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NOTES

RACKETEERS AND NON-RACKETEERS ALIKE SHOULD FEAR FLORIDA'S RICO ACT

RAYMER F. MAGUIRE III

I. INTRODUCTION

The 1977 Florida Legislature determined that organized crime was using vast amounts of money, violence, and intimidation to infiltrate and corrupt legitimate business within Florida. In an effort to eliminate infiltration of legitimate businesses by racketeers,¹ the legislature enacted the Florida RICO (Racketeer Influenced and Corrupt Organization) Act.²

RICO prohibits the use of a pattern or series of criminal acts to conduct or acquire an organization or enterprise. While RICO is directed against organized crime's use of continuing patterns of criminal acts, it also reaches less sophisticated levels of criminal

1. Fla. S., Committee on Judiciary-Civil, Staff Analysis and Economic Statement (May 20, 1977) (on file with committee). An expert on organized crime and FEDRICO during hearings provided the following scenario of what happens when organized crime infiltrates a legitimate business:

Coin operated machines is a good example. What happens is other people don't enter the business. People don't have free choice about the kinds of machines that are put into the bars, and restaurants. In the state of Florida when Florida decides to put an additional tax on cigarettes; to where it suddenly becomes profitable to smuggle cigarettes down from North Carolina. Then the machines are operated by organized crime, they begin selling stamped cigarettes, illegal stamped cigarettes, to make more money out of it. The whole range of what . . . Look, it's an economic activity, the purpose there is to make money. They are going to make money without the normal limitations of law. So it's price fixing, market allocation, there's extortion, there's tax evasion. There may well be wage and hour violations with employees. There may well be sweetheart contracts with the unions that are associated with the transportation of the cigarettes, transportation of the machines. There is a range of things that will happen in that area. . . . The state that's attempting to realize revenue on cigarettes loses revenue, I mean it's net loss of revenue. The state then must make up that revenue in sales tax or income tax. The legitimate distributors of cigarettes lose that aspect of the transaction, of the business, so that the amount of cigarettes that are moving through legitimate commerce actually decreases. It hurts everybody, really. It's a good easy example and it's one that's real for Florida.

Fla. H.R., Select Committee on Organized Crime, transcript of proceedings at 76-77 (March 7, 1977) (on file with committee) (testimony of G. Robert Blakey) (Professor Blakey teaches criminal law, criminal procedure, and organized crime control at Cornell Law School. As the counsel to the United States Senate Subcommittee on Criminal Laws and Procedure, Professor Blakey participated in the drafting of the federal version of RICO).

2. Fla. RICO (Racketeering Influenced and Corrupt Organization) Act, ch. 77-334, 1977 Fla. Laws 1399 (codified at FLA. STAT. §§ 905.34, 943.46-.464 (1977) [hereinafter cited as RICO].

activity. How far it reaches is an important concern, because the penalty for violating RICO is severe—a maximum of thirty years imprisonment and a fine of \$10,000, or three times the gross value gained or the loss caused by the racketeer.³

RICO is patterned after federal legislation entitled the Racketeer Influenced and Corrupt Organizations Act.⁴ Enacted in 1970, FED-RICO has been used successfully against racketeers involved in illegal gambling,⁵ sophisticated fraud,⁶ and the corruption of labor officials.⁷ Politicians⁸ and police officers⁹ have been convicted of violating FEDRICO. It has withstood constitutional challenges of vagueness¹⁰ and double jeopardy.¹¹ Federal courts have ruled that it is not an *ex post facto* law.¹²

However, the scope of FEDRICO is more limited than that of RICO. The predicate acts that trigger FEDRICO are usually limited to felonies, while the acts that trigger RICO can be either felonies or misdemeanors. For example, passing "bad" checks is not serious enough to trigger FEDRICO, yet it is sufficient to trigger RICO. This raises questions about the wisdom of the Florida act—questions which lead to still more questions.

This note explains and critiques the scope of RICO as well as the stated and inferred legislative intent behind it. A discussion of the legislative intent in enacting the new statute concludes that while the legislature wanted RICO to be a powerful weapon against organ-

3. FLA. STAT. § 943.463 (1977).

4. 18 U.S.C. §§ 1961-1968 (1970) [hereinafter cited as FEDRICO].

5. *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (Cappetto allowed his telephone to be used for receiving and transmitting wagering information).

6. *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (Parness and his wife withheld funds owned by a hotel owner and then used the funds to buy the hotel after causing the owner to default on a loan).

7. *United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977) (Kaye accepted money from service contractors for services as a union steward which he did not in fact provide).

8. *United States v. Fineman*, 434 F. Supp. 189 (E.D. Pa. 1977) (Fineman, Speaker of the Pennsylvania House of Representatives, recommended acceptance of certain applications for entrance to graduate school for a \$10,000 to \$15,000 fee).

9. *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977) (Brown and others, former officers of the Macon, Georgia, police department, were charged with violating FEDRICO by soliciting and accepting bribes to protect persons involved in gambling, prostitution, and the illicit marketing of whiskey).

10. *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

11. *United States v. Frumento*, 405 F. Supp. 23 (E.D. Pa. 1975); *United States v. Amato*, 367 F. Supp. 547 (S.D.N.Y. 1973).

12. *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977); *United States v. Ohlson*, 552 F.2d 1347 (9th Cir. 1977); *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977); *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976).

ized crime, lawmakers were also fearful that RICO might be applied to persons committing relatively non-serious crimes such as passing bad checks or failing to obtain governmental permits. Nevertheless, RICO can be applied to such persons.

Amendments to RICO are suggested which would prevent its application to persons committing relatively non-serious crimes, yet preserve the act as a powerful anti-racketeering weapon. The amendments are largely based on the language and principles in FEDRICO which federal courts have construed and applied since 1970. If RICO is not amended, this note might serve the secondary purpose of aiding Florida courts in the task of applying RICO as the legislature intended it to be applied.

II. THE MECHANICS AND SCOPE OF RICO

A. *The Prohibited Activities*

It is prohibited under RICO to:¹³

- (1) use or invest proceeds derived from a "pattern of racketeering activity" to establish or operate an enterprise or to acquire real property;¹⁴
- (2) acquire or maintain any interest or control in an enterprise or real property through a "pattern of racketeering activity";¹⁵
- (3) participate as an employee or associate in any enterprise through a "pattern of racketeering activity";¹⁶ or
- (4) conspire or endeavor to violate any of the above prohibited activities.¹⁷

13. Basic to all the substantive RICO violations is the existence of an "enterprise" and either a "pattern of racketeering activity" or the "collection of an unlawful debt." Discussion in this note is limited to "pattern of racketeering activity" because RICO is rather clear in its definition of an "unlawful debt."

