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**Racketeer Influenced and Corrupt Organizations Act (RICO) -
Maintenance of a Private Civil RICO Action Does Not Require a
Showing That the Defendant Has Been Criminally Convicted of the
Predicate Acts Nor That the Plaintiff Has Sustained a
Racketeering Injury Distinct from the Alleged Predicate Acts.**

Ruth E. Greenfield

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CASENOTES

BUSINESS LAW — Racketeer Influenced And Corrupt Organizations Act (RICO) — Maintenance Of A Private Civil RICO Action Does Not Require A Showing That The Defendant Has Been Criminally Convicted Of The Predicate Acts Nor That The Plaintiff Has Sustained A “Racketeering Injury” Distinct From The Alleged Predicate Acts

Sedima, S.P.R.L. v. Imrex Co.

___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)

Sedima and Imrex became involved in a joint venture to supply electronic parts to a Belgian company.¹ Under the terms of the joint venture, Sedima received orders for electronic components, and Imrex was responsible for their procurement and shipment to Europe.² Sedima suspected that Imrex was sending Sedima bills which falsely overstated the purchase prices of the parts and the expenses incurred in shipping.³ Sedima filed suit in 1982 in the Federal District Court for the Eastern District of New York alleging that Imrex received more than its proper share of the proceeds of the venture as a

1. *See Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3279, 87 L. Ed. 2d 346, 351 (1985). Sedima is a Belgian corporation which imports and exports electronic, hydraulic, and mechanical parts to and from Belgium. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 484 (2d Cir. 1984), *rev'd*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). Imrex is an American corporation which exports aviation parts. *See id.* at 484.

2. *See Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3279, 87 L. Ed. 2d 346, 351 (1985). Purchase orders were to be issued by Imrex to the company from which the parts were bought. *See* Brief for Petitioner at 15, *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (available on LEXIS, Genfed Library, Sup. Ct. Briefs). Copies of these purchase orders were to be sent to Sedima to confirm the purchase and the price. *See id.* at 15. The terms of the joint venture called for the net proceeds to be split between Sedima and Imrex. *See Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3279, 87 L. Ed. 2d 346, 351 (1985).

3. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 484 (2d Cir. 1984), *rev'd*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

result of the allegedly fraudulent bills.⁴ Sedima's complaint contained common-law claims⁵ and three counts alleging violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).⁶ Two of the RICO counts alleged that Imrex had violated section 1962(c),⁷ based upon predicate acts of wire and mail fraud.⁸ The third RICO count alleged a violation of section

4. See *id.* at 484; see also *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3279, 87 L. Ed. 2d 346, 351 (1985). Sedima claimed that it was overbilled for more than \$175,000. See *id.* at ___, 105 S. Ct. at 3279, 87 L. Ed. 2d at 351. Two officers of Imrex, Jacob and Gidon Armon, were also named as defendants. See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 484 (2d Cir. 1984), *rev'd*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). The Armons allegedly prepared the fraudulent papers and made the telephone calls which formed the basis for Sedima's charges. See Brief for Petitioner at 15, *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (available on LEXIS, Genfed Library, Sup. Ct. Briefs).

5. *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3279, 87 L. Ed. 2d 346, 351 (1985). The common law claims included conversion, breach of fiduciary duty, unjust enrichment, breach of contract, and breach of a constructive trust. See *id.* at ___, 105 S. Ct. at 3279, 87 L. Ed. 2d at 351.

6. See *id.* at ___, 105 S. Ct. at 3279, 87 L. Ed. 2d at 351; see also 18 U.S.C. §§ 1961-1968 (1982) (§ 1961(1) recent amendments in 18 U.S.C.A. § 1961(1) (West Supp. 1985)). RICO is Title IX of the Organized Crime Control Act of 1970. See Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, 941-48 (1970).

7. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3279, 87 L. Ed. 2d 346, 351 (1985); see also 18 U.S.C. § 1962(c) (1982). This section provides:

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

Id. § 1962(c). "Racketeering activity" is defined in section 1961(1). See 18 U.S.C.A. § 1961(1) (West Supp. 1985). Section 1961(1) defines racketeering activity in terms of activities already criminal under state and/or federal law. See *id.* § 1961(1). The activities listed in section 1961(1) are commonly referred to as "predicate acts." See *Williamette Sav. & Loan v. Blake & Neal Fin. Co.*, 577 F. Supp. 1415, 1424 (D. Or. 1984). A "pattern of racketeering activity" is defined in section 1961(5) as requiring "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1982).

8. *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3279, 87 L. Ed. 2d 346, 351 (1985). The predicate acts in a RICO violation are those prohibited activities listed in section 1961(1). See 18 U.S.C.A. § 1961(1) (West Supp. 1985); see also *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 486 (2d Cir. 1984) (§ 1961(1) lists predicate acts), *rev'd*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). The relevant provision of section 1961(1) states that "'racketeering activity' means . . . any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . ." 18 U.S.C.A. § 1961(1) (West Supp. 1985). Wire fraud is defined as:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television

1962(d), based upon an alleged conspiracy to violate section 1962(c).⁹ Sedima sought treble damages and reasonable attorney's fees under section 1964(c).¹⁰ The district court granted Imrex's motion to dismiss,¹¹ holding that a private civil RICO action can be sustained only if the plaintiff alleges an injury distinct from that directly flowing from the alleged predicate acts.¹² The United States Court of Appeals for the Second Circuit affirmed,¹³ stating that in order to maintain a private civil RICO action, a plaintiff must show an injury different in kind from the injury flowing from the predicate acts¹⁴ and that the defendant has been criminally convicted of

communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (1982). Sedima alleged that Imrex committed wire fraud by making misrepresentations to Sedima during international telephone calls. See Brief for Petitioner at 15, *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (available on LEXIS, Genfed library, Sup. Ct. Briefs). Mail fraud is defined as:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1982). Imrex is alleged to have committed mail fraud by sending fraudulent purchase orders and credit memoranda to Sedima through the mail. See Brief for Petitioner at 15, *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (available on LEXIS, Genfed library, Sup. Ct. Briefs).

9. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3279, 87 L. Ed. 2d 346, 351 (1985). Section 1962(d) states "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections [sic] (a), (b), or (c) of this section." 18 U.S.C. § 1962(d) (1982).

10. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3279, 87 L. Ed. 2d 346, 351 (1985). Section 1964(c) states that "[a]ny 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." 18 U.S.C. § 1964(c) (1982).

11. See *Sedima, S.P.R.L. v. Imrex Co.*, 574 F. Supp. 963, 964 (E.D.N.Y. 1983), *aff'd*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

12. See *id.* at 965.

13. See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 504 (2d Cir. 1984), *rev'd*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

14. See *id.* at 496.

the underlying predicate acts.¹⁵ The Supreme Court granted *Sedima's* writ of certiorari to resolve a conflict among the circuits concerning the prior conviction requirement and the injury necessary to sustain a private civil RICO action.¹⁶ Held — *Reversed*. Maintenance of a private civil RICO action does not require a showing that the defendant has been criminally convicted of the predicate acts nor that the plaintiff has sustained a "racketeering injury" distinct from the alleged predicate acts.¹⁷

The Racketeering Influenced and Corrupt Organizations Act (RICO) is Title IX of the Organized Crime Control Act (OCCA) enacted by Congress in 1970 to combat the economic effects of organized crime.¹⁸ OCCA was the

15. *See id.* at 503.

16. *See Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 901, 901, 83 L. Ed. 2d 917, 917 (1985). Oral argument in the case was set in tandem with *American Nat'l Bank v. Haroco, Inc.* *See id.* at ___, 105 S. Ct. at 901-02, 83 L. Ed. 2d 917. In *Haroco*, the Court of Appeals for the Seventh Circuit had held that no injury other than that flowing from the predicate acts need be alleged to sustain a civil RICO action and rejected the Second Circuit's prior conviction requirement. *See Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 393, 398 (7th Cir. 1984), *aff'd*, ___ U.S. ___, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985).

17. *See Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3287, 87 L. Ed. 2d 346, 361 (1985). The opinion of the court was delivered by Justice White. *See id.* at ___, 105 S. Ct. at 3277, 87 L. Ed. 2d at 349. Justice Powell wrote a dissenting opinion. *See id.* at ___, 105 S. Ct. at 3288, 87 L. Ed. 2d at 375 (Powell, J., dissenting). Justice Marshall, joined by Justice Brennan, Justice Blackmun, and Justice Powell, also wrote a dissent. *See id.* at ___, 105 S. Ct. at 3292, 87 L. Ed. 2d at 361 (Marshall, J., dissenting) (Marshall's dissent, directed at both *Sedima* and *Haroco* appears after *Haroco* at 105 S. Ct. 3292 but with *Sedima* at 87 L. Ed. 2d).

18. *See Organized Crime Control Act of 1970*, Pub. L. No. 91-452, 84 Stat. 922, 941-48 (1970); *see also id.* at 922-23 (statement of findings and purpose). The Supreme Court had previously examined OCCA's purpose in a criminal RICO case. *See United States v. Turkette*, 452 U.S. 576, 585-86 (1981) (OCCA's purpose was to assist federal government in dealing with organized crime). The legislative history of OCCA also has references to its purposes. *See* 115 CONG. REC. 827 (1969) (statement of Sen. McClellan) (OCCA introduced to correct deficiencies in law enforcement's available tools to fight organized crime); *see also id.* at 832 (statement of Sen. Hruska) (OCCA designed to fill gaps in law enforcement weapons presently available to fight organized crime). It must be noted that the term "organized crime" has many meanings. *See Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013 n.15 (1980). To some, the term denotes traditional ideas of the Mafia or "La Cosa Nostra". *See Blakey, The RICO Civil Fraud Action In Context: Reflections On Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249 (1982). During the Senate's consideration of OCCA, the term was expanded to mean organized criminal behavior in general. *See In re Catanella & E. F. Hutton & Co.*, 583 F. Supp. 1388, 1429 (E.D. Pa. 1984) (quoting remarks of Senator McClellan at 116 CONG. REC. 18,913 (1970)). Senator McClellan stated that organized crime "is a functional concept like white collar crime, serving simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances." *See* 116 CONG. REC. 18,913 (1970). This Note will use the broader meaning of organized crime espoused by Senator McClellan. *See id.* at 18,913.

culmination of more than twenty years of congressional concern over the infiltration of organized crime into many facets of American life.¹⁹ As introduced in the Senate, OCCA did not contain any measures directed specifically at halting the infiltration of organized crime into legitimate

