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Jeffrey E. Grell

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EXORCISING RICO FROM PRODUCT LITIGATION

Jeffrey E. Grell[†]

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I. INTRODUCTION: THE COMMON SENSE OF RICO

When Congress passed the Racketeer Influenced and Corrupt Organizations Act (“RICO”),¹ in 1970, most lawmakers probably believed that it was one of the rare pieces of legislation that offered huge political rewards without much chance of any political fallout. After all, who could oppose the curtailment of organized crime? Thus, the language of section 1962(c), which would become the most frequently relied upon provision in both criminal and civil RICO prosecutions, was wildly broad:

[†] Shareholder, Leonard, Street and Deinard, P.A., Minneapolis, Minnesota; J.D., *magna cum laude*, Georgetown University Law Center.

1. 18 U.S.C. §§ 1961-68 (1994).

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. . . .

Admittedly, RICO was convoluted, but innocuous. The "person" referred to in the statute was obviously someone involved in organized crime: a hit man, a money launderer, the head of a crime family. However, these people were not likely to receive pay checks or to be "employed" by the crime family in any traditional sense, so Congress expanded application of the statute to persons who were simply "associated" with the crime family. Application of the more formal term "enterprise," as opposed to "crime family," simply closed the legal loophole that would enable a creative criminal defense attorney to argue that his client could not be prosecuted under RICO because he was not related by blood or ethnicity to other members of the criminal syndicate. A RICO "enterprise" included any group of people that came together to orchestrate a criminal scheme. Moreover, Congress did not limit RICO to natural persons, but also made it applicable to legal persons, such as legitimate corporations, that were used to launder the funds of the criminal enterprise.³ The limitation on RICO was that it did not prohibit legitimate business or social activity; it applied only when people were involved in "racketeering activity," which was expressly limited to a few very serious crimes such as: murder, kidnapping, illegal gambling, arson, robbery, bribery, extortion, narcotic trade, counterfeiting, embezzlement, slave traffic, mail fraud, and wire fraud, to name but a few.⁴ Finally, under section 1962(c), a person had to commit these crimes repeatedly. For example, the person had to engage in a "pattern" of murder or kidnapping or illegal gambling or arson, and so on, before they could be charged with violating RICO.⁵ On its face, this was a good law. It ensured that the worst of society, and anyone who knowingly advanced their cause, would pay for their crimes.

Unlike traditional criminal legislation, RICO also went one step further. It not only ensured that criminals would serve jail

2. *Id.* § 1962(c).

3. *See id.* § 1961(3).

4. *See id.* § 1961(1).

5. *See id.* § 1962(c).

time for their illicit acts but also enabled anyone “injured in his business or property by reason of a violation of section 1962 . . . [to] recover *threefold* the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.”⁶ Thus, Congress not only gave the Department of Justice the authority to fight against these bad actors but gave every decent, honest, hard-working person injured “by reason of” organized criminal activity the right to don the mantle of a private attorney general.

This is essentially the common sense behind RICO, and during its initial years, RICO worked as intended. Between 1970 and 1979, there are less than 50 reported federal district court cases concerning RICO.⁷ Almost all of the reported cases deal with circumstances that could have been reasonably anticipated by Congress: fraudulent schemes whereby the defendants secured government funding by filing false reports;⁸ non-union companies bribing union officials to obtain union work;⁹ the theft of securities and their interstate transportation;¹⁰ and the bribery of government officials by defendants in order to evade enforcement of state regulations or to obtain government benefits.¹¹

Then, without warning, RICO litigation exploded in the early 1980s. Between 1980 and 1985, there were approximately 266 reported federal district court RICO cases;¹² roughly 77 of which were civil RICO cases.¹³ Between 1986 and 1990, approximately 789 federal district court RICO cases¹⁴ were reported, over 100 of which were civil RICO cases.¹⁵ Between 1991 and 1995, there were approximately 525 reported federal district court RICO cases,¹⁶ almost

6. *Id.* § 1964(c) (emphasis added).

7. This information was obtained by running the following query on Westlaw’s DCT database: DA(After 1969 & Before 1980) & HE(1964(c)).

8. *See* United States v. Munoz, 392 F. Supp. 183 (E.D. Mich. 1974), *aff’d*, 529 F.2d 526 (6th Cir. 1975).

9. *See* United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973).

10. *See* United States v. Amato, 367 F. Supp. 547 (S.D.N.Y. 1973).

11. *See* United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976); United States v. Frumento, 405 F. Supp. 23 (E.D. Pa. 1975).

12. This information was obtained by running the following query on Westlaw’s DCT database: DA(After 1979 & Before 1986) & 319HK!.

13. This information was obtained by running the following query on Westlaw’s DCT database: DA(After 1979 & Before 1986) & 319HK! /p 1964(c).

14. This information was obtained by running the following query on Westlaw’s DCT database: DA(After 1985 & Before 1991) & 319HK!.

15. This information was obtained by running the following query on Westlaw’s DCT database: DA(After 1985 & Before 1991) & 319HK! /p 1964(c).

16. This information was obtained by running the following query on West-

100 of which remained civil RICO cases.¹⁷

More recently, RICO has become an increasingly common claim in product-related litigation. This strange phenomenon is only one natural outgrowth of the many non-traditional uses that creative plaintiffs' lawyers have found for RICO.¹⁸ The RICO "person" is no longer the hit man, but the corporate entity that manufactures a product. The "enterprise" is not the crime family but the network of retailers and dealers that sell the manufacturer's product.¹⁹ The manufacturer is "associated" with the network of retailers or dealers by virtue of the dealership and/or agency contracts that give the manufacturer a degree of control over the retailer/dealer's prices, advertising, inventory, and so on.²⁰ The predicate activity engaged in by the manufacturer is mail and wire fraud, or allegedly fraudulent product advertisements that are distributed through the mail or over the radio and television.²¹

To convert a product liability claim into a RICO claim, a plaintiff usually needs only one arguably fraudulent phrase that is repeated in product advertising. Finding this arguably fraudulent phrase is frequently an easy thing to do. How many products are perfect? When a manufacturer's engineers issue reports suggesting product improvements or alterations that will resolve product glitches, suddenly the manufacturer is on notice that the product may have deficiencies. Not many manufacturers, however, will inform consumers of every deficiency related to a product. If the deficiency is relatively minor, the problem may be left uncorrected. Thereafter, if a product fails as a result of an arguably known but undisclosed or uncorrected deficiency, the consumer can allege that the advertisements were fraudulent. RICO claims based on this type of factual scenario have repeatedly presented themselves

law's DCT database: DA(After 1990 & Before 1996) & 319HK!

17. This information was obtained by running the following query on Westlaw's DCT database: DA(After 1990 & Before 1996) & 319HK! /p 1964(c).

18. See *infra* notes 22-26 and accompanying text.

19. See 18 U.S.C. § 1961(4) (1994) (defining enterprise as "includ[ing] any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity."). See generally Alexander M. Parker, Note, *Stretching RICO to The Limit and Beyond*, 45 DUKE L.J. 819, 836-39 (1996) (giving a broad overview of the enterprise requirement).

20. See 18 U.S.C. § 1962(c) (1994) (making it unlawful for any person employed by or associated with an enterprise to engage in a pattern of racketeering activity through the enterprise).

21. See *id.* § 1961(1) (listing specifically mail and wire fraud as predicate acts upon which a RICO violation can be founded).

in the mass tort arena. Some of the most publicized product liability actions have sought recovery under RICO, including those claims brought against cigarette manufacturers;²² the asbestos industry;²³ medical device and drug companies;²⁴ product suppliers on nuclear power plant construction projects;²⁵ and others.²⁶

The objective of this article is to explain the reasons for the in-

22. See *Ehrich v. B.A.T. Indus., P.L.C.*, 964 F. Supp. 164 (D.N.J. 1997); *City and County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1997); *Allman v. Philip Morris, Inc.*, 865 F. Supp. 665 (S.D. Cal. 1994); *Laborers Local 17 Health & Benefit Fund v. Philip Morris Inc.*, No. 97 Civ. 4550 (SAS), 1998 WL 146217, at *1 (S.D.N.Y. March 26, 1998).

23. See *Fried v. Sungard Recovery Serv., Inc.*, 900 F. Supp. 758 (E.D. Pa. 1995); *Prudential Ins. Co. v. United States Gypsum Co.*, 828 F. Supp. 287 (D.N.J. 1993).

24. See *Raye v. Medtronic Corp.*, 696 F. Supp. 1273 (D. Minn. 1988) (deciding claim related to a defective pacemaker); *Savastano v. Thompson Med. Co.*, 640 F. Supp. 1081 (S.D.N.Y. 1986) (deciding claim brought against manufacturer on an appetite suppressant); *Moore v. Eli Lilly & Co.*, 626 F. Supp. 365, 365 (D. Mass. 1986) (Oraflex litigation); *Campbell v. A.H. Robins Co., Inc.*, 615 F. Supp. 496, 496 (W.D. Wisc. 1985) (Dalkon Shield litigation).

25. See *South Carolina Elec. & Gas Co. v. Westinghouse Elec. Corp.*, 826 F. Supp. 1549 (D.S.C. 1993) (involving claims arising out of the allegedly defective nuclear steam supply systems provided to nuclear power plants in South Carolina); *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 656 F. Supp. 49 (S.D. Ohio 1986) (involving claims arising out of the allegedly defective nuclear steam supply systems provided to the William H. Zimmer Nuclear Power Station in Moscow, Ohio); *Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 646 F. Supp. 1442, *reh'g denied*, 648 F. Supp. 988 (S.D.N.Y. 1986) (involving claims arising out of the supply of defective emergency diesel generators to a nuclear power plant in Shoreham, New York).

26. Several other product liability cases which pursued RICO actions involved claims arising out of a farm storage product that allegedly caused harm to animals that ate the tainted food. See *Martin v. A.O. Smith Corp.*, 931 F. Supp. 543 (W.D. Mich. 1996); *Valleyside Dairy Farms, Inc. v. A.O. Smith Corp.*, 944 F. Supp. 612 (W.D. Mich. 1995); *Wight v. Agristor Leasing*, 652 F. Supp. 1000 (D. Kan. 1987); *Agristor Leasing v. A.O. Smith Corp.*, 634 F. Supp. 1208 (D. Kan. 1986). Another type of product liability action that sought recovery under RICO involved a claim arising out of a defective can opener that caused a fire destroying plaintiff's home. See *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3d Cir. 1987). A third type of product liability case that sought to make use of RICO involved a claim arising out of a live microorganism that lacked the potency to treat waste water as represented. See *General Envtl. Science Corp. v. Horsfall*, 800 F. Supp. 1497, 1497 (N.D. Ohio 1992), *aff'd in part, vacated in part*, 25 F.3d 1048, 1048 (6th Cir. 1994). Three other product liability actions which involved brick bond and mortar that allegedly caused corrosion of metals also pursued RICO claims. See *In re Dow Co. "Sarabond" Prod. Liability Litig.*, 666 F. Supp. 1466 (D. Colo. 1987); *Moravian Dev. Corp. v. Dow Chem. Co.*, 651 F. Supp. 144 (E.D. Pa. 1986); *Behunin v. Dow Chem. Co.*, 650 F. Supp. 1387 (D. Colo. 1986). Finally, a claim arising out of an allegedly fraudulent product warranty also pursued a RICO claim. See *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225 (7th Cir. 1997).

creasing use of civil RICO in product litigation and ways in which manufacturers can avoid the treble liability imposed by the statute. Part II describes the culprits or the characteristics of RICO's statutory language and legislative history that led to its expansive use. Part III discusses early theories aimed at limiting RICO's reach and the United States Supreme Court's rejection of those theories. Part IV discusses legal arguments that are currently sanctioned by the Supreme Court, or that have not been rejected, and that may enable a manufacturer to shed a RICO claim appended to a common product liability action.

