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Randy M. Mastro
Gibson, Dunn & Crutcher

Steven C. Bennett
Office of the United States Attorney for the Southern District of New York

Mary P. Donlevy
Gibson, Dunn & Crutcher

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PRIVATE PLAINTIFFS' USE OF EQUITABLE REMEDIES UNDER THE RICO STATUTE: A MEANS TO REFORM CORRUPTED LABOR UNIONS

Randy M. Mastro*
Steven C. Bennett**
Mary P. Donlevy***

Since its enactment in 1970, the Racketeer Influenced and Corrupt Organizations statute¹ (RICO) increasingly has become a vehicle through which the federal government has attacked corruption of labor unions by organized crime. In 1989, for example, the government used the RICO statute to reform the electoral and disciplinary procedures of the International Brotherhood of Teamsters (the IBT or Teamsters);² and just last year, the government brought a civil RICO suit seeking appointment of an administrator for the New York Waterfront and appointment of trustees for several locals of the International Longshoremen's Association.³ Despite the opportunities that the RICO statute offers for constructive union reform, private litigants have yet to seek RICO equitable remedies against labor unions. This article explains how the government has prosecuted civil RICO cases against labor unions and suggests how private litigants might use the RICO statute to achieve similar equitable reform of labor unions. In describing the government's approach to

* Randy M. Mastro is a former Assistant United States Attorney and Deputy Chief of the Civil Division of the Office of the United States Attorney for the Southern District of New York. He was the lead prosecutor in the Government's civil RICO action against the International Brotherhood of Teamsters. He is a graduate of Yale University, B.A. 1978, and the University of Pennsylvania Law School, J.D. 1981. He is currently an associate at Gibson, Dunn & Crutcher in New York City.

** Steven C. Bennett is an Assistant United States Attorney in the Office of the United States Attorney for the Southern District of New York. He is a graduate of Macalester College, B.A. 1979, and New York University Law School, J.D. 1984.

*** Mary P. Donlevy is currently an associate at Gibson, Dunn & Crutcher in New York City. She is a graduate of Pepperdine University, B.A. 1986, and Columbia University School of Law, J.D. 1989.

1. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901a, 84 Stat. 922, 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988)).

2. Consent Order, *United States v. International Bhd. of Teamsters*, No. 88 Civ. 4486 (S.D.N.Y.) (Mar. 14, 1989); see *infra* notes 73-83 and accompanying text.

3. Complaint, *United States v. Local 1804-1, Int'l Longshoremen's Ass'n*, 732 F. Supp. 434 (S.D.N.Y. 1990) (No. 90 Civ. 0963) (Feb. 14, 1990); see *infra* notes 87-90 and accompanying text.

prosecuting civil RICO actions against labor unions, the authors aim to provide a road map for private litigants to avail themselves of the types of equitable remedies achieved in prior civil RICO cases.

Prior to the enactment of the RICO statute, the federal government's supervision of labor unions principally entailed enforcement of the labor laws, coupled with criminal prosecutions of corrupt individuals.⁴ This limited approach to regulation sometimes permitted unions with sordid histories to remain mired in corruption even in the midst of scrutiny by the Labor Department and other regulatory and law enforcement agencies.⁵ Moreover, union dissidents, constrained by the same labor laws and ostracized by their own leadership, had to rely largely on occasional government intervention for the limited reforms that were available.⁶

The RICO statute radically changed the regulatory landscape. In RICO, the government has found a new and potent weapon to fight corruption of labor unions by organized crime.⁷ RICO has given federal courts the freedom to fashion creative equitable remedies to redress racketeering activity. Under RICO, even at the preliminary stage, "the court may at any time enter such restraining orders or prohibitions, or take

4. S. REP. NO. 617, 91st Cong., 1st Sess. 78-79 (1969) [hereinafter SENATE REPORT].

5. For example, both the Secretary of Labor and the courts found the Teamsters' system of selecting delegates responsible for electing national officers to be in technical compliance with the labor laws. See *Theodus v. McLaughlin*, 852 F.2d 1380, 1384-86 (D.C. Cir. 1988).

6. In the case of the International Brotherhood of Teamsters, Teamsters for a Democratic Union (TDU), a dissident group, made several unsuccessful attempts to reform the Teamsters' election process through litigation. See, e.g., *id.* at 1381-82. Unable to effect changes, union reformers have had to rely on government prosecutions of corrupt elected officials. Four of the last five Teamsters presidents were indicted while in office. Three of them (David Beck, James Hoffa and Roy Williams) were convicted of felonies. PRESIDENT'S COMM'N ON ORGANIZED CRIME, THE EDGE: ORGANIZED CRIME, BUSINESS, AND LABOR UNIONS 89-90 (1986) [hereinafter THE EDGE]; see also *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. Williams*, 737 F.2d 594 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *United States v. Hoffa*, 436 F.2d 1243 (7th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971). The fourth (Jackie Presser) was under indictment on federal felony charges at the time of his death. *United States v. International Bhd. of Teamsters*, 905 F.2d 610, 613 (2d Cir. 1990) (discussing *United States v. Friedman*, No. 86-114 (N.D. Ohio 1986), which named Presser as co-defendant).

7. In a recent civil RICO action against the Teamsters, the government was able to reform the Teamsters election process. See *Consent Order, United States v. International Bhd. of Teamsters*, No. 88 Civ. 4486 (S.D.N.Y.) (Mar. 14, 1989). As part of the settlement of that lawsuit, the Teamsters Union has been required for the first time ever to elect its top officers by direct, rank-and-file, secret ballot. *Id.* at 13.

such other actions . . . as it shall deem proper.”⁸ Thus, the RICO statute has given the government a means to change the way corrupt unions elect their officers, discipline their officers and members, and otherwise conduct their operations.⁹

The fact remains, however, that the government has used this “extraordinary” weapon “very sparingly.”¹⁰ In the two decades since the statute was passed, the government has brought few civil RICO actions against labor unions.¹¹ These cases have involved unions plagued by “systemic corruption” for “so many years” that a “drastic” remedy was necessary.¹² In short, the government has sought RICO relief against labor unions only in the most egregious circumstances.

Nevertheless, through its early successes with the statute, the government has established extremely valuable precedents, the benefits of which private litigants may be able to share. Unlike the government, whose primary concern is eliminating union corruption,¹³ private litigants may have a completely different agenda in bringing a civil RICO action against a labor union. Because RICO affords previously unavailable equitable remedies, union reformers now have within their grasp a weapon that works. They simply need to use it.

Part I of this Article outlines the government’s approach to civil RICO actions involving labor unions, including an

8. 18 U.S.C. § 1964(b) (1988).

9. In connection with the Teamsters settlement, Benito Romano, the United States Attorney for the Southern District of New York, explained the value of the RICO statute: “There would have been no [other] way that I could think of . . . that would have afforded us the broad-based relief that we think we needed in order to achieve systematic reform.” *Federal Government’s Use of Trusteeships Under the RICO Statute: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 101st Cong., 1st Sess. 56 (1989) [hereinafter *RICO Hearings*].

10. *Id.* at 57 (statement of Benito Romano, United States Attorney, Southern District of New York).

11. See, e.g., *United States v. International Bhd. of Teamsters*, 905 F.2d 610 (2d Cir. 1990); *United States v. Local 359, United Seafood Workers*, 889 F.2d 1232 (2d Cir. 1989); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20 (2d Cir. 1989); *United States v. Local 30, United Slate, Tile, & Composition Roofers*, 871 F.2d 401 (3d Cir.), *cert. denied*, 493 U.S. 953 (1989); *United States v. Local 560, Int’l Bhd. of Teamsters*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *United States v. Local 1804-1, Int’l Longshoremen’s Ass’n*, 732 F. Supp. 434 (S.D.N.Y. 1990); *United States v. Local 6A, Cement & Concrete Workers*, 663 F. Supp. 192 (S.D.N.Y. 1986).

12. *RICO Hearings*, *supra* note 9, at 57 (statement of Benito Romano, United States Attorney, Southern District of New York).

13. See *id.* at 23.

overview of the government's prior civil RICO actions and a summary of the types of issues that often arise in such actions. Part II examines the unique issues involved in a civil RICO action brought by a private plaintiff. The principal issue addressed in this Part is whether a private plaintiff can bring an action under the equitable remedies provisions of the RICO statute. This Part also addresses the issues of how a private plaintiff can gain access to information that may be required to prosecute a civil RICO action and how a private plaintiff could pay for such an action.

I. THE GOVERNMENT APPROACH TO CIVIL RICO ACTIONS

This Part addresses the issues that prior government civil RICO actions have raised. Any civil RICO action by a private plaintiff likely would raise many of the same issues.

A. *Overview of the RICO Statute*

Aware of the magnitude of the problem of organized crime corruption of businesses and unions alike, in 1970 Congress enacted RICO,¹⁴ which, as one of the Act's sponsors said, was aimed at "striking a mortal blow against the property interests of organized crime."¹⁵ The recognition that, in many instances, organized crime had come to dominate large and powerful unions was prominent among the congressional concerns underlying RICO:

Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions . . . provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction,

14. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901a, 84 Stat. 922, 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988)).

15. 116 CONG. REC. 602 (1970) (statement of Sen. Hruska).

and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loansharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here.¹⁶

The RICO statute represents an economic approach to rooting out organized crime in businesses and labor unions, not simply a reorganization of previously established methods of fighting corruption. As the Supreme Court observed, "the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."¹⁷

The essence of the RICO statute is a prohibition on gaining control of an economic enterprise through a pattern of racketeering. The statute provides, in relevant part:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.¹⁸

The RICO statute defines "racketeering activity" to include a host of federal and state offenses traditionally associated with organized crime, including murder, kidnaping, gambling, arson, robbery, bribery, extortion, and dealing in narcotics. The listed offenses also specifically include certain labor-related offenses, such as embezzlement from pension and welfare funds.¹⁹

16. SENATE REPORT, *supra* note 4, at 78 (footnote omitted).

17. *Russello v. United States*, 464 U.S. 16, 26 (1983).

18. 18 U.S.C. § 1962(b) (1988). The Act further provides that it is unlawful to participate in the affairs of an enterprise, or to conspire to acquire control of, or participate in the affairs of, an enterprise, as part of a pattern of racketeering. *Id.* § 1962(c), (d).

19. In particular, "racketeering activity" includes, *inter alia*:

(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . [S]ection 664 (relating to embezzlement from pension and welfare funds), . . . section 1341 (relating to mail fraud), . . . section 1343 (relating to wire fraud), . . . section

RICO contains provisions for both criminal penalties and civil remedies.²⁰ The purpose of this two-fold approach was to attack the corrupting influence that Congress recognized organized crime had gained over many types of the nation's commercial enterprises and unions.²¹ Recognizing that years of successful prosecutions of organized crime figures had not weakened organized crime's firm grip over many sectors of the nation's economy,²² Congress sought to expand greatly the prosecutorial tools available to the government and the remedial tools available to the courts.²³ Congress explicitly declared that the provisions of the RICO statute "shall be liberally construed to effectuate its remedial purposes."²⁴ This directive is unique in the entire body of substantive federal criminal law.²⁵

In section 1964, the civil portion of the RICO statute, Congress granted federal courts extremely broad powers to impose equitable relief to prevent and restrain RICO violations. The statute provides:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, *including, but not limited to*: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; *imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in*, the activities of which affect interstate or foreign commerce;

1503 (relating to obstruction of justice), . . . section 1952 (relating to racketeering), . . . section 1954 (relating to unlawful welfare fund payments), . . . [and] (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from Union funds)

Id. § 1961(1).

20. See *id.* § 1963 (criminal penalties); *id.* § 1964 (civil remedies).

21. See SENATE REPORT, *supra* note 4, at 76-78.

22. See *id.* at 78-79.

23. See *id.* at 79-83.

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

25. See *Russello v. United States*, 464 U.S. 16, 27 (1983) (noting, however, that there is a similar provision in the Criminal Appeals Act, 18 U.S.C. § 3731 (1988)).

or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.²⁶

This provision for equitable remedies is perhaps the broadest of the powers granted to the courts under the RICO statute.²⁷ This broad equitable power comports with the legislative history of the statute. The final report of the House Judiciary Committee explained that section 1964 was intended to be a starting rather than ending point for devising creative solutions to organized crime problems:

Subsection (a) contains broad provisions to allow for reform of corrupted organizations. Although certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons.²⁸

The Senate Judiciary Committee concurred in this approach, noting that the equitable provisions of the RICO statute were intended to be "broad enough to do all that is necessary to free the channels of commerce from all illicit activity."²⁹ Although Congress modeled the civil provisions of the RICO statute after existing antitrust statutes,³⁰ Congress made clear that previous models were to be sources of inspiration, not limitation, for equitable remedies: "[I]t must be emphasized that [RICO's enumerated] remedies are not exclusive," and include but are not limited to "the full panoply of civil remedies . . . now available in the antitrust area."³¹ Plainly, Congress intended that federal courts would apply the equitable remedies of the RICO statute broadly to effectuate the statute's purpose. As illustrated in the next section, the government has made extensive use of these broad powers in an attempt to remedy the problem of corrupted labor unions.

26. 18 U.S.C. § 1964(a) (1988) (emphasis added).

27. The Supreme Court has expressly held that "if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964 [the civil remedies section], where RICO's remedial purposes are most evident." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 492 n.10 (1985).

28. H.R. REP. No. 1549, 91st Cong., 2d Sess. 57 (1970).

29. SENATE REPORT, *supra* note 4, at 79.

30. *Id.* at 81.

31. *Id.*; see also *id.* at 160 (stating that "the list [of § 1964 remedies] is not exhaustive").

B. *The Government's Prior Civil RICO Cases*

The influence of organized crime within several of the nation's largest labor unions is frightening in magnitude. For example, in its 1986 report, the President's Commission on Organized Crime identified four international unions—the International Longshoremen's Association, the Hotel and Restaurant Employees International Union, the International Brotherhood of Teamsters and the Laborers International Union of North America—as “substantially influenced and/or controlled by organized crime.”³² Unfortunately, ridding these labor unions of organized crime domination has proved to be a difficult task. Thus far, the government has invoked RICO's civil remedy provisions against unions in only the most egregious circumstances of corruption by organized crime.³³ These cases demanded equitable relief in the interest of protecting the victims of organized crime—the union membership, affected businesses, and the public at large.

When the federal government has brought civil RICO cases, it has sought equitable relief in the form of a divestiture or trusteeship over the affected entities.³⁴ These entities have included various combinations of individual businesses³⁵ and labor unions,³⁶ and in one instance an entire marketplace.³⁷

32. THE EDGE, *supra* note 6, at xvi (quoting *Labor Violence and the Hobbs Act: Hearings on S. 462 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. 208 (1984) (testimony of Floyd I. Clark, Deputy Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation)).

33. See *supra* notes 10-12 and accompanying text.

34. See, e.g., *United States v. Cappetto*, 502 F.2d 1351, 1355 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388, 1392 (S.D.N.Y. 1989); *United States v. Local 359*, 705 F. Supp. 894, 896 (S.D.N.Y.), *aff'd in part and remanded in part sub nom. United States v. Local 359*, *United Seafood Workers*, 889 F.2d 1232 (2d Cir. 1989); *United States v. Local 30*, *United Slate, Tile & Composition Roofers*, 686 F. Supp. 1139, 1141 (E.D. Pa. 1988), *aff'd*, 871 F.2d 401 (3d Cir. 1989), *cert. denied*, 493 U.S. 953 (1989); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 683 F. Supp. 1411, 1419 (E.D.N.Y.), *aff'd*, 879 F.2d 20 (2d Cir. 1989); *United States v. Local 6A, Cement & Concrete Workers*, 663 F. Supp. 192, 193 (S.D.N.Y. 1986); *United States v. Ianniello*, 646 F. Supp. 1289, 1300 (S.D.N.Y. 1986), *aff'd*, 824 F.2d 203 (2d Cir. 1987); *United States v. Local 560, Int'l Bhd. of Teamsters*, 581 F. Supp. 279, 283 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

35. See *infra* notes 38-41 and accompanying text; notes 46-52 and accompanying text.

36. See *infra* notes 42-86 and accompanying text.

37. See *infra* notes 87-90 and accompanying text.

In *United States v. Cappetto*,³⁸ the first reported case involving application of the civil remedies provisions of the RICO statute, the Seventh Circuit Court of Appeals affirmed the district court's order granting the government a preliminary injunction against defendants who had conducted a sports wagering business at a billiard parlor in Chicago.³⁹ The court concluded that preliminary relief was appropriate given that "[i]t was plainly the intention of Congress in adopting Section 1964 [of the RICO statute] to provide for injunctive relief against violations of [the statute] without any requirement of a showing of irreparable injury other than that injury to the public which Congress found to be inherent in the conduct made unlawful by [the statute]."⁴⁰ The court further suggested that divestiture of the owner's interest in the billiard parlor might be an appropriate permanent remedy, but deferred consideration of the issue until the conclusion of the district court proceedings.⁴¹

More recently, in *United States v. Local 560, International Brotherhood of Teamsters*,⁴² the Third Circuit affirmed the district court's order granting equitable relief sought by the government.⁴³ The appellate court observed that "the power to appoint a Trustee falls within the broad equitable powers granted to district courts under Section 1964(a)."⁴⁴ In affirming the district court's order barring two defendants from all further contact with Local 560 and replacing the union's entire executive board with a trustee, the Third Circuit held: "Clearly, the district court's injunction in the instant case fell within its broad remedial powers of 'divestiture' and 'reasonable restrictions' provided for under section 1964."⁴⁵

In *United States v. Ianniello*,⁴⁶ the United States Court of Appeals for the Second Circuit affirmed a district court order appointing a receiver *pendente lite* to run a restaurant business corrupted by racketeering activity.⁴⁷ The court took this action even though the listed owner of the business,

38. 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

39. *Id.* at 1359.

40. *Id.* at 1358-59.

41. *Id.* at 1359.

42. 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

43. *Id.* at 270.

44. *Id.* at 296 n.39.

45. *Id.* at 295.

46. 824 F.2d 203 (2d Cir. 1987).

47. *Id.* at 205.

Robert Ianniello, had been acquitted of criminal RICO charges in connection with restaurant profit skimming, which the government proved at a criminal RICO trial against other defendants, including La Cosa Nostra⁴⁸ Genovese family capo⁴⁹ Matthew Ianniello, who was also a defendant in the civil action.⁵⁰ In appointing a receiver to run the restaurant during the pendency of the civil RICO action, the district court reasoned that because "Robert Ianniello either could not or would not control an improper diversion of funds which the criminal jury found had taken place"⁵¹ the court needed to appoint a receiver to prevent racketeering activity at the restaurant.⁵²

48. The President's Commission on Organized Crime has described La Cosa Nostra, literally, "This Thing of Ours," PRESIDENT'S COMM'N ON ORGANIZED CRIME, THE IMPACT: ORGANIZED CRIME TODAY 22 (1986) [hereinafter THE IMPACT], as "the largest, most extensive, and most influential crime group in this country," *id.* at 35. La Cosa Nostra is made up of 24 "families" nationwide, with major concentrations in Northeastern urban areas. *Id.* at 36. A family is also referred to as a "borgata." *Id.* "Nearly all LA COSA NOSTRA families around the country fall under the authority of the 'national commission,' established by Salvatore 'Lucky' Luciano in 1931." *Id.* at 37. The structure of a La Cosa Nostra family typically consists of a "Boss," who is head of the family, an "Underboss," who is assistant to the Boss, a "Consiglieri," who is counselor to the Boss, various "Caporegime," who are supervisors of the family's day-to-day criminal operations, "Soldiers," or "made m[e]n," who are full-fledged members of the family, and "Associates," who are non-Italian criminal operatives of the family. See *id.* at 39-41.

The existence and structure of La Cosa Nostra and its ruling "National Commission" has been proved in a series of successful prosecutions of organized crime figures. See, e.g., *United States v. Salerno*, 868 F.2d 524, 527-28 (2d Cir.) (involving the prosecution of the bosses of New York's La Cosa Nostra Families, including defendant Anthony Salerno, Boss of the Genovese family, for criminal RICO offenses predicated upon acts of labor racketeering, extortion, and murder), *cert. denied*, 491 U.S. 907, and *cert. denied*, 493 U.S. 811 (1989); *United States v. Cerone*, 830 F.2d 938, 941 (8th Cir. 1987) (finding that La Cosa Nostra defendants were "members of organized crime 'groups' in various Midwestern cities" engaging in racketeering activity in connection with a Teamsters benefit fund), *cert. denied*, 486 U.S. 1006 (1988); *United States v. Local 560, Int'l Bhd. of Teamsters*, 581 F. Supp. 279, 304-06 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986) (involving the Provenzano Group, a subdivision of the Genovese family in New Jersey); *United States v. Brooklier*, 685 F.2d 1208, 1213 (9th Cir. 1982) ("Appellants are [Los Angeles family] members of La Cosa Nostra, a secret national organization engaged in a wide range of racketeering activities, including murder, extortion, gambling, and loansharking").

49. "Capo," short for "caporegima," is a term used for a La Cosa Nostra member who runs a group of organized crime members and associates, known as "crews." The "capo," sometimes referred to as "captain," manages and receives tribute from his "crew." THE IMPACT, *supra* note 48, at 40, 44.

50. 824 F.2d at 205.

51. *United States v. Ianniello*, 646 F. Supp. 1289, 1299 (S.D.N.Y. 1986), *aff'd*, 824 F.2d 203 (2d Cir. 1987).

52. *Id.* at 1299-1300.