14. FLA. STAT. § 943.462(1) (1977) provides:

It is unlawful for any person who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

See generally Note, *Investing Dirty Money: Section 1962 (a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491 (1974).

15. FLA. STAT. § 943.462(2) (1977) provides: "It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property."

16. *Id.* § 943.462(3) provides: "It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt."

17. *Id.* § 943.462(4) provides: "It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsections (1), (2), or (3)."

It is difficult to imagine a type of involvement with an enterprise that is not prohibited by RICO once a "pattern of racketeering activity" has been established. For instance, RICO prohibits the use of a "pattern of racketeering activity" to acquire an enterprise, whether it is bought or acquired through strong-arm tactics or not. The statute prohibits the use of a "pattern of racketeering activity" to operate an enterprise, whether a principal operates it or employees operate it. It prohibits too the use of a "pattern of racketeering activity" to benefit from an enterprise, whether the benefit stems from owning it or controlling it.

B. *The Broad Scope of "Racketeering Activity"*

Under FEDRICO, four groups of crimes make up the definition of "racketeering activities."¹⁸ The first group includes any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs, which is chargeable under state law and punishable by imprisonment for more than one year.¹⁹ The second group includes federal crimes often committed by organized crime operatives, such as sports bribery, counterfeiting, embezzlement from pension and welfare funds, mail and wire fraud, obstruction of justice, obstruction of a criminal investigation, and interstate transportation of stolen property.²⁰ The third group includes the indictable offenses under sections 186 and 501(c) of title 29 which deal with the restrictions on payments and loans to labor organizations and with the embezzlement of union funds.²¹ Last is the group of offenses involving bankruptcy fraud, fraud in the sale of securities, and dangerous drugs.²² Together, the crimes in these four groups comprise the FEDRICO "racketeering activities." Only three of the individual FEDRICO "racketeering activities" are misdemeanors. Two involve bankruptcy fraud²³ and the third prohibits certain payments and loans to labor organizations.²⁴

Under RICO, "racketeering activity" has been defined more broadly than under FEDRICO. The RICO definition incorporates by reference the entire FEDRICO definition.²⁵ It also includes all the

18. 18 U.S.C. § 1961(1) (1970).

19. *Id.* § 1961(1)(A).

20. *Id.* § 1961(1)(B).

21. *Id.* § 1961(1)(C).

22. *Id.* § 1961(1)(D).

23. *Id.* §§ 154, 155.

24. 29 U.S.C. § 186 (Supp. V 1975).

25. FLA. STAT. § 943.461(1)(b) (1977).

crimes chargeable under seventeen chapters and twenty-five sections of the Florida Statutes,²⁶ including such relatively minor offenses as cutting off the ears of hogs, sheep or cattle before they have been dressed;²⁷ "scalping" a sporting exhibition ticket in excess of \$1.00 above the original price;²⁸ knowingly providing false information to any law enforcement officer concerning the alleged commission of any crimes;²⁹ knowingly selling any obscene, lewd, and lascivious book or magazine;³⁰ and selling less than five grams of cannabis.³¹ By including minor crimes such as these in the definition of "racketeering activity," RICO clearly may be used against those who are not, by any stretch of the imagination, racketeers.

The RICO definition of "racketeering activity" is also broader than its FEDRICO counterpart in that, under RICO, a "racketeering activity" can be an attempt to commit, a conspiracy to commit, or a solicitation, coercion or intimidation of another person to commit one of the enumerated crimes.³² In contrast, FEDRICO has been construed to require that predicate crimes be proved and does not allow prosecution for less than actual commission of the specified crimes.³³

The definition of "racketeering activity" in FEDRICO has been criticized as being "broad."³⁴ Yet RICO numerically covers more crimes—many of which are misdemeanors. The number of crimes subject to RICO are then multiplied by including attempts to commit, conspiracies to commit, solicitation, coercion, and intimidation of other persons to commit the specified crimes. The breadth of the FEDRICO definition of racketeering activity pales in comparison to the breadth of the RICO definition.

C. *Does the Pattern Element Limit the Broad Scope of Racketeering Activity?*

After proving the presence of racketeering activities in FEDRICO, the United States Attorney must prove that those activities are in

26. *Id.* § 943.461(1)(a)1-25.

27. *Id.* § 817.27, as prescribed in *id.* § 943.461(1)(a)16.

28. *Id.* § 817.36, as prescribed in *id.* § 943.461(1)(a)16.

29. *Id.* § 837.05, as prescribed in *id.* § 943.461(1)(a)19.

30. *Id.* § 847.011, as prescribed in *id.* § 943.461(1)(a)22.

31. *Id.* § 893.13(1)(f), as prescribed in *id.* § 943.461(1)(a)24.

32. *Id.* § 943.461(1).

33. *United States v. Parness*, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Fineman*, 434 F. Supp. 189, 194 (E.D. Pa. 1977); *United States v. Amato*, 367 F. Supp. 547, 548 (S.D.N.Y. 1973).

34. Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity"*, 124 U. PA. L. REV. 192, 194 (1975).

a pattern.³⁵ Racketeering activities may not be isolated, disconnected incidents, but must be connected with each other by some common scheme, plan, or motive.³⁶

Under FEDRICO, a "pattern of racketeering activity" requires the commission of at least two acts of racketeering activity, one of which must have occurred after the effective date of the statute.³⁷ Only one court has found a pattern based on just two racketeering activities.³⁸ Instead, most courts have interpreted the word "pattern" as requiring a continuity of racketeering activity.

For instance, in *United States v. Stofsky*³⁹ a federal court construed the word "pattern" in a situation where union officials and employees were charged with accepting illegal payments from employers. The court drew from civil rights law, where a "pattern" has been deemed to involve more than just isolated or accidental events.⁴⁰ It also drew from the definition of "pattern of criminal conduct" in title X of the Organized Crime Control Act of 1970: "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are inter-related by distinguishing characteristics and are not isolated events."⁴¹ The *Stofsky* court said that "in spite of the quantitative nature (at least two racketeering activities) of the § 1961 definition of 'pattern' [of racketeering activity] the major concern of Congress, when it enacted § 1961 et seq. was the special danger to legitimate businesses of a continuity of racketeering activity."⁴² And, in *United States v. White*, a federal court ruled that the word "pattern" was not vague because it could be construed as meaning "a combination of qualities or acts forming a consistent or characteristic arrangement."⁴³ The court supported its decision by pointing out that the defendant's commission of mail fraud and interstate transportation of stolen property was "part of a particular continuing criminal activity."⁴⁴

In *United States v. Morris*,⁴⁵ the Fifth Circuit ruled that several card games occurring over a nineteen-month period formed an easily

35. 18 U.S.C. § 1962 (1970).

36. *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973).

37. 18 U.S.C. § 1961(5) (1970). The effective date was Oct. 15, 1970.

38. *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

39. *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973).

