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# State and Local Entities as RICO Enterprises: A Matter of Perception

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# STATE AND LOCAL ENTITIES AS RICO ENTERPRISES: A MATTER OF PERCEPTION

ELLEN S. PODGOR\*

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## I. INTRODUCTION

The Racketeer Influenced and Corrupt Organization Act (RICO) expands federal jurisdiction to include criminal acts previously within the exclusive province of the states.<sup>1</sup> Enacted as Title IX of the Organized Crime Control Act of 1970, the RICO statutes provide an assortment of state offenses that can serve as predicate acts for a RICO charge.<sup>2</sup> Whether the prosecution be premised upon state or federal

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1. In *United States v. Turkette*, the Court stated: "That Congress included within the definition of racketeering activities a number of state crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present." 452 U.S. 576, 586 (1981). The Court in *Turkette* referenced the legislative history to RICO, which included fears expressed about moving "large substantive areas formerly totally within the police power of the State into the Federal realm." *Id.* at 586-87 (citing 116 CONG. REC. 35,217 (1970)).

2. 18 U.S.C. § 1961(1) (1994) (providing in part that: "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act) which is chargeable under State law and punishable by imprisonment for more than one year).

predicate acts, a pattern of racketeering is a necessary component.<sup>3</sup> RICO applies to “those who engage in enterprise criminality.”<sup>4</sup>

An important issue of federalism results from the occasional government use of state and local entities as RICO enterprises.<sup>5</sup> This article focuses on the federalism concerns that arise when the RICO enterprise is a state or local entity.

## II. THE ENTERPRISE ELEMENT

Implicit in a RICO prosecution is the existence of an “enterprise.” 18 U.S.C. § 1962 provides four distinct types of prohibited conduct under RICO, requiring that the defendant either have invested in,<sup>6</sup>

3. “Pattern of racketeering” is not explicitly defined in the RICO statutes. *But see* 18 U.S.C. § 1961(5) (1994) (providing that 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”). In *H.J. Inc. v. Northwestern Bell Tel. Co.*, the Court wrestled with what should be required to satisfy the term “pattern of racketeering.” 492 U.S. 229 (1989). The Court endorsed a test of “continuity plus relationship.” *Id.* at 239 (quoting S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969)).

4. Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerald Lynch*, 88 COLUM. L. REV. 774, 801 (1988).

5. Federal jurisdiction, premised upon the Commerce Clause, seldom presents a barrier to the government’s RICO action. “Given the expansive judicial interpretation of this jurisdictional requirement, this is essentially a polite fiction, equivalent to no required jurisdictional nexus at all.” Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 715 n.232 (1987) [hereinafter Lynch].

In *United States v. Robertson*, a case in which the defendant was charged with a RICO violation, the Court examined whether the activities of the defendant were “engaged in or affecting interstate commerce.” 115 S. Ct. 1732 (1995). Whether the activities “affect commerce” is a proper question where the activities are “purely intrastate commercial activities.” This question, however, is unnecessary where the defendant engages in activities that are interstate. The Court in *Robertson* noted that one is “engaged in commerce” when one is “directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce.” *Id.* at 1733 (quoting *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 285 (1975)). The Court easily found ample federal jurisdiction, finding that the defendant engaged in interstate commerce by purchasing out-of-state items, seeking and bringing out of state employees to Alaska to work in his mine, and taking 15% of the mine’s output out of state. *Id.* at 1733.

6. 18 U.S.C. § 1962(a) (1994).

maintained an interest in,<sup>7</sup> or participated in the affairs of the enterprise.<sup>8</sup> Additionally, a RICO prosecution may be premised upon a conspiracy to do any of these acts.<sup>9</sup> The definitional statute of RICO provides that “‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”<sup>10</sup> The definition of the term “enterprise” does not specifically reference whether state and local entities are encompassed within its terms.

Prosecutors have placed the “enterprise” in a variety of different roles.<sup>11</sup> For example, the enterprise can be a “perpetrator,”<sup>12</sup> as well as a “victim.”<sup>13</sup> Further, the same factual scenario may be presented in several different ways, such as using the individual as the enterprise, using others associated with the individual as the enterprise, or having an actual entity that the individual was involved with serve as the enterprise. Prosecutors are afforded significant discretion to style their

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7. 18 U.S.C. § 1962(b) (1994).

8. 18 U.S.C. § 1962(c) (1994).

9. 18 U.S.C. § 1962(d) (1994).

