Journal of Criminal Law and Criminology

Volume 97
Issue 1 *Fall*

Article 1

Fall 2006

The Crime of Associating with Criminals - An Argument for Extending the Reves Operation or Management Test to Rico Conspiracy

Sarah Baumgartel

0091-4169/06/9701-0001
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 97, No. 1
Printed in U.S.A.

CRIMINAL LAW

THE CRIME OF ASSOCIATING WITH CRIMINALS? AN ARGUMENT FOR EXTENDING THE *REVES* "OPERATION OR MANAGEMENT" TEST TO RICO CONSPIRACY

SARAH BAUMGARTEL*

This Article considers the application of the "operation or management" test under § 1962(c) of RICO, enunciated by the Supreme Court in Reves v. Ernst & Young, *to RICO conspiracy. Such an application best accords with the text and legislative intent of the RICO statute, and with fundamental principles of conspiracy law. Furthermore, the application of the* Reves *test to RICO conspiracy is appropriate regardless of the Supreme Court's expansive interpretation of RICO conspiracy in* Salinas v. United States, *because this extension represents an essential means of giving content to RICO conspiracy and ensuring that it is not reduced to a mere associational offense.*

I. INTRODUCTION

> [T]he interpretation of the conspiracy provision presents the recurring theme of RICO jurisprudence: to interpret the statute to its full breadth in order to encompass the congressional goal of convicting insulated ring leaders runs the risk of expanding the net so wide that unintended fringe actors are also brought within the purview of RICO.[1]

---

* Member of the New York State Bar. A.B., Duke University, 2001; J.D., Harvard University, 2004. The author would like to thank Josh Kelner, Chris Monsour, and Nels Peterson for their helpful comments.

[1] United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986).

When the Supreme Court announced the "operation or management test" in *Reves v. Ernst & Young*[2] in 1993, requiring that individuals control or manage an enterprise in order to be liable under 18 U.S.C. § 1962(c), it represented a significant breakthrough in that it was the first time the Court instituted any broad-stroke restriction on the application of the Racketeer Influenced and Corrupt Organizations Act (RICO) since its 1970 inception. While many thought the decision heralded an end to the liability of so-called "outsiders," including lawyers, accountants, and various other professionals sometimes pulled into RICO suits,[3] many commentators argued that its effects would be narrow and would not extend beyond the specific facts of the particular case.[4]

Since the test was initially announced, questions concerning its proper application have persisted, and the Supreme Court has declined to clarify the intended reach or specifics of the standard. One particularly troubling question concerns the application of the *Reves* test when the charge is not directly under § 1962(c), but rather involves an allegation of conspiracy to violate § 1962(c), criminalized under § 1962(d), commonly known as RICO conspiracy.

Although many circuits have considered this question, most have failed to do so in a thorough or convincing way, preferring to repeat the shibboleths of conspiracy law rather than engage in a close and meaningful analysis of the text and legislative history of RICO.[5] Lower courts' confused efforts on this front have been further complicated by the Supreme Court's decision in *Salinas v. United States*,[6] which seemed to imply only the slightest limits on RICO conspiracy.

Contrary to the rulings of most circuit courts that consider this issue, and even in light of the *Salinas* decision, a searching analysis of RICO, the *Reves* standard, and traditional conspiracy law makes clear that the *Reves* "operation or management" test should be extended to apply to RICO conspiracy cases prosecuted under § 1962(d). This extension is necessary to effectuate the congressionally-intended limit on RICO liability explicated in *Reves* and to ensure that outsiders otherwise exempt from the statute are not simply swept back in by a broad construction of RICO conspiracy. In addition, such an extension best accords with the important criminal justice

---

[2] 507 U.S. 170 (1993).

[3] *See, e.g.*, Joan Biskupic, *Supreme Court Limits Use of Racketeering Law*, WASH. POST, Mar. 4, 1993, at A1.

[4] *See, e.g.*, Jeffrey N. Shapiro, *Attorney Liability Under RICO § 1962(c) After* Reves v. Ernst & Young, 61 U. CHI. L. REV. 1153, 1162 (1994).

[5] *See infra* Section IV.B.

[6] 522 U.S. 52 (1997).

goals of RICO, while at the same time comporting with substantive and procedural fairness for potential defendants.

Section II of this Article will describe the history of RICO and the elements that constitute the statutory offense. Section III will relate the development of the "operation or management" test adopted by *Reves*, including its formulation in the lower courts and the eventual decision by the Supreme Court. Finally, Section IV will consider the interaction of *Reves* and § 1962(d), RICO conspiracy, both before and after the Supreme Court's seminal decision in *Salinas v. United States*, which interpreted the scope of RICO conspiracy. This section will argue that even in light of the broad standard of RICO conspiracy enunciated by *Salinas*, courts should require that defendants agree to operate or manage an enterprise in order to incur liability to effectuate the important aims of *Reves* and ensure that RICO conspiracy does not become merely an associational offense.

II. THE ORIGINS AND ELEMENTS OF RICO

A. THE HISTORY OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

Congress passed the Racketeer Influenced and Corrupt Organizations Act as Title IX of the 1970 Organized Crime Control Act.[7] The ostensible purpose of RICO was the eradication of organized crime.[8] The law evolved from recommendations to Congress by the 1967 President's Commission on Law Enforcement and Administration of Justice, also known as the Katzenbach Commission.[9] The Commission report evinced particular concern with traditional organized crime, including crime families like La Cosa Nostra, and their illegal activities, including gambling, loan sharking, and drug dealing.[10] Beyond wholly illegal activities, however, the Commission noted great concern with the infiltration of legitimate

---

[7] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941 (1970).

[8] *Id.*

[9] *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 666-67 (1987) (detailing RICO's legislative history). For a considerably more thorough look at RICO's legislative history than that offered here, with competing claims as to its proper interpretation, see G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 249-80 (1982); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 776-86 (1988).

[10] Lynch, *supra* note 9, at 668-69.

businesses by organized crime syndicates,[11] resulting in corruption across a diverse field of professions.

As a result of the Commission's work and findings, in 1968, Senator Roman Hruska introduced two bills that would eventually evolve into RICO.[12] Although Congress took no immediate action on his proposed legislation, the following year, Senator John L. McClellan introduced another major bill seeking to act on the Commission's suggestions.[13] Just as the Commission had done, Senator McClellan emphasized the evils of organized crime and the dangers of their corrupting effects on legitimate businesses.[14] Senator Hruska, in turn, introduced a new bill tracking the initiative of his first two, entitled the "Criminal Activities Profits Act."[15] The bill was "aimed specifically at racketeer infiltration of legitimate business."[16] In response to Congressional hearings, debate, and analysis, Senators Hruska and McClellan next joined together and introduced a modified version of Hruska's new bill, entitled the "Corrupt Organizations Act of 1969."[17] With slight modification, this legislative plan was embodied in Senate Bill 1861, which was ultimately enacted as Title IX of the Organized Crime Control Act of 1970, RICO.[18]

The stated purpose of RICO is to combat "organized crime . . . by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[19] Thus, while general congressional priorities in enacting the legislation seem clear, there is some confusion about the specific intended breadth of RICO and the actual means by which RICO was meant to effectuate its ends.[20] Regardless, many commentators and judges alike agree that the application of RICO today has been stretched far beyond the

---

[11] *Id.* at 682 (arguing this concern extended to § 1962(c) specifically); *see also* Blakey, *supra* note 9, at 252-53.

[12] *See* Lynch, *supra* note 9, at 673.

[13] *Id.* at 675.

[14] *Id.*

[15] *Id.* at 676.

[16] *Id.*

[17] *Id.* at 676-77.

[18] *Id.*

[19] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

[20] *Compare* Lynch, *supra* note 9, at 664 (rejecting the suggestion that the statute originally intended to encompass traditional white collar crimes), *with* Blakey, *supra* note 9, at 279-80 (concluding that Congress intended wide use of civil and criminal RICO prosecutions, not limited in application to areas involving racketeering as such, organized crime, or antitrust). The two commentators similarly disagree as to whether RICO was intended to be a new substantive body of criminal law or merely a penalty enhancer.

specific considerations of the enacting Congress, especially where civil suits are involved.[21] Today, RICO reaches past the prosecution of organized crime to encompass what might otherwise be categorized as everyday business fraud, securities violations, political corruption, and various other white collar crimes. In fact, while organized crime, criminal infiltrations of legitimate businesses, and antitrust violations were clearly the focus of the congressional debate, the Supreme Court has bound RICO only by its expansive language, employing its broad terms and so-called liberal construction clause to continually knock down limiting constructions that lower courts have sought to impose on the statute.[22] Thus, the *Reves* "operation or management" test is particularly significant, because it marks one of the only limitations the Court has placed on a broad reading of the text, despite the repeated efforts of lower courts and litigants.

B. THE ELEMENTS OF A RICO OFFENSE

RICO comprises 18 U.S.C. §§ 1961-68. The substantive provisions of the statute, §§ 1962(a)-(c), criminalize conduct committed, in conjunction with an enterprise, that constitutes a pattern of racketeering activity.[23] Under the statute, then, the elements of a RICO violation include (1) the presence of a defendant "person," (2) an "enterprise," (3) and a "pattern" of (4) specifically defined predicate "racketeering" acts.[24]

First, "person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property."[25] "Enterprise," in turn, is defined to include "any individual, partnership, corporation, association, or

---

[21] *See, e.g.*, Sedima S.P.R.L. v. Imrex, Co., 473 U.S. 479, 506 (1985) (Marshall, J., dissenting) (lamenting expanded application of civil RICO); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 924 (1987) (describing varied uses of RICO today, despite arguably specific congressional focus); Ilene H. Nagel & Sheldon J. Plager, *RICO, Past and Future: Some Observations and Conclusions*, 52 U. CIN. L. REV. 456, 457-58 (1983) (summarizing categories of objections to expanding RICO suits); Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 194, 250-51 (1980) (arguing the legislative history supports a much more limited reading, especially with respect to § 1962(d), than RICO is afforded today).

[22] *See* Salinas v. United States, 522 U.S. 52, 65 (1997) (ruling that the defendant need not personally agree to commit any predicate acts to be found guilty of RICO conspiracy); *Sedima S.P.R.L.*, 473 U.S. at 482 (rejecting the requirement of "racketeering injury" for RICO suit); Am. Nat'l Bank & Trust Co. of Chicago v. Haroco, Inc., 473 U.S. 606, 606 (1985) (holding that civil RICO injury need not be a direct result of predicate act for standing); United States v. Turkette, 452 U.S. 576, 583 (1981) (defining RICO "enterprises" to include wholly illegitimate organizations).

[23] *See* 18 U.S.C. §§ 1962 (a)-(c) (2000).

[24] *See id.* § 1962.

[25] *Id.* § 1961(3).

other legal entity, and any union or group of individuals associated in fact although not a legal entity."[26] In *United States v. Turkette*, the Supreme Court explicitly ruled that this definition was intended to encompass wholly illegitimate enterprises, such as criminal gangs, along with more traditional organizations, such as businesses.[27]

Next, the term "pattern" is defined, in relevant part, as "at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."[28] The Supreme Court elaborated on this definition in its seminal case, *H.J. Inc. v. Northwestern Bell Telephone Co.*, describing both open and closed patterns of racketeering activity sufficient to satisfy the statute.[29]

Finally, predicate "racketeering activity" is defined to include a litany of generic state law crimes (such as murder, bribery, and extortion) and specifically enumerated federal law offenses (including, for example, mail and wire fraud).[30]

If each RICO element can be established, as defined above, an individual can be either criminally[31] or civilly[32] liable in four different ways. First, § 1962(a) bars a person from investing income obtained from a pattern of racketeering activity or collection of unlawful debt.[33] Second, § 1962(b) prohibits acquiring an interest in an enterprise through a pattern of racketeering activity.[34] Section 1962(c), the focus of this Article, prohibits a person from conducting an enterprise through a pattern of racketeering activity, stating in relevant part: "It shall be unlawful for any person employed by or associated with any enterprise . . . 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."[35] Finally, in addition to the substantive provisions of RICO, § 1962(d) states, "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."[36]

---

[26] *Id.* § 1961(4).

[27] *Turkette*, 452 U.S. at 593.

[28] 18 U.S.C. § 1961(5).

[29] *See* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239-43 (1989).

[30] 18 U.S.C. § 1961(1)(A)-(G).

[31] *See id.* § 1963. Penalties for criminal RICO violations include up to twenty years in prison, fines, and expansive forfeiture of related assets.

[32] *See id.* § 1964(c).

[33] *See id.* § 1962(a).

[34] *See id.* § 1962(b).

[35] *Id.* § 1962(c).

[36] *Id.* § 1962(d).

III. THE DEVELOPMENT OF THE *REVES* "OPERATION OR MANAGEMENT" TEST

As mentioned, despite the purportedly specific aims of Congress in enacting RICO, the Supreme Court has stubbornly resisted limitations imposed by lower courts on its expansive wording.[37] The most important and notable exception to this trend is the Court's recognition in *Reves* of an "operation or management" test for liability under § 1962(c).[38] In short, that decision reads the text and legislative history of § 1962(c) to require that an individual have "some part in directing [the enterprise's] affairs" to be culpable for a RICO violation under § 1962(c).[39] While this marked a monumental and important decision in placing some limit on RICO liability, the Court did not elaborate on the reach of its opinion. It gave lower courts little guidance as to how the *Reves* "operation or management" test was to be applied, leaving open the question of precisely what degree of involvement or participation was necessary to find liability. In addition, the Court failed to address the implications of this test for liability under § 1962(d), RICO conspiracy.

In determining the reach and application of *Reves*—and in support of the ultimate conclusion that *Reves* was intended to extend to RICO conspiracy—it is useful to track its development in the lower courts, to gain a better understanding of the context and history of the ruling.

