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# PROXIMATELY ANZA: CORPORATE LOOTING, UNFAIR COMPETITION, AND THE NEW LIMITS OF CIVIL RICO

## I. INTRODUCTION

In 1970, Congress believed organized crime was leeching “\$7 to \$10 billion dollars in profits” from society each year.<sup>1</sup> The problem was so pervasive that, according to one contemporaneous estimate, “[i]f U.S. Steel, American Telephone & Telegraph, General Motors, Standard Oil of New Jersey, General Electric, Ford Motor Co., IBM, Chrysler, and RCA all joined together into one conglomerate merger, they would still be in second place.”<sup>2</sup> Congress responded to these staggering figures with the Racketeer Influenced and Corrupt Organizations Act (“RICO”), a unique combination of civil and criminal provisions.<sup>3</sup> The two purposes of the civil provision (“civil RICO”) are to compensate victims and to supplement criminal enforcement.<sup>4</sup>

Subsequent years have seen an expansion of RICO’s role beyond that of eradicating organized crime. For many years, plaintiffs have used civil RICO’s broad definitions and treble damages provision to combat corporate looting and unfair competition.<sup>5</sup> Victims of corporate looting

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1. *Organized Crime Control: Hearing on S. 30 and Related Proposals, Relating to the Control of Organized Crime in the United States Before the H. Comm. on the Judiciary*, 91st Cong. 78 (1970) [hereinafter *Organized Crime Control Hearings*] (statement of Rep. William M. McCulloch).

2. *Id.*; see also H.R. REP. NO. 91-1549, at 2 (1970) (citing Congress’s goal as the “eradication of organized crime”); 116 CONG. REC. 35,206 (1970) (statement of Rep. Thomas S. Kleppe) (“[T]he threat of organized crime cannot be ignored or longer tolerated. It is America’s principal supplier of illegal goods and services . . . ; daily it increases its operation in fields of legitimate business, employing such illegitimate techniques as bankruptcy frauds, tax evasion, extortion, terrorism, arson and monopolization. Its sinister effects upon our Nation must be eradicated.”).

3. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2000). For a statement of the reasons Congress chose both civil and criminal provisions, see H.R. REP. NO. 91-1549 at 1, 2 (“It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.”).

4. See *Rotella v. Wood*, 528 U.S. 549, 557 (2000) (“The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, ‘private attorneys general,’ dedicated to eliminating racketeering activity.” (quoting *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997))); see also Michael Goldsmith & Mark Jay Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735, 741–43 (1990) (critiquing the analysis of Professor Abrams, who believed civil RICO’s primary function was criminal enforcement).

5. Plaintiffs took nearly a decade to recognize the opportunity presented by civil RICO. See AM. BAR ASS’N, REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING, AND BUSINESS LAW 55–58 (1985) [hereinafter ABA REPORT] (“Of approximately 270 trial court decisions in the [computerized database of RICO decisions], three

find that RICO addresses procedural gaps and substantive inadequacies in both bankruptcy and state law that would otherwise withhold protection in certain contexts.<sup>6</sup> RICO similarly protects victims of unfair competition who are unable to invoke antitrust law because they cannot satisfy requirements such as standing or “market share.”<sup>7</sup> Recently, plaintiffs have expanded their use of RICO to combat conversion of corporate

percent were decided before 1980, two percent in 1980, seven percent in 1981, 13 percent in 1982, 33 percent in 1983, and 43 percent in 1984.”). For a discussion of the use of civil RICO in the corporate looting and unfair competition contexts, see *infra* Part II. For an example of civil RICO’s utility in the battle against unfair competition, 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, 908 n.153 (1990). Although civil RICO is available to combat corporate looting in the bankruptcy context, courts hesitate to “interfere with the bankruptcy court’s orderly marshalling of assets.” *Dana Molded Prods., Inc. v. Brodner*, 58 B.R. 576, 579 (N.D. Ill. 1986).

6. Bankruptcy law does not grant insider victims, shareholders, competitors, and unsecured creditors any special priority; they are left at the end of the collection line as general unsecured creditors. 11 U.S.C. § 507 (2000). This approach neglects to account for the victim status of these individuals, instead according them lesser status than secured creditors. For a discussion of state law protections, see ABA REPORT, *supra* note 5, at 63–64, which notes a study by Professor Michael J. Herbert and Mr. Dominic E. Pacitti demonstrating the unenviable position of these creditors:

Of the 4,723 Chapter 7 cases, there were 4,515 in which no assets were distributed, and, as noted above, there were 208 cases in which at least some assets were distributed. In percentage terms, 95.6% of the Chapter 7 cases were cases in which nothing was distributed. Of all the cases closed during the study period, 92.3% were no asset Chapter 7 proceedings and 4.25% were Chapter 7 proceedings in which some assets were distributed.

Michael J. Herbert & Dominic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984–1987*, 22 U. RICH. L. REV. 303, 311 (1988). The ABA REPORT further discusses the inadequacies of state law protections:

The most widely shared reason [for retaining civil RICO] was that [c]ivil RICO provides incentives for persons injured by habitual securities law violators, racketeers, and others engaging in repeated criminal activity to pursue claims that might not be worth litigating without treble damages and attorneys’ fees. . . . [Civil RICO also] [a]llows access to federal courts, which have better procedures for handling business fraud and similar cases, such as liberal joinder rules.

ABA REPORT, *supra* note 5, at 63–64.

7. Samuel R. Miller and Karl Olson provide a hypothetical situation in which civil RICO would be a better remedy than antitrust law:

If, for example, a business was injured by fraudulent or predatory practices of a principal competitor, and the predator was acting unilaterally and did not have the realistic prospect of monopolization, an antitrust claim would be difficult to assert. But if, as is almost invariably the case, the scheme was carried out through the mails or interstate telephone calls, the plaintiff might well have a RICO treble-damage claim. Even if the predatory defendant did have the capacity to monopolize or attempt to monopolize the market, the plaintiff might be better off under RICO since no proof of market share and relevant market, and other complex antitrust issues, would be necessary.

Samuel R. Miller & Karl Olson, *Recent Developments in Civil RICO*, in RICO IN CIVIL LITIGATION 16–17 (William H. Alsup & Samuel R. Miller eds., 1984). For a critique of the overlap of civil RICO and antitrust law, see Virginia G. Maurer, *Antitrust and RICO: Standing on the Slippery Slope*, 25 GA. L. REV. 711, 711–14 (1991); Maurer discusses the interplay between civil RICO and antitrust law and recommends changing RICO standing requirements to comport with antitrust standing requirements.

assets,<sup>8</sup> oppose the hiring of illegal immigrants,<sup>9</sup> and halt other unfair competition practices.<sup>10</sup>

The Supreme Court's decision in *Anza v. Ideal Steel Supply Corp.*<sup>11</sup> threatens to curtail these important uses of civil RICO by implementing a narrow application of the concept of proximate cause<sup>12</sup>—one of the several elements a RICO plaintiff must prove as part of its prima facie case.<sup>13</sup> The plaintiff in *Anza*, Ideal Steel Corporation, alleged that a competitor, National Steel Supply, was able to lower prices because it had executed a tax evasion scheme involving mail and wire fraud.<sup>14</sup> The Court found that the concept of proximate cause limited recovery to only the immediate victim of the mail and wire fraud<sup>15</sup> and denied recovery to the plaintiff, whom the Court believed was a non-immediate, direct victim.<sup>16</sup> This interpretation of RICO's proximate cause requirement severely limits

8. See *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 908 (11th Cir. 1998) (“[A] pattern of racketeering could be directed specifically at a corporation’s creditors. A creditor will have RICO standing only when his injury passes the directness test . . . .”); see also *GICC Capital Corp. v. Tech. Fin. Group, Inc.*, 30 F.3d 289, 293 (2d Cir. 1994) (“When a corporation fraudulently is caused to issue debt and stripped of its assets in a manner that obviously will leave the creditors unpaid, those creditors have standing.”).

9. See, e.g., *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1285 (11th Cir. 2006) (holding that current hourly employees had proper standing under civil RICO to bring suit against employer for allegedly hiring illegal immigrants, thereby depressing the employees’ wages); *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004); see also Thomas C. Green & Ileana M. Ciobanu, *Deputizing—and Then Prosecuting—America’s Businesses in the Fight Against Illegal Immigration*, 43 AM. CRIM. L. REV. 1203 (2006) (discussing the role private enforcement plays in immigration law). The authors discuss the introduction of immigration violations into the definition of “racketeering” under the RICO statute in 1996. *Id.* at 1220–22. This recategorization of immigration, as a violation of RICO, serves to inhibit employers from hiring illegal immigrants. *Id.* The authors suggest, in light of *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007), and *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295 (D. N.J. 2005), that employers should demand independent contractors hire only legal employees and increase supervision of their own hiring practices to avoid prosecution under civil RICO. *Id.* at 1221–23. For new developments in civil RICO’s use in immigrant law, see Julie Lam, Note, *Show Me the Green: Civil RICO Actions Against Employers Who Knowingly Hire Undocumented Workers*, 84 WASH. U. L. REV. 717 (2006).

10. See, e.g., *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 378–80 (2d Cir. 2001) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)).

11. 126 S. Ct. 1991 (2006).

12. *Id.* at 1995–98.

13. See *infra* notes 46–51 and accompanying text.

14. *Id.* at 1994–95.

15. For purposes of this Note, the term “immediate victim” refers to the party against whom the predicate acts are committed. “Non-immediate victim” refers to the party who suffered direct injury due to the racketeering, but who was not the primary party upon whom the defendant inflicted the racketeering. A “direct” victim is one whose injury is caused by the racketeer’s actions and is not contingent on anyone else’s injury. An “indirect” victim is a party whose injury is wholly derivative of the injury of another. See *infra* Parts II.C.2, II.D, II.E. For example, if D mails a letter to A that injures both A and B, A is the immediate victim and B is the non-immediate victim. Both A and B are direct victims. If the injury causes A to default on a loan to C, then C is an indirect victim.

16. *Anza*, 126 S. Ct. at 1997–98.

plaintiff recovery in both corporate looting and unfair competition contexts because damages are difficult to prove and the victims are often non-immediate. Furthermore, this interpretation frustrates the dual purposes of civil RICO by denying compensation to these non-immediate, targeted victims of racketeering and consequently reducing the number of “private attorneys general” available to supplement criminal enforcement.

*Anza* is the culmination of a trend in which courts have struggled to balance their unease with RICO’s broad scope against Congress’s mandate that RICO be “liberally construed to effectuate its remedial purposes.”<sup>17</sup> *Anza* went beyond earlier courts by implementing a strict proximate cause analysis that unreasonably limits civil RICO’s availability to plaintiffs and creates an almost insurmountable hurdle for victims.<sup>18</sup> Under *Anza*, a savvy racketeer could target a competitor and injure him directly, yet escape liability to the competitor if a more immediate victim existed.<sup>19</sup> This problem highlights civil RICO’s past utility in cases of corporate looting and unfair competition, while emphasizing the need for a reasonable, practical application of the statute in the future.

This Note discusses *Anza*’s impact on cases of corporate looting and unfair competition. Part II of this Note examines the mechanics of the statute and explores civil RICO’s legislative history. Part II also traces prior judicial attempts to limit the use of civil RICO, leading to the Supreme Court’s decision in *Holmes v. Securities Investor Protection Corp.*<sup>20</sup> This Part then discusses pre-*Anza* cases of corporate looting and unfair competition, and concludes with a discussion of the *Anza* decision. Following this background, Part III analyzes *Anza*’s probable impact on cases of corporate looting and unfair competition, contrasting this impact with the purposes of the civil RICO provision. Part IV contains proposed

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17. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970) (codified at 18 U.S.C. §§ 1961–1968 (2000)). Since RICO’s adoption, courts have endeavored to limit this expansion of civil RICO beyond traditional notions of organized crime. See *Anza*, 126 S. Ct. at 2004–05 (Thomas, J., dissenting) (“Numerous justices have expressed dissatisfaction with either the breadth of RICO’s application . . . or its general vagueness at outlining the conduct it is intended to prohibit.” (citations omitted)). To curb the use of civil RICO against “legitimate” businesses, courts experimented with extra-legislative limits to civil RICO, including requiring proof that the defendant was previously convicted of a predicate act and proof of a racketeering-enterprise injury. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 485–86 (1985) (reversing the Second Circuit’s imposition of these requirements on the plaintiff). For a critique of RICO’s extension to individuals engaged in protest activity, see Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819 (1996).

18. See *Anza*, 126 S. Ct. at 1997–98.

19. *Id.* at 2004 (Thomas, J., dissenting).

20. 503 U.S. 258 (1992).

judicial and legislative solutions to the problems *Anza* created. Finally, Part V summarizes the impact of *Anza* on civil RICO litigation.

## II. HISTORY

### A. Framework of the Statute

The RICO statute was Congress's response to a fear "that organized crime had begun to move from its traditional revenue raising activities such as gambling and prostitution, into what, on their face, were legitimate business activities."<sup>21</sup> RICO is a "combination of criminal penalties and civil remedies" intended to destroy "the corrupting influence of organized crime."<sup>22</sup>

The statute's substantive prohibitions focus on undermining organized crime's economic base by preventing its participation in legitimate business.<sup>23</sup> Section 1962 effectuates this purpose by prohibiting (1) investing any proceeds gained from a "pattern of racketeering" into an "enterprise,"<sup>24</sup> (2) acquiring an interest in an enterprise through a pattern of racketeering,<sup>25</sup> (3) conducting or participating<sup>26</sup> in the "conduct" of an

21. Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 624 (1990).

22. *Organized Crime Control Hearings*, *supra* note 1, at 172 (comments of the Department of Justice); *see also id.* at 170, 172 ("[T]he proposed statute would also authorize civil remedies modeled upon those found in the antitrust laws. . . . The combination of criminal penalties and civil remedies which has been highly effective in removing and preventing harmful behavior in the field of trade and commerce can and should be utilized to remove the corrupting influence of organized crime from American industry.").

