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QUO VADIS, ASSOCIATION IN FACT? THE
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BACKGROUND TO EXPLAIN WHY)

*Paul Edgar Harold**

INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act¹ is a notoriously broad criminal and civil statute, capable of reaching diverse areas of unlawful activity. Highly abstract, the core idea of what activity the statute reaches is straightforward: the statute prohibits a person from committing a series of criminal acts (in the statute's terms, "a pattern of racketeering activity") that have a relationship in some way to an "enterprise." This amorphous term, "enterprise," covers a wide assortment of varied real-world factual entities—from corporations² to street gangs³ to Mafia families⁴ to government entities⁵—and the flexibility of the enterprise concept forms a large part of RICO's genius.

Federal courts, however, are challenging the heart of the enterprise concept's flexibility. Since the inception of RICO, they have especially attempted to curtail the reach of the "association-in-fact

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1 18 U.S.C. § 1962 (2000).

2 See, e.g., *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *reh'g en banc*, 710 F.2d 1361 (8th Cir. 1983).

3 See, e.g., *United States v. Phillips*, 239 F.3d 829 (7th Cir. 2001).

4 See, e.g., *United States v. Orena*, 32 F.3d 704 (2d Cir. 1994).

5 See, e.g., *United States v. Ambrose*, 740 F.2d 505 (7th Cir. 1984).

enterprise," the element of the enterprise concept that gives RICO such variety in application.⁶ Currently, federal courts evidence the judicial hostility to civil RICO in particular⁷ through tightening their interpretation of what constitutes an association-in-fact enterprise in the civil context, while concurrently unduly loosening the previous restrictions on criminal association-in-fact enterprises. The reason for this federal phenomenon is simple, really. It stems from the "organized crime myth"⁸ that Congress passed RICO with *only* the mob in mind. One eminent jurist described the underlying reason behind the judicial distaste for civil RICO and the concomitant restrictions on civil association-in-fact enterprises simply as "a weapon envisioned as a rifle to shoot mobsters became a shotgun pointed at everybody."⁹ As this Note will demonstrate, however, this myth simply is not true.¹⁰ Thus, many of these restrictions upon civil association-in-fact enterprises amount to judicial activism, albeit a form of activism that has the interests of judicial efficiency and economy rather than individual rights in mind.

The importance of the reinvigorated restrictions federal courts impose against civil association-in-fact enterprises are highlighted by a brief historical introduction. A hypothetical helps to illustrate the various twists and turns that litigation in civil RICO cases has taken due in part to both recalcitrant judges attempting to restrict civil RICO actions in order to clear their dockets and plaintiffs' lawyers attempting to elude those restrictions. Suppose a person became outraged when she learned that a corporation was intentionally committing

6 See, e.g., *United States v. Bledsoe*, 674 F.3d 647, 663 (8th Cir. 1982) (creating restrictions on association-in-fact enterprises in order to limit the focus of RICO to "organized crime-like" cases); *United States v. Anderson*, 626 F.2d 1358, 1369 (8th Cir. 1980) (construing the association-in-fact enterprise provision narrowly).

7 Judge Sentelle's 1990 article provides an important study of this prevalent trend. According to Judge Sentelle:

The Chief Justice of the United States may well have been speaking for all of us [judges] in an piece he wrote for *The Wall Street Journal*. The title of that piece may say it all: "Get RICO Cases Out of My Courtroom." Other Justices have expressed similar sentiments in more formal writing, specifically opinions, especially separate opinions.

Honorable David B. Sentelle, *Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers*, 12 CAMPBELL L. REV. 145, 146 (1990).

8 See G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"*, 43 VAND. L. REV. 851, 860–68 (1990) ("Legally, at least, the Organized Crime Myth ought to be left in its coffin with a stake driven through its heart").

9 *Id.* at 150.

10 See *infra* Part II.B.

fraud by adding a small illegal fee to every transaction it completed with a customer when it mailed out its bill.¹¹ Being a “red-blooded American,”¹² she immediately initiated a civil class action suit against the corporation. To really teach these white collar corporate criminals a lesson, she added a civil RICO count in the complaint under 18 U.S.C. § 1962(c)—seemingly the most logical RICO section—which prohibits “any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”¹³ She alleged that the corporation conducted this pattern of mail fraud and should be held liable for treble damages.¹⁴ A federal judge hearing the case, however, would be quick to apply the first weapon in his arsenal to promptly get this kind of case off his docket: the “Person-Enterprise Rule.” Using this well established doctrine, all the judge would need to do would be to state that no RICO enterprise existed in this case, since “a corporate entity may not be both the RICO person and the RICO enterprise under § 1962(c).”¹⁵ Because the plaintiff named the corporation as a defendant in the RICO suit, the corporation is considered the RICO “person,” and therefore the person-enterprise rule applies.¹⁶ The judge would justify the application of this rule by appealing to congressional intent, arguing that

11 The facts in *Roper v. Conserve, Inc.*, 578 F.2d 1106, 1109–10 (5th Cir. 1978), demonstrate that this is not such a “hypothetical” example.

12 Notre Dame Law Professor Joseph Bauer is known among his students for using this phrase to describe the real or imagined heightened propensity of Americans to resort to lawsuits.

13 18 U.S.C. § 1962(c) (2000).

14 See *id.* § 1964(c) (“Any person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . 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 . . .”).

15 *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); see *Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481, 1489 (6th Cir. 1989); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 123 (5th Cir. 1986) (*per curiam*); *B.F. Hirsch v. Enright Ref. Co.*, 751 F.2d 628, 634 (3d Cir. 1984); *Haroco, Inc. v. Am. Nat’l Bank & Trust Co. of Chicago*, 747 F.2d 384, 400 (7th Cir. 1984), *aff’d per curiam*, 473 U.S. 606 (1985); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *United States v. Computer Scis. Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982); *Bennet v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982). But see *United States v. Hartley*, 678 F.2d 961, 988–90 (11th Cir. 1982), *overruled by United States v. Goldin Indus.*, 219 F.3d 1268 (11th Cir. 2000) (holding that requiring “person” to be separate from “enterprise” would permit a corrupt corporation to evade punishment, and therefore declining to follow the person-enterprise rule).

16 For the rule that courts find the RICO “person” in a civil or criminal RICO action to be whomever the plaintiff names as defendants, see, for example, *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir. 1988).

Congress only meant to punish the infiltration of criminals, not the corporation.¹⁷

With this avenue resoundingly blocked, our plucky plaintiff next could try what plaintiffs' attorneys historically tried after federal courts closed the § 1962(c) door: sue under a different section of RICO.¹⁸ Tantalized by some quips from courts suggesting that there was another way,¹⁹ she sues under § 1962(a), which prohibits "any person who has received any income derived . . . from a pattern of racketeering activity . . . to use or invest . . . any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment of operation of, any enterprise"²⁰ She knows that courts do not apply the person-enterprise rule to actions brought under § 1962(a) or § 1962(b),²¹ so she would not face that previous difficulty. Our plaintiff would allege that the corporation's conduct constituted a pattern of racketeering and that the corporation then invested the proceeds from racketeering in the enterprise. She would also allege that she suffered injury from the predicate mail fraud, but not from the investment of the proceeds of the mail fraud. Again, however, our plaintiff would run into trouble, as the federal judge has another trick up his sleeve: the "investment-injury rule." The judge would be able to invoke this rule, stating that a plaintiff must allege injury arising from the corporation's *investment* of the racketeering income in an enterprise in a claim for civil damages under § 1962(a),²²

17 See, e.g., *B.F. Hirsch*, 751 F.2d at 634 ("It is in keeping with that Congressional scheme to orient section 1962(c) toward punishing the infiltrating criminals rather than the legitimate corporation which might be an innocent victim of the racketeering activity in some circumstances.").

18 See Patrick D. Hughes, Comment, *The Investment Injury Requirement in Civil RICO Section 1962(a) Actions*, 41 DEPAUL L. REV. 475, 491-93 (1992) (tracing the history of the switch from § 1962(c) claims to § 1962(a) claims and pinning responsibility for the switch on the person-enterprise rule).

19 See *B.F. Hirsch*, 751 F.2d at 633-34 (noting that other circuits suggested that an enterprise could be charged under § 1962(a) and remanding to the district court on that issue); *Haroco*, 747 F.2d at 401-02 (qualifying its adoption of the person-enterprise rule by promising recovery under § 1962(a)); see also Blakey & Perry, *supra* note 8, at 863 n.29 (noting the qualification of the Seventh Circuit's holding in *Haroco* that recovery was available under § 1962(a)).

20 18 U.S.C. § 1962(a) (2000).

21 See Lance Bremer et al., *Racketeer Influenced and Corrupt Organizations*, 34 AM. CRIM. L. REV. 931, 948 n.139 (1997) (citing cases where the court has ruled that § 1962(a) and § 1962(b) are exempt from the application of the person-enterprise rule).

22 See *Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992); *Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 356-58 (3d Cir. 1989); *Grider v. Tex. Oil & Gas Corp.*, 868 F.2d 1147,

to dismiss our plaintiff's case. According to the judge, a violation of § 1962(a) would only occur with the actual use or investment of the ill-gotten gain, and not the acts of racketeering themselves.²³ Since our plaintiff had not alleged this in her case (indeed, this would be something very difficult for her to allege given the hypothetical facts of her case—a difficulty that stymies many would-be RICO plaintiffs), she was plain out of luck on this tack.

How would our persevering plaintiff proceed given her last two failures? Historically, the next step in the development of RICO litigation was for plaintiffs to take a second crack at § 1962(c), but this time the plaintiffs would plead the enterprise differently. Instead of pleading just the corporation as the enterprise, the plaintiffs would allege in their complaints an “association-in-fact” enterprise. Sometimes plaintiffs would allege that the association-in-fact enterprise consisted of the corporation and its employees (especially including the officers who were committing the fraud), sometimes the corporation and its subsidiaries, and in other cases the corporation and any other corporation or entity that could possibly have been complicit in the schemes (a bank, for example, if the scheme involved mortgages).

Assuming our plaintiff took this route, at first glance it would seem that she was in luck. This time, our federal judge—looking at the precedents which almost unanimously held that the person-enterprise rule did not apply to association-in-fact enterprises²⁴—would not

1149–51 (10th Cir. 1989). *But see* *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 836–39 (4th Cir. 1990) (rejecting the investment-injury rule, reasoning that the restriction is not contained in the explicit language of RICO, that such a requirement would be contrary to RICO's “liberal construction clause,” and that the logic of the Supreme Court's decisions in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), and *American National Bank & Trust Co. of Chicago v. Haroco, Inc.*, 473 U.S. 606 (1985) (per curiam), applied equally to § 1962(a) claims and therefore dictated against a special-injury requirement in any civil RICO claim). *See generally* Hughes, *supra* note 18 (providing an in-depth treatment of the pros and cons to the investment-injury rule).

23 *See, e.g., Ouaknine*, 897 F.2d at 82.

24 *See, e.g., United States v. Fairchild*, 189 F.3d 769, 776 (8th Cir. 1999) (finding that charging defendant Gruber and his associates as defendants and also as the association-in-fact enterprise did not violate the person-enterprise rule); *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 425 (5th Cir. 1990) (finding that the plaintiff's association-in-fact enterprise theory, where the collective bargaining association for the airline pilots and the airline were both part of the enterprise and also the defendants, did not violate the person-enterprise rule, while the enterprise theory consisting of just the pilots' collective bargaining association as the enterprise did); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995–96 (8th Cir. 1989) (finding that despite two of the corporations comprising part of the alleged association-in-fact being named defendants in the case, the person-enterprise rule was not implicated); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1297 (6th Cir. 1989) (holding that the fact

be able to apply the person-enterprise rule in the context of this application of § 1962(c) even though the corporation would be the "person" and make up part of the "enterprise." Indeed, one would be hard pressed to argue otherwise. No one has debated that one of the main purposes of RICO was to attack organized crime. If the person-enterprise rule applied to association-in-fact enterprises, then "it would preclude the quintessential organized crime prosecution in which a mobster is prosecuted for conducting the affairs of a Mafia family of which he is a member."²⁵ Because a part of the association-in-fact enterprise, namely the mob member, would be named as the defendant and thus would be the RICO "person," applying the person-enterprise rule would bar the prosecution of this mob member.

Therefore, our judge and federal judges in similar situations were not able to easily get rid of civil RICO cases pleading association-in-fact enterprises under § 1962(c). Federal judges had to develop new methods to rid themselves of what they believed to be unmeritorious civil RICO claims.²⁶ This Note, then, traces the development of the new tools that federal judges apply to hinder this new iteration of civil

that the defendant owned 100% of the corporations alleged to constitute the association-in-fact does not prevent the corporations from being separate legal entities, thereby not implicating the person-enterprise rule). *But see* *United States v. Computer Scis. Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) (holding that even with association-in-fact enterprises, the "person" must be distinct from the "enterprise"). At least one court, however, has applied the person-enterprise rule to an association-in-fact enterprise when it consists of only two entities, one of which is the defendant. *See Crowe v. Henry*, 43 F.3d 198, 206 (5th Cir. 1995) (finding that because the plaintiff alleged that the defendant Henry is "both the RICO person and a member of the Crowe/Henry association-in-fact," there was not a "sufficient distinction between the person and the enterprise"); *cf. Cedric Kushner Promotions, Ltd. v. Don King*, 533 U.S. 158 (2001) (holding that the sole shareholder of a corporation was a person distinct from the enterprise for purposes of the person-enterprise rule).

