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I. Introduction

The Racketeer Influenced Corrupt Practice Act (RICO),[1] 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 makes it a crime and provides a civil cause of action for those whose business or property has been damaged by RICO conduct. For a variety of reasons, criminal RICO has fallen into disfavor.[2] 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 parts. Part One provides an overview of RICO, focusing on

[1] Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§1961-1968). Excellent resources on RICO include: JED S. RAKOFF & HOWARD G. GOLDSTEIN, RICO CIVIL AND CRIMINAL LAW & STRATEGY (LJSP 1989) [hereinafter RAKOFF & GOLDSTEIN]; James D. Calder, *RICO's Troubled . . . Transition: Organized Crime, Strategic Institutional Factors and Implementation Delay, 1971-1981*, 25 CRIM. JUSTICE REV. 1 (2000) [hereinafter Calder, *RICO's Troubled Transition*]; Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Part I & II*, 87 COLUM. L. REV. 661 (1987) [hereinafter Lynch, *RICO: Being Criminal*]; G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on "Bennett v. Berg"*, 58 NOTRE DAME L. REV. 237 (1982) [hereinafter Blakey, *RICO Civil Fraud*]; G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L. Q. 1009 (1980) [hereinafter Blakey & Gettings, *Basic Concepts*]; *See also* Mark Gordon, *Ideas Shoot Bullets: How the RICO Act Became a Potent Weapon in the War Against Organized Crime*, 26 CONCEPT (2003) [hereinafter Gordon, *RICO, Potent Weapon*]; Gregory J. Wallance, *Outgunning the Mob*, 80 ABA J. 60 (1994) [hereinafter Wallance, *Outgunning the Mob*].

[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; with the expansion of forfeiture statutes, RICO is no longer needed to obtain a convicted defendant's property by forfeiture. See text accompanying notes _____ *infra*.

the public policy rationale of the statute. Part Two reviews the organized crime context in which RICO was passed. Part Three explains why RICO is an especially effective tool against white collar crime. Part Four 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. Part Four 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. Part Five demonstrates this vitality of the guidance provided in Part Four by applying it to a hypothetical pharmaceutical fraud. Part Six 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.

II. Overview of RICO

A. The RICO Statute[3]

[3] Relevant legislative history on RICO includes: Senate Special Committee to Investigate Organized Crime in Interstate Commerce [First] Interim Report, S. REP. NO. 2370, 81st Cong., 2d

The RICO statute is complex.[4] It is "wide-ranging," "amorphous,"[5] and "capacious."[6]

Sess. (1950) [hereinafter *S. REP. NO. 2370*]; Interim Report on Investigations on Gambling and Racketeering in Florida, S. REP. NO. 81-2370, 81st Cong., 2nd Sess. 16 (1950) [hereinafter *S. REP. NO. 81-2370*]; Second Interim Report, S. REP. NO. 141, 82nd Cong., 1st Sess. (1951) [hereinafter *S. REP. NO. 141*]; Third Interim Report, S. REP. NO. 307, 82nd Cong., 1st Sess. (1951) [hereinafter *S. REP. NO. 307*]; Final Report, S. REP. NO. 725, 82nd Cong., 1st Sess. (1951) [hereinafter *S. REP. NO. 725*]; Hearings of the Senate Special Committee to Investigate Organized Crime and Interstate Commerce; Second Interim Report of Special Committee to Investigate Organized Crime in Interstate Commerce, S. REP. NO. 82-141, 82d Cong., 1st Sess. 33 (1951) [hereinafter *S. REP. NO. 82-141*]; Third Interim Report of Special Committee to Investigate Organized Crime in Interstate Commerce, S. REP. NO. 82-307, 82nd Cong., 1st Sess. 170-181 (1951) [hereinafter *S. REP. NO. 82-307*]; Interim Report of Select Committee in Improper Activities in Labor and Management Fields, S. REP. NO. 85-1417, 85th Cong. (1958) [hereinafter *S. REP. NO. 85-1417*]; Second Interim Report of Select Committee on Improper Activities in Labor and Management Fields, 2 pts., S. REP. NO. 86-621, 86th Cong., 2d Sess. (1960) [hereinafter *S. REP. NO. 86-621*]; James R. Hoffa, and Continued Underworld Control of NY Teamster Local 239, S. REP. NO. 87-1784, 87th Cong., 2d Sess. (1962) [hereinafter *S. REP. NO. 87-1784*]; *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcommittee on Investigations of the Committee on Government Operations*, 88th Cong., 1st Sess. (1963) [hereinafter *Hearings; Permanent Subcomm. 1963*]; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter *PRESIDENT'S COMM'N REPORT*]; *Measures Relating to Organized Crime: Hearings on S. 30, S. 994 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st CONG., 1st SESS. 496 (1969) [hereinafter *Hearings: Measures Relating to Organized Crime*]; S. REP. NO. 91-617, 91st Cong., 1st Sess.; *Report, Organized Crime Control Act of 1969, Senate Comm. on Judiciary*, 91st Cong., 1st Sess. 76, 79, 83 (1969) [hereinafter *S. REP. NO. 91-617*]; *Organized Crime Control Act of 1969, Hearings before Subcomm., No. 5, Comm. on the House Judiciary*, 91st Cong, 2d Sess. (multiple dates in 1970) [hereinafter *Hearings: Organized Crime Control*]; House Rep. No. 91-1549, Organized Crime Control Act of 1970, 91st Cong., 2d Sess. [hereinafter *H.R. REP. NO.* 91-1549]; *Amending The Racketeer Influenced and Corrupt Organizations Act*, S. REP. NO. 100-459, 100th Cong., 2d Sess. (1988) [hereinafter *S. REP. NO. 100-459*]; S. REP. NO. 101-407, *Federal Government's Use of the RICO Statute and Other Efforts Against Organized Crime*, 101st Cong., 2d Sess. (1990) [hereinafter *S. REP. NO. 101-407*]; House Rep. 102-312, *RICO Amendments Act of 1991* [hereinafter *Amending RICO*].

[4] Hemi v. City of New York, 130 S.Ct. 983, 995 (2010) (Breyer, Dissenting).

[5] *Cf. Sedima*, 473 U.S. at 524. As Congress noted, twenty years after passing RICO, "the meaning of many of the ...new concepts and broad remedies...[of RICO] is still unclear." *SEN. REP. NO. 100-459, supra* note 3 at 2.

Courts have "expressed dismay at [its] . . . loose wording, . . . its overbreadth, and . . . its lack of clarity and specificity."[7] It applies to a wide range of conduct, contains abstract terms that are "not easily correlated with everyday experience,"[8] and operates with an unusual public-private enforcement scheme.[9]

There are four types of conduct prohibited by RICO: (1) investing proceeds from a pattern of racketeering activity in an enterprise,[10] (2) acquiring or maintaining control over an enterprise through a pattern of racketeering activity, (3) conducting or participating in the affairs

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The Supreme Court clarified RICO's other unusually broad term, "pattern" in H.J. Inc. v. Northwestern Bell Tele. Co., 492 U.S. 229 (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." *Id*. at 249.

[6] RAKOFF & GOLDSTEIN, *supra* note 1 at §7.01. As Rakoff and Goldstein have noted, RICO's "terms are artificial and not easily correlated with everyday experiences. *Id*. at §1.01.

[7] *S. REP. NO. 100-459*, *supra* note 3 at 2. *Quoting* Judge Kane, *In Re Dow Co. Sarab and Products Liability Litigation*, 666 F.Supp. 1466 (D. Colo. 1987): "RICO is a recurring nightmare for federal courts across the country."; Judges Wood, Cummings and Hoffman, *Schact 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."; Judge Shadur, *Wolin v. Hanley Dawson Cadillac, Inc.,* 636 F.Supp. 890, 891 (N.D. Ill. 1986): "RICO's lure of treble damages and attorney's 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 at §§1.01, 7.01.

[8] RAKOFF & GOLDSTEIN, *supra* note 1 at §1.01. "[RICO is] difficult to apply because its terms are artificial and not easily correlated with everyday experience."

[9] Sedima v. Imrex, 473 U.S. 479, 483 (1985).

[10] RICO specifies that the "enterprise" must be "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a)(b)(c).

of an enterprise through a pattern of racketeering activity, and (4) conspiring to do any of these types of conduct.[11] 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 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,[12] and fines of $250,000 per offense ($500,000 per offense if the defendants is an organization).[13] Those found civilly liable also face serious consequences: treble damages, and payment of attorneys' fees and costs.

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[14] 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.[15] These are the same elements federal prosecutors must prove when prosecuting a criminal case alleging mail fraud. In a RICO civil action, however,

[11] 18 U.S.C. § 1962.

[12] 18 U.S.C. § 1963.

[13] 18 U.S.C. § 3571.

[14] 18 U.S.C. § 1964(c).

