RICO LAW—WRONGFUL DISCHARGE AND RICO CONSPIRACY STANDING: THE HOLMES v. SECURITIES INVESTOR PROTECTION CORP. DIRECT-INJURY TEST RESOLVES THE STANDING ISSUE

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Introduction

Section 1962(a)-(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO")\(^1\) makes it a violation of federal law to invest, maintain an interest, or participate in the affairs of an enterprise through a pattern of racketeering activity.\(^2\) Section 1962(d) of RICO also makes "[i]t . . . unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."\(^3\) Finally, section 1964(c) of RICO provides treble damages to any person "injured in his business or property by reason of a violation of section 1962."\(^4\)

In Holmes v. Securities Investor Protection Corp.,\(^5\) the United States Supreme Court held that an injury occurs "by reason of" a

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2. 18 U.S.C. § 1962(a)-(c) (1988). These subsections state the following:
   \(a\) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .
   \(b\) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
   \(c\) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Id.
4. 18 U.S.C. § 1964(c) (1988) (emphasis added). The full text of this subsection states: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Id.
RICO violation only if the violation directly causes the injury.6 Wrongfully discharged employees have argued that their injuries are directly caused by their former employers' conspiracies to violate RICO. They seek treble damages pursuant to section 1964(c) in two situations. In one situation, the employee is discharged for refusing to participate in the racketeering activity of an employer.7 In the other situation, the employee is discharged for "blowing the whistle" on an employer's racketeering activity.8

The use of RICO's civil damages provision by wrongfully discharged employees, however, rests on the edge of RICO's "direct-injury" analysis. Is the wrongful discharge directly caused by the conspiracy? Should a wrongfully discharged employee's RICO suit survive a motion to dismiss? These questions have divided the United States courts of appeals, and the United States Supreme Court has not resolved the issue. This Note analyzes these questions and discusses the effects of the Holmes decision on the standing of wrongfully discharged employees.

Section I discusses the elements of a RICO conspiracy, the type of injury which is compensable under section 1964(c), and the pre-Holmes wrongful discharge cases. Section II takes a closer look at the facts and analysis of Holmes, and examines the two post-Holmes wrongful discharge cases in the United States courts of appeals. These two cases, Schiffels v. Kemper Financial Services, Inc.9 and Bowman v. Western Auto Supply Co.,10 demonstrate some of the effects of Holmes on wrongful discharge standing analysis.

Finally, Section III further analyzes wrongful discharge under the direct-injury test. The direct-injury test demonstrates that the claims of wrongfully injured employees should survive a motion to dismiss when proper factual allegations are made. The validity of their claims should depend on these factual allegations rather than

6. Id. at 1318. The Holmes Court reasoned that this approach follows the common law principle that proximate cause "reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" Id. (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984)).

7. See infra notes 60-96 and 146-68 and accompanying text for the factual settings and analyses of the RICO civil actions brought by wrongfully discharged employees which have reached the United States courts of appeals.

8. See supra note 7.

9. 978 F.2d 344 (7th Cir. 1992). For a full discussion of Schiffels, see infra notes 146-56 and accompanying text.

on the legal hurdles which a majority of the United States courts of appeals have erected.

I. BACKGROUND

A. What Is a RICO Conspiracy

In *United States v. Elliott*, the Court of Appeals for the Fifth Circuit faced a criminal scheme involving six defendants, thirty-seven unindicted co-conspirators, and over twenty different criminal endeavors ranging from arson to murder to stealing meat and shirts. Because traditional conspiracy law requires the proof of a single agreement, the *Elliott* court noted that the commission of highly diverse crimes by a large number of individuals rendered the defendants' prosecution for conspiracy nearly impossible. In RICO, however, the *Elliott* court found a new tool by which to infer a single agreement among diverse activities: the RICO "enterprise." 

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13. Id. at 902. Traditional conspiracy law utilizes two theories for conspiracy prosecutions. First, the "wheel conspiracy" involves one person acting as the "hub" of a wheel and conspiring with several others, the "spokes" of the wheel. The awareness by the "spokes" of the other "spokes" serves to form a "rim" which encloses the "wheel." *Id.* at 900 (citing United States v. Levine, 546 F.2d 658, 663 (5th Cir. 1977)). Second, the "chain conspiracy" involves a principal actor operating through a series of middlemen. The middlemen may not be aware of each other, but they understand that in order for the conspiracy to be successful, there must be several "links" in the "chain" of operation. *Id.* at 900-01 (citing Blumenthal v. United States, 332 U.S. 539 (1947)).

The *Elliott* court's use of the "enterprise" theory comports with the general philosophy of RICO:

It is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. S. REP. NO. 617, 91st Cong., 1st Sess. 2 (1969).

The *Elliott* court held "that, through RICO, Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy."\(^{15}\) Under RICO's conspiracy provision, the *Elliott* court reasoned, the prosecution of an individual could be achieved if it could reasonably be inferred that the diverse crimes committed were intended to further an enterprise's affairs.\(^{16}\) This use of the RICO "enterprise" concept by the *Elliott* court has "popularized the notion of RICO as a super-conspiracy statute."\(^{17}\)

The holding of *Elliott*, however, has led to some disagreement among the United States courts of appeals. The *Elliott* court concluded that "[t]o be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes."\(^{18}\) A "predicate" crime or act under RICO is one of the many offenses defined by Congress as "racketeering activity."\(^{19}\) Two or more predicate acts must be committed

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16. *Id.* at 902-03.

*See Turkette*, 452 U.S. 576. In *Turkette*, the United States Supreme Court refused to limit the definition of enterprise to legitimate enterprises. The Court, therefore, upheld the conviction of a group of individuals under the RICO conspiracy provision, 18 U.S.C. § 1962(d), who were associated for the exclusive purpose of committing illegal activities. Despite noting that the major purpose of RICO was to prevent the infiltration of legitimate business by organized crime, the Court held that "neither the language nor structure of RICO limits its application to legitimate 'enterprises.'" *Id.* at 587.


(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or
to constitute a substantive RICO violation, 18 U.S.C. § 1962(a)-(c), because these violations require "a pattern of racketeering activity."\(^{20}\) A RICO conspiracy, therefore, is an agreement to commit two or more predicate acts within a single scheme.

The disagreement among the courts of appeals concerns whether the individual must agree to personally commit two or more predicate acts. In other words, the majority of the United States courts of appeals hold that a RICO conspiracy is committed when an individual merely agrees to the commission of a pattern of racketeering activity in furtherance of the affairs of an enterprise.\(^{21}\) The majority does not require that the individual agree to person-

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In H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989), the United States Supreme Court held that a pattern of racketeering activity does not require two schemes, but instead, requires two predicate acts "within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity." Id. at 237.

ally commit those acts.22 A minority of the United States courts of appeals, however, holds that a defendant may be convicted of a RICO conspiracy only if the defendant personally agreed to commit two or more predicate acts.23

The United States Supreme Court has repeatedly denied certiorari on this conflict, and Justice White dissented on numerous occasions.24 Justice White argued that if the majority's position is correct, then "Congress' intent is being frustrated in those circuits which adhere to the narrower view of RICO conspiracy;"25 if the majority is incorrect, then the "defendants are being exposed to conviction for behavior Congress did not intend to reach under [section] 1962(d)."26

