RICO Forfeiture: Can the Adversary Be Removed from the Adversary Process?

Leigh Roadman

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Leigh Roadman, RICO Forfeiture: Can the Adversary Be Removed from the Adversary Process?, 35 DePaul L. Rev. 709 (1986)
Available at: https://via.library.depaul.edu/law-review/vol35/iss3/5

This Legislation Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
LEGISLATIVE NOTE

RICO FORFEITURE: CAN THE ADVERSARY BE REMOVED FROM THE ADVERSARY PROCESS?

INTRODUCTION

Fifteen years ago, Congress passed the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO). Congress intended for the Act to provide law enforcement agencies with strong legal tools to combat organized crime. In enacting RICO, Congress recognized that the continued existence of organized crime is primarily due to the large economic base underlying the criminal organization. Congress included forfeiture provisions in the RICO statute to remove that economic base.2

A Government Accounting Office Report,1 presented to Congress in 1981, concluded that in the ten years since RICO's enactment, law enforcement agencies' use of the act's forfeiture provisions had fallen far below Congress's original expectations. The report attributed the shortfall to the statute's ambiguities,4 judicially imposed limitations,5 and lack of enforcement.6 As a result of this report, Congress passed the Comprehensive Forfeiture Act of 1984 (the Act).7 In passing this act, Congress intended to correct the prior statute's deficiencies and again provide an effective forfeiture remedy. The Act makes substantial changes to the RICO forfeiture provisions and significantly increases the attractiveness of the forfeiture remedy to federal law enforcement agencies.8

The enactment of these amendments has increased forfeiture activity by all federal law enforcement agencies. In addition to the overall increase in forfeiture activity, law enforcement agencies have also attempted to utilize this statute to reach the property transferred by RICO defendants to their legal counsel in payment for services rendered.9 These potential forfeiture actions directed toward RICO defendants' legal counsel present important

---

2. See infra notes 48-67 and accompanying text.
4. Id. at 30. See infra notes 69-71 and accompanying text.
5. Id. at 18. See infra notes 69-71 and accompanying text.
6. Id. at 16. See infra notes 69-71 and accompanying text.
8. See infra notes 75-97 and accompanying text.
9. See infra notes 98-114 and accompanying text.

709
questions concerning a defendant's sixth amendment right to counsel,\(^\text{10}\) the attorney-client privilege,\(^\text{11}\) an attorney's obligations under the rules of professional responsibility,\(^\text{12}\) and the balance of power between the competing sides in the adversary process.\(^\text{13}\)

The purpose of this Comment is threefold: first, to trace the development of the RICO forfeiture provisions; second, to discuss the substantive changes made to the RICO statute by the Comprehensive Forfeiture Act of 1984; and finally, to analyze the court decisions that have considered the application of the RICO forfeiture provisions to attorneys' fees, and to suggest appropriate legislative revisions to the RICO forfeiture provisions.\(^\text{14}\)

I. BACKGROUND

A. Forfeiture Statutes in Federal Law

Currently, two types of federal statutes may be utilized to forfeit crime-related property: \textit{in rem} and \textit{in personam} statutes. The majority of federal forfeiture statutes provide for civil \textit{in rem} forfeiture proceedings against the property itself.\(^\text{15}\) Nevertheless, some federal statutes provide for \textit{in personam}

\(^{10}\) See infra notes 115-29 and accompanying text.

\(^{11}\) See infra notes 130-37 and accompanying text.

\(^{12}\) See infra notes 138-40 and accompanying text.

\(^{13}\) See infra notes 141-47 and accompanying text.

\(^{14}\) See infra notes 148-49 and accompanying text. The applicability of the RICO forfeiture provisions to attorneys’ fees paid by RICO defendants has been a subject of much discussion. See, e.g., Buffone, \textit{Forfeiture of Attorneys’ Fees and the Effect of the Crime Control Act of 1984}, DRUG L. REPORT 145 (1985) (forfeiture provisions may leave defendants without lawyer of their choice and without funds to prepare defense, as well as eroding basic trust which is cornerstone of attorney-client relationship); DePetris & Bachrach, \textit{Forfeiture of Attorneys’ Fees—A Responsible Approach}, N.Y.L.J., June 19, 1985, at 1, col. 3 (suggesting procedures to be followed in order to achieve proper balance between competing interests of government and defendant); Margolin, \textit{Forfeiture of Attorney Fees and the Future of the Criminal Defense Bar}, THE CHAMPION, June 1985, at 10 (application of forfeiture provisions to defense attorneys discourages handling of criminal defenses); Moffit, \textit{The Twilight of the Attorney—Client Privilege}, THE CHAMPION, October 1985, at 15 (providing hypothetical picture of future of small law firm faced with client seeking representation against RICO prosecution); Morvillo, \textit{Freezing and Squeezing Lawyers}, N.Y.L.J., April 2, 1985, at 1, col. 1 (discussing recent steps taken against defense attorneys by prosecutors, as well as potential effect of forfeiture and other legislation on defense bar); Robinson, \textit{Targeting Lawyers, New Assault by Prosecutors on Attorney-Client Privilege, Fee Arrangements}, NAT’L L.J., Jan. 21, 1985, at 1, col. 2 (discussing forfeiture provisions of Comprehensive Forfeiture Act of 1984).

\(^{15}\) Examples of statutes providing for \textit{in rem} forfeiture proceedings are 18 U.S.C. § 1082 (1982) (ships used for illegal gambling purposes); id. § 1465 (items used in transportation of obscene materials for sale or distribution); id. § 3612 (illegal bribe money); id. § 3615 (illegally possessed liquor and any vehicle used in transportation thereof); 19 U.S.C. § 1497 (1982) (failure to declare at entry); id. § 1594 (libel of vessels and vehicles); id. § 1595(a) (seizure for unlawful importation); 21 U.S.C. § 334(a)(1) (1982) (adulterated food); id. § 881 (assets used in drug
RICO FORFEITURE

1986]

forfeiture through a criminal proceeding directly against the offending individual. This latter type imposes forfeiture as a criminal sanction in addition to other sanctions that may be imposed upon the defendant.16

1. In Rem Forfeiture Proceedings

In rem forfeiture proceedings are well recognized in this country.17 Virtually any property used in a criminal offense may be subjected to an in rem forfeiture proceeding.18 The constitutionality of in rem forfeiture proceedings has been challenged on a number of occasions. The most common challenge is that in rem proceedings violate the due process clause of the United States Constitution.19 The due process challenges are based on the theory that the owner of the property is innocent, but is nonetheless being deprived of the enjoyment of his property.20 Courts have, however, consistently upheld the use of in rem forfeiture proceedings on the theory that the proceeding against the property stands independent of any action against its owner.21 The courts

violations, such as boats, cars, and manufacturing equipment); 26 U.S.C. § 5615 (1982) (distilling apparatus); id. § 5661 (illegal wine); id. § 5872 (illegal firearms); id. § 5671 (illegal beer); id. §§ 7301-7303 (property subject to internal revenue laws); 46 U.S.C. § 325 (1982) (vessels regulations); 49 U.S.C. § 782 (1982) (any vessel, vehicle or aircraft used in transportation of illegal contraband). See also Comment, RICO Forfeitures and the Rights of Innocent Third Parties, 18 Cal. W.L. Rev. 345, 349 (1982) (discussing third party rights in in rem forfeiture proceeding) [hereinafter cited as Comment, RICO Forfeiture]; Note, Criminal Forfeiture and the Necessity for a Post-Seizure Hearing: Are CCE and RICO Rackets for the Government?, 57 St. John's L. Rev. 776, 783 (1983) (early forfeiture statutes as well as most of their modern counterparts provide for civil in rem proceedings against offending property) [hereinafter cited as Note, Criminal Forfeiture].


17. Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511 (1921) (in rem forfeiture proceedings are firmly fixed in punitive and remedial jurisprudence of this country).


19. The fifth amendment states, "No person shall . . . be deprived of life, liberty or property without due process of law . . . ." U.S. Const. amend. V.


have almost uniformly rejected the innocence of the owner as a defense. A party who has no legal basis for relief, however, may petition the Attorney General for equitable relief in the form of mitigation or remission of the forfeiture.