23. S. REP. NO. 91-617, at 1-2 (1969).

24. 18 U.S.C. § 1962(a) (2000). Section 1962(a) provides:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a). Congress intended this prohibition to prevent money laundering by impeding the investment of such income in legitimate businesses. *See Brittingham v. Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991) (citing 116 CONG. REC. 35,199 (1970) (remarks of Rep. Fernand G. St. Germain); 116 CONG. REC. 607 (1970) (remarks of Sen. Byrd)). Functionally, the statute attempts to render the racketeering proceeds useless by preventing reinvestment. For the prima face elements of proving a § 1962(a) relationship, *see Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1188 (3d Cir. 1993). The *Lightning Lube* court found that the plaintiff had to prove "(1) that the defendant [had] received money from a pattern of racketeering activity; (2) [that the defendant had] invested that money in an enterprise; and (3) that the enterprise affected interstate commerce".

25. 18 U.S.C. § 1962(b) ("It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any

enterprise through a pattern of racketeering,<sup>27</sup> and (4) conspiring to violate any of the above prohibitions.<sup>28</sup>

The statute sets forth definitions that are vital to understanding the § 1962 prohibitions. An “enterprise,” as defined in § 1961(4), can be either

interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.”). To satisfy this subsection, the plaintiff must prove that the defendant acquired or maintained an interest in or control of an enterprise through racketeering. *See Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995) (“As to subsection (b) [of § 1962], a plaintiff must show that his injuries were proximately caused by a RICO person gaining an interest in, or control of, the enterprise through a pattern of racketeering activity.”); *see also Lightning Lube*, 4 F.3d at 1190 (“[A] plaintiff must show injury from the defendant’s acquisition or control of an interest in a RICO enterprise, in addition to injury from the predicate acts.”). For example, a plaintiff adequately alleged a violation of § 1962(b) when a lawyer committed “numerous predicate acts of mail fraud, wire fraud, financial institution fraud and theft of goods in interstate commerce” to gain control of a farmer’s property. *Crowe*, 43 F.3d at 204 (footnotes omitted).

26. The definition of “conduct or participate” was the subject of some debate among courts. The Supreme Court settled the debate in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), stating:

In order to “participate, directly or indirectly, in the conduct of [and] enterprise’s affairs,” one must have some part in directing those affairs. Of course, the word “participate” makes clear that RICO liability is not limited to those with primary responsibility for the enterprise’s affairs, just as the phrase “directly or indirectly” makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise’s affairs is required. The “operation or management” test expresses this requirement in a formulation that is easy to apply.

*Reves*, 507 U.S. at 179 (footnote omitted). In *Reves*, the Court found that an accounting firm that audited a company did not operate or control the enterprise. *Id.* at 172–75, 184–86. The accounting firm had failed to inform the board that the company had been insolvent, thereby depriving the board of its decision making power. *Id.* at 172–75. The Court found the accounting firm did not operate or control the enterprise because it did not make important decisions for the enterprise. *Id.* at 184–86.

In *Aetna Casualty Surety Co. v. P & B Autobody*, 43 F.3d 1546, 1558–61 (1st Cir. 1994), the court discussed the limits of the “associated with” element, *see infra* note 27, and the “operation or management” test in the context of an insurance fraud cause. The defendants were a consortium of mechanics and claimants who filed false claims with Aetna, an insurer. *P & B Autobody*, 43 F.3d at 1551–52. The court held that the claimants were associated with the enterprise of Aetna because “[i]n ordinary usage, one who, for example, buys an insurance policy from an enterprise and depends on the solidarity of that enterprise, for protection against defined risks, has an association with, and may be said to have ‘associated with,’ the enterprise.” *Id.* at 1559. Addressing the “operation or management” test, the court found the defendant’s “activities caused Aetna employees having authority to do so to direct that other employees make payments Aetna otherwise would not have made,” a type of indirect participation. *Id.*

27. 18 U.S.C. § 1962(c) (“It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”).

28. 18 U.S.C. § 1962(d) (“It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.”). To prove a RICO conspiracy, a plaintiff must demonstrate that the defendant agreed to the conspiracy’s overall objective or participated in two predicate acts in furtherance of the conspiracy. *United States v. Shenberg*, 89 F.3d 1461, 1471 (11th Cir. 1996). In *Shenberg*, the court upheld a defendant’s RICO conspiracy conviction when it was proven that he agreed to a kickback scheme, under which judges appointed their friends to special public-defender positions in exchange for a cut of the fees. *Id.* at 1465–68.

a legally recognized enterprise (e.g., a corporation) or an association in fact (e.g., a drug cartel).<sup>29</sup> A “pattern of racketeering,” defined in § 1961(5), is the commission of two related predicate acts within a ten-year period.<sup>30</sup> These “predicate acts” are a list of violations of either general state law categories or specific federal laws,<sup>31</sup> including mail fraud, immigration violations, securities laws, and drug laws.<sup>32</sup> The predicate acts must be sufficiently related and pose a threat of continued criminality to satisfy the “pattern” requirement.<sup>33</sup> A racketeer who violates

29. 18 U.S.C. § 1961(4) (defining enterprise as including “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity”). Earlier versions of section 1961(4) neglected to include “associations in fact” expressly. However, Congress followed the Supreme Court’s decision in *United States v. Turkette*, 452 U.S. 576, 580–87 (1981) and amended section 1961(4) to include the “associations in fact” language. In *Turkette*, the Court found that individuals who were associated in fact for the purpose of illegal drug trafficking, committing arsons, perpetrating mail fraud, bribing police officers, and obstructing justice constituted an enterprise. *Id.* at 579–80.

30. 18 U.S.C. § 1961(5) (“[P]attern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.”).

31. 18 U.S.C. § 1961(1). This section defines “racketeering activity” as

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of [certain enumerated] provisions of title 18, United States Code . . . [including] Section 201 . . . .

*Id.* The subsequent list of predicate acts includes bribery, mail fraud, counterfeiting, and a number of other related crimes. *Id.* For a discussion of the implications of the broad state-law categories, see *United States v. Garner*, 837 F.2d 1404, 1418 (7th Cir. 1987), finding that Congress intended the state category labels in section 1961 to refer to generic crimes, not to specific state statutes.

32. 18 U.S.C. § 1961(1).

33. The Supreme Court defined the “pattern” requirement in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 236–50 (1989). The Court identified two elements to consider in establishing a pattern: relatedness and continuity. *Id.* at 239. Relatedness, according to the Court, requires that the act have the same or similar purpose. *Id.* at 240. The continuity requirement mandates that the plaintiff show a continued threat of illegality: either that the activity continued for some substantial duration or would have continued in the future absent legal intervention. *Id.* at 240–43. In establishing this test, the Court attempted to ensure that the acts are related and not merely two isolated occurrences, thereby preventing application of RICO to garden variety frauds. *Id.* at 238–43. Justice Scalia found the “relatedness” and “continuity” concepts “about as helpful . . . as ‘life is a fountain.’” *Id.* at 252 (Scalia, J., concurring).

For a discussion of the impact of the Court’s pattern requirements and the ensuing confusion in the lower courts, see Bart A. Karwath, Note, *Has the Constituency of Continuity Plus Relationship Put an End to RICO’s Pattern of Confusion?*, 18 AM. J. CRIM. L. 201, 211–46 (1991).

For an example of application of the pattern requirement in the context of mail and wire fraud, see *ePlus Technology, Inc. v. Aboud*, 313 F.3d 166, 180–81 (4th Cir. 2002). The defendant in *ePlus Technology* sent multiple credit applications to the plaintiff and used telephone conversations to perpetrate the fraud, thereby violating the wire-fraud statutes. *Id.* at 181. The predicate acts were related because they were part of a broader scheme and continuous because they threatened to continue into the future. *Id.* at 182–83.



these provisions is subject to harsh criminal penalties, including fines, imprisonment for up to twenty years, and forfeiture of any property or interest in any property connected to an enterprise used in racketeering.<sup>34</sup>

In addition to the criminal penalties, a racketeer could be liable for treble damages to any person injured by the racketeering.<sup>35</sup> To recover these damages, a plaintiff must first prove a violation of one of the § 1962 substantive prohibitions.<sup>36</sup> Then, under § 1964, the plaintiff must prove three elements: first, that the racketeering caused an injury to the plaintiff's business or property; second, that the racketeering was the actual cause of the injury;<sup>37</sup> and third, that the racketeering was the proximate cause of the injury.<sup>38</sup>

Courts construe the "injury to business or property" requirement literally.<sup>39</sup> In most cases of corporate looting and unfair competition, this requirement is a non-issue because the plaintiff can clearly allege an injury to its business or property. For example, in *Anza* the plaintiff claimed that he had lost business due to the defendant's tax evasion, clearly alleging an injury to his business.<sup>40</sup> Courts typically reject claims that involve only personal injury or fail to allege business injury.<sup>41</sup>

The plaintiff must then prove that the § 1962 violation was the actual cause of the injury to his business or property.<sup>42</sup> The "actual cause" requirement simply requires proof "that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of

34. 18 U.S.C. § 1963.

35. 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains . . .").

36. *Id.*

37. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265–66 (1992).

38. See 1 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY § 7A:05 (2d ed. 1991) ("To prove a civil RICO violation the plaintiff must establish all the elements of a criminal RICO offense. Those elements will, of course, vary depending on which part of section 1962 is alleged to have been violated and depending on whether the violation is alleged to have occurred through a pattern of racketeering activity or through collection of unlawful debt. The civil RICO plaintiff must, in addition, prove an injury to business or property by reason of the violation.")

39. See *Libertad v. Welch*, 53 F.3d 428, 436–38 (1st Cir. 1995); see also *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 19–20 (D.D.C. 2005) (denying RICO standing to detainees in an Iraqi prison facility, despite allegations U.S. military forces seized their money and weapons, because the detainees could not allege anything other than personal injuries).

40. *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1996–97 (2006).

41. See *Libertad*, 53 F.3d at 436–38. In *Libertad*, two women claimed personal injury because an antiabortion group blocked their access to a reproductive clinic. *Id.* at 433–34. The court determined that the two women lacked RICO standing because they failed to allege injury to business or property. *Id.* at 436. However, the doctors at the clinic had standing because the antiabortion group injured their business by causing appointment cancellations and property damage. *Id.* at 438.

42. *Holmes*, 503 U.S. at 265–66.

plaintiff's injury."<sup>43</sup> In cases of corporate looting or unfair competition, this requirement may be a hurdle to recovery because many different factors may account for losses to a business, including fluctuations in the market, individual customer preferences, and other complexities in the marketplace.<sup>44</sup>

Proximate cause poses the greatest obstacle to recovery for a victim of unfair competition or corporate looting. Although the plain language of the statute appears to require no more than proof of actual cause, it is unlikely that "Congress meant to allow all factually injured plaintiffs to recover."<sup>45</sup> Courts have developed a theory of proximate cause that limits a RICO plaintiff's potential recovery based on common-law concepts of fairness and accountability.<sup>46</sup> However, this concept differs from common-law applications of proximate cause because it requires an additional, ambiguous element: proof of the "directness" of the injury.<sup>47</sup> The "directness" requirement, as applied in *Holmes v. Securities Investor Protection Corp.*,<sup>48</sup> required proof of a direct injury that was not derivative of the injury of another.<sup>49</sup> *Anza* changed the definition of "directness" by including the need to prove not only a direct injury, but also that the injury was the most immediate injury caused by the predicate act.<sup>50</sup> *Anza*'s redefinition of "directness" could make proof of proximate cause difficult in corporate looting and unfair competition cases because of these cases' complexity and the increased likelihood that a more immediate victim exists.<sup>51</sup>

The evolution of proximate cause reflects the concern of courts that RICO's broad language makes it susceptible to expansive interpretation

43. *Id.* at 265–66.

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

45. *Holmes*, 503 U.S. at 266.

46. *Id.* at 267–70.

47. *Id.* at 269. The term "directness" has been articulated in different ways by different courts. *Holmes* refers to this concept as "directness of relationship." *Id.* at 269. *Anza* refers to this concept as the "directness requirement." *Anza*, 126 S. Ct. at 1997. For simplicity's sake, I refer to this concept as the "directness" requirement, except when specifically discussing the Court's analysis in *Holmes* in Part II.C.2.

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

49. *See infra* Parts II.C.2, II.D.

50. *See infra* Parts II.E, III.

51. *See, e.g., Downstream Env'tl., L.L.C. v. Gulf Coast Waste Disposal Auth.*, No. H-05-1865, 2006 WL 1875959, at \*6–7 (S.D. Tex. July 05, 2006) (finding that a plaintiff failed to satisfy *Anza*'s proximate cause requirement when it alleged that a competitor was illegally disposing of waste, thereby lowering its costs and gaining a larger market share). In the case of *Downstream*, there would be no antitrust protection unless the defendant had gained a controlling share of the market. *See supra* note 7 and accompanying text. Therefore, the plaintiff would be forced to choose between going out of business or participating in the illegal dumping. *See infra* note 158 and accompanying text.

and abuse.<sup>52</sup> Accordingly, courts have experimented with a variety of methods intended to prevent an explosion of civil RICO litigation.<sup>53</sup> Analysis of this phenomenon requires understanding first, the legislative history of the statute; second, the evolution of civil RICO's proximate cause requirement; third, the application of proximate cause in two contexts (corporate looting and unfair competition); and finally, the impact of *Anza*.

### B. *The Statute and its Purpose*

In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO") to combat "racketeering activity."<sup>54</sup> The bill was a response to investigations by several government commissions that analyzed the economic aspect of organized crime.<sup>55</sup> One of the early

52. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985) (Marshall, J., dissenting) ("In practice, this provision frequently has been invoked against legitimate businesses in ordinary commercial settings. . . . Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.")

53. For a discussion of a modern example of this judicial curtailing of civil RICO's breadth, see Michael A. Hanzman, *Establishing Injury "By Reason of" Racketeering Activity*, 77 FLA. B.J., Mar. 2003, at 36, 36-43, which criticizes the Eleventh Circuit's creation of a per se detrimental reliance rule in *Sikes v. Teleline, Inc. USA*, 281 F.3d 1350 (2002). Hanzman attacks the Eleventh Circuit's opinion, which found that § 1964(c) required a plaintiff prove detrimental reliance on a predicate act. Hanzman, *supra*, at 36-43. Hanzman believes that "[l]itmus tests such as a per se detrimental reliance rule do not assist this type of inquiry because the 'infinite variety of claims . . . make it virtually impossible to announce a black-letter rule that will dictate the result in every case.'" *Id.* at 40 (citations omitted).

