Note

AFTER *SEDIMA*: THE LOWER COURTS' USE OF PROXIMATE CAUSE AS A LIMITATION ON CIVIL RICO

I. INTRODUCTION

In 1970, Congress drafted and passed title 9 of the Organized Crime Control Act,[1] the Racketeer Influenced and Corrupt Organizations Act (RICO),[2] with the purpose of eradicating the serious and detrimental influence of racketeering activity[3] wrought by or-

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1. Pub. L. No. 91-452, 84 Stat. 922 (1970).

2. Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, tit. 9, 84 Stat. 941 (1970), *amended by* 18 U.S.C. §§ 1961-1968 (1982 & Supp. 1990).

3. 18 U.S.C. § 1961(1) (Supp. 1990) defines "racketeering activity" as:

> (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313

ganized crime in American society.[4] The statute targets crimes typically related to organized crime,[5] but also includes crimes committed within the confines of the boardroom.[6] Thus, "[c]orporations are

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(relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

4. Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970). Congress noted the following reasons for the implementation of the RICO statute:

> 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.

5. *See supra* note 3 (defining racketeering activity under 18 U.S.C. §§ 1961(1)(A), (B), (C), (D) & (E) (Supp. 1990)).

6. *See* Rodarmor, 5 CAL. LAW. 45 (Apr. 1985). *See also* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985) (noting that RICO has been used against "enterprises" recognized as both respected and legitimate such as the American Express Company, Merrill Lynch, Lloyd's of London, Bear Stearns & Company, and E.F. Hutton & Company). *See, e.g.*, Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187 (9th Cir. 1987); Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349 (3d Cir. 1987); Blount Fin. Serv. v. Heller & Co., 819 F.2d 151 (6th Cir. 1987); California Architectural Bldg. Prods.

especially fearful of RICO claims . . . because they are answerable to their stockholders."[7]

This fear is further magnified because section 1964 of RICO creates a civil cause of action allowing treble damages[8] for injury caused "by reason of"[9] a section 1962 violation.[10] The private cause of action created by the language of section 1964 frequently has been "civil RICO."

In *Sedima, S.P.R.L. v. Imrex Co.*,[11] the Supreme Court expanded liability under civil RICO by invalidating two standing requirements,

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v. Franciscan Ceramics, 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988); Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986); Schofield v. First Commodity Corp. of Boston, 793 F.2d 28 (1st Cir. 1986); Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986).

7. Rodarmor, *supra* note 6, at 46. Corporate RICO defendants "'have to weigh the years spent tied up in litigation and the enormous cost and exposure against keeping the corporation going.'" *Id.* "Settling a RICO claim 'isn't a matter of wrongdoing, [i]t's pure economics.'" *Id.* "It is also a public relations disaster. [D]efendants . . . have to note in their annual reports that they are being sued as racketeers." *Id.*

8. 18 U.S.C. § 1964(c) (1982) provides the following provision for private suits: "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."

9. *Id.*

10. 18 U.S.C. § 1962 (1982 & Supp. 1990) provides in relevant part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .
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> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
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> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
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> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

11. 473 U.S. 479 (1985).

created by circuit courts, for establishing a cause of action.[12] The *Sedima* holding has increased corporate concerns regarding the growing civil litigation under the RICO statute.[13]

RICO's expansive civil remedies subsequently have come under attack,[14] during which time the lower courts have fashioned a formidable limitation on third party suits under RICO through the application of tort causation principles.[15]

This note will review recent lower court decisions applying causation principles to private civil RICO actions. These cases, ostensibly taking their cue from *Sedima*, have been instrumental in

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12. *See id.* at 493, 495 (rejecting lower court's holdings that a prior RICO conviction, and a racketeering-type injury, by the defendant is required in a private civil action under RICO).

13. *See* cases cited *supra* note 6.

14. See Bridwell & Cooper, *Hard Law and Bad Cases: The Fourth Circuit Limits Civil RICO*, 22 WAKE FOREST L. REV. 715, 716 (1987), stating that:

> [t]he RICO statute has been the center of a growing and intense controversy, more hotly debated than any subject other than 'tort reform.' No other issue has stimulated more ardent lobbying efforts by business interests potentially affected by RICO, either to achieve sweeping change in the statute or its outright abolition.

See also Note, *Corporate Liability Under the Racketeer Influenced and Corrupt Organizations Act (RICO): The Scope of the "Person" and "Enterprise" Elements*, 3 ANN. REV. BANKING L. 225, 225 (1984) ("The scope of the RICO prohibition has been the subject of controversy.").

15. Causation involves the relationship between the defendant's conduct and the harm to the plaintiff and encompasses both actual and proximate cause. The defendant must not only cause the injury in fact, but the conduct must be the proximate cause of the injury as well. Actual causation is a jury question; proximate cause is usually a question of law. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS §§ 41, 42 (5th ed. 1984) [hereinafter PROSSER]. For cases, see Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988) (failing to show requisite causal connection between injury and alleged pattern of racketeering activity); Adams-Lundy v. Association of Professional Flight Attendants, 844 F.2d 245 (5th Cir. 1988) (denying standing to union members because RICO does not support derivative actions); Bass v. Campagnone, 838 F.2d 10, 13 (1st Cir. 1988) (stating that it would be extending the causal connection too far by allowing a union member to gain standing for injuries not flowing from the predicate acts); Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc., 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (citing to the language in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), and noting that regardless of whether an injury is direct or indirect, the plaintiff must show the harm was caused by the alleged RICO violation); Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (stating that the "by reason of" language of § 1964(c) imposes upon plaintiffs a proximate cause requirement that the RICO violation must either directly or indirectly have injured the business or property of the plaintiff). *See also infra* notes 89, 93 and accompanying text.

fashioning the latest limitations on recovery. Section II briefly discusses the purpose and legislative history of the RICO statute. Section III provides an analysis of the Supreme Court's holding in *Sedima*, nullifying the lower courts' requirements of a prior conviction and a racketeering-type injury. Lastly, in light of the Supreme Court's holding in *Sedima*, this note focuses on an analysis of the applicability of proximate cause to third party claims under civil RICO and an examination of the case law from lower courts in determining how tort doctrine has been implemented to halt the increasingly burdensome and detrimental impact of private civil RICO actions on legitimate corporations.

II. BACKGROUND

A. Purpose

RICO begins by pinpointing "'racketeering activity,' which it defines as any act . . . 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud, and any 'offense' involving bankruptcy or securities fraud . . . 'punishable' under federal law."[16]

Section 1962 then defines prohibited activities to include:

> the use of income derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; the acquisition or maintenance of any interest in an enterprise "through" a pattern of racketeering activity; conducting or participating in the conduct of an enterprise through a pattern of racketeering activity; and conspiring to violate any of these provisions.[17]

Any violation of these provisions results in criminal penalties of imprisonment, fines, and forfeiture.[18] In addition to the criminal

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16. *Sedima*, 473 U.S. at 481-82 (citing 18 U.S.C. § 1961(1)). *See supra* note 3 (citing 18 U.S.C. § 1961(1)(A)-(E) (Supp. 1990)) (providing statute's definition of "racketeering activity").

17. *Sedima*, 473 U.S. at 482-83 (footnote omitted). *See supra* note 10 (citing 18 U.S.C. § 1962(A)-(D) (1982 & Supp. 1990)).

18. *Sedima*, 473 U.S. at 483 (citing 18 U.S.C. § 1963). In relevant part, 18 U.S.C. § 1963 (Supp. 1990) provides:

(a) Whoever violates any provision of section 1962 of this chapter shall

penalties provided for under section 1963, Congress implemented a "far-reaching civil enforcement scheme [under the provisions of section 1964], including the . . . provision for private suits" and treble damages.[19]

B. Legislative History

RICO "arose out of a national preoccupation with organized crime and its attendant evils,"[20] as an "aggressive initiative to supplement old remedies and develop new methods for fighting crime."[21]

Although the original civil remedies passed by the Senate were limited in scope to injunctive actions by the United States,[22] earlier drafts of the RICO legislation contained provisions for a private treble damages action fashioned in the same terms as those ultimately adopted in § 1964(c).[23] The treble damage provision, although attracting the attention of some legislators who were concerned that the provision would become a weapon for malicious harassment by business competitors,[24] was ultimately endorsed as being "'a major new tool in extirpating the baneful influence of organized crime in our economic life.'"[25]

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be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962.

19. *Sedima*, 473 U.S. at 483. *See supra* note 8 (citing the provisions under 18 U.S.C. § 1964(c) (1982)).

20. Comment, *Racketeer Influenced and Corrupt Organizations Act (RICO)—Civil Liability—Private Civil Action Requires Neither that the Defendant Have Been Convicted of Either a Predicate Act or of a RICO Violation or that the Plaintiff Have Suffered a "Racketeering Injury." Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S. Ct. 3275 (1985), 17 RUTGERS L.J. 347, 349 (1986).

21. *Sedima*, 473 U.S. at 498. *See generally* Russello v. United States, 464 U.S. 16, 26-29 (1983) (reviewing RICO's legislative history).