40. *Id.* at 613-14 (citing *United States v. Gilman*, 341 F. Supp. 891 (S.D.N.Y. 1972)).

41. *Id.* at 614 (citing 18 U.S.C. § 3575(e) (1970)).

42. 409 F. Supp. at 614 (emphasis added).

43. 386 F. Supp. 882, 883 (E.D. Wis. 1974).

44. *Id.*

45. 532 F.2d 436 (5th Cir. 1976).

recognized pattern. The pattern included trips to Nevada, private card games in the defendant's hotel room, the presence of stooped poker players, the use of prearranged card decks, and other cheating techniques which constituted a "pattern of racketeering activity." The court in *United States v. Field*⁴⁶ followed the logic of the *Morris* court in ruling that fourteen separate "racketeering activities" within a four-year period constituted a clear pattern of racketeering conduct. And, in *United States v. Kaye*,⁴⁷ the Seventh Circuit held that the commission of seventy-four racketeering activities over a four-and-one-half-year period constituted a "pattern of racketeering activity" because it was continuous and related criminal activity. In *Kaye*, the defendant was convicted of seventy-four counts of accepting money from service contractors for services as a union steward which he did not in fact provide.

An important decision which appears to contradict the weight of authority requiring continuous activity to establish a "pattern of racketeering activity" is *United States v. Parness*.⁴⁸ In *Parness* the Second Circuit found a pattern of racketeering activity based on two acts of interstate transportation of cashier's checks, the money for which had been stolen or converted. Moreover, the two acts occurred only five days apart, and, for all practical purposes, were part of one criminal episode. However, as pointed out the following year by the district court in *United States v. Moeller*,⁴⁹ since the two acts in *Parness* were part of a lengthy, sophisticated, and fraudulent scheme to take over a hotel, one could infer that the closely related acts were actually part of a pattern. Given that inference, the reliance in *Parness* on just two racketeering activities is congruous with the presence of continuing criminal activity in *Stofsky*, *White*, *Kaye*, and *Moeller*.

The RICO definition of "pattern of racketeering activity" suggests that the similarity and interrelatedness of racketeering activities should be stressed in determining whether a "pattern of racketeering activities" exists. This emphasis is built into the definition: "'Pattern of racketeering activity' means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are

46. 432 F. Supp. 55 (S.D.N.Y. 1977) (Field was charged with violating FEDRICO and unlawfully demanding and receiving money from an employer of longshoremen).

47. 556 F.2d 855 (7th Cir. 1977).

48. 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

49. 402 F. Supp. 49, 58 n.7 (D. Conn. 1975) (defendants were charged with various offenses arising out of an alleged arson of a business plant).

not isolated incidents"⁵⁰

It is difficult to determine whether Florida courts will require continuity of "racketeering activities" as well as similarity or interrelatedness among them. Merely requiring similarity and interrelatedness aids RICO prosecutors. But imposing the FEDRICO requirement of continuity makes prosecution more difficult.

"Racketeering activities" often have the "same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated."⁵¹ If a criminal commits the same "racketeering activity" twice in the same general manner, he is guilty of violating the RICO statute because the two acts are likely to "have the same or similar intents, results, accomplices, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and . . . not [be] isolated incidents."⁵²

If the "pattern" element in RICO can be satisfied too easily, then RICO may well be applied to non-racketeers who have committed only relatively minor crimes such as possession of an explosive without a license or permit;⁵³ storage of alcoholic beverages in a place other than the building or room approved by the Division of Alcoholic Beverages and Tobacco for a given vendor;⁵⁴ intentionally touching or striking another person against the will of the other person;⁵⁵ carrying a pistol without having a license from the local county commissioners;⁵⁶ or making a check to another, knowing at the time that there are insufficient funds on deposit with which to pay the check.⁵⁷ A judicial construction of "pattern" including the continuity concept would to some degree protect non-racketeers from RICO's broad definition of "racketeering activity." If committed in some sort of a "pattern," the crimes mentioned could and probably would trigger a RICO violation. This should be avoided. Non-racketeers should be insulated from the severity of the first-degree felony conviction under Florida's racketeering statute.

Since a RICO conviction has such grave consequences, the legislature and the courts should carefully consider the construction given to "pattern." If a "pattern" can be demonstrated simply by a showing of similarity and interrelatedness among "racketeering activities," many perpetrators of minor crimes may be potential violators

50. FLA. STAT. § 943.461(4) (1977).

51. *Id.*

52. *Id.*

53. *Id.* § 552.101, as prescribed in *id.* § 943.461(1)(a)6.

54. *Id.* § 562.03, as prescribed in *id.* § 943.461(1)(a)7.

55. *Id.* § 784.03(1)(a), as prescribed in *id.* § 943.461(1)(a)10.

56. *Id.* § 790.05, as prescribed in *id.* § 943.461(1)(a)12.

57. *Id.* § 832.05(2)(a), as prescribed in *id.* § 943.461(1)(a)18.

of RICO. However, if the "pattern" element requires proof that a continuity of particular criminal activity exists, RICO will be used more appropriately against the professional criminal. This would seem to be more in keeping with the motivations of the legislature in enacting the statute.

*D. Does the "Enterprise" Element
Limit the Scope of "Racketeering Activity"?*

FEDRICO defines "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."⁵⁸ The definition is very broad, and, as an element of a FEDRICO violation, has blocked few convictions. A temporary exception was *United States v. Moeller*,⁵⁹ where the court reasoned that FEDRICO did not encompass unlawful ventures. The court held that although a group of individuals associated for the purpose of burning and destroying buildings was clearly an enterprise, it was not a legitimate enterprise. The court was persuaded by legislative history which indicated that FEDRICO was enacted to resist the infiltration of organized crime into legitimate businesses. However, the Second Circuit in *United States v. Altese* overruled *Moeller* on this point, holding that FEDRICO clearly extended to illegitimate businesses as well as to legitimate ones.⁶⁰ The Second Circuit's position is the same as that taken by the Seventh Circuit.⁶¹ Foreign businesses,⁶² periodic card games,⁶³ labor unions,⁶⁴ police departments,⁶⁵ small businesses,⁶⁶ government agencies,⁶⁷ organized prostitution rings,⁶⁸ and a two-person bribery operation⁶⁹ have also been

58. 18 U.S.C. § 1961(4) (1970).

59. 402 F. Supp. 49 (D. Conn. 1975).

60. 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

61. *United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977); *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974).

62. *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

63. *United States v. Morris*, 532 F.2d 436 (5th Cir. 1976).

64. *United States v. Kaye*, 556 F.2d 855 (5th Cir. 1977).

65. *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977).

66. *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975) (Campanale was convicted of conspiring to conduct a pattern of racketeering activity by intimidating and forcing meat packers to contract for certain company services).

