# COMMENT

REVES V. ERNST & YOUNG: THE SUPREME COURT'S RECENT RESTRICTIVE STANDARD CONCERNING § 1962(c) OF THE CIVIL RICO STATUTES

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I. Introduction

Congress passed the Organized Crime Control Act\(^1\) in 1970 to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."\(^2\) One of the twelve substantive titles in the Organized Crime Control Act of 1970 is the Racketeer Influenced and Corrupt Organizations Act (RICO).\(^3\) The Organized Crime Control Act of 1970 and RICO resulted from Congress' fear of organized crime and its effects on legitimate businesses.\(^4\)

RICO contains both criminal and civil provisions. The civil provisions may be used by both government prosecutors and civil plaintiffs.\(^5\) Primary among the civil provisions is RICO's § 1962(c),\(^6\) a civil, remedial statute designed solely for the plaintiff. Section 1962(c) permits plaintiffs, through civil actions, to participate in the battle against organized crime.\(^7\) Section 1962(c) also offers plaintiffs

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4. Senator Hruska, one of the bill's foremost advocates, stated:
   Not only will organized crime bring to a business venture all the techniques of violence and intimidation which it used in its illegal business, but it is also a foregone conclusion that those individuals who have made a career of cheating and stealing will continue to do so in their new roles. The consumer public will suffer from inflated prices, shoddy goods, and outright frauds.
7. Id.
many advantages, including treble damages,⁸ broad venue procedures,⁹ and the right to apply collateral estoppel to a judicial determination of a defendant's guilt under RICO's criminal provisions.¹⁰

The additional advantage of suing under RICO is that courts have historically interpreted RICO and, in particular, § 1962(c), in a broad manner.¹¹ The end result of this expansive view is that professionals—lawyers, accountants, and the like—have been named as defendants in civil RICO suits by plaintiffs attracted to the idea of recovering treble damages. These contemporary defendants range

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8. 18 U.S.C. § 1964(c) (1989). Section 1964(c) states:
   (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Id.

   (a) Any civil action or proceeding under this chapter [18 U.S.C.S. §§ 1961-1968] against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
   (b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.
   (c) In any civil or criminal action or proceeding instituted by the United States under this chapter [18 U.S.C.S. §§ 1961-1968] in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.
   (d) All other process in any action or proceeding under this chapter [18 U.S.C.S. §§ 1961-1968] may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Id.

10. 18 U.S.C. § 1964(d) (1989). Section 1964(d) states:
   (d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 U.S.C.S. §§ 1961 - 1968] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

Id.

11. See infra text accompanying notes 56-59.
far beyond the typical organized criminal which Congress sought to reach by enacting RICO. The broad interpretation of RICO has clearly led to its abuse.

Although courts have consistently and historically interpreted RICO broadly, the circuit courts disagree on the reach of § 1962(c) and apply its terms differently. The debate over the interpretation of § 1962(c) has centered on the meaning of the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." The circuits have applied several different tests in analyzing whether a defendant has violated this particular section.

The lack of uniformity among the courts of appeal as to the scope of § 1962(c) and the problems associated with the expanding use of civil RICO prompted the United States Supreme Court to decide Reves v. Ernst & Young. In Reves, a majority of the Court defined § 1962(c), giving meaning to the phrase, "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." To define this phrase, the Court adopted the "operation or management" test set forth in Bennett v. Berg, an Eighth Circuit case which considered the same issue. Applying the Bennett test, the Court held that a person violates § 1962(c) only when he "participates in the operation or management of the enterprise itself."

The decision in Reves restricted the scope of RICO and contradicted the distinct trend interpreting civil RICO broadly. This comment discusses how the Reves decision, in its search to curtail the expansion of RICO, limited the scope of defendants against whom civil RICO plaintiffs were originally entitled to litigate. Although there appears to be a need to spare legitimate businesses the

12. See infra notes 50 & 55 and accompanying text; Philip A. Lacovara & Geoffrey F. Aronow, The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO, 21 NEW ENG. L. REV. 1, 2 (1985-86) (noting RICO's application "in contexts far removed from those conceived by the statute's supporters").
13. See infra text accompanying notes 69-94.
14. See supra note 6 (citing full text of § 1962(c)).
15. See infra notes 69-94 and accompanying text.
17. Id. at 1169-72.
18. Id. at 1169. See 18 U.S.C. § 1962(c) (1989). For the full text of the provision, see supra note 6.
19. 710 F.2d 1361 (8th Cir. 1983).
20. Id. at 1364.
22. See infra text accompanying notes 154-75.
harsh penalties of RICO,²³ the present path taken by the Court could hamper lawsuits against the type of defendants which Congress intended to reach. In addition, this comment specifically analyzes the post-decision effects of Reves on professionals. Current case law demonstrates that federal courts are less willing to impose liability on professionals in the aftermath of Reves.²⁴

II. BACKGROUND

In order to fully comprehend the evaluation section of this comment a brief discussion of the interpretation, legislative history, and underlying principles of RICO is necessary. Equally important, one must also comprehend how the courts of appeal have construed the language of § 1962(c). The background section discusses each of these topics in turn.

A. Statutory Interpretation

The Reves court interpreted § 1962(c) in a manner contrary to RICO's historical interpretation. The thoughts and rules that emanate from courts and commentators and, more importantly, RICO's liberal construction clause are pertinent to fully understanding the statutory interpretation of RICO.²⁵ Each of these topics is addressed below.

1. Language from Courts and Commentators

Whenever RICO is involved in the disposition of a case, courts engage in some form of statutory interpretation.²⁶ Various courts and commentators have noted that the interpretation of the scope

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²³. See infra note 55.
²⁴. See infra notes 233-67 and accompanying text.
²⁶. See 2A Norman J. Singer, Statutes and Statutory Construction § 45.03, at 17 (5th ed. 1992). Singer adds that "[c]onsistent with a system of separation of powers, it is said to be the function of the legislature to make the laws but for the courts to finally and authoritatively interpret what the law says." Id.
of any statute—RICO included—starts with the text itself. This approach with respect to RICO has the approval of the Supreme Court in United States v. Turkette. The Court stated that “[i]n determining the scope of a statute, we look first to its language.”

The Court added that plain, unambiguous language is “regarded as conclusive” unless Congress expresses a contradictory intent.

If the words are ambiguous, or Congress expresses an intent to define statutory terms contrary to their plain meaning, then courts traditionally defer to legislative intent to define a word. In this


28. 452 U.S. 576 (1981). In Turkette, the Court considered “whether the term ‘enterprise’ as used in RICO encompasses both legitimate and illegitimate enterprises or is limited in application to the former.” Id. at 578. The defendant/respondent “argued that RICO was intended solely to protect legitimate business enterprises from infiltration by racketeers and that RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise.” Id. at 579-80.

29. Id. at 580.
30. Id. (citing Consumer Product Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). The Court admitted, however, that there is no surefire way to conclude that language is “plain” or “unambiguous.” Id. One commentator agrees that in using the plain meaning rule “in interpreting a statute you should begin, though maybe not end, with the words of the statute.” Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 807 (1983). Posner cites a case describing the plain meaning rule as “the cardinal rule of statutory construction.” Id. at 807 n.30 (quoting Western Union Tel. Co. v. FCC, 665 F.2d 1126, 1137 & n.21 (D.C. Cir. 1981)).

Only two years after deciding Turkette, the Court ruled on Russello v. United States, 464 U.S. 16 (1983). In Russello, the Court interpreted § 1963(a)(1), a forfeiture provision of RICO. Id. at 17. In analyzing that section, the Court cited Turkette. Id. at 20. The Russello Court expounded on Turkette’s rule of construction by adding that the absence of a “specific” definition within the statute “compels [a court] to ‘start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.’” Russello, 464 U.S. at 21 (quoting Richards v. United States, 369 U.S. 1, 9 (1962)).
instance, the rule is that courts should not consider any subjective aspects of legislative intent.\(^{31}\) Rather, courts should give the statute its "effect as it is written by the legislature, not as the court may think it should be or would have been written."\(^{32}\) As will be seen below, in the Reves' majority opinion, the plain meaning rule and the legislative intent method of construction played important roles in the analysis of §1962(c).\(^{33}\)

2. Liberal Construction Clause

In analyzing RICO, courts and commentators often cite the Organized Crime Control Act's liberal construction clause.\(^{34}\) This clause states that "the provisions of this title shall be liberally construed to effectuate its remedial purposes."\(^{35}\)

The liberal construction clause is a useful provision because it provides "guidance to courts struggling with ambiguities in the [RICO] statute."\(^{36}\) However, its application is limited. Courts and commentators agree that the liberal construction clause should only be used to resolve ambiguities.\(^{37}\) Indeed, as is discussed further below,

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31. Palm, supra note 27, at 173. In a footnote, Palm quoted Justice Holmes as saying, "When counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean." Id. at 173 n.22 (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 538 (1947) (emphasis added)).

32. 2A SINGER, supra note 27, § 45.09, at 43.

33. See infra text accompanying notes 154-73.


36. See id. at 181. Palm notes certain "policy considerations" reinforce the inclusion of the liberal construction clause in the Organized Crime Control Act of 1970:

(1) In enacting RICO, Congress intended to curtail and ideally eliminate the debilitating effect of racketeering activity on American society.

(2) Congress was concerned about the general deleterious impact of organized crime on commerce. To effectively attack these perceived evils, Congress enacted a very broad and stringent statute.

See id. at 183 (footnote omitted).