2. *In Personam* Forfeiture Proceedings

An *in personam* forfeiture proceeding differs from an *in rem* proceeding, in that the *in personam* action is against the owner of the property, rather than the property itself. The widespread use of *in personam* forfeiture is a recent development in federal law, resulting from Congress's enactment of *in personam* forfeiture provisions in both the RICO statute and the Continuing Criminal Enterprise statute in 1970. While the widespread use of *in personam* forfeiture may be recent, the concept of such forfeiture is rooted in English common law.

Under the common law of England, a conviction for a felony or treason resulted in the complete forfeiture of all of the convicted person's real and personal property. Convicted felons forfeited their chattels to the Crown. 

---

Palmyra case, Justice Story enunciated the rationale of this line of cases:

It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of conviction . . . . [T]he [Crown's right to the goods and chattels] attached only by the conviction of the offender . . . . But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be *malum prohibitum*, or *malum in se* . . . . [T]he practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.

---


23. See, e.g., 19 U.S.C. §§ 1617, 1618 (1982). According to these sections, a party whose property has been forfeited pursuant to the United States customs laws may petition the collector of customs and the Secretary of the Treasury for the remission or mitigation of any penalties imposed, including forfeiture.


while their lands escheated to their lord. Convicted traitors forfeited all their property, real and personal, to the Crown. These forfeitures were based on the belief that a breach of the criminal law was an offense to the King's peace. Accordingly, the offender was denied the right to own property. In addition, when convicted of treason or a felony, the defendant's "blood was corrupted so that nothing could pass by inheritance through his line." This complete divestiture of property was known as "forfeiture of estate." While forfeiture practices varied substantially from colony to colony in early America, forfeiture of estate generally found little favor. In 1787, the founding fathers drafted the Constitution and banned the imposition of forfeiture of estate and corruption of blood for treason. Three years later, the first Congress abolished the use of forfeiture of estate for all convictions and judgments. Despite this prohibition, Congress, in the Confiscation Act of 1862, authorized the President to seize the property of those who had joined the Confederacy in the Civil War. The Supreme Court upheld that Act's constitutionality, but limited forfeiture to the life estates of the Confederate sympathizers. By so doing, the Court recognized the validity of the reversionary interests of these person's heirs.

**B. The Enactment of RICO**

Acting at the behest of federal prosecutors, Congress enacted the Organized Crime Control Act of 1970 to aid law enforcement officials in their efforts...
to eradicate organized crime in the United States. Title IX of this act includes a chapter entitled "Racketeer Influenced and Corrupt Organizations," which sets forth four general types of prohibited criminal activity. Section 1962(a) prohibits an individual from using illegitimately obtained funds to acquire a legitimate enterprise, by prohibiting any person from using either income, or the proceeds of income, derived directly or indirectly from racketeering activity or illegal debt collection to establish, operate, or acquire an interest in an enterprise affecting interstate commerce. Section 1962(b), on the other hand, prohibits the acquisition of a legitimate enterprise through the use of illegitimate means, other than the income or proceeds attributable to those illegitimate means. Under this section, no person can use a pattern of racketeering or unlawful debt collection to acquire, maintain an interest in, or control any enterprise affecting interstate commerce.

37. Pub. L. No. 91-452, 84 Stat. 922 (1970). In the Statement of Findings and Purpose of the Act, Congress stated, "It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Id. at 923.


   It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

40. In order to meet its burden of proof, the prosecution must only prove that illegally derived funds entered the enterprise. The prosecution need not show a trail of specific dollars from a particular criminal act. United States v. Cauble, 706 F.2d 1322, 1342 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). A similar conclusion was reached in United States v. McNary, 620 F.2d 621 (7th Cir. 1980), where the court held that § 1962(a) does not require that the illicit income be used or invested in an enterprise affecting interstate commerce.

41. To satisfy the interstate element of § 1962(a), the enterprise, not the individual defendant, must be shown to engage in or affect interstate commerce. United States v. Groff, 643 F.2d 396 (6th Cir.), cert. denied, 454 U.S. 828 (1981). Likewise, the prosecution must show that the enterprise, not the racketeering acts, affected interstate commerce. Only a slight nexus need be shown, however, to establish the requisite effect on commerce. United States v. Long, 651 F.2d 239, 241-42 (4th Cir.), cert. denied, 454 U.S. 896 (1981). See also United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980) (government must show nexus, albeit slight, between enterprise and interstate commerce); United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978) (government must show at least slight evidence that enterprise affected interstate commerce).

42. 18 U.S.C. § 1962(b) (1982) states, "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."

Section 1962(c) is directed at those individuals who are employees or associates of an illegitimate enterprise rather than at those attempting to gain control of a legitimate enterprise. This section prohibits any person employed by or associated with an enterprise from conducting or participating in the affairs of the enterprise in a manner that constitutes a pattern of racketeering or illegal debt collection. Finally, section 1962(d) makes conspiracy to violate sections 1962(a), (b), or (c) a separate offense.

C. RICO Forfeiture Provisions

The primary motivation for enacting RICO was to curtail the increasing wealth and influence of organized crime by attacking its economic base.
After a RICO conviction, the statute provided for criminal in personam forfeiture of any interest the defendants had acquired in the enterprise they were charged with corrupting. The penalty of forfeiture was in addition to more traditional punitive measures, such as fines and imprisonment. The constitutionality of the RICO forfeiture provisions has been challenged on the grounds that the forfeiture provisions are unconstitutionally vague, that a RICO forfeiture constitutes an unconstitutional forfeiture of estate, and that a RICO forfeiture results in cruel and unusual punishment under the eighth amendment. Despite these challenges, the courts have consistently upheld the constitutionality of the forfeiture provisions.

A RICO forfeiture action begins at the issuance of a grand jury indictment alleging that the defendant has violated the statute, along with specifying what property is subject to forfeiture. If the defendant is found guilty of available to the Government are unnecessarily limited in scope and impact.


48. Senator McClellan, a sponsor of the RICO Act, stated:

[T]itle IX is aimed at removing organized crime from our legitimate organizations. Experience has shown that it is insufficient to merely remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains.


49. 18 U.S.C. § 1963(a) (1982) provides:

Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

50. United States v. Thevis, 474 F. Supp 134, 142 (N.D. Ga. 1979) (RICO forfeiture provisions are clearly drafted and are not unconstitutionally vague or ambiguous). See also United States v. Huber, 603 F.2d 387, 393 (2d Cir. 1979) (court refused to reconsider its holding that RICO is not unconstitutionally vague).

51. United States v. Conner, 752 F.2d 566, 577 (11th Cir. 1985) (RICO forfeiture is for exact amount of money which defendant illegally received in contravention of statute and therefore is not cruel and unusual punishment); United States v. Grande, 620 F.2d 1026, 1039 (4th Cir. 1980) (RICO forfeiture results in forfeiture of narrow interest of defendant); United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977) (Congress recognized that in passing § 1963 it was repealing part of statute enacted by First Congress prohibiting forfeiture of estate); United States v. Thevis, 474 F. Supp. 134, 141 (N.D. Ga. 1979) (RICO forfeiture affects only defendant's unlawfully maintained interest in enterprise and is thus not forfeiture of estate).

52. United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979) (RICO forfeiture is not cruel and unusual punishment because forfeiture provision is keyed to magnitude of defendant's criminal enterprise and is thus proportional to crime); United States v. Thevis, 474 F. Supp. 134, 141 (N.D. Ga. 1979) (RICO forfeiture is neither excessive nor disproportionate and does not involve needless severity).

53. See supra notes 39-46 and accompanying text.

54. The Federal Rules of Criminal Procedure provide that "when an offense charged may
the RICO charges, the finder of fact must then return a special verdict listing
the property subject to forfeiture and authorizing the Attorney General to
seize such property. The physical seizure of the defendant's property, however, only occurs after a conviction.