22. *Sedima*, 473 U.S. at 486.

23. *Id.* at 487.

24. *Id. See supra* note 6 (noting the use of civil RICO against respected and legitimate enterprises).

25. *Sedima*, 473 U.S. at 488 (quoting 116 CONG. REC. 25,190 (1970)).

Congress intended that the broad language of civil RICO be liberally construed[26] to provide more effective sanctions and new remedies against organized crime.[27] Courts have contended that nothing on the face of the statute suggests a congressional intent to limit its coverage;[28] rather, its "words do not lend themselves to restrictive interpretation."[29]

III. DISCUSSION

A. Analysis of the Supreme Court's Decision in Sedima

In 1979, Sedima, S.P.R.L. (Sedima)[30] and Imrex Co., Inc.

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26. "The provisions of this title shall be liberally construed to effectuate its remedial purpose." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). RICO has also been liberally construed in its application to criminal remedies. *See, e.g.*, United States v. Lee Stroller Enters., Inc., 652 F.2d 1313, 1317-19 (7th Cir. 1981), *cert. denied*, 454 U.S. 1082 (1982) (extension of the term "enterprise" to government); United States v. Elliot, 571 F.2d 880, 899 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) (extension of "enterprise" to illicit association). *See, cf.*, United States v. Anderson, 626 F.2d 1358, 1369 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) ("The extent of judicial deference that should be accorded this remark [the liberal construction clause] stands unclear."); United States v. Grzywacz, 603 F.2d 682, 692 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980) (Swygert, J., dissenting) ("It is unclear whether Congress intended its directive to apply to those sections which establish criminal liability or merely to the 'remedial' provisions of Title IX.").

27. Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

28. *See, e.g.*, United States v. Culbert, 435 U.S. 371, 373 (1978).

29. *Id. See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237 (1982). The following findings of congressional intent favoring a broad interpretation of civil RICO were established based on the author's review of the legislative history of RICO, and title 9 in particular:

> (1) Congress fully intended, after specific debate, to have RICO apply *beyond* any limiting concept like "organized crime" or "racketeering";
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> (2) Congress deliberately redrafted RICO outside of the antitrust statutes, so that it would *not* be limited by antitrust concepts like "competitive," "commercial," or "direct or indirect" injury;
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> (3) *Both* immediate victims of racketeering activity *and* competing organizations were contemplated as civil plaintiffs for injunction, damage, *and* other relief;
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> (4) Over specific objections raising issues of federal-state relations and crowded court dockets, Congress deliberately *extended* RICO to the general field of commercial and other fraud; and
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> (5) Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud.

Id. at 280.

30. Sedima is a Belgian corporation that imports and exports to and from

(Imrex)[31] entered into a joint venture to sell electronic component parts.[32] In 1982, Sedima filed suit against Imrex for various common-law violations[33] as well as three RICO violations.[34] Pursuant to 18 U.S.C. section 1964(c),[35] Sedima sought treble damages and reasonable attorneys' fees.[36]

The district court discharged Sedima's claims for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[37] The district court noted that many courts have stated that an injury occurs "'by reason of a violation of section 1962,'" as required by section 1964(c), only when it is somehow different in kind from the direct injury resulting from the predicate acts of racketeering activity provided for under section 1961.[38] The district court held that the plaintiff's claim did not satisfy this construction of the statute.[39]

The court further held that the complaint failed to allege a "'RICO-type injury,'" which has been defined by courts as either some sort of distinct "'racketeering enterprise injury,'" or a "'competitive injury.'"[40]

The Court of Appeals for the Second Circuit affirmed,[41] holding that Sedima failed to allege an injury "'by reason of a violation of

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Belgium electronic, mechanical and hydraulic parts manufactured in the United States and elsewhere. *Sedima*, 741 F.2d at 484, *rev'd*, 473 U.S. 479 (1985).

31. "Imrex is an American corporation engaged in exporting aircraft and aircraft-related electronic component parts." *Id.*

32. *Id.*

33. *Id.* Sedima's complaint set forth seven common law claims: breach of contract, breach of a constructive trust, breach of fiduciary duty, breach of the joint venture agreement, conversion, unjust enrichment, and a cause of action based on quasi contract. *Id.*

34. *Id.* Two of the RICO counts alleged violations of the Mail Fraud Act, 18 U.S.C. § 1341 (1982), as well as the Wire Fraud Act, 18 U.S.C. § 1343 (1982). The third count charged a RICO conspiracy under 18 U.S.C. § 1962(c) and (d). *Sedima*, 741 F.2d at 485.

35. *See supra* note 8 (citing relevant text of 18 U.S.C. § 1964(c) (1982) providing that "any person" may sue to recover under the RICO statute).

36. *Sedima*, 741 F.2d at 485.

37. Sedima, S.P.R.L. v. Imrex Co., 574 F. Supp. 963, 965 (E.D.N.Y. 1983), *aff'd*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

38. *Sedima*, 574 F. Supp. at 965.

39. *Id.*

40. *Id. See* Note, *Judicial Efforts to Redirect an Errant Statute: Civil RICO and the Misapplication of Vicarious Corporate Liability*, 65 B.U.L. REV. 561 (1985). "In general, courts had used [the] term [racketeering injury] to require an injury over and above that caused by the predicate acts." *Id.* at 570-71. *See also supra* note 15 (defining liability in terms of both actual causation and proximate cause).

41. *Sedima*, 741 F.2d at 483.

section 1962.'"[42] The Second Circuit construed this language of the provision to be a limitation on standing.[43] Thus, the plaintiff in a civil action must have suffered a "racketeering injury" to have standing.[44] Further, the circuit court held that a civil RICO action could only be brought after a previous criminal conviction, as is required by the language "violation of [section] 1962" under the private suit provision of section 1964(c).[45]

The circuit court construed the statute narrowly as requiring a prior conviction to avoid what they considered to be "intolerable practical consequences,"[46] fearing that any construction of the statute, other than a narrow interpretation, would raise severe constitutional questions.[47]

The Supreme Court granted certiorari.[48] The Court stated that the *Sedima* case was just one more "episode in a recent proliferation of civil RICO litigation within the Second Circuit and in other Courts of Appeals."[49] The Court also noted that RICO "in its

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42. *Id.* at 494.

43. *Id.*

44. *Id.* at 496. The Second Circuit rejected the district court's allowance of a "competitive injury" as an alternative to a "racketeering injury" on the grounds that the harm associated with a "competitive injury" was a more severe requirement than what Congress intended to acquire standing under RICO. *Id.*

45. *Id.* at 503. *See infra* notes 47, 62 (describing the Second Circuit's concern that a prior criminal conviction was needed to curb potential misuse of the statute).

46. *Sedima*, 473 U.S. at 490. *See infra* note 64 and accompanying text (noting that the Second Circuit analysis requiring a prior conviction was not without problematic consequences of its own: finding that a prior conviction requirement was not present in the statute; that it further undercut legislative intent; and that a broad interpretation of the statute would not violate constitutional protections).

47. *Sedima*, 741 F.2d at 500 & n.49. The court held that allowing for private civil RICO suits to be brought without requiring a criminal conviction "would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation 'racketeer,' authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law." *Id.* at 500 n.49.

48. Sedima v. Imrex Co., 473 U.S. 479 (1985).

49. *Id.* at 485-86. Regarding the decisions of the Second Circuit, the Supreme Court noted that in Bankers Trust Co. v. Rhoades, 741 F.2d 511, 516-17 (2d Cir. 1984), *vacated and remanded*, 473 U.S. 922 (1985), the circuit court held that "§ 1964(c) allowed recovery only for injuries resulting not from the predicate acts, but from the fact that they were part of a *pattern*." *Sedima*, 743 U.S. at 485 n.5. The Court also noted that, two days following the *Sedima* decision and one day following the decision in *Bankers Trust*, a third panel of the same circuit in Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984), *vacated and remanded*, 473 U.S. 922 (1985), relying on the decisions in *Sedima* and *Bankers Trust*, dismissed the complaint for failure to allege a "distinct racketeering injury." However, the Court noted its disagreement

private civil version . . . is evolving into something quite different from the original conception of its enactors."[50]

The Supreme Court stated that underlying the Second Circuit's holding was the concern over the "extraordinary, if not outrageous,"[51] uses of civil RICO.[52] Particularly, the Court recognized that there has been increasing distress displayed by the courts over the use of civil RICO as applied to "respected and legitimate 'enterprises'"[53] rather than organized crime and reputed mobsters.[54]

The Court recognized the circuit court's concern regarding the misuse of civil RICO[55] and noted its increased use by parties in

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with these decisions for requiring injury beyond that resulting from the predicate acts. *Sedima*, 743 U.S. at 485 n.5.

