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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-822

TITLE AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL., Petitioners V. HAROCO, INC., ET AL.

PLACE Washington, D. C.

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PAGES 1 thru 51

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IN THE SUPREME COURT OF THE UNITED STATES

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL., Petitioners	x	No. 84-822
v.	x	
HAROCO, INC., ET AL.	x	

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 12:59 o'clock, p.m.

APPEARANCES:

DONALD E. EGAN, ESQ., Chicago, Illinois; on behalf of the Petitioners.

ARAM A. HARTUNIAN, ESQ., Chicago, Illinois; on behalf of the Respondents.

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
DONALD E. EGAN, ESQ., on behalf of the Petitioners	3
ARAM A. HARTUNIAN, ESQ., on behalf of the Respondents	24
DONALD E. EGAN, ESQ., on behalf of the Petitioners -- rebuttal	50

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Now we will hear arguments next in American National Bank and Trust Company against Haroco.

Mr. Egan, you may proceed whenever you are ready.

ORAL ARGUMENT OF DONALD E. EGAN, ESQ.,

ON BEHALF OF THE PETITIONERS.

MR. EGAN: Mr. Chief Justice, and may it please the court:

Perhaps the best way to start is by telling you, in contrast to what proceeded your lunch, what this case is not about, and then to proceed to tell you what it is about.

It's not about the so-called standing requirement articulated by a majority of the judges in the Second Circuit, which implies, and, indeed, requires, a prior criminal conviction, either under RICO or under the predicate offenses.

That issue was not addressed by the parties in the Seventh Circuit nor was it addressed by the Seventh Circuit.

The second facet of the Sedima case has certain comparable aspects to it, but it's by no means the same, or do we necessarily adopt and follow the position taken by counsel on our side of that case.

Now let me tell you what our case is about.

QUESTION: And you don't necessarily, then, take the position of the Second Circuit?

MR. EGAN: I need not take that position, Justice White. I suppose, if you asked me whether a prior criminal conviction was required, I'd have to answer you. But I think the analytical mind that you will find in our briefs, in contrast to that on the so-called Racketeering, or RICO, injury, as opposed to the standing issue, is quite different. And to respond initially to a question that you raised this morning, Justice White, we believe that this is a statute that, indeed, can and should be interpreted by this Court. And we think that that task can be carried out within the four corners of the statute itself.

The facts in this case are much like the hypotheticals that Justice Powell posed to the counsel this morning.

This is a business dispute between a lender and a borrower. The lender in this case is currently with its parent, the First National Bank of Chicago, the largest bank in the Chicago metropolitan area. The borrower was a businessman.

Loans were made by the bank to this businessman, and in connection with those loans, the contract between the parties specified that they would be keyed to the so-called prime rate, which is alleged in the complaint to be the

rate of interest charged by the bank to its largest and most credit-worthy commercial borrowers for 90 day, unsecured, commercial loans.

It is alleged that that contract was breached, and that the bank, in fact, charged a greater rate of interest than it should have.

This litigation is brought by the borrowers against the bank, against the bank's then-parent, which was a large commercial finance company, named Walter E. Heller, which was then listed on the New York Stock Exchange and by Ronald Grayheck, an Executive Vice President of the bank.

The complaint sounds, with the exception of RICO, like the kind of thing that you'd find in any state court in the land today: a suit for a breach of contract, a claim that the bank breached an alleged fiduciary duty to its borrower, and a claim under an Illinois consumer statute that grants one attorney's fees.

The RICO claims that are involved are under 1962(c), relating to the conduct, as opposed to the acquisition and maintenance.

The District Judge, on our motion, dismissed the complaint for failure to plead a RICO injury. An appeal was taken to the Seventh Circuit. The Seventh Circuit reversed the District Judge and concluded that, and I'm quoting: "A civil RICO plaintiff need not allege or prove injury beyond

any injury to business or property resulting from the underlying acts of racketeering."

In other words, to go back to the discussion in which you were engaged with counsel this morning, the position of the Seventh Circuit, which was unanimous, and the Court indicated no interest in holding a hearing en banc or rehearing on banc, was simply that all you require are two predicate acts under 1961 and proximate causality, which is basically automatic.

QUESTION: And an enterprise?

MR. EGAN: And an enterprise.

Effectively, what the Seventh Circuit --

QUESTION: And you need something besides the two predicate acts to -- an enterprise or not?

MR. EGAN: No, Your Honor, you do not.

QUESTION: Not under the Seventh Circuit?

MR. EGAN: Not under the Seventh Circuit's analysis. The Seventh Circuit, I think, made it abundantly clear what they were doing. They were effectively reading 1962(c) out of the -- and 1962 (a) and (b), by implication, although the case here relates only to 1962 (c).

It is our position that that interpretation of the statute is unwarranted.

The standards to which this Court must adhere in interpreting the statute are well known. They are spelled

out in Mohasco v. Silver. They require, one, an examination of the language of the statute; two, a plain meaning of the statute, not contraty to legislative intent; and, three, no policy reasons not to follow that plain meaning.

The statute, at least superficially, seems to be somewhat complex. As a matter of fact, in one of the other RICO cases that the Seventh Circuit has decided, it is described as a treasure hunt.

But we submit that it is not all that complex, once it is read as an integrated whole.

What is required in the first instance is a violation of one of the two predicate acts.

Now, there was a good deal of discussion this morning about two acts alone being sufficient, under RICO. I would suggest to the Court that, while that issue is not necessarily one that you need address, the definitional section of RICO does not define a pattern of racketeering activity as at least two acts of racketeering. It says it requires at least two acts of racketeering activity.

It can reasonably be inferred, it seems to me, that you are dealing with a threshold without Congress having addressed at what level the pattern of racketeering activity or the number of predicate acts rises to the necessary status for purposes of concluding that you do, indeed, have a pattern of racketeering activity.

