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The Fourth Circuit Rejects Civil RICO's Investment Use Rule: Busby v. Crown Supply, Inc.

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In 1970 Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO)[1] in response to the perceived threat of criminal infiltration of legitimate businesses.[2] In the two decades that have followed, RICO has proved to be a deadly arrow in the prosecutorial quiver.[3] RICO's civil application to legitimate businesses burgeoned in the 1980s, eclipsing its use as a weapon against the stereotypical "mobster."[4] Particularly attractive to plaintiffs is the relief RICO affords: treble damages and attorney's fees.[5]

The growth of civil RICO actions has created a judicial backlash, as some courts attempt to limit the broad sweep of the statute.[6] In the past, the United States Court of Appeals for the Fourth Circuit had joined this effort.[7] *Busby v. Crown Supply, Inc.*,[8] however, marks a dramatic departure from traditional Fourth Circuit RICO doctrine. In *Busby* the court rejected the judicially created "investment use" rule[9] and held that under section 1962(a)[10] a RICO plain-

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1. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-68 (1988)).

2. "The problem, simply stated, is that organized crime is increasingly taking over organizations in our country, presenting an intolerable increase in deterioration of our Nation's standards. Efforts to dislodge them so far have been of little avail." 115 CONG. REC. 9567 (1969) (remarks of Sen. McClellan upon introduction of S. 1861, 91st Cong., 1st Sess., (1969), a precursor to the enacted statute).

3. *See* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1048 & n.204 (1980); Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 302 n.34 (1983).

4. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985). By the mid-1980s only nine percent of RICO cases involved "allegations of criminal activity of a type generally associated with professional criminals." *Id.* at 499 n.16 (quoting REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55-56 (1985)) [hereinafter ABA REPORT].

5. "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1988).

6. The most notable attempt at limitation had been the requirement that the plaintiff show a distinct racketeering injury to recover under § 1962(c), a limitation ultimately rejected by the United States Supreme Court. *Sedima*, 473 U.S. at 481; see *infra* notes 80-94 and accompanying text for a discussion of the *Sedima* Court's causation requirements for § 1962(c) and the Court's reading of Congress's intent in enacting the statute. The Court in *Sedima* also rejected the Second Circuit's position that a plaintiff could recover only if the defendant had been criminally convicted of the predicate racketeering acts. *Sedima*, 473 U.S. at 485-86.

Judicial limitations often appear in the interpretations of what constitutes a pattern of racketeering. At least one district court has required plaintiff to show that, although a pattern of racketeering exists, every predicate act constituting the pattern harmed the plaintiff. The United States Court of Appeals for the Seventh Circuit subsequently repudiated the lower court's position. Marshall & Ilsley Trust v. Pate, 819 F.2d 806, 809 (7th Cir. 1987); *see infra* notes 131, 166-68 and accompanying texts.

7. In *United States v. Computer Sciences Corporation*, the Fourth Circuit held that for actions filed under § 1962(a), the "person" illegally investing racketeering income must be distinct from the "enterprise" receiving that income. United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). The Fourth Circuit was the only circuit to take this position and has since overruled itself. *See infra* notes 42-47, 147-59 and accompanying texts.

8. 896 F.2d 833 (4th Cir. 1990) (en banc).

9. The investment use rule is a shorthand way to describe the requirement by some courts that

tiff is not limited to recovery for harm caused by the investment or use of racketeering income, but also may recover for harm caused by the racketeering acts themselves.[11]

This Note will explore the development of the investment use rule since the United States Supreme Court handed down its first civil RICO decision in *Sedima, S.P.R.L. v. Imrex Co.*[12] Next, the Note analyzes the *Busby* court's reliance on *Sedima*, its construction of section 1962(a), and the legislative history behind RICO. The Note concludes that the *Busby* court misapplied *Sedima* and misread the statute. Although the court exposed corporate racketeers to greater liability, in doing so it enlarged the class of RICO plaintiffs beyond the statute's permissible bounds.[13]

For twenty years John Busby worked as a sales representative for the defendant Crown Supply, Inc. (Crown),[14] receiving a commission based upon the net profits earned from his sales.[15] At least once a month Crown would give its commissioned sales force "price books" that purported to show the true costs of goods to Crown, with adjustments made for overhead and a suggested retail price for the goods.[16] Busby alleged that certain executives at Crown devised a scheme to inflate its costs, thereby allowing Crown to reduce commissions based

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a § 1962(a) plaintiff allege that defendant's investment or use of racketeering income to acquire, establish, or operate an enterprise affecting interstate commerce was the proximate cause of the plaintiff's harm. *See id.* at 836. Mob infiltration of a legitimate enterprise is a paradigm of the rule. The racketeer who uses racketeering income or threats of violence to acquire an enterprise then uses the enterprise to launder money or monopolize a market and reap large profits. Under this scenario, the plaintiff class includes the infiltrated enterprise's original owner and the enterprise's competitors, suppliers, and customers. *See infra* notes 178-79. With a self-investing corporate racketeer, an otherwise legitimate corporation is both the racketeering "person" and the "enterprise" that is acquired or operated with the racketeering income. Then the issue arises whether the defendant corporation injured the plaintiff solely by its racketeering acts or by the use or investment of the racketeering income. This Note's primary focus is to explore the various judicial approaches to that question.

10. Section 1962(a) states in part:

> 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 in which such person has participated as a principal . . . 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.

18 U.S.C. § 1962(a) (1988).

11. *Busby*, 896 F.2d at 837.

12. 473 U.S. 479 (1985); *see infra* notes 80-94 and accompanying text.

13. The decision once again places the Fourth Circuit's RICO doctrine in a minority position, disagreeing with the Third and Tenth Circuits. *See* Rose v. Bartle, 871 F.2d 331, 357-58 (3d Cir. 1989); Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1149 (10th Cir.), *cert. denied*, 110 S. Ct. 76 (1989). See *infra* notes 132-44 and accompanying text for a discussion of the conflict among the circuits. Six days after *Busby*, the Second Circuit also held that the investment or use of the racketeering income, not the predicate acts of racketeering, must be the cause of a compensable injury. Ouaknine v. MacFarlane, 897 F.2d 75, 83 (2d Cir. 1990).

14. *Busby*, 896 F.2d at 835. Crown Supply is a wholesale distributor that buys and resells paper products, cleaning supplies, and equipment to commercial customers exclusively. Brief of Appellees at 4, *Busby* (No. 88-2521).

15. *Busby*, 896 F.2d at 835.

16. *Id.*

on falsely shrunken profits.[17]

Busby also alleged that in 1980 defendant Hammermill acquired Crown[18] and not only perpetuated that scheme, but also developed its own: Hammermill solicited "rebates" from Crown's suppliers based on the purchase prices Crown paid for those goods.[19] The rebates went directly to Hammermill, which concealed them from Crown's sales force. This plan further reduced Crown's costs, yet deprived Busby and the rest of the sales force of commissions based on true profits.[20]

Busby filed a RICO action based on sections 1962(a),[21] 1962(c),[22] and 1964(c)[23] and joined with it two pendent state law claims.[24] The district court granted defendants' motion to dismiss for failure to state a claim for relief on the ground that plaintiff did not suffer an injury caused by the investment or use of racketeering income.[25] Rather, the court concluded that plaintiff's injuries must have resulted from the predicate racketeering acts.[26]

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17. *Id.* The plaintiff alleged that this scheme defrauded nearly 100 other sales representatives for Crown. *Id.*

18. *Id.* Hammermill is a Delaware corporation that has a Commercial Distributors Associates (CDA) Division comprised of similar wholesale distributors. Brief of Appellees at 4, *Busby* (No. 88-2521).

19. *Busby*, 896 F.2d at 835.

20. *Id.*

21. *See supra* note 10 (quoting § 1962(a)).

22. Section 1962(c) provides:

> 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.

18 U.S.C. § 1962(c) (1988).

23. *See supra* note 5 (quoting § 1964(c)).

24. *Busby*, 896 F.2d at 835. The state claims were for fraud and breach of contract. Plaintiff's Complaint at 28-31, *Busby* (No. 88-2521).

25. *Busby*, 896 F.2d at 835-36. The district court did not write an opinion; its decision was contained in an oral ruling. *Id.* at 836. The district court considered the alleged acts to form only a single fraudulent scheme and therefore found that the plaintiff did not sufficiently allege a pattern of racketeering. *Id.* at 835. The district court also stated that dismissal might be warranted on the grounds that the complaint alleged Crown and Hammermill as the defendant "person" and a division of Crown and Hammermill as the "enterprise." If true, that relationship would violate the Fourth Circuit's requirement, set forth in United States v. Computer Sciences Corporation, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), that for § 1962(a) purposes, the person and enterprise must be distinct entities. *Busby*, 896 F.2d at 835. Because the court considered that a question of fact remained as to the nature of the person/enterprise relationship, it did not state that *Computer Sciences* mandated dismissal. *Id.*

26. *Busby*, 896 F.2d at 836. The plaintiff alleged the defendants used mail and wire fraud to conduct their pattern of racketeering. Brief of Appellant at 20, *Busby* (No. 88-2521). Section 1961(1) lists the predicate racketeering acts as including:

> (A) any act or threat involving murder, kidnapping, 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; (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 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of jus-

The United States Court of Appeals for the Fourth Circuit reversed and remanded, finding that plaintiff had sufficiently alleged causation under section 1962(a).[27] The court acknowledged that "numerous" courts, including two other circuits, require that a plaintiff's injury be caused by the use or investment of racketeering income.[28] Nevertheless, it deemed the investment use rule "flawed"[29] in that the rule contradicts not only the causation principles enunciated in *Sedima*, but also the statutory language and the legislative spirit behind the statute.[30]

The *Busby* court viewed the investment use rule as the type of "amorphous 'racketeering injury' requirement"[31] that the United States Supreme Court had previously repudiated.[32] The court also considered the language of section 1964(c) to be critical. Under that section "[a]ny person injured in his business or property *by reason of* a violation of section 1962 . . . may sue therefor."[33] A violation of section 1962(a),[34] the court reasoned, follows from the receipt of income derived from a pattern of racketeering and the use or investment of the income in an enterprise.[35] In cases in which the culpable "person" is a corporation, not only can the use or investment of racketeering income cause competitive injury to a plaintiff, but the corporate racketeering acts themselves can cause injury as well.[36] The court found the "by reason of" language sufficiently broad to allow recovery even though one element of the violation, the use of the in-

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tice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), 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 business), 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 2421-2424 (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), or (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.

