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REACHING A DEEP POCKET UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

MARK STEPHEN POKER*

I. INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (RICO)\(^1\) was enacted as Title IX of the Organized Crime Control Act of 1970.\(^2\) The primary purpose of RICO was to combat the infiltration of organized crime into legitimate businesses.\(^3\) To eradicate this infiltration, RICO authorizes substantial criminal and civil penalties. This Article exclusively examines RICO in a civil context. A civil violation of RICO can result in the recovery of treble damages, attorney fees and costs.\(^4\) In recent years, the Act has been applied in areas far afield from the commonly perceived domain of the

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3. The Statement of Findings and Purpose of the Organized Crime Control Act of 1970 reads, in part, that “[i]t is the purpose of this Act to seek the eradication of organized crime . . . .” Id. at 923.
4. 18 U.S.C. § 1964(c) (1982). Recently, amendments to the federal RICO statute were introduced that would have limited recoveries in most RICO business litigation to actual damages. The bill entitled “RICO Reform Act of 1989,” similar to other legislative proposals to limit RICO, was not enacted. The bill limited recovery to costs, attorney fees, and discretionary punitive damages of up to twice actual damages for limited categories of private plaintiffs. Treble damages would have remained available in a suit against a defendant convicted of a related offense.
racketeer. Today, a major source of RICO claims originates from common business and financial relationships. This broad application has created a feverish dispute over the proper interpretation and scope of RICO, which has resonated through academia as well as the courts.

By virtue of RICO's civil remedy provisions, plaintiffs can convert many common torts into federal treble damage actions. However, in many instances an individual defendant is unable to satisfy a RICO judgment. In such a case, a RICO suit would not be economically worthwhile, unless the plaintiff had access to a "deep pocket." Plaintiffs have attempted to reach these "pockets" directly through the application of the Act's provisions and indirectly under the theories of respondeat superior and aiding and abetting. In the typical RICO suit, where the plaintiff is defrauded by a company, courts have held that the company cannot be liable under all of the Act's civil liability provisions. Accordingly, plaintiffs seeking access to a


9. A majority of courts have ruled that under § 1962(c) a corporation-enterprise cannot be held liable as a person under RICO. See, e.g., Liquid Air, 834 F.2d at 1297; Petro-Tech, 824 F.2d at 1349; Schofield, 793 F.2d at 28; Bennett v. United States Trust Co., 770 F.2d 308, 315 (2d Cir. 1985); B.F. Hirsch v. Enright Ref. Co., 751 F.2d 628, 634 (3d Cir. 1984); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 399-402 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985); Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984); Bennett v. Berg, 685 F.2d 1053, 1061-62 (8th Cir. 1982); United States v. Computer Sciences Corp., 689 F.2d 1181, 1190-91 (4th Cir. 1982).
"deep pocket" through the application of the Act's liability provisions have been forced to bring their case under other sections of the Act. Until recently, courts have not embraced the application of the *respondeat superior* doctrine in RICO cases. The Third and Seventh Circuits have held that a company can be sued directly under the Act as well as indirectly under the common law theory of *respondeat superior*. However, under the Seventh Circuit's restrictive interpretation of *respondeat superior* the application of the doctrine is unnecessarily limited. In addition, the United States Court of Appeals for the Third Circuit has also ruled that a company can incur RICO liability under the theory of aiding and abetting. The courts' adoption of these theories potentially represents an important breakthrough in RICO litigation.

This Article addresses the means as well as the appropriateness of granting a RICO plaintiff access to a "deep pocket." The Article begins with an overview of the RICO Act, as well as the elements of a RICO claim, and will focus on some of the special considerations in bringing a RICO claim. A brief discussion of Wisconsin's Organized Crime Control Act will follow. After laying this foundation, the means and appropriateness of granting access to a "deep pocket" will be explored from two perspectives. First, a plaintiff's ability to directly hold a company liable under RICO's provisions will be examined. Second, a plaintiff's ability to hold a company liable under RICO, based upon the theories of *respondeat superior* as well as aiding and abetting, will be analyzed.

II. AN OVERVIEW OF RICO

A. The Statutory Framework

Broadly speaking, a RICO violation results "from the use of power, acquired by crime, to gain or maintain a foothold in an enterprise that operates in interstate commerce." In order to understand the elements of a civil RICO cause of action, it is necessary to refer to three different sections of the Act. Subsection 1964(c) provides a RICO claimant with a private

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10. Because plaintiffs have been precluded from holding a corporation-enterprise liable as a person under § 1962(c), they have been forced to allege a violation under § 1962(a) or § 1962(b). See, e.g., *Liquid Air*, 834 F.2d at 1297.

11. See supra note 7.

12. *Liquid Air*, 834 F.2d at 1300; *Petro-Tech*, 824 F.2d at 1351.


right of action. This section awards treble damages, costs and attorney fees to "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . ." Over the last few years the use of the private right of action provision has dramatically increased. The increase has been compelled, in part, by the possibility of winning treble damages and attorney fees. Legislative changes to the penalty provisions have been proposed in an attempt to reduce the amount of RICO litigation. Arguably, the increase in litigation is primarily due to the broad language of the Act. In the preamble of RICO, Congress expressly provided that "the provisions of . . . [RICO] shall be liberally construed to effectuate its remedial purposes." In light of RICO's expansive breadth and harsh penalties, it is not surprising that plaintiffs have applied the Act in "garden variety" business fraud cases.

The second section that is crucial to an understanding of a civil RICO claim is Section 1962. Under Section 1962, four types of relationships are prohibited. Subsection 1962(a) prohibits the investment of income, derived from a pattern of racketeering activity, in "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." In

15. Subsection 1964(c) reads as follows: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover treble damages, costs and the suit, including a reasonable attorney's fees." 18 U.S.C. § 1964(c) (1984).
16. Id.
17. Of the 270 district court decisions interpreting RICO prior to 1985, only 2% of the cases were decided throughout the 1970s, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984. ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55 (1985).
19. See supra note 4.
23. Subsection 1962(a) provides in full as follows:
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
addition, subsection 1962(a) requires that the defendant must have engaged as a principal in the racketeering activity. 24 Essentially, this subsection is concerned with criminals who buy their way into businesses by investing their ill-gotten gains.

