



Notre Dame Law Review

Volume 60 | Issue 3

Article 6

1-1-1985

Civil RICO: Prior Criminal Conviction and Burden of Proof

Leigh Ann MacKenzie

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law Commons](#)

Recommended Citation

Leigh A. MacKenzie, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 Notre Dame L. Rev. 566 (1985).

Available at: <http://scholarship.law.nd.edu/ndlr/vol60/iss3/6>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Civil RICO: Prior Criminal Conviction and Burden of Proof

Recently, the debate over the application of the Racketeer Influenced and Corrupt Organizations Act¹ (“RICO”) to defendants not connected to organized crime has intensified.² According to the language of the Act, anyone can be a defendant under RICO if he: 1) uses or invests money obtained through a pattern of racketeering activity or collection of an unlawful debt in an enterprise which affects commerce;³ 2) acquires or maintains, through a pattern of racketeering activity or collection of an unlawful debt, an

1 “Racketeer Influenced and Corrupt Organizations Act,” 18 U.S.C. §§ 1961-68 (1982).

2 See, e.g., “RICO” Running Amok in Board Rooms, L.A. Times, Feb. 15, 1984, at 6, 20, col. 1 (“[A] statute, enacted primarily for one purpose, ends up being applied in ways lawmakers never clearly foresaw, creating litigation on a scale judges never anticipated.”); Skinner & Tone, *Civil RICO and the Corporate Defendant*, Nat’l L.J., Jan. 30, 1984, at 22, 24, col. 1 (“[I]t is now clear that legitimate businesses with no connection to organized crime have much to fear from the broad scope . . . of the RICO statute.”). But see Horn, *Judicial Plague Sweeps United States ‘Resultorientitis’ Infects Civil RICO Decisions*, Nat’l L.J., May 23, 1983, at 31, col. 1.

Although businesses not connected to organized crime have argued against the application of RICO to them as defendants, such businesses have not hesitated to sue under RICO. See, e.g., *Alexander Grant & Co. v. Tiffany Indus.* 742 F.2d 408 (8th Cir. 1984) (public accounting firm sued their client for mail and wire fraud in attempting to induce the firm to issue a favorable audit); *FDIC Using Racketeering Law in Suit Seeking Damages in Bank Failure Case*, Wall St. J., Apr. 9, 1985, at 16, col. 1 (“When bankers have been at the forefront to limit RICO only to apply to real racketeering, it’s kind of an embarrassment that a banking agency itself is using RICO.”).

RICO’s “legislative history clearly demonstrates that . . . [Congress] intended [RICO] to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.” *Russello v. United States*, 104 S. Ct. 296, 302 (1983). “[T]he major purpose of . . . [RICO was] to address the infiltration of legitimate business by organized crime.” *United States v. Turkette*, 452 U.S. 576, 591 (1981). Nevertheless, Congress did not “confine . . . RICO [to] only the infiltration of legitimate business.” *Id.* at 590 (emphasis in original). “[R]ejected [too, has been the] notion that . . . [RICO] applies only to organized crime in the classic ‘mobster’ sense.” *United States v. Grande*, 620 F.2d 1026, 1030 (4th Cir.), cert. denied, 449 U.S. 919 (1980). See also *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1167 (5th Cir. 1984) (cases cited and followed).

Similarly, the Supreme Court has declined to limit other federal statutes to defendants connected to organized crime. *Perrin v. United States*, 444 U.S. 37, 46 (1979) (Travel Act); *United States v. Culbert*, 435 U.S. 371, 373-74 (1978) (Hobbes Act); *United States v. Fabrizio*, 385 U.S. 263, 265-66 (1966) (18 U.S.C. § 1953, a federal statute proscribing the transportation of betting materials in interstate commerce).

3 18 U.S.C. § 1962(a) (1982) provides:

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

interest in such an enterprise,⁴ 3) conducts or participates in the affairs of an enterprise through a pattern of racketeering activity⁵ or collection of an unlawful debt,⁶ or 4) conspires to engage in any of the foregoing activities.⁷

RICO's enforcement mechanisms include criminal and civil sanctions that may be sought by the government⁸ as well as a private claim for relief for any person injured in his business or property by reason of a violation of the statute.⁹ The private claim for relief allows a plaintiff to recover treble damages and reasonable attorneys' fees in federal court. Twenty-two states have similar statutes.¹⁰

4 18 U.S.C. § 1962(b) (1982) provides:

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

5 To engage in a pattern of racketeering activity, a person must commit at least two predicate acts within a 10-year period. 18 U.S.C. § 1961(5) (1982). "Pattern" means "not isolated" or "sporadic" but "continu[ous] and related." S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969); *United States v. Weisman*, 624 F.2d 1118, 1121-23 (2d Cir.) (not related to each other, but to the affairs of the enterprise), *cert. denied*, 449 U.S. 871 (1980). "Racketeering activities" include "four broad, but not mutually exclusive categories: 1) violence; 2) provision of illegal goods and services; 3) corruption in the labor movement or among public officials; and 4) commercial and other forms of fraud." Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 300-06 (1982). See note 24 *infra*. For an exhaustive listing, see 18 U.S.C. § 1961(1) (1982).

6 18 U.S.C. § 1962(c) (1982) provides:

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

7 18 U.S.C. § 1962(d) (1982) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

8 Remedies afforded to the government under the criminal provision of § 1963(a) include a fine of not more than \$25,000 or imprisonment of not more than 20 years, or both, and forfeiture of any interest acquired through a racketeering activity or any interest affording a source of influence over any enterprise conducted in violation of the statute. Section 1964(a) creates a civil cause of action in the government. In addition to traditional civil remedies, the government has various forms of equitable relief, including, *inter alia*, the power to order divestiture of any interest in an enterprise and the power to impose restrictions on future activities or investments of a defendant.

9 18 U.S.C. § 1964 (c) (1982) provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore 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." Section 1962 is set forth in notes 3, 4, 6, and 7 *supra*.

Whether a private plaintiff is entitled to equitable relief is unclear. For a discussion of this issue, see Johnson, *Preditors Rights: Multiple Remedies for Wall Street Sharks Under the Securities Laws and RICO*, 10 J. CORP. L. 3 (1984); Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME L. REV. 945 (1984).

10 ARIZ. REV. STAT. ANN. §§ 13-2301 to 13-2316 (1978 and West Supp. 1984-85); CAL. PENAL CODE §§ 186-186.8 (West Supp. 1985); COLO. REV. STAT. §§ 18-17-101 to 18-17-109 (Supp. 1984); CONN. GEN. STAT. ANN. 53-393 to 53-403 (West Supp. 1984); GA. CODE ANN. §§ 26-3401 to 26-3414 (1983); HAWAII REV. STAT. §§ 842-1 to 842-12 (1976); IDAHO CODE

Generally, plaintiffs ignored the possibilities of civil RICO claims¹¹ until the recent civil RICO litigation against such "legitimate"¹² businesses as Shearson/American Express,¹³ E.F. Hutton & Co.,¹⁴ Lloyd's of London,¹⁵ and Merrill Lynch.¹⁶ Troubled by this use of RICO, the Court of Appeals for the Second Circuit, in *Sedima, S.P.R.L. v. Imrex Co.*,¹⁷ limited the scope of civil RICO by requiring that the plaintiff allege both an injury distinct from the

§§ 18-7801 to 18-7805 (Supp. 1984); ILL. ANN. STAT. ch. 56 1/2, §§ 1651-60 (Smith-Hurd Supp. 1984-85) (limited to narcotics); IND. CODE ANN. §§ 35-45-6-1 to 35-45-6-2, 34-4-30.5-1 to 34-4-30.5-6 (Burns Supp. 1982); LA. REV. STAT. ANN. §§ 15:1351-56 (West Supp. 1985) (limited to narcotics); MISS. CODE ANN. §§ 97-43-1 to 97-43-11 (Lawyers Co-op 1984); NEV. REV. STAT. §§ 207.350 to 207.520 (1983); N.J. STAT. ANN. §§ 2C:41-1 to 2C:41-6.2 (West 1982); N.M. STAT. ANN. §§ 30-42-1 to 30-42-6 (Michie Supp. 1980); N.D. CENT. CODE §§ 12.1-06.1-01 to 12.1-06.1-08 (Smith Supp. 1983); OR. REV. STAT. §§ 166-715 to 166-735 (1981); 18 PA. CONS. STAT. ANN. § 911 (Purdon 1983); R.I. GEN. LAWS §§ 7-15-1 to 7-15-11 (Michie Supp. 1983); UTAH CODE ANN. §§ 76-10-1601 to 76-10-1608 (Smith Supp. 1983); WASH. REV. CODE ANN. §§ 9A.82.010 to 9A.82.901 (West Supp. 1985); WIS. STAT. ANN. §§ 946.80 to 946.87 (West Supp. 1984-85).

11 One commentator noted that only 13 cases involving civil RICO had been published by 1981. See Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1101 n.7 (1982).

12 Labelling a business as "legitimate" before resolution of the allegations against it begs the question. If such a business is held liable, it cannot be "legitimate" in the literal sense of the word, at least in regard to the corrupt transaction.

