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HOW LOW CAN YOU GO (DOWN THE LADDER): THE VERTICAL REACH OF RICO

SCOTT PACCAGNINI*

I. INTRODUCTION

On October 15, 1970, President Richard Nixon signed the Organized Crime Control Act, and proclaimed that the government can now “launch a total war against organized crime.”¹ However, twenty-two years later, under the guise of the Racketeer Influenced and Corrupt Organizations Act (RICO), civil plaintiffs, and not the government, are using President Nixon’s tool on the war against organized crime against non-racketeers such as banks,² lawyers or law firms,³ accounting firms,⁴ insurance companies,⁵ and securities investment firms.⁶ What once was a bill designed to attack organized crime’s ability to weaken the stability of the nation’s economic system and promote free competition,⁷ now has become a forum for deep pocket shopping

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1. See DOUGLAS E. ABRAMS, *THE LAW OF CIVIL RICO* 2 (1990) (citing Public Paper of the Presidents of the United States: Richard Nixon 846 (1970)). Abrams further quoted the President as saying:

[W]e will win this war. It can be done. And the billions of dollars that organized crime has taken out of American society, what it has done to society in other ways, its, for example, support of the drug traffic in this country, in many of these areas where we have seen organized crime doing so much harm to America, we are going to find now that those who are fighting against crime will have the tools that they need to do the job and they will do the job.

Id. at n.3.

2. See *American Nat’l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606, 607 (1985) (stating that petitioner was a bank).

3. See *Sutherland v. O’Malley*, 882 F.2d 1196, 1198 (7th Cir. 1989) (stating that defendant was a law firm).

4. See *Schacht v. Brown*, 711 F.2d 1343, 1359 (7th Cir. 1983) (citing *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982) (holding that accounting firm lacked civil RICO standing to sue its client-corporation)).

5. See *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 741 (5th Cir. 1989) (stating that a party to the proceeding is an insurance company).

6. See *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 755 (3d Cir. 1990) (stating that party to the action was a securities investment firm).

7. See *Beck v. Prupis*, 529 U.S. 494, 495 (Thomas, J.) (citing *Organized*

with treble damages as the ultimate “find.”⁸

Nevertheless, aside from the addition of more predicate acts, the RICO statute remains primarily the same today as the day President Nixon signed the Act, leaving the judiciary to interpret the statute’s meaning and scope.⁹ This task has left the judiciary with circuit splits¹⁰ and a tension between interpreting the statute broadly, as it was allegedly meant to be interpreted,¹¹ or interpreting the statute narrowly in an attempt to adhere to Congressional intent.¹² For example, in *Reves v. Ernst & Young*, the Supreme Court needed to resolve a substantial circuit split involving the interpretation of the statutory language of 1962(c)’s “to conduct or participate . . . in the conduct.”¹³ However, in resolving one circuit split, the Supreme Court’s interpretation of the statute created another.¹⁴ Specifically, in adopting the

Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, 923) (stating that Organized Crime’s affect was to “weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens”).

8. See *Schacht*, 711 F.2d at 1361 (stating Congress “may well have created a runaway treble damage bonanza for the already excessively litigious”).

9. However, this task, as evident by the dismay of many courts, is not easy. See, e.g., *Combs v. Bakker*, 886 F.2d 673, 677 (4th Cir. 1989) (calling RICO a “tormented statute”); *Old Timers Enters. v. Int’l Coffee Crop.*, 862 F.2d 1213, 1220 (5th Cir. 1989) (stating RICO is “an unusually confusing and convoluted statute”).

10. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, J., concurring) (stating that with the Supreme Court’s guidance, the pattern requirement “produced the widest and most persistent Circuit split on an issue of federal law in recent memory”).

11. See *Haroco, Inc., v. Am. Nat’l Bank & Trust Co.*, 747 F.2d 384, 386 (7th Cir. 1984) (stating “RICO’s terms are obviously very broad[] . . . [w]hether RICO’s broad terms should be read literally to permit RICO claims in instances of such ‘garden variety’ fraud has recently been the subject of extended debates in the federal courts”).

12. See *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993) (stating the Court would not use the liberal construction clause “to apply RICO to new purposes that Congress never intended”).

13. 18 U.S.C. § 1962(c) states:

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.

14. Compare *MCM Partners Inc., v. Andrews-Bartlett Assocs.*, 62 F.3d 967, 979 (7th Cir. 1995) (holding defendant’s liable where they “knowingly implemented management’s decisions, thereby enabling the enterprise to achieve its goals”); *United States v. Starrett*, 55 F.3d 1525, 1548 (11th Cir. 1995) (quoting *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994)) (agreeing with the First Circuit that a person “may be liable under the *Reves*’ operation and management test by ‘knowingly implementing decisions, as well

operation or management test, the Court, in dicta, found that liability extends not only to upper level management but also to lower-rung employees of the enterprise.¹⁵ Unfortunately, by not addressing the issue of lower-rung employees specifically in *Reves*, the Court has left open the question: how far down the ladder can liability be found?

This note addresses how far down the ladder liability can be found and if liability should even be found below the first rung. Part I of this note presents the legislative history behind RICO's statutory creation.¹⁶ Part II presents the pre-*Reves* tests in determining liability under 1962(c) and also presents the *Reves* test and its reasoning.¹⁷ Part III outlines the circuit split on the issue of lower-rung participants.¹⁸ Part IV discusses the problems inherent in lower-rung participant liability stemming from *Reves* and RICO's purpose.¹⁹ Part V proposes a new approach courts should take when addressing the liability of lower-rung participants.²⁰

II. LEGISLATIVE HISTORY

The problem of criminal infiltration of legitimate businesses was first documented over fifty years ago.²¹ Originally, antitrust laws were used to attack criminal activity in businesses, but the development of the infiltration of legitimate businesses led Congress to develop criminal legislation.²² Namely, Congress was

as by making them"); *United States v. Wong*, 40 F.3d 1347, 1373-74 (2d Cir. 1994) (finding "*Reves* makes it clear that a defendant can act under the direction of superiors in a RICO enterprise and still 'participate' in the operation of the enterprise within the meaning of § 1962(c)"), *with Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 728 (7th Cir. 1998) (holding "simply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to subject an individual to RICO liability under 1962(c); instead, the individual must have participated in the operation and management of the enterprise itself"); *United States v. Viola*, 35 F.3d 37, 41 (2d Cir. 1994) (finding "[s]ince *Reves*, it is plain that the simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)"); *Univ. of Md. v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1538-39 (3d Cir. 1993) (holding "not even action involving some degree of decisionmaking constitutes participation in the affairs of an enterprise").

15. See *Reves*, 507 U.S. at 184 (stating "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management").

16. See *infra* notes 21-39.

17. See *infra* notes 40-77.

18. See *infra* notes 78-105.

19. See *infra* notes 106-33.

20. See *infra* notes 134-52.

21. S. REP. NO. 2370, 81st Cong., 16 (1950).

22. See *United States v. Penn. Refuse Removal Assn.*, 357 F.2d 806, 808 (3d Cir. 1966), *cert denied*, 384 U.S. 961 (1966) (showing government involved in

trying to prevent “organized crime” from infiltrating legitimate businesses and “laundering” illegal money through such legitimate businesses.²³

In 1951, the Kefauver committee²⁴ disclosed the problem of organized crime’s infiltration into legitimate businesses.²⁵ Congress’ main problem was not only organized crime’s ability to infiltrate a legitimate business, but its power to set up monopolies and unfair competition as a result of that infiltration.²⁶ As a result of congressional studies and research, the President’s Commission on Law Enforcement and Administration of Justice²⁷ recommended the use of regulatory measures to control the infiltration of businesses.²⁸ Congress answered with two bills designed to address the Commission’s recommendations. S. 2048, the first

civil actions against two companies to termination violations of Section I of the Sherman Act); *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 98-101 (1962).

