A Quarter Century of Reading the Words: Supreme Court RICO Jurisprudence From *Sedima* To *Boyle*

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Next July will mark the twenty-fifth anniversary of the Supreme Court's first major civil RICO case, *Sedima, S.P.R.L.* v. *Imrex Co.*[1] Picking up on his decision for the Court in *United States* v. *Turkette*,[2] a criminal case decided four years previously, Justice White in *Sedima* looked to the words of the statute, rather than to notions of policy or Congressional intent, to determine the scope of the private treble damages action authorized by 18 U.S.C. § 1964(c). The Court was closely divided in *Sedima*,[3] but the result and, more importantly, the juridical approach have stood the test of time. Just last Term, in *Boyle* v. *United States*,[4] a criminal case that addressed an issue that had repeatedly come up in civil RICO litigation, the Court rejected an attempt to graft requirements onto the RICO "enterprise" element that had found favor in numerous lower courts, saying "[w]e see no basis in the language of RICO for the structural requirements that petitioner asks us to recognize"[5] and noting that "[i]n prior cases, we have rejected similar arguments in favor of the clear but expansive text of the statute."[6]

Since 1985, the Supreme Court has repeatedly focused on the commonly understood meaning of the words chosen by Congress in rejecting lower courts' misguided policy forays and formulaic incantations of rules nowhere to be found in the statute's text. It has done so notwithstanding Justice Powell's complaint in his dissent in *Sedima* that RICO has strayed far from "suits . . against the 'archetypal, intimidating mobster,'" which were thought to have been the goal of the 91st Congress, and had resulted in "private civil actions . . . being brought frequently against respected businesses to redress ordinary fraud and breach-of-contract cases."[7] The complaints about the scope of RICO have not abated, but the Supreme Court has been clear and consistent in saying that the remedy for the defects in the statute — which are very real, and have exactly the consequences the detractors assert — lies with Congress, not with the courts. The job of the courts is to figure out the meaning of the words of the statute — not what they *should* mean, but what they actually *do* mean — and enforce those words as written.

Background

RICO was passed as Title IX of the Organized Crime Control Act of 1970.[8] Together with Title III of the Act, which deals with wiretapping, it is high on the list of carelessly worded federal criminal statutes.[9] It lived in obscurity for a decade, however, because it was thought of *only* as a criminal statute, and those caught in its grasp were, for the most part, very bad people. Only prosecutors, criminal defense attorneys, and organized crime figures had occasion to consider the meaning of the words Congress had used. At some point in the early 1980s, however, plaintiffs' lawyers[10] woke up to the possibilities of a broadly drafted criminal statute containing a private right of action for treble damages, and the race was on.[11]

It is difficult these days to recall without smiling the shock and horror with which the business community greeted the notion that businesses and businessmen could be sued under a statute labeling them "racketeers." Nowadays, businesses and their executives are called that, and worse, as a matter of course. But reputational concerns were a real part of the *sturm und drang* around civil RICO litigation during the 1980s and 1990s, notwithstanding that the greater part was surely the new leverage RICO afforded those with grievances against businesses. Previously, the federal mail and wire fraud statutes[12] had not been privately enforceable; now, there was a federal cause of action for treble damages, with attorneys' fees. The RICO action had some structural prerequisites that needed to be met, but these did not appear to be much of a problem: Because the early RICO cases had all been criminal cases, and because the

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federal courts are generally prosecutor-friendly in construing criminal statutes and had been so here, it appeared that it would be easy for RICO civil plaintiffs to jump through the necessary hoops.

The relaxed judicial attitude did not cause much stir when the only RICO cases were criminal. One could more or less trust the discretion of prosecutors in choosing whom to indict, and the jury could not convict without finding a very high level of intent beyond a reasonable doubt. Once the action in the RICO arena moved to the civil side, however, things were seen in a different light. Permitting anyone with a filing fee to sue businesses for treble damages under amorphous fraud theories was very, very scary. Something had to be done.

Something was done. Businesses and their lawyers proffered theory after theory as to what a RICO plaintiff had to do to jump through the structural hoops erected by the statute. All of the theories were premised on some variation of the argument that Congress was solely concerned with organized crime in enacting RICO and that it did not "really" intend for RICO's "draconian" remedies to be applied to "legitimate" businesses. Many of these theories found favor in the lower federal courts. Such was the state of play in 1985, when the Second Circuit's decision in *Sedima* reached the Supreme Court.

