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Comment

Turning RICO on Its Head: Schiffels v. Kemper Financial Services, Inc. and the Need to Limit Standing Under § 1962(d) to Plaintiffs Who Allege Injuries From Racketeering Acts

Donald W. Cassidy

Carolyn Schiffels worked as a stock options trading assistant for Kemper Financial Services, Inc. Schiffels claimed that her supervisor and several company officials operated a fraudulent stock options trading scheme, and subsequently conspired to cover up the scheme when she learned of its existence. Both acts, if proven, would violate the Racketeer Influenced and Corrupt Organizations Act ("RICO" or "the Act"). Schiffels maintained that the defendants, to advance the coverup, wrongfully discharged her when she reported the scheme to her superiors. Schiffels brought suit, claiming that her retaliatory discharge violated state law and RICO.

2. Id.
4. Schiffels, 978 F.2d at 346-47.
5. Schiffels v. Kemper Fin. Serv., Inc., 767 F. Supp. 909, 910 (N.D. Ill. 1991), rev'd, 978 F.2d 344 (7th Cir. 1992). Schiffels had no written employment contract for a specific time period; thus she was an "at-will" employee. All fifty-one jurisdictions of the United States follow the same general rule that an at-will employee can be discharged by his or her employer at any time, for any reason whatsoever, or for no reason. See generally NATIONAL EMPLOYMENT LAW INSTITUTE, EMPLOYMENT-AT-WILL: A 1985 STATE-BY-STATE SURVEY 1-340 (David A. Cathcart & Mark S. Dichter eds., 1985) (summarizing employment at-will presumption in each jurisdiction); see, e.g., Palmateer v. Int'l Harvester Co., 421 N.E. 2d 876, 877-78 (Ill. 1985) (describing the general rule under Illinois law). Thus, Schiffels generally would have no cause of action for her discharge.

In Illinois, however, where Schiffels arose, courts recognize an exception to the at-will doctrine when an employer's motivation for discharging an employee contravenes public policy. Id. The Supreme Court of Illinois has explained that although there is no precise definition of the term "public policy," generally, it...
The United States District Court for the Northern District of Illinois dismissed Schiffels's RICO claim. The court held that a plaintiff who alleges injury from a conspiracy to violate RICO, but does not allege injury by one of the enumerated "predicate acts" of racketeering that underlay the RICO violation, has no standing to sue under RICO. The Seventh Circuit Court of Appeals reversed the district court, holding that a plaintiff has standing to sue under RICO for injury from any overt act in furtherance of a conspiracy to violate RICO.

_Schiffels v. Kemper Financial Services, Inc._ illustrates the current controversy over the appropriate scope of RICO's conspiracy provision and its relationship to the Act's civil damages provision in actions in which the plaintiff would be denied standing under the Act's substantive "racketeering" prohibi-

concerns "what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions." _Id._ at 878.

Other jurisdictions also recognize, either at common law or by statute, an action in tort for wrongful discharge based on a "public policy" theory. _E.g._, Tameny v. Atlantic Richfield Co., 610 F.2d 1330, 1335-36 (Cal. 1980) (holding that employer's discharge of employee for refusing to participate in an illegal scheme to fix gasoline prices was in violation of public policy).

6. Schiffels, 978 F.2d at 346-48; see also 18 U.S.C. §§ 1962(d), 1964(c) (1988); _infra_ notes 22-34 and accompanying text (discussing the basic principles and statutory structure of RICO).


8. _Id._ at 912.

Generally, in order to have standing to sue, "a plaintiff must show: (1) that the challenged conduct has caused injury in fact, and (2) that the interest sought to be protected is within the zone of interests to be protected or regulated by the statutory or constitutional guarantee in question." _Jack H. Friedenthal et al._, _Civil Procedure_ 327 (1985); _see generally_ Warth v. Seldin, 422 U.S. 490, 498-501 (1975) (discussing in detail the concept of standing).

Wrongful discharge, however, is not among the enumerated acts that constitute "racketeering activity" under RICO. _See_ 18 U.S.C. § 1961(1) (1988 & Supp. 1991); _infra_ note 31 (providing text of provision). For this reason, the district court in _Schiffels_ dismissed the plaintiff's complaint. _Schiffels, 767 F. Supp. at 912._

9. Schiffels, 978 F.2d at 348-49.

10. Commentators have hotly debated the appropriate breadth of RICO's civil conspiracy provision. _Compare_ Frederic Brooks, Note, _Conspiracy Standing After Sedima_, 25 COLUM. J.L. & Soc. PROBS. 423 (1992) (arguing that RICO's conspiracy provision should be construed broadly) _with_ 62 U.S.L.W. 2095-97 (1993) (reporting recent proceedings at the American Bar Association (ABA) Annual Convention, wherein the ABA House of Delegates reaffirmed its recommendation that Congress amend RICO's conspiracy provision to grant standing only to plaintiffs who allege injuries derived from racketeering acts).


tions. Broad construction of the conspiracy provision has significant financial implications for employers, as well as for other RICO defendants, and may fuel the fire of those critics of RICO who contend that the Act is unconstitutionally vague. By construing the scope of the conspiracy term broadly and thereby holding that plaintiffs have standing to sue when they allege injury from any act committed in furtherance of a RICO conspiracy, the Seventh Circuit followed the approach adopted by the Third Circuit, and consciously rejected contrary decisions reached by the First, Second, Eighth, and Ninth Circuits.

This Comment examines the Seventh Circuit's decision in Schiffels in the context of continued efforts by federal courts to interpret the sweeping, innovative language of RICO while balancing the conflicting interpretive tensions between literalist and purposive constructions of the Act. Part I describes RICO's legislative history and background, focusing on the manner in which Congress formulated RICO's civil damages provision and

14. See, e.g., Williams v. Hall, 683 F. Supp. 639 (E.D. Ky. 1988). In Williams, two former vice presidents of Ashland Oil Co. alleged that their employer dismissed them after they refused to participate in an illegal bribery scheme. Id. at 640. The vice presidents brought suit under RICO, and the jury returned a verdict awarding the plaintiffs $69.5 million in damages. Laura A. Ginger, Employers' RICO Liability for the Wrongful Discharge of Their Employees, 68 Neb. L. Rev. 673, 675 (1989). The defendant appealed but later settled the case for $25 million. Id. at 675 n.19.

The enormous liability of potential RICO defendants takes on even greater significance because the lower courts have held unanimously that RICO recognizes no right of third-party contribution. See, e.g., Miller v. Affiliated Fin. Corp., 624 F. Supp. 1003, 1004 (N.D. Ill. 1985). "Thus, RICO plaintiffs enjoy in terrorem tactical advantages in RICO cases." Michael P. Kenny, Escaping the RICO Dragnet in Civil Litigation: Why Won't the Lower Courts Listen to the Supreme Court?, 30 Duq. L. Rev. 257, 258 n.6 (1992) (citing Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 506 (1985) (Marshall, J., dissenting) ("Many a prudent defendant, facing ruinous exposure, will decide to settle even a [RICO] case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.")

15. See infra notes 68-69, 137 and accompanying text (discussing the vagueness doctrine and summarizing constitutional attacks against RICO).
conspiracy provision. Part II details the holding and reasoning of Schiffels v. Kemper Financial Services, Inc. Part III compares the Seventh Circuit's mechanistic, literalist interpretation of RICO's conspiracy and civil damages provisions with other circuits' more purposive constructions of the provisions. This Comment argues that the conspiracy provision's confusing language, its legislative history, and recent Supreme Court precedent do not compel the result in Schiffels. The Comment concludes that such a broad interpretation of the provision, if widely adopted, would turn RICO "on its head"—dangerously "federalizing" state law, leading to state-by-state inequities in the application of RICO, duplicating existing state common law and statutory remedies, and unnecessarily complicating the apportionment of damages among various RICO plaintiffs.

I. THE RICO STATUTE: ITS STRUCTURE, LEGISLATIVE HISTORY, AND JURISPRUDENCE

A. RICO's Statutory Scheme

Congress enacted RICO in 1970 in order to establish new penal prohibitions, enhanced sanctions, and innovative remedies to eradicate the unlawful activities of organized crime. In the last decade, however, RICO has become an increasingly popular, although controversial, tool in general civil litigation because of its apparently unlimited applicability.

Subsections (a) through (c) of § 1962 contain the Act's substantive prohibitions against racketeering. Subsection (a) makes it unlawful for any person to use money derived from a

21. Cf. Sante Fe Indus., Inc., v. Green, 430 U.S. 462, 479 (1977) (striking down an expansive interpretation of the federal securities anti-fraud provisions to avoid "federaliz[ing]" a substantial portion of state securities laws in the absence of congressional intent); see infra note 132 and accompanying text (discussing the "federalization" concept as it applies to RICO).


