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I. Introduction

The federal law of fraud traditionally has demonstrated a dynamic quality that has allowed it to capture new forms of criminality. This flexibility stems from judicial reluctance to confine fraud to its narrow common law roots. Thus, federal judges have observed that "[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versable [sic] as human ingenuity."[1]

This observation finds further support in the pragmatic approach Congress took in crafting the federal mail and wire fraud statutes. Rather than limit these statutes to classic common-law fraud based upon a misrepresentation between two parties,[2] the mail and wire fraud prohibitions reach any "scheme to defraud" that depends upon the United States mail[3] or interstate

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1. Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958) (quoting Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941)). The Eighth Circuit once observed that "we recognize that the forms of fraud are as multifarious as human ingenuity can devise; that courts consider it difficult, if not impossible, to formulate an exact, definite and all-inclusive definition thereof; and that each case must be determined on its own facts." Isaacs v. United States, 301 F.2d 706, 713 (8th Cir. 1962).

2. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 525 (1965).

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by ***justifiable reliance*** upon the misrepresentation.

Id. (emphasis added).

State common law requirements for fraudulent misrepresentation are similar. In Minnesota, for example, the common law requires:

> (1) there must be a representation; (2) that representation must be false; (3) it must have to do with a past or present fact; (4) that fact must be material; (5) it must be susceptible of knowledge; (6) the representer must know it to be false . . . ; (7) the representer must intend to have the other person induced to act, or justified in acting upon it; (8) that person must be so induced to act or so justified in acting; (9) ***that person's action must be in reliance upon the representation***; (10) that person must suffer damage; (11) that damage must be attributable to the misrepresentation, that is, the statement must be the proximate cause of the injury.

Florenzano v. Olson, 387 N.W.2d 168, 174 n.4 (Minn. 1986) (citation omitted) (emphasis added).

3. *See* 18 U.S.C. § 1341 (1994) (defining mail fraud). In 1994, Congress amended the statute to include certain private carriers within its prohibitions. The inserted language is: "or

wire facilities.[4] Congress based the mail fraud statute on common law cheating (rather than on obtaining money by false pretenses or deceit), which neither required proof or reliance nor applied only to two-party transactions.[5] Subsequently, Congress reinforced its broad approach to mail fraud through a series of amendments expanding the statute's scope.[6] As a result, even fraudulent schemes that do not involve a victim's reliance on misrepresentation may fall within the purview of the mail and wire fraud statutes.[7] Given the capacity of the human mind to invent new ways of cheating business

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deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." The Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2087, 2147.

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id.

4. *See* 18 U.S.C. § 1343 (1994) (defining wire fraud).

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id.

5. *See* Courtney Chetty Genco, Note, *Whatever Happened to Durland?: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333, 355-56 (1992) (discussing legislative history and drafting of original mail fraud statute).

6. *See id.* at 369 (noting "Congress' continuing purpose not to permit the reach of the mail fraud statute to be circumscribed"); *see also* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 (1980) (noting that Congress consistently has endorsed broad application of mail fraud statute).

7. *See infra* notes 12-20 and accompanying text (listing examples of non-reliance fraudulent schemes covered by mail and wire fraud statutes).

competitors, consumers, family, and friends, Congress[8] and the courts[9] have recognized that reasonable reliance should not be a prerequisite to culpability for fraudulent conduct.

The absence of the reliance element has proven to be a hallmark of federal fraud jurisprudence. By not requiring proof of reliance in mail and wire fraud cases, Congress provided "a 'stop gap' device which permits the prosecution of newly-conceived fraud until such time that Congress enact[s] particularized legislation to cope with the new frauds."[10] With this "stop gap" feature, federal law can reach fraudulent schemes[11] involving bribery,[12] embezzlement,[13] misappropriation of information,[14] manipulation of contract payments,[15] unauthorized selling of satellite broadcast descrambling

8. *See* 18 U.S.C. §§ 1341, 1343 (1994) (including no mention of reliance in definition of mail and wire fraud). *See generally* Genco, *supra* note 5 (describing historical development of mail fraud statute).

9. Several courts have ruled that reliance is not a required element of scheme to defraud. *See, e.g.*, Schreider Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1399-1400 (9th Cir. 1986) (noting that essential elements of mail and wire fraud are (1) formation of scheme to defraud, (2) use of United States mails or wires in carrying out schemes, and (3) intent to defraud); United States v. Miller, 545 F.2d 1204, 1216 (9th Cir. 1976) (affirming mail fraud conviction for filing falsified tax returns); United States v. Mirabile, 503 F.2d 1065, 1066 (8th Cir. 1974) (affirming mail fraud conviction for filing falsified tax returns and noting broad scope and "ever-expanding role" of mail fraud statute); Lustiger v. United States, 386 F.2d 132, 138 (9th Cir. 1967) ("It is only necessary to prove that . . . [the] scheme [is] reasonably calculated to deceive, and that the mail service of the United States was used and intended to be used in the execution of the scheme."); *see also* Durland v. United States, 161 U.S. 306, 312-13 (1896) (concluding that mail fraud statute's "scheme to defraud" is not limited by common law interpretations).

10. United States v. McNeive, 536 F.2d 1245, 1248 n.5 (8th Cir. 1976) (quoting United States v. Maze, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting)). In *Maze*, Chief Justice Burger noted in dissent, "When a 'new' fraud develops – as constantly happens – the mail fraud statute becomes a stopping device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil." *Maze*, 414 U.S. at 405-06.

11. "The aspect of the scheme to 'defraud' is measured by a nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958).

12. *See* Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941) (concluding that scheme to bribe public officials is "scheme to defraud" for purposes of mail fraud statute).

13. *See* Carpenter v. United States, 484 U.S. 19, 27 (1987) ("The concept of 'fraud' includes the act of embezzlement, which is 'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.'" (citation omitted)).

14. *See id.* at 28 ("We have little trouble in holding that the conspiracy here to trade on the Journal's confidential information is not outside the reach of the mail and wire fraud statutes.").

15. *See* Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989) (affirming mail fraud convictions of defendants who manipulated contract payments to defraud subcontractors).

devices,[16] check kiting,[17] money laundering,[18] kickback schemes,[19] and many others[20] – *many of which arise in complex third party transactions and all of which potentially inflict injury upon victims who have not relied upon any fraudulent misrepresentations*. Until relatively recently, this pragmatic – and vital – feature of federal mail and wire fraud enjoyed widespread support. Indeed, it still does insofar as federal criminal law is concerned.[21] However, a major development in civil litigation under the Racketeer Influenced and Corrupt Organizations (RICO) law threatens to revive narrow common-law constructions of fraud.[22] This trend potentially may undermine fraud victims' recovery efforts by imposing a reliance requirement upon them *irrespective of whether their injury stemmed from fraudulent misrepresentations*.[23] As not all frauds involve misrepresentations made directly between two parties,[24] reading a reliance requirement into all mail and wire fraud civil RICO cases potentially excludes vast categories of fraud from relief in federal court.[25]

This Article explores the origin of this development and presents an alternative analysis – based on well-established causation principles – that

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16. *See* United States v. Manzer, 69 F.3d 222, 226-27 (8th Cir. 1995) (affirming mail and wire fraud convictions for selling satellite broadcasting decryption devices).

17. *See* United States v. Lang, 904 F.2d 618, 627 (11th Cir. 1990) (upholding mail fraud conviction for check-kiting scheme).

18. *See* United States v. Buckley, 689 F.2d 893, 900 (9th Cir. 1982) (concluding that allegation of use of mail in furtherance of money laundering scheme was sufficient to support mail fraud indictment).

19. *See* United States v. Fischl, 797 F.2d 306, 311 (6th Cir. 1986) (affirming mail fraud conviction for kickback scheme).

20. *See* McClendon v. Cont'l Group, Inc., 602 F. Supp. 1492, 1506-09 (1985) (collecting cases); Genco, *supra* note 5, at 365-67 (same); *see also* Carpenter v. United States, 484 U.S. 19, 27 (1987) (stating that "[s]ections 1341 and 1343 reach any scheme to deprive another of money or property by means of false or fraudulent pretense, representations, or promises").

21. *See supra* notes 8-9 and accompanying text (observing that neither Congress nor courts have included reliance as required element of mail or wire fraud offense).

22. *See infra* Part V (discussing how courts have read reliance into RICO statute).

23. *See infra* Part V (discussing rift over reliance in circuit courts).

24. *See supra* notes 12-20 and accompanying text (listing examples of fraudulent schemes that do not necessarily entail victims' reliance on misrepresentation). At common law there was and continues to be a variety of fraudulent offenses that do not necessarily involve misrepresentations made between two parties. One example is larceny, which is defined as "the (1) trespassory, (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it." Genco, *supra* note 5, at 338. Another example is embezzlement, which is defined as "the fraudulent conversion of the property of another by one who was already in lawful possession of it." *Id.* at 344 (citation omitted).

25. Two simple examples would be larceny and embezzlement. *See supra* note 24 (giving examples). It also excludes complex multi-party frauds in which the principal victim had no contact with the perpetrator of the scheme. *See supra* notes 12-20 and accompanying text (listing examples of fraudulent schemes that do not necessarily involve any two-party misrepresentations).

allows the federal mail and wire fraud statutes to retain their utility in civil RICO cases. Part II provides an overview of civil RICO and explains its role in combating systemic fraud. Part III considers the courts' largely negative response to RICO commercial fraud litigation and reviews efforts to rein in the statute through unduly narrow judicial interpretations. Part IV sets the context of the debate by reviewing the Supreme Court's decision in *Holmes v. SIPC*,[26] upon which lower courts have erroneously premised their rulings that RICO requires proof of reliance. Part V traces the role of reliance in fraud litigation, details why reliance is not an element of mail and wire fraud, and explains how the courts have nevertheless read reliance into the RICO statute. Finally, Part VI proposes a remedy that relies upon traditional common-law principles to resolve the proximate cause issue in civil RICO litigation.

II. The Nature and Structure of Civil RICO: Combating Fraud Through Civil Litigation

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970.[27] Although conceived in a context principally concerned with organized crime, RICO transcends this narrow legislative niche.[28] Rather, the statute sweeps broadly, striking at all forms of "enterprise criminality"[29] by

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26. 503 U.S. 258, 283 (1992).

27. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.).

28. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985).

> Congress wanted to reach both "legitimate" and "illegitimate" enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.

Id. (citation omitted); *see also* Michael Goldsmith, *RICO and "Pattern": The Search for "Continuing Plus Relationship,"* 73 CORNELL L. REV. 971, 975 (1988).

> Significantly, however, RICO does not limit the enterprise element to illicit groups such as organized crime families. Instead, the law suggests that an enterprise may include both licit and illicit organizations . . . . Racketeering activity is explicitly defined to include various types of frauds and other misconduct often committed by white collar criminals.

Id.

29. "Enterprise criminality" has been defined as "all types of organized criminal behavior . . . from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors." United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983) (quoting G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies*, 53 TEMP. L. REV.. 1009, 1013-14 (1980)). *See generally* Goldsmith, *supra* note 28 (discussing broad scope of RICO's "enterprise" element).

providing enhanced criminal penalties and civil remedies against any violator who uses or abuses an enterprise through a pattern of racketeering activity.[30]

The statute contains three central prohibitions: (a) section 1962(a) of Title 18 makes it illegal for a person who has engaged in a "pattern of racketeering activity" to invest its proceeds in the acquisition or operation of an enterprise;[31] (b) section 1962(b) outlaws acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity;[32] and (c) section 1962(c) prohibits conducting the affairs of an enterprise through a pattern of racketeering activity.[33] Significantly, nothing in its text limits RICO to traditional organized crime.[34] On the contrary, Congress defined the elements

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30. 18 U.S.C. § 1962 (1994). It is also a violation of RICO to conspire to conduct, acquire, or maintain an enterprise through a pattern of racketeering activity or its proceeds. 18 U.S.C. § 1962(d) (1994).

31. *See id.* § 1962(a). The subsection reads:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one lass, and do not confer, either in the law or in fact, the power to elect one or more directors of the issuer.

Id.

32. *Id.* § 1962(b). The subsection reads: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *Id.*

33. *Id.* § 1962(c). The subsection reads:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Id.

34. *See* H.J., Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 243-49 (1989) ("[T]he argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text, and is at odds with the tenor of its legislative history."). In footnote five, the Court noted that lower courts had also rejected arguments that RICO is limited to organized crime only. *Id.* at 244 n.5 (citing Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 492 n.32 (2d Cir. 1984), *rev'd*,

of RICO in terms not limited to organized crime. For example, neither the "person"[35] nor "enterprise"[36] elements hint at an organized crime limitation,[37] and Congress explicitly defined "racketeering activity" to include a host of crimes – such as mail and wire fraud – traditionally associated with white-collar crime.[38]

Thus, RICO clearly targeted white-collar criminals. Moreover, to promote application of the statute, Congress included a civil remedy providing treble damages plus reasonable attorneys' fees to victims who could establish that their business or property had been injured "by reason of a violation of section 1962."[39] Congress thereby sought to encourage private enforcement actions that would supplement scarce prosecutorial resources.[40] Based on the

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473 U.S. 479 (1985); Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983); Schacht v. Brown, 711 F.2d 1343, 1353-56 (7th Cir. 1983)).

35. *See* 18 U.S.C. § 1961(3) (1994) (defining "person" as "any individual or entity capable of holding a legal or beneficial interest in property"). Courts have given the term "persons" wide application. *See, e.g.*, Fitzgerald v. Chrysler Corp., 116 F.3d 225, 226 (7th Cir. 1997) (finding that corporation is "person"); Crowe v. Henry, 43 F.3d 198, 204 (5th Cir. 1995) (finding that partner in joint farming venture is "person"); Jund v. Town of Hempstead, 941 F.2d 1271, 1281-82 (2d Cir. 1991) (finding that unincorporated association is "person"); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1305 (2d Cir. 1990) (finding that public utility is "person"); George v. Blue Diamond Petroleum, Inc., 718 F. Supp. 539, 545 (W.D. La. 1989), *aff'd*, 922 F.2d 838 (1989) (finding that sellers of oil and gas interests are "persons"); Kirschner v. Cable/Tel. Corp., 576 F. Supp. 234, 243 (E.D. Pa. 1983) (finding that cable television companies are "persons"); State Farm Fire & Cas. Co. v. Estate of Caton, 540 F. Supp. 673, 681-82 (N.D. Ind. 1982) (finding that estate of alleged wrongdoer is "person").

