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Criminal Law–Racketeer Influence and Corrupt Organization Act–Defining Enterprise

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CRIMINAL LAW—RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT—DEFINING "ENTERPRISE." *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980).

While serving as Arkansas county judges, Leslie Anderson and Leonard Mooney met Paul Baldwin, a salesman of materials required for maintenance of county roads.[1] In their administrative capacities as judges,[2] Anderson and Mooney acted as purchasing agents for their counties. They approved and authorized payments of bills and accounts, including those to Baldwin.

According to Baldwin, there were two methods he used to make purchasing through him personally lucrative to these county officials.[3] He testified that on occasion he would charge the list price on a sales slip for merchandise delivered to the county and then rebate ten percent of that price to the purchasing agent personally. At other times Baldwin would enter into a prior agreement with either Anderson or Mooney to prepare a bogus invoice for merchandise which, in fact, would never be shipped. Under this scheme the judge involved would sign for the goods, and then he and Baldwin would simply split the listed price "fifty-fifty." By use of the purely bogus invoices Anderson defrauded the citizens of Sharp County of $4,842.25, and Mooney defrauded Fulton County citizens of $7,179.72.

Anderson and Mooney were charged by indictment with twenty-eight criminal violations relating to their dealings with Baldwin. Included in the indictment were charges of racketeering activity for their participation in the conspiracy to receive the kickbacks and payoffs.[4] The defendants' denials of ever having had anything but legitimate business dealings with Baldwin did not persuade the

1. Anderson and Mooney were judges for Sharp and Fulton counties, respectively.

2. Arkansas county judges are not true judicial officers and have few judicial duties.

3. At the time of the trial Baldwin had already been convicted of paying bribes and kickbacks to other county judges and acted as the government's chief witness against Anderson and Mooney.

4. The federal statute under which the defendants were charged is Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. § 1962 (1976). The law is entitled Racketeer Influenced and Corrupt Organizations Act (RICO). The sections of RICO under which the defendants were charged are as follows:

> [§ 1962.] (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the

district court jury. Anderson and Mooney were convicted on all twenty-eight counts.

The defendants appealed their convictions to the Eighth Circuit, jointly asserting six errors on the part of the district court:

> (1) permitting the application of RICO; (2) failing to grant severance of the trial; (3) allowing the Government to introduce testimony regarding Anderson's previous felony conviction; (4) forcing the defense to reveal the names of the prospective defense witnesses during the voir dire; (5) improper rulings regarding the selection of jurors; and (6) not granting a change in venue.[5]

The Eighth Circuit reversed only the convictions under Counts I[6] and II[7], under which the defendants had been charged with violations of the federal racketeering statute known as the Racketeer Influenced and Corrupt Organizations Act (RICO).[8] *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980).

The court addressed "only the issue of statutory interpretation of the term 'enterprise' as used in RICO."[9] Courts dealing with the

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conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions [of section 1962.]

5. United States v. Anderson, 626 F.2d 1358, 1361 (8th Cir. 1980).

6. Count I of the indictment charged violation of 18 U.S.C. § 1962 (c), alleging that

> LESLIE ANDERSON and LEONARD MOONEY were persons associated with an enterprise engaged in, and the activities of which affected, interstate commerce, namely each of the said defendants and Paul A. Baldwin were associated in fact to defraud, and to obtain money by means of false and fraudulent pretenses, representations and promises from Sharp and Fulton Counties, Arkansas, and the people of said counties, and the said defendants, LESLIE ANDERSON and LEONARD MOONEY, did knowingly and willfully conduct and participate directly and indirectly in the conducting of such enterprise's affairs through a pattern of racketeering activity as defined in Title 18, United States Code, Section 1961 * * *.

United States v. Anderson, 626 F.2d 1358, 1362 (8th Cir. 1980).

7. Count II of the indictment charged violation of 18 U.S.C. § 1962(c) and (d), alleging that

> LESLIE ANDERSON and LEONARD MOONEY, defendants herein, being associated with an enterprise engaged in and whose activities affect interstate commerce, as defined in Section 1961 of Title 18, United States Code, that is the association in fact with Paul A. Baldwin, d/b/a the "Lisco" Company, did knowingly and willfully conspire, confederate and agree together and with each other, to conduct and participate in, directly and indirectly, conduct of subject enterprise's affairs, through a pattern of racketeering activity * * * .

Id.

8. Organized Crime Control Act of 1970, Title IX, 18 U.S.C. §§ 1961-68 (1976).

9. United States v. Anderson, 626 F.2d 1358, 1362 (8th Cir. 1980). " '[E]nterprise' in-

problem of construing a statute have customarily turned to the legislative history for help.

