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RICO Trends: From Gangsters to Class Actions

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This Article begins with a question: Why is RICO used so infrequently? RICO, the Racketeer Influenced and Corrupt Organizations Act (RICO),[1] both a civil cause of action and a crime, was passed in 1970 with much fanfare.[2] The fanfare was deserved. RICO was an imaginative criminal justice initiative aimed

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1. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 922, 941–47 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2006 & Supp. V 2012)).

2. Relevant legislative history on RICO includes: *Organized Crime Control Act of 1969: Hearings on S. 30 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. (1970) [hereinafter *Hearings: Organized Crime Control*]; H.R. REP. NO. 91-1549 (1970); S. REP. NO. 91-617, at 76–83 (1969); S. REP. NO. 81-2370, at 16 (1950).

at complex, systemic crime. RICO's civil cause of action was viewed as a robust tool for plaintiffs and a vital supplement to strained law enforcement resources. After conducting an in-depth analysis of RICO opinions rendered by the federal appellate courts over a seven-year time period, from 2005 to 2011, this Article suggests an answer to the question initially posed: Criminal RICO's time has come and gone; civil RICO's time has not yet arrived.

The data analyzed in this Article suggest that criminal RICO is anachronistic. Simpler, more streamlined statutes are now available to achieve far more easily the benefits criminal RICO used to uniquely bestow: providing context for isolated acts, linking far-flung actors, penetrating organizations to reach key players, providing stiff sentences, and obtaining forfeiture of property used to commit crime and reaped from crime. Analysis of the data herein further suggests that civil RICO, on the other hand, is an untapped resource. Used properly, civil RICO is an optimal private attorney tool and a boon for plaintiffs, particularly in class actions. This is true for two reasons. First, RICO mandates treble damages at a time when—because of court rulings and legislative actions—many plaintiffs are limited to single damages. Second, in light of recent court rulings in RICO cases, RICO's elements dovetail with the class action requirements of commonality and predominance, making RICO class actions particularly viable. Civil RICO also has potential for significant use in the pharmaceutical fraud area because of recent court decisions, which have spelled out exactly what plaintiffs must do to successfully plead and prove RICO in such cases.

This Article proceeds in eight parts. Part I provides an overview of the RICO statute. Part II explains the methodology used to gather the data in this study. Part III discusses quantitative analysis from the data, including how many RICO cases are decided each year and where they are brought. Part IV describes the types of RICO cases brought under both criminal and civil RICO provisions. Part V analyzes the outcomes in RICO cases, including who wins, who loses, and which circuits favor which side. Part VI examines the issues that have dominated RICO court decisions, discussing how recent court decisions on "pattern," "enterprise," and proximate causation make civil RICO cases easier to plead and prove. Part VII focuses on RICO class actions, discussing past and future trends, successes, and failures. Finally, Part VII focuses on pharmaceutical fraud cases, noting why they are especially ripe for use of civil RICO, and Part VIII concludes.

I. OVERVIEW OF RICO

The RICO statute applies to a wide range of conduct and contains abstract terms "not easily correlated with everyday experience."[3] There are four types of

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3. JED S. RAKOFF & HOWARD W. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY § 1.01 (2003).

conduct prohibited by RICO: (1) investing proceeds from a pattern of racketeering activity in an enterprise,[4] (2) acquiring or maintaining control over an enterprise through a pattern of racketeering activity,[5] (3) conducting or participating in the affairs of an enterprise through a pattern of racketeering activity,[6] and (4) conspiring to do any of these types of conduct.[7]

RICO is a complex and unusual statute.[8] It is one of the few statutes that specify both a criminal offense and a civil cause of action. RICO may be prosecuted by United States Department of Justice prosecutors—either criminally or civilly—or it may be brought as a civil suit by private individuals who suffered damage to their business or property.[9] Criminal RICO carries stiff penalties: a possible prison term of twenty years, forfeiture of property acquired or maintained in violation of RICO,[10] and fines of $250,000 per offense—$500,000 per offense if the defendant is an organization.[11] Civil RICO is similarly formidable, as those found liable pay treble damages, as well as attorney's fees and costs.[12]

RICO's civil cause of action, which is available to "[a]ny person injured in his business or property by reason of a violation" of RICO,[13] requires RICO plaintiffs to prove that the defendants committed crimes.[14] Thus, in addition to proving the "RICO elements" of "pattern" and "enterprise," private plaintiffs in civil RICO actions must prove the elements of the crimes they allege as

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4. 18 U.S.C. § 1962(a) (2006). Furthermore, RICO specifies that the "enterprise" must not be one that is "engaged in, or the activities of which affect, interstate or foreign commerce." § 1962(a)–(c).

5. § 1962(b).

6. § 1962(c).

7. § 1962(d).

8. *See, e.g.*, Hemi Grp., LLC v. City of New York, 559 U.S. 1, 19 (2010) (Breyer, J., dissenting) (noting that the statutory framework of RICO is complex); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 527 (1985) (referring to RICO as a "complex statute").

Excellent resources on RICO include: JED S. RAKOFF & HOWARD W. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY (1989); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237 (1982); James D. Calder, *RICO's "Troubled . . . Transition": Organized Crime, Strategic Institutional Factors, and Implementation Delay, 1971-1981*, 25 CRIM. JUST. REV. 31 (2000); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987).

9. 18 U.S.C. § 1964(c) (2006).

10. 18 U.S.C. § 1963(a) (2006).

11. 18 U.S.C. § 3571(a)(3), (c)(3) (2006). A court also is authorized to fine the defendant "not more than twice the gross profits or other proceeds" derived from this offense. § 1963(a).

12. § 1964(c).

13. *Id.*

14. § 1964(a)–(c) (requiring a pattern of racketeering activity); *see also* 18 U.S.C. § 1961(1) (2006) (listing the crimes that qualify as a "racketeering activity" for the purpose of establishing a pattern).

"racketeering activity."[15] If plaintiffs allege money laundering as the racketeering activity, for example, they must prove that the defendants (1) with the intent to promote or carry on a specified unlawful activity, such as mail fraud, (2) knowing that the transaction is designed to disguise the nature of the proceeds from the mail fraud, (3) conducts or attempts to conduct a financial transaction that involves the proceeds from the mail fraud.[16] The elements plaintiffs are required to prove are the same elements federal prosecutors must prove when prosecuting a criminal case alleging money laundering.[17] In a RICO civil action, plaintiffs prove these elements by a preponderance of the evidence rather than beyond a reasonable doubt.[18]

RICO contains three terms of art: (1) "racketeering activity," (2) "pattern" of racketeering activity, and (3) "enterprise."[19] Section 1961(1) of RICO provides a list of crimes that qualify as "racketeering activity."[20] Generic state crimes (such as murder, kidnapping, and robbery) and approximately 150 specifically enumerated federal offenses qualify as "racketeering activities."[21] "Racketeering activity" encompasses a large variety of white-collar offenses including financial institution fraud, naturalization and immigration fraud, bankruptcy fraud, money laundering, and media and computer program counterfeiting.[22]

A person becomes liable under RICO by committing a *pattern* of racketeering activity.[23] RICO defines a "pattern of racketeering activity" as at least two acts of racketeering activity occurring within a ten-year time period.[24] According to the Supreme Court, racketeering acts must be *related* to each other—but not so related that the acts merge into one act[25]—and must also

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15. *See* Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1302 (7th Cir. 1987) ("[M]any lower courts . . . have reached the conclusion that proof [of the predicate act] by a preponderance of the evidence is sufficient to establish a civil violation of section 1962.").

16. 18 U.S.C. § 1956 (2006).

17. *Id.*

18. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985) (noting that "[t]here is no indication that Congress sought to depart from this general" preponderance standard of proof for civil RICO actions).

19. 18 U.S.C. § 1961(1), (4), (5) (2006).

20. § 1961(1).

21. *Id.*

22. § 1961(1).

23. § 1962.

24. § 1961(5) ("[A] 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]").

25. This issue of whether the acts are related enough to satisfy *H.J. Inc.*'s "relatedness" requirement, but not so related as to merge into one act (thus defeating RICO's requirement of *two* racketeering activities), arises in RICO cases where mail fraud (or mail fraud analogs, such as wire fraud, bank fraud, and health care fraud) is alleged as the racketeering activity. *See, e.g.*, Al-Abood *ex rel.* Al-Abood v. El-Shamari, 217 F.3d 225, 238 (4th Cir. 2000) (quoting Anderson v. Found. for Advancement, Educ. & Emp't of Am. Indians, 155 F.3d 500, 506 (4th Cir. 1998); Menasco, Inc. v. Wasserman, 886 F.2d 681, 684 (4th Cir. 1989)). Some courts have held that two or more schemes

demonstrate "continuity" to satisfy RICO's pattern requirement.[26] Continuity may be shown by a series of related predicates "extending over a substantial period of time" or over a shorter period of time if they "threaten[] . . . future criminal conduct."[27] Part VI.A of this Article discusses the pattern requirement.

Enterprise is defined in the statute 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."[28] Enterprise is also a fluid concept,[29] as discussed in Part VI.B of this Article.

The courts have created an extensive body of common law for civil RICO regarding these terms of art, as well as proximate causation,[30] compensable damage,[31] standing,[32] reliance,[33] and statute of limitations.[34]

II. METHODOLOGY

The data analyzed in this Article consists of all the RICO opinions rendered by the federal courts of appeals between 2005 and 2011.[35] Reported and

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to defraud are needed since the various mailings merge into one scheme. *See* RAKOFF & GOLDSTEIN, *supra* note 3, § 1.04[2][b][iii]. In contrast, other courts have held that separate mailings, even in perpetration of a single scheme, are separate acts. *Id.*

26. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989).

27. *Id.* at 242 (noting that a "pattern" must show a "relationship" among the racketeering acts and "continuity" of the acts).

28. *See* 18 U.S.C. § 1961(4) (2006).

29. *See* Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi., 747 F.2d 384, 401 (7th Cir. 1984) ("Discussion of this person/enterprise problem under RICO can easily slip into a metaphysical or ontological style of discourse . . . ?").

30. *See, e.g.*, Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 460–61 (2006) (noting that the civil RICO proximate cause requirement prevents indirect injuries from becoming an actionable harm); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992) (holding that civil RICO requires a showing of proximate causation).

31. *See, e.g.*, Ironworkers Local Union 68 v. AstraZeneca Pharm., LP, 634 F.3d 1352, 1361 (11th Cir. 2011) (citations omitted) (discussing a plaintiff's allegation of economic injury); Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1285 (11th Cir. 2006) (discussing the allegation of damages at the FED. R. CIV. P. 12(b)(6) stage).

32. *See, e.g.*, Beck v. Prupis, 529 U.S. 494, 499 (2000) (noting the Eleventh Circuit held that a person does not have standing to sue under RICO unless he or she was injured by an act of racketeering) (citing Beck v. Prupis, 162 F.3d 1090, 1098 (11th Cir. 1998)); Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 255–56 (1994) (citations omitted) (addressing whether individuals in a class action had standing to bring a civil RICO claim); *Holmes*, 503 U.S. at 268–69 (noting that, as a general matter, plaintiffs do not have standing when they complain of harms done to a third person).

33. *See, e.g.*, Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 653–60 (2008) (citations omitted) (holding that first-party reliance is not an "indispensable requisite of proximate causation" in a civil RICO claim).

34. *See, e.g.*, Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 146 (1987) (noting that the civil RICO statute does not have an express statute of limitations).

35. United States Supreme Court decisions are not included in the sample because there were so few relevant decisions between 2005 and 2011. The Supreme Court rendered only six substantive RICO decisions between 2005 and 2011. Hemi Grp., LLC v. City of New York, 559

unreported opinions are included in the database because both are needed to accurately track trends. The database, which includes 277 cases, is analyzed in Parts III, IV, and V of this Article (based on quantity, types, and outcome). A smaller sample, consisting of eighty-one cases providing some analysis of RICO issues,[36] was culled from the full database and is discussed in Part VI, which focuses on specific RICO issues.

III. QUANTITY: HOW MANY RICO CASES ARE THERE AND WHERE ARE THEY BROUGHT?

As Chart 1 in Appendix A-1 reveals, of the 227 RICO opinions rendered by the federal courts of appeals between 2005 and 2011, 157 (69%) were civil RICO cases and 70 (30%) were criminal.[37] This author conducted a similar study of federal appellate RICO opinions rendered between 1999 and 2001.[38] Interestingly, the ratio of civil to criminal RICO opinions in the prior study—78% civil to 22% criminal—is remarkably consistent with the ratio in the present study.[39] The peak year for RICO decisions in the current study was 2006, with 29 decisions; however, the quantity remained steady, with an average of 22.5 decisions per year.[40]

As Chart 2 in Appendix A-1 reveals, the Eleventh Circuit (with 26 decisions), Third Circuit (with 24 decisions), and Ninth Circuit (with 21

U.S. 1 (2010); Boyle v. United States, 556 U.S. 938 (2009); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008); Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006); Scheidler v. Nat'l Org. for Women, 547 U.S. 9 (2006). These decisions are discussed when relevant throughout this Article and discussed extensively in Part VI. District court opinions are not included in the sample because many of them are extremely brief—often without sufficient information to determine the RICO conduct or issues at hand. Also, for many RICO cases, there are multiple district court opinions rendered on the same cases during the relevant seven-year time period. Thus, excluding district court opinions and focusing only on appellate decisions permitted a more accurate analysis of RICO trends, not one tainted by multiple rulings in a single case. In comparison to the district court opinions, virtually all of the federal appellate decisions rendered between 2005 and 2011 have some substantive discussion of at least one of the RICO issues raised. Over one-third of the federal appellate decisions contain extensive issue discussions, often critiquing and refining the analyses of other courts, academics, and legislators. Focusing on these decisions provides rich terrain on which to assess RICO trends.

While a number of states have RICO statutes, state court opinions were not included in the sample because of their content, state-specificity, and highly variable frequency.

36. Many of the opinions in the full data set were brief, involving little discussion of issues. While these opinions yield data on the quantity, type of case, and outcome, they are not helpful in assessing issue trends.

37. *See infra* Appendix A-1, at Chart 1.

38. *See* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 22 n.110 (2002). The federal appellate courts rendered 185 RICO opinions between 1999 and 2001. *Id.* at n.111. Of these, 145 (78%) were civil RICO cases and forty (22%) were criminal RICO prosecutions. *Id.*

39. *Id.*; *see also infra* Appendix A-1, at Chart 1 (providing the number of civil and criminal RICO opinions delivered between 2005 and 2011).

40. *See infra* Appendix A-1, at Chart 1.

decisions) dominate civil RICO cases.[41] In comparison, the First (with 3 decisions), Fourth (with 5 decisions) and D.C. (with 1 decision) Circuits have rendered the fewest civil RICO opinions.[42] The Second Circuit (with 21 decisions), Sixth Circuit (with 10 decisions) and Seventh Circuit (with 7 decisions) have rendered the most criminal RICO decisions, while the First (with 2 decisions), Fifth (with 3 decisions), Eighth (with 1 decision) and D.C. (with 2 decisions) Circuits have rendered the fewest criminal RICO decisions.[43] Given the breadth of RICO's reach, the varying quantity of criminal RICO decisions among the circuits presumably reflects the local U.S. Attorneys' expertise in and preference for RICO cases.

It is interesting to compare the data in the present study to the RICO data collected by the Administrative Office of the Courts (AOC).[44] Both studies show significantly more civil RICO cases than criminal RICO cases.[45] Unfortunately, any further comparison to the AOC data or the conclusions from AOC data are not possible because AOC data are collected inconsistently. The AOC calculates the number of civil RICO *cases* filed per year, but counts the number of *defendants* indicted in criminal RICO cases. This creates two problems. The first problem is obvious: the AOC is comparing apples to oranges (*cases filed* versus *defendants charged*). The second problem is that AOC data overstate the number of criminal RICO cases, since there are almost always multiple defendants indicted in each criminal RICO matter. However, even with these limitations, it is revealing that AOC data—like the data in this Article—show that civil RICO cases clearly dominate criminal RICO cases.

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41. *See infra* Appendix A-1, at Chart 2.

42. *See infra* Appendix A-1, at Chart 2.

43. *See infra* Appendix A-1, at Chart 2.

44. The AOC data reflect that, in the following years, the following number of civil RICO cases were filed: 1994 (902); 1995 (883); 1996 (830); 1997 (834); 1998 (779); 1999 (758); 2000 (826); 2001 (687); 2002 (793); 2003 (732); 2004 (839); 2005 (694); 2006 (683); 2007 (655); 2008 (727); 2009 (795); and 2010 (955). ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY tbl. C-2 (2001–2010), *available at* http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/StatisticalTables_Archive.aspx (follow "December" hyperlink for the desired year; then follow "Table C-2" hyperlink) (last visited Sept. 20, 2013).

The AOC data reflect that, in the following years, the following number of defendants were indicted on RICO charges: 1994 (194); 1995 (188); 1996 (181); 1997 (144); 1998 (214); 1999 (162); 2000 (157); 2001 (110); 2002 (218); 2003 (218); 2004 (156); 2005 (177); 2006 (179); 2007 (110); 2008 (166); 2009 (150); and 2010 (149). FEDERAL CRIMINAL CASE PROCESSING STATISTICS, BUREAU OF JUSTICE STATISTICS, *FY1994–FY2010 Number of defendants in cases filed*, http://bjs.ojp.usdoj.gov/fjsrc/ (follow "Number of defendants in cases *filed*" hyperlink; then select all of the years; then select the "Select by chapter and section within U.S.C. Title 18" option; then select "96—Racketeer Influenced and Corrupt Organizations"; then select "all sections"; then select your desired output) (last visited Sept. 20, 2013).

45. Whereas the data collected for this Article reveal an approximate 3-to-1 ratio of civil to criminal RICO opinions rendered, the AOC data reveal an approximate 5-to-1 ratio of civil cases *filed* to criminal RICO defendants *indicted*. *See* STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, *supra* note 44; BUREAU OF JUSTICE STATISTICS, *supra* note 44.

IV. TYPES: WHAT KINDS OF RICO CASES ARE BROUGHT?

As Chart 3 in Appendix B-1 shows, prosecutions for gang and drug activity significantly dominate criminal RICO cases (40 out of 66 cases, or 61%), followed distantly by prosecutions for fraud (8 out of 66 cases, or 12%), organized crime (7 out of 66 cases, or 11%) and bribery/extortion/public corruption (7 out of 66 cases, or 11%).[46]

As Chart 4 in Appendix B-1 demonstrates, most civil RICO cases are brought by or against businesses.[47] Parsing the data in Chart 4 suggests the following three observations. First, a large number (40%) of the civil RICO cases are brought exactly for the purpose civil RICO was intended[48]: suits brought by businesses against other businesses dominate civil RICO actions.[49] "Business deals gone bad"—disagreements between former business collaborators—account for 25% of civil RICO cases.[50] Suits brought by businesses against competitors account for 9% of civil RICO cases.[51] Ten percent of civil RICO cases (investment advice and products liability cases) involve allegations of systemic wrongdoing by an organization or organizations.[52] These three uses of RICO are consistent with Congress's intent that civil RICO would be used to combat sophisticated business frauds.[53] Congress's "Statement of Findings and Purpose" for RICO refers to the "fraud" that "drains billions of dollars from America's economy" and harms "innocent investors and competing organizations."[54] Senator Roman L. Hruska, who helped shepherd RICO through Congress, consistently focused on RICO's applicability to business frauds; in hearings, he referred to misconduct involving or affecting brokerage houses and accounting firms.[55]

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46. *See infra* Appendix B-1, at Chart 3.
47. *See infra* Appendix B-1, at Chart 4.
48. *See infra* Appendix B-1, at Chart 4.
49. *See infra* Appendix B-1, at Chart 4.
50. *See infra* Appendix B-1, at Chart 4.
51. *See infra* Appendix B-1, at Chart 4.
52. *See infra* Appendix B-1, at Chart 4.
53. *See* H.R. REP. NO. 91-1549, at 1 (1970).
54. *Id.*
55. 113 CONG. REC. 17,997–99 (1967) (statement of Sen. Hruska). Senator McClellan, the sponsor of RICO, spoke about RICO's ability to respond to crime in every type of business: accounting, banking, charities, construction, insurance, real estate, and stocks and bonds. 116 CONG. REC. 591–92 (1970) (statement of Sen. John McClellan) (quoting S. REP. NO. 307, at 171 (1951)).

Senator McClellan directly addressed the objection that RICO applied beyond organized crime:

> [T]he curious objection has been raised to S. 30 . . . [that it is] . . . not somehow limited to organized crime . . . as if organized crime were a precise . . . legal concept . . . .Actually, of course, it is a functional concept like white collar crime, serving simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances.

Second, approximately 18% of the civil RICO cases in this data set were brought in cases for which civil RICO clearly was not intended to be used. For example, 9% of the civil RICO cases were brought by individuals convicted of crimes who sued law enforcement or prison officials on issues arising from their criminal case in thinly disguised efforts to contest their criminal convictions.[56] Another 9% of the civil RICO cases were brought by individuals seeking to address what appeared to be trivial personal disagreements.[57]

The third observation is that government officials—almost always federal government officials—were involved in nearly one-fourth of civil RICO cases: 22% as defendants ("alleged wrongdoing by government officials" and "criminal defendant alleging government wrongdoing") and 1% as plaintiffs.[58]

V. OUTCOMES: WHAT HAPPENS IN RICO CASES?

Generally, who wins in a RICO action depends on whether the case is criminal or civil. The prosecution wins most of the time in criminal RICO cases and the defense wins most of the time in civil RICO cases.[59] As Chart 5 in Appendix B-2 shows, the prosecution won in 99 % (69 out of 70) of the criminal

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116 CONG. REC. 18,913 (1970) (statement of Senator John McClellan). Furthermore, Senator McClellan noted that "[w]hatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem." *Id.* at 18,914. Representative Poff, the House sponsor of RICO, chided those who expressed concern that RICO applied beyond organized crime:

> [M]ost disturbingly, however, this objection seems to imply that a double standard of civil liberties is permissible. S. 30 is objectionable on civil liberties grounds, it is suggested, because its provisions have an incidental reach beyond organized crime. Coming from those concerned with civil liberties in particular, this objection is indeed strange. Have they forgotten that the Constitution applies to those engaged in . . . white collar or street crime?

