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North Carolina RICO: A Critical Analysis and User's Guide

Business had not been good for Henry Rockhart, grower and seller of ginseng.¹ The buying public no longer seemed to believe ginseng's major selling point, its power as an aphrodisiac, and sales had fallen off in recent years. When Henry found that his neighbors, Sam and Sophie Sovski, had been stealing ginseng, Henry was ready to quit the business entirely.

The Sovskis had a problem too: Sam suffered from a certain failure in his physical relationship with Sophie. This condition worried them to distraction and made Sam willing to try nearly anything as a remedy, including ginseng. They did not want to steal from Henry, but the Sovskis were not wealthy, already having spent all of their savings on Sam's fresh oyster diet. Also, Sam thought Henry's price of twenty dollars per ounce was high for ginseng, especially because Henry had not sold much of it lately. Given the acres of ginseng Henry had growing behind his house, Sam believed Henry would never miss any. So every Sunday in the spring and summer of 1987, while Henry was at church, Sam and Sophie would drive to the field in their Chevette, hop over the fence, and dig up a few roots. They would then drive home, chop the root, and cure it in their oven. Sam drank a lot of ginseng tea in those months, but usually had some left over to sell to his brother Stan, who suffered from a similar affliction.

Unknown to either the Sovskis or Henry, agents of the State Bureau of Investigation's Special Task Force on Ginseng Larceny (STFGL) had staked out Henry's farm since March and had videotaped the periodic thefts. In August 1987, at the end of the ginseng growing season, the agents raided the Sovski home, arrested Sam and Sophie, and confiscated their Chevette, Magic Chef gas oven, tea pot and mugs, three kitchen knives, and a quantity of small filter bags containing a substance that analysis later showed to be ginseng. The agents also informed Henry of his loss.

Sam and Sophie were charged under North Carolina General Statutes section 14-79 for larceny of ginseng, a felony. A new assistant attorney general, Peter Powers, prosecuted them. The Sovskis pleaded guilty to seven counts of larceny of ginseng but the judge, sympathetic to Sam's disability, fined them costs of fifty dollars and placed Sam and Sophie on probation for six months.

Not satisfied that they had paid their debt to society, Peter Powers brought a civil action against the Sovskis under North Carolina's Racketeer Influenced and Corrupt Organizations Act (RICO).² Powers sought forfeiture of the confiscated items as well as other equitable relief. Because the Sovskis' felony convictions established a per se violation of RICO,³ the court ordered a judicial sale

1. The fictional characters and agencies in this introduction were created to illustrate the use and potential abuse of North Carolina's Racketeer Influenced and Corrupt Organizations Act (RICO). N.C. GEN. STAT. §§ 75D-1 to -14 (Interim Supp. 1986).

2. *Id.*

3. *See id.* § 75D-8(f).

of the oven and kitchen implements⁴ and retention of the Chevette by the STFGL for its operations.⁵ The court also prohibited Sam and Sophie from ever entering Henry's land.⁶

On the day of Sam's conviction a lawyer named Steve Sleaze approached Henry and told him about RICO's private action provisions.⁷ A week later Sleaze filed a RICO suit against the Sovskis on Henry's behalf. Henry's complaint alleged an injury to his business from the lost ginseng roots. Henry's complaint stated that because Sam stole three plants every Sunday for six months, and one plant produces an average of ten ounces, he lost an amount of ginseng worth \$14,400. The complaint sought damages of \$14,400, trebled to \$43,200, plus reasonable attorney's fees.⁸ Using the Sovskis' convictions as collateral estoppel,⁹ Sleaze handily won the case. Henry collected only \$3000, however, before Sam and Sophie filed for bankruptcy.

Although the North Carolina General Assembly probably did not intend RICO to be used in a case like the Sovskis', what happened to them is possible under the statute. As their experience illustrates, RICO provides a civil cause of action to the State against organized criminals. RICO also allows actions by private plaintiffs injured in their businesses by such criminals. The first part of this Note highlights RICO's more important sections and how the new law works—a user's guide. Sam and Sophie's case also demonstrates several of RICO's problems, such as its broad scope and potential for abuse. The second part of the Note examines these and other problems—a critical analysis. The Note concludes that parts of RICO, such as the State's civil forfeiture section, are unconstitutional. Other parts, such as the provision for private treble damages, will make RICO unworkable in practice. Finally, the Note recommends specific curative amendments to RICO that would make it both constitutionally and practically correct.

In 1986 the North Carolina General Assembly enacted RICO to deal with the problem of organized crime in the State.¹⁰ The statute begins with a statement of the general assembly's findings and intent. The general assembly found that organized crime is a problem in North Carolina, especially when such crime infiltrates the State's legitimate businesses.¹¹ Accordingly, the general assembly

4. See *id.* § 75D-5(j)(5).

5. See *id.* § 75D-5(j)(2).

6. See *id.* § 75D-8(a)(2).

7. See *id.* § 75D-8(c).

8. See *id.*

9. See *id.* § 75D-8(e).

10. Act of July 12, 1986, ch. 999, § 1, 1986 N.C. Sess. Laws 360, 361 (codified at N.C. GEN. STAT. §§ 75D-1 to -14 (Interim Supp. 1986)).

11. N.C. GEN. STAT. § 75D-2(a) (Interim Supp. 1986). The general assembly wrote:

The General Assembly finds that a severe problem is posed in this State by the increasing organization among certain unlawful elements and the increasing extent to which organized unlawful activities and funds acquired as a result of organized unlawful activity are being directed to and against the legitimate economy of the State.

Id. Although the general assembly did not define "directed to and against the legitimate economy," it likely meant, for example, the use of illicitly gained money to buy into legitimate businesses for "laundering" purposes or the extortion of "protection" money from legitimate businesses.

intended that RICO be used (1) to deter organized crime; (2) to prevent unjust enrichment of organized unlawful elements; (3) to restore the proceeds acquired by such elements to the general economy of the State; and (4) to compensate victims of organized unlawful activity.¹² Further, the general assembly made clear that RICO is to be directed only against "interrelated [patterns] of organized unlawful activity, the purpose or effect of which is to derive pecuniary gain,"¹³ not against "isolated and unrelated incidents of unlawful conduct."¹⁴ Finally, "legitimate business organizations" lacking any connection to organized criminals should not be subject to RICO actions.¹⁵

Following the statement of intent, section 75D-4 of RICO prohibits certain activities. Subsection (a) provides that no person shall:

- (1) engage in a pattern of racketeering activity or, through a pattern of racketeering activities . . . acquire or maintain . . . any interest in or control of any enterprise [or property]; or (2) conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity . . . or (3) conspire with another or attempt to violate any of [these] provisions.¹⁶

Violations, however, constitute not crimes but civil offenses; "therefore a mens rea or criminal intent is not an essential element of any of [these] civil offenses."¹⁷

To clarify the meaning of section 75D-4, the general assembly defined several terms. "Racketeering activity" is committing or attempting to commit certain acts that would be indictable crimes¹⁸ if accompanied by the requisite criminal intent.¹⁹ These acts are defined by reference to existing offenses, such as statutes prohibiting the sale, use, or possession of controlled substances.²⁰ The scope of "racketeering activity" is quite broad, including nearly all of North Carolina's felony offenses,²¹ with the exception of a few specific articles and sec-

12. *Id.* § 75D-2(b).

13. *Id.* § 75D-2(c).

14. *Id.*

15. *Id.*

16. *Id.* § 75D-4(a).

17. *Id.* § 75D-4(b).

18. The North Carolina General Statutes provide that a bill of indictment is proper only for offenses within the original jurisdiction of the superior court. *Id.* § 15A-627(b) (1983). "The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division . . ." *Id.* § 7A-271 (1986). The district court has jurisdiction over nonfelony offenses. *Id.* § 7A-272. Therefore, the superior court has jurisdiction over felonies, with some limited exceptions. *See id.* §§ 7A-270 to -271; *State v. Wall*, 271 N.C. 675, 157 S.E.2d 363 (1967). In general, then, indictable offenses are limited to felonies. Felonies are crimes punishable by death or imprisonment in the State's prison, crimes denominated as felonies by statute, or crimes that were felonies at common law. All other crimes are misdemeanors. N.C. GEN. STAT. § 14-1 (1986).