Regarding the decisions of other Federal Courts of Appeals, the Court noted that in Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 394, 398-99 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), the "elusive racketeering injury requirement" was rejected. *Sedima*, 743 U.S. at 486 n.6. In Alexander Grant & Co. v. Tiffiny Indus., Inc., 742 F.2d 408, 413 (8th Cir. 1984), *vacated and remanded*, 473 U.S. 922, *adhered to in relevant part*, 770 F.2d 717 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986), the circuit court held that "a RICO claim does require some unspecified element beyond the injury flowing directly from the predicate acts [listed in § 1961]." *Sedima*, 473 U.S. at 486 n.6. Finally, the Court noted that in Alcorn County, Miss. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1169 (5th Cir. 1984), the Fifth Circuit took a "similar position" to the decision in *Haroco*. *Sedima*, 473 U.S. F.2d at 486 n.6.

50. *Sedima*, 473 U.S. at 500.

51. *Sedima*, 741 F.2d at 487.

52. *Sedima*, 473 U.S. at 499.

53. *Id.* (quoting *Sedima*, 741 F.2d at 487). *See supra* text and accompanying notes 6-7, 45-52 (describing the concern over the application of civil RICO to respected and legitimate enterprises).

54. *Sedima*, 473 U.S. at 499 (citing *Sedima*, 741 F.2d at 487). "The ABA Task Force found that of the 270 known civil RICO cases at the trial court level, [in 1984] 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% 'allegations of criminal activity of a type generally associated with professional criminals.'" *Id.* at 499 n.16 (citing ABA SECTION OF CORP., BANKING & BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55-56 (1985)). From a survey of 132 published decisions, 57 involved securities transactions and 38 decisions involved commercial and contract disputes. No other category amounted to double digit figures. *Sedima*, 473 U.S. at 499 n.16 (citing AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, THE AUTHORITY TO BRING PRIVATE TREBLE-DAMAGE SUITS UNDER "RICO" SHOULD BE REMOVED 13-15 (Oct. 10, 1984)). *See also supra* text and accompanying notes 3-4, 20-29; *infra* notes 73-75 and accompanying text (explaining the purpose of RICO and its intended application).

55. *Sedima*, 473 U.S. at 481. *See supra* text and accompanying notes 45, 47. *See infra* note 62 (noting lower court's concern with the misuse of civil RICO by private plaintiffs).

actions seeking recovery of treble damages.[56] The Court nevertheless rejected both of the lower courts' holdings.[57]

Relying on *United States v. Turkette*,[58] the Court concluded that it was Congress' intent to reach both "'illegitimate'" as well as "'legitimate'" enterprises.[59] Legitimate businesses are capable of criminal activity and are not immune from its consequences, thus the fact that the civil RICO provisions are being utilized against legitimate or respected businesses is not a reason for disallowing the remedy.[60] Although the Court recognized that private civil RICO actions under the statute's provisions are being brought primarily against respected, legitimate enterprises instead of the stereotypical mobster, correction of this alleged defect lies with Congress.[61]

In reviewing the lower court's interpretation of the requirements of maintaining a private civil action under the RICO statute,[62] the Supreme Court held that section 1964(c)[63] does not limit suits against only those defendants already criminally convicted prior to a civil

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56. *Sedima*, 473 U.S. at 481. The Court recognized that of 270 district court RICO decisions prior to 1985, only 3% were decided in the decade of the 1970s, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984. *Id.* at 481 n.1 (citing ABA SECTION OF CORP., BANKING & BUSINESS LAW, *supra* note 54, at 55). It has become "easy to bootstrap a pedestrian state-law fraud claim into a federal RICO claim." Rodarmor, *supra* note 6, at 45 (quotation omitted). Many plaintiffs' attorneys, in a strong arm tactic, threaten a defendant corporation with a RICO claim without any substance and, due to the possibility of a class action suit involving years of litigation, the exorbitant cost involved and the public relations problems when labeled under RICO as racketeer, the corporation is forced to settle. *Id.* at 46. *See supra* note 7 (describing potential economic problems facing a legitimate enterprise).

57. *Sedima*, 473 U.S. at 481. *See infra* notes 64-71 and accompanying text (describing the Court's analysis).

58. 452 U.S. 576 (1981).

59. *Sedima*, 473 U.S. at 499 (quoting *Turkette*, 452 U.S. at 586).

60. *Id. See supra* notes 26-29 and accompanying text. *See also infra* notes 73-75 and accompanying text (explaining the legislative intent for a liberal application of RICO).

61. *Sedima*, 473 U.S. at 499. *See supra* notes 54, 56.

62. *See supra* text and accompanying notes 37-47. The Second Circuit, concerned with the potential misuse of civil RICO by private plaintiffs, construed the language of 18 U.S.C. § 1964(c) as allowing civil actions only against defendants who had prior criminal convictions and where there had occurred a requisite "racketeering injury." *Sedima*, 741 F.2d at 496. *See supra* text and accompanying notes 41-47 (detailing the Second Circuit's holding that: "racketeering injury" was required for standing, a prior conviction was required under the statute, and civil suits for criminal acts may involve constitutional concerns).

63. *See supra* note 8 (quoting 18 U.S.C. § 1964(c)).

RICO action.[64] In addition, the Court held that there is no requirement that a plaintiff must suffer a "racketeering injury" separate from the harm which resulted from the direct acts of the required predicate acts themselves.[65] The Court found that the Second Circuit's statement that a "plaintiff must seek redress for a[ ] [racketeering] injury caused by conduct that RICO was designed to deter," was both vague and an "unhelpfully tautological" concept.[66]

The Court determined that the Second Circuit's ambiguity regarding the meaning of "racketeering injury" was inconsequential

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64. *Sedima*, 473 U.S. at 488-93. The *Sedima* Court, in reviewing the language of RICO, noted that there was no "obvious indication" that a prior criminal conviction is required for a civil RICO action and that the legislative history of RICO also "undercuts" the lower court's decision. *Id.* at 488-89. The Court read the statute to define "racketeering activity" as not consisting of acts for which the defendant had prior convictions, but acts for which a defendant could be convicted. *Id.* at 488 (citation omitted). The Court held that a prior conviction was not required by § 1962, which describes the statute's substantive provisions, nor by § 1964(c)'s use of the term "violation". *Id.* at 489. The Court did not consider that a broad interpretation of the statute would impede constitutional protections or allow for punitive damages. The Court noted that a prior-conviction requirement would not be consistent with the public policy concerns which motivated Congress to enact the statute. *Id.* at 492-93. In conclusion, the Court found no support in the statute's language, history or "considerations of policy for a requirement that a private treble-damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted." *Id.* at 493. While the Court acknowledged the use of civil RICO against respected and legitimate "enterprises," the Court criticized the Second Circuit's approach regarding the prior conviction requirement as being problematic.

> It arbitrarily restricts the availability of private actions, for lawbreakers are often not apprehended and convicted. Even if a conviction has been obtained, it is unlikely that a private plaintiff will be able to recover for all of the acts constituting an extensive "pattern," or that multiple victims will be able to obtain redress. This is because criminal convictions are often limited to a small portion of actual or possible charges. The decision below would also create peculiar incentives for plea bargaining to non-predicate-act offenses so as to ensure immunity from a later civil suit. If nothing else, a criminal defendant might plead to a tiny fraction of counts, so as to limit future civil liability. In addition, the dependence of potential civil litigants on the initiation and success of a criminal prosecution could lead to unhealthy private pressures on prosecutors and to self-serving trial testimony, or at least accusations thereof. Problems would also arise if some or all of the convictions were reversed on appeal. Finally, the compelled wait for the completion of criminal proceedings would result in pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications.

Id. at 490 n.9.

65. *Id.* at 495.

66. *Id.* at 494.

since there is no distinct "racketeering injury" requirement in the RICO statute.[67] The Court stated that "[g]iven that 'racketeering activity' consists of no more and no less than commission of a predicate act, [listed in] § 1961(1), we are initially doubtful about a requirement of a 'racketeering injury' separate from the harm from the predicate acts."[68]

Furthermore, the Court stated that:

> [s]ection 1964(c) authorizes a private suit by "[a]ny person injured in his business or property by reason of a violation of § 1962" [which] 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.[69]

Thus, if a defendant were to engage in a pattern of racketeering activity in violation of these provisions, and the same racketeering activity harms the plaintiff in his business or property, there is a valid private civil claim for damages under section 1964(c).[70] Accordingly, there is "no room in the statutory language for an additional, amorphous 'racketeering injury' requirement."[71]

The Court's admittedly broad and less restrictive reading of the RICO statute[72] stems from Congress' "self-consciously expansive language and overall approach,"[73] and also from Congress' "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'"[74] The intended purpose of this expansive approach was to prevent organized crime from escaping liability through various loopholes.[75] The Court noted that RICO's remedial purposes

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67. *Id.* at 494-95.

68. *Id.* at 495. *See infra* notes 82-83, 89 and accompanying text (explaining the Court's holding that a direct victim injured from the commission of a predicate act, as well as the indirect victim injured from the harm resulting from the forbidden conduct, may recover under RICO).

69. *Sedima*, 473 U.S. at 495.

