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I. Introduction

The liability of the so-called "legitimate business entity" for treble damages and attorney's fees pursuant to a civil action brought under the Racketeer Influenced and Corrupt Organizations Act (RICO)[1] is a matter of great concern to corporations and other business entities as well as to the bar which serves them. Such an entity can "act" only through its human agents and employees, thus its liability is necessarily vicarious, based not upon its "own" behavior, but upon the behavior of those who act on its behalf.[2] Thus, the question of corporate liability under RICO is really a question of whether and under what circumstances the Act contemplates vicarious liability of the corporation for the RICO violations of its agents or employees.

The stakes in this debate "are enormous for everyone."[3] The question is an important one for businesspersons and for their lawyers. Imposing vicarious liability upon the business entity is often the only way to find a deep enough pocket to make the lawsuit worthwhile, even under RICO. In addition, the use of vicarious liability in conjunction with civil RICO exposes corporations and other businesses to treble damage liability for the acts of even low-level employees. Thus, the real question is whether and under what circumstances a civil plaintiff, in true derivative fashion, can reach the corporate purse under RICO.[4]

Persons seeking to answer this question will find little guidance

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1. The Act is found at 18 U.S.C. §§ 1961-1968 (1982); private civil suits for treble damages and attorney's fees are authorized at 18 U.S.C. § 1964(c) (1982).

2. *See infra* note 45 and accompanying text.

3. Dwyer & Kiely, *Vicarious Civil Liability Under the Racketeer Influenced and Corrupt Organizations Act*, 21 CAL. W.L. REV. 324, 325 (1985).

4. *Id.* at 326.

in the language of the RICO statute or in its legislative history, for both are silent on the issue.[5] Moreover, federal courts struggling with this problem have been unable to agree on its resolution. Some have ruled that a corporation or other business entity can never be liable, vicariously or otherwise, under the RICO statute;[6] other courts have ruled that a corporation can be vicariously liable under any and all of RICO's provisions, just as under any other statute or common-law rule of liability;[7] still other judges have found that a corporation can be vicariously liable under some of RICO's provisions but not under others.[8] The commentators have likewise been of several minds on the issue.[9]

This Article will analyze the question of whether, under what standard, and to what extent the legitimate business entity should be held liable under civil RICO for the actions of its agents or employees. Part I of the Article will outline the relevant statutory provisions of RICO and review the common law doctrines under which a principal or employer may be held liable for the acts of its agent or employee. The rationale for imputing the misdeeds of an agent or employee to his or her principal or employer will also be examined. Part II of the Article will describe the controversy over whether and when a legitimate business should be liable under RICO, review the court decisions concerning these entities' derivative liability under RICO, and survey the statutory language and purposes of RICO and the policy considerations which bear upon the issue. Part III of the Article will propose a standard to be used in imposing vicarious liability on the legitimate business entity under civil RICO.

II. Statutory and Common Law Background

A. The Statutory Scheme

RICO prohibits three types of activity by "persons" in connection with an "enterprise": the investment of racketeering proceeds in an interstate enterprise;[10] the acquisition or maintenance of an inter-

5. *See infra* note 46 and accompanying text.
6. *See infra* notes 76-78, 119-26 and accompanying text.
7. *See infra* notes 111-12 and accompanying text.
8. *See infra* note 118 and accompanying text.
9. *See infra* notes 161-92 and accompanying text.
10. 18 U.S.C. § 1962(a) (1982). Section 1962(a) states in part:

> It shall be 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 in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or

est in an interstate enterprise through a pattern of racketeering activity;[11] and the conducting of interstate enterprise affairs through a pattern of racketeering activity.[12] "Person" is defined quite broadly to include "any individual or entity capable of holding a legal or beneficial interest in property."[13] "Enterprise" is defined equally broadly to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[14]

It is thus clear that a legitimate business entity such as a corporation, partnership, or trust can be an offending "person" within the terms of the statute if it controls or participates in the affairs of an enterprise through a pattern of racketeering activity. The same legitimate business entity can also be an "enterprise" for RICO purposes. In a RICO action involving an alleged enterprise which is also a legitimate business, the question becomes whether that business may also be alleged to be the "person" who has violated the statute. It is this circumstance which raises the issue of the propriety of vicarious liability under RICO.

B. Common-Law Bases for Vicarious Liability

One of the thorniest issues facing counsel and the courts today is whether RICO contemplates vicarious liability (sometimes given the Latin name *respondeat superior*); that is, civil liability based upon the liability or fault of another.[15] In the RICO context, this involves the question of whether liability is appropriately placed upon the principal, whose agent has violated the statute while acting

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operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id.

11. 18 U.S.C. § 1962(b) (1982). Section 1962(b) states:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id.

12. 18 U.S.C. § 1962(c) (1982). Section 1962(c) 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.

Id.

13. 18 U.S.C. § 1961(3) (1982).

14. 18 U.S.C. § 1961(4) (1982).

15. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

within the scope of his agency, or upon the employer whose employee has violated the statute in the course of his employment. Because RICO imposes civil liability for criminal acts,[16] the common law bases of both criminal and civil liability will be reviewed.

1. Criminal Responsibility.—The federal courts have adopted a relatively expansive view of corporate criminal responsibility for the misconduct of agents. A corporation may be responsible not only for the actions of its officers, directors, and other policymakers, but also for the acts of middle-level managers and supervisors, and even for the acts of subordinate or low-level employees.[17]

Corporate agents can bind the corporate entity by their wrongful conduct only when they act within the scope of their employment. Criminal conduct, however, may be considered to be within that scope of employment even if the corporation has not authorized the conduct of the employee, has acted in good faith to prevent such conduct generally, and has specifically prohibited the very act which is the basis of criminal liability.[18] It seems, then, that the phrase "within the scope of employment" is indeed merely "a term of art signifying little more than that the employee's crime must be committed in connection with his performance of some job-related activity."[19]

Thus, under federal jurisprudence, involvement of the corporation's managerial or supervisory personnel is not a necessary condition to corporate criminal liability.[20] Moreover, the federal courts have rejected the defenses that the corporation did not authorize the illegal conduct, that the acts were committed without the knowledge of the corporation's officers and directors, that the unlawful activities had been specifically forbidden as a matter of corporate policy, and that the executives had exercised great care to prevent such unlawful activities by lower-level personnel.[21]

The Model Penal Code, on the other hand, limits the vicarious

16. Section 1964(c) of the Act authorizes private civil suits against those who violate § 1962 of the Act, and § 1962 of the Act imposes liability based in part on engaging in "racketeering activity," which is defined in terms of a long list of federal and state criminal offenses, 18 U.S.C. §§ 1964(c), 1962, and 1961(1) (1982). *See also* Dwyer & Kiely, *supra* note 3, at 325, 345; *supra* notes 10-12 and accompanying text; *infra* note 161.

17. *See generally* 1 K. BRICKEY, CORPORATE CRIMINAL LIABILITY, ch. 3 (1984).

18. *Id.* at 40.

19. *Id.*

20. *Report of the Ad Hoc Civil RICO Task Force*, A.B.A. SEC. CORP., BANKING & BUS. L. at 345 (1985) [hereinafter *Civil RICO Task Force Report*].

21. *Id.* at 345 n.552 and cases cited therein. *See also* Miller & Levine, *Recent Developments in Corporate Criminal Liability*, 24 SANTA CLARA L. REV. 41 (1984).

criminal liability of corporations to two situations. Liability is imposed when there exists a legislative purpose to impose such corporate liability coupled with the performance of the conduct constituting the offense by a corporate agent acting within the scope of his employment on behalf of the corporation. Offenses which are authorized, commanded, solicited, performed, or recklessly tolerated by the board of directors or a high managerial agent also result in criminal liability.[22]

2. Civil Liability.—Vicarious civil liability of the corporation, or *respondeat superior* liability, is well-established.[23] Under traditional agency law, a principal is liable for the torts or other misconduct of its agents committed within the scope of either their employment or their apparent authority or which are subsequently ratified by the principal.[24] This is true even if the agent acted without actual authority or without any intent to benefit the principal, as long as the injured third party reasonably believed the agent was acting within the scope of his authority.[25]

The doctrine of *respondeat superior* is based on risk allocation principles and reflects a desire to encourage commercial enterprises to supervise their employees closely.[26] The doctrine can even be used to make corporations liable for punitive damages when their agents have acted with apparent authority, regardless of actual authority or ratification.[27] As recently as 1982, the United States Supreme Court stated that "few doctrines of the law are more firmly established or

22. MODEL PENAL CODE §§ 2.07(1)(a),(c) (Proposed Official Draft 1962). *See also* Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988).

23. *Civil RICO Task Force Report, supra* note 20, at 348; Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827, 856 (1987) [hereinafter Goldsmith, *Civil RICO Reform*].

24. PROSSER & KEETON ON TORTS, *supra* note 15, at §§ 69-70; W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 83 (1964); RESTATEMENT (SECOND) OF AGENCY §§ 217C (punitive damages), 257 (misrepresentation of agent), 261 (principal puts agent in a position to deceive); 262 (agent acting for his own purpose) (1957).

25. RESTATEMENT (SECOND) OF AGENCY § 262 comment a (1957).

26. *See* PROSSER & KEETON ON TORTS, *supra* note 15, § 69 at 501; *Civil RICO Task Force Report, supra* note 20, at 348, 363-64; Goldsmith, *Civil RICO Reform, supra* note 23, at 855-56.

27. PROSSER & KEETON ON TORTS, *supra* note 15, § 2 at 13. *But see* RESTATEMENT (SECOND) OF TORTS § 909 (1979) (liability for punitive damages should be limited to situations where agent at a policymaking level, agent in managerial position, or employer recklessly hired or retained unfit agent who committed wrong). The RESTATEMENT (SECOND) OF AGENCY, which limits a principal's vicarious liability for punitive damages, takes the position, however, that a principal may be vicariously liable for punitive damages when that liability is based upon "special statutes such as those giving triple damages," RESTATEMENT (SECOND) OF AGENCY § 217C comment c (1957). RICO is, of course, one of these statutes. *See also* Dwyer & Kiely, *supra* note 3, at 337; Goldsmith, *Civil RICO Reform, supra* note 23, at 875.

more in harmony with accepted notions of social policy than [*respondeat superior*]."[28]

III. The Propriety of Corporate Liability Under Civil RICO

A. Should a "Legitimate Enterprise" Ever Be Liable Under RICO?

There is widespread agreement that Congress intended RICO to thwart the infiltration of legitimate businesses by organized crime,[29] and that this was the principal purpose underlying RICO's adoption.[30] Thus, "there can be little argument that Congress intended legitimate businesses to be the main *beneficiaries* of RICO's provisions."[31] It is equally undisputed, however, that in practice legitimate businesses have become the principal *targets* of RICO.[32]

At least one prominent commentator, Richard Nathan, believes that a legitimate enterprise should *never* be held to have violated RICO or to be liable to anyone under RICO on any theory of liability.[33] Therefore, it is necessary to resolve the threshold question of whether liability of a legitimate business entity is ever appropriate under the RICO statute.

