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NOTES

THE CONFLICT OVER RICO'S PRIVATE TREBLE DAMAGES ACTION

INTRODUCTION

On three successive days in July 1984, the Court of Appeals for the Second Circuit issued decisions¹ circumscribing the private civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO).² RICO allows a private plaintiff to recover treble damages and reasonable attorney's fees for injuries to business or property "by reason of a violation" of the Act's substantive prohibitions.³ In *Sedima, S.P.R.L. v. Imrex Co.*,⁴ the most important of the decisions, the Second Circuit imposed two limitations on the civil RICO action. First, the court imposed a standing requirement under which the plaintiff must allege a racketeering injury, and not merely an in-

¹ See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985); *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-654). *But see* *Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984) (panel refused to follow approach taken in *Sedima* and *Bankers Trust*), *petition for cert. filed*, 53 U.S.L.W. 3343 (U.S. Oct. 14, 1984).

² 18 U.S.C. §§ 1961-1968 (1982). Section 1962 contains RICO's substantive prohibitions. Section 1962(a) prohibits use of income derived from a pattern of racketeering activity to acquire or establish an enterprise affecting interstate commerce. Civil RICO plaintiffs usually bring their claims under §§ 1962(b) and 1962(c):

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1964(c) provides for a private treble damages action. It states:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Because §§ 1964(a) and 1964(b) give the United States the right to sue for divestiture, dissolution, reorganization, or injunctive relief, the term "civil RICO" may refer to § 1964 in its entirety. For the purposes of this Note, however, the term "civil RICO" will refer to the private right of action under § 1964(c), unless otherwise indicated.

³ 18 U.S.C. § 1964(c).

⁴ 741 F.2d at 482.

jury resulting directly from the predicate illegal acts themselves.⁵ Second, the court created a prior criminal conviction requirement. Under this requirement, the defendant must have been previously convicted of the illegal activities alleged to constitute the pattern of racketeering activity.⁶

The Second Circuit's recent decisions restrict the private civil RICO action to a degree unprecedented at the federal appellate level. Although many federal courts have noted the recent "explosion of civil RICO litigation,"⁷ they have not agreed on the proper judicial response.⁸ In an opinion expressly rejecting the *Sedima* court's reasoning, for example, the Seventh Circuit recently refused to place judicial limitations on RICO's plain language, despite the increasing tendency to apply RICO to typical business and securities fraud cases.⁹ In *Haroco, Inc. v. American National Bank & Trust Co.*¹⁰ the Seventh Circuit concluded that any restrictions of the private civil RICO action should be made, if at all, by Congress.¹¹ The United States Supreme Court has granted certiorari in *Sedima* and *Haroco* to resolve the present conflict.¹²

After briefly summarizing RICO's provisions and legislative history, this Note examines *Sedima* and *Haroco*. It then analyzes a number of suggested civil RICO limitations and outlines the judicial responses to each.

⁵ *Id.* at 494-95. The predicate illegal acts are listed in 18 U.S.C. § 1961(a) (1982). See *infra* note 17 and accompanying text.

⁶ *Sedima*, 741 F.2d at 496.

⁷ See *id.* at 486.

⁸ The Seventh Circuit in *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 902 (1985), expressly rejected both *Sedima* and *Bankers Trust*. The Seventh Circuit had previously refused to place standing limitations on civil RICO plaintiffs. See *Schacht v. Brown*, 711 F.2d 1343, 1356-57 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983). The court held in *Schacht* that "we do not see how any legitimate or principled tailoring of RICO could be effected without impairing the broad strategy embodied in the act." 711 F.2d at 1356. Even the Second Circuit is sharply divided on the racketeering injury issue. Compare *Furman*, 741 F.2d at 525 ("neither the language of the statute nor its legislative history imposes such a requirement") with *Sedima*, 741 F.2d at 494-95 (imposing such a limitation).

The Seventh Circuit has also rejected the requirement of a prior criminal conviction. See *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983). The Sixth Circuit has supported this position. See *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) ("Congress has created a civil remedy that is independent of criminal proceedings under § 1963.").

⁹ *Haroco*, 747 F.2d at 384.

¹⁰ 747 F.2d 384 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 902 (1985).

¹¹ *Id.* at 392, 399.

¹² 105 S. Ct. at 901, 902.

I
THE RICO STATUTE

The Racketeer Influenced and Corrupt Organizations Act (RICO), title IX of the Organized Crime Control Act of 1970, became law on October 14, 1970. RICO prohibits four activities by any person: using income derived directly or indirectly from a pattern of racketeering activity to acquire an interest in an enterprise engaged in or affecting interstate commerce;¹³ directly or indirectly acquiring or maintaining an interest in an interstate enterprise through a pattern of racketeering activity;¹⁴ conducting or participating in the conduct of the affairs of an interstate enterprise through a pattern of racketeering activity;¹⁵ or conspiring to violate any of these provisions.¹⁶

Congress vaguely defined RICO's rather amorphous terms in 18 U.S.C. § 1961. The predicate racketeering activities set forth in section 1961(1) include various felonies under state law as well as federal offenses, including mail, wire, and securities fraud.¹⁷ Section 1961(4) defines "enterprise" to include any individual, legal entity, or any group of individuals "associated in fact." The Supreme Court in *United States v. Turkette*¹⁸ broadly construed "enterprise" to include wholly illegitimate businesses as well as legitimate concerns infiltrated by organized crime.¹⁹ Section 1961(5) defines "pattern of racketeering activity" to require at least two acts of racketeering activity, the first occurring after RICO's effective date and the last occurring within ten years of the first. *Turkette* emphasized that the plaintiff must prove both the existence of an enterprise and a pattern of racketeering activity as separate elements of RICO.²⁰

RICO provides for three types of remedies: injunctive and restrictive relief;²¹ criminal penalties;²² and damages through a pri-

¹³ 18 U.S.C. § 1962(a) (1982).

¹⁴ *Id.* § 1962(b).

¹⁵ *Id.* § 1962(c).

¹⁶ *Id.* § 1962(d).

¹⁷ "Racketeering activity" includes any "act which is indictable" as mail fraud, *id.* § 1341, or wire fraud, *id.* § 1343; *see id.* § 1961(1)(B). These are the predicate crimes commonly relied on in business fraud cases. 18 U.S.C. § 1961(1)(D) includes as a racketeering activity "any offense involving . . . fraud in the sale of securities." 18 U.S.C. § 1961(1)(A) also includes various state felonies as racketeering activities.

Section 1961 also contains several definitions of terms used in § 1962 ("Prohibited activities"). *See infra* text accompanying notes 18-20.

¹⁸ 452 U.S. 576 (1981).

¹⁹ *Id.* at 580-93. RICO's application to legitimate enterprises infiltrated by organized crime was established before *Turkette*. *See, e.g.,* *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978) (Pennsylvania Bureau of Cigarette and Beverages Taxes qualified as RICO enterprise).

²⁰ *See Turkette*, 452 U.S. at 583.

²¹ 18 U.S.C. § 1964(a) (1982).

vate right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter."²³ Section 1964(c) provides for the recovery of treble damages plus reasonable attorney's fees.²⁴ The language of this private civil remedy is borrowed from section 4 of the Clayton Antitrust Act.²⁵

Congress designed RICO as a broad measure to alleviate the ill effects of organized crime on the economy and society. Congress proposed to "eradicat[e] . . . 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."²⁶ Congress recognized that profits derived from illegal endeavors "are increasingly used to infiltrate and corrupt legitimate business" and that organized crime's activities "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, [and] interfere with free competition."²⁷ Congress was concerned not only with the economic effects of organized crime, but also with its deleterious effects on democratic processes, domestic security, and the general welfare.²⁸ Congress mandated that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes."²⁹

II

THE CASES

Two cases recently decided in the Second and Seventh Circuits illustrate the judicial conflict concerning the scope of RICO's civil remedy. In *Sedima, S.P.R.L. v. Imrex Co.*,³⁰ a panel of the Second Cir-

²² *Id.* § 1964(b).

²³ *Id.* § 1964(c). Section 1964(d) estops a defendant convicted of a criminal RICO violation "from denying the essential allegations of the criminal offense in [a] subsequent civil proceeding brought by the United States."

²⁴ *Id.* § 1964(c).

²⁵ The Clayton Act contains a private right of action almost identical in language to that of RICO. See 15 U.S.C. § 15(a) (1982). See also *Organized Crime Control: Hearings on S. 30 Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 543-44 (1970) [hereinafter cited as *House Hearings*] (testimony of ABA president Edward L. Wright) (discussing borrowing of Clayton Act language); *id.* at 548 (ABA proposal for private damage provision based upon concept of § 4 of Clayton Act).

²⁶ 18 U.S.C. § 1961 note (1982) (congressional Statement of Findings and Purposes). See generally Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-21 (1980) (tracing RICO's legislative history).

²⁷ 18 U.S.C. § 1961 note (Congressional Statement of Findings and Purpose).

²⁸ *Id.*; see *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516 n.6 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-654).

²⁹ 18 U.S.C. § 1961 note (1982) (liberal construction provision).

³⁰ 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985).

cuit adopted a narrowing approach to the civil remedy. In *Haroco, Inc. v. American National Bank & Trust Co.*,³¹ the Seventh Circuit rejected the *Sedima* court's opinion and gave the RICO civil action a broad reading. The cases typify alternative positions now taken in the debate over civil RICO: one position advocating a narrowing construction, the other a broad reading of the statute. A critical examination of each opinion's reasoning therefore provides a strong basis for resolving the more general conflict over the proper scope of civil RICO.

B. *Sedima, S.P.R.L. v. Imrex Company, Inc.*

Sedima involved typical business fraud. The plaintiff, *Sedima*, imported electronic parts from the defendant-exporter, *Imrex*, for a NATO subcontractor. *Sedima* alleged that *Imrex*'s officers had prepared fraudulent business orders and invoices. *Sedima* also alleged that *Imrex*'s officers fraudulently received money belonging to the *Sedima-Imrex* joint venture. *Sedima* joined breach of contract and unjust enrichment counts with claims under RICO. The district court dismissed the RICO claims for failure to allege a "RICO-type injury."³² The Second Circuit affirmed, requiring the plaintiff to allege, first, a "racketeering injury," and, second, the defendant's prior criminal conviction of the predicate acts constituting the pattern of racketeering activity.³³

The majority opinion in *Sedima* ultimately rests on the view that "[g]iven the general purpose of the RICO legislation, the uses to which private civil RICO has been put have been extraordinary, if not outrageous."³⁴ The majority determined that Congress did not anticipate RICO's use for "garden variety" fraud and surmised that Congress would have discussed this use in greater depth had it been contemplated.³⁵

The majority in *Sedima* began their analysis with a review of the Act's legislative history. They emphasized that because the House added the private civil action under RICO after the bill left the Senate, the legislative history of RICO in the Senate could not shed any light on the private civil action. The majority found little commentary on the civil action in the records of the House proceedings. Form the dearth of specific legislative history, they concluded that "Congress was not aware of the possible implications of section

³¹ 747 F.2d 384 (7th Cir. 1984), cert. granted, 105 S. Ct. 902 (1985).

³² *Sedima*, 741 F.2d at 485. See *infra* notes 160-86 and accompanying text.

³³ *Id.* at 496.

³⁴ *Id.* at 487.

³⁵ *Id.* at 492.

1964(c) [the private civil action].”³⁶

In order to counter the unanticipated explosion of civil RICO cases and follow imputed legislative intent, the majority imposed a limitation on the private action: the racketeering injury requirement. The court stated that the language of the civil RICO provisions, requiring an injury “by reason of a violation” of RICO’s substantive prohibitions, implicitly mandated “that plaintiffs allege injury caused by an activity which RICO was designed to deter.”³⁷

The majority sought to rebut two arguments against imposing a racketeering injury requirement. First, the court conceded that, although RICO’s civil remedy is patterned after section 4 of the Clayton Act, which requires the plaintiff to prove a “competitive injury,”³⁸ Congress probably did not intend to impose the full panoply of antitrust standing requirements on prospective civil RICO litigants.³⁹ The majority nevertheless argued for an “analogous standing barrier . . . to RICO”—the requirement of a “racketeering injury.”⁴⁰ Second, the majority attempted to counter the contention that the term “racketeering injury” could not be precisely defined.

The court sought to distinguish a racketeering injury from a “competitive injury.”⁴¹ According to the majority, a racketeering injury is an “injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter.”⁴² Though disavowing an antitrust competitive injury requirement, the *Sedima* majority would require the plaintiff in a civil RICO action to demonstrate activity by “mobsters” that causes “systemic harm to competition and the market, and thereby injure[s] investors and competitors.”⁴³

³⁶ *Id.* at 492; *see infra* note 88 (improper to derive positive conclusion from silence in legislative history); *see also infra* note 119 (probable Senate awareness of inclusion of private treble damages action).

³⁷ *See Sedima*, 741 F.2d at 494.

³⁸ *See id.* at 494-96, 496 n.41; *infra* note 41.

³⁹ *Sedima*, 741 F.2d at 495 (“It would no doubt violate both the congressional purpose and common sense to require RICO plaintiffs to allege an injury of the type the *antitrust* laws were designed to prevent to maintain a RICO suit.”) (emphasis in original).

⁴⁰ *Id.* (emphasis omitted) (“By borrowing language [from § 4 of the Clayton Act] imposing a standing limitation, it is reasonable to believe that Congress indicated a desire to have an analogous standing limitation imposed in RICO.” (footnote omitted)).

