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Prior Conviction on Underlying Predicate Offenses Required for Civil RICO Suit. Sedima, S.P.R.L. v. Imrex Co., 749 F.2d 482 (2d Cir. 1984), cert. granted, 105 S. Ct. 901 (1985)

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CASE COMMENTS

Prior Conviction on Underlying Predicate Offenses Required for Civil RICO Suit

Sedima, S.P.R.L. v. Imrex Co., 749 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985).

In *Sedima, S.P.R.L. v. Imrex Co.*,[1] the United States Court of Appeals for the Second Circuit restricted the scope of "private civil RICO" actions under section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO)[2] by adopting a prior criminal conviction requirement.[3]

Sedima entered into a joint venture with Imrex to supply a NATO subcontractor with aviation component parts.[4] Imrex obtained the parts and shipped them to Sedima for ultimate delivery to the subcontractor.[5] Sedima brought suit against Imrex, alleging that Imrex fraudulently inflated purchase prices and costs associated with the venture.[6]

The district court dismissed Sedima's RICO counts[7] brought under section 1964(c) because Sedima failed to allege an injury resulting from a

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1. 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985).

2. Pub. L. No. 91-452, tit. 9, § 901(a), 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1982)). Section 1964(c) provides as follows:

> 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.

18 U.S.C. § 1964(c); *see also infra* notes 15-16 and accompanying text (discussing section 1964(c)); *infra* note 12 and accompanying text (discussing section 1962).

3. 741 F.2d at 496-504.

4. *Id.* at 484. Sedima is a Belgian corporation that imports and exports electronic and mechanical parts. *Id.* Imrex is an American exporter of aircraft electronic component parts. *Id.*

5. *Id.*

6. *Id.* Sedima's complaint contained allegations of breach of contract, unjust enrichment, breach of fiduciary duty, breach of a constructive trust, conversion, and quasi contract. *Id.* In addition, Sedima alleged that Imrex violated section 1962(c) of RICO, 18 U.S.C. § 1962(c) (1982). 741 F.2d at 484; *see infra* note 12 and accompanying text (discussing section 1962).

7. Sedima, S.P.R.L. v. Imrex Co., 574 F. Supp. 963, 964-65 (E.D.N.Y. 1983). Sedima alleged that Imrex's use of the mails to send fraudulent purchase orders and credit memoranda constituted an illegal "pattern of racketeering activity." *Id.* at 965. The statutory definition of "racketeering activity," 18 U.S.C. § 1961(1) (1982), includes acts that are indictable under 18 U.S.C. § 1341 (1982) (relating to mail fraud) and 18 U.S.C. § 1343 (1982) (relating to wire fraud). *See infra* note 8 (discussing "racketeering activity").

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"pattern of racketeering activity."[8] On appeal, the Second Circuit affirmed[9] and *held*: As a precondition to a private cause of action under section 1964(c), the defendant must first be convicted of the underlying predicate offenses.[10]

Congress enacted RICO in 1970 to halt the "infiltration of legitimate businesses by organized crime."[11] Section 1962 prohibits the use of proceeds from any "pattern of racketeering activity" in an "enterprise."[12] In the event of a section 1962 violation, the government may resort to the criminal penalties enumerated in section 1963[13] or the equitable remedies

8. 574 F. Supp. at 965. A "pattern of racketeering activity" requires the commission of at least two acts of "racketeering activity." 18 U.S.C. § 1961(5) (1982). The statutory definition of "racketeering activity" lists various federal and state offenses, which are commonly known as "predicate acts." *See id.* § 1961(1). The district court held that Sedima failed to allege a "racketeering" injury. 574 F. Supp. at 965; *see infra* notes 22-23 and accompanying text (many courts require that a civil RICO plaintiff demonstrate a "competitive" or "racketeering" injury as a prerequisite to a § 1964(c) action).

9. 741 F.2d at 504. The Second Circuit agreed with the district court that only certain "racketeering" injuries are compensable under section 1964(c). *Id.* at 494. For a discussion of the "racketeering" injury requirement and other judicially imposed restrictions on civil RICO, see *infra* notes 21-35 and accompanying text.

