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Sedima and Bankers Trust: Second Circuit Delivers a Mortal Blow to Private Civil RICO Actions

The Racketeer Influenced and Corrupt Organizations Act (RICO), Title IX of the Organized Crime Control Act of 1970, was enacted by Congress primarily to combat racketeering activity by organized crime. Section 1962 of RICO makes it unlawful to acquire an interest in any enterprise affecting interstate commerce using income derived from a pattern of racketeering activity; to acquire an interest in an enterprise affecting interstate commerce through a pattern of racketeering activity; to participate in the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity; or to conspire to commit any of the above three offenses. RICO provides that a "pattern of racketeering activity" consists of "at least two acts of racketeering activity, one of which oc-

3. This section provides in relevant part:
   (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, 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. . . .
   (b) 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.
   (c) 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 . . . .
   (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.
curred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."4 Section 1961(1) defines "racketeering activity" as any one of a specified list of predicate acts, including the relatively common federal offenses of mail fraud and wire fraud as well as a variety of other federal and state offenses.5 Congress indicated the broad scope it intended for RICO by stating that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes."6

In addition to setting forth criminal penalties in section 1963,7 RICO contains a civil remedies provision, section 1964. This section authorizes the Attorney General to institute civil

4. Id. § 1961(5).
5. Specifically, § 1961(1) provides:

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), 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 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), 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), or (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 . . . .

7. Under § 1963, any person violating any of RICO's four prohibitions is subject to a fine of not more than $25,000, imprisonment for not more than 20 years, or both, and forfeiture of any interest acquired or maintained in violation of § 1962. 18 U.S.C. § 1963(a).
This increased use of private civil RICO has been accompanied by a growing judicial discomfort with the broad scope of the treble damages remedy. Seeking to stem the tide of suits, courts have imposed a variety of limitations on the literal breadth of the statute. Some courts require that a plaintiff allege that the defendant is connected with organized crime.

In recent years, however, greater awareness of civil RICO's breadth and its treble damages remedy has resulted in a phenomenal increase in the number of private civil RICO suits, with plaintiffs bringing traditional fraud claims within the purview of RICO's protections.

**Footnotes:**
8. Id. § 1964(a), (b). Section 1964(a) specifically enables federal courts to prevent and restrain violations of § 1962 by issuing orders including, but not limited to, those ordering any person to divest any interest in any enterprise, imposing reasonable restrictions on the future activities of any person, and ordering dissolution or reorganization of any enterprise. Id. § 1964(a).
9. Id. § 1964(c).
11. See Wexler, supra note 10, at 286.
14. See Johnsen v. Rogers, 551 F. Supp. 281, 284 (C.D. Cal. 1982) (noting that "federal courts increasingly are refusing to find a RICO claim in civil cases even though such a claim could fall within a literal reading of the statute").

Most courts reject this organized crime nexus requirement, reasoning that Congress recognized that RICO had to be broad enough to include white collar
Other courts require plaintiffs to show that they suffered a "competitive injury" as a result of defendants' actions.¹⁶ Still

crime as well as organized crime. See, e.g., Owl Constr. Co. v. Ronald Adams Contractor, Inc., 727 F.2d 540, 542 (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); Schacht v. Brown, 711 F.2d 1343, 1356 (7th Cir.), cert. denied, 104 S. Ct. 508, 509 (1983); Bennett v. Berg, 685 F.2d 1053, 1063 (1982), aff'd in part, rev'd in part, 710 F.2d 1361, 1364 (8th Cir.) (en banc), cert. denied, 104 S. Ct. 527 (1983); see also Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 NOTRE DAME LAW. 237, 249-53, 342-49 (1982) (although organized crime may have been Congress's primary concern, Congress also realized that fraud was a pervasive problem that RICO could counter); Wexler, supra note 10, at 333 (RICO's definition of racketeering is the only principled definition of "organized crime" because limiting RICO's application to persons fitting in the traditional organized crime category probably would be unconstitutional for being based on ethnicity). For a more detailed discussion regarding the undesirability of an organized crime requirement, see infra notes 44-52 and accompanying text.


The vast majority of courts reject the competitive injury requirement, reasoning that since the purposes behind the two statutes differ, imposing antitrust standing requirements on RICO plaintiffs runs counter to legislative intent. See, e.g., Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1288 (7th Cir. 1983); Schacht v. Brown, 711 F.2d 1343, 1358 (7th Cir.), cert. denied, 104 S. Ct. 508, 509 (1983); Bennett v. Berg, 685 F.2d 1053, 1059 (1982), aff'd in part, rev'd in part, 710 F.2d 1361 (8th Cir.) (en banc), cert. denied, 104 S. Ct. 527 (1983); Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125, 1137 n.11 (D. Mass. 1982). Bennett notes that the financial ruin of an antitrust defendant "would generally lessen competition and increase concentration in a particular industry. RICO, on the other hand, is concerned [sic] to 'strike[e] . . . a mortal blow against the property interests of organized crime.'" Bennett, 685 F.2d at 1059 (quoting 116 CONG. REC. 602 (1970) (statement of Sen. Hruska)). The Bennett court concluded that there are "few countervailing reasons to lessen the impact of RICO remedies by importing the limitations on standing which apply in antitrust law." Id. at 1059; see also Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir.), cert. denied, 459 U.S. 880 (1982) (analogy to standing under § 4 of the Clayton Act are forced); Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983) (RICO is designed to ruin those per-
other courts, uncomfortable with plaintiffs' suing under civil RICO for injuries caused solely by the defendants' predicate acts, impose a "racketeering injury" standing requirement.17 These courts have described racketeering injuries as "the type [of injury] the RICO statute was intended to prevent"18 or "something more than the injury resulting from the alleged underlying predicate crimes."19 Although no court before 1984


19. King v. Lasher, 572 F. Supp. 1377, 1382 (S.D.N.Y. 1983). This "something more" definition does little to elucidate the meaning of "racketeering injury." The incoherence of the applicable law regarding the definition of "racketeering injury" left one court "much in the same predicament Justice
had so held, dicta in two federal district court decisions intimated that civil liability under section 1964(c) might be conditioned on prior criminal convictions of either the predicate acts or criminal RICO itself.20

Two panels of the Second Circuit Court of Appeals recently imposed standards on private civil RICO actions so stringent that civil RICO may be destined to become nothing more than words in a statute book. In *Sedima, S.P.R.L. v. Imrex Co.*,21 a divided panel held that a private plaintiff must meet two requirements to maintain a cause of action for a compensable civil RICO injury. First, the plaintiff must allege a "racketeering injury," that is, an injury caused by "mobsters . . . [who] cause systematic harm to competition and the market."22 Second, the plaintiff must establish that the defendant was criminally convicted of the predicate acts that comprise the pattern of racketeering activity.23 In *Bankers Trust Co. v.

Stewart must have found himself . . . . To paraphrase his unusually applicable words: 'I know [a civil RICO violation] when I see it, and the [one alleged] in this case is not that.'" *Waste Recovery Corp. v. Mahler*, 566 F. Supp. 1466, 1468 (S.D.N.Y. 1983) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).


