October 1976


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COVERAGE AND APPLICATION OF THE ORGANIZED CRIME CONTROL ACT OF 1970: THE ANTI-RACKETEERING STATUTE IN OPERATION

In 1970, the Organized Crime Control Act\(^1\) was signed into law. Its purpose is "to seek the eradication of organized crime\(^2\) in the United States."\(^3\) The Act elevated local criminal activity\(^4\) to the status of federal crimes in certain situations. In order for the Attorney General to bring a cause of action pursuant to OCCA, the factual circumstances must indicate a "pattern of racketeering activity"\(^5\) consisting of at least two substantive crimes\(^6\) proscribed by the statute. By focusing on a "pattern of racketeering activity" rather than on a single crime, the Act attempts to isolate and proscribe the types of activities through which members of organized crime procure money and thereby to curtail the spread of organized crime itself.\(^7\)

Once applicable, Title IX\(^8\) of OCCA provides that the racketeering activity can be terminated either through the use of criminal penalties\(^9\) or civil

2. I.I.T. RESEARCH INST., A STUDY OF ORGANIZED CRIME IN AMERICA 18 (1971) adopted the following definition of organized crime:
Organized crime consists of the participation of persons and groups of persons (organized either formally or informally) in transactions characterized by:
(1) An intent to commit, or the actual commission of, substantive crimes;
(2) A conspiracy to execute these crimes;
(3) A persistence of this conspiracy through time (at least one year) or the intent that this conspiracy should persist through time;
(4) The acquisition of substantial power or money, and the seeking of a high degree of political or economic security, as primary motivations.
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.
4. 18 U.S.C. § 1961(1)(A) (1970) defines racketeering activity as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year" (emphasis added).
5. 18 U.S.C. § 1961(5) (1970) states that a "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . ."
6. See note 4 supra.
7. United States v. Mandel, 415 F. Supp. 997, 1019 (D. Md. 1976), explains this approach toward combating organized crime in the face of the failure of "traditional criminal statutes" to curtail its activities:
Rather than attempt to define "organized crime" and make membership therein unlawful, a task which would undoubtedly have been impossible and probably unconstitutional, Congress defined an unlawful pattern of racketeering activity in terms of the types of crimes and behavior commonly engaged in by organized crime in attempts to seize interests in legitimate businesses.
Equitable procedures were added to customary criminal penalties in order to "provide [the courts] needed flexibility and continuing jurisdiction to assure effective enforcement"\(^\text{11}\) of the Act.\(^\text{12}\)

Nevertheless, courts have experienced considerable difficulty in enforcing OCCA. The most serious problems with implementing the Act stem from the discrepancies between the limited congressional intent expressed in the legislative history and the expansive language of the statute itself. Characteristically, courts interpret the scope and application of a statute in light of its legislative history. Since the legislative history and the statutory language of OCCA do not concur, opposing decisions on the scope of OCCA coverage have resulted from the courts’ use of this analytical approach. In those cases in which courts have held that OCCA was applicable, they have encountered the further challenge of interpreting and implementing the title IX remedies provisions. Neither the legislative history nor the statutory language provides standards by which injunctions are to be issued pursuant to the remedies sections. For this reason, courts have found OCCA difficult to apply.

This article will contain a general discussion of OCCA emphasizing the discrepancies between the legislative history and the statutory language which have generated inconsistent judicial interpretations. It will examine the various interpretations of OCCA coverage. It will analyze the problems created by the sparse legislative history which courts encounter in applying the remedies sections and the ramifications of the courts’ solutions of these problems in terms of the Act’s purpose. Finally, this article will suggest methods of implementing these sections.

**Legislative History and Statutory Language**

The legislative history of title IX of the OCCA is consistent and brief.\(^\text{13}\)

The hearings on this title of the Act clearly indicate a congressional intent that the statute be specifically aimed at combating the infiltration of legitimate business by organized crime. The statement of findings and purposes accompanying the Act embodies this concern and articulates the fear that the techniques of force, fraud, and corruption employed by organized crime members are "increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes."\(^\text{14}\)

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12. S. REP. No. 91-617, 91st Cong., 1st Sess. 81 (1969) includes the following statement: "Title IX thus brings to bear on the infiltration of organized crime into legitimate business or other organizations the full panoply of civil remedies."


consensus of the Senate Judiciary Committee was that the civil remedies are aimed at the protection of legitimate business from these forces. The House Judiciary report describes title IX as "designed to inhibit the infiltration of legitimate business by organized crime." Such concern for the catastrophic effect of organized crime on society is contained throughout the congressional hearings and reflects the climate of thought which generated the enactment of OCCA.

However, despite repeated references in the legislative history to the protection of legitimate business, the Act as drafted fails to articulate this overwhelming concern. The restricted congressional purpose that the Act halt the infiltration of organized crime into legitimate business in the United States was similarly not incorporated in the express language of the statute. Instead, the statute regulates the use of money derived from a pattern of racketeering in conducting the affairs of "any enterprise" and does not refer to organized crime. The statutory language likewise seems to delete the requirement of the legislative history that the enterprise be "infiltrated." According to the statute, it is sufficient that the affairs of the enterprise be conducted or maintained through a "pattern of racketeering activity." Coupled with this all-encompassing statutory language is the interpretative guideline to the judiciary that: "[t]he provisions of this title shall be liberally

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate commerce, threaten domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact . . .

17. See note 3 supra.
18. 18 U.S.C. § 1962(b) (1970) provides:
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.
19. 18 U.S.C. § 1962(c) (1970) provides:
It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
construed to effectuate its remedial purposes."

