THE NEW DIRECT PROXIMATE CAUSE: HOW THE UNITED STATES SUPREME COURT HAS ATTEMPTED TO LIMIT CIVIL RICO IN A MANNER CONGRESS AIMED TO PROTECT

GREGORY M. ZARIN*

* Juris Doctor Candidate, May 2007, University of Miami School of Law

I. INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act ("RICO") creates a substantial liability for corporations and a potential windfall for civil RICO plaintiffs.[1] Violations carry treble damages plus attorney's fees and costs.[2] For that reason, "[c]ivil RICO is an unusually potent weapon–the litigation equivalent of a thermonuclear device."[3] Because of this threat, civil RICO actions frequently settle if the suit moves beyond dispositive motions. Indeed, the "very pendency of a RICO suit can be stigmatizing and its consummation can be costly."[4] Therefore courts "strive to flush out frivolous RICO allegations" at an early stage of the litigation.[5]

Courts look with particularity to assure plaintiffs have sufficient RICO standing, as there is severe hardship to defendants should improper civil RICO suit continue beyond the early stages of litigation.[6] Civil RICO has arguably been over-utilized because of its lucrative remedy,[7] relatively low initial costs,[8] and many statutory ambiguities.[9] These qualities transformed the statute into an attractive option for private parties injured as a result of another's illicit practices.[10] Since its beginning, civil RICO's vague boundaries permit its use in unconventional ways, which has recently led to a unilateral attempt by the United States Supreme Court to restrict its far reaching potential.[11] This is so even where Congress may have intended to expand the racketeering statute to promote private enforcement of unlawful schemes, thus filling gaps of law enforcement capabilities.[12]

---

[1] *See* 18 U.S.C.S. §§ 1961 *et seq*.
[2] *See id.*; *see also* Micah King, *RICO: A New Tool for Immigration Law Enforcement*, CTR. FOR IMMIGRATION STUD. (Aug. 2003), *available at* http://www.cis.org/articles/2003/back1103.pdf (citing 18 U.S.C. §§ 1961 *et seq.*) ("Additionally, the court can order the defendant to divest itself of any interest in any enterprise and to refrain from engaging in any commercial activity or making commercial investment.").
[3] Miranda v. Ponce Fed. Bank, 948 F. 2d 44 (1st Cir. 1991).
[4] *Id.*
[5] Katzman v. Victoria's Secret Catalogue, 167 F.R.D. 649, 655 (quoting Figueroa Ruiz v. Alegria, 896 F. 2d 645, 650 (1st Cir. 1990)).
[6] *See id.* at 655.
[7] *See* King, *supra* note 2.
[8] *See* Jonathan Turley, *The RICO Lottery and the Gains Multiplication Approach: An Alternative Measurement of Damages Under Civil RICO*, 33 VILLANOVA L. REV. 239, 254 (1988) (stating that civil RICO litigation costs are small compared to its lucrative remedy that is set "at a sum great enough to ruin, or at least cripple, a racketeering business").
[9] *See generally* Michael Goldsmith, *Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 HARV. J. ON LEGIS. 281, 289 (2004).
[10] *See* Patrick D. Hughes, *The Investment Injury Requirement in Civil RICO Section 1962(a) Actions*, 41 DEPAUL L. REV. 475, 483-85 (1992) (stating that RICO was 'designed to deal with organized crime, but it also was crafted more broadly to deal with all forms of enterprise criminality') (quoting Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: Mother of God, Is This the End of RICO?*, 43 VAND. L. REV. 851, 860 (1990)).
[11] *See id.*
[12] *See* Raymond J. Dowd, *Civil RICO Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act*, 14 FORDHAM INT'L L.J. 946, 978-79 (1990/1991) ("Congress created civil RICO and its treble damages award as a supplement to enlist private resources in its domestic war on organized crime, a war that Congress believed public prosecutorial resources were insufficient to handle.").

It is only those who abuse civil RICO's broad application that should be limited, however, from RICO's expansive reach. Arguably, civil RICO was an effective tool to fight organized crime in the United States as well as those who profit and benefit from illicit activities. Although a civil RICO plaintiff may constitute a "broad" class of individual or corporation, the expansive requirements of assuring the *defendant* properly fall under the statute's scope provides protection from unnecessary civil RICO claims.