Having satisfied 1961 in whatever fashion, you must then go to 1962(c). And 1962(c) states, "It shall be unlawful for any person employed by or associated with any enterprise engaged in or 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."

Now that middle ground, the one that must be hurdled before one gets on to the injury issue, is what is ignored by the Seventh Circuit's decision. And we submit it has erroneously read it out of the statute.

The net effect, as I mentioned a moment ago, is that I, as the aggrieved victim, if you will, of a so-called racketeering injury, need only establish two acts of mail fraud -- taking the liberal reading of pattern of racketeering activity -- and I've stated a RICO claim.

QUESTION: Mr. Egan, a moment ago you said that the Seventh Circuit had read out what you referred to as the middle ground.

Would you state what the middle ground is?

MR. EGAN: The middle ground was step two, Justice Rehnquist. It's 1962(c). It's the substantive offensive.

Judge Cudahy --

QUESTION: Did you make this argument in the Seventh Circuit?

MR. EGAN: We did not make this precise argument, Your Honor.

QUESTION: So you're not attacking, challenging, the Seventh Circuit decision on the basis that you presented below?

MR. EGAN: I would say we are not challenging it on a different basis, Your Honor.

What happened in the interim was the Seventh Circuit came down with its decision, and after the case was argued in the Seventh Circuit, but before it was decided, the Sedima trilogy came down.

The argument that we made in the Seventh Circuit implicates the very same point I'm making here, namely that the statute had to be read as an integrated whole. The cases at that juncture, including the District Court decision from which the appeal was taken, adopted the so-called racketeering injury really in a void, without any analysis of the relationship between 1962(c), which is a substantive provision, and the injury.

In any event, the net result now, in contrast to the net result in Sedima, is that the floodgates are truly opened. If the Sedima approach is accepted by this Court, particularly the prior criminal conviction,

it seems to me that the floodgates are, probably, effectively closed. If the so-called --

QUESTION: Closed or tightened up?

MR. EGAN: Closed, Your Honor.

I would think that the practical impact of requiring a prior criminal conviction of either the predicate acts or of RICO itself would be effectively to cut off.

QUESTION: Yes, but the Sedima also, didn't the Second Circuit also, they had a decision on the causation, too?

MR. EGAN: Well, they dealt with it in terms of standing, and their approach to the meaning of a RICO injury was an "injury of the type that RICO was calculated to reach."

QUESTION: I know.

MR. EGAN: That's a very subjective test, Your Honor.

QUESTION: I know.

MR. EGAN: We are not advocating that subjective test.

QUESTION: I know you're not.

MR. EGAN: But I think, to the extent that the Court opts to accept it, our position is certainly vindicated, but on a different analytical basis.

That requires something other than a reading of the four corners of the statute, Justice White. In a sense, it's the length of the emperor's toe or the mindset of the District Judge. I think one thing that's become abundantly clear in the large number of District Court decisions that precipitated my trip here today is the fact that, philosophically, the District Judges are all over the map, and, indeed, the circuits are, as well. They are very uncomfortable, I think, with some of the same questions that were raised, certainly use of the terminology "racketeering" and others. And this has impacted their approach to interpreting the statutes.

QUESTION: Mr. Egan, what, again, is it? As I understand it, the Seventh Circuit says you need a finding of civil guilt on the predicate offenses plus causation. Now, what more is it that you think 1962(c) requires?

MR. EGAN: Nineteen-sixty-two(c), by its very terms, requires that after you have an enterprise, that the enterprise be either conducted, or that the person conduct the affairs of that enterprise, in other words, run it. In other words, getting back to what you Justices were asking this morning, isn't this statute really calculated to take care of the person who goes out with illegal gains and acquires a business, or someone who uses illegal

gains to maintain a business, or, lastly, someone who steps in and conducts the business, runs the business?

QUESTION: Through, through a pattern of --

MR. EGAN: Through a pattern of racketeering activity. But you must run the business. You have to conduct the affairs.

This is not dealing with incidental involvement, and in a sense that gets you back to the point that Justice Powell was making this morning and the implication of mail fraud.

QUESTION: Well, is your client, it's a bank and it's a subsidiary of another bank?

MR. EGAN: At the time of the operative events here, it was a subsidiary of a commercial finance company which was listed on the New York Stock Exchange.

It was a subsidiary of First Chicago Corporation. It was sold in the interim period.

QUESTION: Could it be said to have been conducting the affairs of its parent?

MR. EGAN: I think, metaphysically, I have some problems with that. Judge Cudahy disagreed with us. We took the position, although Judge Decker at the trial level had disposed of the case only on motion to dismiss, we had argued the enterprise person issue as well.

In the Seventh Circuit, we raised again the

enterprise person issue. Judge Cudahy accepted our argument in terms of the need for there to be a separate person, separate from the enterprise, but concluded that, yes, indeed, in response to your question, a subsidiary could conduct the affairs of its parent.

QUESTION: So you say what's missing in this case is proof of conducting the affairs of an enterprise?

MR. EGAN: Allegations sufficient, Your Honor, to satisfy pleading requirements that, indeed, either American National conducted the affairs of its parent by charging a higher interest rate than it agreed to. I mean, that's the essence of this thing. This is about as far removed from mail fraud as you'll get.

Indeed, the action, the original action in the pendent state counts didn't even contain a common law fraud claim.

QUESTION: Well, the question that you presented for review here was whether a civil claimant has suffered damages merely by reason of the defendant's commission of the prescribed offenses, without more?

MR. EGAN: That's right.

QUESTION: Or rather by reason of the defendant's inquiring, or conducting? Do you think this question subsumes what you are arguing?

MR. EGAN: No, Your Honor, I don't.

That's precisely my point.

My point is that what the Seventh Circuit did was read the language that you'll find there, acquiring, maintaining control of an interest in or conducting the affairs of an enterprise through.

QUESTION: I think Justice White's question was directed to whether you think the question you presented for review fairly subsumes the point that you are now making.