The legislative history implies a limitation on the application of the Act to organized crime and legitimate business. The statute, on the other hand, speaks of money from a "pattern of racketeering" being used in "any enterprise" both of which terms are to be liberally construed. As a result of these discrepancies, courts basing their reasoning on the legislative history interpret OCCA narrowly while those courts using the statutory language as their rationale interpret the Act broadly.

**JUDICIAL INTERPRETATIONS OF OCCA COVERAGE**

Courts have defined the coverage of the Organized Crime Control Act in three areas. The threshold question suggested by the specified purpose of the Act and its legislative history is whether a connection with organized crime must be established to bring a cause of action thereunder. The second issue is whether the term "any enterprise" of the statutory language is limited to legitimate enterprises consistent with the legislative history or can be broadly construed to include non-legitimate activity. The final issue is whether a governmental entity constitutes an enterprise within the meaning of the Act.

**Connection with Organized Crime**

The issue of whether OCCA requires the establishment of a connection between the defendants and organized crime was addressed initially in *United States v. Amato.* The court reasoned that since the statute required proof of at least two criminal acts to establish the necessary pattern of racketeering activity, merely proving a connection with organized crime was insufficient to bring the statute into play. Thus, the *Amato* court rejected defendants' argument that the statute was unconstitutional because one could violate it simply by being "reputed to be an organized crime member." The court did not specifically decide whether a connection with organized crime was needed in addition to the crime necessary to establish a pattern of racketeering to maintain a cause of action under OCCA.

A year and a half later, in *Barr v. WUI/TAS, Inc.*, the same district court addressed the latter issue. In *Barr* the defendant had conspired to fix prices, had overcharged its customers throughout the United States, and had used the mail to collect the overcharge. Despite these facts, the court refused to allow the plaintiff to amend his complaint to include a claim under OCCA. The court conceded that the alleged mail fraud probably constituted a pattern

22. *Id.* at 548.
of racketeering as described in the Act. However, since there was "‘nothing in the proposed complaint even to suggest that defendant [was] connected in any way with organized crime,’" the motion was denied as a claim which lacked merit. The court justified its decision on an analysis of the legislative history and the fact that the Act, in the words of the then Attorney General, was aimed at "‘combating a society of criminals who seek to operate outside of the control of the American people and their governments.’" Since the record did not indicate that the defendant had been involved in such a society, the statute was held inapplicable.

The contrary position was advanced in United States v. Mandel. The defendant challenged his indictment under OCCA by asserting that the statute was confined solely to members of organized crime. The court noted that even though organized crime may have been the principal concern of Congress in enacting the statute; it was not the only concern. Rather, the fact that the term organized crime is neither used nor defined in the Act engenders the interpretation that a broader base and application was anticipated, reasoned the court. Otherwise, proof of association with organized crime would be a prerequisite for the applicability of the statute. The court stated that "‘to require proof beyond a reasonable doubt that a defendant was a member of ‘organized crime,’ with the highly subjective and prejudicial connotations of that term, would simply render the statute unenforceable, a result plainly not in the contemplation of Congress.’" Furthermore, Congress understood the statute would not be applied "‘exclusively to members of organized crime.’" Thus, the court held the reverse of Barr. As long as the factual pattern fell within the Act’s definition of racketeering activity, the statute was applicable regardless of the failure to allege any connection with organized crime.

Like the Mandel court, the Court of Appeals for the Ninth Circuit in United States v. Campanale rejected the argument that OCCA required evidence that those charged thereunder were engaged in organized crime. The court reasoned that although the statute’s title evidenced congressional concern with organized crime, the statute in itself was broader.

With the exception of the Barr decision, courts have focused their analyses on whether evidence of the proscribed conduct was present. The racketeering activity outlined in the Act is meant to include those patterns of

24. Id. at 113.
25. See id. n.3 quoting statement of the Attorney General of the United States at Senate Hearings.
27. Such a requirement would probably be unconstitutional under Robinson v. California, 370 U.S. 660 (1962).
29. Id. at 1019.
behavior and types of criminal activity characteristically associated with the methods of organized crime.\textsuperscript{31} Any conduct in that general category is proscribed by OCCA. The cases indicate that whether a particular defendant is alleged to be associated with organized crime is irrelevant to prosecution under OCCA.

**Comprehensiveness of the term “Any Enterprise”**

According to the legislative history, the Act attempts to stop the flow of money from organized crime activity into legitimate businesses by providing that money derived from a pattern of racketeering cannot be used in acquiring or maintaining an interest in any legitimate enterprise.\textsuperscript{32} The express language of the statute, however, does not include the word “legitimate.” Rather, the statute repeatedly uses the general term “any enterprise.”\textsuperscript{33} The difficulty of reconciling the legislative history and the statutory language on this point has prompted several courts to hold that “any enterprise” includes both legitimate business and wholly illegal endeavors.\textsuperscript{34}

*United States v. Parness*\textsuperscript{35} was the first case to interpret the meaning of “any enterprise.” The defendant appealed his conviction for acquiring an enterprise affecting commerce through a pattern of racketeering in violation of Title IX of OCCA. He argued that Congress did not intend the word “enterprise” to include a foreign business, in this case a hotel corporation. The Court of Appeals for the Second Circuit summarily rejected this claim, stating that the word “corporation” appeared in the definitions section of the Act and that the legislative history indicated a congressional intent that the statute be broadly construed.\textsuperscript{36} In addition, if the statute were restricted to domestic business only, organized crime members need only invest abroad to evade prosecution under the Act. The court reasoned that organized crime affects the American economy whether the investment occurs in America or abroad and, since the purpose of the statute is to protect the American economy, foreign corporations in which racketeering money has been invested are included within the definition of “any enterprise.”\textsuperscript{37}


\textsuperscript{32} See note 19 supra for text of 18 U.S.C. § 1962(c) which forbids the conducting of the affairs of any enterprise “through a pattern of racketeering activity” (emphasis added). The statutory language does not specify a requirement that the enterprise be infiltrated as suggested in the legislative history.