A. *BENNETT V. BERG*: THE EIGHTH CIRCUIT'S PIONEERING STANDARD

The so-called "operation or management" test ultimately adopted by the Supreme Court in *Reves* was first enunciated by the Eighth Circuit in *Bennett v. Berg*.[40] The case involved a civil RICO suit, predicated on allegations of mail fraud, brought by former residents of the John Knox Village Retirement Community against the founder of the community, the not-for-profit organization that owned the community, related corporations, certain officers and directors therein, and former attorneys and accountants of the parties.[41] Sitting en banc, the Eighth Circuit adopted an earlier panel's partial reversal of the district court's dismissal for failure to state a claim under Rule 12(b)(6).[42] The en banc court generally endorsed the earlier panel's decision, but made special note of their concerns regarding

---

[37] *See supra* note 22.

[38] Reves v. Ernst & Young, 507 U.S. 170, 182 (1993).

[39] *Id.* at 179.

[40] 710 F.2d 1361, 1361 (8th Cir. 1983) (en banc).

[41] *Id.* at 1363.

[42] *See id.* at 1364.

the sufficiency of the § 1962(c) RICO claim.[43] Drawing on a Fourth Circuit decision, *United States v. Mandel*,[44] the court noted that the plaintiff's complaint might be defective for failing to allege the necessary degree of participation on the part of certain defendants to sustain § 1962(c) liability.[45] According to the court:

> Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action. A defendant's participation must be in the *conduct* of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.[46]

The opinion seemingly rested on a close analysis of § 1962(c)'s language.[47] Notably, the court also expanded its test beyond § 1962(c) to questions of liability under RICO conspiracy, reiterating that "a RICO conspiracy charge alleges *agreement to participate in conducting* the affairs of an enterprise through the commission of . . . predicate acts."[48] While not conclusive, this implies that the court that first clearly enunciated the "operation or management" test assumed that it would extend to questions of RICO conspiracy liability predicated on § 1962(c) claims.

B. *YELLOW BUS* AND THE D.C. CIRCUIT'S "SIGNIFICANT" LIMITATION ON LIABILITY

Although occasion to apply the "operation or management" standard did not arise frequently in the Eighth Circuit, its analysis was incorporated and expanded upon by the D.C. Circuit in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union*.[49] The court's opinion, which adopted an even narrower view of liability under § 1962(c) than that taken by the Eighth Circuit, stems from both the D.C. Circuit's in-depth analysis of the language and legislative history of RICO, and the particular facts of the case. In the case, Yellow Bus Line, Inc. alleged RICO violations against a striking union and its trustee, James Woodward, committed in conjunction with the union (the specified "enterprise" in the case).[50] Because the circuit's law proscribed liability under § 1962(c) where the RICO defendant

---

[43] *See id.*

[44] 591 F.2d 1347, 1375-76 (4th Cir. 1979).

[45] *Bennett*, 710 F.2d at 1364.

[46] *Id.* (emphasis added).

[47] *See id.*

[48] *Id.* (quoting United States v. Lemm, 680 F.2d 1193, 1203 (8th Cir. 1982)) (emphasis added).

[49] 913 F.2d 948 (D.C. Cir. 1990).

[50] *Id.* at 950.

"persons" (here, the union and the trustee) and the enterprise (the union) were actually the same entity, the court dismissed Yellow Bus's suit directly against the union.[51] In response, Yellow Bus amended its complaint to name itself, Yellow Bus Lines, Inc., as the enterprise through which the defendants allegedly conducted their racketeering.[52] The claim was that by going on strike against the company, the union had committed acts of racketeering through conduct of or participation in the company itself, in violation of § 1962(c).[53] The D.C. Circuit was thus called upon to determine whether Yellow Bus's innovative construction of § 1962(c) was countenanced by the language of RICO. As the court stated, the question "[s]imply put . . . is to determine the intent of Congress in using the phrase 'to conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs.'"[54]

The D.C. Circuit began its analysis with a summary of how other circuits had interpreted the language of this clause.[55] While the court outlined the discussion of the Eighth Circuit in *Bennett v. Berg*, it noted that most other circuits had opted for a broader reading of the statute.[56] Specifically, the Second Circuit had adopted a broad view of RICO liability, stating in *United States v. Scotto* that § 1962(c) required only that the defendant be enabled to commit the predicate offenses by virtue of his involvement in the affairs of the enterprise *or* that the predicate acts committed by the defendant were related to the activities of the enterprise.[57] The Ninth Circuit also had adopted this test, without elaboration.[58]

Like the Second Circuit, the Eleventh Circuit had rejected the Eighth Circuit's limited view of liability, giving § 1962(c) a significantly broader reading.[59] According to the Eleventh Circuit, "[t]he word 'conduct' in

---

[51] *Id.* at 951.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 952 (quoting 18 U.S.C. § 1962(c) (1988)).

[55] *Id.*

[56] *Id.* at 952-53; *see also* Catherine M. Clarkin, Reves v. Ernst & Young*: The Elimination of Professional Liability Under RICO*, 43 CATH. U. L. REV. 1025, 1046 (1994) (providing a helpful summary of the constructions of § 1962(c) employed by various circuits pre-*Reves*).

[57] United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980).

[58] *See Yellow Bus*, 913 F.2d at 952 n.4 (citing United States v. Yarbrough, 852 F.2d 1522, 1544 (9th Cir. 1988)).

[59] *See* Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986).

§ 1962(c) simply means the performance of activities necessary or helpful to the operation of the enterprise."[60] The court had opined,

> The substantive proscriptions of the RICO statute apply to insiders *and outsiders*—those merely "associated with" an enterprise—who participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity . . . . The RICO net is woven tightly to trap even the smallest fish, those peripherally involved.[61]

The Fourth and Seventh Circuits had specifically rejected the Eleventh Circuit's standard, but had not clearly established their own requirements under § 1962(c).[62] The Fifth Circuit, in turn, had taken a slightly more restrained view than either the Second or Eleventh Circuits, modifying the standard announced in *United States v. Scotto*. Under the Fifth Circuit's enunciation of the test, in order to be liable under § 1962(c), the racketeering acts must be related to the enterprise, and the defendant's position in the enterprise must facilitate their commission.[63]

Turning to its own analysis of the text and legislative history of RICO, the D.C. Circuit ruled the Eighth Circuit's construction of the statute the most sensible, rejecting the broad readings of both the Second and Eleventh Circuits.[64] The court in *Yellow Bus* emphasized that the language of RICO seemed to limit liability to those with some ability to manage or control the enterprise: "Congress, we stress, did not proscribe mere *participation* in the enterprise's affairs . . . but rather, subjected participation *in the conduct* of an enterprise's affairs to RICO liability . . . . 'Conduct' is synonymous with 'management' or 'direction.'"[65]

With this in mind, both the Second and Eleventh Circuit readings were problematic because they effectively read the word "conduct" (which appears twice) out of the statute by allowing liability for activities that represented nothing beyond "participation" in an enterprise. The court emphasized that "conduct" was the crucial term in the statute because "conduct" meant that guidance, management, or some control over the enterprise was required for liability.[66]

Furthermore, as the D.C. Circuit noted, the Eleventh Circuit's analysis of this issue was not particularly compelling.[67] Although the decision in

---

[60] *Id.* at 970.

[61] *Id.* (quoting United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978)).

[62] *See Yellow Bus*, 913 F.2d at 953 (describing the holdings of each circuit).

[63] *See* United States v. Cauble, 706 F.2d 1322, 1341 (5th Cir. 1983).

[64] *Yellow Bus*, 913 F.2d at 953-54.

[65] *Id.* at 954.

[66] *Id.*

[67] *Id.* at 953.

Bank of America National Trust & Savings Ass'n v. Touche Ross & Co.[68] clearly sought to ground itself in the language of the statute, the opinion lacks any real, searching review of the text. While the Eleventh Circuit dismissed the Eighth Circuit's formulation as neglecting the "directly or indirectly" language and therefore overly narrowing liability, the Eleventh Circuit's construction is flawed in that it reads "conduct" out of the statute entirely by permitting mere participation in the affairs of a given enterprise to carry liability.[69] The D.C. Circuit specifically emphasized that its construction, which tracked that of the Eighth Circuit, best fit the language of the statute, rendering no term superfluous.[70] Though the D.C. Circuit did require "significant" participation in the management or control of an enterprise to fall under § 1962(c), it clarified that this requirement did not prevent "outsider" liability or ignore the phrase "directly or indirectly," as the Eleventh Circuit supposed.[71] To elaborate, the court gave the example of an organized crime boss who "pulls the strings of a corporation through a puppet president" as one who might indirectly conduct the affairs of an enterprise, incurring liability under their reading of the statute.[72]

The D.C. Circuit went on to explain how its newly adopted standard was faithful to the goals of RICO, as illuminated by the legislative history.[73] Congress, the court opined, was not concerned with every petty predicate crime, but rather with the infiltration and conduct of legitimate businesses and whole enterprises through a pattern of such acts.[74] The precise language of the statute, therefore, reflects important congressional priorities concentrating on the control and management of businesses, not mere participation in their affairs.[75]

In short, the D.C. Circuit responded negatively to Yellow Bus's creative pleading attempt, concluding that the defendant union could not possibly be liable under RICO in such an action because the union could not have "conducted" the affairs of Yellow Bus Lines, Inc. through a strike, as would be required by the terms of § 1962(c).[76] Under the court's formulation of RICO, then, a defendant must have some significant control

---

[68] 782 F.2d 966 (11th Cir. 1986).

[69] *Yellow Bus*, 913 F.2d at 954.

[70] *See id.*

[71] *See id.*

[72] *Id.* at 953.

[73] *See id.* at 954.

[74] *See id.*

[75] *See id.* at 955.

[76] *See id.* at 956.

over the enterprise, which usually involves managing or determining the course of the enterprise's business, in order to "conduct" that enterprise.[77]

It is clear from the court's discussion of the effects of a different reading of RICO on delicate labor-management legal relations that the particular details of the case weighed heavily on the D.C. Circuit.[78] Nevertheless, the court's determination of the legal standard rests on a careful and thorough analysis of the language and legislative history of § 1962(c), as well as valid policy concerns that can be broadened to many other areas of RICO jurisprudence. As the court recognized in its opinion, circuits that had rejected a narrower reading of RICO had done so only after a cursory review of the language, with little, if any, reference to the legislative history.[79] While the Eleventh Circuit, for example, had focused on the "directly or indirectly" language to justify its broad interpretation, it had failed to read that phrase in its proper context. In context, it is clear that "participation" (whether direct or indirect) is not itself a basis for liability, but rather that there must be "participation . . . in the conduct" of an enterprise's affairs.[80] Similarly, in its grand, sweeping quote from *United States v. Elliott* regarding the fact that RICO is designed to catch "even the smallest fish," the Eleventh Circuit ignores large sections of the legislative history, which emphasize finding new and creative means for getting at mob "bosses" while not necessarily extending liability to those tangentially involved in the enterprise.[81] These issues are recognized and addressed by the court in *Yellow Bus*.[82]

Therefore, while the Supreme Court in *Reves* ultimately adopted the Eighth Circuit's test and rejected what it perceived to be a much narrower construction in *Yellow Bus* (due to the requirement of "significant control" within an enterprise),[83] it is unsurprising that the Supreme Court's decision builds upon the *Yellow Bus* opinion's careful analysis of RICO's text and legislative history.

---

[77] *Id.* at 954.

[78] *See id.* at 955.

[79] *See id.* at 954.

[80] *See* 18 U.S.C. § 1962(c) (2000).

[81] *Cf.* Reves v. Ernst & Young, 507 U.S. 170, 181-82 (1993) (reiterating congressional emphasis on criminalizing the *operation* of criminal enterprises); United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986) (describing RICO's primary purpose as reaching previously unaccountable organized crime leaders).

[82] *See Yellow Bus*, 913 F.2d at 953-54.

[83] *See Reves*, 507 U.S. at 179 n.4.

C. THE SUPREME COURT'S DECISION IN *REVES V. ERNST & YOUNG*

Three years after the D.C. Circuit's opinion in *Yellow Bus* and ten years after the Eighth Circuit first established its "operation or management" test, the Supreme Court officially adopted a version of this test in *Reves v. Ernst & Young*.[84]

Reves v. Ernst & Young was a case on appeal from the Eighth Circuit, in which that circuit's "operation or management" standard for liability under § 1962(c) of RICO had been applied.[85] The case involved a RICO claim stemming from the mismanagement and bankruptcy of the Farmer's Cooperative of Arkansas and Oklahoma, Inc. (the Co-op).[86] The Co-op was organized in 1946 and managed by a twelve person Board of Directors selected from its membership.[87] In 1952, the board named Jack White as general manager, and he became primarily responsible for the everyday dealings of the Co-op.[88] In order to cover its operating expenses, the Co-op sold promissory notes payable on demand.[89]

Jack White oversaw several suspect financial dealings during his tenure as manager of the Co-op.[90] Specifically, in 1980, he personally guaranteed and authorized loans to himself that ultimately totaled around $4 million to finance the construction of a gasohol plant, White Flame Fuels, Inc., that he had undertaken with a partner.[91] Later that year, both White and the Co-op's longtime accountant, Gene Kuykendall, were indicted on charges of federal tax fraud.[92] They were convicted in January 1981.[93] In the meantime, White engaged in litigation with the Co-op board that resulted in a consent decree relieving White of his massive debts to the organization, and in turn providing for Co-op ownership of White Flame starting in February 1980.[94]

In late 1981, the Co-op hired the firm Russell Brown (which later merged with another firm, Arthur Young & Co., and then ultimately

---

[84] 507 U.S. 170.

[85] *See* Arthur Young & Co. v. Reves, 937 F.2d 1310, 1324 (8th Cir. 1991), *aff'd sub nom.* Reves v. Ernst & Young, 507 U.S. 170 (1993).

[86] *See Reves*, 507 U.S. at 172-73.

[87] *See Arthur Young & Co.*, 937 F.2d at 1315.

[88] *Id.*

[89] *Id.*

[90] *See id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 1316.