23. Senator McClellan stated:

To aid in the pressing need to remove organized crime from legitimate organizations in country, I have thus formulated this bill entitled the “Corrupt Organizations Act of 1969.” This bill is designed to attack the infiltration of legitimate business repeatedly outlined by investigations of various congressional committees and the President’s Crime Commission.

115 CONG. REC. 9567 (1969), *reprinted* in R.I.C.O. Leg. Hist. at 30.

24. See U.S. Senate Art & History Home, Historical Minutes, 1941-1963, Kefauver Crime Committee launched, *available at* http://www.senate.gov/artandhistory/minute/Kefauver_Crime_committee_Launched.htm (describing the Kefauver Committee as a Special Committee of the United States Senate created to Investigate Organized Crime in Interstate Commerce).

25. “One of the most perplexing problems in the field of organized crime is presented by the fact that criminals and racketeers are using the profits of organized crime to buy up and operate legitimate business enterprises.” S. REP. NO. 141-82 at 33 (1951).

26. “In most cases, these are enterprises in which gangster methods have been used to obtain monopolies so that their vicious practices taint otherwise legitimate business. They are able to compete unfairly with legitimate business men because of their accumulation of cash and their vicious methods.” S. REP. NO. 2370 at 16 (1950).

27. See DONALD R. CRESSEY, *THEFT OF THE NATION, THE STRUCTURE AND OPERATIONS OF ORGANIZED CRIME IN AMERICA*, 98-108 (1969) (identifying four methods through which organized crime usually gained control of legitimate business: 1) investing profits acquired from gambling and other illegal enterprises; 2) accepting business interests as payment for the owner’s gambling debts; 3) foreclosing on usurious loans; and 4) using various forms of extortion).

28. PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 187, 208. “Law enforcement is not the only weapon that government’s have to control organized crime. Regulatory activity can have a great effect. Government at various levels has not explored the regulatory devices available to thwart the activities of criminal groups, especially in the area of infiltration of legitimate business.” *Id.*

bill, proposed an amendment to the Sherman Antitrust Act that would bring the full force of the Sherman Act to bear on organized crime.²⁹ S. 2049, the other bill, was independent of the Sherman Act, although it borrowed many of its provisions, and focused specifically on the infiltration of legitimate businesses by organized crime. These two bills received criticism from the American Bar Association because of the fear that the commingling of Antitrust Laws³⁰ with soon to be RICO laws might produce unharmonious results and methods.³¹

Both S. 2048 and S. 2049 died in committee. Senator McClellan, in response to the problems of organized crime, introduced S. 30, which utilized the recommendations of the President's Commission. S. 30 did not contain antitrust-type provisions for controlling the infiltration of business, but was a broad based criminal law reform bill covering a wide variety of areas.³²

Senator Hruska introduced S. 1623 two months after the introduction of S. 30. S. 1623 combined S. 2048 and S. 2049. The Department of Justice criticized S. 1623 as being too narrow in scope. The Department of Justice wanted a measure that would punish the control or operation of a business by means of racketeering activity. After hearings and deliberations, the Department of Justice's suggestions were incorporated into S. 1861, which was designed to prohibit the infiltration or management of legitimate organizations by means of racketeering

29. The government looked to antitrust laws as the answer to the problem because:

[t]he antitrust laws now provide a well-established vehicle for attacking anti-competitive activity of all kinds. They contain broad discovery provisions as well as civil and criminal sanctions. These extraordinary broad and flexible remedies ought to be used more extensively against the legitimate business activities of organized crime.

113 CONG. REC. 17999 (1967).

30. The ABA was concerned that if the typical defendant in a RICO type prosecution was Mafia, and if a RICO type prosecution were brought in the context of the Sherman Act then white collar offenders who fell into the same provisions would be treated as if they were Mafia types. Thus, the Antitrust Section of the ABA did not want to directly apply antitrust laws to the Mafia because the resulting prosecutions would be Mafia type against antitrust type defendants. In other words, the ABA attempted to prevent the mix of Mafia prosecutions with white collar prosecutions.

31. *House Hearings on S. 30*, 91st Cong., 149 (1970) "The Antitrust Section agrees that organized crime must be stopped. It further agrees that the antitrust machinery possesses certain advantages worthy of utilization in this fight . . . By placing antitrust-type enforcement and discovery procedures in a separate statute, a commingling of criminal enforcement goals with the goals of regulating competition is avoided." *Id.*

32. See H.R. REP. NO. 91-1549 at 4007-10 (1970) (explaining how the bill covered grand juries, immunity, gambling, and recalcitrant witnesses).

activity.³³ S. 1861 was included as Title IX of S. 30,³⁴ which passed the Senate on January 23, 1970 as the Organized Crime Control Act of 1970.

The American Civil Liberties Union expressed its disapproval of the legislation through a series of attacks. It expressed concern that this liberal legislation would extend beyond organized crime and infringe upon civil rights of white-collar and political activist defendants.³⁵ Senator McClellan responded to the criticism on the proposed legislation with four arguments.³⁶ Specifically, Senator McClellan attacked the idea that RICO should apply only to organized crime by stating that such an argument: (1) confuses the occasion for reexamining an aspect of criminal justice with the proper scope of the legislation coming out of that study; (2) "confuses the role of Congress with the role of a court;" (3) is pragmatically infeasible requiring application of RICO only to organized crime prior to the use of RICO's investigative tools; and (4) implies a "double standard of civil liberties."³⁷

33. 115 CONG. REC. 9567 (1969) ("The bill which I am introducing today, the Corrupt Organizations Act of 1969, is in part a product of testimony developed in four days of hearings on S. 30.").

34. See David B. Smith & Terrance G. Reed, CIVIL RICO, 1-8 (Sept. 2001).

35. The American Civil Liberties stated:

First and foremost we are concerned by the enormous and virtually unlimited breadth of the criminal provisions of the proposed legislation . . . [t]here are no guarantees nor reason to assume that in times of stress, or where the aim seems laudable, S. 1861 would not be used in areas far removed from what we know as organized crime.

See *Measures Relating to Organized Crime, Hearings On S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1816, S. 2022, S. 2122, and S. 2292 Before the Subcomm. On Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91 Cong., 268 (1969).

36. 116 CONG. REC. 18913-18914 (1970).

37. See *id.* Senator McClellan stated the following:

Mr. President, this line of analysis has a certain superficial plausibility, yet on closer examination we see that it is seriously defective in several regards. Initially, 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 the reexamination . . . In addition, the objection confuses the role of the Congress with the role of a court . . . [b]ut the Congress in fulfilling its proper legislative role must examine not only individual instances, but whole problems. In that connection, it has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem . . .

The objection, moreover, has practical as well as theoretical defects, . . . (such as the civil legislative demand), deal with the process of investigating and collecting evidence. When an investigation begins one cannot expect the police to be able to demonstrate a connection to organized crime, . . . [i]t is only at the conclusion of the investigation that organized crime involvement can be shown and verified . . . Lastly, and most disturbingly, however, this objection seems to imply that a double standard of civil liberties is permissible. S. 30 is objectionable on

Acknowledging the arguments and recommendations, the Senate committee on the Judiciary combined many aspects of the different bills into S. 30. In S. 30, the definition of “racketeering activity” was broadened and included more specific types of conduct. Further, the “pattern of racketeering activity,” as defined, required at least two acts.

