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In recent years, no statute, except perhaps the Civil Rights Act of 1871, has engendered as much controversy, discussion, and litigation as the statutory provision that authorizes private civil damage suits for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). Since 1978 the federal courts have published more than 100 decisions involving civil RICO, and have offered almost as many interpretations of its provisions. The controversy surrounding civil RICO was heightened as a result of three decisions handed down by the Second Circuit Court of Appeals on successive days at the end of July 1984. The effect of these three decisions, at

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least in the Second Circuit, was to severely curtail the reach of the
civil RICO statute by drastically limiting a private plaintiff's ability
to pursue a claim under its provisions. The Seventh Circuit then
handed down a decision in Haroco, Inc. v. American National Bank
& Trust Co., which rejected the conclusions reached by Sedima,
S.P.R.L. v. Imrex Co., the controlling decision in the Second Cir-
cuit. As a result of the various approaches to civil RICO taken by
the lower courts and the importance of the issues involved, the Su-
preme Court granted certiorari in both Haroco and Sedima.

On July 1, 1985, the Supreme Court issued a decision in Sedima7 which categorically rejected the attempts of the Second
Circuit to curtail the statute's reach. The Court found no support in
either the statute's language or its legislative history for the conclu-
sions reached by the court below. In Sedima, the Court sanctioned a
broad reading of the statute's provisions which has the potential for
revolutionizing civil litigation throughout the federal court system.

This Article begins by briefly reviewing the civil RICO statute,
its legislative history, and some of the judicial interpretation of its
provisions. It then analyzes the Supreme Court's decision in Sedima
and offers suggestions for alternative methods of limiting the scope
of this controversial statute.

I. BACKGROUND

Enacted as Title IX of the Organized Crime Control Act of

(1985).

The Second Circuit held in Sedima that "prior criminal conviction is a prerequisite to a
civil RICO action." 741 F.2d at 496. The court further held that a plaintiff must demonstrate a
racketeering injury in order to maintain a civil RICO claim. Id. Bankers Trust also held that a plaintiff must demonstrate a racketeering injury in order to maintain a civil RICO
action, but offered a somewhat different "definition" of what constitutes such an injury. 741
F.2d at 516. The Bankers Trust panel did not reach the criminal conviction issue because it
was not necessary to the disposition of the case. The Furman panel concluded that neither the
language nor the legislative history of the statute support a racketeering enterprise injury re-
quirement, but the panel affirmed the dismissal of a civil RICO claim by the district court
based on the controlling precedents of Sedima and Bankers Trust. The Furman opinion ex-
plained that, by agreement of the court, the three decisions were filed in the order in which
they were completed, and that it published its opinion to express its disagreement with the
views of the other two panels. An internal court request for en banc consideration of the three
cases was denied, prior to the opinions being filed, by a vote of 6-3. Id.
5. 747 F.2d 384 (7th Cir. 1984), aff'd, 105 S. Ct. 3291 (1985).
6. 741 F.2d 482 (2d Cir. 1984).
1970, RICO was designed to provide additional criminal and civil remedies to deal with the growing influence of organized crime because existing remedies and sanctions were found to be inadequate in controlling its growth.

The inauspicious origins of what has become known as "civil RICO" are well-documented. The private right of action contained in section 1964(c) was added to the original Senate bill by a House

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8. See supra note 2.

9. The statute's name and the acronym it generated have been the subject of speculation regarding whether it was actually named after the character played by Edward G. Robinson in "Little Cesar," who was named "RICO." See Barnes v. Heinold Commodities Inc., 548 F. Supp. 20, 21 n.1 (N.D. Ill. 1982); Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 NOTRE DAME L. REV. 237 n.3 (1982). Professor Blakey was chief counsel to the Senate Subcommittee on Criminal Laws and Procedures in 1969-70 when the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941, was "processed," and has written extensively on the subject of RICO. See Bridges, Private RICO Litigation Based Upon "Fraud in the Sale of Securities," 18 GA. L. REV. 43, 45-46 n.20 (1983). Although Professor Blakey has helped fuel this speculation, he will neither confirm nor deny that this was the origin of the name. See Blakey, at 237 n.3.


12. See, e.g., Sedima, 105 S. Ct. 3275, 3277 n.1; Blakey, supra note 9, at 249-80; Blakey & Gettings, supra note 10, at 1017-21.

13. In 1969 Senator McClellan introduced the original Senate Bill, S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969), and later that year Senator Hruska Introduced S. 1623, entitled "Crimal Activities Profits Act," which included a provision for private equitable relief and private treble damages actions. 115 CONG. REC. 6995-96 (1969). Senate 1623 was a redraft of two bills previously introduced by Senator Hruska, S. 2048 and S. 2049, 90th Cong., 1st Sess., 113 CONG. REC. 18,007 (1967), which were proposed as amendments to the Sherman Antitrust Act. See 113 CONG. REC. 17,999 (1967) (remarks of Sen. Hruska). Congress did not act on either of these bills, in large part because the Antitrust Section of the American Bar Association recommended that the proposals be enacted into separate statutes. Otherwise, private plaintiffs suing under RICO's civil provisions would have been subjected to restrictive standing and causation requirements "appropriate in a purely antitrust context." 115 CONG. REC. 6995 (1969).


As reported out of the Senate Judiciary Committee, S. 30 did not provide for private...
The legislative history accompanying this provision is meager. Representative Steiger, who introduced the amendment, said it would give private persons “access to a legal remedy [to] enhance the effectiveness of Title IX’s prohibitions.” Representative Poff echoed these sentiments, and stated that this provision was “another example of the antitrust remedy being adapted for use against organized criminality.” None of the bill’s proponents offered any comments indicating that the scope of the private civil damages would or should be limited in any way. Interestingly enough, Representative Mikva, an opponent of the bill, offered an amendment providing for treble damages to defendants who had been subjected to treble damages or injunctive actions. Professor Blakey asserts that the bill explicitly did not contain such a provision “in an effort to streamline it and sidestep a variety of complex legal issues, as well as possible political problems in trying to process legislation that expressly created a variety of both public and private remedies.”


17. The Second Circuit’s position in Sedima regarding the legislative history of civil RICO seemed to be that the paucity of discussion of the private treble damages remedy leads to the “evident conclusion” that “Congress was not aware of the possible implications of section 1964(e).” Sedima, 741 F.2d at 492. This was a novel approach to the analysis of legislative history, and provoked a storm of criticism. See Flaherty, A RICO Crisis, Nat’l L.J., Aug. 13, 1984, at 30-31, col. 1. An equally plausible view is that this “clanging silence” demonstrated that the “silent majority” not only understood what the statutory language clearly permitted but that it agreed wholeheartedly with its potential scope and effect. See Haroco, Inc., v. American Nat’l Bank & Trust Co., 747 F.2d 384, 390 (7th Cir. 1984), aff’d, 105 S. Ct. 3550 (1985). It is far from “evident,” and probably incorrect, that Congress’ “silence” means it did not intend “to provide a federal forum for so many common law wrongs,” Sedima, 741 F.2d at 492, when those “wrongs” are clearly delineated in the statutory scheme as a basis for civil liability. See Sedima, 105 S. Ct. at 3285 n.13.

18. Representative Mikva is now a Judge of the District of Columbia Circuit Court of Appeals.
to frivolous actions under section 1964(c). The amendment was quickly defeated. The revised version of the Senate bill was passed overwhelmingly by the House, concurred in without a conference by the Senate, and signed by the President on October 15, 1970.

II. STATUTORY LANGUAGE

To determine the scope of any statute, the appropriate starting point is its language. If unambiguous, the statute's language controls interpretation, absent "a clearly expressed legislative intent to the contrary." The language of section 1964(c) provides:

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.

Under section 1962, it is unlawful

(a) . . . for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to

20. Id. at 35,343. Judge Oakes acknowledged in Sedima that "[t]he evident purpose of this amendment which was quickly defeated . . . was to point out the dangerous overbreadth of the section." Sedima, 741 F.2d at 490 n.22 (citation omitted). Unfortunately, he dismissed this evidence that the issue was brought to the attention of the House but the House nevertheless rejected the proposed amendment: "We decline to infer from Representative Mikva's comments the conclusion that Congress intended to promulgate a statute as broad as the one he feared it was passing. Deriving legislative intent from a dissenting congressman's 'parade of horrors' speeches in opposition is a notoriously dubious practice." Id.

Regardless of any comments made by Representative Mikva, the fact that the House defeated this amendment without discussion indicates not only that it was on notice of the possible scope of this so-called "dangerous tool," but that it quickly rejected any attempts to limit it. See 116 CONG. REC. 35,342-43 (1970). See also Sedima, 105 S. Ct. at 3285 n.13 ("§ 1964(c) did not pass through Congress unnoticed").

21. Rep. Steiger withdrew a number of last minute amendments he had previously offered. 116 CONG. REC. 35,346-47.

22. Id. at 36,296 (1970).
23. Id. at 37,264 (1970).
use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) . . . for any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) . . . 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 . . .

(d) . . . for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.28

Thus, in order to state a claim under section 1964(c), a plaintiff must allege injury to his business or property by reason of defendant's investing in, maintaining an interest in, or participating in an enterprise27 through a pattern of racketeering activity.28

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28. A "pattern of racketeering activity" requires at least two acts of racketeering activity within ten years. 18 U.S.C. § 1961(5). "Racketeering activity" under § 1961(1) means: (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Sections 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing
On its face, this statutory language appears unambiguous. In light of the absence of any detailed legislative history concerning this provision, its language should control its interpretation. Nevertheless, some courts, concerned that this "broad" language would allow treble damage recovery for an endless variety of claims, attempted

with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected in a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;


31. RICO has been described as the ultimate weapon in business litigation. ABA, Division of Professional Education, RICO: The Ultimate Weapon in Business and Commercial Litigation (1983) (seminar materials). See also Skinner & Tone, Civil RICO and the Corporate Defendant, Nat'l L.J., Jan. 30, 1984, at 22, col. 3. Its potentially "broad" application is perhaps best illustrated by the inclusion of mail and wire fraud as predicate acts under § 1961(1). These statutes, which stand in pari materia, have been broadly construed. See, e.g., Sedima, 105 S. Ct. at 3293-94 (Marshall J., dissenting); United States v. Weiss, 752 F.2d 777, 791 (2d Cir. 1985) (Newman, J., dissenting); United States v. Siegel, 717 F.2d 9, 24 (2d Cir. 1983) (Winter J., dissenting). Alone, the mail and wire fraud statutes do not provide a private cause of action. 18 U.S.C. §§ 1341, 1343. See Ryan v. Ohio Edison Co., 611 F.2d 1170, 1177-79 (6th Cir. 1979). See also Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 HARV. L. REV. 1101, 1104 (1982). Prior to RICO, fraud victims were relegated to traditional common law remedies. With the enactment of RICO, a growing number of plaintiffs have chosen to pursue civil RICO claims in federal court alleging mail and wire fraud as predicate acts, thus transforming "ordinary" fraud claims into federal treble damage actions. See, e.g., Alexander Grant & Co. v. Tiffany Indus., Inc., 742 F.2d 408, 409 (8th Cir. 1984), vacated and remanded, 105 S. Ct. 3550 (1985). Furman v. Cirrito, 741 F.2d 524, 525-26 (2d Cir. 1983), vacated and remanded sub nom. Joel v. Cirrito, 105 S. Ct. 3550 (1985); Sedima, 741 F.2d at 484-85; Bennett v. Berg, 685 F.2d 1053, 1062 (8th Cir. 1982), aff'd on rehearing, 710 F.2d 1361 (8th Cir.) (en banc), cert. denied, 104 S. Ct. 527 (1983).