⁴¹ The “competitive injury” requirement is an antitrust standing limitation focusing on market efficiency rather than business injury. *See id.* at 496 n.41 (citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977)).

⁴² *Id.* at 496. This definition derives partially from analogy to the Supreme Court’s definition of an “antitrust injury” as an “injury of the type the antitrust laws were intended to prevent.” *See id.* at 494-95 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

⁴³ *Id.* at 495-96.

In *Sedima* the Second Circuit also imposed a prior criminal conviction requirement. The court began its analysis by summarily dismissing most of the contrary case law as containing "little or no analysis."⁴⁴ The majority then analyzed the statutory language. First, they compared the language of RICO's private right of action with that of the private civil action under the Clayton Act⁴⁵ and suggested that "violation" in RICO means "conviction," because "violation" is not used in the Clayton Act, where no prior conviction is required.⁴⁶ The majority next looked to RICO's definition of "racketeering activity,"⁴⁷ focusing on the words "act or threat," "indictable [acts]," and "offense."⁴⁸ They noted that "[a]ll these terms . . . speak along criminal rather than civil lines."⁴⁹ Moreover, Congress could not have "intended to permit proof of 'willful' violations by only a preponderance of the evidence" in the securities fraud context.⁵⁰ A civil burden of proof, the majority argued, would create a constitutional problem, because

[r]eading private RICO suits not to require criminal convictions would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation "racketeer," authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law.⁵¹

This interpretation would make "every private plaintiff . . . his own one-person grand jury."⁵²

Second, the majority discussed legislative intent. After conceding that the statute's words "are ambiguous and could be construed to relate to underlying conduct," the court decided that Congress intended RICO to punish only conduct "which explicitly has already been found criminal."⁵³ Because such conduct cannot be proven in

⁴⁴ *Id.* at 496. The majority distinguished *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), on the ground that that case dealt with the government's right to sue for an injunction in the absence of a criminal conviction. See *infra* notes 196-200 and accompanying text.

⁴⁵ *Sedima*, 741 F.2d at 498-99. RICO provides a right of action for any person injured in his business or property "by reason of a violation of § 1962." 18 U.S.C. 1964(c). The Clayton Act grants a right of action to a person injured "by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (1982).

⁴⁶ *Sedima*, 741 F.2d at 498-99. *But see Victims of Crime: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 329 (1972) [hereinafter cited as *Victims of Crime*] (American Law Division of Library of Congress rejecting this reading of "violation"); *infra* note 208 and accompanying text.

⁴⁷ 18 U.S.C. § 1961(1).

⁴⁸ *Sedima*, 741 F.2d at 499.

⁴⁹ *Id.*

⁵⁰ *Id.* See *infra* note 214.

⁵¹ *Sedima*, 741 F.2d at 500 n.49.

⁵² *Id.* at 500.

⁵³ *Id.*

a civil trial, the majority reasoned that a criminal conviction must precede the civil trial.⁵⁴

Judge Cardamone vehemently dissented in *Sedima*. He rejected the majority's imposition of a "racketeering injury" standing requirement. He criticized the vagueness of the term and noted the difficulty of distinguishing between injury caused by the predicate acts and that caused "by reason of conduct the RICO act was designed to prevent."⁵⁵ He asserted that the majority's limitation is really nothing more than a "euphemism for an 'organized crime' nexus requirement."⁵⁶ The Second Circuit and other courts have overwhelmingly rejected a nexus requirement of this type.⁵⁷ Judge Cardamone argued that Congress intended "[t]o cast a net sufficiently wide to catch organized criminals."⁵⁸ He also warned that a racketeering injury requirement would exclude many cases that Congress surely would have chosen to include within civil RICO's scope⁵⁹ and asserted that any limitation on civil RICO actions should come from Congress, not the courts.⁶⁰

Judge Cardamone also criticized the majority for intruding into the congressional sphere by promulgating a prior criminal conviction requirement. Judge Cardamone countered the majority's "drastic redrafting of the statute" on several grounds.⁶¹ First, the judge relied on a case which the majority had distinguished, *United States v. Cappetto*.⁶² The *Cappetto* court ruled that Congress has the power to use civil proceedings to prohibit activities that it finds adversely affect interstate commerce. Congress must also have power, Cardamone argued, to utilize private plaintiffs as "private attorney[s] general" to effectuate its prohibitions.⁶³

Second, Cardamone stated that the "chargeable" and "indicta-

⁵⁴ *Id.* at 501-02.

⁵⁵ *Id.* at 509 (Cardamone, J., dissenting) (quoting the majority).

⁵⁶ *Id.*

⁵⁷ The Second Circuit rejected the requirement that a civil RICO plaintiff allege a nexus to organized crime in *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 n.17 (2d Cir. 1983), *cert. denied* 104 S. Ct. 1280 (1984). See also *infra* notes 136-41 and accompanying text.

⁵⁸ *Sedima*, 741 F.2d at 510 (Cardamone, J., dissenting).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 504.

⁶² 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). In *Cappetto* the government brought a RICO action against defendants accused of operating an illegal gambling operation. The court rejected the defendants' argument that an action under civil RICO was essentially a criminal proceeding and that consequently their constitutional rights were being abridged. *Id.* at 1356.

⁶³ *Sedima*, 741 F.2d at 504-05 (Cardamone, J., dissenting). See also 1 MATERIALS ON RICO 53-54 (R. Blakey ed. 1980) (explaining that private civil RICO action is method for understaffed organized crime programs to "enlist the resources of the private bar").

ble" language in RICO clearly does not require the actual return of an information or indictment, noting that section 1964 is entitled "Civil Remedies" and not "Post Criminal Conviction Civil Remedies."⁶⁴ Cardamone added that the "use of criminal and civil sanctions for the same conduct is common," and that treble damages are not inherently criminal sanctions.⁶⁵ The judge further argued that the majority overlooked the common use of the word "violation" to designate civil wrongs.⁶⁶

Third, Cardamone cited *United States v. Ward*⁶⁷ as authority for using a two-step test to classify a statute as civil or criminal: whether Congress has indicated a preference for one label or another; and, if Congress has preferred the civil label, whether the statute is so punitive in purpose or effect as to negate the intention.⁶⁸ He concluded that, under the *Ward* test, section 1964(c) is "primarily remedial, and only partly punitive."⁶⁹ Judge Cardamone argued further that even if section 1964 lacks some of the constitutional safeguards required when a statute creates a "quasi-criminal" sanction, "the proper course is not to require a prior criminal conviction, but to insist on the application of those safeguards . . . within the context of a civil proceeding."⁷⁰

⁶⁴ *Sedima*, 741 F.2d at 505 (Cardamone, J., dissenting).

⁶⁵ *Id.* See *infra* notes 237-62 and accompanying text.

⁶⁶ *Id.* at 508. The Seventh Circuit has rejected the contention that "violation" means "conviction" in civil RICO. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1271, 1287 (7th Cir. 1983). See *infra* notes 208-11 and accompanying text.

⁶⁷ 448 U.S. 242 (1980).

⁶⁸ *Sedima*, 741 F.2d at 506-07 (Cardamone, J., dissenting).

⁶⁹ *Id.* at 507 (Cardamone, J., dissenting).

⁷⁰ *Id.* at 506. Judge Cardamone also dissented in the second case of the trilogy, *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), a bankruptcy fraud case. *Bankers Trust* treated only the racketeering injury issue. The panel held that the conduct causing a RICO plaintiff's injury must result not only from two or more predicate acts (the pattern of racketeering activity), but also from "the use of that pattern to invest in, control, or conduct, a RICO enterprise." *Id.* at 516. The pattern, and not only the predicate acts, must cause the injury. For example, where a plaintiff is victimized by multiple acts of arson, is consequently unable to obtain fire insurance, and subsequently suffers innocent fire damage, he may recover for that innocent damage. *Id.* at 517. Judge Cardamone in dissent criticized the *Bankers Trust* holding as unjustifiably restricting recovery to those plaintiffs who are injured indirectly by RICO activities. *Id.* at 522-23 (Cardamone, J., dissenting). The Seventh Circuit in *Haroco* felt that the *Bankers Trust* holding was even more restrictive than *Sedima's*. See 747 F.2d at 395-97.

In the final decision of the trilogy, *Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984), a third Second Circuit panel dismissed a RICO complaint because it was bound by the earlier decisions in *Sedima* and *Bankers Trust*. The panel nonetheless found no justification for a racketeering injury requirement in RICO's language or legislative history. The panel found that Congress did not intend to limit RICO's application to "hoodlums and thugs." *Id.* at 528. *Sedima's* racketeering injury limitation, the panel asserted, would "sterilize civil RICO as a weapon against the conduct congress sought to curtail." *Id.* at 529. The panel felt that any restrictions on civil RICO should come from Congress and not the judiciary. *Id.* at 533.

B. *Haroco, Inc. v. American National Bank and Trust Company of Chicago*

In *Haroco*,⁷¹ the Seventh Circuit reaffirmed its refusal to judicially limit access by private plaintiffs to civil RICO's potent remedies. The plaintiffs in *Haroco* were businesses that borrowed money from the defendant, American National Bank and Trust Company of Chicago (ANB), at an interest rate of one percent over ANB's prime rate. Plaintiffs alleged that ANB defrauded them in calculating the prime rate. Dismissing the complaint, the district court held that "a plaintiff's injury to be cognizable under RICO must be caused by a RICO violation and not simply by the commission of predicate offenses, such as acts of mail fraud."⁷² The Seventh Circuit reversed the district court's judgment.⁷³

The *Haroco* panel noted that both courts adopting and those rejecting a racketeering injury requirement claimed support from RICO's plain language. The court therefore decided to "do more than stare at the language of section 1964(c) [the private civil action] to decide this issue."⁷⁴ The court first demonstrated that "Congress deliberately chose the very broad language of RICO's provisions," at least in part "to avoid creating loopholes for clever defendants and their lawyers."⁷⁵ The panel then reaffirmed the Seventh Circuit's position rejecting various standing limitations. In rejecting a competitive injury limitation, the panel stated that "[r]estrictive standing requirements analogous to those in antitrust laws would too often leave those [illegal] gains in the hands of the RICO violators."⁷⁶ The panel found that courts had "thoroughly repudiated" the idea of imposing an organized crime nexus requirement.⁷⁷ The court also decried any attempt to limit RICO's availability to only indirect victims of racketeering activity, again emphasizing RICO's purpose of stripping profits from RICO violators, even in cases of direct injury from predicate acts.⁷⁸ The panel

⁷¹ 747 F.2d at 384.

⁷² *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 577 F. Supp. 111, 114 (N.D. Ill. 1983), *rev'd*, 747 F.2d 384 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 902 (1985).

⁷³ *Haroco*, 747 F.2d at 405.

⁷⁴ *Id.* at 389.

⁷⁵ *Id.* at 390.

⁷⁶ *Id.* at 391 n.8 (citing *In re Catanella & E.F. Hutton & Co.*, 583 F.Supp. 1388, 1433-34 (E.D. Pa. 1984) (noting that small grocer forced to pay protection money would have no redress against racketeer under competitive injury limitation)). See also *infra* notes 153-59 and accompanying text.

⁷⁷ *Haroco*, 747 F.2d at 391. See also *infra* notes 136-41 and accompanying text.

⁷⁸ *Id.* at 391-92. The court was responding to the "indirect injury" argument. Proponents of this argument assert that Congress did not intend RICO to provide a remedy to those injured directly by predicate acts of racketeering activity because direct injuries may be compensable under preexisting causes of action. See *infra* notes 176-86 and accompanying text; *infra* note 84.

held that even if Congress did not fully anticipate civil RICO's potential uses, "it provided few if any textual pegs which could permit courts to develop reasoned, consistent and principled limits without simply redrafting the statute."⁷⁹

The *Haroco* court next examined the Second Circuit's new definition of the racketeering injury limitation,⁸⁰ which it found to be "only a composite of the various proposed standing or injury limits" previously rejected in the Seventh Circuit.⁸¹ The *Haroco* panel described the *Sedima* court's essential error as mistaking a deliberately broad statute for an ambiguous one.⁸² After reviewing *Sedima*, the panel found that "*Sedima* ha[d] revived the discredited 'organized crime nexus' requirement without quite saying so,"⁸³ and "blended elements of competitive injury and indirect injury into its racketeering injury requirement."⁸⁴ According to the Seventh Circuit in *Haroco*, civil RICO's "by reason of" language "simply imposes a proximate cause requirement on plaintiffs."⁸⁵ The court concluded that "Congress appears to have preferred a broad statute, even if overinclusion might result."⁸⁶ The panel also supported a civil standard of proof despite the *Sedima* court's warnings that such a standard created constitutional problems.⁸⁷

III

ANALYSIS

The Second Circuit's decision in *Sedima* unreasonably limits the

⁷⁹ *Haroco*, 747 F.2d at 392.

⁸⁰ See *supra* text accompanying notes 42-43.

⁸¹ *Haroco*, 747 F.2d at 393. The panel referred to the decision in *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.), cert. denied, 104 S. Ct. 509 (1983). *Schacht* involved the defendant's fraudulent concealment and exacerbation of an insurance corporation's actual insolvency, causing the corporation's parent to continue operating the insurance corporation to the parent's detriment. The *Schacht* court, although generally disapproving of limitations on RICO, did not reach the racketeering injury issue. In *Schacht*, it was clear that a pattern of racketeering activity injured the plaintiffs and not merely the predicate acts of fraud. The *Schacht* court rejected, however, any "attenuated 'but for' causation" requirement for § 1964(c), the type of causation that *Bankers Trust* apparently imposed. See 711 F.2d at 1359; *infra* notes 176-86 and accompanying text.