37. The Supreme Court in Reves v. Ernst & Young stated that the liberal construction clause 'obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended.' Reves v. Ernst & Young, 113 S. Ct. 1163, 1172 (1993). "The clause 'only serves as an aid for resolving an
the majority in *Reves* believed that the clause did not preclude a narrowing of RICO’s scope.38

**B. Legislative History and Post-Enactment Developments**

1. The Organized Crime Aspect of RICO

Two major studies shaped RICO’s development into law.39 The first study, conducted in 1951 by the Special Committee to Investigate Organized Crime in Interstate Commerce, reported that organized crime had infiltrated legitimate businesses and state and local government.40 Later, in 1967, the President’s Commission on Law Enforcement and the Administration of Justice (the Katzenbach Commission) conducted a second study on the problem of organized crime. The Commission’s report, *The Challenge of Crime in a Free Society*, further described organized crime’s participation in business and the need for government and private action to combat its influence.41 These two reports “set the stage for the . . . enactment of RICO.”42

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38. See infra text accompanying notes 171-73.
40. Blakey, supra note 27, at 249. See *S. Rep. No. 2370, 81st Cong., 2d Sess.* 16 (1950). This committee was known as the Kefauver Committee, after its chairman, Senator Estes Kefauver. Blakey, supra note 27, at 249.
42. *Batista, supra note 39, § 2.7, at 16 (Supp. 1994).* The long congressional process that would eventually produce RICO began with the introduction of Senator Roman L. Hruska’s two bills, S.2048 and S.2049. See Blakey, supra note 27, at 253-54. These bills were essentially based on the Katzenbach Commission’s recommendations. See id. (citing 113 Cong. Rec. 17,997-18,002 (1967)). In 1969, Senator John L. McClellan opened for congressional debate S.30, the Organized Crime Control Act. See Blakey, supra note 27, at 256. This Act was also based on the Katzenbach Commission’s report. See id. The failure of these two bills to pass Congress prompted Senator Hruska to introduce S.1623, the Criminal Activities Profits Act. See id. at 258. Finally, in April of 1969 Senators Hruska and McClellan uniformly introduced S.1861, the Corrupt Organizations Act. See id. at 262. Later that year the RICO provisions as listed in S.1861 were attached to S.30. *S. Rep. No. 617, 91st Cong., 1st Sess. 83* (1969).

The attitudes of the members of Congress reflected the impact of these two reports and their concern with the problems associated with organized crime. In remarks made on the Senate floor, Senator Robert Dole stated, "It is impossible to overstate the importance of [RICO's] legislative attack on organized crime. . . . Title IX of the Organized Crime Control Act . . . contains a proposal designed to curtail—and eventually to eradicate—the vast expansion of organized crime's economic power.'" With few exceptions, the primary aim of Congress in passing the Organized Crime Control Act of 1970 was to wage war against organized crime.

The only difference between the House and Senate versions was the former's addition of the "private treble damages amendment." Id. at 35,196. The Senate passed the amended version of S.30 on October 12, 1970. Id. at 36,280. The House of Representatives passed S.30 soon after. Id. at 35,363. President Nixon then signed this legislation on October 15, 1970. Id. at 37,264.


44. "[T]he RICO statute was aimed at organized crime's economic power in all its forms . . . ." Russello, 464 U.S. at 25. The "legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Id. at 26. See Turkette, 452 U.S. at 591 n.13 (quoting the remarks of various senators concerning RICO and its organized crime theme); 116 Cong. Rec. 591 (1970). "[RICO] is potentially the broadest statute Congress has passed to combat the harmful effects of organized crime." Palm, supra note 27, at 167. "Congress viewed these sweeping remedial provisions [of RICO] as a means of 'striking a mortal blow against the property interests of organized crime.'" Batista, supra note 39, § 2.7, at 19 (quoting 116 Cong. Rec. 602 (1970)).

Senator McClellan claimed that Senate Bill 1861 was aimed at eliminating the "cancer" of organized crime. 115 Cong. Rec. 9567 (1969). Many of the speeches given by McClellan focused on this issue:

With its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system. The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices. When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses. Competitors can be effectively eliminated and customers can be effectively confined to sponsored suppliers.

Blakey, supra note 27, at 256-57 (quoting 115 Cong. Rec. 5874 (1969)).

The problem, simply stated, is that organized crime is increasingly taking over organizations in our country, presenting an intolerable increase in deterioration of our Nation's standards. Efforts to dislodge them so far have been of little avail. To aid in the pressing need to remove organized crime from legitimate organizations in our country, I have thus formulated this bill [which] is designed to attack the infiltration of legitimate business
Despite Congress’ emphasis on organized crime throughout RICO’s legislative history, those words never appeared in RICO’s

Batista, supra note 39, § 2.12, at 21 (alterations in original) (quoting 115 Cong. Rec. 9567 (1969)).

In addition to Senator McClellan’s statements, the “Statement of Findings and Purpose” for the Organized Crime Control Act of 1970 is replete with language concerning the importance of organized crime to the statute:

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America’s economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.


Legislative compromise forced Congress to pass the Organized Crime Control Act of 1970\textsuperscript{47} and RICO\textsuperscript{48} without a focus on organized crime.\textsuperscript{49} As is discussed more fully in the next section, the lack of focus on organized crime and the expansive language of RICO led to RICO's application in cases wholly unrelated to organized crime.\textsuperscript{50}

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\item 46. BATISTA, supra note 39, § 2.7, at 18-19. RICO's "remedial nature" necessitates a broad statute, one without a "reference to the term 'organized crime' or to the related concepts of crime families and criminal syndicates." Id. Many reasons exist as to why the words "organized crime" were never included in the statute's language. See, e.g., Hanna Mining Co. v. Norcen Energy Resources, Ltd., [1982 Transfer Bd.], Fed. Sec. L. Rep. (CCH) ¶ 98,742, at 93,736 (N.D. Ohio 1982) (noting Congress wanted to avoid constitutional attacks on RICO and burden of proof problems); 116 CONG. REC. 35,343 (1970) (setting forth comments of Representative Mario Biaggi, who challenged use of organized crime as offensive to Italian-Americans and proposed Congress define "Mafia"); BATISTA, supra note 39, § 2.7, at 19 (organized crime terminology not included for constitutional reasons and impossibility of meaningful definition); Carl L. Steinhause, RICO: An Introduction and Description, 52 A.B.A. ANTITRUST L.J. 303, 304 (1983) (listing reasons why definition of organized crime not included: "definition of organized crime [would be] . . . impermissibly vague. Congress could not prohibit status . . . . [T]here were practical prosecutorial difficulties associated with outlawing membership in Mafia . . . . [Congress had to] meet constitutional problems . . . . .").
\item 49. See supra note 46.
2. The Development of RICO into a Broad-Strokeing Brush

Although Congress enacted the Organized Crime Control Act in 1970, nearly a decade passed before there were more than ten reported decisions discussing RICO. 51 During the 1980s, private use of RICO increased exponentially. 52 The increased use of RICO was not limited to criminal activity. In fact, the use of RICO as a cause of action in civil suits became more prominent. 53

The growth of civil RICO had three primary causes. First, as is noted above, Congress elected not to limit RICO to cases involving organized crime. 54 The lack of an express limitation and RICO's broad language "created civil causes of action against legitimate corporations not commonly associated with organized crime." 55

Second, the broad interpretation of RICO throughout the late 1980s can be traced to the Supreme Court's decision in Sedima,
S.P.R.L. v. Imrex Co.\textsuperscript{56} In Sedima, the Court stated that a "less representative reading is amply supported by our prior cases, and the general principles surrounding this statute. RICO is to be read broadly."\textsuperscript{57} The Court found support for this statement in "Congress' self-consciously expansive language and . . . its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.' "\textsuperscript{58} In simple terms, Sedima eased the RICO plaintiff's burden and, accordingly, made it much easier to bring a RICO action.\textsuperscript{59}

The third cause of civil RICO's growth stems from the remedial and procedural advantages open to a plaintiff who brings an action under civil RICO. Section 1964(c) rewards a successful RICO plaintiff with treble damages and costs.\textsuperscript{60} Such damages were previously restricted to plaintiffs who prevailed in antitrust actions.\textsuperscript{61} Moreover, plaintiffs who allege securities fraud as the basis of their RICO claim need not meet the judicially-created standing requirements of the securities laws.\textsuperscript{62} Thus, RICO's damage provisions enticed numerous plaintiffs to file a RICO claim rather than traditional, less rewarding causes of action.

