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### The Second Circuit Rubs Out Civil RICO: Sedima, S.P.R.L. v. Imrex Co.

Arthur J. Ciampi

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## THE SECOND CIRCUIT *RUBS OUT* CIVIL RICO: *SEDIMA, S.P.R.L. V. IMREX CO.*

The Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>1</sup> was designed to eliminate the infiltration of organized crime into legitimate business enterprises.<sup>2</sup> Section 1962 of RICO makes it unlawful for any person to take over or operate an enterprise through a "pattern of racketeering activity,"<sup>3</sup> which is

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<sup>1</sup> 18 U.S.C. §§ 1961-1968 (1982). The Racketeer Influenced and Corrupt Organizations Act is part of the Organized Crime Control Act of 1970. Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 28 U.S.C. § 1826 and scattered sections of 18 U.S.C. (1982)). Concerning the use of the acronym RICO, District Judge Shadur stated that "this Court has always suspected the person who christened the legislation was a movie buff with a sense of humor. In 'Little Caesar,' the first Hollywood gangster movie of the early thirties (a prototype that spawned an entire genre), Edward G. Robinson played the thinly-disguised Al Capone leading role—and was named 'Rico.'" *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 21 n.1 (N.D. Ill. 1982); see Pub. L. No. 91-452, 84 Stat. at 923.

<sup>2</sup> See Pub. L. No. 91-452, 84 Stat. at 923. The purpose of the Act is described as "seek[ing] the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." See Note, *RICO: An Introduction and Description*, 52 ANTI-TRUST L.J. 303, 304 (1983) (purpose of RICO is to stop infiltration of organized crime into business, unions, and government); see also McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 141 (1970) (RICO aimed at removing organized crime from legitimate organizations).

<sup>3</sup> See 18 U.S.C. §§ 1962-1963 (1982). Section 1962 provides in part:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such a person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise . . . .

*Id.* § 1962(a).

"'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). The term enterprise encompasses private businesses, government agencies, and labor unions. See Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1023 (1980). In addition, the enterprise in question may be either legitimate or illegitimate. *United States v. Turkette*, 452 U.S. 576, 580-81 (1981). The Supreme Court in *Turkette* held that, based on the clear and unambiguous language of the statute, both legitimate and illegitimate enterprises are covered, and noted that Congress could easily have narrowed the sweep of the definition simply by inserting "legitimate." *Id.*

The predicate acts under RICO consist of 24 federal and eight state crimes. 18 U.S.C. § 1961(1) (1982). The most controversial aspect of § 1961 is the incorporation of so-called

broadly defined within section 1961 as the commission of at least two so-called predicate acts within a ten year period.<sup>4</sup> In addition to criminal sanctions for violations of its standards,<sup>5</sup> section 1964 (civil RICO) provides that treble damages and reasonable attorney's fees be awarded to anyone injured "by reason of" proscribed RICO activity.<sup>6</sup> The broad definition of "racketeering activity" contained within RICO has enabled an increasing number of plaintiffs to initiate civil RICO suits that have involved various legitimate enterprises as defendants and have encompassed a wide variety of fraudulent conduct.<sup>7</sup> Recently, however, in *Sedima, S.P.R.L.*

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"garden variety fraud," such as mail fraud, *see* 18 U.S.C. § 1341 (1982), and wire fraud, *see id.* § 1345, into the list of "racketeering activities." *See Note, Civil RICO and "Garden Variety" Fraud—A Suggested Analysis*, 58 ST. JOHN'S L. REV. 93, 122 (1983).

<sup>4</sup> *See* 18 U.S.C. § 1961(1) (1982). Section 1961(5) 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. *Id.* Some courts and commentators maintain that the predicate acts must be connected by a "common scheme, plan or motive." *See Blakey & Gettings, supra* note 3, at 1030 (quoting *United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976)).

<sup>5</sup> *See* 18 U.S.C. § 1963 (1982).

<sup>6</sup> *See id.* § 1964(c). Section 1964(a) provides that the district court may order "any person to divest himself of any interest, direct or indirect, in any enterprise; . . . [prohibit] any person from engaging in the same type of endeavor as the enterprise engaged in . . . ; or [order] dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." *Id.* § 1964(a).

<sup>7</sup> *Compare Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1101 n.7 (1982) (before 1978, only two opinions dealing with civil RICO were rendered) with Siegel, "RICO" Running Amok in the Board Rooms, L.A. Times, Feb. 15, 1984, at col. 1 (as of 1984, there have been over 100 published decisions concerning civil RICO).

Reacting to an increase in civil RICO litigation, some courts have attempted to limit the use of the provision. *See, e.g., Guerrero v. Katzen*, 571 F. Supp. 714, 718 (D.D.C. 1983) (to have standing plaintiff must plead RICO injury or "racketeering enterprise injury"); *Noland v. Gurley*, 566 F. Supp. 210, 218 (D. Colo. 1983) (standing for treble-damage claim requires pleading of § 1962-type infiltration and damage to business); *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002, 1007 (C.D. Cal. 1982) (standing under RICO requires an allegation of racketeering injury); *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125, 1136 (D. Mass. 1982) (business type injury required for standing in RICO action); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 210-11 (N.D. Ill. 1980) (showing of competitive injury).