\textsuperscript{33} 18 U.S.C. § 1962(a), (b) and (c) (1970).

\textsuperscript{34} See United States v. Altese, 542 F.2d 104 (2d Cir. 1976); United States v. Morris, 532 F.2d 436 (5th Cir. 1976); United States v. Hawes, 529 F.2d 472 (5th Cir. 1976); United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); United States v. Parness, 503 F.2d 439 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert denied, 420 U.S. 925 (1975).

\textsuperscript{35} 503 F.2d 430, 439-40 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

\textsuperscript{36} Id. at 439.

\textsuperscript{37} In United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S.
The Court of Appeals for the Seventh Circuit adopted the Second Circuit's broad interpretation of the statute in United States v. Cappetto. In Cappetto, a district court enjoined a wholly illegal gambling business operating out of a billiards hall with the owner's knowledge and participation. The defendants contended that the congressional purpose was to protect legitimate business from the influence of racketeers and not to prohibit racketeering activities, such as gambling, in themselves. In rejecting this argument, the court found that the protection of legitimate business was only one of the targets of Congress and that a more inclusive intent was to inhibit any pattern of racketeering influencing interstate commerce. The court concluded that nothing in the definitions section or the prohibited activities section of the Act suggested that the term "any enterprise" must be limited to legitimate ones. Consequently, the court held that an illegal gambling business was included within the category of "any enterprise."

This reasoning was adopted by the Court of Appeals for the Fifth Circuit in United States v. Hawes, in which the court rejected appellants' position that only legitimate business enterprises were contemplated by the statute. The court found that the definition of enterprise included in the statute clearly goes "beyond the scope of legitimate business activity." Defendants were convicted of conspiring to participate in an illegal gambling enterprise, consisting of the manufacture, sale, rental and operation of coin-operated electrical machines used for gambling in violation of Georgia laws. The defendants' argument was two-pronged: that illegitimate business was not included under the Act, and that the allegedly infiltrated enterprise must be distinct from those persons associated with it. In addition, the defendants argued that the statute as applied is constitutionally defective because those reading it would not be put on notice that "any enterprise" included "those

1050 (1976), the Court of Appeals for the Ninth Circuit rejected the argument that the Act was not applicable to small business concerns.


39. In United States v. Castellano, 416 F. Supp. 125, 127-28 (E.D.N.Y. 1975), defendants likewise depended on the legislative history to argue that the statute does not apply to wholly illegal enterprises such as their association to loan money at usurious rates and to collect unlawful debts. The court reiterated that the infiltration of legitimate businesses by racketeers was only one of the targets of Congress in this enactment. Its more general concern was the influence of organized crime on the American economy and, consequently, Congress accorded the word "enterprise" a broad definition. Relying on Parness and Cappetto, the court denied the defendants' motion to dismiss the indictments under the anti-racketeering statute.

40. 502 F.2d at 1358.
41. 529 F.2d 472 (5th Cir. 1976).
42. Id. at 475.
43. Id. at 479.
44. In other words, "persons who by their association constitute an enterprise may not be indicted for associating with that enterprise." Id.
who participate in the affairs of their own organization."\(^{45}\) Citing the Supreme Court standard for establishing unconstitutional vagueness, the court found that a man of common intelligence would realize the possibility of criminal liability for being part of any enterprise, even his own, through a pattern of racketeering.\(^{46}\) Enterprise, then, under Hawes included the conduct of one's own business even though such a broad reading appears inconsistent with the concept of infiltration inherent in the legislative history.

On the basis of the holding in Hawes, the Court of Appeals for the Fifth Circuit affirmed the conviction of a professional gambler in United States v. Morris.\(^ {47}\) The court stated that in order to sustain such a conviction under title IX the prosecution only had to prove "the defendant's association with an 'enterprise' and the existence of a 'pattern of racketeering activity.'"\(^ {48}\) The enterprise alleged in the indictment consisted of a group of three people associated to defraud unsuspecting gamblers who had travelled to Nevada to gamble legally. Since the statutory definition of enterprise includes any group of individuals associated in fact, even if not as a legal entity, the court held that the conspiracy of three men constituted an enterprise and that the statute was thus applicable.\(^ {49}\)

Two years after its decision in Parness, the Second Circuit was again faced with interpreting title IX of the Act in United States v. Altese.\(^ {50}\) The district court had held that title IX applied only to legitimate business and was concerned with its infiltration by persons connected with organized crime. Hence, the court had dismissed two counts of an indictment charging the defendants with conducting a large scale gambling business "through a pattern of racketeering activity and through the collection of [unlawful] debts."\(^ {51}\) In reinstating the two counts, the Second Circuit relied on the language of the Act which states "any enterprise" and not any "legitimate" enterprise and on the clause directing that title IX "be liberally construed to effectuate its remedial purposes."\(^ {52}\) In concluding that such language indicates Congress "meant what it said,"\(^ {53}\) the court joined the Campanale, Cappetto, and Hawes courts in construing the term "enterprise" broadly.