19. See Blakey, *The RICO Civil Fraud Action In Context: Reflections On Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249-56 (1982). Professor Blakey held the position of Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures during OCCA's passage through Congress. See *id.* at 237. Professor Blakey has authored two articles which extensively chronicle OCCA's legislative history. See *id.* at 249-80; Blakey & Gettings, *Racketeer Influenced And Corrupt Organizations (RICO): Basic Concepts - Criminal And Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-21 (1980). RICO followed two years of legislative activity on anti-crime measures. See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 488 n.18 (2d Cir. 1984) (discussing RICO and its predecessors), *rev'd*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). Senate bills 2048 and 2049 were introduced into the Senate in 1967 by Senator Roman L. Hruska. See S. 2048, 90th Cong., 1st Sess. (1967); S. 2049, 90th Cong., 1st Sess. (1967); see also 113 CONG. REC. 17,999 (1967) (remarks of Senator Hruska). Companion bills were introduced in the House by Congressman Richard H. Poff. See H.R. 11266, 90th Cong., 1st Sess., 113 CONG. REC. 17,976 (1967); H.R. 11268, 90th Cong., 1st Sess., 113 CONG. REC. 17,976 (1967). Senate bill 2048 was proposed as a Sherman Act amendment which would prohibit the use of unreported income to invest in businesses which affect interstate commerce. See S. 2048, 90th Cong., 1st Sess. (1967); see also *Yancoski v. E. F. Hutton & Co.*, 581 F. Supp. 88, 95 (E.D. Pa. 1983) (predecessor to RICO drafted as Sherman Act amendment). See generally Blakey, *The RICO Civil Fraud Action In Context: Reflections On Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 253-56 (1982) (discussing congressional activity leading to OCCA). Senate bill 2049 was an independent measure, not tied to the Sherman Act, and forbid the investment of income gained from criminal activity in businesses affecting interstate commerce. See S. 2049, 90th Cong., 1st Sess. (1967); see also 113 CONG. REC. 17,999 (1967) (remarks by Senator Hruska). These two bills did not survive committee review. See *Schacht v. Brown*, 711 F.2d 1343, 1357 & n.16 (7th Cir.) (Congress rejected use of antitrust laws as vehicle for remedies to fight organized crime), *cert. denied*, ___ U.S. ___, 104 S. Ct. 508, 509, 78 L. Ed. 2d 698 (1983) (two petitions for certiorari filed by different parties in original suit); see also Blakey & Gettings, *Racketeer Influenced And Corrupt Organizations (RICO): Basic Concepts - Criminal And Civil Remedies*, 53 TEMP. L.Q. 1009, 1016 (1980) (Senate Committee on Judiciary took no action on Senate bills 2048 and 2049); Bradley, *Racketeers, Congress, And The Courts: An Analysis Of RICO*, 65 IOWA L. REV. 837, 840-41 (1980) (Senate bills 2048 and 2049 "died in committee"). Even though these early bills were not enacted, they stimulated study of the various approaches which could be used to combat the economic effect of organized crime on businesses. See Blakey & Gettings, *Racketeer Influenced And Corrupt Organizations (RICO): Basic Concepts - Criminal And Civil Remedies*, 53 TEMP. L.Q. 1009, 1016 (1980). The Anti-Trust Section of the American Bar Association published a report, reprinted in the Congressional Record, in which it recommended that such legislation not be appended to the Sherman Act. See 115 CONG. REC. 6995 (1969) (since Sherman Act's primary goal is maintenance of free competition, it is undesirable to attach to it provision with primary goal of eradicating organized crime in general). The report further expressed a preference for the independent approach of Senate bill 2049. See *id.* at 6995 (commingling of goals of law enforcement with those of commerce regulation avoided by independent legislation). Senate bill 30, the Organized Crime Control Act, was introduced into the Senate in 1969 by Senator John McClellan. See S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 829-32 (1969).

businesses.²⁰ RICO was added during Senate consideration of the bill, but it did not have a provision allowing private civil action at the time.²¹ A private civil remedy providing for recovery of treble damages and attorney's fees was included during OCCA's passage through the House of Representatives.²² As finally enacted, RICO was expressed in very broad language.²³

20. See 115 CONG. REC. 829-32 (1969). Subsequently, two additional bills, aimed at fighting organized crime economically were introduced into the Senate. See Blakey & Gettings, *Racketeer Influenced And Corrupt Organizations (RICO): Basic Concepts - Criminal And Civil Remedies*, 53 TEMP. L.Q. 1009, 1017 (1980). The first of these bills to be introduced was Senate bill 1623, entitled "The Criminal Activities Profits Act." See S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6995-96 (1969) (introduced by Senator Hruska). Senate bill 1623 was based upon Senate bills 2048 and 2049 and "aimed specifically at racketeering infiltration of legitimate businesses." See 115 CONG. REC. 6993 (1969) (remarks of Senator Hruska). The proposed bill made the use of income derived from criminal activity in the acquisition of an interstate or foreign business a criminal act. See S. 1623, sec. 2, 91st Cong., 1st Sess., 115 CONG. REC. 6995-96 (1969). In addition, the use of unreported income to invest in an interstate or foreign business was forbidden. See *id.* sec. 2(c). Senate bill 1623 provided criminal penalties and civil remedies for such violations, including a provision for recovery of treble damages and attorney's fees by private plaintiffs. See *id.* sec. 4(a). Following Senate hearings on Senate bills 1623 and 30, RICO's predecessor, Senate bill 1861, was introduced. See S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568-71 (1969).

21. See S. 30, 91st Cong., 2d Sess., 116 CONG. REC. 575-84 (1970). Senate bill 1861 was incorporated into Senate bill 30 as Title IX, the Racketeer Influenced And Corrupt Organizations Act. See *id.* sec. 901; see also Blakey, *The RICO Civil Fraud Action In Context: Reflections On Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 265 (1982) (Senate bill 30 amended, incorporating Senate bill 1861). The purpose of Senate bill 1861, the Corrupt Organizations Act, was to provide remedial measures, both criminal and civil, which would be used to combat organized crime. See S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568 (1969) (statement of findings and policy). The civil remedies available under Senate bill 1861, unlike those under Senate bill 1623, did not include a private civil action for treble damages. See Blakey, *The RICO Civil Fraud Action In Context: Reflections On Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 262 (1982) (no express provision for treble damages in Senate bill 1861). Additional changes from Senate bill 1623 included an expansion of the list of racketeering activities (denominated "criminal activities" in Senate bill 1623) and the addition of the requirement that there be a pattern of prohibited conduct. See S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568-71 (1969). See generally Blakey & Gettings, *Racketeer Influenced And Corrupt Organizations (RICO): Basic Concepts - Criminal And Civil Remedies*, 53 TEMP. L.Q. 1009, 1017 (1980) (comparing Senate bills 1623 and 1861). RICO was added to Senate bill 30 to provide measures to combat organized crime's infiltration into the legitimate marketplace. See 116 CONG. REC. 591-92 (1970) (remarks of Senator McClellan) (purpose of Title IX (RICO) is removal of organized crime from legitimate organizations); see also *id.* at 607 (remarks of Senator Byrd) (proposals in RICO can lead to eradication of economic power of organized crime).

22. See S. 30, sec. 901, 91st Cong., 2d Sess., 116 CONG. REC. 35,340-42 (1970) (RICO as reported out of House); Blakey & Gettings, *Racketeer Influenced And Corrupt Organizations (RICO): Basic Concepts - Criminal And Civil Remedies*, 53 TEMP. L.Q. 1009, 1020 (1980) (treble damage action added by House Judiciary Committee); Patton, *Civil RICO: Statutory And Implied Elements Of The Treble Damage Remedy*, 14 TEX. TECH L. REV. 377, 382 (1983) (treble damage provision added by House Judiciary Committee). The amended version of

RICO's substantive provisions make it unlawful for any person to: (a) use

Senate bill 30 was reported favorably out of the House Committee on the Judiciary. See H.R. REP. No. 91-1549, 91st Cong., 1st Sess., reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4007, 4007. The dissenting view of three members of the Committee was included in the report. See *id.* at 4076-91. Title IX (RICO) was declared "particularly egregious." See *id.* at 4077-78. The dissenters argued that there was great potential for abuse, using section 1964(c) (the private civil remedy) as an example. See *id.* at 4083. The chief concern seemed to be use of section 1964(c) to harass competitors and stimulate adverse publicity about them. See *id.* at 4083. These concerns were reiterated during the House debate on OCCA. See 116 CONG. REC. 35,342 (1970) (remarks of Representative Mikva) (one could use section 1964(c) to drive competitors out of business). Representative Mikva also introduced an amendment which would subject a person bringing a frivolous suit under section 1964(c) to treble damages, but it was defeated. See Amendment to S. 30, sec. 901, 91st Cong., 2d Sess., 116 CONG. REC. 35,342-43 (1970). Representative Mikva also expressed concern over the number of offenses classified as racketeering activities. See 116 CONG. REC. 35,205 (1970); see also Blakey, *The RICO Civil Fraud Action In Context: Reflections On Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 276-77 (1980) (Representative Mikva objected to Senate bill 30's broad reach). During Senate consideration of the amended version of Senate bill 30, Senator McClellan asked that the bill be enacted as amended by the House for the following reasons: (1) the principles of the original version of Senate bill 30 had been retained; (2) the House consideration of Senate bill 30 had taken over nine months; and (3) Congress was due to recess shortly, making a conference at least one and a half months away. See 116 CONG. REC. 36,293 (1970). The bill was passed by the Senate without debate over section 1964(c). See Patton, *Civil RICO: Statutory And Implied Elements Of The Treble Damage Remedy*, 14 TEX. TECH L. REV. 377, 382 (1983). Courts squarely addressing the scope of RICO's private civil remedy have used the lack of debate to support, at times, opposite conclusions. Compare *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir.) (lack of "useful legislative history relating to [section 1964(c)]" requires court to look to RICO's deterrent and compensatory objectives in deciding if auditors of allegedly criminal enterprise could sustain action), *cert. denied*, 459 U.S. 880 (1982) with *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 492, 495 (2d Cir. 1984) (using "clanging silence" of legislative history to suggest nothing actually contradicts court's finding of standing limitation), *rev'd*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

23. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941-48 (1970). Courts construing RICO have found its language to be broad in scope. See, e.g., *Sutliff, Inc. v. Donovan Co.*, 727 F.2d 648, 654 (7th Cir. 1984) ("Congress deliberately cast the net of liability wide"); *Schacht v. Brown*, 711 F.2d 1343, 1353 (7th Cir.) (RICO deliberately broad), *cert. denied*, ___ U.S. ___, 104 S. Ct. 508, 509, 78 L. Ed. 2d 698 (1983); *In re Catanella & E. F. Hutton & Co.*, 583 F. Supp. 1388, 1424 (E.D. Pa. 1984) (discussing RICO's "sheer breadth"); see also Steinhouse, *RICO: An Introduction And Description*, 52 ANTITRUST L.J. 303, 303 (1983) (statute drafted broadly). Definitions of the concepts of "person," "racketeering activity," "pattern," and "enterprise" are very broad. See 18 U.S.C. § 1961(1), (3), (4), (5) (1982) (most recent amendments at 18 U.S.C.A. § 1961(1) (West. Supp. 1985) (§ 1961 entitled "Definitions"). When used in the context of a RICO action, whether criminal or civil, a "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." *Id.* § 1961(3). An "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4); see also *United States v. Turkette*, 452 U.S. 576, 593 (1981) (Congress chose to give "enterprise" broad meaning). The use of the term "includes" makes the definitions of "person" and "enterprise" illustrative, not exclusive. See *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 681 (N.D. Ind. 1982);

income gained from a pattern of prohibited activities to invest in an enterprise which is engaged in or affects interstate commerce;²⁴ (b) acquire an interest in such an enterprise by engaging in such a pattern of activities;²⁵ (c) conduct the affairs of such an enterprise by engaging in a pattern of racketeering activities, when that person is employed by the enterprise or associated with it;²⁶ or (d) conspire to commit one of the above offenses.²⁷ RICO provides for both criminal penalties²⁸ and civil remedies upon proof of the

see also Blakey & Gettings, *Racketeer Influenced And Corrupt Organizations (RICO): Basic Concepts - Criminal And Civil Remedies*, 53 TEMP. L.Q. 1009, 1023 n.78 (1980) (" 'Includes' is generally a term of enlargement, not of limitation"). "Racketeering activity" is defined as:

. . . (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, 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: Section 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 the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), 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 the prohibition of illegal gambling businesses), section 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), 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 with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds); (D) any offense involving fraud connected with 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; or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

18 U.S.C.A. § 1961(1) (West Supp. 1985). Section 1961(5) then defines a "pattern of racketeering activity" as requiring "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1982).

24. *See* 18 U.S.C. § 1962(a) (1982).

25. *See id.* § 1962(b).

26. *See id.* § 1962(c).

27. *See id.* § 1962(d).

28. *See id.* § 1963 (violation of RICO's substantive provisions punishable by fine up to \$25,000 and imprisonment for up to 10 years).

commission of any of these offenses.²⁹ The civil remedies include an action for treble damages, litigation costs, and attorney's fees available to any person who incurs a business or property injury as a result of a substantive RICO violation.³⁰ In addition, RICO contains a liberal construction clause included by the legislature to effectuate the statute's remedial purpose.³¹ The liberal construction clause is a directive to courts to construe ambiguities in RICO broadly.³²

29. *See id.* § 1964. Section 1964 provides equitable as well as monetary relief. *See id.* § 1964. Equitable relief includes, but is not limited to, injunctions, ordered divestiture, and restraining orders. *See id.* § 1964(a). Treble damages can be awarded to any plaintiff who sustains a business or property injury as a result of a violation of the substantive provisions of RICO. *See id.* § 1964(c). The language of section 1964 has been interpreted by some courts to limit the relief available to a private plaintiff to the treble damages provision. *Compare* *Kaushal v. State Bank of India*, 556 F. Supp. 576, 583-84 (N.D. Ill. 1983) (holding private RICO plaintiffs in general not entitled to equitable remedies) *with* *Chambers Dev. Co. v. Browning - Ferris Indus.*, 590 F. Supp. 1528, 1541 (W.D. Pa. 1984) (private civil RICO plaintiffs can obtain equitable relief); *see also* *Blakey, The RICO Civil Fraud Action In Context: Reflections On Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 330-31 (1982) (nothing in section 1964 precludes private plaintiff from seeking equitable relief).

