St. John's Law Review

Volume 64, Fall 1990, Number 4 Article 4

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Steven L. Kessler

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AND A LITTLE CHILD SHALL LEAD THEM:* NEW YORK'S ORGANIZED CRIME CONTROL ACT OF 1986

BY STEVEN L. KESSLER**

Behold, a legislature shall be with child, and shall bring forth a son, and they shall call his name Baby RICO, which being interpreted is, Protector over the State.

INTRODUCTION

Twenty years ago, Congress enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO")[1] to combat the influence of organized crime in interstate and foreign commerce.[2] And it was good. The Department of Justice was filing criminal indictments against a carefully selected few thought to be members of reputed organized crime families. Only a handful of cases were being filed by parties other than the Government. And only "true racketeers"—those portrayed in old George Raft movies—were being labeled RICO "racketeers." And it was still good.

Then it happened. RICO started working its way into publications read by people whose only prior knowledge of RICO came from Edward G. Robinson's masterful performance in Mervyn Leroy's 1930 classic *Little Caesar*.[3] The *Wall Street Journal* and the

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* *Isaiah* 11:6.

** A.B. with distinction 1978, Cornell University; J.D. 1982, Cornell Law School. Formerly an Assistant District Attorney for Bronx County in charge of its Asset Forfeiture/Civil Litigation Unit, Mr. Kessler is currently a partner in the Law Offices of Steven L. Kessler in Manhattan. In addition, Mr. Kessler is a member of the RICO Cases Committee of the Criminal Justice Section of the American Bar Association and is a former member of the Forfeiture Law Advisory Group of the New York State District Attorneys Association.

The author thanks the staff of the *St. John's Law Review* for their assistance during the preparation of this Article.

[1] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990)).

[2] *See* J. RAKOFF & H. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY (1989 & Supp. 1990) (detailed discussion and analysis of RICO).

[3] "Mother of Mercy, is this the end of Rico?" gasped Edward G. Robinson (playing the part of Rico), referring to his own imminent death, as the curtain came down in the final

New York Times ran editorials and front page news articles on the demise of civilization under RICO. Politicians called upon Congress to expunge the statute or at least change it so it would not stigmatize the "innocent," those individuals who were caught up in what was called "white collar" criminal activity but who were not really "racketeers." After all, they said, the new wave of defendants under RICO were not "racketeers." Rather, they were people more like, well, us.

And so RICO became the rage. Misunderstood even by some of its drafters, RICO was kept intact by Congress despite ferocious and intense pressure swelling in response to the Princeton/Newport Partners and Drexel Burnham prosecutions. In the shadow of their distant federal cousin, many states adopted a version of RICO for local prosecutions.[4] But, unlike Congress and most other state legislatures, New York waited before drafting its organized crime statute. New York's legislators chose to sift through more than fifteen years of RICO history and select what they perceived as the better parts of RICO before embarking on their own journey into the land of organized crime.

In the summer of 1986, after five years of drafting and refining bills in the state Assembly[5] and state Senate,[6] New York's Organized Crime Control Act of 1986 ("OCCA")[7] was signed into law.[8] Codified in New York Penal Law article 460, with additional procedural rules inserted into other statutes scattered throughout the civil and criminal codes, OCCA, also known as "Baby RICO" or "Little RICO", was created as a weapon to combat and control or-

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scene of the movie.

[4] *See* ARIZ. REV. STAT. ANN. § 13-2312 (1989 & Supp. 1990); CAL. PENAL CODE § 186 (West 1988 & Supp. 1990); COLO REV. STAT. § 18-17-101 (1990); CONN. GEN. STAT. ANN. § 53-393 (West 1985 & Supp. 1990); FLA. STAT. ANN. § 895 (West Supp. 1990); GA. CODE ANN. § 26-3401 (1988); HAW. REV STAT. § 842-1 (1988 & Supp. 1989); IDAHO CODE § 18-7801 (1987 & Supp. 1990); IND. CODE ANN. § 35-45-6-1 (Burns 1985 & Supp. 1990); N.J. STAT. ANN. § 2C:41-1 (West 1982 & Supp. 1990); OR. REV. STAT. § 166.715 (1989); PA. STAT. ANN. tit. 18, § 911 (Purdon 1983 & Supp. 1990).

[5] N.Y.A. 11726, 209th Sess. (1986).

[6] N.Y.S. 4940-C, 209th Sess. (1986) (passed by Senate in early part of 1986, but not passed by Assembly); N.Y.S. 9601, 209th Sess. (1986).

[7] Ch. 516, [1986] N.Y. Laws 1124 (McKinney).

[8] *Id.* Effective as of November 1, 1986, OCCA is applicable to all acts committed thereafter. If, however, a pattern of criminal activity begins prior to the effective date, OCCA would not apply unless the defendant's participation in the alleged pattern of criminal activity included at least one felonious act committed on or after November 1, 1986. *Id.*; *see* Mason v. Rothwax, 152 A.D.2d 272, 283, 548 N.Y.S.2d 926, 932 (1st Dep't 1989).

ganized criminal activities in New York State.[9] Written into OCCA, however, were numerous protections, limitations and restrictions not found in any state or federal counterpart.

This Article will examine OCCA, trace its legislative history, and compare its provisions with those of federal RICO. The Article will then detail the elements required for a conviction under OCCA. Special attention will be given to the forfeiture provisions available to the prosecution against an OCCA defendant. Finally, this Article will conclude with some observations on the direction OCCA seems destined to take.

I. HISTORICAL BACKGROUND

Before examining OCCA's scope and expanse, it is important to understand what OCCA is not. Although patterned after federal RICO,[10] and similar in many respects to RICO statutes in other states, New York's Baby RICO was drafted as a tool to bring state law enforcers "closer to parity with the sophisticated criminal organizations they must try to fight."[11] OCCA is *not* a broad based statute to be used against the likes of Princeton/Newport or Drexel Burnham. Rather, it is far more restrictive than its federal counterpart, evincing New York's interest in enhancing the position and strength of law enforcement agencies, while addressing legitimate concerns for preventing prosecutorial abuse.[12] Drawing on the RICO experience and federal judicial interpretations of RICO's breadth, New York purposefully narrowed the definition of the requisite pattern of criminal activity for prosecution under OCCA to ensure that the crimes making up the criminal enterprise were not isolated incidents or part of a single criminal transaction.[13]

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[9] *See generally* Governor's Jacket for ch. 516, [1986] N.Y. Laws 1124 (McKinney).

[10] 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990); *see also* Memorandum of New York State Attorney General Robert Abrams (July 19, 1986) [hereinafter Abrams Memorandum] (supporting signing of bill into law).

[11] Letter from Assemblyman Daniel Feldman to Evan A. Davis, counsel to Governor (July 18, 1986) [hereinafter Feldman Letter].

[12] Governor's Memorandum on Approval of ch. 516, N.Y. Laws (McKinney) (July 24, 1986), *reprinted in* [1986] N.Y. Laws 3175 (McKinney) [hereinafter Governor's Memorandum].

[13] Governor's Memorandum, *supra* note 12. This thought is confirmed in New York Penal Law section 460.00, which deals with the legislative findings. N.Y. PENAL LAW § 460.00 (McKinney 1989); *see also* Simpson Elec. Corp. v. Leucadia, Inc., 128 A.D.2d 339, 349, 515 N.Y.S.2d 794, 801 (2d Dep't 1987) (provisions of OCCA highlight "basic incompatibility" between federal and state jurisdiction), *aff'd on other grounds*, 72 N.Y.2d 450, 534 N.Y.S.2d 152 (1988).

