

Does the Shoe Fit? Why the Intracorporate Conspiracy Doctrine Should Apply to Conspiracy Claims Brought Under RICO

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*“Because of policy considerations that are unique to antitrust law, conspiracies charged under the Sherman Act and corporate conspiracy prosecutions instituted under the general federal conspiracy statute have resulted in recognition of radically different standards of liability.”*¹

I. INTRODUCTION

With the recent and spectacular implosion of financial institutions like FTX and Silicon Valley Bank (SVB), shareholders and the public alike are vigorously scrutinizing corporate governance and responsibility.² While it will take years for policymakers and regulators to resolve and address FTX’s criminal demise and SVB’s sudden collapse, the doctrines of criminal conspiracy and fraud are well settled.³ Courts are well equipped to handle any criminal conspiracy charges stemming from these companies’ downfalls, but they are not as well prepared to handle civil corporate conspiracy claims.⁴ The U.S. Supreme Court’s

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1. Kathleen F. Brickey, *Corporate Criminal Liability: A Primer for Corporate Counsel*, 40 BUS. LAW. 129, 144 (1984).

2. See Maria Castañón Moats, *Trends Shaping Corporate Governance in 2023—Four Areas to Watch*, PWC (Jan. 4, 2023), <https://www.pwc.com/us/en/services/governance-insights-center/library/corporate-governance-trends.html> [<https://perma.cc/GE6E-TYPH>] (highlighting increased shareholder pressure for board of directors’ oversight responsibilities); see also Margarethe Wiersma & Haeyoung Koo, *Corporate Governance in Today’s World: Looking Back and an Agenda for the Future*, 20 STRATEGIC ORG. 786, 787 (2022) (evaluating effects of increased scholarly research and evolving social morals on corporate governance). See generally *Silicon Valley Bank Parent, CEO, CFO Are Sued by Shareholders for Fraud*, REUTERS (Mar. 13, 2023), <https://www.reuters.com/legal/silicon-valley-bank-parent-ceo-cfo-are-sued-by-shareholder-fraud-2023-03-13/> [<https://perma.cc/4FYM-TNWC>] (addressing fallout of SVB collapse); Jacob Bogage & Tory Newmyer, *Lawmakers Grapple with Sheer Size of FTX’s Missing Billions*, WASH. POST (Dec. 14, 2022), <https://www.washingtonpost.com/business/2022/12/14/ftx-sbf-crypto-fraud-charges-hearing/> [<https://perma.cc/QB6E-UGGS>] (listing conspiracy charges levied against Sam Bankman-Fried).

3. See Bogage & Newmyer, *supra* note 2 (noting conspiracy and fraud charges); Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 400 (1998) (finding federal court rulings addressing corporate criminal conspiracies nearly uniform).

4. See *Alix v. McKinsey & Co.*, No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872, at *69-70 (S.D.N.Y. Aug. 18, 2023) (highlighting circuit split); see also Brickey, *supra* note 1, at 144 (noting unsettled standards of civil liability).

ruling in *Copperweld Corp. v. Independence Tube Corp.*⁵ established the intra-corporate conspiracy doctrine (ICCD) in the antitrust context, but created a disparity between criminal and civil corporate conspiracy claims.⁶ The ICCD establishes that a corporation—as a single, legal entity—cannot conspire with employees who act within the scope of their employment.⁷ Thus, the ICCD negates the multiplicity-of-actors requirement in a conspiracy by grouping together the corporation and its agents.⁸ This decision precipitated a circuit split on the application of the ICCD in civil actions.⁹ Although the ICCD originated in anti-trust law, the doctrine is often invoked against corporations in the civil context.¹⁰

The Sherman Antitrust Act (Sherman Act) was the first federal statute that created a uniform policy on the regulation of monopolies.¹¹ Sections 1 and 2 of the Sherman Act implicate ICCD issues because these sections penalize individuals who conspire to restrain or monopolize trade, respectively.¹² In this context, the ICCD developed out of a hesitancy to charge corporations with conspiracy for strategic conversations between a corporation and its officers or agents to expand the sale of its own products.¹³ Thus, the ICCD inures the actions of corporate officers or agents to combat double jeopardy issues that arise in the

5. 467 U.S. 752 (1984).

6. *See id.* at 773-74 (holding corporations cannot conspire with wholly owned subsidiaries under Section 1 of Sherman Act); *see also Alix*, 2023 U.S. Dist. LEXIS 145872, at *69-70 (discussing circuit split on applying ICCD to civil Racketeer Influenced and Corrupt Organizations Act charges).

7. *See Kirwin v. Price Commc'ns Corp.*, 391 F.3d 1323, 1326 (11th Cir. 2004) (noting case of first impression on this issue). *Kirwin* marked the first time the U.S. Court of Appeals for the Eleventh Circuit ruled on the issue of whether the ICCD applied to RICO claims. *See id.* (addressing lack of case law). The Eleventh Circuit found that agents of a corporation *can* conspire with that same corporation, holding that the ICCD does not bar RICO claims because corporations and their agents are separate entities. *See id.* at 1327 (outlining case's holding). This conspiratorial system is called the multiplicity-of-actors requirement, and is an essential element of a corporate conspiracy claim. *See id.* at 1326 (describing requirement's place within doctrine).

8. *See* David Warner, Comment, *Are the Corporation and Its Employees the Same?: Piercing the Intra-corporate Conspiracy Doctrine in a Post-Enron World*, 55 U. KAN. L. REV. 1057, 1058 (2007) (discussing application of ICCD to RICO claims); *see also Bivens Gardens Off. Bldg. v. Barnett Banks, Inc.*, 140 F.3d 898, 912 (11th Cir. 1998) (asserting civil conspiracy claims require two or more actors).

9. *See United States v. Gurry*, 427 F. Supp. 3d 166, 190 n.85 (D. Mass. 2019) (discussing circuit split); *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000) (declining extension of ICCD in antitrust context); *Alix*, 2023 U.S. Dist. LEXIS 145872, at *70 (mentioning current circuit split).

10. *See* Alexander M. Parker, Note, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 819-20 (1996) (explaining passage of RICO and federal courts construing RICO); *Alix v. McKinsey & Co.*, No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872, at *69-71 (S.D.N.Y. Aug. 18, 2023) (discussing ICCD in civil RICO context).

11. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (establishing federal statute penalizing monopolies); *see also* B. Zorina Khan, *Antitrust and Innovation Before the Sherman Act*, 77 ANTITRUST L.J. 757, 783 (2011) (highlighting shortcomings of Sherman Act).

12. *See Fletway, Inc. v. Pub. Serv. Interstate Transp. Co.*, 72 F.2d 761, 763 (3d Cir. 1934) (articulating Sections 1 and 2 of Sherman Act); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952) (detailing Section 1 of Sherman Act and its application to corporate conspiracies).

13. *See Nelson Radio & Supply Co.*, 200 F.2d at 914 (highlighting absurdity of penalizing conversations about expanding or promoting use of corporation's own products); *McAndrew*, 206 F.3d at 1035-36 (asserting corporation cannot act alone in forming conspiracy to restrain or monopolize trade). *See generally* 15 U.S.C. §§ 1-2 (noting elements of conspiracy in restraint of trade or monopolization).

antitrust context.¹⁴ The ICCD's purpose, however, falters when applied to civil claims arising under the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁵ Congress passed RICO in 1970 to target organized crime leaders who ordered their members to commit heinous crimes and various civil offenses.¹⁶ Yet, due to increasing focus on corporate responsibility and governance, civil RICO claims now target the daily operations of corporations, and courts are struggling to find consistency.¹⁷

In *Alix v. McKinsey & Co.*,¹⁸ the U.S. District Court for the Southern District of New York suggests the ongoing circuit split is tilting towards uniformity by holding that the ICCD does not apply to civil RICO claims.¹⁹ The court sided with the U.S. Courts of Appeals for the Seventh, Ninth, and Eleventh Circuits, reasoning that the policy considerations underpinning the Sherman Act concern the efforts of multiple actors, unlike RICO, making the doctrines fundamentally incompatible.²⁰ While *Alix* is one step towards resolving the circuit split, it also increases the scope of liability that corporations may face when charged with a civil RICO violation.²¹

14. See Warner, *supra* note 8, at 1057-58 (discussing lack of multiplicity of actors when corporation's agent acts within scope of their employment); Martin, *supra* note 3, at 400 (discussing how acts of corporate agents do not constitute multiplicity of actors). But see *United States v. Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986) (holding corporation can conspire with its agents in criminal context).

15. See *Alix*, 2023 U.S. Dist. LEXIS 145872, at *70 (noting circuit split); J.S. Nelson, *Paper Dragon Thieves*, 105 GEO. L.J. 871, 873 (2017) (arguing "destruction" of corporate conspiracy charges for directors and agents causes fraud).

16. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (setting forth federal framework to eradicate organized crime); see also Nathan Koppel, *They Call It RICO, and It Is Sweeping*, WALL ST. J. (Jan. 20, 2011), <https://www.wsj.com/articles/SB10001424052748704881304576094110829882704> [<https://perma.cc/9J5H-KYU8>]. There is a criminal and a civil element to RICO. See Koppel, *supra* (explaining use of RICO in criminal context). The civil arm of RICO is often used to reach into the corporate boardroom by allowing a victim of racketeering to recover treble damages and attorney's fees. See *id.* (addressing civil RICO); see also Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 566 (2004) (describing congressional intent behind RICO); Lee Coppola & Nicholas DeMarco, *Civil RICO: How Ambiguity Allowed the Racketeer Influenced and Corrupt Organizations Act to Expand Beyond Its Intended Purpose*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 241-42 (2012), <https://heinonline.org/HOL/P?h=hein.journals/nejccc38&i=249> [<https://perma.cc/9V6V-C6G8>] (explaining RICO's goals of eradicating organized crime).

17. See Koppel, *supra* note 16 (discussing civil RICO claims against corporations); see also Moats, *supra* note 2 (highlighting increased pressure from shareholders for board of directors' oversight responsibilities).

18. No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872 (S.D.N.Y. Aug. 18, 2023).

19. Compare *id.*, at *70 (finding ICCD incompatible with civil RICO claims), with *Fogie v. THORN Ams. Inc.*, 190 F.3d 889, 899 (8th Cir. 1999) (holding ICCD applicable in civil RICO context).

20. See *Alix*, 2023 U.S. Dist. LEXIS 145872, at *70 (characterizing circuit split); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (discussing weight of authority for applying ICCD to civil RICO claims); see also *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996) (holding ICCD does not bar RICO claims); *Kirwin v. Price Comme'ns Corp.*, 391 F.3d 1323, 1327 (11th Cir. 2004) (joining Seventh and Ninth Circuits in holding ICCD does not bar RICO claims).

21. See *Alix*, 2023 U.S. Dist. LEXIS 145872, at *70 (articulating protections for employees when acting within scope of employment); Warner, *supra* note 8, at 1063-70 (describing RICO provisions and inconsistent rulings from circuit courts).

This Note will first discuss the history, formation, and application of the ICCD as an outgrowth of the Sherman Act.²² This Note will then discuss the application of the ICCD since the seminal case of *Copperweld*.²³ After establishing that the ICCD is firmly rooted in antitrust principles, this Note will discuss the history, policy goals, and application of RICO in both the criminal and civil context.²⁴ This Note will then examine the *Alix* decision, which represents the most recent interpretation of the circuit split and suggests discontinuing the application of the ICCD to RICO conspiracy claims.²⁵ In an effort to settle the debate on this topic, this Note's analysis will be strictly limited to the scenario where there is an alleged RICO conspiracy between a parent corporation and its wholly owned subsidiary, and will argue that the overexpansion of RICO in the civil context is fundamentally incompatible with the ICCD's policy considerations.²⁶ Therefore, this Note will conclude that a RICO conspiracy claim should not be allowed to apply outside of its original, narrowly conceived purpose.²⁷

II. HISTORY

A. Background of the Sherman Act

Amid the boom of the Industrial Revolution, the Sherman Act focused on curtailing the immense power that a select group of corporations and individuals wielded over the American economy.²⁸ The core of the Sherman Act aimed to achieve two goals: to break up monopolies that restrained interstate trade, and to prevent the formation of such monopolies.²⁹ While at least fourteen states implemented anti-monopoly provisions into their constitutions prior to 1890, the Sherman Act marked the first federal legislation on the issue.³⁰ Much of the debate surrounding the Sherman Act focused on balancing Congress's authority

22. See *infra* Sections II.A-B (providing background on Sherman Act and ICCD's creation).

23. See *infra* Sections II.B-C (showcasing ICCD's origins in *Copperweld* and doctrine's application by courts since).

24. See *infra* Section II.D (outlining history of RICO and demonstrating statute's applicability to criminal and civil cases).

