

**CRIMES THAT COUNT TWICE: A REEXAMINATION OF  
RICO'S NEXUS REQUIREMENTS UNDER  
18 U.S.C. §§ 1962(c) AND 1964(c)**

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INTRODUCTION

Two decades have passed since Professor (now Judge) Gerard Lynch first called attention to the most curious feature of the Racketeer Influenced and Corrupt Organization Act (RICO), namely, that it criminalizes already criminal behavior.<sup>1</sup> Now, as then, we know that not all crimes “count” for

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1. See Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 708 (1987). Lynch explained that then-current RICO prosecutions were a far cry from original congressional intent:

Congress viewed RICO principally as a tool for attacking the specific problem of infiltration of legitimate business by organized criminal syndicates. As such, RICO has hardly been a dramatic success. Few notable RICO prosecutions have dealt directly with this sort of criminal activity.

Instead, prosecutors have seized on the virtually unlimited sweep of the language of RICO to bring a wide variety of different prosecutions in the form of RICO indictments. All but ignoring those subsections of RICO that directly prohibit the act of infiltrating legitimate business by investment of illicit profits or by illegitimate tactics, prosecutors have relied principally on the expansive prohibition of the operation of an enterprise through a pattern of racketeering activity to strike at those—whether or not they fit any ordinary definition of “racketeer” or “organized criminal”—who commit crimes in conducting the affairs of businesses, labor unions, and government offices.

. . . Through an expansive (though quite literal) interpretation of section 1962(c), prosecutors have moved directly against “organized crime” itself, in both the narrow and broad senses of the term. In cases of this sort, defendants have been tried for engaging with others in series of crimes having looser connections than have traditionally been permitted even in conspiracy prosecutions. Although particular “predicate acts” must be proven, such prosecutions tend to focus not on the defendant's particular anti-social acts, but on whether an examination of broad stretches of the defendant's criminal career and those of his associates reveals that he has associated himself with a criminal combine. Necessarily, RICO prosecutions put before the jury charges that a particular defendant engaged in not just one but several, often very loosely related, crimes, and frequently also present an equally ill-assorted set of charges against codefendants.

purposes of RICO,<sup>2</sup> and that even a pervasive pattern of racketeering acts (also referred to as “predicate” acts in cases and commentary) will not sustain a RICO claim if it is not tied to a RICO “enterprise.”<sup>3</sup> But twenty years later—and with hundreds of published opinions and law review articles to guide us—there is still considerable confusion as to when “ordinary” crimes spill over into RICO violations. This Article examines various schemes—often called “nexus” requirements—that some courts have devised to ensure that predicate acts bear a sufficient relation to one another, an enterprise, and, in the case of civil litigation, to the claimed injury.<sup>4</sup>

There is disagreement among courts as to the best method of ensuring that RICO’s “relational” requirements are met in every case. This Article seeks to bring some regularity to the analysis. To facilitate that process, a common vocabulary should prove useful. I have thus assigned the following definitions to the following terms:

Horizontal Nexus:	the relationship between one predicate act and another;
Vertical Nexus:	the relationship between a predicate act and an enterprise; and
Causal Nexus:	the relationship between a criminal RICO violation and a civil plaintiff’s claimed injury.

As the following discussion will show, the first two definitions arise from the language of § 1962(c); the third flows from the language of § 1964(c). Specifically, Part I examines the language and structure of § 1962(c) and concludes two things. First, the “pattern” term of the section is in fact a horizontal nexus requirement. Second, both the language and purpose of

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*Id.* at 662–63 (footnotes omitted).

2. See Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961(1) (2000) (listing crimes that qualify as acts of racketeering).

3. See *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993) (“[I]t is clear that Congress did not intend to extend RICO liability . . . beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity.”); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (“A violation of section 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.”); *Jackson v. Radcliffe*, 795 F. Supp. 197, 207 (S.D. Tex. 1992). “‘Racketeering activity’ alone does not violate RICO. Rather, the activity must have some nexus with the ‘enterprise.’” *Id.* (citations omitted).

4. Civil liability arises from 18 U.S.C. § 1964(c), which allows a person injured in his business or property “by reason of” a substantive RICO violation, found in § 1962, to recover treble damages. 18 U.S.C. § 1964(c) (2000).

the section suggest that there must be a vertical nexus between the predicate acts alleged and the enterprise. Taken in tandem, the horizontal and vertical requirements assure that a defendant is being charged—either criminally or civilly—with a RICO violation, not just a predicate act. Part II considers the further requirement of § 1964(c) that a private plaintiff be injured “by reason of” a substantive RICO violation to have standing to sue. This standard assures that there is a causal nexus between the alleged criminal acts and the claimed injury to the plaintiff’s business or property.

#### I. THE STRUCTURE OF § 1962(C) SUGGESTS RELATIONSHIPS AMONG ITS ELEMENTS THAT MUST BE PROVEN TO ESTABLISH A VIOLATION

Because § 1962(c) is the most commonly charged RICO violation, it is the principal focus of the following discussion.<sup>5</sup> Section 1962(c) does not criminalize all acts of racketeering.<sup>6</sup> In fact, its very syntax suggests that a violation depends on a series of relationships: “It shall be unlawful for any person . . . associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise’s affairs through a pattern of racketeering activity . . .”<sup>7</sup> For example, the “person” must be “associated” with the “enterprise”; the “person” must “conduct” the “enterprise’s” affairs; the “conduct” must be “through” “racketeering activity”; and the “racketeering” must form a “pattern.” Given this relational structure, to determine whether a particular predicate act is part of a “pattern” that violates § 1962(c), a

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5. DAVID B. SMITH & TERENCE G. REED, CIVIL RICO § 5.01, 5-2 (2007). The authors outlined the RICO statute by explaining:

There are four ways to violate the RICO statute. These four different RICO offenses are set forth in subsections of section 1962. The first three subsections create substantive offenses. The fourth, section 1962(d), makes it a crime to conspire to violate any of the first three subsections.

Subsections (a), (b), and (c) were “designed to work together to deal with the three different ways in which organized crime infiltrates and corrupts legitimate organizations.” The basic purpose of section 1962(a) was to prevent racketeers from using their ill-gotten gains to operate, or purchase controlling interests in, legitimate businesses. The purpose of section 1962(b) was to prohibit the takeover of a legitimate business through racketeering, typically extortion or loansharking. Section 1962(c), the most often charged RICO offense, was intended to prevent the operation of a legitimate business or union through racketeering.

*Id.* (footnotes omitted).

6. *See United States v. Cauble*, 706 F.2d 1322, 1331–32 (5th Cir. 1983) (“RICO criminalizes the conduct of an enterprise through a pattern of racketeering activity and not merely the defendant’s engaging in racketeering activity.”).

7. 18 U.S.C. § 1962(c) (2000); *see also Cauble*, 706 F.2d at 1332 (stating that a complaining party must “establish that the affairs of the enterprise have been conducted ‘through’ a pattern of racketeering activity”).

court must first consider whether that act is “related” to the other predicate acts in a statutorily significant way.<sup>8</sup> But once a court finds a pattern, it must also consider whether that pattern relates to the operation or management of an enterprise.<sup>9</sup>

Some courts conflate these two separate inquiries as part of the “pattern” determination: “The requirement of ‘relatedness’ embodies two different concepts. The racketeering acts must be related to each other (‘horizontal’ relatedness), and they must be related to the enterprise (‘vertical’ relatedness).”<sup>10</sup> For others, though, horizontal relatedness pertains to the “pattern” and vertical relatedness pertains to the “conduct of [an] enterprise’s affairs through a pattern of racketeering.”<sup>11</sup> The second approach, or test, seems the sounder of the two for two reasons. First, it accords with the common meaning of “pattern,” which connotes a physical relationship of elements—e.g., thread or yarn—coming together to form a recognizable graphic. Second, the question of whether acts relate to an enterprise permits an end-run around the standard established in *H. J., Inc., v. Northwestern Bell Telephone Co.*, to which we will presently turn.<sup>12</sup>

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8. *See H. J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (explaining that a complaining party must show that “the racketeering predicates are related”).

9. *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993) (concluding that “one is not liable under [§ 1962(c)] unless one has participated in the operation or management of the enterprise itself”).

10. *United States v. Polanco*, 145 F.3d 536, 541 (2d Cir. 1998) (“Predicate acts ‘must be related to each other (‘horizontal’ relatedness), and they must be related to the enterprise (‘vertical’ relatedness).” (quoting *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992))); Barry Tarlow, *RICO Report*, CHAMPION, Nov. 1998, at 37, 37.

Courts have long disagreed concerning what kind of relationship must exist between the two acts of racketeering for those acts to constitute a “pattern of racketeering.” Some circuits refused to find a pattern of racketeering where the two acts of racketeering were completely unrelated to each other, insisting that the acts had to be “connected by a common scheme, plan, or motive.” Other circuits, however, found that even unrelated racketeering acts constituted a pattern of racketeering as long as those acts were all committed in connection with the same RICO enterprise. The relationship of racketeering acts to each other can best be described as “horizontal relatedness,” while the relationship of racketeering acts to the enterprise can best be described as “vertical relatedness.”

