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THE RICO "ENTERPRISE" ELEMENT: DOES IT ENCOMPASS ASSOCIATIONS FORMED FOR ILLEGITIMATE PURPOSES?


The Racketeer Influenced and Corrupt Organizations Act¹ was enacted as Title IX of the Organized Crime Control Act of 1970,² a comprehensive package of legislation designed to "seek the eradication of organized crime in the United States."³ RICO is a revolutionary statute which gives unprecedented powers to federal prosecutors.⁴ One commentator has called it "the most sweeping criminal statute ever passed by Congress."⁵

4. See Magarity, *RICO Investigations: A Case Study*, 17 AMER. CRIM. L. REV. 367, 367 (1980). In addition, the penalties for RICO violations are among the most severe criminal penalties in the United States Code. The penalty section of RICO provides:
(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.
A RICO violation occurs when any person invests income derived from a "pattern of racketeering activity" in any interstate "enterprise"; when any person acquires or maintains an interest in any interstate "enterprise" through a "pattern of racketeering activity"; when any person employed by or associated with any interstate "enterprise" conducts or participates in the affairs of that "enterprise" through a "pattern of racketeering activity"; or when any person conspires to violate any of the above proscriptions.

The statute designates twenty-five federal crimes and eight state felonies as racketeering activities. The commission of two or more referred to as Atkinson]. Before RICO was enacted, the federal government's only avenue of attack on organized crime was through traditional criminal statutes which focused on isolated incidents of criminal activity. See Blakey & Goldstock, "On the Waterfront": RICO and Labor Racketeering, 17 AMER. CRIM. L. REV. 341, 349 (1980); Note, The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform, 33 VAND. L. REV. 441, 442 (1980) [hereinafter referred to as Vanderbilt]. Under such statutes it was possible to imprison individual members of criminal organizations; however, it was virtually impossible to damage seriously the criminal organization itself. Id. at 442. Even through the use of traditional conspiracy theories, it was often impossible to prosecute successfully cases in which apparently unrelated persons were associated in the commission of a diversified pattern of crimes. See United States v. Elliott, 571 F.2d 880, 900-05 (5th Cir.), cert. denied, 439 U.S. 953 (1978). RICO changed that picture dramatically, and it has found increasing use among prosecutors in recent years. See Atkinson, supra, at 3 n.21.

6. The statute defines "person" broadly as including "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1976).

7. 18 U.S.C. § 1962(a) (1976) provides:
   It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

8. 18 U.S.C. § 1962(b) (1976) provides:
   It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

9. 18 U.S.C. § 1962(c) (1976) 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.

10. 18 U.S.C. § 1962(d) (1976) provides:
    It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

acts of such racketeering activity within a ten-year period constitutes a "pattern of racketeering activity."12 The crucial RICO element, the "enterprise" which must be affected by the "pattern of racketeering activity," is broadly defined in the statute as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."13

As prosecutors have sought to tap RICO's enormous potential as a weapon against all types of organized criminal groups, they have repeatedly urged that the statutory definition of "enterprise"—specifically the phrase "any . . . group . . . associated in fact"—is broad enough to embrace associations formed for wholly illegitimate purposes such as prostitution or gambling rings.14 Relying on a legislative history which shows that Congress was concerned with the infiltration of legitimate businesses by racketeers, defendants convicted of RICO violations involving illegitimate enterprises have argued that such as-

"racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

"pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

"enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

associations are outside RICO's scope. The question of whether RICO is limited in its application to legitimate enterprises or whether it may be applied to illegitimate enterprises as well has been the source of much litigation and has caused a split in the United States courts of appeals which have considered the issue.

The majority view, adopted either expressly or by implication in eight circuits, is that an "enterprise" may be an association formed for illegal purposes. Some courts have even held that the same criminal conduct which constitutes an illegitimate "enterprise" can also constitute the "pattern of racketeering activity" through which a defendant conducts that "enterprise's" affairs in violation of RICO.

The minority view, adopted by the Eighth Circuit, and recently rejected in favor of the majority position by the Sixth Circuit, limits the scope of RICO. The Eighth Circuit has held that the mere association of two defendants to commit crimes constituting a "pattern of racketeering activity" cannot constitute the "enterprise" which is affected by that "pattern of racketeering activity." However, the Eighth Circuit expressly stopped short of declaring that the affected "enterprise" must be legitimate. Instead, while it did not directly countenance the view that a RICO "enterprise" may be illegitimate, the court

15. See, e.g., United States v. Aleman, 609 F.2d 298, 304 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980) ("Defendants argue that § 1962 is not applicable to an illegal enterprise [a home invasion ring] but only to an infiltrated legitimate business.").


17. A particularly good example of this line of reasoning appears in United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980). In that case the court upheld RICO convictions based on an indictment which charged in relevant part:

[Being persons associated with an enterprise engaged in and the activities of which affected interstate commerce, to wit, a group of individuals associated in fact to plan and commit robberies, to carry away stolen goods and to divide among themselves the stolen goods and all proceeds derived therefrom, unlawfully, wilfully and knowingly did conduct and participate, directly and indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity, to wit, the commission of robberies in Chicago, Illinois, Oak Lawn, Illinois and Indianapolis, Indiana.

Id. at 302 (emphasis added). In short, the Government in this case was able to prove two of the requisite elements of the offense merely by showing that the defendants had planned and committed three home invasions.


19. United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980) (After a rehearing en banc, the court reversed an earlier panel decision, 605 F.2d 260 (6th Cir. 1979), which had held that a RICO "enterprise" must be "ostensibly" legitimate.).

20. 626 F.2d at 1372 ("[W]e do not rest our holding on the word 'legitimate' . . . .").
required only that the "enterprise" have an existence distinct from the crimes constituting the "pattern of racketeering activity." 21

In United States v. Turkette, 22 the First Circuit refused to accept an expansive interpretation of "enterprise" and joined the Eighth Circuit in giving the term a more limited scope. The First Circuit, however, went a step further and explicitly held that a RICO "enterprise" must be legitimate. 23

Noting the conflict which has developed among the circuits, a judge in another recent case involving this issue stated: "The number of RICO prosecutions is rising rapidly. There is a 'need for certainty in the workaday world of conducting criminal trials.' The courts of appeal have performed their assigned function, and the issue now awaits authoritative resolution by the Supreme Court." 24 As if in response to this call for action, the Supreme Court has granted certiorari in Turkette 25 to consider the question of whether a group of individuals associated in fact to commit unlawful acts for profit can constitute an "enterprise" within the meaning of RICO. 26

This case comment will examine RICO's legislative history and trace the development of the conflicting interpretations of the "enterprise" element in the United States courts of appeals. The Turkette decision will then be reviewed and an analysis of the court's reasoning will be presented. Finally, it will be suggested that, while the majority approach may be too broad, the limitation of RICO undertaken by the First Circuit in Turkette is unnecessarily restrictive. It will be recommended that the Supreme Court reverse the First Circuit's decision in favor of the somewhat more liberal construction expounded by the Eighth Circuit which requires only that the two crucial elements, the "enterprise" and the "pattern of racketeering activity," be proven by independent sets of facts.

The Legislative History of RICO

Organized criminal activity has been recognized as a serious prob-

21. Id. ("[T]he phrase 'a group of individuals associated in fact . . .,' as used in [the] definition of the term 'enterprise' . . . [encompasses] only an association . . . that has an existence that can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering activity.' ").


23. Id. at 899.


problem in American society for over half a century.\textsuperscript{27} Congress turned its attention to the problem in 1950 when the Special Senate Committee to Investigate Organized Crime in Interstate Commerce, chaired by Tennessee Senator Estes Kefauver, conducted a yearlong series of hearings across the country which uncovered widespread patterns of organized criminal activity in almost every major city in the nation.\textsuperscript{28} Despite these revelations, the findings of the Kefauver Committee produced little in the way of legislation aimed at combating organized criminal groups.\textsuperscript{29}

Additional evidence of the alarming nature and scope of organized crime appeared in the late 1950s and early 1960s.\textsuperscript{30} Hampered by cor-

\textsuperscript{27} In 1931, The National Commission on Law Observance and Enforcement, which became known as the Wickersham Commission, gave one of the first reports detailing the prohibition-era evolution of small criminal gangs into underworld cartels which conducted their illegitimate operations as highly organized and efficient businesses. The Wickersham Commission recommended an immediate nationwide investigation into the phenomenon of criminals operating in a business-like manner. The recommendation was not followed, however, and the Commission's desire for the development of a plan for the control of organized crime went unrealized. During the next twenty years, the nation's attention was focused on the problems of the Great Depression and World War II. Almost totally unhindered by law enforcement, organized criminal syndicates prospered. See National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Organized Crime 15-16 (1976) [hereinafter referred to as National Task Force Report].

Decades later, the President's Commission on Law Enforcement and Administration of Justice emphasized the similarity between the operations of organized crime and those of legitimate businesses when it observed that:

[organized crime] involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive, but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits.


\textsuperscript{28} In addition to finding criminal empires founded on illegal gambling, drug trafficking, loan-sharking and other crimes, the Kefauver Committee discovered that these criminal enterprises facilitated their operations through a nationwide pattern of bribery and protection payments to law enforcement officials as well as extensive payoffs to corrupt politicians. See A. Bequa1, Organized Crime 43 (1979) [hereinafter referred to as Organized Crime].


\textsuperscript{30} In 1957, the Senate Select Committee on Improper Activities in the Labor and Management Field, chaired by Senator John McClellan, uncovered extensive involvement of organized crime figures in legitimate labor and business organizations. 115 Cong Rec. 5876 (1969) (statement of Senator McClellan). In the autumn of 1957, police in upstate New York discovered the infamous Apalachin conference at which more than 70 crime syndicate chieftains from across the nation had converged. Organized Crime, supra note 28, at 46; National Task Force Report, supra note 27, at 16. In 1963, Joseph Valachi, a long time member of organized crime who had become a government informer, shocked the nation with his televised testimony before the Senate Permanent Subcommittee on Investigations. Valachi described the structure and methods of a nationwide network of criminal "families" known to its members as La Cosa Nostra. Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations
ruption and lack of resources, state and local governments took no significant action. On the federal level, both Congress and the Justice Department took steps to deal with the problem; however, these measures proved largely ineffective, and organized crime continued to flourish.

