

The Criminal RICO “Enterprise” via *Salerno*, *Milken*, and *Cianci*

INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (RICO) is a powerful piece of legislation devised by Congress in 1970 as a potential solution to the growing problem of organized crime in the United States. The expansive language applied in drafting the statute, in addition to a lack of distinct guidance by the Supreme Court, have facilitated RICO’s use as a weapon against a broad spectrum of defendants.

A key feature of RICO is its emphasis on the “enterprise” through which at least two predicate crimes are committed. The government has targeted defendants from an array of societal niches, prosecuting these individuals for their association with “enterprises” that have manifested themselves in a variety of forms.

This article focuses on the RICO “enterprise” and demonstrates the malleability of the enterprise prong in RICO indictments. I will provide three case studies involving the criminal prosecution of RICO defendants in the contexts of: (1) organized crime, (2) the financial sector and (3) political corruption. Through these examples and a brief description of the legislation itself, this article will exhibit the “enterprise” as a chameleon-like asset in the hands of government prosecutors.

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I. HISTORICAL PERSPECTIVE

The Racketeer Influenced and Corrupt Organizations Act (RICO) cannot truly be understood or appreciated without a snapshot of the context within which it was passed.

Prior to the passage of RICO, the government's primary weapon against organized crime - at the time dominated by the Italian Mafia or "La Cosa Nostra" - was the 1946 Hobbs Act (prohibiting robbery and extortion affecting interstate commerce).¹ In 1963, Joseph Valachi, the first member of La Cosa Nostra to turn state's witness, testified before the Senate's McClellan Hearings which had been investigating organized crime in the United States.² Valachi provided never-before heard insight into the organization of the Mafia and its hierarchical structure.³ The McClellan hearings, in addition to the 1967 Presidential Task Force on Organized Crime (the "Katzenbach Commission"), allowed Congress to develop a better understanding of crime in the U.S.⁴ The government now acknowledged not only the strength and sophistication of La Cosa Nostra but also the breadth of crimes its members committed.⁵

In 1970, Congress passed the Omnibus Organized Crime Control Act (OCCA) in an effort to strengthen the arsenal with which U.S. attorneys addressed organized criminality.⁶ Included within the Act was the Racketeer Influenced and Corrupt Organizations Act (RICO)⁷, providing prosecutors with a new formidable weapon to use against the Mafia and other criminal elements.⁸ A key feature of RICO was its focus on the concept of an "enterprise"⁹ through which "a pattern of racketeering activity"¹⁰ was committed. In the past, prosecutors went after organized crime figures who had committed specific individual crimes, many of which carried light sentences and were performed by low-level operatives.¹¹ This, in turn, allowed those sitting at the top of Valachi's hierarchy to remain relatively insulated.¹² RICO enables prosecutors to bring criminal charges against high-level, powerful criminals simply for their association with the broader "enterprise" through which predicate crimes are committed.¹³ The vastly enhanced penalties, both civil and criminal, further added to the power of the new crime-busting legislation.¹⁴

RICO may have been enacted with organized crime as its target, but the law's expansive notion of an "enterprise" has facilitated its use against a wide variety of criminals.¹⁵ Robert G. Blakey, architect of the RICO statute, steadfastly holds that RICO was not created solely as a

¹. Brian Goodwin, *Civil versus Criminal RICO and the "Eradication" of La Cosa Nostra*, NEW ENG. J. ON CRIM. & CIV. CONFINEMENT, Summer 2002, at 289.

². *Id.* at 290.

³. *Id.* at 290-91.

⁴. *Id.* at 290.

⁵. While this is a characteristic of many advanced criminal syndicates, the Mafia was the biggest threat confronting the nation at the time.

⁶. Goodwin, *supra* note 1, at 279.

⁷. *Id.*

⁸. *See id.* at 292-93.

⁹. 18 U.S.C. §1961(4) (2006).

¹⁰. 18 U.S.C. §1961(1).

¹¹. Goodwin, *supra* note 1, at 301.

¹². *Id.*

¹³. *Id.* at 295, 301.

¹⁴. *Id.* at 300-01.

¹⁵. *Id.* at 298-99.

weapon against the Mafia.¹⁶ He notes Justice Brennan's decision in *H.J. Inc. v. Northwestern Tel. Co.*,¹⁷ in which the former Justice writes:

The notion that RICO is limited to organized crime finds no support in the Act's text, and is at odds with the tenor of its legislative history. . . . Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.¹⁸

Supporting Justice Brennan and Robert Blakey's position is a clause Congress attached to the statute mandating that RICO be applied liberally.¹⁹ This clause, which has been subject to much controversy, directs that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes."²⁰ Blakey and other commentators point out that such a clause distinguishes RICO from much federal criminal law, which is regularly construed strictly for due process reasons.²¹

With this remedial directive in mind, prosecutors have brought RICO charges not only against organized criminals but also against commercial enterprises, corporate executives and politicians.²² While the targets of RICO prosecutions have been diverse, the substance of the "RICO enterprise" itself has also been varied.²³ This heterogeneity demonstrates that whatever the initial intent of its framers, the law has become a catch-all tool in the government's fight against fraud in a variety of settings.

II. THE STATUTE

A. INTRODUCTION

Many believe the true purpose of the RICO statute, despite Blakey's position and its broad contemporary application, was to help U.S. attorneys address the problem of organized crime.²⁴ The "successful" criminal organizations had begun to either filter proceeds from illegal ventures into legal enterprises or establish control over legal enterprises through illegal activity (e.g. through extortion).²⁵ These scenarios contemplated the *infiltration* of legal organizations by organized crime, a concern that had grown since the McClellan Hearings and Katzenbach Commission.²⁶ In order to stymie these ambitious organizations and their leaders, Congress

¹⁶. Robert G. Blakey, *Symposium: Law and the Continuing Enterprise: Perspectives on RICO*, 65 NOTRE DAME L. REV. 879 (1990).

¹⁷. 492 U.S. 229 (1989).

¹⁸. *Id.* at 243, 247.

¹⁹. Goodwin, *supra* note 1, at 299.

²⁰. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

²¹. Blakey, *supra* note 16, at 873, 876; Barry Tarlow, *Rico Revisited*, 17 GA. L. REV. 291, 309 (1983).

²². *Id.* at 880.

²³. This is at least partly the result of the statutory language defining the RICO "enterprise" in 18 U.S.C. §1961(4).

