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RECENT DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY

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This century has witnessed a sweeping expansion of the doctrine of corporate criminal liability. From a time when corporations were deemed immune from criminal liability,¹ the law has progressed to a point where a corporation is liable for specific intent crimes committed by a low-level employee acting contrary to express corporate instruction as long as the employee is acting within the scope of employment and for the purpose of benefitting the corporation.² Through the adoption and expansion of the tort doctrine of respondeat superior, the criminal intent of the corporate employee or agent is imputed to the corporation itself.³

Much has been written about the imposition of corporate criminal liability.⁴ This article elucidates some of the areas of recent debate and highlights recent cases. In particular, the article considers the effect of corporate compliance programs, the criminal liability of dissolved and successor corporations, and recent concepts in the sentencing of corporations. The article also examines current decisions concerning the doctrine of intracorporate conspiracy, specifically looking at RICO prosecutions.

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1. See, e.g., *State v. Great Works Milling & Mfg. Co.*, 20 Me. 41 (1841).

2. See generally Miller, *Corporate Criminal Liability: A Principle Extended to Its Limits*, 38 FED. B.J. 49 (1979) [hereinafter cited as Miller]. (The article examines the circumstances in which acts and intent of lower-level employees may be imputed to the corporation).

3. See *id.* at 49 n.3. See also Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957) [hereinafter cited as Mueller]. (The article examines the view of the Model Penal Code on corporate criminal liability).

4. See Miller, *supra* note 2; Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73 (1976) [hereinafter cited as Elkins]; *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV L. REV. 1227 (1979) [hereinafter cited as *Developments*].

I. RECENT CASES AND THE GENERAL PRINCIPLES

Recent cases adhere to the broad rule that a corporation is liable for the criminal acts of its officers, agents and employees committed within the scope of their employment and for the benefit of the corporation.⁵ In *United States v. Cincotta*,⁶ the court presented a clear statement of the current law in reaching its conclusion that the corporate defendant could be held responsible for its employees' acts of filing false claims for payment within the United States. The court explained that a corporation may be convicted of the criminal acts of its agent acting within the scope of employment. Under the theory of respondeat superior, the court added that for the purpose of imposing corporate criminal liability, an employee, to be acting within the scope of his employment, must be "motivated—at least in part—by an intent to benefit the corporation."⁷ Thus, when intent is an element of the crime, intent of the employee is imputable to the corporation only when an intent to benefit the corporation exists.⁸

In *Cincotta* the employees whose intent was imputed to the corporation were highly involved in the corporation—one being an officer and major shareholder and the other being a major shareholder and employee. Although the source of significant debate,⁹ the general rule does not distinguish between officers, management and lower-level employees for the purpose of imputing criminal intent to the corporation.¹⁰ The corporation "may be bound by the acts of

5. *United States v. Richmond*, 700 F.2d 1183, 1195 n.7 (8th Cir. 1983); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 99 (2d Cir. 1983); *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 347 (1982); *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979).

6. 689 F.2d 238 (1st Cir. 1982), *cert. denied*, 459 U.S. 991 (1982).

7. 689 F.2d at 242. Intent to benefit the corporation is all that is generally required; actual benefit is irrelevant. *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979). In *Cincotta* the court found that the intent to benefit the corporation was shown by the proof of actual benefit to the corporation through a scheme to defraud the United States. 689 F.2d at 242.

8. *Cincotta*, 689 F.2d at 242. The court noted, however, that the existence of the agent's intent to benefit the corporation need not be specified in the indictment. *Id.*

9. See, e.g., Miller, *supra* note 2, at 53-56; Elkins, *supra* note 4, at 100-16. See also Model Penal Code § 2.07 (Tent. Draft No. 4, 1955) discussed in *Developments in the Law*, *supra* note 4, at 1251-59.