In 1969, Senator John McClellan introduced the first comprehensive package of legislation designed specifically to attack organized crime. After amendments and revisions, this bill emerged as the Organized Crime Control Act of 1970. The overriding purpose of this Act 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."


33. This legislation was introduced by Senator McClellan on January 15, 1969 with Senators Hruska, Allen, and Ervin as cosponsors and was known as the Organized Crime Control Act of 1969. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 827 (1969). As originally proposed, this Act did not contain a provision comparable to RICO.


(1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeav-
As one of the twelve titles of the Act, RICO was part of this all-out assault on organized criminal activity. In its report on the Act, the Senate Judiciary Committee stated that Title IX (RICO) “has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.” Similarly, the report of the House Judiciary Committee stated that “[s]ection 1962 [of RICO] establishes a threefold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations.”

The legislative history of the Organized Crime Control Act contains many other references to RICO which show that Congress was concerned with the infiltration of legitimate businesses by criminal elements. For example, during his presentation of the bill to the Senate, Senator McClellan summarized the first ten titles and indicated that RICO had been drafted “to attack and to mitigate the effects of racketeer infiltration of legitimate organizations affecting interstate commerce.” During the initial Senate debates on the Act, Senator Hruska of Nebraska, a cosponsor of a bill that had been one of the forerunners of RICO, commented that “[i]n recent years, organized crime has become increasingly diversified and has become entrenched in legitimate businesses and in labor unions where it employs terrorism, extortion, or as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Id.


38. 116 Cong. Rec. 585 (1970). Senator McClellan reiterated this view when he testified in the House hearings on the Organized Crime Control Act of 1970 that RICO was “designed to prevent organized criminals from infiltrating legitimate commercial organizations with the proceeds of their criminal activities or with violent and corrupt methods of operation, and to remove them and their influence from such enterprises once they have been infiltrated.” Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 106 (1970) (statement of Senator John L. McClellan) [hereinafter referred to as House Hearings].
tax evasion, bankruptcy fraud and manipulation, and other measures
to drive out lawful owners and officials." 39

Like remarks were made during the House debates. Representative Poff, the floor manager for the bill stated:

"Perhaps the single most alarming aspect of the organized crime
problem in the United States in recent years has been the growing
infestation of racketeers into legitimate business enterprises . . .
Title IX of S. 30 provides the machinery whereby the infiltration of
racketeers into legitimate businesses can be stopped and the process
reversed when such infiltration does occur . . . . The provisions
of the Title operate largely against racketeering activity as defined in
the bill or, more precisely, against patterns of racketeering activity. 40

The Justice Department echoed these concerns when it summa-
rized RICO for a House subcommittee conducting hearings on Senator
McClellan's bill: "Title IX is designed to inhibit the infiltration of leg-
itimate business by organized crime, and . . . to reach the criminal
syndicates' major sources of revenue . . . . The proposal appears to
cover most of the methods through which La Cosa Nostra customarily
infiltrates and operates legitimate business enterprises." 41

Despite this central concern with the infiltration of legitimate busi-
nesses by organized crime, there were two instances when members of
Congress indicated that RICO could have a broader application. In a
discussion with Senators McClellan and Hruska concerning the possi-
bility that RICO might inject the Judiciary Committee into areas tradi-
tionally under the jurisdiction of the Committee on Commerce,
Senator Magnuson asked, "Also, I suppose the proceeds from illegal
activities in one State that are transported to another State to be used in
further illegal activities would be included [within the scope of
RICO]?" 42 To this Senator Hruska replied, "They might be involved
in [RICO]. I agree with the comments of [Senator McClellan] [regard-
ing the use of RICO to block the investment of illegally obtained funds

at 603 (remarks of Senator Yarborough); id. at 607 (remarks of Senator Byrd); id. at 953 (remarks
of Senator Thurmond).
40. 116 Cong. Rec. 35295 (1970). Similarly, Representative St. Germain observed that:
"[t]he danger of organized crime arises because the vast profits acquired from the sale of
illicit goods and services are being invested in licit enterprises, in both the economic
sphere and the political sphere. It is when criminal syndicates start to undermine basic
economic and political traditions and institutions that the real trouble begins. And the
real trouble has begun in the United States.
Id. at 35199. Other congressmen voiced similar concerns. See id. at 35196 (remarks of Rep.
Celler); id. at 35201 (remarks of Rep. McCulloch); id. at 35206 (remarks of Rep. Kleppe); id. at
41. House Hearings, supra note 38, at 170 (Department of Justice comments on S. 30).
Later, in describing the provisions of the Act on the floor of the House, Representative Meskill summarized RICO by stating that it "[made] it a crime to engage in a pattern of racketeering activity." These comments by Senator Magnuson and Representative Meskill do not alter the conclusion that Congress' primary concern in enacting RICO was to prevent racketeers from taking over legitimate businesses. However, the comments do tend to discount the notion that Congress never considered the possibility that RICO could be used to strike a more direct blow at racketeering activity. It seems particularly significant that neither Senator McClellan nor Senator Hruska, the principal architects of RICO, gave any indication that Senator Magnuson had gone too far during their discussion in suggesting that RICO could reach the investment of illegally obtained funds from one state in further illegal activity in another state.

JUDICIAL INTERPRETATIONS OF THE APPLICABILITY OF RICO TO WHOLLY ILLEGITIMATE "ENTERPRISES"

RICO was seldom used during the first five years after its enactment. This initial lack of use has been attributed, at least in part, to the unfamiliarity of prosecutors with the potential of the new statute. Since 1975, however, the number of reported court decisions involving RICO has risen sharply, and prosecutors have used this new tool with devastating effectiveness against a wide variety of interstate criminal combines.

Predictably, RICO defendants caught in the statute's broad net have sought to escape by arguing that the law was never meant to apply to them. One argument unsuccessfully advanced by members of small criminal gangs has been that Congress was concerned only with vast criminal syndicates such as the Mafia when it enacted the Organized Crime Control Act and that RICO was therefore inapplicable to organized criminals who were not part of such traditional "organized crime" cartels. Another frequently used argument has been that the

43. Id.
44. Id. at 35328.
45. See Vanderbilt, supra note 5, at 443-44 n.12.
46. See Atkinson, supra note 5, at 3 n.21.
47. See United States v. Aleman, 609 F.2d 298, 303-04 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980), in which the court quoted from a law review article written by Senator John L. McClellan, one of the sponsors of the Organized Crime Control Act: McClellan, The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties? 46 NOTRE DAME LAW. 55, 141-44 (1970), and concluded from the Senator's discussion of the futility of attempting to exclude
term "enterprise" as used in RICO was intended by Congress to apply only to legitimate businesses which were taken over by racketeers and therefore could not be used to reach criminals who conducted the operations of illegal businesses through racketeering. Until quite recently, however, efforts by defendants to persuade the United States courts of appeals that RICO cannot encompass a "business" that remains totally illegitimate have been unavailing.

The Majority View of a RICO "Enterprise": It May Be Illegitimate

Among the United States courts of appeals which have been called upon to determine the scope of RICO's "enterprise" element, the majority have opted for a construction that permits the Government to prove that element by evidence of exclusively criminal conduct. The first of the circuits to adopt this position was the United States Court of Appeals for the Seventh Circuit in United States v. Cappetto. Cappetto involved a group of individuals who had associated for the sole purpose of illegally receiving and transmitting horse race and sports wagers. The Government sought to invoke civil remedies against this illegal enterprise under section 1964 of RICO. The defendants argued that the gambling business in which they were engaged was illegal and was, therefore, outside the scope of RICO, because Congress' purpose in enacting RICO was to protect "legitimate business" against infiltration by racketeers.

The court found no merit in this argument and stated that "[b]oth the statutory language and the legislative history" supported an interpretation of RICO's "enterprise" element that embraced illegal as well crimes committed by persons not involved in organized crime from RICO's list of racketeering offenses that Congress had fully contemplated that RICO could be applied to organized criminals who were not members of "organized crime." See also United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976), in which the court observed that although Congress focused on some of the activities by which individuals and associations engaged in organized crime maintained their incomes or influence, RICO's prohibitions applied no matter who engaged in those activities. 48. See United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975) ("Defendants contend that the Act does not authorize the action brought by the government here, because Congress' purpose was to protect 'legitimate business' against infiltration by racketeers and not to prohibit racketeering itself."). 49. 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). 50. Specifically, the Government sought preliminary and permanent injunctions restraining the defendants and those acting in concert with them from engaging in the illegal gambling business which was the alleged "enterprise" in the case. In addition, the Government sought to divest one of the defendants of his interest in the building where the "enterprise" operated. The Government also sought to have the defendants disclose the names of their accomplices in the operation and to have the defendants submit quarterly reports to the United States Attorney for a period of ten years listing their current addresses, sources of income, and other information bearing on their compliance with the injunction the court had been asked to enter. Id. at 1355.
as legal enterprises.\textsuperscript{51} In support of its position that the term “enterprise” should be given this broad construction, the court cited a Second Circuit case, \textit{United States v. Parness},\textsuperscript{52} in which foreign corporations had been found to be RICO “enterprises.” The \textit{Cappetto} court viewed this interpretation by the Second Circuit as evidence that Congress had intended to give the term “enterprise” a very broad meaning.\textsuperscript{53} The \textit{Cappetto} court also pointed out that “[t]here is nothing in the language of subsection (b) or (c) [of section 1962 of RICO] or in the definition section of the Act, Section 1961, to suggest that the enterprise must be a legitimate one.”\textsuperscript{54} The court acknowledged that one of Congress’ targets in enacting RICO had been the infiltration of legitimate organizations by organized crime, but the court declared that the prohibitions of subsections 1962(b) and (c) demonstrated a congressional intent to prohibit any pattern of racketeering activity in or affecting commerce.\textsuperscript{55}

\textsuperscript{51} 502 F.2d at 1358.
\textsuperscript{52} 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). In \textit{Parness}, the defendants were charged with interstate transportation of stolen property in violation of 18 U.S.C. § 2314 (1970), and with violating RICO by using a “pattern of racketeering activity” consisting of that transportation of stolen property to acquire an interest in an “enterprise.” The “enterprise” involved was a hotel located in a foreign country. The defendants argued that RICO was applicable only to domestic “enterprises” and that such a foreign corporation could not constitute a RICO “enterprise.” The Second Circuit rejected that argument, stating:

“Enterprise” is defined in § 1961(4) to include “any . . . corporation.” On its face the proscription is all inclusive. It permits no inference that the Act was intended to have a parochial application. The legislative history, moreover, strongly indicated the intent of Congress that this provision be broadly construed.