116 CONG. REC. 35,344 (1970) (statement of Sen. Richard Poff). RICO supporters, such as the Chamber of Commerce of the United States, and RICO critics, such as the Association of the Bar of the City of New York, understood RICO to reach white collar crime, as well as organized crime. *Hearings: Organized Crime Control*, *supra* note 2, at 294 (statement of Sheldon H. Elsen, Comm. Chairman, Association of Bar of City of New York) (noting that RICO "swcep[s] far beyond the field of organized crime"); *see* 116 CONG. REC. 6,708 (1970) (statement of Sen. Richard Poff) (noting that the association recognizes the necessity of the broad nature of RICO).

The author of RICO, Professor G. Robert Blakey, had consistently maintained that RICO applies to any type of sophisticated crime, including commercial and other fraud. Blakey, *supra* note 8, at 280 ("Congress fully intended . . . to have RICO apply *beyond* . . . 'organized crime' . . . . to the general field of commercial and other fraud; . . . Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud.").

56. *See* Appendix B-1.

57. *See* Appendix B-1.

58. *See* Appendices B-1 and B-2.

59. *See infra* Appendix B-2, at Chart 5.

cases in the study sample, while the defense won in 83% (131 out of 157) of the civil cases.[60]

As can be seen in Chart 6 in Appendix B-2, the prevailing party remains consistent throughout the circuits in criminal cases.[61] This is not surprising, given the consistent success by the government in criminal cases.

However, as Chart 7 in Appendix B-2 shows, the prevailing party varies among the circuits in civil RICO cases.[62] Defendants win less in the Ninth Circuit (57% of cases) and more in the Second and Third Circuits (95% and 96% of cases, respectively).[63]

Although plaintiffs in civil cases do not win often,[64] when they do win, they win big verdicts or settlements, for example, of $218 million,[65] $177 million,[66] and $121.8 million,[67] and attorney's fees of $29.9 million[68] and $10.25 million.[69]

VI. ISSUES: WHAT DOMINATES RICO JURISPRUDENCE

Thirty-six percent (81 out of 227) of the cases in this study contain substantive discussion of RICO issues.[70] As Chart 8 in Appendix C-1 shows, three issues dominate: (1) whether there is a pattern of racketeering activity, (2) whether the plaintiff's alleged injury has been proximately caused by the defendants' alleged conduct, and (3) whether there is a qualifying RICO enterprise.[71]

These three issues account for 69% of all RICO issues discussed.[72] The first and third issues—pattern and enterprise—arise in criminal and civil RICO cases; the second issue—proximate causation—arises only in civil RICO actions.

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60. *See infra* Appendix B-2, at Chart 5.

61. *See infra* Appendix B-2, at Chart 6.

62. *See infra* Appendix B-2, at Chart 7.

63. *See infra* Appendix B-2, at Chart 7.

64. *See infra* Appendix B-2, at Chart 7.

65. *In re* Ins. Brokerage Antitrust Litig., 282 F.R.D. 92, 100 (D.N.J. 2012) (citing *In re* Ins. Brokerage Antitrust Litig., 579 F.3d 241 (3d Cir. 2009)).

66. Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339, 1343–44 (11th Cir. 2008).

67. *In re* Ins. Brokerage Antitrust Litig., 579 F.3d 241, 248 (3d Cir. 2009).

68. *Id.*

69. *In re* Ins. Brokerage Antitrust Litig., 282 F.R.D. at 119–20.

70. *See infra* Appendix C-1.

71. *See infra* Appendix C-1.

72. *See infra* Appendix C-1. Other issues regularly arising in the cases within this study include:

Failure to Plead Predicate Acts. "Racketeering activity" consists of the crimes listed in § 1961(1). Crimes have elements. Failure to fully plead all elements of the alleged racketeering activity leads to dismissal of the complaint or judgment for the defendants. *See, e.g.*, Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1293 (11th Cir. 2010) (holding that the plaintiffs failed to sufficiently plead the elements of mail fraud, the alleged underlying racketeering activity, causing dismissal of the RICO claims); Edwards v. Prime, Inc., 602 F.3d 1276, 1292–94 (11th Cir. 2010)

(holding that the plaintiffs failed to plead violations of the predicate acts required by RICO, leading to dismissal of those causes of action).

Statute of Limitations. RICO does not specify a statute of limitations, but the Supreme Court held that a four-year statute of limitations applies. Rotella v. Wood, 528 U.S. 549, 552–53 (2000) (citing Rotella v. Wood, 526 U.S. 1003 (1999) (mem.) (granting writ of certiorari); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156 (1987)). Issues arise as to when plaintiffs knew or should have known of the defendant's alleged racketeering activity and whether new acts of misconduct occurred during the limitations period. *See, e.g.*, CSX Transp. v. Gilkison, 406 F. App'x 723, 728 (4th Cir. 2010) (noting that the plaintiffs argued the Fourth Circuit should adopt the "separate accrual" rule for new predicate acts occurring within the statutory limitations period); Jay E. Hayden Found. v. First Neighbor Bank, 610 F.3d 382, 386 (7th Cir. 2010) (affirming that the plaintiffs should have discovered the information that gave rise to the RICO frauds within the statutory period, warranting dismissal).

"*Reves.*" In *Reves v. Ernst & Young*, the Court held that one "must participate in the operation or management of the enterprise itself" to be subject to liability under section 1962(c) of RICO. 507 U.S. 170, 185 (1993). Courts analyzing this issue focus on the defendants' degree of involvement in the enterprise. *See, e.g.*, United States. v. Fowler, 535 F.3d 408, 418 (6th Cir. 2008) (determining that the "operation or management" test of *Reves* was satisfied even though there was no proof that the defendant had a "managerial role" in the enterprise, noting that *Reves* is not limited to upper management of an enterprise); Tal v. Hogan, 453 F.3d 1244, 1270 (10th Cir. 2006) (noting that simply misrepresenting facts is not sufficient to meet the "operation or management" test of *Reves*).

Preemption. In the RICO cases in this study, preemption arises most often in the context of the Private Securities Litigation Reform Act of 1995 (PSLRA). *See* 15 U.S.C. §§ 77z-1, 78u-4 (2006 & Supp. V 2011).

In the PSLRA, Congress barred civil actions based on "any conduct that would have been actionable as fraud in the purchase or sale of securities." 18 U.S.C § 1964(c) (2006). *See, e.g.*, AFFCO Invs. 2001, LLC v. Proskauer Rose, LLP, 625 F.3d 185, 189–90 (5th Cir. 2010) (quoting § 1964(c)) (holding that ownership interests in a LLC created by a tax shelter, the subject of a RICO fraud action, were securities and, thus, barred under the PSLRA). Other RICO cases raise the issue of whether the McCarran-Ferguson Act, which prevents Congress from interfering with the states' regulation of insurance, preempts RICO actions alleging insurance fraud. *See, e.g.*, Weiss v. First Unum Life Ins. Co., 482 F.3d 254, 269 (3d Cir. 2007) (holding that the McCarran-Ferguson Act did not bar plaintiff's RICO action and finding that RICO claims "do[] not and will not impair New Jersey's state insurance scheme").

Reliance. In *Bridge v. Phoenix Bond & Indemnity Co.*, the Supreme Court held that first-party reliance is not required in RICO cases alleging mail fraud as the predicate acts. 553 U.S. 639, 660 (2008) (quoting Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 478 (2006) (Thomas, J., concurring in part and dissenting in part)). The Court noted, however, that "at least third-party reliance [may be needed] in order to prove causation." *Id.* at 659.

Type of Injury. Plaintiffs in civil RICO actions must allege economic injury arising from the defendant's actions. *Cf.* Sedima, S.P.R.L. v. Imrex Co. 473 U.S. 479, 496 (1985) ("[T]he plaintiff . . . can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation."). This requirement comes from the language of section 1964(c), which gives a private cause of action to "[a]ny person injured in his business or property." 18 U.S.C. § 1964(c) (2006). *See, e.g.*, Ironworkers Local Union 68 v. Astrazeneca Pharm. LP, 634 F.3d 1352, 1363 (11th Cir. 2011) (noting that the plaintiff must show that the prescription of a particular drug was "unnecessary or inappropriate according to sound medical practice" in order to establish an economic injury under RICO); Living Designs, Inc. v. E.I. DuPont De Nemours & Co., 431 F.3d 353, 363 (9th Cir. 2005) (indicating that the plaintiff alleged the economic injury was being "duped into accepting low settlements").

All three issues arise from RICO elements. This is not surprising, as all three of these elements are unusually amorphous and non-intuitive as statutory terms. Difficulty in applying these elements to real-world situations is part of the reason RICO has been misused, overused, underused, and generally maligned.[73] However, the evolution of these elements during the seven years of this study has been significant. The courts, especially the Supreme Court, have added structure to these concepts, making RICO easier and more predictable for litigants and courts.[74]

It is interesting to note which courts are discussing these issues. Most of the circuits have had fairly equal experience handling the pattern issue. As Chart 9 in Appendix C-2 reflects, the Second, Third, Seventh, and Tenth Circuits have all rendered extensive discussions of pattern during the study period (with 4 cases each), followed by the Fourth Circuit (with 3 cases), and the Sixth and Eleventh Circuits (with 2 cases each).[75] The First, Eighth, and Ninth Circuits (with 1 case each), as well as the Fifth and D.C. Circuits (with no cases),[76] have little experience dealing with the pattern issue.

As Chart 10 demonstrates, the Third Circuit has the most experience (with 5 cases) dealing with the enterprise issue, followed by the Second and Seventh Circuits (with 4 cases each), and the Tenth and Eleventh Circuits (with 3 cases each).[77] As with the pattern issue, the Sixth, Eighth, and D.C. Circuits (with 1 case each), followed by the First, Fourth, and Fifth Circuits (with no cases), have little experience with the enterprise issue.[78]

As Chart 11 in Appendix C-4 demonstrates, the Ninth Circuit has the most experience with the proximate causation issue (with 6 cases), followed by the Second and Eleventh Circuits (with 4 cases each), and the Third and the Seventh Circuits (with 3 cases each).[79] The Fifth, Eighth, and Tenth Circuits (with 1 case each), and the First, Fourth, Sixth, and D.C. Circuits (with no cases) have the least experience with the proximate causation issue.[80]

Thus, overall, the Second, Third, and Seventh Circuits have the most experience dealing with the three most common RICO issues while the First, Fifth, and D.C. Circuits have the least.[81] This presents two interesting

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73. *See* Pamela Bucy Pierson, *RICO, Corruption and White-Collar Crime*, 85 TEMP. L. REV. 524, 568–69 (forthcoming 2013).

74. *See, e.g.*, Boyle v. United States, 556 U.S. 938, 945–49 (2009) (citations omitted) (clarifying enterprise); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268–74 (1992) (footnote omitted) (citations omitted) (clarifying proximate cause); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 250 (1989) (citing 18 U.S.C. § 1961(1) (2006)) (clarifying pattern).

75. *See infra* Appendix C-2, at Chart 9.

76. *See infra* Appendix C-2, at Chart 9.

77. *See infra* Appendix C-3, at Chart 10.

78. *See infra* Appendix C-3, at Chart 10.

79. *See infra* Appendix C-4, at Chart 11.

80. *See infra* Appendix C-4, at Chart 11.

81. *See infra* Appendix C-2, at Chart 9; *infra* Appendix C-3, at Chart 10; *infra* Appendix C-4, at Chart 11.

observations. The Fourth Circuit, which otherwise has no experience dealing with the RICO issues of enterprise and proximate causation, has some considerable experience with the pattern issue.[82] The Ninth Circuit, which has very little experience with RICO issues concerning pattern and enterprise, has—by a wide margin—the most experience dealing with the proximate causation issue.[83]

A. "Pattern" of Racketeering Activity

One must engage in a *pattern* of racketeering activity before RICO liability attaches.[84] Section 1962(a) prohibits investing the proceeds from a pattern of racketeering in an enterprise.[85] Additionally, § 1962(b) prohibits acquiring or maintaining control of an enterprise through a pattern of racketeering activity.[86] Section 1962(c) prohibits conducting the affairs of an enterprise through a pattern of racketeering activity.[87] Finally, § 1962(d) prohibits conspiring to do any of these acts.[88] Determining whether "racketeering activity" is present is fairly straightforward: one simply looks to the list of racketeering activities in § 1961(1).[89] This list includes generic state offenses and approximately 150 specifically listed federal statutes.[90] Determining whether a pattern of racketeering activity exists, however, is more complicated. Section 1961(5) of RICO provides a minimal definition of *pattern of racketeering activity*, characterizing it as "at least two acts of racketeering activity . . . within ten years."[91]

The beginning point of pattern analysis is the Supreme Court's 1989 decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*[92] Although the pattern issue was the most frequently litigated RICO issue during the seven-year time period (from 2005 to 2011),[93] it is the easiest to analyze, primarily because the Court's guidance in *H.J. Inc.* is straightforward.[94] As a result, analysis by the federal appellate courts on the pattern issue is simply an application of *H.J. Inc.*, and the outcome of this issue is predictable.

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82. *See infra* Appendix C-2, at Chart 9; *infra* Appendix C-3, at Chart 10; *infra* Appendix C-4, at Chart 11.

83. *See infra* Appendix C-2, at Chart 9; *infra* Appendix C-3, at Chart 10; *infra* Appendix C-4, at Chart 11.

84. 18 U.S.C. § 1962(a) (2006).

85. *Id.*

86. § 1962(b).

87. § 1962(c).

88. § 1962(d).

89. § 1961(1).

90. *Id.*

91. § 1961(5) (emphasis added).

92. 492 U.S. 229 (1989).

93. *See infra* Appendix C-1.

94. *See H.J. Inc.*, 492 U.S. at 237–50 (citations omitted).

1. Supreme Court Guidance

In 1989, acknowledging that "definitional problems . . . in interpreting RICO's pattern requirement inevitably lead to uncertainty regarding the statute's scope,"[95] the Supreme Court tackled the pattern requirement.[96] Customers of the defendant, Northwestern Bell Telephone Company, brought a putative class action alleging that the defendant paid bribes to members of the Minnesota Public Utilities Commission (MPUC) to obtain higher (and allegedly unfair) rates.[97] The district court dismissed the complaint.[98] The Eighth Circuit affirmed the dismissal on the ground that the plaintiffs failed to demonstrate a pattern of racketeering activity.[99] The Supreme Court reversed.[100] Characterizing pattern as a "flexible concept,"[101] the Court looked to RICO's legislative history and held "that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity."[102]

The Court then expounded on "relatedness" and "continuity."[103] The relatedness aspect is present if the "criminal acts . . . have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[104] The continuity requirement should, the Court explained, "derive from a commonsense, everyday understanding of RICO's language,"[105] and may be shown "in a variety of ways."[106] Continuity is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition."[107] The Court noted that closed-ended continuity may be shown "by proving a series of related predicates extending over a substantial period of time," and that "[p]redicate acts extending over a few weeks or months . . . do not satisfy this requirement."[108] Open-ended continuity, on the other hand, may be shown by a

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95. *Id.* at 241 n.3.
96. *Id.* at 232.
97. *Id.* at 233.
98. *Id.* at 234 (citing H.J. Inc. v. Nw. Bell Tel. Co., 648 F. Supp. 419 (D. Minn. 1986), *aff'd*, 829 F.2d 648 (8th Cir. 1987), *rev'd*, 492 U.S. 229 (1989)).
99. *Id.* at 234–35 (quoting H.J. Inc. v. Nw. Bell Tel. Co. 829 F.2d 648, 650 (8th Cir. 1987), *rev'd*, 492 U.S. 229 (1989)).
100. *Id.* at 235.
101. *Id.* at 246.
102. *Id.* at 239.
103. *Id.* at 239–43 (citing 18 U.S.C. § 3575(e) (1982), *repealed by* Pub. L. No. 98-473, § 212(a)(1)–(2), 98 Stat. 1837, *as amended by* Pub. L. No. 100-182, § 2, 101 Stat. 1266).
104. *Id.* at 240 (quoting 18 U.S.C. § 3575(e) (1982), *repealed by* Pub. L. No. 98-473, § 212(a)(1)–(2), 98 Stat. 1837, *as amended by* Pub. L. No. 100-182, § 2, 101 Stat. 1266).
105. *Id.* at 241.
106. *Id.*
107. *Id.*
108. *Id.* at 242.

"distinct threat of long-term racketeering activity, either implicit or explicit,"[109] such as a "specific threat of repetition" or a "showing that the predicate acts . . . are part of an ongoing entity's regular way of doing business."[110] The Court also specifically addressed the issue of whether multiple schemes are necessary to find sufficient continuity.[111] It rejected the position of a number of the courts of appeals—including the Eighth Circuit in the case before it—that a single scheme could never constitute sufficient continuity to find a pattern.[112] The Court deemed this rigid rule inappropriate, since such rigidity "introduc[ed] a new and perhaps more amorphous concept into the analysis that ha[d] no basis in text or legislative history."[113]

Applying its principles of continuity to the case before it, the Court looked to the petitioners' allegations that "at different times over the course of at least a 6-year period the . . . respondents gave five members of the MPUC numerous bribes, in several different forms, with the objective . . . of causing these commissioners to approve unfair and unreasonable rates . . . ."[114] The court held that it was error to affirm the dismissal of the petitioners' complaint because their allegations sufficiently pled relatedness and continuity to allow the petitioners to prove a pattern of racketeering activity.[115]

2. *Application by the Courts of Appeals*

As Chart 12 in Appendix C-2 reflects, the federal courts of appeals have increasingly dealt with the pattern issue over the past seven years.[116] Review of the pattern analyses in these cases yields the following observations. First, most of the cases addressing the pattern issue resolve it with a simple application of *H.J. Inc.*, making clear that *H.J. Inc.* is the governing precedent on the RICO pattern issue.[117] The second observation from the pattern cases concerns the actual application of *H.J. Inc.*: the duration of the alleged racketeering activity is determinative, in almost every instance, when courts assess the continuity prong of the pattern requirement.[118] One simply counts the months or years in which

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109. *Id.*

110. *Id.*

111. *Id.* at 240.

112. *Id.* at 240–41 (footnote omitted).

113. *Id.* at 241 n.3 (quoting Barticheck v. Fid. Union Bank/First Nat'l State, 832 F.2d 36, 39 (3d Cir. 1987)) (internal quotation marks omitted).

114. *Id.* at 250.

115. *Id.*

116. *See infra* Appendix C-2, at Chart 12.

117. *See, e.g.*, United States v. Bergrin, 650 F.3d 257, 267 (3d Cir. 2011) (quoting *H.J. Inc.*, 492 U.S. at 239–42; United States v. Pungitore, 910 F.2d 1084, 1104 (3d Cir. 1990)) (discussing the *H.J. Inc.* test); U.S. Airline Pilots Ass'n v. AWAPPA, LLC, 615 F.3d 312, 318–20 (4th Cir. 2010) (footnotes omitted) (citations omitted) (applying the *H.J. Inc.* test to determine that the plaintiffs failed to allege a pattern of racketeering due to a lack of continuity).

118. *See, e.g.*, *Bergin*, 650 F.3d at 270 (finding that closed-ended continuity existed over a period of six years); Roger Whitmore's Auto. Servs., Inc. v. Lake Cnty., Ill., 424 F.3d 659, 673 (7th

the alleged activity continued. The third observation is that, despite the Supreme Court's admonition that multiple schemes are not required to find pattern, the federal appellate courts tend to hold otherwise.[119] The fourth observation is that courts use the pattern requirement as a litmus test to assess a more complex question: whether RICO is being used appropriately or inappropriately in a particular case.[120] The following subsections discuss these observations.

a. Application of H.J. Inc.

A review of the decisions addressing the pattern issue yields three observations. First, most of the opinions rendered by the federal appellate courts on the pattern issue during the past seven years are short and simple applications of *H.J. Inc.*, and resolution of the pattern issue tends to be predictable.[121] The clarity and predictability of the pattern jurisprudence is in contrast to the existing jurisprudence on the other dominant issues in RICO cases—the RICO enterprise element and whether proximate causation is shown. The Supreme Court has provided only minimal guidance on the difficult enterprise issue and has done so only recently (in 2009).[122] The courts of appeals have not yet sorted out this guidance, leaving the RICO enterprise issue in a state of confusion. The relatively settled nature of the pattern issue also contrasts to the existing precedent on the proximate causation issue. On this issue, the Supreme Court has decided a complex trilogy of cases that the courts of appeals have not yet sorted out.[123] The clarity and predictability of the pattern jurisprudence, however, should be reassuring to litigants. Litigants and courts should be able to accurately assess the merits of a case on this issue.

Second, most of the decisions on the pattern issue are highly fact-specific, which is consistent with the Supreme Court's admonition that the pattern

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Cir. 2005) (holding that a scheme that lasted two years and had a definitive ending point—an election—did not rise to the level of continuity required by the *H.J. Inc.* test).

