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Violation of Rule 10b-5 As a Predicate Act Under Civil RICO

Introduction

In *Securities Investor Protection Corporation v. Vigman*,¹ the Ninth Circuit Court of Appeals examined a Racketeer Influenced and Corrupt Organization Act (RICO)² claim predicated upon violations of section 10(b) of the Securities Exchange Act of 1934³ and its accompanying Rule 10b-5.⁴ Plaintiffs in the case were the Securities Investor Protection Corporation (SIPC) and the trustees appointed by the SIPC to handle the liquidation of two securities brokerage firms. The SIPC was established by Congress⁵ in 1970 to provide greater protection to customers of brokers and dealers and members of national securities exchanges.⁶ It insures customers of brokerage firms in a manner similar to the way the FDIC insures depositors at banks. In *Vigman*, the SIPC had instituted liquidation proceedings against and appointed trustees for two securities brokers, First State Securities Corporation (FSSC) and Joseph Sebag Inc. The SIPC and trustees were bringing an action for damages against some of the former principals and employees of FSSC and Sebag, as well as against officers and directors of six other companies, all of whom the SIPC alleged had been "engaged in a scheme to manipulate the stock of six companies traded in the over-the-counter market, and [had] used FSSC and Sebag as vehicles in furtherance of this scheme."⁷ The district court granted summary judgment to the defendants on the grounds that the SIPC did not have standing to assert a claim under RICO when that claim was based on alleged securities violations under Rule 10b-5. The Ninth Circuit reversed and held that the SIPC did not have to be a purchaser or seller of the securities at issue in order to bring a Rule 10b-5 securities fraud claim under RICO. The purpose of this article is to question the reasoning behind this decision.⁸

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1. 908 F.2d 1461 (9th Cir. 1990).
2. 18 U.S.C. §§ 1961-68 (1988).
3. 15 U.S.C. § 78j(b) (1988).
4. 17 C.F.R. § 240.10b-5 (1990).
5. 15 U.S.C. §§ 78aaa-78lll (1988).
6. *Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461, 1463 (9th Cir. 1990).
7. *Id.* at 1464.
8. The defendant does not challenge the standing of the trustee to bring such a claim. *Vigman*, 908 F.2d at 1465 n.5.

To properly understand the court's answer, and its significance, it is necessary to have a full understanding of Rule 10b-5, its court imposed purchaser/seller standing requirement, the reasons for the requirement, and the relation of the requirement to a civil RICO claim.

Rule 10b-5 and its Standing Requirement

Rule 10b-5 was enacted by the Securities and Exchange Commission and makes it unlawful to employ manipulative or deceptive devices "in connection with the purchase or sale of any security."⁹ For many years, there was debate over whether "in connection with the purchase or sale" meant that the plaintiff had to have actually been a purchaser or seller of a security in order to bring a 10b-5 claim. In 1952, the Second Circuit held, in *Birnbaum v. Newport Steel Corporation*, that 10b-5 did require the plaintiff to be a purchaser or seller.¹⁰ This conclusion became known as the *Birnbaum* rule, and it required that a plaintiff must have bought or sold the securities at issue in order to file suit under Rule 10b-5 for securities fraud.¹¹

In 1975, the Supreme Court in *Blue Chip Stamps v. Manor Drug Stores* finally stepped in to address the purchaser/seller standing requirement.¹² The question in *Blue Chip* was whether offerees of a stock offering "may maintain a private cause of action for money damages where they allege that the offeror has violated the provisions of Rule 10b-5 of the Securities and Exchange Commission, but where they have neither purchased nor sold any of the offered shares."¹³ The offering was made pursuant to an antitrust consent decree and the offerees claimed that Blue Chip intentionally made the prospectus "overly pessimistic" to discourage them from accepting what was supposed to be a bargain offer so that the rejected shares might be offered to the general public at a higher price. The price of the stocks soared over the next few years, and the offerees who initially declined to purchase the stocks wanted lost opportunity damages, the right to purchase the previously rejected stock at its former price, and exemplary damages.¹⁴

The Supreme Court rejected the claims of the plaintiffs and fully endorsed the *Birnbaum* rule, basing its decision on legislative history, the acceptance of two decades of lower court decisions following *Birnbaum*, and numerous policy factors.¹⁵

9. 17 C.F.R. § 240.10b-5 (1990).

