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COMMENT

Flip That Prosecution Strategy: An Argument for Using RICO to Prosecute Large-Scale Mortgage Fraud

SHAYNA A. HUTCHINS†

INTRODUCTION

The aftermath of the current financial crisis has produced much debate about what should be done to prevent similar catastrophic events in the future. It has been argued that regulatory reform is the key to preventing a similar crisis.¹ Many analysts point to lax regulations in the mortgage industry, specifically in the subprime sector, as a catalyst that helped trigger the crisis in the first place.²

When the housing bubble burst in 2007, it brought the rest of Wall Street down with it. It is clear now that risky subprime mortgages issued to unqualified borrowers by unchecked mortgage lenders were the core components of

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² Id. at 16, 20; see also DENISE JAMES ET AL., ELEVENTH PERIODIC MORTGAGE FRAUD CASE REPORT TO MORTGAGE BANKERS ASS’N 1 (2009); Andrew J. Ceresney et al., Regulatory Investigations and the Credit Crisis: The Search for Villains, 46 AM. CRIM. L. REV. 225, 230-31 (2009).
financial disaster. It is also clear that not all borrowers were innocent victims in pursuit of the American dream to own a home. There were also criminals who took advantage of rising housing prices and lax lending requirements in order to turn a profit.

This Comment explores the prosecution of these criminals and how prosecution strategies should change given the severity of the financial crisis they helped fuel. Part I of this Comment briefly discusses the impact of mortgage fraud on the United States economy in the past ten years, what mortgage fraud is, and how it works. Part II discusses current mortgage fraud prosecution strategies and why they are inadequate. Part III makes an argument for prosecuting large-scale mortgage fraud under The Racketeer Influenced and Corrupt Organizations Act (“RICO”), including an examination of the required statutory elements and how they are met by mortgage fraud perpetrators.

I. THE MECHANICS OF MORTGAGE FRAUD

A. The Impact of Mortgage Fraud

According to the Federal Deposit Insurance Corporation (“FDIC”), United States commercial banks currently hold over $3.7 trillion in domestic real estate loans. About $2.3 trillion of this sum represents loans on residential properties. The remainder of real estate loans held by United States commercial banks represent loans for

7. Id.
construction, land development, and cultivation of farmland.  

"Industry experts estimate that up to 10% of all residential loan applications . . . have some form of material misrepresentation, both inadvertent and malicious." Of loans that experience early payment defaults—often a red flag for problem loans—45-50% of these loans are made on the basis of misrepresentation. Of loans that enter into foreclosure, about 25% have "at least some element of misrepresentation."  

The Federal Bureau of Investigation ("FBI") estimates that mortgage fraud causes between $4 billion to $6 billion in losses annually. In fiscal year 2008, 63,173 mortgage fraud Suspicious Activity Reports ("SARs") were filed with the FBI. In the first four months of 2009, the number of mortgage fraud SARs filed was already 40,901. Also, in just the first four months of 2009, the FBI already had 2440 mortgage fraud investigations pending and had opened 965 new mortgage fraud cases.  

The recent influx of investigations and ensuing litigation may be just the beginning. The Mortgage Asset Research Institute ("MARI") suggests that "reported mortgage fraud is more prevalent now than in the heyday of the origination boom" and predicts that “mortgage fraud is

8. Id.  
10. Id.  
11. Id.  
13. Id.  
14. Id.  
15. Id.  
16. See Pinciak-Madden & Jestin, supra note 3, at S5 (stating that the post-crisis situation is getting worse and predicting an increase in both civil suits and criminal investigations surrounding mortgage fraud).  
17. JAMES ET AL., supra note 2, at 1.
[still] on the rise."\textsuperscript{18} As a result, "[e]merging fraud trends are further draining lender, law enforcement, and consumer resources in the industry's most challenging times."\textsuperscript{19}

As one Deputy Attorney General noted recently, "[m]ortgage fraud and related securities fraud pose a significant threat to our economy, to the stability of our nation's housing market and to the peace of mind of millions of American homeowners."\textsuperscript{20} When we consider the overall impact of mortgage fraud on our economy and the role it played in the recent financial crisis, it becomes clear that the legal and law enforcement communities must take a strong stance against it.\textsuperscript{21} We must examine both the inner workings of mortgage fraud, and how it can be prevented in the future through the use of strong prosecution and sentencing methods.

B. How Mortgage Fraud Works

The FBI defines mortgage fraud as "a material misstatement, misrepresentation, or omissions relied upon by an underwriter or lender to fund, purchase, or insure a loan."\textsuperscript{22} There are two types of mortgage fraud: fraud for housing and fraud for profit.\textsuperscript{23} Fraud for housing occurs when an applicant commits mortgage fraud for the purpose of obtaining a primary residence.\textsuperscript{24} Fraud for profit occurs when one or more individuals commit mortgage fraud for the purpose of gaining illegal profits from the loans.\textsuperscript{25} Fraud

\begin{itemize}
  \item \textsuperscript{18} Id. at 8.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{21} See Holly A. Pierson, Mortgage Fraud Boot Camp: Basic Training on Defending A Criminal Mortgage Fraud Case, CHAMPION, Sept./Oct. 2007, at 14, 21 ("The tumultuous state of the mortgage industry, combined with increasing reports of millions of dollars of loss from mortgage fraud schemes, has created the perfect storm for law enforcement initiatives.").
  \item \textsuperscript{22} 2008 Mortgage Fraud Report, supra note 4.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} Id.
\end{itemize}
for profit "often involves multiple loans and elaborate schemes perpetrated to gain illicit proceeds from property sales." For the purpose of this Comment and the argument for prosecuting large-scale mortgage fraud through RICO, we are more concerned with fraud for profit.

The schemes that are executed to commit fraud for profit are limited only by the creativity and imagination of those committing the mortgage fraud. "Though one may commit mortgage fraud by a single act, mortgage fraud usually involves a combination of bad acts." While countless schemes exist, the most basic fraud for profit involves the following:

- Perpetrators will submit false loan documents in order to purchase a property. Often, middlemen referred to as "straw buyers" will be recruited to apply for the fraudulent mortgages. The documents may include misstatements regarding an applicant's income, occupation, intent to occupy the property, etc.

- An appraiser will value the property to make sure it is consistent with the amount of the loan being issued. The appraisal may also be fraudulent, certifying that the property is worth more than its true value, thereby securing an inflated loan amount.

- The documents are submitted to a mortgage loan originator who signs off on the documents, certifying the value of the property, the loan, and the applicant's ability to repay the lender.

- The property is then closed on by an attorney who verifies that all documents are in order and properly filed, and secures the release of the loan proceeds to the buyer.

- Once the loan proceeds are released, the perpetrators take the money and split the proceeds among those involved.

26. Id.
27. FFIEC WHITE PAPER, supra note 9, at 13.
29. For a more detailed explanation of "straw buyers" and "straw borrowers," see FFIEC WHITE PAPER, supra note 9, at 17.
in the scheme. Payments are not made on the mortgage and the home falls into foreclosure.\textsuperscript{30}

Some of the more popular schemes include property flipping,\textsuperscript{31} builder-bailouts,\textsuperscript{32} short sales,\textsuperscript{33} foreclosure rescue,\textsuperscript{34} reverse mortgages,\textsuperscript{35} and identity theft.\textsuperscript{36} Due to

\begin{itemize}
\item[31.] Jacobson & Barnhill, \textit{supra} note 28, at 9 ("Property flipping occurs when property is purchased, fraudulently appraised for a higher value, and then sold at the inflated price."); see also 2007 Mortgage Fraud Report, \textit{supra} note 30.
\item[32.] Builder-bailout schemes occur when a builder or developer uses fraudulent means to dispose of property they cannot sell:

For example, a builder wishes to sell a property for $200,000. He inflates the value of the property to $240,000 and finds a buyer. The lender funds a mortgage loan of $200,000 believing that $40,000 was paid to the builder, thus creating home equity. However, the lender is actually funding 100\% of the home's value. The builder acquires $200,000 from the sale of the home, pays off his building costs, forgives the buyer's $40,000 down payment, and keeps any profits. 2007 Mortgage Fraud Report, \textit{supra} note 30.
\item[33.] A short sale is a pre-foreclosure sale where the lender who holds the mortgage agrees to sell the property for less than is owed on the mortgage:

In a typical short sale scheme, the perpetrator uses a straw buyer to purchase a home for the purpose of defaulting on the mortgage. The mortgage is secured with fraudulent documentation and information regarding the straw buyer. Payments are not made on the property loan so that the mortgage defaults. Prior to the foreclosure sale, the perpetrator offers to purchase the property from the lender in a short-sale agreement. The lender agrees without knowing that the short sale was premeditated. \textit{Id.}
\item[34.] In foreclosure rescue scams, perpetrators fraudulently convince homeowners that they can save their homes from pending foreclosure through "deed transfers and the payment of up-front fees." \textit{Id.} Victims often pay the perpetrators in large lump sums for their services. Sometimes the perpetrators will take the money and run. Other times they will sell the home out from under the original homeowner or secure a second loan without the homeowner's knowledge, stripping the home of its equity. \textit{Id.}
\item[35.] Reverse mortgages are targeted at senior citizens. They allow the elderly to borrow funds against the equity they have built up in their homes. While reverse mortgages are legal and often helpful to senior citizens, many scam artists are now getting into the business, charging exorbitant fees and illegally
\end{itemize}
their complexity, such schemes usually require several participants.\textsuperscript{37} Multiple perpetrators may be involved at each step, including mortgage brokers, lenders, appraisers, underwriters, accountants, real estate agents, settlement attorneys, land developers, investors, builders, bank account representatives, investment banks, and credit rating agencies.\textsuperscript{38} Often, since those already working in the mortgage industry are familiar with both the mortgage loan process and with one another, they will work together in order to “exploit vulnerabilities in the system.”\textsuperscript{39}

II. THE CHALLENGES OF FRAUD PROSECUTION

A. Current Prosecution Strategies

“While there is no federal mortgage fraud statute\textit{ per se}, federal law enforcement authorities have at their disposal a wide variety of existing criminal statutes to investigate and prosecute mortgage fraud schemes . . . .”\textsuperscript{40} The most commonly used statutes include bank fraud, wire fraud, mail fraud, false statements, money laundering, and conspiracy.\textsuperscript{41}

Bank fraud occurs when a person “knowingly executes, or attempts to execute, a scheme or artifice” (1) “to defraud a financial institution;” or (2) “to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, siphoning off a portion of the proceeds for themselves. See Charles Duhigg,\textit{Tapping Into Homes Can Be Pitfall for the Elderly}, N.Y. TIMES, Mar. 2, 2008, at A1.

36. Identity theft occurs when a mortgage fraud perpetrator “obtains confidential personal information (i.e., social security numbers, name, date of birth) about a person” and then uses the information to either apply for a mortgage loan without their knowledge, or apply for a home equity line of credit on the property they already own. Pierson,\textit{ supra} note 21, at 17. For a more detailed explanation of additional mortgage fraud schemes, see Howard A. Lax,\textit{ Recognizing Mortgage Fraud}, MICH. B.J., Nov. 2007, at 34, 35-39.


40. Pierson,\textit{ supra} note 21, at 15.

by means of false or fraudulent pretenses, reputations, or promises.  

Bank fraud is punishable by a maximum fine of $1 million, a maximum of thirty years imprisonment, or both.

Wire fraud is committed when a person "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, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice." Wire fraud is punishable by a maximum fine of $1 million, a maximum of twenty years imprisonment, or both. However, if the act affects a financial institution (as is the case with mortgage fraud), the maximum punishment for each act increases to a maximum fine of $1 million, a maximum of thirty years imprisonment, or both.

Mail fraud is committed when a person "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 . . . places in any post office or authorized depository for mail matter, any matter or thing that is "to be sent or delivered by the Postal Service, or . . . by any private or commercial interstate carrier." Mail fraud is punishable by a fine, a maximum of twenty years imprisonment, or both. However, as with wire fraud, if the act affects a financial institution, the maximum punishment for each act increases to a maximum fine of $1 million, a maximum of thirty years imprisonment, or both.

False statements occur when a person "knowingly makes any false statement or report, or willfully overvalues

43. Id.
45. Id.
46. Id.
48. Id.
49. Id.
any land, property, or security, for the purpose of influencing in any way" the actions of institutions including, but not limited to, the Federal Housing Administration, any Federal Reserve bank, or any institution of which the accounts are insured by the Federal Deposit Insurance Corporation or the Office of Thrift Supervision (i.e., most lending institutions).\(^{50}\) Fraudulent false statements on loan and credit applications are punishable by a maximum fine of $1 million, a maximum of thirty years imprisonment, or both.\(^{51}\)

Money laundering occurs when a person "knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 [that has been] derived from specified unlawful activity."\(^{52}\) Money laundering is punishable by a fine, a maximum of ten years imprisonment, or both.\(^{53}\) The fine is usually set at a maximum of "twice the amount of the criminally derived property involved in the transaction."\(^{54}\)

Conspiracy can be charged in one of two ways. A perpetrator may be charged with conspiracy to commit any offense that falls under Chapter 63 of Title 18 (including bank fraud, wire fraud, and mail fraud).\(^{55}\) A conspiracy to commit such an offense is punishable by the same penalties as those prescribed in the statute for the original offense.\(^{56}\) A perpetrator may also commit conspiracy against the United States government, which occurs when "two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy . . . ."\(^{57}\) A conspiracy to commit such an offense is


\(^{51}\) Id.


\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) Id.


\(^{57}\) Id.

57. 18 U.S.C. § 371 (2006). Some of the agencies affected by mortgage fraud include the Federal Housing Administration, the Federal Deposit Insurance Corporation, the Federal Reserve Bank, and the Office of Thrift Supervision.
punishable by a fine, a maximum of five years imprisonment, or both.\textsuperscript{58}

The statute of limitations for the above-mentioned actions is generally five years.\textsuperscript{59} However, for a violation or conspiracy to commit bank fraud, mail fraud, or wire fraud that affects a financial institution, the statute of limitations is extended to ten years.\textsuperscript{60}

\textbf{B. A Representative Case: United States v. Stalnaker}

To illustrate the use of the above-mentioned statutes in a mortgage fraud prosecution, let us look at the recent mortgage fraud case of \textit{United States v. Stalnaker},\textsuperscript{61} which revolved around a twelve-count indictment against a dozen defendants for their participation in a mortgage fraud scheme.\textsuperscript{62} Richard Lucas, the leader of the scheme, "orchestrated an elaborate mortgage fraud operation that purchased cheap property and, through various acts of fraud, resold it at a high price."\textsuperscript{63}

As the leader, Lucas convinced two other participants (Clark and Jones) to recruit straw buyers for the scheme.\textsuperscript{64} Lucas would then arrange for the straw buyers (Weary, Fairley, Packer, Irby, and Jones) to purchase multiple properties at low prices.\textsuperscript{65} The straw buyers were not required to put any money down and "would often receive

\textsuperscript{58} \textit{Id.}
\textsuperscript{61} 571 F.3d 428 (5th Cir. 2009). This decision consolidated \textit{United States v. Lucas} and \textit{United States v. Castle}, which arose from the same series of transactions.
\textsuperscript{63} \textit{Stalnaker}, 571 F.3d at 432.
\textsuperscript{64} Indictment Press Release, \textit{supra} note 62.
\textsuperscript{65} \textit{Id.}
cash payments for use of their names and credit ratings." If the straw buyers' credit would not support the mortgage loans, Lucas would arrange for false income statements and false bank account information to be prepared (by Cox) and submitted to the lenders on the straw buyers' behalf. Once the mortgage applications were fraudulently submitted, Lucas would arrange for real estate appraisers (Stalnaker, Champ, and Mosley) to prepare inflated appraisals of the properties. The closing attorney for the transactions (Castle) would list the straw buyers as having made a down payment on the properties, "making it appear they had equity in the properties, when in fact they did not." Once the properties had been successfully purchased and the loan funds released, Lucas and Castle would launder the proceeds and use the funds to finance the ongoing scheme.

The twelve participants were charged using a variety of prosecutorial tools, including bank fraud, wire fraud, conspiracy to commit bank fraud, conspiracy to commit wire fraud, and conspiracy to commit money laundering. As a result of these charges, nine of the participants pled guilty, leaving three others (Lucas, the leader; Castle, the closing attorney; and Stalnaker, the appraiser) to stand trial. At trial, all three were found guilty and received the most severe sentences of the twelve defendants.