Despite this relatively straightforward procedure, the application of the statute has proven difficult. Consequently, the effectiveness of the forfeiture provisions to law enforcement agencies has been diminished. For example, while section 1963(a) provided for the forfeiture of "any proceeds" of the defendant's criminal activities, it was ambiguous whether this was limited solely to direct proceeds, or whether it should be applied broadly to allow the statute to reach both direct and derivative proceeds. It was not until 1983, in Russello v. United States, that the Supreme Court resolved this issue by holding that both direct and derivative proceeds of a defendant's criminal activities were subject to forfeiture under RICO.

result in a criminal forfeiture, the indictment or information shall allege the extent of the interest or property subject to forfeiture." Fed R. Crim. P. 7(c)(2). In United States v. Hall, 521 F.2d 406 (9th Cir. 1975), the court held that if the indictment does not contain a forfeiture count, criminal forfeiture automatically ceases to be an available remedy. Id. at 408.

55. The Federal Rules of Criminal Procedure state, "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." Fed. R. Crim. P. 31(e). See also Weiner, supra note 27, at 253 (once jury makes judgment of relationship of property or interest to criminal violation, court cannot preempt jury's decision).

56. Section 32(b)(2) of the Federal Rules of Criminal Procedure states, "When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper." Fed. R. Crim. P. 32(b).

57. See supra note 49 and accompanying text.

58. United States v. McManigal, 708 F.2d 276 (7th Cir.), vacated on other grounds, 464 U.S. 979 (1983) (term "any interest" used in RICO's forfeiture provisions does not include income, proceeds, or profits derived from pattern of racketeering activity); United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980) (RICO forfeiture is limited to defendant's interest in criminal enterprise and does not include amount paid or payable for performance of contract procured through pattern of racketeering activity).


61. Id. at 22. In Russello, the petitioner had been convicted under RICO due to his involvement in an arson ring that fraudulently received insurance proceeds in payment for the fire loss of a building he owned. A judgment of forfeiture was also entered against the petitioner for the amount of the insurance proceeds pursuant to 18 U.S.C. § 1963(a)(1). The petitioner challenged this judgment of forfeiture on the grounds that these insurance proceeds were not
A second major area of uncertainty under the original RICO forfeiture statute centered upon the language in section 1963(b). This section authorized the government to seek a pre-conviction restraining order to guard against the improper disposition of the defendant’s otherwise forfeitable assets. While jurisdiction was conferred upon the court to entertain applications by the government for such orders, the statute itself did not articulate the procedural standards the court should follow. Furthermore, section 1963(b) failed to adequately protect the government’s interest in assuring that the proceeds of the defendant’s criminal activities would be available for forfeiture upon conviction. This inadequacy resulted because the section did not provide the government with the authority to seek a pre-indictment restraining order. Moreover, the section failed to provide for the forfeiture of other assets of the defendants in the event that they successfully transferred their forfeitable assets prior to being convicted. A final problem with the

an interest in an enterprise within the meaning of § 1963(a)(1) and were therefore not subject to forfeiture. The Supreme Court rejected this argument and held that § 1963(a)(1) reaches more than only interests in an enterprise. In so holding, the Court noted that Congress did not specifically define the term “interest” in the RICO statute, and that therefore the legislative purpose in using this term must be expressed by the term’s ordinary meaning, which comprehends all forms of real and personal property, including profits and proceeds. Id.

62. 18 U.S.C. § 1963(b) (1982). Prior to amendment, § 1963(b) provided that, “In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including but not limited to, the acceptance of satisfactory performance bonds in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.” Id.

63. In the absence of clear statutory direction, the courts were left to their own judgment in determining the standards that should be applied in the issuance of a restraining order. The court’s discretion included whether a hearing was necessary, and if so, what type of showing the government had to make in order to meet their burden of proof. See, e.g., United States v. Scharf, 551 F.2d 1224, 1226 (8th Cir.), cert. denied, 434 U.S. 824 (1977) (once indictment is returned, restraining order may be issued without advisory hearing); United States v. Beckham, 562 F. Supp. 488 (D. Mich. 1983) (government must prove by clear and convincing evidence that property it is seeking to forfeit is involved in RICO violation in order to obtain restraining order); United States v. Veon, 538 F. Supp. 237, 241-42 (E.D. Cal. 1982) (in rem forfeiture statutes wholly different from criminal forfeiture statutes and provide no procedural guidance); United States v. Bello, 470 F. Supp. 723, 724-25 (S.D. Cal. 1979) (restraining order can be issued upon showing that assets are allegedly subject to forfeiture and that defendant is attempting to transfer property). See generally Tarlow, RICO: The New Darling of the Prosecutor’s Nursery, 49 FORDHAM L. REV. 165, 295-304 (1980) (providing excellent discussion of standards imposed by courts faced with government application for pre-conviction restraining order under § 1963(b)).

64. This result was not permitted in United States v. Long, 654 F.2d 911 (3d Cir. 1981). In Long, the court held that assets transferred by the defendant, prior to the entry of a restraining order, would still be subject to forfeiture where there was evidence that the transfer may have been fraudulent. See also United States v. Ginsburg, 773 F.2d 798, 801 (7th Cir. 1985) (government’s interest in forfeitable property vests at time of commission of criminal act and cannot be defeated by defendant subsequently dissipating or transferring away forfeitable property).
RICO forfeiture statute was that it failed to protect the rights of third parties who were affected by a forfeiture of the defendant's property. The statute did not provide for adjudication of third parties' rights. Consequently, these third parties were forced to petition the Attorney General for the equitable relief of mitigation or remission of the forfeiture.

D. The Comprehensive Forfeiture Act of 1984

At the time of RICO's enactment, Congress envisioned forfeiture as a major new law enforcement remedy directed against the financial resources of organized crime. In 1981, Congress was presented with a report prepared by the Government Accounting Office (GAO), which concluded that the use of the RICO forfeiture provisions by federal law enforcement agencies was falling far short of this goal. The GAO report emphasized that the forfeiture

---

65. See Note, Criminal Forfeiture, supra note 15, at 778-79 (RICO statute does not delineate procedural method to be employed in effecting seizure under its forfeiture provisions); contra Comment, RICO Forfeiture, supra note 15, at 349 (RICO forfeiture statute contains adequate provisions to prevent unjust result where interests of third parties are affected by forfeiture under statute).

66. Under 18 U.S.C. § 1963(c) (1982), all provisions of law relating to the remission or mitigation of forfeitures under the customs laws are applicable to forfeitures incurred under RICO. Under the customs laws of 19 U.S.C. §§ 1614, 1617 & 1618 (1982), property subject to forfeiture may be redeemed, and the collector of customs and the Secretary of the Treasury are given discretion to grant a remission or mitigation of the forfeiture. The duties that normally fall upon the collector of customs or the Secretary of the Treasury are to be performed by the Attorney General under the RICO statute. 18 U.S.C. § 1963(c) (1982). While the courts may review the actions taken by those charged with power to grant remission or mitigation of a forfeiture, the courts have very little control over the actions of these persons. United States v. L'Hoste, 609 F.2d 796, 811 (5th Cir.), reh'g denied, 615 F.2d 383 (5th Cir.), cert. denied, 449 U.S. 833 (1980).

67. The Report of the Comptroller General, states:

Although attacking the financial resources of criminal organizations through forfeiture of their assets has been discussed for several years, little has been done. Forfeitures to date have consisted primarily of the vehicles used to smuggle drugs and the cash used in drug transactions. Compared to the profits realized, these forfeitures have amounted to little more than incidental operating expenses. The illicit profits themselves and the assets acquired with them have remained virtually untouched.

When enacted more than a decade ago, the RICO and CCE statutes were envisioned as a major new law enforcement remedy directed at the financial resources of organized crime. For example, drug trafficking organizations were to be completely immobilized by not only jailing their key people, but also obtaining forfeiture of their assets. Unfortunately, the potential effectiveness of forfeiture in combating drug trafficking cannot yet be assessed, because the key statutes authorizing forfeiture have not received extensive use.

REPORT OF THE COMPTROLLER GENERAL, supra note 3, at 9.

68. Id.
provisions contained numerous ambiguities and limitations. In addition, the report noted that law enforcement agencies were not aggressively pursuing the forfeiture remedy. Faced with this analysis, Congress held committee hearings that resulted in a number of bills designed to improve the forfeiture laws being introduced in both the House and Senate. This effort finally came to fruition in the closing days of the 98th Congress. In October 1984, Congress hurriedly passed the Comprehensive Forfeiture Act of 1984 as Title III of the Comprehensive Crime Control Act of 1984.

