

## California Western Law Review

---

Volume 21  
Number 2 *CIVIL RICO SYMPOSIUM*

Article 6

---

1985

### Vicarious Civil Liability Under the Racketeer Influenced and Corrupt Organizations Act

Thomas E. Dwyer, Jr.

Stephen Kiely

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

---

#### Recommended Citation

Dwyer,, Thomas E. Jr. and Kiely, Stephen (1985) "Vicarious Civil Liability Under the Racketeer Influenced and Corrupt Organizations Act," *California Western Law Review*. Vol. 21 : No. 2 , Article 6.  
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol21/iss2/6>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact [alm@cwsl.edu](mailto:alm@cwsl.edu).

## Vicarious Civil Liability Under the Racketeer Influenced and Corrupt Organizations Act

THOMAS E. DWYER, JR.\*  
STEPHEN KIELY\*\*

### INTRODUCTION

Fifteen years after its enactment, the Racketeer Influenced and Corrupt Organizations Act<sup>1</sup> ("RICO" or "the Act") has come full circle. Although it was used sparingly at first, it is now so popular with civil litigants that some courts have recently imposed restrictions which seem calculated primarily to control the explosion of federal "RICO" litigation.<sup>2</sup> In several cases courts have imposed restrictive standing requirements which require the plaintiff to show a "racketeering enterprise injury" in much the same fashion as the antitrust laws require a competitive injury.<sup>3</sup> Similarly, the Second Circuit, in a controversial opinion, has decided that the predicate acts of racketeering must have resulted in criminal convictions, although not necessarily RICO convictions.<sup>4</sup> In great measure, these decisions provide an example of the close statutory examination that counsel who seek to utilize civil RICO must undertake.

One of the most vexing problems today is whether the Act contemplates true vicarious liability, in effect, civil liability based upon the liability or fault of another.<sup>5</sup> Put another way, the question is whether the Act contemplates respondeat superior liability for a principal whose agent has violated the statute while acting within

---

\* Mr. Dwyer is the founding partner of the Boston, Massachusetts law firm of Dwyer & Murray; B.S., Boston College, 1967; J.D., Suffolk University Law School, 1970; former Assistant District Attorney, Suffolk County District Attorney's Office, Boston, 1972-1978, Project Director, Investigation and Prosecution Project which focused on organized and white collar crime.

\*\* Mr. Kiely practices with the law firm of Dwyer & Murray, Boston Massachusetts; A.B., Dartmouth College, 1972; J.D., Boston College Law School, 1975; former Assistant District Attorney and Chief of Investigations Unit, Essex County District Attorney's Office, 1979-1982.

1. 18 U.S.C. §§ 1961-1968 (1982).

2. See Weissman, Circuit Aims to Curb Private Civil RICO Actions, *Legal Times*, Aug 20, 1984, at 12, col. 1; Comment, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513, 1517 n.28 (1983); and Comment, *RICO: The Temptation and Impropriety of Judicial Resolution*, 95 HARV. L. REV. 1101 (1982).

3. See *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516 (2d Cir. 1984), *pet. for cert.* filed, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657).

4. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 503 (2d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648).

5. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 69, at 499 (4th ed. 1971) [hereinafter cited as PROSSER].

the scope of his agency. The issue is of intense practical concern to the bar because a workable theory of vicarious liability is often the only way to find a pecuniary defendant to join in the lawsuit. Conversely, with RICO, it exposes corporations and other businesses to treble damages for acts which may have been committed by low-level employees. Thus, the stakes in this debate are enormous for everyone. In the context of the civil RICO provisions, the debate is further complicated by the fact that the Act functions to impose civil liability for criminal acts. The rules governing the imputation of criminal responsibility from one person to another or from a natural person to a corporation are substantially different from those governing civil responsibility. There is a tendency to confuse the two issues in the context of a statute which imposes civil liability for criminal acts. This Article will analyze the current case law bearing on the question whether RICO contemplates vicarious civil liability, in light of the structure of the statute, its legislative history, and analogous case law, particularly that under the antitrust laws.

### I. BASES FOR IMPOSING DERIVATIVE LIABILITY

For reasons related almost solely to the structure of the statute, RICO plaintiffs have relied primarily on subsections (c) and (d) of section 1962 in bringing claims for commercial or business fraud. Subsection (c) makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." Subsection (d) makes it unlawful to conspire to violate any of the substantive provisions: (a), (b) or (c).<sup>6</sup> Plaintiffs are beginning to experiment more with subsections (a) and (b) particularly when they want to charge a corporation directly with violations of the Act. But while those subsections speak in terms of control of an enterprise, subsection (c) speaks only of participation in the affairs of the enterprise. Because it is so much broader, subsection (c) is more frequently used by RICO plaintiffs.

Broadly speaking, the statute imposes liability on any "person," who acquires, controls, or conducts the business of an "enterprise" through a pattern of racketeering activity. It does not impose liability on the enterprise in express terms. A "person" is defined in sec-

---

6. 18 U.S.C. § 1962 (1982), subsection (a) by its language is designed to prevent the takeover or operation of legitimate business by anyone using funds derived from a pattern of racketeering activity. It has been used sparingly by civil litigants. Subsection (b) prohibits the takeover of any enterprise through acts constituting a pattern of racketeering activity. It has been used somewhat more frequently, particularly in tender offer cases. *See, e.g., Spencer Cos. v. Agency-Rent-A-Car* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) 98,361 (D. Mass. 1981).

tion 1961 to include any individual or "entity" capable of holding an interest in property. Clearly, a corporation, partnership, or trust can be an offending person within the terms of the statute, but only when it controls or participates in the affairs of an enterprise through a pattern of racketeering activity. Moreover, an enterprise may be any individual, legal entity, in effect, a partnership or corporation or association in fact.<sup>7</sup>

The courts have struggled with the theoretical bases for imposing vicarious or derivative liability in civil RICO cases. There are, perhaps, three distinct approaches to this issue: 1) some courts have held that the statute reaches cases where there is an identity between the "person" and the "enterprise" required by subsection (c), so that a corporation may be charged directly with conducting its own affairs in violation of the statute; 2) others have held that the statute does not abrogate the broadest basis of vicarious liability in civil cases; respondeat superior liability, thus exposing corporations to liability for the offending acts of their agents and employees; and 3) still others have held that an agent and his principal constitute the necessary plurality of actors for imposing liability under title 18 section 1962(d). These approaches are quite different and their applications depend on the facts and the pleading context in which the case is decided. The third approach—imposing liability based upon co-conspirator status—has certain analytical limitations. Under traditional notions of conspiracy law, all co-conspirators must have a culpable mens rea and all must share the specific intent to commit the substantive crime.<sup>8</sup> It is no less true with section 1962(d).<sup>9</sup> Although the law will impute acts and statements from one co-conspirator to another, liability is not vicarious; i.e., derived solely from the liability of another, but is personal to those who share conspiratorial intent. Thus, it would seem that any person who has civil liability under section 1962(d) will also have personal, as opposed to vicarious liability, under subsections (a), (b) or (c), if the acts constituting the violation are completed.<sup>10</sup> The real question is whether and under what circumstances can a civil plaintiff reach a corporate purse in true derivative fashion under the Act. A workable theory of vicarious corporate liability, when coupled with the treble dam-

---

7. See *United States v. Turkette*, 452 U.S. 582 (1981).

8. *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975).

