup> Codified at 18 U.S.C. §§ 1961-1968 (1982) (effective date Oct. 15, 1970).

<sup>4</sup> See *infra* notes 7 & 15 for the text of RICO's relevant provisions.

<sup>5</sup> 104 S. Ct. 296 (1983).

<sup>6</sup> Compare *United States v. Martino*, 681 F.2d 952, 953 (5th Cir. 1982) (en banc) (holding proceeds to be included in forfeiture), *aff'd sub nom. Russello v. United States*, 104 S. Ct. 296 (1983), with *United States v. McManigal*, 708 F.2d 276, 283 (7th Cir. 1983), and *United States v. Marubeni America Corp.*, 611 F.2d 763, 769 (9th Cir. 1980) (holding proceeds not included).

<sup>7</sup> Section 1963 of RICO provides:

§ 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 accept-

The Court's expansive construction of RICO's forfeiture mechanism in *Russello* is consistent with both the ordinary meaning of "interest" in the statutory language, and the intent of Congress as reflected in RICO's legislative history. The *Russello* Court's approach preserves the effectiveness of RICO's forfeiture sanction while harmonizing the RICO statute's various parts. The decision will require lower courts to address a number of related issues involved in the application of the RICO forfeiture provision, such as what other types of property may constitute forfeitable "interests," the effect of greater potential criminal liability on existing procedural protections, the role of traditional restitutionary principles with respect to property subject to forfeiture, and the use of preconviction provisional equitable remedies.

## II. FACTS

On June 8, 1977, petitioner Joseph C. Russello and twenty-two others were indicted on charges of RICO conspiracy, RICO substantive violations, and mail fraud.<sup>9</sup> The eighty-three page, thirty-five count indictment alleged the existence of a widespread arson insurance fraud scheme, specifying sixty-nine overt acts and fifty-six predicate acts of racketeering activity.<sup>10</sup> The ring allegedly involved an insurance adjuster, a money lender, a real estate broker, arson "torches," and property owners,<sup>11</sup> and its activities allegedly re-

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ance 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.

18 U.S.C. § 1963 (1982).

<sup>8</sup> 104 S. Ct. at 300.

<sup>9</sup> *United States v. Martino*, 648 F.2d 367, 378 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2020 (1982), *vacated in part*, 681 F.2d 952 (5th Cir. 1982) (en banc) (vacating only as to forfeiture issue), *aff'd sub nom.* *Russello v. United States*, 104 S. Ct. 296 (1983). See also Joint Appendix at 5-50, *Russello* (indictment redacted to counts relating to defendant Russello) [hereinafter cited as Joint Appendix, Indictment].

<sup>10</sup> *Martino*, 648 F.2d at 378-79.

<sup>11</sup> Joint Appendix, Indictment, *supra* note 9, at 9-12.

sulted in the destruction of at least eighteen residential and commercial properties in Tampa and Miami, Florida during a three-year period.<sup>12</sup> After a fifty-two day trial in the United States District Court for the Middle District of Florida, and after twenty days of deliberation,<sup>13</sup> a jury brought back a total of eighty convictions against Petitioner and fifteen of his co-defendants.<sup>14</sup>

Petitioner Russello was convicted of conspiracy to commit RICO violations,<sup>15</sup> participation in RICO violations,<sup>16</sup> and mail

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<sup>12</sup> *Martino*, 681 F.2d at 953. For a detailed description of the properties and their respective roles in the alleged arson scheme, see Joint Appendix, Indictment, *supra* note 9, at 13-26.

<sup>13</sup> Joint Appendix at 1-4, *Russello* (docket entries). The complexity of the case also is reflected in the supplemental record at the appellate court level, which included eight volumes of pleadings, five boxes of exhibits, and the testimony of over two hundred witnesses contained in nearly one hundred volumes, comprising over 11,000 pages of material. *Martino*, 648 F.2d at 379. The Supreme Court, in turn, received four boxes of materials containing the certified original record and appellate court proceedings. Docket Sheet in the Supreme Court, entry no. 13 (Mar. 31, 1983), *Russello*.

<sup>14</sup> *Martino*, 648 F.2d at 378. Three other defendants pleaded guilty. *Id.* The jury found four defendants not guilty. *Id.*

<sup>15</sup> RICO conspiracy is declared unlawful in 18 U.S.C. § 1962(d) (1982). Section 1962 as a whole provides:

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for the purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or [sic: of] racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962 (1982). The lower court discussed the requirements for a RICO conspiracy conviction:

To convict on a charge of conspiracy, the government must prove that the defendant had knowledge of the conspiracy and that he intended to join in the objectives of the conspiracy. The degree of criminal intent necessary for participation in a conspiracy must be *at least* equal to that required for the substantive offense itself. . . . More specifically, to convict for conspiracy to violate RICO the govern-

ment must prove that the person objectively manifested, through words or actions, an agreement to participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes.

*Martino*, 648 F.2d at 394 (emphasis in original) (citations omitted). At least one commentator has criticized this formulation of RICO's conspiracy requirements and *Martino*'s language in particular. See Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 296 n.151 (1982). Professor Blakey was Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969-70, when the Organized Crime Control Act of 1970 was processed; he takes issue with *Martino*'s interjection of a "two personal act" rule into the RICO conspiracy framework. *Id.* at 296-97 n.151. He claims that such a rule is not justified by reference to the text of RICO or its legislative history and runs counter to general principles of conspiratorial liability and the goals of RICO. *Id.* The two personal act rule requires that a person agree to participate in at least two predicate acts in order to be held liable on RICO conspiracy grounds. *Id.* Circuits that have adopted this rule have expressed concern over the possible "guilt by association" implications of a lesser standard. See, e.g., *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981). Professor Blakey contends that "[t]he defendant's role in the enterprise, not specific individual offenses he agrees to commit, ought to suffice for RICO liability." Blakey, *supra*, at 297 n.151 (citation omitted).

Although Congress' main targets in enacting RICO were members of organized crime, see *infra* note 168, legislation attacking "organized crime" required a focus on specific illegal conduct perpetrated by such members, i.e., the commission of two or more crimes that form a pattern of racketeering activity, and not simply their status as known "organized criminals." See Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1981 N. ILL. U.L. REV. 225, 228 n.13. Cf. *Robinson v. California*, 370 U.S. 660, 666 (1962) (state cannot constitutionally punish mere status of being a drug addict). RICO therefore introduced several new concepts to the criminal law. See *infra* note 124 and accompanying text. RICO's definitional section clarifies some of its key terms:

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

fraud.<sup>17</sup> Russello had owned and insured the Central Professional Building in Tampa, Florida before the advent of the arson ring.<sup>18</sup> He later arranged for two arsonists to set fire to the front portion of his building, intending to use the proceeds to rebuild that section, which was less profitable than the newer rear portion of the build-

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...  
(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

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18 U.S.C. § 1961 (1982). One key definition not included in RICO, the absence of which in part generated the case that is the subject of this Note, is that of "interest." See *Russello*, 104 S. Ct. at 299.

<sup>16</sup> Specifically, Russello was convicted under 18 U.S.C. § 1962(c) (1982). For the text of Section 1962, see *supra* note 15. The panel opinion at the court of appeals level identified the essential components for a conviction under Section 1962(c):

Five necessary elements comprise a substantive RICO charge. The government must prove (1) the existence of the enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that he participated in the conduct of the affairs of the enterprise; and (5) that he participated through a pattern of racketeering activity.

*Martino*, 648 F.2d at 394. The "enterprise" in *Russello* was characterized as an "associated in fact" enterprise as defined in Section 1961(4). 18 U.S.C. § 1961(4) (1982). See *supra* note 15 (§ 1961 text). The Supreme Court, in a later case, legitimized such an interpretation of RICO's "enterprise" language. See *United States v. Turkette*, 452 U.S. 576, 580 (1981) (holding that the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises). The "patterns of racketeering activity" that arise under RICO "may be grouped into four broad, but not mutually exclusive categories: (1) violence; (2) provision of illegal goods and services; (3) corruption in the labor movement or among public officials; and (4) commercial and other forms of fraud." Blakey, *supra* note 15, at 300-06 (footnotes omitted).

<sup>17</sup> 18 U.S.C. § 1341 (1982). Section 1341 provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon . . . shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

*Id.* In simple terms, "[t]he two basic elements of a mail fraud scheme are (1) the scheme to defraud, and (2) causing a mailing for the purpose of executing the scheme." *Martino*, 648 F.2d at 394 (quoting *United States v. Green*, 494 F.2d 820, 823 (5th Cir.), *cert. denied*, 419 U.S. 1004 (1974)).

<sup>18</sup> Brief for Petitioner at 4, *Russello*. Russello had obtained fire insurance in the amount of \$925,000 on the building and \$7500 on the contents. Joint Appendix, Indictment, *supra* note 9, at 48.

ing.<sup>19</sup> After the fire, Russello collected \$340,043.09 in insurance proceeds.<sup>20</sup> He paid the insurance adjuster, another member of the arson ring, \$30,000 for his assistance in obtaining the highest possible payment.<sup>21</sup>

Upon submission to the jury of a special verdict regarding the extent of the interest subject to forfeiture,<sup>22</sup> the jury found insurance money received by four defendants in various insurance fraud schemes, including the proceeds received by Russello, to be subject to forfeiture to the government.<sup>23</sup> The trial court subsequently issued an order of forfeiture as to the four defendants,<sup>24</sup> and meted out other penalties.<sup>25</sup> Russello appealed.<sup>26</sup>

On appeal to the Fifth Circuit,<sup>27</sup> a three-judge panel affirmed the convictions of Russello, as well as those of a majority of the other convicted defendants.<sup>28</sup> The appellate panel, however, re-

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<sup>19</sup> Brief for the United States at 3, *Russello*. The fire spread, however, endangering the lives of several tenants. *Id.*

<sup>20</sup> *Id.* at 3-4.

<sup>21</sup> *Id.*

<sup>22</sup> The Federal Rules of Criminal Procedure require a special verdict in certain cases. Rule 31 states:

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.

FED. R. CRIM. P. 31(e).

<sup>23</sup> *Martino*, 681 F.2d at 953. Russello's forfeiture amounted to \$340,043.09. The other three defendants forfeited \$4000, \$2500, and \$4,266.83, respectively. *Id.*; Joint Appendix at 54-57, *Russello* (special verdicts finding four insurance payments to Russello to be interests forfeited to the United States, Feb. 28, 1978). The government had sought the forfeiture of a total of \$508,492.69, consisting of nineteen insurance payments from the various defendants under RICO's criminal forfeiture provision. Joint Appendix, Indictment, *supra* note 9, at 37-47.

<sup>24</sup> Joint Appendix at 58-60, *Russello* (Order and Judgment of Forfeiture, Nov. 17, 1978). The government initially had sought to have Russello's ownership interest and property rights in both the corporation and the real property involved in the violations forfeited as "source[s] of influence" over the RICO enterprise (§ 1963(a)(2)), in addition to seeking forfeiture of the insurance proceeds. Joint Appendix, Indictment, *supra* note 9, at 46. The trial court, however, granted an acquittal as to the forfeiture of Russello's interests in the corporation and the real property. Brief for Petitioner at 28, *Russello*.

<sup>25</sup> *Martino*, 648 F.2d at 379 n.1 (setting out sentences for various defendants). The trial court sentenced Russello to a total of two ten-year terms for the RICO violations (§ 1962(d) conspiracy and § 1962(c) substantive) and a total of two five-year terms for the mail fraud violations (two), all to run concurrently. *Id.*; Joint Appendix at 51-53, *Russello* (Judgment and Probation/Commitment Order, Apr. 7, 1978).

<sup>26</sup> Joint Appendix at 61, *Russello* (Notice of Appeal, Nov. 27, 1978).

<sup>27</sup> This court has since become a part of the new United States Court of Appeals for the Eleventh Circuit. See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980) (effective date Oct. 1, 1981).

<sup>28</sup> *United States v. Martino*, 648 F.2d 367, 406 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2020 (1982), *vacated in part*, 681 F.2d 952 (5th Cir. 1982) (en banc) (vacating only as to

versed the district court's order of forfeiture of insurance proceeds.<sup>29</sup> This portion of the panel opinion was later vacated pending an en banc rehearing on the issue.<sup>30</sup> The appellate panel characterized the question of whether the term "interest" in RICO's criminal forfeiture provision, Section 1963(a), includes income or receipts from racketeering activity as one of first impression in the Fifth Circuit.<sup>31</sup> Relying primarily on the district court decisions in *United States v. Meyers*<sup>32</sup> and *United States v. Thevis*,<sup>33</sup> and the Ninth

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forfeiture issue), *aff'd sub nom. Russello v. United States*, 104 S. Ct. 296 (1983). The appellate court, per Circuit Judge Politz, rejected several attacks by defendants on their convictions and on RICO itself. Various appellants challenged the constitutionality of RICO (on, *inter alia*, associational, vagueness, ex post facto, and tenth amendment grounds); attacked the indictment (on sufficiency, duplicity, and misapplication of RICO grounds); asserted double jeopardy problems (because of prosecution of defendants on both RICO conspiracy and substantive violations); appealed a number of pretrial matters; urged reversible error in not severing trials; claimed several trial errors (including both prosecutorial and defense counsel misconduct); questioned the sufficiency of the evidence on both the RICO and mail fraud charges; and claimed new evidence had been discovered. *Id.* at 380-407. (For a criticism of the *Martino* panel opinion's formulation of RICO's conspiracy requirements, see *supra* note 15.) With regard to *Russello*, the court of appeals found *Russello*'s association with both the arsonist and the insurance adjuster to support adequately the inference of his association with the enterprise, despite his denial of any knowledge of the enterprise as charged in the case. *Martino*, 648 F.2d at 405-06. The court also rejected *Russello*'s contention that his two mail fraud convictions did not constitute a pattern of racketeering activity because they were based on a single scheme that resulted in two convictions because there happened to be two mailings, as well as his claim that his mail fraud convictions were based not on the charge specified in the indictment of falsely disavowing knowledge of who started the fire, but on his exaggeration of the building's value on the claim. *Id.*

<sup>29</sup> Joint Appendix at 62, 68 (*Martino* panel opinion redacted to deleted forfeiture issue discussion) [hereinafter cited as Joint Appendix, *Martino* panel opinion on forfeiture].

<sup>30</sup> The *Martino* panel opinion's discussion of the forfeiture issue was vacated and deleted from publication in the reporters after the Fifth Circuit granted an en banc rehearing. See *Martino*, 648 F.2d at 407-09. The panel court's discussion can be found in full in the advance sheets, slip op. at 8274-76 (5th Cir. June 19, 1981), and is reproduced in the Joint Appendix in *Russello*. Joint Appendix, *Martino* panel opinion on forfeiture, *supra* note 29, at 62-69.

<sup>31</sup> Joint Appendix, *Martino* panel opinion on forfeiture, *supra* note 29, at 64.

<sup>32</sup> 432 F. Supp. 456 (W.D. Pa. 1977). The district court in *Meyers* denied a motion to quash an entire indictment because although the government had failed to specify the extent of the interest or property subject to forfeiture as required by Rule 7(c) of the Federal Rules of Criminal Procedure, there were no longer any properly forfeitable interests still in existence because the government had conceded that the evidence did not establish any participation in the enterprise by the defendant for at least five years' time. *Id.* at 461. See FED. R. CRIM. P. 7(c)(2) ("When an offense charged may result in a criminal forfeiture, the indictment . . . shall allege the extent of the interest or property subject to forfeiture.").

The *Meyers* court discussed the definition of "interest" under § 1963, explaining that "the more natural interpretation is that an 'interest' is akin to a continuing proprietary right in the nature of partnership or stock ownership (or holding a debt or claim, as distinguished from 'equity' investment) rather than mere dividends or distributed prof-



Circuit's decision in *United States v. Marubeni America Corp.*,<sup>34</sup> the Fifth Circuit panel held that forfeiture permitted by the statute extended only to interests "in an enterprise," and not to the fruits or proceeds of an illegal RICO enterprise.<sup>35</sup> The panel presumed a congressional intent to "strictly limit" the forfeitures permitted under Section 1963 because of their *in personam* character.<sup>36</sup> The

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its." 432 F. Supp. at 461 (footnote omitted). The *Meyers* district court contrasted RICO's forfeiture provision with the forfeiture provision embodied in the Comprehensive Drug Abuse Prevention and Control Act, which by its terms specifically applies to "profits," as support for a restricted reading of RICO's forfeiture language. *Id.* at n.18. See 21 U.S.C. § 848(a)(2) (1982) (Comprehensive Drug Abuse Prevention and Control Act of 1970, Act of Oct. 27, 1970, Pub. L. No. 91-513, 84 Stat. 1265).

<sup>33</sup> 474 F. Supp. 134 (N.D. Ga. 1979). The district court in *Thevis* held that § 1963(a)(1) is limited to interests in the enterprise acquired or maintained in violation of § 1962 as part of its finding that RICO is neither unconstitutionally vague nor unconstitutionally ambiguous. *Id.* at 142. The court relied on, *inter alia*, the language of the *Meyers* court. *Id.* The *Thevis* court did posit, however, that forfeitable interests in the enterprise could exist even in the case of associations in fact if property had been "informal[ly] contribut[ed]" to the association "at the risk of the association's success." *Id.* at 143.

<sup>34</sup> 611 F.2d 763 (9th Cir. 1980). The *Martino* appellate court panel characterized *Marubeni* as a "well-reasoned opinion." Joint Appendix, *Martino* panel opinion on forfeiture, *supra* note 29, at 66. The Ninth Circuit in *Marubeni* was the first court of appeals to address the issue of whether profits and proceeds of racketeering activity fell within the ambit of § 1963(a)(1). A three-judge panel in *Marubeni* held that § 1963(a)(1) applied only to interests in an enterprise that have been illegally acquired or maintained and did not encompass \$8.8 million in contract awards obtained as a result of RICO violations. 611 F.2d at 769. *Cf.* *United States v. Godoy*, 678 F.2d 84 (9th Cir. 1982) (holding that commercial real estate purchased with profits derived from racketeering activity is subject to forfeiture), *cert. denied*, 104 S. Ct. 390 (1983). Interestingly, the third judge on the *Marubeni* panel, a district judge from the Eastern District of Virginia sitting by designation, also later participated in the Seventh Circuit's three-judge panel opinion in *United States v. McManigal*, 708 F.2d 276 (7th Cir. 1983), which expressly rejected the en banc Fifth Circuit's decision in *Martino* in favor of *Marubeni*'s reasoning. See *Marubeni*, 611 F.2d at 763; *McManigal*, 708 F.2d at 278.