MR. EGAN: Yes.

QUESTION: Mr. Egan, may I ask you, I still have the same problem I think Justice Rehnquist did. It focuses on 1962(c).

Assume that the complaint alleges that you made a lot of loans and that's part of the affairs of the bank, to make loans, and that you did so by repeatedly making false representations as to what the major customers were getting, the prime rate, and, therefore, you repeatedly committed mail fraud or telephone fraud or something like that.

Why, then, would that not be a pattern of activity, a pattern of racketeering activity, through which you conducted the affairs of the enterprise?

MR. EGAN: My position on that, Justice Stevens, would be that that is no different than any other loan

we make. We determine whether we're going to require collateral. We determine the term of the loan.

QUESTION: Yes, but you don't regularly and routinely make fraudulent statements in making your loans, I'm sure.

MR. EGAN: No, Your Honor. And it's a matter of record that we didn't in this case, either.

QUESTION: But that's what's alleged. If, in fact, you repeatedly and regularly made fraudulent misrepresentations and mailed them out to satisfy the mailing requirement. I really don't quite understand why that doesn't satisfy the definition under your analysis of the statute.

MR. EGAN: Well, I think that perhaps I can best respond to that by giving the Court an example of an instance, and these are reported cases, in which you did have conducting the affairs of an enterprise in a fashion that did pass muster. Indeed, one of them, ironically enough, was the example that the Seventh Circuit used in Schacht v. Brown, which is one of the cases that's routinely cited by the people on the other side of this issue, and, indeed, one that troubled Judge Cudahy when he addressed our argument in the Seventh Circuit.

In that case, the Seventh Circuit specifically

found that the accountants and the insurance holding company facilitated the maintenance of the business--that is, the insurance company, holding company--well beyond the point that it would have been able to do so by reason of fraudulent reinsurance agreements and misstatements of its financial condition.

I think that goes to the essence of conducting one's business. I think the making, the determination, along with another laundry list of things, of what rate you're going to charge someone interest, is not conducting the affairs.

QUESTION: Well, I thought an awful lot of the business of banks was making loans and charging interest. I would think that you're really running your business when you make loans and collect interest, aren't you?

MR. EGAN: That's certainly one facet, Your Honor. But I don't think that goes to the essence of running your business.

In Bennett v. Berg, for example, an Eighth Circuit case, the Court concluded that the owner of a retirement home had routinely defrauded people who bought retirement contracts; that afterwards they had conducted the affairs of the retirement home in a fraudulent manner and continued to bilk money from these people.

I think that those examples come much closer to

L5

the conduct. I think the conduct is something much more inherent than the determination of an interest rate that you're going to charge a borrower.

QUESTION: Mr. Egan, as I understand the complaint -- and you correct me if I am wrong -- they are not just saying you charged too high an interest rate. They're saying that you fraudulently did; in other words, you made certain misstatements about what the prime rate was -- on the basis on this, isn't that right?

MR. EGAN: Well, I go back to what Justice Powell said this morning.

We said we'd charge interest rate X and we, in fact, charged interest rate Y. They say that's fraud. I say it's a breach of contract.

QUESTION: Well, of course, if you're right, then you don't even have to reach the RICO issue. There is no fraud at all.

MR. EGAN: That would only occur as a matter of proof, or it could be developed in the course of discovery.

They say we told you we'd charge you X or we would use X as the base, which would result in a charge lesser than the one they claim we charged. I think that's about as common a contract type dispute as you're going to get.

QUESTION: Well, certainly if you are right, you're

certainly going to win the case, without ever getting to this questions, as Justice Stevens says.

MR. EGAN: That's small consolation, number one, I think, to a national bank that is named in a RICO case. Justice Marshall alluded to a laundry list of very prestigious names in American business. It's a dubious distinction to be added to that list. I don't think that's a burden that should be imposed on somebody.

QUESTION: Well, I suppose it's a dubious distinction to be indicted, too, sometimes, I guess. And a lot of people have been indicted and still win their case.

They're going to have to prove that you committed crimes, if they win.

MR. EGAN: That's true.

The burden of proof was something that we addressed this morning. That's an interesting and open issue.

QUESTION: They allege that you client's conduct was criminal.

MR. EGAN: It seems to me --

QUESTION: I take it that what you are saying is that this is somewhat like the case where a contractor gives a figure on a project and then performs and at the end of the line says that wasn't a bid, that was an estimate and I have to charge you more. So you've got really an

argument over what the contract was, and, if so, whether there was a breach of that contract.And you don't want to go through this long process, if you can avoid it, to establish that.

MR. EGAN: That's correct, Chief Justice.

I think this is a classic example of the type of case that doesn't involve RICO. And, as a matter of fact, it's a classic example --

QUESTION: Yes, but, Mr. Egan, don't we have to assume for purposes of decision that the complaint alleges your client committed at least two felonies? I know it's very unpleasant to make those assumptions for a very dignified company. But that's the kind of problem we have to deal with.

MR. EGAN: Yes, that's correct. It comes before you on a motion to dismiss.

But, as Justice O'Connor pointed out this morning, the import of what you do here impacts many things beyond the sensitivities of the American National Bank. Really, it is that global issue that I've tried to address my remarks to, and not to a parochial, but very important, interest to my client, namely, based upon whatever standard the Court articulates, is a cause of action stated.

QUESTION: It would seem to me you answered my question about 1962(c) by saying well, it really was

nothing more than an ordinary business transaction.

My question is if, by reason of a series of felonious misrepresentations, you have charged excessive rates, why doesn't that constitute conducting business through a pattern of racketeering activity? And I'm really not sure of your answer.

MR. EGAN: Well, in a sense, in a sense I think where we part company is on your determination of how integral, to use the word we used in our briefs, the assessment of the rate of interest to be charged a customer is. I sense that you think that is material.

QUESTION: Do you mean the interest rate that they charge is not the essence of its business?

