UIC Law Review

Volume 30 | Issue 1 Article 7

Fall 1996

Misappropriation of Trade Secrets: The Last Civil Rico Cause of Action That Works, 30 J. Marshall L. Rev. 207 (1996)

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COMMENTS

MISAPPROPRIATION OF TRADE SECRETS: THE LAST CIVIL RICO CAUSE OF ACTION THAT WORKS

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Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device.[1]

INTRODUCTION

Barry Yew worked for Western Electronic Enterprise Company (WEE Co.) as an engineer for many years.[2] WEE Co. was a medium-sized company located in Illinois that designed and built small lots of specialized proprietary integrated circuits for many high technology industries. Mr. Yew designed computer chips and industrial controls, and he became familiar with many of WEE Co.'s proprietary designs, manufacturing processes and vendors during the course of his employment. Due to his years of experience, Mr. Yew was even entrusted with the keys to the locked file cabinets which contained WEE Co.'s most sensitive business information. As a result of an unexpected, simultaneous contraction in both the defense and computer industries, WEE Co. had to downsize. Mr. Yew was assigned a new job during the reorganization, and he hated it. As a result, he decided to seek new employment.

Mr. Yew applied for a job at United System Electrodes and Microelectronics, Incorporated (USEME, Inc.), a large manufacturer of integrated circuits located in Wisconsin. USEME, Inc. was immediately interested in Mr. Yew due to his years of design experience. During Mr. Yew's first interview, USEME, Inc.'s Director of Engineering, Mr. Craft, said that he had always wanted to

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1. Miranda v. Ponce Fed. Bank, 948 F.2d 41, 44 (1st Cir. 1991).

2. The fact pattern presented herein is purely hypothetical and is used to illustrate the main points of this Comment. Any similarities between the hypothetical fact pattern and any person, corporation or other fact pattern is purely coincidental.

get his hands on some of WEE Co.'s technology. Although Mr. Craft did not ask directly, Mr. Yew recognized Mr. Craft's comment as a request for documents. Mr. Yew said that he would see what he could do—if he was hired.

USEME, Inc. promptly requested a second interview with Mr. Yew. On the day of second interview, Mr. Yew called in sick because he was out of personal and vacation days. The second interview was a formality, and USEME tendered Mr. Yew an attractive job offer. Mr. Yew accepted the offer but delayed resigning from WEE Co. for one week because he wanted to copy some documents for USEME, Inc. Every night for that week, Mr. Yew surreptitiously misappropriated copies of customer lists and manufacturing processes out of WEE Co's locked files.[3] He also took computer diskettes and drawings containing some of WEE's proprietary designs.

Upon starting his new job, Mr. Yew gave Mr. Craft WEE Co.'s trade secrets. Mr. Yew was immediately assigned to a project team which had the task of incorporating WEE Co.'s designs into USEME, Inc.'s products. Several weeks later, USEME, Inc.'s Vice-President of Operations, Mr. Big, stopped Mr. Yew in a corridor and congratulated him for giving WEE Co.'s sensitive business information to USEME, Inc.

Within a year, WEE Co. was losing market-share and was suffering from shrinking profit margins. USEME, Inc. introduced a new generation of chips which were similar in operation to those made by WEE Co. WEE Co. knew that these designs were not amenable to reverse engineering[4] and was suspicious that USEME

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3. According to the Uniform Trade Secrets Act, an employee misappropriates a trade secret when the employee knows that knowledge of the trade secret was acquired under conditions giving rise to a duty of secrecy and yet discloses or uses the trade secret without express or implied consent. Derek P. Martin, *An Employer's Guide to Protecting Trade Secrets from Employee Misappropriation*, 1993 B.Y.U. L. REV. 949, 951-52 (1993). According to the RESTATEMENT OF TORTS, a trade secret is any "formula, pattern, device or compilation of information" which gives a business an advantage over competitors who do not possess the information. Peter J.G. Toren, *The Prosecution of Trade Secrets Thefts Under Federal Law*, 22 PEPP. L. REV. 59, 59 n.1 (1994) (citing the RESTATEMENT).

The RESTATEMENT lists six factors which can be used in determining whether a particular formula, pattern, device or compilation of information is a trade secret: 1) the extent to which the information is known outside the business; 2) the extent to which the information is known to the employees within the business; 3) the safeguards taken to protect the information; 4) the value of the information; 5) the money and effort used to develop the information; and 6) the ability of others to properly acquire or duplicate the information. *Id.* The misappropriation of trade secrets and the theft of trade secrets will be used interchangably throughout this Comment.

4. Reverse engineering is the study and recomposition of unpatented articles. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 155 (1989). Reverse engineering is a protected right of the public at large unless

had wrongfully acquired the technology. WEE Co. subsequently learned that all the adverse developments were the result of Mr. Yew supplying USEME, Inc. with confidential business documents. The President of WEE Co. found out that USEME, Inc. had also encouraged the ex-employees of other companies to steal trade secrets including Mr. Smith, formerly of XYZ Corp.

The President of Wee Co. consulted an attorney about suing USEME, Inc. The attorney explained that legal fees and litigation expenses for such a suit could easily exceed $500,000.[5] After doing a cost-benefit analysis, the board of directors of WEE Co. concluded that legal action would be imprudent because of the highly speculative nature of civil litigation.[6]

WEE Co. is a fictitious victim of the burgeoning problem of corporate espionage in America.[7] As Wee Co. discovered, a victim of trade secret theft often encounters a lose-lose proposition: First the company loses the trade secrets, then the company learns that it does not have any effective civil remedies for their loss.[8] How-

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the product has been patented. *Id.* The threat of reverse engineering is one way to spur inventors to meet the rigorous requirements for patents which Congress has set. *See Id.* Reverse engineering is also defined as the process of starting with a known product and working backwards to divine the technology which aided in its development or manufacture. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974).

5. David J. Lynch, *Companies on the Lookout for Spies*, USA TODAY, Feb. 24, 1995, at 4B. Seeking judicial relief through the courts for the misappropriation of trade secrets costs an average of $500,000 in legal fees. *Id.*

6. In *Town of Newton v. Rumery*, the Supreme Court acknowledged the speculative nature of civil litigation. 480 U.S. 386, 390 (1987). Rumery alleged that he was wrongly arrested by the Newton police. *Id.* The town prosecutor offered to drop the charges against Rumery only if he released the town from liability for false arrest. *Id.* at 390-91. Rumery signed the release, but then attempted to sue the town anyway. *Id.* at 391. The Supreme Court held that the release was valid and noted the certain benefit of escaping criminal prosecution outweighed the speculative benefit of prevailing in a civil lawsuit. *Id.* at 394.

7. From the beginning of 1985 to the beginning of 1994, the theft of proprietary business information increased 260%. Michael J. McDermott, *Is International Marketing a Game of Spy versus Spy?*, BRANDWEEK, June 20, 1994, at 31. From the end of 1993 to the end of 1995, an American Society for Industrial Security survey reported that trade secrets theft tripled. Carl Quintanilla, *Tiny Cameras, Bugs and Secret Agents May Be Snooping on Your Business Trip*, WALL ST. J., Nov. 10, 1995, at B1. Security industry analysts do not see the growth of trade secret theft abating. *Id.* Michael Hansen, a security consultant with Northwestern Countermeasures Inc., says, "[t]he problem is going to get worse before it gets better." *Id.*

8. Jennifer M. Bagley et al., *Intellectual Property*, 32 AM. CRIM. L. REV. 457, 458 (1995). The threat of civil sanctions do not deter those who steal trade secrets. *Id.* Civil damages and legal expenses are considered "just another cost of doing business." *Id.* However, the victims of trade secrets theft are reluctant to bring criminal action. Toren, *supra* note 3, at 59. Companies are reluctant because they perceive that their rights are not sufficiently protected by criminal statutes, many prosecutors do not have the technical ex-

ever, victims of trade secrets misappropriation will find that a civil action utilizing the Racketeer Influenced and Corrupt Organizations Act (RICO) provides an adequate remedy. Using RICO, an economically injured party can receive triple damages plus legal fees.[9] Moreover, a RICO suit will attach a stigma to the defendant.[10] Although civil RICO actions have been substantially limited by judicially-created rules over the last decade, a properly pleaded complaint alleging the misappropriation of trade secrets based upon facts analogous to those in the hypothetical meets all of the required statutory elements and judicially imposed rules.[11]

This Comment proposes that compelling reasons exist for allowing the victims of trade secrets theft to use civil RICO and that such a cause of action is still viable despite the many judicially imposed restrictions. Part I of this Comment discusses the problem of misappropriated trade secrets. Part II reviews the development of RICO from the organized-crime hearings of the 1950s and 1960s to the present day. Finally, Part III examines the applicability of RICO to the misappropriation of trade secrets problem.

I. THE PROBLEM OF MISAPPROPRIATED TRADE SECRETS

The problem of misappropriated trade secrets in this country has two components: 1) the actual theft of trade secrets; and 2) the lack of any effective remedy. The extent of the trade secrets theft problem is exemplified by its sheer magnitude, by the concern of industrial security experts and by its threat to American industrial competitiveness. The lack of an effective legal remedy is illustrated by the impediments to bringing a civil action for the misappropriation of trade secrets.

A. Extent of the Problem

Trade secrets are misappropriated in one of two ways: 1) an employee or ex-employee takes the trade secrets before or upon

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pertise to handle a trade secrets case, the trade secrets might be subject to additional public disclosure because court records are open to the public and the company loses control of the criminal case. *Id.* at 59-60 n.3.

9. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) (1994). "Any person injured in his business or property by reason of a violation of § 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." *Id.* For relevant portions of § 1962, see *infra* notes 65-68.

10. William E. Marple, *"Pattern" Requirement Renders RICO Inapplicable to Ordinary Business Disputes*, 14 REV. LITIG. 343, 364 (1995). Allegations of racketeering "besmirch" the reputation of the defendant company and the company's employees. *Id.*

11. See *infra* notes 239-58 and accompanying text for a full discussion of how a misappropriation of trade secrets cause of action meets the common judicially imposed rules of a civil RICO lawsuit.

termination,[12] or 2) the employee or agent of an economic competitor (often foreign) intentionally steals them.[13] The misappropriation[14] of trade secrets is costing American businesses billions of dollars.[15] Corporate loss estimates range from $1.8 billion[16] to $24 billion annually.[17] "[A]t least six million American jobs have been lost this decade" as a result of industrial espionage.[18] In an annual industrial survey, one-half of all companies reported being victimized by trade secret theft in 1992 alone.[19] Even with such alarming numbers, some industry analysts are more concerned with the misappropriations of trade secrets' growth trend.[20]

Between 1985 and 1994, the reported incidents of misappropriated trade secrets rose 260%.[21] This trend is exhibiting signs of unbridled growth as evidenced by the tripling of reported incidents

12. Kerry Fehr-Snyder, *Employers Stung by Stolen Trade Secrets*, PHOENIX GAZ., June 1, 1994, at A1. Fifty-eight percent of the loses attributable to the misappropriations of trade secrets are caused by current of former employees. *Id.* Approximately 70% of all commercial espionage cases involve current or former employees. Lynch, *supra* note 5, at 4B.

13. McDermott, *supra* note 7, at 31. The theft of trade secrets by foreign companies and governments has grown to such a level that it poses a credible threat to U.S. industrial competitiveness. *Id.* Additionally, the purposeful theft of computers and briefcases from hotels and airport terminals by economic competitors is growing rapidly. Quintanilla, *supra* note 7, at B1. The thieves are looking for trade secrets contained within the briefcases and laptops. *Id.* The problem has forced many large corporations to issue travel advisories which warn their employees of the dangers. *Id.*

14. For the purposes of this Comment, "misappropriation of trade secrets," "theft of trade secrets," and "corporate espionage" all refer to the unauthorized and illegal acquisition of a corporation's trade secrets.

15. Robert Bellinger, *Trade-Secret Theft Takes Big Bite Out of Valley*, ELEC. ENG'G TIMES, Dec. 11, 1995, at 126.

16. Toren, *supra* note 3, at 62.

17. *Id.* (citing an annual cost to American firms from the misappropriation of trade secrets of $1.8 billion); Bellinger, *supra* note 15, at 126 (citing an annual cost to American firms of $15 billion); Bill Gertz, *Economic Spying Increases Fourfold: Company Employees Often at Fault*, WASH. TIMES, Mar. 20, 1996, at A7 (citing a monthly cost to American firms of $2 billion dollars, representing a cost of approximately $24 billion annually); Martin, *supra* note 3, at 949 (citing an annual cost to American firms of nearly $20 billion).