10. 741 F.2d at 494-504.

11. United States v. Turkette, 452 U.S. 576, 591 & n.13 (1981); *see also* S. REP. NO. 141, 82d Cong., 1st Sess. 33 (1951) (pre-RICO Senate Report stating that "[o]ne of the most perplexing problems in the field of organized crime is presented by the fact that criminals and racketeers are using the profits of organized crime to buy up and operate legitimate business enterprises); *see generally* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-15 (1980) (discussing motivations leading to the enactment of RICO).

Congress enacted RICO as Title 9 of the Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1982)). The preamble to OCCA states that Congress' purpose in enacting the statute was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

12. 18 U.S.C. § 1962 (1982); *see supra* note 7 (defining "racketeering activity"); *supra* note 8 (defining "pattern of racketeering activity"). Specifically, section 1962(a) prohibits the investment of "any income derived, directly or indirectly, from a pattern of racketeering activity . . . in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in . . . interstate or foreign commerce." 18 U.S.C. § 1962(a) (1982). Similarly, section 1962(b) prohibits the acquisition of "any interest in or control of any enterprise which is engaged in . . . interstate or foreign commerce" through a "pattern of racketeering activity." *Id.* § 1962(b). Section 1962(c) forbids the management of an "enterprise's affairs through a pattern of racketeering activity. . . ." *Id.* § 1962(c). A conspiracy to violate any of section 1962's proscriptions is unlawful under section 1962(d). *Id.* § 1962(d).

13. *See* 18 U.S.C. § 1963 (1982). The criminal sanctions for a RICO violation are imprisonment for up to twenty years, a fine of $25,000, and forfeiture of any interest in an unlawful enterprise. *Id.* § 1963(a); *see generally* Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 305-308 (1983)

of section 1964.[14] Section 1964(c) also allows a private cause of action for persons "injured in [their] business or property" by a RICO violation[15] and awards victorious civil plaintiffs treble damages and attorney's fees.[16]

The broad scope of section 1964(c) has recently prompted an "explo-

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(discussing RICO's criminal penalties); Taylor, *Forfeiture Under 18 U.S.C. § 1963 – RICO's Most Powerful Weapon,* 17 AM. CRIM. L. REV. 379, 391-92 (1980) (same).

14. *See* 18 U.S.C. § 1964 (1982). Section 1964(a) grants the district courts "jurisdiction to prevent and restrain violations of section 1962" and lists examples of equitable relief that courts may grant to the government. *Id.* § 1964(a). In addition, section 1964(b) authorizes the Attorney General to pursue civil remedies, *id.* § 1964(b) and section 1964(d) estops a defendant convicted under section 1963 from denying the essential allegations in a subsequent civil proceeding by the government. *Id.* § 1964(d). For discussions of these government civil remedies, see Note, *Equitable Law Enforcement and the Organized Crime Control Act of 1970,* 25 DEPAUL L. REV. 508 (1976); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192 (1975).

15. 18 U.S.C. § 1964(c) (1982); *see supra* note 2 (quoting § 1964(c)).

16. 18 U.S.C. § 1964(c) (1982). The legislative history of section 1964(c) is unusual. Although RICO largely originated in the Senate, section 1964(c) originated in the House of Representatives. Congress derived the Organized Crime Control Act of 1970 from S. 30, 91st Cong., 1st Sess. (1969), which did not contain a private civil cause of action. The legislative history is silent on why S. 30 did not contain a private cause of action. *Cf.* Blakey & Gettings, *supra* note 11, at 1017-18 (private civil section dropped in effort to "streamline" otherwise complex bill). Section 1964(c) derives from H.R. 19586, 91st Cong., 2d Sess. (1970). Consequently, the Senate Report never addressed section 1964(c). In addition, the House of Representatives did not discuss the potential legal issues associated with the private treble damage remedy. *See* Harper v. New Japan Secs. Int'l. Inc., 545 F. Supp. 1002, 1005 (C.D. Cal. 1982).

