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# RICO, CORRUPTION AND WHITE-COLLAR CRIME

*Pamela Bucy Pierson\**

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## I. INTRODUCTION

The Racketeer Influenced and Corrupt Organization Act (RICO),<sup>1</sup> passed in 1970, is a sprawling and complex statute designed to penetrate organizations and impose liability on those who orchestrate criminal acts but insulate themselves with layers of underlings and bureaucracy. RICO imposes criminal penalties on those who orchestrate these criminal acts, and also provides a civil cause of action to those whose business or property has been damaged as a result. For a variety of reasons, criminal RICO has fallen into disfavor.<sup>2</sup> Civil RICO, which is an optimal tool to pursue fraud, has never reached its potential for use in fraud cases. This Article explores this phenomenon and provides a roadmap for RICO's appropriate use in fraud cases.

This Article proceeds in six Sections. Section II provides an overview of RICO, focusing on the public policy rationale of the statute. Section III reviews the organized crime context in which RICO was passed. Section IV explains why RICO is an especially effective tool against white-collar crime. Section V addresses the biggest stumbling block in RICO's use against white-collar crime: the notion of "RICO enterprise." "Enterprise" is at the heart of the RICO statute. It is also the most amorphous and confusing aspect of RICO. Unfortunately, the case law that has developed regarding RICO enterprise is especially muddled, inconsistent, and in some instances, wrong. This confusion has led, in large part, to RICO's inappropriate use in fraud cases. Section V strives to bring some order to the enterprise chaos. It identifies typical "enterprise" scenarios in the white-collar arena, involving corporations, subsidiaries, officers, directors, owners and agents. Section VI demonstrates the vitality of the guidance provided in Section V by applying it to a hypothetical pharmaceutical fraud. Section VII concludes with observations for future use of civil RICO.

The goal of this Article is to encourage vibrant but appropriate use of RICO in white-collar cases. As this Article discusses, the looming threats to global economic stability posed by fraud are great. Our society needs every effective tool available to address these threats. We should not allow RICO, which is an optimally effective tool, to languish in a morass of confusing jurisprudence.

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1. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968 (2006)). Excellent resources on RICO include: JED S. RAKOFF & HOWARD G. GOLDSTEIN, *RICO CIVIL AND CRIMINAL LAW AND STRATEGY* (1989); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L. Q. 1009 (1980); James D. Calder, *RICO's "Troubled Transition": Organized Crime, Strategic Institutional Factors, and Implementation Delay, 1971-1981*, 25 CRIM. JUST. REV. 31 (2000); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987); see also Mark Gordon, *Ideas Shoot Bullets: How the RICO Act Became a Potent Weapon in the War Against Organized Crime*, CONCEPT (2003), <http://concept.journals.villanova.edu/article/view/312/275>; Gregory J. Wallance, *Outgunning the Mob*, 80 A.B.A. J. 60 (1994).

2. Conspiracy, which is easier to prove and explain to juries, often reaches as far as does RICO. With the advent of the federal sentencing guidelines, RICO's stiff twenty-year prison term is no longer uniquely draconian. Finally, with the expansion of forfeiture statutes, RICO is no longer needed to obtain a convicted defendant's property by forfeiture. See *infra* notes 10-12 and accompanied text for discussion of potential RICO penalties.

## II. OVERVIEW OF RICO

### A. *The RICO Statute*

The RICO statute is complex.<sup>3</sup> It is wide-ranging, “amorphous,”<sup>4</sup> and “capacious.”<sup>5</sup> Courts have “expressed dismay at [its] . . . loose wording, . . . its overbreadth, and . . . its lack of clarity and specificity.”<sup>6</sup> It applies to a wide range of conduct, contains abstract terms that are “not easily correlated with everyday experience,”<sup>7</sup> and operates with an unusual public-private enforcement scheme.<sup>8</sup>

There are four types of conduct prohibited by RICO: (1) investing proceeds from a pattern of racketeering activity in an enterprise, (2) acquiring or maintaining control over an enterprise through a pattern of racketeering activity, (3) conducting or participating in the affairs of an enterprise through a pattern of racketeering activity, and (4) conspiring to do any of these types of conduct.<sup>9</sup> RICO is both a crime and a civil cause of action. It may be prosecuted by United States Department of Justice prosecutors, criminally or civilly, or it may be brought as a civil suit by private

3. *Hemi Grp., LLC v. City of New York*, 130 S. Ct. 983, 995 (2010) (Breyer, J., dissenting). Relevant legislative history on RICO includes: RICO Amendments Act of 1991, H.R. 1717, 102d Cong. (1990); *Organized Crime Control: Hearing on S.30 Before Subcomm. No. 5 of the H. Comm. of the Judiciary*, 91st Cong. (1970); *Measures Relating to Organized Crime: Hearings on S. 30 and S. 994 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong. 496 (1969); *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Gov't Operations*, 88th Cong. (1963); S. REP. NO. 101-407 (1990); S. REP. NO. 100-459 (1988); H.R. REP. NO. 91-1549 (1970); S. REP. NO. 91-617 (1969); S. REP. NO. 87-1784 (1962); S. REP. NO. 86-621 (1959); S. REP. NO. 85-1417 (1958); S. REP. NO. 82-725 (1951); S. REP. NO. 82-307, at 170-81 (1951); S. REP. NO. 82-141 (1951); S. REP. NO. 81-2370 (1950); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUST., *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967) [hereinafter PRESIDENT'S COMM'N REPORT].

4. *Cf. Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 524-25 (1985) (arguing that RICO is morphing into something unintended by its originators). As Congress noted, twenty years after passing RICO, “the meaning of many of these [new] concepts and remedies [of RICO] is still unclear.” SEN. REP. NO. 100-459 at 2. The Supreme Court clarified RICO's other unusually broad term, “pattern” in *H.J. Inc. v. Northwestern Bell Telephone Company*. 492 U.S. 229, 249-50 (1989). Noting the breadth of the term and the difficulty of “developing a meaningful concept of ‘pattern,’” the Court held that in addition to the statutory requirement of at least two racketeering acts within 10 years, the acts must show “relationship” and “continuity.” *H.J. Inc.*, 492 U.S. at 236.

5. Irvin B. Nathan, *Prosecuting a Civil RICO Suit: Pleasing and Providing Plaintiff's Case*, in RICO CIVIL AND CRIMINAL LAW AND STRATEGY § 7, § 7.01, at 7-6 (1989). As Rakoff and Goldstein have noted, RICO's “terms are artificial and not easily correlated with everyday experiences.” RAKOFF & GOLDSTEIN, *supra* note 1, § 1.01, at 1-3.

6. S. REP. NO. 100-459, at 2; *see, e.g., Schacht v. Brown*, 711 F.2d 1343, 1361 (7th Cir. 1983) (“Congress may well have created a runaway treble damage bonanza for the already excessively litigious.”); *In re Dow Co. “Sarabond” Products. Liab. Litig.*, 666 F. Supp. 1466, 1470 (D. Colo. 1987) (“RICO is a recurring nightmare for federal courts across the country.”); *Wolin v. Hanley Dawson Cadillac, Inc.*, 636 F. Supp. 890, 891 (N.D. Ill. 1986) (“RICO's lure of treble damages and attorneys' fees draws litigants and lawyers . . . like lemmings to the sea.”). Rakoff & Goldstein discuss the antipathy federal courts, especially trial courts, have toward RICO, noting that “the lower federal courts, where dockets are more directly affected, have sometimes attempted to erect barriers to the private use of RICO.” RAKOFF & GOLDSTEIN, *supra* note 1, § 1.01 at 1-3; *see also* Nathan, *supra* note 5, § 7.01, at 7-3.

7. RAKOFF & GOLDSTEIN, *supra* note 1, § 1.01, at 1-3.

8. *Sedima*, 473 U.S. at 483.

9. 18 U.S.C. § 1962 (2006). RICO specifies that the “enterprisic” must be one “engaged in, or the activities of which affect, interstate or foreign commerce.” *Id.* § 1962(a).

individuals who have suffered damage to their business or property. Those convicted of RICO crimes face stiff penalties: a possible prison term of twenty years, forfeiture of property acquired or maintained in violation of RICO,<sup>10</sup> and fines of \$250,000 per offense (\$500,000 per offense if the defendant is an organization).<sup>11</sup> Those found civilly liable also face serious consequences: treble damages and payment of attorneys' fees and costs.<sup>12</sup>

RICO's civil cause of action, which is available to "[a]ny person injured in his business or property by reason of a violation" of RICO,<sup>13</sup> requires RICO plaintiffs to prove that the defendants committed crimes. Thus, in addition to proving "RICO elements" ("pattern" and "enterprise"), private plaintiffs in civil RICO actions must prove the elements of the crimes they allege as "racketeering activity." If plaintiffs allege mail fraud as the racketeering activity, for example, they must prove that the defendants (1) intentionally, (2) devised a scheme or artifice to defraud, (3) to obtain property or money, and (4) used or caused to be used the United States mail or an interstate commercial carrier.<sup>14</sup> These are the same elements federal prosecutors must prove when prosecuting a criminal case alleging mail fraud. In a RICO civil action, however, plaintiffs prove these elements by a preponderance of the evidence rather than beyond a reasonable doubt.<sup>15</sup> Thus, private plaintiffs plead, prove, and litigate criminal issues, and therefore create precedent in areas of criminal law.

While there is overlap between criminal and civil RICO, there are differences. Since RICO's passage, courts have created an extensive body of common law that pertains to issues that arise only in civil RICO actions, concerning proximate causation,<sup>16</sup> compensable damage,<sup>17</sup> standing,<sup>18</sup> reliance,<sup>19</sup> and statute of limitations.<sup>20</sup> In addition, there are remedies available in civil RICO cases that are not available in criminal RICO matters. In particular, divestiture of funds, dissolution, and reorganization of corporations or other business structures, even restrictions on future activities, are each available if one brings a civil RICO action.<sup>21</sup> While the weight of authority indicates that these equitable remedies are available only to the federal

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10. *Id.* § 1963.

11. *Id.* § 3571(b)–(c).

12. *Id.* § 1964(c).

13. *Id.*

14. See *Skilling v. United States*, 130 S. Ct. 2896, 2926–27 (2010) (describing the history of the mail and wire fraud statute).

15. *Cf. Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) (noting that it "need not decide the standard of proof issue today" but opining that "[t]here is no indication . . . Congress sought to depart from" the preponderance standard of proof for civil RICO actions brought under § 1964(c)).

16. *Anza v. Ideal Steel Supply Corp.* 547 U.S. 451, 458–61 (2006) (discussing the RICO requirement that the plaintiff have suffered economic damages due to RICO conduct); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (finding that the plaintiff must articulate sufficient damages in order to pursue a RICO claim).

17. See, e.g., *Ironworkers Local Union 68 v. AstraZeneca Pharm., LP*, 634 F.3d 1352, 1361 (11th Cir. 2011); *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1285 (11th Cir. 2006).

18. *Beck v. Prupis*, 529 U.S. 494, 499 (2000); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255–56 (1994); *Holmes*, 503 U.S. at 278–79.

19. *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 653–60 (2008).

20. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 146 (1987).

21. See 18 U.S.C. § 1964(a), (c) (2006).

government and not to RICO plaintiffs in private civil actions, the United States Supreme Court has not ruled on this issue.<sup>22</sup>

RICO contains three terms of art: (1) "racketeering activity," (2) "pattern of racketeering activity", and (3) "enterprise." The definition of "racketeering activity" is straightforward. Section 1961(1) of RICO simply lists the crimes that qualify as "racketeering activity."<sup>23</sup> Generic state crimes (such as murder, kidnapping, robbery, etc.) and approximately 150 specifically enumerated federal offenses qualify as "racketeering activities."<sup>24</sup> Interestingly, it is this definition that has seen the most amendments since RICO's passage in 1970. In 1970, only thirty specific federal crimes were listed as "racketeering activity"; today the list totals over ninety.<sup>25</sup> One can see the evolving priorities of law enforcement through these amendments. In 1970, RICO focused on traditional organized crimes. While mail fraud and wire fraud were included, most of the federal racketeering acts were classic organized crime activities such as bribery, embezzlement from labor unions, extortion, counterfeiting, and prostitution. Today, racketeering activity includes more, and more specific, white-collar crimes, such as financial institution fraud, naturalization and immigration fraud, bankruptcy fraud, money laundering, and media and computer program counterfeiting.

A single act of racketeering activity does not render one liable under RICO. Rather, one must commit a "pattern" of racketeering activity.<sup>26</sup> RICO defines "pattern of racketeering activity" as at least two acts of racketeering activity occurring within a ten year time period.<sup>27</sup> In 1989, the Supreme Court elaborated further on the pattern requirement, holding that racketeering acts must be related to each other (but not so related that the acts merge into one act),<sup>28</sup> and must demonstrate "continuity."<sup>29</sup> The

22. See, e.g., *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 967-68 (9th Cir. 1999) (noting that private civil plaintiffs in RICO actions are not entitled to injunctive relief); *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 726 (4th Cir. 1999) (noting that RICO does not provide for injunctive or declaratory relief for private plaintiffs); *In re Fredeman Litig.*, 843 F.2d 821, 830 (5th Cir. 1988) (noting that Congress did not contemplate injunctive remedies for private RICO litigants); *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28 (2d Cir. 1983) (doubting "the propriety of private party injunctive relief" in RICO actions). The Court accepted certiorari on the question of "[w]hether RICO authorizes a private party to obtain an injunction" but resolved the case on other grounds and did not address this issue. *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 16 (2006).

23. See 18 U.S.C. § 1961(1).

24. *Id.*

25. Compare 18 U.S.C. § 1961 (1970) (defining racketeering activity to include: the act or threat of murder, kidnapping, gambling, arson, bribery, extortion, robbery, drug-dealing, twenty-eight separate enumerated actions defined in various sections under title eighteen, any act under title twenty-nine section 186 or 501, and any offense involving bankruptcy fraud), with 18 U.S.C. § 1961 (2006) (expanding racketeering activity to include all activities outlined in the original statute as well as fifty-four additional sections under title eighteen, fraud in the sale of securities, dealing in any way with a controlled substance as defined in section 102 of the Controlled Substance Act, any act punishable under the Currency and Foreign Transactions Reporting Act, any act punishable under sections 274, 277, or 278 of the Immigration and Nationality Act if committed for the purpose of financial gain, and any act under title eighteen, section 2332b(g)(5)(B)).

26. See 18 U.S.C. § 1961(5) (2006).

27. A "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." *Id.*

28. This issue of whether the acts are related enough to satisfy *H.J. Inc. v. Northwestern Bell Telephone Co.*'s "relatedness" requirement but not so related as to merge into one act (defeating RICO's requirement of

Court explained that continuity may be shown by a series of related predicates “extending over a substantial period of time” or over a shorter period of time if they “threaten . . . future criminal conduct.”<sup>30</sup>

“Enterprise” is the most fluid concept in RICO.<sup>31</sup> It is defined in the statute as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”<sup>32</sup> Section IV of this Article discusses this element.

## B. Policy Rationale

When passed, RICO was viewed as “an aggressive initiative to supplement old remedies and develop new methods for fighting crime.”<sup>33</sup> Despite its complexity, “RICO has at its core a fairly simple design: it prohibits a person from utilizing a pattern of unlawful activities to infiltrate an interstate enterprise.”<sup>34</sup> In passing RICO, Congress specifically intended to craft a “fresh,”<sup>35</sup> “novel,”<sup>36</sup> “new,”<sup>37</sup> “innovative,”<sup>38</sup> and “imaginative”<sup>39</sup> statute to combat sophisticated crime. The drafters of RICO, a statute considered one of the most “daunting”<sup>40</sup> in existence, considered three basic principles about criminal organizations while composing the RICO statute.

### 1. Groups Are More Powerful Than Individuals

RICO recognizes that individuals are more powerful when they work together as a group.<sup>41</sup> This is an obvious point whether we are talking about prehistoric cave

two racketeering activities), arises in RICO cases where mail fraud (or analogs such as wire fraud, bank fraud, and health care fraud) is alleged as the racketeering activity. Some courts hold that two or more schemes to defraud are needed since the various mailings merge into one scheme. *E.g.*, *H.J. Inc. v. Nw. Bell. Tele. Co.*, 492 U.S. 229, 236 (1989). Other courts hold that separate mailings even in perpetration of a single scheme, are separate acts. *See, e.g.*, *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543 (4th Cir. 2001) (finding that multiple uses of the mail and wires relating to a single scheme was not enough to establish a pattern). Other courts hold that separate mailings even in perpetration of a single scheme, are separate acts. *See, e.g.*, *Beuford v. Helmsley*, 865 F.2d 1386, 1390–91 (2d Cir. 1989) (finding that a pattern may be established without proof of multiple schemes); *see also Rakoff & Goldstein, supra* note 1, §1.04[2][b][iii] at 1-36 to 1-38 (discussing the various methods courts utilized to address the relatedness requirement in cases of mail fraud).

29. *H.J. Inc.*, 492 U.S. at 230.

30. *Id.* at 242. (holding that a “pattern” requires a “relationship” among the racketeering acts and “continuity” of the acts).

31. As the Seventh Circuit noted, “[d]iscussion of this person/enterprise problem under RICO can easily slip into a metaphysical or ontological style of discourse.” *Haroco, Inc. v. Am. Nat’l Bank & Trust Co. of Chicago*, 747 F.2d 384, 401 (7th Cir. 1984).

32. 18 U.S.C. § 1961(4).

33. *Sedima, S.P.R.L. v. Imrex. Co.*, 473 U.S. 479, 498 (1985).

34. *RAKOFF & GOLDSTEIN, supra* note 1, § 1.02, at 1–11.

35. *Organized Crime Control: Hearing on S.30 Before Subcomm. No. 5 of the H. Comm. of the Judiciary*, 91st Cong. 330–31 (1970) (testimony of Sheldon H. Elsen, Chairman, Committee on Federal Legislation, Association of the Bar of the City of New York).

36. *Id.* at 401.

37. *See S. REP. NO. 91-617* at 46 (1969).

38. *Organized Crime Control: Hearing*, at 327.

39. *Id.*

40. *Lynch, supra* note 1, at 680.

