American College of Trial Lawyers

A PROPOSAL FOR THE APPLICATION OF VICARIOUS LIABILITY UNDER CIVIL RICO

American College of Trial Lawyers

A PROPOSAL FOR THE APPLICATION OF VICARIOUS LIABILITY UNDER CIVIL RICO

Approved by the Board of Regents
September 17,1993

American College of Trial Lawyers

CHANCELLOR-FOUNDER

HON. EMIL GUMPERT
(1895-1982)

OFFICERS

FRANK C. JONES, *President*
LIVELY M. WILSON, *President-Elect*
THOMAS J. GREENAN, *Secretary*
CHARLES B. RENFREW, *Treasurer*
FULTON HAIGHT, *Immediate Past President*

BOARD OF REGENTS

E. OSBORNE AYSCUE, JR.
Charlotte, North Carolina

EDWARD BRODSKY
New York, New York

ROBERT R. CAMPBELL
Knoxville, Tennessee

ANDREW M. COATS
Oklahoma City, Oklahoma

C. HARRIS DITTMAR
Jacksonville, Florida

WAYNE FISHER
Houston, Texas

L. YVES FORTIER, C.C., Q.C.
Montreal, Quebec

JEROME J. GRAHAM, JR.
Morristown, New Jersey

THOMAS J. GREENAN
Seattle, Washington

FULTON HAIGHT
Santa Monica, California

Wm. BRUCE HOFF, JR.
Chicago, Illinois

FRANK C. JONES
Atlanta, Georgia

CHARLES B. RENFREW
San Francisco, California

DENNIS L. SHACKLEFORD
El Dorado, Arkansas

EARL J. SILBERT
Washington, District of Columbia

JOHN H. STENGER
Buffalo, New York

WILLIAM W. VAUGHN
Los Angeles, California

LIVELY M. WILSON
Louisville, Kentucky

American College of Trial Lawyers

PAST PRESIDENTS

1950-51	EMIL GUMPERT* Los Angeles, California
1951-52	C. RAY ROBINSON* Merced, California
1952-53	CODY FOWLER* Tampa, Florida
1953-54	E. D. BRONSON* San Francisco, California
1954-55	CODY FOWLER* Tampa, Florida
1955-56	WAYNE E. STICHTER* Toledo, Ohio
1956-57	JESSE E. NICHOLS* Oakland, California
1957-58	LEWIS C. RYAN* Syracuse, New York
1958-59	ALBERT E. JENNER, JR.* Chicago, Illinois
1959-60	SAMUEL P. SEARS* Boston, Massachusetts
1960-61	LON HOCKER Woods Hole, Massachusetts
1961-62	LEON JAWORSKI* Houston, Texas
1962-63	GRANT B. COOPER* Los Angeles, California
1963-64	WHITNEY NORTH SEYMOUR* New York, New York
1964-65	BERNARD G. SEGAL Philadelphia, Pennsylvania
1965-66	EDWARD L. WRIGHT* Little Rock, Arkansas
1966-67	FRANK G. RAICHLE* Buffalo, New York
1967-68	JOSEPH A. BALL Los Angeles, California
1968-69	ROBERT W. MESERVE Boston, Massachusetts
1969-70	HON. LEWIS F. POWELL, JR. Washington, D.C.
1970-71	BARNABAS F. SEARS* Chicago, Illinois
1971-72	HICKS EPTON* Wewoka, Oklahoma
1972-73	WILLIAM H. MORRISON* Portland Oregon
1973-74	ROBERT L. CLARE, JR. New York, New York
1974	AUSTIN W. LEWIS* New Orleans, Louisiana
1975-76	THOMAS E. DEACY, JR. Kansas City, Missouri
1976-77	SIMON H. RIFKIND New York. New York
1977-78	KRAFT W. EIDMAN* Houston, Texas
1978-79	MARCUS MATTSON Los Angeles, California
1979-80	JAMES E. S. BAKER Chicago Illinois
1980-81	JOHN C. ELAM Columbus, Ohio
1981-82	ALSTON JENNINGS Little Rock, Arkansas
1982-83	LEON SILVERMAN New York, New York
1983-84	GAEL MAHONY Boston, Massachusetts
1984-85	GENE W. LAFITTE New Orleans, Louisiana
1985-86	GRIFFIN B. BELL Atlanta, Georgia
1 986-87	R. HARVEY CHAPPELL, JR. Richmond Virginia
1987-88	MORRIS HARRELL Dallas, Texas
1988-89	PHILIP W. TONE Chicago, Illinois
1989-90	RALPH I. LANCASTER, JR. Portland, Maine
1990-91	CHARLES E. HANGER San Francisco, California
1991-92	ROBERT B. FISKE, JR. New York, New York
1992-93	FULTON HAIGHT Santa Monica, California

* Deceased

COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE

CHAIR

JOHN T. MARSHALL
Atlanta, Georgia

MEMBERS

GRIFFIN B. BELL
Atlanta, Georgia

JOHN J. BOUMA
Phoenix, Arizona

JOHN J. COLLINS
Pasadena, California

MICHAEL A. COOPER
New York, New York

THOMAS E. DEACY, JR.
Kansas City, Missouri

WAYNE FISHER
Houston, Texas

PAUL L. FRIEDMAN
Washington, District of Columbia

HON. ERWIN N. GRISWOLD
Washington, District of Columbia

PAUL R. HAERLE
San Francisco, California

ALAN N. HALKETT
Los Angeles, California

EDWARD F. HENNESSEY
Hartford, Connecticut

PATRICIA M. HYNES
New York, New York

GARR M. KING
Portland, Oregon

ROBERT M. LANDIS
Philadelphia, Pennsylvania

STANDISH FORDE MEDINA, JR.
New York, New York

ROBERT W. MESERVE
Boston, Massachusetts

M. ROLAND NACHMAN, JR.
Montgomery, Alabama

PETER N. PERRETTI, JR.
Morristown, New Jersey

HARRY M. REASONER
Houston, Texas

BERNARD G. SEGAL
Philadelphia, Pennsylvania

THEODORE P. SHIELD
Long Beach, California

LEON SILVERMAN
New York, New York

RICHARD H. SINKFIELD
Atlanta, Georgia

RAYMOND R. STEFANI
Cedar Rapids, Iowa

RAYMOND J. TAM
Honolulu, Hawaii

JOHN R. TOMLINSON
Seattle, Washington

EARL J. SILBERT
Regent Liaison
Washington, District of Columbia

TABLE OF CONTENTS

A PROPOSAL FOR THE APPLICATION OF VICARIOUS LIABILITY UNDER CIVIL RICO

INTRODUCTION

The American College of Trial Lawyers has approved the following paper, "A Proposal for the Application of Vicarious Liability Under Civil RICO", for dissemination to the membership of the College and the Judiciary. This paper results from a number of years of hard work on the part of many, ensuring a diverse perspective and thorough analysis of the issue presented.

