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RICO's Section 1962(a) and the Investment Injury Rule: Is Big Business off the Hook?

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I. INTRODUCTION

Two decades have passed since Congress launched its attack on widespread corruption infiltrating American businesses. Enacted in 1970 as Title IX of the Organized Crime Control Act, the Racketeer Influenced and Corrupt Organizations Act (RICO)[1] marked an unprecedented attempt to battle organized crime. This corruption prevails today—just as it did twenty years ago—in our high-rise office buildings and in our inner-city slums. While RICO provides enhanced criminal sanctions aimed at organized crime in the traditional "mafia" sense, its broad language also authorizes private civil suits directed at white-collar crime and provides victims with unparalleled remedies against its offenders.[2] Despite the attractive remedial measures afforded successful civil plaintiffs, enforcement by the private civil bar did not gain momentum until rather recently.[3]

While the private sector readily seized upon RICO's potential, the judiciary did not embrace its application enthusiastically. Uncertain whether RICO should encompass white-collar crime committed by legitimate business entities, courts antagonistic to civil RICO repeatedly attempted to create limitations

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1. 18 U.S.C. §§ 1961-1968 (1988).

2. RICO defines "racketeering activity" in section 1961. That section, relating to white-collar crime, reads in pertinent part: " 'racketeering activity' means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 [relating to mail fraud], section 1343 [relating to wire fraud], . . . (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities . . . ." 18 U.S.C. § 1961(1) (1988).

RICO's criminal penalties include fines, imprisonment, and forfeiture of "any interest" that the racketeer has acquired in violation of the substantive sections. 18 U.S.C. § 1963 (1988). Civil remedies afforded successful private plaintiffs include treble damages, costs and attorneys' fees. 18 U.S.C. § 1964(c) (1988).

3. The Department of Justice indicated that there were approximately 500 civil RICO cases brought prior to the United States Supreme Court ruling in Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), 61% of which had an independent basis for federal jurisdiction. *Oversight on Civil RICO Suits; Hearings before the Senate Judiciary Comm.*, 99th Cong., 1st Sess. 127 (1985) (statement of Steven Trott, Assistant U.S. Attorney General). More recent government statistics indicate that in the year following *Sedima*, 1069 civil RICO cases were filed and 244 were terminated. 2 Civil RICO Report No. 44 at 8 (Apr. 12, 1987).

which appeared unsupported by the statute's text and legislative history. The most recent attempt to restrict private civil RICO is the investment injury rule announced in *Grider v. Texas Oil & Gas Corp.*[4]

The investment injury rule derives from section 1964(c) of RICO, which authorizes private civil suits. This section limits civil RICO recovery to only those who can prove injury "by reason of" a section 1962 violation. Section 1962 contains four separate subsections, two of which are relevant for purposes of this Comment. The first, section 1962(a), states that it is unlawful "to use or invest" money derived from a pattern of racketeering activity. The second section relevant for purposes of this Comment, section 1962(c), states that it is unlawful to "conduct an enterprise through a pattern of racketeering activity."[5]

Courts following *Grider* and favoring the investment injury rule now require a plaintiff to allege injury from the *use or investment* of the racketeering proceeds in a section 1962(a) violation rather than injury stemming from the *predicate acts* alone (which were used to obtain the racketeering funds) as allowed in section 1962(c) violations, an allegation much easier to sustain. However, most plaintiffs will be barred from suing corporations under section 1962(c) since that section requires the entity and the person conducting the racketeering activity to be separate—the so-called "person/enterprise" distinction.[6] Consequently, when a company defrauds the investing public, for example, a plaintiff may be able to sue the defrauding employee directly but not his or her employer, even though the fruits of the racketeering activity accrued to the company. Many times that individual will be judgment-proof once attorneys' fees, costs, and treble damages are all tallied. Yet if a plaintiff tries to sue under section 1962(a), again the standing requirement will bar the claim because in most instances it will be impossible for individuals to prove injury from the use or investment of their funds. Given the "person/enterprise" distinction's wide accept-

4. 868 F.2d 1147 (10th Cir.), *cert. denied*, 110 S.Ct. 76 (1989).

5. 18 U.S.C. § 1962(a), (c) (1988).

6. A majority of courts support this restriction. *See, e.g.*, United States v. Computer Sciences Corp., 689 F.2d 1181, 1190-91 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). *Contra* United States v. Hartley, 678 F.2d 961, 987-90 (11th Cir. 1982) (only circuit holding that the person and enterprise need not be distinct for § 1962(c) purposes), *cert. denied*, 459 U.S. 1170 (1983).

ance, the investment injury rule further limits private recovery from corporations allegedly engaged in racketeering activity.

Part II of this Comment briefly reviews the elements necessary for a private civil RICO suit. It then summarizes the various limitations courts have imposed since private civil RICO actions began to surface. Part III discusses the *Grider* decision and the investment injury rule under section 1962(a). Part IV analyzes RICO's statutory language in light of the Supreme Court's ruling in *Sedima, S.P.R.L. v. Imrex Co.*[7] and the causation requirement imposed by that decision. It then explores the fundamental language differences between subsections 1962(a) and 1962(c) and concludes that the *Sedima* ruling concerning injury from predicate acts does not apply to 1962(a). Part V discusses Congress' specific instruction to read RICO broadly. In light of *Sedima*, the liberal interpretation clause is not implicated because section 1962(a) is not ambiguous in what it prohibits, despite its narrow effect on civil enterprise liability. Part VI concludes that the investment injury limitation is consonant with the plain language of RICO's text. Injury must be "by reason of" the conduct constituting the violation (which under section 1962(a) is the use or investment of racketeering proceeds) and not just from an individual component of the prohibited conduct, such as the individual acts of fraud under section 1962(a). The use or investment limitation, however, could potentially permit corporations to go unchecked for their racketeering activities and force victims to seek relief elsewhere, rather than under the statute specifically enacted to prohibit and punish acts of racketeering.

II. Private Civil RICO Prior to *Grider*

One court has likened civil RICO to a "treasure hunt."[8] The quest begins with section 1964(c), which grants standing to RICO plaintiffs if they can prove an injury in their "business" or "property" "by reason of a violation of section 1962."[9] This

7. 473 U.S. 479 (1985).

8. Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 652 (7th Cir. 1984), *quoted in* Haroco, Inc. v. American Nat'l. Bank & Trust Co., 747 F.2d 384, 386 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam).

9. Section 1964(c) reads in full: "[A]ny person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover three-fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1988).

leads to an examination of section 1962, subsections (a) and (c) for purposes of the investment injury rule. Section 1962(a) reads 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 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 . . . .[10]

This section, then, prohibits racketeers from using or investing their illegal incomes to infiltrate other enterprises involved in interstate commerce.[11]

Section 1962(c), on the other hand, prohibits the racketeering acts themselves. It reads, in pertinent part: "It shall be unlawful for any *person* employed by or associated with any *enterprise* . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity."[12] However, the language specifically requires both a "person" *and* an "enterprise"—two distinct entities rather than one in the same. Section 1962(a) contains no such requirement.

