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Escaping the RICO Dragnet in Civil Litigation: Why Won’t the Lower Courts Listen to the Supreme Court?

Michael P. Kenny*

I. INTRODUCTION

The spectre of being sued under the Racketeer Influenced and Corrupt Organization Act (hereinafter “RICO”) and of being labeled a “racketeer” strikes fear in the hearts of individuals and firms.1 Congress enacted RICO primarily as a blitzkrieg on organized crime,2 but it now encompasses pedestrian fraud claims and is ubiquitous in civil litigation.3 The reasons are threefold: (1) the statute itself is hopelessly confusing and thus susceptible of manifold interpretations;4 (2) the Supreme Court has accepted Con-

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1. 18 USC §§ 1961 et seq. The Supreme Court has cavalierly dismissed the notion that the “racketeer” label is of special significance. See Sedima, S.P.R.L. v Imrex Co., 473 US 479, 492 (1985) (“As for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings”).


3. Based on an empirical review of civil RICO cases, Professors Blakey and Cessar concluded that in 1986, 54.9% of all civil RICO cases involved common law fraud. G. Robert Blakey & Scott D. Cessar, Equitable Relief under Civil RICO: Reflections on Religious Technology Center v Wollersheim: Will Civil RICO Be Effective Only against White-Collar Crime?, 62 Notre Dame L Rev 526, 619-22 (1987). See also Chief Justice William H. Rehnquist, Reforming Diversity Jurisdiction and Civil RICO, 21 St Mary’s L J 5, 9 (1989) (“Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970. Most of the civil suits filed under the statute have nothing to do with organized crime. They are garden-variety fraud cases of the type traditionally litigated in state courts”).

4. Justice Scalia has criticized RICO’s vagueness and has intimated that RICO would be unable to withstand constitutional challenge. See H.J. Inc. v Northwestern Bell Tel. Co., 492 US 229, 251-56 (1989) (Scalia concurring). Justice Scalia’s opinion, which was joined by Chief Justice Rehnquist and Justices O’Connor and Kennedy, has served as the catalyst for such constitutional challenges. See notes 87-89 and accompanying text.
gress' instruction that RICO is to be "read broadly"; and (3) the rewards for victorious plaintiffs are alluring—treble damages, litigation costs, and reasonable attorney's fees.5

The recent explosion of civil RICO lawsuits, ironically, has been an unintended consequence of an awkward statute designed to ferret out the infiltration of legitimate businesses by organized crime.7 Section 1964(c) of RICO, which creates a private right of action, was an eleventh-hour addition that "was debated only briefly," and was described by Senator McClellan, the bill's co-sponsor, as a "minor change."8 Based on RICO's legislative history, Congress included the private cause of action merely as "an additional weapon to use against the corrupt infiltration of legitimate commercial activities by organized crime."9

The Supreme Court, however, has steadfastly refused to interpret RICO as an "organized crime" statute.10 In United States v

5. See, for example, Sedima, S.P.R.L., 473 US at 497 ("RICO is to be read broadly").

6. See 18 USC § 1964(c) (1988) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"). The lower courts have also held that there is no right of contribution under RICO. See, for example, Minpeco, S.A. v ContiCommodity Servs., Inc., 677 F Supp 151, 154-55 (S D NY 1988); Miller v Affiliated Financial Corp., 624 F Supp 1003, 1004 (N D Ill 1985). Thus, RICO plaintiffs enjoy interro rem tactical advantages in RICO cases. Compare Sedima, S.P.R.L., 473 US at 506 (Marshall dissenting) ("Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils it was designed to combat").

7. See notes 2-3. See also the "Statement of Findings and Purposes" of RICO, Pub L No 91-452, 84 Stat 922, 923 (1970) (purpose of RICO is "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime"). As one commentator has noted, "Between 1970 and 1985, only 300 civil RICO cases were filed. . . . there were 614 filings in 1986, 1095 cases in 1987, and 957 cases in 1988." William J. Hughes, RICO Reform: How Much Is Needed?, 43 Vand L Rev 639, 644 (1990).

8. See Note, Clarifying a Pattern of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement, 86 Mich L Rev 1745, 1767 (1988). See also Hughes, 43 Vand L Rev at 677-78 (cited in note 7) ("Everyone who has examined the legislative history of RICO, with the exception of Professor G. Robert Blakey, has pointed out that Congress added the private civil treble damages remedy to RICO with virtually no consideration of its purpose or consequences").

9. Note, 86 Mich L Rev at 1768 (cited in note 8). As the Second Circuit has noted, "The most important and evident conclusion to be drawn from the legislative history is that Congress was not aware of the possible implications of section 1964(c)." Sedima, S.P.R.L. v Imrex Co., 741 F2d 482, 492 (2d Cir 1984), rev'd, 473 US 479 (1985).

10. The Supreme Court's refusal to interpret RICO as an organized crime statute is curious considering that, as Justice Powell observed, the Court in "Turkette and Russello
Turkette,\textsuperscript{11} the Court rejected the argument that RICO was intended solely to protect legitimate business enterprises from infiltration by organized crime (\textit{i.e.}, "racketeers"), and held that RICO applies both to "legitimate" and "illegitimate" enterprises.\textsuperscript{12} In Sedima, S.P.R.L. \textit{v} Imrex Co.,\textsuperscript{13} the Court held that a RICO plaintiff does not have to allege and prove that the defendant had previously been convicted of predicate acts of racketeering,\textsuperscript{14} nor does a RICO plaintiff need to allege and prove that he suffered "racketeering injury."\textsuperscript{15}

The Sedima, S.P.R.L. Court acknowledged that "private civil actions under [RICO] are being brought almost solely against [respectable businesses], rather than against the archetypal, intimidating mobster."\textsuperscript{16} The Court also acknowledged, by way of understatement, that "RICO is evolving into something quite different from the original conception of its enactors."\textsuperscript{17} Nonetheless, the Court made it clear that RICO's "breadth" (the Court preferred "breadth" to "vagueness") provides no justification for a judicial rewriting of the statute.

Yet, this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private right of action in situations where Congress has provided it simply because plaintiffs are now taking advantage of its more difficult applications.\textsuperscript{18}

Most recently, the Supreme Court in \textit{H.J. Inc. \textit{v} Northwestern Bell Tel. Co.}\textsuperscript{19} held that RICO does not require, in order to establish a "pattern of racketeering activity," allegations and proof of multiple schemes of racketeering activity.\textsuperscript{20} The Court once again read RICO "broadly," but failed to articulate a principled method of determining when a pattern of racketeering has been established, noting instead that the "development of [the "relationship"
and "continuity" concepts] must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to [RICO's] intended scope." The Court, also following Sedima, S.P.R.L., rejected a "pinched construction" of a statute that "may be poorly drafted," because "rewriting it is a job for Congress, if it is so inclined, and not for this Court."  

