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NEXUS: THE NEXT TEST OF RICO'S TEXT

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The United States Supreme Court will decide this term whether the phrase "to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs" in the Racketeer Influenced and Corrupt Organizations Act (RICO) requires proof that the defendant managed or operated the enterprise.[1] The circuit courts of appeal disagree over the meaning of "conduct or participate in the conduct of the enterprise." The Eighth and District of Columbia Circuits require that one have actual participation in the management or operation of the enterprise before RICO liability can attach,[2] and the Supreme Court recently granted certiorari in an Eighth Circuit case which applied the same test.[3] The other circuits have adopted various formulations, but all are less restrictive than the manage or operate test. *Reves v. Ernst & Young*[4] will be the latest of numerous cases in which the Supreme Court has interpreted this important statute.

Although the authors of a leading RICO treatise have characterized the meaning of "conduct or participate in the conduct of the enterprise" as the "primary intellectual problem posed by the language of section 1962(c),"[5] the issue has received little scholarly attention.[6] The prob-

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> 1. 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 conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1988).

2. Bennett v. Berg, 685 F.2d 1053, 1061 n.10 (1982) *aff'd en banc*, 710 F.2d 1361, 1364 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132 (1989), *rev'd en banc*, 913 F.2d 948 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991).

3. Arthur Young & Co. v. Reves, 937 F.2d 1310 (8th Cir. 1991), *cert. granted sub nom.*, Reves v. Ernst & Young, 112 S. Ct. 1159 (1992).

4. *Id.*

5. DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO S-34-35 (1987).

6. There is only one student note solely on the issue of nexus. *See* Note, *The RICO Nexus Requirement: A "Flexible" Linkage*, 83 MICH. L. REV. 571 (1984) [hereinafter *Nexus Note*]. The Smith and Reed treatise has a section on the subject, *see supra* note 5, at § 5.04. *See also* Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 228 (1980)(section on nexus).

Most recent RICO scholarships have involved the question of whether the pattern

lem is commonly referred to as the "nexus" question.[7] This article will ask and propose an answer to the question which the Supreme Court will confront: What nexus or connection between the enterprise and the pattern of racketeering activity is necessary? Employing the statutory language, another way to frame the question is: What does it mean to conduct or participate in the conduct of an enterprise through a pattern of racketeering activity?

This article will first demonstrate that the manage or operate test adopted by the Eighth and District of Columbia Circuits is too limiting. Moreover, adoption of the manage or operate test would eviscerate the

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requirement is vague. *See* G. Robert Blakey, *Is "Pattern" Void for Vagueness?*, 5 CIVIL RICO REPORT 6, Dec. 12, 1989; G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God - Is This the End of RICO?"*, 43 VAND. L. REV. 851 (1990) [hereinafter *RICO Myths*]; Michael Goldsmith, *RICO and "Pattern:" The Search for "Continuity Plus Relationship,"* 73 CORNELL L. REV. 971 (1988); Robert D. Luskin, *Behold, the Day of Judgment: Is the RICO Pattern Requirement Void for Vagueness?*, 64 ST. JOHN'S L. REV. 779 (1990); Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691 (1990); Joseph E. Bauerschmidt, Note, *"Mother of Mercy — Is This the End of RICO?"— Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern,"* 65 NOTRE DAME L. REV. 1106 (1990); David W. Gartenstein & Joseph F. Warganz, Note, *RICO's "Pattern" Requirement: Void for Vagueness?*, 90 COLUM L. REV. 489 (1990). Most of this scholarly commentary followed Justice Antonin Scalia's concurring opinion in H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989), intimating that the Court might find the pattern component of RICO vague if squarely faced with the issue. *Id.* at 256. This has not yet happened.

Pattern of racketeering activity is defined in 18 U.S.C. § 1961(5) (1988), as requiring "at least two acts of racketeering activity, [racketeering activity being defined in 18 U.S.C. § 1961(1) (1988)] 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."

Scholars have also attended to the enterprise concept. *See* G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980); Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983); Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989).

Enterprise is defined in 18 U.S.C. § 1961(4) (1988), as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Issues which have arisen from the enterprise concept include whether the enterprise must be distinct from the pattern, whether the person and the enterprise must be distinct, and whether the enterprise can be wholly illegitimate.

7. The word "nexus" has been used in other RICO contexts which are beyond the scope of this article. This article does not attempt to discuss "nexus" as it relates to: 1) the connection between the racketeering activity and organized crime, commonly referred to as the "organized crime nexus" or 2) the connection between the racketeering acts and interstate commerce. *See* 18 U.S.C. § 1962(a) (1988) (requiring that the enterprise be engaged in, or that its activities affect, interstate commerce).

Nexus, as it is used in this article, has also been confused with the terms "employed by or associated with" in 18 U.S.C. § 1962(c) (1988) which states:

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

This article is not about whether one is "employed by or associated with the enterprise." It is about whether one conducts or participates in the conduct of the enterprise through a pattern of racketeering activity. The confusion between these concepts is clearest when discussing whether outsiders can participate in the conduct of an enterprise. *See, e.g.*, United States v. Yonan, 800 F.2d 164 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987).

RICO statute, especially in the criminal area. That test would permit prosecutors to convict only actors at the highest level in a criminal organization and would exclude "foot soldiers" who carry out the directions of those above them in the hierarchy. Experience has shown that "criminal actions far below the level of senior management can yield significant profits to wrongdoers and thwart the attainment of the enterprise's legitimate goals."[8] Congress aimed the statute at enterprise criminality, not just the "big fish."[9]

The manage or operate test would severely hamper both government prosecution of white collar crime and private civil actions to recover damages resulting from such crime. The need for both criminal and civil RICO is compelling in the aftermath of the savings and loan scandal and the collapse of the Bank of Commerce and Credit International. The manage or operate test would restrict those who could be prosecuted to senior management in the enterprise itself and exclude many who might have played significant roles in the fraudulent activity, such as accountants, lawyers, and bankers, but who are outside the enterprise. Prosecutors' ability to use RICO to prosecute economic crime would be sharply circumscribed.

Part I of this article provides a brief background of RICO. Part II describes and criticizes the principal tests for nexus between the racketeering acts and the enterprise. Part II specifically analyzes *Arthur Young & Co. v. Reves*,[10] the Eighth Circuit case in which the Supreme Court has granted certiorari, and *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*,[11] the District of Columbia Circuit Court case which most thoroughly articulates the manage or operate test. Part III finds that the manage or operate test has no support in RICO's text or legislative history. Part IV explores the detrimental implications of adopting the manage or operate test. Part V analyzes RICO jurisprudence of the Supreme Court. Part VI suggests that the Court apply traditional principles of statutory construction and reject the manage or operate test. Part VI also proposes an ordinary meaning approach to nexus that would better effectuate the purposes of the RICO statute.

PART I. A BRIEF HISTORY OF RICO

RICO is one of the most controversial statutes that Congress ever enacted. It was enacted as part of the Organized Crime Control Act of 1970.[12] Use of RICO was infrequent until the mid-1970s. Controversy

8. Brief of the United States as Amicus Curiae at 17, Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132 (D.C. Cir. 1989), *rev'd en banc*, 913 F.2d 948 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991) [hereinafter *Amicus Curiae Brief*].

9. United States v. Elliott, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) (cited in Fort Wayne Books v. Indiana, 489 U.S. 46, 80 n.24 (1989)). *See also* Bauerschmidt, *supra* note 6, at 1108.

10. 937 F.2d 1310 (8th Cir. 1991), *cert. granted sub nom*, Reves v. Ernst & Young, 112 S. Ct. 1159 (1992).

11. 883 F.2d 132.

12. Pub. L. No. 91-452, 84 Stat. 941 (codified at 18 U.S.C. §§ 1961-68 (1988)).

began in the criminal arena when prosecutors applied the statute in actions against white collar criminals instead of solely to traditional "Mafia-type" organized crime. Civil RICO has engendered controversy ever since it began to be used by the private bar in about 1975.[13]

The origins of RICO and its intended scope are a matter of dispute. Gerard Lynch concludes that Congress intended RICO principally as a tool for attacking the specific problem of infiltration of legitimate business by organized crime.[14] G. Robert Blakey, RICO's principal drafter, disagrees. He asserts that RICO was intended to deal with the infiltration of legitimate business by organized crime, but it was also intended to encompass the much broader goal of dealing with all forms of "enterprise criminality."[15] Despite his views of RICO's origins, Lynch believes that, over the years, judicial interpretation has expanded the scope of RICO and that Congress approved this expansion when it reviewed RICO in 1984 and did nothing to limit this broad judicial interpretation.[16]

For more than two decades, critics have vilified RICO, while proponents have showered it with praise. RICO's critics have characterized it as "the Monster that mauled Wall Street"[17] and "the Monster that Ate Jurisprudence."[18] Its supporters have described it as "the single most effective device for prosecuting systematic, organized criminal activity."[19]

Congress has steadfastly repelled vigorous attempts to repeal or eviscerate RICO. The Supreme Court correspondingly has refused to read the statute narrowly as its opponents have advocated. Nonetheless, in the 1989 case of *H.J. Inc. v. Northwestern Bell Telephone Co.*,[20] Justice Antonin Scalia, joined by three other justices, wrote a concurring opinion suggesting that the statute was void for vagueness.[21] The defend-

13. *See RICO Myths*, *supra* note 6, at 857 (containing an excellent discussion of the controversy surrounding RICO at page 857, n.14.)

14. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 662 (1987) (an influential article offering one of the most complete discussions of RICO.)

15. *RICO Myths*, *supra* note 6, at 866. *See also* G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 254-80 (1982); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988).

16. Gerard E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 773-74 (1990).

17. L. Gordon Crovitz, *How the RICO Monster Mauled Wall Street*, 65 NOTRE DAME L. REV. 1050 (1990). Mr. Crovitz is an assistant editorial page editor at the *Wall Street Journal*.

18. David B. Sentelle, *RICO: The Monster That Ate Jurisprudence*, address at the CATO Institute Seminar on RICO, Rights and the Constitution (Oct. 18, 1989) (copy available from Cato Institute, Washington, D.C.), *quoted in* Paul Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1037 (1990). Judge Sentelle sits on the Circuit Court of Appeals for the District of Columbia.

19. Coffey, *supra* note 18, at 1049. Mr. Coffey is Deputy Chief of the Organized Crime and Racketeering Section, Criminal Division of the Justice Department.

20. 492 U.S. 229 (1989).

21. *Id.* at 251-56.

ants in *Arthur Young & Co. v. Reves*,[22] the Eighth Circuit case in which the Court recently granted certiorari, urged that RICO be narrowly construed.[23]

PART II. THE CURRENT NEXUS TESTS

The circuit courts of appeals currently employ four primary tests for nexus: The *Scotto-Provenzano* test, the *Cauble* test, the facilitation or utilization test and the manage or operate test.

Under the *Scotto-Provenzano* test, one conducts the activities of an enterprise through a pattern of racketeering activity when "(1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise."[24]

Under the *Cauble* test, to participate in the conduct of an enterprise's affairs, (1) a defendant must commit the racketeering acts, (2) the defendant's position in the enterprise must facilitate the commission of the racketeering acts and (3) the predicate acts must have some effect directly or indirectly on the enterprise.[25]

Under the facilitation or utilization test, there is a sufficient nexus when there is "proof that the facilities and services of the enterprise were regularly and repeatedly utilized to make possible the racketeering activity . . . ."[26]

Under the manage or operate test, "[a] defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself."[27] The phrase "[conduct or participate in the conduct of] refers to the guidance, management, direction, or other exercise of control over the course of the enterprise's activities."[28]

A. *The Scotto-Provenzano Test*

The defendant in *United States v. Scotto*[29] argued that the jury should have been instructed that the predicate acts were "concerned or related to the operation or management of the enterprise" or that they "af-

22. 937 F.2d 1310 (8th Cir. 1991), *cert. granted sub nom.*, Reves v. Ernst & Young, 112 S. Ct. 1159 (1992).

23. *Id.* at 1325.

24. United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); United States v. Provenzano, 688 F.2d 194, 200 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982).

25. United States v. Cauble, 706 F.2d 1322, 1333 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

26. United States v. Carter, 721 F.2d 1514, 1527 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984).

27. Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983).

28. Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991).

29. 641 F.2d 47 (2d Cir. 1980).

fected the affairs of the [enterprise] in its essential functions."[30] The Second Circuit rejected this argument on appeal. The court stated "that the statute does not distinguish between predicate acts which play a major or minor role."[31] The court then articulated, without additional explanation, the following test: One conducts the activities of an enterprise through a pattern of racketeering activity when "(1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise."[32] The Third Circuit adopted the *Scotto* standard in *United States v. Provenzano.*[33]

The *Scotto-Provenzano* test is overly broad in two ways. First, *Scotto* states that if one is enabled solely by one's position within the enterprise to commit the racketeering acts, one conducts the affairs of the enterprise.[34] This test reaches activity beyond RICO's intended scope.[35] One's position could enable one to commit racketeering acts without actually participating in the conduct of the enterprise. For example, in *United States v. Dennis*,[36] a General Motors employee collected usurious loans from his co-workers at a General Motors plant. The indictment charged that Dennis participated in the conduct of General Motors by collecting these loans on the premises. The court in *Dennis* reached the correct result when it dismissed the RICO count holding that merely collecting loans on the premises did not constitute participation in the conduct of General Motors.[37] If the *Scotto-Provenzano* test was applied in *Dennis*, however, it could be argued that the defendant's position as a General Motors employee enabled him to collect the usurious loans on its premises.

