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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-648

TITLE SEDIMA, S.P.R.L., Petitioner V. IMREX COMPANY, INC., ET AL.

PLACE Washington, D. C.

DATE April 17, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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SEDIMA, S. P. R. L., :

Petitioner :

v. : No. 84-648

IMREX COMPANY, INC., ET AL. :

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Washington, D.C.

Wednesday, April 17, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:58 o'clock a.m.

APPEARANCES:

FRANKLYN H. SNITOW, ESQ., New York, N.Y.; on behalf of Petitioner.

RICHARD JORDAN EISENBERG, ESQ., Garden City, N.Y.; on behalf of Respondents.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Sedima v. Imrex. Mr. Snitow, you may proceed I think whenever you're ready.

ORAL ARGUMENT OF FRANKLYN H. SNITOW, ESQ.

ON BEHALF OF THE PETITIONER

MR. SNITOW: Mr. Chief Justice, and may it please the Court:

The matter before the Court today arises out of the district court's dismissal of Plaintiff's claim under the Racketeer Influence and Corrupt Organization Act, more commonly known as RICO, 18 U.S.C. 1961 through '68. The district court, Judge Glasser, dismissed the RICO claim on the grounds that no allegation of RICO-type injury apart from that which would occur as a result of the predicate acts had been pleaded.

The Court of Appeals for the Second Circuit held that there must be a mobster type injury and added, without our having the opportunity to previously brief the issue, that there must be a predicate conviction of either a predicate act or a RICO conviction.

I suggest to the Court that if the Court of Appeals' position is upheld, then the RICO statute will be for all intents and purposes no longer a viable tool in the fight against systematic organized criminal

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activity. And I suggest to the Court that the very language of the statute clearly permits the type of claim that was before the district court in this case.

Upon review of the Second Circuit's opinions and the various briefs which have been submitted to this Court, what is most striking, I believe, is the creation of artificial roadblocks that have to be read into the statute in order to uphold the Second Circuit's decision.

I respectfully suggest that the reading of these artificial roadblocks into the statute has a much greater effect than simply the question of whether Plaintiff's counsel -- whether there will be a bar of RICO Plaintiff's counsel, or whether the dockets will be overcrowded. I think those issues were decided by this Court in the Turkette decision, where the Court recognized that if Congress has the power to cast this kind of legislation we cannot in fact end the legislation, we cannot end this type of claim, because of concern for dockets.

I think that what is at issue here is not only the integrity of the legislative process, where courts engraft different conditions precedent that aren't found actually in the statute. That type of expansionism I suggest to the Court is not proper.

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More importantly -- and I think the Haroco decision alludes to this -- I think if this Court reads into the statute that which the Second Circuit read into the statute, we will create a certain disrespect for law. We will create status defendants, either by ethnic origin as suggested by Justice Cardalone, Judge Cardalone, or by class. Traditionally, I think that's improper and I think that's been rejected by the courts.

More importantly, Your Honors, in terms of the public perception of this type of criminality, where we create two classes, where we recognize that where an enterprise is operated through a pattern of racketeering, but suggest that if certain people don't fit into classical groups -- La Cos Nostra, Mafia -- if that's not the class, then you are immune, then you are not subject to this particular type of statutory scheme.

QUESTION: What effect do you suggest this would have on the criminal prosecutions under the racketeering statute?

MR. SNITOW: I think that the effect would be that criminal prosecutors would be subject to placing witnesses on the stand whom defense counsel could say would be interested, and their sole interest would be

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creating the predicate for later civil prosecution. It adds an extra burden to prosecutors being able to place witnesses on the stand, who traditionally have very little or do not have any legal stake in the outcome of particular litigation.

I mentioned the Haroco decision, Your Honor. At the end of the decision, the court says that if we felt that public policy was at stake here, if we felt that there was some larger good to the Republic that had to be served here, then we might engage in the kind of pruning that the Second Circuit engaged in. But that's not the case.

I submit, Your Honor, as a former prosecutor that I have seen persons who have been defendants in criminal actions, who have been granted the largesse of our laws in having evidence suppressed, honestly believe and create the impression that they were innocent as a matter of fact, rather than having been able to take advantage of procedural safeguards.

I suggest that's exactly what happens in this Court, and the danger to lawyers who trivialize and believe that they can say to a court that the type of facts that are represented here are merely a routine commercial dispute -- that's what's suggested by the Respondents here, that this is a routine commercial

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dispute.

In footnote 3 of the brief, they suggest to the Court that in fact there was only a technical violation. If you look at that footnote, curiously, they have failed to say that when the Defendant was convicted of a crime by a Nassau County grand jury, they failed to suggest what particular statute they were convicted under.

The statute under New York penal law was Section 175.10, which is a felony, for which a $50,000 fine was collected, and which involves the falsification of business records for the purposes of another crime, in this case larceny. There was no technical violation. This was not a mere business dispute.

QUESTION: Well, counsel, it could well be that that's true here. But of course, the holding that we will make will govern many other cases as well. And I guess it's possible in your view that a single technical violation of the Securities Act, coupled with a single mailing, with then be mail fraud or mailing statutes would suffice for the pattern of activity and bring the violator under the civil RICO provisions.

