Kentucky Law Journal

Volume 81 | Issue 2 Article 5

1992

Civil Complicity: Using the Pinkerton Doctrine to Impose Vicarious Liability in Civil RICO Actions

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Brenner, Susan W. (1992) "Civil Complicity: Using the Pinkerton Doctrine to Impose Vicarious Liability in Civil RICO Actions," *Kentucky Law Journal*: Vol. 81 : Iss. 2 , Article 5.
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Civil Complicity: Using the *Pinkerton* Doctrine to Impose Vicarious Liability in Civil RICO Actions*

By Susan W. Brenner**

Table of Contents

	Introduction	370
I.	RICO: An Overview	371
II.	Vicarious Liability, Complicity and RICO	377
	A. Respondeat Superior	378
	B. Complicity	381
	C. The Pinkerton *Doctrine*	384
	D. Note on Complicity in Federal Law	387
III.	Applying *Pinkerton* Liability in Civil RICO Actions	388
	A. The Issue	388
	B. Pinkerton *Liability*	398
	1. *Reported Uses*	398
	2. *Permissibility*	401
	3. *Applying* Pinkerton	405
	a. *Direct Liability*	407
	b. *Vicarious Liability*	413
	c. Pinkerton *Liability*	415
	i. *Logical Structure*	418
	ii. *Victim Rationale*	420
	Conclusion	421

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public . . . ."[1]

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[1] Adam Smith, The Wealth of Nations 128 (Modern Library ed. 1937) (1st ed. London 1776).

INTRODUCTION

In 1970, Congress adopted the Organized Crime Control Act, Title IX of which created the "Racketeer Influenced and Corrupt Organizations" statute.[2] RICO–as it has come to be known–was created as a weapon against organized crime; along with defining new forms of criminal liability, it created civil remedies for those who had been victimized by organized crime.[3] In the two decades since RICO was adopted, a controversy has arisen concerning the extent to which vicarious liability may be imposed for RICO violations in actions brought under the statute's civil remedy provisions.[4]

The controversy centers around whether it is legitimate to use civil doctrines such as respondeat superior to hold a "person," typically a corporate employer, liable for crimes committed by its employees or agents.[5] The concern is that such an application departs from traditional principles of criminal responsibility, which have not recognized the civil doctrine of vicarious liability.[6] This Article suggests an alternative means of holding a party civilly liable for RICO violations committed by its agents or employees.

Federal criminal law recognizes the *Pinkerton* doctrine, a common law rule that makes each conspirator responsible for the substantive offenses that are committed by other members of that conspiracy.[7] Though seldom employed in civil RICO actions, the *Pinkerton* doctrine provides an alternative means of imposing liability upon parties who, while they may not have personally committed RICO violations, agreed to their commission.[8] The virtue of this alternative is that it allows liability to be imposed in accordance with existing principles of federal criminal liability, thereby eliminating the need to resort to civil doctrines such as respondeat superior.

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[2] Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961-68 (1988)).

[3] *See id.* at 922-23 (Statement of Findings and Purpose).

[4] *See, e.g.*, Thomas E. Dwyer, Jr. & Stephen Kiely, *Vicarious Civil Liability Under the Racketeer Influenced and Corrupt Organizations Act*, 21 CAL. W. L. REV. 324 (1985); Senah Green, Note, *Judicial Efforts to Redirect an Errant Statute: Civil RICO and the Misapplication of Vicarious Corporate Liability*, 65 B.U. L. REV. 561 (1985); Michele Theroux, Note, *Innocent Corporate Employers–Should They Be Held Vicariously Liable Under Civil RICO?*, 24 NEW ENG. L. REV. 677 (1989); *infra* notes 123-278.

[5] *See* discussion *infra* notes 124-63.

[6] *See* discussion *infra* notes 55-70.

[7] *See infra* notes 94-104 and accompanying text. Offenses are divisible into those that require cooperative effort for their completion and those that do not; conspiracy and complicity are examples of the former, while arson, homicide, burglary and robbery are examples of the latter. *See, e.g.*, BLACK'S LAW DICTIONARY 1597 (Rev. 4th ed. 1968).

[8] For the few reported instances involving attempts to utilize *Pinkerton* in civil RICO actions, see discussion *infra* notes 164-278.

Part I of this Article outlines the elements necessary to impose liability under the RICO statute. Part II describes the standards used to impute liability for another's acts in civil and in criminal law. Part III describes the issues arising as a result of imposing vicarious liability in civil RICO actions and explains how the *Pinkerton* doctrine can be used to resolve a number of these issues.

I. RICO: AN OVERVIEW

RICO resulted from a national concern with organized crime that arose in the 1950s and 1960s, fostered by a series of Congressional hearings that brought the existence of a group known as "La Cosa Nostra," or "the Mafia," to the attention of the American public.[9] To that end, RICO created "enhanced sanctions and new remedies" designed to combat criminal organizations.[10] In a departure from the normal approach to criminal statutes, Congress provided that RICO be construed liberally "to effectuate its remedial purposes."[11] This directive has been applied to both its civil and criminal provisions.[12]

Despite its origins, RICO has not been limited to use against those who are demonstrably affiliated with "organized crime" in the conventional sense.[13] Indeed, most civil and criminal RICO actions do not

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[9] *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 466 (1968); DONALD R. CRESSY, THEFT OF THE NATION: THE STRUCTURE AND OPERATIONS OF ORGANIZED CRIME IN AMERICA 17-21, 43-44, 309-10 (1969); ESTES KEFAUVER, CRIME IN AMERICA 1-18 (1951); Craig Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 837 (1980); John L. McClellan, *The Organized Crime Act or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME L. REV. 55, 58-60 (1970). For a discussion of the other provisions of the Act, see Craig Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 255-57 (1984).

[10] Statement of Findings and Purpose, Organized Crime Control Act, 84 Stat. at 923 (1970); *see also* G. Robert Blakey & Brian Gettings, *Racketeer Influenced & Corrupt Organizations (RICO): Basic Concepts–Criminal & Civil Remedies*, 53 TEMP. L.Q. 1009, 1013 (1980) (stating that RICO authorizes enhanced criminal penalties and new civil sanctions to combat organized criminal behavior).

[11] Organized Crime Control Act § 904(a), 84 Stat. at 947; *see also* United States v. Russello, 464 U.S. 16, 27 (1983) (noting that RICO is the "only substantive federal criminal statute that contains such a directive").

[12] *See, e.g.*, United States v. Elliott, 571 F.2d 880, 899 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

[13] *See, e.g.*, Theroux, *supra* note 4, at 678-79 ("RICO has not been used against organized crime defendants except in a small percentage of cases. As of 1985, only nine percent of the district court civil RICO decisions involved 'allegations of criminal activity of a type generally associated with professional criminals.'") (footnotes omitted) (quoting Sedima v. Imrex Co., 473 U.S. 479, 481 (1985)); *accord* Bradley, *Racketeering and the Federalization of Crime*, *supra* note 9, at 257; *see also* Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 170 (1980) (noting that most RICO defendants "could not conceivably be included within the traditional or newly expanded definitions of organized crime"). *But see* Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1043 (1990) ("RICO

involve members of La Cosa Nostra but are brought against a variety of "civilian" defendants.[14] Critics argue that such indiscriminate application is a misuse of the statute, but RICO's defenders maintain that its diversity of defendants merely implements the directive that the statute be liberally construed.[15] Both agree that RICO's unique structure allows it to be used in a wide range of contexts and against a variety of defendants.[16] The following discussion first outlines RICO's general structure as a criminal statute, and turns next to an examination of its civil remedies.

RICO targets "enterprise criminality," which consists of committing offenses "in the context of an organization."[17] RICO makes it a distinct offense to use an organization, an "enterprise" in RICO parlance, as an instrument for committing crimes defined by other statutes.[18] The "enterprise" can be anything from a Mafia crime family to a legitimate corporation to a "Mom and Pop" shop, as long as it engages in or affects interstate or foreign commerce.[19] To commit a substantive RICO violation,[20] a RICO "person," defined as an "individual or entity capable of holding a legal or beneficial interest in property,"[21] must employ a

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remains the single most effective device for prosecuting . . . organized criminal activity").

[14] *See, e.g.*, Sedima v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984) (stating that RICO is primarily used "for purposes totally unrelated to its expressed purpose"), *rev'd*, 473 U.S. 479 (1985); *see also* Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805 (1990) (arguing that RICO has strayed from its intended purpose and has become a dangerous tool); L. Gordon Crovitz, *How the RICO Monster Mauled Wall Street*, 65 NOTRE DAME L. REV. 1050 (1990) (arguing that Congress should restrict RICO to is original purposes); Thomas G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691 (1990) (arguing that Courts should limit the extent of RICO's reach); Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 298-300 (1983) (stating that RICO has been employed against those who do not appear to be the intended targets of the legislation).

[15] As to critiques, see sources cited *supra* notes 13-14. For a defense, see Coffey, *supra* note 13, at 1049 (noting legislative mandate "that RICO be liberally construed"); Craig W. Palm, Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980) (arguing that Congress statutorily mandated liberal construction and broad application).

[16] *See, e.g.*, sources cited *supra* notes 13-15.

[17] *See* Blakey & Gettings, *supra* note 10, at 1013-14; Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646, 649 n.12 (1989).

[18] 18 U.S.C. § 1961(4) (1988). An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* The definition, however, is not intended to be exhaustive. *See* Blakey & Gettings, *supra* note 10, at 1023 ("works by illustration, not by limitation").

[19] *See* 18 U.S.C. § 1962(a)-(c) (stating that an enterprise must be engaged in or its activities must affect interstate or foreign commerce); *supra* note 18 and accompanying text; *see also* O'Neill, *supra* note 17, at 649 n.12 ("The term [enterprise] speaks of the commission of crime in the context of an organization, which is as easily a corporation as a mafia family."); sources cited *supra* notes 13-14 (discussing RICO's intended and actual defendants). In United States v. Turkette, 452 U.S. 576, 583 (1981), the Supreme Court held that an enterprise can also consist of persons "associated in fact" for purely illegal purposes.

[20] There are four RICO offenses—three substantive offenses and a RICO conspiracy. *See infra* notes 28-39 and accompanying text.

[21] 18 U.S.C. § 1961(3) (1988). Again, the categories are illustrative, as the definition says that

"pattern of racketeering activity" or engage in the "collection of unlawful debt" in a manner having a specified impact on an enterprise.[22]

"Unlawful debt" results from illegal gambling or "loan-sharking."[23] The "collection of unlawful debt" alternative is rarely used in RICO litigation.[24] Most cases, civil and criminal, allege that one or more defendants used a "pattern of racketeering activity" to commit RICO offenses.[25] The statute defines a "pattern of racketeering activity" as the commission of "at least two acts of racketeering activity" within a ten-year period.[26] The Supreme Court has held that acts of racketeering activity must be linked by "continuity plus relationship" to form a RICO pattern.[27]

RICO defines "racketeering activity" by incorporating conduct that is prohibited by state law and other federal statutes.[28] These offenses are known as "predicate offenses," ostensibly because RICO violations are predicated on their commission,[29] and include "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous

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person "includes" these entities. *See* Blakey & Gettings, *supra* note 10, at 1022-23.

[22] *See* 18 U.S.C. § 1962(a)-(c) (1988). *See also infra* text accompanying notes 32-34 (discussing substantive violations of 18 U.S.C. § 1962(a)-(c)). The "person" and "enterprise" can be the same; it is generally accepted that they must be distinct under subsection (c) but not under subsection (a) or (b). For cases involving subsection (c), see Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 400 (7th Cir. 1984) (separate entities required), *aff'd on other grounds*, 473 U.S. 606 (1985). *But see* United States v. Hartley, 678 F.2d 961, 987-90 (11th Cir. 1982) (holding that a corporation may be both the defendant and the enterprise under subsection (c)), *cert. denied*, 459 U.S. 1170 (1983). For cases under subsections (a) and (b), see Official Publications, Inc. v. Kable News, 884 F.2d 664 (2d Cir. 1989); Petro-Tech Inc. v. The Western Co., 824 F.2d 1349 (3d Cir. 1987); Medallion TV Enterprises, Inc. v. SelecTV of Cal., Inc., 627 F. Supp. 1290 (C.D. Cal. 1986), *aff'd*, 833 F.2d 1360 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 3241 (1989). However, the enterprise and the persons under RICO are usually alleged as distinct entities. *See* O'Neill, *supra* note 17, at 664-69.

[23] *See* 18 U.S.C. § 1961(6) (1988).

[24] *See, e.g.*, Tarlow, *supra* note 14, at 370-71.

[25] *See id.*

[26] 18 U.S.C. § 1961(5) (1988). The ten-year period excludes "any period of imprisonment." *Id.* In addition, at least one of the alleged acts must have occurred after the effective date of the statute, which was October 15, 1970. *See* Organized Crime Control Act, 84 Stat. at 922 (1970).

[27] Sedima v. Imrex Co., 473 U.S. 479, 496 n.14 (1985). In H.J., Inc. v. Northwestern Bell Telephone, 492 U.S. 229, 240-41 (1989), the Court explained that a "relationship" exists if the racketeering acts "have the same or similar purposes, results, participants, victims, or methods of commission" or are otherwise interrelated and not isolated. "Continuity" denotes either "a closed period of repeated conduct" or conduct that poses a danger of repetition. *Id.* at 241 (quoting 18 U.S.C. § 3575(e)).

[28] 18 U.S.C. § 1961(1) (1988). Since RICO was enacted, Congress has increased the number of crimes that constitute "racketeering activity." *See, e.g.*, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7054, 7032, 7020(c), 102 Stat. 4181 (1988); Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, § 205, 98 Stat. 2754 (1984).

[29] *See generally* Coffey, *supra* note 13, at 1036 (discussing the nature of the predicate offense under RICO).

drugs, which is chargeable under State law and punishable by imprisonment for more than one year."[30] The federal predicates comprise a "laundry list" of offenses, including bribery, counterfeiting, embezzling pension and welfare funds, mail and wire fraud, obscenity, obstructing justice, interfering with commerce, money laundering, labor crimes, bankruptcy fraud, securities fraud, drug offenses and violating the Currency and Foreign Transactions Reporting Act.[31]

To commit a substantive RICO violation, a "person" must engage in a pattern of racketeering activity or the collection of unlawful debt so as to: (1) acquire or maintain an interest in, or control of, an enterprise; (2) establish or operate an enterprise; or (3) conduct or participate in conducting an enterprise's affairs.[32] Typically, in a RICO case, the defendants are charged with engaging in a pattern of racketeering activity by committing at least two predicate offenses within ten years of each other so as to affect an enterprise in one of the ways listed above.[33] The most frequently used provision is 18 U.S.C. § 1962(c), which makes it an offense to use a pattern of racketeering to "conduct or participate, directly or indirectly, in the conduct of" the enterprise's affairs.[34]

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[30] 18 U.S.C. § 1961(1)(A) (1988). The state offenses are only "definitional," encompassing "generic" categories of prohibited conduct. *See, e.g.*, H.R. REP. No. 1549, 91st Cong., 1st Sess. 25 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4032; 1 KATHLEEN BRICKEY, CORPORATE CRIMINAL LIABILITY § 7:13 (1984). Since the statute requires only that conduct be "chargeable" under state law, it encompasses such associated offenses as conspiracy to commit the offenses listed above. *See, e.g.*, United States v. Licavoli, 725 F.2d 1040, 1045-47 (6th Cir.) (holding that conspiracy to commit murder may be a predicate act under § 1961(1)(A)), *cert. denied*, 467 U.S. 1252 (1984).

[31] 18 U.S.C. § 1961(1)(B)-(E) (1988).

[32] *See* 18 U.S.C. § 1962(a)-(c) (1988). Under subsection (a), the offense is to "use or invest, directly or indirectly," income derived from racketeering or collection of unlawful debt to acquire an interest in, or establish or operate the enterprise. Under subsection (b), the offense constitutes using the pattern of racketeering activity or the collection of unlawful debt "to acquire or maintain, directly or indirectly" an interest in or control of an enterprise. Under subsection (c), the offense consists of using the pattern of racketeering activity or the collection of unlawful debt to "conduct or participate, directly or indirectly, in the conduct of" the enterprise's affairs.

[33] *See supra* note 32 and accompanying text. Substantive offenses based on the "collection of unlawful debt" have the following analogous structure: the predicate offense is collecting debt resulting from illegal gambling or "loan-sharking," *see* 18 U.S.C. § 1961(6) (1988); the RICO offense is using these acts to engage in an activity prohibited by the statute, *see supra* note 32 and accompanying text.

[34] *See, e.g.*, Pamela H. Bucy & Steven T. Marshall, *An Overview of RICO*, 51 ALA. LAW. 283, 285 (1990) ("[Section] 1962(c) offenses are the most common. One study of all reported RICO cases through 1985 showed that 92 percent ... charged a violation of 1962(c), or a conspiracy to violate 1962(c)."); *accord* Gerald Lynch, *RICO: The Crime of Being a Criminal, Parts I and II*, 87 COLUM. L. REV. 661, 724, 726, 731 (1987); Mark S. Poker, *Reaching a Deep Pocket Under the Racketeer Influenced and Corrupt Organizations Act*, 72 MARQ. L. REV. 511, 515 (1989); Tarlow, *supra* note 14, at 324; Paul W. Flowers, Comment, H.J., Inc.: *Targeting Federal RICO's Pattern Requirement to Long-Term Organized Criminal Activity*, 51 OHIO ST. L.J. 713, 714 (1990); Green, *supra* note 4, at 567. Section 1962(c) is also the provision most commonly used in civil litigation. *See, e.g.*, John P. Barry, *When Protestors Become "Racketeers," RICO Runs Afoul of the First Amendment*, 64 ST. JOHN'S L. REV. 899, 902 n.17 (1990) ("Section 1962(c) is the provision most commonly used in civil

RICO conspiracy is also used quite often: 18 U.S.C. § 1962(d) makes it a crime to conspire to commit a substantive RICO offenses, i.e., to violate 18 U.S.C. § 1962(a), (b), or (c).[35] It is settled that a subsection (d) offense lies in the agreement to commit a substantive RICO offense, rather than the agreement to commit the predicate act necessary for such an offense.[36] While some courts hold that the offense of conspiracy is complete with the agreement, others require an overt act in furtherance of the agreement.[37] In addition, the federal circuits are divided concerning whether the offense is agreeing that some member(s) of the conspiracy will commit substantive violations,[38] or whether a conspirator must personally agree to commit such violations.[39]

Courts do agree that RICO conspiracy does not merge into substantive offenses, meaning that criminal defendants can be convicted of, and punished for, both.[40] For each violation, such defendants can be fined "not more than $25,000 or imprisoned not more than twenty years, or both" and must forfeit any property, or any interest in property, that they "acquired or maintained" by committing RICO violations.[41]

Civil RICO actions incorporate this general structure, the primary difference being the remedy sought.[42] The statute provides that

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RICO suits."); Califa, *supra* note 14, at 815 ("The vast majority of both civil and criminal RICO cases involve (c) and (d)."). Like the other substantive offenses, subsection (c) can be violated either by using a pattern of racketeering activity or the collection of unlawful debt to this end. *See supra* note 32 and accompanying text.

[35] *See supra* note 32.

[36] *See, e.g.*, Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 792 n.8 (3d Cir. 1984) ("mere agreement to commit the predicate acts is not sufficient . . . under § 1962(d)").

[37] *Compare* United States v. Glecier, 923 F.2d 496, 499-501 (7th Cir. 1991) (holding that no overt act is required) *and* United States v. Tripp, 782 F.2d 38, 41 (6th Cir.) (finding no overt act requirement), *cert. denied*, 475 U.S. 1128 (1986) *with* United States v. Kimble, 719 F.2d 1253, 1256 (5th Cir. 1983) (holding that an overt act is required). *See also* 1 BRICKEY, *supra* note 30, § 7:15 (discussing the split of authority concerning an overt act requirement under § 1962(d)).

[38] *See* Pryba v. United States, 111 S. Ct. 305, 306 (1990) (White, J., dissenting), *denying cert. to* 900 F.2d 748 (4th Cir. 1990); *see also* 1 BRICKEY, *supra* note 30, § 7:15 (discussing the division in the circuits over personal commitment to the offense); James C. Mannis, Comment, *Clarifying RICO's Conspiracy Provision: Personal Commitment Not Required*, 62 TULANE L. REV. 1399, 1400 (1988) (same).

