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Incentive to Litigate: The Court's Rejection of Standing Requirements--Civil RICO: *Sedima v. Imrex*, 105 S. Ct. 3275 (1985)

Terrence P. Canade

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CIVIL RICO—INCENTIVE TO LITIGATE: THE COURT'S REJECTION OF STANDING REQUIREMENTS

Sedima v. Imrex, 105 S. Ct. 3275 (1985).

I. INTRODUCTION

The United States Supreme Court in *Sedima v. Imrex*¹ made it easier for a civil plaintiff to state a Racketeer Influenced and Corrupt Organizations Act claim by eliminating standing requirements for stating such a claim.²

Fifteen years ago, Congress enacted the Organized Crime Control Act Title IX Racketeer Influenced and Corrupt Organizations Act (RICO).³ But recently, business entities not associated with organized crime have been fighting RICO battles.⁴ These business entities have taken advantage of RICO's section 1964(c) civil remedy provision to garner treble damages when the business entities can show they were injured by a racket.⁵

The proliferation of civil RICO claims by business entities has forced courts to seriously examine Congressional intent in enacting RICO.⁶ Courts have struggled to weigh Congress' desire to make RICO broad enough that racketeers can not avoid RICO provisions⁷ against Congressional intent regarding prosecutors and private individuals using RICO as a weapon against organized crime.⁸ While courts have largely held that "mobster" involvement is not neces-

¹ 105 S. Ct. 3275 (1985).

² *Id.* at 3287.

³ 18 U.S.C. §§ 1961-1968 (1982).

⁴ *See Sedima v. Imrex*, 741 F.2d 482, 487 (2d Cir. 1984) (notes RICO claims against such respected defendants as the American Express Company, E.F. Hutton and Company, Lloyd's of London, and Merrill Lynch).

⁵ 18 U.S.C. § 1964(c) states: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

⁶ *See, e.g., Sedima*, 741 F.2d at 500.

⁷ *United States v. Turkette*, 452 U.S. 576, 584 (1981) (RICO applies to legitimate businesses as well as illegitimate businesses).

⁸ *See Sutliff v. Donovan Companies*, 727 F.2d 648, 654 (7th Cir. 1984).

sary for a RICO cause of action,⁹ courts have employed two new prerequisites for stating a claim under civil RICO to limit the number of civil RICO plaintiffs: a prior RICO conviction and a special RICO injury.¹⁰

The United States Supreme Court recently sought to clarify civil RICO in *Sedima v. Imrex*.¹¹ The plaintiff in *Sedima* alleged that the defendant had cheated on a business deal causing the plaintiff's financial losses.¹² The Court of Appeals dismissed the plaintiff's complaint, due to the plaintiff's failure to allege that the defendant had been convicted of predicate RICO offenses and because the plaintiff failed to allege a special RICO injury.¹³ The Supreme Court reversed in a five to four decision holding that neither a prior conviction nor a special RICO injury was necessary to state a proper civil RICO claim.¹⁴

After examining the facts in *Sedima*, this Note will discuss the Court of Appeals' prior conviction requirement and trace the development of the various special RICO injury requirements that courts have employed as prerequisites to a civil RICO claim. Next, this Note will present the Supreme Court's rationale for rejecting the two prerequisites to stating a civil RICO claim and the dissent's reasons for requiring a special RICO injury. This Note will then analyze the Court's decision and conclude that the Supreme Court correctly rejected a prior conviction as a prerequisite to stating a claim under civil RICO. This Note will conclude that while the dissent's argument for the special RICO injury is logically compelling, in the absence of clear Congressional intent to limit civil RICO claims through pleading prerequisites, the majority was correct in construing RICO broadly. Finally, this Note will propose a RICO injury requirement that takes into account the majority's concerns about construing RICO broadly and the dissent's concerns about the logical interpretation of the statute.

II. FACTS

Sedima is a Belgian corporation that imports and exports various parts manufactured in the United States and Europe.¹⁵ *Imrex* is

⁹ See, e.g., *Owl Construction v. Ronald Adams Contractor*, 727 F.2d 540 (5th Cir.), cert. denied, 105 S. Ct. 118 (1984); *Moss v. Morgan Stanley*, 719 F.2d 5, 21 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984).

¹⁰ See *Sedima*, 741 F.2d at 503.

¹¹ 105 S. Ct. 3275.

¹² *Id.* at 3279.

¹³ *Sedima*, 741 F.2d at 503.

¹⁴ 105 S. Ct. at 3287.