[94] *Id.* at 1315.

became Ernst & Young) to conduct a financial audit.[95] The Arthur Young auditors were immediately faced with the problem of how to value and treat the White Flame plant in their financial calculations.[96] The auditors reached the somewhat questionable conclusion that the fixed asset value of the plant was greater than $4.5 million.[97] In addition, the auditors decided to account for the plant as if it had been owned by the Co-op at the start of its construction in 1979, rather than treating it as a later purchase, made from White as part of the consent decree.[98] The result of this decision was that they were able to value the plant at its fixed asset value of $4.5 million, rather than at its fair market value at the time of purchase (which would have been between $444,000 and $1.5 million).[99] If the auditors had chosen to value the plant at less than $1.5 million, the Co-op would have been insolvent.[100]

In April 1982, Arthur Young presented its 1981 audit to the Co-op's Board of Directors.[101] The auditors did not draw the board's attention to the decisions they had made in their treatment of the White Flame plant.[102] Similarly, the auditors and the board did not focus on these decisions at their 1982 annual meeting, but instead touted the financial health of the Co-op.[103] The same auditors were again hired to perform the Co-op's 1982 financial audit.[104] Once again, the White Flame plant was valued at over $4.5 million, and it was largely responsible for the positive net worth of the organization.[105]

Despite the efforts of the auditors and board, the apparent financial security of the Co-op began to diminish shortly thereafter. In early 1984, the Co-op had a slight run on its demand notes (which together with financing from the Cooperative Finance Association constituted its only source of funds).[106] Soon after, on February 23, 1984, the Co-op finally filed for bankruptcy.[107] That same month, the trustee in bankruptcy filed suit against numerous individuals and entities, including the auditor, on

---

[95] *Id.* at 1316.
[96] *Id.* at 1316-17.
[97] *Id.* at 1317.
[98] *Id.*
[99] *Id.* at 1317-18 n.7.
[100] *Id.* at 1317.
[101] *Id.* at 1318.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 1319.
[105] *Id.* at 1320.
[106] *Id.* at 1321.
[107] *Id.*

behalf of the Co-op and certain noteholders.[108] Among the claims asserted by the trustee was that Arthur Young (soon to become Ernst & Young) had participated in the operation or management of the Co-op through a pattern of racketeering activity, in violation of § 1962(c).[109]

On the RICO claim, the Eighth Circuit affirmed a grant of summary judgment in favor of Arthur Young, concluding that as a matter of law their participation in the Co-op could not rise to the level demanded by the circuit's "operation or management" test.[110] The court reiterated, "In *Bennett v. Berg* . . . we addressed the nature of the participation required of a RICO defendant before liability is appropriate [concluding] . . . some participation in the operation or management of the enterprise itself" is necessary.[111] The auditor's participation in the enterprise, the court continued, simply could not rise to this level, as their only involvement with the Co-op included conducting an audit and meeting with the board and Co-op members to present their findings.[112] The court commented on the split in the circuits as to how this provision of RICO should be interpreted, but affirmed its commitment to the operation or management test.[113]

In an opinion by Justice Blackmun, the Supreme Court affirmed the Eighth Circuit's dismissal of the suit against Arthur Young, adopting the "operation or management" standard as the proper interpretation of RICO § 1962(c).[114] Like the D.C. Circuit, the Supreme Court's decision centered on the precise language of the provision. In the key phrase defining liability under § 1962(c)—rendering it unlawful for a person employed by or associated with an enterprise "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs"—the Court focused on the word "conduct" and its dictionary definition of "lead, run, manage, or direct."[115] The majority emphasized that the word "conduct" must carry some implication of management or direction, beyond mere participation in an enterprise, or else it would be effectively read out of the statute.[116] In addition, the Court detailed the manner in which the second "conduct" (in the phrase "participate, directly or indirectly, in the conduct of") modified

---

[108] *Id.*
[109] *Id.*
[110] *Id.* at 1324.
[111] *Id.* (citation omitted).
[112] *Id.*
[113] *See id.*
[114] *See* Reves v. Ernst & Young, 507 U.S. 170, 186 (1993).
[115] *Id.* at 177.
[116] *Id.* at 178.

the definition of "participate" in the context of the statute.[117] The Court noted that this clause must extend liability more broadly to give it a separate meaning from the clause directly before it, but that "conduct" nonetheless implied a narrower scope of liability than some lower courts had allowed in merely defining this clause in terms of "participation."[118] In sum, the Court stated that the language "participate . . . in the conduct," just as the word "conduct," implied that the defendant must have some part in directing the enterprise's affairs to sustain liability.[119]

In setting out its "operation or management" test, the Supreme Court emphasized that it was adopting the standard of the Eighth Circuit, and not the more restrictive construction of the D.C. Circuit.[120] In other words, while some level of control over the enterprise was required, the Court refused to hold that the defendant must exercise "significant" control over the enterprise in order to be culpable under § 1962(c).[121] The Court also clarified that its rule was intended to be more functional than formal—an individual need not be part of an enterprise's upper management or hold a formal position within the organization in order to be guilty.[122] The test only required that the individual, whatever his title or status, exert some degree of control over the operation of the RICO enterprise.[123]

In addition to the language of § 1962(c), the Court contended that its interpretation was bolstered by the legislative history of RICO.[124] The Court noted that the bill introduced by Senators Hruska and McClellan that would eventually become RICO stated its purpose as "prohibit[ing] the infiltration *or management* of legitimate organizations by racketeering

---

[117] *See id.*

[118] *See id.* at 179.

[119] *See id.* Extended discussion of the dissenting opinion in *Reves* filed by Justice Souter, and joined by Justice White, is omitted for the purposes of this Article. In brief, Justice Souter concluded that the language of § 1962(c) was vague at best, meaning that RICO's liberal construction provision should govern. *See id.* at 188-89 (Souter, J., dissenting). That clause counseled for rejection of any significant limitation on RICO liability. *Id.* (Souter, J., dissenting). Justice Souter further argued that Arthur Young's actions exceeded that of mere "outside" auditor and that the company should face RICO charges for their part in the Co-op's fraudulent actions. *Id.* at 190 (Souter, J., dissenting).

[120] *See id.* at 179 n.4.

[121] *Id.*

[122] *See id.* at 184-85.

[123] *See id.*

[124] *See id.* at 179-80. While the *Reves* decision was seven-to-two, Justices Scalia and Thomas specifically refused to join the section concerning the legislative history of RICO. *Id.* at 172 n.1. Presumably this was at least in part due to Justice Scalia's outspoken denouncement of reliance on conjectural interpretations of such history as a means of judicial decision-making.

activity."[125] The Court also drew upon the statements of then Assistant Attorney General Will Wilson regarding RICO's predecessor bills, complaining that some "fail[ed] to prohibit the control or operation of such businesses by means of prohibited racketeering activities."[126] Along the same lines, the Court relayed that the Congress that enacted the bill repeatedly evinced its concern with the operation or management of enterprises through racketeering and that they consistently referred to § 1962(c) as "prohibiting the *operation* of an enterprise through a pattern of racketeering."[127] All in all, the Court amassed a convincing collection of evidence to support the idea that Congress was considering liability for those who managed enterprises through racketeering, and not for those who merely associated with such enterprises.[128]

D. EXPLAINING THE *REVES* RULE

The *Reves* rule was drawn from an extensive inquiry into the text and legislative history of § 1962(c), undertaken by the Supreme Court with at least partial reliance on the analyses of the Eighth and D.C. Circuits. While the exact contours of the test and its potential application to RICO conspiracy were not discussed by the Supreme Court, the nature of the opinion in *Reves* lays a clear groundwork for demonstrating why the "operation or management" test must be extended to § 1962(d).

The first important, though perhaps obvious, point is that this is not a mere court-imposed, prudential rule designed to narrow the application of RICO (though certainly such rules have been explored).[129] *Reves* is a decision on the specific legislative intent of Congress, a limitation imposed by a Court that has consistently resisted limiting the statute's scope by opting for the broadest possible reading of its language.[130]

Next, *Reves* is a well-reasoned and well-supported decision as to the proper interpretation of § 1962(c). Criticism of the Court's decision focuses on the difficulty of applying the test or of determining the extent of its effects, not the propriety of its adoption.[131] The textual analysis

---

[125] *Id.* at 181 (quoting S. 1861, 91st Cong. (1968)).

[126] *Id.*

[127] *See id.* at 182.

[128] *See id.* at 182-83.

[129] *Cf.* New Eng. Data Svs. v. Becher, 829 F.2d 286, 290 (1st Cir. 1987) (relating pleading requirements for civil RICO suits).

[130] *See, e.g.*, Sedima S.P.R.L. v. Imrex, Co., 473 U.S. 479, 481 (1985).

[131] *See, e.g.*, G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345 (1996); Scott Paccagnini, *How Low Can*

undertaken by the Court provides convincing support for the idea that some management in an enterprise must have been intended by § 1962(c), from the repeated use of the word "conduct" and the employment of that term to modify the participation prong.[132] Furthermore, the Court does a good job of reconciling its textual analysis with the legislative history, citing numerous references and statements to suggest that § 1962(c) was aimed at those who managed enterprises via racketeering.[133]

Finally, although this was not a specific focus of the Supreme Court's opinion, the test is also important because it accords with the policy goals of RICO, theoretically striking the proper balance in liability by separating those individuals intended to be swept up in the RICO net and those intended to be spared. As the D.C. Circuit noted in *Yellow Bus*, the basic goal of RICO was to eliminate the infiltration of legitimate businesses by those associated with organized crime and racketeers; this goal means that RICO's provisions would naturally focus on "control" of legitimate businesses and not every petty crime or corruption associated with a given enterprise.[134] Similarly, in a highly influential opinion dealing with the proper scope of the RICO conspiracy provision, the Seventh Circuit read RICO-related committee notes to clearly indicate that the congressional focus in enacting the statute was to reach "crime leaders" who were thus far more "experienced, resourceful, and shrewd in evading and dissipating the effects of the established procedures in law enforcement."[135] Insofar as the goal of RICO was to reach "insulated ring leaders,"[136] the *Reves* decision is essential in facilitating this law enforcement aim while preventing the net from being cast unnecessarily broadly.[137]

As a final note, in exploring the *Reves* opinion, it is important to recognize what the Supreme Court rejected in adopting its "operation or

---

You Go (Down the Ladder): The Vertical Reach of RICO, 37 J. MARSHALL L. REV. 1 (2003) (describing issues in determining the extent of RICO liability post-*Reves*).

[132] *See Reves*, 507 U.S. at 177-78 (analyzing the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs").

[133] *See id.* at 179-82.

[134] *See* Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union, 913 F.2d 948, 954 (D.C. Cir. 1990).

[135] *See* United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986) (quoting S. REP. No. 89-72, at 2 (1965)).

[136] *Id.*

[137] This argument focuses on whom the *Reves* line both includes and excludes. There are many positive policy reasons, for example, for permitting some level of immunity to RICO suits to ensure that the lawyers, accountants, and other professionals presumably not "conducting" an enterprise, but often hired to work in conjunction with an organization, are not constantly in fear of being pulled within RICO's wide purview. *See* Clarkin, *supra* note 56, at 1065 (discussing the benefits of excusing "outside" professionals from RICO liability).

management" standard. In announcing this test, the Supreme Court explicitly rejected the more liberal construction of § 1962(c) announced by the Eleventh Circuit in *Bank of America*,[138] which permitted liability for those only tangentially involved with an enterprise.[139] The implication is that RICO was not, in fact, intended to catch even the "smallest fish." In addition, the Court stated that aiding or abetting an enterprise would not carry liability under § 1962(c).[140] The basic thrust of the opinion is an attempt to exempt a certain—though certainly not well defined—category of defendants from liability, recognizing the intent of Congress to exclude some portion of so-called "outsider" defendants from the reach of RICO.[141] As the Court clearly stated, "In this case it is clear that Congress did not intend to extend RICO liability under § 1962(c) beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity."[142] This is directly in line with the comments of one of RICO's original sponsors, Senator McClellan, as related above. To quell concerns of critics, he emphasized that RICO liability would not extend to all of those who committed racketeering offenses, but rather only those that "engage[d] in a pattern of such violations, and use[d] that pattern to obtain or operate an interest in an interstate business."[143]

IV. APPLYING *REVES* TO § 1962(D) RICO CONSPIRACY

In terms of the functional application of *Reves* thus far, lower courts have struggled with the somewhat vague standard announced by the Supreme Court. Courts have used the Supreme Court's pronouncement that operation or management may extend beyond upper management to find the *Reves* test met in a variety of situations. As a general rule, "outsiders," or those merely associated with an enterprise, must play some part in the operation or management; "insiders," in turn, must be under the direction of

---

[138] Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986).

[139] *See* Reves v. Ernst & Young, 507 U.S. 170, 177 (1993).

[140] *See id.* at 178-79; Blakey & Roddy, *supra* note 131, at 1367.

[141] *See Reves*, 507 U.S. at 183 (characterizing plaintiff's proposed liberal construction of RICO to include non-managers, a "new purpose that Congress never intended").

[142] *Id.* at 184.

[143] *Id.* at 183 (quoting 116 CONG.REC. S586, 18940 (statement of Sen. McClellan)).

one who manages an enterprise.[144] However, applying this general rule in precise cases has sometimes proven difficult.[145]

A question that has proved equally as vexing as determining the precise scope of *Reves* involves whether the test was intended to apply to liability under § 1962(d), RICO conspiracy, when predicated on an agreement to violate the substantive § 1962(c) charge. In other words, if a person is accused of conspiring to violate § 1962(c) by agreeing to conduct or participate in the conduct of an enterprise's affairs through a pattern of racketeering activity, must the moving party also allege an agreement to operate or manage the enterprise through such a pattern? Must the individual defendant personally agree to manage the enterprise? Is it sufficient that the defendant conspire with a manager, or one who otherwise meets the *Reves* test? Is the test wholly inapplicable?