II. THE CULPRITS

The use of civil RICO in product-related litigation can be blamed primarily on three factors: (1) legislative history extolling Congress' broad and sweeping intentions when it passed RICO; (2) section 1961(1), which defines racketeering activity as, *inter alia*, mail fraud²⁷ and wire fraud;²⁸ and (3) section 1964(c), which allows for the recovery of treble damages.

A. Legislative History

Much of RICO's unanticipated growth can be blamed on its well-intentioned but short-sighted legislative history. At the time of its passage, Congress no doubt envisioned RICO as a powerful tool against organized crime—not as another boilerplate count in a product liability lawsuit. RICO was an effort by Congress to fight fire with fire—big legislation to combat a big problem. As a result, RICO's legislative record is filled with passages expressing Congress' wide-reaching intentions.

Perhaps the most cited provision in RICO's legislative record is the admonition that RICO be "liberally construed to effectuate its remedial purposes."²⁹ Although this was the most succinct expres-

27. See 18 U.S.C. § 1341 (1994).

28. See *id.* § 1343.

29. See *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 274 (1992); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985); *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996); *United States v. Int'l Bhd. of Teamsters*, 708 F. Supp. 1388, 1395 (S.D.N.Y. 1989); *Shared Network Technologies Inc. v. Taylor*, 669 F. Supp. 422, 426 (N.D. Ga. 1987); *Ora Corp. v. Vinson*, 596 F. Supp. 1546, 1547 (D.S.C. 1984); *Summers v. Federal Deposit Ins. Corp.*, 592 F. Supp. 1240, 1243 (W.D. Okla. 1984); *Engl v. Berg*, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981); *United States v. Frumento*, 405 F.

sion of Congress' broad intentions, there are many other passages of legislative history that have aided RICO's expansion. As noted in *Glusband v. Benjamin*:³⁰

This court's examination of the legislative history behind RICO reveals no evidence of an intent to limit the scope of the civil remedy enacted The House Report on the bill later enacted into law as the RICO statute stated only the following with respect to the [civil remedy provision]:

Section 1964 provides civil remedies for the violation of 1962 above. . . .

Subsection (c) provides for the recovery of treble damages by any person injured in his business or property by reason of the violation of section 1962.

H.R.Rep.No. 91-1549, 91st Cong. 2nd Sess., reprinted in [1970] U.S. Code Cong. & Ad. News 4007, 4034.

The language in the House Report does not evince a "clearly expressed legislative intent" to restrict civil liability. . . . Thus, the court is constrained to give the statutory provision at issue the broad scope indicated by the language of the Act.³¹

Other courts have justified broad interpretations of RICO on the basis of its stated purpose to provide "enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."³² Still other courts have referred to passages indicating that RICO was designed to fight the "corruption of 'the process of our democratic society'" when rationalizing RICO's use against public institutions, rather than private companies.³³ The

Supp. 23, 29 (E.D. Pa. 1975).

30. 530 F. Supp. 240 (S.D.N.Y. 1981).

31. *Id.* at 241.

32. *United States v. Castro*, 89 F.3d 1443, 1458 n.2 (11th Cir. 1996); *see also United States v. Marmolejo*, 89 F.3d 1185, 1197 (5th Cir. 1996); *United States v. Crosby*, 20 F.3d 480, 484 (D.C. Cir. 1994); *United States v. Kragness*, 830 F.2d 842, 864 (8th Cir. 1987); *Cullen v. Margiotta*, 811 F.2d 698, 717 (2d Cir. 1987); *United States v. McClendon*, 712 F. Supp. 723, 729 (E.D. Ark. 1988); *Banco de Desarrollo Agropecuario, S.A. v. Gibbs*, 640 F. Supp. 1168, 1171 (S.D. Fla. 1986); *Parnes v. Heinhold Commodities, Inc.*, 487 F. Supp. 645, 646 (N.D. Ill. 1980); *MHC, Inc. v. Int'l Union, United Mine Workers of Am.*, 685 F. Supp. 1370, 1377 n.2 (E.D. Ky. 1988); *United States v. Bananno Org. Crime Family of La Cosa Nostra*, 683 F. Supp. 1411, 1421 (E.D.N.Y. 1988), *aff'd*, 879 F.2d 20 (2d Cir. 1989).

33. *United States v. Frumento*, 405 F. Supp. 23, 30 (E.D. Pa. 1975); *see also United States v. Mandel*, 415 F. Supp. 997, 1022, *op. supplemented*, 415 F. Supp.

United States Supreme Court, however, provided the most concise description of section 1964(c)'s, or civil RICO's, legislative history in *Sedima, S.P.R.L. v. Imrex Co.*:³⁴

RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime. While few of the legislative statements about novel remedies and attacking crime on all fronts . . . were made with direct reference to § 1964(c), it is in this spirit that all of the Act's provisions should be read. The specific references to § 1964(c) are consistent with this overall approach. Those supporting § 1964(c) hoped it would "enhance the effectiveness of [RICO's] prohibitions," and provide "a major tool." Its opponents, also recognizing the provision's scope, complained that it provided too easy a weapon against "innocent businessmen," and would be prone to abuse. It is also significant that a previous proposal to add RICO-like provisions to the Sherman Act had come to grief in part precisely because it "could create inappropriate and unnecessary obstacles in the way of . . . a private litigant [who] would have to contend with a body of precedent—appropriate purely in antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.'"

[In passing RICO,] Congress wanted to reach both "legitimate" and "illegitimate" enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[T]he fact that RICO has been applied in situations not anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."³⁵

Accordingly, Congress clearly intended that RICO would be an aggressive tool in the fight against organized crime and repeatedly and unconditionally stated that intention. Congress did not realize, however, that the "specifically identified criminal conduct" was not so "specifically identified." The inclusion of mail and wire

1025 (D. Md. 1976).

34. 473 U.S. 479 (1985).

35. *Id.* at 498-99 (citations omitted).

fraud as predicate acts meant that almost any case of common law fraud could give rise to a RICO claim.

B. Mail and Wire Fraud Predicate Acts

The federal mail and wire fraud statutes are specifically listed among the crimes upon which a RICO violation can be predicated.³⁶ The mail and wire fraud statutes state, respectively:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both.³⁷

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.³⁸

The mail and wire fraud statutes are exceptionally broad. Initially, it was believed that the mail and wire fraud statutes could be applied only to the person who actually placed the mail in the mail box or dialed the telephone to make a fraudulent call. Very early on, however, in *Pereira v. United States*,³⁹ the United States Supreme Court rejected such a limitation, holding that the federal mail and

36. See 18 U.S.C. § 1961(1) (1994).

37. *Id.* § 1341.

38. *Id.* § 1343.

39. 347 U.S. 1 (1953)

wire fraud statutes applied to anyone who could reasonably foresee the use of the mails or wires to advance a scheme: “[w]here one does an act with knowledge that the use of the mails [or wires] will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he ‘causes’ the mails [or wires] to be used.”⁴⁰ A mail or wire fraud conviction can even be based on communications sent by a victim of the plot or an innocent third party, so long as these communications were foreseeable by the defendant.⁴¹ This ruling gave prosecutors the ability to use the mail and wire fraud statutes against not only the particular individual who placed the fraudulent letter in the mail box or who dialed the phone, but also against the leader of the crime family who planned the scheme, and eventually, against the corporate president who sanctioned an arguably fraudulent advertising campaign.

In *Pereira*, the Supreme Court also determined that the use of the mails need not be essential to the success of the fraudulent scheme. A conviction could result even though the defendant’s use of the mails or wires was incidental.⁴² Thus, according to *Pereira*, a con artist who induced a woman to marry him and who absconded with checks that were mailed to the woman by her investment firm could be convicted of mail fraud, even though the con-artist’s plan could have succeeded regardless of whether the checks were delivered by mail or carrier pigeon. Likewise, an allegedly unscrupulous manufacturer who sells products exclusively door-to-door could be

40. *Id.* at 8-9.

41. *See, e.g.*, *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (mailing element supplied by victimized used-car retailers submitting title applications to state motor vehicles bureau); *United States v. Pepper*, 51 F.3d 469, 472 (5th Cir. 1995) (mailing element satisfied by defrauded investors’ mailing of money to defendant); *United States v. Blackmon*, 839 F.2d 900, 908 (2d Cir. 1988) (stating defendant could foresee that victim’s investment firm would issue wire transfer instructions in order to transfer funds from victim’s to defendant’s accounts); *United States v. Toney*, 598 F.2d 1349, 1352-53 (5th Cir. 1979) (asserting that letters from victim’s counsel were foreseeable where defendant attempted to lull victim into refraining from investigating the scheme); *Durham v. Independence Bank of Chicago*, 629 F. Supp. 983, 988 (N.D. Ill. 1986) (finding that defendant could foresee that plaintiff would continue to mail business plans in response to the defendant’s false representations that it was continuing to process the plaintiff’s loan application).

42. *See Pereira v. United States*, 347 U.S. 1, 8 (1954); *see also United States v. Sawyer*, 85 F.3d 713, 723 n.6 (1st Cir. 1996); *United States v. Coyle*, 63 F.3d 1239, 1244 (3d Cir. 1995); *United States v. Hubbard*, 16 F.3d 694, 702 (6th Cir. 1994), *rev’d in part*, 514 U.S. 695 (1995).

found guilty of mail fraud if customers paid for the product by mailing checks, even though the particular method of delivery is immaterial to the manufacturer.

One would also think that to be guilty of mail or wire fraud the defendant would actually have to defraud another person, but this is not so. A violation of the mail and wire fraud statutes depends only upon the existence of a "scheme to defraud" regardless of whether that scheme ever results in harm to anyone.⁴³ Whether a mail or wire fraud scheme is successful is immaterial; the government need only show that some actual harm or injury was contemplated by the defendant.⁴⁴ Thus, a particularly inept con-artist could be convicted of mail fraud even if no one responded to his mailed solicitations that fraudulently promised a free vacation if the recipient simply forwarded to him their credit card numbers. Likewise, an unscrupulous manufacturer could arguably be guilty of mail fraud even if no one purchased any of the fraudulently advertised products.

