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## Current RICO Policies of the Department of Justice

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# Current RICO Policies of the Department of Justice

*Edward S.G. Dennis, Jr.\**

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## I. INTRODUCTION

In *H.J. Inc. v. Northwestern Bell Telephone Co.*<sup>1</sup> the United States Supreme Court issued its latest opinion interpreting the reach of the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>2</sup> The *H.J. Inc.* decision comes at a time when the RICO statute is at the

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1. 109 S. Ct. 2893 (1989). In *H.J. Inc.* the Court held that a RICO "pattern of racketeering activity" must consist of racketeering acts that are related and that pose a threat of continuing racketeering activity. *Id.* at 2901. However, the Court rejected the Eighth Circuit's requirement that the pattern consist of multiple "schemes." *Id.* at 2906; *see also* *H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648 (8th Cir. 1987), *rev'd*, 109 S. Ct. 2893 (1989).

2. Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1988)).

center of controversy. Those opposed to private treble damages suits particularly attack the statute. The defense bar attacks the use of the statute in white-collar prosecutions, especially in those cases involving securities fraud. If the defense bar has its way in Congress, RICO could not be invoked in cases involving fraud alone. The criminal defense bar also has criticized the pretrial restraining orders and subsequent forfeitures that have been ordered by the courts in several high-profile RICO cases.

The Department of Justice, the agency primarily responsible for bringing RICO actions on behalf of the Federal Government, must formulate a reasonable plan for the development of RICO. RICO has proven to be the Department's most effective tool against organized crime and other serious criminal activity, and the flexibility it gives prosecutors must be retained. At the same time, we must concede the legitimate concerns of the private bar, the public, and, of course, the Supreme Court, that RICO, like any statute, is subject to abuse.

Most current efforts at legislative reform of RICO have been designed to curb alleged abuses by private plaintiffs.<sup>3</sup> Nevertheless, we continue to fear that our use of RICO will be unfairly lumped together with the many private RICO suits that have created calls for reform. If we let this brush tar our image, Congress might curtail needlessly the criminal provisions of this most important statute. Our best defense is our record. It is important, therefore, to review the evolution and success of criminal RICO prosecutions.

## II. EVOLUTION OF RICO PROSECUTIONS AND AUTHORIZATION PROCEDURES

In 1981, eleven years after RICO was enacted, federal RICO prosecutions, while not rare, were not yet commonplace. Perhaps thirty a year, or fewer, were filed during the statute's first decade. By today's standards, most of these prosecutions were of modest proportion, usually alleging the commission of traditional organized crime offenses like extortion, gambling, or labor racketeering.<sup>4</sup> Civil RICO cases virtually

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3. See, e.g., S. 438, 101st Cong., 1st Sess. (1989); H.R. 1046, 101st Cong., 1st Sess. (1989) (bills pending in the 101st Congress that would limit recovery of treble damages to government plaintiffs or private plaintiffs where the defendant previously has been convicted of related conduct); S. 1523, 100th Cong., 1st Sess. (1987); H.R. 4923, 100th Cong., 2d Sess. (1988) (bills in the 100th Congress using the prior-conviction approach to limit recovery of treble damages); H.R. 4920, 100th Cong., 2d Sess. (1988) (bill in the 100th Congress that sharply would restrict government equitable suits involving labor unions, and that would restrict private actions by subject matter); H.R. 2943, 99th Cong., 1st Sess. (1985) (bill introduced in 1985 adopting the prior-conviction approach).

4. See, e.g., *United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983); *United States v. Zemek*, 634 F.2d 1159 (9th Cir. 1980), *cert. denied*, 450 U.S. 916

did not exist.

The quiescence of the RICO statute during its first decade did not predict the statute's second decade. In 1983 and 1984 an explosion of RICO cases occurred that is still being felt. In part, this explosion was ignited by the *United States v. Turkette*<sup>5</sup> and *Russello v. United States*<sup>6</sup> decisions. In *Turkette* the Supreme Court held that a RICO "enterprise" can be a wholly illegitimate group, such as an organized crime family.<sup>7</sup> *Russello* held that the proceeds of racketeering activity are subject to forfeiture under 18 U.S.C. section 1963(a)(1).<sup>8</sup> In combination these decisions opened the door to "association-in-fact" prosecutions seeking broad forfeitures from business and labor interests. Soon after *Turkette* and *Russello* were decided, several major RICO prosecutions of organized crime factions in New York City reached the indictment stage, accompanied by enormous media coverage.<sup>9</sup> This coverage spurred FBI offices and federal prosecutors throughout the country to increase significantly the number of RICO investigations and to accelerate the completion of RICO cases already initiated. By 1989 the steady flow of organized crime RICO prosecutions had resulted in the convictions of a number of organized crime figures: the bosses of the major New York La Cosa Nostra families in the "Commission" case;<sup>10</sup> numerous participants in a massive Sicilian heroin importation ring (the "Pizza Connection" case);<sup>11</sup> and mob bosses in Los Angeles,<sup>12</sup> Cleveland,<sup>13</sup> Kansas City,<sup>14</sup> Philadelphia,<sup>15</sup> Boston,<sup>16</sup> and Newark.<sup>17</sup> Several of these defendants received prison sentences of one hundred years.<sup>18</sup>

As we gained experience through the organized crime cases, we increased the use of RICO in other categories. In Chicago, for example, Operation GREY LORD has produced a spectacular string of successful

(1981); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

5. 452 U.S. 576 (1981).

6. 464 U.S. 16 (1983).

7. *Turkette*, 452 U.S. at 580-81.

8. *Russello*, 464 U.S. at 16, 22.

9. *See, e.g.*, *United States v. Salerno*, 868 F.2d 524 (2d Cir.), *cert. denied*, 109 S. Ct. 3192 (1989); *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1995 (1988); *United States v. Napolitano*, 552 F. Supp. 465 (S.D.N.Y. 1982).

10. *See Salerno*, 868 F.2d at 524.

11. *See United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989).

12. *See United States v. Milano*, No. 87-439 (C.D. Cal. 1987).

13. *See United States v. Licavoli*, 725 F.2d 1040 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984).

14. *See United States v. Civella*, No. 84-32-5 (W.D. Mo. 1984).

15. *See United States v. Scarfo*, 711 F. Supp. 1315 (E.D. Pa. 1989).

16. *See United States v. Angiulo*, No. 83-235-N (D. Mass. 1983).

17. *See, e.g.*, *United States v. Provenzano*, 688 F.2d 194 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982).

18. *See, e.g., Salerno*, 868 F.2d at 524.

