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A Bridge to Somewhere: How a Bolder Causal Analysis Can Shape Civil RICO into the Ideal Free Market Safeguard

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A *BRIDGE* TO SOMEWHERE: HOW A BOLDER CAUSAL ANALYSIS CAN SHAPE CIVIL RICO INTO THE IDEAL FREE MARKET SAFEGUARD

INTRODUCTION

> [Wrongdoers] must themselves suppose that the [wrongs] can be done, and done by them: either that they can do it without being found out, or that if they are found out they can escape being punished, or that if they are punished the disadvantage will be less than the gain for themselves or those they care for.[1]

On November 9, 2007, Merck & Co. agreed to a blanket settlement of thousands of cases brought regarding the potentially life-threatening side effects from its drug, Vioxx.[2] It came to light that, for years, Merck sales teams played down the dangers of Vioxx and went so far as to pressure a Food and Drug Administration (FDA) official to keep quiet about his concerns regarding the drug.[3] At the time, Vioxx averaged $2.5 billion in annual sales.[4]

Nearly a year later, on June 19, 2008, a month after Bear Stearns' collapse, two former Bear Stearns managers, Matthew Tannin and Ralph Cioffi, became the first executives of many to be charged criminally in the wake of the current subprime market crisis.[5] Following a federal investigation, both men were indicted for securities and wire fraud.[6] Over three months later, with markets plummeting, Christopher Cox, head of the Securities and Exchange Commission (SEC), testified before the Senate banking panel, conceding the SEC's performance in monitoring Bear Stearns was "fundamentally flawed."[7]

Although from widely disparate industries, Merck and Bear Stearns both faced allegations of misleading federal regulators and extracting market advantage in the process. The stories of these two corporate giants illustrate

1. Aristotle, *Rhetoric* (Friedrich Solmsen ed., W. Rhys Roberts trans.), *in* THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT 179, 205 (Patricia Bizzell & Bruce Herzberg eds., 2d ed. 2001).

2. Alex Berenson, *Analysts See Merck Victory in Vioxx Deal*, N.Y. TIMES, Nov. 10, 2007, at A1.

3. Carrie Johnson, *Merck Agrees to Blanket Settlement on Vioxx*, WASH. POST, Nov. 10, 2007, at D1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/11/09/AR2007110900597.html.

4. *Id*.

5. Landon Thomas, Jr., *First Risk, Then Charges*, HOUSTON CHRON., June 20, 2008, at 1.

6. *Id*.

7. Stephen Labaton, *S.E.C. Concedes Oversight Flaws Fueled Collapse*, N.Y. TIMES, Sept. 27, 2008, at A1.

the vulnerability and inefficacy of regulatory agencies. Merck's settlement was the result of thousands of private claims for damages caused by its drug.[8]

Such private claims provide disincentive for companies willing to deceive government regulators. Yet, the future availability of these claims is far from certain. In a 2008 decision, *Riegel v. Medtronic, Inc*.,[9] the Supreme Court held that because the FDA's pre-market approval process contained federal requirements, FDA approval of medical devices preempted state common-law claims of negligence, strict liability, and implied warranty against the manufacturer of a faulty medical device.[10] More recently, in *Wyeth v. Levine*,[11] the Court held that the FDA's approval of the defendant-drug manufacturer's label did not preempt an injured consumer's failure to warn claim.[12] The Court focused on the manufacturer's *post*-FDA approval duty to inform consumers of new risks.[13] This means claims based on *pre*-FDA approval actions remain subject to preemption.[14] The larger question still looms: to what extent the public must rely on regulatory bodies in a post-*Wyeth* landscape.

What if the same free market forces that led these actors astray could be redirected in a way to entice companies to keep industry competitors honest? What if businesses had to play by the rules because failing to do so would mean giving up market share and filling the coffers of competitors? Do honest businesses have a viable and powerful cause of action against competing businesses that attain economic advantage through misleading behavior? The answers to these anticipated questions lie within the Supreme Court decision, *Bridge v. Phoenix Bond & Indemnity Co.*,[15] which has the potential to transform civil RICO from an unwieldy weapon into a powerful corporate instrument for maintaining industry-wide honesty.[16]

In *Bridge*, the Supreme Court unanimously held that a plaintiff raising a claim based on mail fraud under the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1964 is not required to demonstrate reliance on the defendant's alleged misrepresentations.[17] RICO provides a private right of action for treble damages to "[a]ny person injured in his business or property by reason of a violation" of the Act.[18] In *Bridge*, each

8. Johnson, *supra* note 3, at D1.
9. 553 U.S. at ___, 128 S. Ct. 999 (2008).
10. *Id.* at 1007.
11. 555 U.S. at ___, 129 S. Ct. 1187, 1204 (2009).
12. *Id.*
13. *Id*. at 1193–1201.
14. *See* Longs v. Wyeth, 621 F. Supp. 2d 504, 508–09 (N. D. Ohio 2009).
15. 553 U.S. ___, 128 S. Ct. 2131 (2008).
16. *Id.*
17. *Id.* at 2145.
18. *Id*. at 2134. *See also* 18 U.S.C. § 1964(c) (2006).

year the Cook County, Illinois, Treasurer's Office auctioned tax liens acquired on the property of delinquent taxpayers.[19] These liens proved to be smart investments, since many property holders would be unable to redeem their property, and thus allowed the purchasers of the liens to acquire the property and collect significant gains.[20] The auction proved so lucrative that the County began limiting the number of bidders through its "Single, Simultaneous Bidder Rule."[21] The plaintiff, a regular customer at the auction (along with the defendant), brought suit under RICO against the defendant alleging the defendant company filed false attestations that it was in compliance with the County's rule.[22]

The issue decided in *Bridge*, "whether first-party reliance is an element of a civil RICO claim predicated on mail fraud,"[23] exists within the proximate cause requirement first established in *Holmes v. Securities Investor Protection Corp.*,[24] and later affirmed in *Anza v. Ideal Steel Supply Corp*.[25] Since *Holmes*, decided in 1992, the Court has read a proximate cause requirement into the language of § 1964.[26] At the same time, the Court has continually recognized that "[p]roximate cause . . . is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'"[27] Despite this flexibility, *Anza* incorporated a "directness" element into the civil RICO proximate cause requirement that limits recovery only to the "immediate" victims of a predicate act.[28] Often, the most immediate victims of consumer fraud are injured consumers. Yet, the effect of legislative and judicial "tort reform" efforts have left injured consumers without the ability to seek damages from corporate wrongdoers.[29] Given the inability of consumers to recover damages, corporate wrongdoers are able to take advantage of imperfect regulatory oversight in order to gain the market share of its competitors.

19. *Id.* at 2135.

20. *Bridge*, 128 S. Ct. at 2135.

21. *Id.*

22. *Id.* at 2136.

23. *Id*. at 2137.

24. 503 U.S. 258, 275–76 (1992).

25. 547 U.S. 451, 459–60 (2006).

26. *See id.* The *Holmes* Court cites the previous observation that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 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 . . . .'" 503 U.S. at 267.

27. *See Bridge*, 128 S. Ct. at 2142 (quoting Associated Gen. Contractors Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983)).

28. *See Anza*, 547 U.S. at 458–59.

29. *See* G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?,"* 43 VAND. L. REV. 851, 937–38 (1990).

