



1990

RICO: Something for Everyone

Anne B. Poulin

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Criminal Law Commons](#)

Recommended Citation

Anne B. Poulin, *RICO: Something for Everyone*, 35 Vill. L. Rev. 853 (1990).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol35/iss5/2>

This Symposia is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

VILLANOVA LAW REVIEW

VOLUME 35

SEPTEMBER 1990

NUMBER 5

Symposium

RICO: SOMETHING FOR EVERYONE

ANNE B. POULIN†

THE topic of the 1989 Villanova Law Review Symposium is RICO: Something for Everyone. RICO, of course, is the Racketeer Influenced and Corrupt Organizations Act.¹ RICO is a statute with something for everyone, but not always something appealing for everyone. For the courts, RICO offers the challenge of statutory interpretation. For criminal prosecutors and the civil plaintiffs' bar, RICO offers exciting new litigation opportunities. For the defense bars — both civil and criminal — RICO offers tremendous headaches. For those who violate the law, RICO offers new and more serious penalties.

RICO is barely twenty years old. It was enacted in 1970. No great fanfare attended its enactment. It drew little attention, but as lawyers discovered RICO and began to explore its possibilities, there were a number of surprises. One of my colleagues at Villanova recounted to me his initial exposure to RICO, when the statute was fairly new on the scene. He was invited to preside at a mock trial. The trial, as it turned out, was a mock RICO prosecution. The instructor of the trial course provided the guest judge, my colleague, with appropriate jury instructions to be delivered to the jury of high school students. As he read the instructions to the jury, my colleague found himself pausing at the end of each paragraph to say to himself, "This can't be the law." A number of courts responded to RICO with the same incredulity. But, it is the law.

What is so remarkable about this statute? The impetus of the

† Professor of Law, Villanova University School of Law; B.A., 1969, Radcliffe College; J.D., 1973, University of Maine; LL.M., 1975, University of Michigan.

1. 18 U.S.C. §§ 1961-1968 (1988).

statute, reflected in its legislative history, was to arm prosecutors with more effective weapons to battle organized crime. The new weapons RICO created for that battle are indeed potent. The statute, however, was not written in restrictive terms and, therefore, has not been confined to the battle against organized crime. Because the statutory language is broad, those weapons may be employed in civil as well as criminal cases and may be aimed at a wide range of criminal conduct.

Let us look at three key aspects of RICO that reflect its potency in criminal prosecutions. First, RICO contains broad forfeiture provisions.² The government can seek not only imprisonment and fines, but also forfeiture of property associated in particular ways with the RICO violation.³ The government can freeze assets before trial to ensure that forfeiture will be an effective remedy if the defendant is convicted. Among the assets that can be frozen and forfeited under RICO are attorney's fees. In her paper, Professor Brickey addresses the forfeiture provisions of the statute. She cites a number of examples of forfeiture that illustrate the harsh impact of the statute when it is applied broadly. After examining possible arguments for limiting the extent of RICO forfeiture, Professor Brickey concludes that there is nothing in the language or history of the statute that warrants a restrictive interpretation of the forfeiture provisions and nothing in the Constitution that prohibits a broad construction of the statute.

Second, RICO broadens federal criminal jurisdiction. Under the statute, violations of state law become a basis for federal prosecution.⁴ In addition, the statute reaches acts that are part of a pattern of racketeering which may have begun long before the last act, which will trigger the statute of limitations. Thus, a RICO prosecution can rest in part on crimes otherwise barred by the statute of limitations.⁵

Third, the government can introduce in a RICO prosecution evidence that would be inadmissible in most cases. The breadth of the RICO charge renders admissible a broad spectrum of evidence of criminal association and other relevant criminal activity. Louis Pichini, Assistant Attorney in Charge of the Philadelphia

2. *Id.* § 1963.

3. *Id.*

4. *Id.* § 1961.

