

CHAPTER ONE

SECTION 1962 – THE SUBSTANCE OF RICO

Before any defendant can be put in jail for violating RICO or before a defendant can be held liable for a treble damage award under RICO's civil remedies provision, the prosecutor or plaintiff must first prove that the defendant violated the RICO statute. RICO's substantive provisions are found in section 1962, which states:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of any unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Common Elements

As you can see, regardless of whether a RICO claim is brought under subsections (a), (b) or (c), all RICO claims have some common elements. For example, all RICO claims are concerned with the activities of a defendant "person," who somehow impacts the affairs of an "enterprise." All RICO claims concern "patterns of racketeering activity or collection of unlawful debt." All RICO claims require some "affect on interstate or foreign commerce."

Of these common elements, the most important are RICO's "person," "enterprise," and "pattern of racketeering activity" elements, which will be discussed in greater detail in subsequent chapters. There is some case law regarding RICO's required nexus with interstate or foreign commerce, but (as with other federal statutes) it is not a heavy burden to establish a link between the racketeering activity and interstate or foreign commerce.

Although one can establish a RICO claim with proof that a defendant engaged in the "collection of an unlawful debt," that aspect of RICO has been largely (if not completely) ignored by prosecutors, plaintiffs and the courts. The reason the

"collection of unlawful debt" language has been ignored probably relates to the fact that it is superfluous and redundant. Most attempts to "collect unlawful debts" will constitute extortionate credit transactions, in violation of 18 U.S.C. §§ 891-894. Under RICO, acts of racketeering include any act that violates sections 891-894. Unlike RICO's "collection of unlawful debt" criteria, which has been wholly unexplained by the courts, RICO's "pattern of racketeering activity" criteria has been the topic of numerous court decisions. Therefore, to the extent a plaintiff or prosecutor is confronted with facts giving rise to an "unlawful collection of debt," they are likely to depict the violation as acts of racketeering (i.e., extortionate credit transactions) and rely on the known law, relating to patterns of racketeering activity, rather than the unknown of law, relating to the "collection of an unlawful debt." At this time, little more can be said about RICO's "collection of unlawful debt" criteria.

Thus, it is not an exaggeration to say that at the heart of every RICO claim is a defendant "person," an "enterprise," and a "pattern of racketeering activity." If any one of these three elements of RICO is lacking, there can be no RICO violation – regardless of whether a RICO claim is brought under section 1962(a), (b), (c) or (d).

The Common Sense of Section 1962

The language of section 1962 is very ambiguous and difficult to read, let alone understand. Moreover, although all substantive RICO violations require a defendant "person," an "enterprise," and a "pattern of racketeering activity," the interaction among these common elements varies, depending upon whether a claim is brought under section 1962(a), (b) or (c). The best way to achieve an elementary understanding of how the subsections differ is to consider their application to a hypothetical set of facts:

Mr. Big is a drug dealer. He organizes the importation of illegal narcotics from South America, and once the narcotics arrive in Minneapolis, he causes the drugs to be distributed to 20 men living throughout the Twin Cities. The 20 men sell the drugs to end-users. Most sales are in cash, so the cash is returned to Mr. Big.

Mr. Big knows that a bank must file a currency transaction report (CTR) with the IRS whenever a depositor makes a deposit in excess of \$10,000. Pursuant to the CTR, the depositor must disclose the source of the cash. Mr. Big knows he can't tell the IRS that the cash came from drug dealing. Mr. Big also knows that the IRS will get suspicious if he claims that his Aunt Hilda gifts to him \$10,000 per day – he also wouldn't want poor Aunt Hilda to get hit with a tax bill relating to those gifts. So, Mr. Big needs to find some way to justify these big cash deposits.

Mr. Big buys a restaurant in Southwest Minneapolis and incorporates as Mr. Big's Burgers, Inc. (MBB, Inc.). Mr. Big advertises the restaurant in newspapers throughout Minnesota, Wisconsin and the Dakotas, and Mr. Big's Burgers becomes known as one of the best burger joints in the Twin Cities. Every day Mr. Big's accountant deposits a bag filled with cash into MMB, Inc.'s bank account. The bag includes MBB, Inc.'s cash receipts *and* all of the cash from Mr. Big's drug dealing. Mr. Big's accountant fills out the CTR, claiming that all the cash is the proceeds of food sales.

Charlie C is one of Mr. Big's distributors. Charlie C owns a convenience store / gas station at the top of the Bass Lake Road Exit on Interstate 494. In addition to selling gas and junk food, Mr. Big sells narcotics to select customers of the convenience store. The convenience store has lately had difficulty breaking even, so month after month Charlie C has been covering his convenience store losses by skimming money from the amount he owes Mr. Big. For example, last month Charlie C should have returned \$25,000 to Mr. Big but instead returned only \$23,000 and used the other \$2,000 to cover the losses at the convenience store. Since nobody keeps books in the drug business, it took Mr. Big a few months to realize that Charlie C was skimming money. When Mr. Big discovered what was going on, he and his group of thugs showed up at the convenience store one day. They forced Charlie C to sign a power of attorney in favor of Mr. Big. They then threw Charlie C out onto the street. They told him that if he didn't leave town within 12 hours, they'd kill him and his family. Charlie C left town. Mr. Big took over the operation of the convenience store and, with Charlie C's power of attorney, was thereafter able to manage the convenience store and all of its bank accounts.