[39] *See* United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), *cert. denied sub nom.* Rabito v. United States, 469 U.S. 831 (1984); United States v. Cauble, 706 F.2d 1322, 1342 n.64 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983); *see also* 1 BRICKEY, *supra* note 30, § 7:15 (discussing the split in the federal circuits).

[40] *See* 1 BRICKEY, *supra* note 30, § 7:15; *see also* United States v. Rone, 598 F.2d 564, 572 (9th Cir. 1979) (imposing consecutive sentences for convictions under subsections (c) & (d)), *cert. denied*, 445 U.S. 946 (1980). At common law, conspiracy merged into a completed substantive offense, so that a defendant could not be sentenced for both. *See, e.g.*, ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 687-88 (3d ed. 1982).

[41] 18 U.S.C. § 1963 (1988).

[42] *See, e.g.*, Thomas Fitzpatrick & Brian O'Neill, *Elements of a RICO Action*, *in* CIVIL RICO 1989, at 7, 12 (PLI Litig. & Admin. Practice Course Handbook Series No. 153, 1989) ("The elements

"[a]ny person injured in his business or property by" a RICO offense "may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."[43] Even though this provision was included when RICO was adopted in 1970, very few civil RICO cases surfaced until the 1980s.[44] Since then, there has been an "explosion of civil RICO litigation."[45]

Much of this increase is attributable to the availability of treble damages for successful plaintiffs; litigants have become increasingly aware of this aspect of the statute.[46] Also, RICO pleading seems simple and straightforward: a plaintiff who claims to have been injured by a substantive RICO violation must merely allege that her business or property was injured by the defendants' using a pattern of racketeering activity or the collection of unlawful debt to affect an enterprise in one of the statutorily forbidden ways.[47] A plaintiff may also base a claim on RICO's conspiracy offense if she can show that her business or her property was injured by defendants who conspired to commit one or more substantive RICO violations.[48] Though the Supreme Court has not yet

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of a criminal RICO action and a civil one are the same except that in the latter the plaintiff must also prove a compensable injury.").

[43] 18 U.S.C. § 1964(c) (1988).

[44] *See, e.g.*, *In re* Catanella, 583 F. Supp. 1388, 1424 (E.D. Pa. 1984) (noting that this civil remedy has been ignored for almost a decade); Green, *supra* note 4, at 561 ("Private plaintiffs brought few RICO actions prior to 1980.").

[45] Sedima v. Imrex Co., 741 F.2d 482, 486 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985); *see also* Theroux, *supra* note 4, at 681 (declaring that the "volume of RICO cases has increased exponentially in recent years"); sources cited *supra* note 13 (noting the proliferation of RICO actions in the past decade).

[46] As one illustration, see Marconi v. White Sox, Ltd., No. 83-C-7015 (N.D. Ill. Mar. 31, 1986) (LEXIS, Genfed library, Dist. file) (plaintiff brought RICO action against baseball team because security guards confiscated baseball tickets that plaintiff was scalping).

[47] *See, e.g.*, *Sedima*, 473 U.S. at 499. A civil RICO plaintiff must establish four elements: "(1) a pattern of racketeering activity or the collection of an unlawful debt; (2) the existence of an enterprise engaged in or affecting interstate or foreign commerce; (3) a nexus between the pattern of racketeering activity and the enterprise; and (4) an injury to its business or property by reason of the above." Fitzpatrick & O'Neill, *supra* note 42, at 19-20.

[48] *See, e.g.*, Zervas v. Faulkner, 861 F.2d 823, 832-35 (5th Cir. 1988) (noting a failure to show injury); Curley v. Cumberland Farms Dairy, 728 F. Supp. 1123, 1135 (D.N.J. 1989) (necessity of showing injury resulting from conspiracy); Howe v. Reader's Digest Ass'n, 686 F. Supp. 461, 465-66 (S.D.N.Y. 1988) (discussing a failure to show injury); Williams v. Hall, 683 F. Supp. 639, 642-44 (E.D. Ky. 1988) (holding that a plaintiff who has proven a subsection (d) conspiracy to violate either subsection (a) or (c) has standing to recover under subsection (c) if he can show injury from any overt acts done in furtherance of the conspiracy). Professor Brickey explains the difficulty that the federal circuits have had regarding the plaintiff's burden of establishing a subsection (d) injury as follows:

> [T]here remains the problem of identifying the ensuing injury. Conspiracy is, after all, an inchoate offense. As such, it does not cause harm. The Second, Third, Ninth, and Eleventh Circuits have thus concluded that the plaintiff who sues under 1962(d) may allege that the injury resulted from either an overt act or a predicate crime committed in furtherance of

determined what standard of proof governs civil RICO cases,[49] most federal courts require only a preponderance standard.[50]

Obviously, plaintiffs who are attracted to civil RICO by the possibility of recovering treble damages will make every effort to name "deep-pocket" defendants who can satisfy such an award in the event that the plaintiffs prevail. Often, these wealthy defendants will be individuals or entities who were not directly involved in committing the acts at issue in a RICO suit. This creates an incentive for the plaintiff to employ vicarious liability doctrines in an attempt to hold such parties liable for the actions of others. The next section describes the doctrines that have been used to impute liability in civil and criminal law.

II. VICARIOUS LIABILITY, COMPLICITY AND RICO

Vicarious liability is the practice of holding a person, or more recently, an entity, liable for another's actions.[51] In civil law, this is a common practice, known either as vicarious liability or as "respondeat superior."[52] It arises from policy concerns[53] that, at least until recently,

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> the conspiracy. The Tenth Circuit, on the other hand, has ruled that the injury must be caused by a substantive RICO injury.

BRICKEY, *supra* note 30, at § 14.10 (footnotes omitted); *see also id.* at §§ 14:12-13 (discussing the quality of the injury requirement before and after *Sedima*).

[49] *See Sedima*, 473 U.S. at 491 ("we need not decide the standard of proof issue today").

[50] *See, e.g.*, Wilcox v. First Interstate Bank, 815 F.2d 522, 531 (9th Cir. 1987) (holding that a preponderance of evidence is sufficient and discussing cases to that effect); *accord* Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1988).

[51] *See, e.g.*, GLANVILLE WILLIAMS, CRIMINAL LAW 266 n.1 (2d ed. 1961) (describing vicarious liability as "responsibility for the act . . . of another"); Green, *supra* note 4, at 599 ("Vicarious liability, often called the doctrine of respondeat superior, is the imposition of actor A's liability on innocent party B, due to the existence of some relationship between A and B"); *accord* RESTATEMENT (SECOND) OF TORTS §§ 870, 876, 877 (1970); RESTATEMENT (SECOND) OF AGENCY § 219 (1958); *see also* RESTATEMENT (SECOND) OF AGENCY § 212 (1958) ("A person is subject to liability for the consequences of another's conduct which results from his directions as he would be for his own personal conduct if, with knowledge of the conditions, he intends the conduct, or if he intends its consequences, unless the one directing or the one acting has a privilege or immunity not available to the other."); *id.* § 216 ("A master or other principal may be liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion.").

[52] *See, e.g.*, Denise Cote, *Vicarious Liability under Civil RICO*, *in* CIVIL RICO 1990, § II(A) (PLI Litig. & Admin. Practice Course Handbook Series No. C4-4193, 1990).

[53] One commentator has justified vicarious liability as follows:

> The traditional justification . . . is that one who is in a position of control over a situation must exercise that control or bear the loss. More recently, . . . courts and commentators have recognized that this rationale provides little explanation for holding an employer liable when he has done his best to control his employees. Modern justifications characterize vicarious liability as "a rule of policy, a deliberate allocation of risk." The employer is forced to internalize the liabilities created by his employees as a cost of doing business. Because he sought to profit by an enterprise which may predictably harm others,

have not been regarded as applicable to criminal liability.[54] For that reason, criminal law has hesitated to adopt respondeat superior, although it does impute liability for another's conduct under certain circumstances, as explained below.

A. *Respondeat Superior*

"Qui facit per alium facit per se."[55]

Agency law holds an employer, or "principal," liable for the acts of her employee, or "agent," if certain requirements are met.[56] Under the common law doctrine of respondeat superior, which is the governing rule in federal law, an employer is liable for the acts of her employee that are within the employee's scope of employment.[57] An employer is not liable for acts outside the scope of employment unless (1) she meant for them to occur; (2) she was negligent or reckless in supervising her employees; (3) the conduct "violated a non-delegable duty" imposed on her; or (4) the employee "purported to act or to speak" on her behalf and "there was

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> he should bear the cost. The modern economic rationale for vicarious liability stresses that the employer is in a better position to absorb the cost of these liabilities, or to insure against them, and to shift these costs to the public.

Green, *supra* note 4, at 499 (footnotes omitted) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499-500 (5th ed. 1984)).

[54] *See, e.g.*, PERKINS & BOYCE, *supra* note 40, at 911-14 ("courts have refused to convict of true crime on the basis of *respondeat superior*"); WILLIAMS, *supra* note 51, at 266-69 (finding no vicarious criminal liability at common law); Frances B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 723 (1930) (declaring that criminal law "has never accepted the doctrine of *respondeat superior*"). For a further discussion of the hesitancy of criminal law to adopt the doctrine of vicarious liability, see *infra* note 108.

[55] "He who acts through another acts for himself." BLACK'S LAW DICTIONARY 1413 (Rev. 4th ed. 1968).

[56] A master, or principal, is one "who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service." RESTATEMENT (SECOND) OF AGENCY § 2(1) (1958). An agent is "employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." *Id.* § 2(2). A principal can also be liable for acts of agents who are not employees. *See, e.g.*, *id.* § 212 ("A person is subject to liability for the consequences of another's conduct which results from his directions as he would be for his own personal conduct if, with knowledge of the conditions, he intends the conduct, or if he intends its consequences.").

[57] *See* Sarah N. Welling, *Intracorporate Plurality in Criminal Conspiracy Law*, 33 HASTINGS L.J. 1155, 1166 n.106 (1982) (rule in federal law); *accord* New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 493-94 (1909); United States v. Hangar One, Inc., 563 F.2d 1155, 1158 (5th Cir. 1977); *see also* RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."); *supra* note 51 and accompanying text (providing the general nature of vicarious liability). The rule encompasses acts of agents other than employees. *See supra* note 56.

reliance upon apparent authority, or [s]he was aided in accomplishing the tort by the existence of the agency relation."[58]

Under the Restatement (Second) of Agency, an employee acts within the scope of his employment if his conduct is "of the kind he is employed to perform;" is "substantially within the authorized time and space limits;" and is at least partially "actuated . . . by a purpose to serve" his employer.[59] Conduct is outside the scope of employment if it is "different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master."[60] An employer can, however, be civilly liable for conduct that was outside the scope of employment if the employee utilized his "apparent authority" as an agent of the employer to commit the injury.[61]

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[58] RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958).

[59] *Id.* § 228(1)(a)-(c). RESTATEMENT (SECOND) OF AGENCY § 229 further defines the contours of "within the scope of the employment" as follows:

> (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
>
> (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
>
> (a) whether or not the act is one commonly done by such servants;
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> (b) the time, place and purpose of the act;
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> (c) the previous relations between the master and the servant;
>
> (d) the extent to which the business of the master is apportioned between different servants;
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> (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
>
> (f) whether or not the master has reason to expect that such an act will be done;
>
> (g) the similarity in quality of the act done to the act authorized;
>
> (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
>
> (i) the extent of departure from the normal method of accomplishing an authorized result; and
>
> (j) whether or not the act is seriously criminal.

[60] *Id.* § 228(2).

[61] *See* RESTATEMENT (SECOND) OF AGENCY § 228 cmt. a (employer is "liable if a servant speaks or acts, purporting to do so on behalf of his principal, and there is reliance upon his apparent authority or he is aided in accomplishing the tort by the existence of the agency relation"); *see also id.* §§ 8, 27 (providing the rules for determining when apparent authority exists and its scope). One commentator has explained the scope of an employer's liability for the action of his employees' as follows:

> [T]he employer may still be liable . . . if the plaintiff relied upon the agent/employee's apparent authority to engage in such conduct, or if the employee was somehow aided in accomplishing the tort by the existence of the agency relationship. . . . [A]pparent authority . . . stems from the innocent third party's understanding of the agent/employee's authority, not the . . . actual scope of authority. Accordingly, some fraudulent acts, while not within the scope of one's employment, can be within the scope of one's apparent authority with respect to an innocent third party. Consequently, the employer . . . may remain liable, even if the employee's tortious conduct was committed solely to advance the employee's personal illicit motive, where the plaintiff relied on the employee's apparent authorization to so act.

Criminal conduct is not necessarily outside the scope of employment.[62] According to the Restatement (Second) of Agency,

> [t]he fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment, since the master is not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result. The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but serious crimes are not only unexpectable but . . . are in nature different from what servants in a lawful occupation are expected to do.[63]

Under the Restatement, an employer "may be subject" to criminal liability for acts committed by an employee or other agent, even if such acts were not authorized by the employer.[64] Such liability usually exists for offenses that require "neither intent to violate the law nor knowledge of facts which constitute a violation."[65] Liability is not imposed, however, when an offense requires a specific criminal intent, unless authorized by statute.[66]

In addition to these provisions, the Model Penal Code creates a doctrine of "criminal respondeat superior," which makes corporate entities liable for the acts of their employees or agents; this is the

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Theroux, *supra* note 4, at 687-88. For an extended discussion of the issues arising when respondeat superior doctrines are applied to RICO actions, see *infra* notes 131-53 and accompanying text. *But see infra* note 69 and accompanying text (noting that criminal vicarious liability is much narrower in scope than civil vicarious liability).

[62] RESTATEMENT (SECOND) OF AGENCY § 231 (1958) ("An act may be within the scope of employment although consciously criminal.").

[63] *Id.* § 231 cmt. a.

[64] *Id.* § 217D.

[65] *Id.* § 217D cmt. b.

> Many regulatory statutes do not require intent to violate them, or even knowledge of the act or condition which causes the conduct to be illegal. In such cases, a master or other principal may be held subject to a penalty for conduct of servants or other agents acting on his behalf . . . or in conducting transactions of the kind for which they are employed.

Id.

[66]
> Apart from statute, an employer is not subject to a penalty for an unauthorized act constituting a crime committed by an ordinary servant in the scope of employment if the basis for liability is a specific criminal intent. However, . . . an employer may be penalized for the act of an advisory or managerial person acting in the scope of employment. Ordinarily, he is not subject to liability for the acts of such persons if they act disobediently and not for the purpose of serving the employer. Even in such cases, however, a statute may provide for the liability of the employer.

Id. § 217D cmt. d. A "specific intent" is "some intent other than to do the actus reus" required of an offense. PERKINS & BOYCE, *supra* note 40, at 851. In other words, it is a specific intent "in addition to the intentional doing of the actus reus itself." *Id.* at 852. For example, when one takes another's property, one must intend to steal it in order to satisfy the elements of larceny. *Id.*

standard in many states.[67] Under this doctrine, a corporation is liable for an offense if any of three conditions is met: (1) the offense was committed "by an agent of the corporation acting in behalf of the corporation, within the scope of his office or employment"; (2) the offense "consists of an omission to discharge a specific duty" imposed by law; or (3) commission of the offense "was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or a high managerial agent acting in behalf of the corporation within the scope of his office or employment."[68] The first requirement has been interpreted to permit corporate liability for employee actions that were intended to benefit the corporation, although no actual benefit resulted.[69] Thus, an employer is not liable when an employee commits criminal acts solely for his own benefit.[70]

B. Complicity

At common law, it was possible to hold one person liable for another's criminal acts, though the premise for doing so differed from the premise supporting agency law. The common law of crimes also had a category of "principals," but the correlative category was "accessories," rather than "agents."[71]

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[67] *See* Welling, *supra* note 57, at 33 n.106; *see also* MODEL PENAL CODE § 2.07(1) (1985) (noting that this provision is an exception to the general requirements of a personal act); *cf. id.* § 2.01(1) (A "person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.").

[68] MODEL PENAL CODE § 2.07(1). The first requirement can be altered by statute. *See* MODEL PENAL CODE § 2.07(1)(a). For the liability of unincorporated associations, see MODEL PENAL CODE § 2.07(3).

[69] *See, e.g.*, WAYNE LAFAVE & AUSTIN SCOTT, JR., CRIMINAL LAW § 3.10, at 262 (2d ed. 1986). Imposing liability on the corporation in this situation has been justified as follows:

> [C]riminal respondeat superior is much narrower than civil respondeat superior. An employer/principal may be held criminally liable for the acts of its employees/agents only where they acted (1) within the scope of their employment or agency and (2) with the intent to benefit the corporation. This requirement of an "intent to benefit the employer" is consistent with general criminal liability rules, which exempt victims from criminal aiding and abetting liability even though their conduct may have met the substantive requirements.

Cote, *supra* note 52, § II.B. *See also* Standard Oil Co. v. United States, 307 F.2d 120, 128-29 (5th Cir. 1962) (finding that intention to benefit the employer is not needed for civil liability); *accord* American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 567-68 (1982); Gleason v. Seaboard Air Line Ry., 278 U.S. 349, 356-57 (1929).

[70] *See* LAFAVE & SCOTT, *supra* note 69, § 3.10, at 262 ("It is not necessary that the criminal acts actually benefit the corporation, but an agent's acts are not in behalf of the corporation if undertaken solely to advance the agent's own interests or interests other than the corporate employer.") (footnotes omitted).

[71] *See, e.g.*, PERKINS & BOYCE, *supra* note 40, at 722; 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW 309-61 (11th ed. 1912). The categories described above applied only to felonies; misdemeanors were governed by a system that was similar but differed in certain respects. *See*

Early common law further divided these categories, so that "principal" could be either a "principal in the first degree" or a "principal in the second degree."[72] A "first degree" principal perpetrated a crime; a "second degree" principal was present when it was committed and "aided, counseled, commanded or encouraged" the perpetrator.[73] "Accessories" were involved in crimes, but their level of participation was less than that of principals.[74] Common law split these actors into accessories "before" and "after the fact."[75] An accessory "before the fact" was not present when a crime was committed but had "procured, counseled, commanded, or abetted the principal" who committed it.[76] The accessory was liable for the "probable consequences" of his "counsel or command to do an unlawful act," but was not liable if the act committed was "essentially different" from what he counseled or commanded.[77] An accessory "after the fact" aided a "known felon" attempting to avoid liability for his crime; common law regarded the assistance as participation in the original offense.[78]

Although common law distinguished these degrees of participation, identical liability was imposed on principals in the "first degree" and "second degree," as well as on their accessories.[79] Important procedurally, these categories were irrelevant to liability.[80]

LAFAVE & SCOTT, *supra* note 69, § 6.6, at 569; PERKINS & BOYCE, *supra* note 40, at 722; WHARTON, *supra*, at 333.

[72] *See, e.g.*, LAFAVE & SCOTT, *supra* note 69, § 6.6, at 569-71; WHARTON, *supra* note 71, at 311-58.

[73] *See, e.g.*, LAFAVE & SCOTT, *supra* note 69, § 6.6, at 569-71 (discussing principals in the first and second degree); PERKINS & BOYCE, *supra* note 40, at 738 ("[A] principal in the second degree is one who did not commit the crime . . . but was present and abetting the principal."); WHARTON, *supra* note 71, at 311 ("A principal in the first degree . . . is the actual perpetrator of the criminal act."). "Presence" meant actual, physical presence; it could also mean that one was "cooperating with the perpetrator" and could assist him in committing the offense. *See* 1 JOEL P. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW 399-400 (8th ed. 1892); 4 WILLIAM BLACKSTONE, COMMENTARIES *35; PERKINS & BOYCE, *supra* note 40, at 741; WHARTON, *supra* note 71, at 322-23.

[74] *See, e.g.*, BISHOP, *supra* note 73, at 405 (noting that an accessory "participates in a felony too remotely to be deemed a principal"); BLACKSTONE, *supra* note 73, at *35 (defining an accessory as one who is "not the chief actor in the offence, nor present at its performance, but [who] is some way concerned therein, either *before* or *after* the fact committed").

[75] PERKINS & BOYCE, *supra* note 40, at 722; *see also id.* at 727 (discussing common law theory of proper parties to a suit).