10. 18 U.S.C. § 1961(4) (1994). Courts have allowed both domestic and foreign corporations to serve as the enterprise. *See, e.g.*, *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974) (holding that a defendant’s acquisition of a foreign corporation falls within the definition of an enterprise where it impacts domestic commerce). *See also* George K. Chamberlin, Annotation, *What Is An “Enterprise,” As Defined At 18 USCS § 1961(4), For Purposes Of The Racketeer Influenced And Corrupt Organizations (RICO) Statute (18 USCS §§ 1961 et seq.)*, 52 A.L.R. FED. 818 (1981 & Supp. 1995).

11. *See generally* Thomas S. O’Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646, 674-77 (1989) (discussing the enterprise serving as the “perpetrator,” “victim,” “prize,” or as an “instrument”).

12. *Id.* at 674. “In *Turkette*, for example, the enterprise was the illicit association formed for the purpose of committing, *inter alia*, arson to defraud insurance companies.” *Id.*

13. *Id.* at 675. “The enterprise is a victim when it is harmed by the pattern of racketeering activity.” *Id.*

case in a manner that best suits their needs,<sup>14</sup> and court decisions provide only a few restrictions in structuring the enterprise element.<sup>15</sup>

The Supreme Court has resolved several issues relating to the scope of the enterprise element.<sup>16</sup> Specifically it has allowed both legitimate and illegitimate RICO enterprises.<sup>17</sup> The Court has also allowed prosecutions where the RICO enterprise lacks an economic motive.<sup>18</sup> The Court has not, however, directly confronted the use of state and local entities as RICO enterprises.<sup>19</sup>

14. Considerations such as "venue" or "proof requirements" may impact the choice of enterprise. Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 202-03 (1980) (explaining seven different ways in which the RICO enterprise can be structured against the same two defendants who have committed acts of bribery "to gain favors for their legitimate businesses") (cited in JEROLD H. ISRAEL ET AL., *WHITE COLLAR CRIME: LAW AND PRACTICE* (1996)).

In choosing RICO as the charging offense, however, internal Department of Justice guidelines provide that "it is the policy of the Criminal Division that RICO be selectively and uniformly used." U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-110.200. See also Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651 (1990) (discussing policies of the Justice Department in RICO cases). RICO prosecutions require the approval of the Criminal Division of the Department of Justice. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-110.101.

15. For example, courts have required that "association in fact" enterprises have an "ascertainable structure." See, e.g., *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982).

16. Issues on how to define the word "enterprise" are not exclusive to federal courts. With the increase of state RICO statutes, one finds cases reflecting upon the term "enterprise" in the context of a specific state statute. See, e.g., *State v. Ball*, 661 A.2d 251, 257 (N.J. 1995) (discussing the similarities and differences in how the term "enterprise" is defined in state and federal law).

17. See *United States v. Turkette*, 452 U.S. 576 (1981) (explaining that RICO enterprises can be either legitimate or illegitimate enterprises).

18. See *National Org. for Women v. Scheidler*, 114 S. Ct. 798 (1994) (stating that "RICO contains no economic motive requirement").

19. The Court, in *United States v. Turkette*, did state that:

There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones. Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate." But it did nothing to indicate that an enterprise consisting of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal.

The breadth of the enterprise element<sup>20</sup> is evident is noting the array of decisions involving enterprises that are state and local entities.<sup>21</sup> These include enterprises that are state and local police departments,<sup>22</sup> local prosecutors offices,<sup>23</sup> the office of the governor,<sup>24</sup> state administrative agencies,<sup>25</sup> state legislative offices,<sup>26</sup> and commissioners.<sup>27</sup> Even judicial bodies have been used as the enterprise for

452 U.S. 576, 580-81 (1981). *See also* United States v. Gillock, 445 U.S. 360 (1980) (denying state legislator a grant of privilege in RICO case).

20. RICO has been interpreted broadly. *See Turkette*, 452 U.S. at 587 (noting that "Section 904(a) of RICO, 84 Stat. 947, directs that '[t]he provisions of this Title shall be liberally construed to effectuate its remedial purposes'").

21. *See generally* Catherine Collier Stallings, *Criminal Law — Are Governmental Entities Appropriate RICO Enterprises?*, 13 MEM. ST. U. L. REV. 96 (1982) (discussing United States v. Thompson, 685 F.2d 993 (6th Cir. 1982)).

22. *See, e.g.*, United States v. Davis, 707 F.2d 880 (6th Cir. 1983) (Mahoning County Sheriff's Office); United States v. Kovic, 684 F.2d 512 (7th Cir. 1982) (Chicago city police department); United States v. Lee Stoller Enters., Inc., 652 F.2d 1313 (7th Cir. 1981) (county sheriff's office); United States v. Welch, 656 F.2d 1039 (5th Cir. 1981) (sheriff's office); United States v. Bright, 630 F.2d 804 (5th Cir. 1980) (DeSoto County Sheriff's Office); United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979) (Madison, Illinois police department); United States v. Brown, 555 F.2d 407 (5th Cir. 1977) (Macon, Georgia municipal police department).

