FROM LAW-BREAKING CATERPILLAR TO LAW-ABIDING BUTTERFLY? CAN THE DEPARTMENT OF JUSTICE FORCE BUSINESS TO OBEY THE LAW?

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Small crimes always precede great ones. Never have we seen timid innocence pass suddenly to extreme licentiousness.

Jean-Baptiste Racine (1639-1699)[1]

Always do right. This will gratify some people and astonish the rest.

Mark Twain (1835-1910)[2]

The law sets the floor, the minimum requirements for what all members of society, including business, must do.[3] While the great majority of businesses are law- abiding, those few companies that fall short receive significant attention. And, as illegal behavior evolves, so too will the government's approach to prosecution and the laws upon which it will rely.

For instance, although the Foreign Corrupt Practices Act of 1977 ("FCPA")[4] was, for decades, unique in its efforts to prohibit bribery of foreign officials to secure a contract,[5] long before the FCPA prohibited bribery of a foreign official, bribery was illegal.[6] The FCPA demonstrates that legal, but unethical behavior is likely to lead to governmental regulation.

Is a business that is unethical more likely to break the law? The government seems to think so. In 1991, in a carrot-and-stick approach, the U.S. Federal Sentenc

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[1] **PHEDRE act 4, sc. 2.**

[2] Note to the Young People's Society, Greenpoint Presbyterian Church, 1901.

[3] As the late former Chief Justice Earl Warren observed, "in a civilized life, law floats in a sea of ethics." N.Y. **TIMES,** Nov. **2,1962.**

[4] 15 U.S.C. §§ 78dd-l *etseq.*

[5] The OECD's 1997 Anti-bribery Convention (Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 18 Dec. 1997, entered into force 15 Feb. 1999, OECD/-DAFFE/-IME/-'BR(97)16/FINAL (18 Dec. 1997),
37 I.L.M. 1 (1998)) arguably represents the next major change. Until its ratification by thirty members and six non-members, some of the member countries considered bribes a tax deductible business expense. "Until recently, offering bribes to foreign public officials as a way of obtaining contracts was a perfectly normal way of doing business in many OECD countries.... Several governments saw no reason to disagree and offered favourable tax treatment for bribery payments, which could be written off as expenses." Martine Milliet-Einbinder, *Writing Off Tax Deductibility: The Tax Deductibility of Bribes is a Practice which the Convention Has Made Easier to Abolish*, OECD **OBSERVER,** No. 220, April 2000, available at www.oecdobserver.org/news/fullstory.php/aid/245. *See generally* Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 Am. J. COMP. L. 593 (2002).

[6] *E.g.*, 18 U.S.C. §201

ing Guidelines[7] made clear to all organizations the need to establish a formal ethics program.[8] Despite the emphasis given to the need for legal compliance and ethical behavior by both government and society, backed up with the threat of civil litigation and criminal prosecution, a significant problem exists and will undoubtedly continue, as evidenced by significant corporate scandals over the past few years.

What is perhaps most surprising is the cavalier attitude of individuals and organizations toward compliance with the law, even as they face financially ruinous civil litigation and criminal prosecution, along with potentially heavy judgments, fines and jail time.[9] For those organizations that choose to ignore the recommendations of the government's carrot-and-stick approach, the government is likely to dispense with the carrot and choose from an extensive arsenal of exceptionally large sticks. Those businesses that choose to break the law may be forced to run a formidable gauntlet, including:

1. The government's aggressive approach to the prosecution of business;
2. The numerous inflexible laws that control the actions of businesses; and
3. Sentencing guidelines that show no mercy

The first stick available to the government is an aggressive policy of enforcement. The second stick is a wide variety of potent and inflexible laws, running the gamut of antitrust to water pollution, from which the government may choose. In this article, the focus is on criminal prosecution and civil litigation under the Racketeer Influenced Corrupt Organizations Act ("RICO"), and specifically, "white-collar" crimes.[10]

While a business that breaks the law may face prosecution under a wide variety of laws, RICO represents a particularly harsh law that has been interpreted expansively and been applied broadly to a wide variety of situations that might ordinarily be considered beyond the purview of criminal law.[11] In addition, those businesses facing the specter of prosecution under RICO may face numerous additional causes of action available to private plaintiffs that have suffered an injury as a result of a business's illegal activities. The third stick is the sentencing guidelines that allow an

[7] The United States Sentencing Commission was created under the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551 *etseq.* and 28 U.S.C. §§ 991-998.

[8] For instance, the United States Sentencing Commission, Guidelines Manual, Chapter 8B2.1, Effective Compliance and Ethics Program, subpart (a), states, "To have an effective compliance and ethics program, for purposes of subsection (f) of § 8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall...." Although the Supreme Court ruled that certain parts of the sentencing guidelines were unconstitutional (United States v. Booker, 543 U.S. 220 (2005)), judges must still consider the guidelines for sentencing, although judges now have more discretion.

[9] In the case of Martha Stewart, the criminal prosecution received most, if not all, of the attention. The civil litigation was largely ignored. *E.g.*, SEC v. Stewart 317 F. Supp. 2d 426 (S.D.N.Y. 2003).

[10] Defined by the Federal Bureau of Investigation as those illegal acts that are characterized by fraud, concealment, or a violation of trust and are not dependent upon the application or threat of physical force or violence. These acts are committed by individuals and organizations to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure a personal, political, or business advantage. *See* www.fbi.gov/whitecollarcrime.htm.

[11] *E.g.*, Terrence G. Reed, *The Defense Case for RICO Reforms*, 43 VAND. L. Rev. 691, 700-701 (1990).

"upward" departure in fines and jail time for companies that choose to ignore the law, as well as a "downward" departure for those businesses that make a serious effort to comply with the law.