18. Jack Anderson, *Industrial Espionage Costs Billions*, STATE J. REG. (Springfield, Ill.), Mar. 10, 1996, at 16.

19. Bob Williams, *The Spies Who Came in from the Cold War*, NEWS & OBSERVER (Raleigh, NC), Jan. 16, 1994, at F1. In a survey of 5000 companies, the American Society for Industrial Security found that nearly 50% of the companies were victims of trade secret theft in 1992. *Id.* In 1991, only 37% of the companies were victims of trade secret theft. *Id.*

20. Quintanilla, *supra* note 7. Industry analysts do not see the growth in trade secrets theft abating. *Id.* This is a cause for alarm for many security industry analysts. *Id.* Michael Hansen, a security-information consultant with Northwest Countermeasures Inc., projects that the problem will get far worse if nothing is done. *Id.*

21. *See* Gertz, *supra* note 17; McDermott, *supra* note 7, at 31.

in just the last two years.[22] These grim numbers understate the true problem since they only account for reported thefts.[23] Many companies now actively attempt to misappropriate the trade secrets of economic competitors.[24] Concern also exists that the growing involvement of foreign companies and governments could make the problem worse, and could even undermine America's industrial competitiveness.[25] Amid these worrisome statistics, many experts feel that the current litigation options and legal remedies are inadequate.[26]

B. *Problems with Litigating a Misappropriation of Trade Secrets Case*

Companies that have trade secrets stolen typically sue in civil

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22. Quintanilla, *supra* note 7.

23. Ira S. Somerson, *Information: What it Costs When it's Lost*, SEC. MGMT., Oct. 1, 1994, at 61; *Cf.* Toren, *supra* note 3, at 59-60 n.3 (noting that companies are hesitant to report trade secrets theft). Since companies are reluctant to report the theft of proprietary information, the statistics probably underestimate the size of the problem. *Id.*

24. Quintanilla, *supra* note 7.

25. McDermott, supra note 7, at 31; *cf.* Anne Eisele, *U.S. Urged: Be Tougher on Economic Espionage*, NEW TECH. WK, 1995 WL 9015509, Aug. 21, 1995, at *1 (citing a report drafted by the National Counterintelligence Center which states that the industries most targeted for "foreign industrial espionage are those producing 'classified products' . . . dual-use technology, and 'leading-edge technologies critical to maintaining U.S. economic security'"). Increasingly, foreign governments and foreign companies are involved in corporate espionage. *Id.* Recently, the CIA recently identified six countries which are actively spying on corporations within the U.S.: France, Israel, China, Russia, Iran, and China. *CIA Names Names on Espionage*, Chic. Trib., Aug. 15, 1996, at 8. According to former F.B.I. Director William Sessions, foreign governments and foreign corporations consider economic information about individual American companies to be of strategic importance. Toren, *supra* note 3, at 60 n.4. As a result, both foreign governments and foreign companies are increasingly misappropriating the trade secrets of American companies. McDermott, *supra* note 7, at 31.

However, by misappropriating trade secrets on U.S. soil, foreign nationals and foreign companies are potentially subjecting themselves to U.S. jurisdiction under RICO. 18 U.S.C. § 1965(a) (1994). "Any civil action or proceeding under this chapter [RICO] against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs." *Id.*

26. Eisele, *supra* note 25, at *1. The Congressional Report on Foreign Economic Collection and Industrial Espionage found that U.S. law afforded intellectual property inadequate protection. *Id.* Additionally, the FBI officially made the misappropriations of trade secrets one of its top priorities. *Id.* Recognizing that current enforcement tools were inadequate, the FBI expanded a Cold War information program called "Development of Espionage, Counterintelligence and Counterterrorism Awareness" (DECA). *Id.* The DECA program briefs members of the business community on illicit attempts to gather information by corporations and foreign governments. *Id.*

court.[27] Unfortunately, civil actions do not deter most information thieves,[28] and the cost to the plaintiff can be prohibitive.[29] The average civil action for the misappropriation of trade secrets costs the plaintiff up to $500,000 in legal fees.[30] On the other side of the equation, the penalties do not deter trade secrets thieves because the potential civil sanctions are viewed as just another cost of doing business.[31]

Pursuing criminal prosecution is not a viable option for victims of trade secrets theft for a variety of additional reasons. Companies are reluctant to seek criminal prosecution because of the difficulties of gathering evidence in trade secrets cases,[32] the lack of protection for the victim[33] and the perceived lack of technical expertise on the part of many prosecutors.[34] Perhaps the largest impediment to criminal prosecution is the threat of public disclosure of the trade secrets,[35] which would destroy their residual value.[36] Until recently, no federal statute even existed which made the misappropriation of trade secrets illegal.[37] The economic im-

27. Toren, *supra* note 3, at 59.

28. Bagley et al., *supra* note 8, at 458.

29. *See* Lynch, *supra* note 5, at 4B (discussing the exorbitant costs of litigation).

30. *Id.*

31. Bagley et al., *supra* note 8, at 458.

32. *Cf.* Toren, *supra* note 3, at 60 n.3 (noting that prosecutors lack the technical expertise for such a case and the victim relinquishes control of the case).

33. *Id.* Victims are not afforded proper protection by criminal statutes, victims have no control over the case and sensitive business information may be disclosed to the public as part of the judicial process. *Id.*

34. *Id.*

35. *Id.* The public has a presumption of access to the records of criminal trials and proceedings. *Id.* A company's competitors can freely use any information which is in the public record of the trial. *Id.*

Although a trade secret is discoverable during litigation, the trade secret owner is entitled to protection under the Federal Rules of Civil Procedure. MICHAEL A. EPSTEIN, MODERN INTELLECTUAL PROPERTY 147 (2d ed., Prentiss-Hall 1989). A discovery request may be quashed at the courts discretion under Rule 26(c) of the Federal Rules in order to prevent public dissemination or to prevent the competing company from learning the trade secret. *Id.* However, with both sides employing this rule, they must have a high degree of confidence in the legal system. Elisa Williams, *A Santa Ana Maker of Industrial Seals Gets $10 Million from a Competitor*, ORANGE COUNTY REG., Dec. 28, 1994, at C1. Since neither side will be able to review all of the evidence, both sides must "trust their attorneys to interpret events and decide whether the case is worth continuing." *Id.*

36. *See* Williams, *supra* note 35, at 3.

37. Julie Fustanio, *Biz Espionage Now Targeted by Specific Law*, WIS. ST. J., Oct. 8, 1996, at C1. On October 11, 1996, President Clinton signed the Economic Espionage Act of 1996 into law. *Clinton Approves Intelligence Spending Rise; Bill Is Also Signed to Make Theft of Trade Secrets a Federal Crime*, WASH. POST, Oct. 12, 1996, at A6. The Act outlaws both economic espionage and trade secrets theft. The Econ. Espionage Act of 1996, Pub. L. No.

pact of trade secrets theft on the economy and the lack of an adequate remedy are analogous to the concerns which inspired the RICO statute.[38]

II. THE DEVELOPMENT OF RICO FROM 1970-1996

RICO is part of the Organized Crime Control Act (OCC) of 1970.[39] Congress enacted OCC amid growing concerns about the increasing power of organized crime and the failure of existing law enforcement tools to stop it.[40] First, this Part discusses the concerns about organized crime which prompted the adoption of OCC and RICO. Next, this Part reviews the RICO statute focusing on the congressionally created racketeering definitions, the causes of action and the civil remedy. Lastly, this Part examines the history of judicial hostility towards RICO along with the concomitant ju-

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104-294, § 101, 110 Stat. 3488, *available in* Westlaw PL 104-294, at *1-3 (1996). Economic espionage is defined as misappropriating trade secrets for the benefit of a foreign government, instrumentality or agent. *Id.* at *2 Individuals convicted of economic espionage can be sentenced to not more than 15 years in prison and fined not more than $500,000. *Id.* An organization convicted under the Act can be fined not more than $10,000,000. *Id.* An individual convicted of trade secrets theft can be imprisoned not more than 10 years and fined not more than $500,000. *Id.* An organization convicted of trade secrets theft can be fined not more than $5,000,000. *Id.*

The Act's civil remedy is very limited. *Id.* at *3-4. The only civil remedy is injunctive relief to enjoin the use of a misappropriated trade secret. *Id.* at *3. However, the Act does not preempt any other federal or state civil remedy for the misappropriation of trades secrets. *Id.* at *4. In addition, the Act prevents disclosure of trade secrets during any prosecution pursuant to the Act. *Id.* at *3.

The facts adduced in a criminal prosecution under this act may facilitate a civil action under RICO much as the facts adduced in a criminal anti-trust prosecution are often used in a civil anti-trust suit. *Cf.* Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 317 (1965) (noting that Congress intended that the Clayton Act "minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government"). However, The Economic Espionage Act has no provisions for tolling any civil action pending a federal prosecution nor for explicitly making any criminal judments or decrees prima facie evidence in a related civil suit. *Cf.* The Econ. Espionage Act of 1996, Pub. L. No. 104-294, § 101, 110 Stat. 3488, *available in* Westlaw PL 104-294, at *1-4 (1996) (lacking any provision for tolling civil actions or for making criminal judgments prima facie evidence in related civil trial); *Minnesota Mining & Mfg. Co.*, 381 U.S. at 313-16 (noting that (1) while the government is pursuing antitrust actions against a defendant, the Clayton Act tolls the statute of limitations for bringing a private antitrust suit, and (2) after resolution of a civil or criminal action brought by the government, a private party may use any judgment or decree as prima facie evidence in a subsequent civil suit).

38. See *infra* notes 209-27 and accompanying text for a discussion on organized crime and corporate misappropriation of trade secrets parallels.

39. The Organized Crime Control Act of 1970 (OCC), 84 STAT. 922, 941-47 (1970). The actual RICO provisions of the statute (18 U.S.C. §§ 1961-1968) were §§ 901-904 of the OCC. *Id.* at 941-47.

40. OCC, 84 STAT., at 922-23 (Statement of Findings and Purpose).

dicially created rules it produced.

A. Congressional Findings on Organized Crime Circa 1970

Congressional inquiry into organized crime began with hearings conducted by Senator Kefauver in 1951.[41] The Kefauver hearings inspired Senator McClellan to further investigate organized crime throughout the late 1950s and early 1960s.[42] After nearly two decades of consideration, a congressional consensus finally existed that a systematic legislative attack was warranted.[43] As a result, the Organized Crime Control Act of 1970 was passed.[44]

Congress prefaced the OCC with five findings: 1) that organized crime was a sophisticated and widespread activity which drained billions of dollars from the economy; 2) that crime syndicates acquired a great deal of their power through illegally obtained wealth; 3) that the illegally obtained wealth was used to infiltrate legitimate business; 4) that these activities caused grave damage to individual investors, competing organizations and the economy; and 5) that organized crime was a growing phenomenon for which no effective law enforcement tools existed.[45]

The stated goal of RICO was the eradication of organized crime.[46] In order to give maximum effect to the act, Congress used "self-consciously" broad language[47] and expressed a desire that the

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41. Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil Rico*, 30 HARV. J. ON LEGIS. 1, 4 (1993). The Kefauver Committee was the first congressional body to observe the troublesome practice of organized crime buying legitimate businesses with ill-gotten fruits. *Id.* at 4 n.18.

42. *Id.* at 4-5.

43. *Id.*

44. *Id.* at 1 n.2.

45. OCC, 84 STAT. at 922-23.

46. *Id.* In addition to the five findings, Congress also stated that the purpose of the act was the eradication of organized crime. *Id.* This goal was facilitated by strengthening evidence-gathering tools of law enforcement agencies, by establishing new crimes, by increasing penalties and by creating new remedies. *Id.*

47. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498 (1985) (citing United States v. Turkette, 452 U.S. 576 (1981). Sedima, a Belgian corporation, and Imrex, an American company, created a joint venture to export electronic components to Belgium. *Id.* at 483. Belgian consumers placed orders through Sedima which in turn ordered the parts from Imrex. *Id.* Imrex then shipped the parts to Europe. *Id.* Under the agreement, the two companies split the net profits. *Id.* at 484.

Sedima alleged that Imrex purposely inflated bills, thereby cheating Sedima out of its share of the proceeds by demanding reimbursement for fictitious expenses. *Id.* Sedima filed a civil RICO suit against Imrex. *Id.* The district court dismissed the RICO counts because Sedima did not allege an injury related to the pattern of racketeering activity as opposed to the predicate felonies themselves. *Id.* The district court did not establish any exact formula, holding only that in a cause of action based on a violation of § 1962(c) of RICO a plaintiff must allege either a racketeering or competitive injury. *Id.*

act be liberally construed.[48] However, before Congress could enact legislation to eradicate organized crime it had to define what activities constituted racketeering.