For an example of "legitimate" businesses, including Fortune 500 corporations, participating in illegitimate activities, such as money laundering, see PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING* 11-12, 33-34 (1984) (Interim Report to the President and the Attorney General).

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

14 *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636 (C.D. Cal. 1983).

15 *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352 (E.D. Mich. 1983).

16 *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 570 F. Supp. 667 (W.D. Mich. 1983).

17 741 F.2d 482 (2d Cir. 1984). A divided panel affirmed dismissal of *Sedima* on July 25, 1984 for failure to state a claim under 18 U.S.C. § 1964 (civil RICO). On July 26 and 27, 1984, divided panels similarly affirmed dismissal of *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), and *Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984).

Sedima involved a joint venture between the plaintiff-appellant *Sedima, S.P.R.L.* (*Sedima*), a Belgian supplier of aerospace and defense industries, and defendant-appellee *Imrex Company (Imrex)*, a New York exporter of aviation parts, to provide electronic component parts for a NATO subcontractor in Belgium. *Sedima* solicited orders for parts which *Imrex* obtained and shipped to Europe. *Sedima* alleged that *Imrex* and defendant-appellee officers of *Imrex* sent it inflated copies of purchase orders, invoices, and credit memoranda, thereby falsely increasing its reimbursement. In addition to its other claims, the plaintiff alleged three counts under RICO: one count asserting a RICO conspiracy, unlawful under § 1962(d), and two counts alleging that the fraudulent purchase orders, invoices and credit memoranda constituted a pattern of racketeering, unlawful under § 1962(c). The underlying predicate offenses which allegedly constituted the pattern of racketeering activity included violations of the Mail Fraud Act, 18 U.S.C. § 1341 (1982) and the Wire Fraud Act, 18 U.S.C. § 1343 (1982).

The United States District Court for the Eastern District of New York dismissed the three RICO counts for failure to allege an injury distinct from the injuries resulting from the alleged predicate acts of mail fraud and wire fraud. *Sedima S.P.R.L. v. Imrex Co.*, 574 F. Supp. 963, 965 (E.D.N.Y. 1983). The Second Circuit affirmed the dismissal and the

injuries caused by the predicate offenses¹⁸ and that the defendant had been previously convicted of an underlying predicate offense or criminal RICO.¹⁹

This note addresses the prior criminal conviction requirement. Part I analyzes the Second Circuit's interpretation of civil RICO as requiring a prior conviction of the defendant. Part II explores the burden of proof requirement for establishing that, in the absence of a prior criminal conviction, the defendant committed the underlying predicate acts. Based upon the language and legislative history of RICO, analogous civil actions, and policy concerns, this note concludes that the Second Circuit should not have established a prior criminal conviction requirement, and that in proving criminal activity, the correct burden of proof under civil RICO is a preponderance of the evidence.

court's reasoning. *Sedima*, 741 F.2d at 503-04. In addition, the court imposed, *sua sponte*, the requirement of a prior criminal conviction. *Sedima*, 741 F.2d at 496.

Sedima and *Bankers Trust* were 2 to 1 decisions. *Furman* was a 3 to 0 decision. The panel in *Furman*, however, disagreed with the racketeering injury requirement imposed by *Sedima* and *Bankers Trust*, but was compelled to affirm dismissal because of precedent. *Furman*, 741 F.2d at 533. Neither *Bankers Trust* nor *Furman* held that a prior criminal conviction was a condition precedent to a civil action.

Several months later, the Seventh Circuit in *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), rejected the Second Circuit's racketeering injury requirement. The Supreme Court granted certiorari in both *Sedima* and *Haroco* on the issue of a racketeering injury requirement. *Sedima*, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985); *Haroco v. American Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 902 (1985). Certiorari was also granted on the issue of whether a prior criminal conviction is a prerequisite to a civil RICO action.

18 741 F.2d at 494.

19 *Id.* at 496. The prior criminal conviction requirement imposed by the Second Circuit in *Sedima* contradicts previous Sixth and Seventh Circuit decisions that held that no prior criminal conviction is required before a private civil suit may be instituted. See *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982). It is also inconsistent with the Second Circuit's own precedent in *United States v. Parness*, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) that held an indictment for a predicate offense was not required for a RICO criminal prosecution. The prior criminal conviction is also contrary to state court decisions interpreting state legislation comparable to RICO. See *Senfeld v. Bank of Nova Scotia Trust Co.*, 450 So. 2d 1157, 1164 n.9 (Fla. Dist. Ct. App. 1984) (private civil suit); *Commonwealth v. Taraschi*, 475 A.2d 744, 749 (Pa. Super. Ct. 1984) (criminal prosecution); *James v. Brink & Erb, Inc.*, 452 N.E.2d 414, 416 n.3 (Ind. Ct. App. 1983) (private civil suit).

Several federal district courts have adopted the Second Circuit's requirement of a prior criminal conviction. See *McCarthy v. Pacific Loan, Inc.*, 600 F. Supp. 137, 140 (D. Hawaii 1984); *Gardner v. Surnamer*, 599 F. Supp. 477, 480 (E.D. Pa. 1984). The Second Circuit, however, refused to apply its own requirement in a civil RICO action based on the predicate act of usury. *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, No. 84-7221, slip op. (2d Cir. Feb. 5, 1985).

I. Prior Criminal Conviction

In *Sedima*, the Second Circuit stated that it imposed the prior criminal conviction requirement to resolve the question of what burden of proof would be necessary to prove criminal activity in a civil RICO action. The court believed that Congress did not consider the question, but would have required a prior criminal conviction upon such consideration.²⁰ A close examination of the text, legislative history, and policy considerations reveals, however, that the requirement is not justified.

A. Examination of the Text

The starting point for interpreting a statute is to examine the language of the statute.²¹ Absent ambiguity or a clearly expressed contrary legislative intent, the language of the statute is conclusive.²² RICO does not expressly require that a private plaintiff show that the civil defendant had been previously convicted under criminal RICO or for one of the predicate acts.²³ The Second Circuit in *Sedima*, however, suggests that Congress' use of the words "chargeable," "indictable," and "offense" to describe acts fulfilling the racketeering injury requirement,²⁴ indicates that Congress intended that the defendant be convicted before a civil action could commence.²⁵

²⁰ 741 F.2d at 501. It is hard to imagine that the court did not consider that this requirement would reduce the number of civil RICO actions considerably, thereby reducing the workload in federal courts. See notes 78-79 *infra* and accompanying text.

²¹ *Russello v. United States*, 104 S. Ct. 296, 299 (1983) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)).

²² *Id.* See also *Garcia v. United States*, 105 S. Ct. 479, 483 n.3 (1984); *Blum v. Stenson*, 104 S. Ct. 1541, 1548 (1984).

²³ See the provisions of 18 U.S.C. §§ 1962(a)-(d), 1964(c) set forth in notes 3, 4, 6, 7 and 9 *supra*. The state versions of RICO do not expressly require a prior criminal conviction before either a criminal or a civil suit may be brought by the government or a private party. See note 10 *supra*.

²⁴ 18 U.S.C. § 1961(1) (1982) provides in relevant part:

"[R]acketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is *chargeable* under State law and punishable by imprisonment for more than one year; (B) any act which is *indictable* under [various provisions of the United States Code, such as provisions dealing with counterfeiting, mail fraud, wire fraud, obstruction of justice, interference with commerce, robbery, or extortion, unlawful welfare fund payments, interstate transportation of stolen property]; (C) any act which is *indictable* under [provisions of the United States Code dealing with restrictions on payments and loans to labor organizations, and embezzlement from union funds]; or (D) any *offense* involving . . . 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.

(emphasis added).

²⁵ *Sedima*, 741 F.2d at 499 ("[T]hese terms . . . speak along criminal rather than civil lines.").

This suggestion, however, ignores the fundamental principle of statutory construction that words should be interpreted according to their ordinary, contemporary, or common meaning.²⁶ The *Oxford English Dictionary* defines "indictable" as "[l]iable to be indicted or accused of a crime,"²⁷ "chargeable" as "[c]apable of being, or liable to be, charged,"²⁸ and "offense" as a "breach of law, duty, propriety, or etiquette."²⁹ Thus, according to their common meaning, the words of the statute do not require conviction or even indictment.³⁰ They merely incorporate by reference the elements of state and federal offenses. Further, the use of the word "conviction" in other sections of the Act³¹ suggests that Congress knew how to use the word, but consciously did not employ it in the relevant section of the statute.

The plain meanings of the words "chargeable," "indictable," and "offense" should control, unless that interpretation would lead to absurd results or would thwart the obvious purpose of the statute.³² Neither justification applies to civil RICO. Absence of a prior criminal conviction requirement does not lead to absurd results. Other federal criminal statutes, including the Travel Act³³ and Gun Control Act,³⁴ require proof of conduct constituting another crime, but do not require conviction of that crime.³⁵ Further,

26 See *Perrin v. United States*, 444 U.S. 37, 42 (1979).

27 V THE OXFORD ENGLISH DICTIONARY 209 (1933).

28 II THE OXFORD ENGLISH DICTIONARY 286 (1933).

29 VII THE OXFORD ENGLISH DICTIONARY 76 (1933).

30 See *United States v. Parness*, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). See also *Sedima*, 741 F.2d at 505 (Cardamone, J., dissenting) ("All that need be determined is that they are acts which, if proved by the government in a criminal proceeding, would subject the violator to criminal sanctions.").