Although the mail fraud statute is a federal law, a violation of the statutes can be based on purely intrastate mailings. Courts have rationalized that because the jurisdiction under the mail fraud statute is based on the federal government's postal power, conferred by Article I, Section 8, Clause 7 of the Constitution, and because the federal government's postal power includes authority to deliver purely intrastate mail, the mail fraud statute extends to purely intrastate communications.⁴⁵ The wire fraud statute, however, is not so broad and requires that the wire communications occur between residents of different states.⁴⁶

Finally, like common law fraud actions, mail or wire fraud need not be based on direct evidence of the defendant's intent to

43. See *United States v. Blumeyer*, 114 F.3d 758, 767 n.6 (8th Cir. 1997).

44. See *United States v. Bailey*, 123 F.3d 1381, 1390 (11th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996); *United States v. Jordan*, 112 F.3d 14, 19 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 350 (1997); *United States v. Rude*, 88 F.3d 1538, 1547 (9th Cir. 1996); *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir. 1996); *United States v. Ames Sintering Co.*, 927 F.2d 232, 235 (6th Cir. 1990).

45. See *United States v. Elliott*, 89 F.3d 1360, 1363-64 (8th Cir. 1996), *cert. denied*, 118 S. Ct. 318 (1997).

46. See, e.g., *Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir. 1988); *Bernstein v. Misk*, 948 F. Supp. 228, 238 (E.D.N.Y. 1997); *Brooke v. Schlesinger*, 898 F. Supp. 1076, 1082 (S.D.N.Y. 1995) ("[i]n contrast to mail fraud, '[w]ire fraud requires the additional element of a communication across state lines.'"); *Arenson v. Whitehall Convalescent & Nursing Home, Inc.*, 880 F. Supp. 1202, 1212-13 (N.D. Ill. 1995); *Metro Furniture Rental, Inc. v. Alessi*, 770 F. Supp. 198, 201 (S.D.N.Y. 1991).

defraud. Under the mail and wire fraud statutes, intent can be inferred from circumstantial evidence.⁴⁷

In short, a civil RICO claim can be predicated on any allegedly fraudulent scheme that is advanced, no matter how slightly, by the use of the mails or wires. The scheme need not even take advantage of interstate mails. The plaintiff also is not required to have any direct evidence of the defendant's fraudulent intent, rather that intent can be inferred from the circumstances of the alleged scheme. Given the prevalent use of the mails, facsimiles, the internet, and telephones in modern business (regardless of its size), it is difficult to imagine how any business that engages in allegedly fraudulent activity can escape the reach of the mail and/or wire fraud statutes. Thus, what used to be common law fraud is now a RICO violation.

RICO's unlimited application under the mail and wire fraud statutes has led the Supreme Court to lament:

It is true that private civil actions under the statute are being brought almost solely against [legitimate] business defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are taking advantage of it in its more difficult applications.

We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. . . . The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire [and] mail . . . fraud. . . .⁴⁸

47. See, e.g., *United States v. Cochran*, 109 F.3d 660, 668 (10th Cir. 1997); *United States v. Berndt*, 86 F.3d 803, 809 (8th Cir. 1996); *United States v. Sawyer*, 85 F.3d 713, 731 (1st Cir. 1996); *United States v. Wonderly*, 70 F.3d 1020, 1023 (8th Cir. 1995); *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994); *United States v. Ham*, 998 F.2d 1247, 1254 (4th Cir. 1993).

48. *Sedima, S.P.L.R. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985). The Supreme Court also blamed RICO's breadth on the inclusion of securities fraud as a predicate act. See *id.* Securities fraud was eliminated from RICO's list of racketeering activities, pursuant to the passage of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 9107, 109 Stat. 737, 758 (codified at 18 U.S.C. § 1964(c)).

C. *Treble Damages*

Without more than RICO's liberal legislative history and the mail and wire fraud predicate acts, the expansive use of RICO was a possibility at the time of its passage, but the statute's treble damage provision made RICO's expansive use inevitable. Many courts could not accept that, under RICO, most common law fraud claims were now federal statutory claims entitling the plaintiff to recover three times its actual damages and, as a result, strained to dismiss RICO claims:

It is impossible for this Court to believe that in enacting RICO Congress intended to sweep all ordinary injuries occasioned by the predicate criminal acts within the dragnet of the treble damage remedy provided by § 1964. In almost all cases, a person injured by a predicate crime will have a cause of action for damages under either federal or state law. For example, it would seem illogical that a plaintiff suing under [state] laws could recover only one-third of the damages recoverable by a person suing under RICO for the identical injury. Certainly, this Court would not attribute to Congress an intention to make this fundamental change in the nature of private damage remedies absent some clear indication that such a drastic result was envisioned.

There is no evidence, however, that RICO was designed to retool private remedies in this manner. It was simply not intended to provide a plaintiff with a windfall recovery for ordinary injuries which are otherwise compensable.⁴⁹

Despite the courts' expressed dismay, the tide of RICO litigation could not be stopped. Congress clearly included mail and wire fraud as predicate acts, and given the breadth of mail and wire fraud in the criminal context, almost every common law business fraud claim could be and was converted into a civil RICO claim entitling the plaintiff to three times their actual damages. The inclusion of a RICO claim, whenever possible, was only logical. The threat of treble damages, at the very least, gave the plaintiffs greater leverage in trying to settle a claim, no matter how spurious its RICO underpinnings

49. *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983), *aff'd sub. nom.*, *Bankers Trust Co. v. Rhodes*, 741 F.2d 511, 512 (2d Cir. 1984), *vacated*, 473 U.S. 922 (1985) (citations omitted); *see also* *Berg v. First Am. Bankshares, Inc.*, 599 F. Supp. 500, 506 (D.D.C. 1984), *aff'd*, 796 F.2d 489, 491 (D.C. Cir. 1986).

were.⁵⁰

III. EARLY UNSUCCESSFUL EFFORTS TO CONTAIN RICO

Beginning in the late-70s to early-80s, the courts began to recognize that RICO's breadth, which was originally extolled as a virtue, was fast becoming a despicable vice. As civil RICO litigation became more popular, courts began to fashion means by which to eliminate the threat of treble damages in garden-variety business fraud claims. Thus, it became common for courts to dismiss civil RICO claims on the following bases: (1) defendants had not been criminally convicted of committing a predicate act; (2) plaintiffs did not allege a racketeering injury; and (3) plaintiffs had alleged only one fraudulent scheme.⁵¹ All of these methods, however, were eventually rejected by the Supreme Court.

A. *The "Prior Criminal Conviction" Theory*

RICO expressly states that a person can be liable under RICO if they are "indictable" under the mail and wire fraud statutes or other laws defining racketeering activity.⁵² Nonetheless, the Second Circuit read into civil RICO a conviction qualification, *i.e.*, a civil plaintiff could not bring a RICO action for damages unless the defendant had previously been convicted of a predicate offense.⁵³ The court reasoned:

The Act is designed to provide new penalties and remedies to combat conduct which explicitly has already been found criminal RICO liability simply does not exist without criminal conduct, though of course, in a criminal RICO case, the proof of the predicate act convic-

50. See *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 399 n.16 (7th Cir. 1984) ("[a] number of courts dismayed by civil RICO have commented on the *in terrorem* settlement value that the threat of treble damages may add to spurious claims. After all, the line between fraud and mistake or misunderstanding can be a very fine one."), *aff'd*, 469 U.S. 1157 (1985); *UNR Indus., Inc. v. Continental Ins. Co.*, 623 F. Supp. 1319, 1331 (D. Ill. 1985) (refusing to allow amendment to include RICO claim on the basis that the amendment was merely sought "because of the *in terrorem* effect of any treble damage or racketeering claim").

51. See *infra* notes 53-78 and accompanying text.

52. See 18 U.S.C. §1961(1) (1994) (defining "racketeering activity" under the statute).

53. See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 503 (2d Cir. 1984), *rev'd*, 473 U.S. 479, 500 (1984).

tions may be made under the same indictment, in the same trial and coordinately with the proof of the RICO offense(s). But in a civil context, there is no way to know whether the [predicate] conduct in question is “already criminal,” a problem compounded by the fact that ordinarily there is a lower burden of proof in civil actions. We conclude that had Congress considered this problem, it would have explicitly required previously established convictions in the context of section 1964(c). Absent such explicit congressional direction, such a narrow reading of section 1964(c) best integrates that subsection into the entire structure of the Act. On the other hand, if the broad reading is accepted, problems are created of which there is no indication that Congress even dreamed.⁵⁴

The prior criminal conviction qualification gained acceptance outside of the Second Circuit but continued to be questioned.⁵⁵ The Supreme Court eventually rejected the “prior conviction limitation” as being contrary to RICO’s use of the word “indictable” and its broad purposes and/or history.⁵⁶

B. *The “Racketeering Injury” Theory*

Many courts avoided the application of RICO to legitimate business by focusing on passages in the statute’s legislative history

54. *Id.* at 500-01; *see also* *Alkoff v. Gold*, 611 F. Supp. 63, 66 (S.D.N.Y. 1985) (dismissing RICO claim which fails to allege criminal convictions for predicate acts); *Bridge C.A.T. Scan Assoc. v. Ohio-Nuclear Inc.*, 608 F. Supp. 1187, 1193 (S.D.N.Y. 1985) (dismissing RICO claim where no allegation of conviction if a predicate act); *Rooney Pace, Inc. v. Reid*, 605 F. Supp. 158, 160 (S.D.N.Y. 1985) (stating that allegation of conviction of any predicate acts alleged is a necessary element of a RICO claim); *In re Osage Exploration Co.*, 104 F.R.D. 45, 49-50 (S.D.N.Y. 1984) (denying leave to amend complaint to add RICO claim where no criminal convictions allege predicate acts).

55. *Compare* *Butler Mfg. Co. v. Convey-All, Inc.*, 605 F. Supp. 1203, 1204 (N.D. Ala. 1985) (dismissing a civil RICO action on the basis that defendants had not been criminally convicted of committing a predicate act), *Viola v. Bensalem Township*, 601 F. Supp. 1086, 1091 (E.D. Pa. 1984), *vacated*, 774 F.2d 1153 (3d Cir. 1985) (same), *Terra Du Lac Ass’n v. Terra Du Lac, Inc.*, 601 F. Supp. 257, 261 (E.D. Mo. 1984), *aff’d in part, rev’d in part*, 772 F.2d 467 (8th Cir. 1985) (same), *and* *Berg v. First Am. Bankshares, Inc.*, 599 F. Supp. 500, 506 (D.D.C. 1984), *aff’d*, 796 F.2d 489 (D.C. Cir. 1986), *with* *Wang Lab., Inc. v. Burts*, 612 F. Supp. 441, 447 (D. Md. 1984) (refusing to apply prior conviction limitation), *Glusband v. Benjamin*, 530 F. Supp. 240, 241 (S.D.N.Y. 1981) (same), *Heinhold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313-14 (N.D. Ill. 1979) (same).