18 U.S.C. § 1961(1) (1988).

27. *Busby*, 896 F.2d at 840. The complaint alleged that " '[t]hrough the use of the fraudulent schemes . . . defendant Crown was able to retain funds which rightfully were payable to the plaintiff Busby and the Class Plaintiffs as commissions based upon the true cost of the goods they sold . . . [and] defendant Crown was able to retain those funds and use those funds in its operations as that term is used in 18 U.S.C. § 1962(a).' " *Id.* The complaint also stated that " 'plaintiff Busby and the Class Plaintiffs were injured in their business and property by reason of the operation of Crown in the manner described above.' " *Id.*

28. *Id.* at 836-37.

29. *Id.* at 837.

30. *Id.* at 837-40.

31. Sedima, S.P.R.L v. Imrex Co., 473 U.S. 479, 495 (1985); *see infra* notes 83-86 and accompanying text.

32. *Busby*, 896 F.2d at 839.

33. 18 U.S.C. § 1964(c) (1988) (emphasis added).

34. *See supra* note 10 (quoting § 1962(a)).

35. *Busby*, 896 F.2d at 837.

36. *Id.* at 838.

come, did not cause the injury.[37]

The Fourth Circuit also relied on the congressional mandate to interpret RICO liberally,[38] particularly when construing section 1964(c).[39] The Fourth Circuit concluded that to effectuate Congress's intent to subject corporate racketeers to RICO liability, plaintiffs harmed by a culpable corporation *must* rely on section 1962(a) to seek relief: section 1962(c) offers no remedy, as that section demands that the racketeering "person" be an entity distinct from the racketeering-influenced "enterprise."[40] Moreover, since tracing the racketeering income to a plaintiff's injury would prove impossible, the investment use rule would shield corporations from liability for their predicate acts of racketeering.[41]

Following its analysis and rejection of the investment use rule, the Fourth Circuit then reconsidered its ruling in *United States v. Computer Sciences Corporation*.[42] Sitting en banc, the court overruled *Computer Sciences* and its progeny.[43] The court held that under section 1962(a) the "person" and "enterprise" need not be distinct entities as required under section 1962(c), because section 1962(c) depends on an employer-employee relationship;[44] in contrast, section 1962(a) lacks any language implicating an employer-employee relationship.[45] By permitting the person/enterprise identification, the Fourth Circuit abandoned its minority position[46] in favor of one that holds a corporate racketeer liable while still protecting the infiltrated or victimized enterprise.[47]

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37. *Id.* The *Busby* court relied on Smith v. MCI Telecommunications Corporation, 678 F. Supp. 823, 829 (D. Kan. 1987) and Marshall & Ilsley Trust Company v. Pate, 819 F.2d 806, 809 (7th Cir. 1987), for this reading of RICO. *Busby*, 896 F.2d at 837-38. For a discussion of *Smith*, see *infra* notes 125-31 and accompanying text, and for a discussion of *Marshall & Ilsley*, see *infra* notes 165-68 and accompanying text.

38. *Busby*, 896 F.2d at 837-38 (citing Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947).

39. *Id.* "Indeed if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 492 n.10 (1985).

40. *Busby*, 896 F.2d at 838-39. See *infra* notes 156-59 and accompanying text for a discussion of the person/enterprise relationship requirements of sections 1962(a) and (c).

41. *Busby*, 896 F.2d at 839. See *infra* notes 122-24 and accompanying text for a discussion of the difficulty of tracing racketeering income. For a discussion of a recent Fourth Circuit opinion that argues that racketeering income is easily traceable, see *infra* note 203.

42. 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

43. The court applied *Computer Sciences* in Adamson v. Alliance Mortgage Co., 861 F.2d 63, 66 (4th Cir. 1988); Entre Computer Centers, Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279, 1287 (4th Cir. 1987); NCNB Nat'l Bank of North Carolina v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987). To overrule *Computer Sciences*, the court adopted the reasoning of the Seventh Circuit in Haroco Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985). *Busby*, 896 F.2d at 841; *see infra* text accompanying note 157.

44. *See supra* note 10 (quoting § 1962(a)).

45. *Busby*, 896 F.2d at 841.

46. Only three district courts outside the Fourth Circuit have agreed that the person and enterprise must be distinct entities under § 1962(a). *See* H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 916 (D. Minn.), *aff'd on other grounds*, 829 F.2d 648 (8th Cir. 1987), *rev'd on other grounds*, 109 S. Ct. 2893 (1989); Rush v. Oppenheimer & Co., 628 F. Supp. 1188, 1197 (S.D.N.Y.), *rev'd on other grounds*, 779 F.2d 885 (2d Cir. 1985); Cashco Oil Co. v. Moses, 605 F. Supp. 70, 71 (N.D. Ill. 1985). See *infra* notes 147-59 and accompanying text for a discussion of how *Busby* discarded the person/enterprise distinction requirement under § 1962(a).

47. *Busby*, 896 F.2d at 841.

Putting civil RICO in context requires review of the statutory history and legislative intent behind its passage.[48] In 1967 the congressional push to combat organized crime with innovative legislation began with the introduction of Senate Bills 2048[49] and 2049.[50] Senate Bill 2048 created an antitrust statute to encompass situations in which deliberately unreported income received from one business was used in another.[51] Senate Bill 2049 prohibited entities from investing income derived from organized crime activities in legitimate businesses.[52] Both bills aimed to deprive organized crime of any competitive advantage over a legitimate enterprise and to offer remedies to those injured businesses.[53] However, the Senate took no action on either bill.[54]

In early 1969 Senator McClellan brought a new bill to the floor: Senate Bill 30, the Organized Crime Control Act.[55] At that time Senate Bill 30 lacked a treble damages provision for civil RICO actions, yet the concerns regarding the infiltration of legitimate businesses by organized crime remained.[56] That same year Senator Hruska introduced Senate Bill 1623, the Criminal Activities Profits Act, which synthesized the provisions of Senate Bills 2048 and 2049.[57] The bill prohibited investment of money derived from specified criminal acts into businesses that affect interstate commerce.[58] It also provided for treble damages.[59] The intent behind the bill, however, remained unchanged from earlier bills sponsored by Senators McClellan and Hruska.[60]

Following Senate hearings on Senate Bill 30, Senators McClellan and

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48. For a more detailed inquiry into RICO's legislative history, see Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 249-80 (1982); Blakey & Gettings, *supra* note 3, at 1014-21; Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 664-85 (1987).

49. S. 2048, 90th Cong., 1st Sess. (1967).

50. S. 2049, 90th Cong., 1st Sess. (1967).

51. 113 CONG. REC. 17,999 (1967).

52. *Id.*

53. *Id.* Senator Hruska stated:

> [T]he evil to be curbed is the *unfair competitive advantage* inherent in the large amount of illicit income available to organized crime. . . . A full range of criminal and civil sanctions which now exist in our antitrust laws would be made available to enforcement officials and to persons adversely affected by such *investments.*

Id. (emphasis added).

54. Blakey, *supra* note 48, at 254.

55. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969). The cosponsors of the Bill were Senators Hruska and Ervin. *Id.*

56. 115 CONG. REC. 5874 (1969). Senator McClellan noted:

> When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses. Competitors can be effectively eliminated and customers can be effectively confined to sponsored suppliers. The result is more unwholesome than other monopolies because the newly dominated concern's position does not rest on economic superiority.

Id.

57. S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6992-93 (1969).

58. *Id.*

59. *Id.*

60. *Id.* The bill "attacks the economic power of organized crime and its exercise of unfair competition with honest businessmen on two fronts—criminal and civil." *Id.* (remarks of Sen. Hruska).

Hruska introduced Senate Bill 1861, the Corrupt Organizations Act,[61] which set forth provisions substantially similar to the RICO statutes ultimately enacted. Although the bill did not have a treble damages provision, it did seek to strengthen Senate Bill 1623 through other methods.[62] Like its predecessors, Senate Bill 1861 intended to give remedies to those injured by unfair means of competition.[63] Recommendations offered on Senate Bill 1861 were incorporated into Senate Bill 30,[64] and the Senate passed that redrafted bill almost unanimously.[65] After receiving Senate Bill 30, the House amended it to include treble damages, and after two days of debate in the full House, the bill passed by a wide margin.[66] The Senate agreed to the House version without a conference[67] and RICO became effective on October 15, 1970.[68]

Although civil RICO remained dormant for more than a decade, it finally blossomed across the legal landscape and vigorously took root.[69] Section 1962(a) cases typically concern commercial fraud[70] or securities violations,[71] but the political world has not been left untouched.[72] The core elements of any RICO action are a "pattern"[73] of "racketeering activity"[74] that is conducted by

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61. S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9566-67 (1969).

62. *See* Blakey & Gettings, *supra* note 3, at 1018.

63. The drafters of Senate Bill 1861 stated:

> The Congress finds . . . that the danger of organized crime activities in the nation threatens the domestic peace, security and stability of its economic system, harms innocent investors and competing organizations, interferes with free competition, and seriously burdens interstate and foreign commerce. . . . It is, therefore, the declared policy of the Congress to eradicate the baneful influence of organized crime in the United States . . . its infiltration of legitimate organizations, and its interference with interstate and foreign commerce.

S. 1861, 91st Cong., 1st Sess., Congressional Findings and Statement of Policy, 115 CONG. REC. 9568 (1969).

64. *See* Blakey & Gettings, *supra* note 3, at 1018-19.

65. The margin was 73-1. 116 CONG. REC. 972 (1970).

66. The House vote was 341-26. *Id.* at 35,363.

67. *Id.* at 36,296.

68. Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 1961-68, 84 Stat. 922, 941-48.

69. By 1985, of the 270 civil RICO actions to reach a trial court, 40% concerned securities violations and 37% involved common-law fraud related to commerce. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 n.16 (1985) (citing ABA REPORT, *supra* note 4, at 55-56).