41. *See Organized Crime Control: Hearing*, at 144 (finding that organized crime is “purely and simply a



dwellers, ball teams, Girl Scouts, or criminals. Groups can execute complex activities through division of duties and sharing of talents. They can operate simultaneously in multiple geographical areas. Members of a group bring to a collective endeavor their experience, bravado, and network of suppliers, customers, and victims.

## 2. An Organization's Resources Help Criminals

The second fact that the RICO statute recognizes flows from the first: accomplishing any goal is easier when done through an established organization. Again, this is true whether the goal is laudatory—improving world health—or nefarious—committing crimes. Impossible crimes become possible when those who wish to commit them use the name, reputation, bank account, credit rating, customer list, customer data, billing system, or other resources, tangible and intangible, of an established organization.

The enterprise concept of RICO recognizes these two facts: that groups are more powerful than individuals, and that using the resources of an established organization makes the commission of complex crimes more feasible. Every RICO offense is routed through an enterprise. Only when one invests in an enterprise, acquires control over an enterprise, or conducts the affairs of an enterprise through a pattern of racketeering activity, does one become liable under RICO.<sup>42</sup> The enterprise concept allows RICO to implement its “new approach” to crime by “deal[ing] not only with individuals, but also with the economic base through which those individuals [operate].”<sup>43</sup> RICO seeks to target offenders who use the resources of organizations to commit more crimes, wreak greater havoc, harm more people, and conceal wrongdoing more effectively, than if the offender worked alone.

### a. An Example: Penn State, Second Mile, and Sandusky

Although no RICO charges, criminal nor civil, have been brought in the recent Penn State sex abuse scandal,<sup>44</sup> RICO fits the alleged facts perfectly. This scandal

conglomeration of diverse nationalities united by the common bond of crime for profit”).

42. 18 U.S.C. § 1962(a)–(c) (2006).

43. *United States v. Turkette*, 452 U.S. 576, 591–92 (1981) (quoting S. REP. 91-617, at 79 (1969)). The statement of findings for the Organized Crime Control Act of 1970, of which RICO is one section, states: “[Organized crime’s] money and power are increasingly used to infiltrate and corrupt legitimate business[,] . . . subvert and corrupt our democratic processes[,] . . . weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, interfere with free competition . . .” Pub. L. No. 91-452, 84 Stat. 922, 922–23.

44. Jerry Sandusky, defensive coordinator or line coach for the Penn State football team for thirty years until 1999, was arrested November 6, 2011, on charges of sexually abusing boys over a fifteen-year time period. Barry Bearak, *The Sandusky They Knew*, N.Y. TIMES, Nov. 16, 2011, at B1; *Penn State’s Culpability*, N.Y. TIMES, Nov. 9, 2011, at A1; Bill Pennington, *Accusers Plan to Sue Sandusky’s Foundation*, N.Y. TIMES, Nov. 25, 2011, at B1; Pete Thamel, “*Nothing Changed, Nothing Stopped*”, N.Y. TIMES, Nov. 8, 2011, at B1; Mark Viera, *A Sex Abuse Scandal Rattles Penn States’s Football Program*, N.Y. TIMES, Nov. 6, 2011, at A1 [hereinafter Viera, *Sex Abuse Scandal*]; Mark Viera, *A Focus on Paterno’s Reaction to Allegation*, N.Y. TIMES, Nov. 7, 2011, at D1 [hereinafter Viera, *Paterno’s Reaction*]. Gary Schultz, Senior Vice President for Finance and Business at Penn State, and Tim Curley, Athletic Director at Penn State, were arrested on perjury and failure to report child abuse as required by Pennsylvania state law. *Penn State’s Culpability*, *supra*; Thamel, *supra*; Viera, *Sex Abuse Scandal*, *supra*; Viera, *Paterno’s Reaction*, *supra*. Sandusky founded Second Mile charity in 1977 to offer mentoring, sleep-away summer camps, and other services to disadvantaged youth.

provides an illuminating example of how RICO's enterprise concept works. If allegations are true, we can see the following circumstances borne out under the statute. First, Jerry Sandusky, a person associated with both Penn State (a public university) and The Second Mile (a charity Sandusky founded to help at-risk youth), used both Penn State resources (physical facilities such as the athletic locker room, and access to events such as football games, banquets, and team practices) and Second Mile resources (access to youth) to commit racketeering activity (sexual exploitation of children). Stated more simply, (1) Penn State, (2) Second Mile, and (3) Sandusky constitute an "enterprise" within the contemplation of the RICO statute. Sandusky, the defendant, "conducted the affairs" of this enterprise through a pattern of racketeering activity, a § 1962(c) violation.<sup>45</sup>

This scandal demonstrates the tools that RICO's enterprise concept can bring to a situation. It is difficult to imagine how Jerry Sandusky could have accomplished the deeds alleged against him without the resources of Penn State and The Second Mile. Schools, courts, and community programs funneled children to The Second Mile as a respectable organization that could help children in need.<sup>46</sup> In turn, The Second Mile funneled these children to Sandusky.<sup>47</sup> For Sandusky's purposes, The Second Mile provided him the opportunity to interact with children from broken homes where parental supervision was lax and the opportunity to attend a Penn State athletic event would be especially appealing in light of their disadvantaged background.<sup>48</sup> Similarly, Penn State, by allowing Sandusky, who was no longer affiliated with the University, to have wide access to exclusive events such as football games, sports banquets, football practices, and nonpublic facilities such as football locker rooms, enhanced, if not made possible, the years of Sandusky's sexual abuse of children.<sup>49</sup>

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Thamel, *supra*; Viera, *Sex Abuse Scandal, supra*; Viera, *Paterno's Reaction, supra*. According to IRS Form 990 filed by Second Mile for 2009, Second Mile's mission is "providing opportunities for young people to develop positive life skills and self-esteem." The Second Mile, IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2009), available at [http://msnbcmedia.msn.com/i/msnbc/sections/news/Second\\_Mile\\_Tax\\_return\\_2009.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/Second_Mile_Tax_return_2009.pdf). Second Mile's net assets in 2009 were \$8,974,689. *Id.* Although he retired from Penn State in 1999, Sandusky retained access to Penn State facilities thereafter. Thamel, *supra*; Viera, *Sex Abuse Scandal, supra*; Viera, *Paterno's Reaction, supra*. The grand jury report of the matter details allegations that Sandusky met and befriended boys through Second Mile, hosted them at Penn State events and in Penn State facilities, such as athletic locker rooms, and took sexual advantage of them. Bearak, *supra*; Thamel, *supra*; Viera, *Sex Abuse Scandal, supra*; Viera, *Paterno's Reaction, supra*.

45. This scenario also shows the versatility of RICO concept. The "person" (defendant) and enterprise could be configured in several ways and still comply with RICO. See § 1962(c). For example, Penn State could be charged as the defendant, and Penn State plus Sandusky could be pled as the "enterprise" (assuming because he is retired and no longer formally associated with Penn State, Sandusky is not an "agent" of Penn State). Or, Second Mile could be pled as the defendant and the enterprise could be some combination of Second Mile, Penn State, and Sandusky (again taking into account whether Sandusky is an agent of either Second Mile or Penn State). Multiple configurations are possible; which one will depend on enterprise principles and if the case is civil, which presents the availability of a "deep-pocket" defendant. See *infra* Parts V.B and V.C for a discussion of the pleading and statutory requirements for a civil RICO case.

46. Viera, *Sex Abuse Scandal, supra* note 44, at A1.

47. *Id.*

48. Jeff Frants, *Jerry Sandusky Guilty Verdict: A Beloved Coach's Life, Career Weren't What They Seemed*, PATRIOT-NEWS (June 22, 2012, 10:42 PM), [http://www.pennlive.com/midstate/index.ssf/2012/06/jerry\\_sandusky\\_verdict\\_a\\_belov.html](http://www.pennlive.com/midstate/index.ssf/2012/06/jerry_sandusky_verdict_a_belov.html).

49. *Id.*

Penn State, The Second Mile, and their leaders lent their organizations' prestige, legitimacy, and integrity to Sandusky. This enhanced his ability to abuse children. The status of these institutions and their embrace of Sandusky despite the years of rumors, suspicions, and specific complaints to law enforcement that would have brought down others acting without the help of institutions like these, allowed Sandusky to continue his abuse of children longer than most sexual predators. In short, the Penn State/The Second Mile/Sandusky tragedy aptly demonstrates the enterprise rationale of RICO: one's ability to commit crimes is strengthened, if not made possible, by use of an organization's resources.

### 3. Complex Crime Is Difficult to Investigate

The third fact that the RICO statute recognizes about crime is that complex crime can be difficult to investigate and therefore takes significant law enforcement resources.<sup>50</sup> When crime operates through an organization, it is difficult to penetrate the organization, identify its leaders, and build a case against the culpable individuals. The most culpable individuals generally have insulated themselves with minions whose loyalty is secured through enticements or threats. White-collar crime presents an additional challenge: it is often difficult to detect that criminal activity has taken place until significant harm has been done. Everyone knows when they have been extorted by the mob to keep their business open. Everyone knows when they have been terrorized by drug gangs. Few of us, however, know, at least for a while, if our stockbroker has embezzled our funds, especially if our quarterly reports continue to reflect large gains.<sup>51</sup> In the white-collar context, penetrating an organization to determine who is culpable is one challenge; doing so before significant harm occurs is another.

Recognizing the difficulty of investigating and pursuing complex crime, RICO employs the "private attorney general" concept.<sup>52</sup> When RICO was passed, its private cause of action was recognized as "aggressive," "novel," and able to "fill prosecutorial gaps."<sup>53</sup> RICO gives private individuals the opportunity and incentive to sue those who damage their businesses or property by committing criminal acts. It incentivizes private individuals to bring RICO actions by giving them a reward for doing so: treble damages and payment of attorneys' fees and costs.<sup>54</sup> RICO's private attorney general

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50. See 113 CONG. REC. 17,997–18,002 (1967) (statements of Sen. Roman L. Hruska) (explaining that effective investigation and prosecution of organized crimes require the expenditure of a large amount of time and resources that had not been provided by federal or state governments).

51. See, e.g., *United States v. Madoff*, No. 09 Cr. 213, 2012 WL 1142292, at \*1 (S.D.N.Y. 2012) (indicating that defendant Madoff began committing securities fraud and other related other crimes as early as the 1980s but was not arrested until 2008).

52. See 18 U.S.C. § 1964(c) (2006); Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance*, 59 WASH. & LEE L. REV. 83, 114 (2002) (describing statutory provision which is commonly known to practitioners as the private attorney general provision).

53. *Organized Crime Control: Hearing on S.30 Before Subcomm. No. 5 of the H. Comm. of the Judiciary*, 91st Cong. 494 (1970) (testimony of Lawrence Spencer, Director, Washington Office, American Civil Liberties Union). As Rakoff and Goldstein note, "[RICO's] private civil provisions not only expand the scope of federal civil jurisdiction to cover most business torts but also materially alter the balance of power between plaintiffs and defendants." RAKOFF & GOLDSTEIN, *supra* note 1, §1.01, at 1-3.

54. Congress recognized the importance of the private cause of action when it passed RICO:

action brings two important resources to crime-fighting efforts. The first is the time, talent, and hard work of private attorneys. As government budgets become more strained, reinforcements for law enforcement efforts are increasingly important.<sup>55</sup> Talented private attorneys who vet, investigate, organize, and prove a complex RICO civil action supplement law enforcement's efforts. The second resource RICO's private cause of action brings is "inside information"—information about wrongdoing, otherwise hidden from the public or at least from law enforcement, by those with sufficient access, knowledge, and incentive to pursue the wrongful conduct and perpetrators.<sup>56</sup> RICO incentivizes victims to come forward. In the business world, these victims are business associates, partners, or competitors of the alleged perpetrators. Unlike law enforcement or other outsiders, they know the business intricacies from which the wrongdoing has sprung. Additionally, RICO's private attorney general provision also allows class actions to be brought.<sup>57</sup> This allows litigants, especially those who have suffered too small an amount of loss to justify bringing a lawsuit on their own, to unite and consolidate their information and resources.

Thus, four features of RICO's civil cause of action render it potentially a highly effective supplement to law enforcement: (1) treble damages and award of attorneys' fees incentivize plaintiffs to come forward,<sup>58</sup> (2) the standing limitation (only those damaged by RICO conduct may bring a private RICO action) restricts plaintiffs to those who are knowledgeable about the fraud,<sup>59</sup> (3) plaintiffs bring experienced, talented legal counsel with the resources to investigate and prove RICO cases,<sup>60</sup> and (4) the class action option allows RICO plaintiffs to pool information and resources.<sup>61</sup> As the next Part discusses, the full potential of civil RICO's benefits have not yet been realized.

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Civil RICO helps fight the battle against criminal fraud and other criminal conduct committed through a pattern of illegal activity. The availability of a . . . damages recovery along with costs and fees enables both public and private victims to bring suits to recover compensation for their injuries [and] . . . helps deter illegal conduct proscribed by RICO . . .

S. REP. NO. 100-459, at 3 (1988); see also *Organized Crime Control: Hearing*, at 330–31 (testimony of Sheldon H. Elsen, Chairman, Committee on Federal Legislation, Association of the Bar of the City of New York) (referring to RICO "particularly its civil remedy provision" as "offer[ing] a fresh and potentially very useful approach to the fight against organized crime" and referring to RICO as a "novel" legislative proposal)

55. Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 943 (2002).

56. *Id.* at 908, 940–48.

57. See Leah Bressack, Note, *Small Claim Mass Fraud Actions: A Proposal for Aggregate Litigation Under RICO*, 61 VAND. L. REV. 579, 589 (noting the ability for civil RICO suits to attain class certification).

58. See 18 U.S.C. § 1964 (2006).

59. See *id.* (creating a standing limitation for private RICO claims).

60. See, e.g., Brendan DeMelle, *Gulf Coast Attorneys File RICO Class Action Lawsuits Against BP*, HUFFINGTON POST (June 24, 2010, 12:54 AM), [http://www.huffingtonpost.com/brendan-demelle/gulf-coast-attorneys-file\\_b\\_623608.html](http://www.huffingtonpost.com/brendan-demelle/gulf-coast-attorneys-file_b_623608.html) (explaining that private counsel are conducting additional investigation into the BP oil spill, in addition to the Department of Justice civil and criminal charges).

61. *Id.*

### C. RICO's Weaknesses

While two features of RICO's design—its focus on use of an organization to commit crimes, and its incentive for private individuals to join in the fight against crime—make RICO a powerful and effective weapon against complex criminal activity, it has become clear in the forty-plus years since its passage that RICO's design also creates problems. RICO's private attorney general concept has generated as much mischief as benefit. Potential problems begin with the first decisions: Should a case be brought? Against whom? Under what theory? With civil RICO, private attorneys decide who should be publicly accused of racketeering and who should be exposed to significant financial losses.<sup>62</sup> Whereas prosecutors, as public officials, are obliged to bring cases that serve the public interest,<sup>63</sup> private attorneys are not; they are motivated by recoveries of money.<sup>64</sup> Not surprisingly, these different emphases skew the cases pursued, defendants selected, and legal theories crafted. In addition, some of the private attorneys who bring civil RICO actions do not have the investigative resources, experience, skills, or specialized training to deploy a statute as complex as RICO.<sup>65</sup> Too many of the civil RICO cases brought by private attorneys have lacked merit.<sup>66</sup> As

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62. Cf. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985) (indicating that though there is a significant distinction between criminal and civil RICO charges, civil charges still permit "stigmatizing a garden variety defrauder by means of a civil action").

63. Unlike most federal criminal cases in which individual prosecutors have discretion in whether to bring and how to handle the case, criminal RICO actions must be reviewed by a central office within the United States Department of Justice before they are filed. U.S. ATTORNEY'S MANUAL, TITLE 9: CRIMINAL RESOURCE MANUAL §§ 9-110.200 to 9-110.400 (1999), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/110mcrn.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/110mcrn.htm). This manual instructs prosecutors that "[u]tilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application." *Id.* § 9-110.200.

64. As Justice Marshall noted in his dissent to *Sedima*, in which the majority interpreted RICO's civil cause of action broadly:

In the context of civil RICO, however, the restraining influence of prosecutors is completely absent. Unlike the Government, private litigants have no reason to avoid displacing state common-law remedies. Quite to the contrary, such litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud.

*Sedima*, 473 U.S. at 504 (Marshall, J., dissenting). Justice Marshall further noted the breadth of the mail fraud and wire fraud statutes and how that compounded RICO's potential abuse by private litigants:

The single most significant reason for the expansive use of civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud violations . . . .

. . . .

The only restraining influence on the 'inexorable expansion of the mail and wire fraud statutes' has been the prudent use of prosecutorial discretion. Prosecutors simply do not invoke the mail and wire fraud provisions in every case in which a violation of the relevant statute can be proved.

*Id.* at 501-02 (citations omitted) (quoting *United States v. Siegel*, 717 F.2d 9, 24 (2d Cir. 1983)).

65. See S. REP. NO. 100-459, at 5-7 (1988) (adding eleven new requirements and/or adjustments to civil RICO crimes adding complexity to civil RICO cases which inexperienced attorneys may find daunting).

66. "The RICO statute also provides for a private civil action. . . . It is in the area of Civil RICO that the greatest abuses of the statute have been alleged." H.R. REP. NO. 101-975, at 7 (1990). "[T]he civil damages provision of the RICO statute is designed to permit plaintiffs to serve a 'private attorney general' function. But as one of the Committee members noted, '[T]reble damages can stimulate private enforcement in marginal cases beyond the optimal point and may, if applied beyond major participants, be unfair.'" H.R. REP. NO. 102-312 (1991) (second alteration in original). The civil RICO provisions offer substantial opportunities to

Congress noted after twenty-plus years of experience with RICO: “[While there is a] dearth of abusive uses of civil RICO by the Government . . . the orderly development of the law has been interrupted by the filing of inappropriate actions by private parties under civil RICO.”<sup>67</sup>

#### D. *Full Circle: How to Build on RICO's Strengths and Minimize its Weaknesses*

Clearly RICO is no panacea. Because of its breadth, RICO is a powerful and effective tool against white-collar crime. Yet, also because of its breadth, RICO has tremendous potential for inappropriate use. This Article suggests that one of the major reasons for RICO's excesses is the confused state of RICO jurisprudence concerning a RICO enterprise. This Article seeks to sort out this confusion and offers guidance for clearly, predictably, and fairly applying RICO. Clarity on the enterprise issue would help curb RICO's excesses and ensure that RICO is applied vigorously but appropriately in white-collar cases.