[15] Skilling v. United States, 130 S.Ct. 2896 (2010).

plaintiffs prove these elements by a preponderance of the evidence rather than beyond a reasonable doubt.[16] Thus, private plaintiffs plead, prove, litigate criminal issues, and 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,[17] compensable damage,[18] standing,[19] reliance,[20] statute of limitations,[21] and extraterritorial application.[22] In addition, there are remedies available in civil RICO cases that are not available in criminal RICO matters. Divestiture of funds, dissolution and reorganization of corporations or other business structures, even restrictions on future activities are available if brings a civil RICO action.[23] While the weight of authority indicates that these equitable remedies are available only to the federal

[16] *Cf.* Sedima v. Imrex, 473 U.S. 479, 491 (1985) (Court notes that it "need not decided the standard of proof issue today" but opins that "[t]here is no indication...Congress sought to depart from the preponderance standard of proof for civl RICO actions brought under §1964(c).

[17] Anza v. Ideal Steel Supply Corp. 547 U.S. 451, 458-461 (2006); Holmes v. SEC Investor Prot. Corp, 503 U.S. 258, 268 (1992).

[18] *See, e.g.*, Ironworkers Local Union 68 v. Astra Zeneca Pharmaceutical LP, 634 F.3d 1352 (11th Cir. 2011); Williams v. Mohawk, 465 F.3d 1277, 1285 (11th Cir. 2006).

[19] *Holmes*, 503 U.S. at 268; Beck v. Prupis, 529 U.S. 494, 499 (2000); NOW v. Scheidler, 510 U.S. 249 (1994).

[20] Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 653-660 (2008).

[21] Agency Holding Co. v. Malley-Duff & Associates, 483 U.S. 143 (1987).

[22] Morrison v. National Australia Bank Ltd., ___ U.S. ___, 130 S.Ct. 2689 (2010).

[23] 18 U.S.C. § 1964(a).

government and not to RICO plaintiffs in private civil actions, the United States Supreme Court has not ruled on this issue.[24]

RICO contains three terms of art: (1) "racketeering activity," (2) "*pattern* of racketeering activity, and (3) "enterprise." The definition of "racketeering activity" is straight-forward. Section 1961(1) of RICO simply lists the crimes that qualify as "racketeering activity." Generic state crimes (such as murder, kidnapping, robbery, etc) and approximately 150 specifically enumerated federal offenses qualify as "racketeering activities."[25] 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. Once 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, media and computer program counterfeiting.

A single act of racketeering activity does not render one liable under RICO. Rather, one

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[24] *See, e.g.*, Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 967-68 (9th Cir. 1999); Johnson v. Collins Enter. Co., 199 F.3d 710, 726 (4th Cir. 1999); In re *Fredeman Litig.*, 843 F.2d 821, 830 (5th Cir. 1988); Trane Co. v. O'Connor Secur., 718 F.2d 26, 28 (2d Cir. 1983).

The Court accepted certiorari on the question "[w]hether RICO authorizes a private party to obtain an injunction in Scheidler v. NOW, 547 U.S. 9, 126 S.Ct. 1264, 1269 (2006), but resolved the case on other grounds and did not address this issue. *Id.*

[25] 18 U.S.C. § 1961(1).

must commit a "*pattern*" of racketeering activity. RICO defines "pattern of racketeering activity" as at least two acts of racketeering activity occurring within a ten year time period.[26] 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),[27] and must demonstrate "*continuity*." The 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."[28]

"Enterprise" is the most fluid concept in RICO.[29] 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."[30] Part Four of this article discusses this

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[26] "'[P]attern 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 . . . ." 18 U.S.C. § 1961(3).

[27] This issue of whether the acts related enough to satisfy *H.J. Inc.*'s "relatedness" requirement but not so related as to merge into one act (and thus defeating RICO's requirement of *two* racketeering activities), arises in RICO cases where mail fraud (or mail fraud 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. Other courts hold that separate mailings even in perpetration of a single scheme, are separate acts. *See* RAKOFF & GOLDSTEIN, *supra* note 1 at §1.04[2][b][iii].

[28] H.J. Inc. v. Northwestern Bell Telephone Co, 492 U.S. 229, 242 (1989) ("pattern" must show "relationship" among the racketeering acts and "continuity" of the acts).

[29] As the Seventh Circuit noted, "Discussion of this person/enterprise problem under RICO can easily slip into a metaphysical or ontological style of discourse." Haroco Inc. v. ANB, 747 F.2d 384, 401 (7th Cir. 1984).

[30] 18 U.S.C. §1961(4).

element.

B. Policy Rationale

When passed, RICO was viewed as "an aggressive initiative to supplement old remedies and develop new methods for fighting crime."[31] 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."[32] In passing RICO, Congress specifically intended to craft a "fresh,"[33] "novel,"[34] "new,"[35] "innovative,"[36] and "imaginative"[37] statute to combat sophisticated crime. RICO, one of the most "daunting"[38] statutes in existence, is based upon three facts about crime.

1. Groups Are More Powerful Than Individuals

RICO recognizes that individuals are more powerful when they work together as a group. This is an obvious point whether we are talking about prehistoric cave dwellers, ball teams, Girl Scouts, or criminals. Groups can execute complex activities though division of duties and

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[31] *Sedima*, 473 U.S. at 498.

[32] RAKOFF & GOLDSTEIN, *supra* note 1 at §1.02.

[33] *Hearings: Organized Crime Control*, *supra* note 3 at 331.

[34] *Id*. at 401.

[35] *S. REP. NO.* 91-617, *supra* note 3.

[36] *Hearings: Organized Crime Control*, *supra* note 3 at 39.

[37] *Id.*

[38] Lynch, *RICO: Being Criminal*, *supra* note 1 at 680.

sharing of talents. They can operate simultaneously in multiple geographical areas. Members of a group bring to a collective endeavor their experience, their bravado, their network of suppliers, customers, and victims.

2. An Organization's Resources Help Criminals

The second fact RICO 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. 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]."[39] RICO seeks to target offenders who use the

[39] *Hearings on S. 30, supra* note 3. The statement of findings for the Organized Crime Control Act of 1970, of which RICO is one section, state: "The Congress finds that...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..." 84 Stat. 922-923.

resources of organizations to commit more crimes, wreak greater havoc, harm more people, and conceal wrongdoing more effectively, than if the offender worked alone.

3. An Example: Penn State--Second Mile--Sandusky

Although no RICO charges, criminal nor civil, have been brought in the recent Penn State sex abuse scandal,[40] RICO fits the alleged facts perfectly. This scandal provides an illuminating example of how RICO's enterprise concept works. If allegations are true and Jerry Sandusky, a person "associated with" Penn State, a public university, and Second Mile, a charity Sandusky founded to help "at risk" youth, used Penn State resources (physical facilities such as the athletic locker room, and access to events such as football games, banquets, and team practices) and

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[40] 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 15-year time period. 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.

Sandusky founded Second Mile charity in 1977 to offer mentoring, sleep away summer camps and other services to disadvantaged youth. 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 . . . ." Second Mile's net assets in 2009 were $8,974,689. U.S. DEPT. OF INTERNAL REVENUE SERVICE, FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, filed by "The Second Mile," dated December 20, 2010.

Although he retired from Penn State in 1999, Sandusky retained access to Penn State facilities thereafter. 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. *See, e.g.*, Mark Viera, *A Sex Abuse Scandal Rattles Penn States's Football Program*, N.Y. TIMES, Nov. 6, 2011 at A1; Mark Viera, *A Focus on Paterno's Reaction to Allegation*, N.Y. TIMES, Nov. 7, 2011 at D1; Pete Thamel, *"Nothing Changed, Nothing Stopped,"* N.Y. TIMES, Nov. 8, 2011 at B1; *Penn State's Culpability*, N.Y. TIMES, Nov. 9, 2011 at A1; Mark Viera & Jo Becker, *More Accusations Surface in Penn State Abuse Case*, N.Y. TIMES, Nov. 15, 2011 at B1; Barry Bearak, *The Sandusky They Knew*, N.Y. TIMES, Nov. 16, 2011 at B1; Bill Pennington, *Accusers Plan to Sue Sandusky's Foundation*, N.Y. TIMES, Nov. 25, 2011 at B1; Mark Viera, Joe Becker & Pete Thamel, *Sandusky's Charity Makes Plans to Fold*, N.Y. TIMES, Nov. 19, 2011 at D1.

Second Mile resources (access to youth) to commit racketeering activity (sexual exploitation of children), Penn State + Second Mile + Sandusky constitute an "enterprise." Sandusky, the defendant, "conducted the affairs" of this "enterprise" through a pattern of racketeering activity, a section 1962(c) violation.[41]

This scandal demonstrates what 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 Second Mile. Schools, courts and community programs funneled children to Second Mile as a respectable organization that could help children in need. Second Mile funneled these children to Sandusky. For Sandusky's purposes, these children were especially promising victims: many were from broken homes where parental supervision was lax and were from disadvantaged backgrounds where the invitations to the athletic events Sandusky extended were especially cherished. Similarly, Penn State, by allowing Sandusky, who was no longer affiliated with the University, to have wide access to exclusive events such as ball games, sports banquets, ball practices, and non-public facilities such as football locker rooms, enhanced, if not made possible, the years of Sandusky's alleged sexual abuse of children.

Penn State, 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

[41] 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. For example, Penn State could be charged as the defendant and Penn State + Sandusky could be pled as the "enterprise" (assuming since 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, see Part IV(B) and (C) *infra*, and if the case is civil, the availability of a "deep pocket" as defendant.

institutions and their embrace of Sandusky despite the years of rumors, suspicions and specific complaints to law enforcement that would have brought down others, allowed Sandusky to continue his abuse of children longer than most sexual predators. In short, the Penn State/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.