70. *Id.*

71. *Id.*

72. *Id.* at 497.

73. *Id.* at 498 (citing *Turkette*, 452 U.S. at 586-87).

74. *Id.* (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)).

75. *See, e.g.*, *Turkette*, 452 U.S. at 588-90; *Haroco*, 747 F.2d at 390, *aff'd*, 473 U.S. 606 (1985); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984)

are more evident in the provision of a private action for injuries caused by racketeering activity.[76]

The Court acknowledged that private civil actions under RICO have been brought primarily against respected businesses, rather than against intimidating mobsters.[77] However, the Court indicated that if the pattern of civil suits has been inappropriate, the power to correct it lies with Congress.[78]

The Court concluded that a RICO violation of section 1962 which Sedima relied on required "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[79] The plaintiff must allege each of these elements to state a claim. In addition, the plaintiff will only have standing to bring the civil suit and can only recover damages for injuries to "his business or property caused by the conduct constituting the violation."[80] This interpretation is consistent with the judicial limitation that "[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."[81]

The Court held that both the harm proximately caused by the predicate acts as well as the indirect harm flowing therefrom were compensable.[82] Accordingly, the Court held that recovery is allowed

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("But Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes.").

76. *Sedima*, 473 U.S. at 498.

77. *Id.* at 499. *See supra* notes 54, 56.

78. *Sedima*, 473 U.S. at 499.

79. *Id.* at 496 (footnote omitted).

80. *Id.*

81. *Haroco*, 747 F.2d at 398, *aff'd*, 473 U.S. 606 (1985). Although it is arguable that the *Sedima* Court opened the floodgates to litigation in allowing for both the direct and indirect victims to recover, the Court's finding of a judicial limitation on the defendant's liability has afforded the lower courts leeway in applying a proximate cause limitation. A proximate cause limitation has also been read into the RICO statute in the "by reason of" language of § 1964(c). Sperber v. Boesky, 849 F.2d 60, 64 (2d Cir. 1988); *Haroco*, 747 F.2d at 398, *aff'd*, 473 U.S. 606 (1985); *Sedima*, 741 F.2d at 494; *Sedima*, 574 F. Supp. at 965. *See infra* text and accompanying notes 85-89, 93, 117, 122-23, 127, 137 & 161 (discussing the application of a proximate cause limitation to the *Sedima* Court's holding).

82. *Sedima*, 473 U.S. at 497 n.15. The Court stated that "[s]uch damages include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery." *Id. See supra* notes 65, 68-70 & 81 and accompanying text; *infra* notes 83, 89 and accompanying text. It can be argued that recovery for the

for both the direct victim and the indirect victim for injury resulting from the defendant's perpetration of one or more of the predicate acts listed in section 1961.[83]

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direct injury is adverse to the statutory language of the RICO statute. By its terms, § 1964(c) allows for a cause of action when a person is injured "'by reason of a violation of § 1962.'" *See supra* notes 8, 10. Thus, the Court's holding permitting recovery for direct injury allows an injured plaintiff to bring a suit "by reason of a predicate, or racketeering act—*i.e.*, one of the offenses listed in § 1961." *Sedima*, 473 U.S. at 508 (Marshall, J., dissenting). Section 1964(c) does not provide a remedy for direct injury resulting from the forbidden conduct listed in § 1961, rather it requires injury by reason of § 1962. *Id.* at 508-09. "'Such unwarranted judicial interference with the Act's plain meaning cannot be justified.'" *Id.* at 509 (footnotes omitted) (quoting Comment, *Reading the "Enterprise" Element Back Into RICO: Sections 1962 and 1964(c)*, 76 NW. U.L. REV. 100, 128 (1981)).

The problem further presents itself under the statutory provisions, which expressly require the predicate acts result from a pattern of racketeering activity. *See supra* note 10 (providing in relevant part 18 U.S.C. § 1962). A pattern of racketeering activity is a necessary element of a RICO violation. *See supra* text accompanying note 79. Thus, it is difficult to ascertain how a suit for direct injury (an injury from a predicate act) alone can give rise to a cause of action when the predicate act is a sub-element of one of the necessary elements of a RICO violation. *See supra* notes 3, 8 & 10 (setting out 18 U.S.C. § 1961(1), § 1964(c), and § 1962, respectively). Justice Marshall, in the dissent, noted that "Congress intended to give to businessmen who might otherwise have had no available remedy a possible way to recover damages for competitive injury, infiltration injury, or other economic injury resulting out of, but wholly distinct from, the predicate acts." *Sedima*, 473 U.S. at 519 (Marshall, J., dissenting). Justice Marshall also stated that "Congress' concern was not for the direct victims of the racketeers' acts, whom state and federal laws already protected, but for the competitors and investors whose businesses and interests are harmed or destroyed by racketeers, or whose competitive positions decline because of infiltration in the relevant market." *Id.*

83. *Id.* at 497 n.15. Justice Marshall, in the dissent, gave three illustrations he believed were "faithful" to the statutory language which does not appear to provide recovery for direct injuries sustained by the individual predicate acts. These illustrations also avoided the "'extraordinary uses' to which the statute has been put," to label legitimate businesses as "racketeers." *Id.* at 520 (Marshall, J., dissenting). The illustrations avoid the problems of legitimate corporations who, faced with treble damages judgments in favor of direct victims, are often forced to settle the claims to avoid the detrimental publicity and the consequential harm caused to their reputations. *Id. See supra* notes 6-7.

First:

> If a "racketeer" uses "[t]hreats, arson and assault . . . to force competitors out of business and obtain larger shares of the market," House Hearings, at 106 (statement of Sen. McClellan), the threats, arson, and assault represent the predicate acts. The pattern of those acts is designed to accomplish, and accomplishes, the goal of monopolization. Competitors thereby injured or forced out of business could allege "RICO" injury and recover damages for lost profits. So, too, purchasers of the racketeer's goods or services, who are forced to buy from racketeer/monopolist at higher prices, and whose businesses therefore are injured, might recover

While the Supreme Court's decision in *Sedima* eradicated the lower court's standing requirements of "prior conviction" and "racketeering injury,"[84] and allowed a cause of action for damages either directly or indirectly caused by the defendant's conduct, the lower courts have successfully limited recovery under civil RICO where the defendant's conduct has not been the proximate cause[85]

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damages for the excess costs of doing business. The direct targets of the predicate acts—whether competitors, suppliers, or others—could recover for damages flowing from the predicate acts themselves, but under state or perhaps other federal law, not RICO.

Sedima, 473 U.S. at 521.

Second: If a "racketeer" uses arson and threats to induce honest businessmen to pay protection money, or to purchase certain goods, or to hire certain workers, the targeted businessmen could sue to recover for injury to their business and property resulting from the added costs. This would be so if they were the direct victims of the predicate acts or if they had reacted to offenses committed against other businessmen.

Id.

In both of the above cases, the predicate acts were committed with the purpose of achieving a certain result—e.g., "to induce the prospective plaintiffs to take action to the economic benefit of the racketeer; in each case the result would have taken a toll on the competitive position of the prospective plaintiff by increasing his costs of doing business." *Id.* (Marshall, J., dissenting). However, "the plaintiffs could not recover under RICO for the direct damages from the predicate acts. They could not, for example, recover for the cost of the building burned, or for personal injury resulting from the threat." *Id.* Accordingly, these injuries are sufficiently protected under state law actions for damages. *Id.* at 521-22.

Third: If a "racketeer" infiltrates and obtains control of a legitimate business either through fraud, foreclosure on usurious loans, extortion, or acceptance of business interests in payment of gambling debts, the honest investor who is thereby displaced could bring a civil RICO action claiming infiltration injury resulting from the infiltrator's pattern of predicate acts that enabled him to gain control. Thereafter, if the enterprise conducts its business through a pattern of racketeering activity to enhance its profits or perpetuate its economic power, competitors of that enterprise could bring civil RICO actions alleging injury by reason of the enhanced commercial position the enterprise has obtained from its unlawful acts, and customers forced to purchase from sponsored suppliers could recover their added costs of doing business. At the same time, the direct victims of the activity—for example, customers defrauded by an infiltrated bank—could not recover under civil RICO. . . . The customers simply must rely on the existing causes of action, usually under state law.

Id. at 522. Direct victims of the predicate acts would not be able to recover damages under civil RICO for injury resulting solely from the predicate acts. *Id.*

84. *See supra* text and accompanying notes 64-67.