Although the Supreme Court has consistently refused to limit the RICO dragnet, numerous lower federal courts have pinched and pruned the statute considerably. Paradoxically, many of the restrictive interpretations are based on the language of Section 1964(c), which creates a private right of action. RICO provides for a civil remedy to "any person injured in his business or property by reason of a violation of section 1962." With increasing frequency, courts have required RICO plaintiffs to prove more than "but for" factual causation, and have required them to prove that a defendant's violation of one or more of the substantive provisions of RICO proximately caused injury to the plaintiff's business or property. Quietly, but not so subtly, many lower federal courts have ignored the Supreme Court's admonition to interpret RICO broadly, and have placed numerous obstacles in the way of private enforcement of the statute.  

In addition to the potent standing and proximate cause defenses that are available in many jurisdictions, some courts require RICO plaintiffs to plead schemes to defraud with particularity. Other
courts require plaintiffs, usually soon after complaints are filed, to respond to so-called RICO Case Statements which require plaintiffs to allege in detail the factual bases of their RICO allegations.  

Another defense that prevents RICO plaintiffs from getting past the pleadings is that the plaintiff failed to distinguish the so-called "enterprise" from the alleged pattern of racketeering activity. Courts have also dismissed cases where a plaintiff has named the defendant as the enterprise on the grounds that a defendant cannot associate with himself.

This latter defense has been raised in cases brought under Section 1962(c), which makes it unlawful for a "person" to conduct the affairs of an enterprise through a pattern of racketeering activity.

A quiet revolution of sorts is underway over the proper interpretation of Section 1962(a), with the Second, Third, and Tenth Circuits leading the charge. Each of these circuits has held that a plaintiff has standing to raise a claim under Section 1962(a) only if he can show that his alleged injury was proximately caused by the defendant's investment or use of income in an enterprise, which income was derived through a pattern of racketeering activity.

The Fourth Circuit, as the defender of the ancient regime, has correctly noted that if these holdings are followed, "corporate liability under RICO will be eviscerated." The Fourth Circuit has also correctly noted that such an interpretation of Section 1962(a) "conflicts with the explicit policy that RICO be liberally inter-

Supp 92, 97 (D Or 1985) ("RICO's in terrorem effect is potent, in that a RICO defendant faces the unsavory label 'racketeer' as well as the risk of triple damages... a RICO plaintiff should plead the facts constituting the predicate offenses with the particularity required by Rule 9(b)"); Saine v A.I.A., Inc., 582 F Supp 1299, 1306 n 5 (D Colo 1984) ("a charge of racketeering, with its implications of links to organized crime, should not be easier to make than accusations of fraud. RICO should not be construed to give a pleader license to bully and intimidate nor to fire salvos from a loose cannon").

28. See, for example, Marriott Bros. v Gage, 912 F2d 1105, 1107 (6th Cir 1990).

29. See, for example, United States v Bledsoe, 674 F2d 647, 664 (8th Cir 1982) (if the "enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts"); Landry v Air Line Pilots Ass'n Int'l AFL-CIO, 901 F2d 404, 433 (5th Cir 1990), cert denied, 111 S Ct 244 (1990).

30. See note 109.


32. See, for example, Ouaknine, 897 F2d at 83; Rose v Bartle, 871 F2d 331, 356-57 (3d Cir 1989); Grider v Texas Oil & Gas, 868 F2d 1147, 1149 (10th Cir), cert denied, 110 S Ct 76 (1989). See also Old Time Enterprises, Inc. v International Coffee Corp., 862 F2d 1213, 1219 (5th Cir 1999); Craighead v E.F. Hutton & Co., 899 F2d 485, 494 (6th Cir 1990).

The Fourth Circuit's solution, however, relies on a dubious reading of Section 1964(c), obliterates the distinction between Section 1962(a) and Section 1962(c), and manufactures a federal common law cause of action for mail fraud and wire fraud.\textsuperscript{35}

Dialectical tensions engendered by the specific provisions of RICO have manifested themselves more generally in the form of constitutional challenges. These challenges, spurred in large part by Justice Scalia's concurring opinion in \textit{H.J. Inc.},\textsuperscript{36} are based on the argument that RICO is unconstitutionally vague.\textsuperscript{37} As Judge Mikva has accurately observed, "Since logic was not the coin of the realm when Congress drafted and debated RICO, \ldots{} logic has not proven to be a very useful tool in interpreting the statute."\textsuperscript{38} Justice Scalia put the matter even more succinctly: RICO's vagueness is "intolerable."\textsuperscript{39}

The late Professor Lon Fuller, who wrote eloquently about the "immorality" of obscure and vague laws, could have been writing about RICO. In his famous allegory from \textit{The Morality of Law}, Professor Fuller wrote about a monarch named Rex who took to the throne.

Rex came to the throne filled with the zeal of a reformer. He considered the greatest failure of his predecessors had been in the field of law. For generations the legal system had known nothing like a basic reform. \ldots{} Rex now realized that there was no escape from a published code declaring the rules to be applied in future disputes. Continuing his lesson in generalization, Rex worked diligently on a revised code, and finally announced that it would shortly be published. This announcement was received with universal gratification. The dismay of Rex's subjects was all the more intense, therefore, when his code became available and it was discovered that it was truly a masterpiece of obscurity. Legal experts who studied it declared that there was not a single sentence in it that could be understood either by an ordinary citizen or by a trained lawyer. Indignation became general and soon a picket appeared before the royal palace carrying a sign that read, "How can anybody follow a rule that nobody can understand?"\textsuperscript{40}

\textsuperscript{34} Busby, 896 F2d at 838.
\textsuperscript{35} See notes 135-46 and accompanying text.
\textsuperscript{36} \textit{H.J. Inc.}, 492 US at 251-56 (Scalia concurring).
\textsuperscript{37} See, for example, notes 87-99 and accompanying text.
\textsuperscript{38} \textit{Yellow Bus Lines Inc. v Local Union} 639, 913 F2d 948, 957 (DC Cir 1990) (Mikva concurring).
\textsuperscript{39} 492 US at 255.
\textsuperscript{40} Lon Fuller, \textit{The Morality of Law} at 33, 35-36 (Yale Univ. Press, 1969). Echoing a similar sentiment, Ortega y Gasset wrote, "Barbarism is the absence of standards to which appeal can be made." Gasset, \textit{The Revolt of the Masses} at 79 (Notre Dame Univ. Press, 1985).
Escaping RICO Dragnet

Rex wisely withdrew his code. Unfortunately, RICO, which is just as obscure as Rex's code, is still with us. Congress' admonition that RICO be liberally construed has been pickled in the preserving juices of Supreme Court precedent, but in many instances the lower courts do not seem to take heed. As a result, while RICO is a doctrinal muddle, its apparent breadth is matched only by the efforts many lower courts have made to narrow the dragnet.