9. *United States v. Local 560, Int'l Brotherhood of Teamsters*, 581 F. Supp. 279, 332 (D.N.J. 1984) (finding a requirement that RICO specific intent be present).

10. Moreover, the entire issue of intra-enterprise conspiracy has been clouded by the Supreme Court's recent decision in *Copperweld Corp. v. Independence Tube Corp.*, 52 U.S.L.W. 4821n (1984), which held that parent and subsidiary corporations together do not constitute a plurality of actors for purposes of section 1 of the Sherman Act which requires "concerted" action in violation of the antitrust laws.

age provision of section 1964, will undoubtedly have a substantial effect on the future course of RICO litigation.

## II. THE *HARTLEY* AND *COMPUTER SCIENCES* CASES: THE PERSON/ENTERPRISE DEBATE

Obviously, one way to establish corporate liability is to allege that the "person" and the "enterprise" are one, i.e., that the enterprise, usually the deep pocket, has conducted its own affairs through a pattern of racketeering activity. Since the literal language of section 1962 imposes liability only on the "person" who controls or conducts an enterprise through a pattern of racketeering activity, some lawyers have thought it necessary to equate the "person" and the "enterprise" so as to establish enterprise liability. For example, in a typical securities fraud case, the plaintiff may allege that the brokerage house has conducted its own affairs through a pattern of racketeering activity. At least on its face, this avoids vicarious liability issues by charging the enterprise directly with violations of the Act. This pleading technique is somewhat misleading because whenever a corporation is sued there still arise significant questions concerning those acts which may be attributed to the corporation. Moreover, the courts have differed on whether the person and the enterprise may be one and the same. Certainly, the definitions of person and enterprise in section 1961 are broad enough to support such a theory.

In *United States v. Hartley*,<sup>11</sup> the Eleventh Circuit held that a single corporation can be both the person and the enterprise under section 1962(c). *Hartley* relied upon the broad reading of "enterprise" announced in *United States v. Turkette*,<sup>12</sup> (*Turkette*), the liberal construction proviso in the original legislation,<sup>13</sup> and the fact that the literal terms of section 1962(c) do not exclude identity between person and enterprise, in holding that a corporation can be charged directly under that section.<sup>14</sup>

To the same effect, Judge Ackermann in his lengthy opinion in *United States v. Local 560, Int'l Brotherhood of Teamsters*<sup>15</sup> concluded that it is possible for a single defendant to constitute both the person and the enterprise contemplated by subsection 1962(c). He also said, however, that resolution of the issue "depend(s) on the circumstances of each case." Using these two cases, a plaintiff can charge a corporation directly with violations of the Act arising out

---

11. 678 F.2d 961 (11th Cir. 1982), cert. denied, 459 U.S. 1170, 1183 (1983).

12. 452 U.S. 582 (1981).

13. Pub. L. No. 91-452, § 904(a), 84 Stat. 941 (1970).

14. *Hartley*, 678 F.2d at 988.

15. 581 F. Supp. 279,329 (D.N.J. 1984).

of the conduct of the corporation's business in an effort to avoid raising vicarious liability questions at the pleading stage. The rule in *Hartley*, however, has practically no following.<sup>16</sup>

The leading case to the contrary is the Fourth Circuit decision in *United States v. Computer Sciences Corp.*,<sup>17</sup> (*Computer Sciences*). In this case a corporation and several of its officers and employees were indicted for deliberately overbilling the federal government for computer programming and processing services. In one count of the indictment the government alleged that the corporation, Computer Sciences, Inc., had conducted the affairs of its corporate division, Infonet, through a pattern of racketeering activity. The court of appeals, in reviewing a district court order dismissing the entire indictment, held that section 1962 does not contemplate that the person and the enterprise, however characterized, can be identical.

[The question is] whether Congress ever intended, in 18 U.S.C. section 1962 that the statute prohibit activities by a person where the activities are described as occurring with any enterprise when there was identity between the person, on the one hand, and the entity, on the other. We conclude that enterprise was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit.<sup>18</sup>

The court went on to say that since the Infonet division had no identity apart from the corporation itself, an allegation that the corporation, Computer Sciences, Inc., conducted the affairs of Infonet through a pattern of racketeering activity did not charge a crime under the statute. The court recognized that a corporate division may constitute an "enterprise" although not a "person" within the terms of the statute, and also that a corporation may constitute a "person," but concluded that there must be separate identities to make a case under the language of section 1962.<sup>19</sup> This holding precludes a complaint in which the person and the enterprise do not have separate identities. To use the securities case example, the pleader could not charge the brokerage house with conducting its

---

16. *Accord*, *United Equitable Life Ins. Co. v. Trans Global Corp.*, No. 83 C 5408, slip op. (N.D. Ill. Jan. 29, 1984); *United States v. Local 560, International Bhd. of Teamsters*, 581 F. Supp. 279 (D.N.J. 1984); *Mooney v. Fidelity Union Bank*, No. 82-3192, slip op. (D.N.J. March 11, 1983); *D'Iorio v. Andonzo*, 554 F. Supp. 222 (M.D. Pa. 1982); *Coastal Steel Corp. v. Chemical Bank*, No. 82-1714, slip op. (D.N.J. Oct. 27, 1982). See also Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 324 n.181 (1982) [hereinafter cited as *Civil Fraud in Context*] ("*Hartley* is a thoughtful well reasoned opinion . . .").

17. 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

18. *Id.* at 1190.

19. The courts explicit statement that the enterprise cannot be "part of" the person, or the implicit suggestion that the person cannot be part of the enterprise is probably wrong, even if the statute requires distinction of identities. *Computer Sciences*, 689 F.2d at 1190.

own affairs through a pattern of racketeering activity since such a pleading would not set up separate identities for the person and the enterprise. *Computer Sciences* has been followed in a majority of the cases decided since then.<sup>20</sup>

The Seventh Circuit decision in *Haroco, Inc. v. American Nat'l Bank and Trust Co.*,<sup>21</sup> (*Haroco*), neatly posed and answered the person/enterprise question with the following language:

We do not doubt that a corporation may satisfy the section 1961 definitions of both "person" and "enterprise", as the court observed in *Hartley*. But we focus our attention on the language in section 1962(c) requiring that the liable person be "employed by or associated with any enterprise" which affects interstate or foreign commerce. The use of the terms "employed by" and "associated with" appears to contemplate a person distinct from the enterprise. If Congress had meant to permit the same entity to be the liable person and the enterprise under section 1962(c), it would have required only a simple change in language to make that intention crystal clear.<sup>22</sup>

Professor G. Robert Blakey, a recognized authority on RICO, clearly sides with the *Hartley* court.<sup>23</sup> He contends that the *Computer Sciences* opinion ignores the liberal construction clause attached to the Act, and ignores the basic policy decisions inherent in the Act. The *Haroco* panel, for one, recognized, however, that the broad policy considerations of RICO and the liberal construction clause are at odds to some degree with the language of section 1962(c) on this issue. As the court put it: "we do not think the general principle of liberal interpretation of RICO can be used to stretch section 1962(c) to reach this situation in the face of the subsection's own limits."<sup>24</sup>