Second, the *Scotto* court stated that the nexus is sufficient when the offenses are related to the affairs of the enterprise.[38] Being related to an enterprise does not mean that one is conducting or participating in the conduct of its affairs. Congress did not state in § 1962(c) that the com-

30. *Id.* at 54. In *Scotto*, Anthony Scotto, the President of an International Longshoremen's Union local, accepted payoffs from individuals representing waterfront employers of ILA labor. The enterprise alleged in the indictment was the local union. *Id.* at 51.

31. *Id. See also* United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973) (quoting United States v. Stofsky, 409 F. Supp. 609, 613 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976)).

32. *Scotto*, 641 F.2d at 54.

33. 688 F.2d 194 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982). *See also*, Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 195 (9th Cir. 1987). The Tenth Circuit articulated a very similar test and cited, but did not explicitly adopt, *Scotto*. *See* United States v. Zang, 703 F.2d 1186, 1194 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983) (stating that "[t]o prove a pattern, the Government must establish two or more predicate offenses which are related to the activities of the enterprise.").

34. *Scotto*, 641 F.2d at 54.

35. *See Nexus Note*, *supra* note 6, at 578; Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 952 (D.C. Cir. 1989), *cert. denied*, 111 S. Ct. 2839 (1991).

36. 458 F. Supp. 197 (E.D. Mo. 1978).

37. *Id.* at 199.

38. *Scotto*, 641 F.2d at 54.

mission of racketeering acts which are related to an enterprise is a crime. Equating "related to" with "conduct or participate in the conduct of" confuses nexus with pattern.[39] The Supreme Court, in *H.J. Inc. v. Northwestern Bell Telephone Co.*,[40] recently defined "pattern" as acts which are related to each other or to some outside ongoing entity, such as the enterprise, and are continuous or pose a threat of continuity.[41] If acts are related either to each other or to the enterprise, they may form a pattern. This does not mean that they were committed while participating in the conduct of an enterprise's affairs.

B. *The Cauble Test*

In *United States v. Cauble*,[42] the Fifth Circuit began its analysis by stating that merely working for a legitimate enterprise and committing racketeering acts on the business premises do not establish nexus.[43] The court then cited, but reformulated, the *Scotto* test. The *Cauble* court asserted that the *Scotto* test did not distinguish the enterprise-racketeering nexus from the defendant-racketeering connection[44] and modified the test as follows: To participate in the conduct of an enterprise's affairs, (1) a defendant must commit the racketeering acts, (2) the defendant's position in the enterprise must facilitate the commission of the racketeering acts, and (3) the predicate acts must have some effect directly or indirectly on the enterprise.[45] The court explained the parameters of the test by stating that the effect on the enterprise could be direct or indirect and the racketeering acts did not have to benefit or advance the affairs of the enterprise. The government must simply "prove that the racketeering acts affected the enterprise in some fashion."[46] The Seventh and Eighth Circuits have followed the *Cauble* test.[47]

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39. For the statutory definition of pattern, *see supra* note 6.

40. 492 U.S. 229 (1989).

41. *Id.* at 239.

42. 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). In *Cauble*, the defendant, Rex Cauble, and a group of individuals known as the "Cowboy Mafia" ran a drug smuggling operation. The enterprise named in the indictment was Cauble Enterprises, a business owned by Rex Cauble. The court found a sufficient nexus between the drug smuggling venture and Cauble Enterprises based upon the following: (1) Cauble Enterprises' airplane was used for drug smuggling travel, (2) Cauble Enterprises' assets were used to pay for travel related to the drug smuggling, and (3) Cauble's position in Cauble Enterprises made it possible for him to make available funds for loans and other assets of the enterprise which the drug smugglers used. *Id.* at 1341.

43. *Id.* at 1332.

44. *Id.*

45. *Id.* at 1333.

46. *Id.* at 1333, n.24.

47. United States v. Horak, 833 F.2d 1235 (7th Cir. 1987); United States v. Ellison, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986). *But see* Bennett v. Berg, 685 F.2d 1053, *aff'd*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983). In *Ellison*, the Eighth Circuit applied the *Cauble* test in a criminal case without even mentioning *Bennett v. Berg* and the manage or operate test. In addition, the Sixth Circuit cited *Cauble* but did not explicitly adopt the *Cauble* test in United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985). The *Qaoud* court stated, "to establish that an enterprise's affairs have been conducted through a pattern of racketeering activity, there must be a nexus between the enterprise and the racketeering activity." *Id.* at 1115.

The *Cauble* test is obviously more restrictive than *Scotto*, primarily because its elements are phrased in the conjunctive rather than the disjunctive. Moreover, the *Cauble* court used the term "effect" rather than "related to." One problem with the *Cauble* test is that nexus is concerned with whether one participates in the conduct of the enterprise, not whether there was an effect on the enterprise. One could participate in the conduct of an enterprise's affairs through a pattern of racketeering activity and, for instance, affect another victim but not the enterprise itself.[48]

An additional difficulty with the *Cauble* test is its requirement that one's position within the enterprise facilitate the commission of the acts. Does this mean that outsiders cannot violate RICO? Many courts have held that outsiders can violate the statute.[49] The text of RICO itself states that the participation can be direct or indirect and provides that the person need only be employed by, or associated with, the enterprise.[50]

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48. *See* O'Neill, *supra* note 6, at 676. The author discusses the concept of enterprise as "instrument", employing the example of United States v. Blackwood, 768 F.2d 131 (7th Cir.), *cert. denied*, 474 U.S. 1020 (1985). In *Blackwood*, a Chicago police officer, was a court sergeant in the Cook County Circuit Court. For more than a year he solicited and received bribes from an FBI agent who was working undercover as part of Operation Greylord. In return, Blackwood "influenced the disposition" of pending cases in the branch courts of the Cook County Circuit Court. Blackwood was convicted under § 1962(c) for participating in the conduct of the Cook County Circuit Court's affairs through a pattern of bribery. Thus, the enterprise played the role of instrument in the case. The Cook County Court was not victimized by Blackwood's conduct, nor did it participate in the bribery, but Blackwood used his position in the court as leverage, as a "tool" through which to carry on his bribery scheme.

49. The Justice Department amicus brief in *Yellow Bus Lines, Inc.* uses the example of "outsiders who assist the enterprise to commit crimes, use its resources for criminal purposes, or influence its actions by the payment of kickbacks to subordinates, surely 'participate . . . in the conduct' of its affairs through the prohibited pattern, even though not significantly controlling its overall goals." *Amicus Curiae Brief*, *supra* note 8, at 17. Courts have consistently construed RICO to reach that behavior. *See, e.g.*, United States v. Yonan, 800 F.2d 164 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987). In *Yonan*, a defense attorney in Chicago attempted to bribe an Assistant States Attorney to "fix" a criminal case. Yonan, the defense attorney, was charged with conducting the affairs of the State's Attorney's office through a pattern of racketeering activity. The issue on appeal was whether Yonan was associated with the States Attorney's office as required by the statute. The court concluded that he was because he conducted business with the office. *Id.* at 168. However, even if Yonan was associated, it does not necessarily follow that he conducted the affairs of the State's Attorneys office. The court in *Yonan* did not reach this issue, but it seemed to treat the two elements as one.

Other examples of activity that would be excluded under the *Cauble* test are found in: United States v. Roth, 860 F.2d 1382, 1390 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989) (lawyer who bribed judges participated in the conduct of the court's affairs); United States v. Horak, 833 F.2d 1235, 1239 (7th Cir. 1987) (employee of subsidiary participated in conduct of parent company by fraudulently procuring contracts for the subsidiary which financially benefitted the parent company); United States v. Jannotti, 729 F.2d 213, 226-27 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984) (city councilman participated in the conduct of a law firm's affairs by accepting bribe to facilitate approval of transaction from which the law firm stood to benefit); United States v. Watchmaker, 761 F.2d 1459, 1475-76 (llth Cir. 1985) (defendants participated in the conduct of a motorcycle gang's affairs by engaging in acts of extortion and drug dealing at behest of gang members).

50. 18 U.S.C. § 1962(c) (1988).

C. *The Facilitation or Utilization Test*

The Eleventh Circuit espoused the facilitation or utilization test in *United States v. Carter*.[51] In *Carter*, the defendants had argued that the illegal activity must affect the common everyday affairs of the enterprise.[52] The court rejected this limitation relying on an earlier Fifth Circuit case, *United States v. Welch*, which held that the enterprise must make "possible the racketeering activity."[53] The *Carter* court found that since "proof that the facilities and services of the enterprise were regularly and repeatedly utilized to make possible the racketeering activity" a sufficient nexus existed.[54]

The Fourth Circuit followed this approach in *United States v. Webster*.[55] In *Webster I*[56] the court required that the racketeering activity benefit the enterprise in some way.[57] On rehearing, the *Webster II*[58] panel rejected *Webster I* by finding sufficient racketeering activity based on the government's proof indicating that the facilities of the enterprise "were regularly made available to and put in the service of" the racketeering activity.[59]

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51. 721 F.2d 1514 (11th Cir.), *cert. denied*, Morris v. United States, 469 U.S. 819 (1984). In *Carter*, the defendants ran a marijuana importing business out of a dairy farm owned by two of the defendants. The enterprise alleged in the indictment was the dairy farm. The connections between the racketeering activity, the drug smuggling, and the dairy farm were:

> (1) a pasture located on the dairy farm was the site on which an airstrip was constructed and utilized for bringing in shipments of drugs; (2) the dairy farm office was used for communication between conspirators concerning protection of the drug smuggling activities from law enforcement authorities; (3) workers of the dairy farm participated in the drug smuggling and protection activities; and (4) a house on the dairy farm property was used for storing the drugs prior to distribution.

Id. at 1525-26.

52. *Id.* at 1526.

53. 656 F.2d 1039, 1061 (5th Cir. 1981), *cert. denied*, Cashell v. United States, 456 U.S. 915 (1982).

54. *Carter*, 721 F.2d at 1527.

55. 639 F.2d 174 (4th Cir. 1981), *modified in part*, 669 F.2d 185 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982). In *Webster*, the defendants ran a drug smuggling business. The enterprise alleged in the indictment was a restaurant owned by one of the defendants. Calls regarding drugs were forwarded from the defendants' homes to the restaurant. Employees relayed narcotics related messages. An employee provided free drinks to a drug customer who was waiting at the restaurant for drugs to arrive so that a transaction could take place. *Id.* at 187.

56. 639 F.2d 174 (4th Cir. 1981).

57. *Id.* at 184.

58. 669 F.2d 185 (4th Cir. 1981).

59. *Id.* at 187 (quoting from *Webster I*). At least one district court has applied *Webster* when physical facilities of an enterprise were put to the use of a racketeer. In United States v. Thomas, 749 F. Supp. 847 (M.D. Tenn. 1990), the Sheriff of Nashville, Tennessee was charged in a RICO indictment with various predicate acts including mail fraud, obstruction of justice and extortion. The enterprise was the Sheriff's Department. An issue arose as to whether one of the predicate acts had a sufficiently close nexus to the enterprise. This act was an extortion scheme in which the Sheriff, an extremely influential local politician, offered to influence a zoning decision in exchange for money. The defense argued that this scheme was unrelated to the Sheriff's Department. The district court rejected this argument and, following *Webster II*, held that the "Sheriff's Department was . . . regularly made available to and put in the service of the alleged illegal activity." *Id.* at 849. This decision was based upon the following: (1) The Sheriff received phone calls

The author of the *Nexus Note* proposed a similar test, considering "the extent to which the defendant *utilizes the organizational structure or infrastructure* of the alleged enterprise . . . ."[60] According to the author, "utilization requires that the enterprise be more than a context for criminal activity. To be 'utilized' the enterprise must be a 'weapon' of the racketeer; it must enhance the ability to commit the crime."[61] Under this test, one would look at various characteristics of utilization.[62] This utilization test appears to be more narrow than that of *Carter* or *Webster*.

A problem with the utilization test, as espoused in *Carter* and *Webster II*, is that the courts find utilization based solely on use of physical facilities. If utilization of physical facilities alone is sufficient under the test, then *Carter* and *Webster* cannot be distinguished from *United States v. Dennis*.[63] Collecting loans on the premises of General Motors (*Dennis*) is arguably no different from conducting drug deals at a restaurant (*Webster*) or smuggling drugs using a landing strip and the employees of a dairy farm (*Carter*).

The problem with *Carter, Webster, Thomas* and *Dennis* may be that the defendants did not conduct the affairs of those enterprises through a pattern of racketeering activity. They simply utilized the facilities of the enterprise.[64] In contrast, the author of the *Nexus Note* would require more than use of physical facilities.[65] The author defines utilization to require that the enterprise be used as a weapon.[66] This ignores many

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about the matter at his office; (2) The Sheriff's secretary was instructed to set up a meeting regarding the matter; (3) Meetings regarding the matter regularly took place at the Sheriff's office; (4) A co-defendant in the scheme was seen leaving the Sheriff's office with the Sheriff and another Sheriff's Department employee; (5) A Sheriff's Department employee drove the codefendant to a meeting which the codefendant had with the victim of the extortion; (6) The Sheriff used Sheriff's Department stationery to send letters regarding the matter. *Id.* at 848 n.2.

The author of this Article was one of the prosecutors of the *Thomas* case while an Assistant United States Attorney.

60. *Nexus Note, supra* note 6, at 591 (emphasis in original).

61. *Id.* (footnote omitted).