10. See, e.g., *United States v. Hangar One, Inc.*, 563 F.2d 1151, 1158 (5th Cir. 1977) (liability of corporation "may arise from the conduct of employees other than those with 'substantial authority and broad responsibility'"); *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 127 (5th Cir. 1962); *United States v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1946), *cert. denied*, 328 U.S. 869 (1946). See also *United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir. 1981), *cert. denied*, 454 U.S. 1083 (1981) (rejecting corporation's claim that liability can be imputed only from acts of "high managerial agents." The court, however,

subordinate, even menial, employees" as long as the employee acts with the intention to benefit the corporation.¹¹

II. COMPANY POLICIES, COMPLIANCE PROGRAMS AND A "DUE DILIGENCE" DEFENSE

Several recent decisions consider whether the existence of corporate regulations and policies directly prohibiting the unlawful activity engaged in by a corporation's employee or agent should absolve the corporation of criminal liability. Early cases indicated that a corporation could defend a criminal charge by showing that the agent contravened an established company policy.¹² Good faith and due diligence also were recognized as a basis to avoid the imposition of criminal liability.¹³

Although many commentators support such a due diligence defense,¹⁴ recent case authority generally rejects the concept. The prevailing view is that a corporation will be held criminally liable for the conduct of its agents and employees acting within the scope of their employment and for the purpose of benefitting the company, notwithstanding corporate policies or instructions expressly prohibiting the criminal conduct.¹⁵

A leading case establishing this principle is *United States v. Hilton Hotels Corp.*¹⁶ In *Hilton Hotels* the corporation was held lia-

approved an instruction allowing the imposition of liability from acts of "managerial agents" suggesting perhaps a willingness to limit the scope of liability).

11. *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 127 (5th Cir. 1962). See also *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 722 (5th Cir. 1963).

12. *Nobile v. United States*, 284 F. 253 (3d Cir. 1922); *John Gund Brewing Co. v. United States*, 204 F. 17 (8th Cir. 1913), modified, 206 F. 386 (1913).

13. *Holland Furnace Co. v. United States*, 158 F.2d 2, 3 (6th Cir. 1946). In this case the court of appeals reversed a corporation's criminal conviction for knowingly violating a War Board order by selling a new furnace on the misrepresentation that the customer's old furnace was not repairable. The court held that the due diligence and care of the corporation to ensure compliance with criminal statutes by their employees is a defense to a criminal prosecution based on imputed liability. This defense was subsequently disapproved in *Continental Baking Co. v. United States*, 281 F.2d 137, 149-51 (6th Cir. 1960).

14. See, e.g., Miller, *supra* note 2, at 68; Mueller, *supra* note 3, at 28; *Developments, supra* note 4; Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 Sw. L.J. 908, 927 (1975). But see Note, *The Foreign Corrupt Practices Act and Other Arguments Against a Due Diligence Defense to Corporate Criminal Liability*, 29 U.C.L.A. L. REV. 447, 502 (1982).

15. See, e.g., *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir. 1978); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 205 (3rd Cir. 1970), cert. denied, 401 U.S. 948 (1971); *Continental Baking Co. v. United States*, 281 F.2d 137, 150-51 (6th Cir. 1960); *United States v. Armour & Co.*, 168 F.2d 342, 343 (3d Cir. 1948).

16. 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

ble under the Sherman Act because an agent threatened a supplier with a loss of the hotel's business unless the supplier paid a trade association's assessment. The court found the imposition of liability to be proper notwithstanding findings that the agent acted contrary to clear company policy, that the agent was specifically told twice never to engage in such conduct, and that the agent violated his instructions because of a personal hostility toward the supplier's representative.¹⁷ Two recent cases, however, may mark a move away from the prevailing rule. In *United States v. Beusch*,¹⁸ the defendant corporation appealed its conviction of 377 misdemeanor violations of the Bank Secrecy Act.¹⁹ The corporation contended on appeal, among other things, that it lacked the requisite willfulness to violate the Act, and that the jury instruction given was improper since it imposed strict liability on the corporation based on actions of an employee that were contrary to the express instructions and policies of the corporation.²⁰

The court rejected the corporation's claim that there was no sufficient basis to impute the willfulness of the acts of the agent, Beusch, to the corporation. In so concluding, the court restated the current law that the acts of an agent can be imputed to a corporation when the agent's purpose is to benefit the corporation.²¹

The court also rejected the corporation's claim that the jury instruction imposed strict liability on the corporate defendant without proof of intent. The court noted that the challenged instruction was followed by clarifying instructions under which the existence of a corporate compliance program could be considered by the jury.²² When viewed in context, the court found the challenged instruction

17. 467 F.2d at 1004.

18. 596 F.2d 871 (9th Cir. 1979).