B. Congressionally Enacted Organized Crime Definitions

Four elements are common to all RICO theories of liability: 'person,' 'enterprise,' 'racketeering activity' and 'pattern of racketeering activity.'[49] RICO defines a 'person' as an individual or entity capable of holding legal title.[50] An 'enterprise' is any association in fact of individuals, corporations, partnerships or associations.[51] 'Racketeering activity' is any of a number of federal and state criminal violations, referred to as predicate felonies.[52] A 'pattern of racketeering activity' requires at least two acts of the enumerated predicate offenses committed within ten years of one another.[53] Due to statutory vagueness, the United States Supreme

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A divided court of appeals affirmed the decision. *Id.*

The U.S. Supreme Court granted certiorari and reversed. *Id.* at 486. The Court held that the statute was to be interpreted broadly and that no distinct racketeering injury was required. *Id.* at 497-500. The Supreme Court's holdings in *Sedima* defined the interpretive guidelines for RICO for the lower courts. *Id.* at 493-500. It held that a violation of § 1962 (c) "requires (1) conduct (2) of an enterprise (3) through a pattern of racketeering activity," an injury to the plaintiff's business or property as a result of the conduct and nothing else. *Id.* A broad interpretation of RICO is appropriate because of the general principles surrounding the statute and the "self-consciously" broad language Congress used in the statute. *Id.* The Supreme Court held that Congress had the power to pass expansive legislation, and therefore, a broad interpretation of RICO was both proper and constitutional. *See id.* at 486. The Court noted that Congress used broad language in enacting RICO and any defects in RICO which resulted in its expanisve use were for Congress to correct. *Id.* Additionally, the Court held that the use of RICO against purportedly "innocent businesses" was a matter that only Congress could address, not the courts. *Id.* at 499-500.

48. 84 STAT. 947 (1973).

49. *Id.* at 942-43.

50. 18 U.S.C. § 1961(3) (1994).

51. *Id.* § 1961(4).

52. *Id.* § 1961(1). Racketeering activity encompasses over 40 state and federal crimes. *Id.* The common law state crimes which are proscribed are murder, kidnapping, gambling, arson, robbery, bribery, extortion and drug dealing. *Id.* § 1961(1)(A). Among the proscribed federal crimes are bribery, sports bribery, counterfeiting, theft of interstate shipments, embezzlement from pension or welfare funds, charging extortionate credit rates, transmitting gambling information, wire fraud, mail fraud, obstruction of justice, obstruction of criminal investigation, obstruction of law enforcement official, interfering with commerce, interstate transportation of gambling paraphernalia, receiving unlawful welfare payments, running an illegal gambling business, interstate shipment of stolen goods, receiving interstate shipment of stolen goods, trafficking in contraband cigarettes, white slave trafficking, embezzling union funds, undue influence of union official and securities fraud. *Id.* § 1961(1)(B)-(D).

53. *Id.* § 1961(5). The predicate felonies are enumerated in 18 U.S.C. § 1961(1)(A)-(D). The pattern of racketeering activity in no way constitutes an

Court imposed additional requirements to prove a 'pattern of racketeering activity.'[54]

According to the Supreme Court, continuity plus relationship combine to create a pattern.[55] The Court held that continuity could be both a closed and an open-ended concept.[56] A closed-ended pattern of racketeering activity is an extended period of past, repeated, related racketeering activity.[57] An open-ended pattern of racketeering activity is illegal conduct which, by its nature, is on-going or threatens to be on-going.[58] Sporadic conduct or conduct over a short duration of time cannot establish a pattern of racket-

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enterprise, rather it is a separate and distinct element of a RICO offense. United States v. Turkette, 452 U.S. 574, 583 (1981). The enterprise is an entity consisting of RICO "persons" associated in fact. *Id.* The pattern of racketeering activity is a series of criminal acts perpetrated by the RICO person(s). *Id.* The enterprise is proved by evidence showing an on-going organization, formal or informal, legitimate or illegitimate. *Id.* The pattern of racketeering is established by evidence proving that the RICO person(s) committed at least two of the requisite predicate felonies within the last ten years. *Id.*

54. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1988). The local telephone company attempted to influence the utility rate board by giving board members cash, parties, meals, sports tickets, and promises of future employment. *Id.* at 233. The Court held that telephone company's activities constituted a pattern because they endured for six years and were related to each other. *Id.* at 250.

The Court held that the pattern of racketeering activity defined by 18 U.S.C. § 1961(5) does not define a pattern so much as it establishes a minimum condition necessary for the existence of a pattern. *Id.* at 237. In order to establish a pattern, the predicate offenses must be related and continuous (or pose the threat of being continuous). *Id.* at 239. Criminal acts are related if they share common perpetrators, victims, crimes, objectives or other attributes. *Id.* at 240. The legislative history of RICO requires not only relatedness but continuity. *Id.* The Court held that a prosecutor or plaintiff must prove either past continuity of racketeering activity or the threat of continued racketeering activity in the future. *Id.* at 241. The inquiry into continuity is fact-specific, but if previous illicit behavior was ongoing over an extended period of time, the activity was continuous. *Id.* at 242.

The Court gave two examples, which were not intended as an exhaustive list, of what constitutes a threat of an on-going pattern of racketeering activity. *Id.* First, a pattern is established if a long-term threat of racketeering activity exists. *Id.* For example, if a hoodlum extorts "protection" money from a storekeeper under implicit threat, a pattern is established. *Id.* The threat of the hoodlum returning every month for the next installment of the premium is real. *Id.* Second, the threat of continued racketeering activity can be established by showing that the predicate felonies constitute an enterprise's way of doing business. *Id.* For example, a long-term association that exists for illicit purposes establishes a threat of future racketeering activity. *Id.* at 243. Similarly, continuity is established if the predicate acts constitute a legitimate enterprise's way of doing business. *Id.* In no way will predicate acts committed over a few weeks or a couple of months constitute a pattern. *Id.*

55. *Id.* at 240.

56. *Id.* at 241.

57. *Id.*

58. *Id.*

eering activity.[59] Furthermore, the predicate felonies must exhibit the element of relatedness.[60] The Supreme Court held that criminal conduct which has the same or similar purpose, objective, perpetrators, victims or modus operandi is related.[61] Two isolated and unrelated criminal offenses cannot establish a pattern.[62] Person, enterprise, racketeering activity and pattern of racketeering activity combine in four distinct ways to constitute a RICO violations.[63]

C. *Statutory Violations of RICO*

A civil RICO action under 18 U.S.C. § 1964 (c) is dependent upon a showing of damage caused by a violation of 18 U.S.C. § 1962.[64] Under 18 U.S.C. § 1962, Congress created four fundamental RICO offenses whereby it is illegal for a person: a) to use income derived from a pattern of racketeering activity in order to acquire, establish or operate an enterprise involved in interstate or foreign commerce;[65] b) to acquire or maintain an interest, through a pattern of racketeering activity, in any enterprise engaged in interstate commerce;[66] c) to conduct the affairs of an enterprise through a pattern of racketeering activity;[67] and d) to conspire to

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59. *Id.* at 239.

60. *Id.* at 237.

61. *See id.* at 240 (citing with approval Congress's definition in Title X of the pattern requirement in terms of the relationship of the perpetrator's acts on to another). Other conduct or acts which are connected by any relevant distinguishing characteristic are also considered related for purposes of establishing a pattern of racketeering activity. *Id.*

62. *Id.*

63. 18 U.S.C. § 1962 (1994).

64. *Id.* § 1964(c).

65. *Id.* § 1962(a). The text of this subsection is as follows:

> (a) It shall be unlawful for any person whohas 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 within the meaning of section 2, title 18, United States Code, 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 operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id.

66. *Id.* § 1962(b). The text of this subsection is as follows:

> (b) It shall be unlawful for any personthrough 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.

67. *Id.* § 1962(c). The text of this subsection is as follows:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering

commit any of the first three offenses.[68] Person, racketeering activity and pattern of racketeering activity are identical for all four RICO violations.

The enterprise fulfills a different function under each of RICO's four provisions.[69] Under subsection (a), the enterprise is the beneficiary of the income derived via a pattern of racketeering activity.[70] Under subsection (b), the enterprise is the victim acquired with the illicitly derived income.[71] Under subsection (c), the enterprise is the instrumentality of the pattern of racketeering activity.[72] Under subsection (d), the enterprise is the perpetrator of or the co-conspirator to the pattern of racketeering activity.[73] When properly pleaded, RICO allows a plaintiff or prosecutor to assert a theory of liability which matches the underlying "enterprise criminality."[74] A right to a remedy for the damage

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activity or collection of unlawful debt.

Id.

The Supreme Court held that the person's conduct and participation must meet the "Operation or Management Test." Reves v. Ernst & Young, 507 U.S. 170, 179 (1993). The Operation or Management Test merely requires that the RICO "person" participates in the operation and management of the enterprise itself. *Id.* The Court held that the word "participate" means that RICO liability is not limited to actions by corporate officers or other high ranking officials. *Id.* The enterprise's affairs are conducted by both the upper management and by lower rung employees under the direction of upper management. *Id.*

In *Reves*, the receiver of a bankrupt savings and loan sued the savings and loan's former accountant for allegedly fraudulent accounting practices. *Id.* at 175. One of the counts of the complaint accused the accounting firm of violating § 1962(c) of the RICO statute. *Id.* at 176. The accounting firm filed a motion for summary judgement of the RICO count on the theory that the accounting firm did not conduct the Co-op's affairs. *Id.* at 176. The district court granted the motion and the Court of Appeals affirmed that decision. *Id.* The Supreme Court granted certiorari and affirmed both of the lower courts' decisions. *Id.* at 177.

The Court held that the accounting firm's failure to fully disclose its accounting practices did not amount to participating in the operation or management of the savings and loan. *Id.* at 185. The Court further held that the Operation or Management Test related only to subsection (c) and that this subsection had a more limited reach than subsection (a) and (b). *Id.*

68. 18 U.S.C. § 1962(d) (1994). The text of this subsection is as follows: "(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." *Id.*

69. Goldsmith, *supra* note 41, at 22-23.

70. *Id.* at 23.

71. *Id.*

72. *Id.*

73. *Id.* at 23.

74. *Id.* at 23. For example, the enterprise is often characterized as the beneficiary of the illicit profits derived from a pattern of racketeering activity under subsection (a). *Id.*

"Enterprise criminality" is defined as crime committed within the context of an organization. Susan W. Brenner, *Civil Complicity: Using the Pinkerton Doctrine to Impose Vicarious Liability in Civil RICO Actions,* 81 KY. L. J. 369,

caused by the underlying criminality is the theory behind a civil RICO action.[75]

D. Civil RICO Remedy

Any person, partnership, association or corporation whose business or property is injured by a pattern of racketeering activity in violation of 18 U.S.C. § 1962 has a civil cause of action under RICO.[76] Federal courts require the plaintiff to establish a civil RICO claim by a preponderance of the evidence.[77] Although the civil RICO statute itself makes no mention of a statute of limitations, the Supreme Court has ruled that RICO shares the Clayton

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372 (1993). RICO specifically targets not only organized crime, but all enterprise crime. *Id.* Congress drafted the definitions and substantive offenses of RICO broadly, knowing that the statute would reach far beyond traditional organized crime. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985); Goldsmith, *supra* note 41, at 6. One of the principal drafters of RICO said that this broad legislative regime represented an attack on enterprise criminality, not just organized crime. Goldsmith, *supra* note 41, at 6. Indeed, the legislative history explicitly states that enterprise criminality is not synonymous with organized crime. *Id.* at 7 n.32 (citing a reference which cites the legislative history).

75. Goldsmith, *supra* note 41, at 22-23.

76. 18 U.S.C. § 1964(c) (1994) (see *supra* note 9 for text of statute). "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." *Id.* However, the damage must be proximately caused by the racketeering activity. Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1317 (1992).

The Security Investors Protection Corporation (SIPC) is a federally created, private, nonprofit corporation of which most securities dealers are required to be "members." *Id.* at 1314. When a securities dealer cannot meet its obligations to its customers, the SIPC is required to advance up to $500,000 per customer to satisfy all outstanding claims. *Id.* Robert Holmes manipulated the stocks of six SIPC-member companies over a period of seventeen years in order to inflate the stocks' prices. *Id.* at 1314-15. As a result, SIPC had to advance trustees nearly $18 million to cover customer claims. *Id.* at 1315.

The SPIC claimed that Holmes' actions constituted a pattern of racketeering activity and sued in federal court. *Id.* The district court granted a motion by Holmes for summary judgment on the RICO count because Holmes' actions were not the proximate cause of SIPC's injuries. *Id.* The United States Court of Appeals for the Ninth Circuit reversed the district court, Holmes appealed, and the Supreme Court granted certiorari. *Id.* at 1315-16.