Mr. Big was also willing to engage in other criminal activity if the personal loyalties or price was right. On one occasion his gang burned down an apartment building owned by a friend of Mr. Big's because the friend wanted to collect the insurance money. On another occasion, a local businessman hired Mr. Big to beat up a guy who threatened to bring a lawsuit against the businessman. Mr. Big's boys put the putative plaintiff in the hospital for a week. There wasn't any job that Mr. Big wasn't willing to consider.

If Mr. Big is the defendant "person," this is how the RICO claims would play out under each subsection of 1962:

Violation of section 1962(a): Mr. Big [**defendant person**] received income derived, directly or indirectly, from series of narcotics transactions [**pattern of racketeering activity**]. Mr. Big then *invested* the ill-gotten income in the establishment or operation of **MBB, Inc.** [**the enterprise**].

The objective of section 1962(a) is to penalize Mr. Big, and others like him, for his use of MBB, Inc. as a money laundering device to transform his illegal drug revenue into revenue received from his legitimate restaurant business. If Mr. Big could not launder the drug proceeds through MBB, Inc., the bulk of cash from his drug sales would be useless. Every successful criminal enterprise must have a means by which to convert illegally acquired funds into legitimate funds so that the funds can be deposited into a bank account and used like any other money. For this reason, a criminal influence is often present in traditionally "cash rich" businesses, like restaurants, garbage hauling, and gambling. Any business traditionally conducted on a cash basis can provide a criminal with a means to legitimize his illegitimate income. The distinguishing feature of a section 1962(a) violation, as opposed other substantive violations of section 1962, is the *investment* of income derived from a pattern of racketeering activity into an enterprise.

Violation of section 1962(b): Mr. Big [defendant person] acquired control of Charlie C's convenience store [the enterprise] through drug dealing and extortion [pattern of racketeering activity].

The objective of section 1962(b) is to penalize Mr. Big, and others like him, who obtain or exercise control over an enterprise through a pattern of racketeering activity. In this case, Mr. Big's use of Charlie C as a drug dealer and Mr. Big's extortion of Charlie C ultimately enabled him to obtain and exercise control over the convenience store. Section 1962(b) was probably originally intended to address debts resulting from illegal gambling activities or loan sharking, whereby a legitimate businessman would become indebted to an illegal gambling or loan sharking enterprise. When the businessman could not repay the usurious debt, the debt (along with a few threats of bodily harm) would enable the criminals behind the illegal gambling or loan sharking enterprise to take over control of the businessman's legitimate business. Once the criminals obtained control of the business, the business could be used for money laundering, if it was a cash-rich business, or the criminals could use the business' credit to purchase consumer goods for resale on the black market – all the while knowing that they never intended to repay any of the debt incurred by the business to purchase these goods. The distinguishing feature of a section 1962(b) violation, as opposed other substantive violations of section 1962, is the *acquisition or maintenance* of control over an enterprise through a pattern of racketeering activity.

Violation of section 1962(c): Mr. Big [defendant person] conducts or participates, directly or indirectly, in the conduct his gang (consisting of Charlie C, his thugs, his accountants, friends, etc.) [the enterprise] through drug dealing, money laundering, extortion, arson, obstruction of justice, mail and wire fraud [pattern of racketeering activity].

Section 1962(c) is essentially RICO's catch-all provision. Its objective is to penalize Mr. Big, and others like him, whenever they operate or manage any enterprise through a pattern of racketeering activity. Because it is a catch-all provision, and does not specifically target money laundering or loan-sharking, most RICO claims are brought under section 1962(c). The revolutionary aspect of a section 1962(c) is that a defendant may violate the provision even if he does not commit the specific crime, does not direct someone else to commit the specific crime, or does not conspire with someone to commit a specific crime. A defendant can violate section 1962(c) simply by **operating or managing** a group engaged in racketeering activity. The Godfather violates section 1962(c) by setting the agenda, policies, or strategy of the Mafia family – it makes no difference if the Godfather has never personally murdered anyone, directed the murder of a specific person, or conspired to murder another. The Godfather's liability is based upon his conduct or his participation in the conduct of such enterprise's affairs through a pattern of racketeering activity.

Violation of section 1962(d): Assuming Mr. Big violated sections 1962(a), (b) and/or (c), Charlie C, Mr. Big's accountant, or gang members violated section 1962(d) if they knowingly furthered, advanced or participated in Mr. Big's 1962 violation.

