UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 63 | Number 6 Article 4

8-1-1985

Sedima, S.P.R.L. v. Imrex Co.: The Requirement of Prior Criminal Convictions in Private RICO Actions

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Sedima, S.P.R.L. v. Imrex Co.: The Requirement of Prior Criminal Convictions in Private RICO Actions*

In 1970 Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)[1] for the purpose of providing new and more effective methods of combatting organized crime in the United States.[2] In addition to criminal penalties,[3] RICO provided new civil remedies,[4] including a private cause of action under which persons injured in their business or property by a violation of the Act could recover treble damages.[5]

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* Shortly before publication of this Note, the United States Supreme Court reversed the decision of the United States Court of Appeals for the Second Circuit by a 5-4 vote. Sedima, S.P.R.L. v. Imrex Co., 53 U.S.L.W. 5034 (July 1, 1985), *rev'g* 741 F.2d 482 (2d Cir. 1984).

1. 18 U.S.C. §§ 1961-1968 (1982).

2. According to the Congressional Statement of Findings and Purpose, the purpose of RICO was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923.

3. *See* 18 U.S.C. § 1963 (1982).

4. *See id.* § 1964. In addition to the private cause of action for treble damages discussed *infra* note 5, § 1964 authorizes the federal district courts to issue injunctions, orders for divestiture of any interest in any enterprise under the Act, and orders for the dissolution or reorganization of any enterprise under the Act.

5. 18 U.S.C. § 1964(c) (1982) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

The prohibited activities for which treble damages may be awarded under § 1964 are set forth in § 1962, which provides:

> (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. . . .
>
> (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.
>
> (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.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

The conduct prohibited by § 1962 encompasses a wide range of activities because of the broad manner in which the key term "racketeering activity" is defined. Under 18 U.S.C. § 1961(1) (1982), racketeering activity includes (1) "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year"; (2) activities indictable under a number of federal statutes, including the mail fraud and wire fraud statutes; (3) activities indictable under two federal statutes dealing with restrictions on payments and loans to labor organizations; and (4) offenses involving bankruptcy or securities fraud or dealings in narcotics or other dangerous drugs. The requirement of a "pattern of racketeering activity" is satisfied by a showing of two acts of racketeering activity occurring within a 10-year period. *Id.* § 1961(5).

The availability of treble damages to plaintiffs injured by violations of RICO has led to an explosion of private RICO litigation in recent years.[6] In response to this dramatic increase, some courts have imposed restrictions on the scope of civil RICO in an attempt to limit claims for which treble damages may be awarded. The courts that have attempted to limit private RICO claims have done so by requiring that civil RICO defendants have some connection with organized crime,[7] that civil RICO plaintiffs suffer a commercial or competitive injury,[8] or that civil RICO plaintiffs suffer a "racketeering injury."[9]

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6. Few civil actions for treble damages were brought under § 1964(c) during the first decade of RICO's existence. As of 1979, only two private RICO cases had been reported. Sylvester, *Civil RICO's New Punch*, Nat'l L.J., Feb. 7, 1983, at 1, col. 1. As recognition has grown of the advantages RICO offers plaintiffs, however, the number of private RICO suits has increased dramatically. As of early 1983, over 100 cases had been reported concerning private RICO actions. *Id.*

The private RICO cause of action offers plaintiffs a number of advantages in addition to the recovery of treble damages. RICO's liberal discovery, broad venue, and nationwide service of process provisions favor private plaintiffs. Bridges, *Private RICO Litigation Based Upon "Fraud in the Sale of Securities,"* 18 GA. L. REV. 43, 46 (1983). Moreover, the threat of treble damages and the possible stigma of the "racketeer" label are potent weapons in obtaining large settlements of private RICO claims. *Id.*

7. *See, e.g.*, Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 642-44 (C.D. Cal. 1983); Minpeco, S.A. v. Conticommodity Servs., Inc., 558 F. Supp. 1348, 1351 (S.D.N.Y. 1983); Waterman S.S. Corp. v. Avondale Shipyards, Inc., 527 F. Supp. 256, 260 (E.D. La. 1981); Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 746-48 (N.D. Ill. 1981); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975).

In confining the scope of civil RICO to those defendants having some connection to organized crime, the cases noted above relied on congressional statements indicating that RICO was intended to be a weapon against organized crime. *See supra* note 2 and accompanying text. The Act itself, however, contains no requirement that a defendant be affiliated with organized crime. Indeed, Congress specifically rejected attempts to limit RICO's applicability to organized crime because of concerns that such a limitation might impair the effectiveness of the Act and create unconstitutional status-based offenses. *See* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1107-09 (1982). An overwhelming majority of courts has rejected the view that a civil RICO defendant must be connected with organized crime. *See, e.g.*, Owl Constr. Co. v. Ronald Adams Contractor, Inc., 727 F.2d 540, 542 (5th Cir.), *cert. denied*, 105 S. Ct. 118 (1984); Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984); Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1287 n.6 (7th Cir. 1983); Bennett v. Berg, 685 F.2d 1053, 1063-64 (8th Cir. 1982), *aff'd in part on reh'g en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S. Ct. 527 (1983); Morosani v. First Nat'l Bank, 581 F. Supp. 945, 953-54 (N.D. Ga. 1984); Gerace v. Utica Veal Co., 580 F. Supp. 1465, 1468 (N.D.N.Y. 1984); Willamette Sav. & Loan v. Blake & Neal Fin. Co., 577 F. Supp. 1415, 1425-26 (D. Or. 1984); Swanson v. Wabash, Inc., 577 F. Supp. 1308, 1318 (N.D. Ill. 1983); B.F. Hirsch, Inc. v. Enright Ref. Co., 577 F. Supp. 339, 347-48 (D.N.J. 1983); Dakis v. Chapman, 574 F. Supp. 757, 761 (N.D. Cal. 1983); *In re* Longhorn Sec. Litig., 573 F. Supp. 255, 269 (W.D. Okla. 1983); *In re* Action Indus. Tender Offer, 572 F. Supp. 846, 850-51 (E.D. Va. 1983); Taylor v. Bear Stearns & Co., 572 F. Supp. 667, 681-82 (N.D. Ga. 1983); Guerrero v. Katzen, 571 F. Supp. 714, 719 (D.D.C. 1983); Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 570 F. Supp. 667, 669-70 (W.D. Mich. 1983); Ralston v. Capper, 569 F. Supp. 1575, 1579 (E.D. Mich. 1983); Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1239-40 (S.D.N.Y. 1983); Kimmel v. Peterson, 565 F. Supp. 476, 490-93 (E.D. Pa. 1983); Eisenberg v. Gagnon, 564 F. Supp. 1347, 1352 (E.D. Pa. 1983); Windsor Assocs., Inc. v. Greenfeld, 564 F. Supp. 273, 276-78 (D. Md. 1983); Hunt Int'l Resources Corp. v. Binstein, 559 F. Supp. 601, 602 (N.D. Tex. 1982); Lode v. Leonardo, 557 F. Supp. 675, 680 (N.D. Ill. 1982); Crocker Nat'l Bank v. Rockwell Int'l Corp., 555 F. Supp. 47, 49 (N.D. Cal. 1982); D'Iorio v. Adonizio, 554 F. Supp. 222, 230-31 (M.D. Pa. 1982); Meineke Discount Muffler Shops, Inc. v. Noto, 548 F. Supp. 352, 354 (E.D.N.Y. 1982); Gunther v. Dinger, 547 F. Supp. 25, 27 (S.D.N.Y. 1982); Hellenic Lines, Ltd. v. O'Hearn, 523 F. Supp. 244, 247-48 (S.D.N.Y. 1981); Engl v. Berg, 511 F. Supp. 1146, 1154-55 (E.D. Pa. 1981); Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645, 646-47 (N.D. Ill. 1980); Heinold Commodities, Inc. v. McCarty, 513 F. Supp. 311, 313 (N.D. Ill. 1979).