Subsection 1962(b) prohibits any person from acquiring any interest in, or exerting control over, an enterprise through a pattern of racketeering activity. 25 Clearly, this provision was directed at organized crime’s use of force to extort transfers of business interests. However, the provision can be applied to everyday commercial activities such as mergers.

Subsection 1962(c) is the most frequently used provision. 26 This subsection prohibits any person employed by or associated with an enterprise from conducting the affairs of that enterprise through a pattern of racketeering activity. 27 It must be recognized that subsection 1962(c) requires only a showing of participation in the enterprise’s affairs. Clearly, no evidence of income source or control of an enterprise is required. Subsections 1962(a) and 1962(b) appear to place a significant additional burden on a plaintiff. A demonstration of the source and disposition of illegal income or control,
which may exist only informally, must be established. 28 Lastly, subsection 1962(d) prohibits a conspiracy to violate subsections (a), (b) or (c). 29

By virtue of the interaction of Section 1964 and Section 1962, it is clear that a plaintiff stating a claim for civil damages under RICO has two pleading burdens. First, a plaintiff has to allege that the defendant has violated Section 1962. 30 Second, a plaintiff must allege that he was "injured in his business or property by reason of a violation of Section 1962." 31 To satisfy the first pleading burden, the plaintiff must allege the existence of the following seven elements: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." 32

Lastly, Section 1961 must be carefully examined in order to understand a civil RICO cause of action. 33 The statutory definitions, which give meaning to the RICO violations of Section 1962, are presented in Section 1961. In view of the interrelationship between Sections 1962 and 1961, a detailed examination of the Act’s definitions is warranted.

B. Definitions

1. Person

Only persons can sue or be sued under Section 1962. Pursuant to subsection 1961(3), "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." 34 By virtue of this broad definition, as well as RICO's preamble, it would appear that civil RICO should not be restricted to particular persons. 35 In addition, use of "includes" rather than "means" in subsection 1961(3) conveys the conclusion

28. One commentator has stated, in reference to § 1962, that "[o]nly one of the three prohibitions in title IX requires tracing of funds . . . violations of the other two — which essentially proscribe acquisition or operation of a business through racketeering activity — will be far easier to prove." McClellan, The Organized Crime Act or Its Critics: Which Threatens Civil Liberties?, 46 NOTRE DAME L. REV. 55, 145 (1970).

29. Subsection 1962(d) reads as follows: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." 18 U.S.C. § 1962(d) (1984).

30. Moss, 719 F.2d at 17.

31. Id.

32. Id.


34. Id. at § 1961(3).

that items not specifically enumerated may be "included" in the definition. Accordingly, it is not surprising that the majority of courts have ruled that the culpable person need not have some connection to "organized crime" in order to be subject to a civil RICO action.\textsuperscript{36}

2. Racketeering Activity

RICO punishes conduct, not status. The targets of RICO are defined by what they do rather than by the characteristics they possess. Consequently, a plaintiff must show that the defendant participated in a "pattern" of racketeering activity.\textsuperscript{37} Subsection 1961(1) defines racketeering activity as an act or threat that is chargeable under certain state criminal laws, or an act that is indictable under a host of federal statutes, including mail fraud, wire fraud, and any offense involving "fraud in the sale of securities."\textsuperscript{38} These activities are referred to as "predicate acts." In view of Congress' comprehensive approach in defining "racketeering activity," it would be difficult to execute a crime relating to commerce that would not fall within the scope of RICO. Generally, most private RICO suits involve business and security fraud.\textsuperscript{39}

Until recently, some courts had required that a defendant be convicted of the predicate act(s) before a civil action could be brought.\textsuperscript{40} The United States Supreme Court, however, in \textit{Sedima S.P.R.L. v. Imrex Co.},\textsuperscript{41} held that RICO's language does not contain any indication of the prior conviction requirement.\textsuperscript{42} Consequently, racketeering activity consists of acts for which the defendant \textit{has} been indicted as well as for acts for which he \textit{could} be indicted.\textsuperscript{43} Notwithstanding the Court's rejection of this controversial


\textsuperscript{37} See \textit{supra} note 32 and accompanying text.


\textsuperscript{39} Of 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% involved common-law fraud in a commercial or business setting, and only 9% involved "allegations of criminal activity of a type generally associated with professional criminals." \textbf{ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55} (1985).

\textsuperscript{40} \textit{Bunker Ramo Corp.}, 713 F.2d at 1287; USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982); United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974); Parnes v. Heinhold Commodities, Inc., 487 F. Supp. 645, 647 (N.D. Ill. 1980).

\textsuperscript{41} 473 U.S. 479 (1985).

\textsuperscript{42} \textit{Id.} at 483-93.

\textsuperscript{43} \textit{Id.} at 488 (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)).
limitation, it should be recognized that a plaintiff must plead and prove the elements of the predicate act(s) to sustain the "racketeering activity" element of a civil RICO claim. For example, if mail or wire fraud violations are the predicate acts, a plaintiff must allege: (1) formation of a scheme or artifice with intent to defraud, and (2) use of the mails or wires for the purpose of executing the scheme. However, the majority of courts have ruled that a plaintiff must only prove these elements by a preponderance of the evidence rather than the criminal "beyond a reasonable doubt" standard. Moreover, prior to the Court's holding in *Sedima*, many courts ruled that in order to recover under civil RICO, a plaintiff was required to prove a special type of injury, over and above that caused by the predicate acts. In rejecting the "special injury" requirement, the *Sedima* Court observed that RICO was an aggressive initiative to supplement old remedies and develop new methods of fighting crime.