The Supreme Court reversed the Court of Appeals and held that SIPC's injury was not related closely enough to Holmes' RICO violation to support a cause of action. *Id.* at 1322. The defendant's violation of RICO must be both the cause in fact and the proximate cause of the plaintiff's injuries in order for the plaintiff to have a cause of action. *Id.* In civil RICO's scheme of private attorneys' general, directly injured parties will vindicate societyís interests thus obviating the need for allowing indirectly injured parties to sue. *Id.* at 1311.

77. Brenner, *supra* note 74, at 377.

Anti-Trust Act's four year statute of limitation.[78] RICO's civil remedy allows a plaintiff to recover treble damages plus legal fees.[79]

The treble damages provision encourages "private attorney generals" to bring suit, compensates the victims of enterprise crime and acts as an economic disincentive to racketeering activity.[80] When enacting OCC, Congress deemed that public prosecutorial resources were inadequate to eradicate enterprise crime.[81] Therefore, RICO's treble damages provision was intentionally designed to encourage "private attorney generals" to sue for injuries resulting from racketeering activity.[82] The treble damages provision is also intended to compensate the economically injured victim of racketeering activity.[83] Additionally, the treble damages provision is designed as an economic disincentive to racketeering activity.[84] Senator McClellan, the bill's chief Senate sponsor, said that the treble damages provision acts as a potent tool for "extirpating the baneful influence" of organized crime from the

78. Agency Holding Corp. v. Malley-Duff & Assoc. Inc., 483 U.S. 143, 152 (1987).

79. 18 U.S.C. § 1964(c) (1994); *Sedima*, 473 U.S. at 487. The original Senate bill sponsored by Senator McClellan did not have a provision calling for a civil action with treble damages. *Id.* Section 1964 was added to the RICO bill in the House Judiciary Committee by Representative Steiger. *See* Goldsmith, *supra* note 41, at 7-8. The provision obviously met with Senate approval because the House and Senate Reconciliation Committee adopted the House version with no changes, and the Senate subsequently passed the civil action with treble damages. *Sedima*, 473 U.S. at 488. Among others, the ABA lobbied for the provisions inclusion in RICO. *Id.* at 487.

80. *Holmes*, 112 S. Ct. at 1318; *Agency Holding Corp.*, 483 U.S. at 151; *Sedima*, 473 U.S. at 498; United States v. Turkette, 452 U.S. 574, 585 (1985). While few of the legislative history comments specifically referred to 1964(c) (treble damages), all of the provisions of RICO should be considered as novel remedies attacking racketeering on all sides. *Sedima*, 473 U.S. at 498.

81. *Agency Holding Corp.*, 483 U.S. at 151.

82. *Holmes*, 112 S. Ct. at 1318; *Agency Holding Corp.*, 483 U.S. at 151. The carrot of treble damages is used to encourage private attorney generals to sue. *Malley-Duff*, 483 U.S. at 151.

83. *Malley-Duff*, 483 U.S. at 151.

84. *Turkette*, 452 U.S. at 593. The Court quoted with approval the Senate Report on OCC:

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

Id. at 591-92 (emphasis added). Referring to the treble damages provision of RICO, the Court stated, "[a]s a general proposition, however, the civil remedies could be useful in eradicating organized crime from the social fabric, whether the enterprise be ostensibly legitimate or admittedly criminal. The aim is to divest the association of the fruits of its ill-gotten gains." *Id.* at 585. The treble damages provision acts as an economic disincentive to organized crime. *Id.*

economy.[85] Treble damages were designed specifically as an economic disincentive for the lucrative enterprise criminality associated with organized crime.[86] The treble damages provisions worked too well according to some judges; as a result, civil RICO actions incited a great deal of judicial hostility.[87]

E. Judicial Hostility Toward the Civil RICO Provision

Judicial hostility towards RICO exists for a number of interrelated and complex reasons.[88] In the early and mid-1980s, many litigators became aware that RICO was a powerful tool for the victims of white-collar crime.[89] "The number of civil RICO suits grew exponentially . . . due to the treble damages provision" and the Supreme Court's broad interpretation of the statute.[90] The treble damages provision encouraged many plaintiffs to plead a RICO violation predicated on fraud for civil suits arising from ordinary business disputes such as breach of contract.[91] Courts did not like the subsequent large scale federalization of state tort actions.[92]

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85. *Sedima*, 473 U.S. at 488. Senator Byrd heralded the treble damages provision as striking at the economic base of organized crime. *Turkette*, 452 U.S. at 592.

86. *Sedima*, 473 U.S. at 488; *Turkette*, 452 U.S. at 591.

87. Jon H. Kingsepp & Robert B. Johnston, *Recent Developments in Commercial Tort Law*, 30 TORT & INS. L. J. 262, 263 (1995).

88. *Id.* at 262-63; Marple, *supra* note 10, at 351; Goldsmith, *supra* note 41, at 2.

89. Goldsmith, *supra* note 41, at 2.

90. Kingsepp & Johnston, *supra* note 87, at 262. The Supreme Court's broad interpretation in *Turkette* created an explosion of civil RICO action at the district court level. *Id.* The treble damages provision made RICO a desirable cause of action. *Id.*

In *United States v. Turkette*, the Supreme Court held that criminal RICO remedies were equally useful in combatting enterprise crime, whether the enterprise was legitimate or illegitimate. 452 U.S. 576, 585 (1981). In *Sedima*, the Court noted that the civil RICO action was intended to combat enterprise crime, whether the enterprise was legitimate or illegitimate. *Cf. Sedima*, 473 U.S. at 499 (noting that Congress designed RICO to encompass both lawful and unlawful enterprises and that unlawful enterprises "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."). The Court recognized that its ruling would bring white-collar criminals and respected businesses within the ambit of the statute. *Id.*; Goldsmith, *supra* note 41, at 14. The Court held that the applicability of civil RICO to legitimate businesses was "inherent in the statute as written" and that Congress had the sole power to modify or restrict the application of the statute. *Sedima*, 473 U.S. at 499.

91. *See* Marple, *supra* note 10, at 351; Goldsmith, *supra* note 41, at 2.

92. Marple, *supra* note 10, at 351. The clear applicability of the statute in a commercial setting made no difference to the majority of judges. Goldsmith, *supra* note 41, at 2. Nor did the fact that Congress was cognizant of the expansion of federal law into areas previously reserved for the states. *Turkette*, 452 U.S. at 586.

The Supreme Court approved of the federalization of state causes of action. *Id.* at 586. Congress's broad language evinces legislative awareness that

Also, many judges simply "viewed the [civil RICO] statute as an organized crime measure run amok."[93] Judges were swamped with a flood of suits and soon grew impatient with the many pleading errors resulting from the statute's ambiguous text.[94] As a result, district court judges became openly hostile to the civil RICO concept[95] and attempted to curtail the use of RICO in 'garden variety' business disputes.[96]

Judicial activists narrowly construed RICO, thereby limiting the number of actions which could be remedied under the act.[97] In 1985 and 1986, fifty percent of all civil RICO claims were dismissed.[98] An additional 5.9% of the cases were partially dismissed.[99] From 1987 to 1989, sixty-five percent of all civil RICO actions were dismissed with prejudice during the pre-trial stage.[100] More recently, an informal study conducted from 1993-94 revealed that 80% of district court decisions dismissing civil RICO claims at the pre-trial stage were affirmed at the appellate level.[101] Out of all the cases filed in federal court, only a small percentage are dismissed during the pre-trial stage.[102] The high incidence of dismissal for civil RICO actions suggests that the judiciary is using a very restrictive interpretation of the statute.[103] In addition to a restrictive interpretation, federal courts routinely place judicially

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enactment of RICO would broaden the domain of federal jurisprudence. *Id.* At legislative hearings on RICO, Congress was told that enactment would move large areas of substantive law, that formerly was solely within the states' police power, into the "[f]ederal realm." *Id.* Congress nonetheless enacted the OCC, knowing that it would alter the divisions of power between the federal and state governments. *Id.* Although the Supreme Court's discussion of RICO's federalizing effect takes place in a criminal context, the broad language of the decision should apply in a civil context as well. *Cf. Turkette,* 452 U.S. at 583-93.

93. Goldsmith, *supra* note 41, at 2.

94. Kingsepp & Johnston, *supra* note 87, at 262-63.

95. *Id.*; Goldsmith, *supra* note 41, at 2.

96. Goldsmith, *supra* note 41, at 13. Although white-collar crime masquerading as 'garden variety' business disputes burdened society at a rate of more than $200 billion per year, federal judges were unwilling to use RICO's well suited civil action as a remedy. *Id.* at 2-13. The judicial unwillingness to give effect to the RICO statutes stands in stark contrast to the Supreme Court's recognition that RICO responds to an emerging situation where persons engaged in long term criminal activity often operate solely within legitimate enterprises. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1988).

97. Kingsepp & Johnston, *supra* note 87, at 263; Goldsmith, *supra* note 41, at 2-3.

98. Goldsmith, *supra* note 41, at 2 n.9.

99. *Id.* According to another author, between 1970 and 1985, 70% of all civil RICO suits were either dismissed or were victims of summary judgment. Kingsepp & Johnston, *supra* note 87, at 263.

100. Goldsmith, *supra* note 41, at 2 n.9.

101. Kingsepp & Johnston, *supra* note 87, at 263.

102. Goldsmith, *supra* note 41, at 2 n.9.

103. *Id.* at 3.

created limitations on civil RICO actions.[104]

F. Judicially Created Civil RICO Rules

Congress designed RICO to operate without the technical procedural limitations imposed on other analogous civil legislation such as the Clayton Anti-Trust Act.[105] Senator John McClellan, legislative sponsor of the Organized Crime Control Act of 1970, noted that RICO was derived from the Clayton Anti-Trust Act, but that Congress had no intent to incorporate within RICO any of the complex restrictions associated with the anti-trust legislation.[106] Indeed, RICO's text is bereft of any such restrictive language or complex test.[107] Precedents set by the federal district and appeals courts, however, have burdened RICO with many such limitations.[108] The three most widely adopted judicially created restrictions imposed upon civil RICO actions are the person-enterprise distinction,[109] the investment injury rule,[110] and the limitations on establishing corporate liability.[111] This Section discusses the rule,

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104. Goldsmith, *supra* note 41, at 3. Lower courts have consistently disregarded Supreme Court directives to broadly interpret the RICO statute and have instead "reined in the [RICO] statute by imposing judicial[ly created] limitations." *Id.* at 18.

105. *Id.* at 3 n.12.

106. *Id. Cf.* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498 (1985) (noting that Congress had rejected a previous proposal to append the RICO statute to the Sherman Act because it would create "inapporopriate and unnecessary obstacle . . . [for] a private litigant.").

107. Goldsmith, *supra* note 41, at 3.

108. *Id.* In *Sedima*, the Supreme Court struck down two such judicially created rules: a prior conviction requirement and racketeering injury requirement. *Sedima*, 473 U.S. at 488-93; Goldsmith, *supra* note 41, at 3. In fact, the Supr eme Court has generally approved RICO's broad reach and disapproved of encumbering limitations. *Id.*

109. Davis v. Mutual Life Ins. Co.., 6 F.3d 367, 379-80 (6th Cir. 1993); Miranda v. Ponce Fed. Bank, 948 F.2d 41, 45 (1st Cir. 1991); Goldsmith, *supra* note 41, at 28-30.

110. Patrick D. Hughes, *The Investment Injury Requirement in Civil RICO Section 1962 (A) Actions*, 41 DEPAUL L. REV. 475, 477 (1992).

111. *See Davis*, 6 F.3d at 379-80 (holding that the doctrine of *respondeat superior* was an acceptable theory under which to extend liability to an employer, provided that the requirement of distinctness between the corporate employer and enterprise was maintained); Schofield v. First Commod. Corp. of Boston, 793 F.2d 28, 31 (1st Cir. 1986) (stating in dicta that *respondeat superior* would be amenable with a cause of action pled under 18 U.S.C. § 1962(a)); Bernstein v. IDT Corp., 582 F. Supp. 1079, 1083 (D. Del. 1984) (holding that *respondeat superior* is permissible under any section of RICO, provided that the enterprise is not a victim of the pattern of racketeering activity). At least three circuits placed limitations on a civil RICO action by holding that *respondeat superior* is not applicable to 18 U.S.C. § 1962(c) due to the person-enterprise distinction. *Miranda*, 948 F.2d at 45; Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782, 790 (D.C. Cir. 1988); D & S Auto Parts v. Schwartz, 838 F.2d 964, 967 (7th Cir. 1988).

rationale and result of each of these restrictions.

