

RICO, JUDICIAL ACTIVISM, AND THE ROOTS OF SEPARATION OF POWERS

Benjamin V. Madison, III*

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. . . .

– James Madison, The Federalist No. 51¹

I. INTRODUCTION

To many courts, dealing with RICO² is like battling the Hydra of Greek mythology: every time one of its heads is cut off, it grows back. These are the courts that have seen their inventive-but-not-textually based limits on RICO

* Associate Professor, Regent University School of Law. B.A., 1981, Randolph-Macon College; M.A., 1982, J.D., 1985, College of William & Mary. The author thanks Greg Stillman, Brent VanNorman, Maya Eckstein, and David Geneson, his former colleagues at Hunton & Williams LLP, whose experience in litigating civil RICO cases translated into insightful comments on prior drafts of this Article. The author also thanks his colleagues at Regent University whose work in identifying Biblical and natural law principles underlying the legal system inspired him to analyze transcendent principles at work in the legal issue explored in this article. In particular, Professor Mike Hernandez made insightful suggestions that improved this article. The author also expresses his gratitude to Edgar MacDonald, Retired Professor of English, Randolph-Macon College and currently Senior Scholar at the Cabell Library, Virginia Commonwealth University, as well as Richard Hasker, retired professor of English, Randolph-Macon College, both of whom encouraged him many years ago to pay attention to language and who offered insights on the grammatical components of the statutes analyzed in this article. Finally, the author thanks his assistants, Carol Palatini, Kevin Powers, and Justin Choi, who attended to many details in the preparation of this article with love and patience.

¹ JAMES MADISON, THE FEDERALIST, NO. 51, 262 (Buccaneer Books 1992).

² Racketeering Influenced Corrupt Organization Act, 18 U.S.C. §§ 1961-68 (2002). (Hereinafter referred to as §§ 1961-68).

repeatedly fall under the Supreme Court's scrutiny.³ Conversely, another judicial philosophy asks RICO to correct perceived social wrongs.⁴ These courts are the ones on which this article focuses.

A. Judicial Activism Under RICO as an Example of a Myopic Understanding of Separation of Powers

1. The Circuit Split

The circuit split addressed in this article concerns another limitation on civil RICO – one arising from RICO's § 1962(a). That section states:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.⁵

To bring a civil claim under that provision, the RICO plaintiff must also satisfy § 1964(c) – the so-called civil standing provision. This provision states:

Any person injured in his business or property *by reason of a violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may

³ See *infra* notes 46-91 and accompanying text.

⁴ See *infra* notes 169-224 and accompanying text.

⁵ The remaining language in § 1962(a) deals with an exception for certain securities purchases. Here is that language in full:

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, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.⁶

What does it mean to be injured in one's business or property "by reason of a violation of section 1962"? One answer is that the cause of one's injury is tied to the specific acts of *use or investment of income in the acquisition of an interest in, or control over, an enterprise*. Most circuit courts of appeal have adopted this position.⁷ Conversely, a minority of courts – an ever-expanding one at that,⁸ combined with a substantial group of commentators⁹ – take a

⁶ 18 U.S.C. § 1964(c) (emphasis added). Omitted from the quotation in the text is the additional language concerning the exception for sale of securities that grew out of the Private Securities Litigation Reform Act, Pub. L. No. 106-47 § 107, 109 Stat. 737, 758 (1995), codified at 18 U.S.C. § 1964(c). The complete exemption language, following that quoted in the text, follows:

The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

18 U.S.C. § 1964(c).

⁷ The United States Courts of Appeal for the First, Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuits embrace the investment injury rule as a natural reading of § 1962(a) and § 1964(c). *See* *Fogie v. Thorn Americas, Inc.*, 190 F.3d 889, 894-96 (8th Cir. 1999); *Compagnie de Reassurance D'Ile De France v. New England Reassurance Corp.*, 57 F.3d 56, 91 (1st Cir. 1995); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 132 (6th Cir. 1994); *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992); *Parker & Parsley Petroleum v. Dresser Indus.*, 972 F.2d 580, 584 & n.4 (5th Cir. 1992); *Glessner v. Kenny*, 952 F.2d 702, 708-10 (3d Cir. 1991); *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1229-30 (D.C. 1991); *Ouaknine v. MacFarlane*, 897 F.2d 75, 82 (2d Cir. 1990); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149-51 (10th Cir. 1989); *see also infra* notes 116-168 and accompanying text.

⁸ *See, e.g.*, *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 836-37 (4th Cir. 1990), *reaffirmed in* *Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc.*, 262 F.3d 260, 264 n.2 (2001). Judges on the United States District Court for the Northern District of Illinois were among the first to embrace the reasoning of the Fourth Circuit in *Busby*. *See, e.g.*, *In re Conticommodity Servs., Inc. Secs. Reg.*, 733 F. Supp. 1555, 1566 (N.D. Ill. 1990); *Matlock Fertilizer Co. v. Bost*, No. 85 C 8596, 1989 U.S. Dist. LEXIS 1995, at *15 (N.D. Ill. Feb. 27, 1989); *Mid-State Fertilizer v. Exchange Nat'l Bank*, 693 F. Supp. 666, 672 (N.D. Ill. 1988), *aff'd on other grounds*, 877 F.2d 1333 (7th Cir. 1989); *Continental Grain Co. v. Pullman Standard*, 690 F. Supp. 628, 633 (N.D. Ill. 1988).

However, the United States District Court for the Southern District of Florida has been the latest court to take up and advance *Busby's* anti-investment-injury-rule approach. *See In re Managed Care Litigation*, 150 F. Supp. 2d 1330, 1350-53 (S.D. Fla. 2001); *Avirgan v. Hull*, 691 F. Supp. 1357, 1362 (S.D. Fla. 1988), *aff'd*, 932 F.2d 1572 (11th Cir. 1991). For a fuller discussion of these cases, *see infra* notes 218-224 and accompanying text.

different view. They contend that a “violation” of § 1962(a) involves both the “racketeering activity” giving rise to the income and the “use or investment” of this income to acquire control of an enterprise.¹⁰ They conclude that so long as the plaintiff can tie the injury to either the racketeering activity giving rise to the income, or to the investment or use of the income, the civil standing provision has been met.¹¹

One begins to appreciate the vast difference in these approaches when considering the list of acts that qualify as “racketeering activity.”¹² These include more than *ninety* types of conduct, as well as the two kinds of fraud considered the broadest of criminal provisions – mail fraud and wire fraud.¹³ The difference between the minority’s and the majority’s views may be likened to discharging a shotgun at a flock of geese versus firing a rifle at a hummingbird. In the minority’s approach, it is hard to miss one’s causation target; in the majority’s approach, one will rarely have much to shoot at.

The United States Courts of Appeal for the Seventh and Eleventh Circuits have not ruled on this question. However, district courts within those two circuits have split on the question. *See infra* notes 204-224 and accompanying text.

⁹ Some commentators argue that the investment injury rule is an unfounded limitation on § 1962(a) civil RICO claims and that the Fourth Circuit’s decision in *Busby* is the best- reasoned approach to the question. *See, e.g.*, DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO, ¶ 6.04 (2001) (commenting on the “persuasiveness” of the “careful analysis” in the Fourth Circuit’s *Busby* decision while criticizing the majority view as “strained”). Michael Goldsmith is perhaps the most vigorous critic of the investment injury rule. As he writes:

This judicial limitation, like its predecessors, has no principled support in the statute. The text contains no hint of an investment injury requirement. Indeed, for this reason, the Supreme Court rejected a comparable standing limitation in *Sedima*. Moreover, the legislative history expressly asserts a desire to avoid imposing complex standing limitations on RICO.

Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1, 31-32 (1993) (footnotes omitted). The author of that article concludes that the investment injury rule is “illogical from a policy standpoint.” *Id.* at 32. Other commentators offer more qualified patronage of the minority view. *See, e.g.*, Michael P. Kenny, *Escaping the RICO Dragnet in Civil Litigation: Why Won’t the Lower Courts Listen to the Supreme Court*, 30 DUQ. L. REV. 257, 279 (Winter 1992) (“The Fourth Circuit’s *Busby* opinion, however, is not unreasonable in light of *Sedima* . . .”). For additional commentary and arguments against the investment injury rule, see *infra* notes 204-224 and accompanying text.

¹⁰ *See supra* note 8 and accompanying text; *see also infra* notes 204-224 and accompanying text.

¹¹ *See supra* note 8 and accompanying text; *see also infra* notes 204-224 and accompanying text.

¹² *See* 18 U.S.C. § 1961.

¹³ Mail fraud, *see* 18 U.S.C. § 1341, and wire fraud, *see* 18 U.S.C. § 1343 (2004), have been called “the broadest criminal statutes in the federal code.” James P. Kennedy, *Civil RICO in the Antitrust Context*, 55 ANTITRUST L. J. 463, 465 (1986).

2. *Judicial Activism Violating Separation-of-Powers Principles*

Thus, yet another RICO limitation has arisen. Will this one, like so many others, end up rejected by the Supreme Court, as the persistent voice of the minority of courts and many commentators would have it? Perhaps the Supreme Court has already signaled otherwise. In a recent decision addressing the requirements for proving a civil RICO conspiracy, the Court commented on the § 1962(a) split as follows:

For example, most courts of appeal have adopted the so-called investment injury rule, which requires that a plaintiff suing for a violation of § 1962(a) allege injury from the defendant's "use or invest[ment]" of income derived from racketeering activity, see § 1962(a). . . . Although we express no view on this issue, arguably a plaintiff suing for a violation of § 1962(a) is required to allege injury from the "use of invest[ment]" of illicit proceeds.¹⁴

The investment injury rule, unlike so many other judicial interpretations of RICO, is rooted in the text of RICO. As such, it is a limitation that must be enforced by courts, lest they stray beyond their constitutional limits. Oddly enough, no one has yet adequately explored, as this article does, two key questions. First, does the investment injury rule constitute the *only* grammatical reading of the statutory text and, if so, do principles of statutory interpretation and constitutional separation of powers compel the rule's application? Second, if courts that reject the investment injury rule are indeed violating separation-of-powers' principles, what has led these courts so far astray?

While not the only analytical tools available to solve this debate, rules of grammar and principles of statutory interpretation (by which certain grammar rules are imported into law) are particularly enlightening here. They shine a bright light on the sophistic reasoning of courts like the Fourth Circuit and others following its lead.¹⁵ Appearing to engage in statutory analysis, these courts in reality are legislating. They first identify the social policies they wish to further and then bend the statutory text to achieve those policies.

The judicial activism employed by the minority is just as illegitimate as that used previously by those courts restricting a statute they viewed as too

¹⁴ Beck v. Prubis, 529 U.S. 505, 506 n.10 (2000).

¹⁵ See *supra* note 8 (citations to Fourth Circuit and Southern District of Florida decisions, along with other courts in the minority). See *infra* notes 204-224 and accompanying text for a complete discussion of these cases.

broad. Courts should read the statutory text and determine the grammatical components they endeavor to interpret.¹⁶ If on doing so, the interpretation is ungrammatical, they must try to find a grammatical interpretation of the text before launching into extratextual analyses.¹⁷ Settled principles of statutory interpretation insist on this discipline.¹⁸ If courts followed the method outlined here, they would see RICO for what it is – a hybrid criminal and civil statute, with potent remedies, which is both broad in some respects and narrow in others. The primary failure of the minority and those commentators championing that view is to rely on a reading of the statute that ignores its grammatical context.¹⁹ These courts offer a policy-based rationale suggesting that § 1962(a) must be read more broadly than the majority permits or risk leaving corporations with limited liability under civil RICO.²⁰ If the reasons underlying separation of powers were better understood, courts would be less prone to take on the legislative role.²¹

3. *Broader Implications*

For statutes as potent as civil RICO,²² judicial sensitivity to separation-of-powers' principles ought to be heightened. Nevertheless, if this article's premise is correct, a substantial group of courts, not to mention a cadre of commentators, ignores the constitutional implications of its treatment of RICO. How have these courts wandered so far from home?

This article contends that one reason for such judicial roving is the tendency in modern legal analysis to take a myopic view of constitutional separation of powers. The Framers recognized certain realities about human nature, society, and law. Rarely however, do we discuss the extent to which these values are compromised when one branch of government intrudes on

¹⁶ See *infra* notes 225-272 and accompanying text.

¹⁷ See *infra* notes 251-264 and accompanying text.

¹⁸ See *infra* notes 251-264 and accompanying text.

¹⁹ See *infra* notes 225-250 and accompanying text.

²⁰ See *infra* notes 225-250 and accompanying text.

²¹ See *infra* notes 273-308 and accompanying text.

²² It is not uncommon for courts to characterize civil RICO as a “draconian” or “harsh” weapon. See, e.g., *Tarr v. Credit Suisse Asset Mgmt., Inc.*, 958 F. Supp. 785, 803 n.15 (E.D.N.Y. 1987) (labeling civil RICO a “draconian” weapon); *Mathon v. Marine Midland Bank*, 875 F. Supp. 986, 1001 (E.D.N.Y. 1995) (characterizing civil RICO’s sanctions, such as treble damages, as “harsh”). Given the remedies permitted, including treble damages and attorneys’ fees, one certainly appreciates this perspective. The requirement of alleging “racketeering” acts associated with criminal activity is another reason the statute may be considered a harsh one.

another. This article thus concludes by exploring the assumptions beneath the Constitutional principles. We see there that the Constitution hems in the judiciary not simply for symmetry, but out of a keen appreciation of human nature.

B. Organization of this Article

This article contains five parts. Part One has already provided an overview of the investment injury rule debate and its broader significance. Part Two will compare civil claims under § 1962(a) with those pursued under § 1962(c) because the difference between claims under each of these provision is crucial to the divergent paths courts have taken on the investment injury rule debate. Part Three describes the background necessary to put the investment injury rule debate in context. This background includes a description of some of the judicial limits placed on civil RICO, such as the standing principles ultimately addressed by two Supreme Court decisions – *Sedima, S.P.R.I. v. Imrex Co.*²³ and *American National Bank & Trust Co. v. Haroco, Inc.*²⁴ It further explains how, when courts began to limit § 1962(c) claims, litigants increasingly turned to § 1962(a) whereupon courts then developed the investment injury rule. Part Four explores the sharp contrast between the majority and minority views on the validity of the investment injury rule, both in the circuits that have addressed the issue and in the district courts of those circuits that have not. The final section, Part Five, reaches several conclusions: (1) the minority approach is misreading RICO, (2) the misreading violates separation of powers, and (3) if the reasons underlying separation of powers were better understood, courts would be less prone to engage in such misreading.²⁵

II. A COMPARISON OF CIVIL CLAIMS UNDER § 1962(a) AND § 1962(c)

To appreciate the difference between a claim under § 1962(a) and § 1962(c), one must review the language of earlier provisions as it meshes with the civil standing statute (§ 1964(c)).