Procedurally, RICO offers powerful jurisdictional means and a wide choice of fora. Section 1965(a) permits a civil RICO action to be brought "against any person" wherever "such person resides, is

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\item \textsuperscript{56} 473 U.S. 479 (1984).
\item \textsuperscript{57} Id. at 497 (emphasis added). See Barbara E. Brady, Note, RICO—Expansive Interpretation of Civil RICO Gets Stamp of Approval—Sedima, S.P.R.L. v. Imrex Co., 21 Wake Forest L. Rev. 1121 (1986) (discussing Sedima in depth).
\item \textsuperscript{58} Sedima, 473 U.S. at 498-99.
\item \textsuperscript{59} Brady, supra note 57, at 1150; Lacovara & Aronow, supra note 12, at 25. See Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984), rev'd, 473 U.S. 479 (1985) (noting use of private RICO as "extraordinary, if not outrageous"). Assistant Attorney General Stephen S. Trott said, "Experience has shown . . . that the instances of private civil RICO's use against traditional organized crime activities are far outweighed by examples of its application as a general federal anti-fraud remedy against seemingly reputable businessmen." Lacovara & Aronow, supra note 12, at 8 (quoting Statement of Stephen S. Trott, Assistant Attorney General, Criminal Division, Before the Committee on the Judiciary, U.S. Senate, Concerning Civil RICO Suits, May 20, 1985 at 25).
\item For a short discussion of Sedima's effects on the broad interpretations of RICO and the ensuing increase in litigation, see Jeffrey M. Smith & Thomas B. Metzloff, RICO and the Professionals, 37 Mercer L. Rev. 627, 634-36 (1986).
\item 18 U.S.C. § 1964(c). See supra note 8 for full text.
\item \textsuperscript{61} See Sedima, 473 U.S. at 487 (noting RICO's treble damage remedy had its origins in the antitrust laws).
\item \textsuperscript{62} Batista, supra note 39, § 1.6, at 8.
\end{itemize}
found, has an agent, or transacts his affairs."63 Section 1965(b) allows a district court to reach far beyond the borders of its district to summon anyone, so long as the court finds that "the ends of justice require."64 The necessary process can be served in "any judicial district."65 RICO also gives plaintiffs a powerful tool to compel the attendance of witnesses. Under § 1965(c) a plaintiff need only show "good cause" in order to subpoena a witness who resides more than one hundred miles outside the district.66 These provisions cater to the plaintiff by providing "the broadest possible venue and the easiest means of service."67

The three factors discussed above—Congress' failure to limit RICO to organized crime, the Sedima decision, and the attractive remedial and procedural features of RICO—combined in the 1980s to produce a legal paintbrush so broad that almost any legal dispute could be painted as a RICO violation.68 RICO's growth produced a lack of uniformity in the circuits with respect to the interpretation of § 1962(c). The next section discusses the different approaches adopted by the circuits in their efforts to come to grips with RICO's terms.

C. The Lack of Uniform Interpretation of § 1962(c) Among the Various Courts of Appeals

Prior to the Reves v. Ernst & Young decision in 1993, the circuit courts of appeal had no uniform method to analyze claims brought under § 1962(c). There was no common understanding of what it meant to conduct or participate in an enterprise. The circuit courts addressed this question and produced five different interpretations of § 1962(c).69 These interpretations are discussed below beginning with the least and ending with the most restrictive interpretation.

63. See supra note 9 (citing full text of § 1965(a)).
64. See id.
65. See id. (citing full text of § 1965(b)).
66. See id. (citing full text of § 1965(c)).
68. See supra notes 46, 53 & 55.
69. The District of Columbia Circuit reviewed the various positions taken by the circuit courts in Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers, 913 F.2d 948, 952-54 (D.C. Cir. 1990). The District of Columbia Circuit adopted the Eighth Circuit's analysis discussed infra notes 87-88 and accompanying text. Yellow Bus, 913 F.2d at 954; see infra notes 90-94 and accompanying text.
The Second Circuit created the broadest interpretation of § 1962(c) in *United States v. Scotto.* The *Scotto* test only required some relationship between the predicate acts and either the enterprise or the defendant’s position in it:

[O]ne conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.

This interpretation of RICO is broad because a plaintiff does not have to demonstrate control on the part of the defendant. Rather, the defendant need only be involved with the enterprise, and his predicate acts need only be related to its activities.

The *Scotto* test influenced both the Ninth and Third Circuits’ analyses of § 1962(c). The Ninth Circuit in *United States v. Yarbrough* stated that there “simply must be a ‘nexus’ between the enterprise and the racketeering activity.” The *Yarbrough* court held that a nexus existed when either of the two conditions in the *Scotto* test were met. Likewise, the Third Circuit in *United States v. Provencano* adopted the *Scotto* test verbatim in its analysis of § 1962(c). The court in *Provencano* agreed that a defendant violates § 1962(c) whenever the predicate acts are related “to the enterprise or the actor’s association with it.”

70. 641 F.2d 47 (2d Cir. 1980). In *Scotto,* the president of the International Longshoremen’s Association was convicted of racketeering activity in violation of 18 U.S.C. § 1962(c). *Scotto,* 641 F.2d at 50.

71. *Scotto,* 641 F.2d at 54. The court did not require that a person “enhance his position in the enterprise” through his or her acts. *Id.* Accord *United States v. LeRoy,* 687 F.2d 610, 617 (2d Cir. 1982) (employing *Scotto* test), cert. denied, 459 U.S. 1174 (1983); *Town of Kearny v. Hudson Meadows Urban Renewal,* 829 F.2d 1263, 1269 (3d Cir. 1987) (noting only substantial participation in enterprise required).

72. 852 F.2d 1522 (9th Cir. 1988). The defendant, Yarbrough, was a member of a right-wing supremacist group that decided to overthrow the government. *Id.* at 1526. Yarbrough was convicted under RICO. *Id.*

73. *Id.* at 1544.

74. *Id.*

75. 688 F.2d 194 (3d Cir. 1982). Provencano acted in various roles in the Teamsters Union Local 560 in northern New Jersey. *Id.* at 196-97. He was convicted of accepting illegal payoffs. *Id.* at 200.

76. *Id.* at 200.

77. *Id.*
The Eleventh Circuit in *Bank of America National Trust & Savings Ass’n v. Touche Ross & Co.*\(^7\) formulated a test equally as broad as the *Scotto* test: “It is not necessary that a RICO defendant participate in the management or operation of the enterprise. . . . The word ‘conduct’ in § 1962(c) simply means the performance of activities necessary or helpful to the operation of the enterprise.”\(^7\) The court rejected the defendants’ argument that “Congress intended to limit the scope of civil RICO by imposing a ‘conduct’ requirement.”\(^8\)

The Fifth Circuit in *United States v. Cauble*\(^9\) modified the *Scotto* test.\(^2\) The court sought to achieve this end by making the *Scotto* test conjunctive rather than disjunctive:

A defendant does not “conduct” or “participate in the conduct” of a lawful enterprise’s affairs, unless (1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant’s position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise.\(^3\)

As modified, the *Cauble* test is considered more restrictive than the original *Scotto* test.\(^4\)

The standard enunciated by the Eighth Circuit in *Bennett v. Berg*\(^5\) is even more restrictive than the *Scotto*\(^6\) and *Cauble*\(^7\) tests. The court in *Bennett* stated:

\(^7\) 782 F.2d 966 (11th Cir. 1986). In *Bank of America Nat’l Trust & Savings Ass’n*, several banks loaned $60 million to International Horizons, Inc. *Id.* at 968. The banks sued Touche Ross for preparing allegedly fraudulent audits that were used by the banks to evaluate International Horizons, which eventually defaulted on the loan. *Id.*


\(^8\) *Bank of Am. Nat’l Trust & Savings Ass’n*, 782 F.2d at 970.

\(^9\) 706 F.2d 1322 (5th Cir. 1983). In *Cauble*, the government accused a wealthy Texas businessman of being the “don” of the “Cowboy Mafia” and engaging in drug trafficking. *Id.* at 1329.

\(^2\) *Id.* at 1332.

\(^3\) *Id.* at 1332-33 (emphasis added).


\(^5\) 710 F.2d 1361 (8th Cir.), cert. denied sub nom. Prudential Ins. Co. of N.
Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.88

Bennett's restrictiveness stems from its "operation or management" requirement, which unlike previous tests required more than mere involvement to impose liability.89

The District of Columbia Circuit essentially adopted the Bennett test in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers.*90 The court in *Yellow Bus* defined "conduct" as "management" or "direction."91 After reviewing all of the tests adopted by the various circuits, the District of Columbia Circuit concluded that the Bennett analysis best reflected this interpretation.92 However, the court modified the Bennett test by requiring that the degree of control be "significant."93 Thus, under the District of Columbia Circuit's test, "[s]ection 1962(c) applies when a defendant, through a pattern of racketeering activity, exercises significant control over or within an enterprise, participating not merely in the enterprise's affairs, but in the conduct of the enterprise's affairs."94

Examination of the language in § 1962(c) by the various circuits failed to produce a common understanding of its terms. As a result, by the end of the 1980s, and into the 1990s, RICO remained a runaway train with no clear leader at its controls. The majority in

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86. See *supra* notes 70-76 and accompanying text.
87. See *supra* notes 81-84 and accompanying text.
88. *Id.* at 1364. As is discussed Part III.D.1., the majority in *Reyes* reached the same conclusion as the Bennett court after conducting its own independent analysis. See *infra* notes 154-73 and accompanying text.
89. See *supra* notes 70-84.
90. 913 F.2d 948 (D.C. Cir. 1990), *cert. denied,* 111 S. Ct. 2839 (1991). *Yellow Bus* concerned a four day strike by the union. The plaintiff/employer claimed that the strike violated RICO. *Id.* at 949.
91. *Id.* at 954.
92. *Id.*
93. *Id.*
94. *Yellow Bus,* 913 F.2d at 954 (first emphasis added).
Reves provided courts and litigators with a definition of § 1962's terms and, in so doing, slowed the RICO train. However, in slowing RICO, the majority steered it slightly off the track which Congress intended it to follow. The next section discusses Reves' progression through the circuit court and its final resolution in the Supreme Court.

III. Analysis

A. The Facts

Reves v. Ernst & Young involved the operation of the Farmer's Cooperative of Arkansas and Oklahoma, Inc. (Co-op). The Co-op generated funds to operate its business through the sale of demand notes. These demand notes were marketed in the Co-op's monthly newsletter and were very popular due to the high interest rate which they offered.

In 1979, the Co-op's general manager, Jack White, invested personal funds for the construction of a gasohol plant. The gasohol plant and attendant company were later named White Flame Fuels, Inc. (White Flame). Construction of the plant required additional financing, which White obtained through loans from the Co-op. The initial loans proved to be insufficient, so White continued to borrow from the Co-op. By late 1980, only a little more than one year after commencement of construction, White owed the Co-op $4 million.