The House of Representatives considered S. 30, and in so doing, narrowed the definition of “pattern of racketeering activity,”³⁸ removed debts from illegal gambling from RICO’s prohibition against collection of debts, and limited “pattern of racketeering activity” to require that both acts take place within ten years. Along with other additions and amendments, the House passed the bill on October 7, 1970 and sent it back to the Senate as amended for a vote. The basic structure and scope of the bill had been preserved with only minor facial changes and amendments. The Senate, allegedly forced to concur with the House amendments,³⁹ approved the bill on October 12, 1970 and sent it to President Nixon who signed the bill into law on October 15, 1970.

III. WHAT DOES IT MEAN TO “CONDUCT OR PARTICIPATE . . . IN THE CONDUCT”?

A. *Pre-Reves*

1. *The Scotto Test*

The Second and Third Circuits, prior to *Reves*, adopted a more liberal test than some of the other federal appellate courts.⁴⁰ In

civil liberties grounds, the union and city bar committee suggest, because its provisions have an incidental reach beyond organized crime . . . [h]as the union forgotten that the Constitution applies to those engaged in organized crime just as it applies to those engaged in white-collar or street crime? S. 30 must, I suggest, stand or fall on the constitutional question without regard to the degree to which it is limited to organized crime cases.

Id.

38. 18 U.S.C. § 1961(5) (1976).

39. See Toby D. Mann, *Legislative History of RICO*, in MATERIALS ON RICO: CRIMINAL OVERVIEW, CIVIL OVERVIEW, AND INDIVIDUAL ESSAYS 58-118 (G. Robert Blakey ed., 1980). The Senate received S. 30 from the House on October 12th, two days before the election recesses and only 29 working days before the end of the session. See 116 CONG. REC. 36280-44876 (1970). Thus, because of the approaching elections, the Senate was forced to vote on the bill as amended by the House or face the possible death of the bill after the elections.

40. See, e.g., *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980) *cert denied*, 452 U.S. 961 (1981) (finding liability under § 1962(c) when “(1) one is enabled to commit the predicate offenses solely by virtue of his position in enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.”); *United*

United States v. Scotto, the defendant, a union president, was charged with receiving illegal cash payments in the form of kickbacks.⁴¹ The district court instructed the jury that the Government need not prove the affairs of the enterprise were advanced by the defendant; rather, it was only necessary that the jury found “that the acts were committed by the defendant or caused to be committed by him in the conduct of, or his participation in, the affairs of the enterprise.”⁴²

On appeal, the defendant argued the district court judge should have instructed the jury that in order to convict the defendant, the Government must prove the predicate acts were related to the operation or management of the enterprise.⁴³ The defendant further argued a sufficient nexus between the predicate acts and the conduct of the enterprise is needed to establish liability. The Second Circuit rejected this argument. Rather, the Second Circuit stated an individual conducts the activities of an enterprise through a pattern of racketeering activity when either one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, *or* the predicate offenses are related to the activities of that enterprise. (Emphasis added).

2. *The Operation or Management Test*

Originally established by the Fourth Circuit in *United States v. Mandel*,⁴⁴ the restrictive (as compared to the other pre-*Reves* tests) operation or management test attempted to adhere to the legislative history of 18 U.S.C. §1962,⁴⁵ while also attempting to decipher Congressional intent and the limits of the statute.⁴⁶

States v. Provenzano, 688 F.2d 194, 200 (3d Cir. 1982) (endorsing the Second Circuit's *Scotto* test).

41. *Scotto*, 641 F.2d at 51.

42. *Id.* at 54.

43. *Id.*

44. 591 F.2d 1347 (4th Cir. 1979).

45. *See Mandel*, 591 F.2d at 1375 (affirming the lower court's statement that “[a] comparison of the language used [in the legislative history] to describe Section 1962(c) with the language of Section 1962(c) indicates that the words ‘operation of any enterprise’ were meant to describe the phrase ‘conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs’”).

46. *See id.*

We find additional support . . . in the use of the word “through” in the statute which would seem to require proof of some connection between the pattern of racketeering activity and the conducting or operating of the business. Indeed, this connection must be shown if the word ‘through’ is to have any meaning in the statute. Without the word ‘through’, anyone who used income from a legitimate business to participate in racketeering activity would be guilty of a violation of § 1962(c). We do not believe Congress meant to sweep so broadly,

Balancing the need to prevent infiltration of legitimate business by organized crime with the language of the statute, the court held, focusing on the word “through” in the statute, that the “conduct or participate” language required some involvement in the operation or management of the business.⁴⁷

Similarly, the Eighth Circuit adopted the operation or management test in *Bennett v. Berg*,⁴⁸ and later in *Arthur Young & Co., v. Reves*.⁴⁹ In *Bennett*, the court, in dicta, found that mere participation in the predicate act, even in conjunction with a RICO enterprise, may not be enough to support a RICO claim.⁵⁰ Instead, to be liable under §1962(c), an individual must conduct the affairs of the enterprise, which usually required participation in the operation or management of the enterprise itself.⁵¹

Along with the Fourth and Eighth Circuits, the District of Columbia Circuit also adopted the more restrictive operation or management test.⁵² Specifically, in *Yellow Bus Lines, Inc., v. Drivers, Chauffeurs & Helpers Local 639*, the court addressed a RICO claim based on defendants’ actions in conducting a strike against Yellow Bus.⁵³ In so doing, the court focused on the word “conduct”⁵⁴ and concluded, after dismissing various circuit tests used in analyzing 1962(c),⁵⁵ that the statutory language demands more than a relationship with the enterprise’s activity; the language demands guidance, exercise of control, and

especially in light of the mandatory forfeiture penalties for a § 1962 violation.

Id.

47. *Id.*

48. 710 F.2d 1361, 1364 (8th Cir. 1983).

49. 937 F.2d 1310, 1324 (8th Cir. 1991).

50. *Bennett*, 710 F.2d at 1364.

51. *Id.*; see also *Arthur Young & Co.*, 937 F.2d at 1324 (quoting *Bennett* for the proposition that “[a] defendant’s participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself”).

52. See, e.g., *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1231 (D.C. Cir. 1991) (holding that a “defendant must have not merely participated in the enterprise’s affairs, but in the conduct of the enterprise’s affairs”); *Yellow Bus Lines, Inc., v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990) (holding “[s]ection 1962(c) applies when a defendant, through a pattern of racketeering activity, exercises significant control over or within an enterprise, participating not merely in the enterprise’s affairs, but in the conduct of the enterprise’s affair”).

53. 913 F.2d at 950-51.

54. *Id.* at 954 (stating that “[c]onduct” is synonymous with management or direction) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 473 (1961)).

55. The *Yellow Bus* court examined several circuit court tests interpreting 1962(c) including the Second Circuit, Fifth Circuit, Eighth Circuit, and Eleventh Circuits. The court rejected all but the Fourth and Eighth Circuits’ operation and management test. *Id.* at 954.

management.⁵⁶ Thus, to be liable under 1962(c), a person must participate in "running the show."⁵⁷

3. *The Intermediate Test*

Somewhere between the Fourth/Eighth Circuits' more restrictive operation or management test and the Second Circuit's *Scotto* test stood the Fifth/Seventh Circuits' intermediate test.⁵⁸ The intermediate test is very similar to the liberal test but for three differences. First, the intermediate test is a three-prong test as opposed to the two prong liberal test.⁵⁹ Specifically, to be liable, (1) the defendant must have committed the racketeering acts; (2) the defendant's position in or relationship with the enterprise facilitated the commission of the acts; and (3) the acts had some effect on the enterprise.⁶⁰ (Emphasis added).

Second, the Fifth/Seventh Circuits' approach is narrower because it uses the conjunctive "and" as opposed to the disjunctive "or".⁶¹ Whereas the Second Circuit test requires a finding of either element of the test, the Fifth/Seventh Circuits' test require a finding of all three elements to be liable.