MR. SNITOW: Your Honor, I believe that Congress recognized that in order to cast a wide net and in order to avoid loopholes in terms of status, they

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would have to create a statute which set up minimums. And yes, if there were two predicate acts committed within a ten-year period, someone could be accused of a RICO violation.

Whether that RICO violation would ultimately be proven at trial, whether a jury or a tryer of fact would accept that as a racketeering type injury, is another question. I think that the --

QUESTION: But if that technically met the statutory requirement under the Securities Act and Mailing Act, although it was a single transaction, would that be a pattern?

MR. SNITOW: If committed within ten years, yes, Your Honor, that would be a pattern. But what I don't understand and has never been defined is the question of garden variety fraud or technical violation. Your Honor, if we look in a case such as this -- and we've set out an extensive statement of facts.

If one has to litigate, an individual, for $175,000 as in this case or $200,000 or $300,000, and one must litigate because one has been the victim of criminal activity -- not technical frauds, not garden variety frauds, but actual proveable criminal activity -- if this statute is not available, the realities of

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modern litigation make it impossible, make it impossible to go forward.

If the Court reads in the brief submitted by the Attorney General of Arizona and makes reference to the Posner article on the effect of this type of litigation, the Court must recognize that the realities are that when one walks in and accuses someone of fraud -- I think Congress understood this -- fraud through the operation of an enterprise, the kind of sophisticated criminality we're talking about --

QUESTION: Counsel, wasn't this particular statute kind of an afterthought in Congress?

MR. SNITOW: No, because I believe that there has been some language -- if you ask whether chronologically it came into the statute later, yes.

QUESTION: But the legislative history is comparatively deficient when compared with other types of general statutes. You're talking a great deal about, almost as a profit of doom here, as though Congress intended these things. I just wonder where you get -- what you're basing your Congressional intent upon.

MR. SNITOW: The statements of Congressman Poff, the statements of Senator McClellan, the later statements where they recognized that the civil damage -- they recognized that the whole concept, the whole

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scheme here, would reach outside, would reach outside of mere traditional organized crime.

And in one instance the Congress -- there was a notation in the House that they understood that the civil side was an important part of this statute, that in fact it was an adjunct to the criminal, in fact possibly more important than the criminal section, because it provided an opportunity for the private litigant to act as a junior attorney general in terms of searching out this type of wrongdoing, one that I must candidly say prosecutors in many respects aren't equipped to deal with, can't deal with, don't have the resources to deal with.

QUESTION: Of course, you wouldn't -- you certainly couldn't regard Judge Oaks as one who is, as a judge who is not sensitive to this kind of thing.

MR. SNITOW: Your Honor, I have read Judge Oaks' decisions in various criminal matters.

QUESTION: Did you read the list of the corporations that have been subjected to this Act?

MR. SNITOW: Your Honor --

QUESTION: That Judge Oaks put in there --

MR. SNITOW: Yes, Your Honor.

QUESTION: -- for you to read?

MR. SNITOW: Your Honor, he did, and I read.

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And I would rely upon Judge Pratt's language and Judge Cardalone's language. Judge Pratt said that the organized crime -- the person who commits the kind of fraud or predicate act, be he a Wall Street president, president of a Wall Street brokerage firm, or be he the organized crime classical hit man, he is equally susceptible, because there's no difference in the Act.

And racketeering, Your Honor, from the days of the Dewey-Hogan office up through the FBI recent --

QUESTION: Why don't you get off your soapbox and come down to the statute.

MR. SNITOW: Then let me say this, Your Honor. Going to the statute itself, if you deal with the statute, the statute says at Section 1964(c) -- the statute makes it very clear. The statute says that "by reason of any violation of this chapter, any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefore."

We then go back to what the prohibited acts are in 1962(c), and that says that "the operation of an enterprise through a pattern of racketeering" constitutes a -- is the proscribed conduct, be it in criminal or in civil activity.

And then we go back to simply 1961, which

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defines both racketeering activity and pattern of racketeering activity. And those two statutes, Your Honor, make it very clear that there are specific predicate acts and a pattern consists of two acts.

And as the Haroco court in the Seventh Circuit said very clearly, and as this Court recognized, it was a carefully drafted statute and it is broad for a very important reason -- because it doesn't wish to foreclose the right to bringing all who get involved in this type of activity.

QUESTION: But if you prove two of these predicate acts, you have proved a pattern and you have proved the enterprise and you have proved the damage?

MR. SNITOW: That's correct.

QUESTION: And so this is just a statute that permits people to have a civil recovery for the damage done to them by criminal acts as long as there are two of them?

MR. SNITOW: By reason of this pattern of activity, yes.

QUESTION: Well, Mr. Snitow, the initials "RICO" apparently stand for Racketeer Influenced and Corrupt Organizations Act, and certainly just -- it would be hard to transpose that title to the kind of business fraud here in the absence of very express

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Congressional language.

MR. SNITOW: Judge Rehnquist, I don't think so, and I will say why. I don't think so --

QUESTION: Well, do you think that the Defendant in this case was either racketeer influenced in the ordinary sense of that word or a corrupt organization?

MR. SNITOW: Yes, Your Honor, I do. I absolutely do. I think that when -- I think that there's no difference than when someone who is a known made member of a family, as the FBI may have dubbed him, and someone else runs a boiler operation or a bustout operation, it doesn't matter who the individual is that does it.