While government prosecution of "white-collar" crimes is not without its critics[12] we note that the government lacks the resources to prosecute all criminal violations and that the threat of civil litigation did nothing to prevent major business debacles from Enron to WorldCom. Furthermore, as noted below, the criticism that has been leveled, particularly the judicial criticism, seems directed more towards certain aspects of the government's approach to prosecution than towards the criminal prosecution itself. Indeed, even as the laws evolve, arguably in response to creative violations of existing laws, so too does the government's approach to criminal prosecution of businesses.

I. THE EVOLUTION OF THE GOVERNMENT'S APPROACH TO PROSECUTION OF BUSINESS: PRINCIPLES OF FEDERAL Prosecution of Business Organizations[13]

To ensure consistency in the prosecution of business organizations, for a variety of offenses, and to memorialize principles that were previously informal, the Department of Justice issued a document entitled "Federal Prosecution of Corporations"[14] (sometimes referred to as the "Holder Memorandum") in 1999. This comprehensive document established nine factors that prosecutors may consider when contemplating prosecution of a business organization:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condoning of, the wrongdoing by corporate management;
3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;

[12] *E.g.*, John Hasnas, *Trapped: When Acting Ethically is Against the Law*, Cato Institute 2006. Professor Hasnas argues that the government should abstain from criminal enforcement since this approach is "overcriminalization" and that civil litigation represents the most effective control of this behavior. *See* United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), where District Judge Lewis A. Kaplan held that federal prosecutors who pressured KPMG to terminate the funding of attorneys' fees for nineteen defendants in a conspiracy and tax-evasion case had violated their constitutional rights to a fair trial and effective assistance of counsel. (Prior history at United States v. Stein, 429 F. Supp. 2d 648 (S.D.N.Y. 2006); on reconsideration, *aff'd*, United States v. Stein, 2007 U.S. Dist. LEXIS 52053 (S.D.N.Y. July 16, 2007).

[13] The principles are applicable to a wide variety of business malfeasance, not just RICO.

[14] www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html#Federal%20Prosecution%20of

5. the existence and adequacy of the corporation's pre-existing compliance program;
6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution;
8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
9. the adequacy of remedies such as civil or regulatory enforcement actions. Perhaps the most controversial factor allowed prosecutors to evaluate, "the

completeness of its disclosure including, if necessary, *a waiver of the attorney-client and work product protections*, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel."[15] (Emphasis added).

This document also noted,

> Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advance of attorneys' fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.[16]

[15] Emphasis added. Footnote 2 of the Holder Memorandum limits this by noting, "This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation."

[16] Footnote 3 of the Holder Memorandum notes that "Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate." Delaware's indemnification provision is representative:

> A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative... by reason of the fact that the person is or was a director, officer, employee or agent of the corporation...against expenses (including attorneys' fees), judgments, fines and

Although this document noted that these factors are not outcome-determinative and are only guidelines, it established a floor for even more aggressive approaches as a result of even more and far more serious business scandals.

In January 2003, then-Deputy Attorney General Larry D. Thompson issued a document entitled, "Principles of Federal Prosecution of Business Organizations"[17] (sometimes referred to as the "Thompson Memorandum"). Although this document virtually restated the Holder Memorandum (theoretically expanding the coverage to "business organizations" from "corporations"), it represented a significant change.

While the Holder Memorandum was somewhat limited, because it specified that the noted factors were not outcome-determinative, the Thompson Memorandum required the prosecutor to weigh the various factors actively, including a business organization's payment of an employee's attorneys' fees as well as an organization's refusal to terminate a potentially-culpable employee, in the decision to prosecute.

In justifying this approach, the Thompson Memorandum notes,

> The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation.[18] The revisions make clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.

As noted, the federal government's approach has come under criticism for its perceived harshness. The harshest criticism was directed at the requirement that a business "cooperate in the investigation." This seemingly innocuous phrase was interpreted to require a business organization to:

> amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interest of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful.

8 Del. Code § 145.

[17] www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

[18] Although not noted in the document, *see, e.g.*, United States v. Josleyn 206 F.3d 144, 149 (1st Cir 2000), where the court referred to meetings between American Honda and the prosecutors where "American Honda had, at these meetings, attempted to persuade the prosecutor that it was 'innocent of any wrongdoing' and that it was 'ignorant of the crimes committed by its former executives who were under investigation.' In so doing, the court concluded, the extent of American Honda's knowledge was concealed from the prosecutor."

1. waive its attomey-client privilege and attorney work-product doctrine;[19]
2. provide otherwise privileged internal documents to the government;[20]
3. refuse to advance the attorneys' fees of individuals alleged to have committed the crime.[21]

Then, on October 21, 2005, Acting Deputy Attorney General Robert D. McCallum, Jr., issued a memorandum entitled, "Waiver of Corporate Attomey- Client and Work Product Protection"[22] (sometimes referred to as the "McCallum Memorandum"). This one-page memorandum referred to the Thompson Memorandum, including the nine factors that federal prosecutors must consider in determining whether to charge a corporation or other business organization. Referring specifically to "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents including, if necessary, the waiver of corporate attomey-client and work product protection," the memorandum went on to note that "some United States Attorneys have established review processes for waiver requests that require federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking a waiver of the attomey- client privilege or work product protection. Consistent with this best practice, you are directed to establish a written waiver review process for your district or component."

The memorandum went on to allow such waiver review processes to vary from district to district (or component to component), thus allowing each United States Attorney or component head to retain the prosecutorial discretion necessary, consistent with its circumstances, to seek timely, complete, and accurate information from business organizations. Thus, while each of the ninety-three U.S. attorneys was directed to establish a written waiver review process, purportedly to ensure supervisory review, each U.S. attorney was still allowed to exercise prosecutorial discretion to seek timely, complete, and accurate information.

While the McCallum Memorandum seemed to put a restriction on such requests, it was subject to extensive criticism, because it did not require uniform standards for prosecutors to seek a waiver and did not require that the standards be made publicly available. As a result, it was argued that the memorandum would have little effect on such demands by prosecuting attorneys.

