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Profits Derived from Racketeering Activity are Forfeitable Interests under 18 U.S.C. Section 1963.

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CRIMINAL LAW—Forfeiture—Profits Derived From Racketeering Activity Are Forfeitable Interests Under 18 U.S.C. Section 1963

United States v. Martino
681 F.2d 952 (5th Cir. 1982)(en banc), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983).

Twenty-three defendants were accused of committing arson with the intent to defraud insurance companies.[1] The jury found sixteen of the defendants guilty of mail fraud,[2] conspiracy to violate the Racketeering and Corrupt Organizations Act (RICO),[3] and substantive RICO offenses.[4] Following the conviction, the jury handed down a special verdict ordering four defendants to forfeit to the United States the monies received as insurance proceeds.[5] On appeal, the United States Court of Appeals for the Fifth Circuit reversed the forfeiture order.[6] A rehearing en banc was subsequently granted to determine whether profits are forfeitable interests under RICO. Held—*Affirmed and remanded for further proceedings.* Profits derived from racketeering activities are forfeitable interests under 18 U.S.C. section 1963 (1976).[7]

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1. *See* United States v. Martino, 681 F.2d 952, 953 (5th Cir. 1982) (en banc), *cert. granted sub nom.* Russello v. United States, ___U.S.___, ___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983). The arson ring was composed of an insurance adjuster, homeowners, promoters, investors, and arsonists. Initially, ring members had properties they owned burned, then filed inflated proof-of-loss statements. As the enterprise grew, the ring purchased properties suitable for burning, over-insured them, then had them burned. *See id.* at 953.

2. *See* 18 U.S.C. § 1341 (1976).

3. *See id.* § 1962(d).

4. *See id.* § 1962(c).

5. *See* United States v. Martino, 681 F.2d 952, 953 (5th Cir. 1982) (en banc), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983). The total amount to be forfeited was $350,810.52. The jury was allowed to pass on the amount to be forfeited pursuant to Federal Rule of Criminal Procedure 31(e) which provides that "[i]f 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." *Id.*

6. *See* United States v. Martino, 648 F.2d 367, 407-09 (5th Cir. 1981), *vacated in part on other grounds sub nom.* United States v. Holt, 650 F.2d 651 (5th Cir. 1981) (death of defendant Holt), *cert. denied*, ___U.S.___, ___, ___, 102 S. Ct. 2020, 2007, 2006, 72 L. Ed. 2d 474, 465 (1982). Unfortunately, the Federal Reporter, Second Series omitted pages 407-09 when the Fifth Circuit granted the en banc rehearing. The panel's rationale for reversing the forfeiture issue is therefore unavailable.

7. *See* United States v. Martino, 681 F.2d 952, 954 (5th Cir. 1982) (en banc), *cert.*

The concept of forfeiture as punishment has roots in biblical writing and has persisted in varied forms in this country's criminal jurisprudence.[8] In medieval England a felon forfeited all right, title, and interest in all personal property to the Crown; similarly, his real property escheated to the Crown.[9] This complete divestiture of property, triggered by conviction, was known as forfeiture of estate.[10] This type of forfeiture was inferentially repudiated by the Framers in article III of the United States Constitution;[11] it has also been barred by federal legislation since 1790.[12]

Of the two types of forfeiture known to contemporary criminal law, the most common is in rem forfeiture, a proceeding against property founded on a legal fiction that the property itself is the offender.[13] Many federal criminal statutes provide for in rem forfeiture of virtually any type of property that may be used in the conduct of a crime.[14] An in rem forfei-

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granted sub nom. Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983).

8. *See Exodus* 21:28 (King James). "[I]f an ox gore a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten". *Id.* Justice Brennan traces the development of the forfeiture concept in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-84 (1974).

9. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974); *see also* 3 W. HOLDSWORTH, HISTORY OF THE ENGLISH LAW 68-71 (5th ed. 1927) (discussion of concepts of deodand and forfeiture of estate).

10. *See* 3 W. HOLDSWORTH, HISTORY OF THE ENGLISH LAW 68-71 (5th ed. 1927).

11. *See* U.S. CONST. art. III, § 3, cl. 3. Article III provides that "[t]he Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood or Forfeiture except during the Life of the Person attainted." *Id.*

12. *See* 18 U.S.C. § 3563 (1976) ("No conviction or judgment shall work corruption of blood or any forfeiture of estate."). This statute is in effect a codification of the negative implication of article III. One court has noted that RICO's forfeiture provisions partially repeal this statute, and that such was the intent of Congress in enacting RICO. *See* United States v. Rubin, 559 F.2d 975, 991 n.15 (5th Cir. 1977) (Congress realized it was partially repealing 18 U.S.C. section 3563 (1948)).

13. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827). Justice Story distinguished forfeiture of estate and in rem forfeiture as follows:

> 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 or conviction. . . . [T]he [forfeiture] 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; . . . [thus] the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.

Id. at 14-15.

14. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974). "[C]ontemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Id.* at 683; *see also* 18 U.S.C. §

ture is triggered by the seizure of the "offending" property by the sovereign; however, an in personam forfeiture is triggered by the defendant's conviction of a crime.[15] In personam forfeiture is, therefore, akin to forfeiture of estate.[16]

Prior to 1970, in personam forfeitures were unknown to the federal criminal law.[17] In that year Congress enacted the Racketeering and Corrupt Organization Act of 1970 (RICO)[18] and the Comprehensive Drug Abuse Prevention and Control Act of 1970;[19] both of these acts provide for in personam forfeiture.[20] The Comprehensive Drug Abuse Prevention

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3612 (1976) (federal court can order forfeiture of money received or paid as bribe by public official); *id.* § 3611 (in prosecution for transporting stolen vehicle in interstate commerce or committing felony involving threat or use of violence, defendant may be ordered to forfeit guns and ammunition in possession at time of arrest); *id.* § 3615 (in prosecution for federal liquor violations, court may order forfeiture of any vehicles, vessels, and aircraft involved in commission of crime); 49 U.S.C. § 782 (1976) (allowing forfeiture of vessels, vehicles, and aircraft used to transport contraband substances and property).

15. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974) (leased yacht subject to forfeiture despite fact owner-lessor not prosecuted); The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827) (vessel forfeitable despite owner's innocence of piracy charge).

16. *See* Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 380 (1980); *see also* United States v. Rubin, 559 F.2d 975, 991 n.15 (5th Cir. 1977) (RICO forfeiture operates against person of defendant and requires him to forfeit portion of estate). *But see* United States v. Thevis, 474 F. Supp. 134, 141 (N.D. Ga. 1979) (RICO forfeiture extremely narrow and limited to interests in enterprises; hence, no forfeiture of estate), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, ___U.S.___, ___, ___, 103 S. Ct. 57, 74 L. Ed. 2d 61, 102 S. Ct. 3489, 2300, 73 L. Ed. 2d 1370, 1303 (1982) (three defendants prosecuted separate appeals).

17. *See* United States v. Grammatikos, 633 F.2d 1013, 1024 (2d Cir. 1980) (Congress reestablished punishment of in personam forfeiture in 1970).

18. *See* 18 U.S.C. §§ 1961-1968 (1976) (forfeiture upon conviction). RICO is Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23. There are eleven other sections in this Act. *See* Title I, Special Grand Jury, 18 U.S.C. §§ 3331-3334 (1976); Title II, General Immunity, *id.* §§ 6001-6005; Title III, Recalcitrant Witnesses, 28 U.S.C. § 1826 (1976); Title IV, Depositions, 18 U.S.C. § 3503 (1976); Title VII, Litigation Concerning Sources of Evidence, *id.* § 3504; Title VIII, Syndicated Gambling, *id.* §§ 1511, 1955; Title X, Dangerous Special Offender Sentencing, *id.* §§ 3575-3578; Title XI, Regulation of Explosives, *id.* §§ 841-848; Title XII, National Commission on Individual Rights, *id.* note preceding § 3331.

19. *See* 21 U.S.C. § 848(a)(2)(A) (1976) (forfeiture upon conviction). This statute is part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended in scattered sections of 21 U.S.C.), popularly known as the "Controlled Substances Act."

20. *See* United States v. Long, 654 F.2d 911, 914 (3d Cir. 1981) (21 U.S.C. section 848(a)(2) (1976) and 18 U.S.C. section 1963 (1976) both provide for in personam forfeiture); United States v. Grammatikos, 633 F.2d 1013, 1024 (2d Cir. 1980) (these sections both provide for in personam forfeiture).

and Control Act[21] contains a provision which expressly states that profits derived from a criminal enterprise are forfeitable to the United States.[22] RICO, on the other hand, expressly limits forfeiture to "interests" acquired or maintained in violation of its prohibiting sections.[23]

To prove a RICO violation, the United States must show that the defendant has engaged in a pattern of racketeering activity.[24] Racketeering activity encompasses any one of a number of state and federal criminal acts.[25] A pattern is established by proving that the defendant committed one of the predicate acts on two or more occasions within a ten-year period.[26] Once a pattern of racketeering activity is shown, there are four ways a substantive RICO offense can occur. The first way is to use money acquired from racketeering activity to purchase an interest in an enter-

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21. Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended in scattered sections of 21 U.S.C.).

22. *See* 21 U.S.C. § 848(a)(2)(A) (1976) (upon conviction, defendant shall forfeit profits obtained through violation of Act).

23. *See* 18 U.S.C. § 1963(a) (1976). This is RICO's penal section which provides that:

> (a) 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.

Id.

24. *See id.* § 1962. Section 1962 states the elements of a substantive RICO violation. *Id.*

25. *See id.* § 1961(1). Racketeering activity can be composed of any act or threat of murder, kidnapping, gambling, arson, robbery, bribery, or extortion punishable under state law, or any one of a number of federal offenses. *See id.*; *see also* United States v. Bledsoe, 674 F.2d 647, 663 (8th Cir.) (repeated occurrences of predicate crimes, e.g., those punishable under state law, distinguish racketeering activity from mere criminal activity), *cert denied*, ___U.S.___, 103 S. Ct. 456, 74 L. Ed. 2d 608 (1982); United States v. Aleman, 609 F.2d 298, 304 (7th Cir. 1979) (series of burglaries constituted racketeering activity), *cert. denied*, 445 U.S. 946 (1980); United States v. Elliott, 571 F.2d 880, 899-900 (5th Cir. 1978) (repeated occurrences of arson, auto theft, and narcotics dealing constituted racketeering activity), *cert. denied*, 439 U.S. 953 (1978); United States v. Fineman, 434 F. Supp. 189, 194 (E.D. Pa. 1977) (repeated acts of extortion and bribery formed basis of RICO prosecution).