85. *See* PROSSER, *supra* note 15, § 41, at 263. "An essential element of the plaintiff's cause of action for negligence . . . is that there be some reasonable connection between the act or omission of the defendant and the damage which

of plaintiff's injury.[86]

Even though the lower courts must adhere to the *Sedima* decision that both direct and indirect injury are compensable, some leeway is afforded by the Court's reference to the language in a lower court opinion that "'[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.'"[87]

Although the *Sedima* Court did not specifically address the issue of a proximate cause limitation for either direct or indirect injury, the use of this doctrine by the lower courts may be in conflict with both the *Sedima* holding, allowing indirect victims to recover, and Congress' intent in broadly applying civil RICO provisions.[88]

For clarification, it is important to separate the indirect and direct injury that was at issue before the Court in *Sedima* and focused upon by the lower courts after *Sedima* when applying proximate cause limitations to civil RICO.[89] The Court in *Sedima* clarified the issue

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the plaintiff has suffered. This connection . . . is called 'proximate cause.'" *Id. See infra* text accompanying note 93 (lower courts are successfully limiting third party RICO suits through the application of proximate cause). *See also infra* notes 117, 122-23, 126-27, 137-39 & 161 (lower court's definition of proximate cause in relation to a RICO violation). It is arguable that the view of both the *Sedima* Court majority and dissent is inconsistent with tort proximate cause principles as they would allow "open ended" liability by permitting indirect victims to sue. *See infra* note 89.

86. *See infra* notes 95, 103, 107, 120 & 153 and accompanying text (third parties are not direct victims under civil RICO).

87. *Sedima*, 473 U.S. at 496-97 (quoting *Haroco*, 747 F.2d at 398, *aff'd*, 473 U.S. 606 (1985)). *See supra* note 81 and accompanying text. *See infra* notes 89, 137 (explaining the lower court's use of this "leeway" to limit civil RICO suits).

88. The Court's only acknowledgement that there is a causation requirement may possibly come from the language 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." *Sedima*, 473 U.S. at 496. *See supra* text and accompanying notes 16-29, 73-75 & 82-83. *See also infra* notes 89, 123 (explaining how the *Sedima* Court appears to have forsaken a proximate cause limitation for indirect victims under civil RICO).

89. The issues of direct and indirect injury held to be compensable encompass injury to the direct victim (the injury proximately caused by the forbidden conduct or predicate acts) and the injury to the indirect victim (the injury ultimately flowing from this forbidden conduct). *Sedima*, 473 U.S. at 497 n.15. The *Sedima* Court held that the direct victim was allowed recovery. *Id. See supra* text and accompanying notes 38, 41, 68-71 & 82-83. The *Sedima* Court, while allowing recovery for both injuries, did not clarify how an indirect victim would recover under the statute because only the direct victim's injuries are proximately caused. There is no implication in the *Sedima* opinion that the statute preempts any notion of applying a proximate cause limitation. Although the Court indicates that indirect victims may sue for damages, the failure of the Court to address the proximate cause issue,

of "injury" under the RICO statute by allowing for a cause of action for either an indirect or direct victim.[90] The tort concept of proximate cause appears to have been disregarded when the Court allowed recovery for injury (indirect injury) not proximately caused by the defendant's acts.[91] It is the controversial "indirect injury" that is being evaluated by the lower courts under a proximate cause analysis. The purpose of this analysis is to determine the validity of claims brought by third parties under civil RICO for injuries caused by the defendant's conduct in committing the RICO violation.[92]

In light of the *Sedima* decision, the lower courts have successfully limited civil RICO suits through proximate cause by forbidding a third party, not a direct victim under the RICO provisions, to sue.[93]

What follows is an analysis of the application of proximate cause to civil RICO, and an examination of the relevant cases regarding these limitations.

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coupled with the Court's acknowledgement that a defendant is not liable "'to everyone he might have injured by other conduct,'" *Sedima*, 473 U.S. at 496-97 (citation omitted), as well as the proximate cause limitation read into the "by reason of" language in § 1964(c) by the lower courts have provided a loophole for limiting this apparently open-ended liability for indirect victims. *See infra* notes 93, 117, 122-23, 126-27, 137 & 161 and accompanying text (demonstrating how lower courts have dealt with proximate cause); PROSSER, *supra* note 15, § 41, at 264 ("Some boundary must be set to limit liability for the consequences of any act, upon the basis of some social idea of policy.").

The RICO violation consists of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Id.* at 496 (footnote omitted). Both the direct and indirect injury will result from the violation. *Sedima*, 473 U.S. at 496-97 & n.15. Since both the direct victim and indirect victim are able to sue for a RICO violation, but only the direct injury is proximately caused, the lower courts apply a proximate cause limitation and deny a cause of action for injury suffered by the third party, indirect victim. *See infra* notes 95-100, 107, 126, 138-43, 154, 162-64 and accompanying text.

Justice Marshall in his dissent would not allow direct victims to recover for injury proximately caused by the defendant's conduct. *Sedima*, 473 U.S. at 497 n.15. This stems from Justice Marshall's belief that direct victims could seek redress under relevant federal and state law remedies. *Id.* at 519, 521. However, it is arguable that Justice Marshall did not intend open-ended liability for the defendant's conduct. This is exemplified in the language of his dissent that victims even further removed from the category of indirect victims, recognized by the majority, *might* also recover. *Id.* at 521. "So, too, purchasers of the racketeer's goods or services, who are forced to buy . . . might recover damages . . . ." *Id.*

90. *Sedima*, 473 U.S. at 497 n.15. *See also supra* text and accompanying notes 82, 89.

91. *See supra* note 89 (allowing recovery for indirect injury under RICO).

92. *See id.*

93. *See infra* notes 95-100, 107, 126, 138-43, 154 & 162-64 and accompanying text (discussing the relevant lower court caselaw).

IV. EVALUATION

A. *Applicability of Proximate Cause and the Lower Courts' Limitation on Civil RICO*

The lower courts have been faced with various third party claims brought under civil RICO by parties that were not direct victims of the perpetrated criminal activity.[94] In *City of Milwaukee v. Universal Mortgage Corp.*,[95] the district court noted that the broad language of RICO "has been tempered by the judicial belief that . . . the consequences of an act go forward like ripples in a pond and extending liability for RICO violations to all ends of the pond would fill the courts with endless litigation."[96]

Although section 1964(c) states that "any person" may sue to recover treble damages,[97] the *City of Milwaukee* court noted that "courts have held RICO claims to certain causation requirements."[98] The *City of Milwaukee* court stated that, although RICO provides that "any person" may recover, a plaintiff's injuries must have been proximately caused by the RICO violation;[99] and the injuries may not be "so removed from the RICO violation that recovery would offend traditional principles of justice."[100]

The court considered the requisite link between the conduct of the RICO violation and the harm claimed by the victim from two

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94. *See* cases cited *infra* notes 95, 103, 107, 120 & 153.

95. 692 F. Supp. 992 (E.D. Wis. 1988). City and nonprofit organizations brought an action under RICO alleging that certain "mortgage lenders" and "sellers/brokers" entered into a scheme to defraud the Department of Housing and Urban Development and that accordingly, the City's policy of neighborhood preservation was damaged, real estate and loan investment values were lowered, criminal activity had since developed, and that the City had to divert monies from other funds into correcting the subsequent destruction left by the scheme. *Id.* at 993, 994. Although the court discussed dismissal of the RICO claim under Rule 17(a), real party in interest, the court found as a matter of law that the injuries alleged by the plaintiffs were "too indirect and remote from the alleged scheme to permit recovery," and accordingly dismissed. *Id.* at 996, 994.

96. *City of Milwaukee*, 692 F. Supp. at 993 (discussing § 1964(c)).

97. *See supra* note 8 (quoting 18 U.S.C. § 1964(c)).

98. *City of Milwaukee*, 692 F. Supp. at 993.

99. *See supra* text and accompanying note 79 (defining elements of a RICO violation). *See also supra* text and accompanying note 89; *infra* note 137 (analyzing the framework in which the lower courts are able to limit liability of a RICO violation, by distinguishing an indirect victim's injury from the injury proximately caused by the predicate acts).

100. *City of Milwaukee*, 692 F. Supp. at 993.

related and frequently combined perspectives: "one dealing with whether the injured party is the real party in interest under Rule 17(a), [of the Federal Rules of Civil Procedure],[101] and the other dealing with whether the RICO violation was the proximate cause of the injury."[102]

The limitation under civil RICO that results from applying Rule 17(a) was highlighted in *Carter v. Berger*[103] where the Seventh Circuit, in interpreting the language of *Sedima*, held that both the indirect and the directly injured parties may recover.[104] However, the circuit court upheld the dismissal of the RICO claim, under Rule 17(a), brought by county taxpayers who paid higher taxes because of a bribery scandal.[105] The court held that the real party in interest was the county, even though the plaintiffs had to pay higher taxes.[106] Similar to this circuit court's holding that an indirectly injured party may not sue, "other courts also have held that only direct injuries arising from the RICO violation—more specifically, the 'predicate acts' of the RICO violation—fulfill the requirements of standing."[107]

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101. Rule 17 of the Federal Rules of Civil Procedure provides, in pertinent part, "that every action shall be prosecuted in the name of the real party in interest." *Id.* at 996 n.1.

102. *Id.* at 996.

103. 777 F.2d 1173 (7th Cir. 1985) (affirming the lower court's dismissal of a RICO claim brought by taxpayers against defendant who had bribed county officials to receive lower tax assessments).

