1985

RICO Repercussions: Sedima and Haroco

Harold Brown
RICO Repercussions: *Sedima* and *Haroco*

**HAROLD BROWN***

**INTRODUCTION**

In *Sedima, S.P.R.L. v. Imrex Company, Inc.* (*Sedima*),¹ a split panel of the United States Second Circuit Court of Appeals sustained the dismissal of a private RICO claim.² It did so on the ground that the two “predicate acts”³ required under RICO, had to consist of prior criminal convictions and that private damages “by reason of” the violations did not refer to direct injury caused by the “predicate acts,” but by other indirect “racketeering activity.”⁴ In the two following days, another panel adopted *Sedima*,⁵ while the third unwillingly decided that it was controlled by the prior panel rulings.⁶ It also reported that the full circuit bench had rejected en banc review, with three judges dissenting.

In *Haroco Inc. v. American National Bank Trust Co. of Chicago*, (Haroco),⁷ the Seventh Circuit roundly rejected *Sedima*. Further, it stated that its opinion had been circulated among all of its regularly active judges, but no judge favored a rehearing en banc. One seldom is confronted with such strong disagreement by virtually the entire judicial complement of two such prestigious circuits. It easily foreshadowed the Supreme Court’s grant of certiorari,⁸ as well as a

---

* Mr. Brown is a practicing attorney in Boston, Massachusetts. A.B., Yale University, 1936; J.D., Harvard University School of Law, 1939; LL.M., Harvard University School of Law, 1940; author of seven books on franchising including *FRANCHISING: REALITIES AND REMEDIES*, (1981); author of numerous law review articles; and founding member of American Bar Association Forum Committee on Franchising.

4. The private action section of the statute does not contain such language. Its use is a judicial importation, comparable to the judicially created need for “competitive” injury engrafted onto section 4(a) of the antitrust laws.
8. On January 14, 1985, the Supreme Court granted certiorari for Sedima, SPRL v. Imrex Co., Inc., 741 F.3d 482 (2d Cir. 1984); Haroco v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), while withholding action on the petitions in Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984); Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984); and Seville Indus. Machinery v. Southwest Ma-
flurry of Congressional and Executive activity. This Article will address the rationale applied in both Sedima and Haroco. Attention will also focus on the interim and long-term repercussions in the legal community involving other federal circuits, as well as in the numerous states that have adopted "little" RICO statutes of their own.

I. THE RICO STATUTE

Ordinarily, the parsing of a statute is unnecessary. It is, however, essential for a better understanding of Sedima and Haroco. Although the act became law in October 1970, almost all of its court activity has been in criminal process. Civil courts have only begun to wrestle with its application. The legal community has therefore had inadequate opportunity to review its terms; to comprehend its numerous challenges; and to position itself to use RICO in standard civil litigation. In general, the statute condemns the infiltration of a legitimate "enterprise" coupled with abuse through a "pattern of racketeering activity." The phrase "racketeering activity" is substantively defined under "prohibited activity" itself divided into four separate subsections that hinge on the use of a "pattern" of racketeering activity. The statute then employs an unusual method of tying together these several operative provisions.


9. Senator Strom Thurmond (Republican, South Carolina), Chairman of the Senate Judiciary Committee, stated in October, 1984 that it is "imperative" for Congress to clarify RICO; the Department of Justice has a task force to consider whether to propose revisions; and an ABA task force is working on legislative recommendations. See Nat'l L.J., Jan. 7, 1985, at 18, col. 1.

10. Nineteen State statutes are already modeled on the federal act, with many more under active consideration. See ARIZ. REV. STAT. ANN. § 13-2312 (1978) (racketeering injury necessary) (treble damages); CAL. PENAL CODE § 186.2 (a)(17) (West 1983) (does not especially authorize private suits for damages or equitable relief); COLO. REV. STAT § 18-17-101 (1981) (treble damages); CONN. GEN. STAT. § 53-393 (West Supp. 1984) (does not explicitly authorize private suits, but does authorize injunctions); FLA. STAT. ANN. § 895.01 (1982) (treble damages and injunctions); GA. CODE ANN. § 16-14-1 (1982) (treble damages and injunctions); HAWAI REV. STAT. § 842-1 (1976) (limited to actual damages); IND. CODE ANN. § 34-4-30.5-5(b) (treble damages); NEV. REV. STAT. § 207.4-207.17 (1983) (treble damages); N.J. STAT. ANN. 2C:41 (West 1982) (treble damages); N.M. STAT. ANN. § 30-42-1 (1978) (treble damages); N.D. CENT. CODE § 12.1-06 (1983) (treble damages); OR. REV. STAT. § 166.725(7)(a) (1982) (treble damages); PA. CONS. STAT. ANN. § 911 (Purdon 1983) (does not expressly authorize damages); PUERTO RICO LAWS ANN. Tit. 25, § 971 (1978) (does not expressly authorize damages); R.I. GEN. LAWS § 7-15-4(c) (Supp. 1984) (treble damages); UTAH CODE ANN. § 76-10-1601 (1981) (treble damages); WASH. REV. CODE § 1-17 and 20 (effective July 1, 1985) (treble damages); Wis. STAT. ANN. § 946-80 (West Supp. 1982) (punitive damages), amongst other states currently considering little RICO statutes.