10. 193 F.2d 461 (2d Cir. 1952).

11. A list of some of the courts which followed *Birnbaum* before the advent of *Blue Chip Stamps* can be found in note 59.

12. 421 U.S. 723, 95 S. Ct. 1917 (1975).

13. *Id.* at 725, 95 S. Ct. at 1920.

14. *Id.* at 727, 95 S. Ct. at 1921.

15. Though the plaintiffs were denied relief under 10b-5, they still had other theories under which they could recover, such as common law fraud.

With regard to legislative history, the Court pointed out that section 10(b) does not by its terms provide a civil remedy for its violation. A private right of action was first implied in 1946 by a federal district court in *Kardon v. National Gypsum Co.*¹⁶ Although this implied private right of action was implicitly endorsed by the Supreme Court twenty-five years later in *Superintendent of Insurance of State of New York v. Bankers Life & Casualty Co.*¹⁷ and in *Affiliated Ute Citizens of Utah v. United States*,¹⁸ the high court said in *Blue Chip* that it felt more constrained in dealing with an implied cause of action than it would have with an express statutory remedy. Furthermore, in 1957 and again in 1959, the SEC attempted to have Congress amend section 10(b) to read "in connection with the purchase or sale of, or any attempt to purchase or sell, any security."¹⁹ The attempts to add that clause failed, indicating to the *Blue Chip* court a lack of Congressional intent to expand the protection offered by section 10(b) to those not purchasers or sellers. Perhaps the fact most compelling to the Court was that Congress had, in parts of the 1934 Act, unequivocally extended protection to offerees, demonstrating that "[w]hen Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble doing so expressly."²⁰

While the Court felt that it was important that the circuits had been following *Birnbaum* for twenty years, this argument seemed to carry less weight than did considerations of legislative intent or policy. It seems unlikely that the Court would ratify any course of action it found to be wrong, no matter how long it had been followed.

The policy considerations appear to have been the most important factor to the Court in *Blue Chip*, since policy discussion consumed most of the opinion. The Court was dealing with a judicially created remedy, and felt it especially proper to consider policy factors when it came time "to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance."²¹ The Court further acknowledged that "[w]e are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question."²² The Court

16. 69 F. Supp. 512 (E.D. Pa. 1946).

17. 404 U.S. 6, 92 S. Ct. 165 (1971).

18. 406 U.S. 128, 92 S. Ct. 1456 (1972).

19. 103 Cong. Rec. 11636 (1957).

20. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734, 95 S. Ct. 1917, 1925 (1975).

21. *Id.* at 737, 95 S. Ct. at 1926.

22. *Id.* at 749, 95 S. Ct. at 1931-32.

offered several overlapping "policy" justifications for requiring a plaintiff to be a purchaser or a seller to recover under Rule 10b-5.²³ The first was that the very pendency of a lawsuit in this area can have serious repercussions on the normal business activity of the defendant totally unrelated to the lawsuit. Thus, so long as the plaintiff can avoid dismissal or summary judgment, the case has a settlement value to the plaintiff out of proportion to its prospect of success at trial. Secondly, and relatedly, the Court was concerned with the potential for possible abuse of discovery. Obviously, to broadly expand the class of plaintiffs who may sue under Rule 10b-5 would appear to encourage plaintiffs with groundless claims to tie up the resources of defendants, thereby increasing the settlement value of an already overinflated claim. Thirdly,

[w]ithout the *Birnbaum* rule, an action under Rule 10b-5 will turn largely on which oral version of a series of occurrences the jury may decide to credit, and therefore no matter how improbable the allegations of the plaintiff, the case will be virtually impossible to dispose of prior to trial other than by settlement.²⁴