The Ninth Circuit in *Marubeni*, although characterizing the government's position regarding forfeiture as "attractive," concluded that such an interpretation did "not square with the statute Congress wrote." 611 F.2d at 766. The government in its memorandum response to Russello's petition for certiorari pointed out that although it had not been relied upon by the en banc *Martino* court, there was a factual distinction between *Marubeni* and *Martino*: although the interest sought to be forfeited in *Marubeni* involved all monies received under a public contract obtained through bid-rigging, including both profits and actual costs of goods and services furnished under that contract, the insurance proceeds forfeited in *Martino* consisted solely of profit from arson and fraud. Memorandum for the United States at 4 n.3, *Russello*. The government acknowledged, however, that *Marubeni*'s reasoning would almost certainly require the Ninth Circuit to disallow the forfeiture at issue in *Martino*. *Id.* For criticism of *Marubeni*, see Blakey, *supra* note 15, at 321 n.178; Weiner, *supra* note 15, at 241-43; Note, *RICO, Are the Courts Construing the Legislative History Rather than the Statute Itself?*, 55 NOTRE DAME LAW. 777, 783-89 (1980). For support of *Marubeni*, see Taylor, *Forfeiture under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 387 (1980).

<sup>35</sup> Joint Appendix, *Martino* panel opinion on forfeiture, *supra* note 29, at 66.

<sup>36</sup> *Id.* at 66-67. For a discussion of the distinction between *in personam* forfeiture and

appellate panel also rejected as unpersuasive an argument based on the practical problems that such an interpretation would entail in a case involving a wholly illegal "enterprise in fact" in which, by definition, there are no legal interests to forfeit.<sup>37</sup>

Upon petition, the Fifth Circuit ordered an en banc rehearing and vacated the *Martino* panel opinion as to the forfeiture issue.<sup>38</sup> The full Fifth Circuit, by a vote of 16-7, affirmed the forfeiture judgment entered by the district court.<sup>39</sup> In reasoning similar to that later employed by the Supreme Court, the en banc appellate court looked initially to the language of the statute itself.<sup>40</sup> The court of appeals noted that Section 1963(a)(1) does not on its face limit forfeitable interests to those in an enterprise, and that RICO offers no definition of the term "interest."<sup>41</sup> The court then examined the operation and interrelation of RICO's various parts,<sup>42</sup> concluding, *inter alia*, that to read an "enterprise" limitation into Section 1963(a)(1) would render it mere surplusage and duplicative of Section 1963(a)(2).<sup>43</sup>

The court next explored RICO's legislative history. The en

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*in rem* forfeiture, as well as a discussion of the significance of RICO's revival of *in personam* forfeiture, see *infra* notes 131-37 and accompanying text. The court noted that such *in personam* forfeitures had previously been prohibited by 18 U.S.C. § 3563 (1982), and pointed to comments supporting limitation of forfeiture to interests in an enterprise contained in a letter by Deputy Attorney General Richard Kleindienst during legislative hearings on a predecessor bill. Joint Appendix, *Martino* panel opinion on forfeiture, *supra* note 29, at 66-67. For a discussion of the import of the Kleindienst letter, see *infra* notes 111-13 and accompanying text. The court also found significant Congress' use of the more specific term "profits" in a contemporary bill's forfeiture provision. Joint Appendix, *Martino* panel opinion on forfeiture, *supra* note 29, at 67. See 21 U.S.C. § 848(a)(2) (1982) (Comprehensive Drug Abuse Prevention and Control Act of 1970, Act of Oct. 27, 1970, Pub. L. No. 91-513, 84 Stat. 1265).

<sup>37</sup> Joint Appendix, *Martino* panel opinion on forfeiture, *supra* note 29, at 67-68. Although acknowledging that its holding occasioned problems for associations with no legal interests, such as the one involved in *Martino*, the court reasoned that the Department of Justice had itself recognized the limitations of forfeiture involving individuals associated in fact. *Id.* The *Martino* panel affirmed the forfeiture of another defendant's interest in his two companies because it fell "squarely" with § 1963(a)(2)'s language aimed at "any interest . . . affording a source of influence over" the enterprise. Joint Appendix, *Martino* panel opinion on forfeiture, *supra* note 29, at 68. See 18 U.S.C. § 1963(a)(2) (1982).

<sup>38</sup> Joint Appendix at 73-74, *Russello* (Order for Rehearing En Banc, Oct. 14, 1981).

<sup>39</sup> *United States v. Martino*, 681 F.2d 952, 953 (5th Cir. 1982) (en banc), *aff'd sub nom.* *Russello v. United States*, 104 S. Ct. 296 (1983).

<sup>40</sup> *Id.* at 954.

<sup>41</sup> *Id.*

<sup>42</sup> For a detailed discussion of several approaches to construing the relationship of §§ 1962 and 1963, see *infra* notes 138-64 and accompanying text.

<sup>43</sup> *Martino*, 681 F.2d at 954-56. See *supra* note 7 for provisions of § 1963. The court explained further that the district court in *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979), on which the *Martino* panel opinion had in part relied, had wrongly

banc opinion emphasized that Congress had been concerned with the economic influence wielded by organized crime by virtue of its ill-gotten gains.<sup>44</sup> The Fifth Circuit characterized RICO's forfeiture provision as a "two-pronged attack on the sources of economic power which feed the coffers and activities of organized crime . . . demand[ing] both divestiture of power over the enterprise itself and seizure of the income derived from racketeering activities."<sup>45</sup> The en banc court also took notice, as did the panel opinion, of the problems presented by associations in fact, which often have nothing to forfeit but ill-gotten proceeds.<sup>46</sup> The court found it persuasive that the two-part forfeiture provision embodied in Section 1963(a), which contains a provision (Section 1963(a)(1)) that is not by its language limited to interests "in an enterprise" and another (Section 1963(a)(2)) that is so limited, developed from a single forfeiture provision that had been limited to interests in the enterprise.<sup>47</sup> Finally, the Fifth Circuit opinion, recognizing that its holding "squarely conflict[ed]" with the Ninth Circuit's decision in *United States v. Marubeni America Corp.*,<sup>48</sup> dismissed a number of justifications cited by that court.<sup>49</sup>

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construed the relationship between RICO's various provisions. *Martino*, 681 F.2d at 955 nn.14-15.

<sup>44</sup> *Martino*, 681 F.2d at 956-59. See also *infra* note 171 and accompanying text. The court, in passing, explained that it did not need to resolve a suggested conflict between RICO's liberal construction clause and the rule of lenity because absent an ambiguity in RICO's language, which the court declined to find, neither interpretive aid was called into operation. 681 F.2d at 956 n.16. For a fuller discussion of both RICO's liberal construction clause and the rule of lenity, see *infra* notes 126-30 and accompanying text.

<sup>45</sup> 681 F.2d at 957. The court thus rejected an argument that Congress' only relevant objective was divesting the racketeer of his position of power in the offending enterprise. *Id.* at 957 & n.19.

<sup>46</sup> *Id.* at 958. The court commented that it would run contrary to Congress' broad attack on organized crime "to insulate from forfeiture the sole product of many racketeering activities," continuing that such a construction would encourage rather than deter bankruptcy and other schemes yielding largely cash revenues. *Id.*

<sup>47</sup> *Id.* The opinion rejected as inconclusive the Kleindienst letter relied upon by the panel opinion, see *supra* note 36, noting that it had been submitted as a commentary on an original unitary forfeiture provision with an express enterprise limitation, and that it had not been put forth as a technical commentary on the scope of the expanded bill. *Id.* at 958-59.

<sup>48</sup> 611 F.2d 763 (9th Cir. 1980).

<sup>49</sup> *Martino*, 681 F.2d at 959-60. The *Martino* court refused to attach the significance that the *Marubeni* court had to § 1962(a)'s "1% investment exception." *Id.* at 960. See *supra* note 15 for § 1962(a)'s provisions. The *Marubeni* court reasoned that "Congress would not have established rules for the investment of racketeering income, enforced by the penalty of criminal forfeiture, if it intended the government to seize that income regardless of how it was used." *Marubeni*, 611 F.2d at 767. The Fifth Circuit in *Martino* explained its contrary view that the exception serves only to limit the category of illegal activities, and "does not immunize from forfeiture the fruits of activities that are made illegal under other provisions of § 1962." *Martino*, 681 F.2d at 960. For further discus-

The *Martino* court "intimate[d] no views" as to whether there existed an obligation for the government to trace money proceeds to their current form before a forfeiture collection.<sup>50</sup> Circuit Judge Politz, author of the *Martino* panel opinion and its vacated forfeiture discussion, dissented with six others on grounds substantially similar to those expressed in the panel opinion.<sup>51</sup> The Supreme Court thereafter granted certiorari to the Fifth Circuit<sup>52</sup> and heard oral ar-

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sion of the "1% investment exception," see *infra* note 164 and accompanying text. The Fifth Circuit also rejected *Marubeni*'s reliance on Congress' use of the more specific term "profits" in the Comprehensive Drug Abuse Prevention and Control Act of 1970 as relevant to the RICO's drafters' intent in using the more general term "interest." 681 F.2d at 960.

<sup>50</sup> 681 F.2d at 960-61. Although the en banc appellate court returned the case to the district court for a decision on the collectibility of forfeiture orders in the first instance, the court of appeals observed that commentators had suggested application of traditional restitution principles in such a case. *Id.* at 961.

<sup>51</sup> *Id.* at 962 (Politz, J., dissenting). See *supra* notes 27-37 and accompanying text. Initially, the dissenting opinion objected to the majority's framing of the issue before the court, noting that "perhaps the more precise issue at bar" was whether under RICO's criminal forfeiture scheme, "a money judgment may be rendered against a defendant, in a sum equal to the amount paid under a fire insurance policy, for a loss occasioned by arson in a setting violative of RICO." 681 F.2d at 962 (Politz, J., dissenting). Judge Politz asserted at the outset that society's abhorrence of forfeitures, especially in *personam* forfeitures, required that such provisions be "most charily assessed." *Id.* The dissent counseled against expanding the term "interest" to include income or profits, stating that such an expansion is "a matter best left to the legislative branch, for it represents a significant policy decision." *Id.* Judge Politz viewed the decisions in *Marubeni*, *Thevis*, and *Meyers* as persuasive and reiterated a number of his panel opinion justifications. *Id.* at 963-65 (Politz, J., dissenting). Further, the opinion, assuming *arguendo* that insurance proceeds were properly forfeitable, raised a question as to the propriety of applying the forfeiture sanction to Russello and one other defendant. *Id.* at 965 (Politz, J., dissenting). Judge Politz explained that inasmuch as the insurance policies had been obtained prior to the advent of the RICO arson ring, the insurance proceeds might be viewed as a "different manifestation of a pre-RICO asset," and therefore not necessarily the "fruits" of racketeering activity. *Id.* Finally, the dissent identified a number of practical difficulties inherent in the majority's holding:

Regardless, these proceeds, based on arson and the payments of which were induced by fraud, are very likely to be defeasible. One would expect that under the insurance contract, and controlling state law, the insurer would be entitled to recapture the payments. In that event, what happens to the forfeiture decrees which are non-asset oriented money judgments, collectible from the defendants and their estates? Assuming recapture by the insurer, or diversion of all or a portion to an innocent third party such as a mortgage holder, will the United States still have an enforceable money judgment against the defendant and his estate? Presumably so, and if that presumption is correct, what about the concept of divestiture of ill-gotten gains and the separation of the convicted defendant from the fruits of his illegal labors? Will this matter not in fact resolve into the forfeiture becoming an additional fine? Did Congress really intend to establish a latent fine with a potential for exceeding the maximum statutorily stated fine ten-fold, twenty-fold or one hundred-fold?

*Id.*

<sup>52</sup> *Russello v. United States*, 103 S. Ct. 721 (1983) (grant of certiorari). Certiorari was granted on January 10, 1983. Petitioner Russello asserted that a writ of certiorari was justified because, *inter alia*, as the *Martino* decision conflicted with a string of other

gument<sup>53</sup> on the question of whether the term "interest" as used in Section 1963(a)(1) includes income or profits derived from a pattern of racketeering activity.<sup>54</sup>

### III. THE SUPREME COURT'S DECISION

The Supreme Court, in an opinion authored by Justice Blackmun for a unanimous Court, affirmed the judgment of the en banc Court of Appeals for the Fifth Circuit.<sup>55</sup> The Court held that profits and proceeds derived from racketeering activity constitute "interests" within the meaning of Section 1963(a)(1) and are therefore subject to forfeiture.<sup>56</sup>

Characterizing the litigation as "yet another case" concerning RICO,<sup>57</sup> the Court initially framed its task as one of "interpretation"

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cases, including, petitioner claimed, *Marubeni*, *Thevis*, and *Meyers*, as well as *United States v. Long*, 654 F.2d 911 (3d Cir. 1981); *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977); and *United States v. Godoy*, 678 F.2d 84 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 390 (1983). Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals at 6, 16, *Russello* [hereinafter cited as *Petition for Certiorari*]. The government, characterizing the issue as a "potentially significant question" of "substantial and continuing importance," joined in the prayer that a writ of certiorari be granted to resolve any conflicts with what it viewed as a "correct" decision in the court below. Memorandum for the United States at 4-6, *Russello*; *Russello*, 104 S. Ct. at 298 n.1.

<sup>53</sup> See 34 CRIM. L. REP. (BNA) 4038 (Oct. 12, 1983) (summarizing and excerpting oral argument in *Russello*). Argument was heard by the Court on October 5, 1983.

<sup>54</sup> Petition for Certiorari, *supra* note 52, at i (framing question presented). The petitioner viewed the issue as a "purely legal question" independent of the facts elicited at trial. *Id.* at 5. The government regarded the issue as focused on the forfeiture of "uninvested" profits of racketeering activity, thereby distinguishing it from the Ninth Circuit's decision in *United States v. Godoy*, 678 F.2d 84 (9th Cir. 1982) (holding that commercial real estate purchased with profits derived from racketeering activity is subject to forfeiture), *cert. denied*, 104 S. Ct. 390 (1983). Memorandum for the United States at 5 & n.4, *Russello*.

<sup>55</sup> *Russello v. United States*, 104 S. Ct. 296, 304 (1983), *aff'g* *United States v. Martino*, 681 F.2d 952 (5th Cir. 1982).

<sup>56</sup> *Id.* at 300. The Court did, however, allude to possible limits on its decision: In our ruling today, we recognize that we have not resolved any ambiguity that might be inherent in the terms "profits" and "proceeds." Our use of those terms is not intended to suggest a particular means of calculating the precise amount that is subject to RICO forfeiture in any given case. We hold simply that the "interests" subject to forfeiture under § 1963(a)(1) are not limited to interests in an enterprise. *Id.* at 304 n.3.

<sup>57</sup> *Id.* at 297. For example, the Court had only two years before broadly interpreted another key term in RICO, "enterprise," to encompass illegitimate enterprises, such as a series of criminal acts unrelated to a legitimate business operation, as well as legitimate enterprises, thereby resolving a split in the circuits similar to that encountered in *Russello* and eschewing a substantially more restricted reading of the RICO statute. *United States v. Turkette*, 452 U.S. 576 (1981), *rev'g* 632 F.2d 896 (1st Cir. 1980). For an in-depth analysis of the *Turkette* decision, see Note, *RICO Extended to Apply to Wholly Illegitimate Enterprises*: *United States v. Turkette*, 101 S. Ct. 2524 (1981), 72 J. CRIM. L. & CRIMINOLOGY 1426 (1981). As to RICO generally, see Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); Meeker & Dombrink, *Crimi-*

of Section 1963(a)(1)'s language that a RICO violator forfeit "any interest he has acquired or maintained in violation of section 1962."<sup>58</sup> The opinion took note of a then-recent decision, *United States v. McManigal*,<sup>59</sup> that had been handed down after the parties in *Russello* had briefed their positions.<sup>60</sup> In *McManigal*, the Seventh Circuit agreed with the Ninth Circuit's *Marubeni* decision and read the term "interest" in Section 1963(a)(1) as limited to interests in an enterprise.<sup>61</sup>

The *Russello* Court, drawing on its earlier decision in *United States v. Turkette*,<sup>62</sup> in which the Court had interpreted the term "enterprise," began its analysis with the language of the statute: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" <sup>63</sup> In the instant case, Justice Blackmun wrote for the Court that *Russello* "definitely" had "acquired" the insurance proceeds "in violation of section 1962," specifically Section 1962(c).<sup>64</sup> If the insurance monies qualified as an "interest," therefore, they would be forfeitable.<sup>65</sup>

Finding no specific definition of the term "interest" in RICO,

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*nal RICO and Organized Crime: An Analysis of Appellate Litigation*, 20 CRIM. L. BULL. 309 (1984); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980); Note, *supra* note 34; Note, *Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 VAND. L. REV. 441 (1980).

<sup>58</sup> 104 S. Ct. at 297. See 18 U.S.C. § 1963(a)(1) (1982); see *supra* note 7 for full text of § 1963. The Court explained: "The sole issue in this case is whether profits and proceeds derived from racketeering constitute an 'interest' within the meaning of this statute and are therefore subject to forfeiture." 104 S. Ct. at 299.

<sup>59</sup> 708 F.2d 276 (7th Cir. 1983).

<sup>60</sup> *Russello*, 104 S. Ct. at 298.