⁸² *Haroco*, 747 F.2d at 398.

⁸³ *Id.* at 394; see *infra* notes 131-52 and accompanying text.

⁸⁴ *Haroco*, 747 F.2d at 395. An "indirect injury" does not result directly from the acts of fraud. For example, fraud indirectly injures an arson victim that cannot obtain fire insurance as a result of the fraud. *Schacht* rejected an indirect injury requirement. See 711 F.2d at 1358.

⁸⁵ *Haroco*, 747 F.2d at 398.

⁸⁶ *Id.* at 399. The Seventh Circuit emphasized its deference to Congress's policy decision to cast a broad net of liability in order to adequately discourage organized crime. Against this congressional policy, the *Haroco* court weighed "much smaller stakes—legal fees and the sensibilities of prominent defendants alleged to be 'racketeers.'" *Id.* (footnote omitted).

⁸⁷ *Id.* at 404; see *supra* text accompanying note 51.

availability of civil RICO actions to private plaintiffs. The Second Circuit read ambiguity into an intentionally broad statute to justify imposing restrictions on civil RICO that Congress never intended. As the Seventh Circuit in *Haroco* stated, courts should accord civil RICO the broad scope which the statute's language and legislative history require.

A. Congressional Intent

The issue of congressional intent⁸⁸ lies at the core of the judicial debate regarding the scope of RICO. *Sedima* represents a prime example of an improper judicial reading of RICO's legislative history to justify the imposition of various limitations on the civil remedy's scope. Before proceeding to discuss these limitations, it is therefore necessary to consider the inaccuracies in several views of the legislative history advanced by courts to justify a narrowing approach. The courts have focused on three areas of disputable congressional intent: the federalization of traditionally state-law offenses, the duplication of preexisting remedies, and the foreseeability of RICO's potential for abuse.

1. Federalization of State Law

Several courts have justified narrowing RICO by suggesting, albeit inaccurately, that Congress did not mean the statute to federalize issues traditionally covered by state law.⁸⁹ Congress recognized,

⁸⁸ The majority in *Sedima* emphasized the "clanging silence" of the legislative history in justifying their narrowing approach. 741 F.2d at 492. They assumed that if Congress had intended the private civil RICO action to have a broad sweep then it would have at least mentioned the matter. Recent Supreme Court decisions, however, have suggested that the plain language of a statute provides a better indication of legislative intent than do any conclusions drawn from congressional silence relating to a specific legal question. In *Albernaz v. United States*, 450 U.S. 333 (1981), the Court considered the question of whether a court could impose consecutive sentences for conspiracy to import and distribute controlled substances. The Court found the legislative history to be silent on this question: "Petitioners read this silence as an 'ambiguity' over whether Congress intended to authorize multiple punishment. Petitioners, however, read much into nothing. Congress cannot be expected to specifically address each issue of statutory construction which may arise." *Id.* at 340-41 (footnote omitted). See also *Standefor v. United States*, 447 U.S. 10, 20 n.12 (1980) (petitioner's argument, that Congress's failure to mention a certain common law rule in a committee report showed its intent to abrogate the rule, "would permit an omission in the legislative history to nullify the plain meaning of a statute"); *Harrison v. PPG Indus., Inc.*, 447 U.S. 578, 592 (1980) ("it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute").

⁸⁹ See, e.g., *Sedima*, 741 F.2d at 486 ("an expansive interpretation of RICO allows plaintiffs to bring into federal courts many claims formerly subject only to state jurisdiction"); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1137 (D. Mass. 1982) ("We do not believe Congress intended § 1964(c) to afford a remedy to every consumer who could trace purchase of a product to a violation of § 1962. . . .

however, that RICO federalized large areas of traditionally state law. During debates Representative Ekhardt criticized RICO's "overloading of the Federal courts by moving large substantive areas [of law] formerly totally within the police power of the State into the Federal realm."⁹⁰ Representative Mikva warned that "[w]hat we have done in one fell swoop . . . is to incorporate as a part of the Federal Law all of the offenses which heretofore have traditionally been treated as under State and local jurisdictions."⁹¹ Nevertheless, Congress refused to circumscribe RICO and included mail and wire fraud in the statute's substantive provisions.

A number of federal courts agree that Congress intended RICO to federalize large areas of state law. The United States Supreme Court, in *United States v. Turkette*,⁹² recognized this as the congressional intent and rejected the argument, which the *Sedima* majority found persuasive, that such a shift in federal-state responsibility was impermissible. In *Turkette*, the Court reasoned that Congress was within its authority when it created the broadly inclusive civil remedy and found that "the courts are without authority to restrict the application of the statute."⁹³ The Court broadly construed the statute even though amici argued that "[u]nless the lower court opinion is affirmed, the federal judicial system will be faced with an invasion of garden variety commercial disputes masquerading as civil RICO claims."⁹⁴ In *Schacht v. Brown*,⁹⁵ the Seventh Circuit also noted the substantial change RICO effects in the federal-state division of responsibility for redressing illegal conduct, but agreed that "such

Such an interpretation would open the federal courts to frequent RICO treble damage claims by federalizing much consumer protection law and by inviting plaintiffs to append RICO claims for consumer fraud to nonfederal claims thereby achieving treble damage recovery and a federal forum."); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 210 (N.D. Ill. 1980) (holding in case involving fraud in inducement of real estate development contract that "the purpose of § 1964(c) was not to transform state law violations into federal violations, but to prevent interference with free competition").

⁹⁰ 116 CONG. REC. 35217 (1970). Representative Eckhardt's comments referred to S.30, which involved the government's right to civil actions, but not the private civil action.

⁹¹ *Id.* at 35205.

⁹² 452 U.S. 576 (1981). *Turkette* involved a criminal prosecution under 18 U.S.C. § 1962(d) (1982) for various illegal acts, including drug trafficking, arson, mail fraud, and bribery.

⁹³ *Turkette*, 452 U.S. at 587.

⁹⁴ Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655, 673 (1981) (quoting Brief for the Boston Bar Ass'n & Mass. Ass'n of Criminal Defense Lawyers, Amici Curiae at 22-23, *United States v. Turkette*, 452 U.S. 576 (1981) ("The most mundane state tort suits could be brought in to federal court pendant to a RICO claim. . . . The reputations of companies and individuals having no conceivable connection to organized crime will be sullied. And there will be no United States Attorneys' Manual to limit the discretion of private attorneys bringing RICO actions.")) [hereinafter cited as "*Everybody's Darling*"].

⁹⁵ 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983).

dramatic consequences are necessary incidents of the deliberately broad swath Congress chose to cut in order to reach the evil it sought."⁹⁶ The *Schacht* court noted with approval the Eighth Circuit's holding in *Bennett v. Berg*⁹⁷ that federalizing state claims was "not unanticipated" by Congress.⁹⁸

2. Duplication of Remedies

Closely related to the federalization of state law issue is the contention that Congress did not intend to duplicate already existing remedies by enacting RICO.⁹⁹ This argument has enjoyed particular favor in the securities fraud area.¹⁰⁰ For example, in *Harper v. New Japan Securities International*,¹⁰¹ the plaintiff alleged that the defendants had churned her custodial account, a violation of the federal securities laws. The *Harper* court refused to allow the plaintiff to maintain her civil RICO action, finding it "simply incomprehensible that a plaintiff suing under the securities laws would receive one-third the damages of a plaintiff suing under RICO for the same injury."¹⁰² In *Waterman Steamship Corp. v. Avondale Shipyards, Inc.*,¹⁰³ a

⁹⁶ *Id.* at 1353. In *Schacht* the Illinois Department of Insurance brought a RICO claim against an insurance company's officers and directors who allegedly operated the business past the point of insolvency. The *Schacht* court was responding to the argument that allowing such an action to proceed would "unreasonably federalize the common law of 'garden variety' business fraud, and eclipse the federal securities laws." *Id.*

⁹⁷ 685 F.2d 1053 (8th Cir. 1982), *aff'd in part and rev'd in part*, 710 F.2d 1361 (8th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 527 (1983).

⁹⁸ *Id.* at 1063.

⁹⁹ See *Sedima*, 741 F.2d at 492.

¹⁰⁰ See, e.g., *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983) (dismissing plaintiff's RICO claim, alleging loss of money due to unauthorized trades by defendant and Paine Webber in order to generate commissions, on ground that claims were not pled with sufficient particularity); *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982) (dismissing complaint alleging churning of custodial account as not "injury of the type the RICO statute was intended to prevent"); *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981) (dismissing complaint alleging securities fraud by sellers of interests in insolvent coal mining partnership on basis that "[n]othing . . . even remotely brings this case within the ambit of [RICO's] purpose"); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 753 (N.D. Ill. 1981) ("[h]ad Congress intended to turn all securities fraud actions into treble damage suits, it would have, at the very least, given some indications of that purpose"). *But see* Note, *Application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to Securities Violations*, 8 J. CORP. L. 411, 431-32 (because courts' primary concern under RICO should be to inhibit organized crime rather than to remedy specific injuries of particular plaintiffs, "the courts should not concern themselves with whether there is a pre-existing civil remedy if they intend to allow RICO to be used as an effective weapon against organized crime").

The *Sedima* court did not expressly exclude securities fraud cases from the scope of the private civil RICO action. See 741 F.2d at 496 n.41. The court nevertheless listed securities fraud cases as prime examples of RICO's misuse. *Id.* at 487-88 nn.10, 13 & 15.

¹⁰¹ 545 F. Supp. 1002 (C.D. Cal. 1982).

¹⁰² *Id.* at 1007-08.

federal district court found that "[t]he civil remedies provisions of RICO were not designed to convert every fraud or misrepresentation action involving corporations who use the mails or telephones to conduct their businesses in interstate commerce into treble damages RICO actions."¹⁰⁴

The Second Circuit panel which refused to follow *Sedima* in *Furman v. Cirrito*¹⁰⁵ effectively countered the duplication of remedies argument. "What distinguishes a civil RICO claim from an ordinary fraud claim," the panel asserted, "is that RICO requires a 'pattern of racketeering activity' (two acts within 10 years) used to conduct the affairs of an 'enterprise.'" ¹⁰⁶ "While the proof used to establish these elements may in particular cases coalesce," proof of each is essential.¹⁰⁷ The enterprise's activities must also affect interstate commerce.¹⁰⁸ Proof of the underlying offenses alone is insufficient to establish the RICO claim.¹⁰⁹ Thus, rather than merely enhancing penalties for already compensable injuries, Congress created new sanctions for RICO violations.¹¹⁰ As the Third Circuit has held, RICO "forbids 'racketeering,' not state offenses per se."¹¹¹

3. Potential for Abuse

Congress recognized that civil RICO claims might stigmatize private businesses. Representatives Conyers, Mikva, and Ryan ex-

¹⁰³ 527 F. Supp. 256 (E.D. La. 1981).

¹⁰⁴ *Id.* at 260. Another district court requiring a "racketeering enterprise injury" based its decision at least in part on the observation that "[t]he victims of predicate crimes almost always have a cause of action for direct damages under federal or state law." *Landmark Sav. & Loan v. Rhoades*, 527 F. Supp. 206, 209 (E.D. Mich. 1981) (securities, mail, and wire fraud); *see also* *Johnsen v. Rogers*, 551 F. Supp. 281, 285-86 (C.D. Cal. 1982) (securities fraud) (Congress did not intend RICO merely to provide enhanced actions for recidivism).

¹⁰⁵ 751 F.2d 524 (7th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3343 (U.S. Oct. 15, 1984) (No. 84-604).

¹⁰⁶ *Furman*, 741 F.2d at 529. *Cf. Turkette*, 452 U.S. at 583 ("In order to secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.'").

¹⁰⁷ *Turkette*, 452 U.S. at 583; *see also* *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 22 (2d Cir. 1983) (fraudulent tender offer) (evidence of "enterprise" need not be distinct from that of "pattern of racketeering"), *cert. denied*, 104 S. Ct. 1280 (1984).

¹⁰⁸ *See Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983) (listing elements of § 1962(c) RICO violation).

¹⁰⁹ *See Bennett v. Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982), *aff'd in part and rev'd in part*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 527 (1983).

¹¹⁰ One district court concluded that the fact that the "predicate crime here may also be actionable under state fraud laws does not make RICO inapplicable." *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 248 (S.D.N.Y. 1981) (defendants paid kickbacks to plaintiff's employees to induce them to accept false invoices and padded bills).

¹¹¹ *United States v. Frumento*, 563 F.2d 1083, 1087 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

pressed Congress's concern over the potential for undue and therefore abusive stigmatization that would result from meritless claims:

[S]ection 1964(c) . . . provides invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce by authorizing private damage suits. A competitor need only raise the claim that his rival has derived gains from two games of poker, and, because this title prohibits even the "indirect use" of such gains—a provision with tremendous outreach—litigation is begun. What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish—destruction of the rival's business [*sic*].¹¹²

During floor debate Representative Mikva warned that a private businessman could initiate a suit to besmirch his competitor's business reputation even if on the merits he could not expect a judgment.¹¹³ Accordingly, Mikva proposed an amendment providing for a frivolous suit remedy of treble damages for an acquitted section 1964(c) defendant.¹¹⁴ The House rejected the amendment,¹¹⁵ thus indicating that it was not troubled by the potential for abuse through stigmatization.¹¹⁶

Congress also considered the problem of an overly broad application of RICO. The ACLU warned that title IX's broad terms might permit its application not only to professional racketeers, but also "to a man who twice wins \$1000 in a friendly gambling game."¹¹⁷ Senators Hart and Kennedy feared that individual rights might not be adequately protected if RICO were applied outside of

¹¹² H.R. REP. NO. 1549, 91st Cong., 2d Sess. 187 (1970).