The next step in the civil RICO "hunt" is to analyze section 1962's key terms in light of RICO's statutory definitions. Section 1961 defines a "person" as "any individual or entity capable of holding a legal or beneficial interest in property."[13] 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."[14] The investment injury rule is most troublesome in determining whether a private plaintiff states a claim "by reason of" a section 1962(a) violation when the defendant corporation, (the "person") engages in the racketeering activity to extract racketeering proceeds and "use[s] or invest[s]" those racketeering proceeds in itself (the "enterprise").[15]

Courts hostile to civil RICO have repeatedly endeavored to

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10. 18 U.S.C. § 1962(a) (1988).
11. *See* Razzano, *Subsection 1962(a) Under Siege*, 3 RICO L. REP. 809, 810 (1986).
12. 18 U.S.C. § 1962(c) (1988) (emphasis added).
13. *Id.* § 1961(3).
14. *Id.* § 1961(4).
15. *Id.* § 1962(a).

restrict the statute by imposing limitations upon its scope.[16] Initially, courts held that RICO applied only to traditional, mafia-type corruption—the "organized crime" limitation,[17] but before long appellate courts struck this restriction. The next judicially created limitation was the "competitive injury" requirement. Only those who could prove that a section 1962 violation competitively disadvantaged them were allowed standing to sue. Courts ultimately rejected this restriction as well. Then came the "racketeering injury" limitation, which required an injury " 'caused by an activity which RICO was designed to deter.' "[18] This essentially required a RICO plaintiff to allege harm caused by a pattern of racketeering rather than by the individual predicate acts constituting the "pattern." The Supreme Court squarely rejected this limitation in *Sedima*, stating: "There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement."[19] The Court held that with respect to section 1962(c) claims, a plaintiff need only allege injury resulting from the racketeering acts alone.[20] However, this decision is limited to section 1962(c) claims; injury solely from racketeering acts for section 1962(a) claims is insufficient.

Civil RICO plaintiffs had still even more difficult obstacles to overcome. A majority of courts eventually ruled that the defendant (the "person" perpetrating the predicate acts) and the "enterprise" whose affairs he conducted through racketeering activity could not be the same under section 1962(c).[21] Since section 1962(a) is devoid of any such distinction, courts began to hold that the reference to the "person" and the "enterprise" in section 1962(a) could constitute the same entity.[22] Because

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16. *See, e.g.*, Horn, *Judicial Plague Sweeps United States: 'Resultorientitis' Infects Civil RICO Decisions*, NAT'L L.J. 13 (May 23, 1983).

17. *See, e.g.*, Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975).

18. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 493-94 (1985).

19. *Id.* at 495.

20. In the *Sedima* dissent, Justice Marshall and three others specified examples of these types of injuries. As an example of a "racketeering" injury, a racketeer burns several stores to force the storekeepers to purchase the racketeer's product. The direct damages from the predicate acts are the cost of the building burned. Indirect damages are suffered by people who react to offenses against others by buying the mobster's product at a higher price without a threat made directly against them.

As an example of a "competitive" injury, Justice Marshall noted that when a racketeer monopolizes a market, indirect damages are suffered by "purchasers of the racketeer's goods or services, who are forced to buy from the racketeer/monopolist at higher prices, and whose businesses are therefore injured." *Id.* at 521 (Marshall, J., dissenting).

21. *See supra* note 6.

22. *See, e.g.*, Masi v. Ford City Bank & Trust Co., 779 F.2d 397 (7th Cir. 1985); *see*

under section 1962(c) the "person" must be "employed by or associated with" a separate "enterprise," and since most injuries result from the acts of a single business entity, this usually meant that section 1962(c) acts were limited to suits against the "person" employed by the racketeering "enterprise." Section 1962(c)'s person/enterprise distinction severely limited civil recovery under that section because often the fruits of the racketeering activity accrued to the employer/enterprise, leaving the employee/person judgment-proof. As a result, victims of corporate wrongdoing began to abandon section 1962(c) charges and instead began to recast their RICO claims under 1962(a), alleging that the liable *corporate* "person" used or invested the racketeering income in itself, the "enterprise."[23]

The Seventh Circuit endorsed this theory. In *Haroco, Inc. v. American National Bank & Trust Co.*,[24] the court highlighted the differences between sections 1962(a) and 1962(c). It found that as a result of the fundamental language differences, plaintiffs may successfully assert standing under 1962(a) once they allege that a defendant corporation has received income from racketeering acts and has invested it in the management of its business. The court stated:

> As we parse subsection (a), a "person" (such as a corporation-enterprise) acts unlawfully if it receives income derived directly or indirectly from a pattern of racketeering activity . . . and if the person uses the income in the establishment or *operation* of an enterprise affecting commerce. Subsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be separate. Under subsection (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations.[25]

Following this analysis, the trial court, on remand, stated: "[W]hen the fruits of racketeering come to rest in a corporate-enterprise, that enterprise is within RICO's intended reach. Section 1962(a) is designed to recover these proceeds."[26]

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also supra text accompanying note 10 (giving the text of § 1962(a)).

23. *Standing: Special Injury Requirements Under § 1962*, 9 RICO L. REP. 802, 803 (1989).

24. 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam).

25. *Id.* at 402 (footnotes omitted) (emphasis in original).

26. Haroco, Inc. v. American Nat'l. Bank & Trust Co., 647 F. Supp. 1026, 1033 (N.D. Ill. 1986) (quoting *Haroco*, 747 F.2d at 401 n.18).

The most recent RICO limitation, the investment injury rule adopted by *Grider*, accepts the theory that the person and enterprise can be identical under section 1962(a). However, it imposes a new limit on section 1962(a) claims. By accepting the investment injury limitation, *Grider* attempted to resolve a divisive split among lower courts.[27] While most circuits now follow the investment injury rule by requiring plaintiffs suing under section 1962(a) to allege injury from the use or investment of proceeds derived from a pattern of racketeering activity, the Fourth Circuit Court of Appeals has refused to do so.[28] The Fourth Circuit held that injury stemming from the racketeering activities alone suffices; otherwise, guilty corporations could not be sued under civil RICO. The Supreme Court refused to hear the *Grider* appeal, and therefore, a resolution of this issue does not appear to be anywhere in sight.

III. THE *Grider* FACTS AND DECISION

A. Grider *Facts*

The plaintiff in this case, Guy Grider, held a working interest in a group of oil and gas wells.[29] He sought relief from various operators of the oil and gas wells, alleging violations of civil RICO. Grider asserted that the well operators had engaged in two interrelated schemes to defraud him.[30] These schemes, Grider alleged, had been executed through multiple instances of

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27. The district courts, prior to *Grider*, were equally divided in their approach. Many held that a subsection 1962(a) violation occurs only through the use or investment of the racketeering income; receipt of proceeds derived from the pattern of racketeering activity is not enough. *See, e.g.*, Blue Cross v. Nardone, 680 F. Supp. 195, 197 (W.D. Pa. 1988); *In re* Rexplore, Inc. Sec. Litig., 685 F. Supp. 1132, 1141 (N.D. Cal. 1988); Leonard v. Shearson Lehman/Am. Express, Inc., 687 F. Supp. 177, 181 (E.D. Pa. 1988).

Other district courts had rejected the investment injury rule and held that injury from the underlying predicate acts is sufficient to allege a 1962(a) violation. *See, e.g.*, Smith v. MCI Telecommunications Corp., 678 F. Supp. 823, 828-29 (D. Kan. 1987); *In re* Gas Reclamation, Inc. Sec. Litig., 663 F. Supp. 1123, 1125-26 (S.D.N.Y. 1987); Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1256 (E.D. Mich. 1987).

28. The Second, Third and Sixth Circuits adopted the investment injury rule following *Grider*. *See* Quaknine v. MacFarland, 897 F.2d 75 (2d Cir. 1990); Rose v. Bartle, 871 F.2d 331, 355-56 (3d Cir. 1989); and Craighead v. E.F. Hutton & Co., 899 F.2d 485 (6th Cir. 1990). The Fourth Circuit, however, rejected the investment injury rule in Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990). *See infra* note 113 and accompanying text.

