Rico on the High Seas: A Symposium on Civil Rico and Maritime Law: Civil Rico's Cause of Action: The Landscape After Sedima

Douglas E. Abrams
University of Missouri School of Law, abramsd@missouri.edu

Follow this and additional works at: http://scholarship.law.missouri.edu/facpubs
Part of the Criminal Law Commons

Recommended Citation
CIVIL RICO's CAUSE OF ACTION: THE LANDSCAPE AFTER SEDIMA

Douglas E. Abrams*

I. Introduction ................................... 19

II. Civil RICO's "Treasure Hunt" ..................... 25
   A. Section 1964(c): Injury to Plaintiff's Business or Property ........................................... 25
   B. Section 1962: The Enterprise ................... 30
      1. The Section 1962 Enterprise Relationships: May the Enterprise Be a Defendant? .................. 32
         a) Section 1962(a) ................................ 32
         b) Section 1962(b) ................................ 33
         c) Section 1962(c) ............................... 34
         d) Section 1962(d) ............................... 37
      2. Must the Enterprise Be Distinct From the Pattern of Racketeering Activity? .................. 37
   C. Section 1961: The Pattern of Racketeering Activity .................................................. 41
      1. Racketeering Activity .......................... 41
      2. "Pattern" of Racketeering Activity .......... 44

III. Conclusion ............................................ 51

I. INTRODUCTION

In maritime fraud actions, lawyers recently have begun to recognize the potential breadth of "civil RICO," the private cause of action created by the Racketeer Influenced and Corrupt Organizations Act (RICO). To the uninitiated, RICO's name might suggest that the private cause of action reaches only racketeers and other organized-crime defendants. If civil RICO indeed reached no further, it would

---

* Associate Professor of Law, Fordham University School of Law. B.A. 1973, Wesleyan University; J.D. 1976, Columbia University School of Law. The author gratefully acknowledges the help of his research assistant, Catherine DiDomenico of Fordham's class of 1989, and faculty secretary Mary L. Whelan.

1. 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986). This paper reflects the law on May 5, 1987, the date of the paper's delivery at the Maritime RICO symposium. In preparing the paper for publication, however, the author has added commentary concerning four subsequent Supreme Court decisions that bear on civil RICO litigation.
merit only passing attention from most members of the maritime bar. Developments since RICO's 1970 enactment, however, have laid firmly to rest any suggestion of limited reach. As Justice Lewis F. Powell, Jr. observed, civil RICO "has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended targets of the statute."\(^2\)

An understanding of the nascent civil RICO litigation "explosion" begins with recognition that RICO operates against conduct, not status. In the effort to enact effective anti-racketeering legislation in 1970, Congress declined to prohibit membership in organized crime or in identifiable organized-crime groups. Not only did the lawmakers recognize that proving organized-crime membership had traditionally been difficult and often impossible; they also concluded that an express organized-crime prohibition might have led courts to strike down RICO for creating an unconstitutional status offense. Congress sought to reach racketeering not by legislating against racketeers directly, but by legislating against the conduct in which racketeers were thought to engage. Because Congress sought to cast a wide net, RICO operates against some conduct, particularly fraudulent conduct, that is engaged in by racketeer and nonracketeer defendants alike.

More than any other private cause of action enacted by Congress in the past generation, civil RICO has been plagued by unanticipated consequences. In 1967, the Katzenbach Commission urged Congress and the states to "make a full-scale commitment to destroy the power of organized-crime groups."\(^3\) Congress responded in 1970 with the Organized Crime Control Act (OCCA),\(^4\) which included RICO as Title IX. RICO authorizes the government to move against defendants in criminal prosecutions,\(^5\) civil proceedings,\(^6\) or both. RICO's private cause of action, referred to by most courts and commentators as "civil RICO," authorizes plaintiffs to sue and recover treble dam-


ages and costs, including reasonable attorneys' fees.7

As the names "Organized Crime Control Act" and "Racketeer Influenced and Corrupt Organizations" themselves indicate, Congress' concern was the threat posed by organized crime and racketeering. The OCCA's purpose was "to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."8 According to the Senate Report, RICO's purpose was to "eliminat[e] . . . the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."9

During hearings on the OCCA bill, a few witnesses advised the House of Representatives Judiciary Committee that RICO's broad proscriptions might reach some non-racketeers.10 Some lawmakers repeated this warning during debate on the bill,11 but Congress was willing to accept the prospect of occasional non-racketeer defendants in the effort to strike at organized crime.

Civil RICO went virtually unnoticed for nearly a decade, largely because RICO is codified in Title 18 of the United States Code, whose pages plaintiffs' lawyers ordinarily do not turn in search of private

9. Congress found that:
   (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow . . . because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

11. See id. at 1523-24.
remedies. By late 1981, however, plaintiffs had begun to discover not only civil RICO's existence, but also its potential breadth. Of the 270 district court civil RICO decisions reported before 1985, forty percent involved securities fraud and thirty-seven percent involved common law fraud in a commercial or business setting. Only nine percent of these decisions involved "allegations of criminal activity of a type generally associated with professional criminals." With the prospect of recovering both treble damages and attorneys' fees, plaintiffs have continued to invoke civil RICO against a host of nonracketeers, including banks, lawyers or law firms, Big Eight accounting firms, insurance companies, securities investment firms, and colleges. Even the Ku Klux Klan and Church of Scientology have


been named as civil RICO defendants. Civil RICO claims have begun to appear in actions alleging maritime fraud.\textsuperscript{23}

In its 1985 decision in \textit{Sedima, S.P.R.L. v. Imrex Co.},\textsuperscript{24} the Supreme Court addressed civil RICO for the first time. Against the background produced by the four-year civil RICO litigation explosion, the Court raised few eyebrows with its observation that "RICO is evolving into something quite different from the original conception of its enactors."\textsuperscript{25} The Court encouraged continued evolution, not only by rejecting limits that many lower courts had previously placed on civil RICO,\textsuperscript{26} but also by determining as a general proposition that civil RICO's widespread use against nonracketeers is "inherent in the statute as written."\textsuperscript{27} \textit{Sedima} concluded that Congress intended RICO, including the private cause of action, "to be read broadly."\textsuperscript{28}

Current judicial trends indicate that RICO's breadth will enable private plaintiffs to assert civil RICO claims in a large percentage of actions sounding in fraud, no matter what the defendant's status or other circumstance might be. Civil RICO seems destined to become a staple of maritime fraud litigation, much as it has already become a

\textsuperscript{21} See Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982).
\textsuperscript{23} See, e.g., Valero Ref., Inc. v. M/T Lauberhorn (ex Trade Endeavor), 813 F.2d 60 (5th Cir. 1987) (action by purchaser, which had entered into a charter party agreement for shipment of oil, against vessel in rem and shipper in personam seeking to recover damages for alleged short delivery and contamination of the oil). \textit{Valero} is discussed in 4 Lloyd's Maritime Law 1-2 (N. Am. ed. May 15, 1987). See also, e.g., Brent Liquid Transport, Inc. v. GATX Leasing Corp., 650 F. Supp. 467 (N.D. Miss. 1986) (action for declaratory judgment concerning the right to exercise options to purchase eight inland river tank barges under a bareboat charter/lease agreement).