Although section 1964(a) vests authority in the district courts to grant equitable relief, section 1964(c) does not expressly grant such relief to private parties. Private parties arguably may seek equitable relief either pursuant to a district court's general grant of authority under section 1964(a) or pursuant to section 1964(c). *See* Blakey & Gettings, *supra* note 11, at 1038 n.133. The weight of authority, however, opposes granting such relief to the private plaintiff. *See, e.g.,* Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983) (citing cases) (exhaustively analyzing legislative history and concluding that private equitable relief is unavailable); *see also* Trane Co. v. O'Connor Secs., 718 F.2d 26, 28 (2d Cir. 1983) (expressing "serious doubt" about the availability of private equitable relief).

Congress anticipated that RICO's criminal and civil sanctions would "strik[e] . . . a mortal blow against the property interests of organized crime." 116 CONG. REC. 602 (1970) (statement of Sen. Hruska); *see also* United States v. Turkette, 452 U.S. 576, 591-93 (1981). Congress' purpose in enacting RICO was thus contrary to the goals of the antitrust laws, which also sanction treble damage awards. *See, e.g.,* Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983), where the court stated as follows:

> The antitrust laws are designed to promote competition in the market place, . . . [The] use of treble damage provisions in antitrust cases could threaten a company with economic ruin. . . .
>
> RICO has the opposite purpose. It is precisely designed to *ruin* those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from insolvency.

Id.

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sion" of civil RICO litigation.[17] Plaintiffs have brought private civil RICO actions to redress commercial injuries unrelated to organized crime activity.[18] Widespread use of section 1964(c) has stigmatized non-criminal defendants as "racketeers"[19] and has encouraged courts to limit the scope of 1964(c) actions.[20]

A minority of courts require that the plaintiff allege a "nexus" between the defendant's activities and organized crime as a prerequisite to a civil RICO action.[21] Other courts require that the civil RICO plaintiff first

17. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 486 (2d Cir. 1984), *cert. granted,* 105 S. Ct. 901 (1985).

18. Only three reported judicial opinions addressed private civil RICO claims by 1978 and only fifteen by 1981. *See, e.g.,* Farmers Bank v. Bell Mfg. Co., 452 F. Supp. 1278 (D. Del. 1978) (rejecting prior criminal conviction requirement); Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975) (limiting § 1964(c) to cases where the defendant is linked to organized crime). Since 1981, however, courts have reported nearly 200 private civil RICO cases, most having no connection with organized crime. *See, e.g.,* Schacht v. Brown, 711 F.2d 1343 (7th Cir.) (insurance company's directors charged with assuming additional liabilities to the detriment of policyholders), *cert. denied,* 104 S. Ct. 508 (1983); Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983) (allegations that defendant's takeover strategy was a manipulative scheme violating section 10(b) of the Exchange Act); Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D. Ga. 1983) (investor sued broker for churning); Salisbury v. Chapman, 527 F. Supp. 577 (N.D. Ill. 1981) (allegation that realtors improperly failed to disclose interest of mortgage in property); *see also* Siegel, *"RICO" Running Amok in Board Rooms,* L.A. Times, Feb. 15, 1985, at 1, col. 1.

19. RICO's acknowledged purpose is to eradicate organized crime. *See supra* note 11. In addition, civil liability under RICO requires criminal conduct. *See, e.g.,* United States v. Campanale, 518 F.2d 352, 365 n.36 (9th Cir. 1975) ("acts constituting racketeering activity must themselves be criminal offenses"); *see also* S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969) (racketeering activity is "an act in itself subject to criminal sanction"). As a result, many civil RICO defendants feel stigmatized by the racketeering connotations attaching to a RICO suit. *See, e.g.,* Marcus, *Racketeering Law Increasingly Invoked to Thwart Takeovers,* Wash. Post, Feb. 28, 1983, at 1, col. 4 (suggesting that plaintiffs utilized RICO as a "smear tactic" to intimidate defendants).

