



2018

RICO Run Amok

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Recommended Citation

John K. Cornwell, *RICO Run Amok*, 71 SMU L. Rev. 1017 (2018)

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RICO RUN AMOK

John K. Cornwell*

ABSTRACT

In 1970, Congress enacted RICO to eradicate organized crime in America. To enlist the help of private citizens in this effort, the statute included civil provisions providing treble damages for plaintiffs who proved that they were injured by a pattern of racketeering activity. As the decades passed, civil RICO dramatically expanded its reach, addressing misconduct in a diverse array of contexts, including high-profile suits against the Clinton Foundation and Trump University. This Article examines this evolution, focusing on three factors that have figured prominently in civil RICO's runaway growth: the broad interpretation of what constitutes a RICO "enterprise"; the flexibility ascribed to the requirement that members of the enterprise work towards a "common purpose"; and the present ambiguity, created by the U.S. Supreme Court, in defining proximate causation in this context. To illustrate the extent to which RICO litigation has moved away from its original mission, this Article concludes by discussing the civil RICO lawsuit filed in December 2017 against Harvey Weinstein and his associates by women alleging sexual misconduct that compromised their employment prospects.

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I. INTRODUCTION

IN 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)¹ to combat the pernicious effect of organized crime on the economic vitality of the United States.² A Senate report in support of the legislation highlighted, to that end, the billions of dollars dissipated annually based on widespread “force, fraud, and corruption” used to infiltrate and compromise labor unions and other legitimate business entities.³ The statute included both civil and criminal provisions, with early cases focusing almost exclusively on the latter.⁴ Consistent with congressional intent, these prosecutions targeted classic “racketeering” schemes that preyed upon legitimate economic activity⁵ or sought entry into a legitimate business by criminal means.⁶

In the 1980s, civil cases exploded onto the scene⁷ in novel contexts outside congressional contemplation, including claims against investment banks⁸ and restaurant owners.⁹ This shift led the U.S. Supreme Court to lament in 1985 that the statute’s use against “respected businesses” represented an evolution “into something quite different” from RICO’s original conception as a tool against the “archetypal, intimidating mobster.”¹⁰ Four years later, in an address to the Brookings Institution, Chief Justice

1. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941–44 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2012)).

2. See Pamela Bucy Pierson, RICO, Corruption and White-Collar Crime, 85 TEMP. L. REV. 523, 535–37 (2013) (discussing the focus of federal legislators and law enforcement officials on organized crime in creating RICO).

3. S. COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 91-617, at 1 (1969).

4. The Second Circuit noted that the decade following RICO’s enactment saw the publication of very few civil cases. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 486 (2d Cir. 1984), *rev’d*, 473 U.S. 479 (1985). The Department of Justice concurred, commenting that the statute’s civil provision was “largely ignored” in the legislation’s early years. See U.S. DEPT. OF JUST., CIVIL RICO: A MANUAL FOR FEDERAL PROSECUTORS 1 (1988).

5. See, e.g., *United States v. Campanale*, 518 F.2d 352, 355 (9th Cir. 1975) (charging a conspiracy between teamsters and a trucking company to force meat packers to use the services of the trucking companies through intimidation); *United States v. Stofsky*, 527 F.2d 237, 240–41 (2d Cir. 1975) (alleging that union officers in New York’s garment industry were accepting bribes from manufacturers); *United States v. Green*, 523 F.2d 229, 231 (2d Cir. 1975) (alleging “a large-scale conspiracy” among officers and employees of a New Jersey trucking company to steal frozen seafood from New York City piers).

6. See, e.g., *United States v. Parness*, 503 F.2d 430, 433–35 (2d Cir. 1974) (alleging a scheme to acquire a gambling casino on a Caribbean island by converting money collected on the casino’s account and then lending the money back to its owner).

7. For example, approximately 1,000 civil RICO cases were filed per year from 1985 to 1990. H.R. REP. NO. 101-975, at 7 (1990).

8. See, e.g., *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 231 (2d Cir. 1985), *aff’d on reh’g*, 903 F.2d 176 (1990) (action against investment firm and its money market subsidiary for fraud-based civil RICO violations); *Police Ret. Sys. v. Midwest Inv. Advisory Servs., Inc.*, 706 F. Supp. 708, 710–11 (E.D. Mo. 1989) (suit against advisors and brokers for civil RICO violations).

9. See, e.g., *United States v. Ianiello*, 824 F.2d 203, 207–09 (2d Cir. 1987) (appointing receiver to manage an eating establishment operated in violation of various RICO provisions).

10. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499–500 (1985).

Rehnquist called upon Congress to amend civil RICO to restore its focus on organized crime and away from the “garden-variety civil fraud cases” more properly litigated in state courts.¹¹

Congress did not accede to the Chief Justice’s request. Thus, unsurprisingly, the twenty-first century has seen civil RICO continue to proliferate and far outflank its criminal counterpart.¹² The movement away from organized crime has also continued, as an ever more diverse array of claims have sounded in RICO. In the past two years alone, federal courts have upheld civil RICO complaints in vastly different contexts, including: misrepresentations by pharmaceutical companies,¹³ real estate fraud,¹⁴ misconduct in divorce and child custody proceedings,¹⁵ and Fourth Amendment violations by police officers.¹⁶ It is fair to say that, if someone were to survey recent civil RICO cases, she would be very surprised to learn that organized crime was the primary target—or a major target at all—in its creation.

Efforts to extend RICO even further persist. On October 18, 2013, a class action suit was filed by former students of Trump University claiming that they were cheated out of thousands of tuition dollars by fraudulent marketing claims.¹⁷ On March 24, 2015, the chairman of Freedom Watch, Inc. sued Bill and Hillary Clinton and the Clinton Foundation under RICO for racketeering based on their noncompliance with document requests asserted under the U.S. Freedom of Information Act.¹⁸ On February 22, 2017, the Arizona Senate approved a bill that attempted to add “rioting” to the offenses that trigger liability under the state-law analogue to federal RICO.¹⁹ Inspired by concern over alleged violence and property damage tied to political protests, the Republican-sponsored legislation would outlaw the planning of, and participation in, protests even

11. See William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY’S L.J. 5, 9 (1989) (originally presented at the Brookings Institute’s Eleventh Seminar on the Administration of Justice, Apr. 7, 1989). Commentators also urged reform. See, e.g., Gerald E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 802 (1990); Norman Abrams, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. REV. 1, 4 (1989).

12. For example, between 2001 and 2006, civil RICO filings averaged 759 per year. However, during those same years, an average of only 212 criminal RICO cases were referred to United States Attorney’s Office. See KRISTIN M. FINKLEA, CONG. RESEARCH SERV., R40525, ORGANIZED CRIME IN THE UNITED STATES: TRENDS AND ISSUES FOR CONGRESS 15 (2010); Caroline A. Mitchell, Jordan Cunningham & Mark R. Lentz, *Returning RICO to Racketeers: Corporations Cannot Constitute an Associated-in-Fact Enterprise Under 18 U.S.C. § 1961(4)*, 13 FORDHAM J. CORP. & FIN. L. 1, 3 (2008).

13. See *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 804 F.3d 633, 634 (3d Cir. 2015); *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 25 (1st Cir. 2013).

14. *Frydman v. Verschleiser*, 172 F. Supp. 3d 653, 659 (S.D.N.Y. 2016); see also *Johnson v. KB Home*, 720 F. Supp. 2d 1109, 1120–21 (D. Ariz. 2010).

15. *Murphy v. Farmer*, 176 F. Supp. 3d 1325, 1344–46 (N.D. Ga. 2016).

16. *O’Toole v. City of Antioch*, No. 11-CV-1502-PJH, 2015 WL 5138277, at *11–12 (N.D. Cal. Sept. 1, 2015).

17. Complaint at 4–14, *Cohen v. Trump*, No. 3:13-cv-02519-DMS-RBB (S.D. Cal. Oct. 18, 2013).

18. *Klayman v. Clinton*, No. 15-cv-803880, 2015 WL 10857500, at *1 (S.D. Fla. Aug. 14, 2015).