Before discussing the interaction of §§ 1962(c) and (d), a greater examination of RICO conspiracy is required. While the focus of the discussion thus far has been *Reves* and § 1962(c), the issue of the interaction is equally, if not more, one that centers around the meaning and intended reach of RICO conspiracy.

A. ABOUT RICO CONSPIRACY

Unfortunately, courts have long struggled with how to interpret the reach of § 1962(d), which states simply that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of [§ 1962]."[146] Questions have focused on the nature of the conspiratorial agreement necessary to constitute a violation, as well as the extent to which RICO conspiracy adopts traditional criminal or civil conspiracy principles.

A seminal case explicating RICO conspiracy is *United States v. Elliott*.[147] The case discusses the manner in which RICO conspiracy dispenses with certain common law conspiracy requirements that might otherwise inhibit the prosecution of RICO's potentially diverse criminal undertakings together.[148] RICO accomplishes this, the court explains, through its creation of a new and expanded conspiratorial objective, to wit,

---

[144] *See generally* Carrie J. Disanto, Reves v. Ernst & Young*: The Supreme Court's Enigmatic Attempt to Limit Outsider Liability Under 18 U.S.C. § 1962(c)*, 71 NOTRE DAME L. REV. 1059, 1070-71 (1996).

[145] For an exhaustive review of who is liable under § 1962(c) under each circuit's post-*Reves* construction, see Blakey & Roddy, *supra* note 131.

[146] 18 U.S.C. § 1962(d) (2000).

[147] 571 F.2d 880 (5th Cir. 1978).

[148] *See id.* at 902.

violation of RICO provisions §§ 1962(a)-(c) through actions in conjunction with an enterprise.[149] Although the expansive reading of RICO conspiracy offered by *Elliott* has since been curtailed slightly by the Fifth Circuit and other courts,[150] it remains an important opinion in understanding the aims of § 1962(d).

In terms of the simple, mechanical requirements of § 1962(d), questions generally focus on what precisely one charged with RICO conspiracy must have done to incur liability.[151] The basic answer to all questions provided by the cases is that RICO conspiracy adopts background "hornbook" criminal conspiracy laws.[152] It is clear, therefore, that the government must prove the existence of the basic RICO elements, including a defendant person, a RICO enterprise, and a pattern of racketeering (including two predicate acts agreed to or actually committed by some individual) to establish liability.[153] Unlike the general federal conspiracy statute, it is also well accepted that RICO conspiracy does not require proof of any overt act.[154] Beyond this, a defendant must merely agree to the illegitimate objectives that constitute the crime.[155]

The exact content of this agreement is where further questions arise. There is apparent consensus that a RICO conspiracy charge must include an intentional agreement on the part of some defendant to violate a substantive provision of the statute; agreement merely to commit a predicate offense would not be sufficient.[156] Coupled with this requirement is the need that the defendant possess some degree of knowledge that the conspiratorial

---

[149] *See id.* at 902-03.

[150] *See* Blakey & Roddy, *supra* note 131, at 1446-47 (explaining development of law since *Elliott*).

[151] *See, e.g.*, James Clann Minnis, *Clarifying RICO's Conspiracy Provision: Personal Commitment Not Required*, 62 TUL. L. REV. 1399, 1407 (1988) (summarizing divergent arguments as to the level of personal participation and the nature of agreement required for RICO conspiracy).

[152] *See, e.g.*, Salinas v. United States, 522 U.S. 52, 63 (1997); United States v. Neapolitan, 791 F.2d 489, 496 (7th Cir. 1986); Minnis, *supra* note 151, at 1409. This assumption was complicated somewhat by the Supreme Court's decision in *Beck v. Prupis*, which applied principles of civil conspiracy to a civil suit under § 1962(d), despite the fact that RICO's substantive provisions are generally treated alike in civil and criminal cases. 529 U.S. 494, 504 (2000). A full exploration of the potential implications of that decision are beyond the scope of this Article.

[153] *See* Jeanette Cotting, *RICO's Conspiracy Agreement Requirement: A Matter of Semantics?*, 21 HOFSTRA L. REV. 725, 749 (1993).

[154] *See, e.g.*, Blakey & Roddy, *supra* note 131, at 1456.

[155] *See Neapolitan*, 791 F.2d at 496.

[156] *See, e.g., id.* at 496 n.3.

enterprise extends beyond her own personal participation.[157] The difficult question, which has divided the circuits for most of RICO's history, is whether the defendant must personally agree to commit (or actually commit) any predicate acts as part of the initial conspiratorial agreement.[158] Because the government or moving party will frequently be able to prove numerous illegal predicate acts with respect to each defendant, hard questions involving the extent of conspiratorial liability generally arise in the context of smaller RICO prosecutions, when non-active ring leaders are prosecuted, or when more outside members of an alleged conspiracy—those without any direct criminal participation—are involved.[159]

This issue was ultimately settled, for better or worse, by the Supreme Court in its 1997 decision in *Salinas v. United States*.[160] Consequently, it is clear today that an individual need not personally agree to commit or actually commit any predicate acts for RICO liability.[161] *Salinas* both clarified and confused the exact reading of § 1962(d) conspiracy liability, however, and there is still some uncertainty as to the exact proof required as to each defendant. Nonetheless, with the basic outline of RICO conspiracy in mind, the question of the application of *Reves* can be more properly considered.

B. THE INTERACTION OF *REVES* AND § 1962(D) BEFORE *SALINAS*

The question of whether *Reves* would somehow influence the level or quality of proof required to sustain RICO conspiracy when predicated on a violation of § 1962(c) has not been specifically addressed by the Supreme Court. Although the Eighth Circuit seemingly assumed some extension of its "operation or management" test to RICO conspiracy—specifying that "a RICO conspiracy charge alleges agreement to participate in conducting the

---

[157] *See* Blakey & Roddy, *supra* note 131, at 1448-51.

[158] For a helpful summary of the state of the law before the Supreme Court's decision in *Salinas*, see *Adams v. United States*. 474 U.S. 971 (1985) (White, J., dissenting from the denial of cert.). Exacerbating the difficulty in interpretation is the fact that the RICO conspiracy provision is barely discussed in the legislative history of the statute. *See* Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 877 n.227 (noting that the RICO conspiracy provision was not discussed by the House or Senate Reports and that no clarification beyond reciting the text was offered). Instead, the clause seems something of an afterthought, tacked on to ensure that RICO would have its intended wide-reaching effects in combating racketeering and organized crime.

[159] *See* Cotting, *supra* note 153, at 727 n.7.

[160] 522 U.S. 52 (1997).

[161] *Id.* at 63-64.

affairs of an enterprise"[162]—no such language appears in the Supreme Court's *Reves* decision.

The circuits have split on this question. Initially, the Third and Ninth Circuits applied the *Reves* "operation or management" test to RICO conspiracy.[163] Conversely, the Second, Seventh, and Eleventh Circuits rejected the application of *Reves*.[164] The landscape changed somewhat, however, after Supreme Court's decision in *Salinas*. Although the case did not deal directly with this question, it offered such a broad interpretation of RICO conspiracy that many circuits, including the Third, assumed that *Reves* could not possibly apply to that provision. As a result, today the Ninth Circuit is the only jurisdiction that still applies *Reves* to suits under § 1962(d).

In determining whether *Reves* applies to RICO conspiracy, it is helpful to ask the question both pre- and post-*Salinas*. Prior to the Supreme Court's decision in *Salinas*, the Third Circuit plainly had the better reasoned and more convincing analysis of the extension of *Reves*.[165] Post-*Salinas*, the question becomes the true effect of this decision and whether the reasoning of *Salinas* necessarily precludes the application of *Reves* to RICO conspiracy. Next, to the extent that *Salinas* does preclude such an application, how sound is the reasoning and resultant policy?

The Third Circuit first considered questions surrounding the interaction of *Reves* and § 1962(d) in the 1995 case of *United States v. Antar*.[166] The case involved the criminal RICO prosecution of the owners and associates of the Crazy Eddie electronics retail chain in New Jersey, predicated on multiple counts of securities and mail fraud.[167] The circuit case involved the appeal of one defendant, Mitchell Antar, who challenged his RICO conspiracy conviction based on predicate acts that occurred after he had left the RICO enterprise, Crazy Eddie, Inc.[168] The court in *Antar* stated that, in light of the *Reves* "operation or management" requirement, the defendant could not have been convicted of a substantive § 1962(c) violation based on predicate acts committed after he left the enterprise, as

---

[162] Bennett v. Berg, 710 F.2d 1361, 1365 (8th Cir. 1983) (en banc).

[163] *See, e.g.*, Niebel v. Trans World Assurance Co., 108 F.3d 1123 (9th Cir. 1997); United States v. Antar, 53 F.3d 568 (3d Cir. 1995).

[164] United States v. Starrett, 55 F.3d 1525, 1547 (11th Cir. 1995); Napoli v. United States, 45 F.3d 680, 684 (2d Cir. 1995); United States v. Quintanilla, 2 F.3d 1469, 1485 (7th Cir. 1993).

[165] *See* discussion *infra* Section IV.C (describing how the Third Circuit's rule best accorded with the text and legislative intent of RICO).

[166] 53 F.3d 568.

[167] *See id.* at 572.

[168] *Id.* at 580.

he then no longer played any role in managing or controlling the organization.[169] While noting that many courts had sustained convictions under § 1962(d) for which the defendant could not have been guilty of the substantive violation, the court concluded that *Reves* must have some effect on the scope of RICO conspiracy liability.[170] Otherwise, the Third Circuit reasoned, "courts risk eviscerating *Reves* by blanketly approving conspiracy convictions when substantive convictions under section 1962(c) are unavailable."[171] Consequently, the court extended *Reves* to conspiracy charges, opining that "conspiring *to* operate or manage an enterprise" would carry liability, while merely "conspiring *with* someone who is operating or managing the enterprise" would not.[172] The court explained the seemingly fine distinction in that "in the former situation, the defendant is conspiring to do something for which, if the act was completed successfully, he or she would be liable under § 1962(c). But in the latter scenario, the defendant is not . . . ."[173]

The reasoning of the Third Circuit was adopted with limited additional elaboration by the Ninth Circuit in *Niebel v. Trans World Assurance Co.*[174] After noting some disagreement among the circuits on this issue, the court determined that the Third Circuit's rationale best comported with its reading of *Reves* and the previous language it had employed to describe the requirements of liability under RICO conspiracy.[175] As a result, the court noted that the burden of sustaining a § 1962(d) claim would not be met for a given defendant merely by showing that he knew about some illegal scheme, that he benefited from it, or even that he conspired with one of the principal actors.[176] Instead, the moving party would be required to show that the defendant agreed to have some part in directing the enterprise's affairs.[177]

---

[169] *Id.*

[170] *Id.*

[171] *Id.* at 581.

[172] *Id.*

[173] *Id.* While the court adopted the defendant's interpretation of § 1962(d), they still affirmed his liability under that provision because he had not sufficiently demonstrated withdrawal from the conspiracy. *Id.* at 583.

[174] 108 F.3d 1123 (9th Cir. 1997).

[175] *Id.* at 1128.

[176] *Id.*

[177] *Id.* Once again, while enunciating the narrower range of liability under RICO conspiracy, the court nonetheless sustained the conviction of the defendant raising the argument, Trans World Assurance Company. *Id* at 1129; *see also* Congregacion de la Mision Provincia v. Curi, 978 F. Supp. 435, 451 (E.D.N.Y. 1997) (citing *Niebel* and *Antar* in determining that the defendant must have agreed to participate in management of enterprise for RICO conspiracy liability).

Contrary to the Third and Ninth Circuits, the majority of circuits rejected any application of *Reves* to RICO conspiracy charges. Most influential among these was the Seventh Circuit, which announced its interpretation in *United States v. Quintanilla*.[178] The case involved RICO charges against defendants Carlos Quintanilla and Leticia Gutierrez, stemming from a scheme to defraud the G. Heileman Brewing Company via the submission of false funding proposals to the company's corporate sponsorship program.[179] Although defendant Gutierrez initially cooperated with the government in their efforts to investigate and prosecute "big fish" involved with the scheme, another defendant named Joseph Monreal eventually also opted to cooperate, testifying against Quintanilla and Gutierrez.[180] Both defendants were convicted under § 1962(d), and Gutierrez appealed her conviction, contending that *Reves* should apply to RICO conspiracy charges and that she had not taken part in the operation or management of the criminal enterprise.[181]

Although the Seventh Circuit's opinion is widely cited as rejecting any application of *Reves* to RICO conspiracy, the real focus of the reasoning is the question of whether the defendant must personally agree to commit two RICO predicate acts in order to be liable under the conspiracy charge—a contention the court clearly denies.[182] While the Seventh Circuit plainly rejects the idea that a conspiracy charge must be dismissed merely because a defendant could not be convicted of the substantive offense—a basic precept of criminal conspiracy—the logic of the opinion, if simplistic, is somewhat muddled. The bottom line of the analysis is that the *Reves* decision, on its own terms, applied only to the substantive RICO charge, § 1962(c), and not to § 1962(d).[183] What the court does not explain is precisely why *Reves* nonetheless does not in any way impact the requirements of RICO conspiracy based on an agreement to violate

---

[178] 2 F.3d 1469 (7th Cir. 1993).

[179] *Id.* at 1471.

[180] *Id.* at 1472.

[181] *Id.* at 1484.

[182] *See id.* at 1484-85.

[183] *Id.* The decision is based largely on *Jones v. Meridian Towers Apartments, Inc.*, a D.C. District Court opinion interpreting the requirements of RICO conspiracy in light of *Yellow Bus*. 816 F. Supp. 762, 772-73 (D.D.C. 1993). The *Jones* court employed reasoning substantially similar to that applied by the Seventh Circuit in later decisions—namely that RICO conspiracy operates against the backdrop of traditional conspiracy laws and that one need not personally agree to commit an act or even be capable of committing the act in order to be guilty of conspiracy—in ruling that *Yellow Bus* did not limit the scope of RICO conspiracy. *Id.* at 772. Although *Jones* is a precursor to the Seventh Circuit's *Quintanilla* decision, this discussion focuses on *Quintanilla* because it is more frequently cited by other courts in rejecting the application of *Reves* to § 1962(d).