25 2 ARTHUR F. MATHEWS ET AL., *CIVIL RICO LITIGATION* § 6.03[A], at 6-43 (2d ed. 1992).

26 One example of such new methods is the requirement that the RICO association-in-fact enterprise consist of more than just "a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant." *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339, 344 (2d Cir. 1994); *see also* *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 243 (5th Cir. 1988). Another is the requirement that the RICO association-in-fact enterprise must comprise more than just a large manufacturing corporation and its subsidiaries and retail dealers. *See* *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999) ("A firm and its employees, or a parent and its subsidiaries, are not an enterprise separate from the firm itself.") (citations omitted); *Brannon v. Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1147-49 (10th Cir. 1998); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227-28 (7th Cir. 1997). *But see* *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1277 (11th Cir. 2000) (finding that despite overlapping ownership, three

RICO cases. While developing these new standards for association-in-fact enterprises to raise the bar on civil RICO cases, federal judges also must apply these same principles in the criminal context whenever an association-in-fact enterprise is alleged. This Note demonstrates that although the phrasing of these new standards sounds the same in both the criminal and civil contexts, the reality is quite different. A closer examination of the factual situations in both criminal and civil RICO cases reveals that the association-in-fact standards in the criminal context have few teeth, while the application of the "same" standards in the civil context have gnashing jaws that bite unwary plaintiffs with a vengeance.

Part I of this Note begins the discussion of association-in-fact enterprises by taking a brief look at the language and original purpose of the association-in-fact provision. This Part shows that most of the restrictions federal courts currently apply to association-in-fact enterprises have no basis either in the text of the statute or in the legislative history. Next, Part II briefly traces the restrictions on association-in-fact enterprises from their beginnings in cases before *United States v. Turkette*,²⁷ the seminal Supreme Court case in this area that should have closed the door to such restrictions, to their "rebirth" in *United States v. Bledsoe*.²⁸ Part II explains the pedigree of many of the restrictions federal courts currently apply in order to give historical context and aid in their understanding. Finally, Part III demonstrates the growing dichotomy in the application of the restrictions on association-in-fact enterprises, briefly analyzing the post-*Bledsoe* criminal RICO cases that developed the restrictions but did not apply them, and then showing how courts applied the restrictions in later civil RICO cases in a manner inconsistent with the earlier criminal cases.

I. DEBUNKING THE "ORGANIZED CRIME MYTH" OF RICO

A. *The Statutory Definition of an "Association-in-Fact Enterprise"*

Many commentators have spilled ink over the "association-in-fact" enterprise concept. However, before reaching any of the debate it is important to start with the text of the statute.

Subsection 1961(4) defines the term "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, or any union or group of individuals associated in fact although

corporations could all be RICO defendants and also be considered jointly as constituting an association-in-fact enterprise).

27 452 U.S. 576 (1981).

28 674 F.2d 647 (8th Cir. 1982).

not a legal entity.”²⁹ The first obvious—though sometimes apparently missed—observation about this definition is that association in fact is juxtaposed with “legal entity,” thereby clearly demonstrating that the term “enterprise” contemplates more than just legitimate, run-of-the-mill businesses. The second observation from the text is the disjunction between “union” and an association-in-fact group in the second clause: does this mean to suggest that one’s conceptual understanding of an association-in-fact group should be similar to the concept of a union (i.e., a loose association of individuals),³⁰ or rather does the disjunction show that these are two distinct kinds of organizations that give definition to the term “enterprise” along with legal entities? Textual canons of statutory construction suggest the former,³¹ and this has important implications for how one is to understand association-in-fact enterprises. If a union is the frame of reference for what an association-in-fact enterprise looks like, then any sort of rigid structural requirement³² finds little support in the text of the statute. Third, that no structural limitation inheres in the text is further strengthened by considering the existence of a “partnership” among

29 18 U.S.C. § 1961(4) (2000).

30 Contrary to the views of many commentators, who would compare the association-in-fact concept to a corporation, *see, e.g.*, Michael A. Gardiner, *The Enterprise Requirement: Getting to the Heart of Civil Rico*, 1988 WIS. L. REV. 663, 690, the pairing of a union with the association-in-fact concept in the statute suggests the comparison to a much more loosely-knit and far less hierarchical group of individuals is more appropriate. *See* Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 616–18 (6th Cir. 2004) (noting that the traditional understanding of a union was not as a separate entity at all, but just a collection of individuals, because unions generally were not recognized as litigants at common law).

31 *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 826 (3d. ed. 2001) (citing the well-known textual canon of allowing punctuation as an aid to statutory construction). In this case, the fact that there are two clauses separated by a comma in the definition of “enterprise” clearly suggests that “union” and “association in fact” are of the same kind. The textual canon *noscitur a sociis* provides further support for this conclusion. *See* Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 372 (2003) (“[U]nder the established interpretative canon [] of *noscitur a sociis*[,] where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words.”).

32 A distinctness requirement, such as the one re-introduced by the Eighth Circuit in *United States v. Bledsoe*, 674 F.2d at 663–64, in a slightly different form than as first conceived in *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), would especially be suspect if the union is the frame of reference for an association-in-fact enterprise. *See* David Vitter, Comment, *The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View*, 62 TUL. L. REV. 1419 (1988) (highlighting the difference between the distinctness requirement in *Bledsoe* and that of its predecessor *Anderson*).

the statute's enumerated forms of enterprises.³³ Corporate law holds that "a partnership is formed if two or more persons go into a co-owned business without any thought or planning or understanding of what the relationship is."³⁴ Thus, if a simple association to do business together without any formal or distinct structure forms a partnership, so too should a simple association to commit a pattern of racketeering activity without any formal or distinct structure form a RICO enterprise.

The examples of the union and the partnership, then, provide a clear understanding of what the text of RICO means by a group of individuals "associated in fact though not a legal entity." All that is required is an association of individuals with the purpose of doing whatever criminal activities they plan on doing. No hierarchical structure, no decisionmaking unit, no activities distinct from the racketeering acts, and no far reaching plans or purposes are required by the text.

Finally, one must note the general directive Congress provided in the text of RICO mandating that RICO "be liberally construed to effectuate its remedial purposes."³⁵ Courts should not take this instruction lightly in interpreting the association-in-fact provision, and the inclusion of such a directive in the statute further cements the conclusion that the association-in-fact provision should have a broad interpretation.

B. Does the Legislative History Narrow the Statutory Definition of an "Association-in-Fact Enterprise"?

Just as the text of the enterprise definition contemplates an expansive view of what constitutes an association-in-fact enterprise, nothing in the legislative history counsels narrowing the expansiveness of the textual definition of an association-in-fact enterprise.

To start, in dealing with the legislative history of RICO, the Supreme Court has stated on several occasions that only "clearly expressed legislative intent to the contrary" of clear statutory language will support the narrowing of RICO's text.³⁶ In the case of the association-in-fact enterprise, not only is the legislative history unambiguous, but it also clearly supports broadly interpreting the statutory language.

33 18 U.S.C. § 1961(4).

34 ROBERT W. HAMILTON & JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS 10 (8th ed. 2003).

35 Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970).

36 Nat'l Org. of Women, Inc. v. Scheidler, 510 U.S. 249, 261 (1994).

Regarding RICO's legislative history, the House report on the Organized Crime Control Act adds much to strengthen the textual analysis given above:³⁷ it states that since the definition of "enterprise" includes "associations in fact . . . infiltration of *any associative group* by any individual or group capable of holding a property interest can be reached."³⁸ This language certainly seems to contemplate a broad understanding of what constitutes an association in fact. Looking at this language, one would be hard pressed to argue that Congress believed limitations to the association-in-fact concept existed beyond what inhered in the nature of the word "association."

Nevertheless, there are those who argue that when enacting the Organized Crime Control Act, "Congress' primary concern was the infiltration of organized crime into the national economy, and that prosecutions should not be brought if far afield from congressional purposes."³⁹ They claim that "RICO's chief proponents intended to limit the statute's reach to traditional organized crime" and did not mean for RICO to be applied against "small-time criminals" or anything outside the traditional organized crime paradigm.⁴⁰ To support their argument, the proponents of the narrow interpretation cite the

37 See *supra* Part I.A.

38 H.R. REP. NO. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4032 (emphasis added). Courts have thus taken this language in the House Report and the language of the statute itself to find that association-in-fact enterprises can be composed of both legal entities and individuals. See *United States v. Thevis*, 665 F.2d 616, 625 (5th Cir. 1982):

Use of the verb "includes" in the statutory definition indicates congressional intent not to limit a RICO enterprise to the specific categories listed; rather, the language "reveals that Congress opted for a far broader definition of the word 'enterprise.'" Moreover, the House report accompanying RICO stated that "enterprise" included "associations in fact, as well as legally recognized associative entities. Thus infiltration of *any associative group by any individual or group* capable of holding a property interest can be reached."

Id. (citations omitted).

39 David M. Ludwick, Note, *Restricting RICO: Narrowing the Scope of Enterprise*, 2 CORNELL J.L. & PUB. POL'Y 381, 416 (1993) (citing U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-110.000 to -111.700 (1990)).

40 *Id.* at 385; see also *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997) (Posner, C.J.):

The prototypical RICO case is one in which a person bent on criminal activity seizes control of a previously legitimate firm and uses the firm's resources, contacts, facilities, and appearance of legitimacy to perpetrate more, and less easily discovered, criminal acts than he could do in his own person

A step away from the prototypical case is one in which the criminal uses the acquired enterprise to engage in some criminal activities but for the most

1967 report by the President's Commission on Law Enforcement and the Administration of Justice,⁴¹ to which Congress was supposedly reacting when it passed the Organized Crime Control Act and its Title IX RICO provisions. According to one of the proponents of this narrow interpretation of association-in-fact enterprises:

One of the cornerstones of the Report was sociologist Donald Cressey's analysis of the nature of criminal organizations[, and] Cressey's observation that an "organized criminal" is one who has committed a crime while occupying an organizational position for committing that crime bolsters the argument that Congress was not concerned with loosely confederated criminal activities.⁴²

To further bolster this claim, proponents of the narrow interpretation of the association-in-fact enterprise provision cite predecessor bills to RICO proposed in Congress, such as Senate Bill 2187,⁴³ "which sought to prohibit membership in organized crime generally";⁴⁴ Senate Bill 2048, which sought to outlaw investment of unreported income in establishing or operating a business enterprise;⁴⁵ Senate Bill 2049,⁴⁶ which sought to prohibit those who committed certain crimes from investing their ill-gotten gain in "any business enterprise";⁴⁷ and Senate Bill 1623,⁴⁸ which essentially "adopted the key features of the prior bills."⁴⁹ All of these prior bills had as their exclusive domain organized crime and only organized crime, or so the argument goes. Congress, however, realized that it could not just prohibit the status of being a member of an organized crime gang.⁵⁰ Thus, proponents of a

part is content to allow it to continue to conduct its normal, lawful business

Id.

41 PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME (1967).

42 Ludwick, *supra* note 39, at 386.

43 S. 2187, 89th Cong. § 2(a) (1965) (providing that anyone who "becomes or remains a member of (1) the Mafia, or (2) any other organization having for one of its purposes" racketeering activity shall be guilty of a felony).

44 Ludwick, *supra* note 39, at 385.

45 S. 2048, 90th Cong. § 2 (1967).

46 S. 2049, 90th Cong. § 3 (1967).

47 Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 777 (1988) (citation omitted); see also Ludwick, *supra* note 39, at 386 (discussing Senate Bill 2049).

48 S. 1623, 91st Cong. § 3 (1969).

49 Ludwick, *supra* note 39, at 386; see also Goldsmith, *supra* note 47, at 777, 786-87 (discussing Senate Bill 1623).

50 Ludwick, *supra* note 39, at 387 ("Congress could not simply outlaw membership in a criminal organization . . ."); see also Gerald E. Lynch, *The Crime of Being a Criminal* (pts. 1 & 2), 87 COLUM. L. REV. 661, 706, 932-45 (1987) (arguing against

narrow interpretation of an association-in-fact enterprise argue that the reason why RICO's association-in-fact language *sounds* broad is because Congress—worried about organized crime—had to define organized crime through conduct, namely the pattern of racketeering activity, and structure, namely the enterprise.⁵¹ However, “[b]ecause Congress did not tailor this enterprise element narrowly, courts applying RICO have extended it far beyond its intended purposes.”⁵²

This argument from “legislative history” is all very sweet sounding. However, there is somewhat of a flaw to it: the argument has no support from the actual legislative history. The House Report, cited above,⁵³ obviously does not support a narrow reading. Certainly, statements from members of Congress do highlight Congress's special intention concerning RICO to target organized crime. For instance, Senator McClellan, one of the primary sponsors of the Organized Crime Control Act, stated that RICO “is aimed at removing organized crime from our legitimate organizations.”⁵⁴ Similarly, Senator Hruska, the other primary sponsor, remarked that RICO “is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods.”⁵⁵

Just because Congress had the special intention in mind of attacking organized crime, however, does not mean that Congress designed RICO and association-in-fact enterprises *exclusively* for combating organized crime and nothing else. The Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.* directly rejected this view when the Court stated that “the argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text, and is at odds with the tenor of its legislative history.”⁵⁶ As Justice Brennan convincingly put it later in the opinion:

The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.

statutes that criminalize the mere status of being a gangster as violative of the traditional transaction-based model of crime).