31 18 U.S.C. § 1963(c) (1982) (provision of RICO dealing with seizure); 18 U.S.C. § 3575(e)(1) (1982) (provision of the Organized Crime Control Act dealing with sentencing). See also *Iannelli v. United States*, 420 U.S. 770, 789 (1975) ("The [Organized Crime Control] Act is a carefully crafted piece of legislation.").

32 See *United States v. Turkette*, 452 U.S. 576, 580 (1981). On a number of occasions, the Supreme Court has declined to follow the plain meaning of statutory language. In *United States v. Ryan*, 284 U.S. 167, 175-76 (1931), for example, the Court restricted the words "all personal property whatsoever" under a forfeiture provision of the National Prohibition Act to only that personal property incident to the tax evasion at which the statute was aimed. The Court found that to include all personal property would penalize possessing articles having no relation to the offense. Similarly, in *United States v. Katz*, 271 U.S. 354 (1926), the government contended that § 10 of the National Prohibition Act, which provides that "no person shall manufacture . . . any liquor without making at the time a permanent record thereof . . . applied, not only to people allowed under government permits to manufacture, sell, or transport liquor under the Act, but also to bootleggers. The Court found, however, that the literal construction of this clause was unreasonable because it would add to the crime of manufacturing, selling, or transporting, a second offense of failing to make a record of one's own wrongdoing. *Id.* at 362.

33 18 U.S.C. § 1952 (1982).

34 18 U.S.C. § 921 (1982).

35 See *United States v. Nardello*, 393 U.S. 286, 293-96 (1969) (Travel Act), *United*

lack of a prior criminal conviction requirement is not contrary to RICO's purpose of providing new legal tools to eradicate organized crime.³⁶ On the other hand, requiring a prior criminal conviction restricts application of these new legal tools and frustrates Congress' stated purpose in enacting RICO. The legislative history of RICO also supports the view that a prior criminal conviction is not required before civil recovery.³⁷

B. *Legislative History*

In *Sedima*, the Second Circuit suggests that had Congress considered the question it would have required a prior conviction of the predicate crimes as a prerequisite to civil RICO actions.³⁸ The debates reveal, however, that Congress considered the question, but consciously decided to go forward with a broadly drafted statute. In support of an amendment authorizing treble damages to deter frivolous civil actions by private plaintiffs, Congressman Mikva objected to RICO's breadth precisely because a conviction of the predicate offenses was not required for the act to constitute racketeering.³⁹ No one contradicted Congressman Mikva's description of the breadth of the statute and his amendment was defeated.⁴⁰ In addition, Congress purposely modeled RICO after the antitrust statutes, which do not require a criminal conviction.⁴¹ Had

States v. Ramirez, 482 F.2d 807, 813-14 (2d Cir.) (Gun Control Act), *cert. denied*, 414 U.S. 1070 (1973).

36 RICO defines its purpose on the face of the statute:

It is the purpose of this Act to seek the eradication of 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.

Statement of Findings and Purpose, Pub L. No. 91-452, 84 Stat. 922-23 (1970).

37 See notes 39-41 and accompanying text.

38 741 F.2d at 502.

39 116 CONG. REC. 35,342 (1970) ("Now, there need not be a conviction under any of these laws for it to be racketeering.") Congressman Mikva's proposed amendment was defeated. *Id.* at 35,343.

40 *Id.* at 35,343.

41 S. REP. NO. 617, *supra* note 5, at 81 (1969); H.R. REP. NO. 1549, 91st Cong., 2nd Sess. 56-60 (1970). See also 113 CONG. REC. 17,999 (1967) (Remarks by Sen. Hruska upon introduction of RICO legislation) ("A full range of criminal and civil sanctions which now exist in our antitrust laws would be made available to enforcement officials and to persons adversely affected by such investments."); 113 CONG. REC. 17,947 (1967) (Remarks by Rep. Poff upon introduction of RICO legislation) ("[The bills] are intended to activate the antitrust laws in a more vital way and focus their application upon the problem of organized crime.").

RICO was enacted partly in response to a study on organized crime of the President's Commission on Law Enforcement and Administration of Justice. The commission recommended that private businesses develop strategies to prevent and uncover illegal business tactics of organized crime. It also suggested that private civil proceedings be used to stop organized crime from engaging in illegal trade practices and antitrust violations. TASK FORCE REPORT: ORGANIZED CRIME, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT

Congress intended to impose a prior conviction requirement, a radical departure from the analogous antitrust laws, it would certainly have made its intent explicit.

C. *Analogous Civil Actions That Require Proof of a Crime
But Not Conviction*

By imposing the conviction requirement, the *Sedima* court overlooked analogous civil actions that are based upon prior criminal activity, but that do not require a prior conviction.⁴² Absence of a prior criminal conviction requirement in such actions was not always the rule. The history of these actions reveals why the prior conviction requirement was abandoned and why it should not be adopted in civil RICO actions.

Early English common law merged a private right of action for injuries caused by a felony into the higher offense against society and left the private individual without redress.⁴³ Later cases merely suspended the private right of action until the criminal proceedings were resolved.⁴⁴ This rule was based on the civic duty of prosecuting felonies that England imposed on its citizens. Seeking redress for private injuries before criminal prosecution was thought to prejudice public vindication and was generally prohibited.⁴⁵ England

AND ADMINISTRATION OF JUSTICE 23 (1967) ("techniques . . . especially valuable because they require a less rigid standard of proof of violation than the guilt-beyond-a-reasonable-doubt requirement of criminal law").

42 See notes 50-56 *infra* and accompanying text.

43 See, e.g., *Higgins v. Butcher*, Yelv. 89, 80 Eng. Rep. 61, *sub nom.* *Higgins' Case*, Noy, 18, 74 Eng. Rep. 989 (1606) (beating to death of a servant constitutes an offense to the crown which "drowns" the master's cause of action for battery and loss of service); *Markham v. Cobbe*, Noy, 82, 74 Eng. Rep. 1049 (1625) (*dicta*) (civil action for trespass merged into offense of burglary). For a general discussion of this rule, see 1 HALSBURY'S LAWS ¶ 16, at 11-14 (3d ed. 1952).

Other theories advanced to support the rule include: 1) that private actions for damages interfered with the royal prerogative and 2) that since at ancient English common law, felonies were punishable by death and forfeiture of one's goods and land to the Crown, the civil remedies were useless, for nothing remained in the convict's estate from which to satisfy a judgment. See *Boston and Worcester R.R. v. Dana*, 67 Mass. (1 Gray) 83, 96-97 (1854).

44 *Smith v. Selwyn*, 3 K.B. 98, [1914-1915] All E.R. Rep. 229 (1914) (Action for damages for rape stayed until after criminal proceedings). See also *Midland Ins. Co. v. Smith*, 6 Q.B.D. 561 (1881).

45 *Gimson v. Woodfull*, 2 C. & P. 41, 43, 172 Eng. Rep. 19, 20 (1825) ("[Y]ou must do your duty to the public, before you seek a benefit to yourself."). See also *Abbott v. Refuge Assurance Co.*, [1962] 1 Q.B. 432, [1961] 3 All. E.R. 1074 (1961) (Because the law imposed a duty to prosecute before commencement of civil proceedings, commencement of criminal proceedings for forgery did not constitute malice, even though the purpose of the proceeding was to enable recovery in a civil action.).

Nevertheless, English courts did not apply the rule where the injured person had a reasonable excuse for not prosecuting, for example, when the offender had already been brought to justice by another, *Re Shepherd, Ex parte Ball*, [1879] 10 Ch. D. 667; when the

abolished the rule by statute in 1967.⁴⁶

Some American jurisdictions initially applied the English rule.⁴⁷ Courts and legislatures, however, soon abolished the rule because its principal justification did not exist in this country. The existence of public prosecutors in America obviated the need to encourage public prosecution of crimes.⁴⁸

Thus, many modern civil actions that implicate criminal activity do not require conviction of the crime as a prerequisite for civil recovery.⁴⁹ Examples include the False Claims Act,⁵⁰ Internal Revenue Code provisions,⁵¹ and antitrust statutes.⁵² Similarly, under state law, many civil actions that require proof of a conduct constituting a crime do not require a conviction for that crime before authorizing civil recovery. For example, in a civil action to recover proceeds of an insurance policy, the insured's prior acquittal of arson does not prevent an insurance company from asserting arson as a defense.⁵³ Criminal conviction of bribery is also not a prerequisite to cancelling a government contract on the grounds of bribery.⁵⁴ Similarly, various tort actions that implicate conduct

offender had died, *Wickham v. Gatrill*, 2 Sm. & Giff. 353, 65 Eng. Rep. 433 (1854); or when the police had decided not to prosecute, *Oloro v. Ali*, [1965] 3 All E.R. 829.