70. *See, e.g.*, Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1148 (10th Cir.) (allegations that defendant stole natural gas, withheld plaintiff's share of production revenues and billed for nonexistent goods and services), *cert. denied*, 110 S. Ct. 76 (1989); Airlines Reporting Corp. v. Barry, 666 F. Supp. 1311, 1312 (D. Minn. 1987) (airline ticket scam); Heritage Ins. Co. of Am. v. First Nat'l Bank of Cicero, 629 F. Supp. 1412, 1413 (N.D. Ill. 1986) (insurer claimed bank fraudulently induced it to issue performance bond for a public contractor).

71. *See, e.g.*, Leonard v. Shearson Lehman/Am. Express Inc., 687 F. Supp. 177, 178 (E.D. Pa. 1988) (misrepresentations concerning an options trading program); DeMuro v. E.F. Hutton, 662 F. Supp. 308, 308 (S.D.N.Y. 1986) (stock churning).

72. *See, e.g.*, Rose v. Bartle, 871 F.2d 331, 336 (3d Cir. 1989) (coercive political patronage practices); Avirgan v. Hull, 691 F. Supp. 1357, 1360 (S.D. Fla. 1988) (journalist's claim that a Central American right-wing extremist attack caused his injuries).

73. A pattern consists of "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter . . . and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1988).

74. 18 U.S.C. § 1961(1) (1988). See *supra* note 26 for the statutory definition of racketeering activity.

a "person"[75] and which affects an "enterprise"[76] engaged in interstate or foreign commerce.[77] Additionally, a civil RICO plaintiff must allege that a section 1962 violation caused injury to his business or property.[78] Each element, particularly the pattern element,[79] has nurtured a verdant field of doctrinal schism, and none of the circuits, including the Fourth Circuit, has been able to restrain the rampant disagreements.

In *Sedima*,[80] the Supreme Court's first civil RICO decision, the Court set the standard for analysis of RICO. The decision answered two questions that had yielded divergent approaches in the lower courts. The first centered on whether civil RICO requires a plaintiff to allege that a defendant had a prior criminal conviction for the predicate racketeering acts to satisfy language in section 1964(c) that the injury be by reason of a "violation."[81] The Court rejected the prior conviction requirement as inconsistent with the statute's language, history, and policy.[82] The second question involved the issue of standing under section 1962(c). The Second Circuit required a RICO plaintiff to allege a distinct "racketeering injury," one that is " '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.' "[83] The Court found itself "hampered by the vagueness of that concept"[84] and found "no room in the statutory language for an additional, amorphous 'racketeering injury' requirement."[85] Instead, when a plaintiff seeks relief for harm caused by a defendant conducting an enterprise through a pattern of racketeering activity,

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75. A person includes "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1988).

76. 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." 18 U.S.C. § 1961(4) (1988).

77. RICO requires only a "minimal" nexus with interstate commerce. R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1353 (5th Cir. 1985). For a criminal enterprise, the predicate racketeering acts themselves may form the nexus with interstate commerce. *Id.*

78. 18 U.S.C. § 1964(c) (1988).

79. For a discussion of Fourth Circuit pattern doctrine, see *infra* note 146.

80. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). The plaintiff Sedima was a Belgian corporation that contracted with defendant Imrex to furnish electronic components to another Belgian firm. *Id.* at 483. Sedima took in the orders and Imrex acquired the parts and shipped them to Europe. The contract stipulated that the parties would split the profits; however, after Imrex filled eight million dollars in orders, Sedima accused Imrex of inflating its costs in order to skim off more profit for itself. *Id.* at 484. Sedima filed RICO claims under section 1962(c), alleging wire and mail fraud as the predicate acts. *Id.* Sedima also joined several pendent state claims, including breach of contract and unjust enrichment, and alleged damages of at least $175,000. *Id.*

81. *Id.* at 485-86. The Second Circuit stood alone in its prior conviction requirement; the Sixth and Seventh Circuits rejected that position, while the Eighth Circuit announced that civil RICO liability did not require that the defendant be involved in organized crime. *Id.* at 486 n.6.

82. *Id.* at 493.

83. *Id.* at 485 (quoting Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 496 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985)).

84. *Id.* at 494.

85. *Id.* at 495. The Second Circuit's requirement for a distinct racketeering injury derives from analogizing RICO to the Clayton Act. *Id.* at 485. 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 three-fold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee. 15 U.S.C. § 15(a) (1988). The Clayton Act provision that affords treble damages served as a model for RICO's § 1964(c). *Sedima*, 473 U.S. at 485. The

"the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise."[86]

In his dissent, Justice Marshall reviewed RICO's legislative history and concluded that RICO's treble damages provision received only "cursory attention" and was added almost as an "afterthought."[87] More clear to Justice Marshall was the congressional intent to afford a remedy to types of injuries not adequately compensated under existing antitrust laws: injury that is similar to, "but broader than, that targeted by the antitrust laws and different in kind from that resulting from the underlying predicate acts."[88] Competitors can suffer these injuries by being forced out of business through threats or acts of violence,[89] as can investors by being displaced by a racketeer who infiltrates and gains control of a business through a pattern of racketeering.[90] In either case, RICO's civil provision would bar the direct victim of the predicate acts from seeking relief; the statute reserves that remedy for the indirect victims of the predicate acts.[91] The *Sedima* majority rejected an interpretation of section 1962(c) that limited damages solely to competitive injuries[92] and dismissed Justice Marshall's construction as a "topsy turvy" approach.[93] The Court found that Congress "wanted to reach both 'legitimate' and 'illegitimate' enterprises. . . . The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."[94]

The *Sedima* opinion has cast a long shadow across RICO jurisprudence, and courts addressing the investment use rule have struggled with *Sedima*'s language. Courts that reject the investment use rule find support in *Sedima*[95] as do

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Second Circuit concluded that because a Clayton Act plaintiff must allege an antitrust injury, a RICO plaintiff must allege a racketeering injury. *Id.* at 485.

86. *Id.* at 497. It should be emphasized that although the Court in *Sedima* was addressing a violation of § 1962(c), many courts, including the *Busby* panel, consider this discussion to be more generic and, therefore, applicable to § 1962(a) inquiries. *Busby*, 896 F.2d at 839. Some commentators view the investment use rule, when combined with the requirement that the person and enterprise be distinct entities under § 1962(c), as an attempt to reverse *Sedima*. Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wollersheim*: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 586 n.237 (1987).

87. *Sedima*, 473 U.S. at 507 (Marshall, J., dissenting).

88. *Id.* at 511 (Marshall, J., dissenting). See *infra* notes 178-79 and accompanying text for a discussion of the legislative intent regarding the types of conduct Congress sought to deter and the type of injuries it sought to compensate.

89. *Sedima*, 473 U.S. at 521 (Marshall, J., dissenting).

90. *Id.* at 522 (Marshall, J., dissenting).

91. *Id.* at 521-22 (Marshall, J., dissenting). "The construction I describe offers a powerful remedy to the honest businessmen with whom Congress was concerned, who might have had no recourse against a 'racketeer' prior to enactment of the statute." *Id.* at 523 (Marshall, J., dissenting).

92. *Id.* at 497.

93. *Id.* at 497 n.15.

94. *Id.* at 499.

95. *See Busby*, 896 F.2d at 839-40; *In re* National Mortgage Equity Corp. Mortgage Pool Certificates Sec. Lit., 682 F. Supp. 1073, 1081 (C.D. Cal. 1987); Smith v. MCI Telecommunications Corp., 678 F. Supp. 823, 829 (D. Kan. 1987); Roche v. E.F. Hutton & Co., 658 F. Supp. 315, 321 (M.D. Pa. 1986).

courts that embrace the rule.[96] Before *Sedima* the few courts that addressed the causation requirements of section 1962(a) gave it cursory attention;[97] only since *Sedima* have courts fully analyzed and debated the investment use rule.[98]

The post-*Sedima* battle lines began to form in *Gilbert v. Prudential-Bache Securities, Inc.*[99] In *Gilbert* the class-action plaintiff was a securities investor who bought stock through the defendant brokerage house.[100] The plaintiff claimed that the defendant conducted a scheme to induce the purchase of worthless stocks by misrepresenting the viability of the issuing corporations and inflating the value of the stocks.[101] The trial court held that plaintiff lacked standing under section 1962(a) because the predicate acts of racketeering, and not the investment or use of the racketeering proceeds, harmed her.[102] Although, after *Sedima*, injury caused by the predicate acts would be sufficient to state a claim under section 1962(c), plaintiff could not make use of that statute because defendant was not a person distinct from the enterprise.[103] Plaintiff argued that if courts denied standing to parties like herself, there could be no civil liability for a violation of section 1962(a).[104] The court did not agree and declared that "using the proceeds of racketeering activities to infiltrate legitimate businesses can obviously cause damage to many persons, who would have a perfect right to sue. It just happens that plaintiff is not among them . . . ."[105]

In rapid succession courts began to map the various contours of this latest RICO battlefield. In *DeMuro v. E.F. Hutton,*[106] plaintiffs unsuccessfully argued that the racketeering proceeds realized by defendant brokerage house financed defendant's operating expenses, which permitted defendant to continue to defraud plaintiffs.[107] The court thought such a theory would "turn every churning

96. *See* Ouaknine v. MacFarlane, 897 F.2d 75, 83 (2d Cir. 1990); Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1150 (10th Cir.), *cert. denied*, 110 S. Ct. 76 (1989); Cincinnati Gas & Elec. Co. v. General Elec. Co., 656 F. Supp. 49, 84 (S.D. Ohio 1986); NL Indus. v. Gulf & W., Inc., 650 F. Supp. 1115, 1128 (D. Kan. 1986).

97. *See* Guerrero v. Katzen, 571 F. Supp. 714, 720-21 (D.D.C. 1983). *Guerrero* required that the plaintiff's injury be caused by the investment of racketeering proceeds, a requirement it labelled a "racketeering injury." *Guerrero*'s analysis also applied to a claim under § 1962(c). *Id.* at 722. The *Sedima* decision necessarily voids that part of the opinion.