Added to this was the fear that, without the *Birnbaum* rule, the trier of fact would be faced with hazy issues of fact which would depend almost entirely on oral testimony. The Court recognized this threat could be minimized through fashioning unique rules of corroboration and damages, but used this to suggest that the very need for these kinds of special protections absent a purchaser/seller standing requirement argued for the desirability of the *Birnbaum* rule. Lastly, the Court believed that, in the absence of the *Birnbaum* rule,

bystanders to the securities marketing process could await developments on the sidelines without risk, claiming that inaccuracies in disclosure caused nonselling in a falling market and that unduly pessimistic predictions by the issuer followed by a rising market caused them to allow retrospectively golden opportunities to pass.²⁵

Even a cursory examination of these policy considerations reveals that the Court's overriding concern was with unfounded claims which are especially vexatious in the securities field. It is also clear that the Court felt justified in relying so heavily on policy considerations because it was interpreting a judicial remedy, not an express statutory remedy.

Predicate Acts, Rule 10b-5, and RICO

Complicating matters for the *Vigman* court was the fact that it was not faced with a straightforward 10b-5 claim, but with a RICO claim

23. *Id.* at 740-48, 95 S. Ct. at 1927-32.

24. *Id.* at 742, 95 S. Ct. at 1928.

25. *Id.* at 747, 95 S. Ct. at 1931.

based upon 10b-5 violations. *Blue Chip* conclusively determined that a plaintiff must have been a purchaser or a seller to recover under a straight 10b-5 cause of action. RICO, in view of *Vigman*, is another matter.

RICO is an acronym for Racketeer Influenced and Corrupt Organizations Act. It targets "racketeering activity," which it defines as

any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, and any "offense" involving bankruptcy or securities fraud or drug-related activities that is "punishable" under federal law.²⁶

These various crimes which can form the basis of a RICO claim are known as predicate acts. The commission of several predicate acts can constitute a pattern of racketeering activity. What RICO does is outlaw the use of income

derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; the acquisition or maintenance of any interest in an enterprise "through" a pattern of racketeering activity; conducting or participating in the conduct of an enterprise through a pattern of racketeering activity; and conspiring to violate any of these provisions.²⁷

The language employed in RICO is broad and, according to ABA President Robert D. Raven, it permits a "reasonably artful advocate to convert virtually any type of commercial dispute involving arguably deceptive statements into a RICO claim."²⁸ The administrative office of the U.S. courts tracked 614 civil RICO filings in 1986 (the first year it began keeping count), 1,095 in 1987, and 959 cases in 1988.²⁹ Statistics in this area, however, may be misleading because of the manner in which the Administrative Office collects its data. Some authorities believe that civil RICO related claims "may be as high as ten times these figures."³⁰ Raven went on to note that, "[c]ivil RICO is being used almost solely against legitimate business rather than organized crime."³¹

26. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 481-82, 105 S. Ct. 3275, 3277 (1985).

27. *Id.* at 482-83, 105 S. Ct. at 3278.

28. American Bar Association Calls for Reform of Federal Racketeering Law, PR Newswire, June 7, 1989.

29. *Id.*

30. Hughes, RICO Reform: How Much Is Needed?, 43 Vand. L. Rev. 639, 643 (1990).

31. American Bar Association Calls for Reform of Federal Racketeering Law, PR Newswire, June 7, 1989.

Numerous courts have also been concerned with the far reaching impact of civil RICO claims:

[W]e note the mounting controversy in the federal courts over the proper limits, if any, upon the use of RICO in cases far removed from the context which Congress had in mind when it enacted the statute. Congress was out to attack the problem of organized crime, not the problems of corporate control and risk arbitrage. We of course make no attempt to resolve the dispute here and now. We do not propose to enter the fray. We only note that the reach of RICO is itself a troubling issue³²

While many federal courts have been troubled by the breadth of RICO, in the past most of them were not tempted to "enter the fray" lest they find themselves reversed on appeal. As the Supreme Court said as it overruled two restrictions imposed on RICO by the Second Circuit:

"It is true that private civil actions under the statute are being brought almost solely against such defendants [respected businesses], rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress."³³

While RICO remains a powerful force, it seems the pendulum of RICO claims is already beginning to swing back, in large measure because of the Supreme Court's opinion in *H.J. Inc. v. Northwestern Bell Telephone Co.*³⁴ As mentioned above, one element of a RICO claim is pattern; the defendant must have engaged in a pattern of racketeering activity before he can be subject to RICO sanctions. RICO defines "pattern of racketeering activity" to require "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity".³⁵

In an attempt to rein in RICO, lower courts were interpreting the pattern requirement in a multitude of conflicting ways,³⁶ and the Supreme Court used *Northwestern Bell* to resolve some of the confusion.³⁷ Al-

32. *Dan River, Inc. v. Icahn*, 701 F.2d 278, 291 (4th Cir. 1983).

33. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 499, 105 S. Ct. 3275, 3286-7 (1985) (footnote omitted).

34. 492 U.S. 229, 109 S. Ct. 2893 (1989).

35. 18 U.S.C. § 1961(5) (1988).

36. *H.J. Inc. v. Northwestern Bell Telephone*, 492 U.S. 229, 235 n.2, 109 S. Ct. 2893, 2898 n.2 (1989).

37. There is some disagreement over whether the *Northwestern Bell* definition will be helpful in a practical sense. See *id.* at 251, 109 S. Ct. at 2906 (Scalia, J., concurring).

though the existence of a pattern will necessarily depend on the fact and circumstances of each case, as a general rule, the Supreme Court declared that a plaintiff "must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity."³⁸ As some circuits had allowed two predicate acts in and of themselves to constitute a pattern,³⁹ it is easy to see how the stiffer pattern requirement would tend to make a RICO claim harder to sustain, and would tend to curb the rising tide of claims being brought.

The main attraction for attorneys representing plaintiffs is that, in addition to creating criminal liability, RICO has a civil side which renders a violator liable to the injured plaintiff for "threefold the damages he sustains and the cost of the suit, including reasonable attorney's fee."⁴⁰ With this sort of incentive, it is easy to understand the large number of RICO claims being brought,⁴¹ and it is easy to understand the temptation for plaintiffs' lawyers to expand RICO's scope as much as they can.

The Vigman Decision

As mentioned before, the *Vigman*⁴² case involved an action by the Securities Investor Protection Corporation, and trustees it had appointed, against defendants who had allegedly "engaged in a scheme to manipulate the stock of six companies traded in the over-the-counter market, and . . . used FSSC and Sebag [two brokerage firms] as vehicles in furtherance of this scheme."⁴³ The defendants, officers and directors of the six companies and former principals and employees of FSSC and Sebag, allegedly maintained an illusion of active trading of the six stocks through misleading transactions in the accounts of the defendant companies, in the accounts of the two brokerage houses, and in the accounts of unsuspecting customers. When the alleged scheme was uncovered, the price of the stocks fell drastically and, because FSSC and Sebag had purchased and then held large amounts of the stock, they incurred heavy losses leading to the liquidation proceeding. The SIPC liquidated the two firms and reimbursed their customers the value of their cash and securities as of the liquidation. In *Vigman*, the SIPC and the trustees sued the defendants on behalf of the liquidated brokerage firms. The trustees stood in the shoes of the firms that actually had purchased the

38. *Northwestern Bell*, 492 U.S. at 239, 109 S. Ct. at 2900.

39. *Id.* at 235 n.2, 109 S. Ct. at 2898 n.2.

40. 18 U.S.C. § 1964(c) (1988).

41. See *supra* text accompanying note 30.

42. *Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461 (9th Cir. 1990).

43. *Id.* at 1464 (footnote omitted).

stock, satisfying *Blue Chip*, so their standing to bring the RICO claims predicated on 10b-5 violations was not questioned by the defendants.⁴⁴ The standing of the SIPC to bring such claims is what was at issue.