Lucas was sentenced to fourteen years imprisonment, followed by five years of supervised release, and ordered to pay approximately $1.3 million in restitution. Castle was sentenced to four years imprisonment, followed by three years of supervised release, and ordered to pay almost $1.4 million in restitution.

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66. Id.
67. Id.; see also Sentencing Press Release, supra note 62.
68. Indictment Press Release, supra note 62; see also Sentencing Press Release, supra note 62.
70. Id. The names used here are not intended to confuse the reader, but rather to illustrate the many participants involved in a single mortgage fraud scheme.
71. Id.
73. Id.; see also Stalnaker, 571 F.3d at 432.
million in restitution.\textsuperscript{75} Stalnaker was sentenced to less than two and a half years imprisonment, followed by five years of supervised release, and ordered to pay just under $1 million in restitution.\textsuperscript{76}

As for the rest of the participants, the recruiters and straw buyers received a wide variety of sentences ranging from a minimum of three years of probation to a maximum of just over one and a half years imprisonment, and had to pay restitution ranging from $100,000 to just under $1 million.\textsuperscript{77} Cox, who prepared the fraudulent financial statements, was sentenced to only three years of probation, with nine months of house arrest, and ordered to pay about $90,000 in restitution.\textsuperscript{78} The rest of the real estate appraisers received sentences ranging from three years probation with six months of house arrest, to nine months imprisonment followed by three years of supervised release.\textsuperscript{79} The appraisers were ordered to pay restitution of about $120,000 to $150,000 each.\textsuperscript{80}

The details described here illustrate current prosecution strategies and the relatively weak penalties they produce. The \textit{Stalnaker} case will be discussed again in Part III through the prism of hypothetical RICO charges.\textsuperscript{81}

C. \textit{Prosecution Inadequacies}

While it can be argued that the strategies used to prosecute and punish mortgage fraud thus far have been adequate, perhaps they have not been the best possible solution. Inherent weaknesses in current prosecution strategies include the fact that they do not directly address the crime being committed; they cover a complex, unfamiliar, and relatively new area of law; and perhaps most importantly, the relatively weak penalties they impose

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} \textit{See infra} Part III.D.
are not effectively deterring perpetrators from committing mortgage fraud in the future.

It has already been addressed that there is currently no specific mortgage fraud statute. Instead, a myriad of white-collar statutes have become the standard for prosecuting mortgage fraud. When making charging decisions, "prosecutors don't have an easy task in front of them." Not only are prosecutors left to choose among the multitude of applicable statutes out there, they are also left with the task of understanding the transactions that occurred in order to apportion blame and prove intent to defraud among the multiple perpetrators that may be involved in a single complex case.

"The complexity inherent in investigating mortgage fraud, combined with the sheer size of the problem and federal resource constraints, makes difficult effective prosecution of criminal behavior in the industry." It is not just that mortgage fraud cases are complex. More than that, mortgage fraud represents a specialized area of the law that many law enforcement officers and prosecutors are not yet familiar with or well trained in. As a result, the recent influx of mortgage fraud cases is causing a strain on law enforcement resources. The government is being forced to frugally allocate their resources, such as time and money, by going after only the most egregious mortgage fraud cases.

82. See supra note 40 and accompanying text.
83. See supra pp. 307-10.
85. See Ceresney et al., supra note 2, at 235.
86. Id.
87. See Michael Braga et al., Flipping Fraud Ignored by Police and Prosecutors, SARASOTA HERALD-TRIB., July 22, 2009, at 1A.
88. See id.
89. See id.; see also OFFICE OF STATEWIDE INTELLIGENCE, FLORIDA DEPT OF LAW ENFORCEMENT, MORTGAGE FRAUD ASSESSMENT 5-6 (2005) [hereinafter FDLE Mortgage Fraud Assessment], available at http://www.heraldtribune.com/assets/pdf/SH17330717.PDF ("Due to the lack of resources, state and federal
Perhaps the largest weakness of the current mortgage fraud prosecution strategies is their lack of deterrence towards offenders. Mortgage fraud is seen as a "criminal activity which is relatively low-risk with high-yield returns."90 "You get no deterrence and it's free money," notes Bill Black, a white-collar crime expert and economics professor at the University of Missouri.91

When broadly discussing white-collar versus blue-collar crimes, there is "little evidence" that defendants convicted of white-collar crimes are less likely to recidivate.92 A study done by the United States Sentencing Commission93 notes that “[e]ven though fraud . . . offenders have lower recidivism rates for first time offenders, for offenders with a criminal history, ‘the recidivism rates of these offenses exceeds 50[%],’ which is comparable to the recidivism rates for robbery and firearm offenders.”94 The civil penalties and criminal sanctions being issued in response to fraud and other white-collar crimes simply do not act to deter offenders.95

Mortgage fraud offenders, in particular, have frequently shown very little remorse for their actions. Many offenders still argue, even after conviction, that "they did nothing wrong,"96 “[I]n their minds, a dollar borrowed was a dollar earned.”97 For example, Wilbert Brodie, a recent mortgage fraud defendant, was convicted on charges of conspiracy, wire fraud, and false statements for his

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90. 2008 Mortgage Fraud Report, supra note 4.
91. Braga et al., supra note 87, at 7A.
94. Weissman & Block, supra note 92, at 290 (quoting U.S. SENTENCING COMM’N, supra note 93).
95. Id. at 290.
96. Michael Braga et al., The King of the Sarasota Flip, SARASOTA HERALD-TRIB., July 21, 2009, at 1A.
97. Id. at 7A.
involvement in a mortgage fraud scheme to flip houses. In the government’s Memorandum in Aid of Sentencing, the government stressed that “the defendant’s recidivism, spanning over eighteen months, reflects a callous indifference to the social effects of his scheme.”

In another recent case, Chalana McFarland, a closing attorney in Georgia, was disbarred as a result of her participation in a mortgage fraud scheme. After being disbarred, McFarland moved to Florida where she continued to set up fraudulent purchases through straw buyers. McFarland was eventually convicted on a 170-count indictment, including charges of conspiracy, bank fraud, wire fraud, mail fraud, identity theft, and money laundering, for her involvement in a mortgage fraud ring that flipped more than 100 houses. She was sentenced to thirty years in federal prison and to pay nearly $12 million in restitution. This sentence is believed to be the longest and most severe sentence ever handed down in the United States for a mortgage fraud case. During the sentencing hearing, the judge cited McFarland’s lack of remorse as one of the factors contributing to the severity of the sentence.

Unless some new government action is taken, “the attraction for mortgage fraud is likely to continue given the relative ease of committing these frauds, the light penalties in most state criminal systems, and the limits on law enforcement resources in prosecuting these schemes.”


100. Weissman & Block, supra note 92, at 290-91.

101. Id.


103. Id.

104. Id.

105. Id.

106. Pierson, supra note 21, at 14.
D. Possibilities for Change

Perhaps the most logical fix to this problem would be to create a statute that directly addresses mortgage fraud, complete with strict penalties to assure deterrence. However, since laws cannot be created and used to prosecute crimes *ex post facto*, this option will not be discussed. If we cannot create new laws to prosecute current crimes, perhaps we can invest the resources to train investigators and prosecutors in this complex area of law. The influx of recent mortgage fraud cases has already put a strain on government resources though; investigators and prosecutors are already being stretched much too thin. If we cannot create new laws to prosecute these cases, and we cannot take the time or money to educate investigators and prosecutors on the complexities of mortgage fraud and the multitude of related statutes, what can we do?

The only feasible answer seems to be to focus in on what investigators and prosecutors already know—to find an area of the law they are already familiar with which can simultaneously be adapted to prosecute mortgage fraud perpetrators. Not only must it be a familiar and well-used area of the law, it must also contain strict penalties in order to perform a strong deterrent effect. Enter: RICO.

III. MORTGAGE FRAUD AS RACKETEERING

A. RICO Elements and Definitions

The Racketeer Influenced and Corrupt Organizations Act ("RICO") is more formally known as Title IX of the Organized Crime Control Act of 1970. RICO § 901(a) provides that it is (i):

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107. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

108. It should be noted, however, that the creation of a separate federal mortgage fraud statute for use in prosecuting future crimes is an issue that merits both legal and legislative debate.