§ 1962(c). In addition, the court confusingly offers two different standards for RICO conspiracy liability. At one point, the court quotes a previous Seventh Circuit decision, *United States v. Neapolitan*, to state that "a RICO conspiracy requires only an agreement to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity";[184] this is essentially the same language as the standard established by the Third Circuit in *Antar*. However, later in the opinion, the court in *Quintanilla* seemingly modifies its liability standard, stating:

> [O]ur cases make clear that § 1962(d) liability is not coterminous with liability under § 1962(c). . . .
>
> We agree with the District of Columbia that "[T]o hold that under § 1962(d) [the government] must show that an alleged coconspirator was capable of violating the substantive offense under § 1962(c), that is, that he participated to the extent required by *Reves*, 'would add an element to RICO conspiracy that Congress did not direct.'"[185]

Once again, while the court adamantly rejects the argument that *Reves* impacts RICO conspiracy liability, the actual focus of much of the analysis and language seems to be the separate and difficult question of what level of personal participation in the predicate acts is necessary for conspiracy liability. The court speaks more directly to whether a given defendant must agree to commit crimes personally,[186] rather than whether her original conspiratorial agreement must embrace the management or operation of some enterprise (as opposed to mere association with or participation in an enterprise).

Nonetheless, this opinion was relied upon by other circuits in rejecting any application of the *Reves* standard to RICO conspiracy charges based on a conspiracy to violate § 1962(c). In *Napoli v. United States*, the Second Circuit stated simply that a RICO conspiracy conviction is "unaffected by . . . *Reves*."[187]

---

[184] *Quintanilla*, 2 F.3d at 1484 (quoting United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986)).

[185] *Id.* at 1485 (quoting *Jones*, 816 F. Supp. at 773) (citations omitted).

[186] *See id.* at 1484.

[187] Napoli v. United States, 45 F.3d 680, 684 (2d Cir. 1995). The *Napoli* opinion cited an earlier Second Circuit case, *United States v. Viola*, 35 F.3d 37 (2d Cir. 1994), which in turn relied upon *Quintanilla*. It is not an entirely appropriate citation for the proposition for which the court in *Napoli* offers it, however, and it is worth being precise. Specifically, the *Viola* court stated that "[r]eversal of [the defendant's] substantive RICO conviction because he did not participate in the operation or management of the enterprise does not require automatic reversal of his conviction under RICO's conspiracy provision . . . ." *Viola*, 35 F.3d at 43. The *Viola* court went on to repeat the Seventh Circuit's formulation of RICO conspiracy in *Neapolitan*, describing RICO conspiracy as an agreement to conduct or

Similarly, the Eleventh Circuit in *United States v. Starrett* stated, "We agree with the Second and Seventh Circuits that the Supreme Court's *Reves* test does not apply to a conviction for RICO conspiracy."[188] The court articulated a requirement of only an agreement "to participate" in the activities of the enterprise in question for the purposes of RICO conspiracy liability.[189]

C. IN DEFENSE OF THE THIRD CIRCUIT'S INTERPRETATION IN *UNITED STATES V. ANTAR*

In many ways, the repeated phrasing of the question at issue throughout this Article is slightly inaccurate. The question is not merely whether *Reves* should apply to § 1962(d), but more precisely, how it should apply. Even in prosecutions for RICO conspiracy in the Second, Seventh, and Eleventh Circuits, the moving party must prove that some individual operated or managed (or agreed to operate or manage) an enterprise.[190] The question is whether some contemplated participation in the operation or management of an enterprise must be established with respect to every defendant, exactly what such proof would entail, and precisely what the initial conspiratorial agreement made by each defendant must embrace.[191]

In answering this question, the Third Circuit's formulation in *Antar* is that which best accords with the text and apparent legislative intent of RICO.[192] Both *Reves* and traditional conspiracy doctrine counsel in favor

---

participate, directly or indirectly, in the conduct of an enterprise's affairs through racketeering activity. *Id.* The court also noted that conspiracy is shown only where the defendant "embraced the objective of the alleged conspiracy." *Id.* Arguably, then, the court's formulation of RICO conspiracy requirements and its application in this case actually comports with some limited application of the *Reves* principles.

[188] United States v. Starrett, 55 F.3d 1525, 1547 (11th Cir. 1995) (citing *Napoli*, 45 F.3d 680; *Quintanilla*, 2 F.3d 1469).

[189] *Id.* Nonetheless, in both *Starrett* and *Napoli*, the court stated that the defendants met the *Reves* standard under the substantive counts, and evinced clear feelings that the defendants were bad actors. In *Napoli*, the court stated it was without difficulty in finding that petitioners met the *Reves* test under § 1962(c) and that the "evidence of guilt . . . was overwhelming." 45 F.3d at 684. In *Starrett*, the court noted that the primary defendant was the President of the RICO enterprise, the "Outlaw Motorcycle Club," and that the other defendants all also met the substantive § 1962(c) standard. 55 F.3d at 1547, 1549. The courts' opinions regarding the culpability of the defendants undoubtedly contributed to their readiness to ignore potential legal barriers to conviction.

[190] *See, e.g.*, United States v. Warneke, 310 F.3d 542, 547 (7th Cir. 2002).

[191] Note that this question is complicated by the fact that § 1962(c) itself does not have a mens rea requirement, making formulation of the exact conspiracy requirements difficult. For a discussion of this problem, see Tarlow, *supra* note 21, at 235.

[192] Although it has not yet been discussed in this Article, in a 2000 case, the Seventh Circuit offered an unusually thorough and thoughtful consideration of this specific question,

of the extension of conspiracy liability only to those who agree to operate or manage a RICO enterprise. Because this is a conspiracy charge, the agreement need not ever come to fruition; the defendant need not actually conduct the enterprise. But, pursuant to the fundamental precepts of *Reves* and traditional criminal conspiracy requirements, the defendant at least must be in a position to enter into a meaningful agreement that the conduct of an enterprise will be accomplished, meaning that she must have some capacity to effectuate this management and some personal control over the direction of the enterprise.[193] By accepting this, *Antar's* standard is superior to the standards of courts that have rejected any application of *Reves* to RICO conspiracy and to those courts' standards that have offered less rigorous forms of the rule, including post-*Salinas* decisions by the Seventh Circuit. The rule is seemingly compelled by a careful reading of RICO's provisions and represents the most effective means of protecting the *Reves* test from abrogation through lenient application of conspiracy liability to those who might otherwise be excluded from RICO's reach.[194] Additionally, *Antar's* construction separates those liable under *Reves* from those who are not in a way that comports with the statutory aims of RICO, preserving the special functions of the RICO conspiracy clause.

---

ultimately determining that one can be guilty under § 1962(d) if he knowingly facilitates the operators or managers to whom § 1962(c) liability applies. *See* Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 967 (7th Cir. 2000). This ultimate conclusion as to the standard of liability is problematic because its lax personal participation requirement does not limit liability to those who actually have some capacity to operate or control an enterprise as intended by *Reves*, and because the formulation runs afoul of traditional conspiracy liability principles. In addition, the Seventh Circuit itself seemingly adopted a somewhat broader standard for RICO conspiracy liability (perhaps unintentionally), reading out the knowledge requirement of *Brouwer*. *See Warneke*, 310 F.3d at 547. Nonetheless, much of the decision's reasoning will be referenced as it is helpful in attempting to determine the mens rea requirement for RICO conspiracy liability.

[193] Note that this is not an unduly rigorous restriction, as the Supreme Court explained in *Reves* that many defendants potentially meet its standard though they might not be within an enterprise's core managerial group or traditional insiders. *See* Reves v. Ernst & Young, 507 U.S. 170, 184-85 (1993); *see also* Clarkin, *supra* note 56, at 1065-66 (analyzing post-*Reves* decisions, claiming that many cases that purported to apply a more lenient standard of liability under § 1962(c) nonetheless involved defendants who would likely fit the *Reves* test).

[194] For further support for this proposition, see Stephanie Profitt, *RICO Conspiracy: The Ninth Circuit Distinguishes Itself from the Rising Cost of Guilty Thoughts*, 33 GOLDEN GATE U. L. REV. 47, 67 (summarizing the interpretation of most courts of the interaction of *Reves* and RICO conspiracy and concluding that most courts had reached "an overly-broad interpretation of the RICO conspiracy provision that does not support the intent of the statute or the policy it reflects").

i. From the Perspective of the Reves *Test*

First, clearly *some* proof of operation or management of an enterprise must be established in a RICO conspiracy prosecution based on § 1962(c). "Operation or management" is an element of the substantive offense. Just as the prosecution in a given case must prove the existence of a RICO enterprise and a pattern of racketeering activity, with the commission of at least two predicate acts, they must offer proof that some individual "conducted" an enterprise.[195] The only real question is how this should apply to each individual defendant.

The oversight that most courts make in interpreting the interaction of § 1962(d) and *Reves* is that they focus entirely on conspiracy law, completely ignoring the rationale and intent of *Reves*. Obviously, however, when one considers the law of conspiracy based on an agreement to commit murder, for example, one must analyze both conspiracy and murder doctrines.

Orienting the inquiry in this fashion, *Reves* itself counsels that the standard must apply to limit conspiracy liability to those who conspire *to* operate or manage an enterprise, and not merely those who conspire *with* someone who operates or manages an enterprise.[196] *Reves* explicitly ruled that Congress, in enacting RICO, intended to extend liability only to those involved in the operation of enterprises through a pattern of racketeering activity and not to those who merely committed predicate acts or merely associated with an enterprise.[197] This is entirely consistent with the legislative history as detailed above, and this, in a nutshell, is the rationale of *Antar's* limited construction of the RICO conspiracy provision.

Interestingly, the *Antar* opinion is heavily criticized by frequent RICO commentator and expert, G. Robert Blakey, who, in an article on *Reves* with Kevin P. Roddy, denounces the Third Circuit's reasoning as "topsy-turvy"—an improper attempt to determine the meaning of RICO through negative inference.[198] Opaquely, he states:

> *Reves* is silent about conspiracy liability under RICO; it speaks to liability of a principal in the first degree. Silence, in this context, is "no thing," that is, zero . . . . Zero equals zero no matter how many times you multiply it by any figure. . . . *Antar* . . . therefore, cannot be squared with basic techniques of statutory interpretation, much less with the purpose of RICO, which sought to broaden, not narrow the law . . . .[199]

---

[195] *See Reves*, 507 U.S. at 179.

[196] *See* United States v. Antar, 53 F.3d 568, 581 (3d Cir. 1995).

[197] *See Reves*, 507 U.S. at 183-84.

[198] Blakey & Roddy, *supra* note 131, at 1514.

[199] *Id.*

Indeed, the "zero equals zero" rationale seems compelling to many courts, which repeatedly address this question by simply stating that *Reves* was an interpretation of § 1962(c) and therefore cannot possibly have any relevance to § 1962(d).[200]

Antar is not a negative inference or attempt to reason from legislative silence, but rather an attempt to enforce an affirmative limit on the outer bounds of liability clearly intended by the text and legislative history of RICO (as explicated by the Supreme Court in *Reves*).[201] Again, *Reves* is not a prudential rule, but rather a definitive statement on whom Congress chose to include and exclude from liability under the RICO statute. And in order to effectuate the intended limit on liability discussed in *Reves*, the "operation or management" requirement must also apply to prosecutions under RICO conspiracy. To do otherwise would merely shift prosecution of a certain class of individuals no longer liable under § 1962(c) to § 1962(d), thus entirely undermining the intended statutory exclusion of these individuals from RICO liability.

Put another way, given that RICO substantive and conspiracy charges carry exactly the same penalty,[202] what could possibly be the legislative design in exempting a certain class of tangentially associated individuals from liability under § 1962(c) only to allow their prosecution under § 1962(d)? Precision in charging? It is easy to see what the RICO conspiracy provision still accomplishes if *Reves* is extended to apply to conspiracy charges;[203] it is impossible to see what *Reves* accomplishes if it is not extended to conspiracy.

Indeed, it is not surprising that the courts that initially rejected *Reves*'s narrow construction of liability under § 1962(c) are similarly hostile to extending the standard to § 1962(d).[204] Several commentators have

---

[200] *See* discussion *supra* Section IV.B.

[201] *See Antar*, 53 F.3d at 581; *see also* Profitt, *supra* note 194, at 55 (clarifying that "[*Antar*] is based on the reasoning that it would not make sense to exclude a class of people from a participation violation, only to make those same people liable for conspiring to violate that section").

[202] *See* 18 U.S.C. §§ 1962(a), (d) (2000).

[203] *See* discussion *infra* Section IV.B.i.

[204] These include the Second and Eleventh Circuits, which both initially offered a broad construction of § 1962(c). *See* Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 970 (11th Cir. 1986); United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980). This observation probably also applies to at least a few legal commentators who argue against an extension of *Reves* to § 1962(d). For instance, Blakey and Roddy, who vigorously criticize the Third Circuit's opinion and all but a limited extension of *Reves*, *see* Blakey & Roddy, *supra* note 131, at 1514, also strenuously argue for the use of RICO to combat "professional malfeasance and fraudulent misbehavior" on the part of what many would consider traditional *Reves* outsiders. *See id.* at 1361.

recognized that one reason that *Reves* has had less effect than anticipated, particularly in insulating so-called "outsiders" from liability, is that prosecutions have merely shifted to RICO conspiracy charges.[205] The two classes of individuals that *Reves* potentially exempts from liability—outsiders who have little control over the enterprise and insiders so far down the chain of command that they have no ability to operate or control—are therefore simply pulled back in under a broad reading of § 1962(d), rendering them subject to the same RICO penalties as other defendants. Importantly, these are likely to be the least culpable individuals when judged in comparison to others involved in the overall scheme; they are those that Congress most likely intended to exclude from RICO's broad reach; and they are the individuals most likely to be significantly impacted and harmed through the associational guilt that many see as a huge risk of RICO.[206] The basic point is that, by its own terms, *Reves* must be extended to charges of RICO conspiracy to have any success at all in effectuating Congress's intended limit on liability; courts that oppose this extension are challenging the *Reves* decision itself.