98. *See* Blakey & Cessar, *supra* note 86, at 585 n.237; Palumbo v. I.M. Simon & Co., 701 F. Supp. 1407, 1408-11 (N.D. Ill. 1988); Louisiana Power & Light v. United Gas Pipe Line Co., 642 F. Supp. 781, 805-07 (E.D. La. 1986).

99. 643 F. Supp. 107 (E.D. Pa. 1986).

100. Gilbert v. Prudential-Bache Sec., Inc., 769 F.2d 940, 941 (3d Cir. 1985).

101. *Id.*

102. *Gilbert*, 643 F. Supp. at 111. The Third Circuit had reversed the trial court's requirement that the plaintiff must allege a distinct racketeering injury under § 1962(c). Gilbert v. Prudential-Bache Sec., Inc., 769 F.2d at 942. On remand, the trial court addressed the issue of whether the complaint also stated a claim under § 1962(a). *Gilbert*, 643 F. Supp. at 108-09. Although the *Gilbert* court did not explicitly state how the defendants allegedly invested the racketeering income, another court subsequently inferred that the defendants invested the proceeds in stock of other companies and not in their own brokerage house. *See* Blue Cross v. Nardone, 680 F. Supp. 195, 197 (W.D. Pa. 1988).

103. *Gilbert*, 643 F. Supp. at 109.

104. *Id.* at 111.

105. *Id.* It should be noted that the trial court that ruled against the plaintiff Busby adopted the reasoning outlined in *Gilbert*. *Busby*, 896 F.2d at 835-36.

106. 662 F. Supp. 308 (S.D.N.Y. 1986).

107. *Id.*

case into a RICO case" and "would involve a vast and unwarranted extension of the boundaries of civil RICO."[108] Other courts were more amenable to this "self-investment" theory and applied it in dissimilar circumstances: securities churning cases,[109] insurance fraud suits,[110] and construction contract fraud claims.[111] In each context, the racketeering income was used to operate the culpable enterprise.[112] Not all of the courts that considered the self-investment theory explicitly analyzed the issue based on the language of section 1962(a).[113] That statute forbids the use or investment of racketeering income to acquire, establish, or *operate* an enterprise that affects interstate commerce.[114]

Other courts found additional reasons for hostile treatment of the investment use rule: the insurmountable hurdles the rule puts in the path of a RICO plaintiff. In *Louisiana Power & Light Company v. United Gas Pipe Line Company*,[115] a local utility sued its gas supplier for breaching a partial requirements contract, inflating the cost of gas, and failing to credit the utility for certain

108. *Id.* at 308-09; *see also* Vereins-Und Westbank AG v. Carter, 639 F. Supp. 620, 624 (S.D.N.Y. 1986) (holding that *DeMuro* controls).

109. Roche v. E.F. Hutton & Co., 658 F. Supp. 315, 320-321 (M.D. Pa. 1986), *aff'd*, 862 F.2d 310 (3d Cir.), *aff'd sub. nom. In re* Elwell, 862 F.2d 307 (3d Cir. 1988). Another court adopting the "self-investment" theory inferred that the *Roche* court reached its conclusion by distinguishing itself from *Gilbert*: whereas the *Gilbert* defendant invested the proceeds in an unrelated business that did not injure plaintiff, the defendant in *Roche* invested its racketeering income in a business connected with the racketeering activity. Blue Cross v. Nardone, 680 F. Supp. 195, 197 (W.D. Pa. 1988).

110. *Blue Cross*, 680 F. Supp. at 198-99. In this case, the defendant operated a pharmacy and contracted with Blue Cross to provide prescriptions for Blue Cross subscribers. In return, Blue Cross paid the pharmacy. Blue Cross alleged that the defendant began submitting claims for prescriptions that were not filled or prescribed. Blue Cross alleged mail fraud as the predicate act and claimed that the defendant kept some of the income for himself and invested the rest in the pharmacy. *Id.* at 196-97. The defendant argued that his filing false claims, and not the investment of the racketeering income, injured Blue Cross. *Id.* at 197. The court disagreed and found that investing in the pharmacy permitted the defendant to maintain its operation and perpetuate the fraud. *Id.* at 198-99.

111. Omega Constr. Co. v. Altman, 667 F. Supp. 453, 465 (W.D. Mich. 1987). The plaintiff construction company contracted with defendant Altman to build apartments in Florida and Michigan. Altman was the sole shareholder of a development company (ADC). Altman and ADC organized four limited partnerships to build the apartments and all six entities were joined as defendants. *Id.* at 456. Omega claimed the defendants defrauded Omega by contracting for the construction with no intention to fulfill its promises. *Id.* Omega alleged the partnerships were used to issue fraudulent mailings. *Id.* at 464. The court found that even though the complaint alleged that the limited partnerships received racketeering income and used it in their operations, the complaint did not show how this investment caused a § 1962(a) injury. *Id.* at 464-65. The court agreed, however, that the complaint alleged that Altman and ADC used the racketeering income to establish or operate ADC and the limited partnerships in a way that caused injury to Omega. *Id.* at 465.

112. *Cf.* Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1256, *opinion upon reconsideration*, 672 F. Supp. 977 (E.D. Mich. 1987), *aff'd*, 838 F.2d 1215 (6th Cir. 1988). In *Snider* the plaintiff alleged that the defendants defrauded him on the sale of art plates and screens. *Id.* at 1250. The court distinguished *DeMuro*'s repudiation of the self-investment theory on the ground that *DeMuro* involved a legitimate business—a brokerage house. The *Snider* court found that the defendant's enterprise existed solely for the purpose of committing fraud. Investment of racketeering income in an otherwise legitimate enterprise could be used to further the legitimate activities of the business, raising the possibility that the investment might not have caused the plaintiff's injury. *Id.* at 1256. If the enterprise's sole function is to commit fraud, "investment in the enterprise . . . is inseparable from the fraud." *Id.*

113. *But see Blue Cross*, 680 F. Supp. at 198; *Omega Constr.*, 667 F. Supp. at 463-65.

114. 18 U.S.C. § 1962(a) (1988).

115. 642 F. Supp. 781 (E.D. La. 1986).

refunds.[116] Finding support in dictum from a case not directly addressing the investment use rule,[117] *Louisiana Power* announced that a plaintiff satisfies RICO's causation requirements if a plaintiff suffers harm from defendant's racketeering acts and if defendant uses the racketeering proceeds in its business.[118] Unlike other self-investment holdings,[119] *Louisiana Power* did not require *any* causal connection between the self-investment and plaintiff's injuries.[120] The court was concerned that because of section 1962(c)'s person/enterprise distinction requirement, the only recourse for a plaintiff injured by corporate racketeering is section 1962(a).[121] However, an investment or use causation requirement would shield the corporate racketeer: the racketeering proceeds would be in cash, and they would be impossible to trace once the corporation invested in itself.[122] The court observed that because the cash is untraceable, "no causal connection between the use or investment of ill gotten cash and an injury to the plaintiff is provable."[123] To require a plaintiff to trace the proceeds and show an additional causal connection would be "inequitable"—the plaintiff "would not stand a chance of proving its case."[124]

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116. *Id.* at 786.

117. The case relied on was B.F. Hirsch, Inc. v. Enright Refining Co., 617 F. Supp. 49, 52 (D.C.N.J. 1985). *Hirsch* involved a jewelry manufacturer alleging breach of contract and fraudulent misrepresentation against a metal refiner. *Id.* at 49. As *Louisiana Power* recognized, *Hirsch* does not overtly stand for the proposition that § 1964(c)'s "by reason of" clause does not require the plaintiff "prove some injury flowing to it from the use or investment of racketeering proceeds *in addition* to the damage caused by the predicate acts." *Louisiana Power*, 642 F. Supp. at 806 (emphasis added). According to the court in *Hirsch*, the defendant "inevitably used or invested, directly or indirectly, all or part of the income received from a pattern of racketeering activity in the operation of its own business [and] plaintiff has the requisite standing. . . . That is, plaintiff has suffered a racketeering injury by reason of Enright's violation of section 1962(a)." *Hirsch*, 617 F. Supp. at 52. *Louisiana Power* considered this cryptic holding to implicitly support a finding of liability based on an injury from the predicate racketeering acts if the defendant subsequently invested or used the income derived from the racketeering. *Louisiana Power*, 642 F. Supp. at 806. To require the use or investment be the proximate cause would "impose an additional causal element." *Id.*

118. *Louisiana Power*, 642 F. Supp. at 805-07.

119. *See supra* notes 106-11 and accompanying text.

120. *Louisiana Power*, 642 F. Supp. at 806-07. In reaching this conclusion the *Louisiana Power* court also examined Gilbert v. Prudential-Bache Securities, Inc., 643 F. Supp. 107 (E.D. Pa. 1986). The court interpreted *Gilbert* to require plaintiff to be injured first by the racketeering activity and then receive "some *additional* injury" caused by the use or investment of the racketeering income. *Louisiana Power*, 642 F. Supp. at 805 n.21 (emphasis added). A review of *Gilbert*, however, reveals no such double injury "requirement." Indeed, for a court to insist upon a double injury requirement it would have to ignore the class of plaintiffs already permitted to recover under RICO: those who suffer a competitive injury after a racketeer monopolizes a market through a pattern of racketeering. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 521 (1985) (Marshall, J., dissenting); *see supra* notes 87-91 and accompanying text; *see also* Blakey & Cessar, *supra* note 86, at 586 n.237 ("Little doubt exists . . . that direct investment or competitive injury is within the statute."). It follows that if a competitor may recover even though the pattern of racketeering did not harm the competitor, the double injury "requirement" is a mere fiction. See *infra* notes 197-98 and accompanying text, however, for a discussion of a double injury requirement and how it could provide a reasonable ground for a compromise solution in the case of plaintiffs initially injured by the racketeering acts.

121. *Louisiana Power*, 642 F. Supp. at 806.

122. *Id.* "Corporate defendants simply do not keep such records, for the good reason that it is unnecessary to worry about where each dollar in a company goes." *Id.*

123. *Id.* at 806-07.

124. *Id.* at 807. For a discussion of how the Fourth and Seventh Circuits have addressed the difficulty of tracing racketeering income in the criminal RICO setting, see *infra* note 203 and accompanying text.