104. *Id.* at 1176. The court stated, however, that the indirectly injured party should "look to the recovery of the directly injured party, not to the wrongdoer, for relief." *Id.*

105. *Id.* at 1174.

106. *Id.* at 1174-75 (the taxpayers' claims were dismissed for lack of standing with the Seventh Circuit concluding that in the RICO case at hand an indirectly injured party may not sue).

107. *City of Milwaukee*, 692 F. Supp. at 997 (citing National Enters. v. Mellon Fin. Servs., 847 F.2d 251 (5th Cir. 1988)) (construction company supplier, who later filed for bankruptcy, lacked standing for a RICO claim against a lender and loan officer regarding a kickback scheme that supposedly precluded the construction company from paying creditors); *Bass*, 838 F.2d at 11-13 (rejecting an indirect-direct distinction, but denying standing to individual union members in a RICO action against union officials on the basis that the union was the real party in interest); NCNB Nat'l Bank of N.C. v. Tiller, 814 F.2d 931, 937 (4th Cir. 1987), *overruled on other grounds*, 896 F.2d 833 (4th Cir. 1989) (adopting the principle set forth in Carter v. Berger to dismiss a derivative RICO claim of a company shareholder under Rule 17(a), real party in interest, and holding that although the stockholders of a corporation suffer, only the corporation may vindicate its rights, thus an indirectly injured party should look to the recovery of the directly injured party and not the wrongdoer for relief); Rand v. Anaconda-Ericson, Inc., 794 F.2d 843, 849 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986) (corporate shareholders lacked

The court in *Carter* held that, in every instance, the directly injured party should receive complete recovery for the direct injury sustained, and parties only indirectly injured, should look to the recovery of the directly injured party for relief and not to the wrongdoer.[108] The court noted that the County was the real party in interest even though the taxpayers would be the ultimate beneficiaries of the recovery by the County.[109] Since RICO allows for treble damages, only the County can recover in full because taxpayer recovery would amount to what the court considered "sextuple damages."[110]

The *Carter* court noted that an indirectly injured party may recover when it is shown that the "directly injured party was under the continuing control or influence of the defendant."[111] Accordingly, the taxpayers that were indirectly injured could have recovered under RICO if they had shown that the directly injured party was under the influence of the racketeers.[112] This formulation shifts the indirect victim, whose injuries were not originally proximately caused by the defendant's conduct, to a direct victim whose injuries would be a proximate result of the forbidden conduct.[113] Although the *City of Milwaukee* court did not allow for the recovery of damages by indirectly injured plaintiffs, it appears that they would follow the reasoning of the *Carter* court and permit recovery to an indirect victim under a proximate cause limitation if the directly injured party became the perpetrator of a RICO violation.

The second perspective, as noted by the *City of Milwaukee* court, to be examined between the RICO violation and the alleged injuries

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standing to maintain a cause of action under RICO for injuries sustained by the corporation because the legal harm was to the corporation); Warren v. Manufacturers Nat'l Bank of Detroit, 759 F.2d 542, 544 (6th Cir. 1985) (neither the shareholder nor creditor of a corporation had standing to bring a RICO action for injuries sustained by the corporation)).

108. *Carter*, 777 F.2d at 1176. The court did not address the issue of whether or not the non-real party in interest, in this case the taxpayers, has an action against the directly injured, real party in interest, for relief. Nor did the court give any previous examples where an action of this type was alleged.

109. *Id.* at 1174.

110. *Id.* at 1176.

111. *Id.* at 1178.

112. *Id.* (noting that the taxpayers did not offer evidence to substantiate this claim).

113. *See supra* text and accompanying note 89 (explaining recovery in the lower courts for direct and indirect victims).

to the plaintiff, involves an analysis of causation between the two.[114] The Court in *Sedima* held that the statute's provisions are to be read broadly[115] and be "'liberally construed to effectuate its remedial purposes.'"[116] However, balanced against these intentions is the principle, apparently recognized by the *Sedima* Court, that "'legal liability should not extend as far as factual causation.'"[117] Although the *Sedima* decision allows the indirect victim a cause of action under RICO,[118] it does not appear that liability will extend to indirect injury, because this injury is not the actual or proximate cause of the defendant's acts. Conversely, the direct victim will not be precluded from recovering because the direct injury is proximately caused by the defendant's conduct.[119]

The Second Circuit in *Sperber v. Boesky*,[120] attempted to clarify the questions of the proximate cause limitation for both the direct and indirect injury resulting from a RICO violation. The court held that investors in a class action suit could not bring a civil RICO claim against Boesky for a price decline in their stocks due to Boesky pleading guilty to insider trading.[121] The court determined that *Sedima* held that the "by reason of" language of civil RICO establishes "that damages caused directly by the predicate acts of a RICO violation are recoverable."[122] The court further noted that the *Sedima* Court did not focus upon "to what extent are damages caused only indirectly by the predicate acts recoverable?"[123]

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114. *City of Milwaukee*, 692 F. Supp. at 997. Although the court stated that recovery under RICO is limited to injuries that are caused by the predicate acts, such a limitation would include both the indirect and direct injuries to the plaintiff. *See id.* (citing *Sedima*, 473 U.S. at 497).

115. *Sedima*, 473 U.S. at 497.

116. *Id.* at 498 (quotation omitted).

117. *City of Milwaukee*, 692 F. Supp. at 997 (quoting *Sperber*, 849 F.2d at 63).

118. *Sedima*, 473 U.S. at 497 n.15. *See also supra* note 89 (indirect injury is not proximately caused by the forbidden conduct listed in § 1962).

119. *Sedima*, 473 U.S. at 497 n.15.

120. 849 F.2d 60 (2d Cir. 1988).

121. *Id.* at 62.

122. *Id.* at 63. *See supra* notes 82, 83, 89 & 119 and accompanying text (discussing a cause of action for direct injury resulting from the predicate acts).

123. *Sperber*, 849 F.2d at 63. Unlike *Sperber*, the facts of *Sedima* did not require the Court to consider the limitations on indirect injury. *Id.* Assuming that some indirect injury from the predicate acts was recoverable, the court noted the principle that "legal liability should not extend as far as factual causation." *Id.* Accordingly, the court held that "both the direct and indirect injuries must be proximately caused." *Id.* at 64.

The court in *Sperber* classified indirect injury as "'racketeering' injury, 'competitive' injury or injury caused by the total effect of the pattern of racketeering in the enterprise."[124] The *Sperber* court used Marshall's archetypes as a guide in determining whether an indirect victim was entitled to recover.[125]

Proximate cause then comes into play as the court sought to limit damages where the liability began to extend past factual causation. The *Sperber* court focused on whether the injury was proximately caused by the defendant's conduct and whether the plaintiff was foreseeable. The court resolved the issue by applying a negligence test of foreseeability under a *Palsgraf* analysis.[126] The court held that

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124. *Id.* at 63. *See, e.g., Alexander Grant*, 742 F.2d at 411 n.7, *vacated*, 473 U.S. 922, *adhered to in relevant part*, 770 F.2d 717 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

In *Alexander Grant*, the court noted that "'indirect injury' . . . has also been used as a synonym for the 'commercial' or 'competitive' injury requirement." *Id.* at 411 n.7. The *Sedima* Court also recognized competitive injury to be a synonym for indirect injury. *Sedima*, 473 U.S. at 497 n.15.

125. *Sperber*, 849 F.2d at 64-65. *See supra* note 83 (quoting Justice Marshall's illustrations in the *Sedima* dissent).

126. The plaintiffs in *Sperber* argued that it was foreseeable that the price of the stocks would fall when Boesky's "illegal props" were removed. The court quickly dispelled the plaintiffs' foreseeability argument by noting that:

> [i]t is foreseeable that as a result of the disclosure of Boesky's activities, his company would close and that some employees would lose their jobs, that some of those employees would not be able to find new jobs and that their children would not be able to buy new clothes, injuring the clothing manufacturer. However, we have no doubt that the clothing manufacturer is too far from the racketeering to recover under RICO.