4. Complex Crime is Difficult to Investigate

The third fact RICO recognizes about crime is that complex crime can be difficult to investigate and therefore takes significant law enforcement resources. When crime operates through an organization, it is difficult to penetrate the organization, identify its leaders, and build a case against culpable individuals. The most culpable individuals 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 stock broker has embezzled our funds, especially if our quarterly reports continue to reflect large gains. 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." When RICO was passed, its private cause of action was

recognized as "aggressive," "novel," and able to "fill prosecutorial gaps."[42] 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.[43] RICO's private attorney general 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.[44] 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

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[42] *Hearings on S. 30, supra* note 3 at 494. 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 at §1.01.

[43] Congress recognized the importance of the private cause of action when it passed RICO:

> "Civil RICO helps fight the battle against criminal fraud 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, supra* note 3 at 3.

See also, Report of the Association of the Bar of the City of New York, *Hearings: Organized Crime Control*, *supra* note 3 at 330-331 (Referring to RICO "particularly its civil remedy provision" as "offer[ing] a fresh and potentially very useful approach to the fight against organized crime...." ; referring to RICO as a "novel" legislative proposal.")

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

pursue the wrongful conduct and perpetrators.[45] 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. RICO's private attorney general provision also allows class actions to be brought. This allows litigants, especially those who have suffered too small an amount of loss to justify bringing a lawsuit by themselves, 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, (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, (3) RICO plaintiffs bring experienced, talented legal counsel with the resources to investigate and prove RICO cases, and (4) the class action option allows RICO plaintiffs to pool information and resources. As the next section discusses, the full potential of civil RICO's benefits have not yet been realized.

5. 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 create problems. RICO's private

[45] *Id*. at 908, 940-948.

attorney general concept has generated as much mischief as benefit. Potential problems begin with the first decision: 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. Whereas prosecutors, as public officials, are obliged to bring cases that serve the public interest,[46] private attorneys are not; they are motivated by recoveries of money.[47] 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. Too many of the civil RICO cases

[46] 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. ATTORNEYS MANUAL, Title 9, §9-110.200 et seq. This manual instructs prosecutors that "[u]tilization of the RICO statute, more so than most federal criminal sanctions, requires particularly careful and reasoned application." *Id*.

[47] As Justice Marshall noted in his dissent to Sedima v. Imrex, 473 U.S. 479, 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 attorneys' fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud . . . . "

Id. at 503 (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 502.

brought by private attorneys have lacked merit.[48] As Congress noted after twenty-plus years of experience with RICO: "[While t]here is 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."[49]

6. 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.

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[48] "It is in the area of civil RICO that the greatest abuses of the statute have been alleged." *S. REP. NO. 100-459, supra* note 3 at 2. At the time RICO was being considered for passage, some legislators and public policy experts 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."

Dissenting Views of Representative John Conyers, Jr.; Representative Abner Mikva, Representative William F. Ryan, *H. R. REP. NO. 91-1549, supra* note 3 at 181.

[49] *SEN. REP. NO. 100-459, supra* note 3 at 10; *H. R. REP. NO. 91-1549, supra* note 3 at 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. 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.

II. Why RICO Was Passed: Concern Over Organized Crime and Beyond

A. RICO's Focus on Organized Crime

RICO was passed after twenty years of intense scrutiny by Congress, the Department of Justice and the public of organized crime.[50] Public attention to organized crime began in the early 1950's with hearings held by a Congressional committee chaired by Senator Estes Kefauver.[51] Riveting testimony of "criminals and racketeers" using "vicious practices" to take over every imaginable type of legitimate businesses dominated national news.[52] In 1954, the United States Department of Justice created the Organized Crime and Racketeering section of the Criminal Division.[53] By 1960, infiltration of labor unions by organized crime captivated public news.[54] In 1961, Robert F. Kennedy, as Attorney General and with full support of the Kennedy Administration, made prosecution of organized crime a top priority.[55] In 1963, a member of an organized crime syndicate, Joseph Valachi, riveted the nation in televised hearings

[50] For discussions of this history see Lynch, *The Crime of Being Criminal*, *supra* note 1 at 666-680.

[51] *S. REP. NOS.* 2370, 141, 307, 725, *supra* note 3.

[52] *See S. REP. NO. 82-141, supra* note 3 at 33; *S. REP. NO. 82-307, supra* note 3 at 170-181; *S. REP. NO. 81-2370, supra* note 3 at 16.

[53] Calder, *"Troubled Transition" supra* note 1 at 36.

[54] *S. REP. NOS. 87-1784, 86-621, 85-1417, supra* note 3.

[55] Calder, *Troubled Transition, supra* note 1 at 36.

before a Senate subcommittee.[56] The "Valachi hearings" were the first time a "mob" insider had confirmed the existence of organized crime as an organization and detailed its operations. Valachi, a Genovese crime family member, used the term "Cosa Nostra" ("our thing") to describe an organized crime syndicate.[57] Valachi testified about Cosa Nostra's code of conduct, power hierarchies and criminal activities.[58] 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"[59] report,[60] and recommended legislation to combat organized crime.[61] Members of the Commission included academics[62] and members of Congress, specifically Senators John L. McClellan and Roman L. Hruska, and Representative Richard H. Poff. These Congressmen sheparded through Congress legislation which became RICO.[63]

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[56] *Hearings; Permanent Subcomm. 1963, supra* note 3 at 5.

[57] *S. REP. NO. 101-407, supra* note 3 at 2-3.

[58] *Id.*

[59] Blakey, *RICO Civil Fraud, supra* note 1 at 252.

[60] PRESIDENT'S COMM'N REPORT, *supra* note 3.

[61] The Organized Crime Control Act of 1970, which includes RICO, grew out of the Commission's recommendations. Lynch, *RICO: Being Criminal, supra* note 1 at 667 and n.25.

[62] 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, *RICO Civil Fraud, supra* note 1 at 253 n.46.

[63] Blakey, *RICO Civil Fraud, supra* note 1 at 253 n.47, 253-280. The Senate passed S. 30 on January 23, 1970 by a vote of 73 to 1. 116 CONG. REC. 25, 192 (1970). The House passed S. 30 by a vote of 431 to 26, 116 CONG. REC. 35, 363 (1970), after amending it to include the

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 prosecution."[64]

Based upon their years of investigative hearings, RICO's drafters viewed "organized crime" as a monolithic group comprised of Italians. However, they realized they could not define organized crime in ethnic terms and withstand constitutional challenge.[65] Thus, instead of focusing on a particular actor, RICO's drafters took a "functional" approach and focused on conduct. 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

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private cause of action codified at 18 U.S.C. §1964(c), H.R. REP. NO. 91-1549, Organized Crime Control Act of 1970, 91st Cong., 2d Sess. at 181. The Senate accepted the amended House version and RICO was signed into law on October 15, 1970. The Senate sponsors of S. 30, Senators McClellan and Hruska, viewed the House's amendments as minor and recommended passage of S. 30 as amended by the House without a reconciling conference. The Senate approved S. 30 as amended by a voice vote. 116 CONG. REC. 36, 280 (1970).

[64] G. Robert Blakey, *Debunking RICO's Myriad Myths*, 64 ST. JOHNS L. REV. 701, 703 (1991). 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 profits, . . . organized crime has found it necessary to corrupt the institutions of our democratic processes . . . . 115 CONG. REC. 5874 (1969).

[65] Lynch, *RICO: Being Criminal*, *supra* note 1 at 686-687.

criminal acts considered typical of organized crime would be treated the same as the Mafia capo."[66]

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. As one commentator explained, "Buried in RICO's legalese is a simple insight. In this century, organizations control . . . of society . . . . Yet, the criminal law prior to RICO had, for the most part, addressed only individuals."[67] The success of RICO was epitomized by the prosecution in 1985 of five organized crime families in New York. The indictment alleged that the "New York Mafia Commission" directed the relationship among the five crime "families." Investigated by 200 federal agents with use of court-ordered electronic surveillance, the defendants were convicted of 17 racketeering acts and 20 related charges of extortion, labor payoffs and loan sharking.[68] 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.[69] The text of RICO clearly

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[66] *Id.* at 687-688.

[67] Wallance, *Outgunning the Mob, supra* note 1 at 62. Gordon, *RICO Potent Weapon, supra* note 1.

[68] John William Tuohy, *A RICO Interview*, GAMBLING MAGAZINE 9 (2002).

[69] *See, e.g.*, Lynch, *RICO: Being Criminal, supra* note 1 at 674, 683, 684, 697; Calder,

covers white collar crimes. When passed, thirty percent of the federal offenses listed in RICO as "racketeering acts" were white collar crimes.[70]

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."[71] Senator Roman L. Hruska, who helped shepard RICO through Congress, consistently focused on RICO's applicability to business frauds, referring to crime affecting "brokerage houses, accounting firms, shareholders and creditors."[72] 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."[73] Senator McClellan addressed the objection that RICO applied beyond organized crime, specifically noting in doing so, RICO's application to white collar crime:

> "[T]he curious objection as been raised to S. 30 . . . [is 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,

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Troubled Transition, supra note 1 at 40, 48.