29. Grider v. Texas Oil & Gas Corp., 868 F.2d at 1147 (10th Cir.), *cert. denied*, 110 S.Ct. 76 (1989).

30. *Id.*

mail fraud and further charged the operators with conspiracy to participate in each scheme.[31] Grider filed RICO claims for violations of both sections 1962(a) and 1962(d).[32] The lower court granted the defendants' motion to dismiss for failure to state a claim for relief[33] holding that Grider had failed to demonstrate an injury "by reason of" the "use or investment of racketeering income,"[34] making section 1962(a) inapplicable. Because a section 1962(d) claim of conspiracy requires a showing of injury under sections 1962(a)-(c), it was dismissed as well.[35] In dismissing the claim, the court ruled that a violation of section 1962(a) results only from the use or investment of racketeering proceeds, as opposed to Grider's contention of injury resulting from the racketeering acts themselves.

B. Grider *Decision*

In its decision, the Tenth Circuit first emphasized the section 1962(a) language which states that "[i]t shall be unlawful for any person . . . to use or invest . . . any part of such income."[36] The court held that the language of this section does not prohibit the commission of the predicate acts; it forbids only what happens after the acts have occurred. The court stated: "The statute does not state that it is unlawful to *receive* racketeering income; rather, . . . the statute prohibits a person who *has received* such income from *using or investing* it in the proscribed manner."[37] The court next rejected the argument that the investment injury rule was inconsistent with the Supreme Court's ruling in *Sedima*. The court distinguished *Sedima* on the basis that *Grider* was a section 1962(a) claim, whereas *Sedima* involved a section 1962(c) claim. These two sections differ "significantly" because section 1962(a) prohibits the use or investment of racketeering income, while section 1962(c) "specifically prohibits the conduct of an 'enterprise's affairs through a

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31. *Id.* at 1148-49.

32. *Id.* at 1149.

33. *See* FED. R. CIV. P. 12(b)(6).

34. *Grider*, 868 F.2d at 1151.

35. *Id.* While requiring a violation under 18 U.S.C. section 1962(a)-(c) in order to prove a conspiracy under RICO may represent a further attempt to restrict civil RICO claims, this issue is beyond the scope of this Comment.

36. *Id.* at 1149 (quoting 18 U.S.C. § 1962(a) (1988)).

37. *Id.* (emphasis in original).

pattern of racketeering activity,' thus making unlawful the racketeering activity itself."[38]

Grider opposed the investment injury rule for a number of reasons. Citing Congress' specific direction that RICO be "liberally construed to effect its remedial purposes,"[39] the plaintiff argued that only a restrictive reading of the statute justifies such a limitation.[40] The court rejected this argument, stating simply that "the general principle that RICO is to be accorded a liberal interpretation cannot justify expanding section 1962(a) beyond the limits of that section's own language."[41] The plaintiff also contended that reading the investment injury rule into section 1962(a) would virtually eliminate the possibility of private civil suits against corporations because of the nearly unanimous judicial agreement that the "defendant" and the "enterprise" must be distinct under section 1962(c). The court tersely dismissed this argument, stating that there will still be many individuals who, damaged by the use of racketeering income in otherwise respected businesses, will " 'have a perfect right to sue.' "[42] The court concluded that if RICO as drafted does not achieve the purpose of combatting organized crime within the white-collar market, it is Congress' responsibility—and not the courts'—to expand the scope of the statute.[43]

IV. The Investment Injury Rule

Grider signals another attempt by courts to limit the bounds of civil RICO because the investment injury rule could potentially leave RICO powerless against corporations engaged in racketeering activities. Given that white-collar corruption drains approximately $200 billion annually from the American economy,[44] courts should be eager, not hesitant, to encourage vigorous attacks on white-collar corruption by granting expan-

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38. *Id.* at 1150 (quoting 18 U.S.C. § 1962(c)).

39. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

40. *Grider*, 868 F.2d at 1150.

41. *Id.*

42. *Id.* (quoting Gilbert v. Prudential-Bache Sec. Inc., 643 F. Supp. 107, 111 (E.D. Pa. 1986)).

43. *Id.*

44. Att'y Gen. Ann. Rep. 42; *see also* Braswell v. United States, 487 U.S. 99, 115 n.9 (1988) ("[W]hite-collar crime is 'the most serious and all-pervasive crime problem in America today.' ") (quoting Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 Am. Crim. L. Rev. 287, 288 (1980)).

sive remedies. The drafters of RICO undoubtedly sought to thwart the efforts of white-collar racketeers whose corruption had become so pervasive.[45] The Supreme Court also has recognized the statute's potential: "The legislative history [of RICO] clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[46]

While there is unquestionably a well-founded concern for combatting the rising tide of white-collar crime, this alone does not warrant misreading RICO's straightforward statutory language. Moreover, even if those victims harmed by what *should* be characterized as a section 1962(c) violation seek relief under section 1962(a) due to the judicially imposed person/enterprise limitation, courts should not invoke the liberal interpretation clause when no ambiguity exists as to what constitutes an injury "by reason of" a section 1962(a) violation. Though this may have been an unfortunate and unforeseen consequence of RICO's drafting and subsequent court interpretations, it is not for the

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45. In its Statement of the Findings and Purpose of the Act, the Organized Crime Control Act of 1970 states:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.
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> It is the purpose of this Act 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.

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970).

46. Russello v. United States, 464 U.S. 16, 26 (1983).

judiciary to amend what is, in section 1962(a), clear statutory language.

A. Sedima

Sedima, S.P.R.L. v. Imrex Co.[47] remains the leading case governing RICO standing requirements; therefore, a brief discussion of the Court's general RICO standing framework is necessary before discussing specific standing under section 1962(a). In *Sedima*, the Court held that injury from racketeering activity alone is sufficient to support a claim under section 1962(c). Though *Sedima* dealt only with 1962(c), opponents of the investment injury rule argue that the Court implied that separate standing requirements would not be imposed for the other subsections. Justice White analyzed the text of the standing section and its implications for what arguably may include civil RICO suits under any subsection:

> Section 1964(c) authorizes a private suit by "[a]ny person injured in his business or property by reason of § 1962." Section 1962 in turn makes it unlawful for "any person"—not just mobsters—to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. §§ 1962(a)-(c). If the defendant engages in a pattern of racketeering activity in a manner forbidden by *these provisions* [subsections 1962(a), (b) and (c)], and the *racketeering activities* injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)."[48]

The language of this passage on its face would suggest that injury from the predicate acts alone might allow a claim for violation of any of "these provisions" whether they be section 1962(a),(b), (c), or (d). Moreover, this broad interpretation is defensible because while section 1962's subsections clearly contain distinct violations, they all share common underlying elements requisite to a RICO violation: an "enterprise," a "pattern," and "racketeering activity."[49] Though sections 1962(a) and 1962(c) obviously focus on different types of harm, they undeniably share the essential common denominator—racketeering activity.

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47. 473 U.S. 479 (1985).
48. *Id.* at 495 (emphasis added).
49. 18 U.S.C. § 1962(a)-(d) (1988).

Moreover, the *Sedima* Court specifically directed that the *entire* statutory text be construed in light of the background surrounding its passage:

> RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime. While few of the legislative statements about novel remedies and attacking crime on all fronts were made with direct reference to § 1964(c), it is in this spirit that *all of the Act's provisions* should be read.[50]

Thus, those opposing the investment injury rule argue that *Sedima* affirms that "all of the Act's provisions" (and not just section 1962(c)) should be read broadly and that section 1962(a)'s investment injury limitation should be ignored.

