Alabama Law Scholarly Commons

Working Papers

Faculty Scholarship

11-28-2012

RICO Trends: From Gangsters to Class Actions

Pamela Bucy Pierson
University of Alabama - School of Law, ppierson@law.ua.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_working_papers

Recommended Citation

Pamela B. Pierson, *RICO Trends: From Gangsters to Class Actions*, (2012).
Available at: https://scholarship.law.ua.edu/fac_working_papers/620

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.

THE UNIVERSITY OF
ALABAMA
SCHOOL OF LAW

RICO Trends: From Gangsters to Class Actions

Pamela H. Bucy

Working Paper

This paper can be downloaded without charge from the Social Science Research Network Electronic Paper Collection:
http://ssrn.com/abstract=2179211

RICO Trends: From Gangsters to Class Actions

By Pamela H. Bucy*

Introduction
I. Overview of RICO
II. Methodology
III. How Many RICO Cases Are There and Where Are They Brought?
IV. What Kinds of RICO Cases Are Brought?
V. What Happens in RICO Cases: Who Wins? Who Loses?
VI. Issues: What Dominates RICO Jurisprudence
- **A. "Pattern" of Racketeering Activity**
  - **1. Supreme Court Guidance**
  - **2. Application by the Courts of Appeals**
    - **a. *H.J. Inc. v. Northwestern Bell Telephone Co*.**
    - **b. Longevity**
    - **c. Single or Multiple Schemes**
    - **d. "Pattern" as a RICO Litmus Test**
    - **e. Concluding Observations**
- **B. "Enterprise"**
  - **1. Statutory Guidance**
  - **2. "Distinctness"**
  - **3. Association-in-fact Enterprises**
- **C. Proximate Causation**
  - **1. The Supreme Court's Roadmap: *Holmes-Anza-Hemi***
    - **a. *Holmes v. SIPC***
    - **b. *Anza v. Ideal Steel Supply Co.***
    - **c. *Hemi v. City of New York***
    - **d. Concluding Observations**
  - **2. Application and Guidance from the Courts of Appeals**
    - **a. When Plaintiffs Have Done Enough**
    - **b. Business Deals Gone Bad: Time to Use Section 1962(a)**
    - **c. Pharmaceutical Fraud**
    - **d. Conclusion: Proximate Causation**

VII. Class Actions: New Frontier for Civil RICO
- **A. Supreme Court Guidance on Punitive Damages: What Does it Mean for Civil RICO?**
- **B. Recent RICO Jurisprudence Makes it Easier to Meet Class Action Requirements**

Conclusion

---

* Bainbridge-Mims Professor of Law, University of Alabama School of Law. The author expresses her appreciation to Dean Ken Randall and the University of Alabama Law School Foundation for their support of this project, to the library staff at The University of Alabama School of Law: Iain Barksdale, Blake Beals, Penny Gibson, Jamie Leonard, Robert Marshall, and especially, Daniel Thomas (UA Law 2012), and to the following individuals for their research assistance: Julie Bucy, Gustavo Cardinas, Jamie Eckl and Megan Huval.

Electronic copy available at: http://ssrn.com/abstract=2179211

RICO Trends: From Gangsters to Class Actions

By Pamela H. Bucy

This article begins with a question: Why isn't RICO used much? RICO, the Racketeer Influenced and Corrupt Organizations Act,[1] both a crime and a civil cause of action, was passed in 1970 with much fanfare.[2] The fanfare was deserved. RICO was an imaginative criminal justice initiative aimed 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 during the seven year time period from 2005-2011, this article suggests an answer to this question: criminal RICO's time has come and gone; civil RICO's time has not yet arrived.

The data analyzed in this article suggests that criminal RICO is anachronistic. Simpler, more streamlined statutes are now available to achieve, far more easily than RICO, the benefits RICO used to uniquely bestow: providing context for isolated acts, linking far-flung actors, penetrating organizations to reach key players, stiff sentences, 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

---

[1] Pub. L. No. 91-452, 84 Stat. 941 (1970) codified at 18 U.S.C. § 1961-1968.

[2] Relevant legislative history on RICO includes: Senate Special Committee to Investigate Organized Crime in Interstate Commerce [First] Interim Report, S. REP. NO. 2370, 81st Cong., 2d Sess. (1950) [hereinafter *S. REP. NO. 2370*]; Interim Report on Investigations on Gambling and Racketeering in Florida, S. REP. NO. 81-2370, 81st Cong., 2nd Sess. 16 (1950) [hereinafter *S. REP. NO. 81-2370*]; S. REP. NO. 91-617, 91st Cong., 1st Sess.; *Report, Organized Crime Control Act of 1969, Senate Comm. on Judiciary,* 91st Cong., 1st Sess. 76, 79, 83 (1969) [hereinafter *S. REP. NO. 91-617*]; *Organized Crime Control Act of 1969, Hearings before Subcomm., No. 5, Comm. on the House Judiciary*, 91st Cong, 2d Sess. (multiple dates in 1970) [hereinafter *Hearings: Organized Crime Control*]; House Rep. No. 91-1549, Organized Crime Control Act of 1970, 91st Cong., 2d Sess. [hereinafter *H.R. REP. NO.* 91-1549].

Electronic copy available at: http://ssrn.com/abstract=2179211

private attorney general 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 class action requirements of commonality and predominance, making RICO class actions newly viable. Civil RICO also has potential for significant use in the pharmaceutical fraud area because of multiple, recent court decisions that spell 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 measurements 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 examines the issues that have dominated RICO court decisions. Part V discusses how recent court decisions on "enterprise," proximate causation and "pattern" make civil RICO cases now easier to plead and prove. Part VI analyzes the outcome in RICO cases including who wins, who loses, and which circuits favor which side. Part VII focuses on RICO class actions discussing past and future trends, successes, and failures. Part VII focuses on pharmaceutical fraud cases, noting why they are especially ripe for use of civil RICO.

I. OVERVIEW OF RICO

The RICO statute is complex.[3] It applies to a wide range of conduct and contains abstract terms "not easily correlated with everyday experience."[4] There are four types of conduct prohibited by RICO: (1) investing proceeds from a pattern of racketeering activity in an enterprise,[5] (2) acquiring or maintaining control over an enterprise through a pattern of racketeering activity, (3) conducting or participating in the affairs of an enterprise through a pattern of racketeering activity, and (4) conspiring to do any of these types of conduct.[6] Because RICO is both a crime and a civil cause of action, it may be prosecuted by United States Department of Justice prosecutors, criminally or civilly, or it may be brought as a civil suit by private individuals who have suffered damage to their business or property.[7] Those convicted of

---

[3] *See, e.g*., Hemi v. City of New York, 130 S.Ct. 983, 995 (2010) (Breyer, Dissenting). *Cf. Sedima*, 473 U.S. at 524. As Congress noted, twenty years after passing RICO, "the meaning of many of the ...new concepts and broad remedies...[of RICO] is still unclear." *SEN. REP. NO. 100-459, supra* note 1 at 2.

Excellent resources on RICO include: JED S. RAKOFF & HOWARD G. GOLDSTEIN, RICO CIVIL AND CRIMINAL LAW & STRATEGY (LJSP 1989) [hereinafter RAKOFF & GOLDSTEIN]; James D. Calder, *RICO's Troubled . . . Transition: Organized Crime, Strategic Institutional Factors and Implementation Delay, 1971-1981*, 25 CRIM. JUSTICE REV. 1 (2000) [hereinafter Calder, *RICO's Troubled Transition*]; Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Part I & II*, 87 COLUM. L. REV. 661 (1987) [hereinafter Lynch, *RICO: Being Criminal*]; G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on "Bennett v. Berg"*, 58 NOTRE DAME L. REV. 237 (1982) [hereinafter Blakey, *RICO Civil Fraud*]; G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L. Q. 1009 (1980) [hereinafter Blakey & Gettings, *Basic Concepts*].

[4] RAKOFF & GOLDSTEIN, *supra* note 3 at §7.01. As Rakoff and Goldstein have noted, RICO's "terms are artificial and not easily correlated with everyday experiences. *Id.* at §1.01.

[5] RICO specifies that the "enterprise" must be "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a)(b)(c).

[6] 18 U.S.C. § 1962.

[7] 18 U.S.C. § 1964(c).

RICO crimes face stiff penalties: a possible prison term of twenty years, forfeiture of property acquired or maintained in violation of RICO,[8] and fines of $250,000 per offense ($500,000 per offense if the defendant is an organization).[9] Those found civilly liable also face significant consequences: treble damages, and payment of attorneys' fees and costs.

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[10] requires RICO plaintiffs to prove that the defendants committed crimes. Thus, in addition to proving "RICO elements" ("pattern" and "enterprise") private plaintiffs in civil RICO actions must prove the elements of the crimes they allege as "racketeering activity." If plaintiffs allege mail fraud as the racketeering activity, for example, they must prove that the defendants: (1) intentionally, (2) devised a scheme or artifice to defraud, (3) to obtain property or money, and (4) used or caused to be used the United States mail or an interstate commercial carrier.[11] These are the same elements federal prosecutors must prove when prosecuting a criminal case alleging mail fraud. In a RICO civil action, plaintiffs prove these elements by a preponderance of the evidence rather than beyond a reasonable doubt.[12]

---

[8] 18 U.S.C. § 1963.

[9] 18 U.S.C. § 3571.

[10] 18 U.S.C. § 1964(c).

[11] Skilling v. United States, 130 S.Ct. 2896 (2010).

[12] *Cf*. Sedima v. Imrex, 473 U.S. 479, 491 (1985) (Court notes that it "need not decided the standard of proof issue today" but opins that "[t]here is no indication...Congress sought to depart from the preponderance standard of proof for civl RICO actions brought under §1964(c).

While there is overlap between criminal and civil RICO, there are differences. Since RICO's passage, courts have created an extensive body of common law that pertains only to civil RICO, concerning proximate causation,[13] compensable damage,[14] standing,[15] reliance,[16] and statute of limitations.[17] In addition, remedies are available in civil RICO cases that are not available in criminal RICO matters including divestiture of funds, dissolution and reorganization of corporations or other business structures, even restrictions on future activities.[18]

RICO contains three terms of art: (1) "racketeering activity," (2) "*pattern* of racketeering activity, and (3) "enterprise." The definition of "racketeering activity" is straight-forward. Section 1961(1) of RICO simply lists crimes that qualify as "racketeering activity." Generic state crimes (such as murder, kidnapping, robbery, etc) and approximately 150 specifically

---

[13] Anza v. Ideal Steel Supply Corp. 547 U.S. 451, 458-461 (2006); Holmes v. SEC Investor Prot. Corp, 503 U.S. 258, 268 (1992).

[14] *See, e.g*., Ironworkers Local Union 68 v. Astra Zeneca Pharmaceutical LP, 634 F.3d 1352 (11th Cir. 2011); Williams v. Mohawk, 465 F.3d 1277, 1285 (11th Cir. 2006).

[15] *Holmes*, 503 U.S. at 268; Beck v. Prupis, 529 U.S. 494, 499 (2000); NOW v. Scheidler, 510 U.S. 249 (1994).

[16] Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 653-660 (2008).

[17] Agency Holding Co. v. Malley-Duff & Associates, 483 U.S. 143 (1987).

[18] 18 U.S.C. § 1964(a). The weight of authority is that these equitable remedies are available only to the federal government and not to plaintiffs in private civil actions. *See, e.g.,* Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 967-68 (9th Cir. 1999); Johnson v. Collins Enter. Co., 199 F.3d 710, 726 (4th Cir. 1999); In re *Fredeman Litig.*, 843 F.2d 821, 830 (5th Cir. 1988); Trane Co. v. O'Connor Secur., 718 F.2d 26, 28 (2d Cir. 1983).

The Supreme Court has not yet ruled on this issue. The Court accepted certiorari on the question "[w]hether RICO authorizes a private party to obtain an injunction in Scheidler v. NOW, 547 U.S. 9, 126 S.Ct. 1264, 1269 (2006), but resolved the case on other grounds and did not reach this issue. *Id.*

enumerated federal offenses qualify as "racketeering activities."[19] Interestingly, it is the definition of racketeering activity that has seen the greatest number of amendments since RICO's passage in 1970. In 1970, only thirty federal crimes were listed as "racketeering activity"; today, the list exceeds ninety. Evolving priorities of law enforcement are apparent in these amendments. In 1970, RICO focused on traditional organized crimes. While mail fraud and wire fraud were included, most of racketeering activity consisted of classic organized crimes such as bribery, embezzlement from labor unions, extortion, counterfeiting, and prostitution. Today, "racketeering activity" includes a large variety of white collar offenses including financial institution fraud, naturalization and immigration fraud, bankruptcy fraud, money laundering, media and computer program counterfeiting.

A single act of racketeering activity does not render one liable under RICO. Rather, one must commit a "*pattern*" of racketeering activity. RICO defines "pattern of racketeering activity" as at least two acts of racketeering activity occurring within a ten year time period.[20] In 1989, the Supreme Court elaborated further on the "pattern" requirement, holding that racketeering acts must be *related* to each other (but not so related that the acts merge into one act),[21] and must

---

[19] 18 U.S.C. § 1961(1).

[20] "'[P]attern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . ." 18 U.S.C. § 1961(3).

[21] This issue of whether the acts related enough to satisfy *H.J. Inc.'s* "relatedness" requirement but not so related as to merge into one act (and 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. Some courts hold that two or more *schemes* to defraud are needed since the various mailings merge into one scheme. Other courts hold that separate mailings even in perpetration of a single scheme, are separate acts. *See* RAKOFF & GOLDSTEIN, *supra* note 3 at §1.04[2][b][iii].

demonstrate "*continuity*." The Court explained that 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."[22] Part VI(A) of this article discusses the pattern requirement.

"Enterprise" is the most fluid concept in RICO.[23] It 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."[24] Part VI(B) of this article discusses the enterprise element.

II. METHODOLOGY

The data analyzed in this article consists of all opinions rendered by the federal courts of appeals from 2005-2011 in RICO cases.[25] Reported and nonreported opinions are included in the

---

[22] H.J. Inc. v. Northwestern Bell Telephone Co, 492 U.S. 229, 242 (1989) ("pattern" must show "relationship" among the racketeering acts and "continuity" of the acts).