8. *See* North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207 (N.D. Ill. 1980). The requirement of a commercial or competitive injury in civil RICO cases, however, has been rejected by the vast majority of courts that have considered this issue. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co.,

In *Sedima, S.P.R.L. v. Imrex Co.*[10] the United States Court of Appeals for the Second Circuit imposed an entirely new restriction on the scope of civil RICO in treble damage actions. The court held that a private RICO action may not be brought against a defendant who has not previously been convicted of a RICO violation or of the predicate offenses that form the basis of the alleged racketeering activity.[11] This Note examines the implications of the requirement

741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985); Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983); Schacht v. Brown, 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), *aff'd in part on reh'g en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S. Ct. 527 (1983); Kimmel v. Peterson, 565 F. Supp. 476 (E.D. Pa. 1983); Gitterman v. Vitoulis, 564 F. Supp. 46 (S.D.N.Y. 1982); Crocker Nat'l Bank v. Rockwell Int'l Corp., 555 F. Supp. 47 (N.D. Cal. 1982); USACO Coal Co. v. Carbomin Energy, Inc., 539 F. Supp. 807 (W.D. Ky.), *aff'd on other grounds*, 689 F.2d 94 (6th Cir. 1982); Van Schaick v. Church of Scientology, 535 F. Supp. 1125 (D. Mass. 1982); Landmark Sav. & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. 206 (E.D. Mich. 1981); Hellenic Lines Ltd. v. O'Hearn, 523 F. Supp. 244 (S.D.N.Y. 1981).

9. *See* 18 U.S.C. §§ 1961(1), 1962, 1964(c) (1982); *see, e.g.*, Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Nov. 13, 1984) (No. 84-657); Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985); Kaufman v. Chase Manhattan Bank, N.A., 581 F. Supp. 350 (S.D.N.Y. 1984); Willamette Sav. & Loan v. Blake & Neal Fin. Co., 577 F. Supp. 1415 (D. Or. 1984); Hudson v. LaRouche, 579 F. Supp. 623 (S.D.N.Y. 1983); County of Cook v. Midcon Corp., 574 F. Supp. 902 (N.D. Ill. 1983); Dakis v. Chapman, 574 F. Supp. 757 (N.D. Cal. 1983); *In re* Longhorn Sec. Litig., 573 F. Supp. 255 (W.D. Okla. 1983); Richardson v. Shearson/American Express Co., 573 F. Supp. 133 (S.D.N.Y. 1983); King v. Lasher, 572 F. Supp. 1377 (S.D.N.Y. 1983); *In re* Action Indus. Tender Offer, 572 F. Supp. 846 (E.D. Va. 1983); Friedlander v. Nims, 571 F. Supp. 1188 (N.D. Ga. 1983), *appeal dismissed*, 747 F.2d 1467 (11th Cir. 1984); Guerrero v. Katzen, 571 F. Supp. 714 (D.D.C. 1983); Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983); Moss v. Morgan Stanley, Inc., 553 F. Supp. 1347 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984); Johnsen v. Rogers, 551 F. Supp. 281 (C.D. Cal. 1982); Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002 (C.D. Cal. 1982); Landmark Sav. & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. 206 (E.D. Mich. 1981).

Based primarily on the rationale discussed *infra* note 11, the decisions noted above have held that a civil RICO plaintiff must prove a racketeering injury distinct from the injury caused by the defendant's predicate acts. A number of courts, however, have rejected the racketeering injury requirement, holding that injury from the defendant's predicate acts alone is sufficient to sustain a private RICO claim. *See, e.g.*, Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 902 (1985); Schacht v. Brown, 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983); Wilcox v. Ho-Wing Sit, 586 F. Supp. 561 (N.D. Cal. 1984); Laterza v. American Broadcasting Co., 581 F. Supp. 408 (S.D.N.Y. 1984); Yancoski v. E.F. Hutton & Co., 581 F. Supp. 88 (E.D. Pa. 1983); Swanson v. Wabash, Inc., 577 F. Supp. 1308 (N.D. Ill. 1983); Kirschner v. Cable/Tel Corp., 576 F. Supp. 234 (E.D. Pa. 1983); Ralston v. Capper, 569 F. Supp. 1575 (E.D. Mich. 1983); Mauriber v. Shearson/American Express, Inc. 567 F. Supp. 1231 (S.D.N.Y. 1983); Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146 (D.N.J. 1983), *aff'd in part and rev'd in part on other grounds*, 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1179 (1985); Crocker Nat'l Bank v. Rockwell Int'l Corp., 555 F. Supp. 47 (N.D. Cal. 1982).

10. 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985).

11. *Id.* at 503. In addition to the requirement of a prior criminal conviction, the court also adopted the requirement of a racketeering injury in private RICO actions. *Id.* at 495; *see also supra* note 9 (cases requiring that civil RICO plaintiffs suffer a "racketeering injury"). The court based its analysis on the language of 18 U.S.C. § 1964(c) (1982), which states that to recover treble damages, a civil RICO plaintiff must prove injury to his business or property "*by reason of* a violation of section 1962." (emphasis added). Noting that "RICO was intended not simply to provide additional remedies for already compensable injuries" but rather as a method of fighting organized crime, the court held that "[t]he 'by reason of' language [in the statute] requires that plaintiffs allege injury caused by an activity which RICO was designed to deter, which, whatever it may be, is different from that caused simply by [the] predicate acts . . . ." *Sedima*, 741 F.2d at 494.

The court further supported its position by analogizing the "by reason of" language in RICO to identical language in the Clayton Act, 15 U.S.C. § 15(a) (1982), from which the RICO language was drawn. *Sedima*, 741 F.2d at 494. Observing that antitrust plaintiffs must allege and prove an " 'anti-

of a prior criminal conviction in private RICO suits and concludes that such a requirement is both unsupported by statutory or judicial authority and contrary to the policy considerations upon which RICO is based.

In 1979 Sedima, S.P.R.L. and Imrex Co. entered into a joint venture to supply electronic component parts to a NATO subcontractor in Belgium.[12] Under the joint venture agreement, Sedima secured orders for the parts, and Imrex obtained the parts and shipped them to Europe. Sedima sued alleging that Imrex had wrongfully received and retained money belonging to the joint venture by falsely overstating the purchase prices, shipping costs, and finance charges of the parts purchased for the joint venture. Sedima asserted several claims, including a private RICO claim based on the predicate acts of mail fraud[13] and wire fraud[14] and on an alleged RICO conspiracy under section 1962(d).[15]

The United States District Court for the Eastern District of New York dismissed the RICO counts.[16] The lower court relied on previous RICO decisions requiring a showing of competitive or commercial injury[17] or a showing of a "racketeering injury"[18] and held that a civil RICO plaintiff must allege something more or different than injury resulting from the predicate acts alone.[19] Because it determined that Sedima had alleged no injury other than that caused by the predicate acts of mail fraud and wire fraud, the district court dismissed

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trust injury' " or an " 'injury of the type the antitrust laws were intended to prevent,' " *id.* at 494-95 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)), the court concluded by analogy that "the 'by reason of' language in section 1964(c) is intended to limit standing to those injured by a 'racketeering injury,' by an injury of the type RICO was designed to prevent." *Id.* at 495. Based on this analysis, the court held that civil RICO plaintiffs must "show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." *Id.* at 496.

The United States Court of Appeals for the Second Circuit reiterated its position with respect to the racketeering injury requirement in Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (U.S. Nov. 13, 1984) (No. 84-657), decided the day after *Sedima*. The *Rhoades* panel elaborated on *Sedima*'s analysis and attempted to provide some examples of situations that might constitute racketeering injuries. *Id.* at 517. Judge Cardamone, who wrote strong dissents in *Sedima* and *Rhoades*, joined with the majority in Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984), decided the day after *Rhoades*. The *Furman* panel acknowledged the stare decisis effect of *Sedima* and *Rhoades* but expressed disagreement with those decisions and reaffirmed the views expressed in Judge Cardamone's dissents. *Id.* at 525. By agreement of the court, the *Sedima*, *Rhoades*, and *Furman* opinions were published in the order in which they were completed, after the court's denial of en banc consideration of all three cases. *Id.*

12. *Sedima*, 741 F.2d at 484.

