

**RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
ACT:AN INTERPLAY OF CIVIL AND CRIMINAL LAW**

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ABSTRACT

Passed in 1970, the Racketeer Influenced and Corrupt Organizations Act (RICO) is a federal law designed to combat organized crime in the United States. It allows prosecution and civil penalties for racketeering activity performed as part of an ongoing criminal enterprise. To convict a defendant under RICO, the government must prove that the defendant engaged in two or more instances of racketeering activity and that the defendant directly invested in, maintained an interest in, or participated in a criminal enterprise affecting interstate or foreign commerce. In this paper, I try to argue the liberal construction of the term “enterprise” defined under 18 U.S.C section 1961 (4) with various case studies, and how extensively it is undermined by courts with respect to civil and criminal cases. This paper will also try to explain the dichotomy between the civil and criminal interplay within the act and how the Act is misconceived because of it having loosely worded statutes and providing vast powers to the executive.

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INTRODUCTION

In 1970, the Congress had passed a legislature which provided for a powerful tool for fighting against organized crime. The Racketeer Influenced and Corrupt Organizations Act (RICO Act) allows persons who have undergone financial injury from a pattern of criminal activity and claim it under RICO Act in state and federal court. Since the 1980s, the RICO Act has been applied in circumstances that were specifically against the members of the Mafia. It was also applied in cases against legitimate business people, accountants, spouses in divorce cases, and also protest organizations. Therefore, the concept of drafting the RICO Act was to give prosecutors the chance to go after the organizations conducting illegal activities. One of the interesting aspects of the RICO is that it not only allows the perpetrator of the criminal act to be charged, but also the entire enterprise or organization that assisted in the illegal act to be charged. The RICO tends to both criminal as well as civil violations.

It's important to understand the need for such a legislation. As mentioned above, the Act was a major stepping stone for eradicating organized crime. One has a brief imagination of what an organized crime looks and feels like, as movies such as *The Godfather*, *Goodfellas* and Television shows like the *Sopranos* have shown us. In the United States of America, Hells Angels was one of the more notorious mafia groups which was charged under the RICO Act. Mafias engaged in many forms of crime such as loansharking, extortion, union control, counterfeiting, embezzlement, murder, etc. Law enforcements usually had a hard time cracking down the organisations behind the illegal activities as the mafia followed a code, popularly known as the *omerta* which forbade the mafia members from talking about the organization itself to anybody

outside the mafia. Hence, all the dealings were done in hiding. Thus, when RICO Act was established, the primary objective was to lay out a connection between the convict and his organization.

This paper seeks to understand the liberal construction and the far reaching definition of the term “enterprise” which is imposed to include all kinds of criminal activities with the intent and purpose of racketeering. The next section of paper helps to demystify the criminal and civil interplay that runs around throughout the legislature and how courts interpret by applying doctrine of dual construction.

THE RICO “ENTERPRISE”

Section 1961(4) of the RICO Act 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.*” The definition of enterprise is broad which allows the statute to include almost any kind of enterprise that deals with illegal activities that affects national or foreign commerce. This requirement of the RICO is for the prohibition of criminal organizations which engage in racketeering activities². It is important to know that the federal RICO statute contains a liberal construction clause which requires for provision to be liberally construed.³ However, state RICO statutes have taken up similar liberal construction clause, which allows courts’ judgment to

² 18 U S § 1961, “racketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year

³ 18 U.S.C. § 1961

parallel the legislature's intent. However, fewer states like Florida have considered the strict construction of the statute, requiring a narrow interpretation.

Due to its broad definition, several courts have interpreted the term "enterprise" differently. An enterprise under RICO could include corporations and individual investors, markets in State Treasury notes, labor unions, sole proprietorships, and even a government entity.⁴ But enterprises do not include inanimate entities such as bank accounts and trusts.⁵ As it is known, most RICO litigations involve claims under section 1962(c), that states the prohibition of a person from using an enterprise to conduct a conduct a pattern of racketeering, and cases focus on the fact to whether plaintiffs have identified the defendant or a group of defendants that is not a part of the enterprise or association-in-fact enterprise. Association-in-fact enterprises consists of three characteristics to be satisfied; a common or shared purpose amongst the members, some continuity of structure or personnel and an ascertainable structure distinct from that inherent in the pattern of racketeering.⁶ In the case of *United States v Turkette*, it was held that an enterprise to be listed under RICO, it must be proven of an ongoing association that continues its functions as a unit, and not just the racketeering acts committed by the organization. Although several courts disagreed with the characteristic requirements of association-in-fact, it resulted in a circuit split. For instance, First, Second, Eleventh Circuits held that association-in-fact did not need an organizational structure, and would include only group of persons functioning as a