RICO prosecutions of corrupt judges and associated persons.<sup>19</sup> After five years, those cases are still being prosecuted. Other RICO prosecutions have attacked every variety of public corruption at the state, local, and federal levels.<sup>20</sup> RICO has been used against violent motorcycle gangs such as the Pagans and the Outlaw Motorcycle Club.<sup>21</sup> In Seattle, RICO was used to prosecute members of the "Order," a neo-Nazi terrorist group that furthered its extremist views through murder and armed robbery.<sup>22</sup> There have been scores of successful RICO prosecutions of narcotics rings, including major South American traffickers such as Carlos Lehder.<sup>23</sup> Other major figures, such as former Panamanian General Manuel Noriega, are under indictment. More recently, RICO has been applied to extensive white-collar criminality, including insider-trading of securities<sup>24</sup> and bank failures caused by criminal fraud.<sup>25</sup>

Finally, although used far less frequently than the criminal provisions, the civil RICO provisions have proven their worth in several government actions, including the recently settled suit in the Southern District of New York that sought to remove a long-standing criminal influence from the International Brotherhood of Teamsters.<sup>26</sup>

Thus, as private civil RICO cases have mushroomed,<sup>27</sup> the government's uses of criminal and, to some extent, civil RICO has also expanded. However, in contrast to private RICO cases, all government actions were and are subject to strict internal review and controls. In 1981 the Criminal Division established a system whereby every proposed RICO action by the government, criminal or civil, is submitted to the Organized Crime and Racketeering Section for review and approval.<sup>28</sup> The Section substantially modifies most of these cases before the charges are filed. As a result of this review process, very few of our

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19. See, e.g., *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986); *United States v. Devine*, 787 F.2d 1086 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986); *United States v. Conn*, 769 F.2d 420 (7th Cir. 1985); *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

20. See, e.g., *LeFevour*, 798 F.2d at 977 (Cook County, Ill., judge); see also *United States v. Dozier*, 672 F.2d 531 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982) (state official); *United States v. Aguilar*, No. CR 89-364 (N.D. Cal. 1989) (indictment filed) (federal judge).

21. See, e.g., *United States v. Grayson*, 795 F.2d 278 (3d Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987); *United States v. Nolan*, No. 86-6122-Cr-ZLOCH (S.D. Fla. 1986).

22. *United States v. Yarbrough*, 852 F.2d 1522 (9th Cir.), *cert. denied*, 109 S. Ct. 171 (1988).

23. See, e.g., *United States v. Lehder-Rivas*, 669 F. Supp. 1563 (M.D. Fla. 1987).

24. See, e.g., *United States v. Elliott*, No. 88-CR-645 (N.D. Ill. 1988) (indictment filed).

25. See, e.g., *United States v. Billman*, No. B-89-0466 (D. Md. 1989) (indictment filed).

26. *United States v. International Bhd. of Teamsters*, No. 88 Civ. 4486 (DNE) (S.D.N.Y. 1988) (settled in Mar. 1989).

27. See *infra* note 30 and accompanying text.

28. CRIMINAL DIV., U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (1989) [hereinafter U.S.A.M.].

RICO prosecutions have failed because of defects in the pleadings or in legal justification.<sup>29</sup> As a further result of our approval procedure, there has been, until recently, very little criticism of the government's use of RICO. The lack of any such controls over private civil actions, however, arguably has caused the controversy surrounding the private use of RICO to have a negative spill-over effect onto the governmental actions.

### III. THE CIVIL RICO CONTROVERSY AND PROPOSED REFORM LEGISLATION

The Department has used RICO aggressively over the past ten years, but has protected RICO from attack by carefully controlling its use. During this same period, the private civil RICO controversy has grown out of control.<sup>30</sup> I agree with many RICO reformists that a number of these private actions were well outside the scope of the original congressional intent.<sup>31</sup> As the government helplessly watched the volume of civil RICO filings increase, the federal courts have reacted by reinterpreting RICO more narrowly despite Congress's specific requirement that RICO be "liberally construed."<sup>32</sup> For example, the Second Circuit held that a RICO plaintiff must demonstrate both that the defendant had been convicted previously of at least one of the acts of racketeering alleged in the RICO complaint or of a RICO violation and that the plaintiff had suffered a "racketeering injury" *from the RICO violation* apart from any injury caused by the underlying criminal acts.<sup>33</sup> These judicially imposed requirements were rejected by the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*<sup>34</sup> and *American National Bank and Trust Co. v. Haroco, Inc.*<sup>35</sup>

The *Sedima* decision demonstrates how the civil RICO controversy has affected governmental use of RICO. In *Sedima* the Supreme Court suggested that a "pattern of racketeering activity" must exhibit "continuity plus relationship."<sup>36</sup> Because a "pattern of racketeering activity" must be proved beyond a reasonable doubt in criminal cases, we have

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29. The Department has approved some 800 cases. Of those, fewer than 2% purportedly contained legal defects.

30. See, e.g., Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827 (1987); Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55; Lacovara & Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985); Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655 (1982).

31. See, e.g., *Marconi v. White Sox*, No. 83-C-7015 (N.D. Ill. Mar. 31, 1986) (alleging that baseball stadium guards confiscated tickets plaintiff was attempting to sell).

32. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947.

33. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

34. 473 U.S. 479 (1985).

35. 473 U.S. 606 (1985).

36. *Sedima*, 473 U.S. at 496 n.14.

struggled with these terms ever since. Because we have applied our single-episode rule,<sup>37</sup> our RICO indictments have survived attack even in those courts construing narrowly the term "pattern of racketeering activity." In 1987, however, the Eighth Circuit held in a civil RICO case that the Government had to establish the existence of multiple schemes, not simply multiple acts of criminal conduct.<sup>38</sup> Such a restrictive definition of pattern virtually halted criminal prosecutions in that circuit. Fortunately, the Supreme Court eventually reversed the decision.<sup>39</sup>

Even though the Court has rejected restrictive interpretations of the RICO statute, the continued appearance of RICO cases in the Supreme Court has had consequences extending far beyond the legal issues presented in those individual cases. Most significantly, many in Congress have viewed the *Sedima* and *H.J. Inc.* decisions as judicial S.O.S. signals. In response to these signals, members of Congress have proposed a series of bills that would change greatly the face and reach of the entire RICO statutory scheme.