22. *Id.* at 495-96. *Sedima's* racketeering injury requirement should be distinguished from the "traditional" racketeering injury requirement imposed by many courts. *See supra* note 17 and accompanying text. Under the traditional racketeering injury requirement, plaintiffs would need to allege "something more" than the injury caused by the underlying predicate offenses, whereas under *Sedima's* mobster-related racketeering injury requirement, plaintiffs must allege a competition-threatening injury caused by mobsters.

23. 741 F.2d at 503.
Rhoades, a different divided panel held that a civil RICO plaintiff must allege a "distinct RICO injury," that is, a proprietary injury caused by the defendant's use of a pattern of racketeering activity rather than merely by the predicate racketeering acts themselves.

This Note contends that the panels in Sedima and Bankers Trust imposed unjustifiable limitations on the scope of private civil RICO. Part I examines the Sedima and Bankers Trust standing requirements and their analytical flaws. It asserts that Sedima's racketeering injury requirement, which requires plaintiffs to allege "mobster" activity, is simply a restatement of the unworkable organized crime nexus requirement. It next analyzes the Bankers Trust "discrete RICO injury" requirement and argues that private civil RICO plaintiffs should have standing to sue for injuries caused by defendants' individual predicate acts. Part II reviews Sedima's prior convictions requirement and asserts that it is, in effect, a judicial amendment to private civil RICO that has serious practical shortcomings. The Note concludes that any necessary limitations on the scope of private civil RICO should be imposed by Congress, after full consideration of all competing policies, rather than by the courts.

I. THE SEDIMA AND BANKERS TRUST STANDING REQUIREMENTS

Although the Sedima and Bankers Trust panels each held that a civil RICO plaintiff must allege and prove an injury caused by "a violation of section 1962," the panels differed as to what constitutes such an injury. The Sedima panel relied on the legislative intent underlying RICO, arguing that because RICO was aimed primarily at organized crime, plaintiffs must allege a racketeering injury caused by mobsters. The Bankers Trust panel focused instead on civil RICO's statutory language, concluding that the injury must be caused by a pattern of predicate acts rather than by the predicate acts themselves. Although the panels reached different conclusions regarding the nature of compensable injuries, they both imposed limita-

25. Id. at 516. For a summary of the judicial reaction to Sedima and Bankers Trust, see infra note 118.
26. See Sedima, 741 F.2d at 494; Bankers Trust, 741 F.2d at 516.
tions on the scope of civil RICO that are ultimately unjustifiable.

A. THE *SEDIMA* RACKETEERING INJURY REQUIREMENT

The *Sedima* panel concluded that a valid civil RICO claim must contain an allegation of an independent "racketeering injury" that is caused by "mobsters, . . . [who] cause systematic harm to competition and the market, and thereby injure investors and competitors."\(^{27}\) In developing its racketeering injury requirement, the *Sedima* panel focused on RICO's legislative history and noted initially that RICO was directed primarily at organized crime.\(^{28}\) The panel reasoned that many injuries caused solely by section 1961(1) offenses are compensable through non-RICO actions and that a civil RICO action therefore arises only when "mobsters" cause systematic harm that is different from any injury caused merely by the predicate acts and unrelated to mobster activity.\(^{29}\) The *Sedima* panel thus saw RICO as a tool with which to attack those specific activities that Congress intended RICO to deter rather than as a means of federalizing common law offenses.\(^{30}\) The panel also argued that Congress's use in section 1964(c) of the Clayton Act's "by reason of" language\(^ {31}\) demonstrated its intent to create a standing barrier to civil RICO actions analogous to the Clayton Act's competitive injury barrier.\(^ {32}\) This congressional intent demands that the plaintiff allege not only that the predicate acts caused the injury, but that the injury was a "racketeering injury," that is, one caused by mobster-related racketeering activity of the kind that Congress identified as threatening competition.\(^ {33}\)

The binding thread running through the *Sedima* panel's reasoning is that "Congress . . . would at least have discussed it" had Congress intended to grant a private cause of action for injuries caused by predicate acts unrelated to mobster activity.

\(^{27}\) *Sedima*, 741 F.2d at 495-96.

\(^{28}\) Id. at 487.

\(^{29}\) Id. at 495-96. This requirement is somewhat similar to the *Bankers Trust* requirement that the injury be caused by the pattern of racketeering activity rather than by the predicate acts themselves. *See infra* text accompanying notes 53-61. For a discussion of the important differences between these two standing requirements, see *infra* note 61.

\(^{30}\) *See* 741 F.2d at 492, 494.


\(^{32}\) *Sedima*, 741 F.2d at 494. For a discussion of "competitive injury" and the Clayton Act's competitive injury standing barrier, see *supra* note 16.

\(^{33}\) 741 F.2d at 495-96.
and already compensable under state law. The panel stressed the lack of congressional debate on the most attractive feature of the civil RICO action—the private civil cause of action for treble damages in section 1964(c). The House Judiciary Committee added the remedy to the Senate bill at the end of the legislative session, foreclosing discussion of it by the Senate committee responsible for the bill. The addition of a private civil cause of action apparently was not considered a major alteration of the bill. For the Sedima panel, this “remarkable fact... itself indicates that Congress did not intend the section to have the extraordinary impact claimed for it.” The panel believed that the silence in the legislative history regarding private civil RICO indicated that Congress did not intend the provision to “provide an alternate and more attractive scheme for private parties to remedy violations of [existing] laws.” The “racketeering injury” requirement, therefore, represented to the panel a logical, functional limitation ensuring that civil RICO would be available only to those persons for whom Congress intended it.

Despite the Sedima panel’s adoption of the racketeering injury requirement, it cited the earlier Second Circuit case of Moss v. Morgan Stanley, Inc. for the proposition that a civil RICO plaintiff need not allege that the defendant is associated with organized crime. Ironically, however, by limiting the

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34. Id. at 492.
35. Id. at 488-92.
37. Sedima, 741 F.2d at 489.
38. Id. at 489-90. When the Judiciary Committee introduced the amended bill to the full House, it did not even announce the addition of the private treble damages remedy. Id. at 490.
39. Id. at 490.
40. Id. at 492.
42. Sedima, 741 F.2d at 492 & n.31. In Moss, a private party brought a
pensable injuries to those caused by mobsters, *Sedima* effectively overruled *Moss* sub silentio, letting the “organized crime” requirement in through the back door.43

Although the panel correctly noted that organized crime was Congress’s primary target when it enacted RICO, the panel’s racketeering injury requirement represents an inappropriate limitation on a statute that Congress deliberately drafted broadly.44 RICO’s plain language does not restrict its use to defendants associated with organized crime,45 and the congressional debate over RICO indicates that Congress rejected such a requirement for several reasons. First, any attempted definition of “organized crime” threatened to create an unconstitutional status-based offense.46 Furthermore, Congress realized
civil action under § 1964(c) for injuries sustained “by reason of” defendants’ alleged predicate violations of the federal securities laws. The district court dismissed the complaint, reasoning, inter alia, that plaintiff had failed to allege defendants were associated with organized crime. *Moss*, 719 F.2d at 20. The Second Circuit disagreed with this reasoning, stating that RICO’s statutory language “does not premise a RICO violation on proof or allegations of any connection with organized crime.” *Id.* at 21 & n.17. Although this statement was dictum because the Second Circuit affirmed the district court’s dismissal on other grounds, *id.* at 23, the *Sedima* panel accepted it as the Second Circuit position, *Sedima*, 741 F.2d at 492.