¹¹³ 116 CONG. REC. 35342 (1970).

¹¹⁴ *Id.*

¹¹⁵ The amendment was defeated 45 to 22. 116 CONG. REC. 35343 (1970).

¹¹⁶ The *Furman* panel was also "unmoved" by the stigma argument: "If defendants are surprised or offended that their 'garden variety' fraudulent conduct is not statutorily characterized as 'racketeering,' they should address their grievance to Congress, which clearly and specifically included mail, wire, and securities frauds as predicate acts of 'racketeering activity' under § 1961(1) . . ." *Furman*, 741 F.2d at 530; see also *infra* notes 237-40 and accompanying text.

¹¹⁷ 116 CONG. REC. at 35213. Sheldon Eison, Chairman of the ABA's Committee on Federal Legislation, also cautioned that RICO's definition of "pattern of racketeering activity" was overly broad:

[In § 1962(b) and (c)], I think, we have to take a look and see how broad this provision of "pattern of racketeering activity" is. I think if you will look at the underlying crimes which are involved, it would seem to apply to a theft from an interstate shipment, . . . the "Mom and Pop" variety of illegal gambling business, the local numbers place, a securities fraud case. . . .

We think that is too broad, particularly when you consider you are dealing with a person's opportunity to engage in a business as a result of having been involved in any of the acts which are defined as comprising part of "a pattern of racketeering activity."

House Hearings, supra note 25, at 370.

organized crime.¹¹⁸ Congress nonetheless explicitly included mail, wire, and securities fraud—all “white collar” crimes—in RICO’s prohibitions.¹¹⁹ Senator McClellan, a RICO sponsor, defended the breadth of the statutory terms on the ground that Congress could not reach the activities of organized crime against which the statute was drafted without also covering some offenses committed outside the context of organized crime.¹²⁰

The courts have focused their debate over the expansiveness of civil RICO’s provisions on the scope of Congress’s purposes in enacting RICO. Critics of an expansive reading point to RICO’s purpose, to eradicate organized crime in the United States,¹²¹ as limiting the scope of the statute’s applicability to organized criminals.¹²² The Supreme Court in *Turkette*, however, cited RICO’s purpose and a clause in the statute calling for liberal construction¹²³ in rejecting a restrictive reading of RICO. The Court reasoned that a narrow reading would place “[w]hole areas of organized criminal activity . . . beyond the substantive reach of the enactment.”¹²⁴ The Court also emphasized the breadth of Congress’s purpose in

¹¹⁸ S. REP. NO. 612, 91st Cong., 1st Sess. 215 (1969).

¹¹⁹ See *supra* note 116. The *Sedima* majority made much of the fact that § 1964(c) was not included in S.30 when the Senate considered it. See *Sedima*, 741 F.2d at 488-89. The *Sedima* panel’s isolation of § 1964(c) from the rest of RICO runs counter to the principle reinforced in *Turkette* that statutory language controls absent “a clearly expressed legislative intent to the contrary.” 452 U.S. at 580 (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980)); see also *supra* note 88.

There are at least two indications that the Senate was aware of the treble damages provision and what it entailed. First, Senator Hruska had introduced the Criminal Activities Profits Act (S. 1623) on March 20, 1969. This bill contained provisions for both treble damages and private equitable relief. The Senator noted that the civil provisions were “the more important feature of the bill.” He went on to inform the Senate that “[t]he bill is innovative in the sense that it vitalizes procedures which have been tried and proven in the antitrust field and applies them into the organized crime field where they have been seldom used before.” 115 CONG. REC. 6993-94 (1969). Second, Senator McClellan, a sponsor of S. 30 (Organized Crime Control Act), noted the amendments that the ABA had suggested in the House:

In the main, I find these amendments generally acceptable. Indeed, they may be characterized as constructive contributions to the legislative process. For example, amendment No. 6 suggests that title IX of S. 30, dealing with racketeer-influenced and corrupt organizations, be amended to authorize private civil damages suits.

116 CONG. REC. 25190 (1970).

¹²⁰ 116 CONG. REC. 18940 (1970); see *supra* note 119. The substantive provisions of RICO in § 1962, and not the private civil remedy in § 1964(c), determine its breadth.

¹²¹ S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969). In *Waterman S.S. Corp. v. Avondale Shipyards*, 527 F. Supp. 256 (E.D. La. 1981), the district court viewed the civil remedies of § 1964 as designed “to provide an effective mechanism for eradicating organized crime from the social fabric.” 527 F. Supp. at 260.

¹²² See, e.g., *Waterman S.S. Corp.*, 527 F. Supp. at 260.

¹²³ 18 U.S.C. § 1961.

¹²⁴ *Turkette*, 452 U.S. at 589.

Russello v. United States.¹²⁵ In *Russello*, the Court found that Congress's goal in creating the private civil remedy was to "separat[e] the racketeer from his dishonest gains thereby taking the profit out of organized crime."¹²⁶ As with criminal forfeiture, the private civil action was one of RICO's "new legal weapons" to combat a pervasive social and economic evil.¹²⁷ The courts should not undermine Congress's intent that RICO be broadly construed by restricting access to the private civil action.¹²⁸

B. Standing Requirements

The case law regarding appropriate standing requirements for civil RICO plaintiffs is in disarray. The court in *Sedima* perpetuated the confusion by imposing a "racketeering injury" requirement. According to the Second Circuit, a "racketeering injury" occurs when "mobsters . . . cause systematic harm to competition and the market, and thereby injure investors and competitors."¹²⁹ This definition contains elements of at least three previous judicial limitations on the scope of civil RICO:¹³⁰ the organized crime nexus requirement, the competitive injury requirement, and the "racketeering injury" or "racketeering enterprise injury" requirement. These limitations are not supported by RICO's language, legislative history, or purpose.

1. The "Organized Crime Nexus" Requirement

Although the congressional record abounds with references to organized crime, the Mafia, and La Cosa Nostra, RICO does not use or define the term "organized crime." One court¹³¹ has viewed the

¹²⁵ 104 S. Ct. 296 (1983). The Court in *Russello* held that RICO's criminal forfeiture provisions apply to profits obtained from racketeering activities and not only to interests held in RICO enterprises. *Id.*

¹²⁶ *Id.*

¹²⁷ 116 CONG. REC. 819 (1970) (statement of Sen. Scott).

¹²⁸ *Cf. Turkette*, 452 U.S. at 587 (because Congress acted within its authority, courts are without power to restrict statute's application).

¹²⁹ *Sedima*, 741 F.2d at 495-96.

¹³⁰ In *Haroco*, the Seventh Circuit found that "the Second Circuit's new definition of the racketeering injury requirement appears to be essentially an amalgamation of proposed limits on RICO which we rejected in *Schacht v. Brown*, [711 F.2d 1343 (7th Cir.), cert. denied, 104 S. Ct. 509 (1983)] as contrary to the language and purpose of RICO." 747 F.2d at 389. The *Schacht* court rejected both the organized crime nexus requirement and the competitive injury requirement. See *infra* notes 137-40 and accompanying text; *infra* text accompanying note 159; see also *In re Catanella & E.F. Hutton & Co.*, 583 F. Supp. 1388, 1435 (E.D. Pa. 1984) ("There is much to suggest that this racketeer enterprise injury concept is similar or at least related to the competitive injury concept."). See generally *Alexander Grant & Co. v. Tiffany Indus.*, 742 F.2d 408, 413 (8th Cir. 1984) (court implied willingness to allow RICO claims, where pattern of racketeering activity, and not merely predicate acts, caused injury).

¹³¹ See *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 747 (N.D. Ill. 1981).

lack of a definition as an expression of Congress's desire to avoid the practical difficulties entailed in defining what constitutes "organized crime."¹³² A narrow definition of organized crime would create serious constitutional difficulties by creating a status offense.¹³³

Judicial interpretations of RICO's lack of an organized crime definition follow two divergent courses. Under one approach, courts have maintained that Congress would have put an organized crime nexus requirement into the statute but for its probable unconstitutionality.¹³⁴ These courts read the requirement into RICO.¹³⁵ Under the second, more popular approach, courts have not required an organized crime nexus. The *Sedima* court ignored the prior Second Circuit decision, *Moss v. Morgan Stanley, Inc.*,¹³⁶ which rejected the requirement. The Seventh Circuit has concurred in this view, concluding "[i]t is well-established that RICO does not require proof that the defendant or the enterprise are connected with organized crime."¹³⁷ That circuit rejected the organized crime nexus because "where business fraud is alleged . . . there is simply no legitimate principled criterion through which to accomplish this

¹³² RICO's sponsor explained that "it is probably impossible precisely and definitively to define organized crime." 116 CONG. REC. 35204 (1970); see also *Adair*, 526 F. Supp. at 747 (organized crime nexus would create constitutional "difficulties").

¹³³ 116 CONG. REC. 35344 (1970). *E.g.*, *Robinson v. California*, 370 U.S. 660, 666 (1962) (striking down California law which had the effect of making "the 'status' of narcotic addiction a criminal offense" as violative of the eighth and fourteenth amendments). Representative Poff resisted an attempt to include definitions of the Mafia and La Cosa Nostra in RICO. 116 CONG. REC. at 35344.

¹³⁴ See, *e.g.*, *Adair*, 526 F. Supp. at 747 (interpreting RICO's broad language as attempt to avoid constitutional difficulties).

¹³⁵ The organized crime nexus requirement has proven especially popular in the securities context. One court, although generally rejecting the organized crime nexus, has held that in the limited case of civil actions predicated on federal securities law, plaintiffs "must allege some link to organized crime, however defined." *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 643 (C.D. Cal. 1983); see also *Aliberti v. E.F. Hutton & Co.*, 591 F. Supp. 632, 633 (D. Mass. 1984) ("Even if not technically required, . . . a connection between organized crime and the alleged racketeers is an important consideration in determining whether a particular claim is 'within [RICO's] spirit, [or] within the intention of its makers'"; also noting existing remedies for securities fraud); *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981) (dismissing RICO securities fraud action by buyers of limited partnership interests in insolvent coal mining partnership); *Waterman S.S. Corp.*, 527 F. Supp. at 260 (dismissing RICO claim for damages suffered from failure of high-speed engine couplings on ground that "the history of the statute reveals a clearly expressed legislative intent that RICO should apply only to actions involving organized crime activities, and not to everyday civil actions") (footnote omitted); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (denying motion for leave to amend complaint to allege RICO violation in price fixing action against telephone answering service on ground that "[d]efendant is not a member of a society of criminals operating outside of the law").

¹³⁶ 719 F.2d 5, 21 (2d Cir. 1983).

¹³⁷ *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 n.6 (7th Cir. 1983) (citation omitted).

[organized crime] distinction."¹³⁸ Both the Fifth¹³⁹ and the Eighth¹⁴⁰ Circuits have reviewed the legislative history and rejected an organized crime nexus. Most district courts have adopted the second approach.¹⁴¹ Thus, in imposing what amounts to an organized crime nexus requirement, the *Sedima* court departed from the great weight of authority.

On a more general level, the *Sedima* court's approach departs from Supreme Court decisions in other areas which caution the lower courts not to judicially limit the scope of broadly drafted anti-crime measures. In *United States v. Culbert*,¹⁴² for example, the Court refused to limit the Hobbs Act¹⁴³ to "racketeers."¹⁴⁴ The Court held that "the absence of any reference to 'racketeering'—much less any definition of the word—is strong evidence that Congress did not intend to make 'racketeering' an element of a Hobbs Act violation."¹⁴⁵ Similarly, the Court in *Perrin v. United States*¹⁴⁶ refused to restrict the scope of the Travel Act,¹⁴⁷ which prohibits the use of a facility in interstate commerce to commit bribery in violation of certain state laws. The petitioner in *Perrin* contended that commercial bribery, being merely a white collar crime, was not covered by the

¹³⁸ *Schacht v. Brown*, 711 F.2d 1343, 1356 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983); *see also* *United States v. Aleman*, 609 F.2d 298, 303 (7th Cir. 1979) (court rejected organized crime nexus requirement, stating that RICO could apply to anyone "if the statutory conditions are met").

¹³⁹ *Owl Constr. Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir. 1984).

¹⁴⁰ *Bennett v. Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982), *aff'd in part and rev'd in part*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 527 (1983).

¹⁴¹ *See, e.g.*, *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 570 F. Supp. 667 (W.D. Mich. 1983) (securities fraud context); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1239 (S.D.N.Y. 1983) ("The plain language of the statute does not require RICO plaintiffs to allege that defendants are affiliated with organized crime."); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 247-48 (S.D.N.Y. 1981) (same); *Parnes v. Heinhold Commodities*, 487 F. Supp. 645, 646 (N.D. Ill. 1980) ("The language of the statute, however, requires neither proof nor allegation of any connection to organized crime for a violation to lie.").

¹⁴² 435 U.S. 371 (1978).

¹⁴³ 18 U.S.C. § 1951(a) (1982). The Hobbs Act provides:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

Id.

¹⁴⁴ *See Culbert*, 435 U.S. at 373; "Everybody's Darling", *supra* note 94, at 674.

