



# Chapter 11

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RICO



In 1984, the federal Racketeer Influenced and Corrupt Organizations (RICO) statute (18 U.S.C. §§ 1961, et seq.) has come into play as a significant tool against the activities of the illegal, hard-core, pornography industry. On October 12, 1984, President Reagan signed into law an amendment (of Senator Jesse Helms) to the federal RICO statute making "dealing in obscene matter" a predicate offense under the statute's definition of "racketeering activity." Originally passed in 1970 after almost 20 years of study, RICO authorizes the imposition of enhanced criminal penalties and civil sanctions to provide new legal remedies for certain types of enterprise criminality. In a nutshell, RICO makes it a crime to engage in a "pattern of racketeering" or to invest in or operate a business with money gained through racketeering. A violator must forfeit his ill-gotten gains and any interest in the activity involved in the RICO violation. A "pattern of racketeering" is shown by proving at least two of a broad range of predicate crimes, which include, *inter alia*, state crimes of murder, kidnapping, arson, dealing in narcotics and federal crimes of robbery, mail fraud, counterfeiting, and now "dealing in obscene matter." RICO is not limited to organized crime in the "mafia" sense. *United States v. Aleman*, 609 F.2d 298, 303-04 (7th Cir. 1979); *Cenco, Inc v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982).

As noted, RICO employs the concept of criminal forfeiture of ill-gotten gains. Civil suits are also authorized, which may be brought by the Attorney General of the United States (18 U.S.C. § 1964(b)), or by injured persons against RICO violators (§ 1964(c)). Specifically, RICO makes it unlawful for "any person" who has received "any income 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 the acquisition of any "enterprise" (§ 1962(a)). It is also unlawful for "any person" through a "pattern of racketeering activity" to acquire or maintain, directly or indirectly, "any interest" in or control of "any enterprise" (§ 1962(b)). It is also unlawful for "any person" employed by or "associated with any enterprise" to "conduct or participate" directly or indirectly in the enterprise's affairs through a "pattern of racketeering activity" (§ 1962(c)). Finally, it is unlawful to "conspire" to violate § 1962(a), (b), or (c) (§ 1962(d)). "Person includes any individual or entity capable of holding a legal or beneficial interest in property" (§ 1961(3)). In Section 1961(4) the word "enterprise" is intended to be illustrative and not binding. It gives as examples of "enterprise" "any individual, partnership, corporation, association, or other legal entity, any union or group of individuals associated in fact though not a legal entity." The enterprise can be legitimate or illegitimate, *United States v. Swiderski*, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979), or associations in fact informally organized for the purpose of

criminal or legitimate activities. *United States v. Clemones*, 577 F.2d 1247 (5th Cir. 1978), *modified*, 582 F.2d 1372 (5th Cir. 1978) (en banc), *cert. denied*, 445 U.S. 927 (1980).

To violate RICO, the takeover or operation must be accomplished through a "pattern" of "racketeering activity." Section 1961(5) limits "pattern" by requiring that it include "at least...two acts..., one which occurred after the effective date of this chapter and the last which occurred within ten years...after the commission of a prior act" (18 U.S.C. § 1961(5)). The acts must be "related" to each other. *United States v. Stofsky*, 409 F.Supp. 609,613 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2nd Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). They must be "connected with each other by some common scheme, plan, or motive so as to constitute a pattern and not simply a series of disconnected acts." *Stofsky*, at 614. But the acts may be unrelated to each other but held together by a relationship to an enterprise. *United States v. Elliot*, 571 F.2d 880,899 (5th Cir. 1978). Patterns have been found where the separate acts have had similar "purposes," *United States v. Burnsed*, 566 F.2d 882 (4th Cir. 1977), *cut. denied*, 434 U.S. 1077 (1978); "results," *United States v. Nacrelli*, 468 F.Supp. 241 (E.D. Pa. 1979), *aff'd*, 614 F.2d 771 (3rd Cir. 1980); "participants," *United States v. Morris*, 532 F.2d 436 (5th Cir. 1976); "victims," *United States v. Chovanec*, 467 F.Supp. 41 (S.D.N.Y. 1979); or "methods of commission," *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978). RICO is to be "liberally construed to effectuate its remedial purpose" (18 U.S.C. § 1961).

