1989

Employers' RICO Liability for the Wrongful Discharge of Their Employees

Laura Ginger

*Indiana University Kelley School of Business, ginger@indiana.edu*

Follow this and additional works at: [https://digitalcommons.unl.edu/nlr](https://digitalcommons.unl.edu/nlr)

**Recommended Citation**

Laura Ginger, *Employers' RICO Liability for the Wrongful Discharge of Their Employees*, 68 Neb. L. Rev. (1989) Available at: [https://digitalcommons.unl.edu/nlr/vol68/iss3/2](https://digitalcommons.unl.edu/nlr/vol68/iss3/2)
I. INTRODUCTION

There is growing sentiment that the Racketeer Influenced and Corrupt Organizations Act (RICO), which was “created to help fight organized crime, is now being used primarily by private individuals and corporations trying to extract large damage awards from legitimate businesses.” It has also been said that “RICO is upsetting the
rules of the game in the areas of labor and employment law . . . ."³
Nowhere is this more the case than in the area of potential employer liability for employee discharges.

The issue of civil RICO liability for wrongful discharge is of great practical importance in view of (1) the breadth of the RICO statute, (2) the increasing use of the statute by private plaintiffs against business entities, including their former employers, and (3) the fact that a successful RICO claim nets the plaintiff treble damages for injuries to his business or property as a result of lost employment or employment opportunities, as well as his attorney’s fees and court costs.⁴

The RICO statute is characterized by extraordinary breadth, so perhaps it was inevitable that unhappy former employees would eventually discover it as a potential remedy for their loss of employment. Congress added RICO to the Organized Crime Control Act of 1970⁵ to halt the infiltration of organized crime and racketeering into legitimate business entities.⁶ As written by Congress, however, the statute prohibits behavior which is not limited to organized criminals. Section 1962 prohibits the acquisition, establishment, operation, or maintenance of an enterprise in interstate commerce through a pattern of “racketeering activity,” as well as a conspiracy to commit any of these offenses.⁷

However, the element of “racketeering activity” also includes conduct which does not fit within any accepted definition of that term.⁸ It is defined in very broad terms as “acts involving” certain specifically enumerated state and federal criminal offenses,⁹ often referred to as “predicate acts.”¹⁰ State crimes that give rise to RICO charges are those normally associated with racketeering,¹¹ but federal crimes that serve as predicate acts under RICO include both racketeering-type and nonracketeering-type crimes.¹²

Among the remedies Congress included in the RICO statute is a private right of action for treble damages available to anyone injured in his business or property by reason of a violation of section 1962. It is this private right of action which is of primary and increasing concern to business. In each of the last two years, approximately 1,000 civil racketeering suits have been filed by private plaintiffs seeking to recover triple their actual damages from legitimate businesses, including their employers. This figure represents a significant increase compared to the 19 suits filed in 1981 and 117 filed in 1984. New filings are averaging 85 a month, and such “private racketeering cases now comprise about one-half of 1 percent of the 250,000 civil cases filed each year in the Federal courts.”

This private civil RICO remedy is frequently being used by former employees against legitimate business entities, and their standing to do so has been upheld by several district courts. For example, on June 13, 1988, two former Ashland Oil vice presidents won a $69.5 million civil RICO verdict against their former employer on the ground that they were dismissed after questioning allegedly illegal foreign payments and subsequent cover-up attempts. The jury found actual damages, including lost compensation, to be $22 million, but the use of the RICO statute tripled the amount of damages awarded to the plaintiffs. Similarly, an employee of Boise Cascade Corporation, who had

15. Id.
16. Id. at B4, col. 6.
17. See, e.g., Williams v. Hall, 683 F. Supp. 639 (E.D. Ky. 1988); Acampora v. Boise Cascade Corp., 635 F. Supp. 66 (D.N.J. 1986). In addition, on April 18, 1989, a former employee of Texaco Trading and Transportation, Inc. filed suit under civil RICO, charging that he was terminated from his position for refusing to participate in the company's racketeering schemes. The plaintiff is seeking more than $770,000 in actual damages for the loss of past and future wages and benefits, which would total $2.3 million when trebled under RICO, as well as $1 million in exemplary damages and $500,000 in damages for pain and suffering. As of May 1, 1989, none of the defendants had responded to the complaint. Wade v. Texaco Trading & Transp., No. 89-C-316B (D. Okla. filed April 18, 1989) (also discussed in 4 Ind. Employ. Rts. (BNA) No. 7, at 2 (May 9, 1989); 4 Civ. RICO Rep. (BNA) No. 47, at 4 (May 2, 1989)). See also infra notes 92-113 and accompanying text.
19. The defendants moved for summary judgment on the RICO claims on the ground that plaintiffs lacked standing to sue under RICO because they were not directly damaged by the predicate acts. Williams v. Hall, 683 F. Supp. 639, 641 (E.D. Ky. 1988). However, the district court denied the defendants' motions for summary judgment on the RICO claims. Id. at 644. The jury then returned a verdict in favor of the plaintiffs on the RICO claims on June 13, 1988. See N.Y. Times, June 14, 1988, at D1, col. 3; Wall St. J., June 14, 1988, at 5, col. 1; 4 Civ. RICO Rep. (BNA) No. 3, at 1 (June 14, 1988). The defendants originally appealed the jury's
been discharged after discovering that an operations manager was stealing from the corporation, successfully brought suit under civil RICO for three times the actual financial loss resulting from the loss of her job.\textsuperscript{20}

However, the availability of the civil RICO remedy in such situations is far from definitively established, for there is a division of authority in the lower federal courts as to whether Congress intended to afford discharged employees a civil remedy under the RICO statute in these circumstances. One line of cases appears to hold that discharged employees, including so-called "whistleblowers,"\textsuperscript{21} lack standing to sue under RICO because they have not been directly damaged by the commission of acts prohibited by the statute.\textsuperscript{22} As noted above, the other line of cases has permitted civil RICO actions to go forward in such circumstances.\textsuperscript{23} Moreover, in courts which allow such actions, it is unclear whether employees can recover under RICO after merely being discharged for "tattling" about their employers' illegal acts, or whether they can only recover when they are discharged for refusing to participate in these illegal acts.\textsuperscript{24}

This potential liability of the employer is made all the more treacherous by the fact that the former employee who files a civil RICO lawsuit for treble damages is also able to impose vicarious liability upon the business itself for the acts of its other employees.\textsuperscript{25} In other words, the business entity is liable for the actions of an employee who is responsible for wrongfully discharging another of its employees,

\begin{footnotesize}
\textsuperscript{22} See infra notes 114-57 and accompanying text.
\textsuperscript{23} See supra note 17 and accompanying text and infra notes 92-113 and accompanying text.
\textsuperscript{24} Compare Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1217 (5th Cir. 1988) (whether an employee is discharged for reporting a RICO violation or for refusing to participate in a RICO violation, in neither situation does the discharge flow from the predicate acts, and "thus, both fail to meet the causal nexus required under the statutory language of section 1964(c) and under Sedima") with Morast v. Lance, 807 F.2d 926, 933 & n.3 (11th Cir. 1987) (the court implied that there might be standing if plaintiff is fired for refusing to participate in the employer's illegal acts, but found no standing when plaintiff is fired for merely reporting the employer's illegal acts).
\textsuperscript{25} See generally Ginger, Using RICO to Reach into the Corporate Pocket: Vicarious Civil Liability of the Business Entity under the Racketeer Influenced and Corrupt Organizations Act, 93 Dick. L. Rev. 465 (1989) (discussion of vicarious liability of the business entity under civil RICO).
\end{footnotesize}
even if the misbehaving employee is quite low on the corporate totem pole or is acting contrary to express corporate instructions.\textsuperscript{26}

The Supreme Court of the United States recently declined a chance to clear up the confusion among the circuits over the issue of whether or not former employees have standing under civil RICO to sue their employers for wrongful discharge.\textsuperscript{27} The Court was presented with a case wherein a former corporate chief financial officer alleged that he was fired because he had opposed the plan of certain corporate directors to control the corporation through illegal racketeering activities. Because he was neither a target nor a direct victim of the predicate acts, the district court found that the former employee had no standing to maintain a RICO action.\textsuperscript{28} This holding was affirmed on appeal,\textsuperscript{29} and the former employee asked the Supreme Court to review the case.\textsuperscript{30} Despite the conflict among the lower courts, however, the Court denied his petition for certiorari, leaving the issue unresolved.\textsuperscript{31}

This Article will delineate the present state of the law as to RICO liability for wrongful discharge. In Part II of the Article, the general requirements for standing under civil RICO will be discussed, including the statutory language on standing and the judicial interpretations of that language. Part III of the Article will examine how the courts have analyzed and applied the statutory language in the specific context of wrongful termination cases filed under civil RICO.