The intent and practical application of *Reves* also supports the propriety of the seemingly fine distinction that *Antar* draws between those who conspire *to* operate an enterprise and those that conspire *with* someone who operates an enterprise, limiting liability to the former.[207] The Seventh Circuit dismisses this distinction in *United States v. Warneke*, a post-*Salinas* decision ruling that a defendant can be guilty of conspiracy to violate § 1962(c) any time he "join[s] forces with someone *else* who manages or operates the enterprise."[208] The problem with this formulation, however, is that it directly contravenes *Reves* in two ways: first, by arguably criminalizing simply aiding or abetting a RICO enterprise; and second, by extending liability to many outsiders exempted by *Reves*. Although it is not clear what precisely "joining forces" with a RICO manager would involve or what knowledge as to the extent of the

---

[205] *See, e.g.*, Disanto, *supra* note 144, at 1063 ("Unfortunately, in the aftermath of *Reves*, it has become clear that the 'operation or management' test is easily circumventable by . . . conspiracy and aiding and abetting, and therefore is not a limitation on the scope of RICO at all."); *see also* Brief for Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae Supporting Petitioner at 20, Salinas v. United States, 522 U.S. 52 (1997) (No. 96-738) (recognizing tension between overly inclusive conspiracy liability under the *Salinas* and *Reves* rules); W.B. Markovits, *Expanding RICO Civil Liability for Lawyers and Other "Outsiders": Perspectives of a Plaintiff's Lawyer*, FED. LAW., Oct. 1998, at 35 (guiding practitioners in how to avoid *Reves* restrictions on liability through the use of conspiracy and abettor liability).

[206] *See infra* Section IV.D.ii for a more in-depth discussion of these issues.

[207] *See* United States v. Antar, 53 F.3d 568, 581 (3d Cir. 1995).

[208] United States v. Warneke, 310 F.3d 542, 547 (7th Cir. 2003).

conspiracy would have to be proven on the part of the defendant, the first point is that this potentially extends liability to someone who merely renders assistance, encouragement, or support to the enterprise by helping one of its directors. The possibility of such aiding and abetting liability was specifically rejected by the Supreme Court in *Reves*.[209]

More fundamentally, this construction allows RICO liability for many "outsiders" or non-managers exempted by *Reves*. Two major cases, *United States v. Elliott*[210] and *United States v. Viola*,[211] are useful in illustrating this problem. Both are instances where individuals tangentially associated with an enterprise conspire or act with a manager of that enterprise, meaning that they fall within the Seventh Circuit's formulation of liability. For example, in *Viola*, the epitomic outsider, Michael Formisano (whose involvement with the broader criminal RICO conspiracy basically amounted to a few minor crimes and odd jobs) worked directly with the primary RICO defendant, Anthony Viola.[212] Similarly in *Elliott*, the various defendants associated with different criminal endeavors were all connected via their association with the principal defendant, J.C. Hawkins.[213] The point is that a purported application of *Reves* "limiting" conspiracy liability to those who conspire with one who conducts an enterprise may frequently turn out to be no limitation at all. Consequently, such a construction will not effectuate the congressional intent of excluding certain persons from liability.

Antar's argument for a more rigorous application of *Reves* to § 1962(d) is additionally bolstered by the fact that RICO conspiracy is still entirely effective at satisfying its ostensible aims if the *Reves* standard is applied. First, it still effectuates a primary aim of conspiracy generally, allowing law enforcement intervention at an earlier stage of criminality, potentially before any illegal acts (other than the conspiratorial agreement) have been committed.[214]

---

[209] *See* Reves v. United States, 507 U.S. 170, 178-79 (1993); *see also* Blakey & Roddy, *supra* note 131, at 1367; Markovits, *supra* note 205, at 37 (recognizing *Reves*'s limitation on aiding and abetting liability under § 1962(c)).

[210] 571 F.2d 880 (5th Cir. 1978).

[211] 35 F.3d 37 (2d Cir. 1994).

[212] *Id.* at 39-40.

[213] *Elliot*, 571 F.2d at 895-96.

[214] *Cf.* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.02 (3d ed. 2001) (describing the primary aims of conspiracy liability). Obviously the other main objective of conspiracy statutes—increasing penalties to account for the special dangers of group criminality, *see* United States v. Rabinowich, 238 U.S. 78, 88 (1915); DRESSLER, *supra*, § 29.02—is already accounted for by the substantive RICO offense itself.

Second, application of the *Reves* test does not interfere with the conspiracy provision's primary punitive aim—reaching insulated organized crime leaders or other "big fish" previously unreachable by traditional law enforcement tools because they did not participate directly in the commission of crimes. The legislative history is replete with congressional concern about these individuals and the clear aim that RICO be drafted to reach them.[215] In addition, several courts and commentators have recognized this as the primary purpose of the RICO conspiracy provision.[216] As the Seventh Circuit noted, Congress seemingly "intended section 1962(d) to be broad enough to encompass those persons who, while intimately involved in the conspiracy, neither agreed to personally commit nor actually participated in the commission of the predicate crimes," so called "insulated ring leaders."[217] Extending *Reves* to § 1962(d) does not disturb this important purpose. Rather, it allows RICO to sweep broadly enough to trap these "big fish" in its remedial net, while preserving the congressionally intended limit on the liability of outsiders.

In other words, contrary to what many circuits suggest, importing the *Reves* restriction on liability does not violate the fundamental precept of conspiracy that one need not be guilty of the substantive crime to be liable as a conspirator. There will be a large class of individuals who could not be convicted of the substantive crime, but who are nevertheless swept in by RICO conspiracy as a result of their planning efforts. Even with the *Reves* limitation, RICO conspiracy does a good degree of work. With *Reves*, it likely does the specific work that Congress intended—allowing RICO to reach leaders of organized crime groups or other enterprises, especially those that infiltrate legitimate businesses, while leaving less severe traditional law enforcement remedies to deal with subordinate, less culpable associates.

ii. From the Perspective of Hornbook Criminal Conspiracy Law

While the terms of *Reves* itself counsel in favor of application to RICO conspiracy, many courts contend that such an application is simply inconsistent with conspiracy law; that it would require more proof with a

---

[215] *See* Lynch, *supra* note 9 (discussing the legislative history of RICO); *see also* Blakey, *supra* note 9.

[216] *See, e.g.*, United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986); Goldsmith, *supra* note 9, at 798-99 (emphasizing the importance of RICO conspiracy in reaching the leadership of mob families, who frequently cannot be convicted of the substantive offense); Minnis, *supra* note 151, at 1412 (describing the primary purpose of RICO conspiracy as assisting in prosecution of leaders of criminal enterprises).

[217] *See Neapolitan*, 791 F.2d at 498.

RICO prosecution than under any other form of conspiracy.[218] Contrary to these assertions, however, extension best accords with hornbook conspiracy doctrine.

The first and most basic reason is that the application of *Reves* to conspiracy charges does not demand any more proof than other applications of conspiracy liability. It is well established that the crime of conspiracy is defined in terms of the precise nature and scope of the conspiratorial agreement.[219] Thus, to actually conspire to violate § 1962(c), a party must enter into an agreement that embraces every element of the RICO offense, including management or control of a RICO enterprise.

Furthermore, precise conspiracy standards emphasize that conspiracy is not merely a combination of people or a "partnership" for criminal purposes, but rather a specific "union of wills" defined according to an agreement.[220] To borrow an example from Dressler, if X and Y conspire together and D intentionally aids them in the commission of some crime, D is not automatically a party to the conspiracy.[221] In order to be part of the conspiracy, D must aid the initial formation of the agreement, not merely offer corollary or subsequent assistance.[222] As a result, a defendant does not become engaged in the full criminal conspiracy merely by working with or offering assistance to one of the conspirators.

The significance is that this reveals a problem with the Seventh Circuit's limited application of *Reves*. In *United States v. Warneke*, the court finds a violation of § 1962(d) whenever a conspirator "join[s] forces" with an operator or manager of a RICO enterprise.[223] This finding would only be accurate, however, if the defendant's agreement with that person specifically includes the operation or management component of § 1962(c). To give a more concrete formulation of the issue, a defendant would not be guilty under § 1962(d) of conspiring to violate RICO if she merely conspired to commit murder with a drug kingpin. Although the kingpin could likely be guilty of operating or managing an enterprise through a pattern of racketeering activity, in violation of RICO (or at least conspiring to do so), the defendant's mere association with the kingpin or agreement with him to commit one crime should not be sufficient to carry RICO

---

[218] *See, e.g.*, United States v. Zichettello, 208 F.3d 72, 99 (2d Cir. 2000).

[219] *See* Braverman v. United States, 317 U.S. 49, 53 (1942).

[220] *See* DRESSLER, *supra* note 214, at § 29.04[B].

[221] *Id.*

[222] *Id.*; *see also* Direct Sales Co. v. United States, 319 U.S. 703, 709 (1942) (ruling one is not a conspirator if he merely aids, abets, furthers, promotes, or cooperates in the conspiracy).

[223] United States v. Warneke, 310 F.3d 542, 547 (7th Cir. 2002).

liability without further proof relating to a broader agreement or knowledge on the part of the defendant. Unfortunately, the Seventh Circuit's phrasing does not account for this problem.

Under basic conspiracy principles, then, the prosecution or moving party should have to show something like the Third Circuit's formulation—that the defendant initially agreed to the operation or management of an enterprise through such a racketeering pattern (regardless of whatever other acts he also agreed to commit personally). This essentially means that the defendant at least aided the formation of the initial conspiratorial agreement, and not that he merely assisted in its implementation after the fact.

Finally, a more clear-cut rationale for rejecting any attempt to restrict the reach of *Reves* based on hornbook conspiracy law involves the *Gebardi* rule. In *Gebardi v. United States*, a man and a woman were charged with conspiracy to violate the Mann Act[224] as a result of their agreement to travel across state lines so that the woman could engage in sexual relations with the man.[225] The question facing the Court was whether a woman who was transported could be convicted of general conspiracy, given that the legislature had intentionally drafted the Act to protect the involved woman and had explicitly excluded her from substantive liability under the Act.[226] While the Supreme Court recognized that an inability to commit the substantive offense did not necessarily render one immune from conspiracy liability, the Court rejected conspiracy liability for the woman based on what the Court characterized as the affirmative intent of the legislature not to punish the involved woman under the Mann Act.[227]

Dressler relates the simple rule of the case as follows: "A person may not be convicted of conspiracy to violate an offense if her conviction would frustrate a legislative purpose to exempt her from prosecution for the substantive crime."[228] Lower courts have applied this rule to limit the reach of conspiracy or aiding and abetting liability in other contexts, such as those involving the Continuing Criminal Enterprise statute.[229]

---

[224] The relevant text of the Mann Act criminalizes "knowing[] transport . . . in interstate commerce . . . [of] any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." 18 U.S.C. § 2421 (2000).

[225] *See* United States v. Gebardi, 287 U.S. 112, 116 (1932).

[226] *See id.* at 120-21.

[227] *See id.* at 123.

[228] DRESSLER, *supra* note 214, at § 29.09[D][1].

[229] *See, e.g.*, United States v. Castle, 925 F.2d 831, 833-34 (5th Cir. 1991) (declining to extend general federal conspiracy liability to parties exempted from substantive offense under the Foreign Corrupt Practices Act); United States v. Amen, 831 F.2d 373, 381 (2d Cir. 1987) (applying *Gebardi* to limit aiding and abetting liability stemming from the Continuing

In the present context, the *Gebardi* rule militates against conspiracy liability for those excluded from the substantive RICO offense by means of the *Reves* standard. In *Reves*, the Supreme Court recognized an affirmative legislative intent to limit the scope of substantive liability under RICO, stating, "[i]n this case it is clear that Congress did not intend to extend RICO liability under § 1962(c) beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity."[230] This echoes important comments in the legislative history, such as those by Senator McClellan that RICO liability would not extend to all individuals who committed racketeering offenses, but only to those who "engage[d] in a pattern of such violations, and use[d] that pattern to obtain or operate an interest in an interstate business."[231] It is in direct contravention of this congressional intent to allow the *Reves* exclusion to be undermined by a wide-reaching application of RICO conspiracy liability. As a result, not only do the language and policy that undergird *Reves* counsel in favor of its extension to RICO conspiracy, common law criminal conspiracy principles also compel such an extension to avoid undermining an affirmative legislative intent to limit the reach of RICO liability.

In examining the interaction of *Reves* and RICO conspiracy, it is not that courts outside the Third Circuit have dismissed these arguments, but rather that they have failed to fully consider them. The Second and Eleventh Circuits, for example, have preferred to repeat conspiracy truisms rather than engage in a searching analysis of what the language of the standard actually means, the intent of the Supreme Court and Congress in establishing the standard, the effect of specific conspiracy principles in this

---

Criminal Enterprise Act, 21 U.S.C. § 848 (2000), based on the affirmative legislative intent in the statute to target primarily ring leaders, thereby limiting liability of others involved with continuing criminal enterprises: "Here Congress defined the offense as leadership of the enterprise, necessarily excluding those who do not lead"); *cf.* United States v. Michael, 456 F. Supp. 335, 349 (D.N.J. 1978) (reading the possibility of conspiracy liability to hinge on the question of affirmative legislative intent). Some courts read the rule as exempting only legislatively "protected" classes, or those who are clearly victims of the crime in question. *See, e.g.*, United States v. Spitler, 800 F.2d 1267, 1276 (4th Cir. 1986); United States v. Southard, 700 F.2d 1, 19-20 (1st Cir. 1983). So narrow a reading is by no means compelled by the language of the decision, however. As the Alaska Supreme Court noted in response to this argument:

> We are not persuaded . . . that there is any logical reason for giving the legislative exemption the very limited construction. . . . In our opinion, and as the cases suggest, the resolution hinges on whether it would frustrate the legislature's intent to exempt a certain class of persons if those persons could then be punished under a conspiracy statute.