62. *Id.* The other indicia mentioned by the author are:

> (1) Whether the type of criminal activity in question requires or is generally associated with an enterprise . . .; (2) the defendant's position in the enterprise and the extent to which it furthered the racketeering activity . . .; (3) the extent to which the enterprise served to complicate detection . . .; (4) the scope and gravity of the offenses; (5) use of physical facilities of the enterprise.

Id. at 591-95.

63. 458 F. Supp. 197 (E.D. Mo. 1978). *See supra* text accompanying note 36.

64. Professor Robert Blakey has suggested that all of these facilities, including the General Motors plant in *Dennis*, are proper RICO enterprises if they serve as "fronts" for the illegal activity. Telephone interview with G. Robert Blakey, William J. and Dorothy O'Neill Professor of Law, Notre Dame Law School (Mar. 5, 1992).

Barry Tarlow has suggested that the restaurant in Webster was a "front" because it was not a profit making operation. Tarlow argues that there should be little question that the enterprise's affairs are connected to the racketeering when "the racketeering occurs on enterprise property as a part of the plan under which the enterprise is merely a 'front' for the racketeering." He argues that analyzing whether the enterprise is a "front" would be more useful than determining utilization of facilities and employees. Tarlow, *RICO Revisited, supra* note 6, at 375. Of course, the problem then becomes ascertaining whether the enterprise is a front.

65. *See supra* note 62 and accompanying text.

66. *Nexus Note, supra* note 6, at 591.

other roles which the enterprise might play, such as the enterprise as a victim.[67]

D. *The Manage or Operate Test*

1. The Manage or Operate Test Before *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*

The Fourth Circuit was the first court to impose a manage or operate test. In *United States v. Mandel*,[68] the government charged the defendants with conducting the affairs of an investment company through a pattern of racketeering activity. A co-defendant transferred a partnership interest in the company to Governor Marvin Mandel of Maryland in exchange for his support of racing legislation. The Fourth Circuit held that Mandel did not participate in the conduct of the enterprise because Mandel acquired only a passive interest and did not manage or operate the enterprise. The court of appeals agreed with the district court that the "conduct or participate" language of § 1962(c) required some involvement in the management or operation of the enterprise.[69] One might question whether *Mandel* remains valid after *Webster II*.[70] In *Webster I*, where the court required that the activity benefit the enterprise, the court observed that "the *Mandel* panel opinion is not binding upon us," presumably because the opinion had been vacated.[71] When the Fourth Circuit applied *Webster II*, it rejected both the *Mandel* and *Webster I* standards.

The Eighth Circuit, in *Bennett v. Berg*,[72] was the second court to adopt a manage or operate test. The *Bennett* court said in dicta that "[a] defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself."[73]

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67. *See* Goldsmith, *supra* note 15, at 774 n.4, which states: "The role of the enterprise varies in each case depending upon its role in the underlying crimes. Often, the enterprise is a perpetrator of illicit conduct. However, the enterprise may be a prize targeted for takeover, a victim of racketeering activity, or an instrumentality facilitating the commission of crimes."

See also O'Neill, *supra* note 6, at 675. O'Neill uses the case of Sun Sav. & Loan v. Dierdorff, 825 F.2d 187 (9th Cir. 1987), as an example of the enterprise as victim. Dierdorff was president of Sun Savings from 1980 to 1984. During that time, he solicited and received kickbacks from of Sun's several larger customers. Using a fictitious name, Dierdorff deposited upwards of $200,000 of kickback proceeds into his own account. Through a series of phony letters, Dierdorff was able to conceal his activity from other Sun officials for several years. He was fired upon exposure of the scheme. In its complaint, Sun Savings alleged that Dierdorff violated 18 U.S.C. § 1962(c) by conducting the affairs of the savings and loan through a pattern of mail fraud thus benefitting himself to the detriment of the company.

68. United States v. Mandel, 591 F.2d 1347, *vacated on other grounds by an equally divided court*, 602 F.2d 653 (4th Cir.) (en banc) (per curiam) *petition for rehearing denied* (en banc) 609 F.2d 1076 (4th Cir. 1979), *cert. denied*, 445 U.S. 959, 961 (1980).

69. *Id.* at 1375-76.

70. 639 F.2d 174 (4th Cir. 1981). *See* discussion of *Webster II*, *supra* note 55 and accompanying text.

71. United States v. Webster, 639 F.2d 174, 185 (4th Cir. 1981).

72. Bennett v. Berg, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983).

73. *Id.* at 1364. In *Bennett*, the plaintiffs were present and former residents of a retire-

The Eighth Circuit cited *Mandel* for this proposition even though the Fourth Circuit had already abandoned the manage or operate test in *Webster I*.[74] Moreover, on remand the district court in *Bennett v. Berg* denied the defendants' motion to dismiss based on the fact that they had not managed or operated the enterprise. The district court held that "conduct or participate, directly or indirectly in the conduct of the enterprise's affairs could not be limited to operation or management."[75]

In a later criminal case, the Eighth Circuit adopted the *Cauble* standard and did not even mention *Bennett v. Berg*.[76] Courts deciding later civil RICO cases in the circuit have used the *Bennett v. Berg* manage or operate test. The panel in *Arthur Young & Co. v. Reves* commented on the split in the circuits, but stated that it was bound to follow Eighth Circuit precedent set by *Bennett v. Berg*.[77] No other circuit court subscribed to the manage or operate test from the time of the 1983 decision in *Bennett v. Berg* until the 1990 en banc opinion of the District of Columbia Circuit in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*.[78]

2. The *Yellow Bus Lines, Inc.*[79] Case

Before *Yellow Bus Lines, Inc.*, no other court had analyzed the nexus tests and articulated the manage or operate test. *Bennett v. Berg* only mentioned the manage or operate test in dicta[80] but did not analyze it.

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ment community. They brought suit against the not-for-profit corporation, Berg, the founder of the retirement community, various other corporations founded by Berg, a life insurance company, a mortgage lender to the community, the community's former accountants, two attorneys formerly employed by the various defendants, and certain officers and directors of various defendant not-for-profit organizations. The plaintiffs alleged that the defendants defrauded them so that plaintiffs faced the loss of the "life care" which they expected to receive and for which they had paid. *Id.* at 1363.

74. *Id. See also supra* text accompanying note 71.

75. The district court judge stated:

> I am unpersuaded. I do not believe the words 'conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs' can reasonably be limited to the sort of 'hands-on-management' of daily activities which Prudential and SG&M suggest. I find no case authority supporting such a proposition; and to require that degree of involvement would both seem counter to the broad Congressional directive that '[t]he provisions of RICO shall be liberally construed to effectuate its remedial purposes,' . . . and incompatible with the express language of the statute, which provides that such conduct or participation in the affairs of the enterprise may be accomplished 'directly *or* indirectly.' Unfortunately, neither the Eighth Circuit nor any other court which has focused separately on this language has undertaken to furnish any clear guidelines in the matter; but if this wording must be viewed in isolation from the remainder of the statutory language which follows, as the Eighth Circuit's en banc observation might seem to suggest, it seems to me no more can logically be required than that the defendant be involved in activities which constitutes some meaningful aspect of the operation or management of the affairs of the enterprise.

Bennett v. Berg, No. 80-0281-CV-W, 1984 WL 2756 (W.D. Mo. June 21, 1984) (quoting Pub. L. 91-452, 84 Stat. 947).

76. United States v. Ellison, 793 F.2d 942, 950 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986).

77. Arthur Young & Co. v. Reves, 937 F.2d 1310, 1324 (8th Cir. 1991), *cert. granted sub nom*, Reves v. Ernst & Young, 112 S. Ct. 1159 (1992).

78. 913 F.2d 948 (D.C. Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 2839 (1991).

79. *Id.*

80. *Bennett*, 710 F.2d 1361, 1364 (8th Cir. 1983).

The D.C. Circuit's articulation of the test, thus, accorded importance to the manage or operate test. Because *Yellow Bus Lines, Inc.* is the only case to enunciate an underlying rationale for the test, this part of the Article analyzes that rationale.

In *Yellow Bus Lines, Inc.*, a bus company sued a union for allegedly committing racketeering acts in the course of engaging in a recognition strike. The company alleged that the union participated in the conduct of the affairs of the bus company through a pattern of racketeering activity. The panel in *Yellow Bus Lines, Inc.* upheld the RICO complaint and "decline[d] to adopt a more restrictive standard than that enunciated in *Cauble* and *Scotto*."[81] The panel opinion stated that "[s]ection 1962(c) of RICO refers to direct as well as indirect participation in the enterprise's affairs, and imposes no requirement that participation be at the management level or relate to 'core functions'."[82]

The District of Columbia Circuit Court reversed the panel.[83] The en banc court framed the issue as "[d]oes a union merely by conducting a recognition strike against an employer 'conduct or participate, directly or indirectly in the conduct of' the employer's affairs within the meaning of 1962(c)?"[84] The court held that it did not and adopted a management or operation test which is even narrower than that prescribed in *Bennett v. Berg*.

The court first discussed some of the nexus tests. It rejected the *Scotto-Provenzano* test as "far too lenient," because "[i]f section 1962(c) can apply whenever predicate offenses are merely *related* to the activities of an enterprise, then the 'participation in the conduct' element of that section practically drops out."[85] Next it discussed, but did not criticize, the *Cauble* test,[86] and did not mention the *Carter* utilization test. The court then stated that it was adopting the *Bennett* operation and management test.[87]

The *Yellow Bus Lines, Inc.* court observed that RICO does not proscribe mere participation in the affairs of an enterprise, but rather participation in the conduct of an enterprise's affairs.[88] It then stated that "conduct" is synonymous with "management" or "direction" according to Webster's Third New International Dictionary.[89]

> The 'conduct of [the enterprise's] affairs' thus connotes more than just some relationship to the enterprise's activity; the phrase refers to the guidance, management, direction or other exercise of control over the course of the enterprise's activities.

81. Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 143 (D.C. Cir. 1989), *rev'd en banc*, 913 F2d 948 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991).
82. *Id.*
83. *Id.*
84. *Id.* at 949.
85. *Id.* at 952 (emphasis in original).
86. *Id.* at 953.
87. *Id.* at 954.
88. *Id.*
89. *Id.*

> In order to participate in the conduct of an enterprise's affairs, then, a person must participate, to some extent, in 'running the show.'[90]

The court asserted that this interpretation was faithful to RICO's goals because RICO's purpose is to eliminate "the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."[91] Since the union did not conduct or participate in the conduct of the bus line's affairs, it did not exercise control over the management or operation of the bus company.[92]

The court in *Yellow Bus Lines, Inc.* created a more stringent test than the one articulated in *Bennett* because one must exercise "control over the management or operation of the enterprise."[93] Under *Yellow Bus Lines, Inc.*, one not only has to participate in the management or operation of the enterprise but also have "control over the management or operation."[94]

3. *Arthur Young & Co. v. Reves*[95]

The Supreme Court has chosen to resolve the nexus issue with *Arthur Young & Co. v. Reves*. This was a class action suit by shareholders in the Farmer's Cooperative of Arkansas and Oklahoma, Inc. and other owners of demand notes issued by the co-op. The co-op had a board of directors comprised of farmers who were shareholders and a general manager appointed by the board actually managed the co-op. The co-op raised money by selling promissory notes.[96]

Beginning in 1980, the general manager of the co-op, Jack White, obtained loans from the co-op to finance the continued construction and operating costs of a gasohol plant in which he had a substantial investment. White participated in certain activities with the co-op, which led to the co-op's ownership of that gasohol plant and White's being relieved of over $4 million of debt to the co-op.[97] In early 1981, White was convicted of tax fraud in a scheme which included allegations that he engaged in a course of self-dealing with the co-op and manipulated the co-op's finances to serve his own personal ends.[98]

After his conviction, but while he was out on bond awaiting the outcome of his appeal, White hired the firm of Arthur Young and Company to serve as the co-op's accountants.[99] Over a period of years, Arthur Young and Company's accountants used accounting practices that re-

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90. *Id.*
91. *Id.* (quoting S. REP. No. 617, 91st Cong., 1st Sess. 76 (1969), *reprinted in* 1970 U.S.S.C.A.N. 4007).
92. *Id.* at 956.
93. *Id.* at 954.
94. *Id.*
95. Arthur Young & Co. v. Reves, 937 F.2d 1310, 1315 (8th Cir. 1991), *cert. granted sub nom*, Reves v. Ernst & Young, 112 S. Ct. 1159 (1992).
96. *Id.*
97. *Id.* at 1316.
98. *Id.* at 1316 n.3.
99. *Id.* at 1316 n.4.

sulted in the overvaluation of the gasohol plant and projected a false financial picture of the co-op.[100] When the gasohol plant ultimately became insolvent, the co-op's true financial position was revealed and the co-op was forced into bankruptcy.[101]

The plaintiffs primarily alleged that Arthur Young and Company induced buyers to purchase demand notes through the concealment of the co-op's financial position in violation of both federal and state securities laws. They also alleged that Arthur Young and Company was a material participant in the operation and management of the co-op in violation of RICO. The district court granted summary judgment for the defendants and dismissed the RICO claim. At trial of the remaining issues, the jury found that Arthur Young and Company committed both state and federal securities fraud.[102]

Before the Eighth Circuit, the class argued that the district court had improperly granted summary judgment in favor of Arthur Young and Company on its RICO claim.[103] The panel relied on *Bennett v. Berg* and applied the manage or operate test to conclude that:

> Arthur Young's involvement with the Co-op was limited to the audits, meetings with the Board of Directors to explain the audits, and presentations at the annual meetings. In the course of this involvement it is clear that Arthur Young committed a number of reprehensible acts, but these acts in no way rise to the level of participation in the management or operation of the Co-op.[104]

The class urged the Eighth Circuit to follow the Eleventh Circuit's decision in *Bank of America National Trust & Savings Ass'n v. Touche Ross & Co.*[105] In that case, the court had stated that "[i]t is not necessary that a RICO defendant participate in the management or operation of the enterprise."[106] Acknowledging the split in the circuit courts on this issue and citing *Yellow Bus Lines, Inc.*, the court in *Arthur Young & Co.* concluded that "until the Supreme Court rejects our standard or this court en banc overrules *Bennett*, we are bound to follow that decision."[107]

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100. *Id.* at 1316-20. The accountants knew that if the plant were to be valued at less than 1.5 million dollars, the co-op's net worth would be eliminated, thus provoking a run on the demand notes and depriving the co-op of its primary source of funds.