Recently, a flood of RICO "reform" legislation has been proposed.<sup>40</sup> These reform measures have ranged from proposals to increase drastically the number of RICO predicates to proposals that would curtail RICO actions so that only criminal cases could be brought, and only for a reduced number of predicates. Some of the proposals have been dazzling in their complexity and confusion.<sup>41</sup>

Our response to RICO "reform" bills has evolved over the years. At first, we felt that the abuse of private civil RICO was insufficient to warrant substantial amendments.<sup>42</sup> Today, we believe the increased abuse in private civil RICO threatens government use of RICO; therefore, some restrictions on private actions are called for. In public testimony, we have indicated that if it becomes impossible to reach a consensus with respect to lesser reforms, Congress should consider seriously the abolition of private RICO actions.<sup>43</sup> Whether the situation has

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37. United States Attorneys' Manual provides: "No indictment shall be brought charging a violation of 18 U.S.C. § 1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction." U.S.A.M., *supra* note 28, § 9-110.340.

38. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648 (8th Cir. 1987), *rev'd*, 109 S. Ct. 2893 (1989).

39. *H.J. Inc.*, 109 S. Ct. at 2893.

40. See *supra* note 3.

41. See, e.g., S. 438, 101st Cong., 1st Sess., 135 CONG. REC. S1653 (daily ed. Feb. 23, 1989), which would replace the one short paragraph of 18 U.S.C. § 1964 (1988) with a 9½-page version of the subsection, including designations such as 18 U.S.C. § 1964(c)(2)(B)(iii)(II) (1988).

42. See *RICO Reform: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. & 2d Sess. 333 (1985) (statement of John C. Keeney).

43. See *Hearings on S. 438 Before the Senate Judiciary Comm. on the Judiciary*, 101st

become that extreme, however, remains to be seen.

Let me summarize our position with respect to RICO reform legislation at this time. Since May 1985 the Department has testified on several occasions before House and Senate committees that were considering proposals to narrow the private civil provisions of RICO.<sup>44</sup> Depending on the extent of the reform contained in the particular bill under consideration, the Department has:

1. endorsed the retention of the term "racketeering" for government RICO actions;
2. recommended that the United States be designated a "person" under section 1964(c) and thus qualify for treble damages whether or not the defendant has been convicted previously of RICO or of a predicate act;
3. opposed creation of affirmative defenses in a government civil RICO action allowing the defendant to assert that the "criminal" acts were committed in reliance on a state or federal regulatory ruling;
4. opposed retroactive application of RICO reform legislation;
5. sought to specify that the government's burden of proof in a civil RICO suit be a preponderance of the evidence;
6. opposed efforts to dilute the strength of sections 1962, 1963, and 1964(a);<sup>45</sup>
7. conceded that private civil RICO suits under section 1964(c) should be curtailed, possibly by enactment of a prior-conviction requirement,<sup>46</sup> or abolished; and,
8. opposed the complicated formulas proposed in recent bills that create special categories of plaintiffs or injury through which actual, punitive, or treble damages become available.

#### IV. CONTROVERSIES SURROUNDING GOVERNMENTAL USE OF RICO

##### A. Pretrial Restraining Orders

The Department's use of temporary restraining orders (TROs) to prevent the dissipation of assets subject to forfeiture prior to the conclusion of a criminal RICO trial has engendered deep criticism. Under 18 U.S.C. section 1963(d), the United States may move for the entry of

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Cong., 1st Sess. (1989) [hereinafter *S. 438 Hearings*] (hearings not officially printed as of current date) (testimony of John C. Keeney).

44. See *supra* notes 42-43 and accompanying text; see also 18 U.S.C. § 1964(c) (1988).

45. See 18 U.S.C. § 1962 (1988) (describing the prohibited activities under the statute); *id.* § 1963 (setting forth criminal penalties for violations); *id.* § 1964(a) (granting jurisdiction to United States district courts to impose civil remedies for violations).

46. Such a provision would require that a defendant have been convicted of RICO or a RICO predicate offense as a prerequisite to recovery of treble damages by the plaintiff.

such an order upon the filing of a RICO indictment.<sup>47</sup> Although the statute does not expressly require an adversarial hearing on the motion, most courts have decided that some sort of adversarial hearing is necessary to ensure due process to the person whose assets are to be restrained.<sup>48</sup> The Criminal Division instructs its prosecutors to consent to a defendant's request, if reasonable, for an adversarial hearing to determine whether a TRO is appropriate in a particular case. However, despite the fact that pretrial restraints have been a feature of RICO since its inception, and even the subject of litigation as long ago as 1975,<sup>49</sup> RICO-TROs are hotly debated, perhaps because of public reaction to the Princeton/Newport case.<sup>50</sup>

Princeton/Newport Partners (PNP) was a New Jersey investment partnership that conducted substantial stock and bond trading in the 1980s with Drexel Burnham Lambert (Drexel). Five PNP officers (and a Drexel officer) were indicted in the Southern District of New York on August 4, 1988, for RICO and other charges involving securities and related violations as well as tax fraud conspiracy. The United States Attorney moved the same day for a TRO to prohibit each defendant from liquidating his interests in PNP. The prosecution also sought to restrain PNP itself from liquidating its assets even though PNP was not a defendant. After modifying the government's request, the court entered the TRO but agreed to withhold distribution of the TRO to PNP's customers while PNP appealed to the Second Circuit.<sup>51</sup>

In the Second Circuit the defendants argued that the restraining order was improper because it sought to place restraints on an unindicted third party in order to secure a potential RICO forfeiture. The Second Circuit disagreed, ruling that section 1963(d)(1)(A) clearly authorizes a court to "take any other action . . . to preserve the availability of . . . property" subject to forfeiture.<sup>52</sup> However, the court directed the district court to explore alternative methods of securing the forfeiture, such as the posting of a performance bond.<sup>53</sup> On remand, the

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47. See *id.* § 1963(d)(1)(B). Under § 1963(d)(1)(B), the government also may move for a preindictment TRO in certain extraordinary circumstances. *Id.* This provision is rarely used.

48. The Supreme Court recently declined to decide whether a hearing is required or, if so, how extensive the hearing must be. See *United States v. Monsanto*, 109 S. Ct. 2657, 2666 n.10 (1989). Some circuits clearly require a hearing. See, e.g., *United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986); *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985). But see *United States v. Musson*, 802 F.2d 384 (10th Cir. 1986) (holding that an indictment supplies sufficient probable cause to justify a TRO).

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

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

51. *Id.* at 117-18.

52. *Id.* at 119 (quoting 18 U.S.C. § 1963(d)(1) (1988)).