II. GENERAL REQUIREMENTS FOR CIVIL RICO STANDING

A. The Statutory Language of Section 1964(c)

Section 1964(c) of the RICO statute creates a private civil right of action in favor of anyone who has been injured in his business or property by reason of a criminal violation as provided in section 1962.\textsuperscript{32}

\textsuperscript{26} Id. at 482.
\textsuperscript{27} Diamond v. Reynolds, 109 S. Ct. 392 (1988), denying cert. to 853 F.2d 917 (3d Cir. 1988).
\textsuperscript{32} 18 U.S.C. § 1964(c) (1988). Section 1964 provides:

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.

Therefore, only persons injured "by reason of a violation of section 1962" have standing to sue under civil RICO.33 This "by reason of" language has generally been read to impose a proximate cause requirement on plaintiffs wishing to sue under section 1964(c),34 requiring proof that the criminal conduct violating section 1962 injured the plaintiff's business or property.35 Thus, to have standing to sue under civil RICO, one must prove that he has suffered an injury to his business or property which was proximately caused by a violation of section 1962 of the Act.

However, this standing requirement is not as straightforward in practice as it sounds in theory. The courts have never been able to agree upon exactly what the causal link must be between the defendant's RICO violation and the harm suffered by the plaintiff for civil RICO standing to exist.36 The courts have also been unable to resolve the issue of what kind of RICO violation it is which must cause the plaintiff's injury. To have standing under civil RICO, is it sufficient for the plaintiff to be injured by the predicate acts alone, or must he be injured by the pattern of racketeering resulting from those acts, or, alternatively, by the acquisition, establishment, operation, or maintenance of an enterprise through that pattern of racketeering?37

33. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) ("the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation" of section 1962).
34. See, e.g., Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1214 (5th Cir. 1988) ("The language 'by reason of' in § 1964(c) imposes a proximate causation requirement on plaintiffs."); Sperber v. Boesky, 849 F.2d 60, 64 (2d Cir. 1988) ("It is clear that both direct and indirect injuries must be proximately caused."); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984) ("As we read this 'by reason of' language, it simply imposes a proximate cause requirement on plaintiffs.").
35. See Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984) ("The criminal conduct in violation of section 1962 must, directly or indirectly, have injured the plaintiff's business or property.").
36. See City of Milwaukee v. Universal Mortgage Corp., 692 F. Supp. 992, 996 (E.D. Wis. 1989) ("Exactly what the link must be between the conduct of the RICO violation and the harm alleged by the victim has been viewed by courts from two related and often combined perspectives: one dealing with whether the injured party is the real party in interest under Rule 17(a), Fed.R.Civ.P., and the other dealing with whether the RICO violation was the proximate cause of the injury.") (footnote omitted).
37. See, e.g., Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1149 (10th Cir. 1989) (standing under section 1962(a) requires proof of injury by the use or investment of racketeering income, not merely injury caused by the predicate acts themselves as required in section 1964(c)); Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1215 (8th Cir. 1988) (standing under section 1964(c) exists if plaintiff is
This is a troublesome issue for civil RICO plaintiffs generally, but it is especially troublesome for wrongful discharge plaintiffs. Courts have generally acknowledged that plaintiffs can recover under RICO for loss of employment opportunities\(^3\) and that loss of employment or employment opportunities qualifies as "injury to business or property" within the meaning of RICO.\(^9\) However, wrongful discharge is not listed in section 1961(1) of the RICO statute as an underlying predicate act or "racketeering activity," nor is it listed as a full-blown RICO violation in any of the subsections of section 1962 of the Act.\(^4\)

Therefore, it is literally impossible for any civil RICO complaint based upon wrongful discharge to allege that the plaintiff was \textit{directly} injured by either a predicate racketeering act or acts, by a pattern of two or more such acts, or by one of the specific violations listed in section 1962. Thus, the civil RICO standing of any such plaintiff must by definition rely upon an injury to business or property "indirectly" caused by, or "flowing from," some behavior prohibited by the RICO statute. The purportedly legal issue raised in this situation is actually

\[\text{jured by "racketeering activities forbidden by § 1962"};\] Brandenburg v. Seidel, 859 F.2d 1179, 1184, 1187, 1189 n.11 (4th Cir. 1988) (standing under all subsections of section 1962 requires injury caused by predicate acts); Bankers Trust Co. v. Rhoades, 859 F.2d 1036, 1100-01 (2d Cir. 1988) (standing under subsections (a), (b), and (c) requires only injury from the predicate acts); Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1067 (3d Cir. 1988) (standing under section 1962(a) requires injury caused by some or all of the predicate acts); Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1268 (3d Cir. 1987) ("The injury which confers standing on a RICO plaintiff is injury flowing from the commission of the predicate act, not injury flowing from the pattern of such acts."); City of Milwaukee v. Universal Mortgage Corp., 692 F. Supp. 992, 997 (E.D. Wis. 1988) ("Recovery under RICO is limited to those injuries that are caused by the predicate acts."); Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 693 F. Supp. 666, 672 (N.D. Ill. 1988) ("[A] plaintiff can have standing to bring a § 1962(a) claim as long as it has been injured by a predicate act."); P.M.F. Servs. v. Grady, 681 F. Supp. 549, 556 (N.D. Ill. 1988) ("[I]n each instance the specific subsection of Section 1962 focuses on the use of the violation not the conduct of racketeering activity alone, but rather the use of that racketeering activity in the particular way the subsection declares unlawful."); Jones v. Baskin, Flaherty, Elliot & Mannino, P.C., 670 F. Supp. 597, 599 (W.D. Pa. 1987) ("Standing to maintain a private civil RICO action depends on whether the plaintiff suffered 'direct injury' by the conduct which violates section 1962.") (citation omitted); Kouvakas v. Inland Steel Co., 646 F. Supp. 474, 477 (N.D. Ind. 1986) (injuries did not flow from predicate acts, so plaintiff had no standing). See also Matthews, supra note 34, at 288 & nn.439-40.

\(^{3}\) Cf. Grogan v. Platt, 835 F.2d 844, 848 (11th Cir. 1988), cert. denied, 109 S. Ct. 531 (1988) (although recovery for lost employment opportunities was denied in the case, the court did "not hold that plaintiffs may never recover under RICO for the loss of employment opportunities").


a policy question: Is a discharge based upon a plaintiff's knowledge or reporting of, or refusing to participate in his employer's RICO violation the kind of injury for which a civil RICO remedy ought to be available?

