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THE INVESTMENT INJURY REQUIREMENT IN CIVIL RICO SECTION 1962(A) ACTIONS

INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act ("RICO" or "Act")¹ is a federal statute that punishes certain activities related to a pattern of racketeering.² RICO specifically prohibits four types of racketeering-related activities³ and provides both criminal penalties⁴ and civil remedies⁵ for a violation of those prohibitions.

Among other proscriptions, RICO prohibits a person who has received income from a pattern of racketeering activity from using or investing that income to acquire an interest in an enterprise.⁶ Among other remedies, RICO allows private parties injured by a violation of RICO to sue in a civil action for treble damages and attorneys' fees.⁷

Recently, an interpretive issue concerning the interplay⁸ between the use or investment prohibition and the private civil remedy has split the federal appellate courts. Because this issue arises out of the language of the statute, a statement of the issue is meaningless without reading the language of these two sections.

The investment prohibition provides:

It shall be unlawful for any person who has received income derived . . . from a pattern of racketeering activity . . . to use or invest . . . any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in . . . interstate or foreign commerce.⁹

The civil recovery provision provides:

Any person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . in any appropriate United States district court

1. 18 U.S.C. §§ 1961-1968 (1988). RICO was part of the Organized Crime Control Act of 1970, Pub L. No. 91-452, Title IX, 84 Stat. 941.

2. See 18 U.S.C. § 1962; see also *infra* notes 27-31 and accompanying text (discussing the nature of a RICO pattern of racketeering).

3. See 18 U.S.C. § 1962.

4. *Id.* § 1963.

5. *Id.* § 1964.

6. *Id.* § 1962(a).

7. *Id.* § 1964(c).

8. The phrase "interplay between sections 1962(a) and 1964(c)," which perfectly describes the relevant interpretation process, must be credited to the Brief for Plaintiffs-Appellants at 42, *Quaknine v. MacFarlane*, 897 F.2d 75 (2d Cir. 1990) (No. 89-7668).

9. 18 U.S.C. § 1962(a).

and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.¹⁰

The issue, which is the focus of this Comment, concerns what a plaintiff must allege to state a claim under the civil recovery provision, for injury by reason of a violation of the use or investment prohibition.

A plaintiff can only recover for injury "by reason of a violation" of RICO. The investment injury requirement raises the issue of whether a RICO violation, for these purposes, includes the receipt of income. Restated, the issue is whether a plaintiff must allege injuries by reason of the use or investment of income derived by racketeering activities, or instead may merely allege injury flowing from the predicate racketeering acts themselves that created the income.¹¹

A hypothetical may help introduce this often complex and technical issue: Suppose Defendant runs an elaborate mail fraud scheme (for simplicity's sake, with no accomplices). Assume that this operation rises to the level of a "pattern of racketeering."¹² Assume further that the operation of the mail fraud scheme generates income. Defendant invests the income from this operation in an enterprise. This investment would violate section 1962(a), which prohibits the use or investment of income from a pattern of racketeering activity in an

10. *Id.* § 1964(c).

11. At least two student notes have commented on the investment injury issue, each focusing on a particular case that has contributed to the interpretive split. See Scott A. Miskimon, Note, *The Fourth Circuit Rejects Civil RICO's Investment Use Rule*: Busby v. Crown Supply, Inc., 69 N.C. L. REV. 770 (1991) (focusing on Busby v. Crown Supply, 896 F.2d 833 (4th Cir. 1990)); Kristen H. Sorenson, Note, *RICO's Section 1962(a) and the Investment Use Rule: Is Big Business Off the Hook?*, 1990 B.Y.U. L. REV. 1215 (focusing on Grider v. Texas Oil & Gas Corp., 868 F.2d 1147 (10th Cir.), cert. denied, 493 U.S. 820 (1989)).

This Comment refers to the investment injury issue as an issue of what a section 1962(a) plaintiff must allege to state a claim. Courts adjudicating the issue usually have referred to it as such. See, e.g., Eastern Corporate Fed. Credit Union v. Peat, Marwick, Mitchell & Co., 639 F. Supp. 1532, 1536-37 (D. Mass. 1986) (concluding that a section 1962(a) plaintiff must allege investment injury "to state a claim"). Other courts have referred to it as a causation issue. See, e.g., Avirgan v. Hull, 691 F. Supp. 1357, 1362 (S.D. Fla. 1988) (referring to the two different views "with respect to causation under § 1962(a)"), *aff'd on other grounds*, 932 F.2d 1572 (11th Cir. 1991). The difference may be pure semantics. See Busby v. Crown Supply, 896 F.2d 833, 840 (4th Cir. 1990) (rejecting the distinction between standing and causation as irrelevant to the issue's disposition).

Phrasing the issue as one of sufficiency of pleadings, however, avoids a potential source of confusion that phrasing the issue as one of causation invites. Even after a court decides the investment injury issue, it must decide whether a plaintiff meets, as a matter of causation, whatever requirement the court imposes. It is helpful to keep these two questions conceptually separate. Referring to the factual determination of whether a plaintiff meets the requirement as the causation issue, while referring to the initial legal question of whether a plaintiff must allege investment injury as the pleadings issue, helps achieve this conceptual separation.

12. A "pattern of racketeering" is one of RICO's many terms of art. The nature of a RICO pattern of racketeering is discussed *infra* notes 27-31 and accompanying text. For the purpose of this introductory hypothetical, it is enough to know that there must be a pattern for a RICO violation to occur and to assume that the hypothetical plaintiff can allege one.

enterprise. Plaintiff is a victim of Defendant's mail fraud scheme. Section 1964(c) allows a private plaintiff who is injured by a RICO violation to claim treble damages. If a court imposes an investment injury requirement for a section 1962(a) civil RICO claim, then Plaintiff will be unsuccessful, as he was not injured by Defendant's investment. Only a plaintiff injured by the *investment* of the income will be able to state a claim.

Four federal circuit courts, including the Second Circuit, have imposed such an investment injury requirement,¹³ thus drastically limiting the potential number of civil RICO plaintiffs.¹⁴ The Fourth Circuit has rejected such a requirement.¹⁵

This Comment explores that split in the circuits. Section One introduces RICO in a broad sense by outlining its text. That section explains the fundamental controversy over RICO's intended reach. The judicial response to the interpretive controversy is also introduced with a focus on the history of the judicially created limitations on RICO.

Section Two explains the context of the investment injury issue and why it has become a focus of judicial attention. That section catalogues the positions of the various federal courts on investment injury. Further, it introduces the majority and minority approaches to the investment injury requirement.

Section Three analyzes the interplay of RICO sections 1962(a) and 1964(c), and argues that the imposition of an investment injury requirement is consistent with the explicit language of RICO. This Comment also argues that while judicially created limitations on RICO are highly suspect, the investment injury requirement in section 1962(a) actions is nevertheless a legitimate limitation found in the language of the statute. Finally, Section Four explains how the investment injury requirement drastically limits the number and kind of actionable civil RICO claims.

I. RICO IN GENERAL

The investment injury requirement is a complicated sub-issue in a tangled

13. See *Danielsen v. Burnside-Ott Aviation Training Center*, 941 F.2d 1220, 1229-30 (D.C. Cir. 1991); *Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 357-58 (3d Cir. 1989); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149-51 (10th Cir.), *cert denied*, 493 U.S. 820 (1989); *cf. Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 494 (6th Cir. 1990) (stating in dicta that an investment injury must be plead to state a section 1962(a) action).

14. See *infra* notes 261-66 and accompanying text (describing the impact of the investment injury requirement).

15. *Busby v. Crown Supply*, 896 F.2d 833, 840 (4th Cir. 1990).

The federal district courts also had split on the investment injury requirement before any circuit court addressed the issue. See James A. Moss, *Civil RICO: Special Problems*, in *RICO: CIVIL AND CRIMINAL LAW AND STRATEGY* § 3.03[2] (Jed S. Rakoff & Howard W. Goldstein eds., 2d release 1990) (recognizing a controversy among federal district courts on the question of an additional investment injury requirement in civil RICO section 1962(a) claims); see also *infra* notes 131-45 (chronicling the split among circuit and district courts).

area of law.¹⁶ In order to fully understand and analyze this particular sub-issue, it is first necessary to discuss and gain an understanding of the RICO statute as a whole. Therefore, RICO's text, the controversy over its reach, and its case law will initially be discussed.

A. RICO's Text

To understand the investment injury issue, it is necessary to be familiar with three aspects of the text of RICO: the statute's overall structure, its prohibitions, and its provision for private civil recovery for injury from a violation of its prohibitions.

1. Overall Structure

RICO is, at least in part, an attempt to combat organized crime.¹⁷ Because criminalizing the status of being an organized criminal would be unconstitutional,¹⁸ Congress created an intricate structure that seeks to combat activities traditionally associated with organized criminals.¹⁹ RICO criminalizes the or-

16. See Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661, 661 (1987) (noting the high level of controversy surrounding RICO). The Second Circuit has commented, "Even a cursory review of the case law indicates that there is simply no consensus on what RICO requires." *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 492 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985).

17. The Senate Judiciary Committee stated that the purpose of RICO was to eliminate "the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969). The congressional Statement of Findings and Purposes accompanying the Organized Crime Control Act serves to bolster that contention:

It is the purpose of this act to seek 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.

Pub. L. No. 91-452, § 1, 84 Stat. 922 (Statement of Findings and Purpose) (1969).

The belief that RICO was designed *only* to combat organized crime has been vigorously challenged. See, e.g., G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: Mother of God, Is This the End of RICO?*, 43 VAND. L. REV. 851, 860 (1990) ("[T]he first and most powerful myth . . . is that RICO was designed to deal *only* with organized crime.").

18. See *Robinson v. California*, 370 U.S. 660, 667 (1962). In *Robinson*, the Court held that the criminalization of the status of being addicted to narcotics violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Id.* The general proposition that status crimes are unconstitutional prevented Congress from criminalizing the status of being an organized criminal. See *infra* note 19.

19. See Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 693 (1990). Reed, an attorney in private practice, stated that "Congress . . . could not draft statutory language proscribing membership in organized crime because of constitutional prohibitions against status offenses and because of vagueness concerns. Apparently aware of these obstacles to direct prohibition of organized crime, Congress chose indirect means to reach organized crime." *Id.*

ganized and persistent commission of certain other specified crimes.²⁰

The RICO statute contains two definitions essential to its overall framework. First, RICO defines "racketeering activity" by listing a number of offenses.²¹ This long list of offenses, often referred to as "predicate acts,"²² comprises a large subsection of RICO, and can be grouped for simplicity's sake into three categories.²³ The first category is any act "chargeable" under several state criminal laws that is punishable by more than one year in prison, including murder, arson, and narcotics offenses.²⁴ The second category is any act "indictable" under numerous federal criminal provisions, including mail and wire fraud.²⁵ The third category is any offense involving bankruptcy or securities fraud or drug related activities that is "punishable" under federal law.²⁶

20. See *infra* note 26 (listing the crimes that can form the basis of a RICO pattern). Professor Lynch summed up RICO well when he referred to it as "The Crime of Being a Criminal." Lynch, *supra* note 16, at 661.

21. 18 U.S.C. § 1961(a) (quoted in full *infra* note 26).

22. See, e.g., *Ouaknine v. MacFarlane*, 897 F.2d 75, 82 (2d Cir. 1990) (referring to the offenses as "predicate acts of racketeering"); *Busby v. Crown Supply*, 896 F.2d 833, 836 (4th Cir. 1990) (referring to the offenses as "predicate racketeering acts").

23. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481-82 (1985) (dividing the predicate offenses as done in this Comment's text, *infra* text accompanying notes 24-26).

24. 18 U.S.C. § 1961(a).

25. *Id.*

26. *Id.* The complete statutory definition of "racketeering activity" is:

(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, 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 1029 (relating to fraud and related activity in gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution 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 obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (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 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-2424 (relating to

Also essential to the overall framework is RICO's definition of the term "pattern of racketeering activity."²⁷ Actually, the statute only helps define that phrase by establishing that a "'pattern of racketeering activity' requires at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."²⁸ The Supreme Court has interpreted this two-acts-within-ten-years requirement as the minimum necessary for a RICO "pattern," not as the definitive point at which a pattern occurs.²⁹ The question of what constitutes a pattern has been a continuing source of confusion for federal courts.³⁰ The Supreme Court's essential guidance has been to require a criminal prosecutor or civil plaintiff to prove "continuity" or "continuity plus relationship" to establish a pattern.³¹

Next, RICO establishes four "prohibited activities."³² These prohibited activities are: investing or using the income from a pattern of racketeering activity in an enterprise;³³ acquiring or maintaining an interest or control in an enterprise through a pattern of racketeering activity;³⁴ conducting or participating in the affairs of an enterprise through a pattern of racketeering;³⁵ and conspiring to violate any of the above three prohibitions.³⁶ Again, it is the first

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

Id.

27. 18 U.S.C. § 1961(5).

28. *Id.* (emphasis added).

29. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.14 (1985) ("The implication [of section 1961(5)] is that while two acts are necessary, they may not be sufficient.").

30. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, J., concurring). Justice Scalia observed that the search for a meaningful concept of pattern produced "the widest and most divergent split on an issue of federal law in recent memory." *Id.* (Scalia, J., concurring).

31. *H.J.*, 492 U.S. at 239-41. In *H.J.*, the Court rejected the Eighth Circuit's requirement that a pattern involve multiple schemes. The Court instead held that the pleading need only establish "continuity of racketeering activity, or its threat, *simpliciter*." *Id.* at 241. The *H.J.* holding built on a footnote in an earlier Supreme Court opinion defining a RICO "pattern" as "continuity plus relationship." *Id.* at 239 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.14 (1985)).

There are indications that the *H.J.* decision does little to clarify the pattern issue. See *id.* at 252 (Scalia, J., concurring) (tracing the history of the Court's pattern adjudication and finding no further guidance in the majority opinion); Kent R. Cutler, Note, *The Civil Use of the Racketeer Influenced and Corrupt Organizations Act: A Problem for the 1990s*, 35 S.D. L. REV. 150 (1990) (noting the judicial confusion before *H.J.* and arguing the decision does little to provide a meaningful definition of a RICO pattern).

32. 18 U.S.C. § 1962.

33. *Id.* § 1962(a).

34. *Id.* § 1962(b).

35. *Id.* § 1962(c).

36. *Id.* § 1962(d).

prohibited activity, the investment or use of income from a pattern of racketeering activity, that is of primary concern to this Comment.