The Committee on Special Problems in the Administration of Justice began this study in 1989. A number of drafts of the paper have been prepared and thoroughly discussed by members of the Committee and lawyers who have particular expertise in the subject. In late 1991, a paper approved by each member of the Committee was submitted to the Board of Regents of the College. The Board of Regents requested that even further efforts be made to assure that all points of view were represented. This has been done. On March 8, 1993 the Committee submitted this paper to the Board of Regents with the recommendations that the paper be approved and disseminated to the membership of the College and to the Judiciary.

The Committee now has spent a substantial amount of time on this paper over the last several years and truly believes that all points of view have been thoroughly considered and addressed.

A Proposal for the Application of Vicarious Liability under Civil RICO

I. INTRODUCTION

This paper analyzes the application of vicarious liability under the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), and proposes a resolution to the dispute apparent from the divergent judicial opinions on this Issue.

The RICO statute itself provides virtually no express guidance regarding the application of vicarious liability of organizations under RICO. Moreover, the United States Supreme Court, although presented with the opportunity, has yet to directly comment on the issue. As a result, lower courts have taken varying and seemingly irreconcilable positions regarding the use of this doctrine of imputed liability.

Essentially three diverse judicial views have been articulated regarding vicarious liability of organizations under RICO:

1) Vicarious liability never applies under RICO;
2) vicarious liability applies under RICO without impediment; and
3) vicarious liability has only a limited application under RICO.

Advocates for no vicarious liability under RICO contend that the application of traditional vicarious liability would improperly hold an innocent organization liable threefold for the errant crimes of its low level employees. This group's purported wholesale rejection of vicarious liability under any scenario, however, fails to acknowledge that an organization can only act through its agents. Even principles of criminal corporate liability recognize that high ranking agents of an organization set policy for which the organization can be responsible.

Advocates for the liberal application of traditional principles of vicarious liability would always hold an organization liable under RICO for the predicate acts of its employees, including for wrongs of low level employees, when committed within the scope of their employment and with at least some intent to benefit the employer. Such a traditional application of imputed liability, however, ignores RICO's original purpose of targeting corrupt organizations and would expand RICO to reach even those organizations themselves not actively involved in racketeering.

In between the two extremes, the majority of courts recognize vicarious liability under RICO but restrict its application based, at least implicitly, on the Model Penal Code's concept of "high managerial agent" liability. Under this application, it can fairly be said that an organization acts through, and can be held accountable for the conduct of, those high managerial agents and directors who represent corporate policy.

Under such an analysis, low level employees pursuing their own interest obviously do not represent corporate policy and do not impute liability to the corporation. High managerial agents, however, arguably even when pursuing their own illegal motives, act for the corporation and may impute corporate liability. A tougher question arises when low level employees act pursuant to a corporate purpose but purportedly without the organization's acquiescence. It may be that if the employee actually is serving the corporate purpose or "policy," the employee is not acting without corporate knowledge. The organization should be aware of its own policy and should expect its low level employees to act pursuant to that policy.

The three articulated views, when analyzed on their facts, are not actually so diverse. Cases refusing ever to impose vicarious RICO liability typically recognize the unfairness of such liability based on racketeering acts of low level employees. Cases advocating a no-holds-barred application of vicarious liability find such imposition easy when involving the wrongs of corporate presidents and CEOs. Although not expressly, these cases implicitly recognize the high managerial agent concept.

The Model Penal Code's proposal of criminal corporate liability provides an appropriate solution to the controversy surrounding imposition of organization liability under RICO. RICO's recognized unique and inherently criminal nature supports a more restricted application of vicarious liability than that found under traditional agency law. Corporate RICO liability should require conduct attributable to a "high managerial agent" or director of the accused corporation similar to vicarious criminal liability proposed by the Model Penal Code.

II. THE NATURE OF CIVIL RICO

A. Legislative History and Interpretation

RICO prohibits any person from acquiring or operating any enterprise engaged in interstate commerce through a pattern of racketeering activity. RICO also prohibits the use or investment of income received from the commission of such racketeering activity.[1/] Section 904(a) of the Organized Crime Control Act provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purpose."[2/]

RICO was enacted in 1970 after an exhaustive legislative inquiry into the influence and power of organized crime.[3/] Congress' articulated purpose in enacting RICO was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime,"[4/] Unfortunately, however, the legislative history of the statute provides little insight Into its application. In fact, it appears that the civil provisions of RICO were the subject of little debate and were added almost as an afterthought.[5/]

In 1981, the United States Supreme Court stated that the statute's purpose is "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 a part of or operated by unlawful racketeering methods."[6/] The Court more recently has explained, however, that the liberal construction mandated by the language of the Act supports a broad Interpretation which reaches both legitimate and illegitimate businesses and is not restricted to organized crime.[7/] The Court noted that any corrections or changes to the Act must be accomplished through legislation.[8/]

The lack of legislative and judicial guidance on the issue of vicarious liability under RICO fuels diverse views on this issue. Some in the plaintiffs' bar would argue that the United States Supreme Court's opinion in *American Society of Mechanical Engineers v.* Hydro/eve/ Corp.,[9/] (hereinafter *"ASME"),* provides guidance for the application of vicarious liability under RICO. In *ASME,* the

Court construed "person" as used in the Clayton Act to permit civil corporate liability under normal agency principles.[10] In so doing, the Court stated that the doctrine of apparent authority would apply unless there is evidence that Congress intended otherwise.[11]

This position, however, has been rejected by the majority of Federal Circuit courts expressly discussing *ASME* and its application under RICO. For example, the First Circuit, in *Schofield v. First Commodity Corp.*,[12] rejected any attempted analogy to antitrust laws in its analysis of vicarious liability under RICO. As the First Circuit further explained in *United States v. O'Connell,* RICO's specific language preludes the application of such vicarious liability where the clear "Intention of Congress in passing RICO was to punish the individual wrongdoer rather than the broader purposes of deterrence and restitution inherent In the antitrust and securities laws."[13] Thus, while in certain instances RICO and the Clayton Act may provide helpful analogies, with regard to the application of vicarious liability the statutory schemes differ.

B. Attempts at Legislative Modifications.

Past proposals to amend RICO have suggested that imputed liability applies under civil RICO but have advocated a high standard for its application. In 1985, for example, the Ad Hoc Civil Rico Task Force recommended the following clarification with regard to vicarious liability:

> In view of RICO's purpose to protect legitimate business, it is important to limit the circumstances under which legitimate entities can be held liable under Civil RICO. Because of RICO's unique purpose, vicarious responsibility of employers for the acts of their employees or agents should be allowed under Civil RICO only when the entity itself can fairly be accused of wrongdoing. In our view this means precluding derivative liability except in circumstances where high-level managers have knowingly participated in the wrongdoing, or have knowingly disregarded the existence of wrongdoing by lower-level employees or agents (including 'conscious avoidance' and 'willful blindness')."'