Finally, under the third prong of the Fifth/Seventh Circuits intermediate test, the racketeering activity must have some effect on the enterprise, whereas under the Second Circuit's liberal test the predicate offenses need only relate to the activities of that enterprise.⁶²

56. Specifically, the court held "the 'conduct of [the enterprise's] affairs' thus connotes more than just some relationship to the enterprise's activity; the phrase refers to the guidance, management, direction or other exercise of control over the course of the enterprise's activities." *Id.* at 954.

57. *Id.* (quotation marks omitted).

58. See, e.g., *United States v. Cauble*, 706 F.2d 1322, 1331-33 (5th Cir. 1983); *Overnite Transp. Co., v. Truck Drivers, Union Local*, 904 F.2d 391, 393 (7th Cir. 1990).

59. However, writers who believe the test is really only a two-prong test have criticized this statement. See, e.g., J. Todd Benson, Comment, *Reves v. Ernst & Young: Is RICO corrupt?*, 54 LA. L. REV. 1685, 1689 (July 1994) (stating "[t]he [Fifth Circuit] test purports to have three elements, but, in fact is a two-prong test. The first element is nothing more than a matter of proof required to establish any RICO violation").

60. *Overnite Transp. Co.*, 904 F.2d at 393; see also *Cauble*, 706 F. 2d at 1331-32.

61. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (holding that "[c]lanons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise").

62. Compare *U.S. v. Scotto*, 641 F.2d 47, 51 (2d Cir. 1980) (finding a defendant liable if "the predicate offenses are related to the activities of that enterprise"), with *Cauble*, 706 F.2d at 1332-33 (finding liability if, in addition to two other elements, the acts of the defendant had an effect on the enterprise).

4. The Eleventh Circuit Test

The Eleventh Circuit, pre-*Reves*, established a “facilitation or utilization” test in *United States v. Carter*.⁶³ As opposed to other circuits that focused on the “conduct or participate clause,” the Eleventh Circuit instead focused on the statutory word “through.”⁶⁴ Even though the Eleventh Circuit’s focus differed from other circuits, the interpretation was still meant to find a nexus between an enterprise and the racketeering activity. That nexus is established, the court held, when “the facilities and services of the enterprise were regularly and repeatedly utilized to make possible the racketeering activity”⁶⁵

B. *Reves*

In adopting the operation or management test, and rejecting all the other tests (after analyzing the statutory language of §1962(c), the legislative history of §1962(c), and RICO’s liberal construction clause), the Supreme Court held that to be liable under §1962(c) a defendant must have participated in the operation or management⁶⁶ of the enterprise itself.⁶⁷ This requires that the defendant play some integral part in directing the enterprise’s affairs.⁶⁸ Further, the Supreme Court, in *Reves*, did not limit §1962(c)’s reach to only upper-management, but also stated, in dicta, that liability may extend to “lower-rung participants . . . who are under the direction of upper management.”⁶⁹ In coming to its conclusion, the Court focused on the language of the statute, the legislative history, and the liberal construction clause, which are discussed below.

First, in adopting the operation or management test, the

63. 721 F.2d 1514 (11th Cir. 1984).

64. 18 U.S.C. § 1962(c) makes it “unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs *through* a pattern of racketeering activity or collection of unlawful debt.” (emphasis added).

65. *Carter*, 721 F.2d at 1527.

66. Allegedly, the term “operation or management” comes from the debates on the floor of Congress where the members allegedly understood § 1962(c) to include a prerequisite of participation in the operation or management of the enterprise. Senator McClellan’s comments dictated such an understanding where it was feared that “racketeering” was too broadly defined. Senator McClellan stated that a defendant must engage in a pattern of racketeering and “use [] that pattern to obtain or operate an interest in an interstate business.” *Reves*, 507 U.S. at 183.

67. *Id.* at 185.

68. *Id.* at 179. See also *MCM*, 62 F.3d at 977.

69. *Reves*, 507 U.S. at 184. In a footnote, the *Reves* Court stated “[w]e need not decide in this case how far 1962(c) extends down the ladder of operation because it is clear that Arthur Young was not acting under the direction of the Co-op’s officers or board.” *Id.* at 184 n.9.

Court looked to the language of the statute.⁷⁰ The Court first interpreted the word "conduct." The Court acknowledged that in the statute "conduct" was both a verb and a noun and because §1962(c) uses the word twice, the Court concluded that it was reasonable to give each use a similar construction.⁷¹ Ultimately, the Court concluded the first use of the word "conduct" was as a verb meaning "lead, run, manage, or direct." In coming to its decision, the Court rejected defining "conduct" as "to carry on" because such a definition does not encompass some degree of direction inherent in the statute.⁷²

After interpreting the word "conduct", the Court addressed the meaning of the phrase "participate in the conduct." Adhering to the need for a degree of direction, the Court similarly found that "participate in the conduct" means that one must have some part in directing those affairs.⁷³ The Court rejected construing "participate in the conduct" to mean "aid and abet" because such an interpretation would broaden §1962(c) beyond its intended scope of requiring some part in directing the affairs of the enterprise.⁷⁴

Next, the Court reviewed the legislative history behind §1962(c). The Court focused on congressional debates and previous concerns that RICO could be used against legitimate businesses. To further strengthen its adoption of the operation or management test, the Court quoted Senator McClellan as proclaiming that a defendant must engage in a pattern of racketeering activity and use that pattern to obtain or operate an interest in an interstate business.⁷⁵

70. *Id.* at 177 ("In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.") (citing *United States v. Turkette*, 452 U.S. 576, 580 (1981)).

71. *Id.* at 178.

72. *Id.* at 177-78 ("Petitioner's urge us to read 'conduct' as 'carry on,' so that almost any involvement in the affairs of an enterprise would satisfy the 'conduct or participate' requirement. But context is important, and in the context of the phrase 'to conduct . . . [an] enterprise's affairs,' the word indicates some degree of direction.") (citation omitted).

73. *Id.* at 179.

74. *Id.* ("Petitioners argue that Congress used 'participate' as a synonym for 'aid and abet.' That would be a term of breadth indeed, for 'aid and abet' 'comprehends all assistance rendered by words, acts, encouragement, support, or presence.'") (citing *BLACK'S LAW DICTIONARY* 68 (6th ed., 1990) (citation omitted)).

75. Senator McClellan stated:

The danger that commission of such offense by other individuals would subject them to proceedings under title IX [RICO] is even smaller than any such danger under title III of the 1968 [Safe Streets] Act, since commission of a crime listed under title IX provides only one element of title IX's prohibitions. Unless an individual not only commits such a

Lastly, the Court rejected Congress' command that RICO be liberally construed to effectuate its remedial purposes. The Court stated that Congress did not intend to apply RICO liberally to new purposes.⁷⁶ Rather, the Court decided these new purposes should be taken from the statute through interpretation and not through Congressional intent or legislative history.⁷⁷

The result of *Reves*, at least with regard to lower-rung participants, created a tension between the Court's statement, in dicta, that §1962(c)'s liability extends to lower-rung participants who are under direction of upper management with the Court's rejection of interpreting "conduct or participate in the conduct" broadly. This tension resulted in the courts having to determine whether an employee taking directions from upper-management can be liable under §1962(c).

IV. HOW LOW CAN YOU GO (DOWN THE LADDER)?

A. Majority View

The majority of courts addressing the issue of whether an employee, taking directions from upper-management, can be liable under §1962(c) have found the employee can be liable.⁷⁸ Generally,

crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX.

Reves, 507 U.S. at 183 (quoting 116 CONG. REC. 18940) (1970)).