### III. WHY RICO WAS PASSED: CONCERN OVER ORGANIZED CRIME AND BEYOND

#### A. *RICO's Focus on Organized Crime*

The enactment of RICO was a result of twenty years of intense scrutiny of organized crime by Congress, the Department of Justice, and the public.<sup>68</sup> Public attention to organized crime began in the early 1950s with hearings held by a Congressional committee chaired by Senator Estes Kefauver.<sup>69</sup> Riveting testimony of “criminals and racketeers” using “vicious practices” to take over every imaginable type of legitimate businesses dominated national news.<sup>70</sup> In 1954, the United States Department of Justice created the Organized Crime and Racketeering section of the Criminal Division.<sup>71</sup> By 1960, infiltration of labor unions by organized crime

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private individuals to enforce their rights, in the form of significant breadth to enforce those rights. At the time RICO was being considered for passage, some legislators surmised that this could occur:

[S]ection 1964(c) [the section that provides a civil cause of action for private plaintiffs] provides invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce by authorizing private damage suits. A competitor need only raise the claim that his rival has derived gains from two games of poker, and, because this title prohibits even the ‘indirect use’ of such gains—a provision with tremendous outreach—litigation is begun. What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish—destruction of the rival’s business.

H. R. REP. NO. 91-1549, at 181 (1970) (dissenting views of Representatives John Conyers, Jr., Abner Mikva, and William F. Ryan).

67. S. REP. NO. 100-459, at 2–3. It can be a public relations nightmare for a business to be branded “a racketeer.” This alone causes many defendants, or threatened defendants, to settle frivolous claims. *Id.* at 4–5. Because of its stigma, statutorily set treble damages, scope, and notoriety as a tool for organized crime, simply threatening to sue under RICO’s civil provisions can become extortionate.

68. See Lynch, *supra* note 1, at 666–80 (discussing the history of RICO’s enactment and its treatment by Congress, the Department of Justice, and the public prior to being passed).

69. See generally S. REP. NO. 81-2370 (1950); S. REP. NO. 82-141 (1951); S. REP. NO. 82-307 (1951); S. REP. NO. 82-725 (1951).

70. S. REP. NO. 81-2370, at 16; see also S. REP. NO. 82-141, at 9, 33 (describing the infiltration); S. REP. NO. 82-307, at 170–181 (same).

71. Calder, *supra* note 1, at 36.

captivated public news.<sup>72</sup> In 1961, Robert F. Kennedy, as Attorney General and with full support of the Kennedy Administration, made prosecution of organized crime a top priority.<sup>73</sup> In 1963, a member of an organized crime syndicate, Joseph Valachi, riveted the nation in televised hearings before a Senate subcommittee.<sup>74</sup> The Valachi hearings were the first time a mob insider had confirmed the existence of organized crime as an organization and detailed its operations.<sup>75</sup> Valachi, a Genovese crime family member, used the term “Cosa Nostra” (“our thing”) to describe an organized crime syndicate.<sup>76</sup> Valachi testified about Cosa Nostra’s code of conduct, power hierarchies, and criminal activities.<sup>77</sup> Beginning in 1967, the President’s Commission on Law Enforcement and the Administration of Justice (the Katzenbach Commission) held a number of hearings looking at the phenomenon of organized crime, rendered a “monumental”<sup>78</sup> report,<sup>79</sup> and recommended legislation to combat organized crime.<sup>80</sup> Members of the Commission included academics<sup>81</sup> and members of Congress, specifically Senators John L. McClellan and Roman L. Hruska, and Representative Richard H. Poff.<sup>82</sup> These Congressmen shepherded legislation through Congress, which became RICO.<sup>83</sup>

RICO makes it a crime to belong to an organization that commits crimes. This approach was new. It allowed law enforcement to show the context for what appeared, in isolation, to be random crimes. As Robert Blakey, RICO’s author, explained:

Before [RICO], the government’s efforts were necessarily piecemeal, attacking isolated segments of the organization as they engaged in simple criminal acts. The leaders, when caught, were only penalized for what seemed to be unimportant crimes. The larger meaning of these crimes was lost because the big picture could not be presented in a single criminal

72. See, e.g., S. REP. NO. 91-617, at 78 (describing the notoriety of organized crime activities throughout the 1960s).

73. Calder, *supra* note 1, at 36.

74. *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Gov’t Operations*, 88th Cong. 6 (1963) (testimony of Robert F. Kennedy, U.S. Attorney General).

75. PETER MAAS, *THE VALACHI PAPERS* 2 (1968).

76. S. REP. NO. 101-407, at 2-3 (1990).

77. *Id.*

78. Blakey, *supra* note 1, at 252.

79. PRESIDENT’S COMM’N REPORT, *supra* note 3, at v-vi.

80. The Organized Crime Control Act of 1970, which includes RICO, grew out of the Commission’s recommendations. Lynch, *supra* note 1, at 667 & n.25.

81. Professors Donald R. Cressey and Thomas C. Schelling “contributed important elements to the development of RICO, particularly the concepts of ‘enterprise’ and ‘pattern of racketeering activity.’” Blakey, *supra* note 1, at 253 n.46.

82. *Id.* at 253 n.47.

83. *Id.* at 253 n.47, 253-80. The Senate passed Senate Bill 30 on January 23, 1970 by a vote of 73 to 1. 116 CONG. REC. 25, 192 (1970). The House passed Senate Bill 30 by a vote of 431 to 26, 116 CONG. REC. 35, 363 (1970), after amending it to include the private cause of action codified at 18 U.S.C. §1964(c). 116 CONG. REC. 35,346 (1970). The Senate accepted the amended House version and RICO was signed into law on October 15, 1970. 116 CONG. REC. 36, 280 (1970). The Senate sponsors of Senate Bill 30, Senators McClellan and Hruska, viewed the House’s amendments as minor and recommended passage of Senate Bill 30 as amended by the House without a reconciling conference. 116 CONG. REC. 36, 280 (1970). The Senate approved Senate Bill 30 as amended by a voice vote. 116 CONG. REC. 36, 280 (1970).

prosecution.<sup>84</sup>

Based upon their years of investigative hearings, RICO's drafters viewed "organized crime" as a monolithic group comprised of Italians.<sup>85</sup> However, they realized they could not define organized crime in ethnic terms and withstand constitutional challenge.<sup>86</sup> Thus, instead of focusing on a particular actor, RICO's drafters took a "functional" approach and focused on conduct.<sup>87</sup> As Judge Lynch has noted, RICO is aimed at any actor who commits crime for profit: "Organized crime is as organized crime does. In other words, anyone who performed the criminal acts considered typical of organized crime would be treated the same as the Mafia capo."<sup>88</sup>

The enterprise concept of RICO has proven to be especially effective in combating organized crime. By focusing on participation in an enterprise that engages in criminal activity, RICO allows prosecutors to focus on the organizational structure that makes sophisticated crime possible, not just on the individuals committing the crimes.<sup>89</sup> As one commentator explained, "Buried in RICO's legalese is a simple insight. In this century, organizations control . . . society . . . . Yet the criminal law prior to RICO had, for the most part, addressed only individuals."<sup>90</sup> The success of RICO was epitomized by the prosecution in 1985 of five organized crime families in New York.<sup>91</sup> The indictment alleged that the New York Mafia Commission directed the relationship among the five crime families.<sup>92</sup> Investigated by 200 federal agents with use of court-ordered electronic surveillance, the defendants were convicted of seventeen racketeering acts and twenty related charges of extortion, labor payoffs and loan sharking.<sup>93</sup> RICO's enterprise concept was working.

### B. *RICO's Focus Beyond Organized Crime*

Even with its emphasis on organized crime, RICO, when it was being developed and passed, was also viewed as a vital tool against white-collar crime.<sup>94</sup> The text of RICO clearly covers white-collar crimes. When passed, thirty percent of the federal

84. G. Robert Blakey, *Debunking RICO's Myriad Myths*, 64 ST. JOHN'S L. REV. 701, 711 (1990) (quoting GEN. ACCT. OFF., EFFECTIVENESS OF THE GOVERNMENT'S ATTACK ON LA COSA NOSTRA 14 (1988)). RICO's sponsors clearly were focused on RICO's applicability to organized crime. According to Senator McClellan: "With its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system . . . . To exist and to increase its profits, . . . organized crime has found it necessary to corrupt the institutions of our democratic processes . . ." 115 CONG. REC. 5874 (1969).

85. Lynch, *supra* note 1, at 672.

86. *Id.* at 686-87.

87. *Id.* at 683.

88. *Id.* at 687-88.

89. Wallace, *supra* note 1, at 62.

90. *Id.*; see also Gordon, *supra* note 1 (explaining that the passage of RICO allowed prosecutors to pursue organizations).

91. JAMES B. JACOBS ET AL., BUSTING THE MOB: UNITED STATES V. COSA NOSTRA 79-87 (1994); see also S. REP. NO. 101-407, at 5-6 (1990) (summarizing Justice Department prosecution efforts in the 1980s).

92. JACOBS, *supra* note 91, 80-82.

93. *Id.* at 81, 86.

94. See, e.g., Lynch, *supra* note 1, at 674, 683, 684, 697 (describing the intended and actual effects of the RICO legislation on organized crime); Calder, *supra* note 1, at 40, 48 (describing the effects of the RICO legislation during the first ten years after its implementation).



offenses listed in RICO as “racketeering acts” were white-collar crimes.<sup>95</sup>

The legislative history of RICO makes clear that RICO applies to white-collar offenders as well as to La Cosa Nostra. The “Statement of Findings and Purpose” expressly refers to “fraud” that “drains billions of dollars from America’s economy,” and harms “innocent investors and competing organizations.”<sup>96</sup> Senator Roman L. Hruska, who helped shepherd RICO through Congress, consistently focused on RICO’s applicability to business frauds, referring to crime affecting “brokerage houses,” “accounting firms,” “shareholders,” and “creditors.”<sup>97</sup> Senator McClellan, the Senate sponsor of RICO, spoke of RICO’s ability to respond to crime in every type of business including “accounting,” “banking,” “charities,” “construction,” “insurance,” “real estate,” and “stocks and bonds.”<sup>98</sup> Senator McClellan addressed the objection that RICO applied beyond organized crime, specifically noting RICO’s application to white-collar crime:

[T]he curious objection has been raised to Senate Bill 30, . . . [that it is] . . . not somehow limited to organized crime . . . as if organized crime were a precise . . . legal concept . . . . Actually, of course, it is a functional concept like white collar crime, serving simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances.

....

Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem.<sup>99</sup>

RICO supporters, such as the Chamber of Commerce,<sup>100</sup> and RICO critics, such as the Association of the Bar of the City of New York,<sup>101</sup> addressed RICO’s reach to white-collar crime in their critiques. The author of RICO, Professor G. Robert Blakey, consistently has maintained that RICO applies to any type of sophisticated crime,

95. These included mail fraud, wire fraud, securities fraud, bankruptcy fraud, transportation of property taken by fraud, embezzlement from unions, and corrupt welfare fund payments. 18 U.S.C. § 1961(1) (2006). Securities fraud is no longer considered a racketeering act per amendments made in 1995. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat 737 (codified at 15 U.S.C. §78(a)).

96. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23.

97. 113 CONG. REC. 17,997-18,002 (1967).

98. 116 CONG. REC. 591-92 (1970).

99. 116 CONG. REC. 18,913-14 (1970). Similarly, Representative Poff, the House sponsor of RICO, chided those who expressed concern that RICO applied beyond organized crime:

[M]ost disturbingly, however, this objection seems to imply that a double standard of civil liberties is permissible. [Senate Bill] 30 is objectionable on civil liberties grounds, it is suggested, because its provisions have an incidental reach beyond organized crime. Coming from those concerned with civil liberties in particular, this objection is indeed strange. Have they forgotten that the Constitution applies to those engaged in . . . white collar or street crime?

116 CONG. REC. 35,344 (1970).

100. 116 CONG. REC. 6708 (1970).

101. *Organized Crime Control: Hearing on S.30 Before Subcomm. No. 5 of the H. Comm. of the Judiciary*, 91st Cong. 294 (1970) (testimony of Sheldon H. Elsen, Chairman, Committee on Federal Legislation, Association of the Bar of the City of New York) (RICO “sweep[s] far beyond the field of organized crime.”). Another critic, Congressman Abner J. Mikva, also objected that The Organized Crime Control Act reached beyond organized crime. 116 CONG. REC. 35,196 (1970).

including commercial and other fraud.<sup>102</sup>

In short, although RICO was passed in a highly charged furor over organized crime, there is no question that by its terms and legislative history, RICO applies to white-collar crime.

#### IV. RICO AND WHITE-COLLAR CRIME

##### A. Characteristics of White-Collar Crime

The term “white-collar crime” was coined by a sociologist, Edwin Sutherland, in 1939.<sup>103</sup> Sutherland focused on the characteristics of perpetrators, defining white-collar crime as offenses committed by “person(s) of respectability and high social status.”<sup>104</sup> Other attempts to define white-collar crime have focused on conduct, defining white-collar crime as “an illegal act for personal or organizational gain.”<sup>105</sup> Whichever definitional approach one takes, white-collar crime has the following characteristics: it has a hybrid civil/criminal nature,<sup>106</sup> it is rarely self-evident, its perpetrators are in a position of trust to victims, the criminal conduct takes place within an organization, and such crimes are difficult to investigate and prove.<sup>107</sup>

White-collar crime has a hybrid civil/criminal nature because white-collar defendants, unlike most defendants charged with street crimes, have assets.<sup>108</sup> This makes civil suits by victims viable, and the presence of civil suits by victims affects prosecutorial discretion.<sup>109</sup>

Prosecutorial resources are limited. Moreover, prosecutors are the gatekeepers to these resources. Many factors affect a prosecutor’s decision as to which cases should be prosecuted.<sup>110</sup> The presence of viable civil actions by victims of crime against perpetrators is one such factor.<sup>111</sup> Difficulty in proving the elements of an offense and the amount of resources a particular case will take are other factors.<sup>112</sup> Pursuing a routine white-collar case easily takes twenty times, even a hundred times, the investigative, pretrial, and trial time that a rape or burglary case may take. Especially when a case will be difficult to prove and will take significant resources, prosecutors

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102. See, e.g., Blakey, *supra* note 1, at 280 (“Congress fully intended to have RICO apply beyond . . . organized crime . . . to the general field of commercial and other fraud; . . . Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud.”).

103. Geis & Goff, *Introduction to EDWIN SUTHERLAND, WHITE COLLAR CRIME: THE UNEXPURGATED VERSION* at ix (1983).

104. EDWIN SUTHERLAND, *WHITE COLLAR CRIME: THE UNEXPURGATED VERSION* 7 (1983).

105. ALBERT J. REISS & ALBERT D. BIDERMAN, *DATA SOURCES ON WHITE-COLLAR LAW BREAKING* 4 (1980); Herbert Edelhertz, *The Nature, Impact, and Prosecution of White-Collar Crime*, in *CRIME AT THE TOP: DEVIANCE IN BUSINESS AND THE PROFESSIONS* 44, 44–45 (John M. Johnson & Jack D. Douglas eds. 1978).

106. REISS & BIDERMAN, *supra* note 105, at 2–5.

107. *Id.*

108. See *id.* at 1 (noting that while many white-collar defendants have assets, this fact is not an appropriate basis for a definition of white-collar crime).

109. Richard S. Frase, *The Decision to File Federal Criminal Charges, A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 305 (1980).

110. *Id.* at 301.

111. *Id.* at 305.

112. *Id.* at 269.

may opt not to pursue a case criminally when the victim of the crime can pursue the case civilly and thereby make themselves whole as well as obtain deterrence against similar acts.<sup>113</sup> With its treble damages and racketeering stigma, RICO offers all of these benefits.<sup>114</sup> A fourth factor that prosecutors consider in deciding whether to pursue a case is the amount of loss at issue.<sup>115</sup> De minimis losses make it difficult to detect wrongdoing, prove intent (versus a mistake), and justify expenditure of a large amount of prosecutorial resources. Often in white-collar cases, especially when the perpetrator is shrewd, there will be thousands of victims but a small amount of loss per victim.<sup>116</sup> It makes sense for prosecutors to decline prosecution. RICO's availability in class actions makes it a viable means of redress for the victims and an especially persuasive factor in declining to prosecute the matter criminally.

White-collar crime is rarely self-evident.<sup>117</sup> This is for three reasons. First, victims may not realize they are victims until it is too late. Victims of assaults know immediately when they have been assaulted, but victims of fraud may never know they have been defrauded, or not until much has been stolen from them.<sup>118</sup> This is due, in part, to the fact that the white-collar perpetrator usually is in a position of trust to the victim.<sup>119</sup> Because of this relationship, fraud victims do not suspect criminal activity, even when circumstances otherwise would make one suspicious. Second, white-collar crime is hidden in voluminous documents.<sup>120</sup> It may be necessary to follow a lengthy paper trail simply to discover what occurred. This paper trail is especially arduous in business areas dominated by complex and rapidly changing regulations.<sup>121</sup> White-collar crime often is embedded within an organization where the lines of authority, scope of duties, and full knowledge of transactions is diffuse.<sup>122</sup> This makes it difficult to accurately assess intent and knowledge. The employee whose signature appears on false documents may not be aware of the documents' falsity while the true mastermind of the fraud is insulated from the transaction by layers of underlings and delegation of duties.<sup>123</sup>

In short, all of the characteristics of white-collar crime—its hidden nature, the extensive prosecutorial and investigative resources needed to pursue white-collar offenses criminally, its victims' relative ability to bring civil suits and be made whole, its difficulty in prosecuting, the de minimis amount per victim—make white-collar

113. *Id.* at 256, 263.

