

# Focus

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## Guilty by Association?

By Martha Boersch and Caroline Mitchell

The U.S. Supreme Court's recent 7-2 decision in *Boyle v. United States*, 2009 DJDAR 8227, resolved a three-way split among the circuits about what proof of "structure" is required to establish an "association-in-fact" enterprise under the Racketeer Influenced and Corrupt Organization Act. The decision rejected the dissent's view that courts should require a business-like structure before finding a RICO violation. By imposing only minimal structure requirements, this decision invites plaintiffs and prosecutors to up the stakes in a wide variety of cases by alleging RICO.

RICO, 18 U.S.C. Section 1961 et seq., makes it unlawful for anyone associated with an "enterprise" to conduct or participate in the enterprise's affairs through a pattern of racketeering activity. An "enterprise," in turn, is defined to include a "group of individuals associated in fact although not a legal entity."

The question the Supreme Court was answering in *Boyle* was whether an "association-in-fact" enterprise must have "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages" and, if so, what jury instructions are sufficient.

The question arose because the Courts of Appeal had varying readings of an earlier decision, *United States v. Turkette*, 452 U.S. 576 (1981). In *Turkette*, the court ruled that to secure a conviction under RICO, the prosecution had to prove both the existence of an enterprise and the connected "pattern of racketeering activity." Proving an enterprise required "evidence of an ongoing organization, formal or informal" and "evidence that the various associates function as a continuing unit." *Turkette* recognized that 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."

After *Turkette*, five circuits, including the 9th Circuit, ruled that an associated-in-fact enterprise under RICO did not require any particular organizational structure, separate or otherwise. In *Odom v. Microsoft Corp.*, 486 F.3d 541 (2007), the 9th Circuit recognized that it had equivocated in its earlier decisions about whether an ascertainable structure was required and, if so, what functions the structure had to serve.

The *Odom* court then joined the circuits that had found no particular structure necessary, separate or otherwise. The 9th Circuit concluded that courts that found otherwise were misreading *Turkette*. It reasoned that when *Turkette* held that an enterprise is "an entity apart from the pattern

of activity in which it engages," it could not have meant that an enterprise had to have a structure beyond that necessary to carry out its pattern of illegal racketeering activities, because *Turkette* itself had found that a purely criminal enterprise can be an associated-in-fact enterprise. It also cautioned that such a reading would be too narrow because it could exclude criminal enterprises that did not observe the "niceties of legitimate organizational structures."

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Four circuits, the 3rd, 4th, 8th and 10th, followed the position rejected by the 9th Circuit and read *Turkette* as requiring that an associated-in-fact enterprise have an ascertainable separate structure, beyond the structure necessary to engage in the pattern of illegal racketeering activity.

The 7th Circuit, in cases such as *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640 (7th Cir. 1995), fell in the middle, requiring some kind of ascertainable structure, but not requiring a separate structure.

In *Boyle*, Justice Samuel Alito writing for the majority, ruled that an association-in-fact must have "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages," but read the statute to require only three elements to find such a structure: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."

The court reasoned that the "purpose" element was inherent in the ordinary meaning of "enterprise" as a "venture," "undertaking" or "project." Likewise, the necessity of "relationships" follows from the definition of "association" because it "requires both interpersonal relationships

and a common interest." The longevity requirement arose from RICO's requirement of proof that "the enterprise had 'affairs' of sufficient duration to permit an associate to 'participate' in those affairs through 'a pattern of racketeering activity.'" With respect to this element, however, the court made clear that "nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence."

Edmund Boyle, who was prosecuted for participation in a series of attempted night deposit box thefts and at least two bank-vault burglaries across several states during the 1990s, argued for more robust structural requirements. He offered a laundry list of candidates, including 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 and rituals. The Supreme Court rejected them all, finding no basis in the language of RICO for such requirements.

The court stressed that *Turkette* required only a continuing unit that functions with a common purpose. The court found no hierarchical structure or chain of command necessary. It explained that no fixed decision-making process is required and that decisions may be made on an "ad hoc" basis in any number of ways. Likewise it found that members of the association do not need to have a fixed role, but may perform different functions at different times. Nor did the court find that crimes had to have any particular level of sophistication.

The court also rejected Boyle's claim that without additional structural requirements, its ruling would lead to a merger of the RICO Section 1962(c) crime with other federal crimes. The court reasoned that proof of a predicate act was not sufficient to make out a RICO claim because the statute still required a pattern of racketeering activity.

The court also emphasized that a RICO enterprise would require more to establish liability — a common purpose and a course of conduct — than would be necessary to meet the elements of certain conspiracy statutes. It also noted that some of the overlap Boyle pointed to between Sections 1962(c) and 1962(d) would exist even if the court incorporated more structural requirements into an association-in-fact enterprise.