19. N.C. GEN. STAT. § 75D-3(c)(1) (Interim Supp. 1986).

20. RICO defines racketeering activity in part by reference to "Article 5 of Chapter 90 of the General Statutes of North Carolina relating to controlled substances and counterfeit controlled substances." *Id.* § 75D-3(c)(1)a.

21. *See supra* note 18. Certain misdemeanor statutes, however, state that they are indictable offenses. *See, e.g.,* N.C. GEN. STAT. § 14-114 (1986). It is unclear whether these misdemeanors are within RICO's scope. For further discussion of this point, see *infra* notes 148-53 and accompanying text.

tions.²² Unfortunately for Sam, his theft of the ginseng is one of the included crimes. The general assembly also incorporated into such acts the Federal RICO definitions of racketeering activities.²³ The federal definition of racketeering activity has been summarized by the United States Supreme Court:

any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, . . . and any "offense" involving bankruptcy or securities fraud or drug-related activities that is "punishable" under federal law.²⁴

A "pattern of racketeering activity" means committing two or more such racketeering acts that have similar purposes, results, accomplices, or victims, or that are otherwise interrelated.²⁵ One of the acts must occur after October 1, 1986, the effective date of RICO,²⁶ and one other must have occurred within the four preceding years.²⁷ Sam's repeated commission of racketeering activities in the spring and summer of 1987 established a RICO "pattern." Furthermore, his conviction on separate counts established a per se violation for the purposes of a State forfeiture action. Section 75D-8(f) provides that defendants convicted of criminal offenses that are "racketeering activities" over such a period as to establish a RICO "pattern" violate RICO per se.²⁸

A RICO violation results in two or more causes of action, one available to the State²⁹ and the others available to "[a]ny innocent person who is injured or damaged in his business or property by reason of any violation of [RICO]." ³⁰ The State claim proceeds through the Attorney General, who institutes an action under section 75D-5, the RICO civil forfeiture proceeding.³¹ Under this section "[a]ll property of every kind used or intended for use in the course of, derived from, or realized through a racketeering activity . . . is subject to forfeiture to the State."³² As with other civil actions, RICO forfeiture is governed by the North Carolina Rules of Civil Procedure.³³

In a RICO forfeiture action, property subject to such a suit may be seized

22. Racketeering activity is defined by reference to all of North Carolina's criminal statutes under chapter 14 except articles 9, 22A, 38, 40, 43, 46, 47, and 59, and §§ 14-78.1, -82, -86, -145, -146, -147, -177, -178, -179, -183, -184, -186, -190.9, -195, -197, -201, -202, -247, -248, and -313. N.C. GEN. STAT. § 75D-3(c)(1)b (Interim Supp. 1986).

23. *Id.* § 75D-3(c)(2).

24. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481-82 (1985) (citation omitted).

25. N.C. GEN. STAT. § 75D-3(b) (Interim Supp. 1986).

26. *Id.*; Act of July 12, 1986, ch. 999, § 3, 1986 N.C. Sess. Laws 360, 372 (codified at N.C. GEN. STAT. §§ 75D-1 to -14 (Interim Supp. 1986)).

27. N.C. GEN. STAT. § 75D-3(b) (Interim Supp. 1986). In computing the time separating racketeering activities, periods of imprisonment should be excluded from the four years. *Id.*

28. *Id.* § 75D-8(f). This subsection only applies to RICO actions commenced by the State. *Id.*

29. *Id.* § 75D-8(b).

30. *Id.* § 75D-8(c).

31. *Id.* § 75D-8(b). "Attorney General" means the Attorney General of North Carolina. *Id.* § 75D-3(f). The title may also include employees of the North Carolina Department of Justice and district attorneys of North Carolina. *Id.*

32. *Id.* § 75D-5(a).

33. *Id.* § 75D-5(b); see *id.* § 1A-1 (1983). In addition, RICO forfeiture actions may be in rem or in personam. *Id.* §§ 75D-5(c), (k).

before the action is commenced. Moreover, the owner need not be convicted criminally before a final forfeiture judgment is rendered.³⁴ A criminal conviction, however, makes the State's case easier because the defendant is estopped from relitigating issues proved in the criminal trial.³⁵ If convicted of two or more such crimes within a four-year period, the defendant is deemed per se to have violated RICO.³⁶ Should seizure take place prior to the filing of the complaint, however, it must be effected by a law enforcement officer incident to a lawful arrest, search, or inspection. Further, the officer must have probable cause to believe the property is subject to forfeiture and will be lost if not seized.³⁷

When the State files its suit before seizure, the complaint must: (1) specify the property sought to be forfeited; (2) state that the property sought is within the court's jurisdiction; (3) give the grounds for forfeiture; and (4) name all persons known to have an interest in the property. At this point the court must make two *ex parte* determinations. First, the court must decide whether reasonable grounds exist to believe the property is subject to forfeiture. The second determination is whether notice to intended persons would cause the loss or destruction of the property.³⁸ If the court finds reasonable grounds lacking, it must dismiss the suit.³⁹ If reasonable grounds exist, but notice would not cause loss of the property, the court must order notice to interested persons prior to a further hearing on the seizure.⁴⁰ If the court finds both that reasonable grounds exist and that notice would cause such a loss, it may order seizure of the property without notice or further hearing.⁴¹

After the property is seized and the complaint filed, every known interested person who has not yet been served must be served a notice of seizure and a copy of the complaint.⁴² Any interested person may join the action prior to judgment. Such a person need not be named in the State's complaint.⁴³ Pending final judgment, the court may dispose of the property in any way necessary to protect the property, so long as the court also protects the interests of innocent parties.⁴⁴ The statute makes clear that the interests of innocent parties are not to be forfeited. Thus, if Sam's brother owned the Chevette and he was an innocent party, the car could not be forfeited. To qualify as an innocent party, the brother must not have had "actual or constructive knowledge that the property

34. *Id.* § 75D-5(d). Although the statute is silent on this point, the State's burden of proof is probably a preponderance of the evidence, because RICO forfeiture is a civil action.

35. *Id.* § 75D-8(e).

36. *Id.* § 75D-8(f).

37. *Id.* § 75D-5(f). The Attorney General must then file a complaint within 31 days. *Id.*

38. *Id.* § 75D-5(e).

39. *Id.* § 75D-5(e)(1). The statute is silent as to what constitutes "reasonable grounds." See *id.*

40. *Id.* § 75D-5(e)(2).

41. *Id.* § 75D-5(e)(3).

42. *Id.* § 75D-5(g). Service should be in the manner prescribed by the North Carolina Rules of Civil Procedure, though the court may order service by publication within 30 days of the complaint's filing. *Id.*

43. *Id.* § 75D-5(h)(1).

44. *Id.* § 75D-5(h)(3).

was subject to forfeiture."⁴⁵ Further, if a creditor of Sam held a security interest in the Chevette, and Sam was in default on the related debt, the court could order the creditor to sell the car to satisfy the lien, with any excess to be paid back into the court.⁴⁶

Once the court reaches a judgment of forfeiture,⁴⁷ it has broad discretion in disposing of the property.⁴⁸ If its possession or use is illegal, the court may order the property destroyed.⁴⁹ The court also may allow the State to retain the property for official use.⁵⁰ For example, in Sam's case the STFGI agents received the Chevette. If no state agency wanted the car, the court could order its judicial sale.⁵¹ Further, the Attorney General may sue defendants who have notice of a RICO suit and who sell the property before it is seized.⁵² Had Sam sold the car while having notice of the RICO action, he would be liable for its fair market value.