---

20. *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *aff'd in part on rehearing en banc*, 710 F.2d 1361, *cert. denied sub. nom.*, Prudential Ins. Co. v. Bennett, 104 S. Ct. 527 (1983); *Saine v. AIA, Inc.*, 582 F. Supp. 1299 (D.C. 1984); *Willamette Sav. & Loan v. Blake & Neal Fin. Co.*, 577 F. Supp. 1415 (D. Or. 1984); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352 (E.D. Mich. 1983); *In Re Action Industries Tender Offer*, 572 F. Supp. 846 (E.D. Va. 1983); *Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234 (E.D. Pa. 1983); *Yancoski v. E.F. Hutton & Co., Inc.*, 581 F. Supp. 88 (E.D. Pa. 1983); *Van Schaik v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125 (D. Mass. 1982); *Field's v. National Republic Bank of Chicago*, 546 F. Supp. 123 (N.D. Ill. 1982); and *Bays v. Hunter Sav. Ass'n*, 539 F. Supp. 1020 (S.D. Ohio 1982).

Most recently the Third Circuit has joined the majority view in *B.F. Hirsch v. Enright Ref. Co., Inc.*, No. 84-5087 slip op. (3d Cir. Sept. 14, 1984). The court held that section 1962(c) requires that the defendant corporation and the RICO enterprise be distinct entities.

21. 747 F.2d 384 (7th Cir. 1984).

22. *Id.* at 400.

23. *See, Civil Fraud in Context, supra* note 16, at 324 n.181; *See also Sedima*, 741 F.2d 482, 486, 486 n.6 (2d Cir. 1984).

24. *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 482, 400 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3437 (U.S. Jan. 14, 1985).

Although the court concluded that the language of section 1962(c) does not contemplate an identity of "person" and "enterprise," the *Haroco* panel concluded, nonetheless, that section 1962(a) does contemplate such an identity. The court stated:

[A] corporation-enterprise may be held liable under subsection (a) when the corporation is also a perpetrator. As we parse subsection (a), a "person" (such as a corporation-enterprise) acts unlawfully if it receives income derived directly or indirectly from a pattern of racketeering activity in which the person has participated as a principal within the meaning of 18 U.S.C. § 2, and if the person uses the income in the establishment or *operation* of an enterprise affecting commerce. Subsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be separate. Under subsection (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations.<sup>25</sup>

The *Haroco* reasoning reduces the person/enterprise debate, which usually arises in the context of allegations under section 1962(c) to an academic question. In many cases, it is not difficult to plead that a corporation has received some income from the racketeering activity of its agent or employee and that it has used that income in the operation of its business. It may be much more difficult, however, to prove that the receipt of income is the result of racketeering activity in which the corporation participated directly. In any event, both subsections (a) and (c) are rife with agency questions when the issue is whether the corporation has participated as a principal in the racketeering activity.<sup>26</sup>

In the final analysis, the person/enterprise debate, begs the real question which is whether RICO contemplates derivative liability at all. In the person/enterprise cases there must be at least an allegation that the corporation has itself conducted the affairs of an enterprise through a pattern of racketeering activity. Since a corporation can act only through natural persons, there remains the issue of when and under what circumstances the law should impute racketeering acts to a corporation. That question is really nothing more or less than the broader question of when to impose criminal liabil-

---

25. *Id.* at 402 (emphasis added by the court).

26. Since only a handful of civil RICO cases have gone to trial, the person/enterprise question has usually been addressed in the context of the pleadings. One way around the *Computer Sciences* decision, which leaves the corporation exposed to liability is to allege that the corporation qua "person" is conducting the affairs of a different "enterprise" through a pattern of racketeering activity. Usually the "enterprise" is defined as an association-in-fact consisting of the corporation and its agents or employees who have committed the racketeering acts.



ity on a corporation for the acts of its agents or employees.<sup>27</sup>

Civil RICO actions require proof of criminal conduct.<sup>28</sup> That is, an allegation that a corporation has conducted its affairs or the affairs of some other enterprise through a pattern of racketeering activity still requires proof that the corporation "committed" the predicate racketeering acts. Corporate criminal liability is based upon imputing the acts and intent of corporate agents to the entity itself. In general, a corporation is criminally liable for the acts of an agent, or employee, when those acts are done within the scope of the agent's authority, in the course of the agency, and when they have a purpose to benefit the corporation.<sup>29</sup> For the most part, it is immaterial whether the corporation actually benefits from the act.<sup>30</sup> But in every case the pertinent inquiry is whether the general policy considerations of law enforcement, and the specific policy considerations of the criminal statute in issue, are such that the acts of the agent should be imputed to the corporation. This analysis is not unlike that which is used in deciding whether to impose civil liability on a principal for the acts of his agent—so called respondeat superior liability.<sup>31</sup> The best course for plaintiffs is to reach the corporation through its relationship with the agent who has engaged in racketeering activity. Common law rules of agency are enough to expose a corporation to RICO liability when a corporate agent has violated the statute while acting within the scope of his agency. But even this rule, which follows directly from common law principles, is subject to dispute in the RICO context.

### III. TRUE RESPONDEAT SUPERIOR LIABILITY

Only a handful of decisions have addressed directly the question of respondeat superior liability under the Act. The question has also received some attention in legal commentary.<sup>32</sup>

In one of the first such decisions, *Parnes v. Heinhold Commodi-*

27. See Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U.L.Q. 393, 415 (1982) [hereinafter cited as Brickey].

28. *Sedima*, 741 F.2d at 501 ("RICO liability simply does not exist without criminal conduct. . . ."). *Haroco*, 747 F.2d at 404 ("RICO liability must be based, after all, on findings of criminal conduct").

The "burden of proof" issue—whether to require Civil RICO plaintiffs to prove a case beyond a reasonable doubt or by a preponderance of the evidence—is a separate matter. See *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) and *Haroco*, 747 F.2d at 404.

29. See *United States v. Demairo*, 581 F.2d 50 (2d Cir. 1978); *United States v. Carter* 311 F.2d 934, 942 (6th Cir. 1963); and *United States v. Local 560, Int'l Bhd. of Teamsters*, 581 F. Supp. at 337.

30. See *Old Monastery Co. v. United States*, 147 F.2d 905 (4th Cir. 1945); *United States v. Gibson Products Co.*, 426 F. Supp. 768 (D.Tex. 1976).

31. See Brickey, *supra* note 27, at 415-16.

32. See *Civil Fraud in Context*, *supra* note 16, at 286-325.

*ties, Inc.*,<sup>33</sup> (*Parnes*), Judge Shadur of the Northern District of Illinois, concluded that the normal rules of civil liability do not necessarily apply in cases brought under RICO. *Parnes* is interesting, at least in part, because it presents a “routine” securities case in which the plaintiffs alleged that they had been damaged, by fraudulent trading practices of two of the defendants employee/brokers. The plaintiffs sued the brokerage house under section 1962, alleging that Heinhold Commodities, Inc., was equally responsible with the errant brokers for the damages suffered by the plaintiff. The court first noted that a “normal reading” of section 1962(c) made the plaintiffs pleading task difficult.