19. S.B. 1142, 53rd Leg., 1st Reg. Sess. (Ariz. 2017).

before they turned violent.²⁰ In opposing the bill, one Democratic senator argued that it represented “a total perversion” of the “racketeering process” under RICO.²¹

While these novel initiatives have not always proven successful,²² the cost of litigation and the threat of treble damages²³ has led to high-profile settlements. For example, on March 31, 2017, U.S. District Judge Gonzalo Curiel approved a twenty-five million dollar settlement in the Trump University case.²⁴ Previously, attorneys for Donald Trump had publicly criticized the complaint’s legal foundation, labeling the RICO claims an “overreach” since “[n]ot a single case plaintiff cites comes close to approving civil RICO claims on the garden-variety consumer claims here.”²⁵ Victories such as these, splashed over the national news and preceded by hyperbolic rhetoric, embolden further innovation from plaintiffs who see a landscape where RICO has become untethered from its historical foundations and traditional notions of racketeering-based injury have incrementally receded.

This article explores one of the most important pieces in RICO’s runaway expansion: the statutory provision that allows private parties to sue for racketeering-based injuries.²⁶ Part I provides a brief overview of civil RICO. Parts II and III discuss modern case law with a view towards understanding how and why the statute has become so broad a vehicle for vindicating financial harm. Part II focuses on RICO “enterprises”; Part III identifies the confusion surrounding proximate causation. Reflecting on civil RICO’s evolution, Part IV then turns to one of the highest profile civil RICO cases in recent history: the complaint against Harvey Weinstein and his associates filed in December 2017 by women alleging sexual misconduct that has irreparably damaged their career prospects.

20. S.B. 1142 defines rioting as follows: “A person commits riot if, with two or more other persons acting together, such person recklessly uses force or violence or threatens to use force or violence, if such threat is accompanied by immediate power of execution, which either disturbs the public peace or results in damage to the property of another person.” *Id.*

21. Bob Christie, *AZ Senate OKs Racketeering Charges for Riots*, ASSOC. PRESS (Feb. 23, 2017), <http://www.azcentral.com/story/news/politics/arizona/2017/02/23/arizona-senate-oks-racketeering-charges-riots/98296298/> [<https://perma.cc/E4BC-EVT2>] (comments of Sen. Steve Farley).

22. For example, the federal district court dismissed the RICO claims against the Clintons and their Foundation. *Klayman*, 2015 WL 10857500, at *8.

23. See 18 U.S.C. § 1964 (2012).

24. *Low v. Trump Univ., LLC*, 246 F. Supp. 3d 1295, 1298–99 (S.D. Cal. 2017) (approving settlement in the Order Granting Joint Motion for Final Approval of the Proposed Class Settlement).

25. Josh Gerstein & Maggie Severns, *Trump Fights Racketeering Claim in Trump University Suit*, POLITICO (June 18, 2016, 4:12 PM), <https://www.politico.com/blogs/under-the-radar/2016/06/donald-trump-racketeering-claim-trump-university-224517> [<https://perma.cc/NT9S-VP2L>].

26. 18 U.S.C. §§ 1962, 1964(c) (2012). RICO also provides for criminal penalties based on racketeering activity and conspiring to engage in such conduct. This article will not address these issues. For a comprehensive summary of criminal RICO, see Dylan Bensing, Connor Curtin, Matthew Evola, & Austin McCullough, *Racketeering Influenced and Corrupt Organizations*, 53 AM. CRIM. L. REV. 1673, 1676–1715 (2016).

II. CIVIL RICO IN RELEVANT PART

To make out a civil RICO claim, a plaintiff must prove: conduct of an enterprise through a pattern of racketeering activity and injury to business or property by reason of a substantive RICO violation.²⁷ The term “enterprise” is defined broadly as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”²⁸ This definition includes business relationships that are both legitimate and illegitimate; thus, a group of individuals associated in fact for the purpose of engaging in illegal conduct, such as trafficking in narcotics and bribing local officials, is an enterprise for RICO purposes.²⁹

Racketeering activity includes a broad array of chargeable offenses under state and federal law. These include bribery, theft, fraud, violent felonies, immigration offenses, and the sexual exploitation of children.³⁰ To establish the requisite pattern of racketeering, the statute requires proof of at least two predicate acts within a ten-year period.³¹ Plaintiffs must also show that the acts are related and either amount to, or pose a threat of, continued criminal activity.³² The U.S. Supreme Court has described the requisite continuity as “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.”³³

RICO authorizes a variety of civil remedies. Section 1964(a) empowers the Attorney General and private parties to seek various equitable orders pertaining to racketeering enterprises, including: divestiture, restrictions on future activities, and dissolution or reorganization.³⁴ Section 1964(c) adds treble damages and attorney’s fees for private plaintiffs who prevail on civil RICO claims.³⁵

III. RICO “ENTERPRISES”

Proof of an enterprise is an indispensable requirement of RICO complaints that distinguishes them from routine tort or fraud claims.³⁶ As

27. See, e.g., *Williams v. Mohawk Indus.*, 465 F.3d 1277, 1282–83, 1286–87 (11th Cir. 2006).

28. 18 U.S.C. § 1961(4) (2012).

29. See *United States v. Turkette*, 452 U.S. 576, 578–85 (1981). While *Turkette* focused on criminal RICO, Congress presumptively intended for civil RICO to operate similarly in this context. See Michael Goldsmith & Penrod W. Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 78 (1986).

30. 18 U.S.C. § 1961(1) (defining “racketeering activity”).

31. *Id.* § 1961(5).

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

33. *Id.* at 241.

34. 18 U.S.C. §§ 1964(a)–(b).

35. *Id.* §§ 1962, 1964(c).

36. For a thoughtful discussion of the enterprise requirement and its primacy in RICO litigation, see Randy D. Gordon, *Of Gangs and Gaggles: Can a Corporation be Part of an Association-in-Fact RICO Enterprise? Linguistic, Historical, and Rhetorical Perspectives*, 16 U. PA. J. BUS. L. 973 (2014).

indicated above, a RICO enterprise includes a group of persons functioning as a continuing unit for a common purpose of engaging in a course of conduct.³⁷ From this broad definition, two important issues have emerged that are especially important in the civil RICO context. First, to what extent must the unit operate as a hierarchy or some other formal decision making structure? Second, how aligned must the interests be among the parties to the enterprise to constitute a “common purpose”?

A. STRUCTURAL CONSIDERATIONS

The U.S. Supreme Court addressed RICO’s structural requirements head-on in *Boyle v. United States*.³⁸ The defendant was part of a loosely organized group that carried out a series of bank thefts in different states over a roughly nine-year period. Apart from several core members, participation in the thefts varied from crime to crime, as did the nature of the heists.³⁹ The group had no discernable leader or hierarchy, nor did it appear to operate according to any long-term blueprint or master plan. Instead, the participants in any given crime would typically meet in advance to plan the crime, gather any necessary tools, and assign roles (such as lookout and wheelman). They would then split the proceeds acquired from the theft.⁴⁰

At trial, the defendant requested a jury instruction requiring the government to prove his membership in “an ongoing organization” with “a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts.”⁴¹ The judge refused the request, instructing the jury instead that an enterprise can consist of “an association of individuals, without structural hierarchy, form[ed] solely for the purpose of carrying out a pattern of racketeering acts.”⁴² Thus, the shifting membership and lack of coordinated leadership of the group in which Boyle participated would not preclude the jury from finding that it was a RICO “enterprise.”

The Court upheld the judge’s instruction, reasoning that a RICO enterprise did not require hierarchy, members with fixed roles, established rules and regulations, or a formal decision making process. The group must simply function as a continuing unit that pursues a course of conduct that may be characterized by “spurts of activity punctuated by periods of quiescence.”⁴³ In the dissent, Justice Stevens opined that nothing in the statute’s text or legislative history supported the majority’s conclusion that a RICO enterprise could consist of an “ad hoc association of thieves” that coalesced at different times with varying participants when-

37. *United States v. Turkette*, 452 U.S. 576, 576 (1981).

38. 556 U.S. 938, 940–41 (2009).

39. The group typically targeted night-deposit boxes, but occasionally attempted bank robberies and bank-vault burglaries. *Id.* at 941.

40. *Id.*

41. *Id.* at 943.

42. *Id.* at 942.