23. See, e.g., Chief Justice William H. Rehnquist, Get RICO Cases Out of My Courtroom, WALL ST. J., May 19, 1989, at A14 ("I think that the time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court."); see also G. Robert Blakey & Thomas A. Perry, An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?", 43 VAND. L. REV. 851, 857 n.14 (1990) (citing participants in the debate over whether Congress should reform RICO).

“pattern of racketeering activity”[25] to invest in an enterprise[26] affecting interstate commerce.[27] Subsection (b) prohibits any person from acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity.[28] Subsection (c) prohibits any person from conducting the affairs of an enterprise, as an employee or associate of the enterprise, through a pattern of racketeering activity.[29] Section 1962(d) makes it unlawful to conspire to violate the first three subsections of § 1962.[30]

25. A “pattern of racketeering activity” requires at least two acts of racketeering activity which have occurred within ten years of each other. 18 U.S.C. § 1961(5) (1988); see infra note 31 (listing acts constituting “racketeering activity”).


27. Congress may regulate matters affecting interstate commerce. U.S. CONST. Art. I, § 8, cl. 3. Thus, the enterprises governed by § 1962 are those engaged in, or whose activities affect, interstate or foreign commerce. 18 U.S.C. § 1962(a)-(c) (1988).

Subsection (a) makes it unlawful for a person to invest money derived from a pattern of racketeering activity in an enterprise engaged in interstate commerce:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. 18 U.S.C. § 1962(a) (1988); see infra note 28 (comparing subsection (a) to subsection (b)).

28. “It shall be 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 which is engaged in, or the activities of which affect, interstate or foreign commerce.” 18 U.S.C. § 1962(b) (1988).

The difference between subsection (a) and subsection (b) is that subsection (b) “requires the purpose of the pattern [of racketeering activity] to be to acquire or maintain an interest in an enterprise, whereas (a) uses the pattern of racketeering activity to generate income, which is subsequently invested in an enterprise.” Stephen D. Brown & Alan M. Lieberman, RICO Basics: A Primer, 35 VILL. L. REV. 865, 870 (1990) (third emphasis added).

29. “It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity . . . .” 18 U.S.C. § 1962(c) (1988).

30. “It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.” 18 U.S.C. § 1962(d) (1988).
RICO defines "racketeering activity" as any act "chargeable" under nine classes of state criminal felony laws, any act "indictable" under fifty-four specific federal criminal provisions, any federal "offense" involving bankruptcy or securities fraud, and any narcotics-related activities "punishable" under federal law.\(^{31}\)

31. "[R]acketeering activity" means (A) any act or threat involving murder, kidnaping, 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 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), 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 1515 (relating to interference with commerce, robbery, or extortion), section 1521 (relating to racketeering), section 1531 (relating to interstate transportation of wagering paraphernalia), section 1541 (relating to unlawful welfare fund payments), section 1555 (relating to the prohibition of illegal gambling businesses), section 1556 (relating to the laundering of monetary instruments), section 1557 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1558 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations), or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

These crimes are termed "predicate acts" for the act of racketeering.  

Section 1964(c) of RICO provides a civil cause of action for any person injured "by reason of a violation of section 1962." Remedies available to injured persons include treble damages and the recovery of costs and attorney's fees.

B. RICO'S ANTITRUST ANTECEDENTS AND LEGISLATIVE HISTORY

Before RICO's enactment, the U.S. Department of Justice employed antitrust law to fight organized crime. Indeed,
Congress developed RICO's prohibition against infiltration of businesses by racketeering activity\(^\text{38}\) and the Act's private civil damages provision\(^\text{39}\) directly from these early efforts and analogous concepts of antitrust law.\(^\text{40}\) In contrast, nothing in RICO's legislative history indicates that Congress intended RICO's conspiracy provision\(^\text{41}\) to replicate the operation of the antitrust laws.\(^\text{42}\)

Early versions of the bill that became RICO contained neither the conspiracy provision nor the civil damages provision. The Senate added RICO's conspiracy provision while the bill was in the Senate Judiciary Committee.\(^\text{43}\) The Committee Report contained scant explanation of the amendment or its purpose.\(^\text{44}\) Whereas debate on RICO generally was detailed and gal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion." President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 190 (1967).

Various legislative proposals emerged to remedy the problems inherent in attempts by organized crime to infiltrate legitimate businesses. Some proposals sought to amend the antitrust laws. See S. 2048, 90th Cong., 1st Sess. (1967). Other proposals were framed as independent legislation. For example, the American Bar Association recommended separate legislation in lieu of amending the antitrust laws, to avoid the "undesirable blending of otherwise laudatory statutory objectives." 115 Cong. Rec. 6694, 6695 (1969) (quoting ABA Antitrust Section Report). The ABA believed that strict application of antitrust precedent would frustrate efforts to combat racketeering activity:

Moreover, the use of antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as "standing to sue" and "proximate cause."

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far-ranging, not one senator mentioned the conspiracy amendment.

After the Senate passed the bill, the House of Representatives added a private civil damages remedy. Despite detailed

sections 1963 and 1964, below. See Singer v. United States, 323 U.S. 338 (1945)." Id. at 159.

In Singer, the Supreme Court determined the criminal scope of a conspiracy provision of the Selective Training and Service Act of 1940. Singer v. United States, 323 U.S. 338, 340-42 (1945). The Court held that the provision embraced all criminal conspiracies, and did not require the commission of an overt act. Id. at 340-41; see also United States v. Coia, 719 F.2d 1120, 1124 (11th Cir. 1984) (interpreting the holding of Singer), cert. denied, 466 U.S. 973 (1984). Thus, the Committee's cryptic reference to Singer offers no guidance for interpreting RICO's conspiracy provision in a civil action.

Furthermore, in summarizing the bill before the full Senate debate on it, neither of the bill's sponsors, Senators McClellan and Hruska, bothered to mention the conspiracy amendment in their introductory remarks. See 116 Cong. Rec. 584-85 (1970) (remarks of Sen. McClellan); id. at 600-03 (remarks of Sen. Hruska).

45. See supra note 44 (remarks of Sen. McClellan and Sen. Hruska); see generally id. at 606-07 (remarks of Sen. Byrd); id. at 819-20 (remarks of Sen. Scott); id. at 952 (remarks of Sen. Thurmond).

46. See supra notes 44-45. Senator McClellan, however, wrote a law review article that was meant to provide "valuable legislative history and justification" for the bill. 116 Cong. Rec. 35,296 (1970) (remarks of Rep. Poff). In his article, Senator McClellan rebuffed critics who contended that RICO's "crime within a crime" scheme might ensnare legitimate business owners as well as "mobsters":

"It is self-defeating to attempt to exclude from any list of offenses such as that found in [RICO's definition of "racketeering activity"] all offenses which commonly are committed by persons not involved in organized crime . . . . Unless an individual not only commits such a crime but engages in a pattern of such violation, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under [RICO]."


47. Members of the House Judiciary Committee added the civil damages provision. House Hearings, supra note 40, at 520. The Committee modeled the civil damages provision after a similar provision of the antitrust laws. See id.; cf. 15 U.S.C § 15 (1988) (allowing any person injured by a violation of the antitrust laws to recover damages). Commentators have described this amendment as an "eleventh-hour addition" to the bill that was "debated only briefly." Kenny, supra note 14, at 258

The Committee sent the bill to the full House for debate. Representative Sisk, when introducing the bill before the full House, provided a detailed description of RICO's substantive provisions:

[RICO] contains a threefold standard, first making unlawful the receipt or use of income from "racketeering activity" . . . to acquire an interest in . . . an enterprise . . . ; second, prohibiting the acquisition of any enterprise . . . through a "pattern" of "racketeering activity," and
and voluminous debate, no Representative addressed the impact of the private right of action on RICO's conspiracy provision. Because of the ambiguous language and lack of guidance in the legislative history, the scope of RICO's private right of action and conspiracy provisions, as they relate to each other, is unclear.

C. CIVIL CONSPIRACY UNDER RICO

The conspiracy provision of § 1962(d), in its criminal form, does not require the commission of any overt act. In conjunction with the civil damages provision of § 1964(c), however, RICO creates an action for "civil conspiracy." Historically, civil conspiracy takes many forms. In its statutory form, civil

third, proscribing the operation of any enterprise . . . through a "pattern" [of] "racketeering activity."
116 Cong. Rec. 35,191 (1970) (remarks of Rep. Sisk). It is obvious that Representative Sisk, in his reference to the "threefold standard," was referring to § 1962(a)-(c) of RICO. He ignored completely the conspiracy provision of § 1962(d).


49. 18 U.S.C. § 1962(d) (1988); see supra note 30 (providing text of provision).


51. 18 U.S.C. § 1964(c) (1988); see supra note 33 (providing text of provision).