46 Criminal Law Act, 1967, ch. 58, § 1; 8 HALSBURY'S STATUTES 552 (3d ed. 1968).

47 *Boston and Worcester R.R. v. Dana*, 67 Mass. (1 Gray) 83, 98-99 (1854). See, e.g., *Bell's Adm'r v. Troy*, 35 Ala. 184, 204 (1859) (termination of criminal prosecution of arson required before civil action for damages could be maintained); *Keyser v. Rodgers*, 50 Pa. 275, 281 (1865) (suspension of civil suit for trover suspended until criminal prosecution of larceny terminated).

48 *Boston & Worcester R.R. v. Dana*, 67 Mass. (1 Gray) 83, 99 (1854).

49 Moreover, acquittal or dismissal of criminal proceedings does not dispose of a subsequent civil action against the same defendant by collateral estoppel or res judicata. See *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099, 1104 (1984) ("[A]n acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.").

For an analysis of double jeopardy issues concerning RICO, see Note, *RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 NOTRE DAME L. REV. 382 (1982).

For an analysis of collateral estoppel issues concerning RICO, see Pickholz, *Collateral Estoppel and Civil RICO Actions*, in 3 RICO: THE SECOND STAGE M-1 (1984).

50 See, e.g., *Murray & Sorenson, Inc. v. United States*, 207 F.2d 119, 122 (1st Cir. 1953) (acquittal in criminal prosecution for conspiracy to defraud did not bar subsequent civil action against the same defendants to recover forfeitures and double damages under the False Claims Act).

51 See, e.g., *Helvering v. Mitchell*, 303 U.S. 391, 397-98 (1938) (acquittal in a criminal proceeding for wilful attempt to evade a tax did not bar collection of a 50% addition to the tax in a civil action).

52 See, e.g., *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912) (Sherman Antitrust Act) ("An imperative rule that the civil suit must await trial of the criminal action might result in injustice or take from the statute a great deal of its power.").

53 See, e.g., *McSweeney v. Utica Fire Ins. Co.*, 224 F.2d 327, 328 (4th Cir. 1955) (Acquittal was not admissible in a civil trial to prove homeowner's innocence of arson.).

54 See, e.g., *United States v. Acme Process Equip. Co.*, 385 U.S. 138, 146 (1966) (acquittal of charges claiming violation of the Anti-Kickback Act did not bar the right to cancel a

constituting a crime, including wrongful death⁵⁵ and assault and battery,⁵⁶ may be brought without a prior conviction of the defendant on a criminal charge.

As these examples illustrate, American courts traditionally have refused to require either criminal convictions or institution of criminal proceedings as a prerequisite to civil actions. The rationale behind the English rule requiring predicate convictions does not apply to civil suits requiring proof of a crime in the United States. As such, the old English rule does not serve as precedent for requiring conviction prior to a civil RICO action.

Accordingly, an examination of the text, legislative history, and analogous civil actions that implicate conduct constituting a crime does not support the *Sedima* court's imposition of a prior criminal conviction requirement in RICO. In addition, significant policy considerations weigh heavily against such a requirement.

D. Policy Considerations

By imposing the conviction requirement, the *Sedima* court also overlooked important policy considerations, including: 1) the existence of sufficient legal tools to prevent frivolous suits, 2) the inappropriateness of restricting a statute because of workload concerns, 3) the inappropriateness of denying a plaintiff access to court because of matters that preclude conviction, but that are unrelated to the validity of the civil claim, and 4) the detrimental effect of such a requirement on the criminal justice system.

Critics claim that RICO encourages frivolous lawsuits because it offers a private plaintiff the advantages of a federal forum and the

government contract because of the alleged kickback); *Pan Am. Petroleum and Transp. Co. v. United States*, 273 U.S. 456, 500 (1927) (to void contracts and leases because of bribery, it was not necessary to prove that the transaction constituted bribery under the criminal code).

55 See, e.g., *Vosnos v. Perry*, 43 Ill. App. 3d 834, 837, 357 N.E.2d 614, 616 (1976); *Small v. Rockfeld*, 66 N.J. 231, 245, 330 A.2d 335, 343 (1974).

Cf. *Burns v. United States*, 200 F.2d 106, 107 (4th Cir. 1952) (acquittal of murder charges in a criminal proceeding is not binding in a civil case to determine whether defendant is entitled to receive insurance proceeds on decedent's life); UNIFORM PROBATE CODE § 2-803(e) (1983) (conviction of felonious and intentional killing is not required for determining the effect of homicide on intestate succession, wills, joint assets, life insurance, and beneficiary designations); RESTATEMENT OF THE LAW OF RESTITUTION § 187 comment f (1937) (conviction of murder is not required before imposition of a constructive trust for murder of decedent).

56 See, e.g., *Parker v. Lanier*, 82 Ga. 216, 218-19, 8 S.E. 57, 58 (1888); *Nowlan v. Griffin*, 68 Me. 235, 235-36 (1878); *Barr v. Post*, 56 Neb. 698, 707, 77 N.W. 123, 126 (1898); *Harford v. Carroll*, 21 R.I. 515, 516, 45 A. 259, 259 (1900). *But see* *Horby v. King*, 13 N.J. Super 395, 400, 80 A.2d 476, 478 (1951) (public duty to initiate a criminal proceeding for rape before instituting a civil action for damages).

Cf. *Warren v. Byrne*, 699 F.2d 95, 97-98 (2d Cir. 1983) (Dismissal of criminal charges of trespass does not bar relitigation of the trespass issue in a civil action.).

prospect of treble damages and attorneys' fees.⁵⁷ In support of the prior criminal conviction requirement, the *Sedima* court remarked that, whereas prosecutorial discretion and special RICO guidelines guard against overly broad use of criminal RICO,⁵⁸ no comparable restrictions circumscribe the use of civil RICO.⁵⁹

Nevertheless, restrictions that prevent the overly broad use of other civil remedies will equally and adequately prevent frivolous civil RICO claims. First, the Federal Rules of Civil Procedure provide various means to discourage meritless litigation. For example, Rule 11⁶⁰ authorizes a court to order a litigant, who acts in bad faith in conducting litigation, to pay his opponent's expenses, including fees. As recently amended, Rule 11 states that when an attorney signs a document, he certifies that he has read the document, that he believes, after reasonable inquiry, that it is warranted by existing law or a good faith argument to extend the law, and that he is not using it for an improper purpose.⁶¹ An attorney and his client asserting a civil RICO claim may be sanctioned under this rule for bringing a RICO action unwarranted by law or asserted merely for settlement purposes.

Second, attorney rules of ethics also guard against meritless RICO civil suits. Under the *Model Code of Professional Responsibility*, an attorney may be subject to discipline for filing a suit on behalf of his client merely for the purpose of harassing or maliciously injuring another;⁶² or knowingly advancing a claim or defense unwarranted by existing law, unless he can make a good faith argument

57 Skinner & Tone, *supra* note 2, at 24 ("RICO is an attractive vehicle for plaintiffs to assert garden variety fraud claims, obtain a federal fourm and seek treble damages. . . . Civil plaintiffs cannot be expected to exercise, and have not exercised . . . discretion.").

58 United States Attorneys' Staff Manual, Executive Office for U.S. Attorneys, RICO Guidelines (Jan. 30, 1981). These guidelines, however, are not judicially enforceable. *Haley v. United States*, 394 F. Supp. 1022, 1027 (W.D. Mo. 1975) ("simply a 'housekeeping provision' of the Department of Justice"). The guidelines also do not apply to state prosecutors. See also note 64 *infra*.

59 741 F.2d at 497.

60 FED. R. CIV. P. 11. Other federal rules that guard against the institution of meritless suits include FED. R. CIV. P. 9(b) (fraud must be pleaded with particularity); FED. R. CIV. P. 12(e) (motion for a more definite statement); FED. R. CIV. P. 26(g) (signature of party or attorney certifies that discovery requests, responses, and objections are warranted by existing law or good faith argument otherwise, are not used for improper purpose, and are not unreasonable or unduly burdensome); and FED. R. CIV. P. 56 (summary judgment). See also Rodes, Ripple & Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure 64-65, Federal Judicial Center (1981).

61 The rule was amended to reduce courts' reluctance to impose sanctions for pleading and motion abuses. "Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." FED. R. CIV. P. 11 advisory committee note.

62 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1).

for its extension, modification, or reversal.⁶³

Finally, defendants subjected to meritless RICO civil actions may sue RICO plaintiffs under tort theories of abuse of process and wrongful civil proceedings.⁶⁴ Under the theory of wrongful civil proceedings, a defendant in a frivolous private RICO action may sue the private plaintiff if he can prove that the private plaintiff maliciously brought the action without probable cause, that the RICO claim terminated in the defendant's favor, and that the defendant suffered injury from the meritless action.⁶⁵ A defendant in a frivolous private RICO suit, however, may have a better chance of recovering under abuse of process, which requires proving only a wilful use of a legal process for an improper purpose.⁶⁶ Abuse of process would provide recourse against an attorney or client who, for example, commences a private RICO action merely to force a nuisance settlement.⁶⁷

Thus, sufficient rules and procedures exist to prevent meritless RICO actions.⁶⁸ Meritless lawsuits arise because the legal commu-

63 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3).