43. *Id.* at 948.

ever a tip disclosed the potential vulnerability of financial institutions.⁴⁴

Boyle's clarification of the structural requirements of RICO enterprises resolved a split that had developed among the circuits. Some had adopted *Boyle's* approach;⁴⁵ others had not. For example, the Eighth Circuit had held that the enterprise element required proof of “an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity,” as well as a system of authority that directs the group’s activities on more than an ad hoc basis.⁴⁶ The Third⁴⁷ and Tenth Circuits⁴⁸ had also emphasized that the enterprise must be separate “from the pattern of activity in which it engages.”

In holding that association-in-fact enterprises did not need to have a business-like structure that exists apart from its criminal acts, the U.S. Supreme Court implicitly rejected the primacy of the organized crime model and its hierarchy of dons, capos, and lower-level associates.⁴⁹ The expansive understanding of enterprise has facilitated civil RICO claims in diverse areas not considered by Congress when debating the statute that is arguably outside RICO’s intended purview. Consider, for example, *O’Toole v. City of Antioch*.⁵⁰ In this case, plaintiffs alleged that various police officers conducted illegal searches and seizures to acquire money, narcotics, and other items for resale and self-enrichment. Defendant Wielsch moved for summary judgment on the civil RICO claim filed against him by two of the plaintiffs, arguing that the acts in which he participated with two of the other defendants did not constitute an enterprise since the associations among the three were sporadic, with each designed to accomplish a specific goal.

Consistent with *Boyle*, the court did not find that the ad hoc nature of the relationships undermined the existence of an enterprise, nor did the complaint’s allegation of a far broader enterprise involving multiple of-

44. *Id.* at 959 (Stevens, J., dissenting).

45. *See, e.g., United States v. Goldin Indus. Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000) (finding that an enterprise is “an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes”); *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995) (association-in-fact enterprise must be ongoing, exist “separate and apart from the pattern of racketeering,” and employ a hierarchical or consensual decision making structure).

46. *United States v. Kragness*, 830 F.2d 842, 855–56 (8th Cir. 1987); *see also United States v. Smith*, 413 F.3d 1253, 1266–67 (10th Cir. 2005) (requiring “a decision-making framework or mechanism for controlling the group”).

47. *United States v. Urban*, 404 F.3d 754, 770 (3d Cir. 2005) (quoting *United States v. Irizarry*, 341 F.3d 273, 286 (3d Cir. 2003)). Thus, in *Urban*, the City of Philadelphia’s construction services department qualified as an enterprise since, inter alia, it was a governmental agency created to issue permits for construction projects, not for “enabling [defendants’] extortionate acts.” *Id.* at 770.

48. *Smith*, 413 F.3d at 1267 (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

49. *See Michael Vitiello, More Noise from the Tower of Babel: Making “Sense” Out of Reves v. Ernst & Young*, 56 OHIO ST. L.J. 1363, 1400-01 (1995) (noting that the Mafia was “defined by its hierarchy” and discussing the roles played by the members of the twenty-four Mafia families).

50. No. 11-CV-1502-PJH, 2015 WL 5138277, at *1 (N.D. Cal. Sept. 1, 2015).

ficers from different jurisdictions.⁵¹ The enterprise element is not, the judge noted, an “all or nothing” requirement.⁵² Thus, the fact that different parties took part in the searches with no centralized command or power structure directing their collective efforts was immaterial in this regard. The district court also saw no significance in the existence of a warrant authorizing at least one of the searches attributed to Wielsch. Even if a valid warrant removed the search *itself* from the enterprise, items improperly seized remained within its ambit.⁵³

Capturing the fluidity of *Boyle*'s interpretation of enterprise, the Eleventh Circuit has required no more than “a ‘loose or informal’ association of distinct entities.”⁵⁴ Thus, in *Murphy v. Farmer*,⁵⁵ a federal district court in Georgia accepted, for pleading purposes, the plaintiff's allegation that multiple defendants and non-parties had created an enterprise to extort payments and other benefits as part of a prolonged and bitter custody dispute.⁵⁶ Membership in the enterprise was diverse and included lawyers and staff representing plaintiff's ex-wife, the ex-wife's brother, a child custody advocacy group and its owner, a minor who provided testimony against the plaintiff, and the minor's mother.⁵⁷ The predicate acts allegedly committed by the group were equally wide-ranging: attempted extortion, attempted bribery of a judge, influencing witnesses, kidnapping, filing a false report of child abuse, and attempted wire fraud, among others.⁵⁸

The contribution of different parties varied both temporally and substantively, and there is no clear indication that any single individual directed all of the alleged misconduct. For example, the plaintiff claims T.B., a minor child and friend of his children, was flown to the plaintiff's home in the Virgin Islands as part of a scheme orchestrated by his ex-wife to engage the children in drug-related misconduct to promote her claims that the plaintiff was an unfit parent.⁵⁹ It is not clear when or if other members of the enterprise were aware of this plan. Likewise, at least some of the allegedly unlawful actions taken by Defendant Beacham may have been devised personally, such as the publication of defamatory statements about the plaintiff on the website of her organization, My Ad-

51. “The RICO statute,” the judge noted, “does not require constant, uninterrupted criminal activity.” *Id.* at *22.

52. *Id.*

53. *Id.* The warrant authorized a search for evidence of marijuana cultivation. The plaintiffs alleged that the officers also seized a number of non-particularized items outside the scope of the warrant without noting their removal, including shotguns, jewelry, currency, sunglasses, and sports memorabilia. *Id.* at *3.

54. *Williams v. Mohawk, Indus.*, 465 F.3d 1277, 1284 (11th Cir. 2006).

55. 176 F. Supp. 3d 1325 (N.D. Ga. 2016).

56. For a general discussion of the RICO's use in family law litigation, see Erin Alexander, Comment, *The Honeymoon Is Over: The Use of Civil RICO in Divorce*, 37 SAN DIEGO L. REV. 541 (2000).

57. *Murphy*, 176 F. Supp. 3d at 1331.

58. *Id.* at 1338–39.

59. *Id.* at 1335.

vocate Center.⁶⁰

However diffuse the aforementioned actions may be, all are designed to achieve the same objectives: promoting the ex-wife's child custody claims and pressuring the plaintiff to reach a monetary settlement in satisfaction of the various causes of action filed in relation to the divorce and child custody disputes. It does not matter, therefore, if the relationships between certain parties are elusive, or if different participants joined the enterprise at different times.⁶¹ Together, they were all part of what the plaintiff dubbed a like-minded "conflictineering"⁶² enterprise.

B. A COMMON PURPOSE?

In *United States v. Turkette*, the U.S. Supreme Court held that RICO requires participants in an enterprise to be "associated together for a common purpose."⁶³ In that case, the conduct detailed in the complaint unquestionably met this standard. The defendant was allegedly leading a criminal organization whose members jointly perpetrated numerous crimes for financial gain, including: drug trafficking, arson, bribery of public officials, and mail and wire fraud.⁶⁴ Civil RICO cases litigated in the years that immediately followed did not raise "common purpose" issues for the simple reason that, as in *Turkette*, participants in the alleged enterprise shared the same objective.

The nature of cases filed during this period underscore this conclusion. An ABA Task Force reported in 1985 that eighty percent of civil RICO complaints filed up to this point concerned fraud, the vast majority in the securities or commercial context.⁶⁵ Interestingly, these cases generally did not involve organized crime; only nine percent contained allegations of criminal activity "generally associated with professional criminals."⁶⁶

*Zap v. Frankel*⁶⁷ is illustrative of this wave of fraud-based civil RICO actions that emerged in the early to mid-1980s. In this case, the plaintiff surrendered his equity interest in an interstate trucking firm to the defendants in exchange for their agreement to make him a partner in a real

60. *Id.* at 1337-38.

61. *See United States v. Hewes*, 729 F.2d 1302, 1317 (11th Cir. 1984) ("The law does not require all members of the RICO enterprise to have maintained their association with it throughout the enterprise's life.").

62. "Conflictineering" is a litigation tactic that is designed to expose immorality that "creat[es] social and political consequences for adversaries." Debra Cassens Weiss, *Grandstanding Motions Could Bring Sanctions, Judge Warns in Suit Over Lawyer 'Conflictineering'*, ABA JOURNAL (Apr. 11, 2016, 5:45 AM), http://www.abajournal.com/news/article/grandstanding_motions_could_bring_sanctions_judge_warns_in_suit_over_lawyer [https://perma.cc/6AS4-5FSW].

63. *United States v. Turkette*, 452 U.S. 576, 583 (1981).

64. *Id.* at 578-79.