96. Id.
97. Id. The interest rate payable on the notes was substantially higher than rates offered by local financial institutions. Although the newsletter claimed that $11 million in assets were available to back the notes, the notes were uncollateralized and uninsured. Id.
98. Id. Jack White had a partner in this investment, Edwin Dooley. Id. Four months after construction began in 1979, White, backed by loans from Citizens Bank & Trust Company, bought out Dooley. Id. White renamed the company White Flame Fuels, Inc. Id.
100. Id. White personally guaranteed these loans. Id.
101. Id.
102. Id.
During the period in which the loans were accumulating, the government indicted White for federal tax fraud. The indictment and the enormous outstanding debt, suggested the Co-op acquire White Flame. The Co-op agreed, but filed a declaratory action in state court against White and White Flame alleging that the Co-op already owned the gasohol plant. The state court declared the Co-op the owner of White Flame as of February 1980 and dismissed White’s $4 million debt. This transaction weakened the Co-op financially.

In 1981, the Co-op hired the accounting firm of Russell Brown to complete an audit of its 1981 operations. The confusing circumstances surrounding the Co-op’s acquisition of White Flame created problems for the auditors with respect to White Flame’s proper valuation. Accounting principles forced the auditors to decide whether the Co-op had owned White Flame from the beginning of construction in 1979, or whether it had purchased White Flame from White. The distinction was critical. If the former situation was correct, then the company’s value was its fixed asset value, which Russell Brown determined to be $4.5 million. If the latter situation was correct, then the company’s value was its fair market

103. Arthur Young & Co., 937 F.2d at 1315. The indictment alleged acts of “self-dealing with the Co-op” and the filing of “fraudulent tax returns.” Id. Gene Kuykendall, the accountant for both the Co-op and White Flame, was also indicted. Id.

104. Id.

105. Id. The declaratory action alleged that “on February 15, 1980, White had told the Board that all of White Flame’s stock would be transferred to the Co-op in exchange for the Co-op’s assumption of White’s debts to the Co-op and Citizens Bank.” Id. at 1315-16. White’s attorneys, in response to the action, proposed a decree which “provided that the Co-op had owned White Flame since February 15, 1980 . . . and that White was discharged from any liability to the Co-op for loans for White Flame.” Id.

106. Id. at 1316.


109. The audit was performed by Joe Drozal, a partner in Russell Brown. Id. He was assisted by Joe Cabannis. Id.

110. Id.

111. Id. at 1317.

value, which Russell Brown determined to be only $444,000.113 Eventually, the auditors decided that the Co-op had always owned White Flame and valued White Flame at $4.5 million.114 By valuing White Flame at this amount, the auditors were able to avoid declaring the Co-op insolvent.115

Russell Brown’s successor, Arthur Young,116 delivered its 1981 Audit Report to the Co-op’s board on April 22, 1982.117 The report stated that Arthur Young was willing to stand behind the consolidated financial statements but was concerned with the Co-op’s ability to recover its investment in White Flame.118 Arthur Young expressed this concern in explanatory note nine of its report.119 The report also listed White Flame’s value at $4.5 million but did not explain how Arthur Young reached its conclusion or the impact of using fixed asset value to assess White Flame’s worth.120

At the Co-op’s annual meeting in May of 1982, the Co-op distributed condensed financial statements which had been altered to exclude note nine.121 Although an Arthur Young representative presented the 1981 report to the attendees, he failed to inform them that the information in note nine had been excluded from their statements and made no attempt to provide them with the missing information.122 He also neglected to inform them about the controversy underlying the valuation of White Flame.123 Members of Arthur Young later recognized, but did not disclose, that the presentation had been misleading.124

113. Id. Fair market value was determined at the time of purchase. Id. at 1317.
114. Id. The court found the decision to be contrary to the information available to Drozal. Id.
115. There were advantages in valuing the plant at fixed asset value. Id. First, if valued at less than $1.5 million, the Co-op would have been considered insolvent. Id. Second, news that the Co-op was insolvent could have “provoke[d] a run on the demand notes and thus deprive[d] the Co-op of its primary source of funds.” Id. at 1317-18.
116. Arthur Young merged with Russell Brown on January 2, 1982. Arthur Young & Co., 937 F.2d at 1316 n.4. At a later date, Arthur Young became Ernst & Young. Id. Following the change, the name of Ernst & Young was substituted for that of Arthur Young as defendant.
117. Id. at 1318.
118. Id.
119. Id.
120. Arthur Young & Co., 937 F.2d at 1318.
121. Id. at 1318-19.
122. Id. at 1319.
123. Id.
In 1982, the Co-op hired Arthur Young to perform an audit of its 1982 operations.\textsuperscript{125} Like the 1981 report, Arthur Young's 1982 report to the board failed to disclose White Flame's fair market value but warned the board that White Flame probably would not provide a return on its investment.\textsuperscript{126} At the 1982 annual meeting, the board again decided not to disclose Arthur Young's warning, and Arthur Young's representatives failed to enlighten the attendees as to the board's deliberate omission.\textsuperscript{127} At any rate, Arthur Young never informed anyone associated with the Co-op that if White Flame was valued at its fair market value the Co-op's liabilities would exceed the value of its assets.\textsuperscript{128}

In February of 1984 the Farmer's Cooperative experienced a small run on its demand notes.\textsuperscript{129} The Co-op's inability to finance the payment of the demand notes and its desire to avoid further runs on the notes\textsuperscript{130} forced it to file for bankruptcy on February 23, 1984.\textsuperscript{131} The Co-op's entry into bankruptcy proceedings "froze" the demand notes so that they were no longer redeemable by the noteholders.\textsuperscript{132}

In October of 1984 the bankruptcy court appointed Thomas Robertson as trustee.\textsuperscript{133} Early in 1985 Robertson sued the Co-op's board and Arthur Young on behalf of the Co-op and its noteholders.\textsuperscript{134} Later in 1985 the district court named Robert Reves, among others, as the representative of a certified class of demand noteholders.\textsuperscript{135} Of the many claims that Robertson and the class brought against

\textsuperscript{125} Id.
\textsuperscript{126} Id. at 1320.
\textsuperscript{127} Id.
\textsuperscript{128} Arthur Young & Co., 937 F.2d at 1320.
\textsuperscript{129} Id.
\textsuperscript{130} Id. The Co-op, in addition to gathering funds through the demand notes, received "loans and lines of credit from the Cooperative Finance Association." Id. at 1320-21. The Cooperative Finance Association threatened to cut off the Co-op's line of credit if the demand notes dropped below $9.5 million, which they eventually did. Id. at 1321.
\textsuperscript{131} Id. at 1321.
\textsuperscript{132} Arthur Young & Co., 937 F.2d at 1321. In the "bankruptcy disclosure statement" the Co-op "asserted that three factors caused its bankruptcy: (1) ineffective management; (2) using demand notes as the primary source of financing; (3) financial problems of White Flame." Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. After the class certification, Robertson was still responsible for representing the Co-op. Id. Prior to trial, both Robertson and the class settled with all of the defendants except Arthur Young. Id.
Arthur Young, the most pertinent to this comment is the alleged violation of § 1962 of RICO.\textsuperscript{136} The complaint alleged that members of Arthur Young committed both mail fraud and securities fraud while conducting or participating in the affairs of the Co-Op.\textsuperscript{137} Arthur Young moved for summary judgment on the RICO claim and the district court granted the motion.\textsuperscript{138}

B. First Court of Appeals Decision: Arthur Young & Co. v. Reves, 856 F.2d 52 (8th Cir. 1988)

The Eighth Circuit affirmed the district court's decision to grant summary judgment.\textsuperscript{139} The Eighth Circuit noted that in order to avoid summary judgment, the plaintiffs were required to prove that the defendants committed "predicate acts" which formed a pattern of racketeering activity.\textsuperscript{140} The plaintiffs claimed that the predicate acts consisted of Arthur Young's violations of the securities laws.\textsuperscript{141} The court of appeals rejected the plaintiffs' argument that Arthur Young committed securities fraud because it found that the demand

\textsuperscript{136} Arthur Young & Co., 937 F.2d at 1321. Reves and Robertson brought a total of 16 causes of action. Robertson v. White, 633 F. Supp. 954, 958 (W.D. Ark. 1986). Some of the more pertinent actions on appeal were:

(1) Robertson's claim that Arthur Young breached its auditing contract with the Co-op because the firm did not perform its audits in accordance with generally accepted accounting principles and auditing standards;

(2) the Class' claim that Arthur Young induced the purchase of demand notes through the concealment of the Co-op's financial position in violation of 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5;

(3) the Class' claim that Arthur Young induced the purchase of demand notes though [sic] the concealment of the Co-op's financial position in violation of Arkansas securities law.

Arthur Young & Co., 937 F.2d at 1321.

137. Arthur Young & Co., 937 F.2d at 1323.

138. Id. at 1321-22 (citing Robertson v. White, Nos. 85-2044, 85-2096, 85-2155, & 85-2259, slip op. at 116 (W.D. Ark. Oct. 15, 1986)). This motion was affirmed on appeal. Reves, 113 S. Ct. at 1174.

139. Reves, 856 F.2d at 55.

140. Id. See 18 U.S.C. §§ 1961(5), 1962(c) (1989). Section 1961(5) defines "pattern of racketeering activity" as "requir[ing] at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." For a definition of what is considered "racketeering," see 18 U.S.C. § 1961(1) (1989). Section 1962(c) requires "conduct or participat[ion], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (1989) (emphasis added).

notes were not securities. Therefore, the plaintiffs failed to establish that Arthur Young had engaged in a pattern of racketeering activity in violation of RICO. By defining securities as they did, the Eighth Circuit never had to address the remaining specifics of the RICO claim.