[70] These include mail fraud, wire fraud, securities fraud (no longer a racketeering act, per amendments in 1995, *Private Securities Litigation Reform Act*, PL 104-67, codified 15 U.S.C. § 78a), bankruptcy fraud, transportation of property taken by fraud, embezzlement from unions, corrupt welfare fund payments.

[71] Organized Crime Control Act of 1970, 84 Stat. 922-23 (1970).

[72] 113 CONG. REC. 17,997-18,002 (1967).

[73] 116 CONG. REC. 591-92 (1970).

> 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."[74]

RICO supporters, such as the Chamber of Commerce,[75] and RICO critics, such as the Association of the Bar of the City of New York,[76] 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, including commercial and other fraud.[77]

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.

III. RICO and White Collar Crime

[74] 116 CONG. REC. 18, 913-914 (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 liberty is permissible. S. 30 is objectionable on civil liberty grounds, it is suggested, because its provisions have an incidental reach beyond organized crime. Coming from those concerned with civil liberty 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. 35344 (1970).

[75] 116 CONG. REC. 6708 (1970).

[76] *Hearings: Organized Crime Control*, *supra* note 3 at 294 (RICO "sweep[s] far beyond the field of organized crime.") Another critic, Congressman Abner J. Mikva, also objected that S. 30 reached beyond organized crime. 116 CONG. REC. 35, 196 (1970).

[77] *See, e.g.*, Blakey, *RICO Civil Fraud, 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 federal criminal and civil remedies in a field traditionally occupied by common law fraud."

A. Characteristics of White Collar Crime

The term "white collar crime" was coined by a sociologist, Edwin Sutherland, in 1939.[78] Sutherland focused on the characteristics of perpetrators, defining white collar crime as offenses crime committed by "person(s) of respectability and high social status."[79] Other attempts to define white collar crime have focused on conduct, defining white collar crime as "an illegal act for personal or organizational gain."[80] Whichever definitional approach one takes, white collar crime has the following characteristics: it has a hybrid civil/criminal nature,[81] 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.

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

Prosecutorial resources are limited. Prosecutors are the gatekeepers to these resources. Many factors affect a prosecutor's decision as to which cases should be prosecuted. The presence of viable civil actions by victims of crime against perpetrators is one such factor. Difficulty in proving the elements of an offense and the amount of resources a particular case

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[78] Geis & Goff *introduction* to E. SUTHERLAND, WHITE COLLAR CRIME: THE UNEXPURGATED VERSION at ix (1983).

[79] E. SUTHERLAND, *supra* note 80 at 7.

[80] A. REISS & A. BIDERMAN, DATA SOURCES ON WHITE-COLLAR LAW BREAKING 4 (1980); Edelhertz, *The Nature, Impact and Prosecution of White Collar Crime*, in CRIME AT THE TOP 44-45 (1978).

[81] A. REISS & A. BIDERMAN, *supra* note 82 at 2.

will take are other factors. Pursuing a routine white collar case easily takes twenty times, even a hundred times, the investigative, pre-trial 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 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. With its treble damages and "racketeering" stigma, RICO offers all of these benefits. A fourth factor prosecutors consider in deciding whether to pursue a case is the amount of loss at issue. *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. 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.[82] 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.[83] This is due, in part, to the fact that the white collar

[82] *White Collar Crime: Hearing Before the Senate Comm. on the Judiciary, Pt. 1*, 99th Cong., 2nd Sess. 27 (1986) [hereinafter *White Collar Crime*] (testimony of United States Deputy Attorney General D. Lowell Jensen) at 27; P. FINN & A. HOFFMAN, PROSECUTION OF ECONOMIC CRIME 4 (1976).

[83] Bucy, *Information as a Commodity, supra* note 44 at 916; See also A. BEQUAL, WHITE COLLAR CRIME: A 20TH CENTURY CRISIS 12, 65 (1978) at 13; E. SUTHERLAND, *supra* note 80 at 232; Edelhertz, *supra* note 82, at 51.

perpetrator usually is in a position of trust to the victim.[84] 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.[85] 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.[86] White collar crime often is imbedded within an organization where lines of authority, scope of duties, and full knowledge of transactions is diffuse.[87] 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.[88]

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

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[84] *White Collar Crime*, *supra* note 84 at 27 (testimony of United States Deputy Attorney General D. Lowell Jensen).

[85] *White Collar Crime*, *supra* note 84 at 27 (testimony of United States Deputy Attorney General D. Lowell Jensen).

[86] J. GARDINER & T. LYMAN, THE FRAUD CONTROL GAME 87 (1984) at 106.

[87] *White Collar Crime*, *supra* note 84 at 103 (testimony of Professor Stanton Wheeler, Yale Law School).

[88] *White Collar Crime, supra* note 84 at 103 (testimony of Professor Stanton Wheeler, Yale Law School).

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. 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. 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 funds stolen 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. This laundering requires cooperation, usually from participants additional to the original fraudsters. 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.[89]

[89] 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

(*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* 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.

(1) RICO's Criminal/Civil Options. RICO may be pursued criminally or civilly by the Department of Justice, or civilly by private plaintiffs. Three facts: 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.

First, as noted *supra*, 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.

Second, because defendants in criminal cases have more procedural protections, such as

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enterprise element almost surely is not present and RICO is not an appropriate cause of action. Thus, RICO rarely applies to "garden variety fraud."

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 be more appropriate for situations involving companies, provision of essential services, employees, shareholders and communities impacted by a company's presence. 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.[90]

(2) RICO's Public/Private Options. RICO's public/private enforcement scheme is particularly suited to white collar crime. As noted *supra*,[91] 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. 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

[90] 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, *supra* note 3 at 16-30; *Hearings: Organized Crime Control*, *supra* note 3 at 106.

[91] See text and accompanying notes _____ *supra*.

penetrate the innerworkings 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 charts below demonstrate the importance of civil RICO. As can be seen, over the past twenty years between four to five times as many civil RICO cases have been brought than criminal RICO cases. 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*. Almost certainly, criminal cases involved multiple defendants; thus the total number of criminal RICO cases is considerably less than the totals reflected in these charts.

Civil RICO Cases Filed, 1994-2010[92]	
Year	**Number of civil RICO cases filed**
1994	828
1995	900
1996	849
1997	840
1998	785
1999	763
2000	829
2001	724
2002	760
2003	743
2004	777
2005	781
2006	687
2007	653
2008	684
2009	786
2010	993

[92] ADMINISTRATIVE OFFICE OF THE COURTS, OFFICE OF JUDGES PROGRAMS, STATISTICS DIVISION, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, Tables C-2a and C-2, htttp://www.uscourts.gov/Statistics/StatisticalTablesfortheFederalJudiciary.aspx.

Defendants Indicted in Criminal RICO Cases, 1994-2010[93]	
Year	**Number of Defendants Indicted**
1994	194
1995	188
1996	181
1997	144
1998	214
1999	162
2000	157
2001	110
2002	218
2003	218
2004	156
2005	177
2006	179
2007	110
2008	166
2009	150
2010	---

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 10% of civil cases), and rarely awarded when sought (in 30% of the cases in which punitive damages

[93] U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NUMBER OF DEFENDANTS IN CASES FILED, htttp://bjs.ojp.usdoj.gov/fjsrc/.

were sought).[94] The result: punitive damages are awarded in only 3-5% of all civil cases.[95] Moreover, when awarded, punitive damages are paltry. Median punitive damage awards in state tort cases range from $25,000 to $55,000.[96] These statistics reflect the efforts of Congress and state legislatures which, in recent years, have passed legislation restricting punitive damage awards.[97] In addition, over the past thirty years, courts have imposed constitutional restrictions on punitive damage awards.[98] Whatever the merits of these trends, the result is that there are fewer plaintiffs, watchdogs, whistleblowers and attorneys willing to sue for fraud perpetrated by

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[94] Theodore Eisenberg, Michael Heise, Nicole L. Waters & Martin T. Wells, *The Decision to Award Punitive Damages: An Empirical Study*, http://ssrn.com/abstract=1412864.

[95] *Id.*

[96] U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *Selected Findings, Civil Justice Survey of State Courts: Punitive Damage Awards in Large Counties* (2001) (2005).

[97] In 2005 Congress passed the Class Action Fairness Act (CAFA) of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.) which federalized class actions. CAFA has resulted in more federal filings of cases where class action allegations were raised, Emery G. Lee III and Thomas E. Willging, *The Impact of Class Action Fairness Act of 2005 on the Federal Courts*, FEDERAL JUDICIAL CENTER 1-2 (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 paying rules so that the party that loses a case pays the opposing party's attorneys fees. For an overview of this trend see *Closing the Lottery*, THE ECONOMIST 38 (Dec. 10, 2011).

[98] Beginning in 1989 the Supreme Court rendered decisions that restrict the ability of plaintiffs to bring tort punitive damage actions. Further, in so ruling the Court ventured into a domain traditionally left to the states. BMW of North America, Inc. v. Gore, 517 U.S. 559, 585-86 (1996) (holding, for the first time, that a punitive damage award violated the Fourteenth Amendment); Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001) (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).