QUESTION: I agree with you completely. I'm not saying that any particular organization ought to be above suspicion. But you know, Judge Oaks described this as a case of business fraud, and you say it's serious business fraud which resulted in a Nassau County conviction.

But it still seems to me it's something of a step to say that it's racketeer influenced in the sense that Congress used the word in the title.

MR. SNITOW: The only time they used it was in the title, and the Congressional history, as we pointed

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out, demonstrates that Congress, both the Senators and the Congressmen, recognized that it would in fact be used against others.

But more importantly, look at the genesis of the word "racketeering." Traditionally, Your Honor, until the early sixties the FBI did not recognize the traditional La Cosa Nostra family crime syndicates. They are a creation -- I'm not saying in fact a creation, but I'm saying the concept of they as being the only racketeers, they are of fairly recent vintage.

The question of racketeering as that's traditionally been known is an act, a type of conduct.

QUESTION: Well, I am not sure I agree with you. I'm not sure how relevant all this is, but to me "racketeering" means someone who earns a living or a company that makes its way by corrupt practices.

MR. SNITOW: Your Honor, would I have the opportunity to conduct greater discovery into the files of Imrex to determine whether in the conduct of their business with the other suppliers, directly with our Federal Government, they had the right -- or they were involved in other acts of a similar nature? Must I rely first on the FBI taking an interest in random businesses to determine whether in fact they've engaged in other firms of racketeering?

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In this case there were discovery orders which precluded and limited our right to documents.

QUESTION: Counsel, did I understand you to say that in 1960 our Government didn't know what racketeering was?

MR. SNITOW: No, Your Honor. What you understood me to say is there was a period of time that the racketeering as that term has been used to suggest the La Cosa Nostra, that type of activity was not recognized by Mr. Hoover as the only form of racketeering, nor was it recognized by the Dewey-Hogan office, which started in the thirties, as the only form of racketeering.

And I don't know that it should be.

QUESTION: I assume you knew Mr. Hoover very well?

MR. SNITOW: No, Your Honor, but I have reviewed this area of the law and I do know the position that was taken, Your Honor.

QUESTION: Counsel, your client had a joint venture agreement --

MR. SNITOW: That's correct.

QUESTION: -- with the Respondent, and that was a contract, wasn't it?

MR. SNITOW: Yes.

QUESTION: Did you have a cause of action in contract for the breach?

MR. SNITOW: Yes.

QUESTION: Have you brought that?

MR. SNITOW: Yes.

QUESTION: The advantage of this is you get triple damages if you win?

MR. SNITOW: And attorney's fees and costs.

QUESTION: Right.

MR. SNITOW: And -- I'm sorry, Your Honor.

QUESTION: What about any partnership? Suppose you had a partner under a partnership agreement, and he cheated you with respect to the partnership distribution by writing you letters, making reports to you across state lines. Would that come within this statute?

MR. SNITOW: If he committed -- no, Your Honor, it would not.

QUESTION: Why not?

MR. SNITOW: Because it wasn't part of an enterprise. That was individual acts. That wasn't an enterprise.

QUESTION: Suppose you had a large partnership with offices in several states.

MR. SNITOW: And if the enterprise was run by

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means of this, that might constitute it.

QUESTION: Can you fairly say an enterprise is being run when the only acts are two mailings, that run a national partnership?

MR. SNITOW: Then I don't know that it would be operated by a pattern of racketeering, through, operated through a pattern of racketeering. I don't know that that would come under it.

QUESTION: You don't think it would?

MR. SNITOW: No, I don't think so, because I think the jury would have to be charged or a court would have to be charged, was it -- did it operate through a pattern of racketeering?

QUESTION: What is the difference, really, between your case and the hypothetical we've been discussing?

MR. SNITOW: Because in this case, as far as discovery has been permitted, Imrex and the Armons operated that entity through a pattern of racketeering. They operated in terms of the joint venture through a pattern of racketeering.

QUESTION: All he did was cheat his partner. He violated the joint venture agreement.

MR. SNITOW: No, he violated it, but not in the strict -- not in a contract fashion. He violated it

by going one step further by committing tortious acts of mail fraud. He committed mail fraud. They knowingly take documents, knowingly send them to my client, wherein they would sit down and they would take the figures that were relevant, change them after they had gotten them from their enterprise, and take large sums of money back.

QUESTION: Suppose both parties to this agreement had lived in the same city, there'd been no use of the mails, the reports were delivered by hand. Would that be a different case?

MR. SNITOW: Yes, because while there might be an interstate commerce question, but it would not come -- it may not come under the predicate acts, because larceny is not a predicate act.

QUESTION: It wouldn't be one of the defined predicate acts?

MR. SNITOW: That's correct, that's correct.

QUESTION: So the big difference is that one of the parties here lived in Belgium and the other in New York. It could have been New Jersey as well as Belgium.

MR. SNITOW: Yes, it could have. But I think that the real difference is, and what's really symptomatic, is that the court without -- the Congress,

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without being able to define, because I don't think there is one way of defining what is the texture of this type of activity, recognized the nature of the sophisticated, organized, and systematic corruption.