64 The tort of wrongful civil proceedings is also termed malicious prosecution even though involving a civil action. L. PROSSER & W. KEETON, *THE LAW OF TORTS* § 120 (5th ed. 1984).

However, a prosecutor acting within the scope of his duties, enjoys absolute immunity from civil suits for damages under 42 U.S.C. § 1983 or under the common law theory of malicious prosecution. *Imbler v. Pachtman*, 424 U.S. 409, 420-29 (1976). Accordingly, the Second Circuit's statement in *Sedima* that prosecutorial discretion based on the Department of Justice guidelines prevents abuses of criminal RICO is illusory because 1) The Department of Justice guidelines are not judicially enforceable against federal prosecutors and are not even applicable to state prosecutors and 2) federal and state prosecutors enjoy immunity from civil suits for abusive or unlawful prosecutions. See note 58 *supra*.

65 L. PROSSER & W. KEETON, *supra* note 64, § 120. A large minority of jurisdictions require, however, that the plaintiff in the wrongful civil proceedings action allege a special injury, such as interference to his person or property. *Id.* Such a requirement may reduce the chances of recovery by a RICO defendant who alleges as his only injury, damage to his reputation by being stigmatized a "racketeer."

66 *Id.* § 121.

67 *Cf.* *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980) (A complaint and summons charging a doctor with malpractice were misused by an attorney for the ulterior purpose of coercing a settlement. The following facts supported the finding that the commencement of the suit by the attorney was abuse of process: 1) the attorney's failure to adequately investigate before deciding to file suit, 2) the attorney's failure to introduce expert evidence at trial, and 3) the low settlement offer.)

A client may also be liable for an attorney's malicious actions under principles of agency. *Nyer v. Carter*, 367 A.2d 1375 (Me. 1977).

68 See generally *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (fear of frivolous suits unjustified in light of tools available). For application in RICO cases, see *WSB Elec. Co. v. Rank & File Comm. to Stop the 2-Gate System*, 103 F.R.D. 417, 420-21 (N.D. Cal. 1984) (sanctions under FED. R. Civ. P. 11 imposed for frivolous RICO claim based on picketing); *Gordon v. Heimann*, 715 F.2d 531, 539 (11th Cir. 1983) (bad faith counsel fee award in civil RICO appeal); *King v. Lasher*, 572 F. Supp. 1377, 1385 (S.D.N.Y. 1983) (bad faith counsel fee award in civil RICO suit). Frivolous defenses to valid RICO and other claims may also be made the subject of sanctions. *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987, 990-92 (N.D. Ill. 1984).

nity fails to fully utilize these rules and procedures.⁶⁹ The solution to meritless litigation lies not in imposing additional requirements for establishing plaintiff's prima facie case but in using existing rules and procedures to discourage such litigation. If the existing rules are inadequate, the appropriate solution would be to reform the remedies, not redraft RICO, because the problem of meritless actions would extend beyond RICO to all civil actions.⁷⁰

Critics have cited the increased burden on the federal judiciary workload as another problem associated with civil RICO.⁷¹ The increased workload, however, cannot justify a judicial restriction of a statute. Such an approach requires legislative action. The Supreme Court recognized this basic principle in refusing to reject consumer class actions under section 4 of the Clayton Act:⁷² "We must take the statute as we find it. Congress created the treble damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations [I]t is the clear responsibility of Congress to provide the judicial resources necessary to execute its mandates."⁷³

Similarly, Congress created the treble damage remedy of civil RICO to encourage private challenges to racketeering activity.⁷⁴ It is, therefore, Congress' responsibility to provide the means to accommodate the litigation its legislation fosters. Judicial redrafting of RICO to reduce workload is inappropriate.⁷⁵

69 See *Report of the Proceedings of the Judicial Conference of the United States*, Sept. 21-22, 1983, at 56 (existing tools used to reduce meritless litigation are sufficient, but perhaps not fully understood or utilized).

70 Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect petitioners from vexatious litigation, then there is something wrong with those procedures, not with the law

Hoover v. Ronwin, 104 S. Ct. 1989, 2012 (1984). See also *Hudson v. Palmer*, 104 S. Ct. 3194, 3215 n.30 (1984) ("[A flood of frivolous lawsuits] is not sufficient to justify a judicial modification of the requirements of law.").

71 See "*RICO*" *Running Amok in Board Rooms*, *supra* note 2, at 20 ("Trial judges, horrified at the prospect of yet another wave of lawsuits to increase their caseload, have at times displayed notably acrobatic reasoning to throw out RICO charges.").

The Second Circuit, in *Sedima*, pointed to the recent increase of civil RICO cases, but conceded that altering court workload is not within its judicial power. 741 F.2d at 487. That the prior criminal conviction requirement would significantly reduce the number of civil RICO actions, however, could not have escaped the court's notice. See notes 78-79 *infra*.

72 *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (class action by retail customers against manufacturers of hearing aids for antitrust violations).

73 *Id.* at 344 (emphasis in original).

74 See, e.g., *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1169 (5th Cir. 1984) (quoting *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981) (RICO was designed to permit private civil suits by a company forced to pay bribes or kickbacks of any kind.)).

75 See, e.g., *Patsy v. Board of Regents* 457 U.S. 496, 512 n.13 (1982) (The burden im-

The *Sedima* court's requirement of a RICO defendant's conviction as a prerequisite to a private civil action also constitutes an inappropriate restriction on private access to the court. Because of this requirement, a private plaintiff may be denied his day in court where: 1) the defendant is acquitted on the grounds of insufficient evidence to establish guilt beyond a reasonable doubt; 2) the defendant is acquitted because of procedural flaws in the criminal trial;⁷⁶ 3) the defendant is granted immunity from prosecution; 4) the defendant enters a beneficial plea to an offense that is not related to RICO;⁷⁷ 5) the defendant is granted amnesty; 6) the government decides not to prosecute because the defendant is willing to turn State's evidence; or 7) the grand jury does not indict because of insufficient evidence or defective proceedings. In these situations, persons injured by the defendant are barred from seeking restitution by matters not related to the validity of their claims for relief. The determination of who can recover under civil RICO should not depend on prosecutorial errors or decisions, matters wholly unrelated to the merits of the civil action.

According to the *Sedima* court, Congress did not intend that RICO create a broad civil cause of action.⁷⁸ Even so, the Second Circuit's effort to narrow the statute is itself too broad. Requiring a prior criminal conviction reduces a statute's civil counterpart to a trivial remedy. An examination of the number of civil and criminal actions filed in federal courts each year in the areas of antitrust and securities illustrates this result.

In the antitrust area, 1,200 civil actions are filed each year, while only 74 criminal actions are brought. Under securities and related laws, 3,000 civil actions are filed each year, while only 26 criminal actions are brought.⁷⁹ Consequently, if a prior criminal

posed on federal courts by actions under 42 U.S.C. § 1983 is "not sufficient to justify a judicial decision to alter congressionally imposed jurisdiction.").

76 The suppression of evidence obtained illegally by the government might preclude a criminal conviction. The failure to obtain a conviction would also preclude the victim from bringing suit in a civil action. In short, the prior criminal conviction requirement would have the effect of extending the impact of the exclusionary rule to private plaintiffs. Such an extension of the exclusionary rule to civil actions would be inconsistent with current law. See *INS v. Lopez-Mendoza*, 104 S. Ct. 3479, 3490 (1984) (exclusionary rule does not apply in civil deportation hearings); *Sackler v. Sackler*, 15 N.Y.2d 40, 43, 203 N.E.2d 481, 483, 255 N.Y.S.2d 83, 85 (1964) (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)) ("[The fourth amendment] was not intended to be a limitation upon other than governmental agencies.").

77 In fact, prosecutorial discretion had been exercised in *Sedima*. Defendants were charged with grand larceny and agreed to plead guilty to violations of New York's business record statute. Brief for Respondents' at 3 n.4, *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), cert. granted, 105 S. Ct. 901 (1985).

78 741 F.2d at 487.

79 See *Annual Report of the Director of the Administrative Office of the United States Courts*, 121, 164, 314 (1983).

conviction requirement was introduced in the antitrust or securities area, it would virtually end the usefulness of the civil remedies under those statutes. A similar result could well be forecast under RICO. Congress could not have provided a civil right of action and intended it to be available in so few situations.

Moreover, the prior criminal conviction requirement will likely prejudice the criminal justice system. Requiring a prior criminal conviction gives the criminal RICO defendant a powerful incentive to plea bargain for an offense not related to RICO to avoid the civil consequences of a RICO-related conviction.⁸⁰ Further, the requirement gives a victim planning to sue under civil RICO the incentive to perjure himself in the criminal proceeding. Even if a victim-witness does not lie, his credibility is subject to attack in the criminal proceeding because his prospect of receiving treble damages depends upon the conviction of the defendant. Consequently, fewer convictions under RICO and RICO-related offenses may be obtained under the *Sedima* rule. In addition, requiring a prior criminal conviction imposes pressure on prosecutors because the opportunity for RICO victim recovery depends on the institution and success of the government's case. Thus, the problems⁸¹ inherent in the Second Circuit's prior criminal conviction requirement will have a detrimental effect on the criminal justice system that cannot be ignored.