19. 31 U.S.C. § 1058 *et seq.*

20. The jury instruction was as follows: "A corporation may be responsible for the acts of its agents done or made within the scope of its authority, even though the agent's conduct may be contrary to the corporation's actual instruction or contrary to the corporation's stated policies." 596 F.2d at 877.

21. *Id.* Liability under the Bank Secrecy Act is imposed for a willful violation. 31 U.S.C. § 1058.

22. These instructions provided:

You may, however, consider the corporate policies and instructions as one of the circumstances along with any other circumstances that you find to be significant in determining what the authority of the agent actually was and whether the agent was acting on behalf of the corporation.

In order to be acting within the scope of his authority, the employee must be found to be acting on behalf of the corporation with the purpose of benefitting the corporation or serving some corporate purpose.

596 F.2d at 878 n.7.

to be adequate. The court explained:

[A] corporation *may* be liable for acts of its employees done contrary to express instructions and policies, but . . . the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation. Merely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of an employee who violates them outside the scope of his employment. [citation] It is a question of fact whether measures taken to enforce corporate policy in this area will adequately insulate the corporation against such acts²³

A similar result was reached recently by the Fourth Circuit Court of Appeals in *United States v. Basic Construction Co.*²⁴ In *Basic Construction* the corporation was convicted of a criminal violation of the Sherman Act arising from bid-rigging activities of two "relatively minor officials" of the corporation. The employees acted without the knowledge of the corporate officers and in contravention of the corporation's "longstanding, well known, and strictly enforced policy against bid-rigging."²⁵ The defendant corporation contended that the jury should have been instructed to consider the corporation's antitrust compliance policies for the purpose of determining whether the corporation had the requisite intent, rather than for the purpose of deciding whether the corporate agents were acting to benefit the corporation.²⁶ The court rejected this argument, citing the general rule that a corporation may be held criminally responsible for the violations of employees acting within the scope of their authority and for the corporation's benefit. The court noted, however, that "the district court properly allowed the jury to consider Basic's [the corporate defendant's] alleged antitrust compliance policy in determining whether the employees were acting for the benefit of the corporation."²⁷

23. *Id.* at 878 (emphasis in original).

24. 711 F.2d 570 (4th Cir.), *cert. denied*, 104 S. Ct. 371 (1983).

25. 711 F.2d at 572.

26. The court had stated in part:

A corporation may be responsible for the action of its agents done or made within the scope of their authority, even though the conduct of the agents may be contrary to the corporation's actual instructions, or contrary to the corporation's stated position.

However, the existence of such instructions and policies, if any be shown, may be considered by you in determining whether the agents, in fact, were acting to benefit the corporation.

Id.

27. *Id.* at 573.

The recognition in *Beusch* and *Basic Construction* that the jury should be permitted to consider the corporation's policies and instructions in its determination of whether an employee acted to benefit the corporation is a departure from the prevailing view. As noted, prior cases have deemed the existence of corporate policies, compliance programs, and specific instructions irrelevant to the evaluation of corporate criminal liability. Courts have found the corporation liable notwithstanding contrary policies because of a perceived non-delegable duty of a corporation to supervise its employees,²⁸ or because of the belief that conviction and punishment of the corporation are appropriate and effective means to lessen the incidence of the unlawful activity.²⁹

The recent trend recognizes the relevance of compliance programs and intracorporate policies. Although such policies do not insulate a corporation from the broad vicarious liability to which it may be subject, the jury is permitted to consider the policies in evaluating whether the errant employee acted to benefit the corporation.

III. CRIMINAL LIABILITY OF DISSOLVED CORPORATIONS AND THEIR SUCCESSORS

In this era when mergers and acquisitions are increasingly common, issues arise as to the criminal liability of successor corporations and dissolved entities. At common law the dissolution of a corporation had the same effect as the death of a natural person, abating all litigation in which the corporation was involved.³⁰ Despite this rule, it is now established that, if state statutes so provide, proceedings can be instituted against a dissolved corporation.³¹

Whether such a dissolved corporation could be liable in criminal proceedings was the source of significant judicial debate.³² The United States Supreme Court ended any doubt about whether a dis-

28. See, e.g., *Continental Baking Co. v. United States*, 281 F.2d 137, 150 (6th Cir. 1960); *United States v. Armour & Co.*, 168 F.2d 342, 343-44 (3d Cir. 1948).

