Supreme Court Rejects Requirement That a RICO Enterprise Must Have a Structure Beyond That Inherent in the Pattern of Racketeering Activity in Which It Engages

On June 8, 2009, the Supreme Court issued a 7-2 decision in *Boyle* v. *United States*[1] that resolved a lower-court split concerning the RICO "enterprise" requirement in a way that will make it easier for RICO plaintiffs to plead "association in fact" enterprises. Relying on its earlier decision in *United States* v. *Turkette*,[2] the Court held that such an enterprise must have a "structure," but it rejected the requirement imposed by a number of lower courts that the structure must be something more than that which is inherent in the pattern of racketeering activity in which the enterprise engages. Together with last Term's decision in *Bridge* v. *Phoenix Bond & Indemnity Co.*,[3] *Boyle* marks a return to the common-sense, plain English mode of statutory interpretation that had been the hallmark of the Court's RICO jurisprudence for more than two decades before the 2006 detour into free-form policy analysis in *Anza* v. *Ideal Steel Supply Corp.*[4]

I. Background

Congress enacted RICO as an "aggressive initiative to supplement old remedies and develop new methods for fighting crime."[5] The principal substantive subsection of the statute provides that "[i]t 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 . . . ."[6] As the Supreme Court has clarified, "to establish liability . . . one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name."[7] The statutory term "person" is defined to include "any individual or entity capable of holding a legal or beneficial interest in property,"[8] while "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."[9] RICO threatens defendants with treble damages in a civil suit as well as with heightened criminal penalties including fines, imprisonment, and forfeiture.[10]

What a plaintiff must allege and prove to establish an "association in fact" RICO enterprise — *i.e.*, a "union or group of individuals associated in fact although not a legal entity" — has engendered a large volume of litigation over the two-plus decades that civil RICO actions have been part of the litigation landscape. The issue is of particular significance to corporate defendants, because a plaintiff who wishes to name a corporation as a RICO defendant must in general allege a RICO "enterprise" distinct from the corporation.[11] Frequently, the plaintiff will allege an association-in-fact RICO enterprise of which the corporation is one member. Thus, the

---

1 No. 07-1309, 2009 WL 1576571 (U.S. June 8, 2009).

2 452 U.S. 576 (1981).

3 128 S.Ct. 2131 (2008).

4 547 U.S. 451 (2006).

5 *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 498 (1985).

6 18 U.S.C. § 1962(c).

7 *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 161 (2001).

8 18 U.S.C. § 1961(3).

9 18 U.S.C. § 1961(4).

10 18 U.S.C. §§ 1963(a), 1964(c).

11 That the RICO "person" — the defendant — must be distinct from the "enterprise" is only clearly true under 18 U.S.C. § 1962(c); it is not in general true under subsection (a) of section 1962, and there is remarkably little law on whether it is true under subsection (b). Nevertheless, because claims under subsections (a) and (b) are notoriously difficult to bring for other reasons (related to the nature of the injury that must be alleged), the "person/enterprise distinction" is not easily avoided as a major threshold issue in civil RICO cases.

looser the requirements for pleading and proving an association-in-fact RICO enterprise, the easier it is for private plaintiffs to gain the leverage of a treble damages claim against a defendant corporation.

The Supreme Court offered its last direct guidance on the requirements for an association-in-fact RICO enterprise in *Turkette*. The core holding of *Turkette* was that RICO was not intended "solely to protect legitimate business enterprises from infiltration by racketeers," and therefore that "an association which performs only illegal acts" can fall within the RICO's definition of an "enterprise."[12] The Court explained that this holding did not conflate a "pattern of racketeering activity" with an "enterprise":

> "The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of 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 . . . ."[13]

The lower courts offered divergent interpretations of the "ongoing organization, formal or informal" that *Turkette* required of an association-in-fact enterprise. Some courts placed weight on the requirement that an enterprise have "organization" and held that a RICO enterprise must have a certain requisite "structure." For example, the Third Circuit's influential opinion in *United States* v. *Riccobene*[14] divided *Turkette*'s requirements for an association-in-fact enterprise into three elements. The first element was "ongoing organization," which required "that some sort of structure exists within the group for the making of decisions, whether it be hierarchical or consensual," or that there "be some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis."[15] The second element was that "the various associates function as a continuing unit," which required "that each person perform a role in the group consistent with the organizational structure established by the first element and which furthers the activities of the organization."[16] The third element was "an entity separate and apart from the pattern of activity in which it engages," which required that the enterprise "has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses."[17]

Other courts instead placed weight on the Supreme Court's instruction that an enterprise's organization can be "informal" and thus eschewed a "structure" requirement. For example, the Ninth Circuit's en banc decision in *Odom* v. *Microsoft*[18] rejected the view (which it attributed to the Third, Fourth, Eighth, and Tenth Circuits) that there must be "an ascertainable organizational structure beyond whatever structure is required to engage in the pattern of illegal activity."[19] The Ninth Circuit also rejected the view (which it attributed to the Seventh Circuit) "that there be 'some' kind of ascertainable structure," but not necessarily a "separate structure."[20]

---

12 452 U.S. at 579-80.