The plaintiffs appealed the decision to the Supreme Court. In *Reves*, the court determined that the demand notes were securities,

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142. *Arthur Young & Co.*, 856 F.2d at 54-55. The Eighth Circuit found that the demand notes were “uncharacteristic of securities,” “were not securities within the meaning of the Federal Act,” and were not securities within the meaning of Arkansas state securities law. *Id.*


First, the court compared the “characteristics” of a security to those of the notes. A demand note is “not a security unless payment is dependent upon the success of a risky enterprise or the parties contemplate indefinite extension of the note or perhaps conversion to stock.” *Arthur Young & Co.*, 856 F.2d at 54 (quoting *Great W. Bank & Trust v. Kotz*, 532 F.2d 1252, 1257-58 (9th Cir. 1976)). The failure to meet these characteristics denotes use of the second part of the analysis.

The second part of the analysis considers the “economic reality of the transaction.” *SEC v. W.J. Howey Co.*, 328 U.S. 293, 293 (1946). Howey sets forth a test defining a “security” as “(1) an investment; (2) in a common enterprise; (3) with a reasonable expectation of profits; (4) to be derived from the entrepreneurial or managerial efforts of others.” *Arthur Young & Co.*, 856 F.2d at 54 (quoting *W.J. Howey Co.*, 328 U.S. at 301). The failure to meet this test led the court of appeals to conclude that the demand notes issued by the Farmer’s Cooperative were not securities as defined in the Securities Exchange Act of 1934. *Arthur Young & Co.*, 856 F.2d at 54.

In addition to testing the demand notes under the Securities Exchange Act of 1934, the plaintiffs cause of action required the court to analyze Arkansas state securities law. *Id.* at 55. Arkansas courts have pinpointed five significant common characteristics of a security: (1) the investment of money or money’s worth; (2) investment in a venture; (3) the expectation of some benefit to the investor as a result of the investment; (4) contribution towards risk capital of the venture; and (5) the absence of direct control over the investment or policy decisions concerning the venture.

*Id.* (quoting *Smith v. State*, 587 S.W.2d 50, 52 (Ark. Ct. App. 1979), cert. denied, 445 U.S. 905 (1980)). In *First Fin. Fed. Sav. & Loan Ass’n v. E.F. Hutton Mortgage Corp.*, 652 F. Supp. 471 (W.D. Ark.), aff’d, 834 F.2d 685 (8th Cir. 1987), however, the court stated that the Arkansas test employs criteria similar to that used by the Securities Exchange Act (i.e., the *Howey test*). *Id.* at 475. The Eighth Circuit reasoned that since the demand notes failed as securities under the Securities Exchange Act, the notes would also fail as securities under Arkansas state securities law. *Arthur Young & Co.*, 856 F.2d at 55.

143. *Arthur Young & Co.*, 856 F.2d at 55.

contrary to the opinion of the Eighth Circuit. The Court vacated the decision and remanded the case to the court of appeals.

C. Second Court of Appeals Decision: Arthur Young & Co. v. Reves, 937 F.2d 1310 (8th Cir. 1991)

On remand, the Eighth Circuit reaffirmed the district court and upheld the summary judgment in favor of Arthur Young on the RICO claim. In light of the Supreme Court’s remand of the first court of appeals decision, the Eighth Circuit now had to determine whether Arthur Young had, in violation of § 1962(c), “conduct[ed] or participate[ed], directly or indirectly, in the conduct of [the Farmer’s Cooperation]” by performing the audit.

The court of appeals relied on the test set forth in Bennett v. Berg to interpret the “conduct or participate” language of § 1962(c). The Bennett test states: “[A] defendant’s participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.” In applying this test to the facts,

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145. The Court in Reves v. Ernst & Young, 494 U.S. 56 (1990), relied on the Second Circuit’s family resemblance test to determine what is and is not a security. Id. at 64-65. Under this test, “[a] note is presumed to be a ‘security,’ and that presumption may be rebutted only by a showing that the note bears a strong resemblance . . . to one of the enumerated categories of instrument” on the list of exceptions. Id. at 67.

146. Id. at 73.

147. Id. at 73. See supra text accompanying notes 144-46.

148. Arthur Young & Co., 937 F.2d at 1323-24. See supra note 6 (stating language of § 1962(c)).


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

151. Id. (quoting Bennett, 710 F.2d at 1364 (en banc), cert. denied, 464 U.S. 1008 (1983)). The Class argued that the court of appeals should apply the test developed by the Eleventh Circuit in Bank of Am. Nat’l Trust & Sav. Ass’n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986). Arthur Young & Co., 937 F.2d at 1324. In that case, the Eleventh Circuit held that “[i]t is not necessary that a RICO defendant participate in the management or operation of the enterprise.” Bank of Am., 782 F.2d at 970. However, the Eighth Circuit found no reason to abandon its precedent. Arthur Young & Co., 937 F.2d at 1324.
the court determined that Arthur Young did not violate RICO.\textsuperscript{152}

The plaintiffs again appealed. The Supreme Court granted cer-tiorari in order to resolve the issue of "whether one must participate in the operation or management of the enterprise itself to be subject to liability under [§ 1962(c)]."\textsuperscript{153} The Court was divided on this issue. The majority opinion and the dissent are analyzed below.

\textit{D. Second Supreme Court Decision: Reves v. Ernst & Young, 113 S. Ct. 1163 (1993)}

\textbf{1. Majority Opinion}

The Court's interpretation of § 1962(c) began with the statutory language.\textsuperscript{154} In defining the word "conduct" as used in § 1962(c),\textsuperscript{155} the Court applied the plain meaning rule.\textsuperscript{156} The Court believed the word "conduct" to be used as a verb in both instances.\textsuperscript{157} By defining the verb "conduct" as "to lead, run, manage, or direct,"\textsuperscript{158} it

\begin{footnotesize}
\begin{enumerate}
\item Arthur Young & Co., 937 F.2d at 1324. Although the court of appeals considered Arthur Young's actions "reprehensible," "the audits, meetings with the board of directors to explain the audits, and presentations at the annual meetings" were not enough to be considered participation in an enterprise. \textit{Id.}

\item Reves v. Ernst & Young, 113 S. Ct. 1163, 1166 (1993).

\item Reves, 113 S. Ct. at 1169. Following its decision in \textit{Turkette}, the Court indicated that clear, concise and unambiguous statutory language would be regarded as conclusive unless contradicted by express legislative intent. \textit{Id. See also} Russello v. United States, 464 U.S. 16, 20 (1983) (citing \textit{Turkette}). Although no expressly contradictory legislative intent existed that would prevent the statute's words from being conclusive, the Court felt it necessary to analyze such intent. \textit{Reves}, 113 S. Ct. at 1170-72. Throughout the legislative history of § 1962(c) the Court found consistent references to "prohibit[ing] the . . . management of legitimate organizations by racketeering" and "prohibiting the operation of an enterprise through a pattern of racketeering." \textit{Id.} (citing sources which emphasize the "operation" and "management" connotation). See infra notes 164-70.

\item Section 1962(c) states that it is unlawful "for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of [the] enterprise's affairs." 18 U.S.C. § 1962(c) \textcopyright 1989) (emphasis added).

\item Reves, 113 S. Ct. at 1169. For a discussion of the plain meaning rule, see supra notes 26-30 and accompanying text.

\item Reves, 113 S. Ct. at 1169. "Conduct" is used twice in § 1962(c). See supra note 153. The Court felt that the duplicative use of the word "conduct" indicated a need to define it similarly in both instances. \textit{Reves}, 113 S. Ct. at 1169.

\item Reves, 113 S. Ct. at 1169 (citing \textit{Webster's Third New International Dictionary} 474 (1976)).
\end{enumerate}
\end{footnotesize}
interpreted "conduct" as indicating "some degree of direction."\textsuperscript{159}

In addition, the Court defined the word "participate" as used in § 1962(c).\textsuperscript{160} The \textit{Reves} Court concluded that Congress intended the word "participate" to mean "to take part in."\textsuperscript{161} Therefore, § 1962(c) meant "to [manage] or [take part], directly or indirectly, in [the management] of such enterprise's affairs."\textsuperscript{162}

Having defined the terms of § 1962(c), the Court needed a standard through which courts could determine whether a person was managing or taking part in the management of an enterprise's affairs. The Court opined that the "operation or management" test stated in \textit{Bennett}\textsuperscript{163} was the test which best reflected the plain meaning of § 1962(c). However, the Court was not content to rest the selection of the "operation or management" test on a plain meaning rule analysis. Thus, they turned to RICO's legislative history for support.

The Court considered the legislative history of § 1962 and found that it offered further support for the "operation or management"

\textsuperscript{159} \textit{Id.} Reves and the Class argued that "conduct" should be defined as "carry[ing] on." \textit{Id.} However, the Court found that this definition could include almost any involvement in the affairs of an enterprise and that it did not indicate some degree of direction. \textit{Id.}

The dissent found the word "conduct" to be used as a noun. \textit{Id.} at 1169 (Souter, J., dissenting). The majority disagreed with this interpretation because the second reference to the word "conduct" becomes unnecessary, unless one reads the word to include an element of direction. \textit{Id.} Instead of saying "participate . . . in [an] enterprise's affairs," Congress chose to insert the word "conduct." \textit{Id.}

\textsuperscript{160} \textit{Id.} at 1170. Reves, the class representative, argued that the word "participate" was "a synonym for 'aid and abet.'" \textit{Id.} The Court probably should have accepted this definition in light of Russello v. United States, 464 U.S. 16, 21-22 (1983) (characterizing the word "participate" as a "ter[m] . . . of breadth"). Nevertheless, the Court gave the term a more narrow meaning. \textit{Reves}, 113 S. Ct. at 1170.