119. *See, e.g.*, *U.S. Airline Pilots Ass'n*, 615 F.3d at 319, 320 (citation omitted) (affirming dismissal of complaint alleging racketeering activity with a "single goal").

120. *See, e.g.*, Foster v. Wintergreen Real Estate Co., 363 F. App'x 269, 274 (4th Cir. 2010) (noting that if the court were to "adopt such a [broad] characterization [of pattern], [it] would transform every such dispute into a cause of action under RICO" (quoting Flip Mortg. Corp. v. McElhone, 841 F.2d 531, 538 (4th Cir. 1988))); Al-Abood *ex rel.* Al-Abood v. El-Shamari, 217 F.3d 225, 238 (4th Cir. 2000) ("[W]e are cautious about basing a RICO claim on predicate acts of mail and wire fraud . . . .This caution is designed to preserve a distinction between . . . garden-variety fraud claims . . . and . . . a more serious scope of activity.").

121. *See, e.g.*, *Bergrin*, 650 F.3d at 267 (3d Cir. 2011) (quoting H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239, 240, 241, 242 (1989); *Pungitore*, 910 F.2d at 1104 (3d Cir. 1990)) (applying the *H.J. Inc.* test); *U.S. Airline Pilots Ass'n*, 615 F.3d at 318–20 (4th Cir. 2010) (citations omitted) (finding no pattern of racketeering activity under the *H.J. Inc.* test).

122. *See* Boyle v. United States, 556 U.S. 938 (2009).

123. *See* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008); Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992).

analysis will "depend[] on the specific facts of each case."[124] In addressing the "relatedness" prong, the federal appellate courts use the "factors" set forth in *H.J. Inc.*—purpose, result, participants, victims, and methods of commission—to assess relatedness.[125] Lastly, most of the decisions in civil RICO cases resolve the pattern issue against civil plaintiffs, finding that the allegations did not meet *H.J. Inc.*'s mandate of relatedness and continuity.[126]

b. Longevity

The length of the alleged racketeering activity is the key factor in courts' resolution of the continuity prong of the pattern requirement. Courts have held that two years,[127] sixteen months,[128] and seven months[129] were not long enough to find "closed-ended" continuity. "Open-ended continuity" cannot be shown without explicit threats of future racketeering activity.[130] Such specificity was rare in the reported cases. Thus, effectively, if racketeering activity did not last more than two years, or explicit threats did not exist, continuity could not be shown and the pattern requirement was not met. Conversely, pattern was found whenever the alleged activity extended over several years.[131]

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124. *H.J. Inc.*, 492 U.S. at 242.

125. *See, e.g.*, Brown v. Cassens Transp. Co., 546 F.3d 347, 354 (6th Cir. 2008) (quoting *H.J. Inc.*, 492 U.S. at 240) (finding the defendant's alleged acts to be related because they satisfied each of the *H.J. Inc.* factors); United States v. Brandao, 539 F.3d 44, 55 (1st Cir. 2008) (quoting *H.J. Inc.*, 492 U.S. at 240) (finding sufficient relatedness between shootings to constitute a pattern); *see also* Jennings v. Auto Meter Prods., Inc., 495 F.3d 466, 473 (7th Cir. 2007) (quoting Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986)) (using factors similar to the *H.J. Inc.* factors to find that there was no pattern of racketeering).

126. *See, e.g.*, ISystems v. Spark Networks, Ltd., 428 F. App'x 368, 373–74 (5th Cir. 2011) (citing 18 U.S.C. § 1961(5) (2006)) ("[The plaintiff] did not allege conduct that constitutes a pattern of racketeering under RICO. . . . The alleged fraudulent misrepresentations . . . do not threaten long-term criminal activity . . . ."), *reh'g granted and opinion withdrawn*, No. 10-10905, 2012 WL 3101672 (5th Cir. Mar. 21, 2012); Zahl v. N.J. Dep't of Law and Pub. Safety Div. of Consumer Affairs, 428 F. App'x 205, 211 (3d Cir. 2011) ("[Plaintiff's allegations of fraud] are clearly insufficient plausibly to allege that the defendants engaged in 'long-term criminal activity.'"); Rao v. BP Prods. N. Am., Inc., 589 F.3d 389, 399 (7th Cir. 2009) ("[Plaintiff's] complaint merely restates the elements of section 1962(a) in boilerplate fashion . . . . Accordingly, the district court properly dismissed this claim.").

127. Roger Whitmore's Auto. Servs., Inc. v. Lake Cnty., Ill., 424 F.3d 659, 673 (7th Cir. 2005).

128. Spool v. World Child Int'l Adoption Agency, 520 F.3d 178, 184 (2d Cir. 2008).

129. Kaye v. D'Amato, 357 F. App'x 706, 716 (7th Cir. 2009).

130. *See H.J. Inc.*, 492 U.S. at 242.

131. *See, e.g.*, United States v. Bergrin, 650 F.3d 257, 270–71 (3d Cir. 2011) (citations omitted) (six years); United States v. Eppolito, 543 F.3d 25, 57–58 (2d Cir. 2008) (citations omitted) (eight years).

c. Single or Multiple Schemes

Although the Court in *H.J. Inc.* determined that a single scheme could potentially constitute a pattern of racketeering activity,[132] the lower courts have indicated reluctance to find the existence of a pattern if there is only a single scheme to defraud.[133] The Tenth Circuit's decision in *Bixler v. Foster*[134] is indicative of this trend. In that case, minority shareholders of a uranium mining company sued the company's directors and attorneys, alleging fraud in the transfer of company assets.[135] The Tenth Circuit affirmed dismissal of the action on several grounds, including failure to allege that a pattern of racketeering activity existed.[136] Noting that "[a] viable RICO claim requires a showing of *continuity plus relationship*,"[137] the court held that the plaintiffs' complaint "faile[d] to show any threat of future criminal conduct" and thus failed to meet the continuity prong.[138] The court reasoned that the complaint "allege[d] that defendants engaged in a single scheme to accomplish the discrete goal of transferring . . . uranium mining interests . . . ."[139]

Similarly, the Fourth Circuit affirmed dismissal of a RICO action brought by one group of pilots against another group of pilots because there was only a "single goal" of the alleged racketeering activity.[140] The two groups disagreed over calculations of seniority after the merger of US Airways and American West Airlines.[141] One group, the union USAPA, alleged that the other group, the American West Airlines Pilots Protective Alliance (AWAPPA), engaged in extortion and sabotage against the United States Airline Pilots Association (USAPA).[142] USAPA brought a RICO action, seeking injunctive relief and damages.[143] At issue was the continuity prong of pattern.[144] Since the conduct alleged by AWAPPA spanned only a few weeks, there was no question,

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132. *H.J. Inc.*, 492 U.S. at 237.

133. *See, e.g.*, Bixler v. Foster, 596 F.3d 751, 761 (10th Cir. 2010) (citing Boone v. Carlsbad Bancorporation, Inc., 972 F.2d 1545, 1556 (10th Cir. 1992)) (affirming dismissal of complaint alleging that defendant engaged in a single scheme); U.S. Airline Pilots Ass'n v. AWAPPA, LLC, 615 F.3d 312, 319 (4th Cir. 2010) (affirming dismissal of complaint alleging racketeering activity with a "single goal").

134. 596 F.3d 751 (10th Cir. 2010).

135. *Id.* at 754.

136. *Id.*

137. *Id.* at 761 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985)) (internal quotation marks omitted).

138. *Id.* (quoting Boone v. Carlsbad Bancorporation, Inc., 972 F.2d 1545, 1556 (10th Cir. 1992)) (internal quotation marks omitted).

139. *Id.*

140. *See* U.S. Airline Pilots Ass'n v. AWAPPA, LLC, 615 F.3d 312, 319 (4th Cir. 2010).

141. *Id.* at 315.

142. *Id.* at 316.

143. *Id.*

144. *Id.* at 318–20.

according to the Fourth Circuit, that closed-ended continuity was not present.[145] Nor, according to the Fourth Circuit, was open-ended continuity shown, since the alleged racketeering activity had a "built-in ending point . . . ."[146] The court found it compelling that the complaint alleged the defendants' single goal was "to destroy USAPA and render it incapable of discharging its legal duty to represent the US Airways pilots."[147] The Fourth Circuit held that completion of the goal would end the threat to USAPA and, thus, end any threat of open-ended continuity.[148]

d. Pattern as a RICO Litmus Test

The pattern requirement appears to be used by courts as the benchmark for determining whether a case truly warrants use of the powerful RICO statute or whether it is simply "garden-variety" fraud, or otherwise too frivolous for RICO.[149]

Foster v. Wintergreen Real Estate Co., [150] is indicative of this usage. One issue in *Foster* centered on the failure to disclose a noisy stump grinder.[151] The plaintiffs, who purchased resort lots for investment purposes, sued the Wintergreen Real Estate Agency for "fail[ing] to disclose that there was a noisy stump grinder operating next to property [the plaintiffs had] purchased."[152] The plaintiffs also alleged certain additional lapses by the real estate agency: failure to prepare color brochures, hold open houses, put up "for sale" signs, and advertise the sale properties.[153] The plaintiffs therefore argued that at least some of these lapses constituted the racketeering activities of wire and mail fraud.[154]

The Fourth Circuit affirmed dismissal of the complaint on the grounds that the plaintiffs failed to show pattern.[155] Emphasizing that RICO was not designed for garden variety fraud claims,[156] the court noted that the pattern requirement limits RICO to "ongoing unlawful activities whose scope and persistence pose a special threat to social well-being."[157] In this way, the pattern requirement limits RICO to significant frauds: "The pattern requirement is important because [i]n

145. *See id.* at 318 ("[Plaintiff] does not contend that the factual allegations . . . satisfy the Supreme Court's standard for closed-ended continuity.").

146. *Id.* at 319.

147. *Id.* (internal quotation marks omitted).

148. *See id.*

149. *See* Al-Abood *ex rel.* Al-Abood v. El-Shamari, 217 F.3d 225, 238 (4th Cir. 2000).

150. 363 F. App'x 269 (4th Cir. 2010).

151. *Id.* at 271.

152. *Id.*

153. *Id.* at 271 n.3.

154. *See id.* at 271.

155. *Id.* at 276. The court also held that the plaintiffs did not have standing because the Lanham Act prohibited consumers from suing for false advertising. *Id.* at 275.

156. *See id.* at 274 (quoting Al-Abood *ex rel.* Al-Abood v. El-Shamari, 217 F.3d 225, 238 (4th Cir. 2000)).

157. *Id.* at 273 (quoting *Al-Abood*, 217 F.3d at 238).

providing a remedy of treble damages . . . Congress contemplated that only a party engaging in widespread fraud would be subject to such serious consequences."[158] The court expressed a special concern with a RICO action based on mail fraud or wire fraud, stating it was "cautious about basing a RICO claim on predicate acts of mail and wire fraud because it will be the unusual fraud that does not enlist the mails and wires in its service at least twice."[159] Thus, the Fourth Circuit did not disturb the findings of the district court that the plaintiffs' allegations were too speculative and, thus, that pattern of racketeering activity did not exist:

> When considering the alleged scheme at issue . . . it does not appear to be the type of social evil meant to be addressed by RICO. While Plaintiffs allege the scheme was directed at other victims besides themselves, those allegations are too speculative to support a finding of a pattern of racketeering activity."[160]

United States v. Bergrin[161] is similarly instructive, even though the court reached the opposite conclusion. Paul Bergrin, a licensed attorney and former federal prosecutor, was indicted for using his law firm to commit murder, attempted murder, bribery, prostitution, money laundering and mortgage fraud.[162] The district court dismissed all of the RICO counts in the thirty-nine count indictment returned against the defendants, holding that the indictment failed to adequately allege a pattern of racketeering activity.[163]

Relying on the pattern requirement, the Third Circuit concluded that Bergrin and his conspirators were properly indicted for criminal RICO violations.[164] The Third Circuit reversed, concluding that the indictment met both the relatedness and continuity prongs of pattern.[165] According to the Third Circuit, relatedness was shown by the allegations of "the same or similar purposes" of the alleged racketeering activities.[166] The common purpose was "promoting and enhancing the Bergrin Law Enterprise [BLE] and its leaders', members' and associates'

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158. *Id.* (quoting Menasco, Inc. v. Wasserman, 886 F.2d 681, 683 (4th Cir. 1989)) (internal quotation marks omitted).

159. *Id.* at 274 (quoting *Al-Abood*, 217 F.3d at 238) (internal quotation marks omitted).

160. *Id.* at 271–72. (quoting Foster v. Wintergreen Real Estate Co., No. 3:08CV00031, 2008 WL 4829674 (W.D. Va. Nov. 6, 2008) (internal quotation marks omitted), *aff'd*, 363 F. App'x 269 (4th Cir. 2010)).

161. 650 F.3d 257 (3d Cir. 2011).

162. *Id.* at 261–62.

163. *Id.* at 263 (quoting United States v. Bergrin, 707 F. Supp. 2d 503, 519 (D.N.J. 2010), *rev'd*, 650 F.3d 257 (3d Cir. 2011)). In this case, the court also addressed the issue of whether the indictment alleged a RICO enterprise. *Id.* (quoting *Bergrin*, 707 F. Supp. 2d at 519). The district court held that it did not. *Bergrin*, 707 F. Supp. 2d at 519. The Third Circuit reversed, finding that enterprise was adequately alleged. *Bergrin*, 650 F.3d at 268.

164. *Id.* at 268–69, 271.

165. *Bergrin*, 650 F.3d at 270.

166. *Id.*

activities; enriching the leaders, members and associates of the Bergrin Law Enterprise; and concealing and otherwise protecting the criminal activities of the Bergrin Law Enterprise."[167] Closed-ended continuity was shown, since the racketeering activity allegedly extended over six years.[168] Open-ended continuity was also shown because "the alleged number of schemes and the BLE's apparent willingness to engage in criminal acts to aid Bergrin's clients suggest[ed] that there [was] also a threat of continu[ing] criminal activity in the future."[169]

Whereas the district court focused on the variety of crimes charged—including prostitution, murder, and mortgage fraud—and found that their dissimilarity negated a finding of pattern,[170] the Third Circuit concluded that the many alleged crimes were linked by their common purpose.[171] According to the Third Circuit, "RICO's pattern requirement ensures that separately performed, functionally diverse and directly unrelated predicate acts and offenses will form a pattern under RICO, as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise."[172]

e. Concluding Observations

In conclusion, during the past seven years, the pattern issue has been the most frequent RICO issue addressed by the federal appellate courts.[173] Standing alone, the pattern requirement—like other RICO terms—is fairly vague and non-intuitive when compared to the statutory terms in most criminal statutes. Yet, more than other RICO elements—certainly those litigated regularly in RICO cases—the Supreme Court has provided effective clarity and guidance on the pattern requirement, rendering this RICO element predictable.[174] The Court's 1989 decision in *H.J. Inc.* accomplished this by setting forth the two prongs: relatedness and continuity.[175] The lower federal courts use these prongs to focus on objective, observable facts, such as how long racketeering activity continued and whether one or more schemes was involved.[176] Perhaps because the pattern requirement is now so well-defined, it has become a helpful gauge for the courts

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167. *Id.* (internal quotation marks omitted).

168. *Id.*

169. *Id.* (internal quotation marks omitted).

170. *Bergrin*, 707 F. Supp. 2d at 506, 512–13.

171. *Bergrin*, 650 F.3d at 271.

172. *Id.* (quoting United States v. Eufrasio, 935 F.2d 553, 566 (3d Cir. 1991)) (internal quotation marks omitted).

173. *See infra* Appendix C-1.

174. *See* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989).

175. *See id.*

176. *See, e.g.*, *Bergrin*, 650 F.3d at 270 (noting that the defendants collectively engaged in six different schemes over the course of six years); Boone v. Carlsbad Bancorporation, Inc., 972 F.2d 1545, 1556 (10th Cir. 1992) (citing Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1516 (10th Cir. 1990)) (finding that a single scheme which accomplished a discrete goal was not the type of activity that RICO was enacted to address).

in assessing when RICO is being used appropriately—or inappropriately—in a particular case.

B. Enterprise

1. Statutory Guidance

RICO defines *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."[177] This definition recognizes that an enterprise may be an existing, formal structure—such as a corporation—or a group of individuals who come together only for sporadic activities.[178] The latter category is known, in RICO parlance, as an "association in fact" enterprise.[179]

Courts have dealt with this definition of enterprise on numerous occasions. The jurisprudence focuses on two issues. The first issue concerns what type of relationship defendants must have to the alleged enterprise.[180] This is known as the "distinctness" issue. The second issue concerns what is needed to show the existence of an "association in fact" enterprise.[181]

For most of RICO's existence, the lower courts—especially the district courts—have interpreted the enterprise element narrowly,[182] while the Supreme Court has interpreted RICO enterprise broadly.[183] The Supreme Court has held

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177. 18 U.S.C. § 1961(4) (2006).

178 *See id.*

179. *See* United States v. Turkette, 452 U.S. 576, 581–82 (1981).

180. *See, e.g.*, Official Publ'ns, Inc. v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989) (citing Bennett v. U.S. Trust Co. of N.Y., 770 F.2d 308, 315 (2d Cir. 1985); B.F. Hirsch v. Enright Ref. Co., 751 F.2d 628, 634 (3d Cir. 1984), *abrogation recognized by* Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3d Cir. 1995); Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi., 747 F.2d 384, 401–02 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985)) (discussing the necessity of distinctness for certain RICO violations); Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 425 (5th Cir. 1990) (citing 18 U.S.C. § 1962(c) (2006); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1307 (7th Cir. 1987); Bishop v. Corbitt Marine Ways, Inc., 802 F.2d 122, 123 (5th Cir. 1986)) (requiring distinctness for some RICO violations but not for others).

181. *See, e.g.*, *Turkette*, 452 U.S. at 583 ("[Enterprise] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.").

182. Odom v. Microsoft Corp., 486 F.3d 541, 545 (9th Cir. 2007) ("There has been some judicial resistance to RICO, manifested in narrow readings by lower federal courts.").

183. *See, e.g.*, Boyle v. United States, 556 U.S. 938, 950–51 (2009) (noting that the Supreme Court has traditionally favored an expansive view of the statute); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 660 (2008) (refusing to adopt narrow constructions of RICO); Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 257 (1994) ("RICO broadly defines 'enterprise.'"); Sedima v. Imrex Co., 473 U.S. 479, 497 (1985) (stating that RICO is to be read broadly); *Turkette*, 452 U.S. at 590 (1981) (declining to interpret RICO narrowly).

Congress directed that RICO should be liberally construed to effectuate its remedial purposes. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970).

that "[t]here is no restriction upon the associations embraced by the definition [of enterprise],"[184] that an "inclusive" definition of enterprise is consistent with the "new domain of federal involvement" created by RICO,[185] and that even a "loosely and informally organized"[186] group may qualify as a RICO enterprise; thus, the definition of enterprise has a "wide reach."[187] As discussed in Part VII, many of the Court's rulings on enterprise are quite favorable to plaintiffs.[188]

Chart 13 in Appendix C-3 addresses the frequency with which the federal appellate courts discuss the "enterprise" issue.[189]

2. *Distinctness*

The enterprise distinctness issue becomes relevant only when one type of RICO conduct is alleged. As noted above, RICO covers four types of conduct.[190] Section 1962(a) prohibits a person from investing the proceeds of racketeering activity in an enterprise.[191] Additionally, § 1962(b) prohibits a person from acquiring or maintaining control over an enterprise through a pattern of racketeering activity.[192] Section 1962(c) prohibits a person "*employed by or associated with*" an enterprise from conducting or participating in the affairs of the enterprise through a pattern of racketeering activity.[193] Finally, § 1962(d) prohibits conspiring to violate §§ 1962(a), (b), or (c).[194]

Section 1962(c) describes the conduct that is, by far, the most common RICO conduct alleged;[195] it is also where the distinctness issue arises. Section 1962(c), unlike the other RICO sections, limits "persons" who may be charged to persons "*employed by or associated with the enterprise.*"[196] By comparison, *any*

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184. *Turkette*, 452 U.S. at 580.

185. *Id.* at 586.

186. *Boyle*, 556 U.S. at 941.

187. *Id.* at 944; *see also* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 257 (1994) (quoting 18 U.S.C. § 1961(4) (2006)) (discussing the statute's breadth).

188. *See infra* Part VII.

189. *See infra* Appendix C-3, at Chart 13.

190. *See supra* Part I.

191. 18 U.S.C. § 1962(a) (2006). RICO further requires that the enterprise must not be one that is "engaged in, or the activities of which affect, interstate or foreign commerce." § 1962(a)–(c).

192. § 1962(b).

193. § 1962(c) (emphasis added).

194. § 1962(d).

195. *See* RAKOFF & GOLDSTEIN, *supra* note 3, §1.06[3]. This is because the elements of §§ 1962(a) and (b) are more difficult to prove. To establish a § 1962(a) case, one must trace proceeds "invested" in an enterprise, as well as prove that a pattern of racketeering activity and enterprise exists. *See* § 1962(a). To establish a § 1962(b) case, one must prove that defendants "acquired or maintained control" over an enterprise through a pattern of racketeering activity. *See* § 1962(b). By comparison, in a § 1962(c) case, one must simply prove that a defendant who was associated with or employed by an enterprise participated in or conducted the affairs of the enterprise through a pattern of racketeering activity. *See* § 1962(c).