*Id.* (citations omitted).

11. SMITH & REED, *supra* note 5, § 5.04[3][a], at 5-36.

12. *H. J., Inc.*, 492 U.S. at 239 (holding that acts must be (1) related and (2) pose a threat of continued criminal activity (continuity)); *see also Polanco*, 145 F.3d at 541 (finding that defendant’s participation in a murder was related to the weapons distribution activities of defendant’s RICO enterprise). In *Polanco*, to further defendant’s own enterprise, defendant sold guns to a gang leader who committed murder, and murder could be seen as necessary precedent to consummating the particular gun sale. *Id.*; *see United States v. Weisman*, 624 F.2d 1118, 1122 (2d Cir. 1980) (noting that “the statutory language [of RICO] does not expressly require that the predicate acts of racketeering be specifically ‘related’ to each other”). A case like *Polanco* shows the problem with the *Weisman* standard: if applied in the civil context, it could allow a plaintiff to recover for a simple instance of fraud, unrelated to any others.

Moreover, as Barry Tarlow has aptly noted, cases taking the first tack are internally inconsistent because they recite the requirements of horizontal relatedness then apply the test for vertical relatedness.<sup>13</sup> In any event, failure to satisfy either of these tests dooms a § 1962(c) claim.

#### A. Predicate Acts Must Be Related to Each Other

Although no RICO nexus requirement is simple to evaluate or apply, horizontal relatedness is made conceptually simpler because “pattern” is (at least partially) a statutorily defined term.<sup>14</sup> (This contrasts with vertical relatedness, which finds its genesis in terms—“conduct,” “participate,” and “through”—that are vague and undefined.)<sup>15</sup> That definition determines that a “pattern” can be comprised of as few as two of the acts proscribed by § 1961.<sup>16</sup>

Before the mid-1980s, courts applied the pattern requirement quite literally; some courts went so far as to read nothing more into this element than what the literal words of § 1961(5) suggest.<sup>17</sup> All this began to change

13. Tarlow states:

The Second Circuit’s *Weisman* standard is, moreover, internally inconsistent. According to the *Polanco* court, to constitute a pattern of racketeering, predicate acts “must be related to each other (horizontal relatedness) and they must be related to that enterprise (vertical relatedness).” *Polanco*, 145 F.3d at 541 (emphasis added) (citing *Minicone*, 960 F.2d at 1106). Nevertheless, the *Polanco* court defined horizontal and vertical relatedness *in exactly the same way*: according to the opinion, a predicate act is vertically related to an enterprise if it is “related to the activities of the enterprise,” and a predicate act is horizontally related to another predicate act “if each predicate act is related to the enterprise.” *Id.* at 541. The *Polanco* court thus eliminated any distinction between horizontal and vertical relatedness.

Tarlow, *supra* note 10, at 41. Tarlow also noted that courts applying the *Weisman* standard also use different “relatedness” standards in criminal and civil cases that have no textual support in the RICO statute. *Id.*

14. RICO defines the term “pattern of racketeering activity” to require “at least two acts of racketeering . . . which occurred within ten years” of each other. 18 U.S.C. § 1961(5) (2000).

15. *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 141 (D.C. Cir. 1989) (“Unlike ‘enterprise’ and ‘pattern,’ the terms ‘conduct,’ ‘participate’ and ‘through’ do not have statutory definitions.”).

16. § 1961(5).

17. *See, e.g., United States v. Jennings*, 842 F.2d 159, 162–63 (6th Cir. 1988) (reasoning that two telephone calls placed within roughly two hours could constitute a pattern of activity). The court relied on the holding in *United States v. Watchmaker* that a “predicate acts requirement may be satisfied although the two acts were proximate in time.” *Jennings*, 842 F.2d at 163 (citing *United States v. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir. 1985)). The *Watchmaker* court went on to say that acts which are part of the same scheme or transaction can qualify as distinct predicate acts:

The standard which has been applied in this Circuit is whether each act constitutes “a separate violation of the [state or federal] statute” governing the conduct in question. If distinct statutory violations are found, the predicate acts will be

with footnote 14 of *Sedima S.P.R.L. v. Imrex Co.*, which states:

As many commentators have pointed out, the definition of a “pattern of racketeering activity” differs from the other provisions in § 1961 in that it states that a pattern “requires at least two acts of racketeering activity,” § 1961(5) (emphasis added), not that it “means” two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a “pattern.” The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: “The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one ‘racketeering activity’ and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.” S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that “[t]he term ‘pattern’ itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . .” 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO “not aimed at the isolated offender”); House Hearings, at 665. Significantly, in defining “pattern” in a later provision of the same bill, Congress was more enlightening: “[C]riminal conduct forms a pattern if it embraces criminal acts that 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.” 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Jannelli v. United States*, 420 U.S. 770, 789, 95 S. Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).<sup>18</sup>

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considered to be distinct irrespective of the circumstances under which they arose. *Watchmaker*, 761 F.2d at 1475 (citations omitted); see also *United States v. Parness*, 503 F.2d 430, 441-42 (2d Cir. 1974) (holding interstate travel to pick up cashier’s check coupled with transportation of those checks across state lines constituted a “pattern”).

18. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.14 (1985) (internal citations omitted); see also SMITH & REED, *supra* note 5, § 4-01, at 4-4.

Dicta in the Supreme Court’s decision in *Sedima* required the lower courts to reconsider the question of what constitutes a pattern. The *Sedima* Court expressed the view that the appropriate way for the courts to limit any perceived abuse of the civil RICO statute was “to develop a meaningful concept of ‘pattern.’” In footnote 14 of its opinion, the Court opined that the definition of pattern in section 1961(5) was merely a starting point for judicial construction. Based upon RICO’s legislative history, the Court determined that in order to

Although this footnote offered a new linguistic standard, arguably it merely substituted two vague concepts (relationship and continuity) for one (pattern). Not surprisingly, then, courts took wildly different tacks when confronted with *Sedima*, ranging from ignoring it to—in the case of the Eighth Circuit—erecting the impossibly high standard that two distinct criminal *schemes* (not just acts) must be proven.<sup>19</sup>

In the face of splintered circuit holdings, the United States Supreme Court eventually intervened and placed a significant gloss on the two-act threshold; namely, the acts must (1) be related and (2) pose a threat of continued criminal activity (continuity).<sup>20</sup> The first of these two concepts is germane to the nexus discussion. For purposes of this analysis, predicate acts are “related” if they “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.”<sup>21</sup>

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satisfy the pattern element of the offense *both continuity and relationship* among the predicate acts must be shown. Unfortunately the Court did not specifically state what it meant by either continuity or relationship.

*Id.* (footnotes omitted) (citing and quoting *Sedima*, 473 U.S. 479, 496 n.14).

19. See SMITH & REED, *supra* note 5, § 4.01, at 4–4 to –5.

Subsequent to *Sedima*, the lower courts struggled to develop a test for the continuity part of the pattern concept. . . . At one end of the spectrum, the Eighth Circuit adopted the highly restrictive position that two distinct schemes—as opposed to episodes or transactions—are necessary to prove a pattern. At the other end of the spectrum, a few circuits brushed aside footnote 14 of *Sedima*, treating it as unpersuasive dictum, and adhered to their pre-*Sedima* interpretation of the pattern element.

*Id.*

20. *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (“RICO’s legislative history reveals Congress’ intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.”). Thus, a single act of fraud—even one with enormous consequences—is beyond RICO’s purview. *Id.* By contrast, common law fraud generally consists of three elements: (1) a material false statement made with an intent to deceive; (2) the victim’s justifiable reliance on the statement; and (3) damages. RESTATEMENT (SECOND) OF TORTS § 525 (1977). Further, the Court specifically rejected the lower court’s multiple “schemes” requirement as well as the lax holdings of those courts stating that a pattern could be established merely by proving two predicate acts. *H. J. Inc.*, 492 U.S. at 237.

Congress had a more natural and commonsense approach to RICO’s pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.