[76] WILLIAM L. CLARK, HAND-BOOK OF CRIMINAL LAW 109 (2d ed. 1902); *see also* WHARTON, *supra* note 71, at 336 (exploring the nature of an accessory "before the fact"); BISHOP, *supra* note 73, at 410 (defining accessory "before the fact").

[77] CLARK, *supra* note 76, at 110; *accord* WHARTON, *supra* note 71, at 343.

[78] BLACKSTONE, *supra* note 73, at *37; LAFAVE & SCOTT, *supra* note 69, § 6.9, at 596; WILLIAMS, *supra* note 51, at 409-10.

[79] BLACKSTONE, *supra* note 73, at *39; CLARK, *supra* note 76, at 115; PERKINS & BOYCE, *supra* note 40, at 729.

[80] *See* BLACKSTONE, *supra* note 73, at *39; PERKINS & BOYCE, *supra* note 40, at 730, 735; *see also* BISHOP, *supra* note 73, at 396 (noting that the distinction between the two degrees is "without practical effect"); PERKINS & BOYCE, *supra* note 40, at 738 (finding that the "guilt is exactly the

The Model Penal Code replaced the common law categories with the doctrine of "complicity."[81] Section 2.06 of the Code provides that a person is guilty of a crime "if it is committed by his own conduct or by the conduct of another person for which he is legally accountable."[82] One is legally accountable for another's conduct if she causes an innocent party to engage in that conduct, if she is legally responsible for the other's conduct, or if the two are "accomplices."[83] The second alternative imposes "vicarious liability," while the third replaces "accessory" with a new term, "accomplice."[84]

To be an accomplice, a person or entity must do one of the following with the purpose of facilitating or promoting the commission of a crime: (a) solicit another to commit it; (b) aid, agree to aid or attempt to aid another in planning or committing it; or (c) have a legal duty to prevent its commission but fail to do so.[85] One is also an accomplice if a statute defines his conduct as such or if he participates in causing a result that is an element of the offense.[86] The victim of an offense is not an accomplice; nor is one whose conduct was "inevitably incident to" its commission.[87]

Like the common law, the Model Penal Code implements egalitarian notions of culpability, holding all those who participate in an offense equally liable.[88] The Code, however, differs from the common law in its determination of the scope of liability of the participants in an offense. Rejecting the common law rule that participants are liable for the "natural and probable consequences" of their acts,[89] the Code instead imposes liability only for those consequences that "might reasonably be expected

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same").

[81] The Code was devised to provide a model for states to follow in revising codes based on common law principles. *See* LAFAVE & SCOTT, *supra* note 69, § 1.1, at 2-6.

[82] MODEL PENAL CODE § 2.06(1) (1985).

[83] *Id.* § 2.06(2); *see id.* § 2.06 commentary at 300. Under the first alternative, one must act with the culpability that suffices for commission of the offense. *Id.* § 2.02(2)(a). Under the second alternative, the law defining the offense or the Code must impose accountability for the conduct of the party committing the offense. *Id.* § 2.02(2)(b).

[84] *Id.* § 2.06 commentary at 305. This portion of § 2.06 permits the imposition of liability for aiding acts that "may or may not be made criminal themselves, such as aiding suicide or suicide attempts and the escape of prisoners or mental patients." *Id.* at 304. *See also supra* notes 67-70 and accompanying text (discussing the Model Penal Code's doctrine of criminal respondeat superior). As to "accomplice," the term was chosen to avoid the connotations of "accessory." *See* MODEL PENAL CODE § 2.06 commentary at 305.

[85] MODEL PENAL CODE § 2.06(3).

[86] *Id.* §§ 2.06(3)(b), 2.06(4).

[87] *Id.* § 2.06(6). *See id.* § 2.06 commentary at 323-24 (acknowledging a victim exception); *id.* at 324 (determining whether "unmarried party to a bigamous marriage [is] an accomplice of the bigamist").

[88] *See* PERKINS & BOYCE, *supra* note 40, at 767.

[89] *See* MODEL PENAL CODE § 2.06 commentary at 299.

to result from the intended wrong."[90] Under the Code, a perpetrator is not liable "for conduct that does not fall within [his] criminal purpose."[91]

The federal law definition of complicity[92] incorporates the general principles of common law liability; while rejecting the distinction between accessories and principals, it does not adopt the Model Penal Code approach.[93] The principles of federal complicity law are discussed in somewhat more detail in part II.D. of this Article.

C. *The* Pinkerton *Doctrine*

Walter and Daniel Pinkerton were accused of evading liquor taxes.[94] Charged with substantive crimes and conspiracy, both were convicted of conspiracy; Walter was convicted of nine substantive offenses and Daniel of six.[95] The case went to the Supreme Court because the trial court had instructed the jury that it could convict the brothers of all substantive offenses that were committed to advance the conspiracy between them.[96]

The Court upheld the instruction and the convictions. Writing for the Court, Justice Douglas found that the brothers were linked in a conspiracy

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[90] PERKINS & BOYCE, *supra* note 40, at 745 (citing BLACKSTONE, *supra* note 73, at *37). *See also* MODEL PENAL CODE § 2.06 commentary at 311 (At common law, one who persuaded another to commit a crime was liable even though the instigated party committed a different crime if the crime committed was "likely to be caused by" the persuasion.).

[91] MODEL PENAL CODE § 2.06 commentary at 311.

[92] 18 U.S.C. § 2 (1988). One is liable as a principal if he (1) "aids, abets, counsels, commands, induces or procures" the commission of an offense, or (2) "willfully causes an act to be done which if directly performed by him . . . would be an offense." *Id.*

[93] *See, e.g.*, United States v. Kegler, 724 F.2d 190, 200 (D.C. Cir. 1984) (abolishing the distinction between principal and accessory); Morei v. United States, 127 F.2d 827, 831 (6th Cir. 1942) (adopting common law terminology); *accord* Colosacco v. United States, 196 F.2d 165, 167 (10th Cir. 1952); Tarkington v. United States, 194 F.2d 63, 68 (4th Cir. 1952); Von Patzoll v. United States, 163 F.2d 216, 218 (10th Cir.), *cert. denied*, 332 U.S. 809 (1947); Rooney v. United States, 203 F. 928, 932-33 (9th Cir. 1913). One difference between § 2 and the Code is that, while aiders and abettors are punished as principals under the former, they are less severely punished under the Code. *See* MODEL PENAL CODE § 242.4. Federal law imposes liability for attempting to aid and abet an offense. *See, e.g.*, United States v. Cartlidge, 808 F.2d 1064, 1066 (5th Cir. 1987); United States v. Lane, 759 F.2d 618, 623 (7th Cir. 1985); United States v. Martin, 1990 WL 7428, at *1 (E.D. Pa. Jan. 30, 1990). For the Code's treatment of liability for aiding and abetting, see MODEL PENAL CODE §§ 2.06(3)(a)(ii), 5.01(3) & 5.01(3) commentary at 297-98, 356. Imposing liability for attempted aiding and abetting or for aiding and abetting an attempt is a departure from traditional common law principles. *See, e.g.*, United States v. Ruffin, 613 F.2d 408, 412 (2d Cir. 1979) (holding that one "charged with aiding and abetting the commission of crime by another cannot be convicted in the absence of proof that the crime was actually committed"); *accord* United States v. Jones, 425 F.2d 1048, 1056 (9th Cir.), *cert. denied*, 400 U.S. 823 (1970); *see also infra* note 122 and accompanying text (discussing further liability under 18 U.S.C. § 2 and other federal conspiracy statutes).

[94] Pinkerton v. United States, 328 U.S. 640, 641 n.1 (1946).

[95] *Id.* at 641.

[96] *Id.* at 642, 645 n.6. This was important to Daniel because Walter committed the substantive offenses while Daniel was in prison. *See id.* at 648 (Rutledge, J., dissenting).

when the offenses were committed. Likening a conspiracy to a "partnership in crime,"[97] Justice Douglas enunciated what has come to be known as the *Pinkerton* doctrine: because members of a conspiracy are "partners in crime," they are liable for acts taken by their co-conspirators in furtherance of their joint criminal purposes.[98] Therefore, Daniel was liable for crimes that Walter committed while Daniel was in jail.[99]

Justice Douglas based this doctrine on two sources—a rule of proximate causation and a rule of complicity among co-conspirators.[100] In dissent, Justice Rutledge contended that the majority's use of the rule of complicity among co-conspirators abrogated the historic principle that in criminal law guilt is "personal, not vicarious."[101] But even before *Pinkerton*, participation in a conspiracy could establish liability for crimes committed by other conspirators;[102] this was simply a means of proving complicity, and Justice Douglas derived his *Pinkerton* holding from this rule of complicity among co-conspirators.[103] The major difference between the two doctrines is that under *Pinkerton*, membership in a conspiracy gives rise to a presumption of aiding crimes committed to further the goals of that conspiracy, while under the older rule membership was evidence of complicity but did not give rise to a presumption.[104]

It is important to understand that *Pinkerton* is not actually a rule of vicarious liability. As previously explained, in civil law vicarious liability

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[97] *Id.* at 642, 644, 646 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253 (1940)).

[98] *Id.* at 646-47. The *Pinkerton* doctrine does not apply if a "substantive offense . . . was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-48.

[99] *Id.* at 651 (Rutledge, J., dissenting in part) (noting that Daniel was convicted "on proof that he did no more than conspire . . . to commit offenses of the same general character").

[100] *See* Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying* Pinkerton *Liability to RICO Actions*, 56 MO. L. REV. 931, 937-42 (1991).

[101] 328 U.S. at 651 (Rutledge, J., dissenting in part).

> The Court's theory seems to be that Daniel and Walter became general partners in crime . . . and . . . Daniel became . . . responsible as a principal for everything Walter did. . . . [T]he result is a vicarious criminal responsibility as broad as, or broader than, the vicarious civil liability of a partner for acts done by a copartner in the course of the firm's business.
>
> Such analogies from private commercial law and the law of torts are dangerous . . . for transfer to the criminal field. . . . Guilt there . . . remains personal, not vicarious . . . .

Id.

[102] Robinson v. United States, 94 F.2d 752 (5th Cir. 1938); People v. Creeks, 149 P. 821 (Cal. 1915); People v. McKane, 38 N.E. 950, 952 (N.Y. 1894); Whited v. Commonwealth, 6 S.E.2d 647 (Va. 1940).

[103] *See* Brenner, *supra* note 100, at 937-78.

[104] *See, e.g.*, Nye & Nissen v. United States, 336 U.S. 613, 625 (1949) (Frankfurter, J., dissenting); *see also* Brenner, *supra* note 100, at 949-78 (discussing in detail the differences between *Pinkerton* and complicity).

doctrines hold a person or entity liable for another person's actions.[105] These doctrines reflect a policy of allocating the risks involved in activities to those who are regarded to be in the best position to guard against the activities.[106] Because this type of liability is based on social utility, it is considered acceptable to hold a party liable even though that party did not commit the act that actually inflicted the injury for which redress is sought.[107] Criminal law, on the other hand, traditionally made personal fault a condition of liability.[108]

Because the opinion includes agency terminology,[109] *Pinkerton* has been construed as imposing vicarious liability.[110] But rather than abrogating the personal act requirement, *Pinkerton* holds one liable for the act of aligning herself with others for criminal purposes; having done so, each nonacting member of the conspiracy is liable for crimes committed by other conspirators because her acts of alliance "caused" those crimes to be committed.[111] This act is sufficient to satisfy the traditional causation requirements of criminal liability.[112] Indeed, this act is certainly more blameworthy than the acts that suffice for imposing civil vicarious liability.[113] The only element of criminal liability that is attenuated under *Pinkerton* is causation, which is construed just as it is under general complicity doctrines.[114] Neither the *Pinkerton* doctrine nor complicity requires that one's wrongful act actually cause the commission of the crime for which she is held liable.[115] Instead, they

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[105] *See supra* notes 55-70.

[106] *See supra* note 53; *see also* Commonwealth v. Koczwara, 155 A.2d 825 (1959) (explaining that enactment of regulations enforceable by light penalties is a method of applying respondeat superior in criminal cases); RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1958) (stating that the concept of vicarious liability stems from the idea that during the time of service, the master can exercise control over the physical activities of the servant).

[107] *See, e.g.*, LAFAVE & SCOTT, *supra* note 69, § 3.9(d), at 255-56; KEETON ET AL., *supra* note 53, § 69, at 499-501.

[108] *See* Sayre, *supra* note 54, at 694-96. Aside from tradition, criminal law hesitated to impose vicarious liability because, while a civil judgment normally requires payment of damages, a criminal conviction can bring far more severe penalties, including imprisonment and death. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 255 (2d ed. 1960); Sayre, *supra*, at 695.

[109] *See, e.g.*, Pinkerton v. United States, 328 U.S. 640, 646 (1946).

[110] *See, e.g.*, United States v. Troop, 890 F.2d 1393, 1399 (7th Cir. 1989) ("[C]onspirators are agents of each other and just as a principal is bound by the acts of his agents within the scope of the agency, so is a conspirator bound by the acts of his co-conspirators.").

[111] *See* Brenner, *supra* note 100, at 944-78. This reflects the common law rule that parties are liable for the natural and probable consequences of acts committed to aid another in carrying out a given crime. *See supra* note 90 and accompanying text.

[112] *See* Brenner, *supra* note 100, at 963-78.

[113] *See, e.g.*, *supra* notes 55-70.

[114] *See* Brenner, *supra* note 100, at 963-78.

[115] *See, e.g.*, United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938). Indeed, because the act at issue is wrongful in and of itself, liability attaches even though the target crime was never committed. *See, e.g.*, MODEL PENAL CODE § 5.03 commentary at 388.

rely on the concept of "mediate causation."[116] "Mediate causation" refers to situations in which one's acts are deemed to have exerted *a* causal effect on another's conduct.[117] Application of this conception of causation avoids the difficult task of specifying the *actual* effect such acts had on another's conduct by making it possible to assume a causal effect sufficient to support liability.[118] The result is the imposition of criminal liability that comports with traditional requirements by including the element of demonstrable personal fault.[119]

D. Note on Complicity in Federal Law

The civil doctrines described above impose vicarious liability by eliminating the requirement of a personal "bad act."[120] The criminal doctrines discussed above impute liability for crimes others actually perpetrate by holding one liable for the "bad act" of either assisting in the commission of a crime or entering into a conspiracy of which the criminal consequences were a foreseeable result.[121] Federal criminal law, therefore, recognizes three types of imputed liability: (1) aiding and abetting a substantive crime; (2) aiding and abetting an attempt to commit a substantive crime; and (3) *Pinkerton* liability.[122]

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[116] *See* Brenner, *supra* note 100, at 944-78.

[117] *See id.*

[118] *See id.*

[119] *See generally* LAFAVE & SCOTT, *supra* note 69, § 1.2(a)-(d) (discussing the general characteristics of substantive criminal law).

[120] *See supra* notes 55-93.

[121] *See supra* notes 71-119.

[122] Federal law also recognizes a variety of conspiracy offenses. *See, e.g.*, 18 U.S.C. § 371 (1988) (general conspiracy provision); 18 U.S.C. § 1962(d) (1988) (RICO conspiracy). Conspiracy is a separate offense from the substantive crimes that are its goal. *See, e.g.*, United States v. Bayer, 331 U.S. 532, 542 (1947); *Pinkerton*, 328 U.S. at 643. For aiding and abetting attempts, see United States v. Barnett, 667 F.2d 835 (9th Cir. 1982) (attempt to manufacture phencyclidine); United States v. Allied Stevedoring Corp., 241 F.2d 925 (2d Cir.) (attempted tax evasion), *cert. denied*, 353 U.S. 984 (1957); United States v. Anthony, 145 F. Supp. 323 (D. Pa. 1956) (attempted armed robbery). One can be convicted of both conspiracy to aid and abet a substantive offense *and* aiding and abetting the commission of that offense under 18 U.S.C. § 2 (1988). *See, e.g.*, United States v. Huber, 772 F.2d 585 (9th Cir. 1985); United States v. Kensil, 195 F. Supp. 115 (E.D. Pa. 1961). Finally, federal law also makes it an offense to conspire to aid and abet a substantive crime. *See, e.g.*, United States v. Frink, 912 F.2d 1413, 1416 (11th Cir. 1990) (conspiracy to aid and abet possession of a controlled substance); United States v. Nealy, Nos. 86-7263, 86-7264, 87-6611, 87-8015, 840 F.2d 11, 1988 U.S. App. LEXIS 1849 (4th Cir. Feb. 17, 1988) (unpublished disposition in federal reporter and full text available on LEXIS) (conspiracy to aid and assist in preparation and presentation of false tax returns); United States v. Marino, 617 F.2d 76, 78 (5th Cir. 1980) (conspiracy to aid and abet bail jumping).

III. APPLYING *PINKERTON* LIABILITY IN CIVIL RICO ACTIONS

From the plaintiff's perspective, it is often vital to obtain liability of a deep pocket corporate employer in order to realize the promise of RICO's treble damage provisions.[123]

This section examines the issues that have arisen with regard to applying civil vicarious liability doctrines in civil RICO suits and explains how the *Pinkerton* doctrine can be used to resolve at least some of these concerns. Part A defines the scope of this controversy, and Part B explores the application of *Pinkerton* liability.

A. The Issue

Liability can be imposed on a civil RICO defendant in either of two ways: an individual or entity can be either directly liable as a perpetrator of the RICO offense(s) or vicariously liable for the acts of its co-conspirators.[124] If a plaintiff can prove that one or more defendants with resources sufficient to satisfy an award of damages under the statute actually committed the RICO violation(s), she will not need to rely on vicarious liability; this is true even when a defendant is an artificial entity that can only act through individual agents.[125] It is when the actual perpetrators have limited resources that plaintiffs attempt to use vicarious liability to impute the actual perpetrator's unlawful conduct to a party of sufficient means to satisfy such an award.[126]

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[123] Cote, *supra* note 52, § I.

[124] *See, e.g., id.* § III.A.; *see also* Schofield v. First Commodity Corp., 793 F.2d 28, 29-32 (1st Cir. 1986) (holding that under subsection (c) a corporate defendant cannot be both the RICO person and the enterprise).

[125] *See, e.g.*, Yellow Bus Lines, Inc. v. Drivers Local 639, 839 F.2d 782, 790 (D.C. Cir. 1988) ("organizations which conduct their own affairs by illegal means" are subject to direct liability); *Schofield*, 793 F.2d at 30-32 (observing that where RICO permits liability against a culpable entity, courts should find that such liability exists); Georgia Gulf Corp. v. Ward, 701 F. Supp. 1556, 1560 (N.D. Ga. 1987) (holding that plaintiff stated a RICO claim; though corporation "can only act through its agents," it is directly liable when "its agent acts pursuant to express authority").

[126] *See, e.g.*, Cote, *supra* note 52, § III.A. One commentator has explained the issue as follows:

> The question is an important one for businesspersons and for their lawyers. Imposing vicarious liability upon the business entity is often the only way to find a deep enough pocket to make the lawsuit worthwhile, even under RICO. In addition, the use of vicarious liability in conjunction with civil RICO exposes corporations and other businesses to treble damage liability for the acts of even low-level employees. Thus, the real question is whether and under what circumstances a civil plaintiff, in true derivative fashion, can reach the corporate purse under RICO.

Laura Ginger, *Using RICO to Reach Into the Corporate Pocket: Vicarious Civil Liability of the Business Entity Under the Racketeer Influenced and Corrupt Organizations Act*, 93 DICK. L. REV.

Vicarious liability has been imposed in an analogous context: in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*,[127] the Supreme Court held that the doctrine of apparent authority could be used to impose liability on a defendant in an action seeking treble damages under federal antitrust statutes.[128] The Court found that such liability was "consistent with the intent behind the antitrust laws" and was permissible even though the treble damages were designed to serve both punitive and deterrent functions.[129] Notwithstanding *Hydrolevel*, however, lower federal courts are divided on whether vicarious liability doctrines apply in actions seeking treble damages under RICO.[130]

465, 465 (1989) (footnotes omitted).

[127] 456 U.S. 556 (1982).

[128] *Id.* at 577 ("holding ASME liable . . . for the antitrust violations of its agents committed with apparent authority").