As for "racketeering activity," the statute incorporates by reference any act or threat "indictable" under any of twenty-four specific federal offenses as well as eight state crimes that are punishable by imprisonment for more than one year. The "state crimes" include "any act or threat involving murder, kidnapping, arson, robbery, bribery, extortion, or dealing in narcotics." The federal prohibitions include "any act that is indictable" under a long list of specified sections in title 18, including such broad categories as mail or wire fraud, or offenses in title 11 involving fraud connected with a "bankruptcy" or "fraud in the sale of securities." Given the established scope of fraud in the use of the mails, in the sale of securities, and that "connected" with bankruptcy, such offenses can be found in virtually any form of scheme or deception.

The "pattern" of racketeering activity requires proof of two acts of "racketeering activity" within a ten-year period of each other, following enactment of RICO on October 15, 1970. These definitions are then employed to define the "prohibited activities" that give rise to both criminal and civil liability.

The congressional thrust in RICO is to "forbid persons from conducting the affairs of an enterprise through a pattern of engaging in the predicate crimes." The "enterprise" is broadly defined to include "any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated

---

15. See 18 U.S.C. 1961(1)(B) (1982). The twenty-four federal crimes include 18 U.S.C. § 201 (bribery); § 224 (sports bribery); § 471-473 (counterfeiting); § 659 (theft from interstate shipment); § 664 (embezzlement from pension and welfare funds); § 891-894 (extortionate credit acts); § 1343 (wire fraud); § 1503 (obstruction of justice); § 1510 (obstruction of criminal investigations); § 1511 (obstruction of state or local law enforcement); § 1951 (racketeering); § 1953 (shipping wagering materials); § 1954 (illegal gambling business); § 2314-15 (interstate transport of stolen property); §§ 2341-46 (trafficking in contraband cigarettes); §§ 2421-24 (white slave traffic); 29 U.S.C. § 186 (payments and loans to labor organizations), § 501(c) (embezzlement of union funds); plus "any offense involving fraud connected with a (bankruptcy) case" under title II, "fraud in the sale of securities," or felonious narcotics matters under federal law.
17. See A. Bromberg, SEC RULE 10(b)(5) (1982).
20. See Bennett v. Berg, 685 F.2d 1053, 1055 n.10 (8th Cir. 1982), aff'd and rev'd in part, 710 F.2d 1361 (8th Cir. 1983) (en banc), including incorporation of the original panel decision. Other leading civil RICO cases are Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983); Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983); Cenco, Inc. v. Seidman and Seidman, 686 F.2d 449 (7th Cir. 1982); and USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94 (6th Cir. 1982).
in fact although not a legal entity. The term person is defined to include “any individual or entity capable of holding a legal or beneficial interest in property.” The RICO statute focuses on the “infiltration” of such “enterprises” as business concerns, labor unions, or government entities.

Finally, these are all coordinated in the four provisions which define “prohibited activities.” Wherever a “pattern of racketeering activity” is involved, it is declared illegal: (1) to “use or invest income (from such activity); to acquire any interest in, or to establish or operate, any enterprise that engages in interstate commerce; or (2) “to acquire or maintain any interest or control” in such an enterprise; or (3) for any person employed or “associated” with such an enterprise to conduct or participate in such a racketeering pattern of activity; or (4) for any person to conspire to violate any of the foregoing subsections.

The stiff criminal penalties encompass a fine of up to $25,000 or twenty years imprisonment, or both. They go much further to require the forfeiture to the United States of “any interest . . . acquired or maintained” in violation of one of the “prohibited activities,” as well as “any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise he has established, operated, controlled, conducted, or participated in the conduct of.” In addition to restraining orders, the court is directed to authorize the attorney general to seize all forfeited interest or property.

The civil remedies include a full panorama of equitable jurisdiction, speedy trial, a private remedy with treble damages and attorneys’ fees, and total estoppel effect for a final judgment or decree of the United States. Venue is granted nation-wide both in criminal and civil matters. Extremely broad powers are granted to the at-
torney general for civil investigative demands. The Seventh Circuit spoke with more than a modicum of fact when it declared that the civil RICO provisions are "constructed on the model of a treasure hunt."

There are numerous civil RICO issues on which there is substantial disagreement both between and within circuits. For example, there is no agreement as to whether a "person" may also be the "enterprise," as well as whether the "enterprise" may be both a claimant and a violator. Another unresolved question is whether private claimants are entitled to equitable relief either under the authority of the statute or from a court's general equitable jurisdiction.

Without denigrating the significance of the other federal and state crimes enumerated in RICO, it is unquestioned that because of their breadth, the federal mail and wire fraud statutes have occupied the main role. It is erroneous, however, to assume that it is simple to prove the components of these crimes. The mail fraud statute must be read to include "everything designed to defraud by representations as to the past or present, or suggestions or promises as to the future. The act has been employed as a first line of attack against virtually every new fraudulent scheme invented by man's ingenuity, at least until such time as specific legislation has been devised to deal with the newest abuses, ranging through securities transactions, loan-sharking, land sales, credit cards, drug distribution, franchising, and pyramid sales schemes.