5. See *United States v. Dellacroce*, 625 F. Supp. 1387, 1392 (E.D.N.Y. 1986); *United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

Strike Force, spoke at length of the advantages RICO offers for the prosecutor in an organized crime prosecution. Mr. Pichini described his experience in the successful RICO prosecution of Nicodemo Scarfo in *United States v. Scarfo*.⁶ He contrasted the recent *Scarfo* prosecution with earlier, less successful prosecutions under other criminal statutes. The structure of the charges under RICO provided the prosecution with a vehicle for displaying the criminal organization — the mob — to the jury. The mob was the centerpiece of the indictment. Because the mob was the RICO enterprise, it was an essential element of the government's case. The government had to prove the association in fact. Volumes of photographs of non-criminal behavior were admitted to establish the association in fact among mob members. Tapes of conversations concerning the operation of mob activities were admissible to establish the enterprise. In addition, violations of state law could be proven in the federal case because they were predicate acts under RICO. In a traditional criminal prosecution, most of this evidence would have been excluded by the restrictive rules governing proof of other acts. Prior prosecutions had presented mob crimes in a vacuum; under RICO the prosecution was able to portray them in context, to bring the life of the street into the courtroom for the jury.

What does this all add up to? For the *Scarfo* prosecutors, it added up to an organized crime conviction that was previously unattainable. But let me give two other illustrations of what RICO has to offer in criminal cases. The first situation involved a friend and criminal defense attorney who recently complained of the impact of RICO on his practice. He had just received a trial date in a RICO conspiracy case involving white collar crime, not organized crime, and had just under four months to prepare the case. The indictment contained 534 counts and ran 584 pages. The prosecution had 6000 documents and hours and hours of tape recordings for him to review. The trial would last 4 to 6 months. His client was named in only eleven counts. The lawyer wondered how his practice would fare and how his client would bear the financial burden imposed by this criminal prosecution. He did not like what RICO offered him.

The second illustration of what RICO has to offer is a 1989 case, *United States v. Porcelli*.⁷ The United States Court of Appeals

6. The denial of the posttrial motions in this case is reported at 711 F. Supp. 1315 (E.D. Pa. 1989).

7. 865 F.2d 1352 (2d Cir.), cert. denied, 110 S. Ct. 53 (1989).

for the Second Circuit, affirming the conviction in *Porcelli*, remarked that the prosecution in the case "pushes [RICO] to its outer limits."⁸ The defendant was a New York businessman. He had underpaid New York State sales tax on retail gasoline sales. His underpayment amounted to about four and three quarter million dollars. Under New York law, underpaying the taxes and filing the false returns were not crimes. Under federal law, however, these acts were violations of the mail fraud statute;⁹ the defendant had mailed his tax returns. The mail fraud violations represented by the failure to pay the state tax reflected a "pattern of racketeering" and, therefore, supported a RICO prosecution. The defendant was convicted, and it became time to tally the penalty. *Porcelli* was to forfeit four and three quarter million dollars, the RICO enterprise, and the portions of additional properties acquired with funds from the enterprise. The enterprise itself comprised numerous businesses: twelve gas stations, the realty companies that owned the land on which the stations were located and the parent company that operated a wholesale gas terminal. The forfeited amount, four and three quarter million dollars, was to be paid to the state and up to twice that amount was to be paid to the federal government.¹⁰ In addition, the defendant received a two year sentence. The effect may be exactly what the drafters of the legislation wanted. It prompts the question: Does crime pay?

The features that RICO brings to criminal litigation are potent tools. Their potential is as yet undefined, although federal prosecutors now frequently employ RICO. In large part, however, abuses have been avoided and the outer limits of the law have not been defined because of the Department of Justice policy of restraint.¹¹ The government, conscious of the power of the statute, has generally exercised its discretion with care.¹²

8. *Porcelli*, 865 F.2d at 1355.

9. 18 U.S.C. § 1341 (1988).

10. In this way, the court achieved proportionality: the total was equivalent to treble damages measured by the harm to the victim state.

11. See U.S. DEP'T OF JUSTICE, CRIMINAL DIV., RICO: A MANUAL FOR FEDERAL PROSECUTORS 127-29 (1988).

12. There are, nevertheless, some examples of prosecutions which push the statute to its outer reaches. *Porcelli* is one example and Professor Brickey examines some others in her paper. In addition, there are other reported cases, such as *United States v. Regan*, 726 F. Supp. 447 (S.D.N.Y. 1989), in which the results of the prosecution are so drastic that they must be questioned on policy grounds.