1. The Person-Enterprise Distinction

The person-enterprise distinction prohibits the enterprise and person from being the same entity under 18 U.S.C. § 1962(c).[112] Under this subsection, a civil RICO pleading must name as the defendant a RICO person separate and distinct from the RICO enterprise.[113] The rule has been almost universally adopted. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits have explicitly adopted the person-enterprise distinction.[114] Additionally, the Tenth Circuit has acknowledged it as a rule of law in dicta.[115] Only the Eleventh Circuit has rejected the rule.[116]

Proponents assert that the rule is evident from the plain language of the statute.[117] Section 1962(c) requires "that [the] culpable person be 'employed by or associated with' the RICO enter-

112. Goldsmith, *supra* note 41, at 20. In most circuits, the person-enterprise distinction disallows derivative liability under § 1962(c). *Id.* Some districts impose a further pleading requirement: a plaintiff cannot allege that a corporation and its employees are an association-in-fact enterprise other than the corporation itself, unless there are outside parties privy to the pattern of racketeering activity. *Id.* These circuits hold that an extra-corporate conspiracy must exist before a corporation and its employees can be joined as an association-in-fact enterprise. *Id.* Allowing the employee and corporation to both be persons who are united in an association-in-fact enterprise would effectively circumvent the distinctness rule under § 1962(c). *Id.* This additional prohibition keeps the plaintiff from pleading around the distinctness requirement. *Id.* The corporate person can be the same entity as the enterprise only under § 1962(a) and (b). Genty v. Resolution Trust Corp., 937 F.2d 899, 907 (3d Cir. 1991). See *infra* notes 171-79 and accompanying text for a complete discussion of association-in-fact enterprises.

113. Goldsmith, *supra* note 41, at 24.

114. *Davis*, 6 F.3d at 377; Lightning Lube, Inc. v. Witco Corp, 4 F.3d 1153, 1191 (3d Cir. 1993); Brady v. Dairy Fresh Prod. Co., 974 F.2d 1149, 1154 (9th Cir. 1992); Parker & Parsley Petro. Co. v. Dresser Indus., 972 F.2d 580, 583 (5th Cir. 1992); *Miranda*, 948 F.2d at 44; Busby v. Crown Supply, Inc., 896 F.2d 833, 841 (4th Cir. 1990); Official Publications, Inc. v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989); *Yellow Bus Lines*, 839 F.2d at 789-90; Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1306 (7th Cir. 1987); Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987).

115. Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1150 (10th Cir. 1989) (stating that "corporations generally cannot be both the person and the enterprise under section 1962(c)").

116. United States v. Hartley, 678 F.2d 961, 987-90 (11th Cir. 1982). The Eleventh Circuit has not overturned the holding of *Hartley* in any subsequent ruling. Fototec Intern. Corp. v. Polaroid Corp., 889 F. Supp. 1518, 1525 n.12 (N.D. Ga. 1995).

117. *Schofield*, 793 F.2d at 29. "Most courts, including the district court here, have construed the language of this subsection to require that the 'person' who engages in the pattern of racketeering activity be an entity distinct from the 'enterprise.'" *Id.* See *supra* note 67, for the text of 18 U.S.C. § 1962(c).

prise."[118] Courts have held that this language means that "the [same] entity cannot do double duty."[119] For example, a corporation cannot be both the enterprise and the liable "person."[120] Rather, the statute's language requires a specific relationship between the person performing the predicate felonies and the enterprise: the person is the active wrongdoer while the enterprise is the passive instrumentality.[121] Alternatively, the person does the conducting and the enterprise is conducted.[122]

In the late 1980s and early 1990s, the widespread adoption of the person-enterprise distinction caused a decrease in the number of civil suits brought under § 1962(c) and a proportional increase in the number brought under § 1962(a).[123] Before the prevailing use of the person-enterprise distinction, a vast majority of civil RICO actions were brought under § 1962(c).[124] Most practitioners felt that subsection (c) was the simplest and most logical section of RICO.[125] However, the person-enterprise distinction erected an insurmountable obstacle for civil RICO plaintiffs seeking to establish corporate liability for an employee's wrongdoing under § 1962(c).[126] In such a lawsuit, the majority of courts held that § 1962(c) clearly required that the corporation be the RICO enterprise.[127] Since the

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118. *Miranda*, 948 F.2d at 44.

119. *Id.*

120. *Id.*

121. Continental Data Sys. v. Exxon Corp, 638 F. Supp. 432, 438 (E.D. Pa. 1986).

122. Hughes, *supra* note 110, at 492.

123. *Id.* at 491-92. When the number of civil RICO actions exploded in the mid-1980s, plaintiffs almost exclusively alleged violations of § 1962(c). *Id.* at 491. Due to judicial imposition of the person-enterprise distinction, the number of actions filed under § 1962(c) fell precipitously in the late 1980s and early 1990s. *Id.* at 492. As a result, complaints alleging a violation of § 1962(a) comprised an increasingly large proportion of all civil RICO actions. *Id.* at 491.

124. Brenner, *supra* note 74, at 397.

125. *Id.*

126. Goldsmith, *supra* note 41, at 25. See *infra* notes 153-206 and accompanying text for a full discussion of issues pertaining to the establishment of corporate liability in a civil RICO action.

127. *Cf.* 18 U.S.C. § 1962(c) (1994) (see *supra* note 67 for text of statute); *Miranda*, 948 F.2d at 44-45; Official Publications, Inc. v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989); Goldsmith, *supra* note 41, at 25. Courts do not let corporations be both the person and the enterprise under § 1962(c) because of the enterprise-person distinction. *Miranda*, 948 F.2d at 44-45; *Kable News*, 884 F.2d at 668. Since courts do not allow corporations to be the RICO person, the statute must require that the corporation be denominated as the enterprise in a case arising from the misconduct of the corporations' employee. *Cf. Miranda*, 948 F.2d at 44-45 (holding that the corporation was the enterprise and not the person); *Official Publications, Inc.*, 884 F.2d at 668 (holding that the corporation could not be the person because of the person-enterprise distinction). The only exception is an extra-corporate conspiracy. Goldsmith, *supra* note 41, at 34.

corporation could not be named as both the enterprise and the RICO person and since liability attached only to the RICO person,[128] the person-enterprise distinction effectively barred corporate liability under § 1962(c).[129] Without the prospect of reaching the "deep pockets" of the corporate employer, a plaintiff almost never had financial incentive to sue under § 1962(c).[130] As a result of the limitations imposed by the person-enterprise distinction, many plaintiffs started fashioning causes of action under § 1962(a).[131] The federal courts soon attached an additional pleading requirement on this section in the guise of the investment injury rule.[132]

2. *The Investment Injury Rule*

The investment injury rule requires that a plaintiff alleging a violation of 18 U.S.C. § 1962 (a) be injured by the defendant's use or investment of illicit income, not just by the defendant's commission of the predicate felonies.[133] Stated another way, the crux of the rule is that injuries arising only from the predicate felonies do not give the plaintiff standing to sue under § 1964(c)[134] for a violation of § 1962(a).[135] Additionally, the majority view is that merely alleging the reinvestment of illicit income into an enterprise is not sufficient to state a cause of action under § 1964(c) for

128. *Cf.* 18 U.S.C. § 1962 (c) (making it "unlawful for any person . . . to conduct . . . [an] enterprise's affairs through a pattern of racketeering activity."); *Id.* § 1964(c) (allowing plaintiff to recover for violations of § 1962); Goldsmith, *supra* note 41, at 25 (noting that (1) a party could not be "the person /defendant and the RICO enterprise" and (2) the person-enterprise distinction removed any financial incentive for litigation, because the corporation could not be held liable).

129. Goldsmith, *supra* note 41, at 25.

130. *Id.* at 24-28. The person who commits the predicate offenses under RICO rarely has the assets to afford the plaintiff a full recovery under RICO's treble damages provision. Brenner, *supra* note 74, at 377-88. Therefore, in civil RICO actions arising out of an employee's conduct, plaintiffs try to attach liability to the corporate employer. *Id.*

131. Goldsmith, *supra* note 41, at 24-28. Since the person-enterprise distinction precludes plaintiffs from directly naming the corporation as the liable "person," litigants asserted corporate liability based upon alternative enterprise designations or agency doctrines. *Id.* at 28. They were largely unsuccessful in formulating a cogent cause of action under § 1962(c) which attached liability to the corporation. *Id.* As a result, plaintiffs started using cause of actions alleging violations of § 1962(a). *Id.* at 29.

132. *Id.*

133. Hughes, *supra* note 110, at 477.

134. 18 U.S.C. § 1964(c). This section of RICO gives persons injured by a violation of § 1962 the right to a civil cause of action. *Id.* See *supra* note 9 for text of statute.

135. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1188 (3d cir. 1993). The pleading must explain how the plaintiff was injured from the investment of illicit income, as opposed to merely being injured by the predicate act. *Id.*

a violation of § 1962(a).[136] The plaintiff must allege both an investment of racketeering income and an injury resulting from the investment.[137]

The investment injury rule is used in the majority of jurisdictions.[138] The First, Second, Third, Fifth, Sixth, Ninth, Tenth, and District of Columbia Circuits have explicitly adopted the rule.[139] The reasoning employed by the majority concentrates on the relationship between the text of § 1964(c) (the civil remedy provision) and the phrases "it shall be unlawful" and "to use or invest" in § 1962(a).[140] Focusing on the above cited text, the majority of courts hold that a violation of § 1962(a) requires the actual use or in-

136. Vicom Inc. v. Harbridge Merchant Serv., Inc., 20 F.3d 771, 779 n.6 (7th Cir. 1994). If mere reinvestment were sufficient, the investment injury rule would be meaningless in most cases. *Id.* Any pattern of racketeering activity committed on the behalf of a corporation would establish a § 1962(a) RICO violation. *Id.* at 779. In this case, the Court of Appeals for the Seventh Circuit declined to rule on the investment injury rule. *Id.* at 779 n.6. Rather, the court held that the plaintiff mortgagor failed to establish a pattern of racketeering activity by the mortgagee. *Id.* at 773-78.

137. *Lightning Lube*, 4 F.3d at 1188.

138. United States v. Robertson, 73 F.3d 249, 253 (9th Cir. 1996) (holding that the government must prove that ill-gotten proceeds were used or invested in the acquisition or operation of an enterprise in order to get a criminal conviction under § 1962(a); Compagnie De Reassurance D'Ile De France v. New England Reinsurance Corp., 57 F.3d 56, 91 (1st Cir. 1995) (holding that the plaintiff failed to properly allege an investment injury from the defendant's risk re-insurance scheme); Vemco Inc. v. Camardella, 23 F.3d 129, 132 (6th Cir. 1994) (holding that the plaintiff properly plead that the defendant reinvested proceeds received as a result of fraudulently contracting to build a paint machine, but that plaintiff did not properly plead an injury as a result of the re-investment); *Lightning Lube*, 4 F.3d at 1188 (holding that the plaintiff, a quick lube franchisor, failed to allege how the investment injury was distinct from the defendant's predicate acts of fraud based on breach of contract and tortious interference of the contract); Parker & Parsley Petroleum Co., v. Dresser Indus., 972 F.2d 580, 584 (5th Cir. 1992) (holding that plaintiff, an oil well owner, whose only injury was from the defendant oil well fracturer's predicate acts of purposefully under-performing fracturing contract, rather than from an investment injury); Danielson v. Burnside-Ott Aviation Training Ctr., 941 F.2d 1220, 1229-30 (D.C. Cir. 1991) (holding that the plaintiffs, service employees, failed to state any investment injury arising from the defendant employer's violation of a federal minimum wage act); Ouaknine v. MacFarlane, 897 F.2d 75, 82-83 (2d Cir. 1990) (holding that the plaintiff failed to state any investment injury arising from the defendant's multiple acts of real estate fraud); Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1151 (10th Cir. 1989) (holding that the plaintiff, an oil well owner, failed to state any investment injury arising from the defendant-oil well operator's multiple acts of conversion, fraud, and breach of contract). *Contra* Busby v. Crown Supply, Inc., 896 F.2d 833, 837 (4th Cir. 1990) (holding that the plaintiff-salespersons stated a valid § 1962(a) claim against the employer for fraudulently withholding earned commissions, even though the injury was related to predicate acts and not to the investment of illicit income).

139. See *supra* note 138 for a discussion of authorities.

140. 18 U.S.C. § 1962(a); Hughes, *supra* note 110, at 508.

vestment of income derived through a pattern of racketeering activity.[141] Therefore, the majority reasons, a plaintiff alleging a violation of § 1962(a) must plead an injury arising directly from the investment of racketeering income because the civil remedy is only available for injuries caused "by reason of" a violation of § 1962.[142]

Only the Fourth Circuit has explicitly rejected this rule.[143] The Fourth Circuit holds that the "by reason of" terminology of § 1964(c) refers to § 1962(a) as a whole.[144] As a result, the plaintiff can be injured by either the predicate felonies or by the investment of illicit income.[145] Furthermore, the Fourth Circuit is concerned that the investment injury rule is an almost impossible burden for a plaintiff to overcome.[146]

Since the vast majority of plaintiffs fail to properly plead the investment injury rule, the Fourth Circuit's concern is well founded.[147] Plaintiffs typically fail to satisfy this rule in one of three ways: 1) by not alleging any investment injury;[148] 2) by alleging an investment injury which is really an injury caused directly from the predicate felonies;[149] or 3) by alleging the investment of illicit income but not alleging any related injury.[150] The invest-

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141. Hughes, *supra* note 110, at 508.