Indeed, prior to 1985, 77% of all civil RICO cases at the trial court level involved securities, mail or wire fraud in a commercial setting. Report of the Ad Hoc Civil RICO Task
to curtail the statute's scope. In response to the recent explosion of civil RICO litigation these courts had imposed various artificial restrictions on a plaintiff's ability to bring a civil RICO claim.

III. JUDICIAL ATTEMPTS TO LIMIT CIVIL RICO

The means most often used by lower federal courts to restrict civil RICO were (1) requiring an organized crime connection; (2) limiting standing to persons suffering a competitive or commercial injury; and (3) limiting standing to those persons suffering a "racketeering enterprise injury."

A. Organized Crime Connection

Although RICO was enacted in response to the enormous problem of organized crime in the United States, Congress declined to so limit its scope. While the requirement of a nexus to organized crime initially found favor with a number of district courts, circuit courts that considered the issue declined to impose such a burden on civil RICO plaintiffs.

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32. Only two opinions dealing with civil RICO were published as of 1978. By 1981, the number had only increased to thirteen. Now over 100 decisions have been published. Sedima, 741 F.2d at 486. See also Flaherty, supra note 17, at 30, col. 1. Judge Oakes, in Sedima, speculated that the marked increase in civil RICO litigation over the past three or four years was at least partly attributable to the widely cited article coauthored by Blakey and Gettings which argued for a broad reading of the statute. Sedima, 741 F.2d at 486. This seems quite plausible considering Professor Blakey's role in drafting RICO, the persuasive arguments contained in the article, and the RICO "cottage industry" which quickly developed following its publication. See id.

33. See supra note 11.

34. Congress explicitly declined to limit RICO to the activities of the "Mafia" or "La Cosa Nostra." 116 Cong. Rec. 35,344-46 (1970). See Sedima, 105 S. Ct. 3288-89 (Powell, J., dissenting). In addition, the predicate acts of racketeering activity contained in § 1961(1) are in no way limited to conduct engaged in primarily by members of "organized crime." See supra note 28. Senator McClellan, one of the sponsors of RICO, acknowledged that the Senate report did not claim "that the listed offenses are committed primarily by members of organized crime, only that those offenses are characteristic of organized crime." McClellan, The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Law. 55, 142 (1970) (emphasis in original). See also 116 Cong. Rec. 35,344 (remarks of Rep. Poff) (RICO not limited to the operation of organized crime); House Hearings, supra note 15, at 129, 689; Guerrero v. Katzen, 571 F. Supp. 714, 719-20 (D.D.C. 1983).


The primary reasons given for rejecting such a requirement are that (1) it is contrary to the statute's language, and (2) since the concept of organized crime is difficult to define, any attempts to impose such a requirement might create an offense based on status or association, rendering the statute unconstitutional. Moreover, since Congress explicitly chose not to limit RICO's application to organized crime, judicial attempts to impose limitations based on an organized crime requirement clearly contravene expressed Congressional intent.

B. "Competitive" or "Commercial" Injury

Courts have also attempted to limit civil RICO by restricting standing to sue solely to persons who have suffered an antitrust-type "competitive" or "commercial" injury. The imposition of antitrust

508 (1983); Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982), aff'd on rehearing, 710 F.2d 1361 (en banc), cert. denied, 104 S. Ct. 527 (1983).


38. See 116 CONG. REC. 35,343-44 (remarks of Reps. Biaggi and Poff); 116 CONG. REC. 35,204 (remarks of Rep. Poff). See also Kimmel v. Peterson, 565 F. Supp. 476, 491 (E.D. Pa. 1983); McClellan, supra note 34, at 62. The concept of "organized crime" itself is elusive. See 116 CONG. REC. 35,344 (1970) (Rep. Poff remarking that organized crime is not "a precise and operative legal concept"); Blakey & Gettings, supra note 12, at 1013 n.15. See Note, 95 HARP. L. REV., supra note 51, at 1107-09. See also Kimmel, 565 F. Supp. at 492. It is far better to limit RICO's application to "organized illegal activity," as defined by the terms of the statute, without regard to the nature of the "enterprise" involved or to the characteristics of those "infiltrating" it. See United States v. Turkette, 452 U.S. 576, 586-87 (1981) (RICO applies to both legitimate and illegitimate enterprises).

Moreover, the addition of bankruptcy, mail, wire, and securities fraud to the list of predicate acts contained in § 1961(1) would seem to preclude an interpretation of RICO that limits its application to the "Mafia" and its various satellite operations. These offenses generally fall under the rubric of "white collar" or "commercial" crime and the perpetrators are generally persons who occupy trusted positions in government and business. See Blakey, supra note 9, at 341-45 nn.223-35. See also Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose). From this, it would seem that Congress cast a wide net to reach all kinds of organized criminal activity. See Furman v. Cirrito, 747 F.2d 524, 529-30 (2d Cir. 1984), vacated and remanded sub nom. Joel v. Cirrito, 105 S. Ct. 3550 (1985).


Bankers Trust was affirmed by the Second Circuit, although on a different ground, and the court explicitly rejected the competitive injury requirement. 741 F.2d at 516 n.6. Van
"standing" requirements on RICO plaintiffs is premised on the fact that one of RICO's purposes is to prevent interference with free competition,⁴⁰ and also on the similarities in language and remedies in section 1964(c) and in section 4 of the Clayton Act.⁴¹

While it is true that RICO is concerned with protecting legitimate businesses from competitors who are subsidized by organized crime, and the language of section 4 of the Clayton Act parallels that of section 1964(c), "[t]his does not mean . . . that RICO should be viewed as an extension of antitrust law in all respects."⁴² In other words, although RICO remedies are patterned after antitrust remedies, there is little evidence that section 1964(c) also imported the restrictive "competitive injury" requirement applicable in an antitrust context.

Because the objectives of RICO and the antitrust laws are not "coterminous," antitrust concepts are not relevant to RICO.⁴³ Antitrust law is designed to increase competition and efficiency in the marketplace,⁴⁴ and antitrust standing has been strictly limited to avoid ruining violators and thereby reducing competition.⁴⁵ The RICO statute, on the other hand, is aimed at inflicting financial injury on those who operate an enterprise through a pattern of racke-

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Schalck construed § 1964 to require an allegation of "business injury," which the court apparently defined as the same kind of competitive injury. 535 F. Supp. at 1136-37. Johnsen construed the term "racketeering enterprise injury" to mean commercial injury. 551 F. Supp. at 285. For the purpose of this discussion commercial and competitive injuries will be treated in the same manner.


41. Section 4 of the Clayton Act provides in pertinent part that "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15(a) (1982)).


Civil RICO "is designed to ruin those individuals and enterprises it is aimed at," not to "increase their efficiency or protect them from insolvency." Restricting RICO standing based on antitrust principles defeats the basic purposes the statute is designed to serve. Moreover, this restriction would deny standing to individuals who suffer a direct, "non-competitive" injury "by reason of" a section 1962 violation — e.g., customers, shareholders, or creditors of an enterprise — a result surely not intended by Congress, whose concerns "extended much farther" than infiltration of legitimate businesses by organized crime and the resulting harm to competition in the marketplace. For these reasons, most courts that considered the issue correctly declined to limit RICO standing to those suffering a "commercial" or "competitive" injury.

C. Racketeering Enterprise Injury

A greater number of courts have construed RICO to require a "racketeering enterprise injury." This concept also stems from antitrust principles, although here courts have simply based the racketeering enterprise injury concept on analogies to antitrust principles, again based on the similar language contained in section 4 of the Clayton Act and section 1964(c).

49. See, e.g., Bankers Trust Co. v. Rhoades, 741 F.2d 511, 516 n.6 (2d Cir. 1984), vacated and remanded, 105 S. Ct. 3550 (1985); Sedima, 741 F.2d at 493 n.35; Schacht v. Brown, 711 F.2d 1343, 1358 (7th Cir.), cert. denied, 104 S. Ct. 508 (1983); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), aff'd on rehearing, 710 F.2d 1361 (en banc), cert. denied, 104 S. Ct. 527 (1983).
51. Courts consistently intertwine the concepts of racketeering enterprise injury, competitive injury, and commercial injury, using the terms interchangeably when in fact they are conceptually distinct. As a result, courts have blurred the analytical lines between the concepts. For example, while competitive injury seems definitionally clear, because it emanates directly out of antitrust principles, commercial injury is more vague. Compare Van Schieck v. Church of Scientology, 535 F. Supp. 1125, 1137 (D. Mass. 1982) (commercial injury as "busi-
These courts required plaintiffs to show a “distinct RICO injury,” characterized as an injury of the type RICO “was intended to prevent.” Nevertheless, the district courts that adopted this requirement failed to articulate what must be alleged or proved in order to demonstrate a racketeering enterprise injury. At best, these courts suggested that this type of injury was “something more” than injury from the predicate acts, reasoning that Congress could not have intended to provide an additional remedy for already compensable wrongs.

52. The term “racketeering enterprise injury” was apparently coined by the court in Landmark Sav. & Loan v. Loeb, Rhoades, Hornblower & Co., 527 F. Supp. 206, 208 (E.D. Mich. 1981). See Note, Civil RICO and "Garden Variety Fraud" — A Suggested Analysis, 58 St. John’s L. Rev. 93, 106 (1983). The Landmark court, while recognizing that the concept of “competitive injury” was not directly transferable from antitrust law to RICO, nevertheless based its racketeering enterprise injury requirement on an analogy to § 4 of the Clayton Act. Just as an antitrust plaintiff must show antitrust injury, the Landmark court reasoned, so too must RICO plaintiffs allege a “RICO” injury, which the court characterized as “racketeering enterprise injury.” 527 F. Supp. at 208. The racketeering enterprise injury was later defined as “injury of the type the RICO statute was intended to prevent.” Harper v. New Japan Sec. Int’l, Inc., 545 F. Supp. 1002, 1007 (C.D. Cal. 1982). See Guerrero v. Katzen, 571 F. Supp. 714, 719 (D.D.C. 1983); Barker v. Underwriters at Lloyd’s, London, 564 F. Supp. 352, 358 (E.D. Mich. 1983). While this analogy is grounded on the fact that both statutes compensate injury “by reason of” a prohibited activity, the use of those words is by no means unique to these two statutes. For example, a WESTLAW search reveals that the words “by reason” (the word “of” cannot be searched) are found in more than 2,600 sections of the United States Code.


The courts that required a racketeering enterprise injury to be something more than injury from the predicate acts confused what is necessary to establish a RICO violation with the injury that results from such a violation. A civil RICO claim by definition consists of something more than a claim under the predicate acts. Section 1962 prohibits a “pattern” of racketeering activity, which is more than isolated predicate acts. See supra note 28. A RICO plaintiff must prove the existence of an enterprise, which is a separate and distinct element from the pattern of racketeering activity. See United States v. Turkette, 452 U.S. 576, 583 (1981); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), aff’d on rehearing, 710 F.2d 1361 (en banc), cert. denied, 104 S. Ct. 527 (1983). The plaintiff must also prove that the enterprise engaged in a pattern of racketeering activity, which includes, but is not necessarily defined by, at least two predicate acts. See supra note 28.