30. *See* 18 U.S.C. § 1964(c) (1982).

31. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (not included in codification of OCCA). The liberal construction clause in RICO is unique because no other federal statute with criminal penalties has a similar clause. *See* *Russello v. United States*, ___ U.S. ___, ___, 104 S. Ct. 296, 302, 78 L. Ed. 2d 17, 26 (1983) (RICO only substantive federal criminal law with such clause). *See generally* *Note, RICO And The Liberal Construction Clause*, 66 CORNELL L. REV. 167, 168 & n.6 (1980) (discussing uniqueness of RICO's liberal construction clause).

32. *See* *United States v. Sutton*, 642 F.2d 1001, 1008 (6th Cir. 1980) (citing liberal construction clause as support for broad interpretation of "enterprise"), *cert. denied*, 453 U.S. 912 (1981); *see also* *Note, RICO And The Liberal Construction Clause*, 66 CORNELL L. REV. 167, 175 (1980) (liberal construction clause mandates courts to take liberal approach to statutory ambiguities in RICO). Such clauses have been declared valid legislative enactments designed to prevent courts from usurping legislative functions when interpreting statutes. *See* R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 269-70 (1975) (interpretation acts aimed at preventing use of undesirable rules by courts to interpret statutes). The terms "strict" and "liberal" in the context of statutory interpretation refer to how comprehensive a meaning will be given to a statute when it is construed. *See* 2A N. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 58.02 (Sands 4th ed. rev. 1984). Liberal construction of a statute would result in the statute being applicable to a wider range of situations, while strict construction would result in application to a narrower range of situations. *See* 3 C. SANDS, *SUTHERLAND STATUTORY CONSTRUCTION* § 60.01 (rev. 3d ed. 1974). Statutory language is considered ambiguous when it is capable of two meanings reasonably consistent with the legislative intent. *See* *Note, RICO And The Liberal Construction Clause*, 66 CORNELL L. REV. 167, 169-70 (1980). Under common law, ambiguities in penal statutes are strictly construed against the state. *See* 3 C. SANDS, *SUTHERLAND STATUTORY CONSTRUCTION* § 59.03 (rev. 3d ed. 1974). Legislatures, however, may enact statutes which modify or abrogate the rule. *See id.* § 59.07. A remedial statute is directed at redressing injury rather than punishing behavior. *See id.* § 60.03. Ambiguities in remedial statutes are construed liberally in the absence of contrary legislative intent. *See id.* § 60.01. When a statute contains both penal sanctions and

Following its enactment, RICO was rarely used in civil actions by private plaintiffs.³³ After 1980, however, the number of RICO actions filed under the treble damages provision increased dramatically.³⁴ Some federal courts

civil remedies, a court may apply strict construction to the former and liberal construction to the latter under common law. *See id.* § 60.04. If a court construes a statute as unambiguous, the "plain meaning rule" is often applied. *See* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 46.01 (Sands 4th ed. rev. 1984). Under this rule, the court gives the language in the statute its common meaning. *See* 3 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 60.04 (rev. 3d ed. 1974). While this rule has been said to preclude consideration of extrinsic aids to interpretation such as legislative history, the Supreme Court's use of this rule has come to include citation to the legislative history to bolster its interpretation of statutory language. *See* Wald, *Some Observations On The Use Of Legislative History In The 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197-98 (1983) (Supreme Court double-checked statutory meaning with legislative history, even when ostensibly relying on "plain meaning rule").

33. *See In re Catanella & E. F. Hutton & Co.*, 583 F. Supp. 1388, 1424 (E.D. Pa. 1984) (private civil RICO action "[l]argely ignored for nearly a decade"); *see also* King v. Vesco, 342 F. Supp. 120, 125 (N.D. Cal. 1972) (RICO claim dismissed for lack of proper venue); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 111-12 (S.D.N.Y. 1975) (private individuals brought RICO claim against telephone answering service); *Heinhold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 312 (N.D. Ill. 1979) (civil RICO action filed against commodities trading company). *See generally* Note, *Civil RICO: The Temptation And Impropriety Of Judicial Restriction*, 95 HARV. L. REV. 1101, 1101 n.7 (1982) (only two opinions considering private civil RICO claims published by 1978). The civil remedies available to the government were also not widely used. *See* Long, *Treble Damages For Violations Of The Federal Securities Laws: A Suggested Analysis And Application Of The RICO Civil Cause Of Action*, 85 DICK. L. REV. 201, 206 n.32 (1981) (government civil RICO actions have produced few opinions). In a number of the early civil RICO cases, the government was seeking an injunction. *See, e.g.*, *United States v. Capetto*, 502 F.2d 1351, 1359 (7th Cir. 1974) (issuance of preliminary injunction restraining defendant from further gambling activities upheld), *cert. denied*, 420 U.S. 925 (1975); *United States v. Ladmer*, 429 F. Supp. 1231, 1234 (E.D.N.Y. 1977) (government unsuccessfully sought injunction prohibiting defendants from engaging in labor union activities); *United States v. Winstead*, 421 F. Supp. 295, 296 (E.D. Ill. 1976) (government action to enjoin illegal gambling activity). While the civil remedies of RICO were not being utilized, RICO's use in criminal prosecutions began to increase in 1975. *See* Lavine, *Court Blunts Major U. S. Rackets Law*, Nat'l L.J., Sept. 17, 1979, at 13, col. 2. Prior to 1977, only 35 RICO criminal cases had been reported. *See id.* at 13, col. 2. From 1977 to 1979, approximately 60 cases were reported. *See id.* at 13, col. 2. Thus, while civil RICO lay dormant, courts in criminal prosecutions were construing the definitions contained in RICO and its substantive provisions. *See, e.g.*, *United States v. Mandel*, 591 F.2d 1347, 1375 (4th Cir. 1979) (must be connection between pattern of prohibited activities and operation of business to sustain RICO conviction), *cert. denied*, 445 U.S. 961 (1980); *United States v. Elliott*, 571 F.2d 880, 899 (5th Cir. 1978) (requiring two or more predicate acts to be related to enterprise's affairs to constitute pattern), *cert. denied*, 439 U.S. 953 (1979); *United States v. Frumento*, 563 F.2d 1083, 1092 (3d Cir. 1977) (holding state tax bureau can be RICO enterprise).

34. *See* Sedima, S.P.R.L. v. Imrex Co., ___ U.S. ___, ___, 105 S. Ct. 3275, 3277, 87 L. Ed. 2d 346, 349 (1985). Eighty-nine percent of the district court RICO cases decided prior to 1985 were decided between 1982 and 1984. *See id.* at n.1, S. Ct. at 3277 n.1, 87 L. Ed. 2d at 349 n.1 (citing REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF

became concerned with what they perceived as an inappropriate use of RICO to seek remedies for “garden-variety” fraud against “legitimate” businesses.³⁵ As concern over private civil RICO mounted, a number of courts

CORPORATION, BANKING AND BUSINESS LAW 55 (1985)). RICO's sudden popularity has been noted by commentators. See, e.g., Johnson, *Predators Rights: Multiple Remedies For Wall Street Sharks Under The Securities Laws And RICO*, 10 J. CORP. L. 3, 37 (1984) (after ten years of dormancy, RICO being used with increasing frequency in securities fraud cases); Miller & Olson, *Recent Developments In Civil RICO*, 8 CORP. L. REV. 35, 35 (1985) (RICO first used primarily in criminal cases); Milner, *A Civil RICO Bibliography*, 21 CAL. W. L. REV. 409, 411, 418 (1985) (lists only six district and court of appeals private civil cases decided prior to 1980). However, with all of the judicial activity surrounding RICO, this writer's research has found only one case that had actually gone to judgment prior to the Supreme Court decision in *Sedima*. See *Hirsch, Inc. v. Enright Ref. Co.*, 577 F. Supp. 339, 348 (D.N.J. 1983), *aff'd in part & vacated in part*, 751 F.2d 628 (3d Cir. 1984). In *Hirsch*, a jewelry manufacturer alleged that a precious metal refiner violated section 1962(a) and (c) based on predicate acts of mail and wire fraud. See *id.* at 346. The plaintiff alleged damages of \$111,175.84 and sought recovery of treble damages under section 1964(c). See *id.* at 341. Finding that all of the elements needed to sustain a claim under section 1962(c) of RICO were established, the court awarded the plaintiff \$333,527.52 as well as interest, costs of the suit, and attorney's fees. See *id.* at 346, 348. Upon appeal, the judgment was vacated and the case remanded when the Third Circuit held that the “person” charged and the “enterprise” must be two distinct entities. See *Hirsch, Inc. v. Enright Ref. Co.*, 751 F.2d 628, 633 (3d Cir. 1984). The court instructed that on remand, the district court should consider whether the defendant had violated section 1962(a), an issue that the district court had previously not reached. See *id.* at 633. On remand, the district court found that the defendant had indeed violated section 1962(a). See *Hirsch, Inc. v. Enright Ref. Co.*, No. 81-1064, slip op. at 5-6 (D.N.J. Sept. 9, 1985), *reprinted in* 2 RICO L. REP. at 453-55 (1985). The court also found that the plaintiff thus could recover treble damages under section 1964(c) and reinstated the judgment. See *id.* at 6.

35. See, e.g., *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1361 (S.D.N.Y.) (Congress did not intend to create treble damages for “ordinary business[es] or parties”), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983); *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125, 1137 (D. Mass. 1982) (RICO not intended as remedy for consumer fraud); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 210 (N.D. Ill. 1980) (section 1964(c) not intended to provide treble damages for common law fraud). *But see* *Furman v. Cirrito*, 741 F.2d 524, 529 (2d Cir. 1984) (Congress intended RICO to be used whenever elements of statute violated, even in cases of “garden variety” fraud), *vacated on other grounds*, ___ U.S. ___, 105 S. Ct. 3550, 87 L. Ed. 2d 672 (1985); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984) (RICO's breadth demonstrated by use in “situations not expressly anticipated by Congress”), *aff'd*, ___ U.S. ___, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985). It should be noted, however, that in many cases alleging various types of fraud, the RICO violations are based on the underlying predicate acts of mail or wire fraud, listed in section 1961(1) as racketeering activities. See, e.g., *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1275, 1286 (7th Cir. 1983) (mailing of fraudulent purchase orders); *Morosani v. First Nat'l Bank*, 703 F.2d 1220, 1222 (11th Cir. 1983) (allegations that bank fraud perpetrated using mail); *Freschi v. Grand Coal Venture*, 583 F. Supp. 780, 787 (S.D.N.Y. 1984) (false information sent to plaintiff by wire and mail); see also Patton, *Civil RICO: Statutory And Implied Elements Of The Treble Damages Remedy*, 14 TEX. TECH L. REV. 377, 380-81 (1983) (RICO's use in commercial litigation result of mail and wire fraud being predicate acts). Because of the inclusion of wire, mail and securities fraud as racketeer-