76. The Court stated:

RICO's 'liberal construction' clause does not require rejection of the 'operation or management' test. Congress directed, by § 1961, p. 438, that the 'provisions of this title shall be liberally construed to effectuate its remedial purposes.' This clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended.

Id. at 183.

77. See *id.* at 183. This acknowledgment appears problematic because the Court is seemingly side-stepping or completely disregarding the 'liberal construction' clause. The Court stated that allegedly the only purpose of the 'liberal construction' clause was to "only serve [] as an aid for resolving an ambiguity; it is not to be used to beget one." However, at the same time the Court acknowledged the clause's provision that the RICO statute "shall be liberally construed to effectuate its remedial purposes." Thus, how can the 'liberal construction' clause serve only as an aid for resolving ambiguity while at the same time requiring liberal construction to effectuate remedial purposes? It seemingly cannot, but nonetheless, the Court moved on. *Id.*

78. See *MCM*, 62 F.3d at 978; *Oreto*, 37 F.3d at 750; *Starret*, 55 F.3d at 1548 and *Wong*, 40 F.3d at 1373. See also *MCM*, 62 F.3d at 978 (quoting Daniel R. Fischel & Alan O. Sykes, *Civil RICO After Reves: An Economic Commentary*, 1993 SUP. CT. REV. 157, 192 (noting the "tension between the direction requirement and statement about lower-rung participants and concluding that the direction requirement includes both those who direct, as

these courts have found that an employee can be liable if they take part in the conduct of an enterprise by knowingly implementing decisions, as well as by making them.⁷⁹

Specifically, in *United States v. Oreto*,⁸⁰ the First Circuit, acknowledging that *Reves* required some part in directing the enterprise's affairs to be liable,⁸¹ held that an individual could take part in the conduct of an enterprise by knowingly implementing decisions, as well as by making them.⁸² In *Oreto*, the government failed to show that some of the defendants participated in the enterprise's decision making, but the Court held the defendants liable because they were integral to carrying out the collection process.⁸³ The First Circuit, to form its conclusion, relied on RICO's alleged statutory purpose to defeat organized crime.⁸⁴ In interpreting the statute's purpose, the court stated its belief that RICO was designed to reach all who participate in the conduct of an enterprise, "whether they are generals or foot soldiers."⁸⁵

Similarly, the Seventh Circuit held that an individual could be liable where that individual participated in the conduct of the enterprise by knowingly implementing decisions, as well as by making them.⁸⁶ Like *Oreto*, the Seventh Circuit acknowledged that *Reves* requires that the defendant play some part in directing the enterprise's affairs,⁸⁷ but like *Oreto*, the Seventh Circuit

well as those who take direction")) (quotation marks omitted).

79. See, e.g., *Oreto*, 37 F.3d at 750.

80. *Id.*

81. *Id.* ("[T]he Court observed that 'some part in directing the enterprise's affairs is required.'" (quoting *Reves*, 507 U.S. at 179).

82. *Id.* See also *Starrett*, 55 F.3d at 1548 (holding "we agree with the First Circuit that one may be liable under the operation and management test by 'knowingly implementing decisions, as well as by making them'" (quoting *Oreto*, 37 F.3d at 750); *Wong*, 40 F.3d at 1373-74 (stating "*Reves* makes it clear that a defendant can act under the direction of superiors in a RICO enterprise and still 'participate' in the operation of the enterprise within the meaning of § 1962(c)").

83. See *Oreto*, 37 F.3d at 750 (stating "[t]he government did not show that *Oreto, Jr.* or *Petrosino* participated in the enterprise's decisionmaking [sic]; but they and other collectors were plainly integral to carrying out the collection process").

84. *Id.* at 751. "Congress declared in RICO that the statutory purpose was 'to seek the eradication of organized crime in the United States' . . ." *Id.*

85. *Id.* ("Congress listed 'loan sharking' as a means by which 'organized crime derives much of its power.' . . . We think Congress intended to reach *all* who participate in the conduct of that enterprise, whether they are generals or foot soldiers") (emphasis added).

86. *MCM*, 62 F.3d at 978 (citing *Oreto*, 37 F.3d at 750); but see *Goren* 156 F.3d at 728 (stating, "Indeed, simply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to subject an individual to RICO liability under 1962(c); instead, the individual must have participated in the operation and management of the enterprise itself").

87. *MCM*, 62 F.3d at 977. "To be liable under section 1962(c) . . . it must be shown that the defendant 'participated in the operation or management of the

nevertheless held liable those who merely carried out directions given them.⁸⁸

For example, in *MCM Partners v. Andrews-Bartlett*,⁸⁹ the Seventh Circuit acknowledged that the defendants did not manage the enterprise, but nonetheless found the defendants liable because the defendants participated in the enterprise's operation by carrying out the directions given to them.⁹⁰

B. Minority View

Conversely, a minority of circuits have held that an employee taking directions from upper-management cannot be liable under §1962(c).⁹¹ The Third Circuit, in adhering to *Reves*' operation or management test, held "not even action involving some degree of decision making constitutes participation in the affairs of an enterprise."⁹² In *University of Maryland v. Peat, Marwick, Main & Co.*, the Third Circuit held a person is not liable merely because they provided a service to the enterprise that benefited the enterprise. Rather, to be liable, there must be a nexus between the person and the affairs of the enterprise.⁹³ Thus, the court held, in order to be liable under *Reves*, the person must "knowingly engage in 'directing the enterprise's affairs' through a pattern of racketeering activity."⁹⁴

C. Adhering to Both Views

Adhering to both the majority and minority circuit views, the

enterprise itself and that requires that the defendant play 'some part in direction the enterprise's affairs.'" *Id.* (quoting *Reves*, 507 U.S. at 179).

88. *Id.* at 978 (finding the defendant's "participated in the enterprise's affairs by carrying out the directions given them"). See also *Oreto*, 37 F.3d at 750.

89. *Id.*

90. *Id.* The distinction between operating an enterprise, as demanded by *Reves*, or participating in the enterprise's operation by carrying out directions is quite substantial. *Reves* demands, as the Seventh Circuit acknowledges, "[the] defendant must play some part in directing the enterprise's affairs," but merely participating in the operation of the enterprise by way of be giving commands or orders seems to go beyond *Reves* scope. *Id.*

91. See, e.g., *Univ. of Md.*, 996 F.2d at 1538-39 (stating that [u]nder [*Reves*], "not even action involving some degree of decision making constitutes participation in the affairs of an enterprise"); *Viola*, 35 F.3d at 41 (stating that "[s]ince *Reves*, it is plain that the simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of §1962(c)").

92. *University of Maryland*, 996 F.2d at 1538-39.

93. *Id.* at 1539. "[B]ecause one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result. There must be a nexus between the person and the conduct in the affairs of an enterprise. The operation and management test goes to that nexus." *Id.*

94. *Id.* (quoting *Reves*, 507 U.S. at 179).