36. *See* 18 U.S.C. § 1961(4) (1994) (defining "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity"). The statutory definition addresses legal "enterprises" in the first clause and illegal "enterprises" in the second clause. The argument that RICO was meant to only encompass criminal associations is not supported by the statute's definition of "enterprise."

37. Courts consistently have held that the "enterprise" could be either legitimate or illegitimate. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (observing that "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises"); United States v. Turkette, 452 U.S. 576 (1981) (concluding that RICO applies to both legitimate and illegitimate enterprises); United States v. Thevis, 665 F.2d 616, 626 (5th Cir. 1982) (same); United States v. Mannino, 635 F.2d 110, 117-18 (2d Cir. 1980) (same); Unites States v. Rone, 598 F.2d 564, 568 (9th Cir. 1978) (same); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976) (same).

38. *See* U.S.C. § 1961(1)(B) (1994) (defining "racketeering activity" to include white-collar crimes including mail fraud, wire fraud, financial institution fraud, bribery, and embezzling pension, welfare, or union funds in addition to typical criminal activities, such as murder and witness intimidation).

39. 18 U.S.C. § 1964(c) (1994).

40. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 283 (1992) ("By including a private right of action in RICO, Congress intended to bring 'the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources were deemed inadequate.'" (quoting Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 151 (1987))).

treble damage model employed by the antitrust laws, Congress intended that an army of private attorneys general would help federal prosecutors combat all forms of enterprise criminality.[41]

From a policy standpoint, RICO made good sense. The legislative record established that traditional enforcement efforts had proven ineffective.[42] By 1970, organized crime had become entrenched in American society,[43] and white-collar fraud drained billions of dollars annually from the economy.[44] Existing private remedies afforded scant relief, as litigation costs and attorneys' fees depleted most recoveries to such an extent that victims had little incentive to sue.[45] By providing treble damages plus counsel fees, RICO both

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41. *See* Rotella v. Wood, 528 U.S. 549, 557-58 (2000) (observing that both antitrust and RICO "statutes share a common congressional objective of encouraging civil litigation to supplement government efforts to deter and penalize the respectively prohibited practices"). The *Rotella* Court further noted, "The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Id.* at 557; *see also* Klehr v. A.O. Smith Corp., 521 U.S. 179, 187 (1997) (noting that civil RICO has "further purpose [of] encouraging potential private plaintiffs diligently to investigate").

42. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 14-16 (1967) [hereinafter TASK FORCE REPORT]. The task force indicated that there were several reasons why control efforts had failed. Among the reasons given were difficulties in obtaining proof, lack of resources, lack of experience, lack of coordination, failure to develop strategic intelligence, failure to use available sanctions, and lack of public and political commitment. *Id.* at 14-16.

43. *See* TASK FORCE REPORT, *supra* note 42, at 1-5 (describing pervasive reach of organized crime). Organized crime

> involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activities in order to amass huge profits.

Id. at 1. "[O]rganized crime is also extensively and deeply involved in legitimate business and in labor unions." *Id.*; *see also* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922 (codified as amended in scattered sections of 18 U.S.C.) (noting in statement of findings and purpose that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy").

44. *See* Genco, *supra* note 5, at 390 ("In 1974 the United States Chamber of Commerce estimated the direct economic cost of fraud as $41.78 billion annually."). Losses due to fraud continued to increase into the 1980's. *See* Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants, and "ET,"* 73 MINN. L. REV. 1023, 1041 n.67 (1989) (noting that Department of Justice has estimated annual fraud losses at more than $200 billion).

45. Assume that a plaintiff has been defrauded of $50,000. Further assume that the defendant is a large company or other organization with extensive resources. Without the provision for treble damages and attorneys' fees, such a plaintiff could never hope to recover more than a small portion of the $50,000 lost, especially if the case goes to trial. *See, e.g.*, Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 158-72 (1993) (arguing that after appropriate adjustment to treble damage awards for factors such as

motivated victims to seek judicial redress and raised the financial stakes for those considering enterprise criminality.

Ultimately, however, RICO received a bifurcated judicial response that generally distinguished between its criminal and civil applications.[46] As early criminal RICO cases often featured indictments of high level mobsters[47] and prominent public officials charged with corruption,[48] most courts interpreted the law broadly to facilitate prosecutions they considered well within RICO's statutory purpose. In short, judges enthusiastically embraced the proposition that the Organized Crime Control Act of 1970 applies to organized crime and its counterparts.[49] As a result, RICO flourished in its criminal context.[50]

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attorney fees and lack of prejudgment interest, damages awarded are probably only equal to actual damages in anti-trust cases).

46. Courts embraced RICO as written when applying its provisions to criminal activity. *See* Russello v. United States, 464 U.S. 16, 22-24 (1983) (giving broad construction to RICO's criminal forfeiture provisions). The *Russello* Court stated, "The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Id.* at 26; *see also* United States v. Turkette, 452 U.S. 576, 588-93 (1981) (reading RICO's criminal provisions liberally). The *Turkette* Court observed, "Congress was well aware that it was entering a new domain of federal involvement through the enactment of [RICO]. Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the federal government to address a large and seemingly neglected problem." *Turkette*, 452 U.S. at 586.

Judicial support for the use of RICO in the civil context has been lukewarm at best. *See* Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1, 2-3 nn. 9 & 11 (1993) (noting that in 1985 and 1986, approximately 50% of RICO claims were dismissed completely and that 77% of civil RICO claims were dismissed completely in first half of 1991). Additionally, lower courts have endeavored to place judicial limitations on civil RICO unwarranted by statutory language or purpose. *See infra* Part III (discussing various restrictions lower courts have read into RICO in civil context); *see also* Jeffrey E. Grell, *Exorcising RICO From Product Litigation*, 24 WM. MITCHELL L. REV. 1089, 1102-07 (1998) (explaining lower court attempts to contain RICO's civil scope and Supreme Court rejection of such limitations); *infra* Part V (discussing lower court imposition of reliance requirement upon civil RICO claims).

47. *See* United States v. Angiulo, 847 F.2d 956, 965 (1st Cir. 1988) (broadly construing RICO and government's prosecutory powers in prosecution of Boston organized crime boss). *See generally* GERARD O'NEILL & DICK LEHR, THE UNDERBOSS: THE RISE AND FALL OF A MAFIA FAMILY (1989) (detailing RICO prosecution of Angiulo family); Blakey & Gettings, *supra* note 29, at 1023-25 nn. 85-88 (listing variety of enterprises that prosecutors have attacked using RICO's criminal provisions).

48. *See* United States v. Jenrette, 744 F.2d 817, 826 (D.C. Cir. 1984) (affirming RICO bribery conviction of congressman); United States v. Jannotti, 673 F.2d 578, 611 (3d Cir. 1982) (en banc) (affirming RICO bribery conviction of city councilman).

49. *See* Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 799 n.184 (1988) (noting that "RICO has been used to convict the leadership structure of organized crime families in Boston, Buffalo, Kansas City, Cleveland, Los Angeles, New Orleans, Philadelphia, Rochester, and New York City"). During oral arguments in *Turkette*, one Justice asked, "Isn't [RICO] one of the broadest nets that Congress

In civil cases, however, many judges seemed to accept the premise that RICO is limited to organized crime. Thus, when applied civilly to white-collar businesses accused of commercial fraud, these judges viewed the statute skeptically as an anti-mafia law run amuck.[51] This view prompted many courts to saddle civil RICO with a series of judicially imposed limitations.

III. Civil RICO in the Courts: Judicially-Imposed Restrictions

Given the powerful criminal and civil sanctions potentially available under RICO, virtually all defendants against whom the statute initially was

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has ever thrown out to catch criminal activity?" 1981 U.S. TRANS LEXIS 66, *37 (1981).

50. *See Turkette*, 452 U.S. at 580-93 (interpreting broadly scope of RICO's criminal provisions); *see also* Blakey & Gettings, *supra* note 29, at 1023-25 & nn. 85-88 (1980) (listing variety of enterprises that prosecutors have attacked using RICO's criminal provisions).

51. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 529-30 (1985) (Powell, J., dissenting) ("Only a small fraction of the scores of civil RICO cases now being brought implicate organized crime in any way. Typically, these suits are being brought – in the unfettered discretion of private litigants – in federal court against legitimate businesses seeking treble damages in ordinary fraud and contract cases."); *see also In re* Dow Co. "Sarabond" Prods. Liab. Litig., 666 F. Supp. 1466, 1470-71 (D. Colo. 1987):

> RICO is a recurring nightmare for federal courts across the country. Like the Flying Dutchman, the statute refuses to be put to rest. Beating against the wind, it has jettisoned an effusion of opinions which bobble in its wake. In a vain attempt to drop anchor in this sea of confusion, I have made my position known.
>
> . . . I have similarly remarked from the bench that "RICO is just in my view, a rather sloppily thought out kind of way to get the Mafia that everybody jumps on so that they can have more fun with fraud."

Id.

Scholastic criticism of RICO abounds. *See* Grell, *supra* note 46, at 1089 (describing RICO's language as "wildly broad"). Grell notes:

> More recently, RICO has become an increasingly common claim in product-related litigation. This strange phenomenon is only one natural outgrowth of the many non-traditional uses that creative plaintiffs' lawyers have found for RICO. The RICO "person" is no longer the hit man, but the corporate entity that manufactures a product. The "enterprise" is not the crime family but the network of retailers and dealers that sell the manufacturer's product.

Id. at 1092; *see also* Philip A. Lacovara & Geoffrey F. Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985-86) (criticizing abuse of RICO in civil litigation). Lacovara and Aronow state:

> Without any of the restraint and responsibility that governs the decisions of public prosecutors, private lawyers are invoking civil RICO on behalf of private clients to level charges of "racketeering" against reputable businessmen and professionals such as investment bankers, brokers, and accountants. Although RICO was intended to protect legitimate business, the statute is now being used almost exclusively to attack established businesses and firms. The threat to bring a "racketeering" charge sometimes coerces settlements before the filing of a RICO complaint, while the actual filing of a RICO complaint exposes businessmen to continuing embarrassment and expense.

Id. at 3.

employed argued that Congress did not intend the law to apply to them. Thus, organized criminals astonishingly argued that RICO did not reach wholly illicit groups,[52] while white-collar defendants maintained that the statute applied *only* to wholly illicit groups.[53] To date, the organized crime defendants generally have failed in their efforts to restrict the statute's reach.[54] However, at least in civil cases, white-collar defendants have enjoyed remarkable success in convincing judges to read various limitations into RICO.[55]

In perhaps the most brazen effort to restrict the statute, defendants persuaded a district court to rule that RICO applies only to cases involving organized crime.[56] Although this view has been thoroughly rejected, it demonstrates the extent to which some judges would reach to restrict civil RICO in white-collar cases. Other efforts followed. Thus, the Court of Appeals for the Second Circuit found that civil RICO requires a prior conviction and a

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52. *See* Goldsmith, *supra* note 49, at 778 n.36 (quoting Gennaro Angiulo, then boss of Boston crime family, on hearing theory that RICO was limited to legitimate businesses: "We're off the hook. We can do anything we want. They can stick RICO."); Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 191-92 n.139 (1980) (citing various court decisions rejecting limiting application of RICO to infiltration of legitimate businesses). In *United States v. Turkette*, the Court rejected the argument that RICO was inapplicable to illegitimate enterprises:

> On appeal, the respondent argued that RICO was intended solely to protect legitimate business enterprises from infiltration by racketeers and that RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise. The Court of Appeals agreed. We reverse.

United States v. Turkette, 452 U.S. 576, 579-80 (1981).

53. *See, e.g.*, *Sedima*, 473 U.S. at 499 (rejecting notion that RICO was meant only to apply to illegitimate businesses).

54. *See, e.g.*, Tarlow, *supra* note 52, at 191-92 n.139 (citing various court decisions rejecting limiting application of RICO to infiltration of legitimate businesses).

55. The Supreme Court has rejected several such attempts to restrict civil RICO. Examples include arguments that RICO did not apply to illegitimate businesses, *Turkette*, 452 U.S. at 580, that RICO required prior criminal conviction and separate "racketeering injury," *Sedima*, 473 U.S. at 493-95, that RICO required proof of multiple schemes, H.J., Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 236-37 (1989), and that RICO required that the "enterprise" have an economic objective, Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 260 (1994).

56. *See* Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (concluding that RICO did not apply to large corporate defendant). The *Barr* court observed:

> It is clear that [RICO] was aimed not at legitimate business organizations but at combating "a society of criminals who seek to operate outside of the control of the American people and their governments." There is no question that defendant cannot be so characterized.
>
> . . . .
>
> Accordingly, we find plaintiff's proposed third claim for relief *specious, frivolous, and without merit* . . . .

Id. (emphasis added) (footnote omitted).

unique "racketeering injury," such that only *indirectly* injured parties could sue previously convicted felons.[57] These limitations would have eviscerated the statute, as very few white-collar defendants charged with civil RICO violations have incurred prior convictions,[58] and hardly anyone could define, much less allege, an indirect injury claim that satisfied the "racketeering injury" requirement.[59] In *Sedima*, the Supreme Court ultimately rejected both of these

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57. *See* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 502 (2d Cir. 1984), *rev'd and remanded*, 473 U.S. 479 (1985) ("The most logical conclusion to be drawn is that Congress expected the criminality of the predicate acts to be proved before the private action went forward – that a criminal conviction must precede a private civil suit."). Other circuits rejected the requirement of a prior RICO conviction. *See* Bunker Ramo Corp. v. United Bus. Forms, Inc., 713 F.2d 1272, 1287 (7th Cir. 1983) (concluding that criminal conviction is not condition precedent to civil RICO claim); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982) (same).

In addition to requiring a prior RICO conviction, the Second Circuit also required a "racketeering injury." *Sedima*, 741 F.2d at 494-95. "By analogy, then, the 'by reason of' language in section 1964(c) is intended to limit standing to those injured by a 'racketeering injury,' by an injury of the type RICO was designed to prevent." *Id.* at 495. The Seventh Circuit rejected the "racketeering injury" requirement. *See* Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984) (rejecting "racketeering injury" requirement), *aff'd per curiam*, 473 U.S. 606 (1985).

58. *See Sedima*, 473 U.S. at 493 (noting reasons guilty party may escape prosecution and that prior conviction requirement would be inconsistent with congressional policy). On this point, the *Sedima* Court stated:

> Finally, we note that a prior-conviction requirement would be inconsistent with Congress' underlying policy concerns. Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for a number of reasons – not least among them the possibility that the Government itself may choose to pursue only civil remedies. Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps.

Id.

59. *See id.* at 495 (calling "racketeering injury" requirement "amorphous"). On this point, the *Sedima* Court said:

> If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, *amorphous* "racketeering injury" requirement.