In addition to concern over the increasing number of civil RICO claims, courts and commentators have noted that a broad interpretation of civil RICO permits plaintiffs to bring claims traditionally limited to state jurisdictions into federal court. *See Van Schaick*, 533 F. Supp. at 1137; *Fanslow*, 547 F. Supp. at 210; *see also Note, supra* note 3, at 122 (rejecting interpretation that allows all fraud within RICO); *Note, supra*, at 1104 (RICO federalizes common-law fraud). The inclusion of mail and wire fraud violations as RICO predicate offenses, the widespread use of wire and mail in business enterprises, and the

*v. Imrex Co.*,<sup>8</sup> the Second Circuit imposed severe restrictions on the availability of civil RICO by requiring that plaintiffs establish that the defendant has been criminally convicted of predicate offenses and that he has caused a separate injury by reason of his racketeering activity.<sup>9</sup>

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relative ease by which one may perpetrate these frauds are all factors contributing to the proliferation of common-law fraud claims under RICO. See Note, *supra* note 3, at 123. It has been suggested that to alleviate this alleged misuse of the federal courts, predicate acts of fraud should be required to be accompanied by non-fraud predicate acts, such as arson, extortion, interstate transportation of stolen goods, or sale or receipt of stolen goods, thereby providing a federal forum for fraud accompanied by violence while excluding ordinary business fraud. See *id.* at 126 (citing ABA: Report to the House of Delegates, Section on Criminal Justice 7-9 (1982)).

Moreover, it has been suggested that the inclusion of securities fraud within RICO would result in a disruption of the securities laws in cases in which RICO is broadly construed. See Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513, 1530 (1983); Note, *supra* note 3, at 112. But 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, 205-06 (1981) (suggesting methods for converting security fraud cases into racketeering cases). The Supreme Court has cautioned that expanding the availability of private securities actions under rule 10b-5 by eliminating various standing requirements would naturally cause plaintiffs to seek merely "conjectural and speculative" awards that would clearly be inappropriate. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734-35 (1975).

<sup>8</sup> 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985).

<sup>9</sup> *Id.* *Sedima* is the seminal case in a trilogy of civil RICO cases decided by the Second Circuit on consecutive days. See *Bankers Trust v. Rhoades*, 741 F.2d 511 (2d Cir. 1984); *Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984). The cases were denied consideration en banc. *Furman*, 741 F.2d at 525.

In *Bankers Trust*, the defendant, Braten Apparel Corporation (BAC), was indebted to the plaintiff, Bankers Trust, in the amount of 4 million dollars. *Bankers Trust*, 741 F.2d at 513. Two officers of BAC and their attorney devised a scheme by which BAC could avoid its indebtedness by fraudulently filing a bankruptcy petition under the then applicable Chapter XI of the Bankruptcy Act. *Id.*; see 11 U.S.C. § 1-1103 (1976). After the scheme was successfully enacted, Bankers Trust brought an action demanding treble damages and attorney's fees pursuant to § 1964(c). 741 F.2d at 514-15.

Writing for the majority, Judge Kearse affirmed the decision of the district court, holding that, to maintain a civil RICO action, the plaintiff must not only show two violations of the predicate offenses within 10 years, but also must allege a "distinct RICO injury." *Id.* at 515-16. Judge Kearse defined this as a "proprietary injury caused by some of RICO's essential elements." *Id.* at 516. In dissent, Judge Cardamone relied on the language of the statute and concluded that the requirement of the majority was an unwarranted exercise of judicial authority. *Id.* at 523 (Cardamone, J., dissenting).

In *Furman v. Cirrito*, Judge Pratt, although affirming a district court opinion based on the controlling opinions of *Sedima* and *Bankers Trust*, dissented from the decision not to hear the case en banc. *Furman*, 741 F.2d at 525 (Pratt, J., dissenting from the denial of en banc consideration). Reading the purpose of RICO more broadly than either Judges Oakes or Kearse, Judge Pratt contended that the statute was designed not merely with the intent of destroying organized crime, but also to eradicate fraud, and concluded that to restrict the purposefully broad language of RICO by requiring a showing of something in addition to the

In *Sedima*, plaintiff Sedima and defendant Imrex were parties to a joint venture<sup>10</sup> pursuant to which Imrex shipped electrical parts to Sedima in Belgium.<sup>11</sup> Sedima contended that it had been defrauded by Imrex through Imrex's practice of overstating the purchase price, shipping costs, and finance charges of the parts.<sup>12</sup> Moreover, Sedima alleged that Imrex, through its fraudulent statements, had received money that rightfully belonged to the joint venture.<sup>13</sup> In addition to claims of breach of contract and conversion, Sedima alleged that the defendant's conduct constituted a "pattern of racketeering activity" in violation of civil RICO.<sup>14</sup> The district court, however, granted Imrex's motion to dismiss the RICO claim on the ground that the plaintiff had merely alleged a violation of the predicate offenses without alleging a separate "RICO-type" injury.<sup>15</sup> Sedima appealed to the Court of Appeals for the Second Circuit.