Regan, which exemplifies RICO's broad use, involved a tax fraud scheme. Princeton/Newport Partners, an investment partnership with close ties to others implicated in the Wall Street insider-trading scandal, and Drexel Burnham Lam-

RICO also offers powerful new tools in civil litigation. To an unusual extent, the statutory provisions governing civil claims track the criminal provisions. In the civil arena, however, unlike the criminal, there is no restraining influence to avoid abuses. Civil attorneys did not discover RICO immediately. Now it has become an important focus in many types of civil litigation. Edward Mannino, Esq., speaking at the symposium, commented that it may now be malpractice not to include a RICO count in a civil complaint in commercial litigation. The civil provisions of the statute have all the breadth of the criminal statute; the provisions are parallel. RICO gives plaintiffs' attorneys the opportunity to use the theories that provide for far-reaching criminal prosecution. The statute entices lawyers to use those provisions. The financial incentive is substantial — treble damages and attorneys fees.

RICO's impact on civil litigation has been substantial. RICO provides many ordinary civil cases with an entree to federal court. Almost one thousand civil RICO cases were filed in federal courts in 1988. RICO also provides a broad right of action in state court; the Supreme Court recently held that a state court may assert jurisdiction over a claim under the federal RICO statute.¹³ Civil applications of RICO have been unrestrained, extensive and imaginative.

In his paper, Mr. Mannino discusses the use of civil RICO against financial institutions. He examines a number of the creative arguments that have been used — not always with success — to fit the conduct and structure of banks into the statutory requirements of RICO. Even when those arguments do not prevail,

bert, Inc. were indicted for RICO violations. Allegations included a tax scheme in which false long-term capital gains were created through rigged transactions, resulting in a tax write-off of \$13 million in false tax losses. Princeton/Newport was eventually forced to liquidate due to the impending threat of severe RICO penalties and forfeiture provisions. This case marked the first time officials of securities firms had been charged with violations of RICO. *Wall St. J.*, Aug. 5, 1988, § 1, at 3, col. 2.

An extremely critical view of RICO was expressed by Fred Joseph, company chief of Drexel Burnham Lambert, a company precipitated into bankruptcy by the combination of forfeiture and fines, among other factors. He stated:

The federal racketeering law, as applied to financial institutions, is a devastating nuclear bomb. The penalties we paid ended up doing material long-term damage to the firm, costing 11,000 people their jobs and costing the markets what most people will admit was a creative, innovative force for financing companies. All this because of alleged wrongdoing by a handful of people. It just seems unfair.

Behar, *We Grew Quickly and We Stepped On Toes*, *TIME*, April 23, 1990, at 62.

13. *Tafflin v. Levitt*, 109 S. Ct. 2428, *reh'g denied*, 110 S. Ct. 401 (1989).

the suits relying on such arguments force the banks to at least incur the expenses of their defense and force the courts to engage in the process of legislative interpretation.

RICO has been employed with mixed success in civil suits against other types of defendants whose motivation was not criminal gain. For example, union action that becomes overly assertive may provide the basis for a RICO suit. In *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*,¹⁴ a strike against the bus company allegedly led to threats of property damage and bodily harm which then constituted the predicate acts in a RICO complaint. Similarly, in *Domestic Linen Supply & Laundry v. Central States*,¹⁵ the union's excessively forceful effort to persuade the employer to include supervisors in the bargaining unit and pay into the pension fund on their behalf provided the basis for a civil RICO action by the employer against the union. Both cases raised difficult legal issues. In *Yellow Bus Lines*, the question was one of union liability for the threatening and violent conduct of union members. In *Domestic Linen*, the question was whether the union had crossed the line between activity protected by the National Labor Relations Act and activity prohibited by federal criminal law. In each of these cases, the offended employer was able to bring the union before the federal district court with the threat of treble damages and attorney's fees, as well as damnation with the rubric "racketeer." In *Yellow Bus Lines*, the trial court dismissed the RICO counts and the employer's appeal ultimately failed. In *Domestic Linen*, the employer overcame the union's motion to dismiss at the trial level.