In a civil proceeding, it is nonetheless necessary to allege and prove specific intent to defraud in order to obtain money or property by fraudulent pretenses or promises, either by devising, participating in, or abetting the scheme, and by using the mail to carry out the artifice. While "good faith" is a defense, this is merely the other side of having to prove fraudulent intent. The fraud must be alleged with particularity, underscored by the special emphasis on counsel's good faith obligation in signing any pleading or court

36. See Hirsh v. Enright Ref. Corp., No. 84-5087 slip op. — (3d Cir. Sept. 14 1984) (holding that "person" and "enterprise" must be separate entities, resulting in reversal of the first civil RICO recovery in federal court after a full trial).
37. See Bennett v. Berg, 685 F.2d 1055 (8th Cir. 1982), in which this aspect of the panel's ruling was rejected in the rehearing en banc, while the panel's view was relied upon in Schacht v. Brown, 711 F.2d 1343 (1983), cert. denied, 104 S. Ct. 508 (1983).
39. Id. at 313-14.
41. See Fed. R. Civ. P. 9(b) relied upon in Bennett v. Berg, 685 F.2d 1055 (8th Cir. 1982). See also Bender v. Southland Corp., 749 F.2d 1205 (6th Cir. 1984) (RICO
Until Sedima, there had been virtually no civil ruling requiring compliance with the criminal standard of a showing "beyond a reasonable doubt." Almost every court specified proof by a preponderance of the evidence, although some support had been shown for proof "by clear and convincing" evidence. Factually, a "scheme" is adequate if it is calculated to deceive persons of ordinary prudence and comprehension, even though no misrepresentations were made. It includes all elements of trickery whether in the form of half-truths or the concealment of material facts, as well as express misstatements. The "property" may be either tangible or intangible benefits or rights. Finally, the mails must be used either in connection with the accomplishment of the scheme or as a later act to lull victims.

This condensed scanning of RICO and the crime of mail fraud, serves to dispel the fear that civil recovery under RICO is an open invitation to converting ordinary business transactions into a bonanza of treble damage recoveries, plus attorneys' fees and costs. It is against this background that the Sedima-Haroco controversy can be more keenly appreciated.

II. THE SEDIMA CASE

A. Proceeding in Eastern District of New York

In Sedima, the district court dismissed the complaint because it failed to allege a "RICO-type injury," as distinguished from business fraud. Sedima was a Belgian corporate partner in a joint venture with defendant Imrex Company, Inc., a New York company.

mail fraud allegations must include both intent to defraud and damage causation to be pleaded with particularity under Fed. R. Civ. P. 9(b).


48. Id. at 964.
owned and controlled by the two individual defendants. Sedima's role was to obtain orders for electronic component parts from a Belgian manufacturer, while Imrex was to place the orders, ship the goods, and account to Sedima. Sedima claimed that Imrex falsified purchase prices, costs, and expenses in shipping and financing; that it thereby misappropriated joint venture funds; and that it violated RICO, based on mail and wire fraud in the $8.5 million of orders secured by Sedima and placed through Imrex. These allegations brought Imrex and its two owner-executives expressly within the statutory proscription of "conducting . . . an enterprise through a pattern of racketeering (consisting of two or more uses of the mail and wire to defraud Sedima) or collection of unlawful debt (by obtaining money from Sedima through deliberately false pretenses). In addition to these two counts, Sedima alleged that the individuals and Imrex conspired to perform these RICO prohibitions. Sedima sought treble damages and reasonable attorneys' fees.

The sole reason for the dismissal by the district court was Sedima's failure to allege "any injury in this case apart from that which would result directly from the alleged predicate acts of mail fraud and wire fraud." Relying on a prior Second Circuit opinion, the court found that Sedima's claims "need not be grounded in allegations that the defendant is affiliated with 'organized crime' " and that "the racketeering enterprise need not have an economic significance apart from the pattern of racketeering activity." The district court made no reference to a requirement that the "predicate acts" had to be based on prior criminal convictions. No such claim was made in the district, nor in the circuit courts; and importantly, neither party filed any briefs on that subject.

49. Id.
50. Id.
51. In addition to other counts alleging such matters as breach of contract and fiduciary duties, conversion, and constructive trust, Sedima alleged three violations of RICO, 18 U.S.C. § 1962(c) (1982), prohibiting any person "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."
53. 18 U.S.C. § 1962(c) and (d) (1982).
54. Id. § 1964(c). This section provides in pertinent part: "property by reason of a violation of section 1962 . . . shall recover treble the damages he sustains etc."
57. The district court held only that the plaintiffs failed to show they were injured by anything more than the predicate acts. Sedima, 574 F. Supp. at 965.
B. Second Circuit Court of Appeals

Writing for a split panel, Judge Oakes started with a racy tirade against the “explosion” of civil RICO litigation, “spawned” by a broad reading of Professor Blakey’s law review article,58 with “special credence” deriving from the latter’s position as Chief Counsel to the Senate Subcommittee that proposed RICO.59 He said that such a reading gave federal jurisdiction,60 which allows for the bypassing of specific remedial schemes, as for securities, with the additional enticement of treble damages and attorney’s fees.61 He reported that “there is now indeed, a ‘RICO bar’ among some of whom it has been found that the stigma associated with the label ‘racketeering’ is a good settlement weapon.”62

Quoting RICO’s declared purpose in “dealing with the unlawful activities of those engaged in organized crime,” he attacked the use of RICO as “extraordinary, if not outrageous.”63 He declared that RICO “has not proved particularly useful for generating treble damage actions against mobsters by victimized businesspeople.64 It has, instead, led to claims against such respected and legitimate ‘enterprises’ as the American Express Co., E.F. Hutton & Co., Lloyd’s of London, Bear Stearns & Co. and Merrill Lynch, all of whom are named in published opinions.”65

With virtually no foundation, Judge Oakes declared that RICO’s

58. Blakey & Gettings, supra note 23. It is surprising that the Court failed to cite Professor Blakey’s very scholarly article on RICO: Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 NOTRE DAME L. REV. 237 (1982), in which some of the footnotes exceeded ten to twenty pages.