65. ARTHUR F. MATTHEWS ET AL., REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55-56 (1985).

66. *Id.* at 56. Those offenses include arson, bribery, embezzlement, extortion, theft and political corruption. *Id.*

67. 770 F.2d 24 (3d Cir. 1985).

estate venture that owned property leased to the trucking company. Thereafter, the defendants allegedly defrauded Zap by charging the trucking company below-market rates for the rental of said property.⁶⁸ In addition to RICO, Zap asserted civil claims on a host of other grounds, including common law fraud and conspiracy, breach of contract and fiduciary duty, and negligence.⁶⁹

Like myriad other fraud-based civil RICO suits, Zap alleges a “common purpose” shared by all defendants to profit from an allegedly unlawful scheme at the plaintiff’s expense. While the Third Circuit allowed the suit to proceed, other plaintiffs during this period were less successful. Overall, roughly half of these complaints filed by 1985 were dismissed,⁷⁰ with even more in the securities context.⁷¹ The problems, however, revolved around issues other than the defendants’ commonality of purpose.⁷²

The fact that all parties to a RICO enterprise contribute to the same fraudulent goal does not necessarily mean, however, that a common purpose exists. In *Ray v. Spirit Airlines, Inc.*,⁷³ passengers alleged that the airline, together with other parties, misrepresented base fares by fraudulently labeling part of the total amount charged as a Passenger Usage Fee impliedly imposed or authorized by the government. Each of the defendants allegedly played a different role in this scheme. For example, one provided a platform for ticket sales that had been customized to conceal the fee; another, a computer software consultant, helped the airline design its website and reservation system; a third handled public relations around the usage fee.⁷⁴ As such, the complaint alleged that all defendants “shared the common purpose to ‘increase and maximize the revenue of Spirit Airlines.’”⁷⁵

The Eleventh Circuit disagreed, noting that the complaint lacked specific information suggesting that Spirit paid these parties to deceive consumers, as opposed to providing them “compensation for general business services rendered.”⁷⁶ For example, the defendants’ creation of a software platform manipulated by Spirit to hide the Passenger Usage Fee does not, without more, connote that these parties knew of or supported Spirit’s fraudulent purpose, nor is it clear how they profited unlawfully from the misconduct.⁷⁷ Likewise, the public relations firm’s efforts to portray the airline in the best possible light is inapposite to the alleged fraud

68. *Id.* at 25.

69. *Id.*

70. *See* MATTHEWS, *supra* note 65, at 57.

71. *Id.* at 57–58 (57% dismissed).

72. The dismissals of the complaints were typically based on issues such as inadequate particularity, failure to name the enterprise as a defendant, failure to specify the plaintiffs’ injuries, or failure to allege a prior criminal conviction. *Id.* at 58.

73. 836 F.3d 1340 (11th Cir. 2016).

74. *Id.* at 1345–46.

75. *Id.*

76. *Id.*

77. *Id.* at 1353.

flowing from the presentation of the usage fee on Spirit's website, since the firm was not involved in any way in the construction or delivery of internet-based services.⁷⁸ Even Spirit's CEO and Chief Operating Officer were found to lack a common purpose with the airline since the complaint failed to link either clearly to the confusion surrounding usage fee charges. There is a difference, the court noted, between sharing the overall objective of promoting corporate profits and having a common purpose "to misrepresent fees or otherwise defraud Spirit customers."⁷⁹

While it may seem that *Ray* is using the common purpose requirement to impose significant limits on the reach of civil RICO, other cases suggest otherwise. For example, in *United States v. Church*,⁸⁰ the Eleventh Circuit held that members of an enterprise demonstrate a common purpose by profiting from "repeated criminal activity," even if the relevant conduct is diverse.⁸¹ Thus, a changing roster of participants satisfied this standard by engaging in a wide variety of financially lucrative activity, including: trafficking in marijuana and cocaine, money laundering; using violence to protect a participant's business interests, and conspiring to rob a drug dealer.⁸²

At first blush, it might seem difficult to reconcile *Church* with *Ray*. If no common purpose existed between Spirit Airlines, its vendors, and corporate officers to hide the Passenger Usage Fee, what objective did an ever-changing cohort of individuals share when committing a disparate array of offenses? The distinction likely lies in the illicit nature of the activities engaged in by the various parties. That is, the activities of Church's rotating band of participants were all oriented towards the same goal: financial gain achieved through drug trafficking. By contrast, there was nothing inherently illegal about the conduct of the vendors in *Ray*: development of a web-based ticketing platform, software consulting services to implement Spirit's website, reservation system, and public relations support for a company reeling from negative press.

*Williams v. Mohawk Industries, Incorporated*⁸³ underscores this distinction between lawful and unlawful conduct in the common purpose context. In their complaint, Williams and other Mohawk employees alleged that the defendant depressed their wages by hiring undocumented workers.⁸⁴ The plaintiffs described a scheme whereby recruiters commissioned

78. *Id.* at 1354.

79. *Id.* at 1355.

80. 955 F.2d 688 (11th Cir. 1992).

81. *Id.* at 698.

82. *Id.*

83. 465 F.3d 1277 (11th Cir. 2006).

84. This cause of action was based on 1996 amendments to RICO that added immigration offenses to the list of predicate acts that could be used to show a pattern of racketeering activity. See 18 U.S.C. § 1961(1)(F) (2012). These additions included conduct indictable under a section of the Immigration and Nationality Act pertaining to the unlawful employment of "unauthorized aliens." For example, Section 1324 provides that it is unlawful for a person or other entity to hire, recruit or refer for a fee an alien for employment in the United States knowing the alien "is an unauthorized alien" with respect to such employ-

by Mohawk traveled to the border to find and transport illegal aliens to Georgia for employment in Mohawk's facilities.⁸⁵ Mohawk then paid recruiters a fee for each worker supplied in this manner.⁸⁶ Based on these facts, the court concluded that the parties had "the common purpose of providing illegal workers to Mohawk so that Mohawk could reduce its labor costs and the recruiters could get paid."⁸⁷

In reaching this conclusion, the court emphasized that RICO requires only that the enterprise have a common purpose, even if it is not "the sole purpose of each and every member of the enterprise."⁸⁸ In so holding, the Eleventh Circuit noted its disagreement with the Seventh, where the court questioned the existence of a common purpose under similar circumstances in *Baker v. IBP, Inc.*⁸⁹ The *Baker* plaintiffs, hourly wage earners at the defendant's meat processing plant, alleged that IBP knowingly hired undocumented workers to drive down lawful employees' wages. To accomplish this, IBP worked with various recruiters as well as immigrant-welfare organizations, such as the Chinese Mutual Aid Association.⁹⁰ The court characterized each party as having its own distinct interest in the illicit scheme that belied any common purpose: the employer sought lower wages; the recruiters, greater remuneration for services rendered; and the immigrant organization, better opportunities for their members.⁹¹

The Seventh Circuit's seemingly narrow reading of the common purpose requirement conflicts not only with the Eleventh Circuit's more expansive interpretation but also with of many other circuits, at least impliedly. Without addressing the common purpose issue explicitly, the Second, Sixth, and Ninth Circuits have allowed civil RICO claims to proceed in cases factually similar to *Baker* and *Williams*— that is, wage suppression cases based on the use of undocumented workers. In *Trollinger v. Tyson Foods, Inc.*,⁹² plaintiffs alleged that the defendant conspired with "recruiters and temporary employment agencies to supply it with illegal immigrant labor."⁹³ In *Mendoza v. Zirkle Fruit Company*,⁹⁴ the de-

ment. 8 U.S.C. § 1324(a)(3)(B) (2012). This allowed private parties to seek treble damages for injuries caused by competitors who knowingly hired undocumented workers. *See id.*

85. *Williams*, 465 F.3d at 1284.

86. *Id.*

87. *Id.* at 1286.

88. *Id.* at 1285–86.

89. 357 F.3d 685 (7th Cir. 2004).

90. *Id.* at 687.

91. *Id.* at 691. Likewise, in an earlier Seventh Circuit case, the court concluded that no common purpose existed among a "buying club," consisting of its franchisees, manufacturers and wholesalers. *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 674 (7th Cir. 2000). Plaintiffs alleged that the parties fraudulently represented that club members could purchase top quality merchandise at reduced prices from a host of vendors. *Id.* at 674. Even accepting this assertion as true, each party was pursuing its own unique financial objective, the court opined, rendering it improbable that "the enterprise had a common purpose to benefit consumers (or UCC members) as a whole." *Id.* at 677 n.4.