Nathan has made the following assertion:

> I do not believe that there is *any* circumstance in which a legitimate enterprise—one formed for lawful purposes and which continues to be owned, at least in part, by innocent persons—may ever be held to have violated RICO or to be liable under its provisions to anyone. I would recommend an amendment to the civil treble damage liability provision that would make this clear.[34]

Nathan rests his thesis on the assumption that legitimate enterprises and their owners comprise the class that RICO seeks primarily to protect. He claims that it necessarily follows that:

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28. American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 568 (1982) (quoting Gleason v. Seabord Air Line Ry. Co., 278 U.S. 349, 356 (1929)).

29. *See* United States v. Turkette, 452 U.S. 576, 691 (1981); Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 22 n.4 (N.D. Ill. 1982).

30. *See Civil RICO Task Force Report, supra* note 20, at 105; United States v. Turkette, 452 U.S. at 589-91; Parnes v. Heinold Commodities, Inc., 548 F. Supp. at 22.

31. Lacovara & Nicoli, *Refocusing the "Racketeer Influenced and Corrupt Organizations Act" on "Corrupt Organizations"*, 2 CIV. RICO REP. (BNA) at 1 (May 5, 1987).

32. *Id.* at 1; *Civil RICO Task Force Report, supra* note 20, at 55-56; Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985).

33. *See* Separate Statement of Richard E. Nathan and Majority Response, *Civil RICO Task Force Report, supra* note 20, at 407.

34. *Id.* at 407 (emphasis in original).

> no construction of RICO can possibly be correct that holds a legitimate enterprise liable to others under RICO based upon the very criminal activities from which RICO seeks to protect the enterprise . . . . Accordingly, where a legitimate enterprise has participated in racketeering activities, to me that is evidence that it has been infiltrated by criminals who have directed its affairs to those wrongful purposes . . . . [T]hat firm is the victim of the criminal infiltration against which RICO protects. It is not subject to treble damage liability; it is entitled, instead, to a civil RICO treble damage remedy.[35]

In making these assertions and in framing the issue in terms of whether a civil RICO remedy will be available "against the infiltrated legitimate firm that was the innocent tool and victim of the wrongdoers,"[36] Nathan mistakenly assumes that all business entities which are named as RICO defendants are innocent tools and victims. Indeed, as the majority response to Nathan's statement points out, "this is not the universe of cases in which a 'legitimate enterprise' may become a RICO defendant."[37]

There seems little reason to insulate from civil RICO liability *all* legitimate businesses on the ground that *some* may be "tools" or "victims,"[38] particularly when employees have turned the supposedly legitimate enterprise to a pattern of criminal activity of the type addressed in RICO.[39] Furthermore, there is no reason to separate RICO from other theories of liability in which corporations are exposed to multiple or exemplary damages for their employees' conduct.[40]

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35. *Id.* at 408-09.

36. *Id.* at 409 n.659.

37. *Id.* at 424.

38. *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 307-25 (1982) and accompanying footnotes for a discussion of the enterprise in the roles of "prize," "instrument," "victim," and "perpetrator" and whether vicarious liability should be imposed on the enterprise in each case. *See also* Moran, *Pleading a Civil RICO Action Under Section 1962(c): Conflicting Precedent and the Practitioner's Dilemma*, 57 TEMPLE L.Q. 731, 775 (1984) (nature of legal entity's involvement with pattern of racketeering activity will determine whether it should be named as the enterprise, a defendant, or both); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 401 (7th Cir. 1984) (RICO liability of enterprise should depend on the role played). *But see* Dwyer & Kiely, *supra* note 3, at 340 (Blakey's functional analysis unworkable due to conceptual problems in characterizing corporate behavior which may be insurmountable in some cases).

39. *Civil RICO Task Force Report, supra* note 20, at 374; Majority Response to Separate Statement of Richard Nathan, *Civil RICO Task Force Report, supra* note 20, at 424. *See also* Note, *RICO: The Corporation as "Enterprise" and Defendant*, 52 U. CIN. L. REV. 503, 521 (1983).

40. *See supra* note 27 and accompanying text. *See also* McArthur & White, *Civil RICO After Sedima: The New Weapon Against Business Fraud*, 23 HOUS. L. REV. 743, 755

Finally, while the major purpose of RICO undoubtedly was to address the infiltration of legitimate business by organized crime,[41] the courts are all but unanimous in their refusal to read RICO as prohibiting *only* the infiltration of legitimate organizations.[42] Congress purposely drafted RICO to address a wide variety of problems,[43] and as such, "RICO fits well into a consistent pattern of legislation enacted as general reform over the past half century aimed at a specific target, but drafted without limiting its scope to that target."[44]

B. Reaching the Corporate Pocket Under RICO

1. Approaches to Corporate Liability.—If one surmounts the threshold question discussed above and accepts that sometimes a legitimate business entity can and should be held liable under RICO, one must next decide under what theory to impose that liability. Any such liability will necessarily be derivative in the sense that it will result from the imputation of the racketeering acts of an agent or employee to the corporation.[45] Neither the language of the RICO statute itself nor the legislative history of the Act, however, provides any guidance on this issue.[46] As shall be shown below, the case law

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(1986).

41. *See supra* notes 29-30 and accompanying text.

42. *A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation*, REPORT OF THE RICO CASES COMMITTEE, A.B.A. CRIM. JUSTICE SEC. 8 n.18 (1985) [hereinafter *A Comprehensive Perspective*].

43. Goldsmith, *Civil RICO Reform*, *supra* note 23, at 831 & n.24. *See also* Blakey, *supra* note 38, at 280.

44. *A Comprehensive Perspective*, *supra* note 42, at 8 n.18. *See also* Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 788 & nn.98-100 (1988) [hereinafter Goldsmith, *A Response*] (quite common for statutes to be applied to problems unrelated to specific concern that prompted their enactment, and RICO not unique in this respect).

45. *See* Stern, *Corporate Criminal Personal Liability—Who is the Corporation?*, J. CORP. L. 125, 126 (Fall 1987).

46. *See* Gruber v. Prudential-Bache Securities, Inc., 679 F. Supp. 165, 180 (D. Conn. 1987) ("Because the language and legislative history of the statute are silent on the issue of vicarious liability, reference to the legislative policy underlying the statute is an appropriate starting point."); *Civil RICO Task Force Report*, *supra* note 20, at 352 (RICO statute "appears to assume that the standard for both criminal and civil [derivative] liability is the same as would otherwise apply under existing criminal and civil law"); Dwyer & Kiely, *supra* note 3, at 332-33 ("even if section 1962 permits the corporation to stand as a person, whether or not different from the enterprise, RICO, by itself, does not answer the question when to impute racketeering acts of an agent or employee to the corporation"); Black, *Application of Respondeat Superior Principles to Securities Fraud Claims Under the Racketeer Influenced and Corrupt Organizations Act (RICO)*, 24 SANTA CLARA L. REV. 825, 850 (1984) (RICO contains no statutory provision which explicitly authorizes the application of respondeat superior principles); Note, *supra* note 39, at 521 (statutory language of RICO neither permits nor precludes a corporation's being aligned both as enterprise and defendant); Blakey, *supra* note 38, at 287-88 (nothing in RICO statute compels conclusion that "person" and "enterprise"

on the issue also presents no uniform view on derivative liability[47] and "is, for the most part, conclusory and chaotic."[48]

Private plaintiffs who are trying to reach the corporate pocket through RICO usually take one of two approaches: they either charge the corporation as a defendant,[49] alleging that the legitimate business is both the "person" violating the statute (through the acts of its agents and employees) and the affected "enterprise,"[50] or they allege that the corporation is vicariously liable under RICO for the statutory violations of its agents or employees under traditional principles of *respondeat superior*.[51] Both of these approaches raise the issue of when it is appropriate to impute the racketeering acts of an agent or employee to the corporation.

(a) Charging the corporation as the culpable "person" under section 1962(c) of RICO.—Courts have struggled with the theoretical bases for imposing vicarious or derivative liability in civil RICO cases. However, the way in which the statute has been used by both civil practitioners and by government prosecutors has to some extent dictated the context in which the courts have had to confront the issue.

Civil RICO is used by private plaintiffs in civil cases far more often than criminal RICO is used by government prosecutors in criminal cases.[52] Moreover, section 1962(c) of the statute is used more frequently than any other RICO provision, being "by far the substantive violation most often alleged in both criminal and civil cases."[53] That section has become the mainstay of criminal prosecutions of organized criminals[54] as well as of so-called legitimate businesses for a variety of white-collar crimes.[55]

Most important for the current discussion is that nearly all of the civil RICO lawsuits filed have alleged violations of section 1962(c).[56] This, along with the fact that most of these lawsuits have

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either are or are not mutually exclusive elements of proof).

47. *Civil RICO Task Force Report, supra* note 20, at 352.

48. *Id.*

49. 18 U.S.C. § 1962(c) (1982).

50. *See infra* notes 56-106 and accompanying text for a discussion of this approach.

51. *See infra* notes 107-54 and accompanying text for a discussion of this approach.

52. Goldsmith, *A Response, supra* note 44, at 790 & n.113. This is an especially significant statement in view of the fact that criminal RICO "has become one of the favorite and most useful tools of federal prosecutors in pursuing national law enforcement's prosecutory goals," *Civil RICO Task Force Report, supra* note 20, at 18-19 & n.26.

53. *Civil RICO Task Force Report, supra* note 20, at 53.

54. Goldsmith, *Civil RICO Reform, supra* note 23, at 831-32.

55. *Id.* & 832 n.27.

56. *Civil RICO Task Force Report, supra* note 20, at 57 (estimating that 97% of cases

been aimed at business fraud rather than at organized crime and criminals,[57] means that most RICO cases which seek to reach into the corporate pocket have attempted to use section 1962(c) to do so.

Obviously, one way to establish corporate liability is to allege that the culpable "person" and the affected "enterprise" mentioned in section 1962(c) of the Act are one; that the corporate enterprise has conducted its own affairs through a pattern of racketeering activity in violation of section 1962(c). The statutory definitions of "person" and "enterprise" are certainly broad enough to support this approach,[58] and the language of RICO neither permits nor precludes a corporation's being aligned both as enterprise and defendant.[59] Because the language of section 1962 imposes liability only on the "person", many plaintiffs have thought it necessary to equate the "person" and the "enterprise" in order to claim enterprise (or corporate) liability.[60]

Although this approach seems to avoid entirely the issue of vicarious liability by charging the enterprise directly with a violation of the Act, this pleading technique is in fact somewhat misleading. As discussed above,[61] whenever a corporation or other artificial legal person is sued, its liability is necessarily derivative or vicarious because it is based upon the conduct of others. Therefore, the issue of the propriety of vicarious liability in the RICO context is still present in cases which take this approach to pleading the plaintiff's claim.