13. 18 U.S.C. § 1341 (1982).

14. *Id.* § 1343.

15. *Sedima*, 741 F.2d at 485. Sedima sought treble damages and attorney's fees under 18 U.S.C. § 1964(c) (1982); *see supra* note 5 (text of § 1964(c)). Sedima also alleged breach of contract, breach of fiduciary duty, unjust enrichment, breach of the joint venture agreement, conversion, breach of a constructive trust, and a claim based on quasi-contract. *Sedima*, 741 F.2d at 484.

16. Sedima, S.P.R.L. v. Imrex Co., 574 F. Supp. 963 (E.D.N.Y. 1983), *aff'd*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985).

17. *See supra* note 8 and accompanying text.

18. *See supra* note 9 and accompanying text.

19. 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), *cert. granted*, 105 S. Ct. 901 (1985).

Sedima's RICO claims.[20]

The court of appeals agreed in part with the district court's analysis, holding that a civil RICO plaintiff must allege a "racketeering injury" to maintain a suit for treble damages.[21] In addition, the court held that "a prior criminal conviction is a prerequisite to a civil RICO action."[22] Because Imrex had been convicted neither of a RICO violation nor of the predicate offenses on which Sedima's RICO allegations were based, the court held that the RICO claims against Imrex must be dismissed.[23]

The court began its discussion of the prerequisites for civil RICO suits by disposing of possible impediments to its analysis of the private RICO claim. First, the court discounted the relevance of the statute's legislative history to private RICO actions, noting that section 1964(c) was introduced so late in the legislative process that nearly all congressional discussion concerning the statute was inapplicable to treble damage actions.[24] Second, the court refused to apply the "plain meaning rule"[25] of statutory construction to section 1964(c) on the

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20. *Id.*

21. *Sedima*, 741 F.2d at 494-95; *see supra* note 11 (summary of court's analysis).

22. *Sedima*, 741 F.2d at 496.

23. *Id.* at 503-04. The district court did not address whether a prior criminal conviction against the defendant is required in private RICO actions.

24. *Id.* at 489. RICO originated in the Senate in 1969 as title IX of Senate Bill 30. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969). Although Senate Bill 30 contained most of the provisions of § 1964, it did not include the treble damage remedy set forth in § 1964(c). Thus, according to the *Sedima* court, "any comments in the Senate Report . . . pertaining to RICO's civil remedies do not pertain to the scope, impact, or purpose of the private treble damage remedy . . . ." *Sedima*, 741 F.2d at 489.

The House of Representatives proposed the addition of § 1964(c) to Senate Bill 30. As the court noted, § 1964(c) received little discussion, either in committee or on the House floor. *Id.* at 489-92. In addition, the House Report, which did little more than paraphrase the provisions of § 1964(c), shed little light on Congress' intent with respect to the private RICO cause of action. *See* H.R. REP. NO. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4007, 4010 & 4034. The Senate accepted the House's addition of § 1964(c) without requesting a conference.

After its review of RICO's legislative history, the court observed:

> The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c). If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securites laws—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it.

Sedima, 741 F.2d at 492.

For more extensive discussions of RICO's legislative history, see Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-21 (1980); 1 CORNELL INST. ON ORGANIZED CRIME, MATERIALS ON RICO 58-105 (1980-1981).

25. The plain meaning rule "preclude[s] the use of extrinsic evidence to determine the meaning of a statute, the language of which seem[s] clear on its face." Doyon, Ltd. v. Bristol Bay Native Corp., 569 F.2d 491, 494 (9th Cir.), *cert. denied*, 439 U.S. 954 (1978). The Supreme Court, however, has refused to apply the plain meaning rule mechanically, holding that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 10 (1976) (quoting United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940)). More recently, the Supreme Court stated:

> "The starting point in every case involving construction of a statute is the language itself."

ground that such an analysis would provide "little or no guidance as to the handling of the very real ambiguities . . . surrounding the complex statutory scheme providing for the private civil remedy."[26] Last, the court distinguished previous decisions rejecting the requirement of a prior criminal conviction in private RICO suits, holding that they did not control disposition of the issues raised in the *Sedima* case.[27]

Having cleared the way for its analysis of the private RICO claim, the court examined the language of the statute, scrutinizing in particular certain terms which suggested that Congress intended to require prior criminal convictions in civil RICO suits. For example, the court considered the meaning of the word "violation" in the context of section 1964(c)'s requirement that civil RICO plaintiffs show injury "by reason of a violation of section 1962." Although acknowledging that other interpretations were possible, the court concluded that Congress' use of the word "violation" indicated an intent to require prior criminal convictions in private RICO suits.[28]

Because civil RICO plaintiffs must prove that they have been injured by a pattern of racketeering activity under section 1962, the court also examined the meanings of several terms set forth in the definition of "racketeering activity." Under section 1961(1) racketeering activity is defined to include acts "chargeable" under state law, acts "indictable" under federal law, and "offenses" under

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> But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."

Watt v. Alaska, 451 U.S. 259, 265-66 (1981) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring); Boston Sand Co. v. United States, 278 U.S. 41, 48 (1928)).

26. *Sedima*, 741 F.2d at 494. In United States v. Turkette, 452 U.S. 576 (1981), a criminal RICO case, the Supreme Court disapproved of the lower court's departure from the language of the statute, relying on the plain meaning of RICO to construe the term "enterprise" as used in the statute. The *Sedima* court distinguished this use of the plain meaning rule in the criminal RICO context from the possible use of the rule in construing the "very real ambiguities" of § 1964(c). *Sedima*, 741 F.2d at 494; *see also infra* notes 57-60 and accompanying text (discussing *Turkette*'s construction of the term "enterprise").

27. *Sedima*, 741 F.2d at 496-98. The principal cases that the court discussed were United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), and USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94 (6th Cir. 1982). *See infra* notes 47-54 and accompanying text (discussion of these and other cases rejecting the requirement of a prior criminal conviction in private RICO suits).

28. The court based its analysis of the word "violation" on a comparison of § 1964(c) with the parallel language of the Clayton Act, on which § 1964(c) was modelled. The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a) (1982). By contrast, § 1964(c) states that "[a]ny person injured in his business or property by reason of a violation of section 1962" may bring suit for treble damages, attorney's fees, and costs. According to the court,

> The difference [in the language of the statutes] is instructive. It is possible to argue that "violation" is simply a shorthand way of saying "by reason of anything forbidden," and one could suppose that [the change in the language of the statute was made] in a desire merely to eschew surplusage. But this interpretation does not seem as compelling as one which suggests that the change was made with a specific intent in mind—to require that conviction at least of the predicate acts be had before a civil suit may be brought by a private person.

Sedima, 741 F.2d at 498-99.

the securities, bankruptcy, and dangerous drug laws.[29] In the court's view, the terms "chargeable," "indictable," and "offense" "speak along criminal rather than civil lines"[30] and add force to the argument that Congress intended to require prior criminal convictions in civil RICO actions.[31]

The court, however, did not rest its decision solely on interpretation of the statutory language. Rather, it held that "[t]he structure of RICO as a whole leads one to the narrower interpretation requiring criminal convictions by a more direct route."[32] The court premised this argument on the proposition that "RICO liability simply does not exist without criminal conduct,"[33] since the purpose of the Act was "to provide new penalties and remedies to combat conduct which explicitly has already been found criminal."[34] In the court's view, RICO's purpose of combatting activity already found to be criminal would be frustrated in civil actions in which no prior criminal conviction was required, because a civil action would be inadequate to determine whether specific conduct already was criminal.[35] In addition, the court noted that in the absence of

29. *See supra* note 5.