⁴ Averbach v. Rival Mfg. Co., 809 F.2d 1016

⁵ Bonner v. Henderson, 147 F.3d 457, 459 (5th Cir. 1998)

⁶ United States v. Bledsoe, 674 F.2d 647, 664-65 (8th Cir. 1982)

continuing unit with a common purpose.⁷ The Circuit had applied this from the judgment in the Turkette case. Due to the circuit split, several courts began to consider different meaning of association-in-fact. But the dilemma was subsequently solved in the case of *Boyle v United States*, where the Supreme Court held that an association-in-fact should sustain a purpose, relationships among those associated in and with the enterprise and enough longevity for those associated to pursue the enterprise's objective. Even so, any link to a RICO enterprise is satisfied if the defendant is "enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise" or "the predicate offenses are related to the activities of that enterprise."⁸

One affair that comes in to mind is how RICO seemingly considers a person and/or an enterprise to be one and the same. As mentioned, section 1962(c) prohibits a person involved or employed or associated with any enterprise which conducts racketeering activities. But interestingly, courts have stated that according to the interpretation of the statute, a party cannot be both the "person" and "enterprise". There has been much debate about this aspect of the RICO, as the definition of corporation included in section 1961(3)⁹ includes a "person". Later, a holding where in the person/enterprise distinction was discussed at length allowed RICO to reach defendants who were in action within or outside the scope of the corporate authority, through which they would conduct racketeering activity. Under this situation, the principle of vicarious liability can be attained to. Several plaintiffs have tried evading the person and enterprise distinction

⁷ Odom v. Microsoft Corp., 486 F.3d 541

⁸ U.S. v. Robilotto, 828 F.2d 940, 947-48 (2d Cir. 1987)

⁹ (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

by claiming the corporation to vicariously liable for the acts of the employee.¹⁰ The doctrine known as Respondeat Superior, which states an employer is liable for the wrongful doings of his employee or agent, is what was tried to be used. But the questioned which the states raised was if this was the case, the issue will be to prove whether the corporation was an inherently bad actor or just simply being manipulated by its internal or external actors. In the case of *Yellow Bus Lines, Inc v Drivers Local Union* the D.C Circuit explained that respondeat superior will not be favourable in this situation since the liability under 1962(c) is aimed at punishing the person who has the intention of exploiting the enterprise, and the enterprise merely being a passive victim to the exploitation.¹¹ The Fifth Circuit in the case of *Crowe v Henry*¹², held that there would be no barrier to apply vicarious liability under section 1962(a) and (b) since the subsection does not seek any requirements of distinction between a person and an enterprise. However, the respondeat superior liability should only be imposed for those enterprises who derive some benefit from the violation. Another kind of enterprise which was determined was corporate enterprise. Section 1962(a) and (b) of the RICO Act do not deal with the separate enterprises, and so most courts held that person/enterprise distinction does not apply to violations of these sections. However, under section 1962(d) which includes violations under (a), (b) and (c) of section 1962, the defendant need to not agree to manage the enterprise. He can be held liable if he knows and facilitates others who operate or manage the enterprise. The requirement that the enterprise and the defendant must be separate and distinct (the “distinctness”

¹⁰ John J. Hamill, A Guide to Civil RICO Litigation in Federal Courts, Jenner & Block LLP pg 54

¹¹ *Yellow Bus Lines, Inc. v. Drivers Local Union* 639, 883 F.2d 132, 140 (D.C. Cir. 1989)

¹² 43 F.3d 198, 206 (5th Cir. 1995).

principle) was accepted by the Supreme Court in *Cedric Kushner Promotion Ltd. v. King*¹³, where the Court held that “*the need for two distinct entities is satisfied . . . when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner. . .*”. This was known as the distinctness principle.