¹⁵ *Sedima*, 741 F.2d at 484.

an American corporation that exports aircraft-related parts.¹⁶

Sedima and Imrex contracted in 1979 to provide component parts for a NATO subcontractor in Belgium.¹⁷ By the agreement, the NATO subcontractor was to place orders for parts with Sedima.¹⁸ Sedima, in turn, was to fill its orders for the NATO subcontractor with American parts that Sedima ordered from Imrex.¹⁹ Sedima and Imrex were to split the net proceeds.²⁰

Sedima received \$8.5 million worth of orders to place with Imrex.²¹ Sedima, however, became suspicious that Imrex was padding its expense bills to deny Sedima its share of the proceeds from the agreement.²² Sedima filed suit in the Federal District Court for the Eastern District of New York²³ alleging that Imrex prepared fraudulent purchase orders and invoices and intentionally overstated the costs of purchasing and shipping parts for the joint venture.²⁴

In addition to common law claims of unjust enrichment and breach of contract, Sedima alleged three RICO violations.²⁵ According to Sedima's complaint, Imrex overbilled it by at least \$175,000, for which Sedima sought treble damages and attorney's fees under RICO section 1964(c).²⁶

The District Court dismissed Sedima's RICO claims because Sedima failed to allege a RICO injury, "somehow different in kind from the direct injury resulting from the predicate acts of racketeering activity."²⁷ The court of appeals affirmed and added that Sedima's civil RICO claim was deficient because Sedima failed to allege that Imrex had been convicted for the alleged RICO violations.²⁸ The court of appeals determined that Congress intended to impose standing requirements for civil RICO plaintiffs similar to the standing requirements under the Clayton Act.²⁹

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 105 S. Ct. at 3279.

²⁰ *Id.*

²¹ *Sedima*, 741 F.2d at 484.

²² *Id.*

²³ 105 S. Ct. at 3279.

²⁴ *Sedima*, 741 F.2d at 484.

²⁵ *Id.* Sedima alleged violations of 18 U.S.C. § 1962(c) which provides that "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. . . ."

²⁶ 105 S. Ct. at 3279.

²⁷ *Id.* (citing *Sedima v. Imrex*, 574 F. Supp. 963 (E.D.N.Y. 1983)).

²⁸ *Sedima*, 741 F.2d at 503.

²⁹ *Id.* at 495. The Clayton Act, 15 U.S.C. § 15(a) (1982), provides treble damages to

III. THE PRIOR CONVICTION REQUIREMENT

The court of appeals in *Sedima* distinguished all precedent in order to require prior convictions for defendants' predicate offenses before a plaintiff could have civil RICO standing.³⁰ The court of appeals found that a RICO section 1964 proceeding is inherently criminal.³¹ Because Congress could not have intended civil defendants to be stigmatized as criminals without being previously convicted, the court of appeals held that a prior conviction was necessary for civil RICO proceedings.³²

The court noted that the fifth amendment to the Constitution protects persons from answering to infamous crimes without a grand jury indictment.³³ RICO is an infamous crime, according to the court, and therefore unconvicted RICO defendants should not have to answer to civil RICO claims.³⁴ The standard of proof for a jury in a civil case is less stringent than the standard in a criminal case and the court of appeals was concerned that civil RICO defendants would be too easily stigmatized by the 'racketeer' label without a prior conviction.³⁵ Labelling someone a racketeer causes a prejudicial taint for a civil jury, according to the court.³⁶

The court of appeals wrote that the peculiar structure whereby civil RICO defendants face inherently criminal charges, suggests that "had Congress considered the problem, it would have intended criminal convictions of at least the predicate crimes as a prerequisite for civil RICO action."³⁷

IV. THE SPECIAL RICO INJURY REQUIREMENT

Courts have attempted to limit the number of "garden variety" fraud cases pleaded as civil RICO causes of action by imposing various standing requirements.³⁸ These requirements have ranged from alleging mobster involvement³⁹ to alleging 'something more' than

antitrust plaintiffs if the plaintiffs allege an antitrust injury—an injury the antitrust laws were designed to prevent. *See* *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977) (antitrust laws protect competition not competitors).

³⁰ *Sedima*, 741 F.2d at 496-503.

³¹ *Id.* at 500.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 500 n.49 (citing *United States v. Guiliano*, 644 F.2d 85, 89 (2d Cir. 1981)) (prejudicial taint inevitably surrounds label of 'racketeer').

³⁷ *Id.* at 502.

³⁸ *See* *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 28 n.3 (2d Cir. 1983) (lists various fraud actions for which courts rejected RICO claims).

³⁹ *See* *Adair v. Hunt International Resources*, 526 F. Supp. 736 (N.D. Ill. 1981) (court

predicate RICO offenses.⁴⁰ Although courts have employed a variety of civil RICO standing requirements, no court has succinctly defined a special RICO injury.⁴¹

Courts that have applied the mobster involvement requirement for civil RICO standing have based their decisions on the title of the Act (Organized Crime Control Act) and the legislative intent that RICO should be a method for attacking organized crime.⁴² Most circuits have dropped the mobster involvement requirement because courts have recognized that Congress intended RICO to be applied broadly to effectuate its remedial purposes.⁴³ Congress understood that in order to attack organized crime effectively, RICO had to be drafted in broad terms even though legitimate businesses may be accused of RICO violations.⁴⁴ Congress chose to proscribe conduct rather than organized crime status.⁴⁵

After courts discredited the mobster involvement requirement, the District Court for the Northern District of Illinois in *North Barrington Development v. Fanslow*⁴⁶ created a competitive injury requirement. The court in *Fanslow* noted that Congress based civil RICO's provisions on the Clayton Act's recovery provisions, so the court determined that civil RICO plaintiffs, like Clayton Act plaintiffs, must allege a competitive injury.⁴⁷ According to the court in *Fanslow*, Congress intended RICO to provide a remedy for indirect victims of racketeering enterprises because state law protects direct victims.⁴⁸ The court defined the indirect victims of racketeering enterprises as those who had been injured competitively because the victims were forced to compete with racketeering enterprises.⁴⁹

dismissed RICO claim because plaintiffs failed to allege that defendants were involved with organized crime in land fraud action).