Under § 1963, in the event of a criminal conviction the violator may be fined up to \$25,000 and imprisoned not more than 20 years, or both. **As** noted earlier, the violator must also forfeit to the United States any interest he has acquired (all his ill-gotten gains) as well as any interest in an enterprise (his economic base) which affords him a source of power over the enterprise involved in the RICO violations (18 U.S.C. § 1963(a)(1)-(2)). *E.g.*, § 1963 (a)(1) requires forfeiture of insurance proceeds received by a member of an arson ring as a result of his arson activities in violation of § 1962. Interests subject to forfeiture are not limited to interests in the "enterprise." *Russello v. United States*, 464 U.S. 16 (1983). The courts may enter restraining orders prior to conviction to prevent transfer of the property threatened by forfeiture (18 U.S.C. § 1963(b)).

Under § 1964, the Attorney General or "any person injured in his business or property" may bring a civil suit against the RICO offender. This entitles the private litigant to treble damages (§ 1964(b)-(c)). A final judgment in favor of the United States in a criminal proceeding has a collateral estoppel effect on the defendant in a subsequent civil proceeding brought by the government (§ 1964(d)).

Under the 1984 amendment to § 1961, RICO can now serve as an extremely effective means of deterring conduct in violation of obscenity laws. The forfeiture provisions entitle the government to trace the use of funds generated through trafficking in obscene materials and ultimately require the forfeiture of property obtained from the tainted monies. Further, the real prospect of imprisonment for up to 20 years upon separate convictions of an individual on obscenity charges dramatically increases possible punishment. Hence, for the first time, there is a real opportunity to engage the obscenity industry on a favorable basis. No longer is conviction and payment of a fine the acceptable "price of doing business." Moreover, since RICO forbids legitimate investment into legal businesses if that investment comes from a "pattern of racketeering," an attempt to "launder" money by investing it becomes a criminal activity in itself and negates that legitimizing effect.

At least 20 states plus Puerto Rico have passed parallel state RICO statutes, not all of which include obscenity as a predicate crime. Similar legislation is pending in a number of states. There are two basic types of state anti-racketeering laws. The first has been characterized as "little RICO" laws; that is, those laws that are patterned after federal RICO laws. "Little RICO" laws define racketeering activity in terms of enumerated state predicate offenses, define a pattern of racketeering activity, generally proscribe acquiring control of an enterprise through a pattern of racketeering activity or through the investment of racketeering proceeds, and proscribe conducting an enterprise through a pattern of racketeering activity. Most states employing a RICO approach have embraced "little RICO statutes." The second type of state anti-racketeering legislation is the criminal syndicate or "organized crime" statute. Those statutes generally prohibit five or more people from joining together in a combination or syndicate in order to engage in certain specified offenses. The specified offenses are usually of a "traditional" organized crime nature, e.g., prostitution, loan sharking, gambling, and drug trafficking.

Several states have made obscenity law violations predicate offenses within the meaning of racketeering activity.<sup>1</sup> For example in Florida, the cities of Ft. Lauderdale, Jacksonville, and Orlando have been highly successful in using the Florida RICO statute to enjoin the operation of pornography theatres and have seized thousands of dollars in assets. Through such means, those cities have virtually eliminated all hard-core pornography operations. Fort Wayne, Indiana has also been successful in shutting three separate adult book-

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<sup>1</sup> Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, New Jersey, North Dakota, Ohio, Puerto Rico, Pennsylvania, and Utah.

stores previously convicted 47 times for selling obscene materials. Clay County, Indiana also has been successful in closing a "hard-core" outlet using RICO.

In *4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987), the Supreme Court of Indiana held that Indiana's civil RICO statute, as it pertains to the predicate offense of obscenity, is not unconstitutional under the First and Fourteenth Amendments. The Indiana statute allows for closure of a porno bookstore *prior* to conviction of the predicate obscenity offense. The court held that a prompt adversarial hearing within a reasonable time after seizure of the establishment afforded due process. The Indiana RICO statute also permitted seizure of the establishment after a predicate conviction as well. This case is of considerable importance since it is the first to squarely hold that forfeiture of a bookstore is permissible using obscenity as a predicate offense. Following *Goldsmith*, the Indiana criminal RICO obscenity statute was again upheld in *State v. Sappenfield*, 505 N.E.2d 504 (Ind.Ct.App. 1 Dist. 1987). *Goldsmith* is presently before the U.S. Supreme Court on petition for *certiorari*, with oral arguments presented October 3, 1988.