¹⁴⁵ *Culbert*, 435 U.S. at 373. RICO refers to "racketeering activity," but it does not limit that term to organized criminal activities. *See* 18 U.S.C. § 1961(1) (1982); *supra* text accompanying notes 131-33.

¹⁴⁶ 444 U.S. 37 (1979); *See "Everybody's Darling"*, *supra* note 94, at 674-75 (applying Court's reasoning in *Perrin* to RICO).

¹⁴⁷ 18 U.S.C. § 1952(b) (1982).

Travel Act, because Congress intended the Act only to reach organized crime.¹⁴⁸ The Court noted that Congress had found bribery to be a method of organized crime's infiltration into legitimate businesses and upheld the application of the Travel Act to commercial bribery.¹⁴⁹ In each of these cases, the Court deferred to Congress's intent to combat activity outside of that traditionally referred to as "organized crime" or "racketeering." In keeping with this approach, the *Sedima* court should not have read the racketeering injury requirement into RICO.

The *Sedima* majority imposed a racketeering injury formulation that was merely a euphemism for an organized crime nexus requirement.¹⁵⁰ The majority thus grafted onto civil RICO a requirement which had already been rejected in its own circuit,¹⁵¹ in other circuits, and in the criminal RICO context.¹⁵²

2. *The Competitive Injury Requirement*

Some courts rejecting an "organized crime nexus" have instead imposed a competitive injury requirement. These courts have relied on the similarity of the language in section 1964(c) of RICO to that in section 4 of the Clayton Act, which imposes a "competitive injury" requirement on Clayton Act plaintiffs.¹⁵³ Section 1964(c) requires an "injury by reason of a violation of section 1962; courts that require a competitive injury reason that "the purpose of

¹⁴⁸ *Perrin*, 444 U.S. at 46.

¹⁴⁹ *Id.* at 46-47.

¹⁵⁰ *Sedima*, 741 F.2d at 509 (Cardamone, J., dissenting). One district court has found the racketeering injury requirement to be "analytically indistinguishable" from the organized crime nexus requirement. *Windsor Assocs. v. Greenfeld*, 564 F. Supp. 273, 279 (D. Md. 1983) (business fraud). Indeed, courts analyzing the racketeering injury requirement imposed in *Sedima* have emphasized its organized crime nexus elements. The Eighth Circuit in *Alexander Grant & Co. v. Tiffany Indus.*, 742 F.2d 409 (8th Cir. 1984), criticized the *Sedima* majority for requiring "that the injury result from mobster activity or the efforts of organized crime," and therefore rejected the *Sedima* limitation. *Id.* at 413. *Accord Atlantic Fed. Sav. & Loan Ass'n of Fort Lauderdale v. Dade Sav. & Loan Ass'n*, 592 F. Supp. 1089, 1092-93 (S.D. Fla. 1984) (emphasizing *Sedima*'s "mobster" language).

¹⁵¹ See *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983); *supra* note 136 and accompanying text.

¹⁵² "[T]he so-called organized crime requirement has not found acceptance in the criminal RICO context Yet, on the civil side, where the stakes are presumably not as high, some courts have been willing to restrict a civil RICO claim by requiring a . . . nexus with organized crime." *Catanella*, 583 F. Supp. at 1426-27 (citations omitted). Such courts would allow civil RICO defendants a loophole not available to criminal RICO defendants who face the possibility of long terms of imprisonment.

¹⁵³ See, e.g., *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983); see also Comment, *Reading the "Enterprise" Element Back Into RICO: Sections 1962 and 1964(c)*, 76 Nw. U.L. REV. 100, 129 (1981) ("the fact that section 1964(c) was patterned after the antitrust remedies reinforces the notion that Congress was concerned with *competitive injury*") (emphasis in original).

§ 1964(c) was not to transform state law violations into federal violations, but to prevent interference with free competition."¹⁵⁴ The Seventh Circuit in *Haroco* claimed to identify a competitive injury element in *Sedima's* racketeering injury requirement.¹⁵⁵

Most federal courts have rejected the competitive injury requirement¹⁵⁶ on two grounds. First, the requirement is inconsistent with congressional intent.¹⁵⁷ Second, the purposes of RICO differ from those underlying the antitrust law. One purpose of antitrust legislation is to protect competition. An antitrust defendant should, therefore, not be so injured after the application of antitrust penalties that he cannot stay in business. Thus, strict standing limitations on private antitrust actions are appropriate to prevent a plethora of private suits from driving an antitrust defendant out of business. One of RICO's purposes is to put the organized criminal out of business.¹⁵⁸ Thus, engrafting a competitive injury requirement onto RICO could reduce its effectiveness in eliminating organized crime by increasing the possibility that offenders will economically survive after violating the statute.¹⁵⁹ For both of these reasons, the

¹⁵⁴ *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 210 (N.D. Ill. 1980) (business fraud involving real estate development venture).

¹⁵⁵ 747 F.2d at 395. The *Haroco* court noted that under *Sedima* the plaintiff need not show an actual anticompetitive effect "if the injury were of the type which would ordinarily threaten competition." *Id.*; see *Sedima*, 741 F.2d at 495-96 & n.41. Judge Cardamone in dissent objected that any analogy to antitrust limitations is "misplaced." *Sedima*, 741 F.2d at 509. The *Sedima* opinion thus allows the conclusion that "a racketeering injury is indistinguishable from a competitive or commercial injury." Kimmel v. Peterson, 565 F. Supp. 476, 494 (E.D. Pa. 1983) (rejecting antitrust competitive injury requirement in securities fraud case).

¹⁵⁶ See *infra* notes 157-59.

¹⁵⁷ See *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983) (pointing out that securities brokerage infiltrated by organized crime and defrauding its customers would not cause injury to competition, but should surely fall under RICO's condemnation). The *Sedima* majority acknowledged that RICO might apply in the absence of an injury to competition, as where "all competitors are being extorted from equally." *Sedima*, 741 F.2d at 496 n.41.

Senator McClellan, a sponsor of RICO, stated that he did not intend to incorporate antitrust standing limitations into RICO. After noting that the bill drew heavily from antitrust remedies, he stated that there was "no intention here of importing the great complexity of antitrust law enforcement into this field." 115 CONG. REC. 9567 (1969). See generally 115 CONG. REC. 6995 (1969) (report of ABA Antitrust Section asserting undesirability of incorporating antitrust standing principles into RICO).

¹⁵⁸ *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1982) (citing statement of Sen. Hruska, 116 CONG. REC. 602 (1970)), *aff'd in part and rev'd in part*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 527 (1983); see also *In re Action Indus. Tender Offer*, 572 F. Supp. 846, 852 (E.D. Va. 1983) (noting that "antitrust laws were designed to avoid concentration in industry" while "RICO borrow[s] the tools of antitrust law to fight corruption in general"); *Hellenic Lines*, 523 F. Supp. at 248 ("RICO does not countenance racketeering activity so long as it is done uniformly among competing concerns").

¹⁵⁹ See *Schacht*, 711 F.2d at 1358; see also *Bennett v. Berg*, 685 F.2d at 1059 ("In a RICO context, there are few countervailing reasons to lessen the impact of RICO reme-

courts should not engraft a competitive injury requirement onto RICO.

3. *The Racketeering Injury Requirement*

The phrase "by reason of a violation of section 1962"¹⁶⁰ is the source of immense confusion for federal courts. Courts imposing a "racketeering injury" requirement on RICO plaintiffs invariably cite the "by reason of" language as the source of this limitation. The court in *Sedima* found the same language in the Clayton Act and drew an analogy to antitrust law to interpret the phrase. The court held that the "by reason of" language was intended to limit standing in civil RICO actions to those who suffered an "injury of the type RICO was designed to prevent."¹⁶¹ Several district courts have adopted similar racketeering injury standing limitations.¹⁶² Although these courts reject wholesale application of antitrust principles to RICO, they hold that, as in antitrust law, "[i]t is clear that Congress realized that a standing or proximate cause requirement was necessary with respect to the treble damages provision."¹⁶³ Be-

dies by importing the limitations on standing which apply in antitrust law."); 115 CONG. REC. 6994-95 (1969) (statement of Sen. Hruska). See generally Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1112 (1982) (although Congress did not desire to drive Clayton Act defendants out of marketplace, it "purposely designed RICO to threaten violators with economic ruin").

¹⁶⁰ 18 U.S.C. § 1964(c).

¹⁶¹ *Sedima*, 741 F.2d at 495. The definitional language is borrowed from *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent") (emphasis in original).

¹⁶² See, e.g., *Margolis v. Republic Nat'l Bank*, 585 F. Supp. 595, 597 (S.D.N.Y. 1984) (dismissing complaint where individual acts of fraud in newspaper advertisements were sole cause of plaintiff's injury) (following *Sedima*); *Bruns v. Ledbetter*, 583 F. Supp. 1050, 1056 (S.D. Cal. 1984) (plaintiffs alleging injuries only from multiple acts of securities fraud lacked RICO standing); *Hudson v. Larouche*, 579 F. Supp. 623, 630 (S.D.N.Y. 1983) (plaintiffs must allege "something more" than injury from predicate acts of mail and wire fraud); *Gitterman v. Vitoulas*, 579 F. Supp. 423, 428 (S.D.N.Y. 1983) (complaint dismissed where allegations were of direct injury only); *In re Action Indus. Tender Offer*, 572 F. Supp. 846, 851-52 (E.D. Va. 1983) (defining racketeering injury as "the type of injury that RICO was designed to prevent" and requiring that one be alleged for civil RICO claim to proceed); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 358 (E.D. Mich. 1983) (same); *Johnson v. Rogers*, 551 F. Supp. 281, 285-86 (C.D. Cal. 1982) (dismissing RICO complaint where alleged injury resulted directly from defendant's fraudulent inducement of plaintiffs to enter oil and gas lease); *Harper v. New Japan Sec. Int'l Inc.*, 545 F. Supp. 1002, 1007 (C.D. Cal. 1982) (civil RICO plaintiffs must allege more than injuries from defendants' individual acts of securities fraud); *Landmark Sav. & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 209 (E.D. Mich. 1981) (requiring racketeering enterprise injury for civil RICO standing and noting that "[t]he victims of predicate crimes almost always have a cause of action for direct damages under federal or state law").

¹⁶³ *Harper*, 545 F. Supp. at 1007; see also *Bruns v. Ledbetter*, 583 F. Supp. 1050, 1056 (S.D. Cal. 1984) (analogizing to Clayton Act to justify racketeering enterprise injury requirement).

cause of the paucity of legislative history concerning RICO's treble damages provision, these decisions rely on the conclusion that "the antitrust analogy is the construction of the statute which is most likely to reflect Congress' understanding of the words 'by reason of.'"¹⁶⁴

The racketeering injury requirement can be attacked on three grounds. First, some courts have argued that neither the statute's plain language nor its legislative history warrants the requirement.¹⁶⁵ The "by reason of" language in section 1964(c) does not mandate or suggest a standing limitation. One court has held that the statute's "requirement of 'injury by reason of a violation of section 1962' should be read as simply requiring that the plaintiff was injured by at least two acts of racketeering activity."¹⁶⁶ The *Haroco* court read the "by reason of" language as merely imposing a proximate cause requirement.¹⁶⁷ The Fifth Circuit employed a similar proximate cause analysis in a recent RICO case involving a violation of a state anti-bribery statute.¹⁶⁸ The language of section 1964(c) imposes only a proximate cause requirement;¹⁶⁹ turning to either

¹⁶⁴ *Harper*, 545 F. Supp. at 1008.

¹⁶⁵ See *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983) (legislative history does not justify either racketeering injury requirement or competitive injury requirement); *Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983) ("nothing in the statute or legislative history authorizes such a [racketeering injury] limitation"); see also *infra* notes 184-86 and accompanying text.

¹⁶⁶ *Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234, 244 (E.D. Pa. 1983).

¹⁶⁷ *Haroco*, 747 F.2d at 398. The court explained the proximate cause rule as follows:

As we read this "by reason of" language, it simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of section 1962 must directly or indirectly, have injured the plaintiff's business or property. A defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured. This causation requirement might not be subtle, elegant or imaginative, but we believe it is based on a straight forward reading of the statute as Congress intended it to be read.

Id.

¹⁶⁸ *Alcorn Co., Miss. v. U.S. Interstate Supplies*, 731 F.2d 1160, 1168 (5th Cir. 1984). After finding that the complaint alleged the acts of bribery, the court's only further inquiry was whether the RICO violation "damaged the business of [the plaintiff]." *Id.* at 1169.

¹⁶⁹ See *supra* notes 167-68; see also *Yancoski v. E.F. Hutton & Co.*, 581 F. Supp. 88, 96 (E.D. Pa. 1984) ("by reason of" language "should . . . be read as simply requiring that the plaintiff was injured by at least two acts of racketeering—a pattern—charged to the defendant"). The "pattern" element should not be extended artificially beyond the definition Congress assigned to it. See *supra* text accompanying note 20 (definition of "pattern of racketeering activity"); see also S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969) ("[T]he factor of continuity plus relationship . . . combines to produce a pattern."); 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan) ("[T]he term 'pattern' itself requires the showing of a relationship"). Two racketeering acts committed by the same defendant within a ten year period constitute the requisite continuity and relationship.

the organized crime nexus or antitrust analogy to flesh out the "by reason of" language is unjustified.