114. See *supra* Part II.B for a discussion of the effect of treble damages and the stigma of racketeering.

115. Frase, *supra* note 109, at 260.

116. *Id.*

117. *White Collar Crime: Hearing Before the S. Comm. on the Judiciary, Part 1*, 99th Cong. 27 (1986) (testimony of United States Deputy Att'y Gen. D. Lowell Jensen); PETER FINN & ALAN R. HOFFMAN, PROSECUTION OF ECONOMIC CRIME 4 (1976).

118. Bucy, *supra* note 55, at 916; see also AUGUST BEQUAI, WHITE-COLLAR CRIME: A 20TH-CENTURY CRISIS 12-13, 65 (1978) (describing the lag between harm and the victim's realization of harm); SUTHERLAND, *supra* note 104, at 232; Edelhertz, *supra* note 105, at 51.

119. *White Collar Crime: Hearing*, *supra* note 117, at 27 (testimony of United States Deputy Attorney General D. Lowell Jensen).

120. *Id.*

121. JOHN GARDINER & THEODORE LYMAN, THE FRAUD CONTROL GAME 106 (1984).

122. *White Collar Crime: Hearing*, *supra* note 117, at 103 (testimony of Prof. Stanton Wheeler, Yale Law School).

123. *Id.*

offenses prime candidates for pursuit through civil RICO in lieu of criminal prosecution.

## B. *RICO's Design for Organized Crime Fits White-Collar Crime*

### 1. RICO's Design

Three aspects of RICO's design make RICO ideal for pursuing white-collar crime. These are, (1) RICO's enterprise concept, (2) RICO's pattern requirement, and (3) RICO's enforcement mechanism, both its criminal/civil and public/private nature.

#### a. *RICO Enterprise*

RICO is reserved for use against those who use organizations (“enterprises”), formal or informal, that facilitate criminal activity.<sup>124</sup> Organizational structure is inherent in all white-collar crimes. Given the complex nature of white-collar crime, it is almost impossible to commit such crime without some type of organization, either formal through a corporation, for example, or informal through a collective of individuals. Cooperation among individuals is almost always necessary to successfully execute white-collar crimes. This is for several reasons. In the typical white-collar case, money is stolen over time.<sup>125</sup> Concealing the crime is essential to keep the scam going and to keep the perpetrators from getting caught. The longevity of a fraud generally requires the cooperation of multiple individuals. Concealment requires the cooperation of multiple individuals. Using the stolen funds requires cooperation of multiple individuals. Once funds are stolen they need to be moved, hidden, and converted into a usable form before they can be spent.<sup>126</sup> This laundering requires cooperation, usually from participants additional to the original fraudsters.<sup>127</sup> Thus, in all of these ways—execution, concealment, laundering of proceeds—white-collar crime becomes a group endeavor. RICO, with its focus on enterprise fits the group aspect of white-collar crime.<sup>128</sup>

#### b. *RICO Pattern*

RICO's requirement that a pattern of wrongdoing be shown is an optimal way to address the difficulty-of-proof problems posed in white-collar cases by de minimis

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124. See, e.g., *Skilling v. United States*, 130 S. Ct. 2896, 2907–08 (2010) (using Enron's corporate structure to conduct a massive fraud); *United States v. Hutchinson*, 573 F.3d 1011, 1017–18 (10th Cir. 2009) (describing the organizational structure of a crack cocaine business).

125. See *Skilling*, 130 S. Ct. at 2908 (noting that the Enron collapse required several high-ranking employees manipulating Enron's stock information over a period of years).

126. See *id.* at 2955 (Sotomayor, J., concurring and dissenting) (explaining that Enron employees, including the CFO, were indicted for money laundering).

127. See *id.* at 2955, n.12 (noting that the Enron scandal grew to include several employees of its banker, Merrill Lynch).

128. As an aside, it should be noted that when there is no group of individuals working in concert, nor an institution involved, either as the vehicle for or victim of the thievery, the RICO enterprise element almost surely is not present and RICO is not an appropriate cause of action. Thus, RICO rarely applies to “garden variety fraud.” See 18 U.S.C. § 1961 (2006) (defining an enterprise as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity”).

amounts, trusting victims, and the need to prove criminal intent. By focusing on the pattern of many small, seemingly unrelated transactions, the big picture becomes apparent and it is possible to evaluate intent: were these errors, honest mistakes, or fraud?

*c. RICO's Enforcement Mechanism*

Two aspects of RICO's enforcement mechanism are especially effective in white-collar cases: its criminal/civil options, and its public/private causes of action.

*i. RICO's Criminal/Civil Options*

RICO may be pursued criminally or civilly by the Department of Justice, or civilly by private plaintiffs. Three elements—the burdens of proof in criminal and civil cases; the enhanced procedural protections in criminal cases; and the flexibility of civil remedies—make RICO's civil option well suited to white-collar crime.<sup>129</sup>

First, white-collar crime is difficult to investigate and prove, beginning with reconstruction of what happened (are financial statements false?) to determining who knew the facts (were duties so dispersed that no one person knew the big picture?) to assessing intent (was the falsity an innocent error or purposeful fraud?). Every element of criminal cases must be proven beyond a reasonable doubt. This is a high and appropriate burden of proof. Civil cases need be proven only by a preponderance of the evidence. This lower burden fits the nuances of white-collar cases better than the criminal law's high burden of proof.<sup>130</sup>

Second, because defendants in criminal cases have more procedural protections, such as the right not to incriminate oneself and the right to confront witnesses, criminal cases are more expensive and laborious to investigate and prove than civil cases. Especially in a time of strained government resources, more expeditious resolution of cases helps investigators, prosecutors, courts, and victims.

Lastly, remedies in civil cases are varied and flexible, and may therefore be more appropriate for situations involving companies, provision of essential services, employees, shareholders, and communities impacted by a company's presence.<sup>131</sup> For example, appointment of a trustee to monitor a company, rather than indicting the company, could save jobs and allow a company to continue to provide needed services while addressing the structural lapses that allowed the criminal activity to occur.<sup>132</sup>

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129. See *supra* notes 13–22 and accompanying text for a discussion of the advantages of civil RICO actions.

130. Cf. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) (describing the appropriate burden of proof in civil RICO cases).

131. See *Organized Crime Control: Hearing on S.30 Before Subcomm. No. 5 of the H. Comm. of the Judiciary*, 91st Cong. 107 (1970) (testimony of Stanton Wheeler, Professor, Yale Law School) (stating that civil RICO sanctions are useful because the court can order the dissolution of the offending business or prevent offenders from reentering that line of business).

132. Congress repeatedly highlighted the importance of flexible remedies available to the government in civil RICO cases when addressing complex crimes. See, e.g., S. REP. NO. 101-407, at 16–30 (1990) (discussing different tools available to the government in civil RICO cases including trusteeships, administratorships, decreeships, and consent judgments); *Organized Crime Control: Hearing*, at 106 (statements of Senator John L. McClellan) (discussing the procedures available to investigate crime within a civil proceeding against a

## ii. RICO's Public/Private Options

RICO's public/private enforcement scheme is particularly suited to white-collar crime. As noted in Part II.B.3, RICO's private attorney provision, which permits any person (individual or entity) that has been injured in his business or property by RICO violations to sue under RICO, and if successful, to collect treble damages and attorneys fees and costs, brings two important resources to law enforcement's efforts against crime: (1) the time, talent, and expertise of private counsel, and (2) "inside information" by victims about wrongdoing.<sup>133</sup> Because of the labor-intense nature of investigating and proving white-collar cases, and the limited resources available to law enforcement, the supplemental resource RICO brings of private counsel to law enforcement's efforts can be invaluable. Because of the need to penetrate the inner workings of a group and focus a complex investigation on relevant transactions, documents, witnesses, and perpetrators, the information an "insider" brings can be even more valuable. RICO's lucrative private cause of action incentivizes knowledgeable victims to come forward.

The chart that follows demonstrates the importance of civil RICO. As can be seen from the raw Department of Justice data, over the past decade, between four to five times as many civil RICO cases have been brought than criminal RICO cases.<sup>134</sup> Interestingly, the available statistics understate this comparison considerably since civil RICO statistics are compiled by the number of *cases* and criminal RICO statistics are compiled by the number of *defendants*.<sup>135</sup> Almost certainly, criminal cases involved multiple defendants, thus the total number of criminal RICO cases is considerably less than the totals reflected in these statistics. The following table highlights recent civil RICO statistics to highlight its reemergence.

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legitimate organization).

133. See *supra* Part II.B.3 for a discussion of the effects of private counsel and inside information.

134. Data gathered from the U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit reports (Tables C-2 & D-4) from 2001 to 2010 published by the Statistics Division of the Administrative Office of the United States Courts. See *Statistical Tables Archive*, U.S. CTS., [http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/StatisticalTables\\_Archive.aspx](http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/StatisticalTables_Archive.aspx) (last visited June 18, 2013).

135. *Id.*

**Table 1.** Civil RICO Cases Filed, 2001–2010<sup>136</sup>

Year	Number of civil RICO cases filed
2001	687
2002	793
2003	732
2004	839
2005	694
2006	683
2007	655
2008	727
2009	795
2010	955

## 2. Trends in the Business World

That RICO provides one of the most effective ways to detect, deter, and discourage fraud in the business world is increasingly important because of two trends. The first is that other vehicles for policing such fraud have become less viable. Punitive damages in state tort cases have decreased dramatically in recent years. Such damages are rarely sought (in only ten percent of civil cases), and rarely awarded when sought (in thirty percent of the cases in which punitive damages were sought).<sup>137</sup> The result is that punitive damages are awarded in only three to five percent of all civil cases.<sup>138</sup> Moreover, when awarded, punitive damages are paltry. Median punitive damage awards in state tort cases range from \$25,000 to \$55,000.<sup>139</sup> These statistics reflect the efforts of Congress and state legislatures that, in recent years, have passed legislation restricting punitive damage awards.<sup>140</sup> In addition, over the past thirty years, courts have imposed constitutional restrictions on punitive damage awards.<sup>141</sup> Whatever the

136. Information is gathered from the U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit reports (Table C-2) from 2001 to 2010 published by the Statistics Division of the Administrative Office of the United States Courts. See *Statistical Tables Archive*, *supra* note 134.

137. Theodore Eisenberg et al., *The Decision to Award Punitive Damages: An Empirical Study* 1–2 (Cornell Law School Research Paper, No. 09-011, June 2009).

138. *Id.*

139. THOMAS COHEN, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PUNITIVE DAMAGE AWARDS IN LARGE COUNTIES, 2001, at 1 (2005).

140. In 2005 Congress passed the Class Action Fairness Act (CAFA) of 2005, which federalized class actions. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). CAFA has resulted in more federal filings of cases where class action allegations were raised, Emery G. Lee III & Thomas E. Willging, *The Impact of Class Action Fairness Act of 2005 on the Federal Courts*, 156 U. PA. L. REV. 1723, 1723–24 (2008), but fewer class certifications, Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2520, 2527 (2008). Numerous states have imposed caps on punitive damage awards or shifted fee payment rules so that the party that loses a case pays the opposing party's attorney's fees. See *Closing the Lottery*, ECONOMIST, Dec. 10, 2011, at 38 (outlining shifts in fee-paying rules).

141. Beginning in 1989 the Supreme Court rendered decisions that restrict the ability of plaintiffs to bring tort punitive damage actions. *E.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996); *Cooper*

merits of these trends, the result is that there are fewer plaintiffs, watchdogs, whistleblowers, and attorneys willing to sue for fraud perpetrated by others. Compounding this fact is that other causes of action for pursuing business fraud that remain robust are of limited applicability. The civil False Claims Act (FCA), for example, which is one of the most successful tools for addressing fraud,<sup>142</sup> is jurisdictionally limited to frauds against the government and is not available for class actions.

The second trend in today's business world is that fraud is increasing.<sup>143</sup> Globalization and the Internet make business fraud easier to commit, greater in scope, and harder to detect.<sup>144</sup> As recent scholarship has revealed: "[C]ybercrime has the potential to bring devastation [to] legitimate economic markets worldwide."<sup>145</sup>

## V. RICO ENTERPRISE JURISPRUDENCE

### A. Background

It is helpful when thinking about RICO enterprise to recall the policy rationale of RICO: RICO is aimed at individuals who regularly and over a period of time commit crime using a formal or informal organization.<sup>146</sup> This formal or informal organization is a RICO enterprise. RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>147</sup> This definition recognizes that an enterprise may be an existing, formal structure, such as a corporation, or a group of individuals who come together only for sporadic activities. This latter type of enterprise is described as an "association-in-fact" enterprise.<sup>148</sup> Given this broad statutory definition of enterprise, it has fallen upon the courts to interpret RICO enterprise.<sup>149</sup>

While the lower courts generally have interpreted RICO enterprise narrowly, the

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*Indus. Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001). Further, in so ruling, the Court ventured into a domain traditionally left to the states. *BMW*, 517 U.S. at 585–86 (holding, for the first time, that a punitive damage award violated the Fourteenth Amendment); *Cooper*, 532 U.S. at 436 (setting forth a de novo review standard for courts of appeal when reviewing district court determinations on the constitutionality of punitive damage awards); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (elaborating on the *BMW* testing and making clear that large punitive damage awards rarely will pass constitutional muster).

142. See, e.g., Pamela Bucy et al., *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 CARDOZO L. REV. 1523, 1530–31 (2010); Pamela H. Bucy, *Games and Stories: Game Theory and The Civil False Claims Act*, 31 FLA. ST. U. L. REV. 603, 604, 604 n.1 (2004).

143. See Bucy, *supra* note 55, at 926 (noting that new technology makes fraud easier to commit and harder to stop).

144. *Id.* at 926–28.

145. *Id.* at 923, 928 ("Wrongdoing today promises unprecedented complexity and ease in accomplishing massive, global malfeasance that permeates every aspect of a society."). "The Internet has opened up a whole new vista for fraud activity." Timothy Huber, *California: Legislature Ponders Consumer Safety Net for 'Net Fraud Victims'*, WEST'S LEGAL NEWS, May 24, 1996.

146. See *supra* Part III.A for a discussion on RICO's functional approach to organized crime.

147. 18 U.S.C. § 1961(4).

148. *Boyle v. United States*, 556 U.S. 938, 943–51 (2009).

149. See *id.* (defining the required level of structure in a RICO enterprise).



Supreme Court consistently interprets the notion of RICO enterprise broadly.<sup>150</sup> The Supreme Court has held that “[t]here is no restriction upon the associations embraced by the definition [of enterprise]”;<sup>151</sup> an “inclusive” definition of enterprise is consistent with the “new domain of federal involvement” created by RICO;<sup>152</sup> even a “loosely and informally organized,”<sup>153</sup> group may qualify as a RICO enterprise; and the definition of enterprise has a “wide reach.”<sup>154</sup>

In the forty-plus years since RICO was enacted, there have been three key Supreme Court decisions,<sup>155</sup> and fewer than a dozen Courts of Appeals decisions,<sup>156</sup> addressing RICO enterprise. Two issues dominate these rulings: (1) whether there is an adequate distinction between an enterprise and a defendant,<sup>157</sup> and (2) what is required to prove an association-in-fact enterprise.<sup>158</sup> This Section focuses on these issues. As will be seen, the “distinctness” issue arises almost exclusively in cases where some type of legal entity is alleged to be the defendant, the enterprise, or a participant in the enterprise.<sup>159</sup> Because civil RICO cases tend to involve legal entities and criminal cases tend to involve individual defendants, the distinctness issue arises more often in civil RICO cases. The association-in-fact issue arises whenever a group of individuals, or legal entities combined with individuals, organize together for criminal activity.<sup>160</sup> The association-in-fact issue arises in both criminal and civil RICO cases. As will be seen, the distinctness and association-in-fact issues often dovetail.

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150. See, e.g., *Boyle*, 556 U.S. at 943–51 (holding that a RICO enterprise need not have “an ascertainable structure beyond that inherent in the pattern of racketeering activity”); *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 661 (2008) (holding that a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant’s alleged misrepresentations); *Nat’l Org. for Women v. Scheidler*, 510 U.S. 249, 252 (1994) (holding that a RICO enterprise need not have an economic motive); *H.J. Inc. v. Nw. Bell Tele. Co.*, 492 U.S. 229, 249 (1989) (finding that the RICO enterprise need not be based on organized crime); *Sedima, S.R.M.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985); *United States v. Turkette*, 452 U.S. 576, 589 (1981) (holding that the term “enterprise” as used in RICO encompasses both legitimate and illegitimate enterprises). Congress directed that RICO is to “be liberally construed to effectuate its remedial purposes.” Pub. L. 91-452, § 904(a), 84 Stat. 947 (1970).

151. *Turkette*, 452 U.S. at 580.

152. *Id.* at 586.

153. *Boyle*, 556 U.S. at 941.

154. *Id.* at 944; cf. *Nat’l Org. for Women*, 510 U.S. at 257 (describing the statute’s breadth).

155. *Turkette*, 452 U.S. 574; *Nat’l Org. for Women*, 510 U.S. 249; *Boyle*, 556 U.S. 938. These decisions have focused on the following issues: whether a RICO enterprise is limited to illegitimate or legitimate activities (either), *Turkette*, 452 U.S. at 581, 593; must a RICO enterprise have an economic motive (no), *Scheidler*, 510 U.S. at 805; or what kind of structure is necessary before a RICO enterprise exists (minimal as long as three features are present), *Boyle*, 556 U.S. at 946. See Part V.C *infra* for a discussion of the enterprise requirements.

156. Between January 1, 2005, and December 31, 2010, there have been 205 federal courts of appeals decisions ruling on RICO issues. The Second Circuit has dominated this RICO jurisprudence, rendering twenty percent of these decisions followed by the Eighth Circuit (fifteen percent) and the Third Circuit (thirteen percent). The First Circuit, with 1.5% of RICO decisions, and District of Columbia Circuit, with two percent, have rendered the fewest. Pamela H. Bucy, *RICO Trends: From Gangsters to Class Actions*, 65 S.C. L. REV. (manuscript at 10) (forthcoming 2013).