59. Normally, courts would welcome an article by a law professor, especially one so intimately involved in the formulation of important legislation.


61. The Securities Acts are not preemptive either expressly or impliedly. There are also alternate treble damage remedies under “little” FTC Acts, as in Massachusetts. (See Hickey v. Howard, 598 F. Supp. 1105 (D. Mass. 1984) (stock “churning” covered by MASS. GEN. LAWS ANN. Ch. 93A (West 1984) the “little” FTC) which provides for up to treble damages and attorneys’ fees. (MASS. GEN. LAWS ANN. §§ 9-11 (West 1984).

62. Sedima, 741 F.2d at 487 n.7.

63. Id. at 487.

64. Id. at 487-88.

65. Id. at 487. It is surprising to observe a noted jurist engaging in such sweeping factual statements for which there is not only no general knowledge, but in the face of an appellate record completely devoid of such evidence. To the contrary, the Sedima allegations, if proven, will establish repeated intentionally fraudulent business crimes of the worst kind; each of them is also amenable to common law or statutory punitive damages.
terms were "ambiguous," especially in such elements as to the required burden of proof for civil cases.\textsuperscript{66} That "ambiguous language" of the statute therefore required construction in the light of Congress' purpose, particularly since RICO's private action provision drew upon the exact words of another statute and expressly demanded "liberal construction . . . to effectuate its remedial purpose."\textsuperscript{67} He declared that this would require a study of its legislative history to guide the scope of the private civil remedy.\textsuperscript{68}

This transitional paragraph is noteworthy because nothing which precedes it discloses "ambiguous language." The congressional demand for "liberal construction" can not be fulfilled by emasculating the express terms of the statute. Also, the congressional record is very complete in indicating that the statute expressly avoided "status" related language due to the impossibility of adequately defining "organized crime," as well as the severe constitutional doubts implicit in any such declaration of criminality.

These arguments were raised in the Eighth Circuit about one month after Sedima and its two companion Second Circuit decisions.\textsuperscript{69} In the Eighth Circuit case, Alexander Grant & Company v. Tiffany Industries, Inc., (Grant), an accounting firm was held to have standing to sue its corporate client for direct injuries from lost fees, the cost of an SEC investigation, and damage to its financial reputation arising from the client's manipulation of its financial records in order to obtain a favorable audit for use in the market place.

First, Grant distinguished this claim from the lack of standing for an auditor's indemnification charges.\textsuperscript{70} The court then held that the civil remedy for "any person injured in his business or property by reason of a violation of section 1962" was based on "language [that] is unambiguous and conclusive, absent any clearly expressed legislative intent to the contrary."\textsuperscript{71} The Eighth Circuit refused to hold that any requirement of a "racketeering enterprise injury" resembled the "commercial or competitive injury concept" as well as applicability only to those defendants associated with organized crime.\textsuperscript{72} It stated, "[a] 'racketeering enterprise' injury is a slippery concept whose definition has eluded even those courts professing to

\textsuperscript{66} Sedima, 741 F.2d at 487.
\textsuperscript{67} Id.
\textsuperscript{68} See discussion, Sedima, 741 F.2d at 488-94.
\textsuperscript{69} Alexander Grant & Co. v. Tiffany Industries, Inc., 742 F.2d 408 (8th Cir. 1984), was decided August 22, 1984, while Sedima was decided July 25, 1984.
\textsuperscript{70} Cf. Cenco v. Seidman and Seidman, 686 F.2d 449 (7th Cir. 1982) with Grant. In Grant, the Eighth Circuit also stated that it was "not persuaded by the reasoning employed in Cenco." 742 F.2d at 411-12.
\textsuperscript{71} Grant, 742 F.2d at 412.
\textsuperscript{72} Id. at 413.
recognize it." Further, it held that both of those limitations had been rejected in an earlier Eighth Circuit case.

Besides refuting the elimination of damages resulting “directly” from the “predicate acts,” the Grant court noted the indirect injury in “increased harm” to the auditing firm through its being fraudulently induced to continue rendering accounting services. In so doing, it briefly referred to Sedima and its two companion decisions, declaring that the Eighth Circuit does not require “that the injury result from mobster activity or the efforts of organized crime,” as mandated in Sedima; that the Grant decision comports with the holding in Bankers Trust Co. v. Rhoades (Bankers Trust) though the latter is “far narrower”; and that the “prior criminal conviction” holding of Sedima had not been raised in the Grant district court, perhaps chiding the Sedima court for its unwarranted appellate intrusion on an issue not before it.

In Sedima, Judge Oakes then embarked on a ten page search of RICO’s legislative history, doing so entirely on his own and without the benefit of adverse parties’ claims or briefing. While he demonstrated that the private civil claim was proposed late in an otherwise lengthy congressional process, his use of that sparse record was totally inadequate to support his two conclusions, namely, that “Congress was not aware of the possible implications of section 1964(c) . . . [or it] would at least have discussed it,” and that “the clanging silence of the legislative history, coupled with the section’s use in areas far afield from the battle against organized crime” have led to a variety of judicial limitations.