Smith v. MCI Telecommunications Corporation[125] raised other objections to the investment use rule: if courts limit compensable injury to that suffered by the investment or use of racketeering income, then only the competitors of the corporate racketeer would have standing.[126] This result is problematic because competitors likely will not be aware of racketeering acts committed against third parties.[127] The *Smith* court also relied on *Sedima* for support: " '[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions [section 1962(a)-(c)], and *the racketeering activities* injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).' "[128]

Although the *Smith* court acknowledged that *Sedima* involved a claim under section 1962(c), it considered the Court's language broad enough to suggest that a section 1962(a) plaintiff need only allege injury from the predicate racketeering acts.[129] Finally, the *Smith* court concluded that the language of the statutes does not impose a requirement of an injury caused by the defendant's use of the racketeering income.[130] Although section 1964(c) requires an injury by reason of a section 1962 violation, "[a] plaintiff injured by the predicate acts is injured as a result of the violation in spite of the fact that one element of the violation, the use of the proceeds, did not contribute to or cause his injury."[131]

While the investment use rule percolated among the district courts for several years, an appeals court did not address the issue until the Tenth Circuit adopted the rule in *Grider v. Texas Oil & Gas Corporation*[132] Of primary significance to the *Grider* court was the plain language of section 1962(a): the statute

125. 678 F. Supp. 823 (D. Kan. 1987). Factually, *Smith* is very similar to *Busby*: Smith brought a class action suit against her employer claiming that MCI had fraudulently deprived her and other salespersons of commissions due them. *Id.* at 825.

126. *Id.* at 829.

127. *Id.*; *see also* King v. E.F. Hutton & Co., No. 86-0211, slip op. at 9-10 n.6 (D.D.C. Mar. 13, 1987) (unpublished opinion available on WESTLAW, DCTU database) (suggesting that in addition to competitors, stockholders in the racketeering corporation may also have standing under § 1962(a), but would be equally unaware that the corporation had committed the predicate racketeering acts).

128. *Smith*, 678 F. Supp. at 829 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985) (emphasis in *Smith*)).

129. *Id.*

130. *Id.*

131. *Id.* The *Smith* court found support for this proposition in Marshall & Ilsley Trust Company v. Pate, 819 F.2d 806, 809 (7th Cir. 1987). However, *Marshall & Ilsley* is inapplicable to a discussion of § 1962(a)'s causation requirements because the court's inquiry focused on the racketeering pattern. The Seventh Circuit held that a RICO plaintiff must prove there were predicate acts sufficient to form a pattern, but the plaintiff need not prove that "*every* act involved in the pattern also caused a direct injury to the plaintiff." *Marshall & Ilsley*, 819 F.2d at 809-10 (footnote omitted). For a discussion of this misplaced reliance on *Marshall & Ilsley*, see *infra* notes 161-70 and accompanying text.

132. 868 F.2d 1147, 1151 (10th Cir.), *cert. denied*, 110 S. Ct. 76 (1989). Grider was a working interest holder in a group of oil and gas wells who claimed that the defendant well operators defrauded him by stealing natural gas from the well, selling gas without paying him, withholding discounts and rebates owed him, and billing him for nonexistent goods and services. *Id.* at 1148. Grider alleged the predicate acts involved mail fraud. *Id.* at 1148-49. Given the Tenth Circuit's adoption of the investment use rule, *Grider* effectively overrules Smith v. MCI Telecommunications Corp., 678 F. Supp 823 (D. Kan. 1987). Although *Busby* relied upon *Smith*, the latter decision now lacks any precedential force.

does not prohibit the receipt of racketeering income, but it does prohibit "a person who *has received* the income *from using or investing it* in the proscribed manner."[133] The *Grider* court also rejected the contention that *Sedima* grants standing to a section 1962(a) plaintiff injured only from the racketeering acts, finding that sections 1962(a) and (c) differ "significantly."[134] Because section 1962(c) prohibits conducting an "enterprise's affairs through a pattern of racketeering activity,"[135] the statute prohibits the predicate acts themselves.[136] *Grider* repeated *Sedima*'s warning that " 'the plaintiff only has standing if . . . he has been injured . . . by the conduct constituting the violation.' "[137] The *Grider* panel also dismissed any policy arguments based upon the mandate that RICO be construed liberally or that the investment use rule shields corporate racketeers and found that a liberal interpretation of RICO is unjustified if it expands the statute beyond the limits of its language.[138] Instead, if the statute proves inadequate to " 'cover all methods of corporate wrongdoing, it is up to Congress, and not the courts, to expand the scope of the statute.' "[139]

Within a year of *Grider*, the appellate courts rapidly joined the fray as four more circuits staked out their positions on section 1962(a). In *Rose v. Bartle*[140] the Third Circuit adopted the investment use rule, albeit with minimal analysis. The court found the rule consistent with the plain language of the statute[141] and deferred to the weight of authority supporting the rule.[142] A year later the Fourth Circuit chose to split with the Third and Tenth Circuits; however, within a week of *Busby*, the Second Circuit adopted the reasoning the Tenth Circuit outlined in *Grider*.[143] The most recent Court of Appeals to address the issue,

133. *Grider*, 868 F.2d at 1149; *see infra* notes 156-65 and accompanying text; *see also* Palumbo v. I.M. Simon & Co., 701 F. Supp. 1407, 1410 (N.D. Ill. 1988) (the use and investment constitutes the violation while the remaining language describes the circumstances under which the violation occurs).

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

135. 18 U.S.C. § 1962(c) (1988); *see supra* note 22 (quoting § 1962(c)).

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

137. *Id.* (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985)).

138. *Id.*

139. *Id.* (quoting Schofield v. First Commodity Corp., 793 F.2d 28, 31 n.2 (1st Cir. 1986)). *But see* Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago, 693 F. Supp. 666, 672 (N.D. Ill. 1988) ("It is for Congress, not the courts, to narrow down what may be viewed as an excessively broad statute."), *aff'd on other grounds*, 877 F.2d 1333 (7th Cir. 1989).

140. 871 F.2d 331, 357-58 (3d Cir. 1989).

141. *Id.* at 358.

142. *Id.* at 357. Given the holding in *Rose*, one influential case opposing the investment use rule now lacks any precedential force: B.F. Hirsch, Inc. v. Enright Refining Co., 617 F. Supp. 49 (D.N.J. 1985) (relied on by Louisiana Power and Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 807 (E.D. La. 1986)).

143. Ouaknine v. MacFarlane, 897 F.2d 75, 82-83 (2d Cir. 1990). The defendants in *Ouaknine* solicited plaintiff to invest in shares of a corporation set up to renovate and sell cooperative apartments in New York City. *Id.* at 78. The plaintiff claimed that the defendants made misrepresentations to induce his agreement to accept a nonrecourse note in lieu of cash from the sale of the corporation. *Id.* at 78-79. The complaint alleged securities violations and breach of contract. *Id.* at 77. The Second Circuit affirmed dismissal of plaintiff's § 1962(a) claim after rejecting plaintiff's argument that *Sedima* permits recovery under § 1962(a) for injury caused only by the predicate racketeering acts. *Id.* at 83. The court acknowledged that RICO should be liberally interpreted, but the court refused to "permit abrogation of the explicit words of the statute." *Id.*

the Sixth Circuit, joined the majority in support of the investment use rule.[144]

Aside from being the only decision issued by a federal appellate court that repudiates the investment use rule, *Busby* is significant in the breadth of its holding. Like other courts that disfavor the rule,[145] the *Busby* court completely sweeps aside the need for any causal connection between the use or investment of the racketeering proceeds and the plaintiff's injuries. Additionally, the *Busby* decision apparently marks a turning point for Fourth Circuit RICO doctrine: previously RICO plaintiffs typically received a chilly reception in the Fourth Circuit,[146] but *Busby* significantly expands the class of RICO plaintiffs and in turn broadens the scope of liability under section 1962(a).

For the *Busby* court to find in favor of plaintiff, the court first had to abandon its holding in *United States v. Computer Sciences Corporation*[147] That case involved claims by the government that defendant (CSC) had defrauded the government by overbilling for computer services.[148] The entity alleged to be the enterprise was in fact a division of defendant and had no corporate existence

144. Craighead v. E.F. Hutton & Co., 899 F.2d 485, 494 (6th Cir. 1990). *Craighead* involved investors suing a securities broker, alleging fraud and stock churning. *Id.* at 487-89. Citing to *Grider*, the Sixth Circuit affirmed dismissal of plaintiffs' claim under § 1962(a). The court stated that § 1962(a) requires "a separate and traceable injury, and plaintiffs have alleged only injuries traceable to the alleged predicate acts." *Id.* at 494.

145. *See* Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 807 (E.D. La. 1986) ("[T]he plaintiff need only show that it was damaged by the racketeering activity of the defendant .... No additional injury or causal connection to the defendant's violation of § 1962(a) need be shown.").

146. The person/enterprise distinction requirement under § 1962(a), as formulated by United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), is but one example of the hostile treatment the Fourth Circuit has given to civil RICO. See *infra* notes 147-59 and accompanying text for a discussion of *Computer Sciences*. The Fourth Circuit's approach to the pattern requirement is also illustrative of this attitude. Originally, the Fourth Circuit, in *International Data Bank, Ltd. v. Zepkin*, rejected adopting a mechanical test for pattern and announced that pattern requires a "threat of continuing activity." *Zepkin*, 812 F.2d 149, 154 (4th Cir. 1987). The *Zepkin* court stated that "[w]hat constitutes a RICO pattern is thus a matter of criminal dimension and degree." *Id.* at 155. The court thus held that a "single, limited scheme" could not create a pattern; to hold otherwise would frustrate RICO's purpose to protect against "ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." *Id.* Instead, a large, continuous scheme could create a pattern of racketeering. *Id.* at 154-55. This position was a reasonable extension of the pattern requirement hinted at in *Sedima*, and stood in contrast to the Eighth Circuit's more restrictive formula requiring that plaintiffs show that the predicate acts occurred in multiple criminal schemes. Deviries v. Prudential-Bache Sec., Inc., 805 F.2d 326, 329 (8th Cir. 1986). The Supreme Court eventually rejected the Eighth Circuit's multiple criminal schemes requirement. H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2899 (1989). In pattern discussions following *Zepkin*, however, the Fourth Circuit's pattern requirement grew ever more restrictive, focusing on the defendant's purported ends rather than the means to accomplish those ends. *See* Walk v. Baltimore & O.R.R., 847 F.2d 1100, 1105 (4th Cir. 1988) (defendant railroad's alleged commission of predicate acts over a ten-year period did not create a pattern of racketeering; the ultimate goal of removing outside minority interests in the corporation did not pose a special threat to social well-being), *vacated and remanded*, 109 S. Ct. 3235, *rev'd*, 890 F.2d 688 (1989); Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc., 831 F.2d 488, 492 (4th Cir. 1987) (although the predicate acts were sufficient in number and sufficiently related, defendant publisher's alleged copyright infringement was merely a nonrecurring scheme to gain a competitive advantage and posed no threat of continued activity in the future), *vacated and remanded*, 109 S. Ct. 3234 (1989), *aff'd*, 895 F.2d 971 (4th Cir.), *cert. denied*, 110 S. Ct. 3274 (1990). The Fourth Circuit's increasing hostility to RICO plaintiffs stood unchallenged until the Supreme Court vacated *Walk* and *Eastern Publishing* in light of its decision in *Northwestern Bell*.