109. See supra Part II.C.

unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. ¹¹¹

RICO also prohibits any person from (ii) acquiring or maintaining "through a pattern of racketeering activity or through collection of an unlawful debt . . . any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce";¹¹² (iii) conducting or participating "in the conduct of such an enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt";¹¹³ and (iv) conspiring to participate in any of the abovementioned activities.¹¹⁴

In order to prosecute a defendant under RICO, the government must prove three elements: "the defendant: (i) through the commission of two or more acts constituting a pattern of racketeering activity; (ii) directly or indirectly invested in, maintained an interest in, or participated in, an enterprise; (iii) [which was engaged in, or] the activities of which affected interstate or foreign commerce."¹¹⁵

RICO itself contains no specified statute of limitations. Instead, the Supreme Court has stepped in and set the statute of limitations for criminal RICO prosecutions at five years—an amount of time equal to the default statute of limitations set by Congress.¹¹⁶ The predicate acts of a RICO violation, however, can occur up to ten years apart.¹¹⁷ A

¹¹¹. § 1962(a).
¹¹². § 1962(b).
¹¹³. § 1962(c).
¹¹⁴. § 1962(d).
¹¹⁶. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 155-56 (1987) ("RICO itself includes no express statute of limitations for either civil or criminal remedies, and the 5-year statute of limitations applies to criminal RICO prosecutions only because Congress has provided such a criminal limitations period when no other period is specified."). In this case, the Supreme Court also set the statute of limitations for civil RICO violations at four years. Id. at 156.
violation of RICO is punishable by a fine, a maximum of twenty years imprisonment or both, and asset forfeiture may also attach.\textsuperscript{118} The implications of these penalties are discussed below in Part III.B.

1. A Pattern of Racketeering Activity. The statutory definition of "racketeering activity" is very broad, encompassing a wide range of predicate offenses including murder, kidnapping, arson, bribery, extortion, embezzlement, securities fraud, immigration crimes, and more.\textsuperscript{119} Specific to mortgage fraud activities, the relevant predicate offenses for "racketeering activity" include "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud) . . . [and] section 1956 (relating to the laundering of monetary instruments)."\textsuperscript{120}

It is important to note that RICO defendants do not have to be convicted of each underlying predicate offense before RICO can be charged.\textsuperscript{121} If a defendant has been acquitted of criminal charges for a relevant act, it may still serve as a predicate act of a RICO offense.\textsuperscript{122} If the predicate act is based on charges for which the defendant was acquitted in another case, however, then the jury must find the predicate act proved in the RICO case to support a RICO conviction.

\begin{thebibliography}{99}
\bibitem{119} § 1961(1).
\bibitem{120} Id.
\bibitem{121} Holt & Davis, supra note 115, at 979; see also Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 493 (1985) ("There is no requirement that a private action under § 1964(c) can proceed only against a defendant who has already been convicted of a predicate act or of a RICO violation. A prior-conviction requirement is not supported by RICO's history, its language, or considerations of policy. To the contrary, every indication is that no such requirement exists."); BancOklahoma Mortgage Corp. v. Capital Title Co., 194 F.3d 1089, 1102 (10th Cir. 1999) ("[A] person does not have to be formally convicted of any predicate act before liability under 18 U.S.C. § 1962(c) may attach.").
\bibitem{122} Holt & Davis, supra note 115, at 979. Note that Congress has prohibited the use of unconvicted securities fraud as a predicate offense under RICO. Id. at 981.
\end{thebibliography}
A "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this [statute] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[23] Since RICO is not aimed at isolated offenders or incidents though, "proof of two acts of racketeering activity, without more, does not establish a pattern."[24] Instead, a prosecutor must show that the predicate acts are "continuous and interrelated."[25] "It is this factor of continuity plus relationship which combines to produce a pattern."[26] This has become known as the "continuity-plus-relationship-test," under which the government must establish not only a relationship between two or more predicate acts, but also continuity of those acts over time.[27]

To determine what constitutes a relationship, the Supreme Court has turned to Congress' definition of a pattern requirement in Title X of the Organized Crime Control Act. Thus, "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[28] The Supreme Court has defined two different types of continuity: closed-ended continuity and open-ended continuity.[29] Close-ended continuity is demonstrated "by proving a series of related

123. § 1961(5).
125. Holt & Davis, supra note 115, at 981.
127. See H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989) ("RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity."); Holt & Davis, supra note 115, at 982.
130. Id. at 241.
predicates extending over a substantial period of time.”\textsuperscript{131} Open-ended continuity is demonstrated by showing that even though the activity lasted only a short period of time, it poses a threat of extending into the future.\textsuperscript{132}

2. An Enterprise. The next step in prosecuting a RICO case is to show that the defendant “directly or indirectly invested in, maintained an interest in, or participated in, an enterprise.”\textsuperscript{133} An “enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”\textsuperscript{134} This definition is purposefully broad in order to encompass a wide variety of criminal associations. Several courts have validated the vague definition as being necessary based on the “shifting” and “fluid nature” of criminal associations.\textsuperscript{135}

Two broad categories of enterprises have emerged in RICO cases: legal entities and associations-in-fact. Legal entities include both public and private entities and have been found to encompass such organizations as private businesses, sole proprietorships, corporations, labor organizations, and schools.\textsuperscript{136} The relationships among members of a RICO enterprise do not need to be formalized though. Informal relationships among members are sufficient to demonstrate an associated-in-fact enterprise.\textsuperscript{137} “In order to be an association-in-fact, the groups must have a shared purpose, continuity, and unity.”\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{131} Id. at 241-42.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} See supra pp. 308-09 (describing the three main elements of a RICO case).
\item \textsuperscript{135} See, e.g., United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978) ("The shifting definition of 'enterprise' was validated by the courts cited above as necessary in view of the fluid nature of criminal associations.").
\item \textsuperscript{136} Holt & Davis, supra note 115, at 986-87.
\item \textsuperscript{137} Id. at 987.
\item \textsuperscript{138} Id.; see also Boyle v. United States, 129 S. Ct. 2237, 2240 (2009) (holding that proof of an association-in-fact enterprise under RICO requires three "features": (1) purpose; (2) relationships among those associated with the enterprise (unity); and (3) sufficient longevity for the associates to pursue the enterprise's purpose (continuity)).
\end{itemize}
If the enterprise is a legal entity, "the enterprise element is satisfied by the mere proof of the entity's legal existence." Otherwise, in order to show that an enterprise is an association-in-fact, the government must show "a group of persons associated together for a common purpose of engaging in a course of conduct." Although there may be some overlap between the proof used to establish a pattern of racketeering and an enterprise, these are distinct elements that must exist "separate and apart" from one another. "While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other."

It is important to note that a RICO defendant does not need to have a stake in the operation of the enterprise. It is sufficient that the defendant is "an individual outside of the enterprise who assists the enterprise in attaining its goals." The Supreme Court has recognized that "RICO liability is not limited to those with primary responsibility...

139. Holt & Davis, supra note 115, at 988.
141. Id. But see State Farm Mut. Auto. Ins. Co. v. Cohan, No. CV-09-2990 (JS) (WDW), 2009 U.S. Dist. LEXIS 125653, at *19-22 (E.D.N.Y. Dec. 30, 2009) (noting that the Supreme Court's decision in Boyle seems have "loosened the requirement" that the pattern of racketeering activity and the enterprise must be distinct from one another).
142. Id. Some courts have held that the enterprise might need to be something more than just a collection of racketeering acts. See, e.g., United States v. Rogers, 89 F.3d 1326, 1337 (7th Cir. 1996) ("As a separate element, 'enterprise' still requires more than a 'pattern of racketeering activity' . . . the fact that a single individual may engage in a pattern of racketeering activity without, of course, comprising an enterprise adequately illustrates the inherent and logical distinction between these two elements.").
143. Holt & Davis, supra note 115, at 985.
144. Id. at 985 & n.76; see also Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 113 F. Supp. 2d 345, 366 (E.D.N.Y. 2000) ("A defendant is considered to have 'associated with' a RICO enterprise if he engages in the predicate act violations with other members of the enterprise, even if he is not an actual 'insider' of the enterprise."). But cf. Reves v. Ernst & Young, 507 U.S. 170, 185 (1993) ("[Section] 1962(c) cannot be interpreted to reach complete 'outsiders' because liability depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs. Of course, 'outsiders' may be liable under § 1962(c) if they are 'associated with' an enterprise and participate in the conduct of its affairs—that is, participate in the operation or management of the enterprise itself. . . .").
for the enterprise's affairs” and “is not limited to those with a formal position in the enterprise.”  However, in 1993, the Supreme Court held that for a defendant to be found civilly liable under § 1962(c) for “conduct[ing]” or “participat[ing]” in an enterprise, a defendant must pass the “operation or management test.”  The defendant does not need to be in upper management of the enterprise to pass this test; liability can extend to lower level employees who act under the direction of upper management, to persons associated with the enterprise who exert control over it, and to outsiders who participate in the enterprise through its operation or management. The “operation or management” test has since been applied to criminal RICO charges under § 1962(c) as well.