51 See Ludwick, *supra* note 39, at 387.

52 *Id.*

53 See *supra* note 38.

54 116 CONG. REC. 591 (1970).

55 *Id.* at 602.

56 492 U.S. 229, 244 (1989).

In Title IX, Congress picked out as key to RICO's application broad concepts that might fairly indicate an organized crime connection, but that it fully realized do not either individually or together provide anything approaching a perfect fit with "organized crime."⁵⁷

Thus, the Supreme Court has resoundingly answered those arguing that RICO should be limited to organized crime and clearly rejected the premise that Congress was only concerned with organized crime when Congress passed RICO.

Indeed, other statements from the sponsors of the Organized Crime Control Act amply support the Supreme Court's understanding of RICO's scope. Responding to the critics of the Organized Crime Control Act who realized the plain language of the bill went "beyond organized criminal activity,"⁵⁸ the sponsors of the bill did not back down, but rather reaffirmed the breadth of RICO beyond organized crime. According to Senator McClellan: "The danger posed by organized crime-type offenses to our society has, of course, provided the occasion for our examination of the working of our system of criminal justice. But should it follow . . . that any proposals for action stemming from that examination be limited to organized crime?"⁵⁹ Senator McClellan found this logic "seriously defective" in three different respects.⁶⁰ First, "it confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that reexamination."⁶¹ Just because Congress was reacting to the problem of organized crime does not mean that Congress could not use the moment—indeed an infrequent *extra*-political moment where Congress had enough consensus and will to act⁶²—to address larger structural weaknesses in the criminal justice system and seek to buttress them. Second, the argument that Congress meant RICO only to apply against organized crime "confuses the role of the Congress with the role of a court" because Congress is not limited to the narrow facts of the problem that

57 *Id.* at 248.

58 S. REP. NO. 91-617, at 215 (1970) (statement of Senators Hart and Kennedy); see also *H.J. Inc.*, 492 U.S. at 246-47 (stating that "the legislative history shows that Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime").

59 116 CONG. REC. 18,913 (1970), *quoted in H.J. Inc.*, 492 U.S. at 246.

60 *Id.*, *quoted in H.J. Inc.*, 492 U.S. at 246.

61 *Id.*, *quoted in H.J. Inc.*, 492 U.S. at 246.

62 See, e.g., ESKRIDGE, JR. ET AL., *supra* note 31, at 2-23 (describing one of those moments I have dubbed "*extra*-political" (even though they remain very much political! I just could not think of a better descriptive term) with the story of the Civil Rights Act of 1964 and also describing the many difficulties facing an attempted legislative solution even to such a problem that the whole nation identifies).

spurred the legislation at issue.⁶³ According to Senator McClellan: "Congress has the duty of enacting a principled solution to the entire problem."⁶⁴ Finally, as a practical matter "there are very real limits on the degree to which such provisions can be strictly confined to organized crime cases,"⁶⁵ especially with the clamoring of those who would find the mere prohibition of the "status" of organized criminal offensive to the Constitution.⁶⁶

The legislative history, then, completely clarifies that Congress did not intend to limit RICO's association-in-fact enterprise concept only to organized crime. Conceptually, the House Report provided, and RICO's drafters along with the Supreme Court understood, that the association-in-fact enterprise provision allowed for the infiltration of "*any associative group*"⁶⁷ to be punished. This understanding, coupled with the broad language of the statute explored above, should provide a frame of reference for critiquing the many applications of RICO by the courts. The following material demonstrates clearly how and when courts wield RICO's association-in-fact enterprise concept in a manner consonant with this understanding of its text and legislative history, furthering the Act's objectives. It also demonstrates when courts do not apply the association-in-fact concept in a manner consistent with RICO's text and legislative history, frustrating the Act's objectives.⁶⁸

63 116 CONG. REC. 18,914 (1970), *quoted in H.J. Inc.*, 492 U.S. at 246.

64 *Id.*, *quoted in H.J. Inc.*, 492 U.S. at 247.

65 *Id.*, *quoted in H.J. Inc.*, 492 U.S. at 247; *see also id.* at 35,204 (statement of Rep. Poff) ("[I]t is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant?").

66 *See* Goldsmith, *supra* note 47, at 783 n.72.

67 *See supra* note 38 and accompanying text.

68 *See* R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985):

The scope of the civil RICO statute is breathtaking. An allegation of fraud in a contract action can transform an ordinary state law claim into a federal racketeering charge. It may be unfortunate for federal courts to be burdened by this kind of case, but it is not for this Court to question policies decided by Congress and upheld by the Supreme Court.

Id.

II. OLD MYTHS DIE HARD: THE ORIGINS IN LAW OF THE "ORGANIZED CRIME" RESTRICTIONS ON ASSOCIATION-IN-FACT ENTERPRISES⁶⁹

With law, as in history, everything is about context. To see where the association-in-fact enterprise concept in RICO is going, we must first examine where it has been.

A. *The Pre-Turkette Cases: Some Initial Hints at Judicial Re-Interpretation of the Association-in-Fact Enterprise*

For the most part, in the early cases courts did not have any trouble finding an association-in-fact enterprise despite broad factual scenarios.⁷⁰ An example of this early broad interpretation of association-in-fact enterprise is *United States v. Elliott*.⁷¹ There, various combinations of the defendants engaged in a wide variety of criminal activity. For instance, two defendants committed arson by burning down a community convalescent center;⁷² three different defendants stole cars, occasionally selling some of the cars to one of the arson-committing defendants;⁷³ one of the arson-committing defendants and two other defendants stole a truckload of Hormel meat;⁷⁴ and a combination of these defendants and thirty-seven others committed more than eighteen other criminal acts,⁷⁵ including obstructing justice,⁷⁶ truck and construction equipment theft,⁷⁷ murder,⁷⁸ and illegal drug transactions.⁷⁹ The court found that "the government proved beyond a reasonable doubt the existence of an enterprise comprised of at least five defendants," analogizing the enterprise to a "large business conglomerate" with a chairman of the board, executive committees and "many separate branches of the corporation," such as the

69 This Part relies heavily on the previous work of G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345 app. G (1996) (tracing the development of the association-in-fact enterprise concept from RICO's inception to 1996).

70 *Id.* at 1646.

71 571 F.2d 880 (5th Cir. 1978).

72 *Id.* at 884-85.

73 *Id.* at 885-86.

74 *Id.* at 886-87.

75 *Id.* at 884.

76 *Id.* at 887 n.5.

77 *Id.* at 887-88, 889-91.

78 *Id.* at 888-89.

79 *Id.* at 892-94.

"Stolen Car . . . and Amphetamine Sales Department."⁸⁰ The thread the court found tying everything together was simply "the desire to make money."⁸¹ Finding this loose association of individuals to be an enterprise under RICO, the *Elliott* court reasoned:

Similarly, we are persuaded that "enterprise" includes an informal, de facto association such as that involved in this case. In defining "enterprise", Congress made clear that the statute extended beyond conventional business organizations to reach "any . . . group of individuals" whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes. The statute demands only that there be association "in fact" when it cannot be implied in law.⁸²

This reasoning in *Elliott*—a criminal case—should have set the standard in federal courts for the proper application of the association-in-fact enterprise provision. It teaches, consonantly with the text and purpose of RICO, that from a single associative group working to commit a pattern of racketeering activity a court should find an association-in-fact enterprise.

In contrast with the broad application of the statute in cases such as *Elliott*, a few courts in the early cases were willing to fasten the belt much more tightly and apply the association-in-fact enterprise more narrowly.⁸³ A case illustrating the early parsimonious approach is *United States v. Anderson*.⁸⁴ In *Anderson*, the defendants Anderson and Mooney had served as county judges in Arkansas, and through a middleman Baldwin they received kickbacks of ten percent of the price of the merchandise they purchased for their counties, defrauding Arkansas citizens to the tune of \$12,000.⁸⁵ The indictment charged an association in fact between each of the defendants and Baldwin "to obtain

80 *Id.* at 898.

81 *Id.* Many have criticized the finding of this type of association-in-fact enterprise, claiming that it allows federal prosecutors to bring federal charges out of "nothing more than a series of simple statutory violations." See, e.g., Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 879 (1980). Arguments that this application of the statute is not within the ambit of the language of the statute or was not what Congress had in mind when it passed RICO fall flat for reasons set out *supra* in Part I.

82 *Elliott*, 571 F.2d at 897-98.

83 See Blakey & Roddy, *supra* note 69, at 1646.

84 626 F.2d 1358 (8th Cir. 1980). The *Anderson* court was following the lead of the Sixth Circuit in *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), which had held that separate proof was required for the individual elements of RICO. See Blakey & Roddy, *supra* note 69, at 1646.

85 *Anderson*, 626 F.2d at 1361-62.

money by means of false and fraudulent pretenses.”⁸⁶ Though, as argued above,⁸⁷ no language in the association-in-fact provision would seem to prevent the recognition of the alleged enterprise in *Anderson*, the court declined to follow what it termed the “broad construction” of the “association-in-fact enterprise” and held the term “encompass[es] only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the ‘pattern of racketeering activity.’”⁸⁸ Because the government’s evidence on the enterprise element consisted solely of “evidence indicating an association to commit the pattern of racketeering activity,”⁸⁹ the alleged association-in-fact enterprise was not distinct from the pattern of racketeering activity and therefore failed to constitute a RICO violation.

The *Anderson* court was evidently quite worried about the possible expansion of federal criminal jurisdiction that RICO as written would certainly entail.⁹⁰ Due to this concern, the *Anderson* court interpreted RICO’s association-in-fact enterprise concept in such a way as to constrict the statute’s broad reach. Seizing on the “motivating policy of the Act,” namely “free[ing the] nation’s economic system from the tentacles of organized crime,”⁹¹ the court argued that interpreting the “enterprise” concept as something substantially different from the “pattern of racketeering activity” was most in line with RICO’s motivating policy.⁹² The problem with this interpretation, however, is that it finds no support from the statutory text or legislative purpose.⁹³ Insofar as the *Anderson* court interpreted the association-in-fact provision contrary to the text and legislative purpose in order to infuse the statute with its own policy judgment on the limits of federal jurisdiction, its interpretation was illegitimate.

86 *Id.* at 1362.

87 *See supra* notes 29–65 and accompanying text.

88 *Anderson*, 626 F.2d at 1372.

89 *Id.* at 1369.

90 *See id.* (“We find nothing in the statutory scheme to suggest that Congress intended to discard the traditional legal precepts applied to concerted criminal activity, or that Congress intended to expand federal jurisdiction to this extent.”).

91 *Id.* at 1372.

92 *See id.* at 1365, 1371–72. To justify this conclusion from policy, the court made the textual argument that “association in fact” is limited by the entity words preceding it in the definition of an enterprise. *Id.* at 1366. As was shown *supra* Part I.A, this argument is not very persuasive from the text of the statute.

93 *See supra* Part I.

The Sixth Circuit evinced a similar intent in *United States v. Sutton*,⁹⁴ though it went about its work in a different manner. The *Sutton* court distorted the phrase in the legislative history which stated that one of the purposes of RICO was "the elimination of the infiltration of organized crime and racketeering into *legitimate organizations*"⁹⁵ to mean that association-in-fact enterprises are limited only to those entities that are "organized and acting for some ostensibly lawful purpose."⁹⁶ The desire to limit the association-in-fact enterprise provision in *Sutton* also sprung from the organized crime myth. As explained by the en banc panel decision reversing *Sutton*:

The concerns which motivated the majority of the [*Sutton*] panel . . . appear to be these. Some of the deepest concerns of Congress about organized crime came from testimony about major interlocking interstate criminal conspiracies like the Mafia. Many of these criminal activities had serious impact on legitimate businesses. The statute as drafted, however, also strikes at criminal organizations which have much less in the way of financial and manpower resources than those which drew most Congressional attention. These might be subject to appropriate control and suppression through traditional state law enforcement. Therefore, argued the majority of the [*Sutton*] panel, the statute should be construed under the principle that lenity should be required so that the government must allege and prove that the conspiracy involved in the indictment had an impact on legitimate business, in accordance with one of Congress' deep concerns. This would be accomplished by judicially modifying the word "enterprise," as used by Congress, to read "ostensibly legitimate enterprise."⁹⁷

Judicial legislation was thus the means courts such as those deciding *Sutton* and *Anderson* used to re-interpret the association-in-fact enterprise provision to bring it in line with that particular court's understanding of what Congress *should* have meant in drafting RICO.