56. *See* *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488-493 (1985) (stating that racketeering activity under the statute consists not of acts which the defendant has been convicted but of acts for which he could be).

that arguably limited RICO's application to plaintiffs who experienced a "racketeering injury" or whose injuries had a nexus with "organized crime." One of the first cases to rely on this approach was *Barr v. WUI/TAS, Inc.*,⁵⁷ which involved a telephone answering service that purportedly billed clients for messages that were never taken.⁵⁸ The court dismissed the claim, on the basis that the plaintiff's injuries had no nexus with organized crime, or, in other words, were not "racketeering injuries."

The legislative history makes frequent references to "racketeers", "organized crime" and "organized crime families," as well as the "syndicate," "Mafia," and "Cosa Nostra." It is clear that it was aimed not at legitimate business organizations but at combating "a society of criminals who seek to operate outside of the control of the American people and their governments. There is no question that the defendant cannot be so characterized."⁵⁹

The "nexus with organized crime" or "racketeering injury" approach, however, suffered many problems. First, such a qualification is not found in the statute or legislative history.⁶⁰ Second, the terms "organized crime" or "racketeering injury" were hopelessly vague. Some courts tried to remedy the vagueness by equating the qualification with "sinister scheme[s] to defraud,"⁶¹ by stating that "[a] person who suffers a [racketeering] injury should 'know it when [he feels] it,'"⁶² or by requiring the plaintiff to be injured by the RICO violation rather than the individual predicate acts.⁶³ These attempts to remedy the vagueness of the standard only made

57. 66 F.R.D. 109 (S.D.N.Y. 1975).

58. *See id.* at 112.

59. *Id.* at 113.

60. *See* 18 U.S.C. §§ 1961-68 (1994).

61. *See* *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1242 (S.D.N.Y. 1983), *aff'd sub. nom.*, *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 512 (2d Cir. 1984), *and vacated*, 473 U.S. 922 (1985).

62. *UNR Indus., Inc. v. Continental Ins. Co.*, 623 F. Supp. 1319, 1331 (N.D. Ill. 1985) (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

63. *See, e.g.,* *Doxie v. Ford Motor Credit Co.*, 603 F. Supp. 624, 628 (S.D. Ga. 1984) (stating that injury must result from the RICO violation); *Happy Dack Trading Co. v. Agro-Indus. Inc.*, 602 F. Supp. 986, 995 (S.D.N.Y. 1984) (dismissing RICO claim where injury alleged was from predicate acts not from "racketeering activity"); *Gardner v. Surnamer*, 599 F. Supp. 477, 479-80 (E.D. Pa. 1984) (dismissing claim where injury was allegedly caused by predicate acts); *Guerrero v. Katzen*, 571 F. Supp. 714, 719 (D.D.C. 1983) (holding that the alleged injury must be "of the type that RICO intended to prevent").

matters worse. Accordingly, the “nexus with organized crime” or “racketeering injury” requirement also was rejected by the Supreme Court as being “unhelpfully tautological.”⁶⁴

Apart from reliance on the general purposes of RICO and a reference to “mobsters,” the court [below] provided scant indication of what the requirement of racketeering injury means. . . . The court below is not alone in struggling to define “racketeering injury,” and the difficulty of that task itself cautions against imposing such a requirement. . . . If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous “racketeering injury” requirement.⁶⁵

C. *The “Multiple Scheme” Theory*

The problem with both the “prior conviction” and “racketeering injury” qualifications was that they bore no logical relationship to the wording of the statute. In *Sedima*, the Supreme Court attempted to focus the lower courts’ effort to limit RICO on the language of the statute by commenting on the statute’s required “pattern of racketeering activity.”⁶⁶ The Supreme Court stated that “[t]he infiltration of legitimate business normally requires more than one ‘racketeering activity’ and the threat of continuity to be effective . . . ; [i]t is this factor of *continuity plus relationship* which combines to produce a pattern.”⁶⁷ The Eighth Circuit seized upon this language in *Superior Oil Co. v. Fulmer*,⁶⁸ where an oil company brought a RICO claim against former employees who were responsible for pumping operations.⁶⁹ The plaintiff alleged that the employees had procured fraudulent letters of approval to install equipment that allowed them to literally siphon-off thousands of dollars of liquid propane and oil throughout their employment.⁷⁰

64. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 494 (1985).

65. *Id.* at 494-95 (citations omitted) (footnotes omitted).

66. *Id.* at 496.

67. *Id.* at 496 n.14 (citing legislative history defining a pattern of racketeering activity).

68. 785 F.2d 252 (8th Cir. 1986).

69. *See id.* at 253-54

70. *See id.*

The court dismissed the claim stating:

[P]roof of a "pattern of racketeering activity" "requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." [Plaintiff] clearly has proved the "relationship" prong. They proved several related acts of mail and wire fraud in pursuit of the underlying conversion or theft of gas from [Plaintiff's] interstate pipeline.

[Plaintiff] has, however, failed to prove the "continuity" sufficient to form a "pattern of racketeering activity." The actions of [Defendants] comprised one continuing scheme to convert gas from [Plaintiff's] pipeline. There was no proof that [Defendants] had ever done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere.

"[I]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. . . . It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."⁷¹

Thus, in the Eighth Circuit and other courts, plaintiffs had to allege more than one fraudulent scheme in order to sustain a RICO claim.⁷² This qualification was the ally of product manufacturers sued under RICO. Using the qualification, several RICO claims based on allegedly fraudulent product advertising were dismissed; the courts reasoned that the "marketing of a single product

71. *Id.* at 257 (quoting Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 832 (N.D. Ill. 1985)); see also Wright v. Everett Cash Mut. Ins. Co., 637 F. Supp. 155, 158 (W.D. Pa. 1986).

72. See, e.g., Torwest DBC, Inc. v. Dick, 810 F.2d 925, 929 (10th Cir. 1987) (holding that RICO does not apply to an isolated incident); United States v. McClendon, 712 F. Supp. 723, 730 (E.D. Ark. 1988) (dismissing RICO indictment that alleged but one scheme); *In re EPIC Mortgage Ins. Litig.*, 701 F. Supp. 1192, 1253 (E.D. Va. 1988), *aff'd in part, rev'd in part*, 910 F.2d 118 (4th Cir. 1990); Pincetich v. Jeanfreau, 699 F. Supp. 1469, 1476 (D. Or. 1988) (dismissing RICO claim where predicate acts constituted a single scheme); Perkins v. Nash, 697 F. Supp. 527, 531 (D.D.C. 1988) (holding single victim of a single fraudulent transaction fails to meet elements of RICO claim); Rochester Midland Corp. v. Mesko, 696 F. Supp. 262, 266-68 (E.D. Mich. 1988) (holding that activity in furtherance of a single scheme does not, as a matter of law, constitute a pattern); Manax v. McNamara, 660 F. Supp. 657, 663-64 (W.D. Tex. 1987), *aff'd*, 842 F.2d 808 (5th Cir. 1988).

constitute[d] only one fraudulent scheme.”⁷³

The multiple scheme qualification, however, was not uniformly accepted⁷⁴ and was eventually rejected by the Supreme Court in *H.J. Inc. v. Northwestern Bell*.⁷⁵

Under the approach adopted by the Supreme Court, a “pattern or racketeering activity” existed whenever the predicate acts were *related, i.e.*, have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated and not isolated events,⁷⁶ and sufficiently *continuous, i.e.*, extended over a substantial period of time or posed a specific threat of repetition extending indefinitely into the future.⁷⁷ Accordingly, a product manufacturer whose allegedly fraudulent advertising campaign targeted a group of consumers (*i.e.*, victims) and lasted over a substantial period could arguably be held liable under RICO.

In short, product manufacturers cannot escape liability under RICO by arguing that they have never been convicted of a crime, that they did not inflict a “racketeering injury,” or that they have not engaged in a “pattern” because the allegedly false advertisements relate to only one product. To escape RICO, manufacturers must be far more creative.

IV. CURRENTLY AVAILABLE THEORIES OF CONTAINMENT

Although the prior conviction, nexus with organized crime, and multiple scheme approaches have been rejected by the Supreme Court, several other arguments may enable a product manufacturer to shed a nuisance RICO claim. As with all RICO defen-

73. *In re Dow Co. Sarabond Prod. Liab. Litig.*, 666 F. Supp. 1466, 1473 (D. Colo. 1987); *see also* *Wight v. Agristor Leasing*, 652 F. Supp. 1000, 1022 (D. Kan. 1987); *Behunin v. Dow Chem. Co.*, 650 F. Supp. 1387, 1389 (D. Colo. 1986); *Savastano v. Thompson Med. Co.*, 640 F. Supp. 1081, 1085 (S.D.N.Y. 1986).

74. *See, e.g.*, *Deppe v. Tripp*, 863 F.2d 1356, 1367 (7th Cir. 1988); *Blake v. Dierdorff*, 856 F.2d 1365, 1368 (9th Cir. 1988); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51 (2d Cir. 1987); *First Fin. Serv. Bank, Inc. v. American Bankers Ins. Co. of Florida, Inc.*, 699 F. Supp. 1167, 1171 (E.D.N.C. 1988); *Barnett v. Stern*, 93 B.R. 962, 974-75 (N.D. Ill. 1988), *rev'd*, 909 F.2d 973 (7th Cir. 1990); *Smith v. MCI Telecom. Corp.*, 678 F. Supp. 823, 827 (D. Kan. 1987), *reh'g denied*, 124 F.R.D. 665 (D. Kan. 1989); *Greenfield v. Professional Care, Inc.*, 677 F. Supp. 110, 116 (E.D.N.Y. 1987); *Moravian Dev. Corp. v. Dow Chem. Co.*, 651 F. Supp. 144, 147 (E.D. Pa. 1986).

75. 492 U.S. 299 (1989).

76. *Id.* at 240.

77. *Id.* at 242.

dants, a product manufacturer can attack the claim on the basis of the statute of limitations,⁷⁸ or on the sufficiency of the pattern allegations, but this article focuses on those arguments most applicable and helpful in the product context: (A) RICO's "injury to business or property" qualification; (B) RICO's proximate cause standard; (C) RICO's requirement that there be a distinction between the person and the enterprise with which the person associates; and (D) the rule of *in pari materia*, which requires the courts to interpret RICO's civil remedy provision in conjunction with the restitution allowed to victims under the criminal mail and wire fraud statutes.