This premise is manifestly erroneous on several grounds. First, where there is plain and clear language, the legislative history is, at best, a problematic tool of interpretation. Then declaring that Congress did not know what it was doing, Judge Oakes personally assumed the role of deciding what Congress would have intended if it had properly addressed its task. Such unsolicited “activism” has been at the core of attacks on judicial wandering from a court’s constitutional constraints. It has been firmly established that such judicial meandering is unprofessional and unwise.

Having determined that severe limitations on private civil actions
were therefore mandated, the court proceeded to discuss the four principal tasks taken by some courts and widely rejected by others. In singling out these four limitations, Judge Oakes predictably set the course for his two ultimate fiats.

The first, requiring some nexus with "organized crime," had already been rejected by the Second Circuit, as well as by almost every other appellate tribunal. With equal celerity, the Court disposed of the need to allege "competitive" or "racketeering injury." This left for discussion, first, the question "whether the injury complained of must result from 'enterprise' involvement in the racketeering, rather than directly form the activity itself" and second, "whether there must be criminal convictions from the predicate acts underlying a civil RICO suit."

Having narrowed the field to these two "strawmen," Judge Oakes first sought to eliminate any suggestion that the Supreme Court had decided either of these issues. He asserted that its leading decision on criminal application of RICO did not address either question, except for the inverse conclusion that the existence of the civil remedies did not limit the scope of the criminal provision. On that tenuous ground, the Second Circuit held that when the Supreme Court called for reliance on the clear and express language of the statute itself, plus the congressional direction of "liberal construction," it did so "only (sic)" as to the "balance between federal and state enforcement of criminal law," and not with regard to the intended scope of the private civil remedy. What every other circuit court has repeatedly cited as guidance for RICO's interpretation, was thus set aside by Judge Oakes in favor of his own resolution of the "very real ambiguities . . . surrounding the complex statutory scheme providing for the private civil remedy." He relied on a single district case for such authority. As an afterthought, the court simply footnoted the latest and most important Supreme Court RICO decision in which it held that the RICO seizure provi-

---

79. See Moss v. Morgan Stanley, Inc., 719 F.2d 5 (2d Cir. 1983). See also Sedima, 741 F.2d at 493 n.32, wherein the court lists numerous cases rejecting the organized crime nexus.
80. See Sedima, 741 F.2d at 493 nn.33-35 for a long list of citations (1) requiring a showing of a "competitive" injury or a "racketeering enterprise injury; and (2) refusing to impose limitations on RICO claimants.
81. Id. at 494-504.
82. Id.
84. Id. at 493.
85. Id. at 494.
86. Authority for a narrow reading of the private civil remedy was found in a dictum of Harper v. New Japan Securities International, Inc., 545 F. Supp. 1005, 1006 (C.D. Cal 1982).
sions are constitutional. Judge Oakes simply footnoted that in that decision, the Supreme Court had once again rejected a “narrow reading” of RICO’s criminal, rather than its civil provisions. In so doing, he ignored the common law principle of interpretation requiring stricter construction of a statute’s criminal provisions, as compared with that employed for its civil remedies. That general concept was fortified by the express congressional mandate of liberal construction for RICO, with no confinement of its use in criminal prosecutions.

In spite of the foregoing shortcomings, the discussion of “racketeering injury” relied on a carefully constructed analogy. Judge Oakes correctly reported that the “by reason of” phrase had been copied from section 4(a) of the antitrust laws; that the Supreme Court had imported the restriction of that broad language to the “competitive” conduct which was substantively prohibited; that, by analogy, a RICO injury had to be of the “racketeering” variety; and that in order not to be redundant, it had to “cause systemic harm to competition and the market, and thereby injure investors and competitors.” At the same time, the court expressly said that this does not mean that “standing to sue under RICO should be limited only to people who have standing to sue for competitive injury under the antitrust laws.” Evidently recognizing that he had been trapped by his own reasoning, Judge Oakes then shifted to the requirement “that the plaintiff 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.”

Aside from this “slippery concept” rejected by the Eighth Circuit in Grant, it should be noted that Judge Oakes shifted from the deficient allegations ruled upon by the district court in a motion to dismiss. In its place, he found an inadequate “showing” that could only be raised by a motion for summary judgment or after an actual trial. This distinction was particularly important where an appellate court found extreme difficulty in formulating a coherent legal

88. Sedima, 741 F.2d at 494 n.36.
89. See United States v. United States Gypsum Co., 438 U.S. 422 (1978), distinguishing the standard for “intent” in criminal proceedings under the Antitrust Laws, as contrasted with the principles used in civil proceedings under the identical statutory language.
90. In Russello v. United States, 104 S. Ct. 296, 302-03 (1983), the Court concluded that Congress intended RICO to be liberally construed in civil as well as criminal cases.
92. Sedima, 741 F.2d at 496.
93. Id.
94. Id.
standard and where the relevant circumstances could only be dis-
cerned in a fully developed factual record, buttressed by adversarial
claims and legal argument. None of these were before Judge Oakes.
This fundamental error should be compared with Haroco's treat-
ment of "pleading" versus "proof." 95
The most noteworthy holding of Sedima was its requirement that
the two "predicate acts" required two prior criminal convictions. 96
In obvious recognition of its radical departure from RICO's judicial
treatment elsewhere, the court stepped away from its earlier poetic
language and cavalier approach. Instead, it turned to the most met-
ticulous analysis of which it was capable. This included deference
to other appellate treatment, together with a parsing of the statutes'
"language" and "intent," and culminating in a summary of the total
composite of its opinion. 97
First, the court expressly recognized that a private civil suit
under RICO does not require a prior government conviction for a
RICO violation. 98 Further, it used contrived distinctions of the two
leading cases to support its own proposition. It claimed that the
first case, United States v. Cappetto 99 only confirmed the govern-
ment's right to obtain RICO injunctive relief without a prior RICO
conviction. The second leading case, Farmer's Bank of Delaware v.
Bell Mortgage Corp., 100 required no prior criminal conviction and
allowed proof for private RICO by a simple preponderance of the
evidence, but its only authority was Cappetto. 101 Both of these
holdings are tempered by the government's guidelines for
prosecutorial discretion in order to protect against RICO. 102 No
such restraint exists for private suits. A third authority was
USACO Coal Co. v. Carbomin Energy, Inc., 103 where the Sixth Cir-
cuit allegedly confused the lack of a need for a prior RICO criminal
conviction with the issue of prior criminal convictions for the two
predicate acts. 104