3. Pattern

As noted, to succeed on a civil RICO claim, a plaintiff must allege and prove a "pattern of racketeering activity." Subsection 1961(5) defines a "pattern" as "at least two acts of racketeering activity." However, these must have occurred within ten years of each other with at least one act occurring after the effective date of the statute. While two acts are necessary, as a practical matter, they may not be sufficient to constitute a "pat-
tern.” Specifically, in order for separate acts to form a “pattern,” they must be related and have continuity.51

Case law suggests that if a similarity of purpose exists, that is, the purpose of conducting the affairs of the enterprise, then the acts are related.52 Essentially, the acts have continuity under RICO if they are not sporadic, and therefore, pose a threat of continuing racketeering activity.53 The continuity aspect of a “pattern,” however, has proved to be a problematic concept for the courts to standardize. Unfortunately, there has been a plethora of differing views between the federal courts as to what is necessary to satisfy the continuity element of a “pattern.”

For example, the Eleventh Circuit has ruled that a single “scheme” involving numerous acts against several victims may constitute a pattern.54 The Seventh55 and Ninth56 Circuits have held that a “single grand scheme” involving numerous acts against a single victim may constitute a “pattern.” In contrast, the Tenth Circuit has observed that a single scheme against a single victim does not qualify as a pattern even if numerous discrete acts are involved.57 The Fourth Circuit has been even more restrictive, in that, even if a single scheme involves numerous victims, the acts still are not continuous so as to qualify as a pattern.58 The Eighth Circuit has also taken the stance that two separate schemes must exist before a pattern can be established.59 It would appear that the more restrictive interpretations of a “pattern” are the product of an anti-RICO bias towards RICO’s use against legitimate businesses. The breadth of RICO’s venue provision, which will be discussed,60 and the differing views of continuity among the circuits, has increased the prevalence of “forum shopping” between circuits.

It is anticipated that forum shopping as to the pattern question will be reduced to some degree by virtue of the recent Supreme Court holding in *H.J. Inc. v. Northwestern Bell Telephone Co.*61 In *H.J. Inc.*, the Court unanimously rejected the Eighth Circuit’s multiple scheme requirement.62 The

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56. Sun Savings and Loan Ass’n v. Dierdorff, 825 F.2d 187 (9th Cir. 1987).
57. Torwest DBC, Inc. v. Dick, 810 F.2d 925 (10th Cir. 1987).
59. Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986).
60. See *infra* notes 80-90 and accompanying text.
62. *Id.* at —, 109 S. Ct. at 4953-54, 4958.
Court noted that continuity is centrally a temporal concept and may be demonstrated in a variety of ways. The flexible approach adopted by the Court falls short of a definitive explanation of the pattern requirement, and will require further judicial interpretation and refinement. More significantly, Justice Scalia’s concurring opinion noted that the Court’s perceived inability to clearly construe the pattern element, and Congress’ failure to clarify the statute, may be enough to render the statute unconstitutionally vague.

4. Enterprise

The existence of an “enterprise,” which is the instrument or the target of racketeering, is required to establish a civil RICO claim. Under the Act, the term “enterprise” is defined to include “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . .” Relying on this broad definition, the Supreme Court recognized in United States v. Turkette that an “enterprise” encompasses legitimate as well as illegitimate entities and associations of individuals. However, courts have indicated that an enterprise is more likely to be found where the alleged enterprise is a legal entity as opposed to an associational enterprise. Clearly, where a legal entity is the vehicle or target of the racketeering activity, identifying the enterprise is not difficult because evidence of the legal existence of the entity will normally be sufficient. As to associations in fact, their existence may be proven by both circumstantial and direct evidence.

63. Id. at —, 109 S. Ct. at 4954. With respect to continuity, the majority asserted that a series of related predicate acts extending over a “substantial period of time,” or other evidence of acts constituting or threatening “long-term criminal conduct” is necessary. In contrast, acts extending over a few weeks or months, which do not threaten long-term racketeering activity, are not sufficient. Id.

64. Id. at —, 109 S. Ct. at 4957-58 (Scalia, J., concurring). It should be noted that the RICO statute has been upheld as not unconstitutionally vague by lower courts. See, e.g., United States v. Scotto, 641 F.2d 47, 52 (2d Cir. 1980).

65. See supra note 32 and accompanying text.


68. Id. at 580-81.


70. Bennett, 685 F.2d at 1060.

71. United States v. Thevis, 665 F.2d 616, 625 (5th Cir. 1982). Note that a foreign or a domestic business may constitute an enterprise.
In attempting to determine the proper scope of RICO, courts continue to wrestle with two "enterprise" related issues. First, courts disagree as to whether proof of the "enterprise" must be distinct from proof "of the pattern of racketeering activity." In Turkette, the Supreme Court ruled that the existence of an enterprise and the existence of racketeering activity are distinct elements of a RICO claim. Some courts have interpreted this decision to stand for the proposition that the "enterprise" must have an existence entirely distinct and independent of the racketeering activity. This restrictive interpretation is inherently based upon the discredited view that RICO defendants must be tied to organized crime. On the other hand, some courts have read Turkette to hold that proof of the "racketeering activity" and the enterprise need not be separate and distinct, notwithstanding the fact that the enterprise and "racketeering activity" are separate elements. This interpretation is consistent with the Turkette Court's assertion that "the proof used to establish these separate elements may in particular cases coalesce."

Second, there is a split of authority as to whether the "person" committing a RICO violation must be distinct from the "enterprise." Part IV of this Article presents and analyzes the courts' resolution of this issue.

C. Special Considerations

1. Venue and Process

The RICO Act contains its own provisions for venue as well as service of process. The Act's venue provision provides that a civil RICO claim may be instituted in any "district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs." Under this provision, a suit may be brought against a corporation


73. Turkette, 452 U.S. at 583.

74. Bennett, 685 F.2d at 1060; United States v. Anderson, 626 F.2d 1358, 1367 (8th Cir. 1980).

75. See, e.g., Anderson, 626 F.2d at 1372.

76. Moss, 719 F.2d at 22; Mazzei, 700 F.2d at 89-90.

77. Turkette, 452 U.S. at 583.


79. See infra notes 153-213 and accompanying text.

in the judicial district in which it is incorporated.\textsuperscript{81} Moreover, by virtue of the "transacts his affairs" language, a claim may be instituted against a corporation if it carries on business of "a substantial and continuous character" within the district.\textsuperscript{82} The above venue provision is not exclusive, however, in that an action may also be brought where the cause of action "arose" pursuant to the general federal venue statute.\textsuperscript{83} Federal courts relying on the federal venue statute in civil RICO cases have held that the claim "arose" where the defendant's predicate act of communications originated.\textsuperscript{84}

