

***RICO Report Podcast — RICO's Person/Enterprise Distinction*****Host: Cal Stein****Recorded: February 6, 2025****Aired: February 14, 2025****Cal Stein:**

Hello, and thank you for joining me on this installment of the *RICO Report*. My name of course is Cal Stein, and I'm a partner in the White Collar and Litigation practice groups at Troutman Pepper Locke. I represent clients in white collar criminal and government investigation matters, as well as in complex civil lawsuits and in RICO litigation.

Today, we are going to be talking about one of the most complicated, and therefore, at least in my opinion, interesting aspects of civil RICO cases, specifically civil RICO under Section 1962(c). And as listeners know, Section 1962(c) is the section of RICO that prohibits individuals from operating a RICO enterprise through a pattern of racketeering activities. It is by far the most common civil RICO provision that is used by plaintiffs. And one of the requirements that has developed under Section 1962(c) is what is called the person-enterprise distinction. And what that means essentially, is that the RICO person, the defendant, and the RICO enterprise cannot be the same. Sounds easy enough, right? Well, it is anything but easy, and that is despite the Supreme Court and circuit courts all around the country weighing in on this issue repeatedly. So today, we are going to explore this distinction and this kind of quirky aspect of RICO law, and hopefully provide a better understanding of the requirement, how it comes up in a practical sense, and then most importantly, how RICO practitioners can and do use it to help their clients.

Okay, so, what is the person-enterprise distinction? And we are going to start where we usually start at the *RICO Report*, which is the text of the RICO statute, specifically Section 1962(c), which we know is the most common provision to be used by RICO plaintiffs. And it is important to note that, because this person-enterprise distinction only applies in 1962(c) cases, and it only applies in those cases because of the text of 1962(c), which says, "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 an enterprise's affairs through a pattern of racketeering activity or the collection of unlawful debt."

So, every court of appeals that has analyzed this language has held that a party cannot be both a RICO person, i.e., the RICO defendant, and also the RICO enterprise. And that is because of that first part of 1962(c), which I just read, which says it shall be unlawful for any person employed by or associated with any enterprise. From that line, every federal court of appeals that has analyzed this has held that the RICO person and the RICO enterprise must be different. Courts have held of course, that a RICO person can be part of an enterprise, and by that, I mean the RICO person can associate in fact with other individuals or other corporations to form a RICO enterprise. That does not violate the person-enterprise distinction. But absent that, an individual RICO person cannot also be the enterprise.

All right, let's start with a simple example of this. Let's say there's a hypothetical RICO case where the RICO person, the RICO defendant, is an individual. Okay? Obviously that individual cannot also be an enterprise unto himself or herself, because in that case there would be nobody that person would be associating in fact with. So, in that sense, nice and easy, the RICO person cannot be the RICO enterprise, makes perfect sense.

All right, let's move now to a slightly more complicated example. Imagine a hypothetical RICO case where the RICO person is a corporation. Same deal. You've got a single corporation, it cannot also be the RICO enterprise because a corporation cannot associate in fact with itself, just like an individual can.

Now, let's cross the threshold to a truly complicated example that really, this is where we start to get into scenarios that have confounded plaintiff's attorneys and even some federal judges. Let's take a situation, a hypothetical RICO case, where the RICO person is a corporation, but the RICO enterprise is the corporation plus its employees. Well, now you do have multiple parties who are capable of associating in fact. When RICO cases finally get to this point where plaintiffs are bringing RICO claims against a corporation, and we know they like to do that because that's where the money is to pay a big award plus maybe treble damages in attorney's fees. So, when plaintiffs get around to bringing the type of case we're talking about against a corporation alleging that it is the RICO defendant and that the corporation plus its employees, its owners, directors, etc, constitute the RICO enterprise. This, this is where things really start to get interesting with the person-enterprise distinction.

So, let's talk more about that example I just gave, where the corporation is the RICO person and the corporation plus its employees is the RICO enterprise. Let's start with the first part. Can a corporation be a RICO person? Yes, of course it can. It's right there in the definition of person in 18 USC 1961, subsection three, which says person includes any individual or entity capable of holding a legal or beneficial interest in property. Corporations certainly qualify and no one would suggest otherwise. Okay, so then can a corporation then be an enterprise or be part of an enterprise that is comprised of it and its employees? Or put another way, is a corporation, the corporate entity, is it separate and distinct from the individuals who operate it? And this is where things get interesting, because the answer to this question in the eyes of most of the courts that have considered it is, no. And the reason is because the corporations can only act through its employees. Therefore, a corporation plus its employees constitutes a single entity for RICO purposes. We'll return to that thought a little bit later.

