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RICO Had A Birthday! A Fifty-Year Retrospective of Questions Answered and Open

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RICO HAD A BIRTHDAY! A FIFTY-YEAR RETROSPECTIVE OF QUESTIONS ANSWERED AND OPEN

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The Racketeer Influenced and Corrupt Organizations Act (RICO) came into the world in 1970, a time of great social upheaval that was accompanied by shifting attitudes towards both crime and civil litigation. From the outset, the statute's complexity, ambiguity, and uncertain purpose have confounded courts and commentators. At least some doubts as to the statute's meaning and application arise because it has criminal and civil components that subject it to the twin—yet antithetical—social impulses to be "tough on crime" while containing a perceived "litigation explosion." In this Article, I situate RICO in this larger context and offer that context as a partial explanation of how RICO's "meaning" has been shaped. Along the way, I synthesize many years of my own legal scholarship and litigation experience into a retrospective of where RICO interpretation and application have been—and where they still must go.

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I. INTRODUCTION

RICO has reached a half-century milestone. Passed as Title IX of the Organized Crime Control Act of 1970 (OCCA), the Racketeer Influenced and Corrupt Organizations Act (RICO) has proven to be something of an interpretive parlor game for lawyers over its fifty-year history. The problems with the statute are at least three. Structurally, it's complicated: to state a civil RICO claim a plaintiff must show that he was injured "by reason of" a criminal RICO violation, which entails pleading such a violation, which in turn requires him to identify the predicate commission of certain specified crimes (e.g., mail or wire fraud) and to satisfy certain defined terms (e.g., pleading the existence of an "enterprise").[1] It's also vague in the linguistic and philosophical sense of having borderline cases (e.g., what's "tall" or a "mountain?") and ambiguous to boot (e.g., the convoluted syntax and word choices support more than one reading).[2] Finally, and perhaps most problematically, it's of uncertain purpose.

1. 18 U.S.C. §§ 1961(1), 1962, 1964(c).

2. As members of Congress complained at the time of its consideration, RICO "embodies poor draftsmanship," a complaint echoed in many court decisions, which almost universally paint the problem as one for Congressional solution. H.R. REP. NO. 91–1549, at 185 (1970) (dissenting views of Representatives John Conyers, Jr., Abner Mikva, and William F. Ryan); *see, e.g.*, H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249 (1989) ("RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court.").

I've written extensively about RICO for many years and litigated civil RICO cases for even longer, so this Article is intended mostly as a "state of the statute"—with a focus on civil RICO—based in part on past research, commentary, and experience.[3] I will nonetheless make a normative claim here and there with respect to questions that remain open.

II. BIRTH OF RICO AND ITS CULTURAL CONTEXT

There's a tension in American law between its civil and criminal regimes. This tension—which is perhaps best described as a sociological phenomenon—emerges most clearly in public and political debates over "tough on crime" legislation and enforcement, on the one hand, and a perceived civil "litigation explosion," on the other. So, statutes like RICO and the antitrust and securities laws, which provide for both government and private enforcement, are born subject to antithetical forces.[4] To understand the push and pull within RICO litigation, therefore, one needs an understanding of the forces acting on the courts.

A. A Brief History of Crime Legislation and Enforcement

The 1960s and 1970s were times of great social upheaval. Many commentators trace a trend towards greater crime control to the 1968 presidential race and Richard Nixon's promise to restore social order. But, as Walker Newell suggests, Nixon had at his disposal Barry Goldwater's well-known "Southern Strategy," in which he played on links between race and crime:

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3. Randy D. Gordon, *Of Gangs and Gaggles: Can a Corporation Be Part of an Association-in-Fact RICO Enterprise? Linguistic, Historical, and Rhetorical Perspectives*, 16 U. PA. J. BUS. L. 973 (2014) [hereinafter Gordon, *Of Gangs and Gaggles*]; Randy D. Gordon, *Clarity and Confusion: RICO's Recent Trips to the United States Supreme Court*, 85 TUL. L. REV. 677 (2011) [hereinafter Gordon, *Clarity and Confusion*]; Randy D. Gordon, *Crimes That Count Twice: A Reexamination of RICO's Nexus Requirements Under 18 U.S.C. §§ 1962(c) and 1964(c)*, 32 VT. L. REV. 171 (2007) [hereinafter Gordon, *Crimes that Count Twice*]; Randy D. Gordon, *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims under 18 U.S.C. § 1962(c)*, 39 U.S.F. L. REV. 319 (2005) [hereinafter Gordon, *Rethinking*]; Randy D. Gordon, *Making Meaning: Towards a Narrative Theory of Statutory Interpretation and Judicial Justification*, 12 OHIO ST. BUS. L.J. 1 (2017) [hereinafter Gordon, *Making Meaning*]. Where appropriate, issues analyzed in these prior works have been updated to reflect the current state of the law.

4. "Born" is perhaps a bit of a misnomer in that RICO is the only of the three to have been promulgated with a private right of action. Private plaintiffs had to await passage of the Clayton Act to have standing to bring Sherman Act claims; a private right to sue under Section 10(b) of the Securities Exchange Act was not implied until the Supreme Court's decision in Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 (1971).

> Our wives, all women, feel unsafe on our streets. And in encouragement of even more abuse of the law, we have the appalling spectacle of [Adlai Stevenson] actually telling an audience that "in the great struggle to advance human civil rights, even a jail sentence is no longer a dishonor but a proud achievement." Perhaps we are destined to see in this law-loving land people running for office not on their stainless records but on their prison record.[5]

Nixon took a subtler and wider tack, arguing that a slide into cultural decadence had set in:

> Certainly racial animosities . . . were the most visible causes. But riots were also the most virulent symptoms to date of another, and in some ways graver, national disorder—the decline in respect for public authority and the rule of law in America. Far from being a great society, ours is becoming a lawless society.[6]

As we'll soon see, Nixon's fear of a "lawless society" extended quite specifically to organized crime.

The political turn in criminology became operationalized through state and federal legislation that restructured the sentencing process and increased sentence severity. As Sara Sun Beale puts it, "[t]he rehabilitative ideal, which dominated postwar penal theory and practice in the United States, suffered a 'wide and precipitous decline' in the 1970s, attacked by both conservatives and liberals."[7] In its place, an ideology of "crime prevention through incapacitation" took root, which found expression "in legislation that rejected the goal of rehabilitation and in indeterminate sentencing regimes intended to tailor imprisonment to the individual offender's need for rehabilitation" and to keep offenders locked up for mandatory minimum periods.[8]

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5. Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 14–15 (2013).

6. *Id.* at 15.

7. Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 414 (2003) (quoting FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 4–6 (1981)).

8. *Id.*

B. A Brief History of Organized Crime Legislation

There's no doubt that the animating purpose of the RICO statute was to combat organized crime as it existed in the post-WWII era. (Think: the Mafia.) The road to RICO was quite long and begins with a series of press and crime commission reports from the 1940s warning that major American cities were being overrun by a national crime syndicate.[9] In response, the Senate launched an investigation to determine whether organized crime "utilizes the facilities of interstate commerce or otherwise operates in interstate commerce in furtherance of any transactions which are in violation of the law . . . and, if so, the manner and extent to which, and the identity of the persons, firms, or corporations by which such utilization is being made . . . ."[10] The investigating committee issued four reports, which confirmed that nationwide organized crime syndicates did exist, but no legislation made it into the books.[11]

C. The Path to RICO

Against this deep background, the direct legislative history of RICO begins in 1967 with the report popularly known as the Katzenbach Commission.[12] According to (now) Judge Gerard Lynch:

> [T]he report of the Katzenbach Commission is significant in the legislative history of the Organized Crime Control Act of 1970, because so many of the provisions of the act find their origins in recommendations of that body and, in particular, in the analysis performed by its task force on organized crime. Three aspects of the Commission's response to organized crime are particularly notable. First, despite occasional recognition of the diffuse nature of "organized criminal groups," the Commission clearly conceived of organized crime as a single entity and directed its primary attention toward a single target: the Italian syndicate it believed controlled organized crime throughout the United States. Second, the

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9. The Center for Legislative Archives, *Guide to the Records of the U.S. Senate at the National Archives: Chapter 18. Records of Senate Select Committees, 1946–68*, http://www.archives.gov/legislative/guide/senate/chapter-18-1946-1968.html [https://perma.cc/Y67U-EP2K].

10. *Investigation of Organized Crime in Interstate Commerce Before Special Committee to Investigate Organized Crime in Interstate Commerce*, 81st Cong. 135 (1950) (statement of Sen. Estes Kefauver, Chairman).

11. The Center for Legislative Archives, *supra* note 9.

12. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 666 (1987).

> Commission saw as a prime aspect of the threat posed by this syndicate its increasing tendency to involve itself in legitimate business and union activities. Finally, while the Commission's conception of the menace of organized crime is significant in understanding the thinking of those who drafted the RICO statute, the Commission itself did not recommend enactment of anything resembling RICO.[13]

Congress immediately responded with a number of bills, including two that are generally seen as RICO precursors and that targeted the infiltration of legitimate business rather than the crimes typically associated with organized crime.[14] But none of the bills were enacted, and the matter was left for the next Congress.

D. RICO's Purpose(s) as Revealed in its Legislative History

In keeping with the tough-on-crime mantra of the day, "Congress decided that organized crime posed such a grave threat to society that only new, more stringent legislation could ameliorate the situation" especially given that—under then-existing laws—"most organized crime participants went unpunished."[15] The fundamental interpretive question that we must ask, then, is how was RICO supposed to "ameliorate the situation?"

Many previous commentators (including me) and courts have closely examined aspects of RICO's legislative history, so there's no need to do so here.[16] What we must do, though, is ask what social problem the OCCA was intended to remedy and how RICO was to help in that effort. Returning to tough-on-crime President Nixon, as he put it to Congress, "[O]rganized crime has deeply penetrated broad segments of American life. In our great cities, it is operating prosperous criminal cartels. In our suburban areas and smaller cities,

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13. *Id.* at 672–73.

14. *Id.* at 674.

15. United States v. Turkette, 632 F.2d 896, 899–900 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981).

16. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 510–19 (1985) (Marshall, J., dissenting); United States v. Turkette, 452 U.S. 576, 587–93 (1981); DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO ¶ 1.01 (2021); Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMU L. REV. 33, 38–50 (1996); Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 807–14 (1990); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 249–80 (1982); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014–21 (1980); Lynch, *supra* note 12, at 666–80; Gordon, *Of Gangs and Gaggles*, *supra* note 3, at 976.

it is expanding its corrosive influence."[17] It does this through a "virtual monopoly of illegal gambling, the numbers racket, and the importation of narcotics," the proceeds of which give it the power and resources to underwrite criminal businesses like loansharking, to "infiltrate and corrupt organized labor," and to increase "its enormous holdings and influence in the world of legitimate business."[18] The problem had been exacerbated because organized crime groups, the most influential of which were the "24 [La] Cosa Nostra families," had been subject to prosecution efforts, "not a single one [was] destroyed." [19] Moreover, the leaders of these groups had "been notoriously successful in 'getting off' even if those relatively few cases in which the evidence ha[d] warranted the prosecution." [20] The antidote to this was:

> [A] bill which has been carefully drafted to cure a number of debilitating defects in the evidence-gathering process in organized crime investigations, to circumscribe defense abuse of pretrial proceedings, to broaden Federal jurisdiction over syndicated gambling and its corruption where interstate commerce is affected, to attack and to mitigate the effects of racketeer infiltration of legitimate organizations affecting interstate commerce, and to make possible extended terms of incarceration for the dangerous offenders who prey on our society.[21]

In sum, the OCCA was aimed at (1) preventing Mafia kingpins from tampering with or intimidating witnesses, (2) making it easier to prosecute interstate gambling operations, and (3) preventing the infiltration or corruption of legitimate organizations.[22] Only the third of these goals was initially assigned to RICO, which—as of January 21, 1970—was described thusly: "[p]rohibits infiltration of legitimate organizations by racketeers or proceeds of racketeering activities where interstate commerce is affected."[23] RICO authorized civil remedies comparable to the antitrust field to prevent violation of law by divestiture, dissolution, or reorganization.[24] The House and Senate Reports, as well as the Report of Senate Judiciary Committee and Executive

17. S. REP. NO. 91-617, at 35 (1969) (quoting H.R. DOC. NO. 91-105, at 1–2 (1969)).
18. *Id.*
19. 116 CONG. REC. 503, 585 (Jan. 21, 1970).
20. *Id.* at 586.
21. *Id.* at 585.
22. *Id.*
23. *Id.*
24. S. REP. NO. 91-617 (1969) at 81.

Branch commentators, are all to similar effect—i.e., RICO was aimed at infiltration of *legitimate* organizations.[25]

Read in this light, RICO's purpose is narrower than we have come to assume. To be sure, its net captures more than the "Mafia" (although that was certainly the impetus and primary target).[26] So what is it that organized criminals do? We know that they commit an array of acts that are otherwise illegal, but they also infiltrate and otherwise corrupt legitimate businesses and other organizations. To capture all these bad acts in a single statute risks vagueness bordering on unconstitutionality, which some have argued is the case with RICO.[27] But others believe that the statute, when drafted, was targeted and that statutory construction in service of expansive criminal reach is to blame for the confusion that has ensued. In any event, RICO's three substantive provisions, § 1962(a, b, and c), map onto an important set of what organized criminals "do"—namely, invest in, muscle in on, or operate enterprises through a pattern of specified racketeering acts. Thus conceived, "enterprise" is the feature that distinguishes RICO from other crimes, and one to which we will return shortly.

E. The Litigation Explosion

By the 1980s, the notion that the United States was in the midst of a litigation explosion was ubiquitous. Indeed, by the middle of the decade, the Maryland Law Review devoted an issue to the question, with a lead article by Mark Galanter, followed by a number of responses. Galanter was out to debunk the explosion as a myth, but as he recounts, it was a myth with a good deal of pop-culture and political currency (and one that persists even today).[28] He begins with a parade of horribles, led by Senator McConnell, speaking in the run-up to the introduction of the Litigation Reform Act of 1986: "Hardly a day

25. H.R. REP. NO. 91-1549, at 38–39 (1970). The Executive Administrations all seemingly responding about "a bill designed to prohibit the infiltration of legitimate organizations by racketeers." S. REP. NO. 91-617, at 76 (1970); *Id.* at 100, 121, 128 (Office of Deputy Attorney General); *Id.* at 126 (The General Counsel of the Treasury); *Id.* at 128 (Small Business Administration, Office of the Administrator).

26. 116 CONG. REC. at 586 (Jan. 21, 1970).

27. *See* George Clemon Freeman, Jr. & Kyle E. McSlarrow, *RICO and the Due Process "Void for Vagueness" Test*, 45 BUS. LAW. 1003, 1008–10 (1990); Michael S. Kelley, *"Something Beyond": The Unconstitutional Vagueness of RICO's Pattern Requirement*, 40 CATH. U. L. REV. 331, 380–94 (1991); Jed S. Rakoff, *The Unconstitutionality of RICO*, 203 N.Y. L.J. 1, 2–3 (1990); Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 721–26 (1990); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 254–56 (1989) (Scalia, J., concurring).

28. Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5 (1986).

goes by that we do not hear or read of the dramatic increase in the number of lawsuits filed, of the latest multimillion dollar verdict, or of another small business, child care center, or municipal corporation that has had its insurance cancelled out from under it."[29] This pain was inflicted on society because, "quite simply, everyone is suing everyone, and most are getting big money."[30] The result is a "mad romance . . . with the civil litigation process."[31] In sum, McConnell concluded, "we are all suffering a progressively debilitating disease—the disease of hyperlexis, too much litigation."[32]

Galanter goes on to demonstrate how the idea of a litigation explosion had propagated across the media, industry, and even the government. This from Washington Post columnist Jack Anderson: "Across the country, people are suing one another with abandon; courts are clogged with litigation; lawyers are burdening the populace with legal bills . . . . This massive, mushrooming litigation has caused horrendous ruptures and dislocations at a flabbergasting cost to the nation."[33] USA Today picked up on the cultural devolution theme:

> Everybody in the USA suddenly seems to want to sue anybody with liability insurance coverage. The explosion of litigation has choked court dockets. And too-few lawyers tell potential clients that some cases are a waste of time. . . . The greed has turned the temple of justice, long a hallowed place, into a pigsty. The time has come to clean it up.[34]

Self-interested industry participants eagerly chimed in: "America's civil liability system has gone berserk. . . . [It] is no longer fair. It's no longer efficient. And it's no longer predictable."[35] One trade association took the rhetoric to Biblical levels of alarm:

> Like a plague of locusts, U.S. lawyers with their clients have descended upon America and are suing the country out of business. *Literally*. The number of product liability suits and the size of jury awards are soaring. Filings of personal injury cases in federal courts have jumped 600% in the past decade. Product liability suits filed in federal courts doubled from 1978 to 1985.

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29. *Id.* at 3.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 4.
35. *Id.*

> In 1974, the average product liability jury award was $345,000. Last year it averaged more than $1 million . . . . Product liability suits have brought a blood bath for U.S. businesses and are distorting our traditional values. We're now the most litigious country on earth—one of every fifteen Americans filed a private civil suit last year. The judicial system is so clogged with cases, delays, continuances, appeals and legal shenanigans that it's slugging its way through a perpetual traffic jam.[36]

And even the Attorney General's Tort Policy Working Group joined the chorus:

> The growth in the number of product liability suits has been astounding. For example, the number of product liability cases filed in federal district courts has increased from 1,579 in 1974 to 13,554 in 1985, a 758% increase . . . . There is no reason to believe that the state courts have not witnessed a similar dramatic increase in the number of product liability claims.[37]

Again, Galanter's aim was to show that the perception of mushrooming litigation was a false one, but he adequately shows that by the 1980s, there was a widespread fear that civil litigation had run amuck and must be reined in, as indeed it was.[38] Just for example, rulings in securities cases began to restrict the category of plaintiffs entitled to sue[39] and defendants liable to be sued;[40] antitrust cases also raised standing barriers[41] and made it more difficult to plead and prove violations.[42]

Civil RICO, which had lain dormant for most of the 1970s,[43] emerged as a force in the midst of the just-recounted general backlash against private litigation. As Douglas Abrams suggests, "[b]y late 1981, . . . plaintiffs began

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36. *Id.*

37. *Id*. at 22.

38. In a response to Galanter, economic reporter Robert Samuelson located the problem, roughly speaking, as a system that provides perverse incentives to lawyers. Robert J. Samuelson, *The Litigation Explosion: The Wrong Question*, 46 MD. L. REV. 78, 78 (1986).

39. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731–32 (1975) (holding that a private right of action under 10(b) is limited to purchasers and sellers).

40. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 177 (1994) (holding that aiders and abettors cannot be sued by private parties under 10(b)).

41. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596–97 (1986) (engrafting "plausibility" standard onto antitrust conspiracy allegations).

42. Illinois Brick Co. v. Illinois, 431 U.S. 720, 729 (1977) (holding that indirect purchasers of price-fixed product lack standing).

43. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 481 (1985).

to discover not only civil RICO's existence, but also its potential as a general federal antifraud remedy."[44] "The civil RICO litigation explosion" ensued, fueled—at least in part—by an expansive interpretation of RICO's "enterprise" element, which is RICO's distinguishing feature.[45]

III. GETTING TOUGH ON CRIME: EXPANDING THE RICO CONCEPT OF "ENTERPRISE"

"Enterprise" is statutorily defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[46] The first few words don't pose difficult interpretive dilemmas, but the "union or group of individuals associated in fact" is unclear.[47] The open question during RICO's first decade was whether this definition applies only to legitimate enterprises or more broadly to criminal enterprises (like the Mafia or Hell's Angels). A split of authority emerged, and in a critical move, the Supreme Court resolved the issue.

Thirteen individuals, including Novia Turkette, Jr., were charged with, among other things, violating RICO § 1962(c) by operating an association-in-fact enterprise through a pattern of racketeering that included drug trafficking, arson, fraud, influencing state trials, and bribing police.[48] Turkette was convicted and, on appeal to the First Circuit, argued that RICO "was intended to protect legitimate business enterprises from being preyed upon and taken over by racketeers."[49] And, since the association-in-fact was "completely criminal," "RICO does not apply."[50] The First Circuit agreed and held that a wholly criminal enterprise did not fit within § 1961(4), which defines the term.[51]

The Supreme Court disagreed, finding that

> [t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises

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44. Abrams, *supra* note 16, at 51.

45. *Id.*

46. 18 U.S.C. § 1961(4).

47. *Id.*

48. United States v. Turkette, 632 F.2d 896, 897 (1st Cir. 1980).

49. *Id.* at 898.

50. *Id.*

51. *Id.* at 899.

> within its scope; it no more excludes criminal enterprises than it does legitimate ones. Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate." But it did nothing to indicate that an enterprise consisting of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal.[52]

Although it framed its reasoning for this conclusion in terms of language, statutory structure, and legislative history, the Court made a *policy* decision to read § 1961(4) broadly so as to leave a powerful prosecutorial weapon in place. Discussions of the First Circuit's holding make this reasonably clear: e.g., "[w]hole areas of organized criminal activity would be placed beyond the substantive reach of the enactment."[53] But, as Lawrence Solan remarks, "it is wrong to say that 'enterprise' could not be understood to include only legitimate businesses. Generally speaking, that is how the word is used, and the statute's definition is not really very helpful."[54] In any event, *Turkette* essentially doubled the lines of attack available to prosecutors in their war on organized crime.[55]

For the moment, we can set *Turkette* aside because it had little immediate impact on civil litigation, which generally involves more-or-less legitimate organizations. But subsequent *interpretations* of *Turkette*'s holding, as we'll see, have proved influential.

IV. CONTAINING THE EXPLOSION: CIVIL RICO IN THE COURTS

Judicial hostility to civil RICO is well-documented. This hostility is expressed in two ways. First, we find courts placing restrictions on the scope of the statute; second, in moments of candor, judges sometimes overtly express their dissatisfaction—annoyance even—with the statute.[56] With respect to

52. United States v. Turkette, 452 U.S. 576, 580–81 (1981). One of the leading commentators labels the Courts positions as "absurd," failing to "concede the obvious," and otherwise inadequate. SMITH & REED, *supra* note 16, ¶ 3.02[4].

53. *Turkette*, 452 U.S. at 589.

54. LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 79 (1993).

55. SMITH & REED, *supra* note 16, ¶ 3.02[1] n.1.1 (noting that within two years after *Turkette*, prosecutions doubled).

56. David B. Sentelle, *Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers*, 12 CAMPBELL L. REV. 145, 146–47 (1990). Judge Sentelle, former Judge on the D.C. Circuit, addressed the almost "universally" held disfavor federal judges have regarding civil RICO in the first two pages of the article, specifically referencing Chief Justice Rehnquist's Wall Street

containment strategies, the results have been mixed, with some falling at the Supreme Court and others still in active use. Broadly speaking, these strategies have focused on interpretations and applications of RICO's open-textured "enterprise" and "pattern of racketeering" definitions, as well as civil RICO's injury, causation, and standing requirements.

After *Turkette*, it was unclear what a wholly criminal organization must look like to qualify as an association-in-fact enterprise. There's a general sense that lower courts—in government prosecutions—were generally confronted with criminal organizations that either *were* the Mafia or were structured *like* the Mafia in that they had, for example, a leadership structure, membership criteria, and initiation rites.[57] So, the question of whether something as loose as a conspiracy could qualify as an association-in-fact remained open.[58] In civil litigation, though, that was often not the case, so courts devised a fairly standard touchstone for sorting genuine "associations" from groups merely collaborating in the commission of crimes.[59] To wit, an association-in-fact must:

- Have an existence separate and apart from the pattern of racketeering;
- Be an ongoing organization;
- Function as a continuing unit as shown by a hierarchical or consensual decision-making structure.[60]

Journal article, *Get RICO Cases out of my Courtroom*, Justice Marshall's dissent in *Sedima v. Imrex*, and Justice Scalia's concurrence in *H.J. Inc. v. Northwestern Bell Telephone Co.*

57. *See* United States v. Gigante, 982 F. Supp. 140, 145 (E.D.N.Y. 1997); United States v. Pungitore, 15 F. Supp. 2d 705, 711 (E.D. Pa. 1998).

58. *See* 18 U.S.C § 1961(4) ("[E]nterprise includes . . . any union or group of individuals *associated in fact* although not a legal entity.") (emphasis added).

59. *See, e.g.*, United States v. Urban, 404 F.3d 754, 770 (3d Cir. 2005) (holding that an enterprise requires proof "(1) that the enterprise is an ongoing organization with some sort of framework for making or carrying out decisions; (2) that the various associates function as a continuing unit; and (3) that the enterprise be separate and apart from the pattern of activity in which it engages") (quoting United States v. Irizarry, 341 F.3d 273, 286 (3d Cir. 2003)); United States v. Kragness, 830 F.2d 842, 855 (8th Cir. 1987) (finding that an enterprise requires "some continuity of structure and of personnel" and "an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity"). *But see*, *e.g.*, United States v. Goldin Indus. Inc., 219 F.3d 1271, 1275 (11th Cir. 2000) (finding that an enterprise is "an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes").

60. Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995); Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 433 (5th Cir. 1990). The third factor is sometimes referred to as a requiring "*enterprise* continuity," which shares a conceptual relationship with "*pattern* continuity," discussed below.

This rubric held up for thirty years or so, but in 2009, the Supreme Court revisited *Turkette* and "clarified" it in a way that broadened the scope of associations-in-fact well beyond what had persisted in the lower courts.[61] The Court stated the question presented as "whether an association-in-fact enterprise . . . must have an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages."[62] The Court said "yes" but went on to define "structure" in a generic way, thereby suggesting that an association-in-fact enterprise need only have three watered-down features: "[1] a purpose, [2] relationships among those associated with the enterprise, and [3] longevity sufficient to permit these associates to pursue the enterprise's purpose."[63] As a consequence, the Court has reopened what most had considered a settled question, and its holding will no doubt spawn civil-litigation disputes for years to come, especially now that some "conspiracies" may qualify as associations in fact.[64] [65]

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61. *See* Gordon, *Clarity and Confusion*, *supra* note 3, at 704–08.

62. Boyle v. United States, 556 U.S. 938, 940–41 (2009) (citation and internal quotations omitted).

63. *Id.* at 946; *see also id.* at 952 (Stevens, J., dissenting) ("It is clear from the statute and our earlier decisions construing the term that Congress used 'enterprise' in these provisions in the sense of 'a business organization,' . . . rather than 'a venture,' 'undertaking,' or 'project'.").

64. Bell v. Kokosing Indus., Inc., No. 19-53-DLB-CJS, 2020 WL 4210701, at *30 (E.D. Ky. July 22, 2020). Plaintiffs, homeowners, alleged the Defendants, the City, and contracted waste management companies "were all part of an enterprise with 'a common unlawful purpose of evading waste disposal fees at a licensed landfill by wrongly classifying soil at the sewer project as non-contaminated and then hauling and placing such soil on residential property." *Id.* The court, applying the three-factor association-in-fact framework, found there were not sufficient facts to suggest the existence of a RICO enterprise. *Id.*; *see also* Walker v. Beaumont Indep. Sch. Dist., 938 F.3d 724, 738 (5th Cir. 2019) (applying rule promulgated in *Turkette*, the Fifth Circuit found that the plaintiff insufficiently showed existence of a RICO enterprise because plaintiff failed to show an "ongoing organization, formal or informal, that functions as a continuing unit"). Courts that have recently attempted to differentiate conspiracies from enterprises appear to have done so by focusing on the broad continuity and purpose requirements articulated in *Boyle*. *See, e.g.*, United States v. Christensen, 828 F.3d 763, 780 (9th Cir. 2015) (quoting *Boyle*, 556 U.S. at 944–45) ("[T]he definition of a RICO enterprise has 'wide reach' and is to be 'liberally construed to effectuate its remedial purposes.'").

65. *Boyle*, 556 U.S. at 947. The Court blurred well-established line between conspiracies and enterprises by finding that the "beyond the pattern of racketeering" phrase is ambiguous:

> This phrase may be interpreted in least two different ways, and its correctness depends on the particular sense in which the phrase is used. If the phrase is interpreted to mean that the existence of an enterprise is a separate element that must be proved, it is of course correct . . . . On the other hand, if the phrase is used to mean that the existence of an enterprise may never be inferred from the

But, even giving way to *Boyle*, there are plenty of good arguments to be launched against the sort of association-in-fact that is often pled in a civil RICO case.[66] After all, Edmund Boyle joined up with a "core group" that committed scores of bank robberies throughout the 1990s. Under even a lay view of "organized crime" or a "criminal enterprise" this "group" fits the bill. But Boyle's type of organization isn't what is alleged in a typical civil RICO case.[67] There, the alleged association-in-fact is usually a group of business entities like corporations (sometimes coupled with individuals), not the sort of "crew" alleged in *Boyle*.[68] The propriety of that pleading tactic was open prior to *Boyle* and remains so today. Here's why.

A. What is Included in § 1961(4)—the Definition of "Enterprise?"

According to RICO's definitions, "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[69] Most of this poses no interpretive dilemma: there's general agreement that (1) an "individual," (2) a "partnership," (3) a "corporation," (4) an "association," (5) any "other legal entity," and a (6) "group of individuals associated in fact although not a legal entity" can be an "enterprise." But there's a syntactic ambiguity caused by the way the words are laid out in the definition. Is "union" modified and therefore limited by the prepositional phrase "of individuals associated in fact although not a legal entity?" Or does "union" mean labor/trade union or something else? Then, too, is the entire list to be read as

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> evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity, it is incorrect.

Id.