B. Judicial Interpretations of Section 1964(c): Do Indirectly Injured Plaintiffs Have Standing?

1. The United States Supreme Court's Interpretation

No answer is found on the face of section 1964(c) to the questions raised above regarding the sort of causation required for standing, the sort of injury required for standing, or whether standing exists under civil RICO for wrongfully discharged employees. Resort must be had, therefore, to the court decisions interpreting section 1964(c) on the general issue of standing to file a civil RICO claim. (Court decisions on the issue of civil RICO standing for wrongful discharge will be specifically treated in Part III below.)

The only United States Supreme Court decision to address the issue of standing under section 1964(c), Sedima, S.P.R.L. v. Imrex Co.,41 did so in the context of an examination of two specific restrictions on RICO standing which had been imposed by the circuit courts. One such restriction was the requirement that in order to have standing, a RICO plaintiff must not only establish an injury resulting from the predicate acts themselves, but he or she must also establish a so-called "racketeering injury"42 which is an indirect injury because it does not directly result from the commission of the predicate acts.43

The Court held that in order to have standing under the statute, a civil RICO plaintiff is not required to prove a "racketeering injury" in addition to an injury resulting directly from the predicate acts themselves.44 In so doing, the Supreme Court arguably expanded standing under RICO by adding plaintiffs who are injured directly by the predicate acts to the universe of plaintiffs with standing under RICO, while

42. Id. at 481.
43. The district court in Sedima had held that a RICO complaint must allege an injury "apart from that which would result directly from the alleged predicate acts of mail fraud." Sedima, S.P.R.L. v. Imrex Co., 574 F. Supp. 963, 965 (E.D.N.Y. 1983). A divided panel of the Court of Appeals for the Second Circuit affirmed on the ground that Sedima's complaint had failed to allege an "injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 486 (2d Cir. 1984). See also Sperber v. Boesky, 849 F.2d 60, 63 (2d Cir. 1988) ("By damages caused only 'indirectly' we mean 'racketeering' injury, 'competitive' injury or injury caused by the total effect of the pattern of racketeering in the enterprise."). See supra text immediately following note 40.
EMPLOYERS' RICO LIABILITY

at the same time holding that those who had suffered indirect injury continued to have standing under section 1964(c) of the Act.\footnote{45} In the words of a district court which considered this very point,

\[\text{While the defendants assert that the indirect injuries alleged by the plaintiff are not the type of injury contemplated by} \; \text{§} \ 1964(c), \text{there is no indication of such a limitation in the Sedima case. Indeed, the issue confronted in Sedima was not whether indirect injury from the racketeering enterprise was recoverable but whether direct injury from the predicate acts was sufficient to allow recovery. The Court implicitly accepted the premise that the injurious consequences of the enterprise other than the injury directly attributable to the fraudulent acts themselves would be recoverable.}\footnote{46}

However, some of the Court's language in Sedima has been interpreted, and arguably misinterpreted, to grant RICO standing only to those suffering direct injury while denying it to those injured indirectly by the RICO violations.\footnote{47}

In Sedima, the Court addressed the specific issue of what was required for standing to exist in a RICO case premised on section 1962(c),\footnote{48} but its broad language can be applied to cases alleging a violation of any of the subsections of section 1962.\footnote{49} The Court held that a civil RICO plaintiff need only prove that he has suffered an injury flowing in some unspecified way from the defendant's commission of the predicate acts: "Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern . . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts."\footnote{50}

The question left unanswered by this statement centers upon the

\footnote{45. See Petition for Certiorari, supra note 29, at 43-45 ("In Sedima this Court read RICO broadly and decided to thereafter grant RICO standing to those victims directly injured by the predicate acts. But all nine justices agreed that those victims injured indirectly by the racketeering, i.e., those with 'racketeering injury', 'indirect injury,' or 'competitive injury' had standing, and would continue to have standing, under RICO.").}


\footnote{47. See infra note 78 and accompanying text. Such an interpretation leaves no room for standing based upon wrongful discharge, which, as was pointed out above, is by definition an indirect result of the commission of the predicate acts.}

\footnote{48. Section 1962(c) provides:

\text{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.}\text{18 U.S.C. § 1962(c) (1988).}


meaning of the phrase “will flow from the commission of the predicate acts.” In its footnote to this phrase, the Court appears to have included injuries caused *either directly or indirectly* by the predicate acts in its definition of “recoverable damages,” for it states that “[s]uch damages include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery.”\(^5\) The majority’s reference to “the sort of competitive injury for which the dissenters would allow recovery” refers to indirect injury and alludes to the three examples offered by Mr. Justice Marshall on behalf of the four dissenters.\(^5\) These examples were offered in an effort to illustrate and define the concept of a “racketeering injury,” which the dissenters would have required in addition to direct injury for RICO standing to exist.\(^5\)

The “racketeering injuries” mentioned in the examples appear to illustrate primarily anticompetitive effects of racketeering and include being forced out of business by monopolization resulting from threats, arson, and assault; being forced to pay more for the monopolist’s goods or services, resulting in added costs of doing business; being forced to pay protection money, purchase certain goods, or hire certain workers, resulting in added costs; being displaced as an investor in a legitimate business by a racketeer who gains control of the business through racketeering; and losing competitive position to an enterprise which enhances its profits or its economic power, and therefore its competitive position, through racketeering.\(^5\)

Although Mr. Justice Marshall would permit recovery for such indirect “racketeering injury,” he would deny recovery for any of the injuries resulting directly from the predicate acts perpetrated by the racketeers in his examples.\(^5\) He would not permit recovery, for instance, for the cost of the building burned in the arson, for injury resulting from the threats or assault, or for monetary injuries suffered by the customers of or investors in the racketeer-infiltrated business.\(^5\)

It seems clear that the majority, in stating that the damages recoverable under RICO “include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery,”\(^5\) held that plaintiffs who have suffered either direct or indirect injuries have standing to sue under civil RICO.\(^5\) Indeed, the majority’s very next

---

51. *Id.* at 497 n.15.
52. See *id.* at 520-23 (Marshall, J., dissenting).
53. *Id.*
54. *Id.* at 521-22. See also Petition for Certiorari, supra note 29, at 46-48.
56. *Id.* at 521-22. See also Petition for Certiorari, supra note 29, at 46-48.
58. See *Sperber* v. *Boesky*, 849 F.2d 60, 63 (2d Cir. 1988); *Bass* v. *Campagnone*, 838 F.2d 10, 12 (1st Cir. 1988).
statement makes clear the soundness of this analysis:

Under the dissent's reading of the statute, the harm proximately caused by the forbidden conduct is not compensable, but that ultimately and indirectly flowing therefrom is. We reject this topsy-turvy approach, finding no warrant in the language or the history of the statute for denying recovery thereunder to "the direct victims of the [racketeering] activity," while preserving it for the indirect.59

Thus the proper interpretation of the Sedima decision with regard to civil RICO standing would seem to be that plaintiffs injured either directly or indirectly by racketeering activity have standing to bring a private civil suit under the Act. The Court's language is best interpreted as establishing that, while plaintiffs are not required to allege an indirect "racketeering" injury in order to recover under civil RICO, they are certainly permitted to recover on the basis of such an indirect injury, as well as on the basis of a direct injury. As a result of this holding, the Court expanded standing under RICO, not narrowed it, by reading the statute broadly and granting for the first time standing to those suffering direct injury alone, while at the same time preserving standing for those who have suffered indirect injuries.60

As was seen above in the discussion of Mr. Justice Marshall's examples and in the majority's reference to them,61 all nine Justices appeared to agree that those victims injured indirectly by racketeering activity had standing, and would continue to have standing, under RICO.62 The dissenters wanted to restrict standing to only those with indirect injury, while the majority ruled that those who had suffered direct injury also had standing. In the words of one court that has considered the issue, "[t]o allow a RICO action only when the plaintiff is the direct victim of the predicate racketeering activities . . . would be to ignore the essence of a RICO violation, which is the commission of racketeering activities in connection with the conduct of an enterprise."63 In short, the majority's ruling should not be viewed as having had any effect on the preexisting standing of plaintiffs who have suffered indirect injury. However, this is precisely how some courts have viewed it.

59. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 n.15 (1985) (citation omitted). On the proper interpretation of this footnote, see Bass v. Campagnone, 838 F.2d 10, 12 (1st Cir. 1988) ("In the footnote . . . the Court made clear that damages could be recovered for those injuries indirectly caused by predicate acts, as well as those directly caused by them.").

60. See Petition for Certiorari, supra note 29, at 43-45, 49-51.

61. See supra notes 51-59 and accompanying text.


2. Conflict Among the Lower Courts

The lower federal courts are in sharp conflict on the issue of whether the *Sedima* decision stripped standing from RICO victims suffering indirect injury.\(^{64}\) While some courts have held that indirect injury is sufficient to confer RICO standing, other courts have denied RICO standing to anyone not injured directly by the predicate acts.\(^{65}\) As noted above, the United States Supreme Court refused to settle the question, denying certiorari in a recent case posing the very issue.\(^{66}\)

Several circuit courts of appeals decisions disapprove of the very dichotomy used to frame the question. In *Alexander Grant & Co. v. Tiffany Industries*,\(^{67}\) the court held that an accounting firm claiming that its former client falsified audit data had standing based on injury it suffered from the costs attendant to a Securities and Exchange Commission investigation, lost fees, and harm to its business reputation.\(^{68}\) In so doing, the court disapproved of the approach used in other circuits and went so far as to say that it found “no legislative history supporting the direct-indirect dichotomy.”\(^{69}\) On remand, the court readopted this standing ruling and took the opportunity to comment on the impact of the *Sedima* decision which had been rendered in the interim.\(^{70}\) The court stated that “[t]he brief mention of causation in *Sedima* cannot fairly be interpreted as reading into section 1964(c) a direct injury versus indirect injury distinction.”\(^{71}\)

The First Circuit Court of Appeals in *Bass v. Campagnone*\(^{72}\) offered an alternative method of analysis to one focusing on whether or not the injury was direct or indirect. The court concluded that *Sedima* “establishes a broad standard for determining when a person

---

64. Petition for Certiorari, *supra* note 29, at 16-18; National Enters. v. Mellon Fin. Servs. Corp. No. 7, 847 F.2d 251, 253 (5th Cir. 1988) (“Whether an indirect injury is sufficient to constitute standing in a RICO action is a contested question among the federal courts.”); Williams v. Hall, 683 F. Supp. 639, 641 (E.D. Ky. 1988) (“This division of authority seems to reflect a disagreement among the circuits as to whether a plaintiff may sue under § 1962(a) or (c) on the basis of an indirect injury from the predicate acts.”).

65. See infra notes 77-78 and accompanying text. See also Petition for Certiorari, *supra* note 29, at 14-35.


68. *Id.* at 411-12.

69. *Id.* at 412.


72. 838 F.2d 10 (1st Cir. 1988).
is injured 'by reason of' a section 1962 violation: the inquiry in [sic] not whether the plaintiff has alleged a direct or indirect injury, but rather whether he or she has alleged an injury that 'flows from' the predicate acts.'

Finally, in a relatively recent case, the Fifth Circuit also relied on the "flows from" language in the Sediama case, remarking that "a requirement that the nexus between the injury and a predicate act be 'direct' may, at least in some circumstances, be overly restrictive."74

However, most other courts considering the issue of RICO standing do use the direct/indirect analysis. For instance, the Seventh Circuit Court of Appeals stated in Haroco, Inc. v. American National Bank & Trust Co.75 that for standing to exist, "[t]he criminal conduct in violation of section 1962 must, directly or indirectly, have injured the plaintiff's business or property."76 Inherent in this holding, of course, is the ruling that indirect injury is sufficient to grant RICO standing. Several other courts have agreed with this ruling, finding that injury resulting indirectly from the predicate acts confers standing in a RICO action.77 However, a clear majority of the cases has held that only

73. Id. at 12.
74. Zervas v. Faulkner, 861 F.2d 823, 833 (5th Cir. 1988) (citing Sediama, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 n.15 (1985)). However, the Fifth Circuit appears to have reached the same result as those courts which explicitly require direct injury, in that it later held that "the predicate acts constitute both (1) factual (but for) and (2) legal (proximate) causation of the alleged injury." Ocean Energy II v. Alexander & Alexander, Inc., 868 F.2d 740, 744 (5th Cir. 1989) (citation omitted).
75. 747 F.2d 384 (7th Cir. 1984), aff'd per curiam, 473 U.S. 606 (1985) (decision handed down with Sediama, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)).
76. Id. at 398 (emphasis added). This language was recently cited with approval by the same court in Flip Side Prods. v. Jam Prods., 843 F.2d 1024, 1035 (7th Cir. 1988).
77. See, e.g., Sperber v. Boesky, 849 F.2d 60, 63 (2d Cir. 1988) ("The majority [in Sediama] evidently agreed that at least some kinds of indirect injury are recoverable . . .") (citing Sediama, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 n.15 (1985)); Grantham & Mann, Inc. v. American Safety Prods., 831 F.2d 596, 600 (6th Cir. 1987) ("'The criminal conduct in violation of section 1962 must, directly or indirectly, have injured the plaintiff's business or property.'") (quoting Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), aff'd per curiam, 473 U.S. 606 (1985)); Roeder v. Alpha Indus., 814 F.2d 22, 29 (1st Cir. 1987) ("Recovery under RICO . . . is not limited to direct victims.") (citing Sediama, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498-99 (1985)); Terre Du Lac Ass'n v. Terre Du Lac, Inc., 772 F.2d 467, 472 (8th Cir. 1985) ("This court has previously held that standing to pursue a RICO action exists even though the plaintiff does not allege that it was a target of the racketeering activity and even though the plaintiff only alleges that it suffered indirect injury.") (citing Alexander Grant & Co. v. Tiffany Indus., 742 F.2d 408, 411 nn.7 & 8 (8th Cir. 1984), vacated and remanded for further consideration in light of Sediama, 473 U.S. 479 (1985)), cert. denied, 475 U.S. 1082 (1986)); Miller v. Glen & Helen Aircraft, 777 F.2d 496, 498-99 (9th Cir. 1985) (allegation that investigator conspiracy caused portion of insurance proceeds to be paid to investigator, thereby depleting final settlement to plaintiff, demonstrated sufficient causal connection for RICO standing) (citing Sediama,
plaintiffs directly injured by the predicate acts have standing to sue