54. See 18 U.S.C. §§ 1961-1968 (2000); *supra* notes 1-3 and accompanying text. Professor G. Robert Blakey, who was the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969-70, when RICO was passed, drew five conclusions from his review of the legislative history:

- (1) Congress fully intended, after specific debate, to have RICO apply *beyond* any limiting concept like "organized crime" or "racketeering";
- (2) Congress deliberately redrafted RICO outside of the antitrust statutes, so that it would *not* be limited by antitrust concepts like "competitive," "commercial," or "direct or indirect" injury;
- (3) *Both* immediate victims of racketeering activity *and* competing organizations were contemplated as civil plaintiffs for injunction, damage, *and* other relief;
- (4) Over specific objections raising issues of federal-state relations and crowded court dockets, Congress deliberately *extended* RICO to the general field of commercial and other fraud; and
- (5) Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud.

G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 280 (1982).

55. For a discussion of the various commissions and their findings, see ABA REPORT, *supra* note 5, at 73-78 & n.70 (discussing the Kefauver Committee, the Katzenbach Commission, and the McClellan Committee).

Senate committees believed that the criminal syndicates of the country had joined to form “one loose national crime federation.”<sup>56</sup> Later inquiry revealed that “organized crime is . . . extensively and deeply involved in legitimate business.”<sup>57</sup> According to some estimates, by 1970 organized crime annually drained “billions of dollars from America’s economy by unlawful conduct and the illegal use of force, fraud, and corruption.”<sup>58</sup> During hearings on the bill, Congress noted that organized crime perpetrated this infiltration through various offensive means,<sup>59</sup> including corporate looting and unfair competition through tax fraud.<sup>60</sup> Congress feared that, without government intervention, ordinary citizens would no longer be able to “avoid the graver evils of organized crime—the corruption of our Government, the infiltration into our economy, the stifling of our freedoms.”<sup>61</sup>

56. COMM’N ON ORGANIZED CRIME, AM. BAR ASS’N, REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON ORGANIZED CRIME 6 (1951).

57. PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 187 (1967) (“But organized crime is also extensively and deeply involved in legitimate business and in labor unions. Here it employs illegitimate methods—monopolization, terrorism, extortion, tax evasion—to drive out or control lawful ownership and leadership and to exact illegal profits from the public.”); see also H.R. REP. NO. 91-1549, at 1 (1970); 116 CONG. REC. 35,201 (1970) (statement of Rep. Richard H. Poff) (“Whether the technique of infiltration is intimidation and violence or simply public purchase, the consequences of mob ownership of business concerns are always evil. Business competitors suffer unfair competition. Workers are the victims of sweetheart labor contracts. And consumers are the victims of inferior products and services, price-fixing and most of the other predatory practices and monopolies.”).

58. H.R. REP. NO. 91-1549, at 1; see also *Organized Crime Control Hearings*, supra note 1, at 106 (statement of Sen. John McClellan) (“Involvement of La Costa Nostra leaders in legitimate businesses has become the rule rather than the exception. Indeed, Internal Revenue sources have revealed that among the 113 major organized crime figures in America, 98 are involved in 159 businesses.”).

59. *Organized Crime Control Hearings*, supra note 1, at 106 (statement of Sen. John McClellan); see also 116 CONG. REC. 35,206 (1970) (statement of Rep. Donald D. Clancy) (“Organized crime . . . is gradually infiltrating and poisoning every phase of American life. It is corrupting our society, our economy, and our future. . . . It drains countless dollars from our economy, [and] it corrupts our free enterprise system . . .”).

60. *Organized Crime Control Hearings*, supra note 1, at 106 (statement of Sen. John McClellan) (“While these few examples of the extent of organized crime infiltration of business are themselves disturbing from the point of view of economic concentration of power, the most offensive aspect of this infiltration is the means by which it is accomplished and maintained. . . . A corporation is bled of its assets, goods obtained by the corporation on credit are sold for a quick profit, and then the corporation is forced into bankruptcy while the criminals who infiltrated it disappear. . . . Income routinely is understated for tax purposes, so that mob businesses have competitive advantages over businesses which report all their income.”).

61. *Id.* at 78 (statement of Rep. William M. McCulloch) (noting the distinction between those who choose to partake of the vices offered by organized crime and ordinary citizens who abstain, and speculating that, in the near future, even those who choose to abstain would suffer from the evils of organized crime).

Responding to these fears, Senator John L. McClellan and Senator Roman L. Hruska introduced bills that Congress incorporated into Title IX of the Organized Crime Control Act.<sup>62</sup> The bills proposed implementing new criminal penalties, strengthening existing legal tools, and ensuring that the government could use “all legitimate methods” to attack “the economic base” of organized crime.<sup>63</sup> Despite its wide-ranging goals, after three days of Senate debate the bill did not contain either a private cause of action or a treble damages provision.<sup>64</sup>

Representative Steiger introduced the private treble damages provision when the bill was before the House of Representatives.<sup>65</sup> The American Bar Association supported a treble damages provision, stating that the bill should include “the additional civil remedy of authorizing private damage suits based upon . . . the Clayton Act.”<sup>66</sup> The final bill combined criminal and civil enforcement provisions<sup>67</sup> that provided “enhanced sanctions and new remedies”<sup>68</sup> to ameliorate perceived statutory inadequacies that had limited prior enforcement efforts.<sup>69</sup> The criminal and civil provisions relied on the same core definitions and prohibited activities.<sup>70</sup>

The civil provision (“civil RICO”) has two purposes: victim compensation and private enforcement.<sup>71</sup> A treble damages provision

62. See S. REP. NO. 91-617, 91st Cong., 1st Sess. (1969).

63. *Id.* at 76, 79.

64. See ABA REPORT, *supra* note 5, at 106.

65. See *Organized Crime Control Hearings*, *supra* note 1, at 520 (statement of Rep. Sam Steiger).

66. *Id.* at 543–44 (statement of ABA President-elect Edward L. Wright).

67. 18 U.S.C. §§ 1963–1964 (2000); 116 CONG. REC. 35,201 (1970) (statement of Rep. Richard H. Poff) (“[RICO] mobilizes both the criminal and civil mechanisms of the Sherman Act and other antitrust statutes against the barons of organized crime.”).

68. H.R. REP. NO. 91-1549, at 2 (1970).

69. *Organized Crime Control Hearings*, *supra* note 1, at 518 (statement of Rep. Sam Steiger) (“[T]he legislative tools and methods [then] available to the Executive Branch . . . [had] been proved by bitter experience not to be adequate to the task . . .”). Professor Douglas E. Abrams describes President Nixon’s signing of the bill and his order to the Justice Department:

October 15, 1970 was a cloudy day in Washington, D.C. Early that morning, President Richard M. Nixon took the short drive from the White House to the Great Hall at the Department of Justice Building. In a ceremony beginning shortly after 10:00 A.M., the President signed the Organized Crime Control Act (OCCA), which had received final congressional approval three days earlier. . . . Handing the signed bill to the Attorney General and Federal Bureau of Investigation director, the President proclaimed, “Gentlemen, I give you the tools. You do the job.”

DOUGLAS E. ABRAMS, *THE LAW OF CIVIL RICO* 1–2 (1991) (citations omitted).

70. See 18 U.S.C. §§ 1961–1962 (2000); see also 1 BRICKEY, *supra* note 38, § 7A:04 (“The heart of a criminal RICO violation, section 1962, is also the core of a civil violation. To establish a civil claim, the plaintiff must prove all of the elements of a section 1962 violation.”).

71. *Rotella v. Wood*, 528 U.S. 549, 557 (2000) (“The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, ‘private attorneys general,’ dedicated to

addresses victim compensation by providing victims a means to recover three times the amount of damages racketeering causes to their business or property.<sup>72</sup> Senator McClellan proclaimed that the treble damages provision was “a major new tool in extirpating the baneful influence of organized crime in our economic life.”<sup>73</sup> Congress believed the treble damages provision would not only protect victims of racketeering, but would also augment the criminal prohibitions<sup>74</sup> by deputizing plaintiffs as “private attorneys general.”<sup>75</sup> Because the government can bring only “a very limited number of cases” with “limited resources,” private civil action serves to supplement prosecutorial shortfalls.<sup>76</sup> Congress realized that victim-competitors of racketeers not only conserve government

eliminating racketeering activity.” (quoting *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997)); see also *Organized Crime Control Hearings*, *supra* note 1, at 520 (statement of Rep. Sam Steiger) (“[T]hose who have been wronged by organized crime should at least be given access to a legal remedy. In addition, the availability of such a remedy would enhance the effectiveness of [RICO’s criminal] prohibitions.”).

72. 18 U.S.C. § 1964(c) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter . . . shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee . . . .”); see 116 CONG. REC. 35,295 (1970) (statement of Rep. Richard H. Poff) (“In addition, at the suggestion of the gentleman from Arizona (Mr. STEIGER) and also the American Bar Association and others, the committee has provided that private persons injured by reason of a violation of the title may recover treble damages in Federal courts—another example of the antitrust remedy being adapted for use against organized criminality.”).

73. 116 CONG. REC. 25,190 (1970) (statement of Sen. John McClellan); see also *Organized Crime Control Hearings*, *supra* note 1, at 107 (statement of Sen. John McClellan) (“[RICO] contains important civil provisions which in some respects are superior to the criminal process’ remedies and procedures. As to remedies, [RICO] adapts the equitable remedies long applied by courts of equity and brought to their fullest development by federal courts applying the antitrust laws . . . . In extreme cases, the civil remedies could include even the court-ordered dissolution of a business found to be corrupted from top to bottom.”).

74. *Organized Crime Control Hearings*, *supra* note 1, at 520 (statement of Rep. Sam Steiger); 116 CONG. REC. 35,346–47 (statement of Rep. Sam Steiger) (“It is the intent of this body, I am certain, to see that innocent parties who are the victims of organized crime have a right to obtain proper redress.”).

75. *Rotella*, 528 U.S. at 557 (citation omitted); see also 115 CONG. REC. 6993 (1969) (statement of Sen. Roman Hruska) (“Patterned closely after the Sherman Act, [the bill] provides for private treble damage suits, prospective injunctive relief, unlimited discovery procedures and all the other devices which bring to bear the full panoply of our antitrust machinery in aid of the businessman competing with organized crime.”) (discussing a bill that was predecessor to the civil RICO provision).

Another important by-product of the civil provisions was the variety of procedures available in civil actions. Congress considered the civil system to be a more efficient investigative tool for examining business records and transactions. *Organized Crime Control Hearings*, *supra* note 1, at 519–20 (statement of Rep. Sam Steiger) (“More important [sic], [RICO] takes the innovative step of applying the civil procedures and remedies developed in anti-trust cases to the problem of organized crime. The primary procedure borrowed from anti-trust experience is the civil investigative demand, a most effective investigative tool for examining business transactions and records.”).

76. Neil Feldman, Note, *Spiraling Out of Control: Ramifications of Reading RICO Broadly*, 65 DEF. COUNS. J. 116, 120 (1998).

resources by serving as its proxy,<sup>77</sup> but also have a strong economic incentive to protect their own interests by rapidly detecting and halting racketeering that undermines the legitimacy of the marketplace.<sup>78</sup> The “expected benefit of suppressing racketeering activity” justified treble damages.<sup>79</sup>

### C. *The Judicial Evolution of the Proximate Cause Requirement*

Congress broadly drafted RICO’s language to give courts and law enforcement freedom to implement the statute’s remedial purpose.<sup>80</sup> *Anza* is the latest Supreme Court case in a series that has tried to curtail abuse of this broad language by defining the limits of civil RICO.<sup>81</sup> The initial attempts to check the use of civil RICO stemmed from a fear that plaintiffs had expanded civil RICO beyond the purposes envisioned by Congress.<sup>82</sup> Earlier courts sought to allay this fear by engrafting fabricated elements into the statute, such as the “prior criminal conviction” requirement, to heighten the plaintiff’s burden of proof.<sup>83</sup> After the Supreme Court rejected these approaches in *Sedima, S.P.R.L. v. Imrex Co.*,<sup>84</sup> courts turned to common-law concepts of proximate cause as an acceptable limit to the scope of civil RICO.<sup>85</sup> *Anza* is the next step in the evolution of the proximate cause requirement. Although earlier courts used proximate cause to limit recovery appropriately, *Anza* may have gone too far.

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77. The private right of action is available to “[a]ny person injured in his business or property by reason of a violation” of RICO. 18 U.S.C. § 1964(c).

78. See *Organized Crime Control Hearings*, *supra* note 1, at 520 (statement of Rep. Sam Steiger).

79. *Rotella*, 528 U.S. at 558. For a discussion of law enforcement’s inability to “do the whole job,” see Blakey & Perry, *supra* note 5, at 912–16.

80. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (codified at 18 U.S.C. §§ 1961–1968 (2000)).

81. See *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 2004–05 (Thomas, J., dissenting); see also *supra* note 16; see also, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001) (citing *Holmes*, 503 U.S. at 268).

82. See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 494 (2d Cir. 1984), *rev’d*, 473 U.S. 479 (1985).

83. See *Sedima*, 473 U.S. at 493 (reversing the Second Circuit’s fabricated requirements).

84. 473 U.S. 479, 493, 500 (1985).

85. See *Holmes*, 503 U.S. at 267–68.

### 1. Initial Judicial Restrictions

Many courts have attempted to narrow civil RICO's scope because they believe "that civil RICO's evolution is undesirable."<sup>86</sup> As plaintiffs began using civil RICO against a variety of defendants, lower courts worried that civil RICO had expanded into areas "far afield from the battle against organized crime."<sup>87</sup> In response, courts developed different methods to limit the expansion of RICO, experimenting with various judicial solutions: an "organized-crime nexus" requirement,<sup>88</sup> a "competitive injury" requirement,<sup>89</sup> a "racketeering-enterprise injury" requirement,<sup>90</sup> and a "prior criminal conviction" requirement.<sup>91</sup>

Courts rejected the "organized-crime nexus" and the "competitive injury" requirements because they contravened congressional intent and the plain language of the statute.<sup>92</sup> The "organized-crime nexus" requirement required plaintiffs to prove a substantial link between organized crime and the enterprise.<sup>93</sup> This meant that a plaintiff had to prove that organized crime was substantially involved with the enterprise that was engaging in the racketeering.<sup>94</sup> Courts rejected this concept, *inter alia*, because Congress had explicitly considered, and rejected, an amendment that proposed to limit RICO's applicability to "La Cosa Nostra," a pseudonym for organized crime.<sup>95</sup> The "competitive injury"

86. *Anza*, 126 S. Ct. at 2004 (Thomas, J., dissenting) (citations omitted); *see also supra* note 16.