\textit{Id.} at 439.

\textsuperscript{53} 502 F.2d at 1358. The court also relied on a section of the Senate Judiciary Committee’s report on the Organized Crime Control Act as further evidence that Congress intended to include an illegal gambling business such as that involved in the \textit{Cappetto} case within the meaning of the term “enterprise.” The section of the report quoted by the court read:

Despite the best efforts made to date by both the Federal and the several State governments, gambling continues to exist on a large scale to the benefit of organized crime and the detriment of the American people. A more effective effort must be mounted to eliminate illegal gambling. In that effort the Federal Government must be able not only to deny the use and facilities of interstate commerce to the day-to-day operations of illegal gamblers—as it can do under existing statutes—but also to prohibit directly substantial business enterprises of gambling. . . .

\textit{Id.} (quoting S. REP. No. 617, 91st Cong., 1st Sess. 72-73 (1969)). The court failed to point out, however, that the quoted language does not pertain to RICO but to the federal gambling statute, 18 U.S.C. § 1955, which was enacted as Title VIII of the Organized Crime Control Act. Commentators have been justifiably critical of the court’s misleading use of this language from the Senate report. See Bradley, supra note 32, at 852-53; Comment, \textit{Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in Its Interpretation}, 27 DEPAUL L. REV. 89, 97 (1977).

\textsuperscript{54} 502 F.2d at 1358.

\textsuperscript{55} \textit{Id.} Five years later, in \textit{United States v. Aleman}, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980), the Seventh Circuit reaffirmed the position it had established in \textit{Cappetto} regarding the broad scope of the RICO “enterprise” element. In \textit{Aleman}, the court was faced with a RICO case in which the alleged “enterprise” was an interstate home invasion ring. The “business” of the defendants consisted of periodically forcing their way into the homes of wealthy residents of Illinois and Indiana. Once inside, the defendants threatened the residents at gunpoint, occasionally pistol whipped them, then tied them up and proceeded to loot their homes.
A similar conclusion was reached by the Second Circuit in *United States v. Altese*. In *Altese*, the court noted that the language of RICO was clear, precise and unambiguous. The court found that the repeated use of the explicit word "any" throughout the statute, particularly in the statute's references to "enterprise," made it clear that Congress had not intended to eliminate illegitimate businesses from the scope of RICO. In addition, the *Altese* court observed that Congress could have inserted a single word of restriction if it had intended a different result, but had not done so. The court further stated that the same result would follow even if the statutory language was not found to be so explicit on its face and it was obliged to construe that language. The court declared that to read RICO as including legitimate businesses while excluding illegitimate businesses "does not make sense since it leaves a loophole for illegitimate business to escape its coverage." The Second Circuit therefore held that an illegal gambling business constituted an "enterprise" to which RICO applied.

of valuables. The defendants contended that their convictions under RICO could not stand because RICO was applicable only to legitimate businesses infiltrated by racketeers and not to an illegal enterprise. Citing its prior decision in *Cappeuo*, the court reiterated its conclusion that Congress had not only intended to protect legitimate business through RICO, but had also intended the statute to cover other patterns of racketeering activities in or affecting commerce. Having concluded that RICO did indeed embrace illegal enterprises, the court relied on the Fifth Circuit's holding in *United States v. Elliott*, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978), to decide that the home invasion ring involved in *Aleman* was a form of small business, albeit a criminal business, which could be prosecuted as a RICO enterprise.

57. Id. at 106.
58. Id. at 106-07.
59. Id. at 107. Unlike the Second and Seventh Circuits, the Third Circuit has not expressly adopted the broad interpretation of RICO's "enterprise" element as including associations formed for the sole purpose of conducting illegal racketeering activities. However, the First Circuit pointed out in *United States v. Turkette*, 632 F.2d 896, 904 n.31 (1st Cir. 1980), that the Third Circuit has recently rendered a table affirmation of a conviction under RICO for engaging in a wholly unlawful enterprise, *United States v. Manchester*, 605 F.2d 1198 (3d Cir. 1979) (table), cert. denied, 445 U.S. 945 (1980). And, in a series of cases calling for decisions on the scope of RICO in slightly different contexts, the Third Circuit has made it clear that it leans toward acceptance of an expansive interpretation of RICO's provisions.

For example, in *United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977), a bail bond agency was alleged to have committed extensive bribery of court officials. In a prosecution under RICO, it was alleged that the bail bond agency was an "enterprise" and that various magistrates and constables employed by the courts had been "associated" with that enterprise in such a manner as to violate § 1962(c) of RICO. The district court had dismissed the RICO indictments against the court employees on the ground that the independent status of those employees in relation to the "enterprise" precluded a finding of a prosecutable "association" between them and the enterprise. In reversing the district court, the Third Circuit stressed the specific congressional directive that the provisions of RICO "shall be liberally construed to effectuate its remedial purposes." Id. at 1135-36 (citing The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)).

In another case, *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978), the Third Circuit held that a public agency, in that case the Pennsylvania De-
The Fifth Circuit has developed a line of cases in which it consistently has held that illegal enterprises fall within the scope of RICO. In *United States v. Elliott*, the Fifth Circuit carried the broad interpretation of Revenue's Bureau of Cigarette and Beverage Taxes, as an "enterprise" within the scope of RICO. The defendants argued that in construing the statutory definition of "enterprise," the phrase "other legal entity" following the nouns of narrow scope relating to different forms of business ventures could not be extended to encompass state governmental bodies. This argument was grounded on the doctrine of *ejusdem generis*, a maxim of statutory construction which says that general terms following a listing of specific items in a statute must be read to include only items in the same general class as the specific items. The court flatly rejected the defendants' argument and pointed out that *ejusdem generis* is not a rule of law but merely a useful tool of construction that should not be employed when the intention of the legislature is otherwise apparent. The court then stated that it was clear that Congress had intended the words defining an "enterprise" to go beyond private business or labor organizations. In this connection, the court said:

As we read the Organized Crime Control Act, Congress was not so much concerned with limiting the protective and remedial features of the Act to business and labor organizations as it was with reducing the insidious capabilities of persons in organized crime to infiltrate the American economy . . . . In other words, Congress' concern was enlarging the number of tools with which to attack the invasion of the economic life of the country by the cancerous influences of racketeering activity; Congress did not confine its scrutiny to special areas of economic activity. Congress had no reason to adopt a constricted approach to the solution of the problem.

Id. at 1090 (footnote omitted).

Finally, in the 1980 case of *United States v. Provenzano*, 620 F.2d 985 (3d Cir.), *cert. denied*, 101 S. Ct. 267 (1980), the Third Circuit held that a group of individuals associated for the sole purpose of carrying out a complex labor kickback scheme constituted an "enterprise" within the framework of RICO. The defendants predictably argued that their association was not a RICO "enterprise" because it had no legitimate purpose. Citing its prior holding in *Forsythe* that the provisions of RICO were to be liberally construed, and noting that, at that time, five other circuits had rejected arguments such as the defendants', the Third Circuit stated: "We decline in this case to construe the RICO statute so as to allow the appellants a defense that they made sure not to engage in any legal activity." Id. at 993 (emphasis in original).

Similarly, the District of Columbia Circuit indicated its support for a broad interpretation of RICO's "enterprise" element in *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979). In that case, the court found that a legitimate restaurant that was loosely connected with the illegal trafficking of cocaine was a RICO "enterprise." In reaching that conclusion, the court stated that the definition of "enterprise" in the statute included both the legitimate and illegitimate aspects of the restaurant. As support, the court cited Congress' provision that RICO "shall be liberally construed to effectuate its remedial purposes." The court also referred to *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *cert. denied*, 429 U.S. 819 (1976), in which it had been held that Congress intended RICO to apply to all of the many forms an enterprise can take. In addition, the court relied on the Second Circuit's opinion in *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). The *Swiderski* court noted that *Altese* had emphasized the applicability of RICO to "any" enterprise and reiterated the observation of *Altese* that RICO contained no limiting language. 593 F.2d at 1249.

60. *United States v. Diecidue*, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) ("enterprise" formed to commit "contract" murders, armed robberies, narcotics trafficking, and to deal in counterfeit U.S. currency and Treasury bills); *United States v. Malavesta*, 583 F.2d 748 (5th Cir. 1978), *cert. denied*, 440 U.S. 962, 444 U.S. 846 (1979) ("enterprise" consisted of an illegal scheme to obtain money, marijuana, and cocaine); *United States v. McLaurin*, 557 F.2d 1064 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978) ("enterprise" consisted of a multi-state prostitution ring); *United States v. Morris*, 532 F.2d 436 (5th Cir. 1976) ("enterprise" was a group of individuals associated for the purpose of conducting rigged card games); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976) ("enterprise" was an illegal gambling business conducted in conjunction with a legitimate jukebox business).

tation of RICO's "enterprise" element to its outermost limits. In Elliott, a loosely knit group of individuals were associated not for the purpose of conducting a single ongoing criminal enterprise such as a prostitution ring, but instead engaged in a series of more than twenty different criminal endeavors which included murder, theft and illegal drug sales committed over a period of six years. The court stated that Congress had made it clear in defining "enterprise" that RICO "extended beyond conventional business organizations to reach 'any . . . group of individuals' whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes."62 The court found that there was "no distinction, for 'enterprise' purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba-like infra-structure that controls a secret criminal network."63 The court analogized the group of criminals in Elliott to a large business conglomerate with a chairman of the board overseeing the operation of many separate corporate departments and concluded that the thread tying all of the criminal departments and individuals together into an "enterprise" was the "desire to make money."64 The court stated that while earlier cases had considered only enterprises engaged in one type of prohibited activity, a single enterprise engaged in diversified activities "fits comfortably within the proscriptions of the statute and the dictates of common sense."65

The Ninth Circuit has also held that the "enterprise" element of RICO may be interpreted so as to include illegitimate businesses. In United States v. Rone,66 the court rejected the defendants' argument that an "enterprise" must be a legitimate business in order to bring it under the umbrella of RICO. Instead, the court adopted an analysis similar to that applied by the Second Circuit in United States v. Altese67 and relied on the repeated use of the word "any" throughout the statute and the absence of any words of restriction to find that "any enterprise which is conducted through a pattern of racketeering activity falls within the statute."68

As in Altese, the Rone court found that the statutory language of RICO was so clear on its face as to make unnecessary an examination

62. Id. at 898.
63. Id.
64. Id.
65. Id. at 899.
66. 598 F.2d 564 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).
67. See notes 56-59 supra and accompanying text.
68. 598 F.2d at 568.
of the legislative history. Nevertheless, the court did examine the legislative history and found nothing there which contradicted its holding. The court recognized that, according to RICO's legislative history, a significant purpose of the legislation was to address the problems of the infiltration of legitimate business by persons connected with organized crime; however, the court stated that the recognition of this particular purpose hardly led to the conclusion that RICO applied only to the infiltration of legitimate businesses. Instead, the court reasoned that by permitting RICO to be invoked against illicit enterprises, the effect was to retard the infiltration of legitimate businesses by denying racketeers the source of their investment funds. The court concluded that "[t]he prophylactic aims of [RICO] are well served by such an application of the statute." 