OCCA largely omitted the "continuity" requirement from the pattern element, creating a more expansive definition of pattern than that found under RICO.[14] And the legislature inserted into OCCA several procedural rules, such as those relating to joinder and severance, in an effort to limit the prejudicial effect of multi-defendant trials on innocent third parties or "small potatoes" caught in the wake of major organized crime activities.[15]

Baby RICO was designed as a prosecutorial tool. Much like article 13-A of the Civil Practice Law and Rules ("CPLR")[16] and other forfeiture provisions in New York's Penal Law and related statutes, Baby RICO does not provide for a private or individual cause of action.[17] Only the district attorney or affected state prosecutor[18] may bring such an action. Accordingly, none of the problems encountered under RICO's private civil cause of action[19] will arise under the New York statute.

Note that Baby RICO was codified in New York's Penal Law. It was, therefore, intended to be criminal in nature. Its implementation is governed by the codes and procedures related to criminal actions, and appropriate sanctions thereunder include imprisonment,[20] criminal forfeiture, and stiff fines.[21] Civil remedies, as they are commonly regarded, are not enumerated as sanctions under Baby RICO, although they may be sought as part of related forfeiture proceedings.[22] Civil remedies under Baby RICO, however, are not available without a criminal conviction.[23]

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[14] *See infra* notes 89-91 and accompanying text.

[15] N.Y. CRIM. PROC. LAW § 200.40(1)(d)(iii) (McKinney Supp. 1990).

[16] *See* Kessler, *Quo Vadis? Assessing New York's Civil Forfeiture Law*, 4 TOURO L. REV. 253 *passim* (1988) [hereinafter *Civil Forfeiture Law*]; Kessler, *Taking the Profit Out of Crime: Asset Forfeiture*, 59 N.Y. ST. B.J. 48-52 (July 1987); *see also* 2A C. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE art. 13-A (Bender 1986 & Supp. 1988) (describing procedures for article 13-A forfeitures).

[17] *See Simpson*, 128 A.D.2d at 358, 515 N.Y.S.2d at 807 (Spatt, J., dissenting).

[18] *See* N.Y.PENAL LAW §§ 460.50, 460.60 (McKinney 1989).

[19] *See* 18 U.S.C. § 1964(c) (1988).

[20] *See* N.Y. PENAL LAW § 60.05 (McKinney 1987).

[21] *See id.* § 460.30(5). The fines can amount to either triple the gross gain by the defendant or loss to the victim caused by the crime, whichever is greater. *Id.*

[22] *See infra* notes 123-60 and accompanying text (discussing CPLR articles 13-A & 13-B).

[23] N.Y. PENAL LAW § 460.30 (McKinney 1989). Penal Law article 460 permits the execution of civil forfeiture proceedings under CPLR article 13-B against Baby RICO defendants. Other forfeiture procedures pursuant to, and in tandem with, proceedings under OCCA are also available, as is the use of all provisional remedies authorized by CPLR article 13-A, which are available even in proceedings seeking criminal forfeiture. *See id.*

II. OCCA's Legislative History: New York and RICO: Imperfect Together

During five years of careful crafting, OCCA's drafters sought to do more than just duplicate federal law. Their purpose was to craft a statute which would "alleviate the desperate situation which . . . preclude[d] [law enforcement authorities] from prosecuting" organized crime cases in New York.[24] A major cause of the continuing growth of organized criminal activities within New York was deemed to be the inadequate and limited nature of the sanctions and remedies available to state and local law enforcement officials in dealing with the intricate, sophisticated, and varied criminal conduct traditionally a hallmark of organized crime.[25] Existing penal law provisions were seen as primarily concerned with the commission of specific and limited criminal acts without regard to the relationships of those acts to legitimate or illicit enterprises controlled by organized crime.[26] Since existing penal law provisions only provided for the imposition of conventional criminal penalties, they were seen as inadequate and ineffective in deterring organized crime.

Additionally, in a more selfish vein, state prosecutors felt frustrated and short changed by the existing laws. Instead of having the legal and mechanical machinery to prosecute organized crime themselves, state authorities were compelled to surrender their cases to federal authorities for prosecution under federal law. State authorities were thereby compelled to rely on limited federal resources in dealing with major crime in New York.[27] The state also suffered financially, having to settle for a minimal percentage of any proceeds from seizures and forfeitures conducted with its federal counterparts.

Yet, RICO was not the answer. Legislators and other interested parties perceived many significant flaws in the federal statute. Congress had left it to the courts to clarify and overcome many of the problems and potential abuses under RICO. Still, all was not right with the code. State legislators were concerned that the new powers given to prosecutors might be used inappropriately

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[24] Letter from New York City Mayor Edward I. Koch to Governor Cuomo (July 28, 1986) (in support of the Governor's signing proposed bill).

[25] Letter from Nassau County District Attorney Dennis Dillon to Evan A. Davis, counsel to the Governor (July 14, 1986) [hereinafter Dillon Letter].

[26] *See* N.Y. Penal Law § 460.00 (McKinney 1989).

[27] *See* Dillon Letter, *supra* note 25.

against individuals who had no, or only a peripheral, connection with a criminal enterprise.[28] Further, they did not want to include within the scope of the state statute the garden-variety fraud or breach of contract cases.[29] The drafters also sought to protect against the inappropriate or abusive protection which RICO had generated. They wanted to ensure that no one would be indicted who had not committed at least three different crimes; that no one would be joined at trial with any other defendant without having previously joined with such other defendants while engaging in criminal activity; and that no one would be prosecuted for such criminal activity without proof of his intent to commit the crime of enterprise corruption.[30]

Thus, the state legislature, with more than a decade of RICO litigation to learn from, attempted to circumvent many of these problems through precise drafting. Through its definition of "enterprise," the legislature limited OCCA's application "only to *persons employed by or associated with criminal enterprises*" and then only to the extent that those individuals participate in a "pattern of criminal activity."[31] Specifically, then, the legislature drafted the statute to deal with individuals, not corporations. The enterprise itself is not subject to prosecution.[32] This significant departure from RICO represents an effort by the state legislators "to protect against abuse and undue prejudice to defendants."[33]

The Governor's Approval Memorandum accompanying the signing of the bill into law indicated that "[c]rimes committed by individuals who engage in a brief series of criminal acts in a[n] *ad hoc* and unstructured group are not subject to prosecution under the Act."[34] OCCA was, therefore, designed for a limited but important purpose: to combat organized crime by not only prosecuting an underlying criminal offense, but by proving a defendant's role within the broader pattern of criminal activity, his relationship to any unlawful enterprise he may have corrupted and his relation-

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[28] Abrams Memorandum, *supra* note 10.

[29] Letter from Assemblyman Melvin Miller to Evan A. Davis, Counsel to Governor (July 16, 1986) [hereinafter Miller Letter] (urging approval of Assembly Bill No. 11726 (OCCA)).

[30] N.Y. PENAL LAW §§ 460.00, 460.20 (McKinney 1989); Abrams Memorandum, *supra* note 10.

[31] *See* Governor's Memorandum, *supra* note 12, at 3177.

[32] *See* N.Y. PENAL LAW §§ 460.00, 460.20 (McKinney 1989).

[33] Governor's Memorandum, *supra* note 12, at 3177.

[34] *Id.*

ship to the criminal enterprise of which he is a part. Clearly, the crime of enterprise corruption was not to be charged indiscriminately.

In step with this mandate, let it not be said that the state's prosecutors have been anything but deliberate in using the statute. As of this writing, seven indictments have been filed under OCCA,[35] all of which originated in the New York City metropolitan area. The only case brought to trial resulted in an acquittal.[36] Most, in fact, resulted in pleas to crimes other than enterprise corruption. Indeed, only two of the indictments under OCCA resulted in convictions for enterprise corruption.[37]

It is not clear why OCCA has been used so infrequently. Perhaps it has to do with the complexities of initiating an OCCA prosecution. The district attorney must first file a special information certifying that she has "reviewed the substance of the evidence presented to the grand jury and concurs in the judgment that the charge is consistent with [the] legislative findings" as set forth in Penal Law section 460.00.[38] The prosecutor then must notify any "affected district attorneys"[39] of her intention to proceed with an OCCA prosecution and obtain the consent of any such district attorney who may have concurrent jurisdiction over the criminal activity.