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,[99] 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. Globalization and the internet make business fraud easier to commit, greater in scope, and harder to detect. As experts have noted: "[C]ybercrime has the potential to bring devastation [to] legitimate economic markets worldwide."[100]

IV. 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. This formal or informal organization is a RICO enterprise. As noted *supra*, RICO defines "enterprise" as "any individual, partnership, corporation,

[99] *See, e.g.*, Pamela Bucy, Jonathan Diesenhaus, Marc S. Raspanti, Holly Chestnut, Katherine Merrell, Chad Vacarella, *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 CARDOZO L. REV. 1523, 1530- 531 (2010); Pamela H. Bucy, *Games and Stories: Game Theory and The Civil False Claims Act*, 31 FL. St. U. L. Rev. 603, 604 and n. 1 (2004).

[100] Bucy, *Information as a Commodity, supra* note 44 at 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 at WL 282954.

association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[101] 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. Given this broad statutory definition of enterprise, it has fallen upon the courts to interpret RICO "enterprise."

While the lower courts generally have interpreted RICO enterprise narrowly, the Supreme Court consistently interprets the notion of RICO "enterprise" broadly.[102] The Supreme Court has held: "[t]here is no restriction upon associations embraced by the definition [of enterprise]";[103] an "inclusive" definition of enterprise is consistent with "the new domain of federal involvement" created by RICO[104]; even a "loosely and informally organized,"[105] group may qualify as a RICO enterprise; the definition of enterprise has a "wide reach."[106]

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[101] 18 U.S.C. §1961(4).

[102] *See, e.g.*, United States v. Boyle, 556 U.S. 938, 129 S.Ct. 2243, 2246 (2009); Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 661 (2008); NOW v. Scheidler, 510 U.S. 249, 252 (1994); HJ Inv. v. Northwestern Bell Tele. Co., 192 U.S. 229, 249 (1989); Sedima v. Imrex, 479 U.S. 479, 498 (1985); United States v. Turkette, 452 U.S. 576, 589 (1981).

Congress directed that RICO is to "be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904(a), 84 Stat. 947.

[103] *Turkette*, 452 U.S. at 581.

[104] *Id*. at 586.

[105] *Boyle*, 129 S.Ct. at 2241.

[106] *Id*. at 2243; *Cf*. NOW v. Scheidler, 510 U.S. 249, 257 (1994).

In the forty-plus years since RICO was enacted, there have been three key Supreme Court decisions[107] and fewer than a dozen Courts of Appeals decisions[108] addressing RICO enterprise. Two issues dominate these rulings: (1) whether there is an adequate distinction between an "enterprise" and a defendant, and (2) what is required to prove an "association-in-fact" enterprise. 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. 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. 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.

B. The "Distinctness" Issue

1. Statutory Requirements

The "enterprise distinctness" issue becomes relevant when one type of RICO conduct is

[107] *United States v. Turkette*,452 U.S. 574 (1981), *NOW v. Scheidler*, 510 U.S. 249 (1994), and *Boyle v. United States*, 129 S. Ct. 2237 (2009). 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; what kind of structure is necessary before a RICO enterprise exists (minimal as long as three features are present), *Boyle*, 129 S. Ct. at 2244; *See* Part IV (C) *infra*.

[108] 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 20% of these decisions followed by the Eighth Circuit (15%) and the Third Circuit (13%). The First Circuit, with 1.5% of RICO decisions and District of Columbia Circuit, with 2%, have rendered the fewest. [Data on file with Author.]

alleged. As noted *supra*,[109] there are four types of RICO conduct. Section 1962(a)[110] prohibits a person from investing the proceeds of racketeering activity in an enterprise.[111] Section 1962(b)[112] prohibits a person from acquiring or maintaining control over an enterprise through a pattern of racketeering activity. Section 1962(c)[113] 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 sections 1962(a), (b), or (c). Section 1962(c) is, by far, the most common RICO conduct alleged.[114]

As can be seen from the italicized language *supra*, section 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*." By comparison, *any* person may be charged with violations of

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[109] *See* text accompanying notes _____ *supra*.

[110] 18 U.S.C. § 1962(a).

[111] RICO further requires that the enterprise be "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a)(b)(c).

[112] 18 U.S.C. § 1962(b).

[113] 18 U.S.C. § 1962(c).

[114] Section 1962(c) is used much more frequently than sections 1962(a) or (b). This is because the elements of sections 1962(a) and (b) are more difficult to prove. To establish a section 1962(a) case, one must trace proceeds ("invested" in an enterprise) as well as prove that a pattern of racketeering activity and enterprise exists. To establish a section 1962(b) case, one must prove that defendants "acquired or maintained control" over an enterprise through a pattern of racketeering activity. By comparison, in a section 1962(c) case, one must simply prove that the defendant who was associated with or employed by an enterprise participated or conducted the affairs of it through a pattern of racketeering activity. RAKOFF & GOLDSTEIN, *supra* note 1 at §1.06[3].

sections 1962(a), (b) or (d).[115] Because of this difference in statutory language, the courts have held that the "person" charged with violating section 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." The reason for section 1962(c)'s distinctness requirement is simple: one cannot be "employed by or associated with" oneself.[116] The distinctness issue dominates much of RICO jurisprudence since, as noted *supra*,[117] most RICO cases are brought under section 1962(c).

2. Rationale

Before delving into the practical issues raised by the distinctness requirement, it may be helpful to consider first why section 1962(c) imposes this requirement. By adding the qualification that a defendant must be "employed by or associated with" an enterprise, section 1962(c) virtually insures 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.[118]

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[115] The courts are split on whether the person and enterprise must be distinct in §1962(b) cases. *See, e.g.*, Official Publications, Inc. v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989) (requires distinctness); Landry v. Airline Pilots Ass'n Int'l, AFL-CIO, 901 F.2d 404, 425 (5th Cir. 1990) (does not require distinctness).

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); Bishop v. Corbitt Marine Ways Inc., 802 F.2d 122, 123 (5th Cir. 1986); Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 213-214 (10th Cir. 1987).

[116] Haroco v. American Nat'l B & T Co., 747 F.2d 384, 400 (7th Cir. 1985).

[117] See note ___ *supra.*

[118] NOW v. Scheidler, 510 U.S. 249, 257 (1994) ("[Sub]section (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity.")

In this way, section 1962(c) focuses on situations where the enterprise is the conduit (willingly or unwillingly) for the racketeering activity. In other words, in section 1962(c) cases, there must be some link between the racketeering activity and the enterprise.

By comparison with section 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 section 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, section 1962(b) requires no link between *accomplishing* the racketeering activity and the enterprise. The enterprise is the passive victim of whoever violated section 1962(b) by acquiring or maintaining control of the enterprise. As with section 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 it 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

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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 (5th Cir. 2007).

pocket" as the defendant while also pleading the enterprise to comply with the "distinctness" requirement, can be challenging.[119]

This article attempts to sort out the RICO distinctness issue in the following situations: (a) when a legal entity and its members are the defendants, enterprises or participants in an enterprise, (b) when a legal entity is named as one participant in an enterprise, (c) when a legal entity and its subsidiaries or subdivisions are named defendants, enterprises or participants in an enterprise, and (d) 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. 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.[120] Courts consistently have held that the identity

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[119] 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:

> "[T]he 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).

[120] According to the Restatement (Second) of Agency, "Agency is the fiduciary relation which results from the manifestation of consent by one person [principal] to another that the

of the members of a legal entity, as agents of the entity, merge with the entity, with the result that there is no distinctness present if an entity is charged as the "person," and its members, separately or working with the entity, are charged as the "enterprise."[121] The rationale for this rule is that an agent acts on behalf of its organization and an organization can act only through its agents.[122] Thus, if Alice works for Acme, Inc., one could not charge either of the following scenarios and maintain distinctness under section 1962(c):

Insufficient Distinctness	
"Persons" (Defendants)	**"Enterprise"**
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*[123] 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 section 1962(c)'s distinctness requirement. In this case, Cedric Kushner, a

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other shall act on his behalf and subject to his control, and consent by the other to so act." §1. This includes the "power to alter the legal relation between the principal and third persons and between the principal and himself." *Id.* at §12.

[121] Riverwoods Chappaqua Corp. v. Marine Midland Bank, 30 F.3d 339, 344 (2nd Cir. 1994); *See also* Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 263 (2nd Cir. 1995).

[122] 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 . . . .")

[123] 533 U.S. 158 (2001).

corporate promoter of boxing matches, sued an individual, another boxing match promoter (Don King), under RICO for $12 million for alleged fraudulent conduct spanning an eight year time period.[124] Don King Production Inc., of which Don King, the individual, was the President and sole shareholder, was alleged as the "enterprise." Thus the pleadings were as follows:

Pleadings in *Cedric Kushner*	
"Persons" (Defendants)	**"Enterprise"**
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 Court of Appeals affirmed on the ground there was no distinctness between the "person" and the "enterprise." The Supreme Court reversed. 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. The Court explained: "The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its legal status."[125] The Court elaborated: "After 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 individuals who created it, who own it, or whom it employs."[126]

[124] Cedric Kushner Promotions, Ltd. v. Don King et al., 1999 WL 771366 (S.D.N.Y. 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 threats good by cancelling bouts.