<sup>61</sup> *McManigal*, 708 F.2d at 283. The *McManigal* court noted that the arguments for and against including profits and proceeds within § 1963(a)(1) had been "exhaustively explored" by the *Marubeni* and *Martino* courts. *Id.* The Seventh Circuit, however, opted for *Marubeni*'s reasoning "pending a contrary interpretation by the Supreme Court." *Id.* at 287. Certiorari in *Russello* had been granted by that time. The *McManigal* court construed § 1963(a)(1) as not reaching legal fees that the defendant had obtained from clients by fraudulently processing property tax assessment cases. *Id.* at 283. The district court in *McManigal* had ordered forfeiture of defendant's forty percent interest in \$249,250 in legal fees, or \$99,700. *Id.* at 278. The government had also unsuccessfully sought forfeiture of the legal fees under (a)(2) as accounts receivable assets of the law offices relating back to the time of the offense, and therefore an interest in the enterprise. *Id.* at 283, 287.

<sup>62</sup> 452 U.S. 576 (1981). For a discussion of *Turkette*, see *supra* note 57.

<sup>63</sup> *Russello*, 104 S. Ct. at 299 (quoting *Turkette*, 452 U.S. at 580 (quoting in part *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980))).

<sup>64</sup> *Id.* For the language of § 1962(c), see *supra* note 15.

<sup>65</sup> 104 S. Ct. at 299.

the opinion looked to the "ordinary meaning" of the word.<sup>66</sup> The Court pointed to several dictionary definitions of "interest" and suggested that those definitions lead to the conclusion that the "ordinary meaning of 'interest' surely encompasses a right to profits or proceeds."<sup>67</sup> The Court concluded: "It is thus apparent that the term 'interest' comprehends all forms of real and personal property, including profits and proceeds."<sup>68</sup>

The Court analogized its approach in defining the term "interest" to its previous efforts to define "property" interest for purposes of the due process clause of the fourteenth amendment.<sup>69</sup> Reasoning that Congress undoubtedly did not wish its language in RICO to be limited by "rigid and technical definitions drawn from other areas of the law,"<sup>70</sup> the opinion observed that Congress had opted to use terms of breadth such as "enterprise," "racketeering activity," and "participate," as well as "interest."<sup>71</sup> Justice Blackmun added that Petitioner himself had not attempted to define the term "interest."<sup>72</sup>

Petitioner Russello argued that a relationship exists between what is subject to forfeiture as a result of racketeering activity and what constitutes such racketeering activity.<sup>73</sup> Russello contended that because an "interest" connotes at the least an interest in "something," Section 1962's listing of RICO violations, and its "enterprise" requirement in particular, should be read as delineating the scope of that "something" and, therefore, as imposing upon Section 1963 the requirement that the "interest" be in an enter-

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<sup>66</sup> *Id.* (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962) ("start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used")).

<sup>67</sup> *Id.* The Court cited definitions appearing in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1178 (1976) ("interest" includes, *inter alia*, a "good," "benefit," or "profit"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1979) (includes "profit," "welfare," or "benefit"); and BLACK'S LAW DICTIONARY 729 (5th ed. 1979) ("most general term that can be employed to denote a right, claim, title or legal share in something"). 104 S. Ct. at 299.

<sup>68</sup> 104 S. Ct. at 299.

<sup>69</sup> *Id.* The Court noted that "'property' denotes a broad range of interests." *Id.* (quoting *Perry v. Sindermann*, 408 U.S. 593, 601 (1972)). The Court also cited *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982), and *Jago v. Van Curen*, 454 U.S. 14, 17-18 (1981). *Russello*, 104 S. Ct. at 299.

<sup>70</sup> 104 S. Ct. at 299-300. *Cf.* *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) ("'property interests' . . . are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings'").

<sup>71</sup> 104 S. Ct. at 300. *See supra* note 15 (text of §§ 1961, 1962).

<sup>72</sup> 104 S. Ct. at 300.

<sup>73</sup> *Id.*

prise.<sup>74</sup> The Supreme Court rejected this tack, one that had been adopted by a number of lower courts,<sup>75</sup> and noted that every property interest could be described as an interest in something, even if only a "possessory interest in currency."<sup>76</sup> Thus, the Court believed that it was unnecessary to define the "something" in which a RICO forfeitable interest is held as the RICO "enterprise."

Having concluded that the statutory language of Section 1963(a)(1) "plainly covers" Russello's insurance proceeds, the Supreme Court drew support for its finding from RICO's structure.<sup>77</sup> The opinion pointed out that other parts of the RICO statute contain less expansive language than that appearing in Section 1963(a)(1), such as Section 1963(a)(2)'s "interest in . . . any enterprise" phraseology, and that this difference should be presumed intentional: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."<sup>78</sup> Justice Blackmun opined that had it so intended, Congress would have expressly restricted Section 1963(a)(1) to interests in an enterprise as it had restricted (a)(2).<sup>79</sup> Justice Blackmun refused "to ascribe this difference to a simple mistake in draftsmanship."<sup>80</sup>

The Court next examined the relationship between Sections 1963(a)(1) and (a)(2). Justice Blackmun's opinion first noted that the present two-part forfeiture provision, with only one of the subsections limited on its face to interests "in any enterprise," evolved from a unitary provision that had limited forfeiture to "all interest in the enterprise."<sup>81</sup> The Court explained that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."<sup>82</sup> The Court's opinion rejected the reasoning of some lower courts that had found the existence of Subsection (a)(2) to preclude a broad interpretation of "interest" in (a)(1), and contended that an expansive construction, although admittedly allowing

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<sup>74</sup> *Id.* For more detailed analysis of the proper relationship between §§ 1962 and 1963, see *infra* notes 138-64 and accompanying text.

<sup>75</sup> See *infra* notes 145-52 and accompanying text.

<sup>76</sup> 104 S. Ct. at 300.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 301. See S. 1861, 91st Cong., 1st Sess. (1969); see also *infra* notes 108-10 and accompanying text.

<sup>82</sup> 104 S. Ct. at 301 (citing *Arizona v. California*, 373 U.S. 546, 580-81 (1963)).



some overlap to occur between the two subsections, did not render (a)(2) "mere surplusage."<sup>83</sup> The Court stated that unlike interests forfeitable under Subsection (a)(1), which must be "acquired or maintained in violation of section 1962," interests forfeitable under (a)(2) need not necessarily be illegally acquired.<sup>84</sup> The Court ob-

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* The Court concluded: "Thus, there are things forfeitable under one, but not the other, of each of the subsections." *Id.* The Court elaborated in a footnote: "There may well be factual situations to which both subsections apply. The subsections, however, are clearly not wholly redundant." *Id.* at 301 n.2.

Respondent United States posited the same theory to explain the difference between subsections (a)(1) and (a)(2), arguing that a forfeitable interest under subsection (a)(2) need not be "illegally acquired or maintained." Brief for the United States at 23, *Russello*. As an illustration, the government hypothesized a "defendant lawfully acquire[ing] an interest in an enterprise and then conduct[ing] or participat[ing] in the conduct of the enterprise's affairs through a pattern of racketeering activity," and concluded that "his interest in the enterprise would be subject to forfeiture under subsection (a)(2) but not under (a)(1)." *Id.* The government offered no further explanation with regard to this example as to why (a)(1) would not apply.

It is not clear, however, that this fact pattern would not be reachable via § 1963(a)(1)'s forfeiture mechanism. Query whether a person, taking part in illegal racketeering conduct as part of an enterprise in which he has an interest, would not also be illegally "maintain[ing]" that interest, even though the interest was legally acquired, once the enterprise embarked on a pattern of racketeering activity? To be more specific, would not the defendant have "maintained" his interest "in violation of section 1962"; in particular violating § 1962(c)'s proscription of conducting or participating in an enterprise through a pattern of racketeering activity; maintaining his interest through a pattern of racketeering activity in violation of § 1962(b); or violating § 1962(d)'s proscription against conspiring to violate § 1962(a), (b), or (c)? If so, such interest would seem on the face of § 1963(a)(1) to be forfeitable under its "maintained in violation" language. RICO offers no specific definition of the term "maintained," but "maintained" in (a)(1) seemingly means something other than "acquired," and arguably could have been inserted by RICO's drafters precisely to catch those situations in which an interest was legitimately acquired but later illegally "maintained," as where that interest is put to a corrupt use. Indeed, if not this one, what other scenario would the "maintained" language in (a)(1) be designed to reach?

Another problem with the Court's, and the government's, interpretation is that it is also unclear exactly what meaning is to be ascribed to the phrase "in violation of section 1962." In what manner and to what extent, for instance, must the interest that is "maintained" be related to the activity declared unlawful by § 1962 in order to be "maintained in violation of" that section? For that matter, one could raise the same question as to what comprises the requisite relationship where an interest is found to be "acquired . . . in violation of section 1962."

Note that the Supreme Court in *Russello*, unlike the government in its brief, neglected to include the phrase "or maintained" in its formulation of the distinction between (a)(1) and (a)(2): "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." 104 S. Ct. at 301 (emphasis supplied). Indeed, when quoting § 1963(a)(1) at that point, the Court, for no apparent reason, deleted the phrase "or maintained" from the statutory language. See *id.* These omissions may very well be attributable to the fact that *Russello*'s facts involved an illegal acquiring (insurance proceeds) and not an illegal maintaining. Perhaps the omissions also were just that, unintentional oversights. On the other hand, perhaps they reveal the Supreme Court's caution in attempting to state the precise rela-

served further, as had the lower court,<sup>85</sup> that a narrow interpretation "would blunt the effectiveness of the [forfeiture] provision in combatting illegitimate enterprises," such as the instant arson ring, given that such associations in fact rarely possess interests of a forfeitable nature independent of their members.<sup>86</sup> The *Russello* Court eschewed placing "[w]hole areas of organized criminal activity" beyond the reach of RICO forfeiture.<sup>87</sup>

The Supreme Court dismissed a number of arguments that had been raised by some lower courts and by petitioner *Russello*. Justice Blackmun's opinion rejected Petitioner's contention that Congress' use of the more specific term "profits" in the forfeiture mechanism of the Controlled Substances Act, passed within a month of RICO, indicated that RICO's broader language was not meant to reach profits.<sup>88</sup> The Court observed that RICO is targeted

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tionship between (a)(1) and (a)(2) in light of the expanded scope given to (a)(1) by the Court. In oral argument, for example, at least one Justice manifested a concern with the relationship between § 1963(a)(1) and (a)(2) under the government's interpretation:

Justice O'Connor: Can you give us examples of what would be covered under § 1963(a)(2) that would not also be covered by § 1963(a)(1)?

Alito [Assistant to the Solicitor General]: Under § 1963(a)(1), the interest must be *acquired and maintained* in violation of the statute. Under § 1963(a)(2), the interest needn't have been illegally *obtained*. Actually, § 1963(a)(1) is the less controversial of the two sections.

Justice O'Connor: But can you give us a concrete example?

Alito: If someone had a lawful interest in an enterprise, but later fell on hard times and began utilizing it for racketeering purposes in violation of RICO, § 1963(a)(2) would cover that situation, not § 1963(a)(1). There is considerable overlap between the two sections, of course.

Justice O'Connor: Clearly differentiate the two.

Alito: Section 1963(a)(1) covers any interests . . .

Justice O'Connor: Then you don't need § 1963(a)(2).

Alito: No, that's not true. Section 1963(a)(2) covers the situation where the interest was *acquired* legally.

34 CRIM. L. REP. (BNA) 4038, 4039 (Oct. 12, 1983) (emphasis supplied) (ellipsis in original). In this exchange, government counsel retreated to the unlawful acquisition element, variously characterized as an illegal "obtain[ing]," as the distinguishing factor in his hypothetical, which is essentially the same example relied upon in the government's brief. He did not address, however, why the interest described would not have been illegally "maintained," although he acknowledged initially that the term "maintained" also appears in § 1963(a)(1) (which, incidentally, reads "acquired or maintained," and not, as framed by the Assistant to the Solicitor General, "acquired and maintained"). The answer to Justice O'Connor's initial query seems, therefore, somewhat opaque. In any case, given, *inter alia*, Justice O'Connor's obvious concerns, it seems odd that the Court characterized as "plainly incorrect" the argument that Subsection (a)(2) may be rendered redundant by a broad interpretation of (a)(1). See 104 S. Ct. at 301.

<sup>85</sup> See *supra* note 46 and accompanying text.

<sup>86</sup> 104 S. Ct. at 301. The Court previously had held in its *Turkette* decision that a RICO "enterprise" encompassed such wholly illegitimate associations in fact, as well as legitimate enterprises. See *supra* note 57.

<sup>87</sup> 104 S. Ct. at 301 (quoting *Turkette*, 452 U.S. at 589).

<sup>88</sup> *Id.* The Court commented:

Language in one statute usually sheds little light upon the meaning of different

at more economically diverse criminal activity than is the drug legislation, which is aimed at illegal operations generating primarily monetary profits.<sup>89</sup> The opinion also interpreted later attempts by some Congressmen to amend and clarify RICO's forfeiture provision, not as indicative of the limited scope of RICO's language as written, but as a reaction by some members of Congress to narrow readings of Section 1963(a)(1) adopted by several lower courts.<sup>90</sup> Similarly, the Supreme Court attributed the presence of specific "profits" and "proceeds" language in later state RICO-type legislation to an effort by those states to avoid in their courts the narrow readings of RICO engaged in by earlier lower federal court decisions, rather than to a deficiency in RICO's forfeiture language.<sup>91</sup>

The Supreme Court also utilized RICO's legislative history as further justification for an expansive interpretation of RICO's forfeiture provision. The Court drew on Congress' Statement of Findings and Purpose as evidence that "the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."<sup>92</sup> Also of signifi-

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language in another statute, even when the two are enacted at or about the same time. The term "profits" is specific; the term "interest" is general. The use of the specific in the one statute cannot fairly be read as imposing a limitation upon the general provision in the other statute.

*Id.*

<sup>89</sup> *Id.* The opinion explained that although Congress was clearly aware of the differing terminology employed in the two forfeiture provisions, *id.* at 301-02, it was most unlikely . . . that without explanation a potent forfeiture weapon was withheld from the RICO statute, intended for use in a broad assault on organized crime, while the same weapon was included in the Controlled Substances Act, meant for use in only one part of the same struggle. If this was Congress' intent, one would expect it to have said so in clear and understandable terms.

*Id.* at 302.

<sup>90</sup> *Id.* at 302. The Court characterized bills such as S. 2320, 97th Cong., 2d Sess. (1982), as attempts to legislatively overrule decisions such as *Marubeni*, *Meyers*, and *Thevis*. 104 S. Ct. at 302. Justice Blackmun added that it was "well settled that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Id.* (quoting *Jefferson County Pharm. Ass'n v. Abbott Laboratories*, 103 S. Ct. 1011, 1020 n.27 (1983) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960))).

<sup>91</sup> 104 S. Ct. at 302.

<sup>92</sup> *Id.* The Congressional Statement of Findings and Purpose accompanying the Organized Crime Control Act of 1970 provided:

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with

cance, from the Court's perspective, was RICO's "liberal construction" clause: "The provisions of this title shall be liberally construed to effectuate its remedial purposes."<sup>93</sup> The opinion cited a number of statements from RICO's drafters emphasizing organized crime's illegal income and economic clout as the focus of an effective attack.<sup>94</sup>

The *Russello* Court discounted contrary readings of RICO's legislative history espoused by some lower courts. Although recognizing that one of Congress' primary concerns was organized crime's infiltration of legitimate business, Justice Blackmun's opinion disagreed that the scope of RICO's forfeiture provision should be limited to fulfillment of only this one legislative purpose.<sup>95</sup> The opinion reasoned that Congress' "broader goal" was to take the profit out of organized crime by forcing the racketeer to disgorge his ill-gotten gains; indeed, to fail to reach profits and proceeds would only encourage "speedy looting of an infiltrated company."<sup>96</sup> Put simply, a forfeiture provision reaching only "an interest of little worth in a bankrupt shell,"<sup>97</sup> and not illegal profits already removed from an enterprise by its racketeer constituents, would create an incentive to quickly bleed as many proceeds from the enterprise as possible. On grounds resembling those put forth by the en banc

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free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions and remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

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 prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Pub. L. 91-452, 84 Stat. 922, 923 (1970), *reprinted in* 18 U.S.C. § 1961 at 362 (1982). *Cf.* *United States v. Turkette*, 452 U.S. 576, 588-89 (1981) (ascribing similar significance to RICO's Statement of Findings and Purpose in broadly interpreting "enterprise").

<sup>93</sup> Pub. L. 91-452, 84 Stat. 922, 947 (1970), *reprinted in* 18 U.S.C. § 1961 at 362 (1982). The Court stressed the uniqueness of such a clause: "So far as we have been made aware, this is the only substantive federal criminal statute that contains such a directive; a similar provision, however, appears in the Criminal Appeals Act, 18 U.S.C. § 3731." 104 S. Ct. at 302. For further discussion of the role of RICO's liberal construction clause, see *infra* notes 126-30 and accompanying text.

<sup>94</sup> 104 S. Ct. at 302-03. *See also infra* note 171 and accompanying text. The opinion concluded that "Congress could not have hoped successfully to attack organized crime's economic roots without reaching racketeering profits." 104 S. Ct. at 303.

<sup>95</sup> 104 S. Ct. at 303. For a discussion of contrary lower court case law, see *infra* notes 173-76 and accompanying text.

<sup>96</sup> 104 S. Ct. at 303.

<sup>97</sup> *Id.*

Fifth Circuit in *Martino*, the Supreme Court also denied interpretive weight to a letter by then Deputy Attorney General Kleindienst addressing the constitutionality of an early forfeiture draft.<sup>98</sup> Finally, on the grounds that the language of RICO's forfeiture provision was clear, the *Russello* Court found inapplicable the rule of lenity, an interpretive aid sometimes relied upon in cases of statutory ambiguity, which calls for strict construction of penal provisions.<sup>99</sup>

In conclusion, the *Russello* Court expressly declared its disagreement with the reasoning of the *Marubeni*, *McManigal*, *Meyers*, and *Thevis* courts and affirmed the Fifth Circuit's en banc judgment in *Martino*.<sup>100</sup>

#### IV. ANALYSIS

The sharp division in the lower federal courts regarding the propriety of forfeiture of profits and proceeds under RICO's Section 1963(a)(1), as well as the Supreme Court's resolution of the issue in *Russello*, provide an opportunity to examine conflicting approaches to application of the congressional mandate embodied in RICO. This Section discusses the various attempts to define RICO's terms; the question of whether RICO should be read broadly or narrowly; RICO's structural congruity; congressional intent and RICO's legislative history; and potential questions in the application of the RICO forfeiture mechanism.