157. See *supra* Part V.B for a discussion of distinctness.

158. See *infra* Part V.C for a discussion of association-in-fact enterprise.

159. See *infra* Part V.B for a discussion of distinctness as it relates to legal entities.

160. See *infra* Part V.C for a discussion of association-in-fact enterprises.

## B. The Distinctness Issue

### 1. Statutory Requirements

The “enterprise distinctness” issue becomes relevant when one type of RICO conduct is alleged. As noted in Part II.A, there are four types of RICO conduct. Section 1962(a)<sup>161</sup> prohibits a person from investing the proceeds of racketeering activity in an enterprise.<sup>162</sup> Section 1962(b)<sup>163</sup> prohibits a person from acquiring or maintaining control over an enterprise through a pattern of racketeering activity. Section 1962(c) prohibits a person *employed by or associated with* an enterprise from conducting or participating in the affairs of the enterprise through a pattern of racketeering activity. Section 1962(d) prohibits conspiring to violate subsections (a), (b), or (c). Section 1962(c) is, by far, the most common RICO conduct alleged.<sup>164</sup>

As can be seen from the statutory language, § 1962(c), unlike the other RICO sections, limits the “persons” who may be charged to those who are “employed by or associated with [the] enterprise.”<sup>165</sup> By comparison, *any* person may be charged with violations of §§ 1962(a), (b) or (d).<sup>166</sup> Because of this difference in statutory language, the courts have held that the “person” charged with violating § 1962(c) (the defendant) must be separate and distinct from the “enterprise” through which the defendant is alleged to have conducted a “pattern of racketeering activity.”<sup>167</sup> The reason for § 1962(c)’s distinctness requirement is simple: one cannot be “employed by or associated with” oneself.<sup>168</sup> The distinctness issue dominates much of RICO jurisprudence since, as noted earlier in this Section, most RICO cases are brought under § 1962(c).

### 2. Rationale

Before delving into the practical issues that the distinctness requirement raises, it

161. 18 U.S.C. § 1962(a) (2006).

162. RICO further requires that the enterprise be one “engaged in, or the activities of which affect, interstate or foreign commerce.” *Id.* § 1962(a).

163. *Id.* § 1962(b).

164. Section 1962(c) is used much more frequently than § 1962(a) or § 1962(b). This is because the elements of § 1962(a) and § 1962(b) are more difficult to prove. To establish a § 1962(a) case, one must trace proceeds (“invested” in an enterprise) as well as prove that a pattern of racketeering activity and enterprise exists. *Id.* § 1962(a). To establish a § 1962(b) case, one must prove that defendants “acquire[d] or maintain[ed] control” over an enterprise through a pattern of racketeering activity. *Id.* § 1962(b). By comparison, in a § 1962(c) case, one must simply prove that the defendant, who was associated with or employed by an enterprise, participated in or conducted its affairs through a pattern of racketeering activity. RAKOFF & GOLDSTEIN, *supra* note 1, § 1.06, at 1-83.

165. 18 U.S.C. § 1962(c).

166. The courts are split on whether the person and enterprise must be distinct in § 1962(b) cases. *See, e.g.,* Official Publ’ns, Inc. v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989) (suggesting distinctness is required in § 1962(b) cases); Landry v. Airline Pilots Ass’n Int’l AFL-CIO, 901 F.2d 404, 425 (5th Cir. 1990) (finding no distinctness required). The courts agree that § 1962(a) does not contain a distinctness requirement. *See, e.g.,* Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 30 (1st Cir. 1986) (stating that the plain language of § 1962(a) does not require involvement of two separate entities for liability); Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 213-214 (10th Cir. 1987) (holding that under § 1962(a) distinctness is not required when the corporation is the direct beneficiary of racketeering).

167. *Schofield*, 793 F.3d at 29 (collecting cases).

168. Haroco, Inc. v. Am. Nat’l Bank & Trust Co., 747 F.2d 384, 400 (7th Cir. 1984).

may be helpful to consider first why § 1962(c) imposes this requirement. By adding the qualification that a defendant must be “employed by or associated with” an enterprise, § 1962(c) virtually ensures that it will be used to pursue those individuals who are “insiders” of an organization and who use the organization and its resources to commit racketeering activity.<sup>169</sup> In this way, § 1962(c) focuses on situations where the enterprise is the conduit (willingly or unwillingly) for the racketeering activity. In other words, in § 1962(c) cases, there must be some link between the racketeering activity and the enterprise.

By comparison with § 1962(a), which makes it an offense to invest proceeds of racketeering activity in an enterprise, the enterprise is a passive receptacle of ill-gotten gains. In § 1962(a) cases, the racketeering activity has already been committed before the investment of proceeds; the enterprise was not used to commit the racketeering activity. Likewise, § 1962(b) requires no link between accomplishing the racketeering activity and the enterprise.<sup>170</sup> The enterprise is the passive victim of whoever violated § 1962(b) by acquiring or maintaining control of the enterprise. As with § 1962(a), the enterprise is not the facilitator of the racketeering activity.

### 3. Distinctness When Organizations Are Involved

Because civil RICO cases tend to involve legal entities such as corporations, the distinctness analysis becomes complicated in civil RICO matters. Corporate law issues of ownership, control, and identity must be addressed and reconciled with RICO principles. Additionally, pleading issues become more complex. In civil RICO cases, where plaintiffs hope to sue a deep pocket, a legal entity generally is the obvious defendant. Generally, such an entity will have more assets and more insurance coverage than individuals. However, often the legal entity involved is also the obvious enterprise. Pleading a civil RICO action to charge the deep pocket as the defendant while also pleading the enterprise to comply with the distinctness requirement can be challenging.<sup>171</sup>

This Article attempts to sort out the RICO distinctness issue in the following situations: (1) when a legal entity and its members are the defendants, enterprises, or participants in an enterprise; (2) when a legal entity is named as one participant in an enterprise; (3) when a legal entity and its subsidiaries or subdivisions are named

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169. *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994) (“[S]ubsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity.”). There has been considerable discussion since RICO was passed as to whether the enterprise is the “conduit” or “victim” in various RICO offenses with the courts ultimately ruling that RICO does not require that the enterprise serve a particular role for any offense, but that generally in § 1962(c) offenses, the enterprise will be the conduit for the pattern of racketeering activity. *See, e.g., United States v. Browne*, 505 F.3d 1229, 1272 (11th Cir. 2007) (considering the difference between conduit and victim enterprises).

170. *See* 18 U.S.C. § 1962(b) (making it unlawful for an individual to participate in the enterprise).

171. The distinctness issue does not arise regularly when individuals versus collective entities are involved for the simple reason that collective entities are comprised of individuals, which blurs the lines of identity. As the Fifth Circuit noted: “[the] courts have routinely required a distinction when a corporation has been alleged as both a RICO defendant and a RICO enterprise, but a similar requirement has not been mandated when individuals have been named as defendants and as members of an association-in-fact RICO enterprise.” *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 447 (5th Cir. 2000).

defendants, enterprises, or participants in an enterprise; and (4) when a legal entity and its attorneys are named defendants, enterprises, or participants in an enterprise. These are the typical situations that arise causing RICO distinctness questions.<sup>172</sup> As the following discussion notes, there is considerable confusion and inconsistency in courts' rulings on these issues. This confusion is unfortunate. It has led to unfair applications of RICO and to inefficiency by all. This Article sorts out this confusion and explains why simple adherence to established principles of corporate law provides clear, predictable, and fair results in RICO distinctness analysis.

*a. Allegations Involving a Legal Entity and its Members*

For purposes of the foregoing discussion, this Article assumes that a "member" of a legal entity is an "agent" of the entity, and as such has consent to act for and bind the entity.<sup>173</sup> Courts consistently have held that the identity of the members of a legal entity, as its agents, merge with the entity, creating the result that there is no distinctness present if an entity is charged as the "person," while its members, separately or working with the entity, are charged as the "enterprise."<sup>174</sup> The rationale for this rule is that an agent acts on behalf of its organization and an organization can act only through its agents.<sup>175</sup> Thus for example, if Alice works for Acme, Inc., one could not charge either of the following scenarios and maintain distinctness under § 1962(c):

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172. See generally Laurence A. Steckman, *RICO Section 1962(c) Enterprises and the Present Status of the "Distinctness Requirement" in the Second, Third and Seventh Circuits*, 21 *TOURO L. REV.* 1083 (2006) (discussing in Parts IV and V the application of the distinctness requirement to association in fact enterprises between corporations and their officers and employees and the distinctness requirement application to enterprises standing in parent/subsidiary relationships).

173. According to the *Restatement (Second) of Agency*, "[a]gency is the fiduciary relation which results from the manifestation of consent by one person [principal] to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." *RESTATEMENT (SECOND) OF AGENCY* § 1 (1958). This includes the "power to alter the legal relations between the principal and third persons and between the principal and himself." *Id.* at § 12.

174. *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339, 344 (2d Cir. 1994); see also *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263 (2d Cir. 1995) (holding that the corporation could not be both the RICO person and enterprise).

175. *Riverwoods*, 30 F.3d at 344 ("Because a corporation can only function through its employees and agents, any act of the corporation can be viewed as an act of such an enterprise, and the enterprise is in reality no more than the defendant itself.").

**Table 2. Insufficient Distinctness**

<b>Persons (Defendants)</b>	<b>Enterprise</b>
Acme, Inc. Alice (as an agent of Acme)	Alice (as an agent of Acme) Acme, Inc.

The outcome is different, however, if the agent is an owner of the organization. The Supreme Court, in *Cedric Kushner Promotions, Ltd. v. King*,<sup>176</sup> addressed this situation and held that there was sufficient distinctness in the legal status of the owner of a company and the company to meet § 1962(c)'s distinctness requirement.<sup>177</sup> In this case, Cedric Kushner, a corporate promoter of boxing matches, sued an individual, another boxing match promoter (Don King), under RICO for \$12 million in damages, alleging fraudulent conduct spanning an eight-year time period.<sup>178</sup> Don King Production Inc., of which Don King (the individual) was the President and sole shareholder, was alleged as the enterprise.<sup>179</sup> Thus the pleadings were as follows:

**Table 3. Pleadings in *Cedric Kushner***

<b>Persons (Defendants)</b>	<b>Enterprise</b>
Don King (an individual)	Don King Production, Inc. (of which Don King, the individual, was sole shareholder).

The District Court dismissed the complaint, and the Second Circuit Court of Appeals affirmed on the ground there was no distinctness between the person and the enterprise.<sup>180</sup> The Supreme Court reversed.<sup>181</sup> Key to the Court's holding was the fact that an individual who owns a corporation and the corporation he owns have different legal statuses.<sup>182</sup> The Court explained that "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status."<sup>183</sup> The Court elaborated, "[a]fter all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural

176. 533 U.S. 158 (2001).

177. *Cedric Kushner*, 533 U.S. at 163.

178. *Cedric Kushner Promotions, Ltd. v. King*, No. 98 Civ. 6859, 1999 WL 771366 (S.D.N.Y. Sept. 28, 1999). The suit alleged late-night meetings, hundreds of thousands of dollars in payments to professional boxers to change promoters and feign injuries, threats, and making good on threats by cancelling bouts. *Id.* at \*1

179. *Cedric Kushner*, 533 U.S. at 160-61.

180. *Id.* at 161.

181. *Id.* at 159.

182. *Id.* at 163.

183. *Id.*

individuals who created it, who own it, or whom it employs.”<sup>184</sup>

Therefore, whenever a member of a legal entity is alleged to be the RICO defendant and the legal entity is alleged to be the RICO enterprise, or visa versa, distinctness under § 1962(c) does not exist and the case will fail. However, if the member of the legal entity is not simply a member but is the owner of the legal entity, distinctness is present, and the member may be sued as the defendant when the entity is alleged to be the enterprise.

*b. Allegations Involving a Legal Entity as One Participant in an Enterprise*

Although the United States Supreme Court has not, to date, ruled on the issue whether § 1962(c) distinctness is present when a legal entity is alleged to be the defendant and also a participant in the enterprise, various federal appellate courts have ruled on this scenario.<sup>185</sup> These courts have held that § 1962(c)'s distinctness requirement is met in this circumstance.<sup>186</sup> *Cullen v. Margiotta* is indicative.<sup>187</sup> In *Cullen*, the plaintiffs (employees and former employees of the town of Hempstead, New York, or the county of Nassau, New York), sued the town, the county, the Nassau County Republican Committee, and the Town of Hempstead Republican Committee under RICO for allegedly coercing contributions from the employees to the committees.<sup>188</sup> Thus, the pleadings were as follows:

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184. *Id.*

185. *See, e.g.,* *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1274–77 (11th Cir. 2000) (reviewing defendant's convictions on appeal, who argued that because “they constitute both the ‘person’ and the ‘enterprise’ . . . their convictions should be vacated” pursuant to § 1962(c)); *River City Mkts., Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1461–62 (9th Cir. 1992) (ruling on plaintiffs' allegations that defendants “associated together in a business relationship . . . to market the grocery stores, and that it was this ‘enterprise’ with which each individual defendant” committed the alleged fraud); *Shearin v. E.F. Hutton Grp., Inc.*, 885 F.2d 1162, 1165–66 (3d Cir. 1989) (ruling on plaintiff's allegations against defendants for “conduct[ing] an enterprise through a pattern of racketeering”).

186. *See, e.g., Goldin Indus.*, 219 F.3d at 1274–77 (ruling that the mere fact that each defendant comprised both the “person” and the “enterprise” was “no reason to vacate the corporations' convictions under § 1962(c)” because each corporation, or person, was distinct from the enterprise anyway); *River City Mkts.*, 960 F.2d at 1462–64 (ruling that the district court erred in its reasoning, for dismissing the case on the grounds that “plaintiffs failed sufficiently to plead an ‘enterprise’”); *Shearin*, 885 F.2d at 1165 (holding that plaintiff's allegations against defendants for “conduct[ing] an enterprise through a pattern of racketeering . . . pass muster on each item” of the 1962(c) statute).

187. 811 F.2d 698 (2d Cir. 1987), *overruled on other grounds by* *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 438 U.S. 143, 156 (1987).

188. *Cullen*, 811 F.2d at 703.

Table 4. Pleadings in *Cullen v. Margiotta*

Persons (Defendants)	Enterprise
Nassau County Republican Comm. & Town of Hempstead Republican Comm. & County of Nassau & Town of Hempstead	County of Nassau Republican Comm. + Town of Hempstead Republican Comm. + Town of Hempstead  (and various combinations of above)

As can be seen, four defendants were named while the enterprise was pled in the alternative as various combinations of the defendants.<sup>189</sup> After a jury verdict in favor of the plaintiffs on liability, the District Court dismissed the action on the ground that the plaintiffs had failed to show that the alleged RICO enterprise was distinct from the Defendants.<sup>190</sup> The Second Circuit reversed, finding that the jury's answers to specific interrogatories demonstrated sufficient facts to show distinctness.<sup>191</sup> The Court noted:

While we have held that a solitary entity cannot, as a matter of law, simultaneously constitute both the RICO "person" whose conduct is prohibited and the entire RICO "enterprise" whose affairs are impacted by the RICO person, . . . we see no reason why a single entity could not be both the RICO "person" and one of a number of members of the RICO "enterprise."<sup>192</sup>

This view makes sense. The identity of any one of the Defendants was separate and distinct from each other and from the alleged enterprise. For example, the Nassau County Republican Committee, a Defendant, was different in every respect from the Town of Hempstead, another Defendant. They had separate legal existences and each had different goals, officers, employees, leadership, and compensation systems from the other.<sup>193</sup> The Nassau County Republican Committee and the Town of Hempstead did not lose their separate identities simply by cooperating together in the alleged vote-persuading enterprise.

*c. Allegations Involving a Legal Entity and its Subsidiaries and Subdivisions*

A distinctness issue will arise when a parent organization is named as the defendant and its subsidiaries or subdivisions are named as the enterprise, or as participants in the enterprise.<sup>194</sup> The distinctness issue will also arise in the inverse,

189. *Id.*

190. *Id.* at 727 (finding that, based upon the jury's answers to interrogatories, plaintiffs failed to establish distinctness).

191. *Id.* at 704.

192. *Id.* at 729-30.

193. *Id.* at 730.

194. See William B. Ortman, Comment, *Parents, Subsidiaries, and RICO Distinctiveness*, 73 U. CHI. L.

when the subsidiary or subdivision is named as the defendant and the parent organization is named as the enterprise, or as a participant in the enterprise.<sup>195</sup> Unfortunately, the case law in these situations is particularly muddled. It need not be. Adherence to established corporate rules of legal existence would clarify RICO distinctness analysis in every parent and subsidiary situation.<sup>196</sup>

The Supreme Court has not ruled on the RICO distinctness issue in subsidiary and subdivision situations but presumably it would adhere to the view advocated in this Article. As shown in the Court's decision in *Cedric Kushner*,<sup>197</sup> the Court focuses on the separateness of legal entities when assessing RICO distinctness under § 1962(c). However, the Circuit Courts of Appeals that have considered this scenario have held that a parent and subsidiary are not distinct for § 1962(c) purposes even if they are separate legal entities.<sup>198</sup> This Article suggests that this view is wrong. The lower courts should follow the Supreme Court's view in *Cedric Kushner* and focus on legal status. The reasoning of the courts of appeals when ignoring legal status to assess whether subsidiaries or subdivisions are "distinct" for § 1962(c) purposes is flawed.

One rationale offered by the courts of appeals is an apparent desire not to punish an organization by subjecting it to RICO liability because of its chosen corporate structure. As the Tenth Circuit stated when holding that a parent company was not distinct from its subsidiary: it "makes little sense from a policy perspective" for RICO liability to attach simply "because of a business organization choice."<sup>199</sup> This view—that a business should not be punished "because of a business organization choice"—is contrary to basic principles of corporate law.<sup>200</sup> Business organizational choices always influence liability. Millions of transactions every day involving every conceivable business decision are resolved on the basis of a business organization choice. Separate corporate existence provides a significant benefit in shielding one's assets from legal liability. It is only fair that in return for this protection a corporation incur one of the logical consequences of it—recognition that legal entities are distinct for purposes of RICO liability.

Other courts have anchored their willingness to disregard legal status when assessing RICO distinctness on the "original intent" of RICO. These courts state

REV. 377, 377 (2006) (discussing the two different approaches adopted by circuit courts when "parent corporations and their wholly-owned subsidiaries satisfy the distinctiveness requirement" of § 1962(c)).

195. *Id.* at 377 n.1.