In *United States v. Local 6A, Cement and Concrete Workers*,⁵³ the government sought the appointment of a trustee to oversee the operations of the District Council and Local 6A of the Cement and Concrete Workers Union.⁵⁴ The district court initially ordered a preliminary injunction hearing, which was to be "limited in time and subject matter"⁵⁵ in light of the "very strong showing"⁵⁶ the government had made at the outset of the case in support of its motion for preliminary relief. Shortly after this ruling, the union defendants entered into a consent judgment appointing a trustee to oversee union operations for four years, permanently barring individual officer defendants from holding union office, and, in certain instances, even from working as union laborers.⁵⁷ The court-appointed trustee began his term in April 1987.⁵⁸

In *United States v. Local 359*,⁵⁹ the government alleged that the Genovese family of La Cosa Nostra controlled the Fulton fish market in lower Manhattan along with the union that serviced the fish market.⁶⁰ The government sought an administrator to oversee the operations of the fish market, a trustee to run the union, and extensive injunctive relief to bar Genovese family members and associates from the fish market and the union.⁶¹ United States District Judge Thomas P. Griesa entered consent judgments appointing an administrator for the Fulton Fish Market, permanently barring several organized crime figures from the fish market and the union, and enjoining racketeering activity there.⁶² Judge Griesa, however, refused to appoint a trustee for the union.⁶³

In *United States v. Bonanno Organized Crime Family of La Cosa Nostra*,⁶⁴ the government sought a trusteeship for Teamsters Local 814 in New York City, along with injunctive

53. 663 F. Supp. 192 (S.D.N.Y. 1986).

54. *Id.* at 193.

55. *Id.* at 197-98.

56. *Id.* at 197.

57. Judgment (on Consent) Against Union Defendants at 3-7, *United States v. Local 6A, Cement & Concrete Workers*, No. 86 Civ. 4819 (S.D.N.Y.) (Mar. 18, 1987).

58. Galen, *N.Y.-Based Union Agrees to Less Radical Approach*, NAT'L L.J., Aug. 31, 1987, at 1.

59. 705 F. Supp. 894 (S.D.N.Y.), *aff'd in part and remanded in part sub nom. United States v. Local 359, United Seafood Workers*, 889 F.2d 1232 (2d Cir. 1989).

60. *Id.* at 896, 899.

61. *Id.* at 896.

62. *Id.* at 896, 917.

63. *Id.* at 917.

64. 683 F. Supp. 1411 (E.D.N.Y. 1988).

relief to retrieve the Bonanno family's illegally gotten gains.⁶⁵ United States District Judge I. Leo Glasser of the Eastern District of New York entered a consent judgment appointing a trustee for Local 814.⁶⁶ Judge Glasser also denied the other defendants' motion to dismiss, ruling that the government had the right to seek injunctive relief to break up the Bonanno family and disgorgement of the Bonanno family's illegal profits.⁶⁷

In *United States v. Local 30, United Slate, Tile & Composition Roofers*,⁶⁸ United States District Judge Louis Bechtle of the Eastern District of Pennsylvania granted extensive civil RICO preliminary relief, including sweeping injunctions and the appointment of a "court liaison officer" to oversee the operations of a corrupt local roofers union.⁶⁹ In appointing a "court liaison officer" as a preliminary remedy, the court rejected a mere monitorship as insufficient to prevent union corruption during the pendency of the action.⁷⁰ The court gave the court liaison officer extensive powers over the union's collective-bargaining process,⁷¹ which the government proved had been corrupted by violence and threats of violence against employers who refused to comply with the union leadership's demands.⁷²

The government's most ambitious attempt to use the RICO statute against organized crime's contamination of labor unions appears in *United States v. International Brotherhood of Teamsters*,⁷³ a case in which the government sought to impose a trusteeship over an entire international union.⁷⁴ On the eve of trial, the defendants entered into a consent judgment that granted the government an unprecedented breadth of equitable relief.⁷⁵ The Teamsters agreed for the first time to hold direct, rank-and-file, secret ballot elections for all of

65. *Id.* at 1419.

66. *Id.*

67. *Id.* at 1441-42.

68. 686 F. Supp. 1139 (E.D. Pa. 1988).

69. *Id.* at 1171.

70. *Id.* at 1167-68.

71. *Id.* at 1172-73.

72. *Id.* at 1143-50.

73. 708 F. Supp. 1388 (S.D.N.Y. 1989).

74. *Id.* at 1392.

75. See Consent Order, *United States v. International Bhd. of Teamsters*, No. 88 Civ. 4486 (S.D.N.Y.) (Mar. 14, 1989). For a summary of the Consent Order, see *United States v. International Bhd. of Teamsters*, 905 F.2d 610, 613 (2d Cir. 1990).

the Teamsters' top officers.⁷⁶ Moreover, the court appointed three officers, each with a specific area of responsibility, to oversee the actions of the union's officials.⁷⁷ An "independent administrator" was appointed,⁷⁸ with the power to veto all union contracts (other than collective-bargaining agreements), executive appointments, and expenditures; to discipline corrupt union officials; and to impose trusteeships on corrupted union locals.⁷⁹ An "investigations officer" was appointed to act as a prosecutor within the union.⁸⁰ His powers included the authority to seek a court-ordered trusteeship over any one or more of the Teamsters locals.⁸¹ Finally, an "election officer" was appointed to run the union's elections in 1991 and 1996.⁸² The independent administrator and investigations officer will serve until 1992, by which time the union will have established its own permanent independent review board.⁸³ The 1991 election was commencing as this Article went to print.⁸⁴

On June 6, 1989, the government filed a civil complaint in *United States v. Private Sanitation Industry Association*.⁸⁵ The suit charges 64 individual defendants, along with Local 813 of the International Brotherhood of Teamsters and the Private Sanitation Industry Association, a trade group, with RICO violations involving the garbage carting industry. The complaint alleges that the Luchese and Gambino crime families have controlled the Long Island, New York carting industry since the 1950s. The suit seeks forced sale of mob-dominated companies, removal of organized-crime influenced officers of the Teamster's Local, and a court-appointed trustee to run the carting trade association. Trial of the action has not yet commenced.⁸⁶

76. Consent Order at 13-16.

77. *Id.* at 7-13.

78. *Id.* at 7.

79. *Id.* at 7-10.

80. *Id.* at 7-8.

81. *Id.* at 8.

82. *Id.* at 15-16.

83. *Id.* at 3, 19; see also *United States v. International Bhd. of Teamsters*, 931 F.2d 177 (2d Cir. 1991) (describing election process).

84. Lacey, *Report XXVIII to All Members of the International Brotherhood of Teamsters*, INT'L TEAMSTER, Nov. 1991, at 39 (report of Independent Administrator) (discussing procedures for 1991 elections).

85. See Complaint, *United States v. Private Sanitation Indus. Ass'n*, No. 89 Civ. 0970 (E.D.N.Y.) (June 6, 1989).

86. For brief descriptions of the complaint and subsequent proceedings, see *RICO Monster Has Defense Shrieking*, *Manhattan Lawyer*, Sept. 26-Oct. 2, 1989, at 1;

On February 14, 1990, the government filed a complaint in *United States v. Local 1804-1, International Longshoremen's Association*⁸⁷ against six local labor unions of the International Longshoremen's Association (ILA) and their executive boards, thirty-two present or former officials of these ILA locals, twelve individuals who are alleged to be members or associates of organized crime families, and several employers.⁸⁸ In this case, the government seeks to put an entire economic marketplace, the New York and New Jersey Waterfront, under court supervision. The complaint asks the court to appoint one or more trustees whose primary responsibilities will be to ensure free and fair elections of new union officers and to discipline current officers found guilty of wrongdoing.⁸⁹ The complaint also seeks preliminary relief in the form of injunctions to keep organized crime elements out of the ILA and its locals, to bar ILA officers from engaging in any racketeering activity, and to provide for the immediate appointment of a temporary court liaison officer to discipline ILA corruption and prevent further racketeering activity.⁹⁰ Trial of the action commenced in April of 1991.⁹¹

In *United States v. Local 295, International Brotherhood of Teamsters*,⁹² the federal government sued Teamsters Local 295 and Local 851, along with fourteen individual defendants, charging that the Gambino and Luchese crime families had used their control over the unions to control the cargo business at John F. Kennedy airport in New York City. The suit seeks the appointment of a trustee to oversee the affairs of the two unions and to recover ten million dollars gained through extortion and illegal payoffs.⁹³

Kessler & Mintz, *Feds vs. LI Carters: Suit Seeks Sale of Firms U.S. Says Are Mob-Dominated*, *Newsday*, June 8, 1989, at A3, col. 1 (Nassau ed.).

87. See Complaint, *United States v. Local 1804-1, Int'l Longshoremen's Ass'n*, 732 F. Supp. 434 (S.D.N.Y. 1990) (No. 90 Civ. 0963) (Feb. 14, 1990).

88. See Complaint at 5-28; see also *Local 1804-1*, 732 F. Supp. at 435.

89. Complaint at 106-07.

90. Complaint at 103-04.

91. See *Three Manhattan ILA Locals Agree to Settle Civil Racketeering Suit*, *Daily Lab. Rep.* (BNA) No. 64, at M-7 (Apr. 3, 1991) (reporting that four of the six defendant locals had settled before trial).

92. 5 Lab. L. Rep. (CCH) (119 Lab. Cas.) ¶ 10,756 (E.D.N.Y. Mar. 7, 1991), *aff'd in part and vacated in part*, No. 90 CV. 0970, 1991 U.S. Dist. LEXIS 9564, 1991 WL 128563 (E.D.N.Y. June 28, 1991).

93. For brief summaries of the suit, see *Teamsters Named in Airport Rackets Suit*, *L.A. Times*, Mar. 22, 1990, at A16, col. 1; *JFK Unions Named in FBI Mob Action*, *Newsday*, Mar. 22, 1990, at 19. In March of 1991, the court granted the government's motion for partial summary judgment against two of the individual

In a recent civil RICO suit, *United States v. District Council, United Brotherhood of Carpenters*, the government seeks to remove officers of a New York City-based District Council of the Carpenters Union and to appoint one or more trustees to discipline District Council officers and conduct free and fair elections of new officers.⁹⁴ The suit alleges that despite several criminal prosecutions, the Genovese La Cosa Nostra family continues to influence the District Council.⁹⁵

Finally, in *United States v. Local 54, Hotel Employees and Restaurant Employees International Union*,⁹⁶ the government sought to remove the top officers of the local and place the local under a trusteeship.⁹⁷ The complaint alleged that Local 54, located in Atlantic City, New Jersey, has been dominated by the Bruno/Scarpa crime family for over twenty years.⁹⁸ In a settlement reached in April, 1991, all but four officers agreed to relinquish their union positions.⁹⁹ Further, the agreement established a court-appointed monitorship over the local. The monitor will oversee the election of new union officers over an eighteen month period.¹⁰⁰

C. The Government's Approach to Civil RICO Actions

In the civil RICO cases pursued to date, the government has developed the framework for establishing the basis of a claim for equitable relief. Essential to this framework is the establishment of the elements of a RICO violation.

1. *The elements of a RICO violation*—The gravamen of any RICO offense is controlling or conducting of the affairs of an

defendants named in the suit. *Local 295*, 5 Lab. L. Rep. (CCH) (119 Lab. Cas.) ¶ 10,756, at 28,290.

94. See United States Attorney's Office, Southern District of New York, Press Release at [4] (Sept. 6, 1990) (on file with the *University of Michigan Journal of Law Reform*).

95. *Id.* at [3]. For a brief summary of the complaint, see *Racketeering Suit Against Carpenters Chief*, N.Y. Times, Sept. 7, 1990, at B1, col. 2. The government withdrew its motion for preliminary relief after entering into a consent order with the defendants. See Stipulation and Order at 6, *United States v. District Council, United Bhd. of Carpenters*, No. 90 Civ. 5722 (S.D.N.Y.) (Dec. 12, 1990).

96. 18 Pens. Rep. (BNA) No. 1, at 13 (D.N.J. Dec. 19, 1990).

97. *Id.*

98. *Id.*

99. Daily Lab. Rep. (BNA) No. 72, at A-15 (Apr. 15, 1991).

100. *Id.*

enterprise through a pattern of racketeering activity.¹⁰¹ To obtain RICO relief for a labor union, the government generally must show that union leaders have joined with members of organized crime to gain control over the union by various illegal means and have continued to use their control to exploit the rights of union members.¹⁰²

a. The labor union as an "enterprise"—There is little dispute that a labor union can constitute an "enterprise" for purposes of RICO. The statute defines enterprises to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."¹⁰³ An enterprise may be either a legitimate entity or an illegitimate or illicit association.¹⁰⁴

For purposes of a RICO suit against a labor union, the enterprise may be a particular union local¹⁰⁵ or the international union as a whole.¹⁰⁶ The union and its leaders typically are bound together under the terms of their international and local union constitutions.¹⁰⁷ Members of the ruling body of an international union often hold offices in one or more locals of the union as well.¹⁰⁸ This interlinking binds the locals and the ruling boards of the union together to form an "enterprise."

b. Pattern of racketeering activity—The definition of "racketeering activity" includes any one of numerous criminal acts punishable under state law or indictable under various

101. See 18 U.S.C. § 1962 (1988); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 482-83 (1985).

102. See *United States v. Local 560, Int'l Bhd. of Teamsters*, 581 F. Supp. 279, 334-37 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

103. 18 U.S.C. § 1961(4) (1988).

104. *United States v. Turkette*, 452 U.S. 576, 587 (1981).

105. See *United States v. Kaye*, 556 F.2d 855, 861 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977).

106. See *United States v. Scotto*, 641 F.2d 47, 52 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388, 1401 (S.D.N.Y. 1989).

107. For example, the 1988 constitution of the International Brotherhood of Teamsters provided for the election of officers by a regular convention of delegates from local unions. See INTERNATIONAL BHD. OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AM., CONST. art. III, § 1 (May 19-23, 1988) [hereinafter IBT CONST.] (defining convention); *id.* § 2 (defining basis of representation); *id.* art. IV, § 2 (providing for election of officers).

108. For example, during the time that he was eleventh Vice President of the IBT, Harold Friedman was also President of the Ohio Conference of Teamsters and President of Local 507 in Cleveland, Ohio. *United States v. International Bhd. of Teamsters*, 905 F.2d 610, 613 (2d Cir. 1990).

enumerated provisions of the United States Code.¹⁰⁹ Such acts are termed "predicate acts" for purposes of the RICO statute.¹¹⁰ In the *Teamsters* case, for instance, the predicate acts alleged to constitute racketeering activity by La Cosa Nostra and the union leaders included wire fraud, extortion, mail fraud, embezzlement of union funds, unlawful benefit fund payments, obstruction of justice, illegal labor payments, interstate travel in aid of racketeering, and murder.¹¹¹

The government must prove at least two predicate acts to satisfy the "pattern" of racketeering activity requirement.¹¹² Further, as noted by the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co., Inc.*,¹¹³ the alleged predicate acts must be related in some way, and not mere isolated events.¹¹⁴ Proof of a relationship between events may be shown by "their temporal proximity, or common goals, or similarity of methods, or repetitions."¹¹⁵

In the context of control of labor unions by organized crime, the common thread running through the various predicate acts committed generally is control and exploitation of the union (the "enterprise") by organized crime figures for their own economic gain and the benefit of the corrupt union leaders. This singular illicit motive is the impetus for all the racketeering acts committed by the organized crime and union leadership conspiracy.¹¹⁶

109. See 18 U.S.C. § 1961(1) (1988).

110. The term "predicate act" is a term of art describing the commission of an individual crime listed in the RICO statute. See, e.g., *H.J. Inc. v. Northwestern Bell Tel.*, 492 U.S. 229, 236 (1989).

111. See, e.g., Complaint at 32-35, *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388 (S.D.N.Y. 1989) (No. 88 Civ. 4486) (June 28, 1988) (alleging wire fraud in connection with election of Teamsters President Roy L. Williams); *id.* at 35-39 (alleging wire fraud in connection with election of Teamsters President Jackie Presser); *id.* at 39-40 (alleging use of force, violence, and fear to intimidate union membership); *id.* at 76-77 (alleging fraudulent deprivation of union membership's money and property rights).

112. 18 U.S.C. § 1961(5) (1988).

113. 473 U.S. 479 (1985).

114. *Id.* at 496 n.14.

115. *United States v. Indelicato*, 865 F.2d 1370, 1382 (2d Cir.) (en banc), *cert. denied*, 491 U.S. 907 (1989).

116. Cases accepting this common-motive theory of pattern include *Indelicato*, in which the court found that the defendant's participation in three separate assassinations, all aimed at changing the leadership of the Bonanno crime family, fit the RICO pattern requirement. *Id.* at 1384. See also *Beauford v. Helmsley*, 865 F.2d 1386, 1392 (2d Cir.) (en banc), *cert. denied*, 493 U.S. 992 (1989) (holding that the distribution of thousands of fraudulent mailings concerning the sale of condominium apartments satisfied the RICO pattern requirement where "[a]ll of the frauds

2. *Proving the RICO elements*—In a RICO action against a union's leadership, the government's goal is to prove the two principal RICO elements: (1) that organized crime has acquired and maintained control over the union through a pattern of racketeering activity, facilitated by the union leadership; and (2) that members of both organized crime and the union leadership used their control to conduct the affairs of the union through a pattern of racketeering activity.

a. Proving acquisition and maintenance of control over the union enterprise—The government's first burden is to prove the existence of organized crime and its infiltration into the union. Much of this work has already been done. Within the past two decades dozens of members of La Cosa Nostra have been tried and convicted for their racketeering involvement with various labor unions. Transcripts and court records from these trials contain proof of La Cosa Nostra's control over the leaders of these various unions.¹¹⁷ In addition, both the federal and state governments have conducted major investigations and issued extensive reports on the existence of organized crime. Included in these reports are descriptions of organized crime influence and control over various labor unions.¹¹⁸

(1) *Prior criminal RICO prosecutions*—Many of the criminal prosecutions cited in the introduction to this Article involved officers of unions.¹¹⁹ These prosecutions have, in many cases, established the existence of a corrupt relationship between La Cosa Nostra and particular unions.¹²⁰ Testimony and court records from these prosecutions may provide a civil RICO plaintiff with valuable information linking union

allegedly had the same goal, *i.e.*, inflating the profits to be made by the defendants in the sale of the . . . apartments").

117. See *infra* notes 119-21 and accompanying text.

118. See *infra* notes 122-26 and accompanying text.

119. See cases cited *supra* note 6.

120. For example, Roy Williams, a former General President of the Teamsters, was convicted along with Joey Lombardo, a prominent Chicago La Cosa Nostra figure, for conspiracy to commit bribery of a United States Senator. See *United States v. Williams*, 737 F.2d 594, 597 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). After hearing the evidence in that case, United States District Judge Prentice H. Marshall of the Northern District of Illinois remarked: "I am convinced, clearly, unequivocally and beyond reasonable doubt that a structured organization exists, that it is broken down geographically and that various cities have their various bosses. I am convinced that, as the Congress has said, there is a domestic criminal cartel." THE EDGE: ORGANIZED CRIME, BUSINESS, AND LABOR UNIONS APPENDIX 41 (1988); see also *Williams*, 737 F.2d at 594 (identifying Judge Marshall).

officials with organized crime figures. In the *Teamsters* case, for instance, prior criminal trials produced a wealth of evidence for the government, vividly illustrating connections between top Teamsters officials and members of La Cosa Nostra.¹²¹

(2) *Government investigative reports*—A series of reports from various government agencies has detailed the existence of La Cosa Nostra and its influence over labor unions. Principal among these is the 1986 Report of The President's Commission on Organized Crime (PCOC).¹²² Some states, such as New York, have commissioned their own studies chronicling organized crime's firm grip on labor.¹²³

These reports can be extremely useful in a RICO action as proof of the relationship between the particular union and La Cosa Nostra. In the *Teamsters* case, for instance, the PCOC report provided the government with a wealth of evidence of the IBT's relationship with La Cosa Nostra families throughout the nation. The PCOC report summarized this evidence:

The leaders of the nation's largest union, the International Brotherhood of Teamsters (IBT), have been firmly under the influence of organized crime since the 1950's. Although many of the hundreds of IBT locals and joint councils operating throughout the country are not criminally infiltrated, organized crime influences at least 38 of the largest locals and a joint council in Chicago, Cleveland, New Jersey, New York, Philadelphia, St. Louis, and other major cities. Former Teamster president Roy L. Williams told the Commission, "Every big [Teamster] local union . . . had some connection with organized crime." These locals operate in the nation's major business and economic centers

121. See Government's Memorandum of Law in Support of its Motion for Preliminary Relief, *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388 (S.D.N.Y. 1989) (No. 88 Civ. 4486) (June 28, 1988).

122. See *THE EDGE*, *supra* note 6.

123. One recent report, for example, details how organized crime controls the construction industry through labor racketeering. See *NEW YORK STATE ORGANIZED CRIME TASK FORCE, CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY* (1987) [hereinafter OCTF REPORT]. Similar reports from other state agencies include annual reports from the New York/New Jersey Waterfront Commission, *see, e.g.*, 1986-1987 WATERFRONT COMM'N OF N.Y. HARBOR ANN. REP. (detailing recent investigations of criminal activity on the New York waterfront), and the Pennsylvania Crime Commission, *see, e.g.*, 1988 PENNSYLVANIA CRIME COMM'N REP. 25-26 (detailing investigation of La Cosa Nostra influence over the Roofer's Union).

and include the majority of the union's 1.6 million members. They are the foundation of organized crime's union-wide influences.¹²⁴

The PCOC report further found that "[f]or decades organized crime has exercised substantial influence over the international union, primarily through the office of the president."¹²⁵ In light of the extensive evidence of persistent corruption within the union, the PCOC concluded that drastic remedies were required:

At both the international and local levels, the IBT obviously continues to suffer from the relationship with organized crime. Indeed, so pervasive has this relationship become that no single remedy is likely to restore even a measure of true union democracy and independent leadership to the IBT. Sustained commitment of governmental resources to dislodge organized crime from the IBT through a combination of criminal prosecutions, civil action, and administrative proceedings is the only approach that offers even a modest hope of success in the long run. . . . [S]ystematic use of trusteeships by the courts may be necessary to prevent organized crime from continuing to do business as usual in the IBT.¹²⁶

(3) *Fifth amendment invocations*—It is not unusual for a corrupt union officer to refuse to testify regarding his association with organized crime when he is called before a congressional investigating committee, before a grand jury, before government agencies responsible for union affairs, or at depositions in civil actions.¹²⁷ In such cases, the union

124. THE EDGE, *supra* note 6, at 89 (footnote omitted).

125. *Id.* at 89. The PCOC identified past IBT General Presidents James Hoffa (1957-67) and Roy Williams (1981-83) as "indisputably direct instruments of organized crime" and said of then-current IBT General President Jackie Presser: "Presser's past activities indicate that he has associated with organized crime figures and that he benefited from their support in his elevation to the IBT Presidency in 1983." *Id.* at 90.