Second Circuit is an indication of the tension created by *Reves*' operation or management test and lower-rung participants.⁹⁵ First, in *United States v. Viola*, the Second Circuit held the taking of directions or performing of tasks that are necessary or helpful to the enterprise is insufficient by itself to create liability within the scope of 1962(c).⁹⁶ In so holding, the court, like the First and Seventh Circuits, acknowledged that *Reves* required, at a minimum, that the defendant have some part in directing the enterprise's affairs.⁹⁷ However, unlike the First and Seventh Circuits, the Second Circuit reasoned that finding an individual liable where the individual did not have a part in the operation or management of the enterprise cannot be reconciled with *Reves*' requirement that a defendant have some part in directing the enterprise's affairs.⁹⁸ Instead, the Court held that participation in the enterprise must be willful and knowing in order to be liable as a lower-rung participant.⁹⁹

Conversely, two months later, the Second Circuit, in *United States v. Wong*, held "*Reves* makes it clear that a defendant can act under the direction of superiors in a RICO enterprise and still 'participate' in the operation of the enterprise within the meaning of § 1962(c)."¹⁰⁰ In distinguishing *Wong* from *Viola*, the court placed much emphasis on the defendant's lack of knowledge and awareness of the overall criminal activities of the RICO enterprise in *Viola*.¹⁰¹ On the other hand, in *Wong*, the Second Circuit

95. Compare *Viola*, 35 F.3d at 41 ("Since *Reves*, it is plain that the simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of §1962(c)"), with *Wong*, 40 F.3d at 1373-74. *Reves* makes it clear that a defendant can act under the direction of superiors in a RICO enterprise and still 'participate' in the operation of the enterprise within the meaning of §1962(c)").

96. *Viola*, 35 F.3d at 41. See also *United States v. Workman*, 80 F.3d 688, 696 (2d. Cir. 1996):

In stating that—for purposes of § 1962(c)—"participation" might include "the performance of acts or duties that are helpful to the operation of the enterprise," the charge may have suggested to the jury that a finding of guilt was appropriate even where the defendant played a quite minimal role. A defendant might well have performed "helpful" acts without playing any part in "directing the enterprise's affairs."

Id.

97. *Viola*, 35 F.3d at 40. "[W]e have recently recognized . . . that at a minimum the defendant must '[have some part in directing [the enterprise's] affairs.'" *Id.* (quoting *Napoli v. United States*, 32 F.3d 31 (2d Cir. 1994)).

98. *Viola*, 35 F.3d at 41.

99. *Id.*

100. *Wong*, 40 F.3d at 1373-74.

101. See *id.* at 1374 (stating "In *Viola*, . . . the acquitted defendant had no awareness of the overall criminal activities of the RICO enterprise, and was described as "not on the ladder [of the operation of the RICO enterprise] at all, but rather, as [the principal's] janitor and handyman . . .") (alteration in

concentrated on each defendant's role in extorting money from various individuals and the carrying out of murders on command.¹⁰² Even though the court in *Viola* acknowledged that the defendant was not the kingpin of the operation, it did agree that the defendant acted under the instructions of the kingpin in transporting stolen beer and lamps to buyers and returning the proceeds to the kingpin.¹⁰³ Further, the Second Circuit recognized that the defendant's actions (transporting stolen goods and delivering the proceeds) might have contributed to the success of the RICO enterprise, but nonetheless held that the defendant's actions did not fall under *Reves*' operation or management test.¹⁰⁴ Thus, in both *Wong* and *Viola* the defendants acted under the direction of upper-management and in both cases the defendants' actions contributed to the success of the RICO enterprise. The main difference between the two cases seemingly is the extent of the participation in the operation or management of the enterprise.¹⁰⁵

V. PROBLEMS WITH MAJORITY, MINORITY, AND BOTH

The problem with the majority and minority circuits' views is that both are trying to apply three lines¹⁰⁶ and a footnote¹⁰⁷ from a

original).

102. *Id.* The Second Circuit in *Wong* went through each defendant and described each defendant's participation in the activity. First, Joseph Wang was responsible with Alex Wong for collecting extortion money from various restaurants. Next, Alex Wong collected extortion money from restaurants, shot the manager of one restaurant for refusing to pay, and helped organized a hunt for witnesses who saw him shoot the restaurant owner. Last, Roger Kwok, Chiagn Cheng, and Steven Ng were all soldiers who operated under the direction of their superiors and committed murders on command. *Id.*

103. *See Viola*, 35 F.3d at 43 ("[A]cting under *Viola*'s instructions, [one of the defendant's] transported some stolen beer and lamps to buyers and returned most of the proceeds from the sales to *Viola*").

104. *Id.* ("While [defendant's] acts might have contributed to the success of the RICO enterprise, he simply did not come within the circle of people who operated or managed the enterprise's affairs").

105. *Compare Wong* with *Viola*. In *Wong* the defendant's participation consisted of extortion and murder and in *Viola* the defendant's participation consisted of transporting stolen goods. The distinction is important and the Second Circuit's disagreement noteworthy because it shows the tension inherent in the *Reves* operation or management test and lower-rung participation. The seemingly only distinction between the "foot soldiers" in *Wong* and *Viola* was knowledge and the severity of the criminal activity. In *Viola*, the transporting of stolen goods only equals a mere janitor not liable under *Reves*, whereas in *Wong* the killing on command equates to a RICO violation under *Reves*.

106. *See Reves*, 507 U.S. at 184 (stating "We agree that liability under § 1962(c) is not limited to upper management, but we disagree that the 'operation and management' test is inconsistent with this proposition. An enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper

Supreme Court case not dealing with “outsider” or vertical liability.¹⁰⁸ The majority circuit court view is problematic because it consists of applying a strict test very liberally to encompass more than the wording of the Court’s dicta statements allow.¹⁰⁹ The minority circuit court view is a problem because it consists of limiting RICO’s reach of who can be liable.¹¹⁰

A. Majority View Problems

The Supreme Court, in adopting the operation or management test, adopted the most restrictive test. However, the majority circuit court view, in dealing with the issue of lower-rung liability under *Reves*, applied the operation or management test liberally to encompass mere foot soldiers.¹¹¹ The problem with such an application is evident in *Reves*’ demand that defendant play some part in directing the enterprise’s affairs.¹¹² In *MCM*, the Seventh Circuit acknowledged that the defendants did not manage the affairs of the enterprise, but rather, coerced by a third party, had participated in the enterprise’s operation by carrying out directions given to them.¹¹³ But where is the directing of the enterprise’s affairs?¹¹⁴

The majority circuit courts do attempt to limit the test by

management”).

107. *Id.* at n.9 (writing “[w]e need not decide in this case how far 1962(c) extends down the ladder of operation because it is clear that Arthur Young was not acting under the direction of the Co-Op’s officers or board”).

108. *Id.* at 185 (stating “1962(c) cannot be interpreted to reach complete ‘outsiders’ because liability depends on showing that the defendants conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just *their own* affairs”).

109. Specifically, if in adopting the operation and management test the *Reves* Court meant to apply a strict application to § 1962(c)’s scope, as evidenced by the Court’s unwillingness to adhere to the liberal construction clause, then such a strict interpretation should not give way to very liberal liability.

110. Adhering to President Nixon’s call to conquer all organized crime, not extending liability to those carrying out instructions may limit RICO’s possibilities. See *ABRAMS*, *supra* note 1, at 2.

111. See *Oreto*, 37 F.3d at 751 (stating that “Congress intended to reach all who participated in the conduct of that enterprise, whether they are generals or foot soldiers.”).

112. See *Reves*, 507 U.S. at 179 (stating “[o]f course, the word ‘participate’ makes clear that RICO liability is not limited to those with primary responsibility for the enterprise’s affairs, . . . but *some* part in directing the enterprise’s affairs is required”).

113. See *MCM*, 62 F.3d at 979 (stating “[t]hus, even if A-B and FDC may have been reluctant participants in a scheme devised by ‘upper management,’ they still knowingly implemented management’s decisions, thereby enabling the enterprise to achieve its goals”).

114. It seems hard to believe that an individual who is coerced into cooperating with an enterprise would be considered knowingly and willfully implementing management’s decisions.

insisting that the defendant knowingly implement decisions to be liable.¹¹⁵ However, not only is such a standard not discussed in *Reves*, but such a standard will lead to willful blindness and subjective probing.¹¹⁶ At what point does an employee begin to knowingly implement decisions? Further, as in *MCM*, are the defendants knowingly implementing decisions if they are under the threat of physical punishment if they do not act?

