



2015 CLM Annual Conference
Palm Desert

Building Your Civil RICO Action From a Claims and Legal Standpoint to Withstand a Rule 11 Motion and/or a Rule 12b(6) Motion to Dismiss

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I. Elements of a Civil RICO Action – conduct of an enterprise (10 Minutes)

The RICO Act (“RICO”) was originally enacted in 1970 as a powerful tool to criminal prosecutors to fight organized crime. Since then, the statute has evolved into a much broader remedy to address private civil wrongs. RICO can be an effective weapon for companies facing fraudulent insurance claims and resulting litigation.

To state a claim, a plaintiff must allege four elements: 1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity 5) resulting in injury. Conspiracy can also be alleged under RICO.

To utilize civil RICO, a potential civil defendant must be engaged in an “enterprise” that has an intent to harm another. This requires one or more individuals to be acting in concert with each other, or one or more of the individuals acting in combination with some form of a business entity. The civil defendants must be engaged in a pattern of committing at least two acts of “racketeering activity.” “Racketeering activity” consists of specifically enumerated criminal acts which include mail fraud and wire fraud. The racketeering activities of the criminal enterprise must have injured the party filing the civil RICO complaint.

II. Use of Civil RICO Actions Defensively to Prevent Enforcement of Foreign Judgments-the *Chevron* suit (10 Minutes)

RICO has recently been used by Chevron defensively to prevent the enforcement of a foreign judgment.

In 2011, an Ecuadorian court entered an \$18.2 billion judgment (reduced on appeal to 9.5 billion) against Chevron in an action brought by 47 individuals referred to as the Lago Agrio Plaintiffs. (LAPs). In February 2011, Chevron filed an action in the U.S. District Court for the Southern District of New York against the LAPs, their lead US attorney, Steven Donziger, his firm and others involved in the Argio litigation. (11-cv-0691) (Rec. Doc. 1, Amended Complaint, Rec. Doc. 283) Chevron claimed that the judgment was the product of fraud and that acts associated with its procurement were significant parts of a pattern of racketeering activity in

violation of RICO. The pattern included extortion, wire fraud, money laundering and obstruction of justice.

The RICO and fraud claims rested on the allegations that Donziger and other substantially executed, funded, and directed a scheme to extort and defraud Chevron, which included fabricating evidence, corrupting and intimidating the Ecuadorian judiciary to obtain a tainted judgment, influencing U.S. public officials with false representations to cause them to investigate Chevron, making false statements to US Courts, and intimidating and tampering with witnesses in U.S. proceedings to cover up their improper activities. Motions to Dismiss were filed and denied by the Court. Chevron also did not seek damages. Chevron only sought to prevent the enforcement of the Ecuadorian judgment.

On March 4, 2014, the trial court ruled in favor of Chevron finding that RICO had been violated. One of the finding that the court stressed was that a U.S. lawyer had authorized a plan that allegedly promised \$500,000 from a potential judgment as a kickback to an Ecuadorian trial judge. The Court found that equitable relief was available under RICO and prevented the enforcement of the judgment. The Court also created an equitable trust for Chevron's benefit on Donziger's fees and other assets. The defendants, including Donziger, were prohibited from profiting from the judgment in any way.

III. Affirmative Use of Civil RICO Actions to Combat Insurance Fraud (5 Minutes)

RICO has also been used affirmatively in civil actions as means to allow recovery in fraudulent lawsuits.

In December of 2005, CSX Transportation, a freight railroad company, filed a complaint in federal court in the Northern District of West Virginia (5:05-cv-00202) (Rec. Doc. 1) naming as defendants Robert Pierce and his law firm. Other members of the firm, including Louis Raimond and others employed by the firm, including an investigator and a medical expert, radiologist Ray Harron, were also named as defendants. In its amended complaints (Rec. Doc. 208, 278, 284, 841, 853), CSX alleged that the law firm "embarked upon a calculated and deliberate strategy to participate in and to conduct the affairs of the Pierce firm through a pattern and practice of unlawful conduct, including bribery, fraud, conspiracy and racketeering" by "orchestrating a scheme to inundate CSX and other entities with thousands of asbestos cases without regard to their merit." In order to perpetrate this alleged scheme, CSX contended that the lawyer defendants gained access to potential clients through unlawful means, and retained clients and procured medical diagnoses for them through intentionally unreliable mass screenings. CSX also contended that the lawyer defendants prosecuted client claims using dishonest, fraudulent tactics, fabricated and prosecuted asbestosis claims with no basis in fact and did so using mass lawsuits in overburdened courts in an effort to deprive CSX of access to meaningful discovery which in turn concealed the fraudulent claims and leveraged higher settlements based on the threat of mass trials. (*See* Second Amended Petition, Par. 139-158).