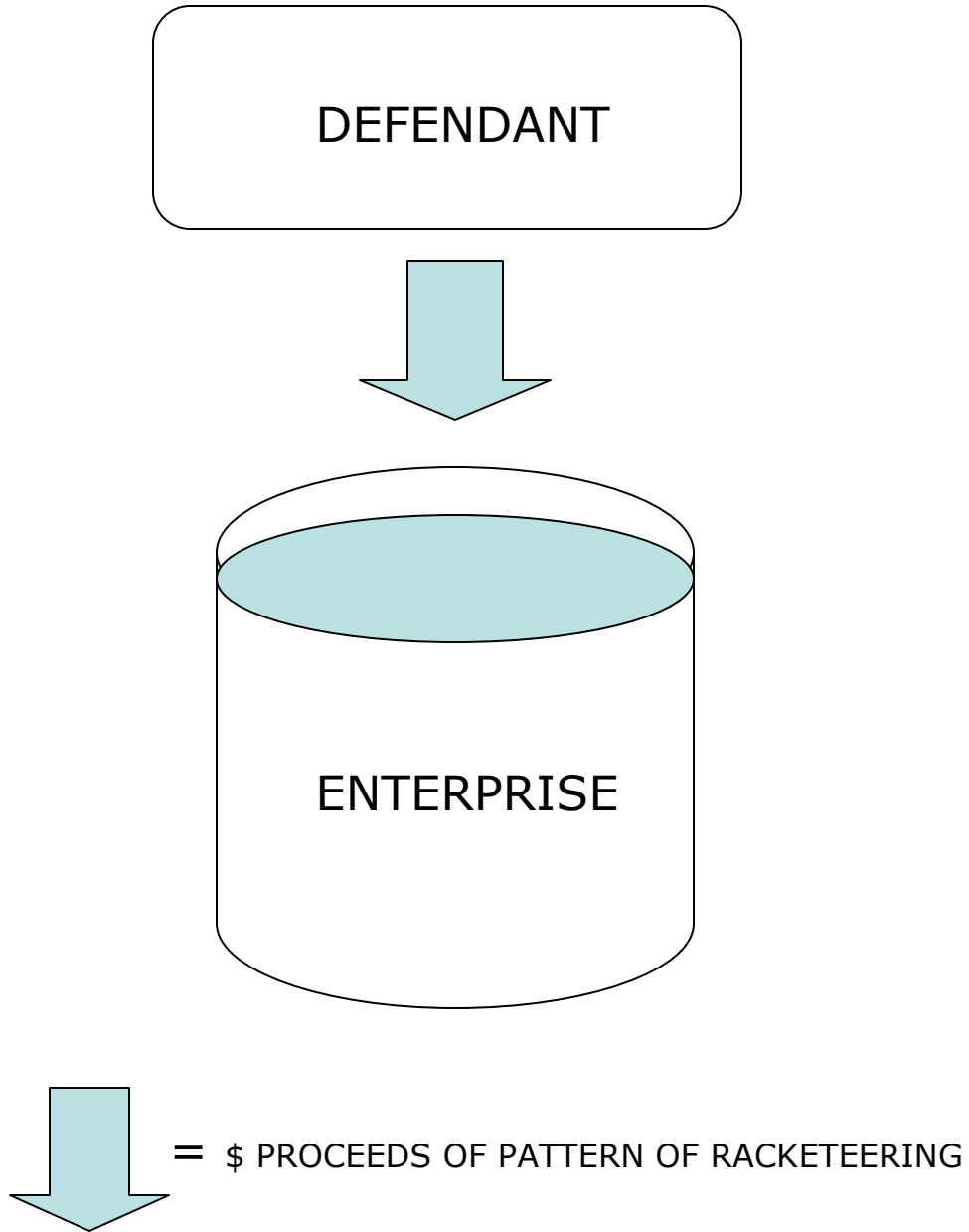
The fundamental principle of any conspiracy statute is that one cannot be liable as a conspirator unless there is a primary wrongdoer who committed the actual crime in question. In other words, a defendant cannot be liable for conspiracy to murder unless another defendant murdered or attempted to murder a victim. Likewise, a defendant cannot be liable for conspiracy to violate RICO unless another defendant violated or attempted to violate RICO. Thus, any conspirator has a vested interest in the innocence of the primary defendant. If Mr. Big is found innocent, then no one else can be found liable for conspiring with Mr. Big to violate RICO.

Under RICO, the conspiracy statute is particularly useful when dealing with "lesser" figures in the criminal scheme. For example, if a street thug simply takes orders from Mr. Big and does not operate or manage the enterprise, the street thug cannot be liable under section 1962(c). The street thug can be liable as a conspirator, however, even if he does not operate and manage the enterprise. Likewise, the owner of the apartment building or the businessman facing a lawsuit arguably engaged in only one act of racketeering (e.g., arson and extortion, respectively), so since they did not engage in a pattern of racketeering activity, they cannot be liable for violating section 1962(c). Nonetheless, the apartment building owner and the businessman can still face liability as conspirators under section 1962(d).