In the 1980 case of United States v. Whitehead, the Fourth Circuit joined the majority in holding that a RICO "enterprise" encompassed any enterprise affecting interstate commerce, regardless of whether that enterprise is lawful or unlawful. The "enterprise" involved in Whitehead was an unlawful interstate prostitution ring centered in Pittsylvania County, Virginia. The county prosecutor had succeeded in making substantial inroads on prostitution activity in the county during his first term in office. The prosecutor then reversed his allegiance, offering protection from prosecution in return for cash payments from the operators of the ring and free sexual services from prostitutes employed by the ring.

The Fourth Circuit affirmed the RICO convictions of the county prosecutor and the operators of the prostitution ring. In doing so, the court stated that while it is clear that the infiltration of legitimate businesses by organized crime was a primary concern of Congress in enacting RICO, the statute itself is not so limited, and its prohibitions apply to the use of racketeering activities to promote any enterprise affecting interstate commerce.

The Sixth Circuit is the most recent court to adopt the majority view of RICO's "enterprise" element. In United States v. Sutton, an en banc court reheard a case involving a wholly illegitimate "enterprise" and reversed an earlier panel decision which had held that a

69. Id. at 569.
70. Id.
71. 618 F.2d 523 (4th Cir. 1980).
72. Id. at 525.
73. Id. n.1.
74. 642 F.2d 1001 (6th Cir. 1980), rev'd 605 F.2d 260 (6th Cir. 1979).
RICO "enterprise" must be at least "ostensibly" legitimate. The "enterprise" involved in Sutton was a large scale heroin distribution operation supported by ancillary illegal activities of trafficking in stolen jewelry, household goods and guns.

The major premise of the court's analysis was that RICO's language is clear and unambiguous, making it inappropriate to resort to interpretation by means of legislative history or rules of statutory construction. Noting that the dictionary definitions of "enterprise" are neutral on the question of whether a particular enterprise is lawful or unlawful, the court observed that Congress had realized the critical importance of the term "enterprise" in RICO and had included a supplementary statutory definition. The court commented that Congress obviously would have known how to characterize an illegal or a legal enterprise had it seen fit to do so. Therefore, according to the court, Congress' choice of the single word "enterprise" and its use of that word in the definition and throughout the statute without any modifiers except the word "any" in sections 1962(b) and (c) was of major importance. Moreover, the court said, this use of the term "any" before "enterprise" made it clear that "enterprise" was used in an all-encompassing sense, including both legal and illegal enterprises.

The court further observed that Title IX of the Organized Crime Control Act of 1970 had been entitled by Congress "Racketeer Influenced and Corrupt Organizations." By these terms, said the court, Congress had included both ostensibly legitimate businesses availed of for criminal purposes and wholly corrupt organizations such as the narcotics distribution organization operated by the defendants.

According to the court, the interpretation urged by the defendants, that the "enterprise" must be "ostensibly legitimate," would force the prosecution to prove a negative: that an organized crime operation is not totally illegal. The court found no reason for such a strained construction and declared, "[W]e decline the appellant's invitation to emasculate Title IX of the Organized Crime Control Act of 1970."  

76. 642 F.2d 1001, 1007 (6th Cir. 1980).
77. Id. at 1004. Summarizing its review of the pertinent statutory language, the court stated: [W]e point out that an interpretation of the statute which would restrict the use of the term "enterprise" to "ostensibly legitimate" enterprises would commit the following errors of construction. First, it would read out of the statute the statute's own definition of "enterprise" which includes "group of individuals associated in fact although not a legal entity." Second, it would read out of the statute the meaning of the words "any enterprise," as used in the statute. And third, it would read into the statute without any justification therefor the vague phrase "ostensibly legitimate" as a modifier for the word "enterprise" which Congress had seen fit to employ alone.

Id. at 1008.
The Minority View: A RICO "Enterprise" May Not Be an Association Formed for Illegitimate Purposes

In the 1979 case of United States v. Sutton, the Sixth Circuit became the first of the United States courts of appeals to reject the majority view and adopt a narrow interpretation of "enterprise," excluding illegitimate associations from the scope of RICO. In a divided panel opinion the court concluded, somewhat reluctantly, that RICO could be applied only to legitimate enterprises. After a rehearing en banc, the Sixth Circuit reversed the panel's decision and adopted the majority position. Nevertheless, the panel's opinion provides useful insights into the minority's approach to the issue.

In reaching its conclusion, the Sutton panel stated that the majority view effectively read the "enterprise" element out of RICO. This was the result, the panel reasoned, of an excessive reliance on a literal interpretation of the statute, which permitted the "enterprise" to be defined in terms of the "pattern of racketeering activity." The court stated that this application of the statute transformed RICO into a simple prescription against "patterns of racketeering activity," a result which Congress clearly had not intended. In order to avoid this result, Sutton stated that the "enterprise" element must denote an entity larger than and conceptually distinct from the "pattern of racketeering activity" through which the affairs of the "enterprise" were conducted.

Thus, the Sutton panel reasoned, a "criminal enterprise" must involve something more than simply a group involved in a pattern of racketeering activity. However, the court was unable to find any reasonably definite standard which would alert a potential offender that he was about to cross the line dividing a mere "pattern of racketeering activity" from a "criminal enterprise" within the ambit of RICO. Absent such a standard, the court felt constrained by the legislative history's numerous references to the elimination of the infiltration of legitimate businesses by racketeers to adopt a construction which lim-

78. 605 F.2d 260 (6th Cir. 1979).
79. The Sutton court stated:
   To say the least, the [defendants' argument that RICO does not reach a group of individuals like themselves, who 'merely' have committed a series of racketeering acts] lacks surface appeal, for it asks us to embrace the rather ironic proposition that racketeers should be immune from criminal liability under [RICO] so long as they keep their activities wholly illegitimate.
   Id. at 264 (emphasis in original).
80. See notes 74-77 supra and accompanying text.
81. 605 F.2d at 265.
82. Id. at 266.
ited the scope of the term "enterprise" to associations that were at least "ostensibly" legitimate.\(^8\) The court found that this construction not only ensured that the "enterprise" and the "pattern of racketeering activity" elements of the offense retained an independent meaning, but that it comported with the apparent intent of Congress in enacting the statute. The *Sutton* panel, therefore, found that RICO had been inappropriately applied in a case where the alleged "enterprise" was a large scale heroin distribution and stolen property fencing operation, the affairs of which the defendants had conducted through a "pattern" of heroin sales and fencing operations.

Approximately one year after the Sixth Circuit's decision in *Sutton*, the Eighth Circuit adopted a somewhat similar position in *United States v. Anderson*.\(^8\) *Anderson* involved the RICO convictions of two Arkansas county administrators who had defrauded their counties of substantial sums of money through their participation in a kickback scheme with a supplier of county road equipment.\(^8\) The only "enterprise" alleged by the Government was the same kickback scheme which constituted the "pattern of racketeering activity" in the case.\(^8\)

The Eighth Circuit began by rejecting the Government's argument that the reference to "any" enterprise in section 1962 mandated a broad interpretation of "enterprise." The court stated that the word "any" applied only after an "enterprise" first fit within the definition of that term under subsection 1961(4).\(^8\) After finding that the wording and composition of RICO, as well as the Act's legislative history and motivating policies, supported the application of rules of statutory construction, the court applied the rule of *ejusdem generis*\(^8\) to the definition of

\(^8\) The court stated its formulation of the definition of "enterprise" as follows: "We therefore hold that an 'enterprise' within the meaning of the statute is 'any individual, partnership, corporation, association . . . and any union or group of individuals associated in fact,' that is organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized." *Id.* at 270.

\(^8\) 626 F.2d 1358 (8th Cir. 1980).

\(^8\) They carried the titles of "county judges"; however, their duties consisted of financial administration, and they were not judicial officers. *Id.* at 1361.

\(^8\) *Id.* at 1362. In addition to the RICO counts, other counts in the indictment charged violations of 18 U.S.C. §§ 2 and 1952 (1976) by interstate travel in aid of the unlawful activity of public servant bribery in violation of Arkansas law and violations of the federal mail fraud statute, 18 U.S.C. § 1341 (1976).

\(^8\) 626 F.2d at 1366.

\(^8\) In the construction of statutes, wills, and other instruments, the *ejusdem generis* rule provides that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. However, the rule does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context
"enterprise." Under that rule of statutory construction, the court concluded that the meaning of the general phrase "any union or group of individuals associated in fact although not a legal entity" was controlled by the preceding specifically enumerated examples of legal entities, "individual, partnership, corporation, association, or other legal entity."

The court also looked to the definition of the other crucial RICO element, the "pattern of racketeering activity," as an aid in construing the term "enterprise." The court noted that the offenses selected by Congress as racketeering activities, the predicate acts to a RICO offense, reflected an economic orientation, reinforcing the view that Congress intended RICO to interdict organized crime's infiltration of the economy. The court found further support for this view in a law review article written by Senator John McClellan, a cosponsor of the Organized Crime Control Act of 1970, in which he explained that the purpose of RICO was served by selecting as racketeering activities crimes which were well-suited for use to infiltrate legitimate organizations. In addition, citing another law review article which had analyzed the civil remedies authorized by RICO, the court pointed to those civil remedies as evidence that RICO was designed to maintain the integrity of business enterprises supplying lawful public needs. The court also examined the legislative history of RICO and concluded that "[i]t is beyond cavil that the primary purpose of section 1962 [of RICO] was to prevent the infiltration of organized crime into legitimate business enterprises."