53. *Id.* at 121-22.

government claimed that the amount to be secured was the maximum potential forfeiture, meaning the maximum value of each defendant's interest in PNP during the period covered by the indictment. The defendants sought to limit forfeiture to the amount of their capital accounts as of the date of the indictment.<sup>54</sup>

The district court ruled that the government could restrain the assets of unindicted third parties if the restraint was necessary to preserve the potential forfeiture. According to the court, "The Government has the right to preserve property that might be tainted, even if it involves the property of third, fourth and fifth parties."<sup>55</sup>

At a hearing to determine the amount of the potential forfeiture that had to be secured, the prosecutors requested twenty-four million dollars, the maximum amount of the defendants' interest in PNP during the alleged racketeering activity and up to the date of the indictment. Judge Carter limited the amount to fourteen million dollars, which represented the maximum amount of the defendants' interests only during the period of the racketeering activity, along with interest accrued in that time.<sup>56</sup> As a result of this ruling, Princeton/Newport was able to post a bond, and there was no need for a restraining order against the firm.

After Princeton/Newport posted the bond, the dispute worsened. Defense attorneys claimed that the threat of a superseding indictment, which prosecutors originally had announced for November 1988, but then postponed until January 1989, ultimately led to the announcement of PNP's liquidation on December 7, 1988.<sup>57</sup>

The pretrial announcement of PNP's liquidation angered the business media, especially the *Wall Street Journal*.<sup>58</sup> Whatever the facts behind the announced liquidation may have been—and there is considerable dispute about the facts—we recognize the continuing *perception* that the RICO TRO contributed to PNP's liquidation before the defendants had a chance to defend themselves at trial.<sup>59</sup> The Department

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54. *United States v. Regan*, 699 F. Supp. 36, 37-38 (S.D.N.Y. 1988).

55. *United States v. Regan*, No. 88 Cr 517 (RLC) (Order dated Oct. 4, 1988).

56. *United States v. Regan*, No. 88 Cr 517 (RLC) (Order dated Oct. 21, 1988).

57. The defendants asserted that investors in the PNP partnerships were allowed to withdraw capital only once a year, on Nov. 19. In response to the government's plans for a superseding indictment, the withdrawal date was moved back to Dec. 10, 1988, so that the investors could consider the impact of the final indictment prior to making their investment decisions. When the government pushed back the date of the superseding indictment, the investors purportedly were unable to assess the impact of the final indictment, and the liquidation was announced.

58. See, e.g., Adler, *Heated Argument: Are RICO Seizures a Violation of Rights, As Critics Contend*, *Wall St. J.*, Feb. 15, 1989, at A1, col. 1.

59. Much of the press criticism has been unjustified and uninformed. Because the PNP case is proceeding to appeal, it would be inappropriate to discuss the facts in detail. It is a matter of public record, however, that at trial the defendants were convicted of 63 of the 64 counts alleged in

believes its use of TROs has been justified generally and that it must continue to seek TROs in appropriate circumstances. We recognize, however, that we risk adverse RICO legislation if a perception continues that we needlessly are seeking pretrial restraints of assets.

As a precaution, the Department's RICO approval guidelines<sup>60</sup> were modified in June 1989 to provide:

1. As part of the approval process for RICO prosecutions, the prosecutor must submit any proposed forfeiture TRO for review by the Organized Crime and Racketeering Section. The prosecutor must show that less-intrusive remedies (such as bonds) are not likely to preserve the assets for forfeiture in the event of a conviction.
2. In seeking approval of a TRO, the prosecutor must articulate any anticipated impact that forfeiture and the TRO would have on innocent third parties, balanced against the government's need to preserve the assets.
3. In deciding whether forfeiture (and, hence, a TRO) is appropriate, the Section will consider the nature and severity of the offense; the government's policy is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant's crime.
4. When a RICO TRO is being sought, the prosecutor is required, at the earliest appropriate time, to state publicly that the government's request for a TRO, and eventual forfeiture, is made in full recognition of the rights of third parties—that is, in requesting the TRO, the government will not seek to disrupt the normal, legitimate business activities of the defendant; will not seek through use of the relation-back doctrine to take from third parties assets legitimately transferred to them; will not seek to vitiate legitimate business transactions occurring between the defendant and third parties; and will, in all other respects, assist the court in ensuring that the rights of third parties are protected, through proceedings under 18 U.S.C. Section 1963(l) and otherwise.

I believe the letter and spirit of these provisions will restrict TROs within acceptable boundaries.

### B. Forfeiture

For much of the 1980s, the controversies surrounding RICO focused on its applicability to certain classes of defendants such as informally organized "enterprises" and on the meaning of "pattern of racketeering activity." While the latter issue remains controversial, the

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the indictment.

The Princeton/Newport defendants were sentenced on Nov. 6, 1989; they received sentences ranging from three to six months. *United States v. Regan*, No. 88 Cr 517 (RLC) (Order dated Nov. 6, 1989). On the issue of forfeiture, Judge Carter apparently agreed with the government's position that § 1963(a)(2) requires full forfeiture of the defendants' enterprise interests, because he ordered Charles Zarzecki, who was involved in stock manipulation, to forfeit the \$1.38 million that the government had requested, rather than the \$200,000 that the jury had directed. However, while the government's position was vindicated in this respect, Judge Carter dismissed the forfeitures against the four defendants who were convicted only of tax-parking charges, on the ground that "the benefits the defendants received were greatly disproportionate to the penalty," in violation of the eighth amendment. *Id.*

60. U.S.A.M., *supra* note 28, § 9-110.414.

public has become accustomed—and gratifyingly so—to the sight of mob bosses in handcuffs being led off to prison to serve fifty year sentences. In the criminal area, RICO works. As a result, the debate has been narrowed considerably to the penalties imposed on white-collar RICO defendants.

Except when convicted under RICO,<sup>61</sup> defendants convicted of federal white-collar offenses generally face a prison sentence (which normally is limited to five years), a fine (perhaps as much as one million dollars, but normally no more than a maximum of 250,000 dollars), and restitution to the victims.<sup>62</sup> Such defendants, in fact, may spend only a short period in jail.<sup>63</sup> All too often, according to a recent article in the *Washington Post*,<sup>64</sup> the fine goes unpaid. Of course, the victims may sue such defendants civilly in state or federal court for compensatory and punitive damages.

RICO, however, operates more broadly. First, RICO requires convicted defendants to forfeit all of their gross criminal proceeds, if such forfeiture is sought.<sup>65</sup> Second, if the defendants have business assets or interests that were specifically *acquired or maintained* through their criminal acts, those interests will be forfeited as well.<sup>66</sup>

The problem—if it is a problem—is that RICO also requires the convicted defendants to forfeit their entire interest in any business (the

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61. Recent legislation in the wake of the savings and loan crisis has increased dramatically the penalties for some other white-collar violations. For example, the maximum penalty for violating 18 U.S.C. §§ 215(a), 656, 657, 1005, 1006, 1007, 1014, 1344 (1988), has been increased to a \$1 million fine and 20 years in prison. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 961, 103 Stat. 183, 499-500 (to be codified in scattered sections of 18 U.S.C.).