Even more striking creativity of application was displayed in *Northeast Women's Center, Inc. v. McMonagle*.¹⁶ The plaintiff, a women's health center, brought a civil RICO action against anti-abortion protesters who had repeatedly and destructively trespassed into the clinic. The plaintiff prevailed on the RICO claim, although the amount of damages attributed to the RICO violation was minimal. As Professor G. Robert Blakey contended in the defendants' unsuccessful petition for a writ of certiorari, this type of suit takes RICO far from its originally intended role as a weapon aimed at the conduct of organized crime.¹⁷ The defend-

14. No. 86-5136 (D.C. Cir. Sept. 4, 1990) (1990 WL 126317).

15. 722 F. Supp. 1472 (E.D. Mich. 1989).

16. 868 F.2d 1342 (3d Cir.), cert. denied, 110 S. Ct. 261 (1989).

17. Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 10-11, 14, 20, *McMonagle v. Northeast Women's Center, Inc.*, 110 S. Ct. 261 (1989) (No. 88-2137).

ants were not acting for profit. Nevertheless, the court concluded that the conduct fell within the ambit of the broadly drafted RICO statute. The United States Supreme Court declined to review that determination. Whether such application pushes the statute beyond the tolerance of Congress remains to be seen.

A problem confronting those attempting to define the scope of civil RICO is that its intended role is far from clear.¹⁸ In his paper, Professor Lynch examines one aspect of civil RICO's function. Professor Lynch considers whether the civil RICO suits augment the criminal enforcement goal of the statute in some useful way. He examines the assumptions underlying the arguments for and against the utility of RICO as a vehicle for private prosecutions and concludes that, overall, the civil provisions effect more harm than good in this capacity.

Some responses have been less tempered. The expansive use of RICO has roused ire in some. Chief Justice Rehnquist was so exercised by the torrent of RICO litigation that he publicly pleaded: "Get RICO Cases Out of My Courtroom."¹⁹ The Chief Justice is not alone in his negative reaction.²⁰ When Congress held hearings on proposed amendments to RICO in 1985, witness after witness condemned the expansive application of civil RICO.²¹ Nevertheless, Congress did not restrict civil application of the statute. Congress responded, apparently, either to the in-

18. The intent of RICO is hard to determine given the statute's broad language. The unintended evolution of RICO into something quite different from its original intent occurred because of RICO's broad language. The statute was written broadly so that federal authorities would have broad discretion to attack organized crime. Federal government authorities can exercise this discretion; however, private attorneys must bring all actions that serve their clients interests. See 132 CONG. REC. E3530, E3531 (daily ed. Oct. 10, 1986) (statement of Rep. Boucher).

19. Rehnquist, *Get RICO Cases Out of My Courtroom*, Wall St. J., May 19, 1989, at A14, col. 4.

20. See, e.g., *Stop Misuse of RICO*, Los Angeles Daily J., July 18, 1989, at 6, col. 1; *RICO, What a Racket*, Los Angeles Daily J., Aug. 29, 1988, at 4, col. 1.

21. Stephen M. Shapiro, Esq. testified that the lack of restraint on civil RICO litigation poses serious adverse effects "not only for the individual companies that are named as defendants but for our entire court system and for our economy." *RICO Reform Legislation: Hearings on H.R. 2517, 2943, 4892, 5290, 5391, 5445 Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 99th Cong., 1st and 2d Sess., at 839 (1985-86)* [hereinafter *Hearings*] (testimony of Stephen M. Shapiro, Esq., on behalf of the New York Clearing House Association).

In addition, the threat of civil RICO penalties leads to extortion settlements since it exposes the business to treble damages. *Id.* at 840. RICO escalates the cost of litigation through immense discovery procedures which tend to force businessmen to dispose of a case at exorbitant settlement amounts rather than be harassed and endure discovery. *Id.* at 841. The number of civil RICO cases

ertia generated by the statute which proved to be an effective prosecutor's tool against organized crime, or to the witnesses who pleaded on behalf of the civil application of the statute.

