IS THERE A GOOD FAITH CLAIM FOR THE RICO ENTERPRISE PLAINTIFF?

BY LEE APPLEBAUM*

ABSTRACT

RICO was created to seek the annihilation of organized criminal conduct. Instead of the impulsive act of violence or even well planned single crime, RICO pursues crimes that are part of a broader design, carried out in discernable patterns. The multi-dimensional statute marries this pattern of prohibited conduct concept to the concept of an "enterprise." RICO's creators recognized this connection between patterns of criminal conduct and some entity or organization as essential to the illicit conduct they wanted to eradicate. Thus, roughly speaking, RICO is concerned with entities that are taken over through patterns of prohibited conduct (e.g., a protection racket), entities that receive the proceeds of that conduct (e.g., money laundering), and entities that are used as the means to carry out that criminal conduct.

This last concern is addressed in 18 U.S.C. § 1962(c) which punishes those who conduct the affairs of an enterprise through a pattern of racketeering activity. In Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., *the court found that a RICO enterprise used to carry out a pattern of racketeering activity could not also be the victim of that activity. This article sets forth a list of arguments to the contrary; reasoning that RICO is meant to punish the parasitic insider who uses the enterprise against itself as well as others. Thus, the corporate officer directing a corporation's affairs against that corporation through an ongoing pattern of actionable fraudulent conduct should not be exempt from a RICO action brought by the corporation itself.*

I. INTRODUCTION

RICO—What other single legal term offers more fascination, controversy, or opportunity? The RICO statute was created to destroy organized crime, and it has effectively undermined the efforts of many crime families. To all but the most prescient, however, it has also achieved an unimagined level of use against legitimate individuals and businesses in the civil litigation context.

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*Lee Applebaum is a commercial litigator with Fineman & Bach, P.C., Philadelphia, Pa.

Civil RICO's treble damages and attorney's fees provisions, combined with the fear and anger that RICO claims can inspire in both civil and criminal defendants, have generated an extraordinary number of hard fought cases. These continuous battles over the statute's meaning and application have resulted in a myriad of opinions in United States District Courts and Courts of Appeals. Moreover, with an unusual frequency for a single statute, RICO issues have reached the United States Supreme Court.

The subtle products of this RICO litigation boom have been the development of statutory interpretation methods and theories in relation to a single statutory scheme. This article looks at one aspect of the RICO statute, involving an unresolved issue as to whether a corporation or another business form can be the potential RICO victim of its own officers or employees. This issue exists at a nexus of currents in statutory interpretation. Only in recognizing, understanding, and addressing all of these interpretations can we fully grasp the form, scope and application of the statute's elements.

II. THE RICO STATUTE GENERALLY

RICO, the Racketeer Influenced and Corrupt Organizations Act,[1] was created to stop systematic criminal conduct. It is a broad and flexible statutory scheme, with a multi-tiered battery of anti-crime formulas set forth in separate statutory sections.[2] These anti-crime weapons are all intended to identify and punish "pattern[s]"[3] of criminal acts.[4] Each section is a unique permutation designed to attack distinct criminal paradigms, the nature of which depend upon the relationship between the RICO defendants, the pattern of criminal acts and an "enterprise."[5] Congress' inclusion of the innovative "enterprise" concept provided a wholly new means for comprehending, and then undermining, the cancerous relationship between complex criminal conduct and corporate, or corporate-

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[1] 18 U.S.C. §§ 1961-1968 (2001).

[2] 18 U.S.C. § 1962(a)-(d) (2001).

[3] 18 U.S.C. § 1961(5) (2001); H.J. Inc. v. Northwestern Bell Tele. Co., 492 U.S. 229 (1989).

[4] The criminal acts making up the prohibited patterns are known as the predicate acts or racketeering acts. 18 U.S.C. § 1961(1) (2001). The predicate acts listed in section 1961 are exhaustive, and create statutory borders beyond which the RICO plaintiff cannot go. Annulli v. Panikkar, 200 F.3d 189, 199-200 (3d Cir. 1999).

[5] 18 U.S.C. § 1961(4) (2001).

type, structures.[6]

RICO includes a private civil remedy, rewarding the successful RICO plaintiff with treble damages and attorney's fees.[7] While this lucrative bounty may have originally been intended to inspire those bold souls willing to pursue civil claims against mobsters who harmed them, civil RICO has taken on a completely different life. It has become a federal anti-fraud statute, routinely brought against "legitimate" citizens and businesses. RICO's expansion rests on the shoulders of the federal mail fraud[8] and wire fraud[9] statutes, two of RICO's predicate acts.[10] It is through these two crimes that "garden variety" common law fraud claims are said to be turned into federal treble damages suits.[11]

RICO defines three basic forms of punishable misconduct.[12] The

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[6]Use of the word corporate does not include only legal business corporations. It can mean a purely illicit corporate type structure used to run a criminal operation—a grotesque example being Murder, Inc. It can also mean any legitimately organized entity that can be used in connection with the prohibited criminal conduct or that can be victimized by a pattern of criminal conduct. Thus, the RICO enterprise can be anything from a Fortune 500 Company to a gang of individuals who have associated together to form some entity greater than themselves; this later group enterprise is typically referred to as an "association in fact" enterprise. *See generally* United States v. Console, 13 F.3d 641 (3d Cir. 1993), *cert. denied*, 511 U.S. 1076 (1994).

[7]18 U.S.C. § 1964(c) (2001).

[8]18 U.S.C. § 1341 (2001).

[9]18 U.S.C. § 1343 (2001).

[10]"Given the prevalence of mail and wire use in commercial transactions, RICO's provision for a private cause of action predicated on violations of the mail and wire fraud statutes virtually federalizes common law fraud." Tabas v. Tabas, 47 F.3d 1280, 1290 (3d Cir.), *cert. denied*, 515 U.S. 1118 (1995) (quoting Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1105 (1982)).

[11]RICO includes offenses that "although they may often be committed by those whom we would categorize as 'racketeers,' also fall into the category of common law or 'garden variety' fraud and which would, in the past, have been the subject of commercial litigation under state law." *Id.* at 1290.

[12]18 U.S.C. §§ 1962(a)-(c) (2001). Section 1962(d) punishes those who conspire to violate these other RICO sections. Set forth in full, these four sections provide:

> § 1962. Prohibited activities
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> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal 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. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do

most commonly used RICO section is 18 U.S.C. § 1962(c). Section 1962(c) is aimed at those who manage or operate an enterprise's affairs through a pattern of racketeering activity, resulting in harm to the RICO plaintiff.[13] In the past, some courts allowed the same enterprise used to carry out the pattern of racketeering acts to also be the RICO plaintiff. In *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*,[14] however, a Third Circuit panel stated that a section 1962(c) RICO plaintiff could not also be the enterprise; rather a section 1962(c) enterprise could only be a vehicle for harm to others, but not a victim itself.[15]

This article examines the question of whether it is still possible for a RICO plaintiff to pursue a section 1962(c) claim in the Third Circuit, in good faith, where that victim also claims to be the section 1962(c) enterprise.[16]

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not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

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

(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 activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Id. § 1962(a)-(d).

[13]RICO's first statutory basis for recovery, 18 U.S.C. § 1962(a), is aimed at those who use the predicate acts to obtain money which is then invested or used in operating an enterprise. If the investment, as opposed to the criminal acts used to obtain the investment money, results in harm, then a RICO claim may exist. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1187-89 (3d Cir. 1993). *See generally* JED S. RAKOFF & HOWARD W. GOLDSTEIN, RICO CIVIL AND CRIMINAL LAW AND STRATEGY § 1.06[1], at 1-79 (Law Journal Seminar Press 2002) (explaining that a RICO claim can come in the form of investing proceeds from prohibited activities). The second form of wrongful activity is set out in 18 U.S.C. § 1962(b). This statute is directed at those who use patterns of prohibited activity to acquire control, or to maintain control, of an enterprise. Again, it is the process of gaining or maintaining control that must cause the harm, not the predicate acts. *Lightning Lube*, 4 F.3d at 1189-91; *see* RAKOFF & GOLDSTEIN, *supra*, § 1.06[2], at 1-81 (stating that this form of wrongdoing "requires that the *object* of the predicate racketeering activity itself be to gain an interest in or control of the paritcular enterprise").

[14]46 F.3d 258 (3d Cir. 1995).

[15]*Id.* at 267.

[16]The subtext of any RICO discussion is unavoidably broader. RICO is the civil law's Moby Dick. HERMAN MELVILLE, MOBY DICK 162-63 (Everyman Library 1992) ("what the White Whale was to them, or how to their unconscious understandings . . . he might have seemed the gliding great demon of the seas of life,--all this to explain, would be to dive deeper than Ishmael can go"). For those trying to understand RICO's history, nature, scope, and proper application,

III. PRE-*JAGUAR CARS* DECISIONS IN THE THIRD CIRCUIT

In *B.F. Hirsch v. Enright Refining Co.*,[17] the Third Circuit addressed the issue of whether a section 1962(c) RICO enterprise could be the same entity as the RICO *defendant*. The *Enright* panel concluded that a plain reading of section 1962(c)'s express statutory language, stating that the RICO defendant must be "employed by or associated with any 'enterprise,'" necessarily required that the RICO defendant must be distinct from the enterprise used to carry out the pattern of racketeering activity.[18] The Third Circuit found it self-evident that an enterprise could not employ itself or associate with itself. The Supreme Court recently confirmed that this linguistic analysis was correct.[19]

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the statute can push the limits of comprehension. RICO has a distinctive range of statutory components, each of which has numerous elements; and there is a tremendous volume of case law and legal commentary interpreting most of these elements. It can be a genuine labor to read that law, comprehend it and apply it, especially when the cases read RICO's language differently. Yet, even with an exhausting effort, we may still not apprehend all of the difficulties that any particular RICO issue presents, and may altogether miss essential issues.

This potential problem is rooted in the ever present danger of losing anchor and drifting away from shore without realizing it—something, no doubt, that will be evidenced in this article as well. Retaining focus requires remembering RICO's entire context and the specific words and phrases in each of its statutory subsections; studying each section's role; recognizing the distinctions and the interplay between RICO's numerous sections and the elements in each section; recalling, carefully examining and reflecting upon all of RICO's statutory history and its judicial interpretations; and understanding the thematic and practical connections between all of these when applying RICO to the facts of actual cases. Even with this effort, it can be difficult to find harmony in the RICO statute.

Jaguar Cars exemplifies a bold effort to examine RICO's fundamental issues. The *Jaguar Cars* court recognized that somehow the Third Circuit's earlier case law prevented a common sense RICO application. The court dove deep to examine the flaws which it perceived as the source of this confusion. It re-examined the prior case law by delving into RICO's original purposes and how the Supreme Court had interpreted and applied RICO in light of those purposes. Further, it looked to the interplay between different aspects of RICO in coming to its conclusion. While this article comes to different conclusions than the *Jaguar Cars*' panel (right or wrong), the lessons in the court's effort are highly valued no matter what the conclusion is.

[17]751 F.2d 628 (3d Cir. 1984).

[18]*Id.* at 633. The court stated:

> The language of section 1962(c) supports the defendant's argument. Under that subsection, the "person" must be employed by or associated with an "enterprise." The Enright Refining Company, Inc. clearly is not employed by the Enright Refining Company, Inc.; nor is it logical to say that the Enright Refining Company, Inc. is associated with the Enright Refining Company, Inc. Thus, the language contemplates that the "person" must be associated with a separate "enterprise" before there can be RICO liability on the part of the "person."

Id.

[19]*See* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001).

The *Enright* panel then addressed the concern that such a reading would "permit a corrupt organization to evade punishment."[20] After briefly setting out arguments attempting to undercut that concern, the *Enright* court went on to conclude that its reading, requiring distinctiveness, best comported with Congressional intent. The court observed that "[o]ne . . . purpose[] in enacting RICO was to prevent the takeover of legitimate businesses by criminals and corrupt organizations."[21] This distinctiveness requirement, separating the wrongdoer from the legitimate enterprise, was "in keeping with that Congressional scheme to orient section 1962(c) toward punishing the infiltrating criminals rather than the legitimate corporation which might be an innocent victim of the racketeering activity in some circumstances."[22] Thus, the defendant had to be sufficiently distinct from the enterprise to perform these acts of infiltration.

The Third Circuit then looked to *Enright*'s policy arguments in setting out section 1962(c)'s criteria. In *Petro-Tech, Inc. v. Western Co. of North America*,[23] the Third Circuit stated that section 1962(c) was intended to govern "only those instances" where an innocent or passive corporation is drained of its own money by the RICO persons, or was used by them to

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[20]*Enright Ref. Co.*, 751 F.2d at 633 (citation omitted).

[21]*Id.* at 633-34.

[22]*Id.* at 634. The *Enright* court's statements of legislative purpose were based, in part, upon language found in United States v. Turkette, 452 U.S. 576, 589-90 (1981). *Turkette* involved the issue of whether a section 1962(c) RICO defendant could *only* be liable if she infiltrated a legitimate business. The court concluded that RICO also reached the use of criminal enterprises that had no legitimate purpose; thus, RICO defendants could not escape liability because they only used criminal enterprises to harm others. In its opinion, the Supreme Court stated that although RICO's primary purpose was to punish the criminal infiltration of legitimate business, this was not RICO's sole purpose. *Id.* at 589-93. This meant that RICO could also punish racketeering activity that did not rely upon, or aim toward, infiltration of some enterprise.

Turkette interpreted RICO expansively. While recognizing that RICO's primary purpose addressed criminal infiltration of innocent legitimate enterprises, the opinion actually de-emphasized that point so that the Court could establish liability for conduct that involved the use of criminal enterprises that were not infiltrated victims. By contrast, *Enright* emphasized the role of criminal infiltration in limiting RICO's scope. As will be discussed later, in defining the elements of section 1962(c), the *Enright* court incorrectly applied Congress' general concern with the infiltration of legitimate businesses; rather than addressing section 1962(c)'s more specific concern with the use of enterprises to create harm. The goal of section 1962(c) is to stop those who have some control over an enterprise from misusing that enterprise. The concern is not over how the wrongdoer got that control, but is in stopping the criminal conduct that the control of the enterprise makes possible. By loose analogy, if the conduct proscribed by section 1962(c) is compared to using a gun, the focus is not on how the defendant stole the gun, or stole money to buy the gun; it is on punishing the defendant for using the gun. The problem with this analogy taken too far is that the enterprise is not wholly like a gun; a gun cannot suffer harm, but an enterprise can. *See infra* note 163 and accompanying text.