Id. (emphasis added).

> In considering the Court of Appeals second prerequisite for a private civil RICO action – "injury . . . caused by an activity which RICO was designed to deter" – we are somewhat hampered by the vagueness of that concept. Apart from reliance on the general purposes of RICO and a reference to "mobsters," the court provided scant indication of what the requirement of racketeering injury means.

Id. at 493-94. "The court below is not alone in struggling to define 'racketeering injury,' and the difficulty of the task itself cautions against imposing such a requirement." *Id.* at 494; *see also Haroco, Inc.*, 747 F.2d at 399 (calling racketeering injury requirement "elusive").

restrictions as unwarranted by the statutory text,[60] unintended by Congress,[61] and undesirable from a policy standpoint.[62] In reaching this conclusion, the

60. The *Sedima* Court found that RICO's statutes were devoid of a prior conviction requirement. *See Sedima*, 473 U.S. at 488 ("The language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction."). "As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be." *Id.* "The word 'conviction' does not appear in any relevant portion of the statute." *Id.* The *Sedima* Court concluded:

> Thus, 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. Indeed if either § 1961 or § 1962 did contain such a requirement, a prior conviction would also be a prerequisite, nonsensically, for a criminal prosecution, or for a civil action by the Government to enjoin violations that had not yet occurred.

Id.

The *Sedima* Court also noted that RICO itself contained no "racketeering injury" requirement. *See id.* at 495 (finding that RICO's statutory language does not support "racketeering injury" requirement). On this point, the *Sedima* Court said:

> [W]e are initially doubtful about a requirement of a "racketeering injury" separate from the harm from the predicate acts. A reading of the statute belies any such requirement .... "If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.

Id.

61. The *Sedima* Court rejected the notion that Congress intended that civil RICO include a prior conviction requirement. *See id.* at 489-93 (noting that neither legislative history nor avoidance of practical and constitutional concerns justified inference of prior conviction requirement). "When Congress intended that the defendant have been previously convicted, it said so." *Id.* at 489 n.7. "The legislative history also undercuts the reading of the court below .... The only specific reference in the legislative history to prior convictions of which we are aware is an objection that the treble damages provision is too broad precisely because 'there need *not* be a conviction under any of these laws for it to be racketeering.'" *Id.* at 489-90 (emphasis in original) (citation omitted).

The *Sedima* Court also rejected the argument that Congress wished to impose a "racketeering injury" requirement in civil RICO. *See id.* at 495 (finding that statutory language of RICO does not support "racketeering injury" requirement). "Congress' 'inklings' are best determined by the statutory language it chooses, and the language it chose here extends far beyond the limits drawn by the Court of Appeals." *Id.* at 496 n.13.

62. *See id.* at 490-93 (noting that requiring prior criminal conviction was unwise from policy standpoint).

> [C]riminal convictions are often limited to a small portion of the actual or possible charges. The decision below would also create peculiar incentives for plea bargaining to non-predicate-act offenses so as to ensure immunity from a later civil suit. If nothing else, a criminal defendant might plead to a tiny fraction of counts, so as to limit future civil liability.

Id. at 490 n.9. "[A] prior-conviction requirement would be inconsistent with Congress' underlying policy concerns. Such a rule would severely handicap potential plaintiffs." *Id.* at 493.

Court also stressed that Congress directed that RICO should be "liberally construed to effectuate its remedial purposes."[63] Finally, the Court cautioned lower courts not to restrict the statute through artificial rules and warned federal judges that, to the extent RICO might be too broad or otherwise flawed, only Congress – and not the judiciary – may rewrite it.[64]

Notwithstanding this directive, lower courts continued to read their own restrictions into civil RICO. For example, after *Sedima*, some courts construed RICO's pattern element rigidly to preclude relief for victims of long-term frauds that fell short of an artificially contrived "multiple scheme" standard.[65] When the Supreme Court rejected this standard as unwarranted and unwise in *H.J., Inc. v. Northwestern Bell Telephone Co.*,[66] lower courts

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The *Sedima* Court also found public policy problems with a "racketeering injury" requirement. *See id.* at 493-500 (discussing reasons for rejecting narrowing of "racketeering injury" requirement). "Far from effectuating [RICO's] purposes, the narrow readings offered by the dissenters and the court below would in effect eliminate § 1964(c) from the statute." *Id.* at 498. "We do not believe that the amorphous standing requirement ["racketeering injury"] imposed by the Second Circuit effectively responds to [the problems of RICO evolving into something quite different than originally conceived and the "extraordinary" uses to which RICO was being put], or that it is a form of statutory amendment appropriately undertaken by the courts." *Id.* at 500.

63. *Id.* at 498 (quotation omitted).

64. *See id.* at 499-500 (noting that flaws in RICO statute must be corrected by Congress). On this point, the *Sedima* Court stated:

> It is true that private civil actions under the statute are being brought solely against [private] defendants rather than against the archetypal, intimidating mobster. Yet this defect – if defect it is – is inherent in the statute as writ ten, and its correction lies with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.

Id.

65. *See* Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986) ("The action of [the defendants] comprised one continuing scheme to convert gas from [plaintiff's] pipeline. . . . [T]he record reveals one isolated fraudulent scheme . . . . It places a real strain on the language [of RICO] to speak of a single fraudulent effort, implemented by several fraudulent acts as a 'pattern of racketeering activity.'") (citation omitted); *see also* H.J., Inc. v. N.W. Bell Tel. Co., 829 F.2d 648, 650 (8th Cir. 1987) ("In order to demonstrate the necessary continuity appellants must allege that Northwestern Bell 'had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities.' A single fraudulent effort or scheme is insufficient." (alteration in original) (citation omitted)), *rev'd and remanded*, 492 U.S. 229 (1989). The Eighth Circuit clung to the "multiple scheme" requirement despite overwhelming rejection of the requirement in other circuits. *See* H.J., Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 235 n.2 (1989) (citing cases from other circuits rejecting multiple scheme requirements).

To understand the fault in the Eighth Circuit approach, assume that an employee embezzles $10,000 a month from his employer for ten years. Under the Eighth Circuit view, the employee would be immune from RICO's provisions because there was only one "scheme" to defraud.

66. 492 U.S. 229, 240-41 (1989) (rejecting Eighth Circuit's multiple scheme test). The Court said:

found other artificial ways to impose a heightened pattern requirement.[67]

These decisions were merely symptoms of a broader judicial assault on civil RICO, as courts imposed jurisdictional limitations,[68] onerous pleading requirements,[69] and other procedural obstacles designed to curtail civil RICO litigation.[70] Furthermore, even when fraud victims could overcome these barriers, they faced other judicially imposed restrictions that effectively conferred immunity from civil RICO liability upon perpetrators of massive white-collar frauds.[71]

Although these restrictions have caused civil RICO litigation to decline, the statute remains the preferred remedy for victims of large-scale frauds. Absent a treble damages remedy, fraud victims often have little hope of recovering their *actual* losses.[72] RICO's continued viability, however, is now threatened by circuit court cases reading a reliance requirement into the statute. Typically, these decisions have misconstrued the Supreme Court's decision in *Holmes v. Securities Investor Protection Corp.*,[73] which did not

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> [A]lthough proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity, it is implausible to suppose that Congress thought continuity might be shown *only* by proof of multiple schemes. The Eighth Circuit's test brings a rigidity to the available methods of proving a pattern that simply is not present in the idea of "continuity" itself; and it does so, moreover, by introducing a concept – the "scheme" – that appears nowhere in the language or legislative history of the Act.

H.J., Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 240-41 (1989). The Supreme Court also noted that a vast majority of the other circuits had rejected the multiple scheme requirement. *See id.* at 235 n.2 (citing cases from all other circuits except Eighth that had rejected multiple scheme requirement).

The multiple scheme requirement contains the same deficiency that a reliance requirement contains. A reliance requirement brings a rigidity not justified by RICO's language. Demonstrating victim reliance should not be the only way to prove proximate cause. For an in-depth discussion of the "continuity" and "pattern" concepts as they apply to RICO, see generally Goldsmith, *supra* note 28.

67. *See* Goldsmith, *supra* note 46, at 20-22 ("[M]any judges force absurd results by imposing an overly restrictive standard for what constitutes pattern. Thus, courts have arbitrarily rejected pattern claims on [a variety of] grounds."). Some examples of these requirements are racketeering activity lasting less than a year, requiring racketeering activity to "constitute a regular part of the defendant's business," requiring the activity to cease before suit, and requiring multiple victims, among others. *See id.* at 21-22 nn.116-22 (citing cases so holding).

68. *See id.* at 19 nn.108-09 (discussing standing limitations and "filed rate" doctrine).

69. *See id.* at 19 n.111 (discussing application in RICO suits of federal requirement that plaintiff plead fraud with particularity).

70. *See id.* at 19-20 nn.112-13 (discussing denial of standing and equitable relief).

71. *See id.* at 2-3, 20-22 (detailing various ways in which courts have judicially restricted civil RICO's reach).

72. *See supra* note 45 and accompanying text (noting that pre-RICO remedies afforded minimal relief).

73. 503 U.S. 258 (1992).

address the reliance issue and simply required RICO plaintiffs to prove factual and proximate causation.[74]

IV. Holmes v. SIPC: *The Causation Standard for Civil RICO*

In *Holmes*, Securities Investor Protection Corporation (SIPC) alleged that the defendant "conspired in a stock-manipulation scheme that disabled two broker-dealers from meeting obligations to customers, thus triggering SIPC's statutory duty to advance funds to reimburse the customers."[75] SIPC sued under RICO to recover these funds, although SIPC had neither sold nor purchased securities in reliance on Holmes' alleged stock manipulation scheme.[76] The district court rejected SIPC's claim against Holmes because SIPC failed to meet the "'purchaser-seller' requirements for standing to assert RICO claims that are predicated upon violation of Section 10(b) and Rule 10(b)(5)"[77] and failed to prove proximate cause.[78] The Ninth Circuit rejected both grounds for the trial court's decision, ruling the district court's "finding of no proximate cause to be error."[79] The Supreme Court granted certiorari on the narrow issue of whether SIPC had standing to sue under RICO, despite being neither a purchaser nor a seller of securities.[80] The Supreme Court reversed.[81]

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74. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 265-77 (1992) (discussing rationales for requiring plaintiff to show proximate cause in addition to actual cause).

75. *Id.* at 261. Apparently Holmes and other dealers conspired to manipulate certain stocks. Part of the scheme was creating the appearance of a liquid market for the stocks by buying and selling substantial amounts of the stocks with the traders' own funds and making overly optimistic statements about the companies' futures. When the fraud was uncovered, the dealers were forced to liquidate their shares of the stocks at heavily reduced prices. This made it impossible for the broker-dealers to meet obligations to their customers. SIPC liquidated the broker-dealers and advanced nearly $13 million to cover the broker-dealer's customers' claims. *See id.* at 262-63 (describing specific allegations).

76. *See id.* at 261 (describing general allegations and theory of recovery).

77. *Id.* at 264 (quotation omitted). Instead, SIPC based its right to recovery on the common law principle of subrogation. *See id.* at 270 (discussing subrogation theory).

78. *Id.* at 263-64.

79. *Id.* at 264. The Ninth Circuit held that, under § 1964(c) of RICO, SIPC was not required to be either a purchaser or seller of securities, unlike the requirements for standing in a civil suit based on section 10(b) of the Securities Exchange Act. *Id.* The Ninth Circuit also held that the district court erroneously focused on the causal relationship between Holmes's acts and SIPC's injury rather than attributing all of the conspirators' acts to Holmes and evaluating proximate causation considering all of the conspirators' acts. *Id.* While the petition for certiorari addressed two issues – SIPC's standing to sue under RICO and whether Holmes was responsible for his fellow conspirators' acts – the Supreme Court granted certiorari on the standing issue alone. *Id.* at 264-65.

80. *Id.* at 264-65.

81. *Id.* at 265.

The Court initially observed that 18 U.S.C. § 1964 requires RICO victims to prove factual causation.[82] In effect, plaintiffs must prove that "but for" the alleged racketeering violation, they would not have been injured in their business or property.[83] The Court also stressed, however, that "but for" causation, standing alone, is not sufficient to recover under RICO:[84]

> [The] language [of § 1964] can, of course, 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. 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. Not even SIPC seriously argues otherwise.[85]

Noting that "[t]he Courts of Appeals have overwhelmingly held that not mere factual, but proximate causation is required,"[86] the Court concluded that "[p]roximate cause is thus required."[87]

A. Public Policy and Proximate Causation: The Holmes *Tripartite Analysis*

Justice Souter's majority opinion advanced at least three policy reasons for finding that civil RICO requires proximate cause. "First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other factors."[88] Absent a proximate cause requirement, courts would have difficulty distinguishing between damages resulting from defendants' conduct and those caused by other, possibly unrelated, factors.

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82. *See id.* ("[A]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue thereafter in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney fee." (quoting 18 U.S.C. § 1964(c) (2000))).

83. *See id.* at 265-66 (noting that provision could be read to require only "but for" causation).

84. *See id.* at 266 n.10 (noting that "[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts . . . ." (quotations omitted)).

85. *Id.* at 265-66 (citation omitted) (footnotes omitted).

86. *Id.* at 266 n.11.

87. *Id.* at 268.

88. *Id.* at 269. One of the reasons the Court rejected SIPC's claims was the difficulty of determining whether the amount that SIPC was required to pay resulted from the manipulation of the stocks of the various companies and what portion of the payments resulted from the "broker-dealers' poor business practices or their failures to anticipate developments in the financial markets." *Id.* at 272-73.

Second, "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries."[89] The Court indicated that this was a distinct consideration from the factual causation inquiry.[90] A proximate cause requirement removes that need.

Third, the Court concluded that any benefit derived from allowing more remote parties to sue did not justify the increased difficulties of permitting these parties access to RICO. "[T]he need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."[91] The Court specifically noted that an alternative plaintiff – the broker-dealers – already had sued to vindicate RICO's concerns.[92] Given these public policy concerns, the Court instructed that proximate causation must be determined according to common law principles.[93]

B. Determining Proximate Causation Under the Common Law

Based on its common law origins, the Court categorized proximate cause as a generic label for "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."[94] Among other factors, the

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89. *Id.* at 269. "Assuming that an appropriate assessment of factual causation could be made out, the district court would then have to find some way to apportion the possible respective recoveries by the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages." *Id.* at 273.

90. *See id.* at 269 (characterizing any apportionment of damages as "quite apart from problems of proving factual causation").