52. See, e.g., Medallion TV Enter., Inc. v. SelectTV of Cal., Inc., 627 F. Supp. 1290, 1298 (C.D. Cal. 1986) (recognizing action for civil conspiracy), aff'd, 833 F.2d 1360 (9th Cir. 1987), and cert. denied, 492 U.S. 917 (1989).
conspiracy laws create a civil remedy for an individual injured by the criminal acts of others. Not all acts, however, give the plaintiff standing to pursue a private action. By contrast, at common law, civil conspiracy is a "procedural device" that allows a plaintiff to impute liability for any actionable wrong committed by one co-party to a conspiracy to all other parties to the conspiracy. Generally, any overt, wrongful act in furtherance of the conspiracy imposes liability on a party to the conspiracy.

53. See, e.g., 15 U.S.C. §§ 1, 15 (1988) (conspiracy to restrain trade); 42 U.S.C. § 1985(3) (1988) (conspiracy to deprive individuals of their civil rights). The Supreme Court has imposed significant standing requirements on plaintiffs seeking relief under both the civil conspiracy remedies of the antitrust laws and under the civil rights laws. See supra note 53.

The Court has eschewed a literal interpretation of the antitrust laws that would grant standing to virtually all plaintiffs:

One problem presented by [the conspiracy provision of the Sherman Act] ... is that it cannot mean what it says. The statute says that "every" contract [or combination or conspiracy] that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of contract law. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-88 (1978) (citations omitted). Accordingly, the Court has adopted a "Rule of Reason" in the interpretation of § 1, which states that whether a conspiracy violates the antitrust laws depends on "whether the challenged agreement is one that promotes competition or one that suppresses competition." Id. at 691.

In addition, the Court has held that in order to prove a private conspiracy in violation of the civil rights laws, a plaintiff must show that some racial or perhaps otherwise class-based, invidiously discriminatory animus motivated the conspirators' action. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 758 (1993).


In this context, a conspiracy requires an agreement between two or more people to participate in unlawful behavior that results in injury caused by an unlawful overt act performed by one of the parties to the agreement, pursuant to or in furtherance of the agreement. Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983).

Furthermore, it is not the existence of the conspiracy itself, but the wrongful acts that cause injury, that are actionable. See Kajtazi, 488 F. Supp. at 21 ("Unlike a criminal conspiracy, where the conspiracy itself forms the gist of the crime, in a civil conspiracy, it is the overt acts producing damage to the plaintiff that give rise to liability.").

57. Thus, by employing a "conspiracy theory," a plaintiff may assert that "co-conspirators" who did not actually commit the alleged injury are nonetheless "secondarily" or "vicariously" liable for the plaintiff's injuries. See William H. Kuehnle, Secondary Liability Under the Federal Securities Laws—Aiding and Abetting, Conspiracy, Controlling Person, and Agency: Common-Law Principles and the Statutory Scheme, 14 J. Corp. L. 313, 314 (1988) ("The determination of who was involved centrally, and thus subject to primary liability, usually can be made readily. The determination of who should be liable among
The first federal court to consider the applicability of the conspiracy provision of § 1962(d) in a civil setting held that the conspiracy language tracks the common law of civil conspiracy. Subsequent cases have built upon this early analysis, but have not offered an extensive rationale for applying common law concepts, rather than statutory principles, to RICO's conspiracy provision.

In Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983), the live-in companion of a house burglar was involved in a scheme with the burglar to make a living from the resale of items stolen in the burglaries. The victim's spouse brought a wrongful death action against the burglar and, under a conspiracy theory of secondary liability, against the burglar's live-in companion. The court concluded that the murder was a "reasonably foreseeable consequence of the scheme" that provided a sufficient basis for imposing tort liability on the burglar's companion according to the law of civil conspiracy.

In Medallion TV Enter., Inc. v. SelectTV of Cal., Inc., 627 F. Supp. 1290, 1298 (C.D. Cal. 1986), aff'd, 833 F.2d 1360 (9th Cir. 1987), and cert. denied, 492 U.S. 917 (1989); see also Laura A. Ginger, Causation and Civil RICO Standing: When Is a Plaintiff Injured "by Reason of" a RICO Violation?, 64 St. John's L. Rev. 849, 867 (1990) (noting the Medallion court's use of common law civil conspiracy and its focus on the overt act requirement).

In Medallion, the court focused on the distinction between criminal and civil conspiracy and concluded that without overt acts causing injury, there is no cause of action for conspiracy under RICO's civil damages provision. The court did not reach the issue of which particular overt acts causing injury might confer standing, because it dismissed the claim on other grounds.

At least two commentators have failed to appreciate that different acts create liability under the common law and statutory forms of civil conspiracy. See Blakey & Perry, supra note 23, at 948 n.281.
D. Supreme Court RICO Jurisprudence: General Principles

The Supreme Court has interpreted various aspects of RICO on ten separate occasions. When interpreting RICO, the Court frequently has taken note of Congress's recommendation in an uncodified clause of the original Act that RICO be "liberally construed to effectuate its remedial purposes." In its most recent decision, however, the Court has held that the liberal construction clause "is not an invitation to apply RICO to new purposes that Congress never intended."

The Court has emphasized that if RICO's statutory language is unambiguous, such language ordinarily must be regarded as conclusive "in the absence of a clearly expressed legislative intent to the contrary." When the Court has found the language of RICO conclusive, it has rebuffed attempts by lower courts to construe the terms of the Act more narrowly than its language allows. Conversely, the Court also has re-

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62. Id.; see Russello, 464 U.S. at 27; Turkette, 452 U.S. at 587. Commentators, however, have suggested that courts should not give weight to the "liberal construction" clause. See DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO, ¶ 1.02 at 9-10.1 (1993) (arguing that, because the "liberal construction" phrase is not codified in the statute, courts should not accord it more force than it is due, and the clause does not require courts to liberally construe RICO in order to determine what constitutes a violation of § 1962).

63. Reves, 113 S. Ct. at 1172.

64. Russello, 464 U.S. at 20 (quoting Turkette, 452 U.S. at 580).

65. See, e.g., Tafflin v. Levitt, 493 U.S. 455 (1990) (holding that federal courts do not exercise exclusive subject matter jurisdiction over RICO actions); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) (holding that the definition of "pattern" is not limited to predicate acts that demonstrate a nexus to "organized crime"); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488-95 (1985) (rejecting lower court interpretation of RICO limiting RICO's civil applicability to actions involving defendants already convicted of criminal RICO acts, or for injuries sustained which are "racketeering injuries"); Turkette, 452 U.S. at 580-93 (holding that RICO reaches both "legitimate" and "illegitimate" enterprises).
jected attempts by lower courts to construe liability under the Act more broadly than the language and legislative history of RICO dictate.66

If RICO is silent on a particular issue, however, or if the Act's language is ambiguous, the Court has looked beyond RICO's literal language by employing additional interpretive tools. In some instances, the Court has used RICO's roots in antitrust law to help interpret some of the Act's ambiguous provisions.67 The Act's ambiguity also has led various members of the Court to "invite"68 arguments contending that RICO is un-

66. See Reves, 113 S. Ct. at 1172-73. In Reves, the Court interpreted the breadth of RICO's provision prohibiting an employee or associate of an enterprise from conducting or participating, directly or indirectly, in the conduct of the enterprises' affairs. Id. at 1166; see 18 U.S.C. § 1962(c) (1988). The petitioner, with the United States as amicus, urged the Court to interpret broadly the term "conduct" to mean "carry on." Reves, 113 S. Ct. at 1168-69.

The Court rejected such a broad construction, holding that the provision requires the employee or associate to exert "an element of direction" on the enterprise. Id. The Court held that "Congress did not intend to extend RICO liability under § 1962(c) beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity." Id. at 1172 (footnote omitted) (emphasis added).

67. See Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1318 (1992) (drawing analogy to antitrust law and holding that to bring a private action under RICO, a plaintiff must show proximate causation, as opposed to causation in fact, despite the literal language of the Act); Agency Holding Corp. v. Mally-Duff & Assoc., 483 U.S. 143, 146-56 (1987) (holding that civil RICO claims are governed by four-year statute of limitations analogous to period applicable to private antitrust damage suits).

68. In H. J. Inc., various members of the Supreme Court speculated that RICO, in its civil applications, may be unconstitutionally vague. 492 U.S. at 255-56 (Scalia, J., concurring). Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, questioned RICO's constitutionality:

[The majority opinion] makes it more rather than less difficult for a potential defendant to know whether his conduct is covered by RICO. . . . It seems to me this increases rather than removes the vagueness. . . . No constitutional challenge to [RICO] has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

Id.

While Scalia's remarks were directed at the vagueness associated with RICO's pattern requirement, see supra note 25, various commentators have contended that other elements of RICO, and indeed the Act as a whole, are equally subject to challenge on vagueness grounds. See, e.g., Terrance G. Reed, The Defense Case for RICO Reform, 43 VAND. L. REV. 722, 727-33 (1990) (describing the nexus requirement of § 1962(c) and the Act as a whole unconstitutionally vague).