Because it found that the language of RICO defined the scope of the necessary structure, the court declined to delve fur-

ther and rejected Boyle's arguments about the statutory purpose of RICO, its legislative history or the rule of lenity.

With respect to jury instructions, the court gave trial courts broad leeway, finding that although "an ascertainable structure beyond that inherent in the pattern of racketeering activity" is required "an instruction framed in this precise language is not necessary." Accordingly, it ruled that the trial court's jury instructions were sufficient because they made clear to the jury that they could not convict unless they found that the government proved the existence of an enterprise.

As to the structure and operation of that enterprise, the court found the trial court's instructions sufficient because the jury was told that they needed to find "an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives" and that "the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose."

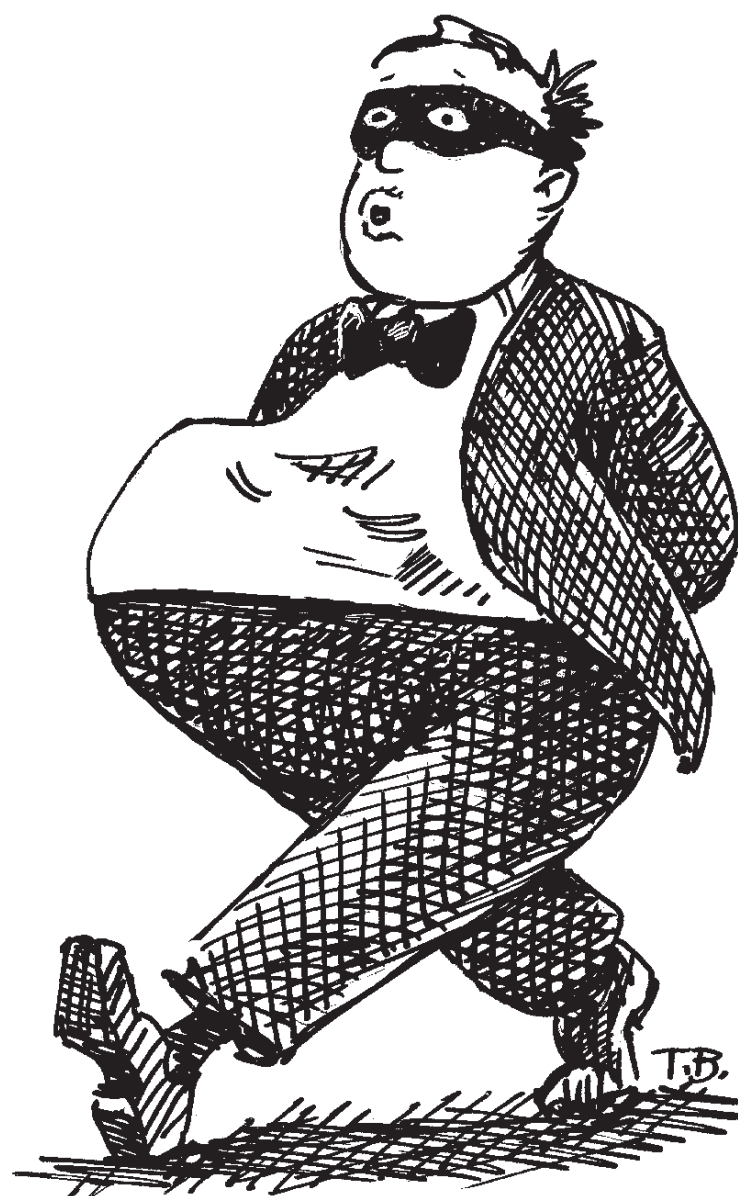
The court also ruled that a jury instruction that "the existence of an association-in-fact is oftentimes more readily proved by what it does, rather than by abstract analysis of its structure" was correct.

Critics of *Boyle*, including Justices John

Paul Stevens and Stephen Breyer in dissent, worry that it broadens RICO far beyond its intended purpose to reach "ad hoc associations of thieves." They argue that after *Boyle*, the proof required to prove a RICO charge, with its 20-year maximum sentence, forfeiture remedies and civil penalties, including treble damages and attorney fees, is essentially indistinguishable from the proof required for a conspiracy under 18 U.S.C. Section 371, which carries a maximum five-year sentence and no civil penalties.

Accordingly, after *Boyle* prosecutors likely will turn more frequently to RICO and have the added leverage of the dramatically increased penalties that RICO affords. On the civil side, where both treble damages and attorney fees are available to plaintiffs who prove RICO claims, the breadth of the opinion will entice plaintiffs to look hard to find RICO allegations to include in their complaints.

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