43. Although the panel impliedly disclaimed the similarity of the terms “mobster” and “organized crime” by noting that the Second Circuit had rejected the organized crime requirement, see *Sedima*, 741 F.2d at 492 & n.31, the functional equivalence of the two terms is evidenced throughout the opinion. The panel noted that RICO was enacted to fight organized crime and later stated that the “by reason of” language in § 1964(c) was intended “to limit standing to those injured by . . . an injury of the type RICO was designed to prevent.” *Id.* at 495. The panel also expressed shock and dismay at the “extraordinary, if not outrageous” way courts had applied civil RICO to “such respected and legitimate ‘enterprises’ as the American Express Company, E.F. Hutton & Co., Lloyd’s of London, Bear Stearns & Co., and Merrill Lynch.” *Id.* at 487. The panel further bemoaned that there are only a “few reported cases where RICO has been used against reputed mobsters or at least against organized criminals.” *Id.*

44. See, e.g., Haroco, Inc. v. American Nat’l Bank & Trust Co. of Chicago, 747 F.2d 384, 390 (7th Cir. 1984) (observing that “it is . . . clear that Congress deliberately chose the very broad language of RICO’s provisions”), cert. granted, 105 S. Ct. 902 (1985).


46. Representative Biaggi attempted to limit RICO to organized crime by proposing an amendment that would have limited its use to those persons associated with “nationally organized criminal groups composed of persons of Italian ancestry forming an underworld government . . . who direct or conduct a pattern of racketeering activity and control the national operation of a criminal enterprise in furtherance of a monopolistic trade restraining criminal conspiracy.” 116 CONG. REC. 35,343 (1970) (statement of Rep. Biaggi). Representative Poff, arguing against the amendment, stated:

I am concerned that such an amendment would raise serious constitu-
that the evils at which RICO was aimed often are perpetrated by persons not falling within the traditional definition of organized crime. Since Congress designed RICO to proscribe certain types of behavior, the statute was carefully drafted to address organized criminality, not the nebulous concept of organized crime. Finally, Congress knew that requiring a plaintiff to prove the defendant’s association with organized crime would create an almost insurmountable burden for the RICO

47. As explained by Representative Poff while discussing another title of the Organized Crime Control Act of 1970, “The concept of organized criminal activity is broader in scope than the concept of organized crime; it is meant to include any criminal activity collectively undertaken . . . .” 116 CONG. REC. 35,293 (1970) (statement of Rep. Poff). Several other excerpts from RICO’s legislative history indicate that Congress was well aware that RICO would address all “organized criminality,” that is, all patterns of racketeering activity. See S. REP. No. 617, 91st Cong., 1st Sess. 215 (1969) (Senators Hart and Kennedy noting that S. 30 reaches beyond organized crime); 116 CONG. REC. 35,344 (1970) (Rep. Poff stating that “organized crime” is not a precise concept, but rather a functional one “serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances”); id. at 35,295 (1970) (Rep. Poff observing that RICO’s treble damages remedy is an example of an antitrust remedy “being adapted for use against organized criminality”).

48. As Judge Richard A. Posner has stated, “Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes.” Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648, 654 (7th Cir. 1984).
plaintiff to overcome.49

Most courts have heeded these concerns, declining to en-
graft onto RICO the organized crime requirement implicitly re-
jected by its drafters.50 Even though one of Congress's primary
targets was the infiltration of legitimate businesses by organ-
ized crime, Congress enacted RICO to prohibit any pattern of
racketeering activity affecting commerce.51 Congress recog-
nized that civil RICO could not be limited to members of organ-
ized crime in any principled manner and that there was no
sound policy justification for attempting to do so. RICO was
aimed at racketeering, not racketeers.52

B. THE BANKERS TRUST "DISTINCT RICO INJURY"
REQUIREMENT

In Bankers Trust Co. v. Rhoades,53 another divided Second
Circuit panel reached a conclusion somewhat different from

49. The difficulty in proving that a violator is a member of a traditional
organized crime "family" was highlighted in 1967 by Senator Percy when he
addressed the need for a RICO-type statute. Senator Percy noted that the
most important reason why organized crime flourishes in modern America Is
the "difficulty of obtaining evidence, admissible in court . . . . [T]hese known
robber barons of the mid-20th Century are rarely brought to justice because
our system of law handicaps itself. These handicaps take many forms . . . ."
113 CONG. REC. 18,004 (1967) (statement of Sen. Percy). It is not difficult to
imagine the "handicap" plaintiffs would be under if they had to prove defend-
ants were members of organized crime; indeed, even constructing a workable
definition of the concept might prove futile. See Horn, When to Bring a Rack-
teering Claim, 9 LITIGATION, Summer 1983, at 33, 34 (plaintiffs would have a
hard time proving defendants are associated with organized crime; the one
person the federal government persuaded to testify as to the existence of an
organized crime underworld is not "available" for the current crop of RICO
cases).

50. See supra notes 44-49 and accompanying text.

51. See United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), corr.

52. Sedima's mobster-related racketeering injury requirement bears a
striking resemblance to the competitive injury requirement adopted by some
courts. See supra note 16. Although the Sedima panel rejected an "antitrust-
type" competitive injury requirement in favor of an "analogous" racketeering
injury requirement, see Sedima, 741 F.2d at 495, and the Bankers Trust panel
rejected the competitive injury requirement, see Bankers Trust, 741 F.2d at 516
n.6, the language in Sedima indicates that the Sedima panel would require at
least some of the characteristics of the traditional competitive injury require-
ment. To what extent Sedima's requirement that civil RICO plaintiffs allege
the "kinds of [facts that] often affect competition . . . even if in the particular
case no harm to competition results," Sedima, 741 F.2d at 496 n.41, survives
the Bankers Trust rejection of the competitive injury requirement remains to
be seen.