The Court has twice interpreted RICO in cases arising from criminal RICO convictions. See \textit{Russello v. United States}, 464 U.S. 16 (1983) (profits and proceeds derived from racketeering constitute an "interest" within the meaning of RICO and thus are subject to forfeiture under 18 U.S.C. § 1963(a)(1)); United States v. Turkette, 452 U.S. 576 (1981) (entirely illegitimate entity may be a RICO enterprise).
\textsuperscript{25} \textit{Sedima}, 473 U.S. at 500.
\textsuperscript{26} See \textit{infra} notes 44-48, 64-67, 111-13 and accompanying text.
\textsuperscript{27} \textit{Sedima}, 473 U.S. at 499.
\textsuperscript{28} \textit{Id.} at 497. As the Court had done in \textit{Turkette} and \textit{Russello}, \textit{Sedima} grounded its broad reading partly in Congress' express directive that RICO "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970). See \textit{Sedima}, 473 U.S. at 498; \textit{Russello}, 464 U.S. at 27; \textit{Turkette}, 452 U.S. at 587.
staple of private fraud litigation in other fields. Maritime counsel will bring and defend private actions under RICO and the various state “Little RICO” statutes that create private causes of action.29 Activity will not necessarily be confined to the courtroom because the Supreme Court recently held that predispute arbitration agreements, otherwise enforceable in accordance with the terms of the Federal Arbitration Act, apply to civil RICO claims.30


To the extent that a “Little RICO” statute authorizes courts to grant private plaintiffs injunctive relief, the statute may provide greater relief than federal RICO provides. Most courts reaching the question have concluded or suggested that injunctive relief is not available to civil RICO plaintiffs. See, e.g., Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1081-89 (9th Cir. 1986), cert. denied, 107 S. Ct. 1336 (1987) (citing and discussing decisions); Vietnam Veterans of Am., Inc. v. Guerdon Indus., Inc., 644 F. Supp. 951, 960-61 (D. Del. 1986) (holding that injunctive relief is not available to civil RICO plaintiffs).

This paper analyzes the federal civil RICO cause of action. Because civil RICO litigation remains a relatively recent development, at each stage of the analysis the paper addresses the major unresolved questions that remain in Sedima's wake.

II. CIVIL RICO'S "TREASURE HUNT"

RICO is codified at 18 U.S.C. sections 1961 to 1968. To state a civil RICO claim, the plaintiff must allege that it suffered (1) injury in its business or property because the defendant, (2) while involved in one or more enumerated relationships with an enterprise, (3) engaged in a pattern of racketeering activity.3

A. Section 1964(c): Injury to Plaintiff's Business or Property

Civil RICO's "treasure hunt"32 begins with section 1964(c), which provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . 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."33 By providing that "‘person' includes any individual

31. The injury element is discussed infra notes 32-52 and accompanying text; the enterprise element is discussed infra notes 53-106 and accompanying text; the pattern element is discussed infra notes 107-49 and accompanying text.

Special venue and process provisions apply in civil RICO actions. Venue lies in any district in which the defendant "resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a) (1982). Process may be served "on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(d) (1982). Once a defendant is served, the court, on a showing that "the ends of justice require that other parties residing in any other district be brought before the court, . . . may cause such parties to be summoned, and process for that purpose may be served in any judicial district . . . ." 18 U.S.C. § 1965(b) (1982).

32. See Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 652 (7th Cir. 1984) (RICO "is constructed on the model of a treasure hunt.").

33. 18 U.S.C. § 1964(c) (1982). Neither § 1964(c) nor any other RICO provision explicitly establishes exclusive federal subject-matter jurisdiction over suits arising under civil RICO. Authority remains divided on the question whether civil RICO litigation is confined to the federal courts. In Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), the Supreme Court reiterated the "general principle" that "state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication." Id. at 477-78 (citations omitted).

Analysis thus "begins with the presumption that state courts enjoy concurrent jurisdiction." Id. at 478. RICO does not explicitly rebut this presumption, but the presumption can be rebutted by "unmistakable implication from legislative history, or by clear incompatibility between state-court jurisdiction and federal interests." Id. Factors indicating clear incompatibility include "the desirability of uniform interpretation, the expertise of federal
or entity capable of holding a legal or beneficial interest in prop-

judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.” *Id.* at 483-84.


On the other hand, decisions finding concurrent civil RICO subject-matter jurisdiction stress that Congress could have, but did not, explicitly establish exclusive federal jurisdiction. *See, e.g.*, Carman v. First Nat'l Bank, 642 F. Supp. 862, 864 (W.D. Ky. 1986); Chas. Kurz Co. v. Lombardi, 595 F. Supp. 373, 381 n.11 (E.D. Pa. 1984) (“When Congress wants jurisdiction to be exclusive it can so provide.”); Luebke v. Marine Nat'l Bank, 567 F. Supp. 1460, 1462 (E.D. Wis. 1983). In the absence of explicit congressional mandate, some courts find civil RICO's Clayton Act pedigree insufficient to establish an “unmistakable implication” of congressional intent to establish exclusive federal jurisdiction. According to one court, “[d]ouble and treble damages are common in both federal and state court and are totally unrelated to the issue of jurisdiction.” *HMK Corp.* v. Walsey, 637 F. Supp. 710, 717 (E.D. Va. 1986); see also, *e.g.*, County of Cook v. Midcon Corp., 773 F.2d 892, 905 n.4 (7th Cir. 1985) (expressing “doubt whether the analogy to antitrust law is sufficiently strong to conclude that because jurisdiction over antitrust cases is exclusively federal, RICO jurisdiction necessarily must follow suit”).


Courts finding concurrent jurisdiction also do not perceive “clear incompatibility” between
RICO creates a potentially broad plaintiff class. Civil RICO claims have been asserted by such plaintiffs as individuals, corporations, partnerships, governmental agencies and units, labor unions, churches, universities, and estates.

Courts have uniformly held that by authorizing suit on behalf of a plaintiff "injured in his business or property," section 1964(c) precludes recovery for personal injury. Until Sedima, however, section this jurisdiction and federal interests. One decision concludes that concurrent jurisdiction would not thwart uniform interpretation because civil RICO is "sufficiently detailed in scope and clear as to its purpose that the likelihood of future judicial gloss is comparatively limited." Cianci, 710 P.2d at 381 (citation omitted); see also, e.g., HMK Corp., 637 F. Supp. at 717. Some courts conclude that because RICO operates against conduct that constitutes state as well as federal violations, federal judges hold no greater expertise than state judges in issues raised in civil RICO actions; see, e.g., Cianci, 710 P.2d at 381; HMK Corp., 637 F. Supp. at 717. Finally, some courts conclude that because RICO operates against conduct that is contrary to state and federal interests alike, no basis exists for concluding that federal courts would be more hospitable than state courts to civil RICO claims; see, e.g., Cianci, 710 P.2d at 381.