In summary, because the *Sedima* requirement of a prior criminal conviction is not supported by the language or legislative history of RICO, analogous civil actions implicating criminal activity, or policy considerations, the requirement should be rejected.

II. Burden of Proof

Among other elements of a civil RICO action, a private plaintiff must prove that the defendant engaged in conduct constituting at

⁸⁰ The A.B.A. voiced its concern over the fact that the enhanced criminal penalties of RICO provide the potential for plea bargaining abuses by the government. See Report to the House of Delegates, 1982 A.B.A. SEC. CRIM. JUST. REP. 3, 16 (Jan. 1982). The prior criminal conviction requirement, as a condition precedent to civil recovery, further enhances that possibility of abuse.

⁸¹ Consideration must also be given to timing of the statute of limitations and bars against splitting claims for relief. In most civil actions, the statute of limitations begins to run from the time of the wrong. Accordingly, it is likely that the criminal prosecution will not be completed by the time the traditional statute of limitations period has expired. If the statute of limitations ran from conviction that rule would defeat the purpose of the statute of limitations itself. RICO defendants in a civil action would be litigating claims years after the wrong occurred. Finally, the plaintiff with a RICO claim and a traditional cause of action would be whipsawed between the need to file his suits at different times. See *Luebke v. Marine Nat'l Bank*, 567 F. Supp. 1460, 1462 (E.D. Wis. 1983) (improper to split RICO and state claim for relief). For a general discussion of the statute of limitations as applied to RICO, see Goldsmith, *Time Bars Under RICO*, in 3 RICO: THE SECOND STAGE Q (1984).

least two predicate offenses within ten years.⁸² In the absence of a prior criminal conviction, the issue arises as to what standard of proof the plaintiff must establish that the defendant committed the criminal activity.⁸³ Should the burden be by a preponderance of the evidence,⁸⁴ or by clear and convincing evidence?⁸⁵ Or should the plaintiff be required to prove the criminal activity beyond a reasonable doubt?⁸⁶ The *Sedima* court suggested that the proper standard is beyond a reasonable doubt.⁸⁷ Other federal courts of appeals have held, however, that a preponderance standard of proof should be applied in civil RICO actions.⁸⁸ While the text of RICO is silent regarding burden of proof,⁸⁹ the legislative history, analogous civil actions, and policy considerations establish that the proper standard is preponderance of the evidence.

A. Legislative History

Traditionally, what measure of proof should be applied is a question left to courts.⁹⁰ The issue, however, is first a matter of legislative intent.⁹¹ An examination of RICO's legislative history reveals several bases for determining that Congress intended a pre-

82 18 U.S.C. § 1961(5) (1982). See note 5 *supra*. RICO may also be violated by the collection of an unlawful debt, which need not be subject to criminal sanctions. See *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, No. 84-7221, slip op. (2d Cir. Feb. 5, 1985).

83 The term burden of proof applies in different contexts. It refers to the burden of going forward with evidence. It also refers to the burden of persuasion. MCCORMICK ON EVIDENCE § 336 (Cleary ed. 1984). This note deals with the burden of persuasion.

84 See, e.g., *Eaby v. Richmond*, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983); *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 676-77 (N.D. Ind. 1982); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313-14 (N.D. Ill. 1979); *Farmers Bank of Del. v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978).

85 *Swanson v. Wabash, Inc.*, 577 F. Supp. 1308 (N.D. Ill. 1983).

86 Although no case has applied the standard beyond a reasonable doubt in civil RICO cases, the Seventh Circuit has suggested that its application might be appropriate. See *Haroco Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 404 (7th Cir. 1984) ("[R]equiring private RICO plaintiffs to prove at trial the elements of a section 1962 violation beyond a reasonable doubt could address some of the legitimate concerns about unfair stigmatization of defendants as 'racketeers' and other abuses of RICO's criminal dimensions through civil proceedings.").

87 741 F.2d at 501-02.

88 *Alcorn County, Miss. v. United States Interstate Supplies, Inc.*, 731 F.2d 1160, 1170-71 (5th Cir. 1984); *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) *cert. denied*, 420 U.S. 925 (1975).

89 Six state versions of RICO expressly set forth burden of proof in a civil suit. Five states provide for a preponderance of the evidence as the burden of proof in a civil suit. ARIZ. REV. STAT. ANN. § 13-2314 (1978 and West Supp. 1984-85); IND. CODE ANN. 34-4-30.5-2 (Burns Supp. 1984); N.D. CENT. CODE. § 12.1-06.1-05 (Smith Supp. 1983); UTAH CODE ANN. § 76-10-1605(2) (Smith Supp. 1983); WASH. REV. CODE ANN. § 9A.82.100(9) (West Supp. 1985). Wisconsin requires proof to a reasonable certainty in a civil proceeding. WIS. STAT. ANN. § 946.86(5) (West Supp. 1984-85).

90 *Santosky v. Kramer*, 455 U.S. 745, 755-56 (1982).

91 *Steadman v. SEC*, 450 U.S. 91, 96 n.10 (1981).

ponderance of the evidence to be the standard of proof applicable in civil RICO actions. First, during hearings on RICO, key sponsors and supporters of the civil action explicitly stated that the standard of preponderance of the evidence would apply in civil RICO actions.⁹² In addition, other references in the legislative history to "procedural equality,"⁹³ "lesser standard of proof,"⁹⁴ and "easier standard of proof"⁹⁵ support this standard. Second, because Congress modeled RICO on the antitrust statutes⁹⁶ which require a preponderance of the evidence,⁹⁷ it may be inferred that Congress intended the same standard to apply in RICO. Third, Congress expressly classified RICO as remedial, instead of penal.⁹⁸ Remedial actions generally require the preponderance of the evidence standard.⁹⁹ Finally, Congress enacted RICO to supplement the existing federal and state laws that Congress deemed inadequate to protect victims of racketeering.¹⁰⁰ The Supreme Court noted that an inadequacy of such laws in the area of securities fraud was the height-

92 *Hearing Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 519-20 (1970) (statement of Congressman Sam Steiger) ("innovative . . . civil procedures and remedies [of Title IX, with their proof] by a preponderance of the evidence"). See also *Measures Relating to Organized Crime; Hearings on S.30, S.994 . . . Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 388 (1969) (statement of Assistant Attorney General) ("by the lesser standard of proof, i.e., by a preponderance of the evidence").

93 *Organized Crime Control: Hearings on A.30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 107 (1970) [hereinafter cited as *Hearings*] (statement of Sen. John L. McClellan) ("Since these civil sanctions would be remedial rather than punitive . . . [there would be] procedural equality."). Sen. McClellan's comments are entitled to "weight" because he is a sponsor of the legislation. *Lewis v. United States*, 445 U.S. 55, 63 (1980). See also *Hearings*, at 664 (remarks of Congressman Richard H. Poff) ("[T]itle IX is really in two parts, one criminal and one civil. The burden of proof under the civil remedy section, section 1964, is much less than it would be under the criminal section . . ."). Congressman Poff's statements should also be entitled "weight" because he has been noted as the "manager of the bill." *United States v. Turkette*, 452 U.S. 576, 593 (1981).

94 S. REP. NO. 617, 91st Cong., 1st Sess.: 126 (1969) (letter of Deputy Attorney General).

95 116 CONG. REC. 35,313 (1970) (statement of Congressman Joseph A. Minish).

96 S. REP. NO. 617, *supra* note 5, at 81; H.R. REP. NO. 1549, 91st Cong., 2d Sess. 56-60 (1970).

97 See *Ramsey v. United Mine Workers*, 401 U.S. 302, 307-11 (1971); *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 778 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971).

98 84 Stat. 947 (1970) ("The provisions of this title shall be liberally construed to effectuate its remedial purposes."); S. REP. NO. 617, *supra* note 5, at 81-82 (1969) ("[T]itle IX, it must be again emphasized, is remedial rather than penal.").

99 MCCORMICK ON EVIDENCE, § 339 (Cleary ed. 1984).

100 84 Stat. 923 (1970). See also *United States v. Turkette*, 452 U.S. 576, 586 (1981) ("[T]he very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions.").

ened standard of proof required by common law fraud.¹⁰¹ To apply a heightened standard of proof in civil RICO would defeat Congress' purpose in filling voids present in existing laws.

B. *Analogous Civil Actions Imputing Criminal Activity*

Part I of this note concluded that requiring a prior criminal conviction in RICO civil actions departs from modern actions that require proof of conduct constituting a crime.¹⁰² Similarly, this section concludes that requiring proof beyond a reasonable doubt in civil RICO actions would also depart from modern civil actions that require proof of conduct constituting a crime by a mere preponderance of the evidence.¹⁰³ Although English courts and early American decisions once required proof beyond a reasonable doubt in civil actions implicating criminal conduct, examination of the English and early American history of the rule reveals why the rule does not apply in modern civil actions and should not apply in civil RICO actions.