26. *See* 18 U.S.C. § 1961(5) (1976). "Pattern of racketeering activity" is defined as requiring "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occured within ten years . . . after the commission of a prior act of racketeering activity." *Id.*; *see also* United States v. Welch, 656 F.2d 1039, 1057 (5th Cir. 1981) (RICO prosecution requires at least two predicate crimes occur within ten-year period); United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976) (series of rigged card games occurring within ten-year period constituted pattern of racketeering); United States v. Chovanec, 467 F. Supp. 41, 45 (S.D.N.Y. 1979) (six acts of wire fraud occurring within four-week period constituted racketeering activity).

prise.[27] If the acquired interest is in a corporation, however, it must comprise more than one percent of the corporation's outstanding securities or no RICO violation occurs.[28] The second type of RICO violation occurs when the defendant uses racketeering activity as a means of acquiring an interest in an enterprise.[29] A third substantive violation involves carrying out the affairs of an enterprise through racketeering activity.[30] Finally, it is a substantive offense to conspire to commit any of the above mentioned offenses.[31]

Upon conviction, the defendant may be subject to traditional penalties of fine, imprisonment, or both.[32] Additionally, section 1963(a)(1) requires mandatory forfeiture of any interest acquired or maintained in violation

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27. *See* 18 U.S.C. § 1962(a) (1976); *see also* United States v. Godoy, 678 F.2d 84, 86 (9th Cir. 1982) (purchase of commercial real estate with proceeds derived from narcotics trafficking); United States v. McNary, 620 F.2d 621, 628 (7th Cir. 1980) (monies derived from bribery and extortion invested in manufacturing business); United States v. Goins, 593 F.2d 88, 90 (8th Cir. 1979) (bribe money invested in tavern).

28. *See* 18 U.S.C. § 1962(a). This is referred to as the one percent investment exception. The wording of the exception is as follows:

> A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities . . . do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

Id.

29. *See id.* § 1962(b); *see also* United States v. Jacobson, 691 F.2d 110, 112 (2d Cir. 1982) (defendant acquired control over bagel bakery through collection of unlawful debt); United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974) (acquisition of interest in corporation through racketeering activity), *cert. denied*, 429 U.S. 820 (1975) .

30. *See* 18 U.S.C. § 1962(c) (1976); *see also* United States v. Melton, 689 F.2d 679, 682 (7th Cir. 1982) (carrying out business of construction company through acts of insurance fraud, arson, mail fraud, and extortion); United States v. Webster, 639 F.2d 174, 184 (4th Cir. 1981) (RICO prosecution based on defendant's operation of drug enterprise out of nightclub owned by defendant), *cert. denied*, 454 U.S. 857 (1982); United States v. Nerone, 563 F.2d 836, 851-52 (7th Cir. 1977) (majority shareholders of corporation owning mobile home park operated illegal gambling operation out of basement of modular home located in park), *cert. denied*, 435 U.S. 951 (1978).

31. *See* 18 U.S.C. § 1962(d) (1976); *see also* United States v. Sutherland, 656 F.2d 1181, 1203 (5th Cir. 1981) (conspiracy to violate RICO hinges on existence of overt act committed in furtherance of agreement to violate same), *cert. denied*, 455 U.S. 991, 930 (1982) (two defendants prosecuted separate appeals); United States v. Palmeri, 630 F.2d 192, 200 (3d Cir. 1980) (overt acts committed in furtherance of conspiracy to violate RICO need not be illegal to support conspiracy prosecution), *cert. denied*, 450 U.S. 967 (1981); United States v. Martin, 611 F.2d 801, 803 (10th Cir. 1979) (conspiracy, like substantive crime, may be proved through circumstantial evidence), *cert. denied*, 444 U.S. 1082 (1980).

32. *See* 18 U.S.C. § 1963(a) (1976). The defendant may be fined up to $25,000 or imprisoned for not more than twenty years, or both. *See id.*

of RICO's prohibitory sections.[33] Section 1963(a)(2) calls for forfeiture of specific proprietary and contractual interests which could be used to influence or control a RICO enterprise.[34]

Although most of the terms used in RICO are statutorily defined, there is no definition of "interest."[35] The courts have construed this term to encompass a wide variety of personal and proprietary interests.[36] Very few cases, however, discuss whether profits derived from RICO violations are a forfeitable interest.[37] The most recent decision discussing the profit issue is *United States v. Marubeni America Corp.*[38] In *Marubeni*, a corporate officer bribed a city official to acquire confidential bidding infor-

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33. *See id.* § 1963(a)(1). Use of "shall" in this subsection mandates forfeiture upon conviction. *See* United States v. L'Hoste, 609 F.2d 796, 812 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

34. *See* 18 U.S.C. § 1963(a)(2) (1976). This subsection requires that upon conviction the defendant forfeit "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." *Id.*

