

## Parents, Subsidiaries, and RICO Distinctiveness

William B. Ortman<sup>†</sup>

### I. INTRODUCTION

#### A. The Problem of Parent-Subsidiary Distinctiveness

This Comment challenges the existing circuit court approaches governing when parent corporations and their wholly-owned subsidiaries satisfy the distinctiveness requirement of 18 USC § 1962(c).<sup>1</sup> Section 1962(c), which was added to the federal criminal lexicon in 1970 as part of the Racketeer Influenced Corrupt Organizations Act<sup>2</sup> (RICO), forbids a RICO “person” from operating the affairs of a RICO “enterprise” through a pattern of racketeering. Courts have interpreted this provision to require that the RICO person be distinct from the enterprise. The circuits have adopted two different yet complementary approaches to assess when parent and subsidiary corporations are RICO distinctive, with both holding that, for all practical purposes, they never are.<sup>3</sup> Despite ostensible differences, both approaches employ purposive statutory analysis extratextually to limit liability in parent-subsidiary cases.<sup>4</sup> This Comment argues that in light of the Supreme Court’s RICO jurisprudence, the proper resolution of the parent-subsidiary question lies in a plain language reading of

---

<sup>†</sup> B.A. 2002, Swarthmore College; J.D. Candidate 2006, The University of Chicago.

<sup>1</sup> 18 USC § 1962(c) (2000):

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.

This Comment considers both cases in which the parent company is alleged to be the RICO person and cases in which the subsidiary appears as the person. Though one circuit’s approach to the issue draws a sharp distinction between such cases, the analysis of other circuits, as well as the analysis suggested in this Comment, requires no such distinction. Compare *Haroco, Inc v American National Bank and Trust Co of Chicago*, 747 F2d 384, 402 (7th Cir 1984) (finding a distinct enterprise and person where a subsidiary allegedly operated its corporate parent in a pattern of racketeering), with *Fitzgerald v Chrysler Corp*, 116 F3d 225, 227 (7th Cir 1997) (distinguishing *Haroco* on the grounds that the alleged pattern of racketeering was operated by the parent corporation, rather than the subsidiary).

<sup>2</sup> Pub L No 91-452, 84 Stat 922 (1970), codified in part at 18 USC §§ 1961–68 (2000 & Supp 2002).

<sup>3</sup> Compare *Fitzgerald*, 116 F3d at 227–28 (adopting the family resemblance test), with *Lorenz v CSX Corp*, 1 F3d 1406, 1412–13 (3d Cir 1993) (applying the different activities test).

<sup>4</sup> See text accompanying notes 30–33, 47–50.

§ 1962(c) and a rule that parent and subsidiary corporations are per se RICO distinctive.

Part I of this Comment outlines the statutory framework and locates § 1962(c) within the larger RICO statute. Part II describes the circuit courts' two existing approaches to the parent-subsidary question and concludes that both function as extratextual barriers to parent-subsidary liability. It then suggests a third approach based on a plain language reading of the statute, concluding that textual analysis supports a per se rule of parent-subsidary RICO distinctiveness. Part III surveys the Supreme Court's RICO jurisprudence and finds that the Court has repeatedly rejected extratextual barriers to RICO liability imposed by lower courts. Part IV addresses and counters a possible objection to a rule of parent-subsidary distinctiveness: that liability of this form would be absurd. Part V offers some concluding thoughts about parent-subsidary RICO liability.

## B. The Statutory Framework

Congress enacted RICO as part of the omnibus Organized Crime Control Act of 1970.<sup>5</sup> Though originally imagined as a federal mechanism to combat organized crime,<sup>6</sup> RICO's scope has steadily expanded over the years, and now addresses legal settings as diverse as divorce fraud and abortion protests.<sup>7</sup> The RICO statute itself spans eight sections of the United States Code.<sup>8</sup> Section 1962, which lists specific pro-

---

<sup>5</sup> Pub L No 91-452, 84 Stat 922 (1970), codified in part at 18 USC §§ 1961-68.

<sup>6</sup> See *id.* at 923 ("It is the purpose of this Act to seek the eradication of organized crime . . . 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.").

<sup>7</sup> See *Manual for Complex Litigation* § 35.1 at 690 & nn 2515-18 (Fed Judicial Center 4th ed 2004) (listing a variety of claims filed under RICO, including "insurance and business disputes, antiabortion and other protests, consumer financial services litigation, family law, and whistle-blower actions"). Compare *DeMauro v DeMauro*, 115 F3d 94, 95-96 (1st Cir 1997) (applying RICO to fraud and extortionate threats in the context of divorce proceeding), with *National Organization for Women v Scheidler*, 510 US 249, 252-53 (1994) (applying RICO to a coalition of antiabortion groups by holding that the coalition constituted a racketeering enterprise and that RICO does not require such an enterprise to be motivated by an economic purpose). Some commentators have speculated that RICO could even be a useful tool in combating international terror. See Stephen C. Warneck, Note, *A Preemptive Strike: Using RICO and the AEDPA to Attack the Financial Strength of International Terrorist Organizations*, 78 BU L Rev 177, 179 (1998) ("The government can attack a terrorist organization by using the criminal law to take the organization's money and assets or to prevent money from ever reaching the organization.").

<sup>8</sup> 18 USC §§ 1961-68. Section 1961 defines RICO's critical terms, such as "racketeering activity," the RICO "person," the RICO "enterprise," and "pattern of racketeering activity." Section 1962, as described in the accompanying text, is the operative portion of the statute. Section 1963 describes the criminal penalties for breaching § 1962. Section 1964 defines civil remedies, which include both public and private rights of action, and authorizes treble damages in the case of private suits. The final four sections contain miscellaneous provisions relating to RICO

hibited acts, is the operative portion of the statute, and consists of four subsections. Section 1962(a) forbids a RICO person from investing income gained through a pattern of racketeering, in which the person is a principal, in a RICO enterprise. Section 1962(b) prohibits a RICO person from using a pattern of racketeering to acquire or maintain control of a RICO enterprise. Section 1962(d) makes it unlawful to conspire to violate § 1962(a), § 1962(b), or § 1962(c).

Section 1962(c) is the most critical RICO section for cases involving parent-subsidiary combinations. The subsection makes it unlawful for “any *person* employed by or associated with any *enterprise* . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”<sup>9</sup> Following the passage of RICO, courts resolving § 1962(c) cases faced an initial question of whether the *person* and the *enterprise* needed to be different legal entities. Though there was once disagreement among the circuits,<sup>10</sup> all now require such distinctiveness,<sup>11</sup> a result recently endorsed by the Supreme Court. In *Cedric Kushner Promotions, Ltd v King*,<sup>12</sup> the unanimous Court accepted the validity of the distinctiveness requirement, but held that boxing promoter Don King was distinct from Don King Enterprises, despite the fact that King was the sole shareholder of the company bearing his name.<sup>13</sup> The Court, however, explicitly reserved the question of whether parent corporations are distinct from their wholly-owned subsidiaries.<sup>14</sup>

## II. THREE APPROACHES TO PARENT-SUBSIDIARY DISTINCTIVENESS

Courts in at least eight circuits have applied the distinctiveness requirement in parent-subsidiary RICO cases.<sup>15</sup> The approaches taken

---

cases, including venue and process, § 1965, expedition of publicly-important cases, § 1966, publicity of evidence, § 1967, and rules for civil investigative demands, § 1968.

<sup>9</sup> 18 USC § 1962(c) (emphasis added).

<sup>10</sup> See *United States v Hartley*, 678 F2d 961, 986 (11th Cir 1982) (refusing to read a distinctiveness requirement into § 1962(c)).

<sup>11</sup> See *United States v Goldin Industries, Inc*, 219 F3d 1268, 1271 (11th Cir 2000) (overruling *Hartley* because of the plain language of the statute and because every other circuit had adopted a distinctiveness requirement).

<sup>12</sup> 533 US 158 (2001).