Although four circuits have agreed that the statutory language takes

45. Id.
46. Id.
47. 532 F.2d 436 (5th Cir. 1976).
48. Id. at 441.
49. Id. at 442.
50. 542 F.2d 104 (2d Cir. 1976).
51. Id. at 105.
52. Id. at 106. In deciding whether a governmental agency is an enterprise, the court in United States v. Frumento, 405 F. Supp. 23, 30 (E.D. Pa. 1975), similarly noted that the congressionally-mandated broad construction of the statute properly included wholly illegal activity within the meaning of enterprise.
53. Id.
precedence over congressional intent in construing the ambiguities regarding the coverage of OCCA, the Altese dissent outlines an impressive argument for the contrary interpretation. Judge Van Graafeiland maintained that specific congressional direction is needed to extend the coverage of the Act beyond legitimate enterprises. The provision authorizing liberal construction of OCCA is not in itself sufficient justification for overriding the precise goal of the statute to rid legitimate businesses of the menace of control by members of organized crime.\footnote{54} "A review of the legislative history of title IX leaves no doubt that Congress never contemplated that ‘enterprise’ as used in §§ 1961, 1962 would extend beyond legitimate businesses or organizations."\footnote{55} To so broadly construe enterprise when the proscribed activities are those ‘chargeable under any State law’\footnote{56} is an impermissible intrusion of federal law into those areas traditionally relegated to the states,\footnote{57} according to the dissent.

Judge Van Graafeiland further pointed out that the Cappetto court was misguided in its reliance on the legislative history to authorize an expansive interpretation of the statute.\footnote{58} The Cappetto opinion quoted language from the legislative history of section 1955 which is not included in title IX.\footnote{59} Thus, by implication, those circuits relying on Cappetto are making the same error. While the legislative history of title IX is sparse, there is a clear indication of a congressional intent to confine the statute to the infiltration of legitimate businesses by organized crime members,\footnote{60} the dissent concluded.

\textit{Governmental Entities as Enterprises}

The question of whether the government or a governmental entity is an enterprise within the meaning of the Act has been litigated by two courts. Conflicting decisions were reached in \textit{United States v. Mandel}\footnote{61} and \textit{United States v. Frumento}.\footnote{62} To substantiate their opinions, both courts relied on the legislative history and on the language of the Act which defines enterprise as "any individual, partnership, corporation, association, or any legal entity, and any union or group of individuals associated in fact although not a legal entity."\footnote{63}

\footnote{54} \textit{Id.} at 107 (Van Graafeiland, J., dissenting).
\footnote{55} \textit{Id.} at 108 (emphasis added).
\footnote{56} \textit{Id.} See note 4 \textit{supra}.
\footnote{57} \textit{Id.} at 109.
\footnote{58} \textit{Id.}
\footnote{59} \textit{Id.}
\footnote{60} \textit{Id.} In \textit{United States v. Moeller}, 402 F. Supp. 49 (D. Conn. 1975), the court noted that "the legislative history . . . provides the clearest indication that Congress intended ‘enterprise’ to mean legitimate businesses." \textit{Id.} at 58. However, the statute was held inapplicable on the basis that there was only one action involved, the alleged arson of a business plant, and thus the requisite pattern of racketeering activity was lacking.
The defendant in *Mandel* was the Governor of Maryland. One count of the indictment which the court dismissed alleged the state "to be an enterprise within the meaning of the [anti-racketeering] statute." The factual allegation was that the defendant used his position as governor in a scheme to defraud the citizens of the state. The Governor was charged with taking bribes to influence the passage of legislation favorable to the other defendants, owners of a race track. He was also charged with using his powers as governor to procure state business for the other defendants. Finally, he was alleged to have acquired and maintained a valuable financial interest in the Security Investment Company with the money realized from the bribes.

The court engaged in a three-part analysis in deciding that neither the Governor nor the state was an "enterprise." First, the court said that the focus of the Act is organized crime activity in commerce according to the legislative history. Consequently, "to read the word 'enterprise' as including public entities would do violence to the plain purposes of Title IX." Second, the absence of any consideration of governments and states as enterprises in the legislative history of OCCA led the court to conclude that they were not contemplated as included within the term "enterprise." Third, the remedies provided imply "that Congress had only private entities in mind when defining 'enterprise.'" In addition, state laws regulating the conduct of public officials safeguard the government from infiltration by organized crime members, the court noted.

In *United States v. Frumento* the court addressed the question of whether a government agency is included within the definition of "enterprise" so as to fall within OCCA coverage. The defendant was a chief investigator for the Bureau of Cigarette and Beverage Taxes in the Pennsylvania Department of Revenue, many of the activities of which affect interstate commerce. The acceptance of bribes in the position constituted his alleged racketeering activity. The court held that governmental agencies are enterprises. The court found authority for this decision in the statutory definition of

64. 415 F. Supp. at 1018.
65. Id.
66. Id. at 1020.
67. See text accompanying notes 80-83 infra.
68. 415 F. Supp. at 1021.
69. Id.
70. The *Mandel* court held that the legislative history was significant on this issue, despite the fact they had held that the statutory language dictated that no connection with organized crime need be alleged to bring a cause of action under OCCA. *Mandel*, then, defines two narrow constructions of the statute; one based on its language and the other on its legislative history. Several other counts under OCCA in the indictment of Mandel were allowed to stand and will be discussed later in this paper. See text accompanying notes 87-93 infra.
72. Id. at 28.
73. Id.
"enterprise" as including any "association, or other legal entity."\textsuperscript{74} Support was also found in the comments of Senator McClennan, the Act's principal sponsor, that a primary consideration behind the legislation was to enable the government to curtail the corruption of "the processes of our democratic society."\textsuperscript{75} The Frumento court noted that the term "organization" is often used interchangably for the term "enterprise" throughout the legislative history of the Act. The general term "organization" was interpreted to include governmental agencies such as a tax bureau. The court further reasoned that the congressional mandate that courts liberally construe the statute "to effectuate its remedial purposes"\textsuperscript{76} encouraged the adoption of a broad definition of enterprise.

For the Mandel and Frumento courts, the legislative history and the statutory language form the bases of contradictory holdings. Due to these conflicting decisions it is unclear whether racketeering and corruption in connection with governmental offices and agencies are subject to regulations under OCCA.