23. *See, e.g.*, United States v. Goot, 894 F.2d 231, 239 (7th Cir. 1990) (office of prosecuting attorney); United States v. Altomare, 625 F.2d 5, 7 (4th Cir. 1980) (Office of Prosecuting Attorney of Hancock County, West Virginia).

24. *See, e.g.*, United States v. Thompson, 685 F.2d 993 (6th Cir. 1982) (Office of the Governor).

25. *See, e.g.*, United States v. Dozier, 672 F.2d 531, 543 (5th Cir. 1982) (Louisiana Department of Agriculture); United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977) (Pennsylvania Bureau of Cigarette and Beverage Taxes).

26. *See, e.g.*, United States v. Blandford, 33 F.3d 685, 703 (6th Cir. 1994) (office of the representative for house district); United States v. Freeman, 6 F.3d 586, 596-97 (9th Cir. 1993) (office of the 49th assembly district); United States v. Long, 651 F.2d 239 (4th Cir. 1981) (office of South Carolina state senator); United States v. McDade, 28 F.3d 283 (3d Cir. 1994), (office of congressman).

27. *See, e.g.*, United States v. Barber, 476 F. Supp. 182 (S.D. W. Va. 1979) (West Virginia Alcohol Beverage Control Commissioner).

purposes of bringing a RICO action.<sup>28</sup> Courts almost uniformly permit state and local entities as RICO enterprises.<sup>29</sup>

### III. FEDERALISM CONCERNS

Despite the wealth of cases that have historically allowed the use of state and local entities as RICO enterprises, appellants continue to argue on appeal the impropriety of this usage. Several lines of attack have been presented in this regard.<sup>30</sup> Both the majority and dissenting

28. See, e.g., *United States v. Blackwood*, 768 F.2d 131 (7th Cir. 1985) (Cook County Circuit Court); *United States v. Robinson*, 707 F.2d 872, 874 n.1 (6th Cir. 1983) (Office of District Judge of the Harlan District Court, Harlan County, Kentucky); *United States v. Angelilli*, 660 F.2d 23 (2d Cir. 1981) (New York City Civil Court); *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981) (Municipal Court of the City of El Paso); *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981) (office of county judge); *United States v. Dean*, 647 F.2d 779 (8th Cir. 1981) (Office of County Judge of Poinsett County, Arkansas); *United States v. Bachelor*, 611 F.2d 443, 450 (3d Cir. 1979) (Philadelphia traffic court); *United States v. Vignola*, 464 F. Supp. 1091 (E.D. Pa. 1980) (Philadelphia traffic court).

29. One instance in which a court rejected the use of a governmental agency as an enterprise is found in *United States v. Mandel*, 415 F. Supp. 997, 1020-22 (D. Md. 1976), *rev'd on other grounds*, 591 F.2d 1347 (4th Cir.), *vacated on other grounds by an equally divided court*, 602 F.2d 653 (1979) (en banc), *cert. denied*, 445 U.S. 961 (1980). In *Mandel*, the court narrowly construed the term "enterprise," finding that the State of Maryland was not an enterprise for purposes of RICO. *Mandel*, 415 F. Supp. at 1022.

30. Federalism issues are not the only basis on which appellants have argued that it is improper to use state and local entities as the enterprise. See, e.g., *United States v. Freeman*, 6 F.3d 586, 597 (9th Cir. 1993) (arguing that "enterprise" is unconstitutionally vague); *United States v. McDade*, 28 F.3d 283, 287 (3d Cir. 1994) (alleging violation of Speech and Debate Clause); *United States v. Thompson*, 685 F.2d 993, 995 (6th Cir. 1982) (arguing that the language of the statute does not include governmental units). In *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), the court rejected the following arguments raised by appellants:

First, they say violations of section 1962 not only gave rise to criminal penalties, but the district courts of the United States are also given extensive civil remedy powers in the event of violation of the statute, including the power to order dissolution or reorganization of any "enterprise," 18 U.S.C. § 1964; and that Congress could not have intended to give the courts the power to order dissolution or reorganization of a state agency. Secondly, appellants argue that since section 1964(c) permits private persons to sue and recover treble damages for violations of section 1962, Congress could not have intended, in view of the limitations of the eleventh amendment, to allow suits against state governmental bodies. Finally, appellants argue that in construing the statutory definition of "enterprise," the phrase "other legal entity" following nouns of narrow scope relating to different forms of busi-

opinions in *United States v. Thompson*<sup>31</sup> express displeasure with the government's use of the "Office of the Governor" as the enterprise in a RICO action. The majority noted that this usage is "disruptive of comity in federal-state relations."<sup>32</sup> Although failing to reverse the lower court, the majority opinion found that it would be preferable to charge defendants as a "group of individual[s] associated in fact although not a legal entity which made use of the Office of Governor of the State of Tennessee."<sup>33</sup>

The dissent in *Thompson*, written by Judge Lively, chose to "buck the tide," taking a position that is not "antithetical to the basic concepts of federalism."<sup>34</sup> The dissent offered three rationales for why the "Office of Governor" should not be a permissible RICO enterprise. First, the dissent noted that "there is no language in the text of the statute which indicates that governmental units were intended to be treated as enterprises for purposes of RICO prosecutions."<sup>35</sup> In this regard, the dissent also noted that an "internal inconsistency" would be created by including governmental units as enterprises.<sup>36</sup> The dissent

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ness ventures, must be construed under the rule of *ejusdem generis* in the light of the narrow terms which follow. Thus, the words of the final clause in the definition dealing with nonlegal entities indicate Congress intended to limit the term "enterprise" to private business or labor organizations.

*Id.* at 1089 (footnote omitted).

31. 685 F.2d 993 (6th Cir. 1982).

32. *Id.* at 1000.

33. *Id.* Some courts have adopted this approach. See *United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985) (alleging in indictment "a group of individuals associated in fact, although not a legal entity, which made use of the Office of the District Judge of the 18th District Court").

34. *Thompson*, 685 F.2d at 1003 (Lively, J., dissenting).

35. *Id.* at 1002. Professor Craig Bradley notes that:

[A] careful consideration of the entire language of RICO as well as its legislative history leaves the issue somewhat unclear. However, the better solution seems to be that of the United States Supreme Court in *United States v. Rewis* [401 U.S. 808 (1971)]: In the presence of somewhat vague statutory language and in the absence of any clear statement of congressional intent, the safest course, and the course suggested by the rule of lenity, is to conclude that had Congress intended to include state governmental offices within the ambit of RICO, it would have somewhere indicated that intention explicitly.

Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 861 (1980) (footnotes omitted).

36. *Thompson*, 685 F.2d at 1002 (Lively, J., dissenting). "Some of the civil remedies

found support for its position in the omission of governmental units in the legislative history.<sup>37</sup> Finally the dissent emphasized that “the Act should be interpreted in such a way as to avoid straining delicate state-federal relations.”<sup>38</sup>

Articles discussing federalism reflect on the growing number of federal criminal statutes, the increase in federal criminal jurisdiction, and the overburdening of the federal courts.<sup>39</sup> Additionally, “[w]hen the government preempts local prosecutions in areas of overlapping jurisdiction, it interferes with a state’s ability to exercise discretion in a way that is responsive to local concerns.”<sup>40</sup> These concerns have little bearing here, in that in most cases the prosecution could proceed absent the use of the state or local entity as the enterprise. The RICO charge could proceed through use of an “associated in fact” enterprise,<sup>41</sup> or alternatively, the conduct could “be effectively reached through other provisions of the Organized Crime Control Act of 1970 and other federal criminal laws such as those dealing with extortion and mail fraud.”<sup>42</sup>

The federalism concern that merits consideration in this context is not one of substance,<sup>43</sup> but rather one of perception. The explicit des-

provided in RICO could not have been intended by Congress to apply to a unit of state government.” *Id.* at 1002. Specially the court notes how governmental units cannot be ordered to dissolve or reorganize. *Id.*

37. *Id.* at 1003. “When various broad statements of purpose are laid aside there remain no explicit references in the legislative history which support a conclusion that the ‘enterprise’ required for a RICO prosecution may consist of a governmental unit.” *Id.*

38. *Id.*

39. See generally Sara Sun Beale, *Federalizing Crime: Assessing the Impact of the Federal Court*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39 (1996); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995). But see Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995). Procedural issues have also been a subject of federalism scholarship. See James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223 (1996); Jerold Israel, *Federal Criminal Procedure as a Model for the States*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 130 (1996).

40. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1172-73 (1995).

41. See *Thompson*, 685 F.2d at 1000.

42. *Id.* at 1003 (Lively, J., dissenting).

43. Gerald Lynch comments that:

ignation of a state and local entity as the enterprise highlights the influence of the federal system in state and local government.