<sup>13</sup> *Id* at 160 (“[W]e conclude that the ‘person’ and ‘enterprise’ here are distinct and that the RICO provision applies.”).

<sup>14</sup> The Court listed *Discon, Inc v Nynex Corp*, 93 F3d 1055 (2d Cir 1996), a parent-subsidiary distinctiveness case, as presenting one of the issues the Court was not reaching. *Cedric Kushner*, 533 US at 164.

<sup>15</sup> See *Bessette v Avco Financial Services, Inc*, 230 F3d 439, 448–50 (1st Cir 2000) (holding that parents and subsidiaries are not distinct); *Discon, Inc v NYNEX Corp*, 93 F3d 1055, 1062–64 (2d Cir 1996) (finding no distinctiveness where “the individual defendants were acting within the scope of a single corporate structure, guided by a single corporate consciousness”); *Brittingham v*

by these courts fall generally into two camps, with one court favoring a “family resemblance” test, and several others adopting a “different activities” test.<sup>16</sup>

#### A. The Family Resemblance Test

The Seventh Circuit has adopted a “family resemblance” test to govern parent-subsidary RICO liability.<sup>17</sup> Judge Posner, writing for the court in *Fitzgerald v Chrysler Corp.*,<sup>18</sup> articulated a test for courts to apply when “there is a danger of [a broadly worded statute] being applied to situations absurdly remote from the concerns of the statute’s framers.”<sup>19</sup> First, the court must “identify the prototype situation to which the statute is addressed.”<sup>20</sup> Once identified, the court must “determine how close to the prototype the case before the court is—how close, in other words, the family resemblance is between the prototypical case and the case at hand.”<sup>21</sup> Although in *Fitzgerald* the test was applied to the specific context of § 1962(c), there is no reason why it would not apply to a broad range of statutory settings.

In *Fitzgerald*, Chrysler Corporation allegedly operated an enterprise consisting of its finance, marketing, and distributor subsidiaries,

---

*Mobil Corp.*, 943 F2d 297, 300–03 (3d Cir 1991) (finding no distinctiveness when the subsidiary “did no more than conduct the normal affairs of the defendant corporations”); *NCNB National Bank of North Carolina v Tiller*, 814 F2d 931, 936–37 (4th Cir 1987) (finding no distinctiveness between a parent and a wholly-owned subsidiary); *Khurana v Innovative Health Care Systems, Inc.*, 130 F3d 143, 154–56 (5th Cir 1997) (affirming dismissal of a RICO claim because “the association-in-fact pleaded by [the plaintiff was] in reality the corporate entity”); *Fitzgerald v Chrysler Corp.*, 116 F3d 225, 226–28 (7th Cir 1997) (finding no distinctiveness where “a large, reputable manufacturer deals with its dealers and other agents in the ordinary way”); *Fogie v THORN Americas, Inc.*, 190 F3d 889, 896–98 (8th Cir 1999) (“[T]o impose liability on a subsidiary for conducting an enterprise composed solely of the parent of the subsidiary and related businesses would be to misread the statute.”); *Brannon v Boatmen’s First National Bank of Oklahoma*, 153 F3d 1144, 1145–50 (10th Cir 1998) (finding a claim insufficient that merely “assert[s] that a defendant corporation . . . is a subsidiary and therefore automatically conducts the affairs of its parent”).

<sup>16</sup> In addition to the two camps described in the text, there are a few outlier parent-subsidary cases that defy classification. Most notably, the Second Circuit addressed the parent-subsidary issue in *Discon*, but the opinion is so particularized to the facts of the case that no clear principle flows from the court’s reasoning. 93 F3d at 1062–64 (analyzing the facts in light of conflicting precedent and searching for “the more analogous situation”).

<sup>17</sup> See *Fitzgerald*, 116 F3d at 226–27 (evaluating “how close to the prototype the case before the court is—how close, in other words, the family resemblance is”); *Emery v American General Finance, Inc.*, 134 F3d 1321, 1323–25 (7th Cir 1998) (Posner) (“The firm must be shown to use its agents or affiliates in a way that bears at least a family resemblance to the paradigmatic RICO case.”).

<sup>18</sup> 116 F3d 225 (7th Cir 1997).

<sup>19</sup> *Id.* at 226–27.

<sup>20</sup> *Id.* at 227.

<sup>21</sup> *Id.*

as well as franchised dealers, through a pattern of racketeering.<sup>22</sup> The court identified the prototypical § 1962(c) case as “one in which a person bent on criminal activity seizes control of a previously legitimate firm and uses the firm’s resources, contacts, facilities, and appearance of legitimacy to perpetrate more, and less easily discovered, criminal acts than he could do in his own person.”<sup>23</sup> As the case at hand did not fit the prototype, the court proceeded to step two, and attempted to divine the case’s degree of removal. One “step away” from the prototype, the court determined, is a scenario “in which the criminal uses the acquired enterprise to engage in some criminal activities but for the most part is content to allow it to continue to conduct its normal, lawful business.”<sup>24</sup> Another step removed occurs when “the criminal seizes control of a subsidiary of a corporation and perverts the subsidiary into a criminal enterprise that manages in turn to wrest sufficient control or influence over the parent corporation to use it to commit criminal acts.”<sup>25</sup> Though the Seventh Circuit had previously acknowledged RICO causes of action that were as far as two steps removed from the prototype,<sup>26</sup> the court felt that the case before it would be a third step removed from the prototypical RICO case, and was unwilling to continue the RICO tango.

Policy concerns drove the court’s unwillingness to extend RICO liability to a case thrice removed from the prototype. The court found itself unable to imagine a good reason why RICO liability should attach to Chrysler merely because it organized itself into subsidiaries and franchisees, given that liability would definitively not attach had Chrysler been organized into unincorporated divisions.<sup>27</sup> The court concluded that the only effect of RICO liability in such a case would be to encourage vertical business organization. This, the court believed, was not among RICO’s purposes.<sup>28</sup> Although the court left open the

---

<sup>22</sup> Id at 226–27. As noted in the text, *Fitzgerald* involved the distinctiveness of both subsidiaries and franchised dealers. Id. As the court treated these categories interchangeably, both the reasoning and the holding apply in full to the parent-subsidiary issue investigated in this Comment.

<sup>23</sup> Id at 227.

<sup>24</sup> Id (distinguishing, by implication, the first degree of removal from the prototype because in the first degree of removal “many of the employees of the business may be unaware that it is controlled and being used by a criminal”).

<sup>25</sup> Id (distinguishing the second degree of removal from the facts at hand by noting that Chrysler was “free-standing” and “merely . . . does business through agents”).

<sup>26</sup> See *Haroco, Inc v American National Bank and Trust Co of Chicago*, 747 F2d 384, 402 (7th Cir 1984) (taking the “second step” away from RICO, in the parlance of *Fitzgerald*).

<sup>27</sup> *Fitzgerald*, 116 F3d at 227 (“If Chrysler were even larger . . . and as a result had no agents, but only employees . . . it could not be made liable for warranty fraud under RICO.”).

<sup>28</sup> Id (“We have never heard it suggested that RICO was intended to encourage vertical integration, yet that is the only effect that we can imagine.”).

possibility that a proper RICO claim involving a parent and subsidiary corporation could arise, it held RICO inapplicable to cases in which subsidiaries perform the very functions that an internal division would perform had the parent chosen a different organizational model.<sup>29</sup>

The Seventh Circuit was explicit that its test was derived from a purposive interpretation of the RICO statute.<sup>30</sup> It is important, the court indicated, to avoid applying statutes “to situations absurdly remote from the concerns of the statute’s framers.”<sup>31</sup> The court identified the family resemblance test as one that courts will find “helpful, in interpreting [broadly worded statutes] in a way that will avoid absurd applications.”<sup>32</sup> The family resemblance test also depends upon purposive interpretation in its application, as a court’s task is to identify the archetypal activity Congress intended to regulate, and then to determine whether the instant facts are sufficiently related to the prototype to extend liability.<sup>33</sup> Thus, in both justification and application, the family resemblance test relies on a model of statutory interpretation that seeks to limit liability to those cases that implicate the identified purposes of RICO.