So, that is the rule that we're talking about when a corporation is the RICO person and the RICO enterprise. But that isn't always the case, or I should say those types of cases are not always exactly the same. And let's go back to our examples and add another one. By way of reminder, first example was we have a RICO person who's an individual and an enterprise who's an individual. That makes no sense. Second example was the RICO person is the corporation, and the enterprise is that same corporation. Again, makes no sense, they're obviously the same. Third example we just talked about was the RICO person is the corporation; the enterprise is the corporation plus its employees. We just talked about how that has been rejected.

Now let's add a new example, which ups the complicated-ness a little bit. In this example, the RICO person is an individual and the RICO enterprise is a corporation of which that individual is

an employee, or even maybe a director or even yet, maybe an owner, maybe the only owner. Well, what about that situation? Does that constitute a valid RICO claim under 1962(c) that satisfies the person-enterprise distinction? Well, the Supreme Court actually took up this exact case in 2001, in a case called *Cedric Kushner Promotions, v. King*. In that case, the plaintiff, Cedric Kushner Promotions was a boxing promotion company. The defendant was Don King, who many listeners will know is also a boxing promoter. In the case, the plaintiff accused Don King of operating a RICO enterprise, so violating 1962(c), with the enterprise being King's Company, Don King Productions. King was the president and sole shareholder of Don King Productions.

So, to recap, what the plaintiff alleged was, Don King is the RICO person, and the company which he owned and operated and was the sole owner, Don King Productions, was the RICO enterprise. And Don King and his attorneys argued at the district court level and then again at the Second Circuit level, that this did not satisfy the person-enterprise distinction, because the person was the company, ostensibly was their argument. And both the district court and the Second Circuit agreed. Their reasoning was that, look, 1962(c) only applies where there is this distinction. And because King was the president and sole shareholder of Don King Productions, for all intents and purposes, the RICO person and the RICO enterprise were the same. So, it gets up to the Supreme Court and what does the Supreme Court say? Well, in a word, the Supreme Court disagreed entirely. I'm going to jump around a little bit in the opinion, but I think these quotes make the position that the Supreme Court takes pretty clear and, in my view, very compelling.

So, here's where they started. Supreme Court said, "We do not quarrel with the basic principle that to establish liability under section 1962(c), one must allege and prove the existence of two distinct entities. One, a person, and two, an enterprise that is not simply the same person referred to by a different name." "But" the Supreme Court continued, "While accepting the distinctness principle, we nonetheless disagree with the appellate court's application of that principle to the present circumstances. Circumstances in which a corporate employee acting within the scope of his authority, allegedly conducts the corporation's affairs in a RICO forbidden way. The corporate owner employee, a natural person is distinct from the corporation itself. A legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more separateness than that."

So in some, the Supreme Court is basically saying, "No, look, an individual in a corporation are different. We know they're different. They have different legal statuses. In fact, that's one of the reasons individuals create corporations. Therefore, they are distinct for RICO purposes. Second Circuit, you are wrong when you say that an individual and his wholly owned corporation are the same." And Justice Breyer, writing for a unanimous court, makes a really compelling case for a corporate owner and a corporation being distinct, at least in my opinion. I mean, it makes sense, right?

Well, this is where things get a little bit complicated, or a little bit more complicated as I should say. After this decision, the Supreme Court has ruled in the case of Don King, that in that particular situation, RICO distinctiveness is satisfied. It overruled the Second Circuit. But in doing so, I want to note, the Supreme Court went to great lengths in that opinion to clarify that its holding applies only in this specific circumstance, which again, is the RICO person is an individual and the RICO enterprise is his corporation. In fact, the Supreme Court made clear in

the ruling that it was not applying that reasoning in the exact opposite situation, which is that other tricky example I gave a few moments ago, where the RICO person is the corporation, and the enterprise is the corporation plus its employees. That was the situation, factually speaking, in some of the cases that the Second Circuit cited and relied upon in affirming the dismissal of Cedric Kushner's case against Don King. And the Supreme Court explicitly said that was the wrong analysis.