Writing for the majority, Judge Oakes concluded from the legislative history that Congress neither foresaw nor intended the current widespread use of civil RICO actions.<sup>16</sup> While noting that RICO was designed to combat organized crime, Judge Oakes observed that RICO has evolved into an effective means to sue legiti-

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predicate offenses would undermine civil RICO. *Id.* at 529-31 (Pratt, J., dissenting from the denial of en banc consideration).

<sup>10</sup> *Sedima*, 741 F.2d at 496.

<sup>11</sup> *Id.* at 484.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Sedima, S.P.R.L. v. Imrex Co.*, 574 F. Supp. 963 (E.D.N.Y. 1983), *aff'd*, 741 F.2d 480 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985). Sedima alleged that the mailing of fraudulent purchase orders and credit memoranda constituted predicate acts upon which a RICO claim could be based. 574 F. Supp. at 965. Although acts of mail fraud, *see* 18 U.S.C. § 1341 (1982), are included in § 1961(1)(d) among the list of violations that would constitute "racketeering activity," District Judge Glasser refused to find a valid RICO cause of action, *id.* at 965. The court relied on two constructions of the phrase "RICO-type injury": first, those that require either a racketeering enterprise injury in which "a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering acts into the enterprise," and, second, a competitive injury occurring when the plaintiff is forced to compete with an infusion of funds from racketeering activity. *Id.*

<sup>16</sup> *Sedima*, 741 F.2d at 485-94. Judge Oakes noted that the silence of Congress on the creation of a "federal forum . . . for so many common law wrongs" was indicative of a failure to perceive the implications of civil RICO. *Id.* at 492. The majority maintained that the failure of Congress to mention the addition of a civil cause of action until the middle of the second to last day of its discussions of the bill indicated that it did not intend as dramatic results for civil RICO as some contend. *Id.* at 490-91. Rather, the court asserted that "[t]he most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c)." *Id.* at 492.

mate business enterprises in federal, rather than state, court.<sup>17</sup> Responding to what it perceived as a widespread and unforeseen misuse of the statute,<sup>18</sup> the *Sedima* court read the "by reason of" language in section 1964(c) as requiring that plaintiffs in civil RICO suits demonstrate an injury caused by "racketeering activity,"<sup>19</sup> which the court defined as an activity in which "mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systematic harm to competition."<sup>20</sup>

The *Sedima* court further limited the use of civil RICO by establishing criminal convictions of predicate offenses as a condition precedent to a civil suit.<sup>21</sup> Comparing the language of the Clayton

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<sup>17</sup> *Id.* at 487. The inclusion of state and federal law violations within RICO, Judge Oakes observed, allows plaintiffs to bring many claims in federal court that previously would have been "subject only to state jurisdiction." *Id.* at 486. In addition, the majority held that there is no consensus among the courts concerning what is required to maintain a civil RICO action, and listed four types of limitations placed on RICO by various courts:

(1) whether RICO requires some nexus between the challenged activity and organized crime; (2) whether the injury complained of must result from "enterprise" involvement in the racketeering, rather than directly from the activity itself; (3) whether plaintiffs must allege a "competitive" or "racketeering injury"; and (4) whether there must be criminal convictions for the predicate acts underlying a civil RICO suit.

*Id.* at 492; see *supra* note 7.

<sup>18</sup> See 741 F.2d at 494. Judge Oakes supported many of the district courts that have maintained that standing under RICO should be limited to those "hurt by an injury of the type RICO was intended to prevent." *Id.*

<sup>19</sup> *Id.* at 494-95. Section 4 of the Clayton Act was the source of the "by reason of" language used in RICO. *Id.* at 494. The Supreme Court has defined the phrase "by reason of" in the context of the Clayton Act as an "injury of the type the antitrust laws were intended to prevent." *Id.* at 495 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). The *Sedima* court, by analogy, concluded that as used in RICO, the language is "intended to limit standing to those injured by a 'racketeering injury' [which Congress defined as an injury] of the type RICO was designed to prevent." *Sedima*, 741 F.2d at 495 (emphasis added).

<sup>20</sup> 741 F.2d at 495-96. Despite the use of the word "competition," the court emphasized that there was no requirement of a showing of competitive injury of the type required by the antitrust laws. *Id.* But see *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980) (there must be an injury showing how plaintiff was injured competitively by the RICO violation).