[129] *Id.* at 569, 574-76. The Court further explained:

> [T]he antitrust private action was created primarily as a remedy for the victims of antitrust violations. . . . Since treble damages serve as a means of deterring antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold ASME liable for the acts of agents committed with apparent authority.

Id. at 575-76 (citations omitted); *see also* RESTATEMENT (SECOND) OF AGENCY § 217C cmt. c (1958) (explaining that the general rule limiting punitive damages against master for the acts of her agent does not apply when interpreting statutes awarding treble damages).

[130] *See, e.g.*, D & S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 968 (7th Cir.) (finding that vicarious liability doctrines do not apply because RICO reveals "[c]ongressional intent to create an exception to the general rule of respondeat superior"), *cert. denied*, 486 U.S. 1061 (1988); *accord* Yellow Bus Lines v. Drivers Local 639, 839 F.2d 782, 791 (D.C. Cir. 1988), *vacated sub nom.* International Bhd. of Teamsters v. Yellow Bus Lines, 492 U.S. 914 (1989), *adopted on reh'g*, 913 F.2d 948, 951 (D.C. Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 2839 (1991); Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987); Schofield v. First Commodity Corp., 793 F.2d 28, 33 (1st Cir. 1986); Lappin v. Mesirow Inv., No. 91-C4374, 1992 WL 106776, at *5 (N.D. Ill. May 11, 1992); Prochaska & Assoc. v. Merrill Lynch, No. 8:CV91-00073, 1992 WL 143662, at *4 (D. Neb. Feb. 26, 1992); Jeffreys v. Exten, 784 F. Supp. 146, 156 n.8 (D. Del. 1992); Metro Furniture Rental, Inc. v. Alessi, 770 F. Supp. 198, 202 (S.D.N.Y. 1991); Kahn v. Chase Manhattan Bank, 760 F. Supp. 369, 372-73 (S.D.N.Y. 1991); First Nat'l Bank v. Lustiq, 727 F. Supp. 276, 280 (E.D. La. 1989); *In re* Citisource, Inc., 694 F. Supp. 1069, 1080 (S.D.N.Y. 1988); Banque Worms v. Luis A. Duque Pena E Hijos, Ltda., 652 F. Supp. 770, 773-74 (S.D.N.Y. 1986); Continental Data Sys. v. Exxon Corp., 638 F. Supp. 432, 440 (E.D. Pa. 1986); Rush v. Oppenheimer & Co., 628 F. Supp. 1188, 1194-95 (S.D.N.Y. 1985); Dakis v. Chapman, 574 F. Supp. 757, 759-60 (N.D. Cal. 1983); Parnes v. Heinold Commodities, 548 F. Supp. 20, 23-24 (N.D. Ill. 1982). *But see* Amendolare v. Schenkers Int'l Forwarders, Inc., 747 F. Supp. 162, 168 (E.D.N.Y. 1990) (holding that vicarious liability does apply in RICO actions); *accord* Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1358-59 (3d Cir. 1987); Connors v. Lexington Ins. Co., 666 F. Supp. 434, 437 (E.D.N.Y. 1987); Federal Sav. & Loan Ins. Corp. v. Shearson-American Express, 658 F. Supp. 1331, 1342 (D.P.R. 1987); Tryco Trucking Co. v. Belk Stores Servs., Inc., 634 F. Supp. 1327, 1334-35 (W.D.N.C. 1986); Hunt v. Weatherbee, 626 F. Supp. 1097, 1103 (D. Mass. 1986); Morley v. Cohen, 610 F. Supp. 798, 811 (D. Md. 1985); Bernstein v. IDT Corp., 582 F. Supp. 1079, 1083 (D. Del. 1984). The Seventh Circuit has taken the middle road by recognizing the limited applicability of vicarious liability in RICO actions. Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1306 (7th Cir. 1987).

Decisions that apply respondeat superior to civil RICO actions generally do so on the theory that this furthers policies analogous to those at issue in *Hydrolevel*: RICO provides redress for victims of racketeering while imposing a sanction that punishes past instances of such activity and deters the commission of future RICO offenses.[131] These opinions tend to stress the remedial aspects of civil RICO actions, while those that decline to apply respondeat superior often emphasize the punitive nature of civil RICO actions.[132] Courts that refuse to apply *Hydrolevel*-type reasoning to civil RICO actions often cite the "significant differences between the antitrust statutes and RICO."[133] Many of these decisions find that respondeat superior applies when "the structure of the statute does not otherwise forbid it."[134]

According to this theory, respondeat superior is permissible when actions are based on violations of either subsection (a) or (b) of section 1962, but not when based on violations of subsection (c).[135] This view regards subsection (c) as applying only when "an 'innocent' or 'passive' corporation is victimized by the RICO 'persons,' and either drained of its own money or used as a passive tool to extract

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[131] *See, e.g.*, Federal Sav. & Loan Ins. Corp. v. Shearson-American Express, 658 F. Supp. 1331, 1342 (D.P.R. 1987).

> The remedial purposes of §§ 1964 and 1962(c) are consistent ... with application of respondeat superior. ... As stated in *ASME v. Hydrolevel* ... if the principal is liable, it is much more likely that similar violations will not occur in the future since pressure will be brought on the organization to see to it that its agents abide by the law.

Id.; *see also* Bernstein v. IDT Corp., 582 F. Supp. 1079, 1083-84 (D. Del. 1984) (stating that application of respondeat superior in RICO actions furthers the statutory goals).

[132] *See Federal Sav. & Loan Ins. Corp.*, 658 F. Supp. at 1342. *See generally* Shearson-American Express, Inc. v. McMahon, 482 U.S. 220, 240-41 (1987) (finding RICO damage awards are primarily remedial in nature). *But see* Abell v. Potomac Ins. Co., 858 F.2d 1104, 1141 (5th Cir. 1988) (declaring that RICO damages in excess of actual damages are punitive); Tellis v. United States Fidelity & Guar. Co., 805 F.2d 741, 746 (7th Cir. 1986) (finding RICO damages "penal in nature"), *vacated in part*, 483 U.S. 1015 (1987).

[133] Salvador v. Mazzocone, 686 F. Supp. 528, 532 (E.D. Pa. 1987) ("Such differences include the specific relationship and separateness between a 'person' and 'enterprise' required by § 1962(c) and Congress's [sic] goals in adopting RICO as contrasted with Congress' goals in adopting the antitrust statutes.").

[134] Petro-Tech, Inc. v. Western Co., 824 F.2d 1349, 1358 (3d Cir. 1987); *see also* Schofield v. First Commodity Corp., 793 F.2d 28, 32 (1st Cir. 1986) (holding respondeat superior applicable unless legislative history explicity indicates that Congress intended otherwise).

[135] *See, e.g.*, *Schofield*, 793 F.2d at 32. In fact, the First Circuit has declared:

> [V]icarious liability is directly at odds with the Congressional intent behind section 1962(c). Both the language of that subsection and the articulated primary motivation behind RICO show that Congress intended to separate the enterprise from the criminal "person" or "persons". Indeed, there is unlikely to be a situation ... in which Congress more clearly indicates that respondeat superior is contrary to its intent.

Id.; *accord* Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1306-07 (7th Cir. 1987); *Petro-Tech*, 824 F.2d at 1358-61.

money from third parties."[136] Such a restrictive view derives from the generally accepted view that under subsection (c), RICO "persons" must be distinct from the "enterprise," but that this distinction is not necessary under subsections (a) or (b). This notion is drawn from the language of subsection (c), which requires that the "person" be "employed by or associated with" the enterprise.[137] Although issues involving RICO conspiracies arise far less often, courts generally hold that claims under section 1962(d) are controlled by the rule governing the substantive offense that was the object of the alleged RICO conspiracy.[138]

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[136] *Petro-Tech*, 824 F.2d at 1359; *accord* B.F. Hirsch v. Enright Refining Co., 751 F.2d 628, 633-34 (3d Cir. 1984); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 399-402 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

[137] "The person-enterprise rule has been justified as necessary to give meaning to the § 1962(c) language that the person be 'employed by or associated with' the enterprise. It is simply non-sensical to say that an entity can be 'employed by or associated with' itself." Cote, *supra* note 52, § III.B.

As to subsections (a) and (b), see Busby v. Crown Supply, Inc., 896 F.2d 833, 840-42 (4th Cir. 1990) (en banc); Yellow Bus Lines v. Drivers Local 639, 839 F.2d 782 (D.C. Cir. 1988), *vacated sub nom.* International Bhd. of Teamsters v. Yellow Bus Lines, 492 U.S. 914 (1989), *adopted on reh'g*, 913 F.2d 948 (1990) (en banc), *cert. denied*, 111 S. Ct. 2839 (1991); *Liquid Air Corp.*, 834 F.2d at 1307; Garbade v. Great Divide Mining Corp., 831 F.2d 212, 213 (10th Cir. 1987); Bishop v. Corbett Marine Ways, 802 F.2d 122 (5th Cir. 1986); *Schofield*, 793 F.2d at 32; Masi v. Ford City Bank & Trust Co., 779 F.2d 397, 401-02 (7th Cir. 1985); B.F. Hirsch v. Enright Refining Co., 751 F.2d 628, 633-34 (3d. Cir. 1984); Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984); Bennett v. Berg, 685 F.2d 1053, 1060 n.8 (8th Cir. 1982), *aff'd in part & rev'd in part*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983); Long Island Lighting Co. v. General Electric Co., 712 F. Supp. 292, 297 (E.D.N.Y. 1989); Filloramo v. Johnston, Lemon & Co., 697 F. Supp. 517, 523 (D.D.C. 1988). *But see* Rose v. Bartle, 871 F.2d 331, 358-59 (3d Cir. 1989) (holding that an entity could be both a person and an enterprise under subsection (c)); United States v. Hartley, 678 F.2d 961, 988-90 (11th Cir. 1982) (explaining why under subsection (c) a corporation can be both a defendant and the enterprise), *cert. denied*, 459 U.S. 1170 (1983). The Seventh Circuit, however, has implicitly adopted the "person-enterprise" rule by declaring:

> Unlike subsection (c), which requires a *relationship* between the "person" and the "enterprise" . . . , subsections (a) and (b) require only the *use* of an "enterprise" by a "person." Accordingly, we hold that, like subsection (a), subsection (b) does not require the existence of an enterprise separate and distinct from the person sought to be held liable.

Liquid Air Corp., 834 F.2d at 1307; *accord* Landry v. Air Line Pilots Assn., 901 F.2d 404 (5th Cir. 1990).

[138] The only reported decision to consider this issue is United Energy Owners Comm., Inc. v. United States Energy Management Systems, Inc., 837 F.2d 356 (9th Cir. 1988), which addressed it only in dicta.

> Since section 1962(d) makes unlawful conspiracies which violate sections 1962(a), (b) or (c), *Schreiber*'s rule applies to the plaintiffs' claims under section 1962(d) which allege conspiracies to violate section 1962(a), though not to those which allege a violation of section 1962(c). Therefore, under their section 1962(a) and (d) claims, plaintiffs have alleged enterprises that, even if they are the same as the persons involved as defendants, qualify as enterprises under Schreiber.

Id. at 364. In Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986), the court held that where a corporation engages in and benefits from racketeering, the corporation can be both a person and an enterprise under subsection (a). *But see Rae*, 725 F.2d at

The reason for the restriction imposed on actions asserting subsection (c) violations lies in the nature of the statute's respective prohibitions: subsection (c) makes it a crime to conduct, or participate in conducting, the affairs of an enterprise through a pattern of racketeering activity.[139] To reiterate, subsection (a) prohibits using racketeering *income* to acquire an interest in, establish or operate an enterprise, while subsection (b) forbids using racketeering *activity* to acquire or maintain an interest in the enterprise.[140] The premise of the restriction noted above is that an enterprise is victimized by a subsection (c) violation and therefore should not be liable for its consequences, even though the offense was carried out and/or facilitated by the enterprise's agents or employees.[141] Because an enterprise can play an active role under either subsection (a) or (b), this limitation does not apply and vicarious liability can be imposed if its essential requirements are met.[142] Likewise, at least one court has held that vicarious liability can be used under subsection (d).[143]

Aside from the "person-enterprise" distinction, courts impose liability only if the elements of *criminal* respondeat superior are satisfied, which usually turns on whether the employee-agents acted

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481 (holding that there must be a distinction between the enterprise and the RICO defendant under subsection (c)).

[139] *See supra* notes 9-50. Each provision also encompasses using the collection of unlawful debt to accomplish the respectively prohibited ends.

[140] *See supra* notes 9-50.

[141] *See, e.g., B.F. Hirsch*, 751 F.2d at 633-34. The court in *B.F. Hirsch* declared:

> One of the Congressional purposes in enacting RICO was to prevent the takeover of legitimate businesses by criminals. . . . It is in keeping with that Congressional scheme to orient section 1962(c) toward punishing the infiltrating criminals rather than the legitimate corporation which might be an innocent victim of the racketeering activity . . . .

Id.; *accord* D & S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 967 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988); Petro-Tech, Inc. v. Western Co., 824 F.2d 1349, 1359 (3d Cir. 1987); Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987); *Schofield*, 793 F.2d at 31-33; Haroco Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984).

[142] *See, e.g., Haroco*, 747 F.2d at 402 (holding that under subsection (a), "the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations"); *see also Liquid Air*, 834 F.2d at 1307 (holding that vicarious liability is appropriate under subsections (a) and (b)); Wilcox v. First Interstate Bank, 815 F.2d 522, 529 (9th Cir. 1987) (allowing plaintiffs to amend their complaint so as to claim that the parent corporation was vicariously liable for subsection (a) and (b) violations of its subsidiary). Some courts apply respondeat superior under subsection (c) when the corporation was not victimized by the racketeering activity. *See, e.g.*, Busby v. Crown Supply, Inc., 896 F.2d 833, 839 n.5 (4th Cir. 1990); Mylan Lab. v. Akzo, 770 F. Supp. 1053, 1070 (D. Md. 1991); Gruber v. Prudential-Bache Sec., Inc., 679 F. Supp. 165, 181 (D. Conn. 1987); Morley v. Cohen, 610 F. Supp. 798, 811 (D. Md. 1985).

[143] *See* Bernstein v. IDT Corp., 582 F. Supp. 1079, 1084 (D. Del. 1984) (finding that "principles of agency . . . appear to support a claim under 1962(d)").

within the scope of their employment.[144] This requirement imports an element of foreseeability into the analysis: a principal cannot be held liable for unlawful conduct of which it was ignorant and which was not a foreseeable result of its relationship with its agents.[145] As previously explained, conduct is within the scope of employment if it was at least *intended* to confer a benefit on the principal;[146] no actual benefit need be shown, but many RICO decisions regard such a benefit as a factor that strongly militates in favor of imposing vicarious liability.[147] The significance of this element of criminal

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[144] For a discussion of criminal respondeat superior, see *supra* notes 67-69 and accompanying text. Specifically, this is the first alternative under the Model Penal Code formulation of criminal respondeat superior. MODEL PENAL CODE § 2.07(1)(a) (1985). Ginger, *supra* note 126, at 468, found that agents "can bind the corporate entity by their wrongful conduct only when they act within the scope of their employment." *See, e.g.*, Local 1814, Int'l Longshoremen's Ass'n v. NLRB, 735 F.2d 1384, 1406-07 (D.C. Cir. 1984) (The "general rule" is that "'if the employee committing the crime is acting solely for his own benefit, his employer is not liable.'"); Lappin Mesiro, No. 91C-4374, 1992 WL 106776, at *5 (N.D. Ill. May 11, 1992) (finding that employers are "vicariously liable only for actions an employee takes within the scope of his or her employment, that is, with the intent to benefit the employer"); *see also Liquid Air*, 834 F.2d at 1306 (finding that implied liability is only appropriate if the corporation can be said to be responsible for the acts of its employees); *Petro-Tech*, 824 F.2d at 1361 (finding that there can be respondeat superior under subsection (a) when the enterprise benefits from the racketeering activity); *Schofield*, 793 F.2d at 32-33 (noting that the adoption of a modified respondeat superior approach must insure that Congressional intent is respected and legitimate businesses be spared); *Haroco*, 747 F.2d at 402 (finding liability appropriate "under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim"); Banque Worms v. Luis A. Duque Pena E Hijos, Ltda., 652 F. Supp. 770, 773 (S.D.N.Y. 1986) (finding that vicarious liability is appropriate only when an employee acts within the scope of his employment); Morley v. Cohen, 612 F. Supp. 798, 811 (D. Md. 1985) (finding the doctrine of respondeat superior applicable to RICO when a corporation's agents act within the scope of their employment). Yet, some courts require that the principal have knowledge of the benefit. *See, e.g.*, Thrailkill v. Champion Ford, Inc., 776 F. Supp. 1486, 1489 (D.N.M. 1991); Harrison v. Dean Witter Reynolds, Inc., 695 F. Supp. 959, 962 (N.D. Ill. 1988); *see also D & S Auto Parts*, 838 F.2d at 967 ("An employee violating RICO without his employer's knowledge is highly unlikely to be acting for his employer's benefit.").

[145] *See* RESTATEMENT (SECOND) OF AGENCY § 231 cmt. a. *See, e.g.*, SK Hand Tool Corp. v. Dresser Indus., 852 F.2d 936, 941 (7th Cir. 1988) ("Dresser cannot be held vicariously liable under RICO for the independent acts of its employees."). As an example, in Harrison v. Dean Witter Reynolds, Inc., 715 F. Supp. 1425, 1430 (N.D. Ill. 1989), the court found that the acts of employees of a brokerage firm were within the scope of their employment because they were "of the kind they were hired to perform," even though the conduct at issue was expressly prohibited by the employer.

[146] *See, e.g.*, *D & S Auto Parts, Inc.*, 838 F.2d at 966-67 (holding corporation not liable for conduct of employee who stole auto parts, sold them for his benefit and billed plaintiff to conceal the loss); *supra* note 69 and accompanying text.

[147] *See Liquid Air*, 834 F.2d at 1306 (approving imposition of vicarious liability "provided the corporation derived some benefit from the RICO violation"); Petro-Tech, Inc. v. Western Co., 824 F.2d 1349, 1361 (3d Cir. 1987) (finding vicarious liability acceptable "so long as the enterprise does in fact benefit from the racketeering"); Haroco Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984) (finding corporation vicariously liable "when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity"); Kahn v. Chase Manhattan Bank,

respondeat superior is that it provides a means of distinguishing "victim" principals from those whose involvement makes it reasonable to cast them as perpetrators.[148] This recognizes the basic principle that, under criminal complicity, neither the victims of a crime nor those whose conduct was "inevitably incident to" its commission are liable as accomplices.[149]

Most courts do not follow *Hydrolevel*, which applied the *civil* rule under which an intent to benefit the employer is not needed if the employee-agent acted with apparent authority.[150] This is an important alternative when criminal acts are at issue because, as one court noted, "[i]n cases involving intentional wrongdoing, the scope of employment doctrine acquires something of an abstract quality, for such wrongdoing is never really within the scope of an employee's employment: if it were, then the employer's liability would be direct, not vicarious."[151] The rationale for not applying apparent authority seems to be that, as one court noted, using it "'against passive entities that have been victimized by low-level employees' would not serve to promote RICO's policy objectives aimed at eliminating the infiltration

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N.A., 760 F. Supp. 369, 373 (S.D.N.Y. 1991) (concluding that the "independent acts of an employee not acting in his employer's interest are not a sufficient basis to hold the employer liable under RICO").

[148] *See, e.g.*, Rush v. Oppenheimer & Co., 628 F. Supp. 1188, 1195 (S.D.N.Y.) (finding no liability absent participation and knowledge of employer), *rev'd on other grounds*, 779 F.2d 885 (2d Cir. 1985); Dakis Pension Fund v. Chapman, 574 F. Supp. 757, 760 (N.D. Cal. 1983) (finding no liability for employee conduct that injured employer).

[149] *See supra* notes 86-87 and accompanying text.