From its analysis of the interrelationship between the "pattern of racketeering activity" element and the "enterprise" element, the court concluded that an overly broad construction of the "enterprise" element could render that element of the offense interchangeable with the "pattern of racketeering" element. Where, as in Anderson, the term "enterprise" was defined so broadly as to permit proof of the "enterprise" element solely by evidence indicating an association to commit the "pattern of racketeering activity," the court felt that the "enterprise" element was effectively eliminated from the statute. The court stated that such an interpretation was contrary to legislative intent. In manifests a contrary intention. BLACK'S LAW DICTIONARY 464 (5th ed. 1979). See also United States v. Powell, 423 U.S. 87, 90-91 (1975); Gooch v. United States, 297 U.S. 124, 128 (1936).


91. 626 F.2d at 1371-72.
addition, the court found that such an elimination of the "enterprise" element would pose difficult problems relating to the fifth amendment's guarantee against double jeopardy. As the court explained, a RICO defendant may be separately prosecuted for both the RICO offense and the underlying crimes comprising the "pattern of racketeering" element of the RICO charge. The court stated that only by requiring proof of an "enterprise" does RICO require proof of a fact other than the facts required to prove the predicate crimes.\(^9\) The court apparently was concerned that if this additional fact was not required for a RICO prosecution, a defendant could be tried and convicted twice for what was effectively the same crime.

Furthermore, the court observed that such a broad construction of "enterprise" would disrupt the balance between federal and state law enforcement by permitting greater and more pervasive intrusion by federal authorities into areas traditionally under state and local authority. In this connection, the court stated that "[t]here is no indication that Congress ever intended to grant federal prosecutors the flexibility to pursue relatively minor offenders, having no connection with organized crime, who simply associate to commit two of the predicate crimes."\(^9\)

The court concluded that the term "enterprise" must signify an association that is substantially different from the acts which form the "pattern of racketeering activity."\(^9\) Consequently, the court held that the phrase "group of individuals associated in fact" in the definition of "enterprise" could encompass "only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering activity.'"\(^9\) The court noted the similarity of its holding to that of its "sole declared ally," the Sixth Circuit panel in *United States v. Sutton*; however, the court pointed out that, unlike the *Sutton* panel, its holding rested not on the "legitimate" nature of the "enterprise" but upon the need for a discrete economic association existing separately from the racketeering activity.\(^9\)

92. *Id.* at 1367.
93. *Id.* at 1372.
94. *Id.* at 1365.
95. *Id.* at 1372.
96. *Id.*
United States v. Turkette

Facts of the Case

Between March, 1977, and April, 1978, Novia Turkette and several accomplices burglarized eighteen pharmacies in the Boston area. One of Turkette's cohorts was the owner of a burglar alarm company. He assisted the gang by disconnecting some of the alarms maintained by his company and by ignoring others when they rang in his office after Turkette had broken into a store. Drugs taken in the burglaries were sold to pushers who distributed them on the streets.

In June, 1977, Turkette introduced Kenneth Landers, a member of the burglary ring, to John Vargas. Vargas and another man owned two new but unsold modular homes. Turkette told Landers that Vargas was interested in having some property burned, and Landers subsequently set fire to one of the homes at Vargas' instruction. Vargas paid Landers $1,000 for committing the arson. Landers split this money with Turkette, and Vargas collected $22,000 in insurance proceeds.

Several months later Turkette engineered a second arson-for-profit deal involving Landers and Vargas. Once again, Vargas paid Landers $1,000 to burn down a house. Landers then kicked back $300 to Turkette. During the same period, Turkette was involved in two insurance fraud schemes. In both instances he arranged to have automobiles insured and then burned. Insurance claims were filed through the United States mails, and Turkette obtained the proceeds.

Turkette and various co-defendants were subsequently named in a nine-count indictment charging violations of several federal criminal statutes. In count nine of the indictment, Turkette, Vargas, and eleven others were charged under the conspiracy provision of RICO with conspiring to violate RICO's prohibition against conducting or participating in the affairs of any interstate "enterprise" through a "pattern of racketeering activity." The "enterprise" alleged in the indictment consisted of the association of Turkette and the others for purposes of

97. United States v. Turkette, 632 F.2d 896, 908 (1st Cir. 1980). The court referred to the crimes committed by Turkette and his cohorts at the pharmacies as robberies; however, from the description the court gave of those crimes, it is clear that they were actually burglaries. For example, the court stated that after Turkette disconnected the burglar alarm system at a targeted store, the others would force an entry into the building while Turkette kept watch outside. Id. Several sentences later, the court described a procedure that permitted Turkette and the others to "break into the stores without fear of discovery." Id. at 909. Compare Mass. Gen. Laws Ann. ch. 266, § 16 (West Supp. 1979-1980) (breaking and entering) with Mass. Gen. Laws Ann. ch. 265, § 19 (West 1970) (robbery).


committing arson and insurance fraud, illegal trafficking in drugs, influencing the outcome of state trials and bribing police officers.

Turkette was convicted by a jury on all nine counts. In addition to consecutive prison terms totaling twenty years on counts one through eight, he was sentenced to a concurrent twenty-year term and fined $20,000 on the RICO conspiracy count.

On appeal to the United States Court of Appeals for the First Circuit, Turkette and Vargas challenged the validity of the legal theory upon which the Government had predicated the RICO count of the indictment. The Government contended that RICO's definition of "enterprise" was so broad that it included any individual or group of individuals who engaged in a "pattern of racketeering activity." Thus, according to the Government's theory, merely by committing crimes which constituted a "pattern of racketeering activity," Turkette and Vargas automatically became a RICO "enterprise." The very conduct which transformed them into an "enterprise" then served as the "pattern of racketeering activity" through which they conducted the affairs of that "enterprise" in violation of RICO. Turkette and Vargas maintained that RICO was intended to protect legitimate businesses from being preyed upon and taken over by racketeers and was, therefore, inapplicable to individuals whose only enterprise activity was completely criminal. It was their position that only legitimate "enterprises" were within the scope of RICO.

The scope of RICO's "enterprise" element was a question of first impression for the First Circuit.\footnote{632 F.2d at 897.} The court noted that it would be easy to dismiss out-of-hand an argument that exempted criminal activity from prosecution. However, the court declined to do this and stated that an examination of the statute and its legislative history was necessary.\footnote{Id. at 898.}

\textit{The Turkette Opinion}

In \textit{United States v. Turkette}, the First Circuit reversed the RICO convictions, holding that RICO could not be applied to illegitimate "enterprises."\footnote{Id. at 906.} The court began its analysis of the scope of RICO's "enterprise" element by considering the interrelationship of RICO's substantive provisions. The first of those provisions, section 1962(a), prohibits any person from using racketeering income to acquire any
interest in any interstate "enterprise" and imposes a strict limitation on the use of such income to purchase securities on the open market.\textsuperscript{103} The next substantive provision, section 1962(b), makes it unlawful for any person to acquire any interest in any interstate "enterprise" through a "pattern of racketeering activity."\textsuperscript{104} Without explanation, the court concluded that these two subsections of RICO make sense only if the "enterprise" is a legitimate one. On the basis of this conclusion, the court reasoned that the RICO provision involved in the \textit{Turkette} case, section 1962(c), which prohibits participation in the affairs of any interstate "enterprise" through a "pattern of racketeering activity," could not be interpreted to include illegitimate enterprises without putting it at odds with sections 1962(a) and (b).\textsuperscript{105}

Turning to the definition of "enterprise" contained in section 1961(4) of RICO, the court noted that each type of enterprise specifically enumerated in the section was a legitimate one. According to the court, it therefore followed, under the principle of statutory construction known as \textit{ejusdem generis},\textsuperscript{106} that the definition's general "catch-all" phrase "any . . . group of individuals associated in fact . . ." should also be limited to legitimate enterprises. The court declared that "[if] Congress had intended to include 'criminal enterprises' in [RICO's] definition section, it would have done so."\textsuperscript{107}

The court stated that section 1962(c) became internally redundant and important phrases were rendered superfluous if the construction urged by the Government was accepted. Under the Government's view, where a "pattern of racketeering activity" could itself be an "enterprise," the court found that the phrases "employed by or associated with any enterprise" and "the conduct of such enterprise's affairs through [a pattern of racketeering activity]" added nothing to the meaning of section 1962(c). According to the court, the words of the statute were coherent and logical only if they were read as applying to legitimate enterprises.\textsuperscript{108} This view was confirmed, the court stated, by the fact that RICO not only established substantive crimes, but also provided civil remedies designed to rehabilitate victimized enterprises and protect them from further depredations.

The \textit{Turkette} court found additional support in RICO's legislative

\textsuperscript{105} \textit{See} notes 7-9 \textit{supra}.
\textsuperscript{106} \textit{See} note 88 \textit{supra}.
\textsuperscript{107} 632 F.2d at 899.
\textsuperscript{108} \textit{Id}. 
history for its interpretation of "enterprise" as meaning only a legitimate enterprise. That history revealed to the court that more than a decade ago Congress had been deeply concerned with the grave threat posed to society by organized crime and had been told by one of its members that financial and physical incursions by racketeers into legitimate businesses and unions had become "one of the Nation's most serious criminal justice and economic problems."

Examining the record of the hearings held by the House and Senate Judiciary Committees prior to RICO's enactment, as well as the House and Senate reports on the bill, the House floor debates, and a Justice Department summary of RICO, the court concluded:

What emerges from RICO's legislative history is that Congress believed it was enacting a new federal crime, that of interference with legitimate enterprises by racketeers and racketeering methods. There is nothing suggesting that it was also legislating against criminal enterprises. The House floor debates on the Organized Crime Control Act is [sic] devoid of anything indicating that any member of Congress thought RICO would reach anything but legitimate businesses.

The Turkette court found that this focus on legitimate enterprises had been emphasized when the House of Representatives had rejected a proposed amendment which would have added a substantive provision to RICO prohibiting membership in a Mafia or La Cosa Nostra organization. The court noted that similar legislation had been rejected several years earlier after the Attorney General had advised against enactment, stating that he hoped the same objective could be achieved through continued use of existing conspiracy and racketeering statutes.

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110. 632 F.2d at 901 (footnote omitted).