While both the *Sutton* and *Anderson* readings of the association-in-fact enterprise are equally disingenuous in their attempts to read the courts' own policies into the statute, only the *Sutton* court's reading was to receive its direct comeuppance from the Supreme Court—as we shall see—in *United States v. Turkette*.⁹⁸ The *Anderson* case, meanwhile, though based on an equally invalid premise implicitly discred-

94 605 F.2d 260 (6th Cir. 1979), *rev'd en banc*, 642 F.2d 1001 (6th Cir. 1980).

95 S. REP. NO. 91-617, at 76 (1970) (emphasis added).

96 *Sutton*, 605 F.2d at 270.

97 *United States v. Sutton*, 642 F.2d 1001, 1009 (6th Cir. 1980) (en banc).

98 452 U.S. 576 (1981).

ited in *Turkette*,⁹⁹ was cited approvingly by the Eighth Circuit in *United States v. Bledsoe*.¹⁰⁰ *Anderson* thus has had its legacy continued, preventing both the government from coming down hard on socially unacceptable conduct¹⁰¹ and well-meaning plaintiffs from seeking the remedies that RICO provides.¹⁰² Courts should deal with this discrepancy, therefore, by freeing the association-in-fact enterprise of the artificially constructed bonds first devised by the willfulness of the *Anderson* court.

B. Turkette

The United States Supreme Court, in *United States v. Turkette*, found itself in a position to replant at least some of the previous law on association-in-fact enterprises to the proper ground of the language and legislative history of RICO. In *Turkette*, the indictment of the respondent alleged the commission of eight counts of various criminal acts, ranging from distribution of controlled substances to several counts of insurance fraud through arson.¹⁰³ The indictment also had a ninth count, which alleged that the "common thread to all counts was respondent's alleged leadership" of a RICO association-in-fact criminal enterprise.¹⁰⁴ Although convicted on all nine counts after a jury trial, the court of appeals reversed, reasoning that because RICO was only intended to protect legitimate business enterprises against the infiltration of organized crime, it did not extend to enterprises that were solely devoted to performing illegal acts and had not attempted to infiltrate legitimate business.¹⁰⁵

Faced squarely with the limitation applied by the court in *United States v. Sutton*, the Supreme Court reversed. A few points from Justice White's opinion for the Court are extremely pertinent here. First, Justice White clearly rejected the application of *ejusdem generis* that

99 See Vitter, *supra* note 32, at 1431-44.

100 674 F.2d 647, 665 (8th Cir. 1982).

101 See, e.g., *id.* at 667 (reversing RICO convictions for various offenses involving the fraudulent sale of agricultural cooperative securities because, among other things, the government had not alleged an overarching structure distinct from the separate instances of racketeering activity).

102 See, e.g., *Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir. 1996) (dismissing RICO charges brought by victims of a real estate fraud scheme against the participants in the scheme on the grounds that the plaintiffs failed to allege a structure distinct from the pattern of racketeering activity); *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580 (5th Cir. 1992) (holding that a claim of a fraudulent scheme did not show an entity separate and apart from the racketeering activity).

103 *Turkette*, 452 U.S. at 579.

104 *Id.*

105 *Id.* at 580.

both the *Anderson*¹⁰⁶ and *Sutton* courts used to justify their limitation of the association-in-fact concept.¹⁰⁷ In the words of Justice White: “[T]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact.”¹⁰⁸ Second, Justice White clarified that just because an enterprise only engages in criminal acts does not mean that the recognition of an association-in-fact enterprise causes the “pattern of racketeering activity” to merge with the “enterprise.”¹⁰⁹ Both the “enterprise” and the “pattern of racketeering activity” remain separate concepts that both must be proved.¹¹⁰ In a few crucial sentences, Justice White further elaborated on the interplay between these two elements:

The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other.¹¹¹

Thus, the Supreme Court reads the statute very broadly, as Congress intended it to be read. Justice White noted that the organization of the association in fact can be “formal or informal,” thus implicitly invalidating any reading of the association-in-fact provision that might require a business-like formal structure for the criminal organization. Justice White’s statement that proof of the pattern of racketeering activity and the enterprise may coalesce also nullifies any reading of the association-in-fact provision that requires the enterprise to be distinct from the pattern of racketeering activity.¹¹² Finally, that the enterprise does not need to exist apart from the pattern of racketeering

106 See *supra* note 92.

107 *Turkette*, 452 U.S. at 581.

108 *Id.* at 580.

109 *Id.* at 583.

110 See *id.* The Court further hammered this point home by noting that “[t]he ‘enterprise’ is not the ‘pattern of racketeering activity’; it is an entity separate and apart from the pattern of activity in which it engages.” *Id.*

111 *Id.*

112 Just because the “enterprise” and the “pattern of racketeering activity” are separate *statutory elements* does not mean that the plaintiff must show that they have a distinctness from each other in actual reality.

activity also implicitly invalidates any continuity requirement in the enterprise itself, because continuity will necessarily be a function of the pattern of racketeering activity element.¹¹³

This conclusion—that the Supreme Court reads the association-in-fact provision broadly—is further buttressed by the Court’s discussion of the legislative history. The *Turkette* Court noted that the legislative history “indicate[s] that Congress was well aware that it was entering a new domain of federal involvement” in crime by enacting RICO.¹¹⁴ Despite the objection that RICO would expand federal jurisdiction in areas of substantive criminal law that were formerly controlled by the police power of the states, “Congress nonetheless proceeded to enact the measure” without providing any limitations in the text of the statute.¹¹⁵ Thus, the Court reasoned, “courts are without authority to restrict the application of the statute.”¹¹⁶

C. Bledsoe: *Turkette* Ignored and the “New” Restrictions on Associations in Fact

Turkette, then, counsels against restricting the association-in-fact enterprise beyond a finding of a loose association of individuals with the common purpose of committing the racketeering acts. Unfortunately, many federal appellate courts in the association-in-fact enterprise cases that followed *Turkette* were quick to ignore the clear reading and import of *Turkette* and create new restrictions on association-in-fact enterprises.

Probably the most notorious of the new breed of post-*Turkette* association-in-fact cases and the case that set the standard for the restrictions on association-in-fact enterprises is the Eighth Circuit’s opinion in *United States v. Bledsoe*.¹¹⁷ Decided shortly after *Turkette*, *Bledsoe* both revitalized the “organized crime myth” and first articulated three new requirements for association-in-fact enterprises that in some circuits still cause grief for civil plaintiffs.¹¹⁸ In *Bledsoe*—interestingly, a criminal case—the Government alleged that a group of twenty-two defendants constituted an association-in-fact enterprise designed “to offer and sell securities of corporations organized as agricultural coopera-

113 See JIMMY GURULÉ, COMPLEX CRIMINAL LITIGATION § 2-2[d][2] (2000) (explaining the continuity prong of the pattern of racketeering element).

114 *Turkette*, 452 U.S. at 586.

115 *Id.* at 586–87.

116 *Id.* at 587.

117 674 F.2d 647 (8th Cir. 1982).

118 But not to the government, as will be shown *infra* in Part III.A.

tives in order to obtain money and property by fraudulent means from residents of the states of Missouri, Oklahoma, and Arkansas.”¹¹⁹

The *Bledsoe* court first reiterated the common theme in restrictive applications of association-in-fact enterprises: namely that the main focus of Congress in enacting RICO was “to prevent organized crime from infiltrating businesses and other legitimate economic entities,” and that the application of RICO regarding legitimate enterprises is relatively clear cut since businesses “have a definite structure and clear boundaries that limit the applicability” of RICO.¹²⁰ In the context of association-in-fact enterprises, the *Bledsoe* court desired to import similar limiting boundaries. The court justified its imposition of these requirements by reference to the “danger of guilt by association” and to its fear that RICO would become “merely a recidivist statute.”¹²¹

Finally, the *Bledsoe* court set out its requirements for an association-in-fact enterprise. First, the enterprise must be an entity with an “ascertainable structure” that is “separate and apart from the pattern of activity in which it engages.”¹²² In establishing this requirement (a “distinctness” requirement, as this Note will call such requirements hereafter),¹²³ the court reached back to pre-*Turkette* cases and cited *Anderson v. United States* approvingly, even though—as was shown above¹²⁴—a close reading of *Turkette* discredited the reasoning upon which the *Anderson* court relied.¹²⁵ The thinly veiled intent behind

119 *Bledsoe*, 674 F.2d at 659.

120 *Id.* at 662.

121 *Id.* at 664. The *Bledsoe* court also rationalized its decision to limit the application of the association-in-fact enterprise by noting that the enterprise requirement in RICO itself “was designed to limit the applicability of the statute and separate individuals engaged in organized crime from ordinary criminals.” *Id.* at 663. While that much is obvious (as in any statute a material term will limit the application of the statute), such a bare statement is far from justifying additional limitations to pleading association-in-fact enterprises.

122 *Id.* at 663–65.

123 As we will see *infra* in Part III, there are many spinoffs of the *Bledsoe* distinctness requirement that all differ in application to some extent. The basic idea of a “distinctness” requirement, however, was the brainchild of the *Anderson* and *Bledsoe* courts.

124 See *supra* Parts II.A, II.B.

125 It is important to stress the relationship between this distinctive-structure requirement and a court’s understanding of Congress’s intention behind the adoption of RICO. The more a court views RICO as adopted solely to address organized crime, the more stringently the court will apply this distinct-structure requirement. As one district court has noted, not applying the distinct-structure requirement would strip RICO of its focus on organized crime by ignoring “the organizational nexus at the heart of the RICO scheme.” *Allington v. Carpenter*, 619 F. Supp. 474, 479 (C.D. Cal. 1985).

this requirement was to restrict association-in-fact enterprises to “true” cases of organized crime.¹²⁶ Second, the *Bledsoe* court required that the government show a “‘common purpose’ animating [the association-in-fact enterprise’s] associates.”¹²⁷ This “requirement” was nothing new: the language of the statute, its purpose, and the Supreme Court in *Turkette* all appeared to embrace such a requirement—at least as far as requiring a common purpose to associate together in order to commit the predicate acts.¹²⁸ However, if a court were to require a common goal animating all members of the enterprise in

Courts have to be careful when applying this judicially-created restriction, however. As one court noted: “Criminal enterprises have less structure than legal ones. . . . It would be ironic if the RICO statute, aimed primarily at criminal enterprises such as the Mafia and its many petty imitators, was more effective against legal enterprises because the latter have a more perspicuous, articulated structure.” *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991). Consequently, since some courts did not understand the real pedigree of this requirement—namely to restrict association-in-fact enterprises to “organized crime” only—these courts have gotten confused and found that the existence of a legal corporation in the association-in-fact enterprise is enough to satisfy the distinctness requirement. *See, e.g., United States v. Feldman*, 853 F.2d 648, 660 (9th Cir. 1988); *United States v. Kirk*, 844 F.2d 660, 664 (9th Cir. 1988).

126 *See supra* note 125.

127 *Bledsoe*, 674 F.2d at 664 (quoting *United States v. Griffin*, 660 F.2d 996, 1000 (4th Cir. 1981)).

128 This is all the language of *Turkette* requires. The Supreme Court stated that an association-in-fact enterprise is “a group of persons associated together *for a common purpose of engaging in a course of conduct*.” *United States v. Turkette*, 452 U.S. 576, 583 (1981) (emphasis added). This only makes sense, of course, because RICO was meant to

relieve some of the deficiencies of the traditional conspiracy prosecution as a means for coping with contemporary organized crime[, since t]he increasing complexity of ‘organized’ criminal activity had made it difficult to show the agreement or common objective essential to proof of conspiracy on the basis of evidence of the commission of highly diverse crimes by apparently unrelated individuals. . . . While within the resulting statutory scheme conspiracy remains conspiracy and an associated-in-fact enterprise is plainly intended to be something different and less difficult of proof, they nevertheless share the basic characteristic that each proscribes purposeful associations of individuals.