147. 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

148. *Id.* at 1183.

apart from CSC.[149] The court failed to distinguish between sections 1962(a) and (c) and blithely concluded "that 'enterprise' was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit, and, failing that, to punish."[150] As a result, the *Computer Sciences* court dismissed the government's claim that CSC violated section 1962(a) by investing or using racketeering income in the operation of CSC's subdivision.[151] Fourth Circuit decisions subsequent to *Computer Sciences* followed the requirement that the person and enterprise be distinct entities without questioning its applicability to section 1962(a).[152] Although the person/enterprise distinction requirement enjoys widespread support as applied to section 1962(c),[153] only a few district courts outside the Fourth Circuit read the same requirement into section 1962(a).[154] The justification for requiring the distinction is threefold: Judicial hostility to the idea that the defendant could participate with itself in investing racketeering income; fulfillment of RICO's purpose of giving relief for a racketeer's infiltration of a legitimate business yet protecting the infiltrated enterprise; and the support of ongoing congressional efforts to curb the scope of RICO.[155]

Despite this line of decisions supporting the application of the person/enterprise distinction in actions under section 1962(a), the Fourth Circuit finally bowed to the logic of *Haroco, Inc. v. American National Bank & Trust Company*.[156] In *Haroco*, the Seventh Circuit reasoned that:

> Subsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be separate. Under subsection (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. This approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering.[157]

The *Busby* court found this argument "compelling" because section 1962(c) requires a relationship between the person and enterprise, while section

149. *Id.* at 1190.

150. *Id.*

151. *Id.* at 1190-91.

152. *See supra* note 43.

153. *Busby*, 896 F.2d at 840.

154. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 653 F. Supp. 908, 916 (D. Minn.), *aff'd on other grounds*, 829 F.2d 648, 650 (8th Cir. 1987), *rev'd on other grounds*, 109 S. Ct. 2893 (1989); Cashco Oil Co. v. Moses, 605 F. Supp.70, 71 (N.D. Ill. 1985); Rush v. Oppenheimer & Co., 628 F. Supp. 1188, 1197 (S.D.N.Y. 1985). The Supreme Court has declined to express an opinion on whether § 1962(a) requires the person/enterprise distinction. *Northwestern Bell*, 109 S. Ct. at 2898 n.1.

155. *Northwestern Bell*, 653 F. Supp. at 916; *see also Rush*, 628 F. Supp. at 1197 ("[I]f it is inappropriate to plead identity in 1962(c), it is then inappropriate to plead it under section 1962(a), particularly in light of our knowledge that the statute was not intended to convict the infiltrated enterprise but the violator of the predicate acts.").

156. 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985).

157. *Id.* at 402.

1962(a) only prohibits a person from using an enterprise.[158] The decision to abandon the distinction requirement for section 1962(a) makes sense. Otherwise a corporate racketeer investing its racketeering income in another enterprise would be liable, yet the same corporation would go unpunished if it invested the proceeds in its own operations.[159]

Although the *Busby* court should be commended for disavowing *Computer Science*'s distinction requirement, its repudiation of the investment use rule suffers from numerous faults, beginning with its construction of the statute. The statute neither prohibits a pattern of racketeering nor the receipt of racketeering income. Rather, the statute provides that "[i]t shall be unlawful . . . to *use* or *invest* . . . any part of such income" to acquire, establish, or operate an enterprise.[160] The use or the investment of the racketeering income violates the plain language of the statute. To suggest otherwise is disingenuous. The Fourth Circuit's construction conflicts with interpretations by the Supreme Court[161] and commentators.[162] Significantly, the *Busby* court ignores other language within section 1962(a) that exempts certain investments from prohibition.[163] Using racketeering income for securities investments does not violate section 1962(a) if those investments do not amount to a minimum percentage of ownership in the infiltrated enterprise and the investor does not have the power to elect the enterprise's directors. Critics of the investment use rule have failed to explain why, if Congress intended to grant standing to victims of predicate acts, it chose to limit the class of plaintiffs based upon the scope of the investment-based infiltration. Why should a racketeering victim be denied standing merely because the racketeer did not "properly" invest the ill-gotten funds? The most logical answer is that Congress intended to grant relief to those injured by the use or investment of racketeering income and not those victimized by the predicate acts.[164]

158. *Busby*, 896 F.2d at 841.

159. Smith v. MCI Telecommunications Corp., 678 F. Supp. 823, 828 (D. Kan. 1987).

160. 18 U.S.C. § 1962(a) (1988); *see supra* note 10 (quoting § 1962(a)).

161. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2897 (1989) ("RICO renders criminally and civilly liable 'any person' who uses or invests income derived 'from a pattern of racketeering activity' to acquire an interest in or to operate an enterprise engaged in interstate commerce . . . ."); *see also* Sedima, S.P.R.L., v. Imrex Co., 473 U.S. 479, 495 (1985) (§ 1962(a) "makes it unlawful . . . to *use* money derived from a pattern of racketeering activity to *invest* in an enterprise." (emphasis added)).

162. *See* Blakey & Gettings, *supra* note 3, at 1021 ("RICO makes unlawful . . . using income derived from a pattern of racketeering activity to acquire an interest in an enterprise . . . ."); Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827, 830 (1987) ("RICO prohibits . . . the investment of racketeering proceeds . . . ."); Lynch, *supra* note 48, at 701 ("Section[ ] 1962(a) . . . prohibit[s] a single action . . . the investment of a sum of money . . . ."). *But see* Blakey & Cessar, *supra* note 86, at 585 n.237 (rejecting investment use rule).

163. Section 1962(a) provides in part:

> A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer . . . shall not be unlawful . . . if the securities of the issuer held by the purchaser . . . do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer . . . the power to elect one or more directors of the issuer.

18 U.S.C. § 1962(a) (1988).

164. *See Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 406 (1969) [hereinafter *Senate*

In response to the argument that the plain language of section 1962(a) demands application of the investment use rule, the *Busby* court labeled the use or investment of racketeering income as merely "one element of the violation."[165] The court then pointed out that a plaintiff may recover if it proves a section 1962 violation *and* " 'an injury directly resulting from *some or all* of the activities comprising the violation' "; therefore, failure to prove an element of a RICO action is not fatal.[166] The court misplaced its reliance on the quoted material: "the violation" referred to in *Marshall & Ilsley Trust Company v. Pate* is the *pattern* of racketeering.[167] The court in *Marshall & Ilsley Trust* merely held that once a plaintiff proves that a pattern of racketeering exists, there is no need to prove the plaintiff was harmed by *every* predicate act that forms the pattern.[168] By confusing the multiple acts that form a pattern with the circumstances surrounding the use of racketeering income,[169] the *Busby* court evades the gravamen of the offense, for the use or investment *is* the violation.[170]

Hearings]. Deputy Attorney General Kleindienst recommended to the Senate subcommittee that Senate Bill 1861 be amended to exempt de minimis securities investments. *Id.* Mr. Kleindienst stated that "subsection (a)'s total ban on the acquisition of any interest in an enterprise, including the purchase of even a single share of stock, is unnecessary and beyond the scope of the evil at which the legislation is aimed." *Id.* Section 1962(a) incorporates nearly verbatim the language Mr. Kleindienst suggested.

165. *Busby*, 896 F.2d at 838.

166. *Id.* (quoting Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806, 809 (7th Cir. 1987) (emphasis in *Busby*)).

167. *See supra* note 131.

168. Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806, 809 (7th Cir. 1987). The Seventh Circuit was addressing a § 1962(c) claim, and, as *Sedima* demonstrated, conducting an enterprise through a pattern of racketeering *is* the violation.

169. *See* Palumbo v. I.M. Simon & Co., 701 F. Supp.1407, 1410 n.5 (N.D. Ill. 1988); 116 CONG. REC. 18,940 (1970) (Senator McClellan remarking that committing the predicate acts that form the pattern is insufficient to hold the racketeer liable).

170. Critics of the investment use rule argue that the rule's proponents assume that "the victim of the 'racketeering activity' is not *separately* injured by the investment (or use) of the income (or its proceeds)." Blakey & Cessar, *supra* note 86, at 586 n.237 (emphasis in the original). Blakey and Cessar note that money acquired by fraud has been converted; they also state that "[a]ny *distinct* act of dominion over the property is, however, a *separate* conversion." *Id.* (emphasis in the original). Blakey and Cessar find support for this notion in Gowin v. Heider, 237 Or. 266, 272, 391 P.2d 630, 636 (1964). Their reliance on *Gowin* is misplaced. In *Gowin*, evidence showed that the defendant's agent took possession of the plaintiff's truck after the defendant coerced the plaintiff into signing a letter releasing the truck to the defendant. *Id.* at 315, 391 P.2d at 634-35. The complaint, however, alleged that the defendant, through fraud and duress, later induced the plaintiff to sign a blank power of attorney that would allow the defendant to transfer title to the truck into his name. *Id.*, at 315, 391 P.2d at 635. The Oregon Supreme Court held that although the defendant converted the truck by physically taking possession of it, the complaint sufficiently alleged, and the jury properly found, that the defendant converted the truck by fraudulently inducing the power of attorney. *Id.* at 317, 391 P.2d at 635-36. The conversion occurred even though the defendant was already wrongfully in possession. *Id.* at 318-19, 391 P.2d at 636. Blakey and Cessar incorrectly assume that the second conversion *separately* harmed the plaintiff; or in other words, that the plaintiff could recover twice. This interpretation flies in the face of the accepted tort doctrine that "[t]he conversion is complete when the defendant takes, detains or disposes of the chattel. At that point, it is the traditional view that the plaintiff acquires the right to enforce a sale, and recover the full value of the property." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS, § 15, at 106 (5th ed. 1984). Blakey and Cessar confuse multiple theories supporting an action for conversion with the singular harm flowing from the conversion. By analogy, if a thief steals a car on Monday and then uses it on Tuesday, the thief has committed a single act of conversion. The true owner has not suffered a separate injury caused by the thief's use, but merely has two theories on which to pursue an action for conversion.