B. Sedima, S.P.R.L. v. Imrex Co.: The United States Supreme Court's First Look at Section 1964(c)

The United States Supreme Court granted certiorari in Sedima, S.P.R.L. v. Imrex Co.27 for two reasons. First, the Sedima Court noted the importance of RICO civil litigation caused by its rapid expansion in the early 1980s.28 Second, the Sedima Court wanted to resolve a division among the United States courts of appeals con-

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22. See supra note 21.
24. Pryba v. United States, 498 U.S. 924 (White, J., dissenting), denying cert. to 900 F.2d 748 (4th Cir. 1990); Neopolitan v. United States, 479 U.S. 940 (White, J., dissenting), denying cert. to 791 F.2d 489 (7th Cir. 1986); Adams v. United States, 474 U.S. 971 (White, J., dissenting), denying cert. to 759 F.2d 1099 (3d Cir. 1985); Morris v. United States, 469 U.S. 819, denying cert. to 721 F.2d 1514 (11th Cir. 1984).
25. Adams, 474 U.S. at 973 (White, J., dissenting), denying cert. to 759 F.2d 1099.
26. Id. A recent law review article suggests that the Supreme Court resolve this disagreement in the following manner:

On the basis of the absence of a provision directly requiring proof of personal agreement and the express statement that RICO is to be liberally construed, it appears that the correct approach is the one taken by the majority. This is because it follows the language of the statute by not creating a requirement that is not contained within the language of the statute. In addition, it further effectuates the purpose of the Act by providing the government with a more effective tool to deal with organized crime.

28. Id. at 485-86 & nn.5-6. Prior to Sedima, district courts had rendered 270 RICO decisions. Of those, only three percent were decided in the 1970s, two percent in 1980, seven percent in 1981, 13% in 1982, 33% in 1983, and 43% in 1984. Id. at 481 n.1
cerning what type of injury could be caused "by reason of" a RICO violation. While the Court of Appeals for the Second Circuit required a "racketeering injury," the Courts of Appeals for the Fifth, Seventh and Eighth Circuits rejected such a limitation.

1. The Background of Sedima

In 1979, Sedima agreed to enter into a joint venture with Imrex to provide aircraft and aircraft electronic parts to a NATO subcontractor. Sedima's role was to secure the orders and to import the parts from Imrex who supplied the parts from the United States. Sedima had secured $8.5 million worth of orders, and Imrex had filled approximately eight million dollars worth of the orders, when Sedima filed suit against Imrex.

Sedima alleged that Imrex had overstated purchase prices and produced fraudulent billing charges. The complaint alleged several common-law counts, including breach of contract and breach of a fiduciary duty. It also alleged two violations of section 1962(c) based on the predicate acts of mail and wire fraud as well as a violation of the RICO conspiracy provision, section 1962(d). Based upon these violations, Sedima sought treble damages and attorney's fees under 18 U.S.C. § 1964(c).

The district court dismissed Sedima's RICO claims for failing to allege a "RICO-type injury." Such an injury, the district court explained, arises in only two situations. In one situation, a "RICO-
type injury” occurs “where ‘a civil RICO defendant’s ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering acts into the enterprise.’”39 In the other situation, it occurs “where the plaintiff is forced to compete with an enterprise that has gained an unfair market advantage through the infusion of funds from racketeering activity.”40

The Court of Appeals for the Second Circuit affirmed the dismissal of Sedima’s RICO claims.41 It stated that an alleged injury must be “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.”42 Because the Clayton (antitrust) Act served as a model for RICO, the Court of Appeals for the Second Circuit held, a “racketeering injury” would be analogous with the Clayton Act’s requirement of an “antitrust injury.”43

2. The Supreme Court’s Reversal in Sedima44

The Sedima Court held that section 1964(c) does not require a

40. Id. (citing North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 211 (M.D. Ill. 1980)).

These two theories on “RICO-type” injuries closely follow the wording of Senator Hruska’s original RICO bills. The Senator’s first bill utilized antitrust laws to prohibit “the use of intentionally and deliberately unreported income derived from one line of business in another line of business.” S. 2048, 90th Cong., 1st Sess. (1967); see 113 Cong. Rec. 17999 (1967). The Senator’s second bill “prohibit[ed] the investment in legitimate business enterprises of income derived from specified criminal activities.” S. 2049, 90th Cong., 1st Sess. (1967); see 113 Cong. Rec. 17999 (1967).
42. Id. at 496. The Court of Appeals for the Second Circuit also held that a civil suit under section 1964(c) may proceed only if the defendant has been convicted of a RICO violation. Id.
43. Id. at 495. The United States Supreme Court pronounced the “antitrust injury” requirement in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). The Brunswick Court held that “[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” Id. at 489.

44. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). The Sedima Court also overruled the Court of Appeals for the Second Circuit’s holding that a RICO civil action may proceed only after a criminal conviction. Id. at 493. The Court held that the term “violation” in § 1964(c) refers not to a conviction, but to acts which are
"racketeering injury." Instead, the Court adopted the following, literal interpretation of the statute: "A plaintiff only has standing if . . . he has been injured in his business or property by the conduct constituting the violation."

The Court outlined, as an example, the conduct which constitutes a violation of section 1962(c). "A violation of [section] 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Therefore, Sedima stands for the proposition that the compensable injury in a RICO civil action based upon section 1962(c) "necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern" when the acts are committed "in connection with the conduct of an enterprise."

The Court did not, however, outline the elements of a RICO civil action based upon section 1962(d). In fact, Sedima's section 1962(d) claim was never addressed by the Court. Presumably, the Court saw no need to address the conspiracy claim because if Sedima had proven the commission of "a pattern of racketeering activity," then a conspiratorial agreement would have been inferable.

Though broadly interpreting RICO civil standing, the Sedima Court did recognize the Court of Appeals for the Second Circuit's underlying concern for the need to limit standing in the RICO con-
text.51 The Sedima Court, therefore, adopted the limitation utilized by the Court of Appeals for the Seventh Circuit. The Seventh Circuit had held that "'[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured.'"52

By adopting this holding, the Sedima Court fostered a new series of appellate court decisions concerning the scope of proximate causation in the RICO context.53 RICO proximate causation was not addressed again by the United States Supreme Court until its 1992 Holmes v. Securities Investor Protection Corp. decision.54

3. The Sedima Dissent

Justice Marshall wrote the dissent in which Justices Brennan, Blackmun, and Powell joined.55 Justice Marshall argued that by allowing standing for injuries caused by the predicate acts of section 1961, the majority was supplanting many state common law reme-

51. The Sedima Court stated that "'[w]e nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors . . . . Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its diagnosis or its remedy." Sedima, 473 U.S. at 500.

52. Id. at 496-97 (quoting Haroco, Inc. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985)).

53. Several circuits interpreted the Sedima language to grant standing only when an injury directly flows from the predicate acts. Morast v. Lance, 807 F.2d 926 (11th Cir. 1987); Marshall & Ilsey Trust Co. v. Pate, 819 F.2d 806 (7th Cir. 1987); Nodine v. Textron, Inc., 819 F.2d 347 (1st Cir. 1987); Town of Kearney v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263 (3d Cir. 1987).

Another group of circuits viewed the direct-injury requirement as overly restrictive. They adopted a more traditional view of proximate causation requiring factual and legal causation. Sperber v. Boesky, 849 F.2d 60 (2d Cir. 1988); Brandenburg v. Speidel, 859 F.2d 1179 (4th Cir. 1988); Zervas v. Faulkner, 861 F.2d 823 (5th Cir. 1988).

The Court of Appeals for the Second Circuit distinguished itself as the only circuit interpreting Sedima to require only factual causation. Bankers Trust Corp. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), cert. denied, 490 U.S. 1007 (1989).