²³ 473 U.S. 479 (1985).

²⁴ 473 U.S. 606 (1985).

²⁵ See *infra* notes 273-308 and accompanying text.

A. *The Statutory Requirements*

§ 1962(a) states:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.²⁶

§ 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.²⁷

To bring a civil suit under either section, the plaintiff must also satisfy the requirements of § 1964(c). That provision reads as follows:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.²⁸

²⁶ The remaining language in § 1962(a) deals with an exception for certain securities purchases:

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, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

²⁷ 18 U.S.C. § 1962(c).

²⁸ 18 U.S.C. § 1964(c). Omitted from the quotation in the text is the additional language concerning the exception for sale of securities that grew out of the Private Securities Litigation Reform Act, Pub. L. No. 106-47 § 107, 109 Stat. 737, 758 (1995), codified at 18 U.S.C.

Thus, a plaintiff asserting a claim under § 1962(a) must, in addition to satisfying the requirements of that subsection, show that he or she was injured “by reason of” a violation of § 1962(a). Likewise, a plaintiff asserting a claim under § 1962(c) must show injury “by reason of” a violation of § 1962(c).²⁹

If § 1964(c) requires a plaintiff’s injury to result “by reason of” a violation of each subsection, then that must be the crucial focus. What, then, is a “violation” of § 1962(a)? And what is a “violation” of § 1962(c)? Courts on each side of the investment injury rule debate answer these questions differently. As will be explained more fully below, the crux of the minority’s rationale hinges on the ability to sue corporations in a broader range of cases under § 1962(a).³⁰ Accordingly, the following hypothetical uses a corporate defendant to illustrate the different approaches to the investment injury rule.

B. Hypothetical to Illustrate the Comparison of Civil Claims under § 1962(a) and § 1962(c) Using a Corporation as a Defendant

Assume the following: Spanky McFarland, together with a group of his associates, devises a scheme to defraud residents in Lil’ Rascals

§ 1964(c). The complete exemption language, following that quoted in the text, follows:

The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

18 U.S.C. § 1964(c).

²⁹ The “by reason of” language raises distinct issues depending on the subdivision of § 1962 at issue. For instance, in § 1962(c) claims, in which the pattern of racketeering “conducted” by the defendant rests on mail or wire fraud, courts have found that the plaintiff must have relied on the misrepresentation (in the mailing or the wiring) to satisfy the “by reason of” requirement. *See, e.g.,* *Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1286-87 (8th Cir. 1994) (dismissing § 1962(c) RICO claim for failure to demonstrate reliance on nondisclosures in mail fraud); *Central Distributors of Beer, Inc. v. Conn.*, 5 F.3d 181, 184 (6th Cir. 1993) (rejecting § 1962(c) claim for failure to show reliance on misrepresentations in alleged mail fraud); *Metromedia Co. v. Fugazi*, 983 F.2d 350, 368 (2d Cir. 1992) (mail fraud in sale of stock giving rise to § 1962(c) claims failed to satisfy reliance requirement); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991) (mail fraud in purchase of stock could not support § 1962(c) claim without reliance); *Chan v. Chase Aircraft Fin. Co.*, Nos. 89-15911 & 89-16116, 1991 U.S. App. LEXIS 16199 (9th Cir. July 18, 1991) (mail fraud occurring in the context of a loan could not support § 1962(c) claim without reliance); *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253-54 (7th Cir. 1989) (RICO claim from nondisclosure of soil conditions in sale of real estate); *Zervas v. Faulkner*, 861 F.2d 823, 834-35 (5th Cir. 1988) (§ 1962(c) claim based on mail fraud in alleged scheme to inflate land prices artificially could not survive due to lack of reliance).

³⁰ *See infra* notes 204-224 and accompanying text.

Neighborhood, a suburb of New York.³¹ McFarland and his associates set up a nonprofit, tax-exempt corporation called “Our Gang for Good, Inc.,” and establish a post-office address for the company. They then mail letters to residents seeking contributions by representing that all contributions to the tax-exempt company will be used by Our Gang for Good, Inc. to provide food, shelter, and clothing for underprivileged kids. McFarland and his associates retain in the non-profit company a substantial part of the contributions they receive to maintain the appearance of a tax-exempt company and actually contribute to groups who help underprivileged children. However, considerable funds are taken and invested in the Bronx Sanitation Company (Bronx Sanitation Co.), a company that McFarland and his associates control. The Bronx Sanitation Co. is engaged in bidding on and servicing Bronx’s sanitation collection and disposal needs.

A defrauded resident who discovers the scheme sues Our Gang for Good, Inc. under § 1962(a). The resident, to recover at all, must do so against Our Gang for Good, Inc., because any meaningful assets of McFarland, his associates, and the Bronx Sanitation Co. are held in offshore accounts associated with offshore companies, against which it would be difficult to recover. Recall that § 1962(a) bans

any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.³²

The “person” in this provision is key because he, she, or it is who will be liable, if anyone, for a violation. The “person,” in other words, is the one the plaintiff names as defendant and from whom the plaintiff expects to recover. Our Gang for Good, Inc. is a “person” because RICO defines the term to

³¹ “Lil’ Rascals Neighborhood” is, of course, a fictional neighborhood used here to combine with the facts of an actual RICO case to illustrate the difference between a civil § 1962(a) and civil § 1962(c) claim. The fictional neighborhood and characters in this illustration derive from a well-known television series created by Hal Roach known as “The Lil’ Rascals” and “Our Gang.” See LEONARD MALTIN, *THE LIFE AND TIMES OF OUR GANG* (1992). (George McFarland played the role of Spanky.) The actual lawsuit, on which the hypothetical is partially based, involved the Gambino organized crime syndicate and the sanitation industry in New York City. See *United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977).

³² 18 U.S.C. § 1962(a).

include any corporate entity.³³ To satisfy the substance of § 1962(a), the resident's suit would have to allege that the Our Gang for Good, Inc. received income (the contributions) from a pattern of racketeering (mail fraud scheme) and invested the income into an enterprise (comprised of McFarland, the associates, Our Gang for Good, Inc., and Bronx Sanitation Co.) engaged in commerce. In an effort to satisfy § 1964(c), the suit would further allege that the resident was injured by the mail fraud scheme. The resident's § 1962(a) claim, however, would not survive in any jurisdiction imposing the investment injury rule.³⁴ These jurisdictions insist that the injury flow from the act of using or investing income, not from racketeering acts.³⁵ The investment of the income is not what caused the resident's injury.³⁶ The racketeering acts of mail fraud caused the resident's injury.³⁷ Thus, the resident's § 1962(a) claim would fail.³⁸

Conversely, in the minority of jurisdictions that reject the investment injury rule, the resident's claim would succeed.³⁹ These courts say that an injury is "by reason of" a violation of § 1962(a) if it results *either* from the racketeering acts giving rise to the income (e.g., the mail fraud) *or* from the use or investment of the income.⁴⁰ The resident's § 1962(a) claim against Our Gang for Good, Inc. would succeed in a jurisdiction that permitted such a broad injury interpretation. Therefore, we see a major difference in the definition of a "violation" of § 1962(a). The pro-investment-injury-rule majority defines a violation narrowly as use or investment of income. The anti-investment-injury-rule minority defines a violation broadly as any racketeering acts giving rise to the income used or invested, or the actual use or investment of the income, or both.

³³ 18 U.S.C. § 1961.

³⁴ See *supra* note 7 (identifying the jurisdictions in which the investment injury rule applies); see also *infra* notes 116-168 (discussing these cases).

³⁵ See *infra* notes 116-168 and accompanying text.

³⁶ See *infra* notes 116-168 and accompanying text.

³⁷ See *infra* notes 116-168 and accompanying text.

³⁸ See *infra* notes 116-168 and accompanying text.

³⁹ The resident could sue under § 1962(a) in such a jurisdiction because the minority view holds that a plaintiff is injured "by reason of a violation of section 1962[(a)]" when the injury flows from either the racketeering acts giving rise to the income or from the investment of the income. See *infra* notes 169-224 and accompanying text. Thus, the resident's injury resulting from the racketeering acts of mail fraud would be sufficient to satisfy the minority test. The lack of any connection between the resident's injury and the investment of income in the Bronx Sanitation Company would not matter.

⁴⁰ See *infra* notes 169-224 and accompanying text.

Now we can turn to § 1962(c). Recall that this section prohibits:

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.⁴¹

As before, the resident must sue Our Gang for Good, Inc. to have any reasonable chance at recovery. The resident would allege that Our Gang for Good, Inc. was associated with the enterprise (McFarland, his associates, Our Gang for Good, Inc., and Bronx Sanitation Co.). The resident would further allege that Our Gang for Good, Inc. participated, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity (mail fraud scheme). Notice that the plaintiff would not have to worry about the investment of income in a § 1962(c) claim. Instead, the plaintiff would be able to concentrate on the racketeering activity itself, the mail fraud, because that is the focus of a violation under this provision. Because the mail fraud scheme misled the resident into contributing, the resident was injured by reason of the racketeering. Thus, the resident's § 1962(c) suit would succeed⁴² if it were not for another hurdle, the so-called enterprise/person distinction. As explained below in more detail, this doctrine typically precludes a corporation from being named as the defendant in a § 1962(c) claim if it is in any way connected to the enterprise.⁴³ Because this hurdle has proved so difficult to overcome, plaintiffs seeking to impose RICO liability on a corporation have turned to § 1962(a) as an alternative.⁴⁴

⁴¹ 18 U.S.C. § 1962(c).

⁴² In this example, all of the elements of § 1962(c) and § 1964(c) would be satisfied. A "person" [Our Gang for Good, Inc.] (first element) "employed by or associated with" [Our Gang for Good, Inc. is associated with] (second element) "any enterprise" [McFarland, his associates, Our Gang for Good, Inc., and Bronx Sanitation Co.] (third element) "engaged in, or the activities of which affect, interstate or foreign commerce" [the mail fraud in Lil' Rascals neighborhood affects commerce] (fourth element) "to conduct, or participate . . . in the conduct of such enterprise's affairs" [Our Gang for Good, Inc. conducts by controlling the affairs] (fifth element) "through a pattern of racketeering activity" [the mail fraud scheme] (sixth element). The requirement pursuant to § 1964(c) of "person" as plaintiff [the neighborhood resident] (seventh element) would be satisfied, as would the requirements of "injury to business or property" [money contributed but used for different purpose] (eighth element) "by reason of a violation of 1962(c)" [Our Gang for Good, Inc. conducting the enterprise through mail fraud causes the plaintiff's losses] (ninth element).

⁴³ See *infra* notes 92-111 and accompanying text.

⁴⁴ See *infra* notes 92-111 and accompanying text.

Hence, the hypothetical illustrates what many courts have found: if one applies both the investment-injury rule (under § 1962(a)) and the enterprise/person distinction (under § 1962(c)), a corporate defendant often cannot be liable under civil RICO. Recognizing that § 1962(a) may be the sole option for many plaintiffs suing a corporation, courts rejecting the investment injury rule suggest that they must do so to ensure corporate liability under some provision.⁴⁵

III. BACKGROUND

A. *The Supreme Court's Response to Standing Limitations*

Since RICO's enactment in 1970, courts have recognized numerous limits on civil claims under the statute.⁴⁶ The Supreme Court ultimately rejected many of these restrictions as lacking a basis in the statutory text, legislative history, or both.⁴⁷ For purposes of the investment injury rule debate, the most important restriction of those addressed by the Supreme Court deals with the concept of standing to sue. Standing relates to three requirements imposed by § 1964(c). These are (1) injury (2) to one's business or property that is (3) by reason of a violation of § 1962.⁴⁸ The first and second requirements are fairly straightforward. The concept of "injury to business or property" fits a broad category of injuries.⁴⁹ The plaintiff need only show some harm to economic or

⁴⁵ See *infra* notes 197-201, 215-217, 223-224 and accompanying text.

⁴⁶ Michael P. Kenny, *Escaping the RICO Dragnet in Civil Litigation: Why Won't the Lower Courts Listen to the Supreme Court*, 30 Duq. L. Rev. 257, 260 (1992), ("Although the Supreme Court has consistently refused to limit the RICO dragnet, numerous lower federal courts have pinched and pruned the statute. Paradoxically, many of the restrictive interpretations are based on the language of Section 1964(c), which creates a private cause of action."). But compare David Kurzwel, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 72-73 (Fall 1996) (citations omitted) ("Despite the Supreme Court's endorsement of civil RICO's broad scope and its liberal interpretation of Section 1964(c), judicial efforts to narrow its scope continue largely unabated.")

⁴⁷ PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL, §§ 2.18 & 2.19 (Wiley 2d ed. 1997).

⁴⁸ See 18 U.S.C. § 1964(c).

⁴⁹ The injury to "business or property" under the Clayton Act limits the scope to competitive injuries and business interests. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). By contrast, the same language in RICO is not so limited. See, e.g., *Schact v. Brown*, 711 F.2d 1343 (7th Cir. 1983). Competitive injury can satisfy RICO's injury to business or property, but the anticompetitive effect required under antitrust law is not essential under RICO. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.15 (1985).

property interests.⁵⁰ Personal injury does not satisfy the requirement,⁵¹ but almost any other economic harm does.⁵²

Unlike the first two standing requirements of § 1964(c), courts have found the “by reason of” requirement more problematic. Some guidance arrived when the Supreme Court decided two companion cases interpreting § 1964(c)’s “by reason of” requirement – *Sedima, S.P.R.L. v. Imrex Co.*⁵³ and *American National Bank & Trust Co. v. Haroco, Inc.*⁵⁴

To appreciate the degree to which these cases both resolved confusion and created new questions, some description of the state of the law preceding them is necessary. During the first couple of decades after RICO’s enactment, federal courts erected standing limitations on civil RICO suits.⁵⁵ Some courts held that a defendant had to be convicted under at least one of the criminal provisions listed among “racketeering activities”⁵⁶ prior to being sued.⁵⁷ In addition, a number of courts imposed a “racketeering injury” requirement.⁵⁸ These courts insisted that a defendant show injury that was not only distinct from the racketeering acts but also caused by the kind of activity RICO was designed to deter.⁵⁹ Other courts found a competitive injury requirement, under which the civil RICO plaintiff had to demonstrate such injury in addition to any injury from predicate acts.⁶⁰

⁵⁰ GREGORY D. JOSEPH, *CIVIL RICO: A DEFINITIVE GUIDE*, § 6.A.3 (ABA Publishing 2d ed. 2000).