67. *United States v. Frumento*, 405 F. Supp. 23 (E.D. Pa. 1975) (the Bureau of Cigarette and Beverage Taxes in Pennsylvania was found to be an "enterprise.")

68. *United States v. McLaurin*, 557 F.2d 1064 (5th Cir. 1977) (defendants were convicted of various federal offenses as a result of their lucrative enterprise in Tampa, Florida, which specialized in prostitution).

69. *United States v. Fineman*, 434 F. Supp. 189 (E.D. Pa. 1977).

held to satisfy the definition of "enterprise" in FEDRICO.

The RICO definition of "enterprise" is even broader than that in FEDRICO. The Florida law follows the FEDRICO definition by applying the law to individuals, partnerships, corporations, associations, legal entities, unions, and groups of individuals associated in fact although not a legal entity.⁷⁰ The legislature obviously learned from the federal decisions, because it added to the definition of enterprise sole proprietorships, business trusts, illicit as well as licit enterprises, and governmental as well as other entities.⁷¹ Consequently, the legislature kept the Florida courts from having to face litigation similar to that which has occurred in the federal courts.⁷² Since the "enterprise" element has blocked few FEDRICO convictions,⁷³ it is apparent that, on the federal level, the "enterprise" requirement has not significantly limited the application of FEDRICO. Since the definition of "enterprise" in RICO is even broader than that in FEDRICO, it is very unlikely that the "enterprise" element will help limit the application of the Florida statute primarily to racketeers.

E. Penalties and Remedies

A person convicted under RICO is guilty of a first-degree felony punishable by a term of imprisonment not to exceed thirty years and a fine not to exceed \$10,000.⁷⁴ The court can set a higher fine, provided the fine does not exceed three times the gross value gained or lost as a result of violating RICO.⁷⁵ Court costs and reasonable costs of investigation and prosecution can be added to the alternative fine. For example, if a pattern of heroin trafficking resulted in \$1,000,000 gross value gained, a court could sentence the RICO violator to pay \$3,000,000 plus the allowable costs.

RICO may also be used in civil prosecutions.⁷⁶ The same essential elements as in a criminal prosecution must be proved, but by the lesser standard of proof applicable in civil cases.⁷⁷ Upon proof of a

70. Compare FLA. STAT. § 943.461(3) (1977) with 18 U.S.C. § 1961(4) (1970).

71. FLA. STAT. § 943.461(3) (1977).

72. See, e.g., *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); *United States v. Frumento*, 405 F. Supp. 23 (E.D. Pa. 1975); *United States v. Moeller*, 402 F. Supp. 49 (D. Conn. 1975).

73. E.g., *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976); *United States v. Moeller*, 402 F. Supp. 49 (D. Conn. 1975).

74. FLA. STAT. § 943.463(2) (1977).

75. *Id.*

76. *Id.* § 943.464.

77. See *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

RICO violation, a circuit court may order the defendant in a civil case to divest himself of any interest in any enterprise, impose reasonable restrictions on future activities or investments, order the forfeiture of the charter of the corporation involved, or suspend or revoke the licenses granted to any enterprise by any department or agency of the state.⁷⁸

Any state agency having jurisdiction over the alleged racketeering activities may institute civil proceedings.⁷⁹ Any person who is or may in the future be damaged in his person, business, or property by reason of a RICO violation has a cause of action for compensatory and punitive damages, court costs, and reasonable attorney's fees.⁸⁰ One of the most interesting provisions under the civil remedies section is that a finding of guilt in any criminal RICO proceeding estops the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings.⁸¹ As a group, the criminal and civil remedies are broad and flexible. A violator of RICO can be brought into court by various state agencies, by state attorneys, and by private individuals.

The United States used the FEDRICO civil remedy in *United States v. Cappetto*.⁸² The defendants were receiving horse race and other sports wagers and transmitting wagering information. In addition to seeking preliminary and permanent injunctions to restrain the defendants from engaging in the illegal gambling operation, the federal government sought divestiture of Cappetto's interest in the building being used by the defendants, disclosure of the identities of those persons acting in concert with the defendants in the gambling business, and an order directing each of the defendants to submit quarterly income reports for the past ten years to the United States Attorney. Relying on the fifth amendment, the defendants refused to comply with discovery orders and refused even to appear for depositions. The defendants unsuccessfully argued that the action under the civil remedies of RICO was essentially a criminal proceeding and that, therefore, they were entitled to the rights guaranteed by the Constitution to defendants in criminal cases. The Seventh Circuit ruled that "acts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings, and the prosecuting arm of the government may be authorized

78. FLA. STAT. § 943.464(1) (1977).

79. *Id.* § 943.464(5).

80. *Id.* § 943.464(7).

81. *Id.* § 943.464(8).

82. 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

to elect to bring a civil or criminal action, or both."⁸³ The court also ruled that the standard of proof was lower in civil proceedings than in criminal proceedings under the same statutes⁸⁴ and that the "[d]efendants ha[d] no more right to refuse . . . to submit to questioning than any other party in a civil case."⁸⁵

F. *Statewide Grand Jury*

In addition to its other provisions, RICO amended section 905.34, Florida Statutes,⁸⁶ to give the statewide grand jury subject matter jurisdiction over "any violation of the provisions of the Florida RICO (Racketeer Influenced and Corrupt Organization) Act." Since the statewide grand jury was instituted largely because of organized crime, it is proper to extend its jurisdiction to RICO violations.⁸⁷ Florida's most recent statewide grand jury has already employed this new power in indicting a reputed associate of the Carlo Gambino Mafia Family for a RICO violation.⁸⁸

G. *Summary of the RICO Elements*

To review, the elements of a RICO violation include:

(1) "pattern of racketeering activity," which can be broken down into:

(a) "pattern," meaning under RICO two or more incidents of racketeering activities with the same or similar distinguishing characteristics,⁸⁹ or, under FEDRICO, two or more incidents of racketeering activities which are "part of a particular continuing criminal activity";⁹⁰ and

(b) "racketeering activity," which includes the FEDRICO "racketeering activities,"⁹¹ the laws in seventeen chapters and twenty-five sections of Florida Statutes,⁹² and the attempts and conspiracies to commit the above crimes, as well as solicitations, coercions, and intimidations of other persons to commit them;⁹³

83. *Id.* at 1357.

84. *Id.*

85. *Id.* at 1359.

86. (1975).

87. FLA. STAT. § 905.32 (1977). This section is entitled "Legislative intent." Usually express legislative intent is not incorporated into a statute.

88. Tampa Tribune, Feb. 22, 1978, § B, at 3, col. 1.

89. FLA. STAT. § 943.461(4) (1977).

90. *United States v. White*, 386 F. Supp. 882, 883 (E.D. Wis. 1974).