126. *Id.* at 138.

127. *See, e.g.,* *Hutcheson v. United States*, 369 U.S. 599, 600-07 (1962) affirming the conviction of a labor union president who invoked the fifth amendment and refused to testify before a Senate Committee investigating union corruption); *Curcio v. United States*, 354 U.S. 118, 118-19 (1957) (describing a Teamsters official who invoked the fifth amendment before a federal grand jury); PRESIDENT'S COMM'N ON ORGANIZED CRIME, ORGANIZED CRIME AND LABOR-MANAGEMENT RACKETEERING IN

officer's refusal to testify can lead to an adverse inference in a civil action. In *Baxter v. Palmigiano*,¹²⁸ a leading case in this area, the Supreme Court noted "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."¹²⁹ Relying on this language from *Baxter*, the Second Circuit permitted a negative inference from a fifth amendment invocation in a civil RICO action.¹³⁰

By invoking the fifth amendment, union officers may also contravene long-standing AFL-CIO policy, which requires union officials to cooperate with law enforcement efforts to fight corruption:

"[I]f a trade union official decides to invoke the Fifth Amendment for his personal protection and to avoid scrutiny by proper legislative committees, law enforcement agencies or other public bodies into alleged corruption on his part, he has no right to continue to hold office in his union. Otherwise, it becomes possible for a union official who may be guilty of corruption to create the impression that the trade union sanctions the use of the Fifth Amendment not as a shield against a matter of individual conscience but as a shield against proper scrutiny into corrupt influences in the labor movement."¹³¹

In addition to supporting a negative inference concerning the testimony the officer would have given if compelled to testify truthfully, the officer's invocation of the fifth amendment and consequent violation of the AFL-CIO policy may constitute a separate basis for seeking removal of the union official.¹³²

THE UNITED STATES 292-97 (1985) (providing record of hearing before executive commission's investigation of union corruption in which Jackie Presser, then general president of the IBT, invoked the fifth amendment and refused to answer questions) [hereinafter PCOC HEARINGS]; *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 292 n.30 (3d Cir. 1985) (describing a union official who invoked the fifth amendment at a deposition).

128. 425 U.S. 308 (1976).

129. *Id.* at 318.

130. See *United States v. Ianniello*, 824 F.2d 203, 208 (2d Cir. 1987).

131. *Hotel Employees & Restaurant International Union: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. 7 (1982) (testimony of committee staff investigator David Faulkner) (quoting AFL-CIO President George Meaney).

132. The long-standing policy of the AFL-CIO requires labor leaders "to cooperate fully with all proper legislative committees, law enforcement agencies and other

(4) *Expert testimony*—The use of expert testimony can be very helpful not only in proving La Cosa Nostra's influence and control over a union, but also in establishing that the defendants have extorted the union members' rights. In the *Local 560* case,¹³³ for example, expert testimony greatly influenced the court's finding that the union leadership extorted the membership's rights. Professor Clyde Summers,¹³⁴ a renowned specialist in labor law, testified on behalf of the government and explained his conclusion that "a significant proportion of Local 560's rank and file were induced by fear of the Provenzano Group to surrender their membership rights."¹³⁵ Summers based his conclusion on the theory that the atrocious incidents that had occurred throughout the history of the local should have raised *some* criticism or dissent from the membership, but did not. After reciting a number of incidents that had occurred within the Local, from murder to appointment of convicted felons to union office, Summers concluded, "[I]t is beyond belief that 10,000 members would sit by and watch these things done and never utter a peep', unless a substantial number of the membership were fearful for their lives or their jobs."¹³⁶ The Third Circuit found Summers's testimony entirely convincing, noting that "[t]here seems to be no other plausible explanation for the silence of Local 560's membership in the face of repeated outrageous events."¹³⁷

b. Proving a pattern of racketeering activity—As stated earlier, a RICO violation consists of at least two predicate acts related to each other in some fashion.¹³⁸ Extortion, embezzlement and murder are examples of egregious crimes that

public bodies seeking fairly and objectively to keep the labor movement or any other segment of our society free from any and all corrupt influences." AFL-CIO CODES OF ETHICAL PRACTICES 12 (1957); see also *United States v. Local 30, United Slate, Tile & Composition Roofers*, 686 F. Supp. 1139, 1170 (E.D. Pa. 1988) (citing AFL-CIO Code).

133. *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267 (3d Cir. 1985).

134. Professor Summers responded to the presentation of this Article at a March 1990 conference on Union Democracy sponsored by the Association for Union Democracy and the *University of Michigan Journal of Law Reform*. Professor Summers's remarks are reproduced at 24 U. MICH. J.L. REF. 689 (1991).

135. *Local 560*, 780 F.2d at 278.

136. *Id.* (quoting the testimony of Professor Summers).

137. *Id.*

138. See *supra* notes 109-15 and accompanying text.

constitute predicate acts. Other crimes, such as wire fraud, mail fraud and obstruction of justice, if proven, also constitute predicate acts for purposes of a RICO action.¹³⁹ The government's theories with respect to RICO predicates have, in some instances, adapted the criminal law to the unique problem of organized-crime corruption of labor unions.

(1) *Wire fraud*—Once organized crime elements have gained influence over a union's leadership, their principal aim (in addition to extracting money from the union) is to maintain influence by controlling access to union office. La Cosa Nostra may take steps to ensure the outcome of elections to sustain its power over the union. La Cosa Nostra members conspire among themselves and with the corrupted union leaders to "fix" the elections.¹⁴⁰ By doing so, they rob the union members of their right to elect their own leaders, and thereby commit a fraud upon the membership. What on its face appears to be a democratically chosen leadership is, in truth, a mob-appointed leadership. This fraud can form the basis for a violation of the federal wire fraud statute.

The federal wire fraud statute provides generally that a crime is committed whenever "any scheme or artifice to defraud" is devised to obtain money or property by means of "false or fraudulent pretenses" and any communication is transmitted by "wire, radio, or television" in interstate or foreign commerce.¹⁴¹ The scheme to defraud "need not be proved by direct evidence; a common scheme or plan may be inferred from *circumstantial evidence*."¹⁴² The same is true of intent to defraud, which "is often established by *circumstantial evidence* revealing a pattern of conduct or coordinated activities from which a rational person may infer . . .

139. See *supra* note 19 and accompanying text.

140. See THE EDGE, *supra* note 6, at 95-97.

141. 18 U.S.C. § 1343 (1988); *cf. id.* § 1341 (mail fraud statute). To prove a violation of the wire or mail fraud statutes, the plaintiff need only establish a scheme to defraud and the use of interstate commerce in furtherance of that scheme. See, e.g., *United States v. Mueller*, 786 F.2d 293, 295 (7th Cir. 1986) (wire fraud); *United States v. Rodolitz*, 786 F.2d 77, 80 (2d Cir.), *cert. denied*, 479 U.S. 826 (1986) (mail fraud).

142. *United States v. Diggs*, 649 F.2d 731, 736 (9th Cir.) (emphasis added), *cert. denied*, 454 U.S. 970 (1981); see also *United States v. Wrehe*, 628 F.2d 1079, 1083 (8th Cir. 1980) (holding that wire fraud scheme "may be inferred from all the circumstances of the case"); *cf. United States v. Shively*, 927 F.2d 804, 809 (5th Cir.) (holding that circumstantial evidence was enough to convict the defendant of conspiracy to commit arson), *cert. denied*, 111 S. Ct. 2806 (1991).

that a defendant joined the scheme or unlawful enterprise with knowledge of its unlawful objective, *i.e.*, to defraud others.¹⁴³

For example, in the *Teamsters* complaint, the government alleged that certain La Cosa Nostra figures, together with the sitting members of the IBT's General Executive Board, selected and promoted Roy Williams and Jackie Presser in their campaigns for IBT general president. Williams and Presser were chosen, the complaint alleged, because they were controlled and influenced by La Cosa Nostra and would be of economic benefit to the mob once in office. The members of the General Executive Board endorsed the arrangement because they benefited from the avoidance of opposition and accountability to the membership that mob control permits.¹⁴⁴ This arrangement harmed the membership in numerous ways, such as by reducing wages and other benefits through sweetheart contracts and non-union labor-leasing schemes,¹⁴⁵ excessive salaries of union officials,¹⁴⁶ and the loss of the basic economic right to cast a meaningful union vote.¹⁴⁷

The government's complaint further alleged that all of the participants in the election fraud schemes concealed from the IBT membership La Cosa Nostra's control and influence over the union's electoral process and the IBT leadership.¹⁴⁸ Because the General Executive Board owed a fiduciary duty under federal labor law to protect the interests of the membership over personal or outside interests,¹⁴⁹ this concealment worked a fraud on the membership.¹⁵⁰ Further, because the

143. *United States v. Panza*, 750 F.2d 1141, 1149 (2d Cir. 1984) (emphasis added); see also *United States v. Amrep Corp.*, 560 F.2d 539, 546 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); *United States v. Simon*, 425 F.2d 796, 809 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970).

144. Complaint at 32-35, *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388 (S.D.N.Y. 1989) (No. 88 Civ. 4486) (June 28, 1988).

145. *Id.* at 76-82.

146. *Id.* at 72.

147. *Id.* at 67-68.

148. *Id.* at 32-33 (alleging control of Williams).

149. See 29 U.S.C. § 501(a) (1988).

150. This theory is well accepted. See *United States v. Bronston*, 658 F.2d 920, 926 (2d Cir. 1981) ("[T]he concealment by a fiduciary of material information which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to another is a violation of the [mail fraud] statute."), *cert. denied*, 456 U.S. 915 (1982); see also *Ingber v. Enzor*, 841 F.2d 450, 455 (2d Cir. 1988) (upholding mail fraud conviction of government official who had concealed conflict of interest from public); *United States v. Carpenter*, 791 F.2d 1024, 1035 (2d Cir. 1986) (quoting *Bronston*), *aff'd*, 484 U.S. 19 (1987).

The fraud, moreover, was not limited to some abstract corruption of the election process. La Cosa Nostra's objective in controlling Teamsters General Presidents

defendants had made telephone calls in furtherance of the election fraud conspiracy,¹⁵¹ they violated the wire fraud statute.

Unfortunately, many unions use election processes that are susceptible to La Cosa Nostra control. In the Teamsters Union, for instance, the membership did not directly elect the international officers.¹⁵² Rather, IBT officers were elected at conventions held every five years,¹⁵³ the maximum period permitted under the Landrum-Griffin Act.¹⁵⁴ Delegates to the convention were selected almost exclusively from among local union officers and business agents.¹⁵⁵ Moreover, if the office of IBT general president became vacant during the five-year period between conventions, as occurred in 1981 when Frank Fitzsimmons died in office and in 1983 when Roy Williams was convicted while in office,¹⁵⁶ the General Executive Board selected the new general president,¹⁵⁷ giving him the crucial advantage of incumbency at the next convention.¹⁵⁸ Similarly, vacancies in the office of IBT vice-president were filled by appointment of the General President, with the approval of a majority of the General Executive Board.¹⁵⁹

At the time the government brought its suit against the Teamsters, it was prepared to prove that thirteen of the

Williams and Presser, as Angelo Lonardo, former Cleveland underboss explained, was to obtain various "favors," such as local union charters, union positions for themselves and their associates, and large loans from the Teamsters Central States Pension Fund. See Deposition of Angelo Lonardo 118-20, *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388 (S.D.N.Y. 1989) (No. 88 Civ. 4486) (Sept. 14, 1988).

151. In his deposition in the case, Angelo Lonardo, former underboss of the Cleveland organized crime family, testified about the facts surrounding the election fraud conspiracy and indicated that calls had been placed between various organized crime and Teamsters figures. See Deposition of Angelo Lonardo, *supra* note 150, at 96-97, 108-10.

152. The government's claims in the *Teamsters* case did not involve elections at the local level. See Complaint at 67, *United States v. International Bhd. of Teamsters*, No. 88 Civ. 4486 (S.D.N.Y.) (June 28, 1988). As a result of the settlement of the *Teamsters* case, substantial changes have been made in the Teamsters election process and an Elections Officer has been empowered to monitor upcoming elections. See *supra* notes 76-82 and accompanying text.

153. See IBT CONST., *supra* note 107, art. III, § 1.

154. See 29 U.S.C. § 481(a) (1988).

155. See IBT CONST., *supra* note 107, art. III, § 5.

156. See THE EDGE, *supra* note 6, at 89-90.

157. See IBT CONST., *supra* note 107, art. VI, § 8(a).

158. For a discussion of the advantages held by incumbents even in a union free from corruption, see generally Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93 (1984).

159. See IBT CONST., *supra* note 107, art. VI, § 1(a).

sixteen sitting vice-presidents had first come to their offices through this appointment procedure, and that the three remaining vice-presidents ran with the incumbent slate at conventions at which the IBT's General Executive Board was expanded to create new vice-presidential slots for them. Because of the concentration of power in a few hands and the limited opportunities for democratic review, La Cosa Nostra gained influence over the top IBT leadership and the officers of many major local Teamsters unions. This influence, in turn, allowed La Cosa Nostra to control the Teamsters' electoral process and to install international union officers without ever subjecting them to a vote by the full membership.¹⁶⁰

(2) *Extortion of union members' rights*—The theory of extortion in a union trusteeship case involves more than the simple scenario of a criminal placing a gun to the head of a union member and demanding his paycheck. This theory recognizes more subtle and pervasive (though no less effective) forms of extortion. In unions controlled by organized crime, extortion typically takes the shape of long-standing, notorious, and unremedied acts of violence, association of union officers with known criminals and organized crime figures, and appointment to union office of persons with extensive criminal records. This kind of obvious domination of a union by criminal elements may continue for so long that union members come to accept corruption of the union as an inevitability. A climate of fear and intimidation arises. Eventually, the union members give up any hope of exercising their basic rights to choose their own leaders and to manage their own affairs.¹⁶¹

By creating, fostering, or tolerating such a situation, union officers violate the Hobbs Act.¹⁶² The Hobbs Act declares generally that obstruction of, or interference with, commerce by means of extortion is a criminal offense.¹⁶³ To prove a Hobbs Act violation, the government must establish that: (i) the defendants induced their victims to part with property, (ii) through the use of fear, (iii) with an adverse effect on interstate commerce.¹⁶⁴

160. Government's Memorandum of Law in Support of Its Motion for Preliminary Relief at 34-35, *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388 (S.D.N.Y. 1989) (No. 88 Civ. 4486) (June 28, 1988).

161. For a concrete example of such a scenario, see *supra* notes 133-37 and accompanying text.

162. 18 U.S.C. § 1951 (1988).

163. *Id.* § 1951(a).

164. *United States v. Addonizio*, 451 F.2d 49, 59 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); *see also* *Stirone v. United States*, 361 U.S. 212, 215 (1960) ("[The

The range of property interests protected under the Hobbs Act is expansive. As the Second Circuit stated in *United States v. Tropiano*:¹⁶⁵

The concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things, but includes, in a broad sense, *any valuable right considered as a source or element of wealth* and does not depend upon a direct benefit being conferred on the person who obtains the property.¹⁶⁶

Consequently, Hobbs Act prosecutions have focused on the coercive taking of numerous forms of property, both tangible and intangible, including union wages,¹⁶⁷ the right to make business decisions and to solicit business free from coercion,¹⁶⁸ and other interests.¹⁶⁹

(a) *Property rights of the union membership*—As a consequence of La Cosa Nostra's infiltration of a union, union members may be forced to relinquish well-recognized property rights under the Labor Management Reporting and Disclosure Act of 1959¹⁷⁰ (LMRDA). Section 411 of the LMRDA, for example, provides that every member of a union shall have equal rights to nominate and elect candidates and to attend

Hobbs] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence."); *United States v. Capo*, 791 F.2d 1054, 1061 (2d Cir. 1986) ("The essence of extortion within the meaning of the Hobbs Act . . . is the extraction of property from another through the wrongful use of fear.").

165. 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

166. *Id.* at 1075 (citations omitted) (emphasis added).

167. *United States v. Green*, 350 U.S. 415, 419 (1956).

168. *United States v. Zemek*, 634 F.2d 1159, 1173-74 (9th Cir. 1980), *cert. denied*, 450 U.S. 916, and *cert. denied*, 450 U.S. 985, and *cert. denied*, 452 U.S. 905 (1981); *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978) (holding that "the property extorted was the right . . . to make a business decision free from outside pressure wrongfully imposed"), *cert. denied*, 440 U.S. 910 (1979).

169. *See, e.g.*, *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir.) (holding that lost business accounts and unrealized profits resulting from forbearance to hire particular sales representatives was a protected interest), *cert. denied*, 411 U.S. 951 (1973); *Battaglia v. United States*, 383 F.2d 303, 306 (9th Cir. 1967) (holding that space in bowling alley for coin-operated pool table was a protected interest), *cert. denied*, 390 U.S. 907 (1968); *Carbo v. United States*, 314 F.2d 718, 734 (9th Cir. 1963) (protecting one-half interest in professional boxer), *cert. denied*, 377 U.S. 953 (1964); *Bianchi v. United States*, 219 F.2d 182, 189 (8th Cir.) (holding that rights under construction contract were protected), *cert. denied*, 349 U.S. 915 (1955).

170. 29 U.S.C. §§ 401-531 (1988).

and participate at meetings.¹⁷¹ Section 411 further provides that union members may assemble and express their views about candidates and union affairs.¹⁷² The LMRDA goes on to provide, in section 501(a), that “[t]he officers, agents, shop stewards, and other representatives of a [union] occupy positions of trust in relation to [the] organization and its members.”¹⁷³ Section 501(a) declares that these representatives owe a duty to hold the money and property of the organization for the benefit of the membership, to refrain from self-dealing, and to avoid conflicts of interest.¹⁷⁴

The LMRDA thus grants a host of tangible and intangible rights to union members. Several courts have held that these rights of union members are protected property rights under the Hobbs Act. In *Rodonich v. House Wreckers Union, Local 95*,¹⁷⁵ for example, the court expressly stated: “Many courts have held intangible business rights to be property under the Hobbs Act. Union rights are no exception. Accordingly, rights arising under the LMRDA are properly classified as property rights within the meaning of the Hobbs Act.”¹⁷⁶ The Third Circuit, in *United States v. Local 560, International Brotherhood of Teamsters*,¹⁷⁷ reached the same conclusion, holding that the Hobbs Act does not distinguish between tangible and intangible property,¹⁷⁸ and that “the membership’s intangible property right to democratic participation in the affairs of their union is properly considered extortable ‘property’ for purposes of the Hobbs Act.”¹⁷⁹ Judge Edelstein, in *United*

171. *Id.* § 411(a)(1).

172. *Id.* § 411(a)(2).

173. *Id.* § 501(a).

174. *Id.*

175. 627 F. Supp. 176 (S.D.N.Y. 1985).

176. *Id.* at 178-79 (citations omitted).

177. 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

178. *Id.* at 281.

179. *Id.* at 282. In the *Local 560* case, the Third Circuit relied in part on *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct., Spec. Term), *modified on other grounds and aff'd*, 263 A.D. 59, 31 N.Y.S.2d 849 (1941). In *Dusing*, the court found that the rights to union membership are “as real and as needful of equitable protection, surely, as money or chattels.” *Id.* at 37, 29 N.Y.S.2d at 884. The court further noted that:

If a member has a “property right” in his position on the roster, I think he has an equally enforceable [sic] property right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution.

Id.; see also *United States v. Daley*, 564 F.2d 645, 650-51 (2d Cir. 1977) (upholding conviction of union official for extortion of union members and cement company that

States v. International Brotherhood of Teamsters,¹⁸⁰ adopted the Third Circuit's reasoning in *Local 560* and held that intangible rights are property rights and that the government's complaint, which alleged that the defendants "created an atmosphere wherein Union members were led to feel intimidated, threatened, or pressured in the exercise of their rights to Union democracy," stated a Hobbs Act claim.¹⁸¹

The notion that a union member's right to participate in union affairs is inextricably linked with her economic interests seems intuitively obvious. The motivating force behind unionization, after all, is purely economic. The court in *Rodonich*, for example, rejected the defendant's contentions that union rights were "any less a 'source of wealth' than ordinary rights to do business."¹⁸² "To the contrary," the court concluded, "it would appear that LMRDA rights provide many union members with a source of livelihood."¹⁸³

The legislative history of the LMRDA further confirms that LMRDA rights are economic rights. Senator John F. Kennedy, one of the sponsors of the LMRDA, concurred with another senator's statement during the course of debate that the rights enumerated in the Act "are economic rights . . . They arise from economic problems and deal with economic democracy."¹⁸⁴

(b) *Creation of a climate of fear*—Because the corruption of a union is often an insidious process, taking place over many years and through gradual development of ever greater control by criminal elements, it can be difficult to point to a single event wherein members were threatened with harm if they chose to exercise their democratic rights. To prove a Hobbs Act violation, however, it is not necessary to show that the membership's fear is a result of a direct threat of immediate

sought to avoid labor problems and stating that "the corrupt abuse of the power of a union official in our view is precisely the type of activity which the [Hobbs] Act was designed to embrace", *cert. denied*, 435 U.S. 933 (1978).

180. 708 F. Supp. 1388 (S.D.N.Y. 1989).

181. *Id.* at 1399.

182. 627 F. Supp. at 179 n.2.

183. *Id.*; see also *Finnegan v. Leu*, 456 U.S. 431, 435-36 (1982) (stating that the LMRDA protects "the rights of union members to freedom of expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in turn *loss of livelihood*") (emphasis added).