In Employers' RICO Liability for the Wrongful Discharge of Their Employees, 68 NEB. L. REV. 673 (1989), Laura Ginger argued that "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." Id. at 683.


dies\textsuperscript{56} as well as broad areas of federal law, including securities law.\textsuperscript{57} Justice Marshall claimed to find no support for such an expansive reading of the statute.

In fact, Justice Marshall concluded, the distinct lack of attention which Congress afforded to RICO's civil damages provision demonstrates that Congress intended a much narrower interpretation.\textsuperscript{58} Justice Marshall, following the analogy to antitrust standing, would have limited standing to "recovery for injury resulting from the confluence of events described in [section] 1962 and not merely from the commission of a predicate act."\textsuperscript{59}

C. Wrongful Discharge and RICO Conspiracy Standing After Sedima

The United States courts of appeals have unanimously denied RICO standing to wrongfully discharged employees whose suits are based upon RICO's substantive provisions, section 1962(a)-(c).\textsuperscript{60} Section 1962(a)-(c) requires, the courts hold, that the alleged injury must result from "a pattern of racketeering activity."\textsuperscript{61} Because

\textsuperscript{56} Sedima, 473 U.S. at 501.
\textsuperscript{57} Id. at 504. See supra note 19 for Congress' list of racketeering activities, 18 U.S.C. § 1961(1) (Supp. V 1993).
\textsuperscript{58} Id. at 507, 518. The RICO bill passed by the United States Senate in 1970 did not contain a civil damages provision. In hearings before the House Judiciary Committee, however, it was suggested that the bill should include "the additional civil remedy of authorizing private damage suits based on . . . Section 4 of the Clayton Act." \textit{Organized Crime Control Act, 1969: Hearings on S. 30 Before Subcomm. No. 5 of the House Comm. of the Judiciary, 91st Cong., 2d Sess. 543-44 (1970) (statement of Edward Wright, ABA president-elect); see also Sedima, 473 U.S. at 520 (statement of Representative Steiger suggesting addition of a private civil damages remedy). The Committee agreed, and without discussion, the provision was added. H.R. REP. No. 1549, 91st Cong., 2d Sess. 35 (1970), reprinted in 1970 U.S.C.C.A.N. 4007.

Representatives Conyers, Mikva, and Ryan provided the only recorded objection to the addition of § 1964(c) during hearings before the House Judiciary Committee. H.R. REP. No. 1549, 91st Cong., 2d Sess. 35 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4083 (stating that the civil damages provision "provides invitation[s] for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce").

\textsuperscript{59} Sedima, 473 U.S. at 509.

\textsuperscript{60} Bowman v. Western Auto Supply Co., 985 F.2d 383 (8th Cir. 1993); Kramer v. Bachan Aerospace Corp., 912 F.2d 151 (6th Cir. 1990); Reddy v. Litton Indus., Inc., 912 F.2d 291 (9th Cir. 1990), cert. denied, 112 S. Ct. 332 (1991); O'Malley v. O'Neill, 887 F.2d 1557 (11th Cir. 1989), cert. denied, 496 U.S. 926 (1990); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3d Cir. 1989); Burdick v. American Express Co., 865 F.2d 527 (2d Cir. 1989); Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211 (5th Cir. 1988); Nodine v. Textron, Inc., 819 F.2d 347 (1st Cir. 1987).

\textsuperscript{61} "The Supreme Court has held that in order for a litigant to establish standing to bring a suit under § 1964(c) of RICO, the injury alleged must be a result of a viola-
wrongful discharge is not a "racketeering activity," wrongfully discharged employees must base their complaints upon section 1962(d). The results have been mixed.

1. The Court of Appeals for the Third Circuit Grants RICO Standing Based on Section 1962(d)

In 1989, the Court of Appeals for the Third Circuit held in Shearin v. E.F. Hutton Group, Inc. that a wrongfully discharged employee could have standing to sue under section 1964(c) if the complaint was based on section 1962(d). The plaintiff, Shearin, alleged that Hutton Trust was involved in a scheme of charging fees to customers of Hutton, Inc. for trust services which were never performed. In order to effectuate this scheme, Shearin claimed, she was hired to give Hutton Trust the appearance of a genuine trust company. When she threatened to disclose the alleged improprieties, however, she was abruptly dismissed.

The Court of Appeals for the Third Circuit held in Shearin that "[n]othing in Sedima forecloses the possibility" that predicate acts for conspiracy standing may be traditional overt conspiracy acts rather than section 1961(1) racketeering activity. The Sedima Court, according to Shearin, had analyzed only violations of section 1962(a)-(c), and had focused its analysis on refuting the notion of a "racketeering injury." The Court of Appeals for the Third Circuit agreed with Sedima that "racketeering activity" necessarily amounts to predicate acts for the purpose of section 1962(a)-(c) because the language of these subsections dictates that a violation occurs only when "a pattern of racketeering activity" has taken place.

The Shearin court distinguished section 1962(d), however, because it does not contain the words "racketeering activity."
court concluded that a plaintiff may have RICO standing based on section 1962(d) if the alleged injury was caused by any act which furthers an agreement (conspiracy) to engage in a pattern of racketeering activity. Such an act, according to the Shearin court, could be either racketeering activity or "classic overt conspiracy acts." The Shearin court added that "Sedima further indicates that classic conspiracy acts not only may, but should, so qualify" as predicate acts for subsection 1962(d).

The Court of Appeals for the Third Circuit relied on Sedima's interpretation of the language of section 1964(c) to conclude that the civil damages provision also "did not mandate that racketeering activity cause the harm." The Sedima Court had echoed the language of section 1964(c) when it held that, in order to have standing, a person need only to have been "injured in his business or property by conduct constituting the [RICO] violation." Thus, the Shearin court found that neither section 1964(c) nor section 1962(d) required the commission of "racketeering activity."

The Court of Appeals for the Third Circuit held that Shearin had standing because her "hiring and firing plausibly constitute overt acts that not only would establish a conspiracy, but in this case were allegedly essential to it."

2. The Majority of the United States Courts of Appeals Deny RICO Standing Based on Section 1962(d)

Hecht v. Commerce Clearing House, Inc. has been cited as a

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69. Id.
70. Id.
71. Id.
72. Id.
73. Id. (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985)).
74. Id.
75. Id. at 1168. See Frederic Brooks, RICO Conspiracy Standing After Sedima, 25 Colum. J.L. & Soc. Probs. 423, 449 (agreeing with the Shearin court's holding because "neither the RICO statute, congressional intent, nor Sedima suggest that such discharged employees may not bring a RICO conspiracy suit").
76. Miranda v. Ponce Fed. Bank, 948 F.2d 41 (1st Cir. 1991); Hecht v. Commerce Clearing House, Inc., 897 F.2d 21 (2d Cir. 1990); Kramer v. Bachan Aerospace Corp., 912 F.2d 151 (6th Cir. 1990); Reddy v. Litton Indus., Inc., 912 F.2d 291 (9th Cir. 1990); Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211 (5th Cir. 1988); Morast v. Lance, 807 F.2d 926 (11th Cir. 1987).
77. 897 F.2d 21 (2d Cir. 1990). Hecht alleged that he discovered his supervisors "forging customer signatures . . . , billing customers for fabricated or improperly confirmed orders, and disregarding subscription cancellation requests." Id. at 22. When he demanded an end to these practices, Hecht was allegedly told to participate or be fired. When he refused to participate, he was terminated for insubordination. Id.
leading case denying RICO standing to wrongfully discharged employees. The Hecht court did not agree with Shearin that "any overt act in furtherance of [a RICO] conspiracy" can be the basis for standing in a RICO civil action based on section 1962(d). The Hecht court held that "Congress did not deploy RICO as an instrument against all unlawful acts. It targeted only predicate acts catalogued under section 1961(1)." The Court of Appeals for the Second Circuit opined that RICO's "purpose . . . is to target RICO activities, and not other conduct."