30. *Sedima*, 741 F.2d at 499.

31. The court used the example of a civil action for securities fraud to illustrate this point. In such a civil case, the court reasoned, a defendant could not be said to have committed an "offense," conviction of which would require criminal scienter and proof beyond a reasonable doubt. Because such a result would be anomalous in a civil action for securities fraud, the court found it "hard to believe that in adopting civil RICO Congress intended to permit proof of 'willful' violations by only a preponderance of the evidence." *Id.*

With respect to the use of the terms "chargeable" and "indictable," the court found it conceivable that Congress intended no requirement of prior informations or indictments in civil RICO actions, since the predicate acts constituting the racketeering activity need only be "chargeable" or "indictable." According to the court, however,

> a plausible alternative view of the words "indictable" and "chargeable," found in RICO's definitional section, is that Congress did not intend to give civil courts the power to determine whether an act is "indictable" in the absence of a properly returned indictment or "chargeable" absent an information. Courts do not traditionally look at a given set of facts—proved by a preponderance of the evidence only—and say that these facts make out acts which are "indictable" or "chargeable." . . . In the case of indictments that is the purpose of grand juries. The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ." Surely, being declared a "racketeer" or being held responsible for being one is being held to "answer for" an "infamous crime." Whatever else one may think of grand juries or the process by which they pursue their deliberations, they may stand as a bulwark between the individual and the government. Under the interpretation given RICO by those courts which do not require criminal convictions of the predicate acts before the bringing of a civil action, every private plaintiff becomes his own one-person grand jury, or in the case of state felonies chargeable by information, his own prosecutor.

Id. at 500.

32. *Id.*

33. *Id.* at 501.

34. *Id.* at 500. In support of this proposition, the court relied on a statement in an article coauthored by Professor G. Robert Blakey, chief counsel of the Senate subcommittee that proposed RICO and an advocate of broad construction of the statute. In discussing the congressional mandate that RICO be liberally construed, the authors observed that "RICO did not draw a line between criminal and innocent conduct. Instead, RICO authorized the imposition of different civil or criminal remedies on conduct already criminal, when performed in a specified fashion." Blakey & Gettings, *supra* note 24, at 1032. Elsewhere in the article, the authors noted that "RICO is not a criminal statute; it does not make criminal conduct that before its enactment was not already prohibited, since its application depends on the existence of 'racketeering activity' that violates an independent criminal statute." *Id.* at 1021 n.71.

35. *Sedima*, 741 F.2d at 501. This view is analogous to the court's argument based on the

prior criminal convictions, civil RICO actions would raise problems with respect to the standard of proof to be applied[36] and the congressional mandate that RICO be liberally construed.[37] The court concluded that a private RICO action may not be maintained against a defendant who has not previously been convicted of a RICO violation or of the predicate offenses forming the basis of the alleged racketeering activity.[38]

Judge Cardamone filed a strong dissent in *Sedima*. He disagreed with the majority's assumption that civil RICO defendants are entitled to the expertise and procedural safeguards of the criminal system because RICO is an inherently criminal statute.[39] He also objected to the majority's attempt to distinguish contrary case law[40] and the majority's interpretation of the terms "indictable," "chargeable," and "violation."[41] In Judge Cardamone's view, the majority's requirement of prior criminal convictions in private RICO suits effectively deprived racketeering victims of the remedy that Congress intended them to have.

> Regardless of whether a defendant is a member of an organized crime family and no matter how lawless his pattern of racketeering activity may be, if he escapes conviction—through acquittal, a beneficial plea,

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meanings of the terms "chargeable" and "indictable." *See supra* note 31. Both arguments rely on the premise that some binding and explicit determination of the criminality of a RICO defendant's conduct must be made before such a defendant may be held civilly liable for his racketeering actvity. This requirement creates problems in private RICO actions, since courts in civil cases cannot make binding and explicit determinations of the criminality of particular conduct. The court's consideration of this conflict between the requirements of the civil and criminal systems led it to "conclude that had Congress considered this problem, it would have explicitly required previously established convictions in the context of section 1964(c)." *Sedima*, 741 F.2d at 501.

36. *Sedima*, 741 F.2d at 501-02. The court's burden of proof argument is based on the premise that the operation of RICO is limited to punishment of criminal conduct; under this view, the conduct of a RICO defendant first must be found criminal to fall within the ambit of the statute. Given this premise, the court reasoned that in the absence of a prior criminal conviction, a civil RICO plaintiff must prove his case beyond a reasonable doubt. Because there was no evidence that Congress intended such a scheme of proof in civil RICO actions, the court concluded that "Congress expected the criminality of the predicate acts to be proved before the private action went forward—that a criminal conviction must precede a private civil suit." *Id.* at 502.

37. *Id.* at 502-03. Congress directed that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947. According to the court, if civil RICO claims were allowed in the absence of a prior criminal conviction, this clause mandating liberal construction would conflict with the due process requirement that criminal statutes be strictly construed. In the court's view, liberal construction of the statute in civil actions not based on prior criminal convictions would deprive RICO defendants of their due process right to have the criminality of their conduct determined under strict construction of the applicable statutes. The court opined that "had Congress considered the [liberal construction] problem, it would have intended criminal convictions of at least the predicate crimes as a prerequisite for a civil RICO action." *Sedima*, 741 F.2d at 502.

38. In the words of the court, "To bring a private civil action [under RICO], there must be a 'violation,' that is, criminal convictions on the underlying predicate offenses. Of course, a conviction under RICO itself will do, a fortiori." *Sedima*, 741 F.2d at 503.

39. *Id.* at 506-08 (Cardamone, J., dissenting). Judge Cardamone rejected the view that private RICO actions are criminal or quasi-criminal under applicable Supreme Court precedents. *See infra* notes 75-83 and accompanying text. Thus, in his view, civil RICO defendants are not entitled to the same protections afforded defendants in criminal or quasi-criminal proceedings. Judge Cardamone argued that even if private RICO actions are viewed as criminal or quasi-criminal, such a finding should not mandate the requirement of a prior criminal conviction, since any necessary procedural safeguards could be afforded a defendant in the civil proceeding.

40. *Sedima*, 741 F.2d at 504-05 (Cardamone, J., dissenting).

41. *Id.* at 505-06, 508 (Cardamone, J., dissenting).

> or a decision not to prosecute—then the remedy granted the victim of these activities is lost.[42]

The *Sedima* requirement of prior criminal convictions in private RICO actions marks an entirely new direction in civil RICO jurisprudence. The prior conviction requirement does not appear in the statute,[43] and the legislative history contains no indication that Congress intended to impose such a requirement.[44] Moreover, every case prior to *Sedima* that had considered the issue had held that no prior criminal conviction is required in private RICO suits.[45]

As the majority observed,[46] few of the cases rejecting the prior conviction requirement have supported their position with extensive analysis. *United States v. Cappetto*,[47] which the *Sedima* court distinguished, frequently has been cited to support the proposition that prior criminal convictions are not required in private RICO actions.[48] Although *Cappetto* did not deal specifically with this issue,[49] its recognition of the independence of RICO's civil remedies from its criminal penalties[50] led many courts to reject the prior conviction requirement.

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42. *Id.* at 508 (Cardamone, J., dissenting).

43. *See supra* note 5.

44. This is hardly surprising given the dearth of legislative history relating to § 1964(c). *See supra* note 24 and accompanying text.

45. *See, e.g.*, Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94 (6th Cir. 1982); *In re* Longhorn Sec. Litig., 573 F. Supp. 255 (W.D. Okla. 1983); Kimmel v. Peterson, 565 F. Supp. 476 (E.D. Pa. 1983); Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983); Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983); Lode v. Leonardo, 557 F. Supp. 675 (N.D. Ill. 1982); State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673 (N.D. Ind. 1982); Glusband v. Benjamin, 530 F. Supp. 240 (S.D.N.Y. 1981); Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645 (N.D. Ill. 1980); Heinold Commodities, Inc. v. McCarty, 513 F. Supp. 311 (N.D. Ill. 1979); Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278 (D. Del. 1978).