#### B. The Different Activities Test

Other courts have adopted a “different activities” test to determine whether a parent and its subsidiary are distinct for the purposes of § 1962(c).<sup>34</sup> Under this approach, parent and subsidiary corporations satisfy the distinctiveness requirement only if they have participated in a racketeering pattern through different activities.<sup>35</sup> As the

---

<sup>29</sup> Id at 228.

<sup>30</sup> Id at 226–27. Throughout this Comment, the phrase “purposive analysis” will refer to the practice of looking to either the legislative history of a statute or its face, in an attempt to discern the particular purposes that Congress had in mind when enacting the legislation.

<sup>31</sup> Id at 226 (noting that the danger of misapplication results because legislators must word statutes broadly “in order to prevent loopholes from being drilled . . . by ingenious lawyers”).

<sup>32</sup> Id at 226–27.

<sup>33</sup> Id at 227 (holding that a court must “identify the prototype situation” and then “determine how close to the prototype the case before the court is”).

<sup>34</sup> See, for example, *Bessette*, 230 F3d at 449 (“[W]e will continue to look to the allegations in the complaint to determine whether the parent’s activities are sufficiently distinct from those of the subsidiary.”); *Khurana*, 130 F3d at 155 (“[T]he distinctiveness requirement is not satisfied . . . if the parent corporation and the subsidiary’s roles in the alleged racketeering activities are not sufficiently distinct.”); *Brittingham*, 943 F2d at 302 (“Without allegations or evidence that the defendant corporation had a role in the racketeering activity that was distinct from the undertakings of those acting on its behalf, the distinctiveness requirement is not satisfied.”).

<sup>35</sup> While many circuits have adopted this approach, courts have not explicitly referred to it as the “different activities test.” However, given the similarity among the approaches of the circuits considered in this section, “different activities test” is an appropriate designation. The only other attempt to name these circuits’ approach to the parent-subsidary question was made

Third Circuit described the test, the approach makes it highly unlikely that a parent-subsiary combination could ever be distinct, while holding open that distinctiveness is still “theoretically possible.”<sup>36</sup> In order to overcome a motion to dismiss a § 1962(c) claim in a “different activities” circuit, “the plaintiff must plead facts which, if assumed to be true, would clearly show that the parent corporation played a role in the racketeering activity which is distinct from the activities of its subsidiary.”<sup>37</sup> Most courts adopting the different activities test have reasoned that it follows naturally from the distinctiveness requirement.<sup>38</sup> It is not clear that this reasoning is sound, though, as the RICO statute does not talk about “activities,” but about RICO persons and enterprises—legal entities with well-specified statutory definitions.<sup>39</sup> An early Third Circuit case made an effort to justify the different activities approach. In *Brittingham v Mobil Corp.*,<sup>40</sup> the court explained that the heavy burden of the different activities rule is necessary because any lower threshold would “eviscerate” the distinctiveness requirement.<sup>41</sup>

Courts applying the different activities test generally fail to explicitly enumerate activities that could distinguish subsidiaries from parents.<sup>42</sup> The Third Circuit, though, has provided some guidance. In *Lorenz v CSX Corp.*,<sup>43</sup> the court applied the different activities test to an allegation of federal securities fraud for failing to disclose pertinent information to debenture holders regarding a subsidiary corporation.<sup>44</sup> The fraud was perpetrated in multiple stages, including both the subsidiary corporation’s initial failure to disclose and letter agreements between the parent company and a bank.<sup>45</sup> Rather than classify these

---

by a district court in Iowa. In *DeWit v Firststar Corp.*, 904 F Supp 1476, 1521 (ND Iowa 1995), the court referred to the line of cases as announcing an “in reality no different from each other” test.

<sup>36</sup> *Lorenz v CSX Corp.*, 1 F3d 1406, 1412 (3d Cir 1993).

<sup>37</sup> *Id.*

<sup>38</sup> See *Khurana*, 130 F3d at 155 (applying the different activities test without fully explaining its derivation); *Lorenz*, 1 F3d at 1412 (same); *Deane v Weyerhaeuser Mortgage Co.*, 967 F Supp 30, 34 (D Mass 1997) (same).

<sup>39</sup> 18 USC § 1961(3)–(4) (defining “person” and “enterprise” explicitly). It should be noted that the word “activities” does appear in § 1962(c), but only as part of the statute’s jurisdictional hook linking the regulated activities to “interstate or foreign commerce.”

<sup>40</sup> 943 F2d 297 (3d Cir 1991).

<sup>41</sup> *Id.* at 301 (“We believe a § 1962(c) enterprise must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation.”).

<sup>42</sup> See, for example, *Khurana*, 130 F3d at 155–56 (finding an absence of distinctiveness without linking the instant facts to the different activities test); *Deane*, 967 F Supp at 34 (same).

<sup>43</sup> 1 F3d 1406 (3d Cir 1993).

<sup>44</sup> *Id.* at 1409 (“Plaintiffs allege that the defendants . . . fail[ed] to disclose material information which would have enabled [the plaintiffs] to convert their debentures into [ ] common stock and receive a lucrative dividend.”). Debentures are “long-term, unsecured debt securit[ies].” *Id.* at 1409 n 1.

<sup>45</sup> *Id.* at 1412.

multiple stages as different activities, though, the court characterized them as all part of a single fraud.<sup>46</sup> Thus, the court clarified that the “activities” part of the different activities test is to be broadly understood. The “activity” is defined at the abstract level of wrongs, rather than at the concrete level of particular acts.

Although the courts that apply the different activities test do not explicitly explain why parent-subsidiary liability should require different activities, they hint at the policy considerations that inform the rule. One theme in the cases is similar to a reason given by the Seventh Circuit in promulgating its family resemblance approach: that RICO was not designed to encourage a particular business structure. This view of RICO’s purposes is implicit in statements such as:

[In the absence of different activities], a subsidiary that simply conducts its affairs as delegated by the parent company for the profit of the parent company is engaged in nothing more than a legitimate corporate and financial relationship, which is certainly not subject to RICO liability on that basis alone.<sup>47</sup>

A similar understanding of RICO’s purposes can be found in *Discon, Inc v NYNEX Corp*,<sup>48</sup> which holds that “[i]t would be inconsistent for a RICO person . . . to be subject to liability simply because it is separately incorporated, whereas otherwise it would not be held liable under [circuit precedent].”<sup>49</sup> Under the theory that RICO’s purposes do not encompass compelling a particular corporate structure, courts avoid liability that depends conclusively on a company’s choice of corporate structure.

Another theme in cases employing the different activities test is that Congress designed RICO to penalize only the RICO person, not the RICO enterprise. In parent-subsidiary cases, the courts reason, penalizing the person *is*, from a financial perspective, penalizing the enterprise. Though, once again, courts do not make this logic explicit, they imply it through statements such as:

The distinctiveness requirement ensures that RICO sanctions are directed at the persons who conduct the racketeering activity, rather than the enterprise through which the activity is conducted. Therefore, we must examine the enterprise allegation to

---

<sup>46</sup> Id (“[A]ll three companies engaged in concerted action.”).

<sup>47</sup> *Bessette*, 230 F3d at 449 (internal citation omitted).

<sup>48</sup> 93 F3d 1055 (2d Cir 1996).