⁴⁰ See *Landmark Savings & Loan v. Rhoades*, 527 F. Supp. 206, 208 (E.D. Mich. 1981)(court dismissed RICO claim because plaintiff failed to allege a racketeering enterprise injury in securities fraud claim).

⁴¹ See *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983).

⁴² See *Adair*, 526 F. Supp. at 747.

⁴³ See *Sutliff*, 727 F.2d at 654; *Moss*, 719 F.2d at 21; *Bunker Ramo v. United Business Forms*, 713 F.2d 1272, 1287 n.6 (7th Cir. 1983)(organized crime requirement is specious).

⁴⁴ See *Turkette*, 452 U.S. at 581. Judge Posner elaborated on *Turkette* in *Sutliff*, 727 F.2d at 654: "Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes."

⁴⁵ *United States v. Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977)("The legislative intent was to make RICO violations dependent upon behavior, not status.").

⁴⁶ 547 F. Supp. 207 (N.D. Ill. 1980).

⁴⁷ *Id.* at 211.

⁴⁸ *Id.* at 210.

⁴⁹ *Id.* at 211.

Courts have eliminated the competitive injury requirement by distinguishing the purposes behind the antitrust laws and RICO.⁵⁰ While Congress designed the antitrust laws to preserve competition, it designed RICO to ruin organized crime's economic power.⁵¹ Courts do not impose antitrust penalties to destroy a competitor and thereby injure competition, but eliminating a racketeering enterprise is a desirable side effect of imposing civil RICO penalties.⁵²

While the court in *Van Schaick v. Church of Scientology of California*⁵³ did not adopt a competitive injury requirement, it expanded on that concept to require that civil RICO plaintiffs allege a commercial injury.⁵⁴ Since section 1964(c) provides remedies for persons injured in their business or property and RICO's primary purpose was to protect legitimate businesses from infiltration by racketeers, the court in *Van Schaick* concluded that RICO protected only business losses.⁵⁵ The court rejected the private plaintiffs' RICO allegations, because RICO has a commercial orientation and thus is not available to every consumer.⁵⁶

Some courts have required a special RICO injury without defining it.⁵⁷ The court in *Landmark Savings & Loan v. Rhoades*⁵⁸ required "something more [than] or different from predicate acts" of a RICO violation for standing to sue under civil RICO.⁵⁹ The court defined this "racketeering enterprise injury" only as an injury that would "frequently overlap but [is not] . . . necessarily the same" as a competitive injury.⁶⁰

Two courts that have required something more than an allegation of predicate RICO offenses have been more specific.⁶¹ These courts noted that section 1964(c) provides a remedy to victims of a

⁵⁰ See *Schacht v. Brown*, 711 F.2d 1343, 1358 (7th Cir. 1983)(state insurer's civil RICO claim as liquidator versus parent company for increasing liability in insolvency was not subject to antitrust standing requirements, because civil RICO has a "broad mission" and organized crime activity "is thought to be *malum in se*"); *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1982)(retirement community residents' mismanagement claim stated a civil RICO cause of action).

⁵¹ *Bennett*, 685 F.2d at 1059.

⁵² See *Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L. Q. 1009, 1042 (1980).

⁵³ 535 F. Supp. 1125 (D. Mass. 1982).

⁵⁴ *Id.* at 1137.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Eisenberg*, 564 F. Supp. at 1352.

⁵⁸ 527 F. Supp. 206 (E.D. Mich. 1981).

⁵⁹ *Id.* at 208.

⁶⁰ *Id.*

⁶¹ See *Alexander Grant & Co. v. Tiffany Indus.*, 742 F.2d 408, 413 (8th Cir. 1984); *Bankers Trust v. Rhoades*, 741 F.2d 511, 516 (2d Cir. 1984).

section 1962 violation.⁶² Section 1962 concerns an illegal pattern of racketeering activity,⁶³ and these courts reasoned that plaintiffs should therefore have standing under section 1964(c) only when they claim an injury by the pattern of racketeering activity, not injury for the predicate acts of that pattern.⁶⁴

Courts have rejected all the above standing requirements for civil RICO plaintiffs on the grounds that Congress intended RICO to be construed broadly.⁶⁵ Courts have been reluctant to impose standing requirements where Congress has not explicitly called for any.⁶⁶ According to some courts, it is a legislative, not a judicial responsibility to draft civil RICO standing requirements.⁶⁷

V. THE SUPREME COURT DECISION IN *SEDIMA*

The United States Supreme Court reversed the court of appeals and held that Sedima alleged sufficient facts in its complaint to make out a civil RICO claim.⁶⁸

First, the Court rejected the prior conviction requirement for standing to sue under civil RICO.⁶⁹ Although section 1964(c) requires an injury by "violation" of section 1962, a violation is not necessarily the same as a criminal conviction.⁷⁰ The Court noted that Congress' silence on the issue of whether a conviction is required to state a civil RICO cause of action indicated that a plaintiff need not allege a prior conviction.⁷¹

A prior conviction requirement would be against public policy, according to the Court, because civil plaintiffs would only be able to recover if the government successfully prosecuted the defendant.⁷² The Court argued that the preponderance of the evidence standard for civil RICO juries should remain intact, despite the fact that a RICO conviction in a criminal proceeding would require proof be-

⁶² *Alexander Grant*, 742 F.2d at 413; *Bankers Trust*, 741 F.2d at 516.