During the course of this case, several attempts were made by the lawyer defendants to dismiss the claims on varying grounds. In an unpublished opinion by the U.S. Fourth Circuit Court of Appeal, 09-2135, (12/30/10) (Rec. Doc. 818), the Fourth Circuit allowed the claims to proceed to trial. In December of 2012, the jury ruled in favor of CSX finding that the defendants had promulgated fraudulent asbestos lawsuits against CSX awarding \$429,240. In September of

2013, the trial judge (Stamp), tripled the original award for damages to approximately \$1.3 million. The trial court has not yet determined if defendants will be required to pay some or all of the \$10 million CSX spent on legal fees and costs. This matter is currently on appeal.

Insurance carriers have successfully used civil RICO actions to recover monies paid on claims before the discovery of the fraudulent activities. When insurance companies file affirmative civil RICO actions, their claim handling practices and investigation of the participants' actions will come under strict scrutiny.

IV. Legal and Factual Support for a Civil RICO Action – Investigation (15 Minutes)

Insurance companies can obtain the necessary factual support for civil RICO actions through routine claim handling practices and the discovery process in related litigation. Care should be taken when suspected fraudulent activities are investigated and documented in individual claim files. Defendants in civil RICO actions have used claim file entries as the basis to file counter claims against insurance carriers. Civil RICO defendants have also used claim file documentation as a basis to dismiss some or all of the allegations against them.

V. Legal Challenges to Civil RICO Actions (15 Minutes)

Civil RICO defendants typically file motions to dismiss the RICO allegations brought against them. Such motions can be based upon the expiration of the applicable four year statute of limitations. However, the most common basis for a motion to dismiss is the failure of the civil RICO complaint to adequately set forth facts necessary to establish the elements of a cause of action under RICO. Civil RICO defendants also employ the doctrine of “reverse preemption” to claim that federal courts are prohibited from hearing civil RICO actions predicated upon insurance claims submitted under state insurance statutes.

The



UNDO Act

**How to Use the Statute to Aggressively
Seek Recovery Against the Unscrupulous**

By Matthew J. Smith, Esq.

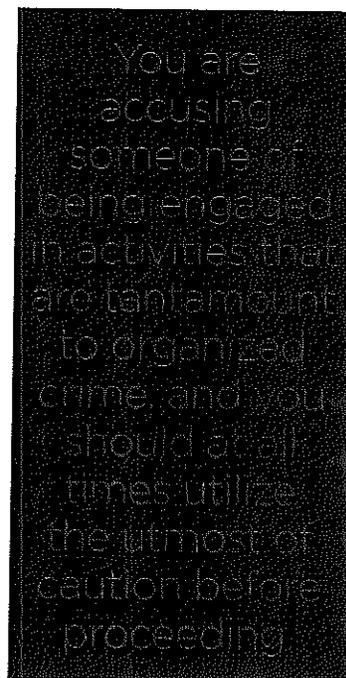
The year was 1970. Richard Nixon was in the White House, Neil Armstrong just stepped foot on the moon the year before, and The Beatles were still together as a band. America was reeling from the loss of a President, a presidential candidate, and a civil rights leader all due to assassinations. Crimes of all sorts appeared to be running rampant in America.

Against this backdrop, the U.S. Congress passed what even today is considered one of the most far-reaching pieces of legislation of the 20th century. Sponsored by Senator John McClellan and assisted by his committee's staff attorney and University of Notre Dame Professor G. Robert Blakey, the Racketeer Influenced and Corrupt Organizations Act (RICO)—officially known as Title IX of the Organized Crime Control Act of 1970—was envisioned and drafted. The now-retired Blakey remains one of the leading experts on RICO law in America, and he frequently assists insurers in understanding civil RICO actions and testifies as an expert witness.