A. *Injury to Business or Property*

The oldest and most effective means for a product manufacturer to rid itself of a RICO claim also may be the most obvious. RICO's civil remedy provision provides a cause of action to "[a]ny person injured in his *business or property* by reason of a violation of section 1962."⁷⁹ As a result, a RICO claim can be based only on injuries to one's financial interests; conduct giving rise to personal injuries is not actionable under RICO. For instance, in *Moore v. Eli Lilly and Co.*,⁸⁰ the plaintiffs brought a claim against the defendant alleging negligence, breach of warranty, and strict liability arising out of the defendant's manufacture and sale of a drug.⁸¹ The plaintiffs subsequently learned that the defendant had allegedly made misrepresentations related to the defective nature of the drug and sought to amend their complaint to include a RICO claim.⁸² The court denied the plaintiffs' motion to amend:

Recognizing that the statute establishes rights and remedies only for persons injured in their "business or property," plaintiffs claim that the alleged diminution of [plaintiff's] estate and the loss of consortium allegedly suffered by [plaintiff's wife] are injuries to "property." This contention, however, is incorrect. Plaintiffs' allegations constitute conventional claims for personal injuries If Congress had intended that the rights and

78. See, e.g., *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1992 (1997) (RICO claim dismissed where plaintiff should have realized that the product advertisements were fraudulent, as alleged, more than four years before he filed his claim); *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 240-42 (6th Cir. 1992) (same).

79. 18 U.S.C. § 1964(c) (1994) (emphasis added).

80. 626 F. Supp. 365 (D. Mass. 1986).

81. See *id.* at 366.

82. See *id.*

remedies established by RICO be available in every personal injury action involving financial loss, it could easily have enacted a statute referring to "injury" generally or have referred expressly to injury to "persons" in addition to injury to "business or property." As the Supreme Court stated in interpreting the identical "business or property" language in the Clayton Act, "Congress must have intended to exclude some class of injuries by the phrase 'business or property.'"⁸³

Thus, if a plaintiff merely brings a RICO claim against a product manufacturer on the basis of a personal injury, then that claim should easily be extinguished.⁸⁴

83. *Id.* at 366-67 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)); *see also* *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991); *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988); *Bankers Trust v. Rhoades*, 741 F.2d 511, 515 (2d Cir. 1984), *vacated*, 473 U.S. 922 (1985); *Gaines v. Texas Tech Univ.*, 965 F. Supp. 886, 890 (N.D. Tex. 1997); *Enrich v. B.A.T. Indus., P.L.C.*, 964 F. Supp. 164, 167 (D.N.J. 1997); *Reynolds v. Condon*, 908 F. Supp. 1494, 1518 (N.D. Iowa 1995); *Fried v. Sungard Recovery Serv., Inc.*, 900 F. Supp. 758, 762 (E.D. Pa. 1995); *Allman v. Phillip Morris, Inc.*, 865 F. Supp. 665, 667-69 (S.D. Cal. 1994); *Raye v. Medtronic Corp.*, 696 F. Supp. 1273, 1274 (D. Minn. 1988); *Bast v. A.H. Robins*, 616 F. Supp. 333, 335 (D. Wisc. 1985); *Campbell v. A.H. Robins Co., Inc.*, 615 F. Supp. 496, 501 (W.D. Wisc. 1985).

84. Product manufacturers, however, need to be careful in the area of personal injury claims covered by their insurer. Insurance companies have sued their insureds under RICO alleging that the insured obtained insurance or policy benefits by virtue of mail or wire fraud. *See, e.g.*, *Ocaso, S.A. Compania De Seguros y Reaseguros*, 915 F. Supp. 1244, 1266 (D.P.R. 1996) (dismissing insurer's RICO claim alleging that it was fraudulently induced by insured to issue insurance; the claim lacked the necessary duration to satisfy RICO's continuity requirement); *Colonial Penn Ins. Co. v. Value Rent-a-car, Inc.*, 814 F. Supp. 1084, 1091-92 (S.D. Fla. 1992) (court denied summary judgment on insured's RICO claim where insurer alleged that the insured had submitted monthly reports that misrepresented the number of automobiles under the policy and misrepresented the monthly gross receipts). One could see this situation arising in the context of product liability actions where, over several months or years, numerous individual personal injury actions are brought against the insured on the basis of a faulty product. Assume the insurer settles all of the claims on the basis of the insured's representations that the claims are meritorious, presenting serious issues of negligence, product liability, and breach of warranty. Later, the insurer discovers evidence that the product problems were not the result of negligence but the result of intentional or reckless wrongdoing by the insured and that the insured advocated a quick settlement of the claims to avoid discovery of the damning evidence that would remove the claims from coverage. Under such a scenario, the insurance company may have been fraudulently induced to settle the personal injury claims, thereby sustaining injury to its business or property, and may have an actionable RICO claim. Admittedly, such a scenario must seem like bad fiction to most legitimate manufacturers, but given the breadth of the mail and wire fraud statutes, and the fact that a lawsuit can be initiated on no more than scant evidence, manufacturers

B. *Proximate Cause*

In *Sedima*, the Supreme Court rejected the “prior conviction” and “racketeering injury” limitations on civil RICO claims but did not close the door on all limitations. The Supreme Court indicated that it would favorably view a “proximate cause” limitation based on RICO’s requirement that plaintiffs experience injury “by reason of” the RICO violation:⁸⁵

[A RICO] plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. As the Seventh Circuit has stated, “[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by his conduct, nor is the defendant liable to those who have not been injured.”⁸⁶

The Supreme Court revisited this theme in *Holmes v. Securities Investor Protection Corp.*⁸⁷ and held that a RICO plaintiff was entitled to damages only if his injuries were “proximately caused” by the RICO violation.⁸⁸ In *Holmes*, the defendants manipulated the stock of various companies by making unduly optimistic representations and by continually selling small quantities of stock to create the appearance of a liquid market.⁸⁹ A number of broker-dealers bought substantial amounts of the stock, but when the defendants’ fraud was disclosed, the value of the stock plummeted.⁹⁰ The broker-dealers were forced into liquidation.⁹¹ The Securities Investor Protection Corporation (“SIPC”) was then obligated to advance nearly \$13 million to cover the claims of the broker-dealers’ customers, whose money was lost when the broker-dealers failed even though the customers never invested in the stock manipulated by the defendants.⁹² The SIPC then brought a RICO claim against the defendants to recoup the losses paid to the broker-dealers’ customers.⁹³ The district court granted

should monitor their representations to their insurers to make certain that such a fiction does not become reality.

85. See 18 U.S.C. § 1964(c) (1994).

86. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (quoting *Haroco, Inc. v. American Nat’l Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984), *aff’d*, 473 U.S. 606 (1985)).

87. 503 U.S. 258 (1992).

88. See *id.* at 276.

89. See *id.* at 262.

90. See *id.*

91. See *id.* at 263.

92. See *id.*

93. See *id.*

the defendants' motion for summary judgment, reasoning that the defendants' conduct directly injured the broker-dealers, not the customers; thus, the customers' injuries were too remote from the violation to warrant recovery under RICO.⁹⁴

The Supreme Court affirmed:

[RICO's civil provision] can, of course, be read to mean that a plaintiff is injured "by reason of" a RICO violation, and therefore may recover, simply on showing that the defendant violated 1962, the plaintiff was injured, and the defendant's violation was a "but for" cause of plaintiff's injury. This construction is hardly compelled, however, and the very likelihood that Congress intended to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading. . . . Thus, we h[o]ld that a plaintiff's right to sue under [section 1964(c)] require[s] a showing that the defendant's violation not only was a "but for" cause of his injury, but was the proximate cause as well

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. . . . [Such a limitation is well founded.] . . . First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.⁹⁵

The Supreme Court's use of the term "judicial tools" makes it clear that RICO's proximate cause standard presents a legal issue, not a factual issue like common law proximate cause standards. As a result, *Holmes'* causation analysis has been expanded by the circuit

94. *See id.* at 263-64.

95. *Id.* at 265-70 (emphasis added) (citations omitted).

courts.⁹⁶ Generally, proximate causation may be found lacking, as a matter of law, whenever any one of the following conditions is present: (1) a third party was directly injured by the predicate activity and the plaintiff's injuries flow only from the injuries to the third party; (2) non-predicate activity or independent factors caused or contributed to the plaintiff's injury; or (3) the plaintiffs did not rely on the predicate activity, in cases of mail and wire fraud.

1. *Intervening Third-Parties*

RICO's proximate cause standard is most commonly used in situations analogous to *Holmes*, *i.e.*, where the plaintiff's injuries are the result of predicate activity directed at a third party.⁹⁷ This rule has also enabled product manufacturers to avoid RICO liability. In *City & County of San Francisco v. Philip Morris, Inc.*,⁹⁸ governmental entities

96. See generally Stephen Scallen, *Proximate Cause under RICO*, 20 S. ILL. U. L.J. 455, 455-505 (1996) (discussing the history and development of proximate cause in civil RICO actions prior to and after *Holmes*).

97. See, *e.g.*, *Anaren Microwave, Inc. v. Loral Corp.*, 49 F.3d 62, 63 (2d Cir. 1995) (per curiam) (finding that an electrical component manufacturer could not prove proximate cause under RICO where defendants' predicate activity directly injured a prime contractor who was denied a contract on the basis of the defendant's fraud and who listed the manufacturer as a subcontractor); *Mendelovitz v. Vosicky*, 40 F.3d 182, 186-87 (7th Cir. 1994) (dismissing RICO claim where the plaintiffs' damages were caused by defendants' predicate acts and third-parties' decision to sue corporation in which the plaintiffs held shares); *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928-29 (9th Cir. 1994) (dismissing RICO claim brought by subtenant against the owner of a building who had fraudulently manipulated the building's value to obtain rent increases from the master tenant; the court held that the master tenant was directly injured by the racketeering activity and that the subtenant was only indirectly injured by reason of the master tenant's decision to pass on the rent increases); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325-27 (8th Cir. 1993) (tenants of a real estate development that was approved by virtue of defendant's bribery of public officials would not have had standing under RICO, even though the bribery may have caused them to pay higher rents; the proper plaintiff was the real estate developer for a competing development whose approval was denied as a direct result of the defendants' predicate activity); *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1312 (9th Cir. 1992) (reasoning that since plaintiffs were minority business enterprises ("MBE") subcontractors who sued a prime contractor that had fraudulently stated its compliance with MBE requirements and been awarded various government contracts at the expense of the prime contractors with whom plaintiffs were associated; the plaintiffs' claim was dismissed because plaintiffs' prime contractors, not the subcontracting MBE's, were directly injured by the defendant's fraud); *Firestone v. Galbreath*, 976 F.2d 279, 285 (6th Cir. 1992) (dismissing RICO claim brought by heirs against defendants who had fraudulently induced the heirs' grandmother to part with her fortune; the court held that the grandmother (or her estate) were the direct victims of the fraud and that the heirs stood in too remote a position to recover).