⁶³ See *supra* note 25.

⁶⁴ *Alexander Grant*, 742 F.2d at 413; *Bankers Trust*, 741 F.2d at 516.

⁶⁵ See *Turkette*, 452 U.S. at 581; *Sutliff*, 727 F.2d at 654; *Schacht*, 711 F.2d at 1358; *Bennett*, 685 F.2d at 1064.

⁶⁶ See *Schacht*, 711 F.2d at 1358.

⁶⁷ See *Bennett*, 685 F.2d at 1064 ("Insofar as the door of the federal courthouse is similarly opened by RICO in a civil context, we are cautioned by the Supreme Court that broad Congressional action should not be restricted by the courts in the name of federalism.").

⁶⁸ 105 S. Ct. at 3287-88.

⁶⁹ *Id.* at 3284.

⁷⁰ *Id.* at 3281.

⁷¹ *Id.* at 3282.

⁷² *Id.* at 3282 n.9.

yond a reasonable doubt.⁷³ A criminal RICO conviction requirement could in effect change the standard of proof for a civil action, because a RICO plaintiff that presents convictions as evidence in its claim presents proof beyond a reasonable doubt that the defendant has committed the violations in question.⁷⁴ Eliminating the conviction requirement poses no Constitutional double jeopardy problems, the Court reasoned, because treble damages and attorney's fees available under civil RICO are not punitive.⁷⁵

The Court next rejected the special RICO injury requirement.⁷⁶ The Court reasoned that since no court has succinctly defined the special RICO injury and Congress did not attempt to define any such injury, the Court ought not to try.⁷⁷ Congress intended civil RICO to be construed broadly to effectuate its remedial purposes, so the Court was not compelled to limit civil RICO standing without Congress' specific indication that it desired to limit the number of civil RICO plaintiffs by requiring a special RICO injury allegation.⁷⁸

VI. THE DISSENT IN *SEDIMA*

Justice Marshall wrote the dissenting opinion.⁷⁹ Justice Marshall did not address the prior conviction requirement, because he would have affirmed the court of appeals and dismissed the case for failure to allege a special RICO injury.⁸⁰

Justice Marshall warned against allowing RICO's treble damages provision to give plaintiffs an incentive to federalize state fraud claims.⁸¹ Civil RICO causes of action, Justice Marshall reasoned, have become too common in suits between legitimate businesses and Congress did not intend that the civil RICO statute be used so frequently.⁸² Justice Marshall interpreted the statutory language and legislative history as requiring that civil RICO plaintiffs allege

⁷³ *Id.* at 3282.

⁷⁴ Whether the defendant violated RICO section 1962 would still be a jury question. The jury would have to consider whether the violations constitute a pattern of racketeering activity for recovery under civil RICO. *See* *United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982).

⁷⁵ 105 S. Ct. at 3283 (citing 42 U.S.C. § 1988). For a discussion of the punitive aspects of civil RICO *see infra* notes 126-142 and accompanying text.

⁷⁶ 105 S. Ct. at 3285.

⁷⁷ *Id.* at 3284. ("The court below is not alone in struggling to define 'racketeering injury,' and the difficulty of that task itself cautions against imposing such a requirement.").

⁷⁸ *Id.* at 3286.

⁷⁹ *Id.* at 3293 (Justices Brennan, Powell and Blackmun joined in the dissent).

⁸⁰ *Id.* at 3304 n.2.

⁸¹ *Id.* at 3294.

⁸² *Id.* at 3296.

injury by a "pattern of racketeering activity," not merely injury by the predicate acts comprising that pattern.⁸³ RICO was designed to provide recovery for injuries not previously compensable, Justice Marshall wrote, and therefore plaintiffs should not be able to use RICO to recover on claims for which they can recover in state courts.⁸⁴

VII. ANALYSIS

Courts have struggled with interpreting the legislative silence on the prior conviction and special RICO injury requirements for stating a civil RICO claim.⁸⁵ This struggle has led to divergent holdings on the standing requirements.⁸⁶ The majority in *Sedima* wrote, "Had Congress intended to impose this novel requirement, there would have been at least some mention of it in the legislative history, even if not in the statute."⁸⁷ The court of appeals, however, viewed the legislative silence differently and speculated on what Congress "would have" required given Congress' method of drafting civil RICO.⁸⁸

THE PRIOR CONVICTION

There are three arguments that demonstrate why a civil RICO plaintiff need not show a prior conviction in order to plead a civil RICO cause of action properly. First, Congress did not intend that a civil RICO plaintiff would have to prove a prior conviction.⁸⁹ Second, the structure of the RICO statute implies that no prior conviction is necessary to sue under civil RICO.⁹⁰ Third, the structure of similar statutes does not suggest a prior conviction requirement.⁹¹ The above three arguments in and of themselves do not answer the

⁸³ *Id.* at 3297.