Because RICO has surprised many with its broad application, one might ask, "Is it really the law?" The answer is, "Yes." A number of lower courts sought avenues to limit RICO, but the Supreme Court has refused to narrow it to any significant degree.²² The Court has merely invited Congress to act. The Court expressed its position in *Sedima, S.P.R.L. v. Imrex Co.*,²³ when it stated: "It is true that private civil actions under the statute are being brought almost solely against such defendants [legitimate businesses], rather than the archetypical, intimidating mobster. Yet this defect — if defect it is — is inherent in the statute as written, and its correction must lie with Congress."²⁴ Yet, despite the complaint presented in *Sedima* and many other complaints that Congress never intended RICO to function as it has, Congress has not intervened. Congress has let most proposed amendments die.²⁵ The action Congress has taken has strength-

being filed has increased 600% in the last three years and is predicted to continue to rise and flood the court system. *Id.* at 842.

In addition, only a minority of civil RICO cases have been brought against racketeering activities; the majority are mere commercial disputes which should be decided under contract law or federal securities laws. *Id.* at 852 (statement of New York Clearing House Association, delivered by Stephen M. Shapiro and Richard A. Salomon).

Newton N. Minow was also highly critical of the broad application of civil RICO. "Defendants who wish to fight RICO claims asserted against them must endure costly and protracted litigation and the tremendous risk of a treble damage award, both while facing damaging accusations of racketeering activity. Ironically and sadly, the civil provisions of RICO have had virtually no effect on what was Congress' purpose, which was the eradication of organized crime." *Id.* at 153 (testimony of Newton N. Minow accompanied by James Dyke and Robert D. McLean, Sidley & Austin, Chicago, IL).

22. *Taffin v. Levitt*, 109 S. Ct. 2428 (1989) (holding that state courts may assert jurisdiction over RICO claims; language of statute did not state otherwise); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *see also*, *United States v. Monsanto*, 109 S. Ct. 2657 (1989) (interpreting similar forfeiture statute to permit forfeiture of attorneys' fees); *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) (rejecting constitutional challenge to use of similar statute to forfeit attorneys' fees).

23. 473 U.S. 479 (1985).

24. *Id.* at 499-500.

25. *See, e.g.*, H.R. 4920, 100th Cong., 2d Sess. (1988) (proposed to amend RICO to restructure civil claims procedures); H.R. 4923, 100th Cong., 2d Sess. (1988) (proposed to add predicate acts similar to those proposed in H.R. 4892, 99th Cong., 2d Sess. (1986)); H.R. 2983, 100th Cong., 1st Sess. (1987) (proposed to restrict inappropriate use of federal racketeering laws in private litigation, while retaining carefully crafted multiple damage consumer fraud remedy

ened the statute. Predicate acts have been added²⁶ and the forfeiture provisions have been enhanced to make them more effective tools.²⁷

The Congressional foot is not yet approaching the brake pedal. Three bills have been presented to the 101st Congress. All are modest. If enacted, the bills would clarify and narrow some applications of RICO, but none would effect major changes. To a large extent, the pending bills advance proposals that have been presented to Congress in past sessions and have failed to become law.²⁸

H.R. 3522 proposes only that nonviolent protest be ex-

and basing RICO civil conviction upon prior criminal conviction); H.R. 4892, 99th Cong., 2d Sess. (1986) (proposed arbitration settlement for claims arising under section 1964(c) of title 18 and based upon fraudulent activity; also proposed additional predicate acts including prostitution involving minors, homicide, obstruction of justice, sexual exploitation of children, destruction of aircraft or aircraft facilities, assaults against federal officer's family, bank bribery, solicitation to commit a crime of violence, fraud on treasury paper, forgery of state and other securities, fraud with computers, and hostage taking); S. 2907, 99th Cong., 2d Sess., 132 CONG. REC. S15823 (daily ed. Oct. 9, 1986) (proposed rewording "racketeer" to avoid negative connotation and prevent unnecessary harm to individual's reputation by using "illicit" instead); S. 2021, 100th Cong., 2d Sess., 132 CONG. REC. S335 (daily ed. Jan. 27, 1986) (proposed to improve protection of children from sexual exploitation by adding predicate act and increasing punishment provisions for sexual exploitation offenses)).