Material concerning RICO contained in the *Congressional Record* revealed that the Act is the product of two bills introduced in the Senate in 1969.[10] Both bills demonstrated congressional concern over the inability of law enforcement officers to combat the growth of organized crime and its contamination of legitimate businesses. The legislative debates that accompanied RICO's passage reflect that concern. Senator John L. McClellan, one of the bill's sponsors and floor leader at that time, warned the Senate: "With its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system."[11] The purpose of the proposed legislation was repeated throughout the debates: "to curb organized crime by strengthening the Federal criminal justice system."[12]

On October 15, 1970, the Racketeer Influenced and Corrupt Organization Act became a federal law "expressly aimed at removing the baneful influence of organized crime from our legitimate commercial endeavors. . . ."[13] The congressional statement of purpose set a high goal: to eradicate organized crime by strengthening legal tools in the evidence-gathering process.[14] Congress evidently sought to accomplish this goal by creating a new federal "racketeering" offense in RICO.[15] This offense is committed when there is a

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cludes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1976).

10. The two bills were S. 30, 91st Cong., 1st Sess., 115 Cong. Rec. 769, 827-32 (1969), introduced on January 15, 1969 by Senator McClellan, and S. 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6925 (1969), known as the Criminal Activities Profiles Act, introduced by Senator Hruska on March 20, 1969. Less than one month later Senators McClellan and Hruska jointly introduced the Corrupt Organizations Act of 1969, S. 1861, 91st Cong., 2d Sess., 115 Cong. Rec. 9512, 9566-71 (1969), and Congressman Poff introduced a companion bill in the House, H.R. 10312, 91st Cong., 2d Sess., 115 Cong. Rec. 9753 (1969). These bills merged to form Title IX, RICO, which is discussed in 116 Cong. Rec. 602 (1970).

11. 115 Cong. Rec. 5874 (1969).

12. 116 Cong. Rec. 35196 (1970). Early in 1970 a synopsis of the proposed racketeering statute was presented as follows:

> *Title IX—Corrupt Organizations*
>
> Prohibits infiltration of *legitimate organizations* by racketeers or proceeds of racketeering activities where interstate commerce is affected. . . .

116 Cong. Rec. 585 (1970) (emphasis added).

13. 116 Cong. Rec. 8670 (1970).

14. 18 U.S.C. § 1961 (1976).

15. (1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, *bribery*, extortion, or dealing in narcotic or

pattern of underlying criminal acts which occur within a ten-year period and are connected with the same enterprise.[16] The predicate offenses themselves are already defined and prohibited by other federal and state laws.[17] It is the added "enterprise"[18] element that completes the definition of a RICO offense. In other words, the predicate acts alone cannot form a violation of the statute. It is the *connection* of those criminal acts *with an enterprise* that causes defendant's conduct to violate the federal Act. Without this added "enterprise" element, conduct prohibited by the federal statute would be so similar to that prohibited by the laws defining the predicate offenses, a defendant could be tried and convicted twice for the same conduct.[19]

Although the legislative history of RICO is extensive, the history does not elaborate on the statutory definition of "enterprise." The language of the Act itself has led to varied judicial interpretations of the term. The Second Circuit was first faced with determining the scope of "enterprise" in *United States v. Parness*[20] in 1974. *Parness* held that "enterprise" does include *foreign* as well as domestic corporations.[21] Later that same year the Seventh Circuit determined that "enterprise" is meant to include *illegitimate* as well as

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other dangerous drugs, which is *chargeable under State law* and punishable by imprisonment for more than one year . . . .

18 U.S.C. § 1961 (1976) (emphasis added).

16. (5) "pattern of racketeering activity" requires at least *two* acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within *ten years* (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. . . .

18 U.S.C. § 1961 (1976) (emphasis added).

With a literal reading of this definition, RICO allows convictions in situations where the predicate offenses would be time-barred from prosecution if brought under the applicable state or federal statutes violated. Courts have consistently upheld this interpretation. *See, e.g.*, United States v. Forsythe, 560 F.2d 1127, (3rd Cir. 1977); United States v. Brown, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); United States v. Revel, 493 F.2d 1, 3 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975); United States v. Fineman, 434 F. Supp. 189, 194 (E.D. Pa. 1977), *aff'd*, 571 F.2d 572 (3rd Cir.), *cert. denied*, 436 U.S. 945 (1978). But for a strong opposing argument see United States v. Davis, 576 F.2d 1065, 1068 (3rd Cir.) (Aldisert, J., concurring), *cert. denied*, 439 U.S. 836 (1978).