MR. EGAN: It's certainly an important consideration, but I don't think it's the essence.

QUESTION: What is the essence of a bank's business?

MR. EGAN: Well, the essence of its business is a myriad of things. It's the determination of the initial creditworthiness of a customer. It's a determination of whether you will require collateral from a customer. It's a determination of what the discount rate will be, how many points you're going to charge a customer on the front end, whether this is going to be a term loan at a fixed rate or whether it will float. Will it float on a day by

day basis or will it float on a month by month basis?

There are a myriad of elements that go into it.

QUESTION: Well, they all relate to one thing.

QUESTION: I suppose if we agreed with you, you certainly would get out of this case an awful lot sooner than you would under the Second Circuit's approach.

MR. EGAN: Well, under the Second Circuit's approach, frankly --

QUESTION: Wholly aside from the predicate crimes point.

MR. EGAN: If the Second Circuit's approach -- I'm not talking about the prior criminal conviction, but the injury of the type RICO was calculated to reach, were to be adopted, you would have a very, very subjective test.

I think that my ability to get out sooner rather than later would be the reaction of a District Judge, who was running on an open field.

QUESTION: But your submission would be a cleaner way, a surer way out.

MR. EGAN: Well, I do not approach this, as I said to Justice Stevens a moment ago, solely--

QUESTION: Well, I know, but it would avoid a lot of litigation.

MR. EGAN: But not only for my client, Your Honor.

QUESTION: For who?

MR. EGAN: For others.

The numbers are somewhat staggering. This is a pretty good example, as I said, of the kind of case that, from my view and in the view of my client, doesn't belong in a RICO courtroom.

But the ABA Task Force report on RICO, which was just released within the last couple of weeks, and I believe has yet to be finally approved, has some very interesting and impressive statistics.

Seventy-seven percent of all of the cases filed under RICO -- all of the cases that they have been able to determine--the data base, obviously, is not as broad as you would like -- involve securities violations or frauds in a commercial setting. Only 9 percent of the cases are true, hard-core kinds of criminal cases.

QUESTION: When you say a hard-core kind of criminal case, if Illinois makes it a criminal offense to fraudulently represent something and damage somebody else, would you say that's a hard-core kind of crime?

MR. EGAN: A felony?

QUESTION: Yes.

MR. EGAN: Yes. I would say that's a hard-core kind of crime. But there is no such Illinois statute.

The only statute that they're proceeding on here

is mail fraud. I don't have to tell this Court how broad one writes as a prosecutor in the area of mail fraud.

QUESTION: But that's a felony, too.

MR. EGAN: Yes, it is. It is.

QUESTION: Mr. Egan, has that ABA Task Force report been filed here at all?

MR. EGAN: No, Your Honor. We obtained a copy of it from some of the committee members. I believe that others had access to it. I notice a reference in at least one of the amicus briefs to some of the material that it contains. It's voluminous.

QUESTION: Is it a public document yet?

MR. EGAN: I am confident that the ABA would make a copy available to the Court.

QUESTION: Well, we don't ask for these things. We wait until someone presents them.

MR. EGAN: We can certainly make an application to file the document with you. It may be of some assistance.

QUESTION: Might I ask, Mr. Egan, I gather your view doesn't accept the prior conviction requirement, does it?

MR. EGAN: We don't address it, Your Honor. I don't think that the prior conviction requirement can fairly be read into the statute.

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QUESTION: Well, of course, the two predicate offenses have to be proved by the plaintiff.

MR. EGAN: And the issue of the burden of proof is an open one on that.

QUESTION: That's what I wanted next to ask you. What do you think the burden of proof should be?

MR. EGAN: I think the burden of proof should be the burden of proof in a criminal case, Your Honor.

QUESTION: Beyond a reasonable doubt?

MR. EGAN: Yes, I do.

As a matter of fact, Judge Cudahy, while he didn't give us much, specifically left that question open. And I think it is an open question.

QUESTION: And you say that, I take it, because the consequences of the proof on the burden are the same as in a criminal case?

MR. EGAN: Precisely.

I'd like to reserve the few minutes I have remaining.

CHIEF JUSTICE BURGER: All right.

Mr. Hartunian.

ORAL ARGUMENT OF ARAM A. HARTUNIAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Petitioners' argument in this case really amounts to a request to imply certain requirements of proof in place of the absence of the words that Congress could have used had it chosen to impose such requirements.

The words of Section 1962(c), which govern this case, are very clear. Any person violates RICO whenever he conducts or participates in the conduct of the affairs of an interstate enterprise through a pattern of racketeering activity which is defined as several predicate acts.

Those words are clear enough.

Petitioners say that that is not enough. They say he must be a manager, and then, in the reply brief, they shift it back to saying well, it's okay if he's a low level person, I suppose upon being confronted with the fact that this Court has already construed the word "conduct" in other settings to mean low level people. It does not have to be a boss or a manager or a supervisor.

And now Mr. Egan comes before you and tells you again that it must be some kind of managerial function involved when the pattern of racketeering activities occurred.

It's interesting that the Petitioners say that if it is a nonmanagerial person, that person may still violate the act if his activities had some "integral relationship" and with the management of the enterprise.

And they say that that means the activities were the means by which the enterprise is being managed, to quote from their brief.

That's interesting, because what that apparently means is that in order for the activities to come within the act, the activities have to be directed by the management of the enterprise or blessed by the management of the enterprise.

Those requirements don't appear in the act. And what they lead to is what occurred to me last night as amounting to a variation of the Nurenberg defense. Because according to Petitioners, a defendant can become exonerated for his activities if he can demonstrate that he was not acting under orders.

That's a bizarre kind of approach to the statute, and it's a very strange kind of interpretation to seek, particularly where what we're talking about when we discuss the enterprise and its affairs is not whether the enterprise is guilty. The only issue in which the concept of the enterprise is implicated is whether the person was guilty of whatever it was that Congress said was so evil as to bring it within the penumbra of this act.