Similarly, in 1986, a bill to amend RICO proposed the following clarifications:

> A person other than individual is liable under this subsection for the conduct of another to the extent that the conduct complained of is --
>
> (A) knowingly engaged in by an officer, director, partner, or employee of such person, acting as such officer, director, partner, or employee;
>
> (B) authorized or ratified by --
>
> (i) an executive officer; or
>
> (ii) the governing board; possessing the authority to determine the manner in which such person conducts its essential functions; and

(C) intended to benefit, and did benefit, such person materially.[15/]

In 1987, proposed civil RICO reform included amendments to strengthen RICO as well as to safeguard against abuse.[16/] In this latter category, Representative John Conyers, Jr., Chairman of the Subcommittee on Criminal Justice, advocated detailed pleading rules requiring particularity for averments of fraud, coercion, agency, *respondeat superior,* accomplice and conspiracy liability. Rep. Conyers explained that although the statute "expressly contemplates such liability under RICO," this proposed provision would reflect the concerns of members of the business community "that private plaintiffs are filing civil RICO claims, especially in the fraud area, without proper consideration of the facts and law. Concerns of the business community are expressed most strongly by those whose liability is alleged to be derivative or vicarious."[17/] Rep. Conyers originally had opposed the enactment of RICO.[18/]

Legislative reform, however, still may be forthcoming. In 1991, the House Judiciary Committee approved and reported to the House the RICO Amendments Act of 1991, a bill designed to make it more difficult for private parties to bring civil RICO suits.[19/] This bill contemplated several sweeping changes to the RICO statute. Among them, H.R. 1717 proposed to raise the burden of proof from a preponderance of the evidence to clear and convincing evidence, limit RICO litigation to federal courts, and limit civil remedies to the redress of "egregious criminal conduct ... which was an integral part of ongoing racketeering activities and which was characterized by a combination of aggravating circumstances that renders the defendant's conduct more reprehensible than the minimum conduct necessary to sustain a violation of Section 1962 of this title."[20/] The bill, however, did not expressly address the vicarious liability issue.

In addition to proposed legislation, several Supreme Court justices have voiced concern with the current application of RICO in the civil context. In *H. J. Inc. v. Northwestern Bell Telephone Company, et al.,*[21/] Justice Scalia, joined by Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy, concurred in the judgment regarding RICO's pattern issue but suggested that the lack of guidance in the RICO statute may be, in fact, unconstitutional. Justice Scalia explained that the prologue of the statute describes a "relatively narrow focus upon 'organized crime'" yet the statute's vagueness as well as the Court's interpretation of RICO has created "a kaleidoscope of circuit positions."[22/]

In a May 1989 article in the Wall Street Journal entitled "Get RICO Cases Out of My Courtroom," Justice Rehnquist observed:

> The legislative history of the RICO Act strongly suggests that Congress never intended that civil RICO should be used, as it is today, in ordinary commercial disputes or divorced from the influences of organized crime.
>
> * * *
>
> Proposals for curtailing civil RICO have been introduced in the past three Congresses. Suggested reforms range from the complete abolition of all civil RICO actions to more modest modifications. Among the latter are the restriction or abolition of treble damages, the imposition of a prior criminal

> conviction or special injury requirement, and the denial of relief where the predicate illegality is confined to ordinary fraud.
>
> * * *
>
> I take no position as to which of the reform proposals are acceptable or which is best, but I do think that the imposition of some limitations on civil RICO actions is required so that federal courts are not required to duplicate the efforts of the state courts.... I think that the time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court.[23]

III. THE NATURE OF VICARIOUS LIABILITY

A. General Common Law

The doctrine of vicarious liability embodies the notion that "one who is in a position to exercise some general control over the situation must exercise it or bear the loss."[24] The modern justification for this doctrine of imputed liability derives strictly from an allocation-of-risk policy decision: losses resulting from an employee's torts are a "required cost of doing business."[25]

Vicarious liability, however, is not a doctrine of strict corporate liability to be applied without any analysis of the particular employee-employer relationship involved or the wrongdoing alleged. Traditionally, whether an employee is acting within the scope of his employment and whether the employee has an intent to benefit the employer are determinative factors. In addition, the analysis should be heightened where a criminal statute applies.

> Often statutes are not that specific as to whether or not they impose vicarious liability. In such a case, if the statutory crime is worded in language requiring some type of fault ("knowingly," "willfully," "with intent to" etc.), then it is the rule that the employer must personally know or be willful or have the requisite intention to be liable for the criminal conduct of his employee; even though the latter is acting to further his employer's business, the employer is not criminally liable unless he knew of or authorized that action. That is, if the statute requires mental fault, it will not be presumed that the legislature intended that the fault of the employee should suffice for conviction of the employer.[26]

Courts view RICO as a unique statute, one initially contemplated to fight organized crime.[27] Essentially all predicate acts of civil RICO are based on criminal law.[28] Thus, an analysis of traditional vicarious liability principles as they are applied to allegations of **criminal** conduct is particularly appropriate. Under such an analysis, considerably more than the mere presence of an employee-employer relationship should be required to impose vicarious liability in RICO actions.[29]

For example, based upon such common law principles, taking bribes to conceal information from one's employer logically does not fall within the scope of one's employment and such conduct should not impute liability to the employer.[30] Nor does a bank employee act to benefit his bank employer where he acts "to line his own pockets and those of his accomplices."[31]

> The general rule is that if a specific criminal intent is necessary to constitute a crime, an employer may be penalized for an employee's criminal act only if the agent acted within the scope of his employment and not if the agent acted for some purpose other than that of serving his employer.
>
> Under a statute requiring 'a specific wrongful Intent' ... the corporation does not acquire knowledge or possess the requisite 'state of mind' essential for responsibility through the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer.[32]

In keeping with this policy, the common law provides that the determination of whether the conduct, though not authorized, was so similar to or incidental to authorized conduct as to be within the scope of employment requires consideration of whether or not the act is seriously criminal.[33]

> The fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment, since **the master is not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result. ... [S]erious crimes are not only unexpectable** but in general are in nature different from what servants in a lawful occupation are expected to do.[34]

B. The Model Penal Code

An examination of vicarious liability under the Model Penal Code also supports the position that RICO, when recognized as essentially a criminal statute, warrants a limited application of vicarious liability.

A great number of states have drawn upon the Model Penal Code in enacting corporate liability provisions for their own criminal codes.[35] In this regard, the Model Penal Code and its commentaries urge rejection of the general *respondeat superior* doctrine for serious crimes and limit corporate liability to situations involving directors or officers "sufficiently high in the hierarchy to assume their acts are reflective of the corporate body."[36] For other than minor offenses, corporate criminal liability under the Model Penal Code is to be determined by the standards of subsection (1) (c), which permits derivative liability only when:

> (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a **high managerial agent** acting in behalf of the corporation within the scope of his office or employment.