91. *Id.* at 269-70. "[T]he law would be shouldering these difficulties [determining factual causation and apportioning damages] despite the fact that those directly injured, the broker-dealers, could be counted on to bring suit for the law's vindication." *Id.* at 273. The Court noted that in fact the broker-dealers had brought suit through the SIPC trustees. *Id.*

92. *Id.* at 273.

93. *See id.* at 268 ("Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."). The *Holmes* Court also noted the parallel between anti-trust and RICO and remarked that the anti-trust proximate cause inquiry "incorporate[d] common-law proximate causation." *Id.* at 267.

94. *Id.* at 268. Some examples of common law tools employed to limit a defendant's liability under a proximate cause analysis are determining whether a direct injury has been established, determining whether the defendant's actions were a substantial cause of the plaintiff's injuries, and determining the foreseeability of the plaintiff's injuries. *See* Ganim v. Smith & Wesson Corp., No. CU9901531985, 1999 Conn. Super. LEXIS 3330, at *25-*32 (Conn. Super. Ct. 1999) (identifying several common law limitations used to determine proximate cause and applying *Holmes* to claim by city of Bridgeport, Connecticut against gun manufactures), *aff'd*, 780 A.2d 98 (Conn. 2001).

common law generally demanded "some direct relation between the injury asserted and the injurious conduct alleged."[95] The majority opinion explained that the term "direct" was "a reference to the proximate-cause inquiry that is informed by the [tripartite] concerns set out in the [*Holmes* opinion itself]."[96]

Thus, *Holmes*'s tripartite analysis sets the context in which a court must consider the "direct relation between the injury asserted and the injurious conduct alleged."[97] For example, plaintiffs "complain[ing] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [are] generally said to stand at too remote a distance to recover."[98]

The Court expressly refrained from establishing a definite test for proximate causation.[99] On the contrary, Justice Souter acknowledged that "the infinite variety of claims that may arise *make it virtually impossible to announce a black letter rule that will dictate the result in every case*."[100] The Court thereby expected lower courts to resolve proximate cause inquiries on a case-by-case basis rather than resort to rigidly restrictive rules.[101] Accordingly, though proof of reliance obviously establishes proximate cause under RICO, nothing in *Holmes* suggests that such proof is the *only* way to do so.[102]

Holmes expressly declined to address the reliance issue. Rather, the Court qualified its use of the term "direct" as follows: "We do not necessarily use [the term 'direct'] in the same sense as courts before us have and intimate no opinion on results they reached."[103] As such, the Court specifically refused to endorse the Eleventh Circuit's treatment of the term in *Pelletier v. Zweifel*,[104] which held that a RICO plaintiff alleging mail fraud "must have been a target of the scheme to defraud and *must have relied to his detriment on misrepresentations* made in furtherance of the scheme."[105]

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95. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 368 (1992).

96. *Id.* at 274 n.20.

97. *Id.* at 268. In explaining the proximate cause requirement, the Court stated that "among the many shapes this concept took at common law, was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* (citation omitted).

98. *Id.* at 268-69.

99. *See infra* part VI.A (discussing reasons proximate cause is not susceptible to definite test).

100. *Holmes*, 503 U.S. at 274 n.20 (emphasis added).

101. Courts perform proximate cause analysis on a case-by-case basis, probably daily, in the run-of-the-mill tort claim. Thus, a case-by-case analysis is clearly workable.

102. *See* Genco, *supra* note 5, at 373. "Justifiable reliance may, of course, establish proximate cause, but it is not invariably required to prove it. Reliance is a *sufficient*, but not a *necessary* cause." *Id.* (emphasis in original).

103. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 274 n.20 (1992).

104. 921 F.2d 1465 (11th Cir. 1991).

105. Pelletier v. Zweifel, 921 F.2d 1465, 1499-1500 (11th Cir. 1991) (emphasis added).

Since *Holmes*, however, several circuits have improperly engrafted a reliance requirement onto RICO by finding it to be a prerequisite to proximate causation.[106] These courts have ignored the expansive evolution of fraud

106. *See infra* Part V (discussing various circuit courts' approaches to proximate causation reliance requirement). Indeed, several recent appellate decisions potentially render the reliance requirement in RICO litigation an insuperable barrier to class certification involving allegations of widespread fraud. *See* Johnson v. HBO Film Mgmt., 265 F.3d 178, 185-94 (3d Cir. 2001) (holding that need for individual reliance determinations precludes class certification); Patterson v. Mobil Oil Corp., 241 F.3d 417, 419 (5th Cir. 2001) (same); Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 978-79 (5th Cir. 2000) (same). These cases demonstrate the devastating impact of improperly reading reliance into RICO. Interestingly, a recent Seventh Circuit decision upholding equity relief under RICO promises an alternative route to obtain class-wide justice in large scale RICO cognizable frauds. *See* N.O.W., Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2000).

Scheidler adopts the view that the RICO's civil remedy section's (§ 1964) plain language entitles private plaintiffs to seek equitable relief. *Id.* at 697-98. In so doing, *Scheidler* properly rejects the Ninth Circuit's decision in *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), which "relied almost exclusively on the legislative history of RICO to reach its result, as opposed to the actual language of the statute." *Scheidler*, 267 F.3d at 695; *see, e.g.*, Jennifer J. Johnson, *Predators Rights: Multiple Remedies for Wall Street Sharks Under the Securities Law and RICO*, 10 J. CORP. L. 3, 63-76 (1984) (arguing that RICO's civil remedies statute intended to permit plaintiffs to pursue equitable relief).

Through the equitable disgorgement remedy, *Scheidler* potentially promises to provide fraud victims relief when reliance would otherwise wrongly constitute a barrier to recovery. Various federal statutes provide for the equitable remedy of disgorgement as a useful sanction. "[I]t is simple equity that a wrongdoer should disgorge his fraudulent enrichment." Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965) (securities); *see also* FTC v. Gem Merch. Corp., 87 F.3d 466, 469 (11th Cir. 1996) (trade practices) ("Among the equitable powers of a court is the power to grant restitution and disgorgement."); SEC v. AMX, Int'l, Inc., 7 F.3d 71, 76 n.8 (5th Cir. 1993) (securities) ("[A] disgorgement order is considered to be in the form of a continuing injunction in the public interest.").

In *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), the Supreme Court affirmed that a district court, properly asserting equity jurisdiction, may impose any equitable remedy, including disgorgement. *Id.* at 398-99. Disgorgement is properly available to RICO plaintiffs. *See, e.g.*, United States v. Private Sanitation Indus. Ass'n. of Nassau/Suffolk, 44 F.3d 1082, 1084 (2d Cir. 1994). In this context, the RICO reliance element would have no application, as standing and proximate cause principles operate quite differently in an equitable context. *See* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111 n.6 (1986) (distinguishing between standing requirements for equitable and damages relief).

Once a class plaintiff exercises the option to only seek equitable relief – i.e., not damages – the rationale for requiring reliance to distinguish direct from indirect or remote claimants wholly disappears. *See* Summit Props., Inc. v. Hoechst Celanese Corp., 214 F.3d 556, 560-61 (5th Cir. 2000) (using reliance as proxy for direct/indirect distinction). In contrast to treble-damages actions, class action claims for equitable relief present no risk of duplicative recoveries or complex allocation problems because the very individuals entitled to relief would constitute the class bringing suit. McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 856 (3d Cir. 1996) (holding that plaintiffs lacked standing to bring antitrust damages action but were not barred from seeking equitable relief). Finally, if reliance is not implicated in granting equitable relief to a class, the per se predominance rule of decisions like *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001), or *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000), is not implicated.

legislation and have adopted precisely the formalistic approach to proximate cause that *Holmes* eschewed.[107]

V. The Rift over Reliance: RICO and Proximate Cause in the Circuit Courts

The appellate courts' failure consistently to abide by *Holmes* has produced a confusing array of circuit conflicts. These conflicts have spurred forum shopping because the proximate cause-reliance issue thereby turns on the circuit in which a case has been filed. Even forum shopping, however, has been rendered problematic by the circuits' inability to articulate and enforce internally consistent proximate cause standards. For example, at least four lines of circuit authority have emerged: (1) circuits implying that reliance is not a prerequisite to proximate cause;[108] (2) circuits implying that reliance is essential to proximate cause;[109] (3) circuits expressly holding that reliance is required for proximate cause;[110] and (4) circuits internally conflicted over this issue.[111] Before the reliance-proximate cause issue can be resolved, however, the different circuit perspectives must be understood.[112]

A. Non-Reliance Implied

Two Ninth Circuit cases taken together imply that reliance is not a prerequisite to proximate cause under RICO.[113] In *Wilcox v. First Interstate Bank of Oregon*,[114] the Ninth Circuit rejected a defendant's argument that an adverse jury verdict on a common law fraud claim precluded RICO litigation

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107. *See supra* text accompanying notes 8-9 (discussing Congress's and Supreme Court's rationale for rejecting reliance requirement); *see also* Genco, *supra* note 5, at 356 ("[B]ecause the drafters [of the mail fraud statute] omitted both misrepresentation and reliance, neither should be invariably required. Accordingly mail fraud is best seen as a modern form of common law cheat [which did not require reliance].").

108. The Ninth Circuit has implied that reliance is not a required element of a civil RICO claim. *See infra* Part V.A (discussing Ninth Circuit cases).

109. The First Circuit has implied that reliance is a required element of a civil RICO claim. *See infra* Part V.B (discussing First Circuit cases).

110. The Second, Fourth, and Sixth Circuits fall into this category. *See infra* Part V.C (discussing Second, Fourth, and Sixth Circuit cases).

111. The Third, Fifth, Eighth, and Eleventh Circuits are all internally conflicted as to a reliance requirement in civil RICO. *See infra* Part V.D (citing Third, Fifth, Eighth, and Eleventh Circuit cases and discussing Fifth Circuit cases as examples).

112. *See supra* text accompanying notes 8-9 (discussing Congress's and Supreme Court's rationales for rejecting reliance requirement).

113. *See* Or. Laborers-Employees Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 963-66 (9th Cir. 1999) (applying *Holmes* tripartite analysis); Wilcox v. First Interstate Bank of Or., 815 F.2d 522, 528-30 (9th Cir. 1987) (rejecting plaintiff's RICO claims).

114. 815 F.2d 522 (9th Cir. 1987).

based on the same underlying facts.[115] Among other things, the court reasoned that "the elements necessary to support damages under RICO are different from . . . common law fraud."[116] *Wilcox* implies that RICO does not require reliance as reliance is an element of common law fraud. However, because proximate cause was not at issue in *Wilcox*, the Ninth Circuit had no occasion to consider whether RICO required reliance.[117] In *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*,[118] the Ninth Circuit subsequently reinforced the implication that RICO contains no reliance requirement, as the court engaged in a comprehensive, *Holmes*-based proximate cause analysis without even mentioning reliance.[119]

B. Reliance Implied

In contrast, the First Circuit has implied that reliance is essential to prove proximate cause under RICO. In *Efron v. Embassy Suites (Puerto Rico), Inc.*,[120] the court affirmed the dismissal of the plaintiff's complaint for failure to plead a pattern of racketeering activity.[121] The court observed in dicta that "lack of causation seems to be a significant possibility [in this case]. Efron entered the . . . [transaction] *without reliance* on any misrepresenta-

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115. *Wilcox*, 815 F.2d at 531-32 (rejecting defendant's argument because RICO requires lower standard of proof than does common law fraud). The plaintiffs alleged that they negotiated business loans from a bank. *Id.* at 524. The variable interest rates depended on the prime rate as determined by the bank plus a risk factor. *Id.* The plaintiffs argued that the bank had conspired with its subsidiary banks to fix the prime rate. *Id.* Therefore, the plaintiffs complained that the bank had violated RICO by "using the mail to charge and collect excessive interest based on deceptive overstatements of FIOR's [First Interstate Bank of Oregon's] true prime rate." *Id.*

116. *Id.* at 531 n.7 (noting that Fifth Circuit so held in *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 482 (5th Cir. 1986)).

117. *See id.* at 529-32 (discussing only enterprise injury, distinction between person and enterprise, and collateral estoppel issues).

118. 185 F.3d 957 (9th Cir. 1999).

119. *See* Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 963-66 (9th Cir. 1999) (discussing *Holmes*-based proximate cause analysis); *see also infra* Part VI.D (detailing *Holmes*-based proximate cause analysis).

120. 223 F.3d 12 (1st Cir. 2000).

121. *See* Efron v. Embassy Suites (P.R.), Inc., 223 F.3d 12, 13 (1st Cir. 2000) (giving disposition), *cert. denied*, 121 S. Ct. 1228 (2001). The plaintiff alleged that Embassy Suites Puerto Rico "purposefully created artificial cash shortfalls, which under the Partnership agreement [with the plaintiff] could be covered by capital calls to the limited partners." *Id.* at 14. The agreement stated that a partner's refusal to contribute additional capital would result in a proportionate reduction in that partner's ownership interest. *Id.* Thus, Efron claimed that the defendants forced him to invest another $1 million in the hotel venture by multiple capital calls that threatened his initial investment. *Id.* He alleged violations of RICO based on predicate acts of mail fraud and RICO conspiracy. *Id.*

tions."[122] Given this "seeming weakness" in the plaintiff's RICO claim,[123] *Efron* certainly suggests that the First Circuit would disregard *Holmes*'s tripartite proximate cause analysis and read a reliance requirement into RICO.

C. *Reliance Clearly Required*

Three circuits have expressly required a showing of reliance to establish proximate cause under civil RICO.[124] Indeed, the Second Circuit has repeatedly held that RICO mail fraud claims require proof of reliance.[125] In *County of Suffolk v. Long Island Lighting Co.*,[126] the court reasoned that because "persons injured 'by reason of' a RICO violation may maintain a civil RICO claim[,] . . . '[t]he phrase "by reason of" requires that there be a causal connection between the prohibited conduct and plaintiff's injury.'"[127] The court concluded that, in civil RICO mail fraud cases, causation requires a showing of reliance on the alleged misrepresentations.[128] *Long Island Lighting Co.* preceded the Supreme Court's decision in *Holmes*, which declined to impose a definitive direct injury test for proximate cause determinations, but the Second Circuit took this same approach post-*Holmes* in *Metromedia Co. v. Fugazy*.[129] The *Fugazy* court stated that "in the context of an alleged RICO predicate act of mail fraud, we have stated that to establish the required connection, the plaintiff was required to demonstrate that the defendant's misrepresentations were relied on."[130]

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122. *Id.* at 17 (emphasis added). The court noted that Efron did not "allege that he was deceived by the written requests for additional capital. Instead, he describes his 'injury-in-fact' as the prospect of a squeezed-down equity position in the partnership . . . ." *Id.* The court further indicated that this loss resulted from the plaintiff's failure to contribute all of the necessary funds, but was "not necessarily a loss occasioned by misrepresentations or false assurances." *Id.*

123. *Id.* The *Efron* court did not decide that case on grounds of causation, partly because the parties largely ignored the issue. *Id.* Nevertheless, the court noted that an inference of reliance by Efron was possible only under an "extremely generous reading" of the complaint. *Id.*

124. *See, e.g.*, Chisolm v. Transouth Fin. Corp., 95 F.3d 331, 337 (4th Cir. 1996) (reviewing circuit case law on reliance requirement); Cent. Distrib. of Beer, Inc. v. Conn, 5 F.3d 181, 184 (6th Cir. 1993) (same); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311 (2d Cir. 1990) (finding that causation requirement necessitates reliance requirement).