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[35] People v. Stern, No. 10001/89 (Sup. Ct. N.Y. County 1989) (Klienman, J.) (murder case); People v. Pagano, No. 89-120 (Sup. Ct. Rockland County 1989) (gambling, loansharking, and extortion case); People v. Moscatiello, No. 8081/89 (Sup. Ct. N.Y. County 1989) (labor racketeering as alleged enterprise); People v. Edmonson, No. 2849/89 (Sup. Ct. Kings County 1989) (narcotics trafficking as alleged enterprise in 70-count indictment); People v. Grillo, No. 5186/88 (Sup. Ct. N.Y. County 1988) (murder, loansharking, and promotion of gambling as alleged enterprise), *aff'd* (1990); People v. Abdullah, No. 6572/88 (Sup. Ct. Kings County 1988) (fraudulent real estate transactions as alleged enterprise); People v. Jeudy, No. 10699/87 (1987) (fraudulent insurance contracts for livery cabs as alleged enterprise).

[36] *Abdullah*, No. 6572/88. The only courts to have addressed OCCA are those confronting issues relating to OCCA's elaborate and extensive provisions regarding the issue of double jeopardy. *See* People v. Bokum, 145 Misc. 2d 860, 869, 548 N.Y.S.2d 604, 610 (Sup. Ct. N.Y. County 1989); People v. Cooper, 143 Misc. 2d 654, 655, 541 N.Y.S.2d 713, 713 (Sup. Ct. Bronx County 1989); N.Y. CRIM. PROC. LAW § 40.50 (McKinney Pam. 1990).

[37] *Stern*, No. 10001/89 (pleaded to Grand Larceny felony counts and related charges); *Grillo*, No. 5186/88.

[38] N.Y. CRIM. PROC. LAW § 200.65 (McKinney Supp. 1990).

[39] *See* N.Y. PENAL LAW §§ 460.40, 460.50, 460.60 (McKinney 1989). The concept of "affected district attorney" stems from the realization that, due to the nature of some organized criminal activity, more than one county or jurisdiction may be affected by the activity. Accordingly, the prosecutor wishing to proceed with the case must secure the consent of any other prosecutor who has concurrent jurisdiction over the crime. *Id.* § 460.60.

Another possible source of restriction on the statute's use is the construction of OCCA. In the statute's section on legislative findings, the legislature made it clear that, although the definitions used throughout the statute should be given their plain meaning, they should be construed "in the context of the legislative purposes set forth in these findings."[40] Thus, even when the technical requirements of an enterprise corruption crime under OCCA are satisfied, the legislative findings caution that the statute "is not intended to be employed to prosecute relatively minor or isolated acts of criminality which . . . can be adequately and more fairly prosecuted as separate offenses."[41] "[W]hether to prosecute . . . is essentially [a question] of fairness," best addressed "by those institutions of government which have traditionally exercised that function: the grand jury, the public prosecutor, and an independent judiciary."[42] This "fairness" doctrine, then, becomes the substance of a pre-trial motion to dismiss the charges in the interests of justice when the court deems the OCCA prosecution is "inconsistent with the stated legislative findings."[43]

Issues of procedure, particularly joinder and severance, may also factor into a prosecutor's decision to proceed with an OCCA prosecution. Because of the legislature's stated desire to protect a minor participant from such a prosecution,[44] the legislature granted the judiciary broad powers to deal with potentially prejudicial situations arising from a combined trial under OCCA.[45] The rules attempt to remove from OCCA's imposing reach those participants playing relatively minor roles in an enterprise corruption crime.

Upon the motion of the defendant or the state, the court may, for good cause, grant a severance of defendants, order the enterprise corruption charges and other counts to be tried separately or provide "whatever other relief justice requires." The statute defines "good cause" as including, but not limited to, a finding that

> proof of one or more criminal acts alleged to have been committed by one defendant but not one or more of the others creates a

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[40] *Id.* § 460.00.

[41] *Id.*

[42] *Id.*

[43] N.Y. CRIM. PROC. LAW § 210.40(2) (McKinney Supp. 1990); *see infra* note 128 and accompanying text (detailed discussion of the interest of justice dismissal).

[44] Governor's Memorandum, *supra* note 12.

[45] N.Y. CRIM. PROC. LAW § 200.40(1)(d)(iii) (McKinney Supp. 1990).

> likelihood that the jury may not be able to consider separately the proof as it relates to each defendant, or in such a case, given the scope of the pattern of criminal activity charged against all the defendants, a particular defendant's comparatively minor role in it creates a likelihood of prejudice against him.[46]

The history of these changes is important. Set against the backdrop of "mass RICO trials" conducted in the federal courts under RICO, the legislature was deeply concerned with the likelihood of "spillover prejudice" by liberal consolidation of non-joinable criminal offenses or defendants.[47] To limit the potential of prejudicial joinder, OCCA provided several modifications to the existing laws.

First, association with a criminal enterprise is a requirement. Since each criminal act must be performed for the purpose of advancing or participating in the affairs of a known criminal enterprise, the criminal conduct joined is, in virtually all cases, the type of conduct which would have been joinable under existing requirements of a common scheme or plan.

Also, the new statute ensures that "strangers" do not sit as co-defendants.[48] Unlike federal law, which carved out broad joinder provisions for RICO prosecutions,[49] every defendant joined by virtue of an OCCA charge would have been joinable with one or more of his co-defendants under previously existing joinder rules.[50]

OCCA also requires severance where there are disparities of proof or where the defendant is a relatively minor participant in a larger scheme. Although there were already existing provisions dealing with severance,[51] the legislature deemed it necessary to explicitly mandate severance in cases where an OCCA prosecution might lead to spillover prejudice.[52] The thought of trying an OCCA case several times against different individuals might also give a prosecutor pause before going forward with such a prosecution.

Further, most prosecutors, with the possible exception of the state Organized Crime Task Force, do not have the manpower to devote to the investigation and prosecution of complex organized

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[46] *Id.*

[47] Miller Letter, *supra* note 29.

[48] *Id.*; *see* N.Y. CRIM. PROC. LAW § 200.40(1)(d) (McKinney Supp. 1990).

[49] *See generally* J. RAKOFF & H. GOLDSTEIN, *supra* note 2, §§ 10.02, 10.03.

[50] N.Y. CRIM. PROC. LAW § 200.40(1)(d)(iii) (McKinney Supp. 1990).

[51] *Id.* § 200.20(3) (McKinney 1982).

[52] *See* Miller Letter, *supra* note 29.

crime cases. Indeed, any of the individuals subject to an OCCA prosecution could probably be prosecuted for committing felonies, such as homicide, drug distribution, or gambling, of which many carry equal or greater weight than the crime of enterprise corruption, which is a class "B" felony, punishable by up to twenty-five years' imprisonment. Investigating and prosecuting the enterprise corruption case may take months, even years.[53] Accordingly, it may not be a worthwhile expenditure of money and resources to prosecute someone for a "B" felony, when the "normal" course of criminal prosecution would result in a similar outcome.[54]

Finally, it is quite clear that the legislature did not intend to include within the scope of OCCA the run-of-the-mill fraud or breach of contract. In a letter to Governor Mario Cuomo encouraging the signing of the bill into law, Assemblyman Melvin Miller, one of the sponsors of the bill, stated:

> [T]he extraordinary sanctions allowed under the Act should be limited for those who not only commit crimes but do so as part of an organized crime enterprise. Present law is adequate to punish ordinary white-collar crime . . . . For that reason, it was not the sponsors' intent to redefine or sanction anew conduct already punishable under current law. Similarly, mere corruption of a legitimate enterprise by a pattern of criminal activity is insufficient to justify prosecution under this Act. . . . Rather, the bill now requires association with an ascertainably distinct criminal enterprise in addition to corruption of a legitimate enterprise by criminal activity. In this way we are assured that the Act will only be applied to those who knowingly and voluntarily seek to advance an organized criminal enterprise by their misconduct.[55]

Because of the important differences between OCCA and similar federal and state statutes, cases decided in other jurisdictions pursuant to statutes which may seem similar in nature to OCCA must be scrutinized carefully before they are relied upon as persuasive authority in New York.