* * *

(4) As used in this Section:

* * *

(c) "high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his **conduct may fairly be assumed to represent the policy** of the corporation or association.[37]

By 1985, 28 of 34 jurisdictions enacting the Code substantially followed these limitations, thus precluding corporate liability for the seriously criminal acts of lower echelon employees.[38]

C. RICO's Remedies

Although some courts view RICO's treble damages as punitive in nature,[39] an analogy to antitrust laws provides a similar statutory structure where vicarious liability and treble damages are deemed compatible.[40] Nevertheless, the nature of RICO's "punishment" represents another factor weighing in favor of a restricted application of vicarious liability. "[I]f the permitted punishment is severe -- a felony or a serious misdemeanor — the statute is not apt to be so construed [to allow vicarious liability] in the absence of an express provision for vicarious responsibility."[41]

IV. CASE DECISIONS REGARDING VICARIOUS LIABILITY UNDER RICO

The state of the case law regarding vicarious liability application to RICO, on its face, could not be any more conflicting. The Eastern District of Louisiana, in *First National Bank of Louisville v, Lustig,*[42] reasoned that *"respondeat superior* can **never** be the basis of liability for a civil RICO suit."[43] In contrast, the Eastern District of California, in *International Brotherhood of Elec'l Workers Local 340 v. Sacramento Valley Chapter of the Nat'l Elec'l Contractors Assoc'n* (hereinafter *"IBEW"),*[44] held that the imposition of vicarious liability appears "entirely consistent with the underlying purpose" of RICO.[45]

A majority of courts, however, now recognizes a limited application of traditional vicarious liability principles under RICO with certain defined restrictions.[46] These courts look more to the level of the employee whose conduct is at issue in deciding questions of vicarious liability. Instructive on this issue is the opinion in *Banque Worms v. Luis A. Dugue Pena E. Hiyios, Ltd.,*[47] where plaintiffs argued that the defendant company, which was not named as the enterprise, should be liable for the acts of its employee because he "acted with the force of the corporation behind him."[48] The district court rejected this theory, stating that "this yields the absurd result specifically denounced ... [citations omitted] ..., i.e., holding an innocent corporation liable for the unauthorized wrongdoing of a **lower level** employee."[49]

This position is supported by and promotes the underlying policy of RICO which seeks to clean the market of corrupt businesses or enterprises, not innocent ones. In *Gruber v. Prudential-Bache Securities, Inc.*,[50] after weighing the policy considerations, the United States District Court for the District of Connecticut determined

that invoking the financially ruinous treble damages of RICO through vicarious liability "could conceivably interfere with the very market forces that RICO was designed to protect."[51]

Recognizing, as have other courts, a distinction between "aggressor" corporations and "conduit" corporations for RICO purposes, the *Gruber* court refused to subject a conduit corporation to vicarious liability for the racketeering actions of **lower level** employees.[52] The court explained that it would be an anomalous result Indeed if the corporation were deemed an "aggressor" enterprise under RICO merely because an employee misused his authority and actually violated internal guidelines.[53]

Although the distinction between "aggressor" and "conduit" corporations, as well as "high level" and "low level" employees, may be difficult to draw in certain cases, line drawing is the business of law.[54] Based upon RICO's original purpose, the line must be drawn between those organizations managed and/or directed by high level wrong-doers and those organizations unwittingly used and/or victimized by a corrupt or errant lower level employee.

Also instructive on this issue is the decision of the United States District Court for the District of Nebraska in *K&S Partnership v. Continental Bank, N.A.*,[55] Plaintiffs in *K&S* contended that defendant Continental Bank, through its employees, violated sections 1962 (c) and (d) of RICO by helping create a false track record of success with regard to limited partnerships exploring oil and gas. The court explained:

> The cases make clear that before RICO liability may be imposed it must be proven that it was the corporate policy which created the scheme or senior corporate management which implemented the scheme.
>
> It is Important to understand that the policies behind vicarious liability and RICO are different. In the normal civil context, vicarious liability is used to shift the economic costs, of the damage from the innocent third party to the producer of the product in order that the producer internalizes the cost, passes those costs along to the consumer, and thereby is placed in a competitive disadvantage when competing against others who produce better quality goods at lower costs. In such a situation a corporation has an incentive to lower its costs by dealing more effectively with its employees. The intent of RICO, however, is to force the corrupt business from the marketplace altogether. Thus, it makes little sense to impose RICO treble damage liability upon an otherwise legitimate entity unless it is shown that the corporate policy was to violate RICO in the first place.[56]

In fact, even those cases purporting to summarily dispose of vicarious liability under RICO in all circumstances, on further examination appear more in line with those cases applying a restricted application of vicarious liability patterned after the Model Penal Code. The First *Nat'l Bank of Louisville v. Lustig* decision, for example, which states that vicarious liability "never" applies under RICO, actually contemplates a restricted form of vicarious RICO liability.[57] Recognizing that the text of the statute requires that a plaintiff establish a corporate defendant's criminal liability, the court stated that "it is necessary to distinguish between a corporation that actually violates

the statute and a corporation whose disloyal employee violates the statute without his employer's complicity or knowledge."[58]

This limited application would impose RICO liability on aggressor or perpetrator corporations, i.e., those corporations managed and/or directed by high-level racketeers, in furthering racketeering activity. Although this is more akin to direct liability -- "a corporation that actually violates the statute" -- it nonetheless is liability based on agents and thus vicarious.

Similarly, the line of cases allowing liberal application of vicarious liability under RICO, at least implicitly, recognizes constraints similar to those imposed by the Model Penal Code. For example, a recent decision from the Eastern District of New York recognizes reliance on apparent authority to impute corporate liability under RICO but accepts its use only "[s]o long as this strand of agency doctrine is not employed against passive entities that have been victimized by low-level employees."[59]

Even the often cited Third Circuit decision in *Petro-Tech, Inc. v. Western Company of North America,*[60] evinces a restricted application of vicarious liability under RICO. Although the *Petro-Tech* court acknowledged and is cited for the proposition that vicarious liability may apply in certain instances under RICO,[61] the court held that it only applies where the employer actually benefits from the predicate acts. In fact, as in *Petro-Tech,* courts which have permitted vicarious liability under RICO typically have done so only on facts where the liability imposed actually was akin to Model Penal Code liability. For example, *Petro-Tech* involved an alleged attempt by the defendant corporation to benefit from racketeering activity involving several of the corporation's **high ranking officers.**[62] Accordingly, the *Petro-Tech* court stated that its holding regarding vicarious liability was expressly narrow and the "decision goes only far enough to decide the merits of that complaint."[63]

Similarly, in *Ashland Oil, Inc. v. Arnett,*[64] where the Seventh Circuit applied vicarious liability to hold the defendant corporation liable, the corporate officers guilty of conspiring to violate RICO were the sole owners and only officers of the defendant corporation in question. Thus, although some hasten to cite *Petro-Tech* and *Ashland Oil* in support of a broad application of vicarious liability under RICO, several recent district court opinions recognize their consequent limited value as precedent.[65]

A liberal application of imputed liability simply fails to recognize the policy concerns of RICO. Imposing treble damages upon an unwitting corporation for fraudulent conduct of an employee does not target the corrupt racketeering enterprise and should not give rise to a new "required cost of doing business" in the legitimate business market.