125. *See* Moore v. PaineWebber, Inc., 189 F.3d 165, 171-72 (2d Cir. 1999) (noting that plaintiffs must allege that misrepresentations caused them to invest and lose funds); Metromedia Co. v. Fugazy, 983 F.2d 350, 368 (2d Cir. 1992) (reiterating that Second Circuit requires reliance); *Long Island Lighting Co.*, 907 F.2d at 1311 (finding reliance requirement).

126. 907 F.2d 1295 (2d Cir. 1990).

127. County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311 (2d Cir. 1992) (quoting Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 636 (2d Cir. 1989)).

128. *Id.*

129. 983 F.2d 350 (2d Cir. 1992).

130. Metromedia Co. v. Fugazy, 983 F.2d 350, 368 (2d Cir. 1992) (citing *Long Island Lighting Co.*, 907 F.2d at 1311).

The Fourth[131] and Sixth[132] Circuits have employed similar reasoning in requiring civil RICO plaintiffs to demonstrate reliance. For example, in *Brandenburg v. Seidel*,[133] the Fourth Circuit stated,

> The defendants correctly point out that while . . . it is not necessary to establish detrimental reliance by the victim in order to make out a violation of the federal mail statute, such reliance is necessary to establish injury to business or property "by reason of" a predicate act of mail fraud within the meaning of § 1964(c).[134]

The Fourth Circuit's subsequent decisions consistently have implemented similar reasoning without regard to *Holmes*'s tripartite analysis.[135]

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131. *See* Chisolm v. Transouth Fin. Corp., 95 F.3d 331, 337 (4th Cir. 1996) ("The only caveat is that, where fraud is alleged as a proximate cause of injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation."); Mid Atl. Telecom, Inc. v. Long Distance Serv., Inc., 18 F.3d 260, 264 (4th Cir. 1994) (noting but not ruling on defense argument that "absent reliance, Mid Atlantic could not bring a RICO claim under § 1964(c)"); Caviness v. Derand Res. Corp., 983 F.2d 1295, 1305 (4th Cir. 1993) ("Even looking beyond the allegations of the complaint to the record, we can discover no evidence of reliance or damage."); Morley v. Cohen, 888 F.2d 1006, 1011 (4th Cir. 1989) (citing rule from *Brandenburg*); Brandenburg v. Seidel, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988) (stating that reliance is needed to establish injury by reason of predicate act of RICO mail fraud).

132. *See* Cent. Distrib. of Beer, Inc. v. Conn, 5 F.3d 181, 184 (6th Cir. 1993) (reiterating reliance requirement); Brightman v. Freeway Ass'n., No. 90-4072, 1991 U.S. App. LEXIS 19069, at *8 (6th Cir. 1991) (reiterating that Sixth Circuit requires RICO plaintiffs to plead with particularity facts showing reliance); Grantham & Mann, Inc. v. Am. Safety Prods., Inc., 831 F.2d 596, 606 (6th Cir. 1987) ("[The plaintiff's] pleadings and proof at trial demonstrate that it was in no way deceived by [the defendant's] mailings, and in no way relied on those letters to its detriment." (citation omitted)); Blount Fin. Servs., Inc. v. Walter E. Heller & Co., 819 F.2d 151, 152 (6th Cir. 1987) ("Fraud alleged in a RICO civil complaint must state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact."); Bender v. Southland Corp., 749 F.2d 1205, 1216 (6th Cir. 1984) ("Second, the plaintiffs' complaint does not allege what misrepresentations (or omissions) of material fact [the defendant] made to the plaintiffs that they reasonably relied on to their detriment. Hence, the plaintiffs have inadequately alleged the requisite elements of mail fraud." (citation omitted)).

The Sixth Circuit reasoning in *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181 (6th Cir. 1993), is illustrative. In *Conn*, the court stated, "Central Distributors cannot maintain a civil RICO claim against these defendants absent evidence that the defendants made misrepresentations or omissions of material fact to Central Distributors and evidence that Central Distributors *relied on those misrepresentations or omissions to its detriment.*" *Conn*, 5 F.3d at 184 (emphasis added). Applying this rule, the court concluded, "Central Distributors has not produced a shred of evidence showing that any of the defendants made any false statements or omissions to Central Distributors or that Central Distributors relied on any statement or omission to its detriment." *Id.*

133. 859 F.2d 1179 (4th Cir. 1988).

134. Brandenburg v. Seidel, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988) (citation omitted).

135. *See supra* note 131 (reviewing Fourth Circuit cases).

D. Intra-Circuit Confusion

Four Circuits have issued internally contradictory reliance rulings: the Third,[136] Fifth,[137] Eighth,[138] and Eleventh Circuits.[139] On different occasions, each held that RICO both requires and does not require reliance to establish proximate cause.[140] The Fifth Circuit's contradictory reliance rulings illustrate the resulting confusion and its consequences. In four decisions addressing RICO proximate cause, the Fifth Circuit has ruled: (1) that reliance is not a

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136. *See* Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 746 (3d Cir. 1996) (affirming dismissal of RICO fraud claims, stating that plaintiff "cannot now claim that it detrimentally relied on [the defendant's] intentional misrepresentations because Ideal knew it was being overcharged for purchases almost from the start," from which one could infer that reliance was required under that Court's interpretation of RICO). *But see* Tabas v. Tabas, 47 F.3d 1280, 1295 n.18 (3d Cir. 1995) ("Defendants' assertion that the mailings involved must themselves be relied upon by the victim of the fraud in order for a RICO claim to be established is inaccurate."); Envtl. Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1067 (3d Cir. 1988) ("To have standing to assert a civil RICO claim, [the plaintiff] need only allege an injury to its business or property resulting from some or all of the predicate acts that comprise the RICO violation.") (citation omitted), *aff'd on other grounds*, 493 U.S. 400 (1990).

137. *See infra* notes 141-51 and accompanying text (analyzing Fifth Circuit rulings).

138. *See* United Healthcare Corp. v. Am. Trade Ins. Co., 88 F.3d 563, 571 n.5 (8th Cir. 1996) ("[I]t is well settled that such a showing [detrimental reliance] is not required to prove mail or wire fraud." (citations omitted)); Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs., 48 F.3d 1066, 1609 (8th Cir. 1995) ("It follows that a RICO claim based upon the predicate acts of mail or wire fraud does not require an allegation of misrepresentation or common law fraud." (citation omitted)); Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989) (rejecting reliance requirement because RICO mail fraud's reach "is broader than the concept of common-law fraud under Minnesota law"). *But see* Appletree Square I, L.P. v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994) ("In order to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts." (citations omitted)); Flowers v. Cont'l Grain Co., 775 F.2d 1051, 1054 (8th Cir. 1985) (affirming dismissal because "there is no clear allegation that plaintiff has parted with property because of his reliance on representations made by the defendants that they knew were false").

139. *See* All Care Nursing Serv. v. High Tech Staffing Servs., Inc., 135 F.3d 740, 745 n.10 (11th Cir. 1998) ("Reliance is only an element of a RICO claim to the extent that a RICO plaintiff must prove he was injured by reason of the RICO defendant's deception and fraud." (citation omitted)). *But see* Turner v. Beneficial Corp., 236 F.3d 643, 650 (11th Cir. 2000) ("Accordingly, we conclude that the district court did not err in finding that reliance is an element of a RICO claim and in denying class certification on that basis."), *vacated by* 242 F.3d 1023 (11th Cir. 2001); Beck v. Prupis, 162 F.3d 1090, 1097 (11th Cir. 1998) ("Because [the plaintiff] did not rely to his detriment on the alleged misrepresentations, these misrepresentations are not the proximate cause of Beck's injury." (citation omitted)), *aff'd on other grounds*, 524 U.S. 494 (2000); Pelletier v. Zweifel, 921 F.2d 1465, 1499-1500 (11th Cir. 1991) ("[W]hen the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme." (citations omitted)).

140. *See supra* notes 136-39 (listing contradictory reliance rulings).

requirement of proximate cause,[141] (2) that reliance is a sufficient but not necessary condition for proximate cause,[142] (3) by implication, that reliance is a requirement,[143] and (4) that reliance is a requirement of proximate cause.[144]

In sum, the Fifth Circuit's range of reliance rulings encompass virtually every conceivable outcome without arriving at a definitive standard. In the process, the court has rendered stare decisis a nullity, with each new decision pretending to write on a clean slate. For example, in *Armco Industrial Credit Corp. v. SLT Warehouse Co.*,[145] the Fifth Circuit initially rejected a proposed reliance jury instruction, reasoning that under the mail/fraud statute, "[i]t is not necessary that the victim have detrimentally relied on the mailed misrepresentations. Indeed, the intended victim need not even have been defrauded for liability to attach under the mail fraud statute."[146] However, in *Summit Properties, Inc. v. Hoechst Celanese Corp.*,[147] the Fifth Circuit recently stated that "when civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation . . . [that] is determinative in this case."[148]

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141. *See* Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 481-82 (5th Cir. 1986) ("To find a violation of the mail fraud statute it is not necessary that the victim have detrimentally relied on the mail misrepresentations. Indeed, the intended victim need not even have been defrauded for liability to attach under the mail fraud statute." (citations omitted)).

142. *See* Khurana v. Innovative Health Care Sys., Inc., 130 F.3d 143, 148-49 (5th Cir. 1997) (stating that "[p]roximate cause determination for RICO standing is guided by indications of preconceived purpose, specifically intended consequence, necessary or natural result, reasonable foreseeability of result, the intervention of independent causes, whether the defendant's acts are a substantial factor in the sequence of responsible causation, and the factual directness of the casual connection"), *vacated as moot sub nom.*, Teel v. Khurana, 525 U.S. 979 (1998).

143. *See* Anderson v. Kutak, Rock, & Campbell, 51 F.3d 518, 523 (5th Cir. 1995) ("In contrast [to the case cited by plaintiffs], there is no allegation in the instant case that [the plaintiffs] acted in any way in reliance upon a representation by the defendants that the bond proceeds would be used to finance low interest agricultural loans.").

144. *See* Summit Props., Inc. v. Hoechst Celanese Corp., 214 F.3d 556, 562 (5th Cir. 2000) ("In sum, when civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation."), *cert. denied*, 531 U.S. 1132 (2001).

145. 782 F.2d 475 (5th Cir. 1986).

146. Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 481-82 (5th Cir. 1986).

147. 214 F.3d 556 (5th Cir. 2000).

148. Summit Props., Inc. v. Hoechst Celanese Corp., 214 F.3d 556, 562 (5th Cir. 2000). In so holding, the Fifth Circuit eviscerated any opportunity for recovery under RICO based on predicate acts that do not require reliance and completely ignored the intended scope of the "scheme to defraud" language in RICO itself. *See supra* notes 3-20 and accompanying text (discussing "scheme to defraud" language). The *Summit* court allowed for the possibility of RICO standing, in third party transactions in which "plaintiff has . . . been the target of a fraud." *Summit*, 214 F.2d at 561. However, its parsimonious application of the "target area" for standing purposes effectively re-introduced the reliance element. Furthermore, the Supreme Court

Remarkably, the *Summit* court concluded that "*Armco* does not answer the question before us: whether reliance is necessary to establish proximate cause under RICO."[149] The Fifth Circuit did not attempt to reconcile this observation with decisions rendered elsewhere that interpreted *Armco* as rejecting a reliance requirement.[150] Furthermore, *Summit* barely mentioned the *Holmes* decision and did not attempt to apply its tripartite analysis to the plaintiffs' claims.[151] Not only did *Summit* fail to follow the law of its own circuit, it also failed to follow Supreme Court precedent.

VI. A Balanced Approach as Required by Holmes

The rift over reliance stems from the judiciary's failure to abide by *Holmes*. Rather than apply the functional tripartite analysis *Holmes* articulated for proximate cause determinations,[152] numerous courts have imposed a threshold reliance requirement for proximate cause.[153] In the course of creating widespread circuit conflicts, these decisions overlook a century of mail fraud jurisprudence, which recognized that the statutory prohibition against "schemes to defraud"[154] encompasses many complex frauds capable of implementation without victim reliance.[155] Cases such as *Summit* thereby

specifically rejected the "target area" label. *See* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters., 459 U.S. 519, 536 n.33 (1983).

149. *Summit*, 214 F.3d at 559.

150. *See* Wilcox v. First Interstate Bank of Or., 815 F.2d 522, 531 n.7 (9th Cir. 1987) ("Similarly, in *Armco*, the Fifth Circuit held that the elements necessary to support damages under civil RICO are different from state causes of action, including common law fraud. The difference is that '*justifiable reliance is not an element that need be proven to establish a mail fraud violation.*'" (quoting *Armco*, 782 F.2d at 482) (emphasis added)); Sys. Mgmt., Inc. v. Loiselle, 112 F. Supp. 2d 112, 114 (D. Mass. 2000) (citing *Armco* as rejecting reliance requirement); Prudential Ins. Co. of Am. v. U.S. Gypsum Co., 828 F. Supp. 287, 295 (D.N.J. 1993) (same); Polycast Tech. Corp. v. Uniroyal, Inc., 728 F. Supp. 926, 946-47 (S.D.N.Y. 1989) (same); Omega Constr. Co. v. Altman, 667 F. Supp. 453, 462 (W.D. Mich. 1987) (citing *Armco* for rule that RICO plaintiffs need not show that they actually were defrauded).

151. *See* Summit Props. v. Hoechst Celanese Corp., 214 F.3d 556, 559-60 (5th Cir. 2000) (showing that court did not follow *Holmes* directive, but merely limited itself to declaring, "[T]he Supreme Court in *Holmes* [has] explicitly adopted a traditional proximate causation requirement" (citation omitted)).