[19] Thompson Memorandum, VI. Charging a Corporation: Cooperation and Voluntary Disclosure, subpart B. The justification is that "Such waivers permit the government to obtain statements of possible witnesses, subject, and targets, without having to negotiate individual cooperation or immunity agreements."

[20] The McNulty Memorandum states, in part, "Prosecutors should first request purely factual information, which may or may not be privileged, relating to the underlying misconduct ('Category I')." The Memorandum goes on to note, "A corporation's response to the government's request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government's investigation."

[21] The Holder Memorandum notes, at VI. Charging the Corporation: Cooperation and Voluntary Disclosure, subpart B.

[22] *Available at* www.corporatecrimereporter.com/documents/AttomeyClientWaiverMemo.pdf.

Perhaps again in response to the continuing criticism, on December 12, 2006, a memorandum was issued by Deputy Attorney General Paul McNulty (the "McNulty Memorandum"[23]), revising certain aspects of the Thompson Memorandum. In particular, the McNulty Memorandum stated that prosecutors "generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment" and established a requirement that federal prosecutors should seek a waiver of the attomey-client privilege or the attorney work-product doctrine only in rare circumstances, and that such a request must be approved by the Deputy Attorney General.[24] The request must also meet the "legitimate need test,"[25] which requires a prosecutor to meet a four-part test:

1. the likelihood and degree to which the privileged information will benefit the government's investigation;
2. whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
3. the completeness of the voluntary disclosure already provided; and
4. collateral consequences to a corporation of a waiver.

Regardless of the apparent limitations, it is clear that, under certain circumstances, business organizations can face the full onslaught of government prosecution, with all of the expense and business disruption that is entailed. Just as important as the government's hard-line approach to litigation are the very laws to be enforced. The laws are strict and the penalties harsh.

II. CIVIL LITIGATION AND CRIMINAL PROSECUTION

All of the other reasons that should motivate individuals and organizations to pay strict attention to legal compliance pale in comparison to the most significant reason of all. The criminal implications of illegal behavior cannot be overstated. While one of the goals of criminal prosecution and punishment is rehabilitation, it is but one.[26] The other goals, including incarceration,[27] are considered every bit as important, if not more so, by a society that feels betrayed by illegal activity.

While the government has a wide variety of resources upon which it may rely in prosecuting criminal conduct, among the most powerful is a law that was originally intended to control organized crime. Congress passed an amendment to the

[23] www.usdoj .gov/dag/speeches/2006/mcnulty_memo.pdf

[24] Statement of Barry M. Sabin, Deputy Assistant Attorney General before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives, March 8, 2007.

[25] *Id.*

[26] *E.g.*, Ewing v. California, 538 U.S. 11, 24 (2003) where the Court noted, "A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation."

[27] As the Court noted in *Ewing*, *supra* note 26, when addressing a challenge to California's three strikes law based on the Eighth Amendment's prohibition of cruel and unusual punishment, "Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.'" 538 U.S. at 25.

Organized Crime Control Act of 1970, known as the Racketeer Influenced Corrupt Organizations Act (RICO) of 1970.

A. *Racketeer Influenced Corrupt Organizations Act (RICO)*

1. The Criminal Aspect of RICO

When the United States Congress, no stranger to ethical lapses itself, enacted the Racketeer Influenced and Corrupt Organizations Act[28] in 1970, it arguably represented a milestone. The full impact of this legislation may have gone unappreciated at the time of its enactment.[29] This law was originally intended to address the issue of organized crime moving into the legitimate business world.[30] The law, enacted as Title IX of the broader Organized Crime Control Act,[31] makes it a federal offense to:

1. Use income obtained from racketeering activity to purchase any interest in an enterprise;
2. Acquire or maintain an interest in an enterprise through racketeering activity;
3. Conduct or participate in the affairs of an enterprise through racketeering activity; or
4. Conspire to do any of the foregoing.

Based on that short, sterile summary of the law, one may conclude that this statute is strictly criminal in nature and other aspects of RICO confirm that impression.[32] Generally, the criminal law aspect of RICO requires a "pattern of racketeering activity" that involves the commission of two or more racketeering acts within ten years of each other. "Racketeering" itself generally means extorting money by threat or engaging in an illegal profit-making enterprise, thus covering a wide variety of offenses. RICO lists more than fifty specific federal crimes that constitute racketeering, including mail fraud, wire fraud and a wide variety of others. Again, this summary appears to be strictly criminal and to have no relation to the subject of ethics.

[28] 18 U.S.C. §§ 1961-1968

29. RICO may be used to combat a wide variety of offenses, including gang violence. *E.g.*, the U.S. Attorneys Criminal Resource Manual, Title 9, 110 RICO-related charges, where the Department of Justice states that "A major focus in curbing gang violence should be the consideration of prosecuting the gangs for the RICO-related charges of Violent Acts in Aid of Racketeering Activity under 18 U.S.C.A. § 1959."

[30] Pub. L. No. 91-452 § 1, 84 Stat. 922, the "Statement of Finding and Purpose" of RICO:

> It is the purpose of [RICO] to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

[31] Pub. L. No. 91-452, 84 Stat. 922 (1970).

[32] The crimes listed in 18 U.S.C. § 1961(1)(A) include murder, kidnapping, gambling, arson, robbery, bribery, extortion, money laundering, securities fraud, and counterfeiting, among others.

Not surprisingly, the criminal penalties for a violation of RICO are harsh. If convicted under RICO's criminal provisions, an individual faces a minimum of a $25,000 fine, twenty years in prison and the forfeiture of all property obtained through the criminal activity to the federal government. In addition, an individual faces the loss of a variety of constitutional rights, as well as various other penalties, as a result of being a convicted felon.[33]

To assume that the foregoing is directed solely at organized crime is to assume too much. Because the government lacks the resources to prosecute all RICO violations, the government included, in addition to RICO's criminal provisions, a section on civil litigation. In particular, it is the mail- and wire fraud aspects of RICO that provide the greatest opportunity to civil plaintiffs who have been wronged by illegal activities.