Those favoring a use or investment limitation distinguish *Sedima* on the basis that the case involved a section 1962(c) claim and not a section 1962(a) claim. Certainly the two sections are not interchangeable; they contain separate violations, even though comprised of the same type of underlying conduct—a pattern of racketeering activity. In addition, the language of this *Sedima* passage would support a section 1962(a) claim based on the commission of predicate acts alone only when read out of context. Though *Sedima* did not accept the investment injury rule outright, it nonetheless imposed a causal relation between a plaintiff's alleged injury and a statutory violation: "In addition, 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."[51] The *Sedima* Court, therefore, established that a private plaintiff must prove a causally-related injury flowing from the defendant's illegal conduct.

B. Causation

The Seventh Circuit was the first to address the causation issue for RICO standing. In *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, the court held that the "by reason of" language in section 1964(c) authorizing private civil RICO suits "imposes a proximate cause requirement on plaintiffs" and requires the section 1962 violation to have injured, either directly or indirectly, the plaintiff's business or property.[52]

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50. 473 U.S. at 498 (citations omitted) (emphasis added).
51. *Id.* at 496 (emphasis added).
52. 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam).

However, *Sedima* focused expressly upon the need to avoid these exact standing and causation difficulties. The *Sedima* Court recognized the danger of imposing stringent limitations upon RICO which might result in difficulties similar to those wrought in the antitrust laws:

> It is also significant that a previous proposal to add RICO-like provisions to the Sherman Act had come to grief in part precisely because it "could create inappropriate and unnecessary obstacles in the way of . . . a private litigant [who] would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.' "[53]

Though dealing with a "racketeering injury" requirement under section 1962(c), the *Sedima* Court avoided imposing standing and causation restrictions similar to those contained in the antitrust laws.[54] Those opposing the investment injury rule maintain that the investment injury rule, like the so-called "racketeering injury" requirement rejected in *Sedima*, creates standing obstacles that "Congress sought to avoid."[55] However, since section 1962(a) prohibits conduct entirely distinct from that which section 1962(c) forbids, section 1962(a) necessarily contains a fundamentally different causal connection between a violation and the consequent injury.[56] The statutory terms do not explicitly require proximate causation,[57] but courts have included this requirement based on RICO's legislative history and policy considerations.

1. *Legislative history*

In *Bastian v. Petren Resources Corp.*,[58] the court looked to the legislative history of RICO and its fashioning after the antitrust laws to justify imposing a proximate cause requirement. The court cited various House and Senate debates that indicated how members of both houses had "repeatedly acknowledged that they were mobilizing 'both the criminal and civil

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53. *Sedima*, 473 U.S. at 498 (quoting 115 CONG. REC. 6995 (1969) (ABA comments on S. 2048)).

54. *Id.* at 498-99.

55. *Id.* at 499.

56. *See infra* text accompanying notes 76-80.

57. *See, e.g.*, Bastian v. Petren Resources Corp., 699 F. Supp. 161 (N.D. Ill. 1988), *aff'd.* 892 F.2d 680 (7th Cir.), *cert denied*, 110 S.Ct. 2590 (1990).

58. *Id.*

mechanisms of the Sherman Act and other antitrust statutes against the barons of organized crime.' "[59] The court then recognized *Sedima*'s holding that although courts should not rely too heavily on the antitrust laws in interpreting RICO, the historical references to antitrust laws in shaping RICO "should not prevent a court from referring to the antitrust laws altogether. Congress did not ignore the antitrust laws, and neither should . . . court[s]."[60]

2. *Policy considerations*

Balanced against RICO's specific "liberally construed" instruction is the notion that courts cannot extend RICO liability indefinitely. Therefore, some idea of social justice must exist to limit liability.[61] While the notion of proximate cause is not yet clearly defined in RICO case law, the common law's notion of proximate cause involves policy considerations analogous to RICO. There are too many "competing policies" to "make a simple rule possible."[62] *Sedima* has provided what is perhaps the greatest indication of exactly how far courts should extend RICO liability. So long as a causal connection exists between the injury and "the conduct constituting the violation," wronged plaintiffs will have no difficulty satisfying standing requirements.[63]

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59. *Id.* at 163.

60. *Id.*

61. *See, e.g.*, W. KEETON, PROSSER AND KEETON ON TORTS 264 (5th ed. 1984) ("In a philosophical sense, the consequences of an act go forward to eternity," and extending liability as far as factual causation therefore "would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.' Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.") (quoting North v. Johnson, 58 Minn. 242, 245; 59 N.W. 1012, 1012 (1984)), *quoted in* Sperber v. Boesky, 849 F.2d 60, 63 (2d Cir. 1988).

62. *E.g.*, Sperber v. Boesky, 849 F.2d 60, 64 (2d Cir. 1988) (" 'Despite the manifold attempts which have been made to clarify the subject [of proximate cause, there is not] yet any general agreement as to the best approach,' either in torts or as applied to RICO. . . .") (quoting KEETON, *supra* note 61, at 263); *Id.* at 64. ("Too many competing policies are gathered under the label 'proximate cause' to make a simple rule possible. Instead, we must be content with making our best efforts to make recovery commensurate with the statutory wrong and to set out 'our more or less inadequately expressed ideas of what justice demands' in each case.") (quoting KEETON, *supra* note 61, at 264).

63. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985).

C. *Statutory Construction: What "Conduct" Constitutes a Section 1962(a) Violation*

Only those victims who can allege an injury "by reason of" a section 1962 violation can file suit under RICO. Given the Supreme Court's ruling in *Sedima*, the crux of the investment injury rule controversy hinges upon virtually one issue: exactly what "conduct" do sections 1962(a) and 1962(c) prohibit? In other words, in what specific activities must a defendant engage to violate these provisions? Each subsection in section 1962 attacks various "evils" stemming from the underlying racketeering activity.[64] Each offense is premised upon the commission of predicate acts, yet each violation contains variations of what happens after those acts occur. Courts following the investment injury rule, despite *Sedima*'s instruction that each RICO section be construed in the "spirit" of "attacking crime on all fronts,"[65] justify the rule by citing certain language differences between the two sections.

1. *Section 1962(c)*

Section 1962(c) is aimed at individuals employed by or associated with an enterprise that engages in racketeering activities to conduct or participate in the enterprise's affairs.[66] To state a claim under section 1962(c), a plaintiff must allege the following elements: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.[67] *Sedima* ruled that the "essence" of a section 1962(c) violation is the racketeering conduct.[68]

2. *Section 1962(a)*

Section 1962(a), on the other hand, is aimed at preventing the use or investment of illegal proceeds to acquire an interest in both legitimate and illegitimate enterprises, to establish such businesses, or to operate such businesses.[69] This section embodies four principle elements: (1) income derived from a pattern of racketeering activity, (2) the use or investment of the income in

64. P.M.F. Serv., Inc. v. Grady, 681 F. Supp. 549, 556 (N.D. Ill. 1988).
65. *Sedima*, 473 U.S. at 498.
66. *P.M.F. Serv.*, 681 F. Supp. at 556.
67. *Sedima*, 473 U.S. at 496.
68. *Id.* at 497.
69. *See, e.g., P.M.F. Serv.*, 681 F. Supp. at 556.

the acquisition, establishment, or operation by a defendant, (3) of an enterprise, (4) engaged in or affecting interstate commerce.[70] Just as the "essence" of a section 1962(c) violation is the racketeering conduct,[71] the "nature" of a section 1962(a) violation is the use of racketeering proceeds.[72]

Though a requisite *element* of the violation, the illegal acts are not the target of 1962(a)'s prohibition.[73] The target is the use or investment of racketeering proceeds. The plaintiff in *Grider* argued that a defendant may violate section 1962(a) in more than one way, one of which is the mere commission of the predicate acts. Grider contended that any one of three types of injuries under section 1962(a) creates standing: (1) injury from the racketeering acts, (2) injury from the investment or use of income or proceeds in an enterprise, *or* (3) injury from both.[74] However, this interpretation belies any straight-forward reading of the statute. The plain text of section 1962(a) does not contain the disjunctive "or" except to state the prohibited conduct: the

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70. Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1396-98 (9th Cir. 1986); Masi v. Ford City Bank & Trust Co., 779 F.2d 397, 401-02 (7th Cir. 1985); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 401-02 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam).