So what is the focus of OCCA? The legislature conceded its difficulty in defining OCCA's targeted "enemy." "In part because

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[53] As of this writing, an OCCA investigation in the Bronx has already lasted more than two years, with the prosecution still presenting evidence to the Grand Jury and with no trial date in sight.

[54] *See* N.Y. PENAL LAW § 460.20 (McKinney 1989). Enterprise corruption is a class "B" felony and is punishable by up to twenty-five years imprisonment. *See id.* §§ 460.20, 70.00(2)(b).

[55] Miller Letter, *supra* note 29.

of its highly diverse nature, it is impossible to precisely define what organized crime is."[56] The legislature did, however, attempt to define and criminalize "what organized crime does."[57] The result was article 460.

III. Essential Statutory Provisions

A. *The Requisite Elements*

A person is guilty of the class "B" felony of enterprise corruption when he:

> [1] intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity; or
>
> [2] intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or
>
> [3] participates in a pattern of criminal activity and knowingly invests any proceeds derived from [either the criminal activity itself or] the investment or use of those proceeds, in an enterprise.[58]

In addition to proof of the elements themselves, a prosecutor must show, under each of the theories above, that the defendant committed the requisite acts (1) while knowing of the existence of a criminal enterprise and the nature of its activities and (2) while employed by or associated with the criminal enterprise.[59]

Four significant terms determine the primary elements of enterprise corruption: enterprise,[60] criminal enterprise,[61] pattern of criminal activity[62] and participation in a pattern of criminal activity.[63]

1. Enterprise and Criminal Enterprise

An "enterprise" includes both a legitimate enterprise as provided for in Penal Law section 175.00 and a criminal enterprise.[64]

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[56] N.Y. Penal Law § 460.00 (McKinney 1989).
[57] *Id.*
[58] *Id.* § 460.20(1).
[59] *Id.*
[60] *See id.* § 460.10(2) (definition of "enterprise" for purposes of article 460).
[61] *See id.* § 460.10(3) (definition of "criminal enterprise").
[62] *See id.* § 460.10(4) (definition of "pattern of criminal activity").
[63] *See id.* § 460.20(2) (definition of "participation in pattern of criminal activity").
[64] *See id.* § 460.10(2); *see also id.* § 175.00(1) (McKinney 1988) (definition of "enter-

This definition mirrors that under RICO.[65] OCCA specifies, however, that the enterprise "need not be the criminal enterprise by which the person is employed or with which he is associated, and may be a legitimate enterprise."[66]

Note, however, that the enterprise itself is not subject to prosecution. The statute only applies to individuals and, to them, only to the extent that they participated in a pattern of criminal activity.[67] Further, an enterprise must be "an ascertainable structure distinct from a pattern of criminal activity."[68] This differs from RICO, under which an enterprise may be limited to the "pattern of racketeering activity."[69] Thus, under OCCA, although the pattern may be part of the enterprise, the enterprise must be distinct from the pattern.[70]

A criminal enterprise is defined as "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents."[71] This is a significant departure from RICO.[72]

Under OCCA, the enterprise itself may be legitimate[73] or illegitimate. If the special information alleges that the defendant acted intentionally or participated in the affairs of the enterprise by participation in a pattern of criminal activity, the enterprise itself must be illegitimate.[74]

On the other hand, a legitimate enterprise may be a target of prosecution only where the defendant commits the crime by intentionally acquiring or maintaining an interest in or control of an enterprise or by knowingly investing in the enterprise any proceeds

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prise" for purposes of article 175).

[65] *See* United States v. Turkette, 452 U.S. 576, 580-82 (1981).

[66] *See* N.Y. PENAL LAW § 460.20(3) (McKinney 1989).

[67] *See id.* §§ 460.00, 460.20.

[68] *Id.* § 460.10(3).

[69] *See* United States v. Mazzei, 700 F.2d 85, 89 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983).

[70] N.Y. PENAL LAW § 460.10(3) (McKinney 1989).

[71] *Id.*; *cf. id.* § 175.00(1) (McKinney 1988) (definition of enterprise).

[72] *Compare id.* § 460.10(3) (McKinney 1989) (narrow construction of "enterprise") *with* 18 U.S.C. §§ 1961, 1962 (1988 & Supp. 1990) (less specific construction of "enterprise").

[73] *See* N.Y. PENAL LAW § 175.00(1) (McKinney 1988).

[74] *Id.* § 460.20(1)(a). If the acts underlying the crime are alleged under Penal Law section 460.20 subdivisions (b) or (c), the enterprise may also be illegitimate, but such is not a requirement.

derived either from the conduct or from the investment or use of those proceeds. This view of an enterprise is substantially more limited than that under RICO.[75]

It is interesting to note the pains taken by the legislature to include legitimate enterprise within OCCA. Such in evidenced by the Governor's Memorandum:

> The reach of the bill is not limited to traditional organized crime families or crime syndicates; rather, it includes any group with a shared criminal purpose and a continuity of existence and structure. Crimes committed by individuals who engage in a brief series of criminal acts in a[n] *ad hoc* and unstructured group are not subject to prosecution under the Act. If, however, the group demonstrates a structure—such as the hierarchy of a "Cosa Nostra" family, or the specialization of a narcotics, loansharking or gambling operation, the criminal enterprise requirement is satisfied.[76]

The Memorandum continues:

> Significantly, the definition of criminal enterprise in this bill does not require that the structure of a criminal enterprise be distinct from that of a legitimate one. This accomplishes two important results. First, it makes clear that groups that have both legitimate and illegitimate purposes, like a social club that "fronts" for a criminal gang, or a pawn shop that is the center of a fencing operation, can constitute criminal enterprises. Second, it permits the hierarchy of and positions within a legitimate enterprise—for example, a labor union, trade association or government agency—to contribute to the structure of a criminal group existing and operating within that legitimate enterprise. Assuming the resulting structure of the group meets the definitional requirements for a criminal enterprise, its members and associates may be prosecuted under the bill.[77]

Assemblyman Miller, one of the bill's sponsors, similarly understood OCCA to reach legitimate business. In his letter to Governor Cuomo, he explained that "there are no selective exclusions or exemptions within the bill. Any enterprise may be victimized by organized crime. This includes businesses, unions and political units."[78]

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[75] *See* United States v. Turkette, 452 U.S. 576, 580-81 (1981).

[76] Governor's Memorandum, *supra* note 12.

[77] *Id.*

[78] Miller Letter, *supra* note 29.