The Ninth Circuit decided that a plaintiff who is asserting a violation of Rule 10b-5 as a predicate act of racketeering under RICO is not bound by the purchaser/seller standing requirement formulated in *Birnbaum* and endorsed by the Supreme Court in *Blue Chip*. In other words, for a plaintiff to assert an ordinary violation of 10b-5, he must have been a purchaser or seller of securities but, if he is suing for treble damages and attorneys' fees under RICO, he need not have been a purchaser or seller to use the very same Rule 10b-5. How the court reached this decision is noteworthy.

The first thing the *Vigman* court did was to compare the language of the RICO statute with the language of Rule 10b-5.⁴⁵ RICO section 1961(1)(D) defines racketeering activity to include "any offense involving . . . fraud in the sale of securities . . ."⁴⁶ Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue therefor . . . and shall recover threefold the damages he sustains . . ."⁴⁷ The court concluded that, on its face, "the RICO text does not require a plaintiff to be a purchaser or seller, so long as the plaintiff suffered injury 'by reason of' the alleged fraud."⁴⁸ In contrast, the court pointed out that, for conduct to be unlawful under Rule 10b-5, it must have occurred "in connection with the purchase or sale of any security."⁴⁹

The *Vigman* court also pointed out that, while a private civil action under 10b-5 had been implied by the courts, RICO contains its own express civil remedy. "The remedy of a private civil action under Rule 10b-5 having been court created, the Court has not been reluctant to limit the class of plaintiffs who may bring such a private action."⁵⁰ The RICO statute, however, has no requirement that the plaintiff be a purchaser or a seller of securities. The court quoted from *Blue Chip*⁵¹ when it said:

[I]f Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the Judiciary may

44. *Id.* at 1465 n.5.

45. *Id.* at 1466.

46. 18 U.S.C. § 1961(1)(D) (1988).

47. 18 U.S.C. § 1964(c) (1988).

48. *Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461, 1466 (9th Cir. 1990).

49. 17 C.F.R. § 240.10b-5 (1990).

50. *Vigman*, 908 F.2d at 1466.

51. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S. Ct. 1917 (1975).

not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.⁵²

The court quoted the Supreme Court again, this time pulling language from *Sedima, S.P.R.L. v. Imrex Co., Inc.*,⁵³ when it continued, "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" ⁵⁴

Analysis

The *Vigman* decision squarely raises the question of what Congress intended when it included "fraud in the sale of securities" as a potential predicate act under RICO. "Fraud in the sale of securities" is understood to mean federal security offenses such as violations of Rule 10b-5, but what is not understood is whether Congress intended to carry forward the standing requirements that had been developed by the courts. The *Vigman* court concluded that Congress did not intend the *Birnbaum* rule to be applied to a RICO claim, and this position is certainly defensible. In addition to the arguments mentioned in *Vigman*, there is the fact that, before RICO was enacted, there was no private cause of action at all for many of the violations which may now be used as predicate acts. For example, it was well established that a private citizen had no cause of action under the federal mail and wire fraud statutes.⁵⁵ Then RICO was enacted to provide treble damages and attorneys fees for a class of plaintiffs that previously had no standing at all under the mail and wire fraud statutes. Similarly, before RICO, plaintiffs had only limited standing to bring a 10b-5 action—they had to have been a purchaser or a seller of securities. Maybe Congress did intend to do away with this limitation on standing when the plaintiff is proceeding under RICO. If in one instance Congress went from no standing to full standing, it is not altogether unlikely that they intended to go from limited standing to full standing in another. In addition, perhaps the policies behind RICO justify giving a limited class of plaintiffs (purchasers

52. *Vigman*, 908 F.2d at 1466.

53. 473 U.S. 479, 105 S. Ct. 3275 (1985).

54. *Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461, 1466 (9th Cir. 1990).