20. *See infra* notes 21-35 and accompanying text. Some commentators have proposed that courts apply the criminal standard of proof in civil RICO actions as a limitation to section 1964(c)'s scope. *See* Note, *Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970,* 53 TEX. L. REV. 1055, 1063-65 (1975) (suggesting that a civil RICO defendant "should arguably receive the benefit of a traditional criminal trial"); *see also* Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655, 715-18 (1982) (suggesting that appropriate standard of proof is "clear and convincing evidence").

21. *See, e.g.,* Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 643 (C.D. Cal. 1983) (RICO not intended to reach ordinary businessmen); Waterman Steamship Corp. v. Avondale Shipyards, Inc., 527 F. Supp. 256, 260 (E.D. La. 1981); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975). Recently in Aliberti v. E.F. Hutton & Co., 591 F. Supp. 632, 633 (D. Mass. 1984), the court dismissed the plaintiff's RICO claim because he failed to allege a connection between the defendant and organized crime. The *Aliberti* court noted that "a thing may be within the letter of the statute and yet not within the statute, because it is not within its spirit, nor within the intention of its makers." *Id.* (quoting United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979)); *see also*

demonstrate a "competitive"[22] or "racketeering"[23] injury.

A few courts have suggested that criminal proceedings on the underlying predicate offenses should precede a section 1964(c) action.[24] Courts adopting this third approach have looked to the statutory definition of "racketeering activity"[25] and have concluded that Congress intended to

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American Sav. Ass'n v. Sierra Fed. Sav. & Loan, 586 F. Supp. 888, 889 (D. Colo. 1984) (cautioning against "slavish literalism" in construing civil RICO); *cf.* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (discussing the social purpose rule of statutory construction); United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940) ("even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this court has followed that purpose, rather than the literal words") (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922)).

Most courts addressing the scope of section 1964(c) have rejected the "nexus" to organized crime requirement. *See* Owl Construction Co. v. Ronald Adams Contractor, 727 F.2d 540 (5th Cir.), *cert. denied,* 105 S. Ct. 118 (1984); Moss v. Morgan Stanley, Inc., 719 F.2d 5, 20-21 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1280 (1984); Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1287 n.6 (7th Cir. 1983); Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982). In *Bennett v. Berg,* the Eighth Circuit held that RICO liability does not depend on a connection with organized crime. The court argued that nothing in the plain language of RICO requires such a connection and that the legislative history demonstrates a contrary congressional intention. *Id.* (citing 116 CONG. REC. 35,344 (1970) (statement of Rep. Poff)). In Sutliff, Inc. v. Donovan Co., 727 F.2d 648 (7th Cir. 1984), Judge Posner concluded that "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. . . .". *Id.* at 654; *see also* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restrictions,* 95 HARV. L. REV. 1101, 1107-09 (1982) (Congress risked imposing liability on defendants unconnected to organized crime in order to cast a wider net).

22. *See, e.g.,* Bankers Trust v. Feldesman, 566 F. Supp. 1235, 1241-42 (S.D.N.Y. 1983) (rejecting "nexus" to organized crime but requiring competitive injury by reason of defendant's activities); North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 210 (N.D. Ill. 1980) (RICO's purpose is to prevent unfair competition). These decisions draw on the similarity between civil RICO and antitrust remedies. *See supra* note 16. *But cf.* Note, *supra* note 21, at 1106 (rejecting "competitive" injury requirement).

23. *See, e.g.,* Harper v. New Japan Secs. Int'l. Inc., 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982) ("plaintiff must allege not only injury from the predicate offenses, but injury of the type the RICO statute was intended to prevent"); Landmark Savs. & Loan v. Rhodes, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981) (section 1964(c) requires "something more" or different than injury from predicate acts). These decisions reflect the influence of antitrust law. *See supra* note 16 (distinguishing between civil RICO penalties and antitrust sanctions). In Brunswick Corp. v. Pubelo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), the Supreme Court interpreted the Clayton Act's civil remedy provision, 15 U.S.C. § 15a (1982), to require the type of injury that antitrust laws are intended to prevent. 429 U.S. at 489. These courts have adopted the analysis of *Pueblo Bowl-O-Mat* and have imposed a similar standing requirement by predicating civil RICO liability on a "racketeering injury."