The Court of Appeals for the Ninth Circuit, in Reddy v. Litton Industries, Inc., addressed the resulting conflict between Hecht and Shearin. The Reddy court noted that the facts of Shearin were unique. In Shearin, the plaintiff's hiring and firing were essential to the alleged conspiracy. The Reddy court held that Shearin should be "construed narrowly," and that the Reddy facts were more similar to those of Hecht. The Court of Appeals for the Ninth Circuit then concluded that "[i]f . . . there is any doctrinal inconsistency between Hecht and Shearin, we prefer the rule of Hecht."

In Miranda v. Ponce Federal Bank, the Court of Appeals for the First Circuit joined the majority. The plaintiff, Miranda, claimed she was discharged for refusing to participate in the defendants' conspiracy to obstruct a federal investigation. The Miranda court took a federalist approach in denying standing. The court held that "[RICO] cannot be used as a surrogate for local law, as a panacea to redress every instance of man's inhumanity to man, or as a terrible swift sword capable of righting all wrongs of a troubled world."

78. See Miranda, 948 F.2d at 48; Reddy, 912 F.2d at 295 (9th Cir. 1990).
79. Hecht, 897 F.2d at 25.
80. Id.
81. Id.
82. 912 F.2d 291 (9th Cir. 1990). The plaintiff, Reddy, alleged that he was terminated after reporting a bribery within Litton Industries to his superiors. Reddy then refused to participate in Litton's cover-up of the illegal bribes. Id. at 293.
83. Id. at 295. See supra notes 62-75 and accompanying text for a full discussion of Shearin.
84. Reddy, 912 F.2d at 295.
85. Id.
86. 948 F.2d 41, 48 (1st Cir. 1991).
87. Id. at 43.
88. Id. at 49. Nevertheless, the Miranda court still recognized Shearin's factual distinction despite concluding that it preferred the denial of standing. Id. at 48 n.9. Compare the Miranda court's holding with Justice Marshall's dissent in Sedima, discussed in supra notes 55-59 and accompanying text.
In *Kramer v. Bachan Aerospace Corp.*, the Court of Appeals for the Sixth Circuit added another dimension to the majority’s analysis. The Sixth Circuit held that because “[t]he government, not the plaintiff, was the target of defendant’s scheme to ship defective military hardware” that the plaintiff did not have standing. In *Kramer*, the plaintiff had allegedly been fired for blowing the whistle on his employer by reporting to the United States Defense Department that the defendant was manufacturing defective parts.

In *Morast v. Lance*, the Court of Appeals for the Eleventh Circuit added a policy argument to the majority’s position. The *Morast* court was faced with a claim by a bank manager allegedly discharged for reporting his employer’s banking violations and cooperating with an investigation of the bank. The *Morast* court refuted the argument that providing the bank manager with a RICO remedy would deter RICO violations. Instead, the *Morast* court opined that providing a remedy in this situation would only benefit the plaintiff. Absent a deterrent effect, the Court of Appeals for the Eleventh Circuit held that Congress did not intend to provide a RICO remedy.

The majority of the United States Courts of Appeals, therefore, provide the following five justifications for denying RICO standing to a wrongfully discharged employee in a suit based upon section 1962(d): (1) wrongful discharge is not a RICO predicate act; (2) *Shearin* should be construed narrowly; (3) RICO does not

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89. 912 F.2d 151 (6th Cir. 1990).
90. *Id.* at 156 (emphasis added). The *Kramer* court held that plaintiff’s injury resulted from defendant’s decision to fire him and not from a RICO conspiracy. *Id.*
91. *Id.* at 152.
92. 807 F.2d 926 (11th Cir. 1987).
93. *Id.* at 929.
94. *Id.* at 933.
95. *Id.*
96. *Id.* at 929. In *Cullom v. Hibernia Nat’l Bank*, 859 F.2d 1211 (5th Cir. 1988), the Court of Appeals for the Fifth Circuit interpreted this policy approach differently. The *Cullom* court held that:
   
   the policy reasons for allowing whistle blowers, as opposed to non-participants, to sue under RICO are more persuasive because in addition to exposing the illegal scheme to the public by bringing a private suit, the whistle blower often times exposes the illegal scheme to the authorities and cooperates with the authorities, thus ‘strengthening the legal tools in the evidence-gathering process.’

*Id.* at 1217 (quoting the Organized Crime Control Act of 1970, 1970 U.S.C.C.A.N. 1073 (statement of findings and purposes)). Nevertheless, the *Cullom* court denied standing for either a whistle blower or an employee discharged for refusing to participate in an illegal scheme because neither type of plaintiff has injuries which flow from RICO predicate acts. *Id.*
displace local law; (4) wrongfully discharged employees are not the
targets of RICO conspiracies; and (5) providing a remedy would
not deter RICO violations.

II. PRINCIPAL CASES

A. Holmes v. Securities Investor Protection Corp.97

1. Background to Holmes

Securities Investor Protection Corporation ("SIPC") was cre­
ated as a private, nonprofit corporation.98 Most broker-dealers reg­
istered under section 15(b) of the Securities Exchange Act of 1934
were required to be members of SIPC.99 The corporation was
charged with protecting the customers of broker-dealers by seeking
a protective decree in federal district court whenever it determined
that a member "'has failed or is in danger of failing to meet its
obligations to customers.'"100

In July of 1981, SIPC sought decrees protecting the customers
of Joseph Sebag, Inc. and First State Securities Corporation
("FSSC").101 The district courts entered the requested decrees and
appointed trustees to liquidate the broker-dealers.102 As a result of
the liquidations, SIPC had to advance nearly $13 million to cover
claims against FSSC and Sebag by their customers.103

SIPC, and the trustees of FSSC and Sebag, subsequently
brought suit against seventy-five defendants in the United States
District Court for the Central District of California.104 The plain­
tiffs alleged that from 1964 through July 1981 the defendants had
"manipulated stock of six companies by making unduly optimistic

98. Id. at 1314 (1992) (noting that the Securities Investor Protection Act
99. Id. (noting that the manner of registration of brokers and dealers is codified
as 15 U.S.C. § 78o(b) (1988 & Supp. V 1993) and the membership requirement is codi­
101. Id.
pointed and charged with liquidating the member's business).
103. Id. at 1315 (Trustees are required to return all securities registered in specific
ties not so registered must be combined with cash found in customers' accounts and
divided ratably to satisfy customers' claims against the broker-dealer. 15 U.S.C.
§§ 78fff-2(b), § 78fff(a)(1)(B) (1988). SIPC must advance up to $500,000 per customer
to the extent that the broker-dealer's funds are inadequate to meet the claims. 15
U.S.C. § 78fff-3(a) (1988)).
104. Id.
statements about their prospects and by continually selling small numbers of shares to create the appearance of a liquid market."  

In July 1981, the plaintiffs alleged, the market recognized defendants' fraudulent activities and the price of the manipulated stocks plummeted. Because FSSC and Sebag had bought substantial amounts of the manipulated stock, the plaintiffs claim that this decline caused the broker-dealers' financial difficulties, resulted in the broker-dealers' liquidation, and triggered SIPC's duty to advance funds.