[23]824 F.2d 1349 (3d Cir. 1987).

extract money from others.[24] The same rule is repeated in later Third Circuit cases.[25] In *Rose v. Bartle*,[26] the court cited the same *Enright* language and then stated, "We see nothing in our decisions that would necessarily preclude an entity from functioning both as an 'innocent victim' of certain racketeering activity, and thus be the enterprise under section 1962(c), and as a perpetrator of other such activity, and thus be a person under that subsection."[27] Thus, *Enright*'s principles led to the conclusion that one of the section 1962(c) enterprise's primary identities was that of "innocent victim."[28]

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[24]The *Enright* court had favorably cited the Seventh Circuit's decision in Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). The *Petro-Tech* panel directed particular attention to "Judge Cudahy's thoughtful opinion" in *Haroco* to support the proposition that section 1962(c) was only intended to govern cases where corporate enterprise was an innocent or passive victim used to harm others or was drained of its own resources. *Petro-Tech*, 824 F.2d at 1359.

In *Haroco*, the Seventh Circuit had also addressed section 1962(c)'s distinctiveness requirement. The court followed an earlier district court opinion which had observed that "the enterprise may very well be the victim of the racketeering activity." *Haroco*, 747 F.2d at 400 (citing Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 23-24 (N.D. Ill. 1982) (Shadur, J.)). The *Parnes* court had stated that "it would make little sense to hold a corporation liable under RICO for the misconduct of lower level employees, at least where it appears that the corporation is a passive instrument or even a victim of the racketeering activity." *Id.* at 401 (citation omitted).

The *Haroco* panel stated that "*Parnes* [is] surely correct in saying that the corporation-enterprise should not be liable when the corporation is itself the victim or target, or merely the passive instrument for the wrongdoing of others." *Id.* (emphasis added). *Haroco* did not appear to conclude that the section 1962(c) enterprise would always be a victim. Instead, it stated that the enterprise might be a victim, or might be passively abused by lower level employees; and this weighed in favor of the distinctiveness requirement. Use of the word "target" takes the meaning of victimization beyond the collateral concept that the defendant's misuse of the enterprise's operations to harm others is a form of victimization; rather, a target suffers direct damage as the object of the defendant's harmful intentions.

[25]*See, e.g.*, Glessner v. Kenny, 952 F.2d 702, 710 (3d Cir. 1991).

[26]871 F.2d 331 (3d Cir. 1989).

[27]*Id.* at 359.

[28]*Id.* at 358. The *Rose* plaintiffs were employees of a county sheriff's office who were unwillingly removed from office and subjected to criminal charges, along with the sheriff himself who had lost a re-election bid after being named in a grand jury investigation. *Id.* at 334-35. These individuals brought RICO claims against the dominant political party in that county and some of its leaders. The alleged enterprises were the county and the political party. One issue was whether the political party could be an enterprise and a defendant. Looking back to *Enright*'s infiltration language and discussion, the *Rose* court concluded that the political party could be both an enterprise, used by its individual leaders, and a RICO defendant, using the county as an enterprise. In addressing the political party's role as a RICO perpetrator harming the individual plaintiffs, the county (enterprise) and its citizens were described as the political party's victims. *Id.* at 358-59.

Thus, there were two discussions of "victimization." First, the political party, as an enterprise, could be its leaders' innocent victim when they used their position within the party to harm the plaintiffs. In this context, the party was not the object of the defendants' wrongful conduct; rather, it was a means to achieve a malicious end directed against others. Second, and

This *Enright* line of cases is the focus of *Jaguar Cars*' review of the Third Circuit's jurisprudence. In an earlier case not expressly addressed by *Jaguar Cars*, however, the Third Circuit also interpreted the meaning of the enterprise-as-victim under section 1962(c).[29]

In *United States v. Provenzano*, defendant Provenzano was a union officer and his union was the alleged RICO enterprise.[30] Provenzano used his position in the union to carry out a systematic bribery scheme.[31] The *Provenzano* court addressed the issue of whether RICO required proof that the enterprise had benefited from the RICO defendant's pattern of racketeering activity.[32] The court concluded that section 1962(c)'s statutory language only required that the enterprise's affairs be conducted by the RICO defendant.[33] There was no statutory language requiring proof that the enterprise itself had to benefit from the RICO defendant's conduct.[34] Thus, "[t]he fact that the [enterprise] was harmed rather than benefited does not remove the conduct from RICO's ambit."[35] The court analogized the

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similarly, the county was the party's victim when used as the means to harm those same plaintiffs. Again, the focus was not on harming the county or its citizens, but in punishing individual political enemies. Thus, the two acts of victimization really represent a single phenomenon.

These descriptions of victimization go back to *Enright*'s and *Petro-Tech*'s requirement that a section 1962(c) enterprise be either an innocent victim or passive instrument used to harm others. In fixing the county's and the party's roles as enterprises, however, the court had no need to describe either as a victim; rather, it could have simply concluded the county was used as a passive tool by the party, and that the party was used as a passive tool by its leaders. These enterprises were only collateral victims, suffering harm to the integrity of their functions because of the way they were used as tools. The real victims were the plaintiffs who lost their jobs and who were subjected to criminal charges.

It is arguable, however, that the county and its citizens might be viewed as something more than collateral victims. Assuming, *arguendo*, that the *Rose* plaintiffs' allegations were true, the county and its citizens also suffered direct harm because qualified and valued public servants were wrongfully removed or driven from office. *See infra* notes 132-141 and accompanying text.

[29]*See* United States v. Provenzano, 688 F.2d 194 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982).

[30]*Id.* at 196-97

[31]*Id.*

[32]*Id.* at 199-200.

[33]*Provenzano*, 688 F.2d at 200.

[34]*Id.* at 200.

[35]*Id. Provenzano* also addressed the nature of what constituted conducting the affairs of the RICO enterprise under section 1962(c). Following the Second Circuit, the *Provenzano* court found that the defendant conducted the affairs of the RICO enterprise if "'(1) One is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise; or (2) The predicate offenses are related to the activities of that enterprise'." *Id.* (quoting United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980)). As set forth *infra* notes 78-82 and accompanying text, the Supreme Court has since ruled that only those persons operating or managing the enterprise's affairs can be deemed to have conducted the enterprise's affairs for purposes of RICO liability.

facts of *Provenzano* to the bribery of public officials, where the RICO enterprise, i.e., "the state itself," suffered a detriment from the racketeering acts carried out by state officials.[36]

The district court in *Temple University v. Salla Brothers, Inc.*[37] expanded *Provenzano*'s principles into a civil context involving employment relationships. In *Salla Brothers*, the court found that there was "no prohibition that . . . [a section 1962(c)] enterprise may not also be a victim of the pattern of racketeering injury."[38] In that case, plaintiff Temple University alleged itself as the enterprise victimized by the defendant independent contractors who allegedly defrauded the University and bribed its employees.[39] Other district courts also found that a section 1962(c) civil plaintiff could be the RICO enterprise in the employment relationship context.[40] These district court cases involved two scenarios: (1) where the enterprise was victimized by an employee or officer; and (2) where the enterprise was victimized by outside contractors that the enterprise had hired.

A variant on this relationship is found in cases where the plaintiff, alleging itself as a section 1962(c) enterprise, is the RICO defendant's weaker contractual partner. In *T.I. Construction Co. v. Kiewit Eastern Co.*,[41] the plaintiff was a subcontractor hired by the defendant contractor on a large construction project.[42] The defendant contractor allegedly gave the plaintiff subcontractor the choice of either cooperating in the commission of illegal acts, or becoming the target of fraud and terroristic threats.[43] The dispute ended in the plaintiff's termination from a job worth over $2

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[36]*Id.* (citations omitted).

[37]656 F. Supp. 97 (E.D. Pa. 1986).

[38]*Id.* at 102.

[39]*Id.* at 100. After *Reves v. Ernst & Young*, 507 U.S. 170 (1993), *infra* notes 78-82 and accompanying text, a direct section 1962(c) claim could not survive if the outside defendants did not operate or manage the enterprise.

[40]Springfield Township v. Kuss, No. 93-1629, 1993 U.S. Dist. LEXIS 14051 (E.D. Pa. Oct. 4, 1993) (RICO defendant was independent contractor hired to administer township pension plans); Gardner v. Authorized Distrib. Network, Inc., No. 91-5335, 1992 U.S. Dist. LEXIS 14409 (E.D. Pa. Sept. 21, 1992) (RICO defendant was former officer of plaintiff enterprise); Mid-Atlantic Exps., Ltd. v. Krick, No. 92-1577, 1992 U.S. Dist. LEXIS 11931 (E.D. Pa. Aug. 7, 1992) (RICO defendant was a former vice president and general manager of the plaintiff enterprise).

Similar results have been reached elsewhere. *See, e.g.*, United Energy Owners v. United Energy Mgmt., 837 F.2d 356, 362 (9th Cir. 1988) (RICO defendants were independent contractors of the plaintiff enterprise); Sun Savings & Loan Assoc. v. Dierdorff, 825 F.2d 187, 194 n.6 (9th Cir. 1987) (RICO claim by plaintiff savings and loan enterprise against its former president allegedly involved in a kickback scheme to provide loans to plaintiff's customers).

[41]No. 91-2638, 1992 U.S. Dist. LEXIS 11607 (E.D. Pa. Aug. 5, 1992).

[42]*Id.* at *5.

[43]*Id.* at *7.

million.[44] For its RICO claims, the *T.I. Construction* plaintiff alternatively pleaded itself as the section 1962(c) enterprise that was used to cause its own harm.[45]

Following the reasoning from an earlier district court decision, the *T.I. Construction* court held that section 1962(c) RICO claims had two different liability tests, based on whether the defendant was an insider or an outsider.[46] A plaintiff trying to prove an insider's liability needs to show that the RICO defendant (1) is able to carry out the predicate acts "'solely by virtue of his position in the enterprise or involvement in or control over'" the enterprise's affairs; or (2) "'the predicate offenses are related to the activities of that enterprise.'"[47] Outsider liability is supposedly rooted in the Third Circuit's decision in *Averbach v. Rival Manufacturing Co.*[48] Under *Averbach*, outsider liability requires proof that the outside defendant corrupted the enterprise's internal processes.[49] Applying the outsider test, the *T.I. Construction* court held against the plaintiff because "there [we]re no allegations that defendants had corrupted the operation of plaintiff's own internal processes."[50] In fact, the court observed that the plaintiff had resisted such corruption.[51]

Averbach itself involved a claim that the section 1962(c) RICO enterprise was the United States District Court for the Eastern District of Pennsylvania.[52] The defendant allegedly corrupted the court system by abusing the discovery process.[53] While recognizing that a RICO claim could be based upon the theory that a court system was the corrupted enterprise, the Third Circuit denied relief.[54] The court found that the defendant was not actually participating in the conduct of the court system,

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[44] *Id.* at *5-*8.

[45] *Id.* at *29.

[46] That court's insider/outsider analysis originated in Moffatt Enters., Inc. v. Borden, Inc., 763 F. Supp. 143, 148-49 (W.D. Pa. 1990). T.I. Constr. Co., 1992 U.S. Dist. LEXIS 11607, at *30-*31.

[47] *Moffatt Enters.*, 763 F. Supp. at 148-49 (quoting *Provenzano*, 688 F.2d at 200).

[48] *Id.* (citing Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1018 (3d Cir.), *cert. denied*, 482 U.S. 915 (1987) and 484 U.S. 422 (1987)). In *Moffatt*, the plaintiff was a distributor of Borden's products. *Id.* at 144. The plaintiff claimed that Borden conducted the plaintiff's affairs as the section 1962(c) enterprise. *Id.* at 148. The district court concluded that Borden's conduct only amounted to conducting its own affairs, and not the plaintiff's affairs, because Borden had not corrupted the plaintiff's internal operations. *Id.* at 148-49.

[49] *T.I. Constr. Co.*, 1992 U.S. Dist. LEXIS 11607, at *31.

[50] *Id.*

[51] *Id.*

[52] *Averbach*, 809 F.2d at 1018.

[53] *Id.*

[54] *Id.*

e.g., as a judge or the court's support personnel.[55] Rather, "[i]f Averbach's allegations [we]re true, no more occurred with respect to the enterprise in question than to mislead those who conducted it. That is not, in our view, equivalent to the participation in its affairs which is required by . . . [section] 1962(c) . . . ."[56]

Examining *Averbach*'s discussion and the authorities cited,[57] those persons corrupting the enterprise's internal processes were actually insiders, *e.g.*, the judge or court personnel suggested in *Averbach*, rather than outsiders who use, but do not operate, the court system. Thus, the fundamental problem section 1962(c) addresses involves those who have the ability to corrupt an enterprise's operations as part of some self-aggrandizing scheme, i.e., insiders or those who have equivalent power. Genuine outsiders, like the *Averbach* defendants, are non-participants in the enterprise's affairs. Their actions might have some affect on the enterprise; but affecting the enterprise, in itself, is not equivalent to finding participation—whether honest or corrupt—in the enterprise's affairs.

The discussion of inside versus outside participation clarifies the analysis found in *Moffatt Enterprises* and *T.I. Construction*. Those cases imply that an outsider can corrupt the enterprise's operations. In turn, this creates the impression that corruption of the enterprise's internal processes is somehow separate and distinct from an insider controlling the enterprise's affairs.[58] *Averbach* stands for a different principle: Those in a position to conduct the enterprise's operations from *inside* the enterprise are in the best

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[55]The court explained that:

> [i]n those cases in which courts have been recognized as RICO enterprises, however, the participants engaged in patterns of activities designed to corrupt the operation of the courts' own processes. Whereas litigants before courts call upon the courts to exercise the judicial process, they do not participate in it in the sense intended by Congress in 18 U.S.C. § 1962(c) (1982). Such litigants do not share with the court's personnel a common purpose with respect to the activity complained of. Indeed Averbach's allegations suggest that while those responsible for conducting Rival Manufacturing Company's defense of product liability litigation may have had a common or shared purpose, that purpose was quite at variance with those of the judges and support personnel of the district court.

Id.

[56]*Id.* (citing 18 U.S.C. § 1962(c) (1982)).

[57]*See* United States v. Bacheler, 611 F.2d 443 (3d Cir. 1979) (defendants were employees of traffic court); United States v. Herman, 589 F.2d 1911 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979) (defendants were magistrate judges); United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa.), *aff'd*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980) (defendant was a former president judge of traffic court).

[58]*Moffatt Enterprises* and *T.I. Construction* retain value to the extent that they recognize some genuine significance in differentiating between those working inside the enterprise and those who are outside the enterprise.

position to conduct its affairs in a corrupt manner, and those truly outside the enterprise cannot participate in the enterprise's affairs. If corruption of an enterprise's internal processes is synonymous with, or a subset of, conducting the enterprise's affairs through a pattern of racketeering activity, then *Averbach*'s result is in line with *Jaguar Cars*' basic holding. This is true except to the extent that if the corruptive process leads to the enterprise's own financial harm, the enterprise itself may have no claims against its insiders.