71. *See supra* text accompanying note 68.

72. *P.M.F. Serv.*, 681 F. Supp. at 556. *Contra* Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 693 F. Supp. 666 (N.D. Ill. 1988):

> [T]he nature of a § 1962(c) violation is not just commission of the predicate acts, it is commission of a *pattern* of predicate acts. Still, there is no requirement that the injury be caused by the pattern as compared to being caused by an individual predicate act. Although each subsection of § 1962 delineates a different type of RICO violation, the essence of each subsection is still the commission of racketeering acts. This court is not concerned with semantical differences between *Sedima*'s use of "essence" and other court's [sic] use of the term "nature." The point is that when *Sedima* refers to the essence of a RICO violation, the predicate offense is what is being referred to, not also the other elements that are necessary to constitute a violation of any subsection of § 1962. Reading *Sedima* otherwise would be inconsistent with its rejection of the requirement of "racketeering injury" and rejection of the requirement of each element of a RICO violation being a cause of injury.

Id. at 672 (footnote omitted) (citations omitted) (emphasis in original).

73. *See infra* text accompanying notes 75-79.

74. Appellant's Brief at 33, Grider v. Texas Oil & Gas Corp., 868 F.2d 1147 (10th Cir.) (No. 87-1671), *cert. denied*, 110 S. Ct. 76 (1989). *See also* Blakey & 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, 586 n.237 (1987) ("Where 'racketeering activity' produces income and it [or its proceeds] is invested [or used] in an enterprise, injury may be of at least three types."). The only circuit court since *Grider* to reject the investment injury rule accepted this argument. *See* Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990).

use *or* investment of illegally obtained income.[75] The statute does not say, "[i]t shall be unlawful for any person *to receive* any income from a pattern of racketeering activity OR *invest* that income," but states that "[i]t shall be unlawful for any person *who has received* any income derived . . . from a pattern of racketeering activity . . . to use *or* invest . . . those proceeds in an enterprise." The only "conduct" section 1962(a) forbids is the use or investment of money obtained through a pattern of racketeering activity. Therefore, no victim should be able to frame a section 1962(a) claim without alleging injury "by reason of" the conduct constituting the violation—the use or investment of racketeering proceeds. No such "alternative" violations exist, as argued by the plaintiff in *Grider*, under section 1962(a).[76]

3. *Language differences*

The fundamental difference in statutory language between subsections 1962(a) and (c) mandates the distinction between the two. Section 1962(c) necessarily requires a causal connection between the predicate acts and the enterprise, since the defendant must conduct the affairs of the enterprise "through a pattern of racketeering activity."[77] No such connection exists under section 1962(a). Instead, the text of section 1962(a) requires only that the racketeering acts generate revenues which are subsequently invested in an enterprise. Therefore, it is what happens *after* that income is generated through a pattern of racketeering that constitutes the section 1962(a) offense. As one author stated, "[i]t is the income rather than the predicate acts which are connected with the enterprise."[78] This concept can be illustrated as follows:

Section 1962(c) violation

predicate acts ▷ pattern of racketeering activity ▷ used to conduct an enterprise's operations ▷ injury

A connection will always exist under section 1962(c) between the harm and *both* the predicate acts and the enterprise.

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75. Brief of Appellees at 7, Grider v. Texas Oil & Gas Corp., 868 F.2d 1147 (10th Cir.) (No. 87-1671), *cert. denied*, 110 S. Ct. 76 (1989).

76. *See infra* note 113 and accompanying text.

77. 18 U.S.C. § 1962(c) (1988).

78. Razzano, *supra* note 11, at 812.

Section 1962(a) violation
predicate acts ▷ pattern of racketeering activity ▷ generates income ▷ used or invested in an enterprise's operations ▷ injury

Under section 1962(a), no connection is necessary between the predicate acts and the enterprise, but a connection between the use or investment of the income and the injury is necessary.

Consequently, the required nexus between the racketeering activity and the enterprise is not as strong under section 1962(a) as it is under section 1962(c). While under section 1962(c) the racketeering activity must be used to conduct the affairs of an enterprise, under section 1962(a) it must just produce income. Racketeering activity undoubtedly forms the underlying foundation of a section 1962(a) violation; its absence would preclude a plaintiff from proceeding to allege the unlawful practice. But the predicate acts are not the sole basis of the prohibited conduct. The verbs "use" and "invest" describe what activities section 1962(a) forbids and are the "crux of the violation."[79] The rest of section 1962(a) merely describes the circumstances and conditions under which these acts are prohibited. The only way to establish a causal connection between the violation of section 1962(a) and the injury, then, is by showing the harm caused by the use or investment of the proceeds. However, as will be discussed below, this causal relation in most cases will be virtually impossible to prove.[80]

4. Injury from some, but not all, of the elements constituting the violation

Those opposing the investment injury rule argue that since the pattern of racketeering activity is a necessary *element* of section 1962(a), its existence alone satisfies a causal connection between the injury and the violation. Rather than proving harm from the use or investment of the criminal gains only, opponents of the investment injury rule contend that a plaintiff should be able to satisfy section 1962(a) by alleging each of the following elements and by showing the injury resulted from any one of them: (1) the existence of an enterprise, (2) defendants derived income from a pattern of racketeering activity, and (3) some

79. Palumbo v. I.M. Simon & Co., 701 F. Supp. 1407, 1410 (N.D. Ill. 1988).
80. *See infra* text accompanying notes 103-07.

part of the interest was used to acquire an interest in or to operate an enterprise.[81] Since no injury can result from the use or investment of the racketeering proceeds without the predicate acts having been committed, there necessarily exists a connection between the predicate acts and the subsequent harm.[82]

This reasoning fails to understand what section 1962(a) prohibits in conjunction with what section 1964(c), the section authorizing civil RICO suits, requires. Section 1964(c) does not require a plaintiff to prove the mere existence of these individual portions of a substantive provision. Instead, section 1964(c) requires an injury "by reason of" the 1962 "violation" *taken as a whole*, which occurs only after aggregating the separate factors into a single offense. The sum of the individual elements then forms the prohibited conduct. Section 1962(c) addresses violations occurring from the "conduct" of racketeering activities. So although only an element of the provision, the predicate acts are also the sum of the prohibited offense.

The same cannot be said of section 1962(a). The predicate acts merely lay the foundation for the ultimate violation; they are not the gist of the offense. To read it otherwise would obliterate all distinctions among the substantive provisions and would render futile Congress' efforts to draft four violations instead of just one.

Moreover, *Sedima* flatly rejected this very analysis. The Court held that while it is necessary to allege each of the elements contained within a section to state a claim, the mere existence of each element is insufficient to sustain a RICO charge.[83] Not only must plaintiffs plead each element of a violation, but they must also prove injury "by reason of" the violation as well. The Court stated: "The plaintiff must, of course, allege each of these elements to state a claim. . . . In addition, 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."[84] As an example, the Court noted that

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81. *See, e.g.*, Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1256 (E.D. Mich. 1987).