62. On Aug. 9, 1989, the penalties for bank fraud under 18 U.S.C. §§ 1341, 1343, 1344 (1988), and other statutes were increased to a maximum of a \$1,000,000 fine and 20 years in prison. In addition, both criminal and civil forfeitures are now available for these and other offenses affecting financial institutions. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, *supra* note 61, § 961, 103 Stat. at 500 (to be codified at 18 U.S.C. § 1344).

63. Under the Sentencing Guidelines promulgated in 1987 pursuant to the Sentencing Reform Act (SRA) of 1984, see Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.), sentences in white-collar fraud cases are dependent largely upon the amount of the financial loss in the case. FEDERAL SENTENCING GUIDELINES MANUAL § 2F1.1 (West 1990). The base offense level for a fraud offense with a loss of \$2000 or less is six, which translates into a sentencing range of between zero and six months for a first-time offender. A fraud offense with a loss between \$1,500,000 and \$2,500,000 would result in a twelve-level increase in the base offense level to level 18 (27-33 months). The minimum base offense level for a RICO violation is level 19 (30-37 months). See *id.* § 2E1.1. It should be pointed out that, because the SRA abolished the parole system, sentences under the SRA are “real time” sentences that can be shortened only by a maximum of 54 days per year for good behavior. See 18 U.S.C. § 3624(b) (1988).

64. Torry, *Unpaid Federal Fines Drift into Oblivion, Disorganization*, Wash. Post, Sept. 18, 1989, at A1, col. 5.

65. See 18 U.S.C. § 1963(a)(3) (1988).

66. See *id.* § 1963(a)(1).

“enterprise”) that is used in some way to facilitate the RICO offense.<sup>67</sup> The rationale is unassailable: Congress wanted racketeers *completely* removed from businesses that they had infiltrated. Many white-collar RICO defendants, however, do not fit the traditional mold of organized crime figures.<sup>68</sup> Even when business people commit a series of frauds, for example, it is difficult in most cases to characterize their activity as criminal “infiltration.” Thus, the *potential* that a business person convicted of RICO could forfeit an entire business has angered RICO critics. This concern with proportionality is legitimate.

Before turning to several court decisions concerning the proportionality of RICO forfeitures, however, I want to make two important preliminary points. First, in recognition of the importance of tailoring forfeiture to the severity of the defendant’s crimes, the Organized Crime and Racketeering Section of the Criminal Division carefully screens every proposed forfeiture, especially those under section 1963(a)(2), to ensure fairness. Certainly we take an aggressive approach to RICO violations; to do less would be to fail in our responsibilities. But we also curtail many proposed forfeitures.<sup>69</sup>

Second, our critics often forget that before a forfeiture actually occurs, a judge must pass upon its legal sufficiency and a fact-finder, usually the jury, upon its factual merits. One would think from the heat generated by RICO forfeitures that the government is allowed to forfeit assets unilaterally. That is neither the law nor the reality.

Section 1963(a)(2), read and applied literally, requires full forfeiture of the defendant’s enterprise interest, even when the degree of the defendant’s crimes may seem minor in comparison to the extent of the forfeiture. The eighth amendment’s protection against disproportionate punishment, however, remains as a bar to indiscriminate use of the forfeiture provision. In *United States v. L’Hoste*<sup>70</sup> the jury convicted the defendant of RICO violations and held his total business interests to be forfeitable. The trial court refused to enter such an order because some

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67. See *id.* § 1963(a)(2). It should be emphasized that such RICO forfeiture is mandatory only if alleged in the indictment and endorsed by the jury. RICO forfeiture may be mandatory, but it is not automatic from the fact of conviction.

68. Some of RICO’s critics have argued that because RICO was enacted in order to address the problem of infiltration of legitimate businesses by organized crime, it should be limited in its application to that class of defendants. Such a limitation, however, would be unworkable and, almost certainly, unconstitutional. The Supreme Court decisively put this argument to rest in *H.J. Inc.*, adopting the view that “[i]t is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.” *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2905 (1989) (quoting Sen. John L. McClellan, 116 CONG. REC. 18,940 (1970)).

69. The screening process is much more extensive than the public record indicates because that record reflects only those forfeitures sought in cases actually indicted.

70. 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 883 (1980).

of the defendant's property was held jointly with his wife.<sup>71</sup> On a writ of mandamus, the Fifth Circuit held that the lower court lacked the power to withhold forfeiture.<sup>72</sup> In contrast, the Second Circuit had already held that in some circumstances, to avoid unconstitutional results, a court must tailor RICO forfeiture to be commensurate with the crimes involved, especially when the defendant's enterprise contained both legitimate and illegitimate aspects.<sup>73</sup>

Three recent cases, *United States v. Busher*,<sup>74</sup> *United States v. Horak*,<sup>75</sup> and *United States v. Porcelli*,<sup>76</sup> have dealt with the proportionality of RICO forfeitures.<sup>77</sup> In *Busher* the defendant's business handled fourteen Department of Defense contracts, only three of which were connected to his acts of racketeering.<sup>78</sup> The Ninth Circuit held that despite RICO's apparent breadth, the district court, in considering forfeiture, must take into account the severity of the defendant's conduct, the degree to which his conduct "infected" his business, his state of mind, and whether his business was essentially legitimate.<sup>79</sup> In short, in the Ninth Circuit, RICO forfeiture must be proportionate to survive an eighth amendment attack.

In *Horak* the Seventh Circuit reached a similar conclusion. The *Horak* defendant's interests in the enterprise—in this case a parent corporation and one of its subsidiaries—covered more than the alleged criminal acts.<sup>80</sup> With respect to the particular entity through which Horak bribed city officials for contracts, the Seventh Circuit stated it would have little trouble upholding forfeiture of any interests (job, salary, bonuses, and pension) that Horak acquired or maintained through his criminal acts in violation of section 1963(a)(1).<sup>81</sup> But the circuit court declined to overrule the district court's denial of forfeiture of the stock that Horak acquired in the parent corporation before he committed his crimes.<sup>82</sup>

The *Porcelli* case involved a defendant who used interlocking corporations to cheat New York State out of 4.7 million dollars in gasoline

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71. *Id.* at 809-10.

72. *Id.* at 813.

73. *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

74. 817 F.2d 1409 (9th Cir. 1987).

75. 833 F.2d 1235, 1239 (7th Cir. 1987).

76. 865 F.2d 1352 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989).

77. *Cf. United States v. Angiulo*, Nos. 86-1331, 89-1212, 89-1800 (1st Cir. Mar. 5, 1990).

78. *Busher*, 817 F.2d at 1414.

79. *Id.* at 1415-16.