111. This amendment, proposed by Representative Biaggi, defined the groups as "nationally organized criminal groups composed of persons of Italian ancestry forming an underworld government ruled by a form of board of directors, who direct or conduct a pattern of racketeering activity and control the national operation of a monopolistic trade restraining criminal conspiracy." 116 CONG. REC. 35343 (1970).

112. 632 F.2d at 902. The court quoted the remarks of Attorney General Nicholas Katzenbach at 116 CONG. REC. 35344 (1970). In fact, these remarks were made by Mr. Katzenbach several years earlier before a Senate subcommittee. The remarks which appear at 116 CONG. REC. 35344 are actually those of Representative Poff who was quoting Mr. Katzenbach's earlier statement.

Although it did not expressly say so, the court apparently viewed the rejection of these amendments as an indication that Congress had been unwilling to extend RICO's coverage to racketeers whose only business was criminal activity unconnected to the infiltration of legitimate enterprises. In fact, however, the amendments were not rejected because they prohibited criminal conduct unrelated to the infiltration of legitimate businesses. The amendments were rejected be-
The First Circuit stated that a comparison of RICO's legislative history with that of the federal statute outlawing illegal gambling businesses\(^{113}\) showed that Congress knew how to draft legislation which would make the operation of an illegitimate enterprise a federal offense. Furthermore, the court pointed out that the gambling statute's definition of an illegal gambling business was very specific.\(^{114}\) If a "pattern of racketeering activity" as defined by RICO could also be a RICO "enterprise," then RICO could be used to prosecute the commission of two acts of illegal gambling within a ten-year period as the operation of an illegitimate gambling enterprise, thus completely circumventing the gambling statute's tightly drawn limitations. Similarly, it was the court's view that an interpretation of RICO which permitted a "pattern of racketeering activity" to be an "enterprise," would serve to swallow the carefully defined "continuing criminal enterprise" section of the Drug Abuse, Prevention and Control Act.\(^{115}\)

In the *Turkette* court's view, this background cast grave doubts on the Government's simplistic and literal interpretation of the meaning of "enterprise" as used in RICO. Under the Government's interpretation, the court said, the concept of "enterprise" was entirely eliminated from cause of the constitutional difficulties inherent in any attempt to make a crime of mere membership in an organization. Representative Poff made it clear that the focus was on potential constitutional problems when he questioned Representative Biaggi's amendment in light of cases such as Scales v. United States, 367 U.S. 203 (1961), and Lanzetta v. New Jersey, 306 U.S. 451 (1939), in which the Supreme Court had indicated that status alone, without more, may not be the basis for a criminal conviction. \(^{116}\) CONG. REC. 35344 (1970) (remarks of Rep. Pofi).


114. 18 U.S.C. § 1955(b) establishes the criteria which must be met before a gambling business will be within the ambit of the statute. The statute applies only to a gambling business which:

(i) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and

(ii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

115. 21 U.S.C. § 848 (1976). That statute defines a "continuing criminal enterprise" as follows:

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

the statute.\textsuperscript{116} This approach would allow one individual who committed two of the crimes enumerated in section 1961(1) within ten years to be prosecuted for a RICO violation as well as for the substantive crimes themselves. Merely by committing two of the section 1961(1) predicate crimes within ten years, the individual not only committed a "pattern of racketeering activity" as defined by section 1961(5), but at the same time, without proof of a single additional fact, became an "enterprise" himself and was automatically in violation of RICO by conducting the affairs of that "enterprise" through a "pattern of racketeering activity." Giving what it admitted to be an extreme example, the court stated that such an interpretation of "enterprise" would permit a RICO prosecution against a prostitute for two acts of solicitation within a ten-year period if she traveled interstate in plying her trade.\textsuperscript{117}

The court was also troubled by the fact that the Government's interpretation of "enterprise" would extend federal jurisdiction to almost every criminal activity affecting interstate commerce. The court expressed concern that such a reading of RICO would give the federal government a powerful tool for usurping a significant province of state criminal jurisdiction. While such a use of RICO might be an effective means of fighting organized crime, the court said it should not be undertaken without some indication that Congress recognized such a potential use when it passed the Act. The court declared that the legislative history was devoid of any indication that Congress had realized that RICO might result in such a deep incursion into the field of state and local law enforcement.\textsuperscript{118}

The First Circuit acknowledged that its position was contrary to that of the majority of circuits which had considered the scope of RICO's "enterprise" element. However, it found the roots of the other circuits' case law on the issue to be "shallow and infirm."\textsuperscript{119} The court observed that the prevailing case law began with the premise that a combination of criminals associated to commit acts of racketeering constituted an enterprise within the ambit of section 1961(4) which defined "enterprise" as including "any . . . [association] in fact." According to the court, the other circuits viewed this use of the word

\textsuperscript{116} 632 F.2d at 903.
\textsuperscript{117} Id. at 904.
\textsuperscript{118} Id. The court's concern with this potential disruption of the federal-state balance was grounded on its perception that the Government's interpretation of RICO rendered the statute essentially equivalent to a traditional state conspiracy statute. However, the court devoted only a single paragraph of its opinion to a discussion of this issue and apparently did not view it as a major problem. See note 146 infra.
\textsuperscript{119} Id. at 905.
“any” in the statute along with the statute’s failure to distinguish between legitimate and illegitimate enterprises as evidence that even illegitimate associations were within the scope of the term “enterprise” as it was used in RICO. However, the First Circuit declared, such a dragnet use of the word “any” obscured the critical issue: the proper scope of “enterprise” in the context of the statute as a whole and its legislative history.

According to the court, most of the cases which had construed “enterprise” to include illegitimate associations had sought to support their interpretation by pointing to a clause in RICO which stated that the Act’s provisions should be liberally construed to effectuate its remedial purposes. Reliance on this clause for such a purpose was misplaced, the court said. Citing the Senate Committee on the Judiciary’s report on the Organized Crime Control Act of 1969, the court stated that the liberal construction clause pertained only to RICO’s civil remedies. To hold otherwise would violate the principle that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of leniency.”

The *Turkette* court expressed the opinion that the other courts’


> The provisions of this title shall be liberally construed to effectuate its remedial purposes.

121. 632 F.2d at 905 (citing S. REP. No. 617, 91st Cong., 1st Sess. 81 (1969)). In fact, however, the language of the liberal construction clause clearly indicates that it is to be applied to “[t]he provisions of this title [RICO].” There is no indication that the clause is limited in its application to only the civil remedies. See note 120 supra for the complete text of the liberal construction clause. Moreover, the Senate report nowhere states that the liberal construction clause pertains only to RICO’s civil remedies. What that report does state with regard to the civil remedies is this: “Title IX thus brings to bear on the infiltration of organized crime into legitimate business or other organizations the full panoply of civil remedies . . . now available in the antitrust area.” Senate report, supra, at 81.

122. 632 F.2d at 905 (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)). A plausible argument can be made that use of the liberal construction clause to expand the scope of the statutory definition of “enterprise” violates the principle that ambiguities in criminal statutes are to be strictly construed. This argument first requires a finding that the statutory definition is ambiguous regarding the inclusion of associations formed for illegitimate purposes. Once such ambiguity is found, the argument is that the principle of lenity bars any resolution of the ambiguity which would increase liability under the statute. Thus, since inclusion of illegitimate associations in the list of entities which may be RICO “enterprises” could, arguably, increase the range of potential RICO defendants, such illegitimate associations should not be included within the definition of “enterprise.” A district court in Georgia gave an interesting, and not wholly unconvincing, response to a very similar argument: Membership alone in a RICO “enterprise,” whatever the nature of that “enterprise,” is not a proscribed activity. Thus, the due process principles upon which the strict construction rule regarding criminal statutes is grounded are not offended if the meaning of the term “enterprise” is not strictly construed. While it is proper to construe strictly statutes which proscribe criminal activity, it is a different thing entirely to apply the strict construction canon of statutory construction to a definitional concept the limits of which do not determine criminal liability. United States v. Thevis, 474 F. Supp. 134, 138-39, 138 n.4 (N.D. Ga. 1979). Responding to the use of cases such as Rewis v. United States, 401 U.S. 808 (1971) and United
natural antipathy to organized crime had clouded their perception of RICO, its purpose, and its legislative history. According to the First Circuit, the other courts had apparently overlooked the fact that participants in illegitimate enterprises could be prosecuted under existing federal and state statutes, thus making it unnecessary to undertake what the First Circuit saw as a distortion of RICO. In the First Circuit’s opinion, “RICO was not enacted as an offensive weapon against criminals, but as a shield to thwart their depredations against legitimate business enterprises.”

**Analysis of The Turkette Opinion**

There are three central themes in the decision of the Turkette court that RICO encompasses only legitimate enterprises: statutory construction, legislative history, and elimination of the statute’s “enterprise” element.

*Statutory Construction*

The starting point in every case involving construction of a statute is the language of the statute itself.124 Quite properly, this is where the First Circuit began its analysis in Turkette. Examining the statutory language of sections 1962(a) and (b),125 the court concluded, without explanation, that these sections made sense only if the “enterprise” involved was a legitimate one.126 It followed, therefore, that section 1962(c)127 must also be limited to legitimate enterprises.

Apparantly, in the case of section 1962(a), the court was led to conclude that the section made sense only in the context of legitimate enterprises by the fact that the section provides for an exception from liability where illegitimate funds are used to make certain limited purchases of securities on the open market. As far as it goes, this conclusion by the court is correct. The exception contained in section 1962(a) does indeed make sense only if the “enterprise” is legitimate.
Obviously, illegitimate "enterprises" do not issue securities, much less issue them on the open market. However, it does not follow that the language of the major portion of section 1962(a) must also pertain only to legitimate enterprises. That language speaks in terms of prohibiting the investment of racketeering income in any "enterprise." It is entirely plausible that the limited open market investment exception applies only to certain classes of legitimate enterprises while the central prohibition of the section applies to investment of illegal funds in either legitimate or illegitimate enterprises.

The fact that the language of the section speaks of "investment" in an "enterprise" certainly does not lead to the conclusion that the "enterprise" must be legitimate. Investment means "an expenditure of money for income or profit." Given this definition, it seems clear that the language of the section 1962(a) prohibition would apply with equal force whether a mobster used illegally obtained funds to purchase an interest in a bank or to finance a loansharking operation. In both cases he would have invested racketeering income in an "enterprise." This is what section 1962(a) prohibits. The Turkette court's conclusion that the section makes sense only if applied to a legitimate "enterprise" does not bear up under close scrutiny.