\textsuperscript{161} \textit{Reves}, 113 S. Ct. at 1170 (citing \textit{Webster's Third New International Dictionary} 1646 (1976)). The Court interpreted the meaning of the word "participate" by determining what Congress "did not say." \textit{Id.} First, the Court described "to participate" as being broader than "to conduct" because a more narrow definition of the former would make its use unnecessary. \textit{Id.} However, the phrase "to participate . . . in the conduct of . . . affairs" must be read more narrowly than "to participate in affairs." \textit{Id.} If it is not read more narrowly, the second use of "conduct" would also be unnecessary. \textit{Id.}

\textsuperscript{162} \textit{Id.} The Court reasoned that it should give each use of the word "conduct" similar meaning. \textit{Id.} at 1169. See Sorenson v. Secretary of the Treasury, 475 U.S. 851, 860 (1986); \textit{supra} note 6.

\textsuperscript{163} \textit{Reves}, 113 S. Ct. at 1170. This was the same test used by the Eighth Circuit in reviewing this present case at the lower levels. See \textit{Arthur Young & Co.}, 937 F.2d at 1323-24 (describing application of "operation or management" test of \textit{Bennett}). This test does not limit those liable to upper management or insiders of the company. \textit{Reves}, 113 S. Ct. at 1172-73.
test. The Court observed that proposed Senate bill number 1623 (S.1623), which later became § 1962, made it unlawful to invest "proceeds derived from criminal activity." Later, S.1861, which became §§ 1962(b) and (c), expanded the purpose of S.1623 "to prohibit the infiltration or management of legitimate organizations by racketeering activity." The Court noted that Assistant Attorney General Will Wilson criticized S.1623's failure to proscribe control or operation of an enterprise through racketeering activity. Wilson praised S.1861, however, because "the 'criminal provisions of the bill contained in Section 1962 are broad enough to cover most . . . methods by which ownership, control and operation of business concerns are required.'"

The Court also observed that members of Congress referred to § 1962(c) as "prohibiting the operation of an enterprise through a pattern of racketeering activity." The Court concluded from the remarks of Congress members that Congress did not intend RICO "to extend beyond the acquisition or operation of an enterprise."

After concluding that the legislative history of § 1962 supported the "operation or management" test, the majority held that RICO's liberal construction clause did not require rejection of this test. The Court stated that the purpose of the liberal construction clause was to prevent frustration of Congress' intent which could result from an "overly narrow reading of the statute." However, the Court cautioned that the clause was not an invitation to apply RICO beyond those who operate or manage an enterprise when to do so would violate Congress' intent.

164. Reves, 113 S. Ct. at 1170.
165. Id. at 1170 & n.5.
166. Id. at 1171.
167. Id.
169. Id.
170. Id. at 1172.
172. Reves, 113 S. Ct. at 1173.
173. Id.
Having satisfied itself that the "operation or management" test was the proper one, the Court applied the test to the facts. Employing the Bennett test, a majority of the Court held that "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs, . . . one must participate in the operation or management of the enterprise itself."\(^{174}\) Therefore, Ernst & Young was not liable under RICO for their accounting services because their auditors did not participate in the operation or management of the Farmer's Cooperative of Arkansas and Oklahoma, Inc.\(^{175}\)

2. Justice Souter's Dissenting Opinion with Justice White Joining

The dissent disagreed with the majority on three issues.\(^{176}\) First, the dissent disagreed with the majority's view that RICO's liberal construction clause did not require rejection of the "operation or management" test.\(^{177}\) Interpreting § 1962(c) requires the definition of certain terminology such as "conduct" and "participate." According to the dissent, employing the liberal construction clause would "recognize the more inclusive definition of the word 'conduct,' free of any restricting element of direction or control."\(^{178}\)

Second, the dissent argued that the majority's definitions and resultant test were too restrictive.\(^{179}\) The dissent believed that the majority unduly restricted § 1962(c) by misdefining the term "conduct."\(^{180}\) Contrary to the majority's position, Justices Souter and White believed that the duplicative use of the word "conduct" denotes use of the word as a verb and then a noun.\(^{181}\) Justice Souter argued that the majority reached the false conclusion that the word "conduct" is a verb by singling out and analyzing only the first use of the word.\(^{182}\) By analyzing only the first use of "conduct," "it is plausible to find a suggestion of control."\(^{183}\) The dissent argued that

\(^{174}\) Id. at 1173.
\(^{175}\) Id. at 1174.
\(^{176}\) Reves, 113 S. Ct. at 1174-78.
\(^{177}\) Id. at 1175.
\(^{178}\) Id.
\(^{179}\) Id. at 1174-75.
\(^{180}\) Reves, 113 S. Ct. at 1174-75.
\(^{181}\) Id. at 1174. The majority found the duplicative use of the word "conduct" as requiring the same contextual definition for each use. Id. at 1169-70. \textit{See supra} notes 154-59 and accompanying text.
\(^{182}\) Reves, 113 S. Ct. at 1174.
\(^{183}\) Id.
the "suggestion of control" did not fit with the remaining text of § 1962(c) which applies not only to those "employed by" an enterprise but also to those merely "associated with" an enterprise.\textsuperscript{184} Therefore, it would be difficult to apply the majority's "operation or management" test to one who is merely associated with an enterprise.\textsuperscript{185} To the dissent, the context of this language indicated a need for broad interpretation not limited to those who "operate or manage."\textsuperscript{186}

Finally, the dissent believed that even assuming that the majority's definition of "conduct" and "participation" were correct, the majority nevertheless misapplied the "operation or management" test.\textsuperscript{187} The dissent asserted that if the "operation or management" test was properly applied, the majority would have found Ernst & Young liable under the civil RICO claim because Arthur Young crossed the line between auditor and management.\textsuperscript{183} For its conclusion, the dissent pointed to the Code of Professional Conduct prepared by the American Institute of Certified Public Accountants (AICPA). The Code distinguishes between an auditor and management.\textsuperscript{189} According to the Code, management has the responsibility to choose the information to be included in the financial statements.\textsuperscript{185} Once that information has been included in the statements, "the auditor 'simply expresses an opinion on the client's financial statements.'"\textsuperscript{191} The dissent found that the Code's standards "leave no doubt that an accountant can in no sense independently audit fi-

\textsuperscript{184} \textit{Id.} See supra note 6 (citing full text of § 1962(c)).
\textsuperscript{185} \textit{Reves}, 113 S. Ct. at 1175.
\textsuperscript{186} \textit{Id.} at 1174 (Souter, J., dissenting).
\textsuperscript{187} \textit{Id.} at 1175.
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Reves}, 113 S. Ct. at 1176. The pertinent part of the Code of Professional Conduct explains that
[t]he financial statements are management's responsibility. The auditor's responsibility is to express an opinion on the financial statements. Management is responsible for adopting sound accounting policies and for establishing and maintaining an internal control structure that will, among other things, record, process, summarize, and report financial data that is consistent with management's assertions embodied in the financial statements . . . . The independent auditor may make suggestions about the form or content of the financial statements or draft them, in whole or in part, based on information from management's accounting system.
\textsuperscript{191} \textit{Id.} (citing Brief for Respondent 30).
Financial records when he has selected their substance himself."

Applying the Code's standards, the dissent concluded that Ernst & Young "did indeed step out of its auditing shoes and into those of management, in creating [the statements] on which the Co-op's solvency was erroneously predicated." The dissent further concluded that Ernst & Young involved itself in management activities by determining the value of an important fixed asset without the aid of the Co-op's management. Accordingly, the dissent asserted that the majority misapplied the Bennett test.

IV. Evaluation

This comment analyzes the Reves v. Ernst & Young decision in two ways. First, it critiques the majority's selection of the "operation or management" test. Second, it analyzes the effect of the Reves decision on professionals in light of post-Reves decisions.

192. Id. See, e.g., In re Thomas P. Reynolds Sec., Ltd., Exchange Act Release No. 29689, 1991 SEC LEXIS 1855, at *6-7 (Sept. 16, 1991) (concluding that once an "outside firm ... prepare[s] [a company's] books of account and financial statements ... it has become identified with management and may not perform an audit").

193. Reves, 113 S. Ct. at 1176. Various activities on the part of Ernst & Young reinforced the dissent's opinion that the auditors had stepped into management's shoes. Id. at 1176-78. For instance, Ernst & Young did not rely on the Co-op's management or look for management's help in estimating the value of the gasohol plant. Id. at 1176. Proper accounting standards call for the company's management to formulate the actual financial statement. See supra notes 187-92 and accompanying text. Ernst & Young, however, determined what they thought the value to be and repeatedly made decisions that, according to the Code, are reserved for management. Reves, 113 S. Ct. at 1176.

In addition, after deciding the worth of the plant, Ernst & Young determined when the plant was acquired. Id. at 1176-77. The choice Ernst & Young made had a considerable impact on the value of the asset. Id. at 1177.

If [Ernst & Young] had decided otherwise, the value of White Flame on the Co-op's books would have been its fair market value at the time of sale—three to four million dollars less. The "blatant fiction" created by [Ernst & Young] maintained the Co-op's appearance of solvency .... The District Court noted some plausible motives for [Ernst & Young's] conduct, including a desire to keep the Co-op's business and the accountants' need "to cover themselves for having testified on behalf of White and Kuykendall in [their] 1981 criminal trial."

Id. at 1177 n.5.

194. Reves, 113 S. Ct. at 1177. At trial, Ernst & Young argued that even though its activity was attenuated, "it was neither an integral part of the management of the Co-op's affairs nor part of a dominant, active ownership or managerial role." Id. at 1178 (quoting Arthur Young & Co. v. Reves, 937 F.2d 1310 (8th Cir. 1991) (emphasis added by dissent)).
A. The Restrictive "Operation/Management" Test Conflicts with the Underlying Principle of RICO—Organized Crime

From 1980 to the present, there has been a constant and consistent increase in the number of civil RICO cases litigated. This increase can be attributed to the broad interpretation of the statute and the advantageous, pro-plaintiff elements of RICO. Both of these factors make the use of RICO an appealing cause of action for plaintiffs.