In addition to forfeiture, the court may order several equitable remedies as part of its final judgment.⁵³ One such remedy is "[i]mposing reasonable restrictions upon the future activities . . . of any defendant in the same or similar type of endeavor [as originally violated RICO]."⁵⁴ For example, the court could enjoin Sam and Sophie from entering Henry's ginseng fields. When the violation involves an enterprise⁵⁵ such as a corporation or partnership, the court could order the enterprise dissolved⁵⁶ or the divestiture of a defendant's interest in it.⁵⁷ Moreover, the court may order "[a]ny other equitable remedy appropriate to effect complete forfeiture . . . or to prevent future violations."⁵⁸

As part of the State's enforcement, RICO includes an important procedural section. Section 75D-11 authorizes the North Carolina Attorney General to enter into "reciprocal agreements" with the Attorney General of the United States or attorneys general from other states that have similar RICO statutes.⁵⁹ Although the statute does not define "reciprocal agreements," it likely entails coordination between law enforcement agencies and sharing of proceeds from RICO actions involving interstate violators.⁶⁰

45. *Id.* § 75D-5(i).

46. *Id.* § 75D-5(h)(2).

47. The nature of the property (realty, personalty, or beneficial interest) determines when the title will vest in the State. *See id.* § 75D-5(l)(1).

48. The court's discretion is limited only by the interests of substantial justice and innocent parties. *See id.* § 75D-5(j)(7).

49. *Id.* § 75D-5(j)(1).

50. *Id.* § 75D-5(j)(2).

51. *Id.* § 75D-5(j)(5).

52. *Id.* § 75D-5(l)(2).

53. *Id.* § 75D-8(a).

54. *Id.* § 75D-8(a)(2).

55. Under RICO, "enterprise" is defined as any person, proprietorship, partnership, corporation, business trust, chartered union, governmental entity, association, or group of individuals associated in fact. Enterprise includes licit and illicit entities. *Id.* § 75D-3(a).

56. *Id.* § 75D-8(a)(3).

57. *Id.* § 75D-8(a)(1).

58. *Id.* § 75D-8(a)(7).

59. *Id.* § 75D-11.

60. *See infra* notes 111-14 and accompanying text.

In addition to the State's action, RICO provides a private cause of action for "[a]ny innocent person who is injured or damaged in his business or property by reason of . . . a pattern of racketeering activity."⁶¹ RICO, however, places limits on the private right of action. First, at least one of the racketeering acts complained of in the suit must not be mail or securities fraud.⁶² Second, a plaintiff must notify the North Carolina Attorney General of the private suit. The Attorney General may seek a stay of the private action if it will interfere with an ongoing public forfeiture suit.⁶³

In spite of these limitations, a private plaintiff has several incentives to bring an action. First, the plaintiff's claim to forfeited property is superior to the State's interest.⁶⁴ To enforce the claim, the private plaintiff need only intervene in the forfeiture proceeding before final judgment.⁶⁵ Second, a prior conviction of a crime considered a racketeering activity estops the defendant from raising matters settled in the trial.⁶⁶ In Sam's case, for example, Henry's private RICO suit primarily presented an issue of damages; Sam's criminal conviction established the RICO violation. These two advantages and the potential for treble damages⁶⁷ make RICO particularly attractive to private plaintiffs.

The foregoing user's guide is intended to be a quick and simple reference to RICO as it is currently written. Although the statute seems straightforward on its face, RICO's language and use raise several constitutional and pragmatic issues. The first constitutional issue is whether RICO's forfeiture action is in essence a civil or criminal statute. The United States Supreme Court noted the importance of distinguishing between criminal and civil actions in *United States v. Ward*.⁶⁸ The Court wrote:

The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to "any criminal case." Similarly, the protections provided by the Sixth Amendment are available only in "criminal prosecutions." Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court.⁶⁹

61. N.C. GEN. STAT. § 75D-8(c) (Interim Supp. 1986).

62. *Id.*

63. *Id.*

64. *Id.* § 75D-8(d).

65. *Id.*

66. *Id.* § 75D-8(e). "A final conviction in any criminal proceeding for a violation of those laws [defined as racketeering activities], shall estop the defendant in any subsequent civil action or proceeding under this Chapter as to all matters proved in the criminal proceeding." *Id.*

67. *Id.* § 75D-8(c). A private plaintiff "shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees." *Id.*

68. 448 U.S. 242 (1980). *Ward* involved an oil spill from a drilling facility leased by plaintiff. When plaintiff notified authorities of the spill as required by § 311(b)(5) of the Federal Water Pollution Control Act, he was assessed a \$500 "civil" penalty as provided for in § 311(b)(6) of the Act. *Ward* sought injunctive relief against the enforcement of the penalty and reporting requirement, and argued that because the penalty was in essence "criminal," the reporting requirement violated his right against self-incrimination under the fifth amendment. *Id.* at 244-47.

69. *Id.* at 248. Another such limited constitutional protection is the double jeopardy clause of the fifth amendment. *Id.* (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)). Furthermore, the

The Supreme Court in *Ward* held that the question of whether a penalty is criminal or civil is a matter of statutory construction.⁷⁰ The Court set out a two-step test for such a statutory analysis. The first step is whether the legislature indicated, either expressly or impliedly, a preference for one label or the other.⁷¹ This inquiry focuses on the intent of the legislature; a punitive intent indicates the law in question is a criminal proceeding.⁷² If the legislature's indicated intention is to establish a civil penalty, a court reaches the second step: "whether the statutory scheme [is] so punitive either in purpose or effect as to negate [the] intention."⁷³ This second inquiry involves a balancing of governmental and individual interests.⁷⁴ The court should recognize that a particularly burdensome penalty may require that a defendant be accorded some or all of the constitutional safeguards associated with criminal prosecutions.⁷⁵ For this second part of the test, however, "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."⁷⁶ Under this standard, a court should find an action to be criminal only if the penalty is so severe as to clearly belie the legislature's expressed intention.

Applying the first part of the *Ward* test to North Carolina's RICO forfeiture action, the statute at first seems to be civil in nature. The general assembly expressed an intent that violation of RICO "is inequitable and constitutes a civil offense only and is not a crime."⁷⁷ The implied intent, however, is also relevant. In *Trop v. Dulles*,⁷⁸ a case involving statutory forfeiture of citizenship, the Supreme Court, in an opinion by Chief Justice Warren, wrote:

In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.⁷⁹

In its statement of findings and intent, the general assembly directed RICO at "organized unlawful elements."⁸⁰ Furthermore, the general assembly stated

burden of proof differs between a civil and criminal case. The Court requires proof beyond a reasonable doubt only in criminal cases. *Id.* (citing *United States v. Regan*, 232 U.S. 37, 47-48 (1914)).

70. *Id.* (citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972)).

71. *Id.* (citing *One Lot Emerald Cut Stone*, 409 U.S. at 236-37).

72. Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192, 209 (1975).

73. *Ward*, 448 U.S. at 248-49 (citing *Flemming v. Nestor*, 363 U.S. 603, 617-21 (1960)).

74. Note, *supra* note 72, at 209.

75. Note, *supra* note 72, at 209.

76. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (quoted in *Ward*, 448 U.S. at 249).

77. N.C. GEN. STAT. § 75D-4(b) (Interim Supp. 1986).

78. 356 U.S. 86 (1958). *Trop* involved a statute that mandated the automatic forfeiture of a defendant's citizenship on conviction, by court-martial, of wartime desertion. Defendant attacked the statute on the grounds it constituted cruel and unusual punishment prohibited by the eighth amendment. The government argued that the statute was technically regulatory, not penal. The Court held for defendant. *Id.*

79. *Id.* at 96 (emphasis added) (footnotes omitted).