[23] As the Seventh Circuit noted, "Discussion of this person/enterprise problem under RICO can easily slip into a metaphysical or ontological style of discourse." Haroco Inc. v. ANB, 747 F.2d 384, 401 (7th Cir. 1984).

[24] 18 U.S.C. §1961(4).

[25] United States Supreme Court decisions are not included in the sample because there were so few. The Supreme Court has rendered six substantive RICO decisions between 2005-2011. Hemi Group LLC v. City of New York, ___ U.S. ___, 130 S. Ct. 983 (2010); Boyle v. United States, 556 U.S. 938 (2009); Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008); Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006); Scheidler v. National Organization for Women, Inc., 547 U.S. 9 (2006). These decisions are discussed as 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 case during the seven year time period

database since both are needed to accurately track trends. The database includes 277 cases; this full database is analyzed in Parts III, IV and V of this article (quantity, types, outcome). A smaller sample, consisting of 81 cases (each of which provides some analysis of RICO issues[26]), 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 reveals, of the 227 RICO opinions rendered by the federal courts of appeals between 2005 and 2011, 157 (74 %) were civil RICO cases and 70 (26%) were criminal. This author conducted a similar study of federal appellate RICO opinions rendered between 1999 and 2001.[27] Interestingly, the ratio of civil to criminal RICO opinions in the prior study, 78 % (civil) to 22% (criminal), is remarkably consistent to the present study. The peak year for RICO

---

studied. 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 2005-2011 have some substantive discussion of the RICO issue(s) raised. Over one-third of the appellate decisions contain extensive issue discussions, often critiquing and refining the analysis by other courts, academics and legislators. Focusing on these decisions provides rich terrain for assessing RICO trends.

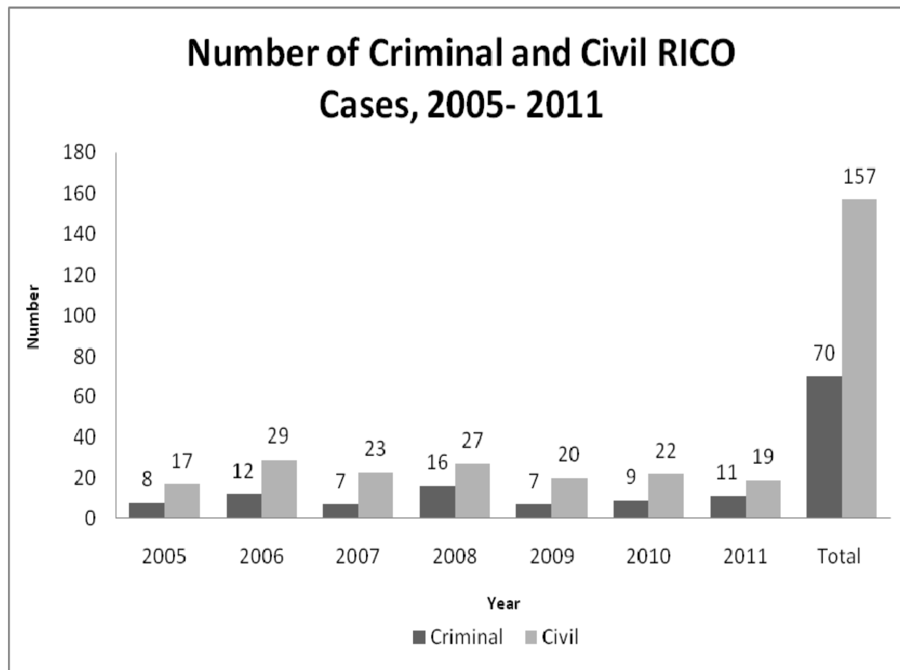
While a number of states have RICO statutes which yield state court opinions, state court opinions were not included in the sample because of their highly variable frequency, content and state-specificity.

[26] Many of the opinions in the full data set were brief, with 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.

[27] Pamela H. Bucy, *Private Justice,* 76 S. CAL. L. REV. 1, 22, Appendix B-1 (2002). The federal appellate courts rendered 185 RICO opinions between 1999-2001. Of these, 145 (78%) were in civil RICO cases; 40 (22%) were in criminal RICO prosecutions.

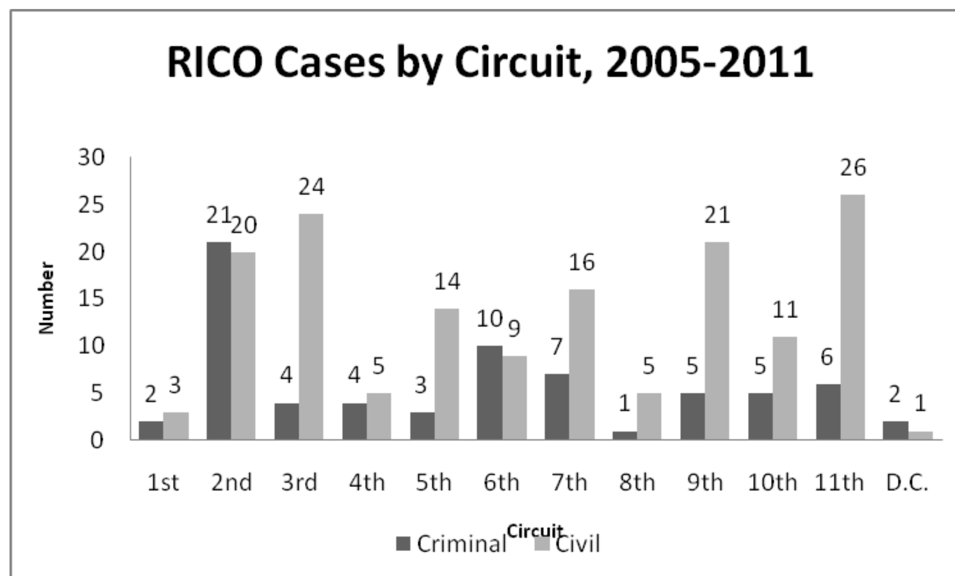
decisions in the current study was 2006 with 29 decisions, however the quantity remains steady, with an average of 22.5 per year.

CHART 1



As Chart 2 reveals, the Eleventh Circuit (with 26 decisions) followed by the Third Circuit (24) and the Second Circuit (20), dominate civil RICO cases. The First (3), Fourth (5) and D.C. (1) Circuits have rendered the fewest civil RICO opinions. The Second Circuit (21), Sixth Circuit (10) and Seventh Circuit (7) have the most criminal RICO decisions while the First (2), Fifth (3), Eighth (1) and D.C. (2) Circuits have the fewest criminal RICO decisions. Given the breadth of RICO's reach the varying quantity of criminal RICO decisions among the circuits presumably reflects the local U.S. Attorney's office expertise in and preference for RICO cases.

CHART 2



It is interesting to compare the data in the present study to the RICO data collected by the Administrative Office of the Courts (AOC).[28] Both studies show significantly more civil RICO cases than criminal RICO cases.[29] Unfortunately, any further comparison to the AOC data or

---

[28] Administrative Office of Courts data reflects that the following number of civil RICO cases were filed in the following years: 1994 (828); 1995 (900); 1996 (849); 1997 (840); 1998 (785); 1999 (763); 2000 (829); 2001 (724); 2002 (760); 2003 (743); 2004 (777); 2005 (781); 2006 (687); 2007 (653); 2008 (684); 2009 (786); 2010 (993). ADMINISTRATIVE OFFICE OF THE COURTS, OFFICE OF JUDGES PROGRAMS, STATISTICS DIVISION, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, Table C-2a and C-2, http://www.uscourts.gov/Statistics/StatisticalTablesfortheFederalJudiciary.aspx.

Administrative Office of Courts data reflects that the following number of defendants were indicted on RICO charges in the following years: 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); 2010 (--). U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NUMBER OF DEFENDANTS IN CASES FILED, http://bjs.ojp.usdoj.gov/fjsrc/.

[29] Whereas the data collected for this article reveals an approximate 3:1 ratio of civil to criminal RICO opinions rendered, the AOC data reveals an approximate 5:1 ratio of civil cases *filed* to criminal RICO defendants *indicted*. See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE

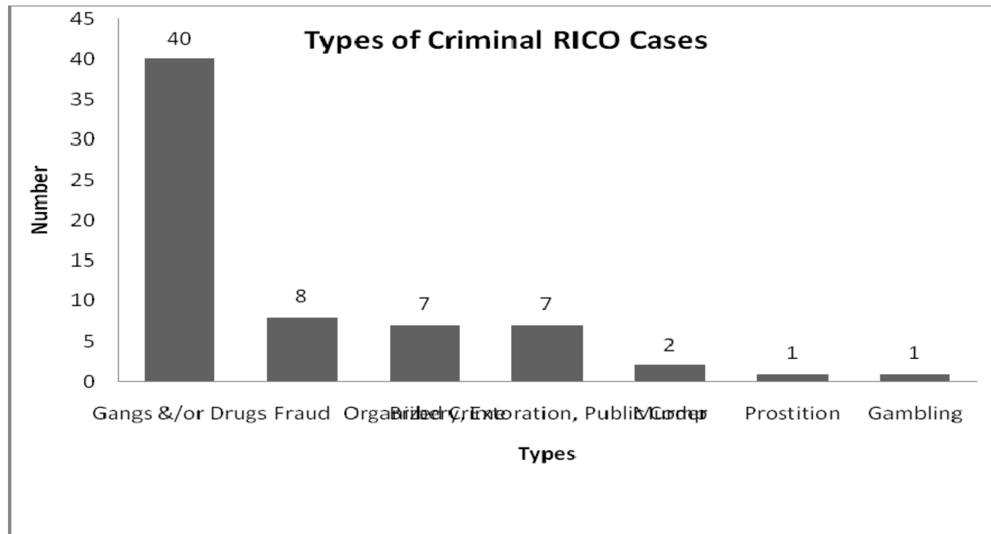
conclusions from AOC data is not possible because AOC data is collected inconsistently. AOC calculates the number of civil RICO *cases* filed per year but counts the number of *defendants* indicted in criminal RICO cases. This creates two problems. The first is obvious: one is comparing apples and oranges (*cases filed* versus *defendants charged*). The second is that AOC data overstates the number of criminal RICO cases since there are almost always multiple defendants indicted in each RICO criminal matter. However, even with these limitations, it is revealing that AOC data, like the data in this article, shows that civil RICO cases clearly dominate criminal RICO cases.

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

As Chart 3 shows, prosecutions for gang and drug activity significantly dominate criminal RICO cases (40, or 57%), followed distantly by prosecutions for fraud (8, or 11%), organized crime (7, or 10%) and bribery/extortion/public corruption (7, or 10%).

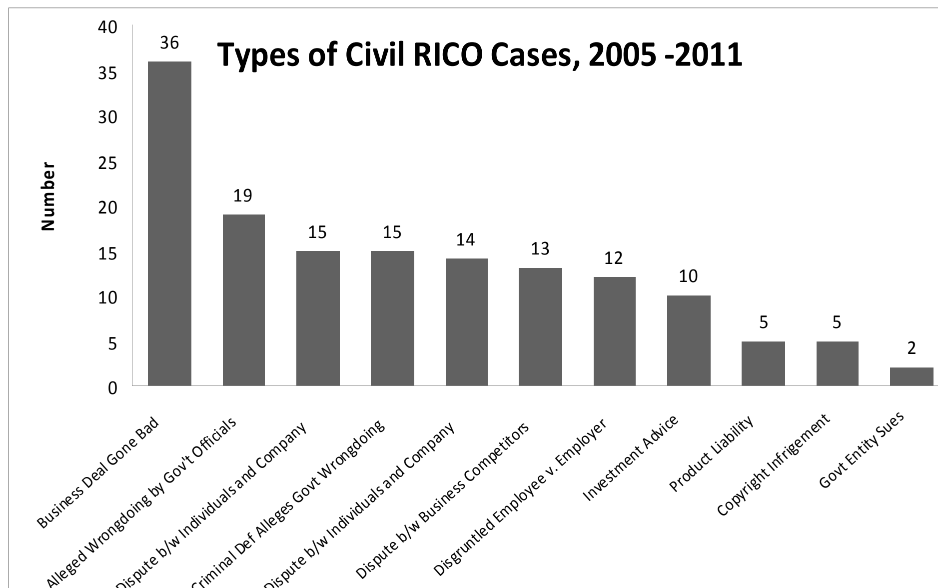
STATISTICS, NUMBER OF DEFENDANTS IN CASES FILED, http://bjs.ojp.usdoj.gov/fjsrc/.

CHART 3



As Chart 4 demonstrates, most civil RICO cases are brought by or against businesses.

CHART 4



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. Businesses suing businesses dominate civil RICO actions. "Business deals gone bad"

(disagreements between former business collaborators) account for 23% of civil RICO cases. Businesses suing competitors account for 8% of civil RICO cases. Ten percent of civil RICO cases (investment advice and products liability cases) involve allegations of systemic wrongdoing by an organization(s). These three uses of RICO are consistent with Congress's intent when passing RICO that civil RICO would be used to combat sophisticated business frauds. Congress's "Statement of Findings and Purpose" of RICO refers to the "fraud" that "drains billions of dollars from America's economy," and harms "innocent investors and competing organizations."[30] Senator Roman L. Hruska, who helped shepard RICO through Congress, consistently focused on RICO's applicability to business frauds, referring to misconduct involving or affecting "brokerage houses, accounting firms, shareholders and creditors."[31]

---

[30] ORGANIZED CRIME CONTROL ACT OF 1970, 84 Stat. 922-23 (1970).

[31] 113 CONG. REC. 17,997-18,002 (1967). Senator McClellan, the sponsor of RICO, spoke of 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). Senator McClellan directly addressed the objection that RICO applied beyond organized crime, specifically noting that its application to white collar crime:

> "[T]he curious objection as been raised to S. 30 . . . [is 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 . . . . Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem."

116 CONG. REC. 18, 913-914 (1970). 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 liberty is permissible. S. 30 is objectionable on civil liberty grounds, it is suggested, because its provisions have an incidental reach beyond organized crime. Coming from those concerned with civil liberty in particular, this objection is indeed strange. Have they forgotten that the Constitution applies to those engaged in white collar or street crime?"