80. *Horak*, 833 F.2d at 1241-42.

81. *Id.* at 1243.

82. *Id.* at 1251. It should be noted that the Seventh Circuit found the district court's ruling to be nonappealable; its holding, thus, was in the context of a request for a writ of mandamus.

sales taxes.<sup>83</sup> The *Porcelli* case is difficult to analyze in the forfeiture context because, on at least two occasions, the court confused the defendant and his interests with the enterprise itself.<sup>84</sup> Consequently, at one point the court appeared to hold that a defendant never forfeits an interest under RICO unless that interest is tainted by the defendant's unlawful acts,<sup>85</sup> whereas at a different point the court stated that "a RICO enterprise [sic] found in violation of Section 1962(c) is indivisible and is forfeitable in its entirety."<sup>86</sup> Nonetheless, the court's message to the government was clear: (1) If the government alleges that the defendant operated ten companies as an "enterprise" in violation of RICO and the proof demonstrates that only six companies were connected to the predicate crimes, forfeiture will be confined to the defendant's interests *in the six*; and (2) To the extent that subsection 1963(a)(2) can be construed to *require* total forfeiture of a defendant's interest in a business, regardless of the extent to which that interest is connected to illegal acts, the eighth amendment's protection against disproportionate punishment applies.<sup>87</sup>

Applying these two concepts, the Second Circuit, again contributing to the confusion, held that "Porcelli must forfeit his RICO enterprise."<sup>88</sup> However, unlike the indictment, the court defined Porcelli's enterprise as excluding four companies to which illegality could not be connected.<sup>89</sup>

These cases have had an impact on how the Department of Justice analyzes RICO forfeiture proposals. The clearest message from these cases is that courts do not want, and will go out of their way to prevent, disproportionate forfeitures,<sup>90</sup> either by narrowing the affected "enterprise" alleged in a particular case or by applying the eighth amendment as a check against RICO's liberal construction clause. In one sense, the courts are the answer to those critics who say that section 1963(a)(2) forfeitures are unconstitutional and the source of unfair threats of pros-

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83. *Porcelli*, 865 F.2d at 1357.

84. *See id.* at 1364.

85. *See id.* at 1365. This is actually the "but for" test articulated by the Seventh Circuit in *Horak* for "(a)(1)" interests, *i.e.*, those interests "acquired and maintained" in violation of RICO. *See Horak*, 833 F.2d at 1243.

86. *Porcelli*, 865 F.2d at 1364.

87. *See id.*

88. *Id.* at 1365 (emphasis added).

89. *Id.* at 1365.

90. This situation is akin to the restrictions that the courts have imposed on RICO's "pattern" element, discussed below, in order to weed out technically sufficient but substantively poor civil RICO cases. The forfeiture restrictions, however, result from constitutional limitations, unlike the "pattern" restrictions, which result from statutory interpretation. For a discussion of the reduction of the forfeitures in the Princeton/Newport case under eighth amendment principles, see *supra* note 59 and accompanying text.

ecution. But the Department of Justice also must prevent requests for excessive forfeitures from ever reaching the courts. When courts are faced with excessive forfeiture requests, they are given the opportunity to suggest that RICO is unconstitutional on its face instead of merely ruling on its application. Such broad criticisms invite congressional tinkering to our detriment. Consequently, the Criminal Division does not authorize extreme RICO forfeiture requests even if they technically satisfy the requirements of section 1963(a)(2).

## V. RICO'S "PATTERN" ELEMENT

### A. H.J. Inc. v. Northwestern Bell Telephone Co.

The most recent RICO controversy developed on June 26, 1989, when the Supreme Court issued its long-awaited decision in the *H.J. Inc.*<sup>91</sup> case. The Court's opinion was not particularly controversial. The Court unanimously struck down the Eighth Circuit's notorious "multiple schemes" test, which required not only that a RICO "pattern of racketeering activity" consist of multiple acts of racketeering activity, but that the pattern comprise multiple "schemes."<sup>92</sup> The Eighth Circuit's test was so restrictive that it would have excluded from the reach of RICO many appropriate civil suits and prosecutions.

The Court's failure to explain clearly what "pattern of racketeering activity" does mean, given that it does not require multiple schemes, surprised some observers. The Court, expanding somewhat on its earlier suggestions in the *Sedima* case with respect to the requirements of "continuity" and "relationship,"<sup>93</sup> adopted the definition of "pattern" from the repealed Dangerous Special Offender statute<sup>94</sup> to define the "relationship" concept.<sup>95</sup> This aspect of the Court's opinion is not particularly noteworthy; no RICO cases brought by the government have failed because of a lack of relationship among the acts in the pattern. In fact, each of the three substantive RICO offenses<sup>96</sup> requires a specific nexus between the racketeering acts and the enterprise. Therefore, RICO already has a built-in "relationship" requirement. The broad

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91. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989).

92. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648, 650 (8th Cir. 1987), *rev'd*, 109 S. Ct. 2893, 2901 (1989).

93. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985); see also *supra* notes 33-34 and accompanying text.

94. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. X, 84 Stat. 922 (1970) (repealed 1986). This statute provided that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

*Id.*

95. *H.J. Inc.*, 109 S. Ct. at 2896.

96. See 18 U.S.C. § 1962(a)-(c) (1988).

Dangerous Special Offender definition does nothing to narrow or clarify the "pattern" concept.

With respect to the "continuity" requirement, the Court attempted to provide guidance in defining the term "pattern." The Court's broad explanation of the "continuity" requirement is that for a "pattern of racketeering activity" to exist, the predicate offenses must "themselves amount to, or . . . otherwise constitute a threat of, *continuing* racketeering activity."<sup>97</sup> The Court then went on to explain this requirement, establishing two categories of racketeering conduct that exhibit the required threat of continuity: "closed-ended" and "open-ended."<sup>98</sup> According to the majority opinion, "closed-ended" continuity can be established "by proving a series of related predicates extending over a substantial period of time."<sup>99</sup> If the conduct did not continue over a "substantial period of time," it still may be sufficiently continuous if it can be shown to exhibit an "open-ended" threat of continuity—that is, if it can be seen from the nature of the predicate acts themselves<sup>100</sup> that the activity is likely to continue, or if the acts are connected to the operation of an ongoing criminal enterprise.<sup>101</sup> The Court left open a broad area for further clarification of the "continuity" concept, noting that "the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists."<sup>102</sup>

The Court's discussion of "continuity" is somewhat troubling. It seems at once to be too broad and too narrow, and does not address some of the harder questions about the substance of the "pattern" concept. Under the *H.J. Inc.* approach, it could be argued that any racketeering conduct occurring over a "substantial period of time" constitutes a pattern. Thus, ten related mailings over a period of three years in furtherance of a single scheme to defraud arguably could constitute a RICO pattern. On the other hand, as Justice Antonin Scalia noted in his concurrence, several distinct racketeering crimes committed over a very short period of time arguably could not be prosecuted under the *H.J. Inc.* approach.<sup>103</sup>

Thus, in the Department's view, the *H.J. Inc.* decision did not provide the guidance that the RICO bar eagerly had been awaiting. More-

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97. *H.J. Inc.*, 109 S. Ct. at 2901 (emphasis in original).