attempted to restrict RICO's use.³⁶ While the approaches taken by the

ing activities, some commentators have noted that RICO can be applied to antitrust, securities, and insurance cases. *See generally* Long, *Treble Damages For Violations Of The Federal Securities Laws: A Suggested Analysis And Application Of The RICO Civil Cause Of Action*, 85 DICK. L. REV. 201, 201-47 (1983) (applying RICO in context of securities law violations); Lorentzen & Huppert, *Blame It On RICO:—The Impact Of The Racketeer Influenced And Corrupt Organizations Act On The Insurance Industry Following Sedima*, 17-23 (Sept. 12, 1985) (unpublished manuscript) (accepted for publication in FED'N INS. COUNS. Q.) (discussing implications of RICO for insurance industry); Nathan, *Doubling The Treble Damages Option: What An Anti-Trust Practitioner Needs To Know About RICO*, 52 ANTITRUST L.J. 327, 335-43 (1983) (discussing advantages of using RICO in antitrust context). Some of the decisions which express concern over RICO's recent widespread use have argued that RICO was intended to provide remedies for situations not already covered by state and/or federal law. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 486 (2d Cir. 1984) (broad interpretation of RICO allows suits in federal court which formerly had to be brought in state court), *rev'd*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985); *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1361 (S.D.N.Y.) (quoting Congressional Statement of Findings and Purposes, Organized Crime Control Act, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923 (1970)), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983). *But see* *Furman v. Cirrito*, 741 F.2d 524, 529 (2d Cir. 1984) (Congress knew inclusion of wire and mail fraud as racketeering activities "elevated 'garden variety' common law fraud claims to the status of federal [offense]"), *vacated on other grounds*, ___ U.S. ___, 105 S. Ct. 3550, 87 L. Ed. 2d 672 (1985); *Schacht v. Brown*, 711 F.2d 1343, 1353 (7th Cir. 1983) (RICO's dramatic impact on federal-state balance necessary incident of deliberately broad approach Congress chose to take), *cert. denied*, ___ U.S. ___, 104 S. Ct. 508, 509, 87 L. Ed. 2d 698 (1984). There is some evidence in the legislative history of RICO that Congress anticipated both its use against entities usually not considered part of traditional "organized crime" and the impact on federal-state balance. *See* 116 CONG. REC. 35,293 (1970) (remarks of Representative Poff) ("concept of organized criminal activity [as used in RICO] is broader in scope than the concept of organized crime"); *see also id.* at 35,205 (remarks of Representative Mikva) (RICO incorporates into federal law offenses traditionally under state jurisdiction). Some courts and commentators have noted, however, that if a "legitimate" business indulges in racketeering activities, that behavior is still criminal. *See Furman v. Cirrito*, 741 F.2d 524, 529 (2d Cir. 1984) (fraud is fraud no matter who commits it), *vacated on other grounds*, ___ U.S. ___, 105 S. Ct. 3550, 87 L. Ed. 2d 672 (1984); *Schacht v. Brown*, 711 F.2d 1343, 1356 (7th Cir.) (difficult to distinguish fraud of "legitimate" business from that of organized crime syndicate), *cert. denied*, ___ U.S. ___, 104 S. Ct. 508, 509, 78 L. Ed. 2d 698 (1983); *see also* Blakey, *The Act Is Neither Anti-Business Nor Pro-Business, It's Pro-Victim*, Nat'l L.J., Aug. 26, 1985, at 27, col. 4 (guilty plea by E. F. Hutton & Co. to illegal overdrawn shows "legitimate" business capable of criminal activity).

36. *See, e.g.*, *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002, 1007 (C.D. Cal. 1982) (restricting use of private civil RICO to plaintiffs whose injury is more than that resulting from predicate acts alone); *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125, 1137 (D. Mass. 1982) (private civil RICO remedy should be confined to business losses); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 747 (N.D. Ill. 1981) (holding land developers not subject to RICO because not involved with organized crime). *But see In re Catanella & E. F. Hutton & Co.*, 583 F. Supp. 1388, 1437 (E.D. Pa. 1984) (court refused to "engraft vague and artificial requirements" onto RICO). *See generally* Note, *Civil RICO: The Temptation And Impropriety Of Judicial Restriction*, 95 HARV. L. REV. 1101, 1105-18 (1982) (discussing judicial limitations placed on RICO). While some courts wish to limit RICO's reach, the statutory scheme has withstood constitutional challenge. *See United States v. Cappetto*, 502

courts vary, the courts' decisions share an emphasis on determining congressional intent as to the uses for civil RICO.³⁷

One approach taken in earlier decisions was to analyze RICO in terms of the purpose behind the OCCA.³⁸ Finding that OCCA and RICO were both aimed at combatting organized crime, some federal district courts held that a link with organized crime was required.³⁹ None of the appellate courts, however, upheld any holding requiring that organized crime be implicated for RICO to be applicable.⁴⁰ Similarly, a number of decisions have rejected

F.2d 1351, 1357 (7th Cir. 1974) (section 1964 upheld against constitutional challenge), *cert. denied*, 420 U.S. 925 (1975). In *Cappetto*, the court found that the commerce clause gave Congress the power to proscribe activities affecting interstate commerce even when already criminal under state law. *See id.* at 1355-56. In addition, the provision in RICO for both civil and criminal remedies was found to be within Congress' power. *See id.* at 1356. The court also found that section 1964 was remedial, not punitive, in nature and not unconstitutionally vague. *See id.* at 1357.

37. *See, e.g., In re Action Indus. Tender Offer*, 572 F. Supp. 846, 850-52 (E.D. Va. 1983) (analyzing Congress' intent to find standing requirement needed to sustain RICO actions); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 746 (N.D. Ill. 1981) (RICO claims dismissed; purposes and legislative history of OCCA determine its reach); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (RICO claim dismissed; Congress did not intend RICO to be used against legitimate businesses).

38. *See Organized Crime Control Act of 1970*, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970) (statement of findings and purpose). OCCA's purpose is "to seek the eradication of organized crime in the United States by . . . providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Id.* at 923. RICO's criminal and civil provisions were designed to strike against organized crime's property interests. *See* 116 CONG. REC. 602 (1970) (remarks of Senator Hruska).

39. *See, e.g., Hokama v. E. F. Hutton & Co.*, 566 F. Supp. 636, 643 (C.D. Cal. 1983) ("plaintiffs must allege some link to organized crime" to sustain private civil RICO action); *Waterman S. S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981) (finding RICO only applicable when litigants have relation to organized crime); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (finding plaintiff's claim for relief under section 1964(c) without merit because defendant not involved with organized crime). *But see, e.g., Kimmel v. Peterson*, 565 F. Supp. 476, 493 (E.D. Pa. 1983) (maintenance of private civil RICO action does not require link to organized crime); *Lode v. Leonardo*, 557 F. Supp. 675, 680 (N.D. Ill. 1982) (RICO's application not limited to those linked with organized crime); *United States v. Mandel*, 415 F. Supp. 997, 1019 (D. Md. 1976) (criminal prosecution of governor under RICO; failure to allege connection with organized crime does not mandate dismissal).

40. *See United States v. Hunt*, 749 F.2d 1078, 1088 (4th Cir. 1984) (RICO action does not require proof of connection to organized crime); *Alcorn County v. United States Interstate Supplies, Inc.*, 731 F.2d 1160, 1167 (5th Cir. 1984) (civil RICO plaintiff need not prove link with organized crime); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 (2d Cir. 1983) (no connection with organized crime need be proven), *cert. denied*, ___ U.S. ___, 104 S. Ct. 1280, 79 L. Ed. 2d 684 (1984); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 n.1 (7th Cir. 1983) (citing both civil and criminal RICO cases supporting its view that organized crime nexus need not be proven); *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.) ("involvement with organized crime . . . not a necessary element of a RICO claim"), *cert.*

the requirement that a RICO defendant must be convicted on the predicate acts or under RICO itself before he can be held civilly liable.⁴¹

Another approach used to restrict RICO's broad application was to look to the statute's legislative history and language to find various standing requirements similar to those needed to sustain private antitrust actions.⁴²

denied, ___ U.S. ___, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983); *United States v. Campanale*, 518 F.2d 352, 363-64 (9th Cir. 1975) (rejecting limitation of organized crime requirement), *cert. denied*, 423 U.S. 1050 (1976). In those circuits which have not addressed the organized crime nexus issue, a number of district court opinions have also rejected such a requirement. *See In re Catanella & E. F. Hutton & Co.*, 583 F. Supp. 1388, 1426 (E.D. Pa. 1984) (refusing to adopt requirement of link to organized crime); *Morosani v. First Nat'l Bank*, 581 F. Supp. 945, 953-54 (N.D. Ga. 1984) (rejecting requirement of connection to organized crime); *Berg v. First Am. Bankshares, Inc.*, 599 F. Supp. 500, 504 (D.D.C. 1984) (rejecting organized crime nexus); *Maxwell v. Southwest Nat'l Bank*, 593 F. Supp. 250, 255 (D. Kan. 1984) (refusing to find organized crime nexus requirement). *See generally* Brown, *RICO Repercussions: Sedima and Haroco*, 21 CAL. W. L. REV. 282, 292 (1985) (organized crime nexus concept rejected by most courts).

41. *See, e.g.*, *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) (civil RICO remedy not dependent upon prior criminal conviction under section 1963); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 676 (N.D. Ind. 1982) (prior criminal conviction not prerequisite for civil RICO action); *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978) (prior criminal conviction not condition to bring civil action).

42. *See, e.g.*, *Morosani v. First Nat'l Bank*, 581 F. Supp. 945, 948-49 (N.D. Ga. 1984) (use of antitrust-like standing requirements carries out legislative intent); *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125, 1136 (D. Mass. 1982) (comparing RICO to section 4 of Clayton Act); *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002, 1007 (C.D. Cal. 1982) (language of RICO and section 4 of Clayton Act almost identical). *But see, e.g.*, *Furman v. Cirrito*, 741 F.2d 524, 532 (2d Cir. 1984) (finding little relevance between antitrust law and civil RICO), *vacated on other grounds*, ___ U.S. ___, 105 S. Ct. 3550, 87 L. Ed. 2d 672 (1985); *Schacht v. Brown*, 711 F.2d 1343, 1358 (7th Cir. 1983) (legislative history demonstrates RICO and antitrust law distinct); *cert. denied*, ___ U.S. ___, 104 S. Ct. 508, 509, 78 L. Ed. 2d 698 (1984); *Kimmel v. Peterson*, 565 F. Supp. 476, 493-95 (E.D. Pa. 1983) (rejecting antitrust-like standing requirements). *See generally* Report of Antitrust Section of the American Bar Association, *reprinted in* 115 CONG. REC. 6994-95 (1969) (using antitrust laws to redress injury resulting from organized crime creates for plaintiffs "inappropriate and unnecessary obstacles," such as standing requirements). The language of section 1964(c) and that of section 4 of the Clayton Act is very similar. *Compare* 18 U.S.C. § 1964(c) (1982) (RICO treble damages provision) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.") with 15 U.S.C. § 15 (1973) (section 4 of Clayton Act when RICO passed) ("Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."). Some decisions have used the similarity of language between the two statutes to infer a congressional intent to treat the two statutes analogously. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 495 (2d Cir. 1984) (use in RICO of language very similar to that in Clayton Act indicates Congress desired analogous standing limitations), *rev'd*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985); *Harper v. New Japan Sec. Int'l, Inc.*, 545

Other courts have analyzed the “by reason of” language in section 1964(c) and established standing requirements.⁴³ The standing requirements erected from section 1964(c) share the common theme that something more than an injury flowing from the predicate acts is necessary to sustain a private civil RICO action.⁴⁴ By 1984, when *Sedima* was decided by the Second Circuit, the federal circuit courts which had ruled on the issue were divided as to the type of injury which had to be alleged by the RICO plaintiff.⁴⁵

F. Supp. 1002, 1007-8 (C.D. Cal. 1982) (similarity in language of section 1964(c) and section 4 of Clayton Act supports analogy to antitrust law in construing section 1964(c)). The United States Supreme Court has prescribed the injury necessary for recovery under antitrust laws. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (to recover treble damages, antitrust plaintiff must prove injury of type Clayton Act designed to prevent).

43. *See* 18 U.S.C. § 1964(c) (1982) (“Any person injured in his business or property *by reason of* a violation of section 1962 . . .”) (emphasis added). This language has been construed by a number of district courts. *See, e.g., Guerrero v. Katzen*, 571 F. Supp. 714, 718 (D.D.C. 1983) (“by reason of” language used to support “RICO injury” or “racketeering injury” requirement); *Barker v. Underwriters of Lloyd’s*, 564 F. Supp. 352, 358 (E.D. Mich. 1983) (analyzing “by reason of” language to find “racketeering injury” requirement); *Harper v. New Japan Sec. Int’l, Inc.*, 543 F. Supp. 1002, 1007 (C.D. Cal. 1982) (“by reason of” language requires injury of type RICO designed to prevent). *But see Haroco, Inc. v. American Nat’l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984) (“by reason of” merely imposes causation requirement on plaintiffs), *aff’d*, ___ U.S. ___, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985).