S.P.R.L. v. Imrex Co., 473 U.S. 479, 498-99 (1985)); Haroco, Inc. v. American Nat’l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984) (The “by reason of” language of section 1964(c) means that “[t]he criminal conduct in violation of section 1952 must, directly or indirectly, have injured the plaintiff’s business or property.”), aff’d per curiam, 473 U.S. 606 (1985); Alexander Grant & Co. v. Tiffany Indus., 742 F.2d 408, 411 nn.7 & 8 (8th Cir. 1984) (accounting firm sued client whose mail and wire fraud enabled it to remain in business for extended period before SEC investigation and which caused firm lost fees, expenses of investigation, and loss of business reputation; these allegations sufficient to confer RICO standing), vacated and remanded for further consideration in light of Sedima, 473 U.S. 922 (1985), standing ruling readopted on remand, 770 F.2d 717 (8th Cir. 1985), cert. denied, Kahn v. Alexander Grant & Co., 474 U.S. 1058 (1986); Lewis v. Lhu, 696 F. Supp. 723, 727 (D.D.C. 1988) (“An allegation that plaintiff was the target of the predicate fraudulent acts is unnecessary. All that is required to sustain standing under RICO is an allegation that plaintiffs’ injuries flowed, directly or indirectly, from defendants’ fraudulent acts.”); Williams v. Hall, 633 F. Supp. 639, 642 (E.D. Ky. 1988) (“[T]he logical conclusion from the opinion of the Court in Sedima is that indirect injury is a sufficient basis for a RICO claim under section 1952(a) or (c).”) (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 n.15 (1985)); Komm v. McFlikter, 682 F. Supp. 924, 928 (W.D. Mo. 1987) (Eight Circuit is “holding firm in allowing RICO recoveries when the illegal conduct has indirectly harmed the plaintiff.”) (citing Terre du Lac Ass’n v. Terre du Lac, Inc., 772 F.2d 467, 473 (8th Cir. 1985), cert. denied, 475 U.S. 1082 (1986)); Wooten v. Loshbough, 649 F. Supp. 531, 535-36 (N.D. Ind. 1986) (A judgment creditor’s allegations that defendants prevented her from collecting judgment on products liability claim by stripping judgment debtor of ability to survive judgment stated RICO claim because RICO statute “contains no requirement that . . . the civil RICO plaintiff be the victim of the predicate acts.”); Acampora v. Boise Cascade Corp., 635 F. Supp. 66, 69 (D.N.J. 1986) (An employee who was discharged because she discovered a manager’s thefts and RICO violations had RICO standing even though she did not allege she was injured directly by the predicate offenses because “[h]er injury flowed from defendant’s commission of a pattern of racketeering activity in connection with the conduct of an enterprise.”); Pandick, Inc. v. Rooney, 632 F. Supp. 1430, 1433 (N.D. Ill. 1986) (“To allow a RICO action only when the plaintiff is the direct victim of the predicate racketeering activities . . . would be to ignore the essence of a RICO violation . . . . Plaintiff has alleged a competitive injury resulting from defendants’ infiltration . . . . It is not necessary for [plaintiff] to allege that it was the target of the predicate fraudulent acts, as long as it was the victim of the dishonest operation of an enterprise.”); SJ Advanced Tech. & Mfg. Corp. v. Junkunc, 627 F. Supp. 572, 576 (N.D. Ill. 1986) (“Nothing blocks an injured competitor from calling on civil RICO” even when predicate acts are directed at third parties.); Philatelic Found. v. Kaplin, No. 85 Civ. 8571 (S.D.N.Y. May 9, 1986) (LEXIS, Genfed library, Dist file) (“While the defendants assert that the indirect injuries alleged by the [plaintiff] are not the type of injury contemplated by § 1964(c), there is no indication of such a limitation in the Sedima case. Indeed, the issue confronted in Sedima was not whether indirect injury from the racketeering enterprise was recoverable but whether direct injury from the predicate acts was sufficient to allow recovery. The Court implicitly accepted the premise that the injurious consequences of the enterprise other than the injury directly attributable to the fraudulent acts themselves would be recoverable.”) (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 n.15 (1985)); Beck v. Manufacturers Hanover Trust Co., 645 F. Supp. 675, 680 (S.D.N.Y. 1986) (“Plaintiffs need not allege that they were personally defrauded by defendants; rather, they need only
employers' RICO liability under civil RICO. 78

78. See, e.g., Ocean Energy II v. Alexander & Alexander, Inc., 868 F.2d 740, 744 (5th Cir. 1989) ("[A] person will be considered injured 'by reason of' a RICO violation if the predicate acts constitute (1) factual (but for) causation and (2) legal (proximate) causation of the alleged injury."); Burdick v. American Express Co., 855 F.2d 527, 529 (2d Cir. 1989) ("[In order to establish standing, [plaintiff] must show that the damage to his business or property resulted from . . . the predicate acts constituting the violation in this case."); Callan v. State Chemical Mfg., 584 F. Supp. 619, 623 (E.D. Pa. 1984) (former sales representatives had RICO standing based upon allegations that they were discharged for refusing to commit bribery pursuant to company policy even though predicate offense did not injure them directly).
As noted above, the United States Supreme Court recently declined an opportunity to resolve this split among the lower courts regarding whether or not indirectly injured plaintiffs have standing.
under RICO.79 Hence, the conflict in the lower federal courts on this issue remains unsettled.

III. RICO STANDING IN THE WRONGFUL DISCHARGE CONTEXT

The conflict in the lower federal courts on the issue of whether indirectly injured plaintiffs in general have standing to sue under RICO is mirrored in those courts' decisions dealing specifically with the issue of whether wrongful discharge plaintiffs, who by definition have suffered indirect injury,80 have RICO standing. Courts have upheld the general propositions that plaintiffs can recover under RICO for loss of employment opportunities81 and that loss of employment or employment opportunities qualifies as "injury to business or property" for purposes of the RICO statute.82 However, because wrongful discharge is not specifically mentioned in the statute as a predicate act (or "racketeering activity"),83 nor as a full-blown RICO violation,84 the connection between the conduct constituting the RICO violation and the discharge is necessarily a tenuous one.

Because the relationship between the defendant's RICO violation and the plaintiff's injury due to a wrongful discharge designed to facilitate the RICO violation is so indirect, the courts fall back upon the direct/indirect injury method of analysis when they are faced with the question of whether a plaintiff suing for wrongful discharge has standing to bring a civil RICO action.85 As a result, there is a division of authority in the lower federal courts as to whether Congress intended to afford discharged employees a civil remedy under RICO in these circumstances.86

Although the better interpretation of the United States Supreme Court decision in Sedima, S.P.R.L. v. Imrex Co.87 would be to find that indirect injury is sufficient to confer RICO standing,88 the majority of lower federal courts refuse to do so, ruling that only plaintiffs directly

---

80. See supra note 43 and accompanying text.
81. See supra note 38 and accompanying text.
82. See supra note 39 and accompanying text.
85. See supra notes 75-78 and accompanying text.
86. See Petition for Certiorari, supra note 29, at 59. Compare infra notes 92-113 and accompanying text with infra notes 114-57 and accompanying text.
88. See, e.g., Williams v. Hall, 683 F. Supp. 639, 642 (E.D. Ky. 1988) ("The logical conclusion from the opinion of the Court in Sedima is that indirect injury is a sufficient basis for a RICO claim.") (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 n.15 (1985)). See also supra notes 61-63 and accompanying text.
injured by the predicate acts have standing to sue under the statute. Four district court panels have ruled that plaintiffs wrongfully discharged for reporting or refusing to participate in RICO violations do have standing to bring a civil RICO suit. However, seven circuit courts in five different circuits and three district court panels have held that such plaintiffs have no standing to sue under RICO.

A. Court DecisionsGranting RICO Standing to Discharged Employees

The four district court opinions granting civil RICO standing to discharged employees present a mixed picture. In the earliest of the four opinions, Callan v. State Chemical Manufacturing Co., former sales representatives of a chemical company, which marketed its products exclusively through the use of commercial bribery, sought treble damages under section 1964(c) of RICO on the ground that they had been discharged in retaliation for refusing to engage in the bribery scheme which itself violated RICO. The defendant contended that the plaintiffs' injuries were not caused "by reason of" its alleged violations of section 1962 as required for standing under section 1964(c). The district court responded to this argument in a rather conclusory fashion, stating that the plaintiffs' contention "that they lost income and were discharged as a result of the fact that the affairs of [the defendant] were conducted through a pattern of racketeering activity . . . is sufficient under Section 1964." The court implied that if the plaintiffs had alleged only injuries stemming from the predicate offenses they would have had no standing, and that they did have standing because they alleged instead injuries stemming from the relationship between the predicate offenses and the enterprise. The district court panel found that the plaintiffs' injuries were "by reason of" a violation of section 1962 because they were injured not by the predicate offense of commercial bribery itself, but by "the fact that [defendant] adopted commercial bribery as a mandatory sales technique." Thus, the case seems to be one in which the discharge was in retaliation for a refusal to participate in the pattern of racketeering activity, and standing was based upon injury from that pattern and not upon injury from the predicate acts themselves.