<sup>49</sup> Id at 1064. This Comment previously noted that *Discon* is not truly a different activities case. See note 16. However, insofar as *Discon* bases its denial of intracorporate distinctiveness on these grounds, it is closely related to the different activities cases.



determine whether it is no more than an association of . . . entities acting on behalf of a defendant [parent] corporation.<sup>50</sup>

Thus, two ideas about RICO's purposes—that it is not designed to dictate corporate structure and that it is not designed to penalize the enterprise—indicate to the courts employing the different activities test that liability should be generally unavailable in parent-subsidary cases. As compared to the family resemblance approach, it is, perhaps, less obvious that the different activities approach is premised on a purposive interpretation of RICO. The premise of the courts using the different activities test is less obvious only because they are implicit where the Seventh Circuit is explicit. Nevertheless, as was the case for the family resemblance test, courts' understanding of congressional purpose has driven the adoption of the different activities test. In requiring different activities, these circuits effectively restrict parent-subsidary liability to those cases that implicate the purposes of the statute.

### C. The Textual Approach

Despite the differences between the family resemblance and the different activities tests, they are similar in several important respects. Research for this Comment revealed no appellate case holding a parent and subsidiary combination to be distinct under either approach.<sup>51</sup> Though circumstantial, this suggests that both approaches make parent-subsidary RICO liability extremely difficult.<sup>52</sup> More significantly, though, both approaches depend on a narrow reading of the RICO statute to limit § 1962(c) liability to cases that implicate the purposes

---

<sup>50</sup> *Brittingham*, 943 F2d at 301.

<sup>51</sup> *Haroco*, in which the Seventh Circuit held the distinctiveness requirement satisfied in a “subsidiary as person” case, appears at first glance to be an exception. 747 F2d at 402–03. However, the logic of the *Haroco* opinion cannot be categorized as either a family resemblance case or a different activities case. Given the Seventh Circuit's retreat from *Haroco* in *Fitzgerald*, the result in the case is best thought of as a unique outlier. See note 1. Nonetheless, the specific holding of *Haroco* remains good law today within the district courts of the Seventh Circuit. See, for example, *Majchrowski v Norwest Mortgage, Inc.*, 6 F Supp 2d 946, 954 (ND Ill 1998) (“[T]he distinctiveness requirement is satisfied when the RICO person is a subsidiary and the RICO enterprise is its corporate parent.”).

<sup>52</sup> Although no appellate decisions that permit parent-subsidary liability under either the family resemblance or different activities approach are available, a small handful of district court cases are. See *In re American Honda Motor Co, Inc Dealerships Relations Litigation*, 958 F Supp 1045, 1055 n 7 (D Md 1997) (“question[ing] the precedential value of” case law stating a per se lack of distinctiveness between franchisors and separately incorporated franchisees); *Philadelphia TMC, Inc v AT & T Information Systems, Inc.*, 651 F Supp 169, 173 (ED Pa 1986) (“The fact that a wholly-owned subsidiary is compliant to the will of its parent corporation in no way precludes the parent . . . from conducting the subsidiary's affairs through a pattern of racketeering activity.”).

of RICO identified by the courts. This Part offers an alternative approach, one grounded in the text of § 1962(c). This Part is meant to be only descriptive of the proposed approach; actual justification must be put off until Part III.

A textualist approach to the parent-subsidary question begins with a reading of the distinctiveness requirement itself. In order to determine what a “textual” reading of the distinctiveness requirement compels, we need an account of the requirement. The best place to look is the text of § 1962(c):

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.<sup>53</sup>

---

<sup>53</sup> 18 USC § 1962(c) (emphasis added). An objection to this textual account of the distinctiveness requirement is that the courts did not solely depend on the text in deriving the distinctiveness requirement, but looked also to the purposes of RICO, and determined that they were aided by requiring that a RICO person be distinct from the RICO enterprise. This was, for instance, the account given by the Third Circuit in *Hirsch*, where the court identified preventing “the takeover of legitimate businesses by criminals and corrupt organizations” as “[o]ne of the Congressional purposes in enacting RICO.” *BF Hirsch v Enright Refining Co*, 751 F2d 628, 633–34 (3d Cir 1984). From this premise, the *Hirsch* court concluded that the distinctiveness requirement is consistent because it “orient[s]” liability in the direction of the “infiltrating criminals.” *Id.* at 634. Nonetheless, although both linguistic and purposive arguments appear in the cases, the linguistic arguments are the more grounded. First, turning to the familiar canons of statutory interpretation, when there is a compelling textual interpretation, courts need not turn to purposive analysis. See generally *Consumer Product Safety Commission v GTE Sylvania, Inc*, 447 US 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”). In the case of § 1962(c), the textual parsing described in the text leads to but a single plausible reading of the statute, and is therefore conclusive. Moreover, the textual interpretation was far more prevalent in the circuit cases than the purposive interpretation. This is true both in the cases actually deriving the requirement, compare *Hirsch*, 751 F2d at 633–34 (reaching a decision on the basis of analysis of congressional intent), with *United States v Goldin Industries, Inc*, 219 F3d 1268, 1271 (11th Cir 2000) (adopting a “plain language” reading to ground the distinctiveness requirement); *Board of County Commissioners v Liberty Group*, 965 F2d 879, 884–85 (10th Cir 1992) (employing linguistic analysis); *Puckett v Tennessee Eastman Co*, 889 F2d 1481, 1489 (6th Cir 1989) (employing linguistic analysis), and in the cases merely referring to it in order to apply the rule. See, for example, *Brannon*, 153 F3d at 1146 (noting that the distinctiveness requirement “flows from the statute’s mandate that the person who engages in the pattern of racketeering activity be ‘employed by or associated with’ the enterprise”); *Khurana*, 130 F3d at 155 (noting that “Section 1962(c) imposes liability on an employee or associate of an enterprise conducting affairs of the enterprise through a pattern of racketeering activity and, logically, such an individual cannot employ or associate with itself,” in a case applying the distinctiveness requirement to a parent-subsidary scenario). Even more importantly, the Supreme Court emphasized the linguistic basis in its *Cedric Kushner* decision. Though the *Cedric Kushner* Court noted that the goals of RICO were not ill-served by a distinctiveness requirement, the linguistic considerations dominated. 533 US at 161.

The terms critical to the distinctiveness requirement are emphasized. As many courts finding and applying the distinctiveness requirement have noted, the legislative choice to name two legal entities, the “person” and the “enterprise,” within the same statutory framework implies nonidentical entities.<sup>54</sup> In the absence of such a requirement, the statute would merely forbid a RICO person from engaging in a pattern of racketeering. This form of liability would render moot the text’s distinction between “persons” and “enterprises.” Moreover, the statute forbids the “person” who is “associated with” or “employed by” the “enterprise” from operating the enterprise in a pattern of racketeering. Many courts have noted that it would make little linguistic sense for Congress to use words such as “employed by” or “associated with” unless Congress envisioned distinct entities.<sup>55</sup> As one court concluded, “[L]ogic alone dictates that one entity may not serve as the enterprise and the person associated with it.”<sup>56</sup>

The Supreme Court itself engaged in this sort of linguistic parsing when it endorsed the distinctiveness requirement in 2001.<sup>57</sup> In *Cedric Kushner*, the plaintiff sued Don King for RICO violations, claiming that he had conducted the affairs of Don King Productions through a pattern of racketeering. Don King Productions was a closely-held corporation, of which King was the sole shareholder as well as an employee. The district court dismissed the action, and the appeals court affirmed, on the ground that King and Don King Productions were legally identical.<sup>58</sup> In reversing, the Court officially endorsed the distinctiveness requirement.<sup>59</sup> The Court thought that the requirement

---

<sup>54</sup> See, for example, *Bennett v United States Trust Co of New York*, 770 F2d 308, 315 (2d Cir 1985) (“[R]equiring a complaint to distinguish between the enterprise and the person conducting the affairs of that enterprise in the prohibited manner is supported by the plain language of section 1962(c), which clearly envisions two entities.”).

<sup>55</sup> See, for example, *Haroco*, 747 F2d at 400:

The use of the terms ‘employed by’ and ‘associated with’ appears to contemplate a person distinct from the enterprise. If Congress had meant to permit the same entity to be the liable person and the enterprise under section 1962(c), it would have required only a simple change in language to make that intention crystal clear.

<sup>56</sup> *Yellow Bus Lines, Inc v Local Union 639*, 839 F2d 782, 790 (DC Cir 1988).