142. Goldsmith, *supra* note 41, at 30-31. See *supra* notes 9, 65 for text of 18 U.S.C. § 1964(c) and 1962(1) respectively.

143. *Busby*, 896 F.2d at 837.

144. *Id.*

145. *Id.*

146. *Id.* at 838-39.

147. Goldsmith, *supra* note 41, at 32 n.176. A 1992 index of cases shows that only four plaintiffs were able to plead in such a way as to overcome the investment injury rule. *Id.*

148. Compagnie De Reassurance D'Ile De France v. New england Reinsurance Corp., 57 F.3d 56, 91 (1st Cir. 1995) (holding that the plaintiff's allegations of fraud were not enough to establish that the plaintiff had been injured by the defendant's use and investment of the proceeds of the fraudulent conduct); Danielsen v. Burnside-Ott Aviation Training Ctr., Inc., 941 F.2d 1220, 1229 (D.C. Cir. 1991) (holding that under § 1962(a) a plaintiff "must plead and prove that his injury flowed from the defendant's use or investment of racketeering income," and finding that plaintiff did not make any such allegation); Ouaknine v. MacFarlane, 897 F.2d 75, 82-83 (2d Cir 1990) (holding that the plaintiff failed to plead that the alleged injury was the result of the defendants' investment of illicit income).

149. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1188 (3d Cir. 1993) (holding that even though plaintiff alleged an investment injury, the plaintiff failed to distinguish how its injury was the result of the use or investment of racketeering income as opposed to resulting from the predicate acts themselves); Parker & Parsely Petroleum Co. v. Dresser Indus., 972 F.2d 580, 584 (5th cir. 1992) (holding that complaint and RICO case statement obviously alleged only injuries flowing directly from predicate felonies, even though the plaintiff pleaded injury from the investment of racketeering income).

150. Vemco, Inc. v. Camardella, 23 F.3d 129, 132-33 (6th cir. 1994) (holding that although Vemco alleged reinvestment of racketeering income, it failed to

ment injury rule in conjunction with the person-enterprise distinction effectively forecloses the civil RICO option to most plaintiffs injured by "garden variety fraud."[151] However, plaintiffs in most civil RICO suits arising from business disputes have yet an additional set of judicially imposed requirements to overcome in order to receive full compensation: limitations on corporate liability.[152]

3. Limitations on Corporate Liability

In order to fully realize the promise of civil RICO's treble damages, a plaintiff must sue an entity with a "deep pocket."[153] In a civil RICO action the "deep pocket" is often the corporate employer of the person who commits the predicate RICO felonies.[154] Therefore, in order to fully realize the promise of civil RICO's treble damages provision, the plaintiff must find some theory with which to attach liability on the corporation.[155] The limitations on corporate liability within the civil RICO context can be divided into two broad categories: establishing direct corporate liability and establishing vicarious corporate liability.[156]

a. Limitations on Direct Corporate Liability

In order to attach direct liability on a corporate "person," a high ranking employee must commit the predicate felonies or conspire with or counsel another to commit the felonies.[157] Corporations are civilly and criminally liable "for the malicious torts or crimes of officers."[158] The high level officers, directors and employees embody the corporation's conscience because they control the corporation's authority.[159] The test for a person of authority is

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allege any injury stemming from the reinvestment); Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1149-51 (10th cir. 1989) (holding that the plaintiff did not allege any investment injury even though the plaintiff's complaint clearly alleges the defendant's reinvestment of racketeering income). Some feel that the investment injury rule improperly denies relief to the vast majority of victims pleading a § 1962(a) violation. Goldsmith, *supra* note 41, at 29.

151. Hughes, *supra* note 110, at 511-12.

152. Brenner, *supra* note 74, at 377-88.

153. *Id.* at 388.

154. *Cf. id.* at 377-88 (discussing (1) how plaintiffs want to sue the person or entity with "deep pocket[s]" and (2) the theories for attaching vicarious liability to the corporate employer of the actual wrongdoer).

155. *Id.* at 377-88.

156. *Id.* at 389.

157. Genty v. Resolution Trust Corp., 937 F.2d 899, 909 (3d Cir. 1991); R.E. Davis Chem. Corp. v. Nalco Chem. Corp., 757 F. Supp. 1499, 1522 (N.D. Ill. 1990); Brenner, *supra* note 74, at 381-84.

158. *Genty*, 937 F.2d at 909.

159. *See id.* A corporation cannot act but through its employees. Roboserve, Inc. v. Kato Kagaku Co., 873 F. Supp. 1124, 1139 (N.D. Ill. 1995). The high level employees, officers and directors, are thought to not only embody the corporation, but also the corporations conscience. *Id.* Therefore, any act

whether one has such responsibility as to arouse the institutional conscience through acts or ratifications.[160] Under federal complicity law, one is liable as a principle if one aids, abets, counsels, commands, induces or procures an offense.[161] Additionally, if intentional wrongdoing is within the scope of employment for a specific employee, then the employer's liability is direct.[162] The Schreiber Rule encompasses many of these precepts by holding that a corporation engaging in and benefitting from a pattern of racketeering activity can be both the person and enterprise under § 1962(a).[163] Under the Schreiber rule, corporate liability attaches directly.[164] Attaching direct corporate liability under 18 U.S.C. § 1962(c) is much more restrictive than under 18 U.S.C. § 1962(a), (b) and (d).

As discussed above, the person- enterprise distinction generally bars the corporation from being named the RICO person.[165] Unfortunately, liability only attaches to the RICO person.[166] Under § 1962(c), the corporation/enterprise is a passive instrumentality which cannot be held liable.[167] The distinctness rule shelters even culpable enterprises from liability under this section.[168]

After the distinctness rule became prevalent, many plaintiffs tried to circumvent it by alleging an association-in-fact enterprise[169] which consisted exclusively of the corporate employer and the culpable employees.[170] Since the corporation was not the en-

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which is committed by or acquiesced to by a high level employee is imputed to the corporation itself. *Cf.* Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1306 (7th Cir. 1987) (noting that liability for an employee's wrongdoing may be imputed to the corporate employer if the conduct (1) was related to the wrongdoer's employement, (2) benefitted the corporation and (3) was acquiesced to by the corporation); *Roboserve*, 873 F. Supp. at 1139 (noting that the complicity doctrine "allow[s] punitive damages where the institutional conscience of the corporate master should [have] be[en] aroused.").

160. *Roboserve*, 875 F. Supp. at 1139. The crimes of high ranking corporate officials are assumed to be those of the corporation itself because "corruption which reaches the upper echelons of the corporation assumes the imprimatur of corporate policy." *R.E. Davis Chem. Corp.*, 757 F. Supp. at 1522.

161. 18 U.S.C. § 2 (1994); Brenner, *supra* note 74, at 383-85.

162. Brenner, *supra* note 74, at 394.

163. *Id.* at 391 n.138.

164. *Id.*

165. Miranda v. Ponce Fed. Bank, 948 F.2d 41, 44-45 (1st Cir. 1991).

166. *Cf. id.*

167. *Id.*

168. Schofield v. First Commod. Corp. of Boston, 793 F.2d 28, 31 (1st Cir. 1986).

169. United States v. Turkette, 452 U.S. 574, 583 (1985). An association-in-fact enterprise is a group of individuals or entities which engages in a course of conduct for a common purpose. *Id.* The test for an association-in-fact enterprise is: (1) an on-going organization, (2) comprised of members functioning as a continuing unit, and (3) which has an existence separate and distinct from the pattern of racketeering activity. *Id.*

170. Goldsmith, *supra* note 41, at 34.

terprise per se, the corporation could be named as the liable RICO person.[171] Courts quickly ruled against plaintiffs using this approach.[172] Courts held that a group comprised solely of an employer and its employees is a single legal entity.[173] Naming employees and the corporation as an enterprise does not change the fact that the corporation acts only through its employees.[174] Under § 1962(c), a corporation cannot join exclusively with its own employees to constitute an enterprise distinct from itself.[175] As a result, courts held that the corporation must be the enterprise and cannot be the person even when an association-in-fact is alleged.[176] The only way to name a corporation as a RICO person is to allege an association-in-fact enterprise encompassing an extra-corporate conspiracy.[177]

The rationale for limiting direct corporate liability under civil RICO is straightforward. Although RICO has a civil cause of action, it is largely a criminal statute.[178] The requirements for attaching direct corporate liability in a civil RICO action are merely those associated with attaching criminal culpability on a corporation under federal criminal law.[179] Often, the corporation is not intimately enough linked with the predicate acts to be directly liable.[180] In such a case, the plaintiff needs to establish vicarious corporate liability.[181]

b. Limitations on Vicarious Corporate Liability

Derivative corporate liability in the civil RICO context usually focuses on the use of *respondeat superior*.[182] *Respondeat superior* is a common law agency rule[183] in which one who is without fault is assigned vicarious liability for the wrongdoing of another.[184] Gen-

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. Davis v. Mutual Life Ins. Co., 6 F.3d 367, 377 (6th Cir. 1993).
176. *Id.*
177. Goldsmith, *supra* note 41, at 34.
178. Brenner, *supra* note 74, at 370.
179. *Cf.* Genty v. Resolution Trust Corp., 937 F.2d 899, 909 (3d Cir. 1991); R.E. Davis Chem. Corp. v. Nalco Chem. Corp., 757 F. Supp. 1499, 1522 (N.D. Ill. 1990); Brenner, *supra* note 74, at 381-84.
180. *Cf.* Roboserve, Inc. v. Kato Kagaku Co., 873 F. Supp. 1124, 1138 (N.D. Ill. 1995) (noting that if an act is done by a person who has "such responsibility as to arouse the 'institutional conscience,' the act binds the coporation as a participant").
181. *Id.* at 388.
182. *E.g.*, Schofield v. First Commod. Corp. of Boston, 793 F.2d 28, 32 (1st Cir. 1986); Petro-Tech, Inc. v. Western Co., 824 F.2d 1349, 1358 (3d Cir. 1987); Bernstein v. IDT Corp., 582 F. Supp. 1079, 1083 (D. Del. 1984).
183. *Bernstein*, 582 F. Supp. at 1083.
184. *Schofield*, 793 F.2d at 32. The rationale behind *respondeat superior* is

erally, normal rules of agency law apply in the absence of a clear indication that Congress had a contrary intent.[185] Under the doctrine of *respondeat superior*, an employer is responsible for injuries caused by an employee acting within the scope of the employee's employment.[186] An employer is not liable for conduct outside the scope of employment unless: 1) the employer intended for the conduct to occur; 2) the employer was negligent or reckless in supervising the employee; 3) the conduct violated a non-delegatable duty on the part of the employer; or 4) the employee purported to speak for the employer or was acting with apparent authority.[187] In a civil RICO suit, *respondeat superior* imposes vicarious liability on the corporation/enterprise for the wrongdoing of the employee/person.[188] The restrictions on the application of *respondeat superior* in a civil RICO action need to be handled separately for part (c) as opposed to part (a) of § 1962.

In the majority of circuits which have considered the question, *respondeat superior* is generally inapplicable to civil actions alleging a violation of § 1962(c).[189] Five circuits, the First, Third, Seventh, Eighth and the District of Columbia, have held that *respondeat superior* can never be applied under this section because doing so would violate the person-enterprise distinction.[190] The

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that "it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit." *Petro-Tech*, 824 F.2d at 1358.

185. *Schofield*, 793 F.2d at 31.

186. Brenner, *supra* note 74, at 377; BLACK'S LAW DICTIONARY 1311-12 (6th ed. 1990).

187. Brenner, *supra* note 74, at 378-79. The Supreme Court has held that the doctrine of apparent authority could impose liability on a defendant in an action seeking treble damages. American Soc. of Mech. Engr's, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575-76 (1982).

188. *Cf. Schofield*, 793 F.2d at 29-33 (noting that the plaintiff acknowledged the validity of the person-enterprise rule and instead tried to hold the corporation liable using the doctrine of *respondeat superiour*).