24. *See* Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D. Ga. 1983); Bache Halsey Stuart Shields v. Tracy Collins Bank, 558 F. Supp. 1042 (D. Utah 1983); Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125 (D. Mass. 1982).

25. *See* 18 U.S.C. § 1961(1) (1982), which provides as follows:

[R]acketeering activity means (A) an act . . . which is *chargeable* under state law and

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limit section 1964(c) actions to cases involving criminal proceedings.[26] Prior to *Sedima, S.P.R.L. v. Imrex Co.*,[27] however, every circuit court of appeals addressing the scope of private civil RICO had rejected this prerequisite.[28]

In *United States v. Cappetto*,[29] for example, the government brought a 1964(a) action to enjoin the defendants from conducting a gambling en-

> *punishable* by imprisonment for more than one year; (B) any act which is *indictable* under . . . [certain] provisions of title 18, United States Code . . . (C) any act which is *indictable* under . . . [29 U.S.C. §§ 186, 501(c) (1982)] . . . or (D) any *offense* . . . *punishable* under any law of the United States.

Id. (emphasis added); *see also supra* note 7 (discussing "racketeering activity").

26. *See* Bache Halsey Stuart Shields v. Tracy Collins Bank, 558 F. Supp. 1042, 1045 (D. Utah 1983). The *Bache Halsey* court concluded that the plaintiff's allegation there was that probable cause to believe that the defendant committed the predicate act qualified as a "chargeable," "indictable," or "punishable" act and therefore satisfied the statutory requirement of "racketering activity." *Id. See also* Taylor v. Bear Stearns & Co., 572 F. Supp. 667, 682-683 (N.D. Ga. 1983) (predicate acts must be based on prior conviction or pled with sufficient particularity to meet probable cause standard).

Courts have frequently discussed the terms "chargeable," "indictable," and "punishable" in the context of criminal RICO proceedings. In United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977), the defendant argued that because the applicable state statute of limitations had run, the alleged bribery acts were not "chargeable under state law" and thus outside the scope of section 1961(1). The court rejected the defendant's contention, reasoning that Congress intended to permit indictment for acts that were "chargeable under state law" at the time the acts were committed. *Id.* at 2234. The court reasoned that RICO's reference to state law violations merely identifies the conduct prohibited and does not require application of state statutes of limitations or procedural rules. *Id.* at 1135; *see also* United States v. Davis, 576 F.2d 1065, 1067 (3d Cir. 1978) (following *Forsythe*); United States v. Frumento, 563 F.2d 1083, 1087-88 (3d Cir. 1977) (prior acquittal insignificant when original acts were "chargeable").

In Kleiner v. First Nat'l Bank of Atlanta, 526 F. Supp. 1019 (N.D. Ga. 1981), *rev'd sub nom.*, Morosani v. First Nat'l Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983), a bank customer challenged the bank's practice of posting prime rates that were higher than the rates charged to commercial customers. *Id.* at 1019. The court conceded that the customer's RICO claims satisfied the literal meaning of RICO's provisions, but nevertheless dismissed her RICO counts. *Id.* at 1022. The court reasoned that RICO is basically a criminal statute and that civil remedies merely provide an "additional weapon" in RICO's "crime-fighting arsenal." *Id.* The court held, therefore, that the criminal process should determine in the first instance whether posting inflated prime rates is criminal conduct. *Id.* The court noted that the availability of RICO's civil remedies may depend on an indictment or a prior criminal conviction. *Id.*

27. 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985); *see infra* notes 36-53 and accompanying text.

28. *See* Moss v. Morgan Stanley, Inc., 719 F.2d 5, 19 n.15 (2d Cir. 1983) (dicta), *cert. denied*, 104 S. Ct. 1280 (1984); Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1287 (7th Cir. 1983); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982); United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *see also In re* Longhorn Sec. Litig., 573 F. Supp. 255, 270-71 (W.D. Okla. 1983); Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352, 356 (E.D. Mich. 1983).