*Id.*

21. *H. J. Inc.*, 492 U.S. at 240. The Court “borrowed” these standards from the definition of pattern in 18 U.S.C. § 3575(e). This borrowing was problematic for two reasons, which Justice Scalia seized upon in characteristic fashion:

Unfortunately, if normal (and sensible) rules of statutory construction were followed, the existence of § 3575(e)—which is the definition contained in another

In many cases this requirement is easily satisfied because all the alleged bad acts are transactionally related (e.g., multiple acts of mail fraud directed to a single end).<sup>22</sup>

In other cases, though, the requisite relationship is not so obvious. Courts have acknowledged this fact and have thus allowed that “[a]n interrelationship between acts, suggesting the existence of a pattern, may be established in a number of ways. These include proof of their temporal proximity, or common goals, or similarity of methods, or repetitions.”<sup>23</sup> This is intended to be a flexible standard, one in which “[t]he degree to which these factors establish a pattern may depend on the degree of proximity, or any similarities in goals or methodology, or the number of repetitions.”<sup>24</sup> In application, this means that a court will (1) establish the beginning and ending dates of the alleged pattern of predicate acts to determine whether and which of the acts bear proximity in time to one another; (2) determine whether the alleged acts involve the same participants; (3) identify the victims of each act; and (4) evaluate whether each act had the same purpose (e.g., to defraud victims of money).<sup>25</sup>

As a practical matter, the horizontal relatedness bar is not difficult to

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title of the Act that was explicitly *not* rendered applicable to RICO—suggests that *whatever* “pattern” might mean in RICO, it assuredly *does not* mean that. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” But that does not really matter, since § 3575(e) is utterly uninformative anyway. It hardly closes in on the target to know that “relatedness” refers to acts that are related by “purposes, results, participants, victims, . . . methods of commission, or [just in case that is not vague enough] otherwise.” Is the fact that the victims of both predicate acts were women enough? Or that both acts had the purpose of enriching the defendant? Or that the different coparticipants of the defendant in both acts were his coemployees? I doubt that the lower courts will find the Court’s instructions much more helpful than telling them to look for a “pattern”—which is what the statute already says.

*Id.* at 252 (Scalia, J., concurring) (citations omitted).

22. *See, e.g.,* Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1413–14 (3d Cir. 1991) (stating that relatedness “will nearly always be satisfied in cases alleging at least two acts of mail fraud stemming from the same fraudulent transaction—by definition the acts are related to the same ‘scheme or artifice to defraud’”); Banks v. Wolk, 918 F.2d 418, 422 (3d Cir. 1990) (finding that relatedness was satisfied because all the instances of mail and wire fraud were related to a single real estate transaction with the common goal of obtaining a lower price for a building).

23. *Dempsey v. Sanders*, 132 F. Supp. 2d 222, 227 (S.D.N.Y. 2001) (quoting *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 520 (2d Cir. 1994)).

24. *Id.* (quoting *Azrielli*, 21 F.3d at 520).

25. *Id.* Specifically, the court found the relatedness prong was satisfied when the defendant schemed to deprive the plaintiff of capital contributions made to a joint venture over a one-year period. *Id.* at 224, 227. The court took into consideration the involvement of the same participants, the defendant and her various corporate entities; the same victim, the plaintiff; and the same purpose, to obtain plaintiff’s funds through thirteen material misrepresentations. *Id.* at 227.

clear, and a plaintiff most easily does so when the defendant commits the same type of racketeering acts again and again—e.g., selling bogus goods or services.<sup>26</sup> But this is not to say that a horizontal nexus is self-proving upon the mere allegation that two or more acts are related. Courts have been quick to dismiss claims based on acts that appear facially disparate.<sup>27</sup>

### B. Predicate Acts Must Be Related to an Enterprise

If horizontal nexus is a troublesome concept, vertical nexus is at least doubly so, if only because it is rarely explored in either cases or commentary.<sup>28</sup> The problem is this: although there is no dispute that the

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26. *See, e.g.*, *United States v. Alkins*, 925 F.2d 541, 552 (2d Cir. 1991) (noting that predicate acts involving the same goal—the receipt of cash bribes in exchange for processing fraudulent licenses and registrations for stolen vehicles—were sufficiently related); *United States v. Tillem*, 906 F.2d 814, 825 (2d Cir. 1990) (finding that predicate acts were related when employees of the New York City Department of Health solicited bribes in exchange for passing grades on health inspections); *United States v. Gelb*, 881 F.2d 1155, 1163 (2d Cir. 1989) (explaining that schemes involving meter tampering and bribery designed to cheat the Postal Service out of postage were sufficiently related to establish a pattern); *United States v. Bortnovsky*, 879 F.2d 30, 41 n.16 (2d Cir. 1989) (finding “predicate act[s] involv[ing] efforts by the defendants to recover on false insurance claims, whether it be for fire or theft,” sufficiently related to establish a pattern); *Rohland v. Syn-Fuel Assoc.*, 879 F. Supp. 322, 334 (S.D.N.Y. 1995) (holding that plaintiffs adequately pled a “pattern of racketeering activity” by alleging a scheme by defendants inducing investments in multiple partnerships over an eight-year period and then administering those partnerships and concealing the fraud).

27. *See Howard v. Am. Online Inc.*, 208 F.3d 741, 749 (9th Cir. 2000) (reasoning that merely having the same participants was insufficient to establish relatedness when the purpose, result, victim, and method were strikingly different in three cases); *McLaughlin v. Anderson*, 962 F.2d 187, 191 (2d Cir. 1992). “The . . . acts here are related . . . only in the sense that they allegedly involve the same parties. The acts have conflicting goals and thus are unrelated for RICO purposes.” *Id.*; *see also Vild v. Viscansi*, 956 F.2d 560, 566 (6th Cir. 1992) (finding two schemes to defraud with different purposes and results directed at different victims were not related). Professor Goldsmith argues, nonetheless, that dismissals on “pattern” grounds are erroneous because that is a standard of proof, not pleading. *See Michael Goldsmith, Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 HARV. J. ON LEGIS. 281, 290–91 (2004).

[A] RICO plaintiff need only generally allege the existence of an enterprise and pattern of racketeering activity. Applied properly, Rule 8(a), which provides general rules of pleading, does not require detailed allegations of the enterprise or pattern of racketeering elements. These are matters of proof that are properly addressed at summary judgment (after completion of the discovery process) or at trial. . . . [M]any courts have dismissed RICO claims for failure to allege a proper pattern of racketeering activity, a proper enterprise, or both. These dismissals have stemmed from a combination of heightened pleading requirements and unduly narrow judicial interpretations of the pattern and enterprise elements. Though designed to curtail frivolous RICO claims, such judicial intervention has broadly undermined the statute’s utility as a weapon against commercial fraud.

*Id.*; *see, e.g., Zerman v. E.F. Hutton & Co.*, 628 F. Supp. 1509, 1512 (S.D.N.Y. 1986) (noting that plaintiff’s single allegation of misrepresentation causing her harm was wholly unrelated to her allegation of a bank overdrafting scheme; therefore the plaintiff alleged no pattern).

28. *See SMITH & REED, supra* note 5, § 5.04, at 5–36 (“Ascertaining the nature of the nexus

gravamen of a RICO violation is conducting an enterprise through a pattern of racketeering, there is often great disagreement as to what it means to (1) conduct (2) an enterprise (3) through (4) a pattern of racketeering activity.<sup>29</sup> Very few cases have closely examined how these four factors must interact. But, as we shall soon see, the few that have are most illuminating.

### 1. History of RICO's Vertical Nexus Tests

Prior to *Reves v. Ernst & Young*,<sup>30</sup> circuit courts had devised four primary touchstones for determining vertical nexus: “[1] The *Scotto-Provenzano* test, [2] the *Cauble* test, [3] the facilitation or utilization test[,] and [4] the manage or operate test.”<sup>31</sup> Each of these tests was designed to set workable standards against which to assess a claim that a particular set of predicate acts was sufficiently tied to an enterprise:

Under the *Scotto-Provenzano* test, one conducts the activities of an enterprise through a pattern of racketeering activity when “(1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.”<sup>32</sup>

Under the *Cauble* test, to participate in the conduct of an enterprise's affairs, (1) a defendant must commit the racketeering acts, (2) the defendant's position in the enterprise must facilitate the commission of the racketeering acts, and (3) the predicate acts must have some effect directly or indirectly on the enterprise.<sup>33</sup>

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requirement is the primary intellectual problem posed by the language of section 1962(c).”).

The courts agree that these words require the RICO plaintiff to show a substantial or meaningful nexus between the affairs of the enterprise and the pattern of racketeering activity or collection of unlawful debt. Some courts find the “nexus requirement” embodied in the word “through” while others emphasized the words “conduct of participate.” The language the court focuses upon appears to have no effect on the result.

*Id.*

29. See *United States v. Zielie*, 734 F.2d 1447, 1463 (11th Cir. 1984) (“The gravamen of a RICO offense is *conducting an enterprise* through a pattern of racketeering activity.” (emphasis added) (citing *United States v. Elliot*, 571 F.2d 880, 902 (5th Cir. 1978))).

30. *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

31. Melissa Harrison, *Nexus: The Next Test of RICO's Text*, 70 DENV. U. L. REV. 69, 73 (1992).

32. *Id.* (citing *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980); *United States v. Provenzano*, 688 F.2d 194, 200 (3d Cir. 1982)).

33. *Id.* (citing *United States v. Cauble*, 706 F.2d 1322, 1332–33 (5th Cir. 1983)).