189. Miranda v. Ponce Fed. Bank, 948 F.2d 41, 45 (1st Cir. 1991); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782, 790 (D.C. Cir. 1988); D & S Auto Parts v. Schwartz, 838 F.2d 964, 967 (7th Cir. 1988); Petro-Tech, Inc. v. Western Co., 824 F.2d 1349, 1358 (3d Cir. 1987); Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987).

190. *Miranda*, 948 F.2d at 45 (holding that *respondeat superior* is not applicable to 18 U.S.C. § 1962(c) because of the requirement of distinctness between person and enterprise); *Yellow Bus Lines*, 839 F.2d at 790 (holding that *respondeat superior* is not applicable to 18 U.S.C. § 1962(c) because of the requirement of distinctness between person and enterprise); *D & S Auto*, 838 F.2d at 967 (holding that *respondeat superior* is not applicable to 18 U.S.C. § 1962(c) because of the requirement of distinctness between person and enterprise); *Petro-Tech, Inc.*, 824 F.2d at 1358 (holding that *respondeat superior* may not be used to hold a RICO enterprise liable under 18 U.S.C. § 1962(c)); *Luthi*, 815 F.2d at 1230 (declining to apply *respondeat superior* to a RICO claim brought under § 1962(c)).

corporate enterprise cannot be the same entity as the liable RICO person under this section.[191] The Sixth and Ninth Circuits have a narrower but analogous holding in that *respondeat superior* cannot be applied where the defendant corporation is also the RICO enterprise because doing so would violate the person-enterprise distinction.[192] In these two circuits, vicarious liability can be imposed on a corporate defendant under § 1962(c) if doing so does not violate the distinctness rule and if the corporation benefitted from the wrongdoing.[193] The reasoning behind both versions of the majority rule is that a plaintiff should not be able to do indirectly what the person-enterprise distinction precludes from being accomplished directly.[194] No circuit court has specifically held that a corporate enterprise could be held vicariously liable under § 1962(c). Fewer circuits have addressed the issue of vicarious liability with respect to § 1962(a).

Two circuits, the Third and the District of Columbia, have held that *respondeat superior* is always applicable under § 1962(a).[195] The Seventh Circuit has held that *respondeat superior* is applicable under this section, provided that the corporate defendant benefitted from and acquiesced to the employee's wrongdoing.[196] Two other circuits, the First and the Second, suggested in dicta that *respondeat superior* is applicable under subsection (a).[197] The reasoning behind the majority holding is that § 1962(a) is more broadly applicable than § 1962(c), and therefore, a corporation can be both person and enterprise under the former section.[198] As a result, *respondeat superior* can attach.[199] Although minimal case law on point exists, precedent suggests that *respondeat superior* would attach under subsection 1962(b) like it does under subsection 1962(a) and would be inapplicable under subsection 1962(d) like it is under 1962(c).[200]

Since RICO is a quasi-criminal statute, some courts have voiced concerns that using vicarious liability departs from traditional principles of criminal responsibility.[201] These concerns are

191. Continental Data Sys., Inc. v. Exxon Corp., 638 F. Supp. 432, 438-39 (E.D. Pa. 1986).

192. Davis v. Mutual Life Ins. Co., 6 F.3d 367, 377 (6th Cir. 1993); Brady v. Dairy Fresh Prod. Co., 974 F.2d 1149, 1154 (9th Cir. 1992).

193. *Davis*, 6 F.3d at 379; *Brady*, 974 F.2d at 1154.

194. Schofield v. First Commod. Corp. of Boston, 793 F.2d 28, 33 (1st Cir. 1986).

195. *Yellow Bus Lines*, 839 F.2d at 790; *Petro-Tech*, 824 F.2d at 1360.

196. Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1306 (7th Cir. 1987).

197. *Schofield*, 793 F.2d at 33; Official Publications, Inc. v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989).

198. *Schofield*, 793 F.2d at 33.

199. *Id.*

200. *See* Genty v. Resolution Trust Corp., 937 F.2d 899, 907 (3d Cir. 1991).

201. Brenner, *supra* note 74, at 370.

generally unfounded.[202] When the *respondeat superior* doctrine is applied to criminal cases, it automatically protects innocent or passive parties.[203] A threshold requirement for vicarious liability in a criminal case is that the agent intends to confer a benefit upon the principal.[204] Furthermore, criminal conduct is not necessarily outside the scope of employment.[205] Like the person-enterprise distinction and the investment injury rule, the limitations on establishing corporate liability have greatly restricted the applicability of civil RICO.[206]

While this Part discussed the origin of RICO, the statutory RICO mechanisms, and the restrictive effect of current RICO case law, the next Part discusses the applicability of RICO to the misappropriations of trade secrets problem. Specifically, Part III will conclude that a successful civil RICO action can still be framed in the hypothetical misappropriation of trade secrets case and that policy considerations support this use of RICO.

III. APPLICABILITY OF RICO TO MISAPPROPRIATIONS OF TRADE SECRETS CAUSES OF ACTION

Congress designed RICO to eradicate enterprise crime, specifically organized crime.[207] The misappropriation of trade secrets is a burgeoning enterprise crime problem.[208] The remedies provided by RICO are tailor-made for the trade-secrets theft problem. First, this Part examines public policy considerations which support the use of civil RICO in misappropriation of trade secrets cases. This Part then outlines how a misappropriation of trade secrets cause of action fits the most restrictive judicially imposed RICO limitations.

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202. *Cf.* Goldsmith, *supra* note 41, at 29 (noting that the "*respondeat superior* doctrine in criminal cases exempts from liabity any principal that is a victim or passive instrumentality of criminality").

203. *Id.*

204. *Id.* at 28-29.

205. Brenner, *supra* note 74, at 370.

206. Goldsmith, *supra* note 41, at 19-38.

207. *Id.* at 8.

208. *Cf.* H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249 (1989) (noting that "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises" and that "[l]egitimate businesses 'enjoy neither an ingerent incapacity for criminal activity nor immunity from its consequences'"); Toren, *supra* note 3, at 62 (noting that trade secrets theft is increasint); Quintanilla, *supra* note 7, at B1 (noting that many companies now actively attempt to misappropriate trade secrets from competitors). "Title 18 U.S.C. § 1961(1) responds to a new situation in which persons engaged in long term criminal activity often operate wholly within legitimate enterprises." *H.J. Inc.*, 492 U.S. at 248. Most trade secrets are misappropriated by current or former employees. Toren, *supra* note 3, at 61 n. 8. Many companies now actively attempt to misappropriate the trade secrets of economic competitors. Quintanilla, *supra* note 7, at B1.

A. Public Policy Considerations

A sound policy for deterring the misappropriation of trade secrets is to encourage the use of civil RICO actions. This Section discusses the public policy considerations which support such a use: 1) parallels exist between trade secrets theft and the congressional findings which prefaced the OCC; 2) civil RICO is designed as an economic deterrent to enterprise crime; 3) trade secret theft is enterprise crime when used as a company's way of doing business; and 4) Congress desired that RICO be liberally construed when it passed the OCC.

America's problem with misappropriated trade secrets shares many themes with the problems which prompted the enactment of RICO. In 1970, Congress found that organized crime was widespread and that it cost the American economy billions of dollars.[209] Today, the misappropriation of trade secrets is widespread and it is draining billions of dollars from the economy annually.[210] Nearly fifty percent of American companies surveyed stated that they are the victims of trade secret theft each year.[211]

In 1970, Congress found that organized crime derived a major portion of its power from illegally obtained money.[212] Similarly, all money made using misappropriated trade secrets is by definition illegally obtained.[213] The old adage that money is power still holds true in business, suggesting that the beneficiaries of misappropriated trade secrets are deriving substantial power from illegal activity.[214]

In 1970, Congress found that organized crime used illegally obtained money to corrupt and infiltrate legitimate businesses.[215] Similarly, a company which uses a stolen trade secret, knowingly or unknowingly, has been infiltrated and corrupted by criminals.[216]

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209. OCC, 84 STAT. 922-23 (1970).

210. Toren, *supra* note 3, at 62; Bellinger, *supra* note 15, at 126.

211. *Cf.* Williams, *supra* note 19.

212. OCC, 84 STAT. 922-23 (1970).

213. Misappropriation is the "unlawful use of funds or other property for purposes other than which intended." BLACK'S LAW DICTIONARY 998 (6th ed. 1990).

214. *Cf.* Gregory K. Bader, *The Keiretsu Distribution System of Japan: Its Steadfast Existence Despite Heightened Foreign and Domestic Pressure for Dissolution*, 27 CORNELL L. REV. 365, 386 n.7 (1964) (noting that during the Hearing on Economic Concentration before the Subcommittee on Anti-Trust and Monopoly of the Senate Judiciary Committee (88th Congress), Professor Corwin D. Edwards stated that a big firm has an advantage just by being big).

215. OCC, 84 STAT. 922-23 (1970).

216. Infiltrate means to penetrate a group gradually or stealthily. WEBSTER'S II COLLEGE WORLD DICTIONARY 568 (2d 1995). To corrupt an institution is to change the institution's morals and principles from good to bad. BLACK'S LAW DICTIONARY 345 (6th ed. 1990). A *malum in se* crime is one which is wrong and immoral in itself. *Id.* at 959. Theft is a *malum in se* offense. Jordan v. DeGeorge, 341 U.S. 223, 237 n.10 (1951) (Jackson, J., dis-

In 1970, Congress found that organized crime activity weakened the economy and injured individual companies.[217] Today, the misappropriation of trade secrets is burdening the economy and hurting individual companies.[218] Individual companies lose billions of dollars annually to trade-secrets theft.[219] Six million people have lost their jobs in just the past six years due to the misappropriation of trade secrets.[220] The cumulative effect is a serious drain on the economy.[221]

In 1970, Congress found that organized crime was continuing to grow and that existing law enforcement tools were ineffective.[222] Many indicia suggest that trade secrets theft is growing and the current remedies for trade secret theft are inadequate. The misappropriation of trade secrets has tripled in the last two years.[223] Companies which are victims of the misappropriation of trade secrets are reluctant to bring criminal charges because of perceptions that prosecutors lack the requisite technical expertise.[224] Perpetrators view the civil penalties imposed by the justice system as just another cost of doing business.[225] Prior to the recent enactment of The Economic Espionage Act, experts admitted that existing law enforcement tools were inadequate.[226] The Economic Espionage Act is of such recent genesis that its effect on trade secrets theft is purely speculative.[227] The concerns that led Congress to

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senting). Theft is wrong in and of itself, and it is a sign of moral turpitude. *Id.* Since corporations only act through their employees and since theft is a sign of moral turpitude, corporations which use stolen trade secrets are corrupted. *Cf.* Goldsmith, *supra* note 41, at 34 (stating that corporations only act through their employees). Legitimate corporations which are unaware of the illegal activities of its employees are by definition being infiltrated. WEBSTER'S, *supra*.

217. OCC, 84 STAT. 922-23 (1970).

218. *See, e.g.*, Toren, *supra* note 3, at 62; Bellinger, *supra* note 15, at 126.

219. Toren, *supra* note 3, at 62 (citing an annual cost to American firms from the misappropriation of trade secrets of $1.8 billion); Bellinger, *supra* note 15, at 126 (citing an annual cost to American firms of $15 billion); Gertz, *supra* note 17 (citing a monthly cost to American firms of $2 billion dollars, representing a cost of approximately $24 billion annually); Martin, *supra* note 3, at 949 (citing an annual cost to American firms of nearly $20 billion).

220. Anderson, *supra* note 18, at 16.

221. *Cf. id* (noting that economic espionage has cost American businesses billions of dollars and workers millions of jobs).

222. OCC, 84 STAT. 922-23 (1970).

223. Quintanilla, *supra* note 7.

224. Toren, *supra* note 3, at 59-60 n. 3.

225. Bagley et al., *supra* note 8, at 458.

226. *See* Eisele, *supra* note 25, at 34. *Cf.* The Econ. Espionage Act of 1996, Pub. L. No. 104-294, § 101, 110 Stat. 3488, *available in* Westlaw PL 104-294, at *1 (1996) (making economic espionage a federal offense); Lynch, *supra* note 5 (noting that in a trade secrets theft cases legal fees for civil causes of action average $500,000).

227. *See generally* The Econ. Espionage Act, at *1-4 (showing that the law was enacted on October 11, 1996).

enact the OCC closely parallel the current problems that the legal system is having with trade secrets theft. Moreover, additional public policy considerations support the use of a civil RICO cause of action in a misappropriation of trade secrets case.

Congress designed the civil RICO action to deter enterprise crime, and trade secrets theft is often enterprise crime. When Congress drafted the OCC, it designed the civil RICO action as an economic deterrent aimed specifically at enterprise crime.[228] Today, an increasing number of companies are using the misappropriation of trade secrets as a way of doing business (i.e. as an enterprise crime.)[229] In defining racketeering activity broadly, Congress "acknowledge[d] the breakdown of the traditional conception of organized crime and respond[ed] to a new situation in which persons engaged in long-term criminal activity often operate wholly within legitimate enterprises."[230] These legitimate enterprises "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."[231] Since economic considerations are driving the misappropriations of trade secrets,[232] an economic disincentive should be tried.