Finally, the Eleventh Circuit recently held that an entity can be both an enterprise under RICO and a victim of the racketeering activity. This is an important development, as it reflects the reality that the enterprise itself is often a passive instrument of corruption.

3. Engaged In or Affecting Interstate Commerce. The final element the government must prove is that the activities charged involved or affected interstate or foreign commerce. “Only a minimal impact upon interstate commerce is necessary to support a RICO conviction.”

145. Reves, 507 U.S. at 179.
146. Id.
147. MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.82 (1995) (citing Reves).
148. See, e.g., United States v. Wilson, 605 F.3d 985, 1018-19 (D.C. Cir. 2010) (revisiting the district court's jury instructions that the defendant could be criminally liable for participating in the conduct of the enterprise even if he was a "lower rung" participant in the enterprise if one or more of the defendants managed or operated the enterprise). Wilson also stands for the premise that the operation or management test applies only to subsection (c) of § 1962 and not to other RICO violations, such as RICO conspiracy under § 1962(d). Id. at 1019-20.
149. United States v. Browne, 505 F.3d 1229, 1273-74 (11th Cir. 2007) (holding that union members, whose organization met the definition of an enterprise that had been co-opted into a racket, were victims of racketeering).
150. See id.
152. United States v. Johnson, 440 F.3d 832, 841 (6th Cir. 2006).
Technically, the enterprise itself and not the predicate acts must be engaged in or affect interstate commerce.153 However, courts have held that while “[t]he interstate commerce nexus must result from the enterprise[, i]t is permissible to find that nexus from acts also charged as predicate acts when those constitute the activities of the enterprise.”154 Simply stated, “the interstate nature of the predicate acts themselves can establish the required connection between the enterprise and interstate commerce.”155 Thus, the government need only prove that the racketeering activities charged had de minimis impact on or connection to interstate commerce.156

4. Conspiracy. RICO also prohibits “any person” from conspiring to violate any provision of § 1962 (i.e., from conspiring to participate in any of the above-mentioned activities).157 This allows the government to prosecute individuals who have not committed or been convicted of any of the underlying predicate offenses.158 To convict a defendant of conspiracy, the government must prove only that the defendant “intend[ed] to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense.”159 As long as “partners in the criminal plan [ ] agree to pursue the same criminal objective,”160 not all participants in the enterprise must “agree to commit or facilitate each and every part of the substantive offense.”161

153. Id.
154. Id. (quoting United States v. Bagnariol, 665 F.2d 877, 893 (9th Cir. 1981)) (internal quotation marks omitted).
155. Id. at 841.
156. Id. (quoting United States v. Qaoud, 777 F.2d 1105, 1116 (6th Cir. 1985)).
158. See Holt & Davis, supra note 115, at 997.
160. Id. at 63.
B. The Strategic Value of RICO

RICO is a commonly used statute among prosecutors. In 2004, the most recent year for which the Bureau of Justice Statistics has issued a comprehensive federal report, there were 3,644 defendants charged with racketeering and extortion.\(^{162}\) This is close to 150% of the number of mortgage fraud investigations pending by the FBI in 2009 and over 350% of the number of new mortgage fraud cases opened in the first four months of 2009.\(^{163}\)

Another of RICO’s strengths is the harsh penalties it imposes, along with its stigma. The U.S. Attorneys’ Manual notes that it is appropriate to use RICO where “RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying charges would not,” and where “[a] RICO prosecution would provide the basis for an appropriate sentence under all the circumstances of the case in a way that prosecution only on the underlying charges would not.”\(^{164}\)

As noted above, each RICO violation is punishable by a fine, imprisonment, or both, as well as asset forfeiture.\(^{165}\) The maximum fine for a RICO charge is “twice the gross profits or other proceeds” from the crime.\(^{166}\) Those amounts may far outweigh the million dollar cap set on most bank, wire, and mail fraud statutes. For example, if a mortgage fraud scheme netted $5 million in profits, a single RICO charge could punish the offender with a $10 million fine, as opposed to an indictment charging bank, wire, and mail fraud, at $1 million each for an aggregate fine of only $3


\(^{163}\) See supra note 15.

\(^{164}\) CRIMINAL DIV., U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-110.310 (1997) (emphasis added). These are only the first two uses detailed in the manual. The manual also notes that it is appropriate to use RICO in situations where the combination of related offenses would otherwise be prosecuted in separate jurisdictions, and where there is a compelling federal government interest to intervene with violations of state law. Id.


\(^{166}\) § 1963(a)(3).
million (which would still leave the offender with $2 million in illegal profits).

The maximum length of imprisonment for a RICO charge is twenty years.\textsuperscript{67} While this is ten years less than the thirty year maximum for bank, wire, or mail fraud, it is important to keep in mind that maximum sentences are often not incurred by offenders. A better indicator of incarceration penalties is to look at the average length of imprisonment for each offense. The Bureau of Justice Statistics states that the average length of imprisonment for any federal offense is 59.7 months.\textsuperscript{168} The average length of imprisonment for fraud, classified in the Compendium of Federal Justice Statistics as the most common form of actionable property offense, is 27.4 months.\textsuperscript{169} The average length of imprisonment for racketeering, classified as the most common public-order offense, is 43.6 months.\textsuperscript{170} Thus, even though the maximum length of imprisonment for RICO charges is not as high as for fraud charges, defendants convicted of RICO offenses are likely to receive longer sentences than those convicted of fraud offenses.

Not only does RICO offer higher fines and longer prison sentences, it also allows for asset forfeiture.\textsuperscript{171} RICO states:

\begin{quote}
Whoever violates any provision of section 1962 . . . shall forfeit to the United States, irrespective of any provision of state law . . . any interest the person has acquired or maintained in violation of section 1962 . . . [including] any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . .
\end{quote}

What this means is that on top of fining offenders twice their proceeds from a crime, the government may also step

\begin{itemize}
\item \textsuperscript{167} § 1963(a).
\item \textsuperscript{168} BUREAU OF JUSTICE STATISTICS, supra note 162, at 2.
\item \textsuperscript{169} Id. at 2, 32.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} 18 U.S.C. § 1963(a)(1)-(3).
\item \textsuperscript{172} Id.; see also James Lieber, \textit{What Cooked the World's Economy? It Wasn't Your Overdue Mortgage}, THE VILLAGE VOICE, Jan. 28, 2009, at 18, http://www.villagevoice.com/2009-1-28/news/what-cooked-the-world-s-economy/ ("The advantage of treating these players like racketeers under federal law is that their ill-gotten gains could be forfeited. The government could recoup these odious . . . debts instead of simply paying them off.").
\end{itemize}
in and seize title assets such as properties or homes that have been obtained as a result of the crime, as well as property such as automobiles, boats, artwork, electronics, etc. that have been purchased with proceeds from the crime.  

Furthermore, RICO allows the government to place pre-trial restraints on such assets.  

75 "The possibility of pre-trial restraints on assets is clearly one of the most powerful tools for a prosecutor under RICO"  

76 as it "guarantee[s] the payment of later judgments . . . where a defendant might otherwise begin to dispose of them or transfer them to conceal them from the government."  

77 This is an important prosecutorial tool that statutes addressing mail, wire, and bank fraud do not currently offer.

Lastly, RICO charges bring with them a certain stigma. RICO charges are often used when prosecutors want to "aggressively" go after a case and "elevate" the charges to a stronger level of prosecution.  

78 It has been noted that even the threat of a RICO indictment may be more likely [than other charges, such as fraud] to cause defendants to settle their case.  

79 "To me it ups the ante," says FBI Special Agent Keith Slotter. "It shows how seriously we take the crime. . . . It's the most serious charge you could go with."