Under the facilitation or utilization test, there is a sufficient nexus when there is “proof that the facilities and services of the enterprise were regularly and repeatedly utilized to make possible the racketeering activity.”<sup>34</sup>

Under the manage or operate test, “[a] defendant’s participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.”<sup>35</sup> The phrase “[conduct or participate in the conduct of] refers to the guidance, management, direction, or other exercise of control over the course of the enterprise’s activities.”<sup>36</sup>

*Reves* came down in favor of the manage or operate test, but it did not answer all the then-outstanding questions, if only because the case arose in a context more or less susceptible to the drawing of bright lines.<sup>37</sup> That is, the case involved the question of whether an outsider to an enterprise (there, an outside accounting firm) could be held directly liable for a scheme to defraud rather than derivatively liable as a conspirator.<sup>38</sup> The Court held in the negative, as long as the outsider does not participate in the “operation or management” of an enterprise through a pattern of racketeering.<sup>39</sup> *Reves* thus provides a framework for determining *who* can be held accountable for a § 1962(c) violation, but it says almost nothing about *what acts* will trigger liability. This is a subtle distinction, and one that is unimportant in a case like *Reves*, where the alleged wrongdoer is a true outsider and, *ipso facto*, his acts have nothing to do with the operation or management of the enterprise. But these inquiries do not always merge as in *Reves*: there are often cases in which a defendant participates in an enterprise in one capacity, yet allegedly commits racketeering acts in another. Courts and litigants sometimes overlook the nexus requirement in this context, as evidenced by the paucity of relevant case law. This is an error, however,

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34. *Id.* (quoting *United States v. Carter*, 721 F.2d 1514, 1527 (11th Cir. 1984)).

35. *Id.* (quoting *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir. 1983)).

36. *Id.* (quoting *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990)).

37. *See Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993) (“[T]he legislative history confirms what we have already deduced from the language of § 1962(c)—that one is not liable under that provision unless one has participated in the operation or management of the enterprise itself.”).

38. *See id.* at 172 (“The question presented is whether one must participate in the operation or management of the enterprise itself to be subject to liability under this provision.”).

39. *Id.* at 184 (“In this case it is clear that Congress did not intend to extend RICO liability under § 1962(c) beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity.”).

because the inquiry should be outcome determinative where the alleged acts—even conceding harm—have nothing to do with conducting the affairs of an enterprise.

## 2. Applying RICO's Vertical Nexus Standard

To set the stage for the remainder of this discussion, it may be helpful to review—as a partial hypothetical—the facts of a case in which vertical nexus was never raised. *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.* involved allegations of both direct and third-party fraud.<sup>40</sup> In that case, which came to the Fifth Circuit in the context of class certification, the plaintiff alleged that dozens of casualty insurers committed mail and wire fraud by passing the cost of states' assessments (referred to in the opinion as “residual market loads” or “RMLs”) onto their insureds without first obtaining regulatory authorization to do so.<sup>41</sup> The plaintiff also asserted that the defendants corrupted the National Council on Compensation Insurance, a licensed rating bureau and trade association, and “used it as a racketeering enterprise to defraud policyholders and state [insurance] regulators.”<sup>42</sup> The fraud-causation theory was thus twofold: the defendants made false regulatory filings (fraud-on-the-regulator theory) and sent invoices that were inflated with unauthorized RMLs (invoice theory).<sup>43</sup> The invoice theory is relevant to our present discussion.

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40. *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 211–12 (5th Cir. 2003). The author was one of counsel in this case.

41. *Id.* at 211–12. The court explained RMLs as follows:

Most employers purchase workers' compensation coverage in the voluntary market. Those who cannot may obtain insurance through legislatively-established involuntary markets, sometimes called “residual markets,” “assigned risk markets,” or “assigned risk pools.” Some states require workers' compensation insurance carriers to reinsure that state's “residual markets,” which often results in additional costs to them when operating deficits occur. When residual market assessments dramatically increased, insurers responded by factoring residual market expenses in the price of their voluntary market insurance. Insurance program documents identified these expenses as “residual market charges” (also known as “residual market loads” or “RMLs”).

*Id.*

42. *Id.* at 211. Although the fraud-on-the-regulator theory poses a question of causation under § 1964(c), it raises no issues under § 1962(c). Questions involving the requisite causal nexus under § 1964(c) are discussed *infra*, Part II. But because the United States Supreme Court recently considered third-party regulatory fraud, I will forgo the Fifth Circuit's position, which squares with that of the Supreme Court.

43. *See id.* at 211. As the court noted, the defendants had “a different view of the pertinent facts,” asserting that the named plaintiff was not only informed of, but negotiated its RML expenses and bargained for other terms that also were not provided for in rate filings, reducing the ultimate cost of its insurance. *Id.* at 213.

As the district court described the invoice theory, “[e]ach class member was overcharged by means of an inflated invoice that affirmatively misrepresented that the premium charged was the amount lawfully due.”<sup>44</sup> The plaintiff asserted that individual reliance was not an obstacle to certification because (1) the act of payment demonstrated reliance, and (2) expert testimony could show that businesses rely on the accuracy of invoices.<sup>45</sup> Regardless, the Fifth Circuit found this reasoning “legally flawed,” principally because it did not account for the defendants’ defenses.<sup>46</sup> The district court did not adequately consider how the invoice theory would be tried in light of “evidence that might persuade the trier of fact that policyholders knew the amounts being charged varied from rates filed with regulators and that they agreed to pay such premiums.”<sup>47</sup> Because the Fifth Circuit was examining only whether the plaintiff’s theory of causation would work under § 1964(c) on a class-wide basis, it had no occasion to ask whether the facts underpinning the theory worked *at all* (i.e., whether they even stated a claim under § 1962(c)). How might the court have analyzed this question, had it been presented? A likely solution would have been to turn to the Fifth Circuit’s widely-adopted test for

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44. *Id.* at 220.

45. *Id.* at 220 (citing *Sandwich Chef of Tex., Inc. v. Reliance Nat’l Indem. Ins. Co.*, 202 F.R.D. 484, 500–01 (S.D. Tex. 2001)).

46. *Id.* The court explained as follows:

Certification of a class under Rule 23(b)(3) requires that the district court consider how the plaintiffs’ claims would be tried. A district court certainly may look past the pleadings to determine whether the requirements of rule 23 have been met. Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues. Absent knowledge of how [the] . . . cases [will] actually be tried, however, [makes it] impossible for the court to know whether the common issues would be a significant portion of the individual trials. Although the district court recognized the need to address how a trial on the merits would be conducted, it did not adequately account for individual issues of reliance that will be components of defendants’ defense against RICO fraud.

*Id.* (citations and internal quotations omitted).

47. *Id.* “Defendants maintain that . . . potential class members, directly or through others (e.g., brokers), negotiated premiums that varied from filed rates for retrospectively rated workers’ compensation insurance. [The potential class members] were aware that carriers were charging them more than the filed rates.” *Id.* The court held that “[a] class cannot be certified when evidence of individual reliance will be necessary.” *Id.*; see also *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665–66 (9th Cir. 2004) (“In this case, individualized reliance issues related to plaintiffs’ knowledge, motivations, and expectations bear heavily on the causation analysis.”). In *Poulos*, class representatives alleged that video poker machines were designed to misrepresent their true functioning. *Poulos*, 379 F.3d at 660–61. The court concluded that even if all the plaintiffs had suffered a “financial loss or other concrete injury as a consequence of playing the machines, it [did] not necessarily follow that plaintiffs’ injuries [were] causally linked to the casino’s alleged misrepresentations.” *Id.* at 665.

vertical nexus, which was first enunciated in *United States v. Cauble*.<sup>48</sup>

In *Cauble*, the Fifth Circuit formulated a *conjunctive* three-part test (i.e., a plaintiff must establish all three elements) for determining whether—to sustain a claim under 18 U.S.C. § 1962(c)—a sufficient nexus (i.e., a vertical relation) exists between the enterprise, the defendant, and the pattern of racketeering activity: “(1) the defendant has in fact committed the racketeering acts as alleged, (2) the defendant’s position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise.”<sup>49</sup>

In fashioning this test, the court built upon its previous holdings that (a) “the predicate crimes must be ‘related to the affairs of the enterprise,’” and (b) “there must be ‘a relation between the predicate offenses and the affairs of the enterprise.’”<sup>50</sup> Against this backdrop, the court concluded that because RICO prohibits conducting an enterprise through a pattern of racketeering activity and not merely the defendant’s engaging in racketeering activity, “there must be a nexus between the enterprise, the defendant, and the pattern of racketeering activity” that includes an “enterprise-racketeering nexus . . . distinct from the defendant-racketeering connection.”<sup>51</sup>

*Whaley v. Auto Club Insurance Ass’n* represents a carefully reasoned analysis of what (without using the term) vertical relatedness must mean under a *Cauble*-type analysis in the context of a regulatory corruption claim.<sup>52</sup> Donna Whaley was an account representative for Auto Club Insurance, (Auto Club) operating in Michigan.<sup>53</sup> The Michigan Insurance Code required all auto insurers to be participating members of the Michigan Insurance Placement Facility (Facility).<sup>54</sup> The Facility was essentially an assigned risk pool—i.e., a source of insurance for otherwise uninsurable motorists.<sup>55</sup> The Michigan scheme was implemented at the agent level: specifically, the state required every authorized agent to offer placement of uninsurable risks within the Facility.<sup>56</sup> For doing this, an agent was entitled to a regulated commission that was to be passed down from the Facility to

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48. See *United States v. Cauble*, 706 F.2d 1322, 1332–33 (5th Cir. 1983) (“Because the enterprise-racketeering nexus should be distinct from the defendant-racketeering connection, we find it necessary to modify this formulation.”).