⁵¹ *See, e.g.*, *Berg v. First Interstate Ins. Co.*, 915 F.2d 460 (9th Cir. 1990); *Rylewicz v. Beaton Servs., Ltd.*, 888 F.2d 1175 (7th Cir. 1989); *Fleischauer v. Feltner*, 879 F.2d 1290 (6th Cir. 1989).

⁵² *See generally* JOSEPH, *supra* note 50, § 6.

⁵³ 473 U.S. 479 (1985).

⁵⁴ 473 U.S. 606 (1985).

⁵⁵ *See generally* SMITH & REED, *supra* note 9, ¶ 6.04[1].

⁵⁶ The complete list of “racketeering activities” includes the exhaustive list of more than ninety types of illegal acts set forth in 18 U.S.C. § 1961.

⁵⁷ *See, e.g.*, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 493 n.42 (2d Cir. 1984) (collecting cases that imposed “prior conviction” requirement), *rev’d*, 473 U.S. 479 (1985).

⁵⁸ *See, e.g.*, *Alexander Grant & Co. v. Tiffany Indus., Inc.*, 742 F.2d 408 (2d Cir. 1984); *Bankers Trust Co. v. Rhoades*, 741 F.2d 482 (2d Cir. 1984); *see also* *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 493 n.34 (2d Cir. 1984) (collecting cases that imposed “racketeering injury” requirement), *rev’d*, 473 U.S. 479 (1985).

⁵⁹ *See infra* note 61-79.

⁶⁰ *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 493 n.33 (2d Cir. 1984) (collecting cases that imposed “competitive injury” requirement), *rev’d*, 473 U.S. 479 (1985).

In *Sedima, S.P.R.L. v. Imrex Co.*,⁶¹ the United States Supreme Court rejected each of these standing limitations. Sedima, a Belgian company, entered into a joint venture with Imrex, a New York exporter of aviation parts, to provide electronic parts to a Belgian firm.⁶² Sedima found that Imrex had presented inflated bills and, by collecting bogus expenses, cheated Sedima out of proceeds due under their joint venture agreement.⁶³ Sedima filed suit in the United States District Court for the Eastern District of New York, asserting RICO claims based on violations of § 1962(c) and § 1962(d).⁶⁴ The § 1962(c) claims alleged that Imrex had, through a pattern of racketeering activity (mail and wire fraud), conducted an enterprise (Imrex and two of its officers) engaged in a pattern of racketeering.⁶⁵ The § 1962(d) claim alleged that Imrex and its officers had conspired to conduct the enterprise through a pattern of racketeering activity.⁶⁶

The district court dismissed the RICO claims because they did not allege a racketeering injury distinct from any injury flowing from the predicate acts.⁶⁷ By a divided panel, the United States Court of Appeals for the Second Circuit affirmed.⁶⁸ Agreeing with the district court on the need for a racketeering injury distinct from the predicate act injuries, the Second Circuit alternatively held that the lack of criminal convictions for racketeering activities barred the suit.⁶⁹

The Supreme Court reversed. Reviewing RICO's language and legislative history, the Court found nothing to support a requirement that one be convicted of predicate acts of "racketeering activity" to file a civil RICO suit.⁷⁰ Indeed, the statute and its legislative history suggested that no such

⁶¹ 473 U.S. 479 (1985).

⁶² *Id.* at 483.

⁶³ *Id.* at 484.

⁶⁴ *Id.*

⁶⁵ The facts are not stated in detail in the opinions of the district court or the Second Circuit. See *Sedima S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 484-85 (2d Cir. 1984); *Sedima S.P.R.L. v. Imrex Co.*, 574 F. Supp. 963, 964 (E.D.N.Y. 1983). Fortunately, the Supreme Court's opinion gives sufficient detail to determine the basis for the RICO claims. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 484 (1989).

⁶⁶ 473 U.S. at 484.

⁶⁷ *Sedima S.P.R.L. v. Imrex Co.*, 574 F. Supp. 963 (E.D.N.Y. 1983).

⁶⁸ *S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984).

⁶⁹ *Id.* at 494-95.

⁷⁰ 473 U.S. at 488-93.

requirement existed.⁷¹ The Court then turned to the alternate ground on which the Second Circuit relied – the racketeering injury requirement.⁷²

The Court observed that the concept of a racketeering injury was vague and the court of appeals had offered “scant indication of what the requirement . . . means” other than to cite RICO’s general purposes and a reference to “mobsters.”⁷³ The Court also considered the racketeering injury requirement “unhelpfully tautological.”⁷⁴ Rejecting a “distinct ‘racketeering injury’ requirement . . . separate from the harm of the predicate acts,” the Court instead held that the only required injury is that imposed by § 1964(c)’s “by reason of a violation of § 1962.”⁷⁵

Then, in a passage that has spurred debate on each side of the investment injury rule controversy, the Court reasoned as follows:

Section 1964(c) authorizes a private suit by “[a]ny person injured in his business or property by reason of a violation of 1962.” Section 1962 in turn makes it unlawful for “any person”—not just mobsters—to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. §§ 1962(a)-(c). If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous “racketeering injury” requirement.⁷⁶

The Court also concluded that proving a “competitive injury” was one way to meet the standing requirement.⁷⁷ Damages resulting from a “competitive injury” were included within, but not the exclusive form of, the damages recoverable in a civil RICO claim based on § 1962(c).⁷⁸ The Court thus effectively rejected a requirement that civil RICO suits be limited to those in which the plaintiff could demonstrate a competitive injury.⁷⁹

⁷¹ *Id.* at 493.

⁷² *Id.* at 493-94.

⁷³ *Id.* at 494.

⁷⁴ *Id.*

⁷⁵ *Id.* 495.

⁷⁶ *Id.* at 495 (footnote omitted).

⁷⁷ *Id.* at 497 n.15.

⁷⁸ *Id.*

⁷⁹ *See id.*

On the same day as its *Sedima* decision, the Court issued a per curiam opinion in *American National Bank & Trust Co. v. Haroco, Inc.*⁸⁰ *Haroco* involved another § 1962(c) RICO claim.⁸¹ The plaintiff alleged that a bank and its officers had operated a RICO enterprise designed to make them money by charging fraudulently high interest rates through a pattern of racketeering.⁸²

The district court dismissed the suit on the basis that the plaintiff had failed to allege a RICO injury distinct from the racketeering acts of mail fraud.⁸³ The Seventh Circuit, however, reversed and held that no such distinct injury was required.⁸⁴ Citing its decision in *Sedima*, the Court affirmed the Seventh Circuit with the following observation:

The submission that injury must flow not from the predicate acts themselves but from the fact that they were performed as part of the conduct of an enterprise suffers from the same defects as the amorphous and unfounded restrictions on the RICO private action we rejected in [*Sedima*].⁸⁵

After *Sedima* and *Haroco*, everyone knew the ground rules for satisfying the “by reason of” requirement in § 1962(c) cases.⁸⁶ If any of the racketeering acts through which the defendant ran the enterprise caused an injury to the plaintiff, that was enough.⁸⁷ However, courts disagreed over whether these decisions extended beyond § 1962(c) claims.⁸⁸ Did the Court’s reference in *Sedima* to § 1962(a) and § 1962(b)⁸⁹ mean that the same test applied to those sections as well? Would racketeering acts causing injury suffice to satisfy the “by reason of” requirement for a § 1962(a) claim even if the investment of

⁸⁰ 473 U.S. 606 (1985).

⁸¹ *Id.* at 607-08.

⁸² *Id.*

⁸³ *Id.* at 608.

⁸⁴ *Id.*

⁸⁵ *Id.* at 609.

⁸⁶ Later, the Court held that the “by reason of” requirement of § 1964(c) also imposed traditional proximate cause limitations, even if the plaintiff established a causal link between racketeering acts and an injury. *See Holmes v. Security Investor Protection Corp.*, 503 U.S. 258 (1992). The Court reasoned that, because Congress was presumptively aware that courts had interpreted § 4 of the Clayton Act to incorporate common law principles of proximate cause, it must have intended § 1964(c) also to incorporate traditional proximate cause limitations. *Id.* at 267-68.

⁸⁷ *See Sedima*, 473 U.S. at 495.

⁸⁸ Compare *infra* notes 132-140, 155-158, and accompanying text with *infra* notes 193-196, 208-209, and accompanying text.

⁸⁹ The relevant text, referring to § 1962(a) and § 1962(b), in the same paragraph as the Court’s ruling, is quoted *supra* in the text accompanying note 76.

income did not cause injury? As is explained in Part Four below,⁹⁰ these questions have split those in the majority from those in the minority on the investment injury rule debate.⁹¹ Before turning to those cases, however, some additional background is necessary to appreciate how § 1962(a) grew in significance and, thus, why the investment injury rule has become a lightning-rod issue.

B. Limits on § 1962(c) and the Ripple Effect on § 1962(a)

Regardless of the judicial limits placed on the statute, the most popular civil RICO claim for at least the first decade after RICO's enactment was § 1962(c).⁹² The breadth of that section (addressing control, or participation in the control, of an enterprise through a pattern of racketeering activity) appealed to plaintiffs.⁹³ By contrast, the apparently limited scope of § 1962(a) made that option less attractive.⁹⁴ Indeed, many thought that § 1962(a) was subsumed within a § 1962(c) claim and, therefore, superfluous.⁹⁵

In the mid-1980s, however, courts began to hold that the "person" named as the § 1962(c) defendant had to be distinct from the "enterprise" that the person controlled, or participated in controlling, through a pattern of racketeering.⁹⁶ Because § 1962(c) speaks in terms of a "person" (the party who can be sued) who is "associated with" or "employed by" the enterprise (the victim of the person's conduct), courts concluded that the statute demanded that the "person" and the "enterprise" be distinct.⁹⁷ The approach of

⁹⁰ See *infra* notes 112-224 and accompanying text.

⁹¹ Courts in the majority have concluded that this language in *Sedima* is dicta. See *infra* notes 174-82 & 197-200 and accompanying text. However, courts in the minority have treated the discussion as binding on § 1962(a) claims. See *infra* notes 193-196 and accompanying text.

⁹² SMITH & REED, *supra* note 9, at ¶ 5.02[1].

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See, e.g., *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985); see also JED S. RAKOFF & HOWARD W. GOLDSTEIN, *RICO: CRIMINAL LAW AND STRATEGY*, § 1.06[1] (2002) (noting that "[a]fter 1985 [§ 1962(a)] was used somewhat more frequently as a way of avoiding the Subsection 1962(c) 'identity' problem. . .").

⁹⁷ See, e.g., *United States v. Goldin Indus., Inc.*, 219 F.3d 1268 (11th Cir. 2000) (en banc); *Palmetto State Med. Ctr., Inc. v. Operation Lifeline*, 117 F.3d 142, 148 (4th Cir. 1997); *Davis v. Mutual Life Ins. Co.*, 6 F.3d 367, 378 (6th Cir. 1993); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 283 (5th Cir. 1992); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1533 (9th Cir. 1992); *Brittingham v. Mobil Corp.*, 943 F.3d 297, 300-03 (3d Cir. 1991); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 140-41 (D.C. Cir. 1989), *rev'd*

requiring a person-enterprise distinction has been uniformly adopted by the circuits.⁹⁸

If a civil RICO plaintiff wants to sue a “deep pocket” entity such as a corporation, the person-enterprise distinction presents a hurdle.⁹⁹ The corporation named as the defendant “person,” though within the definitional scope of that term,¹⁰⁰ typically forms part of the “enterprise.”¹⁰¹ Even the most ingenious of plaintiff’s counsel have had difficulty alleging that the corporation was the defendant “person” but did not form part of the “enterprise” by which the racketeering acts are conducted.¹⁰² The reason stems largely from the reality that most factual scenarios involve the conduct of corporate representatives and, as the law recognizes, corporations act only through such representatives.¹⁰³ Although plaintiffs have since enjoyed some limited success including the person-enterprise distinction with a corporation as a deep-pocket defendant,¹⁰⁴ the limitation remains a hurdle.¹⁰⁵

in part on other grounds, 913 F.2d 948 (D.C. Cir. 1990) (en banc); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989); *United States v. Gelb*, 881 F.2d 1155, 1164 (2d Cir. 1989); *Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212 (10th Cir. 1987); *Schofield v. First Commodity Corp.*, 793 F.2d 28, 32 (1st Cir. 1986); *Haroco, Inc. v. America Nat’l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984).

⁹⁸ See *supra* note 97 (collecting cases imposing the person-enterprise distinction).

⁹⁹ See, e.g., Michael Goldsmith, *Judicial Immunity for White Collar Crime: The Ironic Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1, 22-28 (1993); Kristen Hayes Sorensen, *RICO’s Section 1962(a) and the Investment Injury Rule: Is Big Business Off the Hook?*, 1990 B.Y.U.L. REV. 1215, 1218-20, 1239-43 (1990).

¹⁰⁰ 18 U.S.C. § 1961(1) defines “person” as “any individual or entity capable of holding a legal or beneficial interest in property.”

¹⁰¹ See SMITH & REED, *supra* note 9, ¶ 3.07[2][b].

¹⁰² *Id.*

¹⁰³ See, e.g., *Emery v. American Gen. Fin., Inc.*, 134 F.3d 1321, 1324-25 (7th Cir. 1998) (“Corporations can act only through natural persons. . . . [A contrary] position would treat the corporation as an enterprise distinct from its employees, which the cases that we cited earlier forbid.”).

¹⁰⁴ Some courts have suggested that the corporation can be named as the defendant, and be a part of the enterprise, as long as the corporation does not amount to the complete enterprise. See, e.g., *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *River City Markets, Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1461-62 (9th Cir. 1992); *Energy Independence Partners v. Centennial Energy Co.*, No. 82 C 1275, 1986 WL 3023, at *1-2 (N.D. Ill. Feb. 28, 1986). *But see* *Rokeach v. Eisenbach*, No. 85 C 1106, 1985 WL 4831, at *8 (N.D. Ill. Nov. 27, 1985) (individual defendants were not distinct from the corporation they owned). *But see generally* SMITH & REED, *supra* note 9, ¶ 3.07, at 3-83 (“[C]ourts have grown increasingly reluctant to tolerate . . . easy evasion of the enterprise/person distinction requirement under section 1962(c).”).