92. 370 F.3d 602 (6th Cir. 2004).

93. *Id.* at 606.

94. 301 F.3d 1163 (9th Cir. 2002).

endants' two fruit companies perpetrated an alleged "Illegal Immigrant Hiring Scheme," facilitated by an employment agency, used as a front for their nefarious activities.⁹⁵ Finally, the plaintiffs in *Commercial Cleaning Services, LLC v. Colin Service Systems, Inc.*⁹⁶ contended that the defendant, a business competitor, knowingly paid numerous illegal immigrants reduced wages while simultaneously failing to deduct payroll taxes and workers' compensation insurance fees. The enterprise carrying out this scheme included various entities associated-in-fact, including employment placement agencies, labor contractors, newspapers, and networks that help illegal immigrants obtain employment, housing and work permits.⁹⁷

*United States v. Masters*⁹⁸ casts doubt, however, on the extent to which the Seventh Circuit has truly embraced such a cramped view of the common purpose requirement. *Masters* was an attorney who, along with two police supervisors and their respective police departments, engaged in kickback schemes to refer work to *Masters* and bribed law enforcement personnel to protect individuals engaged in illegal bookmaking. During this same period, at *Masters*'s request, one of the police supervisors also hired a former co-worker to kill *Masters*'s wife after unlawful eavesdropping disclosed lurid details of an extramarital affair. Based on the foregoing, the court noted that the enterprise's main purpose "was to bring under *Masters*'[s] influence . . . the principal police agencies operating in his area of activity."⁹⁹ Because *Masters* conflated his business and personal life "[l]ike many a small businessman," it was "natural" for him to rely on the existing criminal enterprise to resolve marital difficulties that he believed necessitated the murder of his wife;¹⁰⁰ the enterprise was, in sum, "versatile, flexible, [and] diverse in its objectives and capabilities."¹⁰¹

While the reasoning in *Masters* appears at odds with that of *Baker*, it is noteworthy that the latter made no reference to *Masters*—or any other case—in its brief discussion of common purpose. This lack of attribution is unsurprising inasmuch as the court's reflections on common purpose were essentially *dicta*; the complaint was invalidated on other grounds.¹⁰² Moreover, requiring all members of an enterprise to share one overarch-

95. *Id.* at 1166–67.

96. 271 F.3d 374 (2d Cir. 2001).

97. *Id.* at 379. One commentator has advocated the use of civil RICO on behalf of immigrant workers to combat abusive labor practices by employers. Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Enforcement*, 46 LOY. L.A. L. REV. 31, 56–62 (2012).

98. 924 F.2d 1362 (7th Cir. 1991).

99. *Id.* at 1366.

100. *Id.* at 1366–67.

101. *Id.* at 1367. See generally Steven P. Ragland, Comment, *Using the Master's Tools: Fighting Persistent Police Misconduct with Civil RICO*, 51 AM. U. L. REV. 139 (2001); Michael Rowan, Comment, *Leaving No Stone Unturned: Using Civil RICO as a Remedy for Police Misconduct*, 31 FLA. ST. U. L. REV. 231 (2003).

102. *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (identifying the complaint's failure to specify an enterprise as its "fatal problem").

ing purpose would represent bad policy as it would reduce RICO's immigration amendments to a virtual nullity since association-in-fact entities are certain to have both lawful and unlawful objectives that exist simultaneously. For example, the defendants accused of engaging in the illegal hiring of immigrants in RICO lawsuits are invariably acting in concert with employment agencies or recruiters.¹⁰³ Unless these organizations exist solely to facilitate unlawful labor practices, which is highly unlikely,¹⁰⁴ they will necessarily have more than one purpose. Immigrants' rights organizations, *a fortiori*, engage in important lawful activities designed to increase the quality of life for disadvantaged communities.

The activities of the enterprise in *United States v. Masters*¹⁰⁵ were even more wide-ranging. Accordingly, what remains clear is that most courts require a *common* unlawful purpose among members of the enterprise. The *Mohawk* plaintiffs satisfied this standard in asserting that the defendant and outside employment personnel worked together to further the hiring of illegal immigrants. By contrast, the plaintiffs in *Ray* failed to proffer any facts that indicated how or why public relations consultants and the vendors who worked on the airline's computer reservation system endeavored to fraudulently hide its Passenger Usage Fee; the only purpose shared by these parties was a lawful one: improving Spirit's profitability and reputation.

Seen in this light, the common purpose requirement does little to limit the reach of civil RICO. Provided they can identify unlawful conduct within the statute's purview to which all members of the enterprise contributed, plaintiffs will generally satisfy this requirement. The existence of additional, diverse objectives not shared by others is irrelevant. Even the requirement of illicit activity can be somewhat attenuated. In *Masters*, the court identified the enterprise's principal objective as bringing certain police departments within the ringleader's sphere of influence to allow him to perpetrate a wide range of crimes, some totally disconnected in purpose and scope from others.¹⁰⁶

The breadth of the common purpose requirement is especially concerning in the context of enterprises comprised of loosely connected associations-in-fact. In rejecting the need for a businesslike hierarchy in RICO enterprises, the U.S. Supreme Court in *Boyle* relied on common purpose to define structural requirements, identifying three indispensable features: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the

103. For an excellent discussion of the use of civil RICO in the immigration employment context, see generally Mary Catherine G. Isensee, Comment, *Enforcing Against the Enforcers: Ensuring Immigration Compliance Through Civil RICO*, 49 HOUS. L. REV. 101 (2012).

104. Even Selective Employment Agency, Inc., which allegedly served as a front company for the defendants' unlawful employment practices in *Mendoza*, was a separate legal entity under separate ownership. See Complaint at ¶ 40, *Mendoza v. Zirkle Fruit Co.*, No. 00-cv-03024 (E.D. Wash., Mar. 28, 2000), 2000 WL 34480427.

105. 924 F.2d 1362 (7th Cir. 1991).

106. See *supra* text accompanying notes 83–86.

enterprise's purpose."¹⁰⁷ Thus, the justices noted, a RICO enterprise demands more than a criminal conspiracy, whose completion requires only the time necessary to form an agreement and execute an overt act in furtherance of it.¹⁰⁸ For example, an individual who conspires to commit arson is not part of a RICO enterprise to do the same unless he and his co-conspirators have a shared purpose to commit, and do commit, a pattern of arson offenses.¹⁰⁹

While this may be true, it has little bearing in reality on the potential breadth of RICO enterprises that are often wide-ranging, diffuse entities whose "common purpose" may be secondary—even tertiary—to the day-to-day operations of its various members. The Seventh Circuit has even questioned the extent to which *Boyle* meaningfully distinguishes RICO enterprises from most conspiracies.¹¹⁰ In *Jay E. Hayden Foundation v. First Neighbor Bank, N.A.*,¹¹¹ the plaintiff foundation and two affiliated estates, all of which were created by Mr. Hayden's will, alleged that they were defrauded by a RICO enterprise comprised of the entities' joint executor, as well as law firms and bank officers used by the executor in the course of his duties. The court noted that these otherwise independent actors met *Boyle*'s three requirements: they pursued a common purpose, relied on their relationships to each other to do so, and depleted the plaintiffs' accounts valued at more than one million dollars over a period of sixteen years.¹¹² As such, it is the "longevity" requirement that typically differentiates most conspiracies from RICO enterprises, inasmuch as the former need only exist for a period of time long enough to forge an agreement and commit an overt act in furtherance of it.¹¹³

IV. CAUSATION CONFUSION

Like the elasticity inherent in the structural and common purpose requirements, the ambiguity surrounding civil RICO's causation requirements contributes to the uncertainty surrounding the statute's breadth, emboldening those who favor more permissive standards.¹¹⁴ The source

107. *Boyle v. United States*, 556 U.S. 938, 946 (2009).

108. *Id.* at 949–50.

109. *Id.* Thus, in *Stachon*, the Seventh Circuit found that plaintiffs' allegations described merely a conspiracy between a "buying club" and other entities to fraudulently sell discounted goods. *Stachon v. United Consumers Club*, 229 F.3d 673, 676 (7th Cir. 2000). The buying club directed all of the group's activities; there was no "command structure" distinct from it that would allow the group to function as a RICO organization. *See id.*

110. *See Pierson*, *supra* note 2, at 561–62 (noting the challenges inherent in differentiating association-in-fact enterprises from conspiracies after *Boyle*).