66. *See, e.g.*, Bachman v. Bear, Stearns & Co., 178 F.3d 930, 932 (7th Cir. 1999) ("That is a conspiracy, but it is not an enterprise unless every conspiracy is also an enterprise for RICO purposes, which the case law denies."); *see also Boyle*, 556 U.S. at 950 ("Section 1962(c) demands much more [than proof of an ordinary conspiracy]: the creation of an 'enterprise'—a group with a common purpose and course of conduct—and the actual commission of a pattern of predicate offenses.").

67. *See infra* note 75 and accompanying text where courts in civil RICO cases have held the term enterprise to encompass not only an amoeba-like infrastructure that controls a secret criminal network but also a duly formed corporation that elects officers and holds annual meetings.

68. *E.g.*, Ouwinga v. Benistar 419 Plan Servs., Inc., 694 F.3d 783, 794–95 (6th Cir. 2012) (holding that insurance companies, law firms, lawyers, and insurance agents can also form a RICO enterprise); United States v. Console, 13 F.3d 641, 652 (3d Cir. 1993) (holding an association-in-fact RICO enterprise existed between a law firm and a medical practice); United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993) (holding a group or union consisting solely of corporations or other legal entities can constitute an "associated-in-fact" enterprise).

69. 18 U.S.C. § 1961(4).

an illustrative or an exhaustive definition? This only matters when civil RICO litigation intersects with the holding in *Turkette*. As I suggested above, government prosecutors and plaintiffs' lawyers have come to use RICO in different ways. (Unsurprisingly, after RICO became law, Mafia victims did not rush to bring civil claims to recover for protection rackets and so forth—the obvious risk of winding up in a New Jersey landfill provided a sufficient disincentive). When the Government brings a criminal RICO claim, its aim is almost always to try and convict *individuals*. A civil plaintiff, by contrast, almost always wants to obtain a money judgment from a solvent defendant—usually a business entity.

But the civil plaintiff can't usually sue, for example, a corporation *and* name that corporation as the enterprise. This is so because of the rule—still standing after *Boyle*—that § 1962(c)—which, for reasons we'll discuss later, is the most commonly alleged RICO violation—requires a plaintiff to plead a distinction between the "person" (the Defendants) and the "enterprise."[70] This distinction arises because § 1962(c) makes it illegal to operate or manage an enterprise through a pattern of racketeering and, obviously enough, a corporation can't operate or manage itself through a pattern of racketeering. Thus a pleading impediment: to state a subsection (c) violation, the alleged RICO person and the alleged RICO enterprise must be "two distinct entities."[71] In practice, this presents a heady bar because it prevents a plaintiff from alleging an identity between a group of "conspirators" and the enterprise and between

70. *E.g.*, Lynn v. McCormick, 760 F. App'x 51, 53 (2d Cir. 2019) (quoting Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001)) ("As to the enterprise requirement, a plaintiff must 'allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name.'"); *see also* Walker v. Beaumont Indep. Sch. Dist., No. 1:15-CV-379, 2017 WL 928459, at *7 (E.D. Tex. Mar. 6, 2017) ("To establish an enterprise, a plaintiff must plead the existence of an entity separate and apart from the pattern of racketeering activity."), *aff'd*, 938 F.3d 724, 752 (5th Cir. 2019).

71. United States v. Mongol Nation, 370 F. Supp. 3d 1090, 1127 (C.D. Cal. 2019) (quoting Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001)) (upholding principle that "under [RICO] one must allege and prove the existence of two distinctive entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name"); Condos Bros. Constr. v. Main St. Am. Assurance Co., 280 F. Supp. 3d 349, 354 (E.D.N.Y. 2017) (citations omitted) (upholding the distinctiveness requirement in that "a corporate entity may not be both the RICO person and the RICO enterprise under section 1962(c)").

the named defendants and the enterprise.[72] [73] To slip over the bar, plaintiffs often name a corporation as a defendant and as part of an association-in-fact enterprise.[74] The tie back to *Turkette* emerges because—but-for the inclusion

72. Vaguely asserting that only "some" of the defendants form the enterprise is no cure. This is the sort of "open-ended" description of the enterprise that courts routinely reject on vagueness grounds. *E.g.*, United States v. Johnson, 825 F. App'x 156, 170 (5th Cir. 2020). Although the facts of this case could not support a finding of fatal vagueness, the defendant argued RICO's enterprise requirement was unconstitutional both facially and as applied to the specific case because "terms such as . . . 'enterprise' . . . provide no guidance as to what conduct the statute prohibits." *Id.* This argument "rel[ied] principally on Justice Scalia's concurrence in *H.J. Inc v. Northwestern Bell Telephone Co.*" *Id.* (citations omitted). While the court recognized that "today's Supreme Court is not shy about employing the vagueness doctrine to second-guess otherwise valid legislative judgments[,]" the court cited ample precedent to uphold this requirement as constitutional. *Id.* In any event, merely removing some defendants from the alleged enterprise does not solve a plaintiff's "identity" problem. *See* St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 447 (5th Cir. 2000); Andrews v. Am. Nat. Red Cross, Inc., 176 F. Supp. 2d 673, 687 (W.D. Tex. 2001). Courts now focus on "separateness" to fulfil the distinctiveness requirement. CGC Holding Co. v. Hutchens, 974 F.3d 1201, 1213 (10th Cir. 2020) (holding that various distinct shell companies satisfied the distinctiveness requirement where "nothing [exists] in RICO that requires more 'separateness' than that" and reasoning that otherwise, an individual could "avoid RICO liability by using shell companies to conduct criminal enterprises").

73. Tronsgard v. FBL Fin. Grp., 312 F. Supp. 3d 982, 995 (D. Kan. 2018) (stating that "the 'person' and the 'enterprise' engaged in racketeering activities must be distinct entities[,]" and elaborated that "a defendant corporation, acting through its subsidiaries, agents, or employees typically can't be both the RICO 'person' and the RICO 'enterprise'"); *see also* Bradley v. Phillips Petroleum Co., 527 F. Supp. 2d 625, 652 (S.D. Tex. 2007) (noting that association-in-fact consisted of defendants and stating that "[s]uch identity of elements is impermissible for a RICO claim under § 1962(c)"); Robinson v. Standard Mortg. Corp., 191 F. Supp. 3d 630, 639 (E.D. La. 2016) (quoting *Williamson*, 224 F.3d at 447 (5th Cir. 2000)) ("To get around having a corporation named as both a RICO defendant and a RICO enterprise, many plaintiffs have charged the corporation as being part of an association-in-fact enterprise and also as a RICO defendant. Courts have roundly criticized this formulation.").

74. *See* FMC Int'l A.G. v. ABB Lummus Glob., Inc., No. H-04-3896, 2006 WL 213948, at *9 (S.D. Tex. Jan. 25, 2006).

> FMC's own allegations defeat the distinctiveness requirement under § 1962(c). FMC alleges in its Original Federal Complaint that ABB and Heerema are RICO persons, and that the JV, which is a joint venture between ABB and Heerema, is a RICO enterprise. FMC then alleges that ABB and Heerema "have acted as RICO enterprises." Because FMC's allegations demonstrate that there is no distinction between the RICO persons and the purported RICO enterprise(s), FMC has not stated a RICO viable claim under § 1962(c).

Id. The only exception to the non-identity rule is that a living person can be a defendant and part of an association-in-fact:

> There is a slim exception to the rule that the RICO person must be separate from the RICO enterprise. "Courts have routinely required a distinction when a corporation has been alleged as both a RICO defendant and a RICO enterprise, but a similar requirement has not been mandated when individuals have been

of illegitimate organizations in the definition of enterprise—a plaintiff couldn't name a corporation as a defendant and as part of an association-in-fact because the identified association is usually alleged to do only *illegal* acts, despite the corporate member itself being legitimate.[75]

Without laboring an issue that I fully swabbed out in another article,[76] the argument against including corporations in associations in fact is "that the use of the word 'individual' in [RICO's] definition of enterprise . . . refer[s] only to a [living] person."[77] Plain meaning and structural points support this position.[78] And this was the position that seemed to gain traction at oral argument in *Mohawk Industries v. Williams*, the most recent case presenting the issue to the

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> named as defendants and as members of an association-in-fact enterprise." That rule does not apply here, as the . . . . Plaintiffs' claim only implicates the corporate defendants.

Bradley, 527 F. Supp. 2d at 652 n. 52 (citation omitted) (dismissing RICO claims because, in part, plaintiffs had "not identified RICO persons separate from their alleged enterprise").

75. Plaintiffs do this because a corporation cannot be employed by or associated with an enterprise if it *is* the enterprise, which is a required element of a § 1962(c) claim. *See* Schofield v. First Commodity Corp., 793 F.2d 28, 29–30 (1st Cir. 1986). Thus, plaintiffs allege that the corporation is the defendant and part of an association-in-fact to get around the person-enterprise barrier and still keep the corporation in as the deep-pocket defendant. *Id.*

76. Gordon, *Of Gangs and Gaggles*, *supra* note 3, at 973.

77. Starks v. Chuhak & Tecson, P.C., No. 17-62366 CIV-COHN/SELTZER, 2019 WL 10060337 at *8 (S.D. Fla., Jan. 18, 2019). The court dismissed the defendants' argument, based on United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), "that the use of the word 'individual' in the statutory definition of an enterprise must refer only to a natural person," by referencing Lockheed Martin Corp. v. Boeing Co., 357 F. Supp. 2d 1350, 1364 (M.D. Fla. 2005) in holding that "the trend has clearly been in favor of permitting associations-in-fact to include corporations." *Starks*, 2019 WL 10060337 at *8.

78. *Compare Individual*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 615 (1986) ("a single human being as contrasted with a social group or institution") *with Individual*, BLACK'S LAW DICTIONARY 843 (9th ed. 2009) (Individual means either "[e]xisting as an indivisible entity" or "[o]f or relating to a single person or thing, as opposed to a group."). Dictionaries from the time of RICO's adoption are to similar effect. *See* Brief for Petitioner at 12–13, Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006) (No. 05-465), at *12–13 [hereinafter Mohawk Petitioner's Brief]; *see also* 18 U.S.C. § 1961(4); NORMAN J. SINGER & SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2010) ("A statute should be construed so that effect [is given] to all its provisions, so that no part [will be] inoperative or superfluous, void or insignificant . . . . No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to and preserve all the words of the statute."); Corley v. United States, 556 U.S. 303, 314 (2009) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)) ("[O]ne of the most basic interpretive canons [is] that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'"); SINGER, *supra* note 78, § 46.6 ("The same words used twice in the same act are presumed to have the same meaning."); Gustafson v. Alloyd Co., 513 U.S. 561, 569–70 (1995).

United States Supreme Court.[79] Nonetheless, nothing approaching a consensus around the *Mohawk* position has emerged, and plenty of supporting arguments and counterarguments remain to be explored.[80] At the end of the day, although "enterprise" is included in the RICO's "definitions" section, its "definition" is not really so in the sense of laying out necessary and sufficient conditions for something to qualify as an "enterprise."[81] So what we find is a trail of court cases showing judges in search of the meaning of the word, often made in the context of criminal law, where the "tough on crime" policy dictates a broad reading that will put more criminals in jail.[82] The associated cost appears in civil litigation, where there's an accepted premise that the "enterprise" concept is unbounded (i.e., "[t]here is no restriction upon the associations embraced by the definition").[83] Stated thusly, it comes as no surprise that lower courts have assumed, without much analysis, that associations-in-fact made up of or including of corporations are proper.[84]

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79. *See* Oral Argument, Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006) (No. 05-465), https://www.oyez.org/cases/2005/05-465 [https://perma.cc/SE7K-LQ8C]. The case was fully briefed and then argued, but the Court subsequently remanded the case without decision for reconsideration in light of its opinion in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). *See* Mohawk Indus., 547 U.S. at 516.

80. Gordon, *Of Gangs and Gaggles*, *supra* note 3, at 973.

81. *See* Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1589–90 (1994). The definition is thus what Solan calls a "fuzzy concept at the margins." *Id.* at 1588.

82. Solan suggests that courts have interpreted RICO under a "law enforcement model," by which he means that courts "have been generous with prosecutors and stingy with civil plaintiffs in interpreting various provisions of the statute." Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2255 (2003). This phenomenon was no doubt exacerbated by the fact that the interpretations of RICO's substantive provisions first occurred in criminal cases, where the courts were inclined to give the Government a fair amount of leeway in its fight against crime. And, as Smith & Reed note, "[t]he happenstance that civil RICO was not 'discovered' by the plaintiff's bar until the 1980's has had an important influence on the development of RICO jurisprudence. Had the much deplored explosion of civil RICO litigation occurred ten years earlier, the courts would have interpreted the statute much more restrictively than they did with only criminal RICO prosecutions on their docket." SMITH & REED, *supra* note 16, ¶ 3.02[1] & n.19 (noting that "[o]nly a handful of civil RICO cases were brought between 1970 and 1980").

83. United States v. Turkette, 452 U.S. 576, 580–81 (1981).

84. *See, e.g.*, United States v. Phillip Morris USA Inc., 566 F.3d 1095, 1112 (D.C. Cir. 2009).

B. Pattern of Racketeering

RICO's "pattern" requirement is loosely defined in § 1961(5) as two predicate acts within ten years of each other.[85] Early on, many courts (especially in the criminal context) read the definition literally and required only that minimal showing.[86] But after *Sedima*, most courts demanded something more—*viz.*, a showing that the alleged predicate acts are "related" and "continuous"—terms whose meaning is not self-evident.[87] *H.J., Inc.* attempted to clarify *Sedima*, but with limited success.[88] All we can say for certain is that the "relatedness" of predicate acts is a fact only rarely litigated, and the focus has shifted to "continuity," which can be demonstrated in two ways. Under *H.J., Inc.*, "'[c]ontinuity' is both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition."[89]

This attempt at clarification has invited multiple tests that unfortunately have a facts-and-circumstances air to them. About all we can say with certainty is that in a closed-ended scheme (i.e., one that is completed), duration will be *a* factor (nearly dispositive in some courts) in the continuity analysis.[90] By contrast, in an open-ended scheme "past conduct that by its nature projects into the future with a threat of repetition" must be shown.[91] And of course the "threat of repetition" factor is not susceptible to an easily identifiable litmus test. As a practical matter, the "continuity" analysis seems to ensnare civil claims based on allegations of a fraudulent scheme targeting a single victim to

85. "'[P]attern of racketeering activity' requires 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 or racketeering activity[.]" 18 U.S.C. § 1961(5).

86. United States v. Phillips, 664 F.2d 971, 1011 (5th Cir. 1981), *superseded by rule on other grounds*, FED. R. CRIM. P. 23(b), *as recognized in* United States v. Huntress, 956 F.2d 1309, 1314–15 (5th Cir. 1992) (citations omitted) ("[T]he Government must prove . . . that the participation was through a pattern of racketeering activity, *i.e.*, by committing at least two acts of racketeering activity . . . [t]he two predicate crimes need not be related to each other but must be related to the affairs of the enterprise.").

87. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985) (citations omitted) (commenting on the pattern requirement and noting that "it is this factor of *continuity plus relationship* which combines to produce a pattern").

88. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 236–37 (1989).

89. *Id.* at 241.

90. *Id.* at 242 ("A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a *substantial period of time*." (emphasis added)).

91. *Id.* at 241.

obtain a particular benefit, even if the scheme entails multiple predicate acts.[92] On the other hand, repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish continuity.[93]

C. Special Standing Problems in Private Litigation

i. Proof of Injury

Although, as I've mentioned, the language of § 1964(c) of RICO is derived from § 4 of the Clayton Act, about the only thing that's clear is that each gives some private plaintiffs standing to sue for otherwise criminal violations that cause them injury.[94] Because the meaning of § 4 had been litigated for over half a century at the time of § 1964(c)'s adoption, it's reasonable to ask whether the two sections should be viewed in the same light. Both sections provide that "any person injured in his business or property by reason of" a substantive antitrust or RICO violation may seek treble damages.[95] But this apparent simplicity "belies the complexity of the many questions it has raised."[96] Read literally, any person injured (even remotely or unforeseeably) by prohibited conduct can state a claim under either statute. But courts have concluded that the right to sue cannot be so open ended and to staunch the litigation flow have erected multiple embankments to keep claims off the docket.[97]

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92. Grace Int'l Assembly of God v. Festa, 797 F. App'x 603, 605 (2d Cir. 2019) (citations omitted) ("The court must also consider the number and variety of predicate acts, the presence or absence of multiple schemes, and the number of participants and victims.").

93. Metaxas v. Lee, 503 F. Supp. 3d 923, 941 (N.D. Cal. 2020) (finding that a single scheme with a single victim may be sufficient to establish continuity requirement); Norfolk S. Ry. Co. v. Boatright R.R. Prods., Inc., No. 2:17-CV-01787-AKK, 2018 WL 2299249, at *8 (N.D. Ala., May 21, 2018) (finding that open-ended continuity does not require a showing of multiple schemes or victims).

94. The federal antitrust laws—at least as interpreted by the courts after the 1970s—have migrated from a model condemning a wide range of conduct to one condemning only conduct that causes deleterious economic effects. Broadly stated, "Congress's objectives included not only the economic goal of low prices and high quality brought about through competition, but also social and political ends." David F. Shores, *Antitrust Decisions and Legislative Intent*, 66 MO. L. REV. 725, 747 (2001). We see this view enshrined in the earliest cases, which found all restraints—reasonable or not—illegal. *See, e.g.*, United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897). This view quickly eroded in favor of condemning only "unreasonable" restraints, and by the time we arrive at the late the 1970s, the Supreme Court migrated to the view that antitrust claims must be grounded in "demonstrable economic effect." Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).

95. 18 U.S.C § 1964(c).

96. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 16.1, 804 (5th ed. 2016).

97. *Id.* ("By its language, § 4 appears to give a cause of action to every person who is injured by a cartel or overcharging monopolist. The courts have concluded that the statute cannot be as broad as

Under the U.S. competition statutes, one potent element of antitrust standing is the requirement that a plaintiff demonstrate "*antitrust* injury," a concept tracing to *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[98] That case arose after the defendant acquired (in violation of § 7 of the Clayton Act, according to the plaintiff) a number of failing bowling alleys that—after the acquisition—competed with plaintiff and harmed its business.[99] This struck the Court as a claim of injury flowing from *too much competition*, and, therefore, contradictory to the purpose of the antitrust laws, which "were enacted for 'the protection of *competition*, not *competitors*.'"[100] After *Brunswick*:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.[101]

It is true that courts look to antitrust precedent when formulating approaches to RICO standing.[102] But there's a major caveat—the Supreme

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it purports to be, however, and they have devised ways to limit its scope."); *see also, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 729 (1977) (holding that, in the context of illegal overcharging, only the overcharged direct purchaser—and not others down the line—constitute a person "injured in his business or property").

98. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Courts also require, as an element of antitrust standing, a plaintiff to show that it is an "efficient enforcer" of the antitrust laws. In the RICO context, this doctrine still matters, but it tends to be examined in the context of proximate cause. *See* Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1055 (9th Cir. 2008).

99. *Brunswick Corp.*, 429 U.S. at 479–80.

100. *Id.* at 488 (emphasis added) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) ("At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration.").

101. *Id.* at 489; *accord* HOVENKAMP, *supra* note 96, at 806; *but see* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977) (ruling in favor of the manufacturer—rather than the smaller retail store—in holding that the court should apply the rule of reason to vertical non-price restraints); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 927 (2007) (acknowledging that "a basic antitrust objective" is "providing consumers with a free choice about" "lower prices [rather than] more service," but ruling in favor of the manufacturer—rather than the smaller retail store—in holding that a court should apply the rule of reason to vertical price restraints).

102. Waste Mgmt. of La., L.L.C. v. River Birch, Inc., 920 F.3d 958, 970 (5th Cir. 2019) ("the [Supreme] Court recognized that 'antitrust law limits the range of permissible inferences from ambiguous evidence[.]'"); Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F. 3d 556, 563 (6th Cir. 2013) (citations omitted) ("With respect to § 1964(c), [its] limits have often been derived from the similarities between RICO and the antitrust laws. Courts have therefore looked to § 4 of the Clayton

Court fairly quickly rejected the invitation to engraft a *Brunswick*ian conception of injury onto RICO and thereby demand proof of "racketeering injury" and "competitive injury."[103] In *Sedima*, the Court found nothing in the statute suggesting that relief would be available only for a "racketeering injury," a concept that the Court found vague and "unhelpfully tautological."[104] So although it is a commonplace of statutory interpretation and application that like statutory language should be interpreted *pari passu*,[105] we've just seen that that doesn't always happen. Why not here?

Two reasons spring to mind. First, as I've already noted, the government enforcement and private litigation aims under RICO are less congruent, for instance, than they are under the federal antitrust laws, where criminal and civil litigation both target conduct that interferes with open competition. Indeed, as Hannah Buxbaum observes, "The antitrust laws deliberately adopt the private attorney general as a mechanism for law enforcement . . . . This statutory framework reveals Congress' intention to motivate a level of private enforcement that would ensure significant compliance with the antitrust

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Act; its predecessor, § 7 of the Sherman Act; and cases construing these statutes in order to identify limits to the civil remedy afforded by § 1964(c).").

103. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498–99 (1985) ("In borrowing its 'racketeering injury' requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid."); *see also* Cohen v. Trump, 200 F. Supp. 3d 1063, 1069 (S.D. Cal. 2016) ("[T]he Supreme Court [in *Sedima*] rejected the Second Circuit's attempt to read RICO to impose liability only against defendants who had been criminally convicted, and only for what the court called 'racketeering injury.'"). The *Sedima* Court also rejected a reading of § 1964(c) under which a claim could only be predicated on a prior conviction. 473 U.S. at 488 ("[A] prior-conviction requirement cannot be found in the definition of 'racketeering activity.' Nor can it be found in § 1962, which sets out the statute's substantive provisions.").

104. 473 U.S. at 494.

105. In the context of determining the meaning of a statute, "construction" and "interpretation" are disputed terms, that here, for simplicity's sake, I'll treat synonymously. One of the main debates is whether judges should consider the legislature's intent. *See* Cheryl Boudreau, Matthew D. McCubbins & Daniel B. Rodriguez, *Statutory Interpretation and the Intentional(ist) Stance,* 38 LOY. L.A. L. REV. 2131, 2131 (2005) ("[Legal] scholars have pondered whether individuals and collectivities can have intentions; they have asked whether it is possible for judges to discover the legislature's actual intent; and they have questioned whether legislative intent should play a role in judges' interpretations of statutes."). Another debate swirls around the use of a statute's legislative history as an interpretive aid. *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers,* 53 VAND. L. REV. 1457, 1458 (2000) ("In the long-running debate over methods of statutory interpretation, no issue receives more attention than legislative history."). *See also* discussion *infra* Part IV.E.

laws."[106] And in this context, "Congress was successful, as private actions have constituted a substantial portion of antitrust litigation."[107]

This success has come in the form of a division of labor with respect to violations of the Sherman Act: the Antitrust Division of the Department of Justice focuses on "hard core" violations like price fixing whereas private enforcers target (1) the recovery of damages in tag-along class actions following the announcement of criminal antitrust indictments, or (2) anticompetitive theories that the government rarely prosecutes like tying, boycotts, exclusive dealing, and other theories that are easily recognizable as potential *antitrust* violations.[108]

Second, as Abrams has documented, private RICO was ill-conceived and ill-considered: "In the months preceding the OCCA's enactment, Congress paid virtually no attention to the likely efficacy of private RICO relief because RICO included only the government's civil and criminal remedies until late in the deliberation process."[109] Even worse, "When the private remedy was inserted shortly before the final House and Senate votes on the OCCA bill, the lawmakers were racing against the clock to pass crime legislation before adjourning . . . [so as] to appear before the electorate as 'tough on crime' . . . ."[110] This lack of deliberate consideration led to a private remedy that "would have little or no effect on the fight against organized crime and racketeering."[111]

The disjunction between criminal prosecutions and private lawsuits is facially apparent. Government prosecutions look like what one would find under an anti-Mafia criminal statute: indictments typically charge violent crime rings, union infiltration, gambling, and so forth.[112] And the looseness inherent in RICO's drafting is tightened by the Justice Manual, which curbs any prosecutorial predilection to read the statute in novel and highly expansive ways

106. Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 223 (2001).

107. *Id.*

108. *See id.* at 222–23.

109. Abrams, *supra* note 16 at 35.

110. *Id.*

111. *Id.* at 36.

112. *Compare e.g.*, United States v. Simmons, 923 F.2d 934, 940 (2d Cir. 1991) (involving indictments with 24-counts that included, among other things, "murder, conspiracy to murder, heroin trafficking and conspiracy to distribute heroin"), *and* United States v. Dote, 150 F. Supp. 2d 935, 940 (N.D. Ill. 2001) (involving an indictment that "allege[d] a sequence of gambling offenses"), *with* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 484 (1985) (involving counts of mail and wire fraud).

by, for example, stating criteria that must be met, requiring centralized approval before an indictment is issued, and prohibiting use of RICO as a plea bargaining tool.[113]

Private RICO litigants are not similarly burdened and, by contrast, almost never bring claims rooted in stereotypical gangster conduct or tagging along on criminal RICO indictments;[114] typical complaints almost always assert claims of fraud in business or consumer transactions.[115] To be sure, there are ways in which organized criminals gain competitive advantages over legitimate businesses (e.g., selling stolen goods at a discount or not paying and collecting taxes), but those are marginal cases. Indeed, one can persuasively argue that had Congress not joined mail and wire fraud to the list of predicate acts, civil RICO litigation would be more-or-less nonexistent.[116] In any event, just because courts declined to place "racketeering injury" requirements on private litigants does not mean there are *no* specialized standing requirements, two of which need at least brief mention, if only because they explain why § 1962(c) predominates in civil RICO litigation.

ii. § 1962(a) and (b) Problems

For a couple reasons, civil RICO claims tend to be brought under § 1962(c). First, §§ 1962(a) and (b) pose particular standing problems. Section 1962(a),

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113. U.S.J.M. 9-110.310, Considerations Prior to Seeking Indictment, Dept. Justice (https://www.justice.gov/jm/jm-9-110000-organized-crime-and-racketeering#9-110.300) [https://perma.cc/7H7A-H56E].

114. To amplify one of my earlier remarks, I would point to Abrams's rhetorical question, "How many 'private attorneys general' would have the temerity to sue organized crime members and racketeers in open court for treble damages?" Abrams, *supra* note 16, at 36.

115. *See* Gordon, *Rethinking*, *supra* note 3, at 323 n. 20. *See also* Wal-Mart Stores, Inc. v. Watson, 94 F. Supp. 2d 1027, 1031 (W.D. Ark. 2000) (quoting Klehr v. A.O. Smith Corp., 521 U.S. 179, 191 (1997)) ("'[A] high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims.'"). As of 1985, "of the 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% 'allegations of criminal activity of a type generally associated with professional criminals.'" *Sedima,* 473 U.S. at 499 n.16 (quoting Arthur F. Mathews, Judah Best, John K. Tabor, Richard E. Nathan & Andrew B. Weissmann, REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55–56 (1985)). Additionally, "[r]oughly two fifths of all federal civil actions under RICO are based on charges that the defendant committed mail or wire fraud." Horace D. Nalle, Jr., *Civil RICO Claims Predicated on Mail or Wire Fraud: The Indispensability of Reliance*, 109 BANKING L.J. 272, 272 (1992).

116. In a review of civil RICO decisions through the statute's first decade and a half, Abrams notes that despite occasional claims based on crimes like arson or extortion, "[n]o private plaintiff, however, apparently had ever filed a civil RICO action against a member of an organized crime family." Abrams, *supra* note 16, at 53.

generally speaking, prohibits the investment of racketeering-derived income in an enterprise.[117] Most courts—but not all, especially those in the Fourth Circuit—hold that to state a claim a plaintiff must have suffered an "investment injury," which is to say an injury flowing from the investment itself rather than the predicate acts.[118] Section 1962(b), which prohibits acquisition of an interest in an enterprise through racketeering acts, similarly requires pleading and proof of an "acquisition injury."[119] Second, given these obstacles, private plaintiffs drift to § 1962(c), which—as we've already noted—is a more natural fit anyway, because civil RICO litigation typically turns on allegations of fraud in insurance, franchise, or other commercial transactions that are perpetrated through an enterprise.[120] And because fraud allegations have assumed a place of prominence, causation has become a principal point of contention in many civil RICO cases.

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117. 18 U.S.C. § 1962(a).

118. Kolar v. Preferred Real Est. Invs., Inc., 361 F. App'x 354, 360 (3d Cir. 2010) (citations omitted) ("Because the objectives of § 1962(a) are 'directed specifically at the use or investment of racketeering income,' it 'requires that a plaintiff's injury be caused by the use or investment of income in [an] enterprise.'").

119. Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995) (citations omitted) (explaining that there must be a "nexus between the claimed RICO violations and the injury suffered by the plaintiff; [f]or subsection (a), this means that the injury must flow from the investment of racketeering income into the enterprise. . . . As to subsection (b), a plaintiff must show that his injuries were proximately caused by a RICO person gaining an interest in, or control of, the enterprise through a pattern of racketeering activity.").