In short, section 1962(d) provides a prosecutor or plaintiff with a back stop if there is any question as to whether a "lesser" defendant operated or managed the enterprise or engaged in a pattern of racketeering activity.

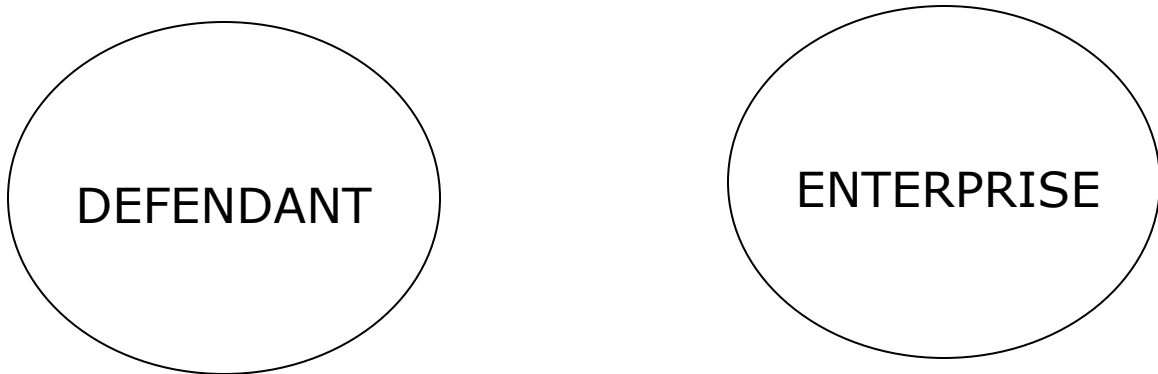
Given the catch-all nature of section 1962(c) claims and given that section 1962(c) serves as the substantive violation in most RICO claims, the subsequent discussion will focus on the elements of a section 1962(c) violation. Once section 1962(c) has been explored, we will return to sections 1962(a) and (b) and discuss how they differ from a section 1962(c) violation. We will then survey the particular requirements of a conspiracy claim under section 1962(d).

Section 1962(a)

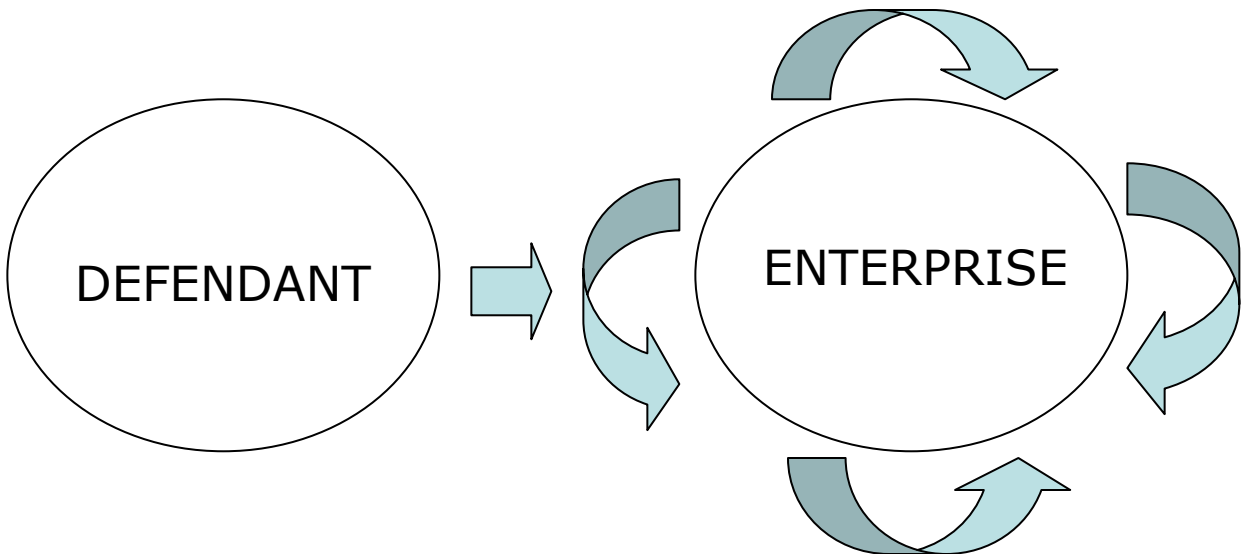



Section 1962(b)