35. *See id.* § 1961. Most of the terms used in RICO are defined in section 1961; there is not, however, a statutory definition of the term "interest." *See id.* § 1961. Several canons of statutory construction are, therefore, helpful in an analysis of RICO's forfeiture provisions. First is the fair warning doctrine annunciated by Justice Holmes in McBoyle v. United States, 283 U.S. 25, 27 (1931). Under this doctrine a criminal statute must be written so as to warn potential violators of what the statute proscribes and what penalty will ensue for its violation. *See id.* at 27. The second pertinent construction aid is the rule that statutes *in pari materia*, i.e., dealing with the same subject matter, should be construed with reference to one another. *See* Northcross v. Board of Educ., 412 U.S. 427, 428 (1973) (similar statutes should be construed together); Erlenbaugh v. United States, 409 U.S. 239, 244 (1972) (similar legislation dealing with same subject matter should be considered together); *In re* Robinson, 665 F.2d 166, 171 (7th Cir. 1981) (statutes dealing with same subject matter should be construed consistently). *See generally* 2A C. SANDS & J. SUTHERLAND, STATUTORY CONSTRUCTION § 51.03 (4th ed. 1973).

36. *See, e.g.*, United States v. L'Hoste, 609 F.2d 796, 805 (5th Cir.) (forfeiture of stock in corporation), *cert. denied*, 449 U.S. 833 (1980); United States v. Huber, 603 F.2d 387, 393-96 (2d Cir. 1979) (forfeiture of seven wholly-owned corporations); United States v. Rubin, 559 F.2d 975, 992 (5th Cir. 1977) (forfeiture of union office; court could not, however, prevent defendant from running for office in future).

37. *See, e.g.*, United States v. Marubeni Am. Corp., 611 F.2d 763, 767-69 (9th Cir. 1980) (profits on illegally procured contract not forfeitable); United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979) (profits from pornography enterprise not forfeitable), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, ___U.S.___, ___, ___, 103 S. Ct. 57, 74 L. Ed. 2d 61, 102 S. Ct. 3489, 2300, 73 L. Ed. 2d 1370, 1303 (1982) (three defendants prosecuted separate appeals); United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977) (dicta stating only strained construction of RICO's forfeiture provisions would allow forfeiture of profits). *But cf.* United States v. Romano, 523 F. Supp. 1209, 1214 (S.D. Fla. 1981) (would have allowed forfeiture of profits but for Fifth Circuit precedent).

38. 611 F.2d 763 (9th Cir. 1980).

mation on cable supply contracts.[39] The corporation used this information to underbid its competitors and consequently, acquired the contracts.[40] The government sought forfeitures of all amounts paid or payable to the defendants under the supply contracts.[41] The Ninth Circuit rejected the government's position, holding that only interests in enterprises are forfeitable under RICO and that these interests do not include profits.[42] The profit issue was also discussed in *United States v. Thevis*[43] and *United States v. Meyers*.[44] In *Thevis*, the defendants were convicted of violating RICO by operating a pornography business.[45] After rejecting the defendant's constitutional attack on RICO's forfeiture provisions, the court held that profits derived from the pornography operation were not forfeitable interests.[46] In reaching its decision, the *Thevis* court was persuaded by dicta from the *Meyers* case, which concluded that an interest forfeitable under RICO is in the nature of a proprietary right and that only a strained construction of the term would include profits.[47]

In *United States v. Martino*,[48] the Fifth Circuit considered several nonstatutory definitions of "interest" and concluded that the term as used in section 1963(a)(1) was broad enough to encompass profits derived from RICO violations.[49] The court reasoned that if profits were not forfeitable,

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39. *See id.* at 764.

40. *See id.* at 764.

41. *See id.* at 766.

42. *See id.* at 768-69.

43. 474 F. Supp. 134 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, ___U.S.___, ___, ___, 103 S. Ct. 57, 74 L. Ed. 2d 61, 102 S. Ct. 3489, 2300, 73 L. Ed. 2d 1370, 1303 (1982) (three defendants prosecuted separate appeals).

44. 432 F. Supp. 456 (W.D. Pa. 1977).

45. *See* United States v. Thevis, 474 F. Supp. 134, 136-37 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, ___U.S.___, ___, ___, 103 S. Ct. 57, 74 L. Ed. 2d 61, 102 S. Ct. 3489, 2300, 73 L. Ed. 2d 1370, 1303 (1982) (three defendants prosecuted separate appeals).

46. *See id.* at 142. Defendants contended that RICO's forfeiture provision was unconstitutional for two reasons: (1) that it amounted to a forfeiture of estate, which is inferentially barred by the United States Constitution; and (2) that the forfeiture provision was unconstitutionally vague and overbroad. *See id.* at 141. Yet the court refused to extend RICO's forfeiture provisions to include profits derived from the pornography operation. *See id.* at 142.

47. *See id.* at 142. The court in *Meyers* stated that an interest as used in section 1963 "is akin to a continuing proprietary right in the nature of a partnership or stock ownership (or holding a debt or claim, as distinguished from 'equity' investment) rather than mere dividends or distributed profits." United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977).

48. 681 F.2d 952 (5th Cir. 1982) (en banc), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983).