91. FLA. STAT. § 943.461(1)(b) (1977).

92. *Id.* § 943.461(1)(a)1-25.

93. *Id.* § 943.461(1).

- (2) enterprise, which includes almost every legal and illegal entity imaginable;⁹⁴ and
- (3) a broad range of prohibited activities such as:
 - (a) using or investing racketeer proceeds;⁹⁵
 - (b) acquiring or maintaining an enterprise through racketeering;⁹⁶
 - (c) participating as an employee in an enterprise through racketeering;⁹⁷ and
 - (d) conspiring or endeavoring to violate RICO.⁹⁸

III. LEGISLATIVE HISTORY AND INTENT

The committee discussion and the floor debate leading up to passage of the RICO statute evince a legislative intent to confine the definition of "racketeering activity" under the new law primarily to felonies. The potential broadness of the definition of "racketeering activity" has been demonstrated. The relative uselessness of employing "pattern," "enterprise," and the other elements involved to narrow the scope of the statute has also been shown. The legislative history points to the conclusion that the legislature inadvertently made RICO broader than it intended.

Senator Edgar Dunn, a Democrat from Daytona Beach, was the prime sponsor of RICO and supervised its amendatory process in the senate.⁹⁹ As chairman of the Senate Judiciary-Criminal Committee, Senator Dunn was able to focus that committee's time and resources on RICO. He worked closely with committee staff and with an expert on FEDRICO to produce the versions of RICO introduced in both the house and senate.¹⁰⁰ He probably understood RICO better than any other legislator.

On May 4, 1977, when the merits of RICO were debated on the senate floor, Senator Dunn was the spokesman for the bill.¹⁰¹ He

94. *Id.* § 943.461(3).

95. *Id.* § 943.462(1).

96. *Id.* § 943.462(2).

97. *Id.* § 943.462(3).

98. *Id.* § 943.462(4).

99. *Florida Times-Union*, May 27, 1977, § B, at 2, col. 3.

100. Fla. S., Committee on Judiciary-Civil, tape recording of proceedings (May 20, 1977) (on file with committee). Senator Dunn told the committee that "[T]he House version is our fifth draft [of RICO]." The house version is identical to one of the working drafts (on file with the *Florida State University Law Review*) produced by the Senate Committee on Judiciary-Criminal except that the house version was amended by the House Committee on Criminal Justice to allow the involved law enforcement agencies to split up the proceeds derived from forfeitures resulting from RICO violations. Fla. HB 2127, § 4(4) (1977). Much of the debate in the house concerned this amendment to the senate's working draft. Fla. H.R., tape recording of proceedings (May 2, 1977) (on file with clerk of house).

101. Fla. S., tape recording of proceedings (on file with secretary of senate).

started the senate's discussion and, in subsequent debate, he defended the bill by reference to a FEDRICO case that took place in Florida:

In the *Cloud* case in Tampa, the pattern of extortion, assault, and violence—including the murder, I might add, of a police officer— . . . were the acts of racketeering activity. Those acts were used to further an operation, a business enterprise. What was the enterprise? It was a vending machine corporation. All right, the way they kept the business going was by extortion, by murder, and by threats of violence to people who wouldn't put those machines in and who were extorted out of their money when they got [them] in there.¹⁰²

Dunn's defense was prompted by the comments of several senators who were concerned that RICO could be easily abused. Senator Lori Wilson said:

In my mind, and I think in the mind of the citizens, racketeering means organized crime, mafia, whatever you want to call it. Now if I read your definition [of racketeering activities] here though, that's not what we're really talking about. . . . [F]or instance, if you violate a Florida statute on profanity and you do it more than once—and there [are not] many people in the room that [haven't]—you're a racketeer. That doesn't follow to me. Prostitution, of course, that's illegal, but what if you're convicted twice or three or four times on a prostitution charge, does that make you a racketeer if you're working as a sole person?¹⁰³

Earlier, Senator Jack Gordon had objected to the "dangerous special racketeer" provision in RICO which provided for increased punishment for such racketeers. His objections stemmed, at least partially, from the use of vague terms like "abnormal mental condition," "manual dexterity," and "special skill or expertise" to describe the "dangerous special racketeer."¹⁰⁴

102. *Id.*

103. *Id.*

104. *Id.*; Fla. CS for SB 960 (1977). The "dangerous special racketeer" provision was patterned after 18 U.S.C. § 3575 (1970), which is entitled "Increased sentence for dangerous special offenders." This federal statute authorized additional sentences of 25 years imprisonment or less for defendants designated as dangerous adult special offenders. A defendant is such a special offender if the felony he committed was part of a pattern of criminal conduct which constituted a substantial source of the defendant's income, and if, in the commission of the felony, the defendant manifested special skill or expertise. "[S]pecial skill or expertise in criminal conduct includes . . . manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of crimi-

Senator Gordon also objected to a provision which would have amended Florida's wiretap statute to permit wiretaps for suspected RICO violations. He feared that an extension of the wiretap statute to RICO would result in too many abuses. He argued that the amendment would have allowed wiretapping even if you were suspected of smuggling cigarettes into the state.¹⁰⁵ Senator Gordon described RICO as "condoning the trampling on liberties of Americans under the guise of fighting organized crime."¹⁰⁶

Because of these objections, the senate voted to return RICO to the Judiciary-Criminal Committee for further consideration.¹⁰⁷ The committee decided the senate would be more likely to pass RICO if it were shorter than the twenty-five page version which had been debated.¹⁰⁸ Accordingly, they pared RICO down to almost half its original size. They deleted the "dangerous special racketeer" provision, the civil investigation provision, the amendment to the wiretap statute, and all the crimes enumerated in the definition of "racketeering activity" which were objected to during senate debate. The provisions for public assistance fraud and prostitution by a sole person were retained.¹⁰⁹

The committee also deleted from the definition of "racketeering activity" crimes which had not been objected to on the senate floor. Those crimes, primarily misdemeanors, involved nonproperty tax crimes, charitable funds, unfair trade practices, mortgaged property, defamation, regulation of dog and horse racing, regulation of jai alai frontons, and real property contracts.¹¹⁰

In its decision to delete a particular crime from the definition, the committee relied on Senator Dunn's "felony rule" which, roughly speaking, meant that Florida's definition of "racketeering activity" should be limited to felonies.¹¹¹ Senator Dunn later qualified the "felony rule" by saying, "We're including things that are used by organized crime, like prostitution and gambling in that context. Those are really the only exceptions."¹¹²

nal conduct, the enlistment of accomplices in such conduct, or the disposition of the fruits or proceeds of such conduct." 18 U.S.C. § 3575 (1970).

105. Fla. S., tape recording of proceedings (May 4, 1977) (on file with secretary of senate).

106. Florida Times-Union, May 27, 1977, § B, at 2, col. 3.

107. FLA. S. JOUR. 327 (Reg. Sess. 1977).

108. Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings (May 9, 1977) (on file with committee).