²⁴. Ilene H. Nagel & Sheldon J. Plager, *Rico, Past and Future: Some observations and Conclusions*, 52 U. CIN. L. REV. 456 (1983) "As the Act itself says in its statement of findings and purpose: 'The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity...; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property...;(3) this money and power are increasingly used to infiltrate and to subvert and corrupt our democratic processes.'" *Id.*

²⁵. Blakey, *supra* note 16, at 873-74.

²⁶. Goodwin, *supra* note 1, at 2901-91.

made the criminal defendant's relationship to the RICO "enterprise" a focal point of the statute.²⁷ Due to the emphasis on this relationship, as opposed to the activities of low-level criminals, it soon became evident that RICO had great potential as federal criminal law.

While effective in combating such infiltration, the statute neither requires the government to show the existence of any organized crime activity nor the infiltration of a legal enterprise by such criminals.²⁸ Whether intended by its crafters or not, the expansive language used in drafting the legislation has enabled prosecutors to target criminals of all varieties for their mere *association* with virtually any form of enterprise.²⁹ These enterprises may be legal entities or loose "associations in fact."³⁰ Therefore, a gangster's association with his own "mafia family" would bring the gangster defendant within RICO's reach just as a bond salesman's job at a large investment bank could similarly subject him to criminal liability when the other elements of RICO are met.

B. PROHIBITED ACTIVITIES (18 U.S.C. §1962)

The RICO statute is embodied in 18 U.S.C. §§1961-1968. The primary section, 18 U.S.C. §1962, has four subsections - (a), (b), (c) and (d) - that outline the activities prohibited by law. The sections that perhaps most clearly reflect the intended purpose of RICO as a tool against the infiltration of legitimate enterprises, §1962(a) and §1962(b), are ironically the least utilized.³¹ Simply put, §1962(a) regulates *investment* in an "enterprise" that would be lawful but for the illegal source of the funds, whereas §1962(b) targets the *acquisition* of an "enterprise" through unlawful means.³²

Section 1962(c) is the broadest of the four subsections and is utilized by prosecutors most often.³³ The government regularly turns to §1962(c) because the relationship the government must prove—between the defendant and enterprise—is not a particularly close one.³⁴ The burden on prosecutors in subsection (c) is merely to show that the defendant was "associated with" or "employed by" the enterprise named in the indictment.³⁵ The expansive list of such enterprises and relatively weak connection that must be proven between the enterprise and defendant means that prosecutors have a lot of flexibility in shaping the government's case.³⁶ Section 1962(c) makes illegal: (1) A defendant person, (2) employed by or associated with any enterprise, (3) who engages in or affects interstate or foreign commerce, (4) conducts or participates, directly or indirectly, in the conduct of such enterprise's affairs, (5) through a pattern of racketeering activity or the collection of unlawful debt.³⁷ Therefore, the "person" who indirectly participates in the affairs of an enterprise, through his illegal actions, is potentially

²⁷ *Id.* at 292.

²⁸ *Twenty-Third Survey of White Collar Crime*, 45 AM. CRIM. L. REV. 871, 891 (2008).

²⁹ *Id.* The infiltration of legal enterprises by organized crime took a back seat largely because it was more difficult to prove and limited RICO's use. The statute's real success came from allowing prosecutors to target a defendant for his relationship to any "enterprise" with which he was associated. *Id.*

³⁰ Goodwin, *supra* note 1, at 298.

³¹ *See Twenty-Third Survey of White Collar Crime*, *supra* note 28, 889-91.

³² David M. Ludwick, *Restricting RICO: Narrowing the Scope of Enterprise*, 2 CORNELL J.L. & PUB. POL'Y 381, 383 (1993).

³³ *See Twenty-Third Survey of White Collar Crime*, *supra* note 28.

³⁴ *Id.* at 891.

³⁵ *Id.*

³⁶ *See* 18 U.S.C. §1961(4) and 18 U.S.C. §1962(c).

³⁷ *See* 18 U.S.C. §1962(c).

subject to RICO's penalties due to mere *association* with that enterprise.³⁸

Although 18 U.S.C. §1961 defines what is meant by many of the terms used in the statute's prohibited activities, it leaves many questions unanswered and provides great flexibility to government enforcers.³⁹ A defendant can include "any individual or entity capable of holding a legal or beneficial interest in property."⁴⁰ Thus, a corporation can be the defendant person in a RICO prosecution.⁴¹ An "enterprise" is defined almost without limitation; it can be an "individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."⁴² The breadth of such definitions has facilitated multiple prosecutions of persons having absolutely no ties to organized crime.⁴³ Augmenting this is the above-noted fact that §1962(c) holds a person or entity liable for merely being "*employed by or associated with any enterprise*" that is engaged in interstate commerce.⁴⁴

A "pattern of racketeering activity" requires the commission of two predicate acts of racketeering by a defendant within ten years of each other.⁴⁵ A prosecutor is permitted to use a prior conviction as one or more of the predicate acts, but it is not required.⁴⁶ Beyond prior convictions, time-barred offenses can be predicate acts as long as the other elements of RICO are met.⁴⁷ Predicate acts can include: "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance . . . which is chargeable under State law and punishable by imprisonment for more than one year."⁴⁸ Amongst the notable federal law violations are mail fraud, wire fraud, money laundering, and securities fraud.⁴⁹

³⁸. At this point, it may be helpful to the reader to elaborate slightly on the greater burden facing the government in §1962(a) and §1962(b) prosecutions. Like §1962(c), both (a) and (b) require a defendant person to have engaged in a pattern of racketeering activity. Section 1962(a) additionally requires that a defendant "use or invest" any part of the income derived from his racketeering activity in the "acquisition of any interest in, or the establishment or operation of" an enterprise that is engaged in or affects interstate commerce. Meanwhile, §1962(b) additionally requires that a defendant, through a pattern of racketeering activity, "acquire or maintain" an "interest in or control of" an enterprise that is engaged in or affects interstate commerce. Simply put, the RICO violation in §1962(c) stems primarily from the pattern of racketeering activity itself; the defendant's association with the broad enterprise concept can be displayed in a variety of ways and the burden on the government with respect to this element is not a weighty one. In §1962(a), the violation stems from the *investment* of proceeds *from* a pattern of racketeering activity *in* an enterprise. In §1962(b), the violation stems from *control obtained over* an enterprise *through* the pattern of racketeering. In sum, proving a §1962(a) or §1962(b) violation requires more of the government and appears to more readily implicate the existence of a legal enterprise to prove investment in or acquisition of control over that entity. See 18 U.S.C. §1962.