This article will proceed first by providing an overview of RICO, and will then analyze the various defenses the lower courts have made available to defendants to parry RICO assaults. The article will also argue that many of these defenses, while a welcome relief from the RICO onslaught, are inconsistent with the Supreme Court's admonition that RICO be interpreted broadly, but that such "RICO tinkering" is probably unavoidable in light of RICO's obscurantism.

II. STATUTORY OVERVIEW

RICO provides for a civil remedy—treble damages, costs and attorney's fees—to "any person injured in his business or property by reason of a violation of Section 1962." To establish a claim for damages under RICO, a private plaintiff must prove that the defendant violated the substantive RICO statute, commonly known as "criminal RICO." Criminal RICO proscribes four types of activities. Section 1962(a) prohibits the use or investment of income derived from a "pattern of racketeering activity" to acquire or operate an interest in an "enterprise." Section 1962(b) prohibits acquiring or maintaining an interest in or control of an enterprise through a pattern of racketeering activity. Section 1962(c) prohibits conducting or participating in the affairs of an enterprise through a pattern of racketeering. Finally, Section 1962(d) makes it unlawful to conspire to violate any of the substantive provisions of criminal RICO.

"Racketeering activity" refers to the commission of any of the state and federal offenses enumerated in 18 USC § 1961(1). These offenses, the so-called "predicate acts," enable private plain-
tiffs to allege that almost any type of business fraud constitutes racketeering activity within the meaning of RICO. The three most commonly alleged predicate acts in RICO litigation are mail fraud, wire fraud, and fraud in the sale of securities.

Congress’ definition of a “pattern of racketeering activity” under RICO is minimalist indeed: a pattern of racketeering activity “requires at least two acts of racketeering activity” which were committed within ten years of each other, and one of which occurred since the enactment of the statute (i.e., 1970). Congress made virtually no effort to define or state the meaning of this concept, but instead merely provided the courts with the broadest contours with which they could, presumably, develop some meaningful concept.

The lower courts have made valiant attempts to give meaning to this so-called definition of “pattern of racketeering activity,” but the results have been unsuccessful, and plaintiffs in most jurisdictions enjoy great latitude with this flexible requirement.

III. ELEMENTS OF A PRIVATE CAUSE OF ACTION UNDER RICO

A plaintiff must prove the following elements to make out a private cause of action under RICO:

48. Sedima, S.P.R.L., 473 US at 500 ("The 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses . . . "). Id. In dissent, Justice Marshall complained that the "Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of fraud, and it approves the displacement of well-established federal remedial provisions." Id at 501 (Marshall dissenting).

49. Id, ("The single most significant reason for the expansive use of civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud violations"). See also note 3. In Securities Investor Protection Corp. v Vigman, 908 F2d 1461, 1466 (9th Cir 1990), cert granted, Holmes v Securities Investor Protection Corp., 111 S Ct 1618 (1991), the Ninth Circuit reversed the dismissal of a RICO claim based on securities fraud where the plaintiff was neither a purchaser nor seller of securities, holding that the RICO statute has no purchase-seller standing requirement. But see International Data Bank, Ltd. v Zepkin, 812 F2d 149 (4th Cir 1987) (corporation lacks standing to bring RICO claim based on securities fraud in relation to prospectus because corporation neither purchased nor sold securities).

50. 18 USC § 1961(5).

51. Compare Friedrich August von Hayek, The Road to Serfdom at 78 (U of Chi Press 1944) ("One could write a history of the decline of the Rule of Law . . . in terms of the progressive introduction of these vague formulas [i.e., "fair" and "reasonable"] into legislation and jurisdiction, and of the increasing arbitrariness and uncertainty of, and the consequent disrespect for, the law and the judicature").

52. See notes 55-67 and accompanying text. In Sedima, S.P.R.L., the Court held, on the one hand, that RICO is to be read broadly and lamented, on the other hand, that civil RICO has been put to "extraordinary" uses, in part because of Congress' failure "to develop a meaningful concept of 'pattern.'" 473 US at 497, 500. One obvious response is: if that which is to be interpreted is not understood, how can it be interpreted liberally, conservatively, or any other way?
prima facie case under RICO: (1) a pattern of racketeering activity or the collection of an unlawful debt; (2) the existence of an "enterprise" raised in or affecting interstate or foreign commerce; (3) a causal nexus between the pattern of racketeering activity and the enterprise; and (4) an injury to his business or his property by reason of the above.

A. Proving a Pattern of Racketeering Activity

1. Judicial Activity Prior to the Supreme Court’s Opinion in H.J. Inc.

Prior to the Supreme Court’s opinion in *Sedima, S.P.R.L.*, some courts held or assumed that two acts of racketeering activity satisfied RICO’s statutory definition of pattern of racketeering activity as long as the acts were related. In *Sedima, S.P.R.L.*, the Court in dicta suggested that two acts of racketeering activity are not enough to establish a pattern of racketeering activity. In footnote fourteen, the Supreme Court observed:

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in Section 1961 in that it states that a pattern "requires at least two acts of racketeering activity," § 1961(5) . . . not that it "means" two such acts. The implication is that while two racketeering acts are necessary, they may not be sufficient. Indeed, in common parlance, two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." Similarly, the sponsor of the Senate Bill, after quoting this portion of the Report, pointed out to his colleagues that '[t]he term 'pattern' itself requires a showing of a relationship. . . . proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteris-

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56. 473 US at 496 n 14.
tics and are not isolated events." This language may be useful in interpret-
ing other sections of the Act.\textsuperscript{57}

Later on in the opinion, the Supreme Court, again in dicta, stated:

We nonetheless recognize that, in its private civil version, RICO is evolving
into something quite different from the original conception of its enactors.
. . . The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern."\textsuperscript{58}

The court in \textit{Sedima, S.P.R.L.} did not attempt to develop a meaningful concept of pattern because the issue was not before it.\textsuperscript{59} The lower federal courts, left to their own devices, struggled to give meaning to this confused jargon, but their efforts degenerated into RICO babel. The Supreme Court's recent opinion in \textit{H.J. Inc.}, while ostensibly deciding the pattern issue, sheds little guidance on the question: what conduct is necessary to satisfy RICO's pattern requirement?