V. CONCLUSION

On its face, the federal RICO statute does not expressly preclude the application of vicarious liability to RICO actions. Thus, advocates for broad use of RICO argue that vicarious liability is fully applicable to RICO. Courts so holding analogize to case law interpreting the Clayton Act. On the other hand, some courts purport to preclude the use of vicarious liability altogether under civil RICO, often with little explanation.

Articulating RICO's perceived unique nature and purpose, however, a majority of courts seek to restrict the application of vicarious liability under RICO without precluding it altogether. This is the better reasoned and logical approach. Under this

approach, "something more" than the mere employer/employee relationship is required to impose the harsh treble damages of RICO upon an organization for the wrongs of its employees. This "something more" requires a showing that the corporation to be held liable is not subject to such liability simply based on actions of an errant low level employee. Rather, such RICO liability must result only where the organization itself is truly culpable, based on wrongful conduct or acquiescence in wrongful conduct by sufficiently high level corporate agents whose acts reflect the corporate body. Essentially, this restricted application is consistent with, and in some cases based upon, the Model Penal Code, imposing liability where high-ranking corporate officers, managers and/or directors are intimately involved in the wrongdoing. Such corporate involvement seemingly equates to actual corporate policy and thus acts of the corporation.

Traditional vicarious civil liability simply Is inconsistent with the language and purpose of RICO. Congress could not have intended to treble the "required cost of doing business" of those passive corporations it sought to protect from infiltration by imposing RICO liability on the organization for unsanctioned crimes of low level employees. RICO's prodaimed broad sweep must be limited to its original objective—targeting the actual violators of racketeering activity.

Under the proposed application, RICO will continue to target those corrupt and "aggressor" organizations led by corrupt corporate agents, while leaving to traditional civil remedies those organizations visited by the errant low level employee wrongdoer. In this way, courts can consistently target actual racketeers and help stem the statute's overuse by plaintiffs merely in search of a deep-pocket. This approach is consistent with proposed amendments providing that RICO should be used only against "egregious criminal conduct" that "was an integral part of ongoing racketeering activities."

ENDNOTES

1/ 18 U.S.C. § 1962(a)-(c). "Racketeering activity" as used in the statute is defined in terms of specific state and federal criminal statutes or "predicate acts." Organized Crime Control Act of 1970, Pub. L. No. 91 -452,1970 U.S. Code Cong. & Admin. News (84 Stat. 922) 4007, 4010.

18 U.S.C. § 1961 (3) defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property." Section 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any Union or group of individuals associated in fact although not a legal entity." *See* 18 U.S.C. § 1961(3), supra note 1. A corporation clearly may fall within both definitions.

2/ Organized Crime Control Act of 1970, Pub. L. No. 91-452,1970 U.S. Code Cong. & Admin. News (84 Stat. 922) 1073,1104. This provision is not codified in the text of the RICO statute.

3/ See Solan, *RICO and the Surety,* 4 Tort and Ins. L. J., Vol. XXV, 787 (1990).

ENDNOTES
Continued

[4/] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 1970 U.S. Cong. & Admin. News (84 Stat. 922) 1073.

[5/] See *Sedlma, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 507 (1985).

[6/] *United States v. Turkette,* 452 U.S. 576, 591 n. 13 (1981) (citing 166 Cong. Rec. 591 (1970)).

[7/] *See Sedlma,* 473 U.S. at 499. *But See Reves v. Ernst & Young, -U.S.-, 113 S.Ct. 1163, 1173, 122 L.Ed.2d 525 (1993) ("RICO's major purpose was to attack the 'infiltration of organized crime and racketeering into legitimate organizations' ...")*

[8/] *Id.* Although there were only nine reported civil RICO decisions during the first ten years of the statute, approximately 1,000 civil RICO cases have been filed annually since 1986. *See* Solan, supra note 3, at 787.

This upsurge of civil lawsuits has provoked a fire storm of protests from legitimate and respectable businesses which complain that RICO was not enacted to supplement traditional common law fraud claims against such businesses. In response to this argument, the Supreme Court [in *Sedima]* has indicated that the RICO statute is to be liberally construed to effectuate its remedial purposes and has declined to prohibit its use against legitimate businesses. In the absence of Congressional action amending the statute, It appears that RICO will be a fixture in litigation for the foreseeable future.

Id.

[9/] 456 U.S. 556, 572-73 (1982)

[10/] *Id.*

[11/] *Id.* In fact, an analogy to antitrust laws has provided other intepretive guidance. In a 1987 opinion, *Agency Holding Corp. v. Malley-Duff & Assoc.,* 483 U.S. 143 (1987), selecting for RICO actions the four-year statute of limitations used for Clayton Act actions, the United States Supreme Court stated:

> Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs and attorneys fees.
>
> * * *
>
> The close similarity of the two provisions is no accident. The 'clearest current' in the legislative history of RICO 'Is the reliance on the Clayton Act model.'

Id. See also Homes v. Securities Investor Protection Corp., 117 L.Ed.2d 532, 112 S.Ct. 1311 (1992) (The same "by reason of" causation language is found in both statutes.)

ENDNOTES
Continued

[12] 793 F.2d 28 (1st Cir. 1986). See *also In the Matter of American Biomaterials Corp.,* 954 F.2d 919, 923 n. 4 (3rd Cir. 1992) ("As the dissent in ASME v. Hydrolevel noted, there is significant common law precedent for requiring an intent to benefit before any vicarious liability can be imposed on the principal for the intentional torts of an agent. ... Outside of the antitrust field that precedent remains viable, even if not adopted by a majority of courts.") Although certain agency principles may apply under antitrust laws, RICO is in contrast to those statutes which specifically deal with "every person". The more specific RICO language targets only "violators". *Schofield,* 793 F.2d at 33. See also *D&S Auto Parts, Inc. v. Schwartz,* 838 F.2d 964,968 (7th Cir. 1988), *cert, denied,* 486 U.S. 1061 (1988) *(ASME's* "rule, however, is not applicable to RICO, which does indicate congressional intent to create an exception to the general rule of *respondeat superior.*"); *Qatar National Navigation & Transportation Co. Ltd. v. Citibank,* 89 Civ. 0464 (1992 WL 276565) (S.D.N.Y. 1992) ("The antitrust laws sweep broadly and extend liability to 'every person.'") *But see Petro-Tech, Inc. v. Western Co. of North America,* 824 F.2d 1349, 1356 (3rd Cir. 1987); *Amendolare v. Schenkers International Forwardess, Inc.,* 747 F.Supp. 162, 171 (E.D.N.Y. 1990).