QUESTION: Yes, but I think you stated that if the cheating had occurred in the same city with no use of the mails, the same degree of cheating, that you could not come within the language of RICO. You agree to that, don't you?

MR. SNITOW: I agree with that because larceny is not a predicate act.

QUESTION: Yes, and does it make any sense really as to whether or not you mail a letter across the state line because somebody lives out here in Bethesda, in Maryland, rather than if you commit the same act within the city of Washington?

MR. SNITOW: Your Honor, I believe it does only in terms of understanding the scheme of the statute and what a legislature is bound to. It can only deal with certain finite choices in terms of framing a statute. And recognizing that, it had to talk in terms of a traditional grounds.

I don't know that -- I think that what the court was trying, the Congress was trying to say is that the Congress was trying to say that when this type of

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activity occurs, that we have a right to come into the court and ask for the relief. And the way they tried to deal with the hallmarks of sophistication are talking about mail fraud as a basis, as opposed to what might be just two larcenies within the state.

I don't think two larcenies in terms of somebody grabbing a pocketbook would necessarily be what is aimed at in this statute. I think that the statutory language, if looked at and if we divorce ourselves from the concepts that we bring in that racketeering has to be what has classically been promoted by the media, I think that what is being driven at by Congress is systematic and wrongdoing criminal activity. I think that's --

QUESTION: May I ask one question about the predicate acts. The list is so long it's a little hard to keep it all in line, but are all of them felonies?

MR. SNITOW: I don't believe so.

QUESTION: Which ones are not?

MR. SNITOW: I don't know that the bankruptcy -- I don't know that the bankruptcy fraud necessarily has to be, but I am not sure, Your Honor. I don't know that they are all felonies.

(Pause.)

MR. SNITOW: Commercial bribery, if that was a

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state crime. In certain states commercial bribery would not come within the ambit; it's not a felony.

QUESTION: To the extent that federal offenses would be predicate acts --

MR. SNITOW: I believe they --

QUESTION: -- is it true that all the federal predicate offenses are felonies?

MR. SNITOW: I believe they are, yes. Yes, I believe they are.

I'd like to say that looking at the statute there is or does not appear to be any support for the concept of the predicate felony. Nowhere in the statute is there any indication as it applies to the civil provisions that a conviction is required.

I think the problems with creating the requirement of a conviction, which we've listed briefly, were not really considered by the Second Circuit when they talked about this. In many cases a local legislature -- a defendant who may be guilty of mail fraud of the most egregious type, and who may fit within all the other criteria, may be prosecuted by the state. That prosecution would preclude, under the Second Circuit's decision, a RICO violation, a RICO civil suit action.

I would like to reserve my remaining time for

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rebuttal. Thank you.

CHIEF JUSTICE BURGER: Mr Eisenberg.

ORAL ARGUMENT OF

RICHARD JORDAN EISENBERG, ESQ.,

ON BEHALF OF RESPONDENTS

MR. EISENBERG: Mr. Chief Justice, may it please the Court:

The question here, the principal question here, of course, is whether or not a civil RICO plaintiff must plead and prove a so-called RICO-type injury or racketeering enterprise injury to prevail under Section 1964(c) of the Act.

Petitioner suggests that the imposition or the adoption of the RICO standing requirement is merely an abstraction in addition imposed on the law by various of the district courts simply because the courts don't like the notion of the increased burden on them which would occur as a result of a broad reading of the statute.

We say, no, contrary to Petitioner's arguments, the standing requirement is essential to the proper and just application of the law, and this Court does have before it today what we think is a proper basic definition of the term, the concept racketeering enterprise injury.

Why do we say, first, that the racketeering

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enterprise injury requirement is essential to the proper enforcement of the statute as expressed by the will of Congress? There are at least three significant reasons why this is so.

First, the racketeering enterprise injury standing requirement comports with the legislative history and legislative intent as far as it can be divined, and it comports further with the stated overall purposes of the entire RICO law, which is the giving to the Government enhanced weapons in the fight against organized crime.

Second, we say that the imposition of the racketeering enterprise injury standing requirement is entirely consistent with the fact that the genesis of civil RICO was in the concept borrowed from the antitrust laws, that concept being an antitrust standing requirement.

Third and finally, we say that the direct result of a failure to adopt the racketeering enterprise injury would in fact result in the use of the law for purposes entirely beyond the consideration of the Congress.

First, if I may return to the issue of why the racketeering enterprise injury requirement is consistent with the stated purpose and legislative history of the

statute. It is clear from the legislative history that the purpose of RICO as a whole, including the civil RICO statute, was to enhance the ability of Government to fight organized crime.

RICO as a whole, and specifically civil RICO, was never intended, and there's no basis to claim this, for the Congress to create a new federal fraud statute. Nor was it intended as a recidivist statute, to give an individual prosecutor additional sanctions against a defendant who had committed two predicate acts or two criminal acts, two felonies, instead of simply one.

The stated purpose of the Congress in enacting RICO -- and this has been discussed by this Court in Turkette -- was to combat the infiltration of organized crime into legitimate areas of the national economy and to combat criminally organized entities which prey upon the national economy.

QUESTION: You say there's no basis for arguing to the contrary. What about the language of the statute? You're going to get to that pretty soon.