Finally, the statute itself confirms that "the concept of criminal enterprise should not be limited to traditional criminal syndicates or crime families."[79]

One glaring omission from RICO's definition of enterprise corruption involves the act of participation.[80] OCCA describes the requisite act as follows:

> A person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he:
>
> (a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity . . . .[81]

Under RICO,

> [i]t 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.[82]

OCCA's requirement that each defendant be associated with a criminal enterprise is probably the most fundamental distinction between OCCA and other RICO-type statutes. As illustrated, RICO permits prosecution of individuals who engage in a pattern of criminal activity without further proof that the criminal activity was accomplished for the purpose of participating in or advancing the affairs of a criminal enterprise with a separate, distinct, and ascertainable structure and a continuity of existence and purpose beyond the scope of the pattern itself.[83]

The members of the State Assembly Codes Committee drafting OCCA believed that the new law's extraordinary sanctions should be reserved for those who commit crimes as part of an organized criminal enterprise.[84] Existing law was seen as adequate to punish the ordinary white collar criminal. Accordingly, it was not the drafters' intent to redefine or sanction anew conduct already

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[79] N.Y. PENAL LAW § 460.00 (McKinney 1989).
[80] *See* 18 U.S.C. § 1962(c) (1988).
[81] N.Y. PENAL LAW § 460.20(1)(a) (McKinney 1989).
[82] 18 U.S.C. § 1962(c) (1988).
[83] *Id.* § 1962.
[84] Miller Letter, *supra* note 29.

punishable under existing laws.[85] Similarly, mere corruption of a legitimate enterprise by a pattern of criminal activity was deemed insufficient to justify prosecution under the new law.[86]

Rather, under OCCA, the law requires association with an ascertainably distinct criminal enterprise in addition to corruption of a legitimate enterprise by criminal activity. So drafted, the legislators wished to assure that OCCA would only be applied to those who knowingly and voluntarily seek to advance an organized criminal enterprise by their misconduct.[87]

Apparently, New York sought to avoid the voluminous litigation which arose while the federal courts attempted to define a "pattern of criminal activity."[88] Thus, under OCCA, the nexus required is between the defendant and the pattern of criminal activity, not between the defendant and the enterprise. This fine tuning by the state legislature should prevent unnecessary and excessive litigation regarding this section of the statute.

2. Pattern

Under RICO, a person employs a pattern of racketeering activity when he commits two or more specified criminal acts, one of which occurred after RICO's effective date and the last of which occurred within ten years, excluding any period of imprisonment, after the commission of a prior act of racketeering activity.[89] The racketeering activity must have sufficient continuity and relationship to constitute a pattern.[90] Left vague for nearly a decade, the pattern element of RICO was finally clarified somewhat in 1989 when the United States Supreme Court held that, to prove a pattern of racketeering activity under RICO, a "prosecutor must show that the racketeering predicates are related, *and* that they amount

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[85] *Id.*

[86] *Id.* "Since the pattern of criminal activity is separately prosecutable there is no need to further prosecute the same conduct merely because the defendant is associated with a legitimate enterprise." *Id.*

[87] *Id.*

[88] *See generally* J. RAKOFF & H. GOLDSTEIN, *supra* note 2, § 2.03(1).

[89] *See* 18 U.S.C. § 1961(5) (1988).

[90] *See* H.J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893, 2900 (1989); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985); United States v. Stofsky, 409 F. Supp. 609, 613-14 (S.D.N.Y. 1973), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); *see also* J. RAKOFF & H. GOLDSTEIN, *supra* note 2, § 2.03(3).

to or pose a threat of continued criminal activity."[91]

Note the differences between these requirements and those under OCCA. New York's legislators again learned from their federal cousins. Under OCCA, at least three criminal acts, not just two, must be committed within a ten year period.[92] These acts may not be isolated incidents or multiple incidents of a single criminal transaction.[93] Additionally, the acts must be either related to one another through a common scheme or plan or must have been "committed, solicited, requested, importuned or intentionally aided by persons acting with the mental culpability required for the commission thereof and associated with or in the criminal enterprise."[94] Although three acts are required, only one common scheme or plan will suffice.

3. Participation

"Participation," as it relates to the pattern of criminal activity, is a concept foreign under federal RICO. Under OCCA, a person participates in a pattern of criminal activity when, with the intent to participate in or advance the affairs of the criminal enterprise, he commits at least three criminal acts included in the pattern.[95] Two of the three acts must be felonies other than conspiracy,[96] two of the acts, at least one of which is a felony, must have occurred within five years of the commencement of the criminal action,[97] and each of the acts committed must have occurred within three years of a prior act.[98]

Note two important requirements. First, the individual must have the *mens rea* specifically addressed to the crime. Intent, therefore, is critical.[99] Second, the individual must have committed, as a principal or an accomplice, at least three of the criminal acts included in the pattern.[100] Thus, more than just being a bystander is required for the person to have participated in the pat-

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[91] *Northwestern Bell*, 109 S. Ct. at 2900 (emphasis in original).
[92] N.Y. PENAL LAW § 460.10(4)(a) (McKinney 1989).
[93] *Id.* § 460.10(4)(b).
[94] *Id.* § 460.10(4)(c).
[95] *Id.* § 460.20(2).
[96] *Id.* § 460.20(2)(a).
[97] *Id.* § 460.20(2)(b).
[98] *Id.* § 460.20(2)(c).
[99] *See* Abrams Memorandum, *supra* note 10, at 2.
[100] *See* N.Y. PENAL LAW § 460.20(2) (McKinney 1989). This provision precludes the prosecution of mere bystanders. *See id.*

tern. As stated by Assemblyman Miller:

> [T]he bill requires more than a mere showing of corrupt criminal acts by one or more individuals. There must be a further showing of association with a criminal enterprise which has a scope and purpose beyond the particular conspiracy or corrupt acts involved. Thus, a plan to gain a government contract by bid-rigging and bribery would be punishable by existing penal provisions. . . . If, however, there is further proof that acquisition of the contract is merely one step in advancing the affairs of a separate criminal enterprise, then OCCA would be employed.[101]

4. Criminal Activity

Finally, the statute enumerates the "criminal acts" eligible for inclusion in a pattern.[102] Any felony listed in the New York Penal Law may constitute a criminal act for purposes of enterprise corruption.[103] A conspiracy or an attempt to commit any felony will also constitute a criminal act under OCCA, even though some of these crimes may classify as misdemeanors.[104] Certain other crimes, codified outside the Penal Law but traditionally linked to organized criminal activities, also qualify as predicate acts.[105] These include specifically enumerated provisions of the Tax Law,[106] the Environmental Conservation Law[107] and the General Business Law.[108]

B. Statutory Limitations

Penal Law section 460.25 sets forth evidentiary limitations on the proof admissible to establish the elements of enterprise corrup-

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[101] Miller Letter, *supra* note 29.

[102] *See* N.Y. PENAL LAW § 460.10(1)(a) (McKinney 1989).

[103] *See id.*

[104] *See id.* § 460.10(1).

[105] *Id.* § 460.10(1)(b).

[106] *See id.* N.Y. TAX LAW § 289-b(4) (McKinney 1986 & Supp. 1990) (criminal penalties for failure to pay gasoline tax); *id.* § 433(3) (McKinney 1987) (criminal penalties for failure to pay alcoholic beverage tax); *id.* § 487(e) (criminal penalties for failure to pay cigarette tax).

[107] *See* N.Y. PENAL LAW § 460.10(1)(a) (McKinney 1989); N.Y. ENVTL. CONSERV. LAW §§ 17-0101-17-1907, 71-1933 (McKinney 1984 & Supp. 1990) (criminal penalties for water pollution).

[108] *See* N.Y. PENAL LAW § 460.10(1)(a) (McKinney 1989); N.Y. GEN BUS. LAW § 347 (McKinney 1984) (criminal penalties for establishing or maintaining monopolies); *see also id.* § 358 (criminal penalties for fraudulent practices regarding securities).

tion.[109] Although it only restates what should be apparent from reading the definitions of the crime, the legislators' concern regarding prosecution of minor participants persuaded them to expressly limit the available proof.[110]

Subdivision two of Penal Law section 460.25 presents a list of activities which are not unlawful. They include: (a) the acquisition of five percent or less of an insurer's securities on the open market without the intent to control the enterprise; (b) a deposit in a savings and loan association or similar financial institution that creates an ownership interest in that association or institution; (c) the purchase of shares in cooperatively owned residential or commercial property: and (d) the purchase of non-voting shares in a limited partnership without the intent of controlling or participating in the control of the partnership.[111] This subdivision was meant to preclude the prosecution of an individual who, through the investment in an enterprise, created an equitable interest in the enterprise. Such an equitable interest, however, does not create the kind of control over the enterprise that the investment prohibition of Penal Law section 460.20(1) seeks to prohibit. Notably, a similar prohibition under RICO applies the securities restriction to less than one percent of the outstanding shares of a particular class of securities in an enterprise.[112] OCCA's five percent restriction further illustrates the legislators' strong desire to protect individuals against government overreaching[113] and to ensure that borderline cases weigh in favor of the individual.