On the other hand, the only direct injuries that normally result from a RICO violation are caused exclusively by the predicate acts of racketeering activity. See Sedima, 105 S. Ct. at 3288-89; In re Catanella, 583 F. Supp. 1388, 1434 (E.D. Pa. 1984). The enterprise is simply
Most courts declined to impose such a requirement, essentially because it has no support in the statute's language or legislative history. They viewed the concept of a racketeering enterprise injury as an artificial judicial gloss — imposed on an otherwise clearly defined statutory scheme — arising more from "judicial discomfort with the broad sweep of RICO," than from traditional methods of statutory analysis.

IV. THE SECOND CIRCUIT SPEAKS

In July 1984 three separate panels of the Second Circuit Court of Appeals issued opinions outlining their views on the scope of civil RICO. After the dust had settled, one commentator noted that the Second Circuit had "pulled the plug on much of the rising tide" of civil RICO litigation. The facts of these three cases, and their respective holdings, are relevant to an understanding of the issues leading to the Supreme Court's decision in Sedima.
A. Sedima, S.P.R.L. v. Imrex Co. 58

The Sedima case involved a claim by Sedima, S.P.R.L., a Belgian exporter and importer, that it had been defrauded by Imrex, with whom it had entered into a joint venture to provide electrical parts to a NATO subcontractor. In its complaint, Sedima alleged that Imrex and two of its officers knowingly prepared purchase orders, invoices, and credit memoranda which overstated charges and costs Imrex had incurred on behalf of the joint venture. Based on these fraudulent documents, Imrex allegedly received monies belonging to the joint venture.59

The complaint contained three counts alleging civil RICO violations, as well as additional pendent state law claims. Two of the RICO counts alleged that the fraudulent orders, invoices, and credit memoranda constituted a pattern of racketeering activity; the predicate acts alleged were violations of the mail fraud60 and wire fraud61 statutes. The third count alleged a RICO conspiracy.62

The district court dismissed the RICO counts based on plaintiff's failure to allege a "RICO-type injury," which the court defined as something more than injury from the predicate acts.63 The Second Circuit affirmed.64 The panel, Judge Oakes writing for the majority, held that in order for a defendant to be held liable under section 1964(c), he must first have been criminally convicted of the underlying predicate acts.65 The panel further held that a plaintiff must also show a "racketeering injury," which it characterized as an injury "caused by an activity which RICO was designed to deter,"66 and which results, the court explained, when mobsters "cause systemic harm to competition and the market, and thereby injure investors and competitors."67

59. 741 F.2d at 484.
60. Id. at 485. See 18 U.S.C. § 1341 (1982).
62. 741 F.2d at 485.
64. 741 F.2d 482.
65. Id. at 496. Because the defendants had not been criminally convicted of the predicate acts, the Second Circuit affirmed the district court's dismissal of the complaint. Ironically, the individual defendants were subsequently indicted for grand larceny and falsifying business records in connection with the same transactions at issue in the civil suit. Kessler, RICO Law's Unexpected Results, Newsday, Jan. 7, 1985, at 7, col. 1.
66. 741 F.2d at 494.
67. Id. at 495-96.
B. Bankers Trust Co. v. Rhoades

The Bankers Trust case involved an alleged scheme by officers and shareholders of Braten Apparel Corporation (BAC) to eliminate, without payment, most of a $4,000,000 debt owed to Bankers Trust. The scheme was allegedly based on BAC's concealment of its holdings. BAC acquired all the stock of defendant Brookfield Clothes, Inc. (Brookfield), an entity worth more than three million dollars. Defendants Braten and Soifer, along with Feldesmen, an attorney for BAC, then agreed that although Soifer would be the name owner of the stock, he would hold the stock in trust for BAC while BAC was involved in bankruptcy proceedings.

The day BAC transferred the stock to Soifer, it filed its petition in bankruptcy. Not only did it fail to list the Brookfield stock as an asset, but Braten, Rhoades, Soifer and Feldesmen all misrepresented to Bankers Trust and the court that BAC had lost ownership of the stock. Subsequently, Feldesmen and the individual defendants convinced BAC's creditors to approve a plan giving Bankers Trust only 17½% of its total claims, and relieving BAC of more than $4.3 million of its debts; had the Brookfield stock been included, BAC would have been able to fully satisfy the Bankers Trust claims. After the bankruptcy court approved the plan, Soifer returned the Brookfield stock to BAC. Upon learning that the true stock ownership had been fraudulently concealed, Bankers Trust applied to revoke confirmation of the plan. Following a trial, the bankruptcy court revoked the plan and ordered BAC to offer a realistic plan taking into account its ownership of the Brookfield stock.

The corporation then allegedly devised a new scheme to protect its assets. It again transferred the Brookfield stock for little or no consideration, purportedly to settle a civil action which arose out of an unpaid loan, the proceeds of which had gone to several of the Bankers Trust defendants. The end result of the transfer was to once again prevent Bankers Trust from receiving any benefit from BAC's stock ownership.

68. 741 F.2d 511 (2d Cir. 1984), vacated and remanded, 105 S. Ct. 3550 (1985).
69. 741 F.2d at 513.
70. Id.
71. Id.
72. Id.
74. Bankers Trust, 741 F.2d at 514.
75. Id.
In addition to challenging the concealment of assets, Bankers Trust also alleged that BAC and the individual defendants had instituted several frivolous lawsuits against it, the sole purpose of which was to impede Bankers Trust in its attempt to collect BAC's debt.\textsuperscript{76} Some of these allegations concerned two lawsuits commenced against Bankers Trust in South Carolina, one filed by BAC, the other by defendant Braten. According to the complaint, both Braten and Rhoades bribed the judge who was presiding over these actions.\textsuperscript{77}

The Bankers Trust complaint alleged that the defendants constituted a RICO "enterprise";\textsuperscript{78} that their actions\textsuperscript{79} constituted a "pattern of racketeering activity";\textsuperscript{80} and that the defendants' formation and conduct of their enterprise through this pattern of activity violated section 1962 of the RICO statute.\textsuperscript{81} Defendants moved for judgment on the pleadings, arguing that the complaint failed to state a claim under civil RICO. The district court agreed.\textsuperscript{82} The court, noting that the statutory scheme provides a civil remedy for persons injured "by reason of a violation of section 1962," construed that phrase to require that a plaintiff allege a "distinct RICO injury as opposed merely to a direct injury from the underlying predicate acts."\textsuperscript{83} The court determined that Bankers Trust alleged an injury resulting from the predicate acts and not a "distinct RICO" injury.\textsuperscript{84} Accordingly, it dismissed the complaint.\textsuperscript{85}

The Second Circuit affirmed. Judge Kearse, writing for the majority, held that a civil RICO complaint must allege a proprietary injury caused by the defendant's "use of a pattern of racketeering activity in connection with a RICO enterprise."\textsuperscript{86} The court concluded that Bankers Trust had alleged only injuries caused by the predicate acts and not a separate injury caused by a violation of sec-

\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id. See 18 U.S.C. § 1961(4) (1982).}
\textsuperscript{79} The complaint alleged that the defendant's activities constituted the criminal offenses of bankruptcy fraud, perjury, and bribery. 741 F.2d at 514.
\textsuperscript{81} 741 F.2d at 514-15.
\textsuperscript{82} Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1240 (S.D.N.Y. 1983).
\textsuperscript{83} \textit{Id. at 1239-40.}
\textsuperscript{84} \textit{Id. at 1242.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} 741 F.2d at 516. The panel explained that it is the "confluence" of the pattern of racketeering activity and "the use of that pattern to invest in, control or conduct a RICO enterprise" that constitutes the "violation" and "must cause the proprietary injury." \textit{Id.}
tion 1962. It viewed the predicate acts alleged — i.e., the various bankruptcy frauds and state law felonies\textsuperscript{87} — as isolated incidents causing separate injuries, and not as part of a larger pattern of racketeering activity causing a "RICO" injury. Because the plaintiff's injury would have been caused by the predicate acts, regardless of any other racketeering activity the defendants may have engaged in, the court reasoned, the complaint did not allege injury by reason of a violation of section 1962 and was properly dismissed.\textsuperscript{88}

C. \textit{Furman v. Cirrito}\textsuperscript{89}

The \textit{Furman} case arose out of the sale of the brokerage firm of Bruns, Nordeman, Rea & Co. (Bruns) to Bache, Halsey, Stewart, Shields, Inc. (Bache). Plaintiffs and defendants were general partners of Bruns. The defendants composed the partnership's executive committee which essentially controlled the partnership's affairs, including the sale at issue; two of the defendants, Rea and Coleman, were Bruns' managing directors.\textsuperscript{90}

The civil RICO claim alleged that Bruns constituted an "enterprise" and that defendants conducted and participated in the enterprise's affairs, within the meaning of section 1962(c), by engaging in a fraudulent scheme of misrepresentations and concealments during the sale negotiations. This scheme, it was alleged, constituted a pattern of racketeering activity, in furtherance of which defendants committed the predicate acts of mail and wire fraud.\textsuperscript{91} More specifically, plaintiffs alleged that defendants withheld material information during the sale negotiations;\textsuperscript{92} misrepresented lucrative employ-

\textsuperscript{87} See supra note 79.
\textsuperscript{88} 741 F.2d at 516-18. Judge Cardamone dissented from the majority opinion, as he did in \textit{Sedima}. He argued that the various acts alleged, occurring over a nine-year period, clearly constituted "a pattern of racketeering activity" within the meaning of \$ 1961(5), and, further, that the individual defendants, by virtue of their control over the corporate entities involved, performed these acts as part of conducting an "enterprise" within the meaning of \$ 1962. 741 F.2d at 523-24. Because each of these elements contributed to plaintiff's overall loss, he argued, plaintiff had sufficiently alleged injury by reason of this violation. 741 F.2d at 523. As Judge Cardamone stated at the outset of his opinion, "[i]f civil RICO does not provide a remedy on the facts of this totally outrageous case, it never will." 741 F.2d at 518.
\textsuperscript{89} 741 F.2d 524 (2d Cir. 1984), vacated and remanded sub nom. \textit{Joel v. Cirrito}, 105 S. Ct. 355 (1985).
\textsuperscript{90} 741 F.2d at 526.
\textsuperscript{91} \textit{Id}.
\textsuperscript{92} Plaintiffs argued that defendants failed to reveal, until late in the negotiations, that Bache would not complete the sale until each Bruns partner signed the purchase agreement. Had they been aware of this requirement, plaintiffs argued, they would have been able to bargain for and obtain certain payments. \textit{Id} at 525-26.
ment arrangements they obtained for themselves; failed to consider the merits of another offer to buy Bruns; and that defendants Rea and Coleman made payments to the other defendants in order to induce misrepresentations to plaintiffs regarding the sale.\footnote{93} 

Plaintiffs claimed business and property injury as a result of the alleged misrepresentations and concealments. Had plaintiffs known what defendants concealed from them, they claimed, they would have been able to bargain for and obtain severance payments and employment arrangements similar to those received by some of the defendants. In addition, plaintiffs argued, the payments made by defendants caused the executive committee members who received them to refrain from seeking alternative purchasers who may have been willing to pay a higher price, and the consideration actually paid by Bache was reduced because Bache absorbed the cost of funding the defendants' "sweetheart" employment arrangements.\footnote{94} In the district court, defendants moved to dismiss the complaint for failure to state a claim. The district court granted this motion on the ground that plaintiffs failed to allege "a separate, distinct racketeering enterprise injury."\footnote{95} 

The Second Circuit affirmed. Although the panel hearing the case concluded that "neither the language of the statute nor its legislative history imposes [a racketeering enterprise injury] requirement," it felt compelled to affirm based on the "controlling opinions" of Sedima and Bankers Trust.\footnote{96}

\begin{footnotes}
93. \textit{Id.}
94. \textit{Id.} at 525-26.
95. \textit{Furman v. Cirrito}, 578 F. Supp. 1535, 1541 (S.D.N.Y. 1984). The defendants put forth a number of additional arguments on support of their motion. They argued that Bruns was not an enterprise, that the sale of Bruns did not constitute "affairs" of an enterprise, and that there was no pattern of racketeering activity, all within the meaning of § 1962(c). Defendants further contended that plaintiffs were required to plead a tie to organized crime and they failed to do so. The district court properly rejected these arguments. \textit{Id.} at 1538-39.
96. 741 F.2d at 525. The panel (Judges Cardamone, Pratt, and Daniel M. Friedman of the United States Court of Appeals for the Federal Circuit) published its opinion solely to express its sharp disagreement with the reasoning and conclusions of the majority opinions in both \textit{Sedima} and \textit{Bankers Trust} insofar as they upheld the racketeering injury requirement. \textit{Id.} at 526. In an unusual move, the \textit{Furman} panel also detailed the procedural history of the three cases from the time of argument until the decisions were filed, including an agreement among the members of the court that the opinions be filed in the order in which they were completed (although \textit{Bankers Trust} was argued before \textit{Sedima}, \textit{Sedima} was apparently "completed" first), and the denial of an internal request for en banc consideration of the three cases before filing. See \textit{supra} note 4.