Judicial decisions have established a liberal trend in interpreting the scope of OCCA coverage based on the statutory language. "Any enterprise" has been held to include foreign and domestic businesses, legitimate and illegal endeavors, and conspiracies of private persons. One court has held that governmental agencies and employees are covered. Despite the fact that the name of the statute is the Organized Crime Control Act, settled case law disposes of the argument that some connection with organized crime must be established for a factual pattern to fall within OCCA's coverage. After coverage has been established in a given case, courts are faced with the problem of implementing the remainder of the statute.

**APPLICATION OF CRIMINAL AND CIVIL REMEDIES**

In applying the Act, courts have experienced the most difficulty with the sections giving them jurisdiction to grant injunctive relief. These are section 1963(b) criminal remedies and section 1964(a) civil remedies. The sections empower courts to enter any order which would accomplish the goal of removing the corrupting influence\textsuperscript{77} of organized crime. However, both sections are silent as to the standards to be employed in granting such equitable relief. Thus, courts have turned to the legislative history and statutory language for direction.

The Senate Report explicitly outlined the intended operational effect of

\textsuperscript{74} See note 63 supra and accompanying text.
\textsuperscript{76} See note 20 supra.
\textsuperscript{77} See note 3 supra.
offering both criminal and civil remedies to deal with the unlawful activities of those engaged in organized crime.\textsuperscript{78} If an organization had been acquired or is being conducted

by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.\textsuperscript{79}

However, the legislative history contains no guidance for obtaining the desired effect. In fact, the sparse legislative history and limited debate on these sections indicate little congressional appreciation of the problems courts have subsequently encountered.

\textit{Title IX Remedies}

The criminal penalties of OCCA are listed in section 1963 of title IX. Subsection (a) authorizes the court to impose a $25,000 fine and/or a sentence of twenty years imprisonment for a violation of section 1962. In addition, upon conviction it requires the forfeiture\textsuperscript{80} to the United States of any interest or property acquired, maintained, or controlled in violation of the prohibited activities section. Subsection (b) grants district courts jurisdiction "to enter such restraining orders or prohibitions, or to take such other actions \ldots in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper."\textsuperscript{81} Subsection (c) directs the Attorney General to seize any property declared forfeited upon conviction, to provide for its disposal, and to make "due provision for the rights of innocent persons."\textsuperscript{82}

The civil law approach codified in section 1964 authorizes appropriate civil remedies including but not limited to those specifically listed in the statute. Subsection (a) grants district courts jurisdiction to issue injunctions requiring individuals to divest themselves of holdings in any enterprise acquired as a result of violations of section 1962 and to refrain from engaging in a like endeavor for a particular time period. Subsection (b) empowers the Attorney General to bring actions under the statute in the district court. Subsection (c) creates a cause of action for a private party injured as a result of

\textsuperscript{79}. \textit{Id}.
\textsuperscript{80}. Forfeiture is a common law remedy which has not been imposed in the United States since 1790. 18 U.S.C. § 3563 (1970) passed in the Act of April 20, 1790 by the First Congress stated: "No conviction or judgment shall work corruption of blood or any forfeiture of estate." OCCA effectively repeals 18 U.S.C. § 3563 (1970) and is the first federal statute to employ the penalty of forfeiture. See 1970 Hearings, note 11 \textit{supra}, at 407.
a section 1962 violation. Subsection (d) states that a judgment in favor of the United States in a criminal suit estops the defendant from denying the same allegations in a subsequent civil suit brought by the United States. Litigation has focused upon the granting of injunctions pursuant to a criminal prosecution under section 1963(b) or to a civil action under section 1964(a).

Section 1963(b) Injunctions

Two cases which involved petitions for injunctions pursuant to section 1963(b) to restrain the use of property pending disposition on the merits are United States v. Mandel83 and United States v. Lipman.84 Both the Mandel and Lipman courts adhered to civil standards85 to govern the hybrid situation created by OCCA of restraint in a criminal prosecution prior to conviction. This approach resulted in a restrictive interpretation of when an injunction could properly be issued pursuant to the criminal remedies section of OCCA.

Case law has established that there are four factors which must be considered in determining whether to grant equitable relief pursuant to rule 65 of the Federal Rules of Civil Procedure.86 These are that the movant demonstrate that he is likely to prevail at a trial on the merits; that irreparable harm will take place if an injunction is not granted; that there will be no significant injury to innocent parties; and that an injunction is in the public interest. In applying OCCA, the last two considerations pose no difficulties since subsection (c) of section 1963 protects innocent third parties and it is in the public interest to remove legitimate business from the control of organized crime and to safeguard the integrity of the criminal justice system. The Mandel and Lipman courts' analyses in applying the first two considerations highlight the difficulties in the implementation of section 1963(b) consistent with the congressional intent that title IX not be defeated.

In Mandel, the facts significant to granting an injunction indicate that the Governor of Maryland was charged with acquiring and maintaining a substantial financial interest in the Security Investment Company in violation of the Act.87 The defendant denied owning any of the interests described in the indictment.88 The government moved for an order to restrain "the transfer or other disposition by defendants of any property or other interests which would be subject to forfeiture upon conviction."89

87. For a complete discussion of the Mandel facts, see text accompanying notes 64-65 supra.
88. 408 F. Supp. at 681.
89. Id. at 680.
In denying the petition, the *Mandel* court held that an indictment composed of only conclusory allegations is insufficient to meet the requirement of demonstrating petitioner's likelihood of success at trial\(^90\) to justify the issuance of an injunction. To succeed in a criminal prosecution, it is necessary to convince a jury of the defendant's guilt beyond a reasonable doubt. Thus, some indication of the government's ability to meet this burden of proof must be offered at the hearing for the preliminary injunction. However, according to *Mandel*, a judicial finding that the government would be likely to prevail at trial based on whatever evidence "constitutes a pretrial determination that the defendants are probably guilty."\(^91\) Such a determination is prejudicial to the constitutional right to a fair trial. Hence, the *Mandel* court stated that to issue a section 1963(b) injunction "would be incompatible with the presumption of innocence defendants enjoy until such time, if ever, as a jury finds them guilty beyond a reasonable doubt."\(^92\) Although the court limited its holding to the facts in *Mandel*,\(^93\) it is difficult to imagine any situation in which this rationale for denying an injunction in a criminal proceeding would not be applicable.