IV. PUBLIC BRIBERY CASE LAW

Provenzano looked to public bribery case law to support the idea that a section 1962(c) enterprise could be a RICO victim in some circumstances. Twelve years after *Provenzano*, the Third Circuit applied the enterprise-as-victim logic in a public bribery case. In *United States v. McDade*,[59] a United States Congressman allegedly engaged in an ongoing pattern of bribery and influence peddling.[60] The main argument was that a Congressional Committee could not be a section 1962(c) enterprise because such a use was barred by the Constitution's Speech or Debate Clause.[61]

The Third Circuit rejected this argument, observing that the committee itself was not being charged with any wrongdoing. Rather, the correct view was that "the committee had been exploited by the individuals charged as defendants."[62] The court stated that "[a] major purpose of the RICO statute was to protect *legitimate* enterprises by attacking and removing those who had infiltrated them for unlawful purposes."[63] The committee was a victim rather than a wrongdoer, and thus could be a RICO enterprise.[64]

Use of the word "infiltrated" must take on an atypical meaning here because a congresswoman is already on the committee through some legitimate means, e.g., election or seniority. In this situation, "infiltration" can only mean that a person who is legitimately part of the enterprise acts in a manner so inconsistent with her intended function that she is the qualitative equivalent of the criminal infiltrator. Using another analogy, the corrupt congresswoman is like a spy, passing herself off as one type of

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[59]28 F.3d 283 (3d Cir. 1994), *cert. denied*, 514 U.S. 1003 (1995).

[60]*Id.* at 286.

[61]*Id.* at 296.

[62]*Id.*

[63]*McDade*, 28 F.3d at 296 (citing United States v. Turkette, 452 U.S. 576, 591 n.13 (1981); Russello v. United States, 464 U.S. 16, 28 (1983)).

[64]*McDade*, 28 F.3d at 296.

person to gain a place in the enterprise, with the actual intention to work contrary to the enterprise's interests. Instead of serving the public through her official role, a venal public official uses the office for her own financial ends. For this misconduct in office, she can be subjected to section 1962(c) RICO liability.

The *Provenzano* court believed that this type of abuse and victimization of office by a public servant stood for a general principle of broader application. Thus, the abuse and victimization of the union by one of its employee-officers was similarly subject to RICO's sanction. Some of the district court cases cited earlier[65] took the same principle into the context of the private corporate employer victimized by its own employees or those it hired, although, like *McDade*, none of these cases actually involved infiltration by a complete stranger.[66]

V. THE THREE SUPREME COURT RICO DECISIONS RELIED UPON IN *JAGUAR CARS*

The pivotal Supreme Court case establishing RICO's broad civil application is *Sedima S.P.R.L. v. Imrex Co.*[67] The *Sedima* Court rejected the notions that: (1) a RICO defendant must first be convicted of the RICO predicate acts[68] and, more importantly for our purposes, (2) a RICO plaintiff does not have to establish a separate "racketeering injury" to set forth a RICO claim.[69] The "racketeering injury" requirement is an unrefined concept intended to put some distance between a person simply committing the predicate acts (of wire, mail and securities fraud)[70] and RICO liability. Depending on how the "racketeering injury" requirement is interpreted, it could be treated as expressing something found in the

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[65]*See supra* note 40.

[66]As set forth above, *supra* notes 41-58 and accompanying text, these district court cases involved some formal relationship between the enterprise and the defendant, ranging from employee or officer to contractor. In *T.I. Construction* and *Moffatt Enterprises*, contractual partners in a superior position allegedly tried to use their superior force to inflict harm on the plaintiff enterprise; however, in both of those cases, the courts determined that the defendants were not actually conducting the plaintiffs' affairs. Thus, those cases did not even involve the type of conduct subject to section 1962(c) liability.

[67]473 U.S. 479 (1985).

[68]*Id.* at 490-93.

[69]*Id.* at 494-500.

[70]Wire fraud, mail fraud, and securities fraud were at the core of RICO's expansion. Securities fraud is no longer a predicate act under the 1995 Private Securities Litigation Reform Act (PSLRA). 18 U.S.C. § 1964(c) (2001) ("no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962").

statutory language. Another possibility would be that it adds an extra-statutory element of proof that would exclude civil RICO's application to legitimate businesses whose conduct happened to fall into the literal language of the statute. Yet another is that it could be treated as having no clear meaning at all.

In rejecting a "racketeering injury" requirement, a 5-4 majority chiefly relied upon RICO's text. RICO's language expressly prohibited a broadly defined category of "persons" from engaging in a pattern of statutorily defined racketeering activity, whether or not those persons were traditional mobsters.[71] The requirement of a "racketeering injury" added something to RICO's language that was not otherwise required by the statute's text, and there was no room for such an addition. The majority opinion stated that "[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by [18 U.S.C. §§ 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a [civil RICO] claim."[72] This is true whether or not the RICO defendant is a notorious gangster or a bank, so long as the express statutory criteria are met.[73]

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[71] *Sedima*, 473 U.S. 494-500.

[72] *Id.* at 495.

[73] The dissenters were incredulous and the divide was deep. In his dissent, Justice Marshall wrote:

> I believe that the statutory language and history disclose a narrower interpretation of the statute that fully effectuates Congress' purposes, and that does not make compensable under civil RICO a host of claims that Congress never intended to bring within RICO's purview. . . . The Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions. We do not lightly infer a congressional intent to effect such fundamental changes. To infer such intent here would be untenable, for there is no indication that Congress even considered, much less approved, the scheme that the Court today defines.

Id. at 501 (Marshall, J., dissenting).

Justice Marshall found that the voluble mix of unrestrained civil plaintiff, the treble damages and attorney's fees remedies, and the inclusion of securities, wire and mail fraud as predicate acts, created an unexpected litigation explosion against legitimate businesses. If permitted to proceed, this unanticipated and improper use of civil RICO would usurp the traditional role of state courts and state common law, as well as certain federal remedies and statutory schemes. *Id.* at 503-06. He concluded that these dramatic changes in the law could only be permitted if Congress had expressed a clear intent to do so in the statutory text and/or legislative history. *Id.* at 507. Justice Marshall identified a "clanging silence" on the subject in RICO's legislative history and no clear textual expression in the statute that Congress intended to dramatically change or federalize the law governing commercial disputes. *Id.* (citation omitted).

Justice Powell's dissent similarly stated:

> [T]he Court today reads the civil RICO statute in a way that validates uses of the

In taking this text-centered approach,[74] the Court provided a simple and direct summary of what constituted a section 1962(c) claim:

> A violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern [ ] (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim. Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of § 1962, nor is mere commission of the predicate offenses. In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.[75]

"Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise."[76]

> statute that were never intended by Congress. . . . I write separately to emphasize my disagreement with the Court's conclusion that the statute must be applied to authorize the types of private civil actions now being brought frequently against respected businesses to redress ordinary fraud and breach-of-contract cases.

Id. at 523. Justice Powell implied that the interpretive logic of the majority's analysis compelled an irrational result and that such logic should not have been adhered to under those circumstances. *Id.* at 524 n.1 (Powell, J. dissenting).

[74]The fundamental dispute among the closely divided Justices centered on the degree of each side's reliance upon the statutory language and its role in relation to legislative history. The majority believed that statutory text was always preeminent in interpreting any statute, and their holding was primarily driven by the statute's language. The dissenters vigorously analyzed the statutory history and the practical consequences of the majority's plain language methodology.

The majority itself did not avoid all discussion of history and consequences, solely to focus on the text. *Id.* at 488-99. Justice White responded to the dissenters that the legislative history, however, had to be seen through the lens of the statute's language:

> Given the plain words of the statute, we cannot agree with the court below that Congress could have had no "inkling of [§ 1964(c)'s] implications." 741 F.2d, at 492. Congress' "inklings" are best determined by the statutory language that it chooses, and the language it chose here extends far beyond the limits drawn by the Court of Appeals. Nor does the "clanging silence" of the legislative history, *ibid.*, justify those limits. For one thing, § 1964(c) did not pass through Congress unnoticed. See Part II, *supra*. In addition, congressional silence, no matter how "clanging," cannot override the words of the statute.

Id. at 495-96 n.13.

[75]*Sedima*, 473 U.S. at 496.

[76]*Id.* at 497. In his critique of the majority's conclusions, Justice Marshall stated that:

> the statute clearly contemplates recovery for injury resulting from the confluence of events described in § 1962 and not merely from the commission of a predicate act. The Court's contrary interpretation distorts the statutory language under the guise of adopting a plain-meaning definition, and it does so without offering any

Jaguar Cars also relied on *Reves v. Ernst & Young*.[77] The issue in *Reves* involved the level of control over an enterprise necessary to establish section 1962(c) RICO liability, with the analysis focusing on the meaning

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> indication of congressional intent that justifies a deviation from what I have shown to be the plain meaning of the statute.

Id. at 509-10. Given the dissenters' passion, juxtaposing Justice Marshall's statement on how section 1962(c) functions with the majority's language is stunning. Both seem to be providing the same test. What Justice Marshall calls the RICO injury, i.e., the racketeering injury, is, at least in large part, the assurance that all of RICO's elements—not just the predicate acts—are required to state a claim. Justice White's majority opinion appeared to have reached the same conclusion. Justice White had expressly stated that harm from the "mere commission of the predicate offenses" alone was not enough to make out a RICO claim. *Id.* at 496.

A restatement of the fundamental issue in *Sedima* helps to clarify the origin of this seemingly *Alice in Wonderland* result. The real issue was: under what circumstances, if any, is it appropriate to hold a legitimate business involved in wire fraud, mail fraud and/or securities fraud liable under RICO? The dissenters found civil RICO's use against legitimate businesses so contrary to Congress' discussions on RICO that they could not conceive that such a use was permitted. They then oversimplified the majority's holding by asserting that the majority had concluded that RICO claims existed so long as there were predicate acts that harmed others, without regard to all of the elements in the racketeering edifice that Congress had erected. Thus, the dissenters claimed, the majority's reading of the statute ignored the racketeering elements in the statute, and wrongly focused on the underlying crimes. Unfortunately, these predicate acts included common law fraud—via the mail and wire fraud statutes—and securities fraud. Included in this straw man argument was the conclusion that civil RICO plaintiffs were only slapping a RICO label on common law and securities fraud, and thus, civil RICO claims differed in no material aspects from those state and federal claims. The dissenters' converse position was that: (1) a full application of RICO's entire text, and the racketeering requirements therein, would naturally filter out claims against legitimate businesses; and (2) a full study of RICO's statutory history supported that conclusion.

In fact, RICO's practical application has been consistent with the minority's position that a civil RICO plaintiff must prove all of the elements in sections 1964(c) and 1962(c) to make out a RICO claim, and not just the presence of a predicate act that harmed the plaintiff. RICO's text has been read to include numerous hurdles that are not found in common law fraud claims. The case law on these issues has been extensively developed since *Sedima*, and it is difficult to bring successful civil RICO claims that can meet each required element. *See generally* RAKOFF & GOLDSTEIN, *supra* note 13. The fact that all of this has still not eliminated RICO's use against legitimate businesses demonstrates severe limits in the dissenters' racketeering injury argument.

This forces the racketeering injury theory back to its fundamental premises: (1) prior to reading the text, the courts must first look at RICO's legislative history to determine Congress' intentions; and (2) a study of that history does not reflect any intention that RICO should be applied to legitimate businesses because this would mean that Congress intended RICO to supplant longstanding state and federal law. Only at this point should the courts look at RICO's text to determine whether such an intention is expressed in the statutory language. As RICO's text makes no clear statement that Congress intended RICO to supplant common law fraud and securities fraud in these situations, there is no basis to infer that Congress could have intended such a radical application in the language it chose. Under this approach, the belief is that the language used has such a unique relation to its particular statute that the meaning of those words must be chiefly derived from the statute's history and definitional sections and not primarily from the ordinary meanings associated with that language. In this methodology, the text is more like the tip of an iceberg, rather than the ripe fruit of a long maturation process.

[77]507 U.S. 170 (1993).

of the statutory word "conduct."[78] Thus, the Supreme Court had to determine what it meant for a defendant to "conduct" the affairs, or to participate in the "conduct" of the affairs of, the RICO enterprise.[79]

After analyzing the dictionary definition of the word "conduct" and reviewing the legislative history, the *Reves* Court determined that a RICO defendant has to operate or manage the affairs of the enterprise to have any potential section 1962(c) RICO liability.[80] In examining the legislative history, the Court repeatedly referred to the illicit "acquisition" of an enterprise and "operation" of an enterprise as the focal points of Congressional concern in creating the RICO statute. The Court further found that RICO's goals were limited to this two-fold purpose: to punish those who wrongfully acquire or wrongfully operate an enterprise.[81] Its discussion associated the former goal with sections 1962(a) and (b) and connected the concept of wrongfully operating an enterprise to section 1962(c) RICO claims.[82]

The Court also anticipated claims that its ruling was too lenient on outsiders.[83] Reprising *United States v. Turkette*,[84] and recognizing that RICO had manifold purposes, the Court admitted that "RICO's major purpose was to attack the 'infiltration of organized crime and racketeering into legitimate organizations.'"[85] This objective, however, was addressed

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[78]Section 1962(c) provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise ... to *conduct* or participate, directly or indirectly, in the *conduct* of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (emphasis added).

[79]*Id.*

[80]*Reves*, 507 U.S. at 177-85. *But see* Smith v. Berg, 247 F.3d 532 (3d Cir. 2001) (RICO's conspiracy statute, 18 U.S.C. § 1962(d), can be used against a defendant for conspiring to violate section 1962(c) where that defendant did not operate or manage the enterprise).

[81]In examining this history, the Court stated:

> Of course, the fact that Members of Congress understood § 1962(c) to prohibit the operation or management of an enterprise through a pattern of racketeering activity does not necessarily mean that they understood § 1962(c) to be limited to the operation or management of an enterprise. *Cf. Turkette*, 452 U.S. at 591 (references to the infiltration of legitimate organizations do not "requir[e] the negative inference that [RICO] did not reach the activities of enterprises organized and existing for criminal purposes"). It is clear from other remarks, however, that Congress did not intend RICO to extend beyond the acquisition or operation of an enterprise.

Reves, 507 U.S. at 182. As set forth *infra* notes 149-153 and accompanying text, if the words "acquisition" and "operation" are taken in their common use, this does not appear to be an accurate conclusion.

[82]*Reves*, 507 U.S. at 181-83.

[83]*Id.* at 184-85.

[84]452 U.S. 576 (1981).

[85]*Reves*, 507 U.S. at 185. *See supra* note 22.

by sections 1962(a) and (b), and section 1962(c)'s language limiting outsider liability did not alter the scope of those two sections or limit ability to punish criminal infiltration by outsiders.