17. *See* definition of "racketeering activity" in note 15 *supra* and of "pattern of racketeering activity" in note 16 *supra*.

18. *See* definition of "enterprise" in note 9 *supra*.

19. In other words, a defendant could be charged and convicted in a state court for two separate burglaries, and later that same individual could be indicted and convicted for the same burglaries under RICO simply because the crimes occurred within ten years of each other and one occurred after RICO's passage.

20. 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

21. *Id.* at 439.

legitimate businesses.[22]

In the instant case the court agreed with Anderson and Mooney that the district court had erred in permitting RICO to be applied to them. The Eighth Circuit held that RICO could reach only those involved in racketeering activity through a business or other "association having an ascertainable structure . . . that has an existence that can be defined apart from the commission of the predicate acts,"[23] *i.e.*, the underlying offenses prohibited by other state and federal laws. The circuit court did not agree with the district court that the conspiracy itself fulfilled the "enterprise" element[24] necessary to trigger the application of RICO to continuing criminal activity.

The court held that the "term 'enterprise' must signify an association that is substantially different from the acts which form the 'pattern of racketeering activity.' A contrary interpretation would alter the essential elements of the offense as determined by Congress."[25] The court would not find an association of three men conspiring to execute bribery schemes to be a RICO "enterprise." The charges named no association which would have existed independent of the predicate crimes.[26]

To reach its holding the Eighth Circuit first looked to the language of the Act. The court viewed RICO as a complex but carefully drafted piece of legislation.[27] The court followed a universal

22. United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1974). *See, e.g.*, United States v. Aleman, 609 F.2d 298, 303 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (series of house burglaries in two states); United States v. Rone, 598 F.2d 564, 568 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (association for bookmaking, mail fraud, extortion, and murder); United States v. Elliott, 571 F.2d 880, 897 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) (amoeba-like infra-structure that controls a secret criminal network); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) (illegal gambling business); United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976) (association to participate in illegal gambling); United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976) (association to defraud through illegal card games).

23. United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980).

24. *See* the definition of "enterprise" in note 9 *supra*.

25. United States v. Anderson, 626 F.2d 1358, 1365 (8th Cir. 1980).

26. The *Anderson* court suggests that both Anderson and Mooney might have been brought under RICO if the defendants had been charged by the prosecution with conducting the affairs of their county governments through a pattern of racketeering activity. The court asserted that such a formulation of the charge would have avoided the particular issue on appeal in that the county governments necessarily constitute "enterprises" separate and distinct from the pattern of racketeering activity. However, the court went on to suggest that it probably still would have been confronted with the issue of defining the scope of the term "enterprise" because the argument that the term does not encompass government agencies or offices was not settled. 626 F.2d at 1365, n.10.

27. *Id.* at 1365. *See* Iannelli v. United States, 420 U.S. 770, 789 (1975).

rule of construction by giving effect to each word of the statute in order to discover the true intention of the legislature.[28] It stressed that an overly broad interpretation of "enterprise" would effectively make that term interchangeable with the "pattern of racketeering activity" involved. The court demonstrated the flaw in expansive construction by noting that, if "enterprise" could include associations formed solely for illicit purposes with no legitimate business structure or connection, then proof of an "enterprise" could be demonstrated simply by showing collaboration to commit the pattern of racketeering activity.[29]

The court agreed with the Second and Fifth Circuits that the "enterprise" element stands as the focal point of the offense. The court determined that the "enterprise" element provides the relationship between the predicate offenses, thus preventing the prohibitions of RICO from covering purely sporadic criminal activity.

The court also noted that only by requiring proof of an "enterprise" that engages in or has activities affecting interstate or foreign commerce does section 1962(c) of RICO require proof of a fact other than those required to prove the predicate crimes.[30] Because a defendant may be separately prosecuted for the two predicate offenses, RICO, without the enterprise element, would provide the means to prosecute a defendant again for the predicate crimes. This would be a clear violation of the fifth amendment's guarantee against double jeopardy.[31]

The court stood firmly behind the premise that due process requires that criminal laws be written to give fair notice of the conduct they prohibit.[32] It stated that due process requires strict construction of the RICO provisions in spite of Congress's statement in section 904 of Pub. L. 91-452, 84 Stat. 947 (1970), that RICO "shall be liberally construed to effectuate its remedial purposes."[33] The court disagreed with other circuits which have placed reliance on that

28. *See, e.g.*, United States v. Menasche, 348 U.S. 528, 538-39 (1955).