120. *E.g.*, Hemi Group, LLC v. City of New York, 559 U.S. 1, 4–5 (2010) (fraud in connection with collection of sales taxes); Bridge v. Phoenix Bond & Indem., Co., 553 U.S. 639, 643–45 (2008) (fraud and bid rigging); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 454–55 (2006) (fraud in connection with collection of sales taxes); *see also* CGC Holding Co. v. Hutchens, 974 F.3d 1201, 1214 (10th Cir. 2020) (victims of an advance-fee loan scam filed a class action and had the judgment rendered by the jury upheld by the Tenth Circuit); Crawford's Auto Ctr., Inc. v. State Farm Mut. Ins. Co., 945 F.3d 1150, 1159 (11th Cir. 2019) (civil RICO claims based on defendants allegedly improperly attempting to suppress amounts they were obligated to pay for automobile repairs, but the court—in dismissing the action—held that "[d]efendants are not liable for any omissions of material fact unless they have a duty to disclose"); *In re* Celexa & Lexapro Mktg. & Sales Pracs. Litig., 915 F.3d 1 (1st Cir. 2019) (RICO claim asserted against pharmaceutical manufacturer for promoting unauthorized "off-label" use of prescription antidepressants for minors); Jaye v. Oak Knoll Vill. Condo. Owners Ass'n, 751 F. App'x 293, 293 (3d Cir. 2018) (holding conclusory allegations failed to plead mail or wire fraud with requisite particularity); *Watson*, 94 F. Supp. 2d at 1031 (quoting *Klehr*, 521 U.S. at. 191) (noting higher percentage of fraud claims in RICO cases than in typical antitrust cases).

iii. General Standard for Proof of Causation by *Holmes*

To recover for RICO violations, private plaintiffs must demonstrate injury "by reason of" those violations,[121] a standard that the U.S. Supreme Court first interpreted in *Holmes v. Securities Investor Protection Corp.*[122] The open question at the time was whether "but-for causation" is sufficient to confer standing under § 1964(c).[123] The Court acknowledged that the statute's "language can . . . be read to mean that a plaintiff is injured 'by reason of' a RICO violation, and therefore may recover, simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury."[124] But the Court rejected this reading because: (1) § 1964(c) is modeled on § 4 of the Clayton Act,[125] and (2) § 4 had been held to "incorporate common-law principles of proximate causation."[126] The *Holmes* Court thus concluded this general tort-law reasoning should extend to § 1964(c).[127]

Holmes settled the causation question at a level of generality, but it didn't mandate how plaintiffs must plead and prove causation, especially in misrepresentation cases.[128] Two issues came to the fore after *Holmes*, both of which were important to class actions, as plaintiffs sought a tool with which to certify nationwide classes, which had become more difficult after a series of

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121. 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . .").

122. Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 272–73 (1992).

123. *See id.* at 266–67, 266 n.12.

124. *Id.* at 265–66 (footnotes omitted).

125. *Holmes*, 503 U.S. at 267 (citations omitted) ("We have repeatedly observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws [and] § 4 of the Clayton Act, which reads in relevant part that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."); *Id.* at 266 ("This construction is hardly compelled, however, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading."). *See* Clayton Act of 1914, ch. 323, § 4, 38 Stat. 731 (codified as amended at 15 U.S.C. § 15).

126. *See Holmes*, 503 U.S. at 267–68 (stating that Congress's use of § 7 language in § 4 has been interpreted by the Court to indicate the same congressional intent, and therefore, the Court has previously held that § 4 required a showing of proximate causation).

127. *Id.* at 268 (citations omitted). This makes good sense, given that civil RICO is in essence a statutory tort. VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE, AND SCHWARTZ'S TORTS 1318 (14th ed. 2020).

128. *See infra* note 134.

circuit opinions in the 1990s.[129] Put simply, the questions are whether "reliance" is an element of a RICO-fraud claim and, if so, is "victim" reliance required.[130] After fifteen years, in a series of three cases, the Court began to clarify the causation muddle that had emerged in the lower courts.

a. Proof of Causation: Anza

In *Anza v. Ideal Steel Supply Corp.*, the Court considered whether a competitor can be "injured in his business or property by reason of a violation,"[131] where the alleged predicate acts are mail and wire fraud, but a third-party was defrauded and the competitor did not rely on the fraudulent conduct.[132] Under *Holmes*,[133] the Court said this is insufficient.[134] A brief review of the facts shows why.

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129. Castano v. Am. Tobacco Co., 84 F.3d 734, 740–41 (5th Cir. 1996) (holding that multistate class would be decertified because the federal district court failed to consider how variations in state law would affect predominance and superiority, district court's predominance inquiry did not include consideration of how trial on the merits would be conducted, and the class independently failed the superiority requirement); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (holding that class certification was precluded due to concerns for protection of the Seventh Amendment, undue and unnecessary risk of entrusting determination of potential multibillion dollar liabilities to single jury, and questionable constitutionality of trying diversity case under legal standard in force in no state).

130. Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 224 (5th Cir. 2003) ("disagree[ing] with the district court that the fraud-on-the-regulator theory is a common issue of fact by all class members" that may be proved at trial because the "regulator's reliance on the fraudulent act would not alone be enough to result in a direct and contemporaneous injury to a policyholder that satisfies RICO's proximate cause requirement").

131. 547 U.S. 451, 458 (2006) (quoting 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . .")).

132. *Id.* It's worth noting that the *Anza* scenario probably *is* the type of competition-harming behavior that Congress had in mind when it created a private right of action. Gordon, *Of Gangs and Gaggles*, *supra* note 3, at 976–77 (discussing the legislative history and its focus of crime and unfair competition).

133. Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268–69 (1992) (holding that a plaintiff may sue under § 1964(c) of the RICO Act only if the alleged RICO violation was the proximate cause of the plaintiff's injury).

134. *Anza*, 547 U.S. at 460–61 (citations omitted) ("A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense. When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. In the instant case, the answer is no. We hold that Ideal's § 1962(c) claim does not satisfy the requirement of proximate causation.").

Ideal sued its chief competitor, National, alleging that National didn't charge New York's sales tax to its cash-paying customers and therefore submitted fraudulent sales-tax returns, thus allowing it to reduce prices without suffering a profit decline.[135] The Court said that Ideal could not make out its § 1962(c) claim because "[t]he direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue as a result."[136] Thus, although "Ideal assert[ed] it suffered its own harms when [National] failed to charge customers for the applicable sales tax . . . [t]he cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)."[137] *Anza* clarified a great deal, but it didn't hold that third-party fraud automatically fails for want of first-party reliance, although many read it that way.[138]

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135. *Id.* at 454.

136. *Id.* at 458.

137. *Id.* The Court further reasoned as follows:

> The attenuation between the plaintiff's harms and the claimed RICO violation arises from a different source in this case than in *Holmes*, where the alleged violations were linked to the asserted harms only through the broker-dealers' inability to meet their financial obligations. Nevertheless, the absence of proximate causation is equally clear in both cases.

Id. at 458–59.

138. *See, e.g.*, Nat.-Immunogenics Corp. v. Newport Trial Grp., 2020 WL 7263544, at *8 (C.D. Cal., Nov. 23, 2020). "At the center of the instant dispute [whether reliance must be plead to avoid a judgment on the pleadings] is the effect that *Bridge* has had within the District and Circuit on the necessary elements a party must prove to establish liability under RICO. It is clear to the Court that reliance is not an element to sustain a cause of action under RICO." *Id.* (citing Bridge v. Phoenix Bond & Indem. Co., 533 U.S. 639, 648 (2008)). "However, *Bridge* also established that while a plaintiff need not show 'first-party' reliance on a defendant's fraudulent acts to prevail, 'none of this is to say that a RICO plaintiff who alleges injury 'by reason of' a pattern of mail fraud can prevail without showing that someone relied on the defendant's misrepresentations.'" *Id.* (quoting 553 U.S. at 658–59); *see also* Painters & Allied Trades Dist. v. Takeda Pharms. Co., 943 F.3d 1243, 1259 (9th Cir. 2019) (holding that plaintiffs adequately alleged the reliance necessary to satisfy RICO's proximate cause requirement in a case against a pharmaceutical company based on their refusal to change warning labels on a diabetes drug or to otherwise inform consumers after the company learned that the drug caused an increased risk of bladder cancer); Devon Drive Lionville, L.P. v. Parke Bancorp, Inc., 791 F. App'x 301, 307 (3d Cir. 2019) (first quoting *Holmes*, 503 U.S. at 268; then quoting *Bridge*, 553 U.S. at 657–58) ("Under RICO, proximate causation requires 'some direct relation between the injury asserted and the injurious conduct alleged.' Though it requires reliance, the reliance need not be by the plaintiff himself; usually, a plaintiff must show 'that *someone* relied on the defendant's misrepresentations.'"); Brown v. Cassens Transp. Co., 492 F.3d 640, 643–46 (6th Cir. 2007), *vacated*, 554. U.S. 901, *rev'd on remand*, 546 F.3d 347, 357 (6th Cir. 2008) (finding that employees' claims

b. Proof of Causation: Bridge

If *Anza* could be (over)read to mean that allegations of third-party fraud cannot support a civil RICO claim, the Supreme Court put that worry to rest in *Bridge v. Phoenix Bond & Indemnity Co.*[139] The case arose out of a bid-rigging scheme involving the sale of county tax liens.[140] Concerned that liens would not be apportioned fairly, the county (1) required each "tax buying entity" to submit bids in its own name, (2) prohibited it from using "agents, employees, or related entities" to submit simultaneous bids, and (3) required a sworn certification of the first two conditions.[141]

The defendants allegedly violated this rule, furnished fraudulent affidavits, and thereby received a disproportionate share of the liens, all at the expense of

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that employer's mail- and wire-fraud scheme to deny them worker's compensation benefits failed because they did not plead reliance); James Cape & Sons v. PPC Constr. Co., 453 F.3d 396, 403–04 (7th Cir. 2006) (relying on *Anza,* the circuit court affirmed the district court's dismissal of claims for lack of proximate causation and noted that a direct causal connection is especially warranted where immediate victims can be expected to pursue their own claims); G & G TIC, LLC v. Ala. Controls, Inc., No. 4:07-CV-162, 2008 WL 4457876, at *4–5 (M.D. Ga. Sept. 29, 2008) (dismissing contractor's RICO claims and finding that the case is more analogous to *Anza* than to *Bridge* because the party directly injured by the defendants' alleged conspiracy to defraud the government through a bidding scheme was not the contractor, but the government and the contractor's injuries were cast in doubt by the fact that the defendant did not win all the contracts); Chaz Concrete Co., LLC v. Codell, No. 3:03-52-KKC, 2007 WL 1741934, at *11–12 (E.D. Ky. June 14, 2007), *rev'd*, 545 F.3d 407, 409 (6th Cir. 2008) (dismissing plaintiffs' claims that they were injured by the defendants' misrepresentations to a state agency for failure either to plead reliance or provide evidence of reliance as required under *Anza*); Leasure v. AA Advantage Forwarders, No. 5:03-CV-181-R., 2007 WL 925829, *9–10 (W.D. Ky. Mar. 23, 2007) (interpreting *Anza* as "emphasizing that under RICO's proximate cause analysis set out in *Holmes*, a RICO plaintiff may not recover for damages sustained by a third party" and consequently finding that the "[p]laintiff cannot recover under RICO for any harms he may have indirectly sustained as a result of the alleged direct injuries incurred by the United States Government"); Downstream Env't, LLC v. Gulf Coast Waste Disposal Auth., No. H-05-1865, 2006 WL 1875959, at *7 (S.D. Tex. July 5, 2006) (finding that where the cause of plaintiff's asserted injury (competitor charging lower prices) was distinct from the alleged RICO violations (competitor operating without a required license), plaintiff could not meet the proximate-cause requirement); Corp. Healthcare Fin., Inc. v. BCI Holdings Co., 444 F. Supp. 2d 423, 429 (D. Md. 2006) ("[A] civil RICO complaint is vulnerable to a motion to dismiss if it fails to allege . . . an adequate causal nexus between that injury and the predicate acts of racketeering activity alleged."); Zavala v. Wal-Mart Stores, Inc., 447 F. Supp. 2d 379, 387 (D.N.J. 2006) (finding that when the plaintiff's asserted injury (underpayment of wages) was distinct from the alleged RICO violation (harboring, transporting and encouraging illegal aliens) plaintiff failed to show proximate cause); Uni-Rty Corp. v. Guangdong Bldg., Inc., 464 F. Supp. 2d 226, 231 (S.D.N.Y 2006) (finding plaintiff failed to allege proximate cause when its injury would have occurred regardless of defendant's conduct).

139. *Bridge*, 553 U.S. at 651–60.

140. *Id.* at 639.

141. *Id.*

the plaintiffs and other bidders.[142] This presented the Supreme Court with a question that *Anza* left open: namely, "whether first-party reliance is an element of a civil RICO claim predicated on mail fraud."[143] For civil RICO to have a reliance requirement, that requirement must flow from one of two sources: the statutory-fraud predicates or § 1964(c).[144] The former was a question already answered by recent precedent: "[u]sing the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentation."[145] So, if reliance is an element, then "it must be by virtue of § 1964(c)," which provides the private right of action.[146] But—unlike common-law fraud—reliance (let alone first-party reliance) is not a stated element of § 1964(c), which is stated solely in terms of causation ("by reason of").[147] The Court thus dispatched the notion that a plaintiff must show that *it* relied on a misrepresentation; nonetheless, a RICO plaintiff is unlikely to prevail "without showing that *someone* relied on the defendant's misrepresentations."[148] As a collateral consequence, *Bridge* opened the door to class certification in cases that once would have failed on "predominance" grounds because individual issues of reliance would have swamped all others. [149]

c. Proof of Causation: Hemi

The whipsaw between *Anza* and *Bridge* once again led to overcorrections in RICO-causation decision-making.[150] In *Hemi Group, LLC v. City of New*

142. *Id.*

143. *Id.* at 646.

144. *Id.* at 649.

145. *Id.* at 648–49 (citing Neder v. United States, 527 U.S. 1, 24–25 (1999) ("The common-law requiremen[t] of 'justifiable reliance' . . . plainly ha[s] no place in the [mail, wire, or bank] fraud statutes.")).

146. *Id.* at 649.

147. *Id.* (quoting 18 U.S.C § 1964(c)).

148. *Id.* at 658–59 (citing Field v. Mans, 516 U.S. 59, 66 (1995)).

149. Vine v. PLS Fin. Servs., Inc., 331 F.R.D. 325, 338 (E.D. Tex. 2019) (quoting Torres v. S.G.E. Mgmt. L.L.C., 838 F.3d 629, 645 n.74 (5th Cir. 2016) (en banc)) (certifying a class and stating that "predominance is not defeated merely because 'other important matters will have to be tried separately'").