35. See, e.g., Cowan v. Corley, 814 F.2d 223 (5th Cir. 1987).
1964(c) was a major battleground. In an apparent effort to restrict civil RICO's potentially broad scope, many courts held that the section conferred standing only on persons who alleged particular types of injury in their business or property.\(^{44}\) Noting that the language of section 1964(c) closely tracks that of section 4 of the Clayton Act,\(^{45}\) some courts required civil RICO plaintiffs to allege injury that placed them at a competitive disadvantage in the marketplace. Noting that RICO was conceived as anti-racketeering legislation, some courts required allegation of "racketeering injury," which the Second Circuit described as "injury caused by an activity which RICO was designed to deter."\(^{46}\)

\textit{Sedima} struck down the competitive-injury and racketeering-injury requirements as inconsistent with RICO's language and legislative history.\(^{47}\) According to the Court, "[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by [section 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)."\(^{48}\)

Congress failed to address a critical threshold issue. RICO does not provide an express statute of limitations for actions brought under section 1964(c). By early 1987, lower courts had not adopted a consistent approach to the problem of selecting the most appropriate stat-

\(^{44}\) See Abrams, supra note 10, at 1509-16.
\(^{45}\) See 15 U.S.C. § 15 (1982); \textit{Agency Holding Corp.}, 107 S. Ct. at 2764 ("Even a cursory comparison of the two statutes reveals that [civil RICO] was patterned after the Clayton Act.").
\(^{47}\) Concerning competitive injury, see \textit{Sedima}, 473 U.S. at 497 n.1 (Civil RICO damages "include, but are not limited to, ... competitive injury."); concerning racketeering injury, see id. at 493-500.
\(^{48}\) 473 U.S. at 495. In two subsequent decisions, the Court has indicated that where a civil RICO plaintiff alleges injury to its business or property by reason of a section 1962 violation based on acts of mail or wire fraud, the plaintiff must allege pecuniary injury or injury to tangible or intangible property rights; allegation of injury to an intangible right does not suffice. See \textit{McNally v. United States}, 107 S. Ct. 2875 (1987), and \textit{Carpenter v. United States}, 108 S. Ct. 316 (1987), both discussed infra note 108.

ute of limitations for civil RICO claims. In *Agency Holding Corp. v. Malley-Duff & Assocs.* in June of 1987, the Supreme Court resolved the limitations imbroglio by holding that the four-year statute of limitations applicable to Clayton Act civil enforcement actions applies in civil RICO actions. Because the plaintiff Malley-Duff had filed its complaint less than four years after the earliest time its civil RICO action could have accrued, however, the Court did not determine the appropriate time of accrual for civil RICO claims.

49. See, e.g., *Agency Holding Corp.*, 107 S. Ct. at 2763 (discussing lower court decisions). In a pre-*Agency Holding Corp.* decision that grappled with the civil RICO limitations problem, one judge offered these perceptive observations about the costs incurred whenever Congress establishes a private cause of action but remains silent concerning the applicable statute of limitations:

Fixing the statute of limitation for a particular cause of action is a legislative function. Indeed, it is not a particularly difficult or complex legislative function. In most circumstances, it can be handled in a sentence. Yet, in a significant number of statutory schemes of nationwide application, Congress has failed to fulfill this basic responsibility and has left the courts to spend hundreds of hours — and thousands of dollars in government money — searching for a substitute solution. Meanwhile, justice is delayed, not only in the cases in which limitation issues arise but also in the many cases, often raising far more serious questions, which must wait while this tedious process takes place.


The 1985 American Bar Association Ad Hoc Civil RICO Task Force had characterized the lower courts' approach to the civil RICO limitations problem as "confused, inconsistent, . . . unpredictable . . . [and] virtually guaranteed to incite complex and expensive litigation over what should be a straightforward matter." See ABA Report, supra note 12, at 391-92. For general discussion of the inconsistent decisions that preceded *Agency Holding Corp.*, see, e.g., Note, *Statutes of Limitations in Civil RICO Actions After Wilson v. Garcia, 55 FORDHAM L. REV. 529 (1987); Lane, Civil RICO: A Call For a Uniform Statute of Limitations, 13 FORDHAM URB. L.J. 205 (1985).*


B. Section 1962: The Enterprise

Section 1964(c) authorizes suit by plaintiffs who allege injury in their business or property "by reason of a violation of section 1962." The latter section makes it unlawful for "any person" to engage in a "pattern of racketeering activity" while the person is involved in one or more enumerated relationships with an "enterprise engaged in, or the activities of which affect, interstate or foreign commerce."

Section 1962(a)-(c) operates not only against any person who engages in a pattern of racketeering activity, but also against any person who engages in "collection of an unlawful debt." Nearly all civil RICO claims, however, are based on allegations of a pattern.

Section 1962(a)-(c) operates not only against any person who engages in a pattern of racketeering activity, but also against any person who engages in "collection of an unlawful debt." Nearly all civil RICO claims, however, are based on allegations of a pattern.
RICO's definition of "person" creates a potentially broad defendant class.\textsuperscript{56} Civil RICO claims have been asserted against such defendants as individuals,\textsuperscript{57} corporations,\textsuperscript{58} partnerships,\textsuperscript{59} labor unions,\textsuperscript{60} churches,\textsuperscript{61} colleges,\textsuperscript{62} and estates.\textsuperscript{63}

Some pre-\textit{Sedima} decisions held that although section 1962 operates against "any person," Congress intended to limit civil RICO's defendant class to persons connected with organized crime.\textsuperscript{64} Even before \textit{Sedima}, the organized-crime limit was rejected by all courts of appeals and most district courts that had considered it.\textsuperscript{65} \textit{Sedima} laid the issue to rest. The Court acknowledged that civil RICO actions "are being brought almost solely against [nonracketeer] defendants, rather than against the archetypal, intimidating mobster";\textsuperscript{66} the Court concluded, however, that this development has occurred because sec-

\begin{itemize}
\item \textsuperscript{56} 18 U.S.C. § 1961(3) (1982). See \textit{supra} text accompanying note 34.
\item \textsuperscript{58} See, e.g., Roeder v. Alpha Indus., Inc., 814 F.2d 22 (1st Cir. 1987).
\item \textsuperscript{60} See, e.g., Rodonich v. House Wreckers Union, Local 95, 817 F.2d 967 (2d Cir. 1987).
\item \textsuperscript{61} Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986); \textit{cert. denied}, 107 S. Ct. 1336 (1987).
\item \textsuperscript{62} See, e.g., Robinson v. City Colleges, 656 F. Supp. 555 (N.D. Ill. 1987).
\item \textsuperscript{63} See, e.g., State Farm Fire & Cas. Co. v. Estate of Caton, 540 F. Supp. 673 (N.D. Ind. 1982).
\item \textsuperscript{64} See Abrams, \textit{supra} note 10, at 1516-19, 1521-24.
\item \textsuperscript{65} See \textit{id}. at 1516 & nn. 193-95.
\item \textsuperscript{66} \textit{Sedima}, 473 U.S. at 499.
\end{itemize}
tion 1962 operates against "‘any person’ — not just mobsters.”

The RICO "enterprise" may be either a legal entity or an association-in-fact. To help assure that section 1962 reaches a broad range of conduct, RICO provides that "‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” In *United States v. Turkette* in 1981, the Supreme Court held that even entirely illegitimate enterprises may be RICO enterprises.

1. The Section 1962 Enterprise Relationships: May the Enterprise Be a Defendant?

(a) Section 1962(a)

The first of section 1962's enumerated enterprise relationships is found in subsection (a). This subsection makes it 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. . . ." The plaintiff alleged a section 1962(a) violation in *Masi v. Ford City Bank & Trust Co.* After the plaintiff Masi had opened an Individual Retirement Account (IRA) by depositing $11,587.39 with the defendant bank, Masi agreed to guarantee a loan made by the bank to a third party for $19,452.96. Masi guaranteed repayment to the extent of $10,000. When the third party defaulted on an unpaid balance of nearly $13,000, the bank withdrew $11,208.31 from Masi's IRA to satisfy the guaranty obligation and notified him of the withdrawal by mailing him three letters. The civil RICO count alleged that the withdrawn funds constituted "income" that the bank had "received from" predicate acts of mail fraud and then had used "in operation of" its own banking enterprise.