RICO provides both criminal and civil penalties for violations of its prohibitions. The three criminal penalties are imprisonment,³⁷ fines,³⁸ and forfeiture of property.³⁹ The two civil remedies are preventative and restraining measures imposed against the racketeer,⁴⁰ and recovery of treble damages and attorneys' fees for injuries caused by a RICO violation.⁴¹

In addition to these provisions, Congress included a "liberal construction clause" in the Organized Crime Control Act, which created RICO, instructing that the "provisions of this title shall be liberally construed to effectuate its remedial purposes."⁴² The judiciary has been divided as to the proper role of this clause in the interpretation of RICO.⁴³

2. Prohibitions

The basic nature of RICO's four "prohibited activities" was introduced above.⁴⁴ However, the content of these prohibited activities demands further elaboration since they form half the basis of the investment injury issue. While only section 1962(a), the investment prohibition, is at issue, familiarity with the language of the entire body of prohibitions is necessary for a discussion of that section.

a. The investment prohibition

The language of section 1962(a) is quoted in this Comment's Introduction.⁴⁵ Section 1962(a) prohibits the investment or use of the proceeds from a pattern of racketeering in an enterprise.⁴⁶ For example, a section 1962(a) violation

37. *Id.* § 1963(a).

38. *Id.*

39. *Id.* § 1963(b)-(m).

40. *Id.* § 1964(a)-(b).

41. *Id.* § 1964(c). The statute also outlines its venue and process requirements, *id.* § 1965; allows expedition of RICO actions for public policy reasons, *id.* § 1966; provides for judicial discretion on whether proceedings under the Act will be open or closed, *id.* § 1967; and authorizes the Attorney General to serve a civil investigative demand for relevant documents, *id.* § 1968.

42. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947.

43. See *infra* notes 184-88, 217-24 and accompanying text for a discussion of the two distinct approaches as exemplified by *Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990) (requiring investment injury in civil RICO section 1962(a) actions) and *Busby v. Crown Supply*, 896 F.2d 833, 836-40 (4th Cir. 1990) (rejecting the investment injury requirement in civil RICO section 1962(a) actions).

44. See *supra* text accompanying notes 32-36 (briefly stating what each subsection prohibits).

45. See *supra* text accompanying note 9.

46. 18 U.S.C. § 1962(a). The section exempts standard purchases of securities from its prohibition by providing that "[a] purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer," is excluded if the securities of the purchaser, the purchaser's family, and the purchaser's accomplices do not aggregately amount to one percent of outstanding securities of any one class, and do not confer the power to elect one or more directors of the issuer. *Id.*

occurred when a defendant who participated in drug trafficking deposited the proceeds from the trafficking in the account of an enterprise.⁴⁷

b. The acquisition/maintenance of interest/control prohibition

Section 1962(b) states:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain . . . any interest or control of any enterprise . . . engaged in, or . . . affect[ing] interstate or foreign commerce.⁴⁸

An example of a section 1962(b) violation occurred when certain defendants took control of a local union organization through murder and extortion.⁴⁹

c. The conduct or participate in affairs prohibition

Section 1962(c) states:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or . . . affect[ing], interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.⁵⁰

An example of a section 1962(c) violation occurred when the defendants conducted the business of a retirement home through a pattern of fraud.⁵¹

d. The conspiracy prohibition

Finally, section 1962(d) prohibits conspiring to violate sections 1962(a), (b), or (c).⁵²

3. Civil Recovery

Among RICO's civil remedies⁵³ is the provision that "[a]ny person injured

47. See *United States v. Cauble*, 706 F.2d 1322, 1342-43 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

48. 18 U.S.C. § 1962(b). Plaintiffs seldom use section 1962(b). DAVID B. SMITH & TERRANCE G. REED, *CIVIL RICO* ¶ 5.03 (5th release 1990). Some courts have imposed a special injury requirement in section 1962(b) civil actions. See, e.g., *Rich Maid Kitchens v. Pennsylvania Lumberman's Mut. Ins. Co.*, 641 F. Supp. 297, 311 (E.D. Pa. 1986) (finding that the plaintiff had no standing under section 1962(b) where the plaintiff did not allege injury from the acquisition of an enterprise), *aff'd*, 833 F.2d 307 (3d Cir. 1987).

49. See *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 270-71 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

50. 18 U.S.C. § 1962(c). The Supreme Court has rejected special injury pleading requirements with respect to this section. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). The *Sedima* opinion is discussed fully *infra* notes 83-105 and accompanying text.

51. See *Bennett v. Berg*, 710 F.2d 1361, 1363 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983).

52. 18 U.S.C. § 1962(c).

53. The other civil remedy is a district court's jurisdiction to "prevent or restrain" violations of

in his business or property by reason of a violation of section 1962 . . . may sue . . . 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."⁵⁴ The interplay between this civil recovery provision and section 1962(a) gives rise to the investment injury question.⁵⁵

B. RICO's Purpose and Actual Use

RICO is an extremely controversial statute.⁵⁶ The issue of the purpose behind Congress' enactment of RICO is a prime source of this controversy.⁵⁷ On

section 1962. Appropriate orders listed in the statute are: "ordering any person to divest himself of any interest . . . in any enterprise; imposing reasonable restrictions on the future activities or investments of any person . . . ; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." 18 U.S.C. § 1964(a).

54. *Id.* § 1964(c).

55. Because the investment injury issue arises from the language of the statute, other statutes with similar wording presumably would create the same issue. Twenty-four states and Puerto Rico have racketeering laws modeled at least in part on Federal RICO. See Richard L. Biggs & Laura V. Potter, *The Little Ricos: About to Grow?*, 41 CONSUMER L. FIN. Q. REP. 3, 3 n.7, 4 (1987) (citing state RICO statutes and describing the similarities and differences between state RICOs and Federal RICO); see also RICO: BUSINESS DISPUTES AND THE "RACKETEERING" LAWS—FEDERAL AND STATE 75-195 (CCH ed., 1984) (providing the full text of 18 state "Little RICO" statutes). The language of some of these "Little RICO" statutes could potentially raise an investment injury question similar to that arising in the federal statute. See, e.g., DEL. CODE ANN. tit. 11, §§ 1503(c), 1505(c) (1987) (providing that "[i]t is unlawful . . . to use or invest" racketeering proceeds and providing civil recovery for any person injured "by reason of any conduct constituting a violation" of the prohibitions).

56. Jed S. Rakoff, *The Fundamentals of RICO*, in RICO: CIVIL AND CRIMINAL LAW AND STRATEGY, *supra* note 15, § 1.01 ("RICO . . . is one of the most controversial statutes in the federal canon.").

Representative William Hughes (D-N.J.) has chronicled the numerous groups that have supported and opposed civil RICO amendments. Among the organizations, as listed by him, that have petitioned Congress to amend civil RICO are as follows: The American Bar Association, National Association of Manufacturers, American Civil Liberties Union, United States Chamber of Commerce, AFL-CIO, American Institute of Certified Public Accountants, Securities Industry Association, American Bankers Association, Independent Bankers Association of America, Future Industries Association, American Council of Life Insurance, Credit Union National Association, Grocery Manufacturers of America, National Automobile Dealers Association, State Farm Insurance Companies, Alliance of American Insurers, and The American Financial Services Association. William J. Hughes, *RICO Reform: How Much is Needed?*, 43 VAND. L. REV. 639, 640 (1990).

Representative Hughes also lists organizations opposed to drastic civil RICO reform. These organizations, as listed by him, include The Public Citizen-Congress Watch, The United States Public Interest Research Group, National Association of Attorneys' General, National District Attorneys Association, National Association of Insurance Commissioners, and the North American Securities Administration Association. *Id.*

57. See Lynch, *supra* note 16, at 664 ("[T]he legislative history of the [RICO] statute has been a source of controversy."); Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 624 (1990) (noting disagreement among academics over whether Congress intended RICO to apply to anything but traditional organized crime).

one side of the controversy are those who advocate that RICO was meant to fight organized crime and its infiltration into legitimate business. The advocates of this interpretation argue that any application of the statute beyond this scope is a violation of at least the intent of the statute.⁵⁸ These parties assert that Congress did not foresee RICO being applied to "ordinary commercial disputes."⁵⁹

Others have asserted that the intent of RICO is broader. Professor G. Robert Blakey, whose involvement in drafting RICO has drawn added attention to his work,⁶⁰ has led commentators supporting a more liberal application of RICO. Writing in collaboration with Michael Perry, he asserted that "RICO was designed to deal with organized crime, but it also was crafted more broadly to deal with all forms of 'enterprise criminality.'"⁶¹

The legislative history of RICO's civil recovery provision is particularly in dispute. Advocates of a limited reading tend to view the civil recovery provision as "spot-welded"⁶² to the more important criminal provisions, a hasty addition.⁶³ Their opponents, meanwhile, see the civil recovery provision as the focus of RICO.⁶⁴

The concern over RICO's intended reach⁶⁵ has arisen primarily in the area of civil,⁶⁶ not criminal,⁶⁷ RICO. This concern surfaced due to the dramatic

58. See, e.g., Lynch, *supra* note 16, at 664 ("[Those who] . . . have found in the legislative history [of the statute] much broader purposes [than fighting organized crime] and have used their findings to justify sweeping interpretations of the statute . . . [are] wrong.").

59. Blakey & Perry, *supra* note 17, at 860 (quoting *Oversight on Civil RICO Suits: Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 109-11 (1985) (statement of Ray J. Groves, Chair, American Institute of Certified Public Accountants)).

60. Lynch, *supra* note 16, at 670-71.

61. Blakey & Perry, *supra* note 17, at 866.

62. P.M.F. Servs. v. Grady, 681 F. Supp. 549, 555 (N.D. Ill. 1988).

63. See, e.g., *id.* (tracing RICO's legislative history and concluding the civil recovery provision was a last-minute addition to the final version of the statute); Susan Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 677-78 (1990) (noting that commentators have concluded Congress gave little consideration at all to the consequences or reach of civil RICO).

64. See, e.g., G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982) (analyzing RICO's legislative history and suggesting the fundamental importance of the civil recovery provision).

65. For extensive citations to academic commentary concerning this controversy, see Blakey & Perry, *supra* note 17, at 862 n.18. Open criticism of RICO's present reach has also emanated from the United States Supreme Court. Chief Justice Rehnquist has criticized RICO in this regard. See William H. Rehnquist, *Reforming Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5, 9 (1989) (originally presented at the Brookings Institute's Eleventh Seminar on the Administration of Justice, Apr. 7, 1989) (urging congressional reform to cure RICO's expansion into "garden-variety civil fraud cases"). Justice Scalia recently voiced constitutional concerns over RICO's vagueness in a concurring opinion, *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 256 (1989) (Scalia, J., concurring), which attracted three other Justices. Justice Scalia asserted, "That the highest Court in the land has been unable to derive from [RICO] anything more than today's meager guidance bodes ill for the day when [a constitutional] challenge is presented." *Id.* (Scalia, J., concurring).

66. Michael Goldsmith & Mark J. Linderman, *Civil RICO Reform: The Gatekeeper Concept*,

increase in the number of civil RICO cases over the last decade. According to one source, only 300 civil RICO cases were filed between 1970 and 1985, while 957 such cases were filed in 1988 alone.⁶⁸ This trend probably will continue.⁶⁹ The attraction of treble damages, attorney's fees, access to the federal courts, and wielding the weapon of labelling a defendant a "racketeer" serves to encourage plaintiffs to invoke civil RICO whenever possible.⁷⁰

Beyond the sheer *number* of civil RICO cases, the *kind* of civil RICO cases dominating the courts also has stirred controversy. Civil RICO primarily has not been used against traditional organized crime, but has been used instead in ordinary commercial disputes (often referred to as "garden-variety fraud"⁷¹). In 1985, the Supreme Court cited startling statistics indicating that of known civil RICO cases at trial, 40% concerned securities fraud, 3% concerned commercial common law fraud, and only 9% involved "allegations of criminal activity of a type generally associated with professional criminals." The Supreme Court also cited a survey concluding that civil RICO claims involving securities transactions and commercial disputes far overshadowed any other category of civil RICO claims.⁷²

43 VAND. L. REV. 735, 735 (1990) (stating that civil RICO has been a perpetual target of criticism and reform efforts); Rasmussen, *supra* note 57, at 627 (stating that, with the inventiveness of lawyers, the civil remedy has taken RICO into areas unanticipated by Congress).

67. Apparently, prosecutorial discretion has kept criminal RICO out of the sort of controversy erupting over civil RICO. The incentives that private civil attorneys have to invoke civil RICO are unchecked by significant countervailing considerations. The Department of Justice, however, has exercised self-restraint in the use of criminal RICO. See Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 655 (1990) (stating that the Department of Justice has kept criminal RICO under control while the civil RICO controversy has exploded); Hughes, *supra* note 56, at 643 (asserting that Congress perceives the Department of Justice as properly restrained in its use of criminal RICO); Rehnquist, *supra* note 65, at 10 (pointing out that while prosecutorial discretion serves to check criminal RICO, no such avenue for controlling civil RICO exists among plaintiffs' attorneys).

68. Hughes, *supra* note 56, at 644 (citing ABA SEC. OF CORP., BANKING & BUSINESS LAW, REP. OF THE AD HOC CIVIL RICO TASK FORCE 55 (1985) and Hearings on H.R. 1046 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) (not officially printed)). Representative Hughes stated that these figures may be drastic underestimates. *Id.*

69. Rehnquist, *supra* note 65, at 9 ("[T]here is every reason to think that we can expect a substantial increase in this already high number [of civil RICO cases] because of the statute's lucrative treble damages provisions and the extensive coverage recently afforded civil RICO actions by the national media, legal publications, and continuing legal education programs.").

70. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504-06 (1985) (Marshall, J., dissenting).

71. See, e.g., Rehnquist, *supra* note 65, at 9. By "garden-variety fraud," Justice Rehnquist and others are generally referring to mail and wire fraud usually litigated at the state level. See, e.g., *id.* Justice Rehnquist also lists among the more interesting areas to which RICO has been applied: "divorce, trespass, legal and accounting malpractice, inheritance among family members, employment benefits, and sexual harassment by a union." *Id.* at 11. *Contra* Blakey & Perry, *supra* note 17, at 881-909 (denying that RICO has been applied too broadly).