QUESTION: Mr. Hartunian, if an employee of, for example, a bank conducted a pattern of fraudulent activity, such as you have alleged here, but only for the

purpose of putting the money in his own pocket and not going into the bank's coffers, would that meet the statutory requirement?

MR. HARTUNIAN: Since I think the test is -- and I think it's clear -- the test is whether the frauds were committed in the course of transacting bank business, those facts are absent from the hypothetical as presented. But if the person was engaging in some kind of fraudulent activity which was bank business, then, clearly, there's no reason to exonerate him.

QUESTION: Well, as I posed it, it would be a bank employee who conducted this activity for his own profit, not the bank's.

MR. HARTUNIAN: I understand. Yes. He's playing his own game. I understand.

But the question is not whether he benefited the enterprise. The question is whether his criminal conduct occurred in the course of conducting or participating in the affairs of an interstate enterprise. And the reason for that goes right to the question of why did Congress impose an enterprise requirement. Why did Congress discuss such a concept as an enterprise?

QUESTION: Well, what's your answer to Justice O'Connor's question?

MR. HARTUNIAN: I believe that it depends on

which of two sets of facts are also involved.

If the person committed the fraud -- for example, in the making of loans, bank business -- then he is guilty because there is a sufficient nexus between what he's doing and the bank's interstate affairs.

QUESTION: And the bank is also liable?

MR. HARTUNIAN: That's a different question. We are not even addressing it and it's not an issue in this case.

Whether the enterprise is liable is really a matter that has nothing to do with any of the considerations we're talking about. That has to do -- in my opionion, the answer to that lies in normal respondeat superior principles.

QUESTION: Well, in this case, who is, for 1962(c) purposes, who is the person and who is the enterprise?

MR. HARTUNIAN: In the example Justice O'Connor--

QUESTION: I mean in your case, the American National Bank et al.

mr. hartunian: There is an individual and Heller International, both of whom are persons, whom we claim were persons who engaged in the enterprise known as American National Bank. In another count we claim that American National Bank was a person that took part

in the affairs of the enterprise known as Heller International.

QUESTION: Kind of a mutually interchangeable thing?

MR. HARTUNIAN: Yes.

QUESTION: Who committed the felonies?

MR. HARTUNIAN: In each instance, the person alleged to have committed the felonious conduct was the person. It was Mr. Grayheck and Heller with respect to the affairs of A and B; and in the other count it's A and B that committed the alleged felony, while taking part in the enterprise.

That is the way it must be.

QUESTION: In other words, you don't have a single theory of who the real culprit is. You're sort of pleading in the alternative?

MR. HARTUNIAN: It is really pleading in the alternative. Obviously, we cannot recover on both.

QUESTION: Would you tell me again, going back to Mr. Egan's point about 1962(c), just precisely what are the two predicate acts that you rely on?

MR. HARTUNIAN: Mail fraud.

QUESTION: I know you said mail fraud, but what did they do?

They say they didn't do anything but charge you

too high an interest rate. What do you say they did?

MR. HARTUNIAN: To put it very simply, they lied about what their prime rate really was.

QUESTION: Does that mean they were charging other customers a different rate? Is that what you mean?

MR. HARTUNIAN: That's right.

The prime rate is an important benchmark which relieves both sides, particularly the borrower, of going shopping. If he knows what the rate of interest is at which his bank is lending money to Chrysler, he may very well say to himself well, that's good enough for me this week. And then when the bank says to him well, we'll charge you 1.5 percent over the best rate which we're charging that week and we'll let you know what that is, and he says fine, I accept that, and they send him a bill saying this week our prime rate is 10 percent, you owe us a point and a half more than that, here is your bill for interest at 11.5 percent, and he pays it, trusting them -- he doesn't know that's a lie -- they're really charging 8 percent, that's really the correct rate.

QUESTION: All right. Now tell me again who has committed the crime. There are three people you have named, an individual and two corporations. The bank is the one who mailed you that information. Who committed the crime?

MR. HARTUNIAN: The person who engaged in the lie committed the crime.

QUESTION: Just the fellow in the office who mailed out the notices?

MR. HARTUNIAN: He or the corporation on whose behalf he's acting committed it, too.

QUESTION: Well, you see, in a statute like this, it's very helpful to know as precisely as we can who it is that you say committed the criminal predicate acts. I have difficulty understanding exactly who you are charging.

MR. HARTUNIAN: I think the easiest way to crystallize it is in the case of a person. There is a named person, an individual named in this complaint, who we say was a person who committed the predicate acts while engaged in the affairs of an enterprise.

Just taking that for the moment, because it is the simplest to view, he committed felonies. He is the person we're suing. He is the person against whom we are seeking a judgment.

When we discuss the enterprise, whose affairs he was allegedly conducting, we are referring to someone who is not being sued for purposes of that count. So, it is the person who committed the felonies, the person who committed the mail frauds.

Does that answer the question?

QUESTION: Well, I think I understand what you're saying.

I gather you haven't had discovery yet. That's probably part of the answer.

MR. HARTUNIAN: Well, we haven't had discovery; but it unsettles me a little to think that that's part of the reason. Because I think the theory upon which the complaint is brought, which is important to analyze what this statute means, doesn't require any discovery. What the statute says is that certain persons are liable, criminally or civilly, and whether that liability attends depends, in part, not only on these other requirements of whether the predicate acts were violated and whether there was a pattern connecting those predicate acts, but also to what extent was he engaging in the business of an interstate enterprise.

And the reason for that, I think, is that Congress is establishing a nexus between the criminality and interstate commerce. That was obviously of great importance to Congress.

Before getting to that, though, I just want to mention, quickly, that Congress could easily have used the words Petitioners say belong in this statute. Easily. They are words familiar to all of us, all lawyers and all members of Congress: manage, supervise, direct. But those words are absent from the statute.