After \textit{Sedima, S.P.R.L.}, the federal courts divaricated in their attempts to give meaning to RICO's "pattern" requirement. Some courts held that where the predicate acts were all committed in furtherance of a single scheme, there could be no continuity among them and thus the pattern requirement was not satisfied.\textsuperscript{60} The Supreme Court rejected this theory in \textit{H.J. Inc.}\textsuperscript{61} The distinct minority view looked to the number of predicate offenses to determine if a pattern of racketeering activity had been established, and if two related acts pursuant to a single scheme had been committed, a pattern of racketeering activity had been established.\textsuperscript{62} Although the \textit{H.J. Inc.} Court rejected such a minimalist requirement, it did not reject \textit{per se} single schemes to defraud.\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{57} \textit{Sedima, S.P.R.L.}, 473 US at 496 n 14.
\item \textsuperscript{58} Id at 500.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} See, for example, \textit{Superior Oil Co. v Fulmer}, 785 F2d 252 (8th Cir 1986); \textit{Schreiber Dist. Co. v Serv-Well Furniture Co.}, 806 F2d 1393, 1399 (9th Cir 1986). Compare the United States Department of Justice's \textit{RICO Guidelines, United States Attorneys' Manual} § 9-110.340 (1990) (prohibiting DOJ attorneys from basing Section 1962(c) RICO indictments on a pattern of racketeering activity arising out of a "single criminal episode or transaction").
\item \textsuperscript{61} \textit{H.J. Inc.}, 492 US at 236.
\item \textsuperscript{62} See, for example, \textit{Beauford v Helmsley}, 865 F2d 1386 (2d Cir), cert denied, 110 S Ct 539 (1989); \textit{Bank of Am. Nat'l Trust & Sav. Ass'n v Touche Ross & Co.}, 782 F2d 966, 971 (11th Cir 1986). This view is certainly the "broadest" interpretation of Section 1961(5), and is, arguably, the most faithful to the text of that statutory provision.
\item \textsuperscript{63} \textit{H.J. Inc.}, 492 US at 236-39.
\end{itemize}
Most courts had rejected any bright line "pattern" test and had opted instead to decide the issue on a case-by-case basis. In *Sedima, S.P.R.L.*, the Supreme Court emphasized that it is "continuity plus relationship which combine to produce a pattern." The Second and Eleventh Circuits, in effect, ignored the continuity aspect of the pattern requirement and focused exclusively on the relationship aspect of that requirement.

The majority of the federal courts, however, required plaintiffs to show both continuity and relationship among the predicate acts.

2. *The Supreme Court's H.J. Inc. Opinion*

The Supreme Court in *H.J. Inc.* attempted to provide more guidance to RICO's pattern requirement, but, as Justice Scalia's concurring opinion satirically observed, the majority's "guidance" seemed "about as helpful to the conduct of their affairs as 'life is a fountain.'" In *H.J. Inc.*, the Eighth Circuit affirmed the district court's dismissal of a complaint for failure to state a cause of action because the complaint had only alleged a single scheme to defraud. The Supreme Court reversed, holding that RICO does not require allegations and proof of multiple schemes.

The Supreme Court rejected such a restrictive construction of RICO, and it also rejected the view that "a pattern is established merely by proving two predicate acts." Thus, although the Court disposed of polar opposites, it failed to articulate a meaningful standard for determining when a pattern of racketeering has been established. Instead, the Court despaired that the development of such a standard "cannot be fixed in advance with such clarity . . . [and] must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope."

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64. See, for example, *International Data Bank, Ltd. v Zepkin*, 812 F2d 149, 154 (4th Cir 1987); *Lipin Enterprises, Inc. v Lee*, 803 F2d 322, 324 (7th Cir 1986); *Barticheck v Fidelity Union Bank/First Nat'l State*, 832 F2d 36, 38-39 (3d Cir 1987).
66. See note 62.
67. See note 64.
69. Id at 236.
70. Id.
71. Id at 243. Even though the Court recognized that "[w]e are called upon in this civil case to consider what conduct meets RICO's pattern requirement," id at 232, the Court could do no better than to throw up its hands and hope that tomorrow would be a clearer
Justice Brennan, writing for the majority, acknowledged the amorphousness of the statutory pattern concept by euphemistically noting that "Congress indeed had a fairly flexible concept of a pattern in mind." This flexibility supposedly is given shape by the tension between the concepts of "relatedness" and "continuity," so that, "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicate acts are related, and that they amount to or pose a threat of continued criminal activity." Although this would-be talismanic "standard" has a ring of firmness as it rolls off the tongue, its explication manifests an inherent formlessness.

The Court defined "relatedness" as:

[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

The H.J. Inc. Court did not even attempt to define "continuity," hoping instead to "delineate the requirement." The Court wrote:

"Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. ... A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. ... Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated.

The Court virtually acknowledged the futility of articulating a principled standard: the "limits of the relationship and continuity concepts that combine to define a RICO pattern ... cannot be

72. Id at 239. Compare Helvering v Hallock, 309 US 106, 121 (1940) (the Court "walks on quicksand when [it tries] to find in the absence of corrective legislation a controlling legal principle").

73. H.J. Inc., 492 US at 239. Justice Scalia concurred in the judgment because, in his opinion, "nothing in the statute supports the proposition that predicate acts constituting part of a single scheme (or single episode) can never support a cause of action under RICO." Id at 256. Notwithstanding, Justice Scalia opined that the majority's "continuity plus relationship" pattern standard "seems to me about as helpful to the conduct of their affairs as 'life is a fountain.'" Id at 252.

74. Id at 240.

75. Id at 241.

76. Id at 241-42.
fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists.\textsuperscript{77} The Court's failure is reminiscent of Justice Stewart's famous concurrence in \textit{Jacobellis v Ohio}:\textsuperscript{78} "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [\textit{i.e.}, 'hard-core pornography']; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it..."\textsuperscript{79} Based on the Court's failure to define intelligibly a pattern of racketeering activity, the lower courts have, predictably, developed conflicting interpretations of the pattern standard.\textsuperscript{80}