87. *Sedima*, 741 F.2d at 492. G. Robert Blakey and Thomas Perry, however, debunk what they call "the Organized Crime Myth," noting that not only did Congress design RICO to deal with all forms of enterprise criminality, but that the Supreme Court has recognized this purpose expressly. Blakey & Perry, *supra* note 5, at 860–68.

88. *See, e.g., Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 643 (C.D. Cal. 1983).

89. *See, e.g., N. Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 210–11 (N.D. Ill. 1980).

90. *See, e.g., Waste Recovery Corp. v. Mahler*, 566 F. Supp. 1466, 1468–69 (S.D.N.Y. 1983).

91. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985) (striking down the prior criminal conviction requirement).

92. *See Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 (2d Cir. 1983) (rejecting the organized-crime nexus requirement because courts should not impose their own understanding of "organized crime" upon broad remedial legislation); *Bunker Ramo Corp. v. United Bus. Forms, Inc.* 713 F.2d 1272, 1288 (7th Cir. 1983) (rejecting the competitive-injury requirement because it violated the plain language and Congressional intent of RICO).

93. Some district courts required plaintiffs to prove that there was a substantial and cognizable connection between the enterprise and organized crime. *See Hokama*, 566 F. Supp. at 643–44; *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Adair v. Hunt Int'l Res. Corp.*, 526 F. Supp. 736, 747 (N.D. Ill. 1981); *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 112–13 (S.D.N.Y. 1975).

94. *See Moss*, 719 F.2d at 21.

95. The Second Circuit provides a brief summary of Congress's rejection of the "La Cosa Nostra" label:

Similarly, the Act's legislative history supports a rejection of this "organized crime" element. During the House debates on RICO, Congressman Biaggi proposed an amendment that



requirement required the plaintiff to prove that he suffered an injury resulting from unfair competition in the marketplace.<sup>96</sup> Courts eventually dismissed both of these requirements as judicial overreaching that vitiated Congress's intent.<sup>97</sup>

However, the circuits disagreed about the legitimacy of the "racketeering-enterprise injury" and "prior criminal conviction" requirements.<sup>98</sup> Courts that adhered to the "racketeering-enterprise injury" requirement stated that a plaintiff had to prove an injury that was separate and distinct from the injury or injuries caused by the predicate acts.<sup>99</sup> According to these courts, the plaintiff had to show that the injury did not stem from the predicate act, but rather resulted from an arbitrary and ill-

sought to limit the application of RICO to Mafia and La Cosa Nostra organizations. 116 Cong. Rec. 35,343 (1970). The amendment was vigorously attacked on constitutional grounds. Congressman Celler objected that such terms were "imprecise, uncertain, and unclear" and that mere membership in an organization should not be punished. *Id.* at 35,343-44 (1970). Congressman Poff (the bill's sponsor in the House) objected that such an amendment might violate the Supreme Court's rulings that struck down statutes which created status offenses . . . . 116 Cong. Rec. 35,344 (1970).

*Moss*, 719 F.2d at 21.

96. *N. Barrington Dev. Inc. v. Fainslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980) ("[P]laintiff must allege how it was injured competitively by the RICO violation in order to state a cause of action under § 1964(c)."). Courts have ascribed different labels to the "competitive injury" requirement, but still generally insist on the type of injury the *North Barrington* court required. *See King v. Lasher*, 572 F. Supp. 1377, 1382 (S.D.N.Y. 1983) (requiring injury resulting from the operation or acquisition of an enterprise); *Bankers Trust Company v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983) (requiring antitrust-type competitive injury); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1137 & n.11 (D. Mass. 1982) (requiring commercial or business injury); *Johnsen v. Rogers*, 551 F. Supp. 281, 285 (C.D. Cal. 1982) (requiring commercial or business injury); *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982) ("[I]njury of the type the RICO statute was intended to prevent."). *But see Gitterman v. Vitoulis*, 564 F. Supp. 46, 49 (S.D.N.Y. 1982).

97. *See Moss*, 719 F.2d at 21; *Bunker Ramo*, 713 F.2d at 1288.

98. Many courts believed that the statute called for a racketeering-enterprise injury. *See Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516-17 (2d Cir. 1984) ("[I]f a complaint alleges a proprietary injury that is caused by the defendant's predicate acts, rather than by its use of a pattern of racketeering activity in connection with a RICO enterprise, the injury cannot be said to have been caused by 'a violation of section 1962.'"); *Alexander Grant & Co. v. Tiffany Indus., Inc.*, 742 F.2d 408, 413 (8th Cir. 1984) (finding that RICO claim requires some unspecified element beyond injury stemming from the predicate acts). *But see Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi.*, 747 F.2d 384, 398-99 (7th Cir. 1984) (rejecting the racketeering enterprise injury requirement). Other courts believed that plaintiffs had standing only if there was a prior criminal conviction. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 496-502 (2d Cir. 1984), *rev'd*, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 484 (1985).

99. *Sedima*, 473 U.S. at 484. *See also Waste Recovery Corp. v. Mahler*, 566 F. Supp. 1466, 1468-69 (S.D.N.Y. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 358 (E.D. Mich. 1983); *Guerrero v. Katzen*, 571 F. Supp. 714, 718 (D.D.C. 1983) (injury "by reason of a [RICO] violation"); *Landmark Sav. & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981) (requiring racketeering-enterprise injury).

defined concept of “organized criminality.”<sup>100</sup> To satisfy the “prior criminal conviction” requirement, plaintiffs had to prove that the defendant had been criminally convicted of the underlying predicate act prior to the civil action.<sup>101</sup>

The Supreme Court addressed and rejected these initial judicial restrictions in *Sedima, S.P.R.L. v. Imrex Corp.*,<sup>102</sup> overturning the Second Circuit’s requirements that a plaintiff prove a prior criminal conviction<sup>103</sup> and a racketeering-enterprise injury.<sup>104</sup> The Court found that the plain language of the statute did not require a prior criminal conviction,<sup>105</sup> but instead required proof of the predicate act by a preponderance of the evidence.<sup>106</sup> The Court reasoned that requiring a prior criminal conviction frustrated the remedial purpose of the statute and did violence to the plain language of the provision.<sup>107</sup> The Second Circuit’s interpretation would

100. *Sedima*, 473 U.S. at 484–85.

101. *Id.* at 485.

102. *Id.* at 483–84. The court briefly summarized the complicated scheme involved in the case:

In 1979, petitioner Sedima, a Belgian corporation, entered into a joint venture with respondent Imrex Co. to provide electronic components to a Belgian firm. The buyer was to order parts through Sedima; Imrex was to obtain the parts in this country and ship them to Europe. The agreement called for Sedima and Imrex to split the net proceeds. Imrex filled roughly \$8 million in orders placed with it through Sedima. Sedima became convinced, however, that Imrex was presenting inflated bills, cheating Sedima out of a portion of its proceeds by collecting for nonexistent expenses.

*Id.*

103. *Id.* at 493 (“[W]e can find no support in the statute’s history, its language, or considerations of policy for a requirement that a private treble-damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted . . . [N]o such requirement exists.”).

104. *Id.* at 495 (“We need not pinpoint the Second Circuit’s precise holding, for we perceive no distinct ‘racketeering injury’ requirement.”). *Contra Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 503 (2d Cir. 1984), *rev’d*, 473 U.S. 479.

105. Debunking the prior criminal conviction requirement, the Court noted, “The word ‘conviction’ does not appear in any relevant portion of the statute.” *Sedima*, 473 U.S. at 488. The Court held that the word “violation,” which the circuit court relied upon in its decision, did not imply a criminal conviction. *Id.* at 488–90 (citing *United States v. Ward*, 448 U.S. 242, 249–50 (1980)).

106. *Id.* at 491 (“We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard . . . . There is no indication that Congress sought to depart from this general principle here.”).

107. *Id.* at 493. The Court discussed Congress’s underlying policy concerns:

Finally, we note that a prior-conviction requirement would be inconsistent with Congress’s underlying policy concerns. Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for any number of reasons—not least among them the possibility that the Government itself may choose to pursue only civil remedies. Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps. This purpose would be largely defeated . . . if private suits could be maintained only against those already brought to justice.”

*Id.* (citation omitted).

have left a plaintiff's right to sue subject to the discretion of a prosecutor, whose decision not to prosecute may be based on factors other than the guilt of the accused.<sup>108</sup>

The Court similarly rejected the Second Circuit's "racketeering-enterprise injury" requirement.<sup>109</sup> The Court found that injuries caused by the defendant's commission of § 1961(1) predicate acts satisfied civil RICO's requirements, even absent a separate racketeering injury.<sup>110</sup> The Second Circuit had required the plaintiff to prove an injury caused by "organized criminality," denying recovery for injuries caused solely by the predicate act.<sup>111</sup> The Court rejected this approach because it was "unhelpfully tautological."<sup>112</sup> Because Congress intended to deter racketeering by punishing the injuries caused by the predicate acts,<sup>113</sup> the Court found the Second Circuit's reading of § 1964 overly restrictive and admonished lower courts to read RICO "liberally . . . to effectuate its remedial purposes."<sup>114</sup>

## 2. Holmes—*Invoking Proximate Cause*

Although the Court in *Sedima* acknowledged a perceived undesirable expansion of civil RICO, it did not propose a solution.<sup>115</sup> Lacking direction, lower courts focused on issues of causation by addressing differences between direct and indirect victims.<sup>116</sup> The circuits split: some

108. *See id.*

109. *Id.* at 494–97.

110. *Id.* at 497 (“[T]he compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern . . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from commission of the predicate acts.”).

111. *Id.* at 484–85, 494.

112. *Id.* at 494.

113. *Id.*

114. *Id.* at 498 (“Far from effectuating these [remedial] purposes, the narrow readings offered by the dissenters and the court below would in effect eliminate § 1964(c) from the statute.”); *see also* Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970) (“[RICO must] be liberally construed to effectuate its remedial purposes.”).

115. In dictum, the Court voiced concerns about the expansion of the civil RICO action. *Sedima*, 473 U.S. at 499. The Court noted that plaintiffs had used the civil provision primarily against legitimate business in fraud cases rather than against mobsters and organized criminals. *Id.* The Court noted that “this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress.” *Id.* The Court acknowledged that the use of civil RICO had evolved into something different from the enactors’ intent, but disagreed with the Second Circuit’s “remedy.” *Id.* at 499–500.

116. Courts defined a direct victim as one who incurs injury directly from the racketeer’s actions, while an indirect victim’s injuries result from the injuries of a third party. *See Morast v. Lance*, 807 F.2d 926, 933 (11th Cir. 1987) (holding that plaintiff only has standing to sue under civil RICO if its injuries flowed directly from predicate acts); *Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987) (requiring plaintiff show that he relied directly on misstatements by defendant to prove mail-fraud injury). *But see O’Malley v. O’Neill*, 887 F.2d 1557, 1563 n.9, 1564

required plaintiffs to prove direct injury,<sup>117</sup> while others allowed both direct and indirect victims to recover.<sup>118</sup>

Again faced with inconsistent circuit decisions on the limits of civil RICO, the Supreme Court interceded in *Holmes v. Securities Investor Protection Corp.* and adopted a “proximate cause” requirement.<sup>119</sup> The plaintiff in *Holmes* alleged that the defendant participated in a stock-manipulation scheme, defrauding two broker-dealers.<sup>120</sup> The plaintiff, the Securities Investor Protection Corporation,<sup>121</sup> argued that because it advanced \$13 million to cover the claims of customers of the defrauded broker-dealers,<sup>122</sup> it was subrogated to the rights of the broker-dealers who had not purchased manipulated securities.<sup>123</sup>

The Court rejected this argument, holding that a proper interpretation of civil RICO required proof of both an actual injury and proximate cause.<sup>124</sup> The Court began its analysis by noting that the legislative history of RICO revealed that Congress had patterned RICO after antitrust provisions in the Clayton Act.<sup>125</sup> Therefore, the Court reasoned, RICO,

(11th Cir. 1989) (Anderson, J., specially concurring) (doubting that *Morast* is faithful to *Sedima*); *Alexander Grant & Co. v. Tiffany Indus., Inc.*, 742 F.2d 408, 412 (8th Cir. 1984) (“We find no legislative history supporting the direct-indirect dichotomy . . .”).

117. See 1 BRICKEY, *supra* note 38, § 7A:14 n.100; see, e.g., *Morast*, 807 F.2d at 933; *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991) (“We . . . hold[] that a plaintiff has standing . . . only if his injury flowed directly from the commission of the predicate acts”); *Nodine v. Textron, Inc.* 819 F.2d 347, 349 (1st Cir. 1987) (rejecting a retaliatory discharge claim because it did not flow from the RICO violation). For a collection of district court cases, see ABA REPORT, *supra* note 5, at 284–86 nn.436–37.

118. See *Zervas v. Faulkner*, 861 F.2d 823, 834 (5th Cir. 1988) (finding that a direct nexus between the injury and predicate act may not always be required, but acknowledging the need for some limit); *Sperber v. Boesky*, 849 F.2d 60, 63 (2d Cir. 1988) (assuming that some indirect injuries are covered by RICO, but declining to extend it to the plaintiff *sub judice*).

119. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267–79 (1992).

120. *Id.* at 261.

121. See Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa–78lll (2000). The Securities Investor Protection Act of 1970 (SIPA) authorized the formation of the private, non-profit Securities Investor Protection Corporation (SIPC), requiring registered brokers to become “members.” *Id.* § 78ccc. When the SIPC determines that a member is failing to meet its obligations, it may ask for a protective decree. *Id.* § 78eee(a)(3). Once the court grants the petition, it appoints a trustee charged with liquidating the member’s business. *Id.* §§ 78eee(b)(1)–(3). If the liquidated property is inadequate, the SIPC may advance up to \$500,000 per customer to the trustee to satisfy those claims. *Id.* § 78fff-3(a).

122. *Holmes*, 503 U.S. at 262–63.

123. *Id.* at 270.

124. *Id.* at 268 (“Here we use ‘proximate cause’ to label generically the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts. At bottom, the notion of proximate cause reflects ‘ideas of what justice demands, or of what is administratively possible and convenient.’” (quoting W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS § 41, at 264 (5th ed. 1984))).