MR. EISENBERG: Yes, indeed, Your Honor, we will. We suggest that focusing on the language of the statute brings us to the point I will return to in a moment, which is that if one analogizes the language clearly to its antecedents in antitrust law, that the

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racketeering enterprise injury comes to the fore once again.

If I may return for just a minute to the purposes and legislative background, RICO is clearly principally a criminal statute. The question was asked, I believe, of Mr. Snitow as to whether or not there is extensive legislative history on the consideration of the civil cause of action.

The answer, as eloquently described by Judge Oaks, is absolutely not. The civil RICO cause of action, 1964(c), was added to the statute very, very late in the legislative consideration by the Congress and without extensive debate. There had been prior considerations of a civil cause of action, but there was no discussion in the legislative record which would give rise to the notion that the civil action can be considered so broad.

QUESTION: Well, Mr. Eisenberg, in Turkette and in Russello the Court applied the plain language of the statute, and it's a little hard to understand how, looking at the plain language of the statute, a person who is injured by a predicate offense that is a component of a pattern of racketeering activity as defined in the statute isn't injured by reason of a violation of 1962.

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MR. EISENBERG: Your Honor, there is absolutely nothing inconsistent about construing the criminal aspects of RICO broadly, but at the same time imposing proper standing requirements on the civil cause of action. We say this because the purposes and background of the statute were different.

QUESTION: Yes, but taking your view, if a pattern of the statutorily specified predicate acts were committed by a known member of the Mafia -- let's make it the worst case -- in your view there couldn't be a recovery without this separate kind of injury that the statute doesn't even talk about.

MR. EISENBERG: With all due respect, Your Honor, that is not Respondents' position. There must be allegations and proof of a pattern of racketeering activity, and that is the requirement in 1964(c), in which it describes the civil cause of action as being by virtue of a violation of the pattern of racketeering activity.

And we say that in the appropriate factual pattern, absolutely, there can be such a recovery. We don't disagree, and we don't suggest that the broad view of the statute in the criminal aspect is inconsistent with our notion that there must be a standing requirement on the civil cause of action.

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QUESTION: Yes, but if the only damage that was caused in Justice O'Connor's example was from the two criminal predicate acts, I take it there would be no recovery?

MR. EISENBERG: We say no, not under the civil cause of action. The civil cause of action posits something more than the mere recitation of predicate acts, and we attempt to define that in our brief.

QUESTION: Well, but your problem -- I think you do have a problem with the language of the statute.

MR. EISENBERG: There is no question that, viewing the language of the statute alone and applying mechanically the language of the statute, the single commission of the two predicate acts can be claimed to be the pattern of racketeering activity and there is a civil RICO suit.

We suggest that the legislative history and the effects which such a mechanistic reading of civil RICO would result in simply mitigate against that use.

QUESTION: You do think the statute is readable to permit recovery in this case?

MR. EISENBERG: Readable to permit recovery in this case under civil -- as a 1964 claim? No, we do not.

QUESTION: But you think it shouldn't be read

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that way because of the legislative history and the purpose of the statute?

MR. EISENBERG: Indeed, correct.

The principal reason why the enterprise injury recovery must be clear from the statute is the analogous construction of the statute taken from the wording of the Clayton Act. Section 1964(c), as we have said, requires violation by reason of a violation of 1962. That is, that "by reason of a violation of" language is entirely consistent with antitrust doctrine.

This Court in the Brunswick Corporation versus Puerbo Bowl-O-Mat case discussed by Judge Oaks' in the opinion below made the point that there is an antitrust standing requirement, that a distinction can and must be made between those injuries intended to come within the rigors of antitrust law and those which are beyond it.

We say the analogy is clear here. There was not intended to be wholesale importation of antitrust doctrine into civil RICO, but the concept that a standing requirement separates the intended uses of the statute from those not intended is clearly usable. It's right there in the structure of the statute. We say it's applicable.

QUESTION: Do you think that -- do you agree that there was an enterprise within the meaning of the

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statute in this case?

MR. EISENBERG: Yes, one of at least two alternatives. I think the enterprise definition is the easiest, because in practical terms, as has been noted, Merrill Lynch has been considered an enterprise, E.F. Hutton, Lloyd's of London.

QUESTION: So you don't attack the notion that -- you don't deny there was an enterprise?

MR. EISENBERG: No, there are several.

QUESTION: All right.

MR. EISENBERG: There's the joint venture, there's the corporate Respondent.

We are focusing on the requirement of an enterprise injury as being part and parcel of the pattern of racketeering requirement.

QUESTION: On your standing point, Mr. Eisenberg, the requirement in Brunswick that there be antitrust injury, injury to competition, may be a little bit gauzey, but it seems to me that when you say there has to be a racketeering type injury it's even gauzier, because there doesn't seem to be the body of law that tells you what it is the way there's a body of antitrust law.

MR. EISENBERG: With all due respect, Your Honor, the reason why there is not the appropriate body

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of law is I believe this is the first civil RICO case to come before this Court. We do suggest, however, that there is a clearly usable basic definition of the racketeering enterprise injury as it relates to Section 1964(c), and we have described it in our brief.

If I may respond in a bit more detail, the essence of it is as follows. Section 1962(c) separates two basic patterns of conduct, conduct characteristic of organized crime -- and that is not the same as conduct connected to organized crime associations; I'll return to that in a moment.