<sup>21</sup> *Sedima*, 741 F.2d at 496. In concluding that a prior criminal conviction was necessary, Judge Oakes distinguished *Sedima* from a leading case, *United States v. Cappelto*, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), which held that such a requirement was not warranted, *id.* Judge Oakes limited the holding in *Cappelto*, stating that it dealt solely with the right of the government, in the absence of a criminal conviction, to sue for an injunction under § 1964(a), while *Sedima* concerned solely an individual seeking damages in a private civil action. *Sedima*, 741 F.2d at 496-97. The court noted that in RICO actions brought by the government, both prosecutorial discretion and guidelines es-

Act, which was an acknowledged influence on RICO, Judge Oakes concluded that the use of the word "violation" in section 1964(c) of RICO, as opposed to the "anything forbidden" language of the Clayton Act, evinced a congressional intent to require a prior criminal conviction.<sup>22</sup> The *Sedima* court noted that permitting a civil RICO suit without a prior criminal conviction would necessitate dual burdens of proof, which the court reasoned would render RICO trials unintelligible to a jury.<sup>23</sup> Moreover, despite the existence of a liberal construction clause,<sup>24</sup> the court asserted that to determine a defendant's criminality in a civil suit would implicate constitutional issues.<sup>25</sup> Applying its criteria to the facts of the case,

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established by the Department of Justice are used, and these protect defendants from an overly broad use of RICO. *Id.* Private claimants, on the other hand, are not similarly limited. *Id.*

Other cases holding that criminal convictions are not necessary as a condition precedent were distinguished by the court by maintaining that they merely relied on *Cappetto*, and therefore were inapplicable. *Id.* at 497.

<sup>22</sup> 741 F.2d at 498 (emphasis in original). Section 1964(c) provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may . . . 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) (emphasis added); see *Harper v. New Japan Sec. Int'l*, 545 F. Supp. 1002, 1007 (C.D. Cal. 1982). The *Harper* court held that, at its inception, RICO was intended to be an antitrust statute, since comparing § 1964(c) of RICO with § 4 of the Clayton Act reveals virtually identical language. 545 F. Supp. at 1007. It is generally held, however, that despite some similarity, RICO is not rendered susceptible to the literal requirement of "antitrust injury" under the Clayton Act. See *Blakey & Gettings, supra* note 3, at 1040. Rather, it has been held that the Clayton Act should be used as a starting point in the examination of RICO. *Id.*

The *Sedima* court did concede that the use of the term "violation" could plausibly be explained as simply a shorthand way of saying "by reason of anything forbidden," see 741 F.2d at 498-99, but maintained that the more compelling interpretation would require conviction of the predicate offenses, *id.* at 498. In addition, the court, based on the use of the terms "indictable" and "chargeable" in RICO, maintained that Congress did not intend to give civil courts the ability to determine if an act was indictable or chargeable without an actual indictment. *Id.* at 499-500.

<sup>23</sup> 741 F.2d at 499-501 & n.52 (citing *United States v. Campanale*, 518 F.2d 352, 356 n.36 (9th Cir. 1975), *cert. denied sub nom.* 423 U.S. 1050 (1976)).

The *Sedima* court stated that without a criminal conviction, there is no way of knowing if the conduct at issue was in fact criminal, and therefore a prior conviction must be required. 741 F.2d at 501. Moreover, Judge Oakes contended that in the absence of a criminal conviction, a civil RICO plaintiff would be required to carry a burden of proof equal to that of a criminal case for some elements of the cause of action, and yet be required to maintain only a civil burden for the other elements of the trial. *Id.* at 501-02.

<sup>24</sup> See Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970).

<sup>25</sup> *Sedima*, 741 F.2d at 502 (citing *Tarlow, RICO Revisited*, 17 GA. L. REV. 291, 309 (1983)). One commentator has noted that when a statute gives rise to both criminal and civil remedies, the Constitution requires that the civil remedies be strictly construed. *Tarlow, supra*, at 310.

the *Sedima* court found neither a prior criminal conviction of a predicate offense nor an establishment of racketeering activity, and therefore affirmed the district court's dismissal of the RICO claim.<sup>26</sup>

Dissenting, Judge Cardamone concluded that the majority's holding ignored both the plain meaning of the statute as well as sound policy reasons underlying the creation of a civil cause of action.<sup>27</sup> The dissent asserted that the plain language of the statute contained no requirement of a prior criminal conviction, and noted that such a requirement had been rejected by almost every court that had addressed the issue.<sup>28</sup> Moreover, the dissenting judge contended that the use of the words "indictable" and "offense" in section 1964 indicated that the prior criminal conviction of a civil RICO defendant was not required.<sup>29</sup> Finally, the dissent maintained that the majority's requirement of a "racketeering injury" in effect required a connection with organized crime, a requirement that had been specifically rejected by Congress.<sup>30</sup>

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<sup>26</sup> *Sedima*, 741 F.2d at 483.

<sup>27</sup> *Id.* at 504 (Cardamone, J., dissenting).

<sup>28</sup> *Id.* at 505 (Cardamone, J., dissenting). The dissent maintained that although *United States v. Cappelto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), involved a government prosecution of RICO actions, *see supra* note 21, other circuits had applied the reasoning of *Cappelto* in private civil RICO cases, *id.* at 504-05 (Cardamone, J., dissenting). In addition, Judge Cardamone maintained that in suits by the government, a defendant was entitled to more protection from abuse of power than in suits by private individuals, and, therefore, he asserted the holding of *Cappelto* should be given additional weight in private suits. *Id.* (Cardamone, J., dissenting).