³⁹. See Blakey, *supra* note 16.

⁴⁰. 18 U.S.C. §1961(3).

⁴¹. See L. Gordon Crovitz, *How the RICO Monster Mauled Wall Street*, 65 NOTRE DAME L. REV. 1050 (1990).

⁴². 18 U.S.C. §1961(4).

⁴³. Ludwick, *supra* note 32, at 381.

⁴⁴. *Id.*

⁴⁵. 18 U.S.C. §1961(5).

⁴⁶. Goodwin, *supra* note 1, at 293-94. However, if a civil RICO claim is predicated on a securities fraud violation, the defendant must first be criminally convicted of that violation. *Id.*

⁴⁷. United States v. Wong, 40 F.3d 1347, 1367 (2d Cir. 1994).

⁴⁸. 18 U.S.C. §1961(1).

⁴⁹. *Id.* The list is extensive and these are notable solely because of their applicability to both organized crime and non-organized crime; "The American Bar Association has expressed concern that abuse of broadly worded predicate offenses such as mail fraud may result in the imposition of disproportionately severe criminal sanctions and a flood of RICO civil actions. To remedy this problem, the American Bar Association has recommended that a racketeering pattern include at least one offense other than mail fraud and wire fraud, interstate

The final prohibited activity, §1962(d), makes it illegal to “conspire to violate any of the provisions of subsection (a), (b), or (c).”⁵⁰ The conspiracy count has been the subject of Supreme Court decisions.⁵¹ The law does not require that a defendant personally commit or agree to commit the two predicate acts required to prove a pattern of racketeering activity.⁵² Instead, a defendant must simply “intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopted the goal of furthering or facilitating the criminal endeavor.”⁵³ A defendant may therefore be convicted of a RICO conspiracy and be acquitted of both the underlying predicate charges and a RICO substantive offense.⁵⁴ It is notable that none of the four subsections defining prohibited activities contain any attached *mens rea*. Therefore, only the predicate offenses underlying the pattern of racketeering activity in a criminal RICO prosecution contain the *mens rea* needed to convict a defendant.⁵⁵

C. CRIMINAL PENALTIES (18 U.S.C. §1963)

The criminal penalties resulting from a successful RICO prosecution are enumerated in 18 U.S.C. §1963. A defendant convicted under §1962 of the statute faces a twenty-year prison sentence, a fine, or both.⁵⁶ If the predicate acts of racketeering upon which the charges are based are substantive federal crimes, a defendant faces higher cumulative maximum statutory penalties and the chance of consecutive sentences.⁵⁷ A guilty defendant also faces a sentence of life imprisonment if that is the statutory punishment attached to the predicate.⁵⁸

The remedy of forfeiture is available to prosecutors in RICO prosecutions.⁵⁹ The government may seek forfeiture of “*inter alia*, any interest acquired or maintained in violation of §1962, any interest in any enterprise operated in violation of §1962, and any property constituting, or derived from, the proceeds of racketeering activity in violation of §1962.”⁶⁰ A court can enter a restraining order or injunction, require the execution of a performance bond, or take other actions necessary to freeze property for forfeiture.⁶¹ Forfeiture proceedings can commence once an indictment is filed or even before it is filed, if there is a showing that the prosecution will likely prevail and that the failure to enter such an order may result in the property’s unavailability in the future.⁶² While forfeiture provisions were included due to the fear that assets will no longer be available should judgment be entered, federal prosecutors are

transportation of stolen goods, or sale or receipt of stolen goods.” Tarlow, *supra* note 21, at 367; interestingly, the Hobbs Act fulfilled its potential through its use as a RICO predicate. Goodwin, *supra* note 1, at 290.

⁵⁰ 18 U.S.C. §1962(d).

⁵¹ See *Salinas v. United States*, 522 U.S. 52, 61-66 (1997).

⁵² *Id.* at 61-66.

⁵³ *Id.* at 65.

⁵⁴ See *United States v. Cianci*, 378 F.3d 71 (1st Cir. 2004).

⁵⁵ *United States v. Baker*, 63 F.3d 1478, 1493 (9th Cir. 1995).

⁵⁶ 18 U.S.C. §1963(a).

⁵⁷ JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME*, 679 (4th ed. 2009).

⁵⁸ 18 U.S.C. §1963(a).

⁵⁹ For a critique of this remedy, see Crovitz, *supra* note 41.

⁶⁰ O’SULLIVAN, *supra* note 57, at 678.

⁶¹ Goodwin, *supra* note 1, at 300.

⁶² 18 U.S.C. §1963(d).

often criticized for applying the threat of pre-trial asset freezes in very different circumstances.⁶³

III. THE CONCEPT OF ENTERPRISE

The spectrum of enterprises implicated in RICO prosecutions reflects the statute's breadth and coverage. Again, the expansive list of entities defined as an enterprise in §1961(4) "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." It is notable that this list is preceded by the word "includes," leaving open the likelihood that it is not exhaustive but rather illustrative.⁶⁴

When the enterprise in question is in fact a legal entity (like Drexel Burnham Lambert, discussed below), the enterprise element is easily satisfied.⁶⁵ This relatively straightforward application of the statute would be covered by the definitional language: "any...corporation...or other legal entity."⁶⁶ Naming entities in the financial sector as the "enterprise" in a RICO prosecution is also greatly facilitated by a number of powerful RICO predicate acts that tend to implicate typical business activities.⁶⁷ The inclusion of these broad and ambiguous white collar predicates—like mail and wire fraud—stemmed from the fear that organized crime was and would continue to expand its reach into the world of legitimate business.⁶⁸ Not only may the use of such expansive language have been justified, but there was no easy way to statutorily limit the targets of RICO prosecutions to organized crime.⁶⁹ Congress was wary about making mere membership in the Mafia or another criminal organization illegal.⁷⁰ Since the Supreme Court had prohibited such status crimes as unconstitutional, Congress could not make it illegal to be classified as a certain kind of person without having committed any specific violation.⁷¹ Therefore, due to the scope of the statute's enterprise language and its inclusion of certain predicate acts, large financial sector firms are not immune from involvement despite the lack of an organized crime presence.⁷²

The enterprise element is often applied in a less orthodox and more creative fashion in §1962(c) prosecutions when wholly legal entities are not implicated.⁷³ As stated above, subsection (c) makes it unlawful for a person "associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs" through his pattern of racketeering activity.⁷⁴ A defendant can therefore be prosecuted solely for his *association* with an ambiguous kind of enterprise defined by RICO as any "group of individuals associated in fact although not a

⁶³. Crovitz, *supra* note 41, at 1060. Large Wall Street firms such as Princeton/Newport Partners and Drexel Burnham Lambert have been threatened with the pre-trial freezing of investor assets that can potentially accompany a RICO indictment. Prosecutors have used this strategy to compel settlements by principals at these firms. *See id.*

⁶⁴. *Twenty-Third Survey of White Collar Crime, supra* note 28, at 881-82.