95. The Haroco court stated:
To establish its case at trial, a civil plaintiff must surely prove the acts of
racketeering, but the district courts in Bache Halsey Stuart Shields, Inc. v.
Tracy Collins Bank & Trust Co., 558 F. Supp. 1042 (D. Utah 1983) and Tay-
lor appear to have moved that requirement up to the pleadings stage. For
several reasons, we do not agree that such specificity is required at the plead-
ings stage.

96. Sedima, 741 F.2d at 496-504.
97. Id.
98. Id. at 496.
101. Id. at 1280.
102. 502 F.2d at 1355.
103. 689 F.2d 94 (6th Cir. 1982).
104. Id. at 95 n.1.
Finally arriving at statutory review, it first approached the “language,” conceding this to be the “proper place to begin analysis,” while leaving one to wonder why it took three quarters of the opinion to reach the obvious.\textsuperscript{105} The court scoured RICO for any language that varied from the antitrust model.\textsuperscript{106} It seized on the single word “violation” in section 1962, blowing this into the “suggestion” that Congress specifically intended to require prior “conviction, at least of the predicate acts.”\textsuperscript{107} It had more difficulty in disposing of the plain meaning of the statutory words “indictable” and “chargeable.”\textsuperscript{108} Judge Oakes was “shocked” that Congress might have ignored the need to show criminal willfulness, as well as the panorama of constitutional safeguards for those criminally charged.\textsuperscript{109} He argued that if the civil claim need only to be proven by a preponderance of the evidence, there could be a dangerous shift of responsibility away from a grand jury or a government prosecutor, making a private claimant his own “one-person grand jury” accusing a civil defendant of infamous misconduct.\textsuperscript{110}

Probing congressional intent, the court found other support for its unique interpretation, admitting that the ambiguities of the statutory language could go the other way.\textsuperscript{111} Here, the court simply declared that RICO was designed “to provide new penalties and remedies to combat conduct which explicitly was already found criminal.”\textsuperscript{112} It opted for this conclusion since in a broad reading, “problems are created of which there is no indication that Congress ever dreamed.”\textsuperscript{113} The first was the asserted incongruity of any standard of proof other than that beyond a reasonable doubt to establish criminality, even through clear and convincing evidence.\textsuperscript{114} This was buttressed by the “mystery” of alleged “probable cause.” He stated that if varying standards of proof had to be employed, it would be extraordinarily difficult for juries to understand and apply. Since Congress apparently anticipated the civil burden of proof, it must have assumed two “prior convictions.” Judge Oakes therefore concluded that the “liberal construction” mandated by the statute, violates the due process requirement of strict construc-

\textsuperscript{105} Sedima, 741 F.2d at 498.
\textsuperscript{106} Id. at 498-499.
\textsuperscript{107} Id. at 498.
\textsuperscript{108} Id. at 499.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 500.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 501.
\textsuperscript{114} Id.
tion of criminal statutes. The Court confirmed its disbelief of any other interpretation by reciting each of the individual points that had been unconvincingly urged throughout the opinion. It then demanded that if Congress otherwise intended, "we will (sic) require more explicit language from Congress indicative of such intent."

In cogent terms in his dissenting opinion, Judge Cardamone disagreed with virtually every argument advanced by the panel majority. He stressed the need for reliance on plain meaning; the absence of policy reasons to ignore statutory language; and the invasion of an area reserved for Congress. With regard to the need for a "prior conviction," he was especially critical of the sweeping disapproval of uniform prior authority; the plain meaning of "indictable" and "chargeable"; the raising of constitutional doubts for a "quasi-criminal" statute; the fear of stigmatizing defendants in civil actions; and hanging this radical departure on the single use of the word "violation" in section 1964 of RICO.

Undoubtedly, the strongest of these was the clear congressional intent to compensate victims of racketeering activity and to encourage them to vindicate their rights. As "private attorneys general," civil RICO plaintiffs aid in the eradication of such activity. To require two prior criminal convictions of predicate acts would, in essence, wipe out this fundamental congressional purpose, without any clear indication that such debilitation was intended.