In Sedima, S.P.R.L. v. Imrex Co., the Court approved of the evolving and expansive application of RICO. While noting that "RICO is to be read broadly," the Court acknowledged that the effect of this policy was that civil actions "are ... brought almost solely against [respected businesses], rather than against the archetypal, intimidating mobster." The Court, however, recognized that the correction of this problem should be left to Congress. Regardless of whether the Court had ample power to fix this problem, the problem had been judicially noted.

Eight years after Sedima, the majority in Reves v. Ernst & Young pulled an about face and attempted to resolve the problem of broad RICO applications. The Reves decision restricted the use of RICO by redefining who constitutes a viable § 1962 defendant. The Supreme Court decided that only those participating in the "operation or management" of an enterprise's affairs would be liable under § 1962(c).

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195. See supra text accompanying notes 51-59.
196. See supra text accompanying notes 56-59.
197. See supra text accompanying notes 60-67.
199. Id. at 497-500.
200. Id. at 497.
201. Id. at 499.
202. Sedima, 473 U.S. at 499-500. "It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications." Id. Accord Note, Civil RICO: The Temptation and Impropriety of Judicial Restrictions, 95 HARV. L. REV. 1101, 1119 (1982) (noting that RICO's broad interpretation "should therefore invite legislative reconsideration, not judicially imposed restrictions").
203. See Sedima, 473 U.S. at 500. "We ... recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. [We] shar[e] the doubts of the Court of Appeals about this increasing divergence ..." Id. (citations omitted).
204. 113 S. Ct. 1163 (1993).
205. Id. at 1169-74.
206. Id. at 1169-74. See supra text accompanying notes 154-75 (analyzing the Supreme Court's decision).
The Supreme Court’s restrictive “operation or management” test unduly reduces a plaintiff’s ability to reach certain defendants who Congress considered to be within the ambit of § 1962(c).\textsuperscript{207} The now unreachable defendants consist of those who “participate” in the “conduct” of an enterprise’s affairs, but do not “operate” or “manage” that enterprise.\textsuperscript{208} It is more than possible that Congress wished to hold those who are equally culpable liable for damages, even though they were merely participating in the enterprise’s affairs.

The restrictive effect of the \textit{Reves v. Ernst & Young} decision can be attributed to the Court’s interpretation of § 1962(c)’s language. The Court’s definition of this language is far from correct and the dissent in \textit{Reves v. Ernst & Young} properly recognized the majority’s error.\textsuperscript{209} The majority gave the words a meaning other than that desired by Congress.\textsuperscript{210} The majority’s definitions resulted in a restrictive standard that conflicts with many of its own previous RICO decisions.\textsuperscript{211}

\textsuperscript{207} See supra note 6 and accompanying text (citing § 1962(c)’s language); supra note 44 (discussing those individuals that Congress considered within the ambit of RICO).

\textsuperscript{208} The test given by the \textit{Reves v. Ernst & Young} Court is capable of producing contradictory results. \textit{Reves}, 113 S. Ct. at 1175-78 (pointing out that proper application of majority’s test would have resulted in liability for the firm). The ultimate question becomes whether Ernst & Young is really a defendant that Congress intended to be held liable under § 1962(c).

Application of the majority’s test could prevent plaintiffs from reaching all defendants considered proper by Congress. For instance, if a plaintiff is able to successfully argue that the president of a corporation is a manager under § 1962(c) he will obtain treble damages. \textit{See} 18 U.S.C. § 1964(c) (1989). However, if nine or ten other individuals exist that could not be labeled as “operators or managers” but still played a large, backstage part in the business, those defendants will not feel the squeeze of treble damages and will quite likely carry on their criminal activity.

\textsuperscript{209} \textit{Reves}, 113 S. Ct. at 1174-78.

\textsuperscript{210} Id. See supra text accompanying notes 176-94 (explaining dissent); supra text accompanying notes 44-49 (explaining what Congress truly intended).

\textsuperscript{211} In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), the Court said “RICO is to be read broadly.” \textit{Id.} at 497. \textit{See supra} notes 198-204 and accompanying text (discussing \textit{Sedima}). Prior to \textit{Sedima}, the Court stated that “[c]onsidering [the statement of findings that prefaces the Organized Crime Control Act of 1970 and its] broad purposes, the [narrow] construction of RICO suggested by respondent . . . is unacceptable. Whole areas of organized criminal activity would be placed beyond the substantive reach of the enactment.” \textit{Turkette}, 452 U.S. at 589. \textit{Turkette} went on to state that “courts are without authority to restrict the application of the statute.” \textit{Id.} at 587. \textit{Reves v. Ernst & Young} restricted the application of § 1962(c).

United States v. Russello, 464 U.S. 16 (1983), which was issued two years after \textit{Turkette} and two years before \textit{Sedima}, stated that Congress’ “broader goal [with
The method of statutory interpretation formulated by Richard A. Posner would alleviate many of the detrimental effects to the plaintiff previously discussed.\textsuperscript{212} Under Posner's method, "[t]he judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."\textsuperscript{213} This method seems more applicable and proper to the present situation than the Court's method of interpretation.

There are three steps to Posner's "imaginative reconstruction."\textsuperscript{214} First, the judge must analyze the typical statutory interpretation factors such as "the language and apparent purpose of the statute, its background and structure, its legislative history (especially the committee reports and the floor statements of the sponsors) and the bearing of related statutes."\textsuperscript{215} Second, the judge must consider "the values and attitudes, so far as they are known today, of the period in which the legislation was enacted."\textsuperscript{216} The judge must interpret the statute as the legislators would have in situations they did not foresee.\textsuperscript{217} Finally, "the judge [should] be alert to any sign of legislative intent regarding the freedom with which he should exercise his interpretive function."\textsuperscript{218} If the legislators prescribe a broad or narrow interpretation for the statute, the judge must recognize such direction accordingly.\textsuperscript{219}

Application of the first part of Posner's "imaginative reconstruction" analysis would require the judge to analyze RICO's leg-

\textsuperscript{212} See Posner, supra note 30. Posner refers to his method as "imaginative reconstruction." \textit{Id.} at 817.

\textsuperscript{213} \textit{Id.} at 817. Posner claims that one could criticize this method for its subjectivity. \textit{Id.} However, Posner states that "the irresponsible judge will twist any approach to yield the outcomes that he desires and the stupid judge will do the same thing unconsciously." \textit{Id.}

\textsuperscript{214} \textit{Id.} at 818.


\textsuperscript{216} Posner, supra note 30, at 818.

\textsuperscript{217} \textit{Id.}

\textsuperscript{218} \textit{Id.}

\textsuperscript{219} \textit{Id.} Posner noted the liberal construction clause of RICO as an example. \textit{See id.} at 818 n.61.
islative history by looking at comments made on the congressional floor and in committee reports.\textsuperscript{220} If the judge were to do this, he would most likely find an extraordinary number of references to organized crime as the progenitor of RICO.\textsuperscript{221}

This analysis would lead the judge directly into an interpretation of "values and attitudes."\textsuperscript{222} Under this part of the analysis, the judge would find that Congress was concerned with organized crime and the control it acquired over the public's lives and businesses.\textsuperscript{223} The Court in \textit{Reves v. Ernst \& Young} should have taken these factors into account when defining the pertinent terms of § 1962(c), namely, "conduct . . . participat[e] . . . conduct." Using the organized crime factor as an underlying principle in interpreting § 1962(c) would have resulted in the \textit{Reves v. Ernst \& Young} Court creating a broad rather than restrictive standard. A broad standard is needed in order to reach any organized criminal, whether directly or indirectly involved in the conduct of an enterprise.\textsuperscript{224} Organized crime is not limited merely to those operating and managing an enterprise; therefore, the standard should allow a plaintiff to go beyond this limitation.

Application of the third part of Posner's method\textsuperscript{225} would involve consideration of RICO's liberal construction clause.\textsuperscript{226} The liberal construction clause supports the broad interpretation of § 1962(c) required by the first and second parts of Posner's method. The Court in \textit{Reves v. Ernst \& Young} disregarded the liberal construction clause.\textsuperscript{227}

\textsuperscript{220} See supra text accompanying note 216.  
\textsuperscript{221} See supra note 44 and accompanying text.  
\textsuperscript{222} See supra text accompanying notes 216-18.  
\textsuperscript{223} See supra note 44 and accompanying text.  
\textsuperscript{224} This is not to say that organized crime should be an express requirement of § 1962(c). Some courts feel that organized crime should be an express limitation in § 1962(c). See, e.g., Moss v. Morgan Stanley, 553 F. Supp. 1347, 1359-60 (S.D.N.Y.), aff'd, 719 F.2d 5 (2d Cir. 1983); Hokama v. E.F. Hutton \& Co., 566 F. Supp. 636, 643-44 (C.D. Cal. 1983); City of Atlanta v. Ashland Warren, 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. Aug. 20, 1982); Noonan v. Granville-Smith, 537 F. Supp. 23, 29 (S.D.N.Y. 1981); Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 747 (N.D. Ill. 1981); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975); Brady, supra note 57, at 1133-34 (noting "implication" that RICO is limited to "organized criminal activity"). Other courts have denied the existence of such an organized crime limitation to § 1962(c). See supra note 44 (last full paragraph).  
\textsuperscript{225} See supra text accompanying notes 218-19.  
\textsuperscript{227} Reves, 113 S. Ct. at 1172. See supra text accompanying notes 154-63 (discussing why the liberal construction clause was not used).
If the Court had considered this clause, a broader interpretation would have resulted and the plaintiffs' goals would have been effectuated.