Faced with such difficulties, plaintiffs began to turn to § 1962(a). Unlike § 1962(c), courts had found that a defendant corporation as the “person” sued in § 1962(a) could be coextensive with the enterprise.¹⁰⁶ Plaintiffs thus found in § 1962(a) a way of avoiding the person-enterprise distinction.¹⁰⁷ At this point, however, the investment injury rule emerged.¹⁰⁸ Some regard the emergence of this rule as dooming § 1962(a) to insignificance.¹⁰⁹ That may exaggerate the impact of the investment injury rule.¹¹⁰ However, the scope of civil claims under § 1962(a) is no doubt narrower than many had originally anticipated. The limited scope, however, could well be what Congress had

¹⁰⁵ See JOSEPH, *supra* note 50, at § 9(A) (noting conflict among the various circuits on the person-enterprise distinction and attempting to harmonize these decisions). *Cf. also*, Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001). In *Kushner*, the Supreme Court agreed that the language of § 1962(c) required a level of distinction between the person and enterprise alleged. *Id.* at 161. However, the Court reversed the application of that principle to a corporate officer who had, in the course of conducting corporate affairs, acted in a way forbidden by RICO. *Id.* at 163. Rather, the Court held that the distinction requirement was met in a situation where the person was the corporate officer and the enterprise was the corporation. *Id.* at 163-65.

¹⁰⁶ *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990) (en banc) (overruling court’s decision in *Computer Sciences Corp.* and holding that the person and the enterprise need not be distinct under § 1962(a)); *Landry v. Air Line Pilots Ass’n Int’l AFL-CIO*, 892 F.2d 1238, 1259-60 (5th Cir. 1990) (§ 1962(b)); *Official Publications, Inc. v. Kable News Co.*, 884 F.2d 664 (2d Cir. 1989) (defendant may be the same as the enterprise under § 1962(a), but probably not under § 1962(b)); *Yellow Bus Lines, Inc. v. Local Union*, 639, 839 F.2d 782, 790 (D.C. Cir. 1988); *United Energy Owners v. United Energy Mgmt.*, 837 F.2d 356, 364 (9th Cir. 1988) (count under § 1962(d) alleging a conspiracy to violate § 1962(a)); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1307 (7th Cir. 1987) (respondent superior liability under § 1962(b)); *Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212 (10th Cir. 1987); *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349, 1360-61 (3d Cir. 1987); *Schofield v. First Commodity Corp.*, 793 F.2d 28 (1st Cir. 1986); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1397-1398 (9th Cir. 1986) (§§ 1962(a) and (b)); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122 (5th Cir. 1986); *Haroco v. American Nat’l Bank & Trust Co. of Chicago*, 747 F.2d 384, 402 (7th Cir. 1984); *Danielsen v. Burnside-Ott Aviation Training Ctr.*, 941 F.2d 1220, 1231 (D.C. Cir. 1991) (§ 1962(b) requires proof of injury arising from the acquisition or maintenance of an interest in or control of an enterprise).

¹⁰⁷ SMITH & REED, *supra* note 9, at § 5.02[1].

¹⁰⁸ *Id.* § 6.04[5][a].

¹⁰⁹ See, e.g., Michael Goldsmith, *Judicial Immunity for White Collar Crime: The Ironic Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1, 22-28 (1993); Kristen Hayes Sorensen, *RICO’s Section 1962(a) and the Investment Injury Rule: Is Big Business Off the Hook?*, 1990 B.Y.U.L. REV. 1215, 1218-20, 1239-43 (1990).

¹¹⁰ Nothing in the rule, for instance, requires the income to have been received from persons connected to organized crime. As long as the income arose from a pattern of racketeering, and as long as the plaintiff can show that the defendant used the income to acquire or maintain an interest in an enterprise, § 1962(a) claims will be available.

intended.¹¹¹ Before exploring such policy questions, however, this article offers a description of the decisions leading up to a full-blown split of authority.

IV. THE MAJORITY AND MINORITY APPROACHES TO THE INVESTMENT INJURY RULE

Since the issue first arose, courts have debated whether a § 1962(a) claim meets the “by reason of” requirement when racketeering acts cause the injury, but investment of income does not.¹¹² Those answering no, by adopting the investment injury rule, have become a solid majority.¹¹³ Nevertheless, the minority rejecting the investment injury rule has remained steadfast.¹¹⁴ Courts continue to join the minority.¹¹⁵

A. The Majority Approach

Three circuit decisions typifying the majority approach to the investment injury rule are the Second Circuit’s decision in *Ouaknine v. MacFarlane*,¹¹⁶ the

¹¹¹ See JOSEPH, *supra* note 50, at 47 (“The majority rule [i.e., the investment injury rule] is more consistent with the legislative intent of the provision—to halt the investment of racketeering proceeds into legitimate businesses.”) (citing 116 CONG. REC. 35,199 (1970) (remarks of Rep. St. Germain); 116 CONG. REC. 607 (1970) (remarks of Sen. Byrd); 115 CONG. REC. 6993 (1969) (remarks of Sen. Hruska)); SMITH & REED, ¶ 6.04[5][a] & n.225 (observing that “the primary evil motivating Congress to enact § 1962(a) as a separate offense” was “the infiltration of legitimate businesses by those enriched through racketeering activity”) (citing Senate Committee on the Judiciary, Report on Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969)).

Nothing in the RICO statute or the legislative history confirms an intent to allow suits against corporations in a broad variety of circumstances. The legislative history on the civil suit component of RICO is not extensive. See SMITH & REED, *supra* note 9, ¶ 6.04[1]. Based on RICO’s language and other indications, it is just as possible that Congress intended civil suits against corporations to be constrained. See *supra* notes 50-54 and accompanying text. Moreover, the scope of the civil suit does not affect prosecutors’ ability to bring criminal cases because § 1964 applies only to civil claims.

¹¹² See *supra* notes 5-13 and accompanying text.

¹¹³ See *infra* notes 116-168 and accompanying text.

¹¹⁴ See *infra* notes 169-224 and accompanying text. As late as 2001, the Fourth Circuit has cited *Busby* as controlling authority. See *Potomac Elec. Power. Co. v. Electric Motor & Supply, Inc.*, 262 F.3d 260, 264 n.2 (2001).

¹¹⁵ See *infra* notes 204-224 and accompanying text.

¹¹⁶ 897 F.2d 75 (2d Cir. 1990).

Tenth Circuit's decision in *Grider v. Texas Oil & Gas Corp.*,¹¹⁷ and the Eighth Circuit's decision in *Fogie v. Thorn Americas, Inc.*¹¹⁸

I. Second Circuit: Ouaknine v. MacFarlane

In *Ouaknine*, investors brought securities fraud and RICO claims against developers of apartments.¹¹⁹ First, they alleged that the defendants conducted an enterprise comprised of themselves, a lawyer, and an accountant through a pattern of racketeering (securities fraud) in violation of § 1962(c).¹²⁰ Second, the plaintiffs alleged that the defendants violated § 1962(a) by investing income received from a pattern of racketeering into the enterprise.¹²¹ The district court dismissed the § 1962(c) claim and the securities fraud claim based on the failure to plead fraud with particularity.¹²² The district court dismissed the § 1962(a) claim because the plaintiff had failed to show that his injury arose from the investment of the income in the enterprise.¹²³

The Second Circuit affirmed the dismissal of the 1962(a) claim.¹²⁴ In doing so, the court thoroughly analyzed the validity of the investment injury rule.¹²⁵ The analysis included three steps – consideration of RICO's language, evaluation of *Sedima*, and assessment of whether RICO's "liberal construction" clause permitted an expansive reading of § 1962(a).¹²⁶

The Second Circuit began with the plain meaning of the statutory provisions.¹²⁷ The court noted that, under § 1964(c), a plaintiff recovers for injury "by reason of a violation of 1962."¹²⁸ Turning to § 1962, the court observed that a "violation of 1962(a)" occurs when the defendant "invest[s] income . . . to acquire an interest in, establish, or operate an enterprise"¹²⁹

¹¹⁷ 868 F.2d 1147 (10th Cir. 1989).

¹¹⁸ 190 F.3d 889 (8th Cir. 1999).

¹¹⁹ 897 F.2d at 77-79.

¹²⁰ *Id.* at 79-82.

¹²¹ *Id.* at 82.

¹²² *Id.* at 79.

¹²³ *Id.*

¹²⁴ *Id.* at 82-83. The court reversed the dismissal of the securities claim and the 1962(c) claim for failure to plead fraud with particularity as to four defendants. *Id.* at 79-82. As to the fifth defendant, however, the court affirmed dismissal of these claims on this ground. *Id.*

¹²⁵ *Id.* at 82-83.

¹²⁶ *See id.*

¹²⁷ *Id.* at 82.

¹²⁸ *Id.*

¹²⁹ *Id.*

The “violation [of § 1962(a)] is not established by mere participation in predicate acts of racketeering.”¹³⁰ Thus, a plaintiff would not be injured “by reason of a violation of section 1962[(a)]” unless the plaintiff’s injury resulted from investment of income.¹³¹

The court then addressed *Sedima*.¹³² On appeal, the plaintiff in *Ouaknine* argued that the following statement in *Sedima* permitted a broader injury nexus than the district court had applied: “if the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).”¹³³ By referring to “racketeering activities” injuring the plaintiff (rather than “investment of income” injuring the plaintiff), the *Ouaknine* plaintiff contended that the Court in *Sedima* had resolved the matter for all § 1962 claims.¹³⁴

The Second Circuit disagreed.¹³⁵ Because *Sedima* dealt solely with a § 1962(c) claim, the statement concerning § 1962(a) was dicta.¹³⁶ The Second Circuit observed that it was not surprising for *Sedima* to focus on injury from predicate acts because “the essence of a violation of § 1962(c) is the commission of racketeering acts in connection with conducting the affairs of the enterprise.”¹³⁷ By contrast, “the essence of a violation of § 1962(a) is not the commission of predicate acts, but investment of racketeering income.”¹³⁸ Moreover, the court in *Ouaknine* pointed to other language in *Sedima* holding that the plaintiff would have standing if he was injured “by the conduct constituting the violation [of § 1962].”¹³⁹ This language, which is more consistent with an approach that tailors the injury nexus to the section of 1962 at issue, supported the Second Circuit’s application of the investment injury rule.¹⁴⁰

Finally, the court in *Ouaknine* addressed the argument that RICO’s liberal construction clause required a broader injury nexus than the investment injury

¹³⁰ *Id.*

¹³¹ See *id.* at 82-83.

¹³² *Id.* at 83.

¹³³ *Id.* (quoting *Sedima*, 473 U.S. at 495.)

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

rule permitted.¹⁴¹ Rejecting the argument, the court ruled that the liberal construction clause could not override the explicit wording of the statute.¹⁴²

2. *Tenth Circuit: Grider v. Texas Oil & Gas Corp.*

Grider arose from alleged improprieties in the operation of oil and gas wells.¹⁴³ The plaintiff held an interest in the wells.¹⁴⁴ The defendants operated the wells.¹⁴⁵ Plaintiff alleged that certain defendants stole gas and revenues from him.¹⁴⁶ The plaintiff asserted claims under both § 1962(a) and § 1962(c).¹⁴⁷ The district court dismissed these claims.¹⁴⁸

On appeal, the plaintiff limited his argument to the § 1962(a) claim. Specifically, he argued that he need not show an injury arising from investment of income if he could show injury arising from the racketeering activity.¹⁴⁹ Rejecting the plaintiff's argument, and adopting the investment injury rule, the Tenth Circuit analyzed the language of RICO, the impact of *Sedima*, and the policy implications of the rule.¹⁵⁰

The Tenth Circuit first considered the language of the two sections at issue because, if not ambiguous, such language is "conclusive."¹⁵¹ Like the Second Circuit in *Ouaknine*, the Tenth Circuit believed that the key question was determining what constituted a "violation" of § 1962(a).¹⁵² Because § 1964(c) requires an injury "by reason of" a violation of 1962," the scope of a "violation" of § 1962(a) had to be understood.¹⁵³ The Tenth Circuit determined that a violation of § 1962(a) was not as broad as the plaintiff suggested: "significantly, the statute [§ 1962(a)] does not state that it is unlawful to *receive* racketeering income; rather . . . the statute prohibits a

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 868 F.2d 1147, 1148 (10th Cir. 1989)

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1149.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1149-51.

¹⁵¹ *Id.*

¹⁵² *See id.* at 1149.

¹⁵³ *Id.*

person who *has received* such income *from using or investing it* in the prescribed manner.”¹⁵⁴

The Tenth Circuit then evaluated the impact of *Sedima*.¹⁵⁵ Noting that *Sedima* dealt with a § 1962(c) claim, the court viewed the Supreme Court’s statements as being limited to § 1962(c) claims.¹⁵⁶ Like the Second Circuit in *Ouaknine*, the Tenth Circuit found the language of *Sedima* ambiguous.¹⁵⁷ As such, and because the holding of the case was limited to § 1962(c) claims, the court in *Grider* held that *Sedima* did not control.¹⁵⁸

Finally, the Tenth Circuit addressed policy concerns about the investment injury rule.¹⁵⁹ Specifically, the court noted some district court decisions had rejected the investment injury rule because, in their view, it insulated corporate defendants from RICO liability.¹⁶⁰ These district courts believed that RICO could not have been intended to limit suits against corporations to the extent such suits would be limited if the person/enterprise distinction of § 1962(c) and the investment injury rule of § 1962(a) prevailed.¹⁶¹ The Tenth Circuit rejected this reasoning for two reasons. First, the court believed that corporations could indeed be sued in some circumstances.¹⁶² Second, the court resolved that even if § 1962(a) and § 1962(c) were arguably too limited in their application to corporations, courts could not change the scope of the statute.¹⁶³

3. *Eighth Circuit: Fogie v. Thorn Americas, Inc.*

In *Fogie v. Thorn Americas, Inc.*, consumers brought a class action against a rental company and its affiliates alleging that they schemed to charge usurious amounts under rental agreements.¹⁶⁴ The district court dismissed the

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1150.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (citing *Smith v. MCI Telecomms. Corp.*, 678 F. Supp. 823, 829 (D. Kan. 1987); *La. Power & Light v. United Gas Pipe Line*, 642 F. Supp. 781, 806-07 (E.D. La. 1986)).

¹⁶⁰ *Id.* (citing *Smith v. MCI Telecommunications Corp.*, 678 F. Supp. 823, 829 (D. Kan. 1987); *La. Power & Light v. United Gas Pipe Line*, 642 F. Supp. 781, 806-07 (E.D. La. 1986)).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ *Fogie v. Thorn Americas, Inc.*, 190 F.3d 889, 892-94 (8th Cir. 1999).

RICO claims, rejecting the § 1962(a) claim under the investment injury rule.¹⁶⁵

On appeal, the Eighth Circuit considered the merits of both the majority and minority views.¹⁶⁶ The court in *Fogie* sided with the majority for two reasons.