\section*{3. Post-\textit{H.J. Inc.} Pattern Decisions}

For example, the Fourth Circuit in \textit{Menasco, Inc. v Wasser-\textit{man}}\textsuperscript{81} affirmed a district court's dismissal of a RICO complaint on the grounds that it failed to allege a pattern of racketeering activity, even though the complaint alleged the occurrence of predicate acts over a one-year period. The Third Circuit recently affirmed the dismissal of a RICO suit that alleged a nineteen-month scheme aimed at a single entity.\textsuperscript{82} By way of contrast, the District of Columbia Circuit in \textit{Yellow Bus Lines, Inc. v Local Union 639}\textsuperscript{83} held that four acts of vandalism and intimidation during a strike for union recognition "meets the statutory requirements for a 'pattern of racketeering activity.'"\textsuperscript{84} The Eleventh Circuit, in \textit{United States v Hobson},\textsuperscript{85} reduced the \textit{H.J. Inc.} test to absurdity when it affirmed the RICO conviction of a defendant for possession of drugs on two separate occasions which were obtained from the same organization.\textsuperscript{86}

\begin{itemize}
\item \textsuperscript{77} Id at 243.
\item \textsuperscript{78} 378 US 184 (1964).
\item \textsuperscript{79} \textit{Jacobellis}, 378 US at 197. It seems to be more than ironic coincidence that RICO and pornography suffer from the same sorts of definitional difficulties.
\item \textsuperscript{80} Justice Scalia castigated the majority's pattern standards by "doubt[ing] that the lower courts will find the Court's instructions much more helpful than telling them to look for a 'pattern'—which is what the statute already says." \textit{H.J. Inc.}, 492 US at 252.
\item \textsuperscript{81} 886 F2d 681 (4th Cir 1989).
\item \textsuperscript{82} \textit{Kehr Packages, Inc. v Fidelcor, Inc.}, 926 F2d 1406 (3d Cir 1991).
\item \textsuperscript{83} 883 F2d 132 (DC Cir 1989), aff'd en banc, 913 F2d 948 (DC Cir 1990).
\item \textsuperscript{84} \textit{Yellow Bus Lines, Inc.}, 883 F2d at 139.
\item \textsuperscript{85} 893 F2d 1267 (11th Cir 1990).
\item \textsuperscript{86} Compare \textit{Phelps v Wichita Eagle-Beacon}, 886 F2d 1262, 1273 (10th Cir 1989) (allegation of one fraudulent scheme and two predicate acts does not satisfy "continuity" requirement).
\end{itemize}
B. Constitutional Challenges to RICO

Justice Scalia's concurring opinion in *H.J. Inc.*, which was joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, accurately predicted that the lower courts would find scant guidance in the majority's opinion.\(^7\) Intellectual honesty, however, moved Justice Scalia to acknowledge that it would be "unfair to be so critical of the Court's effort, because I would be unable to provide an interpretation of RICO that gives significantly more guidance concerning its application."\(^8\) The problem, Justice Scalia opined, is RICO's very vagueness, which he and three other Justices believe "is intolerable."\(^9\) Because of RICO's vagueness, Justice Scalia hinted at the demise of RICO should it be challenged on constitutional grounds: "That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented."\(^\)10

Since the Supreme Court's *H.J. Inc.* opinion, numerous RICO defendants have asserted constitutional challenges to RICO.\(^9\) In *United States v Angiulo*,\(^9\) the First Circuit rejected a constitutional challenge to RICO, holding that the case involved illegal activities of an organized crime family, which Congress clearly intended to include within the meaning of "pattern of racketeering activity."\(^9\)

The First Circuit's reasoning and analytical process in *Angiulo* should encourage constitutional challenges to RICO, but only to its application in particular cases and not to the statute generally. For instance, the *Angiulo* court noted that the applicable standard for assessing whether a statute is void for vagueness is whether it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."\(^9\) Moreover, "in

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88. Id at 254-55.
89. Id at 255. See also *Yellow Bus Lines v Local Union 639*, 913 F2d 948, 957 (DC Cir 1990) (Mikva concurring) ("Since logic was not the coin of the realm when Congress drafted and debated RICO, . . . logic has not proven to be a very useful tool in interpreting the statute").
91. See, for example, *United States v Angiulo*, 897 F2d 1169 (1st Cir 1990), cert denied, 111 S Ct 130 (1991); *Firestone v Galbreath*, 747 F Supp 1556 (S D Ohio 1990); *United States v Andrews*, 749 F Supp 1520 (N D Ill 1990).
92. 897 F2d 1169 (1st Cir 1990), cert denied, 111 S Ct 130 (1991).
93. *Angiulo*, 897 F2d at 1179-80.
94. Id at 1178, quoting *United States v Harriss*, 347 US 612, 617 (1954).
the absence of first amendment considerations, vagueness challenges must be examined in light of a case's particular facts. Because the defendants in Angiulo had engaged in gambling, loan-sharking, and conspiracy offenses, the First Circuit held that RICO provided them with adequate notice that their offenses constituted a pattern of racketeering activity.

The District Court for the Southern District of Ohio, in Firestone v Galbreath, relied on the reasoning in Angiulo to hold that RICO was unconstitutionally vague as applied in that particular case. Firestone concerned a dispute between family members concerning whether property should have remained in a relative's estate. Under those factual circumstances, the district court held that the alleged activities of the family members "are in all likelihood far removed from the typical situations which Congress envisioned as being within RICO's scope of coverage."

The courts' reasoning in Angiulo and Firestone do not augur well for defendants who seek to challenge RICO generally on constitutional grounds, as suggested by Justice Scalia. Those decisions would support particular challenges by defendants who are unlike "typical racketeers"—contrary to the Supreme Court's holding in Turkette that RICO applies to "legitimate businesses" and its holding in Sedima, S.P.R.L. that RICO is to be interpreted broadly. This constitutional issue is just one of the many dialectical tensions between the Supreme Court and the lower courts over the proper interpretation and application of an inscrutable statute.

C. Proving the Existence of an Enterprise

All of the prohibited acts under 18 USC § 1962 involve either investing in, acquiring or maintaining an interest in, or conducting or participating in the affairs of an "enterprise." Under

95. Angiulo, 897 F2d at 1179.
96. See also United States v Pungitore, 910 F2d 1084, 1104 (3d Cir 1990) ("however vague the statute may be as applied to legitimate businesses, its application to the criminal activity of organized crime families is so clear as to be beyond peradventure"); United States v Andrews, 749 F Supp 1520, 1523-24 (N D Ill 1990) (rejecting constitutional challenge to RICO's "pattern of racketeering" requirement where defendants allegedly were members of a street gang trafficking in narcotics).
97. 747 F Supp 1556 (S D Ohio 1990).
99. Id at 1581.
100. 18 USC § 1962(a) (1988).
102. 18 USC § 1962(c) (1988).
RICO, an enterprise "includes any individual, partnership, corporation, association or other legal entity and any union or group of individuals associated in fact although not a legal entity." This statutory definition, like most of RICO's other provisions, is confusing and has produced contrary decisions concerning the proper interpretation of the term.