As to service of process, the RICO Act provides that "in any action or proceeding under this chapter [process] may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs."\textsuperscript{85} Clearly, this provision provides for nationwide service of process. Where nationwide service of process is authorized, courts have held that due process requires that a defendant only have minimum contacts with the United States.\textsuperscript{86} Accordingly, the "minimum contacts" test, as enunciated in \textit{International Shoe Co. v. Washington},\textsuperscript{87} does not apply to a civil RICO case. It should be recognized that the RICO Act is silent as to the manner in which service may be made, and therefore, Rule 4 of the Federal Rules of Civil Procedure controls the manner of service.\textsuperscript{88}

Proper jurisdiction and venue must exist as to each defendant in a civil RICO action.\textsuperscript{89} In cases involving multiple defendants, some of the defendants may not have the necessary contacts with the district to be brought into the action. In these instances, the court may "cure" the venue or process deficiencies by ordering, pursuant to subsection 1965(b) of the Act, that the parties residing outside the district be brought before the court if

\begin{thebibliography}{99}
\bibitem{81} Van Schaick, 535 F. Supp. at 1133-34.
\bibitem{86} See, e.g., F.T.C. v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. 1981); Clement, 575 F. Supp. at 438.
\bibitem{87} 326 U.S. 310 (1945).
\end{thebibliography}
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"the ends of justice" so require. In light of the breadth of the Act's venue and service of process provisions, it seems likely that forum shopping between the districts will occur. Consequently, a uniform interpretation of RICO's substantive provisions is crucial.

2. Concurrent Jurisdiction

The RICO Act clearly confers jurisdiction on the federal district courts to entertain civil actions, but it does not indicate whether this jurisdiction is concurrent with that of state courts or is exclusive. Unquestionably, attorneys are attracted to RICO by virtue of its treble damages and attorney fees provisions. In the past, however, many attorneys may have been reluctant to file a suit under RICO because they wished to avoid federal court. Consequently, the attorneys only filed a suit under state law. Attorneys may have based their decision to avoid federal court on the fact that they were more familiar with state courts than with federal courts, or because the federal courts were an inconvenient forum. The issue of concurrent jurisdiction shall be decided definitively in the near future by the United States Supreme Court. Recently, the Ninth Circuit Court of Appeals in Lou v. Belzberg ruled that federal RICO suits can be brought in state courts. Accordingly, it appears that pending the Supreme Court's determination, plaintiffs' attorneys may no longer have to sacrifice treble damages and fees for familiarity or convenience.

The general rule is that state courts have concurrent jurisdiction over suits concerning federal statutes unless Congress' intent can otherwise be discerned from (1) express language in the statute; (2) an unmistakable implication from legislative history, or (3) clear incompatibility between state court jurisdiction and federal interests. The Ninth Circuit held that none of these factors is present in the RICO context. Specifically, subsection 1964(c) provides that suits may be brought in federal court. With respect to the second factor, the Ninth Circuit pointed out that subsection 1964(c) "was consciously modeled after section 4 of the Clayton Act, 15 U.S.C. section 15, which has been judicially construed to require exclusive federal

Nevertheless, the court held that this is not sufficient to constitute an “unmistakable implication” so as to circumvent the general rule. Finally, the court correctly concluded that the incompatibility exception was inapplicable because federal judges do not have any special expertise in RICO suits.99

The Ninth Circuit was the first circuit to rule on the issue of concurrent jurisdiction in RICO cases. In contrast, the Seventh Circuit asserted in dicta that it would be reluctant to conclude that suits cannot be brought in state court.100 The lower federal courts have been sharply divided on this issue.101 Two state supreme courts, which have addressed the issue, have held in favor of state court jurisdiction.102 However, there have been decisions to the contrary by state appellate courts.103

3. Statute of Limitations

The RICO Act does not include a statute of limitations provision. Accordingly, it has been a long-standing practice to borrow the most analogous state statute of limitations.104 Because RICO cases concern interstate transactions, the statute of limitations of several states could apply to a RICO claim.105 Therefore, the adoption of state statute of limitations laws has caused uncertainty and confusion.106 In addition, it creates a danger of increased forum shopping, and the application of an unduly short statute of limitations.107 Recently, the United States Supreme Court resolved the

100. County of Cook v. Midcon Corp., 773 F.2d 892, 905 n.4 (7th Cir. 1985). But see Chivas Products Ltd. v. Owen, 864 F.2d 1280, 1283-86 (6th Cir. 1988) (exclusive jurisdiction).
statute of limitations issue. In *Agency Holding Corp. v. Malley-Duff & Associates*, the Court ruled that the Clayton Act, a federal law, offers the closest analogy to civil RICO, and therefore, the Clayton Act's four-year statute of limitations should apply to all federal civil RICO suits. The Supreme Court held that if courts were required in each case to choose the most analogous state limitations period, intolerable uncertainty and "time-consuming litigation" would result.

However, *Agency Holding Corp.* did not present the Court with an opportunity to decide when a civil RICO cause of action accrues. In general, there are two schools of thought with respect to the accrual of a civil RICO action. Some courts have held that a civil RICO claim runs from the date a plaintiff knew or should have known that the elements of the civil RICO cause of action existed. This is otherwise known as the simple discovery rule, which has apparently been adopted by five federal appellate courts.

The Third Circuit expanded upon the discovery rule in *Keystone Ins. Co. v. Houghton*. In particular, *Keystone* holds that the simple discovery rule applies unless:

as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern . . . .

The courts which utilize the discovery rule appear to focus exclusively on the injury element for accrual purposes. In contrast, under the *Keystone* formulation, a plaintiff "must also be in a position where they know or should know that the predicate act causing injury is part of a pattern of racketeering."