The complaint alleged that Holmes participated in this scheme by making false statements about "one of the six companies, Aero System, Inc., of which he was an officer, director, and major shareholder." The complaint also alleged that Holmes simulated a liquid market in one of the other six companies, Bunnington Corporation, by selling small amounts of stock.

The complaint charged violations of 18 U.S.C. § 1962, thereby entitling SIPC and the trustees to treble damages under section 1964(c). It stated that the conspirators' violations of section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, and the mail and wire fraud statutes amounted to a "pattern of racketeering activity."

After five years of litigation, the district court granted Holmes summary judgment for two reasons. First, the court held that SIPC did not meet the standing requirements of section 10(b) of the Securities Exchange Act nor of SEC Rule 10b-5. Second, neither SIPC nor the trustees were injured by reason of Holmes' RICO violations.

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105. Id.  
106. Id.  
107. Id.  
108. Id.  
109. Id.  
110. Id. (citing 15 U.S.C. § 78j(b) (1988)).  
111. Id. (citing 17 C.F.R. § 240.10b-5 (1991)).  
114. Id. at 1315 & n.4 (citing Securities Investor Protection Corp. v. Vigman, 803 F.2d 1513 (9th Cir. 1986) (Vigman II); Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309 (9th Cir. 1985) (Vigman I)).  
115. Id. at 1315. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952). SIPC fails the Birnbaum test which requires a plaintiff to be a purchaser or seller of a security.  
The Court of Appeals for the Ninth Circuit reversed.\footnote{117} On the first question, it held that a section 1964(c) RICO action has its own independent standing requirements and does not incorporate those of other statutes.\footnote{118} On the second question, the Court of Appeals for the Ninth Circuit held that the district court mistakenly looked at the causal relationship of Holmes' action alone in relation to the alleged injuries. It held that Holmes could be found responsible for the actions of his co-conspirators, and therefore, the causal relation required reexamination.\footnote{119}

Holmes' petition of certiorari presented two issues: 1) did SIPC have a right to sue under RICO? and 2) could Holmes be held responsible for the actions of his co-conspirators?\footnote{120} The United States Supreme Court granted certiorari on the first issue alone.\footnote{121}

2. The Holmes Opinion

In Holmes, the United States Supreme Court defined civil RICO standing. In the late 1980s, lower courts had accepted proximate causation as a standing requirement for section 1964(c), but their efforts had demonstrated the concept's ambiguity.\footnote{122} The Holmes Court held that the "by reason of" language of section 1964(c) must require more than "but for" causation.\footnote{123} Factual causation, according to the Court, could not have been Congress' sole intention because "any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts."\footnote{124} The Holmes Court, therefore, established the rule that a RICO plaintiff has been injured "by reason of a [section] 1962 violation" only if there exists "some direct relation between the injury asserted and the injurious conduct alleged."\footnote{125}

\footnote{117} Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461 (9th Cir. 1990), aff'd, 112 S. Ct. 1311 (1991).
\footnote{118} Id. at 1465-67.
\footnote{119} Id. at 1467-69.
\footnote{120} Holmes, 112 S. Ct. at 1316. The Holmes Court assumed that the Court of Appeals for the Ninth Circuit correctly held that Holmes could be held responsible for the act of his co-conspirators. Id. n.6.
\footnote{122} Holmes, 112 S. Ct. at 1317 n.11 (citing 18 U.S.C. § 1964(c) (1988)). See supra note 53 and accompanying text for the various interpretations of RICO proximate causation given by the United States courts of appeals.
\footnote{123} Holmes, 112 S. Ct. at 1316.
\footnote{124} Id. at 1316 n.10 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984)).
\footnote{125} Id. at 1318. A recent Note suggested that "Holmes should not be misread to
To arrive at this conclusion, the *Holmes* Court held that section 1964(c) of RICO was modeled after the “by reason of” language in section four of the Clayton Act. The Clayton Act’s civil damages provision provides remedies for injuries caused by violations of antitrust laws. The United States Supreme Court had held in *Associated General Contractors, Inc. v. Carpenters* that the antitrust civil damages provision contained a direct-injury requirement. The *Holmes* Court held, therefore, that because the Ninety-first...
Congress used the same words in the RICO provision that were found in the antitrust provision, "we can only assume it intended them to have the same meaning that courts had already given them."130

The Holmes Court then adopted from *Associated General Contractors* the following three reasons why a direct-injury requirement was essential to the "by reason of" language:

First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors.131 Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries.132 And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.133

Based on these reasons, the Court held that SIPC's injuries were not proximately caused by the conspirators' conduct.134

Analyzing SIPC's claim under the first reason for a direct-injury requirement, the Court found that "the link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers."135 It was the broker-dealers who were directly injured by the conspirators' conduct and SIPC was subsequently injured only because the broker-dealers failed to meet their obligations to their customers.136 The Court labelled the broker-dealers' financial difficulties as an "intervening insolvency connect[ing] the conspirators'
acts to the losses.” 137 Because SIPC’s injury is less than direct, the Court held that allowing SIPC’s claim to proceed would require the difficult determination of what portion of the injury was factually caused by the conspiracy as opposed to other factors. 138 As examples, the Court suggested that portions of the injury could have been caused by the broker-dealers’ poor business practices or failure to anticipate market changes. 139

Aside from this factual causation problem, the Court held that the second reason for a direct-injury requirement also demonstrated that SIPC should not recover under section 1964(c). 140 If indirectly-injured plaintiffs could recover under RICO, then district courts would be faced with finding methods to apportion damages in such a fashion as to prevent duplicative recoveries. 141 This problem arose in Holmes because the broker-dealers remained liable to SIPC via the nonpurchasing customers. If SIPC recovered independently, and then received indemnification from the broker-dealers, then it would have received an unjustified windfall. 142

Finally, the Holmes Court noted that the directly-injured parties also had a suit against the conspirators which could lead to reimbursement for the indirectly-injured plaintiffs’ alleged injuries. 143 The Court stated that a suit by indirectly-injured victims could be an attempt to circumvent the priority which should be afforded to directly-injured victims. 144

137. Id. Associated General Contractors involved an analogous factual situation. The California State Council of Carpenters and the Carpenters 46 Northern Counties Conference Board alleged that they were injured by the antitrust activities of Associated General Contractors of California, Inc. The Carpenters claimed that Associated coerced certain third parties to use only nonunion contractors and subcontractors, thereby causing injury to the unions. The Court held, however, that any injuries suffered by the unions were only “an indirect result of whatever harm may have been suffered by ‘certain’ construction contractors and subcontractors.” Associated Gen. Contractors, Inc. v. Carpenters, 459 U.S. 519, 541 (1983).

139. Id.
140. Id.

141. In Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), the Court stated that “[e]ven the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery.” Id. at 264.

142. The Holmes Court limited its evaluation of this reason for the direct-injury requirement to the following sentence: “Assuming that an appropriate assessment of factual causation could be made out, the district court would then have to find some way to apportion the possible respective recoveries by the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages.” Holmes, 112 S. Ct. at 1320.