80. N.C. GEN. STAT. § 75D-2(c) (Interim Supp. 1986).

that its "purpose and intent" was to *deter* organized crime and to prevent unjust enrichment of such criminals.⁸¹ The general assembly's call for deterrence implies that its true purpose was penal.⁸²

Moreover, members of the general assembly have made public remarks indicating that RICO was intended to be a criminal statute. Speaking on deterring organized criminals, Representative Dennis A. Wicker stated: "They serve their time, and they have that profit and that gain to enjoy."⁸³ Representative H.M. Michaux stated: "They feel it is worth their time in prison to come out and enjoy the fruits of their crimes."⁸⁴ In supporting the RICO legislation, Attorney General Lacy Thornburg echoed the deterrence theme: "If we're going to give any real meaning to the idea that crime doesn't pay, then you have to take strong steps to take the profit out of crime."⁸⁵ It is clear from the statutory statement of intent and statements by individual general assembly members that the RICO statute is criminal in nature. The clause purporting to declare a RICO violation a civil offense is merely a subterfuge for the general assembly's true intention. The subterfuge results in part from the general assembly's desire to avoid the constitutional protections of a criminal proceeding.⁸⁶ Statements made by Attorney General Thornburg imply that the civil action was preferred because of its lower burden of proof.⁸⁷

Even if the legislative intent indicates RICO is a civil statute under the *Ward* test, it still must undergo the second inquiry: whether on balance the government's interests outweigh those of the individual. The *Ward* Court cited a prior Supreme Court decision, *Kennedy v. Mendoza-Martinez*,⁸⁸ as setting forth several standards by which to balance governmental and individual interests.⁸⁹ The *Mendoza-Martinez* standards are:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may be rationally connected is assignable for it, and whether it appears excessive in relation

81. *Id.* § 75D-2(b).

82. As the Supreme Court noted in *Trop*, deterrence is one of the purposes of criminal punishment. 356 U.S. at 96. That deterrence is one of RICO's purposes indicates that the general assembly intended state forfeiture to be a criminal proceeding.

83. Raleigh News and Observer, May 3, 1985, at 18A, col. 1.

84. *Id.*

85. *Id.*

86. The other part of the subterfuge involves an attempt by the general assembly to avoid a constitutional mandate that proceeds from criminal forfeitures go to local educational funding. If RICO is held to be a civil action, however, the courts will have broad discretion in disposing of the proceeds. See *infra* notes 107-17 and accompanying text.

87. Raleigh News and Observer, May 3, 1985, at 18A, col. 1. The News and Observer reported: "The Racketeer Influenced and Corrupt Organizations Act would provide a civil path to recovering property bought with profits from crime. Thornburg said that would be easier than criminal action because the burden of proof was not as strict in civil action." *Id.* at 18A, col. 1-2.

88. 372 U.S. 144 (1963).

89. *Ward*, 448 U.S. at 247-48 n.7.

to the alternative purpose assigned.⁹⁰

Applying these considerations to North Carolina's RICO forfeiture action, the balance falls in favor of the individual. RICO's main purpose is to deter organized *criminal* activity.⁹¹ Under RICO, "racketeering activity" is defined by reference to North Carolina's criminal statutes.⁹² Thus, the behavior to which RICO forfeiture applies is already criminal. The sole difference between criminal statutes and RICO is that racketeering activity does not require the *mens rea* or criminal intent necessary for a crime.⁹³ Moreover, forfeiture is an affirmative disability, unlike, for example, the divestiture of a person's interest in an enterprise, which should result in no loss to the defendant.⁹⁴

In finding RICO forfeiture a criminal proceeding, the most convincing of the *Mendoza-Martinez* factors is that forfeiture historically has been a criminal penalty, even when disguised by a civil label.⁹⁵ The best example of forfeiture in a criminal proceeding is Federal RICO, which clearly sets out forfeiture as a criminal penalty.⁹⁶ It is contradictory for the forfeiture penalty for the same offense to be criminal at the federal level but civil in North Carolina.⁹⁷ Why should a RICO defendant be accorded fewer federal constitutional protections simply because North Carolina rather than the federal government brings a forfeiture suit?

Moreover, the common law accords with the concept of forfeiture as a criminal penalty. In *United States v. United States Coin & Currency*⁹⁸ the government sued defendant for forfeiture of gambling money in addition to arrest-

90. *Mendoza-Martinez*, 372 U.S. at 168-69 (footnotes omitted). In striking the balance, however, not all the *Mendoza-Martinez* factors need point in one direction. *Id.* at 169.

91. See *supra* notes 77-87 and accompanying text.

92. N.C. GEN. STAT. § 75D-3(c) (Interim Supp. 1986). Other United States Supreme Court decisions, however, seem to indicate that this factor alone will not establish a statute as criminal. The Court has written that because "the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985). Further, in *Ward* the Court wrote: "We have noted on a number of occasions that 'Congress may impose both a criminal and a civil sanction in respect to the same act or omission.'" *Ward*, 448 U.S. at 250 (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)).

93. N.C. GEN. STAT. § 75D-3(c) (Interim Supp. 1986). Therefore, the *Mendoza-Martinez* condition of whether scienter is necessary to bring about forfeiture is not met. Even though scienter and criminal intent are not the same, RICO requires neither in a forfeiture proceeding. See *id.* § 75D-4(b).

94. Divestiture, another RICO remedy under § 75D-8(a)(1), theoretically involves no loss to the defendant; he is compensated for the value of the interest sold. In practice, of course, a forced sale may result in a return of less than fair market value. See Note, *Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970*, 18 U.S.C. § 1964 (1970), 53 TEX. L. REV. 1055, 1060 (1975).

95. *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700-01 (1965); *Boyd v. United States*, 116 U.S. 616, 634 (1886).

96. 18 U.S.C. § 1963 (Supp. IV 1986).

97. Both the North Carolina General Assembly and the United States Congress prescribe forfeiture for violations of the respective RICO provisions. *Id.*; N.C. GEN. STAT. § 75D-5 (Interim Supp. 1986). Further, North Carolina incorporates in its entirety the federal definition of "racketeering activity." N.C. GEN. STAT. § 75D-3(c)(2) (Supp. 1986); see also 18 U.S.C. § 1961(1) (Interim Supp. III 1985) (federal definition of "racketeering activity").

98. 401 U.S. 715 (1971).

ing him for failure to register as a gambler and pay taxes on his profits. The Supreme Court reasoned:

From the relevant constitutional standpoint there is no difference between a man who "forfeits" \$8,674 [the amount in issue] because he has used the money in illegal gambling activities and a man who pays a "criminal fine" of \$8,674 as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force.⁹⁹

In an earlier case, *One 1958 Plymouth Sedan v. Pennsylvania*,¹⁰⁰ the Supreme Court reached a similar conclusion. In *Plymouth Sedan* law enforcement officers illegally searched an automobile without a warrant and found thirty-one cases of untaxed liquor. Because of the exclusionary rule the State could not use evidence of the liquor in a criminal trial and instead sought civil forfeiture of the car.¹⁰¹ The trial court dismissed on the ground that forfeiture depended on the admission of the illegally obtained evidence. The Pennsylvania Supreme Court reversed, however, reasoning that the fourth amendment applies only to criminal proceedings and that forfeiture is a civil action.¹⁰² The United States Supreme Court disagreed with the Pennsylvania court's ruling and held that forfeiture is "quasi-criminal in character."¹⁰³ The Supreme Court reasoned that if defendant were convicted, he would have been subject to a maximum fine of five hundred dollars. In the forfeiture proceeding defendant was subject to losing his car, valued at one thousand dollars. Given that defendant would lose more in forfeiture than in a criminal conviction, it would be "anomalous" to hold that illegally seized evidence is admissible in a forfeiture proceeding, but not in a criminal prosecution.¹⁰⁴

The Court's reasoning in *Plymouth Sedan* applies to North Carolina RICO. The Sovskis, for example, were fined only fifty dollars and placed on probation at trial when they were accorded all the constitutional safeguards available in a criminal proceeding.¹⁰⁵ Yet, in the State's forfeiture suit, Sam and Sophie lost their car and other items but enjoyed none of these protections. Such a result was absurd in *Plymouth Sedan* and would be equally absurd under North Carolina RICO forfeiture. Because forfeiture historically has been held to be a criminal penalty and the common-law rationales apply as well to RICO, the balance of the *Ward* test comes down on the side of RICO forfeiture being a criminal proceeding.¹⁰⁶

99. *Id.* at 718.