By virtue of the holding in *Agency Holding Corp.*, plaintiffs may be entitled to reopen their RICO case if they lost an earlier case on statute of limitations grounds. In view of the Supreme Court's decision in *Saint Fran-
cis College v. Al-Khazraji,¹¹⁶ it would appear that the Agency Holding Corp. decision should only be applied prospectively. In other words, if a plaintiff was planning on filing a law suit, but had not done so because the law in the applicable jurisdiction had a statute of limitations exceeding four years, the claim should not be barred even though the four-year period had expired. However, some courts, that have addressed this issue, have concluded that the statute of limitations should be retroactively applied.¹¹⁷ In addition, plaintiffs may be able to utilize equitable tolling doctrines to reopen a suit otherwise barred on statute of limitations grounds.¹¹⁸

III. STATE RICO — WISCONSIN

In the late 1970s, state laws modeled after the federal RICO Act began appearing with increasing frequency.¹¹⁹ While some states essentially copied the federal act, others enacted laws that are substantially different from the federal RICO Act. For example, under Arizona and Rhode Island law, a plaintiff need not establish a pattern of activity.¹²⁰ In addition, not all of the state laws allow recovery of treble damages.¹²¹ In fact, some of the states do not authorize private suits.¹²² Because of this diversity in state anti-racketeering legislation, it is not possible to make meaningful generalizations as to the content of the states’ laws.

Section 946.80 of the Wisconsin Statutes, which is entitled the “Wisconsin Organized Crime Control Act,” generally parallels federal RICO law.¹²³

¹¹⁶. 481 U.S. 604 (1987). The principal holding in Saint Francis College related to the right of members of ethnic groups to sue for job discrimination under the federal civil rights laws. Id. at 607. The Court also held that where a statute of limitations is shortened as a result of a court decision, the decision should be applied prospectively only and should not ban a claim by a party who had been relying on existing caselaw. Id. at 608-09 (emphasis added).
¹²¹. Hawaii authorizes only actual damage recoveries. See HAW. REV. STAT. § 842-8(c) (1986). In addition, Utah and Wisconsin only grant double damage recoveries. See UTAH CODE ANN. § 76-10-1605(1) (1986); WIS. STAT. § 946.86(4) (1987-88).
¹²². Neither California, Connecticut nor New York authorize private suits under their anti-racketeering legislation.
¹²³. WIS. STAT. §§ 946.80-.87 (1987-88).
As a result, the pleading requirements for a claim under federal RICO are applicable to a claim under the Wisconsin formulation, except where the Wisconsin legislature expressly adopted alternative requirements. The Wisconsin Act does differ from federal RICO in some important respects. This Article will briefly highlight these differences as well as some similarities in an effort to provide the Wisconsin practitioner with some guidance. At the onset, it must be pointed out that the intent of the Wisconsin Act "is to impose sanctions against [the] subversion of the economy by organized criminal elements and to provide compensation to private persons injured thereby." Clearly, it was not the legislature's intent "that isolated incidents of misdemeanor conduct be prosecuted under [the] act, but only an interrelated pattern of criminal activity the motive or effect of which is to derive pecuniary gain." Although the state appellate courts and the federal bench's treatment of the Wisconsin Organized Crime Control Act has been limited, the issues of pattern and separateness of the person from the enterprise have been explored.

An important difference between the Wisconsin Act and federal RICO exists in the way the laws define a "pattern of racketeering activity." Under the Wisconsin Act, at least three interrelated incidents of racketeering activity are required before the activity constitutes a "pattern." Moreover, the last incident must have occurred within seven years of the first incident. The definition expressly provides that acts "which may form the basis for crimes punishable under more than one statutory provision may count for only one incident of racketeering activity." Unlike the federal statute, isolated events are not eliminated from the scope of the Wisconsin Act. As a result, under Wisconsin RICO a pattern may result notwithstanding the existence of a simple episode of wrongdoing. Clearly, a claim under Chapter 946 does not stand or fall with a federal claim.

The issue of whether subsection 946.83(3) requires a person to be separate from the enterprise was addressed by the Wisconsin Court of Appeals

126. Id.
128. Id.
129. Id.
131. Id.
in *State v. Judd.* Note that subsection 946.83(3) is Wisconsin's counterpart to subsection 1962(c) of the federal statute. The Court of Appeals concluded that subsection 946.83(3) requires that a person be separate from the enterprise. The court also addressed the question of whether a sole shareholder of a corporation was in fact "separate" from the corporation for purposes of subsection 946.83(3). The court concluded that under the Wisconsin Act "an individual is separate from a solely owned enterprise, as a matter of law, when that enterprise is a corporation."

Similar to the federal statute, a state law action under Chapter 946 can be brought based upon allegations of federal mail, wire or securities fraud. In addition, under the Wisconsin Act, statutory prohibitions exist concerning the following activities: (1) bribery of public officials; (2) commercial bribery; (3) false statements by officers or directors in corporate certificates or reports; (4) obtaining property by deception or false pretense; (5) extortion; (6) franchise misrepresentations; (7) record tampering; (8) state securities violations; (9) theft of trade secrets, and (10) banking officer and employee misconduct.

As stated above, Wisconsin's counterpart to Section 1962 of the federal statute is found in Section 946.83 of the Wisconsin Statutes. The only meaningful difference between these sections is that subsection 946.83(1) requires that a person using or investing proceeds received from a pattern of racketeering activity receive the said proceeds "with knowledge that the proceeds were derived . . . from a pattern of racketeering activity." In contrast, subsection 1962(a) does not require that the defendant have knowledge. It must be recognized that a plaintiff's ability to reach a deep pocket under section 946.83(1) may be restricted by virtue of the knowledge requirement.