[150] American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565-66 (holding that "a principal is liable . . . though the agent acts solely to benefit himself, if the agent acts with apparent authority") (citing Standard Sur. & Casualty Co. v. Plantsville Nat'l Bank, 158 F.2d 422 (2d Cir. 1946), *cert. denied*, 331 U.S. 812 (1947)), *reh'g denied*, 458 U.S. 1116 (1982). The Court had earlier justified holding a principal liable even though no benefit was received by the principal: "few doctrines . . . are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." Gleason v. Seaboard Air Line Ry. Co., 278 U.S. 349, 355-56 (1929). The distinction between respondeat superior and apparent authority is that the former encompasses acts that the employer has specifically authorized, as well as those that are within the scope of employment. *See, e.g.*, Harrison v. Dean Witter Reynolds, Inc., 715 F. Supp. 1425, 1430 (N.D. Ill. 1989); RESTATEMENT (SECOND) OF AGENCY §§ 216, 219(1) (1957).

[151] *Harrison*, 715 F. Supp. at 1430. As noted in the Restatement (Second) of Agency, liability exists not because of the operation of the laws of agency but because of

> the general rule, stated in the Restatement of Torts, that one causing and intending an act or result is as responsible as if he had personally performed the act or produced the result. If one intends a particular result to follow from his conduct and the result follows, it is immaterial that the particular way in which it is accomplished was unintended.

RESTATEMENT (SECOND) OF AGENCY § 212 cmt. a (1957) (citations omitted). For a general discussion of the justifications for vicarious liability, see *supra* note 53.

of legitimate businesses by organized crime."[152] A few courts, however, have applied apparent authority in civil RICO actions.[153]

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[152] Metro Furniture Rental, Inc. v. Alessi, 770 F. Supp. 198, 202 (S.D.N.Y. 1991) (quoting Amendolare v. Schenkers Int'l Forwarders, Inc., 747 F. Supp. 162, 169 (E.D.N.Y. 1990)). *Amendolare*, however, actually stated that if apparent authority "is not employed against passive entities that have been victimized by low-level employees . . . the imposition of liability on an organization for its negligence or acquiescence in allowing criminal activities would tend to promote this policy objective." 747 F. Supp. at 171. *But see* Banque Worms v. Luis A. Duque Pena E Hijos, Ltda., 652 F. Supp. 770, 773 (S.D.N.Y. 1986) ("When a corporation has been more a victim than a perpetrator, it would be a distortion of both the language and intent of the statute to hold the corporation vicariously responsible under RICO . . . merely because one of its employees may have contributed to the scheme.").

One court held that apparent authority could not be used to impute liability to a municipal corporation for the acts of its agents because this would not further the policies RICO was designed to serve; it found that there are significant differences between private and municipal corporations which required this result. *See* Gentry v. Resolution Trust Corp., 937 F.2d 899, 911-12 (3d Cir. 1991). According to this court, an award of treble damages under RICO is a punitive sanction which is improper because there are

> at least two major distinctions between municipal corporations and ordinary corporations. . . . First, there is the difference in accountability. Shareholders of an ordinary corporation can require quarterly reports . . . of the activities of their corporate officers or directors . . . and thus have an opportunity to ascertain if there are any illegal or inappropriate activities. . . . Municipal officials, on the other hand, make no similar accounting to the public . . . .
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> Second, a shareholder . . . can promptly disassociate from the corporation by selling the stock or bringing . . . appropriate remedial action. . . . [R]esidents of a municipality have little opportunity, if any, for disassociation. . . . Without the level of accountability and opportunity to disassociate . . . the imposition of punitive damages against the citizenry for the acts of municipal officials lacks the rational basis which traditionally has justified such penalties against ordinary corporations.

Id. at 911-12. The court fortified its holding by recognizing that municipalities have traditionally been immune from punitive damages. *Id.* at 910-11; *accord* Albanese v. City Fed. Sav. and Loan Ass'n, 710 F. Supp. 563, 567-69 (D.N.J. 1989).

[153] *See, e.g.*, International Bhd. of Elec. Workers, Local 340 v. Sacramento Valley Chapter Nat'l Elec. Constr. Ass'n, 1990 WL 118066, at *3-4 (E.D. Cal. Aug. 9, 1990), *reconsideration granted*, No. S-86-0881-LKK/JFM, 1990 WL 264719 (Dec. 20, 1990).

> [T]here appears to be little doubt that federal common law will impose vicarious liability on a principal for the conduct of its agent within the agent's apparent authority, when that conduct is tortious under a federal statute. The . . . question . . . is the relationship of that doctrine to the purposes of RICO.
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> The Supreme Court has explained that Congress' paramount goal in enacting the civil provisions of RICO was to provide a remedy to those injured by the operation of business enterprises through illegal means. . . . The doctrine of vicarious liability, which operates to widen the net of liability for violations of law, is not incompatible with the broad remedial purpose of RICO to "facilitate recovery by the victims of racketeering activity." . . .
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> . . . .
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> . . . Application of vicarious liability principles to bring within the scope of civil RICO all those who operate the enterprise's affairs, either directly or through agents, would appear entirely consistent with the underlying purpose of section 1962(c). . . . Given my determination that a principal will be liable for his agent's conduct within the scope of the agent's apparent authority, if the jury resolves these factual disputes in the plaintiff's favor, the corporate defendants may be held vicariously liable . . . .

The above discussion outlines the issues that are implicated by any attempt to impose vicarious liability in a civil RICO action.[154] While the empirical permutations that arise are frequently more complex than this discussion may indicate, it provides a context for considering obstacles that confront RICO plaintiffs. The "person-enterprise" rule, for example, can be a major barrier because subsection (c) is often the most appealing premise for a civil RICO claim.[155] It is the preferred option because, unlike subsections (a) and (b), both of which require the defendant(s) to have used racketeering activity or the collection of unlawful debt to exert a relatively pronounced influence on the enterprise, subsection (c) reaches a much lower level of impact.[156]

As explained above, subsection (a) requires that the accused person(s) use income derived from racketeering or the collection of unlawful debt to acquire an interest in, establish or operate the enterprise; subsection (b) requires that they use racketeering or the collection of unlawful debt to acquire or maintain an interest in or control of it.[157] Subsection (c), on the other hand, merely requires that such person(s) use racketeering or the collection of unlawful debt to conduct or participate, "directly or indirectly," in conducting the enterprise's affairs.[158] A RICO plaintiff can, therefore, allege a subsection (c) violation by showing, at a

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Id. (citations and notes omitted). *See also Harrison*, 715 F. Supp. at 1431-32 (suggesting that if the employee's actions had fallen within the definition of apparent authority then employer could have been held liable for RICO violations); Morley v. Cohen, 610 F. Supp. 798, 811 (D. Md. 1985) (finding that a corporation or partnership is liable "for the acts of its agents and/or representatives committed within the scope of their authority").

[154] For a more extensive treatment, see 3 BRICKEY, *supra* note 30, §§ 14:01-08.

[155] *See supra* note 34.

[156] *See* 3 BRICKEY, *supra* note 30, § 14:09(2), at 145 (1991 Supp.) ("As the statute only requires that one participate directly or *indirectly* in the affairs of an enterprise, a RICO defendant need not be shown to have participated in the management or operation of the enterprise.").

[157] *See id.* Henry A. LaBrun, Note, *Innocence by Association: Entities and the Person-Enterprise Rule Under RICO*, 63 NOTRE DAME L. REV. 179, 203 n.173 (1988), has explained the effect of these requirements:

> If the racketeering activity produces a nonmonetary or untraceable benefit--or no benefit at all--Section 1962(a) does not apply. Such activity . . . is covered by Section 1962(c), yet the person-enterprise rule effectively confers immunity upon entities when they violate this section by conducting their own affairs through a pattern of racketeering. As a result, plaintiffs injured by "non-profit" criminality are left without RICO's remedies, and entities engaged in such racketeering are left outside RICO's purview. This result appears contrary to both the statute's liberal construction clause, and its express provision for the dissolution or reorganization of any enterprise.

Id. Use of subsection (a) is further limited by a rule adopted by some courts that injury "must flow specifically from the 'investment or use' of the proceeds of racketeering activity, rather than the racketeering activity itself." *Id.* LaBrun warned that the effect of combining the person-enterprise rule and the "'investment rule'. . . may be to insulate entities from RICO liability altogether." *Id.* For cases recognizing the "investment rule" see Gilbert v. Prudential Bache Sec., Inc., 643 F. Supp. 107, 109 (E.D. Pa. 1986); Heritage Ins. Co. v. First Nat'l Bank, 629 F. Supp. 1412, 1417 (N.D. Ill. 1986).

[158] *See* LaBrun, *supra* note 157, at 203 n.173.

minimum, that one or more RICO person(s) used a pattern of racketeering activity or the collection of unlawful debt to "participate indirectly" in the conduct of the affairs of the enterprise.[159]

This is far less onerous than the requirements imposed under either subsection (a) or (b). Thus subsection (c) may often be the only alternative available to plaintiffs who have been victimized by conduct perpetrated by individuals or entities who constitute a subset of the enterprise; it alone reaches RICO violative conduct that is committed by those who exploit their connections with an enterprise to this end, but who have acquired neither control of nor an interest in the enterprise. This may explain why subsection (c) is the most frequently used provision in civil and criminal RICO litigation.[160]

The problem with using subsection (c) is that the numerous courts that enforce the "person-enterprise" rule will not allow a plaintiff either (a) to allege that the enterprise is directly liable as a participant in the unlawful activity constituting the RICO violation or (b) to impute that activity, as carried on by its employee-agents, to the enterprise in order to hold the latter vicariously liable for their conduct.[161] This means that a party who has been victimized by the unlawful conduct of an enterprise's employees or agents may be able to seek redress only against those individual employees or agents, who are not likely to have resources comparable to those of the enterprise.[162] The same result ensues as to any substantive RICO violation when a court imposes the "scope of employment" requirement discussed above.[163] As the next part of this Article explains, one means of closing this

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[159] *See, e.g.*, 3 BRICKEY, *supra* note 30, § 14.09(2).

[160] *See supra* note 34 and accompanying text.

[161] *See supra* notes 137-43 and accompanying text.

[162] For an example of a scenario such as this, see AD HOC CIVIL RICO TASK FORCE, ABA SEC. OF CORPORATION, BANKING AND BUSINESS LAW 375-76 (1985).

> [S]uppose the Board of Directors of a corporation commits multiple mail frauds in its operation of the company. Surely each participating member of the Board faces possible RICO liability. The only policy reason not to hold the company liable as well is to protect corporate assets owned by innocent shareholders. But this interest may well be outweighed by (1) the preference of allocating risk of loss to persons who have exercised some choice in corporate governance or who can otherwise potentially exercise some control over corporate affairs; (2) the desire to encourage private enforcement actions when a legitimate enterprise is being turned to corruption; (3) the need to encourage shareholders to insist upon internal audit procedures to protect against such corporate activities; (4) the aim of ensuring full compensation of losses suffered by victims; (5) the availability of actions on behalf of the corporation or shareholders against Board members; and (6) the appropriateness of holding the corporate entity liable as a separate person just as many of the advantages of "personhood" inure to its benefit. Accordingly, under circumstances like these, the policies underlying RICO would appear to argue in favor of an "enterprise" which is also a "person" pursuing its affairs through racketeering activities.

Id. See also United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279, 330 (D.N.J. 1984) (observing that individuals may be charged under RICO as persons, and also grouped together as an enterprise), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

[163] *See supra* notes 144-49 and accompanying text.

apparent loophole is the application of the *Pinkerton* doctrine to hold an enterprise and/or an offender's "principal" liable for any substantive violation of subsection (c).

B. Pinkerton *Liability*

In considering how civil RICO plaintiffs can use *Pinkerton* to avoid at least certain of the constraints noted above, it is useful to note the efforts that have been made in this regard. The first portion of this discussion, therefore, describes the reported cases that involve attempts to employ *Pinkerton* in civil RICO cases. The second section explains that it is permissible to use the *Pinkerton* doctrine in civil litigation, and the last section describes how the doctrine can be applied and the advantages that result from such applications.

1. *Reported Uses*

Very few reported cases involve attempts to use *Pinkerton* in civil RICO cases.[164] Of those cases that have attempted to employ *Pinkerton* in civil RICO cases, many have failed. In *Feminist Women's Health Center v. Roberts*,[165] the plaintiffs asserted RICO conspiracy and substantive claims against anti-abortion protestors and tried to use the *Pinkerton* doctrine to overcome one defendant's motion to dismiss their subsection (c) claim against her.[166] The court held that the plaintiffs had not alleged this defendant's involvement in the conspiracy with the specificity required in federal civil pleading; since their conspiracy claim was insufficient, they could not use it as the premise for imposing *Pinkerton* liability.[167] The court

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[164] As to the reason for this, see *infra* notes 185-86 and accompanying text.

[165] No. C86-161Z, 1989 WL 56017 (W.D. Wash. May 5, 1989).

[166] *Id.* at *4.

> The evidence offered to support the charge ... concerns contacts that the Undseths allegedly had with defendant Curtis Beseda after April 19, 1984, when Beseda set the third fire at the Clinic, while Beseda was at large. Thus, relying on the *Pinkerton* doctrine, ... the plaintiffs contend that the Undseths, as Beseda's co-conspirators, are vicariously liable for the substantive offenses of the two arsons committed by Beseda after the Undseths joined the alleged RICO conspiracy.

Id.

[167] *See id.* at *6-7. FED. R. CIV. P. 9(b), which applies to civil RICO claims, requires that "circumstances constituting fraud" be "stated with particularity." In RICO actions, the courts have strictly applied FED. R. CIV. P. 9(b). *See Roberts*, 1989 WL 56017, at *6; *see also* Rhoades v. Powell, 644 F. Supp. 645, 670 n.20 (E.D. Cal. 1986) ("[A] RICO plaintiff should plead the facts constituting the predicate offense with the particularity required by Rule 9(b)."). This is a common problem in civil RICO pleading. *See* RAKOFF & GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY § 7.06[1] (1991) (Discovery requirements in RICO actions are broad, given plaintiff's burden of proving a pattern of behavior.).

also expressed doubt as to whether *Pinkerton* could ever be used in this fashion:

> The plaintiffs submit that the *Pinkerton* doctrine . . . applies to make Bonnie Undseth and each conspirator vicariously liable for every substantive offense of his or her co-conspirators. The Court concludes that the *Pinkerton* doctrine does not permit the imposition of additional allegations that Bonnie committed the substantive predicate offenses of other defendants. . . . [T]he plaintiffs here have not provided any case in which the *Pinkerton* doctrine was applied . . . to hold a RICO defendant chargeable with a predicate offense of a co-conspirator. . . . In fact, two courts have rejected similar arguments.[168]

The two decisions the *Robertson* court cited as rejecting use of the *Pinkerton* doctrine were *United States v. Persico*[169] and *Laterza v. American Broadcasting Co.*[170] Neither is to this effect. *Persico,* a criminal case, held that one conspirator's commission of a predicate act does not toll the RICO statute of limitations as to co-conspirators; it did not address the general propriety of using *Pinkerton* in RICO actions, civil or criminal.[171] *Laterza* was a civil RICO action for damages allegedly resulting from a pattern of racketeering involving door-to-door magazine subscription sales.[172] The magazine publishers-defendants moved to dismiss, claiming that the complaint failed to allege that they had acted as principals in the commission of the requisite criminal acts.[173] The plaintiffs asserted that the publishers were liable because they had contracted with the salesmen who allegedly committed the RICO predicates; the plaintiffs apparently sought to use these contracts as the basis for imposing *Pinkerton* liability on the defendants.[174] The attempt failed because the court found that the existence of a contractual relationship did not establish the requisite conspiracy.[175] The court, however, did not address the legitimacy of using *Pinkerton* to hold a defendant liable for the predicate offenses of a co-conspirator.

Another attempt failed in *Frymire v. Peat, Marwick, Mitchell & Co.*,[176] a stockholder suit against an accounting firm for improperly auditing corporate financial statements. The plaintiffs alleged a claim for

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[168] *Roberts,* 1989 WL 56017, at *7.

[169] 832 F.2d 705 (2d Cir. 1987), *cert. denied,* 486 U.S. 1022 (1988).

[170] 581 F. Supp. 408 (S.D.N.Y. 1984).

[171] *See* 832 F.2d at 714.

[172] 581 F. Supp. at 411-12.

[173] *Id.* at 412.

[174] *See id.* at 412.

[175] *Id.* at 413 (finding the "mere fact that defendants contracted together" insufficient to impose RICO liability).

[176] 657 F. Supp. 889 (N.D. Ill. 1987).

RICO conspiracy, apparently in hopes that the court would hold the defendant liable for substantive violations committed by an alleged co-conspirator.[177] The plaintiffs failed because the court found that they had not adequately alleged the defendant's involvement in the RICO conspiracy.[178]

In some cases, however, the *Pinkerton* doctrine has been successfully employed. The government used *Pinkerton* liability in a civil RICO action against a union local,[179] alleging, *inter alia*, that the defendants had conspired to violate subsections (b) and (c) and had committed substantive violations.[180] The court found for the government on all the RICO counts on the basis that, as members of a conspiracy, each defendant was liable for substantive violations committed in furtherance of it, even though the offenses were actually committed by other conspirators.[181] This is the only reported instance in which *Pinkerton* was used to obtain a civil RICO judgment, but two other decisions approve of this result. In *Securities Investor Protection Corp. v. Vigman*,[182] the Ninth Circuit clearly indicated that *Pinkerton* liability could be used in a civil RICO action.[183] A Wisconsin district court, in dicta, reached the same conclusion.[184]

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[177] *Id.* at 895. The plaintiffs, however, "only [asserted] vicarious liability . . . on a theory of violation of 18 U.S.C. § 1962(d), a conspiracy to violate RICO." *Id.* "Plaintiffs do not allege that [defendant] violated RICO through its own acts. . . . Thus any RICO liability could only be vicarious, through an agreement to join a conspiracy which would violate RICO." *Id.* at 896.

[178] *Id.* at 895. Plaintiffs maintained that the co-conspirator had violated subsections (a), (b) and (c), but the court held that the complaint did not indicate "which of those sections [the defendant] supposedly agreed to violate, let alone find facts which would support such an agreement." *Id.* The court dismissed the RICO count, but gave leave to amend. *Id.*

[179] United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279, 335 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986). RICO creates a civil action that can be brought by the government, in addition to the remedy created for private plaintiffs. *See* 18 U.S.C. § 1964 (1988).

[180] 581 F. Supp. at 283. The government sought appointment of a receiver and injunctive relief barring the defendants from "any further contacts with Local 560." *Id.*

[181] *Id.* at 334-35. The court found that violations of subsections (b) and (c) "were established by their own acts . . . and, under *Pinkerton*, by the conduct of their co-conspirators." *Id.* at 335.

[182] 908 F.2d 1461 (9th Cir. 1990), *rev'd on other grounds sub nom.* Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311 (1992). Although not deciding the validity of using *Pinkerton* liability in civil RICO actions, the Supreme Court did state: "For purposes of this decision, we will assume without deciding that the Court of Appeals correctly held that Holmes can be held responsible for the acts of his co-conspirators." 112 S. Ct. at 1316 n.6.

[183] 908 F.2d at 1468-69. The court stated:

> If Holmes conspired with these codefendants, and if the codefendants caused the alleged injuries, then Holmes is legally responsible. He need not have participated in every detail of the conspiracy. . . . Thus, if the district court properly concluded that there was a genuine issue as to whether Holmes conspired to violate RICO, the district court erred in granting Holmes' motion for summary judgment based on a conclusion that his conduct alone did not proximately cause the injuries alleged.

Id. The Supreme Court disagreed with the Ninth Circuit's finding of proximate causation. 112 S. Ct. at 1316, 1318-19. Instead, the Court held that subsection (c)'s language, "[a]ny person injured . . . by reason of violation of [§ 1962]," requires a direct relation between the injury asserted and the conduct alleged to find proximate causation. *Id.* at 1318-19.