109. Compare Fla. S., tape recording of proceedings (May 4, 1977) (on file with secretary) and Fla. CS for SB 960 (1977) with Fla. S., Committee on Judiciary-Civil, Staff Analysis and Economic Statement (May 20, 1977) (on file with committee).

110. *Id.*

111. Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings (May 9, 1977) (on file with committee).

112. *Id.*

Applying the "felony rule," the committee decided that organized crime used obscene acts and distribution of obscene literature, so misdemeanors relating to those acts were retained in the definition.¹¹³ For similar reasons, cigarette tax evasion was retained because cigarette smuggling can "be a big business with the disparity of taxes between North Carolina and Florida."¹¹⁴ The committee also decided to retain selected misdemeanors involving dog and horse racing, jai alai frontons, prostitution, worthless checks, and gambling.¹¹⁵ These specific misdemeanors are only a small part of the ones included in the definition of "racketeering activity." The committee did not discuss the hundreds of others still covered by the definition.

To understand how so many misdemeanors could be retained in the definition of "racketeering activity" without discussion, one must realize that the committee was editing a definition which included all the misdemeanors and felonies in twenty-seven chapters of the Florida Statutes.¹¹⁶ The committee deleted seven entire chapters and particular sections from five others.¹¹⁷ However, there were still seventeen chapters that the committee did not even discuss.¹¹⁸ Of those seventeen chapters, thirteen chapters contain numerous misdemeanors relating to beverage law enforcement, interest and usurious practices, assault and battery, kidnapping, weapons and firearms, arson, robbery, fraudulent practices, forgery, worthless checks, perjury, obstruction of justice, and drug abuse.

Since the committee intended that only felonies and selected misdemeanors be part of the definition of "racketeering activity," there are probably a substantial number of misdemeanors within those thirteen chapters which the committee did not intend to include in

113. *Id.*

114. *Id.* (statement of Sen. McClain). Evasion of paying cigarette taxes is a misdemeanor only for the first conviction. Subsequent convictions are felonies. FLA. STAT. § 210.18(1) (1977).

115. Fla. S., Committee on Judiciary-Civil, Staff Analysis and Economic Statement (May 20, 1977) (on file with committee); Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings (May 9, 1977) (on file with committee).

116. Fla. CS for SB 960, § 2(1)(a) (1977).

117. Compare Fla. CS for SB 960, § 2(1)(a) (1977) with Fla. S., Committee on Judiciary-Civil, Staff Analysis and Economic Statement (May 20, 1977) (on file with committee).

118. Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings (May 9, 1977) (on file with committee); see FLA. STAT. ch. 517 (1977) (sale of securities); *id.* ch. 552 (manufacture, distribution, and use of explosives); *id.* ch. 562 (beverage law enforcement); *id.* ch. 687 (usurious practices); *id.* ch. 782 (homicide); *id.* ch. 784 (assault and battery); *id.* ch. 787 (kidnapping); *id.* ch. 790 (weapons and firearms); *id.* ch. 806 (arson); *id.* ch. 812 (robbery); *id.* ch. 817 (fraudulent practices); *id.* ch. 831 (counterfeiting); *id.* ch. 832 (worthless checks); *id.* ch. 837 (perjury); *id.* ch. 838 (bribery); *id.* ch. 843 (obstruction of justice); and *id.* ch. 893 (drug abuse).

the definition of "racketeering activity." For example, had Senator George Williamson known, he probably would not have approved of "racketeering activity" being defined as the failure of a common carrier of beverage to file monthly reports with the Division of Alcoholic Beverages and Tobacco.¹¹⁹ When the committee was selecting the racketeering activities from the chapter relating to horse tracks, Senator Williamson said that the definition of "racketeering activity" should not include laws that require "reports to be filed on time."¹²⁰

Similarly, Senator Harry Johnston did not want the definition to include the misdemeanor of knowingly passing a worthless check if passing two bad checks was "going to be a pattern of racketeering."¹²¹ Nevertheless, Senator Johnston declined to delete it because, as he understood RICO, the checkwriters must use their illegally gotten proceeds "for some purpose toward racketeering."¹²² That interpretation of RICO is incorrect because the pattern of racketeering is relevant only as to the source of illegal proceeds. It is true that the proceeds of racketeering must be invested or used in some enterprise, but they need not be used "for some purpose toward racketeering." Senator Johnston did not want two bad checks to constitute a "pattern of racketeering activity," yet such a result is possible by having the worthless check statute in the definition of "racketeering activity."

Except for the worthless check statute, the misdemeanors which the committee discussed and retained involved activities which a FEDRICO expert had suggested might be violated by organized crime operatives in Florida.¹²³ In contrast, beverage report laws, worthless check statutes, and many other laws in the thirteen chapters were not mentioned by the expert during hearings on organized crime.

It appears that the committee inadvertently skipped over at least some of the thirteen chapters containing misdemeanors. It simply is not consistent to conclude that the committee wanted laws requiring reports from the beverage industry included in the definition of racketeering activity, yet not laws requiring reports from the jai alai industry. Nor is it comprehensible that the committee wanted the

119. *Id.* § 562.20(1), as prescribed in *id.* § 943.461(1)(a).

120. Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings (May 9, 1977) (on file with committee).

121. *Id.*

122. *Id.*

123. Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings (March 8, 1977) (on file with committee) (testimony of G. Robert Blakey). He considered prostitution, pornography, and gambling as areas in which organized crime might be operating.

investment or use of proceeds from any two worthless checks to constitute a violation of RICO. It is inconsistent too that the committee would spend hours deleting gambling and prostitution misdemeanors, yet purposely leave all the misdemeanors in the chapters relating to beverage law enforcement, interest and usurious practices, kidnapping, weapons and firearms, arson, larceny, fraudulent practices, forgery, worthless checks, perjury, obstruction of justice, and drug abuse.

The Judiciary-Criminal Committee finished its major editing of the senate version of RICO after a long meeting on May 9, 1977.¹²⁴ By then the house of representatives had unanimously passed its version of RICO and the bill was before the Senate Judiciary-Criminal Committee for review.¹²⁵ Since the house version was basically an earlier draft of the senate version, the committee did not bother to analyze the substantive content of the house bill. However, it did choose to use the house version—House Bill 2127—as a vehicle for the legislative process by striking its substantive content and replacing it with the then edited senate version.¹²⁶ The bill leaving the senate committee was House Bill 2127—as amended by that committee.

The bill then went to the Senate Judiciary-Civil Committee.¹²⁷ That committee expanded the definition of “racketeering activity” to include all the misdemeanors and felonies in the chapter in the Florida Statutes on assault, battery, and culpable negligence.¹²⁸ The

124. Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings (May 9, 1977) (on file with committee).