Not only was the panel criticized for taking the position that it had to adhere to the "controlling authority" in rendering its decision, the full court was criticized for failing to consider these cases en banc. See Flaherty, \textit{supra} note 17. Its failure to do so demonstrates
\end{footnotes}
V. THE IMPACT OF THE SECOND CIRCUIT

As a result of these three decisions, civil RICO plaintiffs seeking to establish a claim under section 1964(c) in the Second Circuit were required to show that: (1) the defendant was criminally convicted of the underlying predicate acts; and (2) the injured party suffered a separate racketeering injury.

A. Criminal Conviction Requirement

The most novel aspect of the Second Circuit decision in Sedima was its holding that criminal conviction of the underlying predicate acts is a condition precedent to maintaining a private civil action under section 1964(c). As Judge Oakes pointed out, no court prior to the Second Circuit in Sedima had held that criminal convictions are required before a civil RICO action could be maintained. In fact, prior case law is to the contrary. The panel, however, based rather graphically that the Second Circuit will rarely rehear cases en banc, relying instead on the wisdom of the panel hearing the appeal. See Newman, En Banc Practice in the Second Circuit: The Virtues of Restraint, 50 BROOKLYN L. REV. 365, 382-84. See also Green v. Santa Fe Indus., Inc., 533 F.2d 1309, 1310 (2d Cir. 1976), rev'd on other grounds, 429 U.S. 881 (1977); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1020 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 156 (1974). The Second Circuit's extreme reluctance to grant rehearings en banc, however significant the issues involved, is based in part on the notion that important issues will catch the attention of the Supreme Court, and that the delay, costs, and uncertainty that en banc consideration entails should be avoided when Supreme Court review is inevitable. See Green v. Santa Fe Indus., Inc., 533 F.2d at 1310. This rationale for denying en banc consideration is especially relevant where, as here, the case "will go to the Supreme Court with full and thoughtful expositions of the opposing views of several members of this Court." Id. Whatever the merits of this approach, it seems that the triumvirate of civil RICO cases was particularly suited for en banc consideration. Unlike other important cases in which the court denied rehearing en banc, the civil RICO cases had tremendous immediate and widespread ramifications in the circuit, which, in the long run, may have unfairly prejudiced litigants whose claims were dismissed on the basis of the Second Circuit's ruling in Sedima.

97. Sedima, 741 F.2d at 496.
98. Id. at 496-97.
99. See, e.g., Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1286-87 (7th Cir. 1983); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982). United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); Farmers Bank of Delaware v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978). Judge Oakes attributes this phenomenon primarily to what he characterizes as misplaced reliance on United States v. Cappetto. It is true that Cappetto involved the government's right to move for injunctive relief under § 1964(1), but Cappetto was merely the starting point for the courts that have considered the issue. The main thrust of their analysis has not been based primarily on Cappetto, but on the fact that if Congress had intended to limit civil liability under § 1964(c) to those previously convicted, it would have done so by referring to "convictions" in § 1964(c); Congress could have required either RICO convictions under § 1963 or convictions of the predicate acts described in § 1961(1). See USACO Coal Co. v.
its holding on "statutory analysis," which it divided into the categories of "language" and "intent."

1. Language. — The panel majority in Sedima contended that the differences in language between section 1964(c) and section 4 of the Clayton Act, and the presence of the words "indictable" and "chargeable" in section 1961(1), supported the criminal conviction requirement.

Section 4 of the Clayton Act permits recovery for a business or property injury "by reason of anything forbidden in the antitrust laws," while the civil RICO statute speaks of a "violation" of section 1962. Judge Oakes argued that Congress made this language change "with a specific intent in mind — to require that conviction at least of the predicate acts be had before a civil suit be brought by a private person."

The Sedima panel also concluded that the use of the words "indictable" and "chargeable" in section 1961(1) indicates that Congress did not intend to give civil courts the power to determine whether an act is indictable or chargeable absent the return of an indictment or information.

2. Intent. — The panel concluded that Congress intended that only criminal conduct be punished, and that a civil RICO plaintiff must meet the burden required to prove criminal conduct in a criminal case. The majority went even further and concluded that criminal convictions are required because any lesser requirement, such as mandating that a plaintiff satisfy a "reasonable doubt" standard, would create problems regarding the proper burden of proof for each private plaintiff who brings a civil RICO action "becomes his own one-person grand jury, or in the case of state felonies chargeable by information, his own prosecutor." It seems that Judge Oakes was saying not that the terms "indictable" and "chargeable" actually mean indictments must be returned or informations filed before a civil plaintiff may bring suit, but that these terms should be construed to mean as much simply because the stigma accompanying civil liability under § 1964(c) is the equivalent of being charged with a criminal offense.

Carbomin Energy, Inc., 689 F.2d at 95 n.1 ("We find nothing in the plain language of RICO to suggest that civil liability under § 1964(c) is limited only to those already convicted or charged with criminal racketeering activity.").


101. Id.


103. Sedima, 741 F.2d at 498-99.

104. Id. at 500. In setting forth this argument Judge Oakes opined that "being declared a 'racketeer' . . . is being held to 'answer for' an 'infamous crime,' " and that a private plaintiff who brings a civil RICO action "becomes his own one-person grand jury, or in the case of state felonies chargeable by information, his own prosecutor." Id. It seems that Judge Oakes was saying not that the terms "indictable" and "chargeable" actually mean indictments must be returned or informations filed before a civil plaintiff may bring suit, but that these terms should be construed to mean as much simply because the stigma accompanying civil liability under § 1964(c) is the equivalent of being charged with a criminal offense.

105. 741 F.2d at 501.
element of the civil cause of action.\textsuperscript{106} According to the court, failure to include a criminal conviction requirement would pervert the statute's "liberal construction" clause.\textsuperscript{107}

B. Racketeering Injury

In addition to imposing the criminal conviction requirement, both \textit{Sedima} and \textit{Bankers Trust} held that a plaintiff must allege and prove a "racketeering injury" in order to maintain a civil RICO claim.\textsuperscript{108}

The \textit{Sedima} majority, following the lead of the other courts that have required some form of "racketeering injury,"\textsuperscript{109} focused on the "by reason of" language contained in section 1964(c) and concluded that Congress intended to apply standing requirements "analogous" to those found in the similarly worded Clayton Act.\textsuperscript{110} The panel then went further, defining what it meant by a "racketeering injury." It is in this proffered definition that the panel diverged from other courts that have imposed such a requirement. Judge Oakes wrote that

RICO was not enacted because criminals break laws, but because mobsters, either through the infiltration of legitimate enterprises or

\textsuperscript{106} \textit{Id.} at 502. The panel concluded that it would be "extraordinarily difficult for juries to understand the different burdens required for different elements of a civil case." \textit{Id.} This ignores the fact that juries are routinely confronted with different burdens of proof in civil trials. In a federal securities fraud case, for example, a preponderance of the evidence standard applies. \textit{See} Herman \& MacLean v. Huddleston, 459 U.S. 375 (1983). Often a pendent state law claim will require proof by clear and convincing evidence. \textit{See}, e.g., Van Alen \& Dominick, Inc., 441 F. Supp. 389, 402-03 (S.D.N.Y.), aff'd, 560 F.2d 347 (1976). There is no reason to assume that it would be more difficult for a jury to comprehend two different burdens of proof in a civil RICO case.

\textsuperscript{107} 741 F.2d at 502. The \textit{Sedima} panel argued that liberal construction is only appropriate where criminal conduct has already been proved. The liberal construction clause is the only one of its kind that applies to a federal criminal statute. \textit{See} Note, \textit{RICO and the Liberal Construction Clause}, 66 CORNELL L. REV. 167, 184-90 (1980).

\textsuperscript{108} \textit{Sedima}, 741 F.2d at 495-96; \textit{Bankers Trust}, 741 F.2d at 516. Because the \textit{Sedima} and \textit{Bankers Trust} panels took different approaches to this concept, the Second Circuit seemingly created two distinct and possibly conflicting requirements. \textit{Sedima}, 105 S. Ct. at 3284 n.12. The Supreme Court distinguished the Second Circuit's decision in \textit{Sedima} from \textit{Bankers Trust}, noting that

[T]he decision below does not appear identical to \textit{Bankers Trust}. It established a standing requirement, whereas \textit{Bankers Trust} adopted a limitation on damages. The one focused on the mobster element, the other took a more conceptual approach, distinguishing injury caused by the individual acts from injury caused by their cumulative effect.

\textit{Id.}

\textsuperscript{109} \textit{See supra} notes 50-53 and accompanying text.

\textsuperscript{110} \textit{Sedima}, 741 F.2d at 495-96.
through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors. . . . It is only when injury caused by this kind of harm can be shown, therefore, that we believe that Congress intended that standing to sue civilly should be granted. 111

This definition required a plaintiff to establish five separate elements to state a civil RICO claim. Under this reading of the statute, a plaintiff would have to demonstrate that (1) mobsters, (2) as part of an enterprise, (3) engaged in a pattern of racketeering activity (4) through infiltration of a legitimate enterprise, or while conducting an illegitimate one, and (5) which caused systemic harm to competition and the market (6) thereby injuring investors and competitors.

This restrictive definition, combining the "organized crime connection" requirement with the "competitive injury" and "racketeering enterprise" injury requirements, would limit civil RICO claims to very specific and limited circumstances - i.e., situations in which a "mob" front organization causes harm to the market through its "racketeering activity." 112

C. Subsequent Decisions

Subsequent to the three Second Circuit decisions, at least two other circuits handed down decisions discussing and interpreting the holdings of Sedima, Bankers Trust, and Furman.

The Eighth Circuit, in Alexander Grant & Co. v. Tiffany Industries, Inc., 113 rejected the Second Circuit’s holding in Sedima, but nevertheless concluded that its own decision was consistent with

111. Id.

112. Cf. Bankers Trust v. Rhoades, 741 F.2d at 516. Judge Kearse, writing for the majority, explained that the "confluence" of the "pattern of racketeering activity" and "the use of that pattern to invest in, control, or conduct, a RICO enterprise" must cause the proprietary injury. Id.