100. 380 U.S. 693 (1965).

101. *Id.* at 694-95.

102. *Id.* at 695.

103. *Id.* at 700.

104. *Id.* at 701.

105. As Class I felons, of course, the Sovskis could have received five-year sentences. N.C. GEN. STAT. § 14-1.1(a)(9) (Interim Supp. 1986). Although an active sentence is arguably "worse" treatment than forfeiture, both smack of punishment and it seems difficult and arbitrary to draw a constitutional distinction between them.

106. A collateral issue is which of the constitutional protections should be accorded a RICO forfeiture defendant. If the forfeiture statute is found criminal under the *Ward* intent inquiry, the

In addition to federal constitutional concerns, the North Carolina Constitution provides another dimension to the issue of whether RICO is a civil or criminal statute. As RICO is written, forfeited property or its proceeds go first to interested innocent parties, with any excess going to the State's agencies or the State Treasurer.¹⁰⁷ Article IX, section 7 of the North Carolina Constitution, however, provides:

All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.¹⁰⁸

The key to the constitutional provision is the word *penal*. If RICO is criminal in nature, forfeitures must go to public education.

Regardless of the constitutional mandate, the general assembly specifically intended that RICO forfeiture proceeds *not* go to schools. Representative Dennis Wicker stated that RICO proceeds should be used for law enforcement and interstate cooperation, not education.¹⁰⁹ The general assembly's intent is reasonable; it is clear that more money is needed for law enforcement. State Bureau of Investigation Director Robert Morgan stated that earmarking RICO forfeitures for law enforcement is critical for certain operations:

Buy money for drugs is important right now . . . In the days of moonshine investigations, the sheriff would go out and buy a little liquor, arrest the guy right then and get his money back.

But if you do that with drugs, you only end up with the little guy, not the big distributors . . . And with cocaine costing about \$3,000 an ounce, we may put out \$40,000 before we even make an arrest.¹¹⁰

In addition, letting all proceeds go to education would discourage federal agencies and other states from helping North Carolina with interstate investigations.¹¹¹ RICO authorizes the Attorney General to enter into reciprocal agree-

Supreme Court has held that all safeguards apply. *E.g.*, *Mendoza-Martinez*, 372 U.S. at 167 ("[T]he Fifth and Sixth Amendments mandate that this punishment [forfeiture of citizenship] cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses."). Under a balancing of the interests, however, RICO could be deemed only "quasi-criminal" and a RICO forfeiture defendant would be entitled to some, but not all, of the constitutional protections. *See, e.g.*, *United States Coin & Currency*, 401 U.S. at 722 ("the Fifth Amendment's privilege may properly be invoked in these [forfeiture] proceedings"); *Plymouth Sedan*, 380 U.S. at 702 ("exclusionary rule is applicable to forfeiture proceedings"); *Boyd v. United States*, 116 U.S. 616, 634 (1886) ("forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature"). Although the extent of protection in a quasi-criminal proceeding is unclear, a defendant in such an action should be accorded the fifth amendment privilege against self-incrimination, *United States Coin & Currency*, 401 U.S. at 722, and the fourth amendment prohibition of unlawful searches and seizures, *Plymouth Sedan*, 380 U.S. at 702.

107. N.C. GEN. STAT. § 75D-5(j) (Interim Supp. 1986).

108. N.C. CONST. art. IX, § 7.

109. Durham Morning Herald, July 6, 1985, at 6A, col. 1.

110. *Id.*

111. *Id.* Representative Wicker, who made this point, left unclear why other states would be discouraged. Wicker's reasoning is probably that other states would not want to help North Caro-

ments with other states that have similar RICO laws and with the federal government.¹¹² Under RICO, North Carolina could join twenty-one other such states and thereby become eligible to share in the forfeited proceeds from interstate crime.¹¹³ The proceeds in question would be substantial. Senator Winner stated that "[t]here's no way to know how much money could be raised by this, but . . . it could raise several million dollars a year for the general fund."¹¹⁴

The general assembly, moreover, was aware of the school fund problem. Senator Robert Warren, for example, argued that RICO clashed with article IX, section 7 of the state constitution.¹¹⁵ Furthermore, the Senate Judiciary IV Committee, which sent RICO to the floor, was unable to resolve the question and instead opted to leave it to the courts.¹¹⁶ This reservation concerning RICO's constitutionality, however, did not prevent both houses from passing the law unanimously.¹¹⁷

In resolving the school fund problem, the courts and the general assembly will have two options, although each has problems associated with it.¹¹⁸ The first option is to argue that under article IX, section 7, the State at least can recover its costs in bringing about the forfeiture. The North Carolina Constitution only mandates that "clear proceeds" of the penalty go to education.¹¹⁹ In *Hightower v. Thompson*¹²⁰ the North Carolina Supreme Court defined "clear proceeds" as "the amount of the forfeit less the cost of collection."¹²¹ In a more recent case, *Cauble v. City of Asheville*,¹²² the North Carolina Court of Appeals articulated the rule for calculating clear proceeds:

[T]he test for determining permissible deductions from gross monies

lina if they were unable to share in North Carolina's forfeiture proceeds. If RICO forfeiture is declared criminal, it is likely that those states could not have a share of North Carolina forfeiture proceeds. See *State v. Maultsby*, 139 N.C. 583, 51 S.E. 956 (1905). In *Maultsby* the North Carolina Supreme Court declared unconstitutional a statute that authorized a fine but provided half the penalty be paid to an informant. The court reasoned that fines cannot include informant payments, because a fine's clear proceeds must go to the school fund and "clear proceeds" means the total sum less only collection fees. *Id.* at 585, 51 S.E. at 956. If other states' law enforcement agencies may be analogized to informants, North Carolina's constitution would also prohibit sharing forfeiture proceeds with the other states.

112. N.C. GEN. STAT. § 75D-11 (Interim Supp. 1986).

113. Raleigh News and Observer, May 3, 1985, at 18A, col. 1. Exactly how proceeds would be shared among states is unclear.

114. Raleigh News and Observer, July 12, 1986, at 5C, col. 2.

115. *Id.* For the text of art. IX, § 7, see *supra* text accompanying note 108.

116. Raleigh News and Observer, May 3, 1985, at 5C, col. 2.

117. *Id.*

118. An additional option is to argue that RICO forfeiture is not penal and thus not subject to article IX, section seven. As discussed above, however, the forfeiture action is almost certainly a criminal proceeding. Nevertheless, such an argument could be made in good faith. See *supra* notes 68-106 and accompanying text.

119. N.C. CONST. art. IX, § 7.

120. 231 N.C. 491, 57 S.E.2d 763 (1950).

121. *Id.* at 493, 57 S.E.2d at 765.