In the second part of the dissent, equally forceful arguments were posed against the requirement of "racketeering injury." Besides its widespread rejection by other courts, the phrase provides little or no guidance. Further, it would bar recovery for direct injury from fraud, while compensating only those indirectly impacted. Congress could hardly have intended such a result and the syllogism is condemned in the enforcement of the antitrust laws. Congress consciously chose a broad remedy in order to stamp out mobster activity, encouraging private litigants to contribute their support. These restrictions would emasculate the congressional grand scheme of enforcement. In addition to his remarks in this dissent, Judge

116. *Sedima, 741 F.2d* at 504.
117. *See generally Sedima, 741 F.2d* at 504-08.
118. *Id.*
119. *Id.*
120. *Id.* at 505. The Court stated: "Ordinarily more, not less, protection is expected for a defendant when the government is plaintiff. When the plaintiff is a private party . . . . the quick dismissal of *Capetto* totally ignores the 'private attorney general' rationale built into RICO."
121. *Id.* at 508-10.
122. *Id.* at 510.
Cardamone expanded his criticism in one of the Sedima companion cases, *Furman v. Cirrito*, disclosing that prior to publication, a majority of the sitting judges had voted against a rehearing en banc.

### III. The Haroco Case

The Seventh Circuit directly contested the holdings of Sedima and its sister decisions, expressly noting that not a single sitting judge voted for reconsideration of Haroco en banc. The district court dismissed for failure to allege RICO injury beyond the direct losses caused by the mail fraud. The claimants asserted that they had borrowed large sums of money from the defendant bank, based on a stated relation to the so-called prime rate used for borrowing by the bank's best customers. The only damage arose from the extra costs which were directly caused by the alleged falsity of the defendants' statements as to the prime rate.

As for the section 1964 (c) claim here asserted, the circuit court segregated the issue of "racketeering injury" from the basic statutory requirements of a defendant's "employment or association" with an "enterprise" in or affecting interstate commerce, by conduct of the enterprise's affairs through a pattern of racketeering activity, based on two or more "predicate acts." The court noted the Second Circuit's Sedima trilogy, as compared with several opposite rulings by other circuits. Since both views claimed to rely on the plain statutory language, more analysis was required.

Aside from the widespread failure to define "racketeering enterprise injury" by those courts that have adopted it, the Eighth Circuit had also considered it a "slippery concept," while those that have rejected it have expressly remarked on the lack of explanation and the difficulty of definition as major reasons for its rejection. Since the recent Second Circuit trilogy relied on an "amalgamation of proposed limits on RICO that [it] rejected in Schacht v. Brown (Schacht)," the Haroco court declined to follow its rulings. The Haroco court relied on the very expansive public policies expressly approved by the Supreme Court in *United States v.*

---

123. 741 F.2d 524 (2d Cir. 1984).
126. Haroco, 747 F.2d at 385.
127. Id. at 387.
128. Id. at 388-89.
129. See Grant, 742 F.2d at 413.
131. 711 F.2d 1343 (8th Cir.), cert. denied, 104 S. Ct. 508, 509 (1983).
132. Haroco, 747 F.2d at 388.
Turkette and relied upon in Schacht. Those courts reaffirmed Congress' full knowledge of what it was doing to assault a problem of national dimensions in which prior federal and state process had failed, thereby denying courts the authority to restrict RICO's application. In spite of sparse legislative history, Congress "chose civil remedies for an enormous variety of conduct, balancing the need to redress a broad social ill against the virtues of tight, but possibly overly stringent, legislative draftsmanship." Further, Congress had expressly foreclosed the use of a "principled criterion" to circumscribe RICO by its express rejection of: (1) references to "organized crime"; (2) the need to show competitive impact, as against its deliberate intent to go much further in RICO; and (3) restricting recovery to those who are "indirect" victims of racketeering activity. Such limitations would impugn Congress' attack on the sources of organized crime's economic power by separating racketeers from their profits. If restricted to direct damages, victims could not recover their major contributions to the racketeers' profits. While rejecting the Sedima trilogy, the Haroco court felt impelled to update its own analysis.

The Court carefully parsed each factual and legal step in Sedima's conclusion that "racketeering injury" was required. The overall opinion was that Sedima had revived the discredited organized crime nexus by requiring allegation of injury "from mobster activity or the efforts of organized crime." Sedima expressed its "shock and dismay" that RICO allegations have labeled as racketeers legitimate enterprises. To this, Haroco quoted Judge Pratt in Furman v. Cirrito: "It seems almost too obvious to require statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm."

While Schacht refused to restrict recovery to injury from "organized crime," Sedima chose that course, though it used the comparison word "racketeering." Sedima focused on "competitive," plus some vaguely "other" indirect injury, both of which were also rejected by Schacht. "Systemic harm to competition" is, therefore, indistinguishable, while it also fails to aid the direct victims of rack-

134. Schacht, 711 F.2d at 1353.
135. Id. at 1354-55.
136. Id. at 1358.
138. Haroco, 747 F.2d at 392.
139. See supra note 65 and accompanying text.
140. Haroco, 747 F.2d at 395 n.14 (citing, Furman v. Cirrito, 741 F.2d 524, 529 (2d Cir. 1984)).
141. Sedima, 741 F.2d at 495-96.
eteering. There is no valid distinction between injury from a “pattern” of predatory acts and direct injury from those acts. Haroco also noted the inconsistency of Second Circuit rulings in Bankers Trust and Sedima, the former going further by adopting a meaningless “but for” test that would have excluded the primary victims of the predatory acts in Schacht. If accepted, Bankers Trust would “reduce RICO’s civil provisions to a trivial remedy, available in only a tiny fraction of RICO violations and dependent upon entirely fortuitous facts.”