1. Legitimate Enterprises Are within RICO's Reach

In *United States v Turkette*, the Supreme Court held that the term "enterprise" encompasses both legitimate and illegitimate enterprises. The Court rejected the contrary view, which had been adopted by the First Circuit. The First Circuit had reasoned that to hold otherwise would be to hold that a "pattern of racketeering activity" would be construed to mean the same thing as "enterprise." The Supreme Court responded to that argument:

This conclusion is based on a faulty premise. That a wholly criminal enterprise comes within the ambit of the statute does not mean that a "pattern of racketeering activity" is an "enterprise." In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute, 18 USC § 1961. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity; it is an entity separate and apart from the patterned activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Thus, even though the *Turkette* Court held that there is no sharp distinction between a "pattern of racketeering activity" and an "enterprise," defendants have nonetheless successfully defeated RICO actions by arguing that plaintiffs have failed to distinguish sufficiently between an enterprise and the pattern of racketeering.

106. Id at 583.
activity.\textsuperscript{107}

2. The Enterprise Requirement and Section 1962(c) Liability

Under Section 1962(c), it is unlawful for a person employed by or associated with an enterprise to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity.\textsuperscript{108} Section 1962(c) is both the most complicated and most commonly used RICO sword in the arsenal. After Turkette, courts have almost unanimously held that the "person" (\textit{i.e.}, defendant) and the "enterprise" must be distinct entities under Section 1962(c), reasoning that a person cannot associate with himself.\textsuperscript{109} Only the Eleventh Circuit has held that the person and the enterprise can be the same for purposes of Section 1962(c) liability.\textsuperscript{110}

RICO defendants have escaped Section 1962(c) liability in other ways, notwithstanding the Supreme Court's instruction in Sedima, S.P.R.L. to interpret RICO broadly. Courts have parsed Section 1962(c)'s language and have focused on the phrase "to conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs."\textsuperscript{111} With regard to the proper interpretation of that seemingly simple phrase, the courts have been "all over the lot."\textsuperscript{112}

The Second Circuit in \textit{United States v Scotto}\textsuperscript{113} has interpreted that phrase broadly:

One conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of [one's] position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.\textsuperscript{114}

The Fifth Circuit has adopted a modified version of \textit{Scotto} by conjointing \textit{Scotto}'s two-part disjunctive test.\textsuperscript{115}

\begin{enumerate}
\item[107.] See note 29.
\item[108.] 18 USC \$ 1962(c) (1988).
\item[109.] See, for example, Schofield v First Commodity Corp., 793 F2d 28, 30-31 (1st Cir 1986); Bennett v United States Trust Co., 770 F2d 308, 315 (2d Cir 1985); Haroco, Inc. v American Nat'l Bank & Trust Co., 747 F2d 384, 399-402 (7th Cir 1984), aff'd on other grounds, 473 US 606 (1985).
\item[110.] \textit{United States v Hartley}, 678 F2d 961, 989-90 (11th Cir 1982).
\item[111.] 18 USC \$ 1962(c) (1988).
\item[112.] \textit{Yellow Bus Lines, Inc. v Local Union 639}, 913 F2d 948, 957 (DC Cir 1990) (Mikva concurring).
\item[113.] 641 F2d 47 (2d Cir 1980).
\item[114.] \textit{Scotto}, 641 F2d at 54. See also \textit{United States v Yarbrough}, 852 F2d 1522, 1544 (9th Cir), cert denied, 488 US 866 (1988) (adopting \textit{Scotto} test).
\item[115.] \textit{United States v Cauble}, 706 F2d 1322, 1333 (5th Cir 1983).
\end{enumerate}
The Eighth Circuit in *Bennett v Berg* has adopted the most restrictive test:

Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action. A defendant’s participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.

Not surprisingly, another Circuit Court of Appeals has reached the opposite conclusion.

Recently, the District of Columbia Circuit, en banc, adopted the *Bennett* test and candidly acknowledged that it was construing RICO narrowly. In *Yellow Bus Lines, Inc.*, the court noted that, “[a]lthough arguably a broad reading of Section 1962(c) would be consistent with Congress’s express intention that RICO be liberally construed in order to effectuate its remedial purposes . . . violations of Section 1962(c) can lead to criminal as well as civil penalties.” The Court of Appeals therefore refused to endorse a “broad and boundless reading of Section 1962(c).”

3. The Enterprise Requirement and Liability under Sections 1962(a) and 1962(b)

Under Section 1962(a), which proscribes the receipt and subsequent investment of racketeering proceeds in an enterprise, most courts have rejected a requirement that the “person” and “enterprise” be distinct. Because Section 1962(a) does not contain the same limiting language (i.e., “associating”) as Section 1962(c), courts have held that the “person” and the “enterprise” can be the same entity.

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116. 710 F2d 1361 (8th Cir 1983).
117. *Bennett*, 710 F2d at 1364.
118. *Bank of Am. v Touche Ross & Co.*, 782 F2d 966, 970 (11th Cir 1986) (“It is not necessary that a RICO defendant participate in the management or operation of the enterprise”).
119. *Yellow Bus Lines, Inc. v Local Union 639*, 913 F2d 948 (DC Cir 1990) (en banc).
120. *Yellow Bus Lines, Inc.*, 913 F2d at 955.
121. Id at 956. Judge Mikva concurred in the judgment, but expressed some “misgivings” about the majority’s narrow interpretation of RICO when the “Supreme Court has previously cautioned us against restrictive interpretations of the statute that might frustrate Congress’ remedial purposes.” Id at 957. Judge Mikva also expressed the hope that Congress would finally “apply logic and order to the statute called RICO.” Id at 958.
Under Section 1962(b), which prohibits the acquisition or maintenance of an interest in an enterprise through a pattern of racketeering activity, the Ninth Circuit has held that the person and the enterprise need not be distinct.123 The more persuasive view, however, is the position articulated by the court in Bruss Co. v Allnet Comms. Servs., Inc.124 In Bruss Co., the district court compared the language in Section 1962(c) to the language in Section 1962(b) and held:

Although this provision does not contain the language in subsection (c) requiring that the person be employed by or associated with the enterprise, it does require that the person “acquire or maintain” an “interest in or control of” any enterprise. Like the language in subsection (c), this language implies that the person acquiring an interest in or control of the enterprise must be separate from the enterprise itself. As with subsection (c), the language contemplates that the enterprise is the victim, not the perpetrator, of the crime. Separate entities must therefore fill the roles of the “person” and the “enterprise.” . . . The court therefore concludes that, for a cause of action under § 1962(b), the person liable and the enterprise must be two distinct entities.125

IV. STANDING AND PROXIMATE CAUSE REQUIREMENTS

Many RICO defendants attack plaintiffs’ claims on the grounds that the alleged RICO offenses were not pleaded with particularity.126 In addition, courts are with increasing frequency favorably receiving defenses asserting lack of standing and failure to prove that alleged injuries were proximately caused by the substantive violation.127 For example, some courts have noted that, “[a]s a general rule, RICO plaintiffs are entitled only to damages to business or property proximately caused by the predicate acts.”128