44. *See In re Catanella & E. F. Hutton & Co.*, 583 F. Supp. 1388, 1430 (E.D. Pa. 1984) (approaches to kind of injury needed under civil RICO share common idea that something more than injury from predicate acts needed). These standing requirements have been labeled differently by the courts finding them necessary to a private civil RICO action. *Compare Willemette Sav. & Loan v. Blake & Neal Fin. Co.*, 577 F. Supp. 1415, 1428 (D. Or. 1984) (plaintiff in civil RICO action must prove “racketeering enterprise injury”) with *In re Action Indus. Tender Offer*, 572 F. Supp. 846, 852 (E.D. Va. 1983) (private civil RICO redresses racketeering injury) and *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980) (maintenance of cause of action under section 1964(c) requires showing of competitive injury).

45. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 492-93 (2d Cir. 1984) (discussing lack of consensus among courts as to injury required to maintain civil RICO action), *rev’d*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). The Eighth Circuit had adopted the criteria that something more than injury flowing from the predicate acts was needed. *See Alexander Grant & Co. v. Tiffany Indus.*, 742 F.2d 408, 413 (8th Cir. 1984), *vacated*, ___ U.S. ___, 105 S. Ct. 3550, 87 L. Ed. 2d 673 (1985). The Seventh Circuit had held that no injury other than that which directly results from the underlying predicate acts need be shown. *See Haroco, Inc. v. American Nat’l Bank & Trust Co.*, 747 F.2d 384, 397-98 (7th Cir. 1984), *aff’d*, ___ U.S. ___, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985). The disparity of opinion over what injury is sufficient to support a civil RICO action was epitomized in the Second Circuit’s holding in *Sedima* and two other cases decided over two following days. *See id.* at 388 n.5. In *Sedima*, the Second Circuit held that a prior conviction on the predicate acts and a racketeering injury were required to sustain a civil RICO cause of action. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 495, 503 (2d Cir. 1984), *rev’d*, ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). The next day, the Second Circuit, through a different panel, held that a civil RICO action is maintainable only if “a distinct RICO injury” is alleged and described a but-for test to be used to determine if such an injury had occurred. *See Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516-17 (2d Cir. 1984) (pattern of racketeering activities

In *Sedima, S.P.R.L. v. Imrex Co.*,⁴⁶ the United States Supreme Court rejected the requirement that a defendant must be convicted of the underlying predicate acts before being susceptible to a private civil RICO action.⁴⁷ Justice White, writing for the majority, found no support for a prior conviction prerequisite in the language of the statute,⁴⁸ civil RICO's legislative his-

must be "but-for" cause of plaintiff's injury), *vacated*, ___ U.S. ___, 105 S. Ct. 3550, 87 L. Ed. 2d 673 (1985). Finally, one day after *Bankers Trust*, yet another Second Circuit panel followed the previous two cases with reluctance after a denial of a request for an *en banc* rehearing in the three cases. *See Furman v. Cirrito*, 741 F.2d 524, 525 (2d Cir. 1984) (finding no basis for "separate, distinct racketeering enterprise injury," but feeling compelled to affirm dismissal by district court because of decisions in *Sedima* and *Bankers Trust*), *vacated*, ___ U.S. ___, 105 S. Ct. 3550, 87 L. Ed. 2d 672 (1985). In addition to the limitations discussed above, courts have also found restrictions in civil RICO which were not addressed by *Sedima*. *See Lorentzen & Huppert, Blame It On RICO: The Impact Of The Racketeer Influenced And Corrupt Organizations Act On The Insurance Industry Following Sedima* 10 (Sept. 12, 1985) (unpublished manuscript) (accepted for publication in FED'N INS. COUN. Q.). For instance, when a civil RICO action is based upon predicate acts of mail and wire fraud, the plaintiff is bound by federal pleading rules which require fraud to be pleaded with particularity. *See FED. R. CIV. P. 9(b)*; *see also Bennett v. Berg*, 685 F.2d 1053, 1062-63 (8th Cir. 1982) (applying Rule 9(b) and finding some allegations sufficiently pled and ordering those not sufficiently pled struck without prejudice), *aff'd*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983). *See generally Dzivi, Civil RICO: Pleading Fraud For Treble Damages*, 45 MONT. L. REV. 87, 106 (1984) (discussing applicability of Rule 9(b) to civil RICO and citing cases allowing amending of inadequately stated pleadings). Another issue which has arisen in the context of civil RICO is whether or not the "person" and the "enterprise" have been adequately distinguished. *See Hirsch, Inc. v. Enright Ref. Co.*, 751 F.2d 628, 633 (3d Cir. 1984) (since damages awarded under section 1962(c), person must be distinct from enterprise). *But see Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 401-2 (7th Cir. 1984) (while person and enterprise must be distinct entities under section 1962(c), not so under section 1962(a)), *aff'd*, ___ U.S. ___, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985). *See generally Lorentzen & Huppert, Blame It On RICO: The Impact Of The Racketeer Influenced And Corrupt Organizations Act On The Insurance Industry Following Sedima* 13-15 (Sept. 12, 1985) (unpublished manuscript) (accepted for publication in FED'N INS. COUN. Q.) (analyzing distinction between "person" and "enterprise"). The Court affirmed the Seventh Circuit's rejection of a distinct RICO injury requirement in a per curiam opinion, but did not address the person-enterprise distinction issue. *See American Nat'l Bank and Trust Co. v. Haroco, Inc.*, ___ U.S. ___, ___, 105 S. Ct. 3291, 3292, 87 L. Ed. 2d 437, 439-40 (1985).

46. ___ U.S. ___, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

47. *See id.* at ___, 105 S. Ct. at 3278, 87 L. Ed. 2d at 349. The Supreme Court reversed the Second Circuit in a 5-4 decision. *See id.* at ___, 105 S. Ct. at 3275-76, 3287, 87 L. Ed. 2d at 346-47, 360-61.

48. *See id.* at ___, 105 S. Ct. at 3281, 87 L. Ed. 2d at 353-54. The Court noted that the word "conviction" was not used in any of the sections of RICO under review. *See id.* at ___, 105 S. Ct. at 3281, 87 L. Ed. 2d at 353. The terms used in the statute were "chargeable," "indictable," and "punishable" leading the majority to conclude that the definition of racketeering activity was in terms of acts for which the defendant could be convicted, but did not require conviction to support civil action. *See id.* at ___, 105 S. Ct. at 3281, 87 L. Ed. 2d at 353-54.

tory,⁴⁹ or the policies behind RICO.⁵⁰ The Court also held that there was no constitutional bar to having both civil remedies and criminal penalties for a substantive violation of the statute, reasoning that there was ample precedent for such a statutory scheme under antitrust laws.⁵¹ The Court, however, was split over the issue of what injury must be alleged to sustain a private civil RICO action.⁵² Basing its decision on RICO's legislative history and liberal construction clause, the majority held that the requirement that the plaintiff be injured by reason of a section 1962 violation is met if the substantive violation causes a business or property injury to the plaintiff.⁵³ The majority reasoned that this approach would allow compensation for direct and indirect injuries.⁵⁴ Justice White further stated that RICO's cur-

49. *See id.* at ____, 105 S. Ct. at 3281-82, 87 L. Ed. 2d at 354-55. The majority observed that the legislative history was silent on this issue, save an objection that section 1962(c) was too broad in that it did not require a prior conviction of the underlying predicate acts. *See id.* at ____, 105 S. Ct. at 3282, 87 L. Ed. 2d at 354-55 (quoting 116 CONG. REC. 35,342 (1970)).

50. *See id.* at ____, 105 S. Ct. at 3284, 87 L. Ed. 2d at 357 (guilty parties who escape conviction for any reason would also escape civil liability, defeating congressional intent to fill prosecutorial gaps).

51. *See id.* at ____, 105 S. Ct. at 3283, 87 L. Ed. 2d at 356. The Second Circuit's reservations about the standard of proof needed in a civil action were also rejected by the majority. *See id.* at ____, 105 S. Ct. at 3283, 87 L. Ed. 2d at 355-56 (definition of racketeering activity by reference to existing criminal statutes need not mean that such conduct be shown by criminal standards of proof). The Court, however, did not decide what standard of proof should be required, but intimated that the usual standard in civil cases, the preponderance of the evidence standard, would be sufficient. *See id.* at ____, 105 S. Ct. at 3283, 87 L. Ed. 2d at 356. The majority further did not find persuasive the Second Circuit's argument that a civil RICO proceeding stigmatized the defendant. *See id.* at ____, 105 S. Ct. at 3283, 87 L. Ed. 2d at 356 (civil RICO action no more stigmatizing than other civil actions).

52. *Compare id.* at ____, 105 S. Ct. at 3286, 87 L. Ed. 2d at 359 (no injury beyond that flowing from predicate acts need be alleged) *with id.* at ____, 105 S. Ct. at 3302, 87 L. Ed. 2d at 373 (Marshall, J., dissenting, joined by Brennan, Blackmun, and Powell, J.J.) (civil RICO plaintiff must show "RICO injury" distinct from that arising from predicate acts).

53. *See id.* at ____, 105 S. Ct. at 3286, 87 L. Ed. 2d at 359-60 (quoting liberal construction clause and referring to Congress' "overall approach"). The majority identified the elements needed to show a substantive RICO violation as "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Id.* at ____, 105 S. Ct. at 3285, 87 L. Ed. 2d at 358-59. The Court pointed out that conduct of an interstate enterprise alone or mere commission of predicate acts was insufficient to constitute a § 1962(c) violation. *See id.* at ____, 105 S. Ct. at 3285, 87 L. Ed. 2d at 359. The majority also took issue with the Second Circuit's failure to define "racketeering activity" to its satisfaction. *See id.* at ____, 105 S. Ct. at 3284, 87 L. Ed. 2d at 357 (definition of "racketeering injury" given by Second Circuit "unhelpfully tautological").

54. *See id.* at n.15, 105 S. Ct. at 3286 n.15, 87 L. Ed. 2d at 359 n.15 (plaintiff may recover for any damages, whether direct or indirect, flowing from commission of predicate offenses). For instance, the businessman whose building is burned down by an arsonist trying to induce him to buy goods at a higher price could sue the arsonist under RICO for the direct damages to the property. *See id.* at n.15, 105 S. Ct. at 3286 n.15, 87 L. Ed. 2d at 359 n.15; *see also id.* at ____, 105 S. Ct. at 3303, 87 L. Ed. 2d at 374 (Marshall, J., dissenting) (giving examples of

rent popularity is a result of the inclusion of securities, mail, and wire fraud as predicate acts, as well as the lack of an adequately developed concept of "pattern."⁵⁵ The majority concluded, however, that Congress, and not the judiciary, was the appropriate forum for the resolution of these problems.⁵⁶

Justice Marshall's dissent took issue with the majority's reluctance to narrow private civil RICO's reach.⁵⁷ He noted that Justice Department restraint present in the context of criminal RICO prosecutions was absent in private litigation.⁵⁸ He premised his opinion on Congress' intent to provide new remedies by filling a gap between state and federal law.⁵⁹ Analyzing RICO's legislative history,⁶⁰ the dissent concluded that Congress intended to adopt antitrust remedies without the existing court-developed antitrust standing requirements.⁶¹ Justice Marshall further reasoned that by limiting recovery under private civil RICO to compensation for commercial injuries, Congress intended that plaintiffs be required to allege a "RICO injury."⁶²

types of damages which can occur). Competitors forced out of business because they were forced to pay higher prices might be considered to have sustained an indirect injury. *See id.* at ____, 105 S. Ct. at 3303, 87 L. Ed. 2d at 374 (Marshall, J., dissenting).

55. *See id.* at ____, 105 S. Ct. at 3287, 87 L. Ed. 2d at 361. The majority noted that the definition of "pattern" in RICO required a minimum of two predicate acts within ten years, thus implying that two acts may or may not be sufficient to form a pattern. *See id.* at n.14, 105 S. Ct. at 3285 n.14, 87 L. Ed. 2d at 358-59 n.14. The court further stated that harm compensable under RICO must be "caused by predicate acts sufficiently related to constitute a pattern." *Id.* at ____, 105 S. Ct. at 3286, 87 L. Ed. 2d at 359.

56. *See id.* at ____, 105 S. Ct. at 3287, 87 L. Ed. 2d at 361 (any defect in RICO is "inherent in statute as written," thus Congress must correct).