184. 105 CONG. REC. 6485 (1959), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1111 (1959).

harm.¹⁸⁵ Recognizing that “[f]ear is not defined or qualified” in the definition of extortion under the Hobbs Act,¹⁸⁶ courts, in searching for evidence of fear in a union’s membership, have examined the entire factual setting.¹⁸⁷ For example, courts have recognized that a defendant need not have generated fear in his victim to be convicted of extortion; it will suffice if he exploited his victim’s preexisting fear.¹⁸⁸ Courts have also upheld Hobbs Act convictions where fear was instilled or exploited by reference to the defendant’s reputation for violence and organized crime affiliation. In *United States v. Russo*,¹⁸⁹ for example, the court permitted the admission of evidence regarding a defendant’s reputation for involvement with La Cosa Nostra on the ground that his reputation created a fear of economic loss among members of a Teamsters local.¹⁹⁰ The defendants in that case, including a business agent of the local, were found to have violated the Hobbs Act because they “knew of and intentionally made use of” the members’ fear.¹⁹¹ Similarly, courts have recognized that simply mentioning the name of a notorious criminal can instill

185. The Second Circuit recently held that “[a] direct threat of future harm is not necessary to establish the reasonableness of the alleged victim’s fear.” *United States v. Covino*, 837 F.2d 65, 68 (2d Cir. 1988); *see also* *United States v. Billups*, 692 F.2d 320, 330-31 (4th Cir. 1982) (holding that fear need not be consequence of direct or implicit threat by defendant, but need only be reasonable under circumstances), *cert. denied*, 464 U.S. 820 (1983); *cf.* *United States v. Duhon*, 565 F.2d 345, 352 (5th Cir.) (holding that intent to extort may be inferred from ambiguous statements), *cert. denied*, 435 U.S. 952 (1978).

186. *Bianchi v. United States*, 219 F.2d 182, 189 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955).

187. Recognizing that there is no absolute standard by which an extortion is measured, one court has held that “[i]t is sufficient if the government can show circumstances surrounding the act of extortion that render the victim’s fear reasonable.” *United States v. Kopituk*, 690 F.2d 1289, 1328 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983); *see also* *Duhon*, 565 F.2d at 351 (finding extortion where the implicit threat exploited the vulnerability, under the circumstances, of the victims). As the Third Circuit noted, “fear can be invoked in subtle and indirect ways.” *United States v. Local 560, Int’l Bhd. of Teamsters*, 780 F.2d 267, 288 n.24 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

188. *See, e.g.*, *United States v. Haimowitz*, 725 F.2d 1561, 1572 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984); *United States v. Gerald*, 624 F.2d 1291, 1299 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); *United States v. Compagna*, 146 F.2d 524, 529 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945).

189. 708 F.2d 209 (6th Cir.), *cert. denied*, 464 U.S. 993 (1983).

190. *Id.* at 214.

191. *Id.*

fear,¹⁹² and that fear can exist where union members become aware that defendants are “underworld” or “strong-arm” men.¹⁹³

A textbook example of the creation and use of a climate of fear and intimidation to extort union members’ rights appears in *United States v. Local 560, International Brotherhood of Teamsters*.¹⁹⁴ In that case, the court granted the government’s request to put IBT Local 560 into trusteeship because the union had been captured and controlled by the Provenzano faction of the Genovese organized crime family.¹⁹⁵ The evidence showed that the Provenzanos and their cohorts conducted a campaign of violence, murder, and threats of physical and economic injury against Local 560 members in order to extinguish all challenges to the Provenzanos’ rule.¹⁹⁶ Evidence in the case included proof that, in 1961, Anthony Provenzano, then President of Local 560 and a Genovese family capo, recruited two men to kill Anthony Castellitto, a Local 560 member who opposed Provenzano’s union leadership.¹⁹⁷ Discussing the Castellitto murder, United States District Judge Harold Ackerman recognized the pervasive effect that even a single profound violent act can have:

[T]he disappearance [of Castellitto] generated a perception among the membership that anyone who represented an actual or potential threat to the Provenzano Group’s dominance and control over Local 560 ran the risk of physical injury. The nature and intensity of that perception has been such that it survives to the present day¹⁹⁸

The Third Circuit affirmed the district court’s finding that, through such violence and intimidation, the Provenzano

192. *United States v. Zito*, 467 F.2d 1401, 1405 (2d Cir. 1972).

193. *Carbo v. United States*, 314 F.2d 718, 740 (9th Cir. 1963); see also *United States v. Tropiano*, 418 F.2d 1069, 1073, 1081 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970).

194. 581 F. Supp. 279 (D.N.J. 1984), aff’d, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986).

195. See *id.* at 321.

196. See *id.* at 306-17.

197. See *id.* at 306-07. Castellitto was murdered on June 6, 1961. *Id.* at 306. Anthony Provenzano was later convicted for his part in the Castellitto murder. See *People v. Provenzano*, 79 A.D.2d 811, 435 N.Y.S.2d 369 (1980).

198. *Local 560*, 581 F. Supp. at 312.

group had extorted “the membership’s rights to democratic participation in Local 560.”¹⁹⁹ Having cowed union members into abandoning control over the affairs of their union, the Provenzano group used IBT Local 560 for its own purposes—embezzling money, appointing convicted criminals to union office, and extorting money from employers.²⁰⁰ As for the officers of Local 560, the Third Circuit held that they had helped create and maintain the climate of fear and intimidation that “coerced a substantial portion of the membership into relinquishing their LMRDA rights.”²⁰¹ The court observed that the extortion had been “achieved, not so much by direct physical assault . . . , but by more sophisticated and indirect physical and economic threats,” such as making certain appointments to office, failing to remove certain appointees, making certain union expenditures, and “being recklessly indifferent to the . . . systematic misconduct of fellow incumbent officers.”²⁰²

Testimony from union members who have been threatened or beaten by mob-connected “goons” can become critical evidence that a climate of fear exists within a union. Admissions by officers of the union may also bolster this claim.²⁰³ In a few instances, moreover, former members and associates of La Cosa Nostra have come forward with testimony concerning their own acts of violence.²⁰⁴ Testimony from union members concerning their fears and their hesitance in exercising their rights may also help to establish this claim.²⁰⁵

199. *Local 560*, 780 F.2d at 289.

200. *Id.* at 278.

201. *Id.* at 283.

202. *Id.*

203. The late Jackie Presser, the IBT’s former general president, told of his personal fear of organized crime elements:

“[I]f you’re totally honest and if you try to clean up the union like you say I should, and you try to do it fast enough and without making accommodations so the government won’t get you, the other guys—the hoods—will get you So that’s a death chair either way.”

S. BRILL, *THE TEAMSTERS* 349 (1978) (quoting Presser).

204. Charles Allen, a self-confessed killer and “strong-arm” man who worked for Teamsters and La Cosa Nostra figures such as Frank Sheeran and Anthony Provenzano, testified at his deposition in the *Teamsters* case that the various acts of violence he committed included “[a]nything from beating somebody up to blowing the place up to killing somebody.” Deposition of Charles Allen at 29, *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388 (S.D.N.Y. 1989) (No. 88 Civ. 4486) (Dec. 22, 1988). His victims included IBT members and officials. *Id.* at 50.

205. Labor union expert Clyde Summers has testified that union members will question and oppose pervasive acts of corruption in the union so long as they are not

Once the civil RICO plaintiff establishes the elements of property and extortion, the interstate commerce element of a Hobbs Act violation requires little additional proof.²⁰⁶

(3) *Aiding and abetting*—Union officers are liable for acts of extortion whether they participate directly or by aiding and abetting La Cosa Nostra corruption of the union. Aiding and abetting liability is predicated on title 18 of the United States Code, which provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."²⁰⁷ To establish liability for aiding and abetting, the plaintiff must prove: "(1) commission of [an] underlying crime, (2) by a person other than the defendant, (3) a voluntary act or omission by the person charged as an aider or abettor, with (4) the specific intent that his act or omission bring about the underlying crime."²⁰⁸

Aiding and abetting liability of union officers can follow both from their actions, *e.g.*, appointment of known criminals to union office, and their failures to act, *e.g.*, failure to investigate evidence of corruption. Aiding and abetting liability for a failure to act flows from a union officer's fiduciary duty to the union membership. As courts have recognized, when a union officer has a duty to act, his failure to do so can support a finding of criminal liability.²⁰⁹ This concept appears prominently in the area of corporate law. For example, in *United*

intimidated. See *United States v. Local 560, Int'l Bhd. of Teamsters*, 581 F. Supp. 279, 316-17 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

206. The "interstate commerce" element of a Hobbs Act violation can be established easily. Because the Hobbs Act applies to conduct affecting commerce "in any way or degree," 18 U.S.C. § 1951(a) (1988), it is well settled that the "interstate commerce" element can be established by "proof of a reasonably probable effect on interstate commerce, however minimal, as a result of the extortion." *United States v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976) (*per curiam*), *cert. denied*, 433 U.S. 909 (1977); see also *United States v. Capo*, 791 F.2d 1054, 1067-68 (2d Cir. 1986); *United States v. Calder*, 641 F.2d 76, 78 (2d Cir.), *cert. denied*, 451 U.S. 912 (1981); *United States v. Cerilli*, 603 F.2d 415, 424 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). The activities of most unions affect interstate commerce because unions enter into collective-bargaining agreements with various businesses directly engaged in interstate commerce: "Thus, when membership rights to democratic participation in [a] union [are] extorted, the actions of [the union are] affected, which, in turn, result[] in affecting interstate commerce through businesses involved in interstate commerce." *Local 560*, 780 F.2d at 281 n.15.

207. 18 U.S.C. § 2(a) (1988).

208. *United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985); see also *United States v. Perry*, 643 F.2d 38, 46 (2d Cir.), *cert. denied*, 454 U.S. 835 (1981).

209. See *infra* notes 216-21 and accompanying text.

States v. Andreadis,²¹⁰ the court upheld the fraud conviction of a corporate officer even though he denied knowledge that advertisements for his product were false.²¹¹ The *Andreadis* court emphasized that:

[A] person in [the defendant's] shoes should not be able to insulate himself from liability . . . by contending he was not told that the claims made for his product by his advertising agency were false, even if the contention should happen to be true. . . . [The defendant] had some affirmative duty to insure that the claims the agency made . . . were true. A person in [the defendant's] shoes, having failed totally to discharge this responsibility in even the slightest measure, should not be permitted to escape the consequences of his inattention.²¹²

Thus, in *Andreadis*, and in a wide variety of other cases involving corporations, courts have found the defendant officers' failure to investigate and rectify criminal activity sufficient to support the inference that the defendant intended to bring about the underlying crime.²¹³ As the *Andreadis* court argued,²¹⁴ cultivating ignorance will not serve to insulate a defendant from liability.²¹⁵

210. 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

211. *Id.* at 426.

212. *Id.* at 430 (citations omitted).

213. *See, e.g.*, *Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983) (holding that inaction can support aiding and abetting liability for securities fraud where inaction was "in conscious and reckless violation of a duty to act"); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690 (2d Cir.) (finding civil liability where corporation and principal failed to supervise employee), *cert. denied*, 344 U.S. 855 (1952); *Baird v. Franklin*, 141 F.2d 238, 239 (2d Cir.) (recognizing potential civil liability where the New York Stock Exchange failed to discipline member), *cert. denied*, 323 U.S. 737 (1944).

214. This argument was not the actual basis of the court's holding in *Andreadis*. Instead, the court held that the prosecution had proved intent based on an inferred conversation between the defendant and the principal. *Andreadis*, 366 F.2d at 423. The court went on to state that the jury could also have inferred intent solely from the defendant's failure to fulfill his duty to investigate. *Id.*

215. 366 F.2d at 430. Indeed, the Second Circuit, in affirming the convictions of defendants charged as principals (not merely as aiders and abettors) in a drug smuggling case, has recognized that "where knowledge is an essential element, specific knowledge is not always necessary; rather, *purposeful ignorance* may suffice." *United States v. Aulet*, 618 F.2d 182, 190 (2d Cir. 1980) (emphasis added); *see also United States v. Joly*, 493 F.2d 672, 675 (2d Cir. 1974). In addition, the Supreme Court has affirmed the conviction of a defendant as a principal who "practice[d] a studied ignorance." *Turner v. United States*, 396 U.S. 398, 417 (1970). It has also stated that defendants may be liable if they were "grossly indifferent to [their] duty

This theory of aiding and abetting liability plainly extends to the union context. In a leading case on aiding and abetting by union officials, *United States v. Local 560, International Brotherhood of Teamsters*,²¹⁶ the district court, after emphasizing the affirmative statutory duty that union officers owe to the union membership,²¹⁷ found that the Teamsters Local 560 Executive Board had aided and abetted multiple acts of extortion by La Cosa Nostra figures by failing to respond to clear evidence of criminal activity within the union.²¹⁸ In affirming the district court's decision, the Third Circuit noted that the district court had properly recognized that "if an individual fails to act when he has an affirmative duty to do so, negative inferences concerning his intent can be drawn from this inaction."²¹⁹ Relying upon the "elevated duty of care owed to union members by their officers,"²²⁰ the district court drew a negative inference based on the demonstrated unwillingness of the union's executive board to take any action to remedy pervasive and long-standing corruption.²²¹

Failure to act in the context of demonstrated, pervasive, long-standing organized crime corruption of a union may thus amount to more than mere indolence or mismanagement. In such a setting, failure to remedy or even to investigate union-related corruption can constitute an active show of support for organized crime domination of the union. For example, union officers may allow convicted felons to obtain office and remain

in respect to the ascertainment of [the] fact[s]," *Spurr v. United States*, 174 U.S. 728, 735 (1899).

216. 581 F. Supp. 279 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

217. *See id.* at 335-36 (citing 29 U.S.C. § 501(a)).

218. *See id.*

219. *Local 560*, 780 F.2d at 284. The Third Circuit emphasized, however, that the failure to fulfill a duty *alone* was not enough to support liability for aiding or abetting a crime; the failure to meet a duty must support an inference of intent. *Id.*

220. *Id.*

221. *See id.*; *see also Local 560*, 581 F. Supp. at 335-36. Judge Edelstein expressly adopted the *Local 560* theory of aiding and abetting liability in *United States v. International Brotherhood of Teamsters*, 708 F. Supp. 1388 (S.D.N.Y. 1989). In denying defendants' motions to dismiss the government's civil RICO action against the Teamsters International Union, Judge Edelstein noted that members of the Teamsters General Executive Board had a fiduciary duty to "disclose and remedy wrongdoing by the IBT." *Id.* at 1401. The court found that the complaint adequately alleged a breach of that duty because, given the scope of the allegations of corruption, "only through conscious avoidance could a member of the [General Executive Board] not have had any knowledge that would have required him to exercise his fiduciary duty to act." *Id.*; *see also United States v. Snyder*, 668 F.2d 686, 690-91 (2d Cir.) (holding that proof of Teamsters benefit fund officer's breach of fiduciary duty was relevant to the issue of criminal intent), *cert. denied*, 458 U.S. 1111 (1982).

there. At the time the *Teamsters* complaint was filed, one defendant, Teamsters Vice-President Harold Friedman, stood indicted for his role in arranging a "ghost" employee scheme involving a Teamsters local. Yet, even after the suit was filed, Friedman remained in office.²²² Such acts clearly contain an element of affirmative aid to criminal elements.

Also, because most union constitutions grant union officers the authority to expel corrupt members²²³ and to impose trusteeships on corrupted local unions or other subordinate bodies,²²⁴ courts should draw an adverse inference from the union leadership's failure to act in the face of a persistent pattern of illegal conduct affecting the union.²²⁵

Finally, when union leaders *actively* support and associate with known La Cosa Nostra figures, these affirmative acts also may implicate union leaders in the criminal RICO violations committed by La Cosa Nostra. For example, the *Local 560*²²⁶ court found "the repeated appointments to union office . . . of known or reputed criminals" to be evidence of extortion of the

222. See *United States v. International Bhd. of Teamsters*, 905 F.2d 610, 612-13 (2d Cir. 1990). The Teamsters General Executive Board had also permitted Maurice Schurr, an international vice-president named as a defendant in the *Teamsters* case, to remain in office for more than three years after his conviction for receipt of illegal labor payments. See Complaint at 2, 25, *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388 (S.D.N.Y. 1989) (No. 88 Civ. 4486) (June 28, 1988); *United States v. Schurr*, 775 F.2d 549 (3d Cir. 1985). Also, in *United States v. Local 6A, Cement & Concrete Workers*, 663 F. Supp. 192 (S.D.N.Y. 1986), Judge Broderick, ruling that preliminary relief was appropriate, stated:

I would note again the very strong showing the Government has already made that criminal domination of the union defendants continues: i.e., the substantial severance payment of more than \$200,000 given to Ralph Scopo after his indictment, together with a Cadillac automobile; and the continued presence, in positions of union control, of Mr. Scopo's relatives, and of the officers who were in power in the heyday of Scopo, *et al.*

Id. at 197.

223. The Teamsters International Constitution, for example, expressly provided for expulsion of members by the General Executive Board. See IBT CONST., *supra* note 107, art. XIX, § 4(a) (describing the jurisdiction of the Board); *id.* § 9(a) (providing penalties). The General Executive Board could discipline members and officers for, *inter alia*:

- (1) Violation of any specific provision of the Constitution, Local Union Bylaws or rules of order, or failure to perform any of the duties specified thereunder.
- (2) Violation of oath of office or of the oath of loyalty to the Local Union and the International Union.
- (3) Embezzlement or conversion of union's funds or property.

See *id.*, art. XIX, § 6(b).

224. See *id.*, art. IV, § 5(a) (granting the general president the power to appoint trustees).

225. See *supra* notes 216-21 and accompanying text.

226. *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

membership's LMRDA rights in violation of the Hobbs Act.²²⁷ Misappropriations of union funds are also extortions of union members' property rights, a violation of the Hobbs Act, and a RICO predicate offense. Years before the *Local 560* case, the union had voted pay increases to former union officer Anthony Provenzano, who declined at the time to accept them. An imprisoned Provenzano later requested the money—approximately \$200,000—for what he called “back salary due and owing to him.”²²⁸ The union's executive board voted to give Provenzano the money.²²⁹ The *Local 560* court concluded that these payments were evidence that the union's officers “intentionally aided and abetted” La Cosa Nostra in the “further extortion of membership rights,” thus violating the Hobbs Act.²³⁰

(4) *Mail fraud*—Most unions have some sort of union newspaper or newsletter that they regularly send to union members through the mail.²³¹ If in these newsletters union officers knowingly fail to acknowledge, or misrepresent the influence of organized crime over the union, a case for mail fraud may be made. By using a newspaper or newsletter to assure the membership that organized crime has no influence over the union, while at the same time facilitating and profiting from La Cosa Nostra's exploitation of the union, a union officer may engage in a scheme to defraud the membership.

The federal mail fraud statute provides that whoever devises a “scheme or artifice to defraud,” and for purposes of executing or attempting to execute the fraud places mail in any post office, or “knowingly causes to be delivered by mail” any matter, is guilty of a crime.²³² As courts have held, the mail fraud statute can be violated where a fiduciary conceals “material information which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other.”²³³ Thus, for example,

227. *Id.* at 286.

228. *Id.* at 287 (quoting Provenzano).

229. *Id.* at 287.

230. *Id.* at 288. Similarly, in *United States v. Local 6A, Cement & Concrete Workers*, 663 F. Supp. 192 (S.D.N.Y. 1986), the court found that the government had made a “strong showing” of “criminal domination of the union,” by demonstrating that union officials made substantial severance payments and gave a Cadillac automobile to an indicted union official. *See id.* at 197.

231. For example, the IBT publishes its official journal, the *International Teamster*, each month. *See, e.g., supra* note 84.

232. 18 U.S.C. § 1341 (1988).

233. *United States v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981); *see also United States v. Grossman*, 843 F.2d 78, 86 (2d Cir. 1988) (affirming a mail fraud conviction

in *Ingber v. Enzor*,²³⁴ the Second Circuit upheld the mail fraud conviction of a municipal official who had breached his fiduciary duty, to the economic detriment of the municipality.²³⁵ The court specifically noted that the municipal official's concealment of his conflict of interest permitted his scheme to proceed.²³⁶

In precisely the same way, a union officer may conceal his conflict of interest, *i.e.*, his allegiance to La Cosa Nostra, at the expense of the union membership, thus permitting his own schemes to proceed. As the court held in *United States v. International Brotherhood of Teamsters*,²³⁷ allegations that organized crime played a role in decisions of the Teamsters General Executive Board sufficed to state a mail fraud claim and supported the government's RICO allegations. The court noted that the alleged mail fraud aided La Cosa Nostra in its maintenance of control of the enterprise:

Although, as the IBT points out, the acts alleged in this portion of the complaint presuppose a degree of control of the enterprise, the concealment would definitely further the maintenance of such interest or control. There can be little doubt that a public announcement by the [General Executive Board] that it was, as the Government alleges, under the control of organized crime figures would have dealt a serious blow to the continued maintenance of an interest in the alleged racketeering enterprise.²³⁸

where the defendant concealed his misuse of employer's confidential information), *cert. denied*, 488 U.S. 1040 (1989); *United States v. Fagan*, 821 F.2d 1002, 1009 (5th Cir. 1987) (restating that the mail fraud statute has been violated where "an employee violates his duty to disclose to his employer economically material information which the employee has reason to believe . . . would lead a reasonable employer to change its business conduct" (quoting *United States v. Ballard*, 663 F.2d 534, 541 (5th Cir. 1981))), *cert. denied*, 484 U.S. 1005 (1988); *United States v. Carpenter*, 791 F.2d 1024, 1035 (2d Cir. 1986), *aff'd*, 484 U.S. 19 (1987); *United States v. Rodolitz*, 786 F.2d 77, 81 (2d Cir.) (affirming a mail fraud conviction where the defendant concealed personal involvement in repairs from insurer), *cert. denied*, 479 U.S. 826 (1986).

234. 841 F.2d 450 (2d Cir. 1988).