This implied that RICO's goal of punishing outside infiltration into legitimate enterprises was wholly addressed by sections 1962(a) and (b). By contrast, section 1962(c) was limited to persons "employed by or associated with" an enterprise, language that can never reach complete outsiders. Under section 1962(c), liability only exists for those who are sufficiently connected to the enterprise to conduct its affairs, and not simply their own affairs.[86] *Reves* did not exclude outsiders from potential section 1962(c) liability, but limited culpable outsiders to those who have conducted or participated in the conduct of the enterprise's affairs, through the operation or management of the enterprise.[87] There is no express discussion in *Reves* as to whether the enterprise could be the victim of those operating or managing the enterprise. Interestingly, the issue might have presented itself under *Reves'* facts. In *Reves*, the enterprise was an agricultural co-operative[88] that allegedly was defrauded by its general manager. The co-op and a class of its noteholders were RICO plaintiffs at the trial level.[89] The trial court denied a motion to dismiss the RICO claims, but ultimately granted summary judgment against the co-op and the noteholders on their RICO claims.[90]

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[86]*Reves*, 507 U.S. at 185.

[87]*Id.* This is the analysis that *Jaguar Cars* used to challenge *Enright*'s criminal infiltration theory. *Reves* appears to take the same statutory language addressed in *Enright*—"employed by or associated with"—and reads an opposite meaning into that language. Instead of distinctiveness, employment and association imply intimacy. A person cannot be a section 1962(c) RICO defendant unless she is so close to the enterprise that she can control its affairs. Those whose relationship to the enterprise is too distant cannot be section 1962(c) defendants because they can never get close enough to control the enterprise and in turn carry out a pattern of criminal behavior. In fact, the conflict between *Enright*'s basic holding and *Reves* is a mirage. In one case, the distance between defendant and enterprise is important because of the need to show a distinction between the defendant and the enterprise; in the other case, that identical distance is emphasized to demonstrate the proximity of the defendant operating the enterprise from which she is distinct. The actual distance between the defendant and the enterprise in both cases remains the same; it is perspective, context, and purpose that alter the description of that distance.

[88]*Id.* at 184-86. The Supreme Court discussed the management of the co-op in determining the level of the defendant's control over the enterprise, thus equating the co-op with the enterprise.

[89]Robertson v. White, 633 F. Supp. 954, 960 (W.D. Ark. 1986). The co-op was insolvent and originally acted as a debtor-in-possession; however, the bankruptcy court later appointed Thomas Robertson as trustee. Arthur Young & Co. v. Reves, 937 F.2d 1310, 1321 (8th Cir. 1991), *aff'd*, 507 U.S. 170 (1993). Robertson originally represented certain noteholders as well, but later only represented the co-op.

[90]*Arthur Young & Co.*, 937 F.2d at 1322.

In denying the motion to dismiss, the trial court observed that there were different periods of alleged RICO activity having different effects on the co-op, and later the noteholders, as time progressed. The court stated that "[t]he alleged R.I.C.O. violations . . . had serial victims: first the Co-op, then the noteholders."[91] Thus, the co-op was originally the victim, but later the vehicle used to victimize the noteholders. It was "at the point of insolvency [that] the Co-op became an *engine of fraud, not a victim of fraud*."[92]

Neither the district court, the circuit court, nor the Supreme Court raised or addressed the issue of whether the co-op could be both a victim and the enterprise. On appeal, only the class of noteholders raised RICO issues.[93] Thus, there was no opportunity for the appellate courts to review the trial court's analysis that the co-op was the enterprise, i.e., the engine of fraud and the victim.

The last Supreme Court pillar in *Jaguar Cars'* analysis is *National Organization for Women, Inc. v. Scheidler*.[94] In that case, the Supreme Court addressed whether or not section 1962(c) required the plaintiff to prove that either the RICO enterprise or the predicate acts "were motivated by an economic purpose."[95]

The Court did not have to address the issue of whether a section 1962(c) enterprise could ever be a RICO plaintiff because that issue was not directly before the Court. As stated, the Court's interest was in determining whether section 1962(c) required an economic motive. Assuming *arguendo* that the acquisition of an enterprise was connected to the presence of an economic motive, the Court reasoned that "since the enterprise in subsection (c) is not being acquired, it need not have a property interest that can be acquired nor an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity."[96] In the course of this analysis, the Supreme Court stated that, rather than being the object of acquisition, "the 'enterprise' in subsection (c) connotes generally the vehicle through which

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[91] *Robertson*, 633 F. Supp. at 977.

[92] *Id.* (emphasis added).

[93] Arthur Young & Co. v. Reves, 856 F.2d 52, 53 (8th Cir. 1988), *rev'd sub. nom.* Reves v. Ernst & Young, 494 U.S. 56 (1990). Trustee Robertson only appealed on his breach of contract claim. *Id.* The Supreme Court described the class of noteholders as the Petitioners in the case before it. *Reves*, 507 U.S. at 175.

[94] 510 U.S. 249 (1994).

[95] *Id.* at 252.

[96] *Id.* at 259.

the unlawful pattern of racketeering activity is committed, rather than the victim of that activity."[97]

At footnote 5 of its opinion, the *Scheidler* Court discussed the different ways that an enterprise could be viewed: "One . . . [author] uses the terms 'prize,' 'instrument,' 'victim,' and 'perpetrator' to describe the four separate roles the enterprise may play in § 1962."[98] The author describes how these four functions relate to the different RICO sections.

> Typically, a violation involving an unlawful acquisition [section 1962(b)] will find the enterprise in the role of "prize" or "victim." Violations involving the operation of an enterprise by a pattern of racketeering activity [section 1962(c)] may find the enterprise in the role of an *"instrument," "victim," or perpetrator.*[99]

The *Scheidler* Court held that a RICO plaintiff did not have to prove an economic motive, as there was no such requirement in RICO's statutory language.[100] The Supreme Court reversed the circuit court decisions that inferred the necessity of an economic motive from RICO's statutory language. On the simplest level, the Court found that the RICO statute did not have any express language requiring an economic motive.[101] The more complex analysis dealt with the issue of whether the language Congress used included the concept of economic motive without an express statement of those actual words.

The same phenomenon is at issue here. RICO provides relief to "*any person* injured in his business or property by reason of a violation of section 1962[(a-d)]."[102] RICO's statutory definition of person includes "*any* individual or entity capable of holding a legal or beneficial interest in

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[97]*Id.*

[98]*Scheidler*, 510 U.S. at 259 n.5 (citing G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 307-25 (1982)).

[99]Blakey, *supra* note 98, at 307-09 (emphasis added) (footnote omitted). Blakey is also the principal author of the RICO statute itself. Gregory J. Wallace, *Outgunning the Mob*, 80 A.B.A. J. 60 (Mar. 1994). His article sets forth examples where the section 1962(c) RICO enterprise is best described as the victim. Professor Blakey cited the Third Circuit's *United States v. Provenzano* decision as an example of the RICO enterprise as a victim, quoting the pertinent language "that the union was harmed rather than benefited does not remove the conduct from RICO's ambit." Blakely, *supra* note 98, at 307-09.

[100]*Scheidler*, 510 U.S. at 257-61.

[101]"Nowhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required." *Id.* at 257.

[102]18 U.S.C. § 1964(c) (2001) (emphasis added).

property."[103] The definition of enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[104] None of these provisions include language that an enterprise is not a person when it comes to making section 1962(c) claims. Thus, there is no express statutory language that says a section 1962 (c) enterprise cannot be a victim.

Section 1962(c) itself also does not include any expressly limiting language.[105] Thus, there is no literal language in the RICO statute that excludes an "enterprise" from the definition of person when the section 1962(c) "any person" injured by a RICO violation is also the RICO enterprise. The issue is whether the language of section 1962(c) necessarily requires such a conclusion from meanings found within its actual text or legislative history.[106]

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[103]18 U.S.C. § 1961(3) (2001) (emphasis added).

[104]18 U.S.C. § 1961(4) (2001).

[105]*See supra* note 12.

[106]The Supreme Court has often interpreted RICO expansively. In the face of arguments that Congress could not have meant RICO to be used as it has been used over the last twenty years is the well known quote from Judge Cudahy: "'The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Sedima*, 473 U.S. at 499 (quoting Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984)). RICO, however, is not without limits, as *Reves* demonstrates.

One could teach a challenging course on statutory interpretation solely using RICO cases as course material. Of particular interest would be the interpretation of individual words, including the Court's use of Webster's Third New International Dictionary to interpret the meaning of words that Congress chose in writing the statute. *See, e.g.*, Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001) (meaning of the words associate and employ); National Org. of Women v. Scheidler, 510 U.S. 249, 258 (1994) (meaning of the word affect); Reves v. Ernst & Young, 510 U.S. 170, 177 (1993) (meaning of the word conduct); Russello v. United States, 464 U.S. 16, 21 (1983) (meaning of the word interest). *See also* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994) (arguing that the Supreme Court should exercise greater care in its use of dictionary definitions).

RICO's most fascinating and troubling word, though arguably not its most important, is "racketeer." The confusion, and frustration, in understanding RICO's scope and purpose begins with the fact that the ordinary use of the word "racketeer" is different than the use of the word "racketeer" in RICO's statutory context.

As we know them, "Racketeers" came into existence in 1920, along with Prohibition. While the word "racket" has been used to describe the same sort of criminal conduct reaching back to eighteenth century England, the word "*[r]acketeer* was a Novelty." H.L. MENCKEN, THE AMERICAN LANGUAGE 580 & n.2 (Knopf 1960). Congress' selection of the word "racketeer" in RICO's title, and use in its text—and even the acronym "RICO" (obviously taken from the movie character Caesar Enrico "Rico" Bandello, played by Edward G. Robinson in the first Prohibition era gangster classic *Little Caesar*)—lead to an inference that Congress must have really intended RICO to apply only to classic gangsters like Little Caesar, "Scarface" Al Capone, Meyer Lansky, and their modern counterparts, e.g., drug lords. Congress' prominent use of the word "racketeer" would not seem to make sense if the Act were going to be most commonly applied—in a civil

VI. THE *JAGUAR CARS* DECISION

In *Jaguar Cars*, the plaintiff was not the alleged enterprise. Thus, the issue of whether a 1962(c) enterprise could be the RICO plaintiff was

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setting at least—to legitimate businesses and individuals who, in most cases, no U.S. Attorney would consider prosecuting. In fact, however, civil RICO is almost entirely used against "legitimate" businesses and people. *See Sedima*, 473 U.S. at 506 (Marshall, J., dissenting) (As early as 1985, "[o]nly 9% of all civil RICO cases have involved allegations of criminal activity normally associated with professional criminals. . . . The central purpose that Congress sought to promote through civil RICO is now a mere footnote.")

One way to look at this apparent contradiction is to distinguish between the phenomena of inference and detection. Detectable facts about RICO—preeminently the statute's actual language—show that RICO encompasses *any person* who acts in the proscribed ways. A person is what they do, not what they are called. If a banker acts like a criminal, then the banker is a criminal, whether or not he looks like Al Capone. Thus, the only salient question would appear to be: Does the conduct at issue fall within the range of conduct that RICO prohibits?

On the risks of relying too much on un-tempered inferences over fact-based detection, see PHILIP RIEFF, FREUD: THE MIND OF A MORALIST 80 (Viking Press 1976). Rieff makes the point, in part, through an old Jewish joke: Two people "meet on a train. 'Where are you going?' one asks. 'I'm going to Pinsk,' the other replies. To which the first answers, 'You say you are going to Pinsk, because you want me to think you are going to Minsk. But I know you are going to Pinsk. So why are you lying to me?'" *Id.* (footnote omitted). While the joke is not an exact fit, we know that: in adopting the RICO statute, Congress chose broad language covering any person who acts in the defined manner. Many believe, or are convinced, that Congress only really meant to use RICO against classic gangsters, but the Supreme Court has repeatedly read RICO's language to cover any person who acts in the defined manner, just as Congress wrote the statute, and Congress has allowed this to go on for over 15 years. Those who remain wedded to the conviction that Congress only meant to cover gangsters might experience a shock similar to the Pinsk-bound passenger's train-mate. On Congress' intent to employ RICO broadly, see, e.g., Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827, 831-32 & n.24 (1987) ("Senator McClellan, principal sponsor of RICO, rejected the proposition that reform ought to be limited to traditional organized crime.").

When the debate was still fresh, however, the argument that RICO was only intended to apply to mobsters was arguably rooted in another form of detectable facts, legislative history. *Sedima*'s dissenters believed that RICO's legislative history provided the hardest facts from which to draw RICO's meaning. The majority, while not wholly discounting legislative history, concluded that the statute's language, the actual fruit of the legislative effort, provided the most sound basis for interpreting legislative intent and even for properly reading the legislative history. Thus, instead of the history giving the words context, the words gave the history context. *See supra* notes 73-74 & 76.

The fact that the variety of civil RICO applications based on patterns of mail and wire fraud outstrips criminal prosecutions likely shows a "working" interpretation of the RICO statute that provides a rough balance to these positions, i.e., traditional businesses and business people will not often be treated as criminals by the criminal justice system; however, the criminal justice system will lend some tools to the civil side to create punishments (financial super-penalties) and labels that go beyond the normal civil sanctions. Thus, there is something approaching a practical equilibrium that accommodates the theoretical tensions.

not squarely before the court.[107] The central issue before the court was whether the officers and employees of the alleged enterprise were sufficiently distinct from that enterprise to be held liable under section 1962(c). Prior Third Circuit jurisprudence typically has not permitted RICO claims against employees where their corporate employer was the enterprise. But in *Jaguar Cars*, the court held that corporate employees were sufficiently distinct from the corporation to be liable under section 1962(c) when their corporate employer was the enterprise used to carry out the predicate acts. This position was recently affirmed by the Supreme Court.[108]

Citing to *Scheidler* and *Reves*, the *Jaguar Cars* court stated that "[i]n these cases the Supreme Court held that the 'enterprise' in subsection (c) is *properly viewed* as the 'vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity.'"[109] The court found that the Supreme Court in *Reves* initiated a clear analytic distinction between acquiring an enterprise (victim) and operating an enterprise (vehicle).[110] "'Congress consistently referred to subsection (c) as prohibiting the operation of an enterprise through a pattern of racketeering activity and to subsections (a) and (b) as prohibiting the acquisition of an enterprise.'"[111] The *Jaguar Cars* court found that the Supreme Court continued this theme in *Scheidler*.[112]

The *Jaguar Cars* panel ultimately concluded that section 1962(c) enterprises were vehicles for harm, via their operation by others, and not victims of harm. To reach that conclusion, the court not only discussed *Reves* and *Scheidler* but reverted back to *Sedima* in challenging the Third Circuit's statements in *Enright*, *Petro-Tech*, and *Glessner* that a section 1962(c) enterprise *must* be viewed as the innocent victim or passive tool of criminal infiltration.