101. *Id.* at 1320-21.

102. *Id.* at 1321-22.

103. *Id.* at 1323.

104. *Id.* at 1324.

105. 782 F.2d 966 (11th Cir. 1986). In *Touche Ross*, five banks which provided financing for a bankrupt corporation sued the accountants who prepared the financial statements of the corporation. The district court dismissed the RICO claim and the Eleventh Circuit reinstated it. The circuit court stated that the "statute requires only that the defendant 'participate, directly or indirectly in the conduct of [the] enterprise's affairs'. . . ." The circuit court further stated: "The substantive proscriptions of the RICO statute apply to insiders *and outsiders* — those merely 'associated with' an enterprise — who participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity . . . . The RICO net is woven tightly to trap even the smallest fish, those peripherally involved." *Id.* (quoting United States v. Elliott, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) (emphasis in original)).

106. 782 F.2d at 970.

107. *Arthur Young & Co.*, 937 F.2d at 1324.

PART III. A CRITICAL ANALYSIS OF THE MANAGE OR OPERATE TEST

The traditional sources of statutory interpretation are text, structure, purpose, congressional intent and legislative history.[108] The Supreme Court has traditionally seen itself as an agent of the legislature, responsible for implementing the original intent or purpose of the enacting Congress. According to this view, the judicial task is to ascertain and apply judgments of the legislature.[109] When the Court undertakes traditional analysis, "legislative history is usually relevant, either to supply the meaning for an ambiguous statute or to confirm or rebut the plain meaning of a clear statute."[110] This part of the Article analyzes the traditional sources of statutory interpretation—language, structure, and history—and finds no basis in the statute for the manage or operate test.

Neither the *Arthur Young & Co.*[111] court nor the court in *Bennett v. Berg*,[112] upon which the *Arthur Young & Co.* court relied, articulated a rationale for the manage or operate test. The District of Columbia Circuit Court is the only court to have done so.[113] This Article will, therefore, criticize the test as enunciated in *Yellow Bus Lines, Inc.*

A. *The Test is Textually Incorrect.*

"Textual analysis starts with the specific words of the statutory provision being interpreted. The interpreter should appoach the statutory text as a reasonably intelligent reader would and give the text its most commonsensical reading."[114]

1. The *Yellow Bus Lines, Inc.* definition of terms is too narrow.

The court in *Yellow Bus Lines, Inc.* construed the word "conduct" in the statute to be synonymous with the words "management" or "direction," citing Webster's Third New International Dictionary.[115] Because it found the words synonymous, the District of Columbia's circuit court concluded that the conduct of the enterprise's affairs "refers to the guidance, management, direction or other exercise of control over the course of the enterprise's activities," and equated this with "running the

108. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 411 (1989). *See also* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

109. Sunstein, *supra* note 108, at 415. *See also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990).

110. Eskridge, *supra* note 109, at 626; *see also* Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987); United States v. James, 478 U.S. 597, 604 (1986).

111. 937 F.2d 1310.

112. 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983).

113. Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948 (D.C. Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 2839 (1991).

114. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354-55 (1990); *see also* American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).

115. *Yellow Bus Lines, Inc.*, 913 F.2d at 954.

show."[116]

The court's definition is flawed for two reasons. First, it incorrectly limits the possible definitions to manage and direct. The Oxford English Dictionary includes the meaning, "[t]o direct, manage, carry on (a transaction, process, business, institution, legal case, etc.)," but adds: "[t]he notion of direction or leadership is often obscured or lost; e.g. an investigation is *conducted* by all those who take part in it."[117] Webster's Dictionary of Synonyms states:

> conduct may imply the act of an agent who is both the leader and the person responsible for the acts and achievements of a group having a common end or goal . . . but often the idea of leadership is lost or obscured, and the stress is placed on a *carrying on* by all or by many of the participants. . . ."[118]

Finally, Black's Law Dictionary defines the verb conduct as "[t]o manage; direct; lead; have direction; carry on; regulate; do business."[119]

The *Yellow Bus Lines, Inc.* decision ignores the equally, if not more, valid connotation of the word conduct as "carrying on." That Congress intended this is reinforced because the statute says "conduct or participate . . . [in] the conduct of an enterprise,"[120] not merely "conduct an enterprise."

This raises the second problem with the court's definitional interpretation. It ignores the "participate in the conduct of" language. Why did Congress add the "participate in the conduct"[121] language and what does it mean? This language bolsters the idea of "carrying on by all or by many of the participants."[122] Webster's Third New International Dictionary defines participate as "to take part in something . . . in common with others."[123] In Webster's Dictionary of Synonyms, the synonyms for participate are share and partake.[124] Black's Law Dictionary defines participate as:

> To receive or have a part or share of; to partake of; experience in common with others; to have or enjoy a part or share in common with others. To partake, as to 'participate' in a discussion, or in a pension or profit sharing plan. To take equal shares and proportions; to share or divide, as to participate in an estate. To take as tenants in common.[125]

This language reinforces the notion that Congress intended these terms to mean a "common undertaking," or in other words, "to take part in carrying on the business in common with others," not merely to manage or operate.

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116. *Id.*
117. THE OXFORD ENGLISH DICTIONARY 691 (2d ed. 1989) (emphasis in original).
118. WEBSTER'S DICTIONARY OF SYNONYMS 184 (1942) (emphasis added).
119. BLACK'S LAW DICTIONARY 295 (6th ed. 1990).
120. 18 U.S.C. § 1962(c) (1988).
121. *Id.*
122. THE OXFORD ENGLISH DICTIONARY 691 (2d ed. 1989).
123. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1646 (1986).
124. WEBSTER'S DICTIONARY OF SYNONYMS 607 (1942).
125. BLACK'S LAW DICTIONARY 1118 (6th ed. 1990).

The court's interpretation of the statute also excludes the words "directly or indirectly" which appear in all three subsections of § 1962.[126] One cannot control the operation of an enterprise or "run the show" indirectly, nor can one indirectly direct, guide or manage.[127] Yet, that is what Congress expressly stated in all three subsections of § 1962. The use of the words "directly or indirectly" additionally demonstrates that Congress did not intend a manage or operate limitation in the statute.

In short, "conduct and participate" are words of ordinary meaning. *Yellow Bus Lines, Inc.* illustrates what Professor Gerard E. Lynch refers to, in a closely related context as "twist[ing] a rather basic . . . concept into elaborate knots in order to find . . . lack of pattern in civil [RICO] suits to which the courts are hostile."[128]

2. The structure of RICO does not support the manage or operate test.

In *Russello v. United States*,[129] the United States Supreme Court concluded that "[C]ongress selected th[e] general term, [interest], apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth."[130] Other terms of breadth that the *Russello* Court referred to were "enterprise," "racketeering" and "participate."[131] "Conduct"[132] is also a term of breadth. When Congress placed the two words, conduct and participate together, as it did in § 1962(c), Congress must have intended the terms to be construed broadly. Similarly, in *Sedima, S.P.R.L. v. Imrex Co.*,[133] the Court declared that "RICO is to be read broadly. This is the lesson . . . of Congress' self-consciously expansive language and overall approach. . . ."[134]

Moreover, Congress inserted more restrictive language in other parts of the statute, thus indicating that it intentionally employed broad language in § 1962(c). Section 1962(a) makes it unlawful to use or invest income derived from racketeering activity "in acquisition of any in-

126. 18 U.S.C. § 1962(a) (1988). § 1962(a) makes it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, . . . in acquisition . . . of any enterprise." *See also* 18 U.S.C. § 1962(b) (1988) (it is unlawful to acquire or maintain, "directly or indirectly," any interest in, or control over, an enterprise through a pattern of racketeering activity). *Id.* § 1962(c) states that "[i]t shall be unlawful . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."

127. The *Yellow Bus Lines, Inc.* court said that its construction of the statute allows for indirect as well as direct participation, but the court failed to explain how one could control an enterprise indirectly. 913 F.2d at 954.

128. Lynch, *supra* note 14 at 772 n.8.

129. 464 U.S. 16 (1983).

130. *Id.* at 21.

131. *Id.* at 21-22. The terms appear in the following statutes: 18 U.S.C. § 1961(4) (1988) (enterprise); 18 U.S.C. § 1961(c) (1988) (racketeering); 18 U.S.C. § 1962(c) (1988) (participate).

132. 18 U.S.C. § 1962 (1988).

133. 473 U.S. 479 (1985).

134. *Id.* at 497-98.

terest in, or the establishment or operation of, any enterprise. . . ."[135] This section also states that a "purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection. . . ."[136] Congress obviously knew that use of "control or participate . . . in the control of"[137] was more restrictive than "conduct or participate in the conduct of."[138] If Congress had wished to impose the same limitation on § 1962(c), it could have done so.[139] "When Congress includes particular language in one section of a statute but omits it in another . . . [the Court] generally presume[s] that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[140]

The word "control" is also included in § 1962(b), which states that it is unlawful to "acquire or maintain directly or indirectly, any interest in or control of any enterprise . . . through a pattern of racketeering activity."[141] Congress presumably knew what it was doing when it included narrow terms in one part of the statute and more general terms in another. If Congress had intended for manage or control to be a part of § 1962(c), it could have added the term because it did so in §§ 1962(a) and (b).[142]

3. Consideration of the use of the same term in other provisions of the same enactment does not support the manage or operate test.

Congress enacted 18 U.S.C. § 1955, like RICO, as part of the Organized Crime Control Act of 1970.[143] Section 1955(a) provides: "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both."[144] This language raises two issues. First, why did Congress include conducts, manage and supervise in § 1955 and only conduct in § 1962(c)? It cannot possibly mean, as the *Yellow Bus Lines, Inc.* court states, that conduct means only manage or direct. If conduct means only manage or direct,

135. 18 U.S.C. § 1962(a) (1988).
136. *Id.*
137. *Id.*
138. *Id.* § 1962(c).
139. *Sedima*, 473 U.S. at 489; Russello v. United States, 464 U.S. 16, 23 (1983); United States v. Turkette, 452 U.S. 576, 581 (1981).
140. *Russello*, 464 U.S. at 23 (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)). *See also* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 252 (1989) (Scalia, J., concurring).
141. 18 U.S.C. § 1962(b) (1988).
142. In 21 U.S.C. § 848 (1988) (Continuing Criminal Enterprise Statute), Congress intended only to reach managers and it specifically indicated so by stating "a person is engaged in continuing criminal enterprise if . . . such person occupies a position of organizer, a supervisory position, or any other position of management"; *see, e.g.*, Garrett v. United States, 471 U.S. 773, 781 (1985) ("This language is designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers.").
143. Pub. L. No. 91-452, 84 Stat. 941 (codified at 18 U.S.C. §§ 1961-68 (1988)).
144. 18 U.S.C. § 1955 (1988).

Congress would not have needed to add those words to the statute in § 1955. According to that interpretation, the word conduct would have been sufficient.

Common sense and common usage suggest that conduct be construed as the more general term and manage, supervise and direct as more specific terms within the general meaning of conduct. This is also consistent with the dictionary definition. Moreover, Congress was apparently aware of the meaning of the words manage, direct and supervise as it added them to § 1955, which is included as part of the same Act. One must assume that Congress would have employed manage, operate or direct in § 1962(c) if it had intended to so narrow the reach of that provision. The Supreme Court has said that it should not lightly infer that Congress intended a term to have wholly different meanings in "neighboring" provisions passed simultaneously.[145]

Second, how have courts interpreted § 1955? If conduct is synonymous with manage and direct as the court in *Yellow Bus Lines, Inc.* suggests, courts should find that conduct is superfluous in § 1955 and that the provision requires one to manage or direct the gambling operation. That has not happened. In fact, no court has imposed such a requirement. The United States Supreme Court, in dicta, stated that "18 U.S.C. § 1955 (1976 ed.) proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor."[146] In *United States v. Zannino,*[147] the First Circuit Court of Appeals stated:

> [t]he term 'conduct' embraces all who participate in the operation of the specified gambling business, that is, each and every person who performs any act, function, or duty necessary or helpful in the business' ordinary operation. As we read it, the statute of conviction applies even to individuals who have no role in managing or controlling the business and who do not share in its profits.[148]

The Seventh Circuit Court of Appeals, in *United States v. Greco,*[149] observed that "[t]he word 'conduct' is broad in scope . . . [A] person may be found to conduct a gambling business even though he is a mere servant or employee having no part in the management or control of the business. . . ."[150] In short, the construction of § 1955 has generated little controversy.[151] All courts agree that the term conduct is broader than the terms manage or direct.