By naming the bank as both the defendant and the enterprise, plaintiff Masi raised the troublesome "distinction" question: may the

67. Id. at 495.
71. Id.
72. 779 F.2d 397 (7th Cir. 1985).
73. Id. at 399, 401.
RICO enterprise also be a defendant? The Seventh Circuit rejected the bank’s contention that, as a matter of law, the section 1962(a) enterprise must be distinct from the defendant, or culpable “person.” The panel held that the section 1962(a) enterprise may also be a defendant when the enterprise is “actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering.”

The panel concluded that under “a literal reading of the statute,” a person may receive income from a pattern of racketeering activity and then “use or invest, directly or indirectly, any part of such income, or the proceeds of such income” in its own operations.

(b) Section 1962(b)

Section 1962(b) makes it unlawful for any person, “through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise . . . .”

The plaintiffs alleged a section 1962(b) violation in *Medallion TV Enterprises, Inc. v. SelecTV, Inc.* Medallion and SelecTV entered

---

74. 779 F.2d at 401 (quoting Haroco, Inc. v. American Nat’l Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984), aff’d per curiam, 473 U.S. 606 (1985)).
75. Id. at 402.
into a joint venture ("Medsel") to acquire and sell worldwide rights to telecast the 1981 heavyweight bout between Muhammad Ali and Trevor Berbick. Medsel subsequently acquired the worldwide telecast rights from the bout's promoter. The joint venture agreement provided that SelecTV would attempt to sell telecast rights to pay and cable television stations in the United States and Canada, and that Medallion would attempt to sell telecast rights throughout the rest of the world. Sales were disappointing, and both joint venturers suffered losses.\(^7\) The plaintiffs brought suit alleging that defendants, SelecTV and three of its officers and directors, had fraudulently induced Medallion to enter into the joint venture. The civil RICO claim alleged that the four defendants had violated section 1962(b) by acquiring or maintaining an interest in or control of two enterprises — SelecTV itself and Medsel — through predicate acts of mail and wire fraud and interstate transportation of stolen property.

The court held that Medallion had properly alleged Medsel as an enterprise. Reaching the distinction question, however, the court held as a matter of law that the defendant SelecTV could not be an enterprise because Congress intended that the section 1962(b) enterprise be "different from . . . the person whose behavior the act was designed to prohibit." \(^8\)

(c) **Section 1962(c)**

Most civil RICO claims allege a violation of section 1962(c).\(^8\)

---

79. *Id.* at 1292-93.
80. *Id.* at 1295 (quoting United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983)). For other decisions concluding that, as a matter of law, the section 1962(b) enterprise must be distinct from the defendant, see, e.g., Robinson v. City Colleges of Chicago, 656 F. Supp. 555, 560-61 (N.D. Ill. 1987); HGN Corp. v. Chamberlain, Hrdlicka, White, Johnson & Williams, 642 F. Supp. 1443 (N.D. Ill. 1986); Bruss Co. v. Allnet Comm. Servs., Inc., 606 F. Supp. 401, 407 (N.D. Ill. 1985) (Section 1962(b)'s language "contemplates that the enterprise is the victim, not the perpetrator, of the crime."); Decisions concluding that the section 1962(b) enterprise may also be a defendant include *Wilcox*, 815 F.2d at 529-30; Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986) (Under section 1962(b), "the corporation necessarily must be the direct or indirect beneficiary of the pattern of racketeering activity to be both the 'person' and the 'enterprise.'"); *Klapper v. Commonwealth Realty Trust*, 657 F. Supp. 948, 957 (D. Del. 1987); *Vietnam Veterans of Am., Inc.*, 644 F. Supp. at 956-57; Commonwealth of Pa. v. Derry Constr. Co., 617 F. Supp. 940, 943-44 (W.D. Pa. 1985).
81. *See* 18 U.S.C. § 1962(c), quoted in relevant part *supra* note 53. Of the 270 pre-1985 district court civil RICO decisions, 97% alleged violation of section 1962(c). *See* ABA Report, *supra* note 12, at 57. Even counting the decisions in which violation of one or more of the other subsections was alleged along with violation of section 1962(c), the other subsections played a relatively minor role. Violations of section 1962(a), (b), and (d) were alleged in approximately 9, 15, and 12 percent of the decisions respectively. *Id.*
which makes it unlawful for any person "employed by or associated
with any enterprise . . . to conduct or participate, directly or indi-
rectly, in the conduct of such enterprise's affairs through a pattern
of racketeering activity . . . ." Sedima itself concerned an alleged
section 1962(c) violation.

In 1979, the plaintiff Sedima, S.P.R.L., a Belgian corporation,
entered into a joint venture with defendant Imrex Co. to provide
electronic components to a Belgian firm. The buyer was to order parts
through Sedima; Imrex was to obtain the parts in the United States
and ship them to Europe. The agreement called for Sedima and
Imrex to split the net proceeds. Imrex filled roughly $8 million in
orders that were placed with it through Sedima. In 1982, Sedima filed
suit alleging that by presenting inflated bills, Imrex had cheated
Sedima out of a portion of its proceeds by collecting for nonexistent
expenses. Sedima alleged that the three defendants (Imrex and two of
its officers) were "employed by or associated with" an enterprise (the
joint venture) and had conducted or participated in the conduct of

82. Some courts have concluded that by operating against defendants who "conduct or
participate, directly or indirectly, in the conduct of an enterprise's affairs, section 1962(c)
requires allegation of the defendant's active involvement in those affairs. See, e.g., Bennett v.
Berg, 710 F.2d 1361, 1364 (8th Cir.) (en banc) (dictum), cert. denied, 464 U.S. 1008 (1983)
("A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which
ordinarily will require some participation in the operation or management of the enterprise
itself."); Agristor Leasing v. Meuli, 634 F. Supp. 1208, 1223 (D. Kan. 1986) (Section 1962(c)
violation "occurs only when the racketeering activity is being used as an integral part of the
management of the enterprise's affairs.").

Most courts considering the question, however, have rejected Bennett's dictum. See, e.g.,
1986) (Contention that defendant must conduct or participate in the conduct of a RICO
enterprise "in a significant manner . . . ignores the 'directly or indirectly' language of
§ 1962(c."); Schacht v. Brown, 711 F.2d 1343, 1360 (7th Cir.), cert. denied, 464 U.S. 1002
(1983) (Section 1962(c) applies "to insiders and outsiders — those merely 'associated with' an
enterprise — who participate directly and indirectly in the enterprise's affairs through a
pattern of racketeering activity . . . . [T]he RICO net is woven tightly to trap even the smallest
fish, those peripherally involved with the enterprise.") (emphasis in the original) (citations
omitted). A person conducts the activities of an enterprise through a pattern of racketeering
activity when the person "is enabled to commit the predicate offenses solely by virtue of his
position in the enterprise or involvement in or control over the affairs of the enterprise; or
[when] the predicate offenses are related to the activities of that enterprise." United States v.
Jannotti, 729 F.2d 213, 226 (3d Cir. 1984); United States v. Provenzano, 688 F.2d 194, 200 (3d


84. See Amended Complaint ¶ 58, reprinted in Joint App. 18a.
the enterprise’s affairs through a pattern of racketeering activity consisting of acts of mail and wire fraud.