The *Jaguar Cars* panel found that *Enright* had set forth two separate bases for its distinctiveness holding. First, there was the still viable

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[107]The issue is not addressed in the parties' briefs. *See* Brief of Appellant Theodore J. Forhecz, Sr., Jaguar Cars, Inc. v. Royal Oaks Motor, Co., 46 F.3d 258 (3d Cir. 1995) (No. 93-5784); Brief for Plaintiff-Appellee Jaguar Cars, Inc., Jaguar Cars, Inc. v. Royal Oaks Motor, Co., 46 F.3d 258 (3d Cir. 1995) (No. 93-5784); Reply Brief of Appellant Theodore J. Forhecz, Sr., Jaguar Cars, Inc. v. Royal Oaks Motor, Co., 46 F.3d 258 (3d Cir. 1995) (No. 93-5784).

[108]Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001).

[109]*Jaguar Cars*, 46 F.3d at 267 (emphasis added) (quoting *Scheidler*, 510 U.S. at 250).

[110]*Id.* at 265.

[111]*Id.* at 267 (quoting *Reves*, 507 U.S. at 182).

[112]*Id.* at 266 ("In the wake of *Reves*, the Supreme Court reiterated its interpretation of § 1962(c) in *National Organization for Women v. Scheidler* . . . .").

reliance on the plain statutory language of section 1962(c).[113] Second, RICO was aimed at the criminal infiltration of legitimate businesses. The court discussed *Enright*'s reasoning: corporate employees are not distinct from the corporate enterprise because only criminals who infiltrated an innocent corporation could be liable under section 1962(c), i.e., legitimate employees of a legitimate corporation were not the targets of section 1962(c) because they had not criminally infiltrated their employer.[114]

The court found that this second rationale was actually foreclosed by *Sedima*.[115] The *Jaguar Cars* panel reasoned that the idea of the infiltrating criminal was merely another form of the rejected concept of "racketeering injury."[116] Applying similar reasoning, there was no statutory basis requiring that the defendant first gain control of an innocent enterprise by some criminal means, and then conduct that legitimate enterprise's affairs through a pattern of further criminal conduct to harm others. Rather, RICO liability begins with a defendant "employed by or associated with" an enterprise conducting its affairs through a pattern of racketeering activity, with no litmus test for how the wrongdoer got there.[117]

Using *Jaguar Cars*' terminology, the enterprise did not first have to be victimized (seized via external criminal conduct) before it became the vehicle for wrongdoing towards others. There was nothing in RICO's statutory language requiring an additional form of criminal-type conduct. The RICO defendant does not need to be a prototypical criminal—separate from the legitimate enterprise —to be liable under civil RICO. To the contrary, the people who already controlled the enterprise from the inside best fit the statute's language.

Thus, it was critical to *Jaguar Cars'* conclusion to permanently inter the idea that the section 1962(c) enterprise was the passive victim of criminal infiltration. This eliminated the premise that corporate employees and officers could only be liable under section 1962(c) if there was a separate illegitimate enterprise, aside from the corporate employer, through which the RICO persons could act in hopes of capturing it for their racketeering uses.[118] The principles from *Reves* and *Scheidler*—that section 1962(c) is aimed at those who operate or manage the enterprise from the inside—put the nails in the coffin that *Sedima* built. With the infiltrating

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[113] *See supra* notes 16-17 and accompanying text.

[114] *Jaguar Cars*, 46 F.3d at 263.

[115] *Id.* at 262-63.

[116] *Id.*

[117] *Id.*

[118] *Jaguar Cars*, 46 F.3d at 262-63.

criminal idea buried, the *Jaguar Cars* court concluded that the enterprise-as-victim concept was simply not viable.[119]

Under this new jurisprudence, the court observed that

> a victim corporation "drained of its own money" by pilfering officers and employees could not reasonably be viewed as the enterprise *through* which employee persons carried out their racketeering activity. Rather, in such an instance, the proper enterprise would be the association of employees who are victimizing the corporation, while the victim corporation would not be the enterprise, but instead the § 1962(c) claimant.[120]

VII. *AFTER* JAGUAR CARS

District courts in the Third Circuit have applied *Jaguar Cars* to bar the identity of the RICO victim and the section 1962(c) enterprise.[121] In a recent district court case, however, the court stated as a general proposition that "[a] plaintiff also can be an enterprise or a member of an enterprise."[122] In *Polymer Dynamics,* the plaintiff was alleged to be part of an association in fact enterprise. The court rejected the concept as a sham in that case.[123] It did not cite *Jaguar Cars* for the principle that a plaintiff could not be part of such an enterprise. While this was probably not a challenge to *Jaguar Cars*, the case does draw some attention back to *Jaguar Cars* and whether a RICO plaintiff can ever assert that it is the RICO enterprise or a part thereof.[124]

Citing to *Jaguar Cars* and *Scheidler*, a Seventh Circuit panel similarly questioned whether a section 1962(c) enterprise could ever be a

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[119]*Id.* at 266-68.

[120]*Id.* at 267.

[121]*See, e.g.*, Kaiser v. Stewart, 965 F. Supp. 684, 687 (E.D. Pa. 1997); United States v. Stewart, 955 F. Supp. 385, 387 (E.D. Pa. 1997); Vanguard S&L Ass'n v. Banks, No. 93-4627, 1995 U.S. Dist. LEXIS 8799, at *5 (E.D. Pa. June 27, 1995).

[122]Polymer Dynamics, Inc. v. Bayer Corp., No. 99-4040, 2000 U.S. Dist. LEXIS 11493, at *13 (E.D. Pa. Aug. 14, 2000).

[123]*Id.* at *18.

[124]At least one other district court case in the Third Circuit did not follow *Jaguar Cars*; but again, it appears that the logic expressed in *Jaguar Cars* is simply not addressed. *See* Data Comm Communications, Inc., v. Caramon Group, Inc., No. 97-0735, 1997 U.S. Dist. LEXIS 18539, at *29 n.5 (E.D. Pa. Nov. 26, 1997) (citing to *Enright*'s infiltrating criminal language, and *Rose v. Bartle*'s language that nothing "would necessarily preclude an entity from functioning both as an 'innocent victim' . . . and thus be the enterprise under section 1962(c), and as a perpetrator").

RICO plaintiff.[125] The appellate court did not rule conclusively on the subject, but its language strongly suggested to the lower court on remand that the plaintiff-as-enterprise concept was dubious. "According to the Bank's theory, the RICO 'enterprise' here was the Bank itself, whose affairs [defendant] allegedly 'conducted' through a pattern of racketeering activity. . . . That theory is, *to say the least*, questionable under the Supreme Court's recent RICO decisions."[126]

On remand, however, the district court in *LaSalle Bank* concluded that *Scheidler* did not change the earlier law, and it held that the enterprise could also be the victim/plaintiff.[127] Three years later, another court in the Northern District of Illinois reached the same conclusion.[128]

What these courts emphasize is that *Scheidler* was not addressing the plaintiff-as-enterprise issue, but was addressing whether an economic motive was required to pursue a RICO claim. Thus, the discussion occurred in an entirely different context. Further, the Supreme Court's language that the enterprise "connotes generally" the vehicle for the pattern of racketeering activity is not conclusive on the issue—it is simply an observation of what *generally* occurs. The language does not conclusively take the word "generally" to mean usually—implying other possibilities.[129] In contrast, *Jaguar Cars* took the same language to mean the enterprise was "properly viewed" as the vehicle and not the victim, thus precluding any other possibility.

VIII. PUBLIC BRIBERY CASE LAW REVISITED

While the Supreme Court has not directly addressed the plaintiff-as-enterprise issue, it has thus far not expressly forbidden the section 1962(c) enterprise from being viewed as the victim. One place we might expect to

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[125]LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 393 (7th Cir. 1995).

[126]*Id.* (emphasis added).

[127]LaSalle Bank Lake View v. Seguban, 937 F. Supp. 1309, 1322-24 (N.D. Ill. 1996).

[128]Shapo v. Engle, No. 98 C 7909, 1999 U.S. Dist. LEXIS 17966, at *30 (N.D. Ill. Nov. 12, 1999) ("This Court does not conclude that the Supreme Court, by stating in the circumstances of the *Scheidler* discussion that generally an enterprise is not a victim, intended to foreclose the possibility that an enterprise may be a victim under § 1962(c)."). *See also* Bulkmatic Transp. Co. v. Pappas, No. 99 Civ. 12070, 2001 U.S. Dist. LEXIS 6894, at *20-*23 (S.D.N.Y. May 11, 2001) (plaintiff could be RICO enterprise where its activities were distinct from the schemes used to defraud it); Chubb & Sons, Inc. v. Kelleher, No. 92 CV 4484, 95 CV 951, 1998 U.S. Dist. LEXIS 22542, at *38-*41 (E.D.N.Y. Feb. 27, 1998) (section 1962(c) enterprise could also be a RICO plaintiff, choosing not to follow *Jaguar Cars*).

[129]"At most, the Court suggested that an enterprise is 'generally' not a victim. This implies that, at times, a RICO enterprise can also be the victim of the RICO violation." *Id.* at *41.

see such a bar, if it exists, is in the public bribery cases where the section 1962(c) enterprise has been described as the victim.[130]

In a recent abuse of public office case, *Salinas v. United States*,[131] the issue before the Court was the scope of RICO's conspiracy statute, section 1962(d).[132] The facts of that case involved a sheriff and his deputy accepting bribes in exchange for permitting unlawful conjugal visits to a federal prisoner. The sheriff was convicted of violating sections 1962(c) and 1962(d), while the deputy was acquitted of the section 1962(c) charge and convicted of the RICO conspiracy count.[133] The issue before the Court was whether the deputy could be liable for conspiring to violate section 1962(c) when he could not be held liable directly under section 1962(c).

The RICO enterprise through which the defendants operated the criminal scheme was the "Hidalgo County Sheriff's Office."[134] The Court did not address the identity of the RICO victim(s), but, as stated above, public bribery case law indicates that the public office is a victim. If *Jaguar Cars* is applied to these types of section 1962(c) cases, the public official RICO defendant can argue that there is no RICO claim because the enterprise, i.e., the public office, is also the victim.

One way to avoid this conclusion is to make the public the true victim, with the public office merely a vehicle for harming the public. This argument permits the public office to be deemed a vehicle and not a victim. For example, in *United States v. Frumento*,[135] Pennsylvania's Bureau of Cigarette and Beverage Taxes (the enterprise) was used by an insider to carry out a cigarette smuggling scheme. Victims of cigarette bootlegging were identified as "many," including state and local governments losing tax revenue, taxpayers, and legitimate cigarette sellers.[136]

Another argument is to accept that the public office is a victim, but to allow its use as a section 1962(c) enterprise anyway because there are also *other* RICO victims. In one criminal case applying *Jaguar Cars*, the

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[130]Applying *Jaguar Cars* to eliminate section 1962(c) claims against venal public officials would likely create a strong visceral reaction; but if the vehicle cannot be the victim then the rationale that the public office is a victim has to either be eliminated or replaced to maintain a potential section 1962(c) claim against corrupt public officials.

[131]522 U.S. 52 (1997).

[132]Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d).

[133]Thus, the deputy was found guilty of conspiring to violate section 1962(c), but innocent of violating section 1962(c) itself.

[134]Brief for the United States, Salinas v. United States, 522 U.S. 52 (1997) (No. 96-738).

[135]563 F.2d 1083 (3d Cir. 1977), *cert. denied sub nom.* Millhouse v. United States, 434 U.S. 1072 (1978).

[136]*Id.* at 1091.

court permitted the section 1962(c) enterprise to include a corporate victim as part of an association in fact enterprise. However, the section 1962(c) claim against the individual defendant could only be viable if the defendant's liability was based solely on harms to other victims who were not part of the enterprise. Harm to the victim/enterprise could not be a basis for liability.[137]

Either of the above constructions is possible and offers a logical analysis. At the same time, it remains fair to say that the public office remains a central victim to the extent that it has been corrupted, undermined, abused, or financially diminished.[138] In *Provenzano*, the Third Circuit panel interpreted *Frumento* as follows: "the convictions of state officials who participated in a cigarette smuggling conspiracy to the detriment of the 'enterprise,' the state itself, were affirmed."[139] While one could argue that the *Provenzano* court incorrectly identified or limited the scope of the proper victim in *Frumento*, the real question is whether a state agency and the people it serves are properly separable for purposes of a RICO analysis, or whether their separation amounts to a process of distinction that does not serve Congressional intent.

IX. SOME QUESTIONS AFTER *JAGUAR CARS*

Is there sufficient leeway in *Jaguar Cars* for a RICO plaintiff to assert that the enterprise discussion was *dicta*, and thus open to challenge; or was *Jaguar Cars*' conclusion on the victim/vehicle distinction so integral to the holding that it simply must be taken as the law of the circuit?

Unlike the Seventh Circuit's admonition in *LaSalle Bank*, *Jaguar Cars*' reasoning on the issue is lengthier, clearer, and stronger and is intertwined with the court's holding. Further, the district courts in the Third Circuit citing to *Jaguar Cars* have not perceived its analysis as open to question or deviation. Thus, a RICO defendant could readily argue that the issue of the RICO plaintiff as an enterprise has been clearly and conclusively resolved in the Third Circuit, and anyone pursuing such a

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[137]United States v. Stewart, 955 F. Supp. 385, 387 (E.D. Pa. 1997).

[138]*See, e.g.*, Averbach v. Rival Mfg. Co., 809 F.2d 1016 (3d Cir.), *cert. denied*, 482 U.S. 915 (1987) and 484 U.S. 822 (1987) (a court may be a RICO enterprise where the "participants engaged in patterns of activities designed to corrupt the operation of the courts' own processes."); Eli Lilly & Co. v. Roussel Corp., 23 F. Supp. 2d 460, 489 (D.N.J. 1998) ("public entity may serve as the enterprise where defendants engage in 'patterns of racketeering activity to corrupt the operation of the' governmental agencies") (citing cases). *See also supra* note 57 and accompanying text.