The two basic types of conduct are: the acquisition of or infiltration into a previously legitimate business by criminal elements; and secondly, the operation of an enterprise through a pattern of racketeering activities.

We say that there are appropriate criteria for determining what is conduct characteristic of organized crime, and there are two basic criteria in this regard: First, is the pattern of racketeering activity alleged to include a hierarchy or internal discipline characteristic of organized crime? Is there an allegation that amongst those who are supposedly criminal actors -- and of course, we remember that we must go back to the predicate acts which are themselves

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crimes -- amongst the criminal actors, was there an internal discipline, coercion amongst them, characteristic of an organized crime syndicate? We suggest in this case there is none, and in the overwhelming majority of so-called garden variety RICO cases there is no such allegation.

The second basic criteria which we say is at the heart of the racketeering enterprise injury requirement is the issue of corruption itself, and the point was made, I believe by yourself, Your Honor, just a few moments ago that the very title of the statute is Racketeering Influenced Corrupt Organizations.

We say the standing requirement makes a separation between ordinary commercial disputes -- and I do not mean to trivialize them as a class or to trivialize the dispute here. I am, however, saying that there's a distinction between ordinary commercial disputes and the racketeering influenced corrupt organizations which were the target both of the criminal and civil aspects of this law.

A corrupt organization would have as part of the allegations the corruptions of the institutions which the Congress sought to protect. That would be labor institutions, political institutions, the public treasury, or civil or regulatory process. We say that's

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at the heart of it.

If the alleged predicate acts are alleged to have been part and parcel of such a corrupting activity, then civil RICO is made out if in addition there are claims of an internal hierarchy or internal discipline amongst the criminal actors. Absent that, we have nothing more than a recitation of predicate acts bootstrapped into civil RICO and treble damages.

QUESTION: The statute speaks of corrupt organizations --

MR. EISENBERG: Yes, it does.

QUESTION: -- in the title, not "corrupting organizations."

MR. EISENBERG: Well, forgive me. I don't mean to mislead. If the allegations are made that the pattern was conducted with the intent of corrupting, then we say the enterprise, if such an enterprise is properly pleaded, is a corrupt organization and one which would fall within the scope of civil RICO.

We simply say, absent the allegations of that sort -- and there are absolutely none in the case at bar --

QUESTION: May I ask --

MR. EISENBERG: -- there is no pattern properly pleaded.

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QUESTION: -- do you defend Judge Oaks' requirement of a prior conviction?

MR. EISENBERG: I'll speak on that briefly. It has been noted just a few moments ago that neither of the parties briefed or argued the prior criminal conviction matter in the district court or before the Second Circuit.

QUESTION: Or in this Court so far.

MR. EISENBERG: Or in this Court so far.

(Laughter.)

MR. EISENBERG: Your Honor, we have certainly attempted to brief it. We have not yet spoken about it.

On reflection, the prior conviction requirement is we believe consistent with the policies of the Act, and its purpose is to avoid extreme difficulties with the operation of the law. First and foremost, I believe Judge Oaks made it clear that the perspective of the Second Circuit was that the civil remedy is incidental to and supplemental to criminal prosecutions.

RICO was originally a new weapon to fight organized crime, and at the tail end there was added the rights of private plaintiffs under certain limited circumstances to proceed against those already proved to

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have committed criminal acts.

The Petitioner does not respond to two vital questions. We say first, RICO is different from all other federal statutes that have been brought to our attention in that proof of a RICO civil judgment must part and parcel include proof of predicate crimes. Criminal acts must have to be proved.

This Court in Addington versus Texas and Herman & MacClean versus Huddleston considered the issue of what are the relative burdens between the parties in determining whether or not a preponderance standard or a proof beyond reasonable doubt standard should apply in any given action.

We say where you are putting on trial the defendant in a civil RICO case for crimes, criminal acts, the plaintiff cannot proceed to judgment unless he in fact proves crimes. He cannot, under the balancing of interests test, prove crimes unless he proves them beyond a reasonable doubt.

QUESTION: That's not his position. His position is he can't even file his complaint until the Government has proved a crime, as I understand.

MR. EISENBERG: Indeed, either for a predicate act or for criminal RICO.

Now, absent this schema we raise two points

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which have not been addressed. What of the civil plaintiff who goes to judgment and obtains a judgment? Can a local prosecuting authority or a United States attorney, using the doctrine of affirmative collateral estoppel, automatically obtain an indictment? Can he automatically obtain a conviction, there having been proof beyond a reasonable doubt of criminal acts? Can he impose the sanctions?

QUESTION: Well, we don't reach the question of standard of proof in this case. As I understand it, that's not before us.

MR. EISENBERG: Indeed, Your Honor.

QUESTION: May I ask, since you give that example and there's the talk about the absence of a body of law, how many of these cases have actually been tried?

MR. EISENBERG: Only a very limited number.

QUESTION: These are all on the pleadings, aren't they?

MR. EISENBERG: Excuse me?

QUESTION: All the law that we have before us is basically pleading law, isn't it?