A more serious problem with this approach is that not all courts will permit the same entity to be both the "person" and the "enterprise" for purposes of section 1962(c). Indeed, most courts which have considered the issue have ruled that the person and the enterprise may *not* be identical, and have required that the plaintiff plead a separate person and enterprise under section 1962(c). Two commentators, masters of understatement, have pointed out that such a requirement "might pose problems in suits against corporations based on the acts of company employees."[62]

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allege section 1962(c) violations).

57. *Civil RICO Task Force Report, supra* note 20, at 57 (citing statistics indicating 77% of civil RICO cases are fraud cases); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (Marshall, J., dissenting) (citing these *Task Force Report* statistics).

58. *See supra* notes 13-14 and accompanying text for a discussion of these statutory definitions and their breadth.

59. Note, *supra* note 39, at 521 & n.84; Blakey, *supra* note 38, at 287-88; Moran, *supra* note 38, at 779 n.265. *See also supra* note 46 and accompanying text.

60. Dwyer & Kiely, *supra* note 3, at 327.

61. *See supra* note 45 and accompanying text.

62. Miller & Olson, *Recent Developments in Civil RICO*, 8 CORP. L. REV. 35, 40 (Win-

The issue of whether a legitimate entity may be alleged as both the RICO enterprise and the RICO person under section 1962(c) was joined in the courts when the Eleventh and Fourth Circuits reached contrary results in cases decided within a day of each other.[63] Unfortunately, neither decision fully develops the basis for its holding.[64]

In *United States v. Hartley*,[65] the Eleventh Circuit held that a single corporation can be both the person and the enterprise under section 1962(c) of RICO. In that case, Treasure Isle, Inc., a corporation specializing in the production of breaded seafood products, a corporate vice-president, and a plant manager had been convicted of violating section 1962(c) by conducting the affairs of the corporation through a pattern of racketeering activity.[66] The court of appeals upheld the convictions of all three defendants,[67] including that of Treasure Isle, Inc., for conducting its own affairs through a pattern of racketeering.

Hartley relied upon the United States Supreme Court's broad reading of the statutory notion of "enterprise,"[68] the liberal construction clause which was included in the original RICO legislation,[69] and the literal terms of section 1962(c) which do not exclude identity between the "person" and the "enterprise."[70] Its holding that a corporation can be charged directly under that section as both the culpable person and the affected enterprise,[71] however, does not have much of a following.[72]

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ter 1985).

63. K. BRICKEY, *supra* note 17, at 244. *Compare* United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), *cert. denied sub nom.* Treasure Isle, Inc. v. United States, 459 U.S. 1183 (1983) (there may be identity between RICO enterprise and RICO defendant) *with* United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) (RICO enterprise and RICO defendant may not be the same entity).

64. K. BRICKEY, *supra* note 17, at 244.

65. 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), *cert. denied sub nom.* Treasure Isle, Inc. v. United States, 459 U.S. 1183 (1983).

66. 678 F.2d at 965, 966.

67. 678 F.2d at 965, 992.

68. United States v. Turkette, 452 U.S. 576 (1981) ("There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact."). *Id.* at 580-81.

69. This clause reads as follows: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 941 (1970).

70. *See supra* note 59 and accompanying text.

71. 678 F.2d at 988.

72. *See, e.g.*, Vietnam Veterans Foundation v. Erdman, C.A. No. 84-0940 (D.D.C. Jan. 24, 1986); Stanton v. Shearson Lehman/American Express, Inc., 622 F. Supp. 293 (N.D. Ga. 1986); Leuders v. Lehman Bros., Kuhn & Loeb, Inc., No. 83-C-371 (N.D. Ill. June 26, 1984) (available on LEXIS, Genfed library, Dist file); United Equitable Life Ins. Co. v. Trans

In marked contrast with the Eleventh Circuit's approach in *Hartley*, the Fourth Circuit concluded in *United States v. Computer Sciences Corporation*[73] that there could be no identity between a RICO enterprise and a defendant charged with violating section 1962(c) of RICO. In this case, Computer Sciences and a number of individual defendants were charged in a fifty-seven count indictment. Prosecutors charged violations of several federal statutes, including those prohibiting mail fraud, wire fraud, and submitting false claims to the United States government.[74]

On appeal from the trial court's dismissal of all counts, the court of appeals refused to reinstate the three RICO counts against the corporation because these charges had designated the corporation's unincorporated Infonet Division as the RICO enterprise. The court refused to reinstate because the term "enterprise was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designated to prohibit, and, failing that, to punish."[75] This rather conclusory holding, therefore, precludes a complaint in which the person and the enterprise do not have totally separate identities. This reasoning has been followed in the majority of the cases decided since it was announced.[76]

Global Corp., No. 83-C-5408 (N.D. Ill. Jan. 26, 1984) (available on LEXIS, Genfed library, Dist file); Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983); Timberlake v. Oppenheimer & Co., No. 83-C-1295 (N.D. Ill. Sept. 30, 1983) (available on LEXIS, Genfed library, Dist file); United States. v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279 (D.N.J. 1984); Mooney v. Fidelity Union Bank, Nos. 82-3192, 3193 (D.N.J. Mar. 22, 1983); B.F. Hirsch, Inc. v. Enright Refining Co., 577 F. Supp. 399 (D.N.J. 1983), *rev'd*, 751 F.2d 628 (3d Cir. 1984); Coastal Steel Corp. v. Chemical Bank, No. 82-1714 (D.N.J. Oct. 27, 1982); Gerace v. Utica Veal Co., 580 F. Supp. 1465 (N.D.N.Y. 1984); D'Iorio v. Andonzio, 554 F. Supp. 222 (M.D. Pa. 1984).

73. 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

74. 689 F.2d at 1183-84.

75. 689 F.2d at 1190.

76. *See, e.g.*, D&S Auto Parts, Inc., v. Schwartz, 838 F.2d 964 (7th Cir. 1988), *cert. denied*, 56 U.S.L.W. 3846 (U.S. June 14, 1988); United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc., 837 F.2d 356 (9th Cir. 1988); Bishop v. Corbitt Marine Ways, 802 F.2d 122 (5th Cir. 1986); Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir. 1986); Masi v. Ford City Bank & Trust Co., 779 F.2d 397 (7th Cir. 1985); United States v. DiCaro, 772 F.2d 1314 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986); Bennett v. United States Trust Co., 770 F.2d 308 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); Alexander Grant & Co. v. Tiffany Ind., 742 F.2d 408 (8th Cir. 1984), *vacated on other grounds*, 473 U.S. 922 (1985); B.F. Hirsch, Inc., v. Enright Refining Co., 751 F.2d 628 (3d Cir. 1984); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd per curiam on other grounds*, 473 U.S. 606 (1985); Rae v. Union Bank, 725 F.2d 478 (9th Cir. 1984); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), *aff'd en banc in pertinent part*, 710 F.2d 1361 (8th Cir. 1983), *cert. denied sub nom.* Prudential Ins. Co. v. Bennett, 464 U.S. 1008 (1983);

J.D. Marshall Int'l, Inc., v. Redstart, Inc., No. 86 C 371, 1988 U.S. Dist. LEXIS 4826 (N.D. Ill. May 24, 1988); Babst v. Morgan Keegan & Co., No. 86 5614, 1988 U.S. Dist. LEXIS 5770 (E.D. La. June 10, 1988); Welek v. Solomon, 650 F. Supp. 972 (E.D. Mo. 1987);

This requirement—that for purposes of section 1962(c), the person who conducts the affairs of the enterprise through a pattern of racketeering activity and the enterprise whose affairs are so conducted must be distinct entities—effectively eliminates vicarious liability from the section most frequently forming the basis of a civil suit under RICO.[77] As a result, frequently RICO is not used against

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Herman v. Jefferson Bancshares, Inc., Nos. 86-4560, 87-0654, 1987 U.S. Dist. LEXIS 9977 (E.D. La. Oct. 26, 1987); Waldo v. North American Van Lines, 669 F. Supp. 722 (W.D. Pa. 1987); Hennessey v. Connecticut Gen'l Life Ins. Co., No. 84 C 10582 (N.D. Ill. June 18, 1986) (available on LEXIS, Genfed library, Dist file); Ash v. Wallenmeyer, No. 85 C 8557 (N.D. Ill. 1986) (available on LEXIS, Genfed library, Dist file); Abelson v. Strong, 644 F. Supp. 524 (D. Mass. 1986); Gaudette v. Panos, 644 F. Supp. 826 (D. Mass. 1986); *modified on other grounds*, 650 F. Supp. 912 (D. Mass. 1987); Zahra v. Charles, 639 F. Supp. 1405 (E.D. Mich. 1986); Temple University v. Salla Bros., Inc., 656 F. Supp. 97 (E.D. Pa. 1986); Walso Bureau, Inc. v. Underwriters Adjusting Co., No. 85-5896 (E.D. Pa. Aug. 14, 1986) (available on LEXIS, Genfed library, Dist file); Intre Sport, Ltd. v. Kidder, Peabody & Co., 625 F. Supp. 1303 (S.D.N.Y. 1985), *aff'd without opinion*, 795 F.2d 1004 (2d Cir. 1986); Onesti v. Thomson McKinnon Securities, 619 F. Supp. 1262 (N.D. Ill. 1985); Tarasi v. Dravo Corp., 613 F. Supp. 1235 (W.D. Pa. 1985); Lopez v. Dean Witter Reynolds, Inc., 591 F. Supp. 581 (N.D. Cal. July 31, 1984); *aff'd on other grounds*, 805 F.2d 880 (9th Cir. 1986); Wilcox v. Ho-Wing Sit, 586 F. Supp. 561 (N.D. Cal. May 3, 1984); Nelson v. Nat'l Republic Bank, [1984 transfer binder] FED. SEC. L. REP. (CCH) ¶ 91,481 (N.D. Ill. Apr. 17, 1984); Nelson v. Chapman & Cutler, [1984 transfer binder] FED. SEC. L. REP. (CCH) ¶ 91,808 (N.D. Ill. July 12, 1984); Jensen v. E.F. Hutton & Co., [1984 transfer binder] FED. SEC. L. REP. ¶ 99,674 (C.D. Cal. Jan. 26, 1984); Saine v. AIA, Inc., 582 F. Supp. 1299 (D. Colo. 1984); Bernstein v. IDT Corp., 582 F. Supp. 1079 (D. Del. 1984); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local 639, No. 83-1232 (D.D.C. June 28, 1984); Miller v. Affiliated Financial Corp., 600 F. Supp. 987, 997 (N.D. Ill. 1984); Mancuso v. Illiott, No. 84 C 7382 (N.D. Ill. Aug. 29, 1984) (available on LEXIS, Genfed library, Dist file); Kosch v. Parkway Bank & Trust Co., No. 83 C 4832 (N.D. Ill. Mar. 9, 1984) (available on LEXIS, Genfed library, Dist file); Addis v. Moser, No. 83 C 6118 (N.D. Ill. Feb. 15, 1984); (available on LEXIS, Genfed library, Dist file);