The *Lipman* court likewise held that the indictment alone was not adequate to support a section 1963(b) injunction but based its conclusion on different reasoning. In *Lipman*, the defendants were involved in a scheme to receive kickbacks in connection with supplying drugs and services charged to Medicare to residents of a nursing home in violation of title IX.\(^94\) The court found that the issuance of an injunction to freeze the defendants' assets in the nursing home solely on the basis of the indictment would constitute a denial of due process protection which guarantees a judicial hearing prior to even a temporary deprivation of a property interest.\(^95\) The court rejected the government's argument that the grand jury's finding of probable cause substituted for a hearing and satisfied due process requirements. The *Lipman* court reasoned that grand jury proceedings do not offer the accused the opportunity to confront witnesses and introduce evidence necessary to insure its judicial nature. Thus, they cannot function as a substitute for an adversary hearing the outcome of which might affect the property rights of the accused.

The court found support for its holding in the statutory language. The Act provides that the court can enter such orders "as it shall deem proper."\(^96\) To make the determination as to what is proper, an evidentiary hearing is essential. As the court noted:

\(^{90}\) *Id.* at 683.
\(^{91}\) *Id.*
\(^{92}\) *Id.*
\(^{93}\) *Id.* at 684.
\(^{94}\) No. 76-96, slip op. at 1.
\(^{95}\) *Id.* at 53.
To interpret the statute as the government does, to allow the entry of an injunction on the bare showing that an indictment has been returned which claims that certain property is subject to forfeiture, would be tantamount to reading judicial discretion out of § 1963(b) and requiring the entry of an injunction in every case.97

Finally, the court reasoned that the hearing should be "surrounded by even greater procedural protections"98 than one required for a civil taking because the consequences of the pending criminal charge are potentially greater. An indictment alone, then, cannot support a section 1963(b) injunction.

After applying the first criterion for likelihood of success on the merits outlined in the rule 65 approach to granting injunctions, the Mandel and Lipman courts analyzed the second factor customarily considered in such cases: impending irreparable harm absent injunctive relief. The Mandel court interpreted the legislative history of OCCA to necessitate less stringent evidence of irreparable harm to obtain a section 1963(b) injunction than is ordinarily required under rule 65. Since the purpose of a section 1963(b) injunction is to prevent change in the present status of property ownership or interest prior to conviction so that the forfeiture provision cannot be defeated, the court concluded that the only harm that need be shown is the threat of imminent transfer. However, in Mandel, the government failed to offer such evidence and consequently an injunction was not issued. The Lipman court thought that the mere possibility that the defendants might be able to defeat the purposes of title IX if not restrained from divesting themselves of their property constituted potential irreparable harm in itself. Thus, both courts seem to indicate that evidence of a current intended transfer of rights in property which might be subject to forfeiture would be persuasive in obtaining an injunction pursuant to section 1963(b), provided the problems of the dilution of the presumption of innocence, on which Mandel was decided, and the potential violation of due process, which the Lipman court articulated, could be overcome.

These two critical concerns indicate reasons issuance of an injunction should not be automatic with an indictment. However, they need not always preclude equitable relief. The adoption of rule 65 civil standards, though, even as the minimum criteria as suggested by the Mandel court, is, in effect, an automatic denial of the injunction and tantamount to a defeat of title IX. In using this approach, courts lose sight of the fact that the reason for the section 1963(b) injunction provision in the Act is to prevent title IX from being defeated.99 The application of the rule 65 civil standards method of granting injunctions in these cases is unduly restrictive in that it does not allow the

97. No. 76-96, slip op. at 55.
98. Id. at 54.
court the latitude necessary to take into account additional factors. These include the facts that procedures have been developed to deal effectively with the concerns which the Mandel and Lipman courts isolated and that the indictment commands significant respect in the criminal justice system.

The language of section 1963 implies that the purpose of an injunction pursuant to that section is to preserve the jurisdiction of the court over property subject to forfeiture upon conviction. Consequently, the only relevant inquiry is whether any threat of transfer of property is present which would defeat jurisdiction prior to a final determination of the case. Rule 7(c)(2) of the 1972 Amendment to Rule 7 of the Federal Rules of Criminal Procedure, which is directed specifically to Title IX of OCCA, provides guidelines for implementing the forfeiture provision. The rule states that "[w]hen an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture." The Amendment manifests a congressional intent that the forfeiture provision of OCCA be implemented.

Rules 31 and 32(b)(2) of the Federal Rules of Criminal Procedure can be interpreted to provide safeguards against the dilution of the presumption of innocence in a section 1963(b) case. The rules provide for a special jury finding and judgment authorizing seizure of forfeited property. Specifically, rule 31(e) states "a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." Since an injunction would be granted only in those cases in which forfeiture was the desired remedy and a special verdict, which almost always means a jury trial, is required for forfeiture, any prejudice from a preliminary injunction is not critical, for the

101. The requirement of likelihood of success at a trial on the merits is of minimal importance in an injunction in a criminal prosecution since once the indictment is entered, the case proceeds to trial.
102. Fed. R. Crim. P. 7(c)(2) (1975). The notes of the Advisory Committee on the 1972 amendment state that "Subsection (c)(2) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Act of 1970 Title IX section 1963."
103. Id.: "Under the common law, in a criminal forfeiture proceeding, the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding a declaration of forfeiture which followed his criminal conviction. Subsection (c)(2) provides for notice."
104. Fed. R. Crim. P. 31(e) as amended effective Oct. 1, 1972 states: "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."
105. See note 102 supra.
106. Fed. R. Crim. P. 31(e) as drafted assumes that the amount of the interest or property subject to criminal forfeiture is an element of the offense.
fact that an injunction had been issued would not be known to the jurors. In the rare instance that a bench trial would take place pursuant to sections 1962 and 1963 of the Act, the presumption of the judge's ability to separate his professional judgment in sentencing from other extraneous information is operative.