At a time when death was the punishment for nearly all crimes, English law established the reasonable doubt rule to mitigate this severity.¹⁰⁴ Because of a peculiar procedural structure, early English courts required proof beyond a reasonable doubt on the issue of crime in civil actions.¹⁰⁵ Private citizens were allowed to bring civil actions against an individual prior to a criminal prosecution against the same person for the same offense. If the private citizen prevailed in the civil action, the defendant often was immediately prosecuted for the criminal offense without intervention of a grand jury.¹⁰⁶ As the criminal law was reformed and fewer crimes merited the death penalty, English courts began to restrict the standard of proof beyond a reasonable doubt to criminal proceedings.¹⁰⁷

Early American courts differed on the application of proof beyond a reasonable doubt in civil actions imputing criminal activity. Some jurisdictions never applied the doctrine.¹⁰⁸ Some courts ap-

101 See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (securities laws require a standard of preponderance of the evidence in civil actions) ("Indeed, an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common law protections . . .").

102 See notes 50-56 *supra* and accompanying text.

103 See notes 111-19 *infra* and accompanying text.

104 Groom, *Proof of Crime in a Civil Proceeding*, 13 MINN. L. REV. 556, 560-61 (1929).

105 Early English courts applied a criminal standard of proof in actions to recover fire insurance proceeds where the defendant pleaded arson as a defense, *Thurtell v. Beaumont*, 1 Bing 339, 130 Eng. Rep. 136 (1823); in actions for libel charging forgery, *Chalmers v. Shackell*, 6 C. & P. 475, 172 Eng. Rep. 1326 (1834); and in actions for slander charging bigamy, *Wilmet v. Harmer*, 8 C. & P. 695, 173 Eng. Rep. 678 (1839).

106 Groom, *supra* note 104, at 557-58.

107 *Id.* at 561.

108 *Id.* at 567 n.49 (Alabama, Colorado, Connecticut, Kentucky, Louisiana, Massachu-

plied the doctrine only in narrow areas.¹⁰⁹ Other courts applied the doctrine for a short time, until statutory or judicial abrogation.¹¹⁰

In most jurisdictions, preponderance of the evidence prevails as the standard of proof applicable in the following civil actions that impute crimes: libel or slander actions where the defense alleges that the plaintiff committed the crime;¹¹¹ actions on insurance policies where the defense is arson¹¹² or theft;¹¹³ wrongful death actions;¹¹⁴ actions under treble damage legislation;¹¹⁵ actions to recover a debt where the defense is that the debt was incurred in an illegal gambling transaction;¹¹⁶ and actions for breach of contract where the defense is bribery.¹¹⁷ Similarly, courts have held that

setts, Michigan, Minnesota, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Oregon, Oklahoma, Rhode Island, Texas, Vermont, Washington, West Virginia).

109 *Id.* at 567 n.48 (Delaware, Illinois, New Jersey, South Carolina). For example, Illinois required the standard of proof beyond a reasonable doubt to prove commission of a crime in a civil action only when: 1) the action was other than divorce or bastardy proceedings, actions to recover a penalty, or libel or slander actions; 2) where the crime would constitute a felony; 3) where the crime was charged in the pleadings; and 4) where it was charged against a party to the action. *Id.* at 575.

110 *Id.* at 567 n.47 (Florida, Indiana, Iowa, Maine, Missouri, Ohio, Pennsylvania, Tennessee, Wisconsin). *See, e.g.,* Elliot v. Van Bruen, 33 Mich. 49, 50-51 (1875) (assault & battery with attempt to ravish) ("There is no rule of evidence which requires a greater preponderance of proof to authorize a verdict in one civil action than in another, by reason of the peculiar questions involved.").

One commentator has suggested that those American courts that applied the beyond a reasonable doubt standard in civil actions did so for one of two reasons. Either American courts were blindly following English precedent or they were confusing this burden with the "two-witness rule." The two-witness rule required two witnesses or one witness and corroborating circumstances to sustain a conviction of perjury. Some courts applied the two-witness rule in civil actions in libel or slander based on perjury. *Id.* at 557.

111 *See, e.g.,* Savannah News-Press, Inc. v. Harley, 100 Ga. App. 387, 390, 111 S.E.2d 259, 263-64 (1959) (defense of truth of statement in newspaper that police shooting was "murderous" required proof by a preponderance of the evidence); Auto West, Inc. v. Baggs, 678 P.2d 286, 291 (Utah 1984) (defense of truth of statement that plaintiff embezzled funds required proof by a preponderance of the evidence).

112 *See, e.g.,* Dean v. Insurance Co. of North Am., 453 N.E.2d 1187, 1194 (Ind. Ct. App. 1983); Godwin v. Farmers Ins. Co., 129 Ariz. 416, 418 (App.), 631 P.2d 571, 573 (1981); Rist v. Commercial Union Ins. Co., 376 So.2d 113, 113 (La. 1979).

113 *See, e.g.,* Aetna Ins. Co. v. English, 204 S.W.2d 850, 856 (Tex. Civ. App. 1947); Weir v. Central Nat'l Fire Ins. Co., 194 Iowa 446, 449, 189 N.W. 794, 795 (1922); Garner v. New Jersey Fidelity & Plate Glass Ins. Co., 200 S.W. 448, 449 (Mo. Ct. App. 1918).

114 *See, e.g.,* Ory v. Libersky, 40 Md. App. 151, 159-60, 389 A.2d 922, 928 (1978); Contestible v. Brookshire, 355 S.W.2d 36, 40 (Mo.), *cert. denied*, 371 U.S. 68 (1962).

Cf. UNIFORM PROBATE CODE § 2-803(e) (1983) (Absent conviction, a court may determine by a preponderance of the evidence whether a killing was felonious and intentional for purposes of determining the effect of the homicide on intestate succession, wills, joint assets, life insurance, and beneficiary designations.).

115 *See, e.g.,* James v. Brinks & Erb, Inc., 452 N.E.2d 414, 416 (Ind. Ct. App. 1983).

116 *See, e.g.,* Israel v. Selman, 263 Ill. App. 351, 356, (1931). *Cf.* Hodoh v. United States, 153 F. Supp. 822, 824 (N.D. Ohio 1957) (In a civil action to recover excise tax assessed on illegal wagering activities, the taxpayer's claim that he was not engaged in the business of wagering required proof by a preponderance of the evidence.).

117 *See, e.g.,* Jaclyn, Inc. v. Edison Bros. Stores, Inc., 170 N.J. Super 334, 361, 406 A.2d 474, 485 (1979).

civil actions under various federal statutes that impute criminal activity, including antitrust¹¹⁸ and securities¹¹⁹ laws, require only a preponderance of the evidence.

The sheer number of civil actions imputing criminal activity without a higher burden of proof reflects the view that the rule of preponderance of the evidence in civil actions is better-reasoned. The life and liberty interests at stake in a criminal trial warrant the presumption of innocence and heightened standard of proof. The presumption of innocence and heightened standard of proof are not used in a civil proceeding because the interest at stake is only pecuniary.¹²⁰ Accordingly, the defendant's pecuniary interest in a civil RICO action merits no more than the traditional standard of proof applied in civil proceedings, proof by a preponderance of the evidence.

The *Sedima* court's suggestion that, absent conviction, the issue of criminal conduct in a civil action would have to be proven beyond a reasonable doubt substantially departs from the rules applicable to most other civil actions.

C. Policy Considerations Concerning Stigma

In *Sedima*, the Second Circuit's position that the stigma of being labelled a "racketeer" justifies the imposition of a heightened standard of proof ignores two important points. First, if a defendant fits the definition of racketeer, the stigma that attaches to him is warranted.¹²¹ Second, the fear of that stigma properly deters care-

118 See, e.g., *Ramsey v. United Mine Workers*, 401 U.S. 302, 311 (1971) (Sherman Antitrust Act); *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 773 (6th Cir. 1970), cert. denied, 402 U.S. 983 (1971) (antitrust laws in general).

119 See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (private action under the Securities Exchange Act of 1934); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943) (government action under the Securities Act of 1933).

120 See *United States v. Regan*, 232 U.S. 37, 48-49 (1913) (quoting *Roberge v. Burnham*, 124 Mass. 277, 278 (1878)).

The rule of evidence requiring proof beyond a reasonable doubt is generally applicable only in strictly criminal proceedings. It is founded upon the reason that a greater degree of probability should be required as a ground of judgment in criminal cases, which affect life or liberty, than may safely be adopted in cases where civil rights only are ascertained.

See *Watson v. Adams*, 187 Ala. 490, 507, 65 So. 528, 533 (1914) (wrongful death) ("Great as the love of money may be in some human beings, it cannot be presumed that to be held liable for damages is, to the ordinary man, the equivalent of the impending, unless diverted, exaction of his freedom or his life . . .").

The Court, however, has applied a heightened standard of proof in certain civil proceedings involving particularly important individuals' interests or rights. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 766-67 (1982) (action to terminate parental rights); *Addington v. Texas*, 441 U.S. 418, 433 (1979) (involuntary civil commitment proceeding); *In re Winship*, 397 U.S. 358, 361-68 (1970) (juvenile delinquency proceeding); *Woodby v. INS*, 385 U.S. 276, 285-86 (1966) (deportation).