53. 741 F.2d 511 (2d Cir. 1984).
the *Sedima* panel regarding the nature of a compensable civil RICO injury, holding that civil RICO plaintiffs may sue only for "distinct RICO injuries" caused by a *pattern* of racketeering activity, not for injuries caused by individual predicate acts.\(^5^4\)

The *Bankers Trust* panel based its holding on the wording of section 1964(c), noting that a civil plaintiff cannot recover unless injured "by reason of" a section 1962 violation.\(^5^5\) The panel reasoned that section 1962 is violated only if "there are present both (1) the pattern of racketeering activity, and (2) the use of that pattern to invest in, control, or conduct, a RICO enterprise."\(^5^6\) Section 1962 therefore does not prohibit the predicate acts that constitute racketeering activity, and a plaintiff's injury is not caused "by reason of" a section 1962 violation when the injury results from such predicate acts. Instead, a plaintiff can only recover under section 1964(c) when injured by the defendant's use of a pattern to participate in a RICO enterprise.\(^5^7\)

The plaintiff-appellant in *Bankers Trust* argued that injury caused by the predicate acts cannot be distinguished conceptually from injury caused by the pattern of predicate acts.\(^5^8\) The panel, however, rejected this argument: "If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury."\(^5^9\) The panel provided a hypothetical example of an injury caused by the pattern rather than by the predicate acts:

[A] plaintiff who is victimized by a defendant enterprise's multiple acts of arson may thereafter be denied fire insurance as a result of his fire history; such a plaintiff whose property subsequently suffers innocent fire damage would be unable to obtain reimbursement for the damage, and his monetary loss would be the result of the pattern of predicate acts of the enterprise, rather than any of the individual

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\(^{54}\) Id. at 516-17. The *Bankers Trust* panel did not address *Sedima*'s requirement that compensable civil RICO injuries be caused by mobsters.

The *Bankers Trust* "distinct RICO injury" requirement appears to be the latest version of the traditional racketeering injury requirement. *See supra* note 17 and accompanying text. Although many earlier cases described racketeering injuries as "something more than the injury resulting from the alleged underlying predicate crimes," *see supra* note 19, *Bankers Trust* refined this description by defining compensable civil RICO injuries as injuries caused by a pattern of predicate acts rather than by the predicate acts themselves, *see Bankers Trust*, 741 F.2d at 516-17.

\(^{55}\) Id. at 516.

\(^{56}\) Id.

\(^{57}\) Id. (quoting *Sedima*, 741 F.2d at 494).

\(^{58}\) *See Bankers Trust*, 741 F.2d at 517.

\(^{59}\) Id. (emphasis in original).
After *Bankers Trust*, therefore, plaintiffs must allege injury caused solely by a *pattern* of predicate acts in order to have standing to sue—any injuries caused by any of the predicate acts themselves are not compensable under civil RICO.61

Because the plain meaning of RICO's statutory language controls in the absence of a clear legislative intent to the contrary, the propriety of the panel's "distinct RICO injury" requirement must be judged initially against the RICO provisions

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60. Id. Significantly, the panel's example of an injury caused by the pattern was hypothetical rather than derived from an actual case. This apparent inability to cite an actual decision in which a plaintiff would be able to recover under *Bankers Trust* highlights the drastic effect the panel's "distinct RICO injury" requirement could have on the future utility of civil RICO.

61. The conclusions reached by the *Sedima* and *Bankers Trust* panels regarding the nature of compensable civil RICO injuries are not only different, they are also potentially inconsistent. Although *Bankers Trust* squarely held that private civil RICO plaintiffs must allege injury caused by the pattern of racketeering activity rather than by the predicate acts, *Sedima* itself implied that predicate acts alone could cause the requisite injury. The *Sedima* panel, in discussing the competition-threatening injury required under RICO, cited *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981), as a case involving a type of claim that "should go forward under RICO." *Sedima*, 741 F.2d at 496 n.41. In *Hellenic Lines*, the plaintiff brought a civil RICO action, alleging injury caused by the defendants' predicate acts of bribery, illegal kickbacks, and fraudulent billings. *Hellenic Lines*, 523 F. Supp. at 245, 246. The *Sedima* panel stated that private civil RICO was appropriate because the plaintiff's injury was the *kind* of injury at which RICO was aimed. *Sedima*, 741 F.2d at 496 n.41; see also id. at 496 (plaintiff must "show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter") (emphasis added). Although not fully developed in the opinion, these statements imply that *Sedima's* racketeering injury standing requirement is met if predicate acts are of the "mobster-related" type the panel felt RICO was designed to deter.

One court has viewed the *Sedima* and *Bankers Trust* standing requirements as inconsistent with each other in that the *Sedima* panel, but not the *Bankers Trust* panel, apparently would grant standing to plaintiffs who were injured solely by predicate acts as long as those acts were related to "mobster activity." See *Haroco v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 397 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 902 (1985). Conversely, it appears that the *Bankers Trust* panel would grant standing to plaintiffs injured by a pattern of predicate acts even if those acts were not perpetrated by mobsters. See *supra* text accompanying note 60. Since *Bankers Trust* did not address this possible inconsistency, the panel may have believed it was following *Sedima*. If such is the case, future civil RICO plaintiffs in the Second Circuit may need to comply with both *Sedima* and *Bankers Trust*—they would need to allege injury caused by a pattern of mobster-related predicate acts. Such a requirement may eviscerate civil RICO entirely, especially in light of *Sedima's* additional prior convictions requirement. See *infra* notes 71-117 and accompanying text.
themselves. According to the statute, the section 1964(c) standing requirement is satisfied if a plaintiff is injured "by reason of" a defendant's participation in the affairs of an enterprise through a pattern of racketeering activity. This standing requirement has two plausible meanings. Under one interpretation, the plaintiff has standing if a defendant participates in the affairs of an enterprise through a pattern of racketeering activity and the acts of such participation injure the plaintiff. An alternative interpretation, adopted by Bankers Trust, requires that the plaintiff be injured because the defendant used a pattern of racketeering activity to participate in the enterprise's affairs. Under the latter interpretation, therefore, the plaintiff in a civil RICO cause of action must prove that it would not have sustained its injury but for the defendant's use of a pattern.

This but-for causation requirement is neither the most sensible interpretation of the statute nor that supported by the legislative intent underlying RICO. Initially, nothing in the statute suggests that the pattern requirement should be singled out as a but-for element while other elements are not. If the

63. See 18 U.S.C. §§ 1962(c), 1964(c).
64. This interpretation is accepted by those courts not imposing the traditional racketeering injury requirement. See, e.g., Haroco v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), cert. granted, 105 S. Ct. 902 (1985); Alcorn County, Miss. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1169 (5th Cir. 1984); Wilcox v. Ho-Wing Sit, 586 F. Supp. 561, 568-69 (N.D. Cal. 1984).
65. Bankers Trust appears to be the first decision in which the § 1964(c) "by reason of" language was interpreted to require an injury caused by the pattern of predicate acts. Many earlier cases requiring a racketeering injury required "something more" than injury caused only by the predicate acts. See, e.g., Margolis v. Republic Nat'l Bank of New York, 595 F. Supp. 595, 597 (S.D.N.Y. 1984); Bruns v. Ledbetter, 583 F. Supp. 1050, 1056 (S.D. Cal. 1984); Hudson v. Larouche, 579 F. Supp. 623, 630 (S.D.N.Y. 1983).
66. See Bankers Trust, 741 F.2d at 516-17.
67. The Seventh Circuit has interpreted the Bankers Trust but-for causation requirement as applying to each element of a § 1962 violation. See Haroco v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 396 (7th Cir. 1984), cert. granted, 105 S. Ct. 902 (1985). Some of the language in Bankers Trust seems to support the Seventh Circuit's interpretation. See, e.g., Bankers Trust, 741 F.2d at 516 (injury must be caused by a "RICO violation, not just . . . some of the essential elements of a RICO violation"); id. at 517 (compensable RICO injury caused "by reason of the defendants' use of a RICO enter-
statutory language is accepted at face value, and there is nothing in the legislative history to indicate that it should not be, each of the RICO elements is of coequal importance. According to the statute's plain meaning, RICO addresses injuries caused by reason of participation through a pattern, not merely injuries caused by the pattern.68