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: 9% of the civil RICO cases are brought by individuals convicted of crimes who sue law enforcement or prison officials on issues arising from their criminal case in thinly disguised efforts to contest their criminal convictions. Another 9% of the civil RICO cases are brought by individuals over what appear to be trivial personal disagreements.

The third observation is that government officials, almost always federal government officials, are involved in almost one-fourth of civil RICO cases: 22% as defendant ("alleged wrongdoing by government officials" and "criminal defendant alleging government wrongdoing") and 1% as plaintiff.

V. OUTCOMES: WHAT HAPPENS IN RICO CASES?

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 actions and the defense wins most of the time in civil RICO cases. As Chart 5 shows, the prosecution won in 99 % (69 out of 70) of

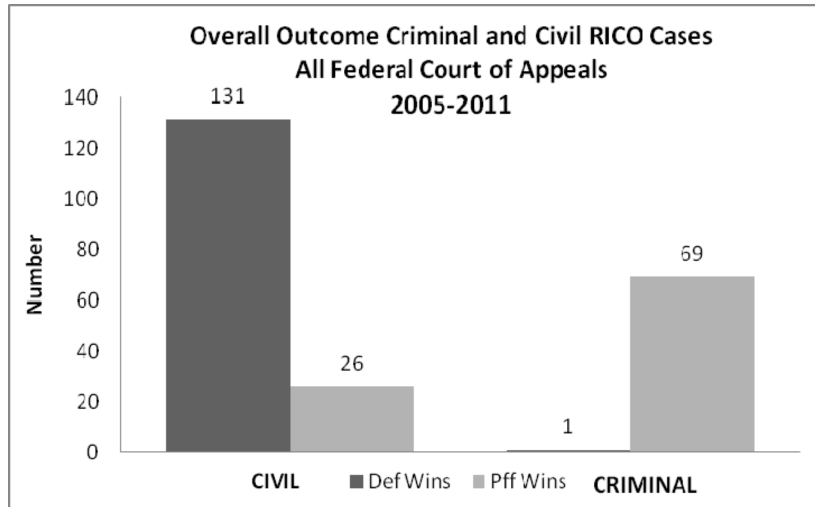
---

116 CONG. REC. 35344 (1970). RICO supporters, such as the Chamber of Commerce, 116 CONG. REC. 6708 (1970), 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 (RICO "sweep[s] far beyond the field of organized crime.").

Another critic, Congressman Abner J. Mikva, also objected that S. 30 reached beyond organized crime. 116 CONG. REC. 35, 196 (1970). The author of RICO, Professor G. Robert Blakey, consistently has maintained that RICO applies to any type of sophisticated crime, including commercial and other fraud. *See, e.g.,* Blakey, *RICO Civil Fraud, supra* note 1 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 federal criminal and civil remedies in a field traditionally occupied by common law fraud.")

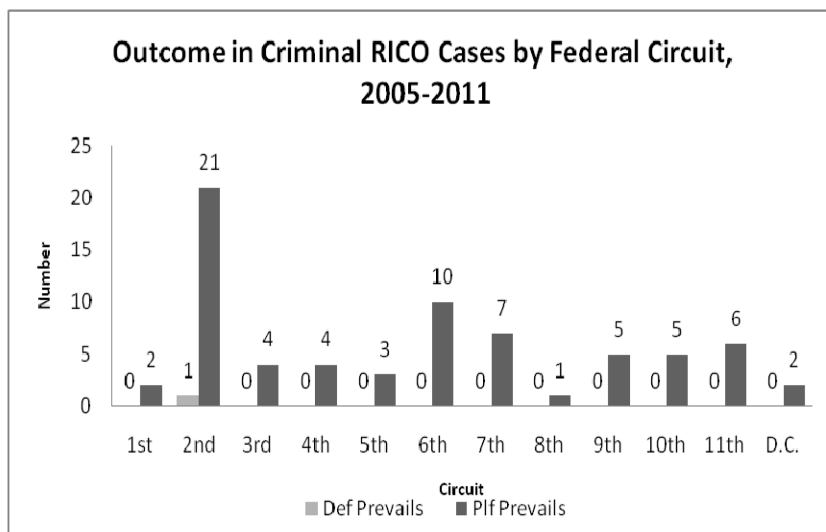
criminal cases in the study sample, while the defense won in 83% (131 out of 157) of the civil cases.

CHART 5



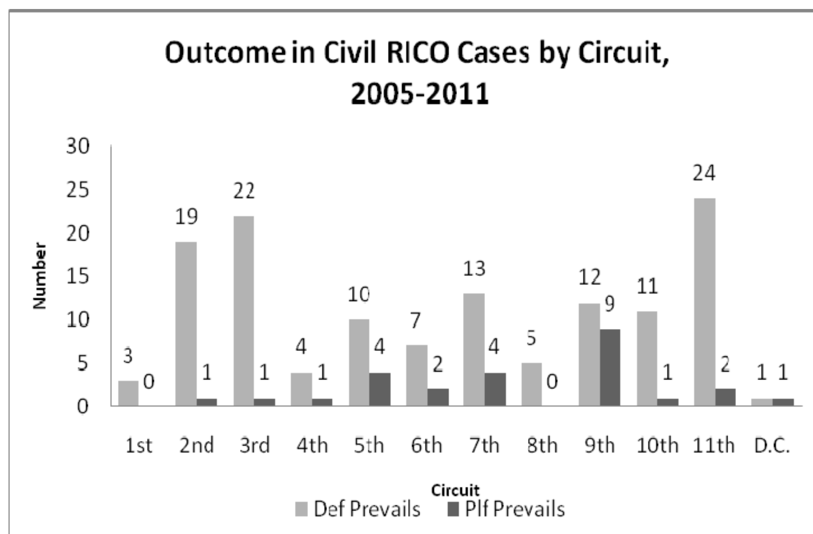
As can be seen in Chart 6, who prevails remains consistent throughout the circuits in criminal cases. This is not surprising given the consistent success by the government in criminal cases.

CHART 6



However, as Chart 7 shows, who prevails varies considerably among the circuits, however, in civil RICO cases. Defendants win less in the Ninth Circuit: (66% of the cases), and more in the Second Circuit and Third Circuits (99% and 95%, respectively).

CHART 7



Although plaintiffs in civil cases do not win often, when they do win, they win big, with verdicts, for example, of $218 million,[32] $177 million,[33] $121 million,[34] and attorneys fees of $29.9 million[35] and $10.5 million.[36]

---

[32] *In re* Insurance Brokerage Antitrust Litigation, 2012 WL 1071240 at *2 (D.N.J. 2012).

[33] Liquidation Comm'n of Banco Intercontinental v. Renta, 530 F.3d 1339 (11th Cir. 2008).

[34] *In re* Insurance Brokerage Antitrust Litigation, 579 F.3d 241, 253 (3d Cir. 2009).

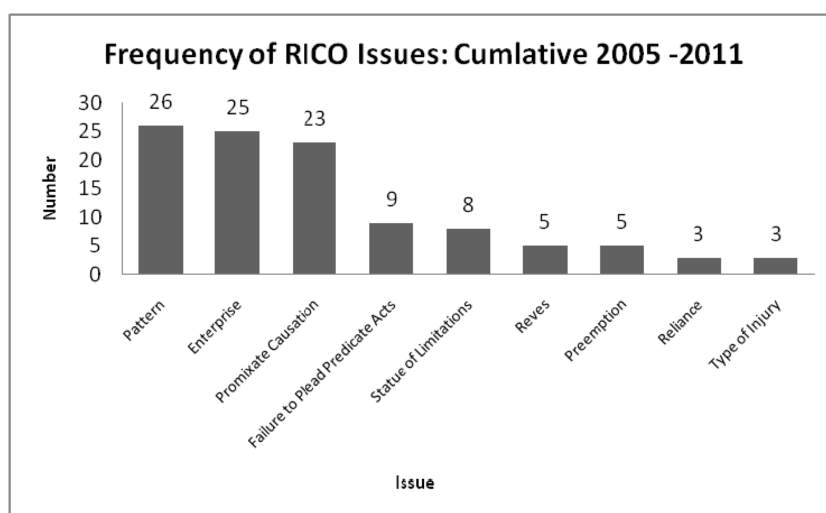
[35] *Id.*

[36] *In re* Insurance Brokerage Antitrust Litigation, 2012 WL 1071240 at *1.

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. As Chart 8 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.

CHART 8



These three issues account for 69% of all RICO issues discussed.[37] 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.

---

[37] Other issues regularly arising in the cases within the study include:

Failure to Plead Predicate Acts. "Racketeering activity" consists of the crimes listed in 1961(1) of RICO. Crimes have elements. Failure to fully plead all elements of the racketeering activity alleged leads to dismissal of the complaint, or judgment for defendants. *See, e.g.*, Carr v. Tillery, 591 F.3d 909, 917 (7th Cir. 2010)(plaintiff failed to sufficiently plead the elements of

mail fraud which was the alleged racketeering activity); Edwards v. Prime, Inc. 602 F.3d 1276, 1291 - 94 (11th Cir. 2010)(plaintiffs failed to plead violations of the Immigration and Nationality Act); Dental Assn. V. Cigna, 605 F.3d 1283 (11th Cir. 2010)(plaintiffs failed to sufficiently plead the elements of mail fraud which was the alleged racketeering activity).

Statute of Limitations. RICO does not specify a statute of limitations, but the Supreme Court has held that a four-year statute of limitations applies. Rotella v. Wood, 528 U.S. 549, 552-53(2000). Issues arise as to when plaintiffs knew or should have known of the defendant's alleged racketeering activity, *see, e.g*. Jay E. Hayden Foundation v. First Neighbor Bank, 610 F.2d 382, 383 (7th Cir. 2010), and whether new acts of misconduct occurred during the limitations period, *see, e.g*. CSX Transportation v. Gikison, 406 Fed Appx 723 (2010).

"*Reves*." In Reves v. Ernst & Young, 507 U.S. 170 (1993) 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. Id at 186. Courts analyzing this issue focus on how involved a defendant is in the enterprise. See e.g. United States v. Fowleer, 535 F.3d 408, 418 (6th Cir. 2008) (court found that "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."); Moshe Tal v. Hogan, 453 F.2d 1244, 1267 (10th Cir. 2006) (simply misrepresenting facts is not sufficient to meet the "operation or management" test of Reves).

Preemption. Preemption arises most often in the RICO cases in this study in the context of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. 77z 1, 78 u 4. 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). See, *e.g*. AFFCO Investments 2001, LLC v. Proskauer Rose, LLP (held that investment vehicles allegedly the subject of a RICO fraud action were "securities" and thus barred under the PSLRA). Other RICO cases raise the issue 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 Insurance Co., 482 F.3d 254, 263 (3rd Cir. 2007) (finds that the McCarran-Ferguson Act did not bar plaintiff's RICO action (finding that the New Jersey insurance laws did not exclude other remedies such as RICO actions).

Reliance. In Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008) the Supreme Court held that first party reliance is not required in RICO cases alleging mail fraud as the predicate acts. *Id*. at 642. The Court noted, however, that "at least third party reliance [may be needed] in order to prove causation." *Id*. at 658.

Type of Injury. Plaintiffs in civil RICO actions must allege economic injury arising from defendant's actions. Sedima, SPRL v. Imrex Co. Inc. 473 U.S. 479, 496 (1985). This arises from the language of section 1964(c) giving a private cause of action to "[a]ny person injured in his business or property." *See, e.,g*. Ironworkers Local Union 68 v. Astrazeneca, 634 F.3d 1352, 1363 (11th Cir. 2011)(economic injury was not alleged unless the plaintiff showed that the

All three issues arise from RICO elements. This is not surprising. All three of these elements are unusually amorphous and non-intuitive for 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.[38] However, their evolution 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.

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 reflects, the Second, Third, Seventh and Tenth Circuits have all rendered extensive discussions of "pattern" during the study period (4 cases each), followed by the Fourth Circuit (3 cases), the Sixth and Eleventh Circuits (2 cases each). The First, Eighth and Ninth Circuits (1 case each) and the Fifth and D.C. Circuits (no cases)[39] have had little experience dealing with the "pattern" issue.

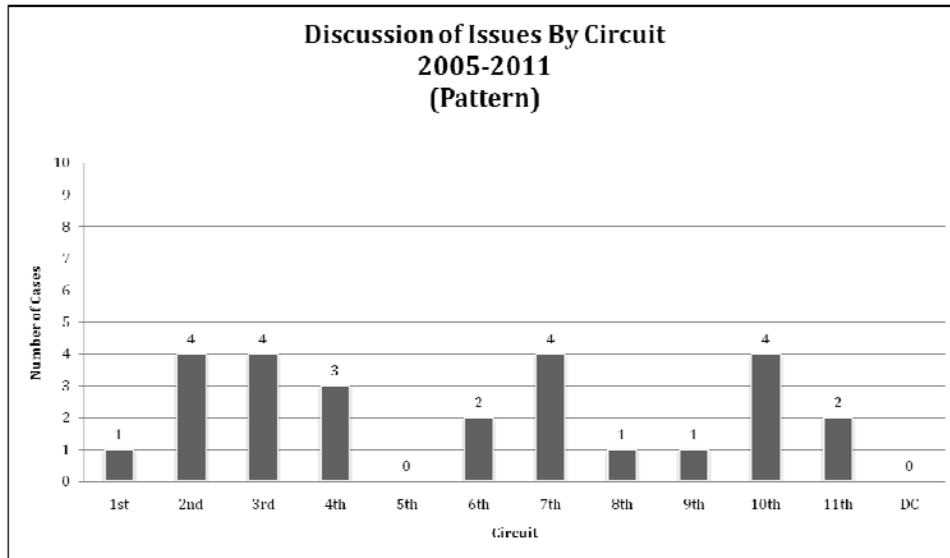
CHART 9

---

prescription of a particular drug was "unnecessary or inappropriate according to sound medical practice." ; Living Design Inc. V. DuPont DeNemours & Co., 431 F.3d 353, 363 (9th Cir. 2005) (economic injury was alleged by plaintiffs who claimed they settled cases by relying on defendants' discovery fraud).