<sup>29</sup> 741 F.2d at 505 (Cardamone, J., dissenting). In refuting the contention of the majority that the existence of both civil and criminal burdens of proof would cause the jury to be utterly confused, Judge Cardamone indicated that the use of both criminal and civil sanctions was not uncommon. *Id.* (Cardamone, J., dissenting). In addition, the dissent maintained that Congress clearly intended § 1964(c) to be a civil statute, and the risk that defendants in RICO actions would be subject to ridicule did not alone render the civil statute criminal. *Id.* at 508 (Cardamone, J., dissenting) (citing *Ullmann v. United States*, 350 U.S. 422 (1956)). Judge Cardamone noted that "[t]o be named as a RICO defendant is not quite the Sword of Damocles that the majority would have it." 741 F.2d at 508 (Cardamone, J., dissenting).

The dissent concluded that § 1964 was not criminal, *id.* and applied the test enunciated in *United States v. Ward*, 448 U.S. 242, 248-49 (1980), 741 F.2d at 506-07 (Cardamone, J., dissenting). The *Ward* Court promulgated a two-step test to determine whether a statute is criminal: (1) did Congress, in establishing the penalizing mechanism, indicate a preference for either a criminal or civil label?, and (2) if the preference is civil, did Congress nevertheless provide for sanctions so punitive as to transform "the civil remedy into a criminal penalty?" *Ward*, 448 U.S. at 248-49.

<sup>30</sup> *See Sedima*, 741 F.2d at 509 (Cardamone, J., dissenting). Judge Cardamone suggested that by requiring a showing of an injury caused "by reason of conduct the RICO act was designed to prevent," and defining this activity by reference to mobster infiltration,



In limiting the availability of civil RICO, the *Sedima* court was reacting to a widely perceived misuse of the statute.<sup>31</sup> Nonetheless, it is submitted that the court has created limitations on civil RICO that go far beyond those intended by Congress. It is suggested that by requiring a criminal conviction of predicate acts, the *Sedima* court has ignored established principles of statutory construction, the legislative history of the statute, and prior case law. In addition, it is submitted that the court's construction of section 1964, which it claimed necessitated injury "by reason of" racketeering activity, is void for vagueness; and, it is suggested, the court's de facto requirement of a connection with organized crime creates an unconstitutional "status offense."

#### THE REQUIREMENT OF A PRIOR CRIMINAL CONVICTION

It is an established principle of statutory construction that "absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language."<sup>32</sup> The *Sedima* court, however, did not begin its analysis with the plain language of RICO, but instead began by comparing the language of section 1964 to that of the Clayton Act, upon which section 1964 was modelled.<sup>33</sup> Specifically, the court compared the phrase "by reason of *anything forbidden*" in the Clayton Act with the "by reason of a *violation*" language in section 1964 of RICO, and thereby concluded that Congress had included the word "violation" to manifest its intent to require a prior criminal conviction.<sup>34</sup> The

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the majority was merely requiring an "organized crime" connection despite the fact that "other courts, the statute's congressional sponsors and commentators do not assign to civil RICO a scope on such a lilliputian scale." *Id.* (Cardamone, J., dissenting). The dissent contended that Congress specifically chose not to use the phrase "for which an indictment or information *has been returned* or filed." *Id.* at 505 (Cardamone, J., dissenting) (emphasis added). Rather, Judge Cardamone suggested that if Congress had intended to require a prior criminal conviction, it would not have used the words "indictable" or "chargeable," but "indicted" or "charged," and would have titled § 1964 "Post Criminal Conviction Civil Remedies," rather than "Civil Remedies." *Id.* (Cardamone, J., dissenting).

<sup>31</sup> See *supra* note 17 and accompanying text.

<sup>32</sup> See *United States v. Turkette*, 452 U.S. 576, 580 (1981) (if statutory language unambiguous, it must be regarded as conclusive); *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980) (absent contrary intention of Congress, statute should be interpreted according to its plain language); *Flora v. United States*, 357 U.S. 63, 65 (1958) (Court must give effect to literal meaning of words employed to effectuate intent of Congress).

<sup>33</sup> See *infra* note 34 & accompanying text.

<sup>34</sup> *Sedima*, 741 F.2d at 498-99.

RICO statute, however, does not define "violation."<sup>35</sup> Indeed, the literal meaning of the term does not denote a criminal conviction, but rather an "infringement" or a "breach of a right or a duty."<sup>36</sup> In addition, the mandate of Congress that RICO be "liberally construed to effectuate its remedial purposes"<sup>37</sup> offers compelling evidence that an expansive reading should be given to the language of the statute, and therefore a prior criminal conviction should not be required.<sup>38</sup>

Section 1964 does not make reference to its own criminal provisions, but rather conditions civil liability on the "prohibited activities" described in section 1962.<sup>39</sup> It is suggested that if Congress had intended to require a prior criminal conviction it would have done so by referring to the criminal provisions of section 1963, or by defining "violation" to include convictions, or simply by stating that criminal convictions were required.<sup>40</sup> Finally, it is submitted that case law does not support the holding of the *Sedima* court. Those courts that have addressed the issue have been virtually

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<sup>35</sup> See 18 U.S.C. §§ 1961-1964 (1982).