Although rendered moot by the Supreme Court’s decision in Sedima, the Bankers Trust standard is interesting because it is so similar to and perhaps the basis for Justice Marshall’s formulation of a "RICO injury" in his dissenting opinion in Sedima. Justice Marshall concluded that the "statute clearly contemplates recovery for injury resulting from the confluence of events described in § 1962 and not merely from the commission of a predicate act." 105 S. Ct. at 3297 (Marshall, J., dissenting). See Bankers Trust, 741 F.2d at 516.

Justice Marshall further determined that this "confluence" must cause some competitive, infiltration or other economic injury. 105 S. Ct. at 3302 (Marshall, J., dissenting). The Bankers Trust panel only required a "proprietary injury." 741 F.2d at 516. Moreover, under the Bankers Trust standard, direct injuries would not be compensable. See id. By contrast, some of the examples provided by Justice Marshall involve direct injuries that would be actionable under certain circumstances. 105 S. Ct. at 3303 (Marshall, J., dissenting).

113. 742 F.2d 408 (8th Cir. 1984), vacated and remanded, 105 S. Ct. 3550 (1985).
Bankers Trust. The case involved a suit by Grant, a public accounting firm, alleging that it was the target of a pervasive scheme of fraud designed to obtain its favorable audit of Tiffany Industries (Tiffany). The scheme's purpose, Grant claimed, was to get credit on better terms, and enable Tiffany to mislead its stockholders, the public, and the Securities and Exchange Commission into believing that the company was financially sound.\(^{114}\)

Although the court reiterated its earlier holding in *Bennett v. Berg*\(^{116}\) rejecting a racketeering enterprise injury *qua* competitive or commercial injury,\(^{116}\) it went on to explain that in *Alexander Grant* it did not have to "consider the nature of a racketeering enterprise injury . . . for it is clear that Grant’s complaint does not simply allege injury from the underlying predicate acts."\(^{117}\) The court based this conclusion on the fact that Grant alleged that Tiffany had conducted a pattern of fraud "that enabled it to remain in business," and that Grant "continued to provide its accounting services to Tiffany for a time greater than it would have had the fraud not occurred."\(^{118}\) In effect, the prolonged life given to Tiffany as an "enterprise" enhanced the injury caused to Grant, and Grant therefore was injured "by reason of a RICO violation" rather than simply by the predicate acts.\(^{119}\)

\(^{114}\) Id. 409-10. The alleged fraud included a number of material misrepresentations, and forgery of important documents by Tiffany officials during the course of the audit. Grant claimed that as a result it suffered theft of services because it had to spend increased time on the audit, causing an increase in fees that was never paid; it incurred large expenses as a result of the SEC investigation; and it suffered damages to its business reputation. Id. at 411.

\(^{115}\) 685 F.2d 1053 (8th Cir. 1982), *aff’d on rehearing*, 710 F.2d 1361 (en banc), *cert. denied*, 104 S. Ct. 527 (1983).

\(^{116}\) *Alexander Grant*, 742 F.2d at 413.

\(^{117}\) Id. Defendants also argued that Grant suffered only an indirect injury insufficient to provide standing under § 1964(c), relying on the Seventh Circuit’s decision in *Cenco, Inc. v. Siedman & Siedman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982). In *Cenco*, the Seventh Circuit held that an accounting firm which sought indemnification on a cross-claim against its codefendants did not have standing to sue under § 1964(c) because it suffered only an "indirect" injury. The Eighth Circuit quite properly distinguished *Cenco* from the case before it on the basis that Grant did not seek indemnification, but instead sought damages for the amount of its lost fees, caused directly by defendant’s fraud. The court also correctly rejected the Seventh Circuit’s holding in *Cenco*, noting that the direct-indirect dichotomy prof ered in *Cenco* was inconsistent with the intent of Congress. 742 F.2d at 411-12. In any event, *Cenco’s* continued validity as precedent is dubious in light of the Seventh Circuit’s subsequent decisions in *Haroco, Inc. v. American Nat’l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff’d*, 105 S. Ct. 3291 (1985) and *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S. Ct. 508 (1983).

\(^{118}\) 742 F.2d at 413.

\(^{119}\) The facts of this case provide a good example of how an “enterprise,” as opposed to an individual or individuals, enhances the injury suffered by a defrauded party, thus warrant-
The Alexander Grant court explained that Sedima held that section 1964(c) "requires that the injury result from mobster activity or the efforts of organized crime"; the Alexander Grant court rejected that view but saw its decision as consistent with Bankers Trust. Unfortunately, it did not explain why. Presumably the court viewed Grant's proprietary injuries as resulting from the "confluence" of the pattern of Tiffany's fraudulent activities and the use of that pattern to conduct Tiffany's business for an extended period of time, rather than merely from the predicate acts themselves.

Next, the Seventh Circuit decided Haroco v. American National Bank & Trust Co. The Haroco case involved a claim by borrowers of the American National Bank and Trust Company against the bank, one of its officers, and an officer of its parent company. Plaintiffs alleged that the defendants had defrauded them by overstating the prime rate which determined the plaintiffs' variable interest payments to the bank. Plaintiffs asserted two civil RICO counts as well as various pendent state law claims. The district court dismissed the complaint based on its conclusion that plaintiffs did not suffer any injury by reason of a RICO violation in addition to any injuries caused by the predicate acts of fraud. The Seventh Circuit reversed. After reviewing the three decisions which had just been issued by the Second Circuit, the court rejected the Second Circuit's conclusion in both Sedima and Bankers Trust that a plaintiff must plead and prove an injury above and beyond that caused by the predicate acts of racketeering. The Seventh Circuit refused to accept the Second Circuit's definition of the racketeering injury requirement, finding such an attempt to limit the scope of RICO "con-
trary to the language and purpose of [the statute]." 127

VI. THE SUPREME COURT'S VIEW

As a result of the conflict within the Second Circuit and among the various courts that considered the issue, the Supreme Court granted certiorari in both Sedima and Haroco. 128 Prior to Sedima, the Court had decided only two RICO cases, both occurring in the criminal context. In both cases, the Court opted for a broad reading of the statute's provisions.

In United States v. Turkette, 129 the Court broadly construed the term "enterprise" as used in the statute, holding that it encompasses both legitimate and illegitimate enterprises. 130 Noting the broad purposes and goals of the RICO statute, the Court determined that Congress did not intend to limit the statute to the infiltration of legitimate businesses, a narrower aspect of organized criminal activity. 131 In response to the argument that such an interpretation would alter the balance between federal and state law enforcement, the Court explained that this was precisely the intent of Congress when it enacted RICO; Congress meant to "alter somewhat the role of the Federal Government in the war against organized crime" because existing law was not capable of dealing with the problem. 132 Since there was "no argument that Congress acted beyond its power"

127. Id. at 389. Essentially, the court viewed its decision in Schacht v. Brown, 711 F.2d 1343 (7th Cir.), cert. denied, 104 S. Ct. 508 (1983) as controlling. Although the criminal conviction requirement was not presented to the court, it noted that the Second Circuit's holding in Sedima conflicted with its decision in Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1286-87 (7th Cir. 1983).


130. Id. at 579. The defendant was indicted for "conspiracy to conduct and participate in the affairs of an enterprise . . . through a pattern of racketeering." The enterprise was formed for the illegal purposes of drug trafficking, arson, insurance fraud, bribery, and influencing state court proceedings. The defendant argued that RICO was intended to protect legitimate enterprises and did "not make it criminal to participate in an association which performs only illegal acts and has not infiltrated . . . a legitimate enterprise." The defendant's argument did not prevail. Id. at 584.

131. Id. at 590. In rejecting the idea that the civil remedies "would have utility only with respect to legitimate enterprise," the Court pointed out that the aim of the civil remedies "is to divest the association of the fruits of its ill-gotten gains." Id. at 585. This observation would seem to militate in favor of a broad reading of § 1964(c).

132. Id. at 587. This explanation also seems to rebut the argument that allowing civil RICO claims to proceed where the only injury is caused by the predicate acts of common law fraud results in federal garden variety or state law fraud claims.
when it enacted RICO, the Court ruled, "the courts are without auth-

ority to restrict the application of the statute."\footnote{133}

More recently, in \textit{Russello v. United States},\footnote{134} the Court con-
strued the term "interest" in section 1963(a)(1) to include insurance
proceeds or profits received as a result of arson activities.\footnote{135} Although the term was not specifically defined in the statute, the Court
looked to the plain meaning and determined "that the term 'interest'
comprehends all forms of real and personal property, including prof-
its and proceeds."\footnote{136} The Court further concluded that RICO's legis-

lative history did not reveal "a limited Congressional intent" with
regard to this provision, in light of the fact that RICO "was in-
tended to provide new weapons of unprecedented scope for an assault
upon organized crime and its economic roots."\footnote{137}

While these two cases involved "criminal" aspects of RICO, they
nevertheless demonstrated the Court's intention to take a broad
view of RICO's scope in order to fully effectuate its remedial pur-

poses.\footnote{138} The Court's decision in \textit{Sedima} is consistent with this inten-
tion. In \textit{Sedima, S.P.R.L. v. Imrex Co.},\footnote{139} the Court rejected both
the underlying criminal conviction and racketeering injury require-
ments that had been imposed by the Second Circuit Court of Ap-

peals on plaintiffs seeking to maintain a private action under section

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} This admonition is equally cogent in the civil RICO context.
\item 104 S. Ct. 296 (1983).
\item \textit{Id.} at 298. Defendant was part of a group of individuals associated for the purpose
of committing arson with the intent to defraud insurance companies. The arsonists would burn
buildings owned by individuals associated with the ring. The owner would then file "an inflated
proof of loss statement," collect the proceeds, and pay the co-conspirators. The association
later bought buildings, secured excess insurance on them, and then had the buildings burned in
order to collect the proceeds. \textit{Id.}
\item \textit{Id.} at 299.
\item \textit{Id.} at 302.
\item \textit{Cf. Sedima, 741 F.2d at 493-94.} The \textit{Sedima} court reasoned that since the Court
in \textit{Turkette} was not specifically dealing with the intended scope of the civil remedy, its discus-
sion of the criminal enforcement provisions "provides little or no guidance" as to how "the
complex statutory scheme providing for the private civil remedy" should be handled. \textit{Id.}
\item \textit{Turkette}, the Court concluded that it is "untenable" that the existence of the civil
remedies "limits the scope of this criminal provision." 452 U.S. at 585. It is equally untenable
to argue, as the \textit{Sedima} majority implicitly did, that the existence of criminal remedies limits
the scope of the civil provisions.
\item 105 S. Ct. 3275 (1985). In a \textit{per curiam} opinion, the Court also affirmed the Sev-
enth Circuit's decision in \textit{Haroco}, viewing it "as consistent with" the Court's opinion in
ingly enough, the Court declined to address petitioners' "late-blooming argument that the
complaint failed to allege a violation of § 1962(c)." Petitioners claimed that the complaint
failed to show that the enterprise was "conducted" through a pattern of racketeering activity.
105 S. Ct. at 3292.
\end{enumerate}
\end{footnotesize}
A. The Criminal Conviction Requirement

After briefly reviewing RICO's legislative history, the Court analyzed the criminal conviction requirement imposed by the Second Circuit panel in Sedima. Initially, the Court concluded that "[t]he language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction." The Court went on to reject the Second Circuit's interpretation of section 1964(c) equating the use of the word "violation" with "criminal conviction," finding instead that the word "violation" only requires a "failure to adhere to legal requirements." Convinced that the Second Circuit's interpretation was supported by neither the statutory language nor the legislative history, the Court reasoned that if "Congress intended to impose this novel requirement, there would have been at least some mention of it in the legislative history, even if not in the statute."