B. *RICO's Legislative History Does Not Support the Manage or Operate Test*

The court in *Yellow Bus Lines, Inc.* justified its narrow reading of the

145. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489 (1985).
146. Sanabria v. United States, 437 U.S. 54, 70-71 n.26 (1978).
147. 895 F.2d 1 (1st Cir. 1990).
148. *Id.* at 10.
149. 619 F.2d 635 (7th Cir. 1980).
150. *Id.* at 638 (quoting United States v. Rotchford, 575 F.2d 166, 174 (8th Cir. 1978)).
151. *See generally* G. Robert Blakey and Harold Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923 (1978).

statute by invoking the statute's goals and quoting a section of legislative history out of context. The court quoted the Senate Report for the proposition that "[t]he purpose of RICO is to eliminate 'the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.'. . . [It] was passed in order to attack 'the use of force, threats of force, enforcement of illegal debts, and corruption *in the acquisition or operation of business*."[152] This portion of the legislative history, however, explains the need for civil remedies; it was not commenting on the intended coverage of § 1962(c). In fact, the legislative history supports no such narrow purpose of the statute, but clearly states that § 1962(c) has a broad scope:

> Unlike subsection (a), which provides an exception to the prohibition against investing funds derived from racketeering activity into an enterprise 'where there is no resulting control in law or in fact to the investor,' subsection (c) applies to *any* 'conduct of the enterprise through the prohibited pattern'; 'there is no limitation on the prohibition.'[153]

Moreover, the Supreme Court rejected the notion that RICO can only reach the infiltration of organized crime and racketeering into legitimate organizations in *United States v. Turkette*,[154] thus rejecting the limitation on the statute's purpose which the District of Columbia Circuit Court imposed. The defendant in *Turkette* argued that RICO was intended solely to protect legitimate business enterprises from infiltration by racketeers and could not reach wholly illegitimate enterprises which performed only illegal acts and which did not attempt to infiltrate legitimate business.[155]

The Court rejected this limitation on RICO. First, it found that nothing in the text of the statute supported such a restriction. The Court also stated that the legislative history's support of the view that RICO's major purpose was to address the infiltration of legitimate business by organized crime does not support a negative inference that the statute cannot reach others.[156]

The Supreme Court, in *Russello v. United States*,[157] observed that RICO's legislative history evinces a broad Congressional intent. The Court emphasized the sweeping language of the legislative history, which states that the intent of RICO was to "provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[158] The Court stated:

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152. *Yellow Bus Lines, Inc.*, 913 F.2d at 954 (quoting S. REP. No. 617, 9lst Sess. 76, 81 (1969), *reprinted in* 1970 U.S.C.C.A.N. 4007).

153. *Amicus Curiae Brief, supra* note 8, at 17 n.14 (quoting S. REP. No. 617, 91st Cong., 1st Sess. 159 (1969)) (reprinted in 1970 U.S.C.C.A.N 4007) (emphasis in original).

154. 452 U.S. 576 (1981). *But see* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 255 (1989) (Scalia, J., concurring) (prologue of the statute describes a relatively narrow focus upon organized crime).

155. *Turkette*, 452 U.S. at 579-80.

156. *Id.* at 591.

157. 464 U.S. 16 (1983).

158. *Id.* at 26 (1983).

> What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.[159]

In *H.J. Inc. v. Northwestern Bell Telephone Co.*, the Court refused to read an organized crime limitation into the statute[160] and stated that such a limitation finds no support in the text and contravenes the tenor of the legislative history. The opinion continues by stating that the legislative history demonstrates that Congress intentionally adopted "commodious language capable of extending beyond organized crime."[161] The Court again invoked the legislative history for the idea that "[t]he occasion for Congress' action was the perceived need to combat organized crime. But 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."[162] The Court quoted the legislative history: "It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well."[163] In sum, the legislative history does not support the narrow interpretation of the statute's terms by the District of Columbia Circuit Court.

Some language in the legislative history of analogous provisions of the same act supports the conclusion that Congress intended the word "conduct" to be construed broadly. 18 U.S.C. § 1511,[164] includes the same conduct, manage, direct, or supervise language as does § 1955.[165] The House Report on § 1511 states that Congress intended the statute to reach both "high level bosses and street level employees."[166] This language suggests that the word conduct was meant to reach "street level employees" as well as "high level bosses." It certainly lends no support to, and directly contravenes, a construction of the word "conduct" which would limit it to manage, operate or direct.

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159. *Id.* at 27 (quoting S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969), *reprinted in* 1970 U.S.C.C.A.N. 4007).

160. 492 U.S. 229, 244 (1989) (Scalia, J. concurring).

161. *Id.* at 246.

162. *Id.* at 248.

163. *Id.* (quoting Senator McClellan, the bill's principal sponsor).

164. 18 U.S.C. § 1511 (1988) states in pertinent part:

> (a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if . . .
>
> (3) one or more of such persons conducts[,] finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

165. *See supra* notes 143-150 and accompanying text.

166. H.R. REP. No. 1549, 91st Cong., 2d Sess. 553 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4029.

PART IV. THE IMPLICATIONS OF THE MANAGE OR OPERATE TEST

Adoption of the "manage or operate" test would eviscerate the RICO statute. If the Supreme Court were to adopt the manage or operate test, it would have severe consequences for prosecutors of criminal RICO cases and plaintiffs pursuing civil RICO.

A. *The Implications for Criminal RICO*

Under the manage or operate test, the Justice Department could only prosecute persons in charge of enterprises. Consider, for example, the "Club" case in the Southern District of New York.[167] The Justice Department prosecuted members of organized crime and their associates for racketeering acts involving, as the enterprise, the Genovese crime family. Leaders of the family, the "foot soldiers" in the family and even some nonfamily associates were prosecuted for their participation in carrying out the business of the Genovese family. Under the manage or operate test, only the heads of the family could be prosecuted. The manage or operate test would exclude enforcers and others who carry out the directives of those above them in the hierarchy.

An example in the public corruption context is the RICO prosecution of the sheriff of Nashville, Tennessee.[168] In this case, there were seven RICO defendants, including the sheriff and several of his deputies. They all participated in the racketeering activity, but not all had management positions within the Sheriff's Department, the enterprise named in the indictment. In fact, some of the deputies were employees, who were intimately involved in the racketeering activity but not highly placed in the Sheriff's Department. Application of the manage or operate test means that only the sheriff could have been prosecuted for these crimes. Such a result would be incompatible with the goal of RICO, which is to pursue enterprise criminality in all its forms.[169] As the Justice Department propounded in its amicus brief in *Yellow Bus Lines, Inc.*, senior management can yield significant profits to wrongdoers and thwart the attainment of the enterprise's legitimate goals.[170] No court, since the Fourth Circuit in *Mandel*,[171] has applied the "manage or operate" test in a criminal context. In fact, the Eighth Circuit, the circuit that first articulated the manage or operate test in a civil RICO case, employed a different standard, the *Cauble* standard,[172] in a later criminal case.[173]

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167. United States v. Salerno, 937 F.2d 797 (2d Cir. 1991), *cert. granted*, 112 S. Ct. 931 (1992).

168. United States v. Thomas, 749 F. Supp. 847 (M.D. Tenn. 1990).

169. United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (quoting Blakey & Gettings, *supra* note 6, at 1013-14).

170. *Amicus Curiae Brief*, *supra* note 8, at 17.

171. United States v. Mandel, 591 F.2d 1347, *vacated on other grounds by an equally divided court*, 602 F.2d 653 (4th Cir.) (en banc) (per curiam) *petition for rehearing, denied (en banc)*, 609 F.2d 1076 (4th Cir. 1979), *cert. denied*, 445 U.S. 959, 961 (1980).

172. *See supra* notes 42-50 and accompanying text.

173. United States v. Ellison, 793 F.2d 942, 950 (8th Cir.), *cert. denied*, 479 U.S. 937

In *Arthur Young & Co.*,[174] the United States Supreme Court must decide the meaning of nexus as applied to a civil case. Its decision, however, will govern the interpretation of the term in the criminal context as well. Courts have imposed many of the limitations on RICO in the civil context. Moreover, many observers believe that there is more judicial hostility to civil RICO than to criminal RICO.[175] The Justice Department uses civil RICO far less often than criminal RICO. It has stringent guidelines for invoking criminal RICO, which operate as a kind of "watchdog" against abuses of criminal RICO.[176] That watchdog provision does not exist in civil RICO.[177] The Department of Justice's concern is that the Supreme Court will interpret RICO in ways which would detrimentally affect both criminal and civil RICO.[178]

The statute's text and legislative history offer no basis for treating any of its terms differently in civil RICO than in criminal RICO and, thus, interpretations of provisions of the statute apply to both criminal

(1986). *But see*, Danielsen v. Burnside-Ott Aviation Training Ctr., 941 F.2d 1220 (D.C. Cir. 1991) (D.C. Circuit followed *Yellow Bus Lines, Inc.* in a subsequent civil case).

174. 937 F.2d 1310 (8th Cir. 1991), *cert. granted sub nom.*, Reves v. Ernst & Young, 112 S. Ct. 1159 (1992).

175. *See, e.g.*, Susan Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time For Congress to Act*, 43 VAND. L. REV. 673 (1990):

> My RICO perspective comes from my years as a federal district court judge in Chicago . . . . As I dealt with these cases, it became clear to me that most civil RICO cases simply should not be in federal court. The majority of civil RICO cases involve commonplace commercial controversies, the facts of which reveal an ordinary business relationship gone sour.

Id. at 674. "RICO has also come under fire recently from judges in and out of the courtroom. Chief Justice Rehnquist was reportedly concerned about the number of RICO cases on the federal docket." Coffey, *supra* note 18, at 1037.

176. *See* Coffey, *supra* note 18 at 1043; Edward S. G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 654 (1990).

177. H.R. REP. No. 1717, 102nd Cong., 1st Sess. (1991), introduced by Rep. William J. Hughes of New Jersey and currently pending in the House of Representatives, includes a judicial gatekeeper provision:

> (3) The court shall dismiss a claim against a defendant under this subsection if, at any time before trial, upon motion of the defendant or on the court's own motion, the court determines after a hearing that the claim finds to meet the requirements of the final 3 sentences of paragraph (1) of this subsection, or the plaintiff has failed to show that this extraordinary civil remedy is in the public interest and is needed to deter egregious criminal conduct, considering any need to deter the defendant and others similarly situated.

Id.; *See also* Michael Goldsmith & Mark Jay Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735 (1990) (reviewing various gatekeeper proposals). Goldsmith and Linderman suggest standards for a gatekeeper provision, proposing the following statutory language:

> In determining whether to permit a civil RICO claim to proceed, the court must find that the allegations concern long-term criminal activity, or the threat thereof, which pose a serious threat to society. Factors to consider in this respect include:
>
> (i) the duration of the criminal activity and the degree to which each predicate act inflicted independent injury;
>
> (ii) the extent of economic loss and the number of victims;
>
> (iii) whether the defendant held a position of special trust or committed crimes against especially vulnerable victims; and
>
> (iv) whether the allegations concern merely an ordinary commercial dispute.
>
> The decision of the court must be accompanied by a statement of reasons reflecting the application of these factors.

Id. at 766.

178. Dennis, *supra* note 176, at 656.

and civil RICO. A court must remember that when it decides a case in a civil RICO context, the ruling has important implications for criminal RICO as well. Adoption of the manage or operate nexus test would undermine criminal RICO.

B. *The Manage or Operate Test Would Severely Frustrate Efforts in the Criminal and Civil Arenas to Combat "Economic Crime."*

If the United States Supreme Court adopts the manage or operate test, who would be excluded? In *Arthur Young & Co. v. Reves*[179] the accountants would be excluded. The "hue and cry" over RICO started when it was applied in the white collar context. There has been little complaint about 18 U.S.C. § 1955. The same language has been construed for years to include everyone affiliated with the gambling business, even cocktail waitresses who serve the gamblers drinks.[180] The controversy over RICO has focused almost entirely on its application to white collar crime and to persons who are involved in white collar crime.[181]

The economic crime problem in this country has reached epidemic proportions.[182] The savings and loan scandal, particularly the collapse of the Charles Keating empire, exemplifies the magnitude of the problem. At least one-half of bank failures and one-quarter of thrift failures involve criminal activity by insiders.[183] In the savings and loan crisis, the government is bringing criminal RICO suits and the Federal Deposit Insurance Corporation (FDIC) and Resolution Trust Corporation (RTC) are using civil RICO.[184] The enormity of the economic crime problem is further evidenced by the collapse of the Bank of Credit and Commerce International (BCCI), the consequences of which remain unknown. Federal prosecutors and private parties have already filed RICO suits based on the collapse of BCCI.[185]

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179. 937 F.2d 1310.

180. *See* United States v. Tucker, 638 F.2d 1292 (5th Cir.), *cert. denied*, 454 U.S. 833 (1981).

181. *See* Crovitz, *supra* note 17. Mr. Crovitz, an editor of the Wall Street Journal is well known for his opposition to RICO's use against Wall Street. *See also* G. Robert Blakey et al., *What's Next?: The Future of RICO*, 65 NOTRE DAME L. REV. 1073 (1990) (a debate between Mr. Crovitz and Professor Blakey, RICO's principal drafter).

182. *RICO Myths*, *supra* note 6, at 882-86; *see also*, Note, *Insider Abuse and Criminal Misconduct in Financial Institutions: A Crisis? Renae v. Stevens*, 64 NOTRE DAME L. REV. 222 (1989).