98. 957 F. Supp. 1130 (N.D. Cal. 1997).

brought a RICO claim against cigarette manufacturers alleging that the manufacturers engaged in a conspiracy to mislead the governmental entities and their residents without regard to the dangers of smoking and the addictiveness of nicotine.⁹⁹ As a result of the cigarette manufacturers' alleged fraud, the governmental entities claimed that they spent millions of dollars each year to provide health care to residents suffering from diseases caused by smoking.¹⁰⁰ The governmental entities sought to recover the health care costs that they had incurred on behalf of residents.¹⁰¹ The court dismissed the claim:

[T]he attenuated chain of causation upon which plaintiffs rely is as follows: (1) the tobacco manufacturers made misleading statements regarding the health consequences of smoking and manipulated the levels of nicotine in cigarettes; (2) as a result of this conduct, plaintiffs' residents smoked in greater numbers and continued to smoke for longer periods of time; (3) these smokers developed health problems from their use of cigarettes; (4) these smokers then sought medical care from plaintiffs; and (5) plaintiffs spent money to provide such health care [T]his Court finds that any alleged violations of duties to the plaintiffs in the present case have not been directly linked to plaintiffs' increased health care expenses given the existence of the essential intervening link of the injured individual smokers.¹⁰²

The circumstances of tobacco litigation are fairly unique, but similar situations are imaginable. For example, a medical drug or device manufacturer may be sued by a physician in a small community who claims his practice was ruined when he relied on the manufacturer's allegedly fraudulent advertising to prescribe a drug or method of treatment to several patients. After the drug or device failed to work as advertised, or perhaps even harmed the patients, the patients lost faith in the physician and his reputation in the small community was destroyed. *Holmes* should be helpful in this situation because the patients, not the physician, are the directly injured parties. Likewise, assume a real estate developer hires a contractor to construct a building. The contractor buys a new piece of equipment for the sole purpose of meeting the unique requirements of the project. The project, however, falls behind schedule after the equipment fails to

99. *See id.* at 1134.

100. *See id.*

101. *See id.*

102. *Id.* at 1137.

perform as advertised. If the developer brought a RICO suit against the equipment manufacturer for losses related to the delayed construction, *Holmes* again should protect the manufacturer. The contractor, not the developer, is the directly injured party.

2. *Intervening Non-predicate Activity or Independent Factors*

Beyond circumstances where the defendant is separated from the plaintiff by a more directly injured third-party, the application of *Holmes* is still uncertain, but many courts are creatively experimenting with RICO's proximate cause standard in this arena. Some of the most helpful experiments relate to the Supreme Court's directive in *Sedima* that a RICO plaintiff "can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation"¹⁰³ and its statement in *Holmes* that courts should be cautious when it is difficult to attribute "damages . . . to the [RICO] violation, as distinct from other, independent factors."¹⁰⁴ Some courts have interpreted this language as sanctioning the dismissal of RICO claims where a defendant has violated RICO but the plaintiff's damages do not arise out of the RICO violation—rather, the plaintiff is directly damaged by the defendant's non-predicate conduct or other independent factors. In other words, a plaintiff's injuries must be the proximate result of the defendant's mail or wire fraud; otherwise, the claim cannot stand.¹⁰⁵ For example, in *Brandenburg v. Seidel*,¹⁰⁶ plaintiffs were depositors in a savings and loan institution insured by a state agency.¹⁰⁷ The institution was placed in receivership.¹⁰⁸ At the same time, a run on all savings and loan institutions was caused by evidence of widespread fraud in the savings and loan industry.¹⁰⁹ Given that the agency had insufficient assets to meet the demands of investors, pay-outs from the agency were frozen; investors thereafter lost any chance to recover interest that otherwise would have been earned on

103. *Sedima, S.P.L.R. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

104. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 269 (1992).

105. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990). This rule even applies in the context of RICO conspiracies. A Section 1964(d) RICO conspiracy cannot be based on any overt act in furtherance of the conspiracy, it must be based on predicate racketeering activity. *See id.* "Congress did not deploy RICO as an instrument against all unlawful acts." *Id.*

106. 859 F.2d 1179 (4th Cir. 1988).

107. *See id.* at 1181.

108. *See id.* at 1182.

109. *See id.* at 1181.

their money.¹¹⁰ The investors brought a RICO claim against the agency alleging that it had fraudulently represented that the institution was adequately insured.¹¹¹ The court dismissed the complaint and stated:

Obviously the two most immediate causes were the alleged depredateions of the insured institution's management, and the [agency's] negligent or reckless failure to prevent those depredateions. That of course is what directly caused the run and ruin that followed, and neither of these of course constitute RICO predicate acts chargeable to these defendants. That these are in practical terms the intervening direct causes of the tragic losses sustained is of course reflected in the fact that they provide the basis for these plaintiffs' related pendent state claims in this action.¹¹²

Based upon this same reasoning, courts have also refused to entertain RICO claims where the plaintiff's damages were apparently caused by intervening, independent factors wholly unrelated to the

110. *See id.* at 1182.

111. *See id.* at 1183.

112. *Id.* at 1190; *see also In re Sunrise Sec. Litig.*, 916 F.2d 874, 883 (3d Cir. 1990) (finding that RICO claims were not actionable because plaintiffs' damages were caused by defendants' mismanagement and other wrongdoing, not by the fraud upon which plaintiff's RICO claims were predicated); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) (elucidating that "Congress did not deploy RICO as an instrument against all unlawful acts . . . [but rather] target[s] only predicate acts catalogued under section 1961(1)"); *Grantham & Mann Inc. v. American Safety Prod.*, 831 F.2d 596, 606 (6th Cir. 1987) (dismissing plaintiff's RICO claim because the damages claimed were caused by defendant's breach of contract, not by defendant's fraudulent assurances that the breach would be remedied); *Bernstein v. Misk*, 948 F. Supp. 228, 240 (E.D.N.Y. 1997) (holding that "[plaintiff's] major losses . . . appear to have occurred more directly as a result of the [defendant's] failure to make the lease payments on equipment and [defendant's] denial of entry to abortion patients . . . [and therefore] [t]hese actions do not constitute racketeering acts because they cannot proximately cause a RICO violation"); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F. Supp. 1365, 1379 (D. Haw. 1995) (dismissing RICO claim where "[t]he main intervening causes come not in the form of other parties as in [*Imagineering*]; rather, they come in the form of other conduct necessary to set the losses in motion, namely the defaults on the loans which the [plaintiffs] have guaranteed."); *Red Ball Interior Demolition Corp. v. Palmadessa*, 874 F. Supp. 576, 586-87 (S.D.N.Y. 1995) (holding that a RICO plaintiff's injuries must be proximately caused by the predicate acts, where "[a]n act which proximately caused an injury is analytically distinct from one which furthered, facilitated, permitted or concealed an injury which happened or could have happened independently of the act"); *North Barrington Dev. Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980) (stating that courts should not "award treble damages for breach of contract or common law fraud where the distinctive RICO violations did not contribute to plaintiff's injury").

defendant's predicate acts. For example, in *First Nationwide Bank v. Gelt Funding Corp.*,¹¹³ the plaintiff brought a RICO claim alleging that the defendant misrepresented the value of real estate acquired by the plaintiff.¹¹⁴ The Second Circuit dismissed the claim and stated:

The value and profitability of multi-unit apartment complexes in New York . . . depend upon many factors that influence the general real estate market including changes in rent controls laws, property taxes, vacancy rates, the level of city services provided, and increased operating expenses including electric and heating oil prices. Given the complexity of the New York real estate market, and the fact that [plaintiff's] losses came in the wake of a downturn in the real estate market, [plaintiff] must allege loss causation with sufficient particularity such that we can determine whether the factual basis for its claim, if proven, could support an inference of proximate cause. [Plaintiff cannot] meet this burden¹¹⁵

Accordingly, the rationale expressed in *Holmes* has been used to dismiss RICO claims where the defendant's alleged RICO violation and the plaintiff's injuries are separated by non-predicate activity or independent factors.

*Martin v. A.O. Smith Corp.*¹¹⁶ exemplifies how a product-based RICO claim can be affected by non-predicate activity and/or independent factors.¹¹⁷ In *Martin*, the plaintiffs were farmers who pur-

113. 27 F.3d 763 (2d Cir. 1994).

114. *See id.* at 765.

115. *Id.* at 770-72 (citation omitted); *see also* Barr Lab., Inc. v. Quantum Pharmics, Inc., 827 F. Supp. 111, 116 (E.D.N.Y. 1993) (dismissing plaintiff's claim that it had lost drug sales as a result of competing drug that had been approved by the government on the basis of defendant's false statements, noting independent factors unrelated to the predicate acts; regardless of the predicate acts, the government still may have approved the drug, or even if government approval had never been granted, there was no assurance that consumers would have bought plaintiff's product as opposed to other products available on the market); Sheperd v. American Honda Motor Co., Inc., 822 F. Supp. 625, 630-31 (N.D. Cal. 1993) (dismissing plaintiff's RICO claim alleging that the value of their car dealership had been adversely affected by defendants' fraudulent scheme to refuse to ship the dealership "high demand" cars, reasoning that the declining dealership value could have been caused by a multitude of factors unrelated to the alleged predicate acts, e.g., poor management, the competitive market, pricing strategies, and changing demographics in the dealership's market).

116. 931 F. Supp. 543 (W.D. Mich. 1996).

117. *See id.*; *see also* Valleyside Dairy Farms, Inc. v. A.O. Smith Corp., 944 F. Supp. 612 (W.D. Mich. 1995) (holding a genuine issue of material fact exists as to whether defendant's fraudulent misrepresentations regarding Harvester proximately caused plaintiff's loss).

chased a feed storage silo from the defendant.¹¹⁸ The defendant allegedly fraudulently advertised the silo as oxygen-limiting, but because of an alleged defect, the silo was not oxygen-limiting.¹¹⁹ As a result, feed in the silo purportedly spoiled and caused injury to the dairy herd when the feed was ingested.¹²⁰ The plaintiffs sued the defendant under RICO and common law theories, seeking recovery of damages resulting from depressed milk production, breeding problems, and a less fit dairy herd.¹²¹ For purposes of its motion for summary judgment, the defendant admitted that the plaintiff was harmed by the allegedly fraudulent statements, *i.e.*, plaintiff would not have purchased the silo “but for” the allegedly fraudulent statements, and that the plaintiffs’ herd problems would not have resulted “but for” the use of the silo.¹²² Relying on *Holmes*, however, the defendant argued that “but for” causation did not satisfy RICO’s proximate cause standard.¹²³ Rather, plaintiffs’ herd problems were proximately caused by intervening non-predicate activity, *i.e.*, the alleged manufacture of a defective silo and/or other independent factors, such as weather conditions and/or poor farm management practices.¹²⁴ The only damage that could be directly attributed to the allegedly fraudulent statements was plaintiffs’ purchase of the silo, but plaintiffs did not seek damages related to the difference between the value of the silo as represented and as it actually performed.¹²⁵ Thus, the defendant argued that it was entitled to summary judgment on the RICO claim.¹²⁶

The court, however, denied the defendant’s motion for summary judgment.¹²⁷ In doing so, the court demonstrated the weakness of the proximate cause limitation. Despite the Supreme Court’s admonition that proximate cause was to be used as a “*judicial tool* . . . to limit a person’s responsibility” for a RICO violation, the court saw no difference between the proximate cause standard applied to RICO claims versus common law claims:

Proximate causation for purposes of RICO is to be

118. See *Martin*, 931 F. Supp. at 545.

119. See *id.* at 545-46.

120. See *id.*

121. See *id.* at 546.

122. See *id.*

123. See *id.* at 548.

124. See *id.* at 549.

125. See *id.*

126. See *id.*

127. See *id.*

determined with reference to the same principles that apply to tort claims generally. . . . If a defendant's conduct was a substantial factor in causing the plaintiff's injury, the defendant will not be absolved from liability merely because other causes contributed to the injury. . . . A question of fact remains as to whether defendants' admitted conduct constitutes a proximate cause of injury for which "justice demands" that they be held accountable.¹²⁸

Thus, the decision in *Martin*, unlike the decisions in *Holmes*, *Brandenburg*, and *First Nationwide Bank*, appears to have been the result of the court's inability to divorce RICO's legal standard of proximate causation from the long tradition of a factual proximate causation. The analytical leap that a court must be willing to take when dismissing a RICO claim on the basis of proximate cause has been aptly described by the Second Circuit:

[RICO] liability, although discussed under the rubric of causation, does not turn on the existence of factual, but-for causation. Nor does it depend on whether there is proximate cause as that term is used at common law. At common law, so long as the plaintiff category is foreseeable, there is no requirement that the risk of injury to the plaintiff, and the risk of harm that actually occurred, were what made the defendant's actions wrongful in the first place. With statutory claims, the issue is, instead, one of statutory intent: was the plaintiff (even though foreseeably injured) in the category the statute meant to protect, and was the harm that occurred (again, even if foreseeable), the "mischief" the statute sought to avoid.¹²⁹

Thus, what many courts may fail to realize is that causation under RICO and other federal statutes first depends upon whether the type of injury is within the reach of the statute, which is a policy question for the court, not an issue of fact for the jury.¹³⁰ Until the Su-

128. *Id.* at 348-49 (citing *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994), *modified*, 30 F.3d 1347 (11th Cir. 1994)); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992)); *see also Kaufman v. BDO Seidman*, 984 F.2d 182, 185 (6th Cir. 1993) (relying on pre-*Holmes* authority to support the proposition that RICO's proximate cause standard is the same as that applied to common law claims).

129. *Abrahams v. Young & Rubicam, Inc.*, 79 F.3d 234, 237 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 66 (1996).

130. *Compare Martin v. A. O. Smith Corp.*, 931 F. Supp. 543, 548 (W.D. Mich. 1996) (finding that proximate cause in a RICO action is a factual issue as in an ordinary tort claim), *with Holmes*, 503 U.S. at 265-70 (deciding that proximate cause in RICO actions is a "judicial tool" and is thus a question of law).

preme Court speaks directly to the significance of non-predicate activity and independent factors under RICO's proximate cause standard, the division between those courts willing to dismiss RICO claims on the basis of proximate causation, and those that are not, will continue to exist and probably widen.

3. *Lack of Reliance*

As noted earlier, a conviction under the mail and wire fraud statutes does not depend on whether anyone was actually defrauded.¹³¹ In other words, a person can be convicted of mail or wire fraud even if no one ever relied on the fraudulent statements. Under section 1964(c), however, many courts have stated that "reliance is necessary to establish injury to business or property 'by reason of' a predicate act of . . . [mail or wire] fraud within the meaning of § 1964(c)."¹³²

In the context of product litigation, reliance is always a question when it comes to claims of false advertising. For instance, a plaintiff makes an unsolicited purchase of a motor for its factory. Thereafter, the plaintiff sees advertisements in magazines and on television guar-

131. See *United States v. Blumeyer*, 114 F.3d 758, 767-68 n.6 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 350 (1997) (following cases not requiring reliance on fraudulent statements).

132. *Brandenburg v. Seidel*, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988); see also *Chisolm v. Transouth Fin. Corp.*, 95 F.3d 331, 337-38 (4th Cir. 1996) (reversing dismissal of plaintiffs' RICO claim and granting plaintiffs leave to amend to plead reliance); *Appletree Square I, Ltd. Partners v. W.R. Grace Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994) (holding a RICO plaintiff must establish detrimental reliance on the defendant's predicate activity); *Central Distrib. of Beer, Inc. v. Conn.*, 5 F.3d 181, 184 (6th Cir. 1993) (holding a RICO claim is not actionable unless a fraudulent statement was made to the plaintiff and the plaintiff detrimentally relied on the statement); *Caviness v. Derand Resources Corp.*, 983 F.2d 1295, 1305 (4th Cir. 1993) (dismissing RICO claim where there was no evidence that the plaintiffs relied on an allegedly fraudulent placement memorandum in making their decision to purchase oil and gas wells); *Pelletier v. Zweifel*, 921 F.2d 1465, 1509-10 (11th Cir. 1991) (concluding plaintiff was not injured by reason of defendant's mail or wire fraud where he relied only on the company's sales figures to determine the company's value and did not rely on any of the allegedly fraudulent information); *Grantham & Mann v. American Safety Prods., Inc.*, 831 F.2d 596, 606 (6th Cir. 1986) (finding that plaintiff did not rely on fraudulent assurances that breach would be remedied because he knew that sale territory had already been offered to and accepted by another); *Sperber v. Boesky*, 849 F.2d 60, 65 (2d Cir. 1988) (dismissing plaintiff's RICO claim against Ivan Boesky alleging that, although he never made any fraudulent statements to the plaintiffs, his insider trading resulted in an increased attraction to certain stocks that caused the plaintiffs to make losing investments, stating that Boesky was not an insurer for all people who lost money in the stock market).

anteeing that the motor will perform without service for 5000 hours. The plaintiff's motor then breaks down after 2000 hours, causing production delays at its factory. The plaintiff then calls the motor manufacturer to complain and speaks to an engineer who innocently quips that the ads were mere puffery and that no one ever believed that the motor could perform for 5000 without service. The plaintiff brings a RICO claim alleging that the advertisements, distributed by mails and wires, were fraudulent. Because the plaintiff did not rely on the advertisements, *i.e.*, his purchase of the motor was unsolicited, his injuries were not caused "by reason of" the pattern of racketeering activity, and his claim should be dismissed. It should be noted, however, that some courts disagree with a reliance requirement under RICO since a mail or wire fraud conviction does not depend upon detrimental reliance.¹³³

C. Person / Enterprise Distinction

Section 1962(c) makes it "unlawful for any *person* employed by or associated with any *enterprise* . . . [to] conduct . . . such enterprise's affairs through a pattern of racketeering activity. . . ."¹³⁴ Accordingly, courts have long held that a RICO violation must involve at least two entities: the person and the enterprise with which the person is associated, *i.e.*, a person cannot associate with himself.¹³⁵ This rule was most problematic when it came to pleading RICO violations against corporations because it prevented plaintiffs from pleading that a corporate employee (*i.e.*, the person) had associated with the corporation (*i.e.*, the enterprise) to engage in racketeering activity:

Because a corporation can only function through its employees and agents, any act of the corporation can be

133. See, e.g., *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 828 F. Supp. 287, 294-96 (D.N.J. 1993) (explaining that reliance is an element of common law fraud, not of RICO).

134. 18 U.S.C. § 1962(c) (1994) (emphasis added).

135. See *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *River City Markets, Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1461 (9th Cir. 1992); *Schaeffer v. Ascension College, Inc.*, 964 F. Supp. 1067, 1071 (M.D. La. 1997) (citing *In re Bruzynski*, 989 F.2d 733, 743 (5th Cir. 1993)); *Moore v. Fidelity Fin. Serv., Inc.*, 949 F. Supp. 673, 678 (N.D. Ill. 1997) (citing *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 645 (7th Cir. 1995)); *U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1061 (N.D. Cal. 1991); *Garbade v. Great Divide Min. & Mill Corp.*, 645 F. Supp. 808, 811 (D. Colo. 1986), *aff'd*, 831 F.2d 212 (10th Cir. 1987).

viewed as an act of such an enterprise, and the enterprise is in reality no more than the defendant itself. Thus, where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation.¹³⁶

Because they could not satisfy the person / enterprise distinction by simply accusing corporate employees of committing wrongs through their corporation, plaintiffs have recently begun to plead that a corporate parent or subsidiary is the person who associates with other members of the corporate tree (or the corporation's dealers, retailers or independent agents) to engage in a pattern of racketeering activity.¹³⁷ So far, the courts have not been favorable to this distinction:

[W]e recognize the frequent asymmetry in the legal treatment of integrated and nonintegrated firms: under antitrust law, for example, a firm can conspire with its dealers, but it cannot conspire with its employees. RICO, however, is not a conspiracy statute. Its draconian penalties are not triggered just by proving conspiracy. "Enterprise" connotes more. Just how much more is uncertain; but it is enough to decide this case that where a large, reputable manufacturer deals with its dealers and other agents in the ordinary way, so that their role in the manufacturer's illegal acts is entirely incidental, differing not at all from what it would be if these agents were the employees of a totally integrated enterprise, the manufacturer

136. *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *see also* *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 155 (5th Cir. 1997) (holding "when the alleged association in fact is in reality no different from the association of individuals or entities that constitute a defendant 'person' and carry out its activities, the distinctiveness requirement is not met"); *China Trust Bank of N.Y. v. Standard Chartered Bank, PLC*, 981 F. Supp. 282, 286 (S.D.N.Y. 1997) (stating "this distinctiveness requirement may not be circumvented by alleging a conspiracy between the defendant and its own employees or agents carrying on the regular affairs of the defendant"); *Nebraska Sec. Bank v. Dain Bosworth, Inc.*, 838 F. Supp. 1362, 1368 n.10 (D. Neb. 1993) (asserting "an employee who simply acts within the scope of employment [cannot] be considered distinct from his or her corporate employer inasmuch as corporations can only act through their employees") (citing *Glessner v. Kenny*, 952 F.2d 702, 711-14 (3d Cir. 1991)). *But see* *Old Time Enter., Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989) (holding that corporate employees and the corporation were sufficiently distinct).