[13] 890 F.2d 563, 568 (1st Cir. 1989). While only a small number of cases have expressly discussed the applicability of *ASME* under RICO, subsequent cases concurring In the First Circuit's analysis of vicarious liability under RICO support the rejection of *ASME as* a mechanism for broadly applying vicarious liability under RICO. See, e.g., *Luthia v. Tonka Corp.,* 815 F.2d 1229,1230 (8th Cir. 1987); *Curley v. Cumberland Falls, Inc.,* 134 F.R.D. 77,81 (D. N.J. 1991). *See also City of Vernon v. Southern Cal. Edison Co.,* 955 F.2d 1361,1370 (9th Cir. 1992), cert, *denied,* 113 S.Ct. 305,121 L.Ed.2d 228 (1992) (distinguishing *ASME* as involving an employee who "wielded a good deal of authority"); *Union City Barge Line, Inc. v. Union Carbide Corp.,* 823 F.2d 129, 138-39 (5th Cir. 1987). In *Union City,* the Fifth Circuit stated that the Supreme Court in *ASME* "made absolutely clear that the holding in *ASME* applied solely to cases raising problems of apparent authority." Thus, the *Union City* court held that as a matter of law a defendant employer would not be held liable under the Sherman Act for acts of an employee which were criminal in nature and outside the scope of his employment. *Union City's* position is consistent with the suggested use of criminal corporate liability principles as discussed herein. In *Union City,* the employee had accepted kickbacks and bribes for himself, causing his employer economic harm.

[14] Report of Ad Hoc Civil RICO Task Force, ABA Section of Corporation, Banking and Business Law, 11-12 (1985).

[15] H.R. Rep. No. 5445,99th Cong., 2d Sess. (1986). This proposed language is consistent with Model Penal Code concepts and the general principles of corporate criminal vicarious liability. The 1986 reform bill, however, was voted out by the Subcommittee on Criminal Practice of the House Judiciary Committee.

[16] See Racketeer Influenced and Corrupt Organizations Act of 1987, 133 Cong. Rec. E 3351 (August 7, 1987).

[17/] ***Id.* at E 3359.**

[18/] *See* Organized Crime Control Act of 1970, Pub. L, No. 91 -452,1970 U.S. Cong. & Admin. News (84 Stat. 922) 4007,4091. The dissenting view of Representatives Conyers, Abner Mikva and William Ryan stated that Section 1964 (c), the civil remedies provision, "provides invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce by authorizing privage damage suits. ... What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish ~ destruction of the rival's business." *Id.* at 4083. Surmising that RICO "seeks to stymie organized crime's growing infiltration of legitimate business," the dissent concluded that "It employs penalties and investigative procedures which are both abusive and pregnant with the potential for abuse." *Id.* at 4081.

[19/] SeeH.R. 1717,102nd Congress, IstSess. (introduced April 11,1991). *See also* Civil RICO Reporter, Vol. 6, Nos. 14 and 16, Sept. 4 and 25. (H.R. 5111, the RICO Amendments Act of 1990, proposed a similar "gatekeeper" concept for civil litigation under RICO)

[20/] *See* H.R. 1717, Version 3, Section 3.

[21/] 492 U.S. 229, 106 L.Ed.2d 195 (1989)

[22/] *Id.* at 218.

[23/] *The Wall Street Journal,* Friday, May 19, 1989, p. A14.

[24/] Prosser & Keeton, *The Law of Torts,* 500 (1984).

[25/] *Id.*

[26/] LaFave & Scott, *Criminal Law,* § 3.9, p. 252 (2d ed. 1986).

[27/] *See, e.g.,* Report of Ad Hoc Civil RICO Task Force, supra note 14, at 11-12.

[28/] 18 U.S.C.§ 1961. Seeateo note 1, supra. The predicate act of a scheme or artifice to defraud, for example, perhaps (he most frequently pleaded predicate act, requires knowing participation. *United States v.* Pearlstem, 576 F.2d 531, 537 (3rd Cir. 1978).

[29/] *See, e.g., Harrison v. Dean Witter Reynolds, Inc.,* 695 F.Supp. 959 (N.D. III. 1988). In acknowledging that the Seventh Circuit has rejected vicarious "corporate liability for acts of lower echelon officers," the *Harrison* court stated that even where the corporate defendant allegedly received some benefits, **"something more"** than a mere employee-employer relationship is necessary for corporate liability under RICO. *Id.* at 961-62 (emphasis added). The essential elements of imposing common law

liability upon a corporation for a **criminal** offense are:

(a) The offense must be committed by an officer or agent of the corporation with broad express authority who holds a position of some responsibility;

(b) the illegal conduct must be related to and done within the course of the agent's employment; and

(c) the agent committing the illegal conduct must have done so with intent to benefit the corporation.

See *United States v. Carter,* 311 F2d 934,942 (6th Cir. 1963), cert, *denied,* 373 U.S. 915 (1963); *Standard Oil Co. of Texas v. United States,* 307 F.2d 120,128 (5th Cir. 1962); *Continental Baking Co. v. United States,* 281 F.2d 137, 149 (6th Cir. 1960).

[30/] See *United States v. Cincotta,* 689 F.2d 238,242 (1st Cir. 1982), cert, *denied,* 459 U.S. 991 (1982).

[31/] *United States v. Ridglea State Bank,* 357 F.2d 495, 498 (5th Cir. 1966).

[32/] *Ridglea State Bank,* 357 F.2d at 498 (quoting *Standard Oil Co. of Texas v. United States,* 307 F.2d 120, 129 (5th Cir. 1962).

[33/] See Restatement (Second) of Agency § 229 comment f. Even Professor G. Robert Blakey, an original drafter of the Act, concedes that "[n]one of RICO's predicate offenses is applicable on a showing of strict liability. Each requires a showing of a *mens rea* or criminal intent'." 133 Cong. Rec. H3643, H3644 (daily ed. May 18,1987). This statutory structure certainly supports a more restricted application of vicarious liability than the traditional civil application.

[34/] Restatement (Second) of Agency, supra note 33, § 231 comment a (emphasis added).

[35/] See, *e.g.,* Arizona Revised Statutes § 13-305(A) (2); Utah Code Annotated § 76-2-204(2). Moreover, Arizona has now amended its state racketeering statute to incorporate the high managerial agent threshold for organization liability in racketeering cases. See A.R.S. § 513-2314.04(1) (1993).