25. See *infra* Sections II.E-F (discussing application of ICCD to RICO conspiracy claims, circuit split regarding issue, and *Alix* case).

26. See *infra* Section III.A (advocating for commonsense application of ICCD to RICO conspiracies).

27. See *infra* Sections III.A-B (setting forth argument and offering policy proposal to ease courts' application of ICCD to RICO).

28. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 50 (1911) (explaining economic backdrop to Sherman Act).

29. See *id.* (noting how corporate organization affected wealth accumulation and facilitated oppression); Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (prohibiting monopolies and anticompetitive practices to ensure fair market competition).

30. See James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 499 (1987) (exploring states' attempts to regulate monopolization prior to Sherman Act); Khan, *supra* note 11, at 760-62 (tracing antitrust regulation to English common law).

to regulate both interstate trade and the effects of monopolies, while simultaneously preserving states' rights to regulate monopolies that restrain *intrastate* trade.³¹ In doing so, Congress divided the Sherman Act into numerous sections; however, this Note will only focus on Sections 1 and 2.³²

Section 1 of the Sherman Act imposes liability on those contracting or conspiring to restrain trade.³³ But the applicability of Section 1 takes a bilateral approach: it requires two or more persons to either agree or conspire to restrain trade.³⁴ This distinction is characterized as the “concerted effort” requirement.³⁵ Section 2 targets persons who monopolize, attempt to monopolize, or combine or conspire with a person to monopolize any part of trade or commerce among the several states.³⁶ Accordingly, a critical distinction between Sections 1 and 2 is that one person alone could violate Section 2 of the Act, whereas Section 1 requires at least two actors.³⁷

B. Creation of the ICCD

Prior to the landmark case of *Copperweld*, courts struggled to effectively rule on how to classify businesses that coordinated with their wholly owned

31. See May, *supra* note 30, at 504 n.65 (explaining legislative purpose and surrounding social attitudes toward Sherman Act).

32. See 15 U.S.C. §§ 1-2 (preventing monopolization and anticompetitive business practices).

33. See *Fleetway, Inc. v. Pub. Serv. Interstate Transp. Co.*, 72 F.2d 761, 763 (3d Cir. 1934) (interpreting Section 1 of Sherman Act); John T. Prisbe, *The Intracorporate Conspiracy Doctrine*, 16 U. BALT. L. REV. 538, 540 (1987) (exploring how modern conspiracy law grants corporations entity or personhood status capable of conspiracy); 15 U.S.C. § 1 (creating foundation for American antitrust law). The Sherman Act states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy . . . shall be deemed guilty of a felony.

15 U.S.C. § 1; see also Prisbe, *supra*, at 541 (explaining conspiracy law requires two or more parties); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (holding Section 1 inapplicable to unilateral corporate conduct).

34. See J. Matthew Schmitten, Note, *Antitrust's Single-Entity Doctrine: A Formalistic Approach for a Formalistic Rule*, 46 COLUM. J.L. & SOC. PROBS. 93, 94 (2012) (highlighting immunity of “single entity” businesses under Section 1). For purposes of the Sherman Act, a single entity is a business that is wholly owned by a single, corporate, parent company. See Prisbe, *supra* note 33, at 541 (voicing critical view of single entity approach under Section 1).

35. See *Copperweld*, 467 U.S. at 767-68 (finding “basic distinction” between concerted and independent action); Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (describing how violations occur).

36. See 15 U.S.C. § 2 (regarding persons who monopolize or conspire). “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .” *Id.*

37. See *Fleetway, Inc.*, 72 F.2d at 763 (interpreting Section 1 of Sherman Act). *But see* Milton Handler & Thomas A. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23, 24 (1981) (advocating for determination of “single actor” definition in accordance with goals of Section 1).

subsidiaries.³⁸ During this time, the U.S. Supreme Court repeatedly held that corporations and their wholly owned subsidiaries constituted two separate actors under Section 1 of the Sherman Act.³⁹ This line of cases developed the intra-enterprise conspiracy doctrine (IECD) and provided that a parent corporation and its subsidiary may be held liable under Section 1, even though both are under common ownership.⁴⁰ The first case to acknowledge the IECD was *United States v. Yellow Cab Co.*,⁴¹ where numerous taxi cab corporations in Chicago and New York operated under one corporate umbrella.⁴² The Court concluded that in this type of vertically integrated enterprise—an organizational structure where one company owns every step of the production process—the corporate interrelationships among the various companies had no impact on the applicability of the Sherman Act.⁴³ After *Yellow Cab*, however, the Court struggled to effectively apply the doctrine.⁴⁴

In *Copperweld*, the Court reconsidered its IECD jurisprudence and ultimately replaced it with the ICCD.⁴⁵ After *Copperweld Corporation (Copperweld)*

38. See S. John Goodwin, Note, *Recent Development: The Demise of the Intra-Enterprise Conspiracy Doctrine: Flexible Antitrust Enforcement Policy Abandoned in a Maze of Economic Certainty—Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984), 60 WASH. L. REV. 757, 758 (1985) (revealing courts' inconsistent approach to intracorporate liability before *Copperweld*); James A. Sprunk, *Intra-enterprise Conspiracy*, 9 A.B.A. SEC. ANTITRUST L. 20, 20 (1956) (characterizing case law on topic).

39. See Goodwin, *supra* note 38, at 759 (explaining pre-*Copperweld* jurisprudence).

40. See *id.* at 757 (citing consistent application of doctrine in federal courts of appeals); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 760 (1984) (defining IECD); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951) (finding elements of common ownership and control bring corporations within antitrust scrutiny). *But see* *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952) (holding conspiracy charges inapplicable where corporations conspire with their own officers and agents); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947) (holding elements of ownership and control do not necessarily create violations of Section 1).

41. 332 U.S. 218 (1947).

42. See *id.* at 220-21 (providing facts of *Yellow Cab Co.*); see also Jennifer Stewart, Comment, *The Intra-Enterprise Conspiracy Doctrine After Copperweld Corp. v. Independence Tube Corp.*, 86 COLUM. L. REV. 198, 198 (1986) (noting formal separation between parent and subsidiary could create conspiracy). Formal separation refers to the differences in the organization and formation of a subsidiary business, such as incorporation in a different state. See Stewart, *supra*, at 208 (discussing how courts ultimately decide separateness on fact-based inquiries).

43. See *Yellow Cab Co.*, 332 U.S. at 227 (explaining how corporate form does not impact Sherman Act liability).

44. See *Copperweld*, 467 U.S. at 766 (discussing later cases). Critically, in the three cases after *Yellow Cab*, the Court only relied on the IECD in a superficial way. See *id.* (characterizing superficial use of IECD). The Court noted that the IECD “played only a relatively minor role” in its Sherman Act holding, since the previous cases could have been adjudicated without reference to the doctrine. See *id.* (highlighting doctrine’s minor impact); *Kiefer-Stewart Co.*, 340 U.S. at 215 (finding instrumentalities of larger corporations may face Sherman Act liability); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) (reiterating Sherman Act liability despite common ownership); *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 141-42 (1968) (reaffirming Sherman Act liability even under common ownership).

45. See *Copperweld*, 467 U.S. at 772 (noting IECD ignores reality of corporate structures). In *Perma Life Mufflers, Inc. v. International Parts Corp.*, the Court granted certiorari to determine whether a parent corporation and its wholly owned subsidiary are capable of conspiring with each other in violation of Section 1 of the Sherman

acquired Regal Tube Company (Regal), Copperweld made Regal a subsidiary by transferring Regal's assets into a newly formed, and wholly owned, Pennsylvania corporation.⁴⁶ A few months after the acquisition, a former officer of Regal (Mr. Grohne) parted ways with the company and established a new business—Independence Tube Corporation (Independence).⁴⁷ Independence contracted with Yoder Company (Yoder) to build a tubing mill while working in the same market as Regal, in violation of Mr. Grohne's noncompete agreement.⁴⁸ Copperweld sent a letter to Yoder, informing it that Copperweld would take any steps necessary to protect its trade secrets.⁴⁹ Yoder rescinded the contract, and Independence was delayed by nine months in commencing its operations.⁵⁰ Independence brought suit, alleging that Copperweld and Regal had conspired to violate Section 1 of the Sherman Act.⁵¹

The Court concluded that the coordinated efforts of a parent corporation and its subsidiaries do not violate Section 1 because the action stems from the same economic actors.⁵² Further, the Court found that the language of Section 1 could not be interpreted to include coordinated conduct between officers or agents of the same company because these actions will always stem from the same economic forces.⁵³ Thus, when a corporation's officers or agents make agreements that combine their efforts towards the same economic goals in furtherance of the corporation, the Section 1 multiplicity-of-actors requirement is unfulfilled.⁵⁴ Moreover, under the Court's interpretation of coordinated efforts between a parent corporation and its subsidiaries, a corporation cannot satisfy the multiplicity-

Act. *See Perma Life Mufflers, Inc.*, 392 U.S. at 135-36 (explaining case's background and pertinent issues before Court); Julie K. Robberson, Note, *Antitrust Law—Supreme Court Holds That a Wholly Owned Subsidiary Is Incapable of Conspiring with Its Parent Corporation Under Section 1 of the Sherman Act: Copperweld Corp. v. Independence Tube Corp.*, 59 TUL. L. REV. 781, 787 (1985) (explaining reasoning behind overruling of IECD).

46. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 756 (1984) (discussing acquisition of Regal and describing transfer of assets).

47. *See id.* (mentioning Mr. Grohne's departure).

48. *See id.* at 757 (examining breach of noncompete agreement).

49. *See id.* at 756-57 (addressing response to breach of nondisclosure agreement).

50. *See Copperweld*, 467 U.S. at 757 (explaining delays); Robberson, *supra* note 45, at 781 (reiterating nine-month delay in plant assembly).

51. *See Copperweld*, 467 U.S. at 757 (listing factual background of claims).

52. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769-70 (1984) (highlighting internal coordination does not warrant Section 1 scrutiny).

53. *See id.* at 769 (finding firm's internal agreement to implement policies does not violate Section 1). From a public policy rationale, the Court hesitated to classify internal firm agreements as "monopolistic." *See id.* at 768-69 (noting "mergers, joint ventures, and various vertical agreements" increase efficiency). Further, were a firm's conduct held to this rigorous standard, it could "dampen the competitive zeal of a single aggressive entrepreneur." *Id.* at 768; *see also Warner*, *supra* note 8, at 1066 (expanding on deterrence effect of narrowly construing Section 1).

54. *See Copperweld*, 467 U.S. at 769 (explaining reasoning); Stewart, *supra* note 42, at 198 (stating single entities incapable of conspiring amongst themselves within meaning of Section 1).

of-actors requirement for Section 1 liability.⁵⁵ In overruling the IECD and creating the ICCD, the Court deferred to the congressional intent that recognized Section 1 liability should not artificially inhibit corporations from taking advantage of their corporate structure.⁵⁶ The Court then announced the new test for Section 1 liability, which requires that conspirators have distinct and diverse economic interests before a conspiratorial interest can be present.⁵⁷ In coming to its conclusion, the Court made it so Section 1 of the Sherman Act could no longer reach single firm activity, and Section 2 only regulated firms when they posed a danger of monopolization.⁵⁸

While the ICCD is rooted in the antitrust context, it is truly an application of agency principles.⁵⁹ If a corporate agent acts within the scope of their employment, agency law attributes those acts to the corporate principal.⁶⁰ But the ICCD is not limitless.⁶¹ One way to circumvent its protection is to allege that the corporate agent acted outside the scope of their professional duties for their personal

55. See *Copperweld*, 467 U.S. at 771 (reasoning single, corporate consciousness guides actions between corporate parent and wholly owned subsidiary); Warner, *supra* note 8, at 1059-60 (asserting single entities cannot conspire with themselves).