Since the Court's decision in H. J. Inc., numerous RICO defendants have challenged RICO's constitutionality on vagueness grounds. See Kenny, supra
constitutionally vague. This balancing between literal and purposive constructions of the Act underlies the controversy surrounding civil standing under RICO.

E. Supreme Court Decisions Affecting Standing to Sue Under § 1964(c)

Section 1964(c) provides a civil remedy for persons injured "by reason of" a violation of § 1962. Subsections (a), (b), and (c) of § 1962 outlaw "racketeering activity" connected with the in-

note 14, at 270 (citing cases); e.g., United States v. Angiulo, 897 F.2d 1169, 1179 (1st Cir.) (defendant unsuccessfully argued that RICO failed to give adequate notice to persons engaging in a pattern of racketeering activity that included gambling and loan-sharking), cert. denied, 498 U.S. 845 (1990). Indeed, some courts have concluded that portions of RICO, as applied, are unconstitutionally vague. E.g., Firestone v. Galbreath, 747 F. Supp. 1556, 1581 (S.D. Ohio 1990) (holding that RICO's pattern requirement was unconstitutionally vague because defendants did not have adequate notice that mail and wire fraud and money-laundering constituted a pattern of racketeering activity), aff'd, 976 F.2d 279 (1992).

69. The Supreme Court's "void for vagueness" doctrine is rooted in the U.S. Constitution's guarantee of due process. See U.S. CONST. amend. V. ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); Joseph E. Bauerschmidt, Note, "Mother of Mercy—Is This The End of Rico?", 65 NOTRE DAME L. REV. 1106, 1114 (1990).

The vagueness doctrine holds that, in order to withstand constitutional attack, a statute must satisfy two requirements. First, the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," so that he or she may conform to what is lawful. Reed, supra note 68, at 723 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)); e.g., Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (striking down state statute making it a crime to be a "gangster," because "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes"). Second, the law must contain standards of enforcement sufficiently precise to guide the judge and jury in ascertaining the offense and avoiding arbitrary and discriminatory application. Bauerschmidt, supra, at 1114-15.


vestment in,\textsuperscript{72} or operation of\textsuperscript{73} interstate enterprises.\textsuperscript{74} Sub-
section (d), however, differs textually from subsections (a) through (c) because it contains no explicit prohibition of "racketeering activity."\textsuperscript{75} This difference lies at the root of the controversy surrounding the appropriate scope of standing under RICO's civil conspiracy provision.

The Supreme Court has determined the standing requirements of only one of the four subsections of §1962. In \textit{Sedima, S.P.R.L. v. Imrex Co.},\textsuperscript{76} the Court interpreted the "by reason of" requirement of §1964(c)\textsuperscript{77} in the context of a violation of §1962(c),\textsuperscript{78} one of the three substantive prohibitions against racketeering of §1962. The \textit{Sedima} court rejected two extrajudicial limitations that circuit courts had imposed on civil RICO's plain language.\textsuperscript{79} The Court's decision was grounded in a literalist approach to interpreting RICO.\textsuperscript{80}

\textit{Sedima} is both the seminal discussion of RICO standing and, in many respects, the source of the current controversy regarding how broadly courts should construe RICO's civil conspiracy provision.\textsuperscript{81} Proponents of a broad standing rule stress language in \textit{Sedima} that ties the plaintiff's standing to the in-

\begin{itemize}
\item \textsuperscript{72} 18 U.S.C. § 1962(a) (1988); \textit{see supra} note 27 (providing text of provision).
\item \textsuperscript{73} 18 U.S.C. § 1962(b)-(c) (1988); \textit{see supra} notes 28-29 (providing text of provisions).
\item \textsuperscript{74} \textit{See supra} note 27.
\item \textsuperscript{75} 18 U.S.C. § 1962(d) (1988); \textit{see supra} note 30 (providing text of provision).
\item \textsuperscript{76} 473 U.S. 479 (1985).
\item \textsuperscript{77} 18 U.S.C. § 1964(c) (1988); \textit{see supra} note 33 (providing text of provision).
\item \textsuperscript{78} 18 U.S.C. § 1962(c) (1988); \textit{see supra} note 29 (providing text of provision).
\item \textsuperscript{79} \textit{See Sedima}, 473 U.S. at 488-95. First, the Court held that a civil action need not proceed only \textit{after} a criminal conviction. \textit{Id.} at 488-93. Second, the Court held that a plaintiff utilizing §1962(c) need not allege a distinct "racketeering injury" analogous to the "antitrust injury" an antitrust plaintiff must allege. \textit{Id.} at 493-95; cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (discussing the concept of "antitrust injury").
\item \textsuperscript{80} Answering critics of RICO's broad application in civil cases, the Court in \textit{Sedima} contended that "this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress." \textit{Sedima}, 473 U.S. at 499; \textit{see also} Smith & Reed, \textit{supra} note 62, ¶ 6.04, at 60-61.
\item \textsuperscript{81} \textit{See Flinders v. Datasec Corp.}, 742 F. Supp. 929, 933 (E.D. Va. 1990); \textit{see also} Ginger, \textit{supra} note 58, at 856 ("Some federal courts have regarded \textit{Sedima}'s standing ruling as applicable to any and all subsections of section 1962 of RICO, while other courts would restrict that holding to cases involving claims based on subsection 1962(c).".).
\end{itemize}
jury caused by the "conduct constituting the violation." By analogy, those proponents would extend this literalist approach to a violation under § 1962(d). At the same time, advocates of a more narrow view of standing stress other language in the very next paragraph of Sedima that limits compensable injury to harm caused by predicate acts of racketeering.

The Court's most recent decision affecting standing under RICO is Holmes v. Securities Investor Protection Corp. In Holmes, the Court displayed a less literalist approach to interpreting RICO than it displayed in earlier cases. The Court ruled that in order to bring a private action under § 1964(c), a

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82. A violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity . . . . Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of § 1962, nor is mere commission of the predicate offenses . . . . The plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. Sedima, 473 U.S. at 496 (footnote omitted) (emphasis added).

83. See infra note 98 and accompanying text.

84. The Court held that "where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." Sedima, 473 U.S. at 497 (emphasis added).

The scope of the Court's holding in Sedima, and the dichotomy that it created, has divided courts interpreting RICO's other substantive racketeering provisions. See 18 U.S.C. § 1962(a)-(b) (1988). The language of subsections (a) and (b) is more specific than the language in subsection (d). Thus, a literalist interpretation of § 1962(a) and (b) narrows liability under those provisions, while a predicate act interpretation broadens liability.

For example, § 1962(a) makes it unlawful for any person to use money derived from a pattern of racketeering activity to invest in an enterprise. 18 U.S.C. § 1962(a) (1988). Some courts, interpreting Sedima literally, require that to have standing to sue under § 1962(a), a plaintiff must allege injury by reason of the defendant's use or investment of the racketeering income. See, e.g., Ouaknine v. MacFarlane, 897 F.2d 75, 83 (2d Cir. 1990); Rose v. Bartle, 871 F.2d 331, 356-58 (3d Cir. 1989); Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1151-52 (10th Cir.), cert. denied, 493 U.S. 820 (1989). This strict interpretation of standing under § 1962(a) has been described as the "investment use" rule. See Busby v. Crown Supply, Inc., 896 F.2d 833, 837 (4th Cir. 1990).

Other courts have interpreted Sedima's holding less literally, and focused instead on the "predicate causation" language as a general requirement when deciding whether a plaintiff has standing under § 1962(a). These courts require only that the plaintiff allege injury from any one of the criminal acts predicate to racketeering. See id. at 836-40. District courts in circuits that have not resolved this issue have reached differing conclusions. See id. at 837 (citing cases).


86. See SMITH & REED, supra note 62, ¶ 6.04, at 63 (opining that after Holmes, the holding of Sedima "has been effectively limited").
RICO plaintiff must establish that the defendant's RICO violation *proximately* caused the plaintiff's injuries.87 This restriction on RICO is analogous to a similar standing requirement the Court has imposed on antitrust plaintiffs.88 The court also identified as a central element of RICO standing analysis89 the "direct relation between the injury asserted and the injurious conduct alleged."90

In addition, the Court in *Holmes* specifically limited the reach of its earlier opinion in *Sedima*.91 The Court rejected the plaintiff's argument that Congress, in enacting RICO as a body of law separate from antitrust law, intended that antitrust standing analysis *never* inform RICO standing analysis.92

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In *Associated General*, the Court construed § 15 of the antitrust laws, which recognizes a private right of action for antitrust injuries, as incorporating "the judicial gloss that avoided a simple literal interpretation" of the Sherman Antitrust Act. *Associated General*, 459 U.S. at 534 (quoted in *Holmes*, 112 S. Ct. at 1317). The *Holmes* Court concluded that because Congress modeled RICO's civil action provision, § 1964(c), after the antitrust laws, similar rules should apply. *Holmes*, 112 S. Ct. at 1317-18; *see also*, SMITH & REED, supra note 62, ¶ 6.04, at 62-63.