[36/] American Law Institute, Vol. 1, Model Penal Code and Commentaries, Philadelphia (1985) p. 339. "Under the better view, called the 'superior agent' rule, corporate criminal liability for other than strict-liability regulatory offenses is limited to situations in which the conduct is performed or participated in by the board of directors or a high managerial agent." LaFave & Stott, supra note 24, at § 3.10, p. 256. This is consistent with the Model Penal Code. *Id.* at 261.

ENDNOTES
Continued

[37/] American Law Institute, *supra* note 34, at 340 (emphasis added).

[38/] *Id. See, e.g.,* A.R.S. § 13-305(A) (2); U.C.A. § 76-2-204 (2).

[39/] See *Morvian Dev. Corp. v. Dow Chemical Co.,* 651 F.Supp. 144 (E.D. Pa. 1986) (based on an analogy to the Sherman Act).

[40/] *Butcf. Liquid Air Corp. v. Rogers,* 834 F.2d 1297 (7th Cir. 1987), cert, *denied,* 492 U.S. 917, 109 S.Ct. 3241 (1989) (Although RICO's treble damages, in some sense, are punitive, they are largely compensatory in nature.)

[41/] LaFave & Scott, supra note 24, at p. 252.

[42/] 727 F.Supp. 276 (E.D. La. 1989).

[43/] *Id.* at 280 (emphasis in original). Some courts rejecting vicarious liability altogether do so with little explanation. For example, in *Schwechter v. Berger,* No. 88 C 2688 (1988 WL 45510) (N.D. Ill. April 4, 1988), the United States District Court for the Northern District of Illinois succinctly stated: "It is black letter law that *respondeat superior* does not apply to 42 U.S.C.§ 1983 actions ... and RICO claims are much the same." *Id.* at 2. See *also Grimsley v. First Alabama Bank,* RICO Bus. Dis. Guide H 7135, 885 (1988 WL 156777) (S.D. Ala. 1988) *("Respondeat superior* is a theory of liability without fault which is inconsistent with Congressional intent under RICO statute.") To reach a corporation, however, the liability must always be vicarious. Thus, such a position, without further rationale, seems untenable. Certainly one could contemplate circumstances where even the *Schwecheter* court would likely impose corporate RICO liability, *i.e.,* where a corporate president engages In continuous racketeering activity with the apparent authority of the corporation behind him.

[44/] CIV. No. S-86-881 LKK (1990 WL 118066) (E.D. Cal. Aug. 9, 1990), *reconsideration granted,* 117 Lab. Cad. 10,488 (1990 WL 264719) (E.D. Cal. 1990).

[45/] *Id.* at 4. The *IBEW* court explained, "[w]here the statute fails to provide explicit guidance, the court must resolve the Issue in terms of the statutory purpose and its reasonable expectation that in enacting a particular statute, the Congress legislated against its knowledge of the common law background." *Id.* at 3-4. The *IBEW* court thus held that the imposition of vicarious liability is not inconsistent with RICO's purpose to "facilitate recovery by the victims of racketeering activity." *See also Brady v. Dairy Fresh Products Co.,* 974 F.2d 1149 (9th Cir. 1992) (An employer benefited by its employee or agent's RICO violations may be held liable under respondeat superior.); *Bersteln v. IDT Corp.,* 582 F.Supp. 1079 (D. Del. 1984) (The "normal rules of agency law apply [under RICO] in the absence of some indication that Congress had a contrary intent." *Id.* at 1083.)

[46/] Perhaps Inappropriately, these limitations originated In part from the person-enterprise distinction embodied in 18 U.S.C. § 1962(c). This section provides:

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

Courts hold that the requirement that the person be employed by or associated with the enterprise contemplates a liable person distinct from the enterprise with which that person *is* employed or associated. *Haroco, Inc. v. American Nat'l Bank & Trust Co.,* 747 F.2d 384,400 (7th Cir. 1984). *Aff'd,* 473 U.S. 606 (1985). Thus, where a corporation is identified as the RICO enterprise, and an employee Is named as the defendant person, holding the enterprise vicariously liable for its employee's racketeering actions would Improperly evade the perceived statutory structure. *See, e.g., D&S Auto Parts. Inc. v. Schwartz,* 838 F.2d 964 (7th Clr. 1988), cert, *denied,* 108 S.Ct. 2833, 100 L.Ed. 933 (1988).

Some courts have extended this rule to preclude a perceived "end run" around the rule which would subject the corporation named as the "enterprise" to vicarious liability. *Id.* Such a wholesale preclusion of corporate liability based on such a statutory Interpretation, however, is illogical. Moreover, a plaintiff simply can name the liable corporation as the defendant person to avoid the distinction Issue.

Today, the majority's restrictions on the use of vicarious liability principles have evolved to extend to RICO claims generally and are no longer limited by those statutory construction origins. See *O&S Auto Parts, Inc. v. Schwartz,* 838 F.2d 964 (7th Cir. 1988), cert, *denied,* 486 U.S. 1061,108 S.Ct. 2833, 100 L.Ed.2d 933<19B8) ("We follow the First and Eighth Circuits in rejecting the doctrine of respondeat *superior* in civil RICO cases." *Id.* at 968.); *Petro-Tech, Inc. v. Western Co. of North America,* 824 F,2d 1349 (3rd Clr. 1987) (The Petro-Tec court refused to extend vicarious liability to a corporation where it is the mere victim, prize or passive instrument of racketeering activity. *Id.* at 1362.); *Luthia v. Tonka Corp.,* 815 F.2d 1229 (8th Cir. 1987) ("corporations will not be liable under RICO based solely on the *respondeat superior* doctrine. *"Id.* At 1230.); *Garbade v. GreatDMde Mining & Milling Corp.* 831 F.2d 212, 213 (10th Cir. 1987) (Corporate liability "can only occur when the corporation actually is the direct beneficiary of the pattern of racketeering activity." (emphasis added).); *Grant v. Union Bank,* 629 F.Supp. 570,574-75 (D.Utah 1986) ("It would make little sense to hold a corporation liable under RICO for the misconduct of lower level employees, at least where it appears that the corporation Is a passive Instrument or even a victim of racketeering activity." (quoting *Haroco, Inc. v. American Nat'l Bank & Trust Co.,* 747 F.2d 384, 401 (7th Cir. 1984), *aff'd,* 473 U.S. 606 (1985).).