143. Id. at 1320.
144. Id. at 1320-21.
The Court concluded that it was not giving the statute an illiberal construction. Rather, the Court held, the nonpurchasing customers "are not proper plaintiffs." By not allowing suits by indirectly-injured victims the Court held that it was keeping the doors closed to "massive and complex damages litigation[, which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble damages suits."145

B. RICO Conspiracy Standing After Holmes

1. The Court of Appeals for the Seventh Circuit Joins the Minority

In Schiffels v. Kemper Financial Services, Inc.,146 the Court of Appeals for the Seventh Circuit became the first circuit to concur with the Shearin court's analysis.147 The Schiffels court held that "since RICO conspiracy does not require the actual commission of a predicate act, it follows that the act causing plaintiff's injury need not be a predicate act of racketeering."148 Furthermore, the Schiffels court opined, Congress could have limited section 1964's remedies to only those persons injured by predicate acts, but it did

145. Id. at 1321 (quoting Associated Gen. Contractors, 459 U.S. at 545) (alterations in original). Observers have noted that "[t]here is a growing sentiment that . . . [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." Ginger, supra note 53, at 673 (quoting Diamond, Steep Rise Seen in Private Use of Federal Racketeering Law, N.Y. TIMES, Aug. 1, 1988, at A1).

Because the Court held that SIPC's injuries were not proximately caused by defendant's RICO violation, it declined the opportunity to rule on whether every plaintiff using securities fraud as a RICO predicate act must be either a purchaser or seller. Holmes, 112 S. Ct. at 1321.

146. 978 F.2d 344 (7th Cir. 1992).

147. Id. at 348. "[T]he approach expounded in Shearin is the correct approach because it is consistent with RICO's unambiguous language and with traditional concepts of conspiracy law." Id. See supra notes 62-75 and accompanying text for a full discussion of Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3d Cir. 1989).

148. Schiffels, 978 F.2d. at 348-49. The Schiffels court observed that § 1962(d) targets "the agreement to violate RICO's substantive provisions, not the actual violations themselves." Id. at 348 (citing United States v. Glecier, 923 F.2d 496, 500 (7th Cir.); cert. denied, 112 S. Ct. 54 (1991); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1169 (3d Cir. 1989); United States v. Angiulo, 847 F.2d 956, 964 (1st Cir.); cert. denied, 488 U.S. 852 and cert. denied, 488 U.S. 928 (1988); United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 and cert. denied, 459 U.S. 906 (1982)).

The District Court for the Northern District of Illinois had dismissed Schiffels' complaint because she was not injured by any predicate act of racketeering. Schiffels v. Kemper Fin. Servs., Inc., 767 F. Supp. 909 (N.D. Ill. 1991), rev'd, 978 F.2d 345 (7th Cir. 1992).
The plaintiff, Schiffels, alleged that she was fired for attempting to blow the whistle on a scheme by her supervisor to defraud two mutual funds. She claimed that the scheme was conducted throughout most of 1987, and was followed by a conspiracy to cover up the fraudulent activities. The Court of Appeals for the Seventh Circuit, nevertheless, distinguished Schiffels from Shearin by relying on the Supreme Court's decision in Holmes that the injury must be directly caused by the conduct constituting the violation. Schiffels held that a plaintiff has standing to sue under RICO if the "complaint alleges an injury to her business or property proximately caused by an overt act in furtherance of a conspiracy to violate RICO, even though the overt act is not a predicate act required in a RICO pattern." Schiffels was not fired until February 15, 1990, after several investigations had been conducted into her allegations. The Seventh Circuit found, therefore, that by the time she was fired the alleged fraudulent scheme had ended. "[A] fair reading of Schiffels' complaint indicates only that she was fired in retaliation for attempting to disclose the fraudulent scheme, not to further it or prevent its disclosure." Her injury may have been factually caused by the conspiracy, but the injury was not proximately caused. Therefore, even though the Schiffels court explicitly agreed with the analysis of Shearin, it reached a different result because of the facts alleged.

2. The Court of Appeals for the Eighth Circuit Joins the Majority

In Bowman v. Western Auto Supply Co., the Court of Appeals for the Eighth Circuit joined the majority of circuits denying

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149. Schiffels, 978 F.2d at 350. Compare Miranda v. Ponce Federal Bank, 948 F.2d 41 (1st Cir. 1991), in which the Court of Appeals for the First Circuit stated that allowing a § 1964(c) remedy for a traditional overt conspiracy act would be "tantamount to rewriting the statute." Id. at 48; see supra note 86-88 and accompanying text.
150. Schiffels, 978 F.2d at 346-47.
151. The Seventh Circuit noted, in dictum, that Shearin had been directly-injured by the conspiracy to violate RICO. Id. at 351.
152. Only "[a] person directly injured by an overt act in furtherance of a RICO conspiracy has been injured 'by reason of' the conspiracy." Id. at 349 (emphasis added).
153. Id. at 351.
154. Id. at 347.
155. Id. at 353.
156. Id. at 351.
RICO standing to wrongfully discharged employees. Bowman alleg­ed that he had discovered Western Auto Supply Company charg­ing its merchandise suppliers for advertising and promotional services that were never performed.\textsuperscript{158} Bowman contended that he was subsequently discharged because he spoke out against and criti­cized the fraudulent scheme.\textsuperscript{159}

The \textit{Bowman} court held that RICO conspiracy suits require the same predicate acts as RICO substantive provisions.\textsuperscript{160} It con­cluded that an injury cannot be caused “by a mere agreement to violate RICO . . . . Some overt act must occur in order to establish civil standing based on \textsection{1962(d)}.”\textsuperscript{161} “Because Congress targeted specific types of activity in the RICO statute, rather than ‘all unlawful acts,’ . . . the limiting factor must be that only harm from a \textsection{1961(1)} predicate act done in furtherance of a RICO conspiracy will suffice to establish standing.”\textsuperscript{162}

The Eighth Circuit reasoned that the \textit{Holmes} decision pro­vided an \textit{example} of how opportunities should be taken “to care­fully delineate the types of plaintiffs who may validly bring a suit”\textsuperscript{163} under RICO. By holding that injuries under section 1962(d) must flow from racketeering activity, the Eighth Circuit reasoned that it was effectuating the statute’s purpose.\textsuperscript{164} The Eighth Circuit rejected the Seventh Circuit’s approach in \textit{Schiffels} that the direct-injury test alone prevents civil RICO liability from being unlimited.\textsuperscript{165}

Finally, the Eighth Circuit recognized the critique that its ap­proach may collapse suits based on section 1962 violations into suits based on RICO’s substantive provisions.\textsuperscript{166} The Eighth Circuit re­sponded that “any other result would render this decision merely a guide to the artful pleader.”\textsuperscript{167} The Eighth Circuit, therefore, sought to prevent civil litigants from using the threat of treble dam­ages as bargaining leverage by alleging a conspiracy to violate

\begin{itemize}
\item \textsuperscript{158} \textit{Id}.
\item \textsuperscript{159} \textit{Id}.
\item \textsuperscript{160} \textit{Id} at 386 (citing Miranda v. Ponce Fed. Bank, 948 F.2d 41, 48 (1st Cir. 1991)).
\item \textsuperscript{161} \textit{Id}.
\item \textsuperscript{162} \textit{Id}.
\item \textsuperscript{163} \textit{Id} at 388.
\item \textsuperscript{164} \textit{Id}.
\item \textsuperscript{165} \textit{Id} at 387.
\item \textsuperscript{166} \textit{Id} at 388.
\item \textsuperscript{167} \textit{Id}.
\end{itemize}
III. Analysis