United States v. Griffin, 660 F.2d 996, 999–1000 (4th Cir. 1981). If the common purpose of the criminal activity could not be inferred from the racketeering acts and each racketeer’s participation in them, then the association-in-fact enterprise suffers from the same defect that it was meant to remedy in conspiracy law. *See id.* at 1000–01. As another court put it, “[t]he ‘enterprise conspiracy’ is a broader concept than that of an ordinary conspiracy.” *United States v. Russo*, 796 F.2d 1443, 1462 (11th Cir. 1986).

the same manner—as some courts have done in civil RICO cases¹²⁹—then the quintessential case of a mafia family having internal power struggles would be ruled out as an association-in-fact enterprise.¹³⁰ Lastly, the *Bledsoe* court found the requirement that the enterprise “function as a continuing unit” with “some continuity of both structure and personality” is “fundamental” to the meaning of an association-in-fact enterprise.¹³¹ The *Bledsoe* court misplaced this so-called “continuity” requirement, however, as it more properly belonged with the “pattern of racketeering” element rather than the “enterprise” element.¹³²

While *Bledsoe* was a criminal case, these requirements devised by the Eighth Circuit certainly shared a common aim: to limit RICO association-in-fact enterprises to what the court considered “organized crime.”¹³³ Indeed, the *Bledsoe* requirements grew from their origins in a criminal RICO case and today find themselves most at home in civil RICO actions.¹³⁴ As we shall see, courts have tailored *Bledsoe*’s re-

129 See *infra* notes 247–49 and accompanying text.

130 See *United States v. Orena*, 32 F.3d 704, 710–11 (2d Cir. 1994) (holding that the existence of an internal war in the Columbo crime family, the alleged enterprise, did not negate a finding of a “common purpose”).

131 *Bledsoe*, 674 F.2d at 665.

132 According to the Second Circuit:

Neither the statutory definition of enterprise nor the legislative history suggests that those concepts[—relatedness and continuity—]pertain to the notion of enterprise. Rather, the language and the history suggest that Congress sought to define that term [enterprise] as broadly as possible, “includ[ing]” within it every kind of legal entity and any “group of individuals associated in fact although not a legal entity.”

United States v. Indelicato, 865 F.2d 1370, 1382 (2d Cir. 1989) (quoting 18 U.S.C. § 1961(4) (1988)).

133 The Eighth Circuit has been quite clear about the fact that its restrictions are designed to limit association-in-fact enterprises to organized crime. “[T]he Eighth Circuit has recognized, [for instance, that] ‘the command system of a Mafia family is an example of th[e] type of structure’ that is distinct from the pattern of racketeering activity.” *United States v. Tocco*, 200 F.3d 401, 425 (6th Cir. 2000) (citing *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988) (quoting *Bledsoe*, 674 F.2d at 665)).

134 Indeed, in this author’s survey of fifty criminal and thirty civil post-*Turkette* federal appellate cases where an issue as to the existence of an association-in-fact enterprise existed, only two criminal cases failed to find an enterprise. Of the two exceptions, one of the cases failed to find an enterprise because all of the alleged enterprise’s members were either dead or in jail, see *United States v. Morales*, 185 F.3d 74, 81 (2d Cir. 1999), while the other was *Bledsoe* itself. In twenty-four out of the thirty civil cases, however, courts failed to find an enterprise. While certainly some of these results are due to poor plaintiffs’ lawyering, as for the rest, it is hard to believe the federal government’s criminal attorneys are just *that* much smarter than the attorneys of the private plaintiffs. One cannot blame this phenomenon on the standard of

quirement of structure distinct from the pattern of racketeering activity so as to apply neatly to almost every criminal gang, no matter how loose the association, while having a clumsy and narrow application in the civil context.¹³⁵ Courts also require a loose common purpose in criminal cases,¹³⁶ but they demand a much more restrictive common purpose in civil cases.¹³⁷ Furthermore, finding continuity of structure and personnel does not bother courts long in criminal cases¹³⁸ so long as the courts can find a "leader,"¹³⁹ while in the civil context courts (especially the Fifth Circuit) have invented restrictive "continuity" tests for association-in-fact enterprises.¹⁴⁰ Lastly, we shall see the crea-

review, either. While it is true that criminal convictions, especially jury verdicts, enjoy a deferential standard of review, most of the civil cases are decided on summary judgment or judgment as a matter of law, where the reviewing court not only views all the evidence "in a light most favorable to the party that opposed the motion," but also will find summary judgment appropriate only where "the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable persons could not arrive at a contrary verdict." See, e.g., *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440 (5th Cir. 1987) (giving the Fifth Circuit's formulation of the standards for summary judgment and JNOV in a RICO case).

135 As one exasperated criminal defendant noted concerning the traits that courts most often find as demonstrative of distinct structure, "every [criminal] group has a leader, . . . every group tries to cover its tracks, and . . . every group tries to thwart law enforcement!" *United States v. Cooper*, 91 F. Supp. 2d 60, 71 (D.D.C. 2000).

136 See, e.g., *United States v. Davidson*, 122 F.3d 531, 535 (8th Cir. 1997) (finding a common purpose of "reap[ing] the economic rewards flowing from the crimes").

137 See, e.g., *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (finding divergent purposes in an enterprise consisting of a corporation that hires illegal aliens and immigrant welfare organizations that find the illegal aliens for the corporation to hire because the corporation "wants to pay lower wages" while the "recruiters want to be paid more for services rendered").

138 This is true except in the ridiculously extreme case, like *United States v. Morales*, where all the members of the gang were either dead or in jail during the time frame in which the enterprise was alleged to exist. *Morales*, 185 F.3d at 81.

139 See, for example, *United States v. Rogers*, 89 F.3d 1326, 1337-38 (7th Cir. 1996), where the only "continuing structure" in the alleged drug dealing enterprise seemed to be the fact that the defendant King was in charge of all the racketeering activity.

140 See *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 427 (5th Cir. 1987), which held that the alleged association was not an association-in-fact enterprise because it lacked continuity. Continuity, according to the *Montesano* court, could only be shown by alleging facts tending to prove that the "enterprise ha[d] an existence that c[ould] be defined apart from the commission of the predicate acts." *Id.* It is ironic that the Fifth Circuit, which correctly interpreted RICO's association-in-fact provision in *Elliott*, could turn around ten years later and begin to apply the same arbitrary restriction that its excellent statutory interpretation in *Elliott* categorically ruled out, see *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir. 1978) ("Congress made clear that the statute extended beyond conventional business organizations to reach 'any . . . group of individuals' whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes."), and which

tive requirements other federal courts of appeals have fabricated, following the lead of the Eighth Circuit in *Bledsoe*, in order to restrict association-in-fact enterprises to criminal gangs.¹⁴¹ The next Part of this Note, therefore, briefly outlines the origins of the growing disparity the federal courts of appeals have created between the requirements for criminal association-in-fact enterprises and their civil counterparts.

III. *UBI VENISTI*, ASSOCIATION IN FACT? THE POST-BLEDSTOE DEVELOPMENT AND REFINEMENT OF RESTRICTIONS ON ASSOCIATION-IN-FACT ENTERPRISES

The only way to understand how federal appellate courts have currently hamstringed civil association-in-fact enterprises with demanding and confusing requirements is to first understand how association-in-fact law developed in the criminal cases which followed *Bledsoe*. Indeed, the proverbial ink had not yet dried on the *Bledsoe* decision when federal appellate courts began either parroting the *Bledsoe* restrictions—though sometimes with widely divergent interpretations of those restrictions—or creating new restrictions on association-in-fact enterprises based on their own “interpretation” of *Turkette*, almost always with an eye towards restricting RICO association-in-fact enterprises to the “organized crime” ideal. From these early criminal cases—which never failed to find the existence of an association-in-fact enterprise—federal courts laid the groundwork to restrict civil RICO association-in-fact enterprises.

A. *Post-Bledsoe Criminal RICO Association-in-Fact Enterprises: Restrictions Developed but Not Applied*

The Eighth Circuit was able to hone the meaning of its *Bledsoe* requirements in *United States v. Lemm*,¹⁴² a white collar arson and insurance fraud case. There, one member of the group, a public insurance adjuster, would give another person instructions on committing arson, and after the arson would act both as the insurance adjuster and as the private contractor repairing the damage caused by the

the Fifth Circuit only *five months earlier* had rejected as a necessary jury instruction in a criminal case, see *United States v. Williams*, 809 F.2d 1072, 1093–94 (5th Cir. 1987).

141 Interestingly enough, courts apply most of these limitations at the *pleadings* stage despite the requirement of only notice pleading. See *Swierkiewicz v. Sorema*, 534 U.S. 506, 512–13 (2002) (reiterating the simplified notice pleading standard of Federal Rule of Civil Procedure 8(a) in civil actions).

142 680 F.2d 1193 (8th Cir. 1982).

fire.¹⁴³ In order to accommodate what the court thought to be organized crime¹⁴⁴ while proceeding carefully so as not to undo its handiwork in *Bledsoe*, the court reinterpreted what it meant by the three *Bledsoe* requirements. The court found the generic common purpose of “setting arson fires so as to defraud one or more insurance companies”¹⁴⁵—a purpose with more generality than *Bledsoe* seemingly allowed.¹⁴⁶ The *Lemm* court also suggested that continuity as to the leader and pattern of roles, not necessarily of personnel, satisfied *Bledsoe*’s requirement of “some continuity of structure and personality.”¹⁴⁷ Regarding the requirement of an ascertainable structure distinct from the pattern of racketeering activity, the *Lemm* court suggested this requirement could be satisfied by having diversified criminal activity separate from the criminal activity that made up the pattern—in *Lemm*, the arson ring was separate from the predicate acts of mail fraud.¹⁴⁸ This appeared to be different from what the *Bledsoe* court meant by “ascertainable structure distinct from the pattern of racketeering activity,” namely some larger structure that is able to exert control over the individuals involved in the racketeering activity.¹⁴⁹

Three other circuits—the Second, the Eleventh, and the Sixth—did not even make any pretense of restricting association-in-fact enterprises, and in criminal cases all three circuits adopted the *Elliott* interpretation of an association in fact. In *United States v. Mazzei*,¹⁵⁰ a case involving a group of individuals associated together to fix Boston College basketball games by point shaving and profit on them by wagering, the Second Circuit found no need for proof that the enterprise existed “distinct and independent” from the pattern of racketeering activity, so long as the Government proved that a “‘group of individuals associated in fact’ with evidence establishing a common or shared purpose among the individuals and evidence that they functioned as a

143 *Id.* at 1197.

144 *Id.* at 1201 (“RICO was appropriately utilized here as a weapon against organized criminal activity.”).

145 *Id.* at 1199.

146 The Government in *Bledsoe*, you may recall, alleged that the defendants had a common purpose of obtaining money and property by fraudulent means from residents of the states of Missouri, Oklahoma, and Arkansas. *See supra* note 119 and accompanying text.

147 *Lemm*, 680 F.2d at 1199–200; *see also supra* note 131 and accompanying text (discussing *Bledsoe*’s requirement).

148 *Lemm*, 680 F.2d at 1201.

149 *See United States v. Bledsoe*, 674 F.2d 647, 667 (8th Cir. 1982) (“Although many of the defendants played various roles in UFA-Mo., PFA, UFA-Ok., and CFA, these roles cannot be seen as constituent elements of a larger structure.”).

150 700 F.2d 85 (2d Cir. 1983).

continuing unit.”¹⁵¹ Because the point-shaving conspirators shared the common purpose of illegally shaving points on the basketball games to maximize their betting chances and functioned continuously through the 1978–1979 Boston College basketball season, they properly constituted an association-in-fact enterprise.¹⁵² Similarly, the Eleventh Circuit, when evaluating an alleged enterprise of various individuals who engaged in a variety of racketeering acts, from murder to extortion to truck hijacking to narcotics, rejected the requirement that the enterprise must have an “ascertainable structure” distinct from the pattern of racketeering.¹⁵³ The Eleventh Circuit found that this six year long informal association—defined around the predicate acts of racketeering and with the common purpose of making money from repeated criminal activity—constituted an association-in-fact enterprise. Joining the Second and Eleventh Circuits was the Sixth Circuit in *United States v. Qaoud*.¹⁵⁴ There, the Government had alleged in the indictment an association-in-fact enterprise consisting of the individuals who made use of the defendant’s office of District Judge of the Eighteenth District Court in Michigan to conduct a pattern of bribery.¹⁵⁵ The court rejected the defendant’s argument that the RICO enterprise had to be distinct from the pattern of racketeering activity, holding that the enterprise and pattern of racketeering may be proved by the same evidence and that the Government in this case had properly alleged an association-in-fact enterprise.¹⁵⁶ With these holdings, the Second, Sixth, and Eleventh Circuits not only correctly followed the statutory definition of RICO, but also were honest about

151 *Id.* at 89 (“There is nothing in the language or legislative history of the Act to support the . . . ‘distinctness’ requirement in RICO cases.”). The *Mazzei* court seemed most concerned about the *Lemm* interpretation of distinctness, as it thought that such an interpretation would require the government to prove that the enterprise engaged in more than one different kind of racketeering activity. See *id.* (giving an example of a large scale heroin enterprise engaging solely in heroin trafficking and expressing the concern that under the “distinctness” requirement the heroin enterprise would not be subject to the prohibitions of RICO).

152 *Id.* at 89–90 (“Crime is no less organized where its purposes are singular.”).