[184] Brunswick Corp. v. E.A. Doyle Mfg. Co., 770 F. Supp. 1351, 1371-72 (E.D. Wis. 1991). The

2. *Permissibility*

It may seem peculiar that there have apparently been so few attempts to combine *Pinkerton* and RICO's civil remedy, but this is largely the product of an aspect of *criminal* RICO litigation. The Department of Justice has chosen not to pursue *Pinkerton* liability in criminal cases because "the combination of RICO and *Pinkerton* could lead to unwarranted extensions of criminal liability."[185] Since civil RICO cases require allegations that are functionally identical to those needed for criminal charges, plaintiffs tend to model their pleadings on RICO indictments; it is, therefore, not surprising that they have been unknowingly influenced by the lack of *Pinkerton* liability in the available criminal jurisprudence.[186]

As is explained elsewhere, there is no doctrinal obstacle to using *Pinkerton* in this context.[187] It is used in other civil suits, and the Department of Justice's self-imposed abstinence does not bind civil litigants.[188] To understand why *Pinkerton* can be used to impute liability

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court noted:

> In light of the numerous letters exchanged between the defendants, once the jury accepted that any particular defendant participated in the general scheme to defraud the plaintiff, the defendants would have had a difficult time proving that any of the individual defendants did not use the United States mail or interstate wire communication on two occasions in furtherance of the scheme. Even if an individual defendant could have proven he never used the mail or wire communications, *a conspirator is responsible for offenses committed by his fellow conspirators*, . . . and the jury unanimously found that each defendant was a member of the conspiracy.

Id. (emphasis added). The court granted judgment notwithstanding the verdict on the RICO claims because it found that "there was insufficient evidence to support the jury's verdict" on those issues. *Id.* at 1356, 1374.

[185] U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 73-74 (1985). *But see* Brenner, *supra* note 100, at 986-1005 (arguing for the use of the *Pinkerton* doctrine in criminal RICO actions); *see also* United States v. Campione, 942 F.2d 429, 437 (7th Cir. 1991) (declaring that it is "not wrong or improper" to use a *Pinkerton* instruction in a RICO case); United States v. Pungitore, 901 F.2d 1084, 1147 n.91 (3d Cir. 1990) (finding no "*Pinkerton* problem" with instructions in criminal RICO case). *See generally* United States v. Neapolitan, 791 F.2d 489, 504-05 n.7 (7th Cir.) ("This is not to say that the use of *Pinkerton* instructions in RICO conspiracy cases is 'wrong or improper' but only to caution that restraint be applied with regard to *Pinkerton* in this context."), *cert. denied*, 479 U.S. 939, 940 (1986).

[186] *See generally* Brenner, *supra* note 100, at 985-86, 1005 (discussing the judicial and prosecutorial reluctance to apply the *Pinkerton* doctrine in criminal RICO actions).

[187] *See id.* at 984-1009.

[188] The *Pinkerton* doctrine has been used in a variety of civil actions. *See, e.g.*, Turner v. Upton County, 915 F.2d 133, 137 (5th Cir. 1990) (civil rights case), *cert. denied*, 111 S. Ct. 788 (1991); Moses v. Illinois Dep't of Corrections, No. 88-1864, 908 F.2d 975 (7th Cir. 1990) (unpublished disposition, text in WESTLAW) (civil rights case); *In re* American Principals Holdings, Inc. Sec. Litig., No. M.D.L. 653, 1987 WL 39746, at *9 n.10 (S.D. Cal. July 9, 1987) (securities violations). Courts have held conspirators jointly and severally liable for damages resulting from the conspiracy. United States Indus. v. Touche Ross, 854 F.2d 1223, 1251 (10th Cir. 1988); Kashi v. Gratsos, 790 F.2d 1050, 1055-56 (2d Cir. 1986); Beltz Travel Serv. v. International Air Trans. Ass'n, 620 F.2d

to a RICO actor's "principal," it is necessary to review the nature of the liability it imposes.

As was explained above, *Pinkerton* does not impose vicarious liability by eliminating the need for a personal "bad act," but instead holds a conspirator liable for the proximate consequences of the unlawful act of joining a conspiracy.[189] As such, it is conceptually analogous to the doctrine of complicity, which was discussed in part II.B. of this Article.[190]

Liability by complicity—more commonly known as "aiding and abetting"—exists in federal law and is enforced in both criminal and civil RICO cases.[191] The Third Circuit explained why the complicity doctrine applies in civil RICO actions:

> [O]ne important purpose of RICO's civil provisions is to permit recovery by the victims of racketeering activity. One who has aided and abetted the

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1360, 1367 (9th Cir. 1980); Ferguson v. Omnimedia, Inc., 469 F.2d 194, 197-98 (1st Cir. 1972); Durant Software v. Herman, 257 Cal. Rptr. 200, 206 (Cal. Ct. App. 1989); Nicolet, Inc. v. Nutt, 525 A.2d 146, 150 (Del. 1987); Laventhol, Krekstein, Horwath & Horwath v. Tuckman, 372 A.2d 168, 170 (Del. 1976); Nicholson v. Kellin, 481 So. 2d 931, 935-36 (Fla. Dist. Ct. App. 1985); Mercer v. Woodard, 303 S.E.2d 475, 482 (Ga. Ct. App. 1983); Kramer v. Leineweber, 642 S.W.2d 364, 369 (Mo. Ct. App. 1982); Fox v. Wilson, 354 S.E.2d 737, 743 (N.C. Ct. App. 1987).

[189] *See supra* notes 104-19 and accompanying text.

[190] *See supra* notes 71-93. The relationship between complicity and the *Pinkerton* doctrine has been explained as follows:

> Under *Pinkerton*, an agreement to commit a crime or crimes is a prerequisite for liability. . . . The act of agreeing to the commission of certain crimes suffices; it is not necessary that one commit any affirmative act to advance the realization of the goals of the conspiracy. Complicity differs in two respects: First, one can "aid and abet" the commission of a crime without entering into an agreement to this effect. Second, to incur aiding and abetting liability, it is not sufficient to associate oneself with a criminal venture; it is *also* necessary to commit an affirmative act that is intended to advance the commission of a substantive offense.
>
> . . . .
>
> *Pinkerton* and accomplice liability are different means for holding a party liable for substantive offenses that were executed by someone with whom that party shared an affiliative relationship.

Brenner, *supra* note 100, at 969-70, 972 (footnotes omitted).

[191] On complicity in federal law, see *supra* notes 71-93 and accompanying text. *See, e.g.*, United States v. Pungitore, 910 F.2d 1084, 1132 n.68 (3d Cir. 1990) (finding "beyond dispute that a RICO conviction may rest upon the defendant's aiding and abetting of charged predicate offenses"), *cert. denied*, 111 S. Ct. 2009 (1991); *accord* United States v. Wyatt, 807 F.2d 1480, 1482-83 (9th Cir.), *cert. denied*, 484 U.S. 858 (1987); Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 485 (5th Cir. 1986); United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 283-84 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); United States v. Quaod, 777 F.2d 1105, 1117-18 (6th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986); United States v. Schell, 775 F.2d 559, 569 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986); United States v. Cauble, 706 F.2d 1322, 1339-41 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); Laterza v. American Broadcasting Co., 581 F. Supp. 408, 412 (S.D.N.Y. 1984); Moss v. Morgan Stanley, Inc., 553 F. Supp. 1347, 1358 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); Judith L. Rosenthal, Comment, *Aiding and Abetting Liability for Civil Violations of RICO*, 61 TEMP. L.Q. 1481, 1506-08 (1988).

> commission of two predicate offenses is guilty of those offenses. . . . The doctrine of aiding and abetting is simply one way that an individual can violate the substantive criminal laws. . . . So long as all of RICO's other requirements are met, we can see no reason why victims should not be able to recover from anyone who has committed the predicate offenses RICO enumerates, regardless of how he committed them.[192]

The rule of complicity most often applied in federal RICO cases is the criminal doctrine codified in 18 U.S.C. § 2.[193]

There is also a civil version of the doctrine of complicity, which is enunciated in section 876 of the Restatement (Second) of Torts. Furthermore, at least one court has applied it to civil RICO actions.[194] Under section 876, one is liable for the torts committed by another if he:

> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[195]

While the reference to liability for acting "in concert" suggests that the Restatement incorporates *Pinkerton* liability, it actually does not.[196] The commentary to section 876 explains that even if parties have conspired to accomplish a certain result, their "agreement is not enough for liability

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[192] Petro-Tech, Inc. v. Western Co., 824 F.2d 1349, 1357 (3d Cir. 1987) (citations omitted). In discussing complicity under federal law, this court cited *Pinkerton* as one of "several well known criminal law cases" that define accomplice liability in federal law. *Id.* at 1356.

[193] 18 U.S.C. § 2 (1988). *See* Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 485-86 (5th Cir. 1986); United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 283-89 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *supra* notes 92-93 and accompanying text; *see also* Rosenthal, *supra* note 191, at 1483 (declaring 18 U.S.C. § 2 the starting point for determining criminal culpability for aiding and abetting civil RICO violations).

[194] *See, e.g.*, *Petro-Tech*, 824 F.2d at 1356-62. This court's use of the civil standard, however, may have been an error:

> [Petro-Tech] marks the Third Circuit as the only jurisdiction to apply the civil aiding and abetting standard to civil RICO violations. . . . [T]he Third Circuit erroneously believed that it was joining the Fifth Circuit's position, as articulated in *Armco Industrial Credit Corp. v. SLT Warehouse Corp.*, and the Southern District of New York court's position, as articulated in *Laterza v. American Broadcasting Co.* In *Armco* and *Laterza*, however, the respective courts applied the criminal aiding and abetting standard under section 2, rather than the civil, *Restatement* standard.

Rosenthal, *supra* note 191, at 1500-01 (footnotes omitted).

[195] RESTATEMENT (SECOND) OF TORTS § 876 (1977).

[196] *See id.* § 876 cmt. b.

in itself, and there must be acts of a tortious character in carrying it into execution."[197]

Therefore, although liability for complicity can be imposed under a civil as well as a criminal standard, the civil standard does not incorporate *Pinkerton* liability.[198] This suggests that *Pinkerton* liability can only be enforced in civil RICO actions, if at all, as a rule of criminal law. That is an inadequate basis for objecting to its use because courts generally agree that the criminal standard, not the Restatement formula, is used to determine the scope of complicitous liability in such actions.[199] Since the criminal standard governs the use of complicity in civil RICO actions, there is no reason why the closely related criminal doctrine of *Pinkerton* liability cannot also be applied in these actions.[200]

Indeed, employing *Pinkerton* as the standard for imputing liability to RICO "principals" assures that such liability is based on the "bad act" of conspiring to commit substantive RICO violations and not on the mere existence of an agency relationship. This is a way of avoiding criticisms that have been leveled at the practice of using civil doctrines to impute liability in criminal cases.[201] It also promotes the policies RICO was intended to further by predicating liability on conduct that the statute specifically proscribes; in other words, when *Pinkerton* is used as the criterion for imputing liability, it is limited to those who personally committed a RICO violation.[202] This ensures that liability is imposed

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[197] *Id.*

[198] The Restatement's rejection of *Pinkerton* is consistent with the American Law Institute's rejection of *Pinkerton* liability in the Model Penal Code. *See* MODEL PENAL CODE § 5.03(6) commentary at 143 (Tent. Draft No. 10, 1960) ("[L]iability for a substantive crime as an accomplice cannot be predicated on the sole fact of having been party to a conspiracy to commit that crime. . . ."); *accord* MODEL PENAL CODE § 2.06 commentary at 307-10 (Official Draft 1962).

[199] *See supra* note 191 and accompanying text.

[200] For a thoughtful discussion of the general applicability of both *Pinkerton* and complicitous liability in civil suits, see Halberstam v. Welch, 705 F.2d 472, 476-78 (D.C. Cir. 1983).

[201] *See, e.g.*, Samuel R. Miller, *Corporate Criminal Liability: A Principle Extended to its Limits*, 38 FED. B.J. 49, 68 (1979) ("[A]pplying tort principles of *respondeat superior* in the criminal context . . . undermine[s] the complex and difficult task of insuring corporate compliance with the law."); Note, *Criminal Liability of Corporations for Acts of Their Agents*, 60 HARV. L. REV. 283, 285 (1946) ("[S]hifting of the burden of loss to consumers, which is a principal justification of *respondeat superior* in the law of torts, has no application in the criminal law.") (footnote omitted); Simeon M. Kriesberg, Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 YALE L.J. 1091, 1096 (1976) ("[Tort analogy] overlooks the different policy considerations underlying criminal and civil penalties"). According to Welling, *supra* note 57, at 1155 n.112:

> Several commentators have noted that, when respondeat superior is applied in a criminal context, one major anomaly has evolved. A principal who is a natural person is not criminally liable for the acts the agent committed without the principal's authorization, consent, or knowledge. In contrast, a principal who is a corporation is liable for the acts of its agents regardless of its lack of authorization or knowledge.

Id.

[202] *See, e.g.*, LaBrun, *supra* note 157, at 192 ("Insofar as treble damages exceed such real damages, . . . they also enhance available criminal sanctions which punish the wrongdoer and deter

on perpetrators, rather than on "victims."[203] Consequently, even though it may be permissible to impute a broader liability by using other civil rules, imposing *Pinkerton* liability in civil RICO actions fulfills the goals of RICO while addressing the concerns generally raised when civil doctrines of imputed liability are applied in criminal cases.

3. *Applying* Pinkerton

The two most problematic issues for RICO plaintiffs are the "person-enterprise" and "scope of employment" limitations.[204] This section considers how *Pinkerton* can be used to avoid the problems that arise under each.

As previously mentioned, under RICO conspiring to commit a substantive RICO offense is a distinct RICO violation.[205] Applying *Pinkerton* to a subsection (d) conspiracy makes each conspirator liable for: (1) the RICO conspiracy and (2) every substantive RICO offense committed by any member of that conspiracy, as long as the substantive offenses were a foreseeable consequence of the conspiratorial agreement.[206] In addition, each conspirator is liable for substantive RICO offenses that she personally committed or participated in committing.[207]

Given the complexity of RICO pleading, it is not practical to explore every manner in which *Pinkerton* could be applied, but it is possible to illustrate how *Pinkerton* can be used to avoid the restrictions imposed by the "scope of employment" and "person-enterprise" rules. For example, consider

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others. Because RICO's damage provisions contain a punitive or deterrent component, it seems appropriate to require a showing of entity culpability. . . .").

[203] *See supra* note 141 and accompanying text.

[204] *See supra* notes 124-63.

[205] *See* 18 U.S.C. § 1962(d) (1988); *supra* notes 35-36, 40 and accompanying text. To reiterate, the substantive RICO offenses are codified at 18 U.S.C. § 1962(a)-(c).

[206] *See supra* note 111 and accompanying text. *Pinkerton* would also make each RICO conspirator liable for the predicate offenses that are required for a substantive RICO violation. For a discussion of predicate acts, see *supra* notes 28-31 and accompanying text. While this can be an important consideration in criminal RICO cases, it is not relevant in civil cases because generally there is no private cause of action for the crimes that are RICO predicates. *See, e.g.*, Ryan v. Ohio Edison Co., 611 F.2d 1170, 1179 (6th Cir. 1979) (holding that there is no private cause of action under federal mail fraud statute); Bell v. Health-Mor, Inc., 549 F.2d 342, 347 (5th Cir. 1977) (holding that no private cause of action exists under either federal mail fraud statutes or federal lottery statutes); Krupnick v. Union Nat'l Bank, 470 F. Supp. 1037 (W. D. Pa. 1979) (holding that there is no private cause of action under federal mail fraud statute); *see also* Napper v. Anderson, 500 F.2d 634, 636 (5th Cir. 1974) (finding no private cause of action under federal wire fraud statute), *cert. denied*, 423 U.S. 837 (1975).

[207] *See supra* notes 20, 32 and accompanying text. This includes both the liability of a principal, who actually commits a RICO offense, and that of an accomplice who encourages or otherwise assists one who commits such an offense. *See supra* notes 71-93, 164-206; *infra* notes 208-78.

the following hypothetical: Assume that John Doe, the president of Doe Chemical, invented ABC-666X, an additive used in gasoline refining.[208] He assigned his rights to ABC-666X to Doe Chemical; only he knows the formula for it. Doe Chemical maintained the formula as a trade secret. It sold ABC-666X to refiners but required that they execute a written agreement promising not to analyze it or disclose anything they might learn in the course of using it. Calco Oil Corporation bought ABC-666X pursuant to such an agreement.

StarChem is a chemical company that supplies refineries but does not sell additives. Ted Smith, StarChem's marketing manager, decided to copy ABC-666X. In February, 1989, he hired Sam Brown as a chemist for StarChem's "XYZ Group," which developed new products. Dan Black was Brown's supervisor. Smith, Black and Brown agreed to develop and sell a version of ABC-666X. Smith asked Greg White, a StarChem salesman who handled the Calco Oil Corporation account, to get a sample of ABC-666X. On April 11, 1989, White, acting with the knowledge and consent of his supervisor, Fred Grey, took a sample of ABC-666X from a Calco refinery. Neither Calco nor Doe Chemical knew this was done. White gave the sample to Grey, who delivered it to Brown, who had it evaluated by StarChem's XYZ Group. Mat Green, head of the XYZ Group, was aware that his group was conducting the evaluation.

Using this evaluation, Brown developed an additive identical to ABC-666X and used StarChem's attorneys to patent it. The patent application went through the U.S. mail; the attorneys consulted with Brown by telephone. The application stated that Brown was the first and only inventor of the additive. After it was patented, Brown sold all rights to it to DaxChem for $50,000, which he split with Black and Smith; they left StarChem. DaxChem sold Brown's additive to two Doe Chemical customers, Maxxon Oil Company and Calco Oil Corporation; Doe Chemical lost sales of $300,000 to Maxxon and $500,000 to Calco.

Doe Chemical wants to use RICO to recover its losses. Assume that the combined assets of Black, Brown and Smith are insufficient to compensate Doe Chemical for its losses due to DaxChem's sales to Maxxon and Calco, and that Doe Chemical can establish additional losses of $1.1 million. Finally, assume that the conduct of Brown, Black and Smith constitutes a pattern of racketeering activity, so that the only issues to be resolved in assembling a RICO action on behalf of Doe Chemical are: (1) defining the violations that were committed and (2) determining who can be held liable for each violation.

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[208] These facts are adapted from the facts in R.E. Davis Chem. Corp. v. Nalco Chem. Co., 757 F. Supp. 1499 (N.D. Ill. 1990).

Obviously, given the limited assets of Black, Brown and Smith, Doe Chemical would want to pursue an action against StarChem. The following sections analyze Doe Chemical's ability to bring an action, first by examining the extent to which the potential defendants–Black, Brown, Smith and StarChem–can be held directly liable as the perpetrators of RICO,[209] and then by considering whether liability for RICO violations committed by Black, Brown and Smith can be imputed to StarChem under civil rules of vicarious liability.[210] The final section applies *Pinkerton* liability to the hypothetical.[211]

a. Direct Liability

Violations: Each of the three substantive RICO offenses is considered separately; a conspiracy to commit a substantive offense is considered in the discussion of that offense.[212] Black, Brown and Smith are collectively referred to as "BBS."

Section 1962(a): Section 1962(a) forbids using income derived from a pattern of racketeering activity to acquire an interest in, establish and/or operate an enterprise; a conspiracy to violate subsection (a) requires an agreement to this effect.[213] BBS agreed to copy ABC-666X, patent their formula and sell it to Doe Chemical's competitors; they used a pattern of racketeering activity to carry out this agreement and realized income from doing so.

The major problem in alleging a subsection (a) violation on these facts is that Doe Chemical cannot show that its injuries resulted from the acts of investing racketeering income in an enterprise, rather than from the predicate acts of racketeering.[214] To begin with the most obvious scenario, if StarChem is construed as the enterprise, BBS's conduct did not violate subsection (a) because they did not invest their racketeering income in that entity. Absent an investment of racketeering proceeds in the enterprise, there is no subsection (a) violation. Here, after realizing the racketeering income, BBS terminated their association with StarChem. Their agreement would constitute a RICO conspiracy if it targeted conduct that violated subsection (a). However, BBS did not use their

[209] *See infra* notes 212-37.

[210] *See infra* notes 212-37.

[211] *See infra* notes 238-45.

[212] *See supra* notes 35-36 and accompanying text.

[213] *See supra* notes 35-36 and accompanying text.

[214] *See, e.g.*, Fitzpatrick & O'Neill, *supra* note 42, at 29-30; *see also* 3 BRICKEY, *supra* note 30, § 14.07 (noting that a plaintiff asserting a subsection (a) violation must prove receipt of racketeering income and that the income was invested to acquire an interest in, establish or operate an enterprise). *But see* Busby v. Crown Supply, Inc., 896 F.2d 833, 838-39 (4th Cir. 1990) (refusing to declare an investment use limitation to actions arising under subsection (c)).

racketeering income to acquire an interest in, maintain or operate StarChem; in fact, they severed their ties with StarChem once they received the racketeering income. It would of course be possible to argue that their agreement contemplated an investment of the racketeering monies in StarChem, but this argument does not seem to be warranted based on the facts given above; absent such an indication, Doe Chemical cannot base a civil RICO action on a subsection (a) violation in which StarChem was the enterprise.