This comment proposes the Court address this problem by reshaping its proximate cause analysis to recognize the intended victims of corporate fraud: honest competitors that have lost market share due to fraud, deception, and misrepresentation. The Court must allow honest corporations, injured by a competitor's wrong, to bring civil RICO claims based on the wrongdoer's intended outcome, as determined using a means–end analysis. Doing so means filling the gap left by individual consumers unable to act as private attorneys general. The following hypothetical may help to illustrate how a corporation may invoke civil RICO that will, perhaps, invite the Court to directly address this very issue in the future.

Suppose ABC Corp. and XYZ Corp. are competing pharmaceutical device companies. Both are engaged in a fierce competition to begin marketing their own versions of an insulin delivery device. Both companies also began the FDA's pre-market approval process almost simultaneously. And nearly a year later, FDA granted full approval to ABC's insulin delivery device Apulert and to XYZ for its equivalent, Exulert.

Following the approval of both drugs, advertising became heated. In fact, XYZ produced marketing materials received by physicians that flaunted what it claimed were "superior trial results." A few weeks later, evidence arose that XYZ had withheld information from federal regulators, fabricating a large portion of its trials. A resulting investigation revealed the fabrication began five months prior to Exulert's release.

Following the evidentiary disclosure, patients who used Exulert began complaining of harmful side effects. These individuals seeking relief through the courts were dismayed by the the plaintiffs' firms hesitance and often outright refusal to agree to provide representation. Prior to refusing, attorneys explain that individuals harmed by Exulert are unable to invoke state consumer fraud acts. With these tort reform measures in place, attorneys are reluctant to invest the massive resources needed for pursuing individual claims, much less bringing mass action of individual claims.

Moreover, although FDA representatives promise closer scrutiny, the public is wary to rely yet again on a regulation process that allowed Exulert onto the market. So, what prevents corporate actors like XYZ from cutting corners in the future? More immediately, how helpful is the causal analysis from *Holmes*, *Anza*, and *Bridge*? Who, if anyone, is in the best position to right the wrong caused by XYZ?

This Comment explores the future benefits *Bridge* may provide to corporations and society at large. This exploration will begin with a brief introduction to the legislative inception and judicial expansion and contraction of RICO. While doing so, the comment will lay out the causal analysis set out in *Holmes* and affirmed in *Anza*. Next, the Comment will discuss Justice Thomas' causation analysis, which, while excising reliance as an element, leaves room for further helpful direction involving future invocations of RICO

in civil actions. Finally, the Comment examines the significance of the Court's decision amidst political pressure to remove RICO as a tool for civil litigators. The Court's adoption of proximate causation suggests civil RICO can be tailored in a way that creates a powerful instrument for businesses injured by third party misrepresentations and that will keep businesses honest and compensate business for damages caused by deceptive, fraudulent, and dishonest competitors.

I. THE RISE OF CIVIL RICO

A. Congress' Fix-all Answer to the Economic Effects of Organized Crime

RICO first appeared within Title IX of the Organized Crime Control Act (OCCA) of 1970.[30] In 1969, Congress sought to combat "a new threat to the American economic system."[31] At the time, organized crime exerted corrupt influence over abundant legitimate businesses and labor unions.[32] RICO grew out of Congress' search for a satisfactory remedy to remove the corrupt influence from these legitimate business practices.[33] Congress' attack would expand beyond individual wrongdoers into "new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the nation."[34] The Senate Judiciary Committee emphasized: "[A]n attack must be made on their source of economic power itself, and the attack must take place on all available fronts."[35]

The Senate bill, at its inception, "limited civil remedies to injunctive actions brought by the United States, but the House added a treble-damages remedy modeled on section 4 of the Clayton Act."[36] Ultimately, Congress passed the RICO statute containing a civil cause of action: "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 and shall recover threefold the damages he sustains and the cost of the suit,

30. Pub. L. No. 91-452, 84 Stat. 922, 941 (1970); *see* GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 2–5 (2d ed. 2000) (describing the statutory history and subsequent case law of civil RICO).

31. G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 256–57 (1982).

32. *See* S. REP. NO. 91-617, at 76–78 (1969).

33. *See* Blakey & Perry, *supra* note 29, at 249.

34. FRANK J. MARINE & PATRICE M. MULKERN, CIVIL RICO: 18 U.S.C. §§ 1961–1968: A MANUAL FOR FEDERAL ATTORNEYS at, 17 (2007), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/civrico.pdf.

35. S. REP. NO. 91-617, at 79 (1969).

36. JOSEPH, *supra* note 30, at 2.

including a reasonable attorney's fee."[37] In passing RICO, Congress provided a broad remedy that had enormous implications.

Congress had reason to shape RICO into a broad and far-reaching tool—organized crime had infiltrated legitimate businesses, weakening the country's economic system.[38] Further, Congress found existing remedies "unnecessarily limited in scope and impact."[39] As a result, the OCCA, that created RICO, provides that "[t]he provisions of this title [RICO] shall be liberally construed to effectuate its remedial purposes."[40] From its inception, RICO's breadth has troubled courts tasked with defining its diffuse boundaries.[41] And, because of this, Civil RICO has been called "an unusually potent weapon—the litigation equivalent of a thermonuclear device."[42]

The elements of § 1962(c) contemplate an array of corporate activity involved either directly or indirectly with "a pattern of racketeering."[43] The expansiveness of the criminal action further evinces Congress's desire to create RICO as an extensive and far-reaching remedy.[44] Stated simply, § 1962(a) makes it unlawful for "any person" who has "received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income . . . [in the] operation of, any enterprise."[45]

Civil RICO is broad. The word *person* is defined to include "any individual or entity capable of holding a legal or beneficial interest in property."[46] While this definition has been interpreted to include corporations,[47] the term "enterprise" includes "any individual, partnership, corporation, association, or other legal entity."[48] Moreover, "pattern of racketeering activity" simply "requires at least two acts of racketeering activity."[49] The term "racketeering activity" is equally broad and includes, as

37. 18 U.S.C. § 1964(c) (2006); *see also* JOSEPH, *supra* note 30, at 3 ("The eleventh-hour addition of a civil remedy not confined to governmental plaintiffs may help to explain the volume of issues that the Congress never expected or considered.").

38. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923.

39. *Id*.

40. *Id.* § 904(a).

41. JOSEPH, *supra* note 30, at 3 ("There is always a tension between a liberal construction of a statute and a tendency to overextend it to accomplish ends that the statute was never designed to achieve.").

42. Schmidt v. Fleet Bank, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998).

43. 18 U.S.C. § 1962(c) (2006).

44. Amy Franklin et al., Comment, *Racketeer Influenced and Corrupt Organizations*, 45 AM. CRIM. L. REV. 871, 872 (2008).

45. 18 U.S.C. § 1962(a).

46. *Id.* § 1961(3).

47. Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1306 (7th Cir. 1987).

48. 18 U.S.C. §1961(4) (2006).