125. *Holmes*, 503 U.S. at 267 (“We have repeatedly observed . . . that Congress modeled

like the Clayton Act, should incorporate the common law's general limitation that allows recovery to only the "first step."<sup>126</sup> However, the Court's "proximate cause" requirement went beyond the common-law notion by applying a concept that the Court labeled "directness of relationship."<sup>127</sup> This concept limited recovery to people who suffered direct injury, distinguishing them from victims whose injury was merely derivative of an injury of another.<sup>128</sup> According to *Holmes*, proximate cause limited recovery to only those victims whom the racketeering directly injured.<sup>129</sup> For example, if D's racketeering caused injury to A and B, they could recover. If A's or B's injury also caused C to be injured, C would be an indirect victim and could not recover.

The Court gave three rationales for its directness requirement.<sup>130</sup> First, the Court was concerned that allowing more remote recovery would make calculating damages too difficult and speculative.<sup>131</sup> Second, the Court worried about the risk of multiple recoveries.<sup>132</sup> Third, the Court reasoned, "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."<sup>133</sup> *Holmes* thus focused the lower courts' attention on issues of proximate cause.<sup>134</sup>

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§ 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 may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.'" (second ellipsis in original)).

126. *Id.* at 271–72 ("As we said, however, . . . quoting Justice Holmes, "The general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" (quoting *Associated Gen. Contractors of Cal., Inc. v. State Council of Carpenters*, 459 U.S. 519, 534 (1983))).

127. *Id.* at 269.

128. *Id.* at 270–74.

129. *Id.* at 268–69.

130. *Id.* at 269–70.

131. *Id.* at 269 ("[T]he 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.").

132. *Id.* ("[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries.").

133. *Id.* at 269–70.

134. See *Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d. 560, 573–84 (2d Cir. 1999).

#### D. Civil RICO Applied Pre-Anza

##### 1. Proximate Cause and Corporate Looting

The *Holmes* decision changed the way courts addressed corporate looting cases under civil RICO. Prior to *Holmes*, civil RICO played an important role in protecting victims from white-collar crime.<sup>135</sup> State common-law jurisprudence was “not adequate to deal with sophisticated forms of fraud” because it developed under “prevailing philosophies of *laissez faire* and *caveat emptor*.”<sup>136</sup> Civil RICO lowered the common law clear and convincing burden of proof to a preponderance of the evidence standard.<sup>137</sup> Additionally, civil RICO provided treble damages and attorney’s fees, which made difficult-to-prove white-collar claims worth litigating.<sup>138</sup>

In the post-*Holmes* environment, courts struggled to apply the *Holmes* “directness” requirement in the context of corporate looting.<sup>139</sup> Courts

135. For an example of how a plaintiff used civil RICO in the corporate looting context before the *Holmes* decision, see *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988). In *Bankers Trust*, the Second Circuit allowed a creditor to bring a civil RICO claim against the debtor corporation’s officers who had defrauded creditors by concealing over three million dollars in assets. *Bankers Trust*, 859 F.2d at 1098–1100, 1101. The court reasoned that the defendant’s conduct—which included bribery, perjury, fraud, and bankruptcy fraud—directly caused the creditor’s financial loss. *Id.* at 1101. The court held that the creditor had standing to bring the case, notwithstanding that the bankrupt debtor corporation was also injured, noting, “if Bankers [the creditor] was injured by defendants’ acts, . . . it has standing to bring a RICO claim, regardless of the fact that a bankrupt BAC [the debtor] might also have suffered an identical injury for which it has a similar right of recovery.” *Id.*

136. Blakey & Perry, *supra* note 5, at 909–13. Despite the common law’s neglect of these plaintiffs, some commentators advocate narrowing civil RICO, leaving victim protection and compensation to other statutes. See, for example, Feldman, *supra* note 76, at 119–20 for a discussion of the perceived overexpansion of civil RICO in the commercial-fraud and abortion-protestor contexts. Feldman believes that courts have allowed plaintiffs to use civil RICO in cases outside of Congress’s original intent. Feldman also believes that most commercial-fraud cases are cases involving ordinary fraud that therefore do not deserve the remedy of treble damages. He proposes limiting civil RICO to class action victims who qualify under Rule 23(b)(3) of the Federal Rules of Civil Procedure to limit the availability of the remedy. Feldman, *supra*, at 120.

137. Blakey & Perry, *supra* note 5, at 910 n.157. Although RICO filled a void in both state law and bankruptcy law, it should be noted that courts hesitate to allow RICO claims in the bankruptcy context due to a fear of upsetting bankruptcy judges’ distribution of assets. See *Dana Molded Prods. Inc. v. Brodner*, 58 BR. 576, 579 (N.D. Ill. 1986).

138. See ABA REPORT, *supra* note 5, at 63.

139. See *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 908 (11th Cir. 1998) (finding that a plaintiff failed to allege a direct injury for skimmed profits, but was directly injured by the illegal sale of corporate assets); *GICC Capital Corp. v. Tech. Fin. Group, Inc.*, 30 F.3d 289, 293 (2d Cir. 1994) (“[T]he . . . timing . . . and the rapacious nature of the alleged looting—fairly posit the directness of injury required for RICO standing.”); *Bankers Trust*, 859 F.2d at 1101 (“[I]f [the creditor] was injured by defendants’ acts, . . . it has standing to bring a RICO claim, regardless of the fact that [the debtor] might also have suffered an identical injury for which it has a similar right of recovery.”). *But see* *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1420 (9th Cir. 1995) (“The creditor’s

focused on whether the creditor's injury was direct or derivative of the looted corporation's injury.<sup>140</sup> Generally, courts found that injury to creditors was derivative of the injury to the corporation.<sup>141</sup> Courts also hesitated to award damages if a corporation went bankrupt because the courts did not want to upset the bankruptcy court's distribution,<sup>142</sup> arguing that creditor use of civil RICO against debtor corporations diminished the general distribution fund, punishing other creditors rather than the racketeers.<sup>143</sup>

Despite this general rejection of creditor claims, some courts recognized that a creditor could suffer a direct injury in some exceptional circumstances.<sup>144</sup> The distinguishing feature in these exceptional circumstances was the intent of the racketeer: whether the racketeer directed the racketeering activity at the company or the creditors.<sup>145</sup>

The Eleventh Circuit used the *Holmes* directness requirement to evaluate a creditor's civil RICO standing when a debtor/racketeer

injury is derivative of that of the corporation and is not caused proximately by the RICO violations." (quoting *Manson v. Stacescu*, 11 F.3d 1127, 1130 (2d Cir. 1993)).

140. See *Bivens Gardens*, 140 F.3d at 908 (finding that stockholders had derivative standing to sue under civil RICO for damages caused by corporate looting by the head of the corporation); compare *GICC Capital*, 30 F.3d at 293-94 (finding the creditors directly injured by corporate looting), with *Hamid*, 51 F.3d at 1420 (finding that a creditor's injury is generally derivative of the corporation's injury).

141. Courts followed this general rule notwithstanding that the legislative history seems to contemplate creditor recovery in corporate looting cases. See *Organized Crime Control Hearings*, *supra* note 1, at 106 (statement of Sen. John McClellan); *supra* note 60.

142. *Popkin v. Jacoby (In re Sunrise Sec. Litig.)*, 916 F.2d 874, 887-88 (3d Cir. 1990).

143. *Hamid*, 51 F.3d at 1420-21 ("[The plaintiff's] claims, if allowed in this lawsuit, would enable them to jump ahead of other creditors in priority and obtain greater shares of the failed bank's assets and of the assets of any wrongdoers who may owe money to the failed bank on account of their wrongs. . . . [The plaintiffs'] attempt to jump in line ahead of other creditors . . . is rebuffed here.").

144. Compare *Manson*, 11 F.3d at 1130 ("Creditors of a bankrupt corporation, however, generally do not have standing under RICO. . . . The creditor generally sustains injury only because he has a claim against the corporation. The creditor's injury is derivative of that of the corporation and is not caused proximately by the RICO violations."), with *Bankers Trust*, 859 F.2d at 1099-1101, 1105 (holding that creditors of a bankrupt company suffered a direct injury when they were forced to defend against lawsuits filed to harass them, the debtor made fraudulent conveyances to insulate its property from creditors, and the debtor attempted to inflict monetary loss on the creditor), and *First Capital Asset Mgmt., Inc. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 383 (S.D.N.Y. 2002) ("It seems entirely foreseeable that these acts designed to hide assets and obtain a wrongful discharge of debts would cause creditors to expend money to block such a discharge and recover any fraudulently transferred assets. In other words, the adversary proceeding, with its attendant costs, may be viewed as an expected and natural consequence of the type of conduct allegedly engaged in by [the defendant]. And it seems that the alleged predicate acts enumerated above played a substantial role in plaintiffs' decision to pursue the adversary proceeding: all of them were mentioned by Judge Gallet as grounds upon which plaintiffs sought denial of [the defendant's] petition. Accordingly, plaintiffs have standing to pursue their substantive RICO claim against [the defendant] because of the [l]egal [f]ees injury." (footnotes omitted)).

145. *Bivens Gardens*, 140 F.3d at 908.

fraudulently attempted to sell a corporation's assets below market value during bankruptcy.<sup>146</sup> The court reasoned that the sale of the asset affected creditors in a sufficiently direct manner because it directly diminished the funds available for distribution.<sup>147</sup> The court held that the sale of the asset at a higher price would have directly benefited the creditors; therefore, a sale at below market price likewise directly injured these creditors.<sup>148</sup>

Similarly, in *GICC Capital Corp. v. Technology Finance Group, Inc.*,<sup>149</sup> the Second Circuit found that a creditor satisfied the *Holmes* proximate cause test when he alleged that a debtor/racketeer fraudulently issued a promissory note, knowing that corporate looting had already rendered the note worthless.<sup>150</sup> Noting that a creditor cannot generally sue for injury visited upon the company,<sup>151</sup> the court felt that the timing and magnitude of the fraud required a finding of directness.<sup>152</sup>

146. *Bivens Gardens*, 140 F.3d at 902–03. The plaintiff, Fred Konstand, founded and incorporated several entities, including defendant Bivens Center, Inc. (BCI), to develop forty acres into a hotel and office park in Gainesville, Florida. *Id.* at 902. Konstand was the majority shareholder of BCI, and James Karns was the largest minority shareholder. *Id.* Konstand created Bivens Gardens Hotel, Ltd. (BGH), a limited partnership with BCI as a fifty percent owner and general partner. *Id.* Konstand funded both BCI and BGH through outside lenders, including University City Bank (UCB). *Id.* In October of 1974, UCB sent notice that a \$200,000 loan was in default. *Id.* at 902–03. UCB officers and lawyers then went to the home of Karns, obtained a false proxy, and held a shareholder meeting in which it forced Konstand out of office. *Id.* at 903. UCB then appointed a twenty-four-year-old as president, who subsequently ran the company into bankruptcy. *Id.* During bankruptcy, the defendant fraudulently sold the hotel for \$1.5 million under market value. *Id.*

147. *Id.* at 908.

148. *Id.* (“As a creditor, Konstand had a direct interest in seeing the hotel sold for as high a price as possible. . . . [T]he sale of the hotel at a lower price affected creditors . . . in a manner sufficiently direct to confer RICO standing . . .”).

149. 30 F.3d 289 (2d Cir. 1994).

150. *Id.* at 290–91. The plaintiff, GICC Capital Corporation (Capital), settled an unrelated litigation with Technology Finance Group, Inc. (TFG) by accepting a promissory note for \$500,000. *Id.* at 290. TFG subsequently defaulted because it conspired with its former parent corporation, Creative Resources, Inc. (CRI), to strip the corporation of its assets through a series of transactions. *Id.* at 291. First, CRI and TFG reorganized, reassigning a TFG subsidiary, Apple Leasing, to CRI, depriving TFG of income. Second, CRI caused Apple to make subsequent repurchase transactions instead of TFG. Through Apple, CRI also forced TFG to buy others that it sold to Apple for no profit. This scheme resulted in a stream of profits that flowed from Apple directly to CRI, bypassing TFG and leaving it as a shell corporation. Third, CRI transferred one million dollars to overseas subsidiaries to frustrate collection of TFG's debts. Fourth, CRI caused the sale of TFG to a new shell company, casting TFG adrift and releasing the insolvent subsidiary. *Id.*

151. *Id.* at 293 (“The question remains one of proximate cause, which we find adequately alleged here.”).

152. *Id.* at 293 (“[C]apital allegedly accepted a litigation settlement unaware that defendants had conveyed assets, and Capital's collection was frustrated when defendants stripped TFG of its assets. Capital's claim is squarely within the compass of our past decisions regarding standing.”).



## 2. *Proximate Cause and Unfair Competition*

Civil RICO has also been an important tool in the battle against unfair competition.<sup>153</sup> Although some argue that antitrust laws provide adequate protection, “[t]here are several situations in which RICO may be a better remedy for a plaintiff.”<sup>154</sup> Antitrust jurisprudence is replete with standing limitations that limit its applicability, such as the “indirect purchaser” rule and “antitrust injury.”<sup>155</sup> Furthermore, a plaintiff’s antitrust claim would fail against a defendant who acted unilaterally or was incapable of monopolizing the market.<sup>156</sup> However, a plaintiff can avoid these antitrust issues and receive compensation from the predatory competitor under civil RICO.<sup>157</sup> RICO additionally prevents an unfairly competing racketeer from forcing his competitors to make a Hobson’s choice: engage in retaliatory racketeering or go out of business.<sup>158</sup>

Although many courts had difficulty applying the *Holmes* directness requirement to unfair competition cases, some courts considered the racketeer’s intent to avoid curtailing civil RICO’s power to thwart anticompetitive behavior. Because of the complexity of the cases, the courts focused on not only the directness of the injury, but also on the intent of the racketeer.<sup>159</sup> The use of the “intent” element comports with RICO’s protection of “competitors . . . whose businesses and interests are harmed . . . or whose competitive positions decline because of infiltration

153. See Blakey & Perry, *supra* note 5, at 908 n.153 (“Retailers that have to compete with tax cheating competitors are put at a substantial and often disabling competitive disadvantage. This problem also implicates RICO’s core concerns. Unfair competition, rooted in the profits of illegal behavior, goes to RICO’s basic rationale.”).