72. *Sedima*, 473 U.S. at 499 n.16; see also Thomas F. Harrison, *Look Who's Using RICO*, 75 A.B.A. J. 56(4) (1989) (deploring the variety of civil claims to which RICO is applied); John G. Odom & Victoria K. McHenry, *Creative Applications of Civil RICO*, 11 AM. J. TRIAL ADVOC. 245, 256-75 (1987) (using actual and hypothetical cases to explore the outer boundaries of

These "garden-variety fraud" cases typically arise when mail fraud⁷³ and/or wire fraud⁷⁴ are used as the predicate acts that form the pattern of racketeering.⁷⁵ Through RICO, a plaintiff in an ordinary commercial fraud dispute can

RICO's application); Steven W. Colford, *RICO False-Ad Suits Rock Industry*, *ADVERTISING AGE*, Oct. 8, 1990, at 1, 84 ("[RICO], designed to attack organized crime, is now being used to charge that false advertising is civil fraud.").

73. 18 U.S.C.S. § 1341 (Law. Co-op. Supp. 1991). The breadth of the federal mail fraud statute is apparent from its text:

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 . . . or imprisoned . . . or both.

Id.

Judicial interpretation of the federal mail fraud statute has broadened its reach as well. See Odom & McHenry, *supra* note 72, at 256.

74. 18 U.S.C.S. § 1343 (Law. Co-op. Supp. 1991). The federal wire fraud statute's breadth is also apparent from its text:

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 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 . . . or imprisoned . . . or both.

Id.

Judicial interpretation of the federal wire fraud statute has expanded its reach as well. See Odom & McHenry, *supra* note 72, at 256.

75. *Sedima*, 473 U.S. at 500. The *Sedima* court stated, "The 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern.'" *Id.* Justice Marshall agreed in his *Sedima* dissent. *Id.* at 501 (Marshall, J., dissenting). Justice Marshall stated, "The single most significant reason for the expansive use of civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud violations." *Id.* (Marshall, J., dissenting).

Commentators have also made this point. See, e.g., Getzendanner, *supra* note 63, at 678-79. Ms. Getzendanner, formerly a federal judge in the Northern District of Illinois, asserted:

The vast majority of civil RICO cases use mail, wire, or securities fraud as the predicate offense Virtually every published case of which I am aware, in which the RICO claims were predicated exclusively on mail or wire fraud, concerns a commercial dispute to which the attorney has added unremarkable fraud allegations.

Id. (footnote omitted).

Ms. Getzendanner has advocated the elimination of mail, wire, and securities fraud as predicate acts unless the case involves a large class of plaintiffs. See *generally id.* (maintaining that such a RICO reform would eliminate most controversial problems with the statute). While on the federal bench, Ms. Getzendanner's position on the investment injury issue was unclear. Compare *In re*

gain the immense advantages of a RICO claim⁷⁶ by alleging a pattern of fraudulent letters and phone calls.

RICO's expansion into areas arguably outside the statute's intended scope is especially unsettling because, while civil RICO allows recovery in such cases, the statute arguably has had no impact on organized crime.⁷⁷ For perhaps obvious reasons, plaintiffs typically are unwilling to serve process on a bona fide mobster.⁷⁸

RICO is a statute designed to punish and provide civil recovery for injuries from certain activities related to patterns of racketeering. Whether the intent of Congress was to combat only traditional organized crime or to combat tamer commercial fraud as well is a subject of much discussion. Whatever the "true" intent of Congress, civil RICO has been applied to the tamer arena of garden variety fraud, to the virtual exclusion of organized crime.

C. Judicial Interpretation of RICO

A significant portion of the judicial interpretation of RICO can be summarized simply. Lower federal courts have searched for limits to RICO based on their interpretation of the purpose of the statute. The Supreme Court, and in some instances appellate courts, have rejected those limits based primarily on RICO's explicit language.⁷⁹

Three Supreme Court cases, *Sedima, S.P.R.L. v. Imrex Co.*,⁸⁰ *American National Bank & Trust Co. v. Haroco, Inc.*,⁸¹ and *H.J., Inc. v. Northwestern Bell Telephone Co.*,⁸² rejected bodies of lower court law that sought to limit RICO. These Supreme Court cases provide the clearest examples of the his-

Olympia Brewing Co. Secs. Litig., No. 77 C 1206, 1985 WL 8801, at *1 (N.D. Ill. Jan. 21, 1985) (concluding that with no injury requirements in section 1962(c) it would be illogical to impose such requirements on section 1962(a)) *with* *Heritage Ins. Co. v. First Nat'l Bank of Cicero*, 629 F. Supp. 1412, 1417 (N.D. Ill. 1986) (dismissing a section 1962(a) claim because "[t]he . . . complaint fails to allege how plaintiffs were injured by the [defendant's] use or investment of the racketeering income.").

Representative Hughes and Chief Justice Rehnquist have commented on the effect of the inclusion of mail and wire fraud as well. *See* Hughes, *supra* note 56, at 626 (stating that the keys to both civil and criminal RICO are mail and wire fraud); Rehnquist, *supra* note 65, at 9 (asserting that the civil RICO explosion happened "[i]n part, because it creates a civil counterpart for criminal wire fraud and mail fraud prosecutions").

76. *See supra* text accompanying note 70 for a list of advantages a RICO count provides for a civil plaintiff.

77. *See generally* Gerard E. Lynch, *How Useful is Civil RICO to the Enforcement of Criminal Law?*, 35 VILL. L. REV. 67 (1990).

78. *See* PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL 5 (1987) (stating that not one private civil RICO action has been filed against traditional organized criminals and suggesting the reason is potential mob intimidation); SMITH & REED, *supra* note 48, ¶ 5.02[1] n.4 (finding no section 1962(a) actions filed against "a real organized crime figure").

79. Rakoff, *supra* note 56, § 1.01.

80. 473 U.S. 479 (1985).

81. 473 U.S. 606 (1985) (per curiam).

82. 492 U.S. 229 (1989).

tory of the judicial response to RICO.

Sedima is a leading Supreme Court decision interpreting RICO. It is especially relevant to this discussion because the effect of its precedent on the investment injury requirement has perplexed the lower courts.⁸³

Before *Sedima*, many lower courts were attempting to impose extra pleading requirements on civil RICO plaintiffs who claimed injuries flowing from violations of section 1962(c).⁸⁴ Section 1962(c) prohibits conducting or participating in the affairs of an enterprise through a pattern of racketeering.⁸⁵ Among these extra requirements had been that a plaintiff must have suffered some "racketeering injury" (an injury RICO was designed to prevent, somehow linked to racketeering).⁸⁶ Another requirement had been that a plaintiff had suffered some competitive injury, or injury traced to the plaintiff's competitive loss from the racketeer's support of the competition.⁸⁷ A third requirement imposed by some lower courts had been that a civil RICO defendant be criminally convicted of the claimed RICO violation.⁸⁸ This effort to limit RICO can be traced to a desire to provide limits on the statute's expanding breadth, which has allowed prosecutors and plaintiffs to use the statute in disputes perhaps not contemplated by Congress.⁸⁹

In *Sedima*, a divided Supreme Court rejected the three limiting requirements. The Court held that the language and history of RICO does not invite the requirements, and that it would violate RICO's remedial purposes to impose them.⁹⁰

Sedima concerned a civil RICO suit claiming injury from a violation of section 1962(c).⁹¹ The plaintiff corporation believed the defendant corporation

83. The Second Circuit used *Sedima* to justify the investment injury requirement. See *infra* notes 169-83 and accompanying text for a discussion of the Second Circuit's approach in *Ouaknine v. MacFarlane*, 897 F.2d 75 (2d Cir. 1990). The Fourth Circuit used *Sedima* to reach the opposite conclusion. See *infra* notes 207-16 and accompanying text for a discussion of the Fourth Circuit's approach in *Busby v. Crown Supply*, 896 F.2d 833 (4th Cir. 1990).

84. Rakoff, *supra* note 56, § 1.01.

85. 18 U.S.C. § 1962(c) (1988).

86. See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 487 (2d Cir. 1984) (relying on legislative purpose and statutory "by reason of" language to impose racketeering-type injury requirement), *rev'd*, 473 U.S. 479 (1985); *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1240-42 (S.D.N.Y. 1983) (requiring that a RICO plaintiff allege a "distinct RICO injury"); *Harper v. New Japan Secs. Int'l*, 545 F. Supp. 1002, 1007 (C.D. Cal. 1982) (requiring "injury of the type the RICO statute was intended to prevent"); *Landmark Sav. & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981) (rejecting a competitive injury requirement, but requiring a "racketeering enterprise injury").

87. See, e.g., *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983) (finding support in legislative history for imposing a competitive injury requirement); *North Barrington Dev. v. Fanslow*, 547 F. Supp. 207, 210-11 (N.D. Ill. 1980) (enforcing a competitive injury requirement because RICO was not designed to compensate for injury from predicate offenses).

88. See *infra* notes 114-15 and accompanying text (briefly discussing this requirement).

89. See Rakoff, *supra* note 56, § 1.07(1) (stating that section 1962(c) injury limits were for the courts "one method of limiting the profusion of civil RICO actions").

90. *Sedima*, 473 U.S. 479, 498 (1985).

91. *Id.* at 484.

had cheated it by overbilling.⁹² The plaintiff filed suit, alleging mail fraud and wire fraud as predicate acts for a violation of section 1962(c) from which it suffered injury.⁹³ The Second Circuit had affirmed a district court dismissal of the suit for failure to state a claim.⁹⁴ The circuit court found the plaintiff's claim failed because it did not allege a "racketeering injury"⁹⁵ and because it did not allege that the defendants had already been convicted of the predicate acts of mail and wire fraud.⁹⁶

The Supreme Court heard the plaintiff's appeal and rejected both requirements.⁹⁷ Although the Supreme Court sympathized with the Second Circuit's concern over the consequences of an "unbridled reading" of RICO,⁹⁸ the Court nevertheless rejected the imposition of requirements it found to be violative of the explicit language and purpose of RICO.⁹⁹

Considering the imposition of a special "racketeering injury" requirement, the Court found no such limitation in the language or history of RICO.¹⁰⁰ Further, it read the legislative history of RICO as requiring a broad, rather than restricted, reading. The Court asserted that such a requirement would frustrate the broad remedial purpose of the statute.¹⁰¹

Considering the "prior conviction" requirement, the Court again found no such limit in the language or history of the statute.¹⁰² The Court also rejected any limit based on a desire to impose more rigorous proof requirements on civil RICO plaintiffs or based on constitutional concerns.¹⁰³

In the portion of the opinion rejecting the racketeering injury requirement, two statements by the Court are important to the investment injury discussion. In one passage, the Court, referring to section 1962 in its entirety, stated that when a plaintiff is injured by racketeering activities, the plaintiff will have a section 1962(c) claim.¹⁰⁴ In another important passage, the Supreme Court noted that the "essence" of a section 1962(c) violation is the racketeering ac-

92. *Id.* at 483-84.

93. *Id.*

94. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

95. *Id.* at 494-96.

96. *Id.* at 496.

97. *Sedima*, 473 U.S. at 500.

98. *Id.* at 481. The Court stated, "While we understand the [lower] court's concern over the consequences of an unbridled reading of the statute, we reject both of its holdings." *Id.*

99. *Id.* at 499-500.

100. *Id.* at 495. The Court found no "racketeering injury" requirement in the language of the statute and called such a requirement "amorphous." *Id.*

The Court had difficulty enunciating the exact meaning of the Second Circuit's "racketeering injury" requirement and referred to it as "vague." *Id.* at 494. The Court felt no need to fully enunciate the nature of the requirement in order to reject it. *See id.* at 495.

101. *Id.* at 497-500.

102. *Id.* at 488-90.

103. *Id.* at 490-93.

104. *Id.* at 495 ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by [sections 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).").

tivities, or predicate acts. Damages, the Court stated, should compensate injury from those predicate acts.¹⁰⁵

Along with *Sedima*, the Supreme Court handed down its companion case, *American National Bank & Trust Co. v. Haroco, Inc.*¹⁰⁶ *Haroco* affirmed, per curiam, the Seventh Circuit's rejection of the requirement that a plaintiff allege injury from the conduct of the enterprise, not just injuries from predicate acts, to bring a section 1962(c) action.¹⁰⁷

To examine the logic of the *Haroco* decision, the language of section 1962(c) must be recalled. Section 1962(c) prohibits "any person . . . associated with any enterprise . . . [from] conduct[ing] or participat[ing] . . . in the conduct of such enterprise's affairs through a pattern of racketeering."¹⁰⁸ Regarding section 1962(c), the district court held that "to be cognizable under RICO [the injury] must be caused by a RICO violation and not simply by the commission of predicate offenses."¹⁰⁹ A RICO violation, recall, is an activity prohibited by section 1962. A predicate offense is a "sub-crime" that makes up the pattern of racketeering activity forming the basis of the prohibited activity.

The Supreme Court affirmed the Seventh Circuit's rejection of the requirement, relying on its analysis in *Sedima*.¹¹⁰ Regarding section 1962(c) actions, the Court rejected a requirement that the injury flow from some other source than the predicate racketeering acts.¹¹¹

While not as directly relevant to the investment injury issue as *Sedima* and *Haroco*, the Supreme Court's decision in *H.J., Inc. v. Northwestern Bell Telephone Co.*¹¹² provides a further example of the Supreme Court's rejection of spurious limits on civil RICO actions. The heart of *H.J.* addressed and rejected the "multiple scheme" pattern limitation imposed by the Eighth Circuit.¹¹³ But the Court also examined a requirement that a civil RICO plaintiff prove that the alleged injury resulted from "organized crime."¹¹⁴ The Court

105. *Id.* at 497 ("[T]he essence of the [section 1962(c)] violation is the commission of those acts in connection with the conduct of the enterprise.").

Two dissents were filed in *Sedima*. Justice Marshall, joined by Justices Brennan, Blackmun, and Powell, rejected the majority's analysis of the history and text of RICO. Justice Marshall attacked the majority's textual interpretation that allowed recovery for injury from RICO predicate acts. *Id.* at 500 (Marshall, J., dissenting). Justice Powell's separate dissent emphasized organized crime as the target of RICO and hesitated to adopt an interpretation of the statute that would broaden it beyond that goal. *Id.* at 523 (Powell, J., dissenting).

106. 473 U.S. 606 (1985) (per curiam).

107. *Id.*

108. 18 U.S.C. § 1962(c) (1988).