<sup>57</sup> *Cedric Kushner*, 533 US at 166 (holding that for RICO purposes Don King is legally distinct from Don King Promotions).

<sup>58</sup> *Id.* at 161 (explaining that the circuit court had held that because King was an employee of Don King Productions, he “in a legal sense, was part of, not separate from, the corporation” and therefore § 1962(c) did not apply). The district court dismissed the complaint citing *Riverwoods Chappaqua Corp v Marine Midland Bank, NA*, 30 F3d 339 (2d Cir 1994), among other cases, as circuit precedent. *Cedric Kushner Promotions, Ltd v King*, 1999 US Dist LEXIS 14934, \*8–11 (SD NY). The Second Circuit affirmed, agreeing that *Riverwoods* was applicable precedent. *Cedric Kushner Promotions, Ltd v King*, 219 F3d 115, 116–17 (2d Cir 2000) (per curiam).

<sup>59</sup> *Cedric Kushner*, 533 US at 161 (“We do not quarrel with the basic principle that to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities:

flowed directly from the language of the statute “read as ordinary English.”<sup>60</sup> The Court noted that “[i]n ordinary English one speaks of employing, being employed by, or associating with others, not oneself.”<sup>61</sup>

The central point of this linguistic parsing is that the RICO “person” and the RICO “enterprise” are distinct whenever they consist of separate legal entities, such that “one entity [is not] serv[ing] as the enterprise and the person associated with it,” or “being employed by, or associating with [itself].”<sup>62</sup> We are now ready to apply this textual account of the distinctiveness requirement to the parent-subsiary context. The familiar concept of incorporation holds that separately incorporated corporations are distinct legal creatures. Corporations, regardless of their ownership, are independent entities under the corporate law. Indeed, the idea of the corporation as a legal “person,” created by operation of the law of the state of incorporation, is perhaps the most fundamental tenet of corporate law.<sup>64</sup> It is this legal independence that makes the corporation a unique form of business organization, distinct from sole proprietorships or partnerships.<sup>65</sup> Moreover, the legal independence between parent corporations and their subsidiaries should be, on the textual reading offered above, thus sufficient to satisfy § 1962(c)’s distinctiveness requirement.

In *Cedric Kushner*, the manner in which the Supreme Court applied the distinctiveness requirement supports the conclusion that the correct textual account of § 1962(c) is a rule of parent-subsiary distinctiveness. In holding that a closely-held corporation (Don King Enterprises) and its sole shareholder (Don King) were separate entities, and thus distinct for purposes of § 1962(c), the court said:

Linguistically speaking, an employee who conducts the affairs of a corporation through illegal acts comes within the terms of a statute that forbids any “person” unlawfully to conduct an “enterprise,” particularly when the statute explicitly defines “person” to include “any individual . . . capable of holding a legal or beneficial interest in property,” and defines “enterprise” to include a

---

(1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.”).

<sup>60</sup> Id (“The Act says that it applies to ‘person[s]’ who are ‘employed by or associated with’ the ‘enterprise.’”).

<sup>61</sup> Id.

<sup>62</sup> *Yellow Bus Lines*, 839 F2d at 790 (“[Y]ou cannot associate with yourself.”).

<sup>63</sup> *Cedric Kushner*, 533 US at 161.

<sup>64</sup> James D. Cox and Thomas Lee Hazen, 1 *Cox & Hazen on Corporations* § 7.01 at 264 (Aspen 2d ed 2003 & Supp 2005) (“Recognition of a corporate personality generally is considered to be the most distinct attribute of the corporation.”).

<sup>65</sup> See id § 1.07 at 15 (“An unincorporated association . . . has been [traditionally] regarded as an aggregation of individuals operating the business as co-owners with individual rights and duties.”).

“corporation.” And, linguistically speaking, the employee and the corporation are different “persons,” even where the employee is the corporation’s sole owner.<sup>66</sup>

The Court endorsed the view “that . . . the statute requires no more than the formal legal distinction between ‘person’ and ‘enterprise’ (namely, incorporation) that is present here.”<sup>67</sup> Though this holding does not technically control the parent-subsidary issue,<sup>68</sup> it does ratify the idea that formal legal distinction is all that is needed to satisfy the distinctiveness requirement. As separately incorporated corporations clearly have such formal distinction, the textual approach endorses a per se rule of parent-subsidary distinctiveness.

### III. EVALUATING THE OPTIONS: PREVIOUS EXTRATEXTUAL BARRIERS TO RICO LIABILITY

The previous Part surveyed three approaches to the parent-subsidary issue, two of which courts currently use and one of which

---

<sup>66</sup> *Cedric Kushner*, 533 US at 163 (internal citation omitted).

<sup>67</sup> *Id.* at 165–66 (“[The holding] does not deny that a corporation acts through its employees; it says only that the corporation and its employees are not legally identical.”).

<sup>68</sup> The *Cedric Kushner* ruling was self-consciously narrow, and explicitly reserved the question of parent-subsidary enterprises. 533 US at 164 (“We do not here consider the merits of [cases involving parent-subsidary distinctiveness], and note only their distinction from the instant case.”). The Court explicitly listed *Discon* as one of the cases that it did not reach. *Id.* (“[T]he Second Circuit’s other precedent [including *Discon*] also involved significantly different allegations compared with the instant case.”). Recall that *Discon* involved application of the distinctiveness requirement to a parent-subsidary setting. 93 F3d at 1064 (affirming dismissal of § 1962(c) claims because the subsidiaries acted as the parent’s agents). See also notes 15–16. The circuits have apparently taken this reservation seriously, as no circuit has changed its approach to parent-subsidary cases in the wake of *Cedric Kushner*. See, for example, *Bucklew v Hawkins, Ash, Baptie & Co, LLP*, 329 F3d 923, 934 (7th Cir 2003) (denying that a parent and subsidiary were distinct because the parent’s “decision to operate through subsidiaries rather than divisions [did not] facilitate[] its unlawful activity”). This is a surprising development, given the Court’s clear guidance. However, a few district court opinions from the Southern District of New York hint that reassessment would be appropriate. See *Wiwa v Royal Dutch Petroleum*, 2002 US Dist LEXIS 3293, \*75 & n 28 (SD NY) (“[T]he Supreme Court has recently suggested that a corporation and its president can be considered an enterprise for RICO purposes, even when the alleged predicate acts were committed by the president acting in the scope of his employment.”) (internal quotation marks omitted); *G-I Holdings, Inc v Baron & Budd*, 238 F Supp 2d 521, 547 (SD NY 2002) (citing *Wiwa* and stating that “*Cedric Kushner* has stretched [the different activities] rule”). But see *Zito v Leasecomm Corp*, 2003 US Dist LEXIS 17236, \*17 (SD NY) (applying *Discon* to bar a parent-subsidary enterprise without considering either *Wiwa* or *Cedric Kushner*). Additionally, many other district court decisions since *Cedric Kushner* confirm the different activity doctrine’s continued vitality. See *Waddell & Reed Financial, Inc v Torchmark Corp*, 223 FRD 566, 600–01 (D Kan 2004) (asserting the different activities test without considering the impact of *Cedric Kushner*); *Z-Tel Communications, Inc v SBC Communications, Inc*, 331 F Supp 2d 513, 558–59 (ED Tex 2004) (applying the different activities test without citing *Cedric Kushner* and finding sufficient allegations of a parent-subsidary enterprise to survive a motion for summary judgment).

they do not. This section will evaluate these approaches by considering the Supreme Court's RICO jurisprudence. Part II argued that despite apparent differences between the family resemblance and different activities tests, they are both extratextual barriers to liability premised on purposive interpretations of RICO. Both of the existing approaches place practically insurmountable hurdles in the path of plaintiffs seeking RICO redress against parent-subsidary racketeering. Though courts outside the Seventh Circuit rarely explain why they disfavor parent-subsidary distinctiveness, Part II showed that they have done so because they do not believe that parent-subsidary liability serves the purposes for which RICO was enacted. In fashioning their approaches, the courts created barriers to liability that, though not rooted in the text of the statute, were designed to limit RICO liability to those cases that implicate certain of the statute's purposes.