B. Minority View Problems

The minority circuits' interpretation of *Reves*' liability for lower-rung participants is also problematic, but for reasons different than the majority. The minority of circuits that hold an employee carrying out directions of upper-management cannot be liable under 1962(c) carries the risk of excluding intended participants under 1962(c)'s scope.¹¹⁷ Namely, if Congressional intent was to defeat organized crime's ability to infiltrate a legitimate business, a rule not extending liability to soldiers (who assist in such infiltration) of the enterprise might defeat RICO's purpose.¹¹⁸ For example, in *Viola*, the Second Circuit did not extend liability to one of the defendants because the court believed the defendant was not on the ladder but rather a mere janitor or handyman.¹¹⁹ However, the Second Circuit also acknowledged that this janitor or handyman transported stolen goods and returned cash proceeds to the head of the organization in furtherance of assisting the enterprise.¹²⁰ Thus, if RICO's purpose was to combat organized crimes ability to infiltrate legitimate businesses then should not this mere janitor or handyman be liable?

115. See, e.g., *Oreto*, 37 F.3d at 750 (stating that "nothing in the [*Reves*] opinion precludes our holding that one may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them"); *MCM*, 62 F.3d at 978 (accepting *Oreto*'s 'knowingly implementing decisions, as well as by making them' standard); *Starrett*, 55 F.3d at 1548 (agreeing with *Oreto*).

116. Even more problematic is that not only did the First Circuit create a new standard but also the First Circuit did not address what constitutes not knowingly implementing decisions. Is it a reasonable man standard or is it based on the subjective knowledge of the employee?

117. See *ABRAMS*, *supra* note 1, at 2.

118. See *Beck v. Prupis*, 529 U.S. 494, 496 (2000) (stating that "Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970, . . . for the purpose of seeking the eradication of organized crime in the United States").

119. *Viola*, 35 F.3d at 43 (stating that "[Defendant] was not on the ladder at all, but rather, as *Viola*'s janitor and handyman, was sweeping up the floor underneath it").

120. *Id.* See also *United States v. Workman*, 80 F.3d 688, 696 (2d Cir. 1996) (holding that although defendant might have performed helpful acts for the enterprise, defendant did not play any part in directing the enterprise's affairs).

The problem with finding a janitor or handyman liable is that such liability goes against the Supreme Court's strict interpretation of operation or management.¹²¹ Specifically, the Court's majority did not want to extend liability to all who assisted in the operation or management of the enterprise, only those who took some part in directing the enterprise's affairs.¹²² Therefore, it appears the minority circuits are adhering to the Supreme Court's strict interpretation in *Reves* but at the same time may be cutting off RICO's liberal extension of liability.¹²³

C. Both Majority and Minority View Problems

Lastly, the most obvious problem with both the majority and minority circuits is both are trying to apply three sentences and a footnote from a Supreme Court case that did not even deal with lower-rung participant liability.¹²⁴ Although some circuit courts acknowledge the special care needed to transform *Reves*' "outsider" liability analysis to the liability for "insiders," such care is problematic.¹²⁵ *Reves*' holding is limited to outsider liability and the Court's statement regarding insider lower-rung participants was inappropriate under the factual pattern before the Court.¹²⁶ In so doing, the Court created a rule for "outsider" liability that does not properly apply in determining "insider" liability.

Similarly, adhering to legislative history, the *Reves* operation or management test is inappropriate for vertical liability. If RICO's purpose was to prevent criminals and racketeers from using profits of organized crime to buy up and operate legitimate business enterprises,¹²⁷ and if RICO's authority extends to those who control or operate such a business by means of prohibited racketeering activities,¹²⁸ then how can the operation or management test apply to those already in an infiltrated enterprise. In other words, the operation or management test

121. This is the immensely cited statement that one must play some part in directing the affairs of the enterprise.

122. See *Reves*, 507 U.S. at 179 (stating "on the one hand, 'to participate . . . in the conduct of . . . affairs' must be broader than 'to conduct affairs' or the 'participate' phrase would be superfluous").

123. *Id.* at 183-84 (stating the liberal construction clause demands "provisions of this title shall be liberally construed to effectuate its remedial purposes").

124. *Id.* at 184.

125. See *MCM*, 62 F.3d at 978 (noting "[s]pecial care is required in translating *Reves* concern with 'horizontal' connections—focusing on the liability of an outside adviser—into the 'vertical' question of how far RICO liability may extend within the enterprise but down the organizational ladder").

126. There is an ongoing debate regarding holding versus dicta and the role each play.

127. See S. REP. NO. 141, at 33 (1951).

128. *Reves*, 507 U.S. at 181.

seemingly is the test extracted from Congressional intent to extend RICO to those who control or operate a legitimate business through racketeering activity but the test does not appear to apply to those already working for the enterprise when such infiltration happens or for those who assist with the infiltration of the enterprise.¹²⁹

Before *Reves*, four different tests had been established in interpreting the “conduct or participate” clause in 1962(c).¹³⁰ The result of such a split inevitably led to forum shopping within the federal circuit courts with the more liberal courts the prize locations. In a mere three sentences and a footnote the Supreme Court reopened the door to forum shopping. Since *Reves*, five federal appellate courts have addressed the question of lower-rung participant liability and of those five, three went one way,¹³¹ one went another,¹³² and one, the Second Circuit, went both.¹³³ Thus, the problem of forum shopping still looms, and until the Supreme Court addresses the question of how far down the ladder liability goes, a new test or standard of addressing lower-rung participant liability must be created.

VI. PROPOSAL

The problem with proposing a new test or standard for lower-rung participant liability is although the Court in *Reves* applied a restrictive test for “outsider” or horizontal liability,¹³⁴ such a test

129. The first line of S. 1861 stated its purpose: “to prohibit the infiltration or management of legitimate organizations by racketeering activity or the proceeds of racketeering activity.” *Id.* This purpose seemingly goes along with the operation or management test of *Reves*, that being to attack those individuals or groups who direct the enterprise’s affairs. However, again, it does not address the issue of who is liable once the enterprise has been infiltrated and there are employees assisting the enterprise with its illegal purposes.

130. These four tests described above are: strict test, liberal test, intermediate test, and the other or 11th Circuit test.

131. See *MCM*, 62 F.3d at 978-79; *Starrett*, 55 F.3d at 1548; and *Oreto*, 37 F.3d at 750.

132. See *University of Maryland*, 996 F.2d at 1538-39.

133. Compare *Wong*, 40 F.3d at 1373-74 (stating “*Reves* makes it clear that a defendant can act under the direction of superiors in a RICO enterprise and still ‘participate’ in the operation of the enterprise within the meaning of § 1962(c).”) with *Workman*, 80 F.3d at 696 (quoting *Reves*, 507 U.S. at 179) (stating “[A] defendant might well have performed ‘helpful’ acts without playing any part in ‘directing the enterprise’s affairs.’”); and *Viola*, 35 F.3d at 41 (stating “[s]ince *Reves*, it is plain that the simple taking of directions and performance of tasks that are ‘necessary or helpful’ to the enterprise . . . is insufficient to bring a defendant within the scope of § 1962(c)”).