MR. EISENBERG: Almost all the law. There is a very egregious case now pending before the Fifth Circuit which we cite in our brief, where a fraud claim

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and RICO claim went to judgment. The common law fraud claim was dismissed by the district court and the district court, even dismissing a common law fraud claim, permitted damages in the amount of $2 million under civil RICO. That case is pending before the Fifth Circuit.

There was, I am aware of, a judgment in the District of New Jersey, which was reversed on grounds not directly on point in the Third Circuit a short time ago. But very, very few of these cases have gone to trial.

We cite the example of one in the Fifth Circuit, Armco versus SLT Warehouse, which has gone to trial and resulted in the most extreme egregious results, as I say, the dismissal of a common law fraud claim but the finding that RICO was properly made out and treble damages under the statute.

Your Honor indicated that the burden issue is not before this Court. I respectfully submit that the burden of proof issue is the flip side of whether or not to affirm the Second Circuit on the prior conviction issue.

This Court could conceivably say that a prior conviction is not necessary, but that a civil RICO plaintiff must move in the context of a civil case and

prove his case, each element of it as it relates to the predicate acts, beyond a reasonable doubt. That raises the same issues. It has other practical effects different from the prior conviction requirement, but the same process would at least protect the rights of civil RICO defendants.

I want to return just very briefly to the argument made that the holding of the Second Circuit reimposes through the back door, so to speak, the organized crime connection requirement. We say it does not.

The civil RICO plaintiff does not have to plead a connection between the actors, the defendants in his or her case, and identifiable organized crime communities. He simply has to plead that the pattern of racketeering is comprised of the events which are characteristic of the conduct of organized criminal syndicates -- very different.

On the one hand, the law might run afoul of the prohibition against status offenses. We say no. RICO punishes conduct, no matter who commits it. But that is not the same as saying the racketeering enterprise injury requirement re-imposes a need to show that the civil RICO defendant is somehow a member of organized crime as it is classically known. That is not

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our position.

QUESTION: Well, I suppose one of the problems is that organized crime is known to invest proceeds in so-called legitimate businesses and launder money in that fashion. So it's a little hard to read in the kind of thing you're suggesting.

MR. EISENBERG: With all due respect, Your Honor, that is not the portion of the statute that is being considered at this time. Section 1962(b) discusses the acquisition of legitimate business through funds acquired through criminal acts. Clasically, organized crime commits act, organizing prostitution, gambling --

QUESTION: Well, yes.

MR. EISENBERG: -- and acquires business --

QUESTION: Sure, but Congress has made a choice, it seems to me, in selecting the offenses that it wants to treat as predicate acts and in reaching out rather broadly for the purpose of deterring this kind of legitimate business activity by potentially organized crime figures.

MR. EISENBERG: We have no quarrel with that basic notion. The ironic thing that I would bring to the Court's attention is that the overwhelming majority of these cases are brought under three predicate acts

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alone: mail or wire fraud or alleged securities violations.

An acceptance of a mechanistic reading of RICO would wipe out overnight much of the case law of securities regulation, imposed in part by statute and in part by the decisions of this Court, and it would also completely eliminate much of the criteria for punitive damages in the state courts in commercial matters.

QUESTION: Why would it wipe out the securities law decisions?

MR. EISENBERG: Over a period of many, many years, Your Honor, just as one example which we state in our brief, the 10(b)(5) action, the implied right of action under Section 10(b) of the 1934 Act has required a purchaser-seller requirement and has imposed an actual damages recovery.

Both those issues could be sidestepped by properly pleading a RICO cause of action which simply says the same facts which would ordinarily be fraud in the sale of securities are now mail fraud. A prospectus was sent over state lines which was improperly fraudulent.

Coming through the back door, the actual damages recovery standard under a Section 10(b) claim is automatically converted into treble damages plus

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attorney's fees. The practitioner doesn't have to look at 10(b) any more. He or she simply describes the RICO pattern, he says there's a violation of the securities laws, and he's into a civil RICO claim.

There's a similar displacement of the state laws of punitive damages in commercial cases. New York, just by way of example, is one of the states where there's a very high burden of proof for punitive damages in a contract case. As has been indicated in the discussion with Mr. Snitow, yes, this is a breach of contract case, breach of fiduciary duty case between co-venturers, et cetera, et cetera, et cetera. At the end, it's a civil RICO case.

There is no question that the burden of obtaining -- the burden of proof for the Plaintiff in New York courts, a federal court applying New York law, to obtain punitive damages is very high. That analysis is unnecessary if the Plaintiff can proceed under civil RICO. There is in effect punitive damages automatically.

QUESTION: May I ask you -- a comment you made prompted this thought. Is it correct that if Congress had not included securities fraud, securities violations and mail fraud as predicate acts, most of the horrendous problems with the statute that are talked about in the

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cases would have been eliminated or avoided?

MR. EISENBERG: The practical results would have been extremely different. I suggest that the egregious --

QUESTION: Because all the other acts would not --

MR. EISENBERG: -- cases would not --

QUESTION: -- be able to fit your definition of whatever it is, racketeering, corruption, and so forth?

MR. EISENBERG: We are not -- we are not -- we are not claiming a per se rule. We are not saying that mail fraud, wire fraud, and securities violations were erroneously put in the statute, or that they should be treated differently. What we're saying is they have to be put into context because they're so close to the run of commercial disputes of all sorts.