[139]*Provenzano*, 688 F.2d at 200.

claim has violated Federal Rule of Civil Procedure 11.[140] Such concerns may foreclose challenges to *Jaguar Cars*. Still, some questions remain.[141]

A. *Does* Scheidler *Mean That the Enterprise Can Never Be the Victim?*

One question involves the meaning of the "connotes generally" language used in *Scheidler*. The *Jaguar Cars* court determined that this language was prescriptive and not merely an observation about what usually, but not always, occurs.[142] The issue of whether an enterprise could

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[140]Rule 11(b)(2) provides that in "signing, filing, submitting or later advocating" a claim in the complaint, an attorney certifies that she has made a reasonable inquiry and to the best of his or her knowledge, information and belief "the claims ... and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." FED. R. CIV. P. 11 (b)(2). Based on the plain language of *Jaguar Cars* there would appear to be no basis in the Third Circuit's current jurisprudence for asserting that a RICO plaintiff can also be a RICO enterprise. However, it does seem that reasonable minds can differ on the point of law at issue, and that "a nonfrivolous argument for . . . modification, or reversal" exists; although a trial judge bound by appellate decisions might question how she can modify or reverse an appellate decision. This does not appear to be a situation where the trial judge could readily say that there are conflicting appellate opinions or that there is any definitive post-*Jaguar Cars* Supreme Court precedent that overrules *Jaguar Cars*. *But see infra* notes 168-170 and accompanying text. Rather, the only basis may be that the principle must be treated as *dicta* because the issue was not directly before the court, no matter how integral that principle is to *Jaguar Cars*' holding.

[141]The first question concerns the practical effect of the fact that the plaintiff in *Jaguar Cars* was not the enterprise. Thus, one may ask whether the battle over the plaintiff-as-enterprise issue was fully joined, and whether every relevant argument was developed for the court's review and determination on that specific issue. These arguments do not appear in the parties' briefs, *supra* note 107.

[142]As with most words, Webster's Third New International Dictionary gives a series of historical and current definitions, and examples thereof, for the word "generally." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 944 (3d ed. 1993). These definitions include, among others, "in a reasonably inclusive manner: in disregard of specific instances and with regard to an overall picture"; and "on the whole" or "as a rule." Examples of the former definition include "[generally] speaking" and of the later two definitions: "elections are held [generally] every other year." *Id.* Before these definitions, Webster's list of definitions includes reference to the words "COLLECTIVELY" and "UNIVERSALLY," with the notation of obsolete usage.

The word "general" does include a definition, not designated as obsolete, of "involving or belonging to every member of a class, kind or group: applicable to every one in the unit referred to: not exclusive or excluding." *Id.* The examples provided are "ladies, a [general] welcome from his grace salutes ye all" and "those first assemblies were [general], with all freemen bound to attend." *Id.* The immediately following definition is narrower: "applicable or pertinent to the majority of individuals involved: characteristic of the majority: PREVALENT, USUAL, WIDESPREAD." *Id.* The examples given for this definition are "the [general] opinion"; "a custom [general] in these areas"; "the conflict became [general]"; and "we, the people of the United States, in order to . . . promote the general welfare." *Id.* A subsequent definition includes "marked by broad overall character without being limited, modified or checked by narrow precise considerations: concerned with main elements, major matters rather than limited details, or

be a victim was not directly before the Court. One way to determine the *Scheidler* Court's intention to exclude this possibility is by positing the effect on *Scheidler*'s holding if the enterprise were permitted to be a victim.

As stated above, the issue in *Scheidler* was whether the enterprise or the predicate acts required an economic motive. The central point to

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universals rather than particulars: approximate rather than strictly accurate." *Id.*

There is no perfectly clear single use of the word. The term general can apply to every instance, *e.g.*, in the above-quoted line from Shakespeare where a message is directed to each and every lady in a particular group. However, the use of the adverb "generally" to mean a collective or universal application does not appear to be the current use of the word; rather, "generally" means something more like "most of the time" or "in almost all instances." This use warns that some specific cases are not going to be encompassed by what is being qualified by the word "generally."

> In the context of contract interpretation, Justice Holmes observed over 100 years ago:
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> It is not true that in practice (and I know of no reason why theory should disagree with the facts) a given word or even a given collocation of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the wordbook. But in this first step, at least, you are not troubling yourself about the idiosyncrasies of the writer, you are considering simply the general usages of speech. So when you let whatever galvanic current may come from the rest of the instrument run through the particular sentence, you still are doing the same thing.

Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899) *in* THE ESSENTIAL HOLMES 296-97 (Richard A. Posner ed. 1992).

In the present instance, we are trying to determine whether "connotes generally" means universally the case, or whether it means usually, but not always, the case. As will be set forth in the following text, the later reading is supported by the notion that *Scheidler*'s holding does not require a universal application to reach its end. This does not mean to a certainty that the Court did not intend to use the phrase "connotes generally" to mean universally and without exception; however, until that issue is put squarely before the Supreme Court for full consideration, we cannot know with complete certainty what they meant.

For some examples of courts discussing the meaning of the words general or generally, see, e.g., McNeil-Ppc, Inc. v. Bayer Corp., No. 99-4733, 2000 U.S. Dist. LEXIS 16431, at *36-*37 (E.D. Pa. Nov. 8, 2000); United States v. Jones, 21 C.M.R. 783 (1956); Regan v. Hugus, 182 N.W. 870, 872-73 (Iowa 1921); Board of Supervisors v. Illinois C. R. Co., 190 So. 241, 243 (Miss. 1939); E.E. Rivers v. Department of Transp. of Tenn., No. 86-271-II, 1987 Tenn. App. LEXIS 2558, at *3 (Tenn. App. Mar. 11, 1987). Without defining the meaning of the words "general" or "generally" it is interesting, in the context of this discussion, to read and reflect on Justice Holmes' use of those words in the above-quoted passage.

For cases using the terms generally or general and connotes, connotation or connoted together, see, e.g., United States Steel Corp. v. Multistate Tax Com., 434 U.S. 452, 464 (1978); Jeffers v. United States, 432 U.S. 137, 150 (1977); United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. American Trucking Ass'ns, 310 U.S. 534, 544 (1940); Poindexter v. United States, 777 F.2d 231, 233 (5th Cir. 1985); American Infra-Red Radiant Co. v. Lambert Indus., Inc., 360 F.2d 977, 993 (8th Cir.), *cert. denied*, 385 U.S. 920 (1966); Vidal v. Backs, 21 P.2d 952, 955 (Cal. 1933); Jylha v. Chamberlain, 121 P.2d 928, 930 (Or. 1942); Jenson v. Employers Mut. Cas. Co., 468 N.W.2d 1, 10 (Wis. 1991).

Scheidler's vehicle/victim analysis was that, unlike the enterprises in sections 1962(a)-(b), the section 1962(c) enterprise did not have to be acquired to create liability for the RICO defendant. If something could be acquired, this would mean that it had property worth acquiring. The section 1962(c) enterprise did not have to own property or have any assets that were the object of the RICO defendant's bad intentions, i.e., an economic motive directed at the enterprise's property. Nor did it have to be the kind of enterprise that had economic motives itself.[143] The point of the Court's discussion was to establish that section 1962(c) violations did not have to involve economic motives, so long as there was an economic "effect" from the wrongful actions, even if that economic effect would not line the RICO defendant's pockets.[144]

Jaguar Cars asks us to assume that if the section 1962(c) enterprise could *ever* be a victim, then *Scheidler* would have been decided differently. More specifically, it assumes as a necessary predicate that the enterprise must always (and only) be a vehicle to permit *Scheidler*'s conclusion that section 1962(c) claims do not require an economic motive as an element of such claims. Such assumptions are only true, however, if treating the enterprise as a victim in some cases would ineluctably lead to the conclusion that an economic motive is required to establish section 1962(c) liability in all cases. On close analysis, however, such a result is not required.

First, interpreting *Scheidler*'s discussion without any nuance or qualification, an enterprise's vehicle or victim status defines the enterprise's relationship to the presence or absence of an economic motive. When the enterprise is a victim, an attack on property is at hand. This in turn creates a basis for RICO requiring an economic motive. When the enterprise is

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[143]The Seventh Circuit ruled below that all three RICO sections, 18 U.S.C. §§ (a)-(c), must be read together uniformly. The lower court assumed that because, as it believed, an economic motive was required for sections 1962(a) and 1962(b), then the identical motive was required to establish a section 1962(c) claim as well.

In responding to this argument, Justice Rehnquist first observed that the enterprise in sections 1962(a) and 1962(b) did not in fact require the enterprise to be a profit seeking entity to establish liability under those two statutes. *Scheidler*, 510 U.S. at 259. Thus, when he went on to distinguish the enterprises' roles in sections 1962(a)-(c), he was working to undermine an argument that was inherently flawed. He was simply telling the lower court judges that even *if* they were correct about an economic motive requirement for sections 1962(a)-(b), the principles governing each of the three RICO sections did not have to be the same. There was no requirement that all three sections be put in lock-step for identical treatment; in fact, their governing principles were not the same. Read in context, one may question whether the Court's analysis surrounding the "connotes generally" language was even necessary and whether the more significant point to take from *Scheidler* is that every part of RICO must be examined carefully within its own context, as well as in relation to the rest of the entire statute.

[144]*Id.* at 259-60.

solely a vehicle, however, no economic motive is required. In that situation, the vehicle is not the object of desire; rather, it is only the means to get at what is desired. Testing *Jaguar Cars*' analysis requires working these two definitions through section 1962(c).

It is not in dispute that section 1962(c)'s language provides for liability in situations where the enterprise is only a vehicle used to harm others. There is no acceptable reading of section 1962(c) mandating that a section 1962(c) enterprise must be both a victim and a vehicle, or that it must be solely a victim.[145] Thus, there will be at least some instances of viable section 1962(c) claims where the enterprise is only a vehicle used to victimize others. In these cases where the enterprise exists solely as a vehicle, section 1962(c) has no economic motive requirement. Thus, section 1962(c) cannot have a universal requirement for an economic motive because there are some actionable cases that will not require an economic motive, whether or not there may be other cases where the enterprise is a victim and is the object of an economic motive. Therefore, it was not necessary for the *Scheidler* Court to conclude that the enterprise had to be the vehicle in *every* case to establish that section 1962(c) did not require an economic motive, thus leaving open the possibility of the victim enterprise in some cases.[146]

One can legitimately question how strictly *Scheidler*, or *Reves*, should be read on the subject matter of enterprises as vehicles and victims. A closer look at the entire RICO statute does not support a conclusion that RICO has two rigid categories of enterprise types (victim or vehicle) based on two matching statutory purposes (unlawful acquisition or unlawful operation), with unbreakable borders separating these finite and utterly distinct realms of conduct. Section 1962(a)[147] provides for liability in the situation, among others, where the RICO defendant receives money derived

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[145]For purpose of the immediate discussion, "victim" means a person or entity that has suffered some direct tangible economic harm, and not solely collateral damage to the honor or integrity of its operations.

[146]*Scheidler* raises some additional questions. In direct relation to use of the "connotes generally" language, *Scheidler* cited Professor Blakey's article. Professor Blakey stated that a section 1962(c) enterprise could be an instrument or a victim. By citing to Professor Blakey's article, was the Supreme Court approving all of Professor Blakey's analysis concerning the four roles an enterprise might play? Further, is the authority that Professor Blakey relied upon in stating that a section 1962(c) enterprise can be a victim still good law, and/or are there other bases for his conclusions if it is not? *See supra* note 99 and accompanying text. Blakey relied on *Provenzano* as an example of the section 1962(c) RICO victim. *Provenzano* is no longer accurate law on determining whether a RICO defendant has conducted the enterprise's affairs. *See supra* notes 35, 78-82 and accompanying text. The Court did not examine to what extent Blakey's analysis is based on good law versus outdated law.

[147]*See supra* note 12.

from a pattern of racketeering activity, and uses or invests that money in operating any enterprise. In this situation, the enterprise is not the vehicle used to gain the money, nor is it necessarily going to be acquired. It may be an ongoing business used for money laundering in which it gains or loses nothing,[148] or it may be a partner in a money laundering scheme in which it makes money.[149] If, however, the meaning of instrument is not limited to "carrying out the predicate acts," then the money laundering enterprise is probably best described as an instrument or vehicle. However, it would be performing a different function than the section 1962(c) enterprise.[150]

If this analysis is correct, it does not seem possible to construe *Scheidler*, or *Reves*, as providing strict and absolute limits defining all of RICO's internal and external borders. While this article does not address section 1962(a), the broader point here is that RICO has goals and purposes beyond those discussed in *Reves* and *Scheidler*. These Supreme Court cases cannot be read too rigidly and still comport with the actual statutory text. Rather, in understanding RICO's application and goals, the courts

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[148]"This provision [section 1962(a)]was primarily directed at halting the investment of racketeering proceeds into legitimate businesses, including the practice of money laundering." *Lightning Lube*, 4 F.3d at 1188 (quoting Brittingham v. Mobil Corp., 943 F.2d 297, 303 (3d Cir. 1991) (quoting 11 CONG. REC. 35,199 (1970) (remarks of Rep. St. Germain); 116 CONG. REC. 607 (1970) (remarks of Sen. Byrd)). *See also* Bennett v. Johnson, No. 92 C 6880, 1993 U.S. Dist. LEXIS 8996, at *13-*14 (N.D. Ill. July 30, 1993) ("Section 1962(a) makes it unlawful for a person who has received income from a pattern of racketeering activity to invest such income in the operation of an enterprise—e.g., laundering dirty money derived from narcotics dealing by investing it in a legitimate business such as a restaurant."). Section 1962(a) "is directed at the activity with which Congress was most concerned in enacting RICO, i.e., use of illegally obtained profits to buy into legitimate businesses." RAKOFF & GOLDSTEIN, *supra* note 13, § 1.06[1], at 1-80. It precludes liability to third parties for those who have received the money innocently or unknowingly. *Id.*

[149]In Professor Blakey's article, such an enterprise would be neither a victim nor an instrument (vehicle) used to carry out a pattern of racketeering activity; rather, it would be more like a prize or possible perpetrator. Blakey, *supra* note 98, at 307 & nn.173-74. *See also* Shearin v. E.F. Hutton, Inc., 885 F.2d 1162, 1165 (3d Cir. 1989) (individual defendant and enterprise do not have to be distinct under section 1962(a)).

[150]One particular evil with money laundering is that the enterprise gives RICO defendants the ability to clean the dirty money so that they can keep the fruits of their criminal conduct. If a racketeer cannot find a means to keep dirty money, there would be no point in obtaining that money. Thus, there would be no point in committing the pattern of crimes in the first place. *Cf. infra* note 155. Congress thus identified a conduct and enterprise paradigm distinct from the "enterprise as vehicle to carry out racketeering acts" model or the "enterprise as a victim of acquisition" model. One might describe this conduct/enterprise paradigm as a clearing house model.

must look at the entire range of specific forms of conduct that RICO is able to address in practice.[151]

B. *Why Should the Criminal Infiltration Model Be Applied to Insider's Liability?*

Another question is whether the rejected infiltrating criminal model must necessarily be equated with an employee fraud model for purposes of concluding that the RICO enterprise can never be a proper section 1962(c) victim. Can the parasitic employee working for a legitimate corporate enterprise be conceptually distinguished from the criminal outsider who infiltrates the legitimate business through traditional criminal methods or corrupt organizations? If so, then the *Enright* model can be discarded, while maintaining a liability model that provides relief to an enterprise victimized by its own employees.