235. *See id.* at 453. The court held that the official had breached his duty to the municipality to have no personal interest in any municipal contracts. *Id.* at 455-56 (citing N.Y. GEN. MUN. LAW § 801 (providing that a municipal officer may not have an interest in a municipal contract over which he exercises power of approval or authorization)).

236. *Ingber*, 841 F.2d at 455.

237. 708 F. Supp. 1388 (S.D.N.Y. 1989).

238. *Id.* at 1400. The *Teamsters* court accepted a similar argument supporting the government's wire fraud allegations in the case. *See id.* at 1396-97.

This ruling is consistent with a host of decisions, principally in the securities investment area, which hold that the mail fraud statute is violated whenever a defendant uses the mails to facilitate a scheme to conceal material facts from defrauded investors.²³⁹

c. *Evidentiary issues—(1) Admissibility of certain government investigative reports*—As mentioned earlier, part of the plaintiff's evidence in a civil RICO action may come from prior government investigations into allegations of corruption within a particular union.²⁴⁰ One example of such a report is the 1986 report of the PCOC.²⁴¹

The PCOC was created by a presidential executive order in 1983.²⁴² The executive order directed the PCOC, *inter alia*, to "make a full and complete national and region-by-region analysis of organized crime" and to "develop in-depth information on the participants in organized crime networks."²⁴³ The PCOC was established as a nonpartisan body composed of nineteen members with extensive experience in the field of criminal justice.²⁴⁴ Congress empowered the PCOC to issue

239. For example, in *United States v. Chappell*, 698 F.2d 308 (7th Cir.), *cert. denied*, 461 U.S. 931 (1983), a mail fraud conviction was upheld where investors were mailed a status report that lulled them "into a false sense of security." *Id.* at 311; see also *United States v. Lane*, 474 U.S. 438, 451-52 (1986) (noting that the mail fraud statute is satisfied if the mailings "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place" (quoting *United States v. Maze*, 414 U.S. 395, 403 (1974))); *United States v. Sampson*, 371 U.S. 75, 80-81 (1962) (reversing a dismissal where a jury could find that a letter lulling victims into inaction violated the mail fraud statute); *United States v. Grossman*, 843 F.2d 78, 86 (2d Cir. 1988) (upholding a mail fraud conviction where mailings "concealed the fraud by maintaining an appearance of normality"), *cert. denied*, 488 U.S. 1040 (1989); *United States v. Wrehe*, 628 F.2d 1079, 1083 (8th Cir. 1980) (affirming a conviction where a letter lulled the victim into inaction); *United States v. Price*, 623 F.2d 587, 593 (9th Cir.) (same), *cert. denied*, 449 U.S. 1016 (1980); *United States v. Toney*, 598 F.2d 1349, 1354 (5th Cir. 1979) (same), *cert. denied*, 444 U.S. 1033 (1980); *United States v. Cohen*, 518 F.2d 727, 737 (2d Cir.) (upholding a conviction where mailing served to maintain an appearance of normality "so as to conceal the actual state of affairs"), *cert. denied*, 423 U.S. 926 (1975); *United States v. Marando*, 504 F.2d 126 (2d Cir.) (upholding a conviction where confirmation slips lulled victims into inaction), *cert. denied*, 419 U.S. 1000 (1974); *Zola v. Gordon*, 685 F. Supp. 354, 373 (S.D.N.Y. 1988) (finding that a letter lulling victim into inaction supported a mail fraud claim in a private RICO action).

240. See *supra* notes 122-26 and accompanying text.

241. See *THE EDGE*, *supra* note 6.

242. See Exec. Order No. 12,435, 3 C.F.R. 202 (1983).

243. *Id.* § 2(a).

244. The members included then-Representative Peter W. Rodino, Jr., of New Jersey, Chairman of the House Judiciary Committee; the late Potter Stewart, former Associate Justice of the Supreme Court; and Senator Strom Thurmond of South

subpoenas for the testimony of witnesses and the production of documents and to apply, with the assistance of the Department of Justice, for orders compelling testimony and granting immunity.²⁴⁵ The PCOC had a staff of more than twenty lawyers and investigators who conducted hundreds of interviews and depositions and reviewed documents and other information provided by many law enforcement and other public agencies as well as the private sector.²⁴⁶

In April 1985, the PCOC held three days of public hearings in Chicago on the subject of organized crime and labor racketeering.²⁴⁷ In March 1986, the PCOC released a 393-page report.²⁴⁸ The report concluded that at least four international unions affiliated with the AFL-CIO, the International Longshoremen's Association, the Hotel Employees and Restaurant Employees International Union, the International Brotherhood of Teamsters, and the Laborers International Union of North America, as well as several independent unions, such as the International Industrial Production Employees Union and the International Shield of Labor Alliances, have been dominated by organized crime.²⁴⁹

A similar report was released in 1987 by the New York State Organized Crime Task Force (OCTF).²⁵⁰ The New York State Legislature created the OCTF in 1970, with a mandate to investigate and prosecute multicounty organized crime activities in the state.²⁵¹ The director of the OCTF, jointly appointed by the governor and the state attorney general,²⁵² commands a staff of over twenty investigators,

Carolina, then-Chairman of the Senate Judiciary Committee. The Honorable Irving R. Kaufman of the United States Court of Appeals for the Second Circuit served as the Chairman of the PCOC. *THE IMPACT*, *supra* note 48, at ix-xii.

245. See Act of July 17, 1984, Pub. L. No. 98-368, §§ 2-4, 98 Stat. 490, 490-91 (1984).

246. See generally *THE IMPACT*, *supra* note 48, at 9-18.

247. See *PCOC HEARINGS*, *supra* note 127.

248. *THE EDGE*, *supra* note 6.

249. *Id.* at 4. The report concluded generally: "Through its domination of select labor unions in major metropolitan areas, organized crime at various times has influenced a number of markets in construction, wholesale and retail meat processing, trucking, garbage carting, and waterfront trade." *Id.* at 2-3. The editorial staff of the *New York Times* praised the report for its "rich detail" and illustrations of organized crime domination of these markets. See *The Mob Commission Moves on*, *N.Y. Times*, Mar. 8, 1986, at A26, col. 1.

250. See *OCTF REPORT*, *supra* note 123.

251. See N.Y. EXEC. LAW § 70-a(1) (McKinney 1982) (establishing the Task Force); *id.* § 70-a(1)(a) (enumerating the duties of the Task Force).

252. See *id.* § 70-a(2).

analysts, lawyers, and consultants.²⁵³ Prior to issuing the 1987 report, the OCTF conducted a two-year investigation,²⁵⁴ drawing on its statutory powers to compel testimony, subpoena documents, apply for search warrants, and enlist the assistance of state and local law enforcement agencies.²⁵⁵ The 1987 Report contains extensive information concerning organized crime influence over labor unions involved in the construction industry.²⁵⁶ Other states have produced similar reports.²⁵⁷

These reports, though not direct evidence of labor racketeering, should be admissible in court under the exception to the hearsay rule provided by Rule 803(8)(C) of the Federal Rules of Evidence. Rule 803(8)(C) provides that public "records and reports" that set forth "factual findings resulting from an investigation made pursuant to authority granted by law" may be admitted by civil plaintiffs "unless the sources of information or other circumstances indicate lack of trustworthiness."²⁵⁸ The PCOC Report and the OCTF Report meet the basic requirements for admissibility under Rule 803(8)(C). Each is a report. Each was generated by a public office or agency. Each sets forth factual findings resulting from an investigation made pursuant to authority granted by law. Thus, pursuant to Rule 803(8)(C), these reports are presumptively admissible.²⁵⁹ The reports must be presumed admissible, moreover, even if they contain "conclusion[s]" or "opinion[s]" in addition to their factual findings.²⁶⁰

Once it is established that these reports meet the basic requirements of the Rule, the reports may be excluded only if

253. See OCTF REPORT, *supra* note 123, at [unnumbered page following title page].

254. *Id.* at 1.

255. See N.Y. EXEC. LAW § 70-a(3), (4), (6), (7) (McKinney 1982 & Supp. 1991).

256. See OCTF REPORT, *supra* note 123, at 15-37, 63-87.

257. For example, the Pennsylvania Crime Commission produces an annual report that details the activities of organized crime members within the state, including their involvement with particular labor unions. See, e.g., 1988 PENNSYLVANIA CRIME COMM'N REP.

258. FED. R. EVID. 803(8)(C). This exception to the hearsay rule also applies to defendant's use of such records and reports, but it does not apply to use by the government in criminal cases. *Id.*

259. See *id.* advisory committee's note (providing that the rule "assumes admissibility in the first instance").

260. See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) (holding that evidence "otherwise admissible under Rule 803(8)(C) [is] not inadmissible merely because [it] state[s] a conclusion or opinion").

defendants establish that "the sources of information [contained in the reports] or other circumstances indicate lack of trustworthiness."²⁶¹ The burden rests squarely on the defendants to establish lack of trustworthiness.²⁶² Further, the burden is on the defendants to demonstrate that their objections to trustworthiness, if any, call into question the *admissibility*, rather than simply the weight and credibility, of the reports.²⁶³

The Advisory Committee note for Rule 803(8)(C) sets forth a nonexclusive list of factors that a court may consider in determining whether a government investigative report is admissible: (1) the timeliness of the investigation; (2) the special skill or experience of the investigating officials; (3) whether a hearing was held and the level at which it was conducted; and (4) possible problems involved in preparing a report in anticipation of litigation.²⁶⁴ Courts have indicated that, in light of this list, and the difficulty of defining precisely what is and is not "trustworthy," it is within the trial court's sound discretion to determine whether a report should be admitted into evidence.²⁶⁵ It appears that all of the factors cited by the Advisory Committee support the admission of the PCOC and OCTF Reports.²⁶⁶

261. FED. R. EVID. 803(8)(C).

262. See, e.g., *Bradford Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 805 F.2d 49, 54 (2d Cir. 1986) ("To exclude evidence which technically falls under 803(8)(C) there must be 'an affirmative showing of untrustworthiness, beyond the obvious fact that the declarant is not in court to testify.'" (quoting *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983))); *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984) (stating that "the burden is on the party opposing admission to demonstrate that the report is not reliable"); *Revlon, Inc. v. Carson Prods. Co.*, 602 F. Supp. 1071, 1079 (S.D.N.Y. 1985), *aff'd in part and rev'd in part on other grounds*, 803 F.2d 676 (Fed. Cir.), *cert. denied*, 479 U.S. 1018 (1986); *Doe v. New York Univ.*, 511 F. Supp. 606, 610 (S.D.N.Y. 1981).

263. See, e.g., *Bradford Trust*, 805 F.2d at 54 ("The weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact."); *Perrin v. Anderson*, 784 F.2d 1040, 1047 (10th Cir. 1986); *Ellis*, 745 F.2d at 303 (holding that defendant's "concern about the methodology of the studies should have been addressed to the *relative weight* accorded the evidence and not its *admissibility*") (emphasis added).

264. FED. R. EVID. 803(8)(C) advisory committee's note. The Advisory Committee cited, *inter alia*, *Palmer v. Hoffman*, 318 U.S. 109, 111-15 (1943), where the Court addressed the problem of a report prepared in anticipation of litigation. *Id.*

265. See, e.g., *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988); *Bradford Trust*, 805 F.2d at 54.

266. First, the reports were timely. Indeed, the investigations on which the reports were based dealt with the ongoing influence of organized crime over labor unions rather than a particular event that occurred at some point in the past. Moreover, witnesses who testified and who were interviewed recounted their

In the *Local 1804-1* case,²⁶⁷ Judge Leonard B. Sand admitted into evidence excerpts from the PCOC and other government reports.²⁶⁸ Judge Sand ruled that all of the Advisory Committee requirements were satisfied.²⁶⁹ Even if these reports are not admitted for their truth, they may of course, be admitted to demonstrate that union officers knew, or should have known, about corruption of their unions.²⁷⁰

(2) *Admissibility of electronic surveillance evidence*—As we will discuss below, tape recordings and transcripts of conversations intercepted pursuant to Title III of the Organized Crime Control and Safe Streets Act (Title III) may be discoverable by a private plaintiff, at least to the extent that those materials have been used in prior proceedings.²⁷¹ Once the private plaintiff has gained access to Title III materials, those materials may be received as evidence in a subsequent civil RICO proceeding so long as the communications reflected in

experiences on a broad range of events, for integration with other sources of information. See, e.g., PCOC HEARINGS, *supra* note 127. This approach minimizes the effect of any lack of recall of particular events.

Second, there can be no doubt of the "special skill and experience" of the officials who investigated the allegations of union-related corruption. These investigators and attorneys were seasoned law enforcement professionals. Moreover, they employed an arsenal of investigatory powers, including subpoenas for records and testimony. See *supra* notes 244-46 and accompanying text (PCOC); 252-55 and accompanying text (OCTF).

Third, at least in the case of the PCOC, extensive public hearings were held. Witnesses were permitted to make opening statements. A number of witnesses, including Jackie Presser, then President of the Teamsters, chose to invoke their fifth amendment privilege rather than testify. See PCOC HEARINGS, *supra* note 127, at 292-97 (1985).

Finally, the PCOC and OCTF reports were not prepared with an eye toward litigation. Rather, each of these bodies was charged to examine the problem of organized crime in various settings, to report their findings, and to suggest comprehensive public policy solutions to the problem, including legislation. These tasks were unrelated to any immediate litigation goal, and instead were aimed at long-term legislative solutions to a problem. Given these techniques and goals, there are no better circumstances in which to honor the assumption on which Rule 803(8)(C) is based: "[T]hat public officials perform their duties properly without motive or interest other than to submit accurate and fair reports." *Bradford Trust*, 805 F.2d at 54.

267. *United States v. Local 1804-1, Int'l Longshoremen's Ass'n*, 732 F. Supp 434 (S.D.N.Y. 1990).

268. Transcript at 1490-91, *United States v. Local 1804-1, Int'l Longshoreman's Ass'n*, 90 Civ. 0963 (S.D.N.Y.) (Apr. 29, 1991).

269. *Id.* (citing *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991)).

270. The reports, to the extent that they are not admitted for their truth, are not hearsay. "Hearsay" is a statement . . . offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c) (emphasis added).

271. See *infra* notes 404-12 and accompanying text.

the materials were not intercepted in violation of the statute.²⁷² The only grounds for suppression of Title III materials are that the communication was not lawfully intercepted, that the order authorizing the interception was insufficient on its face, or that the interception was not made in conformity with the order authorizing the interception.²⁷³

Defendants who wish to challenge previous rulings on the admissibility of Title III materials must establish that they have standing to do so, that they are not estopped from doing so, and that they have valid reasons for relitigating these issues. Under Title III, only an "aggrieved person" has standing to move to suppress the contents of communications intercepted pursuant to the statute.²⁷⁴ An "aggrieved person" is defined as "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed."²⁷⁵ A person who was not party to an intercepted conversation thus lacks standing to challenge the admissibility of Title III materials.²⁷⁶

Even if a defendant establishes that he has standing to make a motion to suppress Title III materials, the defendant must face the fact that the suppression issue was litigated in a prior criminal case. If the defendant was a party to that prior criminal proceeding, he may be collaterally estopped from relitigating the issue. In *Allen v. McCurry*,²⁷⁷ for example, the Supreme Court held that a party seeking to bring a damages action for a civil rights violation arising out of an

272. See *County of Oakland v. City of Detroit*, 610 F. Supp. 364, 369 n.10 (E.D. Mich. 1984) (citing 18 U.S.C. § 2515 (1988) (providing that "no part of the contents of such communication" may be used in evidence "if the disclosure of that information would be in violation of this chapter").

273. 18 U.S.C. § 2518(10)(a) (1988). Suppression under section 2515 is limited to the grounds contained in section 2518(10)(a). See *United States v. Donovan*, 429 U.S. 413, 432 (1977); *Resha v. United States*, 767 F.2d 285, 289 (6th Cir. 1985), cert. denied, 475 U.S. 1081 (1986).

274. 18 U.S.C. § 2518(10)(a) (1988).

275. *Id.* § 2510(11).

276. See, e.g., *United States v. Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975) (holding that a defendant who was not a party to intercepted conversations that did not occur on his premises lacked standing under title III); *United States v. Bynum*, 513 F.2d 533, 534-35 (2d Cir.) (same), cert. denied, 423 U.S. 452 (1975); *United States v. Capra*, 501 F.2d 267, 281 (2d Cir. 1974) (holding that because the defendants were not parties to the calls, they lacked standing), cert. denied, 420 U.S. 990 (1975); cf. *Alderman v. United States*, 394 U.S. 165, 171-72 (1969) (employing the same standing requirement when electronic surveillance is claimed to violate the fourth amendment).

277. 449 U.S. 90 (1980).

allegedly illegal search would be collaterally estopped by the denial of his motion to suppress in a prior state court criminal proceeding against him if he had been given a full and fair opportunity to litigate his federal claims in the prior proceeding.²⁷⁸ As the Court noted, "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."²⁷⁹

Finally, in the few instances in which a defendant both has standing and was not a party to a prior criminal proceeding in which the recorded conversation was admitted into evidence, he remains obligated to demonstrate why the recorded conversation should not be admitted in the subsequent civil RICO action.²⁸⁰ In that unlikely event, the plaintiff can rely upon the ruling of the court that previously admitted the evidence at least for precedential value. Unless the defendants can establish some basis for suppression that was not previously litigated, the plaintiff may argue that there is little point in considering anew arguments made and rejected in prior criminal proceedings.²⁸¹

D. Withstanding a Motion to Dismiss

Once a civil RICO action is brought against the union leadership, the defendants most likely will respond with a motion to dismiss. The defendant may base such a motion on any of a number of theories. In prior civil RICO actions involving the government, these theories have included the following: that the complaint infringes on the defendants' rights under the first amendment;²⁸² that civil RICO actions are preempted by previously enacted federal labor laws;²⁸³ and that a complaint has failed to join an indispensable

278. See *id.* at 103-05.

279. *Id.* at 94.

280. See *supra* notes 272-73 and accompanying text.

281. For example, in *County of Oakland v. City of Detroit*, 610 F. Supp. 364 (E.D. Mich. 1984), the court declined to pass on the admissibility of wiretap evidence when that issue had already been litigated in another case. See *id.* at 366-67.

282. See *infra* Part I.D.1.

283. See *infra* Part I.D.2.

party.²⁸⁴ Civil RICO defendants may also move for a more definite statement of plaintiff's allegations,²⁸⁵ or for dismissal on the grounds that the plaintiff has failed to plead fraud with particularity,²⁸⁶ that the statute of limitations has run,²⁸⁷ or that the court lacks jurisdiction.²⁸⁸

1. *First amendment*—A possible, but most likely unsuccessful, basis for a motion to dismiss is that the civil RICO complaint violates the defendants' first amendment rights of free speech and association. This theory was rejected by the court in the *Teamsters* case as having no merit whatsoever.²⁸⁹

The defendants' argument is that RICO liability cannot be imposed upon union officers for acts of racketeering if those acts were carried out in part through associations of people and by speech. A complaint that seeks a trusteeship over a union, the argument goes, infringes upon the associational, speech, and assembly rights of the union and its officers, and seeks to restrain the unfettered exercise of those rights.²⁹⁰

This argument does not go very far. The first amendment does not protect any right to associate or speak in order to carry out otherwise unlawful activity. As the Supreme Court stated in *United States v. O'Brien*,²⁹¹ "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."²⁹² The *O'Brien* Court expanded on this holding by providing the following test:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

284. See *infra* Part I.D.3.

285. See *infra* Part I.D.4.

286. See *infra* Part I.D.5.

287. See *infra* Part I.D.6.

288. See *infra* Part I.D.7.

289. See *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388, 1393 (S.D.N.Y. 1989) ("Freedom of association' is not . . . a talisman that will ward off all government attempts to proscribe or regulate activity. It is only *lawful* association that is protected, not association for a criminal or unlawful purpose.").

290. See *id.* at 1392-93.

291. 391 U.S. 367 (1968).

292. *Id.* at 376.

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.²⁹³

The Supreme Court since has announced similar holdings in cases upholding laws that further important government interests while imposing only incidental burdens on the freedom of association.²⁹⁴

The use of RICO against the racketeering activity of union officers satisfies each element of the *O'Brien* test. First, Congress had the constitutional power to enact RICO.²⁹⁵ Second, cases brought under the statute further the important public interest of eradicating and punishing organized crime and racketeering activity.²⁹⁶

Third, the public interest furthered by RICO is unrelated to the suppression of free expression. In *Trade Waste Management Association v. Hughey*,²⁹⁷ the defendants raised a similar first amendment challenge to a New Jersey statute that disqualified persons who did not "possess a reputation for good character, honesty and integrity," from participating in

293. *Id.* at 377.

294. For example, in *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), the Court stated:

It may well be that a considerable amount of private or intimate association occurs in such a [nonprivate club] setting, as is also true in many restaurants and other places of public accommodation, but that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination when the Government has barred it from doing so.

Id. at 12; *see also* *Lyng v. International Union, UAW*, 485 U.S. 360, 364-68 (1988) (rejecting a claim that a statute denying food stamps to certain households with members on strike violated the first amendment); *Roberts v. United States Jaycees*, 468 U.S. 609, 622-29 (1984) (rejecting a claim that first amendment freedom of association protects the Jaycees from enforcement of a statute outlawing sex discrimination); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting a claim that first amendment freedom of association protects a law partnership from the enforcement of civil rights laws); *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226-27 (1982) (rejecting a claim that a law against secondary picketing by labor unions violated the first amendment); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) (holding that only "nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment"); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972) (holding that allegations that petitions to government agencies and courts were a sham concealing a Sherman Act conspiracy stated a claim for relief not barred by the first amendment).

295. *See* *United States v. Field*, 432 F. Supp. 55, 60-61 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

296. *See* *United States v. Turkette*, 452 U.S. 576, 588-89 (1981).