This Part argues that no matter how wise the policy rationales of the lower courts might be, the Supreme Court's RICO jurisprudence simply leaves no room for extratextual liability barriers. This Part also shows that the parent-subsidary tests are but the latest in a long line of failed lower court attempts to restrict RICO liability to cases thought to relate to the statute's purposes. As many commentators have observed, the Supreme Court has time and again bulldozed RICO liability barriers constructed by the lower courts.<sup>69</sup> RICO interpretation is a somewhat unique source of tension between the Supreme Court and the lower courts, stemming perhaps from the stress that RICO puts on lower courts' dockets.<sup>70</sup> Although this Part does not attempt to defend parent-subsidary liability as a matter of policy, it suggests that Su-

---

<sup>69</sup> See Benjamin V. Madison, III, *RICO, Judicial Activism, and the Roots of Separation of Powers*, 43 *Brandeis L J* 29, 41 (2004) (noting that "courts have recognized numerous limits on civil claims [that t]he Supreme Court [has] ultimately rejected . . . as lacking a basis in the statutory text, legislative history, or both"); Sarah N. Welling, Sara Sun Beale, and Pamela H. Bucy, 2 *Federal Criminal Law and Related Actions: Crimes, Forfeiture, the False Claims Act and RICO* § 21.1 at 234–35 (West 1998) ("With few exceptions, the United States Supreme Court has consistently rejected restrictive interpretations by lower courts to limit expansive uses of RICO. . . . Despite the Supreme Court's reluctance to interpret RICO restrictively, lower courts have shown consistent hostility to expansive RICO applications."); Michael P. Kenny, *Escaping the RICO Dragnet in Civil Litigation: Why Won't the Lower Courts Listen to the Supreme Court?*, 30 *Duquesne L Rev* 257, 260–62 (1992) (describing the lower courts' refusal to follow the rule of construction laid down by the Supreme Court). See also Michael Goldsmith, *Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 *Harv J on Legis* 281, 288–91 (2004) (arguing that lower courts' interpretations of the RICO enterprise and pattern of racketeering activity elements are unduly restrictive).

<sup>70</sup> See Jed S. Rakoff, *The Fundamentals of RICO*, in Jed S. Rakoff and Howard W. Goldstein, eds, *RICO: Civil and Criminal Law and Strategy* § 1.01 at 1-1, 1-6 (Law Journal Seminars 2005) ("[T]he lower federal courts, where dockets are [ ] directly affected, have sometimes attempted to erect barriers to the private use of RICO, only to have these limitations removed by higher federal courts applying the plain and very broad language of the statute.").

preme Court precedent compels a textualist approach, which necessarily yields a rule of parent-subsidiary distinctiveness.

A pattern has emerged in the RICO statutory interpretation cases. The lower courts enact extratextual liability barriers to constrain liability to those cases thought to implicate RICO's purposes, only to see the Supreme Court strike down them. In this section, I will survey four crucial episodes of the pattern: *United States v Turkette*,<sup>71</sup> *Sedima, S.P.R.L. v Imrex Co, Inc.*,<sup>72</sup> *H.J. Inc v Northwestern Bell Telephone Co.*,<sup>73</sup> and *Cedric Kushner*.

The first instance of the pattern was in *Turkette*, where the Court rejected a rule proposed by the First Circuit that only legitimate organizations qualify as RICO "enterprises."<sup>74</sup> The First Circuit had added an extra element—legitimacy—to the designation of an "enterprise" in the RICO statute, which defines an enterprise to be "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>75</sup> The First Circuit reasoned that an analysis of RICO's underlying purposes revealed that, in addition to the explicit statutory elements, the section implicitly envisions that the enterprise be "legitimate."<sup>76</sup> In reaching this conclusion, the First Circuit relied primarily on RICO's legislative history to conclude that RICO "was designed to break the stranglehold of racketeers on legitimate businesses and unions"<sup>77</sup> but not wholly criminal organizations.<sup>78</sup> On appeal, the Supreme Court rejected this extratextual liability barrier, holding that the investigation into congressional purpose was inappropriate given the absence of textual ambiguity.<sup>79</sup> The Court reasoned that "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily

---

<sup>71</sup> 452 US 576, 578, 593 (1981).

<sup>72</sup> 473 US 479, 481 (1985).

<sup>73</sup> 492 US 229 (1989).

<sup>74</sup> 632 F2d 896, 906 (1st Cir 1980) ("RICO was not enacted as an offensive weapon against criminals, but as a shield to thwart their depredations against legitimate business enterprises.").

<sup>75</sup> 18 USC § 1961(4) (2000) (defining "enterprise" for the purposes of RICO). See *Turkette*, 632 F2d at 905 (noting that "the courts have liberally construed 'enterprise' lest they create a loophole for illegitimate business to escape RICO's coverage") (internal quotation marks omitted).

<sup>76</sup> *Turkette*, 632 F2d at 899 ("RICO is . . . designed to protect legitimate commercial enterprises from the onslaught of racketeers.").

<sup>77</sup> *Id.* at 897, 899–900 ("The purpose of RICO was the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.") (internal quotation marks omitted).

<sup>78</sup> *Id.* at 899–904.

<sup>79</sup> *Turkette*, 452 US at 581–87 (rejecting, point by point, the purposive analysis offered by the circuit court).

be regarded as conclusive.”<sup>80</sup> As the Court could find no such intent to the contrary, it had no recourse but to reject the First Circuit’s proposed addition.<sup>81</sup>

The next episode in the pattern came four years later in *Sedima*, when the Court struck down a “racketeering injury” requirement proposed by the Second Circuit.<sup>82</sup> Without textual justification, the appellate court had ruled that a plaintiff has standing to sue under RICO only when injured by “racketeering,” as distinct from the predicate offenses that make up racketeering.<sup>83</sup> On this basis, the Second Circuit ruled that a corporate plaintiff who had been defrauded through the mails lacked RICO standing because the source of his injuries was mail fraud, rather than racketeering by mail fraud.<sup>84</sup> Once again, the Supreme Court rejected the extratextual liability barrier. In discarding the Second Circuit’s rule, the Court noted that the Second Circuit had grounded its proposal not in the text of the statute, but instead on only “the general principles of RICO and a reference to ‘mobsters.’”<sup>85</sup> The Court rejected this purposive interpretation and the liability barrier it created because a “reading of the statute belies any such [standing] requirement.”<sup>86</sup> The Court went on to note that “[t]here is no room in the statutory language for an additional, amorphous ‘racketeering injury’ requirement.”<sup>87</sup>

The pattern continued in *H.J. Inc.*, where the Court rejected a rule proposed by the Eighth Circuit that would have required plaintiffs to show more than one “fraudulent effort or scheme” in order to satisfy RICO’s “pattern” element, which conditions liability on the plaintiff’s ability to prove the existence of a pattern of racketeering.<sup>88</sup> Though no such multiple schemes requirement appears in the statute, once again, the lower court justified its rule by referring to the purposes of the

---

<sup>80</sup> Id at 580 (finding the definition of “enterprise” unambiguous because “[t]here [was] no restriction upon the associations embraced by the definition”) (internal quotation marks and citation omitted).

<sup>81</sup> Id at 580–81 (“Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, ‘legitimate.’”).

<sup>82</sup> 473 US at 493–95.

<sup>83</sup> Id at 493–94 (“[T]he Court of Appeals’ second prerequisite for a private civil RICO action [is] ‘injury . . . caused by an activity which RICO was designed to deter.’”).

<sup>84</sup> Id at 485 (“[A] RICO plaintiff must allege a racketeering injury—an injury different in kind from that occurring as a result of the predicate acts themselves.”) (internal quotation marks omitted).