Similarly, the court's unexplained conclusion that section 1962(b) is sensible only in the case of legitimate enterprises does not find support in the plain meaning of that section's language. Section 1962(b) prohibits the use of a "pattern of racketeering activity" to "acquire or maintain" an interest in any "enterprise." Thus, for example, the statute would clearly prohibit the use of a pattern of murders and extortion to acquire ownership of an auto parts store. There is not a single word in section 1962(b) which suggests that the section would be inapplicable or would make no sense if the same pattern of criminal acts was used to take over the ownership of an illegal automobile "chop-shop" operation.

Since there is no sound basis in the language of sections 1962(a) and (b) for finding that these sections can apply only to legitimate enterprises, there is no reason to believe that section 1962(c) must be so limited. Section 1962(c) prohibits one who is "employed by or associated with" an "enterprise" from conducting or participating in the affairs of that "enterprise" through a "pattern of racketeering activity." Thus, for example, the operator of an importing firm who facilitated his business by a series of bribes to customs officials could be found

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guilty of violating section 1962(c). There is nothing in the language of section 1962(c) to suggest that the section could not also be used to prosecute a heroin distributor who protected his sources of supply through a similar pattern of illegal bribery.

The First Circuit's conclusion that the language of sections 1962(a) through (c) mandates a finding that a RICO "enterprise" must be legitimate is unsound. If such a limitation is to be found at all in the statutory language, it must be found in the statutory definition of the term "enterprise." That definition draws no distinction between legitimate and illegitimate "enterprises"; instead, it provides a representative list of entities which are "includ[ed]" in the term "enterprise."\(^{129}\)

The cardinal rule in interpreting a statute is that there is no need to turn to the legislative history or to rules of statutory construction if the meaning of the statutory language is clear and unambiguous.\(^{130}\) The language used in the definition of "enterprise" is simple and straightforward. There is certainly no patent ambiguity in the meaning of that definition. Nevertheless, the Turkette court applied the doctrine of *eiusdem generis*\(^{131}\) to RICO's definition of "enterprise" and concluded that the general phrase "any . . . group . . . associated in fact although not a legal entity" must mean only legitimate associations since that phrase is preceded in the statute by several specific examples of legitimate entities.

Given the clarity with which the definition of "enterprise" was drafted as well as the Supreme Court's conclusion that the Organized Crime Control Act of which RICO is a part is "a carefully crafted piece of legislation,"\(^{132}\) it does not seem that this is an appropriate instance for the application of *eiusdem generis*. However, even if it is conceded for the sake of argument that *eiusdem generis* may be applied in this situation, that application does not necessarily lead to the conclusion reached in Turkette. *Eiusdem generis* provides that general terms which follow a list of specific items in a statute must be read to encompass only items belonging to the same general class as the listed specific items. In the "enterprise" definition, the specific items listed are: "individual, partnership, corporation. . . ." The general phrase which follows is: "any . . . group . . . associated in fact although not a legal entity." Turkette assumed that the general class to which the specific items belonged was: types of legal entities. Thus, it followed that the

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129. See note 13 supra for the text of the statutory definition of "enterprise."
130. See, e.g., United States v. Sutton, 642 F.2d 1001, 1003, 1006 (6th Cir. 1980).
131. See note 88 supra for a definition of *eiusdem generis*.
subsequent general phrase could include only legitimate associations. It is just as plausible, however, to interpret the general class to which the specific items in the definition belong as being: types of entities. This interpretation does not automatically lead to the conclusion that the general phrase “any . . . group . . . associated in fact” must mean only legitimate associations. Both legitimate and illegitimate associations may belong to the general class: types of entities.

In any event, *ejusdem generis* is not a rule of law. It is merely a tool that can be used when the intent of the legislature is not otherwise apparent. In the case of RICO, however, there is convincing evidence of a legislative intent to make the definition of “enterprise” expansive. As pointed out by Professor Robert Blakey of Notre Dame, former chief counsel to the Senate Subcommittee on Criminal Laws and Procedures during the time that RICO was drafted, Congress very carefully selected the word “includes” for use in the definition of “enterprise.” “Includes,” the professor notes, is a term of enlargement, not of limitation. Thus, the definition of “enterprise” in the statute, like that of the term “person,” operates by way of illustration, not by way of limitation. That Congress knew what it was doing in this regard is amply demonstrated by its choice of words in the more restrictive definition of “racketeering activity.” There, Congress carefully used a limiting term: racketeering activity “*means . . .*”

**Legislative History**

RICO’s legislative history undeniably shows that Congress was deeply concerned with the infiltration of legitimate businesses by racketeers when it enacted the statute. But there can be no doubt that Congress never expressly disclaimed interest in applying RICO to wholly illegitimate enterprises. The argument that the legislative history shows a single-minded resolve by Congress that RICO should apply only to legitimate enterprises depends for its success on the existence of a negative: Congress did not expressly proclaim the statute’s applicability to illegitimate “enterprises”; therefore, despite the clear meaning


136. *See* note 11 *supra* for the statutory definition of “racketeering activity.”
of the statutory definition of "enterprise," the statute cannot apply to illegitimate "enterprises."

This focus on the congressional purpose in enacting RICO tends to become parochial. The fundamental purpose of the Organized Crime Control Act, to eradicate organized crime in the United States, is ignored while Congress' concern with the infiltration of legitimate businesses is thrust to the forefront as evidence of a purported "congressional intent" to limit the scope of RICO. The legislative history contains a wealth of evidence indicating that Congress was fully aware of the broad scope of the problem which it faced and of the need to launch a broad-based attack on that problem. For example, in addition to the remarks previously mentioned, Senator McClellan made the following introductory comments before a House subcommittee conducting hearings on his bill which ultimately became the Organized Crime Control Act of 1970:

What I say to you today is that the crime situation in America is so critical and particularly so, I believe, with respect to organized crime, because organized crime supports and promotes unorganized crime: the victims of organized crime, for example, commit crimes in order to support their drug appetites and so forth.

This situation is so critical in my judgment that today it is incumbent upon the Congress of the United States to provide every legal tool within the framework of the Constitution that can be made available to our law enforcement officials to combat organized crime.

. . . . The social poison for which S. 30 is intended to be an effective antidote has already crippled or weakened vital organs and centers of our body politic, and it is still spreading and spreading rapidly. Unless we act effectively, and with dispatch, organized crime may well destroy the social, political, economic, and moral heart of our Nation.

Never in the history of America has organized crime had greater adverse impact and widespread control over the social, political, and economic lives of our citizens and institutions than it does today. Never has the national criminal syndicate known as La Cosa Nostra managed with greater success than now to maintain profitable operations in so many areas and in such a variety of illegal enterprises [sic]. . . .

One of those enterprises, of course, as we all know, is trade in narcotics . . . . We must not permit illicit operations such as this, sap-ping our vital strength as a society, to continue to plague and endanger this Nation.138

Similarly, in speaking of the inadequacies of existing laws for

137. See notes 36-44 supra and accompanying text.
138. House Hearings, supra note 38, at 86-87 (emphasis added).
dealing with racketeers, the Senate Report on the Organized Crime Control Act stated: "Obviously, the time has come for a frontal attack on the subversion of our economic system by organized criminal activities. . . . In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts."  

Considering these comments, it does not make a great deal of sense to assume that Congress was as concerned with limiting the scope of RICO as it was with eliminating organized crime. Certainly, Congress was greatly concerned with blocking organized crime's infiltration of legitimate businesses when it enacted RICO, and it spoke of RICO primarily in terms of that objective. But there is no indication that Congress intended that RICO should have that objective as its sole purpose. Indeed, as pointed out earlier, at least two congressmen articulated views indicating that RICO could be employed directly against racketeering activity.

A proper analysis of RICO's legislative history demands that more emphasis be placed upon the nature of the forces which led Congress to enact the Organized Crime Control Act and upon the central policy underlying the Act. Viewed in this light, the use of RICO to attack illegitimate "enterprises" which are operated through ancillary patterns of racketeering seems fully justified. It is undeniable that a major source of organized crime's power is the synergistic effect that occurs when one pattern of criminal activity, such as bribery and official corruption, is used to perpetuate and expand the other operations of an illegal association such as a Mafia "family." 

Moreover, as pointed out in the Senate report, a primary method used by organized crime to gain control of business concerns is the investment of "profits acquired from illegal ventures." The report also referred to the ineffectiveness of prosecution against organized crime figures "as long as the flow of money continues." In this connection, the report concluded that new approaches were needed to deal with the "economic base through which [organized criminals] constitute such a serious threat to the economic well being of the Nation." One such "new approach" could well be the use of RICO to attack illegitimate "enterprises" which are operated through a "pattern of racketeering ac-

140. See notes 42-44 supra and accompanying text.
141. See ORGANIZED CRIME, supra note 28, at 153-72 for a thorough discussion of the Mafia's use of bribery and corruption to maintain its power.
143. Id. at 78 (quoting the Attorney General's testimony before a Senate subcommittee).
144. Id. at 79.
tivity.” As suggested in United States v. Rone, such a use of RICO fully comports with the congressional desire to protect legitimate businesses. By using RICO against illegitimate “enterprises,” the flow of revenues generated by those “enterprises” is interdicted at the source. Deprived of those funds, racketeers are effectively barred from investing them in legitimate “enterprises.”

Elimination of the “Enterprise” Element

A major concern of the Turkette court was that the “enterprise” element would, in effect, be read out of the statute if the “enterprise” was defined as an association to commit the same crimes constituting the “pattern of racketeering activity.” Although not expressly addressed in such terms by the Turkette court, the danger seen by other courts and commentators in permitting such an “elimination” of the “enterprise” element was a potential violation of the fifth amendment’s double jeopardy clause. Under the test enunciated by the Supreme Court in Blockburger v. United States, a single act may be an offense against two statutes only if each statute requires proof of an additional fact which the other does not. If proof of the elements of one crime necessarily proves the elements of another, the two crimes are regarded as the “same offense” for double jeopardy purposes and

145. 598 F.2d 564 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980). See notes 66-70 supra and accompanying text.