82. At least one court has held that the 1962(a) components individually constitute a causal relation to the injury. Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984), *vacated*, 473 U.S. 922 (1985). Yet this court recognized that the connection was merely a "but/for" cause of the harm, not the requisite proximate cause relation as required by the *Haroco* court.

83. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985).

84. *Id.*

"[c]onducting an enterprise that affects interstate commerce is obviously not in itself a violation of § 1962, nor is mere commission of the predicate offenses."[85] Just as section 1962(a) requires the existence of an enterprise that affects interstate commerce (like section 1962(c)), it also requires the commission of predicate acts. If the investment injury rule's opponents' theory were followed to its logical end, a plaintiff could sustain a 1962(a) claim by merely alleging injury from the existence of an enterprise alone.

Of course Congress could not have contemplated this result, and *Sedima* refused to accept it. As the Court stated: "The plaintiff must, of course, allege each of these elements to state a claim."[86] Given that the commission of racketeering acts is but a subpart of section 1962(a), its existence, standing alone, fails to give rise to a civil RICO cause of action under both a simple reading of section 1964(c) and *Sedima*'s ruling.[87]

D. Causation Established for a Corporation Reinvesting Proceeds in Itself

Causation problems necessarily arise for the victim seeking to trace his or her injury from the use or investment of the proceeds once the defendant corporation diverts the money into an unrelated business. However, the causal connection is not so difficult to establish if the corporation channels the funds back into its own operations. *Haroco* recognized this distinction: "[W]hen the fruits of racketeering come to rest in the corporate enterprise [as opposed to a separate entity], that enterprise is within RICO's intended reach. Section 1962(a) is designed to recover these proceeds."[88] A plaintiff could be injured "by reason of" a defendant corporation investing the proceeds in its own business, then using that business to conduct further instances of racketeering. As one court reasoned, "money that enable[s] the

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85. *Id.*

86. *Id.*

87. Though the *Grider* court was the first circuit court to expressly deal with the investment injury rule, at least one other circuit had already implicitly rejected the requirement that a plaintiff allege injury from more than just the racketeering activities. Wilcox v. First Interstate Bank, 815 F.2d 522, 529 (9th Cir. 1987) ("The [*Sedima*] Court emphasized that a plaintiff still must allege each element prescribed in the statute to state a claim. The statute, however, requires no more. The compensable injury is the harm caused by the predicate act relied upon.").

88. Haroco, Inc. v. American Nat'l Bank & Trust Co., 647 F. Supp. 1026, 1033 (N.D. Ill. 1986).

business to continue operating also enable[s] the defendant to perpetuate the fraud."[89]

For example, suppose an enterprise illegally obtains $20,000 from a victim through the commission of one predicate act.[90] The corporation then plunges that $20,000 back into its business. Some time later, the corporation elicits another $10,000 from the same individual. Mere receipt of the $20,000 and the subsequent reinvestment alone may have injured the victim upon whom it had perpetrated the initial fraud. The reinvestment of the first $20,000 strengthened the corporation's economic base, thereby sustaining its ability to procure yet another $10,000.

The language of section 1962(a) could arguably support this reading. It includes illegal income used or invested in the "operation of" the enterprise. The statute does not include the enterprise that commits one predicate act, then "takes the money and runs." There the common law provides the appropriate avenue of relief. Instead, section 1962(a) contemplates a business using or investing the criminal proceeds in the "operation of" its affairs, connoting a more continuing nature and the existence of racketeering. In the above example, the necessary elements comprising a section 1962(a) violation are present: receipt of income from a pattern of racketeering activity that is used or invested in the operation of an enterprise. The first predicate act, coupled with the reinvestment, sets the stage for a section 1962(a) offense. However, until a second predicate act occurs, the victim cannot claim injury by the use or investment of the proceeds from the first predicate act. This is because the injury results from the corporation having a stronger basis for perpetration of the *second* predicate act. It is not enough, therefore, that a victim allege injury from just the two predicate acts. Rather, the profits from the first act must facilitate commission of the second predicate act. RICO does not extend to those suffering from only one instance of fraud; it provides recovery only to those injured by a "pattern" of racketeering activity.

However, courts should not allow this type of connection (a causation in fact) to suffice for RICO standing in cases such as *Grider* but instead should require proximate causation. First, al-

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89. Blue Cross v. Nardone, 680 F. Supp. 195, 198 (W.D. Pa. 1988).

90. Assume for purposes of the hypothetical that the predicate act is mail or wire fraud.

lowing mere factual causation would extend RICO liability indefinitely in scenarios such as the hypothetical above. Literally anyone who has conducted an arm's length transaction with a guilty organization could allege an injury from the use or investment of racketeering proceeds in itself. For instance, once the corporation solidifies its economic base through predicate acts, any individual—and not just the defrauded victim—could allege injury through inferior bargaining position caused by the use or investment of the illegal gains. The relation between the injury and the conduct is too attenuated to render an enterprise liable to each individual with whom it transacts just because it engaged in racketeering activity with another. As the *Haroco* court concluded when establishing a proximate cause requirement,

> A defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured. This causation requirement might not be subtle, elegant or imaginative, but we believe it is based on a straightforward reading of the statute as Congress intended it to be read.[91]

Given that proximate cause is based upon policy considerations rather than factual circumstances, it is appropriate for courts to impose the proximate cause limitation upon victims seeking to sue under section 1962(a). Otherwise, defrauded investors would always file RICO claims, instead of seeking relief through the more appropriate state court remedies for common law fraud or through the applicable federal securities laws. The proximate cause requirement strikes a more equitable balance between the type of injury incurred and the remedy sought. For instance, while common law fraud is not as difficult to prove as a federal securities law violation, it does not afford attorneys' fees. The federal securities laws, on the other hand, allow greater recovery through fees and costs but impose much higher requirements for maintaining a suit.

V. Liberal Interpretation Clause

Those opposing the investment injury rule invoke Congress' specific instruction to construe RICO broadly.[92] Clearly section

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91. Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam); *see also* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985).

92. Congress expressly admonished that RICO "be liberally construed to effectuate

1962(a) prohibits the use or investment of the racketeering proceeds, but it is not so clear whether Congress intended to catch all predicate acts under any section 1962 subsection. Many argue that Congress did contemplate that a pattern of racketeering would constitute a violation under each of the three substantive provisions since it is the primary element underlying each violation. Indeed, this may have been the very "conduct" Congress sought to prohibit. Yet if that is in fact what Congress intended, they failed to expressly reflect such an intent in section 1962(a)'s text.

A. Sedima*'s Limitation*

Despite the language of *Sedima* that supports civil RICO violations for predicate acts alone, the case did not involve a section 1962(a) claim. And given the fundamental language differences between sections 1962(a) and 1962(c), there may be legitimate reasons to suspect that the Court would not simply carry over those same requirements to a section prohibiting entirely different conduct. However, the Court did hint at just how leniently it might read section 1964(c) (the section authorizing private RICO suits) if confronted with a standing issue under another subsection, like section 1962(a): "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964 [authorizing private suits], where RICO's remedial purposes are most evident."[93] For RICO to achieve its "remedial purposes," those engaged in corrupt activities should not be allowed to slip by unchecked, be they individuals or corporations.

Much of the courts' hostility toward civil RICO stems from the widely-held belief that RICO was not intended to impose harsh sanctions upon legitimate, respected businesses. However, even if RICO does contain deficiencies causing divisive splits in its application, the lower courts cannot ignore the explicit guidance provided by the United States Supreme Court in *Sedima*. As Justice White remarked: "It is true that private civil actions under the statute are being brought almost solely against [respected businesses], rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent

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its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947. *See, e.g.*, Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990).