Pre-Pattern of Racketeering Activity

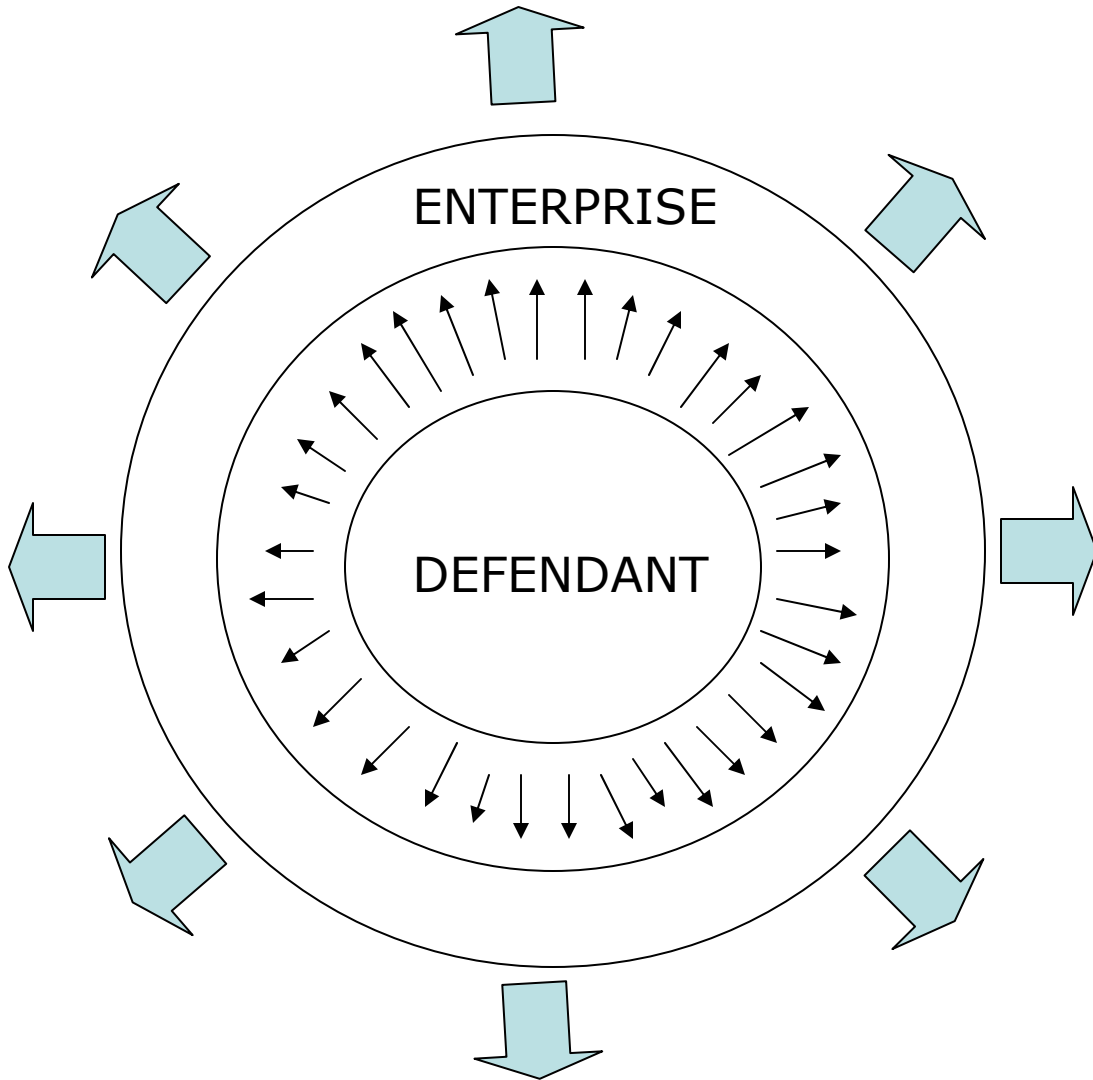


Post-Pattern of Racketeering Activity



 = pattern of racketeering activity used to acquire or maintain interest in or control over an enterprise

Section 1962(c)



↑ = Defendant's operation or management

↑ = pattern of racketeering activity

CHAPTER TWO

THE DEFENDANT PERSON, aka, THE GODFATHER

To me, being a gangster was better than being President of the United States.

* * * *

Tuddy ran the cab stand and the Bella Vista Pizzeria and a few other places for his brother, Paul, who was the boss over everybody in the neighborhood. Paulie might have moved slow but it was only because Paulie didn't have move for anybody.

* * * *

Paulie hated phones. He wouldn't have one in his house. He used to get all of his calls secondhand – then you'd have to call the people back from an outside phone. There were guys -- that's all they did all day long – was take care of Paulie's phone calls.

For a guy who moved all day long, Paulie didn't talk to six people. If there was a union problem or say a beef with the numbers, then only the top guys could meet with Paulie to discuss the problem. Everything was one-on-one – Paulie hated conferences. He didn't want anybody hearing what he said and he didn't want anybody listening to what he was being told.