89. SMITH & REED, supra note 62, ¶ 6.04, at 65.
90. *Holmes*, 112 S. Ct. at 1318. The Court provided three reasons, again drawing from antitrust precedent, why it considered directness of injury central to RICO standing:

First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

*Id.* (citations omitted).
92. [T]here is no merit in [the plaintiff's] reliance on legislative history to the effect that it would be inappropriate to have a "private litigant . . . contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as standing to sue and 'proximate cause.'" That statement is rightly understood to refer only to the applicability of the concept of "antitrust injury" to RICO, which we rejected in *Sedima* . . . .
F. The Circuit Split Involving Standing Under RICO's Civil Conspiracy Provision

The circuit courts disagree on whether a plaintiff has standing to sue under § 1962(d) for conspiracy to violate RICO when the plaintiff is injured by a conspirator's act done in furtherance of the conspiracy, but when the act is not one of the enumerated predicate acts that constitute "racketeering activity." All of the circuit court cases addressing this issue involve plaintiffs bringing wrongful discharge actions against former employers.

In Shearin v. E.F. Hutton Group, Inc., the Third Circuit became the first circuit court to interpret a plaintiff's standing requirements under § 1962(d). The Shearin court read the holding of Sedima, S.P.R.L. v. Imrex, Co. broadly and held that a plaintiff has standing under § 1962(d) when injured by


Section 1962(c) prohibits an employee or associate of an enterprise from conducting the affairs of the enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c) (1988). At first glance, it may appear more appropriate for an employee alleging wrongful discharge for refusing to participate in an employer's racketeering activity to utilize this provision rather than RICO's civil conspiracy provision. The courts, however, have foreclosed plaintiffs from using this strategy. Seven circuits have held that employees lack standing to sue under § 1962(c) because their injuries were caused by the employers' decision to fire them, not by the predicate RICO activity. See, e.g., Pujol v. Shearson/American Express, Inc., 829 F.2d 1201, 1205 (1st Cir. 1987) (holding that injury stemming from discharge is not actionable under § 1962(c) because it does not flow from defendant's RICO predicate acts of mail and wire fraud); Reddy, 912 F.2d at 293-94; Kramer v. Bachan Aerospace Corp., 912 F.2d 151, 154-56 (6th Cir. 1990); O'Malley v. O'Neill, 887 F.2d 1557, 1560-63 (11th Cir. 1989), cert. denied, 110 S. Ct. 2620 (1990); Shearin, 885 F.2d at 1167-68; Burdick v. American Express Co., 885 F.2d 527, 528-30 (2d Cir. 1989) (per curiam); Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1215-18 (5th Cir. 1988).

The courts have held that the persons injured by conducting the affairs of an enterprise through a pattern of racketeering activity are the shareholders, and that they alone have standing to sue under § 1962(c). See, e.g., Shearin, 885 F.2d at 1167.

95. 885 F.2d 1162 (3d Cir. 1989).

96. Id. at 1168-70.

97. 473 U.S. 479 (1985); see supra notes 76-84 and accompanying text (describing the Supreme Court's holding in Sedima).
any act in furtherance of a conspiracy to violate RICO.\textsuperscript{98} The court contended that the language of § 1962(d) and \textit{Sedima} do “not mandate that racketeering activity cause the harm” in all cases where plaintiffs utilize RICO.\textsuperscript{99}

The \textit{Shearin} court rejected a narrower reading of \textit{Sedima} that would have conferred standing only to plaintiffs whose injuries derived from predicate acts of racketeering. The court argued that \textit{Sedima} interpreted standing requirements solely in the context of an alleged violation of § 1962(c).\textsuperscript{100} The \textit{Shearin} court distinguished a violation of § 1962(d), which it contended does not require the commission of a racketeering act.\textsuperscript{101}

The \textit{Shearin} court also reasoned that \textit{Sedima} compelled a literal reading of the statute, and the court therefore concluded that “classic conspiracy acts not only may, but should, so qualify.”\textsuperscript{102} The court noted that it would be “anomalous”\textsuperscript{103} to allow a plaintiff to recover for harm suffered from the investment in, control of, or conduct of an enterprise through racketeering.\textsuperscript{104}

\textsuperscript{98} In \textit{Shearin}, the plaintiff alleged that she was hired as a Vice President solely to give the appearance of legitimacy to a company that was in fact a front for a fraudulent trust service scheme. \textit{Shearin}, 885 F.2d at 1164. The plaintiff alleged further that the sham company fired her to prevent her from disclosing its illegal activities to state banking regulators. \textit{Id.}

Analyzing whether the plaintiff had standing, the court focused on the first of \textit{Sedima}'s two controversial paragraphs. \textit{See supra} note 82. Thus, the court held that a “plaintiff only has standing if he has been injured... by the conduct constituting the violation.” \textit{Shearin}, 885 F.2d at 1167 (quoting \textit{Sedima}, 473 U.S. at 496).

\textsuperscript{99} \textit{Shearin}, 885 F.2d at 1169.

\textsuperscript{100} \textit{See supra} notes 78-80 and accompanying text.

\textsuperscript{101} The \textit{Shearin} court distinguished a violation under the first three subsections of § 1962, which it noted require the commission of a “racketeering act” enumerated in § 1961(1), from a conspiracy to violate RICO:

Nothing in \textit{Sedima} forecloses the possibility that harm arising from an act predicate to conspiracy, yet distinct from the racketeering acts listed in section 1961(1), might yet confer standing so long as the plaintiff has alleged a violation of section 1962(d).... Predicate acts for conspiracy do not of necessity consist of section 1961(1) racketeering activity. To the contrary, a conspiracy to commit the other RICO violations may occur absent the actual commission of the other violations or the racketeering activities that underpin them.... Acts that further a section 1962(d) conspiracy thus may cause harm even when they do not themselves qualify as racketeering activity. Taking into account all the provisions of section 1962, \textit{either racketeering activity or classic overt conspiracy acts may qualify as “predicate acts” to a RICO violation that causes injury.}

\textit{Shearin}, 885 F.2d at 1169 (citations omitted) (emphasis added).

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} \textit{Id.} at 1170.

\textsuperscript{104} \textit{See} 18 U.S.C. § 1962 (a)-(c) (1988); \textit{supra} notes 27-29 (providing text of provisions).
yet preclude recovery for conspiracy to commit these violations because the overt act that furthered the conspiracy was not itself a "racketeering act."\(^{105}\)

After Shearin, the circuit courts in Miranda v. Ponce Federal Bank,\(^{106}\) Hecht v. Commerce Clearing House, Inc.,\(^{107}\) Reddy v. Litton Industries, Inc.,\(^{108}\) and Bowman v. Western Auto Supply Co.\(^{109}\) all expressly\(^{110}\) limited standing under § 1962(d) to plaintiffs who allege injuries derived from one or more of the fifty-four "racketeering acts" enumerated in § 1961(1).\(^{111}\)

The reasoning of the four circuits for their narrower interpretation of standing under § 1962(d) is similar in many re-

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105. Shearin, 885 F.2d at 1170. Decisions in the Third Circuit subsequent to Shearin have, on non-standing grounds, both narrowed Shearin's scope, and questioned its vitality. See Smith & Reed, supra note 62, ¶ 5.05, at 50-58 (citing Glessner v. Kenny, 952 F.2d 702, 714 (3d Cir. 1991); Brittingham v. Mobil Corp., 943 F.2d 297, 303 n.3 (3d Cir. 1991)).

106. 948 F.2d 41 (1st Cir. 1991). In Miranda, the plaintiff was an employee for a bank in Puerto Rico. She alleged that her employer wrongfully discharged her after she cooperated with federal officials in a probe of possible money-laundering activities of the bank. Id. at 43. Puerto Rico recognizes the tort of wrongful discharge. Charles Zeno, Reshaping the Wrongful Discharge Act in Puerto Rico, 25 REVISTA JURIDICA V. INTERAM. P.R. 589, 589 (1991); see supra note 5 and accompanying text (describing the public policy exception that allows at-will employees to bring wrongful discharge suits in tort against their employers).

107. 897 F.2d 21 (2d Cir. 1990). In Hecht, the plaintiff was employed in New York as a sales representative for a well-known publisher of law and business publications. He alleged that he was injured from loss of employment for refusing to aid or abet his employer's alleged attempts to defraud its customers. Id. at 22-23. New York state law provides a civil remedy for private-sector employees discharged by their employers for disclosing or refusing to participate in violations of state, federal, or local laws or regulations. N.Y. LAB. LAW § 740 (McKinney 1988); see supra note 5 and accompanying text.