196. *See id.* at 385–89 (arguing that a "textual" approach, focusing on the text of § 1962(c), and the focus in *Cedric Kushner* on legal identity, dictates that the distinctness analysis for parent-subsidiary situations should focus solely on legal identity).

197. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001). The Court specifically noted that it was not addressing distinctness issues in parent-subsidiary situations. *Id.* at 164.

198. *E.g.*, *Brannon v. Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1147–48 (10th Cir. 1998); *Khurana v. Innovative Health Care Sys.*, 130 F.3d 143, 155 (5th Cir. 1997), *vacated as moot*, 164 F.3d 900 (5th Cir. 1999); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063–64 (2d Cir. 1996); *Odishelidze v. Aetna Life & Cas.*, 853 F.2d 21, 23–24 (1st Cir. 1988); *NCNB Nat'l. Bank of N.C. v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987), *overruled by* *Busby v. Crown Supply Inc.*, 896 F.2d 833, 840–41 (4th Cir. 1990); *cf.* *Brittingham v. Mobil Corp.*, 943 F.2d 297, 302–03 (3d Cir. 1991) (holding that parent and subsidiary are not distinct for §1962(c) purposes where the "person" alleged is the parent corporation and the "enterprise" is "affiliated entities"), *abrogated by* *Jaguar Cars Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 263 (3d Cir. 1995).

199. *Brannon*, 153 F.3d at 1147.

200. *Id.*



(incorrectly in this author's opinion) that RICO's original intent was to prosecute organized crime.<sup>201</sup> They then reason that the case before it (involving allegations of fraud) is not within a "family resemblance" of intended RICO actions.<sup>202</sup> Because, these courts conclude, there is no family resemblance, RICO does not cover parent-subsidary corporate situations, and distinctness is not present when they are participants.<sup>203</sup>

This reasoning is flawed for two reasons. First, distinctness analysis should be conducted on its merits, not on the outcome it yields. Second, on its merits, the family resemblance view is wrong. As detailed in Section III, RICO was not intended to apply exclusively to organized crime. It was clearly intended to apply to white-collar crime as well. Interestingly, the courts that adopted this original-intent approach did so early in RICO jurisprudence when a number of courts mistakenly thought RICO dealt exclusively with organized crime.<sup>204</sup> Unfortunately, the courts have not updated their analyses.

The third flaw in the reasoning of the courts, which finds no RICO distinctness in parent-subsidary situations, was alluded to earlier. As the Tenth Circuit explicitly stated, RICO liability may increase for businesses if distinctness is found.<sup>205</sup> It is true that with the view proposed herein, distinctness analysis should track corporate law principles concerning corporate identity, some RICO cases will go forward, at least on the distinctness issue. The courts should not be so concerned. The notion that a distinctness ruling is the only protection defendants have against inappropriate RICO liability is outdated. Over the past twenty years RICO jurisprudence has become significantly more developed on issues of pattern of racketeering activity,<sup>206</sup> proximate causation,<sup>207</sup> eligible defendants,<sup>208</sup> and eligible damages.<sup>209</sup> RICO liability attaches only when all of these hurdles are overcome.

In summary, the case law on parent-subsidary RICO distinctness analysis is a bungled mess. The Supreme Court has not ruled directly on the issue, leaving intact poorly reasoned, outdated, and erroneous decisions by the Circuit Courts of Appeals. This Article suggests that established principles of corporate law should govern: If a subsidiary or subdivision has a separate legal existence from its parent organization, distinctness is present whenever a parent is alleged as the defendant and a subsidiary or subdivision is alleged as the enterprise or visa versa. If there is no separate legal existence, distinctness is not present. This rule, as in every situation involving legal identity, would be subject to corporate veil piercing principles.<sup>210</sup> These principles, as

201. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (expressing the view that "RICO's major purpose was to attack the 'infiltration of organized crime and racketeering into legitimate organizations'").

202. *Brannon*, 153 F.3d at 1147.

203. *Id.* at 1145.

204. See *supra* Part III.B for a discussion RICO's passage and its focus on both organized and white-collar crime.

205. *Brannon*, 153 F.3d at 1147.

206. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989).

207. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-74 (1992).

208. *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993).

209. *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 257 (1994).

210. The factors to assess in determining whether to pierce the corporate veil are: "failure to comply with corporate formalities," JAMES D. COX & THOMAS LEE HAZEN, *CORPORATIONS* §7.04 (2d ed. 2003),

in all corporate law matters, would deal with subterfuges, shams, and blended identities.

*d. Allegations Involving a Legal Entity and its Attorneys*

There should be no question that an organization's outside counsel is separate and distinct from the organization. Yet in this context also, courts applying both state-equivalent RICO statutes and the federal RICO statute have ignored basic principles of corporate law, as well as professional codes, and held that an organization's outside counsel, like other agents of the company, merge identities with the organization.<sup>211</sup>

The *DuPont* fraud litigation is a helpful case study to examine the issue of distinctness when outside counsel are alleged to be part of an enterprise with counsel's client. The *DuPont* cases occurred over decades in state and federal courts throughout the United States.<sup>212</sup> Multiple courts addressed the RICO distinctness issue and with the same facts and essentially identical pleadings, came to different conclusions.<sup>213</sup> Exploring their analysis is revealing.

E.I. DuPont De Nemours and Company, a US Fortune 500 company, manufactured the herbicide Benlate during the mid-twentieth century and sold it

mingling of business or assets, *id.*,

the parent's participation in day-to-day operations . . . or important policy decisions . . . [of the subsidiary], . . . the parent's determination of the subsidiary's business decisions, bypassing the subsidiary's directors and officers, the parent's issuance of instructions to the subsidiary's personnel or use of its own personnel in the conduct of the subsidiary's affairs,

PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROBLEMS OF PARENT AND SUBSIDIARY CORPORATIONS UNDER THE STATUTORY LAW OF GENERAL APPLICATION* 188 (1989). These factors should control even when the subsidiary is wholly owned by the parent. Notably, in antitrust cases, case law is clear that for intraconspiracy purposes, parent and subsidiary corporations are viewed as "one" and thus a conspiracy, which requires at least two participants, does not exist. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). However, neither this reasoning nor conclusion applies in RICO cases. The *sine qua non* of the conspiracy offense is the agreement between parties. See *Boyle v. United States*, 556 U.S. 938, 950 (2d Cir. 2009) (stating the necessary elements of a conspiracy conviction). This is the "conduct" element of the conspiracy charge and must be shown. It is impossible to have an "agreement of one." See *United States v. Mancillas*, 580 F.2d 1301, 1307 (7th Cir. 1978) (positing that "[b]ecause the crime of conspiracy requires a concert of action among two or more persons for a common purpose, the mere agreement of one person to buy what another agrees to sell, standing alone, does not support a conspiracy conviction"). Thus, the question becomes: are a parent and its subsidiary "one" for purposes of conspiracy law? The answer is yes if an agreement is shown. If a parent and its subsidiary have a sufficient "meeting of the minds" to constitute an agreement to commit crimes, traditional corporate veil piercing facts apply and the corporate veil is and should be pierced. By contrast, the *sine qua non* of RICO is using collective resources (an enterprise) to commit a pattern of racketeering activity. See *supra* Part II.B for an overview of RICO. It is this use of collective resources to commit a pattern of crime that is the focus of RICO. And, the "resource" which separate legal identity provides is significant. It is protection of assets and enables those who have it to reach further, commit more crimes and present a greater danger to more victims. Because a parent and its subsidiary have the resource of asset protection, these separate legal entities are appropriately considered distinct when analyzing participants in a RICO enterprise.

211. See, e.g., *Palmas Y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565, 575 (Fla. Dist. Ct. App. 3 2004) (discussing parallel Florida RICO state statute).

212. See *Living Design, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 356–57 (9th Cir. 2005) (describing the factual circumstances underlying the litigation).

213. Compare *Living Design*, 431 F.3d at 361 (holding that distinctness was present), with *Palmas*, 881 So. 2d at 576–77 (holding that distinctness was not present).

worldwide.<sup>214</sup> Benlate was effective in combating plant diseases such as white mold, black leg, foot rot, and scab.<sup>215</sup> Unfortunately, Benlate was contaminated with a fungicide, which DuPont also manufactured.<sup>216</sup> The contaminated Benlate killed plants, poisoned soil,<sup>217</sup> and, allegedly, caused birth defects.<sup>218</sup> DuPont vigorously contested that Benlate was contaminated, but settled or lost a number of Benlate products liability cases, paying almost two billion dollars in judgments to Benlate plaintiffs.<sup>219</sup>

Shortly after some of the Benlate product liability cases were resolved, the Benlate Plaintiffs learned that DuPont had destroyed, hidden, and falsified test results, which confirmed that Benlate was contaminated.<sup>220</sup> With this discovery, it became clear that DuPont had concealed evidence, violated discovery orders, and misrepresented facts to courts and opposing counsel.<sup>221</sup> DuPont's conduct was found to be egregious.<sup>222</sup> One court described it as "the most serious abuse reflected in the legal precedents."<sup>223</sup> On appeal, the Eleventh Circuit reiterated the district court's disapprobation, explaining in a summary of the proceedings that DuPont's conduct was "willful, deliberate, conscious, purposeful, deceitful, and in bad faith," rendering the trial "a farce."<sup>224</sup> The Eleventh Circuit, in analyzing DuPont's actions while reviewing of the district court opinion, stated that DuPont and its counsel "may very well have engaged in criminal acts,"<sup>225</sup> and noted its assumption that the United States Attorney would conduct a criminal investigation of DuPont and its lawyers.<sup>226</sup> A Hawaii trial court described DuPont's discovery fraud as "abusive," "done in bad faith," and "wanton[],"<sup>227</sup> and its behavior was characterized by the Hawaii Supreme Court as "inexcusable, . . . very disturbing . . . egregious," and "unprecedented."<sup>228</sup>

When the Benlate Plaintiffs who had settled or obtained verdicts against DuPont learned of DuPont's fraud in their cases, a number of them sought sanctions against DuPont.<sup>229</sup> Others brought new lawsuits alleging that DuPont, its executives, and its

214. *Palmas*, 881 So. 2d at 568.

215. *Living Design*, 431 F.3d at 356.

216. *Id.*

217. *Id.*

218. There were allegations that Benlate caused birth defects in babies exposed to it in utero. The alleged birth defects included abnormally small eyes, or no eyes at all. Randall Chase, *DuPont Grapples with Legacy of Benlate*, HOUS. CHRON., March 20, 2006, at C8.

219. William R. Levesque, *Benlate's Bitter Legacy*, ST. PETERSBURG TIMES, Sept. 24, 2006, at 1D.

220. *Fla. Evergreen Foliage v. E.I. DuPont de Nemours & Co.*, 470 3.d 1036, 1039 (11th Cir. 2006); *Living Design*, 431 F.3d at 356–57.

221. *Bush Ranch, Inc. v. E.I. Du Pont de Nemours & Co.*, 918 F. Supp. 1524, 1535–37 (M.D. Ga. 1995).

222. *Id.* at 1542 ("DuPont breached its discovery obligations, its duty to proceed in good faith, and its representations to the Court and counsel. DuPont elicited and presented false testimony from a key witness. DuPont argued falsely to the Court and the jury. DuPont discredited the Bush Ranch Plaintiffs' witnesses with the Alta tests. . . . DuPont's conduct constitutes contempt of this Court.")

223. *Id.* at 1530.

224. *Bush Ranch, Inc. v. E.I. DuPont de Nemours & Co.*, 99 F.3d 363, 366 (11th Cir. 1996) (quoting *Bush Ranch*, 918 F. Supp. at 1556).

225. *Id.* at 369.

226. *Id.* at 369 n.7.

227. *Kawamata Farms, Inc. v. United Agri Prods.*, 948 P.2d 1055, 1099 (Haw. 1997).

228. *Id.* at 1092, 1098.

229. *See, e.g., Bush Ranch, Inc. v. E.I. DuPont de Nemours & Co.*, 99 F.3d 363, 365–66 (11th Cir. 1996) (providing a brief recitation of the facts).

attorneys, operating as a RICO enterprise, engaged in racketeering acts of mail fraud, wire fraud, and obstruction of justice.<sup>230</sup> One issue that arose in these cases was whether the Plaintiffs adequately pled a “distinct” RICO enterprise.<sup>231</sup>

In the RICO action brought in Florida federal court,<sup>232</sup> and a state RICO action brought in Florida trial court,<sup>233</sup> the courts held that the Plaintiffs had not shown distinctness.<sup>234</sup> The federal court dismissed the Plaintiffs’ complaint, while the state court granted a judgment for DuPont notwithstanding the jury verdict for the Plaintiffs.<sup>235</sup> In a third case, a federal RICO action brought in Hawaii,<sup>236</sup> the Ninth Circuit held that the Plaintiffs had shown distinctness.<sup>237</sup>

In the action filed in federal district court in Florida, *Florida Evergreen Foliage v. E.I. DuPont de Nemours & Co.*,<sup>238</sup> and the action filed in Florida state court alleging violation of Florida’s RICO statute,<sup>239</sup> *Palmas Y Bambu. S.A. v. E.I. DuPont de Nemours & Co.*,<sup>240</sup> the Plaintiffs alleged that the following were participants in a RICO enterprise: DuPont, DuPont’s CEO, DuPont’s corporate counsel, DuPont’s outside law firms and the attorneys in the firms, the laboratory that conducted testing on Benlate, and an employee of the laboratory.<sup>241</sup> In dismissing the actions, both courts held that

230. *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 362 (9th Cir. 2005).

231. It should be noted that the plaintiffs also variously alleged that certain employees, officers, and directors were also participants in the enterprise. *Id.* at 361. Because these individuals were clearly agents of DuPont, there was no question that their identity merged with DuPont’s. See *supra* Part V.B.3 for a discussion of the required pleadings for an association-in-fact enterprise.

232. *Fla. Evergreen Foliage v. E.I. DuPont de Nemours & Co.*, 336 F. Supp. 2d 1239 (S.D. Fla. 2004), *aff’d*, 470 F.3d 1036 (11th Cir. 2006); *Fla. Evergreen Foliage v. E.I. DuPont de Nemours & Co.*, 135 F. Supp. 2d 1271 (S.D. Fla. 2001); *Fla. Evergreen Foliage v. E.I. DuPont de Nemours & Co.*, 165 F. Supp. 2d 1345 (S.D. Fla. 2001), *aff’d sub nom. Green Leaf Nursery v. E.I. DuPont de Nemours & Co.*, 341 F.3d 1292 (11th Cir. 2003).

233. *Palmas Y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565 (Fla. Dist. Ct. App. 2004).

234. *Fla. Evergreen*, 336 F. Supp. 2d at 1262; *Palmas*, 881 So. 2d at 574–577.

235. *Fla. Evergreen*, 336 F. Supp. 2d at 1262 (failure to allege a distinct enterprise was only one ground of many grounds for dismissing the complaint); In *Palmas*, the jury returned a \$26 million verdict on the RICO and products liability theories for the plaintiffs. *Palmas*, 881 So. 2d at 568. The trial court granted a judgment for DuPont notwithstanding the verdict on the ground that the trial court improperly gave an instruction to jury advising them they could draw an adverse inference against DuPont because of DuPont’s withholding of evidence during discovery and trial. *Id.*

236. *Matsuura v. E.I. DuPont de Nemours & Co.*, 330 F. Supp. 2d 1101 (D. Haw. 2004), *rev’d*, *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353 (9th Cir. 2005).

237. *Living Designs*, 431 F.3d at 362.

238. 336 F. Supp. 2d 1239 (S.D. Fla. 2004), *aff’d*, 470 F.3d 1036 (11th Cir. 2006).

239. The Florida RICO statute mirrors the federal RICO statute. *Cf.* FLA. STAT. ANN. § 772.104 (West 2013) (Florida civil RICO statute); *Palmas*, 881 So. 2d at 570 n.1 (discussing “the similarities between Florida and federal RICO acts”).

240. 881 So. 2d 565 (Fla. Dist. Ct. App. 2004).

241. In the case before the Florida Appeals Court, the enterprise was alleged to consist of “DuPont; nine of its officers, directors, and employees; its attorney and his firm; . . . DuPont’s claims investigation agency; . . . DuPont’s Costa Rican ‘agent’; and . . . a company that formulated or mixed Benlate for DuPont.” *Id.* at 575 n.6. In the federal RICO cases, the plaintiffs alleged the following were participants in the enterprise: Alston & Bird [DuPont’s counsel] and its attorneys . . . [who] served as DuPont’s counsel during the *Bush Ranch* trial[,] . . . DuPont employee[s], . . . DuPont’s corporate counsel, . . . a consultant for DuPont’s attorneys[:] . . . [the law firm that] served as DuPont’s National Coordinating Counsel for Benlate litigation . . . Alta Labs, and its employee [who] were retained by DuPont to analyze soils[;]

because all members of the alleged enterprise (including DuPont's outside counsel) were DuPont's employees or agents, the plaintiffs had failed to allege a RICO enterprise distinct from DuPont.<sup>242</sup> These courts cited to *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*<sup>243</sup> as controlling precedent.<sup>244</sup> Their rote citation to precedent is typical of most cases addressing the distinctness issue. It is also erroneous.

*Riverwoods Chappaqua* reaffirmed that corporate employees are agents of the corporation, but did not address the issue with regard to outside corporate counsel.<sup>245</sup> This is established law.<sup>246</sup> *Riverwoods Chappaqua* never addressed nor analyzed any issue regarding corporate counsel. The Plaintiff in *Riverwoods Chappaqua* was a borrower of Midland Marine, a bank.<sup>247</sup> The Plaintiff claimed that through extortion and mail fraud, Midland Marine coerced it into restructuring its loans.<sup>248</sup> No attorneys were alleged to be part of the enterprise nor alleged to be involved in the conduct at issue.<sup>249</sup> There were no facts given about Midland Marine's attorneys, nor any discussion of their role. The sole issue in the case was whether the Midland Marine's bank officers were sufficiently distinct from Midland Marine to show distinctness.<sup>250</sup>

The Florida appellate court in *Palmas Y Bambu*, when holding that distinctness was not present in the DuPont case before it, cited to *Riverwoods Chappaqua* as well to *Discon, Inc. v. NYNEX Corp.*<sup>251</sup> and *Goldberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*<sup>252</sup> as support for the view that outside counsel is an agent of its corporate client.<sup>253</sup> Both the *Discon* and the *Goldberg* courts noted (albeit in slightly different contexts for purposes of a claim under RICO) that attorneys are agents of their corporate client.<sup>254</sup> However, they do so only in dicta. The issue whether outside counsel is distinct from its corporate client was not raised in either *Discon* or *Goldberg*. Nor are there any facts or allegations of corporate counsel involvement in either case. Instead, these cases simply cite to *Riverwoods Chappaqua*.<sup>255</sup> The merry-go-round goes around. Beyond these three cases (*Riverwoods Chappaqua*, *Discon*, and *Goldberg*) there is no additional case support for the position that attorneys are agents of their corporate client.