Hundreds of guys depended on Paulie and he got a piece of everything they made. It was tribute – just like in the old country except they were doing it here in America. All they got from Paulie was protection from other guys looking to rip them off – and that's what it's all about – that's what the FBI could never understand – that what Paulie and the organization does is offer protection for people who can't go to the cops. That's it – that's all it is. They're like a police department for wise guys.

Goodfellas (© 1990 Warner Brothers) (Henry Hill – narrating).

When considering most causes of action, one takes for granted that there is a “defendant,” i.e., the wrongdoer against whom judgment is sought. There is no need to consciously consider the role of the defendant person vis-à-vis the other elements of the offense. In the context of section 1962(c), however, one must always identify the defendant person -- as opposed to the enterprise through which the person operates. Only **persons**, not enterprises, are liable under RICO. Thus, when the government issues an indictment, Vito Corleone is indicted as the defendant person – not the Corleone Family. If the charge results in a conviction, Vito Corleone – the defendant person – will go to jail. The enterprise through which Vito Corleone operates, i.e., the Corleone Family, will not be directly impacted by the conviction. The punishment levied upon the Corleone Family is limited to the bad publicity associated with being a racketeering enterprise and to the loss of its leader, which will necessarily cause administrative hassles and power struggles within the organization. In short, in a criminal prosecution under RICO, only defendant persons (not enterprises) go to jail; in a civil prosecution under RICO, only defendant persons (not enterprises) face liability.

Criminal vs. Civil RICO Defendants

In the context of RICO criminal prosecutions, appropriate defendant persons are rare. There is no reason for a prosecutor to bring a RICO charge against someone with blood on their hands. If a defendant murdered someone or conspired to murder someone, the prosecutor will simply charge the defendant with murder or conspiracy to murder. There is no need wrestle with all of RICO's complicated elements when a simple murder or conspiracy to murder charge will result in the same amount of jail time.

In the criminal context, it makes sense to use RICO only on those rare occasions when the defendant does not have blood on his hands. Like Paulie in *Goodfellas*, the stereotypical defendant in a criminal RICO case will do all he can to place himself as far as possible from the blood. Such defendants do not direct specific murders. They may simply set the rules that will cause others within their enterprise to impose the ultimate sanction.

Before RICO, Vito Corleone could never be prosecuted for saying: "any rat should be executed." Vito Corleone, like anyone, has a right to voice his opinion. The difference between Vito Corleone's opinion and John Q. Public's opinion is, however, its affect. If 20 people turned state's evidence against the Corleone Family, and all 20 people (or rats) were subsequently executed, Vito Corleone can be charged with a RICO violation because – unlike John Q. Public's opinion – Vito Corleone's opinion set the policy for, i.e., operated and managed, the Corleone Family. In essence, Vito Corleone violated RICO if it can be proven that through his words or actions, directly or indirectly, he controlled those with blood on their hands.

In the criminal context, such people – the John Gotti's and Osama Bin Laden's of the world – are very rare. This is why RICO's use in the criminal context is limited. If the defendant actually has blood on his hands, you charge the defendant with the underlying crime and avoid the hassles of a RICO claim. A RICO conviction will bring more publicity than a conviction for simple mail or wire fraud, so there are occasions when a prosecutor may incur the risks of a RICO claim in anticipation of positive publicity and increased political influence.

The criminal prosecutor seeks to obtain convictions in the quickest and most efficient means possible, but the civil plaintiffs' attorney seeks to obtain the largest and most collectible judgments possible. Thus, in the civil context, RICO's treble damage and cost / attorneys' fee provision provide incentive to the plaintiffs' attorney to depict everyone as a John Gotti.

If a plaintiff successfully prosecutes a civil claim for common law fraud, the plaintiff will be awarded its actual damages – period. If the plaintiff takes the same facts that gave rise to the claim of common law fraud, casts them as violations of the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343), and brings a RICO claim predicated on the mail and wire fraud violations, then the same plaintiff will not only recovery its actual damages, but treble its actual damages, plus costs and attorneys' fees. A criminal RICO conviction predicated on mail or wire fraud does not result in a longer sentence than a conviction directly under the mail or wire fraud statutes, but a successful civil RICO claim predicated on violations of the mail and wire fraud statutes results in a far great economic reward than a successful common law fraud claim.

Moreover, the corporate structure seems particularly well suited for RICO's application. A famous CEO may not personally prepare or mail a fraudulent advertisement, but so long as that famous CEO operates and manages the corporation (i.e., the enterprise) that prepared and mailed the fraudulent advertisement, the famous CEO may face personal liability under RICO. Likewise, a multi-national parent company may face liability for the fraudulent actions of a foreign subsidiary – if the parent company operates and manages the foreign subsidiary. In the civil arena, the employees or third-world subsidiaries who actually commit an act of racketeering are often penniless and judgment proof. Because the deep-pockets who can afford to pay a substantial judgment (by design or fortuity) often do not have blood on their hands, a civil RICO claim is often the only means by which a plaintiff can reach the people or entities whose policies caused or enabled the wrongdoing to occur.