Although the majority stated that courts had split on whether prior criminal convictions are necessary in private RICO actions, *Sedima*, 741 F.2d at 493, no case before *Sedima* had held that prior convictions are required. Two of the cases the majority cited in support of its proposition merely noted in dicta that prior criminal convictions might be required. *See* Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1137-38 n.12 (D. Mass. 1982) ("While it is difficult for us to conclude that Congress, in using the words 'indictable' and 'punishable' contemplated that civil liability could result without involvement of the criminal process, other courts have done so."); Kleiner v. First Nat'l Bank, 526 F. Supp. 1019, 1022 n.2 (N.D. Ga. 1981) ("It may well be that entitlement to the civil remedy of section 1964 should be conditioned upon a criminal conviction or at least an indictment. However, the Court need not reach this issue here.").

46. *Sedima*, 741 F.2d at 497.

47. 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

48. Many of the cases cited *supra* note 45 relied on *Cappetto* in rejecting the prior conviction requirement.

49. *Cappetto* involved a civil action brought by the government under § 1964 for injunctive relief and divestiture. Although it did not discuss the necessity of prior criminal convictions in civil RICO actions, the *Cappetto* court rejected the contention that § 1964 actions are essentially criminal proceedings that entitle defendants to the constitutional rights afforded in criminal cases. The *Sedima* majority distinguished *Cappetto* on the ground that it dealt solely with governmental actions and thus had no bearing on private RICO suits for treble damages. *Sedima*, 741 F.2d at 496-97.

50. The *Cappetto* court stated that

> acts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings, and the prosecuting arm of the government may be authorized to elect whether to bring a civil or criminal action, or both. A civil proceeding to enjoin those acts is not rendered criminal in character by the fact that the acts also are punishable as crimes.

Cappetto, 502 F.2d at 1357.

For example, in *USACO Coal Co. v. Carbomin Energy, Inc.*[51] the United States Court of Appeals for the Sixth Circuit relied on *Cappetto* in determining that Congress did not intend to limit liability under section 1964(c) to defendants previously convicted of criminal charges.[52] In *Bunker Ramo Corp. v. United Business Forms, Inc.*[53] the United States Court of Appeals for the Seventh Circuit cited both *Cappetto* and *USACO Coal Co.* in rejecting arguments for the prior conviction requirement strikingly similar to those successfully advanced in *Sedima*.[54]

Judge Cardamone in his dissent in *Sedima* suggested that there was an "obviously simple explanation for [these courts'] resounding rejection of any prior conviction requirement—it does not appear in the statute."[55] Judge Cardamone's point is well taken given that RICO contains no explicit requirement of prior criminal convictions in treble damage actions. It is a familiar axiom that "[t]he starting point in every case involving construction of a statute is the language itself."[56] It is likely that the courts that rejected the prior con-

51. 689 F.2d 94 (6th Cir. 1982).

52. The court stated:

> We find nothing in the plain language of RICO to suggest that civil liability under § 1964(c) is limited only to those already convicted or charged with criminal racketeering activity. Section 1964(c) states that an action for damages may be maintained by any person injured in his business or property by reason of a violation of § 1962. . . . Section 1962 merely describes acts that are "unlawful" under RICO. Section 1963 provides that violations of § 1962 are criminal, just as § 1964(c) provides that violations of § 1962 create a private right of action for damages. If Congress had intended to limit liability under §1964(c) only to those convicted of or charged with RICO crimes, it would have done so within § 1964(c) by referring to § 1963 or by otherwise specifically indicating that a conviction under § 1963 is a basis for civil damages. By referring in § 1964(c) only to the unlawful acts of § 1962, Congress has created a civil remedy that is independent of criminal proceedings under § 1963. We believe this literal reading of RICO is consistent with the approach of United States v. Turkette . . . and the Supreme Court's recognition in that case that Congress intended that RICO be liberally construed to effectuate its remedial purposes.

Id. at 95 n.1. The *Sedima* court labelled this argument "misguided," observing that "[i]f Congress had referred to section 1963 in section 1964(c), the result would have been not only to require criminal convictions for the predicate acts before bringing a civil suit, but to require a conviction under RICO." *Sedima*, 741 F.2d at 497-98. In the court's view, "people injured by 'racketeering activity' [*i.e.*, predicate acts] may sue . . . whether or not the government has brought an action *under RICO* to punish that activity. As to whether that racketeering activity itself must already have been proven criminal . . . the reference to section 1962 in section 1964(c) provides no indication." *Id.* at 498.

53. 713 F.2d 1272 (7th Cir. 1983).

54. The *Bunker Ramo* court noted:

> Defendants argue that "violation" as used in section 1962 must mean "conviction." Defendants point out that the treble damages provision of RICO differs from section 4 of the Clayton Act which provides treble damages for injury to business or property "by reason of anything forbidden in the antitrust laws." According to defendants, this difference in language indicates that a criminal conviction under 18 U.S.C. § 1963 for violating section 1962 is an essential element for civil liability under section 1964(c). Defendants also argue that section 1962 is a criminal statute and Congress did not intend a charge of criminal conduct to be adjudicated in a civil proceeding.

Id. at 1287. The court rejected these arguments, holding that "section 1964(c) creates a private right of action for parties injured by conduct that violates section 1962 without any requirement of a prior criminal conviction for that conduct." *Id.*

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

56. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

viction requirement with little discussion simply concluded that the plain language of RICO fully disposed of the issue and obviated the need for further inquiry.

The Supreme Court adopted substantially this approach to construing RICO in *United States v. Turkette*.[57] *Turkette*, a criminal RICO case, involved the question whether the term "enterprise" as used in RICO[58] included both legitimate and illegitimate enterprises. In construing the provisions of RICO, the Supreme Court began its inquiry with the language of the statute, stating: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' "[59] The Court held that the language of RICO alone controlled interpretation of the term "enterprise," which must be construed to include both legitimate and illegitimate enterprises in the absence of any explicit definitional limitation on the face of the statute.[60]

If the *Sedima* court had followed the *Turkette* analysis, it would have concluded that no prior criminal conviction is required in private RICO actions, since such a requirement does not appear on the face of the statute.[61] The court, however, expressly declined to follow *Turkette* on the ground that section 1964(c) presented ambiguities that could not be resolved by resort to the plain meaning of the statutory language.[62] Because there was no legislative history to indicate Congress' intent with respect to the prior conviction requirement,[63] the court supplied its own interpretation of the statute based on its opinion as to what Congress would have intended had it considered the need for prior convictions in private RICO actions.

The court relied in part upon interpretation of the statutory terms "viola-

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57. 452 U.S. 576 (1981).

58. Under 18 U.S.C. § 1961(4) (1982), an " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

59. *Turkette*, 452 U.S. at 580 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

60. The Court observed:

> On its face, the definition [of "enterprise" under § 1961(4)] appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones. Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate." But it did nothing to indicate that an enterprise consisting of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal.

Id. at 580-81.

61. Some of the courts rejecting the prior-conviction requirement in § 1964(c) actions have relied on the Supreme Court's reasoning in *Turkette*. *See, e.g.*, USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982) (construction of RICO rejecting the prior-conviction requirement is consistent with *Turkette*'s approach); State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673 (N.D. Ind. 1982); Glusband v. Benjamin, 530 F. Supp. 240 (S.D.N.Y. 1981).

62. *Sedima*, 741 F.2d at 494, 503.