98. *Id.* at 2902.

99. *Id.*

100. An example of such conduct is repeated extortion threats.

101. *H.J. Inc.*, 109 S. Ct. at 2902.

102. *Id.*

103. *See id.* at 2908 (Scalia, J., concurring).

over, it contained one particularly troubling feature. In his concurring opinion in *H.J. Inc.*, Justice Scalia concluded:

No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.<sup>104</sup>

That observation, appearing under the endorsement of four Justices, sent a shock wave through the RICO bar. Not surprisingly, the number of constitutional attacks on RICO has increased dramatically. The Department believes that RICO will survive these attacks, primarily because as a criminal statute it adequately notifies the defendant that the repeated commission of criminal acts is unlawful.<sup>105</sup> But the Court's unhappiness with certain aspects of the statute, as expressed first in *Sedima* and now in *H.J. Inc.*, undoubtedly will add momentum to the RICO reform movement.

While we defend RICO in the courts the Criminal Division has begun to consider ways to redefine "pattern of racketeering activity" statutorily. As RICO is now interpreted by the courts, two or more predicate "acts" that are "related" and which reflect or threaten continued criminality constitute a "pattern." Nonetheless, that interpretation contains its own ambiguities. It is not entirely certain what "related" means.<sup>106</sup> Furthermore, a sharp division arose in *H.J. Inc.* over the definition of "continuity." Five Justices appear to think the threat posed by the defendants' criminal activities should "extend[] over a substantial period of time."<sup>107</sup> Four Justices seem to doubt that a bright line can ever be drawn distinguishing continuous from sporadic activity.<sup>108</sup> In fact, after *H.J. Inc.* all we know for certain is that a pattern of racketeering activity need not involve separate schemes, separate episodes, multiple victims, or multiple participants. The task will be to improve RICO by supplying some clarity to the pattern element, if possible,

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104. *Id.* at 2909.

105. It is well settled that to pass constitutional muster a criminal statute need only afford defendants fair notice that their contemplated conduct is criminal; they need not know that their conduct violates a specific statute. *See, e.g.,* *Screws v. United States*, 325 U.S. 91, 104-06 (1945); *United States v. Seregos*, 655 F.2d 33, 36 n.3 (2d Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *United States v. McCoy*, 539 F.2d 1050, 1058 (5th Cir. 1976), *cert. denied*, 431 U.S. 919 (1977). Thus, the Supreme Court has upheld a state RICO statute against a vagueness attack, noting that because the obscenity predicate offenses at issue were not vague, the state RICO statute "cannot be vague either." *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 925 (1989).

106. Acts are related if "they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged.'" *H.J. Inc.*, 109 S. Ct. at 2900. This apparently means that a pattern exists either if the acts are interrelated or are connected to the affairs of the same enterprise although not to each other.

107. *See id.* at 2902.

108. *See id.* at 2907-08.

without unduly restricting its reach in areas where we still need it.<sup>109</sup>

*B. Department of Justice Policies for Interpreting and Applying the Pattern Element*

It is important to note that the controversy surrounding the "pattern" element probably will not result in a significant step back in the criminal or civil actions brought by federal prosecutors. The Department's RICO approval guidelines,<sup>110</sup> administered by the Organized Crime and Racketeering Section on behalf of the Criminal Division, prohibit the bringing of RICO actions in inappropriate circumstances and provide detailed guidance about the requirements for a RICO pattern. Each proposed case is reviewed carefully by experienced attorneys in Washington, D.C., and the final decision to permit RICO charges is made at the level of Deputy Chief of the Organized Crime and Racketeering Section or higher. Virtually all proposed indictments and complaints are modified, often substantially, as a result of the review process.

Although we are continuing to reevaluate our approval policies in light of *H.J. Inc.*, we have not yet instituted any changes in our view of the "pattern" requirement. Our current test is labeled informally the "single-episode test." We will not approve a RICO action unless each act in the proposed pattern of racketeering activity arises from a criminal episode that is significantly distinct from the other conduct in the pattern. Thus, for example, if a defendant mails five letters to an insurance company in support of a single fraudulent claim for insurance, those five mailings constitute one act of racketeering activity and can be grouped together in the indictment. If, however, a defendant mails letters to five different insurance companies, each of which insured the

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109. Years ago, RICO was the only federal vehicle for reaching most mob murders and other crimes of violence other than extortion and for exposing mobsters to long prison sentences for otherwise bloodless crimes, such as fraud schemes that deplete businesses of assets. Consequently, a broadly applied RICO statute was needed, for example, to cover three murders committed on the same day.

The situation has changed considerably in recent years. The narcotics statutes in title 21 have been strengthened so dramatically that RICO is almost never needed in pure narcotics prosecutions. See, e.g., 21 U.S.C. § 841 (1988). Sections 1958 and 1959 of title 18 now deal directly with contract murder and professional crimes of violence without requiring proof that the defendant committed a pattern of (two or more) crimes. See *id.* §§ 1958-1959. The mail fraud and bank fraud statutes now carry, in certain circumstances, 20-year jail terms and \$1 million fines. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, *supra* note 61, § 961(i), (k), 103 Stat. at 500 (to be codified at 18 U.S.C. §§ 1341, 1344). And, of course, several RICO predicate crimes (such as loansharking and extortion) independently carry 20-year penalties. See 18 U.S.C. §§ 891-894, 1951 (1988). As a practical matter, therefore, we do not use RICO in many cases where it technically fits.

110. See *supra* note 28 and accompanying text.

property that is the subject of the fraudulent claims, those five mailings would constitute five acts of racketeering activity because there would be five separate victims.

Obviously, the application of our "single-episode" test is not always so clear cut. However, this nine year old test, under which more than eight hundred RICO prosecutions have been approved, has been workable as a matter of prosecutorial discretion. Unfortunately, this test does nothing to control the use of RICO by private plaintiffs, who are not required to submit their pleadings to us for review. Because of the uncontrolled resort to the civil RICO statute by private litigants, legislative action may result whether the government likes it or not.