150. *See, e.g.*, *Torres*, 838 F.3d at 638 ("this understanding of the causation requirement for fraud-based RICO claims—that such claims, unlike most common law fraud claims, do not require proof of first-party reliance—largely dooms the Defendants' attempt to identify individual issues of causation sufficient to preclude a finding of predominance."); St. Germain v. Howard, 556 F.3d 261, 263 (5th Cir. 2009); Harris Cnty. v. Eli Lilly & Co., 2020 WL 5803483, at *11 (S.D. Tex., Sept. 29,

York, the Court revisited the issue of causation in the context of misrepresentations made to someone other than the plaintiff.[151] This time the facts laid out a long causal chain: Hemi sold cigarettes to New York City residents; Hemi was legally obliged to submit purchasers' names to the State but didn't; without the reports from Hemi, the State couldn't meet a contractual obligation to give the purchaser names to the City; without receiving names from the State, the City couldn't determine which customers owed taxes; and without that determination, the City could not target non-paying customers; therefore, the City claimed it was injured to the extent of the unpaid taxes.[152]

Thus cast as a for-want-of-a nail-a-kingdom-was-lost narrative, one easily sees, as in *Anza*, a yawning gap between direct harm-producing conduct and fraud-producing conduct.[153] The Court therefore refused to "extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a fourth party (the taxpayer) to cause harm to the plaintiff (the City)."[154] And the foreseeability of the harm proved insignificant: proximate cause in this context depends on "directness" not "foreseeability."[155]

2020). The district court, in upholding the rule that reliance is not a requirement of causation, held that Harris County's claim that the defendants "misleadingly relabeled rebates so as to avoid paying them to Harris County" and that the defendants' conspiracy to artificially raise the price of insulin was sufficient to show "a direct relationship between the alleged conduct and their injury." *Harris Cnty.*, 2020 WL 5803483, at *11.

151. Hemi Group, LLC v. City of New York, 559 U.S. 1 (2010).

152. *Id.* at 4–5.

153. *Id.* at 2–-3. In his dissent, Justice Breyer opined that *Hemi* is not like *Anza* because "the *kind of harm* that the plaintiff alleged [in *Anza*] is not the *kind of harm* that the tax statutes [in *Hemi*] primarily seek to prevent." *Id.* at 28. Rather, the plaintiffs in *Hemi* "alleged a kind of harm (competitive injury) that tax violations do not ordinarily cause and which ordinarily flows from the regular operation of a competitive marketplace." *Id.* at 28.

154. *Id.* at 3 (emphasis added).

155. *In re* Nat'l Prescription Opiate Litig., 452 F. Supp. 3d 745, 764 (N.D. Ohio 2020). The court held that while "the creation of an opioid crisis foreseeably led to increased costs for hospitals," this "does not end the inquiry." *Id*. "Under RICO law, the injury must also be a direct consequence of a Defendant's injurious conduct." *Id*. Court concluded that West Boca "sufficiently alleged at least one plausibly direct and foreseeable chain of causation from injurious conduct to alleged injury to survive a motion to dismiss for lack of proximate cause." *Id.*; Doe v. Trump Corp., 385 F. Supp. 3d 265, 276 (S.D.N.Y. 2019) ("[I]n the RICO context, the focus is on the directness of the relationship between the conduct and the harm,' and whether the connection is attenuated by substantial intervening factors or third party conduct. Insofar as civil RICO cases are concerned, a court's proximate cause inquiry does not 'go beyond the first step.") (citations omitted). *Compare* Chaz Concrete Co., LLC v. Codell, No. 3:03-52-KKC, 2010 WL 1227750, at *11 (E.D. Ky., Mar. 29, 2010) (dismissing plaintiffs' "scheme to defraud" allegations claiming third-party injury from misrepresentation even though they plead reliance because, under *Hemi*, "the Plaintiffs cannot meet their burden of showing that the

In sum, *Hemi* may fairly be read to hold that proof of civil RICO causation cannot be premised on an "interdiction" theory—i.e., one depending on an allegation that fraud on a third party (often a government regulator) prevented that party from intervening and thereby preventing the plaintiff's injury.

As the matter now stands, we know that but-for and proximate causation are elements of a fraud-based civil RICO claim, that first-party reliance is not (although it is a handy way to demonstrate causation), and that directness of injury from a misrepresentation is critical. But we also know that causation factors, as in tort cases generally, can be devilishly difficult to apply in individual RICO cases, and that, therefore, causation will remain a contested issue in most cases.[156]

D. Does RICO Have Borders?

As with antitrust law, there are often questions as to the extraterritorial reach of RICO. In *RJR Nabisco, Inc. v. European Community*,[157] the Supreme Court sought to answer two of them: "First, do RICO's substantive prohibitions, contained in § 1962, apply to conduct that occurs in foreign countries? Second, does RICO's private right of action, contained in § 1964(c), apply to injuries that are suffered in foreign countries."[158] As a default, the "basic premise of

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Defendants' fraud caused the Plaintiffs' injuries by simply showing that 'the concept of the injury was well known to the defendants' and, thus, foreseeable . . . . Instead, the Plaintiffs must produce evidence of a direct relationship between their injuries and the fraud"), *with* Johnson v. KB Home, 720 F. Supp. 2d 1109, 1118 (D. Ariz. 2010) (reversing dismissal of plaintiffs' complaint because even though plaintiffs did not plead reliance, they sufficiently pleaded that defendants' actions were "a direct cause of their injuries and a 'substantial factor in the sequence of responsible causation'" (citation omitted)).

156. *Compare* Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. U.S.A., 943 F.3d 1243, 1260 (9th Cir. 2019) (holding that health insurer and consumers plausibly alleged the element of proximate cause in alleging civil RICO violations based on pharmaceuticals company's refusal to change warning label on diabetes drug or otherwise inform consumers after they learned that the drug caused an increased risk of bladder cancer), *and* St. Luke's Health Network, Inc. v. Lancaster Gen. Hosp., 967 F.3d 295, 301 (3d Cir. 2020) (holding that plaintiffs, a group of hospitals and their related health care networks, adequately alleged defendants', another hospital and hospital system, misrepresentation proximately caused their injury when plaintiffs alleged that defendants submitted fraudulent claims for reimbursement of "extraordinary expenses" incurred for treating uninsured patients), *with* Empire Merchs., LLC v. Reliable Churchill LLLP, 902 F.3d 132, 143–44 (2d Cir. 2018) (holding that smuggling liquor into New York, as asserted racketeering activity, was not proximate cause of lost sales suffered by exclusive distributor), *and* Collier v. LoGiudice, 818 F. App'x 506 (6th Cir. 2020) (holding that a former restaurant employee failed to adequately allege proximate cause regarding both the alleged workers' compensation insurance scheme and the alleged tax evasion scheme against the restaurant's owner and general manager).

157. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325 (2016).

158. *Id.*

our legal system that, in general, 'United States law governs domestically but does not rule the world.'"[159]

The Court had at its disposal a previously developed "two-step framework for analyzing extraterritoriality issues."[160] The first step entails a look at a statute's language to see whether it gives an unequivocal, affirmative indication of extraterritorial reach.[161] If not, then the second step determines whether the facts alleged push the case into the statute's "focus."[162] RICO presents a particular challenge because—although nothing in § 1962 itself makes an unequivocal statement of extraterritorial application—many predicate acts do expressly apply with extraterritorial force.[163] This was enough for the Court to conclude that "Congress's incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity."[164] What this means is that § 1962 *can* apply extraterritorially, but only to the extent "that the predicates alleged in a particular case themselves apply extraterritorially."[165] Stated differently, RICO covers *some* foreign racketeering activity—viz., "a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial."[166]

So, we know that foreign conduct can support a substantive, criminal violation of RICO. But this doesn't end the inquiry with respect to a civil claim under § 1964(c), to which the Court found that it must "separately apply the presumption against extraterritoriality to RICO's [civil] cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions."[167] Here, the European Union invited the Court to interpret § 1964(c) *in pari materia* to its direct ancestor, § 4 of the Clayton Act, which—under the Court's precedents—allows recovery for injuries suffered abroad.[168] But the Court declined the invitation, noting that—although the Clayton Act sometimes offers "guidance in construing § 1964(c)"—it had "not

159. *Id.* at 2100 (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).
160. *Id.* at 2101.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 2102.
165. *Id.* at 2094.
166. *Id.* at 2103.
167. *Id.* at 2106.
168. *Id.* at 2095.

treated the two statutes as interchangeable."[169] As the matter now stands, absent domestic injury, a prosecutable criminal RICO violation will fail as a civil claim.[170]

E. RICO's Remedies

i. Equitable Relief

Whether private plaintiffs can obtain injunctions and other forms of equitable relief[171] is another RICO conundrum arising from the statute's unclear

169. *Id.* at 2109.

170. To see how lower courts have ruled on the domestic injury requirement post *RJR Nabisco*, *see* City of Almaty v. Khrapunov, 956 F.3d 1129, 1132 (9th Cir. 2020) ("The Ninth Circuit has not yet addressed the question of how to determine whether an injury is domestic or foreign after *RJR Nabisco*, and we need not do so today. That is because Plaintiff's alleged injury is merely a consequential effect of its admittedly foreign injury, and not an independent injury cognizable under § 1964(c)."); Humphrey v. GlaxoSmithKline PLC, 905 F.3d 694 (3d Cir. 2018) (holding that an investigations firm that assisted foreign companies, doing business in China, with American anti-bribery regulations compliance did not suffer a domestic injury as required to establish a civil RICO claim when in their allegation that a multinational healthcare company destroyed their business and prospective business ventures as result of its bribery practices in China); Bascuñán v. Elsaca, 874 F.3d 806, 806–07 (2d Cir. 2017) (holding that an alleged scheme to: (1) steal funds held in a foreign bank account and launder stolen money using bank accounts in the United States and elsewhere did not allege a domestic injury, (2) misappropriate funds held in New York bank account owned by plaintiff did allege a domestic injury, and (3) misappropriate bearer shares owned by principal did allege a domestic injury).

171. Fleetwood Servs., LLC v. Complete Bus. Sols. Grp., Inc., No. 18-268, 2019 WL 5422884, at *4 (E.D. Pa., Oct. 23, 2019) ("The Third Circuit has not addressed injunction for private plaintiffs under RICO. Other courts are split on whether private plaintiffs in RICO actions can request equitable relief. Even if injunctions are available for private plaintiffs in RICO actions, courts have found that private plaintiffs must still show future irreparable harm."). *Compare* Smith v. FirstEnergy Corp., 518 F. Supp. 3d 1118, 1126 (S.D. Ohio 2021) (citations omitted) (emphasis added) (showing the use of traditional injunctive relief requirements and stating that "[e]quitable relief is generally available under § 1964(c), and no court has concluded that this excludes any particular type of equitable relief. . . . Defendants provide no authority that supports the proposition that Plaintiffs fail to state a claim under § 1964(c) by alleging an *imminent and ascertainable* injury"), *with* Hengle v. Asner, 433 F. Supp. 3d 825, 884–85 (E.D. Va. 2020) ("By providing the government with authority to institute proceedings under § 1964 and not providing private plaintiffs with the same authority, Congress expressed an intent that the general grant of injunctive power to the courts in § 1964(a) not apply in cases involving only private plaintiffs. Indeed, by providing a cause of action only if a private plaintiff has suffered monetary damages, Congress implicitly precluded the possibility of equitable relief for such plaintiffs, because—as has been the case since the conception of courts of equity — to obtain equitable relief, a plaintiff must have an inadequate remedy at law."). An interesting, though rarely discussed, issue is whether declaratory relief is available in a RICO case. The Declaratory Judgment Act, 28 U.S.C. § 2201, states that "[i]n a case of actual controversy within its jurisdiction . . . any court . . . may declare the rights and other legal relations of any interested party . . . ." 28 U.S.C. § 2201(a). One

drafting. The first case to take up the question, *Religious Technology Center v. Wollersheim*,[172] held that such relief is not available. What we find in the text is that § 1964(a) is a broad grant of equitable jurisdiction to federal courts, that § 1964(b) allows the government to seek equitable remedies, and that § 1964(c) allows private plaintiffs to recover treble damages, costs, and fees.[173] There's no dispute, then, that "[i]n contrast to part (b), there is no express authority to *private plaintiffs* to seek the equitable relief available under part (a)."[174] Ultimately, the Court held that "[t]he legislative history mandates us to hold that injunctive relief is not available to a private party in a civil RICO action."[175]

might think that this statute would provide a basis for seeking declaratory relief independent of what's provided in the RICO statute itself, but the few cases addressing the issue do not bear that out. Instead, the cases treat a declaration as-if it were an injunction and either allow or deny declaratory relief for the same reasons that an injunction would be allowed or denied. *See* Johnson v. Collins Ent. Co., 199 F.3d 710, 726 (4th Cir. 1999) ("There is substantial doubt whether RICO grants private parties . . . a cause of action for equitable relief. This doubt is especially acute in light of the fact that Congress has declined to authorize injunctive remedies for private parties." (internal citations and quotations omitted); Galaxy Distrib., Inc. v. Standard Distrib., Inc., No. 2:15–cv–04273, 2015 WL 4366158, at *5 (S.D.W. Va. July 16, 2015) ("RICO does not provide for [the plaintiff's] requested relief of declaratory judgment and permanent/preliminary injunctions"); Am. Med. Ass'n v. United Healthcare Corp., 588 F. Supp. 2d 432, 446 (S.D.N.Y. 2008) ("Based upon the weight of Second Circuit authority and Congress's failure to address the issue within the statutory language itself, this Court will not infer that the right to injunctive and declaratory relief exists for private litigants under Section 1964 of RICO."); Aarona v. Unity House Inc., No. 05–00197, 2007 WL 1963701, at *16–17 (D. Haw. July 2, 2007) (finding that declaratory relief is not available to a private party after acknowledging that the Ninth Circuit has prohibited injunctive relief but has not addressed declaratory relief); *In re* Managed Care Litig., 298 F. Supp. 2d 1259, 1282–83 (S.D. Fla. 2003) (finding the reasoning in Nat'l Org. For Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001), persuasive to authorize both injunctive and declaratory relief); Miller v. Affiliated Fin. Corp., 600 F. Supp. 987, 994 (1984) (finding that "there is nothing in the language, structure or legislative history of private civil RICO to suggest Section 1964(c) was meant to grant private plaintiffs" declaratory and injunctive relief). The same may be said of other remedies of an equitable or quasi-equitable nature. Russello v. United States, 464 U.S. 16, 22–24 (1983) (concluding that some things are forfeitable under some RICO subsections that are not forfeitable under others); United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1200 (D.C. Cir. 2005) (finding that RICO does not explicitly include disgorgement and therefore it is not available to the Government); United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995) (holding that the availability of disgorgement is limited to the cases where there is a finding "that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose").

172. 796 F.2d 1076 (9th Cir. 1986).

173. 18 U.S.C. § 1964(a)–(c); *Wollersheim,* 796 F.2d at 1082.

174. *Wollersheim*, 796 F.2d at 1082.

175. *Id.* at 1084.

A number of years later, *National Organization For Women, Inc. v. Scheider* emerged as the leading challenger of *Wollersheim*.[176] There, the court emphasized that *Wollersheim* reached its conclusion by "relying largely on [its] reading of the statute's legislative history,"[177] which "recent Supreme Court precedent teaches . . . is a particularly thin reed on which to rest the interpretation of a statute."[178] The Court thus concluded that plain statutory language permitted injunctive relief and that the proffered legislative history could not trump it.[179]

As the matter presently rests, (with no definitive word from the Supreme Court), courts that have three choices: follow *Wollersheim*, follow *NOW*, or find a way to avoid the issue. After *Wollersheim* (and even to date), most courts have followed *Wollersheim*.[180] But this does not mean that there's a consensus or anything approaching a prevailing view.[181] In fact, "it is impossible to

176. *See* Nat'l Org. For Women, Inc. v. Scheidler, 267 F.3d 687, 699 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003) [hereinafter "*NOW*"].