Alternatively, Doe Chemical could characterize Black, Brown and Smith's relationship as an association-in-fact enterprise and argue that their pattern of racketeering activity generated income that was used to establish and/or operate this enterprise.[215] Again, the problem is that once they received the income, they ended their association. There is no indication that the money realized from selling the copied additive was used to continue the racketeering activity. Also, even if this were used as the basis for alleging a subsection (a) violation, and a subsection (d) violation based on an agreement to this end, it would not advance Doe Chemical's desire to establish claims that will permit it to pursue StarChem's "deep pockets."[216]

As yet another alternative, Doe Chemical could argue that the enterprise was an association in fact comprised of Brown, Black, Smith and StarChem. Although the facts permit the allegation of such an enterprise, they do not sustain assertion of either a subsection (a) violation or an attendant subsection (d) violation. As was noted above, when BBS realized the racketeering income, they ended their association with each other and with StarChem. The proceeds were not, therefore, invested in this enterprise, and there is no indication StarChem ever had any access to this income. Finally, since nothing suggests that an enterprise comprised of BBS and StarChem operated after the individuals obtained payment for the counterfeit version of ABC-666X, it is unrealistic to argue that the racketeering income was used to establish and/or operate an association-in-fact enterprise consisting of BBS and StarChem; even if this were established, such an enterprise would have come into existence after Doe Chemical had already sustained its injuries, and so could not be pursued as the cause of Doe Chemical's injuries.

Section 1962(b): Section 1962(b) prohibits using a pattern of racketeering activity to acquire or maintain an interest in, or control of,

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[215] An "association in fact" can be an enterprise even though it exists only for unlawful purposes. *See supra* note 19.

[216] For simplicity's sake, this discussion will assume that Doe Chemical does not wish to pursue DaxChem. Also, it might be possible to allege that the BBS association-in-fact enterprise entered into a RICO conspiracy with StarChem. The conspiracy allegation would be used to impose *Pinkerton* liability on StarChem for substantive offenses committed by the BBS enterprise; since this achieves the same result as alleging that there was a conspiracy between BBS and StarChem, it is not considered as a distinct alternative.

an enterprise; conspiracy to violate subsection (b) requires an agreement to this effect.[217] In order to allege a subsection (b) violation, Doe Chemical must be able to show that the defendants used a pattern of racketeering activity to have a proscribed impact on the enterprise.[218] It will have difficulty doing this on the facts presented.

BBS clearly agreed to copy ABC-666X, patent their version and sell it to a competitor; and they used a pattern of racketeering activity to carry out this agreement. Their conduct will constitute a violation of subsection (b) if it was used to acquire or maintain an interest in, or control of, an enterprise. Likewise, their agreement will constitute a RICO conspiracy if it contemplated such activity. There is, however, no violation of either subsection if StarChem is determined to be the enterprise since BBS did not use the racketeering activity to acquire or maintain an interest in or control of the enterprise; indeed, nothing in the facts suggests that any of them ever possessed any interest in StarChem.[219] And since nothing in the facts suggests that their agreement sought to obtain such an interest, there is no basis for alleging a subsection (d) conspiracy to commit a subsection (b) violation.

Again, Doe Chemical could characterize the BBS relationship as an association-in-fact enterprise and assert that the three used the pattern of racketeering activity to acquire and maintain their respective interests in, and control of, that enterprise. From Doe Chemical's perspective, the problem with this characterization is that if it were used to allege a subsection (b) violation and a subsection (d) violation, such allegations could only be made against the three individual perpetrators and their meager assets; it would not permit Doe Chemical to pursue StarChem.

Doe Chemical could also allege an association-in-fact enterprise comprised of BBS and StarChem, and claim that all four used the pattern of racketeering activity to acquire and/or maintain their interests in and/or control of that enterprise. The problem here is that it is difficult to cast StarChem as a perpetrator. Though its personnel and facilities were used in carrying out the pattern of racketeering activity, nothing indicates that StarChem directed or exerted any control over that activity.[220] Absent some active involvement, it would be difficult, if not impossible, to show that StarChem was a perpetrator of a subsection (b) violation predicated on its association with BBS.

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[217] *See supra* notes 35-36 and accompanying text.

[218] *See, e.g.*, 3 BRICKEY, *supra* note 30, § 14.08.

[219] For an example of a subsection (b) violation, see United States v. Jacobson, 691 F.2d 110 (2d Cir. 1982).

[220] This cooperation might establish StarChem's liability as an accomplice. *See supra* notes 82-86, 142 and accompanying text. *But see* Rosenthal, *supra* note 191, at 1505-06 (arguing that complicity can only be used to impose liability for a subsection (a) offense).

It might be possible to bring a subsection (d) claim, alleging that StarChem agreed with BBS that those three would use a pattern of racketeering activity to acquire control of, or maintain an interest in, an enterprise consisting of: (1) a BBS association in fact or (2) a StarChem-BBS association in fact. RICO conspiracy requires only that a conspirator agree to the commission of a substantive RICO violation; no overt act is required.[221] Some courts require that a conspirator personally agree to commit a substantive offense, but most merely require an agreement that someone will commit such an offense.[222] As explained above, it is difficult to allege that StarChem personally agreed to commit a subsection (b) offense, but it might be possible, relying on the existence of either of the enterprises noted above, to claim that StarChem agreed that BBS would commit such an offense.

Of course, the main problem with civil conspiracy claims is showing that a conspiracy caused injury; if Doe Chemical advanced such a claim, StarChem would certainly move to dismiss on the premise that any injuries Doe Chemical sustained resulted from the substantive violations committed by BBS, and not from any agreement between StarChem and BBS.[223] A demonstrable injury resulting from a RICO violation is regarded as a requisite for standing to bring suit under 18 U.S.C. § 1964(c).[224]

Section 1962(c): A section 1962(c) offense occurs when a "person" who is employed by or associated with an enterprise uses a pattern of racketeering activity to conduct or participate in conducting the affairs of the enterprise; conspiracy to violate subsection (c) requires an agreement to this effect.[225] The necessary relationship between defendants and enterprise exists however the latter is characterized. If StarChem is the enterprise, then BBS were "employed by" it; StarChem's relationship with itself is not pertinent because, as is explained later, it cannot be named as a defendant if it is the enterprise.[226] If the enterprise is defined as an

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[221] *See supra* note 37 and accompanying text.

[222] *See supra* notes 38-39 and accompanying text.

[223] *See supra* note 48 and accompanying text. Another problem Doe Chemical might face, assuming that it is able to show the existence of an agreement between BBS and StarChem, is proving that the latter agreed to the commission of substantive RICO violations, and not merely to the commission of the predicate acts involved in the pattern of racketeering activity. *See, e.g.*, Fitzpatrick & O'Neill, *supra* note 42, at 36 ("[P]roof of a conspiracy to commit the underlying predicate acts of racketeering is [not] sufficient to prove a violation of subdivision (d). Rather, the plaintiff must prove . . . that the defendant agreed to invest in, control, or conduct the affairs of, an enterprise by committing the predicate acts of racketeering.").

[224] *See* BRICKEY, *supra* note 30, § 14:11.

[225] *See supra* notes 35-36 and accompanying text.

[226] *See infra* notes 238-45; *see also* Rosenthal, *supra* note 191, at 1504 n.194 ("Under subsection (c), a person employed by or associated with Corporation X is liable if he conducts X's affairs through a pattern of racketeering activity. Since X cannot be 'employed by or associated with' itself, the 'person' liable under (c) must be an individual distinct from X.").

association in fact comprised of BBS and StarChem, it is clear that all four were "associated with" that enterprise.

For the substantive violation, Doe Chemical must show that the defendants used a pattern of racketeering activity to conduct or participate in conducting the affairs of the enterprise; the requisite effect can be either a direct or indirect result of the pattern of racketeering activity.[227] As previously noted, subsection (c) is used more often than subsections (a) or (b) because its requirements seem to be relatively less demanding.[228]

If Doe Chemical used StarChem as the enterprise and named BBS as the defendants, it could assert a subsection (c) violation by alleging that BBS used the pattern of racketeering activity to participate indirectly in conducting the affairs of StarChem.[229] Subsection (c) does not require that the defendants' activities have had any profound impact on the enterprise's affairs.[230] Indeed, this subsection is often used to reach the conduct of one who exploited his relationship with the enterprise.[231] Since BBS took advantage of their respective positions with StarChem to enrich themselves, Doe Chemical will have no difficulty in alleging that BBS committed a subsection (c) violation.[232] And because the three agreed among themselves to accomplish this end, Doe Chemical can also establish that their conduct constituted a conspiracy under subsection (d). These allegations suffice for a civil RICO action.

However, one problem remains if Doe Chemical wants to name StarChem as a defendant. If it were to use StarChem as the enterprise, it would have to allege that StarChem also used the pattern of racketeering activity to conduct, or participate in conducting, its own affairs. While the facts may support such an allegation, the "person-enterprise" rule would bar Doe Chemical from asserting a subsection (c) claim against StarChem because StarChem could not be both a RICO "person" and the "enter-

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[227] *See, e.g.*, 3 BRICKEY, *supra* note 30, § 14.09.

[228] *See supra* note 34 and accompanying text. *But see* Fitzpatrick & O'Neill, *supra* note 42, at 32 (stating that "subdivision [(c)] is at once the most complicated [and] the most commonly utilized in both criminal and civil cases").

[229] Doe Chemical could also allege that BBS's conduct constituted a heightened degree of involvement in StarChem, such as "conducting" its affairs, either "directly or indirectly." Its ability to make such an allegation would depend, of course, on the extent of the impact that BBS's activity was shown to have exerted on StarChem.

[230] *See supra* note 156 and accompanying text.

[231] *See supra* notes 156, 158-60 and accompanying text.

[232] *See, e.g.*, United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). In *Scotto*, the Second Circuit declared:

> [O]ne conducts the activities of an enterprise through a pattern of racketeering activity when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.

prise."[233] Thus, if Doe Chemical uses StarChem as the enterprise, it can allege a subsection (c) violation only against the individual defendants. Since the "person-enterprise" rule applies to conspiracies to violate subsection (c), Doe Chemical cannot allege that StarChem committed a subsection (d) violation.[234] Finally, since courts have held that plaintiffs cannot use complicity to evade the "person-enterprise" rule,[235] Doe Chemical cannot allege that StarChem "aided and abetted" a subsection (c) offense in order to name StarChem as a defendant.

Doe Chemical may, however, attempt to avoid the "person-enterprise" rule by claiming that the enterprise was an association in fact composed of BBS and StarChem. Accordingly, Doe Chemical would allege that BBS and StarChem used the pattern of racketeering activity to conduct the affairs of this enterprise. Doe Chemical will argue that because this enterprise is distinct from StarChem, it is permissible to name the latter as a defendant in an action based on an alleged subsection (c) violation. Yet, this argument will almost certainly fail because "courts have foreclosed attempts to characterize the corporation as a 'person' associating with an association-in-fact 'enterprise' comprised of itself and its employees."[236]

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[233] *See* Rosenthal, *supra* note 191, at 1503 ("Since section 1962(c) thrusts liability on the person, a corporate enterprise cannot be held liable under this subsection. Thus, only employees who have used their employer's facilities to engage in racketeering activities are liable under section 1962(c). . . .")(footnote omitted). For a general discussion of the person-enterprise rule, see *supra* notes 135-42 and accompanying text.

[234] *See, e.g.*, LaBrun, *supra* note 157, at 195-96 ("Although some courts have permitted allegations under section 1962(d) that a corporation conspired with its employees or agents, many have dismissed such contentions as attempts to 'end-run' the person-enterprise rule.")(footnotes omitted).

[235] *See, e.g.*, Petro-Tech, Inc. v. Western Co., 824 F.2d 1349, 1359-60 (3d Cir. 1987); *see also* Rosenthal, *supra* note 191, at 1505-06 (arguing that complicity can only be used to impose liability for a subsection (a) offense).

[236] LaBrun, *supra* note 157, at 195. *See, e.g.*, Yellow Bus Lines v. Drivers Local 639, 839 F.2d 782, 791 (D.C. Cir. 1988), *vacated sub nom.* Int'l Bhd. of Teamsters v. Yellow Bus Lines, 492 U.S. 914 (1989), *and adopted on reh'g*, 913 F.2d 948 (1990) (en banc), *and cert. denied*, 111 S. Ct. 2839 (1991). In *Yellow Bus Lines*, the court held that reliance on an association-in-fact enterprise is improper

> where the relationship among the members of the enterprise association is the relationship of parts to a whole. That is, while the corporate or organizational defendant may itself be a member of the enterprise association, the members of the enterprise association may not simply be subdivisions, agents, or members of the defendant organization.

Id.; *accord* Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438, 441 (5th Cir.), *cert. denied*, 483 U.S. 1032 (1987); Robinson v. Kidder, Peabody & Co., 674 F. Supp. 243, 247 (E.D. Mich. 1987); American Bonded Warehouse Corp. v. Compagnie Nationale Air France, 653 F. Supp. 861, 867 (N.D. Ill. 1987); Hanline v. Sinclair Global Brokerage Corp., 652 F. Supp. 1457, 1462 (W.D. Mo. 1987); Minnesota Odd Fellows Home Found. v. Engler & Budd Co., 630 F. Supp. 797, 800 (D. Minn. 1986); Van Dorn Co. v. Howington, 623 F. Supp. 1548, 1554 (N.D. Ohio 1985). *But see Petro-Tech*, 824 F.2d at 1361 (holding that it is appropriate to allow victims of the racketeering activity to recover from corporation that is also part of the association-in-fact); *accord* Department of Economic Dev. v. Arthur Andersen & Co., 683 F. Supp. 1463, 1482 (S.D.N.Y. 1988); Rhoades

Summary: Doe Chemical has several means by which it can seek to hold BBS directly liable as the perpetrators of RICO violations; it cannot, however, successfully proceed against StarChem in this fashion.[237]

b. Vicarious Liability

In order to hold StarChem vicariously liable for RICO offenses committed by BBS, Doe Chemical will have to establish that BBS were StarChem employees who were acting within the scope of their employment when they committed these offenses.[238] The usual criterion for determining if acts were within the scope of employment is to ascertain if the acts were meant to benefit the employer.[239] Clearly, BBS's conduct was not intended to benefit StarChem. It is apparent that BBS exploited their employment to commit the racketeering activity and did so for their own benefit. This is evidenced by the fact that each terminated his employment upon gaining the proceeds of that activity. Indeed, the activity could not have been meant to benefit StarChem because it did not sell additives such as ABC-666X; consequently, StarChem could not have benefited either directly, by marketing the BBS version of ABC-666X, or indirectly, by seeing a competitor's market being undercut by sales of the ersatz ABC-666X.[240]

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v. Powell, 644 F. Supp. 645, 671-72 (E.D. Cal. 1986), *aff'd without opinion*, 961 F.2d 217 (9th Cir. 1992); Nunes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 609 F. Supp. 1055, 1065 (D. Md. 1985).

[237] To summarize the results of the preceding hypothetical: Doe Chemical cannot allege that it was the victim of a subsection (a) offense and/or a subsection (d) conspiracy based on subsection (a). It can, however, claim that BBS committed a subsection (b) violation and a related subsection (d) offense, but this does not allow it to seek redress from StarChem. Doe Chemical cannot proceed against StarChem for such a violation regardless of whether the enterprise is characterized as StarChem or as an association in fact composed of StarChem and BBS. Doe Chemical may also be able to allege that StarChem conspired with BBS to commit a subsection (b) offense, but it will be difficult to demonstrate that Doe was injured by the conspiracy. The facts would allow Doe Chemical to allege that StarChem violated subsection (c) by participating in the conduct of its own affairs through a pattern of racketeering activity, but the "person-enterprise" rule would prevent recovery of such claims. And because courts look askance at attempts to evade the "person-enterprise" rule, alleging an association-in-fact enterprise composed of StarChem and BBS to bring a subsection (c) claim would be equally fruitless.

[238] *See supra* notes 144-49 and accompanying text.

[239] *See supra* notes 144-49 and accompanying text.

[240] *See* Thrailkill v. Champion Ford, Inc., 776 F. Supp. 1486, 1489 (D.N.M. 1991) (rejecting claim that Ford Motor Company was liable under respondeat superior because employees of one of its franchises engaged in racketeering that allowed them to sell more Ford automobiles); Harrison v. Dean Witter Reynolds, Inc., 715 F. Supp. 1425, 1430-31 (N.D. Ill. 1989) (finding actions of brokerage firm employees not within scope of employment when such actions were pursuant to a "conscious plot to prevent Harrison from becoming a Dean Witter customer, and to use Harrison's funds for their own purposes").

As previously noted, most courts do not apply the doctrine of apparent authority in RICO actions.[241] However, even if that doctrine were applied to any of these facts, Doe Chemical would have difficulty in showing that BBS's acts were within their apparent authority as StarChem employees, if only because StarChem did not create, manufacture or market additives such as ABC-666X. Since StarChem was not involved with such products, it would not seem that BBS acted within their apparent authority as StarChem agents in persuading Greg White to obtain a sample of ABC-666X and bring it to Brown for analysis or in convincing DaxChem to buy Brown's version of ABC-666X.[242]

One could argue that Brown, at least, used his apparent authority to have StarChem employees analyze the sample and to convince StarChem's attorneys to help him patent his version of the additive.[243] The objection to this argument is that liability is imposed under the doctrine because an actor has taken advantage of an innocent party's erroneous belief in his "apparent authority" to act on behalf of a principal.[244] Doe Chemical, however, was not directly victimized by any use which BBS may have made of their apparent authority as StarChem employees; the immediate objects of any misuse of this authority would have been other StarChem employees and, perhaps, DaxChem. Since Doe Chemical was not a direct victim of this activity, it is unlikely that a court would allow Doe Chemical to invoke a doctrine that is generally regarded as problematic in civil RICO litigation to hold StarChem liable for BBS's actions, especially since Doe Chemical can pursue BBS directly under RICO.

Also, even if a court were willing to hold that StarChem was liable for BBS's conduct under any of these civil doctrines, the "person-enterprise" rule would continue to bar Doe Chemical's pursuit of

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[241] *See supra* notes 150-53 and accompanying text.

[242] *See generally Harrison*, 715 F. Supp. at 1431-32 (holding that apparent authority does not exist if party is on "notice that an employee is exceeding the scope of his authority").

[243] Apparent authority can mean that a party was victimized either because an employee "purported to act or to speak on behalf of the" employer and the victim relied on this, or that the employee "was aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY § 219(2)(d). For a more extensive discussion of apparent authority principles and their use in RICO actions, *see supra* notes 61, 150-53 and accompanying text.

[244] Liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.

RESTATEMENT (SECOND) OF AGENCY § 261 cmt. a; *see also id.* § 265 (Unless a party relied on apparent authority, "the principal is not liable . . . for conduct of a servant or other agent merely because it is within his apparent authority or apparent scope of employment."); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 566-67 (1982) (citing RESTATEMENT (SECOND) OF AGENCY § 261 cmt. a approvingly).