63. *See supra* note 24 and accompanying text. Under the *Turkette* analysis, *see supra* text accompanying note 59, the *Sedima* court had to rely on asserted ambiguities in the statute to reject the plain meaning rule of statutory construction, since there was no clearly expressed legislative intent contrary to the language of the statute.

tion," "chargeable," "indictable," and "offense" to support its finding that prior convictions are required in private RICO suits. In the court's view, Congress' use of these words in the statute evinced an intent to require prior convictions in actions brought under section 1964(c).[64]

The court's analysis on this point is not persuasive. For example, contrary to the court's suggestion,[65] the term "violation" does not necessarily connote criminal activity. In its ordinary usage, "violation" means an infringement or breach of law.[66] All infringements or breaches of the law do not, of course, result in criminal liability or conviction. Because the definition of "violation" is not synonymous with "conviction," most courts have rejected the argument that section 1964(c)'s reference to a "violation" of section 1962 requires prior convictions in private RICO suits.[67]

The court's interpretation of the terms "chargeable" and "indictable" as used in section 1961 is similarly misguided. The court argued that, in the RICO context, these words must be interpreted to require the actual issuance of an indictment or information by a criminal court prior to any civil RICO proceedings, since courts in civil actions ordinarily do not determine whether particular conduct is "chargeable" or "indictable" in the absence of a previous information or indictment.[68] As Judge Cardamone observed, however, an indictable or chargeable act generally is defined not as an act "for which an indictment or information has been *returned* or *filed*,"[69] but rather as an act for which a defendant *may* be indicted or charged.[70] Because "indictable" and "chargeable" connote only the possibility of an indictment or information, the use of these terms in RICO provides no support for the argument that Congress intended to make criminal proceedings a prerequisite to the maintenance of a section 1964(c) action.[71]

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64. *Sedima*, 741 F.2d at 498-500.

65. *See supra* note 28 and accompanying text.

66. *See* BLACK'S LAW DICTIONARY 1408 (5th ed. 1979).

67. *See, e.g.*, Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1287 (7th Cir. 1983) (rejecting the argument "that 'violation' as used in section 1962 must mean 'conviction' "); Kaushal v. State Bank of India, 556 F. Supp. 576, 579 n.9 (N.D. Ill. 1983) (noting that the term "violation" must be understood in a civil context and that private RICO plaintiffs need allege only a prima facie violation of § 1962); Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645, 647 (N.D. Ill. 1980) (holding that "violation is not tantamount to conviction" under § 1964(c)).

68. *See supra* note 31 and accompanying text.

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

70. "Indictable" means "[s]ubject to being indicted." BLACK'S LAW DICTIONARY 695 (5th ed. 1979). BLACK'S LAW DICTIONARY defines "chargeable" only in its civil sense, "as applicable to the imposition of a duty or burden." *Id.* at 211.

71. Even if the majority's arguments with respect to the terms "chargeable" and "indictable" were accepted, they would not support the requirement of prior criminal convictions in private RICO suits. Assuming *arguendo* that "chargeable" and "indictable" may be redefined to require the issuance of an information or indictment, an information or indictment cannot be equated with conviction of the alleged offense; "information" and "indictment" are not synonymous with "conviction," which the court found to be a prerequisite to a § 1964(c) action.

The court may be on firmer ground with respect to its analysis of the word "offense" as used in § 1961(1). *See supra* note 31. An offense is defined as:

> A felony or misdemeanor; a breach of the criminal laws. The word "offense," while sometimes used in various senses, generally implies a felony or a misdemeanor infringing public as distinguished from mere private rights, and punishable under the criminal laws, though

As previously discussed, the majority's decision to require prior convictions in private RICO actions also was based on the view that RICO is an entirely criminal statute designed to punish conduct that already has been found criminal.[72] Because civil proceedings could neither determine the criminality of particular conduct[73] nor provide the procedural safeguards required in criminal actions,[74] the court concluded that prior convictions are required to ensure that private RICO defendants receive the benefits and protections of the criminal system.

Judge Cardamone rejected the fundamental premise of the majority's analysis, stating that RICO "does not require civil courts to determine that the RICO predicate acts are in fact criminal acts. All that need be determined is that they are acts which, if proved by the government in a criminal proceeding, would subject the violator to criminal sanctions."[75] The statute itself contains no prior conviction requirement, no requirement that a civil RICO defendant's conduct be "already criminal," and no requirement that the civil courts determine the criminality of a defendant's conduct. In short, the majority's reasoning in support of the prior conviction requirement is based not upon the provisions of the statute, but rather upon its own implicit assumption that RICO, including its civil provisions, is an inherently criminal statute enacted for the sole purpose of combatting explicitly criminal activity.

The court's erroneous view of civil RICO as an inherently criminal statute results from its focusing upon the nature of the predicate activity rather than the effect and sanctions of section 1964(c) itself. The acts of racketeering set forth in section 1961(1) are crimes when proved by the government in a criminal proceeding. In such a criminal proceeding, a defendant accused of committing any of the section 1961(1) racketeering acts would be entitled to the procedural safeguards traditionally guaranteed in criminal actions. This fact is immaterial in section 1964(c) suits, however, because civil RICO actions do not subject defendants to criminal prosecution. Even though a civil RICO defendant's conduct might be found criminal in a criminal proceeding, such conduct can give rise to no criminal liability in a civil RICO action. Because there is no risk of criminal liability in civil RICO actions, there is no need for criminal procedural

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it may also include the violation of a criminal statute for which the remedy is merely a civil suit to recover the penalty.

BLACK'S LAW DICTIONARY 975 (5th ed. 1979). Thus, it is arguable that the reference in § 1961(1) to "offenses" under the securities, bankruptcy, and dangerous drug laws indicates a need for prior criminal adjudication to determine whether a defendant's alleged conduct is actually an "offense," *i.e.*, a felony or a misdemeanor. Even if this result is correct, however, it would not affect the disposition of *Sedima*, since defendants in *Sedima* were not alleged to have committed any "offenses" under the securities, bankruptcy, or dangerous drug laws.

72. *Sedima*, 741 F.2d at 500.

73. *See supra* note 35 and accompanying text.

74. The procedural safeguards that the court discussed were the criminal standard of proof and the requirement of strict construction of criminal statutes. *See supra* notes 36-37 and accompanying text. In the court's view, the absence of such procedural safeguards in civil litigation could result in a denial of due process to civil RICO defendants against whom no prior criminal conviction had been obtained. *Sedima*, 741 F.2d at 502.

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

safeguards and no reason to require that a defendant's conduct be pronounced criminal by a court qualified to make such a determination.

It is clear from the foregoing analysis that the nature of a defendant's predicate activity is not dispositive of the question whether a suit under section 1964(c) is an inherently criminal action that triggers the need for traditional criminal safeguards. If private RICO actions are to be viewed as inherently criminal, this conclusion must be based upon the provisions of section 1964(c) itself and not upon the nature of the underlying predicate offenses.

It is true, of course, that "Congress may not, by labeling a proceeding civil, foreclose inquiry into the true nature of the proceeding."[76] To ensure that defendants receive the procedural safeguards and protections to which they are entitled, courts may look beyond Congress' denomination of a statute as civil to determine whether it is in fact criminal in nature.[77] If such a statute is found to be essentially criminal, a defendant in a suit under the statute will be entitled to the procedural safeguards required in criminal proceedings, including sixth amendment rights, a criminal standard of proof, and protections against self-incrimination and double jeopardy.[78]

The classification of particular penalties as either civil or criminal depends upon construction of the applicable statute.[79] In *United States v. Ward*[80] the Supreme Court developed a two-part test for determining whether statutory penalties are essentially civil or criminal.[81]

First, we have set out to determine whether Congress, in establishing

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76. Note, *Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964 (1970)*, 53 TEX. L. REV. 1055, 1059 (1975) (citing Boyd v. United States, 116 U.S. 616 (1886)).