Umstead v. Durham Hosiery Milles, Inc., 592 F. Supp. 1269 (M.D.N.C. 1984); Grantham & Mann, Inc. v. American Safety Products, Inc., No. C 83 126 D (M.D.N.C. Apr. 17, 1984); *In re* Federal Bank & Trust Co. Securities Litigation, [1984 transfer binder] FED. SEC. L. REP. ¶ 91,565 (D. Or. 1984); Kaufman v. Chase Manhattan Bank, N.A., 581 F. Supp. 350 (S.D.N.Y. 1984); Willamette Savings & Laon v. Blake & Neal Fin. Co., 577 F. Supp. 1415 (D. Or. 1984); Wilcox Development Co. v. First Interstate Bank, 590 F. Supp. 445 (D. Or. 1984); Henry v. Kinney, [1984 transfer binder] FED. SEC. L. REP. (CCH) ¶ 91,806 (W.D. Okla. Sept. 27, 1984); Chambers Development Co. v. Browning-Ferris Industries, 590 F. Supp. 1528 (W.D. Pa. 1984); Sinai v. ARCO Medical Products Co., No. C 82 4593 RPA (N.D. Cal. Sept. 13, 1983); Guerrero v. Katzen, 571 F. Supp. 714 (D.D.C. 1983); Delery v. Triple G Oil Co., No. 83 C 2553 (N.D. Ill. Dec. 2, 1983) (available on LEXIS, Genfed library, Dist file); States Security Ins. Co. v. Mercantile Bond Agency, Inc., No. 83 C 285 (N.D. Ill. Sept. 2, 1983) (available on LEXIS, Genfed library, Dist file); D&G Enterprises v. Continental Illinois Nat'l Bank & Trust Co., 574 F. Supp. 263 (N.D. Ill. 1983); Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983); Hudson v. Larouche, 579 F. Supp. 623 (S.D.N.Y. 1983); *In re* Longhorn Securities Litigation, 573 F. Supp. 255 (N.D. Okla. 1983); Kirschner v. Cable/Tel Corp., 576 F. Supp. 234 (E.D. Pa. 1983); Yancoski v. E.F. Hutton & Co., Inc., 581 F. Supp. 88 (E.D. Pa. 1983); *In re* Action Industries Tender Offer, 572 F. Supp. 846 (E.D. Va. 1983); Fields v. Nat'l Republic Bank of Chicago, 546 F. Supp. 123 (N.D. Ill. 1983); Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20 (N.D. Ill. 1983); Bays v. Hunter Savings Ass'n, 539 F. Supp. 1020 (S.D. Ohio 1982); Van Schaick v. Church of Scientology of California, Inc., 535 F. Supp. 1125 (D. Mass. 1982).

77. Hellerstein & Jacobson, *Corporate Vicarious Liability Under Federal Securities, Antitrust, and RICO Laws: Toward Imposing a Good Faith Defense Between the Plaintiff and*

while collar enterprises engaged in fraud.[78]

Although this requirement seems likely to remain the majority rule in judicial treatments of the person-enterprise issue under section 1962(c),[79] it also seems to be ill-advised. In fact, one commentator has asserted that requiring such a distinction between person and enterprise reflects a general judicial hostility to RICO rather than a careful analysis of the problem.[80]

This point is well-taken. For example, such a distinction is not needed to protect "victim" enterprises,[81] who will be protected from RICO liability by RICO's requirement of criminal intent.[82] Moreover, such a rule may let the primary wrongdoer escape prosecution,[83] especially because the corporation is often the central figure (or indeed the only figure) in the enterprise.[84] In such a situation, it seems to "defy reason" to say that the corporation cannot also be a defendant.[85] Because the corporation in many instances will indeed be "the nucleus of the criminal amoeba, the catalyst providing impulse and unity to the authors of the predicate offenses,"[86] it must be able to be cited as both the defendant "person" and the "enterprise" under section 1962(c).

This bar to recovery against enterprise defendants is also unwise because it permits a corporation to escape liability even if it is actively involved in the fraudulent scheme.[87] Such a restriction logically would preclude both criminal sanctions and the imposition of equitable sanctions against perpetrator corporations engaged in a pattern of illicit activity.[88] This rule would also permit such an entity to store its ill-gotten gains in the "enterprise" for RICO purposes, thereby shielding it from treble-damage liability.[89]

Another reason often given for separating the culpable defend-

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the Deep Pocket, ALI-ABA COURSE OF STUDY MATERIALS, CIVIL RICO: LITIGATION VS. ARBITRATION 77, 108 (Seminar held in Boston, Massachusetts, April 14-15, 1988). *See also supra* notes 53-56 and accompanying text.

78. Goldsmith, *A Response*, *supra* note 44, at 796; 6 RICO L. REP. 831-32 (1987).

79. McArthur & White, *supra* note 40, at 754.

80. Goldsmith, *Civil RICO Reform*, *supra* note 23, at 857 n.145, 876; Goldsmith, *A Response*, *supra* note 44, at 796 n.161.

81. *See supra* note 38 and accompanying text.

82. Goldsmith, *Civil RICO Reform*, *supra* note 23, at 876 & n.232.

83. United States v. Hartley, 678 F.2d 961, 989 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

84. *Id.* at 989.

85. *Id.*

86. Note, *supra* note 39, at 521-22.

87. McArthur & White, *supra* note 40, at 755.

88. Goldsmith, *Civil RICO Reform*, *supra* note 23, at 876 & n.233.

89. McArthur & White, *supra* note 40, at 754-55 & n.67.

ants from the enterprise under section 1962(c) when the enterprise is a legitimate business entity is the desirability of shielding the corporate defendant from treble damages and from being branded as a "racketeer" solely on the basis of its employees' fraud.[90] It is unclear, however, why corporations which are exposed to multiple or exemplary damages for their employees' conduct under other common-law theories[91] and statutes[92] should be shielded from such liability under RICO.[93] Such a shield seems particularly inappropriate when it is often true that the corporate facade is the primary reason that the defendants' fraudulent scheme succeeded in the first place.[94]

Moreover, any required distinction between person and enterprise is also vulnerable to clever pleading tactics by plaintiffs.[95] In fact, many of the machinations surrounding the pleading of an enterprise which are apparent and troublesome in RICO cases are a result of the imposition of the requirement of a distinct person and enterprise under section 1962(c).[96] Such tactics are contrary to considerations of judicial economy.[97] This requirement seems all the more unwise as the drafter of RICO probably did not intend the distinction.[98] In addition, the primary justifications usually given for derivative corporate liability in general, that of risk allocation principles and the desire to encourage commercial enterprises to supervise their employees closely,[99] apply equally well in the RICO context in general and to section 1962(c) in particular.

The inquiry into whether a particular defendant should be held

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90. *See, e.g., Report to the House of Delegates*, A.B.A. SEC. OF CRIM. JUSTICE, Section 1 (commentary) (1982); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980).

91. *See supra* note 27 and accompanying text.

92. *See, e.g.*, American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 569 (1982) (vicarious liability principles applicable under antitrust laws). *See also infra* notes 109, 136-47 and accompanying text.

93. *See* McArthur & White, *supra* note 40, at 755.

94. *Id.*

95. *See* Bennett v. Berg, 685 F.2d 1053, 1059-60 (8th Cir. 1982) (outlining how to plead around distinction); *Cumulative Decision Index*, 4 RICO L. REP. 24, 31 (1986) (citing cases pleading around distinction); Blakey, *supra* note 38, at 324-25 (policy sometimes supports treating enterprise as person; because this result "may be achieved by artful pleading, requiring the plaintiff to plead a "person" separate from the "enterprise" can be seen to be artificial"); Moran, *supra* note 38, at 778 & n.259 (because of uncertainty regarding whether legal entity can be named as both enterprise and defendant, "better practice is to name the legal entity as a defendant, and to allege an associational enterprise formed by the entity and the individual defendants"); McArthur & White, *supra* note 40, at 754-55 nn.67, 69 (citing cases pleading around distinction and commenting thereon); Goldsmith, *A Response*, *supra* note 44, at 796 (citing cases pleading around distinction); Note, *supra* note 39, at 514 n.57, 520 n.77 (citing cases advising this tactic and commenting thereon).

96. *Civil RICO Task Force Report*, *supra* note 20, at 161 n.255.

97. Note, *supra* note 39, at 518 n.71.

98. Goldsmith, *Civil RICO Reform*, *supra* note 23, at 877.

99. *See supra* note 26 and accompanying text.

vicariously liable currently focuses primarily on whether that defendant is best situated to prevent accidents, to bear the cost of accidents, and to promote an optimal allocation of productive resources by being forced to bear the costs associated with accidents.[100] As between the business entity and the injured plaintiff, the corporation obviously is better able to prevent or absorb any loss.[101] The corporation is also often the only party in a position to police and deter the illegal conduct.[102]

Other considerations in favor of holding the corporate enterprise liable for the acts of its agents or employees in the section 1962(c) context include: allocating the risk of loss to persons who can exercise choice and control in corporate governance; encouraging private enforcement actions when a legitimate enterprise is being turned to corruption; and encouraging shareholders to insist on procedures to prevent such corporate activities. Corporate liability also ensures full compensation for victims of these activities, makes available derivative suits on behalf of the corporation or shareholders against directors, and holds the corporate entity liable as a separate person, balancing many of the advantages of legal personhood that have inured to its benefit.[103]

In view of these considerations, it appears that the policies underlying both RICO and derivative corporate liability argue in favor of civil RICO liability for an "enterprise" which is also a "person" pursuing its affairs through a pattern of racketeering activities. In such a situation, the peculiar structure of section 1962(c) and the use of the words "person" and "enterprise" should not be employed to make culpable enterprises immune from civil RICO claims.[104] Moreover, neither the language of the statute nor its legislative history suggests that the ordinary rules of agency law, including liability rules, have been displaced by RICO.[105]

Therefore, the person/enterprise structure of section 1962(c) should not be seen to have changed the ordinary common law rules

100. Note, *Real Persons, Corporate Persons and Vicarious Liability*, 38 CASE W. RES. L. REV. 453, 467 & nn.78-80 (1988).