29. 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

terprise, even though criminal proceedings had never been brought against the defendants.[30] The Seventh Circuit rejected the defendant's contention that civil RICO liability is contingent upon a criminal conviction of the defendant and affirmed the district court's grant of injunctive relief.[31] Similarly, in *USACO Coal Co. v. Carbomin Energy, Inc.*,[32] the Sixth Circuit rejected a prior criminal conviction requirement for section 1964(c) actions. The court observed that section 1964(c) requires only "a violation of section 1962."[33] The court reasoned that Congress would have referred to section 1963, which imposes criminal sanctions,[34] rather than section 1962 if it had intended to impose a prior criminal conviction

30. *Id.* at 1354-55; *see supra* note 14 and accompanying text (discussing equitable remedies of section 1964). *Cappetto* did not address a section 1964(c) private cause of action. The defendants, however, argued that all of section 1964 was unconstitutionally vague, and the court accordingly addressed all forms of civil RICO actions.

31. 502 F.2d at 1357. The court in *Cappetto* relied on *In re* Debs, 158 U.S. 564 (1895), and concluded that a civil proceeding is not "essentially criminal" just because the alleged acts also are punishable as crimes. 502 F.2d at 1356. The Seventh Circuit explained that Congress provided the government with civil remedies to relieve it of the higher standard of proof in criminal actions and to facilitate its efforts in combatting organized crime. *Id.* at 1357; *cf.* Note, *supra* note 20, at 1063-65 (suggesting a due process balancing of the government's interest in obtaining information against the defendant's interests in freedom from stigmatization and economic harassment).

Other courts have followed *Cappetto* in rejecting a prior criminal conviction requirement in private civil RICO actions. *See, e.g.,* Mauriber v. Shearson/American Express, Inc., 546 F. Supp. 391, 396 (S.D.N.Y. 1982); Harper v. New Japan Secs. Int'l Inc., 545 F. Supp. 1002, 1007 n.8 (C.D. Cal. 1982); Heinold Commodities, Inc. v. McCarthy, 513 F. Supp. 311, 313-314 (N.D. Ill. 1979); Farmers Bank of Del. v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978) (RICO does not condition a private cause of action in any way upon a previous criminal RICO conviction).

32. 689 F.2d 94 (6th Cir. 1982).

33. *Id.* at 95 n.1; *see supra* note 12 and accompanying text (discussing section 1962). At least one court has expressly rejected the contention that a section 1964(c) "violation" means "conviction" and therefore requires a prior criminal conviction of the defendant. Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983). The court in *Kaushal* stated that a " 'violation' of Section 1962 by a Private RICO defendant must be understood in a civil context: Allegations of the Private RICO complaint need show only a prima facie violation of Section 1962." *Id.* at 579 n.9.

Recently, in United States v. MacLean, 738 F.2d 655 (5th Cir. 1984), the Fifth Circuit held that the government cannot prosecute an employee under the Foreign Corrupt Practices Act (FCPA) without a prior conviction of the employer. *Id.* at 660. The FCPA provides sanctions for an employee convicted under the FCPA only if the employer is *"found to have violated"* section 32 of the Securities Exchange Act of 1934. *Id.* (citing 15 U.S.C. § 78ff(c)(3) (1982) (emphasis added)). The government argued that it may satisfy the "found to have violated" requirement by establishing in the employee's trial that the employer violated the Act. 738 F.2d at 657. The court rejected this argument and held that "violated" means "convicted" as used in section 78ff(c)(3). *Id.* at 659. Focusing on the purposes on the FCPA, the court reasoned that this construction is necessary to prevent the employer from using the employee as a scapegoat to escape conviction. *Id.*

34. *See supra* note 13 and accompanying text (discussing the criminal sanctions of section 1963).