177. *Id.* at 695.

178. *Id.* at 699 (citing Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 169–70 (2001) (noting that "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. A bill can be proposed for any number of reasons, and it can be rejected for just as many others"); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.").

179. *See NOW*, 267 F.3d at 699.

180. U.S. DEP'T OF JUST., CIVIL RICO: A MANUAL FOR FEDERAL ATTORNEYS 33 n.29 (2007) ("The majority of courts to decide this issue have [followed Wollersheim by holding that] private parties may not obtain equitable relief.").

181. As I already noted, the leading commentator, Professor G. Robert Blakey, sharply criticized the *Wollersheim* opinion at the time and has continued the drumbeat as recently as October 2014, in connection with *Chevron v. Donziger*. Brief for Professor G. Robert Blakey as Amici Curiae Supporting Appellant at *10, *14, Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016) ("This amicus agrees with the Seventh Circuit's opinion in *Scheidler* that private parties have the power to obtain the full range of equable remedies. . . . *Scheidler* is correctly decided . . . ."). For recent commentary on this issue, *see* Hengle v. Asner, 433 F. Supp. 3d 825, 882–84 (E.D. Va. 2020) ("Circuit courts that have directly addressed whether § 1964 provides for injunctive and declaratory relief in private RICO actions have reached opposite conclusions." "Having considered these opinions [*Wollersheim* and *NOW*] and district court opinions addressing the same issue, the Court finds the Ninth Circuit's interpretation of § 1964 more persuasive, though without relying on legislative history."); *In re* Insulin Pricing Litig., No. 3:17-cv-699, 2020 WL 831552, at *3 (D.N.J., Feb. 20, 2020) ("The Third Circuit has not directly addressed whether RICO allows for a private right of equitable relief." The plaintiff was unable "to point to any cases within [the] Circuit or District" that adopted *Dozinger* or *Scheidler*; thus, the court "decline[d] to stray from the weight of persuasive authority and

discern whether these courts chose to follow the Ninth Circuit's position simply because for fifteen years *Wollersheim* was the only pronouncement on this issue or because the Ninth Circuit's logic is more persuasive than the Seventh Circuit's."[182] And we must note that many courts following *Wollersheim* were bound to it (because they're in the Ninth Circuit)[183] or—though technically following *Wollersheim* on the availability of injunctive relief under § 1964—nonetheless found alternative ways to grant it in RICO cases.[184] Finally, at least

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h[eld] that a private party may not seek equitable relief under RICO."); *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2019 WL 4194296, at *6 (N.D. Ohio, Sept. 4, 2019) (citations omitted) ("Neither the Supreme Court nor the Sixth Circuit has squarely addressed whether RICO provides an equitable remedy to private plaintiffs, and there is a Circuit split on the question. Unlike the very brief dicta in *Ganey*, more recent Circuit cases undertaking deeper analysis conclude RICO does provide equitable relief."); B2Gold Corp. v. Christopher, No. 1:18-cv-1202, 2019 WL 4934969, at *16 (E.D. Va., July 10, 2019) ("Yet, this Court declines to follow the Second Circuit and instead refers to the language of the statute. Injunctive relief is not appropriate for a RICO offense because § 1964(c) makes no mention of injunctive relief."). *See also* Bakala v. Krupa, No. 9:18-cv-2590-DCN-MGB, 2021 WL 3508585, at *8 (D.S.C. Aug. 10, 2021) (citations omitted) (denying request for injunctive relief "[b]ecause the Fourth Circuit has expressed doubt that injunctive relief is available to private parties under 18 U.S.C. § 1964"). Before so holding, the court took time to compare *NOW* with *Wollersheim*. *See id.* at *7–8 (citations omitted).

182. Huyer v. Wells Fargo & Co., 295 F.R.D. 332, 344 (S.D. Iowa 2013) (footnotes omitted).

183. *See, e.g.,* Comm. to Protect our Agric. Water v. Occidental Oil & Gas Corp., 235 F. Supp. 3d 1132, 1169 n.7 (E.D. Cal. 2017); Cohen v. Trump, 200 F. Supp. 3d 1063, 1069 (S.D. Cal. 2016); Holmes High Rustler, LLC v. Gomez, No. 15–cv–02086–JSC, 2015 WL 4999737, at *6 (N.D. Cal. Aug. 21, 2015); State Comp. Ins. Fund v. Khan, No. 12–01072–CJC, 2012 WL 12887395, at *4 (C.D. Cal. Dec. 28, 2012); Aarona v. Unity House Inc., No. 05–00197, 2007 WL 1963701, at *16–17 (D. Haw. July 2, 2007).

184. Hawaii's "baby" RICO statute, allowing equitable relief, states:

> The circuit courts of the State shall have jurisdiction to prevent and restrain violations of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest oneself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

HAW. REV. STAT. § 842-8(a) (1984); Ne. Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1355 (3d Cir. 1989) (deciding not to reach the issue of injunctive relief under RICO because the plaintiff's state-law claims also provided for injunctive relief); Raymark Indus., Inc. v. Stemple, 714 F. Supp. 460, 476 (D. Kan. 1988) (noting that it found *Wollersheim* persuasive, but the plaintiff also sought injunctive relief under its common-law claims); *see also* DEL. CODE ANN. tit. 11, § 1505(a) (West 1995) (same); V.I. Code Ann. tit. 14, § 607 (1990) (providing a similar "baby" RICO statute to Hawaii's with slightly different wording); MISS. CODE ANN. § 97-43-9 (West 1986) (providing a similar "baby" RICO statute to Hawaii's with slightly different wording).

one major recent case, *Chevron v. Donziger*[185] concluded that equitable relief is available under § 1964(c), "largely for the reasons stated by the Seventh Circuit opinion in *NOW I*."[186]

ii. Other Relief and Remedies

Although the issue is not as complicated as the availability of equitable relief, the pedigree of § 1964 and the larger purpose of § 1964 unsettle the question of how properly to calculate RICO damages. Under one view, the nature of the underlying predicate acts should control.[187] For instance, in a fraud-based RICO case, damages should be determined by borrowing analogous common-law fraud theories of recovery.[188] Under the other view, given that § 1964(c) is based on § 4 of the Clayton Act, the borrowing should come from antitrust precedents.[189] If this is so, then the "yardstick" and "before-and-after" measures familiar in antitrust cases should hold sway. Both the predicate act and Clayton Act approaches are not an ideal fit with RICO, principally because it's difficult to square common-law precedents with groups of predicate acts, and antitrust remedies are designed to compensate competitive injuries, which do not reach all corners of RICO's remedial purposes. The latter point is revealed most starkly when a court bars a claim for a pecuniary loss that it categorizes as a "personal" injury, rather than "injury to business or property."[190]

Another knotty issue arises in the space between the "one-satisfaction rule" and RICO's treble damages provision. The question is one of ordering: does a prior recovery apply before or after trebling? For example, suppose a plaintiff sues two defendants. One settles for $1 million and the other goes to trial and

185. Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016).

186. *Id.* at 137.

187. SMITH & REED, *supra* note 16, ¶ 10.04[3].

188. James v. Meinke, 778 F.2d 200, 207 (5th Cir. 1985). In a RICO securities fraud case, there was found to be no difference between the value of the stock when purchased and its purchase price, but, following a predicate act-based approach, the Fifth Circuit upheld a jury award based on payments plaintiff made on subsequent loan guarantees to the ailing company, by holding that such damages are compensable as "consequential" damages. *Id.*

189. Willie McCormick & Assocs., Inc. v. Lakeshore Eng'g Servs., Inc., No. 12-cv-15460, 2018 WL 1884716, at *4 (E.D. Mich., Mar. 29, 2018) (stating that when attempting to calculate damages the court relied on how "[t]he Sixth Circuit has summarized the degree of certainty required to prove lost profit damages in an antitrust case").

190. *See* Grogan v. Platt, 835 F.2d 844, 847–48 (11th Cir. 1988) (holding that RICO's private civil action provision does not permit recovery for economic aspects of personal injuries inflicted by predicate acts involving murder).

receives an adverse verdict in the amount of $1.1 million. In this scenario, does the plaintiff recover $300,000 or $2.3 million? There is a split of authority on the point, but—given RICO's purpose of punishing criminal conduct that has civil impact—the better rule would seem to be treble first, deduct second.[191]

F. A RICO Miscellany

i. Limitations

The RICO statute contains no statute of limitations. In *Agency Holding Corp. v. Malley-Duff & Assocs., Inc*, the Supreme Court "borrowed" the antitrust limitations period—four years—found in § 4B of the Clayton Act.[192] But the *Malley-Duff* Court did not decide the issue of when a RICO claim accrues. In *Rotella v. Wood*, the Court applied an "injury discovery" rule, although it declined to decide whether it would ultimately choose an "injury discovery" or "injury occurrence" rule.[193] Also undecided are the contours of the separate accrual, sufficient knowledge, and equitable tolling doctrines familiar to limitations jurisprudence more generally. Here's what we do know.

Every federal circuit has adopted a rule "'under which a new claim accrues, triggering a new four-year limitations period, each time plaintiff discovers, or should have discovered,' the operative event triggering accrual (that is, injury or injury plus a pattern of racketeering activity)."[194] This rule—adopted from antitrust principles—effectively limits recovery to injuries that occurred within the four-year statute of limitations.[195] And although the Supreme Court has not explicitly adopted the injury accrual rule, it may tacitly have done so by

191. *Compare* Uthe Tech. Corp. v. Aetrium, Inc., 808 F.3d 755, 762 (9th Cir. 2015) (holding foreign arbitration awards as well as settlements "constitute partial credits toward the full measure of damages for which a defendant may be liable under RICO"), *and* Morley v. Cohen, 888 F.2d 1006, 1013 (4th Cir. 1989) (holding "[t]he deduction here should be made after trebling"), *with* HBC Fin. Corp. v. McPherson, 8 F.4th 335, 345 (5th Cir. 2021) (refusing to award treble damages in RICO action based on "lost debt" theory of injury because after recovering judgment with interest, the "debt was no longer lost"); *and* Com. Union Assurance Co. v. Milken, 17 F.3d 608, 612 (2d Cir. 1994) (holding that investors could not maintain a RICO action where they received, in a settlement, the amount they lost on their investment).

192. Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 146–47, 156 (1987).

193. Rotella v. Wood, 528 U.S. 549, 554–55, 554 n.2 (2000).

194. SMITH & REED, *supra* note 16, ¶ 9.01[5][B][V] (quoting Bingham v. Zolt, 66 F.3d 553, 559 (2d Cir. 1995)).

195. *See Bingham*, 66 F.3d at 560 (stating that "[a] necessary corollary of the separate accrual rule is that plaintiff may only recover for injuries discovered or discoverable within four years").

applying the rule in the context of a federal copyright claim.[196] This does not mean, however, that the Circuits agree on the criteria for defining a separate accrual. For example, some circuits merely require that there be a "new" injury, whereas others require that the injury be both "new" and "independent" of prior injuries outside the statute of limitations.[197] One court has even opined that injuries within the limitations period may not be "entirely unlike" the injuries sustained prior to the limitations period.[198] This seems to be an overreach, and a path not widely followed.

The "sufficient knowledge" doctrine goes hand in glove with the separate accrual doctrine.[199] Courts generally—after determining when a plaintiff sustained injury—determine when the plaintiff discovered or should have discovered the injury. There's also widespread agreement that actual or constructive knowledge is sufficient to commence the running of the period.[200] But here, too, there's no agreed-upon formula for deciding when a plaintiff was put on inquiry notice sufficient to trigger the statute of limitations.[201]

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196. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 671 (2014) (referencing Klehr v. A.O. Smith Corp., 521 U.S. 179, 190 (1997) ("Each [instance of copyright infringement] gives rise to a discrete 'claim' that 'accrue[s]' at the time the wrong occurs.")).

197. *Compare* Viking Constr. Grp., LLC v. Satterfield & Pontikes Constr. Grp., Inc., No. 17-12838, 2018 WL 401182, at *3 (E.D. La., Jan. 12, 2018) (quoting Love v. Nat'l Med. Enters., 230 F.3d 765, 773 (5th Cir. 2000)) (elaborating that the separate accrual rule allows recovery "for injury caused by the commission of a separable*, new* predicate act within the limitations period" (emphasis added)), *with* Lehman v. Lucom, 727 F.3d 1326, 1331 (11th Cir. 2013) ("[I]f a new RICO predicate act gives rise to a new *and independent* injury, the statute of limitations clock will start over for the damages caused by the new act." (emphasis added)), *and* Grimmett v. Brown, 75 F.3d 506, 514 (9th Cir. 1996), *and* Glessner v. Kenny, 952 F.2d 702, 707–08 (3d Cir. 1991).

198. Zalesiak v. UnumProvident Corp., No. 06 C 4433, 2007 WL 4365345, *6 (N.D. Ill. Dec. 12, 2007) (quoting McCool v. Strata Oil Co., 972 F.2d 1452, 1466 (7th Cir. 1992)).

199. A claim cannot begin to accrue until the plaintiff has "sufficient knowledge." *See* Mathews v. Kidder, Peabody & Co., 260 F.3d 239, 250–51 (3d Cir. 2001); Forbes v. Eagleson, 228 F.3d 471, 484 (3d Cir. 2000).

200. *See* SMITH & REED, *supra* note 16, ¶ 9.01[5][B][V].

201. The Third Circuit has provided perhaps the most elaborate formula for ascertaining inquiry notice:

> [I]nquiry notice should be analyzed in two steps. First, the burden is on the defendant to show the existence of "storm warnings" . . . . Second, if the defendants establish the existence of storm warnings, the burden shifts to the plaintiffs to show that they exercised reasonable due diligence and yet were unable to discover their injuries. This inquiry is both subjective and objective. The plaintiffs must first show that they investigated the suspicious circumstances. Then, we must determine whether their efforts were adequate—i.e., whether they

Closely related to the discovery rule is the "equitable tolling" doctrine. As the Third Circuit has explained:

> The discovery rule and the equitable tolling doctrine are similar in one respect and different in another. The doctrines are similar in that each requires a level of diligence on the part of the plaintiff; that is, each requires the plaintiff to take reasonable measures to uncover the existence of injury. The plaintiff who fails to exercise this reasonable diligence may lose the benefit of either doctrine. The two doctrines differ, however, with respect to the type of knowledge or cognizance that triggers their respective applications. The discovery rule keys on a plaintiff's cognizance, or imputed cognizance, of *actual injury*. Equitable tolling, on the other hand, keys on a plaintiff's cognizance, or imputed cognizance, of the *facts supporting the plaintiff's cause of action*. Underlying this difference between the discovery rule and equitable tolling is the more fundamental difference in purpose between the two rules. The purpose of the discovery rule is to determine the accrual date of a claim, for ultimate purposes of determining, as a legal matter, when the statute of limitations begins to run. Equitable tolling . . . presumes claim accrual. Equitable tolling steps in to toll, or stop, the running of the statute of limitations in light of established equitable considerations.[202]

Finally, the "fraudulent concealment" doctrine is a distinct species within the broader equitable tolling genus. It has elements that an invoking plaintiff must plead—and, as a type of fraud, the plaintiff must do so under the particularity standards of Rule 9(b).[203] Although there is no standard articulation of the elements of the doctrine, courts typically require affirmative acts of concealment that in fact prevented a plaintiff exercising due diligence from discovering the basis of its claim.[204]

> exercised the due diligence expected of reasonable investors of ordinary intelligence.