49. *Id.* § 1961(5).

predicate acts, nearly eighty federal criminal acts from Title 18, ranging from counterfeiting to murder.[50] Violations of 18 U.S.C. § 1341 and § 1343, relating to mail fraud and wire fraud respectively, are included as racketeering activity.[51]

Because of RICO's characteristic broadness, courts have dubbed it "an aggressive initiative to supplement old remedies and develop new methods for fighting crime."[52] Civil RICO provides a broad avenue for plaintiffs seeking to remedy wrongs. Yet, civil RICO's breadth also raises considerable challenges. First, the breadth of civil RICO is problematic for the pragmatic reason of docket pressure and the challenge of creating coherent precedent between the circuits. The Supreme Court's decision in *Bridge* could allow civil RICO claims to be crafted for criminal violations and will provide judicial unity and consistency of the elements of a civil RICO claim, including, most importantly, the causation requirement. Prior to *Bridge*, the Court in *Sedima, S.P.R.L. v. Imrex Co.* addressed the challenge confronted by divisions in several circuits that arrived with several different interpretations of what Congress intended RICO to accomplish.[53]

B. "Calling It What It Is": Sedima Reaffirms Circuit Courts' Worst Fears

Several years into the law's life, plaintiffs rarely invoked provisions of RICO to bring civil claims.[54] Beginning around 1978, however, civil RICO claims expanded tremendously as plaintiffs began taking advantage of the wide scope of RICO.[55] These plaintiffs had little trouble drafting RICO claims within the statute's broad language, including its expansive definitions of "pattern of racketeering activity"[56] and "enterprise."[57] Further sweetening the pot, plaintiffs were likely attracted to the possibility of treble damages and attorney's fees.[58]

50. *See id.* § 1961(1).

51. *Id.*

52. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498 (1985) (citing Russello v. United States, 464 U.S. 16, 26–29 (1983)).

53. *Id.* at 485–86.

54. Eric Lloyd, Comment, *Making Civil RICO "Suave": Congress Must Act to Ensure Consistent Judicial Interpretations of the Racketeer Influenced and Corrupt Organizations Act*, 47 SANTA CLARA L. REV. 123, 129–30 (2007) (finding courts published only two private civil RICO decisions between 1970–1977).

55. *See* Stephen D. Brown & Alan M. Lieberman, *Rico Basics: A Primer*, 35 VILL. L. REV. 865, 865 (1990).

56. 18 U.S.C. §§ 1962(b), 1961(5) (2006).

57. *Id.* §§ 1962(c), 1961(4).

58. *See id.* § 1964(c).

Despite the statute's express command that RICO be "liberally construed," federal courts attempted to limit the scope of civil RICO.[59] The Ninth Circuit attempted to limit civil RICO to "traditional" organized crime activities,[60] while the Tenth Circuit required plaintiffs to allege defendants' connection to organized crime.[61] Citing RICO's Clayton Act origins, the Second Circuit construed civil RICO claims to be limited to activities that arose from competitive injury.[62]

Facing growing rifts as a result of differing interpretations between the circuits, the Supreme Court granted certiorari in 1985 in *Sedima* in response to the Second Circuit's attempt to draw in and limit the scope of civil RICO claims.[63] The Court characterized the Second Circuit's command that plaintiffs "must seek redress for an injury caused by conduct that RICO was designed to deter" as "unhelpfully tautological."[64] First, the Court refused to read in a prior conviction requirement, citing, among several reasons, Congress' underlying policy concerns.[65] Next, the Court explained, "Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps."[66] The Court also rejected the Second Circuit's attempt to read the "racketeering activity" definition in § 1961(1) to require a "racketeering injury."[67] *Sedima* established that racketeering activity must only include the commission of a predicate act.[68]

59. Michael Goldsmith & Mark Jay Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735, 736 n.2 (1990).

60. *Id.*; *see, e.g.*, Lopez v. Dean Witter Reynolds, Inc., 591 F.Supp 581, 588 (N.D. Cal. 1984), *aff'd.*, 805 F.2d 880 (9th Cir. 1986) (finding that to ensure the statute is not applied broader than Congress intended, civil RICO actions should only be allowed where the "associated 'enterprise' is organized solely for criminal purposes").

61. *Id.*; *see, e.g.*, Plains Res., Inc. v. Gable, 782 F.2d 883, 887 (10th Cir. 1986) (holding that an added requirement of alleging defendant's connection to criminal organized conduct is against the legislative history and Supreme Court interpretation of the Civil RICO statute). The additional requirement of alleging defendant's connection to organized crime was a fleeting requirement. *See* Goldsmith & Linderman, *supra* note 59, at 736 n.2.

62. *Id.*; *see, e.g.*, Bankers Trust Co. v. Feldesman, 566 F.Supp. 1235, 1241 (S.D.N.Y. 1983), *aff'd sub nom.* Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984), *vacated*, 473 U.S. 922 (1985) (stating that it was appropriate to limit the remedy of section 1964 to "the class of plaintiffs who have suffered a competitive injury" from defendant's conduct).

63. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 485–86 (1985).

64. *Id.* at 494.

65. *Id.* at 493. The Court refused to accept the Second Circuit's policy that "a private treble-damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted." *Id*.

66. *Id*. ("This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice.").

67. *Id*. at 494–95.

68. *Sedima*, 474 U.S. at 495.

The Court concluded that Section 904(a) of the Organized Crime Control Act of 1970 required RICO "to 'be liberally construed to effectuate its remedial purposes.'"[69] The Court clearly stated, "The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[70] In its holding, the Court acknowledged RICO's evolution into "something quite different from the original conception of its enactors."[71] The "extraordinary" applications of civil RICO are "the result of the breadth of the predicate offenses, in particular, the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern.'"[72] As a result, the Court effectively held that a plaintiff bringing a civil RICO claim is not required to allege "any injury apart from that suffered on account of the predicate acts."[73]

Further, the Court clarified that a RICO "plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."[74] While the Court acknowledged the struggle of courts to define "racketeering injury," the Court cautioned against circuit courts imposing requirements like the Second Circuit's "racketeering injury" requirement since "'racketeering activity' consists of no more and no less than commission of a predicate act.[75] Later echoed in *Bridge*, the Court refused to provide a judicial remedy to what it perceived as a legislative problem.[76] By rejecting attempts by appellate courts, like the Second Circuit, to limit civil RICO standing and leaving the task of defining RICO in the hands of Congress, *Sedima* provided little relief to courts facing an expansive diversity of RICO claims.[77] Even so, circuit courts had little patience for Congress' inaction.[78] Strained from creative invocations of civil RICO, circuit courts continued the search for a way to further narrow civil RICO standing.[79]

69. *Id*. at 498 (citations omitted).

70. *Id.* (citing Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984)).

71. *Id*. at 500.

72. *Id*.

73. Lloyd, *supra* note 54, at 134.

74. *Sedima*, 473 U.S. at 496.

75. *Id.* at 495.

76. *Id.* at 499; *see* Bridge v. Phoenix Bond & Indemn. Co., 553 U.S. ___, 128 S. Ct. 2131, 2145 (2008).

77. *Sedima*, 473 U.S. at 496.

78. *See* Barticheck v. Fid. Union Bank/First Nat'l State, 832 F.2d 36 (3d. Cir. 1987); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987).

79. *See, e.g.*, Potomac Elec. Power Co. v. Elec. Motor and Supply, Inc., 262 F.3d 260 (4th Cir. 2001).