153 *United States v. Cagnina*, 697 F.2d 915, 920–22 (11th Cir. 1983) (“*Turkette* did not suggest that the enterprise must have a distinct, formalized structure. Instead, the Supreme Court noted that the organization may be formal or informal.”). In *United States v. Hewes*, 729 F.2d 1302 (11th Cir. 1984), moreover, the Eleventh Circuit reiterated its rejection of the “distinctness” requirement, holding that an even more loosely knit association of fraudulent “bustout” corporations—corporations that referenced each other in order to establish credit, buy on that credit, and then go bust—constituted a RICO association-in-fact enterprise. *Id.* at 1311–12.

154 777 F.2d 1105 (6th Cir. 1985).

155 *Id.* at 1116.

156 *Id.* at 1115.

the fact that they were not going to limit criminal RICO association-in-fact enterprises.

The Ninth Circuit, meanwhile, while not directly answering whether the Government had to prove that the association-in-fact enterprise existed apart from the commission of the pattern of racketeering activity, had no trouble finding that an association-in-fact enterprise did exist in criminal cases. In a pre-*Bledsoe* criminal case, the Ninth Circuit had seemingly endorsed the *Elliott* interpretation of association-in-fact enterprises,¹⁵⁷ but later backed away from that position. In *United States v. DeRosa*, the Government had alleged that the defendants engaged in an ongoing enterprise for the selling and distribution of narcotics.¹⁵⁸ The court found the evidence that the defendants had a lengthy association probative of whether the enterprise was "ongoing."¹⁵⁹ The Ninth Circuit then examined whether the enterprise existed separate from the predicate acts of narcotics distribution, giving a new twist to *Bledsoe's* requirement that there be an ascertainable structure to the enterprise distinct from the predicate acts forming the pattern of racketeering. The *DeRosa* court found attempts by the defendants to "franchise" out their drug distribution business to other criminals sufficient evidence of an enterprise standing apart from the pattern of racketeering activity.¹⁶⁰

157 See *United States v. Bagnariol*, 665 F.2d 877, 890 (9th Cir. 1981). In noting that "the government is not precluded from using the same evidence to establish both the element of an enterprise and the element of a pattern of racketeering," the *Bagnariol* court implicitly ruled out the requirement that the Government show the enterprise existed separate and apart from the pattern of racketeering activity. *Id.* In fact, the *Qaoud* court listed *Bagnariol* as a case that had rejected that there must be proof of the enterprise that is distinct from the proof of a pattern of racketeering. See *Qaoud*, 777 F.2d at 1115-16.

158 670 F.2d 889, 892 (9th Cir. 1982).

159 *Id.* at 896.

160 *Id.* The First Circuit seemed to take a similar tack as the Ninth Circuit. While it did not specifically endorse the *Bledsoe* restrictions, the First Circuit nevertheless applied them in criminal RICO cases. The First Circuit never failed, though, to find an enterprise. See, e.g., *United States v. London*, 66 F.3d 1227, 1244 (1st Cir. 1995) (finding an enterprise consisting of a check cashing business and a bar that furthered an illegal bookmaking operation, where the common purpose was the defendant's economic gain, the "continuity" or "functioning as a continuing unit" was met by the businesses' close location and operation by the same individual (the defendant), and the "distinctness" of the enterprise from the pattern of racketeering activity consisted of the services that the bar and the check cashing businesses provided to their legitimate customers); *United States v. Doherty*, 867 F.2d 47, 68 (1st Cir. 1989) (finding an enterprise consisting of individuals in a police department who stole exams from the department and sold them to those studying for a promotion where there were more than ten instances of the defendants stealing exams over a period of several years and the same defendants participated in the stealing of the exams).

While remaining noncommittal as to whether the three-prong analysis in *DeRosa* was actually required, in two later criminal cases, *United States v. Feldman*¹⁶¹ and *United States v. Blinder*,¹⁶² the Ninth Circuit's case law on the association-in-fact enterprise analysis greatly developed, though not at the price of letting criminal enterprises off the hook. *Feldman* involved a defendant who kept his creditors at bay by defrauding insurance companies with repeated acts of arson committed on businesses which the defendant owned.¹⁶³ The Ninth Circuit applied the three *Bledsoe* requirements to the alleged criminal enterprise and found that they were met in this case.¹⁶⁴ Importantly, when reviewing the "common purpose" requirement, the Ninth Circuit stated that RICO did "not require intentional or 'purposeful' behavior by corporations charged as members of an association-in-fact,"¹⁶⁵ but only a showing of common purpose through proof "'of an ongoing organization, formal or informal, and evidence that the various associates function as a continuing unit.'"¹⁶⁶ While this is undoubtedly the correct interpretation of what the Supreme Court meant in *Turkette* by a "common purpose," this is often ignored by courts in the civil context when the courts use the common-purpose requirement to thwart the finding of an association-in-fact enterprise.¹⁶⁷ The *Feldman* court also found the requisite continuity of structure and personnel in the fact that the defendant and his brother managed each of the businesses in the enterprise.¹⁶⁸ In a strange twist on the requirement that

161 853 F.2d 648 (9th Cir. 1988).

162 10 F.3d 1468 (9th Cir. 1993).

163 *Feldman*, 853 F.2d at 651–52. The indictment listed the association-in-fact enterprise as the defendant and his businesses, and gave the common purpose of "defrauding insurance companies and others through repeated acts of arson." *Id.* at 655.

164 *Id.* at 660.

165 *Id.* at 657.

166 *Id.* (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

167 See, e.g., *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004); see also *infra* notes 247–50 and accompanying text (discussing the actions of courts in the civil context). Interestingly enough, the Ninth Circuit in *Feldman* cited *United States v. Ambrose*—a Seventh Circuit criminal case—for this proposition! See *United States v. Ambrose*, 740 F.2d 505 (7th Cir. 1984). The Seventh Circuit in *Ambrose* held, in essence, that the defendant, a member of the Chicago Police Department, could "conduct a pattern of racketeering activity" through an enterprise—namely the Chicago Police Department—that was legitimate and did not share the defendant's illegitimate goals. *Id.* at 512. It is not too far down the chain of logic from this holding in *Ambrose* to the conclusion that members of an enterprise can have different "goals" in the sense that one has a lawful goal while another has an illegal goal, while all the while being "associated together for a common purpose." See *id.* Unfortunately, the Seventh Circuit in *Baker* chose to ignore what was clearly implied in its holding in *Ambrose*.

168 *Feldman*, 853 F.2d at 658–59.

the enterprise have an ascertainable structure separate and distinct from the pattern of racketeering activity, however, the court found that “the very existence of a corporation me[t] the requirement for a separate structure” from the pattern of racketeering activity, and also noted the presence of a legitimate money making goal for the association of corporations, which the court labeled the defendant’s “business interests.”¹⁶⁹ This dicta in *Feldman* concerning the “distinctness” requirement was further clarified in *United States v. Blinder*, a case involving an association-in-fact enterprise consisting of the defendant, his compatriot, the defendant’s securities brokerage firm, another brokerage firm, and two “blind pool” corporations.¹⁷⁰ There, the court rejected the argument that all the members who compose the enterprise, taken together as a unit, must have a separate economic goal from the pattern of racketeering activity in order to fulfill the distinctness requirement, as opposed to just corporate members of the association-in-fact enterprise having separate goals from the pattern of racketeering activity.¹⁷¹ Because the two brokerage firms engaged in normal securities brokerage operations besides the alleged activities with the “blind pool” corporations, the court found the “separate-existence” test to be met.¹⁷² The progression of cases from *DeRosa* to *Feldman* to *Blinder*, then, shows that the Ninth Circuit, while not formally adopting any of the *Bledsoe* restrictions, developed its case law with an eye to applying those restrictions—though not in the criminal context. Particularly, the Ninth Circuit adopted an interpretation of the “distinctness” requirement that the government seemingly could easily satisfy through allegations that any one corporate member of the association-in-fact enterprise participated in activities outside of the racketeering acts, or allegations that the individual members of the association-in-fact enterprise associated together to participate in activities outside of the alleged racketeering acts.

169 *Id.* at 660.

170 10 F.3d 1468, 1471, 1474 (9th Cir. 1993). A “blind pool” corporation is a corporation “with no actual or anticipated business operations.” *United States v. Haddy*, 134 F.3d 542, 545 (3d Cir. 1998).

171 *Blinder*, 10 F.3d at 1475. The court nonetheless speculated that the enterprise alleged in *Blinder* would meet this test, because the defendant set up “blind pool” companies other than those alleged as the basis for the predicate acts of racketeering, and all the members of the enterprise did “‘maintain operations toward[] an economic goal separate from the commission of the alleged predicate acts’ . . . that is, the bringing public of the blind pool companies that were not the subject of the predicate offenses.” *Id.* (quoting *United States v. McClendon*, 712 F. Supp. 723, 727 (E.D. Ark. 1988)).

172 *Id.* at 1474.

Three other circuits—the Fourth, the Third, and the Tenth—while accepting restrictions on association-in-fact enterprises, did not have trouble finding that the criminal gangs they confronted met the *Bledsoe* restrictions. In *United States v. Riccobene*,¹⁷³ a case involving an organized crime family engaged in numerous different criminal activities, the Third Circuit applied three restrictions. First, the association had to have structure in that it had some way of controlled decision-making.¹⁷⁴ The court found this element satisfied by the fact that the criminal gang was “organized” in the typical manner, with a boss and underlings.¹⁷⁵ Second, the association had to function as a “continuing unit,” with each member having a role within the structure. Here, this requirement was easily satisfied by pointing to the structure of the family and the defendants’ roles within it.¹⁷⁶ Third, the enterprise had to have an existence beyond what was necessary to commit the pattern of racketeering activity. This was satisfied by showing the “overseeing and coordinating [of] the commission of several different predicate offenses and other activities on an on-going basis”¹⁷⁷—an interpretation similar to *Lemm*.¹⁷⁸ The Tenth Circuit applied essentially the same restrictions in a case involving a heroin distribution ring, *United States v. Sanders*.¹⁷⁹ As far as ongoing organization and decisionmaking, the *Sanders* court found those requirements satisfied by evidence that one member was in charge of selling the heroin and that the defendant was in charge of maintaining supply, with various

173 709 F.2d 214 (3d Cir. 1983).

174 *Id.* at 222.

175 *Id.* at 222–23. Indeed, *Riccobene* involved the activities of a Philadelphia “crime family,” *id.* at 216, the model for those who believe the “organized crime myth.” See, e.g., Gardiner, *supra* note 30, at 698 (“[I]t is the enterprise requirement that separates the organized wheat from the loosely-associated chaff.”). In another case involving an insurance fraud scam conducted through inflated medical bills, the Third Circuit found this requirement satisfied by the combined supervision of the complicit doctor and accomplice law firm managing partner over the whole scheme. *United States v. Console*, 13 F.3d 641, 651 (3d Cir. 1993).

176 *Riccobene*, 709 F.2d at 223. In *Console*, the alleged enterprise satisfied this requirement because each member of the enterprise had a defined role in the fraud, with the doctor and the managing partner of the law firm supervising and various employees of the firm referring clients to the doctor, coaching them to make false statements about their medical treatment, and actually falsifying the records. *Console*, 13 F.3d at 651.

177 *Riccobene*, 709 F.2d at 223–24. Similarly, in the later Third Circuit *Console* case, the alleged enterprise satisfied this requirement through the showing that they committed multiple predicate offenses and did legitimate business besides the racketeering activity. *Console*, 13 F.3d at 652.

178 *United States v. Lemm*, 680 F.2d 1193, 1201 (8th Cir. 1982).

179 928 F.2d 940 (10th Cir. 1991).

underlings overseeing the distribution of the heroin on the street.¹⁸⁰ Since the defendant was in prison and still controlling the supply of heroin, the court had no trouble finding continuity.¹⁸¹ The *Sanders* court, however, did face a problem regarding the distinctness requirement, as the criminal gang here was *only* involved in heroin distribution and no other legitimate or illegitimate activities. The court extricated itself from this dilemma by finding that the “group continued to exist and thrive on the proceeds of heroin sales without any particular contribution of individuals,”¹⁸² thus further diluting the distinctness requirement in criminal cases.

The Fourth Circuit worded its requirements somewhat differently but essentially reached the same result in *United States v. Tillett*,¹⁸³ which addressed a five year, sporadic marijuana smuggling venture in which the defendants were the smuggling boat owners and operators. The Fourth Circuit required an enterprise to have a common purpose, to be an ongoing organization with continuity of personnel and structure, and to exist separate and apart from the pattern of racketeering activity.¹⁸⁴ Making money in illegal trafficking of marijuana proved to be enough of a common purpose,¹⁸⁵ while a change in financial backers for the smuggling did not defeat continuity of structure or continuity of personnel.¹⁸⁶ Even though the operation in *Tillett* was solely centered around the smuggling of marijuana and therefore did not seem to pass the *Lemm* test,¹⁸⁷ the court found the fact that the organization existed in between the actual acts of smuggling¹⁸⁸ demonstrated the existence of the enterprise (literally) “beyond” the predicate acts forming the pattern of racketeering activity.