56. See *Copperweld*, 467 U.S. at 770 (clarifying how coordinated efforts between parent and subsidiary do not satisfy Section 1); Robberson, *supra* note 45, at 788 (noting Supreme Court's deference to legislative intent); see also Handler & Smart, *supra* note 37, at 23 (discussing Section 1's separate actor requirement).

57. See *Copperweld*, 467 U.S. at 767-68 (distinguishing new unilateral conduct requirement); Goodwin, *supra* note 38, at 763 (articulating new test under *Copperweld*).

58. See Stewart, *supra* note 42, at 199-201 (basing *Copperweld*'s rejection of IECD on Section 2's unilateral action requirement). As Stewart points out, the *Copperweld* Court implicitly assumed that unilateral action is treated less harshly under Section 2 than under Section 1. See *id.* at 200-01 (highlighting Court's assumption); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767-68 (1984) (discussing congressional intent in passing Sherman Act). Moreover, the Court found that judging unilateral firm conduct in this manner would reduce the risk that antitrust law would hamper the efforts of a single entrepreneur. See *Copperweld*, 467 U.S. at 768 (setting forth rationalization); see also Robberson, *supra* note 45, at 782 (addressing standard to prove Section 2 liability); Stewart, *supra* note 42, at 202 (affirming legal separation between corporation and agent). While the Court affirmed the legal separation between a corporation and its agents, courts do not treat a corporation and its officers as "conspirators" when they engage in business. See Stewart, *supra* note 42, at 202 (likening officers and agents to "horses" under control of one driver); *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981) (recognizing agency law principles attribute acts of corporate agents to corporate principals). But see Douglas G. Smith, Comment, *The Intracorporate Conspiracy Doctrine and 42 U.S.C. § 1985(3): The Original Intent*, 90 NW. U. L. REV. 1125, 1152 (1996) (arguing single entity approach inconsistent with traditional principles of agency and corporate law); J.S. Nelson, *The Corporate Conspiracy Vacuum*, 37 CARDOZO L. REV. 249, 250 (2015) (stressing ICCD misplaces principal and agent incentives in contravention of law).

59. See *Dussouy*, 660 F.2d at 603 (finding agency law principles attribute agents' acts to corporate principals). But see Smith, *supra* note 58, at 1152 (arguing single entity approach inconsistent with agency and corporate law principles); Nelson, *supra* note 58, at 250 (emphasizing ICCD contravenes law by misplacing principal and agent incentives).

60. See Nelson, *supra* note 58, at 250-51 (finding exception to ICCD immunity when agent's actions fall outside scope of principal's interest); Warner, *supra* note 8, at 1057 (noting ICCD bars plaintiffs from bringing conspiracy claims when agent acts within scope of employment).

61. See Warner, *supra* note 8, at 1058 (listing ICCD's criminal charges exception and its "personal stake exception"). The ICCD does not apply in criminal proceedings, and the "personal stake exception" bars the use of the ICCD when an agent has a personal stake or interest in the alleged conspiracy. See *id.* (detailing personal stake exception); see also Nelson, *supra* note 58, at 250-51 (examining limited exception to ICCD liability when agent's actions fall outside scope of principal's interest).

benefit.⁶² This “independent personal stake standard” allows for a conspiracy between a corporation and its agent because the agent is no longer benefiting the corporation, and is instead an independent actor.⁶³ Another exception to the ICCD is its application to criminal claims.⁶⁴ Most courts have held that the ICCD does not apply in federal criminal proceedings, focusing on the idea that the corporate form should increase corporate responsibility, not shrink it.⁶⁵ Thus, the ICCD does not serve as a liability shield for criminal conduct.⁶⁶

62. See Stewart, *supra* note 42, at 206 (elucidating personal stake exception). An example of a personal stake that would break ICCD protection is an agent owning a minority interest in a partially owned subsidiary. See *id.* (defining unity of interest between parent and subsidiary companies); Nelson, *supra* note 58, at 250-51 (explaining personal stake exception).

63. See Nelson, *supra* note 58, at 256 (analyzing ways to avoid circumventing ICCD protection); *Dussouy*, 660 F.2d at 603 (deducing corporation’s officers lose ICCD protection when they act for personal reasons).

64. See Warner, *supra* note 8, at 1058 (mentioning ICCD criminal charge exception); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 786 (1984) (reaffirming ICCD protections do not apply to criminal charges); *Kirwin v. Price Commc’ns Corp.*, 391 F.3d 1323, 1326-27 (11th Cir. 2004) (holding ICCD cannot shield conspirators from criminal liability).

65. See *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1034 (11th Cir. 2000) (recognizing ICCD does not shield criminal wrongdoers from criminal or civil prosecution); *Stern v. Leath*, No. 3:18-CV-807-WKW, 2021 U.S. Dist. LEXIS 127272, at *16-17 (M.D. Ala. July 8, 2021) (finding criminal conspiracy “exception” inapplicable to intentional and willful conduct); *United States ex rel. Huey v. Summit Healthcare Ass’n*, No. CV-10-8003-PCT-FJM, 2011 U.S. Dist. LEXIS 26740, at *20-21 (D. Ariz. Mar. 3, 2011) (relying on *McAndrew* to deny criminal conspiracy exceptions under ICCD); Warner, *supra* note 8, at 1057 (defining ICCD); *Prisbe*, *supra* note 33, at 542 (disregarding corporate form and ICCD protection in criminal proceedings); J.S. Nelson, *The Intracorporate Conspiracy Trap*, 36 CARDOZO L. REV. 969, 1024 (2015) (stating ICCD does not reflect proper applications of criminal law).

66. See *Brickey*, *supra* note 1, at 139 (identifying two scenarios where ICCD protections do not apply). Two major criminal liability exceptions to the ICCD are founded on core tenets of agency law: first, when an agent performs a criminal act, they will be held personally liable; second, through principles of accomplice liability, corporate agents and officers can be held accountable for crimes they do not personally commit. See *id.* at 138-39 (describing agency law roots of ICCD exceptions in criminal context); see also Geoff Lundeen Carter, Comment, *Agreements Within Government Entities and Conspiracies Under Section 1985(3)—A New Exception to the Intracorporate Conspiracy Doctrine?*, 63 U. CHI. L. REV. 1139, 1165 (1996) (suggesting ICCD defense in criminal conspiracies may depend on danger to society). Carter suggests that courts should engage in a balancing test that weighs the magnitude of the danger posed by a corporate criminal conspiracy against the impact on corporate decision making. See Carter, *supra*, at 1165 (noting factors courts must consider and balance). If a criminal conspiracy claim would severely hamper corporate decision making, then the ICCD should apply. See *id.* (demonstrating scenario where ICCD should apply).

C. Development of the ICCD Since *Copperweld*

Since *Copperweld*, courts have settled on a general, uniform definition of the ICCD.⁶⁷ In *Kirwin v. Price Communications Corp.*,⁶⁸ Verizon Wireless acquired a horizontally integrated cellular company.⁶⁹ The Eleventh Circuit defined the ICCD as attributing the actions of corporate agents to the corporation itself, thus eliminating the possibility of holding agents liable under Section 1.⁷⁰ Similarly, in *Ziglar v. Abbasi*,⁷¹ the Supreme Court drew heavily on agency principles and reinforced the concept that when multiple agents of the same legal entity make an agreement, that act is attributed to the principal, eliminating any agreement between two or more people.⁷² Finally, the *Alix v. McKinsey & Co.* decision further reflects the Eleventh Circuit's explanation.⁷³ In *Alix*, McKinsey & Co. (McKinsey) retained—but did not disclose—interests in the debtor estates of the bankrupt companies it represented, in violation of federal law.⁷⁴ The court quoted *Kirwin*'s definition of the ICCD.⁷⁵ Thus, the blackletter definition of the ICCD appears to be well settled when analyzed in a vacuum.⁷⁶

67. See, e.g., *McAndrew*, 206 F.3d at 1036 (defining ICCD). The Eleventh Circuit defines the ICCD as follows:

The intracorporate conspiracy doctrine holds that acts of corporate agents are attributed to the corporation itself, thereby negating the multiplicity of actors necessary for the formation of a conspiracy. Simply put, under the doctrine, a corporation cannot conspire with its employees, and its employees, when acting in the scope of their employment, cannot conspire among themselves. The doctrine is based on the nature of a conspiracy and the legal conception of a corporation. It is by now axiomatic that a conspiracy requires a meeting of the minds between two or more persons to accomplish a common and unlawful plan.

Id.

68. 391 F.3d 1323 (11th Cir. 2004).

69. See *id.* at 1325 (explaining corporate structure of Price Wireless); *Horizontal Integration*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/management/horizontal-integration/> [<https://perma.cc/D6-PC-GUKA>] (defining horizontal integration). Horizontal integration occurs when a company merges or acquires another company with similar capabilities. See *Horizontal Integration*, *supra* (describing acquisitions made via horizontal integration).

70. See *Kirwin*, 391 F.3d at 1327 (stressing distinct entities). Here, the court held that corporations and agents are capable of conspiring with each other because both are distinct entities. See *id.* (joining Seventh and Ninth Circuits in holding ICCD does not apply to Section 1962(d) claims).

71. 582 U.S. 120 (2017).

72. See *id.* at 153 (relying on precedent to find no unlawful conspiracy when officers consult among themselves).

73. See No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872, at *69-70 (S.D.N.Y. Aug. 18, 2023) (using ICCD definition from *Kirwin*).

74. See *id.*, at *5-6 (explaining factual disposition of case).

75. See *id.*, at *69-70 (quoting *Kirwin*); *Kirwin v. Price Commc'ns Corp.*, 391 F.3d 1323, 1326 (11th Cir. 2004) (quoting *McAndrew*'s definition of ICCD); *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000) (defining ICCD).

76. See *Alix*, 2023 U.S. Dist. LEXIS 145872, at *69-70 (using settled ICCD definition); *McAndrew*, 206 F.3d at 1036 (stating ICCD); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 766, 771 (1984) (striking down IECD and implementing ICCD).

D. History of RICO

Seeking to stunt the growing power of organized crime syndicates in the United States, Congress originally passed the modern RICO statute as Title IX of the Organized Crime Control Act of 1970 (Organized Crime Control Act).⁷⁷ The Organized Crime Control Act grew out of prosecutors' frustration with trying and failing to bring the leaders of these criminal organizations to justice.⁷⁸ To reach far enough up the criminal ladder and attack these kingpins, the Organized Crime Control Act included both civil and criminal claims.⁷⁹ Congress wrote the criminal provisions of the Organized Crime Control Act broadly to ensure that sophisticated criminals could no longer evade the federal

77. See generally Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (listing original RICO statute). Title IX of this Act is codified under 18 U.S.C. Sections 1961-68, which serve as the current RICO statute. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (providing current RICO statute).