121 Worried about the prejudicial impact on judges and juries resulting from the label of

less as well as fraudulent business practices.

The *Sedima* court, focusing on the "racketeer" stigma, reasoned that Congress must have intended wilful violation of laws, such as securities, to be proven by a heightened standard of proof. The court asserted that allowing wilful violations to be proven by a mere preponderance of the evidence could subject a director of a national corporation to "racketeering" charges, treble damages, and attorneys' fees for two misstatements in a proxy solicitation.¹²²

True, one does not normally associate a director in a national company with the image of the typical "racketeer." Under the dictionary definition of "racketeering," however, someone who uses fraud to his commercial advantage *is* a racketeer.¹²³ Thus, a director in a national company who benefits from a fraudulent proxy statement or even from the infringement of a trademark¹²⁴ would be properly labeled a "racketeer."

In other civil actions implicating criminal activity where the law holds a defendant liable on a preponderance of the evidence, the defendant is blackened with the stigma of the imputed crime.¹²⁵ For example, a defendant liable for wrongful death may be labeled a "murderer," or a plaintiff who fails to recover insurance proceeds due to a defense of arson may be labeled an "arsonist." Surely, the impact of being labelled a "racketeer" is no more damaging.

The stigma associated with business people found to be "racketeers" under civil RICO may also be viewed in a positive light.¹²⁶

"racketeer," the House of Delegates of the A.B.A. recommended to Congress that the word "criminal" replace "racketeer" in RICO. Report to the House of Delegates, *supra*, note 80 at 4.

It has been argued, however, that use of this type of euphemism in the law makes officials reluctant to enforce the law and causes violators to rationalize their conduct. See D. CRESSEY, OTHER PEOPLES MONEY 102 (1952); Blakey, *supra* note 5, at 250 n.41.

¹²² *Sedima*, 741 F.2d at 499.

¹²³ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1871 (15th ed. 1966) defines "racketeer" as "use of fraud or intimidation in extorting money or commercial or political advantage."

¹²⁴ See *Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co.*, 349 F.2d 389, 396 (2d Cir. 1965) (Lumbard, C.J.) (trademark infringement litigation: defendant labeled by court as a "commercial racketeer").

¹²⁵ See notes 111-19 *supra* and accompanying text.

¹²⁶ One English authority on evidence has argued that protection of reputation was the foremost reason for requiring proof beyond a reasonable doubt for any action charging criminal activity. P. TAYLOR, EVIDENCE § 112 (8th ed. 1887). This view has been criticized because had damage to reputation been a purpose of proof beyond a reasonable doubt, it would have been extended to *all* civil actions, for the resolution of most civil actions, in fact, affects the reputation of the litigants.

What could be more damaging to reputation than the proof of a charge of unchastity, illegitimacy, criminal conversation, contagious disease, insolvency, use of intoxicating liquors to excess, exercise of undue influence, and the like? Yet, in breach of promise cases in which chastity becomes an issue, proof beyond a reasonable doubt has never been required. The same is true of actions for criminal conversation; slander or libel proceedings charging disease, venereal or other

This stigma, coupled with the imposition of treble damages, provides strong incentive for added care in business transactions. For example, in a recent lawsuit, the plaintiff claimed that a bank that charged an individual borrower a higher "prime rate" than the prime rate charged to commercial borrowers violated civil RICO.¹²⁷ This lawsuit motivated many banks to amend their loan documents to avoid similar misrepresentations.¹²⁸ To avoid RICO lawsuits, banks now are urged not to use the term "prime rate" in individual loan documents unless they intend to charge individual borrowers the same rate charged to commercial customers.

Arguably, the threat of civil RICO performs a valuable watchdog function over "legitimate" businesses as well as organized crime. This role is especially important at a time when other organizations designed to perform that function are apparently losing their effectiveness. Public accounting firms, traditional outside checks on improper business conduct in America's corporations, have been subject to a recent barrage of litigation concerning audit failures.¹²⁹ This has prompted congressional scrutiny into the question of whether competitive cost pressures and the desire to expand consulting services have diminished the independence and effectiveness of auditors.¹³⁰ Moreover, the SEC has been criticized

kind; voluntary or involuntary bankruptcy proceedings, or other proceedings affecting credit.

Grooms, *supra* note 104, at 561.

127 *Kleiner v. First Nat'l Bank*, 751 F.2d 1193 (11th Cir. 1985).

128 *A Lawsuit Tests What "Prime Rate" Really Means*, BUSINESSWEEK, Dec. 5, 1983, at 73 ("[I]n response to similar suits, many banks have changed their loan forms to avoid defining interest rates in terms of how much they charge their most favored borrowers."); *Suit Tests Prime's Definition*, N.Y. Times, Feb. 3, 1984, at Y27, col. 3 ("By now, most banks have changed their loan agreements, either by using a new term, such as "posted rate" instead of prime rate, or by redefining the prime rate."). For an analysis of the use of RICO in cases of prime-rate discounting, see Note, *Prime-Rate Fraud Under RICO*, 72 GEO. L.J. 1885 (1984).

One commentator stated that the simplest and best way to avoid RICO claims is to take more care in drafting loan documents. He warns banks not use the term "prime rate" unless they mean "the lowest commercial interest rate available at a particular time and place" and urges banks to state the rate, if possible, or use such terms as "base rate" or "published rate" to avoid misleading loan customers. Mannino, *Prime Rate Overcharge Cases: How to Exorcise the RICO Devil*, 101 BANKING L.J. 196, 215 (1984).

129 *SEC Charges ESM Auditor Received Total of \$125,000 From Firm's Officers*, Wall St. J., Mar. 21, 1985, at 2, col. 3 (SEC charged that the former partner of Alexander Grant & Co. gave, in return for secret payments, unqualified opinions on false financial statements showing the insolvent securities firm to be in sound financial condition. The collapse of this securities firm led to the collapse of an Ohio savings and loan which triggered the closing of 71 other Ohio thrift institutions); *3 Censured by S.E.C. for Audits*, N.Y. Times, June 26, 1984, at Y29, col. 6 (auditors censured for knowingly issuing questionable auditing reports); *Uneasy Period for Andersen*, N.Y. Times, Nov. 23, 1984, at Y29, col. 3 (within two months Arthur Andersen & Co. agreed to \$65 million in out-of-court settlements).

130 *Auditors Face U.S. Scrutiny*, N.Y. Times, Feb. 18, 1985, at Y14, col. 6 (statement of Eli Mason, Chairman of National Conference of C.P.A. Practitioners) ("there has been a marked deterioration in professional behavior due to unscrupulous marketing practices," i.e. cutting prices to obtain a client); *Congress Gives Auditors an Account of Their Shortcomings*,

for failing to remedy this situation by failing to prosecute such firms.¹³¹ If the organizations designed to keep their eye on corporate America are not effective, the threat of civil RICO may be needed to keep "legitimate" businesses truly "legitimate."

In short, the threat of a RICO suit that deters corporate fraud outweighs the harm that it may cause banks, accounting firms, and other "legitimate" businesses sued under its provisions.

III. Conclusion

The language and legislative history of RICO do not support the Second Circuit's creation of a prior criminal conviction requirement. This view is also supported by important policy considerations and by analogous civil actions that require proof of a crime, but not conviction. Accordingly, the Second Circuit's restriction of civil RICO should be rejected.

A preponderance of the evidence standard should be applied in civil RICO actions to prove the defendant committed predicate crimes. The legislative history of RICO and analogous civil actions requiring proof of a crime support this determination. More importantly, however, is the threat of being found liable under RICO by this lesser standard of proof. The "prime rate" case exhibits that the threat of treble damages, attorneys' fees, and the "racketeer" stigma deter fraudulent business practices. Civil RICO should be regarded as not only a device to combat organized crime but also as an effective mechanism to guard against the wrongful practices of "legitimate" businesses.

Leigh Ann MacKenzie

N.Y. Times, Mar. 10, 1985, at Y8, col. 1 ("Not only is the auditor paid by the client whose financial statements the auditor must examine on behalf of the public, but accounting firms have been expanding into sidelines such as management consulting, which require being advocates for the client."). See generally Sorensen, Grove, & Sorenson, *Detecting Management Fraud: The Role of the Independent Auditor*, in WHITE-COLLAR CRIME: THEORY AND RESEARCH (1980).

131 Dingle, *Congress Should Be the Watchdog*, N.Y. Times, Mar. 17, 1985, at F2, col. 3 ("[The SEC] has taken a far too relaxed approach to its responsibilities."); *Accounting Role Seen in Jeopardy*, N.Y. Times, Feb. 21, 1985, at Y46, col. 1 (statement by Rep. Dingle, Chairman of the House Energy and Commerce Subcomm. on Oversight and Investigations) (Direct SEC enforcement actions "appear to result in what can properly be termed mere wrist slaps, even when the firm is a repeat offender."). See also Fedders & Perry, *Policing Financial Disclosure Fraud: The SEC's Top Priority*, 1984 J. OF ACCT. 58, 60 ("Because certain conduct violates the federal securities laws does not mean that the commission must file charges and seek to impose sanctions on the malefactor.").