196. § 1962(c) (emphasis added).

person may be charged with violations of §§ 1962(a), (b) or (d).[197] Because one cannot logically be employed by or associated with oneself,[198] courts have held that a defendant who is charged with violating § 1962(c) must be separate and distinct from the enterprise through which the defendant is alleged to have conducted a pattern of racketeering activity.[199] Since most RICO cases are brought under § 1962(c), the distinctness issue has dominated much of the RICO jurisprudence.[200]

By limiting the persons who can violate § 1962(c), this section essentially ensures that it will be used to pursue those individuals who are "insiders" of an organization, and who use an organization and its resources to commit racketeering activity.[201] This becomes obvious when one examines the RICO cases pursued under each section. In cases arising under § 1962(a), which prohibits the investment of the proceeds of racketeering activity in an enterprise, the enterprise is often the passive receptacle of ill-gotten gains.[202] In these cases, the racketeering activity has already been committed; thus, the enterprise could

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197. *See* § 1962 (a), (b), (d). The courts are split on whether the person and enterprise must be distinct in § 1962(b) cases. *Compare* Official Publ'ns, Inc. v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989) (suggesting § 1962(b) requires distinctness), *with* Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 425 (5th Cir. 1990) (finding that § 1962(b) does not require distinctness).

However, the courts agree that § 1962(a) does *not* contain a distinctness requirement. *See, e.g.*, Schofield v. First Commodity Corp. of Bos., 793 F.2d 28, 31 (1st Cir. 1986) ("[S]ection 1692(a) does not require a relationship between the person and the enterprise . . . ."); Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 213 (10th Cir. 1987) (citing Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi., 747 F.2d 384, 402 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985)) ("[C]ombination liability can only occur when the corporation actually is the direct beneficiary of the pattern of racketeering activity.").

198. *See Haroco*, 747 F.2d at 400.

199. *Id.* (citing United States v. Computer Scis. Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *overruled by* Busby v. Crown Supply, Inc., 896 F.2d 1181, 1190 (4th Cir. 1990); Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 23 (N.D. 111. 1982)).

200. *See* RAKOFF & GOLDSTEIN, *supra* note 3, § 1.06[3].

201. *See* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994) ("[S]ubsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity.").

There has been considerable discussion since RICO was passed as to whether the enterprise is the "conduit" or "victim" in various RICO offenses. The courts ultimately ruled that RICO does not require that the enterprise serve a particular role for any offense, but that generally in § 1962(c) offenses, the enterprise will be the conduit for the pattern of racketeering activity. *See* United States v. Browne, 505 F.3d 1229, 1273 (11th Cir. 2007) (quoting *Scheidler*, 510 U.S. at 259).

202. Philip A. Lacovara & David P. Nicoli, *Vicarious Criminal Liability of Organizations: RICO as an Example of a Flawed Principle in Practice*, 64 ST. JOHN'S L. REV. 725, 762 (1990) ("Under subsection (a), the enterprise plays the role of 'prize' of outside criminal interests or, at worst, a passive instrument, when criminal interests are ensconced inside the enterprise and use it as the receptacle of their 'dirty' money."); *cf.* United States v. Turkette, 452 U.S. 576, 584–85 (1981) (citing 18 U.S.C. § 1964(a), (c) (2006)) (stating that § 1962(a) RICO cases "address the infiltration by organized crime of legitimate businesses," and that "[t]he aim is to divest the association of the fruits of its ill-gotten gains," but that, ultimately, § 1962 can apply to both legitimate and illegitimate enterprises).

not have been used to commit the racketeering activity. Similarly, in cases arising under § 1962(b), which prohibits acquiring or maintaining control over an enterprise through racketeering activity,[203] the enterprise is the passive victim of whoever acquired or maintained control over it.[204]

Because civil RICO cases—more so than criminal RICO cases—tend to involve legal entities, such as corporations, the distinctness analysis becomes more complicated in civil RICO cases. Corporate law issues of ownership, control, and identity must be addressed and reconciled with RICO principles. Additionally, pleading issues are always more complex in civil RICO cases, where plaintiffs hope to sue a "deep pocket."[205] A legal entity has greater assets and insurance coverage than most individuals, and thus is the obvious deep pocket and defendant. However, any legal entity involved in the alleged racketeering activity is also the obvious "enterprise."[206] Charging an entity as a defendant while also meeting the distinctness requirement can be challenging.[207]

> Unfortunately, RICO jurisprudence is littered with poorly reasoned and incorrect holdings on distinctness when legal entities are involved. As a result, RICO's potential as a weapon against [fraud and] white collar crime has not been realized, many inappropriate civil RICO actions have been brought, and RICO has earned a reputation as a problem statute.[208]

This reputation is unfortunate given RICO's potential as an effective tool to combat business frauds. As this author has noted elsewhere, there are simple ways to clear up the confused case law on the enterprise distinctness issue.[209] The Supreme Court has shown the way, but the lower courts now need to follow the Court's lead.[210]

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203. 18 U.S.C. § 1962(b) (2006).

204. *See* Lacovara & Nicoli, *supra* note 202, at 763 ("Indeed, it is hard to fathom how a legitimate business enterprise could be the 'perpetrator' or 'central figure' in the criminal activity contemplated under section 1962(b).").

205. *See* Ryan C. Morris, *Proximate Cause and Civil RICO Standing: The Narrowly Restrictive and Mechanical Approach in* Lerner v. Fleet Bank *and* Baisch v. Gallina, 2004 B.Y.U. L. REV. 739, 751 (2004) (noting that civil RICO "rests on proving that the defendant violated the criminal RICO provisions, an understanding of which requires examining a complex maze of cross references").

206. *See* Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi., 747 F.2d 384, 386 (7th Cir. 1985), *aff'd on other grounds*, 473 U.S. 606 (1985) (citing 18 U.S.C. § 1961(4) (2006)).

207. The distinctness issue does not arise regularly when individuals, as opposed to collective entities, are involved. Because collective entities are comprised of individuals, the lines of identity are blurrier in cases involving collective entities. As the Fifth Circuit noted, "[T]he courts have routinely required a distinction when a corporation has been alleged as both a RICO defendant and a RICO enterprise, but a similar requirement has not been mandated when individuals have been named as defendants and as members of an association-in-fact RICO enterprise." St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 447 (5th Cir. 2000).

208. Pierson, *supra* note 73, at 560.

209. *See id.*

210. *See id.* at 553.

3. *Association in Fact Enterprises*

As noted previously, RICO defines *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*."[211] In the 2009 case of *Boyle v. United States*,[212] the Supreme Court addressed the italicized portion of this definition and clarified what is necessary to prove an "association in fact" enterprise.[213] Eddie Boyle was convicted by a jury on eleven of twelve counts[214] charging him with bank burglary, attempted bank burglary, conspiracy to commit bank burglary, violations of RICO (under § 1962(c)), and RICO conspiracy.[215] Trial evidence showed that Boyle and others committed a number of bank burglaries and attempted bank burglaries in four states over the course of five years.[216] Using crowbars, fishing gaffes, and walkie-talkies, Boyle and his confederates targeted night deposit boxes at banks in retail shopping areas.[217] They broke into the boxes, stole the money, and split the proceeds.[218] Boyle argued that he and his group of alleged confederates were too loosely organized to constitute an association in fact enterprise under RICO.[219]

The Supreme Court affirmed Boyle's conviction, concluding that an association in fact enterprise existed even though Boyle's burglary group "was loosely and informally organized, . . . [without] a leader or hierarchy . . . [or] long-term master plan or agreement,"[220] and functioned only sporadically.[221] According to the Court, "nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence."[222] Noting that RICO's statutory definition of enterprise is "obviously broad," and "expansive," and has "a wide reach,"[223] the Court held that an association in fact enterprise is simply a "continuing unit that functions with a common purpose."[224] According to the Court, an association in fact enterprise must have "at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[225]

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211. 18 U.S.C. § 1961(4) (2006) (emphasis added).
212. 556 U.S. 938 (2009).
213. *Id.* at 948 (citing United States v. Turkette, 452 U.S. 576, 583 (1981)).
214. *Id.* at 943.
215. *Id.* at 941–42.
216. *See id.* at 941.
217. *Id.*
218. *Id.*
219. *Id.* at 947–48.
220. *Id.* at 941.
221. *See id.*
222. *Id.* at 948.
223. *Id.* at 944 (quoting 18 U.S.C. § 1961(4) (2006)).
224. *Id.* at 948 (citing United States v. Turkette, 452 U.S. 576, 583 (1981)).
225. *Id.* at 946.

In many instances, purpose, relationships, and longevity will be easy to establish.[226] The Court specifically noted that evidence establishing the existence of an association in fact enterprise may simply be evidence of the racketeering activity.[227] The Court also noted that "the existence of an association-in-fact [enterprise] is oftentimes more readily proven by what is [sic] does, rather than by abstract analysis of its structure."[228]

C. Proximate Causation

The Supreme Court has rendered three major opinions on proximate causation: *Holmes v. Securities Investor Protection Corporation* in 1992,[229] *Anza v. Ideal Steel Supply Corp.* in 2006,[230] and *Hemi v. City of New York* in 2010.[231] Together, these decisions provide a roadmap for plaintiffs aiming to prove proximate causation in civil RICO cases. Part VI.C.1 discusses these decisions, and Part VI.C.2 analyzes their application in the courts of appeals.

As Chart 14 in Appendix C-4 reflects, the federal appellate courts' attention to proximate cause peaked in 2010.[232] Given the necessity of showing proximate cause in civil RICO cases, it is likely that this issue will remain a major issue for the courts.

1. The Supreme Court's Roadmap: Holmes–Anza–Hemi

a. Holmes v. SIPC

The plaintiff in *Holmes* was the Securities Investor Protection Corporation (SIPC), a private nonprofit corporation.[233] Most broker–dealers registered under the Securities Exchange Act of 1934 are required to be members of the SIPC.[234] Broker–dealers are assessed fees that go into a fund used by the SIPC to pay losses sustained by broker–dealers' customers if a broker–dealer "fail[s] or is in danger of failing to meet its obligations to customers."[235] In July 1981, the SIPC sought protective decrees for two broker–dealers, one located in Florida and

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226. *Cf.* United States v. Hutchinson, 573 F.3d 1011, 1022 (10th Cir. 2009) (quoting *Boyle*, 556 U.S. at 944) (acknowledging that the "requirements for an enterprise are modest").

227. *Boyle*, 556 U.S. at 947 (quoting *Turkette*, 452 U.S. at 583) ("[T]he evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise may in particular cases coalesce.") (internal quotation marks omitted)).

228. *Id.* at 951 (internal quotation marks omitted).

229. 503 U.S. 258 (1992).

230. 547 U.S. 451 (2006).

231. 559 U.S. 1 (2010).

232 *See infra* Chart 14 and Appendix C-4.

233. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 261 (1992).

234. *Id.* (citing 15 U.S.C. § 78ccc(a)(2)(A)).

235. *Id.* (quoting § 78eee(a)(3)) (internal quotation marks omitted).

another located in California.[236] After the SIPC placed the two broker–dealers under trustee supervision, the trustees liquidated the broker–dealers, and the SIPC eventually paid $13 million to the broker–dealers' customers for losses.[237] Thereafter, the SIPC sued Robert Holmes and seventy-five others under civil RICO, alleging that Holmes and his seventy-five conspirators engaged in a fraudulent stock manipulation scheme that led to the bankruptcy of the two broker–dealers and ultimately caused the SIPC to lose $13 million.[238]

The district court entered partial summary judgment for Holmes, holding that the SIPC had not shown that its loss was proximately caused by Holmes's alleged action.[239] The Ninth Circuit reversed in part, concluding that proximate causation was shown.[240] The Supreme Court reversed the Ninth Circuit.[241] The Court first addressed the question of what causation standard applied in civil RICO actions and held that the standard was proximate causation.[242] Turning to the case before it, the Court agreed with the district court that the SIPC had not shown proximate causation.[243]

The Court began its analysis by focusing on the statutory language in § 1964(c), which provides a civil cause of action for "[a]ny person injured in his business or property by reason of a violation of [RICO] . . . ."[244] Acknowledging that the language "by reason of a RICO violation" did not clarify whether a "but-for" or "proximate causation" standard applied,[245] the Court examined the statutory history of civil RICO.[246] The Court found it significant that the Clayton Act—upon which civil RICO is based—was interpreted at the time of RICO's passage as requiring proof of proximate causation, as well as but-for causation.[247] The Court reasoned, "[W]e may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used . . . ."[248]

Thus, the Court held that "proximate cause is . . . required" for a civil RICO plaintiff to prevail.[249] This standard, the Court explained, requires RICO civil plaintiffs to prove "some direct relation between the injury asserted and the

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236. *Id.* at 262.
237. *Id.* at 262–63.
238. *Id.*
239. *Id.* at 263–64.
240. *Id.* at 264 (citing Sec. Investor Prot. Corp. v. Vigman, 908 F.2d 1461, 1467–69 (9th Cir. 1990), *rev'd*, *Holmes*, 503 U.S. at 258 (1992)).
241. *Id.* at 265 (citing *Holmes*, 499 U.S. at 974 (1991) (granting certiorari)).
242. *Id.* at 268.
243. *Id.* at 276.
244. *Id.* at 265 (quoting 18 U.S.C. § 1964(c) (2006)) (internal quotation marks omitted).
245. *See id.* at 265–66.
246. *Id.* at 267.
247. *Id.* at 268 (quoting 15 U.S.C. § 15 (2006)) (citing Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 533–34, 536 (1983)).
248. *Id.*
249. *Id.*

injurious conduct alleged."[250] The Court noted the policy reasons supporting a direct injury requirement, including the difficulty of remedying indirect injuries, and stated that "[r]ecognizing 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 . . . ."[251] As the Court noted, "directly injured victims can generally be counted on to vindicate the law as private attorneys general."[252]

In the case before it, the Court agreed that the link between Holmes's alleged stock fraud and the SIPC's loss was "too remote."[253] According to the Court, there were simply too many steps in the causal chain before the SIPC lost its $13 million: the broker–dealers relied upon the alleged fraud for their investment decisions; the broker–dealers went bankrupt, which could have been caused by the alleged fraud, other factors, or some combination of the alleged fraud and other factors; the broker–dealers' customers sustained losses; the customers qualified under the SIPC rules for coverage of their losses; and the SIPC paid the customers.[254] Simply put, the SIPC was last in a long line of injured parties.[255] The Court further noted that recovery by the SIPC could make it more difficult for the direct victims—the broker–dealers—to recover on their lawsuits against Holmes.[256] According to the Court, this potential situation underscored the inappropriateness of allowing the SIPC to preempt the direct victims.[257]

b. Anza v. Ideal Steel Supply Co.

Fourteen years after its decision in *Holmes,* the Court returned to the issue of proximate causation under RICO in *Anza v. Ideal Steel Supply Corp.*[258] Ideal Steel Supply (Ideal), the plaintiff, was a retail seller of steel mill products, supplies, and services, with two stores in New York City (one in Queens and one in the Bronx).[259] Ideal sued Joseph and Vincent Anza, owners of National Steel Supply (National)—Ideal's major competitor—under civil RICO,[260] alleging that the Anzas "engaged in an unlawful racketeering scheme" by failing to collect the required New York sales tax from its cash customers, thereby "gain[ing] sales

250. *Id.*
251. *Id.* at 269 (citing *Associated Gen. Contractors*, 459 U.S. at 542–44).
252. *Id.* at 269–70.
253. *Id.* at 271.
254. *See id.* at 271–73 (citing *Associated Gen. Contractors*, 459 U.S. at 534).
255. *See id.* at 271 n.18, 274.
256. *See id.* at 274.
257. *See id.* at 272–74 (quoting Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 943 (1970) (codified as amended at 18 U.S.C § 1964 (2006 & Supp. 2012); *Associated Gen. Contractors*, 459 U.S. at 545).
258. 547 U.S. 451 (2006).
259. *Id.* at 453.
260. *Id.* at 453–54.

and market share at Ideal's expense."[261] Ideal claimed that the tax returns National submitted to the New York Department of Taxation concealed National's illegal practice of not collecting the required sales tax.[262] Ideal further alleged that, through this practice, the Anzas violated § 1962(c) by conducting the affairs of National through mail fraud and wire fraud—via the submission of the false tax returns—and that they violated § 1962(a) by "us[ing] funds generated by their fraudulent tax scheme to open National's Bronx location."[263]

The district court dismissed the complaint.[264] The Second Circuit reversed, concluding that Ideal adequately alleged proximate causation on both the § 1962(a) claim and the § 1962(c) claim.[265] The Supreme Court reversed on the § 1962(c) claim and remanded on the § 1962(a) claim.[266]

Citing its analysis in *Holmes*, the Court held that the claimed RICO violation in the current case—as in *Holmes*—was too attenuated from Ideal's claimed injury.[267] The Court explained that the "direct victim of [the alleged RICO violation] was the State of New York, not Ideal," since "the State . . . was being defrauded and the State lost tax revenue as a result."[268] The Court also noted that Ideal's loss of market share could have been caused by any number of factors independent of National's alleged tax fraud, such as National's greater efficiency in operations or better customer service or by the shrinking global market for steel.[269] According to the Court, "Ideal's lost sales could have resulted from factors other than petitioners' alleged acts of fraud. Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices."[270]

As in *Holmes*, the Court noted the practical difficulties in assessing damages when proximate causation cannot be shown.[271] Referring to Ideal's theory of injury, the Court reasoned, "[T]he element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation."[272] As in *Holmes*, the Court noted that there was a more direct victim capable of vindicating the alleged misconduct and said that the State of New York "[could] be expected to pursue appropriate remedies . . . .

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261. *Id.* at 454 (internal quotation marks omitted).

262. *Id.*

263. *Id.* at 454–55 (quoting 18 U.S.C. § 1962(a), (c) (2006)).

264. *Id.* at 455.

265. *Id.* (quoting Ideal Steel Supply Corp. v. Anza, 373 F.3d 251, 263 (2d. Cir. 2004), *rev'd in part, vacated and remanded in part*, 547 U.S. 451 (2006)).

266. *Id.* at 462.

267. *See id.* at 459–61 (citing Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268–74 (1992)).

268. *Id.* at 458.

269. *See id.*

270. *Id.* at 459.

271. *See id.* at 458.

272. *Id.* at 460.

There [was] no need to broaden the universe of actionable harms to permit RICO suits by parties who [had] been injured only indirectly."[273]

Significantly, the Court treated Ideal's two RICO claims differently. Noting that "§ 1962(c) and § 1962(a) set forth distinct prohibitions, it [was] at least debatable whether Ideal's two claims should be analyzed in an identical fashion for proximate-cause purposes."[274] Thus, although the Court reversed the Court of Appeals on Ideal's § 1962(c) claim, holding that proximate causation was not shown, the Court remanded on Ideal's § 1962(a) claim so that the lower court could "determine whether petitioners' alleged violation of § 1962(a) proximately caused the injuries Ideal asserts."[275]

c. Hemi v. City of New York

In *Hemi v. City of New York*,[276] the most recent proximate causation RICO case decided by the Court, the collection of taxes from online cigarette sales was at issue.[277] Out-of-state sellers of cigarettes do not collect sales taxes.[278] Rather, those who purchase cigarettes online from out-of-state sellers are expected to pay applicable sales taxes to their respective jurisdictions.[279] To facilitate the collection of unpaid cigarette sales taxes, Congress passed the Jenkins Act, which requires out-of-state cigarette vendors to file reports with each state's tobacco tax administration—listing names, addresses, and quantities of cigarettes purchased by state residents.[280] These reports provide New York State, for example, the information it needs to collect sales tax of $2.75 per pack.[281] Additionally, the state of New York provides its cities, notably New York City, with the reports it receives from cigarette vendors.[282] These reports then enable New York City to collect from its residents who purchase cigarettes from out of state.[283]

Hemi and other out-of-state cigarette sellers did not file Jenkins Act reports with the state of New York; thus, the state was not able to provide reports to New York City, and the city was not able to collect its $1.50-per-pack tax.[284] The city sued Hemi and other out-of-state cigarette vendors for failing to supply

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273. *Id.*
274. *Id.* at 462.
275. *Id.*
276. 559 U.S. 1 (2010) (plurality opinion).
277. *See id.* at 6.
278. *See id.* at 4.
279. *See id.* at 5.
280. *Id.* (citing Jenkins Act, ch. 699, 63 Stat. 884 (1949) (codified as amended at 15 U.S.C. §§ 375–378 (2006 & Supp. V 2011)).
281. *Id.* at 12 (citing N.Y. TAX LAW § 471(1) (McKinney, Westlaw through L.2010, ch. 34) (amended McKinney Supp. 2013)).
282. *See id.* at 6.
283. *See id.* at 5–6 (citations omitted).
284. *See id.*

the state of New York with the required Jenkins Act reports.[285] The city argued that its injury—the inability to collect its taxes—flowed from the online sellers' Jenkins Act violations to the state.[286]

In a plurality opinion authored by Chief Justice Roberts, the Court reversed the Second Circuit, agreeing with the district court's dismissal of the city's RICO claim for failure to show proximate causation.[287] Finding "the [c]ity's theory of causation . . . far too indirect,"[288] the Court determined that the state of New York, not the city of New York, was the direct victim of Hemi's alleged misconduct and that "[t]he State certainly is better situated than the City to seek recovery from Hemi."[289] The Court emphasized, "[O]ur precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm."[290] Because of the remoteness of the city's injury, the Court determined that the city's loss was too speculative.[291] The Court noted that even if New York City had received the required information from Hemi, the city did not lose anything except the "opportunity" to collect taxes, since it was unclear whether the city would have actually collected cigarette taxes from purchasers had the out-of-state sellers supplied the state of New York with reports.[292] In his dissent, Justice Breyer noted that, historically, the city had collected only forty percent of the cigarette taxes owed by its residents for their online cigarette purchases.[293]

Justice Ginsburg—who concurred in the Court's judgment "[w]ithout subscribing to the broader range of the Court's proximate cause analysis"—focused on the presence of an existing regulatory scheme under the Jenkins Act that dealt with out-of-state cigarette sellers' obligations to report sales.[294] Justice Ginsburg stated, "I resist reading RICO to allow [New York City] to end-run its lack of authority to collect tobacco taxes from Hemi Group or to reshape the 'quite limited remedies' Congress has provided for violations of the Jenkins Act."[295]

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285. *Id.*

286. *Id.* at 6–7. Hemi agreed for purposes of the case that Jenkins Act violations could serve as RICO predicate acts. *Id.*

287. *Id.* at 18.