111. 610 F.3d 382 (7th Cir. 2010).

112. *Id.* at 384, 388–89.

113. In *Jay E. Hayden Found.*, the court upheld the dismissal of the suit nonetheless, noting that the complaint failed to allege that the conspirators *used* the enterprise to engage in a pattern of racketeering activity. They did not allege, for example, that the defendant bank officers had used the bank to assist the executor in perpetrating the fraud. These pleading deficits failed, in the end, to differentiate the enterprise from the conspiracy. *Id.* at 389.

114. Under Section 1964(c), civil causes of action are available only to those injured "by reason of" a defendant's RICO violation. 18 U.S.C. § 1964(c) (2012).

of the confusion lies, first and foremost, with U.S. Supreme Court case law, to which we now turn.

A. THE SUPREME COURT AND PROXIMATE CAUSATION

*Holmes v. Securities Investor Protection Corp.*¹¹⁵ was the Court's first major case addressing civil RICO's causation requirements. In it, respondent Securities Investor Protection Corporation (SIPC) alleged that petitioner Holmes was part of a conspiracy to manipulate stock prices which led to the inability of two broker-dealers to meet their financial obligations to customers thereby triggering the respondent's statutory duty to do so on the broker-dealers' behalf. To merit recovery, the majority specified that SIPC would need to establish that Holmes' conduct was both the "but for" and the proximate cause of its injuries.¹¹⁶ Taking account of common-law requirements, proximate causation requires "some direct relation between the injury asserted and the injurious conduct alleged."¹¹⁷ Thus, the Court found it to be lacking here since the harm that flowed from the stock-manipulation scheme targeted the broker-dealers; any injury to SIPC was necessarily secondary and contingent, making it too remote to satisfy the directness requirement.¹¹⁸

Fourteen years later, the Court revisited the *Holmes* causation standard in *Anza v. Ideal Steel Supply Corp.*¹¹⁹ In this case, the respondent corporation alleged that petitioners Joseph and Vincent Anza, owners of National Steel Supply, charged lower prices to its cash-paying customers by fraudulently failing to impose state sales tax thereby disadvantaging Ideal, its principal competitor. The Second Circuit found sufficient proximate causation based on these facts, reasoning that the complaint alleged that the Anzas "intended to and did give the defendant[s] a competitive advantage over the plaintiff,"¹²⁰ based on a pattern of racketeering activity.

The U.S. Supreme Court reversed.¹²¹ The majority recognized that this case differed factually from *Holmes* in that the harm suffered by the plaintiff was not contingent on the conduct of a third party.¹²² Nonetheless, the Court found proximate cause to be lacking, noting that the "direct victim" of the brothers' misconduct was the State of New York, not the plaintiff.¹²³ Consideration of the underlying premises of the directness requirement underscored the majority's conclusion. First, it would be difficult to determine the extent to which the defendants' alleged fraud,

115. 503 U.S. 258 (1992).

116. *Id.* at 268.

117. *Id.* at 268-69.

118. *Id.* at 270-71.

119. 547 U.S. 451 (2006).

120. *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004).

121. *Anza*, 547 U.S. at 462.

122. *Id.* at 458.

123. *Id.*

as opposed to other factors, contributed to its lowering of prices.¹²⁴ Likewise, the origin of plaintiff's lost sales would be tough to ascertain with any certainty since decreased revenue can result for myriad reasons.¹²⁵ Finally, the majority opined that a direct causal relationship is "especially warranted" where, as here, the primary victim of the alleged fraud is able to pursue, and accurately quantify, the financial injury suffered.¹²⁶ In sum, even if the defendants' intentional, fraudulent conduct were seen as targeting Ideal, the "indirect route" taken to accomplish its objectives negated proximate causation.¹²⁷

As the foregoing makes clear, *Anza* adopts a narrow reading of *Holmes* that focuses the proximate causation inquiry on the directness of the injury to the plaintiff. In 2008, the Supreme Court revisited this issue to resolve a different issue over which a circuit split had emerged: whether proximate causation required proof that the plaintiff had detrimentally relied on a defendant's misrepresentations.¹²⁸ In *Bridge v. Phoenix Bond & Indemnity Co.*,¹²⁹ Respondent Phoenix claimed that Petitioner Bridge and his associates fraudulently manipulated the bidding process at county tax-lien auctions to acquire a greater number of properties. To accomplish these objectives, petitioners allegedly lied to county officials about their compliance with a rule that disallowed multiple agents of a given competitor to participate in the rotational bidding procedure. Arguing that proximate causation requires first-party reliance on a defendant's misrepresentations, petitioners contended that Phoenix's RICO claim failed since any fraudulent statements by Bridge and his associates were made to the county, not to the plaintiff/respondent.¹³⁰ The Court disagreed, holding that first-party reliance was unnecessary to establish proximate causation.¹³¹

In a different section of its opinion, the Court spoke more generally about proximate cause requirements in civil RICO, and it is these statements that have created confusion. Factually distinguishing *Holmes* and *Anza*, the majority noted the directness of Phoenix's alleged injury in losing valuable tax liens, remarking that there is "no more immediate victim . . . better situated to sue."¹³² It commented, at the same time, that the harm to the respondents was "a foreseeable and natural consequence" of petitioners' fraudulent scheme.¹³³ This seeming embrace of foreseeability is both novel and curious. It had been mentioned only once previously in this context, ironically in an opinion by Justice Thomas dissenting from the Court's definition of proximate causation. Thomas advocated a stan-

124. *Id.*

125. *Id.* at 459.

126. *Id.* at 460.

127. *Id.* at 460–61.

128. *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 641–42 (2008).

129. *Id.*

130. *Id.* at 648.

131. *Id.* at 660.

132. *Id.* at 658.

133. *Id.*

dard broader than that of the *Anza* majority that would extend civil RICO liability to “indirect consequences that are foreseeable.”¹³⁴ To see this foreseeability language adopted two years later by a majority of the Court in *Bridge* is odd, to say the least.

In a purported attempt to demystify this causation conundrum, *Hemi Group, LLC v. City of New York*¹³⁵ addressed the foreseeability issue directly in 2010; unfortunately, its splintered reasoning only heightened the confusion. The New Mexico-based Hemi Group, the plaintiff/petitioner in this action, sold cigarettes online to customers in New York City tax free. To allow the City to collect taxes from the purchasers, federal law required Hemi to file paperwork with the State of New York which, in turn, forwards the documentation to the City so that it can seek collection from its residents. Hemi Group’s failure to do so led the City to bring a civil RICO claim against it, claiming that Hemi Group’s conduct deprived the City of “tens of millions of dollars” in lost tax revenues.¹³⁶

In dismissing the complaint, Chief Justice Roberts, joined by three others, found that the petitioner’s violation of federal reporting requirements under the Jenkins Act¹³⁷ did not lead directly to the respondent’s injuries. On the contrary, whereas the City’s lost revenue resulted from customers’ failure to pay cigarette taxes, the alleged fraud relied on entirely separate conduct: the failure to file reports mandated by federal law.¹³⁸ The necessity of going “well beyond the first step” to identify the plaintiff’s injury precluded satisfaction of RICO’s proximate cause requirement.¹³⁹ Justice Ginsburg joined in the dismissal of the complaint on different grounds related to limitations on recovery under the Jenkins Act, adding that she did not “subscrib[e] to the broader range of the Court’s proximate cause analysis.”¹⁴⁰

Three dissenting justices believed that proximate cause existed, assailing the majority’s focus on the directness of the injury in evaluating proximate causation.¹⁴¹ Directness, Justice Breyer opined, has traditionally operated to expand liability beyond what is foreseeable, not diminish it.¹⁴² Thus, because the harm to the City was plainly foreseeable from Hemi Group’s failure to supply the names of purchasers to the State, the complaint satisfied proximate causation requirements.¹⁴³

Because Justice Sotomayor did not participate in the case, *Hemi Group* provides no clear guidance on the role of foreseeability in civil RICO’s

134. *Id.* at 469–70 (Thomas, J., concurring in part and dissenting in part) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42 (5th ed. 1984)).