26. See Victim and Witness Related Amendments, Pub. L. No. 99-646, § 50(a), 100 Stat. 3605 (1986) (added predicate acts relating to tampering with witness, victim or informant, acts relating to retaliating against witness, victim or informant in obstruction of state or local law enforcement); Predicate Offenses, Pub. L. No. 99-570, § 1365(b), 100 Stat. 3207-35 (1986) (added predicate acts relating to laundering of monetary instruments, engaging in monetary transactions in property derived from specified unlawful activity, and acts relating to prohibition of illegal gambling businesses); Pub. L. No. 98-473, §§ 901(g)(2), 1020(2), 98 Stat. 2135, 2143, 2770 (1984) (added predicate offenses including any act indictable under Currency and Foreign Transactions Reporting Act, acts relating to obscene matter, and wire fraud); Definition of Racketeering Activity, Pub. L. No. 98-547, § 205(1), (2), 98 Stat. 2770 (1984) (added predicate offenses including acts relating to trafficking in certain motor vehicles or motor vehicle parts, and acts relating to interstate transportation of stolen motor vehicles).

27. See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 302, 98 Stat. 2040 (1984); Pub. L. No. 98-473, § 2301, 98 Stat. 2192 (1984) (amending 18 U.S.C. § 1963; added provisions relating to power of court to order forfeiture to United States; added provision stating that defendant who derives profits or other proceeds from offense may be fined not more than twice gross profits or other proceeds; substituted provisions relating to transfer of rights in property to United States, or to other transferees, for provisions relating to seizure and transfer of property to United States).

28. S. 438, 101st Cong., 1st Sess., 135 CONG. REC. S1652 (daily ed. Feb. 23, 1989) (proposes to add similar predicate offenses as were proposed in H.R. 4892, 99th Cong., 2d Sess. (1986) and H.R. 4923, 100th Cong., 2d Sess. (1988)). For a summary of the bills, see *supra* note 25.

empted from the coverage of the act.²⁹ The proposed amendment is aimed at applications such as that in *Northeast Women's Center, Inc. v. McMonagle* and to some degree those in the union cases discussed above. If enacted, H.R. 3522 would be more symbolic than effective. In each of those cases that appear to have prompted the legislative proposal, the plaintiffs alleged violence on the part of the defendants, so the suit would be unaffected by the proposed amendment. In addition, the first amendment's protection of free speech prohibits penalizing nonviolent protest as a matter of constitutional law. Thus, even if enacted, the proposal is likely to have little impact.

H.R. 1046 and S. 438 are more ambitious proposals. Like earlier amendments, both include lists of predicate offenses to be added to section 1961.³⁰ In addition, H.R. 1046 and S. 438 include other, more significant aspects. Both proposed amendments would limit access to treble damages. Plaintiffs whose claims rest on commercial or financial injury would be able to recover treble damages and costs only if the offenses fell in specific defined categories and were shown by clear and convincing evidence to have been "consciously malicious, or so egregious and deliberate that malice may be implied."³¹ This proposal responds to the proliferation of RICO complaints in what appear to be otherwise routine civil actions. By increasing the burden of proof, the proposal seeks to remove the major incentives that have encouraged the flood of civil RICO suits.

Interestingly, however, the legislative proposals continue to suggest a scheme that attaches significance to conviction. If the defendant has been convicted of the conduct, the plaintiff would be relieved of the additional burden. This aspect of the proposals is an offspring of earlier proposals to condition the civil action on the criminal conviction, which were introduced in response to *Sedima* and have never commanded a majority vote.³² The current proposals represent a more modest attempt to temper civil use of

29. H.R. 3522, 101st Cong., 1st Sess. (1989).

30. See H.R. 1046, 101st Cong., 1st Sess. 7 (1989); S. 438, 101st Cong., 1st Sess., 135 CONG. REC. S1652 (daily ed. Feb. 23, 1989); see also S. 774, 101st Cong., 1st Sess., 135 CONG. REC. S6907 (daily ed. June 19, 1989) (proposes to make several financial institution crimes predicate offenses for violation of RICO; such crimes include receipt of commissions or gifts for approving loans, financial institution misapplication and embezzlement, fraud and false statements, and financial institution fraud).