Permitting RICO actions based on injuries caused by predicate offenses as well as injuries caused by a pattern of racketeering activity is also more consistent with the legislative intent underlying RICO. Bankers Trust stands for the proposition that Congress intended civil RICO to address only those injuries that are different from any injuries caused by the predicate acts themselves. This position fails to take into account the important additional deterrence value of allowing civil RICO actions based on the harm resulting from the predicate acts. Allowing such claims would deter the commission of the underlying predicate offenses as well as the commission of a RICO pattern of racketeering activity. Although there is little legislative history regarding the intended scope of private civil RICO,69 the congressional belief that private actions would promote this deterrence function is reflected in RICO's treble damages remedy.70 The Bankers Trust but-for requirement

68. See 18 U.S.C. §§ 1962(c), 1964(c). A hypothetical example illustrates the questionable nature of the Bankers Trust reasoning. Suppose a criminal statute made it a crime to participate in a bank robbery through the use of threats and violence, and a civil statute created a private cause of action for injuries received by reason of a violation of this criminal law. Further suppose that a defendant committed a bank robbery through the use of threats and violence and that one of the defendant's acts of violence injured someone. Under the "plain meaning" interpretation recommended by this Note, the plaintiff would have standing to sue. Under the Bankers Trust interpretation, however, there would be no standing because the same injury could have been caused by a robber who made no threats. Only injuries that could not have been inflicted but for the use of threats and violence, and of a type different from any injury caused by the threats and the violence themselves, would be compensable. In this example, the "threats plus violence" element corresponds to the RICO "pattern of racketeering activity" element.

69. See Sedima, 741 F.2d at 488-92.

70. Although this aspect of RICO's deterrence function is not specifically addressed in RICO's legislative history, its validity is clear. Initially, the treble damages provision was modelled after § 4 of the Clayton Act, 15 U.S.C. § 15(a) (1982). The Supreme Court has stated: "Congress created the treble-damages
would preclude liability in many situations in which the defendant’s actions fall squarely within section 1962’s prohibitions. Interpreting the section 1964(c) standing requirement to allow suits based upon the injury caused by the individual underlying offenses, however, more fully realizes the deterrence value of civil RICO.

II. THE SEDIMA PRIOR CONVICTIONS REQUIREMENT

*Sedima* was the first decision to hold that prior criminal convictions of the predicate acts are a necessary prerequisite to a private civil RICO action. In reaching this position, the panel had to contend with a statute that does not specifically require prior convictions and an imposing body of case law that expressly holds that such convictions are not required. The panel attempted to distinguish this contrary case law and adopted a strained interpretation of RICO’s statutory language based on its own somewhat creative due process notions. Although the panel’s reasoning has a certain emotional allure, close examination in the light of legal precedent, public policy, and practical considerations exposes its fatal weaknesses.

The *Sedima* panel initially argued that many of the earlier cases holding that prior convictions are not required in a civil RICO action “discussed the problem with little or no analysis.” The panel characterized the leading case of *United States v. Cappetto*, which supports the proposition that the government may bring a civil RICO injunctive action without the remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.” Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (emphasis in original); see also Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982) (Congress enacted § 4 to “deter violators and deprive them of the fruits of their illegal actions, and . . . provide ample compensation to the victims of antitrust violations”). Federal courts have realized that these same functions apply to civil RICO’s treble damages provision. See, e.g., Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir.) (RICO has both a compensatory and a deterrence objective), cert. denied, 459 U.S. 880 (1982); Hanna Mining Co. v. Norcen Energy Resources Ltd., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742, at 93,737 (N.D. Ohio June 11, 1982) (purposes of civil RICO’s treble damages provision include deterring RICO’s predicate offenses and threatening violators with financial ruin); see also Landmark Savings & Loan v. Rhoades, 527 F. Supp 206, 208 (E.D. Mich. 1981) (Congress provided for treble damages under RICO as a means of effectuating the policy underlying the Act).

71. *See supra* note 20.
72. *Sedima*, 741 F.2d at 496.
prior criminal convictions, as a decision that relied principally on cases unrelated to the scope of civil RICO. The panel further argued that since Cappetto involved the government's ability to bring an injunctive action, it was not controlling in private treble damages actions because no prosecutorial discretion is available to protect against overbroad use of private civil RICO.

The Sedima panel's attempt to distinguish Cappetto is unpersuasive. Cappetto's reliance on cases outside the RICO context was unavoidable because Cappetto was the first case to address the prior convictions issue under RICO. The Cappetto court itself confronted the question of the applicability of non-RICO cases and concluded that the pertinent policies underlying the cases were consistent with RICO's fundamental purposes. Moreover, the Sedima panel cannot justifiably distinguish Cappetto based on the presence of prosecutorial discretion in government actions by arguing that "there is no comparable way to limit private RICO." Private parties are subject to sanctions if they bring frivolous actions under RICO. Furthermore, plaintiffs' attorneys must certify in accordance with Rule 11 of the Federal Rules of Civil Procedure that they believe the action is well-grounded.

74. Cappetto held that the government could seek sanctions under civil RICO for actions also punishable under criminal RICO, implying that prior convictions are not required under civil RICO. See Cappetto, 502 F.2d at 1356-57. As the Sedima panel noted, Cappetto is the case most often relied on by courts that do not require prior convictions. Sedima, 741 F.2d at 496.

75. Sedima, 741 F.2d at 497.

76. See id.

77. See Cappetto, 502 F.2d at 1357 (policy of preventing conduct detrimental to the integrity of interstate commerce underlies RICO as well as the statutes at issue in the non-RICO cases).

78. Sedima, 741 F.2d at 497.

79. See King v. Lasher, 572 F. Supp. 1377, 1385 (S.D.N.Y. 1983) (attorneys' fees awarded to defendants and assessed against plaintiff's counsel when the court found the civil RICO claim to be meritless); see also Horn, supra note 49, at 33 (racketeering claims provoke a "visceral response in judges").