13 *Id.* at 583 (citations omitted).

14 709 F.2d 214 (3d Cir. 1983).

15 *Id.* at 222.

16 *Id.* at 223.

17 *Id.* at 223-24.

18 486 F.3d 541 (9th Cir. 2007).

19 *Id.* at 549 (citing *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003); *United States* v. *Sanders*, 928 F.2d 940, 944 (10th Cir. 1991); *United States* v. *Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *Riccobene*, 709 F.2d at 223-23; *United States* v. *Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982))

20 *Id.* at 550 (citing *Richmond* v. *Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995); *United States* v. *Rogers*, 89 F.3d 1326, 1337-38 (7th Cir. 1996). *See also Limestone Dev. Corp.* v. *Vill. of Lemont*, 520 F.3d 797, 804-05 (7th Cir. 2008) (rejecting *Odom* and holding that "'associated in fact' just means structured without the aid of legally defined structural forms such as the business corporation").

Overturning its earlier precedents, the Ninth Circuit instead adopted the rule (which it attributed to the First, Second, Eleventh, and D.C. Circuits) that "an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise."[21] The court reasoned that "[t]o require that an associated-in-fact enterprise have a structure beyond that necessary to carry out its racketeering activities would be to require precisely what the Court in *Turkette* held that RICO does *not* require."[22]

Regardless of whether *Odom* correctly identified the fault lines of a circuit split,[23] it is beyond cavil that the Ninth Circuit was correct to recognize "confusion in the lower courts."[24]

II. Facts and Procedural History of *Boyle*

Edmund Boyle was indicted and tried under 18 U.S.C. § 1962(c) for a series of bank thefts, which mostly targeted night-deposit boxes. The alleged RICO enterprise included a core group of participants as well as other occasional recruits. Before carrying out a theft, a group of participants typically met beforehand to plan the crime, gather tools, and assign the roles that each participant would play. They generally split the proceeds from a successful theft. The group's organization was loose and informal. It did not appear to have a leader or a hierarchy, or to be guided by any long-term master plan or agreement.

In instructing the jury on the meaning of a RICO "enterprise," the district court hewed closely to the language of *Turkette*. It told the jury that the enterprise element required proof that "(1) There [was] an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose." Over Boyle's objection, the district court also instructed the jury that it could "find an enterprise where an association of individuals, without structural hierarchy, form[ed] solely for the purpose of carrying out a pattern of racketeering acts" and that "[c]ommon sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." The district court refused Boyle's request for an instruction that the government had to prove that the enterprise "had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts."

The jury convicted Boyle on the RICO counts,[25] and the Second Circuit affirmed in a summary order that did not specifically address the RICO jury instruction.[26] The Supreme Court granted *certiorari* and affirmed.

III. The Supreme Court's Decision

Justice Alito's majority opinion, joined by the Chief Justice and Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg, broke the question on which the Court had granted certiorari into three parts: "First, must an association-in-fact enterprise have a 'structure'? Second, must the structure be 'ascertainable'? Third, must

---

21 *Odom*, 486 F.3d at 550 (citing *United States* v. *Patrick*, 248 F.3d 11, 19 (1st Cir. 2001); *United States* v. *Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988); *United States* v. *Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983); *United States* v. *Bagaric*, 706 F.2d 42, 55-56 (2d Cir. 1983)).

22 *Id.* at 551.

23 *Odom*'s characterization of the line of cases it rejected as requiring "that the enterprise have a structure serving both illegitimate and legitimate purposes," *id.* at 551, is in apparent tension with, for example, the *Riccobene* court's instruction that "it is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity," 709 F.2d at 223-24. *See also, e.g.*, *Bledsoe*, 674 F.2d at 665 (citing "[t]he command system of a Mafia family" and "the hierarchy, planning, and division of profits within a prostitution ring" as examples of the requisite "ascertainable structure"). And *Odom*'s characterization of the line of cases it joined as disavowing an "ascertainable structure" requirement, *id.* at 550, is in apparent tension with, for example, the *Perholtz* court's reliance on its conclusion that "[t]he elements of continuity of structure and personnel were evident," 842 F.2d at 354.

24 486 F.3d at 549.

25 *United States* v. *Boyle*, No. 03 CR 0970, 2005 WL 6207652 (E.D.N.Y. Aug. 2, 2005).

26 *United States* v. *Boyle*, 283 Fed. Appx. 825, 826 (2d Cir. 2007). The Second Circuit vacated Boyle's sentence on other grounds. *Id.* at 827. The Supreme Court granted certiorari following resentencing.

the 'structure' go 'beyond that inherent in the pattern of racketeering activity' in which its members engage?"[27] The Court gave short shrift to the second question,[28] focusing on the first and the third.