QUESTION: No, but my thought is that had they not been included this really would be quite a different animal.

MR. EISENBERG: That's quite so, Your Honor, because the remaining predicate offenses go directly to what is classically the problems of organized crime: force, coersion, and corruption; the bribery statute, the labor racketeering statute, transportation of stolen

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goods, narcotics, prostitution, organized gambling, and offenses of coersion and force, kidnapping, racketeering.

Those are clearly the sum and substance of what the Congress was concerned about. By attempting to, as Haroco says, I believe, cast the net wider, it included in its wisdom, the Congress, additional predicate acts which conceivably are the predicate acts of racketeering, but ironically have been utilized to bring this law to bear against clearly legitimate enterprises and enterprises which, although they are isolated events, even if criminal conduct, are clearly not racketeering influenced corrupt organizations, clearly not within the intended scope of the law.

QUESTION: I think, however, that your position it seems to me would also raise some problems for the civil plaintiff even if you excise the securities issue from the statute. Even if you had these garden variety crimes that you just spoke of, you would still have to prove separately a damage from a pattern of racketeering activity wholly apart from the damage caused by those crimes themselves.

MR. EISENBERG: There ought to be no difference in the analysis whether the predicate acts are murder and kidnapping or two alleged acts of wire

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fraud or mail fraud, as in this case or in Haroco. The analysis is the same.

QUESTION: So even if the statute didn't reach as far as it does, as Justice Stevens suggested, you would be here arguing the same thing.

MR. EISENBERG: The standing requirement is still vital. It's part and parcel of the legislative intent, the borrowing from antitrust concept, and the intended scope of the law to impose additional sanctions against actual corrupt organizations. The analysis is no different.

We're simply saying there must be recognition that in the practical sense in litigation mail and wire fraud and securities violations are so close to the run of all sorts of commercial disputes that the character of the predicate acts must be examined. If they don't -- if they aren't tied with -- I'm sorry, Your Honor. If they aren't tied with -- forgive me -- with corruption, they're not racketeering. Forgive me, Your Honor. You had a question.

QUESTION: I did. Under your position, if a Mafia figure committed two predicate acts of arson and burned down the property of the complaining plaintiff, you would say no recovery under the civil section because there's no separate special RICO injury --

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MR. EISENBERG: That is correct.

QUESTION: -- unless the insurance were lost or something of that kind. And you know, Congress clearly intended to permit that. So while Congress tried to create and cast a broad net, the net you would cast would countermand some of what Congress tried to reach.

MR. EISENBERG: With all due respect, no, Your Honor. It's not enough simply to say that a civil RICO plaintiff may plead two predicate acts and an allegation that a person is a member of the Mafia. Almost by definition structurally, if someone can claim a person is a member of the Mafia he can claim that the target person is involved in a syndicate which has an internal criminal hierarchy and also that the predicate acts were for the purpose of corrupting either a business organization or in furtherance of a criminal syndicate's acts.

So we say it is not a status offense. It is not to say predicate acts plus the status of the criminal actor. But the conduct of the predicate acts themselves, the nature of those acts and whether or not they are tied in with a corrupting action and/or a criminal organization.

I just want to conclude by re-emphasizing that

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the opinion below has been sorely criticized as an aggressive jurisprudence. We submit that it is not. It does not go beyond the boundaries of the power of the courts, that rather, it is nothing more and nothing less than the proper historical use of the court's power to properly interpret the legislative intent and to describe the law in such a fashion so that it can be appropriately and justly administered.

Thank you, Your Honors.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Snitow?

REBUTTAL ARGUMENT OF

FRANKLYN H. SNITOW, ESQ.,

ON BEHALF OF PETITIONER

MR. SNITOW: Yes, Your Honor.

Your Honor, I think that the principles of law are that if the statute speaks plainly it's the statute that's controlling. And although Mr. Eisenberg was asked, as Mr. Justice Marshall asked me, never did we hear exactly dealing with the exact words of the statute.

The statute doesn't say what has been read into it by Mr. Eisenberg and Judge Oaks. With regard to the prior conviction requirement that it was suggested that we hadn't mentioned, I'd like to suggest to the

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Court that the prior conviction is in no way found in the statute. When Congress wanted to use the word "conviction," as it did in the forfeiture portions of the statute, it used those words. There is nothing to indicate a conviction requirement.

Moreover, as Judge Cardalone suggested, now wth regard to the enterprise injury or the mobster type injury, that's a euphemism again for racketeers, for status.

The question of the antitrust competitive injury concept has been absolutely put into disrepute by every circuit, I believe, other than the Second. The concept of antitrust was exactly addressed in this case in the legislative history.

The American Bar Association submitted a report, and that report I believe is quoted at pages 36 to 37 of our brief, and the American Bar Association said that the antitrust statute should not be -- should not appear. This is not an antitrust statute. The aims and objectives are very, very different.

A plain reading of this statute without judicial expansion requires, mandates that the prior conviction requirement be eradicated, and the status question, the standing question, the question of special injury, which is not found in the statute, also be

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eradicated.

I think anything else is to engraft unnecessary roadblocks and I suggest to the Court does not comport with the aims and objectives of the statute.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:54 a.m., argument in the above-entitled case was submitted.)

* * *

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