Second, the racketeering injury requirement is unworkably vague; no court adopting the requirement has "provided guidance as to what constitutes such an injury."¹⁷⁰ The much-quoted decision in *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*,¹⁷¹ stated that such an injury might arise "if a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering activity into the enterprise."¹⁷² The *Furman* court correctly pointed out, however, that this statement fails to define the injury and does little to limit RICO's reach because it would describe almost any RICO violation.¹⁷³ The district courts that impose the requirement merely cite each other without defining the phrase "racketeering injury."¹⁷⁴ Courts are increasingly recognizing that "racketeering injury" has no established meaning.¹⁷⁵ *Sedima* also failed to give any meaning to the term. A term with no established meaning gives courts too much discretion in determining whether a plaintiff may recover under RICO.

Third, the racketeering injury requirement insulates from RICO's sanctions conduct that "lie[s] near the center of Congress' concern" in enacting the statute.¹⁷⁶ In *Haroco* the Seventh Circuit noted that the racketeering injury limitation tends to limit the civil RICO remedy to indirect injuries and to exclude actions for injuries resulting directly from the predicate offenses.¹⁷⁷ The district court

Thus, they sufficiently support a civil RICO claim, provided the other elements, such as enterprise and interstate effect, are present. Although it is true that a plaintiff could be indirectly injured by the pattern and not by the predicate acts, if each predicate act injures the plaintiff, then the pattern has also injured him.

¹⁷⁰ *Furman v. Cirrito*, 741 F.2d 524, 530 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3343 (U.S. Oct. 15, 1984) (No. 84-604).

¹⁷¹ 527 F. Supp. 206 (E.D. Mich. 1981).

¹⁷² *Id.* at 209.

¹⁷³ *Furman*, 741 F.2d at 530.

¹⁷⁴ *E.g., Hudson*, 579 F. Supp. at 630.

¹⁷⁵ *See Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 569 (N.D. Cal. 1984) ("A growing number of courts have come to recognize [the requirement is] meaningless" and are beginning to reject it.).

¹⁷⁶ *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983).

¹⁷⁷ *Haroco*, 747 F.2d at 398. Courts reading RICO to cover only indirect injuries read the "by reason of a violation of section 1962" language restrictively. They argue that this clause excludes injuries resulting from the predicate acts and hold that the injury giving rise to the RICO claim must result from the pattern. These courts ignore the fact that whenever injury occurs from the pattern (two RICO predicate acts), the predicate acts must of necessity be contributing causes of the injury. Thus, it is more accurate to say that the racketeering injury requirement serves to limit RICO recovery to cases in which the predicate acts are not the proximate cause of the injury. *See, e.g., infra* text accompanying note 178.

in *Mauriber v. Shearson/American Express, Inc.*¹⁷⁸ stated that organized criminals who infiltrated a brokerage firm might cause direct injury by defrauding the firm's customers. Nevertheless, if the racketeering injury requirement were applied, the criminals could escape civil RICO liability if their acts of fraud, as a "pattern of racketeering activity," did not cause an indirect injury.¹⁷⁹ Congress surely intended RICO's sanctions to apply in such a case. The Seventh Circuit in *Schacht v. Brown*¹⁸⁰ held that "RICO was designed to protect *direct*, and not just second order, victims of organized crime infiltration."¹⁸¹ The Fourth Circuit recently sustained a RICO complaint alleging only direct injury from the defendant's extortionate acts.¹⁸² To the extent the Second Circuit in *Sedima* has limited recovery only to those injured indirectly by RICO violations, it has deprived RICO of much of its effectiveness.¹⁸³

Neither RICO's language nor its legislative history supports the racketeering injury requirement. The requirement also is inconsistent with the liberal construction that Congress statutorily mandated.¹⁸⁴ Congress intended RICO to "bring . . . to bear on the infiltration of organized crime into legitimate business or other or-

¹⁷⁸ 567 F. Supp. 1231 (S.D.N.Y. 1983).

¹⁷⁹ *Id.* at 1240.

¹⁸⁰ 711 F.2d 1343 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 508 (1984).

¹⁸¹ *Id.* at 1358 (emphasis in original); see *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1157 (D.N.J. 1983) (noting that racketeering enterprise injury requirement "could lead to the anomalous result of denying standing to persons concededly the direct victims of racketeering activity"); *Crocker Nat'l Bank v. Rockwell Int'l Corp.*, 555 F. Supp. 47, 49-50 (N.D. Cal. 1982) (RICO purpose of divesting organized crime associations of ill-gotten gains "would be severely undermined if persons who suffered direct harm from racketeering activity . . . could not recover in the absence of a showing of some 'special' harm or some overall anti-competitive effect").

¹⁸² *Battlefield Builders, Inc. v. Sevango*, 743 F.2d 1060 (4th Cir. 1984). The district court dismissed the complaint on the ground that "garden-variety commercial breach of contract [or] fraud . . . isn't what RICO was designed to remedy." *Id.* at 1062-63. The Fourth Circuit reversed, rejecting the district court's contention that the complaint should allege "some pattern of something that would be called 'racketeering.'" *Id.* at 1063.

¹⁸³ The Second Circuit in *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. denied*, 53 U.S.L.W. 3484 (U.S. Jan. 7, 1985) (No. 84-654), was even more restrictive in its limitation of RICO to indirect injuries than it was in *Sedima*. *Cf. Haroco*, 747 F.2d at 398 ("[B]y restricting civil RICO to . . . indirect injuries . . . *Bankers Trust* reduces RICO's civil provisions to a trivial remedy, available in only a tiny fraction of RICO violations and dependent upon entirely fortuitous facts."); see also *Bankers Trust*, 741 F.2d at 522 (Cardamone, J., dissenting) ("even a convicted Mafia defendant could escape civil liability for the harm done his intended victim under the majority's reasoning").

¹⁸⁴ When Congress enacted RICO in 1970, it included the mandate that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purpose." 18 U.S.C. § 1961 note (1982) (Liberal Construction of Provisions). See also Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 182 (1980) ("interpretational provisions give Congress some control over the attitude courts will adopt, enhancing the likelihood that the construction will reflect the true intent of Congress").

ganizations the full panoply of civil remedies."¹⁸⁵ To limit RICO to indirect injuries "is to sterilize civil RICO as a weapon against the conduct congress sought to curtail."¹⁸⁶

C. Requirement of a Prior Criminal Conviction

The *Sedima* majority held that "a prior criminal conviction is a prerequisite to a civil RICO action."¹⁸⁷ The court is the first to explicitly require prior conviction.¹⁸⁸ To reach this unprecedented result, the *Sedima* court unjustifiably rejected contrary case law. The court misinterpreted RICO's statutory language, Congress's intent in passing the Act, and constitutional concerns over its implementation. There should be no prior criminal conviction requirement in civil RICO actions.

1. Case Law

The *Sedima* majority failed adequately to address a large body of case law holding that a prior criminal conviction is unnecessary to a civil action under RICO.¹⁸⁹ Both the Sixth Circuit and the Seventh Circuit have held that no language in RICO justifies a prior criminal conviction requirement.¹⁹⁰ These courts have followed the Supreme

¹⁸⁵ S. REP. NO. 617, 91st Cong., 1st Sess. 81 (1969).

¹⁸⁶ *Furman*, 741 F.2d at 529.

¹⁸⁷ *Sedima*, 741 F.2d at 496. The court required prior conviction for the predicate acts, not prior conviction under RICO. *Id.* at 497-98. The Seventh Circuit in *Haroco* did not address the prior criminal conviction issue, except to note that *Sedima's* holding conflicted with the holding in *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1271, 1286-87 (7th Cir. 1983). See *Haroco*, 747 F.2d at 393 n.12.

¹⁸⁸ The court in *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1137 n.12 (D. Mass. 1982), stated in dicta that "although it is difficult for us to conclude that Congress, in using the words 'indictable' and 'punishable' contemplated that civil liability could result without involvement of the criminal process, other courts have done so." The court in *Kleiner v. First Nat'l Bank of Atlanta*, 525 F. Supp. 1019, (N.D. Ga.), *rev'd on other grounds sub nom.*, *Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983), without reaching the issue opined that "[i]t may well be that entitlement to the civil remedy of section 1964 should be conditioned upon a criminal conviction or at least an indictment." *Kleiner*, 525 F. Supp. at 1022 n.2. The *Sedima* court cited no other authority for its holding on the criminal conviction issue.

¹⁸⁹ See, e.g., *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983) (discussed *infra* note 190); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) (discussed *infra* note 190); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 675-76 (N.D. Ind. 1982) (plain language of § 1964(c) requires only showing that defendant violated § 1962, not prior conviction under § 1963); *Glusband v. Benjamin*, 530 F. Supp. 240, 241 (S.D.N.Y. 1981) (statute's plain language controls because its legislative history reveals no intent to limit RICO's scope; prior conviction not required); *Parnes v. Heinhold Commod., Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980) (plain language controls; no prior conviction required); *Farmers Bank of State of Del. v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978) (same).

¹⁹⁰ In *Bunker Ramo Corp.*, the Seventh Circuit held that "section 1964(c) creates a private right of action for parties injured by conduct that violates section 1962 without

Court's directive in *United States v. Turkette*¹⁹¹ that "[i]f the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" ¹⁹² Congress's intent with regard to a prior criminal conviction requirement under civil RICO is not "clearly expressed."¹⁹³ However, the statutory language establishing civil RICO creates a private right of action without reference to prior criminal convictions.¹⁹⁴ Thus, a plain language analysis requires the rejection of the prior criminal conviction requirement. Therefore, the *Sedima* majority violated the Supreme Court's directive in *Turkette*.¹⁹⁵

In *Sedima*, the Second Circuit also unjustifiably dismissed the Seventh Circuit's decision in *United States v. Cappetto*.¹⁹⁶ In *Cappetto* the court held that the government need not first obtain a criminal RICO conviction in order to bring an action for injunctive relief under section 1964(a).¹⁹⁷ The *Sedima* court attempted to distinguish *Cappetto*, arguing that the *Cappetto* decision approved only the government's right to bring an injunctive action under section 1964(a) and did not speak to whether a prior conviction is required in private suits brought under section 1964(c).¹⁹⁸ The Second Circuit's conclusion is incorrect in that both section 1964(a) and section 1964(c) refer to "violations of section 1962."¹⁹⁹ Thus, a consistent interpretation of the provisions that takes proper regard of their

any requirement of prior criminal conviction for that conduct." 713 F.2d at 1287. The Sixth Circuit held in *USACO Coal Co.*, that "[b]y referring in § 1964(c) only to the unlawful acts of § 1962, Congress has created a civil remedy that is independent of criminal proceedings under § 1963." 689 F.2d at 95 n.1. The *Sedima* majority correctly pointed out that the Sixth Circuit's reasoning in *USACO Coal* would show only that Congress did not intend to require a prior conviction under criminal RICO, § 1963. *Sedima*, 741 F.2d at 497-98. However, the *USACO Coal* court also rested its opinion on the use of the word "unlawful" (as opposed to "criminal") in § 1962, and on *Turkette*'s plain meaning approach. See *infra* note 192 and accompanying text.

¹⁹¹ 452 U.S. 576 (1981).

¹⁹² *Turkette*, 452 U.S. at 580 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

¹⁹³ See *infra* notes 225-31 and accompanying text.

¹⁹⁴ See *infra* notes 201-23 and accompanying text.

¹⁹⁵ Cf. *Maxwell v. Southwest Nat'l Bank*, 593 F. Supp. 250, 255 (D. Kan. 1984) (prior criminal conviction requirement in "*Sedima* fashions a limitation which runs completely contrary to the express language of the statute and then imputes an intent upon Congress which is not justified by the legislative history"); *Kitchens v. U.S. Shelter*, No. 82-1951 (D.S.C. Oct. 20, 1984) (same).

¹⁹⁶ 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

¹⁹⁷ *Cappetto*, 502 F.2d at 1357. 18 U.S.C. § 1964(a) (1982) provides:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders. . . .

¹⁹⁸ *Sedima*, 741 F.2d at 496-97.

¹⁹⁹ See 18 U.S.C. §§ 1964(a), 1964(c); see also *supra* note 197 (quoting § 1964(a)).

plain meaning must yield the conclusion that *neither* imposes a prior criminal conviction requirement.²⁰⁰

2. *Statutory Language*

The Supreme Court has stated that "[b]road general language is not necessarily ambiguous when congressional objectives require broad terms."²⁰¹ In *Sedima*, the Second Circuit mistook intentionally broad language for ambiguous language.²⁰² The Second Circuit's restrictive reading of RICO's private civil action gives insufficient deference to Congress's broad goals.²⁰³

The *Sedima* majority found it necessary to read ambiguities into RICO's language. The first perceived ambiguity stems from the contrast between the phrase "by reason of a violation" in private civil RICO and the phrase "by reason of anything forbidden in the antitrust laws" in the Clayton Act.²⁰⁴ The majority reasoned that the term "violation," when compared with the phraseology of the Clayton Act, was synonymous with "conviction."²⁰⁵ The Clayton Act does not require a prior criminal conviction before private liability can arise. The *Sedima* court found the change from the phrase "anything forbidden" in the Clayton Act to the word "violation" in RICO to be compelling evidence of congressional intent to impose a prior criminal conviction requirement under RICO.²⁰⁶ The court

²⁰⁰ The *Sedima* court also advanced a policy basis for distinguishing *Cappetto*. The court emphasized that "[a]s a matter of policy, government actions and private actions are of course very different. Prosecutorial discretion, and in the case of RICO, guidelines from the Department of Justice, protect against overbroad use of RICO There is no comparable way to limit private RICO." *Sedima*, 741 F.2d at 497 (citations omitted). This argument is unpersuasive for at least two reasons. First, the plain language of the statute draws no distinction between private and public actions with regard to a prior criminal conviction requirement. See *supra* note 199 and accompanying text. Both the public civil action and the private action are granted to prevent or redress violations of § 1962. A plain meaning analysis therefore calls for the provisions to be treated similarly with regard to the prior criminal conviction requirement. See *supra* notes 190-95 and accompanying text. Second, the majority ignored Judge Cardamone's argument for not distinguishing *Cappetto* because "[o]rdinarily more, not less, protection is expected for a defendant when the government is plaintiff. When the plaintiff is a private party . . . the quick dismissal of *Cappetto* totally ignores the 'private attorney general' rationale built into RICO." *Sedima*, 741 F.2d at 504-05 (Cardamone, J., dissenting).