49. *See id.* at 954. The majority considered definitions of "interest" found in *Webster's Third New International Dictionary* ("dictionary definition of the term includes 'right, ti-

the effectiveness of the Act would be undermined and its legislative intent frustrated.[50] Moreover, the court determined that to hold section 1963(a)(1) does not extend to profits, but merely to contractual or proprietary interests, would render section 1963(a)(2) surplusage.[51] Finally, the majority concluded that the one percent investment exception found in section 1962(a) did not reflect congressional acquiescence to the investment of illegally derived profits; rather, the majority construed the exception as limiting the definition of illegal activity.[52]

Speaking for the dissent, Judge Politz concluded that interests forfeitable under RICO are limited to interests in enterprises.[53] This construction was based on the premise that a substantive RICO violation necessarily involves the investment in or control over an enterprise.[54] Thus, the dissent reasoned that only the interest created by such investment or control

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tle, or legal share in something; participation in advantage, profit, and responsibility' ") and *Black's Law Dictionary* (" '[t]he most general term that can be employed to denote a right, claim, title, or legal share in something' "). *See id.* at 954.

50. *See id.* at 956-59. No portion of the legislative history expressly states that a RICO forfeiture extends to profits. The majority reasoned, however, that Congress intended to make a broad attack on organized crime and that in many cases, there would be nothing to seize but cash proceeds. From this, the majority concluded that to disallow the forfeiture of profits would encourage rather than deter racketeering activites "which yield primarily cash revenues." *See id.* at 958.

51. *See id.* at 955-56. On this score, the majority reasoned that "any interest" forfeitable under section 1963(a)(1) is applicable to a violation of section 1962(c). Therefore, according to the majority, the reference to section 1962 contained in section 1963(a)(1) does not define what interests are forfeitable, but merely "identifies the illegal activities which trigger the forfeiture." *See id.* at 955. The majority concluded that section 1963(a)(2) establishes the forfeitable interests created by violations of section 1962(a) and (b). *See id.* at 955.

52. *See id.* at 960. The one percent investment exception states that it is not unlawful under RICO to use profits acquired from a pattern of racketeering activity or collection of an unlawful debt to purchase for investment less than one percent of the securities of a publicly held corporation. *See* 18 U.S.C. § 1962(a) (1976). The *Martino* court contended that the exception is a means of limiting what would otherwise be a substantive offense under section 1962(a). *See* United States v. Martino, 681 F.2d 952, 960 (5th Cir. 1982) (en banc), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983).

53. *See* United States v. Martino, 681 F.2d 952, 962-65 (5th Cir. 1982) (en banc) (Politz, J., dissenting), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983).

54. *See id.* at 964 (Politz, J., dissenting). This contention is readily observable where the substantive offense is of either section 1962(a) or (b). Under either subsection, acquiring an interest is the essence of the criminal act. Under section 1962(c), however, the essence of the offense is engaging in racketeering activity. Judge Politz did not resolve this conflict but concluded that only interests in enterprises are forfeitable. *See id.* at 962-63 (Politz, J., dissenting).

is forfeitable.[55] Judge Politz also found persuasive the reasoning of several prior cases discussing the profit issue and a letter written by former Deputy Attorney General Richard P. Kleindienst to the Congress commenting on Senate Bill 1861, RICO's unenacted statutory predecessor.[56] Finally, Judge Politz recognized that the one percent investment exception illustrates that Congress was not attempting to reach the profits derived from RICO offenses[57] and that reading an enterprise limitation into section 1963(a)(1) would not render section 1963(a)(2) mere surplusage.[58]

The holding in *Martino* is a textbook example of legislation through judicial construction.[59] As the dissent suggests, had the legislature intended for RICO's forfeiture provisions to extend to profits, it would have so stated in clear and unequivocal language.[60] A criminal statute, perhaps more than any other, must be written in "language that the common world will understand."[61] Thus, the fair warning doctrine requires that a citizen be given fair warning of what constitutes criminal behavior and of the penalties potentially invoked by that behavior.[62] As Justice Frankfurter commented, "[i]f a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men."[63] Under the fair warning doctrine and the unquestionable premise that criminal laws are directed towards ordinary men, the *Martino* court incorrectly expanded the meaning of "interest" to

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55. *See id.* at 962 (Politz, J., dissenting).

56. *See id.* at 963-64 (Politz, J., dissenting). The letter written by former Deputy Attorney General Kleindienst states that the "revival of the concept of forfeiture as a criminal penalty, *limited as it is in Section 1963(a) to one's interest in the enterprise* which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of Congressional wisdom rather than of constitutional power . . . . " *Id.* at 958-59.

57. *See id.* at 962-63 (Politz, J., dissenting).

58. *See id.* at 963 (Politz, J., dissenting).

59. *Cf.* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (courts cannot "substitute their social and economic beliefs" for judgment of legislature); Olsen v. Nebraska, 313 U.S. 236, 246 (1941) (courts not concerned with wisdom, need, or appropriateness of legislation).

60. *See* United States v. Martino, 681 F.2d 952, 964 (5th Cir. 1982) (en banc) (Politz, J., dissenting), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983).

61. McBoyle v. United States, 283 U.S. 25, 27 (1931). Justice Holmes said:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

Id. at 27.

62. *See id.* at 27.

63. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

include profits.[64]

Rather than relying on the ordinary meaning of "interest," the *Martino* court fell prey to the adversarial subterfuge of "legislative intent."[65] Indeed, the majority relied on strained references to RICO's legislative history which seem to indicate that profits could be a forfeitable interest.[66] Isolated references to an act's legislative history are not, however, dispositive of a court's interpretation of a statute.[67] Moreover, there are portions of the Act's legislative history which support both the holdings of the majority and of the dissent.[68] Of particular significance is the Kleindienst letter written in reference to Senate Bill 1861. The letter was described in the Senate Report regarding Senate Bill 30 (later codified as RICO) as an accurate interpretation of the latter's forfeiture provisions.[69] If RICO's

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64. *Compare* United States v. Martino, 681 F.2d 952, 953 (5th Cir. 1982) (en banc) (profits are forfeitable interests), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983) *with* United States v. Long, 654 F.2d 911, 915 n.6 (3d Cir. 1981) (distinguishing forfeiture under RICO from forfeiture under Comprehensive Drug Abuse Prevention and Control Act of 1970; under RICO, profits not forfeitable), *and* United States v. Marubeni Am. Corp., 611 F.2d 763, 767-69 (9th Cir. 1980) (profits are not forfeitable interests).

65. *See* United States v. Martino, 681 F.2d 952, 956-59 (5th Cir. 1982) (en banc) (interpretation of RICO's legislative history illustrates profits from racketeering should be forfeited), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983).

66. *See id.* at 956. The majority cited the Senate Committee Report for the proposition that RICO was intended to attack organized crime's "source of economic power," and construed this as inferring that profits are forfeitable. *See id.* at 957. Similarly, the court cited portions of the floor debates which imply that profits are forfeitable interests. *See id.* at 957 n.17.

67. *See* United States Dep't of State v. Washington Post Co., ___U.S.___, ___, 102 S. Ct. 1957, 1960, 72 L. Ed. 2d 358, 363 (1982) (statements found in act's legislative history not dispositive of act's meaning); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring) (resort to legislative history only justified where face of act is inescapably ambiguous); United States v. Dickerson, 310 U.S. 554, 562 (1940) (ambiguous or contradictory portions of legislative history shall not control customary meaning of words). This is not to say that a court should not refer to an act's legislative history to correct certain mistakes such as drafting errors. The Supreme Court has stated, however, that RICO is "a carefully crafted piece of legislation." Ianelli v. United States, 420 U.S. 770, 789 (1975).

68. *Compare* United States v. Martino, 681 F.2d 952, 956-59 (5th Cir. 1982) (en banc) (majority's reliance on legislative history to reach conclusion that profits are forfeitable interests), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983) *with id.* at 963-64 (Politz, J., dissenting) (dissent's reference to portions of legislative history indicating that profits are not forfeitable interests) *and* United States v. Marubeni Am. Corp., 611 F.2d 763, 768-69 (9th Cir. 1980) (legislative history indicates that to be forfeitable, interest must be in enterprise; thus, profits not forfeitable).

69. *See* S. REP. No. 91-617, 91st Cong., 1st Sess., 78-80 (1969). The Senate Report also states that there is an enterprise limitation on interests forfeitable under RICO:

> Section 1963 provides criminal penalties for violation of section 1962 . . .

forfeiture provisions are to reach the fruits of the crime and not merely the defendant's interest in the enterprise, it is within the province of Congress, not the courts, to amend the statute.[70]

In its abortive attempt to read the collective mind of the Ninety-first Congress, the majority all but ignored persuasive judicial reasoning from outside the Fifth Circuit which holds that profits derived from RICO offenses are not forfeitable.[71] The well-reasoned opinion of the Ninth Circuit in *Marubeni* was summarily dismissed by the *Martino* majority as having "obscured" the functions of RICO's prohibitory and penal sections.[72] Indeed, the *Marubeni* court placed heavy emphasis on the one percent investment exception found in section 1962(a), one of RICO's prohibitory provisions.[73] The *Marubeni* court reasoned that a racketeer could use racketeering profits to acquire a de minimus interest in a publicly held corporation without violating RICO.[74] If, however, profits are forfeitable, then the de minimus investment would be forfeitable as well; such an interpretation would, according to Judge Wright, defeat the function of the one percent investment exception.[75] Citing the familiar rule

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> [s]ubsection (a) provides the remedy of criminal forfeiture. . . . The language is designed to accomplish a forfeiture of any "interest" of any type in the enterprise acquired by the defendant or in which the defendant has participated in violation of section 1962.

Id. at 160; *accord id.* at 34; H.R. REP. No. 91-1549, 91st Cong., 1st Sess. 35, 57, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4007, 4010, 4033.

70. *See* United States v. Martino, 681 F.2d 952, 965 (5th Cir. 1982) (en banc) (Politz, J., dissenting) (legislature, not court, should amend RICO to allow forfeiture of profits), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983); United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979) (expansive statutory construction allowing forfeiture of profits would raise serious due process problems), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, ___U.S.___, ___, ___, 103 S. Ct. 57, 74 L. Ed. 2d 61, 102 S. Ct. 3489, 2300, 73 L. Ed. 2d 1370, 1303 (1982) (three defendants prosecuted separate appeals); *cf.* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("courts do not substitute their social . . . beliefs for the judgment of the legislative bodies, who are elected to pass laws.").

71. *See* United States v. Martino, 681 F.2d 952, 960 (5th Cir. 1982) (en banc), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983). The only case cited by the majority was United States v. Marubeni Am. Corp., 611 F.2d 763, 767-69 (9th Cir. 1980), holding that profits are not forfeitable under RICO, which the court rejected as confusing the penal and prohibitory sections of RICO. *See id.* at 960.

72. *See* United States v. Martino, 681 F.2d 952, 960 (5th Cir. 1982) (en banc), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983).