[125] *Id.*

[126] *Id.*

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 section 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 section 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.[127] These courts have held that section 1962(c)'s distinctness requirement is met in this circumstance. *Cullen v. Margiotta*[128] is indicative. 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.[129] Thus, the pleadings were as follows:

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[127] *See, e.g.*, Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165-1166 (3d Cir. 1989); River City Markets, Inc. v. Fleming Foods West, Inc., 960 F.2d 1458, 1461-1462 (9th Cir. 1992); United States v. Goldin Industries, Inc., 219 F.3d 1271, 1274-1277 (11th Cir. 2000).

[128] 811 F.2d 698 (2d Cir. 1987) overruled on other grounds, Agency Holding Corp. v. Malley-Duff Associates, Inc., 438 U.S. 143, 156 (1987).

[129] *Id*.

Pleadings in *Cullen v. Margiotta*	
"Persons" (Defendants)	**"Enterprise"**
• Nassau County Republication Comm. & • Town of Hempstead Republication Comm. & • County of Nassau & • Town of Hempstead	• County of Nassau Republication Comm. + • Town of Hempstead Republication 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. 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.[130] The Second Circuit reversed, finding that the jury's answers to specific interrogatories demonstrated sufficient facts to show distinctness. The Court noted: "While we have held that a solitary entity cannot, as a mater 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.'"[131]

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

[130] 811 F.2d at 706, 727 (The Court found that based upon the jury's answers to interrogatories, plaintiffs failed to establish distinctness).

[131] *Id.* at 729-730.

Hempstead, another defendant. They had separate legal existences and each had different goals, officers, employees, leadership, and compensation systems from the other. The Nassau County Republican Committee and the Town of Hempstead did not lose their separate identities simply by cooperating together in the alleged vote-pressuring 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." The distinctness issue will also arise in the inverse, 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." 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.[132]

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*,[133] the Court focuses on the separateness of legal entities when assessing RICO distinctness under section 1962(c). However, the courts of appeals that have considered this scenario have held that a parent and subsidiary are not

[132] For support of this view, see William B. Ortman, *Parents, Subsidiaries, and RICO Distinctiveness*, 73 U. CHI. L. REV. 377 (2006) (arguing that a "textual" approach, focusing on the text of section 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, *id*. at 385-89).

[133] 533 U.S. at 166. The Court specifically noted that it was not addressing distinctness issues in parent-subsidiary situations. *Id*. at 174.

"distinct" for section 1962(c) purposes even if they are separate legal entities.[134] 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 section 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."[135] The view that a business should not be "punished because of a business organization choice" is contrary to basic principles of corporate law. 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: shielding one's assets from legal liability. It is only fair that in return for this protection a corporation incur one of the

[134] Brannon v. Boatmen's First National Bank of Oklahoma, 153 F.3d 1144, 1147-48 (10th Cir. 1998); Khurana v. Innovative Health Care Sys., 130 F.3d 143, 155 (5th Cir. 1997), vacated on other grounds, Teel v. Khurana, 525 U.S. 979 (1998); Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1063-64 (2d Cir. 1996); Odishelidze v. Aetna Life & Casualty, 853 F.2d 21, 23-24 (1st Cir. 1988); NCNB Nat. Bank of North Carolina v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987) overruled on other grounds, Busby v. Crown Supply Inc., 896 F.2d 833, 840-41 (4th Cir. 1990); *cf.* Brittingham v. Mobil Corp., 943 F.2d 297, 302-303 (3d Cir. 1991) *abrogated on other grounds,* Jaguar Cars Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3d Cir. 1995) (the Court held that parent and subsidiary are not distinct for §1962(c) purposes where the "person" alleged is the parent corporation and the "enterprise" is "affiliated agencies."

[135] Brannon v. Boatmen's First National Bank of Oklahoma, 153 F.3d 1144, 1147 (10th Cir. 1998).

logical consequences of it: a 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 (incorrectly) that RICO's original intent was to prosecute organized crime. They then reason that the case before it (involving allegations of fraud) is "far afield" from RICO's original intent, and thus not within a "family resemblance" of intended RICO actions. Because, these courts conclude, there is no family resemblance, RICO does not cover parent-subsidiary-corporate situations and distinctness is not present when they are participants.

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 *supra*,[136] RICO was not intended to apply exclusively to organized crime. It was clearly intended to apply to white collar crime. 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. Unfortunately, the courts have not updated their analysis.

The third flaw in the reasoning of the courts which finds no RICO distinctness in parent-subsidiary situations was alluded to earlier. As the Tenth Circuit explicitly stated, RICO liability may increase for businesses if distinctness is found. 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

[136] See text and accompanying notes _____ *supra*

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,[137] proximate causation,[138] eligible defendants,[139] and eligible damages.[140] RICO liability attaches only when all of these hurdles are overcome.

In summary, the case law on parent-subsidiary RICO distinctness analysis is a bungled mess. The Supreme Court has not ruled on the issue, leaving intact poorly reasoned, outdated and erroneous decisions by the 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.[141] These principles, as in all

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[137] *H.J. Inc.*, 492 U.S. at 242.

[138] *Holmes*, 503 U.S. at 268-274.

[139] *Reves*, 507 U.S. at 184.

[140] *NOW*, 510 U.S. at 257.

[141] 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, 2d ed. 2003 (Aspen) §7.04, 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

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 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.

The *DuPont* Litigation Fraud 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. Multiple courts addressed the RICO distinctness issue and with the same facts and essentially identical pleadings, came to different conclusions. Exploring their analysis is revealing.

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when the subsidiary is wholly owned by the parent.

Notably, in antitrust cases, case law is clear that for intra-conspiracy 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. This is the "conduct" element of the conspiracy charge and must be shown. It is impossible to have an "agreement of one." 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 has enough "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. 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.

E.I. DuPont De Nemours Corporation, a U.S. Fortune 500 company,[142] manufactured a herbicide, Benlate, during the mid-twentieth century and sold it worldwide. Benlate was effective in combating plant diseases such as white mold, black leg, foot rot, and scab.[143] Unfortunately, Benlate was contaminated with a fungicide which DuPont also manufactured. The contaminated Benlate killed plants, poisoned soil and allegedly, caused birth defects.[144] DuPont vigorously contested that Benlate was contaminated but settled, or lost, a number of Benlate products liability cases, paying almost $2 billion in judgments to Benlate plaintiffs.[145]

Shortly after some of the Benlate product liability cases were resolved, Benlate plaintiffs learned that DuPont had destroyed, hidden and falsified test results which confirmed that Benlate was contaminated. With this discovery, it became clear that DuPont had concealed evidence, violated discovery orders, and misrepresented facts to courts and opposing counsel.[146] DuPont's conduct was found to be egregious. One court described it as "the most serious abuse ... in the legal precedents."[147] Another court found it to be "willful, deliberate, conscious, purposeful,

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[142] http://DuPont.com:Company at a Glance

[143] Living Design v. DuPont, 431 F.3d 353, 356 (9th Cir. 2005).

[144] *Id.*; There were also 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*, HOUSTON CHRONICLE (March 20, 2006).

[145] William R. Levesque, *Benlate's Bitter Legacy*, ST. PETERSBURG TIMES, 1D (Sept 24, 2006).

[146] DuPont v. Bush Ranch, 918 F. Supp. 1524, 1535-37 (M.D. GA 1995).

[147] *Id.*

deceitful, and in bad faith...." rendering the trial "a farce."[148] A third court stated that DuPont and its counsel "may very well have engaged in criminal acts,"[149] and noted its assumption that the United States Attorney would conduct a criminal investigation of DuPont and its lawyers.[150] A fourth trial court described DuPont's discovery fraud as "abusive," "done in bad faith,"[151] "wanton,"[152] "inexcusable,"[153] "very disturbing,"[154] "egregious,"[155] and "unprecedented."[156]

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.[157] Others brought new lawsuits alleging that DuPont, its executives and its attorneys, operating as a "RICO enterprise," engaged in racketeering acts of mail fraud, wire fraud and obstruction of justice. One issue that arose in these cases was whether the plaintiffs adequately pled a "distinct" RICO

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[148] DuPont & Bush Ranch v. DuPont, 99 F.3d 33, 366 (11th Cir. 1996) *quoting* DuPont v. Bush Ranch, 918 F. Supp. 1524, 1556 (M.D.GA. 1995).

[149] *Id.* at 369.

[150] *Id.* at 369, n. 7.

[151] Kawamata Farms Inc. v. United Agri Products, 948 P.2d 1055, 1099 (Haw. 1997).

[152] *Id.* at 1099.

[153] *Id.* at 1092.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 1092.

[157] *See, e.g., DuPont, Bush Ranch v. DuPont*, 918 F. Supp. at 1537 (M.D. Ga. 1995) *reversed*, 99 F.3d 363 (11th Cir. 1996).

enterprise.[158]

In the RICO action brought in Florida federal court[159] and a state RICO action brought in Florida trial court,[160] the courts held that the plaintiffs had not shown distinctness.[161] The federal court dismissed the plaintiffs' complaint; the state court granted a judgment for DuPont notwithstanding the jury verdict for the plaintiffs.[162] In a third case, a federal RICO action brought in Hawaii,[163] the Ninth Circuit held that the plaintiffs had shown distinctness.[164]

In the action filed in federal district court in Florida (*Florida Evergreen*), and the action

[158] It should be noted that the plaintiffs also variously alleged that certain employees, officers and directors were also participants in the enterprise. Because these individuals were clearly agents of DuPont, there was no question that their identity merged with DuPont's.