The Basic Private Claim Under Section 1962(c)

Almost all civil RICO claims are brought under 18 U.S.C. § 1962(c), which 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.[13]

"Racketeering activity" comprises a host of federal and state crimes (known as "predicate acts").[14] The basic RICO claim, therefore, requires (i) a "person" who (ii) conducts the affairs of[15] (iii) an "enterprise" (iv) through a "pattern" of specified crimes. The quoted words have statutory definitions that themselves raise issues;[16] "conduct" is just an ordinary English word, but the fact that it can be both an noun and a verb was at the root of the disagreement between the majority and the dissent in *Reves* v. *Ernst & Young*.[17] Each of these elements has been the subject of close scrutiny by the Supreme Court, as has been the statutory grant[18] of a right of action for treble damages to anyone injured "by reason of" a violation of the substantive sections.[19]

The Sedima *Decision*

At issue in *Sedima* were two of the tools the lower courts had used to cut back on the use of RICO against "legitimate" businesses. The word "tools" is precise; the lower courts were nothing if not frank in acknowledging that they were construing the statute instrumentally: Writing for the Second Circuit in *Sedima*, Judge Oakes had decried "[t]he uses to which private civil RICO has been put" as "extraordinary, if not outrageous."[20] He identified RICO as "a classic case of a statute whose ambiguous language needs to be construed in light of Congress's purpose in enacting it"[21] — *i.e.*, get those mobsters and don't bother "such respected and legitimate 'enterprises' as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch."[22] Accordingly, the Second Circuit held that a private civil RICO action did not lie unless the defendant had been *criminally convicted* of a predicate act or of a RICO violation,[23] and it further held that the "by reason of" language in section 1964(c) was not satisfied by injury flowing from the predicate acts of racketeering but only from "injury caused by an activity which RICO was designed to deter."[24]

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The Supreme Court reversed. On the criminal conviction issue, the Court noted that "the word 'conviction' does not appear in any relevant portion of the statute"[25] and, after surveying the legislative history, concluded that "we can find no support in the statute's history, its language, or considerations of policy" for a criminal conviction requirement. It gave the putative "racketeering injury" requirement even shorter shrift. "A reading of the statute belies any such requirement," it said.[26] Injury from the predicate acts is all that is required for a claim under section 1962(c); there is "no room in the statutory language for an additional, amorphous 'racketeering injury' requirement," and "[g]iven the plain words of the statute," Congress had to know it.[27] End of story.

But *Sedima* is not remembered for the Second Circuit rules it overturned. Rather, it is best known for its foreshadowing of a rule that largely did not yet exist. The Court was not unsympathetic to the Second Circuit's concerns that "RICO is evolving into something quite different from the original conception of its enactors,"[28] but it held that "this defect — if defect it is — is inherent in the statute as written," and it was up to Congress to correct it.[29] What the courts *should* do, Justice White said, was to pay attention to the specific requirements that *were* in the statute and, in particular, "develop a meaningful concept of 'pattern.'"[30] In what may be the second-most famous footnote in Supreme Court history,[31] the Court focused hard on the words used by Congress in defining "pattern of racketeering activity":

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. *Indeed, in common parlance two of anything do not generally form a "pattern."*[32]

Footnote 14 of *Sedima* is what the case is remembered for. Its close parsing of the difference between "requires" and "means," in conjunction with its appeal to "common parlance" to understand the meaning of the statutory term "pattern," set the tone for the Court's entire RICO jurisprudence going forward.

*The Post-*Sedima *Decisions*

The substantive issue laid out in footnote 14 of *Sedima* was picked up in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*,[33] in which the Court reversed an Eighth Circuit holding that the "pattern" requirement could not be met simply by multiple predicate acts but required multiple fraudulent schemes. The Court held that more than merely two predicate acts was required — one really did need to understand and apply the word "pattern" in its ordinary English sense — but no "multiple scheme" requirement was to be found in the words of the statute,[34] nor was any requirement that racketeering activity could not form a "pattern" without being somehow characteristic of organized crime.[35] "We must 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used,'"[36] Justice Brennan said, and "the argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text, and is at odds with the tenor of its legislative history."[37] In fleshing out "pattern" as something requiring repetitive behavior that either lasts for a long period of time or in some other way indicates a threat of continuing criminal activity, the Court was doing nothing more or less than giving content to the "ordinary meaning" of the word chosen by Congress.