Civil RICO has provided a remedy to those directly affected by individuals or corporations that commit such crimes as systematic fraudulent schemes or violate provisions of the INA by hiring undocumented workers to gain an unlawful advantage. At the very least, Congress utilizes civil RICO as an useful tool in fighting crime by continually amending civil RICO's 'predicate offenses' that reach beyond the resources of law enforcement agencies. Therefore, when the Supreme Court applies a judicially created limitation to the standing requirements of civil RICO, as it has done in 2006, the Court has likely done so against the congressional intent of the statute. The Supreme Court *should* take a 'plain language' interpretation of the statute to permit holding those responsible.

In light of these competing theories of the statute, this comment analyzes a heavily litigated issue since civil RICO's enactment–its unclear statutory scope and private party standing.[13] To illustrate this issue, this comment explores recent RICO litigation related to the unlawful hiring of undocumented workers as an example of a congressionally supported application of civil RICO, but in a manner wholly unrelated to organized crime or the mafia.[14] While the Supreme Court has limited civil RICO's outer boundaries, Congress seems to go the opposite direction by continually expanding the statute's application.

Part II.A and Part II.B outline RICO's history and early development, illustrating a remarkable transformation from its initial purpose to modern application. Part III.A and Part III.B then analyze the success of civil RICO in recent cases that address allegations unrelated to organized crime. Specifically, Part III.B examines allegations against corporations that knowingly and systematically hire undocumented immigrants to gain economic advantages over their competitors, depress wages of their lawfully employed workforce, and "harbor" their undocumented employees from law enforcement agencies.

Section Part III.C provides a detailed analysis of two recent Supreme Court civil RICO decisions that have seemingly attempted to restrict this broad RICO application. In *Anza v. Ideal Steel Supply* ("*Anza*"),[15] the Court showed implicit concern with civil RICO's far-reaching potential and adverse economic impact. Consequently, the Supreme Court expanded an already

---

[13] *See* John L. Koenig, *What Have They Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering*, 35 AM. U. L. REV. 821, 857 (1986) (stating that district courts "had imposed a number of different standing limitations on private civil RICO actions"); Stephen Scallan, *Proximate Cause Under RICO*, 20 S. ILL. U. L.J. 455, 495 (1996) (noting the different interpretations courts have applied for civil RICO standing); Patrick Wackerly, *Personal Versus Property Harm and Civil RICO Standing*, 73 U. CHI. L. REV. 1513, 1527 (2006) (noting the difficulties in applying a uniform civil RICO standing test).

[14] *See generally* Commercial Cleaning Servs. v. Colin Serv. Systems, Inc., 271 F. 3d 374 (2001); Mendoza v. Zirkle Fruit Co., 301 F. 3d 1163 (9th Cir. 2002); Trollinger v. Tyson Foods, Inc., 370 F. 3d 602 (6th Cir. 2004); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295 (D.N.J. 2005).

[15] Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991 (June 5, 2006).

narrow "direct proximate cause" requirement first set forth in *Holmes v. Securities Investor Protection Corp.* ("*Holmes*") to further limit access to the statute.[16]

Anza thus further restricts civil RICO standing even where Congress has, for decades, expanded the statute. For example, in the late 1980s and early 1990s, RICO was unpopularity used "in various types of labor-management disputes, including strike and union litigation."[17] In 1996, Congress expanded RICO's predicate offenses to include violations of section 274 of the INA.[18] These 1996 amendments brought immigration law violations, together with labor and employment law, into the statutory scope of civil RICO lawsuits.[19] Thus, even legitimate corporations that have no connection to organized crime but nonetheless knowingly employed undocumented workers or even encourage illegal immigration, are liable to other employees, competitors, or undocumented workers for their participation in their unlawful hiring schemes.[20]

Therefore, as discussed in detail *infra*, the Supreme Court's recent civil RICO decisions restrict its statutory scope to only the 'most' directly affected by the unlawful practices (e.g., law enforcement agencies). If this is correct, it goes directly against congressional intent of civil RICO. Because RICO carries a broad statutory mandate that favors an expansive scope,[21] private enforcement of civil RICO due to violations of immigration law presents "an innovative method for tightening borders, [although] its economic impact on [corporations] in the United States may be harmful."[22] Congressional expansion of RICO, in adding INA violations as predicate offenses, illustrates that "[t]he use of RICO as an immigration enforcement tool is consistent with Congress' intent to provide a remedy to businesses suffering harm from illegal competition."[23] Therefore, "there is little doubt that such suits can provide adequate remedies for businesses and employees" who are injured by the illicit practices of their competitors.[24]