[159] Florida Evergreen Foliage v. DuPont, 135 F. Supp. 2d 1271 (S.D. Fla 2001); Florida Evergreen Foliage v. DuPont, 165 F. Supp. 2d 1345 (S.D. Fla 2001) *aff'd* Green Leaf Nursery v. DuPont, 341 F.3d 1292 (11th Cir. 2003); Florida Evergreen v. DuPont, 336 F. Supp.2d 1239 (S.D.Fla 2004) *aff'd* Florida Evergreen Foliage v. DuPont, 470 F.3d 1036 (11th Cir. 2006).

[160] Palmas Y Bambu v. DuPont, 881 So.2d 565 (Fla. App. 2004).

[161] 336 F. Supp. 2d at 1262; 881 So.2d at 574-577.

[162] 336 F. Supp. 2d at 1262 (S.D. FL. 2004) (There were multiple grounds for ordering dismissal of the complaint. Failure to allege a distinct enterprise was only one ground.); 881 So.2d at 568 (The jury returned a $26 million verdict on the RICO and products liability theories for the plaintiffs. 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 interference against DuPont because of DuPont's withholding of evidence during discovery and trial.)

[163] Matsurra v. DuPont, 330 F. Supp. 2d 1101 (D. Haw. 2004) *rev'd* Living Designs v. DuPont, 431 F.3d. 353 (9th Cir. 2005).

[164] *Living Designs*, 431 F.3d at 362.

filed in Florida state court alleging violation of Florida's RICO statute[165] *(Palmas Y Bambu*), 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.[166] In dismissing the actions, both courts held that 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.[167] These courts cited to *Riverwoods Chappaqua Corp. v. Marine Midland Bank*[168] as controlling precedent. Their rote citation to precedent is typical of most cases addressing the distinctness issue. It is also erroneous.

Riverwoods Chappaqua[169] holds that corporate employees are agents of a corporation.

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[165] The Florida RICO statute mirrors the federal RICO statute. *Palmas Y Bambu*, 881 So.2d at 570, n.1.

[166] 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 . . . the company that formulated or mixed Benlate for DuPont." 881 So.2d 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; . . . former president and CEO of DuPont . . . . " 336 F. Supp. at 1258.

[167] 336 F.Supp.2d 1261; 881 So.2d at 573.

[168] 336 F.Supp.2d at 1261; 881 So.2d at 573.

[169] 30 F.3d 339 (2d Cir. 1994).

This is established law.[170] *Riverwoods Chappaqua* does not hold that outside counsel is an agent of its corporate client. *Riverwoods Chappaqua* never addressed nor analyzed any issue regarding corporate counsel. The plaintiff in *Riverwoods Chappaqua* was a borrower of Midland Marine, a bank.[171] The plaintiff claimed that through extortion and mail fraud Midland Marine coerced it into restructuring its loans. No attorneys were alleged to be part of the enterprise nor alleged to be involved in the conduct at issue. 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.[172]

The Florida Appellate Court (*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*[173] and *Goldberg v. Lynch*[174] as support for the view that outside counsel is an agent of its corporate client. Both the *Discon*[175] and the *Goldberg*[176] courts hold that attorneys are agents of their corporate client. 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

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[170] See text accompanying notes _____ *supra*.

[171] 30 F.3d at 341.

[172] *Id.*

[173] 93 F.3d 1055 (2d Cir. 1996).

[174] 1998 WL 321446 (S.D.N.Y. June 18, 1998).

[175] *Discon*, 93 F.3d at 1063-64.

[176] *Goldberg*, 1998 WL 321446 at *9.

facts or allegations of corporate counsel involvement in either case. Instead, these cases simply cite to *Riverwoods Chappaqua.* 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, the United States District Court for the District of Hawaii found, and the United States Court of Appeals for the Ninth Circuit affirmed, in the Benlate cases brought in Hawaii that outside counsel was distinct from Benlate and that distinctness was present.[177] In the Hawaiian Benlate cases (*Matsuura*), 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."[178]

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."[179] However, the court continued, attorneys are different. It explained: "[T]here is no question that law firms retained by DuPont are distinctive entities...[a]nd there is no question that DuPont and the law firms together can constitute an 'associated in fact' RICO enterprise." 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 law

[177] Living Designs Inc v. DuPont, 431 F.3d 353 (9th Cir 2005).

[178] *Id.* at 361.

[179] *Id.* at 361.

suits.")[180] 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."[181] The court emphasized: "[T]he rules of professional conduct require law firms to be distinct entities and to maintain their professional independence." It concluded: "Thus the litigation 'enterprise' necessarily must be distinct from the client retaining legal assistance."[182]

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 each. Corporate counsel are distinct from their 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 section 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 section 1962(c)'s unique statutory language, RICO cases brought under this provision must allege and prove that a RICO defendant is distinct from the enterprise. Assessing whether

[180] *Id.* at 362.

[181] *Id.* at 362.

[182] *Id.* at 362.

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. 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. 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. 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 A in the Appendix summarizes this article's proposals on RICO distinctness.

C. "Association-in-Fact" Enterprises

As noted *supra*, 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."[183] The first part of this definition is straight forward: 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.

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

[183] 18 U.S.C. § 1961(4) .

In 2009, in *United States v. Boyle*,[184] the Supreme Court clarified what is necessary to prove an "association-in-fact" enterprise. Eddie Boyle was convicted by a jury on eleven out of twelve counts charging him with bank burglary, attempted bank burglary,[185] conspiracy to commit bank burglary, RICO (under section 1962(c)) and RICO conspiracy. The evidence at trial was that Boyle and others committed a number of bank burglaries and attempted of bank burglaries in four states over five years. Using crowbars, fishing gaffes and walkie-talkies, Boyle and his confederates targeted night deposit boxes at banks in retail shopping areas. They broke into the boxes, stole money and split the proceeds. Boyle argued that he and his group of alleged confederates were too loosely organized to constitute an "association-in-fact enterprise" under RICO.

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] a leader or hierarchy...[or] long-term master plan or agreement,"[186] and functioned only sporadically.[187] According to the Court, "nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence."[188] Noting that RICO's statutory definition of "enterprise" is "obviously broad," "expansive," and has "a

[184] 556 U.S. 938, 129 S.Ct. 2243 (2009).

[185] 2005 WL 6207652 (E.D.N.Y. 2005).

[186] 129 S. Ct. at 2241.

[187] *Id*.

[188] *Id*. at 2245.

wide reach,"[189] the Court held that an association-in-fact enterprise is simply a "continuing unit that functions with a common purpose."[190] 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."[191] In many instances, purpose, relationships and longevity will be easy to establish.[192] The Court specifically noted that evidence establishing the existence of an "association-in-fact" enterprise may simply be the evidence of the racketeering activity.[193] 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."[194]

Prior to *Boyle*, a number of the circuits had imposed strict requirements on what constituted an "association-in-fact" enterprise.[195] The Court soundly rejected these approaches, holding that RICO enterprises are not limited to "business-like entities" as had been held by

[189] *Id*. at 2243.

[190] *Id*.

[191] *Id.* at 2244.

[192] *See, e.g.*, United States v. Hutchinson, 573 F.3d 1011 (10th Cir. 2009), Craig Outdoor Advertising v. Viacom, 528 F.3d 1001 (8th Cir. 2008).

[193] *Id.* at 2245. "[T]he evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.' "

[194] *Id.* at 2247.

[195] This was the position taken by a number of circuit courts prior to the Supreme Court's decision in *Boyle*, *id*. at 2243, and expressed by Justice Stevens in his dissent, *id.* at 2247.

several circuits. 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"[196] were necessary to find an association-in-fact enterprise.[197]

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

Given the post-*Boyle* relatively loose requirements for establishing an "association-in-fact" enterprise, 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," . . . Section 1962(c) demands much more: the creation of a 'enterprise' – a group with a common purpose and course of conduct – and the actual commission of a pattern of predicate offenses."[198] In addition, RICO, especially civil RICO, has more elements than does conspiracy: "pattern,"[199] participation in the "operation and management" of the enterprise, [200]

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[196] Internal quotation marks deleted.

[197] *Id.* at 2245.

[198] Boyle v. United States, 556 U.S. 938, ____ (2009).

[199] Reves v. Ernst & Young, 507 U.S. 170, 177-179 (1993).

[200] Reves v. Ernst & Young, 507 U.S. 170 (1993).

proximate causation,[201] and economic injury.[202]

Thus, whereas a simple conspiracy may be formed within seconds and exist only for seconds, as when two people to 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), "continuity" among the criminal acts (robberies that extend over a significant period of time, or threaten to do so), and distinctness between the defendant and enterprise. 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). 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 B, C, and D in the Appendix offer guidance in doing so.

V. Pharmaceutical Fraud: Application of the RICO Enterprise Principles Proposed in this Article

The following hypothetical applies the principles suggested in this article. Assume that Byrd & Brown, Inc. ("B&B") is a major manufacturer and distributor of over-the-counter and

[201] *Holmes v. SIPC*, 503 U.S. 258, 268-274; Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 456-459 (2006).