57. *See id.* at ____, 105 S. Ct. at 3304, 87 L. Ed. 2d at 375 (Marshall, J., dissenting) (statute amenable to narrower interpretation).

58. *See id.* at ____, 105 S. Ct. at 3294, 87 L. Ed. 2d at 363 (Marshall, J., dissenting) (potential of treble damages plus attorney's fees strong incentive to use RICO whenever possible).

59. *See id.* at ____, 105 S. Ct. at 3296, 87 L. Ed. 2d at 364 (Marshall, J., dissenting). Justice Marshall reasoned that Congress did not intend to federalize existing state law or displace federal law when it enacted RICO. *See id.* at ____, 105 S. Ct. at 3296, 87 L. Ed. 2d at 366 (Marshall, J., dissenting).

60. *See id.* at ____, 105 S. Ct. at 3297-302, 87 L. Ed. 2d at 367-73 (Marshall, J., dissenting).

61. *See id.* at ____, 105 S. Ct. at 3299, 87 L. Ed. 2d at 368 (Marshall, J., dissenting).

62. *See id.* at ____, 105 S. Ct. at 3302, 87 L. Ed. 2d at 373 (Marshall, J., dissenting). Justice Marshall defined this concept as "injury to [the plaintiff's] competitive, investment, or other business interests resulting from the defendant's conduct of a business, or infiltration of a business or a market, through a pattern of racketeering activity." *See id.* at ____, 105 S. Ct. at 3302, 87 L. Ed. 2d at 373 (Marshall, J., dissenting). He further found that the statutory language did not call for compensation of injuries directly resulting from the predicate acts themselves. *See id.* at ____, 105 S. Ct. at 3302, 87 L. Ed. 2d at 373-74 (Marshall, J., dissenting). In conclusion, he offered three examples of his concept of RICO injury. *See id.* at ____, 105 S. Ct. at 3303, 87 L. Ed. 2d at 374-75 (Marshall, J., dissenting). In the first example, competitors forced out of business by a "racketeer" using such criminal activities as threats and arson

While joining Justice Marshall's dissent, Justice Powell wrote separately focusing upon the majority's assertion that RICO had to be construed broadly.⁶³ He reasoned that the court was obliged to examine both statutory language and legislative history when construing RICO.⁶⁴ Justice Powell distinguished prior Supreme Court decisions mandating a liberal construction of RICO by noting that the earlier decisions were concerned with the criminal provisions of RICO.⁶⁵

The *Sedima* majority resisted the temptation to ignore a contrary congressional mandate and construe RICO narrowly.⁶⁶ In so doing, the Court followed the generally accepted rule that an unambiguous statute is construed according to its plain language, unless a clear congressional intent to the contrary is found.⁶⁷ Because the legislative history specifically addressing

could recover for the "RICO injury" of lost profits. *See id.* at ____, 105 S. Ct. at 3303, 87 L. Ed. 2d at 374 (Marshall, J., dissenting). Secondly, the businessman forced to pay "protection money" sustains "RICO injury" in the resulting increased cost of business. *See id.* at ____, 105 S. Ct. at 3303, 87 L. Ed. 2d at 374 (Marshall, J., dissenting). The third example, involving a "racketeer" infiltrating an honest business, characterized the losses sustained by a displaced legitimate investor as recoverable under RICO. *See id.* at ____, 105 S. Ct. at 3303, 87 L. Ed. 2d at 374-75 (Marshall, J., dissenting). In all of these examples, however, the loss directly resulting from the criminal activity, such as the loss of a building through arson, was not always a "RICO injury." *See id.* at ____, 105 S. Ct. at 3303, 87 L. Ed. 2d at 374-75 (Marshall, J., dissenting).

63. *See id.* at ____, 105 S. Ct. at 3288, 87 L. Ed. 2d at 376 (Powell, J., dissenting) (disagreeing that statute must be construed "to reach garden variety fraud and breach of contract cases").

64. *See id.* at ____, 105 S. Ct. at 3290, 87 L. Ed. 2d at 376 (Powell, J., dissenting). Justice Powell argued that the language of RICO was complex and that narrow construction of "pattern" and adoption of a "racketeering injury" requirement would be more harmonious with congressional intent to eradicate organized crime. *See id.* at ____, 105 S. Ct. at 3289-90, 87 L. Ed. 2d at 378-79 (Powell, J., dissenting).

65. *See id.* at ____, 105 S. Ct. at 3290, 87 L. Ed. 2d at 379 (Powell, J., dissenting); *see also* *Russello v. United States*, ____, U.S. ____, ____, 104 S. Ct. 296, 299-300, 78 L. Ed. 2d 17, 22 (1983) (construing forfeiture provision of § 1963(a)(1) broadly); *United States v. Turkette*, 452 U.S. 576, 593 (1981) (construing "enterprise" broadly in criminal context).

66. *See Sedima S.P.R.L. v. Imrex Co.*, ____, U.S. ____, ____, 105 S. Ct. 3275, 3286, 87 L. Ed. 2d 346, 359-60 (1985) ("RICO is to be read broadly" in accord with liberal construction clause); *see also* *Lacovera, Justices Rebuffed Tries To Limit Sweep Of RICO*, Nat'l L.J., Sept. 2, 1985, at S-18, col. 2 (judicial efforts to limit civil RICO rejected by Supreme Court). The majority was not influenced by the concerns of lower courts and commentators that RICO was being used in a manner not intended by Congress against "legitimate" businesses. *Compare Sedima, S.P.R.L. v. Imrex Co.*, ____, U.S. ____, ____, 105 S. Ct. 3275, 3287, 87 L. Ed. 2d 346, 360 (1985) (Second Circuit's holding based on distress at way civil RICO being used) *with id.* at ____, 105 S. Ct. at 3304, 87 L. Ed. 2d at 375 (Marshall, J., dissenting) (Court shirks duty by allowing continued unintended litigation).

67. *See, e.g.,* *Jefferson County Pharmaceutical Ass'n v. Abbott Labs.*, 460 U.S. 150, 157 (1983) (in absence of contrary legislative intent, plain language of statute controls); *Aaron v. Securities & Exch. Comm'n*, 446 U.S. 680, 697 (1980) (to justify holding that statute's meaning different from plain language requires very clear evidence in legislative history); *Touche Ross*

section 1964(c) is scant, the majority justifiably found no such contrary intent.⁶⁸ By initially deciding that RICO was to be construed liberally, the *Sedima* majority could easily reject both the prior conviction requirement and the racketeering injury requirement.⁶⁹ Avoiding emphasis on isolated statements in congressional debates, reports, and hearings, the Court looked to the clearest expression of congressional intent embodied in the statute, the liberal construction clause, and refused to apply a stricter standard to civil RICO than it had to criminal RICO actions.⁷⁰ In rejecting the amorphous

& Co. v. Redington, 442 U.S. 560, 568 (1979) (statutory interpretation begins with statute's language).

68. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___ n.13, 105 S. Ct. 3275, 3285 n.13, 87 L. Ed. 2d 346, 358 n.13 (1985) (statutory language cannot be overridden by legislative silence); see also *Jefferson County Pharmaceutical Ass'n v. Abbott Labs.*, 460 U.S. 150, 159 n.18 (1983) ("absence of congressional focus is immaterial where the plain language applies"); Brown, *RICO Repercussions: Sedima and Haroco*, 21 CAL. W. L. REV. 282, 291 (1985) (criticizing Second Circuit's emphasis on sparse legislative history).

69. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3281, 3286, 87 L. Ed. 2d 346, 353-54, 359-60 (1985); see also Stewart, *Supreme Court Report*, A.B.A.J. Sept. 1985 at 92, 95 (language of statute forms basis for court's holding rejecting restriction of civil RICO). The Seventh and Eighth Circuits, as well as commentators, had also rejected the Second Circuit's prior conviction requirement. See *Alexander Grant & Co. v. Tiffany Indus.*, 742 F.2d 408, 413 (8th Cir. 1984), *vacated on other grounds*, ___ U.S. ___, 105 S. Ct. 3550, 87 L. Ed. 2d 673 (1985); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 393 n.12 (7th Cir. 1984), *aff'd*, ___ U.S. ___, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985); Note, *Sedima, S.P.R.L. v. Imrex Co.: The Requirement Of Prior Criminal Convictions In Private RICO Actions*, 63 N.C.L. REV. 1033, 1035-36 (1985) (finding little support for Second Circuit's prior conviction requirement).

70. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3286, 87 L. Ed. 2d 346, 360 (quoting liberal construction clause); see also *id.* at ___, 105 S. Ct. at 3280-81, 87 L. Ed. 2d at 352-53 (discussing legislative history of RICO chronologically). See generally Horn, *The Venue Of The Debate Shifts From The Courts To The Congress*, Nat'l L.J., Aug. 26, 1985 at 24, col. 2 (legislative history has been used to throw obstacles in front of RICO plaintiffs). Mr. Horn has held the position of chairman of the American Bar Association RICO Committee. See *id.* at 24, col. 1. In two earlier Supreme Court cases involving criminal prosecutions under RICO, the Court had construed the statute broadly. See *Russello v. United States*, ___ U.S. ___, ___, 104 S. Ct. 296, 300, 78 L. Ed. 2d 17, 23-24 (1983) (construing forfeiture provision of RICO broadly); *United States v. Turkette*, 452 U.S. 576, 587 (1981) (construing term "enterprise" broadly to include illegitimate as well as legitimate organizations). The opinions in these cases found that broad construction was harmonious with both the language of the statute and RICO's legislative history. See *Russello v. United States*, ___ U.S. ___, ___, 104 S. Ct. 296, 300, 302, 78 L. Ed. 2d 17, 22, 26 (1983) (statutory language and legislative history support broad interpretation of RICO); *United States v. Turkette*, 452 U.S. 576, 586-87 (1981) (language and structure of RICO, as well as legislative history, support broad construction). The majority also realized that the similarity in language between section 1964(c) of RICO and the antitrust treble damages provision cannot be seen as an indication that they are to be construed alike. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3286-87, 87 L. Ed. 2d 346, 360 (1985) (previous RICO-like bill proposed as Sherman Act amendment discarded to avoid standing requirements). Courts attempting to

“racketeering injury requirement,” Justice White stressed the fact that a substantive violation of RICO requires a pattern of racketeering activity.⁷¹ The majority, however, while describing the “pattern” concept, failed to develop meaningful criteria upon which to base a determination that a pattern of racketeering activity has occurred.⁷² Civil RICO litigants now must determine what Justice White meant when he stated that there must be “continuity plus relationship” for a pattern to exist.⁷³

create RICO standing requirements by analogy to antitrust law ignore the difference in purpose between the two statutes. See Note, *Civil RICO: The Temptation And Impropriety Of Judicial Restriction*, 95 HARV. L. REV. 1101, 1113 (1982) (standing requirements in antitrust context needed to avoid defeating objectives of Sherman Act). Multiple treble damage awards could potentially ruin antitrust defendants, thus reducing rather than increasing competition. See *id.* at 1113 (citing L. SULLIVAN, HANDBOOK OF ANTI-TRUST § 247 (1977)). RICO's purpose is to compensate victims and control criminal activity and, thus, there is little economic or social rationale to reduce civil RICO's impact on defendants. See Blakey & Gettings, *Racketeer Influenced And Corrupt Organizations (RICO): Basic Concepts - Criminal And Civil Remedies*, 53 TEMP. L.Q. 1009, 1042 (1980).

71. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___ n.14, 105 S. Ct. 3275, 3285 n.14, 87 L. Ed. 2d 346, 358 n.14 (1985); see also 18 U.S.C. §§ 1962(a)-(c) (1982) (pattern of racketeering activity common element in substantive violation provisions). See generally Horn, *The Venue Of The Debate Shifts From The Courts To The Congress*, Nat'l L.J., Aug. 26, 1985, at 36, col. 4 to 37, col. 1, 2 (discussing pattern concept).

72. See *Sedima, S.P.R.L. v. Imrex*, ___ U.S. ___, ___ n.14, 105 S. Ct. 3275, 3285 n.14, 87 L. Ed. 2d 346, 358 n.14 (1985) (pattern requires “continuity plus relationship”); see also *id.* at ___, 105 S. Ct. at 3287, 87 L. Ed. 2d at 361 (declining to decide if Imrex's conduct constituted pattern of racketeering activity). The definition of “pattern of racketeering activity” given in section 1961(5) of RICO requires at least two predicate acts within 10 years, one of which must have occurred after RICO went into effect. See 18 U.S.C. § 1961(5) (1982).

73. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___ n.14, 105 S. Ct. 3275, 3285 n.14, 87 L. Ed. 2d 346, 358-59 n.14 (1985) (emphasizing Congress did not intend RICO be aimed at sporadic criminal activity); see also Horn, *The Venue Of The Debate Shifts From The Courts To The Congress*, Nat'l L.J., Aug. 26, 1985, at 36, col. 2 to 37, col. 2 (discussing Court's treatment of pattern as “harbinger of things to come” in civil RICO litigation). Federal courts which have addressed the issue of what behavior constitutes a “pattern of racketeering activity” have reached conflicting results. Compare *United States v. Elliott*, 571 F.2d 880, 899 n.23 (5th Cir. 1978) (two predicate acts need to be related to enterprise's affairs but not to each other) with *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (predicate acts must be related to each other in “common scheme, plan or motive”). See generally Berg & Zelikow, *The RICO Statute, 18 U.S.C. §§ 1961-1968: THE BUSINESS CLIENT AS RACKETEER*, 45 TEX. B.J. 159, 160-2 (1982) (discussing conflicting holdings related to definition of “pattern of racketeering activity”). Furthermore, the question has arisen of how to treat multiple offenses arising out of the same criminal episode. See *United States v. Weatherspoon*, 581 F.2d 595, 601-2 (7th Cir. 1978) (five fraudulent mailings constitute five separate acts of “racketeering activity,” thus, is “pattern of racketeering activity”); accord *Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061, 1066 (S.D.N.Y. 1983) (separate mailings constitute separate predicate acts). See generally Miller & Olson, *Recent Developments In Civil RICO*, 8 CORP. L. REV. 35, 36-37 (1985) (discussing issues related to pleading “pattern of racketeering activity”). The fact that some of the cases construing “pattern” are criminal does not make them inapplicable to civil RICO litigation. See *Eaby v. Richmond*, 561 F. Supp. 131, 134 (E.D. Pa. 1983)

While the majority opinion leaves the concept of pattern ill-defined, Justice White's approach is preferable to that of the dissent.⁷⁴ Under Justice Marshall's interpretation of civil RICO, the direct victims of racketeering activities could be left without a remedy under RICO.⁷⁵ For instance, Justice Marshall gives an example in which the defrauded customers of a bank, infiltrated through conduct made criminal by RICO, could not recover under civil RICO because they have a cause of action under state law.⁷⁶ The fact that there may be a remedy under state or another federal law for damage caused by a particular predicate act is not a reason to deny a plaintiff his statutory cause of action under RICO.⁷⁷ Civil RICO is designed to redress the aggregate effect of a pattern of criminal activity, not to punish the activities themselves.⁷⁸ Furthermore, Justice Marshall's statement that "lower courts would . . . smooth numerous rough edges"⁷⁹ in his concept of "RICO

(since elements of substantive RICO violation same for criminal and civil actions, court can draw on criminal cases describing these elements). The *Sedima* majority suggested that the pattern requirement has not been adequately developed by the courts or Congress. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3287, 87 L. Ed. 2d 346, 361 (1985). The majority's emphasis on "continuity" may spur defendants to attempt to limit "pattern" to those situations in which the racketeering activities are part of an on-going common scheme which consists of more than one criminal episode. See Horn, *The Venue Of The Debate Shifts From The Courts To The Congress*, Nat'l L.J., Aug. 26, 1985, at 37, col. 1-2 (majority prefers "common scheme or plan" test to establish relationship, but continuity probably dependent upon showing more than one criminal episode).

74. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3287, 87 L. Ed. 2d 346, 361 (1985) (Congress, not judiciary, is body to limit civil RICO); see also Horn, *The Venue Of The Debate Shifts From The Courts To The Congress*, Nat'l L.J., Aug. 26, 1985, at 24, col. 1 (shift of debate to Congress "good thing for all concerned"). See generally Note, *Civil RICO: The Temptation And Impropriety Of Judicial Restriction*, 95 HARV. L. REV. 1101, 1118-21 (1982) (advocating congressional, not judicial, determination of limitations, if any, to be placed on civil RICO).

75. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3303, 87 L. Ed. 2d 346, 374-75 (1985) (Marshall, J., dissenting) (giving three examples of "RICO injury," two of which deny compensation to direct victims of racketeering activity); see also *id.* at n.15, 105 S. Ct. at 3286 n.15, 87 L. Ed. 2d at 359 n.15 (proximately caused harm paradoxically denied compensation under dissenters' approach).

76. See *id.* at ___, 105 S. Ct. at 3303, 87 L. Ed. 2d at 374-75.

77. See *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 392 (7th Cir. 1984) (RICO intended to supplement remedies already available under existing state or federal law) (emphasis added), *aff'd*, ___ U.S. ___, ___, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985).

78. See *Guerrero v. Katzen*, 571 F. Supp. 714, 718 (D.D.C. 1983) (RICO does not prohibit racketeering activities, nor even pattern of racketeering activities); see also *Schacht v. Brown*, 711 F.2d 1343, 1355 (7th Cir.) (RICO prohibits certain conduct occurring through or resulting from pattern of racketeering activity), *cert. denied*, ___ U.S. ___, 104 S. Ct. 508, 509, 78 L. Ed. 2d 698 (1983). The civil remedies of § 1964(c) are available only to those persons who have been injured as a result of a substantive RICO violation. See *id.* at 1355.

79. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3303-4, 87 L. Ed. 2d 346, 375 (1985) (Marshall, J., dissenting).

injury” calls for a case-by-case determination which would do little to clear the controversies surrounding RICO.⁸⁰ Lower courts would be left to struggle anew with basically the same issues which have been under litigation since 1980.⁸¹ The “cause in fact” standard,⁸² advocated by the majority, is more harmonious with congressional intent and the statutory language and more adequately compensates victims of substantive RICO violations than that of the dissents.⁸³

If Justice Marshall’s poorly defined “RICO injury” concept and his failure to reach the prior conviction requirement had prevailed, the opinion would have been of little value in resolving the differences among the circuit courts.⁸⁴ Similarly, Justice Powell’s separate dissent, while conceding that RICO may be read broadly, advocates narrowing civil RICO’s application.⁸⁵

80. See *id.* at ____, 105 S. Ct. at 3303-4, 87 L. Ed. 2d at 375 (Marshall, J., dissenting); see also Horn, *The Venue Of The Debate Shifts From The Courts To The Congress*, Nat’l L.J., Aug. 26, 1985, at 36, col. 3-4 (RICO injury would have required courts to make subjective case-by-case determinations).

81. See *In re Catanella & E. F. Hutton & Co.*, 583 F. Supp. 1388, 1437 (E.D. Pa. 1984) (courts requiring special injury are unable to define terms). The inability of courts to adequately define or describe special injury requirements is epitomized in a decision in which the court stated that it would recognize such an injury when it saw one. See *Williamette Sav. & Loan v. Blake & Neal Fin. Co.*, 577 F. Supp. 1415, 1430 (D. Or. 1984) (holding plaintiff had not alleged fraud of type RICO designed to prevent); see also *In re Catanella & E. F. Hutton & Co.*, 583 F. Supp. 1388, 1430-37 (E.D. Pa. 1984) (describing efforts by courts to limit RICO by requiring special injury be pleaded, citing numerous cases on both sides of issue).

82. See Patton, *Civil RICO: Statutory And Implied Elements Of The Treble Damage Remedy*, 14 TEX. TECH L. REV. 377, 415-16 (1983) (comparing simple cause in fact standard with proximate cause standard used in antitrust law). A simple cause in fact standard would make a RICO defendant potentially liable for any injury which resulted from a substantive RICO violation. See *id.* at 416. In addition, the damages would not have to be reasonably foreseeable and stringent standing requirements similar to those in antitrust law would be avoided. See *id.* at 415-16.

83. See *Sedima, S.P.R.L. v. Imrex Co.*, ____, U.S. ____, ____, 105 S. Ct. 3275, 3286, 87 L. Ed. 2d 346, 359 (1985) (injury compensable under RICO is that resulting from racketeering activities “sufficiently related to constitute a pattern” when committed in conduct of enterprise). See generally Patton, *Civil RICO: Statutory And Implied Elements Of The Treble Damage Remedy*, 14 TEX. TECH L. REV. 377, 416 (1983) (discussing desirability of cause in fact standard).

84. See *Sedima, S.P.R.L. v. Imrex Co.*, ____, U.S. ____, ____, n.2, 105 S. Ct. 3275, 3304 n.2, 87 L. Ed. 2d 346, 375 n.2 (1985) (Marshall, J., dissenting) (as RICO claims would be dismissed for failure to allege RICO injury, issue of prior criminal conviction need not be decided); see also *Haroco, Inc. v. American Nat’l Bank & Trust Co.*, 747 F.2d 384, 389 (7th Cir. 1984) (noting that racketeering injury requirement imposed by courts without definition being given), *aff’d*, ____, U.S. ____, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985).

85. See *Sedima, S.P.R.L. v. Imrex Co.*, ____, U.S. ____, ____, 105 S. Ct. 3275, 3289, 87 L. Ed. 2d 346, 377 (1985) (Powell, J., dissenting). Justice Powell further states that the court has a duty to narrowly construe RICO in accord with Congress’ “unequivocal intention” to reach “mobsters” not legitimate businessmen. See *id.* at ____, 105 S. Ct. at 3289, 87 L. Ed. 2d at 378 (Powell, J., dissenting). Justice Powell’s interpretation of the judiciary’s role in construing

His attempt to distinguish *Sedima* from two earlier Supreme Court RICO cases on the grounds that the two latter were criminal cases is logically unsound as statutes considered penal in nature are generally construed more narrowly than are remedial ones.⁸⁶ Both of the dissenting opinions repeat the mistake made by the lower courts by relying too heavily on the legislative history in the absence of ambiguity in statutory language.⁸⁷ The legislative history on section 1964(c) is minimal and, therefore, of little value in providing support for far-reaching restrictions on the statute's use.⁸⁸ Given

RICO is at odds with the liberal construction clause as well as the policies behind RICO. *See Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 399 (7th Cir. 1984) (judicial narrowing of civil RICO to exclude subjects such as banks "nearly impossible to rationalize and inappropriate in light of carefully drawn statutory language"), *aff'd*, ___ U.S. ___, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985); *see also* Note, *RICO And The Liberal Construction Clause*, 66 CORNELL L. REV. 167, 181 (1980) (liberal construction clause clarifies legislative intent and mandates attitude with which judiciary should construe statute).

86. *See Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3290, 87 L. Ed. 2d 346, 379 (1985) (Powell, J., dissenting) (*Turkette* and *Russello* principles not necessarily applicable to private civil RICO). In both *Turkette* and *Russello*, the Supreme Court gave RICO an expansive reading. *See Russello v. United States*, ___ U.S. ___, ___, 104 S. Ct., 296, 302, 78 L. Ed. 2d 17, 22-23 (1983) (giving term "interest" in section 1963 forfeiture provision broad meaning, citing liberal construction clause for support); *United States v. Turkette*, 452 U.S. 576, 593 (1981) (giving "enterprise" liberal construction). As a general rule, criminal provisions are subject to a stricter construction standard than are remedial provisions. *See* 3 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 59.03, 60.01, 60.04 (rev. 3d ed. 1974).

87. *See Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3288-89, 87 L. Ed. 2d 346, 376-77 (1985) (Powell, J., dissenting) (using legislative history to support view that RICO should be applied primarily to organized crime in traditional sense); *see id.* at ___, 105 S. Ct. at 3302, 87 L. Ed. 2d at 373 (Marshall, J., dissenting) ("putting together . . . various pieces" of legislative history to support "RICO injury" requirement); *see also* Horn, *The Venue Of The Debate Shifts From The Courts To The Congress*, Nat'l L.J., Aug. 26, 1985, at 24, col. 2 ("Legislative history is the last refuge of a motivated judge in search of a rationale."). While views of a bill's draftsmen expressed during congressional consideration of the measure can be accorded some weight, those of other representatives and senators are generally of lesser value, as they express individual views and motives. *See* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION §§ 48.12 to -13 (Sands 4th ed. rev. 1984). When individual statements of legislators are made during debate on a bill, they are of more value in showing what was not intended than what was intended. *See id.* § 48.13. In the case of section 1964(c), there is little specific legislative history, so use of this extrinsic aid for statutory construction is of little probative value in light of this section's plain language. *See United States v. United States Steel Corp.*, 482 F.2d 439, 444 (7th Cir. 1973) (construing federal statute; "the plainer the [statutory] language, the more convincing contrary legislative history must be"); *see also Haroco v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984) (RICO not ambiguous, but instead "deliberately and extraordinarily broad"), *aff'd*, ___ U.S. ___, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985).