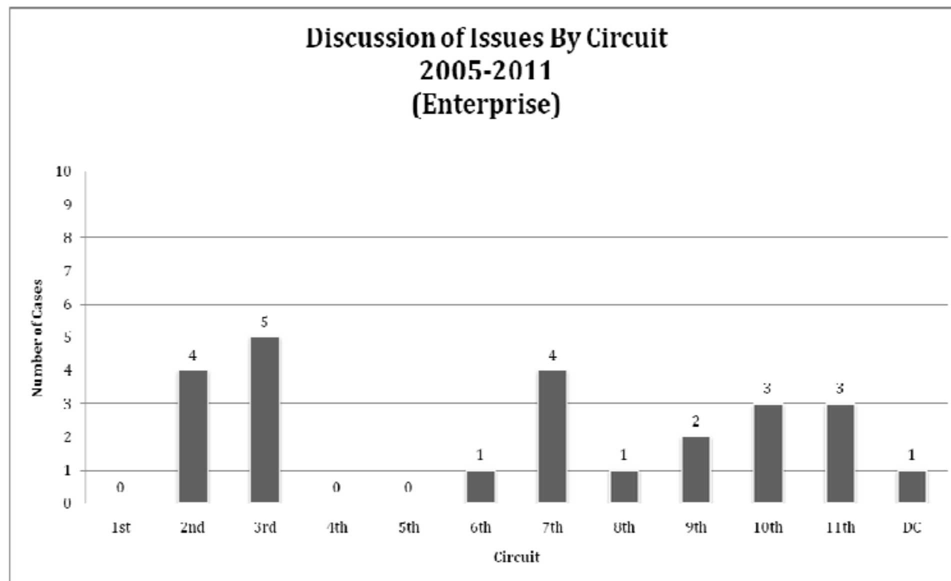
[38] Pamela H. Bucy, *RICO, Corruption and White Collar Crime,* 85 TEMP. L. REV. ____ (forthcoming 2013).

[39]



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

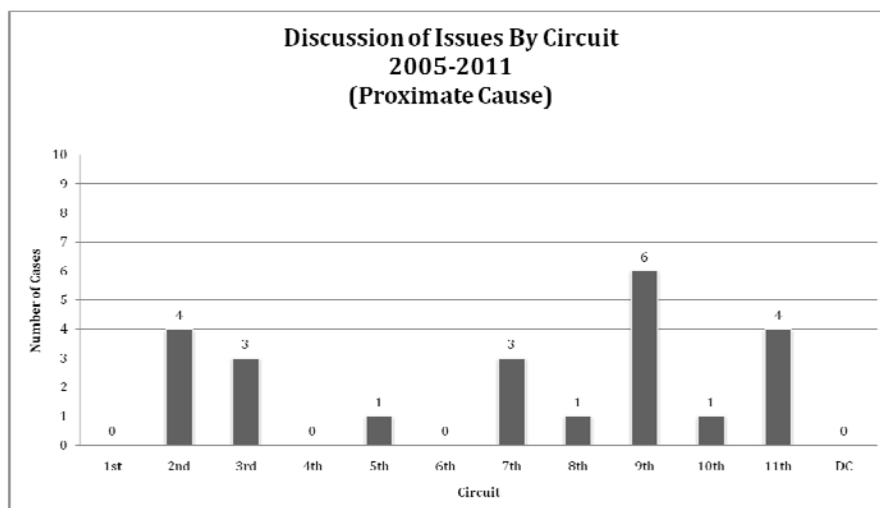
CHART 10



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

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. This presents two interesting observations. The Fourth Circuit, which otherwise has no experience dealing with RICO issues of "enterprise" and proximate causation has some considerable experience with the "pattern" issue. The Ninth Circuit, which has very little experience with RICO issues of "pattern" and "enterprise" has, by a wide margin, the most experience dealing with the proximate causation issue.

CHART 11



A. "Pattern" of Racketeering Activity

One must engage in a *pattern* of racketeering activity before RICO liability attaches.[40] Section 1962(a) prohibits investing the proceeds from a pattern of racketeering in an enterprise; Section 1962(b) prohibits acquiring or maintaining control of an enterprise through a pattern of racketeering activity; Section 1962(c) prohibits conducting the affairs of an enterprise through a pattern of racketeering activity; Section 1962(d) prohibits conspiring to do any of these acts. Determining whether "racketeering activity" is present is fairly straightforward. One simply looks to the list of "racketeering activities" in section 1961(1). This list includes generic state offenses and approximately 150 specifically listed federal statutes. To determine whether one has a pattern of racketeering activity, however, is more complicated. Section 1961(5) of RICO provides a minimal definition of "pattern of racketeering activity": "at least two acts of racketeering activity...within ten years..." The beginning point of "pattern" analysis is the

40

Supreme Court's 1989 decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*[41] Although the "pattern" issue is the most frequently litigated RICO issue in the seven year time period between 2005-2011, it is the easiest to analyze, primarily because the Court's guidance in *H.J. Inc*. is straightforward. As a result, analysis by the lower federal appellate courts on the pattern issue is simply an application, also straightforward, of *H.J. Inc.*, and the outcome on this issue is predictable.

1. Supreme Court Guidance

In 1989, acknowledging that "definitional problems ... in RICO's pattern requirement inevitably lead to uncertainty regarding the statute's scope,"[42] the Supreme Court tackled the pattern requirement.[43] 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. The district court dismissed the complaint. The Eighth Circuit affirmed the dismissal on the ground that plaintiffs failed to demonstrate a "pattern" of racketeering activity. The Supreme Court reversed. Characterizing "pattern" as a "flexible concept,"[44] the Court looked to RICO's legislative history and held "that to prove a pattern of racketeering activity a plaintiff or

[41] 492 U.S. 299 (1989).

[42] 240 n. 3

[43] H.J Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989).

[44] *Id.* at 246

prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity."[45]

The Court expounded on "relatedness" and "continuity." "Relatedness" 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." The "continuity" requirement should, the Court explained, "derive from a commonsense, everyday understanding of RICO's language,"[46] and may be shown "in a variety of ways."[47] 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."[48] 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."[49] Open-ended continuity, on the other hand, may be shown by a "distinct threat of long-term racketeering activity, either implicit or explicit"[50] such as a "specific threat of repetition" or "showing that the predicate acts...are part of an ongoing entity's regular way of doing business."[51] The Court specifically addressed the

---

[45] *Id.* at 239 (emphasis in original)

[46] *Id.* at 241

[47] *Id.*

[48] *Id.* at 241.

[49] *Id.* at 242.

[50] *Id.* at 242

[51] *Id.* at 242.

issue whether multiple schemes were necessary to find sufficient continuity. 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." The Court found such a "rigid rule"[52] inappropriate since such rigidity "... introduc[ed] a new and perhaps more amorphous concept into the analysis that has no basis in text or legislative history."[53]

Applying its principles to the case before it, the Court found that pattern was shown: "[A]t 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...".[54] These allegations, the Court held, showed both relatedness and continuity and sufficiently pled a pattern of racketeering activity to avoid dismissal of the complaint.[55]

2. Application by the Courts of Appeals

As Chart 12 reflects, during the past seven years the federal courts of appeals have increasingly dealt with the "pattern" issue.

---

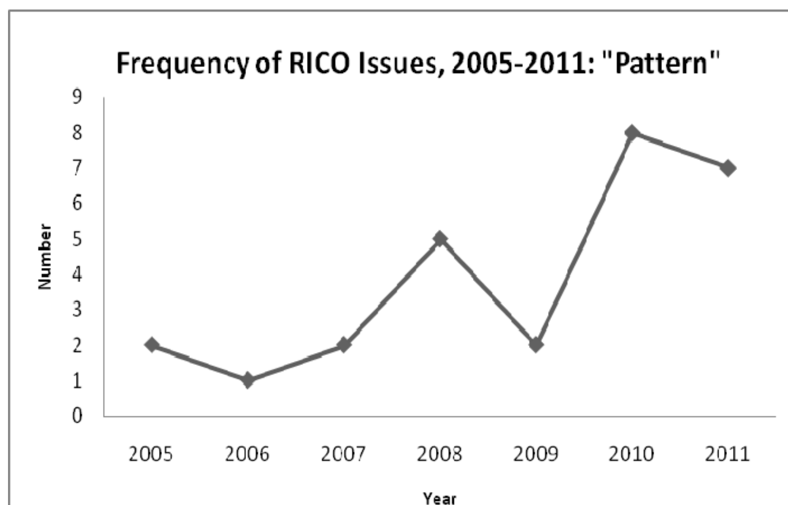
[52] *Id.* at 240.

[53] *Id.* at 241, note 3.

[54] *Id.* at 250

[55] *Id.* at 250.

CHART 12



Review of the analysis in these cases on the "pattern" requirement 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. The second observation from the "pattern" cases concerns the application of *H.J. Inc.*: the duration of the alleged racketeering activity is determinative, in almost every instance, when assessing the continuity prong of "pattern." One simply counts the months or years 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 appellate courts tend to hold otherwise. 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. 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 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. 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 issues and has done so only recently (2009). The Courts of Appeal 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 issued a complex trilogy of cases which the Courts of Appeal have not yet sorted out.

The clarity and predictability of the pattern jurisprudence should be reassuring to litigants. Litigants and courts should be able to assess accurately the merits of a case on this issue. Second, most of the decisions on the pattern issue are highly fact-specific, consistent with the Supreme Court's admonition that the "pattern" analysis will "depend[] on the specific facts of each case."[56] In addressing the "relatedness" prong, the appellate courts use the "factors" set forth in *H.J. Inc.*: purpose, result, participants, victims and methods of commission to assess "relatedness."[57] 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."[58]

---

[56] 492 U.S. 242.

[57] *See, e.g.,* Brown v. Cassens, 546 F3d. 347 (6th Cir. 2008); United States v. Brandao, 539 F3d 44, 54 (1st Cir. 2008); Jennings v. Auto Meter Products, 495 F.3d 466 (7th Cir. 2007); Moshe Tal v. Hogan, 453 F.3d. 1244 (10th Cir. 2006).

[58] *See, e.g.,* The plaintiffs' allegations of fraud are "clearly insufficient plausibly to allege that the defendants engaged in 'long-term criminal activity," Zahl v. New Jersey Dept of law and Public Safety Division, 2011 WL 1880958 (3d Cir. 2011); Plaintiffs allegations are "set forth in boilerplate fashion," Rao v. BP Products North America Inc., 589 F.3d 389 (7th Cir. 2009);

(b) Longevity. The length of the alleged racketeering activity is the key in courts' resolution of the continuity prong in the pattern requirement. Two years,[59] sixteen months,[60] seven months,[61] have been held to be not long enough to find "closed-ended" continuity. "Open-ended continuity" cannot be shown without explicit threats of future racketeering activity. Such specificity was rare in the reported cases. Thus, effectively, if racketeering activity does not last more than two years, or explicit threats do not exist, "continuity" is not shown and the pattern requirement is not met. Conversely, whenever the alleged activity extended over several years, "pattern" was held to exist.[62]

(c) Single or Multiple Schemes. Although the Court in *H.J. Inc.* held that a single scheme could, potentially, constitute a "pattern" of racketeering activity, the lower courts indicate reluctance to find the existence of a pattern if there is only a single scheme to defraud. The Tenth Circuit's decision in *Bixler v. Foster,*[63] is indicative. In this case, minority shareholders of a uranium mining company sued the company's directors and attorneys alleging fraud in the transfer of company assets. The Tenth Circuit affirmed dismissal of the action on several

---

Plaintiff's counsel "on appeal acknowledges that the RICO counts 'could have been pleaded more artfully," *Id.;* The alleged fraudulent misrepresentations...do not threaten long-term criminal activity....; [the plaintiff] did not allege conduct that constitutes a pattern of racketeering." ISystems v. Spark Networks, Ltd. 2011 WL 2342523 (5th Cir. 2011).

[59] Roger Whitmore's Automotive Services, Inc. v. Lake County, 424 F.3d 659, 673 (7th Cir. 2005).

[60] Roger Spool v. World Child Int'l Adoption Agency, 520 F.3d 178 (2d Cir. 2008).

[61] Kaye v. D'Amato, 2009 U.S. App LEXIS 26526 (7th Cir. 2009).

[62] See, eg United States v. Eppolito, 543 F.3d 25, 57-58 (2d Cir. 2008); United States v. Bergin, 650 F.3d 257, 266-271 (3d Cir. 2011).

[63] 596 F.3d 751 (10th Cir. 2010)

grounds including failure to allege that a "pattern of racketeering activity." Noting that "[a] viable RICO claim requires a showing of '*continuity plus relationship*' " (emphasis in original), the court held that the plaintiffs' complaint failed to show any threat of future criminal conduct and thus failed to meet the continuity prong. The court reasoned: the complaint "allege[d] that defendants engaged in a single scheme to accomplish the discrete goal of transferring ...uranium mining interests..."[64]

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. The two groups disagreed over calculations of seniority after the merger of US Airways and American West Airlines.[65] One group, the union USAPA, alleged that the other group, AWAPPA, engaged in extortion and sabotage against USAPA. USAPA brought a RICO action seeking injunctive relief and damages. At issue was the "continuity" prong of "pattern." Since the conduct alleged by AWAPPA spanned only a few weeks, there was no question, according to the Fourth Circuit, that "closed-ended" continuity was not present. Nor, according to the Fourth Circuit was "open-ended" continuity shown since the alleged racketeering activity had a "built-in ending point...."[66] The court found it compelling that the complaint alleged a single goal: the defendants were out "to destroy USAPA and render it incapable of discharging

---

[64] *Id.* at 761.

[65] U.S. Airline Pilots Association v. AWAPPA, LLC, 615 F3d 312 (4th Cir. 2010).

[66] *Id.* at 318 (internal citation deleted).

its legal duty to represent the US Airways pilots."[67] Completion of the goal would end the threat to USAPA and thus, held the Fourth Circuit, end any threat of "open ended" continuity.