2. The Civil Aspects of RICO

> RICO's civil damages provision, 18 U.S.C. § 1964(c), countenances suits by any person "injured in his business or property by reason of a violation of section 1962." This language requires a plaintiff to make two showings: "(1) that he has suffered injury to his business or property; and (2) that this injury was caused by the predicate acts of racketeering activity that make up the violation of Section 1962."[34]

Although the foregoing statement of the law provides no obvious reason for concern on the part of any individual or organization that is not involved in a criminal enterprise, because of the phrase "racketeering activity," this is hardly the case.[35]

[33] *E.g.*, Title 18 U.S.C. § 922(g)(1) provides "It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; to . . . possess in or affecting commerce, any firearm . . . ." Kenneth Waguespack, *Shaw v. Murphy. Restricting Prisoners' First Amendment Rights*, 29 S.U. L. REV. 113, 114 (Fall 2001), analyzing the evolution of the issue, including the following statement:

> In 1871 the Court stated in *Ruffin* v. *Commonwealth* [citation omitted] that a prisoner, "For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in humanity accords him. He is for the time being the slave of the State."

[34] In re American Honda Motor Co., Inc. Dealerships Relations Litigation, 941 F. Supp. 528, 538 (D. Md. 1996) (citations omitted), where the court noted that bribery constituted a sufficient "predicate act" to satisfy RICO's requirements. Other predicate acts alleged included mail fraud, wire fraud, extortion and obstruction of justice.

[35] *E.g.*, Elisabeth J. Sweeney Yu, *Addressing the Economic Impact of Undocumented Immigration on the American Worker: Private RICO Litigation and Public Policy*, 20 N.D. J. L. ETHICS & PUB. POL'Y 909 (2006), discussing the application of RICO to labor law enforcement in the undocumented worker context; Bryn K. Larsen, *RICO's Application to Noneconomic Actors: A Serious Threat to First Amendment*

The ease with which the requirement of a racketeering activity may be met is astonishing.[36]

Because Congress mandated that RICO "be liberally construed to effectuate its remedial purposes"[3] the Supreme Court has held that RICO may be applied to legitimate businesses,[38] allowing private plaintiffs and the government to file civil actions.[39] Under § 1964 of RICO, the Attorney General[40] or a private plaintiff[41] may bring a civil action in either state or federal court.[42] The broad language of RICO invites attorneys to apply its harsh penalties to cases that have no apparent connection to what is traditionally considered criminal activity.

For individuals as well as business, the difference between criminal law and civil law is dramatic and substantial. In a criminal matter, various constitutional protections come into play,[43] including *Miranda* warnings, the Fifth Amendment right against self-incrimination and the right to counsel. In addition, in a criminal matter, the prosecution must convince all of the jurors of the allegations. That is, the jury verdict must be unanimous.

In civil litigation, unanimous juries are not required. In addition, the burden of proof for the plaintiff in civil litigation (to a preponderance of the evidence) is much lower than the requirement in a criminal matter ("beyond a reasonable doubt").[44] All of the protections that apply to a criminal defendant reflect society's

Freedoms, 14 REV. LITIO. 707 (1995), discussing the application of RICO to abortion protesters; Jeffrey N. Shapiro, *Attorney Liability under RICO § 1962(c) after Reves* **v.** *Ernst & Young*, 61 U.CH1. L. REV. 1153 (1994); Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001), where the Supreme Court held that a person, in this case Don King, and his company, Don King Productions, satisfied the RICO requirement of a "person" and a distinct "enterprise" satisfying RICO's requirements for a civil RICO cause of action.

[36] *E.g.*, In re American Honda Motor Co., Inc. Dealerships Relations Litigation, 941 F. Supp 528 (D. Md. 1996) . *Accord*, In re American Honda Motor Co., Inc. Dealerships Relations Litig., 958 F. Supp. 1045, 1056 (D. Md. 1997). In footnote 9 of its opinion, the court notes, "At the very least, plaintiffs have sufficiently alleged that (the Japanese executives) aided and abetted the commission of the predicate acts, which is sufficient to constitute a pattern of racketeering activity."

[37] Pub. L. No. 91-452, § 904(a), 84 Stat. 942 (1970); *see also* United States v. Turkette, 452 U.S. 576, 587 1981).

[38] *E.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985).

[39] 18 U.S.C. § 1964(b).

[40] 18 U.S.C. § 1964(b).

[41] 18 U.S.C. § 1964(c).

[42] *E.g.*,, Tafflin v. Levitt, 493 U.S. 455,458 (1990).

[43] *But see, e.g., supra* note 15, noting that the government in white collar crime, unlike violent crime, may seek a waiver of certain constitutional rights.

[44] Consider, for example, the seemingly contradictory verdicts involving O.J. Simpson. In the criminal trial, Simpson was found "not guilty." Although "not guilty" is not the same as "innocent," in the subsequent civil trial, Simpson was found liable for the wrongful death of two individuals, with a resulting judgment in excess of $30 million. *See In re Winship*, 397 U.S. 358, 361 (1970) where the Court noted the reason for the difference:

> The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from an

belief that it is better to let the guilty go free than to convict the innocent. Those protections do not exist for the civil defendant and the civil aspect of RICO removes the constitutional protections provided to criminal defendants.

Finally, although a prior conviction for RICO violations is not a necessary precursor to filing a civil RICO lawsuit against a party,[45] the benefits of a prior criminal prosecution of a defendant, whether successful or not, that will inure to the plaintiff in civil litigation cannot be overstated.