RICO's legislative history bears this out. Upon introducing Senate Bill 2048, Senator Hruska stated the bill "would make the use of . . . income derived from one line of business in another line of business a violation."[171] Senate Bill 2048 sought to "prohibit the investment in legitimate business enterprises of income derived from specified criminal activities."[172] The synthesis of those bills, Senate Bill 1623, had as its purpose "to prohibit the investment of . . . [certain] . . . income" derived from racketeering.[173] After hearings on various proposed RICO statutes, the Department of Justice recognized the use or investment as the essential nature of section 1962(a).[174] In the House, supporters of Senate Bill 30 (the RICO statute enacted into law) also recognized that a section 1962(a) violation results from the investment of racketeering funds.[175] Critics of the investment use rule fail to cite any authority to support their contention that Congress intended section 1962(a) to give relief to victims of the predicate acts.[176] Although the Supreme Court expressly rejected the notion that civil RICO limits recovery to those damages resulting from competitive injuries,[177] RICO's history reveals competitive injury was a prime motivating factor behind the statute.[178] The fact remains that competitors are not the only victims of the use of racketeering proceeds.[179] The mandate that courts must liberally con-

171. 113 CONG. REC. 17,999 (1967).

172. *Id.*

173. 115 CONG. REC. 6993 (1969) (remarks of Sen. Hruska).

174. *Senate Hearings, supra* note 164, at 404-06. The Department of Justice reviewed § 1962(a) and found the prohibition against investing racketeering income to be too broad because the proposed language could be interpreted to prohibit the receipt of the proceeds. *Id.* at 405. To remedy this defect it was suggested that only a "principal" could violate § 1962(a); in other words, a "person who is an active participant in illegal enterprises." *Id.* at 406. Impliedly, if the statute requires an active role for a violation, but does not prohibit the mere receipt of income, then the use or investment of the racketeering income is the violation. Congress later incorporated the Department of Justice's "principal" suggestion into the statute ultimately enacted.

175. 116 CONG. REC. 35,196 (1970) (Representative Celler remarked that "[t]he title prohibits the investment of funds derived from a pattern of racketeering. . . ."). A House Judiciary subcommittee received testimony from one Department of Justice assistant attorney general which confirms that investing the racketeering income is the essence of a § 1962(a) violation. *Organized Crime Control: Hearings on S. 30, and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 662-64 (1970). The Justice Department viewed § 1962(a) as "a whole new offense. . . . [T]he offense is the investment of funds derived from enumerated racketeering-type offenses. This provision goes to the infiltration of business by racketeers. Where you can prove that the source of the racketeer's funds is illegal activity . . . his investment is a Federal offense, punishable by a good many remedies you don't have under existing law." *Id.* at 663 (testimony of Assistant Attorney General Will Wilson).

176. *See* Blakey & Cessar, *supra* note 86, at 585 n.237.

177. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 n.15 (1985).

178. "[T]he evil to be curbed is the unfair competitive advantage inherent in the large amount of illicit income available to organized crime." 113 CONG. REC. 17,999 (1967) (remarks of Senator Hruska). "[T]he bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman." 115 CONG. REC. 6993 (1969) (remarks of Senator Hruska).

179. If the racketeer's investments give him a monopoly on a market, purchasers who are forced to buy at higher prices might be able to recover for the excess cost of doing business. *Sedima*, 473 U.S. at 521 (Marshall, J., dissenting). Also, "consumers are the victims of inferior products and services, price-fixing and most of the other predatory practices of monopolies." 116 CONG. REC. 35,201 (1970) (remarks of Rep. Poff). The enterprise that is is acquired by the racketeering income would also suffer harm caused by the investment of the racketeering funds. Blakey & Cessar, *supra* note 86, at 586 n.237.

strue RICO[180] should not circumvent either the statute's plain language or the congressional intent behind it.[181] This conclusion is particularly appropriate given the lack of debate on RICO's treble-damages provisions.[182]

The Fourth Circuit's policy argument—that the victim of a self-investing corporate racketeer must necessarily rely on section 1962(a) for relief—adds weight to the court's decision in favor of this particular plaintiff. But given the court's blanket condemnation of the investment use rule, the *Busby* opinion would be more compelling had the court made a greater effort to distinguish the circumstances under which section 1962(a) violations cause harm. *Busby* involved a self-investing corporate racketeer, but the court gave no indication that its decision was applicable only in like circumstances. The language of section 1962(a) and case law interpreting the statute, however, establish that multiple scenarios are possible and the courts in fact have addressed them.

The racketeering person can invest the funds in a unrelated enterprise. At least one court has found the victim of the predicate acts does not have standing;[183] presumably the enterprise's competitors or customers would have standing.[184] If *Busby* were applied to this scenario, nearly *any* plaintiff who can show a pattern of racketeering and an economic injury from a single predicate act would have access to federal court and receive treble damages. The only limitation would be the requirement of section 1962(a) that the defendant purchase

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

181. *See* Blakey & Gettings, *supra* note 3, at 1028 n.91 ("The statute alone is the law. The statute is what is supposed to be clear and it is."); *see also* Greenwood v. United States, 350 U.S. 366, 374 (1956) ("[W]hen the legislative history is doubtful, go to the statute.").

182. Justice Marshall noted that the House of Representatives added treble damages to Senate Bill 30 after the Senate had already passed the measure. The House failed to debate seriously this provision and the Senate passed the House version without a conference. *Sedima*, 473 U.S. at 507 (Marshall, J., dissenting). During the two days of debate in the House, one critic of Senate Bill 30 expressed concern over the speed with which the Bill was making its way through the House. "[T]his bill is another episode in the continuing problem that we are confronted with here when public hysteria inspires legislative passion, and frequently the results are difficult to overcome." 116 CONG. REC. 35,210 (1970) (remarks of Rep. Conyers). "[I]f Congress had intended to bring about dramatic changes in the nature of commercial litigation, it would at least have paid more than cursory attention to the civil RICO provision." *Sedima*, 473 U.S. at 507 (Marshall, J., dissenting). Another court describes the treble damages provision as "a late addition, spot-welded to an already fully-structured criminal statute with defined goals . . . ." P.M.F. Services, Inc. v. Grady, 681 F. Supp. 549, 555 (N.D. Ill. 1988). Given this history, the fact that a common-sense reading of the statute produces inconsistent results does not mean a court should resort to a "strained reading" of the statute. *Id.* at 556. In light of the tenor of the times, a concern far more pressing than RICO's treble damages was "the rash of bombings" targeted against police stations, courthouses, and college campuses. 116 CONG. REC. 35,298 (1970) (remarks of Rep. Schadeberg). Numerous House members expressed their outrage against the bombings and welcomed the addition of Title X1 to the Organized Crime Control Act as a way to turn back "the senseless and terrifying wave of bombings." 116 CONG. REC. 35,308 (1970) (remarks of Rep. Gerald Ford).

183. *See* Waldschmidt v. Crosa, 177 Ga. App. 707, 709, 340 S.E.2d 664, 666 (1986). The plaintiff purchased a laundromat from the defendant and later claimed the defendant fraudulently misled him as to the amount of income produced by the laundromat. *Id.* at 707, 340 S.E.2d at 665. Although the plaintiff claimed the defendant used the racketeering income to acquire or establish defendant's insurance business, the court ruled that the plaintiff did not have standing under § 1962(a) because he could not show injury resulting from the investment of the proceeds from the sale of the laundromat. *Id.* at 709, 340 S.E.2d at 666.

184. *See supra* notes 178-79.

more than one percent of a corporation's stock and have voting power.[185]

Where the racketeering person (an otherwise legitimate corporation) and the enterprise are identical, and the corporation uses the racketeering income in its own operations, three situations can occur. The racketeering person may use the income to establish and operate a subdivision of itself and that subdivision then harms the plaintiff. At least one court has agreed the plaintiff has standing in such a case.[186] Another fact pattern involves the corporate racketeer using racketeering income merely to meet its legitimate overhead costs. Some courts consider the use of the money to be unrelated to the harm caused by the predicate acts, and therefore deny the plaintiff standing.[187] At least one court has disagreed.[188] One reason given for denying standing under these circumstances is that "any time a RICO enterprise which was also the defendant invested the proceeds of its first predicate act in its own operations, the commission of the second predicate act would automatically fulfill the causation requirement."[189] Arguably, using the ill-gotten gain frees up funds that the racketeering corporation would have needed to pay its overhead; the corporate racketeer is therefore able to maintain its operations and is capable of committing the second predicate act. The causal connection, however, still remains impermissibly tenuous since the predicate acts, rather than the proceeds, harmed the plaintiff.[190]

A third scenario involving the self-investing corporate racketeer suggests that the self-investment enables the plaintiff to *perpetuate* the pattern of racketeering and the plaintiff is subsequently harmed. Several courts agree the plaintiff has standing.[191] An ironic situation results if a court adopts this reasoning. For the plaintiff to recover for harm suffered by a predicate act, the defendant must commit a racketeering act against the plaintiff, then commit a second act to form a pattern, and finally use the proceeds in the enterprise in such a way that it perpetuates the racketeering scheme and harms the plaintiff. Courts embracing the investment use rule have implicitly adopted this "double injury" requirement,[192] while courts that disfavor the rule have explicitly repudiated

185. 18 U.S.C. § 1962(a) (1988). See *supra* notes 163-64 and accompanying text for a discussion of § 1962(a)'s de minimis investment requirement.