C. *Forfeiture Under OCCA*

Both criminal and civil forfeiture are available to the prosecutor under OCCA. There are, however, important substantive and mechanical differences between the two.

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[109] *See* N.Y. PENAL LAW § 460.25 (McKinney 1989).

[110] *Id.* § 460.25(2)(a)-(d).

[111] *Id.*

[112] *See* 18 U.S.C. § 1962(a) (1988). "[S]ecurities fraud and theft conducted through legitimate and illegitimate organizations were plainly contemplated. In fact, 'harm to investors' was one of the targeted evils specifically mentioned," when RICO was enacted. Kaplan v. Ritter, 71 N.Y.2d 222, 230 n.4, 519 N.E.2d 802, 806 n.4, 525 N.Y.S.2d 1, 5 n.4 (1987) (citing Preamble, Organized Crime Control Act of 1970, Pub. L. No. 91-450, 84 Stat. 922 (1970)).

[113] Feldman Letter, *supra* note 11.

1. Civil v. Criminal Forfeiture

The nature of criminal forfeiture under OCCA is best understood by comprehending the purpose of the statute itself. OCCA, as with most comparable statutes, is designed to attack members of organized crime both criminally and financially. Although it is important to punish these individuals with prison terms and traditional criminal sanctions, state and federal prosecutors have found that financial punishment is equally as effective. Accordingly, they have attempted to "take the profit out of crime,"[114] and make it financially less rewarding for those involved in organized crime to practice their trade. Forfeiture is one such tool.

First, some background. The primary distinction between criminal and civil forfeiture is mechanical. An action for criminal forfeiture, such as the one under OCCA, is part of the criminal proceeding. The same Grand Jury that votes the criminal indictment files a special information charging criminal forfeiture. The special information must specify the subject of the forfeiture and include a "plain and concise factual statement which sets forth the basis for the forfeiture."[115] Broad criminal discovery procedures are available to the prosecutor through the grand jury and the defendant may obtain disclosure to prepare his defense on the forfeiture issues.[116] The ultimate forfeiture may be imposed by the same trier of fact who decides the criminal case, usually through a bifurcated procedure, following the criminal conviction.[117] Alternatively, the court may impose a fine not exceeding three times the gross value of either the defendant's gain or the victim's loss, whichever is greater.[118] The existence of the special information, however, is kept secret from the trier of fact until after a guilty verdict has

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[114] Governor's Memorandum, *supra* note 12, at 3176.

[115] N.Y. PENAL LAW § 460.30(2)(a) (McKinney 1989).

[116] *See id.* § 460.80. For a guide to the procedures governing discovery in New York criminal cases, see N.Y. CRIM. PROC. LAW § 240.90 (McKinney 1989).

[117] *See* N.Y. PENAL LAW § 460.30(2)(a) (McKinney 1989). However, if the defendant waives his constitutional rights to a trial by jury and proceeds with a bench trial, the proceedings on the special information and the indictment are not bifurcated. A judge is considered better able to separate the evidence on the two issues and to be unprejudiced by the admission of the evidence on forfeiture. *See id.* § 460.30 commentary at 572.

[118] *Id.* § 460.30(5). In imposing the fine, the court is directed to consider the seriousness of the defendant's conduct, the proportionality of the fine to the defendant's conduct, the fine's impact upon victims and the enterprise corrupted by the criminal conduct, and the economic circumstances of the defendant, including the effect of the fine upon the defendant's immediate family. Note that the consideration of these factors is mandatory, not precatory. *Id.*

been rendered on the criminal act.[119] This prevents the evidence bearing on forfeiture from prejudicing the defendant during his trial on the criminal charges.

A person must be convicted of enterprise corruption before his property is subject to forfeiture.[120] An innocent third party caught in the web of a forfeiture proceeding instituted against his property by the prosecutor may protect himself by bringing an action to determine adverse claims under CPLR section 1327.[121] Section 1327 gives the court broad discretionary authority to protect the rights of any non-party who asserts an interest in the attached property. The court may award whatever relief it deems appropriate.[122] Section 1327 also permits the adverse claimant to commence the action in the county where the property levied upon is located, regardless of where the forfeiture action is pending. This makes it easier for the claimant to protect his property.

A civil forfeiture proceeding, in contrast, is usually brought *in rem* directly against the offending property.[123] It is a civil action, separate and distinct from the criminal trial. Usually, the civil action is initiated after the criminal matter is completed and, except in a few select instances, the civil action requires a judgment of conviction of a felony to proceed. Unlike its criminal counterpart, however, civil forfeiture may flow from *any* felony conviction, regardless of its relationship to the subject of the forfeiture action.[124]

Under OCCA, once a forfeiture verdict of guilty is rendered, the defendant may present additional argument and evidence to the court regarding the proportionality of the punishment to the conduct[125] and the weight of the evidence.[126] This provides for an unusual set of procedures.[127] Upon the defendant's request, the court may, in the interests of justice, substitute its factual findings

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[119] *Id.* § 460.30(2)(a),(b).

[120] *Id.* § 460.30(3)(b).

[121] *See* N.Y. CIV. PRAC. L. & R. 1327 (McKinney Supp. 1990).

[122] *Cf. id.* 2661 (McKinney 1980).

[123] An important exception to this is New York's CPLR article 13-A, an *in personam* civil action brought against a defendant. *See Civil Forfeiture Law*, *supra* note 16, at 254-57 (detailed discussion of article 13-A).

[124] *See* D. SMITH, PROSECTION AND DEFENSE OF FORFEITURE CASES § 2.03 (Bender 1985 & Supp. 1988) (discussion of differences between *in rem* and *in personam* forfeiture proceedings).

[125] *See* N.Y. PENAL LAW § 460.30(1)(a)-(c) (McKinney 1989) (conduct may require person convicted to forfeit property or interest to state).

[126] *Id.* § 460.30(2)(c).

[127] *See id.* § 460.30(2)(c).

for that of the jury, weighing factors including whether the forfeiture is disproportionate either to the defendant's gain or to the defendant's conduct on which the forfeiture is based. The court may modify, set aside, limit, or otherwise condition the order of forfeiture. This gives substantial power to the presiding judge.[128]

2. Criminal Forfeiture

Under OCCA, criminal forfeiture may be effectuated in any one of three ways, each paralleling a manner in which a defendant can commit the crime of enterprise corruption. Some of the statutory language in this regard was borrowed from the federal law.[129] Its purpose is to sever the tainted link between an individual convicted of enterprise corruption and the enterprise. Its implementation, therefore, is primarily focused on stocks, bonds, professional licenses, and other similar assets. Unlike its federal cousin, OCCA requires a predicate enterprise corruption conviction and provides for the disallowance of a forfeiture, in whole or in part, if the prospective forfeiture is disproportionate to the defendant's "gain"[130] or "conduct."[131] Criminal forfeiture under OCCA is also unique in requiring that the individual's use of the property being forfeited must have "contributed directly and materially to the crime for which he was convicted."[132]

Forfeiture under Penal Law section 460.30(1)(a), aimed primarily at insiders, requires a direct and material causation between the interests subject to the forfeiture and the crime. The statute also strays from the shadow of its federal counterpart by including a proportionality requirement. Forfeiture cannot be disproportionate to the defendant's gain from his association with or

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[128] Civil forfeiture under OCCA, in that regard resembles the dismissal provision under section 1311(4) of CPLR article 13-A, the most encompassing "interests of justice" provision in New York law. *See Civil Forfeiture Law*, *supra* note 16, at 280; *see also* N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1982 & Supp. 1991) (court may dismiss pending forfeiture action "in interests of justice").