152. *See supra* Part IV.A (detailing tripartite system). The *Holmes* Court indicated that denying recovery to indirect parties was justified by the following three policy concerns: the difficulty of assigning liability among various tortfeasors other than the RICO defendant, the risk of double recovery, and the existence of other parties likely to enforce RICO's civil provisions. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 269-70 (1992) (giving policy concerns).

153. *See supra* notes 120-51 and accompanying text (reviewing reliance holdings).

154. *See supra* notes 2-20 and accompanying text (noting that violations of mail and wire fraud statutes do not require victim reliance).

155. *See supra* notes 12-20 and accompanying text (listing frauds). Examples include bribery, embezzlement, check kiting, and money laundering. *Id.*

have read the term "scheme to defraud" out of the mail and wire fraud statutes for civil racketeering cases.[156] The resulting statutory anomaly is inconsistent with both public policy and common law doctrine.

A. RICO Public Policy and Common Law Doctrine

From a public policy standpoint, RICO seeks to foster private enforcement actions by providing incentives for civil litigation that are identical to those of its antitrust antecedent.[157] Thus, the *Holmes* Court viewed proximate cause as an avenue for identifying the private party *best* situated to effectuate civil RICO's enforcement function.[158] In contrast, a proximate cause test based exclusively on victim reliance threatens to defeat this goal in some cases by precluding *all* victims from initiating RICO enforcement actions.[159]

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156. *See Summit*, 214 F.3d at 562 (failing to recognize this fact by finding that "when civil RICO damages are sought for injuries resulting from *fraud*, a general requirement of reliance by plaintiff is a common sense liability limitation" (emphasis added)). This result is inconsistent with RICO's purposes. The number and variety of acts that qualify as predicate acts under civil RICO indicate that a threshold reliance requirement for determining proximate cause is simply inappropriate. *See* H.J., Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 248-49 (1989) ("Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways."). Requiring reliance guarantees immunity to the significant portion of RICO violators whose predicate acts do not require a misrepresentation.

157. *See supra* notes 40-45 and accompanying text (reviewing impetus for these incentives). Congress modeled RICO's civil remedies on those of the antitrust statutes. *See* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150-51 (1987) (noting that Clayton Act provides "closest analogy to civil RICO"); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489 (1985) (referring to "Clayton Act model").

158. *See* Stasia Mosesso, Note, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War*, 76 NOTRE DAME L. REV. 257, 303 (2000) (outlining policy concerns of *Holmes*). The author stated:

> The final policy factor outlined in *Holmes* expressly identifies the concern about multiple plaintiffs. The Court found that the best way to guard against the potential for multiple claims was to suggest that the trial court inquire into whether a more directly injured party was present who should bring the claim. The inquiry to determine the best plaintiff should not be a method of precluding deserved recovery. It should merely be an attempt to find the best plaintiff.

Id.

159. *See id.* at 321 (citing tobacco litigants as example). Mosesso criticized the Second Circuit for failing to identify a better plaintiff than the health funds to pursue RICO claims against the tobacco industry, saying:

> The fact that the Second Circuit did not identify a better plaintiff is particularly troublesome in the context of this RICO litigation. By denying standing to the Funds, the court effectively immunized the tobacco industry from RICO claims, since the individual smokers are barred from suit under RICO due to the restriction that injury must be to "business or property."

Nor can this outcome be justified by common law doctrine. At common law, the term "proximate cause" had an uncertain meaning.[160] Indeed, Prosser and Keeton characterized proximate cause as "an unfortunate term"[161] that "could not be reduced to absolute rules."[162] For this reason, *Holmes* acknowledged that the proximate cause inquiry was not an exact science.[163] In fact, the common law employed several distinct inquiries to determine proximate cause.[164] Examples include whether the injury was remote in time and place

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Id. (citation omitted). While articulating a legitimate concern, this argument misses the mark somewhat. RICO, by definition, is inapplicable to personal injury. *See* 18 U.S.C. § 1964(c) (2000) (requiring injury to "business or property"). Thus, smokers can enforce RICO only if they can prove injury to business or property instead of personal injury. Nevertheless, *Holmes* does not guarantee the existence of a RICO plaintiff in every case. Instead, *Holmes* focused on the existence of potential plaintiffs likely to enforce civil RICO's provisions other than the plaintiff involved in the litigation. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 269-70 (1992) (stating that directly injured plaintiffs act as sufficient enforcement body without resort to remote victims). However, a blanket reliance requirement creates situations in which no satisfactory plaintiff exists to pursue a civil RICO claim. These situations are unwarranted and defeat congressional intent. For example, the Fifth Circuit in *Summit* eliminated the only party with motivation and standing to bring a civil RICO suit, despite the direct injuries the defendant's actions caused the plaintiffs. *See infra* Part VI.C (examining *Summit*).

160. *See* PROSSER & KEETON ON THE LAW OF TORTS § 41, at 263 (W. Page Keeton et al. eds, 5th ed. 1984) (noting ambiguity surrounding proximate cause). Prosser and Keeton state:

> This connection usually is dealt with by the courts in terms of what is called "proximate cause," or "legal cause." There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there any general agreement as to the best approach. Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly, and that language appropriate to a discussion of one is carried over to cast a shadow upon the others.

Id. § 41, at 263-64.

161. *Id.* § 41, at 264.

162. *Id.* § 42, at 279. The Restatement (Second) of Torts eschews the term "proximate cause," preferring to use "legal causation" instead. RESTATEMENT (SECOND) OF TORTS § 431 (1965). Conduct is the legal cause of harm if it is "a 'substantial factor' in bringing about the harm." *Id.* The Restatement approach rejects mechanical tests in favor of balancing multiple considerations, including the number of other factors contributing to the harm, the extent that the defendant's actions standing alone contributed to the plaintiff's injuries, whether the defendant's actions set in motion a chain of events, and the lapse of time. *Id.* § 433.

163. *Holmes*, 503 U.S. at 272 n.20 (announcing black-letter rule regarding directness and noting that proximate cause would be "virtually impossible" (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983))).

164. *See* PROSSER & KEETON, *supra* note 160, § 42, at 276 ("The search for some test or formula which will serve as a universal solvent for all of the problems of "proximate cause" has occupied many writers. . . . [D]ozens of touchstones and panaceas . . . have been proposed."). Some of these proposed touchstones include "nearest cause," "last human wrongdoer," "cause and condition," "substantial-factor test," and "justly attachable cause." *Id.* § 42, at 276-79.

("remoteness"),[165] whether a defendant's actions caused the alleged injury directly or indirectly ("direct vs. indirect injury"),[166] and whether a defendant's actions constituted a substantial factor in producing a plaintiff's injury ("substantial factor").[167]

In sum, rather than apply strict rules, proximate cause developed as a policy-based principle aimed at limiting the "scope of liability . . . [reflecting]

Obviously, if the proximate cause inquiry under the common law could be resolved simply by asking whether the plaintiff relied on the defendant's actions, the multitude of approaches that common law judges used to determine proximate cause would have been unnecessary.

165. *Id.* § 42, at 276. The remoteness approach is also called "the nearest cause." *See id.* (stating that "proximate" means near or nearest). At early common law, the result of the remoteness inquiry was that "only the antecedent which is nearest in time or space is regarded as the legal cause, and none other will be held responsible." *Id.* Because of the harshness of this rule, courts began to make exceptions. *See id.* (noting that courts have long ceased to recognize that rule). However, the basic concept is still present: the further away in space and time from the tortfeasor's acts the plaintiff's damages stand, the more likely it is that the damages resulted from the acts of someone other than the tortfeasor.

166. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992) ("Accordingly, among the many shapes [proximate cause] took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged."). The thrust of the inquiry is to identify an injury suffered directly by the plaintiff and depending solely on the defendant's actions rather than an injury suffered by the plaintiff resulting from injuries third parties sustained because of the defendant's acts. *Id.* at 268-69. In *Holmes*, the Court found the plaintiff's injuries to be indirect because SIPC's obligations to indemnify investors depended on brokers failing. *Id.* at 271. The defendants' fraudulent actions were but one of the possible reasons why the brokers failed financially. *Id.* at 273.

167. *See* RESTATEMENT (SECOND) OF TORTS § 431 (1965) ("The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."). The Comments go on to note:

> The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred.

Id. § 431 cmt. a. Prosser and Keeton define the substantial factor proximate cause test as requiring that "the defendant's tort must have been a substantial factor in producing the damage complained of." PROSSER & KEETON, *supra* note 160, § 42, at 278 (quoting Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 223, 229 (1911) (internal quotation marks omitted)). However, Prosser and Keeton expressed frustration at the use of the substantial factor inquiry:

> As applied to the facts of causation alone, the test though not ideal, may be thought useful. But when the "substantial factor" is made to include all of the ill-defined considerations of policy which go to limit liability once causation in fact is found, it has no more definite meaning than "proximate cause," and it becomes a hindrance rather than a help.

Id.

our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient."[168] Although this statement of the traditional proximate cause doctrine lacks a definitive framework for analysis, its flexibility is central to explaining how proximate cause must be approached under civil RICO. Each proximate cause inquiry at common law considered the particular public policy at issue.[169] Thus, the rigor of the proximate cause approach varied on a case-by-case basis, depending in part on the importance of the applicable public policy at issue.[170] RICO's private attorney general provision,[171] the failure of previous remedies to adequately compensate RICO victims,[172] and RICO's liberal construction clause[173] all justify a more flexible approach to proving proximate cause than a narrow insistence on reliance. With those principles in mind, we can resolve circuit conflicts over victim reliance by elaborating upon and applying the *Holmes*

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168. *Id.* § 41, at 264. The *Holmes* Court cited this observation with approval. *Holmes*, 503 U.S. at 268.

169. *See* PROSSER & KEETON, *supra* note 160, § 41, at 264 ("Often to greater extent, however, the legal limitation on the scope of liability is associated with policy – with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient."). Prosser and Keeton add:

> [Proximate cause] is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, *so that they depend on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.*

Id. § 42, at 273 (emphasis added).

170. *See id.* § 42, at 279 ("'Proximate cause' cannot be reduced to absolute rules. No better statement ever has been made concerning the problem than that of Street: 'It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent.'" (quoting 1 STREET, FOUNDATIONS OF LEGAL LIBERTY 110 (1906))).

171. *See* 18 U.S.C. § 1964(c) (2000) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.").

172. *See supra* notes 42-45 and accompanying text (reviewing previous failure). Additionally, allowing treble damages responds to a lack of governmental resources to combat RICO violators. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 493 (1985) ("Private attorney general provisions such as 1964(c) are in part designed to fill prosecutorial gaps . . . . [There is a] need for treble damages as an incentive to litigate."). Thus, RICO's attorney general provisions benefit both victims and society as a whole.

173. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified as amended in scattered sections of 18 U.S.C.) ("The provisions of [RICO] shall be liberally construed to effectuate its remedial purposes."). A liberal construction clause in a statute is very rare. *See* Russello v. United States, 464 U.S. 16, 27 (1983) ("So far as we have been made aware, this is the only substantive federal criminal statute that contains such a directive."). *See generally* Craig W. Palm, Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980) (arguing that congressional intent justifies liberally construing RICO).

tripartite analysis in a manner consistent with RICO's civil enforcement function and the common law notion of proximate cause.

B. Holmes*: The Common Law and RICO*

Justice Souter's majority opinion in *Holmes* fully recognized that the proximate cause doctrine stems from a common law policy aimed at limiting liability.[174] *Holmes* also acknowledged that proximate cause is a policy-based principle of administrative convenience.[175] Based on the application of this principle to analogous antitrust cases,[176] the Supreme Court identified three policy concerns central to proximate cause inquiries under civil RICO.[177] These policy concerns are (1) the difficulty in determining damages "attributable to the [defendant's violations] as distinct from other, independent, factors,"[178] (2) the difficulty of "apportioning damages among plaintiffs removed at different levels of injury from the violative acts,"[179] and (3) whether more directly injured victims can be "counted on to vindicate the law as private attorneys general."[180] The Supreme Court broadly framed these concerns in terms of limiting liability to directly injured plaintiffs,[181] but if one under-

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174. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 266 n.10, 268 (1992). Justice Souter wrote:

> In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would set society on edge and fill the courts with endless litigation.

Id. at 266 n.10 (citations and internal quotations omitted).

175. *Id.* at 268.

176. *See* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 531-37 (1983) (finding that Congress must have intended to import common law causation concepts into antitrust statutes). *Holmes* indicated that "Congress modeled § 1964(c) on the civil-action provision of the federal anti-trust laws . . . ." *Holmes*, 503 U.S. at 267.

177. *See Holmes*, 503 U.S. at 269-70 (identifying three policy concerns). In the antitrust context, standing depends upon six factors. *See* Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 924 (3d Cir. 1999) (identifying six factors from *Associated General Contractors*, 459 U.S. at 537-38, 540, 542-44). The six factors are: 1) causal connection between defendant's acts and plaintiff's injuries; 2) presence of specific intent; 3) whether the nature of plaintiff's injuries related to the purposes of the antitrust law; 4) directness of the injury; 5) how speculative the damages claimed are; and 6) ability to avoid complex apportionment of damages or liability. *Id.*

178. *Holmes*, 503 U.S. at 269.

179. *Id.*

180. *Id.* at 269-70.

181. *See id.* at 269 ("Although such directness of relationship is not the sole requirement of Clayton Act causation, it has been one of its central elements."). *Holmes* analyzed plaintiffs' claims based on a direct versus indirect injury analysis.

stands the concerns properly, they roughly approximate the common law standards of substantial factor, remoteness, and direct versus indirect injury.

The Court's first concern in allowing indirectly injured parties to recover is the difficulty of attributing damages to the defendant as distinct from damages that others caused.[182] The common law's substantial factor inquiry addresses this concern.[183] The substantial factor inquiry determines whether the defendant's actions were a substantial factor in causing plaintiff's injuries. If not, another party or source is legally responsible for the defendant's liability under the common law.[184] The Court's second concern addresses the difficulty of apportioning damages among plaintiffs "removed at different levels of injury from the violative acts."[185] Underlying this concern is the "risk of multiple recoveries."[186] The common law remoteness inquiry reduced this risk by precluding recovery by remote victims.[187] The Court's third con-

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182. *See id.* at 269 (noting difficulty with indirect injuries in determining damages caused by defendant as opposed to "independent factors"). The Court said:

> If the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets.

Id. at 272-73. Thus the inquiry becomes whether a plaintiff can demonstrate sufficiently the particular defendant causing the injuries claimed.