135. 559 U.S. 1 (2010).

136. *Id.* at 4.

137. 15 U.S.C. §§ 375–378 (2012).

138. *Hemi Group*, 559 U.S. at 11.

139. *Id.* at 10.

140. *Id.* at 19 (Ginsburg, J., concurring in part and concurring in the judgment).

141. *Id.* (Breyer, J., dissenting).

142. *Id.* at 25 (Breyer, J., dissenting).

143. *Id.* at 25–26 (Breyer, J., dissenting).

proximate cause analysis.¹⁴⁴ Four members of the Court unequivocally rejected it;¹⁴⁵ one refused to join in that rejection; three affirmatively embraced it; and one has taken no official position on the issue, but tends to side with those who favored it. In light of this uncertain terrain, it should come as no surprise that lower courts have struggled to understand how best to articulate proximate cause requirements in this context. RICO complaints filed against pharmaceutical companies in recent years have been especially useful in highlighting the controversy and its ramifications.

B. PROXIMATE CAUSATION, CIVIL RICO, AND “BIG PHARMA”

Since *Hemi Group* was handed down in 2010, drug manufacturers have defended, or continued to defend, a number of lawsuits brought under civil RICO by third-party payers alleging fraud in the marketing of high-profile medications. For example, in 2010, a jury assessed damages of \$140 million to Kaiser Foundation Health Plan, Inc. and Kaiser Foundation Hospitals (collectively Kaiser) against the international drug manufacturer Pfizer for fraud in the publicity and marketing of Neurontin for off-label uses.¹⁴⁶ In affirming the verdict,¹⁴⁷ the U.S. Court of Appeals for the First Circuit addressed proximate causation at length. Significantly, relying heavily on *Bridge*, it framed the Supreme Court’s directness requirement in terms of foreseeability, referencing the “core . . . principle of “allowing compensation for those who are directly injured, whose injury was plainly foreseeable and was in fact foreseen, and who were the intended victims of the defendant’s wrongful conduct.”¹⁴⁸ It also dismissed as irrelevant the argument that doctors function as “independent intervening causes” whose prescribing practices depend on factors unrelated to Pfizer’s marketing of a particular drug; rather than breaking the causal chain, as the defendant urged, the court believed that this concern sounded instead in the quantification of damages owed by Pfizer.¹⁴⁹

Perhaps even more noteworthy than its focus on *Bridge* is the First Circuit’s adoption of Justice Breyer’s proximate cause analysis in his *Hemi Group* dissent. It is not only difficult to square this approach with the Chief Justice’s opinion in *Hemi Group*, it is hard to reconcile it with the Supreme Court’s earlier decisions in *Holmes* and *Anza* which, as the Chief Justice noted in *Hemi Group*, made no mention whatsoever of foreseeability.¹⁵⁰

The Third Circuit articulated a similar causation standard in *In re*

144. *Id.* at 18 (majority opinion).

145. Justice Thomas, who had affirmatively embraced foreseeability in *Anza*, *see supra* text accompanying note 131, paradoxically joined the Chief Justice’s opinion rejecting it here.

146. *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 25–26 (1st Cir. 2013).

147. *Id.* at 31–40, 51.

148. *Id.* at 38.

149. *Id.* at 39, 42–43.

150. *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 12 (2010).

Avandia Marketing, Sales Practices & Product Liability Litigation.¹⁵¹ In this case, third-party payors (TPPs) alleged that the drug manufacturer GlaxoSmithKline misrepresented and concealed safety risks associated with certain diabetes medications to convince plaintiffs to include these drugs on their “formularies”¹⁵² and thereby suffer financial harm. In evaluating proximate causation, the appellate court concluded that, as in *Bridge*, the plaintiffs were the “primary and intended victims” of the defendant’s fraud and their financial injury was a “foreseeable and natural consequence of the scheme.”¹⁵³ The court also specified the uniqueness of the plaintiffs’ economic harm, reasoning that doctors suffered no direct harm while any physical harm suffered by patients was altogether different such that it had no relevance to proximate causation regarding TPPs.¹⁵⁴

Ironically, in a case with remarkably similar facts, the Second Circuit found proximate cause lacking.¹⁵⁵ As in *In re Avandia*, the plaintiffs in this RICO action were TPPs suing drug manufacturers for fraudulent misrepresentations concerning an expensive medication (Zyprexa) that led to its inclusion on the plaintiffs’ formularies.¹⁵⁶ Unlike the Third Circuit, the Second Circuit emphasized the case’s similarity to *Hemi Group*, concluding that the plaintiffs’ theory of liability was too attenuated in that it relied on the independent conduct “of third and even fourth parties” including doctors, Pharmacy Benefits Managers, and their Pharmacy and Therapeutics Committees.¹⁵⁷

The Seventh Circuit recently added its voice in a RICO suit filed by TPPs against the drug manufacturer Abbott Laboratories for the allegedly fraudulent marketing of the anti-seizure medication Depakote for off-label uses.¹⁵⁸ Noting the disagreement among the circuits that have addressed proximate causation in this context, the court agreed with the Second Circuit’s reasoning, finding that the causal chain was too long to satisfy the directness standard articulated in the Chief Justice’s principal opinion in *Hemi Group*.¹⁵⁹ The court emphasized that the misrepresentations at issue were directed at physicians, leaving open—at least impliedly—the potential for a different result if the defendants directed their fraudulent marketing campaign directly to TPPs, as was the case in *In re Neurontin* and *In re Avandia*.¹⁶⁰

151. See 804 F.3d 633 (3d Cir. 2015).

152. *Id.* at 626. If a drug is placed on the formulary, it acquires preferred status over competing drugs, which results in the plan assuming a greater percentage of the cost for the medication vis-à-vis plan members. See *id.* at 634–35.

153. *Id.* at 645 (citing *Bridge v. Phx. Board & Indem. Co.*, 553 U.S. 639, 658 (2008)).

154. *Id.* at 644.

155. *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 134 (2d Cir. 2010).

156. *Id.* at 129.

157. *Id.* at 134 (quoting *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 10 (2010)).

158. *Sidney Hillman Health Ctr. of Rochester v. Abbott Labs.*, 873 F.3d 574, 575–76 (7th Cir. 2017).

159. *Id.* at 578.

160. *Id.*

The uncertainty surrounding proximate causation is perhaps best illustrated by the ongoing multidistrict federal litigation by TPPs against manufacturers, sellers, and promoters of testosterone replacement therapy drugs in which the plaintiffs allege, *inter alia*, that defendants engaged in fraudulent marketing schemes that entitle them to damages under RICO. In a 2016 decision, the district court forthrightly noted that “[t]he parties disagree about the appropriate proximate cause standard that applies to civil RICO claims.”¹⁶¹ Unsurprisingly, the plaintiff focused on *Bridge*, arguing that it was the intended target of the defendants’ conduct and its injuries were a “foreseeable and natural consequence” of the marketing scheme at issue.¹⁶² By contrast, defendants focused on the directness of the injury to the alleged misconduct, which more closely tracks the analysis applied by the Supreme Court in *Holmes*, *Anza*, and *Hemi Group*’s plurality opinion.¹⁶³ They asserted, to that end, that proximate causation was lacking because “too many independent steps . . . separate[d] the misconduct and the injury,” including the personal prerogatives of patients and physicians vis-à-vis medication choices.¹⁶⁴

The district court sided with the plaintiff.¹⁶⁵ In so doing, however, the judge did not focus on *Bridge*’s foreseeability language. Instead, he emphasized the “direct misrepresentations” made by the defendants to the plaintiff that led the TPP to include testosterone replacement medications on its formularies, noting that any steps that occur between the alleged fraud and the plaintiff’s injury do not interrupt the “direct and immediate” relationship between those events.¹⁶⁶ This analysis echoes the Seventh Circuit’s reference the following year in *Sidney Hillman Health Center of Rochester* to the potential significance in the proximate cause context of the party to whom the alleged fraud is directed.¹⁶⁷ Curiously, this is not a consideration that the U.S. Supreme Court has highlighted to date, perhaps because its importance is more paramount in pharmaceutical cases than in the other, diverse contexts addressed by the justices in civil RICO litigation.

V. FROM THE MOB TO THE #METOO MOVEMENT

Keeping in mind that the U.S. government enacted RICO to eradicate organized crime, the foregoing paints a far different modern-day picture. We have learned that a RICO enterprise may be a loose, informal associ-

161. *In re Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings*, 159 F. Supp. 3d 898, 916 (N.D. Ill. 2016).