29. See, e.g., *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-06 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

30. *Chicago Title Co. v. Wilcox Bldg. Corp.* 302 U.S. 120, 125 (1937); *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 259 (1927); *Mumma v. Potomac Company*, 33 U.S. 281, 286 (8 Pet.) (1834).

31. See *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634-35 (1949).

32. Compare *United States v. Safeway Stores, Inc.*, 140 F.2d 834 (10th Cir. 1974) (criminal proceedings against dissolved corporation improper based on the language of state corporation law) with *United States v. P.F. Collier & Son Corp.*, 208 F.2d 936 (7th Cir. 1953) (criminal proceedings against dissolved corporation proper in view of policy considerations).

solved corporation could incur criminal liability in *Melrose Distillers, Inc. v. United States*.³³ In *Melrose* the petitioners were subsidiaries of another corporation that had been indicted for violating the Sherman Act. Shortly after the indictment was returned, they were dissolved and became separate divisions of a new corporation under the same ultimate ownership. Noting that the petitioners continued to operate after dissolution as new subsidiaries under the same ultimate ownership, the Court found no basis to distinguish between the civil and criminal liability of a dissolved corporation.³⁴

A successor corporation, as well, may be liable for the criminal acts of its predecessor.³⁵ One court recently explained that "an existing corporation . . . [cannot escape] criminal liability for past acts simply by discarding its offending element by a transfer of assets."³⁶ It is debatable whether the same corporation could be liable both as the surviving corporation and as the merged corporation.³⁷

IV. PROBATION AND FINES

Much has been written about the rationale for punishing a corporation for the crimes of its agents.³⁸ A recent trend, however, toward mandatory probation for a corporation convicted of criminal conduct is noteworthy. Probation may lead to increased judicial intervention into the corporate infrastructure, although the parameters are still unclear.³⁹

Two recent cases discuss whether a corporation convicted of criminal violations of the antitrust laws can be required to pay part of its fines to community groups without violating the Probation Act.⁴⁰ The cases reach opposite conclusions.

33. 359 U.S. 271 (1959).

34. *Id.* at 274.

35. *Emprise Corp. v. United States*, 419 U.S. 1120 (1975); *United States v. Michigan Carton Co.*, 552 F.2d 198, 201 (7th Cir. 1977) (dictum); *United States v. Polizzi*, 500 F.2d 856, 909 (9th Cir. 1974), *cert. denied sub nom. United States v. Ashland Oil, Inc.*, 537 F. Supp. 427, 431-32 (M.D. Tenn. 1982).

36. *United States v. Ashland Oil, Inc.*, 537 F. Supp. 427, 432 (M.D. Tenn. 1982).

37. *Id.* at 431. Compare *United States v. Stone*, 452 F.2d 42, 47 (8th Cir. 1971) with *United States v. Michigan Carton Co.*, 552 F.2d 198, 201 (7th Cir. 1977).

38. See, e.g., Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions*, 56 S. CALIF. L. REV. 1141 (1983); Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981).

39. See Coffee, *supra* note 37, at 448-55; see also Recent Developments, *The Application of the Federal Probation Act to the Corporate Entity*: *United States v. Atlantic Richfield*, 3 U. BALT. L. REV. 294 (1974).

40. 18 U.S.C. § 3651.

In *United States v. Prescon Corp.*,⁴¹ the Tenth Circuit Court of Appeals held that a judge may not permit a corporation, as an alternative to payment of a fine, to make a contribution to a community group. The court reversed the district court which had suspended the corporate defendant's fine on the condition that a lesser amount be paid to community groups selected by the chief probation officer. The court reasoned that the Probation Act limited courts to requiring defendants to make payments, in lieu of a fine, only to "aggrieved parties for actual damages or loss caused by the offense for which conviction was had."⁴² It is unclear who the court believed were the parties aggrieved by the defendants' criminal conduct.⁴³

The Eighth Circuit found to the contrary in *United States v. William Anderson Co.*⁴⁴ In *William Anderson* the district court imposed probation on the corporate defendant found guilty of price fixing. In addition to imposing a fine, the trial court provided that the defendant could elect to pay part of the fine to charitable organizations which would cause the amount of the fine to be reduced. The government objected on several grounds, but primarily on the basis that the Probation Act requires payment of the fine to the United States Treasury.⁴⁵

The Court of Appeals rebuked the government and lauded the district court's "[creative], innovative, and imaginative sentence."⁴⁶ Stating that the fine was imposed as a term of probation and not as a sentence, the court noted that the Probation Act permits the imposition of "behavioral sanctions."⁴⁷

41. 695 F.2d 1236 (10th Cir. 1982).