The due process argument diminishes in importance in view of the fact that the Act sought to be implemented is a criminal statute. For example, adequate precedent exists in criminal law for impounding evidence and the fruits of crime without a hearing pending trial\(^\text{107}\) and for the use of injunctions.\(^\text{108}\) Finally, an indictment, in itself, is significant. It imposes reasonable restrictions on a person's liberty.\(^\text{109}\) The accused may be presumed innocent but he may be imprisoned nevertheless. If released on bail, he may not leave the jurisdiction of the court without prior approval. This is the same type of control which section 1963(b) of OCCA seeks to provide over property.

The civil standards approach for granting a rule 65 injunction, adopted by both the *Mandel* and *Lipman* courts, seems unduly limited and predictably results in denial of an injunction. A more reasonable standard for issuing an injunction pursuant to section 1963(b) would seem to be to require some evidence of the present intent to transfer an interest in property and an indictment alleging the extent of the interest or property subject to forfeiture in accordance with rule 7(c)(2) of the Federal Rules of Criminal Procedure. Such an approach would serve to implement the legislative intent of the criminal remedies provision of OCCA.

### Section 1964(a) Injunctions

The criteria used in granting an injunction pursuant to rule 65 of the Federal Rules of Civil Procedure, which the *Mandel* and *Lipman* courts adopted to analyze section 1963(b) criminal cases, seem appropriate for the issuance of an injunction sought pursuant to the civil remedies section. Yet, *United States v. Cappetto*\(^\text{110}\) and *United States v. Winstead*,\(^\text{111}\) two cases brought under section 1964(a), do not adopt this reasoning.

*Cappetto* establishes the Seventh Circuit's test for imposing injunctions pursuant to section 1964(a). The district court had preliminarily enjoined the

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108. *See* People v. Barney Lonzo, No. 74-775 (Chicago Mun. Ct., filed May 23, 1975), in which a cease and desist order enjoining the states attorney's office from issuing subpoenas for people to appear when there was no court date was entered. The order also provided that copies be sent to the chief of the criminal division to facilitate compliance.

109. Subsequent to an indictment the accused may post bond if he is able, but the conditions of bond still restrict his liberty.


defendants from continuing their alleged gambling activities in violation of section 1962 of title IX and the appellate court affirmed. The defendants had argued that any action under section 1964 was basically criminal since the complaint had had to allege illegal activities to trigger its application and that the rights guaranteed by the Constitution to defendants in criminal cases should be operative. These rights include the standard of proof of guilt beyond a reasonable doubt, which is denied if an injunction is entered on alleged conduct only.

The court noted that a civil proceeding to enjoin acts which Congress has authorized prosecutors to make the subject of either a civil or a criminal proceeding or both is not "rendered criminal in character by the fact that the acts are also punishable as crimes." Consequently, constitutional safeguards were held not to apply. The Cappetto court reasoned that, since "section 1964 provides for a civil action in which only equitable relief can be granted," it followed that civil standards should govern. However, the court did not apply the four criteria outlined for civil injunctions. Instead, the Cappetto court analysis was in terms of burden of proof.

The traditional civil burden of proof is whether all the facts and circumstances taken together tend to establish that it is more likely that the incident occurred than that it did not. The Cappetto court used this definition to establish its test: "whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future" as the standard by which conduct will be enjoined. This standard permits the inference that criminal conduct will occur in the future to be drawn on the basis of alleged past criminal behavior which has not been proven beyond a reasonable doubt. Even so, the court emphasized that the "standard of proof is lower in a civil proceeding than it is in a criminal proceeding." Thus the Cappetto standard for granting a section 1964(a) civil injunction is whether the alleged conduct will continue if it is not enjoined.

Winstead applied the Cappetto standard but denied a temporary

113. 502 F.2d at 1357.
114. Id.
115. Id.
116. Id. at 1358.
117. Id. at 1357.
118. The Cappetto court interpreted section 1964 as a waiver of the requirement of a showing of irreparable harm which the Mandel and Lipman courts had seen as paramount in the issuance of a section 1963(b) injunction. The court reasoned that the activities proscribed by section 1962 were inherently injurious to the public and thus could be enjoined without specific evidence of irreparable harm. Id. at 1358.
restraining order. In *Winstead*, the defendants had been operating a policy wheel. The *Cappetto* test required that evidence of the likelihood of continued violations be "established by inferences drawn from past conduct."\(^{120}\) Despite evidence of considerable gambling activity and arrests of defendants for possession of gambling paraphernalia six months previously, the court held that the information was out of date. In the absence of current data, an inference that an injunction was needed to terminate the illegal activity could not be drawn. In the case of a gambling wheel operation, a six-month time lag was not considered current.

Under section 1964(a) courts are faced with continuous surveillance of their orders. There is no indication in the legislative history that Congress intended to impose such a burden on courts. Given these facts and the lack of specific criteria for judging the propriety of injunctive relief, courts are not likely to impose section 1964(a) remedies unless the statute and the legislative intent clearly mandate them in a given situation.