Because we assume that considerable illegal activity is a result of ignorance, not only of the government's vigorous prosecution of offenders and the numerous laws that exist, but of the various penalties that may be imposed as well, we list additional civil and related penalties that may be imposed, based on a review of several cases involving a distributor of vehicles, parts and accessories, as well as various other products in the United States (the bribery case). In the words of a criminal court, "Widespread bribery, kickbacks, and other fraud infected the operations of' this company "from the 1970s to the early 1990s."[46]

Those cases are particularly instructive because of the extensive number of parties and exceptionally costly litigation. Part of the litigation received class action certification from the court. This is hardly surprising, given, as the court noted, "upwards of 800 plaintiffs."[47] While the list of defendants was hardly as extensive, the plaintiffs identified 158 dealers, in addition to the dealer defendants, who, plaintiffs allege, were coconspirators."[48] This means that not only were the individual recipients of the bribes (two individuals) prosecuted based on RICO and other causes of action, the employer of the recipients, along with the employer's parent company in Japan, and the parties that paid the bribes were also sued in civil litigation. Although this was civil litigation, the use of the pejorative "co-conspirator" gives a decidedly criminal blush to the litigation.

Nor should the true nature of litigation, whether civil or criminal, be ignored. Although the image of justice as a blindfolded female, holding the scales of

> cient times, [though] its crystalliztion into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.' C. McCormick, Evidence § 321, pp. 681-682 (1954); see also 9 J. Wigmore, Evidence § 2497 (3d ed. 1940). Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced andjusticed administered.'" (Citation omitted).

[45] Although a successful criminal prosecution will call into play 18 U.S.C. § 1964(c), which states, "A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States."

[46] United States v. Josleyn 206 F.3d 144, 147 (1st Cir 2000).

[47] In re American Honda Motor Co., Inc. Dealership Relations Litigation, 979 F. Supp. 365, 367 (D. Md. 1997).

[48] *Id.*

justice, conveys a distinctly benign image, this is hardly the case. As a judge observed in the bribery case, "Settlement, of course, is not a desirable end in and of itself. *Some wars must be waged until there is a clear victor, regardless of cost and collateral injury....*"[49] To consider litigation, even civil litigation, anything short of all-out war, with the attendant expense, is dangerously naive.

B. *Additional Causes of Action*

While civil lawsuits based on RICO violations arguably are of the greatest concern, it is likely that any such lawsuit will not be limited to RICO allegations. That is, most lawsuits will include a wide variety of allegations against the defendant. The lawsuits that arose out of the bribery case include a variety of other, additional causes of action that may be asserted against a defendant.

1. Mail Fraud

The federal mail fraud statute[50] provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, [uses the mails to further the scheme, shall be guilty of mail fraud]. Although this is separate and distinct from RICO, note that a violation of this statute may constitute a predicate act under RICO.

The defendants in the bribery case were compelled to admit that mail fraud and wire fraud occurred, because of the guilty pleas and convictions of former employees. However, the defendants argued that the victim of those acts was the employer and that the bribery scheme was not entered into with intent to defraud. In rejecting these arguments, the court noted, *inter alia,* "Defendants do not dispute that plaintiffs have adequately alleged use of the mails, nor do they dispute that the bribe- paying dealers and [company] executives knowingly engaged in the scheme." Indeed, the requirement of use of the mails as a predicate act is rather easily met. The court went on to note, "a mailing need only be a necessary step in furtherance of a scheme, and need not be fraudulent in and of itself."[51]

2. Alter Ego Liability of a Corporate Parent

In the bribery case, the court refused to allow the plaintiffs to proceed on a theory of alter ego liability against the parent company, Honda Motor Co., Inc. (the

[49] *Id.* at 369 (emphasis added).

[50] 18 U.S.C. § 1341

[51] *Id.* at 546.

manufacturer, referred to by the court as Honda Japan), noting that the mere allegation that the various Honda entities use consolidated financial statements and have interlocking directorates, even if true, was insufficient to justify piercing the corporate veil. The court went on to note that there was no suggestion that American Honda was incorporated for a fraudulent purpose or that American Honda was not adequately capitalized, nor was there any other factor would justify disregarding the corporate separateness of the Honda defendants on equitable grounds.

> Therefore, while the Plaintiffs' allegations that Honda Japan knew about and endorsed the bribery scheme, that Honda Japan benefited from the scheme and that Honda Japan exercised control over American Honda may be relevant to plaintiffs' other theories of liability, they did not serve to justify piercing the corporate veil.[52]

3. Liability of a Corporate Parent for Aiding and Abetting

Aiding and abetting[51] liability involves the defendant's association with the venture, participating in it as in something he wished to bring about, and seeking to make it succeed.[54] The element of "association" for purposes of aiding and abetting means the defendant shared in the criminal intent of the principal.[5>] The element of "participation" means the defendant engaged in some affirmative conduct designed to aid the venture.[56] The defendants in the bribery case argued that a private cause of action for aiding and abetting should not be extended to the civil RICO context. However, the court noted that the plaintiffs had adequately alleged other bases of liability, and that a number of cases recognized aiding and abetting liability under RICO.[57]

4. Obstruction of Justice

> Whoever ... corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be (guilty of an offense).[58]

[52] *Id.* at 551-552.

[53] 18 U.S.C. § 1791(a)(1), 2

[54] United States v. Rodriguez Cortes, 949 F.2d 532, 539 (1st Cir. 1991).

[55] United States **v.** Jaramillo, 42 F.3d 920, 923 (5th Cir.), *cert, denied,* 514 U.S. 1134 (1995).

[56] United States **v.** Martiarena, 955 F.2d 363, 366 (5th Cir 1992)

[57] *Id* at 554.

[58] 18 U.S.C. § 1503. See also 18 U.S.C. §§ 1501-1511.