⁸⁴ *Id.* at 3304.

The construction I describe offers a powerful remedy to the honest businessmen with whom Congress was concerned, who might have had no recourse against a 'racketeer' prior to enactment of the statute. At the same time, this construction avoids both the theoretical and practical problems outlined in Part I. Under this view, traditional state law claims are not federalized; federal remedial schemes are not inevitably displaced or superceded; and, consequently, ordinary commercial disputes are not misguidedly placed within the scope of civil RICO.

Id.

⁸⁵ See *Id.* at 3282; *Sedima*, 741 F.2d at 501.

⁸⁶ *Haroco v. Am. Nat'l Bank and Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984).

⁸⁷ 105 S. Ct. at 3282.

⁸⁸ *Sedima*, 741 F.2d at 501.

⁸⁹ 105 S. Ct. at 3281.

⁹⁰ *USACO Coal v. Carboamin Energy*, 689 F.2d 94, 95 n.1 (6th Cir. 1982).

⁹¹ 105 S. Ct. at 3281.

concerns that separating government and civil actions cause jury standard and double jeopardy problems, but these concerns can be allayed separately.⁹²

The best evidence of Congressional intent not to require a prior conviction for standing to sue under civil RICO is the fact that prior convictions are not included in section 1964(c).⁹³ RICO is a carefully drafted statute, the Supreme Court wrote; if Congress had meant only to provide recovery against convicted defendants Congress would have inserted "conviction" in section 1964(c).⁹⁴ Congress used "conviction" in other provisions, so "violation" in section 1964(c) ought not to be read as requiring a conviction.⁹⁵ One Congressman objected to the provisions of civil RICO because "there need not be a conviction."⁹⁶ This objection indicates that Congress was aware of the prior conviction issue. Thus Congress intentionally omitted the prior conviction requirement from the civil RICO statute.

RICO's statutory structure gives further evidence against a prior conviction requirement. Congress' intent to separate criminal and civil RICO provisions is evidenced by section 1963, which makes a violation of section 1962 a crime.⁹⁷ If Congress had wanted to include a requirement that civil RICO defendants be previously convicted, Congress would have referred to the section 1963 criminal provision in section 1964(c).⁹⁸ Instead, section 1964(c) refers to section 1962, which outlined "unlawful activities."⁹⁹

Courts have studied statutes similar to RICO to determine whether a prior conviction requirement exists.¹⁰⁰ The court of appeals found the difference between the Clayton Act and civil RICO to be instructive: The Clayton Act authorizes treble damages for injuries "by reason of anything forbidden in the antitrust laws"¹⁰¹ while RICO authorizes treble damages for injuries "by reason of a violation of section 1962."¹⁰² In drafting RICO section 1964(c), the court of appeals noted that Congress adapted the civil recovery pro-

⁹² *Id.* at 3282, 3283.

⁹³ *Id.* at 3281.

⁹⁴ *Id.*

⁹⁵ *Id.* at 3281 n.7.

⁹⁶ *Id.* at 3282 (quoting 116 Cong. Rec. 35342 (1970)).

⁹⁷ *USACO Coal*, 689 F.2d at 95 n.1.

⁹⁸ *Id.*

⁹⁹ *Id.* See also *Bunker Ramo*, 713 F.2d at 1287.

¹⁰⁰ See, e.g., *Sedima*, 741 F.2d at 498.

¹⁰¹ 15 U.S.C. § 15(a).

¹⁰² 18 U.S.C. § 1964(c); *Sedima*, 741 F.2d at 498.

visions of the Clayton Act.¹⁰³ The court of appeals determined that Congress substituted "a violation" for "anything forbidden" in drafting civil RICO because Congress wanted a prior conviction requirement for standing to sue under civil RICO.¹⁰⁴

The Supreme Court on the other hand argued that neither unlawful activities nor violations are necessarily the same as convictions.¹⁰⁵ The majority in *Sedima* defines a violation as "a failure to adhere to legal requirements."¹⁰⁶ The Supreme Court has clearly separated civil and criminal provisions in other statutes.¹⁰⁷ For instance, private and governmental actions in antitrust statutes are distinct.¹⁰⁸

Despite the above three arguments against a prior conviction requirement, the court of appeals in *Sedima* adopted such a requirement partially because the court of appeals feared that distinct private and governmental actions in RICO cases would lead to jury standard problems.¹⁰⁹ Criminal RICO defendants are convicted when the jury is convinced of their guilt beyond a reasonable doubt.¹¹⁰ But in a civil case, plaintiffs can recover if they can prove by a preponderance of the evidence that the defendants were involved in racketeering activity.¹¹¹ This worried the court of appeals because plaintiffs could attach the racketeering stigma to respected business entities by proving that the defendant was involved in racketeering activity by a preponderance of the evidence, rather than beyond a reasonable doubt.¹¹² The court of appeals found that labelling defendants racketeers in a civil proceeding is tantamount to labelling defendants criminals.¹¹³ Thus, the court of appeals reasoned, defendants in a civil RICO proceeding ought to be entitled to some of the protections afforded defendants in a criminal proceeding such as a reasonable doubt standard of proof for the

¹⁰³ *Sedima*, 741 F.2d at 495.