By naming Imrex as a defendant but not as an enterprise, Sedima avoided implicating the distinction question. Nearly all courts considering the question have concluded that, as a matter of law, the section 1962(c) enterprise must be distinct from the defendant. These courts conclude that section 1962(c) “clearly envisions two entities” because a person cannot be “employed by or associated with” itself.86


In jurisdictions that require allegation of a section 1962(c) enterprise distinct from the defendant, civil RICO plaintiffs might achieve some measure of flexibility by careful pleading. For example, potential defendants frequently hold an employer-employee relationship, with the employer the party better able to satisfy a judgment. The plaintiff might name the employer as the enterprise, name the employee as the defendant, and seek to hold the employer liable under the doctrine of respondeat superior. Most courts reaching the question under section 1962(c), however, have concluded that the doctrine does not apply to allegations of violation of that section. See, e.g., Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987); Schofield v. First Commodity Corp., 793 F.2d 28, 32-33 (1st Cir. 1986) (Because Congress in section 1962(c) "intended to separate the enterprise from the criminal 'person' or 'persons,'" held "inappropriate . . . to use respondeat superior to accomplish indirectly what . . . the statute directly denies."); Brent Liquid Transport, Inc. v. GATX Leasing Corp., 650 F. Supp. 467, 475 (N.D. Miss. 1986) ("The rule that the [section 1962(c)] defendant must be separate and distinct from the enterprise cannot be circumvented by imposing vicarious liability . . . under the doctrine of respondeat superior."); Gilbert v. Prudential Bache Sec., Inc., 643 F. Supp. 107, 109 (E.D. Pa. 1986) (To apply doctrine of respondeat superior in section 1962(c) actions "would be to read the enterprise requirement out of the statute entirely, whenever a corporate defendant is involved."); Continental Data Sys., Inc. v. Exxon Corp., 638 F. Supp. 432, 439-40 (E.D. Pa. 1986); Rush v. Oppenheimer & Co., 628 F. Supp. 1188, 1194 (S.D.N.Y. 1985) (Defendant "cannot rely on theories of respondeat superior to accomplish an end-run around [the] required distinction between person and enterprise under [section 1962(c)]."); Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 835 (N.D. Ill. 1985); Dakis v. Chapman, 574 F. Supp. 757, 759-60 (N.D. Cal. 1983); Parnes v. Heinold Commodities, Inc.,
(d) Section 1962(d)

The plaintiff Sedima also alleged that the three defendants had conspired to violate section 1962(c). The conspiracy count was grounded in section 1962(d),\textsuperscript{87} which makes it unlawful for any person "to conspire to violate any of the provisions" of the section's first three subsections. The section 1962(d) offense arises from an agreement to violate one or more of these three subsections.\textsuperscript{88}

2. Must the Enterprise Be Distinct From the Pattern of Racketeering Activity?

The circuits remain divided on yet another distinction question. Must a RICO plaintiff, as a matter of law, allegation the existence of an enterprise that is distinct from the conduct that would establish the alleged pattern of racketeering activity?\textsuperscript{89} While specifying that the "enterprise" and the "pattern" remain separate elements of a RICO


\textsuperscript{88} The circuits remain divided on a fundamental question: what is the nature of the agreement that must be shown in the establishment of a defendant's violation of section 1962(d)? The First and Second Circuits have held that section 1962(d) requires proof that the defendant personally agreed to commit two or more predicate acts of racketeering activity. \textit{See, e.g.}, United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), \textit{cert. denied sub nom.} Rabito v. United States, 469 U.S. 831 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), \textit{cert. denied}, 460 U.S. 1011 (1983). Most circuits reaching this question, however, require only proof of a defendant's agreement that other members of the conspiracy violate RICO through the commission of two or more predicate acts. \textit{See, e.g.}, United States v. Neapolitan, 791 F.2d 489, 494-500 (7th Cir.), \textit{cert. denied}, 107 S. Ct. 422 (1986); United States v. Joseph, 781 F.2d 549, 554 (6th Cir. 1986); United States v. Adams, 759 F.2d 1099, 1116 (3d Cir.), \textit{cert. denied}, 474 U.S. 971 (1985) (White, J., dissenting); United States v. Tille, 729 F.2d 615, 619 (9th Cir.), \textit{cert. denied}, 469 U.S. 845 (1984); United States v. Carter, 721 F.2d 1514, 1529 (11th Cir.), \textit{cert. denied sub nom.} Morris v. United States, 469 U.S. 819 (1984).

\textsuperscript{89} For discussion of the pattern element, see infra notes 107-49 and accompanying text. This latter distinction question ordinarily arises, if at all, in actions alleging association-in-fact enterprises. Because these enterprises are not pre-existing legal entities, they frequently consist primarily or entirely of the associates' predicate acts that are alleged to constitute the pattern. In \textit{Superior Oil Co. v. Fulmer}, 785 F.2d 252 (8th Cir. 1986), however, the plaintiff alleged that the enterprise was the partnership entered into by the three individual defendants. First the court of appeals vacated the jury's civil RICO award on the ground that the plaintiff had not proved a pattern of racketeering activity at all. \textit{Id.} at 257. Then, because the partnership "appear[ed] to have had no purpose distinct from the conduct inherent in [defendants'] conversion scheme," the panel in dictum "express[ed] doubt" whether the plaintiff had proved an enterprise distinct from any alleged pattern. \textit{Id.} at 258.
claim, *United States v. Turkette* left room for division on this vexing question. Writing for the Court in that decision, which concerned an association-in-fact enterprise, Justice Byron R. White stated:

The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. . . . The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.91

The Eighth Circuit has held that the alleged RICO enterprise must, as a matter of law, be distinct from the pattern of racketeering activity. In *United States v. Bledsoe*, the court stressed *Turkette*’s description of a RICO enterprise as "at all times . . . a separate element" that is "proved by evidence of an ongoing organization . . . [whose] various associates function as a continuing unit." *Bledsoe* concluded that *Turkette* had defined "three basic characteristics." According to *Bledsoe*, a RICO enterprise, including an association-in-fact enterprise, must have not only "a common or shared purpose which animates those associated with it" and "some continuity of both structure and personality", the enterprise must also have "an ‘ascertainable structure’ distinct from that inherent in the conduct of

---

91. Id. at 583 (citation and footnote omitted).
93. Bledsoe, 674 F.2d at 664 (quoting Turkette, 452 U.S. at 583).
94. Id. at 665 (quoting Turkette, 452 U.S. at 583).
95. Id. at 664.
96. Id.
97. Id.
a pattern of racketeering activity." The Bledsoe panel concluded that consistent with Turkette, a RICO enterprise must have an existence, and must conduct activity, apart from the existence and activity that is alleged to constitute the pattern. Specifically, the panel declared that the enterprise cannot simply be the undertaking of the acts of racketeering[,] neither can it be the minimal association which surrounds these acts. Any two criminal acts will necessarily be surrounded by some degree of organization and no two individuals will ever jointly perpetrate a crime without some degree of association apart from the commission of the crime itself. Thus unless the inclusion of the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering, [RICO] simply punishes the commission of two of the specified crimes within a 10-year period.99

Five months after Bledsoe, the Eighth Circuit applied that decision's enterprise concept in a civil RICO action. In Bennett v. Berg,100 the plaintiffs were current and former residents of John Knox Village, a retirement community organized as a not-for-profit corporation. The civil RICO counts alleged that through numerous acts of mail fraud, various individual defendants had violated each of section

98. Id. (quoting United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981)). The Third, Fourth and Fifth Circuits have reached virtually the same conclusion concerning Turkette's definition of enterprise. In the Third Circuit, for example, a civil RICO plaintiff must prove

1) that the enterprise is an ongoing organization with some sort of framework or superstructure for making or carrying out decisions; 2) that the members of the enterprise function as a continuing unit with established duties; and finally

3) that the enterprise must be separate and apart from the pattern of activity in which it engages.