297. 780 F.2d 221 (3d Cir. 1985).

the hazardous and solid waste disposal businesses.²⁹⁸ The Third Circuit upheld the statute, noting the legitimate public interest served:

Clearly, disqualification of persons convicted of a crime, persons charged with a crime and not yet acquitted, persons having bad reputations for integrity, and persons who have earned their living by antisocial activity advances the New Jersey interest in keeping the sensitive waste disposal business free from the influence of organized crime. That interest, moreover, considering New Jersey's history of difficulties in the waste disposal business, is compelling. *Nor is the exclusion based upon the state's desire to suppress ideas, excepting perhaps the idea that crime pays.*²⁹⁹

Reviewing the question of disqualification based upon bad reputation, the court wrote, "The state has identified the waste disposal business as one that is particularly sensitive to infiltration by organized crime. Its choice to exclude persons having bad reputations from participating in that industry is a necessary element of preventing the criminal infiltration that the licensing scheme is designed to prevent."³⁰⁰ Similarly, the legislative history of the RICO statute establishes that organized crime infiltration of labor unions was the prime concern of Congress in enacting RICO.³⁰¹ Thus, the underlying purpose of RICO is unrelated to the suppression of free expression.

Finally, pleading and proving a case that meets the statutory elements of a RICO offense imposes liability only for actions that Congress has outlawed. Any incidental limitation on the union officers' alleged first amendment rights that may result from a RICO action is no more than is necessary to further the important public interest served by eliminating racketeering

298. *Id.* at 226 (quoting N.J. STAT. ANN. § 13:1E-133(c)). The statute similarly disqualified persons convicted of certain crimes, N.J. STAT. ANN. § 13:1E-133(b), persons against whom criminal charges are pending, *id.* § 13:1E-133(d), and persons pursuing economic gain by methods "in violation of the criminal or civil public policies of this state," *id.* § 13:1E-133(e); see also *Trade Waste Management Ass'n*, 780 F.2d at 225-27 (discussing statute)

299. *Trade Waste Management Ass'n*, 780 F.2d at 238 (emphasis added).

300. *Id.* at 239.

301. See SENATE REPORT, *supra* note 4, at 79.

activity.³⁰² Put simply, the first amendment does not immunize racketeers from liability merely because they carry out illegal activity through an "association" or by "speech."

For the same reasons, relief sought against union officers, such as imposition of a trusteeship over the union, does not violate the first amendment. The RICO statute expressly provides for the remedy of barring defendants from contact with a corrupted enterprise such as a labor organization.³⁰³ Both civil and criminal RICO cases have employed the remedy of barring a RICO defendant from further contact with the union that was the vehicle for his racketeering activity.³⁰⁴

302. Although two courts have declined to address the merits of defendants' first amendment challenges to RICO, *see, e.g.*, *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388, 1393-94 (S.D.N.Y. 1989); *United States v. Bonanno Organized Crime Family*, 683 F. Supp. 1411, 1441-42 (E.D.N.Y. 1988), other courts have rejected similar first amendment challenges to the applications of similar statutes, *see, e.g.*, *Scales v. United States*, 367 U.S. 203, 228-29 (1961) (affirming a Smith Act conviction of a Communist Party member who possessed the intent to accomplish the violent overthrow of the government; noting that statute as construed "does not cut deeper into the freedom of association than is necessary to deal with 'the substantive evils that Congress has a right to prevent.'" *Id.* at 229 (citation omitted)); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (affirming an injunction of union picketing that was part of an overall course of conduct which violated state anti-trade-restraint law: "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.").

303. The court has authority to "impos[e] reasonable restrictions on the future activities or investments of any person, including, but not limited to, *prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in.*" 18 U.S.C. § 1964(a) (1988) (emphasis added). RICO's legislative history shows that Congress wanted organized crime figures barred altogether from labor unions. For example, the Senate Report stated:

[T]hrough a remedy such as the prohibition of engaging in the same kind of activity in the future, the criminal element will not only be removed from an area of activity, they will also be prohibited from using the know-how acquired to start the same type of business or other organization again under a different name.

SENATE REPORT, *supra* note 4, at 82.

304. For example, in the *Local 560* case, the Third Circuit upheld an injunction barring two defendants from any future contacts with Teamsters Local 560. *See United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 270, 296 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986). In *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated on other grounds*, 439 U.S. 810 (1978), *aff'd in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979), the Fifth Circuit upheld a RICO forfeiture of all of the defendant's union and union benefit fund offices. 559 F.2d at 992. Through different RICO remedies, defendants in both cases were separated from the labor organizations which they had exploited through racketeering activity. Although these cases did not involve first amendment challenges, other courts have rejected first amendment challenges to injunctive relief under similar statutes. *See, e.g.*, *Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*

In any event, courts do not consider the terms of a complaint's demand for relief in deciding a motion to dismiss.

2. *Preemption by federal labor laws*—Defendants may attempt to argue that the use of RICO against labor unions is preempted by the LMRDA³⁰⁵ or the National Labor Relations Act³⁰⁶ (NLRA). Because provisions of both the LMRDA and NLRA protect union members' rights, the defendants may argue that the plaintiffs' sole recourse is to those statutes.

The preemption argument,³⁰⁷ however, is premised on a misunderstanding of both the nature of the allegations of wrongdoing and the scope of relief typically sought in a civil RICO action involving a union. A civil RICO action is not brought to invalidate any particular election or to alter any particular collective-bargaining provision, but to excise the union's racketeering element. The RICO statute provides the means by which such relief can be obtained, and indeed, was specifically enacted for this purpose.

RICO provides a far broader range of equitable remedies than either the LMRDA or the NLRA and was enacted to provide a means of ridding unions and other legitimate enterprises of organized crime. The Senate Report on the RICO statute specifically addressed the need to eradicate organized crime's influence over labor unions in a number

v. Read, 597 F. Supp. 1431, 1446-51 (D.N.J.) (rejecting a claim that the New Jersey Casino Control Commission's order requiring removal of union officers based on their associations with organized crime violates first amendment freedom of association), *subsequent opinion*, 597 F. Supp. 1451 (D.N.J. 1984), *aff'd mem.*, 772 F.2d 895 (3d Cir. 1985).

In the antitrust context, the Supreme Court often has approved injunctions involving defendants' labor union and business associations. *See, e.g.*, *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 98 (1962) (divesting individual grease peddlers of membership in the union they joined in order to fix prices); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 427-28 (1945) (ordering the dissolution of a glassware industry trade association); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 188-89 (1944) (enjoining corporate officers from holding office in or controlling more than one movie theater company, with the sole company specified by the court); *United States v. Swift & Co.*, 286 U.S. 106, 115-20 (1932) (refusing to modify a consent decree that barred chief officers of five meat packing companies from any participation in a wide variety of food businesses involving over 100 commodities). RICO's civil provisions are modeled after the antitrust statutes. *See* SENATE REPORT, *supra* note 4, at 81, 160.

305. 29 U.S.C. §§ 401-531 (1988).

306. *Id.* §§ 141-188.

307. The Supreme Court discussed the test to determine whether one federal statute preempts another in *Breininger v. Sheet Metal Workers International Association Local Union No. 6*, 493 U.S. 67, 75-80 (1989).

of industries.³⁰⁸ By contrast, the remedial provisions of the LMRDA and NLRA are not targeted at eliminating organized crime's infiltration of labor unions and commercial enterprises.³⁰⁹

Although defendants may argue that any fraud that occurs in a labor context and involves property obtained through collective bargaining is within the exclusive jurisdiction of the National Labor Relations Board, courts have routinely held otherwise.³¹⁰ As the Supreme Court has observed: "[T]he federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies."³¹¹ The legislative history of the NLRA also provides no support for the preemption argument. The statute nowhere declares that Congress intended the NLRA to displace or repeal any state or federal laws relating to fraud or violence. In fact, its legislative history suggests the contrary.³¹² Moreover, for a defendant to assert that the NLRA has displaced the mail fraud statute (a RICO predicate), for example, is to disregard the holdings of many courts that have applied the mail fraud statute to various schemes, even where a comprehensive and detailed federal statute similarly proscribed the defendants' actions.³¹³

308. SENATE REPORT, *supra* note 4, at 78.

309. *See infra* notes 312, 315.

310. In *United States v. Boffa*, 688 F.2d 919, 930-33 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022, and *cert. denied*, 460 U.S. 1028 (1983), for example, where the court rejected the NLRA preemption argument:

We believe that a scheme to defraud employees of these economic benefits [obtained through collective bargaining], such as wages and seniority rights, lies squarely within the ambit of the mail fraud statute. The source of such benefits was the contract between the appellants and the employees. Although they may have been obtained as a result of employees' exercise of rights guaranteed by section 7 of the NLRA, *these benefits are contractual, not statutory, in nature*. While deprivation of section 7 may be vindicated solely through the procedures established for unfair labor practice disputes, *we believe the broad language of the mail fraud statute proscribes schemes to deprive an individual of economic benefits that are contained in a collective bargaining agreement*.

Id. at 930 (emphasis added).

311. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 85 (1982) (quoting *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975)).

312. *See S. REP. NO. 573*, 74th Cong., 1st Sess. 17 (1935) (stating that "the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of fraud and violence [by unions or union members]"); *see also United States v. Thordarson*, 646 F.2d 1323, 1331 (9th Cir.), *cert. denied*, 454 U.S. 1055 (1981) ("Nothing in the language or legislative history of federal labor legislation suggests that federal criminal statutes . . . should not . . . be available to punish union members and officials who try to achieve collective bargaining goals by means of . . . violence . . .").

313. *See, e.g., United States v. Brien*, 617 F.2d 299, 309-10 (1st Cir.) (noting that the Commodities Futures Trading Act, which provides at 7 U.S.C. § 2 that the

Neither does the LMRDA preempt a civil RICO action against a union and its officers. The LMRDA has never been an "impliedly exclusive plan of federal regulation for union-member relations."³¹⁴ Rather, the LMRDA, even upon its enactment, was intended to be one statute in an arsenal of statutes directed at remedying labor-union abuses.³¹⁵ Indeed, the LMRDA clearly states that the remedies it provides are not intended to be exclusive.³¹⁶

As noted above,³¹⁷ RICO's legislative history reflects the fact that it was enacted, among other reasons, to prevent the infiltration of labor unions by organized crime. Statements in the RICO statute's legislative history concerning the infiltration and corruption of labor unions were based, in part, on reports issued by Senator McClellan's committee, the Select Committee on Improper Activities in the Labor or Management Field.³¹⁸ Because these same hearings were

Commodities Futures Trading Commission shall have exclusive jurisdiction over commodities transactions, does not preclude prosecutions under the mail fraud statute), *cert. denied*, 446 U.S. 919 (1980); *United States v. Weatherspoon*, 581 F.2d 595, 599 (7th Cir. 1978) (involving violations of the mail fraud statute and the false statements statute, 18 U.S.C. § 1001); *United States v. Melvin*, 544 F.2d 767, 775-76 (5th Cir.) (involving a violation of mail fraud statute and the Jenkins Act, 15 U.S.C. §§ 375-378, which requires the seller of cigarettes in interstate commerce to report the transaction to state tax officials), *cert. denied*, 430 U.S. 910 (1977); *United States v. Brewer*, 528 F.2d 492, 498 (4th Cir. 1975) (involving violations of the mail fraud statute and the Jenkins Act); *United States v. Azzarelli Constr. Co.*, 459 F. Supp. 146 (E.D. Ill. 1978) (involving violations of the mail fraud statute and the Sherman Act, 15 U.S.C. § 1), *aff'd*, 612 F.2d 292 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980).

314. *Cox, Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1372 (1972); see also *Boffa*, 688 F.2d at 931 (quoting *Cox*).

315. This fact appears in the congressional declaration of findings, purposes, and policy that prefaces the text of the LMRDA:

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

29 U.S.C. § 401(b) (1988) (emphasis added).

316. "Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any other court or other tribunal . . ." *Id.* § 413.

317. See *supra* notes 14-17 and accompanying text.

318. See S. REP. NO. 1139, 86th Cong., 2d Sess. (1960); S. REP. NO. 621, 86th Cong., 1st Sess. (1959); S. REP. NO. 1417, 85th Cong., 2d Sess. (1958); see also *United States v. Local 560, Int'l Bhd. of Teamsters*, 550 F. Supp. 511, 524-25 (D.N.J. 1982) (noting the connection between RICO's legislative history and these reports), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

the genesis for the LMRDA, it is apparent that RICO—enacted over a decade after the passage of the LMRDA and over three decades after the NLRA's enactment—was designed to supplement the protections already afforded union members.³¹⁹ Thus, not surprisingly, courts that have faced this preemption issue have uniformly rejected the argument.³²⁰

3. *Failure to join indispensable parties*—Depending on the identity of the defendants named in a civil RICO complaint, the defendants may argue that, because the complaint seeks factual determinations and relief that allegedly would adversely affect the rights of various union affiliates or benefit funds that are not named as defendants in the action, all such entities must be joined as indispensable parties.³²¹ This argument proceeds from the terms of Rule 19(a) of the Federal Rules of Civil Procedure, which provide:

A person . . . shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.³²²

This argument fails both because affiliates not named as defendants in the action may not have a sufficiently tangible "interest in the subject of the action" and because, even if they

319. See *Local 560*, 550 F. Supp. at 525.

320. In *Local 560*, the Third Circuit rejected the preemption and exclusivity argument raised by the defendants with the terse observation that "[t]his argument has little merit." 780 F.2d at 280 n.13. The district court in the *Teamsters* case, when faced with this same preemption argument, observed, "[T]he alleged deprivation of union rights are symptoms; the complaint in this case alleges a widespread disease in the Union. The labor statutes are designed to treat these symptoms. RICO was enacted by Congress specifically to cure the disease." *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388, 1394 (S.D.N.Y. 1989).

321. In the *Teamsters* case, for example, the Teamsters International Union argued that all of the local unions and subordinate entities affiliated with the International Union should be named as indispensable parties. See *International Bhd. of Teamsters*, 708 F. Supp. at 1403-04 (rejecting the claim).

322. FED. R. CIV. P. 19(a).

have such an interest, that interest is adequately protected by the participation of the other union defendants.

A factual prerequisite to finding that a person is an indispensable party is a finding that the absent person has an "interest in the subject of the action" within the meaning of Rule 19(a). That determination is discretionary, and turns upon the facts of each case.³²³ Union affiliates for which the plaintiff does not request any immediate relief lack any concrete interest in the action. Although the defendant union may argue that its affiliates or benefit funds *could* be found by adjudication to be controlled by La Cosa Nostra, and that such a determination *could* become the basis for further legal action against it as to which some form of preclusive effect *might* be claimed, speculation that an event may occur does not render a person potentially affected by that event necessary or indispensable to a lawsuit.³²⁴ So long as the relief the plaintiff requests would not alter the membership or hiring practices of the nondefendant union affiliates, and would not implicate the rights of the affiliates under collective-bargaining agreements, it is appropriate to characterize the relief requested as running solely against the named defendant union. Thus, the nondefendant union affiliates have no cognizable interest in the litigation.

In any event, because a civil RICO action involving a union typically will name a union entity and its president and other officers, and because those officers are entrusted with the preeminent role in advocating the interests of the union and in overseeing its affairs, the participation of the union officers as defendants more than adequately protects the interests of the union affiliates. For example, the concentration of power in the International Brotherhood of Teamsters' General Executive Board led many courts to reject arguments advanced by the IBT that its affiliates were indispensable parties to public rights litigation. In a series of Title VII suits

323. See, e.g., *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-19 & n.14 (1968); *Prescription Plan Serv. Corp. v. Franco*, 552 F.2d 493, 496-97 (2d Cir. 1977); *Kamhi v. Cohen*, 512 F.2d 1051, 1053-54 (2d Cir. 1975); *Freeman v. Marine Midland Bank—New York*, 419 F. Supp. 440, 450-51 (E.D.N.Y. 1976); *Yonofsky v. Wernick*, 362 F. Supp. 1005, 1022-23 (S.D.N.Y. 1973).

324. See *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1045-46 (9th Cir.), cert. denied, 464 U.S. 849 (1983); *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1107-08 (4th Cir. 1980); *FTC v. Manager, Retail Credit Co.*, Miami Branch Office, 357 F. Supp. 347, 353-54 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 988 (D.C. Cir. 1975).

brought by the government in the 1970s challenging the discriminatory application of seniority provisions of collective-bargaining agreements negotiated by the IBT, the IBT repeatedly argued that its affiliates, which had adopted those provisions, were indispensable parties. The courts unanimously rejected these arguments on the ground that the presence of the IBT as a defendant adequately protected the interests of its affiliates.³²⁵

Moreover, the interests of the nondefendant union affiliates in governing themselves and conducting their own affairs will coincide with the interests of the defendant union officers in retaining the fullest extent of their powers. Accordingly, the union officers may be expected to represent fully and vigorously protect the interest of the union affiliates at all stages of the litigation and to urge that only the narrowest possible relief be imposed.³²⁶

4. *Motion for a more definite statement*—Defendants may move, in the alternative to their motions to dismiss, for more definite statements under Rule 12(e) of the Federal Rules of Civil Procedure, claiming that they are unable to frame a responsive pleading because the allegations in the complaint lack definiteness. These motions, which are in essence addressed to the sufficiency of the allegations of the complaint, can be resisted as well.³²⁷

Rule 12(e) provides that a motion for a more definite statement is proper only “[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.”³²⁸ Because the Federal Rules of Civil Procedure employ

325. See, e.g., *United States v. East Tex. Motor Freight Sys. Inc.*, 564 F.2d 179, 186 (5th Cir. 1977); *United States v. Navajo Freight Lines Inc.*, 525 F.2d 1318, 1321-22 (9th Cir. 1975); *United States v. T.I.M.E. - D.C., Inc.*, 517 F.2d 299, 310-11 (5th Cir. 1975), *vacated sub nom.* *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

326. Cf. *United Transp. Union v. Long Island R.R.*, 634 F.2d 19, 22 (2d Cir. 1980) (holding that where the New York Attorney General's position was advocated by other parties, he was not an indispensable party), *rev'd on other grounds*, 455 U.S. 678 (1982); *Prescription Plan Serv. Corp. v. Franco*, 552 F.2d at 497 (holding that trustees dropped from the case were not indispensable because their interests coincided with the interests of those trustees that remained in the case).

327. “Whether to grant a motion for a more definite statement is a matter within the discretion of the trial court.” 5A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1377, at 600-01 (1990) [hereinafter WRIGHT & MILLER] (collecting cases).

328. FED. R. CIV. P. 12(e).

the concept of notice pleading, courts generally disfavor motions for a more definite statement.³²⁹ Moreover, given the liberal pleading standards and the availability of liberal discovery under the Federal Rules of Civil Procedure, the use of motions for a more definite statement has been substantially restricted.³³⁰

In addition, Rule 12(e) cannot be invoked to "usurp the ordinary channels of pre-trial discovery."³³¹ Nor is it the function of a Rule 12(e) motion to "discover evidence."³³² Twenty years ago, "[e]xtensive discovery, rather than elaborate framing of issues through pleadings, [was] becoming the accepted method of preparing a trial."³³³ Today, the complaint in a civil RICO action will satisfy the requirements of the Rule so long as the complaint alleges racketeering acts with particularity sufficient to withstand a 12(b)(6) motion. If the defendants seek further specificity with respect to the

329. See, e.g., *Delta Educ., Inc. v. Langlois*, 719 F. Supp. 42, 50-51 (D.N.H. 1989); *Cox v. Maine Maritime Academy*, 122 F.R.D. 115, 116 (D. Me. 1988); *Wheeler v. United States Postal Serv.*, 120 F.R.D. 487, 488 (M.D. Pa. 1987); *Choat v. Rome Indus.*, 480 F. Supp. 387, 391 (N.D. Ga. 1979); *Bazal v. Belford Trucking Co.*, 442 F. Supp. 1089, 1101-02 (S.D. Fla. 1977); *Feldman v. Pioneer Petroleum, Inc.*, 76 F.R.D. 83, 84 (W.D. Okla. 1977).

The proper motion to challenge purported vagueness in pleading is generally a Rule 12(b)(6) motion:

If the movant believes his opponent's pleading does not state a claim for relief, the proper course is a motion under Rule 12(b)(6) even if the pleading is vague or ambiguous. Moreover, even if the pleading is so sketchy that it cannot be construed to show a right to relief, the proper attack is by a motion under Rule 12(b)(6) rather than Rule 12(e).

5A WRIGHT & MILLER, *supra* note 327, § 1376, at 576. Rule 12(e) does not command "elaborate detail" in pleading. 2A J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 12.18[1], at 12-139 (2d ed. 1990) (collecting cases). Rule 12(e) is designed "to strike at unintelligibility in a pleading, not just a claimed lack of detail." *Stanton v. Manufacturers Hanover Trust Co.*, 388 F. Supp. 1171, 1174 (S.D.N.Y. 1975) (denying Rule 12(e) motion); see also *Cox*, 122 F.R.D. at 116. "The Rule concerns defects in the complaint, which must be only specific enough to apprise defendant of the substance of a claim so that he may adequately draft a responsive pleading." *FRA S.p.A. v. Surg-O-Flex of America, Inc.*, 415 F. Supp. 418, 427 (S.D.N.Y. 1975).

330. As Professors Wright and Miller state:

[T]he class of pleadings that are appropriate subjects for a motion under Rule 12(e) is quite small—the pleading must be sufficiently intelligible for the court to be able to make out one or more potentially viable legal theories on which the claimant might proceed, but it must be so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself.

5A WRIGHT & MILLER, *supra* note 327, § 1376, at 577-78.

331. *FRA S.p.A.*, 415 F. Supp. at 427.

332. *Nixa v. Hayes*, 55 F.R.D. 40, 41 (E.D. Wis. 1972).

333. *Fastener Corp. v. Spotnails, Inc.*, 291 F. Supp. 974, 977 (N.D. Ill. 1968).

complaint's allegations, it is the discovery process and not a Rule 12(e) motion that is their proper remedy.³³⁴ If the complaint is sufficiently detailed to permit defendants to frame a responsive pleading, the motion should be denied.