(d) "Pattern" as a RICO Litmus Test. The pattern requirement appears to be used by courts as the benchmark for whether a case truly warrants use of the powerful RICO statute or is simply "garden variety" fraud or otherwise too frivolous for RICO.

Foster v. Wintergreen Real Estate Co.,[68] is indicative. One issue in *Foster* was a noisy stump grinder. Plaintiffs, purchasers of 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. The plaintiffs alleged additional lapses by the real estate agency: failing to "prepare...color brochures, hold open houses, put up 'for sale' signs, or advertise the sale properties.[69] The plaintiffs alleged that these lapses constituted racketeering activities of wire and mail fraud.

The Fourth Circuit affirmed dismissal of the complaint on the grounds that the plaintiffs failed to show "pattern."[70] Emphasizing that RICO was not designed for "garden-variety fraud claims"[71] the court noted how RICO's requirements of "pattern" limits RICO to "ongoing

---

[67] *Id.* at 319.

[68] Foster v. Wintergeen Real Estate Co., 2010 U.S. App. LEXIS 2050, at *2 (4th Cir. 2010).

[69] *Id.*

[70] Additionally, the court also held that the plaintiffs did not have standing because of the Lanham Act's prohibition on consumers suing for false advertising. 2010 US App LEXIS at *13.

[71] *Id.*

unlawful activities whose scope and persistence pose a special threat to social well-being."[72] In this way, the court noted, the "pattern" requirement limits RICO to significant frauds: "The pattern requirement is important because "in providing a remedy of treble damages...Congress contemplated that only a party engaging in widespread fraud would be subject to such serious consequences."[73] With a RICO action based on mail fraud or wire fraud, the court expressed special concern: "[W]e are 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."[74] The court found 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."[75]

United States v. Bergrin is similarly instructive, even though the court reached the opposite conclusion. Paul Bergen was a licensed attorney and former federal prosecutor who was indicted for using his law firm to commit murder, attempted murder, bribery, prostitution, money laundering and mortgage fraud. Relying on the "pattern" requirement, the Third Circuit found RICO, in this instance, criminal RICO, to be appropriately used.

---

[72] *Id.* at *9 quoting Al-Abood v. El-Shamari, 217 F.3d 225, 238 (4th Cir. 2000).

[73] *Id*. (internal quotation marks deleted).

[74] *Id.* at ___ quoting Al-Abood v. El-Shamari, 217 F.3d 225, 238 (4th Cir. 2000).

[75] *Id.* at *5.

The District Court had dismissed all of the RICO counts in the thirty-nine indictment returned against Bergen and his conspirators, holding that the indictment failed to adequately allege a "pattern" of racketeering activity.[76] The Third Circuit reversed, finding that the indictment met both the "relatedness" and "continuity" prongs of "pattern." According to the Third Circuit, "relatedness" was shown by the allegations of "the same or similar purposes" of the alleged racketeering activities. The common purpose was "promoting and enhancing the Bergrin Law Enterprise [BLE] and its leaders', members' and associates' 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."[77] Closed-ended continuity was shown since the racketeering activity allegedly extended over six years.[78] Open-ended continuity was also shown, according to the Court, because "the alleged number of schemes and the BLE's apparent willingness to engage in criminal acts to aid Bergrin's clients ...suggested that there is also a threat of continuing criminal activity in the future."[79]

Whereas the District Court had focused on the variety of crimes charged (prostitution, murder, mortgage fraud) and found that their dissimilarity negated a finding of "pattern," the Third Circuit found that the many alleged crimes were linked by their common purpose: "RICO's pattern requirement ensures that separately performed, functionally diverse and directly

---

[76] *Id.* at 263. There was also an issue whether the indictment alleged a RICO enterprise. The district court held that it did not. The Third Circuit reversed, finding that enterprise was adequately plead. *Id.* at 268-270.

[77] *Id.* at 270 (internal quotation marks deleted).

[78] *Id.* at 270.

[79] *Id.* at 270 (internal quotation marks deleted).

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."[80]

(e) Concluding Observations. In conclusion, during the past seven years, the "pattern" issue has been the most frequent RICO issue addressed by the appellate courts. Standing alone, the "pattern" requirement, like other RICO terms, is fairly vague and non-intuitive when compared to 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. The Court's decision in 1989 in *H.J. Inc.,* accomplished this by setting forth the two prongs: "relatedness" and "continuity." The lower federal courts use these prongs to focus on objective, observable facts such as how long racketeering activity continues and whether one or more schemes were involved. Perhaps because the "pattern" requirement is now so well-defined, it has become a helpful gauge for the courts 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

[80] *Id.* at 271 *quoting* United States v. Eufrasio, 935 F.2d 553, 566 (3d Cir. 1991).

entity."[81] 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. The latter is known, in RICO parlance, as an "association in fact" enterprise.

Courts have dealt with this definition of enterprise a lot. The jurisprudence focuses on two issues. The first is what type of relationship defendants must have to the alleged enterprise. This is known as the "distinctness" issue. The second issue is what is needed to show the existence of an "association-in-fact" enterprise.

For most of RICO's existence, the lower courts, especially the District Courts, have interpreted the RICO "enterprise" element narrowly, while the Supreme Court has interpreted RICO "enterprise" broadly.[82] The Supreme Court has held: "[t]here is no restriction upon associations embraced by the definition [of enterprise]";[83] an "inclusive" definition of enterprise is consistent with "the new domain of federal involvement" created by RICO[84]; even a "loosely and informally organized,"[85] group may qualify as a RICO enterprise; the definition of enterprise

---

[81] 18 U.S.C. §1961(4).

[82] *See, e.g.,* United States v. Boyle, 556 U.S. 938, 129 S.Ct. 2243, 2246 (2009); Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 661 (2008); NOW v. Scheidler, 510 U.S. 249, 252 (1994); H.J. Inc. v. Northwestern Bell Tele. Co., 192 U.S. 229, 249 (1989); Sedima v. Imrex, 479 U.S. 479, 498 (1985); United States v. Turkette, 452 U.S. 576, 589 (1981).
Congress directed that RICO is to "be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904(a), 84 Stat. 947.

[83] *Turkette*, 452 U.S. at 581.

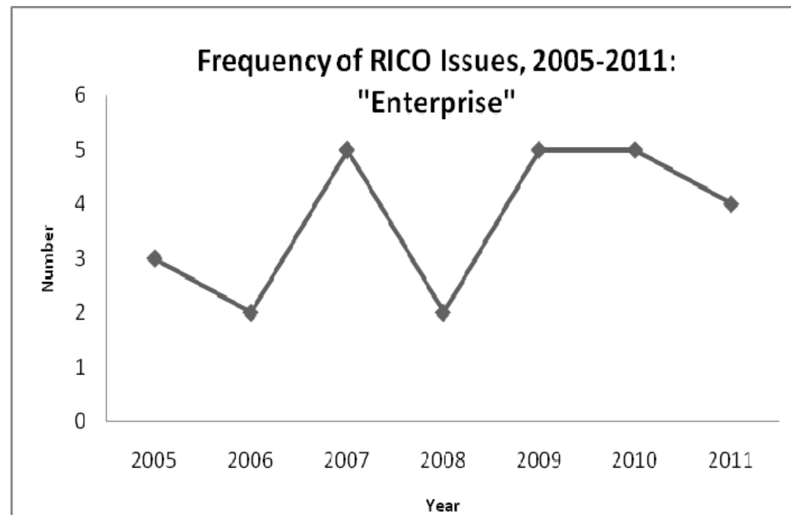
[84] *Id*. at 586.

[85] *Boyle*, 129 S.Ct. at 2241.

has a "wide reach."[86] As discussed *infra,* much of the Court's rulings on "enterprise" are quite favorable to plaintiffs.

Chart 13 addresses the frequency with which the federal appellate courts discuss the "enterprise" issue.

CHART 13



2. Distinctness

The "enterprise distinctness" issue becomes relevant only when one type of RICO conduct is alleged. As noted *supra*,[87] there are four types of RICO conduct. Section 1962(a)[88] prohibits a person from investing the proceeds of racketeering activity in an enterprise.[89] Section

---

[86] *Id*. at 2243; *Cf*. NOW v. Scheidler, 510 U.S. 249, 257 (1994).

[87] *See* text accompanying notes _____ *supra*.

[88] 18 U.S.C. § 1962(a).

[89] RICO further requires that the enterprise be "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a)(b)(c).

1962(b)[90] prohibits a person from acquiring or maintaining control over an enterprise through a pattern of racketeering activity. Section 1962(c)[91] 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. Section 1962(d) prohibits conspiring to violate sections 1962(a), (b), or (c).

Section 1962(c) is, by far, the most common RICO conduct alleged[92] and is 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.*" By comparison, *any* person may be charged with violations of sections 1962(a), (b) or (d).[93] Because one cannot logically be employed by or associated with oneself,[94] courts have held that

---

[90] 18 U.S.C. § 1962(b).

[91] 18 U.S.C. § 1962(c).

[92] Section 1962(c) is used much more frequently than sections 1962(a) or (b). This is because the elements of sections 1962(a) and (b) are more difficult to prove. To establish a section 1962(a) case, one must trace proceeds ("invested" in an enterprise) as well as prove that a pattern of racketeering activity and enterprise exists. To establish a section 1962(b) case, one must prove that defendants "acquired or maintained control" over an enterprise through a pattern of racketeering activity. By comparison, in a section 1962(c) case, one must simply prove that the defendant who was associated with or employed by an enterprise participated or conducted the affairs of it through a pattern of racketeering activity. RAKOFF & GOLDSTEIN, *supra* note 1 at §1.06[3].

[93] The courts are split on whether the person and enterprise must be distinct in section 1962(b) cases. *See, e.g.,* Official Publications, Inc. v. Kable News Co., 884 F.2d 664, 668 (2d Cir. 1989) (requires distinctness); Landry v. Airline Pilots Ass'n Int'l, AFL-CIO, 901 F.2d 404, 425 (5th Cir. 1990) (does not require distinctness).

The courts agree that section 1962(a) does *not* contain a "distinctness" requirement. *See, e.g.,* Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 30 (1st Cir. 1986); Bishop v. Corbitt Marine Ways Inc., 802 F.2d 122, 123 (5th Cir. 1986); Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 213-214 (10th Cir. 1987).

[94] Haroco v. American Nat'l B & T Co., 747 F.2d 384, 400 (7th Cir. 1985).

a defendant who is charged with violating section 1962(c) must be separate and distinct from the "enterprise" through which the defendant is alleged to have conducted a "pattern of racketeering activity." Since most RICO cases are brought under section 1962(c), the distinctness issue has dominated much of RICO jurisprudence.

By limiting the persons who can violate 1962(c), this section 1962(c) essentially insures 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.[95] This is obvious when one examines the RICO cases pursued under each section. In section 1962(a) cases, where it is an offense to invest proceeds of racketeering activity in an enterprise, the enterprise is the passive receptacle of ill-gotten gains. The racketeering activity has already been committed to get the funds to invest; thus, the enterprise could not have been used to commit the racketeering activity. Similarly, the cases arising under section 1962(b), which prohibits acquiring or maintaining control over an enterprise through racketeering activity, the enterprise is the passive victim of whoever acquired or maintained control over it.

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

---

[95] NOW v. Scheidler, 510 U.S. 249, 257 (1994) ("[Sub]section (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 with the courts ultimately ruling 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, e.g.*, United States v. Browne, 505 F.3d 1229, 1272 (5th Cir. 2007).

reconciled with RICO principles. Additionally, pleading issues are always more complex in civil RICO cases, where plaintiffs hope to sue a "deep pocket." 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." Charge an entity as a defendant while also meeting the "distinctness" requirement can be challenging.[96]

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. This 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 caselaw on the enterprise distinctness issue.[97] The Supreme Court has shown the way; the lower courts now need to follow the Court's lead.[98]

---

[96] The distinctness issue does not arise regularly when individuals versus collective entities are involved for the simple reason that collective entities are comprised of individuals, which blurs the lines of identity. 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).

[97] Pamela H. Bucy, *RICO, Corruption and White Collar Crime*, 85 TEMPLE L. REV. ___ (forthcoming 2012).

[98] *Id.* at ____.

3. Association-in-fact Enterprises

As noted *supra*, 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*."[99] In 2009, in *United States v. Boyle*,[100] the Supreme Court addressed the italicized portion of this definition. It clarified what is necessary to prove an "association-in-fact" enterprise. Eddie Boyle was convicted by a jury on eleven of twelve counts charging him with bank burglary, attempted bank burglary,[101] conspiracy to commit bank burglary, RICO (under section 1962(c)) and RICO conspiracy. Trial evidence showed that Boyle and others committed a number of bank burglaries and attempted bank burglaries in four states over five years. Using crowbars, fishing gaffes and walkie-talkies, Boyle and his confederates targeted night deposit boxes at banks in retail shopping areas. They broke into the boxes, stole money and split the proceeds. Boyle argued that he and his group of alleged confederates were too loosely organized to constitute an "association-in-fact enterprise" under RICO.

The Supreme Court affirmed Boyle's conviction, finding 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,"[102] and

---

[99] 18 U.S.C. § 1961(4) .

[100] 556 U.S. 938, 129 S.Ct. 2243 (2009).

[101] 2005 WL 6207652 (E.D.N.Y. 2005).

[102] 129 S. Ct. at 2241.

functioned only sporadically.[103] According to the Court, "nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence."[104] Noting that RICO's statutory definition of "enterprise" is "obviously broad," "expansive," and has "a wide reach,"[105] the Court held that an association-in-fact enterprise is simply a "continuing unit that functions with a common purpose."[106] 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."[107]

In many instances, purpose, relationships and longevity will be easy to establish.[108] The Court specifically noted that evidence establishing the existence of an "association-in-fact" enterprise simply may be evidence of the racketeering activity.[109] The Court noted that "the existence of an association-in-fact enterprise is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure."[110]

---

[103] *Id*.

[104] *Id*. at 2245.

[105] *Id*. at 2243.

[106] *Id*.

[107] *Id.* at 2244.

[108] *See, e.g.,* United States v. Hutchinson, 573 F.3d 1011 (10th Cir. 2009), Craig Outdoor Advertising v. Viacom, 528 F.3d 1001 (8th Cir. 2008).