*C. Post-*Sedima *Circuit Court Attempts to Narrow Civil RICO Standing*

While interpreting civil RICO consistently with the *Sedima* Court's command of liberal construction, appellate courts still took strides to rein in civil RICO.[80] The first post-*Sedima* attempts to limit civil RICO standing took aim at the injury requirement of a civil RICO claim. For instance, the Ninth Circuit instructed that "'[a]bsent damages, a RICO claim cannot be maintained.'"[81] Many other circuit courts defined the restriction and specific types of injuries compensable under § 1964(c). Several post-*Sedima* circuit decisions have attempted to further define circumstances under which civil RICO claims can proceed.[82]

Among the early appellate courts to act, the Eleventh Circuit in *Grogan v. Platt*[83] held that plaintiffs could not recover under civil RICO for "personal injuries" and the resulting economic consequences.[84] In a complaint brought by federal agents and the estates of other agents involved in a shootout with criminal suspects, the court was "sympathetic to appellants' argument that permitting recovery in this case would help to deter the kind of activity that RICO was designed to prevent."[85] The court, however, focused its inquiry on whether the "appellants seek the kind of recovery that RICO was designed to afford."[86]

The court read the words "business or property" within § 1964(c) to exclude personal injury and wrongful death damages.[87] In the court's view, "[T]he ordinary meaning of the phrase 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom."[88] Instead, the court found that "[t]he requirement that the injury be to the plaintiff's business or property means that the plaintiff must show a proprietary type of damage."[89]

Other circuits expanded on the Eleventh Circuit's interpretation of the "business or property" phrase of § 1964(c). The following year, with *Rylewicz v. Beaton Services, Ltd.*, the Seventh Circuit similarly found that "injury to business or property" excluded forms of physical, mental, or emotional

80. *See* Franklin et al., *supra* note 44 at 912; *see also* Lloyd, *supra* note 54, at 135–38 (discussing circuit court attempts at limiting civil RICO standing).

81. Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990) (citations omitted).

82. *See, e.g.*, *id.*; Grogan v. Platt, 835 F.2d 844 (11th Cir. 1988); Bast v. Cohen, Dunn & Sinclair, PC, 59 F.3d 492, 495 (4th Cir. 1995); Drake v. B.F. Goodrich Co., 782 F.2d 638, 644 (6th Cir. 1986).

83. 835 F.2d 844 (11th Cir. 1988).

84. *Id.* at 846–47.

85. *Id.* at 848.

86. *Id.*

87. *Id.* at 847.

88. *Grogan*, 835 F.2d at 847.

89. *Id.*

suffering.[90] More recently, in the *Diaz v. Gates* case, the Ninth Circuit adopted the Eleventh Circuit's interpretation, explaining, "Without a harm to a specific business or property interest . . . there is no injury to business or property within the meaning of RICO."[91]

This reading of § 1964(c) left civil RICO less appealing to individual plaintiffs seeking compensation for both economic and noneconomic damages.[92] Further decisions construed the harm "to a specific business or property interest" in a way that is increasingly better tailored to the interaction between a business and an individual as well as between businesses; for example, the Ninth Circuit explained, "To demonstrate injury for RICO purposes, plaintiffs must show proof of concrete financial loss, and not mere injury to a valuable intangible property interest."[93]

In *Mendoza v. Zirkle Fruit Co*., the Ninth Circuit reviewed a case in which agricultural workers sued their employers for suppressing the workers' wages by hiring undocumented workers for considerably cheaper pay.[94] The Ninth Circuit held that the workers satisfied the requirement to allege a sufficient injury to a property interest; specifically, the "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes."[95] In contrast with *Doe* and *Grogan*, the Ninth Circuit's finding that the agricultural workers "legal entitlement to business relations" exists as a property interest is an indication of the court's willingness to adhere to RICO's liberal construction clause.[96]

The various interpretations of RICO definitions indicate the discord that exists between the circuits. To provide direction, the Supreme Court granted certiorari to resolve the conflict between the circuits on the issue of causation.[97] In focusing its analysis on the separation between direct and indirect victims, *Bridge* affirms the role of causation as a vital factor used by courts to determine the permissive scope of civil RICO claims.[98]

90. Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175, 1180 (7th Cir. 1989). Also, with *Doe v. Roe*, the Seventh Circuit expounded finding the terms "business or property" to be words of limitation that preclude recovery for "personal injuries and pecuniary losses included thereform." 958 F.2d 763, 767 (7th Cir. 1992).

91. Diaz v. Gates, 420 F.3d 897, 900 (9th Cir. 2005).

92. *See* JOSEPH, *supra* note 30, at 30.

93. Chaset v. Fleer/Skybox Int'l, 300 F.3d 1083, 1086–87 (9th Cir. 2002).

94. 301 F.3d 1163, 1166–67 (9th Cir. 2002).

95. *Id*. at 1168 n.4.

96. *See* Lloyd, *supra* note 54, at 149–50.

97. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 264–65 (1992).

98. Benjamin M. Daniels, Note, *Proximately* Anza*: Corporate Looting, Unfair Competition, and the New Limits of Civil RICO*, 85 WASH. U. L. REV. 611, 628–29 (2007).

II. REVIEWING THE BLUEPRINTS: THOMAS' STATUTORY CONSTRUCTION

A. Holmes *Narrows RICO Causation*

In a decision leading up to *Bridge*, the Supreme Court in *Holmes v. Securities Investor Protection Corp.* held that in order to have standing for a civil RICO action, a plaintiff must prove the defendant's violation of § 1962 was the proximate cause of the plaintiff's injury.[99] Proximate cause persists as an impediment to plaintiffs bringing more inventive claims.[100] The Securities Investor Protection Corporation (SIPC) alleged in a § 1962(c) action, among other claims, that the defendants' conspiracy in a stock-manipulation scheme inhibited a pair of broker–dealers from meeting obligations to customers that ultimately caused the SIPC to reimburse the customers.[101]

In setting out its analysis of RICO causation, the *Holmes* Court first acknowledged that the "by reason of" language of § 1964(c), read plainly, could be met "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."[102] The Court, however, determined that not all factually injured plaintiffs may recover under § 1964(c), because Congress modeled § 1964(c) on other provisions that had been interpreted to require "a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." [103]

The Court set forth an analysis of RICO causation, surveying its statutory history.[104] The Court repeated its earlier observation that § 1964(c) was based on the civil-action provision of section 4 of the Clayton Act.[105] Moreover, the Court noted that section 4 was built from earlier language taken from section 7 of the Sherman Act.[106] Section 7 of the Sherman Act incorporates common-law principles of proximate causation, and section 4 of the Clayton Act adopted prior judicial interpretations of section 7.[107] Also, section 4 of the Clayton Act required showing proximate causation.[108] Thus, the Court held, § 1964(c) also required demonstrating proximate causation.[109]

99. Teresa Bryan et al., *Racketeer Influenced and Corrupt Organizations*, 40 AM. CRIM. L. REV. 987, 1032 (2003).

100. *Id*.

101. *Holmes*, 503 U.S. at 262–63.

102. *Id*. at 265–66 (citations omitted).

103. *Id.* at 268.

104. *Id*. at 267–68.

105. *Id*. at 267.

106. *Holmes*, 503 U.S. at 267.

107. *Id.* at 267–68.

108. *Id.* at 268.

109. *Id.*

The Court also emphasized the flexible nature of proximate cause, acknowledging its use to limit the extent of a person's responsibility for the consequences of that person's actions.[110] The Court "use[d] 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."[111] The Court also explained, "[A] plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover."[112] The Court's proximate cause requirement limited recovery to individuals who suffered direct injury and did not extend to individuals whose injury was derivative of another.[113]

The Court noted the concept of proximate cause must have flexibility and must be compliant with three specific policy concerns.[114] The Court applied each of the policy concerns to the facts of the case to demonstrate "how these reasons apply with equal force to suits under § 1964(c)."[115]

At the heart of the Court's concept of causation was a "demand for some direct relation between the injury asserted and the injurious conduct alleged."[116] This "direct-relation" brand of proximate causation provided courts with more discretion and indicated an unwillingness to forge an inflexible causation element within § 1964(c).[117] The Court emphasized that the directness of relationship between the injury asserted and the conduct

110. *Id.*

111. *Holmes*, 503 U.S. at 268.