Mathews, 260 F.3d at 252 (3d Cir. 2001) (footnote omitted).

202. *Forbes*, 228 F.3d 471 at 486 (quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1390 (3d Cir. 1994)).

203. Dummar v. Lummis, 543 F.3d 614, 621 (10th Cir. 2008) ("Allegations of fraudulent concealment, like other types of fraud, must be pleaded with particularity.").

204. Edmonson v. Eagle Nat'l Bank, 922 F.3d 535, 553 (4th Cir. 2019) (quoting Supermarket of Marlinton, Inc., v. Meadow Gold Dairies, Inc., 71 F.3d 119, 126 (4th Cir. 1995) (the Fourth Circuit holds that in order "[t]o satisfy the first element of the fraudulent concealment test, a plaintiff must 'provide evidence of affirmative acts of concealment' by defendants.").

ii. The PSLRA Exemption and Other Limitations

For many years, a common tactic to enhance the force of a claim for securities fraud was to bolt-on a civil RICO claim and thereby gain access to automatic treble damages and attorneys' fees.[205] But in 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA), which states that "no person may rely upon any conduct that would have actionable as fraud in the purchase or sale of securities to establish a violation of section 1962."[206] Although at first glance this proviso seems straightforward enough, it has led to vigorous debate over whether Congress intended merely to remove securities violations as predicate acts, to prevent the recasting of certain securities claims as mail and wire fraud, or to bar all claims somehow touching on the purchase or sale of securities.[207]

Under one recent expression of a touchstone, the court noted that "the fraud itself must be integral to the purchase and sale of the securities in question. Conduct that is merely incidental or tangentially related to the sale of securities will not meet [this] requirement."[208] This more-or-less squares with the legislative history of the PSLRA, which suggests that although plaintiffs should not be allowed to recast securities fraud claims as mail or wire fraud claims, fraudulent schemes that remotely touch on investment injuries should not be preempted.[209] Accordingly, Professor Blakey has proposed a common-sense solution: if a claim is not actionable under the securities law statutes, RICO should fill the gap.[210] A good deal of confusion in the case law nonetheless abounds, although it appears that a consensus is recently developing around the Blakey proposal.[211]

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205. *See generally* Reves v. Ernst & Young, 507 U.S. 170 (1993); Whalen v. Carter, 954 F.2d 1087 (5th Cir. 1992); Smith v. Ayres, 845 F.2d 1360 (5th Cir. 1988); *In re* Integrated Resources Real Est. Ltd. P'ships Sec. Litig., 850 F. Supp. 1105 (S.D.N.Y. 1993); Gold v. Fields, No. 92 Civ. 6680, 1993 WL 212672 (S.D.N.Y. June 14, 1993); King v. Gandolfo, 714 F. Supp. 1180 (M.D. Fla. 1989).

206. The PSLRA is inapplicable to persons who have been criminally convicted in connection with the fraud at issue. Private Securities Litigation Reform Act of 1995, H.R. 1058, 104th Cong. § 107 (1995) (Codified exception).

207. *See In re* Platinum-Beechwood Litig., 377 F. Supp. 3d 414, 425 (S.D.N.Y. 2019); SMITH & REED, *supra* note 16, ¶ 2.02[4][b].

208. *In re Platinum-Beechwood Litig.*, 377 F. Supp. 3d at 425 (citations omitted) (quoting Leykin v. AT&T Corp., 423 F. Supp. 2d 229, 241 (S.D.N.Y. 2006)).

209. *See* H.R. REP. NO. 104-369, at 23 (1995) (Conf. Rep.).

210. SMITH & REED, *supra* note 16, ¶ 2.02[4][b].

211. Plaintiff's Response to UDF Entities and Theodore F. Etter's Motion to Dismiss at 9–11, Megatel Homes, LLC v. Moayedi, No. 3:20-cv-00688-L (N.D. Tex. 2020) (quoting Bald Eagle Area

Before concluding, it's worth noting that the PSLRA exclusion is not the only quirk that can limit a plaintiff's ability to bring a RICO claim. Four are worth brief mention: the ability to sue aiders and abettors, reverse-preemption under the McCarran-Ferguson Act, the standing to sue of indirect purchasers, and a defendant's privileges under the *Noerr-Pennington* doctrine.

Early on, a number of courts held that a defendant who aids and abets a civil RICO violation is liable for the violation.[212] That still appears to be a viable position, although it is no longer unequivocal. There are really two issues at play. First, the Supreme Court held, in *Central Bank v. First Interstate Bank of Denver*, that no implied civil right to sue for aiding and abetting exists under 10(b) of the Securities Exchange Act.[213] Some courts have extended this reasoning to civil RICO claims; others have not.[214] Second, in *Reves v. Ernst & Young*, the Supreme Court held that—for purposes of 1962(c) claims—a defendant must have "participated in the operation or management of the enterprise."[215] This generally forecloses assertions of liability against true third-party providers like accounting firms, but it doesn't foreclose all aiding

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Sch. Dist. v. Keystone Fin., Inc., 189 F.3d 321, 330 (3d Cir. 1999) ("In determining whether the RICO Amendment bars a plaintiff's RICO claims, 'the proper focus of the analysis is on whether the conduct pled as predicate offenses is "actionable" as securities fraud—not on whether the conduct is "intrinsically connected to, and dependent upon" conduct actionable as securities fraud.'"). The Second Circuit is one of the few minority jurisdictions that do not abide by the general consensus. *See* MLSMK Inv. Co. v. JP Morgan Chase & Co., 651 F.3d 268, 280 (2d Cir. 2011) (holding the PSLRA bars a civil RICO claim "premised upon predicate acts of securities fraud, including mail or wire fraud, *even where the plaintiff could not bring a private securities law claim* against the same defendant" (emphasis added)).

212. Before the 1994 decision in *Central Bank*, *of Denver v. First Interstate Bank of Denver,* 511 U.S. 164 (1994), many courts, including the Third Circuit, authorized the imposition of civil liability for aiding and abetting a RICO violation. Early on many courts did so under the reasoning that "the common law doctrine of aiding and abetting can apply under RICO." SMITH & REED, *supra* note 16, ¶ 6.04[A].

213. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 169–71 (1994) (holding "a private plaintiff may not maintain an aiding and abetting suit under § 10(b)").

214. *Compare In re* Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs., and Prods. Liab. Litig., 295 F. Supp. 3d 927, 986 (N.D. Cal. 2018) ("It is clear from *Central Bank* that statutory text is paramount in determining whether a private cause of action for aiding and abetting is available. . . . With respect to the civil RICO statute, Congress did not use those terms [aid and abet]. . . . The Court therefore concludes that a private cause of action for aiding and abetting a RICO violation is unavailable[.]"), *with* Belin v. Health Ins. Innovations, Inc., No. 19-61430-CIV-MORENO/SELTZER, 2019 WL 9575236, at *9 (S.D. Fla., Oct. 22, 2019) (citing *In re Managed Care Litig.*, 135 F. Supp. 2d 1253, 1267 (S.D. Fla. 2001)) ("[A]lthough Defendants suggest that it is an open question whether RICO aiding and abetting liability exists in the Eleventh Circuit, this Court has previously acknowledged controlling precedent holding that it does.").

215. Reves v. Ernst & Young, 507 U.S. 170, 183 (1993).

and abetting theories, especially given that aiding and abetting is available for the federal offenses designated as RICO predicates. This is because many courts have interpreted *Reves* to "foreclose [the] application of aiding and abetting principles to substantive liability under section 1962(c)," but "this does not bar application of aiding and abetting principles to predicate offenses so as to hold liable secondary parties."[216] This idea of applying aiding and abetting principles to the predicate offenses (making it practically work as an extension of the traditional-tort-causation analysis), rather than to substantive liability under § 1962, derives support from the general rule, "aiding and abetting liability is available for all federal offenses," which "would include the federal offenses that Congress has designated as RICO predicates."[217]

Generally speaking, the McCarran-Ferguson Act leaves regulation of the "business of insurance" to the states and "reverse" or "inverse" preempts federal acts of general applicability that otherwise might be found to preempt state laws regulating the insurance industry.[218] RICO is one such act. But reverse preemption does not throw a blanket over all RICO claims that touch on insurance. In *Humana Inc. v. Forsyth*, the Supreme Court implicitly framed the issue as one of "conflict":

> The federal law at issue, RICO, does not proscribe conduct that the State's laws governing insurance permit. But the federal and state remedial regimes differ. Both provide a private right of action. RICO authorizes treble damages; Nevada law permits recovery of compensatory and punitive damages. We hold that RICO can be applied in this case in harmony with the State's regulation. When federal law is applied in aid or enhancement of state regulation, and does not frustrate any declared state policy or disturb the State's administrative regime, the McCarran-Ferguson Act does not bar the federal action.[219]

This formulation invites close scrutiny of the facts alleged and the regulatory scheme implicated, and not surprisingly a fair amount of

216. SMITH & REED, *supra* note 16, ¶ 6.04[A].

217. *Id*.

218. 15 U.S.C. § 1011.

219. Humana Inc. v. Forsyth, 525 U.S. 299, 303 (1999).

disagreement emerges each time a RICO claim is launched against an insurance product.[220]

In *Illinois Brick Co. v Illinois*, the Supreme Court held—in a case brought under Section 4 of the Clayton Act—that only direct purchasers of overpriced goods (i.e., not subsequent purchasers) have standing to sue under the antitrust laws.[221] Courts have for the most part applied *Illinois Brick* to RICO claims, especially when the injury alleged flows from a fraudulent overcharge.[222] Nonetheless, the matter remains unsettled for at least three reasons. First, *Illinois Brick* has been sharply criticized and may well be revisited.[223] Second, many states have passed *Illinois Brick* "repealers," so to the extent they have baby RICO statutes, indirect purchasers may well have standing under those statutes.[224] Third, although the question has not been much litigated, many indirect victims of RICO violations haven't purchased anything, so it's questionable whether *Illinois Brick* should apply at all.

Finally, another antitrust doctrine, *Noerr-Pennington*, immunizes activity properly characterized as "petitioning" the government and includes lobbying, litigation, and incidents to either.[225] The doctrine has applied much more

220. *Compare* Negrete v. Allianz Life Ins. Co., 927 F. Supp. 2d 870, 885–86 (C.D. Cal. 2013) (the court found the facts in this case weigh "strongly against a finding of reverse-preemption of plaintiffs' RICO claims"), *with* Riverview Health Inst. LLC v. Med. Mut., 601 F.3d 505, 519 (6th Cir. 2010) (finding, under the facts, that applying RICO against insurer would impair Ohio's insurance regulatory scheme, as required for reverse preemption).

221. Ill. Brick Co. v. Illinois, 431 U.S. 720, 728 (1977).

222. *See* McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 855 (3d Cir. 1996) ("[A]ntitrust standing principles apply equally to allegations of RICO violations. The precepts taught by *Illinois Brick* . . . apply to RICO claims, thereby denying RICO standing to indirect victims.") (citations and internal quotations omitted). *See also* Hale v. Stryker Orthopaedics, Civ. No. 08-3367, 2009 WL 321579 (D.N.J., Feb. 9, 2009) (holding that plaintiffs who received knee implants manufactured by defendant did not have standing to allege RICO claims of illegal kickback scheme with surgeons that artificially inflated implants' costs because plaintiffs did not purchase implants directly from defendant).

223. Bunker's Glass Co. v. Pilkington PLC, 47 P.3d 1119, 1124 (Ariz. Ct. App. 2002) (reasoning, while tacitly expressing disagreement with the underpinnings of *Illinois Brick*, that "[i]nterpreting A.R.S. § 44–1408(B) in this light impels the conclusion that consumers are best protected when indirect purchasers are permitted to maintain antitrust actions against members of alleged price-fixing conspiracies").

224. *See id.* at 1128 n.11 for states that have adopted *Illinois Brick* repealers.

225. Randy Gordon, *A Question of Fairness: Should Noerr-Pennington Immunity Extend to Conduct in International Commercial Arbitration?*, 19 AM. REV. INT'L ARB. 211 (2008).

widely than the antitrust context, including RICO.[226] Nonetheless, the doctrine has eroded somewhat in recent years, at least in the lower courts.[227] For example, in *United States v. Philip Morris USA Inc.*, the court held that "the doctrine does not protect deliberately false or misleading statements"—and this, despite *Noerr* itself immunizing false statements.[228]

V. CONCLUSION

Although RICO's ambiguities and vagaries are well documented and have been decried for most of its history, Congress has shown scant inclination to do anything about the situation. Indeed, the most significant Congressional collar placed on RICO in the last twenty-five years—the preemption provision of the PSLRA—appeared as part of a more general attempt to tamp down securities litigation, not as an assault on civil RICO per se. With this history as a guide, we can safely predict that clarifications of RICO will come from judges—not legislators—which means that clarifications will emerge not at a stroke but at the speed of the common law, which is to say glacially and incrementally. But that's not necessarily a bad thing. A similar process has unfolded under the antitrust laws, which have exhibited both resilience and flexibility in the face of massive technological and social change. So, we—like A. A. Milne's river—must wait patiently under the realization that "We shall get there some day."[229]

226. Sosa v. DIRECTV, Inc., 437 F.3d 923, 931 (9th Cir. 2006) ("[W]e conclude that the *Noerr–Pennington* doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause.").

227. Relevant Grp., LLC v. Nourmand, No. 2:19-cv-05019-ODW, 2020 WL 2523115, at *5 (C.D. Cal., May 18, 2020) (finding plaintiffs "sufficiently alleged that Defendants' environmental lawsuits constitute[d] 'sham' litigation as an exception to the Noerr-Pennington doctrine" and "[a]ccordingly [that] the *Noerr-Pennington* doctrine d[id] not immunize Defendants from RICO liability").

228. United States v. Philip Morris USA Inc., 566 F.3d 1095, 1123 (D.C. Cir. 2009) (citations omitted) (The court elaborated that "neither the *Noerr-Pennington* doctrine nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation.").

229. A. A. MILNE, THE HOUSE AT POOH CORNER 92 (Puffin Books 1992) (1928).