177. Id.
178. Id. at 1058.
179. Id. at 1064 ("This was the $650 million question for the Board of Directors of Drexel Burnham Lambert, which decided that this amount in settlement of all the charges was a fair price to pay to avoid being RICOed.").
C. The Legislative Purpose of RICO and Its Relationship to Mortgage Fraud

Although RICO was originally enacted to combat organized crime,181 "by the mid-1980s, many criminal RICO cases were aimed at a new breed of alleged criminals that had no ties to organized crime." Robert Blakey, a Notre Dame Law School professor who was an aide to Senator McClellan during the drafting of RICO, has defended the broad use of RICO:

Read the language [of RICO]. The language says 'any person.' There's nothing about any person who happens to be a member of the mob, or any persona whose name ends in a vowel. It says any person. Stop and think about it for a minute. It would be obscene if it were otherwise. The statute doesn't apply to blue-collar people only, or no-collar people only. It applies to everybody.183

In a 1970 Congressional Hearing advocating the passage of RICO, Congress found that "organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nations and its citizens." Analyzing the mortgage fraud problem post-2007, this original legislative rationale seems eerily close to what experts now have to say about the after affects of the sub-prime crisis.185

Using RICO to prosecute mortgage fraud is not a radical idea. RICO statutes are being used more and more

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181. Crovitz, supra note 176, at 1051.
182. Id.
183. Id. at 1067-68 (quoting G. Robert Blakey, Nightline: The RICO Act (ABC News Apr. 12, 1989)); see also id. at 1067 ("[T]he rigorous penalties of RICO are just as applicable against an investment banker or accountant as against the head of a Mafia family that runs drugs and commits murder.").
184. Id. at 1052 (quoting 116 CONG. REC. 575-76 (1970)).
185. See, e.g., Press Release, Fed. Bureau of Investigation, supra note 20 ("Mortgage fraud and related securities fraud pose a significant threat to our economy, to the stability of our nation's housing market and to the peace of mind of millions of American homeowners.").
frequently in a "non-traditional" sense. Recently, RICO has been used as the basis of claims in a wide range of cases, addressing issues such as anti-abortion protests, tobacco litigation, police misconduct, and health care fraud.

The reason RICO fits so well with mortgage fraud is that its core elements align almost perfectly with the very definition of mortgage fraud. It has been noted that mortgage fraud "often involves multiple conspirators acting in concert," and that although "one may commit mortgage fraud by a single act, mortgage fraud usually involves a combination of bad acts." "Multiple conspirators acting in concert" easily translates into an association-in-fact enterprise. "A combination of bad acts" turns into a pattern of racketeering. In terms of conspiracy, about eighty percent of all reported mortgage fraud losses involve collaboration or collusion by industry insiders. Collusion, similar to conspiracy, "involves two or more individuals working in unison to implement a fraud." If we are looking for an area of familiar law with harsher penalties that supports the modern and complex crime of mortgage fraud, RICO seems like a natural fit.

D. A Case Study: United States v. Stalnaker Through the Prism of RICO

Let us return to the case of United States v. Stalnaker. In order to better illustrate the prosecution and sentencing

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187. Id. Some of these cases involved the use of civil RICO rather than criminal RICO. Note that the burden of proof in a civil RICO action is less than the burden in a criminal RICO action. The civil burden of proof is preponderance of the evidence, while the criminal burden of proof is beyond a reasonable doubt. MANUAL FOR COMPLEX LITIGATION, supra note 147, § 33.86.
188. Pierson, supra note 21, at 15; see also supra Part I.B.
189. Jacobson & Barnhill, supra note 28, at 9; see also supra Part I.B.
190. Pierson, supra note 21, at 15.
192. FDLE Mortgage Fraud Assessment, supra note 89, at 8.
193. FFIEC White Paper, supra note 9, at 9.
194. 571 F.3d 428 (5th Cir. 2009).
of a mortgage fraud case under RICO, we will explore *Stalnaker* as if its defendants had been charged with RICO violations.\(^{195}\)

Instead of being charged with bank fraud, wire fraud, conspiracy to commit bank fraud, conspiracy to commit wire fraud, and conspiracy to commit money laundering, as the defendants in the actual *Stalnaker* case were,\(^{196}\) in a RICO case, these charges would merely act as the predicate offenses.\(^{197}\) Under RICO, the *Stalnaker* defendants would have been charged with (i) conducting or participating in an enterprise engaged in or affecting interstate commerce through a pattern of racketeering activity; (ii) acquiring or maintaining an interest in an enterprise engaged in or affecting interstate commerce through a pattern of racketeering activity; and (iii) using or investing income derived from a pattern of racketeering activity to establish the operation of an enterprise whose activities involved or affected interstate commerce.\(^{198}\) In order to meet the burden of proof for these offenses, a prosecutor would have argued the following: (i) the defendants' actions constituted a pattern of racketeering activity; (ii) the defendants participated in an enterprise; and (iii) these actions involved or affected interstate commerce.

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195. See supra Part II.B.


197. However, charging RICO or a RICO conspiracy, or both, does not preclude the government from also prosecuting substantive mail, wire, or bank fraud violations. See Org. Crime & Racketeering Section, Criminal Div., U.S. Dep't of Justice, Criminal RICO: 18 U.S.C. §§ 1961-1968, A Manual for Federal Prosecutors 359 (5th ed. 2009), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/rico.pdf (“RICO was designed to augment existing civil and criminal remedies, and therefore, RICO, as a general rule is not pre-empted by other, even more specific statutes.”); see also Org. Crime & Racketeering Section, Criminal Div., U.S. Dep't of Justice, Civil RICO: 18 U.S.C. §§ 1961-1968, A Manual for Federal Attorneys 273 (2007), available at http://www.justice.gov/criminal/foia/docs/2007civil-rico.pdf (“The legislative history to RICO likewise firmly establishes that Congress adopted the civil and criminal remedies of RICO to add to, not subtract from, existing remedies.”). But as the purpose of this Comment is to point out the shortcomings of these statutes and to focus on the strength of RICO charges instead, the charging of separate violations in the hypothetical version of the *Stalnaker* case will not be discussed.

198. See supra pp. 308-09.
1. A Pattern of Racketeering Activity. As mentioned above, the original charges in this case would provide the predicate offenses for a RICO violation. Racketeering activity is established with a showing of the predicate offenses of wire fraud, bank fraud, and money laundering.\(^{199}\) Since the commission of these predicate offenses was already proven in the original Stalnaker case, we will not explore them further.\(^{200}\) Once it has been shown that two or more predicate offenses were committed, the next step is to demonstrate a pattern of racketeering activity through the continuity-plus-relationship test.\(^{201}\)

"[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission [. . .]."\(^{202}\) In Stalnaker, the defendants worked together in order to commit mortgage fraud.\(^{203}\) They had a common purpose of submitting fraudulent loan applications for fraudulently appraised properties in order to secure illegitimate proceeds.\(^{204}\) The same twelve defendants helped perpetuate this scheme multiple times; at least five separate properties were flipped over a span of five months.\(^{205}\)

Each time, the scheme was committed with similar methods. Lucas would recruit straw buyers; the straw buyers would submit fraudulent paperwork prepared by Cox; Stalnaker and others would fraudulently appraise the properties; and finally, Castle would close on the properties and release the loan proceeds.\(^{206}\) The government's Responsive Brief notes that "Lucas would name the price


\(200\). See Responsive Brief of United States at 8-25, United States v. Stalnaker, 571 F.3d 428 (5th Cir. 2009) (No. 07-60247) [hereinafter Responsive Brief].

\(201\). See supra p. 311.


\(203\). See 571 F.3d at 428.

\(204\). See id.

\(205\). Responsive Brief, supra note 200, at 21-22.

that he needed and Stalnaker regularly delivered." Also, the trial court found that "this was a malicious intentional chain of events." A pattern was established here by the defendants and recognized by the trial court, thus, the relationship prong was met.

The defendants demonstrated close-ended continuity by committing "a series of related predicate [acts] extending over a substantial period of time." As noted above, the Stalnaker defendants flipped at least five separate properties over a span of five months. This was not a single, isolated act by the defendants, but rather a continuous plan to defraud. Open-ended continuity was also present in the Stalnaker case. If the defendants had not been caught, they would have continued their illegal scheme. This assertion is supported by the government's Responsive Brief, noting that Castle was charged with possessing "the intent to promote the carrying on of a specified unlawful activity." Where both forms of continuity are met, along with the relationship prong and two or more predicate offenses, a pattern of racketeering has been established.