The Court's analysis is sound. In fact, the term "violation" is commonly used in statutes that define the scope of civil remedies permitted for violations of a statute. For example, the word "violation" appears in sections of the antitrust laws defining prohibited activity as well as in sections providing sanctions for violations of those laws. Yet, a criminal conviction is not a prerequisite to obtaining civil remedies under these statutes.

The Second Circuit based its conclusion that violation must mean criminal conviction in part on the fact that section 4 of the Clayton Act provides a remedy for "anything forbidden" in the antitrust laws, while civil RICO provides a remedy for a "violation"

140. Sedima, 105 S. Ct. at 3281.
141. Id. The Court also concluded that even if "violation" meant "conviction," it would mean a conviction under RICO, not of the predicate offenses. Id. This is probably true, since § 1964(c) creates a remedy for a "violation" of § 1962, not of § 1961(l).
142. Id. at 3282.
When a violation of any right of the registrant . . . shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled . . . to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.
Id. The Supreme Court concluded that, "[w]hen Congress intended that the defendant have been previously convicted, it said so." Sedima, 105 S. Ct. at 3281 n.7.
The Court surmised that this difference in wording means that Congress intended civil RICO to reach only conduct already proven criminal.\textsuperscript{147}

The difference between the language in the antitrust laws and RICO is probably best explained by the fact that civil RICO permits recovery for a "violation" of a specific statutory provision, section 1962, while the reach of the Clayton Act's section 4 is broader, applying to many different provisions of the wide-ranging antitrust laws. Section 4, in other words, applies not to violation of a single statutory provision, but to "anything forbidden" in any of the antitrust provisions. Indeed, it is also possible to argue, as the Second Circuit admitted, that "'violation' is simply a shorthand way of saying 'by reason of anything forbidden,'" and that the change was made "in a desire merely to eschew surplusage."\textsuperscript{148} Whatever the explanation for the variation in language between the two provisions, it seems clear that the use of the word "violation" in civil RICO no more means a criminal violation than it does when used in the Lanham Act,\textsuperscript{149} or the antitrust laws.

The Second Circuit expressed concern that lack of a prior conviction would result in practical problems because it would require juries to apply different standards of proof to different parts of a case.\textsuperscript{150} The court assumed that proof beyond a reasonable doubt would be required of the predicate acts, while the preponderance of the evidence standard would apply to other elements of a RICO claim.\textsuperscript{151} According to the court, this would result in jury confusion. The Supreme Court dismissed this concern by noting that it is unclear whether the predicate acts must be established beyond a reasonable doubt.\textsuperscript{152} Furthermore, the Court concluded that even if the reasonable doubt standard were to be applied, the "resulting logistical difficulties . . . would not be so great" as to justify the imposition of a criminal conviction requirement "that cannot be found in

\textsuperscript{146} 18 U.S.C. § 1964(c).
\textsuperscript{147} Sedima, 741 F.2d at 498-99.
\textsuperscript{148} Id. at 498. See Sedima, 105 S. Ct. at 3282 n.8 ("It seems more likely that the language was chosen because it is more succinct than that in the Clayton Act, and is consistent with neighboring provisions.")
\textsuperscript{149} Trademark (Lanham) Act, 15 U.S.C. § 1117. See supra note 143.
\textsuperscript{150} Sedima, 741 F.2d at 501-02.
\textsuperscript{151} Id.
\textsuperscript{152} Sedima, 105 S. Ct. at 3282. Although the Court's opinion could be read as approving the use of a preponderance standard of proof in civil RICO cases, it explicitly left the question open. Id. See infra notes 208-20 and accompanying text.
the statute and that Congress . . . did not envision.”

Again, this analysis is correct. The burden of proof question, as the Supreme Court pointed out, remains unsettled. Logistical difficulties that would result from multiple standards of proof in the same trial are relatively minor and certainly do not justify such an extreme solution as requiring criminal convictions. Moreover, in holding that RICO calls for only criminal conduct to be punished, the Second Circuit misconstrued RICO. The RICO statute is not exclusively a criminal statute, but a remedial one, which provides civil remedies and criminal penalties for violations of its substantive provisions. Section 1964(c) provides civil remedies for civil violations of RICO’s substantive provisions, and not merely remedies for conduct already proven criminal.

The Second Circuit also feared that “constitutional questions” would arise if the statute were given a broader construction. The Supreme Court summarily rejected any notion that a “constitutional crisis” would arise in the absence of a criminal conviction requirement. While the Second Circuit based its constitutional argument on the fact that civil liability “for offenses criminal in nature” would stigmatize a defendant “with the appellation ‘racketeer,’” the Supreme Court dismissed the idea of stigmatization arising from civil RICO liability. Any stigmatization resulting from RICO liability, the Court concluded, is not “reduced by making certain that the de-

153. Sedima, 105 S. Ct. at 3282. The Supreme Court also pointed out that the Second Circuit’s holding “is not without problematic consequences of its own.” Id. at 5037 n.9. The examples provided by the Court militate against the imposition of a criminal conviction requirement by Congress at a later date.
154. See supra note 152.
155. See supra note 106.
156. Ironically, by requiring the defendant’s prior conviction of the predicate acts, the Second Circuit would have placed a heavier burden on a civil RICO plaintiff than the government bears in a criminal RICO case. In a criminal case, the government need only prove the commission of the predicate acts as elements of the overall RICO offense; it need not obtain separate convictions of each predicate act. 18 U. S. C. § 1962. As Judge Oakes acknowledged below “in a criminal RICO case, the proof of the predicate act convictions may be made under the same indictment, in the same trial and coordinately with the proof of the RICO offense(s).” Sedima, 741 F.2d at 501. Under the Second Circuit’s rationale it would have been easier in some cases to establish a criminal RICO violation rather than a § 1964(c) claim, because in a criminal RICO case, proof of the “enterprise” element and the “pattern of racketeering activity” need not be “distinct and independent, as long as the proof offered is sufficient to satisfy both elements.” United States v. Mazzei, 700 F.2d 85, 89 (2d Cir.), cert. denied, 103 S. Ct. 2124 (1983). See United States v. Turkette, 452 U. S. 576, 583 (1981).
157. Sedima, 105 S. Ct. at 3283. The Court did not “view the statute as being so close to the constitutional edge.” Id.
158. Sedima, 741 F.2d at 500 n.49; Sedima, 105 S. Ct. at 3283.
Fendant is guilty of fraud beyond a reasonable doubt." Instead of insuring that the protections of a criminal proceeding "were previously afforded by requiring prior convictions," the Court, as did Judge Cardamone in dissent below, posited that the proper solution "is to provide those protections in the context of a civil proceeding."

Finally, the Court pointed out that the "prior conviction requirement would be inconsistent with" Congressional policy. Indeed, the "private attorney general" theory of civil RICO and statutes like it is based on the notion that these statutes are needed to fill in the gaps left by the government's failure to prosecute in certain situations. Imposing a criminal conviction requirement would, as the Court pointed out, largely defeat this purpose because suits could be brought "only against those already brought to justice."

B. Racketeering Injury

Like most courts that have considered it, the Supreme Court was "somewhat hampered by the vagueness" of the concept of racketeering injury. Nevertheless, after considering the Second Circuit's characterization of a racketeering injury, the Supreme Court rejected the Second Circuit's holding that a plaintiff seeking to establish a civil RICO claim must show "injury . . . caused by an activity

159. Sedima, 105 S. Ct. at 3283. (emphasis in original). Although the Second Circuit in Sedima makes much of the stigma accompanying a civil RICO suit, statutes should not be restricted based on any perceived stigmatizing effect they may have on a defendant's reputation. See Sedima, 741 F.2d at 508 (Cardamone, J., dissenting). In any event, the stigmatizing effect of civil RICO liability is more imagined than real or, as Judge Cardamone observed, "a bit overstated." Id.


161. Sedima, 105 S. Ct. at 3284. See also Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1165 (5th Cir. 1984) ("provision for attorney's fees in section 1964(c) was intended by Congress, like the provision for treble damages, to encourage private enforcement of the laws on which RICO is predicated."); Blakey, The Act is Neither Anti-Business Nor Pro-Business, It's Pro-Victim, Nat'l L.J., Aug. 26, 1985, at 25.

162. Sedima, 105 S. Ct. at 3284.

163. Id.
which RICO was designed to deter."\textsuperscript{164} The Court found this definition of racketeering injury "unhelpfully tautological."\textsuperscript{165} In the process, the Supreme Court unequivocally rejected any attempt to limit RICO based on the concept of a distinct "racketeering injury."\textsuperscript{166} It reasoned that such a requirement is unnecessary, simply because any compensable injury consists of "harm caused by predicate acts sufficiently related to constitute a pattern."\textsuperscript{167} Thus, a plaintiff need not show a racketeering injury separate and apart from injury resulting from the predicate acts because any damages by reason of a section 1962(c) violation "will flow [directly] from the commission of the predicate acts."\textsuperscript{168}

As the Supreme Court pointed out, underlying the Second Circuit's holding in \textit{Sedima} was its concern about the extraordinary uses to which the statute has been put and its fear that an inexorable expansion of the civil RICO phenomenon could prove disastrous for both the federal court system and for potential civil RICO defendants.\textsuperscript{169} The Supreme Court shared these concerns and recognized

\begin{itemize}
\item \textsuperscript{164} \textit{Id.} (quoting \textit{Sedima}, 741 F.2d at 496).
\item \textsuperscript{165} \textit{Sedima}, 105 S. Ct. at 3284.
\item \textsuperscript{166} \textit{Id.} The Court explained that it "need not pinpoint the Second Circuit's precise holding, for we perceive no distinct 'racketeering injury' requirement." \textit{Id.} at 3285.
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.} The Court intimated that one way to limit the statute's reach would be to formulate a narrow definition of what constitutes a "pattern of racketeering activity" under § 1961(5). See \textit{id.} at 3285 n.14, 3287 (noting that the issue of whether the predicate acts alleged in \textit{Sedima} constituted a pattern was not before it). In other words, while a pattern consists of at least two acts of racketeering activity, it also consists of something more. Although the Court did not specify what that something more should be, it did provide a few suggestions culled from RICO's legislative history. \textit{Id.} at 3285 n.14.
\item \textsuperscript{169} Prominent in Judge Oakes' opinion is both the notion that a broad reading of § 1964(c) would be disastrous because it would open the federal court floodgates to frivolous claims, and the related idea that most civil RICO suits are just not RICO material because the defendants are "legitimate" businesspeople, not mobsters. See \textit{Sedima}, 741 F.2d at 485-89. Both assumptions are erroneous.
\end{itemize}
as well that civil RICO might have evolved into something that was
different from what its enactors had envisioned.170 Yet the Court
correctly concluded the statute's "breadth" was not a sufficiently
compelling reason for the courts to rewrite its provisions by imposing
"amorphous" standing requirements.171

In sum, the Supreme Court in Sedima reaffirmed the general
principle that statutory correction or revision is best left to Congress.
More specifically, the Court definitively determined that, as far as
section 1964(c) is concerned, lower courts should eschew artificial
restrictions on the statute's scope, and instead concentrate on provid-
ing increased procedural protections to civil RICO defendants.172

C. The Dissent

In dissent, Justice Marshall, joined by Justices Brennan, Black-
mun, and Powell, contended that the language and legislative history
of section 1964(c) "disclose a narrower interpretation of the statute
that fully effectuates Congress' purposes, and that does not make
compensable . . . a host of claims that Congress never intended to
bring within RICO's purview."173 Essentially, the dissent reiterated
the Second Circuit's conclusion that since Congress did not explicitly
consider or approve the broad use of civil RICO, it must not have
intended such a result.