⁶⁵. *Id.* at 884.

⁶⁶. 18 U.S.C §1961(4).

⁶⁷. Crovitz, *supra* note 41, at 1053.

⁶⁸. *Id.* at 1054-55.

⁶⁹. Goodwin, *supra* note 1, at 297-98.

⁷⁰. *Id.*

⁷¹. Crovitz, *supra* note 41, at 1051-52.

⁷². *See* Crovitz, *supra* note 41.

⁷³. Ludwick, *supra* note 32, 387-390.

⁷⁴. 18 U.S.C. §1962(c).

legal entity.”⁷⁵ Implicated in this statutory language is the involvement of a less cohesive enterprise called an “association in fact.”⁷⁶ The Supreme Court has addressed the myriad questions raised by a RICO association in fact enterprise through its decisions in both *United States v. Turkette*⁷⁷ and *Boyle v. United States*.⁷⁸

An association in fact enterprise, as per RICO, is simply a collection of individuals that have come together, but are not legally recognized as such.⁷⁹ The *Turkette* decision reinforced a view that had been prevalent in the Circuits:⁸⁰ the notion that an association in fact enterprise can be an *entirely illegal* entity.⁸¹ Writing for the Court in *Turkette*, Justice White remarked:

Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, ‘legitimate.’ But it did nothing to indicate that an enterprise consisting of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal.⁸²

If an association in fact enterprise can exist for an entirely criminal purpose, what separates its pattern of racketeering activity from its existence as an “enterprise” in the first place?⁸³

In *Turkette*, the Court attempted to elaborate upon what is necessary to show the enterprise element (in an association in fact scenario) apart from the defendant’s pattern of racketeering activity.⁸⁴ While holding that the underlying pattern of racketeering and the enterprise are in fact distinct elements, the Court did not insist that the enterprise have a clearly ascertainable structure.⁸⁵ Therefore, the proof needed to establish each of the two elements can in fact coalesce, while mindful that proof of one does not necessarily supply proof of the other.⁸⁶ The decision held that an association in fact enterprise consists of “a group of people associated together for a common purpose of engaging in a course of conduct.”⁸⁷ Such an enterprise can be demonstrated by an ongoing organization—formal or informal—and by evidence that the various associates function as a continuing unit.⁸⁸

Following *Turkette*, different circuits required a varying amount of proof with respect to

⁷⁵ 18 U.S.C. §1961(4).

⁷⁶ See *United States v. Turkette*, 452 U.S. 576 (1981).

⁷⁷ *Id.*

⁷⁸ 129 S. Ct. 2237 (2009).

⁷⁹ 18 U.S.C. §1961(4).

⁸⁰ Tarlow, *supra* note 21, at 325.

⁸¹ It is important to note that the RICO enterprise can also be a multifaceted association in fact that is comprised of (1) a collection of individuals with a criminal agenda and (2) legitimate entities that these individuals control or are affiliated with.

⁸² *Turkette*, 452 U.S. at 581.

⁸³ Such an issue may arise when there is a small group of petty criminals that rob grocery stores together. Even though the pattern of racketeering activity may be satisfied through their predicate crimes, the government is still statutorily obligated to prove that the defendant criminals were associated in fact as a separate element of the RICO violation. The question confronting the court was the extent to which the pattern of racketeering (the underlying predicate acts) could, without more, prove the enterprise element.

⁸⁴ Again, this issue arises particularly when dealing with small and loosely-affiliated criminal groups that may commit crimes, but do not necessarily have any separate structure, function or relationship. Ludwick, *supra* note 32, at 385.

⁸⁵ See *Turkette*, 452 U.S. 576.

⁸⁶ *Id.* at 583.

⁸⁷ *Id.*

⁸⁸ *Id.*

the enterprise element when dealing with an illegal association in fact.⁸⁹ A majority of the circuits interpreted *Turkette* as requiring the prosecution to prove some ascertainable structure beyond the predicates constituting the pattern of racketeering.⁹⁰ The Supreme Court did not attempt to resolve this conflict until 2009 when it reached a decision in *Boyle*.⁹¹ The Court held that a criminal association in fact enterprise may exist if it has a purpose, sufficient longevity to accomplish that purpose, and relationships among associates (which can be inferred from the underlying acts without a distinct structural hierarchy).⁹² The prosecution-friendly decision defines an association in fact broadly and appears only to require a very limited existence beyond a defendant's predicate acts to prove the enterprise element.⁹³

IV. CASE STUDIES

The following three case studies demonstrate the various forms an “enterprise” can take in criminal RICO prosecutions. The first addresses the RICO enterprise within the organized crime context and offers an example of an enterprise that is composed of a purely illegal association in fact. The second looks at the financial sector and provides an example of a seemingly legal entity named as the enterprise. The third involves an association in fact enterprise with legal and illegal components in the context of political corruption.

A. *UNITED STATES V. SALERNO*⁹⁴

As stated at the outset, federal prosecutors faced considerable odds in bringing charges and securing convictions against prominent figures in organized crime.⁹⁵ Congress corrected this problem by making “once untouchable criminals responsible for the acts of their subordinates.”⁹⁶ This effort was extremely successful in the Southern District of New York, where then U.S. Attorney Rudolph Giuliani aggressively pursued the five La Cosa Nostra “families” and their board of directors, “the Commission.”⁹⁷ The *Salerno* case provides a valuable insight into the concept of a RICO “enterprise.”