This is what the Supreme Court said. "We note that the Second Circuit relied on earlier circuit precedent for its decision, but that precedent involved quite different circumstances which are not presented here. This case concerns a claim that a corporate employee is the person, and the corporation is the enterprise. The earlier Second Circuit precedent concerned a claim that a corporation was the person and the corporation together with its employees and agents were the enterprise. The Second Circuit's other precedent involved significantly different allegations compared with the instant case." And then after twice going out of its way in the passage I just read; to make clear the facts of the Cedric Kushner case are distinguishable from those other cases; the Supreme Court actually puts down the final hammer on this. And they wrote, "We do not here consider the merits of these cases, i.e., the Second Circuit cases, and note only their distinction from the instant case."

Okay, so what does all of that mean? Well, in practical sense, what it means is all the great language in the Cedric Kushner decision about an individual being legally distinct from a corporation for RICO purposes, all of that great language really only applies when the individual is alleged to be the RICO person, and the corporation is alleged to be the RICO enterprise. If you have a case where the RICO person is the corporation and the RICO enterprise is the corporation plus its employees, well then, the Supreme Court has said all that jazz about the legal distinction being the only separateness that is required. Well, that's not all that applicable in that particular circumstance.

So, what is the fallout from this case? Well, we've got this long-standing person-enterprise distinction for 1962 cases that goes back a long time. Okay? Then we have the Supreme Court ruling that in this one specific situation, the corporate form, even standing alone is enough to satisfy the distinction requirement. Had the ruling stopped there, the Supreme Court would have given the plaintiff's bar a big fat loophole, to the person enterprise distinction requirement, namely allowing them to plead around it by alleging the enterprise is the corporation plus its employees. But of course, the ruling didn't stop there. The ruling did not rule that that type of loophole was going to be allowed. In fact, it made crystal clear in the quotes we just read that it was not reaching the merits of that issue. The lengths to which the Supreme Court went to make this clear suggest, at least to me, how it feels about that loophole argument. Even if it did not rule on it, and even if it said explicitly, it was not ruling on it.

And wouldn't you know, the circuit courts have picked up on that hint as well. So, let's talk now about a couple post Cedric Kushner rulings at the circuit court level. At least for the most part, courts have fairly uniformly rejected attempts by plaintiffs to utilize that loophole I just mentioned, by claiming to satisfy the person enterprise distinction by arguing the enterprise is a corporation plus its employees.

The first case I want to talk about is in 2013, it's a Sixth Circuit case, in re: ClassicStar Mare Lease litigation, and here's what the Sixth Circuit had to say about this. "An organization cannot

join with its own members to undertake regular corporate activity, and thereby become an enterprise distinct from itself." That's fairly logical reason, it makes some sense to me. The Sixth Circuit went on, "If RICO imposed liability on a corporation for the ordinary conduct of its agents and employees, every claim of corporate fraud would automatically become a violation of RICO." Again, I think they're building to a conclusion that makes a lot of logical sense.

Then the Sixth Circuit tried to tackle the related issue of look, what if instead of pleading that the enterprise is the corporation and its employees, a plaintiff tried to argue that the enterprise is a corporation plus its affiliates? Like an enterprise purportedly consisting of a parent company and its subsidiary. Does that satisfy the person-enterprise distinction? And in analyzing the law to that point on this issue, the Sixth Circuit offered this gem of an observation. "The number of different approaches to the distinctness analysis roughly mirrors the number of cases that have addressed it." Put another way, the Sixth Circuit is observing that just about every court that has addressed this issue to that point ruled in a different way.

It went on. "The cases run the gamut. Some consider a parent corporation and its subsidiaries to be distinct, from a RICO enterprise of the parent and subsidiaries play different roles in the scheme. Some ask whether the corporate persons are distinct from the enterprise in the way that RICO envisions. And some require that plaintiffs establish differences in corporate decision-making structures and show businesses sufficiently delineated to justify the conclusion that the alleged RICO activity is not the activity of a single composite entity." Ultimately though, the Sixth Circuit was really unable to answer the question of whether you could have an enterprise comprised of a corporation and its affiliates.