The Haroco court also noted Judge Cardamone’s decrying in Bankers Trust that if civil RICO provided no remedy “on the facts of this totally outrageous case, it never will.”

While therefore adhering to its Schacht conclusion that a civil RICO plaintiff need neither allege nor prove more than direct injury, it reaffirmed that the phrase “by reason of” required proof of causation of injury, either directly or indirectly, by the “chargeable” criminal conduct.

It concluded by stressing the fundamental conflicts between Schacht and Sedima. The Seventh Circuit found RICO “not ambiguous,” but “deliberately and extraordinarily broad,” thereby accounting for its sometime unusual applications. Congress deliberately chose broad terms for conduct and participation that would defy judicial confinement. While Congress may not have anticipated the results, it was Congress that preferred breadth to precision. Courts cannot impose special standing and injury requirements where Congress was neither careless nor inartful, it being exclusively for Congress to alter legislation. It concluded that “particularly at the pleading stage,” the court should not challenge explicit congressional policies in the face of much smaller stakes such as “legal fees and the sensibilities of prominent defendants alleged to be racketeers.”

Pursuant to these broad purposes, Haroco also proceeded to define the various roles that an “enterprise” could perform, such as “victim, prize, instrument, or perpetrator,” relying on Professor Blakey’s article. The court expressly rejected a requirement that a victim must both allege and prove in his complaint the probable

142. Haroco, 747 F.2d at 398.
143. Bankers Trust, 741 F.2d at 518. The Haroco court noted that “the plaintiff in Bankers Trust had already proven a substantial portion of its allegations in other court proceedings. Haroco, 747 F.2d at 398 n.15.
144. Haroco, 747 F.2d at 398.
145. Id. at 398-99.
146. Id. at 399.
147. Id. at 399-400 (citing, Blakey, The Civil RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 307-25 (1982)).
cause aspect of the crimes specified as the two predicate acts.\textsuperscript{148} It declined to decide on a bare record the nature of the burden of proof, while noting that in civil matters, this is usually achieved by a preponderance of the evidence.\textsuperscript{149} For the "particularity" required by Rule 9(b) of the Federal Rules of Civil Procedure, the court found adequate the "fair notice" standard as to the transactions, the scheme, the time and the place.\textsuperscript{150}

\textbf{CONCLUSION}

Given the breadth of choices and the serious policy issues involved in the conflict between \textit{Sedima} and \textit{Haroco}, predictions may not serve a valid purpose. It is relevant to note that all of the courts share the public policy goals underlying RICO, but that they differ radically in the application of the civil remedy. In balance, the scales appear to favor the \textit{Haroco} court, joined by Judge Cardamone's dissent in the \textit{Sedima} trilogy.

In the meantime, litigants are confronted with some unusual procedural challenges. Where venue is limited to the Second Circuit, plaintiffs should be cautioned on the need to include civil RICO counts. Though they may either be dismissed or suspended pending Supreme Court action on \textit{Sedima}, failure to do so may raise grave issues under the time barriers of the applicable Statutes of Limitations.

Alternatively, given the high mobility and national character of much of the nation's business activity, claimants may have access to more than one choice of venue, with the Seventh or Eighth Circuits obviously providing high attraction. RICO materially contributes to such litigation by its generous nationwide grant of personal jurisdiction over both individuals and corporations. There are other important choices, including resort to the "little" RICO statutes in half of the states. While the application of such statutes may be somewhat guided by federal court rulings, some important state jurisprudence has already demonstrated independence.\textsuperscript{151}

It is fair to predict that Congress will initiate preliminary hearings. It is, however, unlikely that definitive legislative action will occur prior to the Supreme Court's ruling on \textit{Sedima} and \textit{Haroco}. RICO has had remarkable success in challenging organized crime.

\textsuperscript{148} Id. at 404.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 405.
\textsuperscript{151} See, e.g., State of Arizona v. Pickrel, 667 P.2d 1304 (Ariz. 1983) in which the state supreme court declared that Arizona's RICO statute cannot raise the question of federalizing "garden variety" fraud. In view of its express approval of liberal construction of the statute, it is very doubtful that it would accept the narrow reading of \textit{Sedima}, regardless of its interpretation by the United States Supreme Court.
So long as the statute is fulfilling its purpose better than any prior mechanism, it is unlikely that Congress will tamper with such a favorable record.

As with many other statutes that are imbued with strong public policy, it is essential to employ every means available to eradicate racketeering evils. Since the government has a limited capacity to obtain compliance, it is especially important to encourage private attack through the mandatory award of treble damages, plus the assessment of counsel's fees. In this way, at least some of the victims of criminal conduct may recover monetary damages for their suffering. The Congressional mandate of a private remedy would become virtually meaningless if the "predicate acts" required prior criminal conviction or if civil damages were either limited to or triggered solely by recovery for "indirect" injury. A fair and plain reading of RICO abundantly establishes that Congress did not favor either of these contrived limitations.

152. The Supreme Court has construed the antitrust laws to prohibit recovery by "indirect" purchasers, noting the serious difficulty in separately quantifying the value of their damages, plus the probability that indirect claimants are unlikely to bring suit. Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46 (1977). See J. Truett Payne Co., Inc. v. Chrysler Motors, Corp., 451 U.S. 557, 565 (1981) (in order to satisfy the broad public policy of the antitrust laws, more leniency is allowable for proof of causation of some competitive harm, as well as for the amount of damages, based on the need to preclude the violator from gaining any benefit from his misfeasance).