73. *See* United States v. Marubeni Am. Corp., 611 F.2d 763, 767 (9th Cir. 1980). Judge Wright, in rejecting the government's contention that profits are forfeitable interests, commented that "[c]ongress would not have established rules for the investment of racketeering income, enforced by the penalty of criminal forfeiture, if it intended the government to seize that income regardless of how it was used." *Id.* at 767.

74. *See id.* at 767.

75. *See id.* at 767. The court explains the inappropriateness of such a conclusion as

that statutes should not be "construed to make surplusage of any provision,"[76] the *Marubeni* court refused to hold that profits are forfeitable interests and thereby gave effect to the one percent investment exception.[77] The *Martino* court, on the other hand, erased the one percent investment exception from the United States Code by holding that profits derived from racketeering activity are forfeitable interests.[78]

The *Martino* court made no reference whatsoever to the decisions in *Thevis*[79] and *Meyers*,[80] even though both of these cases specifically addressed the profit issue.[81] The *Thevis* court perceptively concluded that the use of the term "interest" indicates that the forfeitable interest is part of a larger whole.[82] Moreover, the *Thevis* court reasoned that the

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follows:

> If racketeering income were a forfeitable interest, it follows that interests "in an enterprise" acquired with racketeering income would be forfeitable. The test in either case would be whether the interest was "acquired or maintained in violation of section 1962." 18 U.S.C. § 1963(a)(1). An interest is "acquired or maintained" whether it is income derived directly from racketeering or an interest in an enterprise derived indirectly by investing racketeering proceeds. The government's interpretation of RICO thus defeats that 1% investment exception and makes the rest of § 1962(a) surplusage because, under it, § 1962(c) would require forfeiture regardless of how racketeering income was invested.

Id. at 767.

76. *See id.* at 767 (citing Pettis *ex rel.* United States v. Morrison-Knudsen Co., 577 F.2d 668, 673 (9th Cir. 1978)).

77. *See id.* at 769 (RICO's forfeiture provisions apply only to interests in enterprises). By reaching this conclusion, the one percent investment exception is left intact. That is, if profits from racketeering activity are used to acquire less than one percent of a corporation's stock, no crime is committed by virtue of the investment, and no forfeiture can occur. To hold that profits are of a forfeitable nature would mean that even a de minimus investment acquired with such profits would be forfeitable; this interest would, therefore, be forfeitable. The effect of such a holding would be to make non-criminal behavior, i.e., de minimus investment, punishable by forfeiture. *See id.* at 767.

78. *Compare* United States v. Marubeni Am. Corp., 611 F.2d 763, 767 (9th Cir. 1980) (one percent investment exception rendered meaningless if profits held forfeitable) *with* United States v. Martino, 681 F.2d 952, 960 (5th Cir. 1982) (en banc) (de minimus investment of racketeering profits not substantive violation, but nonetheless forfeitable), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983).

79. United States v. Thevis, 474 F. Supp. 134, 141 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, ___U.S.___, ___, ___, 103 S. Ct. 57, 74 L. Ed. 2d 61, 102 S. Ct. 3489, 2300, 73 L. Ed. 2d 1370, 1303 (1982) (three defendants prosecuted separate appeals).

80. United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977).

81. *See* United States v. Thevis, 474 F. Supp. 134, 141 (N.D. Ga. 1979) (profits not forfeitable under RICO), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, ___U.S.___, ___, ___, 103 S. Ct. 57, 74 L. Ed. 2d 61, 102 S. Ct. 3489, 2300, 73 L. Ed. 2d 1370, 1303 (1982) (three defendants prosecuted separate appeals); United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977) (strained construction would allow forfeiture of profits).

82. *See* United States v. Thevis, 474 F. Supp. 134, 141-42 (N.D. Ga. 1979), *aff'd*, 665

"enterprise concept" is fundamental to the RICO schema and distinguishes a RICO offense from the predicate offenses which constitute racketeering activity.[83] From this distinction the court inferred that the forfeitable interest must be an interest in an enterprise.[84] The *Thevis* court cited the *Meyers* decision as standing for the proposition that profits are not forfeitable interests.[85] In *Meyers*, the court qualified its statement that only a strained construction of the word "interest" would extend its meaning to include profits; the court stipulated that such a construction would only be available where the profits were reinvested in the enterprise or used to acquire control over the enterprise.[86]

In addition to ignoring prior case law discussing the profit issue, the *Martino* majority rejected the contention that had Congress intended for profits to be forefeitable under RICO, Congress would have expressly provided for such forfeiture.[87] In comparison, however, the Comprehensive Drug Abuse Prevention and Control Act of 1970 contains the Continuing Criminal Enterprise statute (CCE)[88] which does expressly provide for the forfeiture of profits acquired in violation of the act.[89] A forfeiture under

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F.2d 616 (5th Cir.), *cert. denied*, ___U.S.___, ___, ___, 103 S. Ct. 57, 74 L. Ed. 2d 61, 102 S. Ct. 3489, 2300, 73 L. Ed. 2d 1370, 1303 (1982) (three defendants prosecuted separate appeals).