122. 66 N.C. App. 537, 311 S.E.2d 889 (1984), *aff'd*, 314 N.C. 98, 336 S.E.2d 59 (1985). *Cauble* involved a class action brought on behalf of the citizens of Asheville to compel the city to pay into the county school fund all overtime parking fines. *Id.* at 537, 311 S.E.2d at 890. The central issue was the definition of the "clear proceeds" of those fines. Before articulating the rule, the *Cauble* court also noted that the general assembly has not suggested any guidelines or formula for determining what costs are deductible in computing clear proceeds. *Id.* at 541, 311 S.E.2d at 892.

taken in is that the item to be deductible must bear a *reasonable relation* to the costs of collection of the fine. . . . [A] determination of costs can be made by qualified accountants, which determination is no more complicated than other problems accountants are daily accustomed to resolving.¹²³

The cost of buying drugs, for example, seems reasonably related to the cost of obtaining a forfeiture judgment against the dealers of those drugs. Therefore, law enforcement agencies could then be reimbursed for their investigatory costs.¹²⁴

The clear proceeds argument, however, has several problems. First, forfeiture proceeds may not be used to reimburse an agency in excess of expenses it incurred during that specific forfeiture action. In *Shore v. Edmisten*¹²⁵ the North Carolina Supreme Court held that "monies to be set aside for future enforcement of the law [could not] be deducted from 'fines' to arrive at 'clear proceeds.'" ¹²⁶ Given the *Shore* court's limitation, the general assembly's intention that all forfeiture proceeds go to law enforcement and interstate cooperation would likely be frustrated. Second, the *Cauble* line of cases involves penalties such as parking fines¹²⁷ and forfeiture of bond for nonappearance.¹²⁸ A court may distinguish *Cauble*'s clear proceeds rationale on the ground that RICO offenses include more serious crimes to which specific law enforcement expenses are not readily matched. If those expenses are uncertain, RICO may be beyond *Cauble*'s scope, and a court might disallow them in calculating clear proceeds.

If the clear proceeds argument fails, the general assembly has a second non-statutory option to avoid the school fund provision. In its annual budgeting process, the general assembly could simply allocate less money for education and more for law enforcement. Law enforcement would have a larger budget and the loss of general fund money from school budgets would be made up by

123. *Id.* at 543, 311 S.E.2d at 893-94 (emphasis added).

124. If the State loses in court on the clear proceeds argument, it may pursue the alternative theory of restitution. The North Carolina Supreme Court has held that "[a] state or a local agency can be the recipient of restitution where the offense charged results in particular damage or loss to it over and above its normal operating costs." *Shore v. Edmisten*, 290 N.C. 628, 633-34, 227 S.E.2d 553, 559 (1976). The *Shore* court went on to state:

In a prosecution for sale or possession of contraband we hold that it is proper to order the defendant to reimburse a state or local agency, as a condition for suspension of sentence or probation, any sum paid by its agents to the defendant in order to obtain evidence of the crime. Such a payment is not a fine.

Id. at 634, 227 S.E.2d at 559. If the reimbursement is not a fine, it is not subject to article IX, section 7. *Id.* at 635, 227 S.E.2d at 558-59.

Moreover, the general assembly has recognized restitution in N.C. GEN. STAT. § 90-95.3 (1985). Under that statute, a court may require a person convicted of offenses involving controlled substances to make restitution to law enforcement agencies for expenditures made in buying controlled substances as evidence of crime. Given this statutory recognition of restitution, a court might be more willing to extend the theory to the nondrug-related offenses that RICO covers.

125. 290 N.C. 628, 227 S.E.2d 553 (1976). In *Shore* the Clerk of Superior Court of Guilford County sought a declaratory judgment to determine the disposition of funds he held as a result of criminal fines. *Id.* at 629-30, 227 S.E.2d at 556-57.

126. *Id.* at 636, 227 S.E.2d at 560.

127. *E.g.*, *Cauble*, 66 N.C. App. at 537, 311 S.E.2d at 889.

128. *E.g.*, *Hightower*, 231 N.C. at 491, 57 S.E.2d at 763.

RICO forfeiture's "clear proceeds." This simple solution, however, has several practical problems.

First, the amount of the reallocation would be difficult to estimate. Although RICO forfeiture should produce substantial revenue, the exact sum is uncertain.¹²⁹ As time passes, however, the estimates should improve. Second, the reallocation could result in an unequal distribution of resources to the counties. If forfeiture proceeds go to counties in which RICO violations occurred, but the education budget is cut equally across the counties, those counties with RICO violations will have a windfall while the others suffer. In essence, counties with few violations will see their resources redistributed to counties with many violations. Third, cutting school budgets will not be popular with county school boards. The school boards will certainly perceive reallocation as a threat to their funding and oppose it statewide. Fourth, trying to avoid constitutional provisions may be perceived as wrong, even scandalous, by voters, a result likely to concern general assembly members. Last, a reallocation of money to law enforcement agencies will not cure the lack of interstate cooperation. Unless North Carolina simply gives away money, other states will not share in RICO forfeiture proceeds. Thus, the second option leaves the general assembly's intent to have interstate cooperation unfulfilled. The general assembly does not seem to have a complete solution to the school fund problem.

In addition to the questions of RICO's constitutionality, the statute raises several practical considerations, particularly those resulting from the general assembly's definition of "racketeering activity." First, this definition is at once too broad and too narrow. "Racketeering activity" is too broad in the sense that it covers offenses that seem either trivial or bear no logical relationship to RICO's stated purpose, which is to attack organized unlawful elements.¹³⁰ The Sovskis' offense of stealing ginseng from Henry Rockhart is but one of many that should not be a "racketeering activity." For example, felonies such as the illegal sale of Jamaica ginger¹³¹ or the malicious removal of packing from railway coaches¹³² bear no rational relation to organized crime. These crimes seem so trivial or archaic as not to merit felony status, let alone inclusion under RICO. Other examples include fraudulent entry of horses at fairs¹³³ or obtaining a certificate of registration of animals by false representation.¹³⁴

Many potentially more serious felonies simply bear no relation to RICO's purpose. Abortion and related offenses under article 11, for example, are unlikely to be abused by organized crime.¹³⁵ As reprehensible as it may be, rape also is not an offense properly within RICO's scope.¹³⁶ Organized criminals

129. See Raleigh News and Observer, July 12, 1986, at 5C, col. 2.

130. For a discussion of unlawful organized elements, see *supra* notes 10-15 and accompanying text.

131. N.C. GEN. STAT. § 14-389 (1986).

132. *Id.* § 14-161.

133. *Id.* § 14-116.

134. *Id.* § 14-103.

135. *Id.* §§ 14-44 to -46.

136. Article 7A covers rape and other sexual offenses. *Id.* §§ 14-27.1 to -27.10.

may commit terrible crimes, but sexual assault usually is not one of them. North Carolina's criminal statutes include literally dozens of felonies like these, all of which should be excluded from the definition of racketeering activity because they make RICO's scope too broad.¹³⁷

At the same time, however, the definition of racketeering activity is too narrow because the general assembly excluded many offenses, generally misdemeanors, that are rationally related to organized crime. The general assembly, for example, excepted all of article 47, which involves cruelty to animals, but should have kept the article's sections on cock fighting¹³⁸ and other animal fights.¹³⁹ As potential gambling activities, both misdemeanor offenses provide choice opportunities for organized crime. Likewise, gambling¹⁴⁰ and selling machine guns¹⁴¹ are misdemeanors excluded from the definition of racketeering activity, yet they seem logical offenses to include within RICO's scope. Many other such crimes arguably belong under RICO.¹⁴²

In many instances, moreover, the general assembly's choice of which offenses to include in or except from "racketeering activity" is redundant and even careless. Most of the offenses specifically excluded by section 75D-3(c)(1) are misdemeanors. These crimes presumably are already excluded because they are not indictable offenses. Examples include marathon dances,¹⁴³ public intoxication,¹⁴⁴ injuring bridges,¹⁴⁵ and misdemeanor sexual offenses.¹⁴⁶ That the general assembly excepted article 43, which involved vagrants and tramps, can only be characterized as careless, because article 43 already had been repealed.¹⁴⁷

137. Other examples include *id.* §§ 14-8 to -10 (civil rebellion); §§ 14-11 to -12.1 (subversive activities); §§ 14-177 to -202.2 (offenses against public morality and decency); § 14-288.6 (looting and trespass during emergencies).