##### A. ATTEMPTING TO DEFINE A RICO "INTEREST"

As the Supreme Court noted at the outset of its *Russello* opinion, the question of whether Section 1963(a)(1) reaches profits and proceeds of racketeering activity is essentially one of "interpretation."<sup>101</sup> The single goal of statutory interpretation ostensibly is the ascertaining by the reviewing court of the intended meaning of language used by a legislature. Nevertheless, the process of statutory interpretation can produce diverse results, entailing significant consequences.<sup>102</sup>

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<sup>98</sup> *Id.* See *supra* note 47.

<sup>99</sup> 104 S. Ct. at 303-04. The opinion noted that the rule of lenity "'comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to 'wrong-doers.'" *Id.* at 303 (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)). Cf. *Turkette*, 452 U.S. at 588 n.10 ("There being no ambiguity in the RICO provisions at issue here, the rule of lenity does not come into play.") (citation omitted). See also *supra* note 44; *infra* notes 127-30 and accompanying text.

<sup>100</sup> 104 S. Ct. at 304.

<sup>101</sup> *Id.* at 297.

<sup>102</sup> Disparate conclusions with respect to the question of interpretation raised by this

One universally recognized principle of interpretation exhorts a court to look first to the statutory language itself.<sup>103</sup> The legislature, however, failed to define "interest" in the RICO statute. Furthermore, RICO seems to employ the undefined term "interest" inconsistently: Section 1963(a)(2) authorizes the forfeiture of "any interest in . . . any enterprise"; Subsection (a)(1), on the other hand, reaches "any interest . . . acquired or maintained in violation of section 1962," not on its face limiting forfeiture under that subsection to interests "in an enterprise."<sup>104</sup> When RICO uses the

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one RICO provision represent an informative example. Compare, e.g., *Russello*, 104 S. Ct. at 300 (statute "plainly covers" proceeds), and *Weiner*, *supra* note 15, at 241 (statute "should obviously extend to money forfeitures"), with, e.g., *McManigal*, 708 F.2d at 286 (statute "can be reasonably construed" to exclude proceeds), *Thevis*, 474 F. Supp. at 142 (statute is "clear, precise, and defined . . . [and not] ambiguous" in its exclusion of proceeds), and *Meyers*, 432 F. Supp. at 461 (only a "strained construction" would regard proceeds as within statute).

As for the possible consequences of such interpretive exercises, one issue of first impression raised by the defendants (and rejected) in the *Martino* panel opinion was that RICO was unconstitutional as an ex post facto law because of judicial enlargement. See *Martino*, 648 F.2d at 381. Specifically, the defendants claimed that the court had enlarged RICO by applying RICO to illegitimate as well as legitimate enterprises (an application later approved by the Supreme Court in an unrelated case, *Turkette*, 452 U.S. 576 (1981)). *Martino*, 648 F.2d at 381.

The interpretation issue raised by RICO's forfeiture language to some degree presents the courts with questions of both ambiguity and vagueness. A statute may be unconstitutionally vague, see *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (statute is unconstitutional where it is so vague "that men of common intelligence must necessarily guess at its meaning"), and in particular that vagueness may go to the sanction to be imposed, see *United States v. Evans*, 333 U.S. 435 (1948). Ambiguity, however, "exists when it is in fact possible to ascertain one or more alternative meanings. Vagueness, therefore, means 'no meaning,' while ambiguity means 'more than one meaning.'" *Blakey*, *supra* note 15, at 289 n.150.

<sup>103</sup> See, e.g., *Rubin v. United States*, 449 U.S. 424, 429-31 & n.8 (1981); *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980); *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980); *Lewis v. United States*, 445 U.S. 55, 60 (1980); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979); *Ianelli v. United States*, 420 U.S. 770, 786-89 (1975). In the specific context of RICO, the Supreme Court has expounded at length on a court's proper approach to interpretation:

In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Of course, there is no errorless test for identifying or recognizing "plain" or "unambiguous" language. Also, authoritative administrative constructions should be given the deference to which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

We nevertheless begin with the language of the statute.

*Turkette*, 452 U.S. at 580. The Court added that the statutory language represents "the most reliable evidence of its [Congress'] intent." *Id.* at 593.

<sup>104</sup> 18 U.S.C. § 1963 (1982). At the same time, neither does § 1963(a)(1) by its terms expressly include profits or proceeds.

word "interest" in sections other than 1963(a)(1), express language limits the term to interests "in any enterprise."<sup>105</sup> Unless one considers the omission of limiting language in Section 1963(a)(1) to have been purposeful, no reason, other than a simple mistake in drafting, seems to exist to explain the dissimilar phrasing.<sup>106</sup> The *Russello* Court, rightly it appears, refused to attribute the differing language to mistake, but presumed the omission to be intentional.<sup>107</sup>

<sup>105</sup> See 18 U.S.C. § 1963(a)(2) (authorizing forfeiture of "any interest in . . . any enterprise"); § 1962(b) (making it unlawful through a pattern of racketeering activity to acquire or maintain "any interest in . . . any enterprise"); § 1964(a) (conferring jurisdiction on district courts to divest defendant of "any interest, direct or indirect, in any enterprise").

<sup>106</sup> This argument was espoused by the government in *Russello*. See Brief for the United States at 21-22, *Russello*.

It might be possible to base an argument against inclusion of proceeds in (a)(1) on an *ejusdem generis* type of analysis. *Ejusdem generis* is a principle of statutory construction suggesting that more general terms in a series are limited, by more specific words in that series, to things similar to those specifically enumerated. 2A C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.17 (4th ed. 1973). Strictly speaking, this principle does not fully apply in the context of RICO's forfeiture section because that section does not involve words in a series, but rather involves phrases within a single provision. Nevertheless, the argument might be advanced that despite the omission in (a)(1)—the more general phrase—of the words "in any enterprise," the presence of those words in (a)(2)—the more specific phrase—impels a restricted, more specific reading of (a)(1) as well.

The contention, however, does not seem persuasive. Initially, § 1963(a) is not a series; it contains only two parts, each presumably having an equal role in the statutory forfeiture scheme. Moreover, the *ejusdem generis* approach is at odds with the Supreme Court's reasoning in *Turkette*. In *Turkette*, the First Circuit had relied on *ejusdem generis* to restrict the term "enterprise" to mean "legitimate enterprise." See *United States v. Turkette*, 632 F.2d 896, 899 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981). The court of appeals reasoned that because each of the specific enterprises enumerated in § 1961(4) was a legitimate enterprise, the final phrase, "any union or group of individuals associated in fact," also should be limited to legitimate enterprises. *Id.*; see *supra* note 15 (text § 1961). The Supreme Court, however, explicitly rejected this view. *United States v. Turkette*, 452 U.S. 576, 581 (1981). The *Turkette* Court characterized the rule of *ejusdem generis* as "no more than an aid to construction . . . [that] comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute." *Id.* (citation omitted). Further after dividing the § 1961(4) definitional provision into two groups of enterprises, legitimate ones and ones associated in fact, the Court refused to regard one category as a more generalized description of the other, insisting that both were separate classifications. *Id.* at 581-82. The Court noted that within the second category standing alone, there existed no specific enumeration followed by a general description. *Id.* at 582. Therefore, *ejusdem generis* could not be applied. *Id.* Similarly, RICO's forfeiture provision not only establishes two categories by its language, but explicitly divides these two categories by separating § 1963(a) into (a)(1) and (a)(2). Using the *Turkette* Court's logic, there exists in subsection (a)(1)—analogous to the second category in *Turkette*—no specific enumeration followed by a more general description on which to predicate a case for application of *ejusdem generis*.

<sup>107</sup> See *supra* text accompanying notes 78-80. The presumption that Congress omitted "in any enterprise" intentionally is consistent with the Court's approach in *Turkette*,

The debate over RICO's forfeiture language centers not only on the differences between the two subsections of Section 1963(a), but also on the differences between the language of Section 1963(a) as it now reads and the language of predecessor bills. An earlier draft of RICO, Senate Bill 1861, contained a single forfeiture provision limited to "all interest in the enterprise."<sup>108</sup> After revision by the Judiciary Committee, however, the current two-part version, embodied in Section 1963(a)(1) and (a)(2), emerged.<sup>109</sup> Courts favoring forfeiture of profits and proceeds have pointed to this revision as indicative of Congress' intent not to limit (a)(1) to interests "in an enterprise."<sup>110</sup>

Of some importance as background to these legislative reworkings is a letter from then Deputy Attorney General Kleindienst to Congress that conveyed the Justice Department's view of the constitutionality of Senate Bill 1861, a RICO forerunner:

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 . . . .<sup>111</sup>

Although the Kleindienst letter arguably is of some probative weight,<sup>112</sup> the *Russello* Court was justified in rejecting it as persuasive with respect to Section 1963's construction. The Kleindienst

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wherein it similarly presumed that Congress intended a broad reach to a RICO "enterprise" where the statute did not specify "legitimate" enterprises: "Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate.'" *Turkette*, 452 U.S. at 581. The argument that Congress "would have said so," however, can cut both ways. See, e.g., *Martino*, 681 F.2d at 964 (Politz, J., dissenting) ("If Congress had intended otherwise [than to limit forfeitures to interests in the enterprise], I am convinced it would have said so clearly and unequivocally.").

<sup>108</sup> S. 1861, 91st Cong., 1st Sess. (1969).

<sup>109</sup> S. 30, 91st Cong., 1st Sess. (1969).

<sup>110</sup> See *Russello*, 104 S. Ct. at 301; *Martino*, 681 F.2d at 958; see also Weiner, *supra* note 15, at 238 & n.49. Weiner, Deputy Director of the Office of Economic Crime Enforcement of the Department of Justice (DOJ), argues that the change was made only after the DOJ called the original limitation to the attention of Congress, concluding: "The clear inference is that this expansion of the scope of the statutory forfeiture provision was deliberate, reflecting a legislative intention to extend the applicability of the forfeiture remedy." Weiner, *supra* note 15, at 238.

<sup>111</sup> *Measures Relating to Organized Crime: Hearings on S. 30, S. 1861 and Related Proposals Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 407 (1969) (letter dated Aug. 11, 1969, from Deputy Attorney General Richard P. Kleindienst) (emphasis supplied by Congress) [hereinafter cited as *Senate Hearings*].

<sup>112</sup> A number of courts have noted, for instance, that the Senate Report on RICO, S. REP. NO. 617, 91st Cong., 1st Sess. 79-80 (1969) [hereinafter cited as S. REP. NO. 617], quoted the letter as an accurate interpretation "aptly explain[ing]" RICO's forfeiture



letter was intended only as an examination of the constitutionality of an earlier version of RICO, and in no way constituted an analysis of Congress' intent in enacting a later different version of the forfeiture provision.<sup>113</sup>

If Section 1963(a)(1) is to be viewed as independent of an "enterprise" limitation, whether imposed by Section 1963(a)(2)'s "in any enterprise" language or by reference to the racketeering activities barred by Section 1962,<sup>114</sup> then some meaning must be ascribed the term "interest." As already noted,<sup>115</sup> RICO does not define the term "interest."<sup>116</sup> The *Russello* Court appears correct in broadly

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mechanism. See *McManigal*, 708 F.2d at 286; *Martino*, 681 F.2d at 964 (Politz, J., dissenting); *Marubeni*, 611 F.2d at 768.

<sup>113</sup> See *Russello*, 104 S. Ct. at 303. The *Russello* Court explained:

That letter, with its reference to "one's interest in the enterprise" does not indicate, for us, any congressional intent to preclude forfeiture of racketeering profits. The reference, indeed, is not to § 1963(a) as finally enacted but to an earlier version in which forfeiture was to be expressly limited to an interest in an enterprise. The letter was merely following the language of the then pending bill. Furthermore, the real purpose of the sentence was not to explain what the statutory provision meant, but to explain why the Department of Justice believed it was constitutional.

*Id.* The *Martino* court found that "nothing in the [Senate] report suggests that the letter provides a technical commentary on the scope of each section of the expanded bill." *Martino*, 681 F.2d at 959. The government contended that the Kleindienst letter was included in the Senate Report as relevant because it addressed the constitutionality of a feature that was retained in the final version, the forfeiture of interests in an enterprise. See Brief for the United States at 47-48, *Russello*.

The lower court attributed the letter to Congress' concern over "entering new territory," especially with respect to the constitutionality of the *in personam* criminal forfeiture sanction. *Martino*, 681 F.2d at 959. For further discussion of *in personam* criminal forfeitures, see *infra* notes 131-37 and accompanying text. The government also argued that it was unreasonable to interpret the letter as implying any constitutional problems should Congress mandate forfeiture of interests other than those in an enterprise, inasmuch as the objections that had been raised by some Congressmen had assumed that the authorized forfeiture would extend beyond interests involved in the RICO violation. Brief for the United States at 46-47, *Russello*. The government explained that forfeiture of racketeering profits derived directly from illegal activity was not subject to the same objection that opponents had erected as to forfeiture of an interest in a legitimate business. *Id.* at 47.

<sup>114</sup> The Supreme Court rejected Petitioner's contention in *Russello* that the substantive prohibitions in § 1962 limited the nature of the interests forfeitable under § 1963. See *supra* notes 73-76 and accompanying text. For a discussion of a variety of opinions on how RICO's provisions interrelate, see *infra* notes 138-64 and accompanying text.

<sup>115</sup> See *supra* note 15 and text accompanying note 66.

<sup>116</sup> Although the term "interest" is not defined in RICO, § 1964(a) does confer jurisdiction on district courts to, *inter alia*, divest a defendant of "any interest, direct or indirect, in any enterprise," as a civil remedy. 18 U.S.C. § 1964(a) (1982). Section 1964's language raises its own questions. What do the modifiers "direct or indirect" add to the meaning of "interest," or "interest in any enterprise"? What constitutes an indirect interest, or an indirect interest in any enterprise? Should "direct or indirect" be read into the term "interest" when it is used in other RICO provisions? Is it significant that the "direct or indirect" interest language appears in the civil remedies provision (§ 1964) and not in the criminal penalties provision (§ 1963)? Compare this adjectival use of

applying that term. Whether a court looks to dictionary definitions,<sup>117</sup> relevant treatises,<sup>118</sup> or case law from other areas,<sup>119</sup> the term "interest" ordinarily conveys a comprehensive scope.<sup>120</sup> Additionally, as the Supreme Court recognized, RICO employs a

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"direct or indirect" to other adverbial uses appearing in RICO: "unlawful for any person who has received any income derived, *directly or indirectly*, from a pattern of racketeering activity . . . to use or invest, *directly or indirectly*, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise" (§ 1962(a)) (emphasis supplied); "unlawful . . . through a pattern of racketeering activity . . . to acquire or maintain, *directly or indirectly*, any interest in or control of any enterprise" (§ 1962(b)) (emphasis supplied); "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, *directly or indirectly*, in the conduct of such enterprise's affairs through a pattern of racketeering activity" (§ 1962(c)) (emphasis supplied). Given RICO's intentionally broad substantive reach as evidenced by § 1962's repeated refrain of "directly or indirectly," should the meaning of "any interest, direct or indirect" be given an equally broad interpretation?

Section 1964 provides further that district courts have broad injunctive and equitable powers (§ 1964(a)), that the Attorney General may institute proceedings under the section (§ 1964(b)), that persons injured in business or property may sue and recover treble damages, costs, and attorneys' fees (§ 1964(c)), and that a final criminal judgment against a RICO defendant estops the defendant from denying essential allegations of the criminal offense in subsequent civil proceedings brought by the United States (§ 1964(d)). See 18 U.S.C. § 1964 (1982).

<sup>117</sup> The Supreme Court in *Russello* cited several dictionary definitions of interest. See *supra* note 67 and accompanying text. The Seventh Circuit in *McManigal* had given dictionary definitions of "interest" a narrower reading, seeing an "interest" as a "right, claim, title, or legal share in something." *McManigal*, 708 F.2d at 284 (quoting BLACK'S LAW DICTIONARY 729 (5th ed. 1979) (emphasis supplied by the court)). The *McManigal* court also reasoned that because the terms "interest," "income," and "proceeds" were all used in § 1962(a), see *supra* note 15, Congress did not intend them all to possess the same meaning. 708 F.2d at 284. For a discussion of possible relationships between §§ 1962 and 1963, see *infra* notes 138-64 and accompanying text.

<sup>118</sup> The government cited a number of treatises on property favoring a broad reading of the term "interest." See Brief for the United States at 13-14, 18, *Russello* (citing, *inter alia*, RESTATEMENT OF PROPERTY § 5 (1936) ("interest" denotes any "rights, privileges, powers and immunities" respecting land or other things); *id.* at § 5 comment a ("no corresponding term in common use" manifests a similar scope)).

<sup>119</sup> The Supreme Court in *Russello* referred to several of its due process decisions in divining the meaning of "interest." See *supra* note 69 and accompanying text.