[129] 18 U.S.C. § 1963 (1988) (RICO and OCCA have almost identical procedures to effectuate criminal forfeiture).

[130] N.Y. PENAL LAW § 460.30(1)(a) (McKinney 1989).

[131] *Id.* § 460.30(1)(b).

[132] *Id.* § 460.30(1)(a). Notably, this is akin to the requirement under article 13-A for the forfeiture of an instrumentality. N.Y. CIV. PRAC. L. & R. 1310(4) (McKinney 1989). Distinguish this with the federal statute requiring that "[t]here must be a direct or substantial relationship" between the act and the crime for the property to have been used "in furtherance" of a crime. United States v. One 1984 Ford Van, 861 F.2d 918, 919 (9th Cir. 1987); United States v. Moreno, 561 F.2d 1321, 1323 (9th Cir. 1977).

employment by the enterprise. This requirement is analogous to section 1311(4) of the CPLR, which provides for dismissal in the interest of justice if the value of the subject of the forfeiture action is disproportionately high in relation to the defendant's interest or participation in the crime.[133]

Forfeiture pursuant to subdivision (b) is limited to the interest or proceeds which the defendant acquired or maintained in an enterprise through a pattern of criminal activity. This section, which also includes a proportionality requirement, is aimed at outsiders to the enterprise who infiltrate the enterprise by diabolic means.

Forfeiture under subdivisions (a) and (b) is limited to the interest that a defendant may have in the enterprise. It does not reach gains that the defendant may have taken from the enterprise, such as cash, or items the defendant may have acquired with the ill-gotten gains, such as real estate or jewelry. In contrast, civil forfeiture under article 13-A does reach gains from the criminal activity, including proceeds, substituted proceeds and any appreciation in value that the proceeds may have acquired. Only the latter is recoverable under OCCA's criminal forfeiture scheme.[134]

Interests or proceeds which the defendant procured by investing the proceeds of the enterprise through a pattern of racketeering activity are also subject to forfeiture.[135] Aimed primarily at the racketeer who invests his gains, this section is restricted by the limitations set forth in section 460.25.[136] Again, a proportionality

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[133] *See* N.Y. CIV. PRAC. L. & R. 1311(4) (McKinney Supp. 1990); *see also Civil Forfeiture Law*, *supra* note 16, at 280. It is also the model upon which the legislature based Penal Law article 480, the newly enacted state criminal forfeiture statute aimed at controlled substance felony offenses. Ch. 655, [1990] N.Y. Laws (McKinney) (codified at N.Y. PENAL LAW §§ 480.05(1)(a),(b),(2) & 480.10(6)(d) (McKinney 1990)). Penal Law article 480, enacted as part of Assembly Bill 12141-A, was signed into law by Governor Cuomo on July 18, 1990, and took effect on November 1, 1990. Article 480 permits the trier-of-fact to consider, both before and after the verdict, whether the forfeiture is disproportionate to the defendant's profit from the offense, interest in the property, or participation in the conduct upon which the forfeiture is based. The defendant is also permitted to seek a dismissal of the special forfeiture information as secured upon evidence presented to the grand jury which was legally insufficient to support a claim against his property interest. *Id.* § 480.20(6)(d). The article also bars the imposition of any other state or local forfeiture action arising from the same conduct once a criminal forfeiture verdict is imposed thereunder *Id.* § 480.25.

[134] N.Y. PENAL LAW § 460.30(1) (McKinney 1989).

[135] *Id.* § 460.30(1)(c).

[136] *Id.* § 460.25. The four examples specifically deleted from the definition of investing are set forth in Penal Law § 460.25. They include (a) the acquisition of five percent or less of an insurer's securities on the open market without the intent to control the enterprise; (b) a deposit in a savings and loan association or similar financial institution that creates an ownership interest in that association or institution; (c) the purchase of shares in coopera-

requirement is imposed.

All three categories of interests subject to criminal forfeiture are limited to interests in or derived from the enterprise. Accordingly, the scope of the enterprise determines the scope of the forfeiture. The standard of proof is beyond a reasonable doubt,[137] and all of the forfeiture actions must be premised upon a conviction for enterprise corruption. The prosecution *must* elect one remedy from among the OCCA forfeitures.[138] This, in part, explains why civil remedies and forfeitures should not be underestimated when dealing with an action under OCCA. The imposition of any forfeiture penalty under OCCA, however, does not preclude the application of any other criminal penalties or civil remedies under New York law.[139] Similarly, the payment of restitution to the crime victim pursuant to OCCA does not preclude, limit, or impair the perpetrator's liability for damages in any subsequent civil action or proceeding brought by or on behalf of the victim for an amount in excess of the restitution.[140]

Disposition of assets under OCCA's criminal forfeitures is made pursuant to CPLR section 1349.[141] Prior to November 1, 1990, the legislature prioritized distribution of the assets by first satisfying all outstanding property liens and providing restitution, reparations, and damages to those victimized by the defendant in this or any other crime.[142] Where a forfeiture action was grounded

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tively-owned residential or commercial property; and (d) the purchase of non-voting shares in a limited partnership without the intent of controlling or participating in the control of the partnership. *Id.* § 460.25(2).

[137] *Id.* § 460.30(2)(b). *But see* N.Y. CIV. PRAC. L. & R. 1310, 1311(3)(a) (McKinney Supp. 1990) (civil forfeiture requires proof by preponderance of evidence).

[138] The choices are double or triple gain-based fines pursuant to Penal Law sections 80.00(1)(b) and 460.30(5), criminal forfeiture pursuant to Penal Law § 460.30(1), or remedies pursuant to CPLR article 13-A. Note, however, that an action for the forfeiture of proceeds or substituted proceeds pursuant to article 13-A may be brought in addition to an OCCA forfeiture, but only where the assets seized in the civil proceeding are not subject to forfeiture in the criminal case. N.Y. PENAL LAW § 460.30(6) (McKinney 1989).

[139] *See id.* § 460.30(7).

[140] *See id.* §§ 460.30(7), 460.30(8).

[141] *See id.* § 460.30(4); N.Y. CIV. PRAC. L. & R. 1349 (McKinney Supp. 1990). The lone exception to this distribution scheme arises when the court sentences the forfeiture defendant to pay a fine. Then, the monies collected shall be paid as restitution to victims of the crime for medically expenses actually incurred, loss of earnings, or property loss or damaged caused by the criminal conduct. N.Y. PENAL LAW § 460.30(5) (McKinney 1989). Any money remaining must be paid to the state treasury. *Id.* Additional rules apply when the underlying criminal activity is comprised of one or more narcotics-related activity. *Id.*

[142] N.Y. CIV. PRAC. L. & R. 1349 (McKinney 1989).

upon a narcotics or drug related crime,[143] fifty percent of the monies remaining went to the state Substance Abuse Service Fund. In all forfeiture cases, twenty-five percent of the monies remaining went to the law enforcement fund of the county or jurisdiction represented by the claiming authority. All monies remaining were distributed to the general fund of the state or county, depending on the case. None of this money, however, was earmarked by the statute for a specific use and, therefore, could be used by the respective entity for any legitimate purpose.