One of the many unique things about the RICO Act is that Senator McClellan and Professor Blakey initially set out to draft legislation that continued the efforts began by Attorney General Robert F. Kennedy to prosecute organized crime activity by members of the Mafia. As the legislative process unfolded, a concept was floated to pair the RICO Act's criminal penalties with a civil remedy provision to allow both individuals and corporations harmed by corrupt activities to not only recover their actual damages, but also treble (three times) those damages and all reasonably incurred legal fees. Thus, a very unique "partnership" of both criminal and civil components merged into one of the most powerful crime and fraud-fighting pieces of legisla-

tion ever adopted.

Unlike any other piece of legislation since, the RICO Act was signed into federal law by President Nixon, and only two years later a movement began across the country for individual states to adopt their own criminal and civil RICO laws. In the years since, approximately 33 states, Puerto Rico, and the U.S. Virgin Islands have adopted state RICO laws. Most of these have followed the federal model by including both criminal and civil prosecution and recovery provisions. With enactment of both federal



and state RICO laws mostly within a little more than a decade, the landscape of legislation to battle organized crime and fraud was altered in far-reaching ways that continue to reverberate across U.S. courtrooms today.

With the ability to simultaneously utilize the federal and state RICO laws, the provisions and application of civil RICO have been employed broadly throughout the U.S. In increasing numbers in recent years, insurers have begun to investigate and understand how to utilize RICO laws to pursue fraudulent activity ranging from medical provider and billing fraud to auto-theft rings, body-shop repair schemes,

and property claims. Use by insurers of civil RICO provisions has expanded as insurance fraud has become more widespread and prevalent across our country. Also, as insurers see other carriers succeeding in recovery actions, it spurs an increasing interest and confidence in considering RICO as a tool in the battle to protect honest policyholders and stop the payment of fraudulent claims.

The Specifics of RICO

While individual state laws may vary, to utilize civil RICO, a potential civil defendant generally must have committed at least two acts of racketeering activity and be engaged in an "enterprise" that has an intent to harm another. Racketeering activity is defined and often referenced in many statutes as a list of specific criminal acts. The RICO defendants must be operating the enterprise and engaging in a pattern of racketeering activity. This requires one or more individuals to be acting in concert with each other, or one or more individuals in combination with some form of a business entity. For example, a group of individual medical providers, medical clinics, runners, and unscrupulous attorneys may all potentially be engaged in an enterprise to submit improper personal injury claims. The actual submission of the fraudulent claims would form the pattern of racketeering activity.

Both the federal and state RICO statutes contain a listing of actions that, by their very nature, would be viewed as meeting the requirements of a RICO "predicate" offense. For purposes of analysis by insurers, such actions as defined in these statutes may include extortion, arson, embezzlement, fraud, and money laundering—exactly the type of activities that fuel insurance fraud and questionable claims.

Use of RICO by Insurers

In recent years, insurance carriers

have become more aggressive in seeking reimbursement for monies improperly paid to medical providers, body shops, and even attorneys engaged in unscrupulous practices. Many insurers have found the use of RICO statutes to be an effective way to more aggressively seek recovery, and it also provides several key strategic advantages.

First and foremost, those who are successful in a RICO action can recover three times their actual damages, and also they recover all attorneys' fees associated with bringing and conducting the RICO investigation and subsequent litigation. This alone could result in millions of dollars in damages.

Additionally, insurance carriers that have grown tired of judges prohibiting evidence of improper actions in other prior claims because it is not the specific claim at issue in the pending litigation find RICO claims to be a breath of fresh air. These cases not only allow the insurance company to present evidence of a

Further fueling the race toward actions have been a number of notable successes by insurance carriers in pursuing RICO claims.

pattern of racketeering activity involving multiple events and claims—they require it. When used properly, a RICO action truly allows the insurance carrier the ability to paint for the jury an entire picture of the improper actions being engaged in by the defendants seeking to improperly secure payment for fraudulent claims. This is oftentimes very appealing.