154. Miller & Olson, *supra* note 7, at 16.

155. “Customers that do not compete or deal directly with a defendant (termed ‘indirect purchasers’) generally lack standing to sue it for damages under Clayton Act Section 4.” WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 9:10 (2007). “Antitrust injury” is “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

156. Miller & Olson, *supra* note 7, at 16.

157. *Id.* at 16–17.

158. Blakey & Perry, *supra* note 5, at 908 n.153 (“‘When a gas station on one corner decides to cheat,’ New York Attorney General Robert Abrams rightly observes, ‘the gas stations on the other three corners have to cheat or lose money and in some cases go out of business.’” (quoting Cook, *Making Crime Pay*, FORBES, July 27, 1987, at 57)).

159. See *Mid Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263 (4th Cir. 1994) (“[I]t was recognized that ‘the legal cause determination is properly one of law for the court, taking into consideration such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection.’ . . . We did not, however, intend to establish a rule that only injuries suffered by the immediate victim of the predicate act satisfied the ‘by reason of’ requirement of § 1964(c).” (citing *Brandenburg v. Seidel*, 859 F.2d 1179, 1187, 1189 (4th Cir. 1988)).

in the relevant market.”<sup>160</sup> Lower courts recognized that “the reasonably foreseeable victims of a RICO violation are the targets, *competitors* and *intended* victims of the racketeering enterprise.”<sup>161</sup> Although the plaintiff still had to allege proximate cause,<sup>162</sup> courts found that when a racketeer intended to injure a competitor, he violated civil RICO.<sup>163</sup>

For example, in *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*,<sup>164</sup> the Second Circuit applied the *Holmes* directness test.<sup>165</sup> In *Commercial Cleaning*, the plaintiff alleged that its competitor, Colin Service Systems (Colin), engaged in an illegal hiring scheme in which it hired illegal immigrants at low wages.<sup>166</sup> The plaintiff further alleged that this hiring scheme gave Colin a “significant business advantage over other firms” in the cleaning services industry.<sup>167</sup> The Second Circuit analyzed the plaintiff’s claim using the three policy rationales set forth in *Holmes*.<sup>168</sup> First, the difficulty of determining damages was not an issue because the plaintiff directly bid against Colin; therefore, the court could accurately measure the plaintiff’s losses.<sup>169</sup> Colin argued that the plaintiff “complain[ed] of an injury caused by the low wages paid to Colin’s workers—and not by their immigration status.”<sup>170</sup> The court responded by focusing on Colin’s intent: “the purpose of the alleged violation . . . was . . . to employ a cheaper labor force and compete unfairly on the basis of lower costs.”<sup>171</sup> Second, the difficulty of apportioning damages was inconsequential because the plaintiff was the only victim and was not alleging a derivative injury.<sup>172</sup> Finally, the court noted that there was no

160. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 519 (1985) (Marshall, J., dissenting); *see also id.* at 497 n.15 (majority opinion) (agreeing with the dissent’s statement regarding competitive injury).

161. *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 124 (2d Cir. 2003) (holding that claims against the bank by depositors who were defrauded by a third party were too attenuated) (emphasis added).

162. *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001) (holding that the damages must satisfy “ideas of what justice demands or of what is administratively possible and convenient” (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992))).

163. *See Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1344–46 (2d Cir. 1994); *Mid Atlantic*, 18 F.3d at 262–64; *Cf. Abrahams v. Young & Rubicam, Inc.*, 79 F.3d 234, 238–39 (2d Cir. 1996); *Lewis v. Robinson (In re American Express Co. S’holder Litig.)*, 39 F.3d 395, 399–401 (2d Cir. 1994).

164. 271 F.3d 374 (2d Cir. 2001).

165. *Id.* at 380–85.

166. *Id.* at 378–79.

167. *Id.*

168. *Id.* at 381–82.

169. *Id.* at 382–83.

170. *Id.* at 383.

171. *Id.*

172. *Id.* at 383–84.

other more direct victim to vindicate the aims of the statute.<sup>173</sup> Under the analysis of *Commercial Cleaning*, a competitor who was intentionally targeted by the racketeer suffered a direct, non-derivative injury that was easily calculable and satisfied the *Holmes* directness requirement.

In *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*,<sup>174</sup> the Fourth Circuit held that a plaintiff could satisfy the *Holmes* directness requirement by establishing that his injury was proximately caused by a defendant's mail fraud, despite the fact that only a third party had relied on the fraud.<sup>175</sup> In *Mid Atlantic*, the defendant-competitor defrauded the plaintiff's customers by mailing solicitations containing false long-distance rates, and then fraudulently inflated the length of calls billed.<sup>176</sup> The court rejected the defendant's argument that the plaintiff's injury was derivative of the customer's injury. Instead, the court found that Mid Atlantic had claimed "distinct and independent injuries," including lost customers and lost revenue due to the need to match the artificially lowered rates.<sup>177</sup> The court held that this satisfied the *Holmes* directness requirement.<sup>178</sup>

*In re American Honda Motor Co. Dealerships Relations Litigation*<sup>179</sup> tested the outer limits of the *Holmes* directness requirement. The *American Honda* court held that the plaintiffs satisfied the *Holmes* requirement when they alleged that other car dealers had bribed Honda executives to get extra inventory, causing the plaintiffs to lose profits.<sup>180</sup> The court found

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173. *Id.* at 384–85.

174. 18 F.3d 260 (4th Cir. 1994).

175. *Id.* at 263–64.

176. *Id.* at 261. Mid Atlantic Telecom, Inc. (Mid Atlantic) claimed that Long Distance Services, Inc. (LDS) subsequently maintained these low rates by artificially inflating the lengths of calls of its customers, defrauding them of pennies per call. *Id.* at 261. The court noted that "[i]n practical effect, however, the quoted rates were not lower, since additional minutes were randomly and artificially added to the lengths of telephone calls." *Id.*

177. *Id.* at 263–64 (finding the plaintiff was not trying to "vindicate the rights of its former customers who may have been offered fraudulently low rates"). LDS and its codefendants argued that the customers were the only victims of any alleged fraud that occurred. They argued that any injury suffered by Mid Atlantic was, at most, a derivative injury stemming from the injury to the defrauded customers. LDS additionally contended that any injury suffered by Mid Atlantic stemmed from its independent, intervening acts, not from LDS's solicitations. The court was "unable to agree." *Id.* at 263.

178. *Id.*

179. 941 F. Supp. 528 (D. Md. 1996).

180. *Id.* at 534. The plaintiff dealers alleged that other dealers in the Honda syndicate bribed Honda executives to allocate to them larger allotments of automobiles, thereby depriving the plaintiffs of the opportunity to sell those cars. Plaintiffs additionally alleged that "Honda pressured dealers to participate in sales training seminars offered by a vendor that paid kickbacks to Honda executives." *Id.* at 535. Honda also allegedly "pressured dealers to participate in group advertising activities provided by an advertising firm that paid kickbacks to Honda executives." *Id.* Furthermore, Honda allegedly

the plaintiff-dealers had alleged an “obvious causal connection between their lost profits and the predicate acts constituting the bribery scheme.”<sup>181</sup> This scheme to bribe a distributor, in a limited supply market, directly and proximately injured the plaintiff.<sup>182</sup> The court stated that the *Holmes* directness requirement was satisfied despite the complexity of quantifying the individual dealer’s loss.<sup>183</sup>

These courts recognized that plaintiffs who were direct targets of a RICO violation should be able to recover for direct and foreseeable injuries.<sup>184</sup> In these cases, the courts understood that more than one victim could be a foreseeable and intended victim.<sup>185</sup> Courts extended civil RICO’s protection to these exceptional cases to satisfy fundamental conceptions of fairness and congressional intent.<sup>186</sup> However, in 2006, the Supreme Court altered this balance by abruptly redefining proximate cause in *Anza v. Ideal Steel Supply Corp.*<sup>187</sup>

#### E. Anza

The Supreme Court altered civil RICO’s proximate cause requirement in *Anza v. Ideal Steel Supply Corp.*<sup>188</sup> The plaintiff, Ideal Steel Corporation (Ideal), sold metal products in the Bronx and Queens,<sup>189</sup> while National Steel Supply (National) operated similar stores in Queens.<sup>190</sup> Beginning in 1998, National sought to increase its market share and

“awarded ‘Letters of Intent’ for new dealerships on the basis of bribes and kickbacks.” *Id.* Furthermore, the plaintiffs alleged that Honda executives, “prompted by attorneys at Lyon & Lyon, committed perjury, tampered with witnesses and otherwise obstructed criminal investigations of Honda that took place in the early 1990’s.” *Id.* Finally, Honda allegedly “falsified tax records to cover up the bribery activities of executives.” *Id.*

181. *Id.* at 545. (“That plaintiff dealers would be deprived of profits is the direct and foreseeable result of the alleged scheme to give and receive bribes in exchange for higher allocations of cars.”).

182. *Id.*

183. *Id.* at 538.

184. *Commercial Cleaning Servs. LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 381–82 (2d Cir. 2001).

185. *Id.* at 385.

186. *See id.* at 384–95.

187. 126 S. Ct. 1991 (2006).

188. *Id.*

189. *Id.* at 1994. Ideal operated one store in Queens and one store in the Bronx. *Id.* It sold steel mill products and related supplies and services to professional ironworkers, small steel fabricators, and do-it-yourself homeowners. *Ideal Steel Supply Corp v. Anza*, 373 F.3d 251, 254 (2d Cir. 2004), *rev’d*, 126 S. Ct. 1991 (2006). It sold to customers in New Jersey, New York, and Connecticut. *Id.*

190. *Anza*, 373 F.3d at 254. National sold substantially the same products as Ideal, and its stores were located minutes from Ideal’s stores. The Anza brothers were the owners and operators of National. *Id.* For the sake of clarity, all reference to the party accused of racketeering will be to “National.”

revenue by lowering prices through tax and mail fraud.<sup>191</sup> The company did not charge cash-paying customers sales tax and did not report these sales to the State of New York.<sup>192</sup> This practice artificially lowered prices, increased National's market share, and caused Ideal to lose business.<sup>193</sup> These intentional, predicate acts served National's goal of expanding its market into the Bronx to compete with Ideal.<sup>194</sup>

The Second Circuit vacated the district court's dismissal of Ideal's claims and found that Ideal had standing to bring the civil RICO action.<sup>195</sup> The court applied the *Holmes* directness requirement and held that "a RICO claim based on mail fraud may be proven where the misrepresentations were relied on by a third person, rather than by the plaintiff."<sup>196</sup> The court reached this holding by first looking at Second Circuit precedent that recognized that "the reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise."<sup>197</sup> The court then applied this precedent and found that Ideal satisfied the directness requirement because it had alleged direct harm "by means of a fraud perpetrated on another person."<sup>198</sup> The court also considered the intent of National's tax evasion scheme, which was to unfairly compete with Ideal.<sup>199</sup> The court recognized that the natural target of the scheme was Ideal; therefore, Ideal's allegations satisfied the directness requirement.<sup>200</sup> Accordingly, the Second Circuit

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191. *Id.* at 254–55.

192. *Id.*

193. *Id.* at 255.

194. *Id.*

195. *Id.* at 264–65.

196. *Id.* at 262; *accord* County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311 (2d Cir. 1990) (noting that civil RICO merely requires a causal connection between the prohibited conduct and the injury alleged, not that the prohibited conduct be directed at the injured party); *see also* Shaw v. Rolex Watch U.S.A., Inc., 726 F. Supp. 969, 973 (S.D.N.Y. 1989) ("A plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether he or a third party is the one deceived.").

197. *Anza*, 373 F.3d at 260 (quoting *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 124 (2d Cir. 2003)).

198. *Id.* at 263.

199.

[T]he defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was *intended* to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim. *This is so even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.*

*Id.* (emphasis added)).

200. *Id.* at 264 ("The principal intended victim of the scheme was Ideal, over which defendants sought to secure a competitive advantage by giving certain cash customers an unlawful benefit, and by

reasoned that Ideal Steel could bring RICO claims under § 1962(c) (operating an enterprise through racketeering activity) and § 1962(a) (investment of RICO funds).<sup>201</sup>

The Supreme Court disagreed.<sup>202</sup> The Court stringently interpreted the *Holmes* proximate cause requirement by introducing a new theory of “directness,”<sup>203</sup> distinct from that adopted in *Holmes*.<sup>204</sup> The Court redefined “direct” to limit recovery to only immediate victims of the predicate act, thereby excluding non-immediate victims.<sup>205</sup> Using this theory, the Court determined that the State of New York was the immediate victim of the racketeering because it had lost tax revenue.<sup>206</sup> The Court reclassified Ideal as an indirect victim of the racketeering activity, reasoning that the injury Ideal suffered was derivative of the State of New York’s tax fraud injury.<sup>207</sup>

The Court used the three reasons first articulated in *Holmes* to justify this reclassification: difficulty of determining damages, duplicative recovery, and the ability of more direct victims to vindicate RICO’s purpose.<sup>208</sup> The Court was concerned that Ideal’s injury was too remote to determine the actual cause of the injury.<sup>209</sup> Echoing fears first raised in

concealing that unlawful conduct and retaining the resulting profits by means of racketeering activity.”).

201. *Id.*

202. *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1999 (2006).

203. *Id.* at 1996–97. The Court circuitously interpreted the actual cause of Ideal’s injuries in its analysis. The Court started with the racketeering activity, which is undisputedly National’s defrauding New York of its taxes. The Court then asserted that the only direct injury was New York’s loss of revenue, claiming that Ideal’s injuries were merely derivative of this fraud. What the Court failed to consider was the totality of the scheme. National intended to gain a competitive edge by not charging the tax, thereby lowering the price through its racketeering. The total racketeering scheme involved multiple steps, not merely the predicate act. This rationale, however, failed to persuade the majority. *See id.* at 1998.

204. *See id.* at 1997.

205. *See id.*

206. *Id.* (“The direct victim of this conduct was the State of New York, not Ideal. . . . The proper referent of the proximate-cause analysis is an alleged practice of conducting National’s business through a pattern of defrauding the State.”).

207. *Id.* at 1997–98.

208. *Id.*

209. *Id.* at 1997 (“Ideal’s lost sales could have resulted from factors other than petitioners’ alleged acts of fraud. Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal’s lost sales were the product of National’s decreased prices.”). The Court further reasoned that National’s price lowering might not have been attributable to the tax scheme.