Under the allegations of the Complaint the normal reading of the RICO sections would characterize brokers Keever and Costello, the two active wrongdoers, as the “persons” engaged in the conduct of Heinhold’s affairs through the brokers’ “pattern of racketeering activity.” Heinhold would normally be viewed as the “enterprise” by whom the “persons” were employed. That normal reading however gives plaintiffs no comfort, for they have sued not the alleged RICO violators—“persons” Keever and Costello— but “enterprise” Heinhold. Plaintiffs have not brought themselves within RICO’s coverage under the normal application of the statutory definitions and terms.<sup>34</sup>

Judge Shadur considered the possibility of viewing the defendant corporation as a “person” while viewing the two brokers as the “enterprise.”<sup>35</sup> He concluded that such a possibility would “turn the English language on its head.”<sup>36</sup> The judge went on to say that even if he viewed the corporation as the section 1962(c) “person” it was still necessary to impute to it the criminal acts of the two brokers/employees. He rejected that interpretation of the statute, saying,

that sort of respondeat superior application, perhaps permissible to establish ordinary civil liability, would be bizarre indeed as a means to warp the facts alleged in this case into the RICO mold. Under that theory malefactors at a low corporate level could thrust treble damage liability on a wholly unwitting corporate management and shareholders.<sup>37</sup>

The opinion recognizes that even if section 1962 permits the corporation to stand as a person, whether or not different from the enter-

---

33. 548 F. Supp. 20 (N.D. Ill. 1982).

34. *Id.* at 24.

35. He did not suggest viewing the two brokers and the corporation as an association-in-fact thus establishing the enterprise requirement.

36. *Parnes*, 548 F. Supp. at 24.

37. *Id.* at 24 n.9. Presumably, Judge Shadur would have found corporate liability under the appropriate securities laws which do incorporate “ordinary civil liability” rules. *Holloway v. Howerdd*, 536 F.2d 690 (6th Cir. 1976).

prise, RICO, by itself, does not answer the question when to impute racketeering acts of an agent or employee to the corporation.

The next significant RICO opinion dealing with respondeat superior liability is *Dakis v. Chapman, (Dakis)*.<sup>38</sup> Again, the case arose in a somewhat routine securities context: the plaintiff alleged that the defendant's broker/employee had "churned" her late husband's brokerage account over a long period of time causing substantial losses which were undiscovered until after her husband's death. The court assumed that the complaint made out multiple violations of federal securities laws. The court concluded, however, that the complaint failed to state a RICO claim against the defendant brokerage houses because it did not "allege more than respondeat superior liability on either firms' part in any security violation committed by [the offending broker]."<sup>39</sup> The *Dakis* court stated it as follows:

RICO draws a significant distinction between the aggressor enterprise, legitimate or illegitimate . . . and the infiltrated or injured enterprise. Here, the firms can only be characterized as "conduits" through which [the offending broker] conducted his churning—themselves victims of an ongoing rule infraction by an employee. Although, it isn't necessary that the aggressor enterprise be formally distinct from the "responsible person(s)" (§ 1962(c)), it is necessary that whomever is to be held liable under RICO has him(it)self been actively engaged in the pattern of racketeering.<sup>40</sup>

The court did recognize that the brokerage firms would be responsible under a theory of respondeat superior liability for violations of the securities laws committed by corporate agents or employees, but it was unwilling to extend such liability to claims brought under RICO.<sup>41</sup>

The third important case in this series is *Bernstein v. IDT Corporation*.<sup>42</sup> There, the plaintiff, who was the trustee in bankruptcy of Frigitemp, Inc., sued General Dynamics Corp. and various individual defendants for looting Frigitemp by demanding kickbacks and illegal rebates in exchange for subcontract work at General Dynamics' Quincy Shipyard. The complaint alleged that the culpable acts of bribery and extortion were committed by senior officers of General Dynamics in the course of their employment, thus exposing

38. 574 F. Supp. 757 (N.D. Cal. 1983).

39. *Id.* at 759.

40. *Id.* at 760 (citations omitted).

41. *Id.* The court went so far as to suggest that the brokerage firms had viable RICO claims against their faithless employee. On the facts of *Dakis* that may have been true, but it doesn't have much to do with the question whether the corporation should be liable to innocent third parties who have been defrauded by a corporate employee acting in the scope of his authority.

42. 582 F. Supp. 1079 (D. Del. 1984).

General Dynamics to vicarious liability for the resulting damage. The RICO count, fashioned under section 1962(c), specifically alleged that General Dynamics and two of its corporate officers “conducted the affairs of General Dynamics through a pattern of racketeering activity.”<sup>43</sup> The plaintiff, apparently relying on *Hartley*, set about squarely to prove that General Dynamics through its corporate officers had conducted its own affairs through a pattern of racketeering activity.

Judge Stapleton recast the issue significantly. After alluding to the split between *Hartley* and *Computer Sciences*, he made the point that the relevant considerations are different in the context of a civil lawsuit. He reasoned that since *Hartley* and *Computer Sciences* were criminal cases it was necessary to decide whether an enterprise may be charged as a “person” under section 1962, and if so whether that section contemplates an identity between the person charged and the enterprise. That is so because the law generally does not recognize vicarious *criminal* liability, although a corporation may be criminally liable through the acts of its agents done within the scope of their authority for the benefit of the corporation.<sup>44</sup>

The issue in *Bernstein*, on the other hand, was General Dynamics’ civil liability for RICO violations committed by two of its officers. The court concluded that General Dynamics could be held liable civilly under the circumstances.

When conduct is proscribed by a federal statute and civil liability for that conduct is explicitly or implicitly imposed, the normal rules of agency law apply in the absence of some indication that Congress had a contrary intent. . . .

The trustee here alleges that the corporate officers committed a statutory tort by conducting the affairs of General Dynamics through a pattern of racketeering activity in violation RICO. That activity included extortion of kickbacks and misrepresentation in a bankruptcy proceeding. I perceive nothing in RICO or its legislative history which would suggest that the normal rule of agency not apply to the civil liability created by that statute. To the contrary . . . it appears to me that application of the doctrines of apparent authority and respondeat superior will, at least, in most instances further the statutory goals.<sup>45</sup>

Shortly after *Bernstein* was decided, Judge Hardy of the district court of Arizona decided *O’Brien v. Dean Witter Reynolds, Inc.*,<sup>46</sup> (*O’Brien*), which followed *Dakis* and *Parnes*. *O’Brien* was yet another “churning” case brought under both the federal securities laws and the civil RICO provisions. The plaintiff attempted to

---

43. *Bernstein*, 582 F. Supp. at 1082.

44. See Brickey, *supra* note 27, at 415.

45. *Id.* at 1083-84 (citations omitted).