77. Ostensibly civil statutes also may be found quasi-criminal in some circumstances. *See* United States v. Ward, 448 U.S. 242 (1980); Boyd v. United States, 116 U.S. 616 (1886). As commentators have observed, the criteria for a finding of quasi-criminality are "(1) the triggering of the statute by 'the commission of offenses against the law;' (2) the nature of the penalty; and (3) the purpose of the penalty." Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655, 708 (1982) (quoting Boyd v. United States, 116 U.S. 616, 634 (1886)). A determination of quasi-criminality entitles a defendant to the fifth amendment protection against self-incrimination but does not "trigger the protections of the Sixth Amendment, the Double Jeopardy Clause of the Fifth Amendment, or the other procedural guarantees normally associated with criminal prosecutions." *Ward*, 448 U.S. at 253.

With respect to the *Sedima* decision, it is unnecessary to analyze § 1964(c) under the criteria set forth above. As previously noted, the prior conviction requirement was based on the court's view that civil RICO suits are inherently criminal actions which require that a defendant be afforded criminal procedural safeguards. The court did not suggest that prior criminal convictions would be required upon a finding of mere quasi-criminality in civil RICO actions. Moreover, the procedural safeguards to which the court found civil RICO defendants to be entitled—the criminal standard of proof and the requirement of strict statutory construction—would not be available upon a finding of quasi-criminality, since defendants in quasi-criminal actions are entitled only to protection against self-incrimination. *See Ward*, 448 U.S. at 253-54.

78. *See Ward*, 448 U.S. at 248.

79. *Id.*

80. 448 U.S. 242 (1980).

81. In addition to actions deemed criminal under the two-part *Ward* test discussed *infra* notes 82-83 and accompanying text, the Supreme Court has held that criminal procedural safeguards may be required in some civil actions involving injury to a defendant's reputation. In *In re* Gault, 387 U.S. 1 (1967), for example, the Court held that the possible loss of liberty and injury to reputation resulting from an adjudication of delinquency entitled the juvenile against whom the proceeding was

> the penalizing mechanism, indicated either expressly or impliedly a preference for [either the civil or criminal] label. . . . Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.[82]

In determining whether a statute's purpose or effect is sufficiently punitive to negate its intended civil nature, the Court has stated that it is helpful to consider the "tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character."[83]

Application of the *Ward* test to section 1964(c) demonstrates that RICO's provision for treble damages is not a criminal penalty entitling private RICO defendants to the procedural safeguards of the criminal system. Under the first part of the test, it is clear that Congress expressed a preference for the "civil" label in private RICO actions by placing section 1964(c) within the section of the statute entitled "civil remedies."[84] In addition, private RICO actions must be

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brought to certain procedural safeguards, including the privilege against self-incrimination, the right to confront witnesses, and the right to counsel.

Although the Court in *Gault* relied in part upon the possible stigma that might result from an adjudication of delinquency, its primary reason for requiring criminal procedural safeguards in the ostensibly civil proceeding was the juvenile's potential loss of liberty. As one commentator has noted, the requirement of criminal procedural safeguards generally does not extend to actions that threaten injury to reputation but do not involve a potential loss of liberty. Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192, 213-15 (1975). Thus, defendants in § 1964(c) actions, who may suffer injury to reputation and the stigma of being labelled a racketeer, probably would not be entitled to criminal procedural safeguards under the *Gault* analysis, since § 1964(c) actions involve no potential loss of liberty. The potential "loss of liberty, together with the more compelling policy reasons for protecting a juvenile's reputation than for protecting that of a racketeer, sufficiently distinguishes *Gault* from a section 1964 case to rule out a claim of damaged reputation as a sufficient basis for a claim of . . . constitutional protection under section 1964." *Id.* at 214-15; *cf.* Paul v. Davis, 424 U.S. 693, 712 (1976) (injury to reputation, even when inflicted by officer of state, does not, by itself, constitute deprivation of liberty or property so as to invoke due process safeguards guaranteed by fourteenth amendment).

82. *Ward*, 448 U.S. at 248-49; *see also* United States v. One Assortment of 89 Firearms, 104 S. Ct. 1099, 1106 (1984) (applying *Ward* test).

83. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). Under *Mendoza-Martinez*, the tests for determining whether a statute is punitive or regulatory are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

Id. at 168-69. The Court noted in *Mendoza-Martinez* that all of the above factors are relevant in determining whether a statute is punitive or regulatory, and they "may often point in differing directions." *Id.* at 169. The Court has used the *Mendoza-Martinez* factors in applying the two-part *Ward* test but has noted that these factors are neither exhaustive nor dispositive. *See* United States v. One Assortment of 89 Firearms, 104 S. Ct. 1099, 1106 (1984); *Ward*, 448 U.S. at 249.

84. The Court held in *Ward* that Congress' denomination of a sanction imposed under the Federal Water Pollution Control Act as a civil penalty left "no doubt that Congress intended to allow imposition of [the penalty] without regard to the procedural protections and restrictions available in criminal prosecutions." *Ward*, 448 U.S. at 249. The Court found that the "civil" label took on added significance in view of its juxtaposition with the criminal penalties set forth in the immediately preceding section. *Id.* A similar juxtaposition is present in RICO, in which § 1964 is immediately preceded by § 1963, which sets forth criminal penalties for RICO violations.

regarded as civil under the second part of the *Ward* test because neither the purpose nor the effect of section 1964(c) is so punitive as to negate Congress' intention that its remedies be civil. As stated by Congress, the purpose of RICO is remedial,[85] its aim being to eliminate organized crime in the United States.[86] Section 1964(c) serves the additional remedial purpose of compensating victims of racketeering activity. Moreover, the sanctions imposed on defendants in private RICO actions are not sufficiently punitive to require that section 1964(c) be regarded as criminal. Civil RICO defendants are not subject to restraint or incarceration, but rather to payment of treble damages upon a finding of liability. Although such treble damages arguably may be regarded as partially punitive and may serve a traditional aim of punishment by deterring racketeering activity,[87] they also serve the important purpose of compensating persons who have been injured as a result of racketeering activity. Finally, as the Supreme Court has indicated, the fact that conduct subject to civil liability also may be punished as a crime does not, of itself, convert a civil remedy into a criminal sanction.[88]

Whether RICO's civil provisions are essentially criminal has not been widely discussed. Most authorities that have addressed this question have con-

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

86. *See supra* note 2. The fact that a statute's purpose is to eliminate crime does not prevent it from being remedial. In United States v. One Assortment of 89 Firearms, 104 S. Ct. 1099 (1984), for example, the Court considered whether a firearms forfeiture provision first promulgated under the Omnibus Crime Control and Safe Streets Act of 1968 and later made part of the Gun Control Act of 1968 was essentially civil or criminal. Applying the *Ward* test, the Court determined that the forfeiture provision was essentially civil, observing that "[k]eeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal plainly more remedial than punitive." *Id.* at 1106.

87. Courts have split on whether multiple damages are punitive or remedial. *See, e.g.*, John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495 (9th Cir. 1977) (holding treble damages under antitrust laws basically remedial, notwithstanding their punitive and deterrent effect); Adler v. Northern Hotel Co., 175 F.2d 619 (7th Cir. 1949) (holding treble damages under Housing and Rent Act remedial); Bowles v. Farmers Nat'l Bank, 147 F.2d 425 (6th Cir. 1945) (if sum exacted is greatly disproportionate to actual loss, it constitutes penalty rather than damages); Sullivan v. Associated Billposters & Distribs. of United States & Canada, 6 F.2d 1000, 1009 (2d Cir. 1925) ("If a statute which is penal in part gives a remedy for an injury to the person injured to the extent that it gives such a remedy it is a remedial statute, irrespective of whether it limits the recovery to the amount of actual loss sustained or as cumulative damages as compensation for the injury."); Wahba v. H & N Prescription Center, Inc., 539 F. Supp. 352 (E.D.N.Y. 1982) (observing that treble damages and punitive damages share common functions in that both are penalties imposed to punish offenders and deter future offenses); Aretz v. United States, 456 F. Supp. 397, 408 (S.D. Ga. 1978) ("The fact that damages are accumulated or enhanced does not in itself render them penal."), *aff'd*, 604 F.2d 417 (5th Cir. 1979), *aff'd on reh'g en banc*, 660 F.2d 531 (5th Cir. 1981); United States v. Countryside Farms, Inc., 428 F. Supp. 1150 (D. Utah 1977) (treble damages are punishment but not criminal punishment); Porter v. Household Fin. Corp., 385 F. Supp. 336, 341 (S.D. Ohio 1974) ("[A] liability is not penal merely because greater than 'actual' damages are imposed."); Erie Basin Metal Prods., Inc. v. United States, 150 F. Supp. 561 (Ct. Cl. 1957) ("[T]he fact that a statute grants the right of assessment of treble damages does not make an action on the statute a penal one . . ."); Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506 (D. Colo. 1952) (treble damages under antitrust laws not penal, but compensatory and remedial); *see also* Vold, *Are Threefold Damages Under the Anti-trust Act Penal or Compensatory?*, 28 KY. L.J. 117 (1940) (most courts hold treble damages under antitrust laws remedial rather than penal).