109. *Haroco, Inc. v. American Nat'l Bank & Trust*, 577 F. Supp. 111, 114 (N.D. Ill. 1983), *rev'd*, 747 F.2d 384 (2d Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam).

110. See *Haroco*, 473 U.S. at 609.

111. *Id.*

112. 492 U.S. 229 (1989).

113. See *supra* note 28 and accompanying text for a fuller discussion of that portion of the opinion.

114. *H.J.*, 492 U.S. at 243-44.

rejected the requirement, refusing to impose a limiting pattern requirement not found in the language or history of the statute.¹¹⁵

The majority of the Court rejected the contention that "RICO's broad language should be read narrowly" to ensure that the statute combats only organized crime.¹¹⁶ Justice Scalia, in addition, penned a concurring opinion that blatantly questioned the constitutionality of RICO on vagueness grounds.¹¹⁷ Despite this hostility, Justice Scalia and three Justices joining him would not advocate artificially created limitations.¹¹⁸

In *Sedima, Haroco*, and *H.J.*, the Supreme Court resisted the temptation to limit RICO in ways found neither in the statute's text nor its legislative history. While encouraging legislative reform of RICO¹¹⁹ and supporting the goals of the lower courts in limiting RICO,¹²⁰ the Court nevertheless refused to effectuate those goals judicially. In *Sedima*, the Supreme Court rejected injury requirements in section 1962(c) actions, but used broad linguistic brushstrokes that arguably apply to the interpretation of section 1962(a).

II. THE SECTION 1962(A) INVESTMENT INJURY REQUIREMENT

Against this backdrop of prior judicial efforts to limit civil RICO, the section 1962(a) investment injury requirement has emerged. To facilitate a better understanding of this limitation, this section of the Comment first explains the growing importance of section 1962(a) in civil RICO actions. The position of the federal courts is then chronicled. The section then follows the reasoning of the two most recent federal appellate cases that have taken definitive positions on the issue.

A. The Emergence of Section 1962(a) Actions

When the number of civil RICO cases first escalated in the mid-1980s,¹²¹ section 1962(c) claims comprised the vast majority of total civil RICO cases. Section 1962(a) cases were a rarity.¹²² The current trend, however, is that section 1962(a) claims comprise an increasingly larger percentage of civil RICO claims filed.¹²³

115. *Id.* at 249.

116. *Id.* at 245.

117. *Id.* at 256 (Scalia, J., concurring).

118. *Id.* (Scalia, J., concurring).

119. The Supreme Court has not been shy about suggesting that congressional reform should be the solution, if there is to be one, to RICO's breadth: In *H.J.*, the majority stated, "RICO may be a poorly drafted statute, but rewriting it is a job for Congress, if it is so inclined . . ." *H.J.*, 492 U.S. at 249.

120. See *supra* text accompanying note 98 (noting that the Supreme Court has recognized the concern over the consequences of an "unbridled reading" of RICO).

121. See *supra* notes 68-69 and accompanying text (noting the increase in civil RICO claims).

122. SMITH & REED, *supra* note 48, ¶ 5.02[1].

123. *Id.* Smith and Reed asserted that while section 1962(a) has been little-used, "it is becoming recognized as the biggest gun in the RICO arsenal, [and so] the limited body of case law construing section 1962(a) should grow substantially in the next few years." *Id.*

This trend is due in large part to an almost universally accepted judicial interpretation of RICO that has drastically limited section 1962(c) claims. That interpretation is the section 1962(c) person/enterprise distinction.¹²⁴

In section 1962(c), the prohibition against conducting the affairs of an enterprise through a pattern of racketeering, the "person" who is conducting the affairs of the enterprise through such a pattern must be "employed by or associated with [the] enterprise."¹²⁵ A majority of federal courts have interpreted this statutory language as requiring that the "person" (who is the defendant) and the "enterprise" be separate entities.¹²⁶ A plaintiff alleging a section 1962(c) violation therefore must point to two different entities—the one doing the conducting and the one being conducted. The plaintiff may not point to only one entity that is conducting its own affairs through a pattern of racketeering.

This limitation has significant effects. It substantially hampers section 1962(c) claims against corporate defendants that are based on the defendant fraudulently conducting its own affairs.¹²⁷ An employee of the corporation, who is involved in the fraud, will still be a distinct entity, and therefore will continue to be exposed to section 1962(c) liability. Reaching the employee's pockets, however, is not the goal of plaintiffs' attorneys.¹²⁸ They seek the corporate deep pockets, often sealed by the section 1962(c) person/enterprise distinction.¹²⁹

With section 1962(c) actions less accessible because of the person/enterprise distinction, plaintiffs have pursued section 1962(a) actions. Section 1962(a) actions gradually received fuller litigation and the issue of a section

124. Rakoff, *supra* note 56, § 1.061[1] (stating that "recently . . . [section 1962(a)] has increasingly been employed as a way of avoiding the section 1962(c) [person/enterprise] 'identity problem'").

125. 18 U.S.C. § 1962(c) (1988).

126. *See* Busby v. Crown Supply, 896 F.2d 833, 840 (2d Cir. 1990) ("[T]he alleged 'person' who violates [§] 1962(c) must be different from the 'enterprise.'"); Schofield v. First Commodity Corp., 793 F.2d 28, 29-31 (1st Cir. 1986) (refusing to "strain[]" the language of RICO to reject the distinction); Bennett v. United States Trust Co., 770 F.2d 308, 315 (2d Cir. 1985) (requiring that a violation by a corporate entity be against a different entity), *cert. denied*, 474 U.S. 1058 (1986); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 400 (7th Cir. 1984) (adopting a requirement of "separate entities" in section 1962(c) actions), *aff'd on other grounds*, 473 U.S. 606 (1985); Hirsch v. Enright Ref. Co., 751 F.2d 628, 633 (3d Cir. 1984) (same).

Only the Eleventh Circuit has rejected the distinction. Rakoff, *supra* note 56, § 1.05[3] (citing *United States v. Hartley*, 678 F.2d 961, 987-90 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983)).

127. *Busby*, 896 F.2d at 839 (arguing that corporate liability would be all but eliminated through the section 1962(c) person/enterprise distinction in combination with the section 1962(a) investment injury requirement).

128. Thomas E. Dwyer, Jr. & Stephen Kiely, *Vicarious Civil Liability Under the Racketeer Influenced and Corrupt Organizations Act*, 21 CAL. W. L. REV. 324, 325 (1985) ("[A] workable theory of vicarious liability is often the only way to find a pecuniary defendant to join in the [RICO] lawsuit.").

129. *Id.*

1962(a) investment injury requirement emerged.¹³⁰

B. *The Position of the Federal Courts*

The investment injury issue concerns whether a plaintiff bringing a civil RICO suit for injuries flowing from a violation of section 1962(a) must allege injury from the investment of racketeering proceeds, or merely may allege injury from the predicate acts that created the income. This issue, now a focal point of the more general civil RICO controversy, has split the federal courts.

Only five of the thirteen federal circuit courts of appeals have taken definitive stands on the investment injury requirement. The Second,¹³¹ Third,¹³² Tenth,¹³³ and D.C.¹³⁴ Circuits have required investment injury for section 1962(a) actions, while the Fourth Circuit has rejected such a requirement.¹³⁵ The Sixth,¹³⁶ Seventh,¹³⁷ and Ninth¹³⁸ Circuits have explicitly suggested their

130. Rakoff, *supra* note 56, § 1.06[1]. The investment injury question apparently was not an issue until the later 1980s. In 1986, a United States district court referred to the argument against the investment injury requirement as "novel." *DeMuro v. E.F. Hutton*, 662 F. Supp. 308, 309 (N.D. Cal. 1986).

131. *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir. 1990). Even before *Ouaknine*, the Southern District of New York had unanimously accepted the investment injury requirement. See *Friedman v. Arizona World Nurseries*, 730 F. Supp. 521 (S.D.N.Y. 1990); *Vista Co. v. Columbia Pictures*, 725 F. Supp. 1286 (S.D.N.Y. 1989); *Galerie Furstenburg v. Coffaro*, 697 F. Supp. 1282 (S.D.N.Y. 1988); *In re Gas Reclamation, Inc. Secs. Litig.*, 659 F. Supp. 493 (S.D.N.Y. 1987); *Veriens-Und Westbank AG v. Carter*, 639 F. Supp. 620 (S.D.N.Y. 1986).

The Eastern District of New York had rejected the requirement. See *Long Island Lighting Co. v. General Elec. Co.*, 712 F. Supp. 292, 297 (E.D.N.Y. 1989).

132. *Rose v. Bartle*, 871 F.2d 331, 358 (3d Cir. 1989). *Rose* involved civil rights section 1983 claims and RICO sections 1962(a), (c), and (d) claims filed by the plaintiffs, former county employees, against the defendants, county and political party officials. The plaintiffs alleged that the defendants had illegally obtained grand jury presentments against them. The section 1962(a) analysis was a small, cursory part of the Tenth Circuit's analysis. The court, however, affirmed a district court dismissal of that claim for lack of any allegation of investment injury. *Id.* at 357-58.

133. *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1150-51 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). In *Grider*, the plaintiff, Grider, brought two section 1962(a) claims against the defendant, Texas Oil & Gas Corporation, alleging that the defendant had engaged in two oil-and-gas-fraud schemes involving mail fraud. The Tenth Circuit affirmed a district court grant of the defendant's motion to dismiss, holding that a plaintiff must allege investment injury in order to state a civil section 1962(a) claim. Because the plaintiff only alleged injury from the scheme *itself*, rather than any resulting investment or use, dismissal was appropriate. *Id.* See Sorenson, *supra* note 11, at 1215, for a more complete discussion of the *Grider* case in particular.

134. *Danielsen v. Burnside-Ott Aviation Training Ctr.*, 941 F.2d 1220, 1229-30 (D.C. Cir. 1991).

135. *Busby v. Crown Supply*, 896 F.2d 833 (4th Cir. 1990). For other commentary on the *Busby* case in particular, see Miskimon, *supra* note 11, at 771-74.

136. *Dana Corp. v. Blue Cross & Blue Shield Mut.*, 900 F.2d 882, 887 (6th Cir. 1990) (reserving judgment on the investment injury issue until squarely faced with it). *Dana Corp.* was decided by a three-judge panel. See *id.* at 883.

In *Craighead v. E.F. Hutton & Co.*, however, handed down on the same day as *Dana Corp.*, a different three-judge panel of the Sixth Circuit strongly suggested in dicta that it would require investment injury. See *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 494 (6th Cir. 1990). The *Craighead* court rejected a section 1962(a) civil RICO claim because the plaintiffs had failed to

indecisiveness on the issue. No expressed disposition, or even expressed indeci-

plead the predicate acts of fraud with sufficient particularity. *Id.* The court went on to state:

If plaintiffs had alleged the necessary predicate acts, their section 1962(a) claim would still fail because they have not alleged injuries stemming directly from the defendants' alleged use or investment of their illegally obtained income [Section 1962(a)] requires such a separate and traceable injury, and plaintiffs have alleged only injuries traceable to the alleged predicate acts.

Id.; see also *Newmyer v. Philatelic Leasing*, 888 F.2d 385, 397-98 (6th Cir. 1989) (remanding a section 1962(a) claim to allow the plaintiff the opportunity to establish investment injury), *cert. denied*, 493 U.S. 910 (1990).

Recently, a district court within the Sixth Circuit relied on *Craighead* as authority for the investment injury requirement being accepted in the jurisdiction. See *Nagel v. First of Mich. Corp.*, No. 89-Cv-114, 1990 U.S. Dist. LEXIS 16192, at *31 (W.D. Mich. Dec. 3, 1990) (requiring investment injury but finding that the plaintiff had in fact alleged such injury).

137. *Mid-State Fertilizer v. Exchange Nat'l Bank*, 877 F.2d 1333, 1340 (7th Cir. 1989) (Ripple, J., concurring). The court in *Mid-State Fertilizer* rejected a RICO plaintiff's allegations of predicate acts and therefore affirmed the district court's summary judgment on RICO claims without addressing the investment injury question. *Mid-State Fertilizer*, 877 F.2d at 1337. The district court had rejected an investment injury requirement. *Mid-State Fertilizer v. Exchange Nat'l Bank*, 693 F. Supp. 666, 672-73 (N.D. Ill. 1988), *aff'd on other grounds*, 877 F.2d 1333 (7th Cir. 1989).

Judge Ripple cautioned in his concurring opinion that "this disposition ought not to be read as our deciding *sub silentio* the important question of whether Mid-State has standing to bring an action under subsection (a) of section 1962." *Mid-State Fertilizer*, 877 F.2d at 1340 (Ripple, J., concurring). The standing question to which Judge Ripple refers is the investment injury issue. See *id.* at 1340-41 n.1 (Ripple, J., concurring); see also *Blakey & Perry*, *supra* note 17, at 864 n.29 (citing Judge Ripple's opinion in *Mid-State Fertilizer* as authority for the investment injury issue being unsettled in the Seventh Circuit). Because the Seventh Circuit was affirming on other grounds a district court opinion that had rejected the investment injury requirement, Judge Ripple's cautionary statement may indicate an acceptance of the requirement on his part.

The Seventh Circuit has examined standing/causation issues in the context of actions under section 1962(c). See *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806 (7th Cir. 1987). In *Pate*, the court rejected a requirement that a plaintiff allege injury by reason of at least two predicate acts or by reason of all predicate acts. *Id.* at 809. The Fourth Circuit cited *Pate* in support of the proposition that the language of sections 1962(a) and 1964(c) do not demand an investment injury requirement. *Busby v. Crown Supply*, 896 F.2d 833, 838 (4th Cir. 1990).

The positions of the district courts within the Seventh Circuit are examined *infra* note 144.