<sup>120</sup> *Contra* United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977). See *supra* note 32. See also United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979) (quoting *Meyers*); Joint Appendix, *Martino* panel opinion on forfeiture, *supra* note 29, at 65 (quoting *Meyers*). The government, noting that neither *Meyers* nor *Thevis* had cited authority for the definition of "interest," characterized the *Meyers* approach as "artificially narrow." Brief for the United States at 17 n.4, *Russello*. The government opined that even if the *Meyers* court had arrived at one acceptable definition, a court "engaging in statutory interpretation need not adopt the narrowest possible meaning of a plain and ordinary word," *id.* (citing *Turkette*, 452 U.S. at 587 n.10), but should give the words their "fair meaning in accord with the manifest intent of the lawmakers," *id.* (quoting United States v. Brown, 333 U.S. 18, 26 (1948)). Finally, the government contended that an "interest" need not connote something less than sole ownership, citing a sole proprietorship, a fee simple absolute interest in real estate, and ownership of personal property, among others, as examples of "interests" entailing sole ownership. *Id.* at 18.

number of other broad terms.<sup>121</sup>

#### B. SHOULD RICO BE READ BROADLY OR NARROWLY?

The *Russello* Court skirted a question that has caused some disagreement among lower courts and that may bear on any exercise in interpreting RICO's language: whether RICO's criminal provisions should be read broadly or narrowly. RICO can be read as a sweeping attack on the problem of organized crime, relying on broad terminology to implement that attack. The final version of RICO, the product of extensive congressional consideration,<sup>122</sup> does not manifest a limited scope.<sup>123</sup> The drafters of RICO purposely introduced new concepts and new substantive offenses that are independent of traditional areas of federal legislation such as antitrust.<sup>124</sup> The statute employs broad terms and avoids painstaking enumeration.<sup>125</sup>

<sup>121</sup> See *supra* text accompanying note 71; *infra* note 125 and accompanying text.

<sup>122</sup> See *Iannelli v. United States*, 420 U.S. 770, 789 (1975) (RICO represents a "carefully crafted piece of legislation"). Statements by key sponsors reveal the considerable legislative effort expended in drafting RICO. Senator McClellan, Senate sponsor of RICO, described debate on the Organized Crime Control Act as "the culmination of a year of detailed study, hearings, and consultations" and listed an impressive array of organizations consulted during legislative drafting. 116 CONG. REC. 585 (1970) (statements of Sen. McClellan). Similarly, Representative Poff, House floor manager of RICO, noted that in his experience, no single measure had "received more thorough consideration by a legislative committee than this bill." *Id.* at 35,204 (statements of Rep. Poff).

<sup>123</sup> See *United States v. Culbert*, 435 U.S. 371, 373 (1978) ("Nothing on the face of . . . [RICO] suggests a congressional intent to limit its coverage").

<sup>124</sup> The substantive offenses employ at least two concepts new to the federal criminal law, the "pattern of racketeering activity" and the "enterprise." Taylor, *supra* note 34, at 386. Early legislative efforts had explored antitrust theories as possible avenues of attack on organized crime, focusing on, for example, the use of unreported income from one line of business in another line of business, investment of proceeds of criminal activity in a business enterprise, and anticompetitive effects in general. Blakey, *supra* note 15, at 253-56 & nn.48-53. The Antitrust Law Section of the American Bar Association specifically recommended that RICO-type legislation be enacted independent of extant antitrust legislation, such as the Sherman Act, due in part to unnecessary obstacles that reliance on antitrust jurisprudence might pose. See 115 CONG. REC. 6994-95 (report of ABA); Blakey, *supra* note 15, at 254-56 & nn.51-53.

Professor Blakey has asserted that RICO does not resemble a traditional criminal statute because "its violation depends on the commission of at least two acts that violate independent criminal statutes; it does not 'draw a line' between innocent and criminal conduct. . . . That line is drawn by the offenses that constitute the 'racketeering activity' of 18 U.S.C. § 1961(1) . . . ." *Id.* at 243 n.20 (citations omitted) (emphasis in original). The novelty of RICO's forfeiture approach was underscored by the Justice Department's initial deferral in commenting on the provision: "[W]e are in accord with its objectives. However, because it is so innovative we have been unable to explore all the ramifications of the proposal . . . ." *Senate Hearings, supra* note 111, at 66 (prepared statement for U.S. Dep't of Justice).

<sup>125</sup> The *Russello* Court noted the statute's use of terms of breadth other than "interest," including "enterprise," "racketeering activity," and "participate." See *supra* text

Finally, the drafters of RICO expressly provided that the legislation "be liberally construed to effectuate its remedial purposes."<sup>126</sup> All

accompanying note 71. The government in *Russello* additionally attempted to examine the legislative choice of the term "interest" in light of other options:

Congress's only alternative to the use of the term "interest" would have been a painstaking enumeration of the specific things subject to forfeiture. This is the approach taken in some of the bills recently introduced in Congress to reverse *Marubeni* and similar district court decisions . . . . When the RICO statute was enacted, however, Congress had no way of anticipating such decisions and, without the knowledge subsequently gained in RICO investigations and prosecutions, Congress may have been hesitant to attempt to compile an exhaustive list of things subject to forfeiture. Wishing to strike broadly at the fruits of racketeering, Congress therefore selected the term "interest," the broadest term at its disposal.

Brief for the United States at 16-17, *Russello*.

<sup>126</sup> Pub. L. 91-452, 84 Stat. 922, 947 (1970), reprinted in 18 U.S.C. § 1961 at 362 (1982). The Supreme Court cited the liberal construction clause in *Russello*, see *supra* note 93 and accompanying text, as well as in *Turkette*, 452 U.S. at 587. The Court cautioned in *Turkette*, however, that its conclusion in that case would remain the same "[w]ith or without this admonition [the liberal construction clause]." *Id.* As to the role of the liberal construction clause generally, see Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980). A number of courts have drawn upon the liberal construction clause in their applications of RICO. See, e.g., *United States v. Thompson*, 685 F.2d 993, 997-98 (6th Cir. 1982); *United States v. Godoy*, 678 F.2d 84, 86-87 (9th Cir. 1982), cert. denied, 104 S. Ct. 390 (1983); *United States v. Lee Stoller Enters.*, 652 F.2d 1313, 1317 (7th Cir. 1981), cert. denied, 102 S. Ct. 636 (1982); *United States v. Grzywacz*, 603 F.2d 682, 686 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980); *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1248 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States v. Elliott*, 571 F.2d 880, 899 (5th Cir.), cert. denied, 434 U.S. 1021 (1978); *United States v. Frumeto*, 563 F.2d 1083, 1089-92 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); *United States v. Forsythe*, 560 F.2d 1127, 1135-36 (3d Cir. 1977); *United States v. Kaye*, 556 F.2d 855, 860 (7th Cir.), cert. denied, 434 U.S. 921 (1977); *United States v. Brown*, 555 F.2d 407, 416 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); *United States v. Hawes*, 529 F.2d 472, 479 (5th Cir. 1976); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States v. Parness*, 503 F.2d 430, 439 n.12 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

Some courts, however, have declined to apply RICO's provisions broadly, at least in a criminal context. In *Thevis*, for example, the district court, in holding the scope of § 1963 (a)(1) to be limited to interests in an enterprise, counseled that the liberal construction

mandate must be ignored when the statute to be interpreted proscribes certain activities or provides for forfeiture of interests acquired or maintained in violation of the proscribed activities. . . . To do otherwise and allow a broad, expansive construction of 18 U.S.C. § 1963(a) is to invite serious due process problems under the Fifth Amendment.

*Thevis*, 474 F. Supp. at 142 (citation and footnote omitted). The district court added, "A liberal construction of 'interest' would foment these constitutional confrontations." *Id.* at 142 n.13. Some commentators also have advocated limiting the application of the liberal construction clause. See Bradley, *supra* note 57, at 860 n.126 (positing application of liberal construction clause to remedial civil portions only); Taylor, *supra* note 34, at 389 (courts should construe RICO forfeiture provisions strictly against the government despite liberal construction clause because of due process, vagueness, and disproportionality considerations). Nevertheless, most courts have applied the liberal

these factors support an expansive reading of RICO.

There are considerations, however, that might militate against a broad reading of a federal criminal statute in general and RICO's *in personam* criminal forfeiture provision in particular. First, the "rule of lenity" might play a role in the interpretation of RICO's provisions. The rule of lenity is a general principle of statutory construction that, in cases of ambiguity, favors strictly construing criminal statutes against the government.<sup>127</sup> Because the *Russello* Court found RICO's forfeiture language to be clear and unambiguous, the Court never addressed squarely the possibly antagonistic roles of the rule of lenity and RICO's liberal construction clause in the interpretation of RICO's provisions.<sup>128</sup> Nevertheless, the Court seems to have correctly denied weight to the rule of lenity in the context of RICO because the interests that the rule of lenity seeks to promote<sup>129</sup> are not endangered by a broad reading of RICO.<sup>130</sup>

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construction clause generally to RICO's criminal as well as civil provisions. See Weiner, *supra* note 15, at 236 n.43. On another level, Blakey has noted and harshly criticized the fact that the ABA House of Delegates, at the urging of the Section on Criminal Justice, adopted a recommendation that the liberal construction clause be repealed for both criminal and civil proceedings. See Blakey, *supra* note 15, at 246 n.25.

<sup>127</sup> Although not supporting its application to RICO, Blakey discusses the rule of lenity at length. He provides a useful definition of the principle: "The rule of lenity is a rule of construction that says that the interpretation more favorable to the defendant ought to be adopted when the text of the statute or its legislative history cannot be used to resolve an ambiguity according to congressional intent." Blakey, *supra* note 15, at 290 n.150 (citation omitted). On its rationale: "The modern rule of lenity is rooted in two policies: the principle that fair warning of criminality ought to be given, and the related principle that the moral condemnation of criminality should be based on a legislative, not a judicial determination." *Id.* at 245 n.25 (citing *Dunn v. United States*, 442 U.S. 100, 113 (1979); *United States v. Bass*, 404 U.S. 336, 347-48 (1971)). The rule generally is not seen as constitutionally based, but rather as a nonconstitutional rule of statutory interpretation. See, e.g., *United States v. Rewis*, 401 U.S. 808, 811 n.5 (1971); Blakey, *supra* note 15, at 290 n.150. Indeed, most states have abandoned the common law rule of strict construction in favor of, for example, "fair import" or "liberal" construction. See *id.* at 246-47 n.25 (collecting statutes). For a general discussion of the difference between liberal and strict interpretation, see 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 58.02 (revised 4th ed. 1984).

<sup>128</sup> See *supra* note 99 and accompanying text. The Supreme Court advised in *Callanan v. United States*, 364 U.S. 587, 596 (1961), and repeated in *Turkette*, 452 U.S. at 587 n.10, that the rule of lenity is not to be used to create an ambiguity where none exists. Interestingly, although the Court refused to apply the rule of lenity in *Russello* because it found the statutory language clear, it nevertheless drew on the liberal construction clause as a persuasive indication of Congress' broad purpose in enacting RICO. See *supra* note 93 and accompanying text. The en banc Fifth Circuit in *Martino* also declined to find a conflict between the rule of lenity and the liberal construction clause. See *supra* note 44. That court, however, refused to invoke either of those interpretive aids because, in its opinion, no ambiguity existed. *Id.*

<sup>129</sup> See *supra* note 127 for identification of the two basic rationales for the rule of lenity.

<sup>130</sup> As to the "fair warning" component, it is clear that illegal profits are potentially

Some lower courts have strictly construed RICO's forfeiture provision because of its *in personam* nature.<sup>131</sup> These courts have viewed such *in personam* forfeitures as suspect because of a long history, extending back to England, of disfavor for *in personam* forfeitures.<sup>132</sup> The Supreme Court in *Russello* briefly mentioned the

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subject to disgorgement. If nothing else, § 1964(c) authorizes injured persons to recover treble damages, costs, and attorney's fees as a civil remedy. See *supra* note 116 (§ 1964). Blakey reasons that any due process considerations are met when liberal construction is mandated by the legislature. Blakey, *supra* note 15, at 290 n.150. On a different tack, he argues that imposing the rule of lenity on RICO generally would present a double application of that principle (and double "fair warning") because the rule presumably is relied upon to the extent appropriate in construing the predicate offenses underlying RICO "racketeering activity." *Id.* at 245-46 n.25. Finally, the legislative enunciation of opprobrium for a wide range of racketeering activities in RICO is quite evident in its substantive provisions and in its liberal construction clause. Cf. *United States v. Moore*, 423 U.S. 122, 145 (1975) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose.") (quoting *United States v. Brown*, 333 U.S. 18, 25-26 (1948)). See also *Turkette*, 452 U.S. at 588 n.10.

<sup>131</sup> A RICO forfeiture is *in personam* in that it acts "against a person involving his personal rights and based on jurisdiction of his person, as distinguished from a judgment against property [*in rem*]," BLACK'S LAW DICTIONARY 711 (5th ed. 1979), and it occurs only upon the defendant's conviction, see *Taylor*, *supra* note 34, at 380. The Justice Department delineated the salient distinctions between *in personam* and *in rem* forfeiture:

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.

Under the criminal forfeiture 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.

S. REP. NO. 617, *supra* note 112, at 79-80 (prepared statement for U.S. Dep't of Justice). Several courts have noted, however, that there exists no substantial difference in practice between RICO's *in personam* forfeiture and *in rem* forfeitures, at least where the RICO forfeiture is limited to interests or property put to an illegal use under § 1962. See, e.g., *United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir.), cert. denied, 449 U.S. 830 (1980); *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979); *United States v. Thevis*, 474 F. Supp. 134, 141 n.10 (N.D. Ga. 1979). In *Russello*, the defendant's forfeited insurance proceeds had not, strictly speaking, been put to an illegal use (although arguably the insurance policy had so been), but rather had been acquired through illegal means. See *Russello*, 104 S. Ct. at 298.

<sup>132</sup> See, e.g., *McManigal*, 708 F.2d at 286 ("In light of this history [disfavoring forfeitures], it is necessary to proceed cautiously in construing the forfeiture provisions of RICO.") (citation omitted); *Martino*, 681 F.2d at 962 (Politz, J., dissenting) ("Just as nature abhors a vacuum, historically our society has abhorred forfeitures. . . . Further, a forfeiture with an *in personam* application . . . is to be most charily assessed."); Joint Appendix, *Martino* panel opinion on forfeiture, *supra* note 29, at 66 ("Viewed in that perspective [history disfavoring forfeitures] one would expect that Congress would strictly limit forfeitures."); *Thevis*, 474 F. Supp. at 144 ("[T]he limited forfeiture of the

argument but then ignored it.<sup>133</sup> Notwithstanding the recitation by lower courts of society's historical abhorrence of forfeitures, Congress in recent years has relied increasingly upon the vehicle of *in personam* forfeitures, specifically forfeitures of profits, in its legislation against criminal activity.<sup>134</sup> This recent experience is reflected in the RICO statute, which the *Russello* Court read as congressional authorization of the forfeiture of such illegally obtained monetary "interests."<sup>135</sup> Assuming the ultimate constitutionality of such *in personam* forfeitures,<sup>136</sup> therefore, it seems reasonable to eschew, as the *Russello* Court did implicitly, limiting the construction of the

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property acquired, maintained, or utilized in the conduct proscribed by 18 U.S.C. § 1962 reflects, no doubt, our society's traditional concern for the sanctity of private property acquired under both our Constitution and our system of economic development.").

The United States Constitution itself embodies protections against forfeitures: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work corruption of Blood, or Forfeiture except during the Life of the Person attained." U.S. CONST. art. III, § 3, cl. 2. This protection was codified legislatively in 1790. Act of Apr. 30, 1790, ch. 9, 1 Stat. 117, § 24 (codified at 18 U.S.C. § 3563) ("[N]o conviction or judgment . . . shall work corruption of blood, or any forfeiture of estate."). For discussions of both the English and American history of forfeitures, see Taylor, *supra* note 34, at 381-82; Weiner, *supra* note 15, at 229-32; see generally Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 WM. & MARY L. REV. 661 (1978). RICO's forfeiture provisions have been viewed by some as a partial repeal of § 3563, see *United States v. Rubin*, 559 F.2d 975, 991 (5th Cir. 1977); *Senate Hearings*, *supra* note 111, at 407 (Kleindienst letter), but have not been held to be constitutionally prohibited forfeitures of estate, see *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979).

<sup>133</sup> *Russello*, 104 S. Ct. at 299. The Court noted, "He [petitioner] rests his argument upon the propositions that criminal forfeitures are disfavored in law and that forfeiture statutes, as a consequence, must be strictly construed." *Id.* The *Russello* Court never directly discussed this particular issue in the case.

<sup>134</sup> The government in *Russello*, for instance, identified three other major statutes that authorize the forfeiture of money used in or derived from unlawful activities in the contexts of illegal gambling businesses, 18 U.S.C. § 1955(d) (1982), continuing criminal enterprises, 21 U.S.C. § 848(a)(2) (1982), and controlled substances violations, 21 U.S.C. § 881(a) (1982). Brief for the United States at 12, *Russello*. A number of states also have passed RICO-type legislation, most providing for forfeiture of money and property as well. See Brief of Petitioner at 8-9, *Russello* (collecting statutes); Blakey, *supra* note 15, at 237-38 n.3 (collecting statutes). The government in *Russello* concluded:

Whatever truth there may have been to this maxim ["society abhors forfeitures"] in the past, it is plain that over the last 15 years Congress has come increasingly to view forfeitures as an essential weapon in the battle against crime. It would therefore be more apt today to say that forfeitures are a preferred means of combatting criminal activity.

Brief for the United States at 7, *Russello*.

<sup>135</sup> See generally *supra* notes 55-100 and accompanying text.