Governmental Entities Cannot Be RICO Persons

Aside from the practical considerations of bringing a civil or criminal RICO claim against a defendant person, there are very few legal limitations upon who can be named as a RICO defendant.

The RICO Act simply states: "person" includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). Thus, any natural person or corporate entity can be named as a RICO defendant.

There is, however, one prohibition on a plaintiff's ability to name certain entities as RICO defendants. Although the United States Supreme Court has never sanctioned the rule, United States Courts of Appeals who have considered the issue have uniformly concluded that a governmental entity cannot be named as a RICO defendant. Considerations of policy and statutory construction have served as the bases for the decisions excluding governmental entities from the realm of RICO Defendant persons:

**Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.,
940 F.2d 397 (9th Cir. 1991), cert. denied, 502 U.S. 1094 (1992)**

Plaintiff-appellant Lancaster brought a federal antitrust action against Antelope Valley Hospital ("Antelope"), Antelope Valley Hospital District ("District"), and Antelope Valley Medical Group ("Group"). Lancaster alleged that the defendants sought to use Antelope's monopoly in perinatal services to increase the hospital's market share in non-perinatal services. Antelope, it is said, would not allow certain health maintenance organizations ("HMOs") to contract for perinatal services unless the HMOs agreed to use Antelope for non-perinatal services as well.

* * * *

Lancaster[']s . . . complaint . . . allege[d] RICO claims against the District The complaint accused defendants of conducting the affairs of Antelope through a pattern of fraudulent schemes, including misappropriation of public funds, violations of federal and state anti-kickback statutes, and violations of state laws prohibiting the making of false entries in the records of a corporation. Lancaster further alleged that defendants furthered these purportedly fraudulent schemes by use of the

United States mails. The district court granted defendants' motions to dismiss Lancaster's RICO claims finding, *inter alia*, that Antelope and District, as government entities, could not be held liable under RICO, and that Lancaster had failed to establish the predicate act of mail fraud.

* * * *

We next consider the district court's order of summary judgment in favor of defendants on Lancaster's RICO claim. We conclude that summary judgment was appropriately granted.

The RICO claims against Antelope and District fail because government entities are incapable of forming a malicious intent. [Citations omitted.] (noting the existence of "respectable authority" that municipal corporations "cannot, as such, do a criminal act or a willful and malicious wrong...."). A specific intent to deceive is an element of the predicate act, mail fraud, on which Lancaster's RICO claim is based. 18 U.S.C. § 1341, *Sun Sav. and Loan Assoc. v. Dierdorff*, 825 F.2d 187 (9th Cir.1987). The wisdom of this rule is evident in light of the circumstances of the instant case. The "body politic," that is, the taxpayers, will pay if Lancaster's RICO claim is successful. Yet the "body politic" was the target of the deception perpetrated. Thus, the "body politic" was not even aware of any dishonest activities, and plainly lacked the specific intent to deceive which is an element of mail fraud.

Moreover, Lancaster cannot impose liability on the "body politic" by appeals to the doctrine of *respondeat superior* or to principles of agency. For public policy is offended if all the citizens of a state are made liable for extraordinary damages as a result of the actions of a few dishonest officials. In *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 the Court held that punitive damages are not available in § 1983 actions, rejecting claims that the city should be responsible for the reprehensible conduct of its agents. The Court distinguished municipal corporations from the ordinary variety:

[T]he relation which the officers of a municipal corporation sustain toward the citizens thereof for whom they act, is not in all respects identical with that existing between the stockholders of a private corporation and their agents; and there is not the same reason for holding municipal corporations, engaged in the performance of acts for the public benefit, liable for the willful or malicious acts of its officers, as there is in the case of private corporations.

Fact Concerts, 453 U.S. at 261-62, 101 S.Ct. at 2757 (quoting *Hunt v. City of Boonville*, 65 Mo. 620, 624, 625 (1877)). Exemplary damages are not available against municipal corporations, "because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer [i]s being chastised." 453 U.S. at 263, 101 S.Ct. at 2757. Since civil RICO damages are not merely compensatory, but are trebled, 18 U.S.C. § 1964(c), *Newport* is compelling. As such, Lancaster cannot establish that Antelope or District committed mail fraud, and its RICO claim against them falls.

Berger v. Pierce,
933 F.2d 393 (6th Cir. 1991)

Each of the plaintiffs were owners of property along the shore of Lake Erie. Each plaintiff was issued a standard flood insurance policy by the Federal Insurance Administration (FIA) in accordance with the National Flood Insurance Program (NFIP). The policies were renewed annually and were in effect in 1987. Plaintiffs allege that their properties were damaged during that year from causes covered by their flood insurance policies. Plaintiffs filed loss claims during this period of renewal. The claims were submitted to Computer Sciences Corporation (CSC), the fiscal agent of the NFIP, for processing. CSC requested GAB Business Services (GAB), an approved NFIP adjustor, to investigate the claims. GAB's report identified "gradual erosion" as the central cause of plaintiffs' losses. This report was processed through CSC, and the FIA denied plaintiffs' claims because their losses were caused by "gradual erosion." [Plaintiffs filed the present action to dispute the denial of their claims.]