49. *Id.* at 1333.

50. *Id.* at 1332 n.22 (citations omitted).

51. *Id.* at 1332.

52. *Whaley v. Auto Club Ins. Ass’n*, 891 F. Supp. 1237, 1244 (E.D. Mich. 1995).

53. *Id.* at 1239.

54. *Id.*

55. *Id.*

56. *Id.*

the member-insurer and then on to the agent.<sup>57</sup>

Despite the clear statutory directive, Auto Club adopted a policy of retaining all Facility-derived commissions, ostensibly because its agents already received a salary for placing policies through the Facility.<sup>58</sup> Whaley disagreed and sued under RICO on behalf of herself and a putative class.<sup>59</sup> Whaley's RICO claim had several parts, but for present purposes, it is enough to know that she alleged mail fraud and extortion as the predicate acts, the Facility as the enterprise, and § 1962(c) as the theory of recovery.<sup>60</sup> The court expressed considerable skepticism as to whether the conduct alleged, which essentially amounted to a dispute over the interpretation and application of a statute, could be found fraudulent.<sup>61</sup> Nevertheless, the court went on to examine the § 1962(c) claim on the merits.

Whaley stated a § 1962(c) claim alleging that (1) Auto Club was associated with an enterprise by virtue of its membership in the Facility; (2) Auto Club played a role in the management of the Facility because it had representatives on the Facility's board of governors; and (3) Auto Club conducted the business of the Facility through a pattern of racketeering.<sup>62</sup>

The court rejected this argument on two grounds, one theoretical, one factual. First, although Auto Club had a seat on the Facility's board, the statute limited its duties to "managing the processing of applications and the distribution of commissions."<sup>63</sup> And second, as a factual matter, Auto Club "ha[d] not implemented a [Facility] policy denying commissions to salaried agents, and it ha[d] not changed procedures to reach that result."<sup>64</sup>

In the alternative, Whaley argued that Auto Club was indirectly conducting the Facility's affairs through a pattern of racketeering because the Facility furthered the alleged scheme.<sup>65</sup> Whaley pointed in particular to an Auto Club policy requiring its agents to list Auto Club as the producer on all Facility applications, thus causing the Facility to mail all commission

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57. *Id.*

58. *Id.*

59. *Id.* at 1239–40.

60. *Id.* at 1240.

61. *Id.* The court reasoned:

Mail fraud requires intentional misrepresentations reasonably calculated to deceive persons of ordinary prudence. Extortion requires the obtaining of property through the wrongful use of threatened violence, force, or fear. This court cannot find any evidence of wrongful threats or an intentional scheme to defraud. Instead, the pleadings show that this case presents nothing more than a good faith dispute as to how a state statute should be interpreted.

*Id.* (citations omitted).

62. *Id.* at 1243.

63. *Id.*

64. *Id.*

65. *Id.*

checks to Auto Club.<sup>66</sup> The court bluntly held that “[t]his is not a RICO violation under § 1962(c).”<sup>67</sup> The court reached this conclusion from its finding that “there is absolutely no nexus between the alleged racketeering and Auto Club’s participation in the management of the [Facility].”<sup>68</sup> This lack of a nexus became readily apparent once the court compared Auto Club’s activities at the Facility to the injury alleged:

For example, if Auto Club was not statutorily mandated to be a part of the [Facility], and did not serve on the [Facility’s] board of governors, it could not violate § 1962(c), because it would not participate in the management of the [Facility’s] affairs. *See Reves*, 507 U.S. at [179], 113 S. Ct. at 1170, 122 L. Ed.2d at 537. Nevertheless, Auto Club could still acquire the [account representatives’] commissions, because the [Facility] would still send checks to whomever is designated on the applications. In other words, Auto Club’s position on the [Facility’s] board of governors has no effect on its ability to acquire the [account representatives’] commissions. Accordingly, Auto Club’s alleged racketeering activity bears no nexus to its conduct of the [Facility’s] affairs. Therefore, plaintiff has failed to state a claim for relief under § 1962(c), because she has failed to demonstrate that Auto Club conducted the [Facility’s] affairs through a pattern of racketeering activity.<sup>69</sup>

What the vertical nexus requirement does, then, is insure that a plaintiff has been injured by a RICO violation, not just a predicate act.<sup>70</sup> With these

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66. *Id.* at 1244.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See Jersevic v. Kuhl*, No. 00-CV-10113-BC, 2002 WL 84624, at \*4 (E.D. Mich. Jan. 4, 2002). “In order to state a claim under [any] RICO subsection[], the plaintiff cannot merely allege that he was injured by the predicate act[s] of racketeering;” rather, he must demonstrate that he was injured by a RICO violation. In *Jersevic*, plaintiff alleged that defendant, in a failed extortion attempt, damaged the plaintiff by disclosing embarrassing private facts that were timed to undermine his re-election campaign for the Michigan legislature and damage his law practice. *Id.* at \*1. The court concluded that because there was no causal relationship between one of defendant’s “enterprises” and plaintiff’s injuries, there could be no recovery under RICO. *Id.* at \*5. *Bldg. Indus. Fund v. Local Union No. 3*, 992 F. Supp. 162, 169 (E.D.N.Y. 1996), *aff’d*, 141 F.3d 1151 (2d Cir. 1998), further illustrates the point. There, the plaintiffs, electrical contractors in New York, brought a RICO claim against a large number of other contractors and labor unions. *Id.* at 168. They alleged that defendants used a number of illegal tactics, including arson, violence, threats, and vandalism, in a scheme to drive plaintiffs out of business. *Id.* at 169. As a part of this scheme, the plaintiffs alleged, the defendants had used their alleged RICO enterprise, the “Joint Industry Board” (JIB), to conduct a campaign of filing meritless litigation and administrative complaints against plaintiffs. *Id.* at 176 n.9. The court first held that JIB’s alleged campaign of harassment was not an appropriate predicate act because “filing of a meritless lawsuit or

tools in hand, we can return to our quasi-hypothetical.

The plaintiff in *Sandwich Chef* did not allege that its insurer's involvement with the enterprise "facilitated" the presentation of invoices to it. Rather, it averred a seeming irrelevancy, namely, that the insurer "has operated and managed the [enterprise] through service upon [the enterprise's] rates committee."<sup>71</sup> Thus, under *Cauble*, one fatal flaw in the invoice theory is that it does not account for the requirement that a defendant's relationship with an enterprise facilitate its commission of the alleged predicate acts.<sup>72</sup>

As explained above, a defendant's position in an enterprise facilitates the commission of predicate acts if that defendant could not have

administrative action, even if for the purpose of harassment," was not illegal. *Id.* After those allegations were eliminated, the plaintiffs could not demonstrate any connection between JIB and the remaining predicate acts of racketeering, other than the fact that "some of the individuals involved were also members of JIB." *Id.* at 177. As a result, the court dismissed the RICO claims. *See also* Gussin v. Shockey, 725 F. Supp. 271, 277 (D. Md. 1989) ("[T]he pattern of racketeering [must be] related to the activities of the enterprise."), *aff'd*, 933 F.2d 1001 (4th Cir. 1991). In *Gussin*, the plaintiffs, a father and son who had formed a partnership, entered into an agreement with defendant where defendant agreed to assist plaintiffs in buying and selling horses. *Id.* at 272. Plaintiffs alleged that defendant had taken kickbacks from sellers in transactions where defendant represented plaintiffs. *Id.* The court concluded the relationship was "not of the type required by RICO." *Id.* at 276.

RICO, which was enacted with organized crime in mind, prohibits in a most general sense a defendant from (1) using a pattern of racketeering activity to obtain or control an interest in an enterprise (§§ 1962(a) and (b)) or (2) from using his association with an enterprise to carry out a pattern of racketeering activity (§ 1962(c)). In one situation the enterprise is *the object* of the illegal conduct and in the other it is *the tool or instrumentality*.

In this case the [Plaintiffs'] partnership was neither the object nor the tool. Rather it was an incidental business association of the [Plaintiffs]. The record in this case shows that [Defendant] was the agent of the [Plaintiffs], and there is no document or testimony that he in fact worked for the partnership or used his association with it to carry out the alleged pattern of racketeering activity. The mere fact that he could be described as an agent for the [Plaintiffs] who in fact were in partnership does not give rise to that relationship with an enterprise which is encompassed by RICO. Under § 1962(c) of RICO the defendant must associate with an enterprise to carry on a pattern of racketeering activity. The association must include an aspect of purpose to violate the act. In this case that cannot be said—on the contrary, the partnership here was at most an unintended victim, not a tool of violation.