If Congress wanted to insist on any such element, they could easily have used those words. They could have used the phrase "substantial relation to" or "integrally

connected with" but did not.

QUESTION: Could I ask you, do you think that you're addressing now an issue that was addressed by the Court of Appeals?

MR. HARTUNIAN: No.

QUESTION: Well, do you think that it's an issue that's subsumed within the question presented in the cert petition?

MR. HARTUNIAN: I do not.

QUESTION: Well, I would think you might suggest that that is the case, rather than just argue.

MR. HARTUNIAN: We did so in our brief.

QUESTION: Well, I know. But I haven't heard you suggest it now. Are you ever going to address the issue that was presented in the cert petition?

MR. HARTUNIAN: Yes.

I intend to spend another moment just talking about the breadth of the statute.

QUESTION: All right.

MR. HARTUNIAN: Because, instead of using words of constriction, words affording defenses--and, as a matter of fact, worse than that, if Petitioners are correct, these would impose requirements on the prosecutor in the first instance and on the plaintiff as a necessary element. So it's not just a matter of defense.

But, instead of using terms of constriction, Congress used terms of breadth, in every instance. They used the phrase "any person employed or associated by." So employees can violate the act. "Persons associated" means persons completely outside the organization entirely, directly or indirectly, and "conduct" or "participate."

So, every one of the phrases Congress used are phrases of breadth.

One question that came up this morning is whether the corporation or the enterprise must be primarily corrupt. I thought I heard that. And, of course, that is not the case. It wouldn't make any difference to Congress whether the enterprise is primarily corrupt or completely corrupt.

As a matter of fact, union activities are covered in this statute explicitly, and I cannot imagine any union ever, however corrupt it became, however involved in criminal activities, any such union ever becoming primarily involved in corruption, because it would always tend to the business of negotiating contracts and doing many legal things.

So that could not possibly have been Congress' intention.

No.

The reason why Congress inserted the enterprise requirement is as a vehicle by which to test the person's

involvement in interstate commerce. If a person throws a monkeywrench of criminality into commerce, then he's guilty, and that's what Congress was looking for.

The way that Congress decided to test whether the monkeywrench is in interstate commerce or somewhere else where Congress didn't have a vital interest at that time was to see whether he was working on the affairs of that enterprise. It's as simple as that.

(A) and (b), Subsections (a) and (b) deal with infiltration, and so the enterprise forms the vehicle to determine what it is that needs to be infiltrated.

But (c) has nothing to do with infiltration. (C) deals only with the pernicious effects of criminality on commerce. It would be a strange thing, indeed, for Congress to consider not only whether the person was involved in the affairs of an interstate enterprise, but whether he was a manager, or whether he was carrying out a policy. Congress wouldn't care about such things like that.

QUESTION: Would Congress care if the employee who did the overcharging was acting contrary to the express directions of management?

MR. HARTUNIAN: No. Congress would not care about that either.

QUESTION: In other words, RICO would still apply?

MR. HARTUNIAN: Yes.

QUESTION: Because if some clerk, somewhere, for a personal grudge used the mails to overcharge a customer --

MR. HARTUNIAN: Yes.

QUESTION: --RICO applies and the whole enterprise is characterized as engaged in racketeering?

MR. HARTUNIAN: Oh, no.

The person is regarded as having engaged in racketeering.

QUESTION: Oh, only the person?

MR. HARTUNIAN: Yes. That's the only racketeering relevant.

QUESTION: If the bank in this case could prove that it had no knowledge of the overcharge and that the overcharge was contrary to its normal practices, would it be out of the case?

MR. HARTUNIAN: If it was not sued, it would be out of the case.

Whether it would have a liability under respondeat superior is another matter. But whether the person, whether there's any racketeering activities is solely a question of whether the person committed them. The person would be the person stigmatized, and he would be the one against whom a judgment would be made.

QUESTION: But you've sued the bank, though.

MR. HARTUNIAN: As a person taking part in Heller's

enterprise. Yes.

QUESTION: And so the bank is a person and the bank is charged with racketeering.

MR. HARTUNIAN: Yes.

But the important thing is that the bank can be stigmatized and the bank can be held for a judgment only if the bank committed the felony.

QUESTION: I understand.

QUESTION: May I ask one other question on this point because I feel this language is rather tricky. I read it a million times, I think.

But in 1962(c), supposing you didn't have a parent subsidiary. You have just one corporation and one agent. And the corporation, then, is the enterprise, I gather, and the individual is the person who commits the racketeering violation.

You're saying you might be able to hold the enterprise on a respondeat superior theory.

MR. HARTUNIAN: In those cases where the enterprise happens to be the employer of the person, yes. But not always.

QUESTION: Well, in cases like this --

MR. HARTUNIAN: Yes.

QUESTION: -- it presumably would be.

But, then, to take it one step further, if you

had nothing but -- it's unlikely, I realize -- but say you had a sole individual running the bank and he did everything himself, and he would be both the person and the enterprise, then you would have a violation, would you not?

MR. HARTUNIAN: Well, he cannot be an enterprise. He cannot be both the same --

QUESTION: The person and the enterprise must be different person. I guess we have covered that before.

MR. HARTUNIAN: I think the answer is yes. The way you stated it, Justice Stevens, there would be no enterprise, other than the person, and therefore the act would not be satisfied.

Again, it gets down to why it was that Congress inserted the requirement.

If he is not taking part in the affairs of some interstate entity or company or association, then Congress doesn't care. But Congress cares very much where he is taking part. That's why he would be personally liable under RICO, even though he was playing his own game, doing something where his own profit was involved.

QUESTION: But not necessarily the enterprise?

MR. HARTUNIAN: That's correct.

QUESTION: That's a wholly different question?

MR. HARTUNIAN: That's right.

That is a wholly different question.

There were several questions asked this morning, and I find myself so much at odds with the answers that I feel compelled to answer.