In an even further variation from *Bledsoe*, the D.C. Circuit in *United States v. Perholtz* required continuity, organization, and common purpose among the defendants in order to find an association-in-fact enterprise.¹⁸⁹ These requirements, however, just like the requirements of the other circuits, did not get in the way of finding an association-in-fact enterprise in a criminal case. In *Perholtz*, where a group

180 *Id.* at 943–44.

181 *Id.* at 944.

182 *Id.*

183 763 F.2d 628, 630 (4th Cir. 1985).

184 *Id.* at 631–32.

185 *Id.* at 631.

186 *Id.*

187 See *supra* note 148 and accompanying text.

188 This was evidenced by the establishment of a seafood restaurant to act as a business front and the purchasing of equipment such as trucks and the actual smuggling boat. *Tillett*, 763 F.2d at 632.

189 842 F.2d 343, 354 (D.C. Cir. 1988).

of individuals worked together on several occasions to fraudulently get software development contracts,¹⁹⁰ the common interest of "obtaining the proceeds of government contracts . . . through the perversion of the bidding process," the defendant's leadership role, and the existence of a "continuing core of personnel" despite some changes in accomplices were sufficient to meet the requirements for an association-in-fact enterprise.¹⁹¹

Finally, the Seventh Circuit, while willing to apply the Eighth Circuit's "distinctness" requirement to try to limit association-in-fact enterprises to examples of true "organized crime,"¹⁹² did not hesitate to mold that requirement in criminal cases to fit the description of the criminal enterprise presented. In *United States v. Masters*, for instance, the Seventh Circuit faced an alleged criminal association-in-fact enterprise consisting of the defendant—an attorney—and a police lieutenant, a police chief, two police departments, and the defendant's law firm.¹⁹³ While the alleged enterprise certainly engaged in a large amount of racketeering activity, ranging from police bribery and public corruption to the murder of the defendant's wife,¹⁹⁴ the enterprise did not seem to exhibit the "traits" other courts had found indicative of distinct structure, such as a centralized decisionmaking structure and distinct roles, or engaging in other activity besides the racketeering activity. Realizing that despite the lack of the foregoing traits the enterprise in *Masters* should be a prototypical RICO enterprise (especially given the corruption of the police departments), the Seventh Circuit nevertheless found distinct structure evidenced in how quickly the defendant was able to get his associates to discreetly murder his wife.¹⁹⁵

Thus, as became apparent from cases like *Tillett*, *Lemm*, *Bledsoe*, and *Riccobene*, federal appellate courts, despite fashioning new and (in many ways) artificial parameters to association-in-fact enterprises, certainly were not going to allow criminal gangs to benefit from these

190 *Id.* at 346–50.

191 *Id.* at 354–55.

192 *United States v. Korando*, 29 F.3d 1114, 1118 (7th Cir. 1994).

193 924 F.2d 1362, 1365–66 (7th Cir. 1991).

194 *Id.*

195 *See id.* at 1367.

The strongest evidence is the handling of the problem of dealing with Dianne Masters. When that problem arose, a loose-knit but effective criminal organization was in place ready to respond effectively by planning and carrying out a detection-proof crime that would have been beyond the capacities of the individual defendants acting either singly or without the aid of their organizations.

Id.

developments. Civil defendants, on the other hand, got different treatment. As we shall see in the next section, federal appellate courts took the same restrictions that they had previously applied so loosely in criminal RICO cases, gave them new meaning, and applied them with a vengeance against civil RICO plaintiffs in cases involving association-in-fact enterprises.

B. Civil RICO Association-in-Fact Enterprises: Application of the Restrictions Developed but Not Applied in the Earlier Criminal Cases

Whether it was from a dearth of civil association-in-fact cases or slowness on the part of judges to recognize the powerful tools at their disposal post-*Bledsoe*, courts were not quick to apply the restrictions developed in the early criminal association-in-fact cases to civil RICO associations in fact. By the end of the 1980s, however, federal appellate courts began to realize the potent weapons they possessed to remove more civil RICO cases from federal courtrooms.

The Fifth Circuit started the trend of tightening the belt on civil association-in-fact enterprises. In a series of cases, starting with *Shaffer v. Williams*,¹⁹⁶ the Fifth Circuit began to apply the requirements of common purpose, identifiable structure, and especially continuity (or ongoing organization) to kick RICO plaintiffs out of federal court. The Fifth Circuit's application of these strict, *Bledsoe*-esque requirements was especially ironic given its excellent analysis of the scope of the enterprise provision in *Elliott*.¹⁹⁷ The plaintiff in *Shaffer* alleged—admittedly in cryptic fashion¹⁹⁸—that the defendant and thirty corporations associated in fact together to make misrepresentations to secure lower insurance premiums and to defraud investors who invested in the defendants' oil and gas interests.¹⁹⁹ While the plaintiff's allegations certainly left something to be desired in the way of clarity, the court was still more than eager to hold that the plaintiff's supplemental affidavit lacked allegations of "ongoing organization" (i.e., that a decisionmaking structure existed for the enterprise), common purpose, identifiable structure, and continuity.²⁰⁰ Similarly, in *Atkinson v. Andarko Bank and Trust Co.*,²⁰¹ where the plaintiffs had alleged that a bank, its holding company, and three employees had associated in

196 794 F.2d 1030 (5th Cir. 1986).

197 See *supra* notes 71–82 and accompanying text.

198 See *Shaffer*, 794 F.2d at 1032.

199 See *id.* at 1031–32.

200 *Id.* at 1033.

201 808 F.2d 438 (5th Cir. 1987).

fact to defraud the plaintiffs through mail fraud and charge a higher rate of interest, the court failed to find evidence that the enterprise operated separate from the activities of the bank or evidence "that the five associates functioned as a continuing unit or formed an ongoing association."²⁰²

The Fifth Circuit then seized upon the language of *Atkinson* and *Shaffer*, concerning the need for an "ongoing association" in an association-in-fact enterprise, and combined it with *Bledsoe* to develop a unique requirement of "continuity." Under this conception of continuity, *even if* the defendants met all of the typical *Bledsoe* requirements—such as a common purpose, hierarchical decisionmaking, and distinct structure—the Fifth Circuit would *still* fail to find an association-in-fact enterprise, stating that the enterprise "briefly flourishe[d] and fade[d]"²⁰³ or that the enterprise only had a "short-term goal."²⁰⁴ Such a restriction, however, is nonsense. Though perhaps such a requirement might find some place in the understanding of the "pattern of racketeering activity" element of RICO,²⁰⁵ it has no business defining the "enterprise."²⁰⁶ No judge in the criminal RICO context would dream of dismissing a charge against a group of bank robbers who had banded together for, say, the "short-term" goal of robbing a few banks. Nevertheless, the Fifth Circuit has employed this requirement in many cases to rid its docket of civil RICO cases where the plaintiff had alleged an association-in-fact enterprise.²⁰⁷

In *Manax v. McNamara*, for instance, the plaintiff had alleged that the defendant—a lawyer—coordinated a campaign of "malicious and false public statements" with several defendant newspapers concerning the plaintiff's medical abilities with the purpose of destroying the plaintiff's medical practice.²⁰⁸ The Fifth Circuit quickly concluded that no enterprise existed. Because the association's goal was "short-term," the association would "presumably" disperse "upon the attainment of that goal."²⁰⁹ Unfortunately, this kind of reasoning abandons

202 *Id.* at 441.

203 *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 244 (5th Cir. 1988).

204 *Manax v. McNamara*, 842 F.2d 808, 811 (5th Cir. 1988).

205 See GURULÉ, *supra* note 113, § 2-2[d][2] (describing the concept of continuity as embodied in the pattern-of-racketeering element of RICO).

206 See *supra* note 113 and accompanying text.

207 See *Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 230 (5th Cir. 2003); *Landry v. Air Line Pilots Ass'n*, 901 F.2d 404, 433–44 (5th Cir. 1990); *Delta Truck*, 855 F.2d at 243–44; *Manax*, 842 F.2d at 811; *Foval v. First Nat'l Bank of Commerce*, 841 F.2d 126, 129–30 (5th Cir. 1988); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426–27 (5th Cir. 1987).

208 *Manax*, 842 F.2d at 811.

209 *Id.*

RICO's original meaning, as it essentially says that forming a group to commit crimes for a purpose is not enough to violate RICO.²¹⁰ Similarly, in *Delta Truck and Tractor Co. v. J.I. Case Co.*, the Fifth Circuit found the lack of a "continuous threat" fatal to the plaintiff's enterprise allegation that the three corporate defendants associated in fact together to consolidate their agricultural equipment franchise dealerships through numerous acts of wire and mail fraud.²¹¹ The *Delta* court believed it saw a lack of a "continuous threat" because the plaintiff franchisee "attempted to state a RICO claim by alleging multiple acts of fraud that were part and parcel of a single, discrete and otherwise lawful commercial transaction."²¹² The *Delta* court did not, however, consider whether its "continuous-threat" requirement had any basis in the statute or whether it ever would have applied such a requirement in the criminal context.

With this "continuous-threat" requirement, the Fifth Circuit essentially tells RICO defendants, "look, we know you associated together and committed a number of predicate acts; but because you have *accomplished* your objective, we are going to let you off the RICO hook just so long as you don't do it again!"²¹³ This certainly cannot be what Congress wanted to tell RICO defendants when it passed the law, and certainly is not what courts had been telling criminal RICO defendants.²¹⁴

210 One must remember that the original House Report talked of "any associative group," and any attempts to limit this reach of the RICO association-in-fact provision during the legislative process were rejected. See *supra* note 38 and accompanying text; *supra* notes 58–66 and accompanying text.

211 *Delta Truck*, 855 F.2d at 244.

212 *Id.*

213 Compare *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995) (finding the fact that the two defendants had been committing the same kind of fraud together for five years dispositive of the issue of continuity and therefore concluding that the plaintiffs had properly alleged an association-in-fact enterprise), and *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 749 (5th Cir. 1989) (finding sufficient evidence of continuity in pleadings that suggested that the defendants had engaged in the same pattern of racketeering activity on at least one other occasion), with *Whehan v. Winchester Prod. Co.*, 319 F.3d. 225, 230 (5th Cir. 2003) (holding that the continuity requirement was not satisfied where the plaintiffs only demonstrated a "few transactions" in which the alleged enterprise attempted to defraud the plaintiff royalty owners), and *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1462–63 (5th Cir. 1991) (stating that the accomplishment of a short-term goal is not enough to satisfy the continuity requirement), and *Landry v. Air Line Pilots Ass'n*, 901 F.2d 404, 433 (5th Cir. 1990) (finding no continuity where an enterprise consisting of an airline pilots' union, the union negotiator, and the airline employer "briefly flourished and faded").

214 See *supra* Part III.A.

While the spurning of civil RICO plaintiffs based on a continuity requirement is largely the province of the Fifth Circuit, other courts of appeals, following the spirit of the Fifth Circuit, applied other enterprise restrictions to bar the door to civil RICO plaintiffs. In a nearly textbook application of *Bledsoe*, the Seventh Circuit in *Jennings v. Emry* began to restrict civil RICO association-in-fact enterprises.²¹⁵ The plaintiff chiropractors had alleged that the defendant law enforcement personnel and medical organizations associated together to "persecute" the defendants and drive them out of practice.²¹⁶ The court thought that while the plaintiffs may have told a good "story," they did not properly allege an enterprise since "nothing [in the complaint] indicat[ed] a command structure separate and distinct from the government offices."²¹⁷ However, in *Masters*,²¹⁸ a criminal case decided after *Jennings*, the Seventh Circuit was not concerned that its interpretation of the decisionmaking-structure requirement, given similar facts, was completely different.²¹⁹

This civil-criminal dichotomy in the interpretation of the RICO association-in-fact enterprise provision was not just a problem with the Seventh Circuit, however. Following *Jennings*, the Eighth Circuit carried over its *Bledsoe* restrictions to the civil context in *Stephens, Inc. v. Gelderman, Inc.*,²²⁰ but in the process of doing so gave those restrictions a new spin. In *Stephens*, one of the plaintiff's senior officers had exploited his control over one of the plaintiff's commodity trading accounts with the defendant to enrich his own account with the defendant through the help of the defendant's employees.²²¹ The plaintiff alleged an association-in-fact enterprise consisting of its senior officer, the defendant commodities merchant, and the defendant's employees who aided the plaintiff's senior officer.²²² The court, however, held that the alleged enterprise had no structure independent of the alleged racketeering activity because the legitimate activities the members of the group carried on "were not in furtherance of the common or shared purpose of the enterprise,"²²³ thus "clarifying" its holding in

215 910 F.2d 1434 (7th Cir. 1990).

216 *Id.* at 1436-37.

217 *Id.* at 1440 n.14.

218 See *supra* notes 192-95 and accompanying text.

219 See *Hartz v. Friedman*, 919 F.2d 469, 471-72 (7th Cir. 1990) (doubting the existence of an enterprise where the plaintiffs alleged that three attorneys and their law firms associated in fact together to deprive the plaintiffs of their medical malpractice action).

220 962 F.2d 808 (8th Cir. 1992).