La Cosa Nostra was and continues to be composed of five families in the greater New York City area: the Genovese Family, the Gambino Family, the Colombo Family, the Bonanno Family and the Lucchese Family.⁹⁸ Through a massive FBI investigation initiated in 1980 called “Operation GENUS,” the government gathered evidence by which it was able to outline the structure, hierarchy and activities in which each of the five families engaged.⁹⁹ This evidence was used in a number of prosecutions targeting organized crime, the largest of which was the

⁸⁹. *Twenty-Third Survey of White Collar Crime, supra* note 28, at 885

⁹⁰. *Id.* The Second and Eleventh Circuits allowed proof of the predicate acts constituting the pattern of racketeering to prove the existence of the enterprise itself. *Id.* at 886.

⁹¹. 129 S. Ct. 2237 (2009).

⁹². *Id.* at 2244.

⁹³. *See id.*

⁹⁴. 868 F.2d 524 (2d Cir. 1989).

⁹⁵. Goodwin, *supra* note 1, at 301.

⁹⁶. *Id.* at 300.

⁹⁷. JAMES B. JACOBS, *BUSTING THE MOB*, 5 (New York University Press 1994).

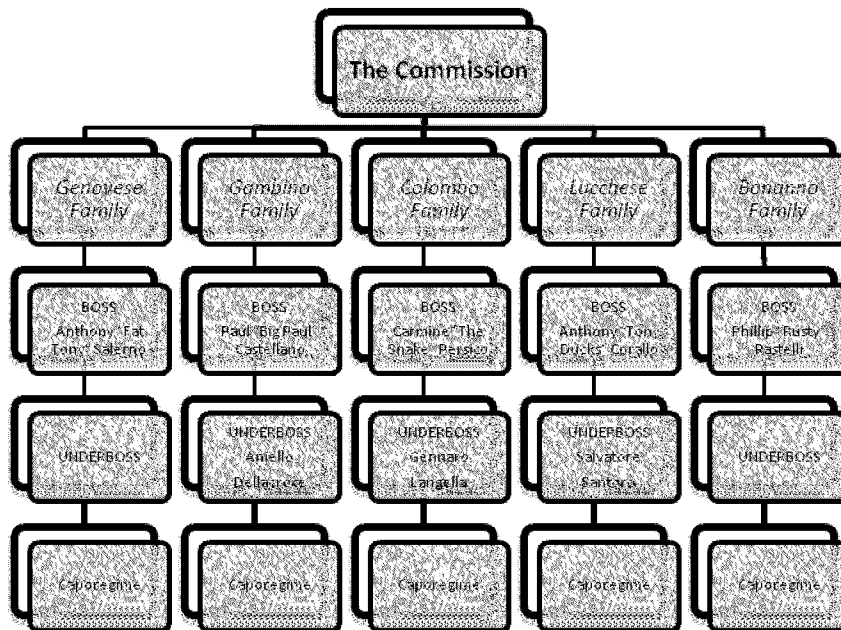
⁹⁸. Goodwin, *supra* note 1, at 305.

⁹⁹. JACOBS, *supra* note 97, at 80 (“Operation GENUS coordinated federal, state, and local agencies: FBI agents, New York City detectives and officers, assistant U.S. attorneys, as well as New York State Organized Crime Task Force attorneys and investigators.”).

1985-86 case, *United States v. Salerno*, also known as “The Commission Case.”¹⁰⁰

Through Operation GENUS and various informants, the government learned about the existence of a supervisory body called “the Commission,” which was comprised of the bosses of all five families in addition to a number of high-level subordinates.¹⁰¹ The original *Salerno* indictment charged eleven people with §1962(c) substantive RICO and §1962(d) RICO conspiracy counts.¹⁰² The government built its case around the theory that “the Cosa Nostra commission constituted a criminal enterprise; that each defendant was a member or functionary of the commission; and that each defendant had committed two or more racketeering acts in furtherance of the commission’s goals.”¹⁰³ If a defendant had not directly participated in a RICO predicate act himself, the government sought to show authorization of the act through the Commission body vis-à-vis his family.¹⁰⁴ In such a scenario, the defendant would still be “indirectly” conducting the affairs of the enterprise, which is adequate under §1962(c).¹⁰⁵

Figure 1: Simplified diagram of La Cosa Nostra hierarchy in 1985-1986. All named individuals were members of the Commission and original defendants indicted by the federal government in the *Salerno* case.



¹⁰⁰ Goodwin, *supra* note 1, at 301-02.

¹⁰¹ JACOBS, *supra* note 97, at 80.

¹⁰² This comprised the largest number of defendants ever included in a single organized crime indictment. Various events took place prior to trial involving certain defendants: Paul “Big Paul” Castellano, boss of the Gambino Family, was murdered; Gambino Family underboss, Aniello “Mr. Neil” Dellarocce, died of natural causes; and Phillip “Rusty” Rastelli, Bonanno Family boss, was severed from the case. The eight remaining defendants included: Anthony “Fat Tony” Salerno (Genovese Family boss), Anthony “Tony Ducks” Corallo (Lucchese Family boss), Carmine “The Snake” Persico (Colombo Family boss), Genarro “Gerry Lang” Langella (Colombo Family underboss), Salvatore “Tom Mix” Santoro (Lucchese Family underboss), Christopher “Christie Tick” Funari (Lucchese Family consigliere), Ralph “Little Ralphie” Scopo (Colombo Family capo) and Anthony “Bruno” Indelicato (Bonanno Family soldier). The latter two defendants were not members of the Commission, but were included in the case because of evidence that they had executed the Commission’s orders. *Id.* at 81.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 90.

¹⁰⁵ 18 U.S.C. §1962(c).

To the prosecution, the Commission comprised an “association in fact” under §1961(4).¹⁰⁶ This view was bolstered by the Supreme Court’s then recent *Turkette* decision, reaffirming the notion that an association in fact enterprise could be wholly criminal with no legitimate components.¹⁰⁷ To demonstrate that the Commission was a group of persons associated together for the common purpose of engaging in a course of conduct,¹⁰⁸ the government introduced substantial evidence laying out the history of organized crime and of the existence of the Commission dating back to 1931.¹⁰⁹ The indictment alleged that “the general purpose of the Commission enterprise was to regulate and facilitate the relationships between and among La Cosa Nostra Families.”¹¹⁰ The indictment lists specific purposes, some of which include joint ventures between families, resolving disputes between families regarding “operation, conduct, and control or illegal activities,” extending formal recognition to new family bosses, approving the initiation of new members in the families, and establishing governing rules.¹¹¹