80. The Rule requires a party's attorney to sign all pleadings, motions, and other papers and provides that such signature constitutes a certificate by [the attorney] that [the attorney] has read the pleading, motion, or other paper; that to the best of [the attorney's] knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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the proposition that private parties are more likely to initiate civil RICO actions than are government prosecutors, RICO's treble damages provision demonstrates a legislative intent to encourage challenges by private attorneys general to help further RICO's deterrence function.\textsuperscript{81}

The prosecutorial discretion present in government actions actually is a reason to reject Sedima's prior convictions requirement because the exercise of such discretion could, in many instances, divest a worthy plaintiff of a meritorious civil RICO claim. Prosecutorial discretion includes the choice to refrain from prosecution if the return will be slight in relation to the effort expended and to accept guilty pleas to lesser offenses. Under Sedima, a potential civil RICO plaintiff cannot pursue a RICO claim, however worthy it may be, if the federal or state prosecutor decides to refrain from initiating a criminal action based on the suspected violator's predicate acts or to settle for a guilty plea to an offense not appearing in the section 1961(1) list of predicate offenses.

Moreover, because the injunctive relief available to the government in section 1964(a) is so effective\textsuperscript{82} and relatively easy to obtain,\textsuperscript{83} the federal government may choose to address RICO violations under civil RICO instead of criminal RICO.\textsuperscript{84} Having initiated a civil RICO injunctive action against a defendant, the federal government may well hesitate to commence less efficient and more burdensome criminal proceedings

\textsuperscript{81} See supra notes 69-70 and accompanying text.
\textsuperscript{82} Under § 1964(a), district courts are empowered to prevent and restrain RICO violations by issuing orders including, but not limited to, ordering any person to divest himself of any interest . . . in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in . . . ; or ordering dissolution or reorganization of any enterprise. 18 U.S.C. § 1964(a).
\textsuperscript{83} See United States v. Frumento, 563 F.2d 1083, 1090 (3d Cir. 1977) (RICO's civil remedies "permit equitable restraint of economic activity . . . as a substitute for criminal prosecution with its attendant procedural and constitutional protection for defendants"); \textit{cert. denied}, 434 U.S. 1072 (1978); \textit{Cappetto}, 502 F.2d at 1357 (standard of proof lower in a civil RICO case than in a criminal action); \textit{id.} at 1358-59 (in order to grant an injunction under RICO, the traditional irreparable injury requirement need not be met).
\textsuperscript{84} It appears that \textit{Cappetto} is a prime example of the government's pursuit of a civil RICO action to the exclusion of a criminal RICO action. See \textit{Cappetto}, 502 F.2d at 1357 ("Conduct . . . which is of a kind that is traditionally proscribed under criminal statutes . . . does not enjoy a special immunity from regulation through civil proceedings . . . .")
against that same defendant for predicate act violations. Similarly, state prosecutors, knowing that a federal civil RICO injunctive action has been filed, might be less likely to prosecute the defendant for state law predicate act violations. Therefore, the Sedima reasoning virtually guarantees that private parties often will be unable to pursue valid claims under civil RICO because it is relatively easy for the federal government to do so. The availability of a federal remedy should not depend on such uncertainties, especially in the absence of an express declaration from Congress.

The Sedima panel also dismissed the argument that RICO's liberal construction directive favors construing civil RICO liberally to allow actions without prior predicate act convictions. The panel stated that "due process, of course, requires that criminal statutes be strictly construed." The panel then concluded that in the civil context, the policy of strict construction could not be implemented without requiring predicate act convictions. In so reasoning, the panel apparently mistook a general rule for a constitutional requirement. As the Supreme Court stated in the criminal RICO case of United States v. Turkette: "The canon in favor of strict construction is not an inexorable command . . . . [I]t is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers." Thus, the Court's relatively liberal construction in Turkette of section 1962, the criminal provi-

85. As a practical matter, the prior convictions requirement raises a potentially significant problem in that it virtually compels private litigants on both sides to involve themselves in the criminal process. Plaintiffs will concentrate their efforts on trying to persuade prosecutors to initiate actions on the suspected predicate act violations while defendants will expend their energies in bargaining the charges down to offenses not listed in § 1961(1). Such private involvement surely would be detrimental to the integrity of the criminal process. See Petition for Writ of Certiorari at 23, Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), cert granted, 105 S. Ct. 901 (1985) (No. 84-648).


87. Sedima, 741 F.2d at 502.

88. Id. (quoting Dunn v. United States, 442 U.S. 100, 112 (1979)).

89. Sedima, 741 F.2d at 502.


91. Id. at 588 n.10 (citing United States v. Brown, 333 U.S. 18, 25-26 (1948)).

92. In Turkette, the Court found "no occasion to apply the rule of lenity" to § 1962 and rejected the argument that the term "enterprise" should be strictly construed to mean "legitimate enterprise." Turkette, 452 U.S. at 587 & n.10.
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93 highlights the lack of any constitutional need for Sedima's overly strict construction of section 1964(c), the civil provision.94

The Sedima panel supported its conclusion that civil RICO required prior convictions with a strained reading of the statutory language.95 The panel noted that section 1964(c) of RICO was modelled after a similar Clayton Act provision that provides that private parties may sue for injuries caused "by reason of anything forbidden in the antitrust laws."96 The RICO provision, however, provides that private parties may sue for injuries caused "by reason of a violation of section 1962."97 The panel concluded that Congress had changed the wording in the RICO provision "with a specific intent in mind—to require that conviction at least of the predicate acts be had before a civil suit may be brought by a private person."98 This argument fails to consider that the term "violation" as it appears in other civil statutes does not necessarily mean "criminally proven viola-

93. Section 1962 is not exclusively a criminal provision. Because both civil and criminal RICO require that the defendant be proved to have performed acts prohibited by § 1962, whether the provision should be viewed as civil or criminal depends on whether the underlying action is civil or criminal in nature. Turkette was a criminal RICO action brought under § 1962(c) and (d), see Turkette, 452 U.S. at 578-79, hence the provision's criminal nature in that context.

94. For an argument that § 1962 should be strictly construed in civil as well as criminal RICO actions, see Tarlow, RICO Revisited, 17 GA. L. REV. 291, 310 (1983) (discussing FCC v. American Broadcasting Co., 347 U.S. 284, 296 (1954), which concluded that statutes giving rise to both criminal and civil sanctions should, as a general rule, be strictly construed in both contexts). The Sedima panel did not address the possibility of strictly construing § 1962's pattern and enterprise requirements and § 1961's predicate act prohibitions, both of which are applicable in civil and criminal RICO actions, and broadly construing the "by reason of a violation" language in the wholly civil § 1964(c) private remedy provision. Such an approach would allow plaintiffs to sue without alleging prior predicate act convictions and would be consonant with RICO's directive that the statute be liberally construed to effectuate its "remedial purposes." See supra text accompanying note 6.

The degree to which courts can manipulate the concepts of strict and liberal construction in the civil RICO context was highlighted in Berg v. First Am. Bankshares, Inc., [Current] FED. SEC. L. REP. (CCH) ¶ 91,826 (D.D.C. Oct. 19, 1984). Although the Berg court adopted Sedima's prior convictions requirement, it seemingly turned Sedima's general rule of strict construction of criminal statutes on its head, stating: "The broad construction given RICO in criminal prosecutions is simply inconsistent with the narrower construction which must be applied in the context of a civil case." Id. at 90, 162.