The offenses against public morality and decency are troubling. Sections 14-190 and 14-190.4 to -190.5 cover the production and distribution of pornography, offenses that arguably may be infiltrated by organized crime. On one hand, these crimes seem natural candidates for RICO sanctions. On the other hand, RICO provides a great potential for abuse by state officials. For example, police used Florida's RICO laws to rid Fort Lauderdale of adult bookstores. RICO penalties succeeded when other tactics failed, including "relentless arrests and heavy police pressure," "rigorous enforcement of local ordinances and building codes," and alleged police harassment and intimidation. Wall St. J., Aug. 18, 1987, § 2, at 35, col. 4. Fort Lauderdale police now have turned their attention to retail video shops that stock adult films. *Id.* at 35, col. 6. Its use as a censorship device clearly is beyond RICO's stated purpose and raises an issue of first amendment freedom. See U.S. CONST. amend. I.

138. N.C. GEN. STAT. § 14-362 (1986).

139. *Id.* § 14-362.1.

140. *Id.* § 14-291.

141. *Id.* §§ 14-409, -409.9.

142. See, e.g., *id.* §§ 14-113.1 to -113.7A (fraudulent use of credit cards); § 14-118 (blackmail); §§ 14-203 to -208 (prostitution); § 14-226 (intimidating or interfering with witnesses); §§ 14-289 to -291.1 (illegal lotteries).

143. *Id.* §§ 14-310 to -312.

144. *Id.* §§ 14-443 to -447.

145. *Id.* § 14-146.

146. E.g., *id.* § 14-184 (fornication and adultery); § 14-186 (opposite sexes occupying same hotel bedroom); § 14-190.9 (indecent exposure). It is unclear why general assembly members went to such great lengths to ensure that certain offenses, such as fornication and adultery, would not be RICO violations.

147. See *id.* §§ 14-336, -338, -339, repealed by Act of Feb. 17, 1983, ch. 17, §§ 1-3, 1983 N.C. Sess. Laws 11, 11; *id.* § 14-337, repealed by Act of Mar. 28, 1973, ch. 108, § 13, 1973 N.C. Sess.

Another problem with RICO's scope is that it unintentionally may include several misdemeanors. Racketeering activities are acts that would be indictable if committed with the requisite mental state.¹⁴⁸ Indictable offenses generally include only felonies.¹⁴⁹ Certain misdemeanors, however, seem to be chargeable by indictment. For example, section 14-366, which involves molesting livestock, states that the offense is a misdemeanor but also provides for what must be alleged in an indictment.¹⁵⁰ Many misdemeanors include such language.¹⁵¹ The question arises whether indictable misdemeanors are included in the definition of racketeering activity. Because the criminal procedure sections which specify that only felonies are indictable postdate these misdemeanors, their language arguably supersedes any contrary language in the misdemeanor sections.¹⁵² If the general assembly intended only felonies, however, why did it proscribe "acts which would be chargeable by indictment" instead of "acts chargeable as felonies"?¹⁵³ At best this language is sloppy lawmaking. At worst it hints that the general assembly does not always know what it is doing. The language is at least contradictory and confusing to practitioners and courts.

A final problem with the general assembly's definition of racketeering activity is one of maintenance. The definition is *inclusive*—that is, the term includes all of the criminal offenses in chapter 14 of the North Carolina General Statutes except certain articles and sections.¹⁵⁴ This inclusiveness means that every time it amends chapter 14, the general assembly must consider its effect on RICO. Whenever the general assembly enacts a new felony, the offense will automatically become a racketeering activity, as is the case with computer hacking.¹⁵⁵ Given the care exhibited in enacting RICO in the first place, it seems unreasonable to expect the general assembly to consider carefully each amendment's effect on RICO.

Instead, the general assembly should rewrite the definition of racketeering activity to be *exclusive*—only those crimes specifically listed would be RICO offenses.¹⁵⁶ In addition to curing the maintenance problem, defining the term exclusively would force the general assembly to consider whether each offense is related to organized crime. The general assembly also should consult state and federal law enforcement agencies to determine which offenses it should include in RICO's scope. Furthermore, such close consideration should reduce the redundancy and carelessness apparent in the present definition.

Laws 84, 85; *id.* § 14-340, *repealed by* Act of June 30, 1971, ch. 700, § 1, 1971 N.C. Sess. Laws 803, 803; *id.* § 14-341, *repealed by* Act of June 30, 1971, ch. 699, § 1, 1971 N.C. Sess. Laws 803, 803.

148. N.C. GEN. STAT. § 75D-3(c)(1) (Interim Supp. 1986).

149. *See supra* note 18.

150. N.C. GEN. STAT. § 14-366 (1986).

151. *E.g., id.* § 14-114 (fraudulent disposal of personal property in which another holds a security interest); § 14-372 (unauthorized opening, reading, or publishing of sealed letters and telegrams).

152. *See supra* note 18.

153. *See* N.C. GEN. STAT. § 75D-3(c)(1) (Interim Supp. 1986).

154. *Id.* § 75D-3(c)(1)b.

155. *See id.* §§ 14-453 to -457.

156. The United States Congress, for example, wrote the Federal RICO definition of "racketeering activity" to be exclusive. *See* 18 U.S.C. § 1961 (Supp. III 1985).

A second practical consideration concerns the general assembly's incorporation of the federal definition of "racketeering activity" into its RICO statute. By incorporating this definition, North Carolina has incorporated all of the federal RICO statute's problems as well. Federal RICO has been criticized on a number of grounds, though most of the criticism has been linked to abuses in private civil suits.¹⁵⁷ In *Sedima, S.P.R.L. v. Imrex Co.*¹⁵⁸ the United States Court of Appeals for the Second Circuit wrote:

Given the general purpose of the RICO legislation, the uses to which private civil RICO has been put have been extraordinary, if not outrageous. Section 1964(c) has not proved particularly useful for generating treble damage actions against mobsters by victimized business people. It has, instead, led to claims against such respected and legitimate "enterprises" as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch, to name a few defendants labeled as "racketeers" in civil RICO claims resulting in published opinions.¹⁵⁹

The court of appeals further noted that it has become a "standard practice"¹⁶⁰ to include a RICO claim in tender offer suits,¹⁶¹ business fraud cases,¹⁶² and other securities¹⁶³ and bank fraud litigation.¹⁶⁴ A "RICO bar" has developed that specializes in defending and bringing private RICO suits.¹⁶⁵

The problem with Federal RICO and, by incorporation, North Carolina RICO, is twofold. First, both statutes provide for treble damages.¹⁶⁶ The barest possibility of treble damages seems to bring out attorneys with multiple and questionable claims. Second, under both Federal and North Carolina RICO statutes a defendant convicted of a crime defined as a racketeering activity is estopped "as to all matters proved in the criminal proceeding."¹⁶⁷ Estoppel makes private RICO actions doubly attractive because the cost of litigation is reduced and the plaintiff's case is much easier. Because of both treble damages and estoppel, North Carolina courts, like the federal courts, potentially will be

157. Compare N.C. GEN. STAT. § 75D-8(c) (Interim Supp. 1986) with 18 U.S.C. § 1964(c) (1982) (both statutes authorize private actions).

158. 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

159. *Id.* at 487. Even though the Supreme Court reversed the appellate court, it agreed that "[i]nstead of being used against mobsters and organized criminals, [RICO] has become a tool for everyday [business] fraud cases." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985).

160. *Sedima*, 741 F.2d at 487.

161. *E.g.*, *In re Action Indus. Tender Offer*, 572 F. Supp. 846 (E.D. Va. 1983).

162. *E.g.*, *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736 (N.D. Ill. 1981).

163. *E.g.*, *Trane Co. v. O'Connor Sec.*, 561 F. Supp. 301 (S.D.N.Y.), *vacated as moot*, 718 F.2d 26 (2d Cir. 1983).

164. *E.g.*, *Kleiner v. First Nat'l Bank*, 526 F. Supp. 1019 (N.D. Ga. 1981).

165. *Sedima*, 741 F.2d at 486-87.

166. 18 U.S.C. § 1964(c) (1982 & Supp. III 1985); N.C. GEN. STAT. § 75D-8(c) (Interim Supp. 1986).