In the bribery case, liability for obstruction of justice was alleged to extend to a law firm and an individual attorney within that law firm[59] for perpetuating the bribery scheme, as well as by committing acts of obstruction of justice during the criminal investigation. Almost needless to say, an outside advisor who intentionally provides services to an illegal scheme, knowing of its purpose may be held criminally culpable and civilly liable.[60] This would obviously include, but not be limited to, an attorney who, although not participating directly, knowingly advised his client to prepare false materials for public distribution to further a scheme to defraud.[61]

In the bribery case, the defendants did not challenge the allegations of obstruction of justice or tax fraud, as noted below.[62]

5. Falsification of Tax Records to cover up the Bribery Activities of Executives

The falsification of tax records raises the very real probability that a business will experience the full wrath of the Internal Revenue Service. For instance, Section 7212(a) of the Internal Revenue Code is an omnibus clause that criminalizes attempts to interfere with the administration of internal revenue laws through corrupt or forcible acts. This statute applies to anyone who impedes the "collection of one's taxes, the taxes of another, or the auditing of one's or another's tax records."

An act is considered corrupt for purposes of Section 7212(a) if an individual attempts to secure an unlawful advantage or benefit either for one's self or for another. This phrase has been construed to cover not only bribery, solicitation and subornation, but also acts of fraud and misrepresentation.[63] Note that the foregoing is a criminal tax violation.

[59] In re American Honda Motor Co., Inc. Dealerships Relations Litigation 941 F. Supp. 528, 560 (D. Md. 1996). Although the court required the plaintiffs to amend their complaints to put the law firm on notice as to how it played a direct role, the court went on to note:

> Here, plaintiffs have alleged that (the law firm) attorneys played a direct management role with respect to policy and procedure for handling' the briibery scheme... in particular to the extent plaintiffs claim that (the law firm) attorneys fielded complaints from non-bribe paying dealers, handled Honda's internal investigations and assisted in covering up the scheme. Plaintiffs also allege that (the individual attorney) and other (members of the law firm) were paid directors with a full voice on the American Honda (board of directors).

[60] *Id.* at 561
[61] *Id.* at 561
[62] *Id.* at 546
[63] *E.g.*, United States v. Mitchell, 985 F.2d 1275, 1277-78 (4th Cir. 1993).

6. Violations of the Sherman Act

The Sherman Antitrust Act[64] (or Sherman Act) was an attempt by Congress to promote competition. Over the years, the courts have considered some kinds of agreements as so inherently anticompetitive that they are considered *per se* violations of the Act and no defenses are available to the defendant.[65] The plaintiffs in the bribery case attempted to invoke the *per se* rule, by classifying the bribery scheme as a group boycott, because it acted as a horizontal agreement among the defendants and co-conspirators, giving favorable allocations to defendant dealers. The court in *Honda* dismissed these claims against the corporate employer, noting that the plaintiffs failed adequately to allege anticompetitive animus, because the bribery scheme was designed to steal profits, not to destroy competition."[66] However, such an argument, when made in relation to the dealers that paid the bribes, may have more force.

7. Violations of the Robinson-Patman Act

Section 2(a) of the Act prohibits discrimination "in price between different purchasers of commodities of like grade and quality . . . where such commodities are sold for use, consumption, or resale."[67] For the provision to apply, therefore, there must be at least two sales of "commodities." Commodities in this context means tangible products.[68] Section 2(d) prohibits a person from discriminating in making certain payments to one of its customers in connection with that customer's sale of "any products or commodities manufactured, sold, or offered for sale by such person."[69] The court noted that the conduct alleged by the plaintiffs in the bribery case fell squarely within the literal terms and intendment of the statute.[711]

8. Potential Violations of State Laws

The state laws would include, but may not be limited to, common law fraud, negligence, breach of contract, estoppel and violations of the state unfair trade practices act,[71] unjust enrichment, conversion, breach of contract, fiduciary duty, and

[64] 15 U.S.C. §§ 1-7.

[65] *E.g.*, United States v. Socony-Vacuum Oil Co. 310 U.S. 150 (1940).

[66] 941 F. Supp 528, 563.

[67] 15 U.S.C. § 13(a).

[68] *E.g.*, Baum v. Investors Diversified Services, Inc. 409 F.2d 872, 875 (7th Cir. 1969), where the court noted that the word "commodity" as used in the Robinson-Patman Act is restricted to products, merchandise or other tangible goods.

[69] 15 U.S.C. § 13(d).

[70] 941 F. Supp 528 at 565.

[71] Sheperd v. American Honda Motor Co., Inc., 822 F. Supp. 625, 626 (N.D. Cal. 1993). The court dismissed the claim based on RICO, but not the state law claims, including the breach of covenant of good faith and fair dealing, fraud, negligent misrepresentation, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage.

constructive trust;[72] breach of covenant of good faith and fair dealing, fraud, negligent misrepresentation, intentional interference with prospective economic advantage and negligent interference with prospective economic advantage.[73] Other laws may apply depending on the nature of the business.

At least some of the state violations may give rise to a claim of punitive damages since, as the Supreme Court has noted, punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.[74]

9. Treble Damages and Attorneys' Fees

RICO specifically countenances the recover of both treble damages and reasonable attorneys' fees by a successful plaintiff.[75] Note that this may be in addition to the punitive damages that may be awarded as noted above.

10. Loss of the Attorney-Client Privilege and the Attorney Work-Product Doctrine[76]

The attomey-client privilege, like other privileges, such as the doctor- patient privilege, has long protected conversations between a party and his or her attorney. Although as noted above, the government may seek a waiver of the privilege, in addition, a civil court may set aside both the attomey-client privilege and the work-product doctrine under the crime-fraud exception.[77] A court ordered the disclosure of such information as a result of evidence that at first trickled, and then flooded out of civil litigation that arose out of the bribery case.[78]

In an unusual turn of events, the materials disclosed as a result of the court's ruling, as well as others, were used by two convicted defendants in support of

[72] *Sedima, supra* note 38.