First, the language of § 1962(a) and § 1964(c), read together, led the court to conclude that the plaintiff could not recover if “injured only by conduct constituting a predicate act,” but rather the injuries must stem from “the use or investment of the unlawfully obtained income”¹⁶⁷

Second, the Eighth Circuit believed that allowing § 1962(a) claims where the injuries resulted solely from predicate acts would render § 1962(c) claims superfluous. The court explained this last point as follows:

Section 1962(c) creates liability for those persons who “conduct or participate . . . in the conduct” of a RICO enterprise. . . . If § 1962(a) were read to allow any person harmed by a predicate act to bring a civil suit under RICO, a defendant could be held liable for violating RICO when that defendant engaged in a predicate act, whether or not that defendant also conducted or participated in the conduct of a RICO enterprise. The restriction of §1962(c) liability to those in management positions would be meaningless. Reading § 1962(a) so broadly that it renders § 1962(c) meaningless runs contrary to the interpretive canon that statutes should be read to give “each word some operative effect.”¹⁶⁸

B. The Minority Approach

The minority approach in the investment injury dispute has support in one circuit court of appeal: the Fourth Circuit. Moreover, in two of the three circuits that have not taken a position on the issue (the Seventh, Eleventh, and Federal Circuits), a number of district courts have joined the Fourth Circuit’s approach.

*1. Busby v. Crown Supply, Inc.*¹⁶⁹

The Fourth Circuit’s decision in *Busby* represents the only circuit opinion to reject the investment injury rule. In *Busby*, the plaintiff was a salesman for Crown, which sold a variety of products and paid commissions to its sales

¹⁶⁵ *See id.* at 894.

¹⁶⁶ *Id.* at 894-95.

¹⁶⁷ *Id.* at 895.

¹⁶⁸ *Id.* at 895-96.

¹⁶⁹ 896 F.2d 833 (4th Cir. 1990).

force.¹⁷⁰ The commission represented a percentage of the difference between the retail price of goods sold and the cost of goods to Crown.¹⁷¹ Busby alleged that Crown had cheated salesmen out of their full commission by misrepresenting Crown's costs in a variety of ways.¹⁷² Busby further alleged that Crown used this difference to invest in the enterprise through which Crown continued to cheat the sales force.¹⁷³ However, Busby did not allege any injury arising from investment of the income into the enterprise – only injury arising from racketeering acts.¹⁷⁴ Plaintiffs asserted various RICO claims, including claims under § 1962(a), § 1962(c), and § 1962(d).¹⁷⁵

The district court dismissed all RICO claims on alternative grounds. First, the district court held that, because the plaintiff's allegations were of a single fraudulent scheme, they failed to establish a pattern of racketeering activity necessary for each RICO claim.¹⁷⁶ Second, the district court relied on the Fourth Circuit's prior decision in *United States v. Computer Sciences Corp.*¹⁷⁷ to suggest that the failure to allege a distinction between the corporate "person" named as the defendant and the enterprise was fatal to the plaintiff's claims.¹⁷⁸ Finally, as to the § 1962(a) claim alone, the district court applied the investment injury rule and held that the failure to allege injury from the investment of the income into the enterprise precluded the claim.¹⁷⁹

The Fourth Circuit heard oral argument before a three-judge panel, but stayed its decision pending the Supreme Court's decision in *H.J. Inc. v. Northwest Bell Telephone Co.*,¹⁸⁰ a case in which the Court had granted certiorari on a question exploring the requirements to establish a pattern of racketeering.¹⁸¹ After that decision, and after deciding to hear, en banc, the part of the decision dealing with its prior decision in *Computer Sciences*, the court reversed the district court's decision. Relying on the Supreme Court's

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ 689 F.2d 1181 (4th Cir. 1982).

¹⁷⁸ The district court, however, refrained from ruling conclusively on this ground due to conflicting affidavit testimony on whether Crown was an unincorporated division of its parent company, which was named as part of the enterprise. *Busby*, 896 F.2d at 835.

¹⁷⁹ *Id.*

¹⁸⁰ 492 U.S. 229 (1989).

¹⁸¹ 896 F.2d at 836.

decision in *H.J.*, the court in *Busby* held that the pattern of racketeering alleged was sufficient.¹⁸² On the question of the claims to which the person/enterprise distinction applies, the Fourth Circuit decided that the distinction was essential for § 1962(c) claims but not for § 1962(a) claims. Because the Fourth Circuit's decision in *Computer Services* required the distinction for both types of RICO claims, the court in *Busby* overruled that decision as to § 1962(a) claims. The Fourth Circuit's ruling on the enterprise/person distinction was the only part of its decision in which the court ruled en banc.¹⁸³

The court in *Busby* then turned to the final ground on which the district court had dismissed the § 1962(a) claim – the failure to adequately show that the plaintiff's injury arose from the investment of income into the enterprise.¹⁸⁴

The analytical framework of the Fourth Circuit's analysis resembled that of the Second Circuit in *Ouaknine* and the Tenth Circuit in *Grider*. Like its sister circuits, the Fourth Circuit analyzed the statutory language, the effect of *Sedima*, the liberal construction clause, and the policy implications of the investment injury rule.¹⁸⁵ Despite the similarity in analytical form, however, the Fourth Circuit's analysis led to a completely different conclusion: rejection of the investment injury rule as a “flawed” interpretation of RICO.¹⁸⁶

Addressing the statutory language, the Fourth Circuit quoted § 1962(a) and § 1964(c).¹⁸⁷ The court inferred from § 1962(a) two distinct prongs: “(a) receipt of income from a pattern of racketeering activity, and (b) the use or investment of this income in an enterprise.”¹⁸⁸ Turning to the interrelationship of § 1962(a) and § 1964(c), the court reasoned that the injury “by reason of a violation of section 1962[(a)],” as required by § 1964(c), could be satisfied by a broader range of acts than permitted by the investment injury rule.¹⁸⁹ As the court explained, courts invoking the investment injury rule presume that the “second prong” in the two-prong reading of § 1962(a) – the use or investment of income in an enterprise – comprises the only conduct that can cause injury so as to satisfy § 1964(c).¹⁹⁰ In the Fourth Circuit's view, however, these courts failed to appreciate the injuries flowing from the racketeering activities

¹⁸² *Id.*

¹⁸³ *Id.* at 836.

¹⁸⁴ *Id.*

¹⁸⁵ *See id.* at 836-37.

¹⁸⁶ *See id.* at 837.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at 837-38.

¹⁹⁰ *Id.*

generating the income and the receipt of such income.¹⁹¹ Focusing on a scenario in which the corporation is the “person” named as a RICO defendant, the Fourth Circuit illustrated its rationale as follows:

Where a corporation is the “person” that commits the racketeering acts and benefits from them, that corporation causes injury to several entities at different stages of the racketeering activities. Specifically, that corporation inflicts injuries on the individual or entity from whom the income was obtained, and on the entity that has suffered the competitive disadvantage from the racketeering activity. Some courts that have followed the “investment use” rule assume, without analysis, that the victims of corporate racketeering are not injured *in the process* of the corporation’s receipt and use of the illegally obtained income. . . . To the contrary, we think the broadly drafted “by reason of” language in § 1964(c) allows recovery for such injuries, despite the fact that one element of the violation, the use of the proceeds, may not have contributed to or caused the injury¹⁹²

Also, the Fourth Circuit relied on the Supreme Court’s decisions in *Sedima* and *Haroco* to support its rejection of the investment injury rule.¹⁹³ The court quoted a passage from *Sedima* that includes the following: “if the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).”¹⁹⁴ The court then referred to language in *Haroco* rejecting the argument that “the injury must flow not from the predicate acts themselves but from the fact that they were performed as part of the conduct of the enterprise.”¹⁹⁵ Although the Fourth Circuit acknowledged that *Sedima* and *Haroco* were § 1962(c) cases, the court believed that the holdings in those cases required the same rationale in suits under § 1962(a).¹⁹⁶

The Fourth Circuit’s other ground for rejecting the investment injury rule rested on its perception that the rule conflicts with RICO’s policy. The Court

¹⁹¹ *Id.* at 838.

¹⁹² *Id.* The Fourth Circuit noted that, rather than being the perpetrator of a RICO enterprise, corporations are “often the ‘passive’ victim of the racketeering activity.” *Id.* n.5. In these situations, according to the court, “it is the corporation that has sustained the major injury, whereas in the former case, competitors and employees of the corporation have sustained the injuries.” *Id.*

¹⁹³ *Id.* at 839-40.

¹⁹⁴ *Id.* (quoting *Sedima*, 473 U.S. at 495).

¹⁹⁵ *Busby*, 896 F.2d at 839 (quoting *Haroco*, 473 U.S. at 609).

¹⁹⁶ *See id.* at 839-40.

began its policy analysis by noting that RICO provides that its terms be liberally construed to effectuate its goals.¹⁹⁷ The court then observed that the requirement of a distinction between the person named as the defendant and the “enterprise” alleged in a § 1962(c) claim¹⁹⁸ had effectively left § 1962(a) as the sole remedy for those injured by “corporate racketeering.”¹⁹⁹ The Fourth Circuit reasoned that the investment injury rule would preclude claims under § 1962(a) because “it is virtually impossible to prove that the invested income caused the alleged injury.”²⁰⁰ The court thus perceived policy support for its decision to interpret a more expansive injury-causing framework for § 1962(a) claims.²⁰¹

The remedy for any problems arising from its expansive approach to injury causation in § 1962(a) cases, according to the court, should originate with Congress.²⁰² In other words, the court suggested that RICO would have to be rewritten before the investment injury rule could apply.²⁰³

2. District Courts in Uncommitted Circuits Following the Minority Rule

District courts in both the Seventh Circuit²⁰⁴ and the Eleventh Circuit²⁰⁵ have adopted the minority view and rejected the investment injury rule.

¹⁹⁷ *Id.* at 838; *see also* Pub. L. No. 91-452, § 904(a), 84 Stat. 947, *reprinted in* Historical Note to 18 U.S.C. § 1961, at 233 (the original version of the RICO statute that included a provision stating that “[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes.”).

¹⁹⁸ *Id.* at 838-39. The court observed as follows:

When enacted in 1970, Congress explicitly intended for RICO to cover corporations engaged in racketeering activity. If the rule advocated by defendant is followed, however, corporate liability under RICO will be eviscerated. Given that the named “person” and the named “enterprise” must be separate for § 1962(c) purposes . . . plaintiffs injured by corporate racketeering have only § 1962(a) to turn to for relief. Invoking the “investment use” rule would close this avenue off, as it is virtually impossible to prove that the invested income caused the alleged injury. (citations omitted).

Busby, 896 F.2d at 838.

¹⁹⁹ *Busby*, 896 F.2d at 838.

²⁰⁰ *Id.* at 839.

²⁰¹ *See id.* at 838-39.

²⁰² *Id.* at 839.

²⁰³ *See id.*

²⁰⁴ For decisions of judges following the minority approach in the United States District Court for the Northern District of Illinois, *see In re Conticommodity Serv., Inc.*, 733 F. Supp.

a. District Court Decisions in the Seventh Circuit

The leading decision²⁰⁶ supporting the minority view in the Seventh Circuit is *Mid-State Fertilizer Co. v. Exchange National Bank*.²⁰⁷ *Mid-State* involved a suit by a corporation and shareholders against a lender. Alleging a fraudulent scheme, the suit pled a violation of § 1962(a). Refusing to throw out that claim, Judge Hart relied heavily on the “broad language in both

1555, 1566 (N.D. Ill. 1990) (Judge Hart); *Aetna Life Ins. Co. v. Youtzy*, No. 88 C 10562, 1990 U.S. Dist. LEXIS 231 (N.D. Ill. Jan. 9, 1990) (Judge Marovich); *Matlock Fertilizer Co. v. Bost*, No. 87 C 3946, 1989 U.S. Dist. LEXIS 1995 (N.D. Ill. Feb. 27, 1989) (Judge Parsons); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 693 F. Supp. 666 (N.D. Ill. 1988) (Judge Hart), *aff'd on other grounds*, 877 F.2d 1333 (7th Cir. 1989). By contrast, a number of judges in district courts within the Seventh Circuit have applied the majority rule. See *Shapo v. O'Shaughnessy*, 246 F.Supp. 2d 935, 965 (N.D. Ill. 2002) (Judge St. Eve) (collecting cases); *Sorrano v. New York Life Ins. Co.*, No. 96 C 7882, 1999 WL 104403, at *6 (N.D. Ill. Feb. 24, 1999) (Judge Nordberg); *Flynn v. Corus Bank*, No. 98 C 1013, 1998 WL 851498, at *3 (N.D. Ill. Dec. 3, 1998) (Judge Andersen); *Pinski v. Adelman*, No. 94 C 5783, 1995 WL 669101, at *8-9 (N.D. Ill. Nov. 7, 1995) (Judge Moran); *Chamberlain Mfg. Corp. v. Maremont Corp.*, No. 90 C 7127, 1993 WL 535420, at *12 (N.D. Ill. Dec. 19, 1993) (Judge Plunkett); *Fujisawa Pharm. Co. v. Kapoor*, 814 F. Supp. 720, 734-36 (N.D. Ill. 1993) (Judge Plunkett); *Bankcard Am., Inc. v. Peach Tree Bancard Corp.*, No. 89 C 1246, 1993 WL 157638, at *5 (N.D. Ill. May 13, 1993) (Judge Nordberg); *Prasinos v. National Mortgage Bank*, No. 89 C 5378, 1990 WL 179852, *2-3 (N.D. Ill. Nov. 8, 1990) (Judge Plunkett); *Illinois ex rel. Hartigan v. Flisk*, 702 F. Supp. 189, 192-93 (N.D. Ill. 1988) (Judge Plunkett); *Pitalis v. Skokie Trust & Sav. Bank*, No. 85 C 8596, 1987 U.S. Dist. LEXIS 3161, at *2 (N.D. Ill. Apr. 22, 1987).

²⁰⁵ For decisions of judges following the minority approach in the United States District Court for the Southern District of Florida, see *In Re Managed Care Litig.*, 150 F. Supp. 2d 1330, 1350-53 (S.D. Fla. 2001) (Judge Moreno); *Davis v. Southern Bell Tel. & Tel. Co.*, No. 89-2839-CIV-NESBITT, 1994 WL 912242 (S.D. Fla. Feb. 1, 1994) (Judge Nesbitt); *Avirgan v. Hull*, 691 F. Supp. 1357, 1361-63 (S.D. Fla. 1988) (Judge King), *aff'd*, 932 F.2d 1572 (11th Cir. 1991). Conversely, some courts within the Eleventh Circuit have also followed the majority rule. Specifically, judges in two courts have adopted the investment injury rule. See *In re Sahlen & Associates, Inc. Securities Litigation*, 773 F. Supp. 342 (S.D. Fla. 1991). In *In re Sahlen & Associates*, the United States District Court for the Southern District of Florida addressed whether investors, in a scheme predicated on securities fraud, had adequately pled a claim under § 1962(a). *Id.* at 366-67. Examining RICO's provisions, the court decided that § 1962(a) did not itself prohibit the receipt of racketeering income. *Id.* at 367. The court ruled that the section prohibited someone who received such income “from *investing* or *using* it . . .” *Id.* (emphasis added). Thus, the court adopted the majority view on the investment injury rule, but nevertheless found that the plaintiffs had satisfied the rule by sufficiently pleading use or investment. *Id.* The second district court within the Eleventh Circuit to apply the investment injury rule is the United States District Court for the Southern District of Georgia. See *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 276 F.Supp. 2d 1276, 1288 (S.D. Ga. 2003).