5. *Failure to plead fraud with particularity*—Generally, on a motion to dismiss, a court must assume that the facts alleged in the complaint are true.³³⁵ Moreover, a complaint should not be dismissed for failure to state a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”³³⁶

Defendants may claim, however, that Rule 9(b) of the Federal Rules of Civil Procedure, which requires that allegations of fraud be plead with “particularity,”³³⁷ requires a higher level of detail in a civil RICO complaint. But that claim must be limited to the portions of the complaint that incorporate specific allegations of *fraud*. Rule 9(b) should not be applied simply because the complaint is a RICO complaint.³³⁸ Moreover, as courts have noted:

334. See, e.g., *Delta Educ., Inc. v. Langlois*, 719 F. Supp. 42, 51 (D.N.H. 1989) (holding that the failure to distinguish defendants who were alleged to have acted together does not justify a more definite statement); *Ford v. Citizens & S. Nat'l Bank*, 700 F. Supp. 1121, 1126 (N.D. Ga. 1988) (finding a RICO complaint stating that defendants conspired to extort things of value in violation of 18 U.S.C. § 1962 sufficient to withstand a Rule 12(e) motion); *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940, 949 (E.D. Cal. 1981) (holding that a party requesting the exact dates of alleged misconduct should obtain the information through the discovery process and not a Rule 12(e) motion).

335. See, e.g., *Luce v. Edelstein*, 802 F.2d 49, 52 (2d Cir. 1986).

336. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted); see also *Goldman v. Belden*, 754 F.2d 1059, 1065 (2d Cir. 1985) (quoting *Conley*). “It is elementary that, on a motion to dismiss, a complaint must be read as a whole, drawing all inferences favorable to the pleader.” *Yoder v. Orthomolecular Nutrition Inst., Inc.*, 751 F.2d 555, 562 (2d Cir. 1985).

337. FED. R. CIV. P. 9(b).

338. Recent authority for this proposition appears in *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n.4 (2d Cir. 1990). Although, prior to *Hecht*, several courts had indicated that greater particularity might be required in non-fraud RICO pleadings, see, e.g., *Plount v. American Home Assurance Co., Inc.*, 668 F. Supp. 204, 206-07 (S.D.N.Y. 1987); *Schnitzer v. Oppenheimer & Co., Inc.*, 633 F. Supp. 92, 97 (D. Or. 1985), those cases themselves involved allegations of fraud, see *Plount*, 668 F. Supp. at 207; *Schnitzer*, 633 F. Supp. at 96. Thus, in *United States v. Bonanno Organized Crime Family*, 683 F. Supp. 1411, 1426-28 (E.D.N.Y. 1988), the court undertook a thorough review of the relevant case law and concluded that Rule 9(b) did not apply to RICO allegations of acts other than fraud:

The Court finds no basis for extending the reach of rule 9(b) to all RICO cases: “Since the rule is a special pleading requirement and contrary to the general approach of simplified pleading adopted by the federal rules, its scope of application should be construed narrowly and not extended to other legal

"The requirement of particularity does not abrogate Rule 8, and it should be harmonized with the general directives . . . of Rule 8 that the pleadings should contain a 'short and plain' statement of the claim or defense and [that] each averment should be 'simple, concise and direct.' Rule 9(b) does not require nor make legitimate the pleading of detailed evidentiary matter."³³⁹

Rule 9(b) thus requires only "that the defendants be given enough information to allow them to frame a responsive pleading and that the court be assured that an adequate basis exists for the charges made."³⁴⁰ This is essentially the same standard as applies to a motion for a more definite statement under Rule 12(e).³⁴¹ The arguments presented in opposition to that motion also apply to a motion under Rule 9(b). Further, in preparation for filing a civil RICO action, a plaintiff ordinarily would prepare a motion for preliminary injunctive relief. The materials presented in that motion (such as copies of criminal indictments and judgments in prior cases, prior sworn testimony, and prior government investigative reports) may further flesh out the basis for the plaintiff's claims of fraud. The nonfraud allegations of the complaint, such as simple extortions or thefts of union funds, of course, should also be emphasized.

6. *Statute of limitations and laches*—Patterns of corruption within a union may take years to develop and years more to

theories or defenses." 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1297 at 405 (1969); *see id.* § 1221 at 149 (Rule 9 is the only special pleading provision in the Federal Rules of Civil Procedure). The Court is not persuaded that the fact that a RICO defendant may be labelled a "racketeer" calls for judicial extension of Rule 9(b)'s scope. *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 492, 105 S. Ct. 3275, 3283, 87 L.Ed.2d 346 (1985) ("As for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings"); *Rodonich v. House Wreckers Union Local 95*, 627 F. Supp. 176, 178 (S.D.N.Y. 1985) (questioning propriety of altering RICO's pleading burden). The Court therefore will not scrutinize the non-fraud RICO allegations of the Amended Complaint against a heightened particularity standard.

Id. at 1427-28.

339. *Ross v. A.H. Robins Co., Inc.*, 607 F.2d 545, 557 n.20 (2d Cir. 1979) (quoting 2A MOORE'S FEDERAL PRACTICE, ¶ 9.03, at 1929-30), *cert. denied*, 446 U.S. 946 (1980). *Accord DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) ("Rule 9(b) must be read together . . . with Rule 8(a) . . .").

340. *Rich-Taubman Assocs. v. Stamford Restaurant Operating Co., Inc.*, 587 F. Supp. 875, 880 (S.D.N.Y. 1984).

341. *See supra* notes 328-34 and accompanying text.

uncover. As a result, the allegations of a plaintiff's civil RICO complaint may, in many instances, involve some events that are several years, if not decades, old. The defendants in a civil RICO action are likely to challenge a complaint containing such allegations on grounds of laches or a statute of limitations. Such a challenge should not be successful.

Although the Supreme Court recently held, in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*,³⁴² that a four-year statute of limitations applies to private civil RICO actions seeking treble damages,³⁴³ the Court's ruling is limited to the context of private actions for damages, not equitable relief.³⁴⁴ A civil RICO action against a union defendant will typically seek purely equitable relief, such as reform of the union's election rules or appointment of an independent officer to investigate allegations of union-related corruption. Because the complaint seeks equitable relief, the only limitations period should be that imposed by the equitable doctrine of laches.³⁴⁵ Thus, in *Malley-Duff*, the Supreme Court explained that an early version of RICO contained no limitations period because the "bill included no private treble-damages remedy, and thus obviously had no need for a limitations period."³⁴⁶

In civil RICO actions brought by the government, the doctrine of laches simply cannot be applied.³⁴⁷ A similar

342. 483 U.S. 143 (1987).

343. *Id.* at 156. The Court reasoned that the four-year limitations period applicable to private actions under the Clayton Act should also apply to civil RICO suits because RICO was modeled after the Clayton Act and the treble damages provisions of both statutes were intended to provide an incentive for "private attorneys general" who are injured in their "business or property by reason of a violation." *Id.* at 151.

344. *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388, 1402 (S.D.N.Y. 1989) (denying the union defendants' motion to dismiss the government's civil RICO claims on various timeliness grounds). Indeed, courts have not applied statute of limitations restrictions to government antitrust actions seeking equitable relief. *See, e.g.*, *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) (permitting an action seeking equitable relief as to 1959 merger brought by the government in 1967 under the Clayton Act).

345. *See Russell v. Todd*, 309 U.S. 280, 287 (1940); *Argus, Inc. v. Eastman Kodak Co.*, 552 F. Supp. 589, 599-600 (S.D.N.Y. 1982).

346. 483 U.S. at 155.

347. *See United States v. Bonanno Organized Crime Family*, 683 F. Supp. 1411, 1458 (E.D.N.Y. 1988). Courts have held as a general matter that the defense of laches is not available against the United States. *See, e.g.*, *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *United States v. RePass*, 688 F.2d 154, 158 (2d Cir. 1982); *see also Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938). Congress expressly acknowledged that neither a statute of limitations nor the

rule should apply to private civil RICO actions. In private actions, as in government actions, the goal is to vindicate important public interests. A long line of authority holds that a statute of limitations or laches defense may not apply in suits aimed at vindicating and enforcing public rights.³⁴⁸ This authority, developed principally in the context of government public interest actions, should apply to a private litigant's efforts to vindicate similar interests.

7. *Personal jurisdiction and venue*—In cases involving multistate union operations, such as cases at the international union level, questions of personal jurisdiction and venue may arise. The RICO statute, however, provides for nationwide service of process, and establishes liberal rules regarding venue.

a. *Personal jurisdiction*—Courts repeatedly have upheld against due process challenge the exercise of personal jurisdiction over defendants served pursuant to federal, statutory nationwide service so long as those defendants have "minimum contacts" with the United States. All of the officers of a labor union based in the United States will have such contacts. Accordingly, under the nationwide service of process provisions of the RICO statute, personal jurisdiction exists.

The RICO statute expressly provides in section 1965(d) for nationwide service of process: "All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs."³⁴⁹ Every court that has considered section 1965(d) has interpreted that provision to establish unconditional nationwide service in RICO actions.³⁵⁰

doctrine of laches limits civil actions brought by the government under RICO: "[I]t should be noted that there is no general statute of limitations applicable to civil suits brought by the United States to enforce public policy, nor is the doctrine of laches applicable." SENATE REPORT, *supra* note 4, at 160.

348. See *Dole v. Local 427, Int'l Union of Elec. Radio & Mach. Workers*, 894 F.2d 607, 610 (3d Cir. 1990) (summarizing cases). Indeed, the *Local 427* court observed that recent cases have expanded the "public purpose" doctrine to include actions to protect *individual* rights as well as *public* rights. *Id.* at 613.

349. 18 U.S.C. § 1965(d) (1988).

350. See, e.g., *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1055 (S.D.N.Y. 1987); *Hirt v. UM Leasing Corp.*, 614 F. Supp. 1066, 1069 (D. Neb. 1985); *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 590 F. Supp. 1453, 1458 (E.D.N.Y. 1984), *aff'd*, 832 F.2d 1325 (2d Cir. 1987); *Clement v. Pehar*, 575 F. Supp. 436, 438, 443 n.5 (N.D. Ga. 1983); *Medical Emergency Serv. Assocs. v. Duplis*, 558 F. Supp. 1312, 1314 n.1 (N.D. Ill. 1983).

Where personal jurisdiction is authorized by a statutory nationwide service of process provision and a federal statute supplies subject matter jurisdiction, courts have held that it is fair to require a United States resident to appear in any federal judicial district as long as service of process provides adequate notice and opportunity to be heard.³⁵¹

Unless an evidentiary hearing is held, jurisdictional facts set forth in the plaintiff's complaint must be "construed in the light most favorable to plaintiff, and where doubts exist, they are [to be] resolved in the plaintiff's favor."³⁵² Moreover, prior to trial in a case, the plaintiff need only set forth a prima facie case of personal jurisdiction.³⁵³

Personal jurisdiction has both a statutory and a constitutional component.³⁵⁴ The statutory basis for personal jurisdiction must be either a state "long-arm" statute or a federal service of process statute.³⁵⁵ If state law provides the statutory basis for personal jurisdiction, "minimum contacts" analysis under the fourteenth amendment controls the constitutional question; if federal law furnishes the jurisdictional basis, the fifth amendment applies.³⁵⁶ Thus, in a civil action under the federal RICO statute, personal jurisdiction analysis under the federal statute proceeds without reference to the fourteenth amendment's limitations on state long-arm statutes. Courts generally interpret article III of the United States Constitution as establishing that "[s]ubject *only* to the regulation of Congress, each federal court exercises the

351. See, e.g., *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (holding that personal jurisdiction is proper if "the service authorized by statute [is] reasonably calculated to inform the defendant of the pendency of the proceedings in order that he may take advantage of the opportunity to be heard in his defense" (citing *Hanson v. Denckla*, 357 U.S. 235, 245 (1958), and *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306 (1950)); see also *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 826 (6th Cir. 1981) (citing *Mariash*), cert. denied, 455 U.S. 949 (1982).

352. *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985).

353. See, e.g., *Beacon Enters., Inc. v. Menzies*, 715 F.2d 757, 768 (2d Cir. 1983). "[A]nd this remains true notwithstanding a controverting presentation by the moving party." *Hoffritz for Cutlery*, 763 F.2d at 57 (citing *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981)); see also *Rolls-Royce Motors*, 657 F. Supp. at 1043 (same).

354. See, e.g., *Max Daetwyler Corp. v. R. Meyer Corp.*, 762 F.2d 290, 293 (3d Cir.), cert. denied, 474 U.S. 980 (1985); *Terry v. Raymond Int'l, Inc.*, 658 F.2d 398, 401 (5th Cir. Unit A Oct. 1981), cert. denied, 456 U.S. 928 (1982).

355. See *Terry*, 658 F.2d at 401.

356. See *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974); see also *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 & n.3 (1st Cir. 1984).

'judicial Power of the United States,' not a judicial power constitutionally limited by the boundaries of a particular district."³⁵⁷

The civil RICO plaintiff may further support the applicability of nationwide service of process by pointing out that a labor union typically affects commerce on a national scale. For example, in the *Teamsters* case, the government alleged that the IBT had a membership of nearly 1.7 million, located throughout the country,³⁵⁸ that violations of rights protected by federal statute had nationwide repercussions,³⁵⁹ and that much of the criminal activity involving La Cosa Nostra's illegitimate control and abuse of the IBT originated from New York City.³⁶⁰ Under these circumstances, the district court concluded that it was fair for the defendants to be called to task in the Southern District of New York.³⁶¹

b. Venue—Alternatively, defendants may assert that their contacts with the forum are so limited that it would be appropriate for the court to transfer the case to a more appropriate venue. The problem of venue, however, is expressly addressed by the RICO statute, which embodies a very liberal approach.

First, section 1965(a) of the RICO statute provides for venue in any district in which the defendants are found or transact business.³⁶² An entity is "found" in a district within the meaning of section 1965(a) if it is "present in the district by its officers and agents carrying on [its] business."³⁶³ A person

357. *FTC v. Jim Walter Corp.*, 651 F.2d 251, 256 (5th Cir. 1981) (footnote omitted). *Accord Lisak v. Mercantile Bancorp Inc.*, 834 F.2d 668, 671-72 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988); *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1315-16 (9th Cir. 1985); *Johnson Creative Arts*, 743 F.2d at 950.

358. *See* Complaint at 3, *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388 (S.D.N.Y. 1989) (No. 88 Civ. 4486) (June 28, 1988).

359. *Id.* at 30, 85, 86, 102.

360. *Id. passim*.

361. *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388, 1403 (S.D.N.Y. 1989) (holding that nationwide service of process "meet[s] the requirements of due process"), *aff'd*, 905 F.2d 610 (2d Cir. 1990); *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (conduct and foreseeable consequences in forum justifies jurisdictional exercise); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (same).

362. RICO's general venue provision states that "[a]ny civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a) (1988).

363. *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1133 (D. Mass. 1982).

who is "regularly conducting business of a substantial and continuous character within [the] district" transacts affairs in the district within the meaning of section 1965(a).³⁶⁴ Typically, the civil RICO plaintiff will choose to bring the suit in a district where the headquarters of the union are located; thus, this venue provision will be satisfied.

Once venue is established for one of the defendants in a civil RICO action under section 1965(a), a court has great power under section 1965(b) to consolidate and manage the action in a single district. That provision states that in any civil RICO action "in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned."³⁶⁵ This section, which has been described as an "alternative venue provision,"³⁶⁶ authorizes a court to summon a nonresident defendant into the district "if the plaintiff demonstrates that the 'ends of justice' so require and that the action is properly venued under Section 1965(a) as to at least one defendant already in the suit."³⁶⁷ Indeed, section 1965(b) may be used to bring nonresident defendants into an action even in cases where venue could be properly laid against *all* defendants in another district.³⁶⁸ The powerful venue provision in section 1965(b) thus overrides the traditional notion that an individual's privilege to invoke venue restrictions trumps other considerations that may warrant locating a complex, multidefendant case in a particular forum.³⁶⁹

As with the question of personal jurisdiction, the civil RICO plaintiff may further bolster claims concerning venue by

364. *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1058 (S.D.N.Y. 1987).

365. 18 U.S.C. § 1965(b) (1988).

366. *Rolls-Royce Motors*, 657 F. Supp. at 1058 n.13.

367. *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 590 F. Supp. 1453, 1459 (E.D.N.Y. 1984), *aff'd on other grounds*, 832 F.2d 1325 (2d Cir. 1987).

368. *See Miller Brewing Co. v. Landau*, 616 F. Supp. 1285, 1290-91 (E.D. Wis. 1985). *But see Rolls-Royce Motors*, 657 F. Supp. at 1058 n.13 (noting that "the fact that *both* [defendants] can be sued in another district . . . suggests that 'ends of justice' may not require an order . . . under § 1965(b)").

369. *Compare Leroy v. Great W. United Corp.*, 443 U.S. 173, 183-84 (1979) (holding that 28 U.S.C. § 1391(b) protects defendants against plaintiff's selection of inconvenient venue) *with Miller Brewing Co.*, 616 F. Supp. at 1290-91 (finding that 18 U.S.C. § 1965(b) "ends of justice" provision authorizes the court to summon nonresident defendants even though venue would exist under § 1965(a) as to all defendants in another district).

pointing to events and evidence that are connected to the forum. In the *Teamsters* case, for example, Judge Edelstein denied a motion to transfer venue from the Southern District of New York to Washington, D.C., on the grounds that "the majority of the named defendants do not reside in Washington," and that many of the acts alleged in the complaint "occurred in the Southern District and the tri-state area."³⁷⁰

Second, venue may be proper under the general venue statute.³⁷¹ That provision authorizes venue "in the judicial district . . . in which the claim arose."³⁷² Courts generally apply a flexible "weight of the contacts" test to determine where a claim arises.³⁷³ Under this test, venue properly lies in the district where the alleged injury occurred or where an "overt act pursuant to the conspiratorial meetings took place in [the] district and it was [a] significant and substantial element of the offense."³⁷⁴ Application of the "weight of the contacts" test will therefore depend on the plaintiff's ability to point to events alleged in the complaint that have some connection with the forum. The fact that some events alleged in the complaint might suffice to establish venue in another district, of course, will not alone deny venue in the plaintiff's chosen forum.³⁷⁵ Once it is established that venue lies

370. *United States v. International Bhd. of Teamsters*, 708 F. Supp. 1388, 1404 (S.D.N.Y. 1989).

371. Courts have held that 18 U.S.C. § 1965 is not an exclusive venue provision but instead operates to supplement the general venue statute. See *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1058 (S.D.N.Y. 1987); *Eaby v. Richmond*, 561 F. Supp. 131, 139 (E.D. Pa. 1983); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1133 n.6 (D. Mass. 1982); *Farmers Bank v. Bell Mortgage Corp.*, 577 F. Supp. 34, 35 (D. Del. 1978). The RICO venue provision was modeled after section 4 of the Clayton Act, see H.R. REP. NO. 1549, 91st Cong., 2d Sess. 58, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4034 ("Section 1965 contains broad provisions regarding venue and process, which are modeled on present antitrust legislation."), and it has long been recognized that the antitrust venue provision supplemented, but did not supplant, the general venue statute, see *Albert Levine Assocs. v. Bertoni & Cotti, S.p.A.*, 314 F. Supp. 169, 170 (S.D.N.Y. 1970).

372. 28 U.S.C. § 1391(b) (1988).

373. See *Rolls-Royce Motors, Inc.*, 657 F. Supp. at 1057 (collecting cases).

374. *Lieb v. American Pac. Int'l, Inc.*, 489 F. Supp. 690, 696 (E.D. Pa. 1980) (quoting *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 260 (E.D. Pa. 1968)); see also *Iranian Shipping Lines, S.A., v. Moraites*, 377 F. Supp. 644, 647-48 (S.D.N.Y. 1974) (applying "place of injury" test for venue).

375. See *Carter-Wallace, Inc. v. Ever-Dry Corp.*, 290 F. Supp. 735, 739 (S.D.N.Y. 1968) (noting that "[a]lthough the claim arose also in other districts, that fact would not derogate its having arisen here").

properly in the chosen district, a motion to change venue³⁷⁶ is addressed to "the discretion of the court."³⁷⁷ The moving party bears the burden of establishing that there should be a change of forum. "[W]here there is a mere balancing of factors, the defendant will not have met his burden of proof," and the motion should be denied.³⁷⁸

II. OBSTACLES TO PRIVATE LITIGANTS' USE OF EQUITABLE REMEDIES UNDER THE RICO STATUTE

The federal government has paved the way for private litigants to seek equitable RICO remedies against corrupted labor unions. There are, nevertheless, several obstacles that the private litigant will face in bringing such an action. First, as a threshold matter, the private litigant will have to convince the court that parties other than the government have the right to seek equitable relief under the RICO statute. Second, the private litigant will have to fight to obtain access to many of the sources of information (such as wiretaps, grand

376. See 28 U.S.C. § 1404(a) (1988) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").

377. *Sheet Metal Workers' Nat'l Pension Fund v. Gallagher*, 669 F. Supp. 88, 91 (S.D.N.Y. 1987); see also *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 451 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976). As one court has summarized:

The determination of whether an action should be transferred pursuant to § 1404(a) depends upon a balancing of many different factors. These factors include not only convenience to the parties and witnesses but also the "relative ease of access to proof, availability of witnesses . . . and 'all other practical problems which make trial of a case easy, expeditious, and inexpensive.'" *Heyco, Inc. v. Heyman*, 636 F. Supp. 1545, 1548 (S.D.N.Y. 1986) (quoting *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353, 385 (E.D.N.Y. 1972) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947))). A court should also consider "where the operative facts occurred" when deciding a transfer motion. *Id.* at 1549.

378. *Round One Prods., Inc. v. Greg Page Enters., Inc.*, 566 F. Supp. 934, 938 (E.D.N.Y. 1982); see also *Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Gallagher*, 669 F. Supp. at 92 ("The party seeking the transfer bears the burden of establishing that the transfer is warranted, and that the balance of convenience weighs clearly in its favor."). This allocation of the burden reflects "the overriding consideration that a plaintiff's choice of forum should rarely be disturbed." *Round One Prods.*, 566 F. Supp. at 938; accord *Fitzgerald*, 521 F.2d at 451 (noting that "[a]lthough plaintiffs should rarely be deprived of the advantages of their chosen forums, 'the doctrine leaves much to the discretion of the court'" (quoting *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 502 (2d Cir. 1966))); *Lykes Bros. Steamship Co. v. Sugarman*, 272 F.2d 679, 681 (2d Cir. 1959).

jury material and the like) on which the government often relies in maintaining civil RICO actions. Finally, the private litigant will face the financial burden of complex and hotly contested litigation. As we explain below, each of these formidable obstacles can be surmounted.