Another important distinction between the Wisconsin Act and the federal statute is that a Wisconsin plaintiff can only recover two times the ac-

133. 147 Wis. 2d 398, 433 N.W.2d 260 (Ct. App. 1988).
134. Id. at 402, 433 N.W.2d at 262.
135. Id. at 405, 433 N.W.2d at 263.
136. Wis. STAT. § 946.82(4) (1987-88).
137. See id. at §§ 946.10-13.
138. Id. at § 134.05.
139. Id. at §§ 180.88, 181.69, 943.39.
140. Id. at § 943.20.
141. Id. at § 943.30.
142. Id. at § 553.41(3).
143. Id. at § 943.39.
144. Id. at §§ 551.41-.44, 184.09.
145. Id. at § 943.205.
146. Id. at §§ 221.17, .31, .39, .40.
147. Id. at § 946.83(1).
tual damages he sustains. However, under Wisconsin law a plaintiff may also recover punitive damages. The Federal RICO statute is silent as to the recovery of punitive damages. It should be noted that under the Wisconsin Act, state authorities, similar to federal authorities under the federal act, may institute civil proceedings. Moreover, the Wisconsin Act is similar to the federal statute in that a court has jurisdiction to prevent and restrain violations by ordering divestiture of a person's interest in an enterprise, imposing restrictions on future activities or investments of any person, or ordering dissolution or reorganization of any enterprise. Lastly, it should be pointed out that the statute of limitations under the Wisconsin Act is six years after a violation terminates or when the cause of action accrues.

IV. REACHING A DEEP POCKET UNDER SECTION 1962

RICO proscribes certain activities of "persons" in connection with an enterprise. Section 1961 of the statute contains such broad definitions of the terms "person" and "enterprise" that a corporation may satisfy both definitions. This raises the question of whether the same corporation can serve as a person and an enterprise in the same case. In other words, must the enterprise be distinct from the culpable person? If a corporation can be held liable as a culpable person when it serves as an enterprise, then the plaintiff has access to a deep pocket.

The majority of courts have held that a corporation cannot serve as an enterprise and be liable as a person in the same case under RICO's civil liability provisions. Recall that damages under RICO are imposed for violations of Section 1962. In turn, Section 1962 prohibits four types of interactions between enterprises and persons. Generally, courts have only allowed a corporation to assume the roles of enterprise and person at

148. Id. at § 946.86(4).
149. Id.
150. Id. at § 946.86(3).
151. Id. at § 946.86(1). The federal counterpart is found at 18 U.S.C. §§ 1964(a) and (b) (1982 & Supp. V 1987).
152. Wis. Stat. § 946.87(1) (1987-88). In light of the similarity between the federal and state acts, it is likely that Wisconsin courts would rely on federal case law when addressing the issue of when a cause of action accrues.
154. See generally Goldsmith, supra note 6, at 874-78; Long, supra note 6, at 245-46; Note, supra note 26, at 593-98.
155. See supra notes 22-32 and accompanying text.
the same time in claims brought under subsections 1962(a) and (b).\textsuperscript{156} This Article will now explore the courts' treatment of the person-enterprise distinction under Section 1962.

Most of the distinct person and enterprise debate has focused on subsection 1962(c). This subsection makes it unlawful for any person employed by or associated with an enterprise to conduct or participate, directly or indirectly, in the affairs of the enterprise through a pattern of racketeering activity.\textsuperscript{157} All of the circuits that have addressed the distinct person and enterprise issue in the context of subsection 1962(c), except for the Eleventh Circuit, have ruled that the liable person must be a separate entity from the enterprise.\textsuperscript{158} It should be noted that RICO's legislative history is silent on the separateness requirement. Nevertheless, in examining the statute, some courts have found that a violation of subsection 1962(c) requires two parties by virtue of the subsection's "employed by" or "associated with" language.\textsuperscript{159} Accordingly, the subsection requires a relationship between an enterprise and a person rather than requiring only the use of an enterprise by a person as under subsections 1962(a) and (b).\textsuperscript{160}

Courts have generally sought to buttress this statutory analysis by examining the relevant policies and potential consequences of requiring a distinction. Specifically, these courts have concluded that permitting a suit under subsection 1962(c) against the corporation-enterprise, which may have been a passive instrument or victim of the racketeering activity, would cause an obvious distortion of the statute.\textsuperscript{161} Other courts have ruled that subsection 1962(a) makes the corporation-enterprise liable only if it benefits

\textsuperscript{156} A minority of courts, however, have held that the same corporation can assume the roles of enterprise and person at the same time under subsection 1962(c). See, e.g., Hartley, 678 F.2d at 988-89; United States v. Benny, 559 F. Supp. 264, 268 (N.D. Cal. 1983). Although the federal district court in Seville Indus. Mach. Corp. v. Southwest Mach. Corp., 567 F. Supp. 1146, 1153-54 (D.N.J. 1983) did not reach the issue of the enterprise-person distinction, it expressed doubt over the viability of the distinction. \textit{Id.}

\textsuperscript{157} 18 U.S.C. § 1962(c) (1982).

\textsuperscript{158} Hartley, 678 F.2d at 988-89.

\textsuperscript{159} See, e.g., Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1300 (7th Cir. 1987); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 399-402 (7th Cir. 1984), \textit{aff'd}, 473 U.S. 606 (1985).

\textsuperscript{160} Enigmatically, most of the courts have generally refrained from engaging in a statutory analysis. In United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), the court relied upon an analogy between individuals and corporate entities. \textit{Id.} at 1190. The Ninth as well as the Eighth Circuit have adopted the \textit{Computer Sciences} rationale without further analysis. See Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984); Bennett v. Berg, 685 F.2d 1053, 1061 (8th Cir. 1982).

\textsuperscript{161} See, e.g., Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1358 (3d Cir. 1987); \textit{Haroco}, 747 F.2d at 401.
from the racketeering activity. Consequently, it has been concluded that the primary purpose of RICO, which "is to reach those who ultimately profit from racketeering," would not be served by allowing the same corporation to serve as an enterprise and a person in the same case under subsection 1962(c). However, as one might expect, courts have reached a contrary result in subsection 1962(a) claims. The courts’ statutory analysis of subsection 1962(c) seems to be well-reasoned. By using the terms "employed by" and "associated with," it appears that Congress contemplated a person distinct from the enterprise under subsection 1962(c). Critics may suggest that subsection 1962(c) only refers to "any person" and not to the culpable person. However, logic dictates that the culpable person is encompassed within "any person." Nevertheless, the policy rationale that the distinction is needed to protect victim enterprises seems ill-founded because an enterprise will be treated as a person if criminal intent is established.