29. *But see* United States v. Aleman, 609 F.2d 298, 303 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980), which allowed this broad construction and found that three home burglaries could provide a basis for a RICO violation.

30. United States v. Anderson, 626 F.2d 1358, 1367; *see* United States v. Solano, 605 F.2d 1141, 1143-45 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980). *But see* United States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

31. United States v. Anderson, 626 F.2d 1358, 1367.

32. *Id.* at 1369. *See also* United States v. Culbert, 435 U.S. 371, 374 (1978).

33. 18 U.S.C. § 1961 (1976).

statement as support for an expansive definition of "enterprise."[34]

The court also looked to the "rule of lenity," which requires resolution of ambiguities in penal statutes in favor of lenity, as support for its determination that a broad definition of "enterprise" is erroneous.[35] Another factor on which the court relied to reach its conclusion was that an expansive definition of "enterprise" would disrupt the balance between federal and state criminal prosecutions by bringing into the ambit of the federal statute offenses which Congress did not consider sufficiently threatening to the economy to warrant federal intervention. With an expansive definition any two of the wide range of criminal acts that can make up a "pattern of racketeering activity"[36] plus a *simple association* would provide the only elements that would have to be shown in order to permit federal prosecution in an area formerly reserved for state jurisdiction. The court stated, "We cannot assume Congress was this careless."[37]

The court concluded that without the essential "enterprise" element the defendants' conduct could not be prosecuted under RICO. The Eighth Circuit observed that there was no indication in the legislative history of RICO that "Congress ever intended to grant federal prosecutors the flexibility to pursue relatively minor offenders, having no connection with organized crime, who simply associate to commit two of the predicate crimes."[38] Rather, the court determined that the motivating policy of the Act was to free the nation's economic system from the tentacles of organized crime.

The court recognized that its decision to narrowly construe RICO provisions places the Eighth Circuit in opposition to five other circuits.[39] The opinion of one ally has been reversed,[40] and

34. *See, e.g.*, United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

35. United States v. Anderson, 626 F.2d 1358, 1370 (1980). *E.g.*, United States v. Emmons, 410 U.S. 396, 411 (1973); Rewis v. United States, 401 U.S. 808, 812 (1970).

36. *See* note 16 *supra*.

37. United States v. Anderson, 626 F.2d 1358, 1370.

38. *Id.* at 1372.

39. *See* United States v. Grande, 620 F.2d 1026 (4th Cir. 1980); United States v. Rone, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

40. United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), *rev'd in part on rehearing*, 642 F.2d 1001 (1980). Although the *Sutton* court narrowly construed the term "enterprise," that case really turned on a different issue. The Sixth Circuit defined "enterprise" in RICO as only applying to *legitimate* businesses. That court held that the "enterprise" could not be a wholly illegal operation—such as a prostitution ring—and still come under the scope of the statute. The court did not address the issue of whether the conspiracy to commit the predi-

there is only one other circuit case which also appears to construe RICO narrowly.[41]

RICO is extraordinary legislation, powerful and complex, created to battle a formidable enemy of the American economy: organized crime. The broad language of the statute lends itself easily to varying interpretations of the elements of the federal crime. By narrowly defining "enterprise," the Eighth Circuit reached the conclusion that there was no RICO violation in this case. As the court observed, the legislative history of the Act supports the position that the defendants' conspiracy with Baldwin to participate in the bribery and kickback schemes was not in itself sufficient to fulfill the "enterprise" element essential to support a RICO charge. The legislative history demonstrates that RICO was designed to eliminate organized crime's use of racketeering profits to infiltrate and control private, legitimate businesses. At present, however, there is great potential for abuse under the Act. Its sweeping language, coupled with judicial willingness to construe it broadly, has allowed the federal government to convict minor offenders whose sporadic criminal acts have no connection with organized crime or with interstate commerce.[42]

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cate offenses can itself fulfill the requirements for RICO's "enterprise" element which is the issue confronting the Eighth Circuit in the subject case.

41. United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 101 S. Ct. 938 (1981). The district court in *Turkette* held that RICO cannot reach individuals involved in wholly criminal "enterprises."

42. United States v. Grande, 620 F.2d 1026 (4th Cir. 1980) (RICO not limited to organized crime in "classic 'mobster' sense"); United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (conviction under RICO for three house burglaries); United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (forfeiture of a family restaurant on the basis of insubstantial contacts with illegal cocaine traffic).