Lastly, Congress's own words implore the courts to construe the statute liberally.[233] Congress has a long history of acquiescing to the extension of civil RICO actions into the area of business torts.[234] The Supreme Court noted Congress's desire to give RICO a broad interpretation; it held that such an interpretation is constitutional and that courts should interpret the statute broadly.[235] For all of these reasons, the victims of trade secrets thefts should be encouraged to use civil RICO actions.

B. Application of a Civil RICO Action to WEE Co. v. USEME, Inc.

The hypothetical proposed in the introduction is admittedly contrived. However, it effectively illustrates that a misappropriation of trade secrets can be remedied under RICO. This section proposes two complaints based on the hypothetical fact pattern and then discusses how these complaints overcome RICO's restrictive, judicially imposed rules.

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228. OCC, 84 STAT. 922-23 (1970); United States v. Turkette, 452 U.S. 576, 591-93 (1981).

229. *See* McDermott, *supra* note 7, at 31; Quintanilla, *supra* note 7.

230. H.J., Inc., v. Northwestern Bell Tel. Co., 492 U.S. 229, 248 (1989).

231. *Id.* at 249 (quoting Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 499 (1985)).

232. *See* Toren, *supra* note 3, at 59-64.

233. OCC, 84 STAT. 922, 947 (1970).

234. *Turkette*, 452 U.S. at 592-93.

235. *Id.*

1. Complaint Filed by WEE Co.

A complaint in Federal court must state the basis of jurisdiction, give a short and plain statement of the claim which shows the plaintiff is entitled to relief, and make a demand for judgement.[236] District courts of the United States have original jurisdiction for any civil RICO action.[237] The complaint may read as follows:

> 1. The person USEME, Inc. derived illicit income, either directly or indirectly, from a pattern of racketeering activity conducted by USEME, Mr. Big, Mr. Craft, Mr. Yew, and Mr. Smith in violation of 18 U.S.C. § 1962(a). The pattern of racketeering activity included: 1) multiple occurrences of interstate shipment of stolen goods; 2) multiple occurrences of receiving stolen goods; and 3) one occurrence of wire fraud during which Mr. Yew used the telephone to intentionally and fraudulently procure a sick day benefit from WEE Co. The goods stolen consisted of converted office products such as computer diskettes and copy paper and the trade secrets affixed to the office products. The value of the stolen goods exceeded $5000. USEME used and invested the money so obtained in the operation of USEME, the enterprise. The pattern of racketeering activity is continuous in that it is Mr. Craft's and USEME's way of doing business, and it is related in that it has a common goal (the theft of trade secrets) and a common modus operandi (the recruitment of respective employees in such a manner as to induce them to steal trade secrets from their former bosses). USEME's investment of illicit income injured WEE Co. in two ways: 1) USEME invested money in developing stolen WEE Co. product designs which directly competed with WEE Co.; and 2) USEME invested money by placing orders with WEE Co.'s low cost suppliers, thereby displacing WEE Co. with these suppliers and damaging WEE Co.'s cost structure. WEE Co. prays for actual damages of $1,000,000, to be trebled, plus legal expenses from USEME, Inc. USEME, Inc.'s liability results from the direct participation of high corporate employees, Mr. Big and Mr. Craft.

An alternative or additional complaint may read as follows:

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236. FED. R. CIV. P 8(a) (1995).

> Claims for Relief. A pleading which sets for a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Id.

237. 18 U.S.C. § 1965(a) (1994). "Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs." *Id.*

2. Mr. Craft, Mr. Big and USEME, Inc. have conducted the affairs of an associated-in-fact enterprise comprised at least of Mr. Craft, Mr. Big, Mr. Smith, Mr. Yew and USEME, Inc. through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). The structure of the enterprise is similar to the structure of USEME, Inc., except that extra-corporate participants are used on an "as-needed" basis to steal trade secrets.[238] The pattern of racketeering activity included: 1) multiple occurrences of interstate shipment of stolen goods; 2) multiple occurrences of receiving stolen goods; and 3) one occurrence of wire fraud during which Mr. Yew used the telephone to intentionally and fraudulently procure a sick day benefit from WEE Co. The goods stolen consisted of converted office products such as computer diskettes and copy paper and the trade secrets affixed to the office products. The value of the stolen goods was in excess of $5000. The pattern of racketeering activity is continuous in that it is Mr. Craft's and USEME's way of doing business, and it is related in that it has a common goal (the theft of trade secrets) and a common modus operandi (the recruitment of respective employees in such a manner as to induce them to steal trade secrets from their soon-to-be-former bosses). This pattern of racketeering activity has injured WEE Co. in its property and business. WEE Co. prays for actual damages of $1,000,000, to be trebled, plus legal expenses from USEME, Inc. USEME, Inc.'s liability results from the direct participation of high corporate employees, Mr. Big and Mr. Craft.

Either of these sample complaints should be sufficient to overcome the judicially imposed civil RICO restrictions.

2. Overcoming the Judicially Created Civil RICO Rules

In order to state a claim, WEE Co. must allege: 1) a RICO person; 2) an enterprise; 3) the requisite number of predicate felonies; and 4) a connection by a pattern of racketeering activity.[239] In addition, WEE Co. must allege that the pattern of racketeering is continuous and related.[240] When alleging a violation of § 1962(a), WEE Co. must plead an injury arising from the investment of illicit income.[241] When alleging a violation of § 1962(c), WEE Co. must plead an association-in-fact enterprise comprising an extra-corporate conspiracy in order to meet the person-enterprise distinction requirement and still attach liability to USEME, Inc.[242] In order to receive full compensation, WEE Co. must attach liability, either directly or vicariously, to USEME, Inc.[243]

Both complaints plead persons, an enterprise, and a pattern

238. Six circuits require that a plaintiff plead an ascertainable structure for an association-in-fact enterprise. Chang v. Chen, 80 F.3d 1293, 1297 (9th Cir. 1996).

239. *See* 18 U.S.C. §§ 1961-62 (1994).

240. H.J., Inc., v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989).

241. *See* United States v. Robertson, 73 F.3d 249, 251 (9th Cir. 1996).

242. *See* Goldsmith, *supra* note 41, at 33.

243. Brenner, *supra* note 74, at 388.

of racketeering activity in accordance with the RICO statute.[244] The complaints allege the requisite number of predicate felonies,[245] and the fraud allegation is pleaded with particularity.[246] The interstate shipment and receipt of stolen goods allegations allege that the goods were transported across state lines and were worth more than $5000.[247] The pattern of racketeering meets the requirement of continuity and relationship because: 1) it is, in effect, USEME's way of doing business (establishing the threat that the pattern of racketeering activity may be repeated in the future);[248] and 2) the predicate felonies have similar or related methods, participants, and results.[249]

Complaint number one alleges an injury arising only from the investment of illicit income and not from the predicate acts themselves. Indeed, WEE Co. can argue that although the theft of the trade secrets was perfected by the time Mr. Yew quit WEE Co., no resultant injury occurred until such time as USEME invested and developed said secrets.[250] Additionally, the injury that WEE Co. suffered is exactly the type of injury that § 1962(a) prohibits.

Congress designed § 1962(a) as an anti-money laundering

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244. *See* 18 U.S.C. §§ 1961-62 (1994).

245. 18 U.S.C. § 1961 (1994).

246. FED. R. CIV. P. 9(b) (1995). "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." *Id.*

247. National Stolen Property Act, 18 U.S.C. § 2314 (1994) (prohibiting the interstate shipment of stolen goods); 18 U.S.C. § 2315 (1994) (prohibiting the receipt of stolen goods shipped in interstate commerce); Bagley et al., *supra* note 8, at 459. A violation of the National Stolen Property Act has five elements: 1) the items were transported across state lines; 2) the items were "goods, wares or merchandise within the meaning of the statute"; 3) the value of the items had a value in excess $5000; 4) the "defendant knew the items were stolen"; and 5) "the items were stolen, converted or taken by fraud." *Id.* In order for a trade secret to be considered a "good" under this section, it must be in tangible form such as a piece of paper. *Id.*

248. *See* H.J., Inc., v. Northwestern Bell Tel. Co., 492 U.S. 229, 242-43. Continuity plus relatedness combine to produce a pattern of racketeering activity. *Id.* at 239. Open-ended continuity refers to past conduct which by its nature projects into the future with a threat of repetition. *Id.* at 241. The threat of repetition is established by showing that the predicate felonies are a regular way of conducting the defendant's on-going, legitimate business. *Id.* at 242. Criminal acts are related if they share "similiar purposes, results, participants, victims or methods of commissions." *Id.* at 240.

249. *Id.*

250. *Cf.* Lockridge v. Tweco Prods., Inc., 497 P.2d 131, 135-36 (Kan. 1972). The misappropriation of a trade secret causes an injury either at the time of the misappropriation or at the time of the first use. *Id.* The injury is not continuing. *Id.* It is "a fixed, palpable, ascertainable and nonrecurring event." *Id.* at 137. WEE Co.'s injury occurred at the time USEME, Inc. started using the trade secrets. Only then was the injury ascertainable and palpable.

provision aimed at preventing criminal enterprises from unfairly competing with legitimate businesses.[251] USEME's development of the trade secrets was an attempt to legitimize "ill-gotten fruits" in much the same way as money laundering is an attempt to legitimize ill-gotten cash.[252] Under § 1962(a), the enterprise is characterized as the beneficiary of the enterprise criminality because it receives illicit profits.[253] USEME is clearly benefitting from the receipt of illicit income derived by the development and use of misappropriated trade secrets.

In complaint number two, WEE Co. alleges an association-in-fact enterprise consisting of Mr. Smith, Mr. Yew, Mr. Craft, Mr. Big and USEME. WEE Co. can allege an extra-corporate conspiracy because Mr. Yew and Mr. Smith were not employees of USEME, Inc. at the time they respectively stole trade secrets.[254] By arguing an extra-corporate conspiracy, WEE Co. will be using the one permissible formulation of a § 1962(c) violation which does not have USEME as the enterprise.[255] In this way, WEE Co. can attach liability, directly or indirectly, on USEME.

USEME's liability can be both direct and vicarious. Mr. Big knew about the misappropriation and acquiesced, thus establishing at least vicarious liability.[256] Direct liability can be argued for two reasons: 1) Mr. Craft was an officer of such high stature that his conduct should have aroused the corporate conscience,[257] and 2) Mr. Craft's illegal conduct was part of his defined responsibilities.[258]

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251. Goldsmith, *supra* note 41, at 29.

252. *Cf.* BLACK'S LAW DICTIONARY 884 (6th ed. 1990). Laundering is defined as the investment or "transfer of money flowing from racketeering, drug transactions, and other illegal sources into legitimate channels." *Id.*

253. Goldsmith, *supra* note 41, at 23.

254. *See id.* at 33.

255. *See id.*

256. *See* Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1306 (7th Cir. 1987) (holding that a corporation which benefits from and acquiesces to an employee's wrongdoing may be held vicariously liable under § 1962(a)); *see also* Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782, 790 (D.C. Cir. 1988) (holding that vicarious liability is applicable under § 1962(a)).

257. *Cf.* Genty v. Resolution Trust Corp., 937 F.2d 899, 909 (3d Cir. 1991) (holding that in order to attach direct liability on a corporate "person", a high rankng employee must commit the predicate felonies or conspire with or counsel another to commit the felonies); Roboserve, Inc. v. Kato Kagaku Co., 873 F. Supp. 1124, 1138 (N.D. Ill. 1995) (noting that when an act is committed by a "person of such responsibility as to arouse the 'institutional conscience,'" the commission binds the corporation as a participant).

258. Brenner, *supra* note 74, at 394. If the tortious or culpable conduct of an employee is understood to be within the scope of that employee's employment, corporate liability can be direct. *Id.*

CONCLUSION

The misappropriations of trade secrets is a serious and growing problem for the U.S. economy. Unfortunately, the currently used law enforcement tools and techniques are inadequate to eradicate the problem. Since the problem of trade-secrets theft is analogous to the problem of organized crime which inspired the OCC, the civil RICO provision might be a useful tool in eradicating trade secret theft. Before a wholesale eradication occurs, the misappropriation of trade secrets cause of action must overcome judicially imposed civil RICO restrictions.

As illustrated above, trade-secret theft is enterprise criminality, RICO is designed to eradicate enterprise criminality, and a properly pleaded misappropriation of trade secrets complaint can easily overcome all of the judicially imposed restrictions on civil RICO.