If corporate liability was limited to subsections 1962(a) and (b), a plaintiff would have to trace the flow of illegal funds to the corporation-enterprise or establish that the corporation-enterprise controlled the funds. On the other hand, under a subsection 1962(c) claim, the plaintiff need only establish a relationship. On its face, it appears that by limiting corporate liability to subsections (a) and (b), the courts have eliminated those cases in which the racketeering activities did not result in the acquisition or control of funds by the corporation-enterprise. As a practical matter, this should not be the case because the distinction between a person and an enterprise under subsection (c) is vulnerable to clever pleading tactics by plaintiffs. A plaintiff should be able to reach into the corporation’s pocket under subsection 1962(c) if he alleges that the corporation is the culpable person and that the enterprise is "an association of fact," which is comprised of the corporation including its officers and directors. It must be remembered that the definition of an enterprise includes associations of individuals.

163. Haroco, 747 F.2d at 402.
164. See supra notes 22-32 and accompanying text.
166. See, e.g., Alexander Grant & Co. v. Tiffany Indus., 742 F.2d 408 (8th Cir. 1984).
167. See Bennett, 685 F.2d at 1059-60 (explanation of how to plead around the distinction).
168. See, e.g., Wilcox v. First Interstate Bank, 815 F.2d 522, 529 (9th Cir. 1987).
However, some courts have refused to allow inclusion of the corporate-defendant within the association of fact enterprise. As a result, the enterprise will lack sufficient structure and the plaintiff's claim will be deficient. In addition, a defendant may attack the plaintiff's pleading by impleading the remaining members of the enterprise, which would effectively destroy any separateness.

In determining whether the person must be distinct from the enterprise under subsection 1962(a), the federal appeals courts have engaged in statutory and policy analysis. Accordingly, the courts' approach to subsection (a) is consistent with their approach in examining subsection (c) claims. The circuits have uniformly ruled that the person need not be distinct from the enterprise under subsection (a). Moreover, the majority of district courts have held that the same corporation may occupy the roles of a person and an enterprise at the same time under 1962(a). One district court, however, has concluded that if it is inappropriate to plead a corporation as both the person and the entity under subsection (c), then it is inappropriate to do so under subsection (a). This rationale is specious because of the differences in the language of the respective subsections. Recall that subsection (a) only requires a use of an enterprise, whereas subsection (c) requires a relationship. In addition, it appears that the express language of subsection (a) encompasses circumstances under which the enterprise itself is liable for wrongdoing, in contrast to subsection (c).

The district courts have reached inconsistent results as to whether the culpable person must be distinct from the enterprise under subsection 1962(b). Recently a major step in resolving this conflict was taken by the Seventh Circuit Court of Appeals. In Liquid Air Corp. v. Rogers, the Seventh Circuit ruled that subsections (a) and (b) only require the use of an enterprise. Therefore, under Liquid Air Corp, there is no distinction between "investing in an enterprise" under subsection (a) and acquiring or maintaining an interest in an enterprise under subsection (b). It should

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171. See supra note 163.
175. 834 F.2d 1297.
176. Id. at 1307.
177. Id.
be recognized that this decision addressed the issue of whether a plaintiff alleging a subsection 1962(b) violation could hold a corporation vicariously liable under respondeat superior, rather than directly liable under subsection 1962(b). Nevertheless, the reasoning of this decision is directly applicable and would be controlling in the Seventh Circuit in a case where a plaintiff seeks to impose liability upon a corporation directly under subsection 1962(b). As the Liquid Air decision indicates, a plaintiff's ability to hold a corporation liable is not limited to the direct application of the RICO statute. This Article will now address these "indirect" means by which a plaintiff can obtain access to a deep pocket.

V. REACHING A DEEP POCKET INDIRECTLY

A. Respondeat Superior

The doctrine of respondeat superior requires that the master answer for the acts of his servant done on behalf of the master and within the scope of the servant's employment. The basic justification for the application of the doctrine is that "it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit." The modern economic rationale for the application of the doctrine is that the employer is in a better position to absorb the cost of these liabilities and to shift these costs to the public. In other words, the costs of these liabilities are internalized into the business. In order to hold the employer corporation liable under RICO, it appears that the plaintiff would only need to establish an employer-employee relationship and that the employee violated Section 1962. However, as discussed below, courts seem to require knowledge of the illegal acts by the employer as well as actual benefit to the employer.

The Third Circuit in Petro-Tech, Inc. v. Western Co. of North America, was the first circuit to address and embrace the common-law doctrine of respondeat superior in the RICO context. However, the court restricted the application of the doctrine to claims based upon subsection 1962(a). Prior to the holding in Petro-Tech, the District of Columbia

178. Id.
180. Id.; see also RESTATEMENT (SECOND) OF AGENCY § 219 (1958).
181. PROSSER, supra note 179, at 500-01.
182. 824 F.2d 1349 (3d Cir. 1987).
183. Id.
184. Id. at 1356-62.
The Circuit Court had rejected the theory of *respondeat superior* in a claim brought under subsection 1962(c).\(^{185}\) This rejection is consistent with the circuit's holdings that the person and the entity must be distinct under subsection 1962(c). To allow a plaintiff to, in effect, circumvent this person-enterprise distinction indirectly under the doctrine of *respondeat superior* would be impermissible.\(^{186}\) In embracing the doctrine in *Petro-Tech*, the Third Circuit noted that common law doctrines can be applied in litigation under a federal statute whenever they "advance the goals of the particular federal statute."\(^{187}\) The court then concluded that the basic justification for the common law doctrine is "that it is consistent with RICO's goal to facilitate recovery by the victims of racketeering activity."\(^{188}\) The only other circuit to address and approve the application of *respondeat superior* is the Seventh Circuit.