2. An Enterprise. The defendants in the Stalnaker case demonstrated an association-in-fact. Since each of the defendants operated at a different point in the scheme, and did not all work within the same company (e.g., Countrywide), there was no formal legal entity. However, there was "a group of persons associated together for a common purpose of engaging in a course of conduct," i.e.

207. Responsive Brief, supra note 200, at 20 (internal quotation marks omitted) (emphasis added).
208. Id. at 63 (emphasis added).
211. Id. at 19 (internal quotation marks omitted).
212. It was well established in the facts of this case that the closing attorney, Kimberly Castle, worked as an agent of Countrywide Financial. Castle used Countrywide as a platform for launching and processing the fraudulent loan applications. See United States v. Stalnaker, 571 F.3d 428, 435-37 (5th Cir. 2009). The straw buyers and appraisers in the mortgage fraud scheme did not have any known affiliation with Countrywide and operated independently of the organization, but with Castle's full knowledge. Id.
to commit mortgage fraud for profit. The Fifth Circuit referenced the idea of an association-in-fact by noting that Lucas "orchestrated an elaborate mortgage fraud operation" and referring to its participants as "members of the conspiracy."\textsuperscript{214} The government referenced the association-in-fact in its Responsive Brief by referring to it as "Lucas's organization."\textsuperscript{215} This was not a one-time event, but rather a continuous "operation" or "organization" in which the defendants coordinated their individual roles and created a "scheme to defraud" Countrywide and collect the illegitimate loan proceeds as profits.\textsuperscript{216} Since the defendants have demonstrated a common purpose, a unified relationship, and continuity, an enterprise has been demonstrated.

Recall that a RICO defendant does not need to have a stake in the operation of the enterprise; it is sufficient that the defendant is "an individual outside of the enterprise who assists the enterprise in attaining its illegal goals."\textsuperscript{217} This is an important rule of law when it comes to mortgage fraud cases because individual participants of a scheme can be held responsible for the actions of the enterprise, even if they were not involved every step of the way. In the Stalnaker case, the government noted that "Stalnaker need not have known every aspect of the fraud, including Lucas's use of a document counterfeiter or his recruitment meetings, to be culpable for his part in the fraud."\textsuperscript{218} Participants who play only a minimal role, such as straw buyers, can still be held responsible for the actions of the enterprise.\textsuperscript{219}

3. Engaged In or Affecting Interstate Commerce. "[T]he interstate nature of the predicate acts themselves [here] establish the required connection between the enterprise

\textsuperscript{214} Stalnaker, 571 F.3d at 432.
\textsuperscript{215} Responsive Brief, supra note 200, at 40.
\textsuperscript{216} See id. at 10.
\textsuperscript{217} Holt & Davis, supra note 115, at 985 & n.76; see also supra Part III.A.4.
\textsuperscript{218} Responsive Brief, supra note 200, at 23 (internal citations omitted).
\textsuperscript{219} But see supra notes 146-48 and accompanying text (discussing the operation or management test for liability under § 1962(c)).
and interstate commerce."\textsuperscript{220} The predicate act of wire fraud involves interstate commerce by its very statutory definition: wire fraud is committed when a person or persons,

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, transmits or causes to be transmitted by means of wire, radio, or television communication \textit{in interstate or foreign commerce}, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice \ldots \textsuperscript{221}

In the \textit{Stalnaker} case, Castle faxed fraudulent HUD-1 forms to Countrywide and sent other fraudulent loan application documents via wire communication.\textsuperscript{222} The enterprise thus used "interstate wires to complete the mortgage transactions."\textsuperscript{223}

The underlying charges of bank fraud in this case are in reference to the mortgage lenders who were defrauded by the enterprise. "Both entities involved here—Countrywide Home Loans, Inc., the principal operating subsidiary of Countrywide Financial Corporation, and the Alliance Funding mortgage subsidiary of Superior Bank, FSB—fall within the scope of the bank fraud statute because of the close association between the mortgage subsidiary and the financial institution parent."\textsuperscript{224} Countrywide's "very name alone signals its status as a national lender."\textsuperscript{225} Thus, a successful scheme to defraud Countrywide in one state could affect its financial ability to lend in other states as well. The same goes for Superior Bank, which also serves a multi-state constituency.\textsuperscript{226}

\begin{footnotesize}
\begin{itemize}
  \item 220. United States v. Johnson, 440 F.3d 832, 841 (6th Cir. 2006) (citing United States v. Bagnariol, 665 F.2d 877, 893 (9th Cir. 1981)).
  \item 222. Responsive Brief, \textit{supra} note 200, at 15-16.
  \item 223. \textit{Id}. at 17.
  \item 224. \textit{Id}. at 73.
  \item 225. \textit{Id}. at 24.
  \item 226. See \textit{SUPERIOR BANK}, http://www.superiorbank.com (last visited Nov. 27, 2010).
\end{itemize}
\end{footnotesize}
Money laundering is linked to interstate commerce in a similar way to wire fraud. "Money is commonly paid over long distances by means of wire transfer." The enterprise "used some of the profits from the sale to pay buyers for their participation," and reinvested the rest of "the proceeds of earlier transactions to promote the ongoing scheme." The specific movement of these funds is not detailed in the court documents, but it can be reasonably inferred that the funds were laundered through some sort of wire transfers, which in turn involved interstate commerce.

4. Conspiracy. If any of the twelve defendants did not fulfill the above-mentioned elements, they could still be prosecuted under RICO's conspiracy provision. These defendants would be charged with conspiring to participate in a pattern of racketeering activity. A prosecutor would then have to prove that the defendants "intend[ed] to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." This is especially important in Stalnaker, and is applicable to mortgage fraud prosecutions in general, since many participants in such schemes may not know the full extent to which the enterprise is operating. Often, participants such as straw buyers are involved in the scheme on a very elementary level, and are unaware of the additional frauds being perpetrated above them.

The Stalnaker straw buyers "agree[d] to pursue the same criminal objective" as the rest of the mortgage fraud participants. All twelve defendants participated in the scheme in order to reap illegal profits. The fact that the

227. Responsive Brief, supra note 200, at 16 (quoting United States v. Mann, 493 F.3d 484, 493 (5th Cir. 2007)).
228. United States v. Stalnaker, 571 F.3d 428, 433 (5th Cir. 2009).
230. There are only general references to how the funds were laundered; no specific transactions are cited. See generally Stalnaker, 571 F.3d 428; Responsive Brief, supra note 200; Reply Brief of Appellee/Appellant Kimberly A. Castle, Stalnaker, 571 F.3d 428 No. 07-60079 (5th Cir. Dec. 28, 2007).
233. Salinas, 522 U.S. at 63.
straw buyers did not “agree to commit or facilitate each and every part”\(^{234}\) of the scheme, or that they were not aware of “each and every” detail, does not excuse them from criminal liability. Under RICO’s conspiracy provision, any defendant who agreed to participate in the mortgage fraud scheme could be found guilty of conspiracy.\(^{235}\)

5. Sentencing. While the maximum length of imprisonment for each RICO offense is twenty years, judges are afforded broad discretion in determining sentences.\(^{236}\) This makes the length of sentences imposed under RICO difficult to predict.

However, for the sake of making an academic comparison of the Stalnaker case under RICO as compared to traditional fraud prosecution strategies, the following approximate sentences have been derived mathematically by: (i) comparing a given defendant’s actual sentence in the case to the average fraud sentence reported by the Federal Bureau of Justice Statistics, and (ii) applying that ratio to the average racketeering sentence reported by the Federal Bureau of Justice Statistics.\(^{237}\) Under such calculations, Lucas’s sentence for imprisonment would jump from 168 months (14 years) to 267.3 months (22.3 years). This represents a 99.3 month (8.3 year) increase from Lucas’s original sentence. Castle’s sentence for imprisonment would jump from 48 months (4 years) to 76.4 months (6.4 years). This represents a 28.4 month (2.4 year) increase from Castle’s original sentence. Stalnaker’s sentence for imprisonment would jump from 28 months (2.3 years) to 44.5 months (3.7 years). This represents a 16.5 month (1.4 year) increase from Stalnaker’s original sentence. For a

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\(^{234}\) Holt & Davis, supra note 115, at 997.

\(^{235}\) Remember that the operation or management test for liability is for § 1962(c) only and explicitly does not apply to RICO conspiracy charges. See United States v. Wilson, 605 F.3d 985, 1019-20 (D.C. Cir. 2010).