[109] *Id.* at 2245. "[T]he evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise may in particular cases coalesce." [internal citations omitted]

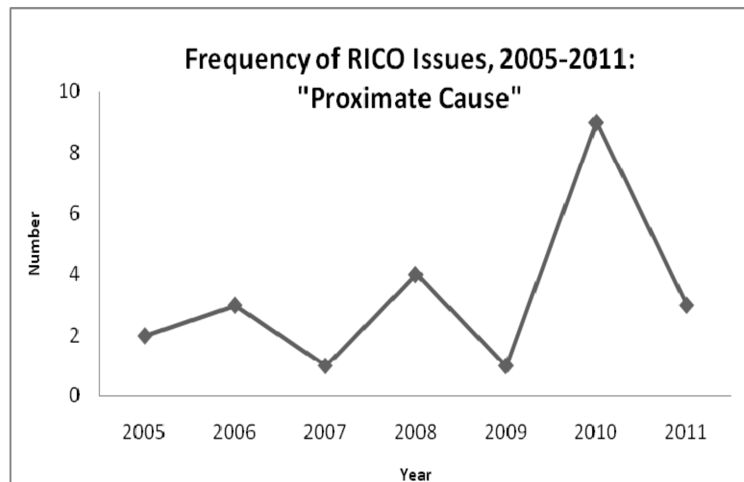
[110] *Id.* at 2247.

C. Proximate Causation

The Supreme Court has rendered three major opinions on proximate causation: *Holmes v. SIPC* in 1992, *Anza v. Ideal Steel Supply Corp*. in 2006, and *Hemi v. City of New York* in 2010. Together, these decisions provide a roadmap for plaintiffs to prove proximate causation in civil RICO cases. Section (C)(1) below discusses these decisions; Section (C)(2) analyzes their application in the courts of appeals.

As Chart 14 reflects, the federal appellate courts' attention to proximate cause peaked in 2010. 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.

CHART 14



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

(a) *Holmes v. SIPC*

The plaintiff in *Holmes v. SIPC* was the Securities Investor Protection Corporation (SIPC), a private nonprofit corporation. Most broker-dealers registered under the Securities Exchange Act of 1934 are required to belong to the SIPC. Broker-dealers are assessed fees which go into a fund used by the SIPC to pay losses sustained by brokers-dealers' customers if a broker-dealer " fail[s] or is in danger of failing to meet its obligations to customers."[111] In July, 1981, the SIPC sought protective decrees for two broker-dealers, one in Florida and another in California. The SIPC placed the two broker-dealers under trustee supervision, the trustees liquidated the broker-dealers, and the SIPC eventually paid $13million to the broker-dealers' customers for losses. Thereafter, the SIPC sued Robert Holmes and 75 others under civil RICO, alleging that Holmes and his 75 conspirators engaged in a fraudulent stock manipulation scheme that led to the bankruptcy of the two broker-dealers and ultimately caused SIPC's loss of $13 million.[112]

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. The Ninth Circuit reversed, in part, finding that proximate causation was shown.[113] The Supreme Court reversed the Ninth Circuit. The Court addressed first the question of what causation standard applied in civil RICO actions and held that the standard was one of proximate causation.

---

[111] 503 U.S 261 *quoting* 15 U.S.C. § 78ccc(a)(2)(A).

[112] *Id.* at 262.

[113] *Id.* at 264.

Turning to the case before it, the Court agreed with the District Court that the SIPC had not shown proximate causation.[114]

The Court began its analysis by focusing on the statutory language in section 1962(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]...." Acknowledging that the language, "*by reason of a violation*" did not clarify whether a "but for" or "proximate causation" standard applied,[115] the Court examined the statutory history of civil RICO. The Court found it significant that the Clayton Act, upon which civil RICO is based, was interpreted, at RICO's passage, as requiring proof of "proximate causation" as well as "but for" causation.[116] The Court reasoned, "We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used."[117]

Thus, held the Court, "proximate cause is required for a civil RICO plaintiff to prevail."[118] This standard, the Court explained, requires RICO civil plaintiffs to prove "some direct relation between the injury asserted and the injurious conduct alleged."[119] The Court noted the policy reasons supporting a direct injury requirement, including the difficulty of remedying indirect injuries: "[R]ecognizing claims of the indirectly injured would force courts to adopt

---

[114] *Id*. at 276.

[115] *Id*. at 265.

[116] *Id*. at 268.

[117] *Id.*

[118] *Id*.

[119] *Id*.

complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts...."[120] As the Court noted, directly injured victims "can generally be counted on to vindicate the law as private attorneys general."[121]

In the case before it, the Court agreed that the link was "too remote" between Holmes's alleged stock fraud and the SIPC's loss. There were simply too many steps in the causal chain: the broker-dealers relied upon the alleged fraud for their investment decisions; the broker-dealers went bankrupt (which, the Court pointed out, could be due to the alleged fraud or to other factors, or to some combination of the alleged fraud and other factors); the broker-dealers' customers sustained losses; the customer qualified under SIPC rules for coverage of their losses; the SIPC paid the customers. According to the Court, this was too many steps in the causal chain before the SIPC lost its $13 million. Simply put, the SIPC was last in a long line among the injured parties.[122] The Court further noted that recovery by the SIPC could make it more difficult for the direct victim, the broker-dealers, to recover on their lawsuits against Holmes. This potential, according to the Court, underscored the inappropriateness of allowing the SIPC to preempt the direct victims.[123]

(b) ***Anza v. Ideal Steel Supply Co.***

---

[120] *Id*. at 269.

[121] *Id*. at 269-270.

[122] *Id*. at 273; 271, note 18.

[123] *Id*. at 273-274.

Fourteen years after its decision in *Holmes,* the Court returned to the issue of RICO proximate causation in *Anza v. Ideal Steel Supply Corp.*[124] Ideal Steel Supply, 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. Ideal sued Joseph and Vincent Anza, owners of National Steel Supply, Ideal's major competitor, under civil RICO,[125] 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 "gaining sales and market shares at Ideal's expense.[126] Ideal claimed that the tax returns which National submitted to the New York Department of Taxation concealed National's illegal practice of not collecting required sales tax.[127] Ideal alleged that through this practice the Anzas violated section 1962(c) by conducting the affairs of National through mail fraud and wire fraud (submission of the false tax returns), and that they violated section 1962(a) by "us[ing] funds generated by their fraudulent tax scheme to open National's Bronx location."[128]

The District Court dismissed the complaint. The Second Circuit reversed, finding that Ideal adequately alleged proximate causation on both of the section 1962(a) and section 1962(c) claims. The Supreme Court reversed on the section 1962(c) claim and remanded on the section 1962(a) claim.

---

[124] 547 U.S. 451 (2006).

[125] 547 U.S. at 453.

[126] *Id.*

[127] *Id.* at 454.

[128] *Id.* at 455.

Citing to its analysis in *Holmes,* the Court found that the claimed RICO violation in the current case, as in *Holmes,* was "too attenuated" from Ideal's claimed injury:[129] As the Court explained: the "direct victim of th[e 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."[130] The Court noted that Ideal's loss of market share could be 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. As the Court noted: "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."[131]

As in *Holmes*, the Court noted the practical difficulties in assessing damages when proximate causation can not be shown.[132] Referring to Ideal's theory of injury, the Court reasoned: "The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries form overrunning RICO litigation."[133] As in *Holmes,* the Court noted that there was a more direct victim capable of vindicating the alleged misconduct: The State of New York "can be expected to pursue appropriate remedies.... There is no need to

---

[129] *Id*. at 458.

[130] *Id*. at 458.

[131] *Id*. at 458.

[132] *Id*. at 459

[133] *Id*. at 460.

broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly."[134]

Significantly, the Court treated Ideal's two RICO claims differently. Noting that "§1962(c) and §1962(a) set forth distinct prohibitions, it is at least debatable whether Ideal's two claims should be analyzed in an identical fashion for proximate-cause purposes."[135] 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) so that the lower court could "determine whether petitioner's alleged violation of §1962(a) proximately caused the injuries Ideal asserts."[136]

(c) *Hemi v. City of New York*

Collection of taxes from online cigarette sales was the issue in *Hemi v. City of New York*,[137] the most recent RICO proximate causation case issued by the Court. Online sellers of cigarettes do not collect sales taxes. Rather, purchasers of online cigarettes are expected to pay applicable sales taxes to their respective jurisdictions. To facilitate collection of unpaid cigarette sales tax, Congress passed the Jenkins Act which requires online vendors of cigarettes to file reports with each state's tobacco tax administration listing names, addresses and quantities of cigarettes purchased by state residents. Supplied with this information, New York State for

---

[134] *Id*. at 460.

[135] *Id*. at 461.

[136] *Id*. at 462.

[137] 130 S. Ct. 983 (2010).

example, has the information it needs to collect, from cigarette purchasers, sales tax of $2.75 per pack. Additionally, the state of New York provides its cities, notably New York City, with the reports it receives from cigarette vendors. These reports then enable New York City to collect from its residents who are on-line cigarette purchasers an additional $1.50 tax per pack of cigarettes.

Hemi and other online cigarette sellers did not file Jenkins Act reports with the state of New York, and 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. The City sued Hemi and other online cigarette vendors for failing to supply the state of New York with the required Jenkins Act reports. The City argued that its injury (inability to collect its taxes) flowed from the online sellers' Jenkins Act violations to the state.[138]

In a plurality opinion authored by Chief Justice Roberts, the Court affirmed the District Court's dismissal of the City's RICO claim for failure to show proximate causation. Finding "the City's theory of causation...far too indirect,"[139] the Court held that the state of New York, not the City of New York, was the direct victim of Hemi's alleged misconduct: "The State certainly is better situated than the City to seek recovery from Hemi."[140] The Court emphasized, "Our precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm."[141] Because of the remoteness of the City's injury, the Court

---

[138] Hemi agreed for purposes of the case that Jenkins Act violations could serve as RICO predicate acts. *Id.* at 988.

[139] *Id.* at 989.

[140] *Id.* at 990.

[141] *Id.* at 991.

found the City's loss too speculative. 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[142] since it was not clear the City would have actually collected cigarette taxes from purchasers even if the online sellers had supplied New York state with reports. The Court noted that historically the City had collected only 40% of the cigarette taxes due from its residents for their online sales of cigarettes.

Justice Ginburg, who concurred in the Court's view "without subscribing to the broader range of the Court's proximate cause analysis," focused on the presence of an existing regulatory scheme to deal with online cigarette sellers' obligations to report sales: "I resist reading RICO to allow [NYC] 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 violation of the Jenkins Act."[143]

(d) Concluding Observations

As the above discussion shows, together *Holmes*, *Anza* and *Hemi* make the following points: (1) The standard for causation in civil RICO actions is proximate causation. (2) RICO plaintiffs in civil actions must prove that their alleged injuries are *directly* caused by the defendant's alleged violation of RICO. This is a high and exacting burden. (3) To prove

---

[142] *Id*. at 992.

[143] The dissenting Justices in *Hemi* (Justices Breyer, Stevens and Kennedy) focused on the forseeability of Hemi's conduct, finding that NYC's loss of cigarette taxes was "reasonably forseeable" to Hemi and in fact was "desired" by Hemi for it make its product more appealing to online customers. *Id.* at 996. The plurality countered that "forseeability was not the issue"; rather, "directness of the relationship between the defendant's conduct and the plaintiff's harm is the key." *Id.* at 991. Justice Sotomayor did not participate in the Court's consideration of the case. *Id*. at 994.

proximate causation, RICO plaintiffs must be able to show that factors other than the alleged RICO conduct did not contribute to their injury. (4) RICO plaintiffs must be able to demonstrate why they are the party best situated to redress the alleged injury. (5) Additionally, given Justice Ginsburg's point in *Hemi,* it may also be helpful for RICO plaintiffs to show that there is no other statutory scheme in place 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 during 2005-2011. All six decisions were rendered subsequent to the *Holmes-Anza-Hemi* trilogy. Together, they signal what appears to be a pro-plaintiff trend on 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. Time will tell whether the lower courts continue to analyze proximate causation in a pro-plaintiff manner, but as the discussion in this section demonstrates, they have done so since *Hemi* was decided in 2010.

The first two cases discussed herein are *BCS Services v. Heartwood 88,* and *Anza v. Ideal Steel Supply Corp*. They were rendered by the Seventh and Second Circuits, respectively, after remand by the Supreme Court. The last four decisions, all alleging pharmaceutical fraud, while decided against plaintiffs, provide clear guidance for future plaintiffs on how to show proximate causation under RICO, especially in pharmaceutical fraud cases.

(a) When Plaintiffs Have Done Enough

BCS Services v. Heartwood 88,[144] rendered by the Seventh Circuit, applies proximate causation requirements favorably for the plaintiffs.

At issue in *BCS Services* was a tax lien auction held in Cook County, Illinois to bid on properties for which property taxes had not been paid. After a property is sold at auction, the property owner is provided one last opportunity to pay the taxes due and reclaim its property. If the owner does not pay the taxes by the deadline, the bidder who obtained the lien at the auction pays the taxes and receives the deed to the property. Generally, when this occurs, the bidder is able to sell the property at a significant profit. Thus, obtaining the liens at the tax auction is lucrative. There are many more bidders than properties. To fairly allocate bidding opportunities, Cook County permitted only one agent of a "related entity" to bid. As the Seventh Circuit noted, "[o]therwise a potential buyer could increase the likelihood of winning by packing the room."[145] The plaintiffs (BCS Services) alleged that the defendants falsely represented that they were not related when they were. As a result, claimed BCS Services, it, as bidder who followed the rules, was cheated out of more opportunities to bid.[146]

The Seventh Circuit consolidated *BCS Services* with *Phoenix Bond & Indemnity Co. v. Bridge*,[147] after *Bridge* was remanded by the Supreme Court.[148] *Bridge* involved the same facts

---

[144] 637 F.3d 750 (7th Cir. 2011).

145 *Id.* at 753.

146 *Id.*

[147] 553 U.S. 639 (2008).