101. *Id.* at 467-69; McArthur & White, *supra* note 40, at 755.

102. McArthur & White, *supra* note 40, at 755.

103. *Civil RICO Task Force Report, supra* note 20, at 375-76; Majority Response to Separate Statement of Richard Nathan, *Civil RICO Task Force Report, supra* note 20, at 425.

104. The *Civil RICO Task Force Report, supra* note 20, at 376-77 makes this point and recommends "that the RICO statute be amended to make clear that the use of the words "person" and "enterprise" in Section 1962(c) is not intended to make culpable enterprises immune from civil RICO claims."

105. Dwyer & Kiely, *supra* note 3, at 345.

governing the liability of a principal for the acts of his agent.[106] Private plaintiffs should be permitted to allege a legitimate business entity as both the defendant person and the enterprise under that section of RICO.

(b) Alleging vicarious liability of the corporation under RICO for statutory violations of agents and employees.—Private plaintiffs who are trying to reach the corporate pocket through RICO sometimes take a different approach than that just described by alleging that the corporation is vicariously liable under RICO for the acts of its agents and employees under traditional principles of *respondeat superior*.[107] Thus, the issue raised in this context is whether these traditional standards should apply to civil RICO claims so as to make a legitimate business vicariously liable for treble damages based on the misconduct of lower-level employees.[108] Unfortunately, the court decisions on this issue are widely divergent.[109]

Five different approaches to the issue can be identified from the court decisions.[110] First, some courts have taken a broad view of the propriety of vicarious liability and have held that a legitimate business may be liable under the common law doctrine of *respondeat superior* for RICO damages just as for other types of damages.[111]

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106. *Id.* at 347. *See also supra* notes 17-28 and accompanying text for a discussion of these rules.

107. *See supra* notes 23-28 and accompanying text.

108. *See, e.g.*, Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 24 n.9 (1982); Dwyer & Kiely, *supra* note 3, at 342; Goldsmith, *Civil RICO Reform, supra* note 23, at 875.

109. Most courts confronting the *respondeat superior* issue under RICO look to American Society of Mechanical Engineers (ASME) v. Hydrolevel Corp., 456 U.S. 556, 569 (1982), in which the United States Supreme Court held that traditional principles of *respondeat superior* applied under the federal antitrust laws because Congress never evinced a contrary intent. However, when trying to apply this principle to RICO, the courts have disagreed about whether Congress intended for *respondeat superior* to apply under RICO. *Compare* Schofield v. First Commodity Corp., 793 F.2d 28, 32 (1st Cir. 1986) ("there is unlikely to be a situation, in the absence of an express statement, in which Congress more clearly indicates that *respondeat superior* is contrary to its intent") *and* D&S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 968 (7th Cir. 1988), *cert. denied*, 56 U.S.L.W. 3846 (U.S. June 14, 1988) (RICO "does indicate Congressional intent to create an exception to the general rule of *respondeat superior*") *with* Bernstein v. IDT Corp., 582 F. Supp. 1079, 1083 (D. Del. 1984) ("I perceive nothing in RICO or its legislative history which would suggest that the normal rules of agency law should not apply to the civil liability created by the statute.").

110. This analytic framework is based on Lacovara & Nicoli, *supra* note 31, at 4.

111. *See, e.g.*, Connors v. Lexington Ins. Co., 666 F. Supp. 434 (E.D.N.Y. 1987); Federal Sav. & Loan Ins. Corp. v. Shearson-American Express, Inc., 658 F. Supp. 1331 (D.P.R. 1987); Tryco Trucking Co., Inc. v. Belk Store Services, Inc., 634 F. Supp. 1327 (W.D.N.C. 1986); Morley v. Cohen, 610 F. Supp. 798 (D. Md. 1985); Bernstein v. IDT Corp., 582 F. Supp. 1079 (D. Del. 1984). *See also* Moran, *supra* note 38, at 776 n.251 (recognizing the applicability of doctrine of apparent authority and *respondeat superior* to RICO to make principal liable for racketeering acts of agent which are within scope of its actual or apparent

Under these decisions a legitimate business is liable for treble damages under RICO even when its employee acted solely for his own benefit, perhaps even against company policy, so long as he acted with apparent authority.[112]

Second, some courts have narrowed the permissible range of vicarious liability under RICO and have permitted the imposition of vicarious liability when the employee or agent acted within the scope of his employment with at least a partial intention to benefit the employer.[113] This is essentially the standard for vicarious criminal liability that the federal courts have traditionally imposed on organizations, although that standard has been liberalized in recent years.[114]

The third approach which courts have taken is to impose vicarious liability under RICO only when the criminal activity involved high-level corporate agents or employees. Such high-level involvement is said to demonstrate that the organization itself actively participated in the alleged racketeering activity,[115] and may function to turn the criminal behavior into conduct *of the corporation itself.*[116]

Fourth, some courts analyze the vicarious liability issue with reference to the person/enterprise debate discussed above. These courts hold that while an enterprise cannot also be a culpable person, and therefore cannot be a defendant under section 1962(c) of the

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authority "notwithstanding the fact that the principal might not have participated in or directly benefited from the racketeering activity").

112. *See supra* notes 18, 25 and accompanying text. *See also* Moran, *supra* note 38, at 776 n.251.

113. *See, e.g.*, D&S Auto Parts, Inc. v. Schwartz, No. 82 C 5279 (N.D. Ill. Sept. 3, 1985), *aff'd in pertinent part*, 838 F.2d 964 (7th Cir. 1988), *cert. denied*, 56 U.S.L.W. 3846 (U.S. June 14, 1988); Hunt v. Weatherbee, 626 F. Supp. 1097 (D. Mass. 1986); Wagman v. FSC Securities Corp., 1985 Fed. Sec. L. Rep. ¶ 92,445 (N.D. Ill. July 23, 1985); *In re* Olympia Brewing Co. Securities Litigation, (N.D. Ill. Dec. 18, 1984) (available on LEXIS Genfed library, Dist file) (applying *respondeat superior* in the subsection (a) context, but implying that it is equally applicable to subsection (c)).

114. *Civil RICO Task Force Report, supra* note 20, at 343-45. However, the *Task Force Report* notes also that the view that a corporation will be held vicariously liable only if its agent acted with intent to benefit the corporation may not be uniformly accepted, *id.* at 344-45.

115. *See, e.g.*, Gruber v. Prudential-Bache Securities, Inc. 679 F. Supp. 165, 181 (D. Conn. 1987); Onesti v. Thomson McKinnon Securities, Inc., No. 85 C 4375, (N.D. Ill. Jan. 22, 1987) (available on LEXIS, Genfed library, Dist file); O'Brien v. Dean Witter Reynolds, Inc., [1984 Transfer binder] FED. SEC. L. REP. (CCH) ¶ 91,509 (D. Ariz. Mar. 26, 1984); Dakis v. Chapman, 574 F. Supp. 757 (N.D. Cal. 1983).

116. *See, e.g.*, Lacovara & Nicoli, *supra* note 31, at 4; *Civil RICO Task Force Report, supra* note 20, at 374. However, it has also been said that such a situation does not involve a question of vicarious liability at all, but direct liability of the corporation for the misdeeds; *see, e.g.*, Note, *Judicial Efforts to Redirect An Errant Statute: Civil RICO and the Misapplication of Vicarious Corporate Liability*, 65 B.U.L. REV. 561, 600-01 (1985); D&S Auto Parts v. Schwartz, 828 F.2d 964, 967-68 (7th Cir. 1988), *cert. denied*, 56 U.S.L.W. 3846 (U.S. June 14, 1988); Schofield v. First Commodity Corp., 793 F.2d 28, 33 (1st Cir. 1986).

statute,[117] an enterprise can be alleged to be both the defendant person and the enterprise under sections 1962(a) and 1962(b) of RICO.[118] Under this theory, these courts have applied common law principles of vicarious liability to hold corporations liable for acts of employees and agents under sections 1962(a) and 1962(b), but have been unwilling to do so under section 1962(c).

Finally, some courts have completely rejected the use of *respondeat superior* in the RICO context. These courts assert that RICO aims at punishing the individual wrongdoer rather than the enterprise.[119] Some of these decisions also warn that permitting the use of *respondeat superior* in this context would allow a plaintiff to circumvent the required person-enterprise distinction which courts have seen fit to impose.[120]

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117. *See supra* notes 74-77 and accompanying text.

118. *See, e.g.*, D&S Auto Parts, Inc. v. Schwartz, 838 F.2d 964 (7th Cir. 1988), *cert. denied*, 56 U.S.L.W. 3846 (U.S. June 14, 1988); United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc., 837 F.2d 356 (9th Cir. 1988); Petro-Tech, Inc. v. Western Co., 824 F.2d 1349 (3d Cir. 1987); Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir. 1986); Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393 (9th Cir. 1986); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984); Gilbert v. Prudential-Bache Securities Inc., 643 F. Supp. 107 (E.D. Pa. 1986); Intre Sport Ltd. v. Kidder Peabody & Co., Inc., 625 F. Supp. 1303 (S.D.N.Y. 1986); Abelson v. Strong, 644 F. Supp. 524 (D. Mass. 1986). However, there are logistical problems involved in the pleading of a case under section 1962(a). *See, e.g., Civil RICO Task Force Report, supra* note 20, at 376-77 (section 1962(a) not coextensive with section 1962(c) in reaching unlawful activity; culpable organizations could perhaps avoid liability because of limits on applicability of section 1962(a)); Hellerstein & Jacobson, *supra* note 77, at 112 ("major problem" before civil RICO plaintiff can use section 1962(a) to reach corporate pocket; to wit, satisfaction of proximate cause and damage requirements in showing causal relationship between investment or use of racketeering proceeds in an enterprise and his injury); Note, *supra* note 116, at 596-97 ("limiting corporation liability to [1962(a)] would require a demonstration of the source and disposition of illegal income, a significant added burden for the plaintiff;" might also encourage organized crime to function through corrupt but RICO-immune corporations; and would eliminate cases in which racketeering did not result in acquisition of funds and eliminate corporate liability for participation in pattern of racketeering activities); Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 691 & n.139 (1987) (section 1962(a) requires proof of use of proceeds from racketeering to invest in a legitimate enterprise, presenting an "extremely difficult and burdensome" task for plaintiffs); *Racketeer Influenced and Corrupt Organizations (RICO)*, 22 AM. CRIM. L. REV. 401, 420-21 & nn. 1235-36 (1984) (section 1962(a) poses evidentiary problems "because the income must be traced from the racketeering activity to the principal's investment in the enterprise through the defendant's typically inadequate or doctored records. Due to these evidentiary limitations, prosecutors rarely invoke section 1962(a).").