Section 1964(c) provides a civil action to "[a]ny person injured in his business or property by reason of a violation of section 1962."[152] If the parasitic insider meets all of section 1962(c)'s express requirements,

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[151]The existence of this separate type of criminal activity, not best described by the usual vehicle or victim models, provides a practical example of an interpretive pitfall. The potential for interpretive problems starts with the inevitable development of extra-statutory conceptual frameworks. In trying to understand the statute, we create categories, models and theories to get a conceptual hold on the statute. If these interpretive models become preeminent, however, the conduct addressed by RICO's language may be forced into these categories, whether or not that language really fits into the interpretive models. Worse, if RICO's language cannot be forced into some existing interpretive category, then we might conclude there is no cause of action.

In fact, the contrary rule must be true; if the statute's text makes clear that there is a kind of conduct that RICO can encompass, then that language and the conduct it addresses are primary and not derivative. The categories and models created to interpret RICO are secondary and derivative. Instead of bending, twisting or contorting RICO to fit the model, it is our interpretations that must conform to, and accommodate, RICO's language. If the interpretative devices and categories fail, then they must be discarded, as *Jaguar Cars* did with *Enright*'s criminal infiltration model.

Retaining the integrity of a model, interpretive device or technique that runs contrary to a statute's plain language would require the most extraordinary circumstances. This statement addresses something different than circumstances involving a conflict between a statute's clear language and the text of its legislative history, or the circumstance where strict application of the statutory text might result in an absurd or unjust practical result. Rather, it involves matters at least one level removed from statutory history, i.e., it involves thoughts, ideas, conceptions, etc. about the statute's language and history that we synthesize and use to create forms to measure what the legislative history and/or statutory language mean. Like the Ptolemaic epicycle system, at some point, no matter how much time is put into its development, a failed model has to be recognized and put aside. In dealing with statutes, as opposed to planetary movement, the task is more difficult because the phenomenon being measured—the statute—is much more imperfect, reflecting the nature of any individual person or group of people trying to work together to create some one idea or practical model addressing human conduct.

[152]18 U.S.C.S. § 1964 (2001).

injuring the employer/enterprise, then *Jaguar Cars* must read section 1964(c) to exclude such enterprises from the definition of a RICO person. Since section 1964(c) does not do so expressly, *Jaguar* Cars must find such an exclusion rooted in *Sedima*, *Reves*, and *Scheidler*. *Scheidler* has already been discussed at length and does not require such a conclusion; neither, as will now be discussed, does *Sedima* or *Reves*.

As interpreted by *Jaguar Cars*, *Sedima* forbids the infiltrating criminal requirement because the only statutory issue is whether a person operated or managed an enterprise through a pattern of racketeering activity, not whether a traditional criminal used illicit means to infiltrate an enterprise, and then operated its affairs through a pattern of racketeering activity. Thus, the enterprise need not first be an infiltration victim to be used as a vehicle to harm others. In the case of a corrupt insider, however, this analysis does not even arise. There is no need to read an infiltrating motive into the matter because the defendant is already inside the enterprise. If that insider, using her position, operates or manages the enterprise to the enterprise's own financial harm, there is victimization without infiltration. Under those circumstances, there is no clear reason why *Sedima*'s principles are violated because there is no need to find a racketeering type act or injury to create this kind of liability. Rather, the facts fall into section 1962(c)'s express language.[153]

Of the Supreme Court cases that *Jaguar Cars* relies upon, it is *Reves* that provides the most significant measure of *Jaguar Cars*' result. Thus, it is necessary first to discern what the Supreme Court was doing in *Reves* to evaluate its use by the *Jaguar Cars* panel.

The Court's goal in *Reves* was to interpret the meaning of "conduct" in section 1962(c).[154] The conduct in question was the conduct of the section 1962(c) enterprise's affairs. Thus, the Court had to understand the nature of the section 1962(c) "enterprise" in determining how that enterprise's affairs could be conducted. The Court reviewed the statute's

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[153]In *Russello v. United States*, 464 U.S. 16 (1983), as in *Turkette*, the Supreme Court observed that "Congress' concerns were not limited to infiltration. Another aim was to remove the profit from organized crime by separating the racketeer from his dishonest gains." *Id.* at 28 (addressing RICO's forfeiture component and the need to deal with attacking the illegal profits derived from organized crime's racketeering practices). Since the "Racketeer" component of the "Racketeer Influenced and Corrupt Organizations" Act has been allowed to include "racketeering" acts carried out by those we would normally think of as legitimate businesses, then it is a short step to transfer the notion that such legitimate racketeer's should somehow be stripped of their ill-gotten gains as well. While not in the form of forfeiture to the government, the civil plaintiff victimized by the legitimate racketeer should be able to effect this purpose through the powerful treble damages provision. If a victimized corporation cannot bring such a claim against one of its racketeering officers, then that purpose would appear to be frustrated.

[154]The word "conduct" is used twice in section 1962(c). *See supra* note 12.

language and history to determine the section 1962(c) enterprise's function in that statutory scheme, in part by comparing it to a RICO enterprise's roles in sections 1962(a)-(b). It was in this context that *Reves* used the concepts of vehicle and victim.

Thus, the focus and point of the victim/vehicle discussion was on the function of the *enterprise*. The results of this analysis permitted the Court to understand and describe what manner of conduct that it would take for a section 1962(c) RICO defendant to use the section 1962(c) RICO enterprise to carry out the patterns of racketeering activity that Congress intended to punish. The Court's analysis did not address the issue of what it meant for a *person* to be injured by a section 1962(c) violation, with an ensuing civil cause of action as a RICO victim under section 1964(c).[155] More specifically, *Reves* did not interpret whether an entity meeting the statutory function of an enterprise (vehicle) under section 1962(c) could also be a victimized person under the statutory language found in section 1964(c). Absent that statutory interpretation, *Reves* offers no conclusive answers on what it means to be a section 1964(c) person victimized by the conduct proscribed by section 1962(c).

Jaguar Cars did not identify or address this question either. Instead, *Jaguar Cars* used *Reves* to focus on the idea that those who operated or managed the enterprise constituted the possible section 1962(c) RICO defendants. Foremost in that class were officers and high level employees who used the enterprise that employed them to harm others. *Jaguar Cars* made these people fully subject to RICO liability by removing the false shield that they were an indistinct part of the alleged enterprise, rather than distinct users of the alleged enterprise. The court found that a person's distinctiveness from the enterprise should not, and could not, require a complete separation, something that the court believed *Enright* and its progeny had required. It then went one step further to link the two concepts— "outsider liability is to victim as control person liability is to vehicle"—and to banish the possibility of a section 1962(c) enterprise-victim.[156]

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[155]Section 1964(c) provides a civil RICO claim to "any person" injured in their business or property by way of a violation of sections 1962(a)-(d). This statutory section must be the starting point for mapping the parameters of who can be a RICO victim.

[156]Looking to *Reves*, *Jaguar Cars* demolished the criminal infiltration model for the purpose of making insiders liable, and to make clear that officers and employees belong to the class of defendants who actually operated or managed the enterprise. Earlier insistence that a RICO defendant had to meet the criminal infiltration model to establish liability had insulated those whose status did not conform to that model. Instead of looking to what principles lay behind RICO, blind application of the infiltration model exempted insiders from liability simply because they did not fit the analytic model used, not because their actual conduct was outside RICO's scope. Protecting the individual who used his or her employer like a weapon against an innocent

In reaching this conclusion, *Jaguar Cars* did not do at least two things: (1) it did not look closely enough at the practical realities of what constitutes insider and outsider liability; and (2) it did not address the differences in statutory context between the meaning of victimization in understanding the role of an enterprise, and the meaning of victimization in evaluating a civil plaintiff's ability to claim a RICO injury. Had the *Jaguar Cars*' panel recognized the differences between how insiders and outsiders could *victimize an enterprise*, i.e., as a corrupted tool or as a financially harmed entity, this would have led to an inquiry into whether the section 1962(c) enterprise could be examined separately as a section 1964(c) victim.

The practical differences between the insider who harms the enterprise in the way she conducts its affairs and the outsider who harms the enterprise by infiltrating it through some external criminal means are analytically distinct.[157] *Enright* erred by failing to make that distinction when it applied criteria meant for outsiders to insiders.[158] The result was to excuse insiders from section 1962(c) liability to third parties. *Jaguar Cars* went the other extreme in applying an anti-*Enright* test, making the absence of an infiltration victim a criteria for the presence of section 1962(c) culpability. This test excused the same insiders from liability to their corporate employer, while making them liable to third parties.[159]

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third party defied a common sense reading of the RICO statute.

[157]As discussed above, *supra* notes 41-58 and accompanying text, at least two district courts described the phenomenon of an insider corrupting his or her employer as a test for outsider liability. Thus, the victimization/abuse of the enterprise achieved through the insider's ability to exercise control over the enterprise became confused with the idea of an external force corrupting the enterprise. In fact, the real distinction is that section 1962(c) liability may exist for those who use the leverage of their positions to operate the enterprise in a corrupt manner; but there can be no section 1962(c) liability for those who are not in a position to participate in conducting the enterprise's functions, and whose conduct can only create some external effect on the enterprise.

[158]Bracketing out *Enright*'s infiltration analysis, that court's basic conclusion is consistent with *Reves*. The words "employed by or associated with" do not mean "the same as"; rather, they indicate distinction and support a holding that a RICO defendant must be separate from the enterprise. The separation simply does not have to be a distant one. Thus, depending on the issue and the context, "employment by" could mean separate or intimate. A CEO might be separate from her corporation, but still extremely close to it. The paradox of distance and identity does not really exist.

[159]*Jaguar Cars* interpreted the relationship between the RICO defendant and the RICO enterprise too far on the side of intimacy. *Jaguar Cars* effectively found that the section 1962(c) defendant was so close to the enterprise that the defendant could not harm the enterprise, but only use it. The *Jaguar Cars* panel reduced the section 1962(c) enterprise to an appendage, and how could a person be said to be liable for harming part of his or her own body? This result is made more odd by the fact that the *Jaguar Cars* panel wanted to establish that the defendant operating the enterprise was sufficiently distinct from that enterprise, and not a mere appendage, to be held liable for using it as a weapon against others.

The proposition that the opposite of *Enright* must be true because the holding in *Enright* is false has some intuitive appeal, but lacks foundation. The flaw in this anti-*Enright* test is that *Enright's* model does not work because its premise—the enterprise must be an infiltration victim—has no place in section 1962(c) jurisprudence; it is off-subject. The fact that an enterprise could be an *Enright*-type victim (of infiltration by an outsider) does not have anything to do with the meaning of "victim" (of racketeering activity) under section 1962(c). The proper test for a section 1962(c) victim depends on whether or not harm has been inflicted through a pattern of racketeering activity, rather than through some act of infiltration. The presence or absence of an infiltration victim cannot be used to locate the presence of a section 1962(c) violation. Thus, neither a test for the presence of an infiltration victim nor a test for the absence of an infiltration victim has value in the section 1962(c) context. A proper test must wholly abandon the definition of victim that *Enright* appears to create, and replace it with meanings that make sense in the context of section 1962(c).

Jaguar Cars did not do that; instead it adopted *Enright*'s definition of victim and retained this flawed premise in re-defining section 1962(c). *Jaguar Cars*' critique of *Enright* impliedly reasoned that: (1) victimizing an enterprise required criminal infiltration; and (2) criminal infiltration required complete separation between defendant and enterprise; but (3) complete separation precluded section 1962(c) RICO liability because it could not account for those in control of the enterprise (such as employee insiders); therefore, (4) victimization of an enterprise must inevitably preclude section 1962(c) RICO liability because it cannot account for insiders who control the enterprise to harm others. In this analysis, "victim" has only one meaning—infiltrated enterprise.

Through section 1962(c)'s language and *Reves*, however, we know that section 1962(c) is not interested in victimization by infiltration; rather, it is aimed at victimization through a pattern of racketeering activity. *Enright* ran into confusion by mixing up the roles of the enterprise and the section 1962(c) plaintiff/victim in defining section 1962(c)'s purpose. Section 1962(c)'s purpose should have been defined by the type of harm it was directed against—patterns of racketeering activity carried out through enterprises to inflict that harm. Instead of shaping the section 1962(c) enterprise to meet this statutory purpose, *Enright* took the general Congressional mandate to attack the infiltration of legitimate business and mistakenly applied that statutory purpose to interpret the function of the section 1962(c) enterprise. Compounding the problem, *Enright* then started its analysis in the wrong place—with the enterprise instead of the directly

injured victim.[160] At that point, the court lost perspective on section 1962(c)'s driving principle and mistook the infiltration victim for the pattern of racketeering victim.

Like *Enright*, *Jaguar Cars* did not fully delineate the roles of the enterprise and the plaintiff (victim). It did not examine the corporate employer under both a section 1962(c) enterprise test and a section 1964(c) victim test. It did not look at whether the entity was a victim of a pattern of racketeering. Instead, it placed all inquiry under the single question of whether or not any form of infiltration-victim could be found in any role. Applying this indiscriminate test, *Jaguar Cars* concluded that the section 1962(c) enterprise could not be a victim because that would mean turning it into an infiltration victim, and infiltration has no role in section 1962(c). However, whether an entity can be a section 1962(c) plaintiff instead depends on whether it is victimized through a pattern of racketeering activity. Thus, the fact that a section 1962(c) enterprise need not be an infiltration victim did not answer the unasked question of whether a section 1962(c) enterprise could ever be a pattern of racketeering victim, as well as a vehicle for such activity.

C. *Has the Vehicle Metaphor Been Read Too Mechanically, Instead of Organically?*

Another issue involves the terminology used to describe the section 1962(c) enterprise, i.e., vehicle. This mechanical term may be too restrictive for a statute as organic as RICO.

Up to a limit, the mechanical analogy fits with the applicable law that the RICO defendant must be distinct from the enterprise (*Cedric Kushner*), but that same person must be close enough to the enterprise to manage or operate it (*Reves*). Consider a motor vehicle. A person must be in the car to be able to drive it, or at least to be giving directions to the driver, but that does not make the driver or navigator identical to the thing they are driving. If that motor vehicle is used in a crime, even if demolished in a collision, we do not think of the motor vehicle as a victim. It is an inanimate tool.

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[160]This included a secondary use of the word "victim," as something corrupted by misuse in the process of victimizing others. *See also supra* notes 24, 28, 48-51 and accompanying text. As essentially adduced by the *Averbach* court, *supra* notes 52-58 and accompanying text, in section 1962(c) cases it is the enterprise's insiders who are in the best position to carry out this sort of corruptive victimization, and not outsiders. Leaving aside the words "victim" and "infiltration," and using the word "corruption" instead provides a more accurate depiction. Further, the kind of corruption that section 1962(c) is concerned with can only come from an insider or one with an equivalent opportunity.