Congress passed the Comprehensive Forfeiture Act to enhance the use of criminal forfeiture as a law enforcement tool in combating criminal racket-

69. The Report of the Comptroller General identified four specific problems with the prior RICO forfeiture statute. First, the scope of the forfeiture authorizations had been narrowly defined. Second, forfeiture under RICO had been limited by some courts to interests in legal enterprises or had been construed so as not to include "profits." Third, the extent to which assets had to be traced to the crime of conviction was unclear. Fourth, the transfer of assets prior to conviction limited the effectiveness of forfeiture. See id. at 30. In addition, the report noted that the procedures necessary to accomplish a forfeiture had not been clearly defined. Id.

70. The Report of the Comptroller General stated:

Even though attacking drug trafficker's finances has been a major component of the Government's drug law enforcement policy for several years, it has not been effectively integrated into DEA or U.S. Attorney operations. The Department of Justice has simply not exercised the kind of leadership and management necessary to make asset forfeiture a widely used law enforcement technique. Nearly ten years after the forfeiture statutes were enacted, the Department lacked the most rudimentary information needed to manage the forfeiture effort. No one knew how many forfeiture cases were attempted and why, the disposition of the cases, or why those attempted either failed or succeeded. Id. at 16. The Comptroller General further noted that the RICO and CCE forfeiture statutes had only been applied in ninety-eight cases during the period from 1970 to March, 1980. Id. at 10. See also Webb & Turow, RICO Forfeiture in Practice: A Prosecutorial Perspective, 52 U. Cin. L. Rev. 404 (1983) (general discussion of problems faced by prosecutors in seeking RICO forfeiture judgments).


72. Pub. L. No. 98-473, 98 Stat. 1976 (1984). See United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985) (legislative history). In Rogers, the court noted that there was little legislative history interpreting the Comprehensive Crime Control Act of 1984 and that the Act was so hastily passed that the copy to be executed by the President was missing pages. Further, the Rogers court noted that even after enactment, the contents of the Act were so uncertain that portions of the bill that were not enacted were included in the United States Code Annotated advance sheets of the law. Id. at 1336 n.1.
The Act made substantial changes to the forfeiture provisions of RICO. A number of these changes were directed at administrative matters necessary to the forfeiture process. These administrative changes were designed to provide guidance to both the courts and law enforcement agencies. Congress also made substantive changes in areas where the prior statute was ambiguous or had been limited by case law. Perhaps the most significant of these changes were those clarifying when forfeiture is appropriate and the types of property subject to forfeiture. To reach these aims, Congress explicitly provided in the 1984 Act that both direct and derivative proceeds of the defendant's criminal activity were subject to the Act's coverage. Next, Congress emphasized that the definition of property subject


74. See, e.g., 18 U.S.C. § 1963(l) (1984) (court has authority to order deposition of any witness or production of any non-privileged material that will facilitate identification of forfeitable property); id. § 1963(k) (court has power to enter forfeiture orders without regard to location of property); id. § 1963(f) (following entry of forfeiture order, court may take any action necessary to protect government's interest); id. § 1963(g) (Attorney General shall direct disposition of forfeited property, but court may enter restraining order upon showing of irreparable harm to third party); id. § 1963(h) (outlining Attorney General's powers with respect to forfeited property); id. § 1963(i) (Attorney General has power to promulgate regulations); id. § 1963(j) (third parties affected by forfeiture must avail themselves of ancillary hearing procedure of § 1963(m) and cannot intervene in criminal case or initiate civil suit against government).

75. Prior to amendment, § 1963(a) provided that the defendant shall forfeit (1) any interest acquired or maintained in violation of § 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which the defendant had established, operated, controlled, conducted, or participated in the conduct of, in violation of § 1962. 18 U.S.C. § 1963(a) (amended 1984). In § 1963(a), as amended, Congress specifically used the term "proceeds" to describe the interest of the defendant in the criminal enterprise that was subject to forfeiture. This term was chosen over the term "profits" in order to alleviate what Congress perceived to be an unfair burden on the government of proving net profits. See Senate Report, supra note 73, at 199. See also United States v. Jeffers, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part, vacated in part, 432 U.S. 137 (1977) (finding evidence of net profits is extremely difficult in this conspiratorial, criminal area). Subsequent to the Comprehensive Forfeiture Act's revision of the RICO forfeiture provisions, the Second Circuit interpreted the pre-amendment RICO forfeiture provisions as requiring that forfeiture be based upon gross rather than net profits. See United States v. Lizza Industries, Inc., 755 F.2d 492 (2d Cir. 1985).

76. 18 U.S.C. § 1963(a) (1984). See supra notes 57-61 and accompanying text. At the time the Comprehensive Forfeiture Act of 1984 was passed, the Supreme Court had granted certiorari in Russello v. United States, 459 U.S. 1101 (1983), to review the issue of whether RICO's forfeiture provisions extended to both direct and derivative proceeds of a defendant's criminal activity. Congress recognized the pending nature of this review, but included this provision in the 1984 Act because of its perception that the interpretations, such as that in United States v. McManigal, 708 F.2d 276 (7th Cir.), vacated on other grounds, 464 U.S. 979 (1983), and United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980), finding that RICO's forfeiture provisions reached only direct proceeds of the defendant's criminal activity, significantly diminished the utility of the RICO criminal forfeiture sanction and was at odds with the overall
to forfeiture under RICO was to be broadly construed, by specifically providing that all property, whether real, or tangible or intangible personal property, was subject to forfeiture.\(^7\) Finally, the 1984 amendments demonstrate Congress’s intent to make criminal forfeiture a mandatory penalty for RICO convictions.\(^8\)

A second major area addressed by the 1984 amendments was Congress’s perception that defendants could too easily defeat the prior RICO forfeiture provisions by pre-conviction transfer of forfeitable assets.\(^9\) The 1984 amendments strengthened the government’s forfeiture power in two ways.\(^0\) First,
section 1963(e) was added to expand the government's pre-existing authority to enter post-indictment restraining orders and to extend this authority, in certain circumstances, to the entry of pre-indictment restraining orders.\textsuperscript{81} Section 1963(e) provides that a post-indictment restraining order can be entered by the court without prior notice or a hearing, because the indictment provides the defendant with sufficient notice that forfeiture will be sought.\textsuperscript{82} Section 1963(e) also significantly expands the court's power by providing for the entry of pre-indictment restraining orders, either with\textsuperscript{83} or without\textsuperscript{84} forfeitures. Presently, a defendant may succeed in avoiding the forfeiture sanction simply by transferring his assets to another, placing them beyond the jurisdiction of the court, or taking other actions to render his forfeitable property unavailable at the time of conviction. Under this new provision, forfeiture of substitute assets would be authorized when property found subject to forfeiture under section 1963(a), as amended, (1) cannot be located; (2) has been transferred to, sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value by any act or omission of the defendant; or (5) has been commingled with other property that cannot be divided without difficulty.

See Senate Report, supra note 73, at 201-02. This provision, however, was subsequently deleted by Pub. L. No. 98-473, Title II, §§ 302, 230(b), 98 Stat. 2040-41, 2192 (1984). The reason underlying the last minute deletion of what would have been § 1963(d) is unclear. United States v. Ginsburg, 773 F.2d 798, 801 n.2 (7th Cir. 1985).

\textsuperscript{82} The Senate Judiciary Committee stated:

[T]he post-indictment restraining order provision does not require prior notice and opportunity for a hearing. The indictment or information itself gives notice of the government's intent to seek forfeiture of the property. Moreover, the necessity of quickly obtaining a restraining order after indictment in the criminal forfeiture context presents exigencies not present when restraining orders are sought in the ordinary civil context. This provision does not exclude, however, the authority to hold a hearing subsequent to the initial entry of the order and the court may at that time modify the order or vacate an order that was clearly improper . . . . For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is based.