186. Omega Constr. Co. v. Altman, 667 F. Supp. 453, 465 (W.D. Mich. 1987).

187. *See, e.g.*, Vista Co. v. Columbia Pictures Indus., 725 F. Supp. 1286, 1299-1300 (S.D.N.Y. 1989); Palumbo v. I.M. Simon & Co., 701 F. Supp. 1407, 1411 (N.D. Ill. 1988); DeMuro v. E.F. Hutton, 662 F. Supp. 308, 308-09 (S.D.N.Y. 1986).

188. *See* Roche v. E.F. Hutton & Co., 658 F. Supp. 315, 321-22 (M.D. Pa. 1986), *aff'd*, 862 F.2d 310 (3d Cir.), *aff'd sub. nom. In re* Elwell, 862 F.2d 307 (3d Cir. 1988).

189. *Vista Co.*, 725 F. Supp. at 1299-1300.

190. While self-investment for overhead costs could satisfy § 1962(a)'s language that the use of racketeering income to operate an enterprise is a violation, § 1964(c) liability must still be predicated on an injury suffered by reason of the violation. *See* Williamson v. Simon & Schuster, 735 F. Supp. 565, 568 (S.D.N.Y. 1990). A court in an earlier case also cautioned against finding liability for the self-investing corporate racketeer because the investment may have been used to further legitimate corporate activities unconnected to the plaintiff's injuries. Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1256, *opinion upon reconsideration*, 672 F. Supp. 977 (E.D. Mich. 1987), *aff'd*, 838 F.2d 1215 (6th Cir. 1988).

191. *See, e.g.*, Long Island Lighting Co. v. General Elec. Co., 712 F. Supp. 292, 297 (E.D.N.Y. 1989); Blue Cross v. Nardone, 680 F. Supp. 195, 198 (W.D. Pa. 1988).

192. *See Blue Cross*, 680 F. Supp. at 198; Omega Constr. Co. v. Altman, 667 F. Supp. 453, 465 (W.D. Mich. 1987).

it.[193] The irony is that third parties, such as competitors, may be injured by the use of the racketeering proceeds, but still have standing to sue even absent a showing of injury by any predicate act.[194]

One other scenario is possible: the person and enterprise are identical, but they exist solely for the purpose of committing fraud, and the self-investment funds the illegitimate operation. At least one court has found that the victim of the predicate acts has standing.[195]

The *Busby* court's failure to distinguish these various situations is its principle fault, resulting in a holding that, if not wrong, is too broad. While the court did note in passing that a RICO plaintiff may suffer injuries caused by the operation of the enterprise,[196] it never analyzed section 1962(a) to determine the required extent of defendant's use of the racketeering income to operate the enterprise. Must the funds perpetuate the racketeering and thereby further harm the plaintiff, or must they merely contribute to the ordinary business expenses of the corporate racketeer? *Busby* essentially adopts the latter position: a plaintiff would have standing if, after the corporate racketeer completed the final racketeering act, the corporation used the racketeering proceeds to pay its electric bill. The former choice, as adopted in *Blue Cross*,[197] is a more reasonable interpretation of section 1962(a) and affords several advantages. This position expands an overly restricted plaintiff class without violating the plain language of section 1962(a). It also maintains section 1964(c)'s proximate cause requirement which *Busby* discards. Because the *Blue Cross* position implicitly rests on a double injury requirement, this interpretation might appear to be nothing more than an attempt to resuscitate the long-dead "distinct racketeering injury" requirement.[198] However, a "distinct racketeering injury" purportedly was unique and differed from a mere predicate racketeering act. The *Blue Cross* position grants standing where the self-investing corporate racketeer uses the income to fund its operations and thereby perpetuates the racketeering activities; those subsequent racketeering acts causally connected to the investment can properly be considered the proximate cause of the plaintiff's injury. Based on the pattern of racketeering alleged in *Busby*, the Fourth Circuit could have adopted the reasoning of *Blue Cross* to permit the plaintiff to maintain his action, rather than completely eschew the investment use rule.

The fundamental question *Busby* failed to address is *why* the statute re-

193. *See* Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 805-07 (E.D. La. 1986).

194. *See supra* notes 178-79 and accompanying text; *see also* Blakey & Cessar, *supra* note 86, at 586 n.237 ("Little doubt exists . . . that direct investment or competitive injury is within the statute.").

195. *See* Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1256, *opinion upon reconsideration*, 672 F. Supp. 977 (E.D. Mich. 1987), *aff'd*, 838 F.2d 1215 (6th Cir. 1988). See *supra* note 112 for a discussion of *Snider*.

196. *Busby*, 896 F.2d at 837. The complaint did allege that Crown used the racketeering income in its operations, and that Hammermill used its racketeering proceeds to establish and operate the CDA Division. *Id.* at 840.

197. Blue Cross v. Nardone, 680 F. Supp. 195 (W.D. Pa. 1988). See *supra* note 110 for a discussion of *Blue Cross*.

198. *See supra* notes 83-86 and accompanying text.

quires a subsequent investment or use of the funds. If a plaintiff is injured by the predicate act, is his injury made any worse if the defendant later uses or invests the money? Conversely, why should a plaintiff who is injured not recover for the same harm solely because the racketeer (unlikely as this may be) did not use or invest the money?[199] Or if the racketeer did invest the money, it was not to the extent proscribed by the statute?[200] The answer lies in the type of harm Congress sought to remedy: monopolization of legitimate businesses that puts competitors at a disadvantage, deprives customers and suppliers of the "free channels of trade," and imperils free enterprise.[201] Although Congress certainly wanted to curb the power of organized crime, it deliberately chose to keep the class of plaintiffs limited; otherwise the statute would permit plaintiffs suffering personal injuries caused by racketeering activities to seek RICO relief.[202]

Despite *Busby*'s faults, strict application of the investment use rule also is unsatisfactory. First, how would plaintiffs not injured by the predicate acts learn of the pattern of racketeering? Most likely those plaintiffs would receive notice only after the racketeering victim began legal action against the racketeer. Second, tracing the proceeds to the plaintiff's injury would be difficult, especially in the case of a corporation that receives legitimate as well as racketeering income and uses both to maintain its operation. The Fourth and Seventh Circuits, however, have found that section 1962(a)'s prohibition against indirect use offers a solution.[203] Finally, the rule can shield egregious corporate racketeers from feeling the sting of a powerful remedy.[204]

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199. One commentator has noted that in a criminal RICO action, those who commit predicate racketeering acts but do not actually engage in the act prohibited by the statute—under § 1962(a), the investment or use of racketeering income—cannot be indicted as accomplices or coconspirators. Lynch, *supra* note 48, at 702. If civil liability requires that violative act, then civil RICO plaintiffs have no relief for injuries caused by those racketeers who do not use or invest the racketeering proceeds as prohibited by the statute.

200. For a discussion of § 1962(a)'s de minimis investment requirement, see *supra* notes 163-64 and accompanying text.

201. 116 CONG. REC. 607 (1970) (remarks of Sen. Byrd).

202. *See* Abrams, *Civil RICO's Cause of Action: The Landscape After* Sedima, 12 TUL. MAR. L.J. 19, 27 & n.43 (1987).

203. In United States v. McNary, 620 F.2d 621 (7th Cir. 1980), the court affirmed the defendant's conviction under § 1962(a). *Id.* at 628-29. The defendant in *McNary* was a former mayor charged with using his power of office to extort money and receive bribes. *Id.* at 622. The defendant allegedly invested the racketeering income in a travel agency. *Id.* The court agreed the prosecution proved that the defendant violated § 1962(a) despite having combined the racketeering income with other funds in a bank account. The receipt of the racketeering income placed in the account enabled the defendant to make an equivalent investment in the travel agency without depleting the legitimate assets in the bank account. *Id.* at 629. This "indirect" use of the racketeering income was sufficient to convict the defendant. *Id.* Under the investment use rule, the racketeering-funded enterprise that caused economic injury to competitors, customers, or suppliers would be civilly liable.

Shortly after *Busby*, the Fourth Circuit itself affirmed a § 1962(a) criminal conviction in United States v. Vogt, 910 F.2d 1184 (4th Cir. 1990). Citing *McNary*, the Fourth Circuit held that the racketeering income does not have to be "directly traced in proof from its original illegal receipt to its ultimately proscribed 'use or investment' by the defendant." *Id.* at 1194. The *Vogt* court found that § 1962(a)'s expansive language "easily" supported a custom service officer's conviction for using bribe money to invest in a North Carolina apartment complex and to purchase several luxury items. *Id.* at 1187-89, 1194. The *Vogt* opinion casts serious doubt upon the Fourth Circuit's prior contention that tracing racketeering income is an insurmountable hurdle, *see Busby*, 896 F.2d at 839, especially when the burden of proof in a civil claim is less than in a criminal action.

204. The judicial desire to mete out stern punishment should not produce result-oriented deci-

Read narrowly, the Fourth Circuit's decision to allow the plaintiff in *Busby* to have his day in court appears defensible. The court's analysis is still troublesome, especially as it failed to reach a reasonable middle ground. The court should have adopted *Blue Cross*'s requirement of a double injury flowing from investments that perpetuate racketeering activities. Read more broadly, *Busby* is symptomatic of laudable congressional intentions gone awry, further exacerbated by inconsistent judicial approaches. One hopes the Supreme Court will impose order on a helter-skelter statute. Given the schismatic results that followed *Sedima*, it would be pure speculation to assume that another attempt to clarify RICO would succeed. The most effective solution, therefore, would be for Congress to redraft an obviously flawed statute to carefully delimit the class of RICO plaintiffs.[205]

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sions like *Busby*. As the Supreme Court has acknowledged, not every racketeer is " '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.' " Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97 (1985) (quoting Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (1984), *aff'd*, 473 U.S. 606 (1985)).

205. The Supreme Court has expressly disavowed attempts to reform RICO, declaring that "RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court." H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2905 (1989).