42. *Id.* at 1243. The court based its decision on the language of the Probation Act which provides: "While on probation and the conditions thereof, the defendant . . . [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . ." 18 U.S.C. § 3651 (1976).

43. *Id.* at 1243-44. Perhaps the court deemed the public at large to be the only acceptable aggrieved party for the antitrust violation. See *White Collar Crime: 1983 Update*, 21 AM. CRIM. L. REV. 294, 294-95 (1983).

44. 698 F.2d 911 (8th Cir. 1982).

45. *Id.* at 914. This is the same argument with which the Government prevailed in *Prescon*. See generally Note, *United States v. William Anderson Co.: "Crime in the Suites" Alternative Sentencing of Corporate Defendants*, 16 CREIGHTON L. REV. 1025 (1983).

46. 698 F.2d at 913. The court also rejected the argument that a corporation, as a legal fiction, is incapable of rehabilitation and should be solely compelled to pay money. *Id.* at 914.

47. *Id.* at 913. See also *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159 (S.D.N.Y. 1983) (Probation Act allows requiring six bakeries convicted of Sherman Act violations to pay fine and to donate fresh baked goods to needy organizations).

V. CONSPIRACY AND THE RICO ENTERPRISE

The intracorporate conspiracy doctrine, concerning the capacity of a corporation to conspire with its own officers and agents, has had its most frequent application in the antitrust context.⁴⁸ The issue, however, has arisen in other areas.⁴⁹

In *United States v. Hartley*,⁵⁰ the court carefully described the complicated system devised by defendants to defraud the government into purchasing breaded shrimp below government standards. The court gave thoughtful consideration to whether a corporation can conspire with its own employees, agents, and officers.⁵¹ Stating that an acceptance of the legal fiction that a corporation and its agents are a single entity would permit "a corporation or its agents to hide behind the identity of the other,"⁵² the court held that it is possible for a corporation to conspire with its own officers, agents, and employees where criminal liability is at issue.⁵³

The *Hartley* court's acceptance of an intracorporate conspiracy as a basis for corporate criminal liability is notable. Recent cases adhere to the general rule that a corporation may not be subject to *civil* liability when the actors involved are employees of a single corporation.⁵⁴ The *Hartley* court and others, however, heeding the advice of Justice Harlan that "the fiction of corporate entity . . . had never been applied as a shield against criminal prosecutions,"⁵⁵ have refused to follow the rule regarding civil liability and have held that a corporation may be convicted of conspiracy with its officers, agents,

48. See *Copperweld Corp. v. Independence Tube, Corp.*, 104 S. Ct. 60 (1984) (parent corporation cannot conspire with wholly owned subsidiary under § 1 of Sherman Act); Brickley, *Conspiracy, Group Danger and the Corporate Defendant*, 52 CIN. L. REV. 431 (1983). Yet, most cases hold that a corporation may not form a conspiracy with its officers and agents punishable under section 1 of the Sherman Act. *Id.* at 434. See also Handler and Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23 (1981).

49. See, e.g., *United States v. Cincotta*, 689 F.2d 238 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 347 (1982); *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 834 (1983). In both of these cases, the individual defendants, officers, and employees of the corporation, as well as the defendant corporations, were convicted of conspiracy and the intent to defraud the government.

50. 678 F.2d 961 (11th Cir. 1982). *cert. denied*, 103 S. Ct. 834 (1983).

51. 678 F.2d at 970-72. This discussion is dictum since the court previously found a conspiracy involving government inspectors as well.

52. *Id.* at 970. The court added that the greatest adherence to the single-entity fiction was in the antitrust sphere because of factors unique to that area. *Id.* at 970-71.

53. *Id.* at 972.

54. *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942, 951 (6th Cir. 1983); *General Business Sys. v. North American Phillips Corp.*, 699 F.2d 965, 980 (9th Cir. 1983).