Sperber, 849 F.2d at 66. The court concluded that the plaintiffs, like the clothing manufacturer, are too far removed from the racketeering activity to recover under RICO. *Id.*

Proximate cause is used to determine the extent of the defendant's liability, after actual causation is established, as an attempt to deal with the problem of liability for unforeseeable or unusual consequences following the defendant's acts. *See* PROSSER, *supra* note 15, at §§ 42-43. The defendant's act will be considered the proximate cause of the plaintiff's injury only if such consequences, judged at the time, place, and under the circumstances when the defendant acted, were reasonably foreseeable. *See, e.g.*, Ryan v. New York Cent. R.R., 35 N.Y. 210 (1866) (recovery denied for damages sustained by owner of a house destroyed by a spreading fire as too remote). It is not enough that just any damage or results are foreseeable or follow in an unbroken sequence. Some limitation must be imposed so the court adopted the rule of reasonable foreseeability, i.e., liability was limited to what the reasonable person ought to foresee. Thus, liability was limited by holding the defendant liable for those acts that were reasonably foreseeable. *See* Overseas Tankship v. Morts Dock & Eng'g Co. (Wagon Mound 1) A.C. 1-31 Law Rep. 388 (1961); Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). A

"it is clear that both direct and indirect injuries must be proximately caused."[127]

The *Sperber* court noted that the "by reason of" language imposes a proximate cause limitation on plaintiffs, and that there has been no general consensus as to the best approach to take in applying proximate cause either in tort or under RICO.[128] Accordingly, the *Sperber* analysis can offer no uniform guidance. However, in determining if a defendant's acts were the proximate cause of a plaintiff's injury, the court in *Sperber* provides guidance in making the proper determination.[129] In a situation where a party is not specifically deprived of money or property, or where the actual illegal acts did not directly injure the plaintiffs, there is no direct injury and no recovery.[130]

Since the parties are separable, a distinction can be made to exclude the third party injury from the injury which is proximately caused by the acts perpetrated against the direct party. This distinction will effectuate a complete bar to recovery for an indirect victim. Further, an indirect victim must survive any breaks in the causal link between the defendant's acts and the injury to show the injury was proximately caused by those acts.[131]

This overwhelming burden was demonstrated in *Sperber*, where the court found that, due to the fact that injured parties were not involved in the original transactions against the direct victim, the causal link becomes even more attenuated if the defendant did not intend in some way to encourage a certain type of behavior which

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wrongdoer should be held liable for all of his acts that are reasonably foreseeable, whether or not the manner in which the injury resulted was foreseeable. *See Palsgraf*, 248 N.Y. at 344, 162 N.E. at 104.

127. *Sperber*, 849 F.2d at 64. The court noted that a "'defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct,' but only to anyone whose injuries were caused 'by reason of a violation of section 1962.'" *Id.* (quoting *Haroco*, 747 F.2d at 398). *See supra* note 89 (indirect injury is not recoverable under RICO, as only direct injury is proximately caused by the defendant's forbidden conduct); *Sedima*, 473 U.S. at 497 n.15 (the harm proximately caused by the forbidden conduct is direct injury and the party is the direct victim).

128. *Sperber*, 849 F.2d at 64 (quoting PROSSER, *supra* note 15, § 41, at 263).

129. *Sperber*, 849 F.2d at 64.

130. *Id.* Thus, an indirect victim will be barred from recovery under RICO contrary to the mandate in *Sedima* that both direct and indirect injury is compensable. This would be consistent with tort causation principle as a defendant will only be held liable for injury proximately caused by his conduct. *See supra* notes 82, 85, 87-89 & 126-27.

131. *Sperber*, 849 F.2d at 64.

was acted upon by the injured party.[132] Additionally, there are many outside variables that must be taken into account, over which the defendant has no control, which may in some way further affect the outcome of an individual's injury.[133]

The court also noted that these damages not only were too remote under a *Sedima* analysis but that these injuries would also fail under Justice Marshall's examples of hypothetical plaintiffs in his *Sedima* dissent, "whom he thought Congress intended to allow recovery for their indirect injuries."[134]

The *Sperber* court further removed the plaintiffs' claim involving Boesky's illegal activity from Marshall's apparently liberal illustrations because the plaintiffs were unaware of Boesky's illegal involvement in the stocks they had purchased.[135] The court stated that "[e]xtending liability to everyone to whom an illegal price is passed would extend the chain of liability indefinitely because, economists tell us, all products in the economy are related to all other products, and a change in the price of one necessarily affects the remainder."[136]

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132. *Id.*

133. In *Sperber*, the claimant stockholders alleged that the price of six stocks was inflated due to either the now infamous Boesky's success in other stocks which attracted buyers to takeover stocks in general, or that other buyers bought up the stocks that Boesky bought. *Id.* The court held as "a matter of policy . . . that a price increase caused solely by an increased attraction to takeover stocks is too distant from Boesky's alleged illegal activities in other stocks . . . ." *Id.*

134. *Id.* The indirect injury for which Justice Marshall would allow recovery is synonymous to the indirect injury the *Sedima* Court adopted as recoverable. *Sedima*, 473 U.S. at 497 n.15. The court found that although Justice Marshall's examples tended to emphasize injury in the ordinary commercial context, and not the stock investment context, the examples were a useful comparison. *Sperber*, 849 F.2d at 64. According to Justice Marshall's dissent, indirect damages are suffered by plaintiffs who "reacted to offenses committed against other[s]." *Sedima*, 473 U.S. at 521. When a mobster monopolizes a market, indirect injuries 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 therefore are injured." *Id.* Indirect injury is also incurred by the "honest investor" who is injured when "a 'racketeer' infiltrates and obtains control of a legitimate business either through fraud, foreclosure on usurious loans, [or] extortion." *Id.* at 522. *See also* notes 82-83, 89 (discussing and quoting, respectively, Justice Marshall's dissent).

135. *Sperber*, 849 F.2d at 65. However, there is no knowledge requirement noted in Justice Marshall's dissenting hypothetical. *See supra* notes 82-83. The plaintiffs are different from an "intimidated storekeeper[ ], and at best are like the consumers who pay the intimidated storekeeper higher prices, not knowing that racketeering is involved." *Sperber*, 849 F.2d at 65. In addition, the "consumers are further removed from the racketeer than the storekeeper is and probably cannot recover under RICO, just as they cannot recover under the antitrust laws." *Id.* (citing Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)).

136. *Sperber*, 849 F.2d at 65.

Furthermore, the "plaintiffs here were neither the target of the racketeering enterprise nor the competitors nor the customers of the racketeer."[137]

Thus, although a defendant's act may be the actual cause of some injury,[138] mere foreseeability that a particular plaintiff could be injured is insufficient to establish liability unless the acts were also the proximate cause of the injury.[139] Accordingly, following the principle that "the doctrine of proximate cause reflects social policy decisions based on shared principles of justice,"[140] the court concluded that it was not Congress' intent to permit recovery to plaintiffs who allege such attenuated claims.[141]

Looking at the application of the real-party-in-interest limitation by the court in *Carter*, and the proximate cause limitation by the

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137. *Id.* Under the *Sedima* analysis, the target would be the direct victim, the competitor or customers would be indirect victims. *See supra* note 89. Thus, *Sperber* illustrates the lower court's methodology in excluding indirect injury as not being proximately caused by the defendant's forbidden conduct. The court in *Sperber* was able to distinguish the plaintiffs in this case because they did not claim to be customers of Boesky, nor was Boesky alleged to be a competitor of the plaintiffs. *Sperber*, 849 F.2d at 65. Furthermore, the plaintiffs were not similar to the "honest investor" who is displaced by a racketeer who takes "control of a legitimate business," through racketeering because neither Boesky nor the plaintiffs attempted to take control over the six companies whose stock they had purchased. *Id.* The court was "skeptical of claims that a defendant is liable to hundreds of thousands or even millions of people" and noted that "although RICO is broad, it is not that broad." *Id.*

138. "The conception of causation in fact extends not only to positive acts and active physical forces, but also to pre-existing passive conditions which have played a material part in bringing about the event." PROSSER, *supra* note 15, § 41, at 265. Specifically, "it applies to the defendant's omissions as well as the defendant's acts." *Id.*

139. *Sperber*, 849 F.2d at 65-66. In Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988), the court expressed the distinction between cause in fact and proximate cause in a RICO context as follows:

> a cause-in-fact connection, standing alone, does not suffice to establish liability. Civil RICO is of course a statutory tort remedy—simply one with particularly drastic remedies. Causation principles generally applicable to tort liability must be considered applicable. These require not only cause-in-fact, but "legal" or "proximate" cause as well, the latter involving a policy rather than a purely factual determination: "whether the conduct has been so significant and important a cause that the defendant should he held responsible." As such, the legal cause determination is properly one of law for the court, taking into consideration such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection.

Id. at 1189 (quotations and citations omitted).

140. *Sperber*, 849 F.2d at 65.

141. *Id.*

court in *Sperber*, the district court in *City of Milwaukee* held that in order for the plaintiffs to allege a claim upon which relief could be granted, the plaintiffs must first allege the elements of a RICO violation: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[142] Second, the plaintiffs must establish that they are the real parties in interest.[143] Lastly, the plaintiffs must show that the resulting injuries were "proximately caused by the RICO violations."[144]

Requiring the plaintiff to allege a claim by showing they are the real party in interest, where they are indirectly injured by the defendant's acts, creates an impossible standing barrier for parties that were not directly targeted by the racketeering activity. Indeed, the court in *City of Milwaukee* found that the plaintiffs, both the city and the other neighborhood associations, suffered only indirect and secondary injuries.[145]

This interpretation and application of the *Sedima* holding shows that lower courts are merely paying lip service to recoverable third party claims under the *Sedima* Court's analysis of the RICO provisions.[146] The *City of Milwaukee* court effectively limited RICO recovery for indirect injury by implementing two impenetrable defenses. While not contradicting the Supreme Court's decision in *Sedima*, the *City of Milwaukee* court has in effect barred recovery by applying both a proximate cause limitation and a real party in interest standard.[147]

The *City of Milwaukee* court found that the plaintiffs were not the real party in interest because it was the United States that "suffered the direct injuries at the hands of the defendants."[148]

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142. *City of Milwaukee*, 692 F. Supp. at 998. *See supra* text and accompanying note 79 (quoting *Sedima*).