[202] NOW v. Scheidler, 510 U.S. 249, 257 (1994).

prescription medications.[203] B&B has been in existence for almost a century with headquarters in Chicago, Illinois. Over 600 employees work at the Chicago facility and over 3000 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 100 - 200 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 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, visited the subsidiaries.

[203] This example is purely fictional and is not based upon any existing situation or company.

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 B&B's, and Wilson's, perspective, the purpose of the on-site visits to the manufacturing facilities was 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 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 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 filed a complaint alleging violations of the civil False Claims Act against B&B for fraud upon the federal government. Specifically, the complaint alleged that the sulfonylureas manufactured at the Metepec facility was contaminated. The complaint detailed a variety of vile, unsanitary conditions at the plant including violation of cleanliness protocols by employees, rodent infestation, and raw sewage on

plant floors left 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 sulfonylureas's production met industry standards for manufacturing, production and distribution.[204]

It appears from the complaint that a plant employee at the Metepec facility was a qui tam relator[205] 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 present when Peterson toured the plant. The complaint specifically noted that an employee (assumed to be the relator) recalled Peterson at the

[204] Suits filed under the civil False Claims Act, 31 U.S.C. §3729 et seq. alleging false certification of quality of care or services are common FCA actions. See Pamela H. Bucy, *Fraud by Fright: White Collar Crimes by Health Care Providers*, 67 N.C. L. REV. 855, 920-932 (1989) [hereinafter *Bucy, Fraud by Fright*].

[205] "Qui tam relators" are private individuals who are given authority under the civil False Claims Act, 31 U.S.C. §3729 et. seq. to bring lawsuits against those who submit false claims to the Government. The civil False Claims Act 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 note 101 *supra*, for sources discussing the civil False Claims Act.

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 and visible from the inside of the office. The complaint alleged that when Peterson "toured" the plant, she did not actually go in the plant. 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?[206] If so, against whom? Presumably there is monetary damage to every patient who paid co-payments to obtain prescriptions of sulfonylureas and received adulterated sulfonylureas manufactured at B&B's Metepec facility. Also, presumably, there is monetary damage to insurance companies that paid for adulterated sulfonylureas 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. Because of its relative ease in proof, section 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

[206] That a factual situation may give rise to both a civil False Claims Act (FCA) case brought by the federal government (in conjunction with a qui tam relator) under 31 U.S.C. §3729 et. seq. and a civil RICO case brought by private health insurance companies and/or patients, is quite realistic, especially in the health care field. A fraud by health care 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. Mail fraud or wire fraud would be the obvious "racketeering activity." Certifications of compliance with safety standards, which are required for reimbursement by insurers, must accompany reimbursement requests. Given the adulterated state of B&B's sulfonylureas, these certifications would be false. B&B would have mailed, emailed these false certifications or caused them to be mailed or emailed. See *Bucy, Fraud by Fright, supra* note 203 at 920-932 (discussing "implied certification" fraud).

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 off-shore rendering recovery of any judgment difficult. Additionally as discussed *infra*, 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.[207] 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,[208] (3) B&B + Peterson & Peterson,[209] (4) B&B + MM,[210] (5) B&B + Maximum

[207] 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).

[208] 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

Marketing Inc. and/or Green Testing Inc.

Because of the distinctness requirement, option (1) is not viable. 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.

For the reasons discussed *supra*,[211] 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.

For the reasons discussed *supra*,[212] 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

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result: as agents of Byrd & Brown, including them would not provide distinctness.

[209] 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.

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

[211] See Part V(B)(3)(d) *supra*.

[212] See Part V(B)(3)(c) *supra*.

veil piercing principles do not apply. Factors relevant in assessing their independence from each other include the role of Peter Wilson (*i.e.,* did B&B, through Wilson, supervise 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 (3 of the 15 directors serve each corporation).[213] 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, also ill-conceived and erroneous, hold that a subsidiary's existence is not sufficiently separate from its parent corporation to find section 1962(c) distinctness.

Option (5), joining B&B with two separate independent corporations, is viable only if evidence exists that Marketing Inc. and/or Green Testing Inc. were knowing partners in false marketing or testing of the contaminated sulfonylureas. Given the facts of this hypothetical, culpability on the part of 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). The chart below summarizes these conclusions.

[213] *Id*.

Pleading Options in Hypothetical		
"Persons" (Defendants)	**"Enterprise"**	**"Distinctness" Present?**
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 do 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." As noted *supra*, under *Boyle*, a plaintiff must show a "common purpose" among all enterprise members,[1] a "relationship among those associated with the enterprise" demonstrating "coordination among members,"[2] and "longevity sufficient to pursue the enterprise's purpose."[3]

Applying these factors, it appears that option (3) almost certainly complies with *Boyle*.

[1] *Boyle*, 129 S.Ct. at 2245.

[2] *Id*. at 2245, n.4.

[3] *Id.*

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).[4] They shared the joint purpose of obtaining the successful manufacture, marketing, and sale of sulfonylureas, and reimbursement for sulfonylureas by patients and insurance carriers (including government programs such as Medicare and Medicaid, and private insurers). B&B and Peterson & Peterson had a coordinated, working relationship to monitor the quality control of MM's production. They committed time and resources to this monitoring. "Longevity" is shown by B&B's long-standing retention of Peterson & Peterson for its manufacturing compliance needs. 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, 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) + Peterson & Peterson (outside counsel), or (2) B&B (corporation) + MM (subsidiary), comply with RICO's requirements.

VI. Conclusion

[4] *See., e.g.*, Masson v. New Yorker Magazine, 501 U.S. 496, 511 (1991); United States v. Yusuf, 461 F.3d 374, 383 (2006).

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 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 overutilized 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 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 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 needed tool against white collar crime.

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APPENDICES

Table A: Distinctness Analysis		
"Persons" (Defendants)	**"Enterprise"**	**Outcome**
Individual ("A")	A + Other individuals	Sufficiently distinct for §1962(c) purposes[5]
Individual ("A") (who is owner of Acme, Inc.)	A + Acme, Inc.	Sufficiently distinct for 1962(c) purposes[6]
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[7]
Corporation ("Acme, Inc.")	Acme, Inc. + DFG Inc. (other fictional entities)	Sufficiently distinct for §1962(c) purposes[8]
Corporation ("Acme, Inc.")	Acme, Inc. + Acme, Inc.'s Subsidiaries or Subdivisions	Sufficiently distinct for §1962(c) if all have separate legal identity

5 *See, e.g.*, St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 447 (5th Cir. 2000).

6 Cedric Kushner v. King, 533 U.S. 158 (2001).

7 Cedric Kushner Promotions Inc. v. King, 533 U.S. 158 (2001); Riverwoods Chappaqua Corp. v. Marine Midland Bank, 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 + employee at 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 (3rd Cir. 1995); Sever v. Alaska Pulp. Corp., 978 F.2d 1529, 1534 (9th Cir. 1992).

8 *See, e.g.*, Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987); St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425 (5th Cir. 2000).

		unless "piercing corporate veil" rules apply[9]
Corporation ("Acme, Inc.")	Acme, Inc. + Acme, Inc.'s attorneys	Sufficiently distinct for §1962(c) purposes (unless counsel abdicates legal obligations)[10]

[9] See *supra* text and accompanying notes _____.

[10] Living Designs, Inc. v. DuPont, 431 F.3d 353, 361-362 (9th Cir. 2005).

Table B: Necessary Components of an "Association-in-fact" Enterprise
(1) Purpose[11] • Is there a "venture," "undertaking," or "project"?[12] • Is there a "common" purpose among all enterprise members?[13] • Is there a "group of persons associated together for a common purpose of engaging in a course of conduct"?[14] **(2) "Relationships among those associated with the enterprise"**[15] • Is there "coordination among members"?[16] **(3) "Longevity sufficient to pursue the enterprise's purpose"**[17] • Must "remain in existence long enough to pursue a course of conduct"[18] • May be an "association-in-fact" enterprise if its "associates engage in spurts of activity punctuated by periods of quiescence."[19]
[20]

[11] *Boyle*, 129 S.Ct. 2243.

[12] *Id.*

[13] *Id*. at 2245; *Craig Outdoor*, 528 F.3d at 1026.

[14] *Turkette*, 452 U.S. at 583.

[15] *Id.*

[16] 129 S.Ct. at 2245, n. 4.

[17] *Id*.

[18] *Id*. at 2245.

[19] *Id*. at 2245.

[20] It may be possible to infer "structure" from "evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity . . . ." *Id*.

Table C: Proving an Association-in-fact Enterprise
• May be "informal" and "not much structure is needed"[21] • May be "loosely and informally organized"[22] • Need not have "long term master plan or agreement"[23] • May be "proved by evidence of an ongoing organization, formal or informal, and . . . by evidence that the various associates function as a continuing unit."[24]

[21] *Id.*

[22] *Id*. at 2241.

[23] *Id.*

[24] *Turkette*, 452 US at 583.

Table D: Not Necessary to Find an "Association-in-Fact" Enterprise[25]
• 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

[25] *United States v. Boyle*, 129 S.Ct. at 2245-2248; *Turkette*, 452 U.S. at 583.