112. *Id*. at 268–69.

113. JOSEPH, *supra* note 30, at 24 ("A principal constraint on standing is the direct/derivative dichotomy. A plaintiff may sue for injury that directly suffers by reason of a RICO violation. If, however, the injury is mediated through another entity (for example, a corporation, trust, union) in which the plaintiff holds an interest, that derivative injury does not suffice to confer standing to bring an individual suit absent a particularized injury unique to the plaintiff. This is a critical component of the proximate cause analysis under *Holmes*.").

114. *Holmes*, 503 U.S. at 269–70:

> *First*, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. *Second*, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, *finally*, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Id. (emphasis added) (citations omitted).

115. *Id.* at 270.

116. *Id*. at 268.

117. *See id.*

alleged is a central element of RICO causation.[118] Further, the Court characterized proximate cause as reflecting "ideas of what justice demands, or of what is administratively possible and convenient."[119]

The invocation of *Holmes* within *Bridge* indicates the current Court's willingness to acknowledge the "direct-relation" requirement of RICO causation.[120] The "direct-relation" requirement, however, is merely a synthesis of the Court's proximate cause analysis. Additionally, while the aforementioned policy concerns may guide courts in determining proximate causation, the Court has yet to take up the degree to which societal change may affect the scope of proximate cause given the concept's inherent flexibility. The degree of elasticity of the "direct-relation" requirement will allow business plaintiffs to proceed in an era of "tort reform" and regulatory lapses to recover their losses.

B. Anza*'s Direct Relationship Requirement*

In 2006, the Court redrew *Holmes*' proximate cause requirement by incorporating a new "directness" requirement. In *Anza v. Ideal Steel Supply Corp.*, the plaintiff steel supply business brought a § 1964(c) action against a competing business that artificially lowered prices by failing to charge taxes to customers that paid cash and refused to report those taxes to the state.[121] As a result, the defendant charged lower prices, purportedly causing the plaintiff corporation to suffer a loss of market share.[122] In *Anza*, the Court redefined its direct-relation requirement espoused in *Holmes* by limiting recovery only to "immediate" victims of the predicate act.[123] In doing so, the Court determined the state was the immediate victim since it lost tax revenue, explaining, "The cause of [the plaintiff steel supply business's] asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the state)."[124] The Court based its narrowing of §

118. *Id*. at 269 (citation omitted).

119. *Holmes*, 503 U.S. at 268 (quoting W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 264 (5th ed. 1984)).

120. *See* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. ___, 128 S. Ct. 2131, 2141–42 (2008).

121. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 453–54 (2006).

122. *Id.* at 455.

123. *Id*. at 460.

124. *Id*. at 458. The Court further stated:

> 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.

1964(c) causation principles on *Holmes*.[125] The Court explained, "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."[126] The Court found the separation between the plaintiff's harms and the claimed RICO violations too attenuated to provide for proximate causation.[127]

Applying the *Holmes* principles, the Court first examined its concern with the difficulty of ascertaining damages, since the defendant could have lowered its prices without acting fraudulently.[128] Next, the Court found a "discontinuity between the RICO violation and the asserted injury."[129] Similarly, the plaintiff could have lost market share for reasons outside of the defendant's fraudulent practices.[130] Finally, the Court refused to "broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly."[131] Supporting its determination, the Court deemed that "[t]he requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims."[132] Overall, the Court underscored its concern with preventing the "intricate, uncertain inquiries" articulated within the *Holmes* principles from persisting and "overrunning RICO litigation."[133] The Court would wait until *Bridge* to address the question of whether reliance by the plaintiff is a required element of a RICO claim.[134]

Justice Thomas' dissent in *Anza* lays the framework for *Bridge*.[135] Justice Thomas criticizes the majority for disregarding the Court's earlier causation analysis established in *Holmes* and for forgoing a careful examination of the statutory language altogether.[136] For Justice Thomas, there was no way to ignore the fact that Congress explicitly characterized § 1962(c) using broad language.[137]

125. *Id*.

126. *Anza*, 547 U.S. at 461.

127. *Id.* at 459.

128. *Id*. at 458.

129. *Id.* at 459.

130. *Id.*

131. *Anza*, 547 U.S. at 460.

132. *Id*. at 469 (quoting Holmes v. Sec. Investor Prot. Corp, 503 U.S. 258, 269–70 (1992)).

133. *Id.* at 460.

134. Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2137 (2008) (resolving the circuit split as to "whether first-party reliance is an element of a civil RICO claim predicated on mail fraud").

135. *See* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. ___, 128 S. Ct. 2131, 2139 (2008).

136. *Anza*, 547 U.S. at 463 (Thomas, J., dissenting).

137. *Id.* ("The language of the civil RICO provision, which broadly permits recovery by '[a]ny person injured in his business or property by reason of a violation' of the Act's substantive restriction plainly covers the lawsuit brought by respondent.").

Justice Thomas argues that it was not the State of New York's injury that caused the plaintiff steel company's damages; rather, it was the defendant steel company's conduct.[138] Stated simply, just because New York was directly injured, there is no reason that the plaintiff steel company could not also be directly injured by the predicate act.[139] And Justice Thomas was not convinced by the majority's stated concern with the difficulty of ascertaining damages.[140] Citing common-law principles, Justice Thomas argues:

> [C]ourts have historically found proximate causation for injuries from natural causes, if a wrongful act 'rendered it probable that such an injury will occur;' for injuries where the plaintiff's reliance is the immediate cause, such as in an action for fraud, so long as the reliance was 'reasonably induced by the prior misconduct of the defendant;' and for injuries where an innocent third party intervenes between the tortfeasor and the victim, such that the innocent third party is the *immediate* cause of the injury, so long as the tortfeasor 'contributed so effectually to [the injury] as to be regarded as the efficient or at least concurrent and responsible cause.'[141]

Justice Thomas praised the Eleventh Circuit for its limitation of RICO plaintiffs to those who are the "targets, competitors and intended victims of the racketeering enterprise."[142] To further narrow RICO plaintiffs' standing would be to allow future defendants to avoid liability for damages that are not only foreseeable, but also the "*intended* consequences of the defendant's unlawful behavior."[143]

Justice Thomas' analysis of principles of common law, proximate cause, and statutory language in his *Anza* dissent would later garner approval from each Justice of the Supreme Court in its unanimous decision in *Bridge*.[144] Yet still unknown is the extent to which societal change may allow for shifts within the directness requirement, given its foundation in proximate causation. For example, what if "the immediate victims of an alleged RICO violation" are unable to "vindicate the laws by pursuing their own claims?"[145]

138. *Id*. at 465 ("[R]ather, it was petitioners' own conduct—namely, their underpayment of tax—that permitted them to undercut respondent's prices and thereby take away its business.").

139. *See id*.

140. *Id*. at 468 ("[T]he means through which the fraudulent scheme was carried out—with sales tax charged on noncash sales, but no tax charged on cash sales—renders the damages more ascertainable than in the typical case of lost business.").