<sup>136</sup> RICO's forfeiture provision has been upheld as constitutional. See, e.g., *United States v. Grande*, 620 F.2d 1026, 1039-40 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980); *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

Section 1963(a)(1) forfeiture provision based on vaguely defined, nonconstitutionally based presumptions concerning the inherent "badness" of extracting ill-gotten gains from convicted criminals.<sup>137</sup>

C. RICO'S STRUCTURAL CONGRUITY—HOW IT ALL FITS

A key consideration in statutory interpretation concerns whether the result of the process of interpretation is consistent with the statutory scheme.<sup>138</sup> The Supreme Court, for example, holding in *United States v. Turkette*<sup>139</sup> that a RICO "enterprise" encompassed both legitimate enterprises and illegitimate associations in fact, examined the effect that its interpretation of the term "enterprise" would work on RICO's statutory scheme.<sup>140</sup> The Court concluded in *Turkette* that broadly interpreting the term "enterprise" to apply to criminal organizations would neither "render any portion of the statute superfluous nor . . . create any structural incongruities within the framework of the Act."<sup>141</sup>

The *Russello* Court engaged in a similar analysis and concluded that an expansive reading of "interest" in Section 1963(a)(1) would not render Section 1963(a)(2) "mere surplusage."<sup>142</sup> The Court adopted the government's position that Subsection (a)(2) was distinguishable from (a)(1) in that an (a)(2) interest in the enterprise need not be illegally acquired, whereas an (a)(1) interest must be "acquired or maintained in violation of section 1962."<sup>143</sup> The *Russello* Court concluded that there did exist "things forfeitable under one, but not the other, of each of the subsections."<sup>144</sup>

The Supreme Court's approach in *Russello* stands in sharp contrast with what had been the position of a number of lower courts. Because the term "interest" in Section 1963 is not defined, most

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<sup>137</sup> At oral argument in *Russello*, Assistant to the Solicitor General Alito commented that it was farfetched to suggest that Congress had entertained unexpressed doubts regarding the constitutionality of forfeiture of proceeds under RICO because, among other things, it obviously had enacted the provision, manifesting no "abhorrence." 34 CRIM. L. REP. (BNA) 4038, 4039 (Oct. 12, 1983).

<sup>138</sup> See *Turkette*, 452 U.S. at 580 ("internal inconsistencies in the statute must be dealt with") (citation omitted).

<sup>139</sup> 452 U.S. 576 (1981).

<sup>140</sup> *Id.* at 587.

<sup>141</sup> *Id.* The Court continued, "The result is neither absurd nor surprising. On the contrary, insulating the wholly criminal enterprise from prosecution under RICO is the more incongruous position." *Id.*

<sup>142</sup> See *supra* text accompanying note 83.

<sup>143</sup> See *supra* note 84 and accompanying text for a discussion of the *Russello* Court's language, the government's position in *Russello*, and an analysis of this distinction. For the text of § 1963, see *supra* note 7.

<sup>144</sup> 104 S. Ct. at 301 (footnote omitted).



lower courts prior to *Russello* had looked to Section 1962's prohibitions to clarify the scope of, and in particular to provide an enterprise limitation to, the definition of "interest" in Section 1963(a)(1).<sup>145</sup> Additionally, these courts often tied the application of RICO's specific forfeiture provisions (Section 1963(a)(1) or (a)(2)) to specific prohibitory provisions (Section 1962(a), (b), (c), or (d)).<sup>146</sup> Petitioner in *Russello* similarly suggested such a relationship

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<sup>145</sup> See, e.g., *McManigal*, 708 F.2d at 284-87; *United States v. Zang*, 703 F.2d 1186, 1195 (10th Cir. 1982); *Marubeni*, 611 F.2d at 765-69; *Thevis*, 474 F. Supp. at 142. See also Taylor, *supra* note 34, at 386-89. The district court in *Thevis* explained its reading of the two RICO sections:

[T]he employment of that term ["interest"] establishes additional limits for the forfeiture mandated under § 1963(a)(1).

Curiously, the term "interest" is not defined by RICO, but as employed in 18 U.S.C. § 1963(a), it derives its meaning from the activities barred by § 1962.

18 U.S.C. § 1963(a)(1) is directed at an interest acquired or maintained "in violation of section 1962." (emphasis added). The statutory concept on which 18 U.S.C. § 1962 rests is the "enterprise" concept; that is to say, it is the acquisition, maintenance, or participation in an enterprise through a pattern of racketeering activity that is proscribed under that section. Since it is the addition of the "enterprise" concept which distinguishes a RICO prosecution under 18 U.S.C. § 1962 from an ordinary prosecution directed at each of the individual predicated [sic] acts which constitute the pattern of racketeering activity, this Court is convinced that the "interest" subject to forfeiture under 18 U.S.C. § 1963(a) is limited to the interest in the enterprise and does not extend to fruits or profits generated from the enterprise.

*Thevis*, 474 F. Supp. at 142. In a post-*Martino* appellate opinion, the Seventh Circuit in *McManigal* expressed similar sentiments:

It is not really possible to determine the meaning of the word "interest" simply from reading Section 1963. *Contra Martino*, *supra*, 681 F.2d at 954-956 and n. 16. An examination of the substantive provisions in Section 1962 supports a narrow reading of the term "interest." Section 1962(a), for example, makes it illegal only to invest income derived from a pattern of racketeering activity. Though Congress obviously recognized that income and profits could be generated by a pattern of racketeering activity, it chose to criminalize only the investment of that income, except under the 1% investment exception, when the total investment is de minimis and thus would not grant the racketeer control over the business. The earning of illegal income itself is not prohibited under RICO. Rather the entire statutory scheme is based on the "enterprise" concept, and it is that concept which distinguishes a RICO prosecution from any other prosecution. Although the Fifth Circuit is technically correct when it says that the enterprise concept applies to a RICO prosecution under Section 1962, and not necessarily to the forfeiture provisions of Section 1963, *Martino*, *supra*, 681 F.2d at 955 and n. 15, it makes sense in construing the scope of the statute to read the prohibitory and penal sections in a similar way.

*McManigal*, 708 F.2d at 284-85.

<sup>146</sup> For example, the *McManigal* court opined that "the forfeiture sanctions in Section 1963(a)(1) and (a)(2) were meant to apply to different types of illegal behavior under Section 1962." 708 F.2d at 286. The court of appeals continued:

Section 1963(a)(1) requires forfeiture of any interest defendant "has acquired or maintained in violation of section 1962." Yet one cannot "acquire" or "maintain" an interest "in violation of section 1962" except by violating Section 1962(a) or (b). In this sense, Section 1963(a)(1) *does* tie forfeiture to violations only of Sections 1962(a) and (b). *Contra Martino*, *supra*, 681 F.2d at 955. Thus the forfeiture sanction in Section 1963(a)(1) is meant to apply to interests in a business acquired with

between Sections 1962 and 1963.<sup>147</sup>

Courts and commentators supporting the imposition of an enterprise element into the RICO forfeiture mechanism argued that such an interpretation provides meaning for all parts of Sections 1962 and 1963. Courts opposing an implied enterprise requirement argued that Section 1963(a)(1) would have no role independent of Section 1963(a)(2) were an enterprise requirement to be read into (a)(1).<sup>148</sup> In response, several courts espoused an "active-passive" or "control-no control" distinction between the two subsections: interests in an enterprise affording the defendant an active role, entailing control or influence over the enterprise, would be

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tainted money under Section 1962(a), and to interests in an enterprise acquired or maintained by racketeering activity under Section 1962(b). The forfeiture sanction in Section 1963(a)(2) is meant to apply to interests in an enterprise which is involved in conduct violative of Section 1962(c), as well as conduct violative of Section 1962(a) that does not involve "acquiring" or "maintaining" an interest in an enterprise. See Tarlow, *RICO Revisited*, 17 Ga. L. Rev. 291, 307-308 (1983).

*Id.* at 286-87 (emphasis in original). See also Taylor, *supra* note 34, at 387 ("Marubeni and Thevis are correct. One cannot 'acquire' or 'maintain' an interest 'in violation of section 1962' except by violating section 1962(a) or (b).").

This formulation, restricting a § 1963(a)(1) forfeiture to § 1962(a) and (b) violations, seems to beg the question of what constitutes a § 1963(a)(1) "interest." If an "interest" is restricted to investment in or control of an enterprise, then § 1962(a) and (b) may be the only subsections of § 1962 under which a RICO defendant could illegally "acquire or maintain" an interest. If an "interest" is seen as a broader notion, however, encompassing the insurance proceeds at issue in *Russello*, for example, such "interests" could clearly be "acquired or maintained" through a violation of § 1962(c), or perhaps § 1962(d), as the facts in *Russello* bear out. Furthermore, it is unclear under this interpretation why an interest could not be *maintained* in violation of § 1962(c), for instance, whether or not the interest were *acquired* in violation thereof. See *supra* note 84. For further criticism of the restrictive position, see *infra* notes 160-64 and accompanying text.

<sup>147</sup> See Brief for Petitioner at 23, *Russello*. Petitioner provided a brief synopsis of the suggested relationship between the two sections:

What, then, is the legal relationship between 18 U.S.C. §§ 1962 and 1963 pertaining to forfeitable "interest"? A guide through the labyrinth would be as follows: 18 U.S.C. § 1962(a) and (b) relate to enterprises in law, while 18 U.S.C. § 1962(c) relates to employees in enterprises in law and to enterprises in fact. 18 U.S.C. § 1963(a)(2) provides for the forfeiture of active investments and interests obtained by enterprises in law in which either a controlling interest or over one per cent investment has been obtained. 18 U.S.C. § 1963(a)(1) provides for the forfeiture of passive investments and interests obtained by enterprises in law in which neither a controlling interest nor over one per cent investment has been obtained. In addition, 18 U.S.C. § 1963(a)(1) provides for the forfeiture of interests in the enterprise obtained by enterprises in fact, such as real estate and other investments. 18 U.S.C. § 1963(a)(1), being limited to interests in the enterprise and to individual members' interest in said enterprise, does not extend to profits or dividends which have been distributed and over which the enterprise has no control.

*Id.*

<sup>148</sup> See, e.g., *Martino*, 681 F.2d at 955 ("reading an enterprise limitation into § 1963(a)(1) renders that section surplusage. . . . Section 1963(a)(1) would merely be duplicative of this provision [§ 1963(a)(2)] if . . . it reaches only interests in an enterprise acquired or maintained in violation of §§ 1962(a) or (b).").

reachable under Section 1963(a)(2); Subsection (a)(1), on the other hand, would extend to passive interests, involving no control or influence, where those interests were acquired or maintained in violation of Section 1962.<sup>149</sup> Adherents to this theory contended that if an enterprise requirement were not read into Section 1963(a)(1), it would be Subsection (a)(2), and not (a)(1), that was rendered surplusage.<sup>150</sup> Simply put, this argument asserts that were (a)(1)'s use of the term "interest" to be broadly interpreted, (a)(2)'s phrasing of "interest in . . . any enterprise" would become in effect a "lesser included" of (a)(1).<sup>151</sup> The Supreme Court in *Russello*, however, explicitly rejected this analysis as "plainly incorrect."<sup>152</sup>

Notwithstanding the lower court case law to the contrary, several justifications exist to support the Supreme Court's rejection in *Russello* of an implied enterprise requirement in Section 1963(a)(1). First, the *Russello* Court's framework is more consistent with the different roles a RICO enterprise may assume. The fact that a RICO enterprise may take a variety of forms<sup>153</sup> occasions also a variety of roles that an enterprise may play in a RICO violation. Professor Blakey has identified four categories that may aid analysis: prize, instrument, victim, and perpetrator.<sup>154</sup> He suggests that the reme-

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<sup>149</sup> See, e.g., *McManigal*, 708 F.2d at 287; *Martino*, 681 F.2d at 963 (Politz, J., dissenting); *Thevis*, 474 F. Supp. at 143 n.14. See also 34 CRIM. L. REP. (BNA) 4038, 4039 (Oct. 12, 1983) (petitioner in oral argument in *Russello*); Brief for Petitioner at 18, *Russello*; Petition for Certiorari, *supra* note 52, at 12-13.

<sup>150</sup> See, e.g., Brief for Petitioner at 17-18, *Russello*; Petition for Certiorari, *supra* note 52, at 16.

<sup>151</sup> Petition for Certiorari, *supra* note 52, at 16.

<sup>152</sup> *Russello*, 104 S. Ct. at 301. For more detailed discussion of the Court's analysis, see *supra* notes 83-84 and accompanying text.

<sup>153</sup> The Supreme Court has recognized that a RICO "enterprise" encompasses both legitimate and wholly illegitimate organizations. *Turkette*, 452 U.S. at 580; see also *Russello*, 104 S. Ct. at 301 (citing *Turkette*). Blakey has commented on the range of organizations that may constitute a RICO enterprise:

The concept of "enterprise" may be divided into four broad categories: (1) commercial entities (e.g. corporations, partnerships, sole proprietorships); (2) benevolent organizations (e.g. unions, benefit funds, schools); (3) governmental units (e.g. the office of a governor, a state legislator, a court, a prosecutor's office, a police or sheriff's department, or an executive department or agency); or (4) associations in fact (licit or illicit). The categories are not mutually exclusive.

Blakey, *supra* note 15, at 290-300 (footnotes omitted).

<sup>154</sup> Blakey, *supra* note 15, at 306-07. He explains his categorization:

Since RICO's standards make "unlawful" certain investments, acquisitions or conduct in connection with an "enterprises," [sic] the roles that the enterprise may play in a violation of these standards may be variously—but not mutually exclusively—described as "prize," "instrument," "victim," or "perpetrator."

A violation involving an unlawful investment will usually cast the enterprise in the role of a "prize." Typically, a violation involving an unlawful acquisition will find the enterprise in the role of "prize" or "victim." Violations involving the operation of an enterprise by a pattern of racketeering activity may find the enterprise in the role of an "instrument," "victim," or "perpetrator."

dial purpose, both civil and criminal, underlying the prosecution of a RICO violation may vary with the function of the enterprise in a particular scheme.<sup>155</sup> In the RICO criminal forfeiture setting, reading an implicit enterprise requirement into Section 1963 does not accommodate adequately the statutory remedial purpose of forfeiture where the RICO enterprise serves not as a prize or victim, but as an instrument or perpetrator. As the Court in *Russello* recognized,<sup>156</sup> such a construction allows no room for forfeiture of interests in the context of an illicit association in fact, which inevitably will be cast in the role of "perpetrator."<sup>157</sup> The apparent single-mindedness of these lower courts in envisioning a RICO enterprise for forfeiture purposes only in terms of a prize or victim is underscored initially by their focus on "invested" interests and their consequent dismissal of the problems faced in forfeiting interests "in the enterprise" in the case of associations in fact.<sup>158</sup> This conceptual tunnel vision is evidenced secondly by the emphasis of these courts on the prevention of infiltration of legitimate business as Congress' goal in enacting RICO, to the exclusion of the goal of reaching organized crime's ill-gotten gains.<sup>159</sup>

A second justification for *Russello*'s rejection of an enterprise element in Section 1963(a)(1) is that although Section 1963 clearly employs Section 1962 as a referent,<sup>160</sup> any limiting relationship be-

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*Id.* at 306-09 (footnotes omitted). Blakey presents these categories in the context of an analysis of the application of RICO's substantive liability provisions. They may nevertheless be of help here in examining the role of the enterprise with respect to RICO's remedial provisions.

<sup>155</sup> *Id.* at 323 (footnote omitted). Blakey provides the following illustrative application:

Where an enterprise is a "prize" or "victim," no salutary remedial purpose would be served by attributing the conduct of an individual involved in the pattern of racketeering activity to the individual or entity playing the role of the enterprise, whether for civil liability or criminal responsibility. Indeed, doing so would undermine the purpose of the Act. On the other hand, the remedial purpose of the statute would be enhanced by such an attribution where the individual or entity was playing the role of "perpetrator." . . .

A more difficult issue, however, is presented by the role of "instrument." The enterprise is used in the unlawful conduct, but it is not its author in the same sense as when the enterprise is the "perpetrator." Nonetheless, it is not wholly innocent, as when it plays the role of purely a "prize" or "victim." . . . On balance, the remedial purposes of RICO tip the judgment toward finding civil liability, but not criminal responsibility for the enterprise when its role is purely that of "instrument."

*Id.* at 323-24 (footnotes omitted).

<sup>156</sup> See *supra* text accompanying note 86.

<sup>157</sup> Blakey, *supra* note 15, at 322 n.178 ("Where the enterprise is an illicit association in fact . . . the association will inevitably play the role of 'perpetrator.'" ) (citing, *inter alia*, *Turkette*).

<sup>158</sup> See *supra* note 37; *infra* note 174.

<sup>159</sup> See *infra* notes 173-76 and accompanying text.

<sup>160</sup> Both § 1963(a) generally and § 1963(a)(1) specifically point to § 1962: "Whoever

tween Section 1962's provisions and those of Section 1963 is, at the very least, of arguable degree and significance. The Fifth Circuit in *Martino* construed the two sections to operate independently once the forfeiture mechanism is activated:

To be sure, the reference [in Section 1963(a)(1) to Section 1962] serves a kind of limiting function, but that function is not to define the type of forfeitable interests . . . . Rather, the reference merely identifies the illegal activities which trigger the forfeiture penalty, supplying the nexus between the RICO violation and the forfeitable property which the government must establish at trial.<sup>161</sup>

If sections 1962 and 1963 do operate independently to a large extent, it follows that any of the provisions of Section 1962, and not just Section 1962(a) or (b), can trigger a Section 1963 forfeiture.<sup>162</sup> Indeed, such an interpretation is necessary to afford Section 1962(c) an identifiable role in a Section 1963 forfeiture.<sup>163</sup> Finally, Section 1962(a)'s "one per cent investment exception" need not be read as immunizing invested funds from a forfeiture that results from violations of other provisions of Section 1962 the exception is therefore not conclusive with respect to the proper scope of Section 1963(a)(1).<sup>164</sup>

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*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 . . . .*" 18 U.S.C. § 1963(a) (1982) (emphasis supplied).

<sup>161</sup> *Martino*, 681 F.2d at 955 (footnote omitted). The court of appeals elaborated its view in a footnote: "That the enterprise concept is the overriding concept in RICO, distinguishing a RICO prosecution from an ordinary prosecution for the predicate acts of racketeering, does not necessarily mean that the enterprise concept is also a limitation on the type of property interests subject to forfeiture under § 1963(a)(1)." *Id.* at 955 n.15 (emphasis in original).

<sup>162</sup> *Id.* at 955. See also Brief for the United States at 27 n.9, *Russello* (limiting § 1963(a)(1) forfeitures to § 1962(a) or (b) violations, and § 1963(a)(2) forfeitures to § 1962(c) violations, is "obviously untenable").