In this regard, it should be noted that Congress has provided for multiple damages in other kinds of civil actions, such as suits brought under the antitrust laws, 15 U.S.C. § 15 (1982), the false claims statute, 31 U.S.C. § 3729 (1982), and the odometer requirements statute, 15 U.S.C. § 1989 (1982).

88. *See, e.g.*, United States v. One Assortment of 89 Firearms, 104 S. Ct. 1099, 1107 (1984); *Ward*, 448 U.S. at 250.

sidered the criminality issue in the context of civil RICO proceedings brought by the government for injunctive relief, divestiture, or dissolution under section 1964(a) or (b).[89] These authorities have concluded that civil RICO actions instituted by the government are not criminal proceedings that entitle a defendant to the procedural safeguards afforded by the criminal system.[90]

The court in *Sedima* declined to follow the reasoning of these authorities, observing that a determination that civil RICO actions brought by the government are not criminal does not resolve the question whether purely private RICO actions are criminal.[91] This observation is misguided, however, since the rationale the court rejected applies with even greater force to RICO suits instituted by private plaintiffs. For purposes of determining whether RICO's civil provisions are inherently criminal, there is no analytic difference between private and governmental actions under section 1964; both private and governmental actions involve penalties for conduct that also might be punished as a crime.[92] There is even less reason to afford defendants criminal procedural safeguards in private RICO actions than in governmental actions because private actions do not involve the government as a party. As Judge Cardamone observed, defendants in purely private actions ordinarily are not entitled to greater protection than defendants in actions to which the government is a party.[93]

Because private RICO actions are neither inherently criminal nor subject to the procedural requirements of the criminal system, there is no basis for the court's position that prior criminal convictions must be required to ensure that defendants have the benefit of the criminal standard of proof[94] and strict statutory construction.[95] In actions such as private RICO suits, which are not inher-

89. *But see* Windsor Assocs., Inc. v. Greenfeld, 564 F. Supp. 273 (D. Md. 1983) (rejecting argument that private RICO action was essentially criminal proceeding). In *Greenfeld*, defendants in a private RICO action attacked the constitutionality of § 1964(c), arguing that the statute was inherently criminal and did not provide the constitutional protections required in criminal proceedings, including the privilege against self-incrimination and the right to indictment by a grand jury. Relying on United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), discussed *supra* notes 47-50 and accompanying text, the court rejected this argument on the ground that a civil proceeding is not rendered criminal by the fact that the prohibited activity also is punishable as a crime. *Greenfeld*, 564 F. Supp. at 281. The court further observed that the defendants' argument could be asserted against any statute that provides for both civil and criminal enforcement, including the undoubtedly constitutional antitrust laws. *Id.*

90. *See* United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); Note, *supra* note 76; Comment, *supra* note 81. *But cf.* Strafer, Massumi & Skolnick, *supra* note 77, at 708-09 (suggesting that § 1964 might be found quasi-criminal in some circumstances).

91. The court in *Sedima* found the *Cappetto* reasoning inapplicable to § 1964(c) actions, since *Cappetto* involved a civil RICO action brought by the government. *Sedima*, 741 F.2d at 496-97.

92. Thus, the requirement in *Sedima* of prior criminal convictions in civil RICO suits would appear to apply to governmental as well as private actions, even though the *Sedima* holding was restricted to private RICO suits. *See id.* at 503.

93. *Id.* at 504-05 (Cardamone, J., dissenting). In this regard, it is interesting to note that the Supreme Court decisions considering the criminality or punitive nature of ostensibly civil statutes generally have involved actions to which the government was a party. *See, e.g.*, United States v. One Assortment of 89 Firearms, 104 S. Ct. 1099 (1984); United States v. Ward, 448 U.S. 242 (1980); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Flemming v. Nestor, 363 U.S. 603 (1960); Rex Trailer Co. v. United States, 350 U.S. 148 (1956); Helvering v. Mitchell, 303 U.S. 391 (1938).

94. *See supra* note 36 and accompanying text.

95. *See supra* note 37 and accompanying text.

ently criminal, neither proof beyond a reasonable doubt[96] nor strict construction of the applicable statutes[97] is required.[98]

The requirement in *Sedima* of prior criminal convictions in private RICO actions marks a significant and erroneous departure from established precedent. Initially, the court erred by failing to follow the Supreme Court's criteria for construction of RICO set forth in *United States v. Turkette*. If the court had followed the *Turkette* analysis, it would have been unable to insert into RICO a restriction on treble damage actions that has no support either in the statute or its legislative history. Instead, however, the court created "ambiguities" in the statute, which it then resolved by redefining key statutory terms and holding that civil RICO actions are inherently criminal proceedings that entitle defendants to criminal procedural safeguards.

The questionable reasoning in *Sedima*, however, is not as disturbing as its result. By requiring prior criminal convictions in private RICO actions, the decision strikes a serious blow against private persons who are injured by racketeering activity. Under the rule of *Sedima*, the right of private plaintiffs to bring actions under section 1964(c) depends upon the success of the criminal justice system in securing convictions against potential civil RICO defendants. In view of the possibility of plea bargains and decisions not to prosecute, as well as the high standard of proof required in criminal proceedings, the prior conviction requirement may present an insurmountable obstacle to many private plaintiffs with legitimate claims for racketeering injuries.

In enacting RICO, Congress explicitly indicated that the statute was designed to serve broad remedial purposes. By severely restricting the scope of section 1964(c), the court's prior conviction requirement violates Congress' intent and frustrates the purposes for which the statute was enacted. Indeed, in the words of the court itself, the requirement of prior criminal convictions in private RICO actions "make[s] a hash"[99] of the congressional mandate that RICO be liberally construed to effectuate its remedial purposes.

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96. *See* Helvering v. Mitchell, 303 U.S. 391 (1938) (government need not prove its case beyond a reasonable doubt in civil proceedings); United States v. Regan, 232 U.S. 37 (1914) (proof beyond a reasonable doubt required only in criminal cases).

97. *See* Haig v. Agee, 453 U.S. 280 (1981) (in cases that do not involve criminal prosecutions, strict statutory construction not required); Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 375 (1973) (not "every section of an act establishing a broad regulatory scheme must be construed as a 'penal' provision . . . merely because two sections of the Act provide for civil and criminal penalties"); *see also* Peyton v. Rowe, 391 U.S. 54, 65 (1968) ("[R]emedial statutes should be liberally construed."); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) ("[R]emedial legislation should be construed broadly to effectuate its purposes.").

98. As Judge Cardamone observed, even if criminal procedural safeguards were found to be required in private RICO actions, such a finding would not necessitate the requirement of a prior conviction, since any necessary protection could be afforded a defendant in the civil action itself. *Sedima*, 741 F.2d at 506 (Cardamone, J., dissenting).

99. *Id.* at 502.