108. 912 F.2d 291 (9th Cir. 1990), cert. denied, 112 S. Ct. 332 (1991). In Reddy, the plaintiff alleged that his employer wrongfully discharged him because he refused to participate in a cover-up of illegal bribes to foreign government officials intended to secure the award of certain military contracts. Id. at 292-93. California recognizes a tort for wrongful discharge. Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1335-36 (Cal. 1980); see supra note 5 and accompanying text.

109. 985 F.2d 383 (8th Cir.), cert. denied, 113 S. Ct. 2459 (1993). In Bowman, the plaintiff alleged that his employer wrongfully discharged him for speaking out against his employer's fraudulent scheme to "double bill" its merchandise suppliers. Id. at 384. Missouri recognizes the tort of wrongful discharge. Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 876 (Mo. Ct. App. 1985); see supra note 5 and accompanying text.

110. The Eleventh Circuit also has dismissed a plaintiff's wrongful discharge action based on conspiracy to violate RICO, but has done so in a less explicit manner. See Morast v. Lance, 807 F.2d 926, 932-33 (11th Cir. 1987).

pects. Although the Hecht, Miranda, and Bowman courts all took note of RICO's "liberal construction" clause, they concluded that Congress's purpose in enacting RICO should dictate the scope of the ambiguous conspiracy provision. Consequently, the circuit courts reasoned that because RICO's general aim is to outlaw racketeering activity, only plaintiffs who allege injury from the commission of such acts have standing under the Act.

In addition, both the Reddy and Miranda courts distinguished Shearin on its facts, noting that Shearin's hiring and firing were "essential" to the success of the conspiracy. In contrast, the Reddy court found that in the fact pattern before it "the alleged conspiracy was ongoing and the role of the discharged employee in the conspiracy was peripheral, not central to the very existence of the conspiracy."

Finally, the Hecht, Miranda, and Bowman courts reasoned that state tort or statutory law already provided the plaintiffs with a remedy for their injuries. The Bowman court also ar-

112. See supra notes 61-62 and accompanying text (describing the liberal construction clause); Hecht, 897 F.2d at 25; Miranda, 948 F.2d at 48; Bowman, 985 F.2d at 387-88.

113. Hecht, 897 F.2d at 25 ("Congress did not deploy RICO as an instrument against all unlawful acts. It targeted only predicate acts catalogued under section 1961(1). . . . Its purpose . . . is to target RICO activities, and not other conduct."); Miranda, 948 F.2d at 48 ("Congress painstakingly enumerated a complete list of predicate acts in 18 U.S.C. § 1961(1). For judges, under a conspiracy rubric, to allow RICO damages for an injury caused other than by an enumerated predicate offense would be tantamount to rewriting the statute. . . . [T]here are bounds to interpretive liberality."); Bowman, 985 F.2d at 388 ("Imposing the predicate act requirement on civil claims based on violations of § 1962(d) narrows the focus of those suits to the specific racketeering activity that lies at the heart of the RICO statute.").

114. See supra note 113.

115. 885 F.2d 1162 (3d Cir. 1989); see supra notes 95-105 and accompanying text (describing the Shearin court's reasoning).

116. Reddy, 912 F.2d at 295; Miranda, 948 F.2d at 48 n.9.

117. Reddy, 912 F.2d at 295. The facts of Miranda are different from the situations in both Shearin and Reddy. While the employee in Miranda was not hired to help advance the goals of the conspiracy, neither was she peripheral to the conspiracy's existence. Miranda, 948 F.2d at 43; see supra note 106 (describing the facts of Miranda).

Furthermore, both the Miranda and Reddy courts stated that even if their holdings were inconsistent with Shearin, they were unconvinced by the Shearin court's reasoning. Miranda, 948 F.2d at 48 n.9; Reddy, 912 F.2d at 295.

118. Hecht, 897 F.2d at 24 ("[T]he purpose of civil RICO liability does not extend to deterring any illegal act such as retaliatory firings for which there are state and common law remedies. A defendant is not liable for treble damages to everyone he might have injured by conduct other than that prohibited by RICO.") (quoting Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 635-
gued that a decision broadly construing standing would allow an "artful pleader" to "circumvent the predicate act requirement applicable to suits based on § 1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts."\textsuperscript{119}

II. \textsc{Schiffels v. Kemper Financial Services, Inc.}

When Carolyn Schiffels sued her former employer for wrongful discharge,\textsuperscript{120} the Seventh Circuit Court of Appeals adopted the approach to standing analysis that the Third Circuit expounded in Shearin.\textsuperscript{121} The court held that Schiffels had standing under § 1962(d)\textsuperscript{122} for injuries caused proximately by any overt act in furtherance of an alleged conspiracy to violate RICO, even though the act was not one of the fifty-four racketeering acts.\textsuperscript{123}

The court applied a three-part analysis to reach this conclusion. First, it found RICO's conspiracy language unambiguous, and thus applied the statute's "literal" meaning.\textsuperscript{124} The court found guidance from the general framework erected by the Supreme Court in Sedima, which it concluded mandated a literal interpretation of § 1962(d).\textsuperscript{125} Second, the Schiffels court held that Sedima did not impose a general standing limitation that applied to § 1962(d).\textsuperscript{126} The Schiffels court contended that the Supreme Court in Sedima, by rejecting the circuit court's "overly restrictive"\textsuperscript{127} approach to standing under § 1962(c), would not impose a standing limitation on § 1962(d) "without even mentioning that section."\textsuperscript{128} Third, the court modeled its

\textsuperscript{119} Bowman, 985 F.2d at 388.
\textsuperscript{120} 978 F.2d 344, 347 (7th Cir. 1992).
\textsuperscript{121} Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3d Cir. 1989).
\textsuperscript{122} 18 U.S.C. § 1962(d) (1988); \textit{see supra} note 30 (providing text of provision).
\textsuperscript{124} Schiffels, 978 F.2d at 350.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 349.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
decision on what it vaguely described as "traditional concepts of conspiracy law."\footnote{129}

The court in \textit{Schiffels} rejected the defendant's claim that the "purpose" of all four of RICO's subsections in § 1962 is to target only predicate racketeering acts enumerated in § 1961(1).\footnote{130} The court concluded that "Congress could have written RICO to state that only those injured by reason of predicate acts committed as part of a RICO violation could sue. It did not, and for courts to read § 1964(c) as if that is what Congress wrote would be 'tantamount to rewriting the statute.'"\footnote{131}

\section*{III. COURTS SHOULD LIMIT STANDING UNDER § 1962(d) TO PLAINTIFFS WHO ALLEGE INJURIES FROM RACKETEERING ACTS}

If other courts adopt the view of civil conspiracy standing expounded by the Seventh Circuit in \textit{Schiffels}, civil liability under RICO will expand dramatically, leading to further "federalization" of state criminal and common law.\footnote{132} According to \textit{Schiffels}, any act that is tortious under common law or statute could subject the actor to RICO liability—including treble dam-


In \textit{Neapolitan}, the Seventh Circuit noted that RICO's criminal conspiracy provision does not create new substantive crimes, but only harsher penalties and new remedies for existing crimes when carried out in a specific context. \textit{Neapolitan}, 791 F.2d at 495-98.

130. \textit{Schiffels}, 978 F.2d at 349-50; see supra note 113 and accompanying text (discussing the \textit{Miranda, Hecht} and \textit{Bowman} courts' holdings that Congress's purpose in enacting RICO should determine the Act's scope).


132. In \textit{Sedima S.P.R.L. v. Imrex, Co.}, 473 U.S. 479, 500-01 (1985), Justice Marshall argued in dissent that the majority had interpreted standing under § 1962(c) of RICO too broadly:

\begin{quote}
The court's interpretation of the RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions. We do not lightly infer a congressional intent to effect such fundamental changes. To infer such intent here would be untenable, for there is no indication that Congress even considered, much less approved, the scheme that the Court today defines.
\end{quote}


While Justice Marshall's criticism of the \textit{Sedima} majority may be dubious given the plain language of § 1962(c), his reasoning directly counters a broad standing rule under RICO's civil conspiracy provision, § 1962(d), which is not plain. See supra note 30 (providing text of provision).
ages and attorney's fees—when committed in furtherance of a conspiracy to violate RICO. While the cases decided thus far by the circuit courts all involve wrongful discharge actions, the range of actions that potential plaintiffs might bring under the "conspiracy to violate RICO" rubric is limitless. Indeed, a civil RICO action based on the tort of nuisance might be cognizable under § 1962(d). Thus, under the Schiffels approach, RICO is turned on its head: the conspiracy provision eclipses the three substantive racketeering provisions that inform it. As the First Circuit has noted, "the RICO statute . . . is not entirely open-ended. It cannot be used as a surrogate for local law, as a panacea to redress every instance of man's inhumanity to man, or as a terrible swift sword capable of righting all the wrongs of a troubled world." Equally important, broad construction of RICO's conspiracy provision also eviscerates the bulk of jurisprudence interpreting the Act's three racketeering provisions.