88. *See Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___ n.13, 105 S. Ct. 3275, 3285 n.13, 87 L. Ed. 2d 346, 358 n.13 (1985) (congressional silence cannot override statutory language); *see also Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 392 (7th Cir.

the plain, but exceedingly broad language of RICO, the majority properly left the task of restricting RICO's reach to Congress.⁸⁹

As the majority noted, the primary cause of the ever-increasing application of civil RICO is the inclusion of securities violations and mail and wire fraud as racketeering activities.⁹⁰ The solution to the "problem," if it is in-

1984) (congressional history provides little basis to limit RICO without redrafting it), *aff'd*, ___ U.S. ___, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985). See generally Brown, *RICO Repercussions: Sedima And Haroco*, 21 CAL. W. L. REV. 282, 291 (1985) (criticizing Second Circuit's reliance on "clanging silence" of congressional history to support restriction of RICO).

89. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3287, 87 L. Ed. 2d 346, 361 (1985) (restriction of RICO's breadth lies with Congress). The majority of commentators support judicial restraint and advocate leaving restriction of civil RICO to Congress. See, e.g., Dzivi, *Civil RICO: Pleading Fraud For Treble Damages*, 45 MONT. L. REV. 87, 111 (1984) (Congress, not judiciary, should limit RICO); Patton, *Civil RICO: Statutory And Implied Elements Of The Treble Damage Remedy*, 14 TEX. TECH L. REV. 377, 382 (1983) (judicial limitations of RICO legally insupportable); Note, *Civil RICO: The Temptation And Impropriety Of Judicial Restriction*, 95 HARV. L. REV. 1101, 1104 (1982) (limitation of RICO should be left to Congress). Three bills have been introduced which would limit RICO's applicability to commercial litigation. See S. 1521, 99th Cong., 1st Sess. (1985), *reprinted in 2 RICO L. REP.* 352 (1985); H.R. 2943, 99th Cong., 1st Sess. (1985), *reprinted in 2 RICO L. REP.* 351 (1985); H.R. 2517, 99th Cong., 1st Sess. (1985), *reprinted in 2 RICO L. REP.* 192-94 (1985). Senate bill 1521 would amend section 1964(c) to allow recovery of treble damages only for "competitive, investment, or other business injury." See S. 1521, sec. 1, 99th Cong., 1st Sess. (1985), *reprinted in 2 RICO L. REP.* 352 (1985). The pattern requirement would be amended for section 1964(c) so that only one of the alleged predicate acts could be mail, wire, or securities fraud. See *id.* sec. 2. Finally, attorney's fees would be available to the defendant if the suit was found to be frivolous. See *id.* sec. 3. House bill 2943 would add a prior conviction requirement to section 1964(c). See H.R. 2943, sec. 2, 99th Cong., 1st Sess. (1985), *reprinted in 2 RICO L. REP.* 351 (1985). House bill 2517 would make several changes which would affect the entire statute such as renaming "racketeering activity" "predicate criminal activity" and limiting the definition of "enterprise" so that an individual could not be an enterprise under RICO. See H.R. 2517, secs. 1(1), (2), 99th Cong., 1st Sess. (1985), *reprinted in 2 RICO L. REP.* 192 (1985). The definition of pattern would be changed so that the acts must occur within five years instead of ten, only one of the acts could be mail or wire fraud, and the acts would have to be "interrelated by a common scheme, plan, or motive." *Id.* sec. 1(5)(c); see also *id.* sec. 5(1)(A), (B). Major changes would also be made in sections 1962 and 1963 as well. Compare *id.* sec. 2, 3 (proposing amendments to RICO's substantive provisions and criminal penalties) with 18 U.S.C. §§ 1962, 1963 (1982) (RICO's substantive provisions and criminal penalties currently in force). House bill 2943 has purportedly garnered considerable support in the House at the committee level but is opposed by prosecutors who claim a prior conviction requirement would greatly reduce civil RICO's private attorney general function. See *Congress Considers New RICO Limits*, Nat'l L.J., October 21, 1985, at 3, col. 3, 8, cols. 2-4. At least one commentator has predicted that Congress is unlikely to alter RICO substantially until some of the pending cases have actually gone to trial and an adequate assessment can be made of RICO's effect on business litigation. See Miller & Olson, *Recent Developments in Civil RICO*, 8 CORP. L. REV. 35, 47-48 (1985) (quoting Professor G. Robert Blakey) (Congress unlikely to amend since few civil RICO cases actually tried).

90. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___ n.16, 105 S. Ct. 3275, 3287 n.16, 87 L. Ed. 2d 346, 361 n.16 (1985); see also Patton, *Civil RICO: Statutory And Implied*

deed a problem, is to remove these predicate acts from section 1961(1).⁹¹ Only Congress has the power to take this step.⁹² The dissenting Justices also expressed concern over the potential for frivolous suits and the proliferation of recent suits against "legitimate" businesses.⁹³ What the dissenting opinions fail to acknowledge is that the civil RICO defendant who has been unjustly harassed has redress under the Federal Rules of Procedure.⁹⁴ Considering that few RICO cases have progressed to trial, any action to alter

Elements Of The Treble Damage Remedy, 14 TEX. TECH L. REV. 377, 394 (1983) (majority of reported civil RICO cases based on predicate acts of mail or wire fraud).

91. See *Schacht v. Brown*, 711 F.2d 1343, 1356 (7th Cir.) (stating exclusion of "garden variety" fraud from RICO easily accomplished if Congress wishes by taking mail and securities fraud out of section 1961), *cert. denied*, ___ U.S. ___, 104 S. Ct. 508, 509, 78 L. Ed. 2d 698 (1983); see also *Wexler, Civil RICO Comes Of Age: Some Maturation Problems And Proposals For Reform*, 35 RUTGERS L. REV. 285, 335-38 (1983) (discussing ABA proposed amendments to RICO which would require at least one predicate act other than mail or wire fraud be included in pattern of racketeering activity).

92. See *Furman v. Cirrito*, 741 F.2d 524, 533 (2d Cir. 1984) (Congress, not judiciary, should restrict RICO), *vacated on other grounds*, ___ U.S. ___, 105 S. Ct. 3550, 87 L. Ed. 2d 672 (1985). See generally Note, *Civil RICO: The Temptation And Impropriety Of Judicial Restriction*, 95 HARV. L. REV. 1101, 1118 (1982) (restrictions on RICO's application may result in "constitutionally suspect excess of judicial discretion").

93. See *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S. ___, ___, 105 S. Ct. 3275, 3288, 87 L. Ed. 2d 346, 376 (1985) (Powell, J., dissenting); see also *id.* at ___, 105 S. Ct. at 3294, 87 L. Ed. 2d at 363-64 (Marshall, J., dissenting). See generally Horn, *The Venue Of The Debate Shifts From The Courts To The Congress*, Nat'l L.J., Aug. 26, 1985, at 34, col. 4 (primary concern of dissent was suits against those not organized criminals in traditional sense).

94. See FED. R. CIV. P. 11 (allows award of attorney's fees for defense of bad faith claims); see also *Dzivi, Civil RICO: Pleading Fraud For Treble Damages*, 45 MONT. L. REV. 87, 111 (1984) (advocating imposition of civil sanctions for filing frivolous RICO suits); *Blakey, The Act Is Neither Anti-Business Nor Pro-Business, It's Pro-Victim*, Nat'l L.J., Aug. 26, 1985, at 26, col. 3-4 (remedies against frivolous suits available, and if inadequate, can be supplemented). Court sanctions have already been used in the context of civil RICO. See, e.g., *Gordon v. Heiman*, 715 F.2d 531, 533 (11th Cir. 1983) (district court award of attorney's fees to RICO defendants upheld based on finding that RICO claims frivolously filed); *WSB Elec. Co. v. Rank & File Comm. to Stop 2-Gate Sys.*, 103 F.R.D. 417, 420-21 (N.D. Cal. 1984) (RICO defendants awarded \$6,125 in attorneys fees based upon Federal Rule of Civil Procedure 11); *King v. Lasher*, 572 F. Supp. 1377, 1385 (S.D.N.Y. 1983) (RICO claim dismissed and defendant awarded attorney's fees based on finding that RICO claim made in bad faith). Attorneys who file frivolous suits are also potentially subject to disciplinary proceedings and tort liability. See *Blakey, The Act Is Neither Anti-Business Nor Pro-Business, It's Pro-Victim*, Nat'l L.J., Aug. 26, 1985, at 26, col. 4, 28-32 n.40; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1), DR 7-102(A)(3) (1979). See generally *Furgeson, RICO — Application To Civil Litigation*, 1985 LITIGATION UPDATE A-9 to A-12 (available from State Bar of Texas) (discussing ethical considerations of filing RICO suits). An attorney or plaintiff who brings a civil RICO claim in bad faith could theoretically incur tort liability in an abuse of process suit. See *Restatement (Second) Of Torts* § 682 (1976). However, no cases have been found which utilized the tort or disciplinary remedy rather than sanctions under Federal Rule 11.

the statutory scheme would be precipitous until it is amply demonstrated that pending suits have been frivolous and without merit.⁹⁵

After *Sedima*, civil RICO remains a useful tool to combat both traditional organized crime and "white collar" crime. The decision, however, addresses only three specific issues relating to civil RICO actions and leaves others still unresolved. The court settled the question of a prior conviction requirement by rejecting it. The prerequisites to maintaining a RICO action were also clarified by the Court's specific listing of the elements needed to sustain a private civil RICO action based upon section 1962(c). In addition, the court sent a strong signal to Congress that it would continue to construe RICO broadly, regardless of the context, criminal or civil, in which the action is brought. Resolution of the controversy surrounding the use of RICO against "legitimate" businesses will now occur only when the scope of civil RICO is clearly delineated by Congress. Several bills have been introduced which would alter civil RICO's application in commercial litigation,⁹⁶ but until an amendment is actually enacted, the Supreme Court decision in *Sedima* leaves the treble damages remedy potentially available to many plaintiffs. The fears of the dissents that unrestrained litigation against "legitimate" businesses will surely result are unfounded in light of the other methods through which defendants may successfully defeat RICO claims. The court did not resolve the question of what is needed to show that a "pattern of racketeering activity" has occurred. Thus, a future line of cases will no doubt litigate exactly what behavior will be sufficiently continuous and related to constitute such a pattern. The majority left the impression that, if faced in the future with deciding the pattern issue, it might construe the term narrowly. Furthermore, because predicate acts based upon fraud are subject to federal pleading rules which require particularity, the civil RICO defendant can often attack the pleadings for failure to adequately allege actionable fraud.⁹⁷ Finally, the issue of whether the "enterprise" and "person" need to be distinct entities for the various substantive violations of RICO was not addressed in *Sedima* or its companion case *Haroco*. RICO plaintiffs who fail to carefully draft their pleadings will fare no better now than they have in the past. Thus, even though the court has continued to construe the

95. See *Hoover v. Ronwin*, ___ U.S. ___, ___, 104 S. Ct. 1989, 2012, ___ L. Ed. 2d ___, ___ (1984) (Stevens, J., dissenting) (frivolous cases should not be basis for "fundamental shifts in legal doctrine").

96. See S. 1521, 99th Cong., 1st Sess. (1985), reprinted in 2 RICO L. REP. 352 (1985); H.R. 2943, 99th Cong., 1st Sess. (1985), reprinted in 2 RICO L. REP. 351 (1985); H.R. 2517, 99th Cong., 1st Sess. (1985), reprinted in 2 RICO L. REP. 192-94 (1985).

97. See FED. R. CIV. P. 9(b).

statute broadly, a civil RICO award is by no means assured to every victim of two acts of mail fraud.

Ruth E. Greenfield