89. See supra note 78 and accompanying text.
90. See infra notes 92-113 and accompanying text.
91. See infra notes 114-57 and accompanying text.
93. Id. at 620.
94. Id. at 623.
95. Id.
96. Id.
97. Id.
The next case which granted standing to a discharged employee came two years later and both cited and followed Callan. However, it did not involve a discharge for refusal to participate in racketeering, but rather an attempt to cover up racketeering by terminating a woman with knowledge of it. In Acampora v. Boise Cascade Corp., a discharged employee alleged that her former employer's operations manager harassed her and caused her to be fired in an effort to cover up a racketeering scheme she had discovered in which the manager had stolen from the employer and later resold the goods. The court found that the plaintiff had standing to sue the operations manager despite the fact that she did not allege that she was injured directly by the defendant's predicate acts of stealing because "[h]er injury . . . flowed from defendant's commission of a pattern of racketeering activity in connection with the conduct of an enterprise." The court "explained" this rather conclusory holding as follows:

Plaintiff claims that defendant, in his position as a manager in the corporation, engaged in an overall scheme which consisted of the commission of the predicate acts and the cover-up of those activities, which caused plaintiff to lose her job. In a similar case, the court found that while the predicate offense, commercial bribery, did not cause injury to plaintiff, the loss of plaintiff's employment for refusing to participate in bribe schemes was compensable under RICO as an injury "by reason of" a violation of § 1962. We are persuaded that plaintiff's alleged injury is sufficiently related to defendant's alleged illegal conduct to enable her to maintain this action.

The third district court opinion granting RICO standing to a discharged employee, Komm v. McFliker, appears to have involved a "pure" whistleblower situation, in which the plaintiff was not fired for refusing to participate in racketeering or in an effort to cover up racketeering, but merely in retaliation for reporting racketeering. The court noted that while courts in other circuits had denied RICO standing to whistleblowers on the ground that their discharge "is only indirectly caused by the pattern of illegal conduct alleged," its own circuit court of appeals seems to be holding firm in allowing RICO recoveries when the illegal conduct has indirectly harmed the plaintiff. Therefore, although plaintiff does not claim that he was terminated for refusing to act illegally . . . he does now allege a claim for which he could apparently receive relief in this Circuit, under RICO.

---

89. Id. at 67.
90. Id. at 69.
91. Id. (citation omitted).
92. 662 F. Supp. 924 (W.D. Mo. 1987) (the court did not recite the facts underlying the plaintiff's RICO claim other than to say that it was based upon his being discharged for whistleblowing).
93. Id. at 927.
94. Id. at 928 (citation omitted).
The court’s opinion is devoid of any other statement of the rationale for its decision.

The final and most recent district court case granting RICO standing to discharged employees involves terminations designed to cover up racketeering, but its actual holding was based upon a different theory than the coverup case described above. In Williams v. Hall,\footnote{683 F. Supp. 639 (E.D. Ky. 1988).} two former vice presidents of Ashland Oil Company alleged that for several years Ashland Oil conducted the procurement phase of its operations in part by illegally bribing officials of Middle Eastern countries in violation of both the Foreign Corrupt Practices Act and of RICO.\footnote{Id. at 640.} The plaintiffs “charge[d] that when they refused to participate in these illegal activities and refused to cooperate in the coverup that necessarily resulted, they were discharged from their employment.”\footnote{Id.}

The defendants moved for summary judgment on the ground that the “plaintiffs lacked standing to sue under RICO because they were not directly damaged by the predicate acts.”\footnote{Id. at 641.} The district court noted “a disagreement among the circuits as to whether a plaintiff may sue under § 1962(a) or (c) on the basis of an indirect injury from the predicate acts,”\footnote{Id.} and then noted that its own circuit “seems to be leaning toward the view that indirect injury is sufficient.”\footnote{Id. at 641-42.} After asserting that “the logical conclusion from the opinion of the Court in Sedima is that indirect injury is a sufficient basis for a RICO claim under § 1962(a) or (c),” however, the district court declined to resolve that issue and based its holding in the case on a different theory.\footnote{Id.}

The plaintiffs in Williams had argued in the alternative that they could meet the causation requirement for RICO standing even if direct causation were required because they were directly injured by section 1962(d), which prohibits a conspiracy to violate any other subsection of section 1962 of the statute.\footnote{Id.} The court seized upon this opportunity to recast the issue presented to it and to rule upon the issue as recast:

The issue is thus presented: Does a plaintiff have standing to sue under RICO if he can show the existence of a conspiracy to violate RICO, prohibited by § 1962(d), and that some overt acts committed in furtherance of the conspiracy were prohibited predicate acts under Section 1961, but his only injury was caused by other overt acts, which were not “predicate acts.” The court holds

\footnote{105. 683 F. Supp. 639 (E.D. Ky. 1988).}
\footnote{106. Id. at 640.}
\footnote{107. Id.}
\footnote{108. Id. at 641.}
\footnote{109. Id.}
\footnote{110. Id.}
\footnote{111. Id. at 641-42.}
\footnote{112. Id. Section 1962(d) reads as follows: “It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.” 18 U.S.C. § 1962(d) (1988).}
that this issue must be resolved in favor of plaintiffs and that they have standing to sue for their discharge and resulting damage if they can prove that the terminations were overt acts done in furtherance of a conspiracy to operate Ashland through a pattern of racketeering activity as defined by the RICO statute. 113

B. Court Decisions Denying RICO Standing to Discharged Employees

Although four district court panels have conferred RICO standing for wrongful discharge based upon what might be termed four different rationales, the majority of the district courts and all of the courts of appeals that have treated the issue have ruled that employees of an alleged RICO violator claiming derivative injury based on predicate acts directed at their employer’s clients or some other third party have not been injured in their business or property “by reason of” a violation of section 1962, and therefore do not have standing to sue under civil RICO. 114 Most of these decisions seem to be based upon the assertion that the plaintiffs therein have no standing because they were not actually injured “by” the predicate acts, and their authors often cite each other.

1. Decisions of the United States Circuit Courts of Appeals

The earliest circuit court of appeals decision reaching this conclusion is Morast v. Lance. 115 In Morast a former bank officer alleged that he was discharged in retaliation for reporting to the Comptroller of the Currency irregular banking transactions which violated RICO and for cooperating with the Comptroller’s subsequent investigation. 116 The plaintiff further alleged that he was discharged because of a conspiracy in violation of RICO in that “the only way defendants could continue their illegal scheme was to rid the bank of those people who would not ‘go along’ with the plan,” including the plaintiff. 117

However, the Eleventh Circuit Court of Appeals ruled that because the plaintiff was not fired for a refusal to participate in the bank’s illegal scheme, his “injury, his discharge, did not flow directly from the predicate acts, the defendants’ banking violations.” 118 Accordingly, the court ruled that he had no standing to sue under RICO.