The dissent pointed to the presence of mail and wire fraud predi-
cate offenses as the most "significant reason" for the expansive use
of civil RICO.174 This may well be true.175 Yet the dissent went on
to compare the restraining influence of prosecutorial discretion in
pursuing criminal RICO actions based on mail and wire fraud predi-
cate offenses, with the absence of such restraint on the part of pri-

Cirrito, 105 S. Ct. 3550 (1985). As Professor Blakey explains in his well-documented article,
white collar fraud is a billion dollar business that law enforcement, with its limited resources
and capabilities, cannot possibly hope to eliminate. Blakey, supra note 9, at 341-49. By provid-
ing for a private right of action which carries a threat of severe economic sanction — i.e.,
treble damages and attorney's fees — Congress added a powerful weapon to the depleted
arsenal used to fight corporate and other white-collar fraud. See id.

170. Sedima, 105 S. Ct. at 3287.
171. Id. See supra note 29.
172. Sedima, 105 S. Ct. at 3283, 3287.
173. Id. at 3040 (Marshall, J., dissenting). Since the dissent concluded that the civil
RICO claims at issue should be dismissed for failure to allege a "RICO injury," it did not
reach the question of whether a civil RICO action can proceed only after a criminal conviction
is obtained. Id. at 3304 n.2.
174. Id. at 3293-96 (Marshall, J., dissenting).
175. See supra note 31.
vate civil litigants who bring civil RICO claims. The absence of such a restraining influence, the dissent contended, necessitates a narrow interpretation of the scope of the private civil remedy under RICO. There are two problems with this reasoning.

First, by comparing the exercise of prosecutorial discretion with the absence of such discretion on the part of private litigants, the dissent incorrectly equates a criminal prosecution with a civil damage suit. Furthermore, the fact that the federal courts have interpreted the mail and wire fraud statutes broadly is not relevant to a determination of what the language of section 1964(c) requires. It is indisputable that the mail and wire fraud statutes are broadly written. Arguments in support of limitations on these statutes or on civil RICO, however, should be made to Congress and not the courts.

It is clear that civil RICO has, in the words of Justice Marshall, "brought profound changes to our legal landscape." Justice Marshall is concerned that the broad reading given civil RICO by the majority "virtually eliminates decades of legislative and judicial development of private civil remedies under the federal securities laws" because it allows plaintiffs to avoid the limitations of the securities laws "merely by alleging violations of other predicate acts." In support of this position, Justice Marshall notes that courts "have paid close attention to matters such as standing, culpability, causation, reliance and materiality, as well as the definitions of 'securities' and 'fraud'" under the securities laws. While they may have paid "close attention" to these matters, courts have

177. *Id.* (Marshall, J., dissenting). Justice Marshall seemed to dismiss the possibility that utilizing a narrow definition of the pattern requirement might be an appropriate way to limit RICO. Indeed, he opined that under the majority opinion "two fraudulent mailings or uses of the wires occurring within ten years of each other might constitute a 'pattern of racketeering activity.'" *Id.* at 3293. This ignores the implied, if not express, admonition of the majority that a pattern requires more than merely two acts of racketeering within ten years. *Id.* at 3285 n.14.
178. *Id.* at 3296 (Marshall, J., dissenting). Justice Marshall argued that the "broad" view of civil RICO has effectively federalized state common law, bringing about "dramatic changes in the nature of commercial litigation." *Id.* These changes are more illusory than real. Most state law fraud claims arising out of complex commercial transactions are brought in federal court, either on grounds of diversity of citizenship, pursuant to 28 U.S.C. § 1331 (1982), or as pendent claims to a federal cause of action. See Flaherty, *supra* note 17, at col. 3. See UMW v. Gibbs, 383 U.S. 715 (1966).
180. *Id.* (Marshall, J., dissenting).
181. *Id.* (Marshall, J., dissenting).
broadly interpreted provisions dealing with these issues.182

Significantly, Justice Marshall overlooks the fact that neither mail and wire fraud nor fraud in the sale of securities is per se actionable under RICO. These offenses only become actionable when they are part of a pattern of racketeering activity conducted by an enterprise. In addition, it seems logical that as the case law under RICO develops further, courts will look for guidance to legislative and judicial restrictions on claims of fraud brought under the securities laws in determining whether predicate acts have been adequately pleaded and proved.

The dissent also pointed out that since the statute excludes recovery for personal injuries, Congress must not have intended victims to recover for injuries resulting directly from the predicate acts.183 The RICO statute, however, was enacted to deal with economic, rather than personal, injury. In this regard, Congress did not limit recovery to those incurring only indirect economic injury, it merely limited recovery to “anyone” incurring a business or property injury.184 Indeed, if Congress intended to limit recovery to those incurring only indirect injury, it would have limited recovery to “business injury,” as opposed to “business or property” injury, suffered by a limited class of persons, rather than by “any person,” as the statute now reads.

Furthermore, by arguing that the statute “contemplates recovery for injury resulting from the confluence of events described in section 1962 and not merely from the commission of a predicate act,”185 the dissent misconstrued the statute’s language. As the majority explained, liability results from the section 1962 violation, but

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182. See, e.g., Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971) (plaintiffs can maintain securities actions for fraud “touching” the sale of securities); United States v. Winans, 612 F. Supp. 827 (S.D.N.Y. 1985) (reporter criminally liable under § 10(b) for misappropriating information by disclosing the content and timing of market sensitive stories, where reporter was aware that his employer, the Wall Street Journal, had a policy against such disclosure); United States v. Newman, 664 F.2d 12, 15 (2d Cir.), aff’d after remand, 772 F.2d 729 (2d Cir. 1981), cert. denied, 104 S. Ct. 199 (1983) (outsider who breaches his fiduciary duty by misappropriating confidential market information entrusted to his employer and who trades on the basis of that information may be criminally liable under § 10(b) and Rule 10b-5). Cf. SEC v. Materia, 745 F.2d 197 (2d Cir. 1984), cert. denied, 105 S. Ct. 2112 (1985) (misappropriation theory of liability applicable in SEC injunctive and disgorgement proceedings). But see Moss v. Morgan Stanley Inc., 719 F.2d 5 (2d Cir. 1983), cert. denied, 104 S. Ct. 1280 (1984) (misappropriation theory of liability not applicable in private actions under § 10(b) and Rule 10b-5).


harm results from the predicate acts which, of course, must be sufficiently related to constitute a pattern and have been committed in connection with the conduct of an enterprise.\textsuperscript{186}

The dissent relied on legislative history to support its formulation of an economic injury requirement, concluding that Congress intended to provide a means for businessmen "to recover damages for competitive injury, infiltration injury, or other economic injury resulting out of, but wholly distinct from, the predicate acts."\textsuperscript{187} While the sponsors of RICO were greatly concerned with economic losses suffered by competitors of businesses infiltrated by racketeers, and such losses are compensable under the statute, Congress did not define compensable injury under RICO as narrowly as the dissent suggested.\textsuperscript{188} In supporting its conclusions by "[p]utting together" various segments of legislative history,\textsuperscript{189} the dissent unfortunately overlooked the fact "Congress' self-consciously expansive language"\textsuperscript{190} speaks for itself. The Court should, therefore, not infer any limitations on the statute based on a piecemeal analysis of legislative history.

\textsuperscript{186} Id. at 3285 (Marshall, J., dissenting).
\textsuperscript{187} Id. at 3302 (Marshall, J., dissenting). The economic injury requirement seems to be an amalgamation of the "commercial" and "competitive" injury requirements discussed previously in this Article. \textit{See supra} notes 39-49 and accompanying text. While Justice Marshall seemed to look to antitrust law in part for guidance in formulating his proposed limitation, he did not suggest directly imposing restrictive antitrust standing requirements on civil RICO plaintiffs. Instead, he synthesized the antitrust competitive injury requirement with a concept he called "infiltration" or "business" injury. \textit{Id.} at 3296-3303. Ironically, although the dissent emphasized that Congress did not intend to provide a remedy under RICO for direct victims of racketeering activity, ostensibly because such persons have other "adequate" remedies at law, many of the examples of "RICO injuries" cited by the dissent involve recovery for direct injuries. \textit{See id.} at 3302.

\textsuperscript{188} It may be true, as Justice Marshall claimed, that the "principal target" of the RICO statute "was the economic power of racketeers and its toll on legitimate businessman." \textit{Sedima}, 105 S. Ct. at 3299 (Marshall, J., dissenting). There is, however, no indication that Congress intended to deny recovery to others who satisfied the literal requirements of the statute. \textit{Id.} at 5039 n.15.

\textsuperscript{189} Id. at 3296-3303 (Marshall, J., dissenting).

\textsuperscript{190} Id. at 3286. Even though Justice Powell admitted that both United States \textit{v. Turkette}, 452 U.S. 576 (1981) and \textit{Russello v. United States}, 104 S. Ct. 296 (1984), stand for the proposition that the statute must be read broadly and construed liberally to effectuate its remedial purposes, he distinguished both of these cases from \textit{Sedima} because they involved RICO's criminal provisions whereas this case involved a civil claim. 105 S. Ct. 3288-91 (Powell, J., dissenting). Yet, it is incongruous to argue that although a statute's criminal provisions should be liberally construed, its civil provisions should be narrowly construed. To the contrary, the fact that a statute's criminal provisions must be liberally construed militates strongly in favor of liberally construing the corresponding civil provisions. \textit{See id.} at 3283 n.10 ("Indeed, if Congress' liberal construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident.").
Justice Powell wrote a separate dissent. He also advocated a narrow reading of the statute's provisions, but, more importantly, he focused on the "pattern" requirement of section 1961(5) in proposing possible ways to limit the scope of civil RICO. Justice Powell concluded that "[b]y construing 'pattern' to focus on the manner in which the crime was perpetrated, courts could go a long way toward limiting the reach of the statute to its intended target — organized crime." Furthermore, Justice Powell noted that the majority conceded that "pattern" could be narrowly construed, but expressed concern that the Court had read the statute so broadly that it may be impossible for courts to construe the "pattern" requirement in a manner consistent with Congressional intent. This fear appears unwarranted. Under section 1961(5), a pattern consists of "at least" two acts of racketeering within ten years. What may be required in addition to these two acts has not been conclusively established. The language of this particular provision gives sufficient leeway for the courts to develop a restrictive view of what a "pattern" is, notwithstanding the "broad" reading given to the language of section 1964(c) in this case. At this point, the issue of what constitutes a "pattern" is open for resolution.

VII. LIMITING CIVIL RICO AFTER Sedima

While the Supreme Court rejected the approaches taken by the Second Circuit in attempting to limit the scope of civil RICO, it did not rule out the possibility that there may be ways to restrict RICO without violating either the statutory language or congressional intent. It invited lower courts to focus on the "pattern" requirement of section 1961(5) as a means of limiting civil RICO claims. The Court also left open the question of what burden of proof is applicable in civil RICO actions.