Since *H.J.*, the Court has repeatedly resorted to the ordinary meaning of statutory words and phrases to answer RICO questions. In *Reves* v. *Ernst & Young*,[38] for example, the issue was the the requirement that a defendant under section 1962(c) "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs." What level of involvement, or

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management, or control was required? Everyone agreed that the first use of "conduct" — the verb — required some level of control over the enterprise's affairs,[39] but what was one to make of the second use — the noun — as the object of a preposition in a verb phrase whose verb was "participate"? "Participate" was surely a term of "breadth" but, in context, did not make it all the way to being a synonym for "aid and abet."[40] Rather:

[W]ithin the context of § 1962(c), "participate" appears to have a narrower meaning. We may mark the limits of what the term might mean by looking again at what Congress did *not* say. On the one hand, "to participate . . . in the conduct of . . . affairs" must be broader than "to conduct affairs," or the "participate" phrase would be superfluous. On the other hand, as we already have noted, "to participate . . . in the conduct of . . . affairs" must be narrower than "to participate in affairs," or Congress' repetition of the word "conduct" would serve no purpose. It seems that Congress chose a middle ground, consistent with a common understanding of the word "participate" — "to take part in." Webster's Third New International Dictionary 1646 (1976).[41]

Having provided this context, the Court readily concluded that "[i]n order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs," and it held that a test requiring defendant to play some role in the "operation or management" of the enterprise was an easy-to-apply way to implement the statutory language.[42]

The Court's focus on the correct, in-context meaning of the words Congress actually used in drafting RICO continued after *Reves.* At issue in *National Organization of Women* v. *Scheidler*[43] was whether an alleged conspiracy to shut down abortion clinics through extortion and other acts of racketeering activity stated a RICO claim notwithstanding that neither the enterprise nor the alleged predicate acts were motivated by an economic purpose. Chief Justice Rehnquist's opinion (for a unanimous Court) brushed aside arguments of Congressional "purpose" to hold that "RICO requires no such economic motive,"[44] because "the statutory language is unambiguous"[45] and Congress did not require such a motive "either in the definitional section or in the operative language."[46] Likewise, in *Cedric Kushner Promotions, Ltd.* v. *King,*[47] Justice Breyer (also for a unanimous Court) had repeated recourse to "the statute's language, read as ordinary English"[48] to hold, under section 1962(c), that the "person" must be distinct from the "enterprise" he conducted[49] but that a corporation's sole shareholder *was* distinct from the company he owned[50] and that fine distinctions in the lower court caselaw between individuals acting within and without the scope of their authority had no basis in the statutory language.[51]

The Supreme Court's careful textual analysis of the statute to determine the scope of RICO continues unabated. Just this past Term, in *Boyle* v. *United States*,[52] Justice Alito looked to what Congress actually said — and what it did not say — to reject the numerous appellate decisions holding that an "enterprise" must have some structure beyond that inherent in the pattern of racketeering in which it engages.[53] "Structure," yes; so much is implicit in the statutory word "enterprise" and is supported by the "ordinary usage" of the term as adumbrated in the four separate dictionaries cited by the Court.[54] But "beyond that inherent in the pattern"? Or specific "additional structural attributes," such as "hierarchy," "role differentiation," or "chain of command"? No: "We see no basis in the language of RICO for the structural requirements that petitioner asks us to recognize."[55] When Congress wanted to require such additional elements it knew how to do so,[56] but "Congress included no such requirements in RICO."[57] The statutory language is "clear," the Court held, and that was that.[58] Nearly 25 years after *Sedima*, the Court's focus on the "plain words of the statute," and their meaning in "common parlance," remains alive and well.

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Where We Are Now

It is possible to read *Sedima* as agreeing that RICO did need to be reined in but telling the courts that they were simply going about it the wrong way. Read the words of the statute, Justice White said; you will find what you need there.