<sup>36</sup> See, e.g., *Parnes v. Heinold Commodities Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980). The *Parnes* court concluded that a "fair reading" of § 1962 indicates that the term violation "is not tantamount to conviction." *Id.*; see also BLACK'S LAW DICTIONARY 1408 (5th ed. 1979) (violation defined as "injury; infringement; breach of right, duty or law").

<sup>37</sup> Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970).

<sup>38</sup> Cf. Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 168, 170 (1980). A liberal construction clause was included to "strengthen RICO's effectiveness," hence, courts should give an expansive interpretation to the language of the statute. *Id.* at 168-70. While a liberal reading of RICO would reinforce congressional intent to destroy organized crime, *id.* at 184, strict construction often relies on "fine technicalities and dubious distinctions" and limits the effectiveness of a statute, *id.* at 181. In addition, since there exists no constitutional barrier to Congress providing interpretation clauses, courts are clearly bound by them. *Id.* at 184. See generally Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 762-70 (1935) (supporting abrogation of rule of strict construction for penal statutes). The broad scope of RICO was acknowledged by Congress. See 116 CONG. REC. 35,204-05 (1970) (statement of Representative Mikva) (criticizing broad scope of RICO). Senators Hart and Kennedy recognized and took exception to the broad reach of RICO as "[going] beyond organized criminal activity." S. REP. NO. 617, 91st Cong., 1st Sess. 215 (1969).

<sup>39</sup> See 18 U.S.C. § 1964 (1982); see also *id.* § 1962 (prohibited activities enumerated).

<sup>40</sup> See *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 675 (N.D. Ind. 1982). The *State Farm* court noted that there is no reference in § 1964 to the criminal provisions of RICO and that § 1962 refers to "unlawful," not criminal, activities. See *id.*; see also *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982). The *USACO* court supported a literal reading of RICO, and, based on the fact that Congress made reference only to the unlawful acts of § 1962, concluded that the civil remedies of RICO were designed to be independent of criminal proceedings. See *USACO Coal Co.*, 689 F.2d at 95 n.1; see also *Sedima*, 741 F.2d at 505-06 (Cardamone, J., dissenting) (civil courts need not determine that predicate acts are criminal).

unanimous in their rejection of a prior criminal conviction requirement.<sup>41</sup>

Congress enacted a civil provision within RICO to provide private citizens their own means to seek redress for injuries caused by organized crime.<sup>42</sup> In so doing, Congress recognized that criminal law, with its attendant procedural safeguards, is not always the most efficient tool for eradicating organized crime.<sup>43</sup> By imposing a prior criminal conviction as a prerequisite to a civil RICO suit the *Sedima* court imposed a requirement that, it is suggested, has the effect of emasculating the utility of the civil provision of RICO.<sup>44</sup> A civil RICO plaintiff, for example, could be denied the right to bring an otherwise legitimate cause of action simply because the government chose not to prosecute for reasons related to any number of procedural technicalities relevant to a criminal proceeding that have no bearing on the merits of a civil action.<sup>45</sup>

#### THE RACKETEERING ACTIVITY REQUIREMENT

The primary purpose of RICO is to obliterate organized crime, yet Congress declined either specifically to define organized crime or to proscribe membership or involvement in organized crime per

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<sup>41</sup> See, e.g., *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) (prior criminal conviction not prerequisite to civil RICO suit); *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 675 (N.D. Ind. 1982) (plain language of § 1962 does not require criminal conviction of predicate offenses); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980) (language of Act does not condition civil cause of action on previous conviction).

<sup>42</sup> See *supra* note 2; see also 18 U.S.C. § 1964(c) (1982).

<sup>43</sup> See *Hearings on S. 30 and Related Proposals Relating to the Control of Organized Crime in the United States Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 106-07 (1970) (statement of Sen. McClellan) [hereinafter cited as *Hearings*]. Senator McClellan stated that in light of the Mafia's preeminent position, it was apparent that existing criminal sanctions for organized crime were basically inadequate, due to the nature of the procedure and the limited scope of criminal remedies. See *id.* at 106; see also *The Use of Civil Remedies in Organized Crime Control*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 2 (1975). It has been suggested that organized crime is an "economic phenomenon" and that the best way to solve the problem is to make it unprofitable. *Civil Remedies, supra*, at 2.

<sup>44</sup> See *N.Y. Times*, Aug. 21, 1984 (Op. Ed.), at 24.

