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Rico versus Organized Crime in the United States

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This paper will discuss the Racketeer Influenced and Corrupt Organizations Act (RICO)\(^1\) statute in the United States, or more specifically, RICO versus organized crime. An important focus of the paper will be on prosecutions in New York because it has been the venue for many famous RICO prosecutions. RICO has been used in criminal law for over 30 years. When RICO was first introduced, entire seminars were devoted to it, and the general consensus was that RICO would revolutionize criminal and civil enforcement. But RICO has not lived up to those early predictions. Today, RICO is a rarely used tool in criminal prosecutions, although it is often used in civil proceedings because it offers treble damages and attorneys' fees.\(^2\) RICO is used against hospitals, insurance companies, and banks. While RICO is rarely used in criminal cases now, when the government employs it, it has proven very effective.\(^3\) This paper will discuss some of the cases where RICO has been used effectively in criminal prosecutions.

Generally, RICO was intended to do three things: (1) strengthen the tools for gathering evidence; (2) establish new criminal penalties; and (3) provide new remedies such as forfeiture and freezing of assets. In an effort to foster the goals of RICO, many states also passed shadow legislation often called "Little RICO" statutes.\(^4\)

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RICO was originally passed to combat two major problems with the federal government’s campaign against organized crime. The first problem was insulation. The people atop organized crime successfully insulated themselves from prosecution by putting many layers between themselves and the guys who were actually breaking legs, collecting loans, picking up prostitution money, etc.

The government’s second problem with prosecuting organized crime was fungibility, or replacements. Since the top guys were insulated, the foot soldiers, who were easily replaceable, were the only ones being nabbed and put away. As soon as the feds took out one group or crew, the top guys would simply bring on a new crew to hit the streets.

Thus, RICO was devised to make it easier to prove liability of the people at the top for the acts done by the people on the streets. RICO’s purpose was to encourage aggressive prosecution and to extend liability to the top of an organization, as well as to allow the federal government to attack an entire enterprise as opposed to merely picking off individuals.

The federal statute has largely succeeded. Wiretap information captures mobsters themselves referring to the RICO statute by name. Indeed, there is a very famous tape from a case prosecuted in 1985, where the boss states, “under RICO, no matter who we are, what positions we have, if we’re together, they’ll get every one of us.”

This mobster offered a good summation of the law.

RICO is aimed at organized crime and not necessarily individual criminal acts. Thus, the government must show a pattern of racketeering activity, as defined by statute, by a criminal enterprise. The laundry list of crimes that can constitute racketeering activity continues to grow. The crimes prosecutors tend to rely on as staples for RICO prosecution are mail fraud, wire fraud, financial institution fraud, and other kinds of fraud. These are the types of predicate activities that can form racketeering activity for statutory purposes.

In addition to proving that the activity is considered racketeering, prosecutors must also show a pattern of such activity. A pattern has been defined to mean continuity plus a relationship. The predicate acts must to be related to each other, connected in some way, share a similar purpose, result, participants, victims, methods, or commission, or other distinguishing characteristics, and must show continuity. Basically, there must be at least two related predicate acts within a ten-

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6. "Racketeering activity" is defined in 18 U.S.C.A. § 1961(1)(A)-(D) and includes "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical."
9. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. at 496, 500-01 (1985) where the Supreme Court stated that in order to constitute a RICO "pattern," the predicate acts must have "continuity plus relationship."
year period by an enterprise. While an enterprise is defined to include non-legal entities, a law firm or corporation could also be charged under a RICO statute.

In probably the most famous RICO case, called the Salerno Case or the Commission Case, the entire criminal syndicate in New York City, known as La Cosa Nostra and comprising the five families, was considered an association-in-fact. The families formed an enterprise. These families were tied together by a gloss on the RICO statute that is not present in other federal substantive criminal statutes: a liberal construction clause.

Even with the liberal construction clause and RICO’s past successes, RICO is not often used in criminal prosecutions because of its complexity. If a prosecutor decides to indict under RICO, he or she must explain to a jury the definitions of enterprise, association-in-fact, pattern, and racketeering activity. It is usually more difficult to submit the numerous jury instructions defining these terms than it is simply to charge a defendant with the predicate acts.

Another reason for RICO’s passage was to stiffen penalties. The general penalty under RICO is 20 years, unless the predicate act could lead to a life sentence, in which case RICO contains a possible life sentence. The forfeiture provisions are also extremely important, as are the freezing provisions, which allow courts to freeze assets prior to the disposition of a case. Of course, freezing assets may impede a defendant’s ability to pay defense counsel.

The Federal Sentencing Guidelines determine how much time a convicted felon will serve in prison and include the presence of organized crime elements in a prosecution as grounds for an upward departure. Under the Guidelines, defendants are sentenced pursuant to a complex formula. Myriad factors play into the formula. The formula in a particular case presents the judge with a range of potential sentences (expressed in months). The vast majority of sentences imposed will fall within that range.