[73] *Sheperd, supra* note 71, at 626. In this case, the plaintiffs alleged that from 1973 through the present, American Honda and the other RICO defendants perpetrated a scheme (the turn and earn scheme) of false reporting of dealer sales. The scheme was aimed at increasing allocations of Honda vehicles to the United States and promoting one of Honda's cars, the Accord, as the number one selling name plate.

[74] BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996). The Court went on to note, "Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. 517 U.S. at 568 (citations omitted). *See also Pacific Mutual Life Insurance Company* v. *Haslip*, 499 U.S. 1, 7 (1991), where the Court observed that while punitive damages are not recoverable in Alabama for misrepresentation made innocently or by mistake, they are recoverable for deceit or willful fraud.

75 18 U.S.C. § 1964(c).

76 E.g., United States v. Billmyer 57 F.3d 31, 37 (1st Cir. 1995). *Accord*, United States v. Josleyn, 206 F.3d 144. 149 (1st Cir. 2000). Although these are criminal cases, the benefit that will inure to plaintiffs in civil litigation arising out the same facts should not be underestimated.

[77] United States v. Billmyer 57 F.3d 31, 37 (1st Cir. 1995).

[78] In re American Honda Motor Co. Dealer Relations Litig., MDL Case No 1069 slip op at 1 (D. Md. June 3, 1998).

a renewed motion for a new trial (which was denied), because the information tended to show much more knowledge of corruption by top-level company officials than had previously been shown. [9]

11. The Presence of a Court-Appointed Monitor

In a case that may serve as a model for future SEC enforcement actions,[80] the SEC sought not to simply enjoin future violations, but to create a model of corporate governance and internal compliance. As part of the effort, the parties asked the court to appoint a corporate monitor to oversee the transformation. In response, the company replaced its entire board of directors, hired a new chief executive officer and began recruiting other senior managers from without, fired or accepted the resignation of every employee accused of having participated in the fraud, and terminated even those employees who, while not accused of personal misconduct, were alleged to have been insufficiently attentive in preventing the fraud.

12. Personal Liability of Officers and Directors

At least one court has observed that directors have a duty to assure that information and reporting systems exist that are reasonably designed to provide senior management and the board itself with timely, accurate information that is sufficient to allow management and the board to make informed judgments concerning both the corporation's compliance with the law and its business performance.[M]

That court also referred to the Federal Sentencing Guidelines for Organizations and stated that a director's obligation includes a duty to attempt in good faith to assure that an adequate corporate information and reporting system exists.[82] The lack of such a system may create personal liability on the part of directors in shareholder derivative suits.

III. RECOMMENDATIONS FOR BUSINESS

Although compliance with the various laws requires a significant effort on the part of business, businesses that choose to violate the law face exceptionally aggressive criminal prosecution, along with the harsh penalties that accompany the associated laws. Criminal liability may lead to civil liability, including significant attendant legal expenses, so such companies are facing the financially all-consuming fires of extensive litigation along with negative publicity. In at least some situations, a company may be facing bankruptcy.

[79] United States v. Josleyn 206 F.3d 144, 148 (1st Cir. 2000).

[80] SEC v. WorldCom, Inc. 273 F.Supp.2d 431 (S.D.N.Y. 2003).

[81] In re Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 970 (Del. 1996).

[82] Mat 970.

Therefore, business must prepare and implement a comprehensive legal compliance program. The absence of a legal compliance program may be a significant factor in the government's decision to prosecute a business organization and are likely to increase the fines and jail time that may be imposed as a result of a conviction. However, the existence of such a compliance program, alone, is woefully insufficient.[83] The compliance program must be designed and implemented in an effective manner. A hollow "paper program" is likely to be perceived by the government as not only inadequate, but an additional reason to prosecute an organization, as well as a reason for a court to impose a harsher sentence.

As part of this, it is arguable that monitoring and control of employees is an absolute requirement and the United States Sentencing Guidelines that are noted below virtually require this. Chapter Eight of the United States Sentencing Commission Guidelines Manual[84] recommends a number of steps that all businesses should take:

- Establish compliance standards and procedures for employees that are reasonably capable of reducing criminal acts. Such policies should contain broad expressions on honesty, integrity and fairness, possibly along with examples on gifts, entertainment and bribes.
- Assign responsibility for overseeing the program to high-level personnel. The reason for this is obvious. Assigning responsibility to a lower-level employee conveys the impression that upper management does not consider the program to be important. As part of that, employers must exercise due care not to delegate substantial discretionary authority to persons who are prone to engage in criminal behavior. This ordinarily requires a reasonable background check.
- Take reasonable steps to communicate standards and procedures to all employees.
- In addition, a business should take reasonable steps to achieve compliance with standards by using monitoring and auditing systems designed to detect lawbreaking and by having in place multiple reporting systems that employees can use to report criminal conduct, including but not limited to hot

83. The Holder Memorandum notes, VII. Charging a Corporation: Corporate Compliance Programs, subsection A:

> However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program.

Subsection B. goes on to note, Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a paper program' or whether it was designed and implemented in an effective manner."

84 www.ussc.gov/2005guid/8b2_l.htm

lines. As part of this, the company must establish and enforce a policy that forbids retaliation against employees who report misconduct.

- Consistently enforce reasonable standards using appropriate disciplinary mechanisms and, as appropriate, disciplining individuals responsible for failure to detect an offense. Assure that the punishment fits the crime. Although all offenses must be handled on a case-by-case basis, take reasonable steps to assure uniformity.
- After an offense has been detected, respond immediately and appropriately and take reasonable steps to prevent further similar offenses. Notify the appropriate authorities immediately and do not attempt to conceal the offense. Take steps to keep employees reasonably informed.