<sup>45</sup> Cf. *Hearings, supra* note 43, at 106-07. Representative McClellan's testimony clearly indicates that Congress' intent in enacting the civil provision was to create a more effective tool to fight organized crime. See *id.* This was to be accomplished by circumventing the safeguards necessitated by criminal law. See *id.* It is submitted, therefore, that if plaintiffs are required to wait until the defendant is tried and convicted according to the procedures required by criminal law, the purpose of the civil action will not be achieved.

se within RICO.<sup>46</sup> This refusal, it is suggested, reflects an awareness that Congress could not effectively do so in a constitutional manner that was neither void for vagueness nor violative of the constitutional prohibition against "status offenses."<sup>47</sup> Congress, therefore, chose to provide remedies for those who suffered from acts typically associated with organized crime.<sup>48</sup> It is submitted that the *Sedima* court's requirement of an injury "by reason of racketeering activity" ignores this fact and has, in effect, read into RICO the requirement of an organized crime connection,<sup>49</sup> a re-

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<sup>46</sup> See *United States v. Campanale*, 518 F.2d 352, 363 (9th Cir. 1975) (per curiam), *cert. denied*, 423 U.S. 1050 (1976). The *Campanale* court noted that, in enacting RICO, Congress proscribed activities that are typically engaged in by individuals and associations involved in organized crime, *id.*, but, nevertheless, made these activities illegal regardless of who engages in them, *id.*; see *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313 (N.D. Ill. 1979) (RICO makes specific acts unlawful); see also *Furman v. Cirrito*, 741 F.2d 524, 529 (2d Cir. 1984) (Pratt, J., dissenting from the denial of en banc consideration) (RICO not aimed at racketeers per se, but at "racketeering activity").

<sup>47</sup> See, e.g., 116 CONG. REC. 35,344 (1970) (statement of Rep. Poff). Representative Poff, opposing a proposal by Representative Biaggi that Congress make membership in the Mafia or Cosa Nostra illegal, expressed the belief that such a law would not withstand constitutional requirements. *Id.*; see *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 21 n.17 (2d Cir. 1983) (Rep. Biaggi's proposed amendment vigorously attacked on constitutional grounds during House debates), *cert. denied sub nom.* 104 S. Ct. 1280 (1984). For a further discussion of the legislative history of RICO, see also *Maxwell v. Southwest Nat'l Bank*, 593 F. Supp. 250, 255 n.2 (D. Kan. 1984); Note, *supra* note 7, at 1527; Note, *supra* note 3, at 100 n.34.

In addition to the fear of rendering the statute unconstitutional, Congress chose not directly to prohibit membership in organized crime because of a concern that such a requirement would "defeat the objectives of the legislation by making enforcement unduly burdensome. . . ." Note, *supra* note 7, at 1527 (citing *United States v. Roselli*, 432 F.2d 879, 885 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971)). "[I]t would be difficult if not impossible to prove that an individual or business was associated with or controlled by a clandestine criminal organization." *Roselli*, 432 F.2d at 885; see 117 CONG. REC. 586 (1970) (statement of Sen. McClellan).

<sup>48</sup> See *supra* note 3.

<sup>49</sup> It is suggested that a comparison of the language used in *Sedima* to describe racketeering activity, see 741 F.2d at 495-96, with the language of other courts that have required a showing of an organized crime connection, demonstrates that the two requirements are one and the same. In *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975), for example, the district court refused to uphold a civil RICO claim because the plaintiff failed to assert a connection to organized crime. *Id.* at 113. In so doing, the *Barr* court defined organized crime as "a society of criminals who seek to operate outside of the control of the American people and their governments." *Id.* (quoting *Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 108 (1969)(statement of Att'y Gen. of United States)). Both the word "mobster" as used by Judge Oakes in *Sedima* and the phrase "society of criminals" as used in *Barr* denote an individual working within a gang for a particular illicit purpose. Compare WEBSTERS NEW COLLEGIATE DICTIONARY 732, 468 (1980) (mobster defined as a "member of a gang"; gang defined as "group of persons working to unlawful or antisocial ends") with *id.* at 1,094 (society defined as "voluntary association of individuals

quirement that has been rejected not only by Congress, but also by a majority of the courts and commentators.<sup>50</sup>

Under *Sedima*, it is imperative to comprehend what constitutes "racketeering activity," since only when such conduct is present is invocation of civil RICO proper.<sup>51</sup> In its attempt to provide some guidepost as to the term, however, the *Sedima* court referred merely to conduct engaged in by "mobsters."<sup>52</sup> This implicit requirement of an organized crime connection, it is submitted, violates a longstanding constitutional principle prohibiting the imposition of liability due to membership in a group.<sup>53</sup> Moreover, it is suggested that if *Sedima* is interpreted alternatively as prohibiting conduct rather than group membership,<sup>54</sup> its requirement of a

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for common ends").