¹⁰⁴ *Id.* at 498.

¹⁰⁵ 105 S. Ct. at 3281.

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g.*, *United States v. Ward*, 448 U.S. 242 (1980); *Helvering v. Mitchell*, 303 U.S. 391 (1938)(acquittal on tax evasion charges does not preclude fifty percent assessment on deficiency).

¹⁰⁸ 105 S. Ct. at 3282.

¹⁰⁹ *Sedima*, 741 F.2d at 501-02 ("[I]n the absence of previous convictions a civil plaintiff must carry a burden equal to that in a criminal case in proving that criminal conduct. Yet it would be extraordinarily difficult for juries to understand the different burdens of proof required for different elements of a civil case.").

¹¹⁰ *Id.*

¹¹¹ *Id.* at 503.

¹¹² *Id.*

¹¹³ *Id.*

jury.¹¹⁴

But the Supreme Court had already tackled the court of appeal's jury standard dilemma.¹¹⁵ The Supreme Court upheld the preponderance standard for quasi-criminal civil proceedings in *United States v. One Assortment of 89 Firearms*.¹¹⁶ In that case, a jury acquitted the defendant of illegally harboring firearms, and the government sought forfeiture of the firearms in a subsequent civil proceeding.¹¹⁷ The Court rejected the defendant's contention that the civil claim was barred by double jeopardy.¹¹⁸ The Court noted that a defendant is not innocent merely because a jury holds a reasonable doubt as to the defendant's guilt.¹¹⁹ The jury may hold a reasonable doubt in a criminal proceeding for a variety of reasons not present in a civil proceeding: improper arrest, prosecutorial impropriety, or a poor evidence gathering effort by the prosecution.¹²⁰ These factors have no bearing on whether a plaintiff is entitled to remedial recovery from a defendant.¹²¹ A plaintiff ought to be entitled to recover from a defendant if a plaintiff can establish by a preponderance of the evidence that the plaintiff was injured by the actions of the defendant.¹²²

The policy reasons for allowing a plaintiff civil RICO recovery without a prior conviction are related to the reasons for separate jury standards in civil and criminal cases. If the civil RICO statute requires a conviction to make out a cause of action, the injured plaintiff would be forced to rely on government prosecutors.¹²³ An injured plaintiff who is required to show that a defendant has previously been convicted of RICO offenses would have no recovery if the government simply chose not to prosecute the defendant.¹²⁴ RICO was never meant to be so limited, rather Congress intended RICO to be a means for the government as well as private plaintiffs to attack organized crime.¹²⁵

¹¹⁴ *Id.*

¹¹⁵ 105 S. Ct. at 3282.

¹¹⁶ 465 U.S. 354 (1984).

¹¹⁷ *Id.* at 356.

¹¹⁸ *Id.* at 361.

¹¹⁹ *Id.* ("But an 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.")

¹²⁰ *See id.* at 361-362.

¹²¹ *Id.* at 362 ("It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel.")

¹²² *Id.*

¹²³ 105 S. Ct. at 383 n.9.

¹²⁴ *Id.*

¹²⁵ *See Turkette*, 452 U.S. at 585.

The majority in *Sedima* summarily dismissed the argument that RICO poses a double jeopardy problem.¹²⁶ The argument is that by allowing plaintiffs to recover treble damages and attorney's fees from a defendant and by subjecting the defendant to criminal penalties, the RICO statute violates the Fifth Amendment provision against double jeopardy.¹²⁷ A convicted RICO violator who is subject to treble damages and attorney's fees in a subsequent civil suit may be subjected to double jeopardy if treble damages and attorney's fees are punitive in a criminal way.¹²⁸

Justice Brandeis has written that "in the civil enforcement of a remedial sanction there can be no double jeopardy."¹²⁹ But in later cases, the Supreme Court has set up a stricter test for what constitutes double jeopardy.¹³⁰ In *United States v. Ward*,¹³¹ the court used a two step test to determine whether a statute violated double jeopardy.¹³² First, the court asked whether Congress expressly labelled the penalty as civil or criminal.¹³³ Second, if Congress sought to enact a civil penalty, was the penalty "so punitive either in purposes or effect as to negate that intention."¹³⁴

Congress intended section 1964(c) to be a civil remedy,¹³⁵ so a court should look to the purpose and effect of treble damages and attorneys fees in section 1964(c).¹³⁶ The court in *Kennedy v. Mendoza-Martinez*¹³⁷ established seven factors for determining whether a statute is criminally punitive in either purpose or effect:

- [1] Whether the sanction involves an affirmative disability or restraint,
- [2] whether it has historically been regarded as a punishment,
- [3] whether it comes into play only on a finding of scienter,
- [4] whether its operation will promote the traditional aims of punishment, retribution and deterrence,
- [5] whether the behavior to which it applies is already a crime,
- [6] whether an alternative purpose to which it may be rationally connected is assignable for it, and
- [7] whether it appears excessive in relation to the alternative purpose

¹²⁶ 105 S. Ct. at 3283.

¹²⁷ U.S. Const. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . .").