Lythgoe v. State, 626 P.2d 1082, 1084 (Alaska 1980).

[230] Reves v. Ernst & Young, 507 U.S. 170, 184 (1993).

[231] *Id.* at 183 (quoting 116 CONG. REC. S586, 18940 (statement of Sen. McClellan)).

context, and the strong policy reasons supporting the Third Circuit's initial extension of *Reves*. The result is a series of incestuous opinions that mechanically build on and cite one another while adding little value to a thoughtful discussion of the question.[232] This hostility towards extension seems intertwined with a basic hostility that persists towards the application of *Reves* to substantive charges, and a concomitant reluctance to allow the rigorous application of *Reves* in conspiracy cases where courts see real culpability on the part of defendants.

D. THE INTERACTION OF *REVES* AND § 1962(D) AFTER *SALINAS*: ACCOMMODATING THE COURT'S BROAD INTERPRETATION OF RICO CONSPIRACY

If the situation appeared dire for RICO conspiracy defendants hoping to extend *Reves*'s limitation on liability to the charges against them before 1997, it deteriorated further that year with the Supreme Court's decision in *Salinas v. United States*.[233] The decision clarified certain aspects of RICO conspiracy, with obvious implications for the application of *Reves*.

i. The Supreme Court's Decision in Salinas v. United States

The Supreme Court granted certiorari in *Salinas* to settle a question of RICO conspiracy jurisprudence that had long divided lower courts, namely, whether a conspirator must personally agree to commit or actually commit two predicate racketeering acts in order to be liable under § 1962(d).[234] The specific facts of the case involved the prosecution of a local sheriff and his deputy in connection with ongoing bribery schemes involving federal prisoners in their custody.[235]

Writing for a unanimous court, Justice Kennedy outlined the requirements of RICO conspiracy liability, stating, "A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense."[236] This was accomplished provided the conspirator adopted the goal of furthering or facilitating the criminal endeavor, and did not require that the conspirator *personally* agree to commit any particular act in furtherance of the conspiracy.[237] The Court assumed that the simple language of § 1962(d) conveyed congressional

---

[232] *See* discussion *supra* Section IV.B.
[233] 522 U.S. 52 (1997).
[234] *See id.* at 61-62.
[235] *Id.* at 54-55.
[236] *Id.* at 65.
[237] *Id.*

intent to incorporate background criminal conspiracy principles.[238] With this in mind, the Court stated that it was clear that conspirators need not be required "to commit or facilitate each and every part of the substantive offense" and that one may be liable for conspiracy even if incapable of committing the substantive crime.[239] Conspirators were required only to share a common purpose.[240]

Although not directly on point, it is easy to see how this expansive formulation of RICO conspiracy liability affected consideration of the *Reves* question, as was specifically observed by several courts. For example, in its initial consideration of the question in 1998, the Fifth Circuit relied heavily on *Salinas* to determine that *Reves* did not apply in any way to RICO conspiracy charges.[241] Instead, the court ruled, RICO conspiracy is established where the government shows that two or more people agreed to commit a substantive RICO offense and the defendant knew of and agreed to the overall objective of that offense.[242]

Similarly, the Second Circuit relied on *Salinas* in reaffirming its prior interpretation of the interaction of *Reves* and § 1962(d), citing *Salinas* directly for the proposition that the "operation or management" test did not apply to RICO conspiracy charges.[243] The court set the standard for RICO conspiracy liability as follows: "Assuming that a RICO enterprise exists, the government must prove only 'that the defendant[s] . . . know the general nature of the conspiracy and that the conspiracy extends beyond [their] individual role[s].'"[244]

The Seventh Circuit has offered the most in-depth analysis of RICO conspiracy post-*Salinas*. In a series of cases including *Goren v. New Vision International, Inc.*,[245] *Brouwer v. Raffensperger, Hughes & Co.*,[246] and

---

[238] *See id.* at 63.

[239] *Id.* at 63-64.

[240] *Id.*

[241] *See* United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998). Once again, one might be a bit suspicious of the fidelity of the Fifth Circuit to *Reves* itself in answering this question—the court actually employed its pre-*Reves* standard for determining liability under § 1962(c), enunciated in *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), though this standard is arguably much more expansive than the law established by the Supreme Court. *See Posadas-Rios*, 158 F.3d at 856.

[242] *Posadas-Rios*, 158 F.3d at 857.

[243] *See* United States v. Zichettello, 208 F.3d 72, 99 (2d Cir. 2000).

[244] *Id.* (quoting United States v. Rastelli, 870 F.2d 822, 828 (2d Cir. 1989)); *see also* Castro v. United States, 248 F. Supp. 2d 1170, 1180 (S.D. Fla. 2003) (referencing *Salinas* in support of established Eleventh Circuit law that *Reves* modifies only the substantive § 1962(c) charge and that a defendant need not agree to the operation or management of an enterprise to incur RICO conspiracy liability).

[245] 156 F.3d 721 (7th Cir. 1998).

United States v. Warneke,[247] the Seventh Circuit has outlined its formulation of RICO conspiracy requirements. These cases have afforded questions involving the reach of RICO conspiracy liability and, specifically, the interaction of *Reves* and § 1962(d), a much more thorough and searching analysis than any other circuit.[248] Ultimately, however, with some reliance on the *Salinas* decision, the Seventh Circuit concluded that the requirements of proving a conspiracy to violate § 1962(c) will be met "whenever the conspirator joins forces with someone *else* who manages or operates the enterprise."[249] The court, therefore, specifically rejected *United States v. Antar*'s[250] application of *Reves* to the conspiracy provision.

Finally, and most notably, the Third Circuit concluded that *Salinas* implicitly overruled its decision in *Antar* to apply *Reves* to RICO conspiracy.[251] In rejecting its previous application of the *Reves* test and a requirement that the defendant agree to participate in the conduct of an enterprise's affairs to sustain liability, the Third Circuit stated, "The plain implication of the standard set forth in *Salinas* is that one who opts into or participates in a conspiracy is liable . . . even if the defendant did not personally agree to do, or to conspire with respect to, *any* particular element."[252] The court also noted that the vast majority of circuits to consider the question had come out against its reasoning in *Antar*.[253] The Third Circuit modified its standard for conspiracy liability to criminalize any knowing agreement to *facilitate* a scheme that includes the operation or management of a RICO enterprise.[254] As a result, today the Ninth Circuit is the only court that continues rigorously to apply the *Reves* test to RICO conspiracy charges.

---

[246] 199 F.3d 961 (7th Cir. 2000).

[247] 310 F.3d 542 (7th Cir. 2002).

[248] *See, e.g.*, *Brouwer*, 199 F.3d at 964.

[249] *Warneke*, 310 F.3d at 547. Interestingly, the Seventh Circuit purported to announce this standard because "[s]ection 1962(d) is not limited to a conspiracy among the top dogs." *Id.* However, *Reves* itself is not limited to the "top dogs," as the Supreme Court explicitly recognized that control of an enterprise could extend beyond upper management to many "lower rung" participants. *See* Reves v. Ernst & Young, 507 U.S. 170, 184 (1993). Consequently, even if *Reves* were applied in the most rigorous fashion possible to § 1962(d), conspiracy charges would still never be limited to "top dogs," as the lower court seems to fear.

[250] 53 F.3d 568 (3d Cir. 1995).

[251] *See* Smith v. Berg, 247 F.3d 532, 536-37 (3d Cir. 2001).

[252] *Id.*

[253] *Id.* at 536.

[254] *Id.* at 538.

ii. Reconciling Antar *and* Salinas

In determining the interaction of *Reves* and RICO conspiracy going forward, one important question is whether *Salinas* actually implicitly overruled *Antar*. Although *Salinas* offered an expansive interpretation of RICO conspiracy, there is an argument that its language is not inconsistent with *Antar*'s application of *Reves*. The essence of the RICO conspiracy requirement remains the same. However, to the extent that *Salinas* can be read as inconsistent with an application of *Reves* to RICO conspiracy, *Salinas* is problematic and should be carefully considered by lower courts before its broad language is blindly extended and applied.

While *Salinas* offers an expansive interpretation of the reach of RICO conspiracy, it leaves certain fundamental precepts intact. First, while the Court notes that "a conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense,"[255] this is not the same as saying the conspirator need not specifically agree to *any* part. The conspirator must still "agree to pursue the same criminal objective and . . . divide up the work,"[256] and intend "to further an endeavor, which, if completed, would satisfy all of the elements of a substantive offense."[257] In order to agree to such an endeavor, according to *Reves*, an agreement to violate § 1962(c) must in some way embrace the management or control of an enterprise. If the defendant does not plan to control the enterprise himself, he must at least be party to the agreement where management is allocated. Therefore liability must still be limited to those in a position to operate or manage an enterprise, or the defendant would have no capacity to make this agreement. In addition, *Salinas* does not directly criticize or contradict *Reves*, meaning the earlier decision still counsels powerfully in favor of an extension of the "operation or management" test (regardless of what else may or may not be required to prove RICO conspiracy), in order to effectuate the congressionally mandated limit on liability.

iii. An Argument for Limiting Salinas

To the extent that *Salinas* does disallow an extension of *Reves* to RICO conspiracy, as all courts to consider the issue have ruled, that decision is problematic. First, *Salinas* mistakenly assumes a broad-stroke application of traditional criminal conspiracy principles that might not be appropriate in the RICO context. The decision is probably correct in its

---

[255] Salinas v. United States, 522 U.S. 52, 63 (1997).

[256] *Id.*

[257] *Id.* at 65.

narrow holding that individuals do not personally need to agree to the commission of two predicates to be liable under RICO conspiracy.[258] This comports with the broad phrasing of the statute and the references in the legislative history to address insulated organized crime and racketeering ring leaders.[259] However, the decision should have been more precise. Even if a defendant need not personally agree to commit two predicate acts, must he specifically agree or know that someone will commit two predicate acts? Clarification of this question would help somewhat in sorting out the *Reves* issue.

More broadly, the Court would have been better to base its decision on the text and legislative history of the statute, rather than unnecessarily repeating what it considers truisms of criminal conspiracy.[260] The problem with such an approach is that courts in other contexts have repeatedly recognized that RICO conspiracy is not like other conspiracies, and that the old rules of criminal conspiracy do not necessarily apply.[261] In *United States v. Elliott*, for example, the Fifth Circuit ruled that traditional structural requirements of criminal conspiracy under the general federal conspiracy statute did not apply to RICO prosecutions.[262] Specifically, the government was not required to show that a single traditional conspiracy existed or that there was a "wheel" or "chain" structure.[263] In addition, the government was allowed to prosecute incredibly diverse criminal endeavors, all in a single proceeding.[264] Thus, RICO established the phenomenon of the "enterprise conspiracy."[265] This is a new kind of conspiracy that differs from criminal conspiracy in certain significant ways already recognized by courts. As a result, the *Salinas* opinion's assertion that background criminal conspiracy law is simply adopted wholesale is overly simplistic and unsatisfying.

---

[258] *See id.* at 64-66. However, the holding is not without its critics. *See, e.g.*, Jeremy M. Miller, *RICO and Conspiracy Construction: The Mischief of the Economic Model*, 104 COM. L.J. 26, 44 (1999) (commenting that "[t]he old adage that if one says it long enough and often enough, it must be true, is unfortunately the essential reasoning of *Salinas*").

[259] *See* United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986).

[260] *See Salinas*, 522 U.S. at 63-64.

[261] *See, e.g.*, United States v. Elliott, 571 F.2d 880, 902 (5th Cir. 1978); *see also* Blakely & Roddy, *supra* note 131, at 1446 n.389 (collecting cases describing RICO as broadening traditional conspiracy liability); Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 386 (1983) (relating how early RICO decisions described the statute as creating a new kind of conspiracy law).

[262] *Elliott*, 571 F.2d at 902.

[263] *Id.*

[264] *Id.*

[265] *See id.* at 903.

What the *Salinas* Court should have considered specifically in explicating RICO conspiracy is that, to the extent that RICO builds upon and modifies traditional conspiracy, it magnifies many of its problems.[266] While the procedural advantages inherent in this new form of conspiracy were largely intended by Congress, one unintended consequence was the increased danger to defendants stemming from the risk of guilt by association. Commentators frequently criticize the crime of conspiracy and the attendant criminal procedures for risking this associational guilt. In fact, the Supreme Court itself explicitly cautioned against charging too many defendants or too many diverse crimes in a single proceeding for this reason: "[A]s [the conspiracy] is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater."[267] These concerns about traditional criminal conspiracy cases apply a fortiori to RICO when one considers the breadth of defendants and crimes possibly linked in a single RICO prosecution, encouraged by the fact that old structural limitations no longer apply.[268] *Elliott* specifically recognized that the purpose of many of the old structural constraints on conspiracy was to protect defendants from so-called "spill-over" effects.[269] With these constraints removed, RICO cases can span an incredible range of crimes (with predicate acts ranging from conspiracy to commit securities fraud to murder[270]) and include a diverse group of defendants with varying degrees of involvement with the enterprise—the sheer breadth of these proceedings must threaten prejudice from spill-over effects to at least some defendants.[271] The prospect of unfairness to a defendant and the possibility

---

[266] *See* Lynch, *supra* note 21, at 945-47 (discussing the relationship between RICO and conspiracy broadly and their overlapping substantive and procedural-related fairness concerns).

[267] Kotteakos v. United States, 328 U.S. 750, 776 (1946).

[268] *Cf.* Ellen Jancko-Baken, *When Will the Idling Statute of Limitations Start Running in RICO Conspiracy Cases?*, 10 CARDOZO L. REV. 2167, 2182 (1989) (deeming RICO conspiracy even more amorphous than traditional criminal conspiracy); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 17-18 (1992) (emphasizing concerns related to guilt by association involving conspiracy charges, accentuated when defendants are joined in large, complex trials and commenting how these concerns have only been magnified by RICO).