The next two circuit court decisions to deny RICO standing in these circumstances were from the First Circuit Court of Appeals. In Nodine v. Textron, Inc., 119 the plaintiff alleged that the defendants vi-

---

115. 807 F.2d 926 (11th Cir. 1987).
116. Id. at 929.
117. Id. at 932-33.
118. Id. (footnote omitted).
119. 819 F.2d 347 (1st Cir. 1987).
olated RICO and Canadian customs laws and covered up these acts, and that he was fired because he reported the customs scheme to his superiors.\(^{120}\) Citing \textit{Sedima} and \textit{Morast}, the court held that Nodine was not "injured by RICO violations" in that

\[\text{his injury resulted from Textron's decision to fire him after he reported the customs scheme to his superiors. Firing Nodine under these circumstances was wrong, but it did not violate the RICO Act. Thus, William Nodine was not "injured in his business or property by the conduct constituting the violation." Accordingly, he lacked standing to bring a RICO suit.}\(^{121}\)

The other First Circuit case to deny RICO standing for wrongful discharge is \textit{Pujol v. Shearson/American Express}.\(^{122}\) That case involved a former Shearson officer who charged that he was fired because he took action to report and stop RICO predicate acts consisting of illegal banking transactions, defrauding of investors, and mail and wire fraud. The \textit{Pujol} court explicitly followed \textit{Nodine} despite the fact that Nodine was fired in retaliation for reporting racketeering, whereas Pujol was dismissed to prevent him from reporting racketeering.\(^{123}\) The court found this distinction to be irrelevant and devoid of any meaningful concrete application, stating that in any event, either sort of dismissal would be "an action independent of" the racketeering scheme and therefore not a violation of the RICO statute sufficient to confer standing under section 1964(c).\(^{124}\)

The next case in this series, \textit{Cullom v. Hibernia National Bank},\(^{125}\) cited \textit{Morast}, \textit{Nodine}, and \textit{Pujol} in support of the proposition that "[w]histle blowers do not have standing to sue under RICO for the injury caused by the loss of their job."\(^{126}\) The court elaborated only to the extent of saying that "being discharged for either reporting a RICO violation or refusing to participate in a RICO violation does not flow from the predicate acts; thus, both fail to meet the causal nexus required under the statutory language of § 1962(c) and under \textit{Sedima}."\(^{127}\) In support of its decision, the court also mentioned the fact that the plaintiff was neither the victim nor the target of the predicate acts.\(^{128}\)

A contemporaneous Third Circuit Court of Appeals decision, \textit{Diamond v. Reynolds},\(^{129}\) involved a former corporate officer who charged

\begin{footnotes}
\footnotetext[120]{Id. at 347-49.}
\footnotetext[121]{Id. at 349 (quoting \textit{Sedima, S.P.R.L. v. Imrex Co.}, 473 U.S. 479, 496 (1985)) (citation omitted).}
\footnotetext[122]{829 F.2d 1201 (1st Cir. 1987).}
\footnotetext[123]{Id. at 1205.}
\footnotetext[124]{Id.}
\footnotetext[125]{859 F.2d 1211 (5th Cir. 1988).}
\footnotetext[126]{Id. at 1215.}
\footnotetext[127]{Id. at 1217.}
\footnotetext[128]{Id. at 1218.}
\end{footnotes}
that he was fired for opposing a plan to control the corporation through racketeering. The Diamond court also cited Morast, Nodine, and Pujol in support of its holding that a discharged plaintiff had no standing to sue under RICO. The court held that whether Diamond was discharged in retaliation for objecting to the alleged conspiracy or to prevent him from reporting the conspiracy, his dismissal “did not flow from the commission of the predicate acts.” Therefore, the court felt that he was not injured “by reason of a violation of section 1962,” as is required for standing to exist under the Act. As will be discussed below, the United States Supreme Court recently refused to review this decision.

The next circuit court opinion on the issue also denied RICO standing to a discharged employee. In Burdick v. American Express Co., a former vice president of Shearson Lehman Brothers alleged that he was terminated as a result of numerous complaints he made to his supervisor and others about racketeering activities engaged in by the firm and its employees. The Second Circuit Court of Appeals ruled that Burdick had no standing to bring a civil RICO suit because he did not allege in the complaint that his own business or property was injured as a result of the predicate acts of racketeering committed by the defendant.

The final and most recent circuit court opinion to decide the issue also denied RICO standing to a whistleblower. In Norman v. Niagara Mohawk Power Corp., the plaintiffs were former nuclear power plant quality assurance auditors. They claimed that they were the victims of harassment and intimidation, false performance evaluations, disparaging reports damaging to their careers, and reassignments which amounted to demotions, all in retaliation for reporting various plant violations and defects to company management and to the Nuclear Regulatory Commission.

The plaintiffs filed complaints with the Department of Labor in 1985 under the Energy Reorganization Act, which requires employees to notify the Nuclear Regulatory Commission of statutory violations or safety defects, prohibits employers from discharging or discriminating against “whistle-blowing” employees, and permits employees who believe that they have been improperly discharged or discriminated against to file a complaint with the Department of Labor. The De-

---

131. Id. at 8.
133. 865 F.2d 527 (2d Cir. 1989).
134. Id. at 529.
135. 873 F.2d 634 (2d Cir. 1989).
136. Id. at 635.
partment of Labor dismissed one plaintiff's complaints for failure to
meet a thirty-day limitation period and dismissed the other's after an
administrative law judge found that the defendant was not conspiring
to harass or retaliate against him.\textsuperscript{138}

In 1986 the plaintiffs filed suit under RICO, alleging that Niagara
engaged in a pattern of racketeering in furtherance of a scheme to
conceal from its shareholders, the Nuclear Regulatory Commission,
and the New York Public Service Commission construction deficien-
cies, excessive costs, and management failures at the plant.\textsuperscript{139} They
also alleged that they were victims of a related scheme to ruin anyone
who threatened the company's ability to hide the true state of affairs
at the plant.\textsuperscript{140}

The district court dismissed the RICO claim and the Second Circuit
affirmed that dismissal on three grounds. The circuit court ruled that
the administrative remedy provided under the Energy Reorganization
Act was the exclusive remedy for whistleblowers in the plaintiffs' situ-
ation, and that the plaintiffs' RICO claim was barred under res judi-
cata principles because it made the same allegations as complaints
which had been previously dismissed by the Labor Department and in
a separate district court action.\textsuperscript{141} However, the court also held that
RICO standing "requires that there be a causal connection between
the prohibited conduct and plaintiff's injuries."\textsuperscript{142} The court con-
cluded that no such causal nexus existed between the plaintiffs' inju-
ries and the defendant's alleged RICO violations.\textsuperscript{143}

2. Decisions of the United States District Courts

Three district court panels have also denied RICO standing for loss
of employment. In a very recent case, Hecht v. Commerce Clearing
House,\textsuperscript{144} a former employee claimed that he was fired for insisting on
rectifying and refusing to participate in allegedly fraudulent sales
practices which violated RICO. In dismissing the suit, the court held
that the plaintiff lacked standing for several reasons.

The court first noted that it had previously "refused to recognize a
plaintiff's standing for 'whistle blowing.'"\textsuperscript{145} The court then followed
Cullom in ruling that Hecht also lacked standing as a "non-partici-
pant" in the company's alleged scheme because "the act of 'not partici-
pating' is legally indistinguishable from the act of 'whistle blowing' for

\begin{itemize}
\item[139.] Id. at 636.
\item[140.] Id.
\item[141.] Id. at 637-38.
\item[142.] Id. at 636.
\item[143.] Id.
\item[144.] 713 F. Supp. 72 (S.D.N.Y. 1989).
\item[145.] Id. at 74.
\end{itemize}
the purpose of standing analysis under RICO." The court also held that Hecht's injuries were not proximately caused by his conduct as either a whistleblower or a non-participant, and noted that he was neither the target, the competitor, nor the customer of the alleged racketeering enterprise.