183. H.R. REP. No. 1088, 100th Cong., 2d Sess. 2-13 (1988), *cited in* Brief of Trial Lawyers for Public Justice as Amicus Curiae, Reves v. Ernst & Young, 112 S. Ct. 1159 (1992).

184. *RICO Myths*, *supra* note 6, at 885.

185. Federal prosecutors indicted BCCI, as a corporation, on RICO charges in district court in the District of Columbia. A plea agreement has been reached in the case in which all BCCI assets in the United States are to be forfeited. Half of the forfeited assets will be sent to an overseas fund to repay creditors and half will be distributed here to government entities and to victims. *See* United States v. BCCI Holdings (Luxembourg) S.A., DC, Crim. No. 91-0655 (JHG), plea approved Jan. 1, 1992 (reported in *Federal Judge Approves BCCI Settlement Over Objections of Other BCCI Creditors*, 17 BNA, Daily Report for Executives A-8, Jan. 27, 1992). The plea agreement does not preclude the government from prosecuting individuals who may have been involved in the scandal. A civil RICO class action suit arising out of the BCCI collapse has been filed in Los Angeles. Among the defendants are the accounting firms of Price Waterhouse and Ernst & Young. *See* Victoria Slind-Flor,

Some observers have tried to frame the issue as one of whether RICO was intended to reach those who are peripherally involved in the enterprise.[186] They characterize accountants, lawyers and investment bankers as only peripherally involved when the enterprise is the company or organization that hired them.[187] This characterization is false. Professionals have played key roles in many of the savings and loan failures.[188] Accountants, lawyers or bankers may be so involved in shaping the course of the business of the enterprise that they are conducting or participating in its conduct. Attorneys may shape the activities of their clients through the rendering of legal advice, accountants through their accounting services, and lenders through their financing.[189]

An accountant, lawyer or banker will rarely manage or control the enterprise as the *Yellow Bus Lines, Inc.* test[190] would require. In fact, that test would include only the top management of the enterprise. Congress intended RICO to reach anyone who conducts or participates in the conduct of the enterprise. This may or may not include accountants, lawyers or bankers depending on the circumstances of the case. If RICO includes "Mafia" foot soldiers who carry out a mob murder at the behest of the "family boss," then it includes an accountant who, by preparing false statements or by otherwise misrepresenting the financial status of a company at the behest of the chief executive officer, conducts or participates in the conduct of the company.

Three accounting firms are implicated in the Charles Keating scandal.[191] Accounting groups have been very active in seeking to restrict

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BCCI Suit: Far-Flung, Massive, NAT'L L.J., Jan. 20, 1992, at 1. In addition, the Banking Department of the State of New York, filed a civil RICO suit seeking recovery of loans from the New York agency of BCCI. *See* Zephas v. Zurich Corp., 91 Civ. 7907 (JSM), D.C. S.N.Y., Nov. 22, 1991 (reported in *N.Y. Banking Department Seeks Recovery of Loans from BCCI in Receivership Case*, 231 BNA, Daily Report for Executives A-2, Dec. 2, 1991).

186. *See* Edward Brodsky, *RICO—Conflicting Views about Professionals*, N.Y.L.J., Sept. 11, 1991, at 3 (discussing the *Arthur Young & Co.* case).

187. *Id.*

188. *Two Firms Settle Lincoln S&L Cases*, L.A. TIMES, Mar. 31, 1992, at A1 (Ernst & Young and Jones, Day, Reavis and Pogue settle lawsuits arising out of failure of Lincoln Savings and Loan); Donna K. H. Walters, *New Liability Twist Has Lawyers, Accountants Scurrying*, L.A. TIMES, Mar. 29, 1992, at D1; *Yes-Men Professionals*, THE CHRISTIAN SCI. MONITOR, Mar. 16, 1992, at 20 (editorial) ("[S]urrounding Keating like a praetorian guard were phalanxes of lawyers and accountants who assured both investors and regulators that their client's Lincoln Savings and Loan was sound."); James S. Granelli, *Keating's Advisers Under Fire: Attorneys, Accountants Helped Massive Fraud Work Investors' Lawyers Say*, L.A. TIMES, Mar. 14, 1992, at D1.

189. *See* Stephen Labaton, *Law Firm Will Pay A $41 Million Fine in Savings Lawsuit*, N.Y. TIMES, Mar. 9, 1992, at A1. (On March 2, 1992, the Office of Thrift Supervision filed a RICO civil suit against the New York law firm of Kaye, Scholer, Fierman, Hays & Handle for its role in the collapse of Charles Keatings' Lincoln Savings Bank. On March 9, 1992, the firm agreed to pay forty-one million dollars to settle the lawsuit); *see also* Jolie Solomon, *U.S. Did In S&L Advisor By the Book*, THE BOSTON GLOBE, Mar. 10, 1992, at 35 (stating the public should be delighted that the government cracked down on Kaye and Scholer).

190. *See supra* notes 79-94, and accompanying text.

191. One of those implicated is Arthur Young & Co. (now Ernst & Young). *See* Allison Leigh Cowan, *Big Law and Auditing Firms to Pay Millions in S & L Suit*, N.Y. TIMES, Mar. 31, 1992, at A1 (Jones, Day, Reavis & Pogue and Ernst & Young settle Keating litigation). *See also* Eric N. Berg, *Losing $2 Billion—An Accounting Quagmire; The Lapses by Lincoln's Auditors*, N.Y. TIMES, Dec. 28, 1989, at D1. Arthur Young & Co. gave Lincoln and American Conti-

the scope of RICO.[192] The efforts of the accounting profession to limit its liability under RICO should be considered in light of the role which accountants have played in the collapse of the savings and loan institutions. There are compelling reasons to construe "conduct" to include these white collar offenders in the reach of RICO.

PART V. AN ANALYSIS OF SUPREME COURT RICO JURISPRUDENCE

This part of the article will discuss the Supreme Court's prior RICO jurisprudence, focusing on five cases in which it has interpreted the statute.[193] This jurisprudence indicates that neither the text of the statute nor its legislative history support the restrictive manage or operate test.

A. *United States v. Turkette*[194]

Justice White, writing for the Court in *Turkette*, decided that RICO covered both the infiltration of legitimate business by organized crime and completely illegitimate organizations. The defendant in *Turkette* argued that RICO was intended solely to protect legitimate business enterprises from infiltration by racketeers and did not cover those enterprises that perform only illegal acts and make no attempt to infiltrate legitimate businesses.[195]

The opinion analyzes the statute by looking first at its language. Early in the opinion, the Court hints at its views of the interplay between that language and the legislative history. "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclu-

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nental unqualified audit opinions at the time that examiners have claimed that Lincoln was insolvent. Based on the firm's report that the company's financial condition was accurately represented, American sold more than $200 million of junk bonds to over 23,000 investors. This sounds almost identical to what the plaintiffs in *Arthur Young & Co. v. Reves* are alleging the company did. Following these sales, the Arthur Young partner who handled Lincoln's account accepted a $930,000 position with Lincoln. Nathaniel C. Nash, *Auditors of Lincoln on the Spot*, N.Y. TIMES, Nov. 14, 1989, at D1, *cited in RICO Myths*, *supra* note 6, at 885 n.108. Similar collapses of Arthur Young clients have occurred in Texas. *See* Lee Berton, *Spotlight on Arthur Young is Likely to Intensify as Lincoln Hearings Resume*, WALL ST. J., Nov. 21, 1989, at A20, *cited in RICO Myths*, *supra*, at 855. In fact, five of the top six accounting firms were banned from doing new work for savings and loans by the RTC because of pending litigation for past faulty audits and dozens of impending civil suits. *See RICO Myths*, *supra* note 6, at 894-95 n.137.

192. *See* Briefs of American Institute of Certified Public Accountants as Amici Curiae, H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); and Reves v. Ernst & Young, 112 S. Ct. 1159 (1992).

193. In addition to the five cases discussed here, the Supreme Court has also construed RICO in Tafflin v. Levitt, 493 U.S. 455 (1990); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989); United States v. Monsanto, 491 U.S. 600 (1989); Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143 (1987); and Shearson Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987). The first four cases analyzed in the text most clearly elucidate the Court's method of statutory interpretation. This Article includes the final case, Holmes v. Security Investor Protection Co., 112 S. Ct. 1311 (1992), because it is the Court's most recent interpretation of RICO.

194. 452 U.S. 576 (1981).

195. *Id.* at 579-80.

sive.' "[196] In other words, the Court will first examine the language, but legislative history can trump even unambiguous statutory language.[197] In *Turkette*, the Court initially found that nothing in the language limits enterprises to legitimate ones.[198] It considered the statutory language unambiguous saying that "[t]he language of the statute, however—the most reliable evidence of its intent—reveals that Congress opted for a far broader definition of the word 'enterprise' " than the defendant suggested.[199]

The Court then examined the legislative history concluding that the statement of findings and purpose is broad and that nothing in the legislative history supports a narrow reading of the term enterprise.[200] It rejected the view that the statute was only intended to reach the infiltration of legitimate business by organized crime. "This is not to gainsay that the legislative history forcefully supports the view that the major purpose of Title IX is to address the infiltration of legitimate business by organized crime."[201] But none of these statements requires the negative inference that Title IX does not reach others.[202] The Court in *Turkette* found unambiguous language and unambiguous legislative history. It ultimately discerned a clear Congressional intent in the legislative history that the terms of RICO be construed broadly.[203]

B. *Russello v. United States*[204]

Justice Blackmun, writing for the Court in *Russello*, followed the same approach to statutory interpretation as the *Turkette* Court. Justice Blackmun quoted the language in *Turkette* that interpretation starts with the statute's language, but clearly expressed legislative history can trump unambiguous statutory language.[205] The Court stated that, if the relevant term is not defined in the statute, this silence compels the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.[206] It then consulted the dictionary for a definition of the words "interest and profit," which were at issue in *Russello*. The Court concluded that "Congress selected th[e] general term ["interest"] apparently because it was fully consistent with the pattern of

196. *Id.* at 580. *See also* Eskridge, *supra*, note 109, at 626-30. (Eskridge refers to this as "soft plain meaning").

197. *See, e.g.*, Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987); TVA v. Hill, 437 U.S. 153 (1978), *discussed in* Eskridge, *supra* note 109, at 626.

198. *Turkette*, 452 U.S. at 580.

199. *Id.* at 593.

200. *Id.* at 588-89.

201. *Id.* at 591.

202. *Id.*

203. *Id.* at 593.

204. 464 U.S. 16 (1983). In *Russello*, a person convicted under RICO for arson-related offenses challenged the forfeiture of the insurance proceeds he received from his arson activities. Defendant argued that the term "interest" in § 1963(a)(1) should be limited to an interest in the enterprise, not profits or proceeds. The Court rejected this argument.

205. *Id.* at 20. *See also* Eskridge, *supra* note 109, at 626.

206. *Russello*, 464 U.S. at 21.

the RICO statute in utilizing terms and concepts of breadth."[207] Among the terms of breadth in the statute to which the Court referred are "enterprise" in § 1961(4), "racketeering" in § 1961(1) and "participate" in § 1962(c).[208] The Court decided *Russello* by considering the language of the statute, looking first to the dictionary meaning of the terms, then analyzing how the terms were used throughout the entire statute.

The Court considered the legislative history in *Russello* but indicated that it may be unnecessary to do so. It said "[i]f it is necessary to turn to the legislative history . . . that history does not reveal . . . a limited congressional intent."[209] As in *Turkette*, the Court discovered in RICO's legislative history a broad scope since RICO was intended to provide "new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[210]

C. *Sedima, S.P.R.L. v. Imrex, Co.*[211]

The Court in *Sedima* rejected a restrictive interpretation of § 1964(c) that would have required plaintiffs in a civil RICO action to prove both that the defendant had already been convicted of a predicate racketeering act of a RICO violation and a special racketeering injury.[212] Justice White, who wrote the *Turkette* opinion, also wrote the *Sedima* opinion. The Court again looked first to the language of the statute, then to the legislative history, concluding "the language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction."[213] It observed that when Congress intends, in other statutes, for a defendant to have been previously convicted, it says so.[214] The Court also looked to neighboring subsections of the statute and concluded that Congress would not have "intended the term to have wholly different meanings in neighboring subsections."[215] As before, the Court then analyzed the legislative history:

> The history is otherwise silent on this point and contains nothing to contradict the import of the language appearing in the statute. Had Congress intended to impose this novel requirement, there would have been at least some mention of it in the legislative history, even if not in the statute.[216]

The Court referred to the general principles in the legislative history and concluded that a "less restrictive reading is amply supported by our prior cases and the general principles surrounding this statute. RICO is

207. *Id.*
208. *Id.*
209. *Id.* at 26.
210. *Id.* at 26 (quoting S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969) *reprinted in* 1970 U.S.C.C.A.N. 4007).
211. 473 U.S. 479 (1985).
212. *Id.* at 481.
213. *Id.* at 488.
214. *Id.* at 489 n.7.
215. *Id.* at 489.
216. *Id.* at 490.

to be read broadly. This is the lesson . . . of Congress' self-consciously expansive language and overall approach . . . ."[217]

Sedima also includes language which clearly shows that Congress intended RICO to combat white collar crime and that its language should be broadly read to include those types of criminal defendants:

> Underlying the Court of Appeals' holding was its distress at the 'extraordinary, if not outrageous,' uses to which civil RICO has been put. (citation ommitted). Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against 'respected and legitimate 'enterprises." (citation ommitted). Yet Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. (citation ommitted). The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that [RICO] is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the 'ambiguity' discovered by the court below. '[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' (citation ommitted).[218]