183. *See* RESTATEMENT (SECOND) OF TORTS § 431 (1965) ("The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm."). Recovery is allowed only if the plaintiff can prove that the defendant's acts are the legal cause of the plaintiff's harm.

184. See PROSSER & KEETON, *supra* note 160, at 268 (*"If the defendant's conduct was a substantial factor* in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because the other causes have contributed to the result." (emphasis added)). Thus, if the defendant's conduct was not a substantial factor in causing the plaintiff's liability, courts will absolve him from liability.

185. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 269 (1992). Applying this concern to *Holmes*'s facts, the Court stated, "Assuming that an appropriate assessment of factual causation could be made out, the district court would then have to find some way to apportion the possible respective recoveries by the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages." *Id.* at 273.

186. *Id.* at 269. "The second concern addressed by the *Holmes* Court was the possibility of double recovery of damages where more than one claimant is recognized." Mosesso, *supra* note 158, at 303.

187. Remote is the opposite of proximate. Thus, some courts have considered the closeness of the defendant's actions. *See* City of Brady v. Finklea, 400 F.2d 352, 357 (5th Cir. 1968) (identifying time as one consideration to determine closeness). "[L]apse of time is but one element to be considered along with all other relevant facts in the case." *Id.* Apparently the theory is that the more time and distance that separate the plaintiff from the defendant's actions, the more likely the defendant's acts were not the proximate cause of the plaintiff's injuries. Denying remote parties recovery minimizes the dangers of duplicative recovery. *See Holmes*, 503

cern seeks to maximize the incentive to enforce civil RICO's private attorney general function.[188] This approach is another formulation of the common law's direct versus indirect injury inquiry, as the most directly injured party ordinarily has the greatest motivation to file a RICO claim. Taken together, these three concerns constitute a balanced approach to civil RICO proximate cause that conforms with statutory text, public policy, and common-law doctrine. These concerns also explain why the *Holmes* Court declined to articulate a more definitive text for proximate cause.[189]

Thus, rather than base proximate cause on a rigid reliance rule, *Holmes* established that this element should be governed by a tripartite analysis designed to select the *best* plaintiff to fulfill RICO's private attorney general function.[190] In contrast, the reliance test for proximate cause often excludes the best private enforcer from filing suit and sometimes denies standing to *all* victims of civil racketeering.[191] The Fifth Circuit's decision in *Summit Prop-*

U.S. at 269 (allowing indirect injury claims that would complicate rules that prevent multiple recovery).

188. *See Holmes*, 503 U.S. at 269-70 (discussing third concern). When denying RICO standing to the plaintiff, the Court stated, "[T]hose directly injured, the broker-dealers, could be counted on to bring suit for the [RICO's] vindication." *Id.* at 273.

189. *See id.* at 274 n.20 ("The infinite variety of claims that may arise make it virtually impossible to announce a black letter rule that will dictate the result in every case." (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983))).

190. In the present context, the term, "best plaintiff," necessarily means the best RICO plaintiff. Certainly, the availability of alternative non-RICO remedies should not defeat RICO standing for otherwise qualified RICO plaintiffs. In enacting the Organized Crime Control Act of 1970, of which RICO was Title IX, Congress expressly recognized the inadequacies existing in the law at that time. Pub. L. No. 91-452, 84 Stat. 923 (Finding (5) (1970)). Congress intended RICO to supplement the remedies already available. *See id.* § 904(a) & (b); *cf.* California v. ARC Am. Corp., 490 U.S. 93, 104 (1989) (finding that in antitrust contest, direct/indirect distinction is designed to select best plaintiff to enforce antitrust remedy); Sports Racing Servs., Inc. v. Sports Car Club of Am., 131 F.3d 874, 889 (10th Cir. 1997) (same).

Two circuits have ignored or misapplied this principle, finding instead that the existence of other state remedies preclude RICO standing for an indirectly injured plaintiff who was otherwise best situated to sue under RICO. *See* Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc., 249 F.3d 1068, 1072-73 (D.C. Cir. 2001); Callahan v. A.E.V., Inc., 182 F.3d 237, 266-67 (3d Cir. 1999). This violates the notion that "RICO's statutory language reflects congressional intent to supplement, rather than supplant, existing crimes and penalties." United States v. Deshaw, 974 F.2d 667, 671-72 (5th Cir. 1992); *see also* Pub. L. No. 91-452, § 904(b), 84 Stat. 947 (codified as amended in scattered sections of 18 U.S.C.) (same).

191. *See* Summit Props., Inc. v. Hoechst Celanese Corp., 214 F.3d 556, 562 (5th Cir. 2000) (affirming trial court's dismissal of claims by owners of property with defective plumbing systems and leaving no plaintiff to effectuate RICO's purposes), *cert. denied*, 531 U.S. 1132 (2001). In tobacco litigation, there is often no plaintiff able to sue under RICO because courts refuse to find standing in the case of insurance funds. *See infra* Part VI.C (discussing *Summit*).

erties, Inc. v. Hoechst Celanese Corp. manifests this unfortunate byproduct of the rigid reliance rule.[192]

C. Summit Properties, Inc. v. Hoechst Celanese Corp.[193]

Summit exemplifies the consequences of a rigid reliance rule and a refusal to abide by *Holmes*. In *Summit*, plaintiff property owners brought RICO claims against industry defendants who allegedly made false claims in marketing polybutylene plumbing systems to various contractors.[194] Several systems failed after installation, and the affected property owners sued the industry defendants.[195]

The Fifth Circuit affirmed the district court's dismissal of plaintiff's civil RICO claims,[196] reasoning that plaintiffs failed to show proximate cause because they never detrimentally relied upon the defendants' fraudulent statements.[197] In reaching this result, the Fifth Circuit maintained that no prior circuit case law had considered this issue.[198] At best, this reasoning was

192. *See Summit*, 214 F.3d at 562 (affirming dismissal of RICO claim).

193. 214 F.3d 556 (5th Cir. 2000).

194. *See id.* at 558 (stating facts).

195. *See id.* (stating claim).

196. *See id.* at 562 (affirming lower court's dismissal). The district court's decision to dismiss plaintiff's RICO claims resulted from faulty reasoning that extended beyond a threshold reliance inquiry. Additionally, the district court apparently held that RICO plaintiffs must also be the direct recipients of the misrepresentations. Summit Props., Inc. v. Hoechst-Celanese Corp., 125 F. Supp. 2d 205, 208 (S.D. Tex. 1999), *aff'd*, 214 F.3d 556 (5th Cir. 2000).

> The Court concludes . . . absent an allegation that Defendants made material misrepresentations *to* Plaintiffs *and* that Plaintiffs relied on the mail and wire fraud on which the Civil RICO claims are predicated, Plaintiffs cannot satisfy the proximate causation requirement for purposes of Civil RICO. As a result, Plaintiffs [sic] Civil RICO claim must be dismissed.

Id. (emphasis added). The district adopted the minority rule on "convergence," which requires that the misrepresentation be made to the person from whom the property was obtained. The better rule rejects convergence. *See, e.g.*, United States v. Christopher, 142 F.3d 46, 52-53 (1st Cir. 1998).

197. *See* Summit Props., Inc. v. Hoechst Celanese Corp., 214 F.3d 556, 560 (5th Cir. 2000) ("Nevertheless, the plaintiffs came into possession of PB systems without relying on the alleged fraud. Whether they received their systems from the manufacturers or from prior property owners, any past fraud was not a proximate cause of the plaintiffs' resulting injuries since fraud did not induce the purchase transactions."), *cert denied*, 531 U.S. 1132 (2001).

198. *See id.* at 558-59 (distinguishing prior case law). The Fifth Circuit stated:

> The question before us is whether a plaintiff's reliance on the predicate mail or wire fraud is necessary in order to establish proximate causation. In *Armco Industries Credit Corp. v. SLT Warehouse Co.*, this court distinguished mail fraud under RICO from common law fraud and stated that "to find a *violation* of the federal mail fraud statute it is not necessary that the victim have detrimentally relied on the mailed misrepresentations." Ours is a different question.

Id. (citation omitted).

disingenuous because prior Fifth Circuit case law had squarely held that a RICO claim based on mail or wire fraud did not require reliance.[199] Moreover, by imposing a reliance requirement for proximate cause, the court misconceived the *Holmes* doctrine.[200]

Proper application of the tripartite proximate cause analysis contemplated by *Holmes* produces a different result. First, the facts and circumstances of *Summit* pose no difficulty in distinguishing between damages caused by defendants' alleged RICO violations and damages caused by others. For example, plaintiffs did not allege incorrect installment of the plumbing systems. Rather, the systems were simply "worthless."[201] All damages allegedly resulted from systematic defects that the defendants fraudulently hid from the contractors who installed them.

The second *Holmes* inquiry also supports plaintiffs' proximate cause claim. As *Summit* posed no difficulty apportioning damages among plaintiffs with different levels of injury, no risk of double recovery existed.[202] Unlike

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199. *See* Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 482 (5th Cir. 1986) ("To find a violation of the federal mail fraud statute it is not necessary that the victim have detrimentally relied on the mailed misrepresentations. Indeed, the intended victim need not even have been defrauded for liability to attach under the mail fraud statute." (citation omitted)). In *Summit*, the court simply imposed an additional requirement to the predicate act requirement. "[T]he government can punish unsuccessful schemes to defraud because the underlying mail fraud violation does not require reliance, but a civil plaintiff 'faces an additional hurdle' and must show an injury caused 'by reason of' the violation." *Summit*, 214 F.3d at 559 (citation omitted). Defendants' acts can cause injury without reliance.

200. *See supra* notes 174-92 and accompanying text (observing that Holmes did not require reliance to prove proximate cause). Courts further aggravate this problem when they insist upon "reasonable" reliance. *See, e.g.*, United States v. Brown, 79 F.3d 1550, 1559 (11th Cir. 1996) (unreasonable for buyer to rely on Florida real estate agent's misrepresentation). In effect, this "reasonable reliance" standard absolves perpetrators who commit crimes against especially vulnerable victims. The better rule stands against a "reasonable reliance" requirement. *See, e.g.*, United States v. Circone, 219 F.3d 1078, 1083 (9th Cir. 2000). To the degree that reliance is ever an appropriate measure of proximate cause in two-party transactions, the standard should be "justifiable" rather than "reasonable reliance." *Cf.* Field v. Mans, 516 U.S. 59, 69, 70-76 (1995).

201. *Summit*, 214 F.3d at 558. The *Summit* court stated:

> [P]laintiffs allege . . . that PB plumbing is worse than worthless, that it not only fails to perform its intended function, but also that it causes severe property damage; that PB's inherent defects render it unsuitable for use as a water distribution system, including the fact that after installation, such systems degrade, crack, leak, and spray water.

Id.

202. The court never identified another party that incurred damages. The building inspectors faced no liabilities to third parties resulting from defendants' misrepresentations, nor had the building inspectors suffered any damages to their business or property. Additionally, the court failed to articulate how the contractors who installed the defective systems suffered damage. Apparently, only the property owners suffered directly from the defendants' alleged misstatements.

Holmes, in which more directly injured parties also sued,[203] *Summit* never considered whether the contractors filed suit against the industry defendants. Although the defendants fraudulently induced the contractors to provide defective systems, the property owners ultimately incurred the costs of paying for and removing the defective systems as well as installing new ones. The court could determine the costs with reasonable certainty, and the facts in the case posed no risk of duplicative recovery.

The third *Holmes* concern considers whether the court could rely upon another injured victim to vindicate the law as private attorney general.[204] In *Summit*, the court failed to inquire, much less identify, anyone other than the property owners motivated to vindicate RICO's civil provisions.[205] Because the contractors suffered no direct injury, they lacked incentives to act as private attorney generals. Conversely, the property owners stuck with useless plumbing systems were ideally situated and motivated to fulfill RICO's enforcement function.

In sum, because the Fifth Circuit failed to apply the *Holmes* tripartite analysis, it denied standing to the only victims in a position to seek redress under civil RICO. By comparison, *Holmes* reflects an approach designed to identify the party in the best position to fulfill RICO's enforcement function. For example, to the extent that *Holmes* embodied prior case law, numerous courts properly denied standing to indirectly injured parties because others were better situated to implement the statutory objective of deterring racketeering activity.[206] Thus, as *Holmes* itself illustrates, the tripartite analysis does not threaten traditional proximate cause principles by conferring standing upon all persons adversely affected by racketeering activity.

Moreover, for the *Holmes* tripartite analysis to promote proper proximate cause determinations in RICO cases, courts must apply it objectively with due consideration to the statutory goal of deterring racketeering activity. The Ninth Circuit's decision in *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*[207] (*Oregon Laborers Trust Fund*) illustrates

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203. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 273 (1992) (noting that more directly injured broker-dealers also had brought suit against defendants).

204. *See id.* at 269-70 ("[D]irectly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.").

205. *See supra* note 190 and accompanying text (noting lack of potential claimants after court denies plaintiff standing).

206. *Cf.* Sparling v. Hoffman Constr. Co., 864 F.2d 635, 640 (9th Cir. 1988) (citing cases from various circuit courts denying RICO standing to shareholders of corporation); Carter v. Berger, 777 F.2d 1173, 1176-78 (7th Cir. 1985) (denying RICO standing for taxpayer); Warren v. Mfrs. Nat'l Bank of Detroit, 759 F.2d 542, 545 (6th Cir. 1985) (stating shareholder and employee not entitled to RICO standing).

207. 185 F.3d 957 (9th Cir. 1999).

the consequences of applying proximate cause principles without regard to RICO objectives.

D. Oregon Laborers Trust Fund

Plaintiffs in *Oregon Laborers Trust Fund* were a collection of labor union, health, and welfare trust funds (the funds) suing various tobacco companies to recover increased costs stemming from the tobacco industry's alleged deceptive practices in promoting smoking.[208] The funds claimed to have incurred damages because defendants' fraudulent conduct "resulted in higher incidence of disease and higher expenditures for medical bills by plaintiffs."[209] The funds argued that these increased expenditures occurred because the industry's frauds "prevented plaintiffs from obtaining accurate information . . . which in turn prevented plaintiffs from taking action to reduce smoking rates among their participants."[210] More specifically, the funds alleged that but for the tobacco companies' misrepresentations, plaintiffs would have implemented stop smoking campaigns and other programs to reduce their insured's smoking rates.[211] Such initiatives by the funds allegedly would have reduced their expenditures for health insurance benefits.[212]

In reviewing defendants' motion to dismiss, the Ninth Circuit first considered whether more directly injured victims of the alleged RICO violations would likely seek relief against the tobacco industry, and the court concluded that injured smokers were better situated to file suit.[213] This reasoning, however, disavowed two critical features of RICO. First, as civil RICO authorizes recovery only for damages to business and property, defrauded smokers could sue for personal injuries only under state law.[214] Second, as RICO limits relief to business and property damages, the funds were the only victims in a position to vindicate this interest. More fundamentally, the court's reliance on the possibility of other forms of relief for smokers cannot be reconciled with

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208. *See* Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 961 (9th Cir. 1999) (stating facts).