137. *See infra* note 138 and accompanying text.

plus its dealers and other agents (or any subset of the members of the corporate family) do not constitute an enterprise within the meaning of the statute.¹³⁸

As long as the person / enterprise distinction continues to be strengthened by similar opinions, product manufacturers have a valid defense to RICO claims. Manufacturers cannot be held liable under RICO simply because their employees approved an allegedly false advertising campaign and the product was sold through a network of dealers. The employees' approval of the advertising campaign does not create a distinct person and enterprise because the employees are merely acting on behalf of the manufacturer. Similarly, the sale of the manufacturer's product by the dealers does not satisfy the distinction because the dealers are not substantially different from totally integrated employees. The person / enterprise distinction is a limitation that every manufacturer faced

138. *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (citations omitted); *see also Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 155 (5th Cir. 1997) (holding "the distinctiveness requirement is not satisfied by pleading a subsidiary corporation or affiliated entity as a perpetrator-defendant if the parent corporation and the subsidiary's roles in the alleged racketeering activities are not sufficiently distinct"); *Davis v. Mutual Life Ins. Co. of N.Y.*, 6 F.3d 367, 377 (6th Cir. 1993) (noting that "a corporation may not be liable under section 1962(c) for participating in the affairs . . . of its own subdivisions, agents or members."); *China Trust Bank of N.Y. v. Standard Chartered Bank, PLC*, 981 F. Supp. 282, 286 (S.D.N.Y. 1997) (holding the distinctiveness requirement is not met where "the alleged conspirators are separate legal entities . . . operate[d] within the same corporate structure guided by a single corporate consciousness"); *Ewing v. Midland Fin. Co.*, No. 96 C222, 1997 WL 627644, at *5 (N.D. Ill. Sept. 26, 1997) (stating that "[m]erely pleading that the parent corporation set the proscribed policy and that the subsidiary subsequently acted on its behalf is not sufficient" to satisfy the distinctiveness requirement); *Dornberger v. Metro. Life Ins. Co.*, 961 F. Supp. 506, 524 (S.D.N.Y. 1997) (asserting that distinctiveness requirement was satisfied where plaintiff alleged that defendant conducted its scheme through the use of governmental entities and not through just its agents); *Emery v. American Gen. Fin., Inc.*, 952 F. Supp. 602, 605-06 (N.D. Ill. 1997) (holding "the plaintiff must allege that the RICO person was doing something more than merely conducting its own corporate affairs."); *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 640 (S.D.N.Y. 1995) (noting that distinction requirement is not satisfied where plaintiff merely alleged that members of partnership were simply carrying out the business of the partnership); *Nebraska Sec. Bank v. Dain Bosworth, Inc.*, 838 F. Supp. 1362, 1368 (D. Neb. 1993) (asserting that distinction was not satisfied where plaintiff merely pleaded association between parent and its wholly-owned subsidiary); *Rodriguez v. Banco Cent.*, 777 F. Supp. 1043, 1054 (D.P.R. 1991), *aff'd*, 990 F.2d 7 (1st Cir. 1993) (holding "[t]he distinction requirement is not satisfied by merely naming a corporation and its employees, affiliates, and agents as an association-in-fact, since a corporation acts through its employees, subsidiaries and agents, and would thereby be merely associating with itself.").

with a RICO claim should fully explore.

D. Coordination of Civil and Criminal Remedies

Although untested in the courts, another theory aimed at limiting RICO liability is based on an attempt to coordinate the restitution remedies available to victims of criminal mail or wire fraud with the damages recoverable by a civil RICO plaintiff. If a civil plaintiff's damages were determined under the same standards used to calculate restitution to victims of mail and wire fraud, product manufacturers could avoid substantial damage awards under RICO. This theory will not result in dismissal of a RICO claim but may significantly limit damages.

"A primary rule of statutory construction is that when a court interprets multiple statutes dealing with a related subject or object, the statutes are *in pari materia* and must be considered together."¹³⁹ In other words, a proper comprehensive analysis will read the parts of the statutory scheme together, bearing in mind the congressional intent underlying the whole scheme.¹⁴⁰ Thus, because RICO incorporates the mail and wire fraud statutes, the courts should adopt an interpretation of civil RICO's damage provision that considers the Congressional intent underlying the whole statutory scheme related to penalizing violations of the mail and wire fraud statutes.¹⁴¹

Victims of mail and wire fraud, whose claims are prosecuted by the government, cannot receive restitution for lost profits; yet, this is frequently a major component of any civil RICO plaintiff's damage claim.¹⁴² The Victim and Witness Protection Act of 1982 ("VWPA")

139. *Linquist v. Bowen*, 813 F.2d 884, 888 (8th Cir. 1987) (citing *United States v. Freeman*, 44 U.S. 556, 564-65 (1845)).

140. *See id.* at 889.

141. *See id.*

142. *See, e.g., Raybestos Prod. Co. v. Younger*, 54 F.3d 1234, 1243-44 (7th Cir. 1995) (holding \$240,000 damage award was reasonable where plaintiff alleged \$5 million in lost profits); *Brandenburg v. Seidel*, 859 F.2d 1179, 1190 (4th Cir. 1988) (noting the unreasonableness of seeking interest lost on investments as a result of a state agency's failure to be adequately insured); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987) (asserting damages related to plaintiff's lost rent were compensable under RICO even though they were not recoverable under state law contract claim); *Frankford Trust Co. v. Advest, Inc.*, 943 F. Supp. 531, 533-34 (E.D. Pa. 1996) (holding lost profits are recoverable under RICO); *Martin v. A.O. Smith Corp.*, 931 F. Supp. 543, 546 (W.D. Mich. 1996) (holding damages related to lost milk production and lost offspring were barred); *Barr Laboratories, Inc. v. Quantum Pharmics, Inc.*, 827 F. Supp. 111, 116 (E.D.N.Y. 1993) (holding plaintiff's damages related to lost drug sales too speculative); *Sheperd v. American Honda Motor Co.*, 822 F. Supp. 625, 630 (N.D. Cal. 1993) (asserting that damages

governs awards of restitution for all crimes delineated in Title 18 of the United States Code, including mail fraud and wire fraud.¹⁴³ Under the VWPA, victims of Title 18 crimes (*i.e.*, mail or wire fraud) are entitled to receive a return of the property obtained by the defendant or its value.¹⁴⁴ Victims are not entitled to receive restitution for lost profits. For example, in *United States v. Mitchell*,¹⁴⁵ the defendant was convicted of possessing a stolen commercial vehicle that crossed state lines, a Title 18 offense.¹⁴⁶ The district court ordered the defendant to pay restitution based on the victim's income lost as a result of the theft.¹⁴⁷ The Fifth Circuit vacated the district court's award:

[The VWPA section 3663(b)(1)] sets forth the restitution that may be ordered for crimes resulting in ' . . . loss . . . of property.' This section contains no authority to order restitution for lost income. . . . Congress is clearly capable of authorizing restitution for lost income when it chooses to do so. *See* 18 U.S.C. § 3663(b)(2). Despite this fact, it has not included lost income in the type of restitution that may be awarded in property cases and, unless and until it amends the statute to include lost income, courts may not order such restitution in property cases.¹⁴⁸

Given the restitution scheme employed under Title 18, civil RICO plaintiffs should not be allowed to recover damages related to lost profits caused by mail or wire fraud. Allowing recovery of lost profits under RICO for violations of the mail and wire fraud statutes is illogical and inequitable. Victims whose rights are redressed by their U.S. Attorney cannot recover any lost profits, whereas victims who were wealthy enough or sophisticated enough to file a civil RICO claim, where the burden of proof is less, can recover *three times* their lost profits. Such an illogical and inequitable result could not have

related to diminished value of car dealership too "attenuated" from the alleged wrongful conduct); *General Envtl. Science Corp. v. Horsfall*, 800 F. Supp. 1497, 1505 (N.D. Ohio 1992), *aff'd in part, rev'd in part*, 25 F.3d 1048 (6th Cir. 1994) (awarding over \$1.2 million to plaintiff's in lost profits); *Sound Video Unlimited, Inc. v. Video Shack, Inc.*, 700 F. Supp. 127, 142 (S.D.N.Y. 1988) (noting plaintiff's lost profits were recoverable under RICO).

143. *See* 18 U.S.C. § 3663(a) (1994). *See also* 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud) (1994).

144. *See id.* § 3663(b) (1).

145. 876 F.2d 1178 (5th Cir. 1989).

146. *See id.* at 1181.

147. *See id.* at 1182.

148. *Id.* at 1183; *see also* *United States v. Sharp*, 927 F.2d 170, 174 (4th Cir. 1990) (holding "[b]ased on the plain language of the statute, the district court should not have included lost income in the calculation of restitution").

been intended by Congress. The more logical result is that no victim of wire or mail fraud is entitled to recover lost profits, unless the lost profits have been diverted away from the plaintiff and to the defendant or a member of the enterprise by virtue of the scheme.¹⁴⁹ This interpretation effectuates the purposes of RICO, the mail and wire fraud statutes, and the VWPA, without offending any of the statutes or Congress' apparent comprehensive scheme. The defendants in a civil RICO claim will be sufficiently penalized if plaintiffs are allowed to treble the amount of money actually invested in the scheme.¹⁵⁰

Essentially, this is another policy argument closely related to RICO's proximate cause standard that may limit a defendant's exposure under RICO. Product manufacturers faced with large lost profit claims that allegedly arise from a defective and fraudulently advertised product may be aided by this comparison to the restitution available under the mail and wire fraud statutes.

IV. CONCLUSION

In an order dismissing a RICO claim, the Honorable Judge Kane of the United States District Court for Colorado best described the frustration that RICO has caused many courts and defendants:

RICO is a recurring nightmare for federal courts across the country. Like the Flying Dutchman, the statute refuses to be put to rest. Beating against the wind, it has jet-tisoned an effusion of opinions which bobble in its wake. In a vain attempt to drop anchor in this sea of confusion, I

149. *See, e.g.,* Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1343 (2d Cir. 1994) (stating plaintiff was entitled to lost profits on contracts it was not awarded where defendant would only award contracts to other members of the enterprise who were willing to pay kickbacks to defendant); United States v. Lively, 20 F.3d 193, 202-03 (6th Cir. 1994) (holding defendant who obtained plaintiff's products through mail order retail catalogue and resold the products to consumers without ever intending to pay plaintiff for the products was liable for damages, not limited to the cost of the product because plaintiff could have sold the goods to other purchasers at retail price); Sound Video Unlimited, Inc. v. Video Shack, Inc., 700 F. Supp. 127, 141-42 (S.D.N.Y. 1988) (stating plaintiff wholesaler who entered a joint venture with the defendant distributor whereby plaintiff sold products at a reduced wholesale cost to defendant so that the joint venture would be more profitable was entitled to the profits it would have made had it sold the goods to defendant at the regular wholesale cost); DeMent v. Abbott Capital Corp., 589 F. Supp. 1378, 1385-86 (N.D. Ill. 1984) (holding defendants who fraudulently procured options to purchase stock were partially liable for lost profits under RICO);

150. *See* Fleischhauer v. Feltner, 879 F.2d 1290, 1299-1300 (6th Cir. 1989) (holding "[a] plaintiff injured by civil RICO violations deserves a 'complete recovery'").

have made my position known.¹⁵¹

Product manufacturers are only one group of defendants in whose nightmares RICO has appeared. Given the breadth of the statute, no one in modern business can rest assured that he or she will not be the next to be brought to court under RICO. Product manufacturers in particular must be aware that an allegedly fraudulent advertisement may not only result in a product liability claim but also in a common law fraud claim, and worse of all, in a RICO claim, where they may be subject to treble damages. Because the federal courts have never been unified in their approach to any single aspect of RICO, not to mention the entire statute, no one can guarantee that any of theories discussed in this article will provide a product manufacturer with relief from a particular claim, before a particular judge. To the extent a manufacturer's ounce of prevention fails to protect it from a RICO claim, however, this article and, in particular those arguments analyzed in section IV, should provide the manufacturer with some hope for a cure.

151. *In re Dow Co. Sarabond Prod. Liab. Litig.*, 666 F. Supp. 1466, 1470 (D. Colo. 1987).