46. 1 RICO Litig. Rptr. 153 (D. Ariz. 1984).

reach Dean, Witter through an allegation that the company had failed to supervise adequately the activities of its broker. The court concluded that negligence alone will never suffice to establish liability under section 1962.<sup>47</sup> But the court went on to note that even if the plaintiff sought to reach Dean, Witter solely through the acts of its authorized agent, the complaint under RICO would be deficient. Judge Hardy apparently thought that the determinative question was whether Dean, Witter had "knowledge" of the fact that its broker had engaged in a pattern of racketeering activity. He held squarely that "the knowledge of a defendant may not be imputed to another by the doctrine of respondeat superior."<sup>48</sup> He gave the plaintiffs leave to file an amended complaint alleging that Dean, Witter "knowingly or intentionally participated in [the broker's] racketeering activities."<sup>49</sup> The opinion leaves unanswered what kind of evidence would support a finding that the brokerage firm had intentionally participated in such activities. The opinion also misconstrues the doctrine of respondeat superior, although in all fairness, it seems that the complaint was vague at best.<sup>50</sup> The doctrine of respondeat superior does not impute knowledge or intent but rather holds the principal strictly liable for the acts of his agent done within the scope of the agency.<sup>51</sup>

Of the few civil RICO cases discussing respondeat superior liability, only *Bernstein* placed any substantial reliance on RICO's closest analog—the antitrust laws.<sup>52</sup> In concluding that General Dynamics could be held liable under the civil RICO provisions, the *Bernstein* opinion placed appropriated reliance on the recent Supreme Court decision in *American Society of Mechanical Engineers v. Hydrolevel Corp.*,<sup>53</sup> (*Hydrolevel*). *Hydrolevel* was a suit under section 4 of the Clayton Act for damages arising out of alleged violations of sections 1 and 2 of the Sherman Act.<sup>54</sup> *Hydrolevel Corp.* brought suit against the American Society of Mechanical Engineers (Society or ASME), a nonprofit trade association which among other things

47. *Id.* at 157.

48. *Id.*

49. *Id.*

50. The Eleventh Circuit opinion in *Hartley* makes a passing reference to the issue of respondeat superior liability under the Act. In a footnote the court said, "[s]ince a corporation is liable for the acts of its agents and employees, it permits an employee's activities to serve as proof of the two predicate acts required by section 1962(c). This is simply a reality to be faced by corporate entities. With the advantages of incorporation must come the attendant responsibilities." *Hartley*, 678 F.2d at 988-89 n.43. *Hartley*, of course, was a criminal case which raised slightly different issues.

51. See PROSSER, *supra* note 5, § 69.

52. See Blakey & Gettings, *Racketeering Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980).

53. 456 U.S. 556 (1982).

54. 15 U.S.C. §§ 1, 2 (1982).

promulgates professional engineering standards. Hydrolevel sued ASME when it discovered that one of its competitors had improperly participated through an ASME subcommittee in promulgating certain design standards which adversely affected Hydrolevel's competitive position. In promulgating the safety standard at issue, the Society acted solely through two members of its Boiler and Pressure Vessel Committee who were full-time employees of a company in direct competition with Hydrolevel. The effect of the safety standard was to prefer the competitor's design for the emergency fuel cutoff over Hydrolevel's. Since the standards had significant influence in the industry, Hydrolevel's business was ruined after the fuel cutoff standard was issued. The question before the court was "the Society's civil liability under the antitrust law for acts of its agents performed with apparent authority."<sup>55</sup>

The Supreme Court canvassed the federal cases dealing with the civil liability of a principal for the acts of an agent in a number of statutory and common law contexts. The Court noted that "[i]n a wide variety of areas, the federal courts . . . have imposed liability upon principals for the misdeeds of agents acting with apparent authority."<sup>56</sup> Liability, the Court said, "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."<sup>57</sup> Thus, the Court concluded that the fundamental question was whether the well-recognized rule that a principal is responsible for the acts of his agents done within the scope of the agent's authority was "consistent with the intent of the antitrust laws."<sup>58</sup> The Justices, with reasoning that is strikingly apt in the context of civil RICO, held squarely that the antitrust laws, including their treble damage provisions, contemplate that a principal shall be liable for the acts of his agent done with apparent authority. The Court based its holding on three broad grounds.

First, the Court found that the threat of vicarious civil liability will have an appropriate deterrent effect in the industry.

It is true that imposing liability on ASME's agents themselves will have some deterrent effect, because they will know that if they violate the antitrust laws through their participation in ASME, they risk the consequences of personal civil liability. But

---

55. *American Soc. of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 558-59 (1982).

56. *Id.* at 568.

57. *Id.* at 566 (quoting RESTATEMENT (SECOND) OF AGENCY § 261, at 571 (1957)).

58. *Id.* at 570.

if, in addition, ASME is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future. “[P]ressure [will be] brought on [the organization] to see to it that [its] agents abide by the law.” Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps.<sup>59</sup>

Second, the Court concluded that vicarious civil liability under the antitrust laws is not limited to situations in which the agent acts to benefit his principal. The court held that a rule limiting corporate vicarious liability to cases where the agent acts to benefit the corporation is “irrelevant to the purposes of the antitrust laws.”

Whether they intend to benefit ASME or not, ASME’s agents exercise economic power because they act with the force of the Society’s reputation behind them. And, whether they act in part to benefit ASME or solely to benefit themselves or their employers, ASME’s agents can have the same anticompetitive effects on the marketplace. The anticompetitive practices of ASME’s agents are repugnant to the antitrust laws even if the agents act without any intent to aid ASME, and ASME should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority, especially those who use their positions in ASME solely for their own benefit . . . .<sup>60</sup>

Finally, and perhaps most importantly, the Court concluded that it is not inappropriate under the antitrust laws to impose treble damage liability on a principal for the acts of his agent done with apparent authority.

Treble damages “make the remedy meaningful by counterbalancing ‘the difficulty of maintaining a private suit’ ” under the antitrust laws. Since treble damages serve as a means of deterring anti-trust 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.<sup>61</sup>

As the opinion duly notes, even the Restatement (Second) of Agency, which limits a principal’s vicarious liability for punitive damages, takes the position that a principal may be liable vicariously for punitive damages when that liability is based upon a statute which has its own enhanced damages provision.<sup>62</sup>

---

59. *Id.* at 572.

60. *Id.* at 574.

61. *Id.* at 575-76 (citations omitted). The *Hydrolevel* opinion also notes that such a limitation on the principal’s liability for punitive damages may be misplaced when the principal is a corporation which can act only through an agent. *Hydrolevel*, 456 U.S. at 575 n.14.

62. RESTATEMENT (SECOND) OF AGENCY § 217C, Comment c at 474 (1958).

For the most part, the policy arguments for vicarious antitrust liability advanced by the majority in *Hydrolevel* can be made with equal force under the civil RICO provisions. Moreover, the statutory arguments for vicarious antitrust liability all have an analog under RICO.<sup>63</sup> At the policy level, it is clear that the legislative history of both the antitrust laws and RICO evince a congressional intent that the statutes be liberally construed to effectuate their broad remedial purposes.<sup>64</sup> The vicarious liability of a corporation for the acts of its agents and employees is well established at common law, even where those acts are *ultra vires* of the corporation.<sup>65</sup> To the extent that vicarious liability functions to influence corporations to supervise their employees, it can be argued that there is little reason to distinguish between the antitrust laws and RICO; the need to provide inducements to corporate responsibility is as great with respect to RICO violations as with antitrust violations. From an economic standpoint, the corporation is best able to spread the risk of damage from racketeering activity by corporate agents. Finally, if the treble damage provisions of the antitrust laws and RICO are understood primarily as an incentive to private litigants rather than as punitive damages, then there is no obvious conflict between enhanced damages and vicarious liability. If anything, enhanced damages provide an effective incentive only when coupled with vicarious liability because vicarious liability is usually the only way to expose a "deep pocket."<sup>66</sup>

---

63. A relatively minor factor in the *Hydrolevel* decision, but one which applies with equal force in RICO cases, is the fact that the definition of a "person" who may be liable under the antitrust laws includes "corporations and associations." *Hydrolevel*, 456 U.S. at 573 n.11. 18 U.S.C. § 1961(3) defines a person who may be liable under RICO to include "any individual or entity capable of holding a legal or beneficial interest in property." An entity, like a corporation, can only act through natural persons; since RICO contemplates "entity" liability just as the antitrust laws contemplate "corporate" liability, the statutes necessarily contemplate some vicarious liability.