146. 632 F.2d at 903. A secondary concern of the court in this regard was that such an “elimination” of the “enterprise” element would tend to disrupt the federal-state balance in law enforcement. 632 F.2d at 904. The court did not question that Congress could constitutionally assert federal law enforcement jurisdiction over areas traditionally reserved to state authorities. Instead, the court in Turkette was concerned that Congress had not sufficiently indicated an intention to take jurisdiction over traditionally local crimes to the extent that would result if the “enterprise” element were to be “eliminated” as in the government’s proposed use of RICO.

Absent the problem with the “enterprise” element, there is little room for doubt that Congress has the power to take jurisdiction over local crimes that affect interstate commerce. Congress’ power in this area derives from the commerce clause of the Constitution which provides that Congress shall have the power “[t]o regulate Commerce . . . among the several States . . . .” U.S. CONST. art. I, § 8, cl. 3. That power has frequently been held to be very broad, requiring only a de minimus effect on interstate commerce in order to justify federal jurisdiction. See, e.g., United States v. Staszcuk, 517 F.2d 53 (7th Cir.), cert. denied, 423 U.S. 837 (1975). See generally Comment, The Scope of Federal Criminal Jurisdiction Under the Commerce Clause, 1972 U. ILL. L.F. 805. Congress specifically included eight state crimes within RICO’s definition of “racketeering activity.” Certainly, there can be no clearer indication than this that Congress intended to assert federal jurisdiction where these crimes affected an interstate “enterprise.”


148. Atkinson, supra note 5, at 8; Bradley, supra note 32, at 855.

149. U.S. CONST. amend. V provides:

No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .

150. 284 U.S. 299 (1932).
the offender cannot be punished twice for the same offense. Thus, the argument is that where a conviction and separate sentence are obtained for both the RICO offense and the "pattern" crimes, the defendant is, in effect, punished twice for the same offense if the RICO "enterprise" element is effectively eliminated. Only if that element is proven independently of the "pattern" crimes does the RICO offense require proof of an additional fact and thus escape the "same offense" proscription of the Blockburger test.

It immediately becomes apparent under this analysis that, whatever double jeopardy problems may be lurking in the statutory language, they remain only latent problems until sentences are actually obtained for both the RICO offense and the "pattern" crimes. Thus, these potential problems can be avoided by electing to prosecute either the RICO offense or the "pattern" crimes, but not both. This is hardly a compelling reason to find that a RICO "enterprise" must be legitimate in order to avoid double jeopardy violations. This analysis also overlooks the fact that where state "pattern" crimes are involved, separate sentences for those crimes and the RICO offense are entirely permissible under the "dual sovereignty" doctrine of Abbate v. United States, even if the RICO offense is absolutely identical to the state "pattern" crimes.

Nevertheless, concern with the effective "elimination" of the "enterprise" element is justified. Congress clearly intended that there be independent proof of both an "enterprise" and a "pattern of racketeering activity" in order to obtain a RICO conviction. Where the "pattern of racketeering activity" automatically constitutes the "enterprise" in a case, the Government is allowed to obtain a conviction by providing evidence which proves only that the defendant engaged in a "pattern of racketeering activity." Thus, in United States v. Aleman, the Government offered proof that Aleman and his companions committed three home invasions. Clearly, this evidence satisfied the "pattern of racketeering activity" element of RICO. However, in the court's view, this same evidence, without more, automatically proved that

151. 359 U.S. 187 (1959). The "dual sovereignty" doctrine provides that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. Prosecutions under the laws of separate sovereigns such as the state and federal governments do not subject the defendant to be twice put in jeopardy for the same offense. See Bartkus v. Illinois, 359 U.S. 121 (1959); United States v. Lanza, 260 U.S. 377 (1922). In United States v. Wheeler, 435 U.S. 313 (1978), the Supreme Court discussed Bartkus and Abbate at length and clearly reaffirmed the validity of the "dual sovereignty" doctrine.

152. 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

153. See note 12 supra for the definition of "pattern of racketeering activity."
Aleman and his companions constituted a RICO “enterprise” by virtue of their having associated with each other to commit the home invasions. This carries the broad interpretation of RICO’s “enterprise” element too far. It is one thing to permit a RICO “enterprise” to be an association formed for wholly illegitimate purposes. It is another thing entirely to effectively dispense with the need to prove the existence of that “enterprise” independently of the bare association to commit the “pattern” crimes.

The First Circuit would eliminate this problem by confining the “enterprise” to legitimate associations, thereby ensuring that it remains distinct from the “pattern of racketeering activity,” which by definition consists of criminal conduct. Such an approach would prohibit a RICO prosecution of illegal gamblers for conducting illegal gambling through a pattern of illegal gambling or of prostitutes for conducting prostitution through a pattern of prostitution. This is a correct result where the same acts constitute both the “enterprise” and the “pattern of racketeering activity.” However, it would also prohibit a RICO prosecution in the Whitehead situation where the “enterprise” and the “pattern of racketeering activity,” while both illegal, are factually and conceptually distinct and proof of one does not obviate the need to prove the other.

A Better Approach

A better approach appears to be that taken by the Eighth Circuit in United States v. Anderson. Under that approach, it does not seem to be mandatory that the “enterprise” be legitimate, only that it be distinct from the crimes constituting the “pattern of racketeering activity” in the case. This view comports with the congressional requirement that the two elements be proven independently and does no violence to the statutory definition of “enterprise” which makes no distinction between legitimate and illegitimate “enterprises.” Under this approach, a RICO prosecution would be permissible in the Whitehead situation where the operations of an illegal interstate prostitution “enterprise” were facilitated through a “pattern” of bribery and official corruption. What this view would preclude is a RICO prosecution in the Aleman situation where no effective distinction existed between the home inva-

154. See note 17 supra for the indictment in Aleman which charged that the same home invasions constituted both the “enterprise” and the “pattern of racketeering activity.”

155. See notes 84-96 supra and accompanying text.
sion "enterprise" and the "pattern" of home invasions through which the affairs of that "enterprise" were conducted.

It is conceivable that difficulties might arise in affirming Turkette's conviction under the *Anderson* approach. For example, if the "enterprise" was taken to be the burglary ring and the distinct "pattern" crimes to be the arson and insurance fraud schemes, there is no solid indication that Turkette conducted the affairs of that "enterprise" through those "pattern" crimes. On the other hand, if the illegitimate "enterprise" could be found to be the drug distribution operation to which Turkette wholesaled his stolen drugs, there is no difficulty in seeing that he participated in the affairs of that "enterprise" through a distinct "pattern" of burglaries. In any event, there can be little doubt that demanding independent proof of the two crucial elements of the offense is preferable to permitting both elements to be satisfied by the same evidence. Such an approach is also preferable to one which relies upon what at best an ambiguous legislative history to impose a "legitimacy" requirement upon the unambiguous language in the statutory definition of the "enterprise" element.

A requirement that a RICO "enterprise" must be "legitimate" could create as many difficulties as it might solve. The word "legitimate" may be subject to varying interpretations. A question that would surely arise under such a "legitimacy" requirement would concern the degree of illegitimacy that would be tolerated in a business before it could no longer serve as a RICO "enterprise." A prostitution ring clearly could not be a RICO "enterprise" if the "enterprise" were required to be completely legitimate. However, an otherwise ostensibly legitimate business might be in violation of so many licensing ordinances, zoning regulations, or health codes so as to be completely "illegitimate" in the eyes of local authorities. Could such a business nevertheless be considered sufficiently legitimate to be a "legitimate enterprise" for purposes of RICO? Such a legitimacy requirement, whether added by Congress as an amendment to RICO or judicially engrafted by courts attempting to devine what Congress may have intended, would tempt racketeers to devise schemes whereby they could avoid prosecution under the statute by ensuring that every "enterprise" in which they engaged had an element of illegitimacy sufficient to remove it from the scope of RICO.
Conclusion

Relying on RICO's legislative history, the First Circuit in *Turkette* found that Congress was concerned with the infiltration of legitimate businesses by racketeers when it passed the Act. Drawing on this background and considering the interrelationship of RICO's subsections, as well as the relationship of RICO to the other provisions of the Organized Crime Control Act of 1970, the court concluded that RICO could be applied only to legitimate enterprises. The court found this conclusion to be justified by its concerns that a broader construction, encompassing illegitimate enterprises, would disturb the federal-state law enforcement balance and would tend to read the "enterprise" element out of the statute.

The most serious of those concerns, the elimination of the "enterprise" element, could also have been alleviated by an approach similar to that taken by the Eighth Circuit in *United States v. Anderson*. Under that approach, the crucial test is not the legitimacy of the "enterprise" but its existence distinct from the "pattern of racketeering activity." Since the language of the statute, when read literally and without resort to unnecessary use of statutory construction, does not demand that the "enterprise" be legitimate, it seems that the *Anderson* approach is preferable to that in *Turkette*. Such an approach would avoid the new set of problems which would arise as a result of engrafting a legitimacy requirement onto the "enterprise" element.

When the United States Supreme Court considers the *Turkette* case, it will be determining the future effectiveness of one of the most potent weapons in the arsenal against organized criminal groups ranging from the Mafia to sophisticated white collar criminals. It should not needlessly circumscribe the utility of this powerful statute by imposing a requirement that a RICO "enterprise" must be legitimate.* Any excesses which may have occurred in the use of RICO can be avoided in the future by demanding that the government prove the "enterprise" element by a set of facts independent of those offered to prove the "pattern of racketeering activity" element.

JOHN A. HELLER

* As the volume containing this case comment went to press, the Supreme Court handed down its decision in the *Turkette* case, holding that the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises. *United States v. Turkette*, 49 U.S.L.W. 4743 (U.S. June 17, 1981). Flatly rejecting the First Circuit's reasoning, the Court declared:

Contrary to the judgment below, neither the language nor structure of RICO limits its application to legitimate "enterprises." Applying it also to criminal organizations does not render any portion of the statute superfluous nor does it create any structural incongruities within the framework of the Act. The result is neither absurd nor surprising. On the contrary, isolating the wholly criminal enterprise from prosecution under RICO is the more incongruous position.
In view of the purposes and goals of the Act, as well as the language of the statute, we are unpersuaded that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime, and, in particular, under RICO, only the infiltration of legitimate business.

Id. at 4746-47 (emphasis in original).

The Court carefully pointed out, however, that the "enterprise" and the "pattern of racketeering activity" elements must both be proven in order to obtain a conviction under RICO:

In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity . . . . The pattern or racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. . . . The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Id. at 4745 (footnote omitted).