78. See 84 Stat. at 923 (easing difficulty of prosecutorial burden). Congress reasoned that it was necessary to pass RICO because it found that organized crime severely affects America's economy, derives power from illegal endeavors, and uses this ill-gotten money and power to corrupt legitimate businesses, labor unions, and the democratic process. See *id.* at 922-23 (identifying rationale for statutorily suppressing organized crime); see also Coppola & DeMarco, *supra* note 16, at 244, 247 (delving into original intent behind RICO). Congress specifically aimed RICO at eliminating the American Mafia, which grew increasingly powerful in the mid-1900s by infiltrating and corrupting legitimate businesses and labor unions. See Coppola & DeMarco, *supra* note 16, at 244-45 (explaining rise and expansion of Mafia). Before the passage of the Act, various congresses established commissions concerned with addressing organized crime syndicates' increasing involvement in legitimate businesses. See *id.* at 247 (noting commission addressed threat of organized crime to businesses and unions). Critically, "[i]n conjunction with weak state penalties . . . many 'top pins' could avoid state prosecution by using caution and remaining behind the scenes." *Id.* at 248. Thus, RICO set federal standards that allowed prosecutors to successfully prosecute leaders of these criminal organizations. See *id.* (describing how RICO eases ability to prosecute organized crime leaders); James B. Jacobs, *The Rise and Fall of Organized Crime in the United States*, 49 CRIME & JUST. 17, 41 (2020) (explaining impact of RICO on American crime families); Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646, 652 (1989) (chronicling RICO drafters' difficult task of "defining illicit business in organizational terms").

79. See 84 Stat. at 922, 923 (stating Act's purpose and expanding prohibitions and sanctions on organized crime); see also Warner, *supra* note 8, at 1061-63 (highlighting expanded interpretations of RICO). The text of the Act suggests that Congress only intended the Act and RICO to apply in the criminal context. See 84 Stat. at 922-23 (giving legislative background to circumstances surrounding creation of RICO); Warner, *supra* note 8, at 1062 (providing evidence of Congress's original intent for RICO's application). In the criminal context, RICO proved to be a powerful weapon against organized crime, and helped to close "gaping holes" in states' criminal law enforcement against organized crime. See Coppola & DeMarco, *supra* note 16, at 248 (emphasizing federal law enforcement's importance in combatting organized crime). The civil arm of RICO, however, has increased the reach of RICO, especially when applied to the "enterprise" requirement. See *id.* at 241-42 (showcasing RICO's expansive reach into civil context); Parker, *supra* note 10, at 831 (discussing "enterprise" requirement). As such, RICO suits are no longer confined to the backroom dealings of criminal enterprises, and are now common in areas such as commercial fraud, securities fraud, and antitrust violations. See Parker, *supra* note 10, at 819 (parsing evolution of civil RICO suits); see also Arthur F. Mathews et al., *Report of the Ad Hoc Civil RICO Task Force*, 1985 A.B.A. SEC. CORP., BANKING & BUS. L. REP. 55 (reporting notable increase in RICO suits starting in 1980); *United States v. Turkette*, 452 U.S. 576, 586 (1981) (addressing congressional concerns over expanding criminal liability).

government's grasp through gaps in state laws.⁸⁰ Additionally, the legislative findings of the Organized Crime Control Act highlight the public animosity towards these criminals, and vividly depict the carnage inflicted upon law abiding citizens and businesses when the government does not have the tools to adequately pursue and punish them.⁸¹

Despite RICO's original intent, plaintiffs since the late 1980s have overwhelmingly used its civil prong in comparison to the government's relatively infrequent use of its criminal prong.⁸² There are several driving factors behind this trend, including RICO's unique private right of action that allows both the government and private individuals to bring civil claims.⁸³ RICO plaintiffs benefit from favorable venue provisions and, when successful, enjoy the right to recover "triple their provable damages."⁸⁴ The drafters of RICO believed that these factors would empower civil plaintiffs to report racketeering activity, and thus supplement government efforts to deter racketeering.⁸⁵ At the time of RICO's drafting, Congress felt it necessary to include broad language due to the

80. See 18 U.S.C. § 1961 (stating criminal provisions); Parker, *supra* note 10, at 831 (describing broad statutory language). Soon after its passage, RICO proved to be a powerful weapon against organized crime by creating a uniform federal standard that closed lingering gaps in state criminal codes. See Coppola & DeMarco, *supra* note 16, at 248 (analyzing reasons behind RICO's passage); Jacobs, *supra* note 78, at 41 (discussing importance of uniform federal criminal punishment for organized crime); David Kurzweil, Article, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 42 (1996) (reinforcing courts' acceptance of liberally applying criminal provisions of RICO). Kurzweil points out that courts have readily accepted broad applications of criminal RICO claims despite its conflict with "one of criminal law's most established maxims—the rule of lenity." See Kurzweil, *supra*, at 42 (highlighting RICO interpreted broadly despite canonized method of interpreting criminal laws); United States v. McClendon, 712 F. Supp. 723, 729 (E.D. Ark. 1988) (delineating Congress's call for liberal interpretation).

81. See 18 U.S.C. § 1961 (defining criminal provisions); 84 Stat. at 922 (declaring dangerous levels of organized criminal activity in United States). In 1965, Senator McClellan introduced a bill that proposed outlawing membership in criminal organizations. See O'Neill, *supra* note 78, at 650 (detailing proposed bill). While the bill failed, it was an important first step in creating RICO. See *id.* at 651 (laying foundation for RICO).

82. See Warner, *supra* note 8, at 1062-63 (mentioning triple damages provision of civil RICO claims); Coppola & DeMarco, *supra* note 16, at 242 (hypothesizing expansion of RICO into civil cases through broad and ambiguous language); see also Laura Ginger, *Using RICO to Reach into the Corporate Pocket: Vicarious Civil Liability of the Business Entity Under the Racketeer Influenced and Corrupt Organizations Act*, 93 DICK. L. REV. 465, 473 (1989) (discussing how nearly all civil RICO lawsuits allege violations of Section 1962(c)); Christopher D. McDemus, Comment, *Reves v. Ernst & Young: The Supreme Court's Recent Restrictive Standard Concerning § 1962(c) of the Civil RICO Statutes*, 19 DEL. J. CORP. L. 1027, 1038 (1994) (addressing increased private use of RICO in civil actions); 18 U.S.C. § 1962 (listing civil RICO provision).

83. See McDemus, *supra* note 82, at 1028 (outlining RICO's distinctive civil and criminal aspects).

84. See Parker, *supra* note 10, at 820 (asserting treble damages provision for successful civil plaintiffs); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (defining eligibility for treble damages); see also McDemus, *supra* note 82, at 1029 (reporting three advantages of bringing civil RICO suit); 18 U.S.C. § 1965(a) (stating plaintiffs can bring civil RICO actions anywhere defendant resides, has agents, or transacts).

85. See Warner, *supra* note 8, at 1062 (evaluating drafter intent behind broad civil liability language). Viewed from this perspective, Section 1962 operates in a similar manner to a private enforcement mechanism. See *id.* (noting civil RICO liability meant to further deter racketeering activity).

legitimate concern that racketeers had infiltrated legitimate businesses.⁸⁶ The unintended consequences of this broad language, however, led to a large number of legitimate businesses ending up as defendants in civil suits against unscrupulous plaintiffs who were enticed by the prospect of treble damages.⁸⁷

For a plaintiff to bring a RICO claim under any of its subsections—particularly Section 1962—the claim must state there is “(1) a person who engages in (2) a pattern of racketeering activity (3) connected to the establishment, conduct, or control of an enterprise.”⁸⁸ The plaintiff must then prove the existence of each of these elements to receive relief.⁸⁹ First, a plaintiff must allege and prove the existence of a “RICO person,” which is broadly defined as “any individual or entity capable of holding a legal or beneficial interest in property.”⁹⁰ This framework creates the main tension point between RICO and the ICCD, since RICO allows for a conspiracy between a legal person—a corporation—and a natural person—an employee or agent of the corporation.⁹¹ Second, a plaintiff must allege a “pattern of racketeering activity,” which includes a wide array of different, but repeated, criminal and civil offenses.⁹² Third, the plaintiff must allege that the defendant is involved with a legal entity, a corporation per se, or an “association-in-fact enterprise.”⁹³ Thus, an individual or officer of a legal entity may be

86. See *McDemus*, *supra* note 82, at 1028 (analyzing reasons behind broad criminal statutory language); *Jacobs*, *supra* note 78, at 25 (mentioning congressional concern over Mafia control and increasing participation in legitimate businesses).

87. See *McDemus*, *supra* note 82, at 1029-30 (discussing consequences of broad language for legitimate businesses); 18 U.S.C. § 1964 (creating civil right of action).

88. See *Crowe v. Henry*, 43 F.3d 198, 204 (5th Cir. 1995) (distilling common elements of RICO claims); *Warner*, *supra* note 8, at 1063 (quoting common elements).

89. See *Crowe*, 43 F.3d at 204 (concluding RICO plaintiffs must prove three common elements).

90. See *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. § 1961(3) (defining “person” for statutory purposes); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001) (reaffirming “basic principle” of two separate entities for Section 1962(c) liability); see also *Crowe*, 43 F.3d at 204 (citing statutory language). Once again, this broad language offers room for various interpretations, yet courts have settled on a uniform approach. See *Crowe*, 43 F.3d at 204 (characterizing “broad” RICO language); *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir. 1988) (rejecting narrow interpretation of Section 1961(3) language).

91. See *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 164 (explaining natural person distinction); *Warner*, *supra* note 8, at 1065 (stating standard for successful RICO pleadings). A RICO plaintiff is not required to prove that a violation of any subsection occurred—only that the pleadings state a substantive RICO claim upon which relief can be granted. See *Warner*, *supra* note 8, at 1064 (listing burden of proof); *Howard v. Am. Online, Inc.*, 208 F.3d 741, 748 (9th Cir. 2000) (parsing necessary elements of successful claim).

92. See 18 U.S.C. § 1961(1) (defining racketeering activity). Section 1961 broadly defines racketeering activities, ranging from gambling, arson, robbery, bribery, and extortion to the sale or possession of nuclear weapons. See *id.* (outlining what constitutes racketeering activity); see also *id.* § 831(a) (prohibiting unauthorized possession, use, or transfer of nuclear weapons); *Warner*, *supra* note 8, at 1063 (stating Section 1961(1) encompasses large amounts of criminal and civil offenses). A “pattern of racketeering activity” requires at least two acts of racketeering. See *Delta Truck & Tractor, Inc.*, 855 F.2d at 243 (defining pattern of racketeering activity); 18 U.S.C. § 1961(5) (creating pattern requirement).

93. See *Crowe*, 43 F.3d at 204-05 (offering two types of entities plaintiffs can allege conspiracy against). A legal entity is created by any filing of articles of limited partnership, liability, or incorporation with the relevant state official. See *FED. R. CIV. P. 17(b)* (creating steps to determine legal entity status).

found as a co-conspirator because Section 1962(c) recognizes the individual as a natural person, and the corporation as a legal person.⁹⁴

E. Application of the ICCD to RICO Conspiracy Claims

While courts have settled on a uniform definition of the ICCD and the application of RICO outside of the antitrust context, they have struggled to find consistency when determining how the ICCD interacts with RICO in antitrust cases.⁹⁵ Because a corporation or entity can only act through its “natural” agents and employees, the inconsistent outcomes of applying the ICCD to RICO claims are deeply problematic.⁹⁶ The most recent applications of the ICCD to RICO conspiracy claims have come in the civil context.⁹⁷ The majority of these civil claims were brought under Section 1962(d), and the cases involving these claims have created a near-even circuit split over whether the ICCD should apply to RICO claims.⁹⁸

94. See 18 U.S.C. § 1962(c) (allowing for prosecution of individuals who further enterprise’s illegal conduct).

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.

Id.; see also *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 161-62 (reaffirming principle behind separating natural from legal persons). The Court claimed that its ruling in *Cedric Kushner Promotions, Ltd.* was “not inconsistent” with the ICCD at issue in *Copperweld*. See Fern L. Kletter, Annotation, *Intracorporate Conspiracy Doctrine—RICO Conspiracy Cases*, 66 A.L.R. Fed. 3d Art. 1, § 2 (2021) (comparing Court’s seemingly inconsistent rulings in *Cedric Kushner Promotions, Ltd.* and *Copperweld*). “Rather, we hold simply that the need for two distinct entities is satisfied; hence, the RICO provision before us applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner.” *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 166.