Had the Court in *Reves v. Ernst & Young* employed Posner's method of statutory interpretation, it would have reached a more sensible, rational, and applicable approach. The Court should have recognized that organized crime was the central force behind the enactment of RICO, although never expressly stated as such in the statute.228 The Court should have realized that organized crime extends beyond operators and managers.

The test set forth in *United States v. Scotto*229 best employs the reasoning behind Posner's methodology.230 This test encompasses virtually all possible defendants. In addition, the test does not require that the defendant participate in organized crime.

If the Court's goal in *Reves* was to restrict the expansive use of RICO, there were more effective ways to achieve this result than restricting liability to operators and managers.231 To reduce the number of respectable businesses involved in civil RICO actions through this broad test, courts should exercise judicial discretion. This would require judges to follow the *Scotto* test with these questions in mind: (1) is this a claim more properly adjudicated under state law;232 and (2) did this plaintiff seem to bring this action under RICO solely for the procedural advantages and treble damages? A court which employs this approach will follow the true intent of Congress and reduce the attack on professionals and legitimate businesses.

**B. Post-Reves Decisions and Their Effect on Professionals**

As stated earlier, the use of RICO reached the apex of expansive applications in the 1980s.233 Many of these suits were brought against

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228. *See supra* note 44.
229. 641 F.2d 47, 54 (2d Cir. 1980).
230. *See supra* text accompanying notes 69-94; and *supra* notes 70-76 and accompanying text (discussing the *Scotto* test).
231. Even as a policy reason, it would make more sense to have a standard that allowed plaintiffs to reach more organized criminals than just those who operate or manage. It has never been Congress' goal to only attack certain types of criminals, leaving the remainder of the same category unscathed. To do so would be analogous to making the getaway driver a felon but letting the actual bank robbers go.
232. Today, most of the claims brought under RICO are actually covered by "specific federal regulatory laws such as the securities laws, or do not belong in the federal courts at all." Lacovara & Aronov, *supra* note 12, at 9.
professionals such as accountants and lawyers\textsuperscript{234} for actions not originally intended under RICO.\textsuperscript{235} In an attempt to restrict the use of RICO, the \textit{Reves v. Ernst \& Young} decision adopted the restrictive "operation or management" test.\textsuperscript{236} To demonstrate the effect of the more restrictive \textit{Reves} standard, this comment analyzes a few illustrative post-\textit{Reves} decisions.

1. Appellate Court Decisions

The Eighth Circuit in \textit{Nolte v. Pearson}\textsuperscript{237} concluded that the law firm of Rosenbaum, Wise, Lerman, Katz \& Weiss was not liable under RICO's § 1962(c).\textsuperscript{238} The Rosenbaum firm was sued for fraud by a group of investors.\textsuperscript{239} The fraud charge involved four documents prepared by the law firm in anticipation of investor inquiry concerning a "leasing program" run by the Music Leasing Company.\textsuperscript{240} The district court determined that the opinion letters merely interpreted information provided to the law firm by the leasing company and did not involve operation or management of the company.\textsuperscript{241}

\begin{itemize}
\item \textsuperscript{234} Report of the Ad Hoc Civil RICO Task Force, 1985 A.B.A. SEC. CORP. BANKING \& BUS. L. REP. 21, 30. According to Smith \& Metzloff, "RICO claims against attorneys have been filed primarily for expressing opinions in stock transactions or partnership offerings." Smith \& Metzloff, supra note 59, at 629. RICO claims involving accountants concern "problems arising in connection with audit examinations." Id.

\item \textsuperscript{235} See supra note 44.

\item \textsuperscript{236} \textit{Reves}, 113 S. Ct. at 1173. In analyzing this decision as it relates to professionals, the \textit{Journal of Accountancy} stated:

The ruling's impact on the accounting profession is substantial. By establishing an "operation or management" test for accountants, the Court appeared to limit RICO's applicability to the profession to cases in which management consulting services were provided. . . .

Under the new test, RICO counts against accounting firms will be subject to pretrial dismissal by summary judgment, absent a showing that a factual dispute exists about whether the firm was involved in managing the business. \textit{Supreme Court Limits RICO, J. OF ACCT.,} May 1993, at 24.

\item \textsuperscript{237} 994 F.2d 1311 (8th Cir. 1993).

\item \textsuperscript{238} Id. at 1317.

\item \textsuperscript{239} Id. at 1314.

\item \textsuperscript{240} Id.

\item \textsuperscript{241} \textit{Nolte}, 994 F.2d at 1316. The four documents consisted of:

an attorney opinion letter and accompanying information memorandum . . . advising investors of federal income tax consequences; a defense letter agreeing to render legal assistance to investors; and two documents explaining whether changes in federal tax laws would have a material effect on an investor's income tax consequences.

\textit{Id.} at 1314.
The court of appeals restated the "operation or management" test formulated by the *Reves v. Ernst & Young* Court. The Eighth Circuit agreed that the attorneys were not liable because the plaintiff had not shown that the defendants participated in the operation or management of the Music Leasing Company.

In *University of Maryland v. Peat, Marwick, Main & Co.*, the Third Circuit concluded that an accounting firm was not liable under § 1962(c) for its services as an independent auditor. Peat, Marwick had prepared opinions concerning the financial stability of Mutual Fire, Marine & Inland Insurance Company. Although the opinion letters vouched for the veracity of Mutual Fire's financial statements, the "statements were false and misleading."

The court of appeals concluded Peat, Marwick was not liable for its actions. The court found that the "essence" of the plaintiff's claim was that the defendant performed materially deficient accounting services. Applying *Reves*, the court concluded that such actions did not amount to "operation or management," therefore, they did not create RICO liability for accounting firms.

In addition to the more traditional accounting services, Peat, Marwick computerized Mutual Fire's accounting functions, assisted Mutual Fire in purchasing an interest in a building, and assessed the value of a Mutual Fire's reinsurance subsidiary. The plaintiffs argued that these services involved "operation or management" by the accounting firm. The Third Circuit disagreed with this contention, stating that a beneficial service does not create RICO liability.

2. District Court Decisions

In *Sassoon v. Altgelt, 777, Inc.*, the Northern District of Illinois concluded that the law firm of Binger, Carminiti & Iatarola was not
liable under RICO’s § 1962(c) provision. The plaintiffs alleged that the attorneys were liable for their silence concerning a public offering of limited partnerships. The law firm’s involvement consisted of drafting the offer and writing advisory and extension letters.

The district court applied the Reves v. Ernst & Young decision and the “operation or management” test. In assessing the defendants’ actions, the court concluded that the attorneys’ “conduct consisted of providing legal services to the general partners and to the limited partnership.” Providing legal services did not qualify as “operation or management” under the Reves test.

In Chamorac Properties, Inc. v. Pike, the Southern District of New York held that an accountant and an attorney were not liable under § 1962(c) of RICO. According to the court, the plaintiff failed to provide sufficient evidence that the defendants “exercise[d] some measure of control or direction over the enterprise.” The plaintiff was only able to show that two of the defendants “were outside professionals who provided legal and accounting services.”


255. Id. at 1304-05.
256. Id. at 1307.
257. Id. at 1306-07.
259. Id.
263. Id. at *10. Altman was also a limited partner in a company owned by another defendant, Pike Enterprises, but the district court did not feel this position “impl[ied] the degree of control or direction of the entire RICO enterprise needed to maintain a claim under § 1962(c).” Id. at *10-11.
The plaintiffs, in their counter-argument, made a distinction between those "independent" professionals performing for legitimate fees and non-independent professionals seeking "pecuniary gain."\textsuperscript{264} This distinction implied that a defendant who "knowingly participated" in such illegal actions by "obtaining unwarranted and unjustifiable professional fees" fulfills the "operation or management" test.\textsuperscript{265} However, the district court denied the veracity of this conjecture.\textsuperscript{266} The court emphasized that liability under other laws does not create RICO liability under § 1962(c).\textsuperscript{267}

V. Conclusion

The existence of organized crime gave birth to the RICO statutes. Even though organized crime played such an integral role in RICO's formation, Congress, for constitutional and other reasons, chose not to include an express organized crime limitation. The lack of an organized crime limitation led to broad interpretation and even broader application of § 1962(c). The United States Supreme Court, however, realized that RICO had become unwieldy and unpredictable in its application to professionals such as accountants and lawyers.

Through Reves v. Ernst & Young, the Court attempted to reduce the effect of RICO on professionals. In restricting the standard to reduce professionals' liability under § 1962(c), the Court reduced a plaintiff's ability to reach those originally considered under the ambit of RICO—organized criminals. The Court should have adopted a broad standard in light of RICO's legislative history and historically broad interpretation. Other measures could have been taken to limit the type of defendant included in a RICO claim. The use of Posner's "imaginative reconstruction" theory would have enabled the Court to formulate a broad standard without the difficulty of expressly limiting RICO defendants to organized criminals.

The Reves v. Ernst & Young standard should ease professionals' fears. Later decisions applying Reves indicate that providing opinion letters, aiding the computerization of companies, drafting offers, and offering basic legal or accounting services are not actions involving the "operation or management" of a company. Unless the courts

\textsuperscript{264} Id. at *11.
\textsuperscript{265} Chamorac Properties, No. 86 CIV 7919, 1993 U.S. Dist. LEXIS 14593, at *11.
\textsuperscript{266} Id.
\textsuperscript{267} Id. at *12.
begin to interpret the term "operation" more broadly, persons providing these services will be protected from RICO claims.

Christopher D. McDemus