31. H.R. 1046, 101st Cong., 1st Sess. 7 (1989).

32. See H.R. 2983, 100th Cong., 1st Sess. (1987); H.R. 5445, 99th Cong., 2d Sess. (1986).

the cause of action by the normally responsible exercise of prosecutorial discretion and the operation of the criminal justice system. Rather than conditioning civil access on conviction, the proposed provision would merely give a boost to civil suits brought after conviction. This approach is preferable to earlier proposals that would have permitted a civil RICO action only if the defendant had been convicted of the predicate act.³³ The current proposal does not condition the availability of a civil action on prosecutorial decisions about who to prosecute and what plea bargains to strike.³⁴ It may prove a useful way to slow down the machine of civil RICO.

The pending legislation also continues efforts to free civil targets of RICO from the damning epithet "racketeer" in civil cases which do not involve crimes of violence.³⁵ Many have decried the unfairness of inflicting damage by labelling a defendant a racketeer or a member of organized crime when the case involves a commercial or financial fraud, and has no connection with organized crime.³⁶ The proposed legislation addresses that complaint by putting such terms off limits in all aspects of civil cases in which the complaint does not allege a crime of violence and designates as crimes of violence those activities which are more traditionally associated with syndicated crime and terrorism.

The pending legislation also provides that good faith reliance on a ruling or legal provision would be an affirmative defense to a RICO action under section 1964. This provision would benefit

33. According to testimony of Ronald Goldstock, Director, New York State Organized Crime Task Force, it is unfair to condition a civil RICO conviction upon a prior criminal conviction since a criminal case may be lost due to an illegal search or other procedural technicality and through no fault of the victim. The victim's right to a civil case should also not depend upon the prosecutor's willingness to appeal or plea bargain. In addition, due to the guarantees of the fifth amendment, a defendant may not be called to the witness stand in a criminal case and, therefore, testimony which would be revealed in a civil case to prove the predicate acts is lost in a criminal case. *Hearings, supra* note 21, at 1340-41 (testimony of Ronald Goldstock, Director, New York State Organized Crime Task Force).

34. See H.R. 1046, 101st Cong., 1st Sess. 7 (1989); S. 438, 101st Cong., 1st Sess., 135 CONG. REC. S1652 (daily ed. Feb. 23, 1989).

35. See *supra* note 34; see also S. 2907, 99th Cong., 1st Sess., 132 CONG. REC. S15823 (daily ed. Oct. 9, 1986); H.R. 5290, 99th Cong., 2d Sess. (1986).

36. One of the complaints which the business community voices against civil RICO's broad use is that "RICO's 'racketeer' label, particularly along with the threat of treble damages, leads legitimate businesses to settle 'garden variety' fraud claims for 'extortionate' amounts." 133 CONG. REC. E3351, E3352 (daily ed. Aug. 7, 1987) (statement of Rep. John Conyers, Jr., of Michigan).

defendants such as the union defendant in *Domestic Linen*, which claimed to have limited its conduct to organizing activity protected by the NLRA. This proposed provision may also be intended to protect protester defendants like those sued in *Northeast Women's Center*; they could claim a good faith belief that their behavior was protected by the first amendment. Its protection is limited, however. If the defendant can point to a ruling or legal provision that arguably supported the conduct alleged to have violated RICO, the defendant still must go to trial and put the affirmative defense before the jury. The defendant must incur the cost of litigation and run the risk of failing to persuade the jury before gaining the benefit of the proposed protection. Again, the legislators are looking for a way to temper what they see as the worst abuses of RICO without diminishing its core impact.

As was remarked throughout the symposium, RICO is identified as a statute aimed at organized crime, and no legislator wants to advocate narrowing the statute and risk being labelled a pro-crime legislator. For that reason, it is difficult to amend the statute to narrow it significantly. The current legislative proposals reflect that fact. None strikes at the criminal application of the statute. None would restrict the prosecutor's broad discretion to apply RICO aggressively and creatively. Further, although the proposals would alter the face of civil RICO litigation, none would disable the civil bar from employing RICO in creative and lucrative ways. RICO may be "very possibly the single worst piece of legislation on the book,"³⁷ but it is the law.

37. Rehnquist, *supra* note 19.