²⁰⁶ For other decisions following the minority approach in the Seventh Circuit, see *supra* note 204.

²⁰⁷ 693 F. Supp. 666 (N.D. Ill. 1988) (Judge Hart).

[*Sedima* and *Haroco*] that indicates injury caused by predicate racketeering acts is sufficient for any type of § 1962 violation.²⁰⁸ Judge Hart rejected a reading of § 1962(a) in which the “essence” of the violation is any different from a § 1962(c) violation.²⁰⁹ To Judge Hart, “the essence of each subsection [of § 1962] is still the commission of racketeering acts.”²¹⁰ As long as the injury flowed from racketeering acts, a civil claim could arise under § 1962(a), § 1962(b), or § 1962(c).²¹¹

Judge Hart supported his conclusion by relying on RICO’s liberal construction clause and on policy grounds.²¹² A narrow construction of § 1962(a) and § 1964(c) would, in his view, conflict with the provision requiring RICO to be construed liberally to effectuate its purpose.²¹³ Moreover, Judge Hart believed that RICO was designed to allow a broader range of suits against corporate defendants than would be possible with an investment injury rule.²¹⁴ Section 1962(c) suits against corporations are difficult because “a corporation and defendant cannot be both the defendant and the required enterprise.”²¹⁵ Narrowing § 1962(a) through the investment injury rule, according to Judge Hart, “would effectively protect corporate defendants from liability in most instances. . . .”²¹⁶ Judge Hart believed that result was incompatible with RICO’s purpose.²¹⁷

b. District Court Decisions in the Eleventh Circuit

Judge Moreno’s decision in *In re Managed Care Litigation*,²¹⁸ is the latest and most detailed expression of the minority opinion from the United States District Court for the Southern District of Florida.²¹⁹ In this decision, Judge Moreno chose to follow the Fourth Circuit’s decision in *Busby*.²²⁰ Judge

²⁰⁸ *Id.* at 672.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *See id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ 150 F. Supp. 2d 1330, 1350-53 (S.D. Fla. 2001) (Judge Moreno).

²¹⁹ For other decisions in the Eleventh Circuit adopting the minority view, see *supra* notes 218-224.

²²⁰ 150 F. Supp. at 1350-53.

Moreno believed that *Busby* correctly read RICO as not requiring anything other than injury from predicate acts for § 1962(a) claims.²²¹ Furthermore, Judge Moreno concluded that the investment injury rule “would eviscerate corporate liability.”²²² Like the Fourth Circuit and district courts that have rejected the rule, Judge Moreno was concerned that the person/enterprise distinction had limited RICO suits against corporations.²²³ Given that reality, Judge Moreno believed that limiting § 1962(a) suits by the investment injury rule left too little room to sue corporations under RICO.²²⁴

V. ANALYSIS OF THE INVESTMENT INJURY DEBATE

The following analysis of the investment injury debate has three steps. First, the grammatical components of each provision are thoroughly examined. Doing so proves not only that § 1962(a) and § 1962(c) mean different things – but that when read with § 1962(c), a civil claim under each section *must* have different causation elements. By relying on grammatical rules and their statutory interpretation analogues, we see that the investment injury rule is one mandated by RICO’s language.

The second step in the analysis addresses two subsidiary issues about which the majority and minority disagree – the precedential force of *Sedima* and *Haroco*, and the effect of RICO’s liberal construction clause. For the reasons set forth below neither the Supreme Court precedent nor the liberal construction clause support the minority’s rejection of the investment injury rule.

The last step in this analysis engages the most intriguing question raised by the investment injury debate: Is the activism of the Fourth Circuit and its fellow courts in the minority the result – at least in part – of a shallow approach to separation-of-powers’ principles?

²²¹ *See id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *See id.* A prior decision of the United States District Court for the Southern District of Florida also followed the minority position on the investment injury rule. *See Avirgan v. Hull*, 691 F.Supp. 1357, 1362 (S.D. Fla. 1988).

A. *The Grammatical Components of § 1962(a) and § 1962(c) Reveal a Major Difference Between Them*

1. *Because The Subject of § 1962(a) Is Different from That in §1962(c), the Conduct Representing a “Violation” of Each Section Is Likewise Different*

The key to the dispute between the majority and minority views is whether a “violation” of § 1962(a) is different from a “violation” of § 1962(c). This question is preeminent because of § 1964(c). That section requires, for any civil RICO claim, a plaintiff to be injured “by reason of a *violation* of section 1962.”²²⁵ To determine whether the injury in question was “by reason of” a violation, it follows that one must know what constitutes a violation.

Oddly enough, no court or commentator has correctly identified the grammatical components of § 1962(a) and § 1962(c). These sections read as follows:

[1962] (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, 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 commerce²²⁶

[1962] (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.²²⁷

Both § 1962(a) and § 1962(c) follow the same syntactic pattern: *It* followed by *shall be unlawful* followed by an infinitive (“to use or invest . . .” in § 1962(a); “to conduct . . . through a pattern of racketeering activity” in § 1962(c)). In this grammatical pattern, the word “It” is the subject of the

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

²²⁶ 18 U.S.C. § 1962(a). *See supra* note 5 for the full text of this subsection.

²²⁷ 18 U.S.C. § 1962(c).

sentence and has the same meaning as the infinitive phrase later in the sentence.²²⁸ As reordered to place the infinitive in the position of “It,” the meaning of the sentence becomes clearer: “To use or invest, directly or indirectly, any part of such income” (subject) “shall be unlawful” (verb) “for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . .” (adverbial modifiers). The final part of the sentence, as reordered, is the prepositional phrase “for any person who has received income derived, directly or indirectly, from a pattern or racketeering” . . .²²⁹ As such, this phrase operates as a supplement to the key components of the grammatical structure.²³⁰ In summary, the violation of § 1962(a) – i.e., that which is declared “unlawful” – is “to use or invest income derived . . . from a pattern of racketeering.”²³¹

This same analysis applied to § 1962(c) yields a different conclusion on the meaning of that section. The word “It” refers to the infinitive phrase “to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity . . .” Reordering the sentence to place the infinitive in place of “It” helps clarify the meaning of the sentence: “To conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity . . .” (subject) “shall be unlawful” (verb) “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce . . .” (predicate adjective). In summary, the violation of § 1962(c) – i.e., that which is declared “unlawful” – is “to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity . . .”

²²⁸ See BETTY SCHRAMPFER AZAR, *FUNDAMENTALS OF ENGLISH GRAMMAR* at 264 (1992).

²²⁹ See H. RAMSEY FOWLER, *THE LITTLE, BROWN HANDBOOK* at 145-46 (1986).

²³⁰ See MARGARET SHERTZER, *THE ELEMENTS OF GRAMMAR* at 27 (1986).

²³¹ By the use of the “It . . . [plus] shall be unlawful [plus] to use or invest . . . syntactic pattern, the subject of the sentence happens to be a verb – i.e., the infinitive “to use or invest . . .” Thus, it is still the verb that, as is typical in statutes, offers the key to the prohibited conduct. The “legal predicate” of the statute, is what defines the conduct. See 2A NORMAN J. SINGER, *STATUTES & STATUTORY CONSTRUCTION* § 46:01 (2000). As a leading commentator on statutory construction notes: “It is the verb which directs or permits action or inaction.” *Id.* Here, as noted above, the infinitive verb form in each statute, by the grammatical structure, is given the primary position. See *supra* notes 228-231 and accompanying text. “[T]o use or invest income,” takes the primary location in § 1962(a) by the reference to “It” at the beginning. Likewise, “to . . . participate . . . in the conduct of such enterprise’s affairs through a pattern of racketeering activity . . .,” replaces “It” to take preeminence in section 1962(c).

What, then, is a violation of each section? For § 1962(a), the violation is using or investing income derived from a pattern of racketeering in the acquisition of an interest in, or the establishment or operation of, any enterprise affecting interstate or foreign commerce.²³² The courts that refer to “use or investment” of income as the “essence” of a § 1962(a) violation intuitively grasp this much: § 1962(a)’s grammatical structure compels the conclusion that, without use or investment of income, there is no violation.²³³ By contrast, a violation of § 1962(c) occurs when one conducts an enterprise affecting commerce through a pattern of racketeering.²³⁴ The use or investment of income is not required.²³⁵ Instead, one must conduct an enterprise through racketeering activity.²³⁶ In other words, the racketeering acts are part of the essence of a § 1962(c) violation.²³⁷

Because § 1964(c) requires the plaintiff’s injury in a civil suit to arise “by reason of” the violation of § 1962, the difference between the meaning of a § 1962(a) violation and a § 1962(c) violation is crucial.²³⁸ The Fourth Circuit, and others in the minority, say that a § 1962(a) violation has two elements – first, the receipt of income derived from racketeering; and second, the use or investment of the income to acquire an interest in, or control of, an enterprise.²³⁹ If these courts had analyzed the statutory text, along the lines suggested above, they would not have reached this conclusion. Instead, they would realize that the statute defines a violation of § 1962(a) in the phrase “to use or invest, directly or indirectly, any part of such income”²⁴⁰ The

²³² See Patrick D. Hughes, *The Investment Injury Requirement in Civil RICO Section 1962(A) Actions*, 41 DEPAUL L. REV. 475, 508-09 (1992) (concluding that a “violation” of § 1962(a) must be the use or investment of income); Kristen Hayes Sorensen, *RICO’s Section 1962(a) and the Investment Injury Rule: Is Big Business Off the Hook?*, 1990 B.Y.U. L. REV. 1215, 1229-32 (1990) (same).

²³³ See *supra* notes 119-168 & accompanying text.

²³⁴ See *supra* note 137 & accompanying text.

²³⁵ See *supra* notes 137-138 & accompanying text.

²³⁶ See *infra* notes 248-250 & accompanying text.

²³⁷ See *infra* notes 248-250 & accompanying text; see also Hughes, *supra* note 232 at 5, 6, 10 (concluding that a “violation” of § 1962(c) is the conduct of an enterprise through racketeering activity); Sorensen, *supra* note 99, at 1229-32.

²³⁸ See *supra* notes 7-13 and accompanying text. See also Hughes, *supra* note 232, at 507-08 (“Ascertaining the meaning of the term “violation, as used in § 1964(c), is the fundamental task”); Sorensen, *supra* note 99, at 1229-32 (“the crux of the investment injury rule controversy hinges on virtually one issue: exactly what “conduct” do § 1962(a) and § 1962(c) prohibit?”).

²³⁹ See *supra* notes 169-224 and accompanying text.

²⁴⁰ See *supra* notes 116-168 and accompanying text.

conduct that the minority wants to make an independent violation (receipt of income derived from racketeering) is included in the words “such income.”²⁴¹ But the receipt of income is not what violates § 1962(a). The conduct constituting the violation is “to use or invest,”²⁴² not to receive income.

Even if one assumed, contrary to the text of the statute, that “receipt of income” was an element of a § 1962(a) claim, the minority’s conclusion does not follow. To constitute a violation of § 1962(a), not just one, but both, elements have to be violated.²⁴³ If someone received income derived from a pattern of racketeering, but did nothing with it, this person would not be subject to RICO liability.²⁴⁴ In effect, the minority’s approach interprets § 1964(c) as allowing a civil suit by a plaintiff injured “by reason of a violation [of some but not necessarily all elements] of section 1962[(a)].”²⁴⁵ The problem with such an analysis is plain: it requires one to interpolate language

²⁴¹ See 18 U.S.C. § 1962(a).

²⁴² See *id.*

²⁴³ By contrast, there are statutes involving receipt of income that would be violated solely by receipt of the income. Drawing from such a statute, one commentator offers the following hypothetical comparison:

The Model Penal Code prohibits the receipt of stolen property: “A person is guilty of theft if he purposely receives, retains, or disposes of movable property of another knowing that it has been stolen”

Suppose a civil recovery provision were added to that prohibition that, like section 1964(c) of RICO, allowed recovery for injury “by reason of a violation” of that prohibition. If a receipt of stolen property occurred, and a plaintiff attempted to recover for injuries by reason only of the original theft of the property, an issue similar to the RICO investment injury issue would arise: whether the theft is part of the violation.

It is clear in this example that the violation – the act that a person cannot do – is to receive a certain kind of property. The violation is the receipt. Similarly, what a person cannot do under section 1962(a) of RICO is to invest or use a certain kind of income. Creating the stolen status of the property is not in violation of the prohibition against receipt of stolen property, and the gathering of income through racketeering activity does not violate section 1962(a) of RICO. Those actions merely created a situation in which illegality could occur.

Hughes, *supra* note 232, at 508-09.

²⁴⁴ See *supra* notes 130-131 & 154 and accompanying text. Of course, this person could still be subject to prosecution for violating a criminal statute.

²⁴⁵ See Sorensen, *supra* note 99, at 1232-33 (contending that “[i]njury from some, but not all of the elements constituting a violation” of § 1962(a) cannot satisfy the “by reason of” requirement of section 1964(c)); see also *Nugget Hydroelectric, L.P. v. Pacific Gas & Electric Co.*, 981 F.2d 429, 437 (9th Cir. 1992).

into a statute that is not there.²⁴⁶ To read language into a statute goes well beyond a court's role.²⁴⁷

One is not subject to a civil suit under § 1962(a) simply by receiving income derived from a pattern of racketeering activity.²⁴⁸ One violates this section by using or investing the income in acquiring or establishing an enterprise engaged in interstate or foreign commerce.²⁴⁹ By contrast, the prohibited act in § 1962(c) is conducting or participating in an enterprise *through a pattern of racketeering activity*.²⁵⁰ Thus, committing the predicate acts themselves is, under § 1962(c), the violation. Courts are correct, therefore, when they conclude that a RICO plaintiff injured by racketeering acts, but not by use or investment of income, states a claim under § 1962(c). Courts err, however, when they conclude that a RICO plaintiff injured by racketeering acts, but not by use or investment of income, states a claim under § 1962(a).