64. See *Hydrolevel*, 456 U.S. at 573 n.11.

65. In the early case of *State v. Morriss & Essex & R.R.*, 23 N.J.L. 360 (1852), the New Jersey Supreme Court rejected the argument that a corporation cannot commit a criminal act because its charter does not confer the power to do so. The court said:

According to the doctrine contended for, if they do an act within the scope of their corporate powers it is legal, and they are not answerable for the consequences. If the act be not within the range of their corporate powers, they had no right be law to do it, it was not one of the objects for which they were incorporated, and therefore is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice.

*Id.* at 369.

66. At the statutory level, it has already been noted that both the antitrust laws and RICO define a "person who may be liable very broadly to include corporations and other collective entities. Moreover, the particular language which Congress used in creating the private right of action under 18 U.S.C. § 1964 is modeled closely on the language of section 4 of the Clayton Act. See *Bankers Trust*, 741 F. 2d at 517. There is,



## IV. A FUNCTIONAL ANALYSIS

Professor Blakey has written that it is appropriate first to characterize the role of the corporation with regard to the pattern of racketeering activity before deciding whether to impose civil RICO liability on the corporation.<sup>67</sup> In general, he favors imposing such liability when the corporation is a "perpetrator," or when it acts as an "instrument or conduit" for the offending activity.<sup>68</sup> He opposes civil liability when the corporation is itself the victim of racketeering.<sup>69</sup> However, it is not always easy to determine exactly what role the corporation plays. More troublesome is the fact that in many racketeering schemes orchestrated by corporate agents, the corporation may have characteristics of a "perpetrator," an "instrument" or "conduit," and a "victim." The corporation's role may change over time. Within Professor Blakey's framework, it is difficult, for example, to characterize the corporation's role in a typical securities churning case. The brokerage house, which has done nothing more than employ the offending broker, may actually realize a short term benefit from the broker's illegal activities. But, in all probability, it will also suffer a long-term loss from such activity, particularly if the activity is uncovered and prosecuted vigorously. It is clear under federal securities law that a brokerage house can be held liable for the fraudulent activities of an errant broker/employee in the usual case.<sup>70</sup> It is difficult to see why the result should be different under RICO for securities law violations which also make out a case under RICO. Yet, in *Dakis*, which involved broker-level securities law violations, the district judge concluded that the brokerage house "suffered direct economic harm" from the activities of its faithless employee; thus, it was inappropriate to impose vicarious liability on the brokerage house.<sup>71</sup> *Dakis* is consistent with Professor Blakey's analysis if the brokerage house was a true victim of the broker's fraudulent activity. That question, however, would spark debate. As a matter of fact, one does not have to go beyond Professor Blakey's writing to see the debate. He makes the point that in *Parnes*, the court "grasped the correct principle" but, alas, "incorrectly applied it."<sup>72</sup> *Parnes* involved unadorned securities fraud not unlike the pattern in *Dakis*. The plaintiff sought to reach the brokerage house based on a theory of respondeat superior. Judge

---

finally, a clear congressional mandate as to each that the law be liberally construed to effectuate its purpose. *See id.* at 521 (Cardamone, J., dissenting).

67. *See Civil Fraud in Context, supra* note 16, at 307-25.

68. *Id.* at 323-24.

69. *Id.* at 323.

70. *Holloway v. Howerdd*, 536 F.2d 690 (6th Cir. 1976).

71. *Dakis*, 574 F. Supp. at 760.

72. *See, Civil Fraud in Context, supra* note 16, at 323 n.179.

Shadur, wrestling with the treble damage provision and the statutory label “racketeer,” concluded that it would be inequitable to hold the brokerage house liable where it was victimized by its own “low-level” employee. But Professor Blakey disagrees that, on the facts of *Parnes*, the brokerage house was a victim. For him “the facts alleged make the [brokerage house] not a victim, but a perpetrator, which hardly casts [it] in a sympathetic role.”<sup>73</sup> The analysis is inherently difficult to apply because there is often dispute over the true role of the corporation. A rule which yields such divergent results on one set of facts is of almost no help to plaintiffs and defendants alike.

Moreover, Professor Blakey concedes that even within his analytical framework, the most difficult cases are those in which the corporation functions as an instrument or conduit for the racketeering activity.

A more difficult issue, however, is presented by the role of “instrument.” The enterprise is used in the unlawful conduct, but it is not its author in the same sense as it is when the enterprise is the “perpetrator.” Nonetheless, it is not wholly innocent, as when it plays the role of purely a “prize” or “victim.” The crucial issue comes down to determining the general impact of vicarious or entity liability in controlling the unlawful conduct. Should the risks of loss be shifted for civil liability? Would a broadening of the onus of criminal responsibility tend to alter the conduct of other individuals or those who are in charge of the entity, so that the unlawful conduct itself would be curtailed? On balance, the remedial purposes of RICO tip judgment toward finding civil liability, but not criminal responsibility for the enterprise when its role is purely that of “instrument.”<sup>74</sup>

Unfortunately, Professor Blakey offers little guidance on the difference between a perpetrator, an instrument, and a victim. The conceptual problems in characterizing corporate behavior may be almost insurmountable in some cases, like, for example, stockholder derivative suits carrying RICO allegations.

The Seventh Circuit in *Haroco* adapted Professor Blakey’s policy analysis to a statutory-construction analysis to achieve the same result. The *Haroco* court reasoned that since section 1962(c) contemplates separate identities for person and enterprise, there can be no direct “enterprise liability” under that section. The Court went on to say, however, that inasmuch as subsection (a) contemplates an identity between person and enterprise, a corporation (enterprise) may be liable under that subsection “if it receives income derived directly or indirectly from a pattern of racketeering activity in

---

73. *Id.*

74. *Id.* at 323-24 (footnote omitted).

which [it] has participated as a principal within the meaning of 18 U.S.C. § 2, and if [it] uses the income in the establishment or operation of an enterprise affecting commerce.”<sup>75</sup> The *Haroco* decision apparently would limit corporate civil liability to those cases in which the corporation has participated in the racketeering activity at least as an “aider and abettor,” under traditional tests of corporate criminal responsibility.<sup>76</sup> This approximates Professor Blakey’s category of cases in which the corporation is a “perpetrator.” It probably excludes, however, a great number of cases in which Professor Blakey would characterize the corporation as an instrument or conduit—for him a nexus sufficient for imposing civil liability.<sup>77</sup> Moreover, the rule in *Haroco* requires some degree of corporate participation sufficient at least to make the corporation an accessory under 18 U.S.C. section 2. In that respect it is at odds with *Hydrolevel* and more traditional jurisprudential tests for vicarious civil liability.<sup>78</sup> In *Cenco Inc. v. Seidman & Seidman*,<sup>79</sup> another judge in the Seventh Circuit made the point that “[a]nyone who would be guilty in a criminal proceeding of aiding and abetting a fraud would be liable under tort law as a participant in the fraud since aider and abettor liability requires participation in the criminal venture.”<sup>80</sup> That Congress could have intended such a substantial change in civil liability tests without a clear expression in the statute is doubtful at best. The legislative history of the Act is also silent on this point.