95. See Katy O’Leary, Note, *A Free Pass for Corporate Conspirators?: Inconsistent Distinctions Between Civil and Criminal Corporate Conspiratorial Liability*, 14 SUFFOLK J. TRIAL & APP. ADVOC. 58, 59-60 (2009) (explaining circuit split regarding ICCD defense in 42 U.S.C. § 1985 cases).

96. See Ginger, *supra* note 82, at 465 (stressing how circuit split prolongs dispute over ICCD’s application to RICO claims).

97. See Warner, *supra* note 8, at 1065 (confirming persistent difficulty to consistently apply ICCD to RICO claims); *Alix v. McKinsey & Co.*, No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872, at *3 (S.D.N.Y. Aug. 18, 2023) (evidencing recent claims of RICO in civil context); *McDemus*, *supra* note 82, at 1038 (detailing exponential increase in civil RICO claims during 1980s).

98. See *Haroco, Inc. v. Am. Nat’l Bank & Tr. Co.*, 747 F.2d 384, 403 n.22 (7th Cir. 1984) (declining to extend ICCD to Section 1962(c) claims); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (stating intracorporate conspiracies threaten RICO’s goals); see also *Webster v. Omnitrition Int’l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996) (analyzing application of ICCD to Section 1962(d)); *Kirwin v. Price Commc’ns Corp.*, 391 F.3d 1323, 1326 (11th Cir. 2004) (interpreting Section 1962(d)); *Alix*, 2023 U.S. Dist. LEXIS 145872, at *70 (rejecting application of ICCD to RICO claims). But see *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997) (using ICCD’s personal stake exception to bar RICO claim); *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 179-80 (4th Cir. 2002) (applying personal stake exception); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 899 (8th Cir. 1999) (rejecting Seventh and Ninth Circuits’ conclusion regarding ICCD’s inapplicability to RICO conspiracy claims).

When addressing whether the ICCD should apply to a RICO conspiracy claim, the Supreme Court has demonstrated particular sensitivity to the policies and mandates of the Sherman Act.⁹⁹ Because of the continuity of interest between a parent and its subsidiary corporations, the Court in *Copperweld* reasoned that “there can be little doubt” that the operations of a divided corporate enterprise are considered one single actor.¹⁰⁰ Further, the *Copperweld* Court concluded that there is no conspiracy when a parent corporation and its various divisions or subsidiaries act together, because there is no joining of independent economic forces.¹⁰¹ Unlike a Section 1962(d) claim brought against an employee acting outside the scope of their employment *and* a corporation, a RICO claim against a corporation’s divisions or subsidiaries is considered a suit against one legal entity.¹⁰² Therefore, in the wake of *Copperweld*, courts have traditionally considered these divisions and subsidiaries as incapable of conspiring with the parent firm in violation of RICO.¹⁰³

F. The Current Circuit Split Regarding the Application of the ICCD to RICO Claims

While the *Copperweld* ruling brought stability to the definition and application of the ICCD to claims under the Sherman Act, that resolution was insufficient to prevent the circuit split on the application of the ICCD to RICO conspiracy claims.¹⁰⁴ As a result, the Seventh, Ninth, and Eleventh Circuit Courts of Appeals—and, most recently, the U.S. District Court for the Southern District of New York—have all concluded that the ICCD *does not* bar section 1962(d)

99. See Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (asserting definition of restraint on trade); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 770 (1984) (noting Section 1 not violated by internal, coordinated conduct between parent and subsidiary); see also *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001) (addressing possible perception of inconsistency with *Copperweld*’s ICCD reasoning).

100. See *Copperweld*, 467 U.S. at 770 (conceding issue of first impression, but quickly concluding single actor status).

101. See *id.* (citing general agreement no violation of Section 1 occurs from corporation’s internally coordinated conduct). The basis for this agreement stems from the idea that a corporation’s structure and various arms are all designed to further the economic goals of the same corporation in the most efficient manner possible. See *id.* (highlighting such efficiency promotes furthering whole of corporation’s common interests).

102. See *id.* at 772 (rejecting notion antitrust liability should turn on incorporation status); *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 166 (distinguishing between RICO applications with corporate agents and antitrust principles); Kletter, *supra* note 94, § 2 (comparing Court’s reasoning in *Cedrick Kushner Promotions, Ltd.* and *Copperweld*).

103. See *Copperweld*, 467 U.S. at 770 (discussing reasoning for single actor categorization); *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 166 (noting desire not to disturb antitrust principles).

104. See Nelson, *supra* note 58, at 258-59 (pinpointing circuit split); *Alix v. McKinsey & Co.*, No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872, at *70-71 (S.D.N.Y. Aug. 18, 2023) (vacillating between pros and cons of applying ICCD to RICO).

RICO conspiracy claims.¹⁰⁵ In contrast, the Fourth and Eighth Circuit Courts of Appeals have held that the ICCD *does* bar RICO conspiracy claims.¹⁰⁶

Soon after *Copperweld*, the Seventh Circuit—in *Haroco, Inc. v. American National Bank & Trust Co.*¹⁰⁷—had the opportunity to shed light on whether the ICCD applies to RICO.¹⁰⁸ In *Haroco*, the plaintiff claimed that the defendant violated Section 1962(c) “by conducting [American National Bank]’s . . . affairs through a pattern of racketeering activity.”¹⁰⁹ The court concluded that despite American National Bank being a wholly owned subsidiary, under Section 1962(c), a subsidiary corporation “is certainly a legal entity distinct from its parent” that can be held civilly liable, meaning the ICCD was inapplicable under these circumstances.¹¹⁰ Similarly, in *Ashland Oil, Inc. v. Arnett*,¹¹¹ the plaintiffs alleged a RICO conspiracy where the defendants—an oil distributor and its subsidiaries—were found to have conspired with a subsidiary corporation.¹¹² Relying on the precedents in *Copperweld* and *Haroco*, the Seventh Circuit stated that intracorporate conspiracies threaten RICO’s goals of “preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits.”¹¹³

105. See Nelson, *supra* note 58, at 258-59 (summarizing circuit split on application of ICCD to RICO); Warner, *supra* note 8, at 1065 (commenting on circuit split); *Haroco, Inc. v. Am. Nat’l Bank & Tr. Co.*, 747 F.2d 384, 403 n.22 (7th Cir. 1984) (finding ICCD may not apply in RICO cases since *Copperweld* considerations do not apply); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (refusing to apply ICCD to RICO); see also *Webster v. Omnitrition Int’l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996) (allowing intracorporate conspiracies to be litigated under Section 1962(d) and not applying ICCD); *Alix*, 2023 U.S. Dist. LEXIS 145872, at *70 (declining to extend ICCD to RICO claims).

106. See Nelson, *supra* note 58, at 259 (discussing Fourth and Eighth Circuits’ decisions); Warner, *supra* note 8, at 1065 (justifying factual differences leading to circuit split); see also *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997) (using personal stake exception to ICCD to allow RICO claim only in specific, limited context); *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 179-80 (4th Cir. 2002) (mentioning personal stake exception); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 899 (8th Cir. 1999) (rejecting Seventh and Ninth Circuits’ refusal to apply ICCD to RICO claims).

107. 747 F.2d 384 (7th Cir. 1984).

108. See *id.* at 403 n.22 (scrutinizing reasoning used in *Copperweld*).

109. See *id.* at 385-86 (stating claims for relief); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(5) (defining “pattern of racketeering activity”). A “‘pattern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.” 18 U.S.C. § 1961(5).

110. See *Haroco, Inc.*, 747 F.2d at 401-03 (concluding parent and subsidiary corporations subject to RICO).

111. 875 F.2d 1271 (7th Cir. 1989).

112. See *id.* at 1280-81 (detailing RICO allegations).

113. See *id.* at 1281 (applying precedents). The *Ashland* court distinguished its holding from *Copperweld* on the ground that, unlike the Sherman Act, Section 1962(c) is not predicated on the “basic distinction between concerted and independent action.” See *id.* (giving reasoning for not applying ICCD to RICO conspiracy claim); see also *Haroco, Inc. v. Am. Nat’l Bank & Tr. Co.*, 747 F.2d 384, 401-03 (7th Cir. 1984) (establishing both parent and subsidiary corporations subject to RICO in Seventh Circuit); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 770-72 (1984) (discussing policy rationale behind Sherman Act); Warner, *supra* note 8, at 1068 (elucidating how *Ashland* court came to its conclusion).

The Ninth Circuit reached a similar result in *Webster v. Omnitrition International, Inc.*¹¹⁴ There, the defendants—the owners of Omnitrition—allegedly operated a pyramid scheme in violation of numerous RICO provisions, including Section 1962(d).¹¹⁵ The court found the Seventh Circuit’s reasoning in *Ashland Oil* persuasive and held that because intracorporate conspiracies threaten RICO’s policy goals, the ICCD does not bar Section 1962(d) claims.¹¹⁶ Similarly, in *Kirwin*, the Eleventh Circuit sided with the Seventh and Ninth circuits by holding that the ICCD does not bar Section 1962(d) claims.¹¹⁷ The court cited its previous decision in *McAndrew v. Lockheed Martin Corp.*¹¹⁸ and reasoned that “[c]orporations and their agents are distinct entities and, thus, agents may be held liable for their own conspiratorial actions.”¹¹⁹

Further, *Alix*—the most recent case to interpret whether the ICCD should apply to RICO claims—tipped the scales of the ongoing circuit split towards barring application of the ICCD to RICO claims.¹²⁰ In coming to its conclusion, the court relied heavily on the Seventh Circuit’s reasoning and policy argument.¹²¹ The court found that “because the Sherman Act is premised, as RICO is not, on the ‘basic distinction between concerted and independent action[,]’ [t]he policy considerations discussed in *Copperweld* . . . do not apply to RICO.”¹²² Continuing with this policy rationale, the court asserted that it would be antithetical to RICO’s purpose of separating racketeers from their profits if it prevented intracorporate conspiracies from being prosecuted under RICO.¹²³

114. See *Webster v. Omnitrition Int’l, Inc.*, 79 F.3d 776, 789 (9th Cir. 1996) (holding RICO liability possible due to participation in RICO enterprise).

115. See *id.* at 786 (explaining predicate racketeering acts sufficient to invoke RICO).

116. See *id.* at 787 (siding with Seventh Circuit); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d) (listing conspiracy provision).

117. See *Kirwin v. Price Commc’ns Corp.*, 391 F.3d 1323, 1326 (11th Cir. 2004) (acknowledging case of first impression for Eleventh Circuit).

118. 206 F.3d 1031 (11th Cir. 2000).

119. See *Kirwin*, 391 F.3d at 1327 (applying *McAndrew* precedent to conclude ICCD does not bar Section 1962(d) RICO claims); *McAndrew*, 206 F.3d at 1034 (holding ICCD cannot shield conspiracies from civil liability under 42 U.S.C. § 1985(2)). Even though *McAndrew* addressed the ICCD in the context of 42 U.S.C. § 1985—conspiracy to defraud civil rights—the court reasoned that the same principles apply when analyzing whether the ICCD should apply to civil liability claims. See *McAndrew*, 206 F.3d at 1034-36 (reasoning 42 U.S.C. § 1985 extends to civil liability).

120. See *Alix v. McKinsey & Co.*, No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872, at *70 (S.D.N.Y. Aug. 18, 2023) (siding with Seventh, Ninth, and Eleventh Circuits). “As the circuit split suggests, the issue is not clear cut, but the [c]ourt concludes that the Seventh, Ninth, and Eleventh Circuits have the better of the argument and that the intracorporate conspiracy doctrine does not apply to RICO.” *Id.*

121. See *id.* (explaining reasoning).

122. See *id.* (endorsing Seventh Circuit’s *Copperweld* interpretation and asserting policy considerations of Sherman Act and RICO incompatible).