#### IV. CONCLUSION

Matters of perception can make a difference. Courts can find several rationales for holding that state and local entities should not be permitted as RICO enterprises.<sup>44</sup> Clearly they are omitted from the definition provided in the statute.<sup>45</sup> Further, there is no legislative history that is determinative of this issue.<sup>46</sup> The doctrine of *ejusdem generis* supports this application.<sup>47</sup> The fact that civil remedies and di-

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[O]ne may question whether the federalism issue presents a fundamental philosophical problem, or merely a question of the efficient allocation of resources and responsibilities in a rather unwieldy system of overlapping jurisdictions. Overfederalization of law enforcement does not appear to be a pressing political concern, nor is it apparent that prosecution of RICO offenses by federal officials threatens either the rights of individual defendants or the remaining sovereignty of the states.

Lynch, *supra* note 5, at 715 (footnotes omitted).

44. See generally Jeff Atkinson, "Racketeer Influenced And Corrupt Organizations," 18 U.S.C. §§ 1961-68: *Broadest Of The Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 14 (1978) (arguing for limiting definition of "enterprise" to "the words of proscriptio and not on stretched interpretations utilizing the liberal construction clause").

45. In *United States v. Angelilli*, however, the court stated that they could "see no sign of an intention by Congress to exclude governmental units from its scope." 660 F.2d 23, 31 (2d Cir. 1981). The court noted that the statute used the word "'includes,' rather than a more restrictive term such as 'means.'" *Id.* Also emphasized by the court was that the word "any" was used in the statute. *Id.* The court believed that these word choices demonstrated that the list was not "all-inclusive," but rather "illustrative." *Id.* See also *United States v. Vignola*, 464 F. Supp. 1091, 1095 (E.D. Pa. 1979) (Philadelphia traffic court is a "creature of statute" and therefore is a legal entity).

46. In *United States v. Mandel*, the court stated:

The legislative history of Title IX of the organized Crime Control Act contains no express consideration of the question whether an 'enterprise' may include such public entities as governments and states. It would be difficult to infer from this legislative silence any authority to construe the statute broadly so as to include public entities. Furthermore, to read the word 'enterprise' as including public entities would do violence to the plain purposes of Title IX.

415 F. Supp. 997, 1020 (D. Md. 1976).

47. In *Mandel*, the court noted that its position was supported by the "doctrine of *ejusdem generis*, that is, the presumption that all items named are of the same type and class." *Id.* at 1021. In applying that doctrine the court noted:

vestiture of the enterprise are included as remedies in RICO supports an interpretation that state and local entities were not intended to be included in the definition of enterprise.<sup>48</sup>

These arguments have continually been rejected by courts. Decisions are quick to cite the extensive precedent in finding that state and local entities can be enterprises. Having state offenses as a part of the federal act of RICO is a clear congressional shift that serves to enhance the federal role. That same explicitness is not provided with respect to including state and local entities in RICO. One can only wonder if this issue will be the *McNally*<sup>49</sup> of RICO.<sup>50</sup>

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None of the specific narrow nouns involved in this definition are public entities. They are rather a listing of the common legal forms in which business entities and labor groups fashion themselves to carry out their private functions. The more general references to "any legal entity" and "any group of persons associated in fact although not a legal entity" must be construed to be limited to the same type and class of entities which preceded it in the statutory definition.

*Id.* But see *United States v. Frumento*, 563 F.2d 1083, 1090 (3d Cir. 1977) (stating that the doctrine of *eiusdem generis* should not be applied here in that there is clear intent by Congress for the term "enterprise" "to go beyond the specific reference to private business or labor organizations).

48. In *Mandel* the court noted that:

The remedies provided for in the civil and criminal provisions clearly imply that Congress had only private entities in minds when defining "enterprise". The criminal penalties include fine, imprisonment and forfeiture; the civil penalties, modeled on the antitrust statute, provide for private treble damage actions and such injunctive relief as divestiture and forfeiture. It could hardly be contended that a private citizen of a state, aggrieved by the "racketeering acts" of an official in conducting the state, could bring a treble damage action against that official and require forfeiture of office and dissolution of the state government.

*Mandel*, 415 F. Supp. at 1021. But see *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977).

49. In *McNally v. United States*, the Court disregarded extensive precedent in finding the government's use of an intangible rights theory improper in mail fraud actions. 483 U.S. 350 (1987). *McNally* held that money or property would be required to satisfy the "scheme to defraud" element of mail fraud. See Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 228 (1992).

50. After *McNally*, Congress redefined "scheme to defraud" to include "the intangible right of honest services." 18 U.S.C. § 1346 (1994).