The allegations fit squarely within the prohibited activity in §1962(c), making it illegal for a defendant merely associated with an enterprise to conduct, even indirectly, that enterprise’s affairs through a pattern of racketeering activity.¹¹² In this scenario, the enterprise was the “association in fact” Commission whose purposes the defendants conducted via their pattern of racketeering behavior.¹¹³ The racketeering activities serving as the predicates for the substantive RICO violations revolved around three separate schemes: (1) the “Concrete Club,” in which the Commission and five families controlled the companies and bidding for construction contracts involving large amounts of cement; (2) a loan-sharking operation on Staten Island; and (3) the murder of a Bonanno Family boss to resolve an internal dispute.¹¹⁴ All of the predicate acts furthered the broader purposes and goals of the Commission both by organizing joint ventures amongst the families and resolving disputes between them.¹¹⁵ The government successfully convinced the jury “that the nexus of all these acts is the continuous existence both of the Commission and its goals and means and methods of attainment of those goals.”¹¹⁶

The defendants were ultimately found guilty of seventeen acts of racketeering, and twenty related charges of extortion, labor payoffs, and loansharking.¹¹⁷ All but one defendant was sentenced to one hundred years in prison and each was fined up to \$250,000.¹¹⁸ The defendants were found guilty for their association with the Commission, which had facilitated a number of illegal predicate acts in furtherance of its goals as an association in fact RICO enterprise.¹¹⁹ The predicate acts constituting the pattern of racketeering did not need to have been committed by the defendants themselves, but could have been authorized by them and

¹⁰⁶ Goodwin, *supra* note 1, at 307.

¹⁰⁷ Tarlow, *supra* note 21, at 325.

¹⁰⁸ *Turkette*, 452 U.S. at 583.

¹⁰⁹ Goodwin, *supra* note 1, at 301.

¹¹⁰ JACOBS, *supra* note 97, at 96.

¹¹¹ *Id.*

¹¹² 18 U.S.C. §1962(c).

¹¹³ Goodwin, *supra* note 1, at 307.

¹¹⁴ *Id.* at 308-10.

¹¹⁵ *See id.* at 310.

¹¹⁶ *United States v. Salerno*, 1986 WL 1450, 1 (S.D.N.Y. Jan. 30, 1986).

¹¹⁷ JACOBS, *supra* note 97, at 86.

¹¹⁸ *Id.*

¹¹⁹ Goodwin, *supra* note 1, at 310.

performed by others.¹²⁰ Such authorization was inferred by a defendant's place in La Cosa Nostra's hierarchy.¹²¹ Thus, many argued that the government, through its use and interpretation of RICO and the RICO association in fact enterprise, had made it possible to convict a gangster simply for being a gangster.¹²²

B. *UNITED STATES V. MILKEN*

As noted earlier, an entirely legal entity can become a RICO enterprise.¹²³ When there is no connection to organized crime and the enterprise is a traditional commercial enterprise, application of the statute has often been highly controversial.¹²⁴ Drexel Burnham Lambert (DBL), the enterprise at the center of the *Milken* case, was once a massive Wall Street investment-banking firm in the 1980s that dealt in mergers and acquisitions. Michael Milken, as an employee of DBL, started their high-yield bond trading department and is often cited as creating the market for junk bonds.¹²⁵ Milken and DBL organized the issuance of these junk bonds for acquirers in order to help them raise capital to facilitate leveraged buyouts.¹²⁶ The cash obtained from the target corporation was then used to help pay back the holders of the bonds in the future. Milken was wholly successful at creating markets for the bonds, which he would issue for DBL clients.¹²⁷ At one point, Michael Milken was the "most highly paid financier in history, personally collecting more than \$1.1 billion between 1983 and 1987"¹²⁸ from DBL.

The criminal RICO indictment against Michael Milken resulted from what was initially an investigation of DBL itself.¹²⁹ In the mid-1980s, the SEC began to investigate DBL based largely on information provided by Ivan Boesky, a Drexel client who had plead guilty to securities fraud in 1987.¹³⁰ Soon after, Rudy Giuliani, the then U.S. Attorney for the Southern District of New York, instituted a separate investigation of DBL.¹³¹ In December of 1988, DBL plead *nolo contendere* to six counts of mail and securities fraud and paid \$650 million in fines.¹³²

¹²⁰ . JACOBS, *Supra* note 97, at 90.

¹²¹ . *Id.*

¹²² . Goodwin, *supra* note 1, at 311.

¹²³ . 18 U.S.C. §1961(4).

¹²⁴ . See Crovitz, *supra* note 41.

¹²⁵ . A junk bond is a speculative grade bond that generally has a greater risk of defaulting than investment grade bonds, but also promises to yield a higher return for its investors.

¹²⁶ . Kurt Eichenwald, *Milken Set to Pay a \$600 Million Fine in Wall St. Fraud*, N.Y. TIMES, Apr. 21 1990, available at: <http://www.nytimes.com/1990/04/21/business/milken-set-to-pay-a-600-million-fine-in-wall-st-fraud.html?pagewanted=1>.

¹²⁷ . When a company was unable to obtain adequate funding by other means, often in hostile takeover scenarios, DBL sometimes issued a "highly confident letter" assuring investors, banks or the target corporation that it would be able to raise the money promised in a takeover bid and that the deal would be completed. The success of such letters, which were not legally binding, reflects the skill and trust people placed in DBL and the market for junk bonds Milken had created. JAMES B. STEWART, DEN OF THIEVES, 114 (Simon & Schuster 1991).

¹²⁸ . Eichenwald, *supra* note 126.

¹²⁹ . See JESSE KORNBLUTH, HIGHLY CONFIDENT: THE CRIME AND PUNISHMENT OF MICHAEL MILKEN (William Morrow and Company 1992).

¹³⁰ . *The Collapse of Drexel Burnham Lambert; Key Events for Drexel Burnham Lambert*, N.Y. TIMES, Feb. 14 1990, available at: <http://www.nytimes.com/1990/02/14/business/the-collapse-of-drexel-burnham-lambert-key-events-for-drexel-burnham-lambert.html?pagewanted=1>.