¹²⁸ See *Ward*, 448 U.S. at 248-249.

¹²⁹ *Helvering*, 303 U.S. at 404.

¹³⁰ See *Ward*, 448 U.S. at 242; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

¹³¹ 448 U.S. 242.

¹³² *Id.* at 248-49.

¹³³ *Id.* at 248.

¹³⁴ *Id.* at 248-49.

¹³⁵ The title to 18 U.S.C. § 1964 is "Civil Remedies."

¹³⁶ See *Ward*, 448 U.S. at 248-249.

¹³⁷ 372 U.S. 144.

assigned.¹³⁸

The fourth factor above may have some significance for civil RICO. There is some evidence that Congress intended civil RICO to be punitive thus, civil RICO may be in violation of the Constitution's double jeopardy provision.¹³⁹ Treble damages generally are not considered punitive,¹⁴⁰ but one scholar questioned whether Congress could have drafted section 1964(c) as a non-punitive provision in the midst of ten titles worth of punishment in the Organized Crime Control Act.¹⁴¹

Because the proof is unclear as to whether Congress intended civil RICO to be punitive in effect, civil RICO should not be held to violate double jeopardy.¹⁴²

THE SPECIAL RICO INJURY REQUIREMENT

Congress may have drafted the treble damages provision in civil RICO to compensate special RICO injuries.¹⁴³ The special RICO injury requirement is more appropriate if courts do not characterize civil RICO remedies as punitive. The majority in *Sedima* referred to civil RICO's treble damages and attorneys fees as "incentive[s] to litigate."¹⁴⁴ But plaintiffs would only need incentives to litigate claims where their injuries are not directly attributable to defendants' predicate fraud acts, because plaintiffs would readily pursue state remedies for garden variety fraud claims.¹⁴⁵

The definition of the special injury requirement that Congress

¹³⁸ *Id.* at 168-69.

¹³⁹ The court in *Russello v. United States*, 464 U.S. 16, 27-8 (1983) quotes from remarks by Senator McClellan on RICO's forfeiture provision (§ 1963(a)(1)). McClellan noted that the provision was designed to punish, deter, incapacitate and remove organized crime from legitimate business. While the court in *Russello* had no need to follow McClellan's remarks on civil remedies, McClellan seemed to imply that civil RICO provisions were punitive and written to deter racketeering. See 116 Cong. Rec. 18955 (1970) (Remarks of Sen. McClellan).

¹⁴⁰ See, e.g., *Brunswick*, 429 U.S. at 485-86 (treble damages in antitrust case which "measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.").

¹⁴¹ Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity"*, 124 U. Pa. L. Rev. 192, 211. Judge Caramone wrote in dissent in *Sedima*, 741 F.2d at 507, that treble damages are partly punitive and partly compensatory so treble damages need not be considered punitive.

¹⁴² See *Ward*, 448 U.S. at 251. The court in *Ward* found that the respondent did not offer the "clearest proof" that the respondent's civil penalty was punitive in purpose or effect (as those terms were defined in *Mendoza-Martinez*, 372 U.S. 144) and rejected the respondent's claim that his civil penalty violated the Constitution's double jeopardy clause. *Id.*

¹⁴³ See, e.g., *Bankers Trust*, 741 F.2d 511, 517.

¹⁴⁴ 105 S. Ct. at 3284.

¹⁴⁵ *Id.* at 3294.

may have thought deserved treble damages has eluded most courts.¹⁴⁶ For this reason, the majority in *Sedima* rejected the special injury requirement in the wake of the legislative silence on the issue.¹⁴⁷ The majority in *Sedima* wrote that courts should not rewrite legislation to create a special RICO injury requirement.¹⁴⁸

Through civil RICO, Congress sought to compensate injuries caused by a pattern of racketeering activity.¹⁴⁹ Civil RICO recovery is available to plaintiffs who are injured by reason of a violation of RICO section 1962.¹⁵⁰ While the majority lists indictable and chargeable offenses under section 1961,¹⁵¹ section 1962 is concerned with a pattern of racketeering activity. Congress, then, sought to provide a remedy for injury by the pattern described in section 1962 rather than the predicate acts described in section 1961 because section 1961 is not mentioned in the civil remedy provision of section 1964(c).¹⁵²

The court in *Bankers Trust v. Rhoades*¹⁵³ presented a further argument in favor of a special RICO injury allegation:

If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be said to be the but for cause of the injury.¹⁵⁴

The majority in *Sedima* summarized the elements of a pattern of racketeering activity¹⁵⁵ as required by section 1962, but in spite of that summary wrote, "the compensable injury necessarily is the harm caused by predicate acts."¹⁵⁶ Congress however, intended RICO to supplement, not supplant, the state laws that would ordinarily apply to fraud cases.¹⁵⁷

¹⁴⁶ See, e.g., *Id.* at 3284.

¹⁴⁷ See *id.* at 3284 n.11.

¹⁴⁸ *Id.* at 3287 ("It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.").

¹⁴⁹ *Id.* at 3297 (dissenting opinion).

¹⁵⁰ 18 U.S.C. § 1964(c).

¹⁵¹ 105 S. Ct. at 3284-85.

¹⁵² See *Id.* at 3297 (dissenting opinion).