What Congress sought to accomplish by the Act was to provide legislation which would check the spread of organized crime in a manner similar to the way in which the Sherman Antitrust Act,\(^{121}\) as amended by the Clayton Act,\(^{122}\) precludes the development of monopolies. Consequently, the concept of providing dual remedies within the context of both civil and criminal suits was borrowed from antitrust laws,\(^{123}\) in which the approach had proven effective. Antitrust laws do offer the possibility of two suits and both criminal and civil remedies for the same factual situation. Criminal penalties include fine and imprisonment but not forfeiture. Since there is no provision for forfeiture in the antitrust laws, there is no need for an OCCA section 1963(b) type injunction in a criminal suit to keep the statute from being defeated. Civil remedies provide for an injunction in a suit by a private party ordering divestiture and enjoining specific activities.\(^{124}\) Many of the concerns which the courts have considered in deciding whether to grant injunctions pursuant to litigations under either sections 1963(b) or 1964(a) have been addressed in

120. 502 F.2d at 1358.
123. See note 13 supra.
 Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . . .
antitrust cases with similar results. Antitrust case law has established that preliminary injunctions require a showing of irreparable harm. The showing of imminent activity suggested as a criterion by the Mandel and Lipman courts, has been held to be required for an injunction pursuant to antitrust law. The plaintiff must demonstrate that the accused has violated or intends to violate antitrust laws threatening him with loss or injury. As in Winstead, courts have refused to enter an injunction on a showing of prior criminal activity without some indication of a danger of recurrence. In addition, damage provisions of the Clayton Act have been held not to be criminal and therefore constitutional safeguards of a criminal proceeding have been denied.

The statutory schemes under antitrust laws and OCCA are the same, but application of the dual remedy approach in the area of organized crime control has not been as successful. Research has not disclosed a situation closely analogous to the one OCCA creates. Consequently, there is little authority on which to ground an interpretation. However, one of the problems in implementing OCCA to the fullest extent might be contained in the statutory language. The lack of standards in the Act itself by which to judge the propriety of equitable relief under OCCA has caused courts to hesitate to enter injunctions. Failure to obtain injunctions, in turn, renders civil suits under OCCA idle and the criminal forfeiture penalty useless. If there is no provision for a sanction which runs to the benefits procured as a result of a pattern of racketeering, members of organized crime profit from their illegal activities and the congressional intent of OCCA is not carried out. It may be possible to avoid such a result.

A section 1964(a) civil injunction, as allowed in Cappetto, could be granted in those cases meeting the Cappetto test of likelihood of continuing criminal activity as established by a preponderance of the evidence. The Winstead court adds the requirement of current data which is consistent with court decisions in antitrust litigation. An alternative approach would be to utilize the guidelines developed for rule 65 injunctions as demonstrated in Mandel and Lipman.

Although a section 1963(b) civil injunction is sought within a criminal prosecution, it is nonetheless civil, and criminal safeguards do not apply. However, criminal procedures provide the court with various possibilities from which to develop standards for injunctions. Guidance for implementa-

125. Credit Bureau Reports, Inc. v. Retail Credit Co., 476 F.2d 989, 992 (5th Cir. 1973).
126. Id.
127. Id. at 993.
130. Credit Bureau Reports, Inc. v. Retail Credit Co., 476 F.2d 989, 993 (5th Cir. 1973).
tion of this section is included in the 1972 Amendment to Rule 7 of the Federal Rules of Criminal Procedure. In addition to listing the interest in property subject to forfeiture, the indictment could be drafted to include those facts probative of the possibilities of immediate transfer of such property, a criterion on which all the courts have agreed. The indictment would include sufficient facts to meet the burden of proof regarding possible transfer, whatever that might be. The standard of proof for the indictment itself is probable cause. While courts differ as to how "probable cause" equates with other burdens such as "preponderance of the evidence," it is definitely less than a "beyond a reasonable doubt" standard or there would be no need for a trial. Once entered, the consequences of an indictment over persons are comparable to the consequences of an injunction over property sought pursuant to section 1963(b) of OCCA. Both restrict the thing involved, the person or the property, within the jurisdiction of the court prior to proof of guilt beyond a reasonable doubt. An injunction is no more a dilution of the presumption of innocence than is the indictment itself.131

CONCLUSION

Few cases have been brought pursuant to OCCA since its passage in 1970. A survey of those cases reveals two problem areas in the Act's application—interpretation of the scope of coverage and implementation of the remedies sections. The first problem has been solved by a liberal interpretation of the statutory language regarding coverage. "Any enterprise" means both legitimate and illegal endeavors run by racketeering methods. Despite the legislative history, there is no need to show an infiltration of the enterprise or a connection with organized crime. The second problem has not been completely resolved. In the absence of any guidance in the legislative history or the statutory language from which to formulate a method of applying the remedies sections, courts have had to devise their own.

Courts seeking to implement a section 1964(a) injunction in a civil suit have developed a test based on a preponderance of the evidence standard. Courts asked to enter a section 1963(b) injunction in a criminal case have utilized Rule 65 of the Federal Rules of Civil Procedure criteria. The application of this approach results in a narrow framework within which a section 1963(b) injunction would be operative. Since courts entering section 1964(a) civil remedies injunctions have not turned to rule 65 civil standards, courts asked to enter a section 1963(b) injunction in a criminal suit should not feel compelled to do so.

Consistent with the liberal trend in resolving the coverage question, a less rigid approach toward implementing the remedies sections is in order. Some direction might be found in the procedural aspects of criminal litigation. It is essential to formulate a standard compatible with the needs of criminal law and the purpose of the Act. Uniform standards to be used in granting injunctive relief under the Organized Crime Control Act are essential if the purpose and promise of the Act are to be fulfilled.

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