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requirement.[35]

The Second Circuit first addressed the prior criminal proceedings limitation in *Sedima, S.P.R.L. v. Imrex Co.*[36] Diverging from decisions of other circuits,[37] the court held that a defendant is subject to civil RICO liability under section 1964(c) only if he has been convicted of the underlying predicate acts.[38]

Judge Oakes, writing for the majority, first noted the paucity of analysis by courts rejecting a prior criminal conviction requirement.[39] Turning to the statutory language of RICO, Judge Oakes observed that Congress modeled section 1964(c) after the civil remedy provision of the Clayton Act[40] and noted that the Clayton Act provides compensation for any injury caused "by reason of *anything forbidden* by the antitrust laws."[41] Section 1964(c) provides compensation for injuries caused "by reason of a *violation* of [RICO]."[42] Judge Oakes found the variation significant, concluding that a RICO "violation" means a conviction.[43]

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35. 689 F.2d at 95 n.1.

36. 741 F.2d 482 (2d Cir. 1984), *cert. granted,* 105 S. Ct. 901 (1985). The Second Circuit explicitly left the prior criminal conviction issue "to another day" in Trane Co. v. O'Connor Secs., 718 F.2d 26, 29 (2d Cir. 1983).

37. *See* cases cited *supra* note 28. The Second Circuit addressed the "explosion" of civil RICO litigation as follows:

> Given the general purpose of the RICO legislation, the uses to which private civil RICO has been put have been extraordinary, if not outrageous. Section 1964(c) has not proved particularly useful for generating treble damage actions against mobsters by victimized businesspeople. It has, instead, led to claims against such respected and legitimate "enterprises" as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch, to name a few defendants labeled as "racketeers" in civil RICO claims. . . .

741 F.2d at 487.

38. 741 F.2d at 502-03. Circuit Judge Oakes wrote the majority opinion in which Circuit Judge Lumbard joined. Circuit Judge Cardamone filed a dissenting opinion. *Id.* at 504. *Sedima* was the first of three decisions handed down in succession by the Second Circuit. The second decision, Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984), held that a claim under section 1964(c) must allege a distinct "racketeering injury." *Id.* at 516; *see supra* notes 25-26 and accompanying text (discussing "racketeering activity"). In the third decision, Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984), the Second Circuit affirmed the district court's dismissal of a private civil RICO action on the basis of *Sedima* and *Bankers Trust. Id.* at 533. The opinion in *Furman,* however, strongly criticized the reasoning in both of these cases.

39. 741 F.2d at 496-97.

40. *Id.* at 498. The Clayton Act provides in part: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained . . . including a reasonable attorney's fee." 15 U.S.C. § 15(a) (1982); *see also supra* note 2 (quoting section 1964(c)).

41. 741 F.2d at 498 (quoting 15 U.S.C. § 15(a) (1982)) (emphasis added).

42. *Id.* (quoting 18 U.S.C. § 1964(c) (1982) (emphasis added)); *see supra* note 2.

43. 741 F.2d at 498-99; *see also supra* note 33.

Judge Oakes also looked to the statutory definition of "racketeering activity," which includes acts that are "chargeable" or "indictable" and "offense[s]" that are "punishable."[44] Judge Oakes reasoned that Congress assumed that civil proceedings would always follow criminal proceedings.[45] A punishable "offense," he noted, refers to criminal conviction.[46] Judge Oakes observed that the terms "indictable" and "chargeable" arguably refer to conduct that is not necessarily "criminal."[47] He concluded, however, that "indictable" conduct requires the return of an indictment and that "chargeable" conduct requires the return of an information.[48]

In addition, Judge Oakes asserted that absent a prior criminal conviction of the predicate acts, section 1964(c) would permit recovery for "criminal conduct" proved only by a preponderance of the evidence.[49] Judge Oakes examined RICO's legislative history and concluded that Congress did not intend to lower the criminal burden of proof.[50] He contended that if Congress had considered this apparent anomaly, it would have explicitly required a prior criminal conviction.[51]

In dissent, Judge Cardamone criticized the majority for launching RICO into a "sea of uncertainty."[52] Judge Cardamone contended that the majority's decision will deprive victims of a remedy whenever a racketeer escapes conviction through plea bargaining or the government decides not to prosecute.[53]

Sedima represents a severe, but prudent restriction on the scope of private civil RICO. Congress' failure to draft a private civil remedy consistent with RICO's purposes[54] and to respond to the resulting "explosion" of private RICO claims has created confusion in the courts and

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44. *Id.* at 499; *see also* note 25 (quoting "racketeering activity" definition).