[148] At issue in *Bridge* was the issue of reliance. The Supreme Court held that first party reliance need not be shown in a RICO action when mail fraud or wire fraud is the alleged racketeering activity. *See* text accompanying footnotes *infra*.

and allegations. The District Court, after remand of *Bridge* and consolidation with *BCS Services,* granted summary judgment for the defendants on the ground that "the plaintiffs can't prove that the fraud was a 'proximate cause' of their alleged losses."[149]

The Seventh Circuit reversed, finding that the plaintiffs had demonstrated sufficient proximate cause, at least to survive the motion for summary judgment. 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 on grounds of legal liability."[150]

Turning to the case before it, the Seventh Circuit was blunt, holding that "[t]he doctrine has no application to this case.[151] Chastising the District Court for allowing the defendants to "thow[] sand in the ... judge's eyes," the Seventh Circuit found that the District Court had indulged the defendants in "present[ing] ...implausible speculations concerning possible superseding causes, and demand that the plaintiffs refute them."[152] The Court concluded: "Once a plaintiff presents

---

[149] 637 F.3d at 752.

[150] *Id*. at 756.

[151] *Id*. at 756.

[152] *Id*. at 757.

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."[153]

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

The Second Circuit's analysis in *Anza v. Ideal Steel Supply Co.*, also upon remand after the Supreme Court's ruling on the section 1962(c) claims in the case, points to a potentially new, helpful avenue for plaintiffs who seek to use civil RICO against business competitors. Since lawsuits between business competitors are the second most common use of civil RICO,[154] the lesson from *Anza* could be particularly fruitful for plaintiffs.

As discussed *supra*,[155] the plaintiff in *Anza v. Ideal Steel Supply Corp.* alleged that the Anzas violated both sections 1962(a) and 1962(c) by failing to collect required taxes and underreporting income, thereby obtaining an unfair competitive advantage over Ideal.[156] Although the Supreme Court held that proximate causation could not be shown under section

---

[153] *Id*. at 758. The Seventh Circuit remanded the case to the District Court where it proceeded to trial and ended with a jury verdict for the plaintiffs against some of the defendants on RICO, RICO conspiracy and state law tortious interference claims. The District Court awarded the plaintiffs treble damages and attorneys fees under RICO and punitive damages on the plaintiffs state claims. Phoenix Bond & Indemnity Co v. Bridge, 2011 WL 5978742 (N.D. Ill. 2011); 2012 WL 8706 (N.D. Ill. 2012).

[154] See Chart _____ *supra.*

[155] See text accompanying notes ____ *supra*.

[156] 547 U.S. at 453-454.

1962(c),[157] the Court remanded for further findings regarding proximate causation under 1962(a).[158]

After remand by the Supreme Court, Ideal amended its complaint, focusing on its section 1962(a) claim. According to the amended complaint, National filed amended tax returns upon Ideal's filing of the original RICO complaint in the case, National's amended tax returns showed that, as alleged by Ideal, National had underreported its income for the time period 1998-2003 by $4.3 million and underpaid its taxes by approximately $1.7 million.[159] Ideal further alleged that in violation of section 1962(a), National used the cash it collected by virtue of its tax fraud to purchase a store in the Bronx.[160] Because of its proximity to Ideal's location, the Anza's new Bronx store, Ideal alleged, caused it to lose between $1.2 million and $2.3 million in business per year.[161]

The District Court granted the Anzas' motion for judgment on the pleadings, and in the alternative for summary judgment. The Second Circuit Court of Appeals reversed, holding that Ideal's amended complaint adequately alleged proximate causation for a section 1962(a) violation. The court remanded the case for trial.

In reaching its conclusion that proximate causation was shown, the Second Circuit highlighted the differences in sections 1962(a) and 1962 (c): that section 1962(a) prohibits

---

[157] *Id.* at 461.

[158] *Id.* at 461-62.

[159] *Id*. at 317.

[160] *Id*. at 317-318.

[161] *Id.* at 326.

investing the proceeds of a pattern of racketeering activity in an enterprise while section 1962 (c) prohibits any person associated with an enterprise from *conducting the affairs of the enterprise* through a pattern of racketeering activity. Thus, reasoned the court, "the compensable injury flowing from a violation of [1962(c)] 'necessarily is the harm caused by predicate acts..." while injury flowing from a violation of 1962(a) is not [an] injury caused by the pattern of racketeering activity itself, but . . . [from the] investment of the proceeds of that activity."[162] Because the injury in section 1962(a) is "investment" and the harmful conduct alleged by Ideal was an "investment" by National, the Second Circuit found 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."[163] In holding that Ideal's amended RICO complaint adequately demonstrated proximate causation, the Second Circuit assessed the district court's mistaken judgment: "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."

In short, the Second Circuit's decision in *Anza v. Ideal Steel Supply Co.,* demonstrates how use of section 1962(a) by plaintiffs, rather than heretofore the more widely used section 1962(c),[164] may make the showing of proximate causation easier for plaintiffs.

---

[162] 652 F.3d 321 *quoting Anza*, 547 U.S. at 457, and Quaknine v. MacFarlane, 897 F2d. 75, 82-83 (2d Cir 1990).

[163] *Id*. at 327.

[164] See note ___ *supra*.

(c) Pharmaceutical Fraud

The four cases discussed in this subsection involve allegations of fraud by pharmaceutical companies marketing drugs. The plaintiffs in all of these cases were union health and welfare funds. As insurers for their fund members, the plaintiffs were obligated under their health plans to pay for the drugs prescribed for their members by a physician. Either singly or in putative class actions, depending on the case, these plaintiffs sued pharmaceutical companies for misrepresenting, allegedly, the efficacy and/or side effects of various drugs. The damage theories in the cases varied somewhat but essentially, the argument in each was 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. In all four cases the District Court dismissed the action and the appellate court affirmed dismissal on proximate cause grounds.[165] Although the plaintiffs did not win in any of these cases, the courts provided detailed, practical guidance for future plaintiffs as to how to show proximate causation in RICO claims.

(1) *United Food & Commercial Workers Central Pennsylvania & Regional Health & Welfare Fund v. Amgen*

---

[165] Dismissal on proximate causation grounds was one of the grounds for dismissal in most of these cases. *See, e.g.,* Southeast Laborers Health and Welfare Fund v. Bayer, 444 Fed. Appx. 401 (11th Cir. 2011) (The court also dismissed for failure to allege economic harm); Inronworkers Local Union 68 v. Astrazeneca, 634 F.3d 1352 (11th Cir. 2011) (The court also dismissed for failure to allege economic harm).

In *United Food & Commercial Workers Central Pennsylvania & Regional Health & Welfare Fund v. Amgen*,[166] decided in 2010, the Ninth Circuit closely tracked 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. At issue were two drugs, Aranesp and Epogen, both used to treat anemia and both linked to serious complications in cancer and kidney patients.[167] Allegedly, Amgen offered kickbacks to medical providers to increase sales of Aranesp and Epogen.

The Ninth Circuit held that "the complaint failed to plead a cognizable theory of proximate causation that links Amgen's alleged misconduct to Appellants' alleged injury." The court noted that there were "at least four independent links" 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 payors' decision to cover Aranesp for anemia... and (4) doctors' decision to prescribe Aranesp..."[168] The Ninth Circuit concluded: "This causal theory is too attenuated to satisfy the Supreme Court's proximate causation requirement in the RICO context."[169]

(2) *Southeast Laborers Health and Welfare Fund v. Bayer Corporation*

---

166 2010 WL 4128490 (9th Cir. 2010).

167 Andrew Pollack, *Amgen to Pay $780 Million to Settle Suits on Its Sales*, NY TIMES, Oct 24, 2011; Martin Zimmerman, *California Among 15 States Suing Amgen Over Anemia Drug*, L.A. TIMES, Oct 31, 2009.

168 *Id.*

169 *Id.*

The Eleventh Circuit's decision in *Southeast Laborers Health and Welfare Fund v. Bayer Corporation*,[170] decided in 2011, is similar to the Ninth Circuit's analysis in *United Food and Commercial Workers.* The plaintiffs alleged that Bayer had "misrepresented or suppressed emerging information revealing serious risks associated with the use of Trasylol."[171] Trasylol originally was developed to treat pancreatitis. It was later found to reduce excessive bleeding during surgery and was administered to surgery patients until it became linked to kidney damage.[172]

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 to reduce excessive bleeding).[173] The Eleventh Circuit rejected this claim of causation, finding the Fund's allegations inadequate. It noted that there was no evidence connecting the Fund's decision to pay for Trasylol to the alleged misrepresentations by Bayer. According to the court: "Southeast alleges no facts indicating how it would have independently evaluated Trasylol's medical appropriateness....Thus, Southeast's supposedly 'direct chain of causation' is unsupported by factual allegations."[174] The court provided guidance for plaintiffs in

---

[170] 2011 WL 5061645 (11th Cir. 2011).

[171] *Id.* at *1.

[172] *Id.* at *2.

[173] The plaintiffs also alleged a "fraud on the market" theory (the entire health care market was hurt by Bayer's misrepresentation). *Id.* at *5. The Eleventh Circuit quickly rejected this causation theory, characterizing it as "no more than a ... 'fraud on the FDA' theory," which the court noted, is "a theory that has been specifically rejected by the Supreme Court." *Id.* at *6. 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 *7.

[174] *Id.* at *6.

future pharmaceutical fraud cases: "[A]lthough Southeast alleged that it had an independent choice of whether or not to pay for Trasylol, Southeast failed to explain how or why it made the choice to pay for Trasylol and how or why Bayer's alleged concealment of the dangers of Trasylol led Southeast to pay for Trasylol."[175]

(3) *Ironworkers Local Union 68 v. Astrazeneca Pharmaceuticals*

In *Ironworkers Local Union 68 v. Astrazeneca Pharmaceuticals*[176] 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.[177] Astrazeneca had marketed and sold Seroquel as effective in treating autism, dementia, Alzheimers and other disorders.[178] Seroquel was widely prescribed for these disorders even though it was not FDA-approved for such uses. The plaintiffs alleged that Astrazeneca's representations of Seroquel's effectiveness and safety for these disorders were false --- it was neither effective nor safe. They further alleged that Astrazeneca's misrepresentations caused physicians to prescribe Seroquel unnecessarily, which, in turn, injured the plaintiffs, who under the terms of their health plans, paid for Seroquel.[179]

---

[175] *Id.* at *9.

[176] 634 F.3d 1352 (11th Cir 2011).

[177] *Id.* at 1355.

[178] *Id.* at n.4.

[179] *Id.* at 1359.

Tracking 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. In *Anza,* the independent factors were market and business vagrancies which may have caused Ideal's loss of business to the Anzas, rather than the Anzas' alleged wrongdoing. Here, the independent factor was the independent decision by each physician to prescribe Seroquel for a particular patient. 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 'presentations...regarding the drug's relative safety and efficacy."[180]

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. The plaintiffs in *Ironworkers* failed to take this into account. The problem in proving proximate causation was that the plaintiffs' own theory of causation incorporated an independent factor, namely, each physician prescribed Seroquel to a particular patient.

(4) *UFCW v. Eli Lilly & Company*

---

[180] *Id*. at 1359. (Internal quotations marks deleted). The court continued to note that the Funds' economic loss in covering Seroquel was due to its own actuarial errors. *Id.* at 1364. The court 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*. at 1364.

In *UFCW v. Eli Lilly & Company*, [181] 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 misrepresented the efficacy and side effects of Zyprexa. Zyprexa was originally approved by the FDA to treat schizophrenia and later approved for treatment of bipolar disorders.[182] The plaintiffs alleged that Eli Lilly, the manufacturer of Zyprexa, misrepresented Zyprexa's side effects and exaggerated its effectiveness.[183] The District Court certified the class and denied the defendant's motion for summary judgment. The Second Circuit reversed, de-certifying the class and holding that summary judgment for the defendant was appropriate. Although the defendant prevailed in this case, the opinion provides excellent guidance for future plaintiffs, namely, prove every step in your causal chain, and by inference, construct only a causal chain you can prove.

The Second Circuit began its analysis with a discussion of reliance. Acknowledging that the Supreme Court has held that first party reliance is not an element of a RICO civil cause of action based upon mail fraud or wire fraud, the Second Circuit noted that in the case before it, however, because of the plaintiffs' chosen theory of liability [incorporating reliance], "plaintiffs ... must prove …third-party reliance as part of their chain of causation."[184] The court continued, because class actions may be certified only if class members' claims may be shown by

---

[181] 620 F.3d 121 (2d Cir. 2010).

[182] *Id.* at 124.

[183] *Id.*

[184] *Id.* at ____. [R]eliance is a necessary part of the causation theory advanced by the plaintiffs. *Id.* at ____.

"generalized proof," "the question becomes "whether reliance can be shown by generalized proof."[185]

The Second Circuit described the alleged chain of causation: "[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"][186] relying on the advice of PBMs [Pharmacy Benefit Manager] and their Pharmacy and Therapeutics committees place Zyprexa on their formularies [a list 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."[187] This chain of causation, the court explained, rests on the independent actions of third and even fourth parties."[188] As such, it must fail.

(5) Concluding Remarks

Together, these four cases: *United Food & Commercial Workers*, *Southeast, Ironworkers*, and *UFCW*, provide significant guidance for plaintiffs who sue pharmaceutical companies under civil RICO alleging fraudulent misrepresentations of drugs they manufacture or market. The

---

[185] *Id*. at 134.

[186] The Eleventh Circuit described succinctly the role of insurers in the U.S. health care system referring to "insurers" to refer to "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 pa for the health care services received by their enrollees . . . " *Ironworkers*, 634 F.3d at 1355 n.1.

[187] *Id.* at 134.

[188] *Id.* (*quoting Hemi*, 130 S. Ct. at 990).

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.

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

While creating and documenting an explicit causation trail would be difficult if not impossible for many types of businesses, it should not be 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 add to and document their decision making process to cover a particular drug. Insurers and Funds already have existing protocols to determine drug coverage under their plans. Through Pharmacy Benefit Managers (or other similar outsourced entities) insurers and funds already have in place systems for establishing formularies of what drugs they will cover. 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, as one more step in constructing their formularies, that the insurer has relied upon specific representations by pharmaceutical companies regarding efficacy and side effects in making its own, independent decision to cover the drug. The specific representations should be set forth in the insurer's 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.