First of all, I think the question was asked, would it have an impact in criminal prosecutions if the Sedima prior conviction rule were approved by this Court.

I must say it would have a slight, if any, impact, and probably a good one, I must confess. The impact would be that complaining witnesses' victims would have more of an incentive to bring cases to the prosecutor.

But, of course, that has nothing to do with whether there is such a requirement. The fact is that there is nothing stated in the act. I know of no case, no statute, in which bringing a civil suit depends on a prior conviction. And Congress known of no such statute.

Had Congress had any such intention to effect such a radical departure from the procedure, you know, with all of the other statutes, virtually all of the other statutes of the United States, you would think Congress would have explicitly said so.

QUESTION: Mr. Hartunian, do you agree that your burden of proof of the predicate acts would have to be beyond a reasonable doubt?

MR. HARTUNIAN: No.

Were this not a fraud this, were this a case

involving some one of the other predicate acts, excluding securities fraud, I would say that it's simply a preponderance.

What gives me pause about the fraud element is that there are many cases, in particular there was one Federal case, there was one case decided by this Court in which it was stated that the traditional burden of proof in fraud civil cases is clear and convincing evidence.

Another question that has been raised is what constitutes a pattern?

A pattern is not defined in the act. The word "pattern" is not defined at all, and there is no attempt to define the word. The normal rule of interpretation is that a pattern is what the ordinary usage of the word means it to be.

QUESTION: Do you think that it may mean something more than a single episode conducted by mail?

MR. HARTUNIAN: I think that in the single instance in which there are two offenses, a single transaction in which there are two offenses, and that can happen easily, that's probably one of the cases in which Congress viewed the requirement as being more than two.

I admit there might be cases in which there are more than two. And what Congress was doing by saying it requires at least two was making sure that no Court says that the minimum is something higher.

QUESTION: And that's one of the recommendations in the ABA study, is it not, that we should look at what a pattern means? It may mean something more than a single episode.

MR. HARTUNIAN: The ABA study -- and I think I read the preliminary report -- I think is in error in assuming that the way the law is written now, that any two acts amounts to a pattern. There has to be a connection. That's an important difference. And it has to be something more than one transaction. That makes sense to me.

The reason I talk about what makes sense is because Congress left it open for interpretation by not specifically defining the word.

But, at any rate, it may be three, it may be four. It depends on the facts, and it depends on whether there is a connection between the events that make up the pattern, as to whether or not a pattern exists.

One question raised this morning had to do with the tital of the act and the obvious purpose. Justice Rehnquist raised this question.

I'm sure, when you asked that, I remember that the answer was not, I don't think adequate for the question.

QUESTION: There is no doubt, from your point of view.

MR. HARTUNIAN: I am talking about the answer

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given by my --

QUESTION: Oh, by your cohort.

MR. HARTUNIAN: By the same side, yes.

There is no question that the underlying purpose of the Congress, in sitting down to consider this legislation, was organized crime. But it is also not open to doubt that what Congress intended in the language, in the act which was eventually enacted, was something much broader. The Congressmen's statements make that clear. The fact that some of the Congressmen said we cannot make this a status based offense, and then some Congressmen teased others for even considering the idea of making a status based offense because the Congressmen themselves not only feel obedient to the Constitution and to the decisions of this Court, but they, themselves, presumably believe in its principles.

So Congress would not want to pass a status based offense. And, therefore, that means that Congress passed an act which it deliberately meant to embrace people, far beyond organized crime. And there is a lot of logic to it, aside from simply being forced to.

To put it in a nutshell, in the terms of our case, Congress intended to deter fraud committed by organized crime by deterring fraud, period, by any person.

QUESTION: But that doesn't really explain

why it's entitled the Racketeering, Influence, and Corrupt Organizations. It was simply to deter fraud.

MR. HARTUNIAN: Well, that doesn't explain it, no. But I think an adequate explanation for the title is because that was the purpose for which Congress sat down in the first place and talked about such a thing.

The war on organized crime has been going on for more statutes than just this one. There have been several pieces of legislation, some of which have been enacted into law -- the Travel Act, the Hobbs Act, and I think the Hobbs Act's predecesor was called the Anti-Racketeering Act -- all of which were designed to deal with this problem. There's no doubt that, up until the moment the statute was passed -- not up until, until now -- Congress' primary purpose was to deal with the pernicious influence of organized crime.

But that does not mean that Congress intended that this statute apply only to organized crime. That is impossible.

And Congress said that's not what they were doing. And, of course, the language of the statute makes it clear that when it says "any person" who commits the predicate acts, that's to be taken literally.

The last thing I want to mention is that, of course, it's in my interest to make sure that the statute

not be interpreted in a way so that --

QUESTION: The last thing you want to mention in your whole argument?

MR. HARTUNIAN: Yes.

QUESTION: When are you going to discuss -- do we assume that you don't want to say any more than what was said in the prior case on the issue that the Petition presented?

MR. HARTUNIAN: I do want to say it. I misspoke when I said the last thing I want to say in the whole argument.

The last thing I want to say in response to the Petitioners' argument is that one of the notes Petitioners made, one of the observations Petitioners made is that the Blue Chip Rule and other rules of this Court will be gutted by this statute. If that were true, then that would be the way it is. But that's not true.

When Congress included a separate predicate act called Securities Fraud, it's quite clear that Congress meant that to be the exclusive predicate act for securities fraud. Otherwise, it would make no sense for Congress to include both the mail fraud provision and the securities fraud provision -- unless in the unlikely case Congress wanted a special provision to cover securities frauds not committed through the use of the mails or the wires, or

telephones. It's unlikely that such a thing could happen. It would be a rareity and would not justify Congress' putting in a special provision about securities fraud.

In addition, Congress restricted the securities fraud provision to the sale of securities. That doesn't cover the purchase of securities.