2. Principles of Statutory Interpretation Support the Majority's View of the Investment Injury Rule

Because statutes consist of grammatical components, courts understandably rely on grammatical rules in construing statutes. Indeed, the United States Supreme Court has a long history of doing so.²⁵¹ The types of grammatical rules that come into play, however, are diverse. Some of these rules are more flexible than others. For instance, grammarians would insist that an adverb modifies the most proximate verb.²⁵² Courts, however, will not be so strict if the statute's purpose suggests otherwise.²⁵³ It was for this

²⁴⁶ Another way the courts may be rewriting RICO focuses on § 1962(a). As one commentator notes, "The statute does not say, 'it shall be unlawful for any person to receive any income from a pattern of racketeering OR invest that income. . . ." Sorensen, *supra* note 99, at 1231.

²⁴⁷ See *infra* notes 277-307 and accompanying text.

²⁴⁸ See Hughes, *supra* note 232 at 508-09.

²⁴⁹ See *supra* notes 116-224 and accompanying text.

²⁵⁰ See 18 U.S.C. § 1962(c).

²⁵¹ See, e.g., Department of Housing & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) (refusing to adopt reading of Anti-Drug Abuse Act that was inconsistent with "basic rules of grammar"); Dewsnap v. Timm, 502 U.S. 410, 434-35 (1992) (relying on grammatical structure of the statute in interpreting bankruptcy code).

²⁵² See SHERTZER, *supra* note 230, at 40.

²⁵³ See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994) (rejecting the "most grammatical reading of the statute" under which "knowingly" would modify the nearest

category of grammatical issue that courts developed the “principle that in construing statutes ‘the general purpose is a more important aid to meaning than any rule which grammar or formal logic may lay down.’”²⁵⁴

Other grammatical rules are so fundamental that the law insists on them as much as grammar does. For instance, a sentence cannot be read in a way that does not make sense, assuming, of course, that the sentence can be read in any way that makes sense. The “plain meaning” rule is the principle most often cited in addressing the question.²⁵⁵ The rule requires courts to apply a statute as written, if nothing is ambiguous in the statute’s meaning.²⁵⁶

Although the plain meaning rule certainly supports the method advanced here, it is not the only principle of statutory interpretation that applies. Indeed, it may not even be the best principle of statutory construction with which to demonstrate the minority view’s errant approach.²⁵⁷ For instance, the following may be even better: “[i]t is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.”²⁵⁸ Although complementing the plain meaning rule, this rule is not identical. This rule seeks to ensure that parts of a statute are not selectively disregarded.²⁵⁹ Here, that would mean a court must take into account the

verb in the statute because a strictly grammatical application of the rule did not square with the apparent legislative purpose).

²⁵⁴ *Costello v. Immigration & Naturalization Serv.*, 376 U.S. 120, 133 n.1 (1964) (quoting *U. S. v. Whitridge*, 197 U.S. 135, 143 (1905)).

²⁵⁵ In *United States v. Fisher*, 6 U.S. 385 (1805), Chief Justice Marshall observed that a statute’s meaning “must be obeyed” if “the meaning of the legislature is plain.” *Id.* at 386. On the temptation to go beyond the language of the statute, the Chief Justice wryly noted: “Where the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived” *Id.* Now known as the “plain meaning rule,” this textual approach to statutory interpretation has endured. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (“Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning Our inquiry must cease if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’”) (quoting *U. S. v. Ron Pair Enter., Inc.*, 489 U.S. 235 (1989)).

²⁵⁶ *See* 2A NORMAN J. SINGER, *STATUTES & STATUTORY CONSTRUCTION* § 46:01 (2000).

²⁵⁷ The plain meaning rule allows for flexibility in application. Many see it as having been a “soft rule” that has, in recent years, become somewhat harder. *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. Rev. 621 (1989). By contrast, the rule precluding part of a statute from being ignored is not so easily manipulated according to the court’s judicial philosophy.

²⁵⁸ SINGER, *supra* note 256, § 46.06.

²⁵⁹ *See id.* Consider another equally hallowed tenet: where the statute has a number of sections (or subsections), courts will not read one section in a way that would render another section redundant. *Id.* § 46:05.

following parts of § 1962(a): “To use or invest income derived . . . from a pattern of racketeering” (subject) “shall be unlawful” (verb) “for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity. . . .” (adverbial modifiers).²⁶⁰ Courts in the minority ignore “[t]o use or invest income derived . . . from a pattern of racketeering.”²⁶¹ Finding a “violation” of § 1962(a) solely from receipt of income derived from racketeering, these courts overlook not just part – but a key part – of language *within the same statutory section*.²⁶² By so doing, the courts are effectively reading the statute in a way that it is not written.²⁶³ Courts in the majority have failed to analyze the issue with sufficient depth.²⁶⁴

B. Neither Sedima and Haroco nor RICO’s Liberal Construction Clause Support the Minority’s Reading of the Statute

The minority courts rely on the Supreme Court’s decisions in *Sedima* and *Haroco* to reject the investment injury rule.²⁶⁵ That rule, however, was not at issue in those decisions. They dealt solely with the effect of § 1964(c)’s “by reason of” language on a § 1962(c) claim. As demonstrated above, a plaintiff suing under § 1962(c) must assert that the defendant conducted the enterprise *through a pattern of racketeering activity*. The racketeering activity, in other words, is the crux of a § 1962(c) claim. Hence, it is not surprising that the

²⁶⁰ As shown above, § 1962(a) actually begins “It shall be unlawful for any person who has received income . . . to use or invest” *See supra* notes 225-250 and accompanying text. But the “It” in this construction refers to the infinitive verb “to use or invest” *See id.*

²⁶¹ *See supra* notes 225-250 and accompanying text.

²⁶² As pointed out elsewhere, these courts also ignore the impact of their reading § 1962(a) in a way that makes it superfluous in light of § 1962(c). *See supra* note 168 and accompanying text.

²⁶³ *See supra* notes 243-247 and accompanying text.

²⁶⁴ The most egregious error remains reading the statute so as to completely ignore the subject of the statute. *See supra* notes 225-250 and accompanying text. Courts in the majority have relied on the related principle of statutory interpretation providing that separate sections of a statutory scheme must be read to give meaning to each section. *See supra* notes 116-168 and accompanying text. As certain decisions in the majority explain, the minority’s approach fails to give meaning to different subsections of § 1962(a). *See supra* note 168. Under the minority’s view, every violation of § 1962(c) would necessarily include a violation of § 1962(a). *See supra* notes 168 & 206-224. Because the focus, in these courts’ view, is on the racketeering acts, not on what someone does with the income produced by racketeering acts, § 1962(a) becomes a subset of § 1962(c). *See supra* notes 257-264. The concern is that § 1962(a), in this scheme, becomes superfluous. *See id.* If all claims under § 1962(a) could fit within § 1962(c), one may well ask why Congress chose to enact two provisions at all.

²⁶⁵ *See supra* notes 193-196, 208, and accompanying text.

Court in *Sedima* and *Haroco* ruled that injuries flowing from racketeering acts satisfied § 1964(c)'s "by reason of" requirement. By contrast, a violation of § 1962(a) requires not simply the receipt of income derived from racketeering acts, but *use or investment of such income* into an enterprise.

If the Court intended to rule that § 1964(c)'s "by reason of" requirement is met whenever an injury flows from a racketeering act, regardless of whether the injury has any causal link to the use or investment of income, the Court would have likely said so. Dicta from the United State Supreme Court may have some weight when the Court explicitly addresses an issue.²⁶⁶ Here, there is little indication in *Sedima* that the Court was contemplating the implications of its analysis for anything other than a § 1962(c) claim.²⁶⁷ Indeed, as the Second Circuit noted in *Ouaknine*, other language in *Sedima* holding that the plaintiff would have standing if he was injured "by the conduct constituting the violation [of § 1962]."²⁶⁸ Thus, it is a stretch to suggest that the reference to § 1962(a) in *Sedima* was a firm and considered analysis of the investment injury question. Therefore, even if *Sedima* and *Haroco* suggest what the minority claims they do, the suggestion should be disregarded as unconsidered dicta.²⁶⁹

Likewise, RICO's liberal construction clause cannot be used as the minority tries to use it. The Fourth Circuit and the other courts adopting the minority view rely on the RICO provision stating that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes."²⁷⁰ A liberal construction clause may be used to interpret a statute more expansively if the meaning is not being changed in the process.²⁷¹ However, a liberal

²⁶⁶ Compare *In re Cajun Elec. Power Co-Op, Inc.*, 109 F.3d 248, 256 (5th Cir. 1997) (court "cannot derive much guidance" from Supreme Court's passage because "it has the distinctive earmarks and weaknesses of dictum") with *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) ("firm and considered dicta" of the Supreme Court binds circuit court) and *McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("[w]e think that federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings").

²⁶⁷ See *supra* notes 61-79 and accompanying text.

²⁶⁸ See *supra* notes 61-79 and accompanying text.

²⁶⁹ See *supra* note 169-224 and accompanying text.

²⁷⁰ Pub. L. No. 91-452, § 904(a), 84 Stat. 947, reprinted in Historical Note to 18 U.S.C. § 1961, at 233.

²⁷¹ See *supra* notes 251-270 and accompanying text.

construction clause may not be used to support a selective reading of the statute's text.²⁷²

C. The Minority's Approach Reveals a Myopic Understanding of Separation-of-Powers Principles.

A modern tendency is to treat the Constitution, or even the United States Supreme Court's opinions about the Constitution, as the highest law by which courts will measure legal questions. In some cases, the reason underlying a constitutional principle is reasonably apparent from the constitutional text. The Fourth Amendment's reference to the people's right "to be secure in their persons, houses, papers, and effects," for instance, clearly signifies that the prohibition on "unreasonable searches and seizures" vindicates citizens' freedom from arbitrary invasions of their body or possessions. The sources of other constitutional provisions, particularly those that are woven into its structure, are not so easily grasped. Constitutional separation of powers is perhaps the quintessential example of this latter category.

One of the primary rationales for limiting each branch of government – especially the judiciary – was the Framers' understanding that all persons are vulnerable to human weaknesses.

James Madison expressed this rationale clearly:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself²⁷³

²⁷² See *supra* notes 251-270 and accompanying text. In *Holmes v. Security Investor Protection Corp.*, 503 U.S. 258 (1992), the Supreme Court held that the liberal construction clause could not be used to expand RICO's text beyond its ordinary meaning. See *id.* at 274.

²⁷³ JAMES MADISON, THE FEDERALIST, NO. 51, 262 (Buccaneer Books 1992) (1788).

And judges are no less weak and flawed than others. Indeed, judges are arguably more prone to vices such as pride and ambition than the average person. As Madison commented: “The latter [judges] by the mode of their appointment, as well as, by the nature and permanency of it, are too far removed from the people to share much in their prepossessions.”²⁷⁴ Like de Tocqueville, Madison thus saw that judges are essentially aristocratic.²⁷⁵ Seven hundred years before, Thomas Aquinas observed that judges are, despite their best efforts at impartiality, influenced by personal biases and imperfect judgment. Aquinas’ *Treatise on Law* favored “lawgivers [i.e., legislators, who] judge in the abstract and of future events; whereas those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted.”²⁷⁶

In light of the role of judges in society, the Framers of the Constitution feared judicial encroachment into the legislative sphere more than any other breach of separation of powers. Alexander Hamilton, for instance, observed in *FEDERALIST*, NO. 78:

It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean, so long as the judiciary remains truly distinct from both the legislative and the executive. For I agree that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.” And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments²⁷⁷

In *FEDERALIST*, NO. 47, Madison echoed these concerns: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*.”²⁷⁸

The principle underlying this concern was not some abstract political science theory. It was a keen awareness of human nature. “No man,” Madison observed, is “allowed to be a judge in his own cause, because his interest

²⁷⁴ JAMES MADISON, *THE FEDERALIST*, NO. 49, 257 (Buccaneer Books 1992) (1788).

²⁷⁵ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 263-270 (Anchor 1969).

²⁷⁶ THOMAS AQUINAS, *SUMMA THEOLOGICA*, *Treatise on Law*, Question 95, First Article, at 77 (1956 Regnery Publishing Inc. ed).

²⁷⁷ ALEXANDER HAMILTON, *THE FEDERALIST*, NO. 78, 394 (Buccaneer Books 1992).

²⁷⁸ JAMES MADISON, *THE FEDERALIST*, NO. 47, 246 (Buccaneer Books 1992) (*quoting* 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, book XI, ch. 6 at 163 (Fred B. Rothman & Co. ed. 1991)).

would certainly bias his judgment, and, not improbably, corrupt his integrity.”²⁷⁹

When we consider the Framers’ belief in the corruptibility of man and the need for separation of powers, we may do well to consult the consensus of the jurisprudence that dominated for a millennium, as opposed to the “enlightened” jurisprudence of the last 150 years.²⁸⁰ This jurisprudence shaped the view of law’s role in society well into the nineteenth century²⁸¹ and rested on the fundamental premise that “there was a fixed law—a higher law—upon which all human law was based.”²⁸²

One primary source by which human law was measured was divine law as revealed by the Bible.²⁸³ Another source was the “natural law,” which is articulated even without the aid of divine law, because it was inherent in the nature of the world and reason and thus can be discerned without the aid of divine law.²⁸⁴ One of the first and most influential to expound natural law was

²⁷⁹ JAMES MADISON, THE FEDERALIST, NO. 10, 44 (Buccaneer Books 1992).

²⁸⁰ See generally Michael V. Hernandez, *A Flawed Foundation: Christianity’s Loss of Preeminent Influence on American Law*, 56 Rutgers L. Rev. 625 (2004).

²⁸¹ JEFFREY A. BRAUCH, IS HIGHER LAW COMMON LAW? xv (Rothman 1999).

²⁸² *Id.*; see also JOHN HART ELY, DEMOCRACY AND DISTRUST, 48-50 (Harvard University, 1980); Louis Henkin, *Rights: Human and American*, 79 Colum. L. Rev. 405, 409 (1979).

²⁸³ “The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature” WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, vol. I, 42 (University of Chicago 1979).

In the famous *Calvin’s Case*, 77 Eng. Rep. 377 (K.B. 1608), Sir Edward Coke stated that:

The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *Lex aeterna*, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed before the law written by Moses, who was the first reporter or writer of law in the world.

Id. quoted in, Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 AM. J. JURIS. 229, n.70 (1996). As noted in Polly Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 YALE J.L. & HUMAN. 73, 74 (Winter 1997), “In the view of Sir Edward Coke . . . the court’s determination was required by the divine law of nature, which was ‘indeed...the eternal law of the Creator’ and ‘part of the law of England.’”