125. FLA. H.R. JOUR. 416 (Reg. Sess. 1977). RICO was, for the most part, produced by the Senate Committee on Judiciary-Criminal. The House Committee on Criminal Justice and its Select Committee on Organized Crime were only slightly involved in the drafting of RICO. The house committee's involvement with RICO was limited to Professor G. Robert Blakey's testimony on the infiltration of organized crime into legitimate businesses, quoted in note 1 *supra*, and the later deleted amendment to permit the involved law enforcement agencies to split up the proceeds derived from forfeitures resulting from RICO violations, discussed in note 100 *supra*. Activity on the floor of the house was for the most part limited to a general explanation that RICO would prohibit organized crime operatives from investing their illegally gotten proceeds in legitimate enterprises, to a discussion of the proceeds amendment authored by the House Committee on Criminal Justice, to an amendment drawn from the senate version of RICO which gave statewide grand juries jurisdiction to investigate possible violations of RICO, Fla. H., tape recording of proceedings (May 2, 1977) (on file with clerk of house), and to an amendment deleting an affirmative defense, quoted in note 140 *infra*.

126. See FLA. H.R. JOUR. 846 (Reg. Sess. 1977).

127. LEGISLATIVE INFORMATION DIVISION, JOINT LEGISLATIVE MANAGEMENT COMMITTEE, HISTORY OF LEGISLATION, 1977 REGULAR SESSION, FLORIDA LEGISLATURE 503 (House Bill Actions Report).

128. Compare Fla. S., Committee on Judiciary-Civil, Staff Analysis and Economic Statement (May 20, 1977) (on file with committee) and Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings (May 9, 1977) (on file with committee) with Fla. CS for SB 960 (1977).

civil committee also amended the first part of the definition of "racketeering activity" by deleting the provision that "[r]acketeering conduct' means engaging in: (a) Any conduct in violation of the following provisions of law" In its place the committee substituted the provision that "[r]acketeering activity' means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit: (a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes" ¹²⁹ The analyst for the Judiciary-Civil Committee explained to the committee that the amendment was needed because the word "engaging" made the original provision vague. ¹³⁰ He also said the change would allow RICO to reach not just "the individuals actually committing the crime, but everyone involved," including persons attempting to commit, conspiring to commit, or soliciting, coercing, or intimidating another person to commit the enumerated racketeering activities. ¹³¹

Robert E. Stone, president of the Florida Prosecuting Attorneys Association, said that in talking about combating organized crime it is necessary to go after "the person who is sitting up there masterminding it." ¹³² He said that the amendment "goes to a person who might intimidate a person or coerce a person into committing" racketeering activities. ¹³³

The committee did not discuss whether the misdemeanors in the thirteen unedited chapters should be retained. Senator Dunn told them that the Judiciary-Criminal Committee had already applied the general principle of not retaining in the definition of "'racketeering activity' offenses that were merely misdemeanors, except in the area of gambling and prostitution." ¹³⁴

It is noteworthy that Senator David McClain, a member of both senate judiciary committees, expressed a desire that the Judiciary-Civil Committee specify the "serious offenses" it wanted defined as "racketeering activity." ¹³⁵ He did not want the committee to use the "shotgun approach" by incorporating every crime in entire chapters. Unfortunately, Senator McClain did not pursue this concern because he was convinced by Stone that his concern was "protected

129. *Id.*

130. Fla. S., Committee on Judiciary-Civil, tape recording of proceedings (May 20, 1977) (on file with committee).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

by the amendment . . . which requires that the [racketeering activity] be a crime that is chargeable by indictment or information. . . . [A]ny provision of [chapter] 550 that is not a crime or chargeable by information of indictment would be excluded under the definition you adopted on page one."¹³⁶

Stone correctly observed that the amendment excludes statutory prohibitions which are not crimes or chargeable by information or indictment. He was incorrect, however, when he said Senator McClain's concern was "protected." The definition of "racketeering activity" still includes the misdemeanors in the thirteen chapters in which the "shotgun approach" was used. Misdemeanors are not excluded by the phrase "chargeable by information or indictment"—because all crimes, misdemeanors and felonies, are chargeable in that manner. The amendment does exclude noncriminal regulations and civil infractions, such as traffic tickets, since they are not crimes or chargeable by information or indictment. Yet Senator McClain was not concerned with those kinds of non-serious crimes. He, like the Judiciary-Criminal Committee, was concerned with misdemeanors.

After the Judiciary-Civil Committee had made its changes, House Bill 2127 was placed on the Special Order Calendar for May 26, 1977. It passed unanimously in the senate without debate.¹³⁷ The next day a newspaper article quoted Senator Dunn as saying "[t]he parts we took out are not essential to the RICO concept."¹³⁸ The article noted that RICO had undergone drastic changes, such as the deletion of the wiretap and special dangerous racketeering provisions and the misdemeanors in the definition of "racketeering activity."¹³⁹

On May 30, 1977, the house passed House Bill 2127 as amended by the senate, making only two minor changes.¹⁴⁰ The next day the

136. *Id.* (statement of Mr. Stone.)

137. FLA. S. JOUR. 545 (Reg. Sess. 1977).

138. Florida Times-Union, May 27, 1977, § B, at 2, col. 3.

139. *Id.*

140. FLA. H.R. JOUR. 848 (Reg. Sess. 1977). The house amended the senate's version of RICO in two ways. It substituted the definitional heading of "pattern of racketeering activity" for "pattern of racketeering conduct." This change was necessary because RICO defines "racketeering activity," not "racketeering conduct." Unfortunately, within the definition of "pattern of racketeering activity," there remain the words "racketeering conduct."

The second amendment deleted a senate provision which provided:

It is an affirmative defense if the proceeds were used to purchase securities of such enterprise on the open market without a purpose to control or participate in the control of such enterprise, or to assist another person to do so, if the securities of the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering conduct after such purchase do not confer, either in law or in fact, the power to elect one or more directors of such enterprise. The person asserting such defense bears the burden of proof.

senate passed RICO as amended by the house.¹⁴¹ By June 25, 1977, RICO had been engrossed, enrolled, and signed by the Governor.¹⁴² On October 1, 1977, RICO went into effect.

IV. PROPOSALS

Even if Florida courts construed the "pattern" element of RICO narrowly, the presence of so many non-serious misdemeanors in the definition of "racketeering activities" makes RICO much too broad. If RICO is to be narrowed, that definition will have to be edited once again. Other changes, especially changes in the definition of "pattern," might help narrow RICO, but the key to the overbreadth of RICO is in the definition of "racketeering activity."