138. *Reddy v. Litton Indus.*, 912 F.2d 291 (9th Cir. 1990), *petition for cert. filed*, 60 U.S.L.W. 3057 (U.S. Oct. 15, 1991) (holding that plaintiff lacked standing to bring a RICO action based on wrongful employee termination). Like the Sixth Circuit panel in *Dana Corp.*, discussed *supra* note 136, the Ninth Circuit in *Reddy* felt the facts of the case did not demand resolution of the investment injury requirement. *Reddy*, 912 F.2d at 296. The *Reddy* court noted the four-circuit split on the issue and stated, "[T]his circuit has not yet decided whether a plaintiff must show injury by reason of his use or investment of racketeering income, or if the injury caused by the predicate acts of racketeering is sufficient [to bring a section 1962(a) action]." *Id.*

There had been some remote indication before *Reddy* that the Ninth Circuit might favor rejection of the investment injury rule. See *Wilcox v. First Interstate Bank, N.A.*, 815 F.2d 522, 529 (9th Cir. 1987). The plaintiffs' brief in *Ouaknine v. MacFarlane* asserted that because the Ninth Circuit decided *Wilcox* (a section 1962(a) case) based on *Sedima*, the Ninth Circuit had implicitly rejected a 1962(a) investment injury requirement. Brief for Plaintiffs-Appellants at 42 n.33, *Ouaknine v. MacFarlane*, 897 F.2d 75 (2d Cir. 1990) (No. 89-7668). Of course, *Reddy* firmly establishes that the Ninth Circuit is undecided on the issue.

Within the Ninth Circuit, two districts have taken positions on the investment injury require-

sion on the investment injury requirement is found in the First,¹³⁹ Fifth,¹⁴⁰ Eighth,¹⁴¹ Eleventh,¹⁴² or Federal Circuits.

Within the undecided circuits, there also exists a split on the district court level.¹⁴³ The district courts within the Seventh Circuit have been especially divided on the issue, with prominent judges taking opposite positions.¹⁴⁴ Thus,

ment. The Northern District of California thus far has consistently required investment injury. *See* *Chemical Device Corp. v. American Cyanamid Co.*, No. C-89-1739 WHO, [1988-90 Transfer Binder] RICO Bus. Disp. Guide (CCH) ¶ 7429 (N.D. Cal. filed Jan. 11, 1990) (denying section 1962(a) standing to victims of predicate mail and wire fraud); *In re* *Rexlore, Inc. Secs. Litig.*, 685 F. Supp. 1132, 1142 (N.D. Cal. 1988) (denying section 1962(a) standing to investors injured by predicate securities fraud).

The Eastern and Central Districts of California thus far have rejected the requirement. *See* *Occupational-Urgent Care Health Sys. v. Sutro & Co.*, 711 F. Supp. 1016, 1023 (E.D. Cal. 1989); *In re* *National Mortgage Equity Corp. Mortgage Pool Certificates Secs. Litig.*, 682 F. Supp. 1073, 1081 (C.D. Cal. 1987) (fearing the investment injury requirement would be a retreat to the special injury requirements rejected by the Supreme Court).

139. Within the First Circuit, both the District of Puerto Rico and the District of Massachusetts thus far have required investment injury. *See* *Rodriguez v. Banco Cent.*, 727 F. Supp. 759, 771 (D.P.R. 1989) (holding that an injury consisting of being defrauded of funds does not confer section 1962(a) standing); *Eastern Corporate Fed. Credit Union v. Peat, Marwick, Mitchell & Co.*, 639 F. Supp. 1532, 1537 (D. Mass. 1986) (same, denying standing to investors in bank); *Econo-Car Int'l v. Agency Rent-A-Car*, 589 F. Supp. 1368, 1372 (D. Mass. 1984) (dismissing claim where no reasonable juror could find investment caused plaintiff's injury).

140. Within the Fifth Circuit, only the Eastern District of Louisiana has considered the investment injury issue. That court rejected the requirement. *See* *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 806 (E.D. La. 1986). The *Louisiana Power & Light* court was willing to rely heavily on the policy goal of reaching corporate defendants in rejecting the investment injury requirement. *Id.*

141. Within the Eighth Circuit, only the District of Minnesota has considered the investment injury issue. That court required allegation of investment injury. *See* *Airlines Reporting Corp. v. Barry*, 666 F. Supp. 1311, 1314-15 (D. Minn. 1987) (denying standing to victims of an airline ticket scam who did not allege investment injury).

142. Within the Eleventh Circuit, only the Southern District of Florida has considered the investment injury issue. That court rejected the requirement. *See* *Avirgan v. Hull*, 691 F. Supp. 1357, 1363 (S.D. Fla. 1988), *aff'd*, 932 F.2d 1572 (11th Cir. 1991). The *Avirgan* court relied heavily on its perception of the policy goals of RICO and on the liberal construction clause. *Id.*

143. *See supra* notes 135-42 (chronicling the positions of many of the district courts within undecided circuits).

144. The divided case law on the investment injury requirement from district courts within the Seventh Circuit has been prolific. Judges in the Northern District of Illinois have disagreed significantly on the issue.

Judge Shadur has been a strong proponent of the investment injury requirement. In *P.M.F. Services v. Grady*, 681 F. Supp. 549 (N.D. Ill. 1988), Judge Shadur dismissed an investor's section 1962(a) action against a bank that retained racketeering profits and invested them. *Id.* at 555. The investor had not alleged any injury from the investment, only from the original predicate acts of mail fraud. *Id.*; *see also* *Donohoe v. Consolidated Operating & Prod. Co.*, No. 86 C 7543, 1987 U.S. Dist. LEXIS 45, at *17 (N.D. Ill. Jan. 7, 1987) (accepting, without extensive discussion, the investment injury requirement and rejecting the claim of the plaintiff, an investor, who could not allege injury from the defendant's use or investment). Judge Shadur's approach to investment injury has been specifically criticized by Professor Blakey and Mr. Perry. *See* *Blakey & Perry, supra* note 17, at 863 n.29.

Judge Bua, recently retired, also had required investment injury in section 1962(a) actions and

not only the Supreme Court's lack of disposition, but also the refusal of cer-

penned an influential opinion on the subject. See *Palumbo v. I.M. Simon & Co.*, 701 F. Supp. 1407, 1410 (N.D. Ill. 1988); see also *Craig v. First Am. Capital Resources*, 740 F. Supp. 530, 537 (N.D. Ill. 1990) (declining to reconsider *Palumbo*, noting majority acceptance of the investment injury requirement); *Grove Fresh Distribs. v. Flavor Fresh Foods*, 720 F. Supp. 714, 716 (N.D. Ill. 1989) (same).

Judge Plunkett as well has consistently required investment injury. See *Prasinos v. National Mortgage Bank*, No. 89 C 5378, 1990 U.S. Dist. LEXIS 15049, at *4 (N.D. Ill. Oct. 15, 1990) (rejecting the defendants' motion for interlocutory appeal to allow the Seventh Circuit to consider the investment injury issue); *Illinois v. Flisk*, 702 F. Supp. 189, 193 (N.D. Ill. 1988) (holding that where the State Department of Revenue brought a civil RICO claim involving unpaid taxes, the use of those funds to pay employees did not constitute actionable injury for the Department); *Flood v. Waste Management*, No. 87 C 4643, 1987 U.S. Dist. LEXIS 629, at *16 (N.D. Ill. Jan. 21, 1988); *Village of Fox Lake v. Waste Management*, No. 86 C 4888, 1987 U.S. Dist. LEXIS 1593, at *16 (N.D. Ill. Mar. 2, 1987).

Other opinions in the Northern District of Illinois requiring investment injury include *Midwest Grinding Co. v. Spitz*, 716 F. Supp. 1087, 1091 (N.D. Ill. 1989) (Rovner, J.) (denying section 1962(a) standing to a plaintiff harmed by a fraudulent overcharging scheme but not by any subsequent investment); *Grove Fresh Distribs. v. Everfresh Juice Co.*, Nos. 89 C 1118, 1117, 1113, 1990 U.S. Dist. LEXIS 14147, at *11 (N.D. Ill. Nov. 27, 1989) (Zagel, J.) (rejecting sua sponte a claim alleging injury only from predicate fraud, not from any subsequent investment of proceeds); *Latigo Ventures v. Laventhol & Horwath*, No. 85 C 9584, 1987 U.S. Dist. LEXIS 11225, at *7 (N.D. Ill. Nov. 27, 1987) (Duff, J.) (accepting the investment injury requirement without extensive analysis and denying standing to plaintiff investors who could not allege same).

Judge Hart has led Northern District judges in rejecting the investment injury requirement. He authored a key opinion on the issue. See *Mid-State Fertilizer v. Exchange Nat'l Bank*, 693 F. Supp. 666, 672 (N.D. Ill. 1988), *aff'd on other grounds*, 877 F.2d 1333 (7th Cir. 1989). He recently reaffirmed his position. See *In re Conticommodity Servs., Inc. Secs. Reg.*, 733 F. Supp. 1555, 1566 (N.D. Ill. 1990). Judge Hart's analysis has been specifically followed by Judge Marovich. See *Aetna Life Ins. Co. v. Youtzy*, No. 88 C 10562, 1990 U.S. Dist. LEXIS 231, at *8 (N.D. Ill. Jan. 9, 1990) (recognizing the split over the investment injury requirement but accepting Judge Hart's analysis in *Mid-State Fertilizer*).

For other opinions in the Northern District of Illinois rejecting an investment injury requirement, see *Matlock Fertilizer Co. v. Bost*, No. 87 C 3946, 1989 U.S. Dist. LEXIS 1995, at *15 (N.D. Ill. Feb. 27, 1989) (Parsons, J.) (relying heavily on the liberal construction clause to reject the requirement); *Continental Grain Co. v. Pullman Standard*, 690 F. Supp. 628, 633 (N.D. Ill. 1988) (Leinenweber, J.) (relying on analogous section 1964(c) precedent to reject the requirement); *Pitalis v. Skokie Trust & Sav. Bank*, No. 85 C 8596, 1987 U.S. Dist. LEXIS 3161, at *1 (N.D. Ill. Apr. 22, 1987) (Holderman, J.) (dismissing section 1962(a) claim against a bank where plaintiff alleged no injury from subsequent investment).

Two judges have avoided disposition of the issue. Judge Kocoras almost faced the investment injury issue in a suit involving fraudulent transfer of postage stamps. See *Buckley Dement, Inc. v. Perez*, No. 90 C 2414, 1990 U.S. Dist. LEXIS 11102, at *19 (N.D. Ill. Aug. 23, 1990). Because the plaintiffs in that case failed to plead fraud with sufficient particularity, Judge Kocoras did not reach the investment injury requirement. *Id.* He hinted that he would require investment injury by referring to the "rather conclusory fashion" with which the plaintiff asserted that injury from the predicate acts would be enough to gain standing. See *id.* at *10. Similarly, Chief Judge Moran, when faced with the argument, dismissed it as untimely. *J.D. Marshall Int'l v. Redstart, Inc.*, No. 86 C 371, 1989 U.S. Dist. LEXIS 15758, at *11 (N.D. Ill. Dec. 29, 1989), *aff'd*, 935 F.2d 815 (7th Cir. 1991).

In the Central District of Illinois, Judge Mills has considered the issue and has required investment injury. See *Forkin v. Paine Webber, Inc.*, Nos. 87-3197, 87-3191 [1988-89 Transfer Binder] 1322 Fed. Sec. L. Rep. (CCH) ¶ 94,129 (C.D. Ill. Nov. 23, 1988) (denying recovery for losses

tain circuit courts to dispose of the issue has left the federal judiciary split on the investment injury issue.¹⁴⁵ Two recent circuit court cases exemplify the split.

In *Ouaknine v. MacFarlane*,¹⁴⁶ the Second Circuit held that a plaintiff must allege investment injury in order to have standing to sue in a civil RICO section 1962(a) action.¹⁴⁷ Conversely, the Fourth Circuit in *Busby v. Crown Supply*,¹⁴⁸ focusing on the same interpretive issues as the Second Circuit, rejected the investment injury requirement in section 1962(a) actions.¹⁴⁹ Both decisions were published in February of 1990.

These two decisions focused on the same interpretive issues, without disagreeing substantially on the proper *approach* to the question. Therefore, examining these two cases will bring to light the bases of the interpretive split.¹⁵⁰

C. *Ouaknine v. MacFarlane: The Second Circuit Adopts the Investment Injury Requirement*

In *Ouaknine*, the Second Circuit faced the investment injury issue in a

incurred by victims of securities fraud).

145. Interestingly, the Seventh Circuit has also left its district courts divided on another controversial area of RICO: the correct point of accrual for private civil claims. While the Supreme Court has determined that the civil RICO statute of limitations is four years, *Agency Holding Corp v. Malley-Duff & Assocs.*, 483 U.S. 143, 146 (1987), the Court has left the determination of the point of accrual to a divided lower federal judiciary. See Mary S. Humes, *RICO and a Uniform Point of Accrual*, 99 YALE L.J. 1399, 1401-02 (1990); Paul B. O'Neill, Note, *Mother of Mercy, Is This the Beginning of RICO?: The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. REV. 172, 174-75 (1990). The Seventh Circuit has not yet resolved the issue. *South Chicago Bank v. Notaro*, No. 90 C 6357, 1991 WL 21185, at *5 (N.D. Ill. Feb. 12, 1991) ("[T]he Seventh Circuit has not yet ruled on the [civil RICO accrual] issue.").

Many judges within the Seventh Circuit have adopted the "last predicate act" rule: A civil RICO action accrues upon the last predicate act in the relevant pattern. See *Norris v. Wirtz*, 703 F. Supp. 1322, 1326 (N.D. Ill. 1989); *Citicorp Sav. of Ill. v. Streit*, No. 84 C 7471, 1987 WL 9318, at *2 (N.D. Ill. Apr. 3, 1987); *County of Cook v. Berger*, 648 F. Supp. 433, 433-35 (N.D. Ill. 1986); *Newman v. Wanland*, 651 F. Supp. 20, 22 (N.D. Ill. 1986); see also *South Chicago Bank*, 1991 WL 21185, at *5 (listing other cases adopting the last predicate act rule).

Most other judges within the circuit have adopted the "discovery" rule: A civil RICO action accrues when the plaintiff discovers or should discover the injury being sued upon. See *South Chicago Bank*, 1991 WL 21185, at *5-6 (adopting the rule and listing other cases so holding); *In re VMS Secs. Litig.*, 752 F. Supp. 1373, 1389 (N.D. Ill. 1990).

146. 897 F.2d 75 (2d Cir. 1990).

147. *Id.* at 83.

148. 896 F.2d 833 (4th Cir. 1990).

149. *Id.* at 841.

150. As *Busby* is the only circuit court case rejecting the investment injury requirement, this Comment uses that case to flesh out that position. The Comment uses *Ouaknine*, the Second Circuit's decision, to examine the position favoring the investment injury requirement both because it was the most recent case on that position during the writing, and because it was the most extensive appellate court analysis concluding that the investment injury requirement is warranted. Since completion of this project, the D.C. Circuit adopted the investment injury requirement. See *Danielsen v. Burnside-Ott Aviation Training Ctr.*, 941 F.2d 1220, 1229-30 (D.C. Cir. 1991). The *Ouaknine* court's analysis, however, still remains the most extensive.