²⁸⁴ As Blackstone declared in his *Commentaries* . . .

Yet undoubtedly the revealed law is (humanly speaking) of infinitely more authority than what we generally call the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law.

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at 42. A noted scholar of the natural law tradition summarized its tenets as follows:

Aristotle, who rejected the Sophist's view that law could be measured by standards of justice depending on societal conventions.²⁸⁵ Here we see the key similarity between divine law and natural law: they both contemplate pre-existing and transcendent objective truths beyond human law.²⁸⁶ Accordingly, human law can and should be measured against these objective standards to determine whether the man-made law is congruent with them.²⁸⁷ Society has enacted statutes – and even a Constitution – that, for instance, conceived of African-Americans as partially property rather than fully persons.²⁸⁸ Likewise society may attempt to deprive others of rights that they are naturally endowed with, e.g., the right to suffrage, the right to life, liberty and the pursuit of happiness. Divine law and natural law principles expose the repugnance of

Thomas [Aquinas] and [John] Locke both adhere to the ancient tradition that philosophers call natural law. First, they agree that there is such a thing as natural law-moral principles that are both right for everybody and knowable to everybody by the ordinary exercise of human reason. Second, they agree about what these principles are—do not murder, do not steal, care for your neighbor, and so forth. Finally, they agree that the authority of those principles is rooted in God.

J. BUDZISZEWSKI, *WRITTEN ON THE HEART*, 109 (Intervarsity 1997).

²⁸⁵ Carnes Lord, *Aristotle*, in LEO STRAUSS AND JOSEPH CROUSEY, *HISTORY OF POLITICAL PHILOSOPHY*, 128-30 (University of Chicago, 3d ed. 1987). “According to Aristotle, political justice is divided into what is just by nature and what is just by law or convention. Aristotle registers his disagreement with the sophistic view that because all laws are subject to change, justice exists only by convention . . .” *Id.* at 128.

²⁸⁶ One is naturally derived from the other:

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There is, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are sound necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former.

BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, 42.

²⁸⁷ *Id.*

²⁸⁸ Article I, Section 2, as originally ratified states:

Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.

U.S. Constitution U.S. Con. Art. 1, § 2 (1789); *See also* *Dred Scott v. Sandford*, 19 How. 393 (1857).

inconsistent human laws; sooner or later, the inconsistency becomes apparent.²⁸⁹

Divine law teaches that humans are by nature vulnerable to self-interest, ambition, and other failings.²⁹⁰ Natural law teaches the same thing.²⁹¹ One of the transcendent principles that natural law accepted as a major premise was that the reality of human nature is that each person is flawed to a greater or lesser extent.²⁹² Indeed, the recognition of man's limited capacity for justice – due to his human nature – is a theme common through history. That this teaching occurs not only in the Christian faith but in other world religions affirms its legitimacy as a natural law principal.²⁹³

²⁸⁹ The Emancipation Proclamation and the North's victory in the Civil War effectively undermined *Dred Scott*. However, it took a constitutional mandate to overrule the decision: In *Dred Scott v. Sandford*, 19 How. 393 (1857), this Court had limited the protection of Article IV to rights under state law and concluded that free blacks could not claim citizenship. The Fourteenth Amendment overruled this decision. The Amendment's Privileges or Immunities Clause and Citizenship Clause guaranteed the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any State in which they resided and by precluding that State from abridging their rights of national citizenship.

Saenz v. Roe, 526 U.S. 489, 511 (1999).

²⁹⁰ See, e.g., ROMANS 3: 10-18, 7: 7-25 (NIV); Colossians 3:5 (NIV); Galatians 5:19-21 (NIV); see also Martin Luther, *Disputation of Scholastic Theology*, IN JAROSLAV PELIKAN AND HELMUT T. LEHMAN, EDs., AMERICAN EDITION OF LUTHER'S WORKS, vol. IV, 4 (Concordia 1955-1979). Indeed, even enlightenment thinkers did not always view man as inherently good. Thomas Hobbes, in Chapter 13 of his famous *Leviathan*, stated that "the condition of man [in the state of nature] is a condition of war of every one against every one." THOMAS HOBBS, *LEVIATHAN*, 66 (PROMETHEUS BOOKS 1988).

²⁹¹ THOMAS AQUINAS, *SUMMA THEOLOGICA*, *Treatise on Law*, Question 95, First Article at 75 (1956 Regnery Publishing Inc. ed).

²⁹² Charles Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 Wake For. L. Rev. 539, 566-69 (1989).

²⁹³ Many world religions support the concept that man is inherently flawed and must seek law or truth through divine revelation. Consider, for example, the following teachings: "The mind of man is ever ready to incite to evil" and "He who purifies his soul of earthly passions shall be saved and shall not suffer ruin, but he who is overcome by his earthly passions should despair of life" THE QURAN 12:54, 91:10-11 (Islam); "Liberation comes from living the holy Word." Adi Granth, SRI RAGA, ASHTPADI 14.8 (Sikhism); "Truth is victorious, never untruth / Truth is the way; truth is the goal of life / Reached by sages who are free from self-will." MUNDAKA UPANISHAD 3.1.6 (Hinduism); "Then do I proclaim what the Most Beneficent spoke to me / The Words to be heeded, which are best for mortals / Those who shall give hearing and reverence / Shall attain unto Perfection and Immortality By the deeds of good spirit of the Lord of Wisdom!" AVESTA, YASNA 45.5 (Zoroastrianism).

In natural law thinking, one significant role of law is to limit the damage that any one person, or group of persons, can do, while encouraging society to virtue.²⁹⁴ Hence, natural law philosophy requires a restraint upon the government – and each branch within that government. “The law, which is no respecter of persons, stands supreme. . . .”²⁹⁵ “The validity or regularity of judicial decision-making is not rooted in the chimerical theme of respect - that chameleon of amorality - but upon a natural moral law that generates and announces some fundamental precepts for human living. Judges rule correctly when being attentive to reason and the divine imprint. . . .”²⁹⁶ One fundamental principal of reason is that laws enacted for the “common good” – i.e., the happiness of the whole of society – by the representatives of all the people – should not be changed by those in power.²⁹⁷ Overt steps by any government actors beyond their proscribed functions violate not just the normative, but the positive, foundations of the law.²⁹⁸ As Dr. Martin Luther King observed while imprisoned in Birmingham, Alabama, “[A] just law is a code a majority compels a minority to follow that it is willing to follow itself.”²⁹⁹ When judges enter the realm of statutory revision, their decisions are

Although these religions thus agree with the proposition of truth proclaimed by the Christian faith – i.e. that humans are imperfect – the Christian faith is distinctive in proclaiming that God became a man, even as he remained divine, in the person of Jesus Christ, whose life, death, and resurrection provides the way for humans to transcend their mortal, imperfect condition.

²⁹⁴ Rice, *supra* note 292 at 566-69.

²⁹⁵ RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER*, 183-185 (Regnery 1974).

²⁹⁶ Charles P. Nemeth, *Judges and Judicial Process in the Jurisprudence of St. Thomas Aquinas*, 40 *CATH. L.* 401, 403 (2001). “When a moral realist judge today invalidates the expression of majority will that a statute presumptively represents, he does so in the name of something beyond his power to change and beyond the power of a societal consensus to change.” Michael S. Moore, *Law as a Functional Kind*, in ROBERT P. GEORGE, ED., *NATURAL LAW THEORY: CONTEMPORARY ESSAYS*, 229 (Clarendon Press, 1992)

²⁹⁷ Aquinas’ classic definition of law is “an ordinance of reason for the common good made by him who has care for the community, and promulgated.” THOMAS AQUINAS, *SUMMA THEOLOGICA, Treatise on Law*, Question 90, Fourth Article at 11 (1956 Regnery Publishing Inc. ed). Aquinas expands on this notion in a later question addressed in his *Summa Theologica*:

For if they [the people] are free, and are able to make their own laws, the consent of the whole people expressed by a custom counts far more in favour of a particular observance, than does the authority of the sovereign, who has not the power to frame laws, except as representing the people. Wherefore although each individual cannot make laws, yet the whole people can.

Id. Question 97, Article 4 at 112-13.

²⁹⁸ See generally Rice, *supra* note 292 at 566-67.

²⁹⁹ MARTIN L. KING, JR., *LETTER FROM BIRMINGHAM JAIL*, in JEFFREY A. BRAUCH, *IS HIGHER LAW COMMON LAW?*, 51 (Rothman, 1999).

per se unjust because they represent law imposed by a minority on the majority that has not given its consent.

The Framers were strongly influenced by the Protestant Reformation.³⁰⁰ John Calvin espoused a form of government that distributed power so as to limit a single person's inclination to act unjustly.³⁰¹ The reality of "men's faults or failing" influenced Calvin's preference for a government in which neither a King nor judges had excessive power.³⁰² The fear of excessive power is prevalent throughout American history. "[O]ur own colonial history also provided ample reason for people to be afraid to vest too much power in the national government."³⁰³ Justice Black correctly intoned that the government was created with specific divisions "of authority . . . none of which was to have supremacy over the others. This separation of powers with the checks and balances which each branch was given to the others was designed to prevent any branch . . . from infringing individual liberties safeguarded by the Constitution."³⁰⁴

Another eminent philosopher that influenced the Founding Fathers was Thomas Paine. In this opening paragraph in *Common Sense*, in the section titled "On the Origin and Design of Government in General, with Concise Remarks on the English Constitution," Paine writes that: "Society is produced by our wants, and government by our wickedness; the former promotes our happiness POSITIVELY by uniting our affections, the latter NEGATIVELY by restraining our vices. The one encourages intercourse, the other creates distinctions. The first is a patron, the last a punisher."³⁰⁵ In this aspect, Paine

³⁰⁰ Stephen L. Carter, *The Byron J. McCormick Lecture: Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 296-97 n. 8 (Summer, 2002) ("The dominant thinker in the training of those who met in Philadelphia was probably John Calvin."); see also Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293 (Michael W. McConnell et al. eds., 2001) (the Framers used Calvinist theology and principles to analyze and then construct a limited but viable form of government).

³⁰¹ JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, bk IV, ch. XX, at 1493 (John T. McNeill ed.).

³⁰² See *id.* For discussions on the original intent of the Constitution and its relation to restraints on judicial power, see ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (London: Collier-Macmillan, 1990); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (Cambridge, Mass.: Harvard University Press, 1977); Antonin Scalia, *Originalism: The Lesser Evil*, CIN. L. REV. 849, 851 (1989).

³⁰³ Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 869 (Apr. 1960).

³⁰⁴ *Id.* at 870 (emphasis added).

³⁰⁵ Thomas Paine, *COMMON SENSE*, 1, (Barnes & Noble Books 1995).

echoes the Calvinist ideals and sentiments discussed above. Paine therefore distrusts civil government but called it the lesser evil:

For were the impulses of conscience clear, uniform and irresistibly obeyed, man would need no other lawgiver; but that not being the case, he finds it necessary to surrender up a part of his property to furnish means for the protection of the rest; and this he is induced to do by the same prudence which in every other case advises him, out of two evils to choose the least.³⁰⁶

The American system of checks and balances reflects transcendent, extra-Constitutional principles, including the principle that, as a matter of policy, laws enacted by representatives of the people best protect the common good of society. Our best protection against tyranny is to keep the “elite” governmental powers (the judiciary, and the executive) from exercising legislative power. Distrust of the intentions of government officials – including judges – should be the norm. We must “but bind ...[men] down from mischief by the chains of the Constitution,”³⁰⁷ as Jefferson recognized, and rebind judges when they escape those chains.

It is therefore inadequate to merely observe that the Fourth Circuit and the courts following its lead have violated separation of powers.³⁰⁸ Therefore, we must go further. These courts are imposing their self-interested, grandiose view of what the law ought to be, as opposed to following legislature’s expression of legislature enacted in RICO. The complexity of the statute may initially hide the audacity of their judicial revision. However, a fair reading of the statute shows that the scope of civil RICO is nowhere near as broad as these courts think it should be, or have made it out to be.

³⁰⁶ *Id.*

³⁰⁷ Thomas Jefferson, *Draft Kentucky Resolutions*, in ALBERT E. BERG AND ANDREW A. LIPSCOMB, *THE WRITINGS OF THOMAS JEFFERSON*, vol. 17, 388 (Thomas Jefferson Memorial Association 1904).

³⁰⁸ The Ninth Circuit, for instance, rejected the Fourth Circuit’s position based in part on the separation-of-powers principle at stake in the investment injury debate. *See Nuggett Hydroelectric, L.P. v. Pacific Gas & Electric Co.*, 981 F.2d 429, 438 (9th Cir. 1992). Yet the court in *Nuggett* offered little more than a passing reference to this point. As shown in this article, however, the principle at stake here implicates not only constitutional principles, but also transcendent truths on which the Framers crafted our Constitution.

VI. CONCLUSION

For the better part of two decades, courts have disagreed on whether § 1964(c)'s "by reason of" language requires the plaintiff's injury in a § 1962(a) claim to have been caused by the use or investment of income. A consensus has emerged among a majority of circuits. The consensus holds that RICO's language requires the investment injury rule. Although they intuitively grasp the meaning of the statutory provisions, these courts in the majority have not clearly explained the grammatical and statutory principles at play. Applying these principles, one sees that a violation of § 1962(a) is fundamentally different from a violation of § 1962(c). Because § 1964(c) requires that the plaintiff be injured "by reason of a violation of section 1962," one must clearly understand what a "violation" of each section of 1962 means.

The difference between a violation of § 1962(a) and a violation of § 1962(c) produces a different analysis for each section. As shown in this article, a violation of § 1962(a) means one thing: the use or investment of income derived from racketeering. Thus, permitting a plaintiff standing to sue under § 1962(a) for injuries not linked to use or investment of income, but solely to racketeering acts, ignores the statutorily mandated requirements.

The issue here illustrates a broader, more fundamental concern. The RICO statute is a quintessentially the kind of law that must be promulgated by the only body equipped to do so: Congress. The statute deals with controversial issues, and imposes some of the most severe remedies available in civil litigation. The judicial activism of the Fourth Circuit and other courts following its lead demonstrates judicial willingness to stray beyond the courts' role. Influenced by transcendent principles, principally the concern about the imposition of the frailty and prejudices of elites who were not directly accountable to the people, our Framers crafted a Constitution that limited the power of the federal judicial branch for transcendent reasons. These include the frailty and prejudices of the few – perhaps accentuated by the elite status of those few. When courts engage in judicial activism such as here, they violate not simply the Constitution, but fundamental principles on which the Constitution was founded. Therefore, the need to correct the circuit split on this issue exemplifies the urgency of courts staying contentedly within boundaries of their legitimate authority– in constitutional chains.