<sup>85</sup> Id at 494 (noting that the circuit court “emphasized Congress’ undeniable desire to strike at organized crime”).

<sup>86</sup> Id at 495 (“If the defendant engages in a pattern of racketeering activity [that] injure[s] the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).”).

<sup>87</sup> Id.

<sup>88</sup> *H.J. Inc.*, 492 US at 234–35, citing *H.J. Inc v Northwestern Bell Telephone Co.*, 829 F2d 648, 650 (8th Cir 1987).



RICO statute. The Eighth Circuit believed that a multiple schemes rule was necessary because RICO was not designed to “target . . . sporadic activity.”<sup>89</sup> The Court rejected the extratextual liability barrier as unsupported by the text (and, for that matter, even the legislative history).<sup>90</sup> Instead, the Court “adopt[ed] a less inflexible approach that [seemed to the Court] to derive from a commonsense, everyday understanding of RICO’s language and Congress’ gloss on it.”<sup>91</sup> In lieu of a hard and fast rule, the Court held that a pattern is established by showing “continuity plus relationship” of the racketeering.<sup>92</sup> Though this definition of “pattern” was famously vague,<sup>93</sup> for the purposes of this Comment the important thing to note is the Court’s rejection of the Eighth Circuit’s “multiple schemes” rule.<sup>94</sup> Once again, the Court had thwarted an attempt to fashion an extratextual liability barrier based only on a lower court’s understanding of RICO’s purpose.

The final instance of this pattern, and perhaps the most important, is the Court’s recent decision in *Cedric Kushner*. The Court rejected a rule proposed by the Second Circuit that an employee “acting within the scope of his authority” can never be distinct from the employer.<sup>95</sup> This liability barrier was, once again, premised on the lower court’s judgments about RICO’s purposes.<sup>96</sup> Indeed, the purposive

---

<sup>89</sup> *H.J. Inc.*, 829 F2d at 650. Upon reversing, the Supreme Court noted that “[m]ost Courts of Appeals have rejected the Eighth Circuit’s interpretation of RICO’s pattern concept to require an allegation and proof of multiple schemes,” and concluded that both the “relationship requirement” and “continuity requirement” for RICO liability can be met without proof of multiple schemes. *H.J. Inc.*, 492 US at 235, 239–43.

<sup>90</sup> *H.J. Inc.*, 492 US at 238–39 (finding that both the text and the legislative history “show[] that Congress indeed had a fairly flexible concept of a pattern in mind”).

<sup>91</sup> *Id.* at 241 (allowing “continuity of racketeering activity” to be proved “in a variety of ways”).

<sup>92</sup> *Id.* at 239 (emphasis omitted).

<sup>93</sup> The unhelpfulness of the definition is explained in Justice Scalia’s concurring opinion. See *id.* at 251–52 (“I doubt that the lower courts will find the Court’s instructions much more helpful than telling them to look for a ‘pattern’—which is what the statute already says.”) (Scalia concurring). See also Kenny, 30 Duquesne L Rev at 267–69 (cited in note 69) (describing the Court’s “failures” in *H.J. Inc.*).

<sup>94</sup> According to the concurrence, the rejection of the “multiple schemes” test is “the Court’s only substantive contribution to [its] prior guidance.” *H.J. Inc.*, 492 US at 254 (Scalia concurring).

<sup>95</sup> *Cedric Kushner*, 533 US at 160–61 (concluding “that the ‘person’ and ‘enterprise’ here are distinct and that the RICO provision applies”). The Court’s conclusion overturned the Second Circuit, which had refused to “creat[e] exceptions to the distinctness requirement based on the identity of the defendant.” *Cedric Kushner Promotions, Ltd v King*, 219 F3d 115, 117 (2d Cir 2000) (per curiam).

<sup>96</sup> The actual opinion in the Second Circuit was quite brief, and did not go into any detail. See *Cedric Kushner*, 219 F3d at 116–17 (per curiam) (spanning only two pages in the reporter). The proposition that employees are never distinct from employers was attributed to the Circuit’s previous decision in *Riverwoods Chappaqua Corp v Marine Midland Bank, NA*, 30 F3d 339, 344

analysis underlying the employer-employee rule seems to mirror that of the family resemblance and different activities courts.<sup>97</sup> In reversing, the Supreme Court ruled that, at least in the context of an employee who is also the president and sole shareholder of a corporation, distinctiveness exists between employers and employees.<sup>98</sup> The Court's guidance was clear: the distinctiveness requirement is to be applied in accordance with the statute's plain text, and not as a tool for judges to constrain liability perceived to be outside of the statute's purposes. Part II.C considered in detail the implications of *Cedric Kushner* for analysis under the distinctiveness requirement. For present purposes, *Cedric Kushner* demonstrates, in the context of the distinctiveness requirement itself, that the Supreme Court has rejected the efforts of lower courts to constrain RICO by imposing extratextual liability barriers.<sup>99</sup>

This Part shows that there is a well-established pattern in RICO cases. The lower courts have repeatedly attempted to limit the breadth of RICO by creating extratextual barriers to liability. In the end, though, they are always thwarted by the intervention of the Supreme Court. The extratextual liability barriers present in both the family resemblance and different activities approaches to parent-subsidiary distinctiveness fall squarely within this pattern.<sup>100</sup> Just as the now-

---

(2d Cir 1994) (predicating the proposition on the idea that a corporation can act only through its agents, which include employees acting within the scope of their employment).

<sup>97</sup> See generally Part II.A–B. In particular, the idea that RICO is not designed to attack the enterprise when the enterprise has the same financial interest as the RICO person would seem to apply to King, just as it applies to parent corporations and their wholly owned subsidiaries. See text accompanying note 50.

<sup>98</sup> *Cedric Kushner*, 533 US at 160 (“[W]e conclude that the ‘person’ and the ‘enterprise’ there are distinct and that the RICO provision applies.”).

<sup>99</sup> One could argue that *Reves v Ernst & Young*, 507 US 170 (1993), is an exception to the pattern described in this section. *Id.* at 185 (“[W]e hold that to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs, one must participate in the operation or management of the enterprise itself.”) (internal quotation marks and citation omitted), but that is not so. In *Reves*, the Court accepted a barrier to RICO liability by requiring a person or corporation charged in § 1962(c) with conducting the affairs of an enterprise be involved in the management of the enterprise. *Id.* at 184–85 (upholding “the ‘operation or management’ test”). Unlike the extratextual barriers described in the other RICO cases in this section, though, the primary basis of the management rule was an extrapolation of the words “conduct” and “participate” in the statute. See *id.* at 177–79 (“Once we understand the word ‘conduct’ to require some degree of direction and the word ‘participate’ to require some part in that direction, the meaning of § 1962(c) comes into focus.”). *Reves* thus posits a textual liability barrier, rather than one of the extratextual variety.

<sup>100</sup> In each of the cases surveyed, the Court resolved a circuit split between “purposive liability barrier” circuits and more textual circuits that permitted liability. See, for example, *Cedric Kushner*, 533 US at 161 (“Other Circuits, applying § 1962(c) in roughly similar circumstances, have reached a contrary conclusion.”). One might seek to distinguish the parent-subsidiary issue on grounds that the circuit split, such as it is, exists between two different extratextual liability barriers. Though this is a valid distinction, it would not seem to make much of a difference. The Supreme Court does not need to have any circuits on its side to defend its jurisprudential position.

overturned lower court rules described in this Part, these approaches look to RICO's purposes to derive an extratextual rule constraining liability. In the family resemblance approach, liability is limited to those cases that are part of the same family as the prototypical RICO case. In the different activities approach, liability is extratextually limited to cases in which the parent and subsidiary engage in different aspects of the racketeering. The textualist approach, on the other hand, is based on a linguistic accounting of the words in the statute. It offers the text-centered analysis that the Supreme Court has repeatedly insisted on in its cases construing RICO. A *per se* rule of parent-subsidiary RICO distinctiveness is thus the result compelled by the Supreme Court's RICO jurisprudence.