¹³¹ . *Id.*

¹³² . *Id.*

DBL plead to the charges because prosecutors had threatened to bring a RICO indictment in which a number of partners would likely have been named as defendants and the firm itself as the RICO enterprise.¹³³ This would have led to the pre-trial seizure of firm assets to guarantee the payment of later judgments.¹³⁴ In such a scenario, investor funds could have been seized or frozen and the investors would likely have pulled out.¹³⁵ Without the capital of its investors, upon which the firm was dependent, DBL would surely have gone bankrupt before it was able to defend itself against the RICO charges in court.¹³⁶ At the end of the day “[t]his was the \$650 million question for the board of directors of Drexel Burnham Lambert, which decided that this amount in settlement of all the charges was a fair price to pay to avoid being RICOed.”¹³⁷

The illegal activity at DBL had allegedly occurred under Milken’s direction and, as part of the plea, he was removed from his post.¹³⁸ In March of 1989, U.S. attorneys from the Southern District charged Milken with ninety-eight counts of racketeering, securities fraud, and mail fraud among other crimes.¹³⁹ The mail fraud and security fraud counts alone could have served as the predicate offenses needed to prove Milken’s pattern of racketeering activity.¹⁴⁰ Furthermore, he was employed by DBL,¹⁴¹ which would have served as the enterprise whose junk bond department he had “conducted” through his racketeering as per 18 U.S.C. §1962(c). However, none of this came to fruition as Milken plead guilty to six criminal counts and paid \$600 million in fines to avoid the potential of a 20-year prison sentence from a RICO conviction.¹⁴² Milken was initially sentenced to a term of ten years in prison but had his sentence reduced to two with the support of federal prosecutors who cited his cooperation.¹⁴³

The *Milken* case provides an example of a legal entity, DBL, which was infiltrated by a “racketeer,” Michel Milken. Semantically, this may have been the kind of scenario contemplated by the architects of the RICO statute. However, Milken is certainly not part of an organized crime family and the legislation’s harsh penalties were probably not designed to punish a business like DBL. Some argue that the pre-trial forfeiture remedy exists because:

[O]rganized crime, with its foreign bases of operation, has traditionally been able not just to hide its assets but also to secretly transfer its assets outside the jurisdiction of U.S. courts. While this pre-trial procedure might make sense for cases against a Mafia family or a corrupt foreign official indicted in U.S. courts, it has perverse affects when used against legitimate businesses.¹⁴⁴

Regardless of the intent of the statute, the broad definition of a RICO enterprise and the

¹³³ . Crovitz, *supra* note 41, at 1064.

¹³⁴ . *Id.*

¹³⁵ . *Id.* A RICO case is different than any other prosecution because investor funds can be attached.

Id.

¹³⁶ . *Id.*

¹³⁷ . *Id.*

¹³⁸ . Eichenwald, *supra* note 126.

¹³⁹ . *Id.*

¹⁴⁰ . 18 U.S.C. §1961(1).

¹⁴¹ . Drexel Burnham Lambert, as part of its own plea deal, had agreed to cooperate with the government’s investigation of Milken.

¹⁴² . Eichenwald, *supra* note 126.

¹⁴³ . *Milken’s Sentence Reduced by Judge; 7 Months are Left*, N.Y. TIMES, Aug. 6 1992, available at: <http://www.nytimes.com/1992/08/06/business/milken-s-sentence-reduced-by-judge-7-months-are-left.html?scp=4&sq=Michael%20Milken%20released&st=cse>.

¹⁴⁴ . Crovitz, *supra* note 41, at 1060.

use of predicates such as mail fraud, wire fraud and security fraud have allowed federal prosecutors to bring charges against a variety of companies, firms and executives.¹⁴⁵ Indeed, the mere threat of a RICO indictment against the principals at a large financial institution, as was threatened against DBL, can have disastrous effects on the firm itself through the substantial forfeiture and asset freezing penalties.¹⁴⁶

C. *UNITED STATES V. CIANCI*¹⁴⁷

For twenty-one years, from 1975-1984 and from 1991-2002, Vincent A. “Buddy” Cianci was the mayor of Providence, Rhode Island. An immensely popular figure throughout the city, he was once described by a N.Y. Times reporter as “a kind of P.T. Barnum of Providence, ubiquitously promoting and ushering in the makeover of its downtown.”¹⁴⁸ In 2001, Buddy Cianci was indicted with two aides, Frank E. Corrente and Richard E. Autiello,¹⁴⁹ for what amounted to running the City of Providence as a criminal enterprise.¹⁵⁰ The four-year F.B.I investigation that led to the indictment, nicknamed “Operation Plunder Dome,” alleged that the defendants had used various illegal means to enrich Cianci and keep him in power.¹⁵¹

The three defendants were charged with forty-six violations of federal statutes that prohibited public corruption, two of which were substantive RICO (§1962(c)) and RICO conspiracy (§1962(d)) charges.¹⁵² The enterprise, as in *Salerno*, was an association in fact.¹⁵³ However, unlike *Salerno*, the association in fact in *Cianci* was multifaceted, containing legal and illegal entities.¹⁵⁴ Here, the enterprise was alleged to have been comprised of three entities: (1) The group of three defendants themselves (Cianci, Corrente and Autiello), (2) the City of Providence “including, but not limited to many of its departments, offices, and agencies,”¹⁵⁵ and (3) a campaign contribution fund for Buddy Cianci under his and Corrente’s control.¹⁵⁶ The federal indictment alleged that Cianci’s enterprise existed between 1991 and 1999 for the purposes of: (a) enriching Cianci through extortion, mail fraud, bribery, money laundering and witness tampering, and (b) through the same means, enriching, promoting, and protecting the power and assets of the enterprise’s leaders and associates.¹⁵⁷ The indictment tracks the language of 18 U.S.C. §1962(c), alleging that the defendants “associated with, and conducted

¹⁴⁵ . See *id.*

¹⁴⁶ . For an instructive example, see Crovitz, *supra* note 41, at 1058-65 (describing the effect of RICO on Princeton/Newport Partners, the first securities firm to have its officers charged with RICO violations). Also see *Indicted Securities Firm says it will Liquidate*, N.Y. TIMES, Dec. 8 1988, available at: <http://www.nytimes.com/1988/12/08/business/indicted-securities-firm-says-it-will-liquidate.html?scp=9&sq=drexel%20and%20RICO&st=Search>.

¹⁴⁷ . 378 F.3d 71 (1st Cir. 2004).

¹⁴⁸ . Pam Belluck, *A Sentence for Corruption Ends an Era in Providence*, N.Y. TIMES, Sep. 7 2002, available at: <http://www.nytimes.com/2002/09/07/us/a-sentence-for-corruption-ends-an-era-in-providence.html?pagewanted=1>.