*Id.* at 276–77.

71. Complaint at 29, *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 202 F.R.D. 484 (S.D. Tex. 2001) (No. Civ. A H-98-1484).

72. *See* *United States v. Cauble*, 706 F.2d 1322, 1332–33 (5th Cir. 1983).

A defendant does not 'conduct' or 'participate in the conduct' of a lawful enterprise's affairs, unless (1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant's position in the enterprise *facilitated* his commission of the racketeering acts; and (3) the predicate acts had some effect on the lawful enterprise.

*Id.* (emphasis added).

committed the acts but for its association with the enterprise.<sup>73</sup> Many courts examining this “positional” prong have held that there is no nexus unless a defendant was able to commit a predicate act “solely” because of its association with an enterprise.<sup>74</sup> But the *Sandwich Chef* plaintiff did not plead (nor does it seem that it could have, as a practical matter) that the insurer was able to mail or wire invoices to it solely because the insurer served on a committee of the enterprise. Arguably, then, the alleged predicate acts upon which the invoice theory was based had no nexus to the conduct of the enterprise’s affairs.<sup>75</sup>

The invoice theory appears to suffer a second—and even more fundamental—flaw under *Cauble* because it did not rest on allegations that invoices mailed or wired to the plaintiff had an effect on the enterprise.<sup>76</sup> Again, “to state a claim under § 1962(c), the defendant must *operate* the affairs of an enterprise *through a pattern of racketeering activity*.”<sup>77</sup> This means that “the alleged racketeering activity must bear some nexus to the defendant’s participation in the management of the enterprise.”<sup>78</sup> Even

73. *See id.* at 1332 (citing as the basis for the first two parts of the *Cauble* test a Third Circuit requirement that the defendant “is enabled to commit the predicate offenses solely by virtue of his position in or control over the affairs of the enterprise”).

74. *See, e.g., Bldg. Indus. Fund*, 992 F. Supp. at 178. In *Building Industry Fund*, plaintiffs, individual corporations engaged in the business of providing electrical contracting services and materials in the New York metropolitan area, alleged defendants engaged in threats, violence, and extortion amounting to a pattern of racketeering. *Id.* at 168. The court explained that “to the extent that [defendant] has engaged in racketeering activities, it was not able to commit those enterprises solely by virtue of its position in [the RICO enterprise].” *Id.* at 178; *see also* *United States v. Thai*, 29 F.3d 785, 815 (2d Cir. 1994) (stating that the relationship between predicate acts and the criminal enterprise is satisfied if “the offense was related to the enterprise’s activities, whether or not it was in furtherance of those activities, or if the defendant was enabled to commit the offense solely by virtue of his position in the enterprise”); *United States v. Locascio*, 6 F.3d 924, 943 (2d Cir. 1993) (“[U]nder the law of this Circuit, it is not determinative that the defendant committed the crime to further his own agenda, if indeed he was only able to commit the crime by virtue of his position within the enterprise.”); *United States v. Leroy*, 687 F.2d 610, 617 (2d Cir. 1982).

[O]ne conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.

*Id.* at 617 (emphasis omitted).

75. *Whaley v. Auto Club Ins. Ass’n*, 891 F. Supp. 1237, 1244 (E.D. Mich. 1995) (finding no racketeering-enterprise nexus because defendant’s “position on the [enterprise’s] board of governors has no effect on its ability to [commit the racketeering acts]”).

76. The third prong of the *Cauble* test requires that the predicate acts have some effect directly or indirectly on the enterprise. *Cauble*, 706 F.2d at 1333.

77. *Whaley*, 891 F. Supp. at 1244 (emphasis added) (citing *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993)).

78. *Id.*; *see also* *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980) (“Simply committing predicate acts which are unrelated to the enterprise or one’s position within it would be insufficient.”);

more specifically, a plaintiff must show that the “racketeering acts affected the enterprise in some fashion.”<sup>79</sup> Because the *Sandwich Chef* plaintiff could not make a showing that the allegedly fraudulent invoices had an impact on the enterprise, it did not state a claim under § 1962(c).<sup>80</sup>

## II. 1964(c)’S CAUSAL NEXUS REQUIREMENT<sup>81</sup>

### A. *The General Standard for Proof of Causation Provided by Holmes*

Plaintiffs may recover civilly for RICO violations only if they can demonstrate injury “by reason of” those violations.<sup>82</sup> The U.S. Supreme Court first announced this standard in *Holmes v. Securities Investor Protection Corp.*<sup>83</sup> In *Holmes*, the plaintiff Securities Investor Protection Corporation (SIPC), a private nonprofit insurer, paid several million dollars to cover claims of customers of two failed broker-dealers.<sup>84</sup> SIPC alleged that seventy-five defendants participated in a fraudulent stock-manipulation scheme that caused the failure of the two broker-dealers.<sup>85</sup> SIPC sued as the subrogee of customers who had *not* purchased the manipulated securities but were nonetheless injured when the broker-dealers collapsed.<sup>86</sup> The Court was thus called upon to decide whether a plaintiff may sue for a RICO violation that directly injures a third party and derivatively injures the plaintiff.<sup>87</sup> The legal question presented was whether but-for causation is

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*Bldg. Indus. Fund*, 992 F. Supp. at 179 (finding that predicate acts must be related to activities of enterprise, thereby “requir[ing] some clear link between the activity and the enterprise”); *Gussin v. Shockey*, 725 F. Supp. 271, 277 (D. Md. 1989) (“[T]he pattern of racketeering [must be] related to the activities of the enterprise.”), *aff’d*, 933 F.2d 1001 (4th Cir. 1991).

79. *Cable*, 706 F.2d at 1333 n.24.

80. *See, e.g., Zerman v. E.F. Hutton & Co.*, 628 F. Supp. 1509, 1512 (S.D.N.Y. 1986) (“[T]he allegation that [defendant] engaged in an overdrafting scheme can not serve as a predicate act for plaintiff’s RICO claim because there is no relation between plaintiff’s claim and the check overdrafting . . .”).

81. For an extended discussion of this subject, see generally Randy D. Gordon, *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims under 18 U.S.C. § 1962(c)*, 39 U.S.F. L. REV. 319 (2005) (discussing issues in fraud-based claims under § 1962(c)).

82. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) (2000) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . .”).

83. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 272 (1992).

84. *Id.* at 261–263.

85. *Id.* at 262.

86. *Id.* at 263 n.5.

87. *See id.* at 265 n.7.

The petition phrased the question as follows: “Whether a party which was neither a purchaser nor a seller of securities, and for that reason lacked standing to sue

sufficient to confer standing under § 1964(c).<sup>88</sup>

At the outset, the Court acknowledged that the statute's "language can . . . be read to mean that a plaintiff is injured 'by reason of' a RICO violation, and therefore may recover, simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury."<sup>89</sup> But the Court eschewed this reading, based principally on its divination of Congressional intent.<sup>90</sup> Section 1964(c) is modeled on § 4 of the Clayton Act, which provides a private right of action for violations of the antitrust laws.<sup>91</sup> Section 4 had been held to "incorporate common-law principles of proximate causation."<sup>92</sup> The *Holmes* Court quickly extended this reasoning to § 1964(c):

We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.<sup>93</sup>

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under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, is free of that limitation on standing when presenting essentially the same claims under the Racketeer Influenced and Corrupt Organizations Act ('RICO')."

*Id.* (citation omitted).

88. *See id.* at 266–67 n.12.

89. *Id.* (footnote omitted).

90. *Id.* at 266 ("This construction is hardly compelled, however, and the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading.") (footnotes omitted).

91. *See* Clayton Act of 1914, ch. 323, § 4, 38 Stat. 731 (codified as amended at 15 U.S.C. § 15 (1982)); *Holmes*, 503 U.S. at 267.

We have repeatedly observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws [and] § 4 of the Clayton Act, which reads in relevant part that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

*Id.* (citations omitted).

92. *Holmes*, 503 U.S. at 267–68. Congress used the § 7 language of the Sherman Act, that "[a]ny person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue. . ." in § 4 of the Clayton Act. *Id.* at 267 n.13. This led the Court to conclude in *Associated General Contractors* that "a plaintiff's right to sue under § 4 required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Id.* at 268 (citing *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983)).

93. *Id.* at 268 (citations omitted).

From this, the Court concluded that “[p]roximate cause is thus required.”<sup>94</sup>

The Court did not, however, articulate a test for determining proximate cause; instead, it referred the lower courts to “the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts.”<sup>95</sup> After *Holmes*, it was clear that a plaintiff who complains of harm “merely from the misfortunes visited upon a third person” will “stand at too remote a distance to recover.”<sup>96</sup> But it was equally true that the Court refused “to announce a black-letter rule” and that it would “not rule out” that third parties could state a claim of fraud.<sup>97</sup> This gap led to dozens of cases—particularly in the class-action context—in which courts were called upon to decide whether plaintiffs could recover for misrepresentations that they never heard.<sup>98</sup>

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94. *Id.*

95. *Id.* The Court observed that “[a]t bottom, the notion of proximate cause reflects ‘ideas of what justice demands, or of what is administratively possible and convenient.’” *Id.* (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984)). The court went on to state: “[A]ccordingly, among the many shapes this concept took at common law, was a demand for some direct relation between the injury asserted and the injurious conduct alleged.” *Id.* (citations omitted).

