

# Congress considers curb on civil RICO

by William Jones

Hearings have begun on Capitol Hill on a bill to try to reverse some of the uglier aspects of the notorious Racketeer Influenced Corrupt Organization (RICO) legislation. Rep. Rick Boucher (D-Va.), recently appointed to the House Judiciary Subcommittee on Crime, is the primary proponent of the bill. Boucher, who earlier was a member of the Judiciary Subcommittee on Criminal Justice, had been working on a RICO reform bill since 1968, but with little success in getting it introduced. Similar legislation has now been introduced in the Senate by Sen. Dennis DeConcini (D-N.M.).

Since its enactment in 1970, the RICO statute has come under increasing fire from lawyers and from the general public. Ostensibly crafted to go after the Mafia and organized crime, RICO has been increasingly utilized in a myriad of cases of civil commercial fraud not having the slightest relationship to organized crime. Particularly in its civil aspects, RICO has been used in ways that have astounded even the legislators who passed it into law. As Supreme Court Justice Byron White commented in his ruling on *Sedima, S.P.R.I. vs. Imrex Co., Inc.*, "In its private civil version, RICO is evolving into something quite different from the original conception of its enactors." Especially during the last eight years, there have been definitive interpretations of RICO's broad language by the U.S. Supreme Court.

Now lawmakers are making attempts to regain control over their Frankenstein monster. "We can't wait any longer," said Rep. Bill McCollum (R-Fla.), the ranking Republican on the subcommittee. "RICO is not being filed against mobs and mobsters, but against churches, government officials, and corporate leaders." Although one must laud the efforts being made to reform the seriously flawed and misused legislation, the question at this stage of the game is, will they be enough to get the genie back in the bottle.

Part of the reason why the "RICO Reform Act of 1989" was insufficient was pointed out by the first witness, Gerard Lynch, a professor of law at Columbia University, who was called by the committee to give a general picture of the RICO legislation and its problems. It was Lynch's contention that the problem with RICO is not simply due to its interpretation in the courts, but in the way in which it was originally formulated by the Congress. Lynch pointed out that the "vague-

ness of its terms" made "extremely serious penalties available virtually whenever prosecutors choose to invoke them, without the identification of genuine aggravating circumstances justifying the more serious penalties." Therefore, continued Lynch, "we rely on the prosecutor's discretion to decide for us, without the benefit of prior definition by Congress, who are the most serious offenders, and to prosecute them more rigorously."

## Anyone could be targeted

The concept of an "enterprise" as defined by the RICO legislation could indeed be almost any type of association—a business, a labor union, a government bureau, a partnership, a corporation. "In order to cover the range of legitimate activities that organized crime could seek to invade," commented Lynch, "the definition of enterprise had to be extremely broad—so broad as to be virtually all-encompassing." The second element of vagueness in the RICO statute involves the notion of a "pattern of racketeering . . . which means little more," said Lynch "than committing two related crimes over a period of time." One or two people, members of a business or a church, who commit some form of "fraud" more than once could be the defendants in a RICO case. However, "most kinds of commercial dispute can be described by the aggrieved party as some species of fraud, and, given the ubiquity of the mails and interstate wire communications, as mail or wire fraud."

"The breadth of RICO is extraordinary," said Lynch. "Virtually any civil claim can be expanded into a RICO case." As Lynch points out, however, the more serious problem lies not with the civil application of RICO, but with criminal RICO. "RICO is a criminal statute with a civil appendage," noted Lynch. "The law makes certain forms of activity criminal, and then permits persons injured by such activity to sue the perpetrators civilly for damages. . . . Any overbreadth in civil RICO is therefore by definition an overbreadth in criminal RICO as well."

Although Lynch claims that prosecutors have used RICO legislation with restraint, he noted, "This is government—not by law—but government by the men and women in the Department of Justice who will decide who the offenders will be." "Is a law justifiable," he adds, "whose lack of abuse is dependent on the restraint of the Department of Justice?"

RICO's "vague terms make it potentially applicable in such a wide variety of completely different situations, and allow prosecutors to invoke it at will in cases that are no more serious or threatening than 'ordinary' criminal behavior." For this reason, he considered RICO "a dangerous instrument." Noting that the only change in criminal RICO made by the bill now pending "is to further expand the list of predicate crimes," he felt that the approach was "essentially an effort to apply an extremely elaborate band-aid to a deeply flawed statute." Lynch's proposal was to appeal RICO altogether, noting, however, that this would be a political "hot potato."