141. *Anza*, 547 U.S. at 470 (Thomas, J., dissenting) (citations omitted).

142. *Id*. at 470 (citation omitted).

143. *Id.*

144. *Bridge*, 553 U.S. at ___, 128 S. Ct. at 2139.

145. *Anza*, 547 U.S. at 460.

C. Justice Thomas' Analysis in Bridge

Like *Anza* and *Holmes* before it, *Bridge* grew out of an intricate, multilayered scheme allegedly based in fraud, with the plaintiffs arguing they had been wrongfully deprived of their fair share of liens and financial benefits.[146] In *Bridge*, unlike *Holmes* and *Anza*, there were "no independent factors that account for the respondent's injury, there [was] no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim [was] better situated to sue."[147] The central question became "whether first-party reliance is an element of a civil RICO claim predicated on mail fraud."[148]

Justice Thomas begins his analysis by examining the relevant statutory provisions.[149] First, Justice Thomas notes that § 1964(c) includes "[a]ny person injured in his business or property by reason of a violation of section 1962."[150] Moreover, "Section 1962(c) does not use the term 'fraud'; nor does the operative language of § 1961(1)(b), which defines 'racketeering activity' to include 'any act which is indictable under . . . section 1341 [relating to mail fraud].'"[151] Mail fraud, as separate from common law fraud principles, was not subject to the common law fraud requirement of reliance.

Justice Thomas characterized the plaintiff's theory as straightforward.[152] The plaintiffs argued the defendant company developed a scheme to defraud when it committed to submitting false attestations of compliance with the Single, Simultaneous Bidder Rule to Cook County.[153] The Court noted, "In the furtherance of this scheme, [the defendants] used the mail on numerous occasions to send the requisite notices to property owners."[154] As a result of this process, the plaintiffs lost the chance to acquire valuable liens.[155] Finally, the plaintiffs were "injured in their business or property by reason of petitioners' violations of § 1962(c), and RICO's plain terms give them a private right of action for treble damages."[156]

Justice Thomas concedes the plaintiffs could not show they relied on the defendant's fraudulent misrepresentations.[157] As he acknowledged, "This they [could not] do, because the alleged misrepresentations—petitioners'

146. *Bridge*, 553 U.S. at __, 128 S. Ct. at 2144 (2008).
147. *Id.*
148. *Id.* at 2137.
149. *Id.*
150. *Id.*
151. *Bridge*, 128 S. Ct. at 2140.
152. *Id*. at 2138.
153. *Id.* at 2135.
154. *Id*. at 2138.
155. *Id*.
156. *Bridge*, 128 S. Ct. at 2138.
157. *Id.*

attestations of compliance with the Single, Simultaneous Bidder Rule—were made to the County, not respondents."[158] In fact, the plaintiff could not even claim it received any misrepresenting materials through the mail.[159] Justice Thomas further supports his claim, stating, "Nothing on the face of the relevant statutory provisions imposes such a requirement [of first party reliance]" that explains, "a person can be injured 'by reason of' a pattern of mail fraud even if he has not relied on any misrepresentations."[160] In doing so, plaintiffs who raise civil RICO claims predicated on mail fraud need not show as an element of the claim any reliance on the defendant's alleged misrepresentations.[161]

Justice Thomas cites his *Anza* dissent, explaining there is "no reason to believe that Congress would have defined 'racketeering activity' to include acts indictable under the mail and wire fraud statutes if it intended fraud-related acts to be predicate acts under RICO only when those acts would have been actionable under the common law."[162] By incorporating his dissent from *Anza*, Justice Thomas underscores the incompatibility of RICO's formulation of causation within mail fraud with that of common law fraud.[163] Thomas strikes down the defendant's argument for reading a reliance requirement into a RICO claim, stating that "[t]he indictable act under § 1341 is not the fraudulent misrepresentation, but rather the use of the mails with the purpose of executing or attempting to execute a scheme to defraud."[164] Thomas further notes that mail fraud exists outside common law fraud, making common-law fraud principles of little consequence.[165]

Thomas, however, defines the appropriate proximate cause analysis under civil RICO: "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."[166] Thomas emphasizes that proximate cause should be a flexible principle that is not easily laid down in "black letter rule[s]."[167] Proximate cause, he explains, is used "'to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's

158. *Id.*

159. *Id.*

160. *Id.*

161. *Bridge*, 128 S. Ct. at 2138–39; *see also* Beck v. Prupis, 529 U.S. 494, 500 (2000) (using common law conspiracy as a template to construe RICO conspiracy and providing Justice Thomas with precedent for reading a reliance requirement into a 1964(c) conspiracy claim).

162. *Bridge*, 128 S. Ct. at 2141 (citing Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 477–78 (2006) (Thomas, J., concurring in part and dissenting in part)).

163. *See id*. at 2142.

164. *Id.* at 2140.

165. *Id.*

166. *Id.* at 2142.

167. *Bridge*, 128 S. Ct. at 2142 (citing Holmes v. Sec. Investor Prot. Corp, 503 U.S. 258, 272 n.20 (1992)).

own acts,' with a particular emphasis on the 'demand for some direct relation between the injury asserted and the injurious conduct alleged . . . .'"[168] Yet, first-party reliance is not necessary if there exists a "sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury."[169]

The Court's newly crafted definition of causation in civil RICO cases is consistent with the view of the Restatement (Second) of Torts, which "provides the example of a defendant who 'seeks to promote his own interest by telling a known falsehood to *or about* the plaintiff or his product.'"[170] Moreover, the Restatement also "specifically recognizes 'a cause of action' in favor of the injured party where the defendant 'defrauds another for the purpose of causing pecuniary harm to a third person.'"[171] While first party reliance is not required in a RICO action, reliance of some party remains a necessity.[172] This makes sense considering that damages rarely arise unless there has been reliance on fraud.[173]

In conclusion, Justice Thomas struck out at further judicial attempts at limiting the breadth of civil RICO: "It is not for the judiciary to eliminate the private action in situations where Congress provided for it."[174] He continues, "We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe."[175]

Amidst three divided appellate courts,[176] the Supreme Court has, without equivocation, recognized that RICO is exactly what it purports to be—a broad, powerful, and accessible tool for victims of one or more of the numerous predicate acts it identifies.[177] Whereas *Sedima* provided little practical direction to appellate courts facing an onslaught of RICO claims, *Bridge* now provides a causal analysis that will help lawyers craft remedies and provide courts with uniformity of decision.

168. *Id.* at 2142.

169. *Id.* at 2144.

170. *Id.* at 2143 (quoting RESTATEMENT (SECOND) OF TORTS § 870, cmt. H (1977)).

171. *Id.* at 2143 (quoting RESTATEMENT (SECOND) OF TORTS § 435A cmt. A (1965)).

172. *Bridge*, 128 S. Ct. at 2144.

173. *Id.* at 2144 ("If, for example, the county had not accepted petitioners' false attestations of compliance with the Single, Simultaneous Bidder Rule, and as a result, had not permitted petitioners to participate in the auction, respondents' injury would never have materialized.").

174. *Id.* at 2145. (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499–500 (1985)).

175. *Id.*

176. VanDenBroeck v. CommonPoint Mortgage Co., 210 F.3d 696, 699–700 (6th Cir. 2000); Phoenix Bond & Indem. Co. v. Bridge, 477 F.3d 928, 932 (7th Cir. 2007).