A construction of RICO's civil conspiracy provision that imposes such vast liability also raises questions about the Act's constitutionality. Already, critics of RICO contend that the Act is unconstitutionally vague. Given the innumerable differences in state statutory and common law, construing § 1962(d) broadly to recognize standing for plaintiffs who allege injury


134. See Oscar v. University Students Co-op. Ass'n, 939 F.2d 808, 809 n.1 (9th Cir. 1991) (stating that residents acting together to violate RICO may be liable for conspiracy under § 1962(d)), reh'g granted, 952 F.2d 1566 (9th Cir.), and cert. denied, 113 S. Ct. 655 (1992).

135. See Miranda v. Ponce Fed. Bank, 948 F.2d 41, 49 (1st Cir. 1991); see also Schiffels v. Kemper Fin. Serv., Inc., 767 F. Supp. 909, 912-13 (N.D. Ill. 1991), rev'd, 978 F.2d 344 (7th Cir. 1992) (arguing that broad construction of § 1962(d) would "open the RICO portals to remote or tangential consequences of illegal activities that are themselves often extraordinarily complex and far-reaching").

136. See, e.g., Bowman v. Western Auto Supply Co., 985 F.2d 383, 388 (8th Cir.) (warning that a broad construction of standing under RICO's conspiracy provision, § 1962(d), would allow "artful pleaders" to "circumvent the predicate act requirement applicable to suits based on § 1962(a)-(c)"), cert. denied, 113 S. Ct. 2459 (1993); see also Brief for Respondents in Opposition to Petition for Writ of Certiorari at 9, Reddy v. Litton Indus., Inc., 912 F.2d 291 (9th Cir. 1990) (No. 91-95), cert. denied, 112 S. Ct. 332 (1991) (arguing against broad standing rule); supra note 94 (explaining that courts unanimously hold that an employee wrongfully discharged by his or her employer for refusing to participate in racketeering activity does not have standing to sue under § 1962(c)).

137. See, e.g., Antonio J. Califa, RICO Threatens Civil Liberties, 43 VAND. L. REV. 805, 844 (1990) (arguing that "RICO should fit into that category of laws that have been held void for vagueness"); see supra note 68 (summarizing constitutional attacks against RICO).
from any wrongful act may invite the Supreme Court to strike down RICO as a whole, or at least the Act's conspiracy provision, as unconstitutionally vague.\textsuperscript{138}

A. COURTS SHOULD CONSTRUE § 1962(d) NARROWLY IN LIGHT OF ITS AMBIGUITY

The scope that Congress intended for § 1962(d) is not clear from the provision's language. In its criminal and civil forms, the provision implies radically different concepts.\textsuperscript{139} Given the difficulty in applying RICO's conspiracy provision in a civil context,\textsuperscript{140} a literal reading of the provision is unwarranted. Further, the cryptic legislative history surrounding the conspiracy provision demonstrates that Congress failed to consider all of the implications and complexities of applying the provision in a civil context.\textsuperscript{141}

If Congress intended the conspiracy provision, in its civil applications, to expand dramatically the scope of RICO far beyond the racketeering acts that it "painstakingly enumerated,"\textsuperscript{142} Congress would have stated this intention explicitly.\textsuperscript{143} In contrast, the legislative history indicates that Congress gave little consideration to the conspiracy provision. The meager discussion that took place focused on application of the conspiracy provision in its criminal form, not on application of the provision in civil cases.\textsuperscript{144} Unlike so much else of RICO, the conspiracy provision was not modeled after existing antitrust law;\textsuperscript{145} its theoretical underpinnings therefore are not linked to early efforts by the Justice Department to combat organized crime through en-

\textsuperscript{138} See supra notes 68-69 and accompanying text (discussing the vagueness doctrine and its application to RICO).
\textsuperscript{139} See supra notes 49-57 and accompanying text.
\textsuperscript{140} See supra notes 52-59 and accompanying text (describing the various forms of "civil conspiracy").
\textsuperscript{141} See supra notes 43-48 and accompanying text (describing the scant legislative history surrounding the adoption of RICO's conspiracy provision).
\textsuperscript{142} Miranda v. Ponce Fed. Bank, 948 F.2d 41, 48 (1st Cir. 1991).
\textsuperscript{143} Thus, the canon of interpretation \textit{expressio unius est exclusio alterius} is applicable. By carefully enumerating the predicate acts that constitute racketeering, Congress implicitly eschewed a more expansive scope. See, e.g., Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375-76 (1958) (holding that provisions of the Clayton Act that recognize private actions resulting from acts forbidden by the "antitrust laws," as defined elsewhere in the Act, do not permit plaintiffs to bring suit for injuries caused by violations of other laws that "may be colloquially described as... 'antitrust statute[s]'").
\textsuperscript{144} See supra note 44 (describing the Senate's reference to criminal conspiracy jurisprudence).
\textsuperscript{145} See supra note 42 and accompanying text.
forcement of the antitrust laws.\textsuperscript{146} Courts that broadly construe § 1962(d) ignore this scant legislative history, and thereby unjustifiably attribute to Congress an intention to expand the scope of RICO far beyond the racketeering act framework upon which the Act was constructed.

Even if the "plain meaning" of the conspiracy provision, in a civil context, is clear, courts can apply few statutes in a literal, mechanistic fashion without sometimes producing absurd results.\textsuperscript{147} On rare occasions, the Supreme Court has sanctioned absurd results by applying strictly the literal language of a statute.\textsuperscript{148} The Court, however, has "typically attempted to justify the harsh results in light of the legislative history and purpose of the statute."\textsuperscript{149} The context of § 1962(d) of RICO, the Act's legislative history, and its purpose \textit{do not} support the tortured results reached by construing the conspiracy provision broadly through a literal reading of its language.\textsuperscript{150}

A more sound approach, used by the Court on other occasions, eschews a literalist construction of a statute's "plain meaning," and instead interprets the statute consistent with its

\textsuperscript{146} See supra notes 36-48 and accompanying text (describing RICO's legislative history).

\textsuperscript{147} In United States v. American Trucking Ass'n, 310 U.S. 534 (1940), the Supreme Court repeated the well-established canon that statutes should be interpreted broadly to accomplish their purpose:

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, 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.\textit{Id.} at 543 (footnotes omitted). \textit{But cf.} Brooks, \textit{supra} note 10, at 437 n.81 (arguing that the purpose of § 1962(d) may not parallel the purpose of RICO's substantive prohibitions, §§ 1962(a)-(c)).


\textsuperscript{150} See, \textit{e.g.}, Ginger, \textit{supra} note 14, at 675, 676 n.19 (describing Williams v. Hall, 683 F. Supp. 639 (E.D. Ky. 1988), a wrongful discharge case brought under § 1962(d) in which the defendant settled for $25 million after the jury awarded $69.5 million to two former vice presidents).
purposes and policies. The purpose of RICO is to eradicate racketeering activity; this fact alone should limit standing to plaintiffs who allege injuries from one or more of the enumerated racketeering acts. Nine of these enumerated acts are for racketeering acts "chargeable under State law." Given the generality with which RICO describes these nine acts, however, limiting standing under § 1962(d) to plaintiffs who allege injury from racketeering acts still imposes vast liability on potential defendants.

Construing § 1962(d) narrowly also is consistent with recent Supreme Court decisions that display a more reasoned approach to interpreting RICO than the strict literalism the Court displayed in a portion of Sedima, S.P.R.L. v. Imrex, Co. In any event, the Court's approach to standing in Sedima does not dictate a broad civil conspiracy standing rule under § 1962(d). Sedima involved extrajudicial limits on RICO's plain language. In contrast, the scope of RICO's conspiracy provision is not plain.

151. See, e.g., FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 430-440 (1986) (construing the purpose of a provision of the federal deposit insurance program); MidAtlantic Nat'l Bank v. N.J. Dept. Envtl. Protection, 474 U.S. 494, 500-07 (1985) (construing the purpose of a provision of the Bankruptcy Code); Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute ...."); see also Eskridge & Finley, supra note 148, at 593.

152. See Ethan M. Posner, supra note 60, at 1763-68 (arguing that civil RICO's pattern requirement should be construed narrowly because RICO's purpose is to eradicate organized crime's infiltration of business, and because there was very little congressional debate concerning the ramifications of amending RICO to include a civil damages provision).


154. The Supreme Court has observed that the "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses ...." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985) (emphasis added).