<sup>163</sup> The *Martino* court explained: "If § 1962(c) results in any forfeiture at all—and § 1963(a) provides for forfeiture if one violates any § 1962 section—it must provide for forfeiture of something more than § 1962(a) or (b) or be mere surplusage." 681 F.2d at 956 (emphasis in original).

<sup>164</sup> Section 1962(a)'s "1% investment exception" essentially provides that purchases of securities for investment purposes aggregating less than one per cent of the issuer's outstanding securities are exempt from § 1962(a) liability. See *supra* note 15 (text § 1962). The Ninth Circuit in *Marubeni* assigned significant weight to this language, reasoning that "[C]ongress would not have established rules for the investment of racketeering income, enforced by the penalty of criminal forfeiture, if it intended the government to seize that income regardless of how it was used." *Marubeni*, 611 F.2d at 767. The "1% investment exception" is not, however, rendered meaningless by *Russello*'s interpretation of § 1963(a)(1). See *Martino*, 681 F.2d at 960. The *Martino* court observed that

the exception functions as a practical limit, exempting from prosecution what otherwise would constitute illegal activity under § 1962(a). If the investment of illegally

## D. CONGRESSIONAL INTENT AND RICO'S LEGISLATIVE HISTORY

An examination of the legislative history accompanying the passage of RICO<sup>165</sup> may aid in interpreting the language of the statute and, specifically, the language of Section 1963(a)(1). Although analysis of such legislative history has its limitations,<sup>166</sup> review of several aspects of RICO's enactment supports the conclusion that RICO represents a broad approach to organized crime and its related problems. Initially, Congress' Statement of Findings and Purpose reveals legislative concern that existing "sanctions and remedies available to the Government [had been] . . . unnecessarily limited in scope and impact."<sup>167</sup> Moreover, individual statements of key legislators and others in floor debate bolster the view that RICO was designed as a crime-fighting measure of "unprecedented scope."<sup>168</sup>

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derived income constitutes less than 1% of the issuer's outstanding shares, that investment alone violates no criminal proscription and hence triggers no forfeiture at all. The exception thus limits the definition of what is illegal. It does not immunize from forfeiture the fruits of activities that are made illegal under other provisions of § 1962; it "does not create a class of investment of illicit income exempt from forfeiture."

*Id.* (quoting Trojanowski, *RICO Forfeiture: Tracing and Procedure; Appendix: United States v. Marubeni America Corp. and the Scope of RICO Forfeiture*, in 1 *TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME* 378a, 378aa (G. Blakey ed. 1980). See also Brief for the United States at 10, *Russello* ("It was completely consistent for Congress to require forfeiture of racketeering profits and proceeds while also providing that under certain circumstances [the '1% investment exception'] the investment of such moneys is not a separate crime.").

<sup>165</sup> RICO's enactment enjoyed clear legislative support. The Senate passed S. 30, the Organized Crime Control Act, of which RICO was Title IX, by a 73 to 1 vote, with twenty-two additional senators later indicating that they would have voted for the bill. See 116 CONG. REC. 972, 25,192 (1970). The House, after minor amendments, passed the legislation by a 431 to 26 margin. See *id.* at 35,363. The Senate later accepted the House amendments on a voice vote. See *id.* at 36,296.

<sup>166</sup> The most obvious limitation is that the statutory language, not the legislative history, is the "law of the land." *Martino*, 681 F.2d at 958 n.22. As to the role of RICO's legislative history generally, see Note, *supra* note 34. For a discussion of the problems faced in employing legislative history to determine the purpose of a legislature in enacting a particular statute, see Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049, 1071-77 (1979). Finally, Congress clearly "cannot be expected to specifically address each issue of statutory construction that may arise." *Albernaz v. United States*, 450 U.S. 333, 341 (1981).

<sup>167</sup> Pub. L. 91-452, 84 Stat. 922, 923 (1970), reprinted in 18 U.S.C. § 1961 at 362 (1982). For the full text of the congressional statement, see *supra* note 92. The Supreme Court in *Russello* and *Turkette* relied upon this statement in interpreting RICO's provisions, see *supra* note 92 and accompanying text, as did the *Martino* court, 681 F.2d at 956. At least one lower court, however, the Seventh Circuit in *McManigal*, has quoted the congressional statement in support of a restricted reading of § 1963(a)(1), emphasizing the "infiltration" language employed in the third clause. See *McManigal*, 708 F.2d at 285.

<sup>168</sup> *Russello*, 104 S. Ct. at 302 ("The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."). See also *Turkette*, 452 U.S. at 586

Indeed, the legislative record manifests Congress' recognition that RICO's reach clearly extended beyond traditional notions of "organized crime."<sup>169</sup> The perceived scope of RICO's mandate is re-

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("[T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure."); *Martino*, 681 F.2d at 961 ("RICO is a powerful and flexible weapon designed to break the economic power of organized crime and hence to undermine its ability to disrupt and drain the national economy."); *id.* at 962 (Politz, J., dissenting) ("RICO is Title IX of the Organized Crime Control Act of 1970, Congress' solar plexus blow to organized crime."); *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) ("[T]he RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise."); *Weiner*, *supra* note 15, at 225 (RICO "is a powerful federal statute passed by Congress to provide strong remedies intended to deal with the national problem of corrupt criminal organizations and the infiltration of organized crime into legitimate businesses.").

This Note will avoid extensive examination of the statements of individual legislators, which itself could be and has been the subject of exhaustive academic analysis. *See, e.g.*, Blakey, *supra* note 15, at 249-80. Professor Blakey has concluded:

This review of the legislative history of S. 30 in general, and Title IX in particular, establishes the following points beyond serious question:

(1) Congress fully intended, after specific debate, to have RICO apply *beyond* any limiting concept like "organized crime" or "racketeering";

(2) Congress deliberately redrafted RICO outside of the antitrust statutes, so that it would *not* be limited by antitrust concepts like "competitive," "commercial," or "direct or indirect" injury;

(3) *Both* immediate victims of racketeering activity *and* competing organizations were contemplated as civil plaintiffs for injunction, damage, *and* other relief;

(4) Over specific objections raising issues of federal-state relations and crowded court dockets, Congress deliberately *extended* RICO to the general field of commercial and other fraud; and

(5) Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud.

*Id.* at 280 (emphasis in original).

<sup>169</sup> Several commentators noted at the time of RICO's passage that the reach of RICO's predicate offenses encompassed significantly more than would ordinarily be considered "organized crime." *See, e.g.*, *Senate Hearings*, *supra* note 111, at 404-07 (DOJ); *id.* at 475 (ACLU). For this reason, Representative Cellar, Chairman of the House Judiciary Committee, suggested the possibility of renaming the Organized Crime Control Act. *See 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. at 185 (during testimony of Attorney General Mitchell). One commentator has stated that RICO must necessarily catch much ordinary white collar crime, for instance, as incidental to an effective attack on organized crime. *See Weiner*, *supra* note 15, at 228 n.13.

The breadth of RICO's application has engendered concern in some circles that RICO charges may unjustly tarnish defendants' reputations. *See, e.g.*, 1982 A.B.A. SEC. CRIM. JUST. REP. 4; Brief of Amici Curiae Boston Bar Ass'n and Mass. Ass'n of Criminal Defense Lawyers, *Turkette*, 452 U.S. 576 (1981), *quoted in* Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655, 673 (1982). *But see* *United States v. Aleman*, 609 F.2d 298, 306 (7th Cir. 1979) ("If a defendant qualifies as a racketeer able to accomplish the same illegal goals as organized crime he qualifies for punishment."); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1029 n.91 (1980) ("There is nothing in RICO that says that if legitimate businessmen act like racketeers, they should not be treated like racketeers."); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1107 (1982) ("RICO claims can

flected in its wide-ranging applications in practice.<sup>170</sup>

Courts nevertheless have differed in their readings of RICO's legislative purpose. Courts adopting the more expansive view, which prevailed in *Russello*, have culled from RICO's legislative history a legislative purpose of attacking organized crime's wealth and its illegal income.<sup>171</sup> Courts engaging in a more limited reading concluded that RICO's drafters intended a "surgical"<sup>172</sup> role for RICO and its forfeiture sanction: Congress intended through RICO forfeiture to extricate the racketeer from the infiltrated enterprise, and did not intend a "broadside"<sup>173</sup> attack on racketeering through forfeiture.<sup>174</sup> The latter view posited that unrestrained forfeiture

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stigmatize defendants only if courts restrict the applicability of the broad statutory language to proven organized criminals.").

<sup>170</sup> RICO's provisions, both civil and criminal, have been applied in a wide variety of situations. See generally *Blakey*, *supra* note 15, at 280-349 (discussing cases). Unusual applications, however, may occasion some judicial hesitation. See, e.g., *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979) (subsidiary's conduct attributable to parent, but government should avoid "undue prosecutorial zeal in invoking RICO for situations where it was not primarily intended"). But cf. *Martino*, 681 F.2d at 961 (RICO's "breadth supplies a potential for great abuse" but "[t]he harshness of the statute's impact . . . cannot dictate the proper construction of its provisions."). See generally *Tarrow*, *supra* note 57.

<sup>171</sup> See, e.g., *Russello*, 104 S. Ct. at 303 ("The broader goal [of RICO] was to remove the profit from organized crime by separating the racketeer from his dishonest gains."); *Turkette*, 452 U.S. at 588-93 (discussing at length statements of individual legislators concerning organized crime's employment of economic power in general and ill-gotten gains in particular); *Martino*, 681 F.2d at 957 ("Simply put, Congress' express objective in RICO is to take the profit out of organized crime.") (footnote omitted); *United States v. Romano*, 523 F. Supp. 1209, 1211 (S.D. Fla. 1981) (purpose of forfeiture is to divest associations of fruits of ill-gotten gain); *Weiner*, *supra* note 15, at 240 ("The legislative record is replete with references to Congress' determination to take the profit out of large-scale crime.") (footnote omitted). Senate and House reports on RICO reflected this concern with organized crime's ill-gotten wealth. See S. REP. NO. 617, *supra* note 112, at 79 (Senate Judiciary Committee conclusion that legislation must deal both with individuals and their economic base); H.R. REP. NO. 1549, 91st Cong., 2d Sess. 57 (1970) (House Judiciary Committee "Section Analysis" explaining that forfeiture provision applies to "all property and interests, as broadly described, which are related to the violations") [hereinafter cited as H.R. REP. NO. 1549].

<sup>172</sup> *Tarrow*, *supra* note 34, at 380 ("Congress expected forfeiture to play a surgical, not a destructive role in the statutory scheme.").

<sup>173</sup> *Marubeni*, 611 F.2d at 769 ("Congress plainly imposed criminal forfeiture to separate racketeers from the enterprises they owned, controlled or operated and not to attack racketeering broadsides.") (footnote omitted).

<sup>174</sup> See, e.g., *id.* at 769 n.11 ("We believe anyone who reads the legislative history must be struck by the singleness of mind with which Congress drafted RICO. Congress declared over and over again that its purpose was to rid legitimate organizations of the influence of organized crime. This purpose must be the linchpin of any construction of RICO."); *United States v. Rubin*, 559 F.2d 975, 992 (5th Cir. 1977) (Congress "intended forfeiture fully to serve the broader goal of legally separating persons who run an enterprise through the defined racketeering activity from the enterprise itself."); *Theris*, 474 F. Supp. at 142 ("Though Congress recognized that income and profits could



would work harmful financial effect on otherwise legitimate businesses and their assets.<sup>175</sup> This position dismissed as "simply rhetorical approximations" those "isolated references" by legislators that described RICO generally, and forfeiture specifically, as targeted at organized crime's "ill-gotten gains."<sup>176</sup>

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be generated by a pattern of racketeering activity, it chose to require forfeiture only of the interest in, and not the income of, a § 1962 enterprise."); Taylor, *supra* note 34, at 389 ("Congress sought to rid American business of organized crime, not to bankrupt the criminal."). This view also points, for support, to the same Senate and House reports on which the more expansive reading is based. See S. REP. NO. 617, *supra* note 112, at 160 ("The language [of § 1963] 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."); H.R. REP. NO. 1549, *supra* note 171, at 35, 57 (forfeiture of interest "in an enterprise"). Note that this view apparently presupposes the enterprise as "victim" rather than "perpetrator." See *supra* text accompanying notes 158-59.

<sup>175</sup> See Brief for Petitioner at 15-16, *Russello*; Taylor, *supra* note 34, at 381, 385. Taylor, on whose analysis the petitioner in *Russello* heavily relied, explained the predicted effect on legitimate business:

Constitutional infirmities aside, unless RICO forfeitures are limited to the statute's language and purpose, they can threaten massive destruction of legitimately-acquired assets, a result Congress did not intend to achieve.

... [W]ith RICO, Congress could not rationally seek forfeiture of all proceeds or fruits of a racketeer-influenced, but otherwise inherently legitimate, endeavor. Destruction of the enterprise is not the goal. The income and proceeds may be attributable, at least in part, to the efficacy of the legitimate endeavor, not to the racketeering methods.

Taylor, *supra* note 34, at 381, 385. Petitioner in *Russello* similarly opined that the government's interpretation of "interest," requiring forfeiture of illegal profits and proceeds, "could result in the dismantling of legitimate business" and "could directly affect the stability of the company by causing extreme economic hardship, or even bankruptcy." Brief for Petitioner at 16, 17, *Russello*. Several criticisms of this approach exist. Initially, the view conceives of the enterprise only as both legitimate and or "victim," and not as an illegitimate "perpetrator." (Taylor wrote before the Supreme Court's decision in *Turkette*, in which the Court affirmed the approach that had been adopted in the majority of federal circuits by applying RICO's "enterprise" terminology to wholly illegitimate organizations; petitioner in *Russello* did not.) Where the enterprise is an illegitimate "perpetrator," RICO's goal is the destruction of the enterprise, and no part of the income and proceeds is attributable to legitimate endeavor. Furthermore, even hypothesizing an "otherwise inherently legitimate endeavor" whose assets are only in part attributable to racketeering activity, it is difficult to equate the disgorgement of ill-gotten profits and proceeds obtained through racketeering with the "destruction" of legitimate business in general, or even that particular legitimate business. Forfeiture of illegal gains would leave undisturbed the legitimate profit-making portions of the business. Finally, assuming *arguendo* that such disgorgement would "dismantle" the particular enterprise, there seems little reason "why Congress would have been concerned about preserving a business so dependent upon the fruits of illegal activity." Brief for the United States at 24 n.7, *Russello*.

<sup>176</sup> *Marubeni*, 611 F.2d at 768 n.10. See also *McManigal*, 708 F.2d at 286 n.5 (quoting *Marubeni*). The *McManigal* court's reliance on the *Marubeni* characterization seems surprising in light of the Supreme Court's intervening decision in *Turkette*, in which the Supreme Court examined these "isolated references" in considerable detail. See *Turkette*, 452 U.S. at 588-93.

The more expansive interpretation of RICO is the more persuasive. First, those statements of RICO drafters and legislators speaking to forfeiture of organized crime's "ill-gotten gains," and those speaking to forfeiture of the racketeer's "interest in the enterprise," are not mutually exclusive.<sup>177</sup> Second, the broader construction attacks organized crime's infiltration of legitimate business at its source, the economic power of the racketeer, and therefore satisfies both RICO's remedial and preventive purposes.<sup>178</sup> Finally, even if the prevention of infiltration was the single goal of Congress in enacting RICO, that congressional concern with infiltration arguably might extend to organized crime's control and infiltration of illegitimate enterprises as well.<sup>179</sup>

#### E. QUESTIONS IN THE APPLICATION OF RICO FORFEITURE

##### Interpreting Section 1963(a)(1) to authorize forfeiture of prof-

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<sup>177</sup> See, e.g., *Russello*, 104 S. Ct. at 303 ("Congress' concerns were not limited to infiltration"); *Turkette*, 452 U.S. at 590-91 (Court "unpersuaded that Congress . . . confined the reach of the law to only narrow aspects of organized crime, and, in particular, under RICO, only the infiltration of legitimate business. . . . [N]one of these statements [expressing concern about organized crime's infiltration of legitimate business] requires the negative inference that Title IX did not reach the activities of enterprises organized and existing for criminal purposes.") (emphasis in original) (citation omitted); *Martino*, 681 F.2d at 957 n.19 (congressional concern about infiltration "does not mean . . . that we should blind ourselves to other forms of racketeering which Congress also declared to be the object of its concern"); *Weiner*, *supra* note 15, at 240 ("Although there are statements in the legislative history that indicate that forfeiture applies to a defendant's interest in the RICO enterprise itself there is no statement that precludes the forfeiture of other types of 'interests,' including money.") (footnote omitted) (emphasis in original).

<sup>178</sup> The *Turkette* Court focused on organized crime's use of its illicit revenues "as a springboard into the sphere of legitimate enterprise." 452 U.S. at 591 (citation omitted). The Court further stressed both the remedial and the preventive functions of RICO, requiring "some positive sign that the law was not to reach organized criminal activities that gave rise to the concerns about infiltration." *Id.* at 593. See also *Martino*, 681 F.2d at 957 ("Section 1963(a) launches a two-pronged attack on the sources of economic power which feed the coffers and activities of organized crime. It demands both divestiture of power over the enterprise itself and seizure of the income derived from racketeering activities.") (footnote omitted); *United States v. Frumento*, 563 F.2d 1083, 1090 (3d Cir. 1977) (Congress was concerned with reducing invidious capabilities of organized crime to infiltrate American economy), *cert. denied*, 434 U.S. 1072 (1978).