So it has turned out. Not only by developing a "meaningful concept of 'pattern,'" but also by insisting that the defendant "conduct" a distinct "enterprise" under section 1962(c) and by requiring that injury under sections 1962(a) and (b) flow from the conduct that Congress, by its choice of verbs, chose to make illegal, courts have prevented the nightmare scenarios posited in the 1980s from transforming themselves into reality. The floodgates have not opened. Civil RICO actions that survive motions to dismiss (and, even more so, those that survive motions for summary judgment) tend to contain detailed, credible, and factually supported allegations of long-term, pervasive wrongdoing. There are plenty of exceptions, of course — RICO is far from a perfect statute, and this is not yet a perfect world — but, for the most part, private civil RICO litigation seems to be doing a not bad job of remedying wrongs *without* effecting either the over-deterrence or the unnecessary stigmatization the alarmists feared. Or so it has seemed to one who has read and litigated many, many RICO cases over the last 25+ years.

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[1] 473 U.S. 479 (1985).
[2] 452 U.S. 576 (1981).
[3] The decision was 5-4, with Chief Justice Burger and Justices Stevens, Rehnquist, and O'Connor joining the majority and Justices, Marshall, Brennan, Blackmun, and Powell dissenting.
[4] 2009 BL 122450 (June 8, 2009).
[5] *Id*. at 9.
[6] *Id*. at 11.
[7] 473 U.S. at 524, n.1 (Powell, J. dissenting).
[8] Pub. L. No. 91-452, 84 Stat. 922.
[9] The author of RICO is Prof. G. Robert Blakey, who in 1970 was chief counsel to the Senate committee that drafted the statute. In classic Washington fashion, Prof. Blakey has for the last three decades made a living writing about the statute and representing clients in RICO cases.
[10] The phrase "plaintiffs' lawyers" here is intended to be neutral — meaning, quite literally, lawyers for persons and entities appearing in litigation as plaintiffs. Although some of these lawyers were members of the traditional plaintiffs' class action bar (and some were personal injury lawyers), many others represented businesses suing other businesses. Some traditional business defense firms would not touch a plaintiff's RICO case, but many others would and did.
[11] There were only nine reported civil RICO decisions in the entire decade of the 1970s, *Sedima*, 473 U.S. at 481, n.1, whereas there were over a thousand new civil RICO filings in 1986 alone, O'Neill, *"Mother of Mercy, Is This The Beginning of RICO?": The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. Rev. 172, 173 n.8 (1990). There were, however, numerous *criminal* RICO decisions throughout the early years. *See generally* Marcu & Chepiga, *The Evolution of RICO's "Pattern-of-Racketeering" Element: From Sedima to H.J. Inc. and Its Progeny*, in 155 PLI/Crim. 97 (1990) (collecting cases).
[12] 18 U.S.C. §§ 1341, 1343.
[13] There are two other substantive sections, 18 U.S.C. § 1962(a), (b), as well as a conspiracy section, 18 U.S.C. § 1962(d). Subsection (a) prohibits investing the proceeds of racketeering activity in an enterprise,

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and subsection (b) prohibits acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity. For reasons related to the theme of this article — *i.e.*, the words (and specifically the verbs) Congress used to describe the sequence of events necessary to establish a substantive violation — it is very difficult (albeit not impossible) for a civil plaintiff to establish the type of injury needed to recover under subsections (a) and (b). *See generally Kmart Corp.* v. *Areeva, Inc.*, Civ. Case No. 04-40342 (E.D. Mich. Sept. 29, 2006) (discussing bases on which courts have found "investment injury" under 18 U.S.C. § 1962(a)); *In re Tyco Int'l, Ltd.*, MDL Docket No. 02-1335-B (D.N.H. June 11, 2007) (upholding "investment injury" and "acquisition injury" claims under 18 U.S.C. § 1962(a), (b)).

In the case of civil RICO conspiracy claims, the Supreme Court has held that there can be no claim unless the injury flows from actual predicate acts of racketeering. *Beck* v. *Prupis,* 529 U.S. 494 (2000). The analysis in *Beck* is not directly related to the thesis of this article, because it did not involve a close textual analysis of specific portions of the statute, but it is thematically related in that it did not advert to policy considerations but rather to well understood, pre-existing principles of law — in this case, the common law principle that civil conspiracy actions lie only to redress conduct that itself constitutes an independent tort. *See id.* at 501 (citing *Restatement (Second) of Torts* § 876).