This Note seeks to identify Congress' intention to provide a civil remedy for injuries caused "by reason of" a conspiracy to violate RICO.\textsuperscript{169} It addresses this issue in the context of civil RICO actions brought by wrongfully discharged employees. Because the United States Supreme Court has not addressed this issue, this section predicts what the Court would hold by analyzing RICO's underlying policies and the means by which the Court has effectuated those policies in other contexts. The United States Supreme Court has handed down two decisions which are now the focus of litigation among the United States courts of appeals with respect to RICO civil actions based on section 1962(d). In the first decision, the \textit{Sedima} Court outlined the elements of a section 1962(c) RICO violation.\textsuperscript{170} The United States courts of appeals disagree as to whether the \textit{Sedima} analysis also applies to a suit based upon a section 1962(d) violation.\textsuperscript{171}

In the second decision, the \textit{Holmes} Court ruled that RICO civil remedies are limited to plaintiffs who are directly-injured by RICO violations.\textsuperscript{172} Unlike the \textit{Sedima} holding, the \textit{Holmes} direct-injury test explicitly applies to RICO civil suits based on any violation of section 1962, including a RICO conspiracy. This Note, therefore, utilizes the \textit{Holmes} decision as its nucleus for analyzing the RICO standing of wrongfully discharged employees. It suggests that the disagreement among the United States courts of appeals with respect to the \textit{Sedima} analysis can be reconciled by applying the \textit{Holmes} test.

The direct-injury test consists of three factors: (1) the remoteness of the plaintiff's injury; (2) the danger of duplicate recoveries by multiple plaintiffs; and (3) the deterrent effect of allowing individual plaintiffs to recover.\textsuperscript{173} By applying the direct-injury test to actions brought by wrongfully discharged employees, this Note will

\textsuperscript{168} Id.

\textsuperscript{169} Congress set forth this intent with the following statement: "[s]ubsection (d) makes conspiracy to violate (a), (b) or (c) equally subject to the remedies of section[ ]... 1964." S. REP. No. 617, 91st Cong., 1st Sess. 159 (1969).

\textsuperscript{170} Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985); see supra text accompanying note 47.

\textsuperscript{171} See supra parts I.B and II.B.

\textsuperscript{172} Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1318 (1992); see supra note 125 and accompanying text.

\textsuperscript{173} Holmes, 112 S. Ct. at 1318; see supra notes 131-33 and accompanying text.
conclude that the minority position among the United States courts of appeals should prevail. The complaints of wrongfully discharged employees should be able to survive a motion to dismiss. They should be considered "proper [RICO] plaintiffs."\footnote{174}

A. Are Wrongfully Discharged Employees' Damages Too Remote from a RICO Violation?

The Holmes Court held that Congress did not intend to provide damages for all injuries which would not have occurred "but for" a defendant's RICO violation.\footnote{175} As a matter of statutory construction, the Court adopted this stance by analogy to antitrust law.\footnote{176} The policy reason behind the holding, however, is more important. If the Court had adopted a theory of "but for" causation, then the courts would be filled with "massive and complex damages litigation[, which would] not only burde[n] the courts, but also underm[ine] the effectiveness of treble-damages suits."\footnote{177}

The Holmes Court held that "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors."\footnote{178} In theory, this concern is especially salient when considering a civil action based on a RICO conspiracy. As the facts in United States v. Elliott\footnote{179} demonstrate, the enterprise

\footnote{174. Holmes, 112 S. Ct. at 1321. The direct-injury test is designed to distinguish those plaintiffs whose complaints will further Congress' goals from those whose complaints will not.}

Prior to the Holmes decision, Laura Ginger concluded that "wrongful discharge is by definition an injury which results only indirectly from a RICO violation." Ginger, supra note 53, at 700. This conclusion rested on the premise that if an injury does not result from a predicate act then it must be indirect. \textit{Id.} at 680. The Holmes test demonstrates, however, that the direct-injury requirement is a separate and distinct test from the requirement of a predicate act. This Note has further argued that the predicate act requirement does not exist when a § 1964(c) claim is based on a RICO conspiracy because § 1962(d) does not require the actual commission of "a pattern of racketeering activity." See supra part I.A. Wrongful discharge, therefore, is not by definition an indirect injury simply because it is not a "racketeering activity." See also Brooks, supra note 75, at 446 (arguing that since RICO conspiracy is a distinct offense, it is misleading to characterize the firing as an injury indirect to all RICO violations”).

\footnote{175. Holmes, 112 S. Ct. at 1316. The Court noted, nevertheless, that the “by reason of” language in § 1964(c) could be interpreted to require only “but for” causation. \textit{Id.}}

\footnote{176. \textit{Id.} at 1317-18; see supra notes 126-30 and accompanying text.}

\footnote{177. Holmes, 112 S. Ct. at 1321 (quoting \textit{Associated Gen. Contractors, Inc. v. Carpenters}, 459 U.S. 519, 545 (1983)) (alterations in original).}

\footnote{178. \textit{Id.} at 1318 (citing \textit{Associated Gen. Contractors}, 459 U.S. at 542-43); see supra note 131 and accompanying text.}

\footnote{179. 371 F.2d 880 (3rd Cir.), \textit{cert. denied}, 493 U.S. 953 (1978).}
theory of RICO conspiracy allows for the single prosecution of a large number of individuals involved in highly diversified crimes.\textsuperscript{180} The "enterprise" theory, therefore, provides many events to which RICO civil liability could be attached by private litigants as well as many possible intervening causes.

The Holmes Court's refusal to adopt factual causation in RICO civil actions, however, does not eliminate the efficacy of suits brought by wrongfully discharged employees. The Schiffels court applied the direct-injury test to an employee who blew the whistle on a fraudulent scheme by her supervisor; but the court denied liability to the plaintiff because she was not discharged until after the scheme had ended.\textsuperscript{181} The Schiffels court concluded that the link between the conspiracy and the discharge was too tenuous under the facts alleged.

The Schiffels court concurred in dictum, however, with the Court of Appeals for the Third Circuit's decision to grant standing in Shearin. In Shearin, the plaintiff alleged that her hiring and firing had been "essential" to the defendants' RICO conspiracy. The damages suffered by the plaintiff in Shearin were attributable to the RICO conspiracy of the plaintiff's employers. The plaintiff's claim in Shearin, therefore, survived a motion to dismiss.\textsuperscript{182}

The Bowman court argued that the analysis presented by the Shearin and Schiffels courts "would render [RICO conspiracy suits] merely a guide to the artful pleader."\textsuperscript{183} In a sense, this criticism is justified. Plaintiffs will sometimes be able to characterize their grievances in manners which allow their claims to survive a motion to dismiss. The Reddy court had been close to recognizing such a distinction when it held that Shearin should be narrowly construed and joined the majority position because of the specific facts alleged by the plaintiff.\textsuperscript{184}

The Bowman court fails to realize in its analysis that proximate cause is first an issue for the court. "The administration of rules of

\textsuperscript{180} See supra notes 12-13 and accompanying text for the facts of Elliott.

\textsuperscript{181} For the full discussion of Schiffels v. Kemper Financial Services, 978 F.2d 344 (7th Cir. 1992), see supra notes 146-56 and accompanying text.

\textsuperscript{182} For the full discussion of Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3d Cir. 1989), see supra notes 62-75 and accompanying text.

\textsuperscript{183} Bowman v. Western Auto Supply Co., 985 F.2d 383, 388 (8th Cir.), cert. denied, 113 S. Ct. 2459 (1993).