221 *Id.* at 810-11.

222 *Id.* at 815.

223 *Id.* at 816.

Lemm.²²⁴ However, if the *Stephens* court would have framed the common purpose of the alleged enterprise in *Stephens* as broadly as it framed the common purpose of enterprises in the criminal context²²⁵—namely, to mutually profit—then almost any other of the enterprise members’ activities outside of the racketeering activity would have satisfied the distinctness requirement. The *Stephens* court’s unwillingness to do this demonstrated a desire to further limit RICO enterprises to only organized crime.

Just a few years after *Stephens*, the Ninth Circuit—though previously undecided regarding the adoption of the *Bledsoe* requirements—embraced the “organized crime myth” and followed the Seventh and Eighth Circuits in restricting civil RICO association-in-fact enterprises. *Chang v. Chen*²²⁶ marked the Ninth Circuit’s first foray into limiting civil RICO enterprises. In *Chang*, the defendants ran a real estate scam whereby two of the defendants would secure an option to buy land and then enter into a first escrow to purchase the property.²²⁷ Then, defendant Eddie Lin would solicit another unsuspecting buyer and, after making fraudulent representations to induce the buyer to buy the property from the other defendants, would open up a second escrow and get the potential buyer to make a nonrefundable deposit into the second escrow without informing them about the existence of the previous escrow.²²⁸ The defendants then divided and pocketed the profit from the nonrefundable deposits.²²⁹ At first glance these facts—that each member of the alleged enterprise performed the same functions in each instance of racketeering activity, that the defendants would give Eddie Lin the green light to solicit prospective buyers, and that the defendants divided the profits from the nonrefundable deposits²³⁰—obviously showed a “partnership in crime” and therefore should have constituted an association-in-fact enterprise. Despite the facts of this involved scheme, however, the court held that the plaintiffs had not shown structure “separate and apart from the predicate acts to distribute the proceeds of the transactions” because they had not alleged any activity conducted by the defendants besides the fraudulent transactions, nor any allegations of

224 See *supra* notes 148–49 and accompanying text.

225 See, e.g., *United States v. Kragness*, 830 F.2d 842, 856–57 (8th Cir. 1987) (finding a common purpose to buy, sell, and otherwise deal and conceal narcotics and dangerous drugs).

226 80 F.3d 1293 (9th Cir. 1996).

227 *Id.* at 1296.

228 *Id.*

229 *Id.*

230 *Id.* at 1300.

some overarching management entity.²³¹ While this holding is at least consistent with the Ninth Circuit's dicta in the criminal case *United States v. DeRosa*,²³² it is entirely at odds with the Ninth Circuit's interpretation of the distinctness requirement in another RICO criminal case, *United States v. Blinder*.²³³ Insofar as *Blinder* can be read to allow the plaintiff to satisfy the distinctness requirement by showing that one member of the association in fact has legitimate activities apart from the racketeering acts, the *Chang* plaintiffs should have satisfied the *Blinder* version of the distinctness test because the defendant Eddie Lin was involved in the legitimate activities of his real estate agency²³⁴ as well as the racketeering activity. Unfortunately, the Ninth Circuit—chomping at the bit to limit civil RICO—did not even consider *Blinder*.

Two further civil RICO association-in-fact cases demonstrated the extent of the Ninth Circuit's desire to limit civil RICO enterprises. Both cases, like *Chang v. Chen*, involved the court applying the Ninth Circuit's distinctness requirement to find the plaintiff's enterprise allegations insufficient. In *Simon v. Value Behavioral Health, Inc.*,²³⁵ the plaintiffs claimed that the defendants, a large number of health insurance companies, agents, trade groups, and employee benefit plans, fraudulently denied health benefit claims and then invested the proceeds to develop a group of preferred medical providers.²³⁶ Following *Chang*, the court held that the plaintiff had failed to allege facts suggesting the existence of an enterprise since the plaintiff's "complaint alleged no more than that appellees collaborated to defraud health plan beneficiaries."²³⁷ According to the court, the plaintiff did not allege a hierarchy or decisionmaking structure that guided the enterprise and was distinct from the racketeering acts.²³⁸ Likewise, the Ninth Circuit in *Wagh v. Metris Direct, Inc.*²³⁹ held that the plaintiff had not properly alleged an enterprise for the same reasons as the

231 See *id.*

232 Recall that *DeRosa* required enterprise activities different from the predicate acts of racketeering. See *supra* note 160.

233 See *supra* note 172 and accompanying text. Interestingly, the *Chang* court did not cite *Blinder* at all in its opinion.

234 Indeed, those legitimate activities were a necessary cover for the real estate scam, or else Eddie Lin would have had no credibility with which to lure in potential buyers.

235 208 F.3d 1073 (9th Cir. 2000).

236 *Id.* at 1080.

237 *Id.* at 1083.

238 *Id.*

239 348 F.3d 1102 (9th Cir. 2003).

Simon court.²⁴⁰ Because the billing fraud allegedly perpetrated by the defendant credit card companies and the card-issuing bank represented just a “normal credit card transaction” between the defendants, Citibank (the card-issuing bank), and the plaintiff, the plaintiff did not allege “that Defendants and Citibank have established a system of making decisions in furtherance of their alleged criminal activities, independent from their respective regular business practices.”²⁴¹ Both of these cases present an affront to the correct interpretation of RICO’s association-in-fact provision, as RICO contains no requirement for a decisionmaking structure or enterprise activities apart from the racketeering acts. Such an interpretation of the enterprise provision also flies in the face of the congressional directive that RICO “be liberally construed to effectuate its remedial purposes.”²⁴²

The growing disparity between civil and criminal association-in-fact cases found further demonstration in the Sixth Circuit’s decision in *VanDenBroeck v. Commonpoint Mortgage Co.*²⁴³ In a factual situation similar to *Wagh*, the plaintiffs alleged that the defendant mortgage company committed a pattern of fraud by associating with secondary lenders, procuring a loan for the plaintiffs at a higher interest rate than the market offered, and then selling the plaintiff’s loan to the secondary lenders for a fee based on the difference between the defendant’s loan rate and the secondary lender’s rate for the same loan.²⁴⁴ The Sixth Circuit said that this did not satisfy the enterprise requirement because the plaintiffs did not show “some minimal level of organizational structure between the entities involved,” or “evidence of a hierarchy.”²⁴⁵ The Sixth Circuit, however, must have forgotten its holding in *Quoad*, where for criminal RICO cases they rejected the argument that the plaintiff had to show more than just the racketeering acts to prove the existence of the enterprise.²⁴⁶ By asking for “evidence of a hierarchy” and “organizational structure,” the Sixth Circuit set a higher standard for association-in-fact enterprises in civil RICO cases than in criminal RICO cases.

Finally, the latest and perhaps most devastating twist in the common theme of restricting civil RICO association-in-fact enterprises

240 *Id.* at 1112.

241 *Id.* (quoting *Wagh v. Metris Direct, Inc.*, No. C01-01711TEH, 2002 WL 257846, at *3 (N.D. Cal. Feb. 20, 2002)).

242 Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

243 210 F.3d 696 (6th Cir. 2000).

244 *Id.* at 699.

245 *Id.* at 699–700.

246 See *supra* notes 154–56 and accompanying text.

came from the Seventh Circuit in *Baker v. IBP, Inc.*²⁴⁷ In *Baker* the Seventh Circuit rejected the claim that a manufacturing plant formed an association-in-fact enterprise with immigrant welfare organizations in order to smuggle in illegal aliens to work at the plant.²⁴⁸ In doing so, the Seventh Circuit claimed no common purpose animated the enterprise as a whole: "IBP [the manufacturer] wants to pay lower wages [while] the Chinese Mutual Aid Association [one of the immigrant welfare organizations] wants to assist members of its ethnic group. These are divergent goals."²⁴⁹ Such an understanding of "common purpose" was never hinted at or applied in the criminal context. There, all the government needed to show was a common purpose to commit the racketeering activity.²⁵⁰ No court inquired as *Baker* did into whether members of an alleged association-in-fact criminal enterprise might have different goals, analyzing whether, say, criminal *X* committed the bank robbery because he wanted to buy a new Porsche, or whether criminal *Y* robbed the bank because he needed to feed his family. The *Baker* court never considered that in criminal RICO cases the common goal of the enterprise and the personal goals of the conspirators often diverge.²⁵¹

Ironically, while the purpose of the Seventh Circuit in *Baker* may have been to try to further limit civil RICO, the interpretation it used threatens to swallow what everyone agrees is the basic purpose of RICO: attacking mob family-type organizations. If a court were ever to apply such a requirement to a mafia family RICO prosecution, the prosecutor would have a difficult time alleging an association-in-fact enterprise. Many of the family members would certainly have different goals: for example, one underboss's goal of becoming the family

247 357 F.3d 685 (7th Cir. 2004).

248 *Id.* at 687, 691.

249 *Id.* at 691.

250 Recall that something as general as "monetary profit" sufficed in the criminal context to satisfy "common purpose." See, e.g., *United States v. London*, 66 F.3d 1227, 1244 (1st Cir. 1995) (finding the common purpose of economic gain); *United States v. Orena*, 32 F.3d 704, 710 (2d Cir. 1994) (holding that the existence of an internal war in the Columbo crime family, the alleged enterprise, did not negate a finding of a "common purpose"); *United States v. Feldman*, 853 F.2d 648, 651-52 (9th Cir. 1988) (finding the common purpose of defrauding an insurance company through repeated acts of arson); *United States v. Tillet*, 763 F.2d 628, 631 (4th Cir. 1985) (finding the common purpose of making money off of the illegal trafficking of marijuana).

251 See, e.g., *United States v. Beasley*, 72 F.3d 1518, 1525 (11th Cir. 1996) (finding that while only a small subset of the members of a religious cult committed racketeering acts, the entire cult could properly constitute the association-in-fact enterprise).

leader is different and inconsistent with another's goal of doing the same.²⁵²

From *Shaffer* to *Baker*, then, courts have either applied the old limitations developed in criminal RICO cases with a novel and brutal vigor, or created entirely new rules not applied previously in criminal RICO cases in order to restrict civil RICO cases. Moreover, this disturbing trend has shown no sign of abating, as recent cases such *Baker*, *Wagh*, and *VanDenBroeck* attest to the commitment of federal courts to restrict association-in-fact enterprises. Worse, these cases apply restrictions that run counter to the text and legislative history of RICO and should not even exist, much less be inconsistently applied in a harsher manner in civil RICO cases than in criminal RICO cases. Unless courts start critically re-examining where their association-in-fact caselaw is going, their decisions threaten to run so far afield from the statute that RICO's association-in-fact provision will become a judicial—and cease to be a legislative—enactment.

CONCLUSION

Federal courts are finding a way to interpret the same statutory enterprise definition two different ways, depending on the names typed on the case caption. Perhaps, given the correct interpretation of RICO's enterprise provision, the scope of civil RICO becomes frighteningly broad and unmanageable. Indeed, the author of this Note throughout the writing process found himself somewhat shocked at the nearly boundless nature of the enterprise provision. Yet, given the above discussion of Congress's understanding of what it was doing when it passed RICO,²⁵³ combined with careful evaluation of the text of the enterprise provision,²⁵⁴ one cannot in good conscience say that such an interpretation is not the law and should not control the actions of federal courts regarding association-in-fact enterprises. Any interpretation of RICO's association-in-fact enterprise contrary to the will of Congress and the text of the statute is simply illegitimate, no matter what good intentions motivated such an interpretation. If we truly have faith in the operation of our democratic republic, the remedy to such a perceived malady must be found in Congress, not the courts. In the end, even in seemingly minor matters such as the proper interpretation of the RICO association-in-fact

252 See *Orena*, 32 F.3d at 710 (holding that the existence of an internal war in the Columbo crime family, the alleged enterprise, did not negate a finding of a "common purpose").

253 See *supra* Part I.B.

254 See *supra* Part I.A.

enterprise, our judges must avoid the "eternal temptation,"²⁵⁵ accept results they do not like, and interpret the law in accord with its text and purposes.

While almost twenty-five years have passed since *United States v. Turkette* and nearly thirty-five years since the passage of RICO, it is never too late for federal courts to change course, critically examine their association-in-fact case law, and attempt to bring uniformity to their association-in-fact jurisprudence across criminal and civil RICO caselaw. Federal courts should also purge their case law of any restrictions on association-in-fact enterprises not in accord with the statute. Specifically, courts should not apply any hierarchy or decisionmaking-structure requirement, distinct structure apart from the racketeering-acts requirement, continuity requirement, or common-purpose requirement beyond the common purpose to form an ongoing organization to commit the predicate acts. By applying RICO to really prohibit "associations in fact" that engage in racketeering activity—as the statute intended—courts will not only be keeping within their role in our democratic republic, but will also put the proper pressure on Congress to do its job, too, if RICO association-in-fact cases threaten to get out of control. Thus, our government will be operating as it is supposed to, and that is a very good thing.

255 See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 261 (1990).