123. See *id.*, at *70-71 (utilizing Seventh Circuit’s reasoning).

On the other hand, the Fourth and Eighth Circuits have concluded that the ICCD *can* apply to—and thus bar—RICO conspiracy claims.¹²⁴ In *Detrick v. Panalpina, Inc.*,¹²⁵ the Fourth Circuit considered whether the ICCD’s “personal stake exception” should apply to RICO conspiracy claims where the plaintiff contracted with, and brought suit against, the defendant in their personal capacity.¹²⁶ The court affirmed the district court’s conclusion that, because the defendants only alleged a conspiracy between “a corporation and its officers,” no conspiracy could have taken place.¹²⁷ Alternatively, in *ePlus Technology, Inc. v. Aboud*,¹²⁸ evidence showed an officer of a corporation had an independent stake in a RICO conspiracy “bust-out” scheme.¹²⁹ The court concluded that, under these facts, the personal stake exception to the ICCD *did* apply to the defendant and, therefore, the defendant could be charged under RICO because the officer’s stakes differed enough from the corporation’s to demonstrate a RICO conspiracy.¹³⁰

Similarly, in *Fogie v. THORN Americas Inc.*,¹³¹ the Eighth Circuit rejected the Seventh, Ninth, and Eleventh Circuits’ reasoning that the ICCD should not apply to RICO claims because intracorporate conspiracies do not threaten RICO’s fundamental policy goal of separating racketeers from their profits.¹³² The court held that the plaintiffs failed to show that the defendant corporation

124. See Warner, *supra* note 8, at 1065 (mentioning circuit split); *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997) (holding personal stake exception to ICCD sufficient to allow conspiracy claim under RICO); *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 179-80 (4th Cir. 2002) (applying personal stake exception to RICO); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 899 (8th Cir. 1999) (declining to follow Seventh and Ninth Circuits’ nonapplication of ICCD to RICO claims).

125. 108 F.3d 529 (4th Cir. 1997).

126. See *id.* at 533-34 (characterizing factual background of case). The plaintiff, who ran an air freight business, alleged that the defendants violated Section 1961 and relevant Virginia conspiracy statutes through a fraudulent rebilling scheme. See *id.* at 534 (listing plaintiff’s allegations).

127. See *id.* at 544 (discussing conspiracy claim). In coming to its conclusion that the ICCD bars RICO claims, the court was not persuaded that the personal stake exception applied based on the fact that the plaintiffs sued in their personal capacities, rather than on behalf of the corporation they owned. See *id.* (determining whether personal stake exception applies). In declining to apply the independent personal stake exception, the court found that there can be no conspiracy between a corporation and its officers because they act as one economic force. See *id.* (narrowing personal stake exception).

128. 313 F.3d 166 (4th Cir. 2002).

129. See *id.* at 179-80 (defining personal stake exception). The court found that the defendant fell squarely within the ICCD’s personal stake exception where her interest was to gain from the corporation’s racketeering activities. See *id.* (applying personal stake exception). The defendant’s independent interest came in the form of “siphoning money” out of the corporation and profiting at the corporation’s expense. See *id.* at 180 (explaining why personal stake exception applied). Thus, the court concluded that the defendant had conspired with her fellow schemers in defrauding the corporation. See *id.* (imposing liability on defendant).

130. See *id.* at 179 (opining why ICCD did not apply to RICO claim due to exception).

131. 190 F.3d 889 (8th Cir. 1999).

132. See *id.* at 899 (canvassing why Seventh and Ninth Circuits’ reasoning not persuasive). “Neither the Seventh nor the Ninth Circuit explains why, when two entities are under common control and there is no distinctiveness or independence of action, an agreement or understanding between them creates any of the special dangers [Section] 1962(d) targets.” *Id.*

and its subsidiaries were distinct and independent entities.¹³³ Thus, the defendant corporation's actions were "driven by a single consciousness," making the parent and subsidiaries incapable of conspiring with each other in violation of Section 1962(d).¹³⁴ Overall, the ongoing circuit split on whether the ICCD should apply to civil RICO claims not only yields inconsistent outcomes, but threatens to maintain an overexpanded concept of civil RICO that reaches further into the corporate boardroom than ever considered by the law's original drafters.¹³⁵

III. ANALYSIS

A. Why the ICCD Should Apply to RICO Conspiracies

Where there is an alleged RICO conspiracy between a parent corporation and its wholly owned subsidiary, the ICCD should apply to bar RICO conspiracy claims because the parent corporation is not "conspiring" with an extension of itself.¹³⁶ Applying the ICCD in this way would be more in line with RICO's original, congressional intent.¹³⁷ The issue then becomes a balancing test, where the court must weigh the ICCD's policy considerations against RICO's policy considerations.¹³⁸ The Seventh, Ninth, and Eleventh Circuits—and now the Southern District of New York—believe that RICO's policy considerations should outweigh the ICCD's on that scale.¹³⁹ On the other side, the Fourth and

133. *See id.* (explaining factual background).

134. *See id.* (utilizing lack of separation between parent and subsidiary to conclude single actor). The court analogized the defendant's corporate structure to that of the corporate structure at issue in *Copperweld*, concluding that THORN and its subsidiaries "are common, not disparate," and thus incapable of conspiring with one another in violation of Section 1962(c). *See id.* (emphasizing *Copperweld*'s reasoning cannot allow adjudication of RICO conspiracies when common interests present).

135. *See* Nelson, *supra* note 58, at 254 (complaining overexpansion of ICCD imposes "inappropriate liabilities" on corporations and individuals); Parker, *supra* note 10, at 819-20 (mentioning growing concern among commentators and practitioners on expanded applications of civil RICO); Ginger, *supra* note 82, at 465 (opining concern over civil RICO unnecessarily exposing corporations to treble damages); *see also* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (reviewing policy rationale behind RICO).

136. *See* *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (limiting scope of inquiry to parent corporation and wholly owned subsidiary).

137. *See* *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 899 (8th Cir. 1999) (asserting lack of distinctness or independence from parent corporation creates presumption of single consciousness); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) (citing complete unity of interest between parent and wholly owned subsidiary corporations).

138. *See* *Ashland Oil*, 875 F.2d at 1281 (urging intracorporate conspiracies threaten RICO's goals); *Alix v. McKinsey & Co.*, No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872, at *70-71 (S.D.N.Y. Aug. 18, 2023) (agreeing with Seventh Circuit's refusal to extend policy considerations discussed in *Copperweld* to RICO); *Copperweld*, 467 U.S. at 775 (refusing to address single firm anticompetitive behavior).

139. *See* *Alix*, 2023 U.S. Dist. LEXIS 145872, at *70 (concluding ICCD does not apply to RICO); *Ashland Oil*, 875 F.2d at 1281 (declining to apply ICCD to RICO); *see also* *Haroco, Inc. v. Am. Nat'l Bank & Tr. Co.*, 747 F.2d 384, 402 (7th Cir. 1984) (justifying decision to not apply ICCD to RICO); *Kirwin v. Price Commc'ns Corp.*, 391 F.3d 1323, 1326 (11th Cir. 2004) (relying on *McAndrew* to not apply ICCD to RICO); *Webster v. Omnitrail Int'l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996) (using *Ashland Oil* to conclude ICCD does not bar RICO claims).

Eighth Circuits believe that the ICCD's policy considerations should weigh more than those of RICO.¹⁴⁰ Preserving competitive zeal is central to the American economy and there are numerous exceptions that allow RICO to function effectively alongside the ICCD; therefore, the ICCD should apply to RICO conspiracies to ensure that corporations are held accountable for conspiring with outside actors, while exercises of internal corporate power between agents, divisions, and subsidiaries should go unpunished.¹⁴¹

Regarding congressional intent, RICO and the Sherman Act aim to counter specific harms.¹⁴² The main goals of RICO are to prevent the infiltration of legitimate businesses by racketeers and to separate those racketeers from their profits.¹⁴³ The main goal of the Sherman Act is to prevent unreasonable restraints on trade.¹⁴⁴ Both Acts target a narrow spectrum of behavior and afford the interpreting court wide deference.¹⁴⁵ Under the Sherman Act, Congress strictly limited the ability of courts to impose liability on single firms to *only* situations where they pose a danger of monopolization.¹⁴⁶ The Court has repeatedly held that coordinated conduct between a parent corporation and its wholly owned subsidiary does *not* pose a threat to antitrust law.¹⁴⁷ But, the courts that

140. See *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997) (utilizing personal stake exception to ICCD despite generally asserting ICCD bars RICO claims); *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 179-80 (4th Cir. 2002) (looking to *Detrick's* personal stake exception to avoid applying ICCD to RICO conspiracy claim); *Fogie*, 190 F.3d at 899 (spurning Seventh and Ninth Circuits' reasoning for finding ICCD does not bar RICO conspiracy claims).

141. See *Copperweld*, 467 U.S. at 775 (reinforcing importance of preserving competitive enthusiasm anti-trust laws foster); Sherman Antitrust Act, 15 U.S.C. § 1 (defining illegal conspiracies threatening competition); see also *Detrick*, 108 F.3d at 544 (applying personal stake exception in RICO context).

142. See *Copperweld*, 467 U.S. at 775 (explaining congressional intent behind Sherman Act); *Webster*, 79 F.3d at 787 (mentioning policy goal behind RICO).

143. See *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 899 (8th Cir. 1999) (discussing policy goals behind RICO); *Parker*, *supra* note 10, at 834 (highlighting broad interpretation of RICO contributes to its overexpansion).

144. See 15 U.S.C. §§ 1-2 (codifying intent to eliminate unreasonable restraints on trade).

145. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 770-71 (1984) (limiting scope of Section 1). According to the *Copperweld* Court, Section 1 of the Sherman Act has a limited scope that focuses on a restraint on trade by two separate actors. See *id.* (disagreeing with lower court's conclusion of coordinated effort between corporate divisions violates Sherman Act); see also *Fogie*, 190 F.3d at 899 (recognizing split on whether special policy considerations underlying Sherman Act apply to RICO cases). Compare *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996) (asserting intracorporate conspiracies threaten RICO's goals), with *Parker*, *supra* note 10, at 819-20 (criticizing recent stretching of RICO to broadest interpretation its language allows).

146. See *Copperweld*, 467 U.S. at 767-68 (paying careful attention to congressional intent). The *Copperweld* Court found that Congress only allows Sherman Act scrutiny of single firm conduct when such firms pose a risk of monopolization. See *id.* (limiting scrutiny of single firm conduct). Judging unilateral conduct from this perspective prevents antitrust laws from unnecessarily restraining a particular entrepreneur. See *id.* at 768 (providing rationale for protecting competitive zeal); *Stewart*, *supra* note 42, at 200-01 (summarizing policy considerations underlying *Copperweld*).

147. See *Copperweld*, 467 U.S. at 769 (offering skeptical interpretation of coordinated activity within firms). Once again, the Court declined to increase the level of scrutiny on single firms under Section 1 because internally coordinated conduct does not represent the merger of independent market forces. See *id.* (asserting officers

fail to apply the ICCD to RICO claims are concerned that this coordinated, intracorporate conduct threatens RICO's goals.¹⁴⁸ The Seventh, Ninth, and Eleventh Circuits—and now the Southern District of New York—all misapply the “gap” left in the Sherman Act for the adjudication of conspiracies, and implicitly reason that the public policy concerns of RICO outweigh those of the ICCD and the Sherman Act.¹⁴⁹ This interpretation of RICO's reach proves too broad.¹⁵⁰ When courts give more weight to RICO than the ICCD's policy considerations, it contributes to RICO's overexpansion.¹⁵¹ Therefore, the ICCD should apply to RICO conspiracies to limit both courts' overly broad interpretation of RICO's reach, and their unequal weighing of policy goals.¹⁵²

For example, the *Ashland Oil* court reasoned that the policy considerations underlying the Sherman Act do not apply to RICO because the Sherman Act is premised on the “basic distinction between concerted and independent action,” whereas RICO is not.¹⁵³ Thus, the *Ashland Oil* court, like the *Copperweld* Court, implicitly reasoned that the policy considerations underlying the Sherman Act

working together under one firm's umbrella not separate economic actors); *Fogie*, 190 F.3d at 899 (equating plaintiff's conspiracy allegations to conspiring with one's own arms and hands); Robberson, *supra* note 45, at 782 (finding Section 2 of Sherman Act addresses monopolization concerns by penalizing unilateral action).