Now, with respect to the injury requirement, the most important thing about the injury requirement, as imposed by the District Court, and the reason why the Seventh Circuit reversed it, is because, not only does it not exist, not only does it not appear anywhere in the statute, but no one, no one up until that time, had even defined what it is. The District Court certainly didn't. All the District Judge said was that this is not a RICO injury, and you have to have a RICO injury, and he didn't tell us what it was.

As we told the Seventh Circuit, we don't even know if we comply, because we don't know what the requirement is.

Now, the only time I know of in which any Court which took this point of view and dismissed cases for lacking a RICO, a distinct RICO enterprise injury, was when the Second Circuit described the hypothetical of the person suffering from two arsons and, as a result, not being able to get insurance. The hypothetical, first of all, incorrectly assumes that each person must himself be

victimized by two acts. That's not required.

The focus of the pattern requirement is to eliminate sporadic activity, to get rid of the case in which somebody commits just one offense now and some other offense unrelated, either because of time or a different kind of offense, or something.

It's because Congress was typifying organized crime, a thread which appears throughout the statute, that the pattern requirement was imposed. And for that reason, since a pattern is required, then there really is no sense to taking the view that the pattern is something which, in and of itself, must cause injury to two people.

If a person brings himself within the statute by his conduct, by committing a pattern, that's what Congress was interested in -- not whether both offenses were committed against the same person. There's really no rationality to that.

Most importantly, the pattern requirement does not lend itself to a "but for" analysis, simply because Congress did not, and could not have, envisioned injuried separately attributable to pattern, in which the pattern was the cause rather than the individual components.

But, in the last analysis, the most important thing is that Congress, although it could easily have enunciated such a requirement in words, didn't do so.

There are ample, adequate reasons to account for why the pattern requirement is in the statute, without making it part of a "but for" analysis.

QUESTION: May I ask one other question?

There is a certain area of agreement between you and your opponent that the pattern is something different from two predicate acts.

MR. HARTUNIAN: Yes.

QUESTION: Supposing you had a pattern that consisted of several acts, five or ten. Do they all have to be felonies? It seems to me that, under your view of a kind of connection and all, you might well have evidence of a pattern that was not itself a predicate act, necessarily.

MR. HARTUNIAN: Well, all the predicate acts are felonies, except one.

QUESTION: I know all the required ones are. But I'm just wondering, if you had a half dozen acts in establishing your pattern, under your view the plaintiff could recover if any one of the acts caused injury, proximately caused injury.

MR. HARTUNIAN: Yes.

QUESTION: Whereas your opponent would say the pattern itself has to someone or other cause injury.

MR. HARTUNIAN: Not only do we say that, but if the person that we're suing goes and commits an act,

a predicate act, against each of nine or ten people, and it had nothing to do with me, and then he commits his eleventh act and injures me, if I show a pattern between the acts, between the one in which he injured me and any one or more of the prior acts, he, then, is liable to me as a person under RICO, because he has engaged in a pattern.

QUESTION: Since you've also been injured by a pattern?

MR. HARTUNIAN: I have not been injured --

QUESTION: Well, you've been injured by a crime that's part of a pattern?

MR. HARTUNIAN: Yes, a crime that's part of a pattern.

QUESTION: And what do you think, in addition to the predicate acts, is necessary to show, to prove a pattern? How do you prove a pattern?

MR. HARTUNIAN: Well, I view a pattern as a negative thing. I view a pattern as being in existence when the elements of which it is comprised are not unconnected.

QUESTION: It takes more than showing that the same person committed two predicate acts, but how much more?

MR. HARTUNIAN: Well, of course it has to be the same person.

QUESTION: Sort of a conspiracy between two people?

MR. HARTUNIAN: No, no.

QUESTION: That he has a business of doing these things?

MR. HARTUNIAN: Well, it's not that he has a business of doing them. It's that when he did them, he did it in such a fashion, let's say when he did one, he had it in mind to do another. Now, we don't go into his subject intent. We do it by objective evidence. But we can tell certain things about the relationship between one act or another just by the profile and the attributes by which they occur.

When we can infer something about act A from the facts of act B, then I think we have a pattern. If the two have something in common -- it might be the victim, it might be the purpose, it might be the method by which it was conducted -- but if there is a connection, then, such as to take him out of the realm of being the sporadic violator that Congress wasn't concerned with, then that connection comprises the pattern and satisfies the reason why Congress inserted the requirement.

QUESTION: Doesn't the plaintiff also have to prove, though, that the affairs of the enterprise were conducted through the pattern?

MR. HARTUNIAN: Yes. But our view of "conducted" means taking any part, because I think that's what Congress clearly meant, and that's what this Court said in Sunobry, United States v. Sunobry, about the use of the word "conduct" in this same act, but in a different title. It's any person, whether it's a boss or a street employee, a person who's a runner in a numbers game or an unlawful gambling operation. He is certainly a person against whom this statute is directed. He doesn't conduct anything except drive his car up and back. He certainly is liable so long as he takes part in the activities.

That concludes my argument.

Thank you.

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

ORAL ARGUMENT OF DONALD E. EGAN, ESQ.,

ON BEHALF OF PETITIONERS -- REBUTTAL

MR. EGAN: Briefly, Your Honors.

Mr. Hartunian's presentation, like Mr. Hartunian's brief, nowhere attempts to define what a RICO injury is.

Our position is that the RICO injury can only be defined by determining what Congress meant when it talked about conducting the affairs through a pattern of racketeering activity.

Perhaps Justice Stevens and I part company in terms of how intimately involved in the conduct of the affairs of the American National Bank through a pattern of alleged racketeering activity the setting of interest rates may be. But that's what the statute says. And until and unless you do that, you can't answer the issue which we bring before you, Justice White, namely, what is a RICO injury. That's the very same issue that was addressed by the Seventh Circuit. It's the issue that this Court must address.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:56 p.m., the case in the above-entitled matter was submitted.)

* * *

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BY Paul A. Richardson

(REPORTER)