143. *City of Milwaukee*, 692 F. Supp. at 998. Specifically, plaintiffs must show that they are "parties that suffered direct rather than indirect injuries at the hands of defendants." *Id.*

144. *Id.* In other words, the plaintiffs must show that the "injuries caused by defendants were not so remote so as to be barred by the principles governing legal liability." *Id.*

145. *Id.* at 998-99. Although the *Sedima* Court and Justice Marshall, in dissent, recognized recovery for indirect injury, only the direct injury is proximately caused. *See Sedima*, 473 U.S. at 497 n.15.

146. *See supra* note 89.

147. *See supra* notes 143-46 (examining the *City of Milwaukee* court's holding denying indirect victims recovery under RICO).

148. *City of Milwaukee*, 692 F. Supp. at 998.

Consequently, the plaintiffs had suffered only secondary injuries.[149] Thus, the court held that the plaintiffs were similar to:

> the taxpayers in the Seventh Circuit's *Carter* case, the construction company supplier in the Fifth Circuit's *National Enterprises* case, the individual union members in the First Circuit's *Bass* case, and the corporate shareholders in the Sixth Circuit's *Warren* case, the Fourth Circuit's *NCNB National Bank* case, and the Second Circuit's *Rand* case, the City of Milwaukee and the two neighborhood organizations have no standing to bring RICO claims that derive from injuries directly inflicted on another party . . . ."[150]

In applying a standard of proximate cause, the court held that the injury sustained by the plaintiffs was not a direct result of the defendant's scheme to defraud the United States.[151] The damage to the plaintiffs occurred only after the forbidden acts were committed against the United States and, therefore, the plaintiffs' damages were not a direct result of the defendant's scheme and, at best, were indirectly caused.[152]

The party distinction between the targeted victim, and the non-targeted victim, in relation to a proximate cause limitation was further substantiated in the more recent case of *Zervas v. Faulkner*.[153] The Fifth Circuit held that the evidence failed to establish that the alleged RICO violation proximately caused the injury to the purchaser.[154] The court found that the forbidden acts were targeted towards depositors, other stockholders and the insurers, not the plaintiff.[155] Here

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149. The court stated:

> The injuries to the City of Milwaukee and the other plaintiffs . . . were at least one step beyond those of the United States. The damage to the neighborhood preservation policy, real estate and loan investment values, deterrence of criminal activity, and funds that would otherwise be used for other city projects came only after the United States had suffered the consequences of the scheme . . . .

Id.

150. *City of Milwaukee*, 692 F. Supp. at 999. *See supra* note 101 (briefly describing FED. R. CIV. P. 17(a)).

151. *City of Milwaukee*, 692 F. Supp. at 999.

152. *Id.*

153. 861 F.2d 823 (5th Cir. 1988) (a purchaser of unsuccessful condominium developments brought a civil RICO action against the construction lender, the closing agent, and the vendor).

154. *Id.* at 835.

155. *Id.* at 832.

the court used the language of *Sedima*, noting that "'the compensable [RICO] injury necessarily is the harm *caused by predicate acts* sufficiently related to constitute a pattern' and that '*[a]ny* recoverable damages occurring by reason of a violation of § 1962(c) will flow *from the commission of the predicate acts.*'"[156]

The court noted that there is a line of cases that interpreted this language in *Sedima* and have determined that "only the injuries which *directly* flow from the predicate acts are compensable under RICO."[157] However, the court also noted that requiring the nexus between the injury and the predicate act be direct in every instance would be overly restrictive in some circumstances and would result in denying damages for the sort of competitive injury (indirect injury) that Justice Marshall allowed recovery for in his dissent.[158]

Nonetheless, although a "direct" nexus between the alleged injury and the predicate act may not always be required, the court reiterated that the "vast majority of appellate decisions do require something more than mere 'but for'[159] factual causation."[160] The *Zervas* court then followed the *Haroco* court's interpretation that section 1964(c)'s "'by reason of' language . . . imposes a proximate cause requirement on plaintiffs."[161]

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156. *Id.* at 833 (quoting *Sedima*, 473 U.S. at 497) (emphasis added by the *Zervas* court) (footnote omitted).

157. *Id.* (citing Nodine v. Texron, Inc., 819 F.2d 347, 349 (1st Cir. 1987) (following the Eleventh Circuit's decision in *Morast*); Morast v. Lance, 807 F.2d 926, 933 (11th Cir. 1987) (recovery under RICO was denied as plaintiff's job loss "did not flow directly from the predicate acts."). *See* Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806, 810 (7th Cir. 1987) (stating that the plaintiff alleging RICO violations "should recover for whatever damages are directly caused by any part of the acts that add up to a violation"). *See also supra* note 107 (listing lower court decisions requiring that only direct injury arising from the predicate acts give rise to standing).

158. *Zervas*, 861 F.2d at 833. *See supra* notes 82-83, 89 (quoting and explaining Marshall's dissent in *Sedima*).

159. The "but for" rule of causation can be described as follows:

> [M]any courts have derived a rule, commonly known as the "but for" or "sine qua non" rule, which may be stated as follows: The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it.

PROSSER, *supra* note 15, § 41, at 266 (footnote omitted).

160. *Zervas*, 861 F.2d at 834. With respect to requiring more than "but for" causation, the court noted that the "Eighth Circuit may be an exception." *Id.* at 834 n.11 (citing *Terre Du Lac Ass'n*, 772 F.2d at 472-73).

161. *Haroco*, 747 F.2d at 398. *See Zervas*, 861 F.2d at 835.

The *Zervas* court stated that it was in general agreement with other courts,[162] and concluded that the plaintiff's injuries in *Zervas* were at most, "a remote, incidental, and non-proximate result," since there was no evidence that the defendant's intent was to inflate land values or overbuild the area.[163] The plaintiff's claim rested upon nothing more than an "attenuated chain of inferences" and upon "no more than speculation and conjecture."[164]

Thus, although the *Zervas* court has spotted the *exact flaw* centering around indirect recovery under RICO—that a direct nexus between the defendant's acts and the indirect injury be established—the *Zervas* decision is nonetheless a continuation of the trend set by the lower courts in limiting the broadened liability afforded under *Sedima* by applying a proximate cause limitation on private third party suits. The *City of Milwaukee*, *Carter*, *Sperber*, and *Zervas* courts have legitimately, within the mandates of both the *Sedima* holding and under tort causation principles, denied recovery for injury to indirect victims for which the *Sedima* Court and Congress intended RICO's broad provisions to reach.

V. CONCLUSION

The lower courts are faced with a formidable struggle to come to a clear and rational interpretation of civil RICO claims. The Supreme Court in *Sedima* recognized the lower courts' concern that civil RICO claims are now being increasingly brought against legitimate businesses. It appears, however, that any reform must come from Congress. Although many post-*Sedima* decisions continue to reflect the broad application of civil RICO to legitimize enterprises for violations that occur within the confines of the boardroom, there is leeway for the lower courts to apply some limitation on civil RICO.

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162. *Zervas*, 861 F.2d at 834-35. The court considered the holding of the *Sperber* court and the *Brandenburg* court and found that the principles from both decisions were "fully consistent with and logically flow from" their decision in *National Enterprises*. *Id.* *See supra* note 15; *supra* notes 120-41 and accompanying text (describing the holding of the *Brandenburg* and *Sperber* cases). Regarding *National Enterprises*, the court stated that it "neither expressly referred to proximate cause nor explicitly decided whether RICO extended to any indirect injuries." *Zervas*, 861 F.2d at 834. In *National Enterprises*, the Fifth Circuit denied recovery to a supplier-creditor of a construction company under RICO because the plaintiff's injuries were not caused by the predicate acts as mandated by *Sedima*. *National Enters.*, 847 F.2d at 254.

163. *Zervas*, 861 F.2d at 835.

164. *Id.* at 837.

Although the *Sedima* court did not have before it the issue of causation in relation to the indirect and direct injury, relevant case law suggests that the lower courts have paid lip service to the language of *Sedima* while denying recovery for the indirect injury which ultimately results from the predicate acts. While these efforts by the lower courts are consistent with tort principles, they may be in direct conflict with the congressional intent.

Until the Supreme Court is faced with the issues of causation for both a targeted as well as a nontargeted plaintiff, it appears that the lower courts will continue to deny the recovery under RICO allowed by the Court in *Sedima*. It will be appropriate for the Supreme Court to not only consider the impact of a proximate cause limitation but also the use of a real party in interest standard as a standing barrier. As an empirical matter, any reform in the way of limiting civil RICO by Congress is more than likely to be slow in coming.

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