55. E.g., *Bell v. Health-Mor, Inc.*, 549 F.2d 342, 346 (5th Cir. 1977); *Krupnick v. Union National Bank*, 470 F. Supp. 1037, 1039 (W.D. Pa. 1979); *Milburn v. Blackfrica Promotions, Inc.*, 392 F. Supp. 434, 435 (S.D. N.Y. 1974); *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974), cert. denied, 423 U.S. 837, 96 S. Ct. 65 (1975).

and sellers) the right to sue for damages under 10b-5 while giving those injured by a pattern of racketeering the right to sue for treble damages and attorneys' fees.

However, it is equally as likely that Congress meant to incorporate the existing 10b-5 standing requirement when it enacted the RICO legislation. In *International Data Bank, LTD. v. Zepkin*,⁵⁶ the Fourth Circuit held that a corporation which did not buy or sell any of its own stock lacked standing to bring a civil RICO action based on Rule 10b-5 securities fraud. Eugene Zepkin and Harold Grossman issued a stock prospectus for their new firm, International Data Bank (IDB). The outside investors eventually ousted Zepkin and Grossman and IDB sued the two, claiming that the prospectus included a fraudulent statement in violation of federal securities laws. The court began by succinctly stating that: "Because IDB based its RICO claim on a Rule 10b-5 predicate offense, the district court properly applied the standing requirements of that Rule in dismissing the action."⁵⁷ The court then supported its conclusion in a manner strikingly similar to that employed by the *Vigman* court.

The *Zepkin* court examined the language of the RICO statute and found that "[t]he statutory language describing the predicate offense—'fraud in the sale of securities'—is, however, narrow and suggests the pivotal role of the actual sales transaction."⁵⁸ It then pointed out that the RICO legislation was written in 1970 against the backdrop of existing federal securities law. The *Birnbaum* standing requirement came into existence in 1952 and had by 1970 been followed by virtually all of the lower federal courts facing the issue.⁵⁹ "If Congress had intended the drastic result of overturning this consensus, it surely would have done so in a more explicit way."⁶⁰ The *Zepkin* court continued:

We doubt that Congress meant, when it buried securities fraud among all these offenses [the other enumerated predicate acts], to overturn the rule established in *Birnbaum*. Where a predicate offense already has a well-developed private right of action under federal law, we think the better view is that Congress meant

56. 812 F.2d 149 (4th Cir. 1987).

57. *Id.* at 151.

58. *Id.* at 152.

59. See, e.g., *Dyer v. Eastern Trust and Banking Co.*, 336 F. Supp. 890, 911-12 (N.D. Me. 1971); *Iroquois Industries, Inc. v. Syracuse China Corp.*, 417 F.2d 963, 966-70 (2d Cir. 1969), cert. denied, 399 U.S. 909, 90 S. Ct. 2199 (1970); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 589 (5th Cir.), cert. denied, 419 U.S. 873, 95 S. Ct. 134 (1974); *James v. Gerber Products Co.*, 483 F.2d 944, 947-50 (6th Cir. 1973); *Erling v. Powell*, 429 F.2d 795, 798-99 (8th Cir. 1970); *Horwitz v. Panhandle Eastern Pipe Line Co.*, 438 F.2d 53, 55 (10th Cir. 1971).

60. *Zepkin*, 812 F.2d at 152.

for RICO simply to expand the range of *remedies* by allowing for treble damages and attorneys' fees, rather than to summarily overturn the settled law.⁶¹

While the *Vigman* court summarily dismissed the policy concerns behind the *Birnbaum* rule because RICO provides an express statutory remedy, the *Zepkin* court felt differently because "many elements of the RICO action, including that of standing, have not been clearly legislated. With respect to those elements, we think it proper—and indeed prudent—to consult the practical considerations that *Blue Chip Stamps* addressed at such length"⁶²

The fact that the Fourth Circuit and the Ninth Circuit take such different views of remarkably similar facts exemplifies the ambiguity in this important area of securities law. All of the policy considerations behind the Supreme Court's initial endorsement of the *Birnbaum* rule in *Blue Chip Stamps* are equally if not more relevant in the RICO context, yet if Congress intended to overrule the 10b-5 standing requirement in the RICO context they must have taken these same policy factors into consideration. In the absence of legislative guidance, the courts are, at best, left with a difficult choice. The question centers on the intent of Congress when it added "fraud in the sale of securities" to the list of potential predicate acts. As *Vigman* and *Zepkin* indicate, it is as equally plausible that Congress meant to retain the *Birnbaum* rule as it is that Congress meant to overturn it.