177. *See Bridge*, 128 S. Ct. at 2145.

III. BEYOND *BRIDGE*: CIVIL RICO PERSISTS AMIDST AN ATMOSPHERE OF TORT REFORM

The Court's decision to sustain RICO's characteristically broad import stands in striking contrast to expanding "tort reform" measures. "After *Bridge*, plaintiffs need not plead or prove that they relied on defendants' alleged misrepresentations in order to establish the elements of their civil RICO claim based on mail or wire fraud."[178] *Bridge* now introduces RICO as a new remedy that will benefit businesses and consumers alike. Further, businesses now have a more predictable legal landscape, helping to foresee and avoid future liabilities and prevent litigation.

A. Stress-testing: Proximate Causation and the Current Consumer Protection Landscape

Yet, to what extent are plaintiffs constrained by the *Holmes* "direct-relation test?" As *Holmes* indicated—and *Anza* and *Bridge* affirmed—the "direct-relation test" is nothing more than the court's proximate cause analysis.[179] Proximate cause is merely a "judicial [tool] used to limit a person's responsibility for the consequences of that person's own acts."[180] Because this is the current law, individual businesses must consider the effects of "tort reform" measures together with decisions like *Riegel* when planning their future conduct and behavior (i.e., putting the drugs on the market without adequate warning).

To understand the need for reassessing the *Holmes* factors, the Court must assess the civil action landscape of the relevant area of law. Private civil actions are becoming increasingly limited and ineffective at righting consumer wrongs. With the Court asserting constitutional limitations over the quantification of punitive damages,[181] the ability of individual or class plaintiffs to find a remedy from corporate wrongdoing hangs in the balance. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Supreme Court held that an award of $145 million in punitive damages on a one million dollar compensatory damage judgment violated due process.[182] Further, the court suggested that limiting punitive damages to a single digit multiplier (of compensatory damages) would sufficiently address a violation of due process rights.[183]

On the legislative front, the Class Action Fairness Act of 2005 (CAFA) has had the effect of limiting plaintiffs' remedies by removing state class actions,

178. Brown v. Cassens Transp. Co., 546 F.3d 347, 357 (6th Cir. 2008).
179. *See supra* notes 112–119 and accompanying text.
180. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 464 (2006).
181. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416–17 (2003).
182. *Id.* at 429.
183. *Id.* at 425.

including large, private consumer fraud actions, to federal courts.[184] CAFA was passed in response to the multiplicity of class actions in state courts before perceived plaintiff-friendly juries.[185] The Act contains provisions limiting the fees available to attorneys pursuing large class actions that combine small individual claims.[186] In general, CAFA expands federal diversity jurisdiction for class action lawsuits by creating, with certain narrow exceptions, federal jurisdiction for class action litigation involving 100 or more class members, an amount in controversy of more than $5 million, and minimal diversity where any proposed class member is a citizen of a state different from any defendant.[187]

The Federal Judicial Center conducted a study, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, that examined the number of class action filings and removals in the federal courts from July 1, 2001 through June 30, 2007.[188] The effect of CAFA has been to increase the number of class actions filed in the federal courts based on diversity jurisdiction.[189] CAFA, therefore, appears to be meeting its objective of expanding federal diversity jurisdiction for class action lawsuits, thereby diverting many class actions away from the state courts with perceived plaintiff-friendly juries.[190] If the plaintiffs' bar perceives that class actions are less likely to be decided before such courts, then such attorneys will be less likely to take on class actions for fear of expending resources on dubious claims or claims that are not likely to succeed.

As noted above, the Supreme Court in *Wyeth v. Levine* found that manufacturers maintain a duty to update their FDA-approved warning labels.[191] The future, however, remains uncertain as to whether consumers can bring claims based on harms arising from manufacturer claims made *during*

184. Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

185. Jeffrey T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 AM. U. L. REV. 621, 622 (2006).

186. 28 U.S.C. § 1712 (2000 & Supp. 2006).

187. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

188. EMERY G. LEE III & THOMAS E. WILLGING, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1 (Federal Judicial Center 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf.

189. *Id.* at 1–2 ("There has been a dramatic increase in the number of diversity class actions filed as original proceedings in the federal courts in the post-CAFA period. The pre-CAFA average of such filings per month was 11.9; the post-CAFA average was 34.5 per month . . . .").

190. *See id.* at 2 (noting that the increase occurred nationwide and across a variety of causes of action).

191. Wyeth v. Levine, 555 U.S. ___, 129 S. Ct. 1187, 1197–98, 1204 (2009).

the FDA approval process.[192] If the Court finds federal regulatory preemption in this and other areas, individuals will lose an avenue to right wrongs caused by large companies, including pharmaceutical corporations, caused by defective products. The result will be that consumers will become considerably more reliant on federal regulatory bodies for protection, notwithstanding their past mistakes, such as those made evident by the Vioxx litigation.[193]

If "tort-reform" measures continue to curtail the ability of potential individual plaintiffs to assert tort claims, then it must follow that corporate entities will be left unto themselves to right the wrongs of corporate wrongdoers. While CAFA limitations set hurdles for plaintiffs' attorneys seeking to establish a victim class, a single business entity may now, under *Bridge*, bring an action alone in their place. And even if the Court extends *Campbell*'s holding, civil RICO will remain a worthwhile instrument because it provides for treble damages.[194] With legislation and case law inhibiting the individual consumer's ability to right wrongs in the marketplace, and given the imperfections of regulatory oversight, the ability of an injured business to utilize civil RICO to seek justice against dishonest competitors may serve a vital substitute role for consumers and businesses alike.

Bridge struck down the Second Circuit's effort to restrict civil RICO standing. Yet, under closer review, *Bridge* presents a challenging dilemma. Justice Thomas' intricate statutory construction of RICO aside, it is the Court's evaluation and application of *Holmes* that proves problematic. In *Bridge*, the Court emphasizes the instruction set out in *Holmes* "that proximate cause is generally not amenable to bright-line rules."[195] Despite doing so, the *Bridge* Court grounds its entire analysis using statutory construction, foregoing an opportunity to contextualize the three *Holmes* factors in order to determine civil RICO causation.[196] The Court appears to assume the three *Holmes* factors exist in an atmosphere unchanged since 1992, as though ordinary consumers are granted the same access to consumer protection as existed seventeen years earlier. In reality, this access has retracted.

B. The Holmes *Factors Applied*

To illustrate, reconsider the hypothetical set out in the beginning of this comment. With *Bridge*, whether ABC has a viable cause of action against XYZ depends on the Court's analysis of proximate cause, since ABC has met

192. Longs v. Wyeth, 621 F. Supp. 2d 504, 509 (N.D. Ohio 2009) (discussing the court's decision not to address "a manufacturer's duty prior to approval by the FDA").

193. *See supra* text accompanying notes 2–4.

194. 18 U.S.C. § 1964(c) (2006).

195. Bridge v. Phoenix Bond & Indem. Co., 553 U. S. ___, 128 S. Ct. 2131, 2145 (2008).

196. *Id.* at 2137–39.

all standing requirements of civil RICO, such as the pattern of XYZ's misrepresentations and the company's use of the mails to perpetrate the fraud. First, while ABC may be able to demonstrate that its loss of market share exists *but for* XYZ's multiple misrepresentations to the FDA, *Holmes*, *Anza*, and *Bridge* have read "by reason of," the textual representation of RICO causation, to incorporate the Court's proximate causation analysis.