---

75. *Haroco*, 747 F.2d at 402 (emphasis added by the court).

76. 18 U.S.C. § 2 (1948) provides as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Liability as an aider and abettor is established when the evidence shows that the defendant associated himself with the venture, that he wished to bring it about, and that he sought by his actions to make it succeed. *United States v. Thomas*, 676 F.2d 531 (11th Cir. 1982).

77. Although, on balance, Professor Blakey would impose civil liability on a “conduit” corporation, he would not impose criminal liability. *Civil Fraud in Context*, *supra* note 16, at 324. *Haroco* makes the cogent point that there are “no statutory grounds for such a distinction between civil and criminal liability.” *Haroco*, 747 F.2d at 404.

78. *Haroco* also cites with approval the statement in *United States v. Hartley* that a corporation is generally liable for the acts of its agents and employees. *Haroco*, 747 F.2d at 401 n.18. But *Haroco* does not cite the Supreme Court decision in *Hydrolevel* which has obvious application to RICO cases raising vicarious liability issues. And, as noted above, the rule suggested by *Haroco* in dictum is probably a good deal more narrow than the broad rule in *Hydrolevel*.

79. 686 F.2d 449 (7th Cir. 1982).

80. *Id.* at 453.

## V. AN ECONOMIC ANALYSIS

Among those courts which have refused to impose vicarious corporate liability in civil RICO cases, the chief concern expressed is whether it is appropriate to impose a treble damage remedy on a corporation which may not have benefited from the racketeering activity, and whose liability is wholly derivative.<sup>81</sup> To a lesser extent, the courts have been concerned with the label "racketeering activity" when it is applied to activity which is not characteristic of organized crime and which has no connection to organized crime.<sup>82</sup>

From an economic standpoint, the issue is whether enhanced damages (more than simple damages) can be imposed on a party whose liability is derivative, without causing substantial diseconomies. The issue can be broken down into its component parts: derivative or vicarious liability and enhanced damages.<sup>83</sup>

### A. Vicarious Liability

Vicarious liability is, from the viewpoint of the defendant, strict liability because it is imposed without respect to the defendant's fault. Modern theories of damages justify strict liability on several bases. First, it provides a greater incentive for those exposed to such liability to take cost-effective precautions to avoid the liability. Cost-effective precautions are those which cost less than the overall cost of whatever damage or loss the precaution is designed to prevent. In general, the overall cost of an accident is a function of the actual damages which will result and the probability that the accident will occur. Economists theorize that in a free market, unconstrained by other forces, there is an obvious incentive to undertake those precautions which cost less than the overall damage which they prevent.<sup>84</sup> The incentive exists whether we use a fault based, or a strict liability standard. One of the principal objects of any system of compensation is to set the incentive level high enough to prevent uneconomical losses without wasting resources on unnecessary precautions. When the Supreme Court ruled in *Hydrolevel* that the antitrust laws contemplate vicarious corporate liability, it clearly recognized the upward pressure on such incentives which it

---

81. See *Dakis v. Chapman*, 574 F. Supp. 757, 760 (N.D. Cal. 1983). See also *Parnes v. Heinhold Commodities, Inc.*, 548 F. Supp. 20, 24, 24 n.9. (N.D. Ill. 1982).

82. See, e.g., A.B.A. Sec. of Crim. Justice, *Report to the House of Delegates*, § 1 (commentary) (Aug. 1982); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980).

83. Much of this discussion draws from R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977) [hereinafter cited as R. POSNER]; But see Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419 (1980).

84. *Id.* at 122-23.

was exerting.<sup>85</sup>

It can be argued that the incentive to prevent loss should be highest when one party to the transaction has a low (or no) capacity to take the precautions necessary to prevent loss. Professor Posner<sup>86</sup> has said that respondeat superior liability is particularly justified where "potential victims of the injury are not in a good position to make adjustments that might in the long run reduce or eliminate the risk of injury."<sup>87</sup> Imagine for example, a small business trying to protect itself from the possibility that five or six executives at a large commercial bank are fraudulently keeping the prime interest rate at higher than market level.<sup>88</sup> Yet, the spectre of vicarious liability for the acts of those executives will constitute a powerful economic incentive for the bank to police their activities.<sup>89</sup> We tolerate an excess of incentive because there is little chance that potential victims can protect themselves adequately.

Second, strict liability has been justified on the basis that it places ultimate responsibility on the party who is best able to spread the risk. It is assumed usually that the cost of an accident, or any other compensable loss, including the cost of insuring against the accident, can be spread more efficiently by a collective entity, than by an individual. This may be only roughly true in an economy with sophisticated insurance mechanisms, since even individuals can spread a given risk through insurance. But a corporation can also spread the cost of purchasing such insurance in a way which an individual cannot. On balance, the allocation of risk argument supports imposing strict liability in many situations where relatively large enterprises deal in the market place with relatively large numbers of individual users or buyers.

### B. *Enhanced Damages*

From the perspective of the defendant, enhanced damages—defined as more than actual damages—may function as punishment for past activity or as a deterrent to future unlawful activity. It is impossible to justify enhanced damages as punishment for past activity except in a fault-based liability system; punishment without fault makes no economic, or moral, sense.

---

85. *American Soc. of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 572 (1982).

86. Now a judge of the Seventh Circuit Court of Appeals.

87. R. POSNER, *supra* note 83, at 140-41.

88. *See, e.g., Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983).

89. It is not clear, however, that a fault-based standard would not be enough. Strict liability only means that if neither the bank nor its customer can prevent fraud by a bank employee, the loss should be shifted to the bank.

However, modern jurisprudence increasingly recognizes enhanced damages as “a method to influence future behavior” rather than as punishment.<sup>90</sup> Enhanced damages are particularly appropriate where the tortious conduct is concealable, since from the tortfeasor’s perspective the cost of engaging in the unlawful conduct is reduced in proportion to the likelihood that those costs will not be shifted from the injured party to the tortfeasor.<sup>91</sup> The civil RICO provisions have created a new cause of action for which “the closest analogy is to an action in tort.”<sup>92</sup> Moreover, the predicate crimes which constitute the core of RICO are, by and large, concealable crimes. The fact that they are concealable tends to reduce the chance that they will be discovered; thus, lowering the overall cost of the racketeering activity to the perpetrator viewed ex-ante. Enhanced damages, by increasing one variable in the equation, tend to restore the balance, providing a deterrent to future unlawful conduct.