In contrast, in the Benlate cases, the Ninth Circuit affirmed the District Court of Hawaii's conclusion that the company's outside counsel was separate from Benlate

... former president and CEO of DuPont.

*Fla. Evergreen*, 336 F. Supp. 2d at 1262.

242. *Fla. Evergreen*, 336 F. Supp. 2d at 1261 n.18; *Palmas*, 881 So. 2d at 575.

243. 30 F.3d 339 (2d Cir. 1994).

244. *Fla. Evergreen*, 336 F. Supp. 2d at 1261; *Palmas*, 881 So. 2d at 575.

245. *Riverwoods Chappaqua*, 30 F.3d at 344.

246. See *supra* Part V.B.3.a for a discussion of the distinctness requirement when a legal entity and its members are named as RICO defendants.

247. *Riverwoods Chappaqua*, 30 F.3d at 341.

248. *Id.*

249. *Id.* at 341-43.

250. *Id.* at 343.

251. 93 F.3d 1055 (2d Cir. 1996), *judgment vacated*, 525 U.S. 128 (1998).

252. No. 97 CIV. 8779, 1998 WL 321446 (S.D.N.Y. June 18, 1998).

253. *Palmas Y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565, 576-77 (Fla. Dist. Ct. App. 2004).

254. *Discon*, 93 F.3d at 1063-64; *Goldberg*, 1998 WL 321446, at \*3 n.5.

255. *E.g.*, *Discon*, 93 F.3d at 1063; *Goldberg*, 1998 WL 321446, at \*2-3.

itself, and thus distinctness was present.<sup>256</sup> In the Hawaiian Benlate cases, consolidated in *Matsuura v. E.I. Du Pont de Nemours and Co.*,<sup>257</sup> as in the Florida Benlate cases, DuPont was the defendant and the enterprise alleged was “DuPont, the law firms employed by DuPont, and expert witnesses retained by the law firms.”<sup>258</sup>

The Ninth Circuit began its analysis by noting the obvious: “To be sure, if the ‘enterprise’ consisted only of DuPont and its employees, the pleading would fail for lack of distinctiveness.”<sup>259</sup> However, the court continued, attorneys are different.<sup>260</sup> It explained further that, “there is no question that law firms retained by DuPont are distinctive entities. . . . And there is no question that DuPont and the law firms together can constitute an ‘associated in fact’ RICO enterprise.”<sup>261</sup> The Ninth Circuit looked at the respective roles of DuPont (“a company that offers products and services for markets including agriculture . . . transportation, and apparel”) and its outside counsel (who were “retained for the purpose of defending DuPont in Plaintiff’s lawsuits.”).<sup>262</sup> The court focused on ethics rules that apply to attorneys: “These law firms are required to conform to ethical rules and thus are not merely at the beck and call of their clients.”<sup>263</sup> The court emphasized that, “the rules of professional conduct require law firms to be distinct entities and to maintain their professional independence.”<sup>264</sup> It concluded that, “the litigation ‘enterprise’ necessarily must be distinct from the client retaining legal assistance.”<sup>265</sup>

The Ninth Circuit was correct, and the courts in Florida (both federal and state) were wrong in the DuPont cases. Corporate counsel is not an agent of its corporate client because of the different goals and ethical mandates of client and counsel. Corporate counsel is distinct from its corporate clients, and RICO analysis should reflect this fact. Whenever an attorney is alleged to be a participant in an enterprise with her client, sufficient independence exists to satisfy § 1962(c)’s distinctness requirement. Thus, distinctness is satisfied when a corporate client is pled as a RICO defendant and the client and outside counsel are pled as the enterprise, or visa versa. As in the parent-subsidiary situations, corporate veil principles apply with the result that if counsel performs as a corporate employee rather than as an attorney, or counsel abandons her ethical duty to maintain professional independence, distinctness is not present.

#### *e. Conclusion*

Section 1962(c) is the most commonly used provision of RICO. Because of § 1962(c)’s unique statutory language, RICO cases brought under this provision must

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256. *Living Designs, Inc v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005).

257. 330 F. Supp. 2d 1101 (D. Haw. 2004).

258. *Living Designs*, 431 F.3d at 361.

259. *Id.* at 361.

260. *Id.*

261. *Id.* (citing *United States v. Blinder*, 10 F.3d 1468, 1473–74 (9th Cir.1993)).

262. *Id.* at 362.

263. *Id.*

264. *Id.*

265. *Id.*

allege and prove that a RICO defendant is distinct from the enterprise.<sup>266</sup> Assessing whether such distinctness exists is not difficult when the defendant alleged is an individual and the enterprise alleged consists of that individual plus other individuals. This is the usual scenario in criminal RICO cases.<sup>267</sup> Distinctness analysis becomes more difficult when a legal entity is the alleged defendant, enterprise, or participant in the enterprise, which is the usual scenario in civil RICO cases. Unfortunately, RICO jurisprudence is littered with poorly reasoned and incorrect holdings on distinctness when legal entities are involved.<sup>268</sup> As a result, RICO's potential as a weapon against white-collar crime has not been realized, many inappropriate civil RICO actions have been brought, and RICO has earned a reputation as a problem statute.<sup>269</sup> This Article suggests that the way out of this ill-conceived morass is to follow basic, established, well-accepted principles of corporate law and legal ethics when assessing RICO distinctness. These principles provide clear guidance: distinctness exists whenever separate legal entities exist, unless piercing the corporate veil rules apply. Table A1 in the Appendix summarizes this Article's proposals on RICO distinctness.

### C. Association-in-Fact Enterprises

RICO defines enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>270</sup> The first part of this definition is straightforward: any individual, partnership, corporation, association, or other legal entity may be an enterprise. The latter part of the definition, "group of individuals associated in fact" is more nuanced, and is addressed further in this Section.

#### 1. Supreme Court Guidance: *United States v. Boyle*

In 2009, in *United States v. Boyle*,<sup>271</sup> the Supreme Court clarified what is necessary to prove an "association-in-fact" enterprise.<sup>272</sup> Eddie Boyle was convicted by a jury on eleven out of twelve counts charging him with bank burglary, attempted bank burglary, conspiracy to commit bank burglary, RICO (under § 1962(c)), and RICO conspiracy.<sup>273</sup> The evidence at trial demonstrated that Boyle and others committed and attempted a number of bank burglaries in four states over five years.<sup>274</sup> Using crowbars, fishing gaffs, and walkie-talkies, Boyle and his confederates targeted night deposit boxes at banks in retail shopping areas.<sup>275</sup> They broke into the boxes, stole money, and split the proceeds.<sup>276</sup> Boyle argued that he and his group of alleged confederates were

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266. See *supra* Part V.B.3 for a discussion of the distinctness requirement.

267. See *supra* Part IV.B.1.c for a discussion of the differences between a civil and criminal RICO case.

268. See *supra* Part V.B.3.c for a discussion of courts' erroneous reliance on precedent not bearing directly on distinctness.

269. S. REP. NO. 100-459, at 4-5 (1988).

270. 18 U.S.C. § 1961(4) (2006).

271. 556 U.S. 938 (2009).

272. *Boyle*, 556 U.S. at 945-47.

273. *United States v. Boyle*, No. 03 CR 0970, 2005 WL 6207652, at \*1-2 (E.D.N.Y. August 2, 2005).

274. *Boyle*, 556 U.S. at 941.

275. *Id.*

276. *Id.*

too loosely organized to constitute an “association-in-fact enterprise” under RICO.<sup>277</sup>

The Supreme Court affirmed Boyle’s conviction, finding that an association-in-fact enterprise existed even though Boyle’s burglary group “was loosely and informally organized . . . [without neither] a leader or hierarchy . . . [nor] long-term master plan or agreement,” and functioned only sporadically.<sup>278</sup> According to the Court, “nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence.”<sup>279</sup> Noting that RICO’s statutory definition of enterprise is “obviously broad,” “expansive,” and has “a wide reach,”<sup>280</sup> the Court held that “an association-in-fact enterprise is simply a continuing unit that functions with a common purpose.”<sup>281</sup> According to the Court, “an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.”<sup>282</sup> In many instances, purpose, relationships, and longevity will be easy to establish.<sup>283</sup> The Court specifically noted that evidence establishing the existence of an “association-in-fact” enterprise may simply be the evidence of the racketeering activity.<sup>284</sup> The Court approved the district court’s instruction that “the existence of an association-in-fact is oftentimes more readily proven by what [it] does, rather than by abstract analysis of its structure.”<sup>285</sup>

Prior to *Boyle*, a number of the circuits had imposed strict requirements on what constituted an association-in-fact enterprise.<sup>286</sup> The Court soundly rejected these approaches, holding that RICO enterprises are not limited to “businesslike entities” as had been held by several circuits.<sup>287</sup> The Court also rejected the views that a “structural hierarchy, role differentiation, . . . unique *modus operandi*, . . . chain of command, professionalism and sophistication of organization, diversity and complexity of crimes, membership dues, rules and regulations, uncharged or additional crimes aside from predicate acts, an internal discipline mechanism, regular meetings regarding enterprise affairs, an enterprise name, [or] induction or initiation ceremonies and rituals”<sup>288</sup> were necessary to find an association-in-fact enterprise.<sup>289</sup>

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277. *Id.* at 948.

278. *Id.* at 941.

279. *Id.* at 948.

280. *Id.* at 944.

281. *Id.* at 948.

282. *Id.* at 946.

283. *See, e.g.,* *United States v. Hutchinson*, 573 F.3d 1011, 1022 (10th Cir. 2009) (stating that Boyle relaxed the examination an enterprise’s structural requirements in order to give effect to the broad language in the RICO statute); *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1026 (8th Cir. 2008) (clarifying that an enterprise’s purpose need not be illegal to fall within RICO’s statutory reach).

284. *Boyle*, 556 U.S. at 947. “[T]he evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise ‘may in particular cases coalesce.’” *Id.* (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

285. *Id.* at 951 (internal quotation marks omitted).

286. *See, e.g.,* *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 804 (7th Cir. 2008). This was the position expressed by Justice Stevens in his dissent. *Boyle*, 556 U.S. at 952 (Steven, J., dissenting).

287. *Id.* at 945.

288. *Id.* at 948 (internal quotation marks omitted).

289. *Id.*



## 2. Association-in-Fact Enterprises and Garden-Variety Conspiracies: Is There a Difference?

Given the relatively loose requirements for establishing an association-in-fact enterprise after *Boyle*, one may wonder how, if at all, an association-in-fact enterprise is different from a garden-variety conspiracy. The Supreme Court addressed this question in *Boyle*, noting that while the crime of conspiracy

may be completed in the brief period needed for the formation of the agreement and the commission of a single overt act in furtherance of the conspiracy . . . [s]ection 1962(c) demands much more: the creation of an “enterprise”—a group with a common purpose and course of conduct—and the actual commission of a pattern of predicate offenses.<sup>290</sup>

In addition, RICO, especially civil RICO, has more elements than conspiracy: “pattern,”<sup>291</sup> participation in the “operation or management” of the enterprise,<sup>292</sup> proximate causation,<sup>293</sup> and economic injury.<sup>294</sup>

Thus, whereas a simple conspiracy may be formed within seconds and exist only for seconds, as when two people agree to rob a passerby, RICO applies only when there is a “relationship” between the criminal acts (for example, multiple robberies, or robberies plus a network for getting rid of property stolen),<sup>295</sup> “continuity” among the criminal acts (robberies that extend over a significant period of time, or threaten to do so),<sup>296</sup> and distinctness between the defendant and enterprise.<sup>297</sup> Furthermore, in a civil RICO action, the plaintiff must show that her injury was directly caused by the RICO conduct (the series of robberies) and that her damage is a “RICO” injury; that is, not a personal injury but an injury to business or property (loss of business, perhaps, in neighborhoods plagued by robberies).<sup>298</sup> Thus, although the Supreme Court made clear in *Boyle* that the standards for proving the existence of a RICO association-in-fact enterprise are relaxed, because of RICO’s additional elements, association-in-fact enterprises are not simply watered-down conspiracies.

While *Boyle*’s holding is clear, applying *Boyle* to real-world situations is challenging. Tables A2, A3, and A4 in the Appendix offer guidance in doing so.

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290. *Id.* at 950.

291. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

292. *Id.* at 183.

293. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 456–59 (2006); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268–74 (1992).

294. *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 257 (1994).

295. *H.J. Inc. v. Nw. Bell Tele. Co.*, 492 U.S. 229, 240 (1989).

296. *Id.* at 230.

297. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162 (2001).

298. *See Holmes*, 503 U.S. at 269–274 (holding that an indirectly injured victim cannot sue under RICO).

VI. PHARMACEUTICAL FRAUD: APPLICATION OF THE RICO ENTERPRISE PRINCIPLES  
PROPOSED IN THIS ARTICLE

The following hypothetical applies the principles suggested in this Article.<sup>299</sup> Assume that Byrd & Brown, Inc. (B&B) is a major manufacturer and distributor of over-the-counter and prescription medications. B&B has been in existence for almost a century with headquarters in Chicago, Illinois. Over six hundred employees work at the Chicago facility and over three thousand employees work for B&B worldwide. B&B has warehouses throughout the United States and in many overseas countries. Its medications are manufactured at three facilities, all in Mexico. A different B&B subsidiary owns and operates each of the manufacturing facilities.

Each B&B manufacturing subsidiary is wholly owned, separately incorporated, and has its own board of directors. The board of each subsidiary has fifteen members. Three members are completely overlapping and serve on all of the subsidiaries' boards as well as on B&B's board of directors. Each subsidiary has its own set of officers: a president and three vice presidents. Each subsidiary also has an office staff of three to four persons. Between one to two hundred employees work at each manufacturing facility. B&B does not conduct patient testing or marketing of its products; it contracts with Green Testing, Inc. for the former, and Maximum Marketing, Inc. for the latter.

One of B&B's best-selling products is a series of sulfonylureas, which are prescribed for diabetic individuals to increase the secretion of insulin. All medications in the sulfonylureas series are manufactured at a plant in Metepec, Mexico. This plant is owned and operated by the B&B subsidiary Metepec Manufacturing, Inc. (MM).

Every two to three years, a B&B executive visits the facilities of B&B's manufacturing subsidiaries. In early 2010, Peter Wilson, B&B's Executive Vice President for Manufacturing, and Amanda Peterson, an attorney with the firm of Peterson & Peterson, LLP, visited the subsidiaries. Peterson & Peterson serves as B&B's outside counsel for manufacturing compliance and has done so for a dozen years. Wilson's and Peterson's schedule is similar at each facility visit. They stay at the facility for two days. Each visit is planned months in advance in cooperation with the respective subsidiaries' executives.

The visits to each of the three subsidiaries' facilities by Wilson and Peterson in 2010 were uneventful. Wilson, who had been with B&B for twenty years, knew the executives of each subsidiary well, having visited them regularly and communicated with them almost daily. From the perspective of B&B and Wilson, the purpose of the on-site visits to the manufacturing facilities is to solidify the working relationship between B&B and its subsidiaries. Whenever he visits a plant, Wilson spends his entire time meeting with the executives at each plant; he takes only a brief tour of the plant facility.

As B&B's outside counsel for compliance, Peterson's focus during the on-site visits is the condition of the plants, quality control of production, and adequacy of supervision protocols of the plant workers. During all three 2010 visits, Peterson met with plant supervisors and various employees and took a tour of the plant.

Although Wilson and Peterson found nothing unusual or problematic at any of the

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299. This example is purely fictional and is not based upon any existing situation or company.

facilities during their 2010 on-site visits, soon upon their return from their last visit (to Metepec), a bombshell hit B&B. The United States Department of Justice (DOJ) filed a complaint alleging violations of the FCA against B&B for fraud upon the federal government. Specifically, the complaint alleged that the sulfonylureas manufactured at the Metepec facility were contaminated. The complaint detailed a variety of vile and unsanitary conditions at the plant, including violations of cleanliness protocols by employees, rodent infestation, and raw sewage on plant floors left over from when sewage lines overflowed after rains. The federal complaint further alleged that B&B caused false claims to be submitted to the federal government when patients and providers sought reimbursement from Medicare and Medicaid for sulfonylureas prescriptions. The falsity alleged was a misrepresentation that the sulfonylureas's production met industry standards for manufacturing, production, and distribution.<sup>300</sup>

It appears from the complaint that a plant employee at the Metepec facility was a *qui tam* relator<sup>301</sup> who brought evidence of the conditions at the Metepec plant to DOJ's attention by filing an FCA complaint. It further appears that the relator documented the Metepec facility conditions. According to the complaint, some of the most egregious conditions were cleaned up prior to the 2010 visit by Wilson and Peterson. Allegedly, Metepec executives knew well in advance when the Wilson-Peterson visit would occur and gave orders for a superficial clean up of the facility prior to their arrival. However, according to the complaint, obvious signs of rodent infestation, unsanitary employee behavior (such as cigarette smoking and tobacco chewing and spitting) while on the plant floor and assembling medications, as well as standing sewage from overflowing toilets in employee restrooms, were all present when Peterson toured the plant. The complaint specifically noted that an employee (assumed to be the relator) recalled Peterson at the plant because he brought coffee to her and the plant supervisor in the supervisor's office. To carry the coffee to Peterson, the employee walked through raw sewage immediately outside the supervisor's office, which was visible from the inside of the office. The complaint alleged that when Peterson toured the plant, she did not actually go inside the plant. Rather, all she did was drink coffee and talk with the supervisor in the supervisor's office.