\textsuperscript{83} Senate Report, supra note 73, at 203.
\textsuperscript{84} 18 U.S.C. § 1963(e)(1)(B) (1984). This section permits the court to enter a pre-indictment restraining order if, after notice to persons appearing to have an interest in the property and an opportunity for a hearing, the court determines that:

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

\textit{Id.}

\textsuperscript{84} 18 U.S.C § 1963(e)(2) (1984) provides:

A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United
notice to parties appearing to have an interest in the property.\textsuperscript{85} Congress's second major amendment of the RICO forfeiture provisions, designed to defeat the problem of pre-conviction transfer, was a codification of the "taint" theory in section 1963(c).\textsuperscript{86} Under the taint theory, the interest of the government in the defendant's property vests at the time of the commission of the act giving rise to the forfeiture and is not extinguished by pre-conviction transfers by the defendant to third parties.\textsuperscript{87} Congress also


86. 18 U.S.C. § 1963(c) (1984). This section provides:

All right, title, and interest in property (subject to forfeiture) vests in the United States upon the commission of the act giving rise to forfeiture under this section.

Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States . . . .

\textit{Id.}

87. The taint theory has long been recognized as applicable in civil forfeiture cases. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 685, \textit{reh'g denied}, 417 U.S. 977 (1974); United States v. Stowell, 133 U.S. 1 (1890); Simons v. United States, 541 F.2d 1352 (9th Cir. 1976); Florida Dealers & Growers Bank v. United States, 279 F.2d 673 (5th Cir. 1960); Wingo v. United States, 266 F.2d 421 (5th Cir. 1959); Weathersbee v. United States, 263 F.2d 324 (4th Cir. 1958). Subsequent to the 1984 amendment of the RICO forfeiture provisions, the Seventh Circuit reached this same result in United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985), where it held:

[While the government's interest in the profits or proceeds of racketeering activity does not \textit{attach} until conviction, its interest \textit{vests} at the time of the act that constitutes the section 1962 violation and cannot subsequently be defeated, as far as section 1963(a)(1) is concerned, if the defendant dissipates or transfers away the proceeds subject to forfeiture.]

\textit{Id.} at 801 (emphasis in original). See also United States v. Navarro-Ordas, 770 F.2d 959, 970 (11th Cir. 1985) (to carry out congressional intent behind RICO forfeiture provisions, court must order forfeiture of amount of profits from racketeering activity and place burden of satisfying order on convicted defendant), \textit{reh'g denied en banc}, 776 F.2d 1057 (1985); United
provided a hearing procedure to protect third parties who had made bona fide purchases of the defendant's property subsequent to the act giving rise to forfeiture. 88

A final major congressional revision to the RICO forfeiture provisions was the inclusion of an ancillary hearing procedure. This hearing is to be utilized for the resolution of third party claims arising out of the RICO forfeiture action in the Comprehensive Forfeiture Act of 1984. 89 Section 1963(m) provides for a post-judgment hearing to be held upon application by a third-party claimant. 90 At this hearing, third-party claimants may establish a legal basis for relief by proving that they either had a legal interest in the property prior to the commission of the criminal offense, 91 or that they were bona fide purchasers for value and did not have reason to believe that the property was subject to forfeiture. 92 A third party who is unable to establish

---

88. The Senate Judiciary Committee, in reference to this section, stated, “[Section 1963(c), as amended by the bill, makes it clear that this provision may not result in the forfeiture of property acquired by an innocent bona fide purchaser. Such purchasers are entitled to relief under the new ancillary hearing procedure in section 1963(m) which was adopted by amendment by the Committee.” For a discussion of the hearing procedures of § 1963(m), see Senate Report, supra note 73, at 201. See infra notes 89-93 and accompanying text. In a recent case, United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985), the court held that a similar pre-conviction restraining order provision added by Congress to the Comprehensive Drug Abuse Prevention and Control Act was unconstitutional. The court reasoned that because Congress failed to provide for a hearing on a restraining order before trial or conviction, the provisions violated third parties’ fifth amendment rights to due process of law. Id. at 1383.


90. Id. § 1963(m)(2). This section provides:

Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

Prior to the enactment of this ancillary hearing procedure, the Department of Justice had taken the position that, at least in the first instance, any third party asserting a legal or equitable basis for relief should petition the Attorney General for remission or mitigation of the forfeiture. See Senate Report, supra note 73, at 207.

91. 18 U.S.C. § 1963(m)(6)(A) (1984). The Senate Judiciary Committee stated with regard to this test, “[The petitioner will prevail where he] had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture was vested in him rather than the defendant or was superior to the interest of the defendant.” Senate Report, supra note 73, at 209.

92. 18 U.S.C. § 1963(m)(6)(B) (1984). The Senate Judiciary Committee stated, “[The petitioner will prevail where he] acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a bona fide purchase for value and had no reason to believe that the property was subject to forfeiture.” Senate Report, supra note 73, at 209. The Committee further indicated that this provision should be construed to deny relief to third
a legal basis for relief may still seek equitable relief by petitioning the Attorney General.\textsuperscript{93}

In sum, the amendments made by the Comprehensive Forfeiture Act of 1984 to the RICO forfeiture provisions have enhanced the attractiveness of these provisions to federal law enforcement agencies. Given a literal reading, the RICO provisions allow for the forfeiture of both the direct and derivative proceeds of the RICO criminal activity for which the defendant has been convicted.\textsuperscript{94} Additionally, the government is no longer constrained from protecting its interest in forfeitable property prior to the defendant's conviction. The government may now seek both pre-indictment and pre-conviction restraining orders to prevent defendants from attempting to defeat forfeiture by transferring their property prior to trial.\textsuperscript{95} The ability of the defendant to transfer assets prior to trial has also been significantly reduced due to the inclusion of "relation back" provisions. These provisions provide that title to the proceeds of the criminal activity is deemed to vest in the government upon commission of the criminal act, rather than upon the defendant's conviction.\textsuperscript{96} Finally, the government's forfeiture claim of the proceeds from criminal activity is now superior to the claims of all third parties, unless the third party can establish that they had an interest in the property prior to the commission of the criminal act or that they were a bona fide purchaser for value.\textsuperscript{97}

II. THE APPLICATION OF THE RICO FORFEITURE PROVISIONS TO ATTORNEYS' FEES

In recent years, federal law enforcement agencies have proceeded on the theory that organized crime in this country flourishes not only because of its tremendous economic power, but also because of the efforts of attorneys who assist these organizations in the pursuit of their criminal activities.\textsuperscript{98} Accordingly, prior to the amendment of the RICO forfeiture provisions in 1984, law enforcement agencies were willing to include lawyers within the

\begin{paracol}{2}
\usepackage{balance}

\clearpage
\end{paracol}
scope of their investigative and prosecutorial efforts. Since the enactment of the amendments to the RICO forfeiture provisions, prosecutors have expanded their efforts against attorneys by attempting to apply the RICO forfeiture provisions to the fees paid by RICO defendants to their counsel.

The RICO forfeiture provisions do not explicitly state whether attorneys’ fees are forfeitable. Section 1963(c) merely provides that any forfeitable property transferred to a third party continues to be subject to forfeiture, unless the third party prevails in the post-conviction hearing provided by section 1963(m). Section 1963(m) is also silent on its applicability to attorneys’ fees. This section merely indicates that the property transferred to the third party is subject to forfeiture unless that party establishes a prior interest in the property or shows that they are a bona fide purchaser for value who had no reason to believe that the property was subject to forfeiture.

In the absence of clear statutory language, courts faced with the question of attorneys’ fees have turned to the legislative history of the forfeiture provisions for guidance. The legislative history of section 1963(m) is devoid of any specific reference as to whether attorneys’ fees are forfeitable. However, the report of the Senate Judiciary Committee discusses what property is subject to a forfeiture order. In particular, the Senate Judiciary Committee report states, “an order of forfeiture may reach only property of the defendant, save in those instances where a transfer to a third party is voidable.” The legislative history further indicates that the statute is not

---

99. See, e.g., In re Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984) (federal grand jury subpoena issued to attorneys for fee information about clients whom they were representing in pending state criminal prosecution); In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032 (2d Cir. 1984) (subpoena of law firm’s client records); Kitzman, Kitzman & Gallagher v. Krut, 744 F.2d 955 (3d Cir. 1984) (seizure of law firm’s records); U.S. v. $149,345 U.S. Currency, 747 F.2d 1278 (9th Cir. 1984) (forfeiture of attorneys’ fees upheld where attorney refused to disclose identity of his client).