148. See *Webster*, 79 F.3d at 787 (expressing concern because intracorporate conspiracies threaten RICO's policy goals); *Alix v. McKinsey & Co.*, No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872, at *70 (S.D.N.Y. Aug. 18, 2023) (using *Copperweld* to support finding ICCD does not apply to RICO).

149. See *Copperweld*, 467 U.S. at 774-75 (identifying “gap” in Section 1 liability). This “gap” refers to the room that Section 1's narrow focus on concerted effort leaves when applied to unreasonable restraints on trade. See *id.* at 775 (explaining gap); see also *Alix*, 2023 U.S. Dist. LEXIS 145872, at *70 (joining majority of circuits in finding ICCD does not apply to RICO); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (giving too much weight to RICO policy considerations and misapplying ICCD); *Haroco, Inc. v. Am. Nat'l Bank & Tr. Co.*, 747 F.2d 384, 402 (7th Cir. 1984) (refusing to apply ICCD to RICO); *Kirwin v. Price Commc'ns Corp.*, 391 F.3d 1323, 1326 (11th Cir. 2004) (rejecting application of ICCD to RICO); *Webster*, 79 F.3d at 787 (finding ICCD does not bar RICO conspiracies' actionability).

150. See *Ashland Oil*, 875 F.2d at 1281 (acknowledging intracorporate conspiracies do not threaten antitrust laws but reasoning they do threaten RICO's goals). By stating that intracorporate conspiracies threaten RICO's goals, the court implied that the policy goals of RICO are more critical than those of antitrust law. See *id.* (setting up balancing of policy goals).

151. See *id.* (expressing why ICCD does not apply to RICO conspiracies); *Kirwin*, 391 F.3d at 1326-27 (explaining reasoning behind rejecting application of ICCD to RICO). The *Kirwin* court reasoned that just as the ICCD cannot immunize corporate conspirators from criminal prosecution, neither can it shield them from civil liability. See *Kirwin*, 391 F.3d at 1326-27 (expanding *McAndrew*'s holding to apply to RICO conspiracy claims); *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1034 (11th Cir. 2000) (holding ICCD cannot shield actors from criminal or civil liability under 42 U.S.C. § 1985(2)).

152. See *Parker*, *supra* note 10, at 819-20 (chastising overexpansion of civil RICO); *Haroco, Inc.*, 747 F.2d at 401 (synthesizing different policy rationales and articulating narrow standard for corporate liability).

153. See *Haroco, Inc.*, 747 F.2d at 403 n.22 (finding policy considerations underlying intracorporate conspiracies in Sherman Act context do not apply to RICO); *Ashland Oil*, 875 F.2d at 1281 (distinguishing between policy considerations underlying Sherman Act and RICO). Critically, the Sherman Act concerns combining distinct economic forces into one, whereas RICO conspiracies concern identifying and eliminating racketeering activity. See *Ashland Oil*, 875 F.2d at 1281 (explaining reasoning); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767-68 (1984) (discussing Sherman Act scrutiny of single firms).

do not threaten RICO's goals.¹⁵⁴ Moreover, the *Haroco* court recognized and limited the incredibly broad scope of RICO.¹⁵⁵ These courts have narrowed corporate liability under RICO to the extent of the corporation's role in the fraud.¹⁵⁶ If the corporation is the perpetrator, then the corporation should be primarily liable.¹⁵⁷ On the other hand, if an agent of the corporation is just using the corporation as an instrumentality for their own fraud, then the agent should face the bulk of the penalties.¹⁵⁸ This flexible standard carves out a narrow exception under RICO that allows a corporation to be penalized when a RICO claim is brought against the "enterprise" itself.¹⁵⁹ But in applying this exception, courts overstep their bounds by unnecessarily putting their thumb on the scale to find that the policy goals of RICO outweigh those of the ICCD.¹⁶⁰

Concededly, courts must give some deference to RICO's plain language, which empowers them to penalize illegitimate and legitimate businesses in the same manner.¹⁶¹ Civil RICO liability should be reigned in, however, and the ICCD offers a strong starting point.¹⁶² Because the ICCD is an established doctrine that firmly states parent and subsidiary corporations are part of the same economic engine, allowing the ICCD to apply to RICO conspiracies would

154. See *Ashland Oil*, 875 F.2d at 1281 (expressing concern intracorporate conspiracies threaten RICO's goal of separating racketeers from their profits); *Copperweld*, 467 U.S. at 768 (minimizing concern over potential for unilateral corporate behavior to violate Section 1 of Sherman Act). But see O'Neill, *supra* note 78, at 649-50 (alleging RICO's wording evinces congressional intent to reach and penalize wide range of concerted activity).

155. See *Haroco, Inc. v. Am. Nat'l Bank & Tr. Co.*, 747 F.2d 384, 386-87 (7th Cir. 1984) (identifying broad statutory language in RICO encompassing various fraud offenses); O'Neill, *supra* note 78, at 652 (attributing broad language to RICO's ambitious goals).

156. See *Haroco, Inc.*, 747 F.2d at 400 (turning to congressional intent to liberally interpret Section 1962(c) and find defendants liable); *United States v. Turkette*, 452 U.S. 576, 585 (1981) (hinting Congress deliberately failed to restrict RICO's statutory language).

157. See *Haroco, Inc.*, 747 F.2d at 400-02 (tailoring RICO liability based on corporation's level of involvement in perpetrating fraud or conspiracy). According to the *Haroco* court, a corporation's RICO liability should turn on the role it played in the alleged fraud. See *id.* (noting RICO liability's relation to corporation's perpetuation of racketeering activity patterns).

158. See *id.* at 402 (limiting scope of RICO liability to role played in fraud). On the other hand, if the corporation is merely an instrumentality or even a victim of racketeering activities, then it should not face liability. See *id.* (addressing counterargument).

159. See *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (rejecting Arnett's argument of "unwitting conduit" of its employees' RICO violations to avoid liability).

160. See *Parker*, *supra* note 10, at 819-20 (recognizing overexpansion of RICO).

161. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(a)-(d) (empowering prosecutors to go after racketeers in legitimate and illegitimate businesses); *Coppola & DeMarco*, *supra* note 16, at 247 (stressing Senators Hruska and McClellan intended RICO to attack racketeers' infiltration of legitimate businesses).

162. See *Warner*, *supra* note 8, at 1062-63 (explaining potential for civil RICO plaintiffs to collect triple damages); *Coppola & DeMarco*, *supra* note 16, at 242-43 (asserting expansion of RICO's broad language and lenient interpretation created expanded use); *McDemus*, *supra* note 82, at 1038-39 (examining trending increase of civil RICO complaints); see also *Parker*, *supra* note 10, at 819-20 (warning of chilling effects from expanded RICO).

balance out this scale.¹⁶³ This deference does not mean, however, that the ICCD's application to RICO conspiracies should be absolute.¹⁶⁴

The existing exceptions to the ICCD offer a workable and narrow framework for its effective application to civil RICO conspiracies.¹⁶⁵ The personal stake exception is the most potent example.¹⁶⁶ While the exception has only been applied in the Fourth and Eighth Circuits, it should be applied to—or at least considered in—all civil RICO conspiracy cases.¹⁶⁷ Moreover, the exception fits well when applied to RICO.¹⁶⁸ Because it applies when an agent is acting outside the scope of their employment and profiting from those acts, the agent need not have conspired with the corporation to be found liable.¹⁶⁹ This comports with the distinction made in *Haroco* that focused on punishing a corporation when it is the main wrongdoer, as opposed to punishing the agent when they use the corporation as an instrumentality for individual gain.¹⁷⁰

From an enforcement perspective, identifying when a corporate agent has a personal stake can be easier than determining a corporation's separation from its agents, divisions, or subsidiaries.¹⁷¹ For example, in *Aboud*, the court correctly applied the personal stake exception when it identified the defendant's plan to enrich himself at the corporation's cost through a “bust-out” scheme.¹⁷²

163. See *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 897 (8th Cir. 1999) (characterizing imposition of liability on parent and subsidiary businesses result of misreading of statute). The distinctiveness requirement of Section 1962(c) cannot be fulfilled when a parent corporation and its subsidiary are acting as one. See *id.* at 898 (requiring distinctiveness to include separate corporate entities); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 770 (1984) (concluding “little doubt that” operations of corporate enterprise's divisions do not constitute multiple actors). Instead, the *Copperweld* Court held that this is a distinction without a difference and should only be considered the action of a single firm. See *Copperweld*, 467 U.S. at 770-71 (asserting this type of coordinated conduct does not warrant Sherman Act Section 1 scrutiny).

164. Compare *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997) (utilizing personal stake exception where RICO claim otherwise barred by ICCD), with *Ashland Oil*, 875 F.2d at 1281 (rejecting application of ICCD to RICO claim).

165. See *supra* note 140 (providing examples of cases where courts adjudicated RICO claims via ICCD's personal stake exception).

166. See *Warner, supra* note 8, at 1074 (arguing personal stake exception protects intent of RICO).

167. See *Detrick*, 108 F.3d at 544 (deploying personal stake exception); *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 179-80 (4th Cir. 2002) (using personal stake exception); *Warner, supra* note 8, at 1074-75 (detailing when to apply personal stake exception).

168. See *Warner, supra* note 8, at 1074 (discussing how personal stake exception protects intent of RICO).

169. See *id.* (giving example of how personal stake exception functions within RICO context); see also *Nelson, supra* note 58, at 256 (explaining how personal stake exception defeats liability shield offered by ICCD); *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981) (reasoning officers lose ICCD protection when they act for personal reasons outside scope of employment).

170. See *Haroco, Inc. v. Am. Nat'l Bank & Tr. Co.*, 747 F.2d 384, 400 (7th Cir. 1984) (distinguishing between person and enterprise). The *Haroco* court recognized that a corporation can be both a person and an enterprise, which implies that not only can a *person* satisfy the personal stake exception, but so can an *enterprise* when it acts with interests that oppose those of a related corporate enterprise. See *id.* (noting RICO contemplates both victimization and liability for persons and enterprises).

171. See *Warner, supra* note 8, at 1074 (noting ease with which courts can identify an agent's “independent” stake); see also *Aboud*, 313 F.3d at 179 (noting personal stake exception “plainly applies” because defendant stood to gain from illegal bust-out scheme).

172. See *Aboud*, 313 F.3d at 179 (identifying bust-out scheme and quickly imposing liability).

Similarly, in *Alix v. McKinsey & Co.*, plaintiffs alleged that McKinsey used its employees to file false declarations in several bankruptcies.¹⁷³ The court implicitly applied the personal stake exception by finding that when acting on behalf of McKinsey, the individual defendants acted for personal gain when they intentionally concealed McKinsey's connections to the bankrupt companies that it represented.¹⁷⁴ Thus, despite finding that the ICCD generally does not bar RICO claims, the Southern District of New York nonetheless applied the ICCD's personal stake exception.¹⁷⁵

Much of the precedent that supports the idea that the ICCD does not bar RICO conspiracy claims asserts that intracorporate conspiracies threaten RICO's policy goals.¹⁷⁶ "Conspiratorial" communications between a parent corporation and its subsidiary, however, do not threaten the goals of antitrust law.¹⁷⁷ If antitrust liability turned on the corporate form of a subsidiary, then parent corporations would be encouraged to convert subsidiaries into unincorporated divisions.¹⁷⁸ This interpretation of the Sherman Act relates back to its original distinction between unilateral and concerted conduct.¹⁷⁹ The *Copperweld* Court characterized this distinction between the choice of corporate form and a possible violation of the Sherman Act as a "gap" intentionally left by Congress.¹⁸⁰ This gap aimed to improve competition among corporations without subjecting a firm's "every action to judicial scrutiny for reasonableness."¹⁸¹ This same logic applies when examining the conduct of a wholly owned subsidiary because Section 1 of the

173. See *Alix v. McKinsey & Co.*, No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872, at *67-68 (S.D.N.Y. Aug. 18, 2023) (alleging defendants intentionally concealed connections in violation of RICO).