In *Liquid Air Corp. v. Rogers*,\(^ {189}\) the Seventh Circuit held that *respondeat superior* is "entirely appropriate under both subsections (a) and (b)."\(^ {190}\) The court observed that the imposition of vicarious liability under *respondeat superior* was consistent with congressional intent, provided the corporation *derived some benefit* from the RICO violation.\(^ {191}\) The "derived benefit" limitation is inconsistent with the doctrine of *respondeat superior* in that intent to benefit the principal is the focus of determining liability under the doctrine.\(^ {192}\) The Seventh Circuit has mistakenly narrowed the application of the doctrine by requiring an actual benefit as opposed to just an intent to benefit.\(^ {193}\) One commentator has urged that the internalization of "business costs" caused by *respondeat superior* is not within the intent of RICO.\(^ {194}\) Moreover, the application of the doctrine has caused concern that victim enterprises may be exposed to undeserved liability.\(^ {195}\) Both of these concerns appear to be misplaced in view of the Seventh Circuit's limitation that the defendant-corporation *actually derive* some benefit from the RICO violation. Even if an actual benefit were not required these concerns would be alleviated by the scope of employment requirement of *respondeat superior*.

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188. *Id.* at 1358.
189. 834 F.2d 1297 (7th Cir. 1987).
190. *Id.* at 1307.
191. *Id.*
192. *Restatement (Second) of Agency §§ 228, 235-36 (1958).*
193. *Liquid Air*, 834 F.2d at 1307.
However, just two months after the decision in *Liquid Air*, a panel composed of two of the three *Liquid Air* judges rejected the doctrine of *respondeat superior* in *D & S Auto Parts v. Schwartz*. A careful examination of these cases, however, allows one to reconcile these apparently inconsistent holdings. *Liquid Air* involved high level corporate officials and as such the corporation-enterprise, though not directly perpetrating the illegal acts, was deemed to have stood by silently while its employees conferred benefits upon it. In contrast, *D & S Auto Parts* involved lower level officers. Therefore, *D & S Auto Parts* should only be read as rejecting vicarious liability in situations in which the corporation is unaware of its employees' wrongdoings. However, the critical factor for determining liability under *respondeat superior* is whether the agent was acting in the scope of his or her employment, and not whether the employer had "knowledge."

Under *D & S Auto Parts*, a key factor in determining the corporation's awareness is the level of the corporate officials involved. Involvement of high level officials should result in *per se* knowledge. When lower level officers are involved, however, lines of demarcation are not as clear. In such instances the inquiry as to corporate awareness should be dependent upon the facts and circumstances of a particular case. In situations where a corporation has closed its eyes to an official's illegal acts, vicarious liability should be imposed and constructive knowledge should suffice. In view of the Seventh Circuit's requirements of employer awareness and actual benefit, the application of *respondeat superior* is unduly restrictive. In response, plaintiffs should also seek to impose liability based upon the theory of apparent authority. Under apparent authority, a principal is subject to liability "even if the conduct was committed solely to advance the agent's scheme." Further, the focus under apparent authority is on the plaintiff's view of the scope of the agent's authority as opposed to the employer's knowledge.

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196. 838 F.2d 964, 968 (7th Cir. 1988).
199. *D & S Auto Parts*, 838 F.2d at 967 n.5; see also Onesti v. Thompson McKinnon Sec., Inc., 619 F. Supp. 1262 (N.D. Ill. 1987).
201. *Id.* at 962-63.
B. Aiding and Abetting

In addition to the utilization of the theory of respondeat superior, it now appears that a RICO plaintiff may be able to reach a "deep pocket" under the civil common-law theory of aiding and abetting. Aiding and abetting has most commonly been used as a theory of criminal liability. However, the doctrine also has civil application and as such has been codified in the Restatement of Torts. The Fifth Circuit, in Armco Industrial Credit Corp. v. SLT Warehouse Co., was the first circuit to embrace the theory of aiding and abetting in the civil RICO context, but did not specifically address the rationale(s) supporting the adoption of the aiding and abetting theory. The Armco decision does, however, clearly establish that the plaintiff must prove the alleged aider or abettor "shared in the criminal intent of the principals."

Recently, the Third Circuit in Petro-Tech reaffirmed the Fifth Circuit's decision to allow access to a deep pocket based upon aiding and abetting. Unlike the Fifth Circuit, the Third Circuit asserted rationale in support of the imposition of civil RICO liability under the aiding and abetting theory. The Third Circuit held, that as a civil concept, the theory of aiding and abetting "will advance RICO's goals." Essentially, the Third Circuit's rationale behind the application of aiding and abetting is two-fold. First, civil RICO liability is dependent upon the commission of a pattern of criminal acts. Second, it is a general rule that anyone who aids or abets a crime is just as guilty of the crime as the actual perpetrator. Accordingly, anyone who aids or abets the crimes leading up to a RICO violation should be just as liable for them as the actual criminal. However, it must be recognized that the Third Circuit limited the doctrine's application to subsection 1962(a). The court explicitly stated that the use of the aiding and abetting theory under subsection 1962(c) would disrupt the subsection's in-

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206. 782 F.2d 475 (5th Cir. 1986).
207. Id. at 483-86.
208. Id. at 485.
209. Petro-Tech, 824 F.2d at 1356-62.
210. Id. at 1357.
211. Id.
212. Id.
213. Id. at 1360-61.
tended operation. Interestingly, the court did not address the viability of the theory as to subsection 1962(b) claims. It seems likely that some circuits will apply the theory of aiding and abetting to subsection 1962(b) claims in view of the Seventh Circuit's holding in Liquid Air, which provided that the doctrine of respondeat superior applied to subsection 1962(b) claims.

VI. CONCLUSION

By virtue of civil RICO's treble damages and attorney fees provision, the Act is one of the most fearsome weapons in a plaintiff's arsenal. Civil RICO offers a unique opportunity to punish illegal acts where it would be impossible to satisfy the burden of proof in a criminal case. However, in a given case, the corporate defendant may be the only potential defendant with the proverbial deep pocket. Accordingly, RICO's utility in many instances is dependent upon the plaintiff's ability to gain access to this deep pocket. Recently, courts have granted access more freely through the application of the theories of respondeat superior and aiding and abetting. The application of these doctrines as well as apparent authority to violations of subsections 1962(a) and (b) is consistent with RICO's intent and does not result in the abuse of the scope of the Act.

214. Id. at 1359.
215. Liquid Air, 834 F.2d at 1301.
216. See supra note 4 and accompanying text.
217. See supra note 45 and accompanying text.