For example, many crimes fall under RICO's prohibition of acts "dealing in narcotic or other dangerous drugs." 18 U.S.C. § 1961(1) (1988 & Supp. 1991); supra note 31 (providing text of provision). Under Minnesota law, 22 acts dealing with the sale or possession of "prohibited drugs" are punishable by imprisonment for more than one year. MINN. STAT. §§ 152.01-.027 (1992). Thus, all of these crimes are predicate acts to racketeering activity.


156. 473 U.S. 479 (1985); see supra notes 76-84 and accompanying text (discussing the Supreme Court's holding in Sedima).

157. See supra note 79 and accompanying text.

158. See supra note 30 (providing text of provision).
B. A Narrow Standing Rule Promotes Uniformity and Equity in State-By-State Application of RICO

A broad reading of RICO's civil conspiracy provision that grants standing to plaintiffs who allege injury from any overt act results in different treatment and unequal access to RICO as a remedy in the various states, due to the existence of inconsistent statutory and tort law remedies among states. Carolyn Schiffels sued her former employer alleging that she had been wrongfully discharged. Such a claim was available to her only because Illinois recognizes a "public policy exception" to the general rule that an at-will employee may be fired for any reason or for no reason, at any time. Not all jurisdictions, however, recognize the existence of such an action. Four jurisdictions do not provide, either by statute or at common law, a public policy exception to the general at-will rule. In addition, four other jurisdictions recognize a public policy exception only for public employees in limited circumstances. Therefore, the Seventh Circuit's approach to standing under Schiffels would deny access to certain victims of wrongful discharge in these eight states, while granting standing to plaintiffs in other states.

In the remaining jurisdictions that recognize a "public policy" civil action for both public and private sector employees, the contours of the action are not uniform. Thus, under the Sev-

159. See supra note 5 and accompanying text.
160. See supra note 5 (discussing the at-will doctrine and the public policy exception).
161. Alabama, the District of Columbia, Georgia, and Mississippi do not recognize the public policy exception to the at-will employment rule. See Hinrichs v. Tranquilaire Hosp., 352 So.2d 1130, 1132 (Ala. 1977) (per curiam) (holding that the public policy exception is "too vague" to overturn the state's long history of upholding termination of at-will employees for any reason or for no reason); Ivy v. Army Times Publishing Co., 428 A.2d 831, 831 (D.C. 1981) (per curiam); Evans v. Bibb Co., 342 S.E.2d 484, 485-86 (Ga. Ct. App. 1986); Kelly v. Mississippi Valley Gas Co., 397 So.2d 874, 878 (Miss. 1981).
enth Circuit's view of standing, a plaintiff in one state can take advantage of the Act, while a plaintiff in another state, who may have suffered the same injury, cannot utilize RICO.\textsuperscript{164}

Framed in this context, the question of how broadly courts should construe RICO's conspiracy provision may be analogous to determining whether courts should allow state laws to define the boundaries of a federal statute, or whether courts instead should fashion a uniform federal rule to govern the statute. In this area of law, the Supreme Court has developed a three-factor analysis for determining whether to adopt a uniform federal rule.\textsuperscript{165} Courts should consider whether a need for uniformity exists, an examination which often requires an inquiry into congressional intent;\textsuperscript{166} whether application of a state rule would frustrate specific objectives of the federal program;\textsuperscript{167} and whether the application of a federal rule would disrupt commercial relationships predicated on state law.\textsuperscript{168}

If courts applied this analysis to RICO's civil conspiracy provision, they most likely would grant standing only to plaintiffs who allege injuries from acts predicate to racketeering. RICO was enacted as a national strategy to fight crime;\textsuperscript{169} uniformity is essential to accomplish this national goal. In addition, application of myriad state laws to the Act and the resultant lack of

employer's violation of federal regulations had sufficiently stated claim under Missouri's public policy exception).

164. Flinders v. Datasec Corp., 742 F. Supp. 929 (E.D. Va. 1990), underscores the state-by-state inequity that may result when plaintiffs have standing to sue when injured by any independently wrongful act. In Flinders, the plaintiff brought a § 1962(d) wrongful discharge action alleging that his former employer terminated him for refusing to participate in a kickback scheme involving the sale of computers. \textit{Id.} at 931.

The court reasoned that § 1962(d) should be interpreted to grant standing to plaintiffs alleging injury from any injurious, independently wrongful act in furtherance of a conspiracy to violate RICO. \textit{Id.} at 931-35. The court, however, denied standing to the \textit{Flinders} plaintiff because Virginia's common law public policy exception "was limited to public rights embodied in state statutes," as opposed to "private rights." \textit{Id.} at 935.

165. \textit{See} United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979). In the context of RICO standing, the "uniform federal rule" would be the adoption of a racketeering act requirement for all plaintiffs alleging violations of RICO's civil conspiracy provision.

166. \textit{See}, e.g., United States v. Carson, 372 F.2d 429, 432 (6th Cir. 1967) (holding that "Congress, of course, is the primary source of federal law, and the federal courts must adhere to the intent of Congress whenever this intent is discernible").


168. \textit{Id.} at 729.

169. \textit{See supra} note 22 and accompanying text (describing RICO's legislative history).
uniformity in RICO's application frustrates the administration of this federal program. Finally, there is little probability that a uniform federal rule would disrupt commercial relationships predicated on state law. To the contrary, narrowly construing RICO's conspiracy provision would bring greater certainty to commercial relationships by limiting liability to individuals who commit racketeering acts.

C. A Narrow Standing Rule is Not Unfair to Victims of Wrongful Discharge, Given the Availability of Other Remedies

As the courts in Hecht v. Commerce Clearing House, Inc., Miranda v. Ponce Federal Bank, and Bowman v. Western Auto Supply Co. have recognized, construing § 1962(d) narrowly and thereby denying RICO standing to individuals wrongfully discharged does not prevent a plaintiff from bringing an action at common law, if a remedy exists in his or her jurisdiction. Rather, the plaintiff merely is prevented from utilizing RICO's more advantageous treble damages and attorney's fees provisions. Courts often have awarded substantial damage awards, including punitive damages in tort actions involving wrongful discharge. Moreover, many state "whistleblower" statutes provide for civil damages and attorney's fees for employees discharged for refusing to violate state or federal law. In any event, if there is no remedy in a particular jurisdiction, a discharged employee already is prevented from utilizing RICO's conspiracy provision, because even courts construing § 1962(d)


171. 897 F.2d 21, 24-26 (2d Cir. 1990).

172. 948 F.2d 41, 48 (1st Cir. 1991).


174. See supra note 118 and accompanying text.

175. See, e.g., Southwest Forest Indus. v. Sutton, 868 F.2d 352, 357 (10th Cir. 1989) (upholding jury verdict awarding $250,000 in actual damages and $1,000,000 in punitive damages under Kansas law of wrongful discharge), cert. denied, 494 U.S. 1017 (1990); see also Lex K. Larson & Philip Borowsky, 1 UNJUST DISMISSALS § 9A.03[2] at 42-43 (1990) (listing public policy cases).

176. See, e.g., MINN. STAT. §§ 181.931-.935 (1992); see also Westman, supra note 162, at 177-87 (providing a state-by-state list of "whistleblower" statutes that protect private and public sector employees).
broadly require that the plaintiff show injury from an overt, *wrongful* act.\textsuperscript{177}

D. A Narrow Standing Rule Avoids Complexity in Apportioning Damages Among Victims of Racketeering Activity

Finally, there exists little economic justification for allowing plaintiffs who are only tangential victims of a RICO scheme to utilize the Act's civil damages and attorney's fees provisions.\textsuperscript{178} Congress enacted RICO's treble damages and attorney's fees provisions in part to provide incentives to those injured by racketeering activity to "prosecute" the crime under a "private attorney general" theory.\textsuperscript{179} Granting standing to plaintiffs who allege injury from all overt acts, not just racketeering acts, does not advance this goal. In addition, suits of this nature diminish the defendant's resources available to pay the *actual* victims of injuries from racketeering acts,\textsuperscript{180} and require the courts to adopt complex rules for apportioning damages among various RICO plaintiffs.\textsuperscript{181}

CONCLUSION

In *Schiffels*, the Seventh Circuit held that plaintiffs who allege injury from *any* unlawful act have standing to sue under RICO's civil conspiracy provision. In arriving at this decision, however, the Seventh Circuit failed to appreciate the awkward structure of RICO's conspiracy provision, which makes applic-
tion of the provision difficult in a civil action. Although the decision in Schiffels may comport literally with a mechanistic reading of RICO, it offends the purpose of the Act and misreads its legislative history. To ensure that RICO is not turned on its head, courts should reject the Schiffels rule and instead limit standing under § 1962(d) to RICO plaintiffs who allege injury from predicate acts of racketeering. A narrow view of standing is consistent with RICO's purpose and will prevent the further federalization of state law, avoid state-by-state inequities in the application of RICO, eliminate duplication of existing remedies, and help courts fairly apportion damages among various plaintiffs who bring RICO actions.