288. *Id.* at 10.

289. *Id.* at 12.

290. *Id.*

291. *See id.* at 10.

292. *Id.* at 15.

293. *See id.* at 21 (Breyer, J., dissenting).

294. *Id.* at 19 (Ginsburg, J., concurring in part) (quoting City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425, 459–60 (2d Cir. 2008)).

295. *Id.* (Ginsburg, J., concurring in part). The dissenting Justices in *Hemi*—Justices Breyer, Stevens, and Kennedy—focused on the foreseeability of Hemi's conduct, finding that the city's loss of cigarette taxes was "reasonably foreseeable" to Hemi and, in fact, was "desired" by Hemi to make its product more appealing to customers. *See id.* at 22–23 (Breyer, J., dissenting). The plurality countered that foreseeability was not the issue; rather, "directness of the relationship between the [defendant's] conduct and the [plaintiff's] harm" was the key. *Id.* at 12 (quoting *id.* at

d. Concluding Observations

As the above discussion shows, *Holmes*, *Anza*, and *Hemi* collectively make the following five points. First, the standard for causation in civil RICO actions is proximate causation.[296] Second, RICO plaintiffs in civil actions must prove that their alleged injuries are *directly* caused by the defendant's alleged violation of RICO.[297] This is a high and exacting burden. Third, to prove proximate causation, RICO plaintiffs must be able to show that factors other than the alleged RICO conduct did not contribute to their injury.[298] Fourth, RICO plaintiffs must be able to demonstrate why they are the party best situated to redress the alleged injury.[299] Finally, given Justice Ginsburg's point in *Hemi,* it may also be helpful for RICO plaintiffs to show that no other statutory scheme in place was designed to redress the injury at issue.

2. Application and Guidance from the Courts of Appeals

This section discusses six RICO cases decided by the federal courts of appeals between 2005 and 2011, all of which were rendered subsequent to the *Holmes–Anza–Hemi* trilogy. Together, they signal what appears to be a pro-plaintiff trend in the RICO proximate causation issue. This is unusual. Historically, although the Supreme Court has generally interpreted RICO broadly and in favor of RICO plaintiffs, the lower federal courts have not.[300] Time will tell whether the lower courts will continue to analyze proximate causation in a pro-plaintiff manner, but as the discussion below demonstrates, they have done so since *Hemi* was decided in 2010.

The first two cases discussed herein are *BCS Services, Inc. v. Heartwood 88, LLC*[301] and *Ideal Steel Supply Corp v. Anza.*[302] Both opinions were rendered by the Seventh and Second Circuits, respectively, after disposition by the Supreme Court.[303] While the last four decisions—all alleging pharmaceutical fraud—were decided against plaintiffs, they provide clear guidance for future plaintiffs seeking to show proximate causation under RICO, especially in pharmaceutical fraud cases.[304]

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24 (Breyer, J., dissenting); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 470 (2006) (Thomas, J., concurring in part and dissenting in part); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992)). Justice Sotomayor did not participate in the Court's consideration of the case. *Id.* at 18.

296. *See supra* note 242 and accompanying text.

297. *See supra* notes 250–52 and accompanying text.

298. *See supra* notes 267–70 and accompanying text.

299. *See supra* notes 289–91 and accompanying text.

300. *See supra* notes 182–87 and accompanying text.

301. 637 F.3d 750 (7th Cir. 2011).

302. 652 F.3d 310 (2d Cir. 2011).

303. *See Ideal Steel Supply*, 652 F.3d at 317; *BCS Servs.*, 637 F.3d at 752 (citing Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008)).

304. *See* discussion *infra* Part VI.C.2.c.

a. When Plaintiffs Have Done Enough

In *BCS Services*, the Seventh Circuit applied proximate causation requirements favorably for the plaintiffs.[305] At issue in *BCS Services* was a tax lien auction that was held in Cook County, Illinois, to allow people to bid on properties for which property taxes had not been paid.[306] When a property was put up for auction, the highest bidder obtained a lien on the property and agreed to pay the county the past-due taxes on it.[307] The property owner was then provided one last opportunity to reclaim the property by reimbursing the bidder.[308] If the owner did not pay the taxes by the deadline, the bidder who obtained the lien at the auction received the deed to the property.[309] Generally, if this occurred, the bidder could then sell the property at a significant profit.[310] Thus, obtaining liens at the tax auction was a lucrative endeavor. There were typically many more bidders than properties.[311] To fairly allocate bidding opportunities, Cook County permitted only one agent of a "related entity" to bid.[312] As the Seventh Circuit noted, "[O]therwise a potential buyer could increase the likelihood of winning by packing the room."[313] The plaintiff, BCS Services, alleged that the defendants falsely represented that they were not related entities when the three groups were related.[314] As a result, BCS Services claimed that, as a bidder who followed the rules, it was cheated out of more opportunities to bid.[315]

The Seventh Circuit consolidated *BCS Services* with *Phoenix Bond & Indemnity Co. v. Bridge* after *Bridge* was decided by the Supreme Court and reheard by the district court.[316] The court noted that the *Bridge* suit involved the same facts and allegations.[317] After rehearing *Bridge*, the district court "grant[ed] summary judgment for the defendants on the ground that the plaintiffs

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305. *See BCS Servs.*, 637 F.3d at 756–58 (citations omitted) (discussing the plaintiff's burden of proof in showing proximate causation).

306. *See id.* at 752–53.

307. *Id.* at 752.

308. *Id.*

309. *Id.*

310. *See id.* (discussing how investors target properties that "are worth more than the past-due taxes").

311. *See id.* at 752–53 (discussing the auction process for tax liens and the alleged fraud committed by defendants in packing these auctions with between eleven and thirty-nine bidders).

312. *Id.* at 753.

313. *Id.*

314. *See id.*

315. *See id.* at 753–54.

316. *See BCS Servs.*, 637 F.3d at 751–52 (quoting Phoenix Bond & Indem., Co. v. Bridge, No. 05 C 4095, 2005 WL 3527232, at *5 (N.D. Ill. Dec. 21, 2005), *rev'd*, 477 F.3d 928 (7th Cir. 2007), *aff'd*, 553 U.S. 639 (2008)). At issue in *Bridge* was "whether a plaintiff asserting a RICO claim predicated on mail fraud must plead and prove that it relied on the defendant's alleged misrepresentations." *Bridge*, 553 U.S. at 641–42. The Supreme Court held that, under these circumstances, "first-party reliance [was] not required . . . ." *Id.* at 642.

317. *BCS Servs.*, 637 F.3d at 751.

can't prove that the fraud was a proximate cause of their alleged losses."[318] The Seventh Circuit reversed, concluding that the plaintiffs had demonstrated sufficient causation to survive the motion for summary judgment.[319] The Seventh Circuit began its analysis with a far-ranging discussion of the role of the proximate causation requirement:

> The doctrine of proximate cause . . . protects the ability of primary victims of wrongful conduct to obtain compensation; simplifies litigation; recognizes the limitations of deterrence (unforeseeable consequences of a person's acts will not influence his decision on how scrupulously to comply with the law); and eliminates some actual or possible but probably minor causes as grounds of legal liability.[320]

Turning to the case before it, the Seventh Circuit bluntly stated that "[t]he doctrine has no application to this case . . . ."[321] Chastising the district court for allowing the defendants to "throw[] sand in the . . . judge's eyes,"[322] the Seventh Circuit determined that the district court had indulged the defendants in "present[ing] . . . implausible speculations concerning possible superseding causes, and demand[ing] that the plaintiffs refute them."[323] The court concluded that "[o]nce a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation."[324]

b. Business Deals Gone Bad: Time to Use § 1962(a)

The Second Circuit's analysis in *Ideal Steel Supply Corp. v. Anza*[325] also points to a potentially new, helpful avenue for plaintiffs who seek to use civil RICO against business competitors. Since lawsuits between business

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318. *See id.* at 752 (internal quotation marks omitted).

319. *See id.* at 758–59, 761.

320. *Id.* at 756.

321. *Id.*

322. *Id.* at 758.

323. *Id.* at 757.

324. *Id.* at 758 (citing Liriano v. Hobart Corp., 170 F.3d 264, 271–72 (2d Cir. 1999); Kingston v. Chi. & N. W. Ry., 211 N.W. 913, 915 (Wis. 1927); Martin v. Herzog, 126 N.E. 814, 816 (N.Y. 1920) (Cardozo, J.)). The Seventh Circuit remanded the case to the district court, which rendered a jury verdict for the plaintiffs against some of the defendants on RICO violations, RICO conspiracy, and state law tortious interference claims. Phoenix Bond & Indem. Co. v. Bridge, No. 05 C 4095, 2011 WL 5978742, at *1 (N.D. Ill. Nov. 29, 2011). The district court awarded the plaintiffs treble damages and attorney's fees under RICO, as well as punitive damages on the plaintiffs' state law claims. Phoenix Bond & Indem. Co. v. Bridge, Nos. 05 C 4095, 07 C 1367, 2012 WL 8706, at *3 (N.D. Ill. Jan. 2, 2012).

325. *See* 652 F.3d 310 (2d Cir. 2011).

competitors are the second most common use of civil RICO,[326] the lesson from *Anza* could be particularly fruitful for plaintiffs.

As previously discussed, Ideal—the plaintiff company in *Anza*—alleged that National violated both § 1962(a) and § 1962(c) by failing to collect required taxes and underreporting income, thereby obtaining an unfair competitive advantage over Ideal.[327] Although the Supreme Court held that Ideal did not show proximate causation under § 1962(c),[328] the Court remanded for further findings regarding proximate causation under § 1962(a).[329]

After the Supreme Court remanded the case, Ideal amended its complaint, focusing on its § 1962(a) claim.[330] According to the amended complaint, National filed amended tax returns upon Ideal's filing of the original RICO complaint.[331] Ideal alleged that these amended tax returns showed that National had underreported its income from 1998 to 2003 by $4.3 million and underpaid its taxes by approximately $1.7 million.[332] Ideal further alleged that, in violation of § 1962(a), National used the cash it collected by virtue of its tax fraud to purchase a store in the Bronx.[333] Because of its proximity to Ideal's location, the new Bronx store allegedly caused Ideal to lose between $1.3 million and $1.7 million in business per year.[334]

The district court, however, granted the defendants' "motions for judgment on the pleadings, and in the alternative for summary judgment."[335] The Second Circuit reversed, holding that Ideal's amended complaint adequately alleged proximate causation for a § 1962(a) violation.[336] Accordingly, the court remanded the case for trial.[337]

In reaching its conclusion that proximate causation was shown, the Second Circuit highlighted the differences between § 1962(a) and § 1962(c): § 1962(a) prohibits *investing* the proceeds of a pattern of racketeering activity in an enterprise,[338] while § 1962(c) prohibits any person associated with an enterprise from *conducting the affairs of the enterprise* through a pattern of racketeering activity.[339] Thus, the court reasoned that "the compensable injury flowing from a violation of [§ 1962(c)] necessarily is *the harm caused by predicate*

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326. *See infra* Appendix B-1, at Chart 4.
327. *Anza*, 547 U.S. at 454–55.
328. *Id.* at 461.
329. *Id.* at 462.
330. Ideal Steel Supply Corp. v. Anza, 652 F.3d 310, 317 (2d Cir. 2011).
331. *Id.*
332. *Id.*
333. *Id.* at 317–18.
334. *Id.* at 318.
335. *Id.* at 313.
336. *See id.* at 326.
337. *Id.* at 328.
338. *Id.* at 321 (emphasis added) (quoting 18 U.S.C. § 1962(a) (2006)).
339. *Id.* (emphasis added) (quoting § 1962(c)).

acts . . .,"[340] while injury flowing from a violation of § 1962(a) is not "an injury caused . . . by the pattern of racketeering activity itself, but rather . . . [from the] investment of the proceeds of that activity."[341] Because the injury in § 1962(a) is an "investment" and the harmful conduct alleged by Ideal was an "investment" by National, the Second Circuit concluded that Ideal had adequately alleged proximate causation:

> With respect to Ideal's subsection (a) claim, . . . the act constituting the violation is the very act that causes the harm: the use or investment of the funds derived from the pattern of mail and wire frauds to establish and operate the Bronx store is both the violation and the cause of ideal's lost sales.[342]

In holding that Ideal's amended RICO complaint adequately demonstrated proximate causation, the Second Circuit assessed the district court's mistaken judgment, stating that "as a general matter, the district court viewed the proximate cause inquiry as the same for a claim under subsection (a) as for one under subsection (c), and it does not appear to have given effect to the different referents required by the different prohibitions."[343]

In short, the Second Circuit's decision in *Anza v. Ideal Steel Supply Corp.* demonstrates how use of § 1962(a) by plaintiffs—rather than the more widely used § 1962(c)[344]—may make the showing of proximate causation easier for plaintiffs.

c. Pharmaceutical Fraud

The four cases discussed below involve allegations of fraud by pharmaceutical companies marketing drugs.[345] The plaintiffs in all of these cases were union health and welfare funds.[346] As insurers for their fund members, the plaintiffs were obligated under their health plans to pay for the drugs prescribed to their members by a physician.[347] Either as a single plaintiff

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340. *Id.* (quoting Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 457 (2006)) (internal quotation marks omitted).

341. *Id.*

342. *Id.* at 327.

343. *Id.*

344. *See* RAKOFF & GOLDSTEIN, *supra* note 3, § 1.06[3].

345. *See* Se. Laborers Health & Welfare Fund v. Bayer Corp., 444 F. App'x 401, 402 (11th Cir. 2011); Ironworkers Local Union 68 v. AstraZeneca Pharm., LP, 634 F.3d 1352, 1356 (11th Cir. 2011); United Food & Commercial Workers Cent. Pa. & Reg'l Health & Welfare Fund v. Amgen, Inc., 400 F. App'x 255, 257 (9th Cir. 2010); UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 124 (2d Cir. 2010).

346. *Se. Laborers*, 444 F. App'x at 401; *Ironworkers*, 634 F.3d at 1352; *United Food*, 400 F. App'x at 255; *UFCW Local 1776*, 620 F.3d at 121.

347. *See, e.g.*, *Ironworkers*, 634 F.3d at 1366 ("[T]he insurers had to pay regardless of the facts surrounding that prescription . . . .").

or in putative class actions—depending on the case—these plaintiffs sued pharmaceutical companies for allegedly misrepresenting the efficacy, side effects, or both the efficacy and side effects of various drugs.[348] The damage theories in the cases varied somewhat, but the argument in each was essentially that if the defendants had not misrepresented facts about the drugs, the plaintiffs would not have paid for the drugs or would not have paid as much as they did.[349] Although the plaintiffs did not win in any of these cases, the courts provided detailed, practical guidance for future plaintiffs regarding how to show proximate causation in RICO claims.[350]

i. United Food & Commercial Workers Central Pennsylvania & Regional Health & Welfare Fund v. Amgen

In the 2010 case of *United Food & Commercial Workers Central Pennsylvania & Regional Health & Welfare Fund v. Amgen*,[351] the Ninth Circuit followed the Supreme Court's reasoning in *Holmes*, focusing on the steps in the causal chain from the defendant's alleged misconduct to the plaintiffs' alleged injury.[352] At issue were two drugs—Aranesp and Epogen—used to treat anemia, both of which were linked to serious complications in cancer patients and kidney patients.[353] Allegedly, Amgen offered kickbacks to medical providers to increase sales of Aranesp and Epogen.[354]

The Ninth Circuit held that "the complaint failed to plead a cognizable theory of proximate causation that link[ed] Amgen's alleged misconduct to Appellants' alleged injury."[355] The court noted that "at least four independent links" were present in the causal chain, including "(1) the USP-DI's [United States Pharmacopeia Drug Information] listing of Aranesp for anemia of cancer, (2) Medicare's decision to cover Aranesp for anemia of cancer, (3) third-party

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348. *See Se. Laborers*, 444 F. App'x at 402; *Ironworkers*, 634 F.3d at 1356; *United Food*, 400 F. App'x at 257; *UFCW Local 1776*, 620 F.3d at 123.

349. *See Se. Laborers*, 444 F. App'x at 404; *Ironworkers*, 634 F.3d at 1356–57; *UFCW Local 1776*, 620 F.3d at 123.

350. *See infra* Part VI.C.2.c.v.

351. 400 F. App'x 255 (9th Cir. 2010).

352. *Compare id.* at 257 (determining that the plaintiff's complaint alleged a causal connection that was too attenuated to satisfy the proximate cause requirement of RICO), *with* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268–74 (1992) (discussing the proximate causation requirements for § 1962(c) RICO claims and concluding that the causal link between the alleged stock manipulation and the harm suffered by the plaintiffs was too remote).

353. Martin Zimmerman, *California and 14 Other States Sue Amgen over Anemia Drug Aranesp*, L.A. TIMES, Oct. 31, 2009, at B1 [hereinafter Zimmerman]; *see* Andrew Pollack, *Amgen to Pay $780 Million to Settle Suits on Its Sales*, N.Y. TIMES, Oct. 25, 2011, at B4 [hereinafter Pollack].

354. Pollack, *supra* note 353; Zimmerman, *supra* note 353.

355. *United Food*, 400 F. App'x at 257 (citing Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 654–55 (2008)).

payors' decision to cover Aranesp for anemia . . ., and (4) doctors' decisions to prescribe Aranesp . . . ."[356] The Ninth Circuit concluded that "the causal theory was too attenuated to satisfy the Supreme Court's proximate causation requirement in the RICO context."[357]

ii. Southeast Laborers Health & Welfare Fund v. Bayer Corp.

The Eleventh Circuit's analysis in *Southeast Laborers Health & Welfare Fund v. Bayer Corp.*,[358] decided in 2011, is similar to the Ninth Circuit's analysis in *United Food*.[359] The plaintiffs alleged that Bayer had "misrepresented or suppressed emerging information revealing serious risks associated with the use of Trasylol."[360] Trasylol originally was developed to treat pancreatitis.[361] It was later found to reduce excessive bleeding during surgery and was administered to surgery patients until it became linked to kidney damage.[362]

The plaintiff, the Southeast Laborers Health and Welfare Fund, alleged that its damage—paying for Trasylol—was caused by Bayer's misrepresentations that Trasylol was a safe and effective drug.[363] The Eleventh Circuit rejected this claim of causation, finding the Fund's allegations inadequate.[364] It noted that there was no evidence connecting the Fund's decision to pay for Trasylol to the alleged misrepresentations by Bayer.[365] According to the court, "Southeast allege[d] no facts indicating how it would have independently evaluated Trasylol's medical appropriateness . . . . Thus, Southeast's supposedly 'direct chain of causation' [was] unsupported by factual allegations."[366] The court provided guidance for plaintiffs in future pharmaceutical fraud cases by suggesting that to meet the direct relation requirement, complaints must adequately allege how or why the plaintiffs chose to pay for certain drugs and how or why the defendants' alleged improper conduct led to those payments.

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356. *Id.*

357. *Id.*

358. 444 F. App'x 401 (11th Cir. 2011).

359. *See supra* notes 351–57 and accompanying text.

360. *Se. Laborers*, 444 F. App'x at 402.

361. *Id.*

362. *See id.* at 402–03.

363. *See id.* at 404. The Eleventh Circuit quickly rejected the plaintiff's causation theory, stating that it amounted to "no more than a . . . 'fraud on the FDA' theory" and noting that this theory "has been specifically rejected by the Supreme Court." *Id.* at 407 (citing Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 348 (2001)). The court also rejected the plaintiff's argument "that Bayer's alleged material omissions give rise to a presumption of causation," since it was not raised below and, thus, was waived. *Id.* at 408.

364. *Id.* at 408.

365. *See id.* at 407–08.

366. *Id.* at 408.

iii. Ironworkers Local Union 68 v. Astrazeneca Pharmaceuticals

In *Ironworkers Local Union 68 v. AstraZeneca Pharmaceuticals, LLP*,[367] the plaintiffs—a number of health and welfare funds—alleged that AstraZeneca misrepresented facts about Seroquel, an antipsychotic medication approved by the FDA for treatment of schizophrenia and bipolar disorder.[368] AstraZeneca had marketed and sold Seroquel as an effective treatment for autism, dementia, Alzheimer's, and other disorders.[369] Seroquel was commonly prescribed for these disorders, even though it was not FDA-approved for such uses.[370] The plaintiffs alleged that AstraZeneca's representations of Seroquel's effectiveness and safety for these disorders were false—the drug was neither effective nor safe.[371] They further alleged that AstraZeneca's misrepresentations caused physicians to prescribe Seroquel unnecessarily, which in turn, injured the plaintiffs—who had paid for Seroquel under the terms of their health plans.[372]

Following the Supreme Court's approach in *Anza*, the Eleventh Circuit noted that in this case—as in *Anza*—there was an independent factor in the causal chain between the defendant's alleged fraud and the plaintiffs' alleged loss.[373] In *Anza*, the independent factors were the market trends and business practices that may have caused Ideal's loss of business to National—rather than National's alleged wrongdoing.[374] Here, the independent factor was the independent decision by each physician to prescribe Seroquel for a particular patient.[375] The court noted that physicians prescribe medications "in the exercise of their independent professional judgment, and such judgment could be informed by sources other than AstraZeneca's representations . . . [regarding the] drug's relative safety and efficacy."[376]

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367. 634 F.3d 1352 (11th Cir. 2011).