95. See Sedima, 741 F.2d at 498-99.
96. Id. at 498 (quoting 15 U.S.C. § 15(a) (1982) (emphasis added)).
97. 18 U.S.C. § 1964(c) (emphasis added), quoted in Sedima, 741 F.2d at 498.
98. Sedima, 741 F.2d at 498-99.
tion." Moreover, if a criminal trial is necessary to determine whether a "violation" occurred, the same reasoning would seem to require a criminal trial in order to determine whether an antitrust defendant's actions were "forbidden" under the antitrust laws. This has never been a requirement under the Clayton Act provision. 99

The panel also reasoned that Congress's use of such words as "chargeable," "indictable," and "offense" in section 1961(1) indicated that convictions were required because the words necessarily were tied to the procedure of criminal cases. 100 This reasoning is strained when viewed in light of the Supreme Court's mandate that, absent express congressional intent to the contrary, a statute's plain meaning controls its interpretation. 101 The plain meaning of the terms "chargeable" and "indictable" suggests acts that, "if proved by the government in a criminal proceeding, would subject the violator to criminal sanctions." 102 Not only does RICO's plain language not require prior convictions, its "chargeable" and "indictable" language indicates a specific desire not to require convictions or even indictments. Furthermore, when Congress intended to require convictions in other portions of RICO and the Organized Crime Control Act, it did so expressly. 103 That Congress failed to do


100. No decision has required prior convictions under the Clayton Act's private treble damages provision, 15 U.S.C. § 15(a) (1982). Indeed, it appears that no decision has even fully addressed the issue.

101. Sedima, 741 F.2d at 499-500. The panel admitted that "chargeable" and "indictable" conceivably could mean able to be charged or indicted, but it felt that the more plausible alternative was that the use of these words demonstrated that Congress did not intend to give civil courts power to determine whether an act is "indictable" in the absence of a properly returned indictment or "chargeable" absent an information. . . . Under the interpretation given RICO by those courts which do not require criminal convictions of the predicate acts before the bringing of a civil action, every private plaintiff becomes [a] one-person grand jury. Id. at 500; see also id. at 499 ("An 'offense' speaks to conviction.").


103. Sedima, 741 F.2d at 505 (Cardamone, J., dissenting).

104. See, e.g., 18 U.S.C. § 1963(c) ("Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property
the same in civil RICO, therefore, manifests its intent not to require convictions.\textsuperscript{105}

\textit{Sedima}'s case law and statutory analysis arguments are influenced by misplaced due process concerns. The panel argued that not requiring prior convictions in civil RICO actions "would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation 'racketeer,' [and] authorize the award of damages which are clearly punitive."\textsuperscript{106} Close examination reveals that each of these arguments is unpersuasive.

First, although the panel's argument that civil actions cannot be based on offenses "criminal in nature" unless guilt is proven in a criminal trial has a certain emotional appeal, it overlooks Congress's ability to constitutionally impose criminal and civil sanctions for the same act or omission.\textsuperscript{107} Since civil RICO defendants are not threatened with criminal sanctions, such as the loss of liberty, the prior convictions safeguard is unnecessary.\textsuperscript{108} Further, allowing civil RICO actions does not...
strip defendants of their constitutional armor; if constitutional issues arise during a proceeding, specific safeguards can be applied to protect the defendant.  

Second, the Sedima panel ignored several important points in asserting that defendants should not be stigmatized with the criminal connotations of the "racketeer" label without first having been proven to be racketeers beyond a reasonable doubt. Obviously, stigma alone will not ordinarily render a civil action criminal. Even assuming that the stigma of the "racketeer" label is constitutionally significant, however, Sedima's prior convictions requirement will not purge civil RICO defendants of such stigma. Even under the Sedima approach, a defendant convicted of only the predicate acts is not

...
labelled a “racketeer” until a later civil RICO action. For example, if a defendant is convicted of the predicate acts of mail and wire fraud, that defendant might be labelled a “defrauder.” A civil RICO plaintiff could then sue this “defrauder” under section 1964(c) and recover if all the elements of a civil RICO violation are proven. Until the court enters a judgment for the plaintiff, however, the defendant is not a “racketeer,” but merely a “defrauder.” Since the mere commission of predicate offenses is not necessarily racketeering, the “racketeer stigma” that is so offensive to the Sedima panel attaches as a result of the civil action, based on proof by a preponderance of the evidence, notwithstanding the prior convictions requirement. Therefore, the panel’s “stigma” argument, when carried to its conclusion, fails to accomplish its intended objective.

Third, the plaintiff’s ability to recover “punitive” damages under a civil RICO claim does not signal a quasi-criminal action demanding more constitutional safeguards for the defendant. As the Sedima dissent observed: “Congress has provided for multiple damages, statutory punitive damages, civil penalties and counsel fees in scores of statutes . . . . Treble damages have been part of our jurisprudence for centuries . . . and they

113. The panel also insisted on prior convictions to ensure that a defendant is not found “guilty” of a “crime” in a civil action. See Sedima, 741 F.2d at 500 n.49. Under Sedima, however, if a defendant is convicted of the predicate acts and is later held liable in a civil RICO action, the defendant will have been proved to have violated § 1962, a potential criminal offense, in a civil action.

Another problem with the “stigma” argument is apparent in light of the panel’s mobster-related racketeering injury requirement. See supra notes 27-52 and accompanying text. Under Sedima, only alleged mobsters properly may be civil RICO defendants. Sedima, 741 F.2d at 495-96. If such is the case, any person held to be a proper civil RICO defendant automatically would be labelled a “mobster” regardless of the ultimate outcome of the action; this would be true even if the predicate act convictions were for traditionally “nonmobster” offenses, such as mail fraud or wire fraud. Therefore, the “mobster stigma” would necessarily attach in the civil RICO action solely by virtue of the court’s allowing the action to proceed. Sedima’s mobster-related racketeering injury and prior predicate acts convictions requirements thus may create more stigma than does the position they criticize.

114. This defect in the Sedima reasoning could be cured by requiring a prior conviction under § 1962 of criminal RICO itself. In that case, the “racketeer stigma” would attach at conviction since the § 1962 elements of a civil RICO cause of action, excluding causation and damages, would be established in the criminal proceeding. Considering, however, the fact that the federal government often may decide to initiate civil rather than criminal RICO actions against a suspected violator if it initiates any action at all, see supra text accompanying notes 82-85, requiring a prior criminal RICO conviction would have the practical effect of foreclosing the use of civil RICO to a large number of potential plaintiffs.
have never been viewed as 'criminal' sanctions." Moreover, aside from being a permissible means of deterring RICO violations, RICO's treble damages remedy may be more economically efficient than simple damages.