National, however, could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud. It may have received a cash inflow from some other source or concluded that the additional sales would justify a smaller profit margin. Its lowering of prices in no sense required it to defraud the state tax authority. Likewise, the fact that a company commits tax fraud does not mean the company will lower its prices. . . .

*Holmes*, the Court worried that factors such as possible poor management of Ideal, market complexities, and customer preferences made calculating the damages attributable to National's racketeering too difficult and speculative.<sup>210</sup> The Court further felt that the direct causal connection requirement prevented duplicative recoveries; otherwise, the racketeer might have to pay multiple times for his one RICO offense.<sup>211</sup> Finally, the Court believed the direct victim, the State of New York, would vindicate its rights, thereby fulfilling RICO's enforcement purpose.<sup>212</sup> Under the majority view, these factors required restricting recovery to only those plaintiffs who were the direct and immediate victims of RICO schemes.<sup>213</sup>

Justice Thomas, in his dissent, criticized the majority's opinion, finding it inconsistent with the holding of *Holmes* and the general purpose of civil RICO.<sup>214</sup> *Holmes*, Thomas argued, stood for the proposition that "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."<sup>215</sup> Thomas agreed that the plaintiff in *Holmes* was an indirect victim, a public corporation that advanced money to cover the injuries caused by broker-dealer malfeasance.<sup>216</sup> However, Ideal did not claim that New York's injury caused the injury to Ideal, but rather alleged that the conduct of National directly caused Ideal's injury.<sup>217</sup> Under the *Holmes* analysis, this allegation would have satisfied the directness requirement because it alleged a direct, non-derivative injury.<sup>218</sup> Thomas argued that the majority's focus on the

*Id.* at 1997.

210. *Id.* ("One motivating principle is the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action."). The Court feared that much of the injury could be attributable to market forces, business practices, and the tastes of the public. *Id. Contra id.* at 2001 (Thomas, J., dissenting) ("We did not adopt the . . . proposition that any injuries that are difficult to ascertain must be classified as indirect . . .").

Furthermore, the Court insisted that failing to pay taxes did not always lower prices, *id.* at 1997, but this point seems irrelevant because National *did* lower prices by not charging taxes. *See id.* at 2002 (Thomas, J., dissenting) (noting this was not a price lowering scheme but rather that "[National] simply *ceased charging tax* on cash sales, allegedly, and logically, because it had ceased reporting those sales").

211. *Id.* at 1997–98 (majority opinion).

212. *Id.* at 1998.

213. *Id.* at 1997–98 ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. In the instant case, the answer is no.")

214. *Id.* at 1999–2008 (2006) (Thomas, J., dissenting).

215. *Id.* at 2000 (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268–69 (1992)).

216. *Id.*

217. *Id.* at 2001.

218. *Id.*; *see Holmes*, 503 U.S. at 271–74.

predicate act failed to consider the purpose of National's scheme: to unfairly compete with Ideal.<sup>219</sup> According to Thomas, the predicate acts alone did not violate RICO, but rather the violation stemmed from National's conducting of its business through a pattern of racketeering activity.<sup>220</sup>

Furthermore, Thomas noted, the majority's opinion allowed racketeers to intentionally target their competitors.<sup>221</sup> For example, consider a hypothetical in which A and B are competitors in a business. A specifically wants to injure B by committing a pattern of RICO predicate acts. However, A has the foresight and planning to commit the predicate acts upon C, causing B injury. The *Anza* majority would deny B recovery. If A was particularly sophisticated, he could concoct a scheme that caused no legally cognizable injury to C, thereby avoiding civil liability altogether. This result clearly would undermine the dual purposes of the civil RICO statute.<sup>222</sup>

### III. ANALYSIS

In *Holmes*, the Court appropriately limited recovery to those who suffered direct injury from the racketeering activity.<sup>223</sup> *Holmes* used the term "directness" to differentiate between direct and derivative injuries.<sup>224</sup>

219. *Anza*, 126 S. Ct. at 2001 (Thomas, J., dissenting).

220. *Id.*

221.

The Court, in contrast, permits a defendant to evade liability for harms that are not only foreseeable, but the *intended* consequences of the defendant's unlawful behavior. A defendant may do so simply by concocting a scheme under which a further, lawful and intentional step *by the defendant* is required to inflict the injury. Such a rule precludes recovery for injuries for which the defendant is plainly morally responsible and which are suffered by easily identifiable plaintiffs.

*Id.* at 2004.

222. *Id.* at 2006 ("It is not difficult to imagine a competitive injury to a business that would result from the kind of organized crime that *Sedima*, Congress, and the Commission all recognized as the principal concern of RICO, yet that would fail the Court's restrictive proximate-cause test." (citation omitted)).

223. *Holmes*, 503 U.S. at 265–700. Keeton also notes the underlying justification for this common law limitation:

In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation."

KEETON, DOBBS, KEETON & OWEN, *supra* note 124, § 41, at 264 (citation omitted) (quoting *North v. Johnson*, 59 N.W. 1012 (Minn. 1894)).

224. *Holmes*, 503 U.S. at 268 ("Accordingly, among the many shapes this concept took at common law . . . was a demand for some direct relation between the injury asserted and the injurious



The *Anza* Court, however, re-characterized “directness” by adding a requirement that a direct victim also be the immediate victim of the predicate act.<sup>225</sup> This redefinition significantly narrows the application of civil RICO and could have serious ramifications for both creditor-victims of corporate looting and for competitors alleging unfair competition because it ignores the intent of the racketeering scheme.

The root of this interpretation is the *Anza* Court’s focus on three underlying principles: the difficulty of determining damages, duplicative recovery, and the ability of more direct victims to vindicate RICO’s purpose.<sup>226</sup> The concern about the difficulty of damage determination was twofold. First, the majority worried that the connection between the tax fraud and Ideal’s injury was too speculative to warrant recovery.<sup>227</sup> The Court was concerned that factors other than the tax fraud might have caused the lower prices; therefore, National could be punished with damages for an injury caused by legal price lowering that was independent of the alleged scheme.<sup>228</sup> Second, the Court feared that the lower prices, legal or not, might not have been the actual cause of Ideal’s injuries, in which case National might incur liability for damages relating to an injury it did not cause.<sup>229</sup>

Although the difficulty in damage calculation is a valid prudential concern, it ignores a key fact of the case. National *intended* to injure Ideal by stealing customers through its tax evasion scheme.<sup>230</sup> National did not gain any direct monetary advantage by failing to charge sales tax; if it had collected taxes, it would have had to remit those funds to the state.<sup>231</sup> Instead, the only benefit National got for violating the law was a competitive advantage.<sup>232</sup> Therefore, it seems counterintuitive to speculate that other factors could have caused the injury when the racketeer intended

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conduct alleged.”).

225. *Anza*, 126 S. Ct. at 1997–1998 (“[The 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.”).

226. *Id.* at 1997–98.

227. *Id.* at 1997 (“[C]onsidering the directness requirement’s underlying premises[,] . . . [o]ne motivating principle is the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action.”).

228. *Id.* at 1997 (discussing how National may have lowered the price independently of the tax fraud, either through a conscious business decision or due to a windfall in cash).

229. *Id.* at 1997 (discussing how Ideal’s injuries may have been caused by a variety of factors, including fair competition, decreased customer service, and other market forces that would make calculating the losses directly attributable to National’s lower prices difficult, if not impossible).

230. *See id.* at 1995.

231. *See* N.Y. TAX LAW § 1105 (McKinney 2004).

232. *Anza*, 126 S. Ct. at 1995.

its actions to cause certain damages to a certain party and those exact damages later occurred.

Duplicative recovery refers to the Court's fear that multiple recoveries could punish the defendant multiple times for the same crime.<sup>233</sup> Limiting the recovery to the immediate victim eliminated these fears by allowing only one person to pursue the defendant and fulfill RICO's enforcement purpose.<sup>234</sup> However, like the "difficulty in determining damages" concern, this rationale similarly fails to consider that the defendant *intended* to injure these targeted parties and should be held accountable for his intentional actions.<sup>235</sup>

A broad reading of *Anza's* final principle—that a more direct victim could vindicate the purpose of the RICO statute—threatens to undermine the civil RICO statute. Although the "more direct victim" concept seems to be grounded in prudential concerns, it could potentially eliminate standing for all private parties.<sup>236</sup> The RICO statute requires proof of a predicate act arising from state or federal criminal statutes; therefore, the government will always be in a better position to vindicate the statute's aims than a private individual.<sup>237</sup> Accordingly, under *Anza's* rationale a private plaintiff would never be the most immediate victim, and therefore would not have RICO standing.<sup>238</sup> This result conflicts with one of the reasons behind the enactment of civil RICO: the inadequacies of government enforcement.<sup>239</sup>

Furthermore, *Anza's* "more direct victim" factor may result in a heightened burden on lower courts and could lead to potentially absurd results.<sup>240</sup> Courts must now consider not only the *prima facie* elements, but also whether other potentially damaged parties exist.<sup>241</sup> Consideration of this factor could lead to complicated judicial inquiry into myriad aspects of the competitive market, including business trends, customer's interests,

233. *Id.* at 1997–98.

234. See discussion of the enforcement purpose *supra* Part II.B.

235. See *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 384 (2d Cir. 2001).

236. See *id.* at 385.

237. *Id.*

238.

If the existence of a public authority that could prosecute a claim against putative RICO defendants meant that the plaintiff is too remote under *Holmes*, then no private cause of action could ever be maintained, for every RICO predicate offense, as well as the RICO enterprise itself, is separately prosecutable by the government.

See *id.*

239. See Feldman, *supra* note 76, at 120.

240. See *Anza*, 126 S. Ct. 1997–98.

241. See *id.*

and state's interests—the very type of inquiry the *Anza* court was trying to avoid.<sup>242</sup> Additionally, the “more direct victim” factor may inadvertently eliminate RICO’s protection of the very victims of racketeering the statute intended to protect: those who suffered injury because the defendant conducted an enterprise “through a pattern of racketeering activity.”<sup>243</sup> If read broadly, *Anza*’s “more direct victim” factor may allow a RICO defendant to escape liability by committing the racketeering against a third party in a way that caused injury to the competitor-victim. If the third party is uninjured by the racketeering, there would not be an immediate victim to vindicate RICO’s purpose.<sup>244</sup> Apparently, the defendant would be free to engage in this impermissible conduct without fear of reprisals.

Because *Anza* addressed these three concerns without considering the racketeer’s intent, it may foreclose civil RICO’s protection in cases of corporate looting.<sup>245</sup> In the typical RICO corporate looting case the defendant-looters convert the assets of the corporation, causing its imminent bankruptcy.<sup>246</sup> This bankruptcy leaves the creditors without

242. *See id.* at 1997.

243. 18 U.S.C. §§ 1962(c), 1964(c) (2000); *see also Organized Crime Control Hearings, supra* note 1, at 106 (statement of Sen. John McClellan) (mentioning in his testimony before the Committee on the Judiciary of the House of Representatives, this exact scenario—a party misreporting taxes to gain a competitive advantage over legitimate businesses—and calling it one of the “most offensive aspect[s] of [racketeers’] infiltration”). McClellan noted that one of the corrupt and violent ways in which organized crime has acquired and operated businesses is by understating income for tax purposes “so that mob businesses have competitive advantages over businesses which report all their income.” *Id.*

244. *See Anza*, 126 S. Ct. at 1997–98. For a case rejecting this approach and applying a more limited interpretation of *Anza*, *see Phoenix Bond & Indem. Co. v. Bridge*, 477 F.3d 928, 931 (7th Cir. 2007). In *Bridge*, the defendant committed mail fraud when it lied to Cook County about its compliance with a single-bid-per-parcel rule during a tax-lien auction. 477 F.3d at 929–30. The plaintiff complained that the lower bids caused him to acquire fewer tax liens, hurting his business. The court rejected the defendant’s contention that the sole victim was the County, noting, “[t]he only injured parties are the losing bidders, who acquire fewer tax liens than they would if the [s]ingle, [s]imultaneous [b]idder [r]ule were followed.” *Id.* at 931.

245.

As a result, after today, civil RICO plaintiffs that suffer precisely the kind of injury that motivated the adoption of the civil RICO provision will be unable to obtain relief. If this result was compelled by the text of the statute, the interference with congressional intent would be unavoidable. Given that the language is not even fairly susceptible of such a reading, however, I cannot agree with this frustration of congressional intent.

*Anza*, 126 S. Ct. at 2006 (Thomas, J., dissenting). *See also Organized Crime Control Hearings, supra* note 1, at 520 (statement of Rep. Sam Steiger).

246. For examples of these so-called “bust-out” schemes, in which the corporate looter steals the assets of the corporation and leaves nothing for the creditors, *see ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 170–75, 182–83 (4th Cir. 2002) (holding defendant liable for RICO violations when the defendant set up several credit scams to defraud computer-equipment suppliers) and *Isaak v. Trumbull Sav. & Loan Co.*, 169 F.3d 390, 397–98, 401 (6th Cir. 1999) (holding defendant committed RICO

recompense because the looters have removed all of the company's equity. Earlier courts recognized that creditor-victims who were targets of corporate looting and suffered direct, non-derivative injury from the racketeering satisfied civil RICO's proximate cause requirement.<sup>247</sup> However, *Anza* indicates that these creditor-victims would lack standing to bring a civil RICO action,<sup>248</sup> even if they suffered injuries due to the intentional, targeted actions of the looters.<sup>249</sup> *Anza* could potentially deny these creditors civil RICO protection because the corporation is the immediate victim and could vindicate its own rights, much like the government in *Anza*.<sup>250</sup> This application would undermine the dual remedial purposes of the civil RICO provision by denying compensation to these intended victims and reducing the number of victims able to combat racketeering.<sup>251</sup>

In cases of unfair competition, *Anza* may have a similar negative impact. Congress intended civil RICO to provide an avenue for compensating the victims of organized crime and racketeering.<sup>252</sup> Prior to *Anza*, the courts recognized that intentional targets of unfair competition deserved compensation, even if they were not the most immediate victim, because they were direct victims.<sup>253</sup> For example, the court in *Commercial Cleaning* focused on the substance, rather than the form, of the

violations in complicated scheme involving fake real estate development, but dismissing because of statute of limitations).