For another example of the Court's use of pre-exisiting concepts to flesh out RICO's statutory language, see *Holmes* v. *SIPC*, 503 U.S. 258, 267-68 (1992), which interpreted the requirement of 18 U.S.C. § 1964(c) that a RICO plaintiff's injuries occur "by reason of" the underlying statutory violation to require reference to the ordinary common law concept of proximate cause. How that common law concept has played out in subsequent cases, particularly *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Bridge* v. *Phoenix Bond & Indemnity Co.*, 2008 BL 122111 (June 9, 2008), is beyond the scope of this article.

[14] 18 U.S.C. § 1961(1).

[15] Or "participate[s], directly or indirectly, in the conduct of" the affairs of.

[16] See 18 U.S.C. §§ 1961(5) (definitions of "racketeering activity" and "pattern of racketeering activity"), 1961(3) (definition of "person"), 1961(4) (definition of "enterprise").

[17] 507 U.S. 170 (1993).

[18] 18 U.S.C. § 1964(c).

[19] *See Holmes* v. *SIPC*, 503 U.S. 258 (1992) (discussed in footnote 13 *supra*).

[20] 741 F.2d 482, 487 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

[21] *Id.* at 488.

[22] *Id.* at 487. Judge Oakes's business pantheon provides its own set of ironies when viewed with twenty-five years of hindsight.

[23] *Id.* at 496-504.

[24] *Id.* at 494-96. What that phrase meant, of course, was a trifle unclear, but Judge Oakes suggested it at least included infiltration of legitimate enterprises by mobsters. *Id.* at 495-96.

[25] 473 U.S. at 488.

[26] *Id.* at 493, 495.

[27] *Id.* at 495, n.13.

[28] *Id.* at 500.

[29] *Id.* at 499. Congress *has* acted to narrow RICO in at least one broad category of cases, providing in section 107 of the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (amending 18 U.S.C. § 1964(c)), that "fraud in the sale of securities" cannot be a predicate act for a civil RICO claim unless the defendant has already been convicted of that crime.

[30] *Id.* at 500.

[31] The first, of course, is footnote 4 of *Carolene Products*. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

[32] 473 U.S. at 497 n.14 (emphasis added).

[33] 492 U.S. 229 (1989).

[34] *Id.* at 236.

[35] *Id.* at 243-44.

[36] *Id.* at 238 (quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962)).

[37] *Id.* at 244.

[38] 507 U.S. 170 (1993).

[39] *See id.* at 178, 187-88. Arguing from the Oxford English Dictionary, Justice Souter's dissent nevertheless tried to soften even the implications of the use of the word as a verb. *Id.* at 187-88 (Souter, J., dissenting).

[40] *Id.* at 179.

[41] *Id.*

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[42] *Id.*
[43] 510 U.S. 249 (1994).
[44] *Id.* at 252.
[45] *Id.* at 261.
[46] *Id.*
[47] 533 U.S. 138 (2001).
[48] *Id.* at 161.
[49] *Id.* ("In ordinary English one speaks of employing, being employed by, or associating with others, not oneself."); *id* at 163 ("[l]inguistically speaking, an employee who conducts the affairs of a corporation through illegal acts comes within the terms of [the] statute . . . [a]nd, linguistically speaking, the employee and the corporation are different 'persons,' even where the employee is the corporation's sole owner"); *id.* at 164 (discussing the "natural" meanings of "employed by" and "associated with").
[50] *Id.* at 163.
[51] *Id.* (regardless of whether he is acting within or without the scope of his authority, "the corporate owner/employee . . . is distinct from the corporation itself, . . . [a]nd we can find nothing in the statute that requires more 'separateness' than that").
[52] 2009 BL 122450 (June 8, 2009).
[53] *Boyle* was a criminal case, but this "enterprise" issue has come up literally hundreds of times in civil RICO litigation.
[54] 2009 BL 122450 at 7.
[55] *Id.* at 9.
[56] *Id.* at 10.
[57] *Id.* at 10.
[58] *Id.* at 11.

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