The decisions that require plaintiffs to show that their injuries were proximately caused by a violation of Section 1962 appear to be at odds with the Supreme Court’s Sedima, S.P.R.L. opinion,

123. See, for example, Medallion TV Enters., Inc. v SelectTV of Cal., Inc., 627 F Supp 1290 (C D Cal 1986), aff’d, 833 F2d 1360 (9th Cir 1987), cert denied, 109 S Ct 3241 (1989).
126. See text at note 27.
127. See, for example, Sperber v Boesky, 849 F2d 60 (2d Cir 1988); National Enterprises v Mellon, 847 F2d 251 (5th Cir 1988); Sears v Likens, 912 F2d 889 (7th Cir 1990). In Sedima, S.P.R.L., the Supreme Court rejected the argument that a private plaintiff under Section 1964(c) must prove a “racketeering injury.” 473 US at 495.
128. Fleischauer v Feltner, 879 F2d 1290, 1300 (6th Cir 1989). See, for example, Morast v Lance, 807 F2d 926, 933 (11th Cir 1987).
which is confusing on this point. At one point in the *Sedima, S.P.R.L.* opinion, and in specific reference to Section 1962(c), the Court wrote that “the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.”129 Earlier in its *Sedima, S.P.R.L.* opinion, however, and in reference to Section 1962(c) generally, the Court held that “[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).”130

Which direction lower courts follow is significant. Under the former direction, a plaintiff must show that his injury was proximately caused by the substantive RICO violation. Under the latter direction, a plaintiff need only trace his injuries to the alleged racketeering activities. Justice Marshall, in his *Sedima, S.P.R.L.* dissent, apparently believed that the majority intended to expound the latter direction: “Under the Court’s opinion today, two fraudulent mailings or use of the wires occurring within 10 years of each other might constitute a ‘pattern of racketeering activity,’ . . . leading to civil RICO liability.”131

A. Interpreting Section 1962(a) Out of Existence

The standing and proximate cause requirements for Section 1962(a) claims are foreclosing recovery for many plaintiffs who can show injury, show that the defendants engaged in a pattern of racketeering activity, and show that the defendants received income therefrom. Section 1962(a) provides in pertinent part:

> 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, or the proceeds of such income, in the 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.132

Thus, Section 1962(a) requires that a “person” (1) receive income from a pattern of racketeering activity and (2) then use or invest

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130. Id at 495.
131. Id at 502 (Marshall dissenting).
that income in an "enterprise." Moreover, pursuant to Section 1964(c), a private RICO plaintiff must show that he was injured in his business or property by reason of the defendant's violation of Section 1962(a).

As is true with virtually every other aspect of RICO, contrary views exist with respect to the causation requirement of Section 1962(a). The narrower, better reasoned, and generally more accepted view requires that a plaintiff show that his injury was proximately caused by the use or investment of income that was derived from a pattern of racketeering activity. In Grider v Texas Oil & Gas Co., the Tenth Circuit affirmed the district court's dismissal of a Section 1962(a) claim, holding that the "clear language" of Section 1964(c) requires that a plaintiff allege injury by reason of a violation of Section 1962(a), and not just injury from the racketeering activities.

In so holding, the Tenth Circuit declined to follow those district courts that had held that, based on Sedima, S.P.R.L., plaintiffs need only show injury from the racketeering acts. The Grider court noted that Sedima, S.P.R.L. addressed the injury issue in the limited context of Section 1962(c), which "specifically prohibits the conduct of an 'enterprise's affairs through a pattern of racketeering activity. . . .'" The Grider court also rejected the policy argument that, because RICO is to be interpreted broadly, plaintiffs need only show injury from the alleged racketeering activities. As the court of appeals succinctly put it, "The general principle that RICO is to be accorded a liberal interpretation cannot justify expanding Section 1962(a) beyond the limits of that subsection's own language."

133. See Grider v Texas Oil & Gas Corp., 868 F2d 1147 (10th Cir), cert denied, 110 S Ct 76 (1989) ("Significantly [§ 1962(a)] does not state that it is unlawful to receive racketeering income. . . ."). Grider, 868 F2d at 1149 (emphasis in original).

134. 18 USC § 1964(c) (1988).

135. See, for example, Grider, 868 F2d at 1149; Ouahnine v MacFarlane, 897 F2d 75, 82-83 (2d Cir 1990) ("under the plain terms of the statute, to state a civil claim under § 1964(c) for a violation of § 1962(a), a plaintiff must allege injury 'by reason of' defendants' investment of racketeering income in an enterprise"); Rose v Bartle, 871 F2d 331, 357-58 (3d Cir 1989).

136. 868 F2d at 1150-51.


138. Grider, 868 F2d at 1150.

139. Id.

140. Id.
The Fourth Circuit, in *Busby v Crown Supply, Inc.*, rejected the *Grider* "investment use" rule and held that allegations of injury caused by the predicate acts of racketeering activity satisfy Section 1964(c). The *Busby* court opined that nothing in the language of either Section 1962(a) or of Section 1964(c) "limits the compensable racketeering injuries to those sustained by the . . . investment and/or use of the [racketeering] income." The *Busby* court also rejected the "investment use" rule on the grounds "that it conflicts with the explicit policy that RICO be liberally interpreted." As the Fourth Circuit perceptively recognized:

> If the [investment use] rule advocated by defendant is followed, however, corporate liability under RICO will be eviscerated. Given that the named "person" and the named "enterprise" must be separate for § 1962(c) purposes, . . . plaintiffs injured by corporate racketeers have only § 1962(a) to turn to for relief . . . Invoking the "investment use" rule would close this avenue off, as it is virtually impossible to prove that the invested income caused the alleged injury.

The Fourth Circuit is correct: the investment use rule does cut off potential avenues to treble damages. The Fourth Circuit's legislative prestidigitation, however, is even worse, because it effectively creates a federal common law private right of action for mail fraud and wire fraud. Based on *Busby*, a plaintiff who can show only that an agent of a corporate defendant caused him injury by the fraudulent use of the mails and wires could sue the corporation under Section 1962(a). Thus, the *Busby* holding not only eviscerates Section 1964(c) and creates a federal cause of action in an area where Congress chose not to provide such a cause of action, it also

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141. 896 F2d 833 (4th Cir 1990).
143. *Busby*, 896 F2d at 837. The Second Circuit's reading of RICO is just the opposite. See *Ouaknine*, 897 F2d at 82-83 ("under the plain terms of the statute . . . a plaintiff must allege injury 'by reason of' defendants' investment of racketeering income in an enterprise"). Moreover, the Fourth Circuit begged the question when it referred to the "compensable racketeering injuries." The very issue to be decided was what injuries are compensable, and Section 1964(c) does not mention "compensable racketeering injuries." Section 1964(c) refers only to injuries to "business or property by reason of a violation of section 1962."
144. *Busby*, 896 F2d at 838.
145. Id at 838-39.
146. 18 USC §§ 1341, 1343 (1988). Significantly, Congress has not created a private right of action for either mail fraud or wire fraud.
obliterates the clear distinction between Section 1962(a) and Section 1962(c).