96. *Id.* at 268–69; see also 1 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 99–100 (1903). Sutherland states:

*Where the plaintiff is injured by the defendant’s conduct to a third person it is too remote, if he sustains no other than a contract relation to such third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such third person to perform his part, or in increasing the plaintiff’s expense or labor of fulfilling such contract, unless the wrongful act is wilful [sic] for that purpose.*

*Id.* (emphasis added).

97. *Holmes*, 503 U.S. at 272 nn.19–20.

98. The classic scenario where the target of fraud is the plaintiff, but misrepresentations are made to third parties, involves falsehoods intended to lure customers from the target to the defendant. Until the decision in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), courts repeatedly found this scenario actionable, as they reasoned misrepresentations by a competitor to a plaintiff’s customers could be the proximate cause of a RICO injury. Conceptually, these cases are fraudulent interference cases—tortious interference cases in which the tort is fraud. See, e.g., *Sys. Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 104 (1st Cir. 2002).

[R]eliance is a specialized condition that happens to have grown up with common law fraud. Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way . . . . There is no good reason here to depart from RICO’s literal language by importing a reliance requirement into RICO.

*Id.*; *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 381–82 (2d Cir. 2001) (finding that plaintiff adequately stated a direct, proximate relationship between its injury and defendant’s pattern of racketeering activity, while noting that the “‘direct relation’ requirement generally precludes recovery by a ‘plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant’s acts’”); *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 564–65 (5th Cir. 2001) (“In general, fraud addresses liability between persons with direct relationships—assured by the requirement that a plaintiff has either been the target of fraud or has relied upon the fraudulent conduct of defendants.” (quoting *Summit Props. Inc., v. Hoechst Celanese Corp.*,

*B. The Relationship Between Reliance and Causation Left Uncertain by  
Holmes*

*Holmes* definitively settled the then-open question of whether both but-for and proximate causation must be pled and proven in a civil RICO case. However, it did little concretely to indicate exactly how plaintiffs must do so, especially in misrepresentation cases. Just recently, the Court stepped back into the fray and brought clarity to this muddled area of RICO jurisprudence.

In June 2006, the Supreme Court issued an opinion narrowing the pool of plaintiffs eligible to bring civil RICO actions. In *Anza v. Ideal Steel Supply Corp.*, the Court considered whether a competitor can be “injured in his business or property by reason of a violation”<sup>99</sup> within the meaning of § 1964(c),<sup>100</sup> if the alleged predicate acts of racketeering activity are mail and wire fraud, but the competitor was not the party defrauded and did not

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214 F.3d 556, 561 (5th Cir. 2000))). The court concluded, however, that if plaintiff’s customers relied on the fraudulent rumors to make purchasing decisions, the reliance was enough to show proximate cause. *Id.* at 565; *see also* Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 521 (3d Cir. 1998) (holding that when a plaintiff’s relationship with a third party was the direct target of an alleged scheme, the plaintiff may pursue a RICO claim); Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1318 (11th Cir. 1998) (determining that because misrepresentations the defendants allegedly made were directed at a third party, not the plaintiff, the plaintiff lacked standing under § 1964(c) to prosecute a claim based on these misrepresentations); Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1257 (7th Cir. 1995).

[T]here is no doubt that a producer injured by a campaign of misinformation directed at its customers suffers an injury compensable under the law of torts; it is not cut off by the proximate-causation and foreseeability requirements. . . . RICO similarly allows suits when the predicate offenses influence customers and, derivatively, injure business rivals.

*Id.* (citations omitted); *see also* Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc., 18 F.3d 260, 263–64 (4th Cir. 1994) (holding that plaintiff could bring a RICO claim against defendant, whose actions allowed it to offer lower rates and lure away plaintiff’s customers, even though defendant claimed any damages were sustained by the customers, not plaintiff); Cent. Distribs. of Beer, Inc. v. Conn., 5 F.3d 181, 184 (6th Cir. 1993) (holding that “fraud connected with mail or wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff,” thus, precluding the plaintiff’s RICO claim); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311 (2d Cir. 1990) (noting that since “[t]he phrase ‘by reason of’ requires that there be a causal connection between the prohibited conduct and plaintiff’s injury,” to prove causation it was necessary for the county to demonstrate at trial that defendant’s misrepresentations were relied upon by the State Public Service Commission, and that the misrepresentations caused defendant’s rate increases to be granted) (citations omitted).

99. *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 2000 (2006). For a slightly fuller discussion of this case, see generally Randy D. Gordon and Samuel E. Joyner, *Annual RICO Update*, TEX. BUS. LITIG. J., Summer 2006.

100. Racketeer Influenced and Corrupt Organizations Act (Rico), 18 U.S.C. § 1964(c) (2000) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . .”).

rely on the fraudulent behavior.<sup>101</sup> Expanding on its holding in *Holmes*,<sup>102</sup> the Court answered the question in the negative.<sup>103</sup>

Ideal Steel Supply Corporation (Ideal) sued its chief competitor, National Steel Supply, Inc., (National) and National's owners and operators, Joseph and Vincent Anza. Ideal alleged that National did not charge New York's sales tax to cash-paying customers, thus allowing it to reduce its prices without affecting its profit margin.<sup>104</sup> Further, National allegedly submitted fraudulent state sales tax reports that intentionally omitted information concerning National's cash transactions.<sup>105</sup> Ideal claimed that by submitting these fraudulent tax returns to conceal its conduct, National committed various acts of mail and wire fraud that violated § 1962(c).<sup>106</sup> Ideal alleged that under § 1964(c) it was injured "by reason of" National's scheme to avoid state sales taxes and gain a competitive advantage over Ideal.<sup>107</sup>

National moved to dismiss Ideal's complaint.<sup>108</sup> Because Ideal did not rely on National's fraudulent sales tax reports, the district court concluded that Ideal could not satisfy RICO's causation requirement injury "by reason of" National's alleged RICO violation.<sup>109</sup> Ideal's action was thus dismissed.<sup>110</sup>

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101. *Anza*, 126 S. Ct. at 1997.

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

103. *Anza*, 126 S. Ct. at 1998.

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

*Id.* (citations omitted).

104. *Id.* at 1994.

105. *Id.*

106. *Id.* at 1995. Ideal also brought a claim under § 1962(a), alleging that National had earned profits by its "cash, no tax" scheme and used the profits to open an outlet in close proximity to Ideal's sales facility. *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 255 (2d Cir. 2004). Section 1962(a) "makes it unlawful for any person who has received income derived from a pattern of racketeering activity 'to use or invest' that income 'in acquisition of any interest in, or the establishment or operation of,' an enterprise engaged in or affecting interstate or foreign commerce." *Anza*, 126 S. Ct. at 1995. According to Ideal, the opening of National's new facility caused Ideal to lose "significant business and market share." *Id.*

107. *See Anza*, 126 S. Ct. at 1997.

108. *Id.* at 1995.

109. *Id.*

110. *See id.*

The District Court granted the Rule 12(b)(6) motion, holding that the

Ideal appealed and the Second Circuit vacated the judgment.<sup>111</sup> Regarding Ideal's § 1962(c) claim, the Second Circuit "held that where a complaint alleges a pattern of racketeering activity 'that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim.'"<sup>112</sup> According to the Second Circuit, this is the case "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff."<sup>113</sup> National appealed the decision, and the Supreme Court granted certiorari.<sup>114</sup>

Applying the principles of *Holmes*, the Supreme Court concluded that Ideal could not maintain its § 1962(c) claim.<sup>115</sup> The Court explained that "the compensable injury flowing from a violation of that provision 'necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.'"<sup>116</sup> Here, Ideal alleged that the Anzas conducted National's affairs through a pattern of mail and wire fraud.<sup>117</sup> According to the Court, "[t]he direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue as a result."<sup>118</sup> The Court found that while "Ideal assert[ed] it suffered its own harms when [National] failed to charge customers for the applicable sales tax," "[t]he cause of Ideal's asserted harms . . . [was] a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)."<sup>119</sup>

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complaint failed to state a claim upon which relief could be granted. The court began from the proposition that to assert a RICO claim predicated on mail fraud or wire fraud, a plaintiff must have relied on the defendant's misrepresentations. Ideal not having alleged that it relied on petitioners' false tax returns, the court concluded Ideal could not go forward with its RICO claims.

*Id.*

111. *Id.*

112. *Id.*

113. *Id.* (quotations omitted). The Second Circuit:

[R]eached the same conclusion with respect to Ideal's § 1962(a) claim. It reasoned that Ideal adequately pleaded its claim because it alleged an injury by reason of [National's] use and investment of racketeering proceeds, as distinct from injury traceable simply to the predicate acts of racketeering alone or to the conduct of the business of the enterprise.