100. See United States v. Ianniello, 621 F. Supp. 1455 (S.D.N.Y. 1985) (United States Attorney asserted that attorneys’ fees were subject to forfeiture under 18 U.S.C. § 1963); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985) (government served subpoena duces tecum on attorney for fee information, asserting it would be relevant evidence of offense with which defendant was charged and that fees would be forfeitable under § 1963); Payden v. United States, 605 F. Supp. 839 (S.D.N.Y.), rev’d on other grounds, 767 F.2d 26 (2d Cir. 1985) (defendant’s counsel served with subpoena duces tecum requiring him to appear before grand jury and disclose information regarding fee arrangement); United States v. Rogers, 602 F. Supp. 1332 (D.C. Colo. 1985) (defendant sought order declaring that fees of his attorney would not be subject to forfeiture under § 1963).

101. See supra note 88.

102. See supra notes 91-92.


104. See Senate Report, supra note 73, at 208.
designed to reach legitimate transfers for value to third parties, and that voidable transfers, as contemplated by the statute, are those that the defendant has made pursuant to some type of sham or artifice.\textsuperscript{105}

In \textit{United States v. Rogers},\textsuperscript{106} a federal district court specifically relied upon the legislative history behind section 1963(m) in concluding that the RICO forfeiture provisions are inapplicable to attorneys' fees. The \textit{Rogers} court recognized that section 1963(m) imposes a two-prong test on a third party attempting to prevail in a post-conviction ancillary hearing. The court concluded that attorneys, who receive fees for services rendered, meet the first prong of this test, because they have paid value.\textsuperscript{107} The court recognized that it must apply the canon of statutory construction that Congress was aware of, and adopted, existing case law when it drafted a particular statute.\textsuperscript{108} Since prior case law held that the filing of the indictment was sufficient notice to a third party of the government's claim for forfeiture, the court held that a defendant's attorney could never be a taker without notice.\textsuperscript{109} The \textit{Rogers} court, after noting that the statute itself was silent on whether attorneys' fees are forfeitable, looked to the legislative history.\textsuperscript{110} The court determined that, because an attorney who receives funds for bona fide services rendered engages in neither a fraud nor a sham, fees paid to the attorney are not within the reach of the RICO forfeiture statute.\textsuperscript{111}

\textsuperscript{105} \textit{Id.} at 209 n.47.

\textsuperscript{106} 602 F. Supp. 1332 (D. Colo. 1985).

\textsuperscript{107} \textit{Id.} at 1346.

\textsuperscript{108} Cannon v. University of Chicago, 441 U.S. 677, 696-99 (1979) (unless Congress specified to contrary, it intended to adopt existing case law). Prior to the 1984 amendments to the RICO forfeiture provisions, case law held that knowledge of the indictment and the government's claim to forfeiture therein was sufficient notice to a third party attorney. See \textit{United States v. Raimondo}, 721 F.2d 476, 478 (4th Cir. 1983), cert. denied, 469 U.S. 837 (1984); \textit{United States v. Long}, 654 F.2d 911, 917 (3d Cir. 1981).

\textsuperscript{109} \textit{Rogers}, 602 F. Supp. at 1347.

\textsuperscript{110} The \textit{Rogers} court reasoned that:

An attorney who receives funds in return for services legitimately rendered, operates at arm's length and not as part of an artifice or sham to avoid forfeiture. Like the grocer compensated for the food he sells the defendant or the doctor paid a fee for healing the defendant's children, the lawyer is entitled to compensation for his services actually and legitimately rendered.

\textit{Id.} at 1348. Not surprisingly, the Justice Department has a different interpretation of Congress's intent. The Justice Department argues that Congress specifically rejected the notion that attorneys' fees are exempt from forfeiture by citing with approval \textit{United States v. Long}, 654 F.2d 911 (3d Cir. 1981). In \textit{Long}, the court ruled that property derived from a violation of 21 U.S.C. § 848 was still subject to forfeiture although transferred to the defendant's attorneys more than six months prior to conviction. \textit{See Justice Department Guidelines on Forfeiture of Attorneys' Fees}, Crim. L. Rep., Sept. 18, 1985, at 3001 (BNA) [hereinafter cited as \textit{Guidelines}].

\textsuperscript{111} While the \textit{Rogers} court concluded that Congress did not intend to include in those items forfeitable the compensation already paid for goods and services legitimately provided, it recognized that assets transferred to a lawyer as part of a sham would be subject to forfeiture. 602 F. Supp. at 1348.
Other courts, however, have not reached the same result as the Rogers court. In United States v. Payden,112 the court read the Report of the Senate Judiciary Committee to require that both prongs of the two-prong test of section 1963(m) be met before a third party will prevail.113 Thus, under Payden, because the filing of the indictment constitutes notice that the defendant's assets are subject to forfeiture, attorneys who had received their fees could not be said to have entered into an arms-length transaction regardless of the price paid for their services.114

III. SIXTH AMENDMENT PROBLEMS IN APPLYING RICO FORFEITURE PROVISIONS TO ATTORNEYS' FEES

The Court's analysis in Payden is unsound because it will interfere with a defendant's sixth amendment right to counsel in any RICO case where forfeiture of attorneys' fees is sought in the indictment. A cornerstone of our criminal justice system is the right of the accused to be represented by competent counsel. The colonists considered this right to be fundamental even before the adoption of the federal Constitution and the Bill of Rights.115 In the 1932 case of Powell v. Alabama,116 the Supreme Court first established the right of an indigent defendant to appointed counsel in all federal capital cases.117 Later, in United States v. Wade,118 the Supreme Court gave an

113. Id. at 849 n.14.
114. The Payden court argued:
   [F]ees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds . . . [T]o permit this would undermine the purpose of forfeiture statutes, which is to strip offenders and organizations of their economic power.
   Id.

115. In re Grand Jury Subpoena Served Upon Doe, 759 F.2d 968, 972 (2d Cir.), rev'd on other grounds, 781 F.2d 238 (2d. Cir. 1985). In colonial England, parties in civil cases, persons accused of misdemeanors, and those charged with treason were entitled to the full assistance of counsel. Those charged with felonies, however, were denied the aid of counsel, except with respect to legal questions that the accused might suggest. Powell v. Alabama, 287 U.S. 45, 60 (1932). At the time the Constitution was adopted, this common law rule had been rejected in at least twelve of the thirteen colonies. Id. at 64. Thus, in enacting the Constitution, the framer's included language providing that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

116. 287 U.S. 45 (1932).
117. While an accused defendant was viewed as having the right to assistance of counsel under the Constitution, the government was not perceived to be liable to provide counsel to those unable to retain their own. See Note, Effective Assistance of Counsel on Appeal: Due Process Prevails in Evitts v. Lucey, 35 DE PAUL L. REV. 185, 186-87 & nn.8-12 (1985). In Powell v. Alabama, 287 U.S. 45 (1932), however, the Supreme Court recognized that this right "is of such a character that it cannot be denied without updating those fundamental principles.
expansive reading to the sixth amendment's guarantee of counsel when it held that the amendment required counsel's assistance whenever necessary to assure a meaningful defense. More recent Supreme Court cases have confirmed that a person is entitled to be represented by an attorney at or after the time judicial proceedings have been initiated against them, "whether by way of formal charge, preliminary hearing, indictment, information or arraignment." 

Courts have also recognized that defendants able to retain counsel have a qualified right to obtain counsel of their own choice. It is unnecessary to reach the question of whether a defendant's right to obtain counsel of their own choice has been infringed by the Payden decision. The practical effect of Payden is not that defendants will be denied counsel of their own choice, but rather, defendants may be unable to retain counsel at all. 