²⁰¹ *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980).

²⁰² The *Haroco* court viewed RICO as "a statute which is not ambiguous, but which is, above all, deliberately and extraordinarily broad." 747 F.2d at 398. This view was the "root of the conflict" between its position and that taken by the Second Circuit in *Sedima*. See *supra* text accompanying note 75.

²⁰³ See 18 U.S.C. § 1961 note (1982) (Statement of Findings and Purposes); see also *supra* notes 158-59 and accompanying text.

²⁰⁴ See *supra* note 45.

²⁰⁵ *Sedima*, 741 F.2d at 498-99.

²⁰⁶ *Id.*

acknowledged that the word "violation" might be merely a shorthand for "anything forbidden" but concluded that it is more likely that the change was made with the intent of establishing a prior criminal conviction requirement.²⁰⁷

The *Sedima* majority was mistaken when it inferred that Congress meant the term "violation" to be read as synonymous with "conviction." The term "violations" appears elsewhere in the antitrust laws and is not there synonymous with "conviction."²⁰⁸ "Violations" also appears in RICO sections giving the United States government the right to restrain RICO violations.²⁰⁹ Finally, "violations" appears in the private civil action provided for in earlier bills.²¹⁰ In these contexts "violation" was never equated with "conviction." Indeed, several courts have considered and rejected this argument.²¹¹

The provision of a private action for those injured by a "violation of section 1962" does not support a requirement of prior conviction on the predicate acts of racketeering activity.²¹² The term "violation" refers to RICO's substantive prohibitions in section 1962, not to the predicate acts listed in section 1961.²¹³ The term

²⁰⁷ *Id.*

²⁰⁸ Commenting on the contrast between RICO's language and that of the Clayton Act, the American Law Division of the Library of Congress noted:

Although it could be argued that the difference between "*forbidden* by the antitrust laws" and "*violations* of this chapter" requires a prior conviction in the second case not necessary in the antitrust situation, use of the term "violation" elsewhere in the antitrust laws would weigh heavily against such an interpretation, *see, e.g.*, 15 U.S.C. §§ 4, 25, 26.

Victims of Crime, supra note 46, at 329.

²⁰⁹ See 18 U.S.C. § 1964(a); *supra* note 197 (quoting § 1964(a)). "Violations," as used in § 1964(a), cannot mean "convictions" because it is impossible to "prevent and restrain" a conviction. It would be strange indeed if the House were to include in a different subsection of the section containing 1964(a) a use of the term "violations" to mean "convictions." Because "[t]he final statute blends both [government injunctive and private] types of actions in a common section[,] they should receive . . . a similar construction." Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennet v. Berg*, 58 NOTRE DAME L. REV. 237, 263 n.72 (1982).

²¹⁰ *See, e.g.*, S. 1623, 91st Cong., 1st Sess. (1969); H.R. 19586, H.R. 19215, 91st Cong., 2d Sess. (1970).

²¹¹ The Seventh Circuit in *Bunker Ramo* considered and rejected the argument that the difference in language between RICO and the Clayton Act indicated Congress's intent to create a prior conviction requirement under RICO. *See* 713 F.2d at 1287; *see also* Maxwell v. Southwest Nat'l Bank, 593 F. Supp. 250, 255 (D. Kan. 1984) ("word 'violation' can only be given its common and ordinary meaning, that of an 'infringement' or a 'breach of a right or a duty'"); State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 675 (N.D. Ind. 1982) ("[s]ection 1962 says that acts in violation of it are 'unlawful,' not criminal"); Parnes v. Household Commodities, Inc., 487 F. Supp. 645, 647 (N.D. Ill. 1980) ("violation is not tantamount to conviction").

²¹² The predicate acts are defined in 18 U.S.C. § 1961(I). Congress would have referred to that section if it wished to require prior conviction under the laws listed there.

²¹³ The only logical inference from the use of "violation" in § 1964(c), if taken to be

"violation" thus does not refer to whether a particular act is sufficient to form the predicate for a private RICO action.

The *Sedima* majority also asserted that by describing the acts that constitute racketeering activity as "indictable" and "chargeable,"²¹⁴ Congress demonstrated its intent that RICO impose a prior conviction requirement. The terms "indictable" and "chargeable" refer to the criminal law in that whether a person is indictable or chargeable is normally determined through application of the criminal law.²¹⁵ The *Sedima* court noted that courts in civil actions, where proof is by preponderance of the evidence, do not usually determine whether such purely criminal standards have been met.²¹⁶ From this the court deduced that Congress did not intend to depart from tradition to give courts such power in the civil RICO context.²¹⁷ Thus, under the *Sedima* court's reasoning, courts must wait for criminal convictions on the predicate acts before hearing civil RICO claims based on those acts.

The *Sedima* majority's interpretation of the ramifications of Congress's use of "indictable" and "chargeable" is incorrect. As Judge Cardamone asserted in dissent, Congress chose not to use the words "for which an indictment or information has been returned or filed."²¹⁸ Judge Cardamone also noted that section 1964 is labelled "Civil Remedies," and not "Post Criminal Conviction Civil Remedies."²¹⁹ Moreover, even if the words "indictable" and "chargeable" were to require an indictment or information, they do not require an actual criminal conviction.²²⁰ In the criminal context, sev-

synonymous with "conviction," would be that Congress intended to require a prior conviction under RICO's substantive provisions. 18 U.S.C. § 1962(a)-(d). The statute's structure refutes this possibility, and *Sedima* does not require it. See *supra* note 187. 18 U.S.C. § 1963 deals with criminal penalties for acts proscribed in § 1962, and requires proof beyond a reasonable doubt. 18 U.S.C. § 1964 provides civil remedies for those injured by the acts proscribed in § 1962. Section 1964 also gives the government the right to seek injunctions to restrain § 1962 acts, which it may do without a § 1962 conviction. See *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *infra* notes 225-28 and accompanying text.

²¹⁴ These terms appear in 18 U.S.C. § 1961(1)(A) ("chargeable under state law") and 18 U.S.C. § 1961(1)(B) (listing "indictable" offenses under federal law, including mail and wire fraud). The first section includes various state law offenses; the second deals with federal offenses, including mail and wire fraud. Section 1962(1)(D) uses the word "offense," and it includes securities frauds. The plaintiff's cause of action in *Sedima* falls under § 1961(1)(B), the "indictable" acts being mail and wire fraud.

²¹⁵ See *Sedima*, 741 F.2d at 499.

²¹⁶ *Id.* at 500.

²¹⁷ *Id.*

²¹⁸ *Id.* at 505 (Cardamone, J., dissenting) (emphasis in original).

²¹⁹ *Id.*

²²⁰ See 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 121, at 338 (1982) ("An indictment or information is the pleading by which the United States puts forward a criminal charge.").

eral circuits have held that the use of the word "chargeable" does not require a conviction, or even a possibility of conviction, under the state laws defining racketeering activity.²²¹ RICO's list of predicate racketeering activities is intended "only to identify the type of unlawful activity in which the defendant intended to engage."²²² In using the words "indictable" and "chargeable," Congress was not requiring actual indictment or conviction on the predicate acts. Rather, it was merely defining the type of conduct that might invoke RICO's sanctions. To require a prior conviction is to ignore the breadth of Congress's language.²²³

3. *Congressional Intent*

The *Sedima* majority imputed to Congress an intent to restrict RICO's applicability to defendants with prior convictions based on a perception that RICO was designed to punish only criminal conduct.²²⁴ The majority recognized that "Congress assumed a preponderance standard was appropriate" under civil RICO²²⁵ but reasoned that Congress must also have expected that a prior criminal conviction would be obtained.²²⁶ The legislative history does not support this reasoning. Congress viewed the lower standard of proof as a method of facilitating recovery of ill-gotten gains.²²⁷ A prior criminal conviction requirement would frustrate this goal. Such a prerequisite to recovery under RICO would, in essence, im-

²²¹ The Sixth Circuit in *United States v. Licavoli*, 725 F.2d 1040 (6th Cir.), *cert. denied*, 104 S. Ct. 3535 (1984), held that conspiracy to murder and murder could constitute the predicate acts requisite for a federal RICO prosecution even though the defendant could not be separately punished for the two crimes under state law. *Id.* at 1047. The court also held that the defendants' acquittal on the state law charges did not bar the federal prosecution even though the defendants were no longer "chargeable" under state law because of double jeopardy principles. *Id.* The Third and Fifth Circuits agree that acquittal on the predicate state offenses does not prevent RICO prosecution even though those acts are no longer "chargeable" under state law. See *United States v. Malatesta*, 583 F.2d 748, 757 (5th Cir.), *aff'd on reh'g*, 590 F.2d 1379 (1978), *cert. denied*, 440 U.S. 962 (1979); *United States v. Frumento*, 563 F.2d 1083, 1086 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

²²² *Frumento*, 563 F.2d at 1087-88 (quoting *United States v. Cerone*, 452 F.2d 274, 286 (7th Cir. 1971)). See also *id.* at 1087 n.8A ("Section 1961 requires . . . only that the conduct on which the federal charge is based be typical of the serious crime dealt with by the state statute . . .") (emphasis in original).

²²³ See *infra* note 231 and accompanying text.

²²⁴ *Sedima*, 741 F.2d at 501-02.

²²⁵ *Id.* at 502 (footnote omitted).

²²⁶ *Id.*

²²⁷ See *House Hearings*, *supra* note 25, at 106 ("This one-sided character of the criminal process has been a handicap in the use of the criminal law as a means of avoiding infiltration of legitimate business by organized crime."); *id.* at 664 (statement of Rep. Poff) ("The burden of proof under the civil-remedy section . . . is much less than it would be under the criminal remedy section We need not be preoccupied with the criminal process when we can accomplish the same result by a civil remedy.").

pose the requirement of proof beyond a reasonable doubt and would therefore defeat the purpose of Congress's "civil approach," which was designed to strike directly at the economic evils of racketeering.²²⁸ In addition, a prior conviction requirement would condition an injured RICO plaintiff's right of recovery on the government's prior initiative in pursuing a criminal suit as to the predicate acts. An injured plaintiff's right to recover damages should not depend upon prosecutorial discretion, which involves considerations unrelated to the plaintiff's right of recovery.

Two other factors indicate that Congress did not intend to impose a prior criminal conviction requirement. First, the two recommendations in the House for a private civil RICO action referred to the private remedy under the antitrust laws, which does not require a prior conviction.²²⁹ Thus, Congress would have made explicit any intent to make RICO actions more restrictive for plaintiffs than actions under the antitrust laws.²³⁰ Second, Congress intended RICO's list of predicate racketeering acts only to encompass "offenses committed by organized crime with substantial frequency."²³¹ To require prior conviction on these predicate offenses would defeat Congress's intent to define the type of conduct that underlies RICO violations and not to redress the predicate acts themselves.

4. *Constitutional Concerns*

The *Sedima* majority believed that, absent a prior criminal conviction requirement, civil RICO would be unconstitutional. The court's concern arose from a perception that liability under section 1964(c) results in penalties which are essentially criminal in na-

²²⁸ See S. REP. No. 617, 91st Cong., 1st Sess. 81-83 (1969). The civil remedies were designed to compensate for the government's "relative disadvantage" at a criminal trial due to procedural protections. *House Hearings, supra* note 25, at 106. Private plaintiffs facilitate Congress's intention to strike at RICO violators.

²²⁹ See *House Hearings, supra* note 25, at 520 (recommendation of Rep. Steiger); *id.* at 548 (ABA recommendation for "provision authorizing private damage suits based upon the concept of Section 4 of the Clayton Antitrust Act").

²³⁰ See 15 U.S.C. § 15 (private right of action under Clayton Act). In fact, Congress intended that RICO be interpreted *less* restrictively than the antitrust laws. See *supra* notes 153-59 and accompanying text.