209. *Id.* at 962.

210. *Id.*

211. *See id.* (stating claim).

212. *See id.* (stating claim).

213. *See id.* at 964 ("The existence of the smokers, who are more direct victims of the alleged wrongful conduct and who can be counted on to vindicate the injury caused by defendants' alleged wrong conduct, weighs heavily in favor of barring plaintiffs' actions.").

214. *See id.* ("Plaintiffs are correct that individuals that suffer personal injury cannot claim medical expenses as 'injury to business or property,' and that the smokers are therefore barred from asserting RICO or antitrust claims."). RICO states, "Any person injured in his *business or property* by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . ." 18 U.S.C. § 1964(c) (2000) (emphasis added).

congressional findings characterizing RICO as supplementing pre-existing remedies that had proven inadequate.[215] In contrast, the *Holmes* Court articulated its tripartite analysis with a full appreciation of RICO's legislative context and objectives.[216]

The *Oregon Laborers Trust Fund* court, however, also premised its ruling on two other features of the *Holmes* standard.[217] The Ninth Circuit noted the difficulty of attributing plaintiffs' damages (payment of health benefits) exclusively to the defendants.[218] Because plaintiffs' losses reflected the insureds' smoking habits, the funds would have to distinguish between damages caused by the defendants' alleged fraud and payments that would have continued despite anti-smoking efforts.[219] Accordingly, the Ninth Circuit found that this *Holmes* factor – difficulty of apportioning damages – weighed in favor of rejecting proximate causation.[220]

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215. One may find RICO's purpose at Organized Crime Control Act of 1970, Pub. L. No. 91-952, 84 Stat. 922-23.

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools . . . and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Id. at 923. RICO was necessary because "the sanctions and remedies available to the Government are unnecessarily limited in scope and impact." *Id.*

216. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 269-70 & n.15 (1992) (discussing tripartite analysis).

217. *See* Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 964-66 (9th Cir. 1999) (applying *Holmes* analysis).

218. *See id.* at 966 ("Although the smokers cannot recover under either RICO or the antitrust laws, they can seek recovery under other state law theories for personal injury and the associated medical costs – the same damages that plaintiffs seek to recover.").

219. *See id.* at 965 (noting difficulty of such distinctions).

> It will be virtually impossible for plaintiffs to prove with any certainty: (1) the effect any smoking cessation programs or incentives would have had on the number of smokers among the plan beneficiaries; (2) the countereffect that the tobacco companies' direct fraud would have had on the smokers, despite the best efforts of the Funds; and (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers of smoking and having been offered smoking cessation programs. On a fundamental level, these difficulties of proving damages stem from the agency of the individual smokers in deciding whether, and how frequently, to smoke. In this light, the direct injury test can be seen as wisely limiting standing to sue to those situations where the chain of causation leading to damages is not complicated by the intervening agency of third parties (here, the smokers) from whom the plaintiffs' injuries derive.

Id. (citation omitted).

220. *See id.* (stating that *Holmes*'s second factor "weigh[ed] heavily" in favor of barring plaintiff's actions).

The Ninth Circuit premised this aspect of its conclusion on the "virtual[ ] impossibil[ity]" of plaintiffs being able to prove damages with "any certainty."[221] Proof difficulties, however, are not grounds for dismissal of a complaint. Rather, motions to dismiss must be gauged by assuming plaintiff's allegations to be true and reading the complaint in a light most favorable to the non-moving party.[222] Problems attendant to proof, therefore, are properly considered only at summary judgment or trial. Moreover, using theories of aggregation and statistical modeling, plaintiffs might well have met their burden of proof.[223]

The final *Holmes* factor, in the court's opinion, also weighed against proximate causation.[224] The Ninth Circuit noted that tobacco litigation was particularly vulnerable to the possibility of duplicative recovery for the same damages.[225] For example, a smoker/insured could sue the tobacco companies directly and recover the same damages for medical payments as the funds.[225]

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221. *Id.* (citation omitted).

222. *See* H.J., Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 249-50 (1989) (discussing standard on motion to dismiss).

> Because respondents prevailed on a motion under Federal Rule of Civil Procedure 12(b)(6), we read the facts alleged in the complaint in the light most favorable to petitioners. And we may only affirm the dismissal of the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

Id. at 249-50 (citation omitted).

223. *See* Int'l Bhd. of Teamsters v. Philip Morris, Inc., 196 F.3d 818, 823 (7th Cir. 1999) ("Statistical methods could provide a decent answer – likely a more accurate answer than is possible when addressing the equivalent causation question in a single person's suit."); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 36 F. Supp. 2d 560, 575 (E.D.N.Y. 1999) (drawing distinction from *Holmes* where it was nearly impossible to determine breakdown of factors causing damages).

> [T]he Blues are likely to have extensive documentation with respect to the medical care they have provided to their insureds. . . . The aggregation of millions of alleged injuries in the instant suit can be expected to yield more accurate results with respect to the causation issue since projections based upon a large statistical base will be available, thus reducing the size of the possible error.

Id. at 575 (citations omitted); *see also* Mosesso, *supra* note 158, at 333-34 (discussing damages calculation).

224. *See* Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 965-66 (9th Cir. 1999) (considering third factor).

> Moreover, although there may be some protection from multiple recovery in state law, this safeguard would not cure the ultimate problem – that the courts would be forced to "adopt complicated rules apportioning damages among plaintiffs at different levels of injury from the violative acts, to obviate the risk of multiple recoveries."

Id. (citation omitted).

225. *See id.* (observing that state laws against duplicative recovery may be insufficient to avoid *Holmes*'s third concern).

This view, however, improperly blurs the common law collateral source rule with RICO proximate cause principles. The collateral source rule entitles tort plaintiffs to recover for medical expenses reimbursed by a third party.[226] As a threshold matter, however, this rule does not ordinarily duplicate recoveries because third party providers often recoup their expenses from plaintiffs who have won personal injury judgments.[227] Moreover, the concern in *Holmes* was the risk of duplicative recovery *under RICO*, not other state remedies.[228]

Indeed, as the collateral source rule plays no role in conventional proximate cause analysis, there is no reason to treat it as an obstacle to proximate cause under civil RICO. On the contrary, the public policy for this rule promotes RICO objectives. Collateral source recovery is premised upon the deterrence principle that tortfeasors should not benefit from precautions that a plaintiff might have taken to minimize the economic consequences of tort injury.[229] Because deterrence principles likewise undergird civil RICO, the

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> It is quite likely that if there are not cases by smokers already pending in Oregon, there will likely be many filed as has been seen in other states. Although the smokers cannot recover under either RICO or the antitrust laws, they can seek recovery under other state law theories for personal injury and the associated medical costs – the same damages that plaintiffs seek to recover.

Id. at 965-66.

226. *See* DAN B. DOBBS, LAW OF REMEDIES, § 3.8(1) (2d ed. 1993) ("The general rule is that benefits received by the plaintiff from a source collateral to the defendant may not be used to reduce that defendant's liability for damages.").

> The usual case is one in which the plaintiff is injured by the defendant's tort but suffers no actual medical expense loss because those expenses are paid for by the plaintiff's own medical insurance or paid for as part of government benefits to veterans. In these cases the rule is quite firm that the defendant must pay for the reasonable value of medical services reasonably required even though the plaintiff's own insurance has paid for such services.

Id. at 267.

227. Through subrogation, insurance companies often attach liens to any settlement or judgment for expenses paid by the insurer. *Id.* at 268. Although the plaintiff recovers the medical expenses paid by the insurer from the defendant, the plaintiff then must pay the insurer for monies paid on the plaintiff's behalf. *Id.* In fact, one of the justifications for the collateral source rule is that it "preserves subrogation rights of any insurer who paid benefits to the plaintiff." *Id.*

228. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(b), 84 Stat. 947 (codified as amended in scattered sections of 18 U.S.C.) ("Nothing in [RICO] shall supersede any provision of Federal . . . law imposing criminal penalties . . . in addition to those provided for in [RICO]."); *see also* United States v. Deshaw, 974 F.2d 667, 671-72 (5th Cir. 1992) ("RICO's statutory language reflects congressional intent to supplement, rather than supplant, existing crimes and penalties."); *supra* note 190 and accompanying text (noting congressional intent in enacting RICO).

229. If the plaintiff purchases insurance, and the defendant were allowed a credit for the insurer's payment, then the defendant would benefit from the plaintiff's diligence in obtaining

rationale for the collateral source rule applies equally in this context. At the very least, this deterrence-based rule should not preclude the right *even to seek relief* for racketeering violations under the guise of proximate cause principles.

Notwithstanding its failures, however, the Ninth Circuit's analysis in *Oregon Laborers Trust Fund* at least recognized that the *Holmes* tripartite analysis governs proximate cause inquiries under RICO.[230] In this respect, the decision represents significant improvement, as most courts have misunderstood *Holmes* and resolved the proximate cause issue by looking exclusively to the reliance element.[231] As such, *Oregon Laborers Trust Fund* holds considerable promise. To the extent that future judges recognize that *Holmes* provides the framework for resolving proximate cause determinations, they eventually will produce a body of case law that applies this framework in a manner consistent with the goals of civil RICO.[232]

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insurance. "[I]t is argued that the wrongdoer should not have a windfall, which would be his if he got credit for a benefit that reduced the plaintiff's damages." DOBBS, *supra* note 226, § 3.8(1).

230. *See* Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 963 (9th Cir. 1999) (recognizing applicability of *Holmes*'s tripartite analysis).

231. *See supra* Part V (detailing reliance holdings).

232. To some degree this is already happening. Although they represent only a small fraction of post-*Holmes* decisions, a few district courts have demonstrated that they readily can resolve proximate cause inquiries by applying the *Holmes* tripartite analysis with RICO's objectives in mind.

After rigorously applying the *Holmes* tripartite analysis, several district courts have denied standing to potential RICO plaintiffs. *See, e.g.*, Chera v. Chera, No. 99-CV-7101(JG), 2000 U.S. Dist. LEXIS 13749 (E.D.N.Y. Sept. 20, 2000) (denying standing to brother claiming unequal partnership distributions); Browne v. Abdelhak, No. 98-6688, 2000 U.S. Dist. LEXIS 12064 (E.D. Pa. Aug. 23, 2000) (denying standing to donors to charitable foundation); Legal Aid Soc'y v. City of New York, 114 F. Supp. 2d 204 (S.D.N.Y. 2000) (applying *Holmes*'s tripartite standard to determine proximate cause in § 1983 action); Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, 103 F. Supp. 2d 134 (N.D.N.Y. 2000) (deeming that injuries of Attorney General were indirect), *aff'd*, No. 00-7972, 2001 U.S. App. LEXIS 21775 (2d Cir. Oct. 12, 2001); Medgar Evers Houses Tenants Ass'n v. Medgar Evers House Assocs., 25 F. Supp. 2d 116 (E.D.N.Y. 1998) (denying standing to tenants and homeowners because HUD was more directly injured); Sebago, Inc. v. Beazer E., Inc., 18 F. Supp. 2d 70 (D. Mass. 1998) (denying standing to owners of buildings with defective insulation); Kaiser v. Stewart, 965 F. Supp. 684 (E.D. Pa. 1997) (denying standing to liquidator of insurance company); Barr Labs. v. Quantum Pharms., 827 F. Supp. 111 (E.D.N.Y. 1993) (denying standing to drug manufacturer competitor).

Some district courts have granted RICO standing based on a proper application of *Holmes*'s tripartite analysis. *See, e.g.*, Sys. Mgmt., Inc. v. Loiselle, 91 F. Supp. 2d 401 (D. Mass. 2000) (granting standing to employees); State Farm Mut. Auto. Ins. Co. v. Abrams, No. 96-C-6365, 2000 U.S. Dist. LEXIS 1524 (N.D. Ill. Feb. 3, 2000) (granting standing to auto insurer against participants of staged accidents); Spitzer v. Abdelhak, No. 98-6475, 1999 U.S. Dist. LEXIS 19110 (E.D. Pa. Dec. 15, 1999) (allowing employees' RICO claims to go forward); Rodriguez v. McKinney, 878 F. Supp. 744 (E.D. Pa. 1995) (granting standing to students of technical school).

VII. Conclusion

Justice Frankfurter wisely observed, "In law . . . the right answer usually depends on putting the right question."[233] This observation explains the present proximate cause controversy under civil RICO. The victim reliance controversy stems from judges asking whether plaintiffs can prove they relied on fraudulent misrepresentations *rather than asking whether plaintiffs can demonstrate proximate cause*. Those courts that measure proximate cause exclusively by looking to victim reliance fail to appreciate that victim reliance is sufficient - *but not always necessary* - to show proximate cause.[234] As *Holmes* demonstrates, a variety of other factors also can prove this point. These factors, which represent an amalgam of traditional common law principles with unique RICO objectives, are preferable to a unitary standard that rigidly reads a reliance element into the statute.

Given the multitude of way to perpetrate frauds without effecting direct victim reliance, neither the mail nor wire statutes make reliance an element of proof. Ironically, by limiting civil RICO standing to plaintiffs who directly relied on fraudulent misrepresentations, the judiciary has completed a cycle of cases which began with circuit decisions holding that RICO affords relief only to *indirectly* injured victims. The Supreme Court summarily rejected this initial line of authority as nonsensical.[235] Public policy is equally ill-served by a judicial standard that effectively immunizes vast categories of fraudulent conduct from civil liability merely because the crimes could be effectuated without direct representations. Based on a century of federal fraud jurisprudence to the contrary and the remedial objectives of civil RICO,[236] courts can readily resolve the rift over victim reliance by heeding Justice Frankfurter's advice and asking the right question.

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233. Estate of Rogers v. Comm'r of Internal Revenue, 320 U.S. 410, 413 (1943).

234. *See supra* note 102 and accompanying text (stating that proof of reliance is not only way to establish proximate cause).

235. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (rejecting indirect injury claim); *see also supra* note 57 and accompanying text (showing Second Circuit case that required indirect injury as prerequisite to bringing suit).

236. RICO is a remedial statute. *See Sedima*, 473 U.S. at 498 ("The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity.").