An indigent defendant who is unable to afford the retention of counsel has a right to obtain appointed counsel under 18 U.S.C. § 3006(A). Nevertheless, this option is not available to a RICO defendant who has money to
pay counsel and who cannot, therefore, claim to be indigent.\textsuperscript{123} The RICO defendant's dilemma is not the inability to retain counsel due to indigence, but rather the inability to find counsel willing to accept the risk that their fee may later be subject to forfeiture.\textsuperscript{124} Regardless of the possible availability of appointed counsel to the RICO defendant, it may be argued that traditional views of due process and the right to counsel have been violated.\textsuperscript{125}

The \textit{Payden} decision is unacceptable because it will inevitably deny defendants their sixth amendment right to counsel once judicial proceedings have been initiated against them. It is a fundamental principle of statutory interpretation that when two interpretations of a statute exist, a court must choose the interpretation that will render the statute constitutional.\textsuperscript{126} An interpretation of the RICO forfeiture provisions that results in denying defendants their sixth amendment right to counsel renders these provisions unconstitutional.\textsuperscript{127} Congress has recognized that the forfeiture provisions must not interfere with constitutional rights by providing in the legislative history of the \textit{in personam} forfeiture provisions of the Comprehensive Drug Penalty Act of 1984 that, "[N]othing in this section is intended to interfere

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{123} The Criminal Justice Act provides for the furnishing of representation to a person "financially unable to obtain adequate representation." 18 U.S.C. \textsection 3006(A) (1982).
\item \textsuperscript{124} United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985). Defendants with money available to pay an attorney, albeit money that may eventually be subject to forfeiture, could not lawfully swear under oath that they were financially unable to obtain counsel as required by this Act. As a result, RICO defendants, unlike indigent defendants, would be placed in a situation of being unable to obtain counsel, either retained or appointed. \textit{Id}.
\item \textsuperscript{125} Practically, the costs of mounting a defense to an indictment under RICO are far beyond the resources or expertise of the average federal public defender's office, which is already overtaxed. The government brings to bear significant resources to prosecute RICO cases. Adequate defense of RICO cases generally requires representation during grand jury investigations lasting as long as two or three years. Counsel appointed three to four months in advance of the defendant's trial is patently inadequate to protect the defendant's interests. \textit{Rogers}, 602 F. Supp. at 1349-50. In reality, the fact that appointed counsel is available pays no more than lip service to due process and the right to counsel. \textit{Id}. at 1349.
\item \textsuperscript{126} As Justice Brandeis recognized in \textit{Ashwander} v. Tennessee Valley Auth., 297 U.S. 288 (1936), "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" \textit{Id}. at 483-84 (Brandeis, J., concurring) (quoting \textit{Crowell} v. Benson, 285 U.S. 22, 66 (1921)).
\item \textsuperscript{127} United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985). \textit{See}, e.g., United States v. Rumely, 345 U.S. 41, 45 (1953) (court's duty to avoid constitutional issue applies not merely to legislation, but also to congressional action by way of resolution); \textit{Crowell} v. Benson, 285 U.S. 22, 62 (1932) (it is cardinal principle of statutory construction that if serious doubt of constitutionality is raised, Court will first ascertain whether construction of statute is fairly possible by which question may be avoided); Lucas v. Alexander, 279 U.S. 573, 577 (1929) (what Congress has written must be construed with eye to possible constitutional limitations so as to avoid doubts as to validity); \textit{Richmond Screw Anchor Co.} v. United States, 275 U.S. 331, 346 (1928) (it is court's duty in interpretation of federal statutes to reach conclusion that will avoid serious doubt of constitutionality). \textit{See also} 2A \textit{SUTHERLAND STAT. CONST}. \textsection 45.11 (4th ed. 1984).
\end{itemize}
\end{footnotesize}
with a person's Sixth Amendment right to counsel." Courts confronted with this issue have recognized the legislative history as a positive statement of congressional intent.

IV. ATTORNEY-CLIENT PRIVILEGE PROBLEMS IN APPLYING RICO FORFEITURE PROVISIONS TO ATTORNEYS' FEES

The application of the RICO forfeiture provisions to attorneys' fees paid by a defendant presents difficult problems with regard to the attorney-client privilege. As a general rule, information relating to the fees of an attorney is not privileged. The information which an attorney would need to disclose in order to prevail at a section 1963(m) hearing, however, would necessarily include more than merely the rates and hours expended. It would require disclosure of the attorney's knowledge as to both the scope and source of the defendant's assets. Such disclosure far exceeds the limited exception to the attorney-client privilege providing for information relating to attorneys' fees.

The general rule that information pertaining to attorneys' fees is not privileged is subject to exception where the disclosure would implicate the

129. Rogers, 602 F. Supp. at 1347-48 n.4; United States v. Iannelli, 621 F. Supp. 1455, 1476 (S.D.N.Y. 1985); United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985). While the House Judiciary Committee's discussion of the right to counsel dealt with the problem of pre-trial restraining orders, the Rogers court felt that this analysis was equally applicable to the problem of chilling the pre-trial availability of counsel due to the threats of post-conviction forfeiture. Rogers, 602 F. Supp. at 1347-48 n.4. But see United States v. Payden, 605 F. Supp. 839 (S.D.N.Y.), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985) (court felt that reliance on report in Rogers was misplaced). According to Payden, Congress did not intend to resolve the sixth amendment conflict through legislation, but rather left the resolution of these issues to the courts. Payden, 605 F. Supp. at 850-51 n.14. See supra note 110.
130. United States v. Hodgson, 492 F.2d 1175, 1177 (10th Cir. 1974) (generally attorney-client privilege extends to substance of matters communicated to attorney in professional confidence, not to matters related to receipt of fees from client); United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973) (matters involving receipt of fees from client normally not privileged); Colton v. United States, 306 F.2d 633, 637-38 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963) (matters related to fees from client not usually privileged as they are not communicated to attorney in professional confidence). But see Liew v. Breen, 640 F.2d 1046, 1049 (9th Cir. 1981) (information may come within ambit of privilege when client's name itself has independent significance such that disclosure would uncover client confidences).
132. Id. The Rogers court reasoned that while fee information may not be within the scope of the attorney-client privilege because it is not a matter of substance communicated to the attorney in professional confidence, the scope and source of the defendant's assets is a matter of substance disclosed in professional confidence. Therefore, to require such disclosure would violate the attorney-client privilege. Id. This reasoning is somewhat undermined by the legal profession's recognition that lawyers may reveal the confidences and secrets of their clients when necessary to establish or collect their fee. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(4) (1981).
Because the disclosure required of attorneys opposing forfeiture of their fees would occur in a post-conviction hearing, such disclosures could not affect the determination of the defendant’s guilt already entered by the trial court. This disclosure, however, could affect the ultimate determination of the defendant’s guilt if an appeal were taken by the defendant and the section 1963(m) hearing were held during the pendency of this appeal. In this instance, attorney disclosure of privileged information tending to incriminate the client may affect the ultimate determination of the defendant’s guilt because the finality of the determination is still pending.

The potential of disclosure of privileged information by the attorney significantly impacts the attorney-client relationship. The purpose of the attorney-client privilege is to promote full and frank communication between attorneys and their clients, thereby promoting broader public interests in the observance of the law and administration of justice. The privilege recognizes that sound legal advice or advocacy depends upon the lawyer being fully informed by the client. However, if defendants know that information disclosed to an attorney in confidence may later have to be disclosed by the attorney in a section 1963(m) hearing, the willingness of defendants to provide full and open disclosure to the attorney will be hampered. Therefore, the mere threat of attorneys having to disclose privileged information may chill the openness of attorney-client communications, thereby impinging upon the defendant’s sixth amendment right to counsel.

133. In re Grand Jury Investigation, 631 F.2d 17, 19 (3d Cir. 1980), cert. denied, 449 U.S. 1083 (1981). See also United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973) (matters involving receipt of fees from client, while normally not privileged, may be so if disclosure would implicate client in crime).

134. Rogers, 602 F. Supp. at 1349.


136. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). In Trammel v. United States, 445 U.S. 40, 51 (1980), the Supreme Court recognized that the attorney-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out. Similarly, in Fisher v. United States, 425 U.S. 391, 403 (1976), the Supreme Court recognized that the purpose of the privilege is to encourage clients to make full disclosure to their attorneys. The Court has long recognized that full, free and open communication between attorney and client is the rationale supporting this privilege. See Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (privilege is founded upon necessity, in interest and administration of justice, of aid of persons having knowledge of law and skilled in its practice, which can only be safely and readily availed of when client is free from consequences or apprehension of disclosure).