<sup>179</sup> See, e.g., *Turkette*, 452 U.S. at 584-85 ("It is obvious that §§ 1962(a) and (b) address the infiltration by organized crime of legitimate businesses, but we cannot agree that these sections were not also aimed at preventing racketeers from investing or reinvesting in wholly illegal enterprises and from acquiring through a pattern of racketeering activity wholly illegitimate enterprises such as an illegal gambling business or a loan-sharking operation."); *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981) (RICO deals with organized crime's control over business enterprises of all sorts, whether legitimate or illegitimate); *United States v. Castellano*, 416 F. Supp. 125, 128 (E.D.N.Y. 1975) (RICO purpose extends to infiltration of racketeering funds into illegitimate business as well as legitimate ones).

its and proceeds of racketeering activity potentially impacts on RICO's reach, operation, and constitutionality. Initially, one question centers on how far a Section 1963(a)(1) forfeiture can extend: what else is forfeitable besides the insurance proceeds at issue in *Russello*, in light of the fact that the Supreme Court declined to offer help in defining "profits" and "proceeds"?<sup>180</sup> Given the Court's broad language in its discussion of the term "interest,"<sup>181</sup> and the variety of possible applications of RICO's provisions,<sup>182</sup> the federal district courts can expect to address this issue in the near future.<sup>183</sup>

*Russello*'s expansive construction of RICO's forfeiture language also may affect the handling of a RICO prosecution. Initially, the broader reading will "raise the stakes" generally because much more potentially will be forfeitable in any given RICO criminal prosecution.<sup>184</sup> One obvious side effect of greater potential criminal liability will be to provide the government more opportunity for plea bargaining with potential RICO defendants.<sup>185</sup> Greater criminal liability also may affect more directly specific procedural protections.<sup>186</sup> Federal Rule of Criminal Procedure 7, for instance, requires the indictment to allege the extent of the interest or property subject to forfeiture.<sup>187</sup> *Russello* conceivably could affect this requirement in several ways. Courts may require a greater degree of specificity in the indictment to reflect the greater risk facing the

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<sup>180</sup> See *supra* note 56. The Court admittedly had no occasion on *Russello*'s facts to speak to what else might be forfeitable. See Brief for the United States at 20, *Russello* ("What other things may be subject to forfeiture under Section 1963(a)(1) need not be decided here.").

<sup>181</sup> See *supra* notes 66-68 and accompanying text.

<sup>182</sup> See *supra* note 170 and accompanying text.

<sup>183</sup> The broad applicability of § 1963(a)(1) clearly may also increase the number of forfeitures, which has been somewhat limited in the past. One commentator has attributed the low number of forfeitures to plea bargaining, asset depletion, non-application of forfeiture to illegitimate associations in fact, reluctant judges, and unwilling prosecutors. Weiner, *supra* note 15, at 227 n.12.

<sup>184</sup> This effect would, of course, be incremental. RICO defendants already had faced imprisonment, which assumedly carries some deterrent effect, and a fine, as well as forfeiture of their interest in the enterprise. See *supra* note 7 (text § 1963).

<sup>185</sup> See Weiner, *supra* note 15, at 227 & n.12 (noting that one reason for few forfeitures under RICO historically was that some RICO indictments had "resulted in plea bargains where criminal forfeiture was bargained out of the case").

<sup>186</sup> The Federal Rules of Criminal Procedure were amended in 1972 to include several procedural protections to alleviate any due process problems in the criminal forfeiture area. Protective provisions include (1) Rule 7(c)(2) (specific notice to the defendant in the indictment of potential forfeitable property), see *supra* note 32; *infra* notes 187-90 and accompanying text; (2) Rule 31(e) (special jury verdict on extent of forfeiture), see *supra* note 22; and (3) Rule 32(b)(2) (authorizing Attorney General to seize forfeited property and fix "such terms and conditions as the court shall deem proper"). See Weiner, *supra* note 15, at 228 n.13.

<sup>187</sup> FED. R. CRIM. P. 7(c)(2). See *supra* note 32.

RICO defendant.<sup>188</sup> Or, courts may allow even the greater forfeiture liability to be based on "catch-all" indictment language, which practice could, in the extreme, impinge on the defendant's due process interests because of lack of adequate notice.<sup>189</sup> Courts also may

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<sup>188</sup> Compliance with Rule 7(c)(2) requires specificity with respect to interests subject to forfeiture. Weiner, *supra* note 15, at 247-48. Cf. United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977) (denying motion to quash indictment for lack of specificity under Rule 7(c)(2) because there were no properly forfeitable interests in existence to be so identified). For a discussion of the facts of *Meyers*, see *supra* note 32. In *Russello*, for instance, the government identified all claimed insurance checks by amount, payor insurance company, payee defendant, date, and draft number, as well as other potentially forfeitable interests, in a section of the indictment entitled "Forfeitures." See Joint Appendix, Indictment, *supra* note 9, at 37-47. See also United States v. Peacock, 654 F.2d 339, 351 (5th Cir. 1981) (indictment meticulously setting out arsons that defendants allegedly had committed and precise amount of insurance proceeds that defendants gained from arsons gave defendants ample notice of property government sought to have forfeited under RICO).

<sup>189</sup> Courts have tolerated forfeiture of interests identified in indictments under "catch-all" provisions. See, e.g., *Thevis*, 474 F. Supp. at 145 (defendant's contention that properties subject to forfeiture were not listed with sufficient particularity under Rule 7(c)(2) rejected where government sought forfeiture of defendant's entire interest in the designated properties); United States v. Bergdoll, 412 F. Supp. 1308, 1318-19 (D. Del. 1976) (upholding indictment seeking forfeiture of "all profits, interest in, claims against or property or contract and rights" obtained from defendant's participation in continuing criminal enterprise in violation of 21 U.S.C. § 848). Prosecutors using such a "catch-all" provision apparently would rely on facts elicited at trial to determine the extent of the forfeiture to be sought at the end of the trial. Because a special jury verdict on forfeiture is required by Rule 31(e), see *supra* note 22, the government eventually would have to offer the jury a precise amount to be forfeited. But cf. United States v. Hess, 691 F.2d 188, 191 (4th Cir. 1982) (no special verdict required in RICO criminal forfeiture proceeding where defendants had stipulated "in lieu of a Special Verdict" as to the amount of their interests in agricultural association).

The due process interests of RICO defendants might be implicated by use of these "catch-all" provisions. As indicated in the text, *Russello* occasions a greater stake for the RICO defendant facing criminal forfeiture. Criminal forfeiture orders traditionally have been accorded certain procedural protections, as the discussion of Rule 7(c)(2) indicates. A forfeiture order is a judgment separate from the sentence and commitment order, requiring a separate notice of appeal. See Joint Appendix, *Martino* panel opinion on forfeiture, *supra* note 29, at 64 n.19. The forfeiture may even be the subject of a separate trial. See United States v. Cauble, 706 F.2d 1322, 1348 (5th Cir. 1983) (RICO forfeiture issue and instructions should be withheld from jury until general verdict returned); Weiner, *supra* note 15, at 252 n.104 (there exists "little guidance currently as to whether the trial should be bifurcated"). A district court has relatively little discretion after a jury has found interests to be forfeitable under RICO. See United States v. Godoy, 678 F.2d 84, 88 (9th Cir. 1982) (district court obligated to order forfeiture after jury determines applicability of forfeiture provision); United States v. L'Hoste, 609 F.2d 796, 812-13 (5th Cir.) (forfeiture of property mandatory after jury forfeiture determination), *cert. denied*, 449 U.S. 833 (1980). The district court may have some discretion under § 1963(c) to set "terms and conditions" of the forfeiture. See *supra* note 7 (text § 1963). But see *L'Hoste*, 609 F.2d at — (district court's ability to set terms and conditions of RICO forfeiture is limited and any abuse of discretion is subject to appellate review); Weiner, *supra* note 15, at 253 (§ 1963(c) should not be used to give district

employ a mix of these approaches.<sup>190</sup>

Due to both the greater liability generally and the application of RICO forfeiture to more *monetary* proceeds specifically, *Russello's* holding likely will require a greater role than had previously been the case for a host of restitutionary and other principles, such as those concerning tracing of illegal proceeds into other forms, protection of innocent third parties, and relation back of forfeitable interests to the time of the offense. The effective use of the RICO criminal forfeiture penalty necessarily entails thorough investigation of the defendant's financial affairs.<sup>191</sup> However, neither the right to use such investigations to trace funds to a particular RICO defendant on restitution-type theories,<sup>192</sup> nor, conversely, the obligation to so trace, is clearly established.<sup>193</sup> A related issue centers on criminal

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courts discretion to deny forfeitures). These factors underscore the important role of procedural protections, like Rule 7(c)(2), with respect to criminal forfeiture.

<sup>190</sup> The en banc Fifth Circuit in *Martino* expressly noted that there was no occasion there for the court to address the possible ramifications of its decision on the requisite degree of particularity in the indictment: "Questions regarding the specificity required in the indictment in order to comply with Federal Rule of Criminal Procedure 7(c)(2) and the extent to which tracing principles apply in satisfying that requirement are not before us." *Martino*, 681 F.2d at 961 n.31.

<sup>191</sup> See Weiner, *supra* note 15, at 248 n.88. One commentator has identified common techniques in such efforts, which include examination of public records, utilization of IRS information, grand jury subpoenas of corporate records, examination of local land transfer indexes, electronic surveillance, daily mail covers, subpoenas of telephone records, and the use of informants. See Magarity, *RICO Investigations: A Case Study*, 17 AM. CRIM. L. REV. 367, 375-77 (1980).

<sup>192</sup> Restitutionary principles provide established legal rules governing the tracing of fungible cash, for example, where it has been commingled with other cash. See RESTATEMENT OF RESTITUTION §§ 211-15 (1937). One method to legally reach property so traced involves a constructive trust, which imposes, on unjust enrichment grounds, an equitable duty on the holder of title to property to convey it to another. See *id.* at § 160. An equitable lien allows one to reach property as security for a claim, also on unjust enrichment grounds. *Id.* at § 202.

<sup>193</sup> The issue as to whether the government has an obligation to trace profits and proceeds into their current form was expressly left unresolved in *Martino* because it went "to collectibility and related procedures and not to the type of interests forfeitable under § 1963(a)(1)" and because the parties had not briefed the issue. 681 F.2d at 961. See *supra* note 50 and accompanying text. The *Martino* court delegated the determination in the first instance to the district court. 681 F.2d at 961. The government in *Martino* claimed that it had no statutory or constitutional duty to trace the insurance proceeds into their current form. *Id.* at 961 & n.32. The government equated the monetary forfeiture order with an ordinary money judgment, "permitting it to satisfy the judgment from any of the defendants' current assets." *Id.* at 961 (footnote omitted). Despite its noncommittal stance, the *Martino* court did observe that commentators had suggested the application of normal restitution principles, such as the theories of constructive trust and equitable lien, to trace forfeitable property that has changed form. *Id.* (footnote omitted). See also Weiner, *supra* note 15, at 242 ("Tracing of the defendant's property into bank accounts and other places should be permitted so long as the required nexus to the criminal violation in section 1962 is proven beyond a reasonable doubt.").

forfeiture that implicates the rights of third parties, a question that courts increasingly will encounter given *Russello*'s expansion of the range of forfeitable interests under RICO.<sup>194</sup> The possibility of relation back of forfeitable interests to the time of the offense is another concept, related to both tracing and to the protection of third parties, that likely will be the focus of some judicial debate in light of *Russello*'s inclusion of money as a forfeitable interest.<sup>195</sup> Finally, lower courts necessarily must address the effect of forfeiture of profits and proceeds on provisional equitable remedies, such as restraining orders, performance bonds, receiverships, or "other actions," that are within the jurisdictional power of district courts handling RICO cases.<sup>196</sup> Although *Russello* should not impact on

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<sup>194</sup> Section 1963(c) provides both that "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," and that the "United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons." 18 U.S.C. § 1963(c) (1982). See *supra* note 7 (text § 1963). RICO does not define "innocent persons."

Traditional civil forfeiture proceedings admitted of no right of innocent persons to assert any claims if a particular forfeiture affected their interests. See *Weiner, supra* note 15, at 257. In the customs law, Congress as a matter of legislative discretion provided for a person with an interest in seized property to petition for cancellation. *Id.* at 257-58 (citing 19 U.S.C. § 1618). RICO employs the practice under the customs laws, where not inconsistent with its specific provisions, as a referent. See 18 U.S.C. § 1963(c) (1982). In a criminal context, however, depriving third parties of title to property without an opportunity to be heard may raise due process considerations. See *Taylor, supra* note 34, at 396. *Taylor* has identified a number of questions that he indicates must be faced by a court should it allow a third party, alleging an interest in property ordered forfeited by a jury, to participate in post-trial proceedings: "Who has the burden of proof? What weight, if any, is the jury's verdict to be given? What standard of proof is to be applied: the civil standard of preponderance of the evidence or the criminal standard of beyond a reasonable doubt?" *Id.* at 396 n.118. See generally *Comment, RICO Forfeitures and the Rights of Innocent Third Parties*, 18 CAL. W.L. REV. 345 (1982).

<sup>195</sup> The *McManigal* court rejected the relation back doctrine in RICO forfeiture cases, "interpret[ing] the government's right to the property to attach on conviction; or, if the government can meet its burden of showing a high enough likelihood of conviction to get a restraining order, then on indictment." *McManigal*, 708 F.2d at 289 n.6 (citation omitted). The court noted that relation back in the RICO context could serve only a punitive, as opposed to remedial, purpose. *Id.* at 289. Although not addressing the issue, *Russello* on its facts affirmed the forfeiture of insurance proceeds, which *Russello* received shortly after the § 1962 violation occurred (the predicate offenses were arson and related actions), even though, assumedly, at least some of the proceeds had been converted to cash or other form before trial commenced or a restraining order issued. See *Russello*, 104 S. Ct. at 304. This fact situation appears, therefore, to cloud the relation back issue.

<sup>196</sup> Section 1963(b) provides district courts with authority to enter restraining orders or prohibitions, or to take "other actions," such as requiring performance bonds, with respect to property subject to forfeiture, as they deem proper. See 18 U.S.C. § 1963(b) (1982). For full text of § 1963, see *supra* note 7.

A restraining order potentially can assume great significance in a RICO forfeiture context involving, for instance, a large amount of cash proceeds. Although a restraining

the basic principles governing the granting of equitable provisional remedies, it will clearly enhance the significance, both for the government and for the defendant, of such actions.

## V. CONCLUSION

The Supreme Court's decision in *Russello* represents a recognition of RICO's expansive scope, continuing the Court's broad approach to interpreting RICO that was first exhibited in *Turkette*. *Russello* is not a surprising decision, despite the body of lower court case law holding that RICO's forfeiture mechanism does not encompass proceeds or profits of racketeering activity. The Court is cor-

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order does not in itself violate due process, *see* *United States v. Bello*, 470 F. Supp. 723, 724-25 (S.D. Cal. 1979) (issuance of restraining order relating to assets subject to RICO forfeiture did not constitute pretrial determination of guilt and did not deny defendant due process); *United States v. Scalzitti*, 408 F. Supp. 1014, 1015 (W.D. Pa. 1975) (restraining order on assets subject to potential RICO forfeiture did not deprive defendant of presumption of innocence), courts may exercise considerable caution in employing a restraining order in the context of RICO criminal forfeiture. This judicial caution may be manifested in two ways. First, courts may require a prompt, post-order, seizure hearing. *See, e.g.*, *United States v. Spilotro*, 680 F.2d 612, 617-18 (9th Cir. 1982) (recognizing importance of affording prompt hearing once restraining order is issued, government could not wait until trial to produce adequate grounds for forfeiture to justify restraining order on encumbrance of corporate assets); *see generally* Comment, *Criminal Forfeiture and the Necessity for a Post-Seizure Hearing: Are CCE and RICO Rackets for the Government?*, 57 ST. JOHN'S L. REV. 776 (1983). *Contra* Blakey, *supra* note 15, at 316 n.176 (criticizing *Spilotro* as converting a § 1963(b) hearing into a mini-trial, causing unnecessary delay and unwisely affording criminal defendants pretrial discovery). Blakey argues that the indictment itself may be considered sufficient probable cause on the question of criminal responsibility to justify a restraining order. *Id.* at 315 n.176. He would limit the court to the issue of the "proper terms" of the order. *Id.* *See* 18 U.S.C. § 1963(b) (1982). He continues:

RICO grants broad equitable powers. . . . In light of its liberal construction clause and its legislative history, it ought to be held to authorize temporary restraining orders, preliminary injunctions, receiverships, and the full range of ultimate equity relief on the request of the government or private parties, and because the source of the jurisdiction is statutory, restrictive precedent ought not be held to narrow the ability of the court to do justice.

*Id.* at 338 n.217 (citations omitted).

Further evidence of judicial caution is reflected in the heavy burden imposed by some courts on the government to justify equitable action such as a restraining order. *See, e.g.*, *Spilotro*, 680 F.2d 612, 618 (9th Cir. 1982) (government's burden in obtaining restraining order is to demonstrate that it is likely to convince jury beyond a reasonable doubt that defendant is guilty of racketeering and the properties are subject to forfeiture); *United States v. Beckham*, 562 F. Supp. 488, 490 (E.D. Mich. 1983) (issuance of restraining order requires proof by clear and convincing evidence that the properties were involved in the violation, that the properties would be subject to forfeiture, and government has reasonable grounds to believe defendant is likely to make properties inaccessible to government before end of trial); *United States v. Veon*, 538 F. Supp. 237, 240-41 (E.D. Cal. 1982) (brief ex parte restraining order will be continued only if government establishes in adversary hearing by preponderance of the evidence that defendant is guilty and property subject to forfeiture).

rect in interpreting Congress' use of differing language in Sections 1963(a)(1) and (a)(2) as attributable to something more than poor draftsmanship. Given RICO's broad purpose and its equally broad operative language, the Court was justified in ascribing an expansive construction to RICO's forfeiture provision. The *Russello* Court's reading of the forfeiture provision is consistent with RICO's legislative history and preserves the effectiveness of RICO's criminal sanctions. The decision does, however, raise some questions with respect to future application of the forfeiture provision. The Supreme Court's holding in *Russello* will require that lower courts address a number of related issues, such as what other types of property may constitute forfeitable "interests," the effect of greater potential criminal liability on existing procedural protections, the role of traditional restitutionary principles with respect to property subject to forfeiture, and the use of provisional equitable remedies.

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