247. See *GICC Capital Corp. v. Tech. Fin. Group, Inc.*, 30 F.3d 289, 293 (2d Cir. 1994) (creditors have RICO standing when corporate assets disappear as a result of fraud). Cf. *Manson v. Stacescu*, 11 F.3d 1127, 1130 (2d Cir. 1993) (creditor's injury is derivative of corporation's; proximate cause is lacking, and creditor does not have RICO standing).

248. See *Anza*, 126 S. Ct. at 1997–98 (discussing the directness requirement of the proximate cause analysis).

249. See *id.*; cf. *GICC Capital*, 30 F.3d at 292–93.

250. See *Anza*, 126 S. Ct. at 1997 (“The direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue as a result.”).

251. See *Anza*, 126 S. Ct. at 2004 (Thomas, J., dissenting).

252.

The first bill . . . would enable the antitrust law enforcement agencies to act promptly to discover the source of funds by means of discovery techniques, and add the sanction of private treble damage suits. Thus, organized criminal activity in legitimate businesses could be attacked before its anticompetitive effect had an opportunity to destroy the business.

113 CONG. REC. 17,999 (1967) (statement of Sen. Roman Hruska) (discussing a bill that was a precursor to the civil RICO provision).

253. See, e.g., *Bankers Trust Company v. Rhoades*, 859 F.2d 1096, 1101 (2d Cir. 1988) (finding the creditor suffered a cognizable injury under civil RICO when corporate looters committed bankruptcy fraud); see also *GICC Capital*, 30 F.3d at 292 (finding the creditor satisfied proximate cause when the debtor issued a false promissory note and then immediately filed for bankruptcy); *Mid Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 262–64 (4th Cir. 1994) (finding the plaintiff satisfied proximate cause requirements by alleging that a competitor caused it direct injury by defrauding the plaintiff's customers).

violation.<sup>254</sup> And, in *Mid Atlantic* the Fourth Circuit stated that a plaintiff, who was the targeted victim of a RICO violation, should be able to recover from an injury caused by a third party's reliance on the racketeering.<sup>255</sup>

However, the *Anza* majority's disregard of the racketeer's intent now seems to be foreclosing civil RICO's use in unfair competition cases.<sup>256</sup> For example, a recent Seventh Circuit case determined that a construction company lacked standing to bring a civil RICO action when it alleged that former employees and a competitor conspired to rig bids for state construction contracts.<sup>257</sup> The court reasoned that the state might have awarded the defendants the bids absent the racketeering activities;<sup>258</sup> therefore, the plaintiffs failed to prove that the racketeering was the proximate cause of the lost contract opportunity even though they were the direct, targeted victims of the scheme.<sup>259</sup> This type of case indicates that *Anza* may signal the end of the use of civil RICO in the unfair competition forum because courts may find the competitive injury too difficult to attribute to the predicate act.<sup>260</sup> The mere fact that a racketeer is intelligent enough, or lucky enough, to commit the predicate crime against a third party should not give him greater flexibility to intentionally target and victimize a competitor.

254. See *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 383 (2d Cir. 2001).

255. *Mid Atlantic*, 18 F.3d at 263–64.

256. See *Anza*, 126 S. Ct. 1997–98; *infra* notes 257–60 and accompanying text.

257. *James Cape & Sons v. PCC Constr. Co.*, 453 F.3d 396, 398–99, 401–03 (7th Cir. 2006). The plaintiff, James Cape & Sons, was a competitor of the defendants for certain Wisconsin Department of Transportation (WisDOT) contracts. *Id.* at 398. During the bidding process, bidders had to submit sworn statements certifying that they “did not collude with competitors or otherwise restrain free bidding.” *Id.*

Beginning in approximately 1997 and continuing until 2004, the defendants began to unfairly rig the WisDOT bidding process. The owners of [the defendants] would meet to discuss projects that would soon be up for bid. They would share their companies' bid information, discuss potential competitors, and set bids amongst themselves in an attempt to allocate projects between them.

*Id.* at 398. The defendants approached an employee of James Cape & Sons, who agreed to reveal the plaintiff's bids to the defendants before the plaintiff entered its bids to WisDOT. *Id.* This allowed the defendants to underbid James Cape on all contracts. *Id.*

258. *Id.* at 403 (“A court could never be certain whether Cape would have won any of the contracts that were the subject of the conspiracy ‘for any number of reasons unconnected to the asserted pattern of fraud.’” (quoting *Anza*, 126 S. Ct. at 1997)).

259. *Id.* (“It is entirely possible that Defendants would have won some bids absent the bid-rigging scheme, even if making less profits in the meantime.”)

260. See *id.* (“The [*Anza*] Court explained that civil RICO plaintiffs must show that the alleged fraud directly harmed them, lest damages become too difficult to ascertain.”) (discussing *Anza*, 126 S. Ct. at 1997).

In both the corporate looting and unfair competition contexts, targeted victims injured by a third party's reliance on the predicate act may lose civil RICO protection.<sup>261</sup> Courts should continue to resist attempts to limit civil RICO by addressing the concerns of *Anza* and the purposes of civil RICO.<sup>262</sup>

#### IV. PROPOSAL

*Anza* presents a multitude of potential impediments to the victims of RICO violations. A broad interpretation of *Anza* threatens to disrupt the civil RICO system, depriving compensation to targeted victims of racketeering. To avoid these potential pitfalls, courts and Congress should take action.

Courts should guide their proximate cause analysis by employing a three-part test that evaluates directness, intent of the racketeer, and *Anza*'s prudential concerns.<sup>263</sup> First, courts should employ the *Holmes* directness test to look for "some direct relation between the injury asserted and the injurious conduct alleged."<sup>264</sup> In making this determination the court should evaluate the foreseeability of the injury and differentiate between direct and derivative injuries.<sup>265</sup> Focusing on directness makes ascertaining damages easier, relieves courts of complicated damage allocations, and prevents multiple recoveries.<sup>266</sup> Although in most cases this application of

261. See *Downstream Envtl., L.L.C. v. Gulf Coast Waste Disposal Auth.*, No. H-05-1865, 2006 WL 1875959, at \*7 (S.D. Tex. July 5, 2006) ("[T]he cause of Downstream's asserted injury is that [U.S. Oil] charges lower prices, which is distinct from the alleged RICO violations of operating without a required permit and improperly dumping waste.").

262. See, e.g., *Breslin Realty Dev. Corp. v. Schackner*, 457 F. Supp. 2d 132, 137 (E.D.N.Y. 2006).

263. *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1287–89 (11th Cir. 2006) (noting the twin aims of *Anza* and applying them to a case in which plaintiff-employees charged that their employer depressed wages through a pattern of racketeering activity which involved employing illegal immigrants and holding that the employers had adequately alleged proximate cause).

264. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Keeton also notes the need for sensible limitations to common law liability:

As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.

KEETON, DOBBS, KEETON & OWEN, *supra* note 124, § 41, at 264.

265. *Holmes*, 503 U.S. at 268–69 ("Thus, 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."); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1420 (9th Cir. 1995) (distinguishing a creditor's injury as derivative, rather than direct).

266. *Holmes*, 503 U.S. at 268–74. For a discussion of directness and proximate cause in the field of antitrust, see *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*:

directness will prevent creditors and competitors from recovering, in exceptional circumstances, like those alleged in *Anza*, courts should abide by Congress's clear intent to compensate victims who suffered injury as a direct result of a RICO violation.<sup>267</sup>

Second, once the plaintiff has established directness, the court must evaluate the intent of the racketeer.<sup>268</sup> Addressing intent improves judicial accuracy, satisfies the purpose of RICO, and is consistent with the approach used by courts before *Anza*.<sup>269</sup> An intent inquiry improves the accuracy of the judicial inquiry by allowing the court to consider whether the defendant believed his actions would cause the alleged injurious conduct. This is valuable because, in many cases, it is likely that the defendant will have more experience evaluating the relevant market and a better understanding of the impact of its actions. Therefore, the defendant's belief that its racketeering would injure the victim-competitor may indicate exactly how the racketeering caused the injury, thereby lessening the court's burden. Additionally, the intent inquiry fulfills Congress's desire to combat organized crime's infiltration of businesses by protecting the intended victims of racketeering.<sup>270</sup> Worried that organized crime was using its money and power to "infiltrate and corrupt

If either these firms [other than the plaintiff], or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and . . . they would have a right to maintain their own treble damages actions against the defendants. An action on their behalf would encounter none of the conceptual difficulties that encumber the [plaintiff's] claim. The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the [plaintiff] to perform the office of a private attorney general.

459 U.S. 519, 541–42 (1983) (footnote call numbers omitted).

267.

In addition to this criminal prohibition, the bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Anti-Trust Act to organized crime activities, as a practical matter the legitimate businessman does not have adequate civil remedies available under that act. This bill fills that gap.

115 CONG. REC. 6993 (1969) (statement of Sen. Roman Hruska) (discussing the bill the House ultimately patterned the civil RICO provision upon).

268. See *Holmes*, 503 U.S. at 268 (noting that in an antitrust context, directness of relationship is not the sole criterion).

269. *GICC Capital Corp. v. Tech. Fin. Group, Inc.*, 30 F.3d 289, 293 (2d Cir. 1994) (holding that a plaintiff has satisfied proximate-cause standing requirements when a corporation issues debt to the plaintiff during a scheme to strip the corporation of its assets).

270. See *Organized Crime Control Hearings*, *supra* note 1, at 106 (statement of Sen. John McClellan) ("The corrupt and violent methods by which organized crime members conduct their . . . operations are adapted as means of acquiring and operating businesses. . . . These methods and others gives such a competitive advantage to the mob enterprise that monopoly power is approached or gained, and prices are raised.")

legitimate business,<sup>271</sup> members of the House and Senate voiced concerns about the intentional corruption of business through racketeering.<sup>272</sup> Earlier courts recognized that RICO's remedial nature required extending standing to the targeted victims of the racketeering.<sup>273</sup> Evaluating the intent of the racketeer protects victims in cases involving an injury that is intentional and direct. This is the type of behavior Congress intended RICO to punish.<sup>274</sup>

Finally, courts should consider the difficulty of calculating recovery only in extreme cases. Mathematical difficulties should not interfere with substantive justice. However, if the damages are uncertain, courts should hesitate to impose liability. For example, in unfair competition cases, if the plaintiff cannot prove that the racketeer's actions were a substantial factor in causing the injury, then the court should not attempt to allocate damages according to proportional guilt.

When applying these factors, courts should accord different weight to each. Courts must start with the threshold inquiry of directness. First, the plaintiff must allege that the racketeer caused its injury directly. Courts should dismiss any derivative claim in which the plaintiff claims damages incurred solely through the visiting of misfortune upon a third party.<sup>275</sup> However, courts must then evaluate the intent of the racketeer, determining whether the racketeer was attempting to circumvent the directness requirement through his scheme. Accounting for intent in the proximate cause analysis negates many of the issues raised by Justice Thomas in his *Anza* dissent.<sup>276</sup> Intentional victims of racketeering need protection and remuneration, and evaluating the intent of the racketeer

271. H.R. REP. NO. 91-1549, at 1 (1970).

272. See *Organized Crime Control Hearings*, *supra* note 1, at 106 (statement of Sen. John McClellan).

273. *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 908 (11th Cir. 1998) (“[T]he sale of [corporate assets] at a lower price affected creditors in a manner distinct from shareholders, and in a manner sufficiently direct to confer RICO standing . . .”).

274. See *id.*; see also 116 CONG. REC. 35,311 (1970) (statement of Rep. Lawrence H. Fountain) (“The time has long since come when the Federal Government should act to adequately protect the law-abiding citizens of our country. . . . Organized crime has penetrated almost every type of business and industry you can name, imperiling our heritage of responsible competition and legitimate private enterprise.”).

275. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268–69.

276.

For example, an organized crime group, running a legitimate business, could, through threats of violence, persuade its supplier to sell goods to it at cost, so that it could resell those goods at a lower price to drive its competitor out of the business. Honest businessman would be unable to compete. . . . Civil RICO, if it was intended to do anything at all, was intended to give those businessmen a cause of action.

*Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 2003 (Thomas, J., dissenting)



affords them this protection. Finally, difficulty in calculating damages is the least important factor. Dismissal for difficulty in calculating damages should not occur unless calculation of the damages is administratively unachievable or the plaintiff fails to prove damages.

In addition to these judicial solutions, Congress should pass legislation that clarifies the intent of the civil RICO statute and should extend the statute to incorporate white-collar crimes and similar institutional malfeasance explicitly. Because of the deterrent effect of the civil RICO treble damages provision,<sup>277</sup> the statute serves as an important tool to combat both traditional and corporate organized crime.<sup>278</sup> Additionally, competitors and victims are the most vigilant monitors of RICO violations because they have both an individual financial incentive and the need to maintain a fair market place.<sup>279</sup> Expanding civil RICO to expressly include more commonly occurring corporate crimes would deter corporate looting of companies and unfair competition, increasing the public's trust in both corporate America and confidence in their consumer protection.

#### V. CONCLUSION

The Supreme Court, in an effort to restrict the breadth of the civil RICO statute, unintentionally limited claims by plaintiffs who suffer precisely the injuries that motivated the enactment of civil RICO. *Anza* inadvisably extends the *Holmes* proximate cause requirement, which required proof that the predicate racketeering act directly and proximately caused the plaintiff's injury. The Court's aims of addressing issues of difficulty in calculating damages, duplicative recoveries, and the presence of more immediate victims led to a miscalculation of the ramifications of its decision. The Court attempted to institute a narrow definition of proximate cause to restrict the proliferation of civil RICO suits. Unfortunately, the Court created a loophole in civil RICO jurisprudence, providing a safe harbor for perceptive defendants who are able to concoct schemes in which they defraud a third party in order to injure the plaintiff. This loophole unduly restricts the civil RICO action.

To remedy the situation, courts need only look for an alternative interpretation of *Anza*. They can address *Anza*'s concerns of remoteness

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277. 18 U.S.C. § 1964(c) (2000).

278. 1 BRICKEY, *supra* note 38, § 7:01.

279. See *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 151 (1987) ("Both [the antitrust statutes and RICO] bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate. . . .").

and duplicative recovery by focusing on three factors when analyzing proximate cause: (1) the directness of the injury, (2) the intent of the racketeer, and (3) the difficulty of calculating damages. By incorporating these factors into their proximate cause calculus, courts can avoid any negative impact *Anza* might have on civil RICO and still address its major concerns.

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