*Id.* (quotations omitted).

114. *Id.*

115. *Id.* at 1996.

116. *Id.* (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985)).

117. *Id.* at 1997.

118. *Id.*

119. *Id.* The Court further reasoned:

In contemplating the underpinnings of the directness requirement, the Court identified several factors that reinforced its conclusion. First, the Court noted the difficulty that can arise “when a court attempts to ascertain the damages caused by some remote action.”<sup>120</sup> For example, the Court explained that while “[t]he injury Ideal alleges is its own loss of sales resulting from National’s decreased prices for cash-paying customers,” National “could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud.”<sup>121</sup> Additionally, “Ideal’s lost sales could have resulted from factors other than [National’s] alleged acts of fraud.”<sup>122</sup>

Second, “[t]he attenuated connection between Ideal’s injury and [National’s] injurious conduct thus implicates fundamental concerns expressed in *Holmes*.”<sup>123</sup> The Court was particularly troubled by “the speculative nature of the proceedings that would follow if Ideal were permitted to maintain its claim.”<sup>124</sup> A district court would need to calculate “the portion of National’s price drop attributable to the alleged pattern of racketeering activity . . . [then determine] the portion of Ideal’s lost sales attributable to the relevant part of the price drop.”<sup>125</sup> According to the Court, “[t]he element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation.”<sup>126</sup>

Third, “the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims.”<sup>127</sup> In this

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

*Id.*

120. *Id.*

121. *Id.* The court listed several other potential motivating factors. *Id.* Namely, National could have “received a cash inflow from some other source or concluded that the additional sales would justify a smaller profit margin.” *Id.*

122. *Id.* The court noted that “[b]usinesses 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.” *Id.*

123. *Id.*

124. *Id.* at 1998.

125. *Id.*

126. *Id.*; see also *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992) (“[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts . . .”). The Court added that “[i]t has particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws.” *Anza*, 126 S. Ct. at 1998.

127. *Anza*, 126 S. Ct. at 1998; see also *Holmes*, 503 U.S. at 269–70 (“[D]irectly injured victims

instance, if Ideal's allegations were true, the State of New York could "be expected to pursue appropriate remedies."<sup>128</sup> According to the Court, there was "no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly."<sup>129</sup>

It bears repeating that the Supreme Court expressly rejected the Second Circuit's holding "that because [National] allegedly sought to gain a competitive advantage over Ideal, it [was] immaterial whether [it] took an indirect route to accomplish [its] goal."<sup>130</sup> Writing for a seven-member majority, Justice Anthony Kennedy declared:

This rationale does not accord with *Holmes*. A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense. When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. In the instant case, the answer is no.<sup>131</sup>

The Court thus rejected Ideal's § 1962(c) claim, holding that any harm Ideal suffered from National's alleged actions was too indirect to support the claim.<sup>132</sup>

Demonstrating the breadth of *Anza*, the Supreme Court, in another case argued last term, ordered the Eleventh Circuit to reconsider the case of *Williams v. Mohawk Industries, Inc.*<sup>133</sup> In *Williams*, several employees filed a class action complaint alleging that Mohawk, the second largest carpet and rug manufacturer in the United States, had "conspired with recruiting agencies to hire and harbor illegal workers in an effort to keep labor costs as low as possible," in violation of the RICO Act.<sup>134</sup> The employees alleged

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can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.")

128. *Anza*, 126 S. Ct. at 1998.

129. *Id.* The court reached this conclusion in part by reasoning that the adjudication of the State's claims would be relatively straightforward, while Ideal's claims would be difficult to prove. *Id.*

130. *Id.*

131. *Id.* (citation omitted).

132. *Id.* The Court also vacated the Second Circuit's judgment with respect to Ideal's § 1962(a) claim. This claim, as described above, alleged that National's tax scheme provided it with funds to open a new store that attracted customers who otherwise would have purchased from Ideal. Without addressing § 1964(c) causation, the Second Circuit held that this claim was adequately pled. The Supreme Court refused, however, to consider Ideal's § 1962(a) claim "without the benefit of the Court of Appeals' analysis" regarding whether National's alleged RICO violation proximately caused the injuries Ideal asserted. *Id.* at 1999.

133. *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016 (2006) (per curiam).

134. *Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252, 1255 (11th Cir. 2005) (per curiam).

that Mohawk was part of a separate RICO “enterprise” made up of a combination of the employer plus recruiting agencies with the common purpose of hiring and harboring illegal workers.<sup>135</sup> The district court denied Mohawk’s motion to dismiss the § 1962(c) claim,<sup>136</sup> and the Eleventh Circuit affirmed, concluding that the “enterprise” was the association-in-fact between Mohawk and the third-party recruiters.<sup>137</sup> The Eleventh Circuit also concluded that the employees had sufficiently alleged proximate cause.<sup>138</sup>

The Supreme Court granted certiorari to hear only one of the two questions presented—whether RICO applies to a corporation and agents that work for it on the theory they were part of a racketeering enterprise.<sup>139</sup> The Court refused to address the question concerning proximate causation, “whether [the employees] state proximately caused injuries to business or property by alleging that the hourly wages they voluntarily accepted were too low.”<sup>140</sup> In a per curiam decision issued the same day as *Anza*, the Court dismissed its grant of review on the definition of enterprise under RICO as “improvidently granted” and ordered the Eleventh Circuit to reconsider the case in light of *Anza*.<sup>141</sup>

*Anza* clarifies prior Supreme Court precedent requiring that a plaintiff be directly injured by the alleged RICO predicate acts.<sup>142</sup> It is noteworthy that *Anza* came before the Court on an appeal of the district court’s grant of National’s motion to dismiss. It is thus likely that district courts will make short work of claims based on third-party fraud and the like. Indeed, early results bear this out.<sup>143</sup>

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135. *Id.* at 1258.

136. *Id.* at 1256.

137. *Id.* at 1258–59.

138. *Id.* at 1262.

139. *Mohawk Indus., Inc. v. Williams*, 546 U.S. 1075 (2005); *see also* Petition for Writ of Certiorari at i, *Mohawk Indus., Inc.*, 546 U.S. 1075 (2005) (No. 05-465).

Question Presented. 1. Whether a defendant corporation and its agents can constitute an ‘enterprise’ under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (‘RICO’), in light of the settled rule that a RICO defendant must ‘conduct’ or ‘participate in’ the affairs of some larger enterprise and not just its own affairs.

*Id.*

140. Petition for Writ of Certiorari at i, *Mohawk Indus., Inc.*, 546 U.S. 1075 (2005) (No. 05-465).

141. *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016 (2006) (per curiam).

142. *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1998 (2006) (“When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff’s injuries.”).

143. *See, e.g., James Cape & Sons v. PPC Const. Co.*, 453 F.3d 396, 403–04 (7th Cir. 2006) (relying on *Anza*, the circuit court affirmed the district court’s dismissal of claims for lack of proximate causation and noted that a direct causal connection is especially warranted where immediate victims can

## CONCLUSION

RICO's complicated structure makes it easy—in any given case—to overlook critical elements of an asserted claim. Nowhere is this more true than in civil RICO cases, which place a causal overlay on an already multifarious criminal regime. As this Article has shown, one way that a court can ensure that a RICO claim is *really* a RICO claim is to carefully apply the “nexus” requirements inherent in RICO's structure. Armed with these implements, courts can weed claims from the RICO garden that are predicated on acts insufficiently related to one another, an enterprise, or the alleged injury.

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be expected to pursue their own claims); *Downstream Envtl., LLC v. Gulf Coast Waste Disposal Auth.*, No. H-05-1865, 2006 WL 1875959, at \*7 (S.D. Tex. July 5, 2006) (holding that where the cause of plaintiff's asserted injury (i.e., competitor charges lower prices) was distinct from the alleged RICO violations (i.e., competitor is operating without a required license) plaintiff could not meet the proximate-cause requirement); *Corporate Healthcare Fin., Inc. v. BCI Holdings Co.*, 444 F. Supp. 2d 423, 429 (D. Md. 2006) (“[A] civil RICO complaint is vulnerable to a motion to dismiss if it fails to allege . . . an adequate causal nexus between that injury and the predicate acts of racketeering activity alleged.”); *Zavala v. Wal-Mart Stores, Inc.*, 447 F. Supp. 2d 379, 387 (D.N.J. 2006) (holding that where the plaintiff's asserted injury (i.e., underpayment of wages) was distinct from the alleged RICO violation (i.e., harboring, transporting and encouraging illegal aliens) plaintiff failed to show proximate cause); *Uni-Rty Corp. v. Guangdong Bldg., Inc.*, 464 F. Supp. 2d 226, 231 (S.D.N.Y. 2006) (finding plaintiff failed to allege proximate cause when its injury would have occurred regardless of defendant's conduct).