\(^{236}\) See United States v. Booker, 543 U.S. 220, 233 (2005); U.S. SENTENCING GUIDELINES MANUAL (2009); see also Lisa M. Seghetti & Alison M. Smith, CONG. RESEARCH SERV., RL 32766, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS 9 (June 2007) (“[T]he Court affirmed the broad sentencing discretion . . . judges possess under Booker and stated that they may impose non-guideline sentences by departing or applying § 3553(a).”).

more detailed explanation of how comparable sentences were calculated, as well as to see the rest of the converted sentences under this method, see the table below.\footnote{238}

RICO also calls for fines of "twice the gross profits or other proceeds" from the crime.\footnote{239} In this case, the total loss was estimated to be $1,450,388.\footnote{240} Twice this amount is $2,900,776, which represents the maximum amount each defendant could be fined under RICO. Once again, it is difficult to estimate the amount that a judge or jury would impose on each defendant. Instead of trying to come up with a formula to approximate the average fine of each defendant under RICO, I will just note that the aggregate amount paid by all twelve defendants in the original case was $5,819,358.\footnote{241} This is less than 20\% of the maximum fines that could be ordered under RICO.\footnote{242}

Also under RICO, the government would have been able to seize any assets belonging to the enterprise.\footnote{243} This would include any homes still owned by the defendants that had not yet been flipped or resold at the time of the indictment, any profits from the scheme, and any property purchased with profits derived from the scheme. The government would have been able to place a pre-trial restraint on such assets back in February 2006 when the indictment was

\begin{table}[h]
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\begin{tabular}{|l|c|c|c|c|c|}
\hline
Defendant & Original & Avg. & Original & Avg. & *Comparable \ 
 & Prison & Fraud & Prison/Avg. & Racketeering & Racketeering \ 
 & Sentence & Sentence & Fraud & Sentence & Sentence \ 
\hline
Lucas & 168 & 27.4 & 6.13x & 43.6 & 267.3 \ 
Castle & 48 & 27.4 & 1.75x & 43.6 & 76.4 \ 
Stalnaker & 28 & 27.4 & 1.02x & 43.6 & 44.5 \ 
Champ & 9 & 27.4 & 0.33x & 43.6 & 14.4 \ 
Weary & 19 & 27.4 & 0.69x & 43.6 & 30.1 \ 
Fairley & 7 & 27.4 & 0.26x & 43.6 & 11.3 \ 
\hline
\end{tabular}
\caption{Mathematical calculations for comparable sentences are as follows (in months):}
\end{table}

\footnote{238}{Mathematical calculations for comparable sentences are as follows (in months):}


\footnote{240}{United States v. Stalnaker, 571 F.3d 428, 441 (5th Cir. 2009).}

\footnote{241}{See Sentencing Press Release, supra note 62.}

\footnote{242}{This number was calculated by taking the maximum fine of $2,900,776 and multiplying it by each of the twelve defendants charged in the Stalnaker case.}

\footnote{243}{§ 1963(a)(1)-(3).}
filed, and the assets would have remained frozen until the case was resolved in February 2007. This would have prevented the defendants from liquidating or disposing of any of the proceeds they possessed in the year that lapsed between the indictment and sentencing.244

Hopefully, this illustration has provided readers a more comprehensive idea of how RICO can be used to prosecute acts of large-scale mortgage fraud. Looking at the individual elements that make up the charges, as well as the individual facts of the Stalnaker case, it is easy to see RICO as a natural fit to prosecute and deter large-scale mortgage fraud violations.

CONCLUSION

I recognize that in practice, it is often easier to stick to the status quo than to branch out and try new, non-traditional prosecution strategies. However, in light of the role that mortgage fraud played in the recent financial crisis, we need to reconsider the traditional prosecution strategies that have been used in the past and are still being used today. We must ask ourselves: have mortgage fraud perpetrators been sentenced harshly enough for the damage they caused? Are we deterring these perpetrators from causing similar damage in the future? And are the enforcement and prosecution mechanisms currently in place ready to take on the influx of mortgage fraud cases likely in the coming years?

Based on the arguments made in this Comment, the answer is “no.” We are not sentencing mortgage fraud perpetrators harshly enough when compared to the damage they have caused to our economy. These perpetrators have not been sufficiently deterred from committing similar acts of fraud in the future, and the current mechanisms in place to combat mortgage fraud are insufficient to combat the likely volume of cases in the coming years.245

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244. There is no mention in the case or the supporting briefs that the defendants tried to liquidate assets after they had been indicted. I mention the option of a pre-trial restraint on assets only to further illustrate the advantages of RICO over traditional mortgage fraud prosecution strategies.

245. See supra Parts I.A, II.C.
Implementing the wide-scale changes suggested in this Comment on a national level will not happen overnight. Instead, I would suggest that the use of RICO to prosecute large-scale mortgage fraud be implemented on a trial level in five to ten of the top mortgage fraud states. These states include Arizona, California, Colorado, Florida, Georgia, Illinois, Maryland, Massachusetts, Michigan, Missouri, New York, Pennsylvania, Rhode Island, Texas, Virginia, and the District of Columbia.\textsuperscript{246}

It is important to note that all RICO prosecutions by U.S. attorneys must be approved by the Department of Justice.\textsuperscript{247} The Department of Justice issues \textit{Guidelines for RICO Prosecutions} that “set[ ] out rigid, national rules of prosecutorial discretion.”\textsuperscript{248} The U.S. Attorneys’ Manual states that:

Despite the broad statutory language of RICO and the legislative intent that the statute “... shall be liberally construed to effectuate its remedial purpose” it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist will result in the approval of a RICO charge.\textsuperscript{249}

Some readers may view this as a setback in the proposed prosecution strategy. However, “[t]he use of RICO in the 1980s by federal prosecutors, especially by former U.S. Attorney for Manhattan, Rudolph Giuliani, against alleged white-collar criminals,”\textsuperscript{250} including wealthy oil trader Marc Rich, investment banking firm Drexel Burnham Lambert, and the now infamous Michael Milken, has greatly extended RICO’s reach.\textsuperscript{251} In fact, “there is

\begin{footnotesize}
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\item \textsuperscript{246}2008 Mortgage Fraud Report, supra note 4; JAMES ET AL., supra note 2, at 4.
\item \textsuperscript{247}Crovitz, \textit{supra} note 176, at 1056; \textit{see also} CRIMINAL RICO: A MANUAL FOR FEDERAL PROSECUTORS, \textit{supra} note 197, at 17-19
\item \textsuperscript{248}Crovitz, \textit{supra} note 176, at 1056.
\item \textsuperscript{249}Id. at 1057 (quoting CRIMINAL DIV., U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-100.200 (1988)); \textit{see also} UNITED STATES ATTORNEYS’ MANUAL, \textit{supra} note 164, § 9-110.200 for the most recent update on this guidance.
\item \textsuperscript{250}Crovitz, \textit{supra} note 176, at 1056.
\item \textsuperscript{251}Id. at 1056-58.
\end{itemize}
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reason to wonder whether these Guidelines remain in effect or are in abeyance, gathering dust..."

A more recent sign that these guidelines will not prevent prosecutors from imposing RICO violations on mortgage fraud offenders is the March 2009 indictment of defendant Darnell Bell. Bell and twenty-three others were charged with "conspiracy to conduct enterprise affairs through a pattern of racketeering activity (RICO)." The charged racketeering activity all stems from an extensive mortgage fraud scheme based in San Diego, California, that involved 220 properties with a total sales price of more than $100 million dollars. The case is currently being prosecuted by two Assistant U.S. Attorneys from the Southern District of California.

The Bell case was not explored in detail in this Comment because defendant Darnell Bell, the leader of the alleged mortgage fraud scheme, is "a documented member" of the Lincoln Park street gang. This creates a gray area, as it muddles the fine lines between other organized crime activities, the scope of RICO statutes, and mortgage fraud enterprises. However, it provides a promising ending to this Comment as it demonstrates the willingness of U.S. attorneys to experiment with non-traditional prosecution strategies under severe circumstances (i.e. the over $100 million in losses caused by mortgage fraud in the Bell case). "This [is] the first known time in the country that defendants in an alleged mortgage fraud scheme have been charged in a RICO conspiracy."

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252. Id. at 1057-58.
255. Id.
256. Id.
257. Id.
258. Bennett, supra note 180.