The primary benefit of such a program relates to litigation, both criminal and civil. Federal sentencing guidelines for business organizations allow dramatic reductions in fines and penalties for companies with an internal program to prevent and report criminal behavior. Indeed, organizations that fail to implement such policies may be facing both civil litigation and criminal prosecution and corporate directors that fail to set up management systems promoting lawful behavior may be held personally liable for fines.[85]

[85] *E.g.*, In re Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 970 (Del. 1996), where the court noted the vigilance required of a director in a modem corporation. The court observed that directors have a duty to assure

> that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to make informed judgments concerning both the corporation's compliance with law and its business performance.

In referring to the Federal Sentencing Guidelines for Organizations, the court stated, "A director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists." Therefore, the absence of an effective internal compliance program may create personal liability on the part of directors in shareholder derivative suits.

CONCLUSION

The laws with which all businesses must comply are numerous.[86] While not all laws are applicable to all businesses, a complete list of the alphabet soup of regulations is beyond the scope of this article. With the vast number of laws, all businesses must consider the importance of educating their employees. To assume that all employees are familiar with all of the legal requirements regarding the myriad issues that a business faces on a daily basis is to assume too much. This educational process should begin at the very top. The government's guidelines for prosecution virtually compel this conclusion.

The Holder Memorandum specifically states that "Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation ... or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place . . . for the single isolated act of a rogue employee."[87]

All of the referenced memoranda also note that of all the factors, the most important is the role of management. The reason for this is obvious. A corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in the commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority... who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding

[86] Employment issues such as discrimination, including the Equal Pay Act of 1963; Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2000e-17; the Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 621-634; the Pregnancy Discrimination Act of 1978; the Americans with Disabilities Act of 1990; privacy issues, such as those covered by the Electronic Communications Privacy Act of 1986 (18 U.S.C. §§ 2150-2521); lie detector tests and the Employee Polygraph Protection Act (29 U.S.C. §§ 2001 *el seq.y,* intellectual property issues, such as trademarks and the Lanham Act of 1946 (15 U.S.C. §§ 1051- 1128); the federal Trademark Dilution Act amending the Lanham Act (15 U.S.C. § 1125); the Anticyber-squatting Consumer Protection Act, also amending the Lanham Act (15 U.S.C. § 1129); copyrights and the Copyright Act of 1976 (17 U.S.C. §§ 101 et seq.); the Copyright Term Extension Act of 1998 (17 U.S.C. § 302); the No Electronic Theft Act of 1997 (17 U.S.C. §§ 101, 506, 18 U.S.C. §§ 2311, 2319, 2319A, 2320 and 28 U.S.C. §§ 994 and 1498), among numerous others; environmental protection, including the Clean Air Act (42 U.S.C. §§ 4321-4370d) and its amendments; the Federal Water Pollution Control Act (33 U.S.C. §§ 1251-1387) and the amendments known as the Clean Water Act; the Water Quality Act of 1987 (amending 33 U.S.C. § 1251); the Safe Drinking Water Act (42 U.S.C. §§ 300f to 300j-25); the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. §§ 1401-1445); the Oil Pollution Act of 1990 (33 U.S.C. §§ 2701-2761); the Federal Insecticide, Fungicide, and Rodenticide Act of 1947 (7 U.S.C. §§ 136-136*y*), among numerous others. Antitrust issues including the Sherman Antitrust Act; the Clayton Act and the Robinson-Patman Act among others; trade secret issues, including issues covered by the Economic Espionage Act (18 U.S.C. §§ 1831-1839).

87 IV. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation, subpart A *General Principle.* The subsequent Thompson and McNulty Memoranda repeat this language.

> of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization.[88]

In addition to ethical leadership, business organizations are also in need of a high-ranking officer who is in charge of ethics and the United States Sentencing Commission guidelines, again, virtually compel this.[89] Given the complexity of the legal environment in which all organizations must operate, an attorney appears to be the logical choice. What is clear is that any such individual, whether attorney or not, must be chosen with exceptional care.[90]

While criminal prosecution may be the greatest threat, particularly with the potential loss of the Fifth Amendment right against self-incrimination, among other constitutional protections, the danger that civil litigation represents, where no constitutional protections exist, should not be underestimated. In either case, the cost of defending one, or both such actions, regardless of the result,[91] may be ruinous for a business organization.

While the government may not be able to force business to abide by the law, those that fail to learn from their own mistakes, or the mistakes of others, deserve the unwanted attention that they may receive.

> *Sancho: But if this is Hell, why do we see no lawyers?*
> *Clarindo: They won't receive them, lest they bring lawsuits here.*
> *Sancho: If there are no lawsuits here, Hell's not so bad.*
> Lope de Vega (1562-1635)[92]

[88] IV. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation, subpart B.

[89] *E.g.*, the United States Sentencing Commission, Guidelines Manual, Chapter 8B2.1. Effective Compliance and Ethics Program, subpart (bXl)(B) states, "High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program.... Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program."

[90] While this article takes no position on this subject, for an example of an organization that improvidently chose an attorney and law firm to be in charge of its ethics, *see* United States of America v. Josleyn, 206 F. 3d 144, 156 (1st Cir. 2000).

[91] The indictment of Arthur Andersen, LLP virtually destroyed the company. Few remember that the company was later acquitted. Arthur Andersen, LLP v. United States, 544 U.S. 696 698 (2005), where the Court noted,

> As Enron Corporation's financial difficulties became public in 2001, petitioner Arthur Andersen LLP, Enron's auditor, instructed its employees to destroy documents pursuant to its document retention policy. A jury found that this action made petitioner guilty of violating 18 U.S.C. §§ 1512(b)(2)(A) and (B). These sections make it a crime to "knowingly use intimidation or physical force, threaten, or corruptly persuade another person . . . with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." The Court of Appeals for the Fifth Circuit affirmed. We hold that the jury instructions failed to convey properly the elements of a "corrupt persuasion" conviction under § 1512(B), and therefore reverse.

[92] **The Star of Seville, act 3, sc. 2.**