<sup>50</sup> See, e.g., *In re Longhorn Sec. Litigation*, 573 F. Supp. 255, 269 (W.D. Okla. 1983) (RICO requires no connection with organized crime because no such requirement appears in statute); *Meineke Discount Muffler Shops, Inc. v. Noto*, 548 F. Supp. 352, 354 (E.D.N.Y. 1982) (plaintiff need not allege defendant is member of organized crime); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313 (N.D. Ill. 1979) (statute cannot be limited by requirement of connection with organized crime); see *Tarlow*, *supra* note 25, at 305 & n.53 (requiring organized crime connection deemed to be a "form of improper judicial legislation"); Note, *supra* note 7, at 1106-09 (requirement of organized crime connection is "misguided"); see also *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 392 (7th Cir. 1984) (if scope of RICO to be restricted, it should be done by Congress, not courts), *cert. denied*, 105 S. Ct. 902 (1985). The Seventh Circuit recently noted that, although RICO might create "a runaway treble damage bonanza for the already excessively litigious," the role of the judiciary is not to "reassess the costs and benefits associated with the creation of a dramatically expansive . . . tool for combating organized crime." *Schacht v. Brown*, 711 F.2d 1343, 1361 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983); see also Note, *supra* note 7, at 1120-21. It is not the role of the judiciary to limit RICO since courts are not authorized "to create standing requirements that would preclude liability in many situations in which legislative intent would compel it." Note, *supra* note 7, at 1120-21.

<sup>51</sup> See *supra* notes 19-20 and accompanying text.

<sup>52</sup> See *supra* notes 19-20 and accompanying text.

<sup>53</sup> The prohibition on status offenses disallows the imposition of civil liability solely because an individual is a member of a group. See *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 918-19 (1982). Liability may be imposed based solely on association only if the group in question "possessed unlawful goals and . . . the individual held a specific intent to further those illegal goals." *Id.* at 920.

<sup>54</sup> Although it may be asserted that the *Sedima* court's requirement of an organized crime connection falls within the *Clairborne Hardware* exception to the constitutional prohibition of status offenses, see *supra* note 53, the *Sedima* court's racketeering injury requirement contains none of the safeguards enumerated in *Clairborne* and refers merely to "mobster" activity, see *Sedima*, 741 F.2d at 495. While reference to mobsters may connote intentional wrongdoing, there is no limitation within the *Sedima* court's requirement that the group possess unlawful goals, and, therefore, it is submitted that an unconstitutional status offense is created. Cf. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 919 (1982) (government must establish that group possessed unlawful goals and that individual intended to further them).

"racketeering injury" is void for vagueness since the court defined the term only by reference to a group that has historically eluded specific definition,<sup>55</sup> and is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ."<sup>56</sup>

#### CONCLUSION

In *Sedima, S.P.R.L. v. Imrex Co.*, the Second Circuit has imposed severe restrictions on civil RICO that not only contravene the purpose of the civil provisions, but also render the statute unconstitutional. Notwithstanding the observation of several courts that RICO is currently being applied in areas far afield from what was originally intended by Congress, it is suggested that the requirements imposed by the *Sedima* court are inappropriate and contravene explicit statutory language. Barring a congressional directive otherwise, RICO should be applied in a manner cognizant of congressional intent to "cast the net of liability wide" to ensure its positive effect in eradicating white collar fraud.<sup>57</sup>

*Arthur J. Ciampi*

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<sup>55</sup> See, e.g., *United States v. Roselli*, 432 F.2d 879, 885 (9th Cir. 1970) (difficult, if not impossible, to prove individual or business associated with organized crime), *cert. denied*, 401 U.S. 924 (1971); *Kimmel v. Peterson*, 565 F. Supp. 476, 491 (E.D. Pa. 1983) (organized crime is nebulous concept; definition would be of dubious benefit); *United States v. Chovanec*, 467 F. Supp. 41, 45 (S.D.N.Y. 1979) (legislative history defining organized crime a murky water); see *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); Note, *supra* note 7, at 1527; Note, *supra* note 3, at 100 n.34.

<sup>56</sup> *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). The Court in *Lanzetta* held void for vagueness a New Jersey statute that declared "any person . . . known to be a member of any gang" a "gangster" and, therefore, subject to punishment by fine or imprisonment. See *Lanzetta*, 306 U.S. at 452. The Court held that the word "gang" was so vague that the statute was repugnant and a violation of the fourteenth amendment. See *id.* at 458. Recently, the Supreme Court articulated as the purpose for the void for vagueness doctrine "reduc[ing] the danger of caprice and discrimination in the administration of the laws [and] enabl[ing] individuals to conform their conduct to the requirements of the law. . . ." *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3256 (1984).

<sup>57</sup> *Furman v. Cirrito*, 741 F.2d 524, 528 (2d Cir. 1984) (Pratt, J., dissenting from the denial of en banc consideration). In *Furman*, Judge Pratt wrote: "fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm." *Id.* at 529 (Pratt, J., dissenting from the denial of en banc consideration). Judge Pratt reasoned that since Congress made no exception in the statute "for businessmen, for white collar workers, for bankers, or for stock brokers," it is inappropriate for courts to pardon these groups from RICO liability. *Id.* (Pratt, J., dissenting from the denial of en banc consideration); see also *Wall Street J.*, July 29, 1982, at 21, col. 3 (discussing use of civil RICO against corporations such as Arthur Andersen & Co., Coopers & Lybrand, and Shearson/American Express).