In Kouvakas v. Inland Steel Co., the plaintiff charged that defendants engaged in a pattern of racketeering by causing fraudulent invoices and other documents to be mailed to Inland Steel's customers, thereby falsely assuring them that Inland Steel employees had inspected the customers' goods and that the goods were conforming. Spiro Kouvakas alleged that defendants harassed and abused him when he refused to participate in the fraudulent scheme, causing him to become physically disabled and lose his job. The court found that the alleged predicate acts were falsification of inspection documents, and that the plaintiff had not shown that he was injured "by reason of" these acts. Therefore, summary judgment was granted to the defendant on the civil RICO claim.

Finally, in another district court case, Jones v. Baskin, Flaherty, Elliot & Mannino, P.C., a discharged attorney sued the law firm that had fired him, alleging, among other things, predicate racketeering acts of tax and mail fraud which had caused injury "in his business, property rights, contractual rights and employment." The court held that because "standing to maintain a private civil RICO action depends on whether the plaintiff suffered 'direct injury' by the conduct which violates section 1962," and "neither the acts of tax fraud nor mail fraud themselves directly caused the injuries suffered by the plaintiff," he had no civil RICO standing. The Jones court also cited Morast in support of its decision.

C. The Issue in the United States Supreme Court

On November 14, 1988, the United States Supreme Court denied certiorari in Diamond v. Reynolds. As noted above, Diamond was a

146. Id. at 75.
147. Id. at 76.
148. Id.
149. 646 F. Supp. 474 (N.D. Ind. 1986).
150. Id. at 476.
151. Id.
152. Id. at 477.
153. Id.
155. Id. at 599 (quoting the plaintiff's complaint). The plaintiff did not elaborate upon or explain this rather summary allegation.
156. Id. at 599-600.
157. Id. at 600.
wrongful discharge case which squarely presented the issue of whether the Supreme Court's expansion of RICO standing in *Sedima* to include those directly injured by the predicate acts simultaneously eliminated RICO standing for those who had suffered indirect injury, as some lower courts had been interpreting that decision.\textsuperscript{159} The *Diamond* case involved a former corporate chief financial officer who alleged that he was fired because he opposed the plan of certain corporate directors to control the corporation through illegal racketeering activities in violation of RICO.\textsuperscript{160}

The district court held that Diamond "does not have standing under *Sedima*, because he was not 'injured . . . by the conduct constituting the [RICO] violation'."\textsuperscript{161} The district court reached this conclusion on the basis of its statement that

the discharge of plaintiff may have assisted defendants' alleged scheme, but the discharge in itself is not conduct constituting a violation of RICO. The persons injured by the alleged racketeering acts of [defendant] are the shareholders . . . . They alone have standing to bring a RICO action containing the type of allegations made by plaintiff. Plaintiff, however, represents himself only and has never asserted that he is bringing suit on behalf of the shareholders . . . .\textsuperscript{162}

The United States Court of Appeals for the Third Circuit affirmed the district court's judgment on the basis of its own reading of *Sedima*, stating that

Diamond's dismissal did not flow from the commission of the predicate acts . . . . [W]hether Diamond was discharged in retaliation for objecting to the alleged conspiracy or to prevent him from reporting the conspiracy, he does not have RICO standing . . . . Diamond was not a target—either directly or indirectly—of the alleged criminal conduct, and his discharge cannot provide the basis for RICO standing. The district court properly held that Diamond's discharge was not sufficiently linked to the predicate acts that comprised the pattern of racketeering activity.\textsuperscript{163}

Diamond, the discharged former employee, asked the United States Supreme Court to review the case.\textsuperscript{164} His petition stated that certiorari should be granted for the three following reasons:

1. to resolve the conflict among nine circuits as to whether victims with "racketeering injury" also known as "indirect injury" have RICO standing
2. because the decision below holding that *Sedima* restricted RICO standing, conflicts with this Court's decision in *Sedima*, and
3. because the fact pattern in this case, an employee fired for opposing

\textsuperscript{159.} Petition for Certiorari, supra note 29, at i.
\textsuperscript{162.} Id.
\textsuperscript{163.} Id.
RICO violations, is being frequently presented to the federal courts and is resulting in conflicting decisions. Nonetheless, the Court denied his petition, and the conflict remains.

IV. CONCLUSION

Although the better reading of the United States Supreme Court decision in Sedima, S.P.R.L. v. Imrex Co. would be to find that both directly and indirectly injured plaintiffs have standing under civil RICO, the majority of the lower federal courts have generally ruled that only those plaintiffs suffering direct injury of some sort may sue under section 1964(c) of the Act. In addition, the majority of courts to address the issue have held specifically that plaintiffs filing suit under civil RICO for loss of employment have no standing to bring such a suit. Courts' positions on the issue of civil RICO standing for wrongful discharge appear to be dictated by their policy stance on the issue of whether a RICO remedy ought to exist in a particular situation rather than by any principled analysis of the problem. This approach makes difficult any predictions about when such a remedy is available to discharged employees.

Those courts which have granted civil RICO standing based upon wrongful discharge have done so in cases involving plaintiffs who refused to participate in racketeering, plaintiffs who reported racketeering, plaintiffs who merely had knowledge of racketeering but had not taken any action to report it, and plaintiffs who had both refused to participate in and reported racketeering. All of these decisions seem premised at bottom upon the conclusion that such discharges constitute injury caused by a pattern of racketeering in connection with the operation of an enterprise, and that as a matter of public policy, loss of employment in such a situation is an injury "by reason of" a RICO violation even though it is not caused directly by the predicate acts. Even in the case which granted standing on an alternative theory but declined to decide the issue of whether indirect injury such as loss of employment is sufficient to confer RICO standing, the court intimated that it was.

Similarly, that majority of courts which has denied civil RICO

---

167. See supra notes 60-63 and accompanying text.
168. See supra note 78 and accompanying text.
169. See supra notes 114-57 and accompanying text.
170. See supra notes 92-97 and accompanying text.
171. See supra notes 102-04 and accompanying text.
172. See supra notes 98-101 and accompanying text.
173. See supra notes 105-13 and accompanying text.
174. See supra note 111 and accompanying text.
standing based upon loss of employment appears also to have done so based upon a policy judgment, though this judgment has been disguised as a factual inquiry into causation. Some of the cases refuse to find standing in such a circumstance on the ground that a person who is discharged has not been "directly" injured in his own business or property "by" or "by reason of" the predicate acts committed by the defendant.175 Similarly, other cases have denied standing on the ground that the discharge "did not flow from the predicate acts."176 Two cases hold that a person who is discharged for reporting racketeering activity is not injured by a RICO violation as required by section 1964(c) because the termination of employment in retaliation for whistleblowing, though wrong, is not itself a RICO predicate act.177

Therefore, it appears that the trend of decisions is clearly toward denying civil RICO standing for wrongful discharge. Moreover, those wishing to buck this trend will have a difficult time, for they will have to argue that the courts' policy decision on the issue is in error, a much harder undertaking than attempting to show a court that its reading of a statute or of a Supreme Court decision is in error. Moreover, because wrongful discharge is by definition an injury which results only indirectly from a RICO violation,178 plaintiffs' attorneys will be unable to meet the majority of courts' requirement that civil RICO plaintiffs allege and prove direct injury. As a result, the prospect of bringing a successful civil RICO claim based upon wrongful discharge seems dim under the current state of the law.

175. See supra notes 133-53 and accompanying text.
176. See supra notes 115-18, 125-32 and accompanying text.
177. See supra notes 119-24 and accompanying text.
178. See supra note 43 and accompanying text.