Further fueling the race toward actions have been a number of notable successes by insurance carriers in pursuing RICO claims. State Farm has brought several RICO actions in recent

years resulting in multimillion-dollar jury verdicts, including one case that exceeded \$12 million in recovery. Similarly, Allstate has pursued several RICO actions, including the successful trial last year of a RICO case against a chain of chiropractic clinics and related parties, successfully recovering nearly \$2 million in actual damages. Under the RICO Act, that award by the court trebles to \$6 million, and then attorneys' fees are assessed as well.

Before you rush to call your defense counsel to file a RICO action to "go after the bad guys," however, consider

STATES WITH CIVIL RICO STATUTES

In addition to Puerto Rico and the U.S. Virgin Islands, here are the 33 states that have civil RICO statutes.

- Arizona: Ariz. Rev. Stat. Ann. § 15-2301 et seq.
- Colorado: Colo. Rev. Stat. § 18-17-101 et seq.
- Connecticut: Conn. Gen. Stat. § 53-383 et seq.
- Delaware: Del. Code Ann. tit. 11, § 1501 et seq.
- Florida: Fla. Stat. § 732.101 et seq. and 895.01 et seq.
- Georgia: Ga. Code Ann. § 15-14-1 et seq.
- Hawaii: Haw. Rev. Stat. § 842-1 et seq.
- Idaho: Idaho Code § 18-1601 et seq.
- Illinois: Ill. Comp. Stat. 175/1 et seq.
- Indiana: Ind. Code § 34-6-3-12 et seq.
- Iowa: Iowa Code § 726A.1 et seq.
- Louisiana: La. Rev. Stat. Ann. § 15:1151 et seq.
- Michigan: Mich. Comp. Laws § 23011501 et seq.
- Minnesota: Minn. Stat. § 60B.921
- Mississippi: Miss. Code Ann. § 97-43-1 et seq.
- Nebraska: Neb. Rev. Stat. § 38-1503 et seq.
- Nevada: Nev. Rev. Stat. § 207.200
- New Jersey: N.J. Rev. Stat. § 2C-41-4 et seq.
- New Mexico: N.M. Stat. Ann. § 30-421
- New York: N.Y. Penal Law § 400.00 et seq.
- North Carolina: N.C. Gen. Stat. § 75C-1 et seq.
- North Dakota: N.D. Cent. Code § 12.1-01101 et seq.
- Ohio: Ohio Rev. Code Ann. § 2923.34
- Oklahoma: Okla. Stat. tit. 22, § 1401 et seq.
- Oregon: Ore. Rev. Stat. § 166.735
- Pennsylvania: 18 Pa. Cons. Stat. § 911 et seq.
- Rhode Island: R.I. Gen. Laws § 1-15-1 et seq.
- South Dakota: S.D. Codified Laws Ann. § 54-14-161
- Tennessee: Tenn. Code Ann. § 38-12-201 et seq.
- Utah: Utah Code Ann. § 76-10-1601 et seq.
- Virginia: VA Code Ann. § 18.2-972 et seq.
- Washington: Wash. Rev. Code § 9A.82.101 et seq.
- Wisconsin: Wis. Stat. § 946.00 et seq.

carefully that RICO can be a double-edged sword.

RICO actions are truly the “atomic bomb” of insurance-related litigation. From the time the statute was first adopted, it was intended to be utilized appropriately to bring down those engaged in fraudulent activities by invoking civil

or criminal prosecution and penalties. RICO was, and remains, closely associated with the concept and practice of organized crime.

A number of insurance carriers have learned the hard way the risk of filing a RICO action for which a proper and firm foundation may not exist. Insurers

that attempt to utilize RICO for purposes of leverage or as a scare tactic will find themselves potentially facing not only bad-faith claims from first-party insureds, but also claims for defamation, abuse of process, and even emotional distress if the insurer is not eventually successful in being able to sustain and

Chevron's RICO Victory

By Howard Kaplan

On March 4, 2014, after many years of litigation, Chevron obtained a highly favorable ruling using RICO to fight fraudulent lawsuits. Chevron's RICO victory, along with other similar cases, can provide a model for other companies to follow in using RICO to fight fraudulent lawsuits.

The Chevron Suit

In 2011, an Ecuadorian court entered an \$18.2 billion judgment against Chevron in an action brought by 47 individuals referred to as the Lago Agrio plaintiffs (LAPs). The judgment was reduced to \$9.5 billion by the Ecuadorian Supreme Court.