RICO claim arising out of complicated, multi-party real estate transactions.¹⁵¹ The court read RICO's language and Supreme Court interpretation of that language as directing the adoption of the investment injury requirement.¹⁵² The court also was unwilling to adopt an overly liberal construction of RICO and its intended reach that would contradict the court's reading of the text.¹⁵³

1. *Facts and Procedural History*

Ouaknine v. MacFarlane involved RICO, securities fraud, and pendent state claims.¹⁵⁴ The plaintiffs, Ouaknine and a development company, alleged that multiple defendants made false representations to induce their investments. The plaintiffs further alleged the defendants' activities constituted a pattern of racketeering and that the defendants then invested the proceeds from racketeering in an enterprise, thereby violating section 1962(a).¹⁵⁵ The plaintiffs also alleged injury, but only from the predicate fraudulent representations, and not from any subsequent use or investment of the proceeds.¹⁵⁶

The district court ruled in favor of all defendants, dismissing the section 1962(a) RICO claim for failure to meet the investment injury requirement.¹⁵⁷ The plaintiffs appealed.

2. *Justification of the Investment Injury Requirement*

The Second Circuit affirmed the district court, holding that to state a claim for civil damages under section 1962(a), a plaintiff must allege *injury arising from the defendants' investment* of racketeering income in an enterprise.¹⁵⁸ Because the district court held that Ouaknine had not alleged any facts establishing that the injury arose from the defendants' investment, only injury from the predicate fraud, the Second Circuit affirmed the dismissal of the section 1962(a) claim.¹⁵⁹

The Second Circuit essentially examined three sources to interpret sections 1962(a) and 1964(c): the plain language of the statute,¹⁶⁰ the precedential effect of the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*,¹⁶¹

151. *Ouaknine*, 897 F.2d at 77-78. The plaintiff Ouaknine subscribed to stock in a plaintiff corporation established for investment in a real estate project. Defendants gave Ouaknine false assurances to get his approval on further transactions and to get him to take a nonrecourse note instead of cash. *Id.* at 78.

152. *Id.* at 82-83.

153. *Id.* at 83.

154. *Id.* at 77.

155. *Id.* at 77-79.

156. *Id.*

157. *Id.* The court also dismissed the section 1962(c) RICO claim based on predicate securities fraud, the securities fraud counts, and the state-law claims based on fraud, for failure to plead fraud with particularity. *Id.*

158. *Id.* at 83.

159. *Id.*

160. *Id.* at 82-83.

161. *Id.* at 83 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985)).

and the remedial purpose of RICO as expressed in its "liberal construction clause" and as interpreted by the Supreme Court in *Sedima*.¹⁶²

a. RICO's language

The Second Circuit noted that, in analyzing a statute, the primary source for interpretation is the statutory language.¹⁶³ The court emphasized that section 1964(c) authorizes recovery for injuries "by reason of a violation of section 1962."¹⁶⁴ Then, looking at section 1962(a), the court noted that its language provides that "[i]t shall be unlawful for [a person who has received income from a pattern of racketeering] . . . to invest . . . [that] income . . . in [the enterprise]."¹⁶⁵

The Second Circuit maintained that a violation of section 1962(a) is the actual use or investment of income derived from a pattern of racketeering activity.¹⁶⁶ Mere participation in the predicate acts of racketeering does not establish the violation.¹⁶⁷ Thus, the court viewed the "plain language" of the statute as calling for the investment injury requirement.¹⁶⁸

162. *Id.* at 75.

163. *Id.* at 82.

164. *Id.*

165. *Id.* (citing 18 U.S.C. § 1962(a) (1988)).

166. *Id.*

167. *Id.*

168. *Id.* at 82-83.

The Third Circuit's acceptance of the investment injury requirement relied in part on the fact that a majority of courts, thus far, had so ruled. *See Rose v. Bartle*, 871 F.2d 331, 357 (1989). Its own analysis was limited to the conclusion that "the allegation of income use or investment injury 'is consistent with both the literal language and the fair import of the language [of section 1962(a)].'" *Id.* at 358 (quoting *P.M.F. Servs. v. Grady*, 681 F. Supp. 549, 555 (N.D. Ill. 1988)).

The Tenth Circuit also relied on the statute's "plain language" in requiring investment injury. The court, in *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989), asserted that RICO "does not state that it is unlawful to receive racketeering income; rather . . . the statute prohibits a person who *has received* such income *from using or investing it* in the proscribed manner." *Id.* at 1149.

Professor Blakey and Mr. Perry find another piece of evidence in the language of the statute that, according to them, suggests courts should reject the investment injury requirement. They argue that because section 1962(a) "not only requires 'use or invest,' but also requires that the person be a principal in the racketeering activity . . . [the violation of section 1962(a)] requires both 'racketeering activity' and 'use or invest . . .'" Injury by either would, therefore, be injury "by reason of a violation of section 1962" Blakey & Perry, *supra* note 17, at 864 n.29 (citation omitted). Under this analysis, the fact that the predicate acts are elements of the violation means that injuries from the predicate acts alone are recoverable.

This Comment later argues that Blakey and Perry's statutory analysis does not address the real issue of whether that participation as a principal is part of the violation and therefore can cause injuries recoverable under section 1964(c). *See infra* text accompanying note 247 (rebutting Blakey and Perry's analysis). Furthermore, it is not entirely clear that section 1962(a)'s clause, "in which such person has participated as a principal," 18 U.S.C. § 1962(a) (1988), applies to the phrase "pattern of racketeering activity," *id.* § 1961(5). *See Hilary S. Schultz, Note, Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491, 1496 (1974) (asserting "[t]he inclusion of the clause 'in which such person has participated as a

b. The effect of *Sedima*

The plaintiff argued that the Supreme Court's decision in *Sedima* strongly suggested that an investment injury requirement did not belong in section 1962(a) actions.¹⁶⁹ In *Sedima*, the Supreme Court held that plaintiffs instituting civil actions under section 1962(c) need not allege injury "separate from the harm from the predicate acts."¹⁷⁰ The plaintiffs in *Ouaknine* had pointed to the *Sedima* Court's statement that "[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by [section 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)."¹⁷¹

The *Ouaknine* court acknowledged that the Supreme Court in *Sedima* had interpreted the language of section 1962(c) broadly.¹⁷² Still, the *Ouaknine* court held *Sedima* did not control the disposition of a section 1962(a) claim.¹⁷³ The *Ouaknine* court limited *Sedima* to the specific subsection of section 1962 at issue in that case, noting that "the Court was dealing only with that section [1962(c)] of RICO."¹⁷⁴ The subtle linguistic distinction between sections 1962(a) and 1962(c) allowed the court to limit *Sedima* squarely to its facts.¹⁷⁵ Section 1962(c) prohibits the conducting of affairs *through* a pattern of racketeering activity. Thus, the predicate acts of racketeering will normally constitute the violation.¹⁷⁶ In section 1962(a), on the other hand, the pattern of racketeering is not, under the Second Circuit's analysis, what constitutes the violation.¹⁷⁷ That section prohibits use or investment of funds *that have been received* through a pattern of racketeering.¹⁷⁸

The *Ouaknine* court also noted that the *Sedima* decision rejected a narrow reading of section 1962(c) because "the essence of the violation [of section 1962(c)] is the commission of those acts in connection with the conduct of an enterprise."¹⁷⁹ Because, according to the court, the "essence" of a violation of section 1962(a) is not the commission of predicate acts but the investment of racketeering income, the *Sedima* holding again did not contradict the invest-

principal' was presumably intended to clear up . . . ambiguity, but it is not clear from the placement of the clause in the statute whether it modifies 'a pattern of racketeering activity' as well as 'the collection of an unlawful debt,' or just the latter phrase"). *But see* Rakoff, *supra* note 56, § 1.06[1] (adopting the broader reading of the "participated as a principle" clause).

169. *Ouaknine*, 897 F.2d at 83.

170. *Sedima*, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985); *see also supra* notes 97-101 and accompanying text (discussing *Sedima*).

171. *Ouaknine*, 897 F.2d at 83 (quoting *Sedima*, 473 U.S. at 495).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* (quoting *Sedima*, 473 U.S. at 497).

ment injury requirement.¹⁸⁰

The court also relied on the statement in *Sedima* that a “‘plaintiff only has standing if . . . he has been injured in his business or property by the conduct constituting the violation.’”¹⁸¹ The *Ouaknine* court viewed the “conduct constituting the violation” of section 1962(a) to be the investment of racketeering income.¹⁸² The Second Circuit, therefore, read *Sedima* as not demanding the rejection of the investment injury requirement, and surprisingly was able to read into that opinion the necessity of adopting the requirement.¹⁸³

In short, the Second Circuit’s analysis of *Sedima* limited the effect of that opinion to section 1962(c) actions, and rejected the theory that the broad language of the opinion covered section 1962(a) actions as well. Further, the Second Circuit’s analysis of *Sedima*’s “essence of the violation” language allowed it to read *Sedima* as prescribing the investment injury requirement.

c. The purpose of RICO

The Second Circuit considered the effect of the liberal construction clause in its analysis of the legislative intent of Congress in enacting RICO. RICO’s “liberal construction clause” states that its provisions are to be “liberally construed to effectuate its remedial purposes.”¹⁸⁴ The *Sedima* Court had relied in part on that congressional directive,¹⁸⁵ and asserted further that “[t]he statute’s ‘remedial purposes’ are nowhere more evident than in the provision of private action for those injured by racketeering activity.”¹⁸⁶

The Second Circuit rejected *Ouaknine*’s argument that this statutory provision and judicial gloss demand the rejection of the investment injury requirement.¹⁸⁷ The court granted that RICO is to be construed broadly, but would not read that general directive as overriding a limitation found in the explicit text of the statute.¹⁸⁸

By not extending the explicit text of the RICO statute, the court was able to conclude that recovery under section 1962(a) does require investment injury.¹⁸⁹ Because the plaintiffs could not allege such injury,¹⁹⁰ only injury from

180. *Id.*

181. *Id.* (quoting *Sedima*, 473 U.S. at 496) (emphasis added by the *Ouaknine* court).

182. *Id.*

183. *Id.*

The Tenth Circuit rejected a broad reading of *Sedima* as well, also relying on the fact that the case was dealing only with section 1962(c) actions. *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1150 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989).

184. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947.

185. *Sedima*, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479, 498 (1985).

186. *Id.*

187. *Ouaknine*, 897 F.2d at 83.

188. *Id.*

189. *Id.*

190. A plaintiff could conceivably meet the investment injury requirement, although it is difficult. SMITH & REED, *supra* note 48, ¶ 5.02.

One inventive way to meet the investment injury requirement is to allege that the proceeds of a

the predicate fraud, the court affirmed the dismissal of the section 1962(a) claim.¹⁹¹

D. Busby v. Crown Supply: The Fourth Circuit Rejects the Investment Injury Requirement

In *Busby*, the Fourth Circuit, faced with the issue of investment injury in the context of an employer-fraud RICO claim, disagreed with the Second, Third, and Tenth Circuits. The court held that RICO's language, purpose, and Supreme Court interpretations all warrant a rejection of the investment injury requirement.¹⁹²

1. Facts and Procedural History

The plaintiff, Busby, suing on behalf of himself and all current and former sales representatives of the defendant, Crown Supply, Inc. ("Crown"), alleged that Crown and a subsequent owner of Crown's business formulated a scheme of false representation while he was their sales representative.¹⁹³ More specifically, Busby alleged that Crown would understate the profit upon which sales representatives' commissions were based.¹⁹⁴

Busby sued under sections 1962(a), 1962(c), and 1964(c) of RICO.¹⁹⁵ The district court dismissed the section 1962(a) claims on the grounds that the plaintiff failed to allege any investment injury.¹⁹⁶

pattern of racketeering were invested in the enterprise that engaged in the pattern of racketeering. A plaintiff would allege further injury from the continuation of the enterprise, which was made possible by the internal investment of racketeering proceeds. At least one court has accepted such internal investment injury as satisfying the investment injury requirement. *See Blue Cross v. Nardone*, 680 F. Supp. 195, 197-98 (W.D. Pa. 1988).

The reason this "internal investment" theory at times may not appear appropriate is that the injury may flow from the kinds of criminal activity that are RICO predicate acts—for example, mail fraud and wire fraud. Having just decided injury from predicate acts is not sufficient to bring a section 1962(a) civil action, a court may not want to let a plaintiff in the "back door" to recovery for injury from those sorts of predicate acts.

Nevertheless, if the litigation focuses on the factual causation issue of whether the plaintiff was injured by reason of a RICO violation, then the allegation of internal investment injury must confer standing for a section 1962(a) claim. *See Donohoe v. Consolidated Operating & Prod. Corp.*, No. 86 C 7543, 1987 U.S. Dist. LEXIS 45, at *18-19 (N.D. Ill. Jan 8, 1987).

The crimes of the perpetuated criminal enterprise are not predicate acts for the purposes of a plaintiff's allegations. They are actions that happen to be listed in the statute as RICO predicate acts, but that are not alleged as such in the plaintiff's complaint. If a plaintiff can establish the causation from the RICO violation to the injury, the plaintiff should be free to proceed. *Contra Sorenson*, *supra* note 11, at 1235-36.

191. *Ouaknine*, 897 F.2d at 83.

192. *Busby v. Crown Supply*, 896 F.2d 833, 837 (4th Cir. 1990).

193. *Id.*

194. *Id.*

195. *Id.* The plaintiff also attached two pendant state-law claims. *Id.*

196. *Id.* at 835-36. The district court also dismissed all RICO counts for failure to state a claim, ruling that plaintiff's RICO allegations failed to establish a pattern of racketeering activity. *Id.* at 835. The district court suggested that dismissal also might be required because the com-

2. Rejection of the Investment Injury Requirement

The Fourth Circuit reversed the district court, holding, among other rulings,¹⁹⁷ that section 1962(a) actions carry no investment injury requirement.¹⁹⁸ Although the Fourth Circuit came to the opposite conclusion as the Second Circuit, the Fourth Circuit in *Busby* nevertheless looked at essentially the same interpretive tools: RICO's language,¹⁹⁹ Supreme Court precedent,²⁰⁰ and legislative purpose.²⁰¹

a. RICO's language

Like the Second Circuit, the Fourth Circuit began its analysis by stating that, if unambiguous, the explicit language of the RICO statute is determinative.²⁰² That language, the court maintained, does not require investment injury.²⁰³

The court emphasized that a violation of section 1962(a) contains two separate elements: "(a) receipt of income from a pattern of racketeering activity, and (b) the use or investment of this income in an enterprise."²⁰⁴ These are the two events that must occur before section 1962(a) is violated.