A. *The Private Litigant's Right to Equitable RICO Relief*

The threshold legal question is whether a private litigant has the right to seek equitable remedies under the RICO statute. While commentators have endorsed the view that private litigants may obtain equitable RICO relief,³⁷⁹ courts have split on the issue.³⁸⁰

On its face, the RICO statute permits any litigant to seek equitable relief. Section 1964(a) of the statute makes no mention of a limitation on equitable actions by private plaintiffs. Section 1964(a) provides as follows:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of

379. See, e.g., Belgard, *Private Civil RICO Plaintiffs Are Entitled to Equitable Relief Under § 1964(a)*, 2 RICO L. Rep. (RICO L. Rep.) 537, 541 (1985); Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 330-41 (1982); Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903, 949; Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME L. REV. 945, 945 (1984) (authored by Donald R. Lee).

380. Compare *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986) (holding that injunctive relief is unavailable to private civil RICO plaintiffs), *cert. denied*, 479 U.S. 1103 (1987) and *Kaushal v. State Bank*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983) (same) with *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984) (holding that equitable relief is available to private civil RICO plaintiffs) and *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (noting that the question is open, and that injunctive relief may be available) and *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983) (same), *aff'd on other grounds*, 730 F.2d 905 (2d Cir. 1984).

which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.³⁸¹

Thus, section 1964(a) on its face gives federal courts authority to grant equitable relief in civil RICO actions and does not limit that authority to cases brought by the government.

To ensure that the government has standing to seek equitable RICO relief, the statute does expressly provide that the "Attorney General may institute proceedings under this section" and, "[p]ending final determination thereof," obtain from a court such relief as the court "shall deem proper."³⁸² Finally, the statute permits "[a]ny person injured in his business or property by reason of a violation" of RICO to recover treble damages.³⁸³ Thus, on its face, the statute says no more than: (i) any plaintiff may seek equitable RICO remedies, (ii) the government has standing to seek equitable RICO remedies, and (iii) the government has standing to seek such remedies even if it cannot demonstrate injury to its "business or property" necessary for a treble damage award.³⁸⁴

This reading of the statute comports with the "Statement of Findings and Purpose" of the Organized Crime Control Act of 1970,³⁸⁵ and the statute's express direction that its provisions "shall be liberally construed to effectuate its remedial

381. 18 U.S.C. § 1964(a) (1988).

382. *Id.* § 1964(b). Section 1964(b) states in full: "The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper." *Id.*

383. *Id.* § 1964(c). Section 1964(c) states in full: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.*

384. The government is afforded standing to bring a civil RICO action for equitable relief even though the government itself is not a "victim." *Cf. In re Debs*, 158 U.S. 564, 584-86 (1895) (holding that the U.S. government has standing to seek injunctive relief from wrongs that affect "the public at large" even when the government itself has no pecuniary interest in the case). The private litigant, by contrast, has standing to maintain a civil RICO action only if he or she suffered a direct and concrete injury from a defendant's RICO violations.

385. Pub. L. No. 91-1152, 84 Stat. 922, 922. That section states that "[i]t is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Id.*, 84 Stat. at 923.

purposes."³⁸⁶ As one RICO commentator has suggested: "If the text is plain, the remedy is there; if the text is ambiguous, the ambiguity should be resolved in favor of enhancing the remedial purpose of RICO."³⁸⁷

A few courts, however, have held that RICO does not permit the private plaintiff to seek equitable relief under the statute.³⁸⁸ The most significant of those authorities is *Religious Technology Center v. Wollersheim*,³⁸⁹ in which the Ninth Circuit reasoned that private plaintiffs were not entitled to equitable relief under the RICO statute because Congress failed to pass two earlier versions of the RICO statute that expressly provided standing for private litigants to obtain equitable relief.³⁹⁰

The *Wollersheim* court's reasoning is far from compelling and ignores the statute's plain language. As another court has explained:

[T]he fact that Congress did not pass earlier versions of RICO containing provisions for private equitable relief is by no means a clear indication that Congress intended to deprive the district court of its traditional equity jurisdiction to grant preliminary injunctive relief to a plaintiff who could show irreparable injury resulting from a defendant's alleged violation of § 1962.³⁹¹

Moreover, there was no reason for Congress to include a section expressly authorizing such relief in the RICO statute because the statutory language already clearly granted that

386. *Id.* § 904(a), 84 Stat. at 947. This liberal mandate is unique in federal criminal law. See *supra* note 25.

387. Note, *supra* note 379, at 953.

388. See, e.g., *Dixie Carriers, Inc. v. Channe Fueling Serv.*, 843 F.2d 821, 830 (5th Cir. 1988) (holding that RICO does not permit certain forms of preliminary injunctions, but leaving open the question whether "all forms of injunctive or other equitable relief are foreclosed to private plaintiffs under RICO"), *cert. denied*, 479 U.S. 1103 (1987); *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986); *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1137-38 (D.N.J. 1989); *First Nat'l Bank & Trust Co. v. Hollingsworth*, 701 F. Supp. 701, 703-04 (W.D. Ark. 1988); *Kaushal v. State Bank*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983). See generally sources cited *supra* note 379.

389. 796 F.2d 1076 (9th Cir. 1986).

390. *Id.* at 1085-86.

391. *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910 (E.D.N.Y. 1983) (citation omitted).

authority.³⁹² Thus, persuasive authorities recognize the private litigant's right to seek equitable RICO remedies.

While the Supreme Court has yet to decide this issue, the Court has consistently given liberal constructions to the RICO statute. Indeed, the Supreme Court expressly stated in *Sedima, S.P.R.L. v. Imrex Co., Inc.*³⁹³ that the RICO statute's "'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity."³⁹⁴ RICO's "remedial purposes" would undoubtedly be furthered by a statutory construction that permitted private plaintiffs to seek equitable RICO remedies.

Even if the Supreme Court concluded that private plaintiffs are not authorized to seek equitable relief under the RICO statute itself, private parties could still pursue other avenues. For example, a private plaintiff could ask the court to exercise its inherent equity powers. RICO actions necessarily include claims that constitute the "predicate acts" of racketeering necessary to make out a RICO offense. A federal court has the authority, in the exercise of its inherent equity powers, to enjoin such misconduct, irrespective of any statutory grant of authority.³⁹⁵ Indeed, preliminary relief is available to private plaintiffs under Rule 65 of the Federal Rules of Civil Procedure.³⁹⁶ If the private plaintiff could show immediate

392. See *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540 (W.D. Pa. 1984) ("A reasonable construction of Section 1964, therefore, is that both private litigants and the Attorney General may seek remedies such as divestiture and, in addition, the Attorney General may seek temporary restraining orders." (quoting Fricano, *Civil RICO—An Antitrust Plaintiff's Consideration*, in 1 CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 827-28 (1983))).

393. 473 U.S. 479 (1985).

394. *Id.* 498 (1985).

395. See *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1223 (8th Cir. 1987) (granting injunctive relief in private RICO action based on district court's finding that it had inherent power to do so on state law grounds); *Chambers*, 590 F. Supp. at 1541 (recognizing "the federal court[s'] inherent power to grant equitable relief to prevent irreparable injury from conduct prohibited by RICO"); *Aetna Casualty*, 570 F. Supp. at 910 (granting a preliminary injunction to a private RICO litigant after finding that the traditional standards in that circuit for obtaining the preliminary injunction were met). But see *First Nat'l Bank & Trust Co. v. Hollingsworth*, 701 F. Supp. 701, 703 (W.D. Ark. 1988) (refusing to grant injunctive relief because its jurisdiction in the case was based solely on RICO).

396. See FED. R. CIV. P. 65 (authorizing preliminary injunctive relief). *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 544 (W.D. Pa.) ("[T]he threatened violation of the law here is itself sufficient public injury to justify the requested relief."), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

Some courts may also require a substantial likelihood of success on the merits and that the balance of equities favor the plaintiff. See, e.g., *Dixie Carriers, Inc. v. Channel Fueling Serv., Inc.*, 843 F.2d 821, 824 (5th Cir. 1988).

and irreparable injury—a heavy burden not required of the government in civil RICO action—preliminary injunctive relief might be ordered.

In sum, the private litigant should be able to obtain equitable relief under the RICO statute. If not, the private litigant may have other means of securing equitable relief under state and federal law.

B. Obtaining Access to Confidential Government Information

The private plaintiff may face problems obtaining access to much of the evidence upon which the government typically relies to show organized crime's influence over a union. Such materials include FBI informant files and investigative reports, grand jury testimony, and conversations intercepted pursuant to court order. The private plaintiff, however, does have some means of obtaining that information.

1. *Freedom of Information Act*—Many government reports, including FBI files, may be obtained through requests made under the Freedom of Information Act³⁹⁷ (FOIA). Although FOIA protects certain government documents from disclosure, it permits public access to many files that could benefit the private civil RICO litigant.³⁹⁸ Moreover, inquiries from private parties may prompt further dialogue between the government and those parties.

Because a plaintiff union member may have information valuable to government investigators regarding his union's association with organized crime, the government may be willing to work with the union member as a source of information. The government's information might help in the plaintiff's civil RICO action, and the plaintiff's information could aid the government in criminal prosecutions against particular organized crime figures or corrupt union officers.

397. 5 U.S.C. § 552 (1988).

398. See *Federal Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 351-52 (1979) (“[T]he purpose of FOIA is ‘to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.’”); *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 6 (6th Cir.1980) (“[T]he overwhelming thrust of FOIA is toward complete disclosure.”).

2. *Access to grand jury reports*—Rule 6(e) of the Federal Rules of Criminal Procedure allows private plaintiffs access to grand jury proceedings upon a showing of particularized need.³⁹⁹ To show a “particularized need” for the information, the plaintiff must show that such information is vital to his case and cannot be obtained through discovery.⁴⁰⁰ If the information cannot be obtained from another source and the litigant wishes to use the grand jury transcript to impeach a witness or test her credibility, the Supreme Court has indicated that the “particularized need” test has been met.⁴⁰¹ Some courts may require the plaintiff to commence an independent civil action to compel disclosure before the judge who supervised the grand jury.⁴⁰² Alternatively, the plaintiff may simply make a motion to transfer grand jury transcripts.⁴⁰³

3. *Title III materials*—Members of organized crime often have been the subject of government wiretaps and other electronic interceptions of conversations as part of criminal investigations. A substantial number of these recorded conversations have been admitted into evidence in various criminal trials.⁴⁰⁴ A private plaintiff may be able to use these previously admitted recorded conversations in a subsequent civil RICO action.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968⁴⁰⁵ authorizes the use of electronic surveillance in the investigation of certain serious offenses.⁴⁰⁶ Title III limits disclosure of materials gained by electronic surveillance to use

399. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958). Specifically, Rule 6(e) provides that “[d]isclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made . . . when so directed by a court preliminarily to or in connection with a judicial proceeding.” FED R. CRIM. P. 6(e)(3).

400. *Procter & Gamble*, 356 U.S. at 681-83.

401. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 n.12 (1979).

402. See, e.g., *United States v. Alston*, 491 F. Supp. 215, 216-17 (D.D.C. 1980).

403. See *Alpha Portland Indus. v. United States Dist. Ct.*, 649 F.2d 387, 389 (6th Cir. 1981), *cert. denied*, 453 U.S. 946 (1981).

404. For recent examples of intercepted wire conversations in criminal cases, see *United States v. Echavarria-Olarte*, 904 F.2d 1391, 1396-97 (9th Cir. 1990) (ruling that wiretap evidence was admissible against a member of a cocaine distributing cartel); *United States v. Apodaca*, 820 F.2d 348, 350 (10th Cir. 1987) (same); *United States v. Weber*, 808 F.2d 1422, 1424 (11th Cir.) (same), *cert. denied*, 484 U.S. 903 (1987).

405. 18 U.S.C. §§ 2510-2521 (1988).

406. These offenses are set forth in 18 U.S.C. § 2516(1) (1988), and include Hobbs Act violations, see 29 U.S.C. § 501 (1988), and RICO violations, see 18 U.S.C. § 1963 (1988).

by "investigative or law enforcement officer[s]." ⁴⁰⁷ An "investigative or law enforcement officer" is defined as "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses" enumerated in Title III. ⁴⁰⁸ Title III also provides that the government may disclose the contents of an authorized wire communication while giving testimony in state or federal court. ⁴⁰⁹ Typically, this disclosure occurs in the course of a criminal trial where the government wishes to use the results of electronic surveillance as evidence.

Private plaintiffs may not, in the first instance, gain access to Title III materials that have not been disclosed as evidence in prior criminal proceedings. ⁴¹⁰ Courts have held, however, that if such materials are used as evidence in a criminal case, Title III creates no independent bar to the public's right of access to the materials. ⁴¹¹ Accordingly, Title III materials that have been used as evidence in previous criminal cases may be produced as evidence in a subsequent civil RICO lawsuit. The private litigant may gain access to recordings of electronically intercepted conversations obtained by the government under Title III by serving a subpoena upon a United States Attorney for release of the tapes and transcripts of the conversations. ⁴¹²

4. *Prior court proceedings*—The easiest government records for the private litigant to obtain are the transcripts and exhibits of government actions, both civil and criminal. Court proceedings generally are public, and records relating to them are publicly available. ⁴¹³ Therefore, where the government has already prevailed in a prosecution involving allegations of labor union corruption, the private litigant has ready access to a substantial body of evidence covering that union.

407. 18 U.S.C. § 2517(1) (1988).

408. *Id.* § 2510(7).

409. *See id.* § 2517(3).

410. *See National Broadcasting Co. v. United States Dep't of Justice*, 735 F.2d 51, 53-55 (2d Cir. 1984).

411. *See, e.g., United States v. Rosenthal*, 763 F.2d 1291, 1293 (11th Cir. 1985); *County of Oakland v. City of Detroit*, 610 F. Supp. 364, 369 (E.D. Mich. 1984).

412. *See County of Oakland*, 610 F. Supp. at 369 (allowing plaintiffs to subpoena a United States Attorney for release of Title III materials).

413. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy . . . judicial records and documents." (footnote omitted)).

C. Funding the Private Litigant's Civil RICO Action

A civil RICO action against a labor union may place a substantial financial burden on the private litigant. Funding for the litigation, however, may be available from several sources. For example, the RICO statute expressly provides for an award of attorney fees and costs to a successful plaintiff in a civil RICO action. Section 1964(c) states: "Any person injured in his business or property by reason of a violation of section 1962 . . . shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."⁴¹⁴ Thus, if the private plaintiff is successful in proving RICO violations, he will be entitled to costs and fees. On that basis, a private litigant may be able to persuade an attorney to take the case.

Other attorneys unwilling to take the case for a promise of an attorney's fee in an amount that is subject to the discretion of the court pursuant to § 1964(c) may accept the case if promised a portion of the plaintiff's treble damage award. Thus, the attorney would be retained on a contingent-fee basis and would receive an agreed-upon percentage of whatever damages the plaintiff recovers. Although most RICO plaintiffs pursuing an action against their unions will seek equitable relief, such plaintiffs may also seek money damages. Because RICO authorizes courts to award treble damages to successful plaintiffs, as much as one-third of those awards could go to the attorneys without substantially depleting the amounts recovered by plaintiffs.

Another option available to the private litigant is to persuade the court to order the defendant union to fund certain aspects of the action. A civil RICO lawsuit brought by a union member is an action undertaken on behalf of the union, and each member of the union will obtain a substantial benefit if the litigation is successful. It follows that the union should be required to pay for the action. Although no court has held yet that a union may be required to fund a RICO action brought by a union member, such an argument is worth making.

The suggestion that a court may order a defendant to pay some of the plaintiff's costs of litigation is not unprecedented.

414. 18 U.S.C. § 1964(c) (1988).

If civil RICO plaintiffs bring their case as a class action, they may be able to convince the court to require defendants to pay the plaintiff's notification costs prior to final judgment. Courts have inherent equitable power to require either party to a class action to pay the costs of communicating with class members concerning the conduct of the litigation.⁴¹⁵ Although the Supreme Court, in *Eisen v. Carlisle & Jacquelin*,⁴¹⁶ set forth the general rule that a class representative must bear the costs of notifying absent class members that the action has been instituted,⁴¹⁷ the Court also recognized, without expressing an opinion, a possible exception to this rule where there is a preexisting fiduciary relationship between the plaintiff and defendant.⁴¹⁸ In such a case, a court may require the defendant to pay for the cost of notifying absent class members. The fiduciary relationship between a union and its members may support application of these same principles in a private civil RICO action.⁴¹⁹

Another example of defendants paying the costs of litigation appears in cases in which receivers have been appointed. As a general rule, the costs of a receiver are paid out of the funds or property in receivership.⁴²⁰ This same rule has been applied against a labor union in a civil RICO case. In *United*

415. See FED. R. CIV. P. 23(d)(2).

416. 417 U.S. 156 (1974).

417. *Id.* at 177. FED. R. CIV. P. 23(c)(2) requires that potential class members in a Rule 23(b)(3) action be notified of the suit and provided with the opportunity to request that they be excluded from the class.

418. The Court noted that "where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit," a departure from the rule may be warranted. 417 U.S. at 178; see also *Popkin v. Wheelabrator-Frye, Inc.*, 20 Fed. R. Serv. 2d (Callaghan) 125, 128-30 (S.D.N.Y. 1975) (noting the fiduciary duty exception but refusing to apply it where it was impossible to tell if the suit was meritorious). And in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 361-63 (1978), although the Court held that \$16,000 was too substantial a sum to require the defendant to pay toward communicating with the class, it did not rule out the notion of a defendant paying such costs prior to judgment.

419. The Supreme Court has characterized the duty owed by a union to its members as analogous to the fiduciary duty in the corporate context. See *Air Line Pilot's Ass'n v. O'Neill*, 111 S. Ct. 1127, 1134 (1991).

420. "Generally, the courts hold that a receiver's compensation and the expenses necessarily incurred by him in preserving and caring for the property under an order of court are primarily a charge on and should be paid out of the fund of property in his hands." *SEC v. Investors Sec. Leasing Corp.*, 476 F. Supp. 837, 844 (W.D. Pa. 1979); accord *O'Leary v. Moyer's Landfill*, 677 F. Supp. 807, 822 (E.D. Pa. 1988); cf. *RESTATEMENT (SECOND) OF TRUSTS* § 242 (1959) (stating that expenses of the administration of the trust are charged to the property of the trust).

States v. Local 30, United Slate, Tile & Composition Roofers,⁴²¹ the court, in response to the government's request for preliminary relief, imposed a "decreeship" over a union local.⁴²² As part of the decreeship, the court appointed a court liaison officer to administer and enforce the provisions of the decree.⁴²³ The court further ruled that "all costs incurred in the administration of the decreeship" would be borne by the union local or its affiliated entities.⁴²⁴ Courts unquestionably have the power to require union defendants to pay the costs of preliminary relief in a civil RICO action.

A plaintiff that brings a civil RICO lawsuit can use these examples when arguing that the court has the authority to require union defendants to pay various costs of the litigation and that such a ruling would be consistent with the union's fiduciary obligations. Indeed, all union members arguably would benefit from a successful action.

As a final alternative, private plaintiffs may be able to obtain *pro bono* or public interest representation.⁴²⁵ The private plaintiff may look also to public interest groups, such as the Association for Union Democracy,⁴²⁶ for assistance in fund-raising. Thus, while funding the action may prove challenging, that same challenge exists for any union reformer who goes to court to vindicate union members' rights.

III. CONCLUSION

The RICO statute is a powerful tool for reforming labor unions that have become corrupted by organized crime. The federal government has used this tool with great success in a series of recent cases. The resources available to the federal

421. 686 F. Supp. 1139 (E.D. Pa. 1988), *aff'd*, 871 F.2d 401 (3d Cir. 1989).

422. *Id.* at 1168.

423. *Id.* at 1169.

424. *Id.* at 1174.

425. For example, the American Civil Liberties Union appeared on behalf of the Teamsters for a Democratic Union, a union dissident group, in the government's civil RICO action against the International Brotherhood of Teamsters. See *L.A. Times*, July 12, 1990, pt. D, at 7, col. 1.

426. The Association for Union Democracy, based in Brooklyn, New York, is a non-profit organization that seeks to promote the democratic rights of union members. See Kilborn, *Unions at a Loss to Reverse Falling Futures of Workers*, *N.Y. Times*, Sept. 2, 1991, § 1, at 1, col. 4 (late ed.).

government, however, are not unlimited. Moreover, the government has indicated that the RICO statute is an "extraordinary" weapon to be used "very sparingly."⁴²⁷ As a result, the federal government can be expected to seek to reform only the most egregious cases of unions that have been corrupted by organized crime.

The cases brought by the government, however, have established important precedents for reform of corrupted labor unions. Private litigants may be able to take these precedents and apply them in private civil RICO actions. The focus of this Article has been on the challenging obstacles that are likely to arise in private civil RICO actions. Many of these problems have already been addressed and overcome in the civil RICO actions brought by the government. The private civil RICO litigant should not have to "reinvent the wheel" on those issues. The private litigant will also face many other unique obstacles. Many of these problems, however, can be anticipated and overcome. The purpose of this Article has been to serve as a "road map" around both the common and the unique obstacles. This road map, of course, does not guarantee success. Some potential problems in bringing a private civil RICO action simply cannot be predicted. The RICO statute, however, holds great promise for the honest members and officials of trade unions throughout the country who are truly interested in fostering union democracy and honest trade unionism by every available means.

427. *RICO Hearings*, *supra* note 9, at 57 (statement of Benito Romano, United States Attorney, Southern District of New York).