93. *Sedima*, 473 U.S. at 492 n.10.

in the statute as written, and its correction must lie with Congress."[94]

Courts should use the liberal interpretation clause only in those instances when a bona-fide uncertainty exists concerning statutory language. Only then will RICO truly effectuate its "remedial purposes."[95] This conclusion is supported by *Sedima*, which held that when the textual language is clear, the liberal interpretation clause is inapplicable: "The strict-construction principle is merely a guide to statutory interpretation. . . . [I]t 'only serves as an aid for resolving an ambiguity; it is not to be used to beget one.' "[96]

The investment injury rule is well founded upon a rational reading of section 1962(a). No liberal interpretation need even be applied—its language is not ambiguous. Section 1962(a) clearly prohibits one type of conduct: the use or investment of racketeering proceeds. Consequently, courts should not grant potential plaintiffs the authority to circumvent a common-sense reading of section 1962(a).

Just because Congress provided a broad-interpretation clause does not warrant its use when a victim—though wrongfully harmed by a corrupt organization—does not legitimately have a cause of action under the appropriate section. Wronged plaintiffs, now unable to sue corporations under section 1962(c) because of the person/enterprise distinction, resort to section 1962(a) for relief and seek to blur all distinctions between the specific violations in each section under the guise of "liberally" construing RICO. All sections share a common objective, the eradication of organized crime. And all sections share one underlying element necessary for each violation, the predicate acts constituting a "pattern of racketeering activity." However, victims should not be allowed to cloak their charges under section 1962(a) in an effort to resurrect what would otherwise be a failed section 1962(c) claim. Simply because one section does not permit recovery does not justify artfully-styled complaints. One court aptly described how inappropriate it is to characterize an

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94. *Id.* at 499 (footnote omitted).

95. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947.

96. *Sedima*, 473 U.S. at 492 n.10 (likening the broad interpretation provision to its "identical twin, the 'rule of lenity' ") (quoting Callanan v. United States, 364 U.S. 587, 596 (1961)).

otherwise unsuccessful claim under statutory language that clearly does not support such an interpretation:

> While there is no doubt that RICO is to be interpreted broadly in order to effectuate its purposes, at the same time RICO is not a catch-all statute intended to provide any plaintiff wronged by any organization a cause of action for that wrong. . . . RICO was not designed as a means for small investors to sue investment companies upon common law fraud actions, but rather RICO is a specialized statute only allowing recovery for breaches of specific types of injury.[97]

Granted, victims harmed by the predicate acts of corporations will not be able to sue under a section that prohibits only the use or investment of racketeering proceeds. Maybe Congress did intend RICO to reach this type of racketeering conduct. If it did, it failed to delineate such in the clear statutory language of section 1962(a). Just because Congress did not specifically indicate that injury from the predicate acts alone would suffice for section 1962(a) claims will not save an otherwise failing argument when the language leaves little room for doubt: "[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute."[98] Though both sections 1962(a) and 1962(c) require a pattern of racketeering activity to comprise what is "unlawful," the individual violations remain separate and distinct. What cannot be neatly categorized under one section does not justify another providing a "universal remedy" to satisfy section 1964(c).[99]

B. Civil Enterprise Liability

Unfortunately, injured plaintiffs will be severely limited in suing companies engaged in white-collar crime because of the investment injury rule. As previously discussed, the plain language of RICO's text clearly contemplates enterprise liability. But courts favoring both the investment injury rule and the person/enterprise distinction virtually insulate corporations from RICO's penalties, specifically the sting of treble damages. The irony of such restrictive standing requirements like the investment injury rule is that plaintiffs will no longer be able to sue

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97. Forkin v. Paine Webber, Inc., RICO Bus. Disp. Guide (CCH) ¶ 7086 (C.D. Ill. Nov. 29, 1988).

98. *Sedima*, 473 U.S. at 495 n.13 (1985).

99. P.M.F. Serv., Inc. v. Grady, 681 F. Supp. 549, 556 (N.D. Ill. 1988).

white-collar racketeers under the statute christened for this very purpose—the Racketeer Influenced and Corrupt Organizations Act—unless they find escape hatches to avoid the restrictions.[100] As the plaintiff in *Grider* argued, "[i]t is nonsense to have a corporation as a 'person,' who can violate the statute . . . without providing a concomitant remedy for its victims."[101] Those harmed by corporate racketeering will hardly be comforted knowing that they must now revert to common law procedures. The traditional remedies and punishment were obviously inadequate to combat the problem in the first place, thus giving rise to RICO.[102]

Many argue, however, that shielding corporations from civil RICO liability is of no grave concern since the statute was not drafted to punish established, upstanding businesses. However, the primary purpose behind enacting RICO was "to address the infiltration of *legitimate* business [by organized crime.]"[103] Before *Sedima*, many courts reacted hesitantly to civil RICO suits since major corporations did not fit the bill of mafioso-type corruption. Those same misgivings are still widely held, despite the judiciary's rejection of the argument that RICO applies only to organized crime in the "classic 'mobster' sense."[104] Even if a plaintiff manages to plead each of the section 1962(a) elements, that victim will still face the obstacle of proving injury from the use or investment of racketeering income that has long since disappeared. The Court in *Sedima* rejected the "distinct racketeering injury" requirement because it would be difficult, perhaps

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100. *See infra* note 107.

101. Petition for Writ of Certiorari at 26-27, Grider v. Texas Oil & Gas Corp., 868 F.2d 1147 (10th Cir.) (No. 87-1671), *cert. denied*, 110 S. Ct. 76 (1989).

102. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 ("[T]he sanctions and remedies available . . . [under existing law] are unnecessarily limited in scope and impact.").

103. United States v. Turkette, 452 U.S. 576, 591 (1981) (emphasis added).

104. United States v. Grande, 620 F.2d 1026, 1030 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980); *see also* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) ("Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises.") (citation omitted); *Turkette*, 452 U.S. at 590 ("The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."); Papai v. Cremosnik, 635 F. Supp. 1402, 1411 (N.D. Ill. 1986) ("RICO's use against white-collar crime "is not contrary to the intent of Congress but is in fact one of the 'benefits' Congress saw the Act as providing."). *See generally* Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237 (1982); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980).

impossible, "to apply in practice or explain to a jury."[105] That same reasoning applies to section 1962(a) as well. Imposing the standing limitation upon section 1962(a) would require an element of causation that in most instances will be impossible to prove, even if the corporation plunges the proceeds back into its own operations. Cash is fungible, so few plaintiffs will be able to trace exactly where *their* dollars went in the business and how that reinvestment subsequently injured them. Only those competitors of the charged corporation will have standing to sue for civil RICO under this limitation. These competitors will, in most instances, be entirely unaware of the predicate acts.[106] And even if they are aware, it will be virtually impossible to track exactly how the specific funds obtained illegally were channeled into a particular investment.[107]

Another example serves to illustrate just how the investment injury rule would render civil RICO inoperative. Assume a corporation acquires substantial revenues from those it induces to purchase fraudulent investment interests.[108] The corporation subsequently uses that money to acquire a subsidiary (a laundromat, for instance) that enjoys overwhelming success due to the racketeering revenue funnelled to it by the parent corporation. By limiting standing to those harmed by the use or investment of this money, only other laundromats in competition with the subsidiary will be permitted to bring a section 1962(a) action. Realistically, those competitors will generally have no idea that their competitor is supported by racketeering income.

Given the rising tide of white-collar crime in America, the repercussions of shielding corporations from RICO's grasp become particularly disturbing.[109] Of specific concern is that big

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105. *Sedima*, 473 U.S. at 495 n.12.