137. Rogers, 602 F. Supp. at 1349. One commentator has suggested that if the client’s privilege of confidentiality is jeopardized by their retention of counsel and subsequent intercourse with that counsel, they may be dissuaded from retaining counsel in basic opposition to their right to counsel. See Seidelson, The Attorney-Client Privilege and Client's Constitutional Rights, 6 Hofstra L. Rev. 693, 713 (1978).
V. ETHICAL PROBLEMS IN APPLYING RICO FORFEITURE PROVISIONS TO ATTORNEYS' FEES

Application of the RICO forfeiture provisions to attorneys' fees presents a number of potential problems under the Model Code of Professional Responsibility. For example, if the fees of an attorney representing a RICO defendant are forfeitable, the attorney may be considered as having accepted a contingent fee in a criminal case. Essentially, attorneys would only be ensured of receiving their fee if the defendant were acquitted.138 Also, a potential conflict arises because attorneys may be more interested in preserving the assets from which their fees could be paid.139 Such actions may result in a violation of the attorney's duty to give independent advice solely for the benefit of their clients.140

The application of RICO forfeiture provisions to attorneys' fees will add more uncertainty to the already difficult ethical questions that an attorney must face under the rules of conduct governing the legal profession. This area of the law is already fraught with situations where the ethical, but unwary, attorney may nevertheless be accused of wrongdoing. Moreover, this application will needlessly inject additional distrust between the client and his attorney. Such distrust will have a negative impact on the defense attorney's efforts to effectively represent his client's interests.

VI. PROPOSED LEGISLATIVE REFORM

The application of RICO forfeiture provisions to attorneys' fees has the potential to undermine the principles underlying the adversary system. The

138. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1981). This Rule provides, "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." See also Peyton v. Margiotti, 398 Pa. 86, 89-90, 156 A.2d 865, 867 (1959) (contingent fees, whether in civil or criminal case are special concern of the law, but in criminal cases, rule is stricter because of danger of corrupting justice); MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 52 (1964) (A Report of the American Bar Foundation) (consensus among commentators is that contingent fee in criminal case is void as against public policy).

139. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(A) (1981). This rule provides, "A lawyer shall not acquire a property interest in the cause of action or subject matter of litigation he is conducting for a client . . . ."; DR 5-101(A) provides, "[A] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." See Payden, 605 F. Supp. at 849-50 n.14 (citing People v. Csabon, 103 Misc. 2d 1109, 1110, 427 N.Y.S.2d 571, 572 (N.Y. Sup. Ct. 1980) (attorney who had agreed to pay fine for convicted client was disqualified from arguing motion to reduce or vacate fine).

140. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), 103(A) (1981). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1981) (professional judgment of attorneys should be exercised solely for benefit of their clients and free of compromising influences and loyalties); EC 5-2 (lawyers should not accept employment that will adversely affect advice to be given to their clients); EC 5-3 (lawyers should decline employment if their interest in property may interfere with exercise of free judgment on behalf of their clients); EC 5-7 (possibility of adverse effect upon exercise of free judgment by lawyers on behalf of their clients makes it undesirable for lawyers to become financially interested in outcome of litigation).
United States Supreme Court has expressed its view that “the very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free,”¹⁴¹ and that the “balance of forces between the accused and his accuser” is central to due process.¹⁴² If the RICO forfeiture provisions are indeed applicable to attorneys’ fees, prosecutors will maintain the tactical advantage of choosing their legal opponent by selectively appending a RICO forfeiture indictment directed towards attorneys’ fees. This tactic permits prosecutors effectively to exclude skilled defense attorneys.¹⁴³

While prosecutors are required to act in good faith, prosecutorial misconduct can and does occur.¹⁴⁴ The United States Justice Department has recently acknowledged that attorneys representing criminal defendants, whose assets may be subject to forfeiture, are in a unique position and that the prosecutor should take this into consideration when applying the RICO forfeiture provisions to attorneys’ fees.¹⁴⁵ Accordingly, the Justice Department has issued guidelines designed to assure that the application of the forfeiture provisions to attorneys’ fees will be carefully reviewed and fairly applied.¹⁴⁶ These guidelines, however, fail to represent any variance from the previous Justice Department position that there are no constitutional or statutory prohibitions to the application of the third party forfeiture provisions to

¹⁴³. Rogers, 602 F. Supp. at 1350.
¹⁴⁴. See Brady v. Maryland, 373 U.S. 83 (1963) (defendant’s due process rights violated by prosecutor’s suppression of evidence requested by defendant where evidence was favorable to accused and material to either guilt or punishment); Napue v. Illinois, 360 U.S. 264 (1959) (defendant’s due process rights violated by prosecutor’s knowing failure to correct false testimony relating to witness’s credibility); Mooney v. Holohan, 294 U.S. 103 (1935) (defendant’s denied due process and fair trial by prosecutor’s deliberate use of perjured testimony to obtain conviction); In re Grand Jury Subpoenas (Kiefaber), 774 F.2d 969 (9th Cir. 1985) (grand jury subpoenas properly quashed in face of federal prosecutor’s flagrant attempts to circumvent rule of grand jury secrecy); United States v. Samango, 607 F.2d 877 (9th Cir. 1979) (indictment dismissed because prosecutor misled jury to believe that witness was truthful when prosecutor knew of witness’s extensive history of drug abuse and doubtful credibility); United States v. Kilpatrick, 594 F. Supp. 1324 (D. Colo. 1984) (dismissal of grand jury indictment due to numerous acts of prosecutorial misconduct, including violations of federal criminal rules pertaining to grand juries, violations of statutory witness immunity sections, violations of fifth and sixth amendments, knowing presentation of misinformation to grand jury and mistreatment of witnesses); United States v. Anderson, 577 F. Supp. 223 (D. Wyo. 1983) (indictment dismissed due to government’s misconduct in use of undercover investigations to infiltrate defense camp and involvement of grand jury in that infiltration); United States v. Lawson, 502 F. Supp. 158 (D. Md. 1980) (indictment dismissed because of prosecutor’s deliberately false and misleading interrogation of defense witness).
¹⁴⁵. See Guidelines, supra note 110, at 3003.
¹⁴⁶. Id.
Therefore, these guidelines are at best a cosmetic treatment of a troubling area of the law. This trouble can be resolved through specific congressional action. The alternative is the otherwise long and inevitable battle that will ensue in the nation's court system as the Justice Department selectively chooses cases in which to advance its views.

Currently, bills have been introduced in Congress which are aimed at amending the RICO statute. None of these bills, however, proposes any change to the RICO forfeiture provisions. While the changes proposed by these bills may be desirable, legislation is necessary to exempt the expenses that defendants incur while awaiting a RICO forfeiture trial. In this way, should a pre-conviction restraining order be entered by the court, defendants will still have resources available to pay their mortgage, grocery bills, medical bills and lawyer's fees. While such an amendment could have the effect of permitting RICO defendants to enjoy the fruits of their criminal actions, this enjoyment would be subject to a reasonableness limitation by the court. Therefore, an amendment of this type would protect the government's concern that criminal defendants should not enjoy the fruits of their crime, while correcting the potential prosecutor's advantage created by the current RICO forfeiture provisions.

CONCLUSION

The Comprehensive Forfeiture Act's amendments to the RICO forfeiture provisions have provided federal law enforcement agencies with a powerful weapon which may be utilized to attack the economic base of organized crime. The prosecutor's discretion under these provisions, however, is not unbridled. When a prosecutor attempts to utilize the RICO forfeiture provisions to reach the fees paid to a defendant's attorney in a bona fide transaction for legal services performed, the government's interest in fighting organized crime's economic base is outweighed by the defendant's sixth amendment right to counsel, the defense attorney's duty to abide by the attorney-client privilege, and the Model Code of Professional Responsibility. Due process requires a balancing of both the interests of the government and the rights of the accused. The current RICO forfeiture provisions have upset this balance by providing the prosecution with the opportunity to

147. Id. The insufficiency of these guidelines is also demonstrated by the fact that the Department of Justice issued them with the qualification that they are solely for the purpose of internal department guidance and may not be relied upon to create any rights nor place any limitations on otherwise lawful litigative prerogatives of the department.


149. In Rogers, the court noted that while the representation provided by counsel may not, in the common sense, be considered a "necessary" like food, shelter or health care, in other legal contexts attorney fees are considered a necessary. 602 F. Supp. at 1348 n.5.
selectively remove an adversary from the judicial process due to the risk that
the adversary's fee may later be found to be forfeitable. Congressional
amendment of the RICO forfeiture provisions is thus desirable, necessary
and appropriate.

Leigh Roadman