119. D&G Enterprises v. Continental Illinois Nat'l Bank, 574 F. Supp. 263, 270 (N.D. Ill. 1983) (RICO does not hold the enterprise liable, but only persons who participated in its affairs through a pattern of racketeering activity).

120. *See, e.g.*, Luthi v. Tonka Corp., 815 F.2d 1229 (8th Cir. 1987); Brent Liquid Transp., inc. v. GATX Leasing Corp., 650 F. Supp. 467 (N.D. Miss. 1987); Banque Worms v. Luis A. Dque Pena e Hijos, Ltd., 652 F. Supp. 770 (S.D.N.Y. 1986); Gaudette v. Panos, 644 F. Supp. 826 (D. Mass. 1986); Continental Data Sys., Inc. v. Exxon Corp., 638 F. Supp. 432 (E.D. Pa. 1986); Lynn Elecs. v. Automation Mach & Dev. Corp., No. 86 2301 (E.D. Pa. Oct. 6, 1986); Walso Bureau, Inc. v. Underwriters Adjusting Co., No. 85 5896 (E.D. Pa. Aug. 14, 1986) (available on LEXIS, Genfed library, Dist file); Rush v. Oppenheimer & Co., Inc., 628

One of the first decisions to directly address the question of *respondeat superior* liability under RICO is *Parnes v. Heinold Commodities, Inc.*[121] In *Parnes*, a securities case, the plaintiffs alleged that they had been damaged by the fraudulent trading practices of two of the defendant's employee-brokers. The plaintiffs sued the brokerage house, Heinold Commodities, Inc., under section 1962 of RICO, alleging that it was equally responsible with the errant brokers for the damages they had suffered.

Refusing to impute to the corporation the criminal acts of the two broker-employees, the court asserted:

> that sort of respondeat superior application, perhaps permissible to establish ordinary civil liability, would be bizarre indeed as a means to warp the facts alleged in this case into the RICO mold. Under that theory malefactors at a low corporate level could thrust treble damage liability on a wholly unwitting corporate management and shareholders.[122]

The next significant RICO opinion dealing with *respondeat superior* liability was *Dakis v. Chapman.*[123] The plaintiff in *Dakis* alleged that the defendants' broker-employee had "churned" her late husband's account and caused substantial losses by doing so. The court held that the plaintiff's RICO claim must fail because it alleged only *respondeat superior* liability on the part of the brokerage houses.[124] The court recognized that the firms would have *respondeat superior* liability under the securities laws, but was unwilling to extend such liability to RICO claims,[125] holding that "it is necessary that whomever is to be held liable under RICO has him(it)self been actively engaged in the pattern of racketeering."[126]

As one commentator has pointed out, rejection of *respondeat superior* liability in these cases "seems an abrupt departure from modern tort principles."[127] The court's refusal to apply *respondeat*

F. Supp. 1188 (S.D.N.Y. 1986); Kredietbank N.V. v. Joyce Morris, Inc., 1 CIV. RICO REP. (BNA) 7 (Oct. 30, 1985) (D.N.J. Oct. 11, 1985) (available on LEXIS, Genfed library, Dist file), *aff'd mem.*, 808 F.2d 1516 (3d Cir. 1986); Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828 (N.D. Ill. 1985); Addis v. Moser, No. 83 C 6118 (N.D. Ill. Feb. 15, 1984) (available on LEXIS, Genfed library, Dist file); Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20 (N.D. Ill. 1982). *See also* Separate Statement of Richard E. Nathan, *Civil RICO Task Force Report, supra* note 20, at 342-43.

121. 548 F. Supp. 20 (N.D. Ill. 1982).
122. 548 F. Supp. at 24 n.9.
123. 574 F. Supp. 757 (N.D. Cal. 1983).
124. 574 F. Supp. at 759.
125. 574 F. Supp. at 760.
126. 574 F. Supp. at 760.
127. Black, *supra* note 46, at 836. *See also supra* notes 23-28 and accompanying text.

superior seems questionable in view of RICO's liberal construction clause.[128] The policies of loss distribution and deterrence which underlie *respondeat superior* are well-served by its application to RICO.[129] In addition, the availability of *respondeat superior* under the federal securities laws for the predicate offenses of churning and suitability[130] make the rejection of that doctrine in a RICO case anomalous.

A third case specifically discussing vicarious liability under RICO is *Bernstein v. IDT Corporation.*[131] In *Bernstein*, the trustee in bankruptcy of Frigitemp, Inc. sued General Dynamics Corporation and various individual defendants, claiming that they had looted Frigitemp by demanding kickbacks and illegal rebates in exchange for subcontract work at General Dynamics' Quincy Shipyard. The complaint alleged that the culpable acts of bribery and extortion were committed by senior officers of General Dynamics in the course of their employment, thus exposing General Dynamics to vicarious liability for the resulting damage.

The RICO count of the complaint alleged a violation of section 1962(c), claiming that General Dynamics and two of its corporate officers conducted the affairs of General Dynamics through a pattern of racketeering activity.[132] The court found that General Dynamics could be held liable under RICO for violations committed by its officers using the normal rules of agency law:

> When conduct is proscribed by a federal statute and civil liability for that conduct is explicitly or implicitly imposed, the normal rules of agency law apply in the absence of some indication that Congress had a contrary intent . . . . I perceive nothing in RICO or its legislative history which would suggest that the normal rules of agency not apply to the civil liability created by that statute. To the contrary . . . it appears to me that application of the doctrines of apparent authority and *respondeat superior* will, at least in most instances, further the statutory goals.[133]

The court added in a footnote that if General Dynamics were civilly responsible for the conduct of its two officers, it could be required to

128. *See supra* note 69 and accompanying text.
129. Black, *supra* note 46, at 836.
130. *Id.*; Note, *supra* note 116, at 605; Gruber v. Prudential-Bache Sec. Inc., 679 F. Supp. 165, 181 (D. Conn. 1987).
131. 582 F. Supp. 1079 (D. Del. 1984).
132. 582 F. Supp. at 1082.
133. 582 F. Supp. at 1083-84 (citations omitted).

pay treble damages.[134]

In discussing vicarious civil RICO liability, the *Bernstein* court placed substantial reliance on RICO's closest analog—the antitrust laws.[135] It cited the United States Supreme Court's decision in *American Society of Mechanical Engineers v. Hydrolevel Corp.*[136] and analogized the application of *respondeat superior* in a treble damages antitrust suit to a civil RICO action.[137] In *Hydrolevel*, treble damages were sought under the antitrust laws against a non-profit association (ASME) for the actions of agents who were unpaid volunteers. The issue before the Supreme Court was whether ASME could be held liable under the antitrust laws for the acts of these agents, who were acting with apparent rather than actual or implied authority.[138]

The Court concluded that the fundamental question presented in *Hydrolevel* was whether the well-recognized rule that a principal is responsible for the acts of his agents done within the scope of the agent's authority was "consistent with the intent behind the antitrust laws."[139] The Court used "reasoning that is strikingly apt in the context of civil RICO"[140] to hold that the antitrust laws contemplate vicarious liability of a principal for the acts of his agent done with apparent authority.[141]

Looking to the Congressional intent behind the antitrust statutes, the Court noted that absent any indication that the law was not intended to reach that far, the antitrust action should be at least as broad as the plaintiff's right to sue for analogous torts.[142] Reviewing the legislative history, the Court concluded that Congress' desire that the antitrust laws sweep broadly would be furthered by allowing the apparent authority rule to apply in such cases.[143]

The Court found that the threat of vicarious civil liability under the antitrust laws would have a deterrent effect in the industry. Such a threat would create a powerful incentive for ASME to take "steps to make improper conduct on the part of all its agents unlikely."[144]

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134. *Id.* at 1084 n.3.
135. *See* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations Act (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980).
136. 456 U.S. 556 (1982).
137. 582 F. Supp. at 1083.
138. 456 U.S. at 558-59.
139. 456 U.S. at 570.
140. Dwyer & Kiely, *supra* note 3, at 336.
141. 456 U.S. at 570.
142. 456 U.S. at 569.
143. 456 U.S. at 573 n.11.
144. 456 U.S. at 572.

The Court also held that vicarious civil liability under the antitrust laws should not be limited to situations in which the agent acts to benefit his principal.[145] Moreover, the Court concluded that treble damage liability of a principal for the acts of his agent done with apparent authority was warranted on the ground that treble damages deter violations, compensate victims, and counterbalance the difficulty of maintaining a private suit under the antitrust laws.[146] Finally, the Court rejected ASME's argument that it should not be held liable unless it ratified the actions of its agents, stating that such a rule would allow ASME to "avoid liability by ensuring that it remained ignorant of its agents' conduct."[147]

The *Bernstein* court's reliance on the Supreme Court's *Hydrolevel* decision is well-placed. Most of the policy arguments for vicarious antitrust liability made by the majority in *Hydrolevel* can be made with equal force under civil RICO.[148] First, the vicarious liability of a corporation for the acts of its agents and employees is well-established at common law, even when those acts are *ultra vires* of the corporation.[149] Second, vicarious liability will function equally as well under RICO as under the antitrust laws to influence corporations to supervise their employees. The need to induce corporate responsibility is surely as great with respect to RICO violations as it is in the antitrust area. Furthermore, as between innocent victims and a principal with supervisory responsibility, fairness mandates imposing the risk of loss on the latter.[150]

In addition, each of the statutory arguments for vicarious antitrust liability have an analog under RICO. The intended broad sweep of the antitrust laws referred to by the Supreme Court in *Hydrolevel* is at least duplicated in RICO. Not only is RICO "a foster child of the antitrust statutes,"[151] but Congress also added to RICO an express provision, which had not been added to the antitrust laws, calling for the liberal construction of RICO to achieve its remedial purposes.[152]

From an economic standpoint, vicarious liability under both the antitrust laws and RICO is justified because the corporation is best

145. 456 U.S. at 573-74.
146. 456 U.S. at 575-76 (citations omitted).
147. 456 U.S. at 573.
148. Federal Sav. & Loan Ins. Corp. v. Shearson-American Express, Inc., 658 F. Supp. 1331, 1341 (D.P.R. 1987).
149. Dwyer & Kiely, *supra* note 3, at 338.
150. Goldsmith, *Civil RICO Reform*, *supra* note 23, at 877.
151. *Civil RICO Task Force Report*, *supra* note 20, at 351.
152. *See supra* note 69 and accompanying text.

able to spread the risk of loss from anticompetitive behavior as well as from racketeering activity by corporate agents. Further, the treble damage provisions of both the antitrust laws and RICO will provide an even stronger incentive to private litigants if vicarious liability is available. It is through vicarious liability that such plaintiffs will be able to reach into the deep corporate pocket.