As it is known, under the RICO statute, it is a federal crime for any person who is employed by or associated with an enterprise that is engaged in or affects interstate or foreign commerce, to conduct or to participate in the conduct of the affairs of that enterprise through a pattern of racketeering activity. In order to find guilt of his offense, one must find that the government proved each of the following five elements beyond a reasonable doubt. These elements are 1) existence of an enterprise 2) that the enterprise engages in or its activities affected interstate or foreign commerce 3) that it was employed by or associated with that enterprise 4) that it knowingly conducted that enterprise’s affairs or that knowingly participated, directly or indirectly of the enterprise’s affairs 5) that the defendant party knowingly conducted the enterprise’s affairs through what was alleged in the indictment.¹⁴ For the convenience of this paper, only the first element will be discussed, therefore, in order for the government to prove that it is an association in fact, the government must prove beyond reasonable doubt that the group had a purpose and longevity of a continuing operation. It must also prove that there existed a relationship among the members of the group and that the members of the group continue to achieve a common purpose. But it need not prove that the group had a hierarchical structure, the decision can be made on ad hoc basis. But for the

¹³ 533 U.S. 158, 161, 166 (2001),

¹⁴ Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions

government to prove that the entity was separate and had an existence beyond what was already necessary to commit the racketeering activity. It is not necessary for the government to prove that the enterprise and its function to the racketeering activity. The enterprise can be charged simply of the chain of racketeering activities. In *Boyle v. United States*¹⁵, the Court held that the trial judge correctly instructed the jury that “In order to establish the existence of such an enterprise, the Government had to prove that: “(1) There [was] an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose.”

Under the RICO Act, any individual or entity that is entitled to hold an interest in property may sue or may be sued. The civil and criminal law provide similar but distinct rationales for attributing the conduct of individuals to themselves to other individuals or to other artificial entities.

Most states have adopted a broad definition of the term enterprise, but some states have allowed open ends to the definition to allow flexibility. If the courts have tried to stretch the definition so much so as to include most kinds of criminal enterprises, it becomes problematic since the courts impose additional requirements of their such that the purpose of RICO is satisfied. However, it’s already clarified about the broadness of the RICO, so its best to limit the criminal activity which count as predicate acts for the sole purpose of proving racketeering activity. Another problem which has been mentioned earlier is that of interpretation of association in fact. Since there is no past legal

¹⁵ 129 S.Ct.2237 (2009)

guidance, it becomes hard for the courts to interpret this with the case involved. The courts, in fact should circumscribe certain of factors as to what would be considered during prosecution. But it should not be rigid factors. Another issue which is within the definition of enterprise, which according to Russell D. Leblang¹⁶, should be that enterprise should include prosecutor to prove that the defendant obtained “substantial income” from the enterprise. But this criticism ignores the very aspect of RICO’s intent, which is primarily to reach out to all criminal activities, and not specifically concerned with economic gain.

THE DOCTRINE OF DUAL CONSTRUCTION – CIVIL AND CRIMINAL INTERPLAY

These general rules of civil and criminal liability are common to the statutes under the RICO act. Employers or principals can also incur vicarious civil liability for the wrongdoings of their employees or agents. For instance, the employer is liable for the individual’s wrongdoing if they commit within the scope of the employment. Another principle, where the individual may be liable under agency theories that the individual authorized the agent’s conduct. Just like that, a member of a joint enterprise, is vicariously liable for the torts of his members that commit within the scope of employment. As mentioned above, when it comes to entities since artificial entities only act through their employees and agents, respondeat superior may be imposed. Criminal liability is against the society as a whole. But unlike civil remedies, criminal law imposes penalties on the defendant. It is essential that two elements *actus reus* and *mens rea* is established. The individual may also be criminally liable as an aider or co-

¹⁶ Jason D. Reichelt, Stalking the Enterprise Criminal: State Rico and the Liberal Interpretation of the Enterprise, Element, Cornell Law Review pg 266

conspirator. As per entities, are not able to act without their members, thus two elements that must be satisfied is that criminal act was within the scope of their employment or agency and with the intent to benefit the corporation.¹⁷

Under the RICO Act, even though there are civil and criminal statutes, courts have given a liberal interpretation to statutes. For instance, they have liberally interpreted a statute in a civil case when the same statute can be applied in a criminal case. This is known as the doctrine of dual construction.¹⁸ The legislative history of RICO reveals that its applicable to government actions and the ones granting private civil action, while those that are similar to the predicate acts, have more or less the same language, but multiple purposes. For example, in *Domanus v. United States*, the appellant had been assessed a civil penalty under section 6672 for 100% of the tax owed for willfully failing to withhold employee social security and income taxes. He was found liable for the penalty under a definition of "willfully" as "voluntary, conscious and intentional-as opposed to accidental-decisions not to remit funds properly withheld to the Government. "The taxpayer argued that the government should be required to prove "willfully" according to its settled definition in section 7202, the mirror-image criminal counterpart to section 6672: an intentional violation of a known legal duty. The court held that Congress had evidenced an intent that criminal tax statutes, but not civil, be accepted from the usual rule that ignorance of the law is no excuse.¹⁹ Therefore, the term "willfully" had been interpreted strictly against the government in criminal cases. In the case of *McKenzie v*