368. *Id.* at 1355 & n.1.

369. *Id.* at 1356 n.4.

370. *Id.*

371. *Id.* at 1356.

372. *Id.* at 1356–57.

373. *Compare id.* (quoting Ironworkers Local Union No. 68 v. AstraZeneca Pharm. LP, 585 F. Supp. 2d 1339, 1344 (M.D. Fla. 2008), *aff'd on other grounds*, 634 F.3d 1352 (11th Cir. 2011)) (noting that the prescribing physicians' professional judgment could have been an independent factor), *with* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 459 (2006) (discussing how businesses lose and gain customers for many reasons, any one of which could have functioned as an independent factor).

374. *Anza*, 547 U.S. at 459 (quoting Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 272–73 (1992)).

375. *Ironworkers*, 634 F.3d at 1359 (quoting *Ironworkers*, 585 F. Supp. 2d at 1344).

376. *Id.* (alteration in original) (quoting *Ironworkers*, 585 F. Supp. 2d at 1344) (internal quotation marks omitted). The court also noted that the Fund's economic loss in covering Seroquel was due to its own actuarial errors. *Id.* at 1364. The court also reasoned that "insurers assume[] the risk of paying for all prescriptions of drugs covered by their policies, including medically unnecessary or inappropriate prescriptions—even those caused by fraudulent marketing." *Id.*

As the Supreme Court made clear in *Anza*, as long as there is an independent factor in the causal chain, it is not possible to directly attribute the plaintiff's injury to the defendant's alleged misconduct and, thus, not possible to show proximate causation in a civil RICO case.[377] The plaintiffs in *Ironworkers*, however, failed to take this into account. The problem with proving proximate causation was that the plaintiffs' own theory of causation incorporated an independent factor: the fact that each physician prescribed Seroquel to a particular patient.[378]

iv. UFCW v. Eli Lilly & Co.

In *UFCW Local 1776 v. Eli Lilly & Co.*,[379] a case rendered by the Second Circuit in 2010, a number of unions and insurers who provided coverage—including prescription drug coverage—for their insured members brought a putative class action, alleging that Eli Lilly & Co. (Eli Lilly) misrepresented the efficacy and side effects of Zyprexa.[380] Zyprexa was originally approved by the FDA to treat schizophrenia and later approved for the treatment of bipolar disorder.[381] The plaintiffs alleged that Eli Lilly, the manufacturer of Zyprexa, misrepresented Zyprexa's side effects and exaggerated its effectiveness.[382] The district court certified the class and denied the defendant's motion for summary judgment.[383] The Second Circuit reversed, decertifying the class and holding that the denial of summary judgment for the defendant was inappropriate.[384] Although the defendant prevailed in this case, the opinion provides excellent guidance for future plaintiffs: namely, it will help them prove every step in their causal chain and, by inference, help them construct only a causal chain that they can prove.[385]

The Second Circuit began its analysis with a discussion of reliance.[386] Acknowledging the Supreme Court's holding that first-party reliance is not an element of a civil RICO cause of action based upon mail fraud or wire fraud,[387] the Second Circuit noted that because the plaintiffs chose to incorporate reliance into their theory of liability, "the plaintiffs . . . must prove . . . third-party

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377. *See Anza*, 547 U.S. at 461.

378. *Ironworkers*, 634 F.3d at 1359 (quoting *Ironworkers*, 585 F. Supp. 2d at 1344).

379. 620 F.3d 121 (2d Cir. 2010).

380. *Id.* at 123.

381. *Id.* at 124.

382. *Id.*

383. *Id.* at 130.

384. *Id.* at 137.

385. *See id.* at 134 (rejecting plaintiff's attempt to prove a causal link because it "skips several steps and obscures the more attenuated link between the alleged misrepresentations made to doctors and the ultimate injury to the [plaintiffs]").

386. *See id.* at 132 (citing McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 222 (2d Cir. 2008)).

387. *Id.* (citing Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 659 (2008)).

reliance as part of their chain of causation."[388] Further, the court noted that because class actions may be certified only if the class members' claims may be shown by "generalized proof,"[389] the question becomes "whether reliance can be shown by generalized proof."[390]

The Second Circuit described the alleged chain of causation as follows:

> [I]f plaintiffs' factual allegations are correct, the chain of causation runs as follows: Lilly distributes misinformation about Zyprexa, physicians rely upon the misinformation and prescribe Zyprexa, TPPs [third party payors][391] relying on the advice of PBMs [Pharmacy Benefit Managers] and their Pharmacy and Therapeutics Committees place Zyprexa on their formularies [lists of medications approved by TPPs for payment] as approved drugs, TPPs failed to negotiate the price of Zyprexa below the level set by Lilly, and TPPs overpay for Zyprexa.[392]

This chain of causation, the court explained, "rests on the independent actions of third and even fourth parties."[393] As such, it must fail.

v. Concluding Remarks

Together, *United Food*, *Southeast Laborers*, *Ironworkers*, and *UFCW Local 1776* provide significant guidance for plaintiffs who sue pharmaceutical companies under civil RICO by alleging fraudulent misrepresentations of drugs the companies manufacture or market. The theory of liability plaintiffs choose is the key. Plaintiffs must demonstrate that *their* decision to pay for a particular drug rests upon *their* assessment of the drug's efficacy and side effects, and that *they* relied on the pharmaceutical company's representations about efficacy and side effects in making this decision.[394]

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388. *Id.* at 133 ("[R]eliance is a necessary part of the causation theory advanced by the plaintiffs.").

389. *Id.* at 131–32.

390. *Id.* at 133.

391. The Eleventh Circuit succinctly described the role of insurers in the U.S. health care system, referring to *insurers* as "entities that engage in the health insurance function—*i.e.*, the contractual assumption of a third-party's risk of future payment for health care services .... [H]ealth benefit plans [such as labor unions and self-funded health and welfare funds] are trust funds established, and funded, by the labor unions to pay for the health care services received by their enrollees ...." Ironworkers Local Union 68 v. AstraZeneca Pharm., LP, 634 F.3d 1352, 1355 n.1 (11th Cir. 2011).

392. *Id.* at 134.

393. *Id.* (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 15 (2010)) (internal quotation marks omitted).

394. *See, e.g.*, *id.* (citing *In re* Zyprexa Prods. Liab. Litig., 253 F.R.D. 69, 193 (E.D.N.Y. 2008), *rev'd and vacated*, 620 F.3d 121 (2d Cir. 2010) (stating that plaintiffs' failure to allege that "*they* relied on [the pharmaceutical company's] misrepresentations" was crucial to their theory of liability).

To successfully demonstrate probable cause, an *insurer* alleging injury arising from a pharmaceutical company's representations about drugs must show that its coverage decision is based on its *own* decisionmaking process, which in turn, must be based on representations about the drug made by a pharmaceutical company.[395] An insurer's decision to cover a particular drug cannot be based on a third party's independent assessment of efficacy, regardless of whether that third party is the FDA, Medicare, or a prescribing physician.[396] While FDA proclamations, Medicare policies, or physician prescriptions may be prerequisites to an insurer's decision to cover a particular drug, the insurer must make its own *final* decision to provide coverage based upon specific representations about the drug by its manufacturer and marketer, which the insurer explicitly relied upon in making its decision to cover that specific drug.[397]

While creating and documenting an explicit causation trail would be difficult—if not impossible—for many types of businesses, it should not be as difficult for insurers or other entities—such as health and welfare funds—that serve as insurers for their members. Health insurers and health and welfare funds can easily document their decisionmaking process to cover a particular drug. Insurers and funds already have existing protocols to determine drug coverage under their plans.[398] Through Pharmacy Benefit Managers, or other similar outsourced entities, insurers and funds already have systems in place for establishing formularies of what drugs they will cover.[399] To shore up proximate causation—in the event a lawsuit against pharmaceutical companies later becomes necessary—insurers and funds simply need to explicitly include one more step in their existing coverage decision tree. After ensuring that a drug is approved by the FDA and prescribed by a physician, insurers—through the agents they already employ or outsource to develop formularies—should document that they have relied upon specific representations by pharmaceutical companies regarding efficacy and side effects in making their own, independent decision to cover the drug.[400] The specific representations should be set forth in the coverage decision tree. With this type of documentation, insurers will be able to meet the rigors of the proximate causation requirements if they later need to bring a civil RICO action against pharmaceutical companies for misrepresentations about drugs covered.

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395. *See, e.g.*, Se. Laborers Health & Welfare Fund v. Bayer Corp., 444 F. App'x 401, 410 (11th Cir. 2011) (holding that insurer's claim did not establish the direct causation requirement of proximate cause because it failed to prove that the pharmaceutical company's alleged misrepresentation affected its decision to pay for the drug in question).

396. *See id.* at 408.

397. *See id.* at 410.

398. *See* UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 126 (2d Cir. 2010) (discussing the insurers' process for compiling the formulary—the "list of medications approved for payment").

399. *See id.*

400. *See supra* notes 395–98 and accompanying text.

d. Conclusion: Proximate Causation

The Supreme Court has provided a roadmap for plaintiffs seeking to prove proximate causation in civil RICO actions.[401] Recent decisions by the courts of appeals have provided additional guidance for this roadmap.[402]

To prove proximate causation in civil RICO actions, plaintiffs must show that their injury was directly caused by the defendant's alleged conduct; that there are no independent, contributing factors to the plaintiff's injury; and that there are no other victims more directly harmed and, thus, better able to vindicate their rights.[403] In addition, if plaintiffs use civil RICO against business competitors, they should use § 1962(a) of RICO instead of the more commonly used § 1962(c) since proximate causation will be easier to prove under § 1962(a) than under § 1962(c).[404] Lastly, the way is bright if insurers, either as a single plaintiff or in class actions, want to use RICO to sue pharmaceutical companies for fraudulent misrepresentations about covered drugs.[405] Recent decisions have set forth exactly what insurers must do to show proximate causation in such cases.[406]

VII. CLASS ACTIONS: THE NEW FRONTIER FOR CIVIL RICO

One of the intriguing observations from this study concerns the use of RICO in class actions. A confluence of two recent trends—RICO decisions that make it easier to use RICO in class actions, and judicial and legislative restrictions on punitive damage awards in general—thrusts RICO into the forefront as a new and powerful vehicle for bringing class actions. Recent cases show that, in the context of class actions, RICO is being used more often, more successfully, and in larger cases.

Fifteen of the 157 civil RICO actions included in this study (10%) are class actions.[407] More than one-third of the opinions in these class actions were

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401. *See supra* Part VI.C.1 and accompanying text.

402. *See supra* Part VI.C.2 and accompanying text.

403. *See supra* Part VI.C.1.

404. *See supra* Part VI.C.2.b.

405. *See supra* Part VI.C.2.c.

406. *See supra* Part VI.C2.c.

407. *See* Se. Laborers Health & Welfare Fund v. Bayer Corp., 444 F. App'x 401 (11th Cir. 2011) (pharmaceutical fraud); Ironworkers Local Union 68 v. AstraZeneca Pharm., LP, 634 F.3d 1352 (11th Cir. 2011) (pharmaceutical fraud); *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (pharmaceutical fraud); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010) (insurance fraud); Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283 (11th Cir. 2010) (health care reimbursement fraud); Edwards v. Prime, Inc., 602 F.3d 1276 (11th Cir. 2010) (employment discrimination claims and immigration fraud); Crichton v. Golden Rule Ins. Co., 576 F.3d 392 (7th Cir. 2009) (health insurance fraud); Longmont United Hosp. v. Saint Barnabas Corp., 305 F. App'x 892 (3d Cir. 2009) (health insurance reimbursement fraud); McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008) (products liability for cigarettes); Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) (consumer fraud); Olaniyi v. Alexa Cab Co., 239 F. App'x 698 (3d Cir. 2007)

rendered recently, in 2010 and 2011.[408] Plaintiffs received favorable rulings in one-third of these class actions,[409] which is a higher success rate than in civil RICO actions overall (20%).[410] Health care issues dominate the RICO class action cases: more than half of the RICO class actions allege some type of health care fraud,[411] with pharmaceutical fraud as the predominant category.[412] Using RICO to bring pharmaceutical fraud class actions is a recent phenomenon: all of the pharmaceutical fraud opinions in this sample were rendered in 2010 and 2011.[413] Indeed, no RICO pharmaceutical fraud decisions were rendered prior to 2010. Perhaps most telling is that all of the decisions in RICO class actions rendered in 2011 alleged pharmaceutical fraud.[414] As discussed earlier, this trend of using RICO to bring class actions aimed at pharmaceutical fraud is likely to accelerate.[415]

RICO has always conferred four advantages on plaintiffs in class actions. First, damages under RICO, which include treble damages and an award of attorney's fees and costs, can be quite large.[416] RICO's damages are also mandatory[417]: they cannot be altered by courts or capped by legislatures.[418] Second, because of the large number and variety of the predicate acts it incorporates, RICO applies to a wide swath of conduct.[419] In particular, because RICO incorporates mail and wire fraud, it applies to virtually all frauds:

(mortgage fraud); Humphrey v. United Parcel Serv., 200 F. App'x 950 (11th Cir. 2006) (consumer fraud); Williams v. Mohawk Indus., Inc., 465 F.3d 1277 (11th Cir. 2006) (employment discrimination; immigration fraud); Denney v. Deutsche Bank AG, 443 F.3d 253 (2d Cir. 2006) (investment fraud); Guerrero v. Gates, 442 F.3d 697 (9th Cir. 2006) (prisoner rights).

408. *See Se. Laborers*, 444 F. App'x 401; *Ironworkers*, 634 F.3d 1352; *UFCW Local 1776*, 620 F.3d 121; *In re Ins. Brokerage*, 618 F.3d 300; *Am. Dental Ass'n*, 605 F.3d 1283 (2010); *Edwards*, 602 F.3d 1276 (2010).

409. *See UFCW Local 1776*, 620 F.3d at 137; *In re Ins. Brokerage*, 618 F.3d at 383; *Odom*, 486 F.3d at 555; *Williams*, 465 F.3d at 1295; *Denney*, 443 F.3d at 268; *Guerrero*, 442 F.3d at 708.

410. *See infra* Appendix B-2, at Chart 5.

411. *See Se. Laborers*, 444 F. App'x at 402 (pharmaceutical fraud); *Ironworkers*, 634 F.3d at 1356 (pharmaceutical fraud); *UFCW Local 1776*, 620 F.3d at 123 (pharmaceutical fraud); *Am. Dental Ass'n*, 605 F.3d at 1286 (health care reimbursement fraud); *Crichton*, 576 F.3d at 394–95 (health insurance fraud); *Longmont*, 305 F. App'x at 893 (health insurance reimbursement fraud).

412. *See Se. Laborers*, 444 F. App'x at 402; *Ironworkers*, 634 F.3d at 1356; *UFCW Local 1776*, 620 F.3d at 123.

413. *Se. Laborers*, 444 F. App'x at 401; *Ironworkers*, 634 F.3d at 1352; *UFCW Local 1776*, 620 F.3d at 121.

414. *See Se. Laborers*, 444 F. App'x at 402; *Ironworkers*, 634 F.3d at 1356.

415. *See supra* Part VI.C.2.c.

416. 18 U.S.C. § 1964(c) (2006). For example, expert testimony in *UFCW Local 1776* estimated that damages for the putative class ranged between $4 billion and $7.7 billion. *UFCW Local 1776*, 620 F.3d at 129.

417. *See* § 1964(c); Judith A. Morse, Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 528 (1986) ("Like compensatory damages, treble damages are mandatory once the victim establishes liability and the extent of the harm.").

418. *See* § 1964(c).

419. *See* § 1962(a)–(c); *supra* Part I.

business, health care, computer, construction, financial services, etc.[420] Third, RICO provides plaintiffs with many choices of venue, since RICO claims may be brought against defendants wherever a defendant "resides, is found, has an agent, or transacts his affairs."[421] Lastly, RICO makes it easier to certify class actions.[422] Recent Supreme Court RICO decisions regarding issues of first-party reliance, enterprise, and causation, along with existing case law on RICO's pattern requirement,[423] have the combined effect—however unintended—of making it easier to meet class action requirements of commonality and predominance.

A. Court and Legislative Restrictions on Punitive Damages

Over the past three decades, the United States has seen efforts by courts and legislatures to restrict punitive damages.[424] For example, in 1985, only seven states legislatively imposed limitations on punitive damages.[425] By 1987, twenty-two states had enacted such legislation.[426] The Supreme Court has been especially active in restricting punitive damages. Beginning in 1996 with its decision in *BMW of North America v. Gore*,[427] the Court began to rein in punitive damages by focusing on the relationship between punitive and compensatory damages.[428] The Court anchored its restrictions in the Due Process Clause of the Fourteenth Amendment[429] and held that a punitive damage award of $2 million was "not simply excessive, but grossly so, and therefore

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420. *See* § 1961(1); *see generally* Abels v. Farmers Commodities Corp., 259 F.3d 910, 918 (8th Cir. 2001) (quoting Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989)) (commenting on the breadth of mail fraud).

421. § 1965(a).

422. *Cf.* J. Gordon Cooney, Jr. et al., *Back to the Future: Civil RICO in Off-Label Promotion Litigation*, 77 DEF. COUNS. J. 168, 169 (April 2010) (citing Castano v. Am. Tobacco Co., 84 F.3d 734, 740–44 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300–04 (7th Cir. 1995)), *available at* http://www.morganlewis.com/pubs/Cooney&Lavelle_CivilRICOinOff-LabelPromotionLitigation_april2010.pdf ("[C]ivil RICO claims conceivably allow plaintiffs to sidestep the predominating choice-of-law issues that typically prevent nationwide class actions based on fraud or deceptive practice[s] . . . .").

423. *See infra* Part VII.B.

424. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 371 (1994).

425. CONG. BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES 6 (2004), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5549/report.pdf.

426. *Id.*; *see generally* Exxon Shipping Co. v. Baker, 554 U.S. 471, 495–96 (2008) (quoting Larsen Chelsey Realty Co. v. Larsen, 656 A.2d 1009, 1029 n.38 (Conn. 1995)) (discussing states' efforts to prohibit or restrain punitive damages).

427. 517 U.S. 559 (1996).

428. *See id.* at 580–81 (citing Owen, *supra* note 424, at 368 & n.23).

429. *Id.* at 568.

unconstitutional, particularly since compensatory damages only amounted to four thousand dollars."[430]

In the 2003 case of *State Farm Auto Ins. Co. v. Campbell*,[431] the Court held that a punitive damage award of $145 million on a $1 million compensatory damage award was excessive.[432] The Court noted that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[433]

In the 2008 case of *Exxon Shipping Co. v. Baker*,[434] the Court drew a "bright line," holding that a 1:1 ratio of punitive-to-compensatory damages was appropriate.[435] The Exxon Valdez, an oil tanker, ran aground in Prince William Sound in Alaska, spilling eleven million gallons of crude oil.[436] Compensatory damages in the amount of $507.5 million were awarded,[437] as well as $2.5 billion in punitive damages.[438] In setting aside the punitive damage award, the Court approved a punitive-to-compensatory ratio of 1:1.[439] The Court rendered a damning discourse on punitive damages in general, noting the "audible criticism"[440] and the "stark unpredictability" of punitive damage awards,[441] which created "tension . . . in a system whose commonly held notion of law rests on a sense of fairness . . . ."[442] Although the Court's ruling in *Exxon Shipping Co.* was limited to maritime cases, its reasoning was not.[443] The Court spoke of the hazards of punitive damage awards in general, and not simply in the context of maritime punitive damage awards.[444]

The implication of the *BMW–State Farm–Exxon Shipping* trilogy is that any punitive damage award that exceeds compensatory damages is highly suspect, violates due process, and is vulnerable to reduction to a 1:1 ratio.[445] Coupling this judicial trend with state legislative efforts to cap punitive damages makes RICO's mandatory treble damages and costs newly attractive for plaintiffs' attorneys.

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430. *Id.* at 611 (Ginsburg, J., dissenting) (referencing the majority's decision).
431. 538 U.S. 408 (2003).
432. *Id.* at 429.
433. *Id.* at 425.
434. 554 U.S. 471 (2008).
435. *Id.* at 513.
436. *Id.* at 478.
437. *Id.* at 515.
438. *Id.* at 481.
439. *Id.* at 515.
440. *Id.* at 497.
441. *Id.* at 499.
442. *Id.* at 502.
443. *See id.* at 499–515 (citations omitted) (discussing punitive damages generally).
444. *See id.* The Court also cited to statistical data beyond maritime cases. *Id.* at 495–96 & n.12.
445. *See supra* notes 430–34 and accompanying text.