83. *See id.* at 142. The court reasoned that "interest" derives its meaning from RICO's prohibitory provisions. *See id.* at 142. Perhaps more important is that acquiring, controlling, or maintaining an interest in an enterprise is what RICO makes illegal. *See id.* at 142. The court concluded, therefore, that the forfeitable interest "is limited to the interest in the enterprise and does not extend to fruits or profits generated from the enterprise." *Id.* at 142.

84. *See id.* at 142.

85. *See id.* at 142 (quoting United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977)).

86. *See* United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977) (dicta).

87. *See* United States v. Martino, 681 F.2d 952, 960 (5th Cir. 1982) (en banc), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983). *But see id.* at 964 (Politz, J., dissenting) (that profits are expressly forfeitable under 21 U.S.C., section 848(a)(2) (1976) supports inference Congress did not intend profits to be forfeitable under RICO); United States v. Long, 654 F.2d 911, 915 n.6 (3d Cir. 1981) (scope of forfeiture under 21 U.S.C., section 848(a)(2) (1976) broader than 18 U.S.C., section 1963; as under latter, profits not forfeitable); United States v. Marubeni Am. Corp., 611 F.2d 763, 766 n.7 (9th Cir. 1980) (comparison of 21 U.S.C., section 848(a)(2) (1976) and 18 U.S.C., section 1963 illustrates profits not forfeitable under RICO).

88. *See* 21 U.S.C. § 848(a)(2) (1976).

89. *See id.* Section 848(a)(2) states that:

> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—
>
> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Id.

CCE attaches in personam as does a RICO forfeiture.[90] Furthermore, these statutes were enacted within days of one another.[91] They are, therefore, *in pari materia,* and should be construed together.[92] A comparison of these two statutes makes it clear that Congress recognized the difference between profits and interests.[93] The distinction between these two forfeiture statutes was originally discussed in *United States v. Long.*[94] In *Long,* the Third Circuit noted that a forfeiture under CCE is not equal in scope to a RICO forfeiture; while CCE extends to profits, RICO only mandates the forfeiture of the defendant's "personal interest in the tainted enterprise."[95] As the *Martino* dissent suggests, had Congress intended for a RICO forfeiture to extend to profits, it would have expressly stated that intention as it did in the CCE.[96]

RICO allows the forfeiture of interests in enterprises, not profits derived from racketeering activities. The *Martino* court erroneously legislated the forfeiture of profits into the act.[97] In so doing, the court placed undue reliance on isolated remarks found in RICO's legislative history and rejected persuasive authority holding that profits are not forfeitable.[98] Additionally, the court all but ignored a similar statute which illus-

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90. *See* United States v. Long, 654 F.2d 911, 914 (3d Cir. 1981) (CCE provides for in personam forfeiture); 21 U.S.C. § 848(a)(2) (1976) (profits forfeitable upon conviction).

91. *See* United States v. Martino, 681 F.2d 952, 964 (5th Cir. 1982) (en banc) (Politz, J., dissenting) (both statutes enacted within matter of days), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983).

92. *Cf.* Northcross v. Board of Educ., 412 U.S. 427, 428 (1973) (statutes sharing same essential purpose should be construed together); Erlenbaugh v. United States, 409 U.S. 239, 244-45 (1972) (when interpreting statute, similar legislation dealing with same subject matter should be considered); *In re* Robison, 665 F.2d 166, 171 (7th Cir. 1981) (statutes dealing with same subject matter must be construed consistently).

93. *Compare* 21 U.S.C. § 848(a)(2) (1976) (profits forfeitable) *with* 18 U.S.C. § 1963 (1976) (interests forfeitable).

94. 654 F.2d 911 (3d Cir. 1981). In *Long,* the government sought forfeiture of an airplane purchased by the defendants with the profits of an illicit drug enterprise. *See id.* at 912-13.

95. *See id.* at 915 n.6.

96. *See* United States v. Martino, 681 F.2d 952, 964 (5th Cir. 1982) (en banc) (Politz, J., dissenting), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983).

97. *Cf.* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (courts cannot "substitute their social and economic beliefs" for judgment of legislature); Olsen v. Nebraska, 313 U.S. 236, 246 (1941) (courts not concerned with "wisdom, need, or appropriateness" of legislation).

98. *Compare* United States v. Martino, 681 F.2d 952, 954 (5th Cir. 1982) (en banc) (profits forfeitable), *cert. granted sub nom.* Russello v. United States, ___U.S.___, 103 S. Ct. 721, 74 L. Ed. 2d 948 (1983) *with* United States v. Marubeni Am. Corp., 611 F.2d 763, 767-69 (9th Cir. 1980) (discussion of why profits not forfeitable interests) *and* United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979) (profits not forfeitable), *aff'd,* 665 F.2d 616 (5th Cir.), *cert. denied,* ___U.S.___, ___, ___, 103 S. Ct. 57, 74 L. Ed. 2d 61, 102 S. Ct. 3489,

trates that Congress was aware of the difference between profits and interests when it enacted RICO.[99] It is impossible to speculate as to the deterrent effect the *Martino* holding will have; however, the primary effect of the case will be to create confusion among the federal courts as to what interests are forfeitable under RICO.

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2300, 73 L. Ed. 2d 1370, 1303 (1982) (three defendants prosecuted separate appeals).

99. *Compare* 21 U.S.C. § 848(a)(2) (1976) (forfeiture of profits expressly provided for) *with* 18 U.S.C. § 1963 (1976) (providing for forfeiture of interests).