The court held that the civil recovery provision does not limit recovery to injuries flowing from the second prong of a section 1962(a) violation.²⁰⁵ The court noted that injuries, as a factual matter, can flow both from the predicate

plaint named Crown and the subsequent owner as defendants and pointed to a division of Crown as the "enterprise" in the RICO violation. *See id.* at 835-36.

197. The court also disposed of pattern and person/enterprise issues. Based on the Supreme Court's holding in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), discussed *supra* notes 112-18 and accompanying text, the court and the parties agreed that the plaintiffs had alleged a pattern of racketeering. *Busby*, 896 F.2d at 836. The court would not consider the constitutionality of RICO because it had not been litigated in the district court. *Id.*

The court, sitting en banc, reconsidered its person/enterprise holding in *United States v. Computer Sciences*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). *Computer Sciences* had required the "person" and "enterprise" in section 1962(a) actions be distinct entities. *Id.* at 1190. The *Busby* court was persuaded by circuit court opinions, especially the Seventh Circuit's opinion in *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985). *Busby*, 896 F.2d at 841. *Busby* overruled *Computer Sciences* in so far as it had required this person/enterprise distinction in section 1962(a) actions. *Id.*

198. *Busby*, 896 F.2d at 837.

199. *Id.*

200. *Id.* at 839.

201. *Id.* at 838.

202. *Id.* at 837 (quoting *Russello v. United States*, 464 U.S. 16, 20 (1983) ("[A]bsent ambiguity or a clearly expressed legislative intent to the contrary, [the] statutory language is conclusive.")).

203. *Id.* The court noted that other courts had required investment injury based on the statutory language of section 1962(a). *Id.* (citing *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th Cir.), *cert denied*, 493 U.S. 820 (1989)).

204. *Id.*

205. *Id.*

racketeering acts and the investment of the racketeering income.²⁰⁶ The court therefore recognized recovery for whatever part of the RICO violation, as the court defined it, caused the injury.

b. The effect of *Sedima* and *Haroco*

The Fourth Circuit used *Sedima, S.P.R.L. v. Imrex Co.*²⁰⁷ and its companion case, *American National Bank & Trust Co. v. Haroco, Inc.*,²⁰⁸ in the exact manner criticized by the Second Circuit in *Ouaknine*.²⁰⁹

According to the Fourth Circuit, the passage in *Sedima* stating, in terms applying to section 1962 in its entirety, that injury from predicate racketeering acts is actionable under section 1964(c),²¹⁰ was evidence that the Supreme Court would grant standing in a section 1962(a) action without investment injury.²¹¹ Because *Sedima*'s language refers generally to section 1962, the Fourth Circuit read the section 1962(c) analysis in *Sedima* as syllogistically working from the general statement that injuries from section 1962 predicate acts warrant civil recovery to the conclusion that injuries from section 1962(c) predicate acts warrant civil recovery. Thus, the Fourth Circuit did not read *Sedima* as an analysis of the language of section 1962(c), but as a broad statement about the nature of civil RICO recovery. The fact that *Sedima* was a section 1962(c) case did not, therefore, restrict the logical effect of its language. The Fourth Circuit held that the logic of *Sedima* applies equally to section 1962(a) and 1962(c) claims.²¹²

The court also relied on similar language from another section 1962(c) case, *American National Bank & Trust Co. v. Haroco, Inc.* The *Busby* court noted that in *Haroco*, the Supreme Court rejected "[t]he submission that the injury must flow not from the predicate acts themselves" but rather from the "conduct of an enterprise."²¹³ The *Busby* court read this language as rejecting a special injury requirement in any civil RICO claims. The *Busby* court therefore applied the language and logic of *Haroco* to section 1962(a) actions.²¹⁴

206. *Id.* at 837-38. The court appeared to recognize some controversy as to whether injury by reason of the predicate acts alone ever arose. The court asserted that some courts had assumed that predicate acts cannot cause injury. *Id.*; see also *Avirgan v. Hull*, 691 F. Supp. 1357, 1362 (S.D. Fla. 1988) (stating that a defendant's conduct can injure a RICO plaintiff through the use or investment of the racketeering income and by the "operation of the enterprise"); G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 586 n.237 (1987) (asserting that when racketeering activity produces income and that income is invested, injury may occur in various ways).

207. 473 U.S. 479 (1985).

208. 473 U.S. 606 (1985).

209. See *supra* notes 169-83 and accompanying text (discussing the Second Circuit's interpretation of *Sedima*).

210. *Sedima*, 473 U.S. at 495.

211. *Busby*, 896 F.2d at 839.

212. *Id.* at 839-40.

213. *Id.* (quoting *Haroco*, 473 U.S. at 609).

214. *Id.* at 839.

The *Busby* court acknowledged that the direct precedential value of both of these Supreme Court cases is limited, as both cases dealt explicitly only with section 1962(c) claims, not 1962(a) claims.²¹⁵ The court contended, however, that "it is clear that the Supreme Court was referring to [section] 1962 as a whole in both cases, and in fact cited [section] 1962(a) and the offense it defines in *Sedima*."²¹⁶

c. The purpose of RICO

The *Busby* court also contended that the investment injury requirement conflicts with RICO's "liberal construction clause."²¹⁷ The court noted that this clause had been used by the Supreme Court to support broad applications of RICO.²¹⁸

The Fourth Circuit maintained that the investment injury requirement violates congressional intent because Congress intended RICO to cover not only organized crime but also legitimate corporations engaged in racketeering activity.²¹⁹ The investment injury rule, in conjunction with the section 1962(c) person/enterprise distinction,²²⁰ would essentially eliminate such corporate liability.²²¹ The Fourth Circuit further argued that in bringing a section 1962(a) action against a corporate defendant, it is virtually impossible to prove injury flowing from investment.²²² The predicate acts, often mail or wire fraud, usually produce the injury sued upon.²²³ Thus, the broad remedial purpose of RICO would be frustrated by imposing the investment injury requirement.²²⁴

The court acknowledged that problems may arise from RICO's breadth, but

215. *Id.*

216. *Id.*

217. *Id.* at 838.

218. *Id.* The court noted three instances of Supreme Court use of the liberal construction clause: *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 492 n.10 (1985) ("[I]f Congress' liberal-construction mandate is to be applied anywhere, it is in section 1964, where RICO's remedial purposes are most evident."); *Russello v. United States*, 464 U.S. 16, 27 (1983) (using legislative history to support a broad use of the criminal forfeiture provision); *United States v. Turkette*, 452 U.S. 576, 587 (1981) (same; applying to the enterprise requirement). *Busby*, 896 F.2d at 838.

219. *Busby*, 896 F.2d at 838 (citing *United States v. Turkette*, 452 U.S. at 587) ("[I]nsulating the wholly criminal enterprise from prosecution under RICO is the more incongruous position [given RICO's language and legislative history]."); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerald E. Lynch*, 88 COLUM. L. REV. 774, 786 (1988) (stating that the prosecution of legitimate but criminal enterprises was a key congressional concern).

220. See *supra* notes 124-26 and accompanying text for an explanation of the section 1962(c) person/enterprise distinction.

221. See *Busby*, 896 F.2d at 838-39.

222. *Id.* at 839; see also *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 806-07 (E.D. La. 1986). The *Louisiana Power & Light* court asserted that if courts require investment injury then a plaintiff "will almost never prove a claim against a corporate defendant." 642 F. Supp. at 806-07. The court feared that because of tracing problems, a plaintiff would not be able to prove causation from the investment of the proceeds and the injury. *Id.*

223. *Busby*, 896 F.2d at 838.

224. *Id.*

asserted it is the plain language of the statute that creates this breadth.²²⁵ Therefore, the court asserted, any corrections lie within the purview of Congress.²²⁶

According to the Fourth Circuit, because Busby alleged injury flowing from predicate acts, he deserved to have his section 1962(a) claim analyzed in a traditional proximate cause analysis, without any additional requirement that the investment or use of racketeering income cause his injury.²²⁷ Thus, the court reversed and remanded the dismissal of the section 1962(a) RICO claim.²²⁸

In summary, both the Second Circuit and the Fourth Circuit recently considered whether a plaintiff alleging injury from predicate racketeering activity, and not from the subsequent use or investment of the racketeering proceeds, may state a claim for civil damages under section 1962(a) of RICO. The Second Circuit, aligning itself with the majority of federal courts, held that a plaintiff would not have stated a claim under these circumstances. The court held that RICO's language, its interpretation by the Supreme Court, and its legislative purpose all urged such an investment injury requirement. The Fourth Circuit, turning to those same sources of statutory construction, came to the opposite conclusion, holding that injury from predicate acts is sufficient to state a section 1962(a) claim.

III. ANALYSIS: THE SECTION 1962(A) INVESTMENT INJURY REQUIREMENT IS AN ACCURATE READING OF RICO

The history of judicial limitations on RICO has been a history of courts imposing restraints found neither in the language nor the legislative record of the statute. Because of this history, a suspicion of new judicial limitations, such as the investment injury requirement, is justified. Nonetheless, the plain language of the statute does require investment injury in section 1962(a) actions. The interplay between sections 1962(a) and 1962(c), when examined carefully, demands this result. Further, the precedential effect of *Sedima*, while not entirely clear, cannot by itself require rejection of the investment injury requirement.

A. *The Justified Suspicion of Judicial Limits on RICO*

When approaching the investment injury issue, a possible first reaction is to suspect the kind of judicial tampering that the Supreme Court has consistently rejected.²²⁹ Half of the *Sedima* decision was devoted to rejecting special racketeering requirements in section 1962(c) actions that were imposed by the Sec-

225. *Id.* at 839.

226. *Id.*

227. *Id.* at 840.

228. *Id.* at 834.

229. See *supra* notes 79-120 and accompanying text (discussing the efforts of lower federal courts to find limits to RICO and the Supreme Court's rejection of those efforts).

ond Circuit, a court that has authored the leading case supporting the section 1962(a) investment injury requirement.²³⁰

Commentators suspicious of judicial tampering with the impact of the breadth of RICO's plain language are understandably uncomfortable with judges deciding whether a person is the kind of criminal that RICO was meant to punish.²³¹ They argue that any broad language in the statute should not be "interpreted" out.²³²

Their argument is persuasive. RICO is a broad statute. Its language covers a multitude of situations.²³³ For a court to impose limits based on its own perceptions of the proper reach of the statute arguably is an improper use of judicial power.²³⁴ While an inquiry into RICO's intended reach helps understand the statute, it is not the first question that must be asked. The first question is what RICO actually does cover by its language.

Undoubtedly, however, certain aspects of the statute have allowed applications to situations perhaps not conceived by Congress.²³⁵ The most glaring aspect is the inclusion of mail and wire fraud as predicate racketeering acts.²³⁶ A limit on civil RICO actions that is legitimately found in the statute's language therefore would, in most commentators' eyes, be welcome. Civil RICO's primary applications have been in areas to which many believe private federal causes of action should not apply.²³⁷

The first question, nonetheless, is what the language of RICO says.²³⁸ It is important to discuss the interpretation of the statute's language uninfluenced by the controversy surrounding RICO. One must attempt to decide what the linguistics of the statute actually accomplish.

B. Plain Language, Liberal Construction, and the Bottom Line: What Is a "Violation"?

The language issue can be divorced from any policy debate lurking behind RICO case law. Ascertaining the meaning of the term "violation," as used in

230. See *Ouaknine v. MacFarlane*, 897 F.2d 75 (2d Cir. 1990).

231. *Blakey & Perry*, *supra* note 17, at 864-65 ("To assert that an offender's treatment should be determined by the color of a collar is contrary not only to the text and legislative history of the statute, but also to our most basic premise of our jurisprudence: equal justice under law." (footnote omitted)).

232. See *supra* notes 60-61 and accompanying text (Prof. G. Robert Blakey and Mr. Michael Perry).

233. See *supra* note 26 (listing the predicate offenses included in RICO's definition of "racketeering activity").

234. See *supra* note 231.

235. See *supra* notes 71-76 and accompanying text (discussing the use of RICO against "garden-variety fraud").

236. See *supra* note 75 for support for the proposition that the inclusion of mail and wire fraud as predicate acts has been the primary catalyst for the growth of civil RICO.

237. See *supra* notes 71-76 and accompanying text.

238. The leading majority and minority opinions on investment injury agree on this fundamental first step of analysis. See *Ouaknine v. MacFarlane*, 897 F.2d 75, 82 (2d Cir. 1990); *Busby v. Crown Supply*, 896 F.2d 833, 837 (4th Cir. 1990).

section 1964(c), is the fundamental task in interpreting the language of RICO regarding the investment injury requirement.²³⁹ The query is whether "violation" refers to predicate acts *and* the subsequent investment of income or merely refers to the subsequent investment of income. When the courts that have considered the investment injury issue turn to the language of the statute, the result is two distinct views of the interplay between section 1962(a) and section 1964(c).

The majority courts, which require investment injury, have a tendency to concentrate on the phrases in section 1962(a), "[i]t shall be unlawful" and "to use or invest." The courts hold that those phrases interplay such that the "violation" is the use or investment.²⁴⁰ The predicate acts, under this analysis, serve only to establish under what circumstances the use or investment is unlawful.

The minority courts prefer to view section 1962(a) as containing two distinct elements. A violation requires (1) predicate racketeering acts creating income, and (2) the subsequent investment of that income.²⁴¹ Either one of these aspects of a violation would warrant civil recovery under this view. Normally this would mean that alleging injury from the predicate racketeering acts themselves would be sufficient to state a cause of action under section 1962(a). The minority position, however, is flawed because it does not squarely address the question of what constitutes a violation.

Section 1962(a) prohibits the use or investment of the proceeds of racketeering income.²⁴² The predicate racketeering acts are elements in the sense that a violation is logically impossible without their occurring at some time.²⁴³ The predicate acts, however, are not the prohibited action under section 1962(a). They are not the verb that the statute has prohibited.