On the first question, the Court held that "an association-in-fact enterprise must have a structure."[29] Quoting the *American Heritage Dictionary*, the Court explained that "structure" in the relevant sense means "[t]he way in which parts are arranged or put together to form a whole" and "[t]he interrelation or arrangement of parts in a complex entity."[30] Drawing on the common meanings of statutory language including the words "enterprise" and "association," the Court held that "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associations to pursue the enterprise's purpose."[31]

The Court then turned to the third question, which was the source of the lower-court split that had prompted the grant of *certiorari*. Justice Alito distinguished two interpretations of the phrase "beyond that inherent in the pattern of racketeering activity." "If the phrase is interpreted to mean that the existence of an enterprise is a separate element that must be proved," the Court explained, "it is of course correct."[32] But "if the phrase is used to mean that the existence of an enterprise may never by inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity, it is incorrect."[33] The Court reiterated its instruction in *Turkette* that the evidence of a pattern of racketeering activity and the evidence of an enterprise "may in particular cases coalesce."[34]

The Court rejected Boyle's argument that a RICO enterprise must have "at least some additional structural attributes, such as a structural hierarchy, role differentiation, a unique *modus operandi*, a chain of command, professionalism and sophistication of organization, diversity and complexity of crimes, membership dues, rules, and regulations, uncharged or additional crimes aside from predicate acts, an internal discipline mechanism, regular meetings regarding enterprise affairs, an enterprise name, and induction or initiation ceremonies or rituals."[35] The Court saw "no basis in the language of RICO for the structural requirements that petitioner asks us to recognize."[36] Quoting from its decision last Term in *Bridge*, the Court emphasized: "We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe."[37]

IV. The Dissent

Justice Stevens wrote in dissent, joined by Justice Breyer. According to the dissent, the terms "individual, partnership, corporation, association, or other legal entity" in the definition of a RICO enterprise refer to "formal legal structures most commonly established for business purposes."[38] The dissent inferred that the subsequent reference to a "union or group of individuals associated in fact although not a legal entity" must reflect "an intended commonality between the legal and nonlegal entities included in the provision" and

---

27 *Boyle*, 2009 WL 1576571, at *5.

28 On whether the structure must be "ascertainable," the Court held that *any* element of a crime must be "ascertainable" if the jury is to find it proved beyond a reasonable doubt and, thus, "telling the members of the jury that they had to ascertain the existence of an 'ascertainable structure' would have been redundant and potentially misleading." *Id.* at *6.

29 *Id.* at *5.

30 *Id.* (quoting *American Heritage Dictionary* 1718 (4th ed. 2000)) (internal quotation marks omitted).

31 *Id*.

32 *Id*. at *6.

33 *Id.*

34 *Id.* (quoting *Turkette*, 452 U.S. at 583).

35 *Id.* (internal quotation marks and citations omitted).

36 *Id.*

37 *Id.* at *7 (quoting *Bridge*, 128 S.Ct. at 2145).

38 *Id.* at *8 (Stevens, J., dissenting) (quoting 18 U.S.C. § 1961(4)).

concluded that "an enterprise must have business-like characteristics."[39] "Because covered enterprises are necessarily business-like in nature," it stated, "proof of an association-in-fact enterprise's separate existence will generally require evidence of rules, routines, or processes through which the entity maintains its continuing operations and seeks to conceal its illegal acts."[40] The dissent concluded that "[t]here is no evidence in RICO's text or history that Congress intended it to reach such ad hoc associations of thieves."[41] The dissent would have reversed Boyle's RICO convictions on the ground that the government's evidence was insufficient to prove an enterprise.

V. Significance of the Decision

As evidenced by the Court's quotation from last Term's decision in *Bridge*, *Boyle* falls in line with the long series of Supreme Court decisions that read the words of the RICO statute in line with their ordinary English meanings and decline to narrow RICO according to a conception of its intended purpose or policy considerations. Justice Kennedy's majority opinion in *Anza* v. *Ideal Steel Supply Corp.* had departed from this mode of analysis when it reasoned that a proximate causation requirement was "meant to prevent . . . intricate, uncertain inquiries from overrunning RICO litigation" and cited a risk of blurring between RICO and the antitrust laws in support of the Court's decision.[42] The majority opinion in *Boyle* confirms a return to a focus on the RICO statute's text, as it would be understood by an ordinary user of the English language. Notably, Justice Stevens's dissent followed the majority's methodological lead in attempting to anchor its conclusion in textual analysis, but Justice Stevens failed to persuade a majority of the Court that a "business-like" requirement could be gleaned from the statutory language.

The decision in *Boyle* represents a flat rejection of one of the basic techniques that business defendants, and courts sympathetic to them, have used to rein in civil RICO plaintiffs. Countless RICO complaints have been dismissed for failure to plead an enterprise having a structure distinct from the alleged pattern of racketeering activity. Many of these complaints no doubt would have been (and in many cases were) dismissed on other grounds as well, but some complaints that previously would have fallen will now survive. To be sure, the enterprise requirement will continue to have some teeth, and one can expect the action on that element to shift to the level of detail that must be alleged in order to plead the necessary structure.

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Edward P. Krugman at 212.701.3506 or ekrugman@cahill.com; Charles Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Nate Holcomb at 212.701.3748 or nholcomb@cahill.com.

---

39 *Id.* at *8-*9 (quoting 18 U.S.C. § 1961(4)).

40 *Id.* at *10.

41 *Id.* at *11.

42 547 U.S. at 460.