In sum, then, it seems accurate to say that "[v]icarious and entity civil liability and criminal responsibility are well-established principles in federal jurisprudence; they should also serve well in implementing RICO's broad remedial purposes."[153] As a "bulwark against institutional misconduct,"[154] *respondeat superior* liability is clearly warranted in the RICO context.

IV. A Proposed Standard for Vicarious Civil RICO Liability of the Legitimate Business Entity

After deciding that derivative liability of the business entity is appropriate under civil RICO, the next step is to decide upon the appropriate theory of liability to be used and the measure of damages to be imposed upon the corporation. The ordinary federal rules of *respondeat superior*[155] will govern the corporation's liability for the actual damages for offenses committed by its agents and employees. These acts may also be predicate offenses under RICO.[156] The RICO statute and legislative history, however, are silent on the issue of vicarious treble damage liability[157] and, as was demonstrated above, "the case law on this issue is in disarray."[158]

The use of *respondeat superior* under RICO should not be left to haphazard judicial development in the lower courts.[159] It appears, though, that the United States Supreme Court is unwilling to settle the disagreement among the circuits. The Court recently declined to review a case that squarely presented the issue of vicarious treble damage liability under RICO.[160]

Several legislators and many commentators have proposed solu-

153. Blakey, *supra* note 38, at 323.

154. Goldsmith, *Civil RICO Reform*, *supra* note 23, at 855.

155. *See supra* notes 17-28 and accompanying text.

156. *See* Hellerstein & Jacobson, *supra* note 77, at 115 n.100; *Civil RICO Task Force Report*, *supra* note 20, at 360; Note, *supra* note 116, at 605; Gruber v. Prudential-Bache Sec. Inc., 679 F. Supp. 165, 181 (D. Conn. 1987).

157. *See supra* note 46 and accompanying text.

158. *Civil RICO Task Force Report*, *supra* note 20, at 360.

159. *Id.*

160. D&S Auto Parts, Inc. v. Schwartz, 838 F.2d 964 (7th Cir. 1988), *cert. denied*, 56 U.S.L.W. 3846 (U.S. June 14, 1988) (presenting issue of whether doctrine of respondeat superior is applicable to civil RICO actions).

tions to the issue of the propriety of vicarious RICO liability. These proposals are reviewed below; then, another standard for liability is proposed.

A. Legislators and Commentators Address the Issue

Two commentators have proposed that section 1964(c) of RICO, which authorizes private civil RICO actions for treble damages,[161] be amended to prohibit completely vicarious treble damage liability under the statute. One of these commentators advocates a prohibition of the use of any vicarious liability doctrine, including *respondeat superior*, to impose liability for treble damages.[162] The other commentator suggests an amendment of section 1964(c) to explicitly state that a legitimate entity may never be held to have violated RICO or be liable for treble damages under its provisions.[163] This latter proposal would include a prohibition on the use of vicarious liability principles against the legitimate business entity.

Other proposals, however, would permit some use of vicarious liability principles under civil RICO. At least one civil RICO reform bill introduced in Congress has sought to severely restrict the use of vicarious liability against the legitimate entity,[164] while several other reform bills have been silent on the issue.[165] For example, in July of 1986, the House Judiciary Committee's Subcommittee on Criminal Justice proposed a civil RICO reform bill,[166] H.R. 5445, which would have restricted severely vicarious liability under RICO.[167]

H.R. 5445 would have effectively eliminated *respondeat superior* as a basis for RICO liability by limiting enterprise liability to cases in which an executive officer or governing board authorized or ratified the criminal acts.[168] The restrictive *respondeat superior* lan-

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161. This section reads as follows:

> 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.

]18 U.S.C. § 1964(c) (1982).

162. Anderson, *Problems of Private RICO Remedies and Suggested Legislative Solutions*, Nat'l L.J., Jan. 20, 1986, at 30, col. 3.

163. Separate Statement of Richard E. Nathan, *Civil RICO Task Force Report, supra* note 20, at 407, 421, 422 n.668.

164. *See infra* notes 166-72 and accompanying text.

165. *See infra* notes 173-78 and accompanying text.

166. *See House Subcommittee Approves Bill Eliminating RICO's Treble Damage Provision*, 2 CIV. RICO REP. (BNA) at 2 (Aug. 20, 1986).

167. *See* Goldsmith, *Civil RICO Reform, supra* note 23, at 855, app. at 904-06.

168. *See id.* at 856, app. at 905. As Mr. Goldsmith points out, if one views the authorization of criminal violations as a basis for direct rather than vicarious liability, this version of H.R. 5445 "would have limited vicarious liability to the rare situations involving ratification."

guage found in this original version of the bill received strong criticism[169] and was not included in the revised version of H.R. 5445.[170] This revised version, which was silent on the issue of vicarious liability under RICO, passed the House of Representatives,[171] but was tabled in the Senate by a 47-44 vote.[172]

Several other currently pending RICO reform bills are also silent on the issue of the use of *respondeat superior* in RICO actions. Bills introduced by Representative John Conyers (D-Mich)[173] and by Senator Howard Metzenbaum (D-Ohio)[174] during 1987 did not address the issue.[175] So-called "compromise" bills introduced on June 28, 1988, by Representatives Boucher[176] and Conyers[177] also make no mention of the issue.[178]

One commentator has criticized the approach of the revised version of H.R. 5445 (and, implicitly, the other reform bills which are silent on the issue of vicarious civil RICO liability) and suggests a limited use of *respondeat superior* which he terms "a compromise designed to make RICO less threatening to institutional businesses."[179] He has proposed that *respondeat superior* liability be applied to civil RICO, but only for actual damages. Only when the board of directors, a partner, or a high managerial agent of the principal, acting within the scope of employment, authorized, ratified, or recklessly tolerated the pattern of racketeering activity[180] would the

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Id. at 856. In addition, the bill required that the "conduct complained of" must have been "intended to benefit, and did benefit [the principal]." H.R. 5445, 99th Cong., 2d Sess., 132 CONG. REC. H9365-66 (daily ed. Oct. 7, 1986).

169. *See* Celebrezze, *Keep RICO Intact: It's Working Well*, Legal Times, Oct. 6, 1986, at 17, col. 1.

170. *See* Goldsmith, *Civil RICO Reform, supra* note 23, at 878, app. at 907-11. Mr. Goldsmith suggests that Congressman Boucher, the sponsor of both versions of H.R. 5445, is trying to "legislate indirectly a result he could not achieve directly" by this tactic, in that Boucher advocates that the current trend in the law, which generally rejects *respondeat superior*, be continued without congressional action, *id.* at 877-78.

171. 132 CONG. REC. H9365-66 (daily ed. Oct. 7, 1986).

172. *See* 132 CONG. REC. S16,704 (daily ed. Oct. 16, 1986).

173. H.R. 3240, 100th Cong., 1st Sess., 133 CONG. REC. H7406 (daily ed. Sept. 9, 1987).

174. S. 1523, 100th Cong., 1st Sess., 133 CONG. REC. S10,497, 10,501-03 (daily ed. July 22, 1987).

175. 3 CIV. RICO REP. (BNA) at 1 (Feb. 9, 1988).

176. H.R. 4923, 100th Cong., 2d Sess., 134 CONG. REC. H4833 (daily ed. June 28, 1988).

177. H.R. 4920, 100th Cong., 2d Sess., 134 CONG. REC. H4832 (daily ed. June 28, 1988).

178. 4 CIV. RICO REP. (BNA) at 5 (July 5, 1988).

179. Goldsmith, *Civil RICO Reform, supra* note 23, at 877.

180. *Id.* at 874, 877. Mr. Goldsmith's proposed amendment to section 1964(c) of RICO reads as follows:

> (6) In all actions arising under this subsection, a principal is liable for actual damages for harm caused by an agent acting within the scope of either his

principal be liable for double damages.[181]

This standard of applying *respondeat superior* to make a legitimate entity liable under civil RICO only if high-level officials of the firm approved or had knowledge of the racketeering activity is one probably derived from the Model Penal Code[182] and is found in the proposals of several other commentators. For example, the Task Force on Civil RICO of the American Bar Association Section of Corporation, Banking, and Business Law has recommended that *respondeat superior* be applied in civil RICO cases to make legitimate businesses liable for treble damages only when high-level managerial agents or top officers or directors of the corporation were directly involved in or knew of the racketeering activities.[183] Similarly, other commentators have suggested that "[i]t is appropriate to hold a corporation criminally and civilly liable for the predicate acts and a RICO violation when . . . the corporation acquiesced in or authorized the actions of its agents in furtherance of corporate business,"[184] or "when its high-level managerial agents, officers of [sic] directors are directly involved with the alleged criminal activity or they expressly approve such activity by their underlings."[185]

Other commentators have chosen not to limit the vicarious civil RICO liability of the corporate entity to situations when high-level corporate actors take part. One commentator has asserted that "[i]f the entity participates in or directly benefits from the racketeering activity, it should be named as a defendant" under *respondeat superior* or vicarious liability principles, and that when the entity "has acted or participated in or benefitted [indirectly] from the pattern of racketeering activit[y]," it may also be permissible to allege such

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> employment or apparent authority. A principal is liable for double damages only if the pattern of illicit activity was authorized, ratified, or recklessly tolerated by the board of directors, a partner, or a high managerial agent acting within the scope of employment.

Id. at 874.

181. *Id.*

182. *See* MODEL PENAL CODE Section 2.07(1)(c) (Proposed Official Draft 1962); Goldsmith, *Civil RICO Reform, supra* note 23, at 361; Note, *supra* note 116, at 600 & n.255.

183. *Civil RICO Task Force Report, supra* note 20, at 364-65, 431-32. The one exception to this rule which is advocated by the Task Force is that "actual damage derivative or *respondeat superior* liability should exist in the limited circumstances where there exists a distinct RICO injury for which no compensation is available in claims based upon the individual criminal acts that constitute the predicate offenses." *Id.*

184. Note, *supra* note 116, at 601. However, the author of this Note terms this direct, and not vicarious, corporate responsibility. *Id.* at 600-01.