B. Recent RICO Jurisprudence Makes It Easier to Meet Class Action Requirements

Federal Rules of Civil Procedure (FRCP) Rule 23, which governs class actions, requires "sufficient unity so that absent class members can fairly be bound by decisions of class representatives."[446] FRCP Rule 23(a) also requires the following for class certification:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[447]

Once the prerequisites in FRCP Rule 23(a) are met, a class may be certified only if the standards in FRCP Rule 23(b) are also met.[448] FRCP Rule 23(b)(3) requires "the court [to] find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[449]

Recent Supreme Court rulings on reliance enhance RICO's ability to meet the commonality and predominance requirements in class actions. It is well-established that plaintiffs must prove reliance in fraud cases: "It has long been settled . . . that only the recipient of a fraudulent misrepresentation may recover for common-law fraud, and that he may do so, if, but only if . . . he relies on the misrepresentation in acting or refraining from action."[450] This requirement of first-party reliance makes it more difficult to find commonality, as required in FRCP Rule 23(a), and predominance, as required in FRCP Rule 23(b). Plaintiffs must present individualized proof to show that each and every plaintiff relied upon a defendant's misrepresentation.[451]

In *Bridge v. Phoenix Bond & Indem. Co.*, which was decided in 2010, the Supreme Court held that first-party reliance need not be proven in civil RICO actions where mail fraud is the alleged racketeering activity.[452] Writing for the

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446. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997).

447. FED. R. CIV. P. 23(a).

448. *Windsor*, 521 U.S. at 614.

449. FED. R. CIV. P. 23(b)(3).

450. Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 650 (2010) (quoting RESTATEMENT (SECOND) OF TORTS § 537 (1977)) (internal quotation marks omitted).

451. *See* Martinelli v. Petland, Inc., 274 F.R.D. 658, 662 (D. Ariz. 2011) ("Because the Court and a jury could not simply assume that every class member relied on [defendant's] alleged representations in making his or her purchase decision, individual proof of reliance would be necessary.").

452. *Bridge*, 553 U.S. at 653 (quoting Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 476 (2006) (Thomas, J., concurring in part and dissenting in part)).

majority, Justice Thomas reasoned that because mail fraud—a statutory offense—was "unknown to the common law"[453] and did not contain a first-party reliance element, it was not bound by common law interpretations of fraud.[454] The Court stated that "Congress chose to make mail fraud, not common-law fraud, the predicate act for a RICO violation."[455] Therefore, "a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations."[456]

By freeing RICO actions based on mail or wire fraud from proof of first-party reliance, the Court has, almost certainly unintentionally, conferred a significant advantage on using RICO—instead of common law fraud—to bring class actions. With RICO, plaintiffs will not need to individualize their proof to show that any plaintiff, much less an entire class of plaintiffs, relied on a defendant's misrepresentation.[457]

The second area in which the Supreme Court has made it easier to meet the commonality and predominance requirements with RICO is with its rulings on RICO enterprise.[458] As noted previously, RICO requires proof of an enterprise[459]: that a defendant invested the proceeds of racketeering activity in an *enterprise*;[460] that a defendant acquired or maintained control over an *enterprise* through a pattern of racketeering activity;[461] that a defendant who is employed by or associated with an enterprise conducted the affairs of the *enterprise* through a pattern of racketeering activity;[462] or that a defendant conspired to do any of these activities.[463] A RICO enterprise may be a legal entity, such as a corporation, or it may be "any . . . group of individuals associated in fact although not a legal entity."[464] This latter option is known as an association in fact enterprise.[465]

As noted above, in *Boyle v. United States*,[466] the Supreme Court rejected lower courts' limiting interpretations of RICO's association in fact enterprise and solidified a broad interpretation of enterprise by holding that a RICO enterprise exists even if a group is "loosely and informally organized;" has no master plan,

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453. *Id.* at 652.

454. *Id.* at 653 (quoting *Anza*, 547 U.S. at 476 (Thomas, J., concurring in part and dissenting in part)).

455. *Id.*

456. *Id.* at 661.

457. *See id.*

458. *See supra* Part VI.B.

459. *See supra* Part VI.B.

460. *See* 18 U.S.C. § 1962(a) (2006).

461. *See* § 1962(b).

462. *See* § 1962(c).

463. *See* § 1962(d).

464. § 1961(4).

465. *See supra* Part VI.B.3.

466. 556 U.S. 938 (2009).

agreement, or hierarchy; or entails activities that are only conducted sporadically.[467]

The Court's ruling in *Boyle* permits plaintiffs to prove that far-flung actors are part of the enterprise.[468] The more actors involved, the easier it is to show that many individuals (*i.e.*, class members) have been impacted by an enterprise's conduct. In this way, a broad interpretation of enterprise makes it easier to show commonality and predominance and enlarges potential class members.

The third area in which Supreme Court rulings have made it easier to show commonality and predominance pertains to RICO's requirement that there be a *pattern* of racketeering activity. As discussed above,[469] in *H.J. Inc. v. Northwestern Bell Telephone Co.*, the Court held that "a pattern of racketeering activity" is shown if "criminal acts . . . have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[470] Thus, to meet the pattern requirement in a RICO case, it becomes necessary and relevant to show how seemingly disparate actors, actions, events, and victims are related.[471] This requirement of relatedness will dovetail with proving commonality among members.

In short, these holdings—that first-party reliance is not required, that enterprise may consist of far-flung actors, and that RICO requires proof of a pattern of activity—make it necessary, relevant, and easier to prove commonality among seemingly disparate acts by defendants and impacts on plaintiffs. The Third Circuit's opinion in *In re Insurance Brokerage Antitrust Litigation*[472] is one example of this. In that case, the court specifically relied on the enterprise and pattern requirements of RICO to approve class certification and settlement in a class action suit involving bribery and kickbacks in obtaining insurance coverage.[473] The court noted that proof of an "association in fact" enterprise "would encompass common questions of law and fact . . . including whether activities that constitute racketeering were taking place through the enterprise."[474] The court similarly concluded that RICO's pattern requirement helped the plaintiffs show commonality and predominance, stating that "whether these racketeering activities were recurring such that a pattern could be established" "would encompass common questions of law and fact . . . ."[475]

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467. *See id.* at 941, 948; *see also supra* Part VI.B.3.

468. *See supra* Part VI.B.3.

469. *See supra* Part VI.A.1.

470. 492 U.S.C. 229, 240 (internal quotation marks omitted) (citing 18 U.S.C. § 3575(e) (1982) (repealed 1984)).

471. *See supra* notes 102–04, 124–25 and accompanying text.

472. 579 F.3d 241 (3d Cir. 2009).

473. *See id.* at 270, 278.

474. *Id.* at 270.

475. *Id.*

In conclusion, because of the breadth of conduct to which RICO applies and the venue and choice of law opportunities it confers, RICO has always offered some advantages to plaintiffs seeking to bring class actions. However, because of two recent, seemingly unrelated but parallel trends—restrictions on punitive damages by legislatures and courts, and a series of Supreme Court decisions on RICO elements—RICO is a new and especially promising vehicle for bringing class actions. With the Supreme Court's apparent mandate that most punitive damages will be confined to a 1:1 ratio to compensatory damages, RICO's mandatory treble damages, attorney's fees and costs are more appealing than ever.[476] Supreme Court decisions on reliance, enterprise, pattern, and proximate causation, especially those rendered in 2009 and 2010, make RICO even more helpful in proving commonality and predominance.[477] For all of these reasons, RICO should be poised to thrive in the class action arena.

VIII. CONCLUSION

This Article began with a question: Why is RICO used so infrequently? It is a worthy question. RICO is an imaginative tool that was designed to address complex wrongdoing. Such tools are needed. Yet RICO has been used relatively little and maligned much. Accordingly, this Author undertook a study of federal appellate decisions on RICO rendered between 2005 and 2011, which has yielded interesting observations and an answer to the question initially posed.

First, this Author made the following observations. Most RICO cases are civil,[478] involve business disagreements between former associates or competitors,[479] and are resolved in favor of the defense.[480] About one-fourth of RICO cases are criminal prosecutions,[481] most of which are aimed at gang and drug activities;[482] the government prevails in almost all of these cases.[483] Considerable differences exist among the circuits regarding their experience with RICO and outcomes in RICO cases.[484] The Eleventh Circuit rendered the largest number of civil RICO decisions during the seven-year study,[485] while the Second

476. *See supra* Part VII.B.

477. *See generally* Hemi Grp., LLC v. City of New York, 559 U.S. 1 (2010) (requiring a direct relationship between the conduct and the harm to satisfy the proximate cause element of a RICO claim); Boyle v. United States, 556 U.S. 938 (2009) (allowing for a broad definition of "association in fact" enterprise); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008) (holding that a party bringing a civil RICO action alleging mail fraud as the racketeering activity does not need to prove first party reliance).

478. *See infra* Appendix A-1, at Chart 1.

479. *See infra* Appendix B-1, at Chart 4.

480. *See infra* Appendix B-2, at Chart 5.

481. *See infra* Appendix A-1, at Chart 1.

482. *See infra* Appendix B-1, at Chart 3.

483. *See infra* Appendix B-2, at Chart 5.

484. *See infra* Appendix B-2, at Chart 5.

485. *See infra* Appendix A-1, at Chart 2.

Circuit rendered the greatest number of criminal RICO decisions.[486] Defendants in civil RICO cases win less often in the Ninth Circuit[487] but most often in the Second, Third, and Eleventh Circuits.[488] The government wins most of the criminal RICO cases in all of the circuits.[489]

Three issues have dominated RICO case law: pattern, enterprise, and proximate causation.[490] All three issues have been clarified considerably by the Supreme Court in recent years, with the result that RICO jurisprudence—which has been mired in confusion for most of RICO's forty-year existence—is finally maturing into a workable body of law.

Additionally, a significant percentage of the civil RICO cases are class actions.[491] This trend is likely to accelerate. Recent case law development on the issues of proximate causation, reliance, pattern, and enterprise have made RICO civil actions easier to prove and the class action requirements of commonality and predominance easier to show.

And so, the answer to the question emerges. Criminal RICO is not used much because it has outgrown its usefulness. Civil RICO has not been used much because it has not yet grown into its usefulness. However, it appears that civil RICO's time to thrive has arrived.

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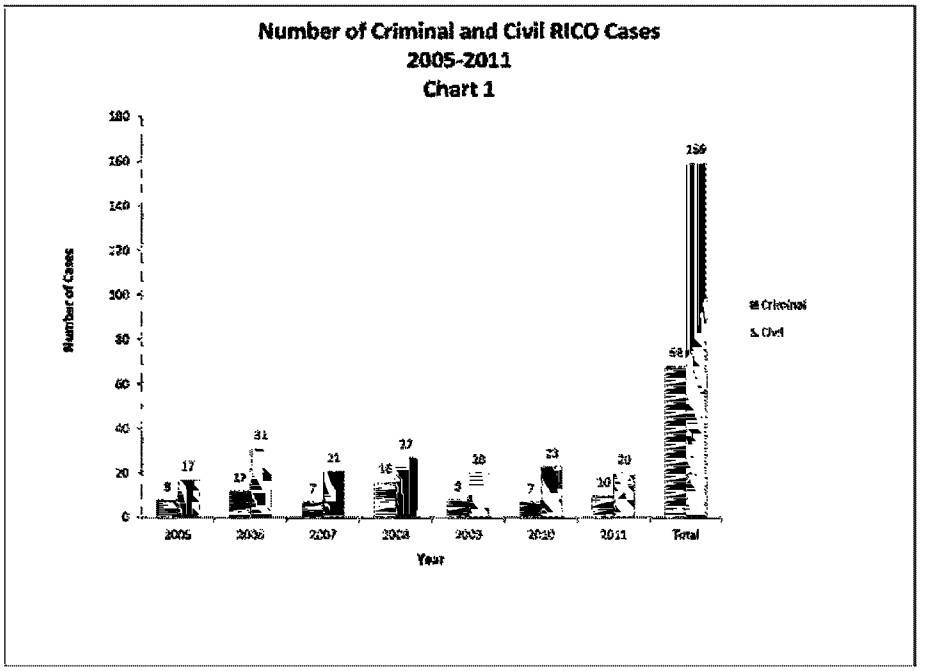
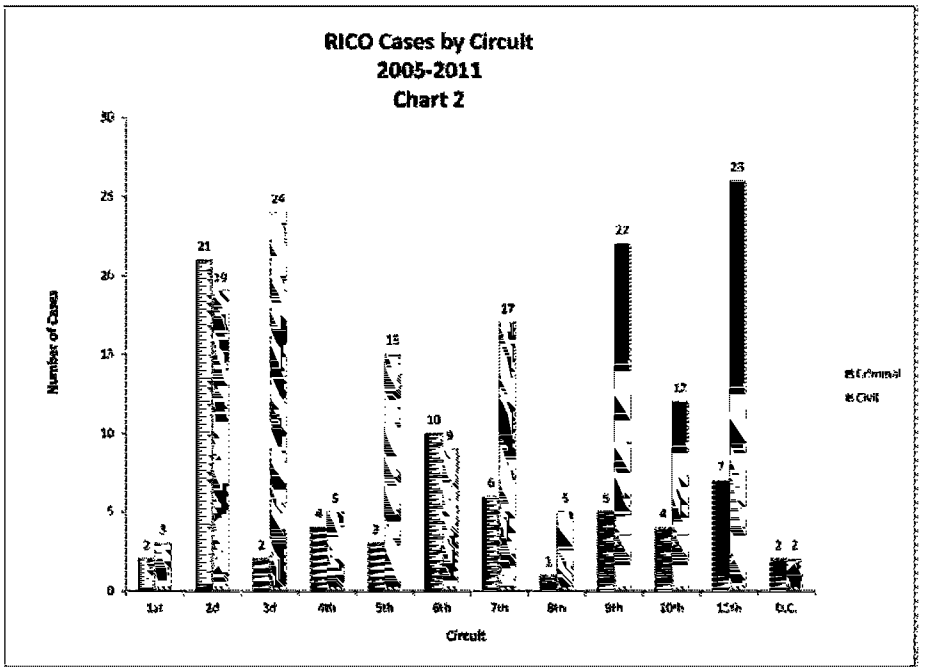
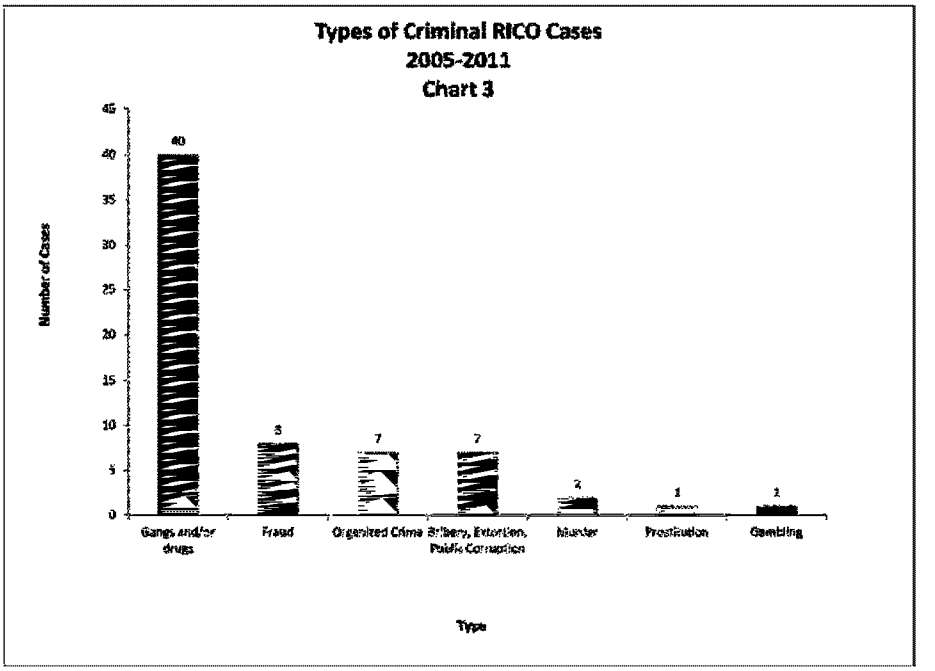
486. *See infra* Appendix A-1, at Chart 2.
487. *See infra* Appendix B-2, at Chart 8.
488. *See infra* Appendix B-2, at Chart 7.
489. *See infra* Appendix B-2, at Chart 7.
490. *See infra* Appendix C-1.
491. *See supra* note 407 and accompanying text.

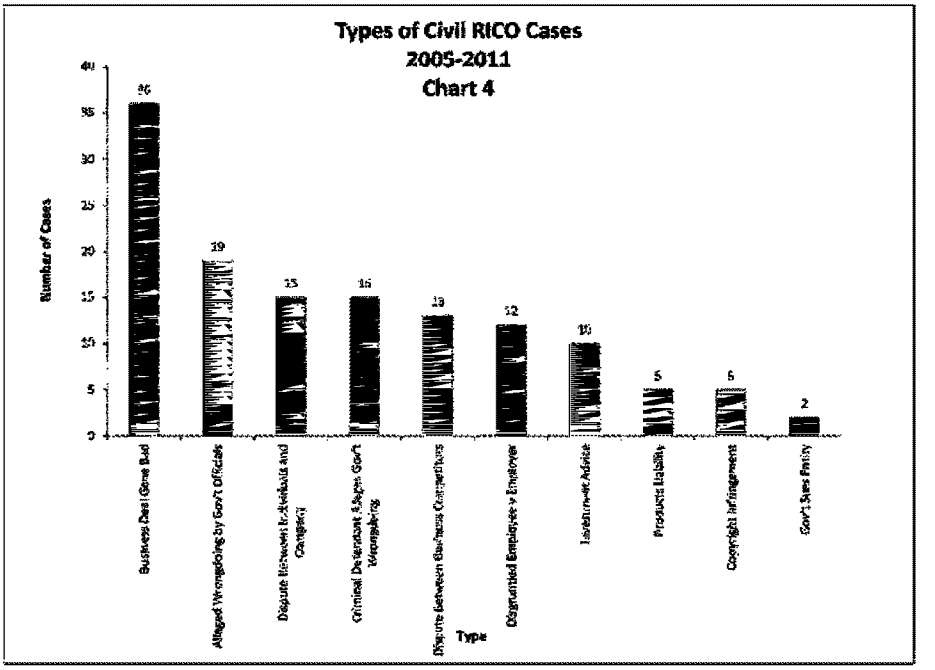
APPENDIX A-1


Number of Criminal and Civil RICO Cases
2005-2011
Chart 1
Number of Cases
Year
Criminal
Civil
2005
2006
2007
2008
2009
2010
2011
Total

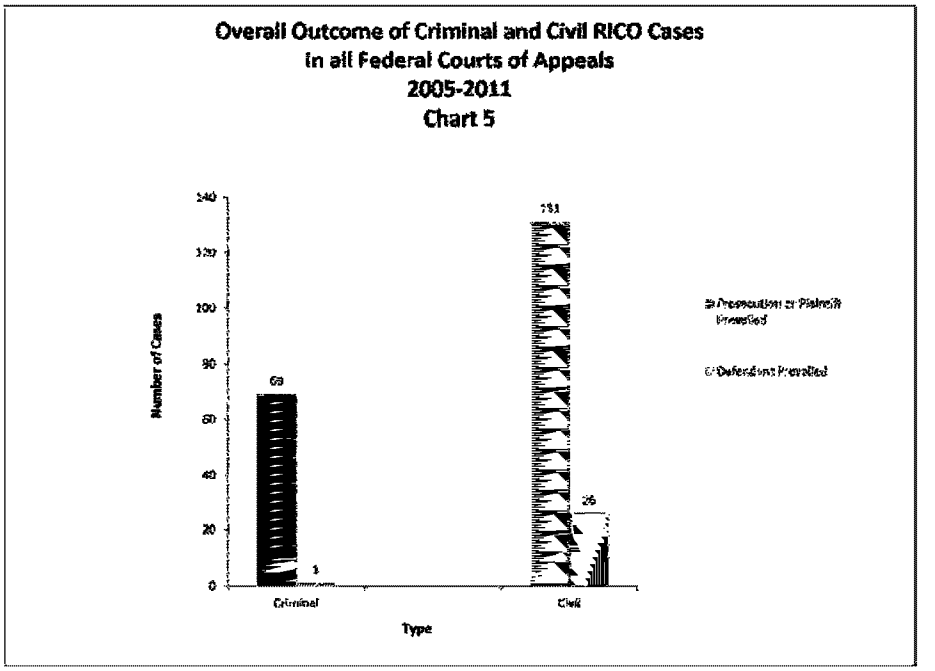

RICO Cases by Circuit
2005-2011
Chart 2
Number of Cases
Circuit
Criminal
Civil
1st
2d
3d
4th
5th
6th
7th
8th
9th
10th
11th
D.C.