99. Bledsoe, 674 F.2d at 664.

1962's four subsections by engaging in financial mismanagement and self-dealing that left the community on the verge of bankruptcy. The Bennett panel concluded that the corporation was a proper civil RICO enterprise because it demonstrated not only a common purpose and continuity, but also "an ascertainable structure apart from any predicate acts of mail fraud."101 If the alleged predicate acts were removed, the corporation as a legal entity would continue "provid[ing] numerous legitimate services."102

The Second Circuit has expressly rejected the Eighth Circuit's view that the evidence offered to prove the RICO enterprise must, as a matter of law, be distinct from the evidence offered to prove the pattern of racketeering activity. The Second Circuit has instead "upheld application of RICO to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering acts."103 In Moss v. Morgan Stanley Inc.,104 plaintiff brought a class action on behalf of himself and other investors who sold stock in Deseret Pharmaceutical Company ("Deseret") on November 30, 1976. The civil RICO claim alleged that defendant Courtois, employed by Morgan Stanley Inc. in its mergers and acquisitions department, obtained confidential information that day of an imminent tender offer for Deseret stock. Courtois informed the defendant Antoniu, a Kuhn Loeb & Co. employee, who in turn informed the defendant Newman. Pursuant to an agreement with Courtois and Antoniu, stockbroker Newman that day purchased Deseret stock for his and their accounts. Upon public announcement of the tender offer a few days later, the three defendants tendered their Deseret shares and reaped substantial profits.

Plaintiff Moss alleged that through a pattern of racketeering activity consisting of predicate acts of fraud in the sale of securities, Newman violated section 1962(c) in his purchase and sale of Deseret stock based on the confidential information. Stressing Turkette's determination that the proof used to establish the RICO pattern "may in particular cases coalesce"105 with the proof offered to establish the

101. Bennett, 685 F.2d at 1060.
102. Id.
enterprise, the Second Circuit concluded that Moss had adequately pleaded the existence of an association-in-fact enterprise consisting of the activities of the three individual defendants. Unlike the corporate legal entity that served as the alleged Bennett enterprise, the alleged Moss enterprise did not conduct activity apart from the predicate acts of its associates.  

C. Section 1961: The Pattern of Racketeering Activity

1. Racketeering Activity

Each of section 1962's enumerated enterprise relationships requires proof that the defendant engaged in a "pattern of racketeering activity." According to section 1961(1), a person engages in "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1510 (relating to obstruction of justice), section 1511 (relating to obstruction of criminal investigations), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to

106. For other decisions rejecting the view that the RICO enterprise must, as a matter of law, be distinct from the pattern of racketeering activity, see, e.g., United States v. Qaoud, 777 F.2d 1105, 1115 (6th Cir. 1985) ("Although 'enterprise' and 'pattern of racketeering activity' are separate elements, they may be proved by the same evidence."), cert. denied sub nom. Callanan v. United States, 475 U.S. 1098 (1986); United States v. Weinstein, 762 F.2d 1522, 1537 & n.13 (11th Cir. 1985), cert. denied, 475 U.S. 1110 (1986); United States v. Cagnina, 697 F.2d 915, 921 (11th Cir.), cert. denied, 464 U.S. 856 (1983); Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1251-52 (E.D. Mich. 1987).

ing activity” by engaging in any act “chargeable” under several generically described state criminal laws, any act “indictable” under several specific federal criminal provisions, or any “offense” involving bankruptcy or securities fraud or drug-related activities that is “punishable” under federal law. Certain of these so-called predicate acts (for example, “any act or threat involving murder, kidnaping, . . . [or] arson, which is chargeable under State law . . . .”) might well be committed by persons generally labeled “racketeers.” Other defendants, however, frequently commit at least three other predicate acts—any “indictable” act of mail or wire fraud, and “any offense involving . . . fraud in the sale of securities. . . .”

108. 18 U.S.C. § 1961(1)(B),(D) (1982 & Supp. IV 1986). The Supreme Court recently diminished the Government’s ability to bring RICO prosecutions based on predicate acts of mail or wire fraud. In McNally v. United States, 107 S. Ct. 2875 (1987), the Court reversed a public official’s mail fraud conviction. The Court held that the federal mail fraud statute, 18 U.S.C. § 1341 (1982), protects only money or property rights and not the citizenry’s intangible right to good government. The same holding would seemingly obtain under the federal wire fraud statute, 18 U.S.C. § 1343 (1982), which contains language identical to the language that McNally found dispositive. Both statutes operate against “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . .” See Carpenter v. United States, 108 S. Ct. 316, 320 n.6 (1987) (“The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.”). Carpenter specified that McNally “did not limit the scope of § 1341 to tangible as distinguished from intangible property rights,” Id. at 320, but merely distinguished protected property rights from unprotected intangible rights such as the right to good government. Id. at 320-21.

McNally and Carpenter will have little effect on the typical civil RICO action based on predicate acts of mail or wire fraud. Section 1964(c) requires that civil RICO plaintiffs allege injury in their “business or property”; see supra text accompanying note 33. McNally and Carpenter indicate that where a civil RICO plaintiff alleges injury to its business or property by reason of a section 1962 violation based on predicate acts of mail fraud (and presumably wire fraud), the plaintiff must allege pecuniary injury or injury to tangible or intangible property rights; allegation of injury to an unprotected intangible right does not suffice. Even before McNally, however, nearly all civil RICO claims based on these predicate acts have alleged pecuniary injury or injury to tangible or intangible property rights, even when the defendant was an allegedly corrupt public official or political party. See, e.g., Cowan v. Corley, 814 F.2d 223, 224-25 (5th Cir. 1987) (county sheriff); Cullen v. Margiotta, 811 F.2d 698, 704, 713 (2d Cir.) (political party), cert. denied sub nom. Nassau County Republican Comm. v. Cullen, 107 S. Ct. 3266 (1987); State of N.Y. v. O’Hara, 652 F. Supp. 1049, 1051-52 (W.D.N.Y. 1987) (city
in *Agency Holding Corp. v. Malley-Duff & Assocs.*, 109 "the large majority of civil RICO complaints use mail fraud, wire fraud or securities fraud as the required predicate offenses."110

*Sedima* held that section 1961(1) does not limit civil RICO’s defendant class to persons previously convicted under RICO or its predicate acts.111 The prior-conviction limit, which had divided the lower courts, 112 would have relegated civil RICO to virtual insignificance because federal and state authorities prosecute only a small percentage of persons who otherwise would be subject to civil RICO liability. Because Congress defined predicate acts that are "chargeable," "indictable" or "punishable," *Sedima* held that "racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be."113