D. *H.J. Inc. v. Northwestern Bell Telephone Co.*[219]

In *H.J. Inc.*, Justice Brennan writing for the Court, looked first to language and then to legislative history. The difference in *H.J. Inc.* is that the Court found the language itself to be less clear than in the other cases. *H.J. Inc.* concerned what may be the most problematic term in the entire statute: "pattern of racketeering activity." Once again, the Court first consulted the dictionary, and upon finding it insufficient, considered how Congress used the term in analogous provisions within the same act.[220] It examined the legislative history and developed the definition of pattern as "continuity plus relationship" from the legislative history of another provision within the act.[221]

Moreover, in *H.J. Inc.*, the Court explicitly rejected an organized crime limitation on RICO, finding such a limitation is without support in the text and contravenes the tenor of the legislative history.[222] The Court invoked the legislative history to demonstrate that Congress intentionally employed commodious language capable of reaching beyond organized crime[223] by referring to comments made by opponents of RICO, that criticized the statute for potentially extending beyond organ-

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217. *Id.* at 497-98.
218. *Id.* at 499.
219. 492 U.S. 229 (1989).
220. *Id.* at 239.
221. *Id.* at 252 (relying on S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969)) (*reprinted in* 1970 U.S.C.C.A.N. 4007).
222. *Id.* at 244.
223. *Id.* at 246.

ized crime.[224] The Court concluded with an allusion to the legislative history: "[tlhe occasion for Congress' action was the perceived need to combat organized crime. But 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."[225]

Justice Scalia sharply criticized the majority's statutory analysis in perhaps a concurring opinion.[226] He called the term "pattern of racketeering activity" "enigmatic."[227] Justice Scalia criticized the majority for "[e]levating to the level of statutory text a phrase taken from the legislative history . . . ."[228] Again criticizing the majority for taking the definition from another provision in the same act and applying it to RICO, he said:

> [I]f normal (and sensible) rules of statutory construction were followed, the existence of 3575(e) - which is the definition contained in another title of the Act which was explicitly *not* rendered applicable to RICO - suggests that *whatever* 'pattern' might mean in RICO, it assuredly *does not* mean that. '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in disparate inclusion or exclusion.'[229]

Justice Scalia concluded by indicating that he would find the statute vague if faced with that issue squarely.[230]

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224. *Id.*

225. *Id.* at 248.

226. Justices Rehnquist, O'Connor, and Kennedy joined Justice Scalia in the concurrence.

227. *H.J. Inc.*, 492 U.S. at 251.

228. *Id.* at 252.

229. *Id.* (emphasis in original) (citing Russello v. United States, 464 U.S. 16, 23 (1983)).

230. *Id.* at 255. Accepting Justice Scalia's invitation, many litigants have raised this issue in the circuits and, so far, no circuit has held the pattern element vague. *See* United States v. Angiulo, 897 F.2d 1169 (lst Cir.), *cert. denied by* Granito v. United States, 111 S. Ct. 130 (1990); United States v. Pungitore, 910 F.2d 1084 (3d Cir.), *cert. denied by* Virgilio v. United States, 111 S. Ct. 2009 (1990) (post-*H.J. Inc.* cases rejecting vagueness challenges). Prior to *H.J. Inc.*, the First, Second, Third, Fifth, Sixth, Seventh, Ninth and District of Columbia Circuits found RICO's pattern requirement constitutionally sound.

Moreover, in Fort Wayne Books v. Indiana, 489 U.S. 46 (1989), the Supreme Court upheld the Indiana RICO statute, which has the same pattern language, against a void for vagueness challenge and observed:

> [B]ecause the scope of the Indiana RICO law is more limited than the scope of the State's obscenity statute—with obscenity-related RICO prosecutions possible only where one is guilty of a 'pattern' of obscenity violations—it would seem that the RICO statute is inherently *less* vague than any state obscenity law: a prosecution under the RICO law will be possible only where all the elements of an obscenity offense are present, and then some.

Id. at 58-59 n.7 (emphasis in original).

Professor G. Robert Blakey, the author of the RICO statute, has suggested that *Fort Wayne Books* be read to settle the issue of the facial constitutionality of RICO type legislation. According to Professor Blakey, "RICO . . . [does] not draw a line between criminal and innocent conduct, [but] authorize(s) the imposition of different criminal or civil remedies on conduct already criminal when performed in a specific fashion." G. Robert Blakey, *Is "Pattern" Void For Vagueness?*, *supra* note 6, at 6, 11, nn.13, 72 Dec. 12, 1989. Moreover, "No person seeking to keep his conduct within the law need fear RICO. All he must do is not violate the predicate offenses." *Id.* at 7. Blakey, therefore, contends that RICO cannot

E. *Holmes v. Securities Investor Protection Corp.*[231]

On March 24, 1992, the Supreme Court decided that § 1964(c), the civil Rico provision, includes a proximate cause requirement.[232] This means that the racketeering activity must proximately cause the injury claimed.[233] The Court's straightforward analysis looked to the legislative history and found that § 1964(c) was modeled after Section Four of the Clayton Act[234] which was based on Section Seven of the Sherman Act.[235] Lower federal courts had read Section Seven to incorporate common law principles of proximate causation. The Supreme Court previously held that Congress' use of Section Seven language in Section Four presumably showed the intention to adopt the judicial gloss on Section Seven.[236] The Court said that this reasoning applies equally to § 1964(c). "[Congress] used the same words, and we can only assume it intended them to have the same meaning that courts had already given them."[237]

In a concurring opinion, Justice O'Connor[238] agreed with the majority that § 1964(c) includes a proximate cause requirement. However,

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be vague because a defendant is clearly apprised of the line between guilt and innocence. "What the Constitution requires is that a defendant know to conform his conduct to the law. Nothing else is required." *Id.*

Professor Lynch has characterized the confusion over what the pattern requirement means as bogus.

> The notion that the concept of 'pattern' is too vague to be understood by a jury of English-speakers of ordinary intelligence can be credited only against the background of judicial efforts to twist a rather basic (if hard to define) concept into elaborate knots in order to find patterns in criminal cases and find lack of pattern in civil suits to which courts are hostile.

Lynch adds:

> Far more than obscenity, a 'pattern' is something that we know when we see it; it is the nature of our intelligence to group things into patterns based on perceived relationships, while finding some things too random—too 'isolated and sporadic,' if you will—to be so grouped. Asking jurors quite simply whether the facts fall into a pattern or are just isolated and sporadic instances of crime strikes me as a perfectly responsible course. Subdividing the fundamental notion of pattern into rigid subtests of 'relationship' and 'continuity' seems unnecessarily arcane, and it is no wonder that the courts have wrought wonders of confusion by attempting a technical definition of a readily understood lay term.

Gerard E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 772 n.8 (1990).

One commentator has suggested that nexus, like the pattern element, is also vague. *See* Reed, *supra* note 6, at 722. Reed thinks that nexus is susceptible to a vagueness challenge for the following reasons: (1) It has generated imprecise judicial interpretations, (2) it is not defined in the definitional section of RICO, and (3) 1962(c) itself does not specify "the degree of interrelationship between the pattern of racketeering and the conduct of the enterprise's affairs." *Id.*

231. 112 S. Ct. 1311 (1992) (Justice Souter wrote the opinion).

232. 18 U.S.C. § 1964(c) (1988) states that: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

233. *Holmes*, 112 S. Ct. at 1318.

234. Codified at 15 U.S.C. § 15 (1988).

235. Codified at 15 U.S.C. § 6(a) (1988).

236. Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 536 (1983).

237. *Holmes*, 112 S. Ct. at 1318.

238. Justices White and Stevens joined Justice O'Connor. Justice Scalia concurred separately with the opinion.

these three justices and Justice Scalia would have reached the other issue presented in the case—whether a plaintiff must be a purchaser or a seller of securities to bring a RICO claim predicated upon allegations of fraud in the sale of securities.[239] The four justices would have found no such limitation in the statute. Justice O'Connor's opinion considered the text of the statute and found that § 1964, on its face, has no purchaser/seller standing requirement and sweeps broadly, using the words " '[a]ny person' who is injured by reason of a RICO violation."[240] The four concurring justices found that "any person" cannot reasonably be read to mean only purchasers and sellers of securities.[241] Furthermore, Justices O'Connor, White, and Stevens said that "[t]here is no room in the statutory language for an additional . . . requirement."[242]

PART VI. A PROPOSAL FOR INTERPRETING NEXUS

A. *The Court's Prior RICO Jurisprudence Should Lead It to Reject the Manage or Operate Test.*

If the Supreme Court follows its past RICO jurisprudence, the Court will apply traditional principles of statutory interpretation in *Reves v. Ernst & Young*.[243] The Court will consider first the words of the statute and then, if the Court considers the language clear, it will analyze the legislative history to support that finding. If the Court considers the language ambiguous, the Court will examine the legislative history in an attempt to discover the intent of Congress.

In its prior RICO opinions, the Court has found that Congress used terms of breadth[244] in RICO; has interpreted the statute broadly in accordance with a general statutory plan employing such terms; and has distilled from the legislative history a congressional intent that RICO be broadly applied. The Court's language in *Sedima* is illustrative: "RICO is to be read broadly. This is the lesson . . . of Congress' self-consciously expansive language and overall approach . . . ."[245]

The Court, in determining whether adoption of the manage or operate test is warranted, should first consider the language of the statute. The Court, as it did in *Turkette*,[246] *Russello*[247] and *Sedima*,[248] should reject the addition of language which does not appear in the statute. To ascertain whether the text of the statute supports the manage or operate

239. *Holmes*, 112 S. Ct. at 1322.
240. *Id.* at 1323.
241. *Id.*
242. *Id.*
243. 112 S. Ct. 1159 (1992), *cert. granted sub nom* from, Arthur Young & Co. v. Reves, 937 F.2d 1310 (8th Cir. 1991).
244. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985).
245. *Id.* at 497-98.
246. 452 U.S. 576 (1981).
247. 464 U.S. 16 (1983).
248. 473 U.S. 479 (1985). Moreover, four concurring justices in *Holmes* would have reached the issue of whether one was required to be a buyer or seller of securities to bring a RICO action based on a violation of securities laws and would have found as well that no such limitation appears in the statute.

test, the Court should consider the definition of the terms "conduct" or "participate" in the dictionary, the structure of the entire RICO statute, including how the same terms are used in other parts of the statute, and how the same terms are construed in analogous provisions of the Organized Crime Control Act.

Application of these concepts should lead to rejection of the manage or operate test. First, the word conduct should not be restricted to manage or operate. That reading ignores other equally valid definitions which appear in the dictionary, such as "to carry on." The District of Columbia Circuit Court's definition reads the statutory terms "conduct or participate in the conduct of," too narrowly proceeding as if the statute simply said "conduct."[249] The restrictive definition in *Yellow Bus Lines, Inc.* also ignores the word "participate" and the words "directly or indirectly" which appear in § 1962(c). That these words appear with conduct in § 1962(c) additionally undercuts limitation of the word conduct to manage, operate, or control.

Moreover, Congress' use of more restrictive language in other parts of the statute indicates that it intentionally employed broad language in § 1962(c). The words "control or participate in the control of" appear in § 1962(a), and § 1962(b) uses the term "control of any enterprise." Congress presumably would have used equally restrictive terms in § 1962(c), had it so wished.

Analogous provisions of the Organized Crime Control Act, such as 18 U.S.C. §§ 1555 and 1511, and judicial interpretation of those provisions support a broad reading of conduct. Sections 1555 and 1511 which also use the word "conduct" have routinely been applied to individuals who did not "manage or operate" a gambling establishment. In short, Supreme Court scrutiny of RICO's language should lend no support to the manage or operate test.

The Court, following its prior method, should find persuasive support for a broad reading of RICO's terms in its legislative history. It should hold, as it has in earlier RICO cases, that RICO's legislative history evidences a broad scope. The Court should reject the manage or operate test based upon the language of the statute, its structure and the legislative history.

The Court may be influenced by the "new textualism"[250] of which

249. Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132 (D.C. Cir. 1989), *rev'd en banc*, 913 F.2d 948 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991).

250. This term was coined by William Eskridge, Jr.. *See* Eskridge, *supra* note 106, at 623 n.11. Eskridge defines "new textualism" as:

> once the court has ascertained a statute's plain meaning, consideration of legislative history become irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text. Such confirmation comes, if any is needed, from examination of the structure of the statute, interpretations given similar statutory provisions, and canons of statutory construction.

Id. at 623-24. For additional critiques of "new textualism," *see* Sunstein, *supra* note 108; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597

Justice Antonin Scalia is the leading proponent. There is evidence that his views on statutory construction are increasingly influencing the Court's statutory construction.[251] Scalia favors a "hard plain meaning rule," which ignores legislative history except in the rare instance when the text is absurd on its face.[252]

Justice White and Justice Scalia have sparred on the issue of statutory interpretation in other cases; most recently in *Wisconsin Public Intervenor v. Mortier*.[253] In *Mortier*, Justice White wrote the majority opinion, joined by everyone on the Court except Justice Scalia. The majority opinion relied heavily on the legislative history of the federal statute being construed. Justice Scalia wrote a scathing concurrence attacking the majority's use of legislative history to reach its conclusion—a conclusion which he agreed with based on his reading of the text alone.[254]

A "new textualist" analysis of nexus would differ from traditional statutory interpretation since it requires less consultation of legislative history and relies on the language of the statute itself and the dictionary definitions of the terms. Such an approach would examine other terms within the same statute and then consider how the same terms are interpreted in other statutes. This procedure would differ minimally from the Court's prior RICO analysis. A "new textualist" approach would

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(1991); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward A Factfinding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990).