In fact, numerous decisions have rejected expanded theories of recovery where the corporation is strategically named only as the "person" and not the enterprise. An example of this evolution can be found in *Village of Fox Lake v. Waste Management of*

Illinois, Inc., 86 C 4888 (N.D. Ill. March 2, 1987) (1987 WL 7494), where the District Court for the Northern District of Illinois rejected vicarious liability claims under RICO against a corporation named as the liable § 1962(c) "person" and not the "enterprise". Recognizing that such claims present a "somewhat different" case, the court nevertheless stated that that does not render earlier cases discussing the person-enterprise distinction useless to the analysis. *Id.* at 4. RICO was designed to attack the person actually liable — the "violator." *Id.* "The violator is the 'person' that has engaged in the unlawful conduct." Id. Thus, although "in this case plaintiff alleges that the corporation in question is itself a liable 'person', we do not think this changes the analysis as to whether that corporation can be held vicariously liable for acts of an employee — in this case, another alleged liable 'person'." *Id.* at 5.

[47/] 652 F. Supp. 770 (S.D.N.Y. *1986)*

[48/] *Id.* at 773.

[49/] *Id.* (emphasis added).

> The notion that a corporation should be vicariously responsible under RICO for the independent fraudulent acts of one of its employees is a rather startling one. By its plain terms, RICO only imposes liability on corporations that benefit from the racketeering activity. ... When a corporation has been more a victim that a perpetrator, it would be a distortion of both the language and intent of the statute to hold the corporation vicariously responsible under RICO for an elaborate fraud merely because one of its employees may have contributed to the scheme.

Banque Worms, 652 F.Supp. 772-73.

[50/] 679 F.Supp. 165 (D. Conn. 1987)

[51/] *Id.* at 181.3 See also Reves v. *Ernst & Young,*_ U.S..__ , 113S.Ct. 1163,1173, 122 LEd.2d 525 (1993) ("RICO's major purpose was to attack the 'infiltration of organized crime and racketeering into legitimate organizations.' S.Rep. No. 91-617, at 76.")

[52/] *Id.* See *also* Note, *Judicial Efforts to Redirect an Errant Statute: Civil RICO and the Misapplication of Vicarious Corporate Liability,* 65 B.U.L. Rev. 561, 606 (1985).

> Vicarious liability is intended to encourage employers to internalize risks to insure against them or to spread the cost of the injury to the consumer. These purposes are inconsistent with RICO's goal of financially undercutting the corrupt enterprise and removing it from the marketplace. Holding a corporation liable under RICO's treble damage provision solely on vicarious liability is therefore an unjustified expansion of civil RICO.

[53/] *Gruber,* 679 F.Supp. at 181. *See also Dakis v. Chapman,* 574 F.Supp. 757 (N.D. Cal. 1983). The Dakis court recognized that allegations of securities violations by a **low level** executive, acting without corporate sanction, may state a claim under federal or state securities laws, but explained that they did not rise to a RICO claim. "RICO was intended to address a different malady than [plaintiff] alleges occurred here. RICO was aimed at bands of marauding criminals, whose ongoing use of criminal behavior was part of their concerted 'business plan' to control or eliminate otherwise legitimate commerce." *Id.* at 760.

[54/] See *Dominion Hotel v. Arizona,* 249 U.S. 265 (1919) ("[I]f... the distinction is Justifiable ... the fact that some cases ... are very near to the line, makes it none the worse." *Id.* at 268-69.)

[55/] 127 F.R.D. 664, 669 (D. Neb. 1989), *aff'd in part, rev'd in part,* 952 F.2d 971 (8th Cir. 1991), cert, *denied,* 112 S.Ct. 2993, 120 LEd.2d 870 (1992).

[56/] *Id.* at 669. See *also Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7th Cir. 1987), *cert, denied,* 492 U.S. 917,109 S.Ct. 3241 (1989) ("[T]o the extent that agency rules would require holding a legitimate, infiltrated business vicariously liable, the rules are at odds with the clear Congressional intent to protect such legitimate businesses.")

[57/] 727 F.Supp. 276,280-81. (emphasis in original) The *Lustig* court explained that the "primary purposes of RICO are 'to reach those who ultimately profit from racketeering, not those who are victimized by it' ... and to strike 'a mortal blow against the property interests of organized crime,'" purposes "ill-matched" to the policy behind vicarious liability. *Id.* at 280.

[58/] *Id.* at 281.

[59/] *Amendolare v. Schenkers Inter'l Forwarders, Inc.,* 747 F.Supp. 162 (E.D.N.Y. 1990). Similarly, the Fifth Circuit in *Union City,* 823 F.2d 129, stated that the Supreme Court "made absolutely clear that the holding in *ASME* applied solely to cases raising problems of apparent authority." The *Union City* court held that as a matter of law a defendant employer would not be held liable under the Sherman Act for acts of an employee which were criminal in nature and outside the scope of his employment.

[60/] 824 F.2d 1349 (3d Cir. 1987)

[61/] '[I]t would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit.' Restatement (Second) of Agency §219, comment on a subsection (1). Here too the goals of the common law doctrine are entirely consistent with RICO's goal to facilitate recovery by the victims of racketeering activity. We therefore hold that the doc-

trine of *respondeat superior* may be applied under RICO where the structure of the statute does not otherwise forbid it.

Petro-Tech, 824 F.2d at 1358.

See *also Quick v. Peoples Bank of Cullman County,* 993 F.2d 793 (11th Cir. 1993). The 11th Circuit confirms that vicarious liability may apply under civil RICO where an employee's wrongful act is 1) related to and committed within the course of employment; 2) committed in furtherance of the corporate business; and 3) authorized or subsequently acquiesced in by the corporation. At the same time, the court recognized the requirement that the errant employee be in a sufficiently high-level position before imposing corporate racketeering liability, explaining that the assistant vice-president "employee" at issue in *Quick* was one of the top seven or eight officers in an organization that had 45-50 employees and therefore was of a sufficiently high level.

62/ *Id.* at 1352,1361.

63/ *Id.* at 1361.

64/ 875 F,2d 1271 (7th Cir. 1989)

65/ In *First National Bank of Chicago v. Shearson Lehman Bros., Inc.,* No. 85 C 4266 (1989 WL 164995) (N.D. Ill. December 20,1989), the court succinctly stated:

> [i]t is now clear (in the Seventh Circuit) that RICO plaintiffs cannot rely upon *respondeat superior* to hold corporations liable for acts of their employees.
>
> For while Seventh Circuit precedent endorses corporate liability when corporate owners or sufficiently high-ranking corporate officers cause a corporation to violate RICO, *see Ashland Oil, Inc. v. Arnett,* 875 F.2d 1271,1280-81 (7th Cir. 1989), the precedent also strongly disapproves of claims that non-policymaking employees associated with their corporate employers to make up an enterprise in fact.
>
> The incompatibility of *respondeat superior* principles with RICO claims needs no more discussion.

Id. at 2-3. *See also Curley v. Cumberland Farms Dairy, Inc.,* 728 F.Supp. 1123 (D.N.J. 1989) (declining to follow *Ashland Oil* as inconsistent with "most circuits." *Id.* at 1134.)