106. *See* King v. E.F. Hutton & Co., RICO Bus. Disp. Guide (CCH) ¶ 6578 (D.C. Cir. Mar. 13, 1987).

107. One means by which plaintiffs avoid the investment injury requirement, given the difficulty in proving an injury from the use or investment of money, is to find some "shell" corporation (a subsidiary, for example) that the defendant corporation has established and operates with the racketeering proceeds. Plaintiffs can effectively avoid dismissal of section 1962(a) claims by alleging injury from the use or investment of racketeering funds used to operate it. However, this is not always a viable alternative, since not all businesses fit this type of organization.

108. Assume for purposes of this hypothetical that the predicate acts are mail and wire fraud.

109. Chief Justice Rehnquist recently commented on this national plight: "White-collar crime is 'the most serious and all-pervasive crime problem in America today.' . . . Although this statement was made in 1980, there is no reason to think that the problem

business will be immune from such penalties as treble damages and attorneys' fees, which the statute extracts from equally culpable non-corporate defendants. Despite the consensus that RICO was designed to reach racketeering activities infiltrating all aspects of our economy,[110] many courts are still loathe to impose such hard-hitting punishment upon businesses otherwise considered "respectable." Forcing injured victims to resort to common law remedies will do little to either encourage wronged plaintiffs to file suit, adequately compensate them, punish the guilty enterprise, or deter it from further illegal conduct.[111]

VI. CONCLUSION

Since many wrongfully injured plaintiffs will now be barred from suing corporations because of *Grider*'s investment injury rule, big business appears to be the one winning the civil RICO "treasure hunt." Corporations allegedly involved in racketeering activity should not be permitted to slip beyond the purview of the statute, though that is exactly what will happen now that

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has diminished in the meantime." Braswell v. United States, 487 U.S. 99, 115 n.9 (1988) (quoting Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 288 (1980)).

110. *See supra* note 104.

111. The private enforcement mechanism serves essentially three distinct purposes: (1) encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crimes.

Note, *Treble Damages under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 533-34 (1986).

The legislative history surrounding RICO clearly indicates that the civil remedies were considered just as important to achieving the statute's goal: eradicating organized crime from all aspects of society, in both legitimate and illegitimate businesses. The inclusion of treble damages was not merely an accidental after-thought tacked onto a primarily criminal statute. In fact, the provision was deemed to be an essential aspect to private enforcement of the statute. *See, e.g.*, Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 151 (1987) ("Both RICO and the Clayton Act . . . bring to bear the pressure of 'private attorneys general' [for] a serious national problem for which public prosecutorial resources are deemed inadequate."); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 241 (1987) ("RICO's drafters likewise sought to provide vigorous incentives for plaintiffs to pursue RICO claims."); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 493 (1985) ("[p]rivate attorney general provisions are in part designed to fill prosecutorial gaps"). Senator Hruska, one of RICO's principal sponsors, acknowledged that "the criminal provisions are intended primarily as an adjunct to the civil provisions which [he] consider[s] as the more important features of the [RICO] bill." 115 CONG. REC. 6993-94 (1969); *see also* 116 CONG. REC. 602 (1970) ("[T]he principal value of this legislation may well be found to exist in its civil provisions . . . .") (statement of Sen. Hruska).

circuit courts like the Tenth Circuit in *Grider v. Texas Oil & Gas* have begun to adopt the investment injury rule. Though there may be ways for some plaintiffs to circumvent the standing requirements under 1962(a)—by finding a separate "enterprise" into which illicit gains were deposited, for example—not all injured victims will be fortunate enough to find escape hatches.[112] The investment injury rule under section 1962(a) continues to restrict recovery as a whole for those wrongfully injured by white-collar crime in America and threatens to immunize corporations from legal accountability under RICO. However, if this is in fact an unforeseen defect in the statute, only Congress can rectify it and not courts trying to read beyond plain statutory language.

Section 1962(a), despite creative interpretations, does not state that it is unlawful merely to engage in a pattern of racketeering activity (although committing the predicate acts is requisite to the ultimate prohibited conduct). Rather, section 1962(a) means exactly what it says: a racketeer cannot "use or invest" the illegal gains in an enterprise's operation. While commission of the racketeering acts alone will always suffice for a section 1962(c) violation, *Sedima* cannot be read so expansively as to mean that all section 1962 offenses are the same. What is a violation in one section does not necessarily constitute a violation in another. Congress created each provision separately, and each contemplates a distinct prohibition, though all share common denominators (an "enterprise," a "pattern of racketeering activity," and a "person" perpetrating the predicate acts).

Furthermore, courts should not permit litigants to use the liberal interpretation clause as a guise to cast claims unsupported by the clear language of the text. Just because the person/enterprise distinction now restricts RICO victims under section 1962(c) does not warrant allowing plaintiffs to frame RICO charges under another section prohibiting entirely different conduct. Courts should invoke the liberal interpretation clause only as a supplement to resolving textual ambiguities and not as a substitute for otherwise plain meaning. What conduct section 1962(a) prohibits is clear and unambiguous. But until some compromise is reached for RICO reform,[113] troublesome standing re-

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112. Razzano, *supra* note 11, at 813; *see supra* note 107 and accompanying text.

113. *But see* Petition for Writ of Certiorari at 37 n.12, Grider v. Texas Oil & Gas Corp., 868 F.2d 1147 (10th Cir.) (No. 87-1671), *cert. denied*, 110 S. Ct. 76 (1989) ("[A]lthough Congress is presently considering revisions of RICO, the problems created

quirements like the investment injury rule will continue to thwart the very purpose for which the statute was enacted—to eliminate corrupt racketeering activity, both criminally and civilly—instead of seizing it in the fight against white-collar crime in America.

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by the split in the authorities [concerning the investment injury rule] are not being addressed by Congress."). No resolution among the split circuits appears to be anywhere in sight, given the Supreme Court's denial of certiorari for *Grider v. Texas Oil & Gas Corp.* in October, 1989.

Since *Grider* and the decisions in the Second, Third and Sixth circuits adopting the investment injury rule, *see supra* note 28 and accompanying text, the Fourth Circuit has rejected their holdings and ruled that the restriction is "flawed." In Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990), the court held that injury caused by the predicate racketeering acts is sufficient to state a 1962(a) claim. The court looked to the statutory language of 1962(a) and concluded that it requires two prongs for a violation: the receipt of income from a pattern of racketeering activity, and the use or investment of that income. Although injury may result from the use or investment of the proceeds, the court held that "this is not the only injury that plaintiffs sustain 'by reason of' a § 1962(a) violation." *Id.* at 837. This is essentially Grider's argument of "alternative violations" addressed above. *See supra* text accompanying notes 74-75. However, section 1962(a) contains no such "choice" of violations. Only *one* conduct is prohibited. The reasoning of the *Busby* court would essentially allow injury to be caused from any one element of the violation, rather from the violation itself: "[T]he broadly drafted 'by reason of' language in § 1964(c) allows recovery for such injuries, despite the fact that one element of the violation, the use of proceeds, may not have contributed to or caused the injury." This analysis circumvents the explicit statutory language that sets out what conduct is a violation of section 1962(a). Such reasoning would virtually allow plaintiffs to take any statute, dissect its elements, and allege harm from any one necessary aspect of a particular violation. For example, a statute might provide that "it is unlawful to cross the street when the light is red." To allege an injury "by reason of a violation" of this statute, it would be enough, therefore, to claim harm merely from crossing the street. Though a necessary element, that is certainly not what the statute prohibits.