The Fourth Circuit’s Busby opinion, however, is not unreasonable in light of Sedima, S.P.R.L.’s mixed signals. The Busby court relied on the language in Sedima, S.P.R.L. that rejected the Second Circuit’s “racketeering injury” requirement and held:

If the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).

The Busby court also relied on a companion case to Sedima, S.P.R.L., American Nat’l Bank & Trust Co. v Haroco, Inc., in which the Court stated:

[t]he submission that the injury must flow not from the predicate acts themselves but from the fact that they were performed as part of the conduct of an enterprise suffers from the same defects as the amorphous and unfounded restrictions on the RICO private action we rejected in [Sedima].

Although the Fourth Circuit recognized that both Sedima, S.P.R.L. and American Nat’l Bank & Trust Co. involved claims under Section 1962(c), it dismissed that fact by opining that “it is clear that the Supreme Court was referring to § 1962 as a whole. . . .” The Busby court’s efforts to be faithful to the Supreme Court’s exhortations of liberal statutory construction come, as noted above, at too high a price.

B. The Standing Requirement of Section 1962(c)

Section 1962(c) makes it 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. . . .” In Sedima, S.P.R.L., the plaintiffs had brought an action under Section 1962(c), and while the issue was not before the Supreme Court, the

147. See notes 129-31 and accompanying text.
151. Busby, 896 F2d at 839.
152. 18 USC § 1962(c) (1988).
Court nonetheless made it clear that "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."\textsuperscript{153} The conduct constituting the violation under Section 1962(c) is the actual conducting or participating in the affairs of an enterprise through a pattern of racketeering activity. Thus, the Court in \textit{Sedima, S.P.R.L.} held:

Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation [\textit{i.e., § 1962(c)}] is the commission of those acts in connection with the conduct of an enterprise . . . Any recoverable damages occurring by reason of a violation . . . will flow from the commission of the predicate acts.\textsuperscript{154}

Based on this language, some courts have required plaintiffs to show that their injuries were directly and proximately caused by defendants' racketeering activities.\textsuperscript{155} Absent such a showing, plaintiffs are not entitled to recover damages, even if they can show a RICO violation and injury to their business or property.

\textbf{C. Recovery under RICO's Conspiracy Provision}

Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."\textsuperscript{156} The prerequisite to liability under Section 1962(d) involves an agreement to commit one of the activities prohibited under any of the subsections of 1962.\textsuperscript{157} If a plaintiff fails to prove an injury from the substantive violation, he will be unable to prove how an alleged conspiracy to commit the violation caused him injury.\textsuperscript{158}

There is, predictably, a split of authority on the question of whether the defendant must personally agree to commit the predicate acts.\textsuperscript{159} In the Second Circuit, a required element of a RICO

\textsuperscript{153} \textit{Sedima, S.P.R.L.}, 473 US at 496.
\textsuperscript{154} Id at 497.
\textsuperscript{155} See, for example, \textit{Morast v Lance}, 807 F2d 926, 933 (11th Cir 1987) (dismissing RICO claim because the plaintiff's injury "did not flow directly from the predicate acts").
\textsuperscript{156} 18 USC § 1962(d) (1988).
\textsuperscript{157} See, for example, \textit{United States v Elliott}, 571 F2d 880 (5th Cir 1978) (must have an agreement to commit a violation of § 1962; an agreement to commit predicate acts is not enough).
\textsuperscript{158} See \textit{Grider}, 868 F2d at 1151 (granting motion to dismiss § 1962(d) claim because plaintiffs failed to allege that § 1962(a) violation caused injury).
\textsuperscript{159} Compare \textit{United States v Kragness}, 830 F2d 842 (8th Cir 1987) (defendant need not personally commit the predicate acts as long as he agrees to their commission by an-
conspiracy is that the defendant himself [had] agreed to commit two or more predicate acts.\textsuperscript{160} The Eleventh Circuit, however, has held that when "a defendant agreed to participate in the conduct of an enterprise's affairs with the objective of violating a substantive RICO provision, it is not necessary that the defendant agreed to \textit{personally} commit two predicate acts for the required pattern of racketeering activity."\textsuperscript{161}

V. Conclusion

RICO is a study in legal obscurantism. Just like King Rex's code in Professor Fuller's allegory, RICO contains nary a sentence that is within the grasp of reasonable comprehension and understanding. Whereas Rex withdrew his code and started over, Congress has left it to the courts to divine meaning from an inscrutable statute, a task more appropriately befitting the disciplines of hermeneutics and semiotics rather than jurisprudence.

In response, the Supreme Court has attempted to ossify Congress' admonition to interpret RICO broadly, but has failed to convert RICO's vague formulas into meaningful standards of behavior. The lower courts, nonplussed by the hopelessness of the situation, have rendered contrary decisions on virtually every aspect of RICO, and in many instances, have simply ignored the Supreme Court's exhortations of liberal statutory construction.

RICO jurisprudence has thereby been converted into gamesmanship with a concomitant decline in the respect for the rule of law. Civil RICO is characterized by pleadings games and rank forum shopping,\textsuperscript{162} where plaintiffs search for those jurisdictions that expand the RICO accordion and defendants cite cases that contract the accordion. All the while, the emanating sounds are RICO cacophony.

Civil RICO is incoherent, and the fault is to be found within the statutory framework. Federal judges have struggled mightily to impose order on this chaos, but have realized that the task is a will-o'-'the-wisp. Unless Congress repeals or modifies RICO, or unless

\textsuperscript{160} United States v Benevento, 836 F2d 60, 73 (2d Cir 1984) (emphasis added).
\textsuperscript{161} RICO's nationwide service of process and venue provisions facilitate this unseemly behavior. See 18 USC § 1965.

other party); Casperone v Landmark Oil & Gas Corp., 819 F2d 112 (5th Cir 1987) (same), with United States v Teitler, 802 F2d 606 (2d Cir 1986) (defendant must agree to commit two predicate acts); United States v Winter, 663 F2d 1120 (1st Cir 1981).

one more Justice becomes convinced that RICO is "intolerable," Rex's citizens will continue to ask: how can anybody follow a rule that nobody can understand?