134. See *Reves*, 507 U.S. at 184 n.8 (stating that “because the meaning of the statute is clear from its language and legislative history, we have no occasion to consider the application of the rule of lenity. We note, however, that the rule of lenity would also favor the narrower “operation and management” test

appears to be problematic with "insider" or vertical liability. In addition, congressional intent focused primarily on the infiltration of organized crime into legitimate businesses and to find liable those who control or operate the enterprise in its illegal endeavors, but the extent of downward direction of Congress' intent is not clear. Thus, a proper proposal must create two tests, one interpreting a liberal reading¹³⁵ and one interpreting a stricter (i.e. operation or management) reading.¹³⁶

Because the Supreme Court has already defined "conduct or participate," those definitions must remain consistent in the creation of any new test or standard.¹³⁷ Thus, to "conduct" means to "lead, run, manage, or direct."¹³⁸ Further, in the context of the statute, the word "conduct" indicates some degree of direction. The word "participate" means "to take part in."¹³⁹

A. Liberal Test

Reading the statute on its face, a more liberal standard appears appropriate. Whereas the original fear behind the creation of the RICO statute was the infiltration of racketeering activity into a legitimate business ("outsiders"),¹⁴⁰ the fear with lower-rung liability is different because these individuals are already involved in the enterprise ("insiders"). Therefore, the focus of the new test should be on the disjunctive "or" in the statute. If the "or" is adhered to, then "conduct" or "participate" is read separately and liability is found by any action conforming to either one.¹⁴¹ A more liberal test will focus not so much on the "conduct" aspect of the statute, but rather on the "participate" aspect of the statute. If to "participate" means to "take part in," then such a definition does not require some degree of direction as held by the Supreme Court in *Reves*.¹⁴² Rather, adhering to the "or" in "conduct or participate," liability is found if an individual led, ran, managed, or directed an enterprise or if an individual took part in the racketeering activity of the enterprise.

Adhering to the disjunctive construction of the statute and

that we adopt").

135. See *infra*, notes 138-144.

136. See *infra*, notes 146-152.

137. See *Reves*, 507 U.S. at 179.

138. *Id.* at 177.

139. *Id.* at 179.

140. See *ABRAMS*, *supra* note 1, at 2

141. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (holding that "[c]anons of construction . . . suggest terms connected by a disjunctive be given separate meanings unless the context dictates otherwise").

142. The Supreme Court appears to have read "conduct or participate" together where it stated "Once we understand the word 'conduct' to require some degree of direction and the word 'participate' to require some part in that direction, the meaning of §1962(c) comes into focus." *Reves*, 507 U.S. at 178.

the definitions of "conduct or participate" as defined by the Supreme Court, the Fifth/Seventh Circuits intermediate test, pre-*Reves*, would be the best applicable test.¹⁴³ To be liable, (1) the defendant must have committed the racketeering acts; (2) the defendant's position or relationship with the enterprise facilitated the commission of the acts; and (3) the acts had some effect on the enterprise.¹⁴⁴ This test would incorporate the liability of foot soldiers, but at the same time limit liability to only those who committed racketeering acts and not merely any act that may have been illegal to benefit the enterprise. Further, the test would not demand any degree of direction of the enterprise as the *Reves* test does, but rather, the test would only demand some relationship or position with the enterprise. However, the relationship or position must benefit the enterprise for liability to follow. Therefore, this test would extend to the lowest rungs and find liable all those who satisfy the test, thereby completely eradicating all involved in the enterprise.

B. Restrictive Test

Notions of coercion and lack of knowledge may demand that liability not be so liberal. Rather, lower-rung liability should adhere to the Court's strict interpretation of "conduct or participate." First, as defined in *Reves*, "conduct or participate" should be understood as requiring some degree of direction and some part in that direction thereby necessitating liability upon only those who have taken some part in directing the enterprise's affairs.¹⁴⁵ Thus, liability should not extend to soldiers of an enterprise who merely carry out directions given to them and who do not have any part in directing the enterprise's affairs. Furthermore, liability should not extend to those individuals who are forced to participate and follow directions of the enterprise because they too have no part in directing the enterprise's affairs. In fact, in such a situation, those individuals coerced into following direction probably have less say than a soldier of the enterprise. Lastly, because not every enterprise consists of organized crime groups (i.e. banks, lawyers or law firms, accounting firms, insurance companies, and securities investment firms),¹⁴⁶ liability should not extend to those who follow directions given to them by upper-management and whose actions benefit the enterprise, but

143. See *Cauble*, 706 F.2d at 1332-33; *Overnite Transp. Co.*, 904 F.2d at 393.

144. See *Cauble*, 706 F.2d at 1332-33; *Overnite Transp. Co.*, 904 F.2d at 393.

145. See *Reves*, 507 U.S. at 178-79.

146. See, e.g., *American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606 (1985); *Sutherland v. O'Malley*, 882 F.2d 1196 (7th Cir. 1989); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983), *cert. denied*, 464 U.S. 1002 (1983); *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740 (5th Cir. 1989); *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750 (3d Cir. 1990).

who do so without knowledge of illegality.

The problem with creating such a test is that the Supreme Court adopted a restrictive test used by the federal appellate courts in *Reves* and that test does not appear to be working for lower-rung participant liability. Thus, a completely new test must be created only for dealing with liability of lower-rung participants.

Again, following the Supreme Court's interpretation of 1962(c) that the liberal construction clause was not an invitation to apply RICO to new purposes that Congress never intended,¹⁴⁷ the new test that should be administered for lower-rung participants is whether the *individual knowingly and willfully directed or managed the enterprise's affairs*. The use of the phrase "knowingly and willfully" eliminates the possibility of any coercive action whereby an individual must assist the enterprise or face consequences.¹⁴⁸ Further, the phrase allows for a defense of lack of knowledge.¹⁴⁹ However, this defense will be objective (i.e. reasonable person standard) thereby eliminating any willful blindness. The use of the word "direct" in place of "conduct" will eliminate any ambiguity behind the Supreme Court's definition of "conduct." To "direct" implies "to order or command with authority."¹⁵⁰ Liability only extends to individuals who order or command the enterprise. Second, the use of the word "manage" is defined as "to direct affairs."¹⁵¹ Thus, as similarly used by the Supreme Court in *Reves*, to "direct or manage" the enterprise's affairs implies some authority to command within the enterprise. This test, like in the one in *Reves*, will not be exclusive of only upper-management because like the Army or a corporation there are many levels of authority.¹⁵² However, under this test, liability will not be extended to those who merely follow directions.

Looking at these two tests it appears the more liberal test would fit better with RICO's purpose and eliminate the infiltration of organized crime into legitimate businesses. However, 1962(c)'s application has not been limited to organized crime but rather to insurance companies, law firms, accounting firms, and securities firms. Therefore, in order to limit the drive for treble damages

147. See *Reves*, 507 U.S. at 183.

148. In *MCM*, the Seventh Circuit stated the defendants were "reluctant participants," but in truth they were no choice participants because of the threats they received from the "organized crime" enterprise. 62 F.3d at 973, 980-81.

149. This would have to be an affirmative defense raised in a pre-trial hearing before the merits of liability can be established.

150. WEBSTER'S NEW WORLD DICTIONARY, COLLEGE DICTIONARY 389 (1997).

151. *Id.* at 820.

152. This implies that someone lower down the ladder can be liable but only if he/she has a position of leadership that allows for some type of managing or directing of lower situated individuals.

and the “sue everybody” mentality, the stricter test is more practical.

VII. CONCLUSION

The Supreme Court in *Reves* took ambiguous terms in a statute and attempted to clarify them for future litigants. However, the operation or management application in *Reves* applied to “outsiders” or horizontal participants to the enterprise. *Reves* did not involve “insiders” or vertical participants. Thus, the operation or management test should not and really does not apply to “insiders” or vertical participants. A new test should apply for the “insiders” of an enterprise. This test, for practical purposes, should be stricter than the operation or management test and should not apply to defendants who were merely following directions and whose actions helped the enterprise.