## VI. PROPOSED RICO REFORM LEGISLATION

At this writing, there are pending in Congress two nearly identical civil RICO "reform" bills, designated as Senate Bill 438 and House Bill 1046.<sup>111</sup> This legislation sharply would curtail private civil actions for treble damages in most circumstances, while leaving government actions largely untouched. The bill, as currently drafted, would not change the substantive provisions of RICO, including the definition of "pattern of racketeering activity." In recognition of the adage "forewarned is forearmed," however, the Department is considering current proposals to refocus RICO's "pattern" requirement, some of which, if accompanied by a suitable explanatory discussion in the legislative history, might be acceptable to the Department of Justice. We have not, as yet, concluded that one approach is superior to another, but I can provide some insight into the endeavor. For example, one definition that we have considered is the following: "'Pattern of racketeering' means two or more events of racketeering that present an actual or potential threat of continuous racketeering over a substantial period of time, with each event occurring within five years of another event in the pattern." We believe this definition, in conjunction with appropriate analysis in the legislative history, would codify our "single-episode" test, avoid constitutional concerns, and clarify the statute while leaving it intact for important government actions.

Other possible approaches, however, could serve as well. For example, Professor G. Robert Blakey, a principal drafter of the original RICO statute, has proposed the following as one possible approach:

"pattern of racketeering activity" means

(A) three or more acts of racketeering activity (excluding acts of jurisdictional sig-

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111. See *supra* note 3 and accompanying text. On Nov. 16, 1989, the Senate Judiciary Committee was unable to accomplish the scheduled mark-up of S. 438, because of the lack of a consensus.

nificance only),

(B) the last act of racketeering activity occurred within five years of a prior act of racketeering activity,

(C) the acts of racketeering activity were related to each other or to the affairs of an enterprise,

(D) the acts of racketeering activity were part of a continuing series of acts of racketeering.

For the purpose of this paragraph (C), acts of racketeering activity are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events.

For the purpose of paragraph (D), acts of racketeering activity are not part of a continuing series if the acts of racketeering activity are so closely related to each other and connected in point of time and place that the acts of racketeering constitute a single episode so that in reference to the manner of their commission, the purpose for which they were committed, the person who committed them, the enterprise in whose affairs they were committed, or otherwise, the acts of racketeering do not give rise to an inference of the possibility of continuing acts of racketeering activity.<sup>112</sup>

We do not endorse either of these definitions or any other definition that has been proposed. We mention these two approaches only to demonstrate that it is possible to correct the perceived deficiencies in the current "pattern" definition through legislation. We will continue to study these and other possible approaches in order to find one that best clarifies the statute without unduly interfering with appropriate uses of the RICO provisions.

## VII. WHITE-COLLAR RICO PROSECUTIONS

Having addressed in detail the specific controversies currently surrounding TROs, forfeiture of enterprise interests, and the "pattern" requirement, I will conclude by addressing what is perhaps the fundamental question underlying all of these controversies, at least in the context of criminal prosecutions: Does the government have any business using RICO to prosecute white-collar crime?<sup>113</sup>

The most obvious answer is that serious crime is serious crime, regardless of the title on the defendant's door. The stealing of a million dollars through a sophisticated securities fraud or mail fraud scheme is just as harmful to society as the stealing of a similar amount by hijacking interstate trucks. Fraudulent or otherwise criminal activity carried on by legitimate businesses and their employees should be prosecuted to the full extent of the laws enacted by Congress. As the

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112. *S. 438 Hearings, supra* note 43 (testimony of Prof. G. Robert Blakey).

113. It should be noted that most, if not all, of the public controversy about our use of RICO in "white-collar" cases has concerned cases involving securities or commodities fraud. Such cases have constituted only about 2% of criminal RICO prosecutions approved by the Department of Justice between 1984 and 1989.

Supreme Court noted in *H.J. Inc.*, “[l]egitimate businesses ‘enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences.’”<sup>114</sup>

Moreover, Congress clearly envisioned white-collar RICO prosecutions when it included such offenses as mail fraud, wire fraud, and securities fraud in the list of RICO predicates. Very recently, in the wake of the savings and loan crisis, Congress added bank fraud<sup>115</sup> to the list of predicates.<sup>116</sup>

The fact that RICO properly encompasses many white-collar offenses does not dispose of the issue. RICO is undeniably a very broad statute with very severe penalties, including forfeiture. If the criminal provisions were used in every case where they technically applied, we could be criticized justifiably. The key to our use of RICO in prosecuting white-collar crime is to confine the statute’s use to those cases where the unlawful conduct was both continuous and egregious and where there is the prospect of significant forfeiture of ill-gotten proceeds or of interests in a tainted enterprise.

While we certainly recognize the necessity for restraint in our use of RICO to prosecute white-collar crime, we continue to insist that RICO is a valuable tool in the fight against such crime. In some cases such as fraud schemes resulting in the failure of financial institutions, RICO forfeiture may serve to return stolen assets to regulatory agencies for the benefit of defrauded depositors.<sup>117</sup> In other cases, the use of RICO may permit the government to include in the indictment as part of the RICO “pattern” crimes for which the statute of limitations has run and crimes committed in districts other than the district of venue. Thus, the full extent of the defendant’s conduct can be reflected in the charging document, resulting in a fairer sentence.

Despite some apparent public perceptions, there is one thing the government does *not* use RICO for: to coerce defendants into pleading guilty. It is, of course, appropriate to advise a prospective defendant that prosecutors are contemplating RICO charges. A defendant’s knowledge of that fact inevitably will figure in the decision whether to go to trial or to plead guilty. Such an announcement to a defendant must come, however, only in the regular course of plea negotiations, and only when the prosecutors are in good faith planning to seek approval or

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114. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2905 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

115. 18 U.S.C. § 1344 (1988).

116. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, *supra* note 61, § 968, 103 Stat. at 506.

117. 18 U.S.C. § 1963(g)(4) (1988) provides for the restoration of forfeited property to victims and other innocent persons.

have already obtained approval to present a RICO indictment to the grand jury. The Criminal Division strictly enforces this distinction. Prosecutors may not mention RICO charges solely as a weapon of intimidation to coerce a guilty plea.

#### VIII. CONCLUSION

It is our philosophy that the more the public knows about our use of RICO, the less the statute will be subjected to unfair attacks. That is why our RICO guidelines and our procedures dealing with pretrial restraints and forfeitures are part of the public record. It is why in most RICO cases, where flight to avoid prosecution is unlikely, it is our policy to provide preindictment conferences to defense attorneys, and it is why Criminal Division officials have testified so frequently before Congress on the state of RICO use and misuse. With continued restraint by the government and further clarification by the courts and Congress, RICO can be expected to enjoy at least another two decades of vigorous use.