An illustration from an unrelated statute may help clarify. The Model Penal Code prohibits the receipt of stolen property: "A person is guilty of theft if he purposely receives, retains, or disposes of movable property of another knowing that it has been stolen"²⁴⁴

Suppose a civil recovery provision were added to that prohibition that, like section 1964(c) of RICO, allowed recovery for injury "by reason of a violation" of that prohibition. If a receipt of stolen property occurred, and a plaintiff attempted to recover for injuries by reason only of the original theft of the property, an issue similar to the RICO investment injury issue would arise: whether the theft is part of the violation.

It is clear in this example that the violation—the act that a person cannot do—is to receive a certain kind of property. The violation is the receipt. Similarly, what a person cannot do under section 1962(a) of RICO is to invest or

239. See 18 U.S.C. § 1964(c) (1988).

240. *E.g., Ouaknine*, 897 F.2d at 82-83.

241. *E.g., Busby*, 896 F.2d at 837-38.

242. 18 U.S.C. § 1962(a).

243. *Busby*, 896 F.2d at 837-38.

244. MODEL PENAL CODE § 223.6 (Proposed Official Draft 1962).

use a certain kind of income. Creating the stolen status of property is not in violation of the prohibition against receipt of stolen property, and the gathering of income through racketeering activity does not violate section 1962(a) of RICO. Those actions merely created a situation in which illegality could occur.

Those who oppose the investment injury requirement might reject the above analysis, in part, because section 1962(a) demands that the income flow from predicate acts in which the defendant "participated as a principal."²⁴⁶ Because of this requirement, the argument runs, the predicate acts are more integral to the violation than if this requirement were absent.²⁴⁶

There is some dispute whether, under section 1962(a), a plaintiff must allege that a defendant who has received income from a pattern of racketeering activity "participated as a principal in that racketeering activity."²⁴⁷ Even accepting that a plaintiff must allege such a connection under section 1962(a), the distinction is still not valid.

The question is whether the creation of the income is part of the violation. It is not. Regardless of who creates the income, the predicate acts and the subsequent investment are separate concepts in section 1962(a). It is unlawful to invest a certain type of money—namely, the investor's own profits from racketeering. Racketeering profits can be thought of almost as instrumentalities in a section 1962(a) violation. The creation of those profits, of the "instrumentalities," however, is not the violation.

Nor is it relevant that injury may arise from predicate acts.²⁴⁸ The relevant question is whether that injury is compensable under civil RICO. Injury from predicate acts alone, by the language of the statute, is not compensable.

Once it is determined that the plain, unambiguous language of sections 1962(a) and 1964(c) demands an investment injury requirement, the investment injury requirement is a necessity in civil RICO. The liberal construction clause should come into play only if the language of the statute is ambiguous. Certainly the statutory invitation to construe liberally is not an invitation to apply the statute to cover activity not contemplated by the plain language.²⁴⁹ The liberal construction clause would not warrant "interpreting in," for example, extra predicate acts not listed in the statute. Nor does the liberal construction clause warrant interpreting in an extra violation for which civil recovery is allowed. Because the interplay of sections 1962(a) and 1964(c) clearly produce an investment injury requirement, the requirement is valid.

245. 18 U.S.C. § 1962(a).

246. See *supra* note 168 (noting Blakey and Perry's defense of the "participated as a principal" argument).

247. See *supra* note 168.

248. See *supra* note 206 and accompanying text (noting the *Busby* court's conclusion that injury can flow from both investment and predicate acts).

249. Even the *Busby* court acknowledged this much. See *Busby v. Crown Supply*, 896 F.2d 833, 837 (4th Cir. 1990).

C. The Precedential Effect of *Sedima*

While the language of RICO requires investment injury for civil action under section 1962(a), the issue of the effect of *Sedima*, *S.P.R.L. v. Imrex Co.* still remains.

Sedima's only direct and binding precedent regarding injury requirements applies to section 1962(c). The actual case before the *Sedima* Court concerned only section 1962(c),²⁵⁰ and therefore the case can only have purported to address source-of-injury issues regarding that section. Dicta in *Sedima*, however, may support the proposition that injury resulting from predicate acts is enough to have standing to bring a civil RICO action,²⁵¹ a conclusion at odds with the investment injury requirement.

The *Sedima* Court used general language concerning special injury requirements²⁵² and then applied that general language to the 1962(c) setting.²⁵³ That application of the broad to the specific could apply to section 1962(a) as well.

Sedima's general language here is unfortunate. Perhaps the Court, without the benefit of the current lower-court jurisprudence on the investment injury controversy, was not aware of the potential impact of such language. Speculation aside, however, some language in *Sedima* is threatening to the investment injury requirement.²⁵⁴

On the other hand, *Sedima's* reliance on predicate acts being the "essence of the violation" of section 1962(c) leaves room to read the opinion as consistent with the investment injury requirement.²⁵⁵ The predicate acts and operative verbs in section 1962(a) are separate in time and concept from each other: one gains income, then one invests. The structure of section 1962(c) intertwines predicate act and operative verb²⁵⁶ more closely: one conducts an enterprise through racketeering. This structure suggests that the essence of a section 1962(c) violation may include predicate acts, while the essence of a section 1962(a) violation hinges on what a person does with the racketeering proceeds.

Because *Sedima's* effect on the investment injury issue is from dicta, and that dicta is ambiguous, the case will continue to be interpreted by both sides of the issue as supporting their position until the Supreme Court takes up the

250. *Sedima*, *S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

251. See *supra* notes 210-12 and accompanying text (noting the *Busby* court's use of dicta in *Sedima* to support the investment injury requirement).

252. See *supra* notes 104-05 and accompanying text (quoting and commenting on the relevant passages).

253. See *supra* note 210-12 and accompanying text (pointing out the *Busby* court's acceptance of this syllogistic analysis).

254. See *supra* notes 210-12 and accompanying text.

255. See *supra* note 105 (quoting the relevant passage).

256. See *Eastern Corporate Fed. Credit Union v. Peat, Marwick, Mitchell & Co.*, 639 F. Supp. 1532, 1537 (D. Mass. 1986) ("Focusing on the operative verbs, § 1962(a) makes it unlawful for a person to "use or invest" income derived through racketeering activity in the acquisition of an interest in an enterprise.").

issue directly.²⁵⁷ In the face of a plain-language reading of the statute supporting the investment injury requirement, however, the ambiguity should be resolved in favor of the requirement.

If the Supreme Court does address the issue directly, the Court may be influenced by its current hostility to RICO's breadth.²⁵⁸ However, the Court also has been hostile to judicially imposed limitations.²⁵⁹ Current hostility to RICO's breadth may result in a tendency to seize an opportunity to limit RICO that is legitimately based in the text of the statute, satisfying the twin desires of the Supreme Court.

Judicial limitations have, in the past, been perversions of the RICO statute. The investment injury requirement, however, is an outgrowth of the only fair reading of the text of the statute. The only legitimate reason for a lower court to reject the requirement is the broad language in *Sedima*. That language, however, is ambiguous and therefore should not outweigh the plain language of the statute.

IV. IMPACT: A LIMIT ON THE USE OF CIVIL RICO

Civil RICO claims can be classified conceptually into two broad categories. First, there are "garden-variety fraud" claims, cases arising out of an ordinary commercial setting in which mail and/or wire fraud typically are used as predicate acts.²⁶⁰ Second, there are more serious claims revolving around RICO's more serious predicate acts,²⁶¹ claims that might be directed at organized crime figures. The impact on these two types of violations will be considered separately. Also noted is a means of scuttling the impact of the investment injury requirement through the allegation of internal-investment injury.

A. "Garden Variety Fraud"

Requiring investment injury in section 1962(a) actions helps eliminate a class of cases at the heart of the controversy surrounding RICO: cases employing as predicate acts mail and wire fraud committed by a corporate defendant. This occurs as a result of the combined effect of the investment injury requirement in section 1962(a) actions and restrictions imposed upon section 1962(c) actions.

As mentioned earlier, in section 1962(c) actions courts interpret RICO as

257. The closest the Supreme Court came to adjudicating the investment injury issue was when it denied the plaintiff's request to grant certiorari after the Tenth Circuit adopted the rule. See *Grider v. Texas Oil & Gas Corp.*, 493 U.S. 820, *denying cert. to* 868 F.2d 1147 (10th Cir. 1989).

258. See *supra* notes 117-18 and accompanying text (noting that four Justices recently questioned RICO's constitutionality).

259. See *supra* notes 79-120 and accompanying text (noting that the Supreme Court has consistently struck down artificial limitations).

260. See *supra* notes 71-76 and accompanying text (explaining the "garden-variety fraud" problem).

261. See *supra* notes 24-26 and accompanying text (describing RICO's more serious predicate acts).

requiring that the "person" who controls the conduct of an "enterprise" through a pattern of racketeering must be an entity distinct from that enterprise.²⁶² The person/enterprise distinction clearly reduces a plaintiff's ability to sue an individual entity for fraud using section 1962(c). In most instances, a plaintiff can only reach an employee, not the deep pocket of the "enterprise" whose affairs that employee is conducting.²⁶³

The investment injury requirement in section 1962(a) actions may eliminate most mail and wire fraud claims brought under that section, at least against a corporate defendant. Normally, it is the predicate mail or wire fraud, and not the subsequent investment, that injures the victim.²⁶⁴

The combined effect of these two limitations, the person/enterprise distinction in section 1962(c) actions and the investment injury requirement in section 1962(a) actions, is to limit RICO actions brought in ordinary commercial settings. These claims are against a singular entity acting fraudulently. This forecloses a section 1962(c) action. These claims are also alleging injury primarily from the fraud itself. This forecloses a section 1962(a) action.

Professor Blakey and Mr. Perry have noted that the worst fear of those opposing a restricted view of RICO, that RICO will not apply to white-collar criminals, may be the result of this combined effect. They view these two steps as jointly achieving a result not contemplated by Congress.²⁶⁵ Mr. Smith and Mr. Reed have observed the same effect of the investment injury requirement, but praised that result as bringing civil RICO in line with the original congressional intent.²⁶⁶ While the argument over the proper breadth of RICO rages on, with no addition from this Comment, two conclusions are asserted: the investment injury requirement is prescribed by the text of RICO, and the investment injury requirement may effectively eliminate the more controversial civil RICO cases involving commercial disputes.

262. See *supra* notes 124-29 and accompanying text (discussing the § 1962(c) person/enterprise distinction and its impact on RICO litigation).

263. See *supra* note 129 and accompanying text.

264. *P.M.F. Services. v. Grady*, 681 F. Supp. 549, 555 (N.D. Ill. 1988) ("[I]t is certainly true that the victims of (say) mail fraud are most typically injured by the crimes themselves, not by the criminal's use of the proceeds in the operation of an 'enterprise.'"); SMITH & REED, *supra* note 48, ¶ 4.04[5] (stating that "the potential of section 1962(a) for reaching the corporate deep pockets has been thwarted . . . by the [investment injury requirement]").

265. Blakey & Perry, *supra* note 17, at 865 n.29. Blakey and Perry argue that:

Congress did not intend to confine RICO to organized crime or to preclude its application to white-collar crime. That limitation, however, might be the effect of the adoption of the person-enterprise rule under [section] 1962(c) and a narrowly defined use or invest rule under [section] 1962(a). The courts would have in two steps adopted a policy that Congress specifically declined to adopt when RICO was enacted in 1970.

Id.

266. SMITH & REED, *supra* note 48, ¶ 6.04[5][a]. Smith and Reed stated that the investment injury requirement "would serve a salutary role in restricting civil section 1962(a) actions to the primary evil motivating Congress to enact section 1962(a) as a separate offense: the infiltration of legitimate business by those enriched through racketeering activity." *Id.*

B. Organized Crime

The first inquiry in exploring the effect of the investment injury requirement on organized crime cases is whether there is any significance in restricting or expanding the availability of such suits. Because cases filed against organized crime figures are rare or even nonexistent, there does not appear to be a class of cases to restrict.²⁶⁷

Nevertheless, the section 1962(a) investment injury requirement would still leave a *conceivable* class of claims involving organized crime. The infiltration of other businesses by organized criminals would violate section 1962(c) despite the person/enterprise distinction. The person—an organized criminal—and the enterprise—the business—would be distinct entities leaving the criminal exposed to section 1962(c) liability.

The effect of the investment injury requirement cases on suits against organized crime figures may be, as a practical matter, irrelevant. Nonetheless, a conceivable class of section 1962(c) cases would remain for plaintiffs who muster the courage to use it.

C. Alleging Internal-Investment Injury

One factor may diminish the impact of the investment injury requirement. A section 1962(a) plaintiff may have the ability to allege injury resulting from predicate acts made possible by the defendant's internal investment or use of the proceeds of prior predicate acts.

Authority exists supporting the viability of this kind of section 1962(a) allegation.²⁶⁸ The success of these allegations, however, would be an exception. Establishing the requisite causation would be an often insurmountable task.²⁶⁹ Nonetheless, these cases would fit within the investment injury requirement and not violate the language of the statute.

CONCLUSION

RICO is a statute immersed in controversy. The breadth of civil RICO has been a focal point of that controversy. The judiciary's response to that breadth has created a controversy of its own over whether the judicial limits on RICO are warranted.

The investment injury requirement is the latest in a line of limits on civil RICO. Opponents of the requirement read the language as rejecting it, and point to legislative history and Supreme Court precedent to bolster their position. Proponents of the requirement read the statute as prescribing the limit, and bring their own interpretation of legislative history and Supreme Court

267. See *supra* notes 77-78 and accompanying text (noting that civil RICO has rarely, if ever, been used against a traditional organized crime figure).

268. See *supra* note 190 (explaining how an enterprise's investment in itself and subsequent acts of fraud can yield section 1962(a) liability for the fraud).

269. See *supra* notes 219-24 and accompanying text (explaining one court's view of the limiting effect of the investment injury requirement).

precedent to the debate. The plain language of the RICO statute, however, requires investment injury in section 1962(a) actions, and that should control.

Those who have urged a broad application of RICO have lived by plain-language readings of the statute and now may die by one. Plain-language readings have protected RICO from artificial judicial limitations and now a plain language reading may legitimately limit the reach of RICO. The investment injury requirement eliminates much of a controversial class of cases while respecting the language of RICO.

The influx of mail and wire fraud cases brought under RICO against corporate entities may be reduced by application of the investment injury requirement. To many, this is a welcome result. To others, this is a tragedy. The result, however, is drawn from the text, and is thus available to courts seeking a limit that comports with the language of the statute.

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