A corporation, however, is not like a motor vehicle. Legally, a corporation is a person.[161] It can earn and lose money, sue and be sued. Thus, if we take the enterprise to be like a human body—instead of a mechanical device—the analysis reaches a different result.

Applying the human body model, the RICO defendant is like a virus that uses the host body to reproduce and spread disease to innocent others. In the process, the host body could also be infected and harmed. Any doctor would try to kill the virus and prevent further transmission. If the virus was solely killing its host body, and no one else was threatened with infection or death, treatment would still be applied to stop the virus from harming even that one person. The medical community would act as best it could to treat *each* person with the virus.

In this analogy to a human vehicle, we are concerned with the protection of the vehicle, as well as others. By contrast, in the motor vehicle analogy, we are not concerned with the effects on the car when it is used in the process of harming others. In this organic model, the virus (defendant-racketeer) should be stopped from harming the host (enterprise-employer) and others (innocent third parties) in using the host to replicate and/or transmit itself (pattern of racketeering activity).

The belief expressed here is that this organic model provides a more accurate understanding of RICO's complexities. By applying the organic model to analyze the vehicle/victim question, conceptual resistance to the vehicle as victim can be eliminated.

D. *The Supreme Court Has Affirmed the* Jaguar Cars' *Holding Without Relying on the Vehicle-Victim Analysis as Found in* Jaguar Cars

The Supreme Court's recent decision in *Cedric Kushner Promotions, Ltd. v. King*,[162] while not addressing the exact issue before us, discussed the nature of the RICO defendant as corporate insider. Finding that section 1962(c) required a distinction between the RICO defendant and the RICO enterprise, the Court expressly approved *Jaguar Cars'* holding that corporate employees could be held liable as RICO defendants where their

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[161] In *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), the court stated that:

> linguistically speaking, the employee and the corporation are different 'persons,' even where the employee is the corporation's sole owner. After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs . . . .

Id. at 163.

[162] Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001).

employer corporation was the RICO enterprise. In other words, employees could be treated as distinct from their employers for RICO purposes.[163] The Court specifically cited *Jaguar Cars* as a leading case with such a holding.[164] The supporting analysis, however, was not identical.

Like *Jaguar Cars*, the Supreme Court (using the same sort of linguistic analysis typified earlier in cases like *Enright*[165]) found that section 1962(c)'s plain language established a requirement that the RICO defendant and the RICO enterprise had to be distinct.[166] The more subtle analysis was to explain why a person acting within the scope of his or her authority for an enterprise/employer was distinct from that employer for RICO purposes. In reaching the same result on the same issue as *Jaguar Cars*, the Supreme Court did not reprise *Jaguar Cars'* victim/vehicle analysis to support a holding that corporate employees or owners are distinct from the corporate enterprise.[167] The Court's silence on the subject shows neither approval nor disapproval. However, silence while reaching the same conclusion shows that the victim/vehicle analysis was not necessary in reaching that conclusion.[168]

The Court in *Cedric Kushner* stated that the plain language analysis was consistent with section 1962(c)'s purposes.[169] It indirectly defined those purposes by observing that the statutory language used was consistent with the RICO defendant (person) being distinct from the victim and distinct from the enterprise. In making these two distinctions, the Court directed attention to the essential purposes of the Act—punishment of the wrongdoer who victimizes, for example, a small business, and deterring misuse of a corporate enterprise for criminal purposes.[170] Punishing a corporate insider for misusing his or her employer's operation to victimize that employer is literally consistent with both of those goals. No bar on the victim-as-enterprise is self-evident from these two goals, and the Court described no other statutory purpose to the contrary.

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[163] *Id.* at 161.

[164] *Id.*

[165] *Id.*

[166] *See supra* note 18 and accompanying text.

[167] The Court cites *Jaguar Cars* as one of the leading cases supporting its holding *Cedric Kushner*, 533 U.S. at 161. Thus, it would be safe to assume that the Court was familiar with *Jaguar Cars'* vehicle/victim analysis.

[168] This may provide comfort to those who would challenge *Jaguar Cars* in the district courts on the basis that its conclusion on the victim/vehicle analysis should be treated as *dicta*. The *Jaguar Cars* court believed this reasoning necessary to undermine that argument in light of prior precedent in the Third Circuit and, because of that, put the issue forward and addressed it.

[169] *Id.* at 161.

[170] *Id.*

The *Cedric Kushner* Court guides us further on how to read RICO's statutory language.

> Linguistically speaking, an employee who conducts the affairs of a corporation through illegal acts comes within the terms of a statute that forbids any "person" unlawfully to conduct an "enterprise," particularly when the statute explicitly defines "person" to include "any individual . . . capable of holding a legal or beneficial interest in property," and defines "enterprise" to include a "corporation."[171]

More simply, if one reads what the statute says, the employee falls within the definition of "person" and the employer falls within the definition of "enterprise." Thus, "by definition" the statute permits claims against employees who use their corporate employer as a RICO enterprise. As discussed earlier, the same analytic model would allow the enterprise to be an injured person since RICO's own definitions literally encompass that situation.[172]

The Court also supported its decision by observing that corporations are legally distinct from their owners. In fact, this distinction was one of the basic purposes for creating corporations in the first place.[173] Similarly, the Court stated that *Reves* found RICO liability based on the RICO defendant conducting the enterprise's affairs and not on the RICO defendant conducting his or her own affairs.[174] Both of these notions can be read consistently with the victim-as-enterprise concept. They support the idea that the corporate employee has a distinct existence from and within a corporation, and that such a person, with malign purpose, can operate his or her employer to ill ends. There is no necessary logic that springs from these premises cutting off liability if the harm reaches the employer itself.

Finally, like *Reves*, the *Cedric Kushner* Court observed that the RICO statute's basic purposes were to protect legitimate businesses from victimization through unlawful acts, and to protect the public from those who would unlawfully use an enterprise as the vehicle to commit unlawful activity. "A corporate employee who conducts the corporation's affairs through an unlawful RICO 'pattern . . . of activity,' § 1962(c), uses that

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[171] *Cedric Kushner*, 533 U.S. at 163.

[172] *See supra* notes 100-03, 153 and accompanying text.

[173] *Cedric Kushner*, 533 U.S. at 163.

[174] *Id.* (citing Reves v. Ernst & Young, 507 U.S. 170, 185 (1993)).

corporation as a 'vehicle' whether he is, or is not, its sole owner."[175] Looked at in isolation, this language supports *Jaguar Cars* in the same way that *Scheidler* and *Reves* support *Jaguar Cars*. It is suggested here, however, that none of the underlying principles relied upon in these cases are actually inconsistent with punishing an insider for operating the enterprise contrary to its own interests, and to the employer's financial loss.

E. *Does* Jaguar Cars *Unduly Limit Rico Claims?*

Denying any possibility for section 1962(c) claims by an enterprise against a parasitic employee could prevent RICO's application to parties who should be subject to RICO claims. *Jaguar Cars* suggested that a corporation victimized by its employees could be a section 1962(c) plaintiff, with the enterprise being an association in fact of its wrongdoing employees.[176] This alternative to the plaintiff-as-enterprise would not work, however, in the situation where a single officer or employee was the wrongdoer, because a single individual cannot constitute an association in fact enterprise. Nor would this alternative work if, for some reason, a group of people defrauding the corporation did not meet the criteria for forming an association in fact enterprise.[177] Ironically, at least on the surface, this new requirement for a separate association in fact enterprise seems to parallel the defunct theory that the corporate employee cannot be liable unless she uses a separate illicit enterprise to infiltrate the corporate employer.

Any attempt to get around these limitations by using RICO's other two sections, 1962(a) and 1962(b), does not provide a fully equivalent alternative. An enterprise victimized under section 1962(b) can only bring a claim for harm suffered as a result of the enterprise being acquired or controlled by the defendant. It cannot bring a claim for harms caused by

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[175] *Id.* at 164-65 (citing United States v. Turkette, 452 U.S. 576, 591 (1981); National Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994)).

[176] *See supra* note 120 and accompanying text.

[177] The Third Circuit gives the following test for determining the existence of an association in fact enterprise: (1) an ongoing organization with some guiding mechanism to direct that organization; (2) a continuous unit existing with associates fulfilling roles consistent with the organizational structure of the association in fact enterprise; and (3) the organization has a distinct existence from the pattern of predicate acts, i.e., an existence that goes beyond that which is necessary to engage in the predicate acts. United States v. Console, 13 F.3d 641, 650 (3d Cir. 1993), *cert. denied*, 511 U.S. 1076 (1994); United States v. Riccobene, 709 F.2d 214, 221-24 (3d Cir.), *cert. denied sub nom.* Ciancaglini v. United States, 464 U.S. 849 (1983). On the third criterion, "[t]he function of overseeing and coordinating the commission of several different predicate offenses and other activities on an ongoing basis is adequate to satisfy the separate existence requirement." *Console*, 13 F.3d at 652 (citing *Riccobene*, 709 F.2d at 223-24).

the pattern of predicate acts themselves that led to the acquisition or control.[178] If the corporation is harmed *solely* through a pattern of racketeering acts such as wire or mail fraud, by an insider conducting the corporation's affairs, the corporate victim has neither a section 1962(b) claim, nor, under *Jaguar Cars*, will it have a section 1962(c) remedy.[179] Thus, *Jaguar Cars* effectively bars RICO's application to the high level corporate employee who victimizes his or her employer through a pattern of predicate acts. There are no principles expressed in *Sedima*, *Reves*, *Scheidler*, or *Cedric Kushner* that mandate this result. Further, the behavior addressed by section 1962(c) is fundamentally the same whether the harm is to the enterprise itself or to a third party.

F. *If Wire and Mail Fraud Create Culpability for Those Who Cheat Their Employers, Should RICO Permit Redress Against Those Same Employees Harming Their Employers Through a Pattern of Those Predicate Acts?*

There is a strong argument that RICO's two key predicate acts, mail and wire fraud, open the door to RICO claims by a corporate enterprise against its own officers or employees who harm the corporate enterprise. In *Carpenter v. United States*,[180] the Supreme Court found a *Wall Street Journal* writer criminally liable under the wire fraud statute for defrauding his employer out of its property rights in confidential business

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[178]*Lightning Lube*, 4 F.3d at 1187-91.

[179]In a case like *Reves*, we see the tendency to view sections 1962(a) and 1962(b) as the tools for stopping criminals from infiltrating legitimate organizations, as if all one needed to prove was that the RICO person used a pattern of criminal acts to insinuate herself into a legitimate business. Some may even further generalize that these statutes are intended to cover any sort of defendant who directs harmful conduct at an enterprise. This creates the notion that those who attack the enterprise itself will necessarily be subject to one or the other of these two statutory sections.

At least in civil RICO cases, this notion does not conform to actual practice. The lower court decisions requiring harm from the investment activity or the acts of gaining or maintaining control are reasoned to fine distinction, and they limit the civil RICO plaintiff. *See, e.g.*, *Lightning Lube*, 4 F.3d at 1187-91. Thus, while it may be relatively easy to show harm arising from wire or mail fraud, it is comparatively difficult to show harm from an investment of racketeering proceeds or from gaining control of the enterprise. *See generally* RAKOFF & GOLDSTEIN, *supra* note 13, §§ 1.06[1]-[2], at 1-79 to 1-83. In light of the strict causation requirements included in section 1962(a)-(b) jurisprudence, the practical reality is that those two sections do not cover every type of harm to an enterprise, and if section 1962(c) cannot fill in some of the gaps, then there will be patterns of racketeering activity that cannot be punished.

[180]484 U.S. 19 (1987).

information.[181] The Court stated that "[s]ections 1341 and 1343 reach any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises."[182] In that case, the "another" was the defendant's employer, and the defendant's guilt was upheld for the exploitation of knowledge he acquired through his employment.[183]

Similarly, with the adoption of 18 U.S.C. § 1346 in 1988, Congress provided that, for purposes of establishing a scheme of mail or wire fraud, "the term 'scheme or artifice to defraud' included a scheme or artifice to deprive another of the intangible right of honest services."[184] This surely includes employees as one of the foremost classes of persons owing such an obligation.

If civil RICO's two most basic predicate acts permit an employee to be criminally liable for defrauding his or her employer, it would be consistent to allow a RICO claim by the same employer against the same employee, who, through a pattern of wire and mail fraud, deprived the employer of its property—assuming the victim can show cognizable RICO

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[181] *Id.* at 25-28.

[182] *Id.* at 27.

[183] *Id.* at 27-28.

[184] Prior case law has determined, at a minimum, that the mail and wire fraud statutes did not apply to the loss of an intangible right to honest government service; rather, these statutes were concerned only with protecting property rights. *See, e.g., Carpenter*, 484 U.S. at 25 (citing McNally v. United States, 483 U.S. 350 (1987). Following *McNally*, *Carpenter* reiterated that the mail fraud statute was rooted in protecting property interests, and described the employer's "contractual right to [the employee defendant's] honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute." *Id.* The *Carpenter* court distinguished *McNally*, however, on the basis that property can be either tangible or intangible, and that the *Carpenter* defendant had fraudulently taken his employer's intangible property. *Id.* With the passage of 18 U.S.C. § 1346 (1988), Congress effectively overruled *McNally*. *See, e.g.*, United States v. Schwartz, 924 F.2d 410, 416 n.2 (2d Cir. 1991) ("In 1988, Congress reacted to *McNally* by amending the fraud statutes so that 'the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.'").

RICO itself provides damages only to those who are harmed in their business or property. 18 U.S.C. § 1964(c) (1970). Following *Carpenter*'s discussion, the intangible right to honest service is too ethereal to be deemed a property right, and if the only loss suffered was the loss of the intangible right of honest service, it should also be too ethereal to be a business or property loss for RICO purposes. In *Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3d Cir. 2000), a Third Circuit panel ruled that the RICO plaintiff must establish a "'concrete financial loss and not mere injury to a valuable intangible property interest.'" *Id.* (citing Steele v. Hospital Corp. of Am., 36 F.3d 69, 70 (9th Cir. 1994)).

For our purposes, there is no need to address the nuances, if any, of whether *Maio* is entirely consistent with *Carpenter*. The point here is that the mail and wire fraud statutes encompass employees who harm their employers; and whether, in a case where there is financial loss proximately caused by a pattern of wire and/or mail fraud, the one causing that loss should be exempt from section 1962(c) liability if she has used the victim of that loss as the vehicle for carrying out the harmful pattern.

damages. Should the fact that the corporate employer was the vehicle through which this pattern of mail or wire fraud was conducted insulate the employee from civil RICO liability to the enterprise/employer?

X. CONCLUSION

Whether or not the result reached in *Jaguar Cars* would remain the same after addressing these questions, the issues are worth addressing in determining whether a RICO enterprise can ever be a section 1962(c) plaintiff.