²³¹ 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan). RICO's immediate predecessor bill, S. 1861, defined "racketeering activity" as "any act involving the danger of violence to life, limb, or property, indictable under State or Federal law, and punishable by imprisonment for more than 1 year." S. REP. No. 612, 91st Cong., 1st Sess. 121 (1969). The Department of Justice thought this definition was "too broad" and would "tend toward a complete federalization of criminal justice." *Id.* at 121-22. The definition was therefore altered to list specific state offenses. *Id.* The original broad definition shows that Congress was not concerned with prior convictions on specific predicate acts and that these acts were listed primarily for definitional purposes.

ture.²³² The court's perception arose from two factors: the stigma associated with being labelled a "racketeer" and the punitive nature of the treble damages provision.²³³ According to the court, both of these perceived penalties arise under RICO after a finding that the defendant has committed the predicate criminal acts. Thus the court argued that RICO liability, and its penalties, do not operate absent a prior finding of criminal conduct, requiring proof beyond a reasonable doubt. Absent the prior conviction requirement, a court hearing a civil case could find the predicate acts using a preponderance of the evidence standard. The court could impose the penalties of stigma and treble damages without determining their predicates under a proper burden of proof. The *Sedima* court believed that this was unconstitutional.²³⁴ The court rejected imposing a heightened burden of proof in the civil context because of the possibility of jury confusion.²³⁵ These perceived constitutional and practical difficulties led the majority to conclude that Congress "would have explicitly required previously established convictions" if it had considered the problem.²³⁶

The *Sedima* majority was mistaken in its belief that civil RICO imposes penalties that are primarily criminal in nature. In his dissenting opinion, Judge Cardamone rebutted the majority's argument that the stigma associated with being labelled a racketeer made the statute criminal in nature. He stated that "stigma alone ordinarily does not suffice to convert a proceeding from civil to

²³² *Sedima*, 741 F.2d at 501. The *Sedima* majority created "burden of proof problems" by arguing that, absent a prior conviction requirement, civil RICO would improperly require the court to make criminal judgments using a civil burden of proof. *See id.* at 499-502; *see also supra* notes 214-17 and accompanying text. These are really "problems" only if one accepts that civil RICO is a criminal statute, which it is not. *See supra* notes 218-23 and accompanying text; *infra* notes 237-62 and accompanying text. Thus a normal preponderance of the evidence standard applies throughout the trial. Several courts have accepted this conclusion. *See, e.g., Haroco*, 747 F.2d at 404; *Schacht v. Brown*, 711 F.2d 1343, 1352-53 (7th Cir.), *cert. denied*, 104 U.S. 508 (1983); *Eaby v. Richmond*, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 675-77 (N.D. Ind. 1982); *Parnes v. Heinhold Commodities*, 487 F. Supp. 645, 745 (N.D. Ill. 1980); *Farmers Bank of Del. v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978).

²³³ *See Sedima*, 741 F.2d at 500 n.49. The majority also cited the nature of the underlying offense, the intent of Congress, and whether the government or a private party is bringing the action as factors supporting its characterization of RICO. *Id.* The majority emphasized the two factors discussed in the text. *Id.* at 503.

²³⁴ *Id.* at 501-02.

²³⁵ *Id.* at 502.

²³⁶ *Id.* at 501. The majority relied on language in a law review article to the effect that Congress intended RICO to reach conduct "already criminal." Blakey & Gettings, *supra* note 26, at 1023. In the context of the article this phrase referred to conduct "already punishable under another criminal law." The same article states that "RICO is not a criminal statute." *Id.* at 1021 n.71.

criminal.”²³⁷ One commentator has pointed out that “RICO claims can stigmatize defendants only if courts restrict the applicability of the broad statutory language to proven organized criminals.”²³⁸ In limiting RICO’s application to “mobsters,” the *Sedima* majority has thus exacerbated the stigma which it decried. The *Sedima* majority seems to have forgotten that a civil RICO defendant cannot be labelled a “racketeer” until the plaintiff proves the underlying acts of fraud. The defendant held liable under RICO is not “innocent.” As the Seventh Circuit panel in *Haroco* pointed out, the white collar crimes typically alleged in civil RICO complaints are “at least as disturbing as the bringing of RICO claims against ‘legitimate and respected defendants.’”²³⁹ The court should accord no more deference to a business person than to any other wrongdoer.²⁴⁰

The *Sedima* court’s argument based on the punitive nature of the treble damages provision is also unconvincing; the provision is not inherently a criminal sanction. The Supreme Court recently reviewed the Clayton Act’s treble damages provision in *Blue Shield of Virginia v. McCready*.²⁴¹ In *McCready*, the Court held that Congress’s “‘expansive remedial purpose’” in enacting section 4 of the Clayton Act was “to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.”²⁴² Although the courts should not fetter RICO with antitrust standing limitations, the Court’s holding in *McCready* demonstrates that treble damages need not be considered exclusively punitive. Furthermore, the Second Circuit did not claim in *Sedima* that the civil action under the Clayton Act is criminal in nature, even though its remedy is identical to that of civil RICO. The Supreme Court has also held that certain other multiple damages provisions

²³⁷ *Sedima*, 741 F.2d at 508 (Cardamone, J., dissenting) (citing *Ullman v. United States*, 350 U.S. 422 (1956)). The Supreme Court in *Turkette* considered the stigma argument but apparently did not find it compelling. See *supra* note 94 and accompanying text.

²³⁸ Note, *supra* note 159 at 1107.

²³⁹ *Haroco*, 747 F.2d at 395 n.14. The *Haroco* court also addressed the *Sedima* majority’s argument that civil RICO has an inordinate in terrorem settlement value. See 741 F.2d at 487. In *Haroco*, the Seventh Circuit noted the “other side of the scales”; RICO plaintiffs with valid claims may be able to obtain settlements closer to the actual value of those claims. 747 F.2d at 399 n.16. The *Haroco* court concluded that Congress must make the choice between simple compensatory and treble damages. *Id.*

²⁴⁰ As the panel in *Furman v. Cirrito* noted, “fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm.” 741 F.2d 524, 529 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3343 (U.S. Oct. 15, 1984) (No. 84-604).

²⁴¹ 457 U.S. 465 (1982).

²⁴² *Id.* at 472.

are compensatory in nature.²⁴³ The fact that a treble damages provision appears in a statute also providing for criminal remedies does not render that provision criminal.²⁴⁴

The two-level test the Supreme Court promulgated in *United States v. Ward*²⁴⁵ supports the conclusion that the private RICO action is not "criminal" in nature. Judge Cardamone applied the test in his *Sedima* dissent. He examined, first, whether Congress indicated a preference for a civil or criminal label,²⁴⁶ and, second, if the label was "civil," whether the statutory scheme was so punitive in purpose or effect as to negate that intention.²⁴⁷ He correctly found that Congress had labelled the private RICO action as civil and that civil RICO was not primarily punitive.²⁴⁸ Several factors support Judge Cardamone's conclusions.

The private RICO action satisfies the *Ward* test's first prong. Congress clearly indicated that private RICO is civil rather than criminal. The Senate Report accompanying RICO stated that "Title IX, it must again be emphasized, is remedial rather than penal."²⁴⁹ Although the Report also noted that "[p]unishment as such is limited to the criminal remedies,"²⁵⁰ the House placed the treble damages within RICO's civil provision. The statute directs that "[t]he provisions of this title . . . shall be liberally construed to effectuate its remedial purpose."²⁵¹ Thus Congress placed the civil damages provision within a statutory provision labelled as remedial.

Civil RICO also satisfies the second prong of the *Ward* test. Civil RICO is not so punitive as to negate Congress's intent that it

²⁴³ See, e.g., *United States v. Bornstein*, 423 U.S. 303, 314 (1976) ("The device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole.") (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943)).

²⁴⁴ See *United States v. Cappelto*, 502 F.2d 1351, 1357 (7th Cir. 1974) ("acts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings"), cert. denied, 420 U.S. 925 (1975); see also *Marcus*, 317 U.S. at 550.

²⁴⁵ 448 U.S. 242, 248-49 (1980). The defendant in *Ward* had been fined \$500 under the Federal Water Pollution Control Act. The Court found that the statute enacted a "civil penalty" and did not implicate the procedural protections involved in criminal prosecutions.

²⁴⁶ See *Sedima*, 741 F.2d at 505 (Cardamone, J., dissenting); see also *Ward*, 448 U.S. at 248 (setting forth test's first prong).

²⁴⁷ See *Sedima*, 741 F.2d at 505-06 (Cardamone, J., dissenting); see also *Ward*, 448 U.S. at 248-49 (setting forth test's second prong).

²⁴⁸ See *Sedima*, 741 F.2d at 505-06 (Cardamone, J., dissenting).

²⁴⁹ S. REP. NO. 617, 91st Cong., 1st Sess. 82 (1969). The bill did not contain the treble damages remedy at that time. The report also stated that "[h]owever remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil." *Id.* at 81. Treble damages was one of the remedies eventually fashioned.

²⁵⁰ *Id.*

²⁵¹ 18 U.S.C. § 1961 note (1982) (liberal construction provision). See generally Note, *supra* note 184 (discussing significance of RICO's liberal construction clause).

be considered a civil statute. The Supreme Court has found that "a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."²⁵² Congress listed such legitimate purposes as underlying civil RICO, including promotion of free enterprise, domestic security, and the general welfare.²⁵³ In addition, the *Ward* case demonstrates that a monetary "penalty" need not be considered criminal in nature.²⁵⁴ A monetary penalty may be analogous to civil damages.²⁵⁵

In *Ward*, the Court considered an earlier case, *Kennedy v. Mendoza-Martinez*,²⁵⁶ in which it set forth seven factors to be considered in evaluating whether a statute is criminal in nature.²⁵⁷ Only one factor (whether the behavior to which the sanction applies is already a crime) might apply to civil RICO.²⁵⁸ The Court held that the presence of this single factor was insufficient to make the statute under consideration in *Ward* so punitive as to be criminal in the absence of any expressed congressional intention.²⁵⁹ Courts should reach the same result when interpreting civil RICO.

Because civil RICO is not a criminal statute in that it does not impose criminal penalties,²⁶⁰ a civil burden of proof is appropriate in evaluating the presence of the predicate acts.²⁶¹ Neither RICO's plain language nor its legislative history supports the prior criminal conviction requirement imposed in *Sedima*. Because civil RICO does not impose penalties of a criminal nature, constitutional protections

²⁵² *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (citations omitted).

²⁵³ 18 U.S.C. § 1961 note (1982) (Statement of Findings and Purposes).

²⁵⁴ The \$500 fine levied for oil spillage in *Ward* was not a "damages" remedy.

²⁵⁵ See *Ward*, 448 U.S. at 254; see also *id.* at 256 (Blackmun, J., concurring) ("monetary assessments are traditionally a form of civil remedy").

²⁵⁶ 372 U.S. 144 (1962).

²⁵⁷ The factors are the following:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned

Id. at 168-69 (footnotes omitted).

²⁵⁸ Justice Blackmun, concurring in *Ward*, stated that "a monetary penalty . . . does not result in the imposition of an 'affirmative disability or restraint' within the meaning of *Mendoza-Martinez*." 448 U.S. at 256. Judge Cardamone, dissenting in *Sedima*, agreed that "[t]reble damages have been part of our jurisprudence for centuries . . . and they have never been viewed as 'criminal' sanctions." *Sedima*, 741 F.2d at 506.

²⁵⁹ See 448 U.S. at 254.

²⁶⁰ See *supra* 232-59 and accompanying text.

²⁶¹ Courts approving a civil burden of proof include *Haroco*, 747 F.2d at 404, *Schacht v. Brown*, 711 F.2d 1343, 1352-53 (7th Cir. 1983). See *supra* note 232.

such as the reasonable doubt standard are unnecessary.²⁶² Congress's intent in enacting civil RICO was to facilitate the broad remedial aims of that Act without implicating constitutional protections mandated in criminal proceedings. The court's decision in *Sedima* to impose a prior criminal conviction requirement thus improperly abrogates congressional intent and should be reversed.

CONCLUSION

The Seventh Circuit's decision in *Haroco* to leave civil RICO restrictions to Congress accords with RICO's plain language and broad legislative intent. The federal judiciary should not restrict a statute whose plain language directs a sweeping attack at deeply entrenched economic and societal ills.²⁶³ In contrast, the racketeering injury requirement imposed in *Sedima* has reintroduced the baggage of the antitrust and organized crime nexus standing limitations to eviscerate civil RICO. In addition, the *Sedima* court read nonexistent ambiguities into RICO's language and disregarded the civil label on the private treble damages action in imposing a criminal conviction requirement. The Supreme Court should therefore reject the Second Circuit's reasoning in *Sedima*. As the Court held in *Turkette*, the "language of the statute . . . [is] the most reliable evidence of its intent."²⁶⁴ Until Congress clearly manifests a contrary intent,²⁶⁵ civil RICO's broad language should control the scope of its availability.

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²⁶² See *Ward*, 448 U.S. at 248 (various constitutional protections, including reasonable doubt standard, are limited to context of criminal cases).

²⁶³ Commentators generally favor less restrictive readings of civil RICO. See, e.g., Blakey & Gettings, *supra* note 26; Note, *supra* note 159, at 1120-21 (criticizing imposition of undue standing requirement by courts and suggesting that "[o]nly section 1962(a), which prohibits the subsequent investment of income derived from a pattern of racketeering activity, should not be available to direct victims of the predicate offenses"); Comment, *Putting a Halt to Judicial Limitations on Civil RICO*, 52 UMKC L. REV. 56, 71 (1983) ("[j]udicial limitations on RICO are prompted by goals inconsistent with those of Congress," for example, preventing overlap of state and federal remedies, and preventing use of RICO against non-organized crime defendants); Comment, *Civil RICO: Pleading Fraud for Treble Damages*, 45 MONT. L. REV. 87, 111 (1984) (In order to control frivolous suits, "courts should impose existing civil sanctions rather than change the substantive law."); Note, *supra* note 100, at 437 ("Congress and the courts are left with the options of having either a powerful anti-organized crime weapon that is equally effective against legitimate businesses or restricting the application of RICO so that its powerful provisions fall on only those involved with organized crime. . . . [T]he latter [may be] impossible to achieve.").

²⁶⁴ 452 U.S. at 593.

²⁶⁵ Congress could easily amend civil RICO if it so desired by either limiting the very broad definition of a "pattern of racketeering activity" in § 1961(5) or by adding a specific requirement of causation in place of the "by reason of" language in § 1964(c).