In 2011, Chevron filed a complaint against the LAPs, their lead U.S. attorney Steven Donziger and his law offices, and others involved in the litigation. Chevron claimed that the Ecuadorian judgment was the product of fraud, extortion, wire fraud, money laundering, and obstruction of justice, which violated RICO.

The RICO and fraud claims rested on the allegations that Donziger and others substantially executed, largely funded, and significantly directed a scheme to extort and defraud Chevron by, among other things: (1) litigating the Lago Agrio case; (2) fabricating evidence for use in that lawsuit and commencing and maintaining the Ecuadorian litigation in order to obtain a biased judgment; (3) exerting pressure on Chevron to coerce it to pay money not only by means of the Lago Agrio litigation and judgment, but also by threatening Chevron to publicize attacks in the U.S. and elsewhere based on false and misleading statements; (4) inducing U.S. public officials by their representatives to investigate Chevron and (5) making false statements to U.S. courts and communicating and tampering with witnesses in U.S. court proceedings to cover up their fraudulent activities.

The Ruling

Prior to trial, Chevron waived any claim for monetary damages, seeking only equitable relief. In an extensive 444-page decision, the court ruled that RICO had been violated. One of the findings that the court stressed was that a U.S. lawyer had authorized a plan that allegedly provided \$250,000 from a potential plaintiff's judgment as a kickback to an ill-reputable trial judge. The court initially found that equitable relief is available in private RICO actions. The court noted that this was an unresolved issue with conflicting appellate court decisions.

After finding that equitable relief was available, the court found that Chevron had proved all of the elements necessary for a RICO claim. It granted equitable relief to Chevron by preventing the defendants from benefiting from the fraud. Specifically, the court entered a constructive trust for Chevron's benefit on Donziger's fees and other assets. The court also enjoined the defendants from enforcing the Ecuadorian judgment in the U.S. The defendants, including Donziger, were prohibited from profiting from the judgment in any way.

It should be noted that the decision in favor of Chevron is a district court decision that likely will be affirmed. Additionally, the question of whether equitable relief is available as a private remedy under RICO is an unresolved question of law. Nevertheless, this decision is a road map for further use of RICO to fight fraudulent lawsuits. **CLM**

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prove the RICO allegations. RICO cases require the utmost of preparation, knowledge, and skill. All of these attributes must exist to the highest level before litigation is considered or filed.

The U.S. Supreme Court has implied that naming a person or entity a defendant in a civil RICO proceeding may, in certain situations, be no different than being named a defendant in any other type of litigation. While this may afford insurers some level of protection, the reality is that many of these cases can still reach a jury, and those jurors may be inclined to award large amounts of damages to defendants if they believe an insurance carrier did not have a sufficient legal basis to bring a RICO allegation.

Regardless of whether a RICO action is filed as a civil case by the insurer or by the U.S. Justice Department in a criminal action, the basic allegations of RICO remain the same. You are accusing someone of being engaged in activities that are tantamount to organized crime,

and you should at all times utilize the utmost of caution before proceeding.

Preparing the Successful RICO Case

One of the many pitfalls to avoid in civil RICO litigation is viewing these types of cases as being similar to other insurance law or civil litigation matters. Frequently, a party files a lawsuit intending to use the discovery process to prove and substantiate the allegations asserted. Doing so in a RICO action may expose your company to great peril.

A successful RICO recovery action may take years of preparation before filing in the state or federal court. Witness interviews, expert evaluation reports, conferences with local and state insurance and law enforcement officials as well as independent reviews of the evidence all may be necessary—and expensive—steps to take prior to filing the RICO action.

Most experienced civil RICO

attorneys not only will take no offense, but also will encourage their insurer clients to engage an outside RICO expert to evaluate the insurer and attorney's combined investigative work and the proposed RICO pleading. The expert can afford in advance of filing a written opinion and evaluation of the worthiness of the RICO Act as applied to the facts and allegations to be pled. An independent review of this nature may be worth its weight in gold if an insurer is later called upon to demonstrate in court why it felt it had a good-faith basis to proceed with the RICO action filing.