251. These views have not, however, commanded a majority on the Court. Eskridge, *supra* note 109, at 656. *See also* Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991).

252. Eskridge, *supra* note 109, at 651.

253. 111 S. Ct. 2476 (1991).

254. The concurrence elucidates Justice Scalia's "new textualist" approach:

> Their [the majority's] only mistake was failing to recognize how unreliable Committee Reports are—not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not . . . . All we know for sure is that the full Senate adopted the text that we have before us here, as did the full House, pursuant to the procedures prescribed by the Constitution; and that that text, having been transmitted to the President and approved by him, again pursuant to the procedures prescribed by the Constitution, became law. On the important question before us today, . . . we should try to give the text its fair meaning, whatever various committees might have had to say—thereby affirming the proposition that we are a Government of laws not of committee reports.

Id. at 2488, 2490.

> Justice White, in the majority opinion, responds to Justice Scalia's criticism by stating: As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, '[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived.' [citation omitted] Legislative history materials are not generally so misleading that jurists should never employ them in a good faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. [citation omitted] We suspect that the practice will likewise reach well into the future.

Id. at 2485 n.4.

> Justice Scalia responded to Justice White's statement by observing:
> I am depressed if the Court is predicting that the use of legislative history for the purpose I have criticized 'will . . . reach well into the future.' But if it is, and its prediction of the future is as accurate as its perception that it is continuing a 'practice . . . reach[ing] well into [our] past,' I may have nothing to fear.

Id. at 2491.

consult legislative history, however, only if the language of the statute were not only ambiguous but ridiculous.[255] Even were the Court to apply Justice Scalia's "new textualist" approach, it should reject the manage or operate test. The test has no support in the particular language being construed nor the structure of the statute itself.

B. *The Court Should Require That One "Manage, Operate, or Carry On the Business of the Enterprise."*

If the Court rejects the manage or operate test, how then should it interpret this provision of the statute? I suggest an "ordinary meaning" approach.[256] I propose that the Court construe "conduct or participate in the conduct of an enterprise" to mean "manage, operate, or to take part in the carrying on of the business of the enterprise." This construction conforms to the dictionary definition of the terms, and it is consistent with the structure of the statute which demonstrates that Congress intended § 1962(c) to be construed more broadly than §§ 1962(a) or (b). It is also consistent with the construction of the terms in analogous provisions such as 18 U.S.C. §§ 1511 and 1555 where conduct has been interpreted to cover more than just those who manage or operate. This construction is true as well to RICO's legislative history which indicates that Congress intended to create a "new weapon of unprecedented scope for an assault on organized crime and its economic roots."[257]

The test which I propose is preferable to other nexus tests that courts currently employ. The *Scotto-Provenzano* test[258] is too broad. This test means that one can conduct the affairs of the enterprise simply if one's position in the enterprise enables one to commit the racketeering acts. The test also states that, if the racketeering acts are related to the enterprise, one conducts or participates in the affairs of the enterprise. It would include acts committed when one was not managing, operating or carrying on the business of the enterprise. The *Cauble* test[259] is problematic because it requires that the racketeering activity affect the enterprise and that one's position within the enterprise facilitate the commission of the acts. This requirement would exclude outsiders who are associated with the enterprise. The facilitation test[260] is deficient because using the facilities and services of an enterprise does not mean that one is conducting or participating in the conduct of the enterprise.

The test which I have proposed includes outsiders as well as insiders but requires that one at least carry on the business of the enterprise.

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255. *See* Eskridge, *supra* note 109, at 623 (quoting Justice Scalia's concurring opinion in Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987)).

256. Michael Goldsmith proposed such an approach to the issue of pattern in *RICO and "Pattern:" The Search for "Continuity Plus Relationship."* Goldsmith, *supra* note 6, at 973.

257. S. REP. No. 617, 91st Cong., 1st Sess. 76 (1969), *reprinted in* 1970 U.S.C.C.A.N 4007.

258. *See supra* notes 29-41 and accompanying text.

259. *See supra* notes 42-50 and accompanying text.

260. *See supra* notes 51-67 and accompanying text.

This is truer to congressional intent than tests which merely require relation or utilization.

Does this test apprise people of ordinary intelligence what conduct is forbidden, and is it precise enough to avoid arbitrary and discriminatory law enforcement by those applying the statute?[261] Criminal statutes must pass two tests not to be found vague. First, they must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that she can conform her actions to the law. Second, criminal statutes must be precise enough to avoid arbitrary and discriminatory law enforcement by those applying them. The notice requirement does not impose on statutory language impossible requirements of specificity. Statutory language does not have to approach mathematical certainty and a court will not invalidate a statute for vagueness simply because Congress could have drafted the law more precisely.[262]

Words never stand by themselves. The significance of congressional enactments necessarily depends on context.[263] One, therefore, looks not only to the words, but to their context. If one assumes that the words "conduct or participate in the conduct of" mean manage, operate or carry on, one must then determine what the phrase means within the whole context of § 1962(c).[264] Second, the individual must manage, operate or carry on the business of the enterprise. Third, the person must do this through a pattern of racketeering activity. It is not a crime to manage, operate or carry on the business of an enterprise. One must go through a pattern of racketeering activity. In other words, one must first commit a crime.

The United States Supreme Court has already stated that the vagueness line is drawn in RICO at the commission of the predicate offense. In *Fort Wayne Books v. Indiana*,[265] the Court said, if the predicate offense is not unconstitutionally vague, the RICO statute cannot be. The Court observed:

> [B]ecause the scope of the Indiana RICO law is more limited than the scope of the State's obscenity statute—with obscenity-related RICO prosecutions possible only where one is guilty of a "pattern" of obscenity violations—it would seem that the RICO statute is inherently *less* vague than any state obscenity law; a prosecution under the RICO law will be possible only where all the elements of an obscenity offense are present, and then some.[266]

261. Reed, *supra* note 6, at 723; Bauerschmidt, *supra* note 6, at 1115; Gartenstein & Warganz, *supra* note 6, at 512-17.

262. *See* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972); *see also* Blakey, *Is "Pattern" Void for Vagueness?*, *supra* note 6, at 6; Gartenstein & Warganz, *supra* note 6, at 514.

263. Sunstein, *supra* note 108, at 416; *see also* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 217-27 (1975).

264. 18 U.S.C. § 1962(c) makes it illegal for "any person employed by or associated with an enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

265. 109 S. Ct. 916 (1989).

266. *Id.* at 925 n.5.

Professor G. Robert Blakey contends that RICO does not draw a line between criminal and innocent conduct but authorizes additional penalties for activity that is already criminal when performed in a specific fashion.[267] The purpose of notice is to give a person an opportunity to conform his or her actions to the law. A person should not have the right to commit a predicate act yet still avoid RICO prosecution.[268] As Professor Blakey has stated, one does not get "two bites at the vagueness apple."[269] Even Reed, who argues most vociferously that RICO is vague, concedes that any vagueness challenge to RICO must overcome the Supreme Court's decision in *Fort Wayne Books* drawing the vagueness line at the predicate act.[270]

Assuming that there is no notice problem, it is my proposal that "conduct or participate in the conduct of" be interpreted simply to mean "manage, operate, or carry on the business of an enterprise." This test is sufficiently broad to encompass acts which Congress intended the statute to cover and narrow enough to exclude conduct which Congress intended not to include. Application of this proposal can best be demonstrated by applying these definitions to the facts of some of the leading RICO cases.

Yellow Bus Lines, Inc.[271]

The union did not manage, operate or carry on the business of the bus lines. The bus company was merely the target of the union's illegal acts. The facts of *Yellow Bus Lines, Inc.*, therefore, fail the test which I have proposed.

United States v. Dennis[272]

The facts of *Dennis* would also fail to establish nexus under this construction. Dennis did not carry on the affairs of General Motors through a pattern of racketeering activity. He simply participated in the activity while on General Motors' premises.

United States v. Thomas[273]

In the case of the Sheriff of Nashville, Tennessee, nexus would be present not only for the Sheriff but also for the deputies who were charged. The deputies who carried on the racketeering activity were carrying on the affairs of the Sheriff's Department as well.

267. Blakey & Gettings, *supra* note 6, at 1031-33.
268. Garterstein & Wanganz, *supra* note 6, at 520 n.236.
269. Blakey, CIVIL RICO REPORT, *supra* note 6, at 7.
270. Reed, *supra* note 6, at 727.
271. 883 F.2d 132 (D.C. Cir. 1989), *rev'd en banc*, 913 F.2d 948 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991).
272. 458 F. Supp 197 (E.D. Mo. 1978). *See also* text accompanying note 36.
273. 749 F. Supp 847 (M.D. Tenn. 1990).

United States v. Webster[274]

If one applies this construction of "conduct or participate in the conduct of" to the facts of *Webster*, no nexus would be found. The defendant in *Webster* did not manage, operate, or carry on the affairs of the restaurant through a pattern of racketeering activity. The restaurant was merely the situs for some of the indicia of racketeering activity. Employees only forwarded calls regarding drugs from the restaurant to the defendant's home. An employee provided free drinks to one of the defendant's drug customers.[275] The defendants were conducting the affairs of their narcotics-selling organization through a pattern of racketeering activity, but they were not conducting the affairs of their restaurant through their drug selling activity.

United States v. Cauble[276]

In contrast to *Webster*, the ranching business in *Cauble* was completely interwoven with the drug smuggling activity. All of the facilities and assets of the enterprise were regularly put to the use of drug smuggling. Most importantly, the drug smuggling financed the enterprise and kept the enterprise going. The defendants carried on the business of the enterprise through the drug smuggling. A sufficient nexus, therefore, exists under the facts of *Cauble*.

United States v. Scotto[277]

Scotto presents a difficult case. Anthony Scotto was president of an International Longshoremen's Union local and accepted payoffs from individuals representing waterfront employers of union labor. The reasons for those payoffs varied. Some were to secure Scotto's assistance in "reducing fraudulent and exaggerated workmen's compensation claims filed by Scotto's local."[278] Others were to garner his assistance in soliciting new business.

The question is did he carry on the business of the local through the acceptance of those illegal payoffs? The answer is perhaps. Under the test enunciated in *Scotto*, it was unnecessary for the court to decide this. Using that test, one could easily determine that *Scotto* was enabled to accept these payoffs by being president of the local. But this is not necessarily sufficient. If *Scotto* simply accepted the payoffs and did not operate, manage or carry on the business of the local based upon receiving these payoffs, there would be no nexus. If he did, however, for example, encourage union managers to file or not file fraudulent workers compensation claims because he received these payoffs, Scotto would be carrying on the business of the local through a pattern of racketeering

274. 639 F.2d 174 (1981), *modified in part*, 669 F.2d 185 (4th Cir. 1982), *cert. denied*, 456 U.S. 935 (1982).
275. *Webster II*, 669 F.2d at 187.
276. 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).
277. 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).
278. *Id.* at 51.

activity. The evidence would have to show not only that he received the payoffs solely because he was president of the union but also that he pursued some course of action within the local based upon receiving those payoffs.

United States v. Yonan[279]

What about outsiders under this test? In *Yonan*, a defense attorney offered bribes to an Assistant State's Attorney to fix a case.[280] Did he manage, operate, or carry on the affairs of the State's Attorney's office through a pattern of racketeering activity? The answer is yes. He conducted business with the county attorney's office. The business of the county attorney's office was to prosecute criminal cases in Chicago. The defendant tried to affect that business, and he did business with the enterprise. Under the *Yellow Bus Lines, Inc.* test, the nexus in Yonan would obviously have been insufficient. Yonan hardly exercised "control over the course of the enterprise's activities."[281]

Reves v. Ernst & Young[282]

If all that the accountants did was prepare false financial statements, they would not be carrying on the business of the enterprise. However, they also met with the board of directors and with the shareholders and gave false information at those meetings. Their interaction with the general manager in this scheme to overvalue the assets of the co-operative would be critical to determining whether they carried on the business of the enterprise. If they worked with the general manager in this overall scheme to overvalue assets and hide the liabilities that were incurred by the gasohol plant, they might very well have been participating in carrying on the business of the enterprise, even though they may not have managed or operated it.

These examples illustrate that simply construing the terms in ways that comport with their common everyday meaning is workable and realistic for courts. It does not broaden the terms so that they lose any meaning.

CONCLUSION

Congress has steadfastly repelled vigorous attempts to eviscerate RICO. The Supreme Court has, in the past, refused to impose limitations upon RICO which are unsupported by its text and legislative history.

The Supreme Court should similarly reject the manage or operate test in *Reves v. Ernst & Young* because RICO's language, structure, and

279. 800 F.2d 164 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987).
280. *Id.* at 165.
281. Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991).
282. 112 S. Ct. 1159 (1992), *cert. granted sub nom.* from, Arthur Young & Co. v. Reves, 937 F.2d 1310 (8th Cir. 1991).

legislative history do not support the test. The Court should construe "conduct or participate in the conduct of" to mean "manage, operate, or carry on the business of" the enterprise. This test honors the words of RICO, and is consistent with the structure of the statute and is supported by the legislative history.

Such a test would not exclude those people such as lawyers or accountants who play significant roles in fraudulent activity, but who, nonetheless, do not manage or operate the enterprise. Congress did not intend to exclude this type of person from RICO's reach.