In applying this analysis, consider the directness of the injury. Those most directly injured by XYZ's misrepresentations are the patients who utilized XYZ's product. As *Anza* warns, the more attenuated the injury, the more difficult it becomes to ascertain the amount of the plaintiff's damages attributed to the company's violation. Assessing damages depends upon the ability of ABC—the only other manufacturer of this type of insulin device—to calculate the loss of sales it incurred. Does the fact the individual patients' claims are preempted by FDA premarket approval solve the Court's problem with attenuation? It would certainly solve any issues with multiple recoveries. Most interestingly, preemption has excised the ability of the "directly injured" victims to "vindicate the law as private attorneys general."

Allowing civil RICO standing in such a case has the potential to produce vast societal benefit, since consumers are better protected when companies report to regulators with honesty, fearing reprisal from industry competition.

C. A Proposal

Both the *Sedima* and *Bridge* Courts criticized judicial activism. Indeed, changes to the statutory text of civil RICO lies in the domain of Congress.[197] But the Court cannot shirk its responsibility of interpreting civil RICO in a manner that will ensure justice, equality, and equity in application. Proximate causation offers the Court a flexible solution, which will allow more litigants access to justice. Access to justice exists, as *Holmes* instructs, as an instrument "to limit a person's responsibility for the consequences of that person's own acts."[198]

Justice Thomas' statutory construction provides a thoughtful, nuanced interpretation of civil RICO, but the Court has given little attention to its underlying purpose. As stated earlier, Congress' focus was to provide "new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the

197. Geoffrey F. Arownow, *In Defense of Sausage Reform: Legislative Changes to Civil RICO*, 65 NOTRE DAME L. REV. 964, 966 (1990).

198. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992); *see, e.g.*, Blue Shield of Va. v. McCready, 457 U.S. 465, 478 n.13 (1982) ("The traditional principle of proximate cause suggests the use of words such as 'remote,' 'tenuous,' 'fortuitous,' 'incidental,' or 'consequential' to describe those injuries that will find no remedy at law. . . . And the use of such terms only emphasizes that the principle of proximate cause is hardly a rigorous analytic tool.").

economic well-being of the Nation."[199] Future decisions must expand to include the legislative intent of civil RICO, in order to further refine the *Holmes* factors.

Considering the first *Holmes* factor, it is important to recognize that a wholesale liberalization of the Court's "demand for some direct relation between the injury asserted and the injurious conduct alleged" is unnecessary.[200] This idea, however, should not be given so much weight that other factors are hidden from consideration. Indeed, the Court's concern with directness assists with ascertaining damages. Without some restriction, the degree of attenuation between the fraudulent act and the injured victims will provide courts with the unworkable task of compensating the injured and preventing multiple recoveries. Yet, as Benjamin M. Daniels explains in his thoughtful examination of proximate causation in *Anza*, "Mathematical difficulties should not interfere with substantive justice."[201] The Court must acknowledge the reality that often the direct victims of fraudulent behavior are unable to seek damages for the aforementioned reasons, including future reform measures and federal regulatory preemption.[202]

With "tort reform" measures and federal statutory preemption, consumers are left without remedy. They are left to rely only on the efficacy of regulators, despite the failure of regulators to regulate and provide for protection. The predicament leaves consumers, the "directly injured," unable to "be counted on to vindicate the law as private attorneys general."[203] As a result, consumers have lost the potentially powerful force of the private attorney general as a safeguard for them against the failures of regulatory bodies.

The "directness inquiry" should acknowledge the reality that direct victims cannot always be counted upon to vindicate the wrongs committed against them. Instead, the Court must shape its proximate causation analysis in a way that takes stock of situations like those presented by the Vioxx example and illustrated by the ABC hypothetical. Given the power of the free market, corporations are well situated to fill the void left by the removal of the remedy brought by an individual consumer.

In applying the *Holmes* factors, courts must acknowledge this predicament. Using intent as a guiding factor, injured companies would be allowed to

199. MARINE, *supra* note 34, at 17 (quoting S. REP. NO. 91-617, at 79 (1969)).

200. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 457 (2006) (quoting Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992)).

201. Daniels, *supra* note 98, at 649.

202. In reality, overemphasis of the "directness" requirement has overshadowed the fact that tort reform efforts, both legislative and judicial, have aligned in a way that alleviates the *Holmes* Court's concern of eliminating multiple recoveries. *See Holmes*, 503 U.S. at 269–70 (articulating the concern).

203. *Id.*

"vindicate the law as private attorneys general" when they are injured in the marketplace.[204] In doing so, the companies that have fallen victim to corporate misconduct—indeed, society as a whole—will benefit from a broader, more effective paradigm of jurisprudence that mandates corporate accountability. Creating this more effective paradigm does not require expanding causation to include indirect victims.

And yet, consider that a dishonest corporate entity that has misled regulators must have intended to appropriate the market share of its competitor. If the effort to mislead regulators serves as the *means* of the dishonest corporation, then the *ends* sought are weakening its competitor's standing in the market. Employing a means–end analysis, using intent as a guidepost, courts can effectuate justice between the honest corporate actor and the dishonest competitor. By divorcing the *Holmes* principles from surrounding context, *Bridge*, like *Anza* before it, employs a causal analysis that invites inconsistent outcomes. *Anza* viewed the State of New York as the direct victim, while viewing the resulting injury to the wronged company as a side effect of the fraudulent action.[205] Moreover, Justice Thomas' causal analysis from *Bridge* has the counterintuitive effect of simultaneously expanding civil RICO causation by excising a showing of reliance, while limiting the prospect of a successful invocation of civil RICO to a very limited set of facts.[206]

By emphasizing a means–end analysis instead, civil RICO will be available to the intended victims of regulatory fraud—the honest competitor. Such an analysis extends beyond recognizing just those collaterally injured (such as the victims of XYZ's Exulert), whose access to justice is blocked by forces such as federal regulatory preemption. By adopting this causal analysis, compliant corporations are provided an avenue of recourse that extends societal benefit beyond the boardroom and to the consumer.

CONCLUSION

In the aftermath of over thirty-five years of litigation, civil RICO stands on the cusp of becoming a remedy for equalizing the economic battlefield. The need for civil RICO will grow as the role of the individual as private attorney general dims in an atmosphere of "tort reform." More specifically, the effect of "tort reform" measures on recovery of punitive damages and Congress' efforts to shrink the prevalence of class actions precludes individuals from raising claims that typically would shift the economic losses away from the plaintiff on to the businesses that caused the injury. With *Bridge*, civil RICO

204. *Id.*

205. *See supra* text accompanying notes 123, 126.

206. *See* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. ___, 128 S. Ct. 2131, 2143 n.7 (2008).

falls short of filling the void left from the individual consumer. Harnessing the free market, compliant corporations have great incentive to invoke civil RICO to remedy the economic effects of competitors who have wrongfully gained market share by cutting corners.

By adopting the free-enterprise system to patrol the marketplace, civil RICO will exist as a powerful force to encourage honesty. In this way, the free market incentive to mislead regulators in order to gain a competitive edge will be eliminated. Honest, compliant companies will be able to pursue dishonest companies and recover attorney's fees and threefold economic damages. The Supreme Court, in construing the language of the RICO legislative enactment, has provided the potential for a powerful incentive to play by the rules.

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