By rejecting the prior-conviction limit, *Sedima* focused greater attention on civil RICO’s standard of proof. May a plaintiff prove all elements of a civil RICO claim (including the defendant’s commission of predicate acts) by a preponderance of the evidence, or must proof of the predicate acts’ commission be made by a higher standard? RICO does not state civil RICO’s standard of proof. Because the predicate acts are defined by reference to criminal statutes and because the acts’ commission may result in treble-damage recovery, arguments had been made in favor of requiring proof of the acts’ commission by a higher standard.114 *Sedima* expressly declined to deter-

---


110. *Id.* at 2763. From its study of the 270 pre-1985 district court civil RICO decisions, the American Bar Association Ad Hoc Civil RICO Task Force concluded:

Approximately 44 percent of the cases for which the predicate offenses can be determined from the opinion appear to rely solely on allegations of mail or wire fraud. Another 13 percent rely primarily on mail or wire fraud, but also allege another predicate offense. Twelve percent focus on another predicate offense, but also allege mail or wire fraud violations. Approximately 35 percent rely solely or primarily on allegations of securities fraud. No other predicate offense occurs in as many as two percent of the cases.

*See* ABA Report, *supra* note 12, at 57.

111. 473 U.S. at 488-93.


113. 473 U.S. at 488.


---
mine the predicate acts' standard of proof, but dicta in the Court's opinion appeared to approve "the usual preponderance standard." 115 In decisions considering civil RICO's standard of proof since Sedima, lower courts have uniformly applied the preponderance standard to all elements of the claim. 116

2. "Pattern" of Racketeering Activity

"[T]he heart of any RICO complaint is the allegation of a pattern of racketeering." 117 According to section 1961(5), a pattern "requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 118

---

(suggesting that commission of the predicate acts must be proved beyond a reasonable doubt), rev'd, 473 U.S. 479 (1985); Matz, Determining the Standard of Proof in Lawsuits Brought Under RICO, Nat'l L.J., Oct. 10, 1983, at 21, col. 1 (arguing that commission of the predicate acts must be proved by clear and convincing evidence).

115. 473 U.S. at 491. Writing for the Court in Sedima, Justice White had this to say concerning the standard of proof question:

In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard . . . . There is no indication that Congress sought to depart from this general principle here . . . . That the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction . . . .

Id. (citations omitted). See also, e.g., Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983) (holding that persons seeking recovery under section 10(b) of the Securities Exchange Act of 1934 need prove their cause of action only by "the preponderance-of-the-evidence standard generally applicable in civil actions"). For a discussion of the factors courts consider in determining the standard of proof under a statute that does not establish a standard, see, e.g., Huddleston, 459 U.S. at 389-90.


Most pre-*Sedima* decisions considering the pattern question concluded or assumed that a defendant's commission of two predicate acts within the ten-year period was sufficient to establish the pattern necessary to support RICO liability. In 1983, for example, the plaintiffs in *Beth Israel Medical Center v. Smith*119 alleged that through multiple acts of mail and wire fraud, the defendants had engaged in a scheme by which Smith, the chief legal officer responsible for handling medical malpractice and personal injury claims against certain nonprofit institutions, sold confidential information about these claims to various attorneys. The attorneys used this information in representing claimants in litigation against the institutions.

Smith and other defendants moved to dismiss the civil RICO claim on the ground that the plaintiffs failed to allege a pattern of racketeering activity. According to the movants, the alleged acts of mail and wire fraud arose out of "a common nucleus of facts" and thus "comprise[d] only one predicate act."120 The court denied the motion on the ground that the plaintiffs had "adequately allege[d] the two predicate RICO acts required to establish" a pattern.121

Decisions such as *Smith* suggested few barriers to civil RICO liability. Under settled law, each fraudulent use of the mails or wires constitutes a separate indictable offense of mail or wire fraud, even if multiple uses are made pursuant to a single fraudulent scheme.122 By basing civil RICO claims on predicate acts of mail or wire fraud, therefore, plaintiffs could allege a pattern of racketeering activity almost on the mere allegation of intentional fraud. After all, "[i]n today's integrated interstate economy, it is the rare transaction that does not somehow rely on extensive use of the mails or the

---


121. Id. at 1066.

telephone."123

*Sedima* made the pattern element civil RICO's newest major battleground. After rejecting limits that some decisions had placed on civil RICO's litigant classes, the Supreme Court stated that civil RICO's apparent breadth stemmed partly from the "failure of Congress and the courts to develop a meaningful concept of 'pattern.'"124 In footnote fourteen, the Court stressed that "the definition of a 'pattern of racketeering activity' differs from the other provisions in section 1961 in that it states that a pattern 'requires at least two acts of racketeering activity,' . . . not that it 'means' two such acts."125 According to the Court:

> the implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern . . . . "The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern."126

In the three years since *Sedima*, several circuits have wrestled with the pattern element in light of the Court's provocative footnote. "Relationship," the footnote's second prong, usually is not a matter of serious dispute because civil RICO plaintiffs ordinarily allege predicate acts that have the same or similar purposes, results, or methods of commission.127 "Continuity," however, has divided the circuits.

---


125. *Id.* at 496 n.14 (emphasis by the Court); section 1961(5) is quoted *supra* text accompanying note 118.

126. *Id.* (quoting Senate Report, *supra* note 9, at 158) (emphasis by the Court). *See also* 473 U.S. at 527 (Powell, J., dissenting) ("The definition of 'pattern' may . . . logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a 'pattern' to be proved."). After rejecting the limits the Second Circuit had placed on civil RICO's litigant classes, the Court remanded *Sedima* for determination whether the defendants had committed the requisite predicate acts and, if so, whether those acts constituted a pattern of racketeering activity. *Id.* at 500.

127. See, e.g., International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 154 (4th Cir. 1987) ("[T]he element of relationship between the predicate acts is undoubtedly present, but the element of continuity is absent."); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928 (10th Cir. 1987) ("clear" that alleged predicate acts satisfied relationship prong); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1399 (9th Cir. 1986) (brief discussion finding relationship prong satisfied); Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986)
The Eighth Circuit's "multiple scheme" test and the Second Circuit's "continuing enterprise" test highlight the polar extremes, while the Seventh Circuit has moved toward a middle-ground "separate transaction" test.