¹⁷ Henry A. LaBrun, Innocence by Association: Entities and the PersonEnterprise Rule under RICO, Notre Dame Law Review

¹⁸ Bryan T. Camp, Dual Construction of RICO: The Road Not Taken in Reves, Washington and Lee Law Review pg 82

¹⁹ *Ibid* pg 83

*Peoples Baking Co.*²⁰, it was held that “It is by no means new in our law to hold that statutes of a double aspect (penal and remedial) may be given a liberal construction in the civil courts when applied remedially, and yet be strictly construed in the criminal courts, when one is prosecuted in the latter for a violation.” The same count can be applied from doctrine of dual construction. The statute at issue is required only for posting a notice that children under fourteen were not allowed to clean moving machinery. But it never expressly forbade from actually cleaning. Action due to personal injury was taken up, where the interpretation was done through a civil context, which stated that the notice was not held to post false notices, but was intended to make cleaning moving machinery by children of under fourteen years unlawful, and thus took the civil interpretation of criminal act.²¹

However, the problem that lies here can be observed from the holding of the abovementioned case, and why the doctrine working in this manner is problematic. The cases where the plaintiff was relieved off some burden that the government was required to hold, many of the them did so by construing terms in the statute in their own way, the terms only appeared only once and no statutory distinction is given as to how the term would apply differently. For instance, the case mentioned above was granted a civil interpretation, only since it would mean the penal feature to fail, but there has been no statutory distinction on its application. If the same term is used in almost all over the statute, then it would contain the same legislative purpose. But the principle construed by the courts is that if the statute may contain different legislative purposes and may be

²⁰ 31 S.E.2d 154, 155 (S.C. 1944)

²¹ *Ibid* pg 85

read as two statutes. Secondly, courts tend to rely heavily on the rule of lenity while applying the doctrine. The rationale behind this rule, is that the severity of criminal sanctions is so high that "fundamental principles of due process ...mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."²² The rule is not a straight jacket rule but it's merely an aid to interpretation.

It can be demarcated from the intention of legislature. In the case of *Turkette v United States*, it was held that criminal provisions would be given a softer construction of interpretation but criminal provision are narrowly interpreted. Thus, the rule makes very little differences from the problems arising from RICO Act. Sections 1961 and 1962 should be narrowly constructed in private civil cases and not in criminal case, but the issue which stands is that the judges are blinded by only the invocation of the rules of statutory construction and do not apply their reasoned application. Finally, the doctrine of dual construction is overused to the extent that it is courts see it is an application to use it on any statute. However, the doctrine should only be applied merely when the plain meaning of the statute or rules of construction preclude the use of it.

CONCLUSION

The basic motive the Congress had for making these hybrid statutes is that they each prescribe for some specified misconduct a host of civil and criminal penalties and remedies.²³ While in theory, the RICO acts as a significant legal weapon to combat these misconducts, in practice leads to material inconsistencies which is mainly because of the fact that courts have interpreted civil and criminal statutes in a certain manner

²² *Dunn v. United States*, 442 U.S. 100, 112 (1979).

²³ Jed S. Rakoff, *Hybrid Statutes: A Study in Uncertainty*, Speech at Conference on Corporate Crime and Financial Misdealing, New York University Law School

already and become unpredictable while interpreting the legislature. With the definition of enterprise having undergone several interpretations, by federal as well as state courts, it seems as though the liberal construction of definitions such as association in fact enterprise can lead to dichotomies between several courts. As of now, there are no guidelines to suggest a proper method to identify with the type or factors involved with the enterprise. Doctrine of dual construction, provides for a fair amount of relief to the defendant since most courts stand for a civil remedy, but rule of lenity is usually taken up as straight jacket construction, if all other interpretations fail. Also, the irony in the situation here is that courts tend to lean towards a broad interpretation for the criminal side and a narrow strict interpretation on the civil side. RICO Act has existed for over four decades and has successfully continued to weaponize prosecutors with a powerful tools for seeking out perpetrators of organized crimes and racketeering activities, but its liberal construction has opened floodgates, where almost any kind of crime can be set under the RICO. In addition to this peril, the interplay of civil and criminal statutes gives leeway to the courts to choose as they deem fit.