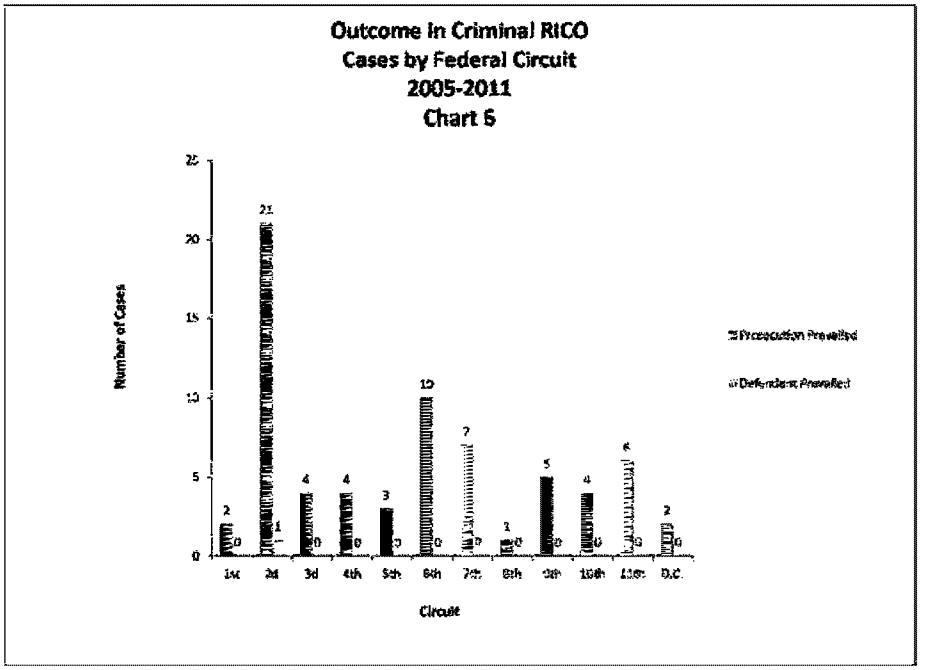
APPENDIX B-1

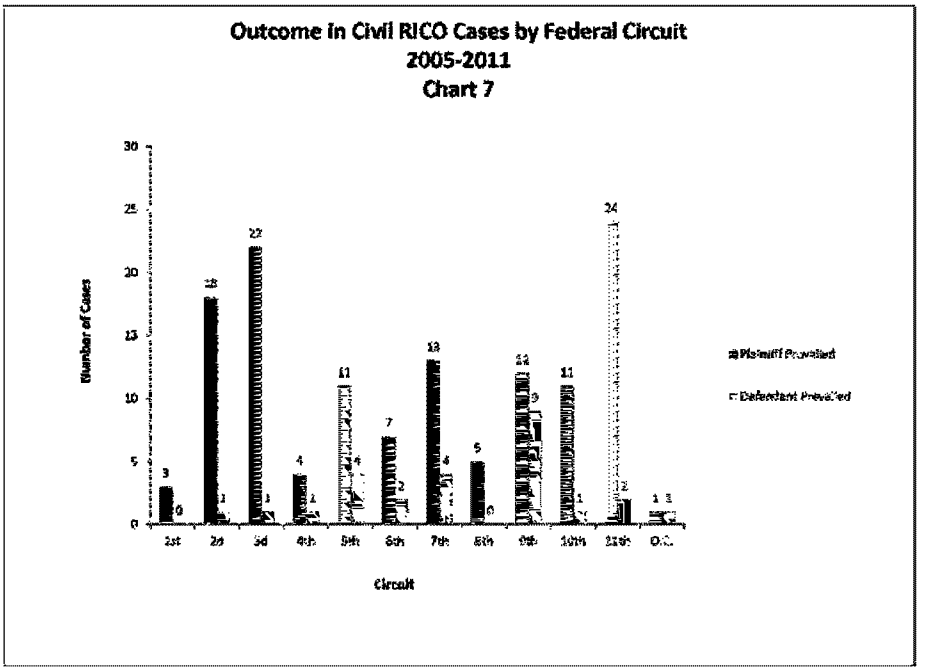

Types of Criminal RICO Cases
2005-2011
Chart 3
Number of Cases
40
8
7
7
2
1
2
Gangs and/or drugs
Fraud
Organized Crime
Bribery, Extortion, Public Corruption
Murder
Prostitution
Gambling
Type


Types of Civil RICO Cases
2005-2011
Chart 4
Number of Cases
36
19
15
15
13
12
10
5
6
2
Business Deal Gone Bad
Alleged Wrongdoing by Gov't Officials
Dispute Between Individuals and Company
Criminal Defendant Alleges Gov't Wrongdoing
Dispute between Business Competitors
Disgruntled Employee v. Employer
Takeover-or Antitrust
Products Liability
Copyright Infringement
Gov't Sues Party
Type

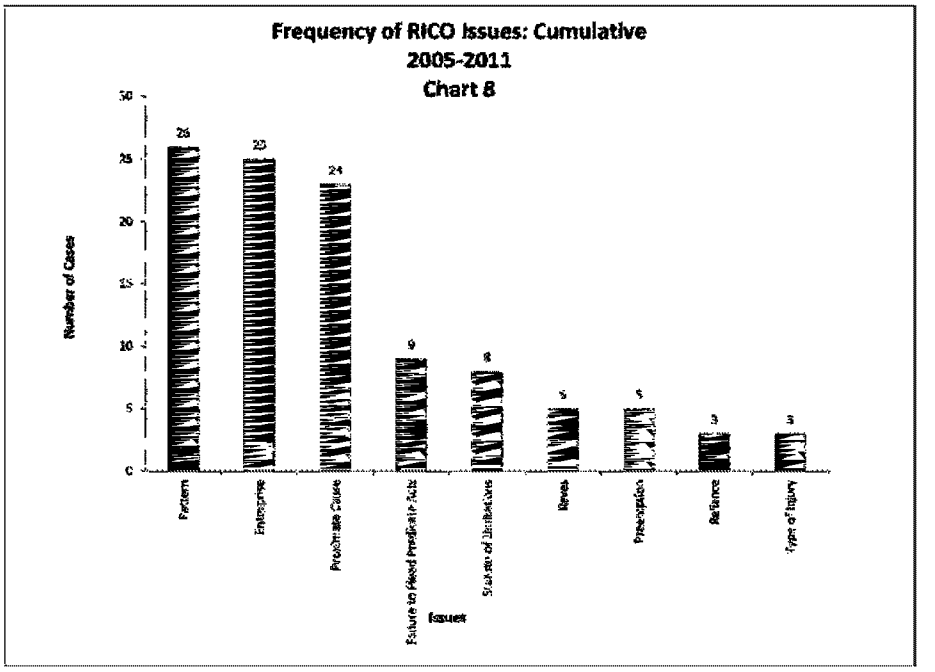
APPENDIX B-2


Overall Outcome of Criminal and Civil RICO Cases
In all Federal Courts of Appeals
2005-2011
Chart 5
Number of Cases
Type
Criminal
Civil
69
1
191
26

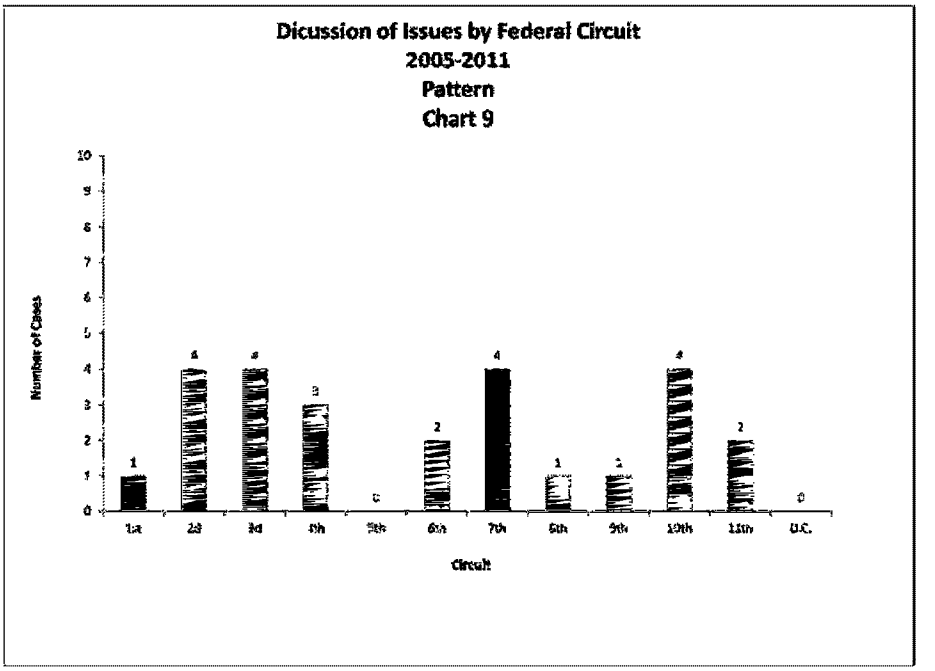

Outcome in Criminal RICO
Cases by Federal Circuit
2005-2011
Chart 6
Number of Cases
Circuit
2
0
21
1
4
0
4
0
3
0
10
0
7
0
1
0
5
0
4
0
6
0
2
0

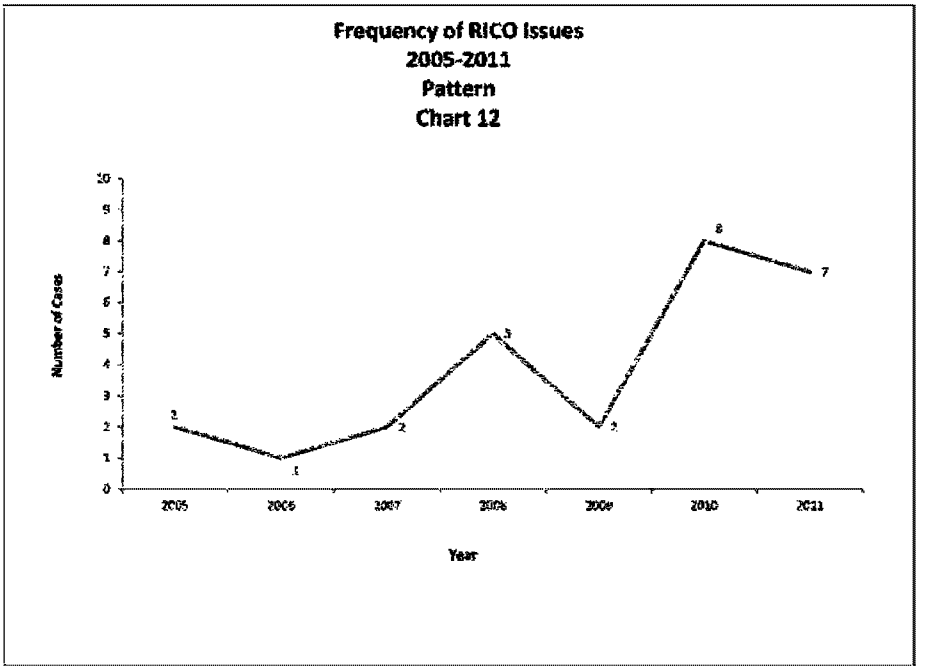

Outcome in Civil RICO Cases by Federal Circuit
2005-2011
Chart 7
Number of Cases
Circuit
Plaintiff Prevailed
Defendant Prevailed

APPENDIX C-1

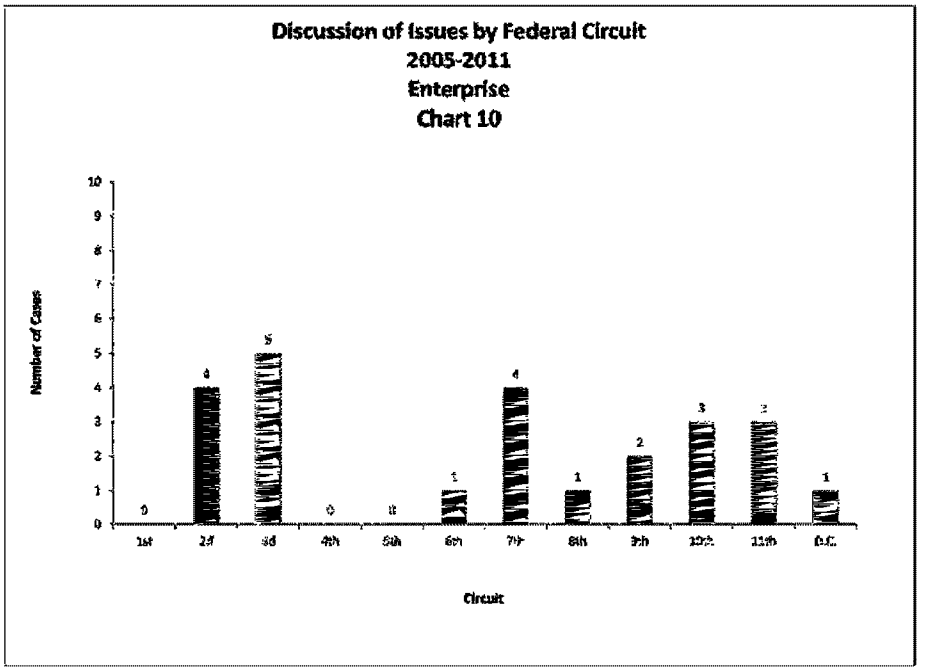

Frequency of RICO Issues: Cumulative
2005-2011
Chart 8
Number of Cases
Issues
26
25
24
9
8
5
5
3
3
0
5
10
15
20
25
30
Pattern
Enterprise
Proximate Cause
Reliance
Type of Injury

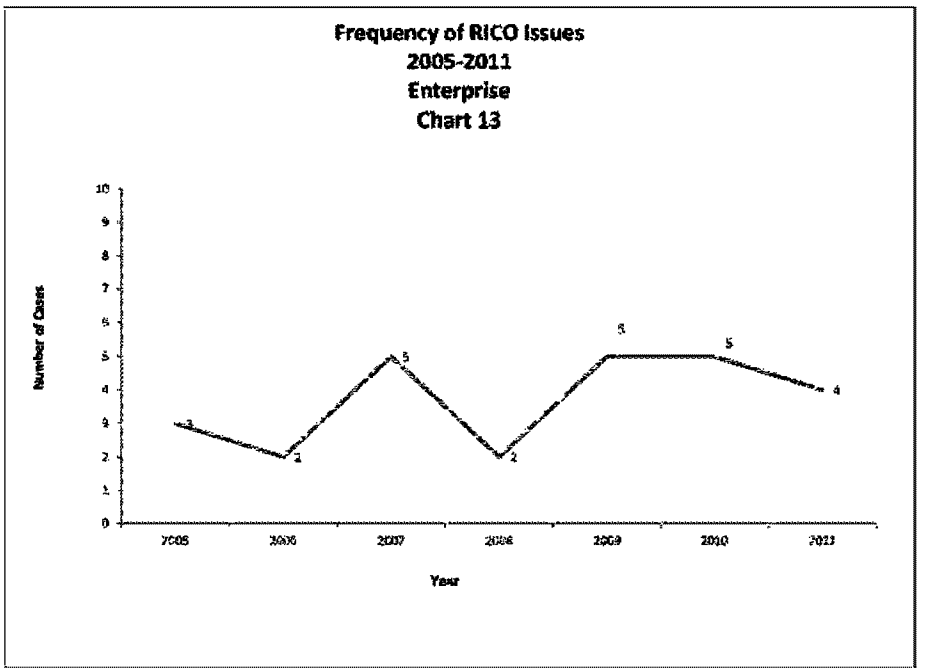
APPENDIX C-2


Dicussion of Issues by Federal Circuit
2005-2011
Pattern
Chart 9
Number of Cases
Circuit
1st
2d
3d
4th
5th
6th
7th
8th
9th
10th
11th
D.C.

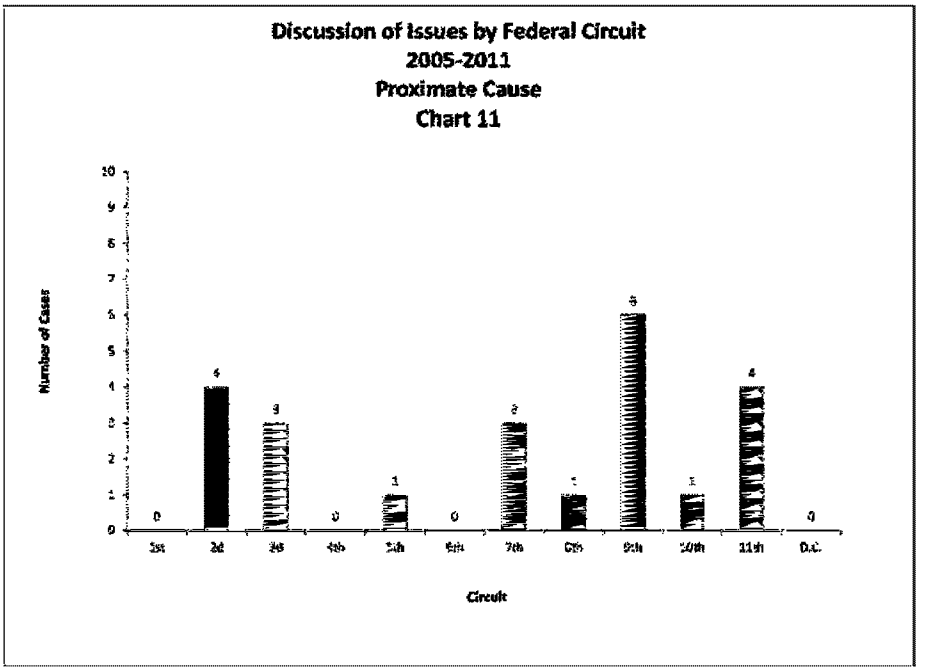

Frequency of RICO Issues
2005-2011
Pattern
Chart 12
Number of Cases
Year
2005
2006
2007
2008
2009
2010
2011

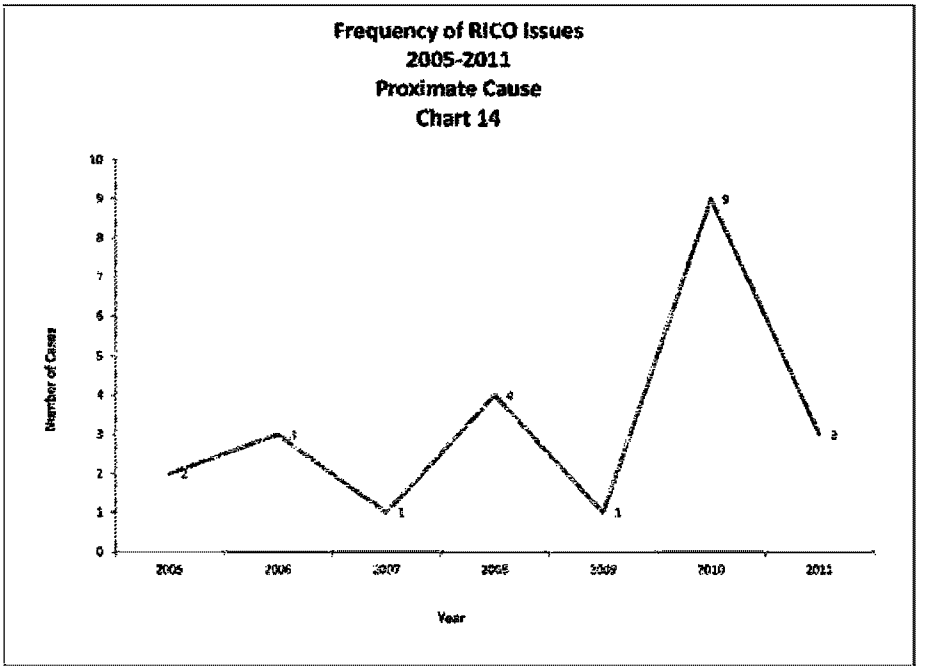
APPENDIX C-3


Discussion of Issues by Federal Circuit
2005-2011
Enterprise
Chart 10
Number of Cases
Circuit

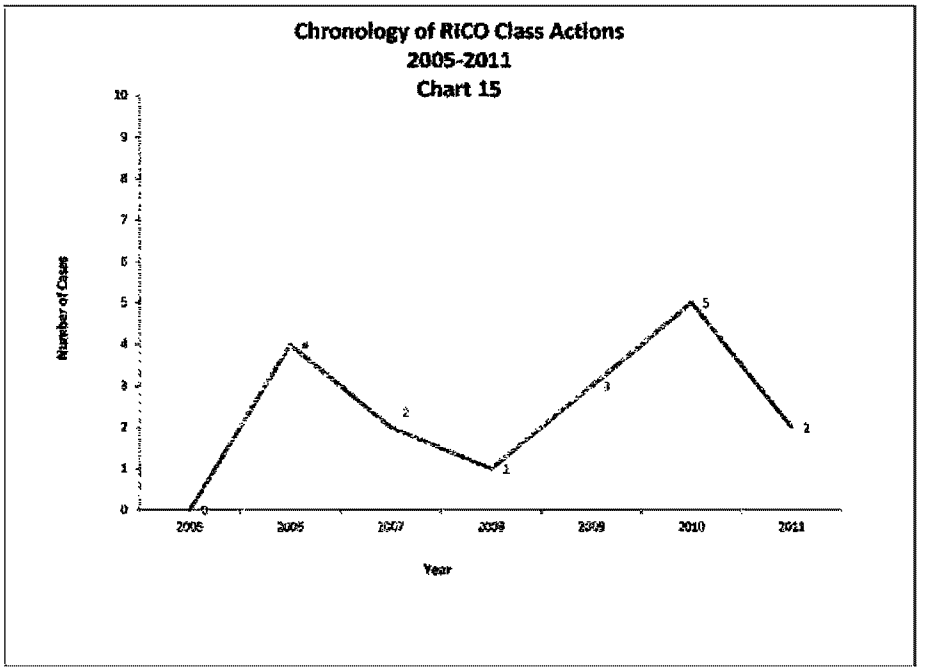

Frequency of RICO Issues
2005-2011
Enterprise
Chart 13
Number of Cases
Year

APPENDIX C-4


Discussion of Issues by Federal Circuit
2005-2011
Proximate Cause
Chart 11
Number of Cases
Circuit


Frequency of RICO Issues
2005-2011
Proximate Cause
Chart 14
Number of Cases
Year
2005
2006
2007
2008
2009
2010
2011

APPENDIX D-1


Chronology of RICO Class Actions
2005-2011
Chart 15
Number of Cases
Year
0
1
2
3
4
5
2
2005
2007
2009
2010
2011