55. *United States v. Wise*, 370 U.S. 405, 417 (1962) (Harlan, J., concurring).

and employees.⁵⁶

The conduct of the defendants in *Hartley* was also the basis for a conviction under a subpart of the Racketeering Influenced and Corrupt Practices Act (RICO).⁵⁷ In *Hartley* the court considered whether a corporation could simultaneously be the defendant and the criminal "enterprise" under the RICO statute. The court rejected the corporation's allegations that it could not associate with itself as an enterprise under the intracorporate conspiracy doctrine and that the corporation could not be the enterprise and a defendant simultaneously. This conclusion was based upon the Supreme Court's decision in *United States v. Turkette*,⁵⁸ which the *Hartley* court interpreted as evidencing a "willingness to expand the scope of RICO's application" as well as giving a "broad reading" to the term "enterprise," in addition to the absence of any prohibition against finding a corporate defendant to have assumed a dual role.⁵⁹ More specifically, the court reasoned that proof of the corporate existence was sufficient proof of an enterprise—a concept distinct from those acts giving rise to criminal liability.⁶⁰

The Fourth Circuit reached a seemingly contrary conclusion in *United States v. Computer Sciences Corp.*⁶¹ In *Computer Sciences* the court considered the propriety of the district court's dismissal of the

56. *United States v. S & Vee Cartage Co.*, 704 F.2d 914, 920 (6th Cir. 1983); *United States v. Hartley*, 678 F.2d 961, 968-72 (11th Cir. 1982); *United States v. Consolidated Coal Co.*, 424 F. Supp. 577, 581 (S.D. Ohio 1976).

57. The elements of a RICO offense are: (1) acquisition of the enterprise affecting interstate commerce with income received from a pattern of racketeering activity; (2) acquisition or maintenance of an interest in an enterprise affecting interstate commerce through a pattern of racketeering activity; (3) conducting the affairs of an enterprise affecting interstate commerce through a pattern of racketeering; or (4) conspiracy to violate any of the above. 18 U.S.C. § 1962.

RICO has become a "formidable weapon in the government's arsenal to wage war against crime." *Hartley*, 678 F.2d at 987. A discussion of RICO and its uses, however, is beyond the scope of this article. See Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts*, 53 TEMP. L.Q. 1009, 1014 (1980).

58. 452 U.S. 576 (1981) (the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises).

59. 678 F.2d at 988. The court acknowledged that "[s]ince a corporation is liable for the acts of its agents and employees, it [the corporate liability doctrine] permits an employee's activities to serve as proof of the two predicate acts required by section 1962(c)." The court noted, however, that "[t]his is simply a reality faced by corporate entities," explaining that "[w]ith the advantages of incorporation, must come the attendant responsibilities." *Id.* at 988-89 n.43.

60. *Id.* at 988. The court found further support for its holding in the general corporations law providing for "piercing the corporate veil" and in "common sense." *Id.* at 989.

61. 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983).

57-count indictment charging defendants with, among other things, RICO violations, conspiracy, and defrauding the United States by overbilling the General Services Administration. Relevant here is the court's RICO discussion in which the court concluded "that 'enterprise' was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit, and, failing that, to punish."⁶² Although the court found that a corporate division could be the "enterprise" under the RICO statute, the court found an identity between the "person" and the "enterprise," thus preventing RICO liability.⁶³

VI. CONCLUSION

The doctrine of corporate criminal liability, thus, can be seen to be a doctrine that is constantly evolving. Through the expansion of the tort principle of respondeat superior, corporations became liable for crimes committed by low level employees acting contrary to corporate policy. Recently however, courts have expressed a degree of sympathy for a "due diligence" defense by permitting evidence of compliance programs and corporate policies to go to the jury. Moreover, there are indications that the traditional attitudes towards punishment for corporate crimes may be undergoing a change. And, in the area of intracorporate conspiracy, the traditional rule that a corporation may not be subject to civil liability when the actors involved are employees of that corporation is being questioned in the context of criminal prosecutions, particularly those under the Racketeering Influenced and Corrupt Practices Act.

62. *Id.* at 1190.

63. The court added:

To be sure, the analogy between individuals and fictive persons such as corporations is not exact. Still, we would not take seriously, in the absence, at least, of very explicit statutory language, an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon. A corporation, in common parlance, is not regarded as distinct from its unincorporated divisions either.

Id. For a further discussion of this issue, see Note, RICO: *The Corporation As "Enterprise and Defendant,"* 52 CIN. L. REV. 503 (1983).