Yet, judges sometimes sentence above or below that range. A judge may upwardly depart from the range because of the presence of organized crime. A judge may downwardly depart due to a defendant’s providing substantial assistance to the government. In fact, substantially assisting the government, or “ratting out” colleagues, is the main way for a defendant to catch a break in the federal system.

10. 18 U.S.C.A. § 1961(5): "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of the prior act of racketeering activity."

11. 18 U.S.C.A. § 1961(4): "enterprise includes any individual, partnership, corporation, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity."

12. United States v. Turkette, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). According to the Supreme Court, "enterprise" connotes a group with a common purpose, with a continuity of personnel, and an ongoing formal or informal organization.


15. Id.

The harsh penalties of statutes like RICO increase the pressure on defendants to cooperate with the government.

As stated above, the most famous criminal case under RICO, the Salerno case, took place under the leadership of then-United States Attorney for the Southern District of New York, Rudy Giuliani. The Salerno Case involved a syndicate of five families in New York called La Cosa Nostra. The indictment encompassed the entire syndicate as an association-in-fact. Thus, the level of insulation between the boss and the bottom rung of the family crumbled, and the boss became liable for actions of other members of other families. The government pursued a strategy that stretched liability to its limit.

That case proves that association-in-fact is a flexible term under RICO, and the size of the conspiracy is really limited by two things: the imagination of the prosecutor and the size of the courtroom. Ultimately, those are probably the only factors that limit the RICO conspiracy. At trial the government presented evidence that this syndicate, or association-in-fact, regulated businesses among the families. The families promoted joint ventures when they needed to work together on a project, and they resolved disputes, both boundary disputes and turf wars.

Although RICO also reached white-collar crimes by the families, some of the predicate acts were hardly white-collar. For example, predicate acts included mob murders, extortions, and a bombing. As a result of the government’s powerful evidence, all defendants were convicted, and all but one defendant received a triple-digit sentence and a seven-figure fine.

The Salerno case pushed RICO liability to its boundary. The problem with such a great success is that it led to premature declarations of victory, from the U.S. President on down. In fact, Rudy Giuliani stated in 1986 that the Mafia would “cease to be major threat within ten years.” While Giuliani’s prediction was overly optimistic, it is hard to deny RICO’s effectiveness when used properly.

Among cases that have recently been prosecuted, in May of 1996, the boss of the Colombo crime family pled guilty to defrauding a Swiss and New Jersey-based company of $1.2 million. In 1999, the Bonnano, Colombo and Genovese organized crime families were all found to be involved in multiple stock manipulation scams worth millions of dollars. In June of 1999, members of the Bonnano and Gambino organized crime families were indicted in the largest securities fraud case in US history. In September of 2000, members of the Lucchese organized crime family were charged with siphoning millions of dollars from New York City’s construction industry. Finally, in December of 2001, 73 members of the Genovese family were arrested for racketeering activity accounting for $14 million in illicit revenue. These cases demonstrate that RICO is alive and well.

17. See United States v. Salerno, 868 F.2d 524 (2d Cir. 1989).
19. See Goodwin at 303, supra n. 11.
20. Id. at 320.
21. Id. at 321.
22. Id.
23. Id.
24. Id.
25. Id.
These cases also reveal two trends. First, all people in organized crime are replaceable, even mob bosses. Second, some mob chiefs were fairly successful at running their organizations from inside prison.

RICO has some drawbacks. The chief drawbacks are the complexity of the statute, which makes it difficult for some juries to follow, and the danger of overusing it. A statute that contains the word "racketeer" ought to be somewhat limited in its use. The final problem is that, although the Federal Sentencing Guidelines posit organized crime as a basis for an upward departure, arguably the Guidelines have led to fewer, rather than more racketeering cases. Significantly, the Guidelines are very harsh toward certain crimes, particularly drug offenses. Therefore, even though many drug cartels could be charged under RICO, the drug sentences are usually so onerous that it becomes unnecessary to use RICO for additional leverage.

The crime families are not the only, or even chief, groups conducting organized crimes. Traditional organized crime is dying and being replaced by new forms of organized crime. The same activities typically associated with the familiar crime families are being committed by other groups, including motorcycle gangs, youth gangs, prison gangs, and as demonstrated on September 11, 2001, international terrorist organizations. These evolving groups present a greater challenge to prosecutors than the old-style families.

Organized crime presents a greater challenge now than it did when RICO was passed for two chief reasons. First, the days of making easy cases against organized crime by tapping into phones and slipping agents undercover into meetings are vestiges of the past. More and more often, organized crime communicates through computers with powerful encryption. Thus, crime barons avoid meetings and phone calls whenever possible. While dumb disorganized crooks will continue to be caught by the old methods, more sophisticated organized crooks will not.

The second reason that RICO now faces greater challenges is the international nature of criminal organizations. A recent case involving a huge international kiddie porn organization that raked in tens of millions of dollars a year presents a good example. The leaders of that organization never set foot in the United States. They conducted their business over the internet, and they remained far from the United States, operating from countries that do not extradite to the United States. Consequently, international task forces are replacing the old state or regional task forces in order to crack computer communications and combat new international organizations. As organized crime continues to evolve, RICO must evolve as well.