#### IV. THE ABSURDITY DOCTRINE: AN INAPPOSITE OBJECTION TO THE RULE OF PARENT-SUBSIDIARY DISTINCTIVENESS

Part III showed that the existing approaches to parent-subsidiary distinctiveness clash with the Supreme Court's approach to interpreting RICO and that the proper solution is a textually grounded *per se* rule of parent-subsidiary distinctiveness. This Part considers a potential objection to this doctrinal move, namely, that liability in the parent-subsidiary context would be "absurd."<sup>101</sup> In none of the RICO cases discussed in Part III was there a serious concern that liability would produce a truly absurd result, so, at least potentially, the absurdity doctrine is a potential basis on which to distinguish the existing RICO interpretation cases. The following analysis shows that, because parent-subsidiary liability is not absurdly removed from RICO's purposes, any such attempt must fail. The analysis in this Part, however, is not meant to show that parent-subsidiary liability is compelled by a proper understanding of RICO's underlying purposes. As Part III argues, such an inquiry is irrelevant under the Supreme Court's RICO jurisprudence. Rather, this Part takes the much more modest aim of showing that such liability is not *so* unrelated to RICO's purposes as to render it absurd. For the purpose of evaluating the nonabsurdity of parent-subsidiary liability, this Part separates cases in which the parent is charged as the RICO person from cases in which the subsidiary is so charged.

---

<sup>101</sup> See generally Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 *Am U L Rev* 127, 128–30 (1994) (describing the history and meaning of the absurd results canon of statutory interpretation). A classic judicial statement of the absurdity principle is *Church of the Holy Trinity v United States*, 143 *US* 457, 460, 472 (1892) (rejecting as absurd the plain-language analysis of a law prohibiting contracts to import foreign labor in a case where the imported laborer was a priest).

The Seventh Circuit's family resemblance test itself demonstrates why liability is not absurd in the context of subsidiary corporations charged as RICO persons. The test was designed to distinguish the circuit's prior decision in *Haroco, Inc v American National Bank and Trust Co of Chicago*,<sup>102</sup> which held the distinctiveness requirement to be satisfied in a case that alleged that the subsidiary was the RICO person.<sup>103</sup> In doing so, the court accepted that where subsidiary corporations take over their parent corporations and operate them through racketeering, the activity pattern closely resembles the very case that RICO was actually designed to address.<sup>104</sup> Given such resemblance, it cannot reasonably be said that "subsidiary as person" liability bears an absurd relation to RICO's purposes.

For cases in which the parent is alleged to be the RICO person, *Fitzgerald* makes the most potent argument for absurdity. The *Fitzgerald* court argued that the only effect of assigning liability would be to encourage the vertical integration of business organizations.<sup>105</sup> As encouraging vertical integration is not among the purposes of RICO, the court reasoned that liability would serve no useful function.

Although it is almost surely true that the vertical integration of corporations was not foremost in the mind of RICO's authors, it is less clear that such an outcome cannot serve the statute's purposes. Under fundamental principles of corporate law, parent companies are not routinely responsible for claims against their subsidiaries.<sup>106</sup> This liability shield, which applies to claims for the torts that are included in RICO's definition of racketeering,<sup>107</sup> provides a reason for parent corporations to commit their torts through subsidiary corporations, rather than through internal divisions. Though the parent corporation's participation in the fraud may be exposed, or the parent may be susceptible to a veil-piercing action,<sup>108</sup> there is some probability that liability will be limited to the assets of the subsidiary corporation alone.<sup>109</sup> This

---

<sup>102</sup> 747 F2d 402 (7th Cir 1984).

<sup>103</sup> Id at 402. See text accompanying note 26.

<sup>104</sup> See *Fitzgerald*, 116 F3d at 227.

<sup>105</sup> Id at 227. See note 28 and accompanying text.

<sup>106</sup> Cox and Hazen, 1 *Cox & Hazen on Corporations* § 7.16 at 300 (cited in note 64) ("[C]ourts will not ordinarily disregard the separation of corporate entities in the absence of a showing that injustice or unfairness would otherwise result.").

<sup>107</sup> See 18 USC § 1961(1) (2000) (defining "racketeering activity" to include dozens of types of crimes).

<sup>108</sup> Cox and Hazen, 1 *Cox & Hazen on Corporations* § 7.16 at 299–303 (cited in note 64) (describing veil-piercing actions in the context of subsidiary corporations).

<sup>109</sup> Corporate law is awash with cases preserving highly dubious corporate veils between parent corporations and their subsidiaries. See, for example, *De Castro v Sanifill, Inc*, 198 F3d 282, 284–85 (1st Cir 1999) (refusing to find the parent liable where the subsidiary had no assets and was itself inactive); *Walkovszky v Carlton*, 18 NY2d 414, 223 NE2d 6, 7–10 (1966) (refusing

probability creates an incentive for parent corporations to take advantage of the corporate law by establishing subsidiary corporations to commit the most detectable and provable aspects of racketeering. RICO liability in parent-subsidary enterprises can thus be viewed as a mechanism to correct for this undesirable consequence of the corporate law.

From this perspective, it is as if RICO says to a parent corporation: “Look, we prefer that you commit your tortious and potentially tortious conduct directly, because, among other reasons, you are more likely to be solvent than your subsidiary. If your subsidiary is caught racketeering, we might not find out that you were really calling the shots, and so you might get lucky. But if we do find out that you committed your torts through a subsidiary, we are going to hit you hard. You can avoid this extra hit, though, just by doing your torts directly.” On this view, RICO *is* designed to encourage vertical integration of businesses engaged in wrongdoing.

Courts, including the Seventh Circuit, have recognized the possibility of parent-subsidary liability if the corporate form were alleged to have *actually* supported the racketeering.<sup>110</sup> The point missed by these courts, though, is that the act of separate incorporation can, in and of itself, assist the fraud because of the veil between parent and subsidiary corporations. This mere possibility is enough to conclude that there is nothing absurd about liability in cases alleging the parent corporation as the RICO person.

None of this is to say, of course, that individual members of Congress voting for the passage of RICO actually had in mind lawsuits naming two members of a corporate family as the RICO enterprise and person. Nor is it to say that parent-subsidary liability is valuable as a matter of social policy. The point is only that such liability has a nonabsurd relation to the RICO legislation. In the context of Supreme Court jurisprudence that insists on applying RICO according to its terms, “absurdity” thus provides no escape from a rule of parent-subsidary distinctiveness.

---

to find the parent liable where the subsidiary had limited assets that were continually drained by the parent).

<sup>110</sup> See *Bucklew v Hawkins, Ash, Baptie & Co*, 329 F3d 923, 934 (7th Cir 2003) (Posner) (denying liability “unless the enterprise’s decision to operate through subsidiaries rather than divisions somehow facilitated its unlawful activity”); *Waddell & Reed Financial, Inc v Torchmark Corp*, 223 FRD 566, 600 (D Kan 2004) (“Absent some allegation that by using a subsidiary, the parent corporation was able to more easily commit or conceal the fraud, a subsidiary is not an ‘enterprise’ separate from the parent corporation.”).

## V. CONCLUSION

The circuit courts have erected two complementary extratextual barriers to liability in parent-subsidary RICO cases. In so doing, they have ignored the Supreme Court's repeated directives against the use of purposive interpretation to extratextually cabin RICO liability. Both the family resemblance and different activities approaches are grounded in hypotheses about the congressional purposes behind enacting RICO. Though the courts' judgments as to these purposes may well be correct, their significance is truncated by the susceptibility of § 1962(c) to a plain language reading. To be sure, the courts could certainly have a valid complaint that RICO liability for parent and subsidiary enterprises is simply too expansive. Although important, the merits of parent-subsidary RICO liability is a debate properly taken up by Congress. As the Supreme Court said in *H.J. Inc.*, "RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for [courts]."<sup>111</sup>

---

<sup>111</sup> 492 US at 249.