(d) Conclusion: Proximate Causation

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

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 than the plaintiff. In addition, if plaintiffs use civil RICO against business competitors, they should use section 1962(a) of RICO instead of the more commonly used section 1962(c) since proximate causation will be easier to prove under 1962(a) than under section 1962(c). Lastly, the way is bright if insurers, either singly or in class actions, want to use RICO to sue pharmaceutical companies for fraudulent misrepresentations

about covered drugs. Recent decisions have set forth exactly what insurers must do to show proximate causation in such cases.

VII. CLASS ACTIONS: 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 which make it easier to use RICO in class actions, and judicial and legislative restrictions on punitive damage awards in general, thrust RICO into the forefront as a new and powerful vehicle for bringing class actions. Recent cases show that RICO is being used more often for class actions, more successfully, and in larger cases.

Sixteen of the 157 civil RICO actions included in this study (11%) are class actions.[189] One-third of the opinions in these class actions were rendered recently, in 2010 and 2011.[190]

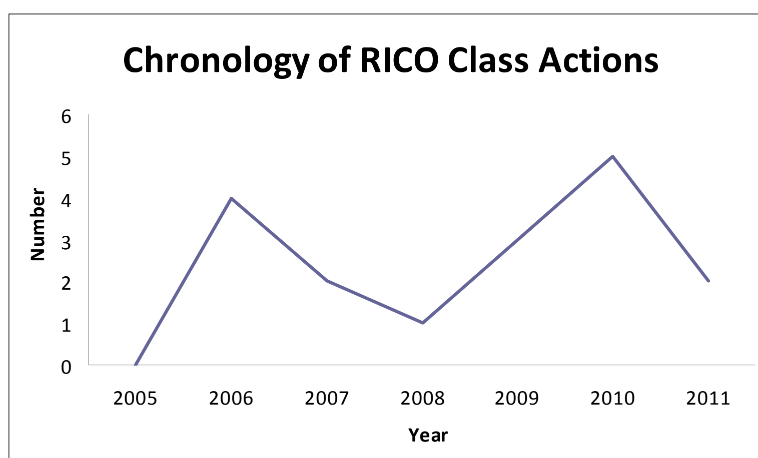
---

[189] Southeast Laborers Health and Welfare Fund v. Bayer Corp., 2011 WL 5061645 (11th Cir. 2011) (pharmaceutical fraud); Ironworkers Local Union 68 v. Astra Zeneca Pharmaceuticals, 634 F.3d 1352 (11th Cir. 2011) (pharmaceutical fraud); UFCW Local 1776 v. Eli Lilly Co., 620 F.3d 121 (2d Cir. 2010) (pharmaceutical fraud); In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300 (3d Cir. 2010) (insurance fraud); American Dental Assn. 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; immigration fraud); In re Insurance Brokerage Antitrust Litigation (MDL No. 1663), 579 F.3d 241 (3d Cir. 2009); Crichton v. Golden Rule Ins. Co., 576 F.3d 392 (7th Cir. 2009) (health insurance fraud); Longmont United Hosp. v. Saint Barnabas Corp., 2009 WL 19343 (3d Cir. 2008) (health insurance reimbursement fraud); McLaughlin v. American Tobacco Co., 522 F.3d 215 (2d Cir. 2008) (products liability (cigarettes)); Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) (consumer fraud); Olaniyi v. Alexa Cab. Co., 2007 WL 979657 (3d Cir. 2007) (mortgage fraud); Humphrey v. UPS, 2006 WL 2970813 (11th Cir. 2006) (consumer fraud); Williams v. Mohawk Industries, 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).

[190] See note ____ *supra*.

Plaintiffs received favorable rulings in one-third of these class actions, which is a higher success rate than in civil RICO actions overall (20%).[191] Health care issues dominate the RICO class action cases: 50% of the RICO class actions allege some type of health care fraud[192] with pharmaceutical fraud dominating.[193] 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.[194] No RICO pharmaceutical fraud decisions were rendered prior to 2010. Perhaps most telling, all of the decisions in RICO class actions rendered in 2011 alleged pharmaceutical fraud. As discussed *supra*,[195] this trend of using RICO to bring class actions aimed at pharmaceutical fraud is likely to accelerate.

CHART 15



---

[191] See chart _____ *supra*.

[192] See note ____ *supra*.

[193] *Id.*

[194] See note ___ *supra*.

[195] See Part VI(C)(2)(c).

RICO has always conferred four advantages for plaintiffs in class actions. First, its damages are large: treble damages and award of attorneys' fees and costs.[196] RICO's damages are also mandatory. They cannot be altered by courts or capped by legislatures. Second, because of the large number and variety of the predicate acts it incorporates, RICO applies to a wide swath of conduct. In particular, because RICO incorporates mail and wire fraud, it applies to virtually all frauds: business, health care, computer, construction, financial services, etc. 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."[197] Lastly, RICO makes it easier to certify class actions.[198] Recent Supreme Court decisions on RICO on issues of first party reliance, "enterprise," and causation, along with existing case law on RICO's "pattern" requirement,[199] 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

---

[196] 18 U.S.C. § 1964. These amounts can be quite large. For example, Expert testimony in UFCW Local 1776 v. Eli Lilly, 620 F.3d 121 (2d Cir. 2010) estimated damages for the putative class as between $4-7.7 billion. *Id.* at 129.

[197] 18 U.S.C. § 1965(c).

[198] Cf. J. Gordon Cooney, Jr., John P. Pavelle, Jr., Bahar Shariati, *Back to the Future: Civil RICO in Off-Label Promotion Litigation*, www.morganlewis.com. "Civil RICO claims conceivably allow plaintiffs to sidestep the predominating choice-of-law issues that typically prevent nationwide class actions based on fraud or deceptive practices."

[199] See text accompanying footnotes _______ *infra.*

The past two decades have seen efforts by courts and legislatures to restrict punitive damages. For example, in 1985, only seven states legislatively imposed limitations on punitive damages.[200] By 2010, 22 states had enacted such legislation.[201] The United States Supreme Court has been especially active in restricting punitive damages. Beginning in 1996 with its decision in *BMW of North America v. Gore*,[202] the Court began to rein in punitive damages by focusing on the relationship between punitive and compensatory damages. The Court anchored its restrictions in the due process clause, and held that a punitive damage award of $2 million on compensatory damages of $4000.00 was "not simply excessive, but grossly so, and therefore unconstitutional."[203]

In 2003, in *State Farm Auto Ins. v. Campbell,*[204] the Court held that a punitive damage award of $145 million on a $1 million compensatory award was excessive. The Court noted, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages ... will satisfy due process.[205]

---

[200] Congressional Budget Office, the effects of Tort Reform: Evidence From the States 6 (June 2004) available at http;//www.cbo.gov/showdoc.cfm?index=5549).

[201] *Id.* at 6. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 495-496 (2008) for an overview of states' efforts to prohibit or restrain punitive damages.

[202] 517 U.S. 559 (1996).

[203] *Id.* at 586.

[204] 554 U.S. 471 (2008).

[205] State Farm Auto Ins. v. Campbell, 538 U.S. 408 (2003).

In 2008, in *Exxon Shipping v. Baker*,[206] the Court drew a "bright line," holding that a 1:1 ratio of punitive to compensatory damages was appropriate. The Exxon Valdez, an oil tanker, ran aground in Prince William Sound in Alaska, spilling 11 million gallons of crude oil.[207] Compensatory damages in the amount of $507.5 million were awarded[208] and $2.5 billion in punitive damages were awarded.[209] In setting aside the punitive damage award, the Court approved a punitive-to-compensatory ratio of 1:1.[210] The Court rendered a damning discourse on punitive damages in general, noting the "audible criticism"[211] and the "stark unpredictability" of punitive damage awards,[212] which created "tension . . . in a system whose commonly held notion of law rests on a sense of fairness . . . ."[213] Although the Court's ruling in *Exxon Shipping* was limited to maritime cases, its reasoning was not. The Court spoke of the hazards of punitive damage awards in general, not simply maritime punitive damage awards.[214]

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

---

[206] Exxon Shipping v. Baker, 554 U.S. 471 (2008).

[207] *Id.* at ___.

[208] *Id.* at 514.

[209] *Id.* at 475.

[210] *Id.* at 514.

[211] *Id.* at 498.

[212] *Id.* at 499.

[213] *Id.* at 503.

[214] "The real problem, it seems, is the stark unpredictability of punitive awards." *Id.* at 499. The Court also cited to statistical data beyond maritime cases. *Id.* at 495-497.

vulnerable to reduction to a 1:1 ratio. 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.

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

Federal Rule of Civil Procedure (FRCP)23, which governs class actions, requires "sufficient unity so that absent class members can fairly be bound by decisions of class representatives."[215] FRCP Rule 23(a) 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."[216] Once the prerequisites of Rule 23(a) are met, a class may be certified only if the standards in FRCP 23(b) are also met. 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."[217]

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

---

[215] Amchen Prods. Inc. v. Windsor, 521 U.S. 591, 621 (1997).

[216] *Id.* at 614.

[217] *Id.*

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."[218] This requirement, of first party reliance, makes it more difficult to find commonality as required in FRCP 23(a), and "predominance" as required in FRCP 23(b). Plaintiffs must present individualize proof to show that each and every plaintiff relied upon a defendant's misrepresentation.

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.[219] Justice Thomas, writing for the majority, reasoned that mail fraud, a statutory offense was "unknown to the common law,"[220] does not, by its terms, contain a first party reliance element, and is not bound by common law interpretations of fraud. The Court stated, "Congress chose to make mail fraud, not common-law fraud, the predicate act for a RICO violation,"[221] 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."[222]

---

[218] Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 650 (2010) (quoting the defendant's argument as an accurate statement of common law fraud).

[219] *Id.* at 653.

[220] *Id.* at 652.

[221] *Id.* at 653.

[222] *Id.* at 661.

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 in 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.

The second area in which recent Supreme Court rulings make it easier to meet the commonality and predominance requirements with RICO is with its rulings on RICO "enterprise." As noted *supra*,[223] RICO requires proof of an "enterprise": that a defendant invested the proceeds of racketeering activity in an *enterprise* (section 1962(a)); that a defendant acquired or maintained control over an *enterprise* through a pattern of racketeering activity (section 1962(b)); that a defendant who is employed by or associated with an enterprise conducted the affairs of the *enterprise* through a pattern of racketeering activity (section 1962(c)), or that a defendant conspired to do any of these (section 1962(d)). 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."[224] This latter option is known as an "association in fact" enterprise.

As noted *supra*,[225] in 2009, in *United States v. Boyle,* [226] the Supreme Court rejected lower courts' limiting interpretations of RICO's "association-in-fact" enterprise and solidified a

---

[223] See text and accompanying notes _____ *supra*.

[224] 18 U.S.C. §1961(4).

[225] See text and accompanying notes _____ *supra*.

[226] 556 U.S. 938 (2009); See text accompanying notes _____ *supra*.

broad interpretation of enterprise by holding that a RICO enterprise exists even if a group is "loosely and informally organized," has no master plan, agreement or hierarchy, and when the group's activities are sporadically conducted.[227]

The Court's ruling in *Boyle* permits plaintiffs to prove that far-flung actors are part of the enterprise. 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 make it easier to show commonality and predominance pertains to RICO's requirement that there be a "*pattern*" of racketeering activity. As discussed *supra*,[228] in 1989 in *H.J. Inc. v. Northwestern Bell Telephone Co.,* [229] the Court held that "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."[230] 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. This requirement of relatedness will dovetail with proving commonality among members.

---

[227] *Id.* at 950.

[228] See text and accompanying notes ____ *supra*.

[229] H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, ___ (1989).

[230] *Id.* at 235; *See* text accompanying notes ___ *supra.*

In short, these holdings: first party reliance is not required, enterprise may consist of far-flung actors, 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*[231] is one example of this. In this case, the court specifically relied on the enterprise and pattern requirements of RICO to approve class certification and settlement in a class action alleging bribery and kickbacks in obtaining insurance coverage. 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..."[232] The court similarly found RICO's pattern helped to show commonality and predominance: "whether these racketeering activities were recurring such that a pattern could be established ...would encompass common questions of law and fact...."[233]

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

[231] In re Insurance Brokerage Antitrust Litigation (MDL No. 1663), 579 F.3d 241, 269-270 (3d. Cir. 2009).

[232] *Id.* at 270.

[233] *Id.*

damages, attorneys' fees and costs, are more appealing than ever. Supreme Court decisions on reliance, enterprise, pattern and proximate causation, especially those rendered in 2009 and 2010,[234] make RICO ever more helpful in proving commonality and predominance. For all of these reasons RICO should be poised to thrive in the class action arena.

Conclusion

This article began with the question, why isn't RICO used more? It is a worthy question. RICO is an imaginative tool for addressing complex wrongdoing. Such tools are needed. Yet RICO has been used relatively little and maligned much. This author undertook a study of federal appellate decisions on RICO rendered between 2005 and 2011. This study has yielded interesting observations and an answer to the question.

First, the observations. Most RICO cases are civil, most involve business disagreements between former associates or competitors, and the defense wins most civil RICO cases. About one-fourth of RICO cases are criminal prosecutions, most are aimed at gang and drug activities, and the government prevails in almost all criminal RICO cases. There are considerable differences among the circuits as to their experience with RICO and the outcome in RICO cases. The Eleventh Circuit rendered the largest number of civil RICO decisions during the seven year study; the Second Circuit rendered the greatest number of criminal RICO decisions. Defendants in civil RICO cases win less often in the Ninth Circuit; most often in the Second Circuit. The government wins criminal RICO cases in all of the circuits.

---

[234] Hemi v. City of New York, 130 S. Ct. 983 (2010); Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2010); Boyle v. United States, 556 U.S. 938 (2009).

Three issues have dominated RICO case law: "pattern," "enterprise," and proximate causation. All three issues have been clarified considerably by the United States 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.

A significant percentage of the civil RICO cases are class actions. This trend is likely to accelerate. Recent case law development on proximate causation, reliance, pattern and enterprise make RICO civil actions overall 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.