\textsuperscript{184} Reddy v. Litton Indus., 912 F.2d 291 (9th Cir. 1990). See supra notes 82-85 and accompanying text. The facts in Reddy made it easy for the Court of Appeals for the Ninth Circuit to side with the majority because the facts involved an employee who refused to participate in the employer's alleged racketeering activities.
law, and the determination of facts upon which there could be no reasonable differences of opinion is in the hands of the court.”185 Furthermore, the artful pleaders feared by the Bowman court will also be subject to motions for summary judgment. If the Bowman court had properly applied the Holmes direct-injury test it would have understood that it was unnecessary to continue denying RICO standing to wrongfully discharged plaintiffs simply because their injuries were not caused by a RICO predicate act. Many of the same cases would be disposed of because the employees’ injuries would be too remote from the RICO conspiracy.

B. Is There a Danger of Duplicate Recoveries in RICO Civil Actions Brought by Wrongfully Discharged Employees?

The Holmes Court’s second justification for the direct-injury test was the difficulty in “apportioning damages among plaintiffs removed at different levels of injury from the violative acts.”186 The Holmes Court held that “district court[s] would . . . have to find some way to apportion the possible respective recoveries.”187 The fear was that duplicate recoveries would result by allowing both directly and indirectly-injured plaintiffs to recover from the same defendant, which would be followed by the indirectly-injured plaintiff also recovering from the directly-injured plaintiff.

In Holmes, the Court denied recovery to an insurance company attempting to recover against an alleged RICO violator. The Court held that the broker-dealers who were insured by the company were directly-injured by the defendant. If the broker-dealers recovered from the defendant then they would be subject to repaying the insurance funds which they had been advanced. If the insurance company recovered from the defendant, then it might receive a windfall. Not only could the insurance company receive damages from the defendant, but it could also receive reimbursement from the insured broker-dealers.

In a wrongful discharge case, however, there is no risk of duplicate recovery. The basis of the employee’s damages are unrelated to the basis of damages to plaintiffs injured by predicate acts. Because the wrongfully discharged employee has no claim against the

187. Id. at 1320.
party injured by RICO predicate acts, it would be improper to characterize the employee as indirectly-injured.

An analogous situation arose in the antitrust context of *Blue Shield v. McCready*. In that case, the defendant, Blue Shield, violated antitrust laws by providing reimbursement to subscribers treated by psychiatrists, but not to those subscribers treated by psychologists. Blue Shield's policy was aimed at discouraging the use of psychologists. The Court held that because Blue Shield would not reimburse the plaintiff, McCready, for payments she had made to a psychologist that she was directly-injured "by reason of" the antitrust violation. The plaintiff had no claim against the psychologists because the psychologists had only received from her the money they deserved for their services. The plaintiff's claim was against Blue Shield for failing to reimburse her as a part of the antitrust violation, and therefore, she was directly-injured by Blue Shield.

The danger of double liability is nonexistent in wrongful discharge RICO conspiracy cases. The *Kramer* court held, however, that wrongfully discharged employees could not recover under RICO because they are not the targets of RICO violations. Target-analysis appears to be justified in situations such as *Holmes* which involve the prospect of duplicative recovery, but target-analysis is not a good methodology for analyzing RICO standing because it does not distinguish between duplicate and non-duplicate recovery situations. Because there is no danger of wrongfully discharged employees receiving duplicate recovery, their injuries should be considered directly caused by a RICO conspiracy.

C. *Would the Granting of RICO Standing to Wrongfully Discharged Employees Serve RICO's Deterrent Function?*

Finally, the *Holmes* Court held that "directly injured victims can generally be counted on to vindicate the law as private attorneys general." Under the majority position, directly-injured victims would include only those plaintiffs injured by a RICO predicate act. This dependence on RICO predicate acts derives

188. *457 U.S. 465 (1982).*
189. *Id. at 467-70.*
190. *Id. at 484.*
191. *Kramer v. Bachan Aerospace Corp., 912 F.2d 151, 156 (6th Cir. 1990); see supra* notes 89-91 and accompanying text.
from the *Sedima* Court's holding and the impression that the courts must "carefully delineate the types of plaintiffs who may validly bring a suit under RICO's civil enforcement provisions."193

The majority of the United States courts of appeals, however, place an unwarranted importance on the list of RICO predicate acts. A study of RICO's legislative history demonstrates that the predicate acts merely served as a means to reach the desired end of stopping the infiltration of legitimate businesses by organized crime. As RICO evolved from Senator Hruska's original bill into its present form the list of predicate acts increased from four non-descript activities to a diverse list of state and federal laws.194 The explanation for this expansion of activities is that Congress intended the list to reflect the activities of organized crime. In other words, organized crime is as organized crime does.195

The *Miranda* court argued for the majority of the United States courts of appeals, however, that "[RICO] cannot be used as a surrogate for local law."196 This federalism approach sounds of Justice Marshall's dissent in *Sedima*.197 Justice Marshall also wanted to limit the scope of RICO, but the majority of the *Sedima* Court disagreed with the "racketeering injury" approach with which he sought to achieve his goal. Instead, the *Sedima* Court held that remedies should be provided for injuries caused by conduct constituting a violation of section 1962.198 Not until the *Holmes* decision did the Court apply the standing limitation that a plaintiff's suit must serve to deter RICO violations in order to be classified as a direct-injury.

A conspiracy to violate RICO was recognized as a separate RICO offense because Congress understood that "certain offenses

194. S. 2049, 90th Cong., 1st Sess. (1967) included gambling, bribery, narcotics, and extortion as the activities which it sought to address. See 113 Cong. Rec. 17999 (1967); see supra note 19 for Congress' list of racketeering activity, 18 U.S.C. § 1961(1) (Supp. V 1993). Note that this list continues to be expanded and amended. In 1992, the United States Congress added several new offenses to the list of predicate acts.
196. Miranda v. Ponce Fed. Bank, 948 F.2d 41, 49 (1st Cir. 1991); see supra notes 86-88 and accompanying text.
198. *Sedima*, 473 U.S. at 496; see supra note 46 and accompanying text.
produce a continuing result.” A RICO conspiracy is more than a mere adoption of state law. The agreement must be in furtherance of a RICO “enterprise.” 18 U.S.C. § 1962(d) does not require the commission of “a pattern of racketeering activity.” Thus, the predicate acts were not intended to serve as an independent limiting factor for RICO standing based upon a RICO conspiracy violation.

The United States Supreme Court has not addressed the issue of whether allowing wrongfully discharged employees to bring RICO suits would deter RICO violations. It would seem, however, that employees could well serve this function. The employees of an “enterprise” are in a unique position to observe the activities of said enterprise. Their awareness of the activities of the enterprise in which they are employed is demonstrated by the facts of the several cases discussed in this Note.

CONCLUSION

The United States courts of appeals need to change their focus from the Sedima approach to the Holmes direct-injury test in order to evaluate RICO standing for wrongfully discharged employees. In one stroke, the direct-injury test will limit RICO standing while providing redress to “proper plaintiffs;” the direct-injury test will allow recovery only to employees whose discharges were sufficiently linked to a RICO conspiracy.

The proper elements of a RICO civil action based upon a violation of 18 U.S.C. § 1962(d) should be the following: (1) an agreement manifested by any overt act; (2) to violate any subsection of section 1962(a)-(c); (3) in furtherance of the affairs of an enterprise; (4) which directly causes; (5) an injury to business or property. This interpretation does the most justice to the RICO statute.

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199. S. REP. No. 617 at 160.
200. See supra note 14 and accompanying text.
201. “Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps.” Sedima, 473 U.S. at 493.