45. 741 F.2d at 499-500.

46. *Id.* at 499.

47. *Id.* at 499-500.

48. *Id.* at 500; *see also* note 26 (discussing judicial interpretation of the words "chargeable," "indictable," and "punishable").

49. 741 F.2d at 501-02; *see supra* note 31 (discussing burden of proof in civil RICO actions).

50. 741 F.2d at 502. "Absent such explicit congressional direction, such a narrow reading of section 1964(c) best integrates that subsection into the entire structure of the Act. On the other hand, if the broad reading is accepted, problems are created of which there is no indication that Congress even dreamed." *Id.* at 501. Judge Oakes found only "clanging silence" from his examination of section 1964(c)'s legislative history. *Id.* at 492.

51. *Id.* at 502.

52. *Id.* at 504 (Cardamone, J., dissenting).

53. *Id.* at 508 (Cardamone, J., dissenting).

54. *See supra* note 11 and accompanying text (stating Congress' purposes in enacting RICO).

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outrage among the new community of "racketeers."[55] *Sedima*'s prior criminal conviction requirement will protect legitimate businessmen from civil RICO liability and will subject only those persons whose activities merit criminal prosecution to treble damages.

Although *Sedima* is correct in spirit,[56] the court's interpretation of the statutory language is flawed. Courts have consistently held that section 1961(1)'s reference to "indictable," "chargeable," and "punishable" acts merely describes the type of conduct that constitutes racketeering activity.[57] The *Sedima* court's conclusion that this language connotes a criminal conviction prerequisite appears unprecedented.

Judge Oakes' contention that section 1964(c)'s reference to a "violation" means a conviction on the underlying predicate acts[58] reflects common sense and furthers the purposes of RICO. The court, however, should have limited civil RICO liability to violations of RICO itself. Sections 1963 and 1964(c) both predicate liability on a "violation of section 1962." The references to the substantive offenses of section 1962, rather than the underlying offenses, suggest that a prior criminal conviction of the defendant for a violation of section 1962 is a precondition to a private civil RICO action.[59]

Sedima's prior criminal conviction requirement will drastically reduce the amount of civil RICO litigation in the Second Circuit. In addition, the decision should force either the Supreme Court or Congress to take notice of the uncertainty among courts faced with increasing numbers of civil RICO claims.[60] *Sedima* is consistent with Congress' goals in enact-

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55. *See supra* notes 17-19 and accompanying text.

56. *Sedima* is an excellent case for the application of the social purpose rule of statutory construction. *See supra* note 21 (discussing social purpose rule). The clear ambiguity presented by RICO's purpose and RICO's use should suggest to courts that section 1964(c) is poorly drafted and poorly integrated with the rest of RICO. Several courts have recently adopted narrow constructions of RICO based on its purpose, rather than its language. *See* cases cited *supra* note 21.

57. *See* cases cited *supra* note 26. Thus, an act may be "chargeable under state law" even though the state statute of limitations has run. *See* United States v. Forsythe, 560 F.2d 1127, 1134 (3d Cir. 1977).

58. *See supra* note 43 and accompanying text.

59. Judge Oakes contended that if Congress had intended to base civil liability on a violation of RICO, it would have referred to section 1963, RICO's criminal provisions, rather than section 1962. 741 F.2d at 497-98. Section 1963, however, contains no substantive prohibitions. Had Congress referred to section 1963 in section 1964(c), the reference would have been meaningless.

60. The Supreme Court may remove the confusion surrounding section 1964(c) and the prior criminal conviction requirement this term. The Court granted petitions for writs of certiorari in *Sedima* and its companion case, American Nat'l Bank v. Haroco, Inc., — F.2d — (7th Cir. 1984),

ing RICO because it reads back into RICO the criminal element.

P.I.R.

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cert. granted, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985) (No. 84-822). Only *Sedima*, however, raises the prior criminal conviction issue.

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