In addition, it has been argued that where the damage consists, in the main, of a forced transfer of wealth, enhanced damages are appropriate to prevent the tortfeasor from bypassing the marketplace.<sup>93</sup> A “racketeer” who is forced to do nothing more than disgorge his ill-gotten gain, has no incentive not to engage in similar activity in the future. His next takeover may go unchallenged.

Finally, since civil RICO relies on private enforcement, enhanced damages provide an incentive to “scout up violations and enforce legal rules.”<sup>94</sup> No doubt the attorney’s fees provision of RICO was also designed as an incentive to private enforcement. There is probably little to be said, economically, for the threefold multiplier,<sup>95</sup> but it has historical precedent in the antitrust laws on which RICO was modeled.

Some of the justifications for enhanced damages which make sense in the context of direct liability, may make less sense in the context of vicarious liability. For example, the fact that enhanced damages deter transactions outside the marketplace will have very little effect on the behavior of a person or entity whose liability is derivative and who has not chosen in a meaningful sense to transact any business at all. Yet, the damage provisions of the law do not distinguish between cases of direct liability and cases of vicarious

---

90. Easterbrook, *The Supreme Court, 1983 Term - Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 44 (1984) [hereinafter cited as Easterbrook] See also *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984).

91. See R. POSNER, *supra* note 83, at 143.

92. *NSC Intern Corp. v. Ryan*, 531 F. Supp. 362, 363 (W.D. Ill. 1981).

93. See R. POSNER, *supra* note 83, at 121-22.

94. Easterbrook, *supra* note 90, at 30; R. POSNER, *supra* note 79, at 462.

95. See R. POSNER, *supra* note 83, at 235.

liability. With RICO, as with the antitrust laws, the treble damage provision is justified on the basis that it provides the necessary incentive to private litigants to enforce the law. The incentive effect does not recognize a distinction between direct and vicarious liability since it focuses solely on the plaintiff.

### CONCLUSION

If there has been confusion about the reach of civil RICO, it is because the Act imposes civil liability for criminal conduct in the context of a statute which prohibits certain *malum in se* relationships between a person and an enterprise. To this is added the fact that both “person” and “enterprise” are expansively defined so that the two concepts overlap substantially in the statute. The tests for corporate civil liability under respondeat superior and corporate criminal liability are certainly similar, but they are not the same. The chief distinction is that corporate criminal responsibility normally requires an intent or purpose to benefit the corporation; corporate civil liability extends to acts which have no purpose to benefit the corporation so long as the corporate agent acts within the scope of his apparent authority and, the transaction appears to be regular from the perspective of a third party.

Vicarious civil liability under RICO can be supported on the ground that neither the language of the statute nor its legislative history suggests that the ordinary rules of agency—including liability rules—have been displaced by RICO. This was precisely the point made in *Bernstein v. IDT Corp.*<sup>96</sup> Beyond that, however, vicarious civil liability can be supported on policy grounds in a great number of potential RICO cases which result in economic injury to persons or businesses outside of the defendant corporation. To the extent that RICO cases are brought in conjunction with other federal or pendent state claims, there will be respondeat superior liability in any event. It may not be treble damage liability, but as noted above, enhanced damages are primarily an incentive to private parties to enforce the law. The basis for that liability is irrelevant to the incentive.

Moreover, whatever the basis for imposing civil liability, RICO requires proof of criminal conduct. That fact alone should tend to limit the number of cases raising RICO exposure. The current “explosion”<sup>97</sup> of RICO litigation is, in many respects, just a relocation of commercial tort litigation from the state to the federal courts. The relocation may or may not make sense on economic and polit-

---

96. *Bernstein*, 582 F. Supp. at 1083.

97. *Sedima*, 741 F.2d at 486.

ical grounds, but it makes no sense to tamper with recognized rules of liability solely in an effort to curb federal litigation.<sup>98</sup>

All of this is not to say that other rules are not possible. One alternative would be to impose civil liability on a corporation only if the corporation, as well as its agents, would have criminal liability under section 1962 for the activity in question. This was the suggested approach of the *Haroco* court.<sup>99</sup> Of course, it is not vicarious liability at all, since it requires a finding of corporate complicity sufficient to satisfy section 1962(a). However, since corporate criminal liability is itself a species of vicarious liability, a rule like that suggested in *Haroco* would nonetheless take some account of the various factors which bear on whether a corporation should be called to answer for the acts of its agents.<sup>100</sup> From a policy standpoint, it is not beyond debate that the traditional rules for imposing civil liability on corporations are "fairer" than the rules imposing criminal liability, or that they result in a more efficient allocation of resources *ex ante*.<sup>101</sup>

The argument that a corporation, as a victim of racketeering activity, should not be responsible to innocent third parties who may have been victimized by the same activity is, for the most part, beside the point. In most cases where a corporation pays damages for the tortious acts of its agents it has a right of subrogation against

---

98. *See id.* at 487 ("The problem with RICO is not the explosion of federal litigation. Congress is of course free to create federal causes of action for civil litigants within constitutional limits not in question here").

99. *Haroco*, 747 F.2d at 401-02.

100. Perhaps the most carefully considered modern theory of corporate criminal liability is that embodied in the Model Penal Code. In general, it imposes liability on a corporation in three situations: 1) if a corporate agent violates a law while acting on behalf of the corporation within the scope of his agency and if the law plainly evinces a legislative intent to impose criminal liability on corporations; or 2) if a corporate agent fails to discharge a specific duty of affirmative performance imposed on corporations by law; or 3) when the commission of any offense is authorized, requested, or recklessly tolerated by the board of directors or a high managerial agent (as defined) acting in behalf of the corporation in the scope of his agency. A.L.I., MODEL PENAL CODE § 2.07 (P.O.D. 1962).

101. For a thorough discussion of the common law development of corporate criminal responsibility, *see* *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 254-81, 275 N.E.2d 33, 71-86 (1971). *Beneficial Finance* involved a fact pattern not unlike some of the so-called "prime rate" cases brought under RICO today. *See Haroco Inc. v. American Nat'l Bank and Trust Co.*, 747 F.2d 384 (7th Cir. 1984). In *Beneficial Finance*, the Supreme Judicial Court concluded as follows:

Considering everything we have said above, we are of opinion that the quantum of proof necessary to sustain the conviction of a corporation for the acts of its agents is sufficiently met if it is shown that the corporation has placed the agent in a position where he has enough authority and responsibility to act for and in behalf of the corporation in handling the particular corporate business, operation or project in which he was engaged at the time he committed the criminal act.

*Beneficial Finance*, 360 Mass. at 280, 275 N.E.2d at 86.



the agent. If the corporation can show injury apart from its vicarious liability, it will usually have an independent claim against its agent. The courts are quite competent to adjust rights among parties some of whom have personal liability, or derivative liability, or who are innocent. The fact that a malfeasant corporate agent may be impecunious is just a detail. We permit vicarious corporate liability in many other situations where the right of subrogation is practically worthless.

The task at hand is to identify the proper framework for analysis of the vicarious liability issues under RICO. The person/enterprise structure of the statute does not change the ordinary common law rules governing the liability of a principal for the acts of his agents. When liability questions are considered against this framework, the answers will follow. If the results are unexpected, or if they seem wholly out of proportion to the injury over the range of cases, then and only then will it be appropriate to change the rules.