185. Lacovara & Nicoli, *supra* note 31, at 4. However, these commentators also assert that this is not a situation involving vicarious responsibility, but one in which the alter ego of the organization has made the organization itself corrupt, *id.*

liability.[186] Going further, another commentator has asserted that when the agent of a legal entity commits racketeering acts that fall within the scope of its actual or apparent authority, the principal can be named as a defendant under section 1962(c) of RICO pursuant to the doctrines of apparent authority and *respondeat superior*, "notwithstanding the fact that the principal might not have participated in or directly benefitted from the racketeering activity."[187]

Another proposal advocates amending section 1962(c) of RICO to explicitly provide for vicarious liability, but also suggests making available a good faith defense for the corporate enterprise that diligently supervised its agents and employees.[188] The authors of this proposal contend that such a defense will provide the corporate employer with an incentive to supervise and will therefore better protect the public than traditional agency principles, which make the corporate employer strictly liable notwithstanding its diligence.[189]

Professor Robert Blakey, one of the drafters of RICO and an influential commentator on the statute, has chosen instead to focus on the role of the enterprise in order to determine when vicarious liability should arise under RICO. He asserts that in some situations, attributing civil or criminal liability to the enterprise for the conduct of a person violating RICO is justified, while in other situations such attribution "would be perverse."[190] After describing the possible roles of the enterprise as "prize," "instrument," "victim," and "perpetrator,"[191] Blakey advocates no vicarious liability whatsoever when the enterprise is either a prize or a victim. He suggests vicarious civil and criminal liability when the enterprise is a perpetrator; and civil, but not criminal, vicarious liability when the enterprise is an instrument.[192]

B. A Simple Standard for Imposing Vicarious Civil RICO Liability

As outlined above, the judiciary is generally reluctant to apply

186. DuVal, *A Trial Lawyer's Guide: Everything You Always Wanted to Know About RICO Before Your Case Was Dismissed*, 12 WM. MITCHELL L. REV. 291, 316 n.110.

187. Moran, *supra* note 38, at 776 n.251. In fact, Moran describes this as an "important exception" to the principle that an entity which did not participate in or directly benefit from racketeering activity should not be named as a defendant under section 1962(c). *Id.* at 775-76 & n.251.

188. Hellerstein & Jacobson, *supra* note 77, at 79-81, 115-16.

189. *Id.* at 80.

190. Blakey, *supra* note 38, at 290 & n.151.

191. *See id.* at 307.

192. *Id.* at 323-24.

respondeat superior to civil RICO.[193] Some courts and most commentators would prefer to apply it, if at all, only in situations in which the corporation, through its high-level employees or agents, actively participated in or knew about the racketeering activities which have occurred.[194] This judicial reluctance probably stems from "both a hostility to RICO" in general,[195] and a conviction "that *respondeat superior* ought not be a basis for treble damage liability."[196]

Such hostility, however, is misplaced. RICO is here to stay, and Congress is charged with the task of amending the statute if it is to be amended.[197] Moreover, neither the language of the RICO statute nor its legislative history suggests that the ordinary rules of agency—including vicarious liability rules—have been displaced by RICO.[198] The provision making the corporation liable for treble damages can be supported on several grounds.

First, civil RICO's treble damage and counsel fee provision[199] encourages remedial litigation by private plaintiffs.[200] Because complex fraud investigations into corporate white-collar crime often require resources that government prosecutors do not have,[201] private attorneys general serve a critical supplementary function. Second, private treble damage actions also promote deterrence to a greater extent than actions seeking only actual damages. Few miscreants are

193. *See supra* notes 107-20 and accompanying text. *See also* Schofield v. First Commodity Corp., 793 F.2d 28, 32-34 (1st Cir. 1986) (noting majority view).

194. *See supra* notes 115-16, 123-26 and accompanying text.

195. Goldsmith, *Civil RICO Reform, supra* note 23, at 856, 876; Goldsmith, *A Response, supra* note 44, at 796 n.161.

196. Goldsmith, *Civil RICO Reform, supra* note 23; at 856; Dwyer & Kiely, *supra* note 3, at 342; Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 24 n.9 (D. Ill. 1982).

197. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499-500 (1985) ("It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.") (footnote omitted).

198. Dwyer & Kiely, *supra* note 3, at 345, 347; Bernstein v. IDT Corp., 582 F. Supp. 1079, 1083 (D. Del. 1984).

199. 18 U.S.C. § 1964(c) (1982). *See supra* note 161.

200. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 493 (1985) (noting that private attorney general provision and treble damages provision support legislative purpose to encourage civil litigation). *See also Civil RICO Task Force Report, supra* note 20, at 425 (treble damages liability a means to create incentives to undertake costs and risks of litigation when public policy calls for private involvement to supplement limited public law enforcement resources).

201. *See, e.g.*, H. EDELHERTZ, THE NATURE, IMPACT, AND PROSECUTION OF WHITE-COLLAR CRIME 8 (1970) (the prevention, deterrence, investigation, and prosecution of white-collar crime must compete with other interests for allocation of scarce law enforcement dollars . . . .").

deterred by the possibility that in the rare event of litigation limited to actual damages, they merely will have to part with their ill-gotten gains.[202] In addition, treble damages serve the socially desirable function of compensating victims,[203] and are especially appropriate as RICO violators have, by definition, engaged in a pattern of continuous criminal activity.[204]

Vicarious civil liability under RICO can also be supported on policy grounds. Both criminal and civil vicarious liability are well-established and broadly applied in American jurisprudence,[205] even as a basis for assessing punitive damages.[206] Further, there is no reason to separate RICO from other theories of liability in which corporations are exposed to multiple or exemplary damages for their employees' conduct.[207]

With regard to the propriety of derivative liability under RICO specifically, neither the language nor the legislative history of the statute suggests that the ordinary rules of agency law, including liability rules, have been displaced by RICO.[208] The statute is silent on the issue of vicarious liability, and the assumption must be that the standard for such liability is that which would otherwise apply under existing criminal and civil law.[209] Moreover, Congress purposely appended a liberal construction clause to RICO to ensure that the law would be generously applied to achieve its remedial purposes.[210]

The application of the doctrine of *respondeat superior* will generally further the remedial purposes of RICO[211] and Congress' desire that RICO sweep broadly.[212] Moreover, both the policy argu-

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202. *See Oversight on Civil RICO Suits: Hearings Before the Committee on the Judiciary*, 99th Cong., 1st Sess. 415 (1986) (statement of the National Association of Attorneys General and National District Attorneys Association):

> If our society authorizes the recovery of only actual damages for deliberate anti-social conduct engaged in for profit, it lets the perpetrator know that if he is caught, he need only return the misappropriated sums. If he is not caught, he may keep his ill-gotten gains, and even if he is caught and sued, he knows that he may be able to defeat part of the damages claim or at least compromise it. In short, the balance of risk under traditional simple damage recovery provides little disincentive to those who engage in such conduct.

203. *Cf.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) (treble damages serve compensatory function in antitrust context).

204. RICO liability is limited by the statute to persons who have engaged in a pattern of racketeering activity. *See* 18 U.S.C. §§ 1961(5), 1962 (1982).

205. *See supra* notes 17-28 and accompanying text.

206. *See supra* note 27 and accompanying text.

207. *See supra* notes 27, 40 and accompanying text.

208. *See supra* notes 105-33 and accompanying text.

209. *Civil RICO Task Force Report, supra* note 20, at 352.

210. *See supra* note 69 and accompanying text.

211. Bernstein v. IDT Corp., 582 F. Supp. 1079, 1083-84 (D. Del. 1984).

212. *Cf.* American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 573

ments and the statutory arguments made by the Supreme Court in favor of vicarious antitrust liability in the *Hydrolevel* opinion[213] can be made with equal force under civil RICO.[214] Finally, the primary justifications usually given for derivative corporate liability in general, risk allocation and deterrence,[215] apply equally well in the specific RICO context.

The use of vicarious liability principles in the context of civil RICO suits ought to be based upon the plain language of the RICO statute and upon Congress' express direction that RICO should be liberally construed to effectuate its remedial purposes.[216] Congress did not even hint that the usual rules of derivative liability should not apply under RICO, and it defined the culpable person for purposes of RICO to specifically include business entities.[217] Legitimate business entities, therefore, should be vicariously liable under civil RICO whenever they would be vicariously liable under general principles of *respondeat superior*:[218] whenever an agent of the entity acts with apparent authority or an employee of the entity acts within the scope of his employment.

Section 1964(c) of the RICO statute should be amended by Congress to state explicitly that a person, as broadly defined in the statute to include an entity, is vicariously liable for treble damages for injury to person or property caused by its agent acting with apparent authority or by its employee acting within the scope of his employment. Such a provision would impliedly incorporate existing rules of vicarious liability, making the principal vicariously liable for treble damages. Congress chose this remedy to compensate victims of racketeering activity, encourage private enforcement of RICO's provisions, and deter further racketeering activity. The proposed amendment is:

> Title 18 U.S.C. Section 1964(c) is amended to read as follows:
>
> (6) In all actions arising under this subsection, a person, as defined in section 1961(3) of this chapter, is liable for treble damages and the cost of the suit, including a reasonable attor-

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n.11 (1982) (noting that Congress' desire that antitrust laws sweep broadly would be furthered by allowing use of apparent authority rule).

213. American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982).

214. *See supra* notes 148-52 and accompanying text.

215. *See supra* notes 99-103 and accompanying text.

216. *See supra* note 69 and accompanying text.

217. *See supra* note 13 and accompanying text for the statutory citation and definition of "person."

218. *See supra* notes 23-28 and accompanying text.

> ney's fee, for injury to person or property caused by an agent acting with apparent authority or by an employee acting within the scope of his employment. It is no defense to liability under this provision that the culpable person did not authorize, direct, command, request, ratify, participate in, or have knowledge of the racketeering activities engaged in by the agent or employee.

IV. Conclusion

There are circumstances in which a legitimate business entity can and should be held liable under civil RICO. Because this liability is necessarily derivative,[219] it is important to fashion a workable theory of vicarious liability that can be used in conjunction with civil RICO. Private plaintiffs, struggling to reach the corporate pocket through civil RICO, have tried various approaches.[220] This scramble has resulted in chaos and confusion in the lower courts, a problem which the Supreme Court seems unwilling to resolve.[221] Therefore, it is up to Congress to fashion and implement such a theory.

In doing so, Congress should be mindful that neither the person-enterprise structure of the statute[222] nor the silence of RICO's framers[223] lead to the conclusion that the ordinary rules of vicarious liability do not apply under RICO. On the contrary, the use of these rules would further RICO's remedial purposes as well as the statutory directive that it be liberally construed.[224]

Thus, an amendment to section 1964(c) of the statute, which would provide for vicarious liability of a principal for the full measure of treble damages based upon the traditional principles of *respondeat superior* and agency law, is appropriate. A vicarious liability provision of this type will provide principals with an incentive to abide by RICO and to develop effective procedures to supervise their agents and employees. At the same time the provision will offer adequate remedies so that private plaintiffs may vindicate wrongs committed against them by business entities as well as obtain redress for these wrongs.

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219. *See supra* note 45 and accompanying text.
220. *See supra* notes 56-60, 107 and accompanying text.
221. *See supra* notes 47-48, 160 and accompanying text.
222. *See supra* note 106 and accompanying text.
223. *See supra* note 46 and accompanying text.
224. *See supra* note 69 and accompanying text.