In *State v. Feld*, 745 P.2d 146 (Ariz.Ct.App. 1987) *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 99 L.Ed.2d 482 (1988), the Arizona RICO statute was partially invalidated on constitutional grounds. The court held that profits from the sales of "protected materials" could not be seized, but those from materials adjudged obscene could. The seizure of the entire bookstore was ruled unconstitutional as a prior restraint. However, the reimbursement to the state for the cost of prosecuting the defendant was found permissible.

In *Western Business Sys., Inc. v. Slaton*, 492 F.Supp. 513 (N.D.Ga. 1980), the plaintiffs asked the trial court to enjoin the possible prosecution of obscenity as a predicate offense for RICO violations. They argued that forfeiture of property acquired with racketeering proceeds acted as a prior restraint on presumptively protected materials. The court held that there was no First Amendment problem because the defendants were not entitled to retain racketeering proceeds, nor were they entitled to property acquired by racketeering proceeds, even if that property consisted of books. The court ruled that denial of the injunction was proper because there was no irreparable harm or likelihood of success on the merits of plaintiff's claim.

The United States Department of Justice recently has begun to utilize the 1984 amendments to the RICO statute discussed above. In *U.S. v. Pryba*, 678 F.Supp. 1218 (E.D.Va. 1988), the district court found that the evidence supported convictions of an officer and bookkeeper

for various corporations and discussed evidence standards required.

The U.S. District Court for the Eastern District of Virginia is the only federal court to deal substantively with legal and constitutional questions relating to RICO and obscenity. *U.S. v. Pryba*, 674 F.Supp. 1502 (E.D.Va. 1987), hereinafter *Pryba I*; *U.S. v. Pryba*, 674 F.Supp. 1504 (E.D.Va. 1987), hereinafter *Pryba II*; *U.S. v. Pryba*, 674 F.Supp. 1518 (E.D.Va. 1987), hereinafter *Pryba III*; *U.S. v. Pryba*, 678 F.Supp. 1218 (E.D.Va. 1988), hereinafter *Pryba IV*; *U.S. v. Pryba*, 678 F.Supp. 1225 (E.D.Va. 1988), hereinafter *Pryba V*; and *U.S. v. Pryba*, 680 F.Supp. 790 (E.D.Va. 1988), hereinafter *Pryba VI*. An appeal of the underlying case is pending in the Fourth Circuit Court of Appeals.

In *Pryba II*, at 1510, the Court found the activities alleged in the indictment constituted a pattern of racketeering activity.

Defendants argued that the three RICO counts do not sufficiently allege the requisite "pattern of racketeering activity." In essence, defendants argued that the activity alleged in the indictment constitutes a single scheme, not separate acts. This indictment, they claim, is analogous to the one at issue in *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987). There the issuance of a fraudulent prospectus was held to be a single, unitary scheme, not a RICO pattern of racketeering.

Defendants' argument is unpersuasive. *Zepkin* is not in point. In contrast to the issuance of a prospectus, this indictment alleges a series of separate but related acts dealing with the sale and distribution of obscene material. The allegations fit squarely within RICO, which defines a "pattern" as "at least two acts" and "racketeering activity" as including "dealing in obscene matter."

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This indictment, therefore, properly pleads a "pattern of racketeering activity."

The *Pryba II* decision, reviewing the history of RICO legislation and state obscenity cases discussed above, heard and disagreed with the defendant's claims that RICO as applied to obscenity law chilled protected speech; that the forfeiture provisions constituted impermissible prior restraints; that the forfeiture provisions constituted cruel and unusual punishment in violation of the Eighth Amendment; that the forfeiture provisions violated due process; and, finally, that the

forfeiture provisions could not be applied to earlier acquired (1984 Amendment) property and related acts.

The court in *Pryba III* dealt with direct application of constitutional and legal issues in the first federal RICO forfeiture proceeding. The *Pryba* decision, at 1519-21, held that the Congress intended for the reasonable doubt standard to be employed throughout all phases of a RICO proceeding.

In *Pryba IV*, the court permitted prior state obscenity convictions to be introduced to prove acts of racketeering under RICO.

In the future there will be more activity in this area. RICO is probably the strongest tool in the prosecutor's arsenal. It provides the greatest opportunity to successfully deal with the multibillion dollar hard-core pornography syndicate.

*Pryba I* dealt with the conflict of interest motion filed against the defense attorneys. *Pryba IV* upheld the evidence of participation by the corporate bookkeeper and officer. *Pryba V* ruled that the defense poll and testimony by the defense "expert" were inadmissible on the issue of community acceptance.