¹⁴⁹ . Corrente was the City’s Administration Director and Autiello actively solicited funds for Cianci.

¹⁵⁰ . See *supra*, note 147.

¹⁵¹ . Dan Barry, *Providence Mayor is Guilty of Corruption*, N.Y. TIMES, Jun. 25 2002, available at: <http://www.nytimes.com/2002/06/25/us/providence-mayor-is-guilty-of-corruption.html?pagewanted=1>.

¹⁵² . *Cianci*, 378 F.3d at 77.

¹⁵³ . *Id.* at 82.

¹⁵⁴ . *Id.* at 79

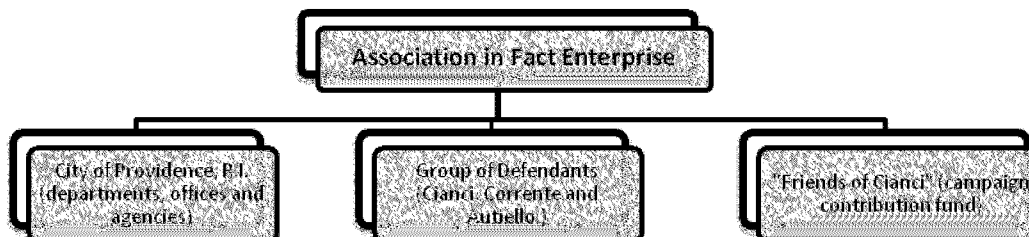
¹⁵⁵ . *Id.*

¹⁵⁶ . *Id.*

¹⁵⁷ . *Cianci*, 378 F.3d at 80.

and participated, directly or indirectly, in the conduct of the enterprise's affairs"¹⁵⁸ through a pattern of racketeering which was broken down into nine separate and detailed schemes.¹⁵⁹

Figure 2: Diagram of the association in fact enterprise implicated in *Cianci*. The illegal purposes of the entity consisting of the group of defendants were imputed to the legitimate entities in the association in fact.



Ultimately, Cianci was only convicted of one RICO conspiracy count.¹⁶⁰ The government requested that the district court submit a special verdict form to the jury containing special interrogatories for every RICO predicate act with respect to each defendant.¹⁶¹ The jury did not check off the “yes” (or guilty) box for any of the predicate acts with respect to Cianci.¹⁶² Since there was no established pattern of racketeering, Cianci could not be convicted of a substantive RICO charge. Nonetheless—as the First Circuit notes—for a RICO conspiracy conviction, a defendant simply “must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopted the goal of furthering or facilitating the criminal endeavor.”¹⁶³ Buddy Cianci was therefore found guilty of a §1962(d) RICO conspiracy violation and sentenced to five years and four months in prison.¹⁶⁴

On appeal, the defense argued that the association in fact enterprise alleged in the indictment was a legal impossibility due to the inclusion of municipal entities, citing the requirement that members of an association in fact share a “common unlawful purpose.”¹⁶⁵ The defense argued that the municipal elements included in the prosecution’s enterprise simply could not act with unlawful intent and therefore could not share in the unlawful purposes of the defendants.¹⁶⁶ The First Circuit dismissed this argument, holding that the City, as a part of the enterprise, was not required to have the same illegal purpose as the defendants themselves.¹⁶⁷ The Circuit resolved the dilemma by allowing the criminal purpose to be imputed:

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 80-81.

¹⁶⁰ Corrente and Autiello were convicted on a number of other charges, with only Corrente being found guilty of a substantive §1962(c) RICO violation. *Id.* at 77.

¹⁶¹ *Id.* at 90.

¹⁶² *Id.*

¹⁶³ *Salinas*, 522 U.S. at 65.

¹⁶⁴ Belluck, *supra* note 148.

¹⁶⁵ *Cianci*, 378 F.3d at 82. The defense relied on *Turkette* without directly citing the case. In fact, the government did not contest the requirement that it show a common unlawful purpose; the government believed that this purpose could be imputed by the defendants to the municipal entities in the association in fact.

¹⁶⁶ *Id.* Here, the defense relied partly on the Sixth Circuit decision in *United States v. Thompson*. In that case, the court held that “Criminal activity is private activity even when it is carried out in a public forum and even though the activity can only be undertaken by an official’s use of a state given power.” (*Id.* citing 685 F.2d 993, 1001 (6th Cir. 1982)). This argument was not accepted by the First Circuit in *Cianci*.

¹⁶⁷ *Cianci*, 378 F.3d at 84.

Requiring the government to prove that all members named in the enterprise shared a common purpose of illegality did not compel the government to show that the City itself had the mens rea to seek bribes and to extort. . . . Unlawful common purpose is imputed to the City by way of the individual defendant’s control, influence, and manipulation of the City for their illicit ends.¹⁶⁸

In permitting the common purpose of the associated in fact enterprise to be imputed to the City and its agencies by the defendants, the Circuit took an expansive view of the RICO enterprise element.¹⁶⁹

V. CONCLUSION

In constructing the Racketeer Influenced and Corrupt Organizations Act, Congress utilized language that has facilitated the law’s application in a variety of situations and against a broad spectrum of defendants. A number of elements needed to successfully prosecute a defendant in a criminal RICO case are highly adaptable to the government’s needs. The enterprise element is representative of this adaptability and best demonstrates the diversity of targets and entities implicated.

Figure 3: Defendant, entity and enterprise comparison table.

Defendant	Entity (through which pattern of racketeering was committed)	Enterprise
<i>Salerno</i>	The Commission	Purely Illegal Association in Fact
<i>Milken</i>	Drexel Burnham Lambert	Legal
<i>Cianci</i>	Defendants; City of Providence; Friends of Cianci	Association in Fact (legal and illegal)

While many commentators argue that RICO was not meant to be applied in certain situations or against certain defendants, its power as a weapon against “racketeers” of all stripes cannot be doubted. Until the Supreme Court sets a firm precedent with respect to the law’s use, its architects should be applauded for their foresight and skill in crafting a law that has been so effective.

Benjamin Zev Koblentz

¹⁶⁸ *Id.*

¹⁶⁹ Janelle G. Koren, *Criminal Law – RICO Enterprise Present Even if Enterprise Members do not Share an Express Common Purpose – United States v. Cianci*, 387 F.3d 71 (1st Cir. 2004), 39 SUFFOLK U. L. REV. 325, at 330-31 (2005).