[269] *See Elliott*, 571 F.2d at 900; *see also Kotteakos*, 328 U.S. at 773.

[270] *See* 18 U.S.C. § 1961(1) (2000).

[271] *See, e.g.*, Lynch, *supra* note 21, at 929. Lynch discusses *United States v. Castellano* as a good example of this problem. That case included twenty-four defendants and seventy-eight different counts. *See* United States v. Castellano, 610 F. Supp. 1359, 1378 (S.D.N.Y. 1985). Lynch notes, "While the range of activities charged against the enterprise was vast, the involvement of many of the defendants in those activities could only be described as

that she might be convicted merely on the basis of association with her co-defendants is real cause for concern.[272] As Gerard Lynch explicitly noted in his seminal article on RICO, the compound prejudicial effect of RICO's new enterprise crime and the statute's procedural allowances is to increase the likelihood of criminal conviction for all RICO defendants, guilty or not.[273]

As a result, in defining the contours of RICO conspiracy, courts should look to account for these dangers by making specific and concrete provisions regarding what must be proven with respect to each individual defendant.[274] Indeed, courts should recognize that background conspiracy requirements have changed and if personal agreement to commit predicate acts was not intended under the statute, they should seek individualized proof of elements that were; any implication of *Salinas* that *no* particular element must be proven as to each defendant,[275] or that nothing has changed, risks fundamental unfairness to individuals.

In this context, *Reves* is an appropriate and useful standard of individualized action, and courts should require that each defendant be shown to have agreed to the operation or management of the RICO enterprise. This level of proof is certainly in line with the legislative history and purposes of the statute. In addition, it has the added benefit of likely affording the greatest assistance to less culpable defendants who are, in turn, more likely to suffer the prejudices of guilt by association.

---

tangential." Lynch, *supra* note 21, at 929. Lynch goes on to assert that this is not an aberration, but rather a natural and permitted consequence of the RICO statute and offense. *Id.* at 930. He further opines that these large prosecutions result because RICO ended some previously implicit, but nonetheless enforced, limitation on the scope of conspiracy prosecutions. *See id.* at 951.

[272] Lynch, *supra* note 21, at 951; *see also* Yvette M. Mastin, *RICO Conspiracy: Dismantles the Mexican Mafia & Disables Procedural Due Process*, 27 WM. MITCHELL L. REV. 2295, 2333 (2001) (describing increased dangers of "spill-over" effects in RICO conspiracy trials and offering constitutional argument for limitations); Minnis, *supra* note 151, at 1415 (supporting the interpretation of RICO that defendants need not personally agree to commit predicate acts in order to be liable for RICO conspiracy, but expressing misgivings regarding the dangers of guilt by association when a large number of defendants are tried together); Tarlow, *supra* note 21, at 251 (noting the guilt by association problems with RICO).

[273] *See* Lynch, *supra* note 21, at 961. Lynch expressed specific concern, for this and other reasons, with charges of conspiracy to violate § 1962(c). *Id.* at 981-82.

[274] *See Kotteakos*, 328 U.S. at 773 (noting that conspiracy trials are "exceptional to our tradition and call for the use of every safeguard to individualize each defendant in relation to the mass").

[275] *See* Smith v. Berg, 247 F.3d 532, 37 (3d Cir. 2001) (interpreting *Salinas* to hold as such).

The benefits of this application are clear for two primary reasons. First, application of *Reves* to RICO conspiracy liability matters most for those with only a tangential relationship to the enterprise; if the defendant is heavily involved with all the enterprise's affairs, he will likely meet the *Reves* test regardless, and application to conspiracy would be a moot point. Second, application of the test will likely affect only those persons who cannot be found guilty of the substantive crime. If they can be found guilty of the substantive crime, then in virtually every case they will also be guilty of conspiracy regardless of *Reves*. In other words, if the moving party can prove that the defendant actually managed or operated an enterprise through the commission of racketeering acts, all proof of conspiracy will likely be met (or at least the conspiracy charge will be superfluous). It is only where the substantive charge fails for one reason or another that application of *Reves* to RICO conspiracy becomes significant. The further point is that this class of defendants is likely to have personally committed few, if any, predicate crimes; otherwise, substantive liability would be easier to establish.

To summarize, an application of *Reves* to RICO conspiracy matters most to defendants tangentially involved with the enterprise, who are facing exclusively conspiracy charges, and who have committed few, if any, predicate acts. Given the risks of associational guilt inherent in conspiracy and, in particular, RICO conspiracy, it is startling that *Salinas* acts to limit what must be proven as to this class of defendants. Furthermore, conspiracy charges are likely to be bolstered by evidence of dealings and interactions with other defendants, because direct evidence of a conspiracy is rare and the use of circumstantial inference is widely accepted.[276] Thus, defendants described above are those who face the greatest risk of incurring steep criminal and civil penalties under RICO merely by virtue of their association with the other defendants. The broad point is that lower courts might want to give careful consideration to the implications before mechanically extending *Salinas*'s bold pronouncements regarding RICO conspiracy. The narrower point is that the application of *Reves* to RICO conspiracy helps address some of these concerns by requiring a more individualized element of proof and benefiting the defendants most likely to be otherwise prejudiced.

An additional reason that lower courts might regard *Salinas* with concern relates to the rule it established. While the Supreme Court was likely correct to hold that RICO conspiracy does not require that the individual defendant personally agree to commit two predicate acts for the

[276] *See* DRESSLER, *supra* note 214, at § 29.04[A].

reasons stated above, by removing this restriction previously employed by many jurisdictions, *Salinas* took the already alarmingly vague and formless RICO conspiracy charge and further emptied it of content. Courts previously rejected an application of *Reves* to RICO conspiracy in a context where the prosecution was still required to prove that each individual defendant personally agreed to two predicate acts.[277] The landscape has changed. Prior to *Salinas*, the Second Circuit, for example, held a defendant could be guilty of conspiracy to commit RICO if he "embraced the objective of the alleged conspiracy and agreed to commit two predicate acts in furtherance thereof."[278] The court recognized the importance of this tangible personal involvement requirement, stating, "The required nexus between the defendant's acts and the RICO conspiracy thus protects the defendant from being found guilty based on incidental or tenuous association with the enterprise or its members."[279] With no component of RICO conspiracy still present to link a defendant's cognizable personal acts to the enterprise, there is a pressing need to define RICO conspiracy more specifically to ensure that individual defendants are adequately distinguishable from one another and punished for acts, not associations.[280]

In addition, it bears mention that often the only criminal "act" a defendant will commit in this context is this conspiratorial agreement; it would behoove courts, then, to define that act in a meaningful way.[281] Again, as described above, the application of *Reves* to RICO conspiracy represents one way of establishing this personal connection to the activities of the enterprise; a way seemingly compelled by the statutory language and in tune with the congressional goals of RICO. Extending *Reves* to RICO conspiracy, therefore, represents one means of resolving the eternal RICO dilemma of how to reach insulated crime leaders, while not inadvertently sweeping up all manner of lower-rung participants.[282]

---

[277] *See, e.g.*, United States v. Viola, 35 F.3d 37, 43 (2d Cir. 1994).

[278] *Id.* (internal quotation marks omitted).

[279] *Id.* at 44; *cf.* United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981) (citing concerns involving dangers of guilt by association as reason for adopting requirement of personal agreement); Miller, *supra* note 258, at 62 (criticizing the *Salinas* decision for further diluting the already weak action requirements of RICO conspiracy).

[280] *See* Kotteakos v. United States, 328 U.S. 750, 773 (1946).

[281] *Cf.* WAYNE R. LA FAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.4(d) (2d ed. 1986) (emphasizing the primacy of the agreement in conspiracy charges, as it determines whether the requisite mental state, plurality, etc. is present); Lynch, *supra* note 21, at 934 (detailing the propriety of the deeply rooted American tradition that criminal charges be linked to some culpable act).

[282] *See* United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986) (describing the "recurring" RICO dilemma).

When considering these questions, it helps to remember that many RICO defendants will likely be guilty of other crimes. For instance in *Viola*, defendant Formisano, a minor associate of the RICO enterprise, had other criminal charges pending against him.[283] Courts should not worry that by narrowing the scope of RICO conspiracy liability, they exculpate culpable defendants. The more refined question they must consider is whether a defendant's actions should bring him within the scope of the special RICO statute and its harsh criminal and civil penalties. Although there is an argument that RICO established new and separate substantive offenses,[284] many contend that it was primarily intended as a sentence enhancer—a more powerful, more punitive tool for dealing with an especially harmful manner of criminal. What courts should ask in considering the exclusion of certain defendants from the reach of RICO is whether those defendants are truly part of the particular class deserving of RICO's special brand of liability.

V. CONCLUSION

The failure of most courts to extend *Reves* to RICO conspiracy is not the only barrier to a full realization of that opinion's intended limitations on liability. The Supreme Court has done nothing to regulate or clarify the manner in which *Reves* is applied by lower courts. As a result, many circuits have strayed from a faithful application of the test, offering a broad construction of "operation or management" that excludes virtually no defendant.[285] This tendency reflects both the tireless efforts of private litigants to extend RICO's harsh damages provisions to new contexts and the hesitancy of judges to stand in the way of RICO criminal prosecutions. When a defendant looks like a criminal, thanks to her commission of certain petty crimes or association with certain particularly culpable actors, it seems difficult for some courts to countenance excusing her from RICO liability merely because she was not as deeply involved as other defendants in the criminal enterprise. This problem is exacerbated by continuing confusion over the purposes of RICO and an enthusiasm for extending it to the criminal issues of the day (like professional malpractice or white collar

---

[283] *See Viola*, 35 F.3d at 44.

[284] *See* Lynch, *supra* note 21, at 939 (arguing that RICO clearly established a new substantive crime).

[285] *See* Disanto, *supra* note 144, at 1074 (finding that many lower courts fail to apply *Reves* faithfully and that others do so only inconsistently). The First Circuit's decision in *United States v. Oreto*, is a good example of how lower courts are extending liability, most likely beyond the permissible bounds of *Reves*. *See* 37 F.3d 739 (1st Cir. 1994).

crime), whether such an extension was originally intended by Congress or not.

Even with the watered-down version employed by a few of the circuits, however, certain outside defendants continue to be exempted from RICO liability under *Reves*.[286] This highlights the pressing need to ensure that these individuals, whom Congress intended to be exempt from liability, are not swept back up in RICO's punitive net via an improperly broad construction of the conspiracy provision.

In sum, both *Reves* itself and hornbook conspiracy law counsel in favor of an extension of the *Reves* test to § 1962(d). Such an extension is the only way to effectuate the congressionally intended affirmative limit on liability and truly restrict RICO charges to those who control or operate enterprises. In addition, hornbook conspiracy law bolsters the case because it represents the only means to ensure that the illegal agreement actually encompasses all the important elements of the substantive offense. The extension also accords with *Gebardi* and the line of conspiracy cases that reject the use of conspiracy to evade an affirmative legislative restriction on substantive liability. Finally, especially in light of the Supreme Court's decision in *Salinas*, there are strong policy reasons for extending the *Reves* test. In this context, applying *Reves* to RICO conspiracy strikes the appropriate balance between the legislative intent to reach certain classes of racketeer or organized crime leaders, while allowing some refuge for those "small fish" associated with a RICO enterprise. With the *Reves* restriction, RICO conspiracy still does a great deal of work as a separate provision and is still entirely effective at its putative aims.

Most importantly, an extension of the *Reves* test provides additional protection for individuals otherwise subject to the risk of guilt by association. To put it lightly, RICO is a tricky statute, and there is a harsh reality lurking behind RICO's complicated structure—huge criminal penalties can be incurred for minimal conduct. While RICO can function as an important tool for reaching the actions of organized crime syndicates or halting the work of criminal gangs, it carries many hazards for defendants that fall within its extensive reach. This is especially true of the RICO conspiracy provision which, when predicated on conspiracy and without an overt act requirement, comes as close to a thought (or more functionally, an

---

[286] *See, e.g.*, United States v. Swan, 250 F.3d 495, 499 (7th Cir. 2001); BancOklahoma Mortgage Corp. v. Capital Title Co., 194 F.3d 1089, 1101 (10th Cir. 1999); *Viola*, 35 F.3d 37; *In re* Pharm. Indus. Average Wholesale Price Litig., 262 F. Supp. 2d 172, 186 (D. Mass. 2003); Pennino v. Selig, 258 F. Supp. 2d. 914, 923-24 (W.D. Ark. 2003); Cooper Indus., Inc., Cooper Tools Div. v. Lagrand Tire Chains, 205 F. Supp. 2d 1157, 1167 (D. Or. 2002); Yadlosky v. Grant Thornton, L.L.P., 120 F. Supp. 2d 622, 632 (E.D. Mich. 2000); United States v. Altman, 820 F. Supp. 794, 796 (S.D.N.Y. 1993).

associational) crime as any law currently enforced today. Many have criticized the very idea of RICO conspiracy.[287] Consequently, the slow march of many courts towards emptying RICO conspiracy of all content should be carefully considered in light of these concerns. Once again, when facing these issues, an extension of *Reves* is one means of strengthening the proof necessary for RICO conspiracy and appropriately limiting the provision's reach. In sum, *Reves* helps resolve what the Seventh Circuit identified as the key dilemma in interpreting RICO conspiracy—crafting an interpretation sufficiently broad to reach criminal "ring leaders," but which also excludes "fringe actors" from RICO's harsh punishments. Courts should consider the importance and propriety of this extension.

[287] *See, e.g.*, Tarlow, *supra* note 261, at 393 n.432 (criticizing the concept of RICO conspiracy and noting the diverse and numerous groups that have recommended its repeal); *cf.* Lynch, *supra* note 21, at 954-55 (recommending no separate use of §§ 1962(c) and (d) for illegitimate enterprises because the use contravenes his rule that all RICO defendants must be linked to the enterprise via specific predicate acts).