A. The Pattern of Racketeering Activity

The Court intimated that it was possible to devise a restrictive definition of what constitutes a "pattern of racketeering activity" which could effectively limit the types of claims that can be brought

192. Id. (Powell, J., dissenting).
193. Id. at 5047. (Powell, J., dissenting).
194. Id. (Powell, J., dissenting).
195. See supra note 28.
under the statute. For example, section 1961(5) states that a pattern of racketeering requires "at least two acts of racketeering activity." The statute does not explicitly describe what else, if anything, is required. The legislative history of RICO indicates that two isolated acts of racketeering activity do not per se constitute a pattern. Some combination of "continuity plus relationship" between the acts of racketeering activity must also be shown. The courts have yet to determine conclusively what combination of activities will satisfy this somewhat amorphous standard.

A recent ABA report on civil RICO supports the view that the pattern requirement should be interpreted narrowly. The report, cited by both the majority and by Justice Powell in dissent, points out that the "pattern" element was intended by Congress to be a limiting concept, designed to restrict RICO to "planned, ongoing, continuing (activity) as opposed to sporadic, unrelated, isolated criminal episodes." In order to effectuate this intent, Justice Powell argued that a plaintiff must plead and prove that (1) the racketeering acts are somehow related, (2) they are part of a common scheme, and (3) there is either some sort of continuity between the acts or a threat of continuing illegal activity.

The argument in favor of a narrow view of the pattern require-

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197. See id. at 3287 ("[t]he ‘extraordinary’ uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses . . . and the failure of Congress and the courts to develop a meaningful concept of ‘pattern’") See also id. at 3285 n.14 (discussing the legislative history of the pattern requirement).


201. A.B.A. Report, supra note 31, at 70, quoted in Sedima, 105 S. Ct. at 3289 (Powell, J., dissenting). Moreover, while Justice Powell fears that the Court has read the statute so broadly as to effectively preclude lower courts from adopting a narrow view of what constitutes "pattern," Sedima, 105 S. Ct. at 3290, there is nothing in the majority opinion to indicate as much. In contrast, the Court seems to be inviting the lower courts as well as Congress to focus on the pattern requirement in considering alternative ways to restrict civil RICO's scope. See id. at 3287.

202. Sedima, 105 S. Ct. at 3286-87; id. at 3289-90 (Powell, J., dissenting).

203. Id. at 3289 (Powell, J., dissenting) (quoting A.B.A. Report, supra note 31, at 71-72).

204. Id. at 3290 (Powell, J., dissenting) (citing A.B.A. Report, supra note 31, at 193-208).
ment is consistent with the statute’s legislative intent and is, on its face, an attractive way to limit the statute’s reach. It is questionable, however, whether the application of such a narrow definition would have much practical effect in limiting the number of civil RICO claims. For example, it would have been difficult for the Second Circuit to utilize the narrow definition of the pattern requirement, proposed by the ABA as a basis for dismissing the civil RICO claims brought by Sedima. The preparation of the false purchase orders, invoices, and credit memoranda in *Sedima* were acts that (1) were related to each other as part of the overall effort to defraud the joint venture; (2) were part of a common scheme to defraud the joint venture; and (3) although occurring over a defined and limited period of time, there was at least “some sort of continuity” between these acts. Other so-called “outrageous” uses of civil RICO would also satisfy this “narrow” definition of pattern.

Nevertheless, a definition of “pattern” requiring multiple acts occurring in two or more separate criminal episodes could lead to a weeding out of some of the more tenuous claims brought under the statute. Such a construction of the pattern requirement would enable courts, for example, to dismiss claims alleging that the “pattern of racketeering activity” merely consists of multiple mailings in furtherance of a single scheme to defraud. This would serve the spirit as well as the letter of the law, much more than any of the artificial requirements that courts previously attempted to impose on civil RICO.

205. *Sedima*, 741 F.2d at 484.


B. The Burden of Proof

Another open question is the proper burden of proof in a civil RICO action. Since Congress did not specifically provide for a particular standard of proof in civil RICO actions, it is up to the courts to resolve this issue. While the Sedima majority opinion can be read to sanction the use of the typical preponderance standard in civil RICO actions, the Supreme Court expressly left the question open.208 A strong argument can be made that civil RICO is, in fact, a quasi-criminal statute, and that a higher burden of proof is called for. While it is not possible to impose a reasonable doubt standard on civil RICO plaintiffs,208 it may very well be possible to impose an intermediate standard, i.e., proof by “clear and convincing evidence.”

A preponderance of the evidence standard is used in most civil litigation, which generally involves a monetary dispute between private parties.210 Nevertheless, a higher standard of proof may be justified in a civil RICO action. While civil RICO claims involve monetary disputes, the statute provides for much more than simple compensation for a quantifiable loss. It also provides for treble damages, which are punitive in nature because they do more than compensate a prevailing plaintiff for the actual loss caused by the defendant's wrongdoing.211

The mere fact that RICO provides for treble damages is proba-


209. Proof beyond a reasonable doubt is only mandated where the state seeks to restrain a defendant’s liberty or impose criminal sanctions. See In re Winship, 397 U.S. 358, 362-64 (1970); United States v. Regan, 232 U.S. 37, 47-50 (1914). Civil RICO does not seek to do either. The fact that other sections of RICO call for the imposition of criminal penalties for criminal violations of § 1962, e.g., 18 U.S.C. § 1963, does not alter this result. See United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); Regan, 232 U.S. at 48-50.


211. See Sedima, 741 F.2d at 500 n.49. See also Vuitton S.A. v. Spencer Handbags Corp., Nos. 85-7066, 7094 (2d Cir. June 26, 1985) (“punitive treble damages” provision contained in Trademark Counterfeiting Act of 1984 is not to be applied retroactively because to do so would raise a potential ex post facto problem).
bly not sufficient to justify an enhanced standard of proof. However, in civil cases involving allegations of fraud or other quasi-criminal activity, an intermediate standard, requiring proof of guilt by clear and convincing evidence, may be imposed. The rationale for raising the standard of proof in such cases is based on the recognition that the interests at stake are “more substantial than mere loss of money.” Such additional interests include the stigmatization or injury to one’s reputation which can arise out of civil liability in these contexts.

In addition, courts generally apply a clear and convincing evidence standard to claims of common law fraud. The fact that, but for the use of the mails or wires, the elements of the mail and wire fraud predicate offenses are essentially similar to those of common law fraud claims, militates in favor of applying an intermediate standard to those predicate acts. Moreover, the other offenses enumerated in section 1961(1) all involve some kind of quasi-criminal behavior. Therefore, it is appropriate to require a plaintiff to prove the predicate offenses of racketeering by “clear and convincing”

212. Although treble damages are awarded under the antitrust laws, a preponderance standard applies to antitrust claims. See Ramsey v. UMW, 401 U.S. 302, 307-11 (1971); Matz, supra note 208, at 21, col. 1. But cf. Comment, supra note 208, at 433 n.218.


214. Id.

215. Id. The possibility of “stigmatization” has been consistently used by the courts to justify imposing a higher standard of proof. See, e.g., In re Gault, 387 U.S. 1, 27 (1967) (possible stigmatization accompanying finding of delinquency requires additional procedural safeguards); Note, Criminal Law — Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964 (1970), 53 Tex. L. Rev. 1055, 1061 (1975). Cf., Sedima, 741 F.2d at 508 (Cardamone, J., dissenting) (stigmatization from civil RICO liability “a bit overstated”). Nevertheless, it could be argued that an intermediate standard is appropriate only in proceedings involving the loss of some tangible right, i.e., the loss of liberty, because of the due process implications of such proceedings. See, e.g., Stantosky v. Kramer, 455 U.S. 745, 748 (1982) (in order to terminate rights of natural parents, state must support allegations of permanent neglect by clear and convincing evidence); Addington v. Texas, 441 U.S. at 423-33 (due process requires that the state prove the basis for involuntary commitment by clear and convincing evidence). See also Comment, supra note 208, at 441-42.

216. See Comment, supra note 208, at 441.

217. Id. at 444.

218. The fact that a preponderance standard is applicable in actions under Rule 10b-5 of the Securities and Exchange Act, Herman and MacLean v. Huddleston, 459 U.S. 375 (1983), does not preclude imposing an intermediate standard in RICO cases alleging securities fraud as a predicate act. Rule 10b-5 neither provides for treble damages in a private action nor attorney’s fees. Furthermore, liability under Rule 10b-5 does not have the stigma which arguably attaches to liability under RICO.

219. See supra note 28.
Such a requirement would go a long way toward limiting RICO liability to only the most egregious cases of civil RICO violations. It would also provide increased procedural protection to a RICO defendant. It would not, in the process, serve to emasculate the statute as an effective remedy as would the standing requirements previously sought to be imposed by the courts.

**Conclusion**

By rejecting the Second Circuit’s restrictive interpretation of section 1964(c), the Court demonstrated that it will continue to defer to the plain language of a statute unless there is an explicit mandate to the contrary. The *Sedima* decision clearly indicates that this policy will be pursued even where a statute has been applied in situations that were not contemplated by Congress.\(^{221}\)

The Court went even further by declaring that “RICO is to be read broadly.”\(^{222}\) This pronouncement will undoubtedly enable victimized consumers, stockholders, and borrowers to make a significant dent in the economic armor of those enterprises engaged in illegal activities. It also creates the possibility of frivolous and vexatious litigation brought to force a quick settlement with an organization faced with the prospect of paying treble damages and attorneys’ fees. Nevertheless, the Court intimated that there may be other ways to limit RICO, including the formulation of a narrow definition of what constitutes a “pattern of racketeering activity.” Under the existing statutory scheme the practical effect of any such limitations may be minimal.

Until now Congress has done nothing to limit the scope of RICO. In the wake of *Sedima*, it is up to Congress to decide whether or not RICO should be limited and, if so, by what means.\(^{223}\)

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\(^{220}\) See Comment, *supra* note 208, at 445-46 (advocating requiring proof of all of the elements of a violation of § 1964(c) by clear and convincing evidence). Since the predicate acts are actually the quasi-criminal activity, and the RICO violation consists of the commission of those acts in specified circumstances, it is more appropriate to require proof by clear and convincing evidence of only the predicate acts.

\(^{221}\) See *Sedima*, 105 S. Ct. at 3287.

\(^{222}\) *Id.* at 3286.

\(^{223}\) *Id.* at 3287. Any “defect” in the statute “is inherent in the statute as written, and its correction must lie with Congress.” *Id.* Congress has begun to consider ways to limit RICO. On July 10, 1985, Representative Frederick Boucher (D. Va.) introduced a bill that would require that a defendant be “convicted of racketeering activity or of a violation of 18 U.S.C. § 1962” before a civil suit could be brought. H.R. 2943, 99th Cong., 1st Sess., 131 CONG. REC. H5442 (1985). See 54 U.S.L.W. 2059 (July 23, 1985). In addition, on July 29, 1985, Senator
Hopefully, any such restrictions will accommodate the need to limit abuse of the statute without limiting the effectiveness of RICO as a weapon against systematic racketeering activity.

Orrin Hatch (R. Utah) introduced a bill, the Civil RICO Amendments Act of 1985, S. REP. No. 1521, 99th Cong., 1st Sess., 131 CONG. REC. S10285 (1985), which is intended to "clarify the scope of civil remedies under section 1964(c)." 131 CONG. REC. S10287 (daily ed. July 29, 1985) (statement of Sen. Hatch). This bill would (1) require private plaintiffs suing under section 1964(c) to prove injury separate from injury caused by the predicate acts alone; (2) require that at least one of the predicate offenses be an act other than mail, wire, or securities fraud; and (3) allow judges to award attorney's fees to defendants in frivolous RICO actions. Id. at S10287-88.