* * * *

Count IV attempts to allege a RICO claim against the federal government, CSC, and GAB. Aside from the fact that the elements of RICO have not been adequately alleged, 18 U.S.C. §§ 1961-2, it is clear that there can be no RICO claim against the federal government. *Cf. Wiley v. Federal Land Bank*, 657 F.Supp. 964 (S.D.Ind.1987). Section 1962 states a requirement of "racketeering activity" as a predicate for a civil RICO action. Section 1961(1), in turn, defines "racketeering activity," which requires that the defendant be, variously, "chargeable," "indictable," or "punishable" for violations of specific state and federal criminal provisions. The assertion in Count IV that the FIA was engaged in a RICO conspiracy under section 1962(d) was patently defective as a matter of law, since it is self-evident that a federal agency is not subject to state or federal criminal prosecution. The court believes that the effort to encumber the action with this threatening claim may be an abuse of legal practice. The district court is directed on remand to hold a hearing as to whether Rule 11 sanctions should be applied. [Citations omitted.]

Discussion Points

- Which approach do you find more persuasive? The Ninth Circuit's policy oriented rationale or the Sixth Circuit's statutory construction rationale?
- Do you agree with the end result in each case?
- Can you conceive a scenario where it may be appropriate to hold a governmental entity liable under RICO?
- What about a governmental entity that is extorting non-taxpayers, e.g., an Indian tribe that demand kickbacks from non-tribal members wanting to do business on the reservation?
- What about foreign governments? Should the same exception apply?
- What about local governmental entities who have become the captives of private or public interests? For example, should have the City of Richfield been liable when it used its eminent domain powers to take away property from Walser Motors and give it to Best Buy?
- Is there something unique about the exercise of governmental power that makes it inappropriate to use RICO against a governmental entity? Isn't every action of government extortion to a certain extent?

- Is it better to use RICO or the Due Process Clause to keep a check on the “legalized” forms of governmental extortion?

In practice, the issue of whether to bring a RICO claim based on governmental action does not end merely because a governmental entity cannot be held liable as a RICO defendant person. An individual government agent can still face personal liability under RICO if she violated the RICO Act. For example, if a city council member was being bribed by a real estate developer and a rival real estate developer could establish a quid-pro-quo relationship between the bribes and the city council member’s votes benefiting the briber, the city council member could undoubtedly face liability as a RICO defendant person. It becomes a more ambiguous question when there are not quid-pro-quo bribes but instead convenient campaign contributions. What if the city council member simply owns property next to the development and the value of the city council member’s property will coincidentally increase if she votes in favor of a particular developer’s project? Should the campaign contributions or property appreciation give rise to a RICO claim against the council member? Or is there a better avenue to address these concerns?

When bringing suit against a governmental agent for actions committed within the scope of their governmental duties, one must always consider whether the doctrines of official or governmental immunity will shield the agent. In general, such defenses are not available to government agents who engage in racketeering activity because acts of racketeering are per se beyond the scope of the agent's legitimate authority as a government agent. Nonetheless, the more ambiguous the nature of the racketeering activity, the more likely the governmental agent will have an effective immunity defense.

Finally, even though a government agency cannot be named as a defendant person under RICO, a government agency may still serve as the enterprise through which a defendant engages in a pattern of racketeering. See, e.g., *United States v. Urban*, 404 F.3d 754, 770 (3d Cir.), cert. denied, 546 U.S. 1030 (2005) (“we have frequently found government entities to be ‘enterprises’ for RICO purposes”); *United States v. Freeman*, 6 F.3d 586, 597 (9th Cir. 1993), cert. denied, 511 U.S. 1077 (1994) (“a governmental entity may constitute an ‘enterprise’ within the meaning of RICO”); *United States v. Angelilli*, 660 F.2d 23, 33 (2d Cir. 1981), cert. denied, 455 U.S. 910 (1982) (New York City Civil Court was an actionable enterprise); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980) (County Sheriff's office was an actionable enterprise). If a RICO claim alleges that a city housing inspector threatens to condemn properties unless the landlords make personal payments to the inspector, the inspector would be named as the RICO defendant person, who is operating or managing the city housing inspector’s office (the enterprise) through a pattern of racketeering (kickbacks and extortion). In the case of the city council member receiving bribes from a real estate developer, the city council member would be named as the RICO defendant person, who is operating and managing the city council (the enterprise) through a pattern of racketeering (bribery and votes infected by bribery). As noted, however, being named as an enterprise does not expose the governmental entity to any liability.