162. *Id.* at 917.

163. *Id.* at 917–18.

164. *Id.* at 918.

165. *Id.* at 919–20.

166. *Id.* at 919. In the court’s only implicit reference to *Bridge*, it noted that, when fraudulent misrepresentations of the kind alleged here so “infect” the chain of causation that a TPP unwittingly includes a medication in its formulary, “it becomes virtually inevitable (and thus foreseeable) that it will pay for unnecessary, off-label uses of the drug.” *Id.*

167. *Sidney Hillman Health Ctr. Of Rochester v. Abbott Labs.*, 873 F.3d 574, 578 (7th Cir. 2017).

ation-in-fact of distinct entities that lacks any formal hierarchical structure. The enterprise must have a “common purpose,” but that unlawful purpose need not reflect participants’ primary, day-to-day conduct; enterprises can be, and often are, versatile, flexible, and diverse entities. And while there must be a direct relationship between the enterprise’s allegedly unlawful conduct and plaintiff’s injury, the precise parameters of this connection remain unclear. It may be enough that the conduct is intentional and the harm foreseeable.

This thumbnail portrait of civil RICO provides a backdrop to the complaint filed on December 6, 2017 by six women against Harvey Weinstein and others, including Miramax Film Corporation.¹⁶⁸ The named plaintiffs purport to represent a “Nationwide Class” of women who had face-to-face interaction with Weinstein for purposes of employment with his company or Miramax.¹⁶⁹ According to the complaint, Weinstein, aided by firms and entertainment executives with whom he worked, constituted the “Weinstein Sexual Enterprise” whose common purpose “was to harass and mislead Class members and the media to prevent the victims from reporting Weinstein’s sexual misconduct and to destroy evidence.”¹⁷⁰

The complaint recounts the personal experiences of the six named plaintiffs, all of whom describe how Weinstein assaulted them sexually with the cooperation and assistance of members of the Weinstein Sexual Enterprise.¹⁷¹ The complaint also includes less detailed accounts of sexual assault from a host of other women, a number of whom are prominent film actresses, such as Rosanna Arquette, Ashley Judd, and Angelina Jolie.¹⁷² Collectively, according to the plaintiffs, these accounts establish a pattern of racketeering activity through ongoing violations of federal laws pertaining to mail and wire fraud, witness tampering, and “obtaining a victim for the purpose of committing or attempting to commit aggravated sexual abuse.”¹⁷³ As a result of this alleged abuse perpetrated by the enterprise, plaintiffs claim “injur[y] in their property and business” through loss of “employment and employment opportunities, as well [as] . . . contractual opportunities.”¹⁷⁴

An assessment of the complaint’s likelihood of success on the merits of the RICO claim requires identification of those issues that are most, and least, challenging for plaintiffs. First, we can expect the defendants to

168. Complaint at 1, *Geiss v. Weinstein Co. Holdings, LLC*, No. 1:17-cv-09554 (S.D.N.Y. Dec. 6, 2017).

169. *Id.* at 51.

170. *Id.* at 40.

171. For example, Katherine Kendall describes an incident in 1993 when Weinstein chased her around his apartment naked, demanding sexual favors. When she refused, he told her he was insulted, commenting that actresses do this sort of thing all the time. *Id.* at 20–22.

172. For example, the complaint alleges that Weinstein made “unwanted advances” towards Jolie in her hotel room and, when Arquette visited his hotel room, Weinstein allegedly forced her to massage his neck and “pulled her hand towards his erect penis.” *Id.* at 18.

173. *Id.* at 56.

174. *Id.* at 58–59.

challenge the existence of a RICO enterprise, arguing that the alleged members of the “Weinstein Sexual Enterprise” are, in fact, no more than a haphazard assortment of individuals who sporadically and episodically helped Weinstein manage his business relationships. However, this contention, even if true, does not negate the existence of an association-in-fact enterprise which, as we have seen, may be a loose and informal group of distinct entities who participate in the organization of unlawful activities at different times and in different ways.¹⁷⁵

Likewise, defendants will struggle to refute plaintiffs’ satisfaction of the common purpose requirement. The complaint clearly describes a scheme whereby members of the enterprise worked together to achieve unlawful objectives related to facilitating, and subsequently covering up, sexual misconduct. In cases where the court found common purpose to be lacking, such as *Ray v. Spirit Airlines*, various members had no identifiable interest in pursuing the alleged unlawful objectives.¹⁷⁶ In the instant case, by contrast, the entities and individuals assisting Weinstein shared an interest in covering up his felonious conduct to safeguard his reputation and preserve the economic vitality of his projects whose profitability inured to their benefit either directly or indirectly.

Causation, on the other hand, poses a far greater challenge for the plaintiffs. To establish proximate cause, they must show a direct relationship between the enterprise’s unlawful conduct and the injury suffered. Even accepting plaintiffs’ allegations as true, the link between the sexual misconduct and the loss of employment opportunity may be too attenuated to satisfy the Supreme Court’s proximate cause standard articulated in *Hemi Group* and earlier cases. Employment opportunity in the entertainment industry undoubtedly is influenced by subjective and independent factors, such as talent, availability, and presence in the right place at the right time. Similar arguments held sway in the Second Circuit case of *UFCW Local 1776* where the Court dismissed TPPs’ RICO claims against the manufacturers of Zyprexa, finding that any allegedly fraudulent marketing was insufficiently connected to plaintiffs’ financial harm due to the decisional intervention of other parties.¹⁷⁷

On the other hand, the causation standard forwarded in *Bridge* supports a different conclusion: proximate cause exists because the plaintiffs were the intended victims of the defendants’ misconduct, and the plaintiffs’ loss of opportunity was a natural and foreseeable consequence in light of Weinstein’s power and influence in the entertainment industry.¹⁷⁸ Moreover, proximate causation requires proof that the defendants’ conduct was a substantial cause, not the sole cause, of plaintiffs’ injuries.¹⁷⁹ Additionally, cases involving fraudulent marketing of medication by

175. See *supra* text accompanying notes 38–62.

176. See *supra* text accompanying notes 73–75.

177. *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 134 (2d Cir. 2010).

178. Complaint, *supra* note 168, at 58–59.

179. See, e.g., *Trollinger v. Tyson Foods, Inc.*, 370 F.2d 602, 620 (6th Cir. 2004).

pharmaceutical companies provide an imperfect analogy. Doctors and Pharmacy Benefit Managers wield independent authority in prescribing medication or determining its suitability for inclusion on a health plan's formulary. By contrast, Weinstein's power is so all-consuming as to overwhelm the contribution of any otherwise independent actor in the chain of authority for hiring decisions in Hollywood.¹⁸⁰

In sum, then, the civil RICO action against Harvey Weinstein and his associates, while provocative, is viable. And that is the point. By the end of 2017, a federal statute passed decades ago to undermine the Cosa Nostra is targeting instead the "Weinstein Sexual Enterprise" and has injected itself into messy divorce proceedings, educational fraud, police misconduct, and even animal rights.¹⁸¹ RICO has truly run amok, and Congress does not seem to care.

180. See Complaint, *supra* note 168, at 10–11 (detailing Weinstein's power and influence in the film industry).

181. See *Feld Entm't, Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 332–33 (D.D.C. 2012) (denying motion to dismiss). The plaintiff, owner of Ringling Brothers and Barnum & Bailey Circus, sued the ASPCA and other animal-rights organizations under RICO for paying a fact witness, later found not to be credible, in litigation over the circus's use of elephants. On December 28, 2012, the ASPCA settled with Feld for 9.3 million dollars. See Meredith Bennett-Smith, *Ringling Bros. Wins \$9.3 Million In Settlement From ASPCA Over Claims Of Elephant Abuse*, HUFFPOST (Dec. 31, 2012), https://www.huffingtonpost.com/2012/12/31/ringling-bros-wins-93-million-aspc-a-phant-abuse-in-question_n_2388822.html [<https://perma.cc/3CX2-FSLR>]. For criticism of the use of civil RICO in this context, see Jaime I. Roth, *Reptiles in the Weeds: Civil RICO vs. the First Amendment in the Animal Rights Debate*, 56 U. MIAMI L. REV. 467 (2002).