174. See *id.*, at *67-68, *72-73 (laying out defendants' arguments and finding RICO predicate acts).

175. See *id.*, at *73 (finding RICO conspiracy between defendants and McKinsey). *Alix* is the most recent example of how courts can readily identify the personal stake exception. See Warner, *supra* note 8, at 1074 (identifying independent stake with ease); *Alix*, 2023 U.S. Dist. LEXIS 145872, at *67-68, *72-73 (applying personal stake exception by implication).

176. See *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996) (discussing how intracorporate conspiracies threaten RICO's goals); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (disagreeing with application of ICCD to RICO conspiracies).

177. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 775 (1984) (referring back to congressional intent). The Court noted that Congress deliberately left such a gap in the Sherman Act because unnecessarily increasing judicial scrutiny of single firms would go against the policy goals of antitrust law. See *id.* at 772 (contending antitrust liability should not depend on incorporation status of wholly owned subsidiary).

178. See *id.* at 773-74 (reasoning this interpretation of antitrust liability deprives consumers and producers of benefitting from subsidiary corporations).

179. See *id.* at 774 (using facts of case to articulate error of treating corporate divisions differently than subsidiaries).

180. See *id.* at 774-75 (discussing gap).

181. See *Copperweld*, 467 U.S. at 775 (hesitating to discourage competitive enthusiasm). Moreover, the *Copperweld* Court argued that if Congress intended to treat unilateral conduct the same as multilateral conduct, then it simply would have eliminated Section 1 because Section 2 already encompasses this activity. See *id.* (deferring to congressional intent); Sprunk, *supra* note 38, at 20 (pointing out prevalence of parent-subsidiary corporate structure since enactment of Sherman Act).

Sherman Act does not accept that a corporation and its wholly owned subsidiaries can combine or conspire with each other.¹⁸²

While some circuits agree with this basic premise and generally use the ICCD to bar claims in the RICO context, there are still ways for those courts to hold parties liable for engaging in RICO conspiracies.¹⁸³ For example, in applying the ICCD to RICO conspiracies, the Fourth and Eighth Circuits have consistently found exceptions allowing adjudication of RICO claims.¹⁸⁴ In *Detrick*, the Fourth Circuit held that because the defendant poorly claimed that a conspiracy between the officers of the corporation and the corporation itself existed, the ICCD barred its RICO counterclaim and the personal stake exception did not apply.¹⁸⁵ Meanwhile, in *Fogie*, the Eighth Circuit likewise found a lack of distinctiveness between the parent corporation and its subsidiary, but found it proper to apply the ICCD's personal stake exception.¹⁸⁶ These two holdings do not suggest that the Fourth and Eighth Circuits outright reject the premise that the Southern District of New York and the Seventh, Ninth, and Eleventh Circuits embraced in deciding that the ICCD does not bar RICO claims; instead, these holdings show that the Fourth and Eighth Circuits have not had the opportunity to fully consider the issue outside of contexts where these exceptions may apply.¹⁸⁷

B. An Alternative Policy Proposal to Smoothen the Application of the ICCD to RICO

Given the ongoing circuit split and general confusion created when the ICCD and RICO interact, there is room to suggest an alternative policy.¹⁸⁸ Both the ICCD and RICO were created to solve unique problems.¹⁸⁹ The Supreme Court established the ICCD as a response to the increasing complexity of corporate

182. See *Copperweld*, 467 U.S. at 776 (concluding coordinated behavior of parent corporations and their wholly owned subsidiaries fall outside Section 1); Sprunk, *supra* note 38, at 21 (expressing deep concern with corporate form). Although it is obvious that a parent and subsidiary constitute a single economic entity, if it is not recognized as such, then only sole proprietorships would escape the ICCD. See Sprunk, *supra* note 38, at 21 (discussing irrational view of parent-subsidiary relationship).

183. See *supra* note 140 (listing Fourth and Eighth Circuit cases using ICCD to bar RICO claims or applying exceptions).

184. See *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997) (agreeing with district court's reasoning and applying personal stake exception); *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 179-80 (4th Cir. 2002) (noting narrow application of personal stake exception); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 896-97 (8th Cir. 1999) (grappling with pleading).

185. See *Detrick*, 108 F.3d at 544 (criticizing corporation's argument and misapplication of ICCD's personal stake exception).

186. See *Fogie*, 190 F.3d at 898 (requiring higher showing of distinctness between parent and subsidiary to meet RICO standard).

187. See *Detrick*, 108 F.3d at 544 (disregarding circuit split and directly applying personal stake exception); *Fogie*, 190 F.3d at 896-97 (contending with circuit split); See *Alix v. McKinsey & Co.*, No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872, at *70 (S.D.N.Y. Aug. 18, 2023) (siding with Seventh, Ninth, and Eleventh Circuits).

188. See Warner, *supra* note 8, at 1080 (offering policy proposal).

189. See *supra* notes 142-144 and accompanying text (explaining policy considerations underlying both RICO and ICCD).

forms that businesses utilize, and to decrease the number of Sherman Act Section 1 violations being lodged against parent corporations.¹⁹⁰ Of course, the ICCD is not perfect.¹⁹¹ Its main criticism is that its grant of immunity to corporate executives has led regulators to overly rely on alternative methods of holding employees responsible for their actions.¹⁹² Alternatives include increased reliance on piercing the corporate veil and the responsible corporate officer doctrine.¹⁹³ Similar to the Court's rationale for creating the ICCD, Congress passed RICO to address the seemingly untouchable hold the mafia had on the American economy.¹⁹⁴ Due to RICO's broad scope and potent enforcement mechanisms, these organized crime syndicates are no longer in power.¹⁹⁵

When the ICCD and RICO collide, courts struggle to effectively operate within this gray area.¹⁹⁶ At the heart of this challenge is the reality that applying the ICCD to RICO claims is a fact-specific inquiry.¹⁹⁷ Thus, an additional policy delineating what ICCD and RICO criteria must be met for RICO claims to move forward, what exceptions apply, and how the two doctrines interact, would minimize the chance of a miscarriage of justice.¹⁹⁸

One possibility is to create an additional subsection within RICO—Section 1962(e)—that would explicitly state that the ICCD should apply to RICO conspiracies.¹⁹⁹ This would not only end the circuit split, but would complement the congressional intent behind both the Sherman Act and RICO.²⁰⁰ Courts want to avoid overstepping the Sherman Act's policy goals when confronted with RICO

190. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 773 (1984) (noting increasingly complex corporate form, necessitating overturning IECF and creating ICCD). In creating the ICCD, the Court reasoned that “there is nothing inherently anticompetitive about a corporation’s decision to create a subsidiary.” *Id.* Instead, the law should function in a way that allows corporations to structure themselves in a manner that best serves their needs. See *id.* (stating corporate complexities demand law grant corporations freedom to structure themselves).

191. See Nelson, *supra* note 58, at 254 (citing public and judicial frustration with ICCD’s inability to hold employees responsible).

192. See *id.* (arguing public and judicial frustration comes from expansion and misapplication of ICCD beyond initial scope).

193. See *id.* (explaining increased reliance on alternative doctrines to hold corporations and employees responsible).

194. See Coppola & DeMarco, *supra* note 16, at 244 (describing structure of organized crime families in United States).

195. See *id.* at 248 (highlighting success of RICO and downfall of organized crime).

196. See *Alix v. McKinsey & Co.*, No. 18-CV-4141, 2023 U.S. Dist. LEXIS 145872, at *70 (S.D.N.Y. Aug. 18, 2023) (summarizing circuit split).

197. See *id.*, at *71 (adopting case-by-case standard to determine if ICCD should apply to RICO).

198. See Warner, *supra* note 8, at 1080 (offering policy solution). Warner argues that the ICCD should not apply to RICO claims, and, therefore, that either explicit language should be added to Section 1962(d), or the “doctrine should be judicially dissolved by the Supreme Court.” See *id.* (articulating policy proposal).

199. See *id.* (advocating for removal of ICCD from RICO conspiracy cases).

200. See *Alix*, 2023 U.S. Dist. LEXIS 145872, at *70 (mentioning circuit split); Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (intending to halt unreasonable restraints on trade); Handler & Smart, *supra* note 37, at 24 (hypothesizing Section 1 of Sherman Act designed to prevent concerted action between distinct economic entities); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (laying out RICO statute); Coppola & DeMarco, *supra* note 16, at 246-47 (establishing Congress enacted RICO in response to organized crime).

claims.²⁰¹ Giving courts the green light to move forward with applying the ICCD to RICO claims would smoothen and clarify this gray area, and eliminate reason for courts to hesitate to step into the “gap” left by Congress.²⁰² Next, Section 1962(e) would list the limited exceptions to the ICCD that would bar the ICCD’s application to RICO.²⁰³ For example, it would list the ICCD’s personal stake exception as an automatic grant for adjudicating RICO conspiracy claims.²⁰⁴ Further, Section 1962(e) would state that a plaintiff must show that the agent, parent corporation, or subsidiary they are bringing the claim against has an interest separate from that of another “person.”²⁰⁵ Finally, Section 1962(e) would state that while the effective and even-handed implementation of RICO to legitimate and illegitimate businesses is vital to dissuading racketeers, it must be evenly weighed against the ICCD when courts encounter RICO conspiracy claims.²⁰⁶

IV. CONCLUSION

The ongoing circuit split over the ICCD’s application to RICO claims threatens to expand the reach of civil RICO liability beyond RICO’s original intent and design. By not allowing the ICCD to act as a defense to RICO “conspiracies” between parent corporations and their subsidiaries, the Seventh, Ninth, and Eleventh Circuits, and the Southern District of New York, all run the risk of allowing civil RICO liability to reach into every aspect of corporate decision making. Under these courts’ interpretations, a duly formed parent and subsidiary corporation can be held liable at any moment for committing a RICO conspiracy violation, simply by communicating with one another about their interrelated businesses. Additionally, because RICO allows for treble damages, the current standard encourages underhanded plaintiffs to bring frivolous lawsuits against corporations. As such, the Fourth and Eighth Circuits are correct in applying the ICCD to RICO conspiracies, and have set precedent that should inform alternative policy

201. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 770-71 (1984) (articulating Section 1’s focus on coordinated activity); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001) (acknowledging antitrust policy considerations underlying ICCD).

202. See *Copperweld*, 467 U.S. at 774-75 (addressing gap); Warner, *supra* note 8, at 1087-88 (predicating expansion of RICO on policy considerations to assist in corporate reform).

203. See *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997) (refusing to utilize ICCD to avoid imposing civil RICO liability due to personal stake exception); *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 179-80 (4th Cir. 2002) (explaining application of personal stake exception to ICCD).

204. See *Detrick*, 108 F.3d at 544 (characterizing and applying “well-established” personal stake exception); *Aboud*, 313 F.3d at 179-80 (stating personal stake exception to ICCD “plainly applies here”).

205. See *Aboud*, 313 F.3d at 179-80 (identifying agent’s separate interest); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 897 (8th Cir. 1999) (reasoning imposition of liability on parent and subsidiary businesses equates to misreading Section 1962(c)); see also *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 166 (holding corporate owner and corporations satisfy Section 1962(c)’s distinctness requirement).

206. See *Coppola & DeMarco*, *supra* note 16, at 248 (highlighting focus on dissuading racketeers from infiltrating legitimate businesses); O’Neill, *supra* note 78, at 649 (arguing RICO targeted enterprise criminality); *Fogie*, 190 F.3d at 898 (balancing Section 1962(c) distinctness requirement with ICCD).

proposals that would fairly and effectively address the ICCD's interaction with RICO.