Given the concern over the reach of RICO, and given that there is no prosecutorial discretion to rely on in civil RICO cases, it seems that the courts should restrict its use when its applicability is ambiguous and instead look to the policy considerations outlined by the Supreme Court in *Blue Chip Stamps* to uphold the *Birnbaum* rule in the RICO context. While certiorari has been applied for in the *Vigman* case, the decision has already been cited approvingly in dicta by at least two district courts.⁶³ It is hoped that the Supreme Court will take this opportunity to remedy the split among the circuits and prevent the *Vigman* decision from taking root. In the absence of express legislative guidance, there is simply no reason to give plaintiffs a shot at treble damages and attorneys' fees under RICO in an area as sensitive as the securities field when they would be refused standing to litigate the very same instances of alleged securities fraud under Rule 10b-5.

In the meantime, it might be possible to read *Vigman* narrowly and thus limit its impact. Even though the trustees were the ones standing in

61. *Id.* at 152-3.

62. *Id.* at 153.

63. *Gutman v. Howard Sav. Bank*, 748 F. Supp. 254, 265 n.8 (D.N.J. 1990); *Scholes v. Shroeder*, 744 F. Supp. 1419, 1422 (N.D. Ill. 1990).

the shoes of the defunct firms and who should have been asserting their claims, if the SIPC brings their claims at least some of the worries expressed in *Blue Chip* would be avoided. After all, the SIPC was challenging actual transactions, not transactions that might or might not have been entered into in the absence of fraud. Thus, there is no danger of insubstantial claims supported only by oral testimony, as the SIPC only becomes involved after it has paid real money on real claims to real customers.⁶⁴

Conclusion

In *Securities Investor Protection Corporation v. Vigman*,⁶⁵ the Ninth Circuit Court of Appeals determined that a plaintiff bringing a RICO claim predicated upon violations of Rule 10b-5 did not have to satisfy the *Birnbaum* purchaser or seller standing requirement. In doing so, the *Vigman* court ignored all of the policy concerns addressed by the Supreme Court in *Blue Chip Stamps*.⁶⁶ The *Vigman* court reasoned that RICO is an express statutory remedy, unlike the remedy afforded by Rule 10b-5. Thus, it was appropriate for the Supreme Court to look to policy factors in tailoring the reach of the 10b-5 implied cause of action while it was not appropriate for them to examine policy factors in the RICO context. However, as *International Data Bank v. Zepkin*⁶⁷ indicates, it is not altogether clear that Congress intended to do away with the 10b-5 standing requirement when it added "fraud in the sale of securities" to the list of predicate acts. Given this ambiguity and the continuing concern over the reach of RICO it seems reasonable to look to the policy factors outlined by the Supreme Court in *Blue Chip Stamps*. In the absence of legislative guidance, there is little reason to give plaintiffs a shot at treble damages and attorneys' fees in the sensitive securities area under RICO while at the same time denying the same plaintiffs standing to pursue ordinary damages under 10b-5. While, in the meantime, it is possible to give *Vigman* a narrow reading and thus perhaps limit its impact, it is hoped the Supreme Court will grant certiorari and resolve the split among the circuits in this important area of securities law.

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64. Allowing the SIPC to assert the claims of the brokerage firms presents problems of its own. The trustees have a duty to collect the debts and pursue the rights of the firm on behalf of all creditors, not just the SIPC. If the trustee abrogates part or all of its rights to pursue the 10b-5 claims to the SIPC, it could result in the SIPC having a privilege over other creditors that the SIPC should not have. Such abrogation could also result in double recovery.

65. 908 F.2d 1461 (9th Cir. 1990).

66. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S. Ct. 1917 (1975).

67. *International Data Bank, LTD. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987).