But it did offer two important principles that it believed had emerged in the law to that point. The first is that individual defendants are always distinct from a corporate enterprise because they are legally distinct entities. This is the Cedric Kushner holding, we already know that. But second, that corporate defendants are distinct from RICO Enterprises when they are functionally separate, as when they perform different roles within the enterprise or use their separate legal incorporation to facilitate racketeering activity. So, this is the sixth Circuit formulation, at least. Something of a legally distinct entities plus test, with the plus being that the entities have some functionally separate activities, whatever that means.

All right, let's fast-forward now to 2016, when we get a very interesting Eleventh Circuit opinion in a case called *Ray v. Spirit Airlines*. Here is another court that at least in my view, is kind of laying down the hammer on a plaintiff trying to use that loophole we talked about. And here's what the Eleventh Circuit said, "We too hold that plaintiffs may not plead the existence of a RICO enterprise between a corporate defendant and its agents or employees acting within the scope of their roles for the corporation." And here is where the Eleventh Circuit says the quiet part out loud. The Eleventh Circuit says, "Because a corporation necessarily acts through its agents and employees." Well, what does that mean? Well, what it means is that a corporation, while legally its own entity, is not a living, breathing thing that is capable of acting on its own. Corporations are inanimate, they can only act when their employees act. And this all makes some sense.

The Eleventh Circuit Judge, Judge Marcus, puts a beautiful bow, in my opinion, on this bit of legal analysis by stating, "When an individual defendant acts through a corporation, he may have formed an association in fact with an entity distinct from himself." In that situation, the rule



announced in Cedric Kushner makes sense. "In contrast to an individual, a corporation cannot act except through its officers, agents and employees. Thus, a corporate defendant acting through its officers, agents, and employees is simply a corporation. Labeling it as an enterprise as well would only amount to referring to the corporate person by a different name."

Okay, the last opinion we are going to talk about is in the following year, 2017, when the Second Circuit issues an opinion in a case called, *U1it4Less, Inc. v. FedEx Corporation*. Now remember, the Second Circuit was the court that the Supreme Court overruled in the Cedric Kushner case. It was also the court that the Supreme Court chastised for applying precedent that the Supreme Court felt was readily distinguishable.

In this case, the Second Circuit begins with Cedric Kushner, but it focused on something we talked about a little bit earlier, namely the lengths the Supreme Court went to, to make clear its holding in that case was limited. And here's what the Second Circuit said. "In concluding that King and Don King Productions were distinct however, the Supreme Court emphasized that its holding was limited to the circumstances in which a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner, whether he conducts those affairs within the scope or beyond the scope of corporate authority. Indeed, the court described our earlier decisions relating to the distinctness issue as significantly different. A strong signal that it was not addressing cases in which as here, a corporate person conducts the affairs of an enterprise consisting only of corporate members of its wholly owned corporate family." Seems like the Second Circuit learned its lesson, or at least made the conscious decision to follow the Supreme Court's lead in Cedric Kushner.

Now, there are of course other cases and other jurisdictions that do address this very complicated issue/ and that is why, once again, when you're dealing with RICO, this is another example of why it is just so critical that you know the specific law in your specific jurisdiction. This is a complicated requirement, and one that requires real, strong RICO knowledge. You would be shocked, and I mean shocked, at how many times this argument based on the person-enterprise distinction is available to RICO defendants who are facing RICO claims at the motion to dismiss stage. I've made this argument many times, I've been successful making this argument many times.

Due to the nature of RICO cases, there is very frequently a parent subsidiary or corporate affiliate relationship between multiple parties that a RICO plaintiff might try to lump together into an association in fact, RICO enterprise. And depending on the nature of those relationships and depending on how the plaintiff has pleaded the nature of those relationships and what court you're in, you might have an opportunity to get a RICO claim kicked at the Rule 12th stage because the allegations do not support the RICO person, RICO enterprise distinction. So, while this rule and this requirement is a bit complicated and certainly more confusing than one might think it would be, it provides opportunities for RICO practitioners, precisely for that reason. And do not, especially if you are bringing a RICO claim, do not fall into the trap of thinking that the Cedric Kushner holding, and all of its seemingly helpful language applies outside the specific factual paradigm that case presents.

And with that, we are out of time here today, so I want to bring this discussion to a conclusion. If you have any thoughts or any comments about this series or today's episode, I invite you to contact me directly at [callan.stein@troutman.com](mailto:callan.stein@troutman.com). You can subscribe and listen to other

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