StarChem for a substantive violation of subsection (c) and/or a subsection (d) conspiracy based on such a violation.[245] Since the facts do not support the assertion of a subsection (a) violation, and make the assertion of a subsection (b) violation highly problematic, it seems that Doe Chemical would be unable to pursue StarChem by using conventional doctrines of vicarious liability.

c. Pinkerton *Liability*

Doe Chemical can use the *Pinkerton* doctrine to hold StarChem liable for RICO violations, including subsection (c) violations, if it can establish that (1) StarChem conspired with, *inter alia*, BBS and (2) the violations for which it seeks redress were a foreseeable consequence of that conspiracy.[246] While *Pinkerton* is a rule of general application in federal law, Doe Chemical will want to allege that this conspiracy arose under subsection (d), rather than under another federal conspiracy statute.[247] It will do this because subsection (d) is the provision that specifically targets agreements to commit substantive RICO offenses, and because RICO creates a private right of action for injuries resulting from subsection (d).[248]

To illustrate how *Pinkerton* can be used, assume that in its complaint Doe Chemical alleges that BBS and StarChem were involved in a subsection (d) conspiracy to commit a subsection (c) offense, that the offense was committed, and that Doe sustained injury as a proximate result thereof. Doe asserts that BBS used the pattern of racketeering activity noted above to conduct and/or participate in conducting an enterprise that was either StarChem or an association in fact comprised of BBS and StarChem.[249] Doe Chemical asserts civil RICO claims against BBS as the direct perpetrators of the subsection (c) offense and against BBS and StarChem as conspirators under subsection (d). Doe Chemical would further allege that it sustained injury from this conspiracy by virtue of the fact that three of the conspirators perpetrated the subsection (c) offense alleged. Rather than trying to show that StarChem actually carried out this offense, it uses the *Pinkerton* doctrine to hold StarChem liable for an offense that was physically perpetrated by

[245] *See supra* notes 234-37 and accompanying text.

[246] *See supra* notes 94-119.

[247] For a general discussion of *Pinkerton*'s application in federal law, see 3 BRICKEY, *supra* note 30, § 6:06; Brenner, *supra* note 100, at 944-78.

[248] *See supra* notes 36-41 and accompanying text.

[249] As to the association in fact, Doe Chemical may want to allege that it included parties and/or entities in addition to BBS and StarChem.

StarChem's co-conspirators, BBS; by doing so, Doe establishes injuries that proximately resulted from its subsection (d) claim.[250]

In this example, Doe Chemical applies *Pinkerton* to a subsection (c) violation; this offense was chosen for the example because it best fits the facts given in the hypothetical and because it is the most frequently used substantive offense. The general pleading structure given above holds, however, regardless of whether a plaintiff alleges offenses under subsections (a), (b), (c), multiple violations of any one provision and/or multiple violations of any two or more.

Obviously, therefore, the *Pinkerton* doctrine provides a device that can be used to attribute substantive criminality to any RICO "person" who enters into a conspiracy to that effect. One advantage of this application, noted above, is that it allows a plaintiff to allege that a RICO conspiracy inflicted demonstrable injury.[251] Another, of course, is that it provides a device that can be used to widen the net of RICO liability; since a RICO conspiracy merely requires an agreement, a conspirator need not have committed any overt act in furtherance of the conspiracy in order to incur liability for the conspiracy and for substantive offenses that were its proximate result.[252]

This tactic also allows litigants to take advantage of the general rule of criminal law that "'[o]nce the existence of a conspiracy is established, even slight evidence connecting a defendant to the conspiracy may be sufficient proof of his involvement in the scheme!'"[253] Plaintiffs who can prove that a RICO conspiracy existed and that it involved a principal's agents may be able to use this rule to link the principal to that unlawful activity, and thereby hold the principal liable for substantive RICO offenses that resulted from the conspiracy.[254]

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[250] This, of course, resolves the major difficulty that arises in attempts to base civil RICO claims on alleged violations of subsection (d)--proving injury. *See supra* note 48.

[251] *See supra* note 250 and accompanying text.

[252] *See supra* note 37 and accompanying text. Certain areas of federal law enforce a rule under which "a corporation is deemed capable of engaging in a conspiracy with its own officers, directors, employees, and agents." John T. Prisbe, Comment, *The Intracorporate Conspiracy Doctrine*, 16 U. BALT. L. REV. 538, 538 (1987). This rule is not discussed, even though it would block the use of *Pinkerton* liability in the scenario set forth above, because the majority of courts have held that it does not apply to civil RICO actions. *See, e.g.*, Lawaetz v. Bank of Nova Scotia, 653 F. Supp. 1278, 1287 (D. V.I. 1987) ("The majority rule is that conspiracy can not lie against the corporal entity for the concerted action of its employees who violate RICO on its behalf."). Some courts, however, do not apply the intracorporate conspiracy doctrine when a corporation acts through its wholly-owned subsidiaries. *See* Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1281 (7th Cir. 1989).

[253] PERKINS & BOYCE, *supra* note 40, at 712 (quoting United States v. Schmaltz, 562 F.2d 558, 560 (8th Cir. 1977)); *accord* LAFAVE & SCOTT, *supra* note 69, at 529.

[254] It is important to note that, according to most courts, *Pinkerton* can only be used to impute liability for acts that occurred *after* one joined a conspiracy. *See, e.g.*, BRICKEY, *supra* note 30, § 6:06 ("Although overt acts committed before the defendant joined the conspiracy may be charged to him for purposes of holding him liable for the conspiracy offense, the defendant cannot be held

Pinkerton clearly provides an alternative means of holding a party liable for subsections (a) and/or (b) offenses that it did not personally commit. This alternative is likely to prove useful for litigants who wish to impute liability for such offenses to a party whose accountability cannot be established under the conventional rules of vicarious liability discussed earlier in this Article.[255] The more important issue, however, is whether *Pinkerton* can be used to avoid the limitations that the "person-enterprise" rule imposes on imputing liability for subsection (c) offenses.[256] The example given at the beginning of this section showed how *Pinkerton* can be used to impute liability to a nonacting conspirator; the critical question then becomes whether such use is inconsistent with the rationales behind the "person-enterprise" rule. If *Pinkerton* is inconsistent with the basic premises of that rule, it is likely to be disallowed as an "end run" around the rule;[257] but if there is no inconsistency, there should be no objection to *Pinkerton*'s use in this regard.

This discussion will assume that the "person-enterprise" rule is a generally appropriate limitation on imputing what might be termed "entity liability" for subsection (c) offenses.[258] Courts that enforce the rule justify their action under either of two theories. One is that the logical structure of subsection (c) does not permit the "person" and "enterprise" to be the same entity. The other justification is that it would be unjust to hold the enterprise liable because it is necessarily the victim of a subsection (c) violation.[259]

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retroactively liable for substantive offenses committed by others before he became a member of the conspiracy."). The premise is that the civil doctrine of ratification should not be used to impose criminal liability. *See* PERKINS & BOYCE, *supra* note 40, at 704-05 (declaring that ratification "is not a criminal-law doctrine"); *accord* Levine v. United States, 383 U.S. 265, 266 (1966); United States v. Knippenberg, 502 F.2d 1056, 1059 (7th Cir. 1974); United States v. Freeman, 498 F.2d 569, 575 (2d Cir. 1974). *But see* United States v. Michel, 588 F.2d 986, 1002 (5th Cir.) ("When one knowingly joins a conspiracy in progress he is responsible for acts of the conspiracy occurring before or after his association with it."), *cert. denied*, 444 U.S. 825 (1979).

[255] *See supra* notes 55-70 and 124-63.

[256] As previously mentioned, the person-enterprise rule bars the imposition of liability for a subsection (c) violation on an entity as a RICO person when that entity is also the enterprise. *See supra* notes 135-42 and accompanying text.

[257] *See, e.g.*, LaBrun, *supra* note 157, at 195-96.

[258] The assumption noted above is made for analytical purposes only, and is not intended to concede the validity of this rule. Though cases usually involve attempts to impute liability to a corporation or other artificial entity, it may be possible to impute liability to an individual or sole proprietorship. *See, e.g.*, United States v. Benny, 786 F.2d 1410, 1415-16 (9th Cir.), *cert. denied*, 479 U.S. 1017 (1986); McCullough v. Suter, 757 F.2d 142, 143-44 (7th Cir. 1985).

[259] *See supra* notes 124-63; *see also* G. Robert Blakey & Scott D. Cessar, *Equitable Relief under Civil RICO: Reflections on* Religious Technology Center v. Wollersheim: *Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 581-84 n.235 (1987) (discussing, in considerable detail, the two justifications for courts' enforcement of the rule).

i. Logical Structure

The rationale supporting the "person-enterprise" rule derives from the language of subsection (c), which requires that the RICO offender must be "employed by or associated with" the enterprise.[260] Under the "person-enterprise" rule, an entity that is alleged to have been the enterprise cannot also be held liable as the perpetrator of a subsection (c) offense, on the premise that the enterprise cannot be "employed by or associated with" itself.[261] And since the enterprise cannot be held directly liable as a perpetrator, courts do not allow it to be held indirectly liable under vicarious liability doctrines.[262]

It is important to realize, at the outset of this discussion, that under the *Pinkerton* doctrine a conspirator is not held liable as an actual perpetrator of substantive offenses resulting from the conspiracy; the premise for imposing liability is instead that these offenses are at least partially attributable to the distinct "bad act" of agreeing to their commission.[263] As to subsection (c) violations, therefore, *Pinkerton* can only be used to hold a party liable for offenses that were carried out by other members of the conspiracy; given the context of this discussion, this means that *Pinkerton* will be used, if at all, to impute liability to an employer or other principal for crimes that were actually committed by its agents-employees with whom it conspired to that end.

Under the "person-enterprise" rule, *Pinkerton* can be used to hold an enterprise liable for subsection (c) offenses carried out by its agents-employees only if doing so is consistent with the statute's requirement that offenders be "employed by or associated with" the enterprise.[264] In analyzing this issue, it is necessary to consider two scenarios. In one, liability is to be imputed to an entity that is the RICO enterprise.[265] In the other, liability is to be imputed to an entity that is a component of an association-in-fact enterprise that also includes the entity's agents-employees among its members.[266]

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[260] *See supra* note 137 and accompanying text.

[261] *See supra* note 137 and accompanying text.

[262] *See, e.g.*, Schofield v. First Commodity Corp., 793 F.2d 28, 33 (1st Cir. 1986) (holding that it is "inappropriate to use respondeat superior to accomplish indirectly what we have concluded the statute directly denies").

[263] *See* Brenner, *supra* note 100, at 944-78.

[264] *See supra* notes 111-13 and accompanying text.

[265] This corresponds to an attempt to hold StarChem liable for BBS' using a pattern of racketeering activity to participate in conducting its affairs. *See supra* text accompanying notes 217-24.

[266] This corresponds to an attempt to hold StarChem liable for BBS' using a pattern of racketeering activity to participate in conducting the affairs of an association-in-fact enterprise composed of StarChem and BBS. *See supra* text accompanying notes 235-36.

Since the first scenario directly implicates the "employed by or associated with" issue, it is appropriate to begin with it. Assume, therefore, that Doe Chemical wants to use *Pinkerton* to hold StarChem, which is alleged to be the enterprise, liable for one or more subsection (c) offenses carried out by BBS. Does allowing Doe Chemical to do this violate the statutory requirement that RICO offenders have been "employed by or associated with" the enterprise?

Such application of *Pinkerton* does not violate this requirement because liability is not being imposed for StarChem's engaging in conduct that is prohibited by the statute, but is instead being imputed to it on the basis of a different, albeit related, wrongful act–agreeing to the commission of these offenses.[267] As is explained elsewhere, imputing liability for substantive offenses under *Pinkerton* merely holds a conspirator liable for the foreseeable consequences of its criminal bargain.[268] The act of agreeing to the commission of offenses is considered to have an independent causal significance that justifies holding one who agrees to the conspiracy liable for its foreseeable results.[269] Furthermore, an agreement may be established by providing minimal evidence connecting the enterprise to the conspiracy.[270] Here, liability is imputed to StarChem because, by agreeing that one or more subsection (c) offenses would be committed, it became a contributing cause of any crimes that were actually committed.[271]

It is for this reason that "a conspirator's inability to commit the object offense as a principal does not" prevent it from being held liable for that offense under the *Pinkerton* doctrine.[272] Therefore, even if one assumes that the "person-enterprise" rule is valid, and that an enterprise such as StarChem cannot perpetrate a subsection (c) offense by conducting or

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[267] For the rationale justifying this imputation, see Brenner, *supra* note 100, at 944-78.

[268] *See id.*

[269] *See id.*

[270] *See supra* notes 253-54.

[271] *See id. See generally* United States v. Lebron, 704 F. Supp. 332, 333-34 (D.P.R. 1989) (describing participation in a conspiracy as the act of causing the commission of an offense by another).

[272] BRICKEY, *supra* note 30, § 6:06 ("Thus, for example, one who is not connected with a financial institution may be guilty of conspiring to evade currency reporting requirements imposed on the institution."); *accord* United States v. Donahue, 885 F.2d 45, 47-48 (3d Cir. 1989); United States v. Segal, 852 F.2d 1152, 1156 (9th Cir. 1988); Unites States v. Hayes, 827 F.2d 469, 472-73 (9th Cir. 1987); Lebron, 704 F. Supp. at 333-34. This aspect of *Pinkerton* liability reflects the general rule that one can be liable as an accomplice and/or as a conspirator even if that party is immune from liability for the offense under rules of substantive law. *See, e.g.*, BRICKEY, *supra* note 30, § 5:10; *accord* United States v. Gomto, 792 F.2d 1028, 1035 (11th Cir. 1986); Wright v. United States, 243 F.2d 569, 570 (5th Cir. 1957), *cert. denied*, 355 U.S. 831 (1958); *see also* United States v. Tenorio-Angel, 756 F.2d 1505, 1513 (11th Cir. 1985) ("A person may be guilty of conspiring to commit an offense although incapable of actually committing that offense")(citing United States v. Rabinowich, 238 U.S. 78, 86 (1915)).

participating in the conduct of its own affairs through a pattern of racketeering activity, it can still be held liable under the *Pinkerton* doctrine for conspiring with others to accomplish this result.

The next issue is whether this result ensues under the second scenario given above, in which the enterprise is an association in fact composed of an entity and its employee-agents. The rationale courts give for refusing to impose substantive subsection (c) liability under civil vicarious liability doctrines in this situation is that plaintiffs are merely attempting to subvert the "person-enterprise" rule by re-casting the enterprise.[273] But, as is explained above, the rule does not preclude using *Pinkerton* to impute liability for subsection (c) offenses to an entity that is itself the "enterprise." Since *Pinkerton* can be used to impute liability when an entity *is* the enterprise, there is no logical and/or policy reason why this cannot also be done when an entity is alleged to have been but one component of an association-in-fact enterprise, the members of which also included some of its employees-agents.

ii. Victim Rationale

The other rationale used to justify the "person-enterprise" rule is that it would be unfair to hold an enterprise liable for a subsection (c) violation because it is necessarily the victim of such a violation.[274] Obviously, there should be no need for this theory if the "logical structure" rationale is valid, because under it, an enterprise cannot commit a subsection (c) violation.[275] This discussion, however, makes the rather problematic assumptions that the "victim" rationale plays a role independent of the "logical structure" rationale, and that it is empirically valid.[276]

Neither assumption defeats the conclusion reached above, which is that the *Pinkerton* doctrine can be used to hold an enterprise liable for subsection (c) violations committed by its employee-agents if the violations were a foreseeable consequence of a conspiracy of which the enterprise was a member.[277] The "victim" rationale in no way alters the validity of this result because in this scenario the enterprise is not a passive victim but has, in fact, agreed to the commission of the offenses in question. By doing so, the enterprise has committed a criminal act that is considered to have been at least a contributing cause of those offenses;[278] consequently, it should be held liable for them.

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[273] *See, e.g., supra* note 262 and accompanying text.

[274] *See supra* note 141 and accompanying text.

[275] *See supra* notes 260-73.

[276] For critiques of this aspect of the "victim" rationale, see LaBrun, *supra* note 157, at 201 ("Although the person-enterprise protects victims, it also protects perpetrators. As such the rule is both dangerous and superfluous.").

[277] *See supra* notes 94-119.

[278] *See supra* notes 260-73.

CONCLUSION

This Article has demonstrated that the *Pinkerton* doctrine, which holds conspirators liable for substantive crimes committed by other members of that conspiracy, can be used to allow civil RICO plaintiffs to hold "deep pocket" parties liable for RICO violations that were physically committed by their employees and/or agents. Because of the constraints imposed by certain general principles of criminal liability and by the intricate, often arbitrary rules of RICO liability, plaintiffs can encounter difficulty in attempting to use civil vicarious liability rules or the doctrine of criminal respondeat superior to hold principals, usually corporate and other artificial entities, liable for the actions of those whom they employ or for whose actions they should otherwise be held accountable. Often, allowing these principles to prevent plaintiffs from reaching such defendants undercuts the very policies that RICO was intended to further, i.e., sanctioning any use of an organization for criminal purposes.[279]

This Article proposes that in civil RICO litigation cases, courts should incorporate *Pinkerton* liability as a rule of "civil complicity" in order to allow plaintiffs to reach principals who have committed the independent "bad act" of agreeing to the commission of substantive RICO offenses. Although this act is itself a RICO violation, it is difficult for plaintiffs to use it as a basis for obtaining redress for their injuries because a RICO conspiracy, though itself an actionable violation, is an inchoate offense.

Such offenses were developed as a means of sanctioning conduct that had not yet resulted in the commission of a crime.[280] While conspiracy, has come to be regarded as an offense in its own right, it targets an intangible "harm," the act of agreeing that offenses will be committed. Criminal law sanctions this act because it creates the "special danger" of coordinated criminal activity.[281] But because this act, taken in isolation, usually does not produce demonstrable injuries to a "victim," it is difficult to use it as the basis for recovery in a civil action.

The *Pinkerton* doctrine, however, recognizes that the act of agreeing to the commission of offenses can cause others to commit them, and

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[279] *See supra* note 276; *see also* G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 261-63 (1982) (noting that legislative history exhibits an intent to broadly interpret RICO so as to provide remedies for victims of organized crime).

[280] *See, e.g.*, Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 3 (1989) ("'Inchoate' offenses allow punishment of an actor even though he has not consummated the crime that is the object of his efforts. Indeed, the main purpose of punishing inchoate crimes is to allow the judicial system to intervene before an actor completes the object crime.").

[281] *See, e.g.*, MODEL PENAL CODE § 5.03(1) commentary at 387 (Proposed Official Draft 1985); *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 923-25 (1959).

therefore holds one who commits such an act liable for its proximate results. The Restatement (Second) of Torts incorporates a version of this principle in section 876, which allows one to be held liable for torts committed "in concert . . . or pursuant to a common design with" another.[282] This Article contends that as to civil RICO litigation, this concept of "civil complicity" should be expanded to include the *Pinkerton* doctrine, which imposes liability for the proximate results of the prohibited act of agreeing to the commission of substantive RICO offenses.

Implementing a doctrine of civil complicity that incorporates *Pinkerton* liability will allow litigants to obtain redress from those who agree to the commission of RICO offenses, as well as from those who actually perpetrate them. This will have two results, both of which further the policies RICO was intended to promote. One is that offenders, especially corporate entities, will not be able to insulate themselves from RICO liability by having agents commit acts that they have sanctioned.[283] The other desirable result is that those who have been injured by RICO-violative conduct can seek redress from all who contributed to its commission. This advances both the policies of making victims of such activity whole and of ensuring that its beneficiaries suffer for the consequences of their unlawful actions.[284]

In addition to furthering these important policy objectives, recognizing *Pinkerton* liability as a rule of civil complicity will also ensure that the imputation of liability under the statute proceeds in a fashion that is consistent with the traditional premises of the criminal law. That is, civil rules of vicarious liability base a principal's liability for acts of its agents on the existence of a demonstrable agency relationship between them. As noted earlier, such rules effectively eliminate the requirement of a personal "bad act."

While this result is satisfactory for civil liability, RICO is a criminal statute; the civil remedy created by 18 U.S.C. § 1964(c) is available for injuries caused by criminal activity. It is, therefore, preferable to predicate the imputation of liability for such activity on principles that are consistent with those used to impose criminal liability. In criminal law, the personal commission of a "bad act" is generally a prerequisite for liability. Since *Pinkerton* bases the imputation of liability for substantive offenses on the commission of a unique "bad act" rather than on the existence of a specific relationship between parties, it is a preferable means of accomplishing this result in the context of civil RICO liability.

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[282] RESTATEMENT (SECOND) OF TORTS § 876 (1977).

[283] *See* Blakey & Cessar, *supra* note 259, at 581-84 n.235; Ginger, *supra* note 126, at 471; James C. Minnis, Comment, *Clarifying RICO's Conspiracy Provision: Personal Commitment Not Required*, 62 TUL. L. REV. 1399, 1417 (1988).

[284] *See generally* Blakey, *supra* note 279, at 265-80 (providing a thorough analysis of RICO's legislative history).