167. N.C. GEN. STAT. § 75D-8(e) (Interim Supp. 1986); *accord* 18 U.S.C. § 1964(d) (1982). An argument can be made that estoppel makes later civil actions more efficient in that the plaintiff need not prove a RICO violation for the second time. If conviction equals estoppel, however, a defendant is more likely to fight at the criminal trial than plea bargain. Efficiencies gained in the civil action would be offset by the inefficiency of conducting a full criminal trial. Moreover, the costs of prosecution are borne by the State; North Carolina will, in effect, pay for part of private plaintiffs' cases.

inundated by questionable private RICO claims unrelated to the purpose of deterring organized crime.

The North Carolina General Assembly, however, was aware of the federal abuses¹⁶⁸ and adopted several preventive measures. Unfortunately, most of these measures are inadequate. First, Senator Winner stated that RICO's statement of intent makes clear it is not to be used as a weapon in normal business disputes.¹⁶⁹ The United States Congress, like the North Carolina General Assembly, made clear that Federal RICO was to be applied only against organized crime,¹⁷⁰ and much debate centered around the potential for malicious harassment of business competitors.¹⁷¹ Regardless of this intent Federal RICO has been abused.¹⁷² There is no reason to believe the general assembly's statement of intent will prevent such abuses in North Carolina.

A second safeguard is that RICO will expire in 1989 unless it is extended.¹⁷³ A shortcoming of this safeguard is the great potential for injustice between RICO's enactment and 1989. Many people could suffer abuses from State forfeiture actions and unfounded private treble damages suits. With regard to potential abuses, the general assembly should have acted in a preventive rather than curative manner; RICO should have initially been written to avoid abuse. For that reason the renewal safeguard is inadequate.

As a third protection, Senator Winner pointed to the RICO provision authorizing the Attorney General to seek a court order blocking the private action.¹⁷⁴ The section to which Winner referred, however, only allows a court to issue a stay of the private action if it finds that the private action will materially interfere with an ongoing public forfeiture action or that the Attorney General, because of public interest, should bring a public action.¹⁷⁵ The provision is designed to prevent a private suit from impairing a public action, not to prevent baseless private litigation. Even if the provision could be construed to protect against abuse, the statute provides no procedure by which a private defendant could appeal to the Attorney General for relief.

The fourth safeguard is the only one that may prevent some abuse, although it does not go far enough.¹⁷⁶ Section 75D-8(c) provides that for private RICO actions, at least one of the racketeering activities complained of must not be either (1) an act indictable as federal mail or wire fraud or (2) "an offense involving fraud in the sale of securities."¹⁷⁷ Under this section many of the

168. Raleigh News and Observer, July 12, 1986, at 5C, col. 2.

169. *Id.*

170. See 116 CONG. REC. 35,191 (1970).

171. H.R. REP. NO. 1549, 91st Cong., 2d Sess. 58, 187, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4007.

172. See *supra* notes 157-65 and accompanying text.

173. Act of July 12, 1986, ch. 999, § 3, 1986 N.C. Sess. Laws 360, 372; see Raleigh News and Observer, July 12, 1986, at 5C, col. 2.

174. Raleigh News and Observer, July 12, 1986, at 5C, col. 2.

175. N.C. GEN. STAT. § 75D-8(c) (Interim Supp. 1986).

176. Interestingly, this safeguard was the only one not mentioned by Representative Winner. See Raleigh News and Observer, July 12, 1986, at 5C, col. 2.

177. N.C. GEN. STAT. § 75D-8(c) (Interim Supp. 1986).

abuses noted by the appellate court in *Sedima*, such as suits for tender offer fraud,¹⁷⁸ are not possible. The general assembly, however, did not prohibit a private plaintiff from complaining of acts of fraud under North Carolina's criminal laws.¹⁷⁹ Thus, suits for other types of business fraud may still be abused by private RICO plaintiffs. The general assembly should have gone much further toward eliminating this kind of abuse.

In sum, North Carolina RICO has several constitutional and practical problems. RICO's language purporting to make the statute civil rather than criminal makes it unconstitutional. In other contexts, forfeiture defendants have been guaranteed no less constitutional protection than have criminal defendants. Because RICO forfeiture is in essence a criminal proceeding, it also brings into question the constitutionality of disposing of forfeiture property to uses other than county school funds.

The general assembly should cure these constitutional defects with two amendments. First, the general assembly should statutorily recognize that RICO is criminal. This amendment is necessary if there is to be any effective RICO-like law in North Carolina; otherwise, courts surely will hold RICO unconstitutional. Second, the general assembly should define "clear proceeds" in the statute itself to include all costs of obtaining forfeiture: investigation, prosecution, and administration expenses.¹⁸⁰ In that way, law enforcement agencies may be reimbursed for some of their operating expenses. Under this amendment, however, other states would not be able to share in North Carolina forfeiture proceeds, thus potentially impairing interstate cooperation. Apart from a constitutional amendment, little can be done about the school fund problem.

Fortunately, RICO's practical problems are less difficult to solve. The general assembly needs to make several amendments to the definition of "racketeering activity." First, section 75D-3(c)(1)b, which defines racketeering activity by reference to North Carolina's criminal statutes, should be made *exclusive*.¹⁸¹ Defining racketeering activity by specific criminal offenses will prevent RICO from becoming broader or narrower in scope each time the general assembly amends the criminal laws. Further, an exclusive definition will force the general assembly to examine each offense to determine whether it is related to organized crime. The resulting definition of RICO should be more cohesive and less redundant.

The general assembly also will need to prevent potential abuses by private RICO plaintiffs. The most obvious change is to eliminate treble damages; they are not necessary to compensate victims of organized crime, and their presence only invites abuse.¹⁸² A second amendment should disallow the use of estoppel

178. See *supra* notes 157-65 and accompanying text.

179. N.C. GEN. STAT. §§ 14-100 to -118.5 (1986).

180. The *Cable* court implied that a statutory definition of clear proceeds would be permissible, even desirable. *Cable v. City of Asheville*, 66 N.C. App. 537, 540-41, 311 S.E.2d 889, 892 (1984), *aff'd*, 314 N.C. 598, 336 S.E.2d 59 (1985); see *supra* note 122.

181. See *supra* notes 154-56 and accompanying text.

182. Of course, eliminating treble damages also eliminates RICO's punitive effect. A RICO defendant only will forfeit illegal profits and repay injuries, but will not suffer a greater loss simply as

by civil plaintiffs against criminally convicted defendants. Although it makes private suits more efficient, estoppel makes criminal proceedings inefficient¹⁸³ and attracts questionable claims. Instead of estoppel, the general assembly should specifically allow for a lower burden of proof in private actions, such as a preponderance of the evidence. The general assembly should also require a private plaintiff to show some connection between a defendant and organized criminal activity.¹⁸⁴ Although these amendments would make a plaintiff's case more difficult, the positive effect is that baseless suits would be discouraged.

Regardless of RICO's problems, the statute arose from a host of good intentions—deterring organized crime, preventing unjust enrichment, and compensating victims. Attacking crime by taking out its profit is a good weapon against criminals. North Carolina RICO fails, however, in translating this concept into statutory language. The suggested amendments to RICO should help direct it back toward its goals. These amendments, however, are just a beginning. They cure RICO's major defects, but other problems are sure to arise as RICO is litigated. If the general assembly follows RICO's development closely, making changes when necessary, and if courts interpret the statute to give effect to its purpose, RICO will deter organized crime and compensate its victims.

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punishment. The general assembly must weigh the need for punishment against the potential for abuse. As an alternative, however, the general assembly could impose heavy fines on RICO forfeiture defendants. Because a RICO violation would already be classified as a crime through amendment, assessing fines would pose no more procedural or constitutional difficulty.

183. See *supra* note 167.

184. Some authorities have even suggested restricting the private cause of action to cases in which a defendant has been criminally convicted. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d at 498-99. This restriction, however, would leave victims compensated only when the State chooses to prosecute. Further, the restriction would eliminate a plaintiff's usefulness as a "[p]rivate attorney general." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985).