In short, the Sedima panel's prior predicate acts convictions requirement is unjustifiable. The plain language of the civil RICO provision does not require such convictions, and there is nothing in RICO's legislative history that suggests that Congress intended to erect such a formidable barrier to potential civil RICO plaintiffs. The Sedima panel's rewriting of the statute, purportedly to avoid "serious constitutional questions," appears to be more a visceral reaction to the broad scope of civil RICO than a logically consistent statutory analysis. The result of this well-intentioned activism undoubtedly will be the unavailability of civil RICO to many of the persons for whom it was specifically designed, ironically leaving the Sedima panel's handiwork at odds with the very legislative intent it professed to revere.

CONCLUSION

The dramatic recent increase in civil RICO litigation has prompted many courts to impose a variety of restrictions on the scope of private civil RICO. The panels in Sedima and Bankers Trust have delivered a mortal blow to civil RICO, at least in the Second Circuit. The two panels, by requiring plaintiffs to al-

115. Sedima, 741 F.2d at 505-06 (Cardamone, J., dissenting).
116. See supra text accompanying notes 69-70; see also Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101, 1117 (1982) (RICO's treble damages provision advances its deterrence function).
117. According to Professor, now Judge, Posner, economically efficient damages remedies should be developed by considering not only the actual harm suffered by a plaintiff, but also the probability that the penalty will be imposed. R. Posner, Economic Analysis of Law 171 (2d ed. 1977). In the RICO context, the actual detection of a violation and imposition of a penalty often is unlikely due to the violator's ability to hide behind an apparently lawful organizational or transactional facade. See H. Edelhertz, The Nature, Impact and Prosecution of White-Collar Crime 12-18 (1970). Thus, RICO's treble damages provision arguably is a more efficient compensator of racketeering injuries than a simple damages provision would be.
118. There is an early indication that although Sedima and Bankers Trust may not be followed blindly in other circuits, they at least will be influential. In Alexander Grant & Co. v. Tiffany Indus., Inc., 742 F.2d 408 (8th Cir. 1984), the Eighth Circuit seemingly overruled sub silentio the leading case of Bennett v. Berg, 685 F.2d 1053 (1982), aff'd in part, rev'd in part, 710 F.2d 1361 (8th Cir.) (en banc), cert. denied, 104 S. Ct. 527 (1983), and adopted a strain of the Bankers Trust "discrete RICO injury" requirement. Compare Bennett, 685
le different types of “racketeering injuries,” engrafted onto RICO a standing requirement that has no support in its legislative history and can be “found” only from a twisted reading of the statute. *Sedima*’s mobster-related racketeering injury requirement resulted from a mistaken notion that only members of organized crime can commit acts that Congress has defined as racketeering. Such a judicial amendment, rejected by Congress and having serious constitutional implications, has no place in the interpretation of a statute laid out in behavioral, not status, terms. The *Bankers Trust* requirement that the injury result from the pattern of racketeering activity ignores the plain meaning of civil RICO and forecloses its use by many persons suffering the most direct types of injuries. Finally, *Sedima*’s prior convictions requirement was the product of an unconvincing rejection of prior case law and a tortured statutory interpretation of the civil RICO provisions based on the panel’s misplaced due process notions. The panel’s narrow construction of civil RICO, and especially its obsession with the stigma of the racketeer label, are not warranted in light of the statute’s remedial, as opposed to criminal, nature.

RICO unquestionably is a broad statute. Realizing this, the

F.2d at 1059 n.5 (standing granted when injury is caused by predicate acts because such acts were part of “the conduct of the affairs of an enterprise through a pattern of racketeering”) with *Alexander Grant*, 742 F.2d at 413 (standing granted because plaintiff alleged “something more than injury from the underlying predicate acts”). The *Alexander Grant* court viewed its reasoning as consistent with *Bankers Trust* but inconsistent with *Sedima*’s mobster-related racketeering injury requirement. *Alexander Grant*, 742 F.2d at 413. It also noted *Sedima*’s prior convictions requirement but did not pursue the issue since it was not raised in the trial court. *Id.* at 413 & n.11.

The District Court for the District of Columbia addressed the issues decided in *Sedima* and *Bankers Trust* in *Berg* v. First Am. Bankshares, Inc., [Current] FED. SEC. L. REP. (CCH) ¶ 91,826 (D.D.C. Oct. 19, 1984). Although the *Berg* court refused to adopt any type of organized crime or racketeering injury requirement, see *id.* at 90,160-62, the “sound reasoning of the Second Circuit” persuaded the court to adopt *Sedima*’s prior convictions requirement, *id.* at 90,162.

The Seventh Circuit, however, in *Haroco* v. American Nat’l Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 902 (1985), sharply criticized both *Sedima* and *Bankers Trust* and refused to accept the reasoning of either decision. The *Haroco* court felt that *Sedima* “revived the discredited ‘organized crime nexus’ without quite saying so,” *Haroco*, 747 F.2d at 394, and that *Bankers Trust* “reduce[d] RICO’s civil provisions to a trivial remedy, available in only a tiny fraction of RICO violations and dependent upon entirely fortuitous facts,” *id.* at 398.

119. The legislative “history” relied on by the *Sedima* panel was the lack of discussion regarding private civil RICO. See supra text accompanying notes 34-40.
American Bar Association has issued a draft report recommending legislative reform to limit its scope.\textsuperscript{120} Legislative reform is the most principled way to shape civil RICO into a more consistent and effective tool to fight racketeering and provide relief to its victims.\textsuperscript{121} The judicial amendment of civil RICO by the \textit{Sedima} and \textit{Bankers Trust} panels goes beyond traditional statutory interpretation; it virtually strips civil RICO of its usefulness, causing the statute to fail of its essential purpose. Courts should not substantively amend statutes by creating imagined problems and "solving" them by hypothesizing how the statute might have read "had Congress considered the problem."\textsuperscript{122} Unless and until Congress amends RICO, courts should interpret it in accordance with its plain meaning and its manifest legislative intent.

\textit{S. Gregg Kunzi}

\textsuperscript{120} \textsc{American Bar Association, Section of Criminal Justice, Report to the House of Delegates} (Aug. 1982); see also Wexler, \textit{supra} note 10, at 334-39 (reviewing draft report).

\textsuperscript{121} See Note, \textit{supra} note 116, at 1118-20; see also Furman v. Cirrito, 741 F.2d 524, 530 (2d Cir. 1984) (dictum) ("If defendants are surprised or offended that their 'garden variety' fraudulent conduct is now statutorily characterized as 'racketeering', they should address their grievance to congress, which clearly and specifically included mail, wire, and securities frauds as predicate acts of 'racketeering activity' under § 1961(1)."), \textit{petition for cert. filed sub nom.} Joel v. Cirrito, 53 U.S.L.W. 3343 (U.S. Oct. 15, 1984) (No. 84-604).

\textsuperscript{122} \textit{Sedima}, 741 F.2d at 502 (justifying prior convictions requirement by presuming Congress never considered the problem of "cross[ing] into the sphere of criminality simply by bringing a civil action"). The Supreme Court has pointedly stated that courts should not interpret statutes by guessing what Congress would have done had it considered an unaddressed issue: "In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." \textit{Harrison v. PPG Indus.}, Inc., 446 U.S. 578, 592 (1980).