State prosecutors remained troubled by this disposition scheme, especially in light of the perquisites available to prosecutors under federal law.[144] State authorities claimed that a significant number of cases with forfeiture potential under article 13-A were declined or transferred to federal authorities since article 13-A failed to provide for reimbursement for the resources expended by law enforcement to investigate and litigate forfeiture actions. Accordingly, bowing to strong lobbying, the state legislature passed a new dispositional scheme for forfeited assets.[145]

Effective November 1, 1990, the claiming agent receives first crack at the forfeited monies. The claiming agent is reimbursed for monies directly expended in the underlying criminal investigation for the purchase of contraband which were converted into a non-monetary form or which were otherwise not recovered.[146] The claiming agent may also apply to the court for retention for law enforcement purposes of forfeited vehicles, vessels, or aircraft which are not subject to an unsatisfied perfected lien.[147] Where the claiming agent does not apply to the court for such property, the claiming authorities, including police and sheriff departments, may apply for the same consideration.[148]

If no claim for retention is made, the property is sold and apportioned pursuant to the remaining distribution schedule.[149] All outstanding property liens and restitution, reparations, and damages to those victimized by the defendant in this or any other

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[143] *See* N.Y. PENAL LAW art. 220, §§ 221.30, 221.55 (McKinney 1989).

[144] *See Civil Forfeiture Law*, *supra* note 16, at 295-97.

[145] Ch. 655, [1990] N.Y. Laws (McKinney) (codified in N.Y. CIV. PRAC. L. & R. 1349 (1990) (effective November 1, 1990).

[146] N.Y. CIV. PRAC. L. & R. 1349(2) (McKinney 1989).

[147] *Id.*

[148] *Id.*

[149] *Id.*

crime are paid, as provided for under the former law.[150] Next, the court may satisfy expenditures by claiming agents and claiming authorities for the maintenance and operation of real property attached pursuant to article 13-A[151] and expenditures for the disposal of hazardous substances or other materials when the forfeiture action is based upon a violation of the environmental conservation law.[152] The claiming authority may then recover fifteen percent of the costs and expenses incurred in the investigation, preparation, and litigation of the forfeiture action, including the proportion of salaries devoted to those activities.[153] In addition, the claiming agent can recover five percent of the actual costs it incurred for protecting, maintaining, and forfeiting the property, also including the proportional percentage of salaries.[154]

Of any remaining funds, forty percent must be distributed to the state Substance Abuse Service Fund.[155] This percentage is from monies recovered in all cases, and is not limited to funds recovered in narcotics-related prosecutions, as was the case under prior law. Finally, three-quarters of the balance of the remaining funds must be deposited into a law enforcement account for use in the investigation of penal law offenses.[156] The remaining twenty-five percent of the monies must be deposited into a prosecution services account for use in the prosecution of penal law offenses.[157] If multiple claiming agents participated in the forfeiture action, the funds must be disbursed to the law enforcement accounts in accordance with the terms of a written agreement between the respective claiming agents reflecting their participation in the forfeiture action.[158]

3. Civil Forfeiture

Once a defendant is convicted of an OCCA violation, the defendant and any enterprise he controls may be subjected to equitable remedies, including injunctions to prevent future misconduct.

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[150] *See id.* 1349 (2)(a),(b),(c).
[151] *Id.* 1349(2)(d)(i).
[152] *Id.* 1349(2)(d)(ii).
[153] *Id.* 1349(2)(e).
[154] *Id.* 1349(2)(f).
[155] *Id.* 1349(2)(g).
[156] *Id.* 1349(2)(h)(i).
[157] *Id.* 1349(2)(h)(ii).
[158] *Id.*

This relief is available not only against the criminal enterprise, but also against any infiltrated legitimate enterprise. Such is the relief provided for under CPLR article 13-B.

Drafted and adopted together with OCCA, article 13-B sets forth civil remedies available to the court following an OCCA conviction. Its purpose is to prevent the *continuation* of criminal conduct committed through an enterprise. An action pursuant to article 13-B is civil in nature and, like that under article 13-A, is separate from the criminal action. Unlike an action under article 13-A, however, an article 13-B proceeding may be filed only after a criminal conviction for the violation of one of the subdivisions of Penal Law section 460.20.[159]

The relief available to the prosecutor under article 13-B includes: (a) an order requiring the defendant to divest himself of his interest in a specified enterprise; (b) an order imposing "reasonable restrictions" upon the future activities or investments of the defendant; (c) an order dissolving or reorganizing the enterprise; (d) an order suspending or revoking a state or local license or permit held by the defendant or any enterprise controlled by the defendant or in whose control he participates; and (e) an order revoking the certificate of incorporation of any corporation in which the defendant has a controlling interest to conduct business within New York.[160]

D. Case Law under OCCA

As indicated above, there have been only a handful of indictments filed under OCCA.[161] These indictments, however, have

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[159] *See id.* 1310(6), 1311(1)(b). Article 13-A permits preconviction forfeiture in certain circumstances prior to or in the absence of any criminal proceeding. *Id.* Preconviction actions are only applicable where the underlying felony involves narcotics or marijuana. The prosecutor may prove the occurrence of such a criminal act, not necessarily by the 13-A defendant, in the forfeiture case itself. *Id.* The proof of the crime, however, must meet the higher civil standard of clear and convincing evidence. *Id.* 1311(3)(b)(i). All other elements of the forfeiture action require a preponderance standard of proof. *Id.* 1311(3)(b)(ii).

[160] Similar relief, as provided for under article 13-B, is available under 18 U.S.C. section 1964(a) of RICO. *See, e.g.*, United States v. United Slate Tile, 871 F.2d 401, 407-08 (3d Cir. 1989) (court decree enjoining union leaders from holding office or participating in union affairs); United States v. Ianniello, 824 F.2d 203, 207 (2d Cir. 1987) (receivership *pendente lite* over restaurant allegedly used by organized crime for cash skimming); United States v. Local 560, Int'l Brotherhood of Teamsters, 780 F.2d 267, 295 (3d Cir. 1985) (trusteeship imposed on Teamsters local dominated by organized crime), *cert. denied*, 476 U.S. 1140 (1986).

[161] *See* notes 35-37 and accompanying text.

failed to generate any reported case law. Only issues relating to OCCA's elaborate and extensive provisions regarding the issue of double jeopardy have been decided.[162] Codified in article 40 of the Criminal Procedure Law and adopted in 1986 as part of OCCA, these provisions attempt to explain when double jeopardy would apply to a state prosecution for enterprise corruption.[163]

CONCLUSION

OCCA reflects the New York State Legislature's attempt to formulate workable components of an effective law, drawing from RICO and comparable statutes. The overall effort is commendable. OCCA has a substantially more limited scope than its federal counterpart and clearly grants greater protection to defendants and innocent third parties than does RICO. Furthermore, its procedural mechanisms, though somewhat cumbersome, reflect the careful drafting and attention to detail which is typically lacking from RICO-type statutes. Yet, Baby RICO is still an infant, with its provisions remaining to be probed. Despite precision drafting, state prosecutors perhaps have taken the statute's narrow scope too much to heart. Only a handful of indictments have been filed under OCCA and those have failed to generate any case law of substance.

Without prosecution and judicial interpretation, the lofty potential of OCCA will remain unfulfilled and its strength against organized crime will go untested. Until it develops a solid body of decisional law, Baby RICO will fail to meet the purpose of its creation. Let us hope that the legislature's child will mature and grow strong and, learning from its ancestors, meet our expectations as a capable, responsible, and a respected force in the fight against crime.

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[162] *See* N.Y. CRIM. PROC. LAW § 40.50 (McKinney Pam. 1991); People v. Bokum, 145 Misc. 2d 860, 867-69, 548 N.Y.S.2d 604, 608-10 (Sup. Ct. N.Y. County 1989); People v. Cooper, 143 Misc. 2d 654, 655-56, 541 N.Y.S.2d 713, 714 (Sup. Ct. Bronx County 1989).

[163] These provisions and the cases addressing them are outside the scope of this Article. For an in-depth discussion of these provisions and related issues, see N.Y. CRIM. PROC. LAW § 40.50 commentaries at 168-71 (McKinney Pam. 1991).