Based upon these facts, obvious questions arise: Is there a civil RICO class action available for private individuals or companies?<sup>302</sup> If so, against whom? Presumably

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300. Suits filed under the civil False Claims Act alleging false certification of quality of care or services are common FCA actions. See Pamela H. Bucy, *Fraud by Fright: White Collar Crime by Health Care Providers*, 67 N.C. L. REV. 855, 873-74 (1989) (discussing the civil remedies available against fraudulent health care providers).

301. "Qui tam relators" are private individuals who are given authority under the FCA to bring lawsuits against those who submit false claims to the government. 31 U.S.C. § 3730 (2006) The FCA is a highly successful tool for combating white-collar crime and the route by which much fraud is brought to the attention of authorities. See *supra* note 142 for sources discussing the civil False Claims Act.

302. That a factual situation may give rise to both a civil FCA case brought by the federal government (in conjunction with a *qui tam* relator) and a civil RICO case brought by private health insurance companies and/or patients, is quite realistic, especially in the healthcare field. A fraud by healthcare providers generally affects all patients and all insurers (whether government or private insurers). The FCA's jurisdiction is limited to false claims billed to the federal government (through the Medicare and Medicaid programs), but civil RICO's reach is available to any party injured in its business or property by the racketeering activity. See *supra* note 142 and accompanying text for a discussion of the FCA's limited jurisdiction. Mail fraud or wire fraud would be the obvious racketeering activity. Certifications of compliance with safety standards, which are

there is monetary damage to every patient who paid co-payments to obtain prescriptions of sulfonyleureas and received adulterated sulfonyleureas manufactured at B&B's Metepec facility. Also, presumably, there is monetary damage to insurance companies that paid for adulterated sulfonyleureas prescriptions for their insureds. Thus, there appear to be two separate possible RICO class actions: one for patients and one for insurers. Issues of commonality would determine whether these are viable class actions.<sup>303</sup> Because of its relative ease in proof, § 1962(c) is the obvious RICO violation with mail fraud and wire fraud (conveying false certifications of compliance) as the obvious racketeering acts. This Article leaves for another day class action and substantive RICO issues raised by these facts, such as knowledge, intent, causation, damages, and commonality, and addresses only the issue of how to plead the person and enterprise.

B&B is an obvious defendant. It is potentially culpable as a principal or as an aider and abettor. MM is another obvious, culpable defendant. However, MM may not have the assets of B&B or if it does, MM may be incorporated offshore rendering recovery of any judgment difficult. Additionally, as discussed in the following paragraphs, MM may be more useful as a participant in a RICO enterprise rather than as a defendant. Peterson & Peterson, LLP, is another potential defendant. The law firm would appear to have liability because of the negligence of its attorney, Amanda Peterson. However, even with a generous Directors and Officers (D&O) liability policy, the policy is not likely to provide enough coverage to satisfy any class action judgment. Furthermore, given the egregiousness of Amanda Peterson's conduct, coverage under a D&O policy may be excluded.<sup>304</sup> Various individuals—including officers, staff, and employees of MM, Amanda Peterson, and Peter Wilson—are viable defendants but likely do not have resources to make successful suits against them worthwhile. Focusing on culpability and judgment worthiness, therefore, the most promising defendant is B&B.

There are many options for pleading the enterprise: (1) B&B, (2) B&B + Peter Wilson,<sup>305</sup> (3) B&B + Peterson & Peterson,<sup>306</sup> (4) B&B + MM,<sup>307</sup> (5) B&B + Maximum Marketing Inc. and/or Green Testing Inc.

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required for reimbursement by insurers, must accompany reimbursement requests. *See* Bucy, *supra* note 300, at 920–32 (discussing requirements for reimbursement). Given the adulterated state of B&B's sulfonyleureas in this hypothetical, these certifications would be false. B&B would have mailed or emailed these false certifications, or caused them to be mailed or emailed. *See id.* (discussing “implied certification” fraud).

303. *See* Bressack, *supra* note 57, at 589 (discussing the requirements for class certification in Federal Rule of Civil Procedure 23).

304. Many D&O policies exclude coverage for executives who have engaged in “deliberate and willful acts.” Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 *IND. L. REV.* 279, 331 (1991).

305. Peter Wilson is the obvious individual to include for purposes of this example, but any number of additional individuals who are also agents of B&B could be added with the same result—as agents of Byrd & Brown, including them would not provide distinctness.

306. For purposes of proving Peterson & Peterson's participation in the enterprise with B&B, it would be helpful to list Amanda Peterson as an additional member of the enterprise, but because she is an agent of the law firm, including her does nothing to enhance the enterprise distinctness analysis.

307. Various individuals at MM could be included in the enterprise, such as the plant supervisor and company executives, but as agents of MM, their identities will merge with the company and thus their presence would add nothing to the enterprise distinctness analysis.

Because of the distinctness requirement, option (1) is not viable.<sup>308</sup> In this instance the “person” (B&B) and the “enterprise” (B&B) are identical.

Because Peter Wilson is an agent of B&B and his identity merges with that of B&B, option (2) is not viable. Even assuming that Peter Wilson is a licensed attorney, he is clearly serving as a B&B employee and agent, not acting in a role as attorney or legal counselor during the time in question.<sup>309</sup>

For the reasons discussed in Part V.B.3.d, option (3), joining B&B with its outside law firm would provide an enterprise distinct from the defendant, B&B. This option, of course, is fraught with some peril since there is existing precedent, albeit ill conceived and erroneous, that outside counsel for a client are agents of the client.<sup>310</sup>

For the reasons discussed in Part V.B.3.c, option (4), joining B&B with its corporate subsidiary, MM, provides an enterprise sufficiently distinct from the defendant, B&B, as long as B&B and MM are separate legal entities and operate in good faith as separate legal entities, *i.e.*, corporate veil piercing principles do not apply.<sup>311</sup> Factors relevant in assessing their independence from each other include the role of Peter Wilson (*i.e.*, whether B&B, through Wilson, supervised the daily operations of MM through Wilson’s close communication with MM’s executives and staff), and the overlapping directors of B&B and its manufacturing subsidiaries (three of the fifteen directors serve each corporation). If, after assessing these facts, it appears that B&B and MM are, and operate as, separate legal entities, option (4), although viable, remains perilous since many courts, in an ill-conceived and erroneous fashion, hold that a subsidiary’s existence is not sufficiently separate from its parent corporation to find § 1962(c) distinctness.<sup>312</sup>

Option (5), joining B&B with two separate independent corporations, is viable only if evidence exists that Maximum Marketing Inc. and/or Green Testing Inc. were knowing partners in false marketing or testing of the contaminated sulfonyleureas.<sup>313</sup> Given the facts of this hypothetical, culpability on the part of Maximum Marketing Inc. and Green Testing Inc. is not present.

To conclude, therefore, the only options for pleading the facts of this hypothetical and demonstrating RICO distinctness are (3) and (4). Table 5 below summarizes these conclusions.

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308. See *supra* Part V.B.3 for a discussion of the distinctness requirement of RICO.

309. See *supra* Part V.B.3.a for a discussion of the merging of an agent with the principal.

310. See *supra* Part V.B.3.d for a discussion of the relationship of outside counsel to the legal entities they represent.

311. See *supra* Part V.B.3.c for a discussion of allegations that involve a legal entity and its subdivisions and subsidiaries.

312. See *supra* Part V.B.3.c for a discussion of distinctness as applied to a legal entity and its subsidiaries.

313. See *supra* Part V.B.3.b for a discussion of allegations involving a legal entity as one participant in an enterprise.

**Table 5.** Pleading Options in Hypothetical

<b>Persons (Defendants)</b>	<b>Enterprise</b>	<b>Distinctness Present?</b>
B&B	B&B	No
B&B	B&B + Peter Wilson	No
B&B	B&B + Peterson & Peterson LLP	Yes, with qualification
B&B	B&B + Metepec Manufacturing, Inc.	Yes, with qualification
B&B	B&B + Marketing, Inc. and/or Green Testing, Inc.	No (unless culpability can be shown)

In addition to the distinctness analysis, one must also perform an association-in-fact analysis on the possible enterprises. The question becomes whether option (3) (B&B + Peterson & Peterson) or option (4) (B&B + MM) meet the *Boyle* requirements for an association in fact.<sup>314</sup> As noted in Part V.C.1, under *Boyle*, a plaintiff must show a “common purpose” among all enterprise members,<sup>315</sup> a “relationship among those associated with the enterprise” demonstrating coordination among members,<sup>316</sup> and “longevity sufficient to permit the enterprise’s purpose.”<sup>317</sup>

Applying these factors, it appears that option (3) almost certainly complies with *Boyle*. B&B and its outside law firm, Peterson & Peterson, through its agent, Amanda Peterson, were united in their intent and knowledge, or at least in their reckless disregard of the truth (which suffices to demonstrate knowledge).<sup>318</sup> Peterson & Peterson may not have had this explicit goal; rather, Peterson and Peterson’s goal is more accurately described through its ethical obligation to represent its client, B&B, in obtaining the successful manufacture, marketing, and sale of sulfonylureas, and reimbursement for sulfonylureas by patients and insurance carriers (including

314. *Boyle v. United States*, 556 U.S. 938, 945 (2008).

315. *Id.* at 946.

316. *Id.* at 947 n.4.

317. *Id.* at 946.

318. *See, e.g., United States v. Yusuf*, 461 F.3d 374, 383 (3d Cir. 2006) (treating reckless disregard for the truth and knowledge identically for determination of actual malice); *Masson v. New Yorker Magazine*, 501 U.S. 496, 511 (1991) (noting that knowledge of falsity or reckless disregard for the truth both meet the requirement).

government programs such as Medicare and Medicaid, and private insurers).<sup>319</sup> B&B and Peterson & Peterson had a coordinated, working relationship to monitor the quality control of MM's production.<sup>320</sup> They committed time and resources to this monitoring.<sup>321</sup> "Longevity" is shown by B&B's long-standing retention of Peterson & Peterson for its manufacturing compliance needs.<sup>322</sup> Option (3) clearly meets the *Boyle* requirements.

Similarly, option (4), an enterprise consisting of B&B + MM, meets the *Boyle* factors. B&B created MM for the purpose of manufacturing pharmaceuticals which B&B marketed and sold, and for which B&B received reimbursement. Their relationship and longevity are also well established.

To conclude, under both the distinctness analysis suggested in this Article and the association-in-fact analysis required by *Boyle*, either of the following enterprises—(1) B&B (corporation) and Peterson & Peterson (outside counsel), or (2) B&B (corporation) and MM (subsidiary)—comply with RICO's requirements.

## VII. CONCLUSION

This Article has made six points. First, that RICO's design fits the typical white-collar case well. It does so because of two aspects of RICO: RICO's enterprise approach, and RICO's private cause of action. RICO focuses on those who use an enterprise to commit crimes. White-collar offenders almost always use an enterprise, as defined by RICO, to accomplish their crimes; their deeds require a collective endeavor and use of the resources of an existing organization. Additionally, RICO contains a private attorney general provision giving a civil cause of action to anyone who has been damaged in her business or property.

Second, because of globalization and the Internet, white-collar crime is on a grander scale, wreaks greater havoc on economic stability, is easier to commit, and is easier to conceal, than ever before. Effective tools are needed to combat the threats posed by white-collar crime. Used properly, RICO can be a highly effective weapon against white-collar crime.

Third, RICO, especially civil RICO, historically has not been used effectively against white-collar crime. Civil RICO has been overused to pursue frauds that do not meet RICO's elements. Understandably, this has caused courts and the business community to resent RICO. At the same time, RICO has not been used as much as it could be against sophisticated, wide-ranging frauds. RICO should be deployed more often by the private bar and by the government to target sweeping white-collar schemes.

Fourth, a major reason for RICO's inappropriate use, both its overuse and underuse, is its complexity. RICO's approach to white-collar wrongdoing is novel and effective, but its terms are abstract and the courts have made a confusing mess of RICO

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319. See *supra* Part V.C.1 for a discussion of *Boyle*'s joint purpose requirement.

320. See *supra* notes 280–81 and accompanying text for a discussion of the relationship needed in a RICO action.

321. See *Boyle*, 556 U.S. at 947–49 (discussing the broad interpretation of what action constitutes the creation of a RICO group).

322. *Boyle*, 556 U.S. at 946.

as they have strived to sort out its elements.

Fifth, this Article seeks to clear up the existing jumbled jurisprudence regarding RICO enterprises. Enterprise is at the heart of RICO. It is also its most misunderstood and misapplied term, especially in civil RICO cases where the presence of legal entities complicates enterprise analysis. This Article sorts through this tangled web. It analyzes existing case law, suggesting which approach makes sense and which does not.

Lastly, this Article offers concrete suggestions for proper analysis of RICO enterprise issues. These suggestions build on established principles of corporate law. They provide a roadmap for straightforward application of RICO even in the most complex situations. Such clarity will help RICO be a robust and necessary tool against white-collar crime.



## APPENDIX

Table A1. Distinctness Analysis

Persons (Defendants)	Enterprise	Outcome
Individual (A)	A + Other individuals	Sufficiently distinct for § 1962(c) purposes <sup>323</sup>
Individual (A) (who is owner of Acme, Inc.)	A + Acme, Inc.	Sufficiently distinct for § 1962(c) purposes <sup>324</sup>
Corporation (Acme, Inc.)	Acme, Inc. + A (employee, officer, or agent of Acme, Inc.)	Not sufficiently distinct for § 1962(c) purposes because A's identity merges with Acme's with the result, Acme = Acme <sup>325</sup>
Corporation (Acme, Inc.)	Acme, Inc. + DFG, Inc. (other fictional entities)	Sufficiently distinct for §1962(c) purposes <sup>326</sup>
Corporation (Acme, Inc.)	Acme, Inc. + Acme, Inc.'s Subsidiaries or Subdivisions	Sufficiently distinct for §1962(c) if all have separate legal identity unless "piercing corporate veil" rules apply <sup>327</sup>
Corporation (Acme, Inc.)	Acme, Inc. + Acme, Inc.'s attorneys	Sufficiently distinct for §1962(c) purposes (unless counsel abdicates legal obligations) <sup>328</sup>

323. See, e.g., *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 447 (5th Cir. 2000) (discussing the distinction between RICO enterprises and RICO defendants).

324. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 160–63 (2001).

325. *Id.* at 163; *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994). It is important to note that there is considerable precedent for the rule that the inverse is sufficiently distinct. Where an individual, A, who is not the owner of Acme, Inc., but is an employee, officer, director, or other obvious agent of Acme, Inc., is the alleged defendant and Acme, Inc. is the alleged "enterprise," courts have found § 1962(c) distinctness present on the ground that this situation naturally fits the language of § 1962(c) (a person employed by or associated with an enterprise). *Cedric Kushner*, 533 U.S. at 164. On the other hand, naming the corporation as the person, and the corporation plus employee as the enterprise, it is "less natural"; one does not speak of a corporation as "employed by" or associated with such an "oddly constructed entity." *Id.*; see also *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc.*, 46 F.3d 258, 268 (3d Cir. 1995) (finding that a claim against individual defendants through a corporate enterprise states a § 1962(c) cause of action); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992) (finding that a § 1962(c) claim can be brought when corporation only has one employee and they are the person while the corporation is the enterprise).

326. E.g., *Cullen v. Margiotta*, 811 F.2d 698, 728 (2d Cir. 1987); *St. Paul Mercury*, 224 F.3d at 447.

327. See *supra* note 210 and accompanying text for a discussion of the procedures for piercing the corporate veil.

328. *Living Designs, Inc. v. E.I. DuPont de Nemours*, 431 F.3d 353, 361–362 (9th Cir. 2005).

**Table A2.** Necessary Components of an Association-in-Fact Enterprise

<p><b>(1) Purpose</b><sup>329</sup></p> <ul style="list-style-type: none"> <li>• Is there a “venture,” “undertaking,” or “project”?<sup>330</sup></li> <li>• Is there a “common” purpose among all enterprise members?<sup>331</sup></li> <li>• Is there a “group of persons associated together for a common purpose of engaging in a course of conduct”?<sup>332</sup></li> </ul> <p><b>(2) “Relationships among those associated with the enterprise”</b><sup>333</sup></p> <ul style="list-style-type: none"> <li>• Is there “coordination among members”?<sup>334</sup></li> </ul> <p><b>(3) “Longevity sufficient to pursue the enterprise’s purpose”</b><sup>335</sup></p> <ul style="list-style-type: none"> <li>• Must “remain in existence long enough to pursue a course of conduct,”<sup>336</sup></li> <li>• May be an “association-in-fact” enterprise if its “associates engage in spurts of activity punctuated by periods of quiescence.”<sup>337</sup></li> </ul>
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329. *Boyle v. United States*, 556 U.S. 938, 942–46 (2009).

330. *Id.* at 946.

331. *Id.* at 948; *Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1025–26 (8th Cir. 2008).

332. *United States v. Turkette*, 452 U.S. 576, 583 (1981).

333. *Boyle*, 556 U.S. at 946.

334. *Id.* at 947 n.4.

335. *Id.* at 946.

336. *Id.* at 948.

337. *Id.* It may be possible to infer “structure” from “evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity.” *Id.* at 947.

**Table A3.** Proving an Association-in-Fact Enterprise

- May be “informal” and “not much structure is needed,”<sup>338</sup>
- May be “loosely and informally organized,”<sup>339</sup>
- Need not have “long term master plan or agreement,”<sup>340</sup>
- May be “proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.”<sup>341</sup>

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338. *Id.* at 948.

339. *Id.* at 941.

340. *Id.*

341. *United States v. Turkette*, 452 U.S. 576, 583 (1981).

**Table A4.** Not Necessary to Find an Association-in-Fact Enterprise<sup>342</sup>

Ongoing organization
Core membership that function(s) as a continuing unit
An ascertainable structural hierarchy distinct from the charged predicate acts
Hierarchy
Role differentiation
Unique modus operandi
Chain of command
Professionalism and sophistication of organization
Diversity and complexity of crimes
Membership dues, rules and regulations
Uncharged or additional crimes aside from predicate acts
Internal discipline mechanism
Regular meetings regarding enterprise affairs
Enterprise name
Initiation ceremonies and rituals
Dues

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342. *Boyle*, 556 U.S. at 947–50; *Turkette*, 452 U.S. at 583.