¹⁵³ 741 F.2d at 511.

¹⁵⁴ *Id.* at 517 (emphasis in the original).

¹⁵⁵ 105 S. Ct. at 3285.

A violation of § 1962(c) requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim. Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of section 1962, nor is mere commission of the predicate offenses.

Id.

¹⁵⁶ *Id.* at 3286.

¹⁵⁷ *Haroco*, 747 F.2d at 392.

Courts have been able to give examples of how a person gets injured by a pattern of racketeering activity,¹⁵⁸ but have been unable to formulate a definition of the injury.¹⁵⁹ The courts' inability to define the injury, however, does not justify a conclusion that no special RICO injury requirement exists as the majority concluded in *Sedima*.¹⁶⁰

Because the pattern of racketeering activity is different from its component predicate acts, Congress intended further compensation for an injury by the pattern than for injury by predicate acts alone.¹⁶¹ RICO defines a pattern of racketeering activity in section 1961 to require at least two acts of racketeering activity within ten years of each other.¹⁶² The majority in *Sedima*, however, noted that two acts are necessary, but not sufficient for a pattern of racketeering activity.¹⁶³ The Court wrote, "in common parlance two of anything do not generally form a 'pattern.'"¹⁶⁴ A pattern, according to the Court, requires a continuity plus a relationship.¹⁶⁵ The court in *Bankers Trust* called this continuity plus relationship the confluence that constitutes the section 1962 violation.¹⁶⁶

In compensating a RICO plaintiff, a court should focus on the harm caused by the pattern of racketeering activity, not the harm caused by the predicate acts.¹⁶⁷ The pattern of racketeering activity may be composed of predicate acts, but Congress sought to provide remedy for injury by the pattern.¹⁶⁸ The court in *Alexander Grant & Company v. Tiffany Industries*¹⁶⁹ found that the summation of predicate mail and wire fraud offenses constituted a pattern of racketeering activity for the purpose of stating a civil RICO claim.¹⁷⁰ The distinction between the holdings in *Sedima* and *Alexander Grant* is that the majority in *Sedima* wrote that the harm in RICO is caused by the predicate acts,¹⁷¹ while the court in *Alexander Grant* wrote that the

¹⁵⁸ See, e.g., 105 S. Ct. at 3303; *Bankers Trust*, 741 F.2d at 517.

¹⁵⁹ See, e.g., *Eisenberg*, 564 F. Supp. at 1352-53.

¹⁶⁰ 105 S. Ct. at 3284.

¹⁶¹ See *Alexander Grant*, 742 F.2d at 413; *Bankers Trust*, 741 F.2d at 516.

¹⁶² 18 U.S.C. § 1961.

¹⁶³ 105 S. Ct. at 3285 n.14.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Bankers Trust*, 741 F.2d at 516.

¹⁶⁷ See *Alexander Grant*, 742 F.2d at 413.

¹⁶⁸ See *Bankers Trust*, 741 F.2d at 516. ("Section 1964(c) does not provide a private right of recovery unless the conduct that caused the injury was 'a violation of section 1962.' . . . Commission of two or more predicate acts is but an element of a section 1962 violation; those acts do not themselves constitute the section 1962 violation.")

¹⁶⁹ 742 F.2d 408 (8th Cir. 1984).

¹⁷⁰ *Id.* at 413.

¹⁷¹ 105 S. Ct. at 3286. See *supra* notes 149-57 and accompanying text.

harm comes from the pattern of racketeering activity.¹⁷²

Whether a plaintiff has been injured by a pattern of racketeering activity is an appropriate question for a jury.¹⁷³ Whenever a plaintiff can establish, by a preponderance of the evidence,¹⁷⁴ that it was injured by a group of events that a jury believes constitute a pattern of racketeering activity, that plaintiff ought to be entitled to pursue treble damages and attorneys fees under civil RICO.

VIII. CONCLUSION

The Supreme Court correctly rejected the prior conviction requirement for stating a civil RICO claim. Civil RICO provides a remedy for persons injured by a violation of RICO section 1962, but civil RICO does not mention the need for a conviction. Congress intended civil RICO to be a means for private plaintiffs to attack organized crime separately and distinctly from government actions against RICO offenders.

Congress provided treble damages for civil RICO plaintiffs to compensate for injuries by a *pattern* of racketeering activity, not to punish RICO offenders and not to compensate for garden variety frauds. Congress did not explicitly require a special RICO injury allegation for stating a claim under civil RICO, but a special RICO injury allegation makes sense because plaintiffs can recover for predicate RICO acts through state fraud claims. A jury should determine whether a plaintiff has been injured by a pattern of racketeering activity.

The Supreme Court and the courts of appeals struggled over whether Congress intended to limit civil RICO standing in any way. The Court found congressional intent unclear and construed civil RICO broadly. It is now Congress' responsibility to define any standing limitations for suing under civil RICO.

TERRENCE P. CANADE

¹⁷² 742 F.2d at 413.

¹⁷³ *Brooklier*, 685 F.2d at 1222; *United States v. Huber*, 603 F.2d 387, 395 (2d Cir. 1979).

¹⁷⁴ *See supra* notes 101-16 and accompanying text.