Attorney John Floyd of Atlanta has authored a leading textbook on civil RICO litigation. In it, he warns, "On a cautionary note, it is important to realize that RICO statutes involve the interaction of criminal and civil law. The key to treble damages (and in many states, injunctive relief) is not proof of civil torts, but rather specific criminal offenses. So it is very important to be very familiar

with the offense: do not

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with the essential elements of those offenses, which most civil practitioners do not regularly encounter.”

Perhaps more than any other area of insurance law, carriers that wish to consider use of civil RICO as a tool to battle fraud and recoup monies paid for fraudulent activities must be very cautious in selecting legal counsel. RICO claims are not for the faint of heart, and you should interview counsel carefully and require them to prove and document their knowledge and experience in the field of civil RICO litigation. You do not want to find your company in a position where a RICO case is dismissed for lack of evidence or statutory compliance and you, together with your legal counsel, are then sued. Even worse is if you learn for the first time in the deposition of your own counsel that they had no experience or qualifications to handle the RICO action that they undertook on behalf of your company.

RICO: A View to the Future

It's unlikely that another far-reaching, antifraud law like the RICO Act will be passed in most of our remaining lifetimes. As insurers continue efforts to battle back against the ever-widening reach of insurance fraud and those engaged in fraud expand their efforts in new and more organized manners, RICO will become an even more valuable tool. It will be used to fight fraud and recover substantial amounts of money paid to fraudulent providers and individuals.

A RICO action also could be an excellent way for insurers to show their legitimate and honest policyholders that they are at the forefront of fighting to hold down the high cost of fraud. Insurers must be prepared to use this tool effectively and as the weapon it was intended to be to fight those engaged in organized and improper activities to harm others. Like any weapon, though, it must be respected and used only with the utmost of caution, and by those who are properly trained to use it correctly.

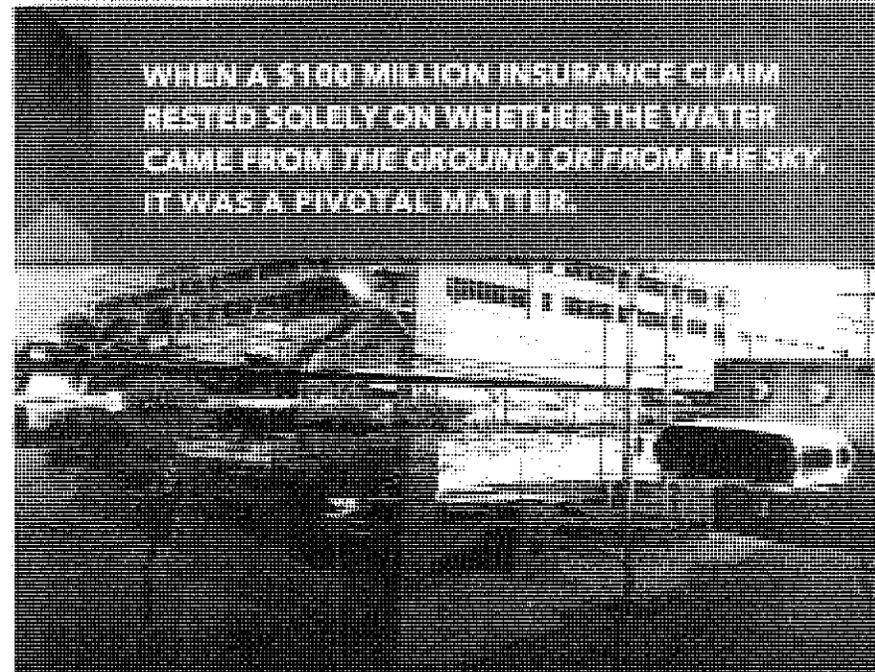
Although it has taken more than four decades, insurers are beginning to truly appreciate the breadth and power

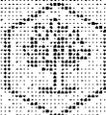
of civil RICO actions as an important tool in battling insurance fraud. We should not be fearful of a law that was enacted for the purpose of providing a method of recovery and severe penalties for those who engage in improper and fraudulent activities. We must, however, approach these cases with the utmost of preparation and diligence. Only then will we see the rewards of what was

envisioned by this historic legislation's authors so many years ago. **CM**

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WHEN A \$100 MILLION INSURANCE CLAIM RESTED SOLELY ON WHETHER THE WATER CAME FROM THE GROUND OR FROM THE SKY, IT WAS A FISCAL MATTER.





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