The legislature should finish the editing of RICO by diligently applying Senator Dunn's "felony rule" to the misdemeanors in the definition of "racketeering activity." Using the standards established by the Senate Judiciary-Criminal Committee, such an application would result in a drastic reduction of the number of misdemeanors in the definition of "racketeering activity."¹⁴³

The legislature should also make RICO violations based on misdemeanors punishable as third-degree felonies. Of course, violations based on felonies would continue to be first-degree felonies. This proposal is reasonable if one believes that a pattern of robberies should be more severely punished than a pattern of prostitution or pornography violations. It is inequitable to sentence a person to one year for committing a single misdemeanor and then, through RICO, to sentence that person to thirty years for committing the same misdemeanor in a pattern. Under this proposal the sentence for a pattern of misdemeanors could still be up to five years.

The FEDRICO definition of "pattern of racketeering activity" should be duplicated in the Florida statute. This would help Florida courts follow the federal decisions which have properly required a continuity of organized wrongdoing. As the FEDRICO expert explained to the Judiciary-Criminal Committee, RICO is based on the theory that it is a crime to "commit a series of [individual criminal acts] . . . held together in a pattern and . . . part of an ongoing enterprise."¹⁴⁴ By adopting the definition in FEDRICO, the legisla-

141. FLA. S. JOUR. 628 (Reg. Sess. 1977).

142. LEGISLATIVE INFORMATION DIVISION, *supra* note 127, at 503.

143. The reasoning behind this proposal can also be applied to FLA. STAT. § 943.461(2)(3) (1977) which incorporates the entire chapter on usury in the Florida Statutes into the definition of "unlawful debt." By doing so, a person extending credit to another person and willfully and knowingly charging 26% interest per annum violates RICO when he uses or invests the proceeds in, or acquires or maintains an enterprise with the proceeds from the usurious debt.

144. Fla. S., Committee on Judiciary-Criminal, tape recording of proceedings (March 8,

ture would be saving time and money in the fight against organized crime because Florida courts could make use of the federal decisions as to the meaning of "pattern of racketeering activity." Unless the FEDRICO definition is adopted, the legislature cannot be sure that RICO will be limited to the "ongoing enterprise." In fact, the RICO definition will probably not be so limited because it is easy for "two incidents of racketeering conduct . . . [to] have the same or similar intents, results, accomplices, victims, or methods of commission."¹⁴⁵

In addition, the legislature should amend Florida's wiretap statute so that law enforcement officials may intercept wire or oral communications under judicial supervision when there is reasonable cause to believe RICO is being violated.¹⁴⁶ Florida needs this amendment because, as the legislature determined, "organized crime exists on a large scale within the State of Florida."¹⁴⁷ According to the great majority of law enforcement officials, organized crime investigations and prosecutions require the aid of electronic surveillance techniques to gather evidence adequately.¹⁴⁸ The law enforcement

1977) (on file with committee).

145. FLA. STAT. § 943.461(4) (1977).

146. See generally *id.* ch. 934.

147. RICO, *supra* note 2, which in full provides:

WHEREAS, the Legislature finds that organized crime is a highly sophisticated, diversified, and widespread problem which annually drains billions of dollars from the national economy by various patterns of unlawful conduct, including the illegal use of force, fraud, and corruption, and

WHEREAS, organized crime exists on a large scale within the State of Florida, and it engages in the same patterns of unlawful conduct which characterize its activities in other states, and

WHEREAS, seventeen of the twenty-one publicly identified organized crime "families" are reported to operate within Florida, and because no single "family" is considered by the other "families" to have exclusive dominion in the state, Florida is considered by organized criminal operatives as an "open state" and other organized criminal operatives are now migrating to Florida from other states, and

WHEREAS, organized crime is infiltrating and corrupting legitimate businesses operating within this state and this infiltration and corruption uses vast amounts of money, power, and all the techniques of violence, intimidation, and other forms of unlawful conduct to accomplish its goals, and

WHEREAS, in furtherance of such infiltration and corruption, organized criminal operatives utilize and apply to their unlawful purposes laws of the State of Florida conferring and relating to the privilege of engaging in various types of business enterprises, and

WHEREAS, infiltration and corruption of legitimate business provide an outlet for illegally obtained capital, harm innocent investors, entrepreneurs, merchants, and consumers, interfere with free competition, and thereby constitute a substantial danger to the economic and general welfare of the State of Florida, and

WHEREAS, in order to successfully resist and eliminate such infiltration, it is necessary to provide new criminal and civil remedies and procedures . . .

Id. at 1400.

148. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE,

officials maintain that electronic surveillance techniques "are indispensable to develop adequate strategic intelligence concerning organized crime, to set up specific investigations, to develop witnesses, to corroborate their testimony, and to serve as substitutes for them—each a necessary step in the evidence-gathering process in organized crime investigations and prosecutions."¹⁴⁹

The Florida Legislature made a similar determination and found such findings important enough to incorporate them in the Florida Statutes: "Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communication to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice."¹⁵⁰ The words "any violation of the Florida RICO (Racketeer Influenced and Corrupt Organization) Act" could simply be added to the crimes enumerated in the wiretap statute.

There are adequate safeguards in the wiretap statute for assuring that wiretapping authority is not abused by law enforcement officials. Among other precautions, each application for a wiretap must be made in writing to a judge of competent jurisdiction.¹⁵¹ Either the Governor, the attorney general, or a State's attorney must authorize the application.¹⁵² The application must include details about the offense being investigated, the place where the communications are to be intercepted, the identity of the person committing the offense, details about whose communications are to be intercepted, and information about how long the interception will be required.¹⁵³ To issue an order authorizing a wiretap the judge must determine that "[t]here is probable cause for belief that an individual is committing, has committed, or is about to commit" one of the enumerated offenses in the statute.¹⁵⁴

A fifth and final proposal is merely technical—to substitute the phrase "racketeering activity" for "racketeering conduct" in the definition of "pattern of racketeering activity." This is necessary because RICO defines "racketeering activity," not "racketeering conduct."

TASK FORCE REPORT: ORGANIZED CRIME 201 (1967).

149. *Id.*

150. FLA. STAT. § 934.01(3) (1977).

151. *Id.* § 934.09.

152. *Id.*

153. *Id.*

154. *Id.*

V. CONCLUSION

The very broad definition of "racketeering activity" makes the RICO statute a potential candidate for prosecutorial abuse. Adoption of the first proposal would provide more protection for Floridians from overzealous prosecutors by limiting the definition of "pattern of racketeering activity" primarily to felonies. This would allow Florida courts to follow the federal cases construing this difficult phrase. With those changes and with the adoption of the wire-tap proposal, RICO could become a major weapon with which to drive organized crime out of Florida without destroying "the personal liberties of Floridians."¹⁵⁵

155. Fla. S., tape recording of proceedings (May 4, 1977) (on file with secretary of senate) (statement of Sen. Gordon).