To allege continuity in the Eighth Circuit, a civil RICO plaintiff must assert a defendant's engagement in more than one "scheme."\[128\] In *Devries v. Prudential-Bache Securities, Inc.*,\[129\] for example, the civil RICO count alleged that the defendant securities brokers made fraudulent misrepresentations to secure the plaintiff's account and then churned the account for six years by recommending transactions unsuitable to the plaintiff's investment needs. The court of appeals assumed that the plaintiff could establish the defendant's commission of several related predicate acts in connection with the account.\[130\] The panel held, however, that these acts constituted only one ongoing scheme, even though the acts allegedly continued for a considerable

(Defendant "clearly has proved the 'relationship' prong."); Kronfeld v. First Jersey Nat'l Bank, 638 F. Supp. 1454, 1472 (D. N.J. 1986) (finding alleged predicate acts "clearly related"); *but see*, e.g., Rojas v. First Bank Nat'l Ass'n, 613 F. Supp. 968, 971 n.1 (E.D.N.Y. 1985) (summary judgment dismissing civil RICO claim entered against plaintiff who alleged unrelated predicate acts; "[s]everal isolated acts . . . do not a pattern make").

\[128\] See, e.g., Madden v. Gluck, 815 F.2d 1163, 1164 & n.1 (8th Cir. 1987) (per curiam) (noting Second Circuit's rejection of multiple-scheme test in *Ianniello*, infra notes 134-39 and accompanying text, but adhering to that test); Holmberg v. Morrisette, 800 F.2d 205, 209-10 (8th Cir. 1986) (one scheme to draw down three letters of credit does not constitute RICO pattern), *cert. denied*, 107 S. Ct. 1953 (1987); *Superior Oil Co.*, 785 F.2d at 254-57 (civil RICO award vacated because plaintiff alleged only "one continuing scheme to convert gas from Superior Oil's pipeline," without proof that defendants "had ever done these activities in the past . . . [or] that they were engaged in other criminal activities elsewhere").


129. 805 F.2d 326 (8th Cir. 1986).

130. *Id.* at 329.
period. Absent an allegation that the defendants "had engaged in similar endeavors in the past or that they were engaged in other criminal activities," 131 the plaintiff failed to allege "a true 'pattern' of related but distinct schemes of fraud." 132 According to the panel "[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'" 133

In United States v. Ianniello, 134 the Second Circuit affirmed the defendants' RICO convictions arising from their conduct of an enterprise that skimmed profits from bars and restaurants owned and operated by the defendants. The defendants' activities defrauded the state liquor authority, state taxation authorities, and legitimate creditors. Apparently relying at least partly on Eighth Circuit precedent, one defendant contended that his conviction was based on two predicate acts of mail fraud that constituted a "single, discrete crime" 135 which, as a matter of law, could not constitute a RICO pattern.

The Ianniello panel, however, expressly rejected the Eighth Circuit's multiple-scheme test as resulting from "a strained and inappropriate reading of the statutory language" 136 whose application would "effectively eliminate" the pattern requirement. 137 Ianniello held that when a RICO defendant commits at least two predicate acts within ten years that have the common purpose of furthering a continuing criminal enterprise with which the defendant is associated, this commission establishes both relationship and continuity. 138 In a subsequent civil RICO action, another Second Circuit panel stated in dictum that "Ianniello confirms that two related predicate acts will suffice to establish a pattern." 139

131. Id.
132. Id.
133. Id. (quoting Superior Oil Co., 785 F.2d at 257); accord, Holmberg, 800 F.2d at 210.
134. 808 F.2d 184 (2d Cir. 1986).
135. Ianniello, 808 F.2d at 191.
136. Id. at 192.
137. Id.
138. Id.
No other circuit has adopted either the Eighth Circuit's multiple-scheme test or the Second Circuit's continuing-enterprise test. On the one hand, the multiple-scheme test has been criticized for inviting results that are inconsistent with congressional intent that RICO impose enhanced sanctions on persons who regularly commit predicate acts of racketeering. "[D]efendants who commit a large and ongoing scheme, albeit a single scheme, would automatically escape RICO liability for their acts."\textsuperscript{140}

On the other hand, the continuing-enterprise test has been criticized as inconsistent with congressional intent that RICO implicate not "the isolated offender," but rather only the person who "regularly commits" predicate acts.\textsuperscript{141} Without citing \textit{Ianniello}, the Fourth Circuit concluded that the test "would . . . eliminate the pattern requirement altogether."\textsuperscript{142} Because commission of fraud invariably requires use of the mails or wires at least twice within ten years, "every fraud would constitute 'a pattern of racketeering activity.'"\textsuperscript{143}

The Seventh Circuit's middle-ground "separate transaction" test requires an allegation of less than multiple schemes but more than minimal acts and a continuing enterprise. In \textit{Morgan v. Bank of Waukegan},\textsuperscript{144} for example, the civil RICO claim alleged that the defendants had defrauded the plaintiff investors through several acts of mail fraud for nearly four years. Some acts of mail fraud concerned two separate foreclosure sales, and others concerned allegedly fraudulent statements made in connection with an initial loan transaction. The panel viewed the alleged predicate acts as "part of a single

\textsuperscript{140} Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986), quoted in Roeder v. Alpha Indus., Inc., 814 F.2d 22, 31 (1st Cir. 1987); see also, e.g., Lipin Enters., Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986) (Multiple-scheme test "would allow a large continuous scheme to escape the enhanced penalties of RICO liability."). quoted in International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987); Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1255 (E.D. Mich. 1987) ("[I]t would be counterproductive if one massive racketeering scheme could not be attacked under RICO whereas several insignificant schemes could.").

\textsuperscript{141} Lipin Enters., Inc., 803 F.2d at 324 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985)).

\textsuperscript{142} International Data Bank, Ltd., 812 F.2d at 155.

\textsuperscript{143} Id. at 154.

\textsuperscript{144} 804 F.2d 970 (7th Cir. 1986).
grand scheme,"\textsuperscript{145} but held that the acts established continuity because they were "ongoing over an identified period of time"\textsuperscript{146} and thus could "fairly be viewed as constituting . . . 'transactions 'some-
what separated in time and place.''\textsuperscript{147}

As the Second, Seventh, and Eighth Circuit formulations demonstrate, no consensus has yet emerged concerning the showing a civil RICO plaintiff must make in order to allege continuity sufficient to establish a pattern of racketeering activity.\textsuperscript{148} Some circuits determine continuity without applying an enunciated test.\textsuperscript{149} The nationwide

\textsuperscript{145} Id. at 976.
\textsuperscript{146} Id. at 975.
\textsuperscript{147} Id. (citations omitted). According to the panel, factors relevant in determining separateness include:
the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. However, the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement.
\textsuperscript{149} See, e.g., Roeder v. Alpha Indus., Inc., 814 F.2d 22, 31 (1st Cir. 1987) ("[N]o one characteristic can be considered as controlling in determining whether a pattern exists."); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987) ("[N]o mechanical test can determine the existence of a RICO pattern . . . . What constitutes a RICO pattern is . . . a matter of criminal dimension and degree.").
division suggests that uniformity may have to await Supreme Court determination of the issues raised but not addressed or answered in Sedima’s footnote fourteen.\(^{150}\)

III. CONCLUSION

Current judicial trends indicate that the Racketeer Influenced and Corrupt Organizations Act will assume a predominant role in private maritime litigation sounding in fraud. Contrary to the vision of mobster defendants that RICO’s name may evoke, the Act’s private cause of action has barely touched mobsters. A private plaintiff states a treble-damage RICO claim by alleging that it suffered injury in its business or property because the defendant, while involved in one or more enumerated relationships with an enterprise, engaged in a pattern of racketeering activity. The pattern may consist of acts of mail fraud, wire fraud, or fraud in the sale of securities. Because nonracketeer defendants frequently commit these acts, civil RICO shows signs of becoming a broad federal antifraud remedy that “revolutionizes private litigation.”\(^{151}\)

\(^{150}\) The Court recently granted certiorari in a case that is likely to permit significant amplification of Sedima’s footnote fourteen and the civil RICO pattern element. See H.J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1987), cert. granted, 56 U.S.L.W. 3638 (Mar. 22, 1988).