II. THE HISTORY AND DEVELOPMENT OF THE RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)

A. Civil RICO's Enactment

RICO was enacted by Congress as part of the Organized Crime Control Act of 1970 "in response to public outcry and several government studies revealing pervasive infiltration of the legitimate business community by the mafia and other organized crime syndicates."[25] The enactment of RICO was to empower federal prosecutors the powers to enforce criminal penalties

---

[16] Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992).
[17] Elisabeth J. Sweeney Yu, *Addressing the Economic Impact of Undocumented Immigration on the American Worker: Private RICO Litigation and Public Policy*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 909, 936 (2006).
[18] This was codified in 8 U.S.C. § 1324; *see* discussion *infra* Part II.B.
[19] *See* 8 U.S.C. § 1324.
[20] *See* King, *supra* note 2 (citing 18 U.S.C. §§ 1961 - 1968).
[21] United States v. Pepe, 747 F.2d 632, 659 (11th Cir. 1984).
[22] Adam J. Homicz, *Private Enforcement of Immigration Law: Expanded Definitions Under RICO and the Immigration and Nationality Act*, 38 Suffolk U.L. Rev. 621, 623 (2005).
[23] *Id.* at 637 (citing Teresa Bryan et al., *Racketeer Influenced and Corrupt Organizations*, 40 AM. CRIM. L. REV. 987, 989 (2003)).
[24] Homicz, *supra* note 22, at 638 (citing Micah King, *supra* note 2).
[25] Daniel Z. Herbst, *Injunctive Relief and Civil RICO: After Scheidler v. National Org. for Women, Inc., RICO's Scope and Remedies Require Reevaluation*, 53 CATH U.L. REV. 1125 (2004).

and civil equitable remedies against the mafia.[26] By providing a *civil* RICO cause of action, private individuals and corporations are also able to recover damages directly caused from the "broad patterns of racketeering activities associated with organized crime."[27]

RICO has always been applied broadly. Indeed, Congress charged that RICO should be "liberally construed to effectuate its remedial purposes."[28] RICO was part of an "aggressive initiative to supplement old remedies and develop new methods for fighting crime."[29] After an eightfold increase in civil RICO actions between 1983 and 1988,[30] including more than one thousand actions filed per year,[31] district courts increasingly presided over civil RICO cases in areas not typically associated with organized crime. Although there are many harsh critics against the broad application of RICO because of its adverse potential economic impact, it is not clear whether a broad application of this remedial statute is bad. Indeed, "RICOs 'liberal construction' clause . . . seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute."[32]

Even though RICO was endorsed because of "the perceived need to combat organized crime . . . , [Congress] chose to enact a more general statute, one which . . . was not limited in application to organized crime.[33] Further, the Supreme Court has stated that although "RICO may be a poorly drafted statute[,] rewriting it is a job for Congress . . . and not for this Court. There is no more room in RICO's 'self-consciously expansive language and overall approach' for the imposition of an organized crime limitation . . . ."[34]

Drafting a Constitutionally sound statute geared towards a group such the mafia proved to be challenging.[35] As a result, Congress "defined 'racketeering activity' by incorporating into its definition numerous predicate offenses chargeable under state and federal law that had long been associated with organized crime syndicates."[36] The original Senate RICO bill did not include a civil action and remedy for private persons.[37] Civil RICO was actually "eleventh-hour

---

[26] *Id.* at 1126.
[27] *Id.*
[28] Sedima, S.P.R.L. v. IMREX Co., Inc., 473 U.S. 479, 528 (1985) (quoting Pub. L. 92-452, § 904(a), 84 Stat. 947) (Powell, J. dissenting).
[29] *Id.* at 498.
[30] *Id.* at 481 n.1.
[31] William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 9 (1989).
[32] Reves v. Ernst & Young, 507 U.S. 170, 183 (1993).
[33] H.J., Inc. v. NW Bell Telephone Co., 109 S. Ct. 2893, 2905 (1989).
[34] *Id.* at 2905 (citations omitted).
[35] *See* Cecil Greek, *Is This the End of RICO? Or Only the Beginning?*, 19 FREE INQUIRY IN CREATIVE SOCIOLOGY 1 (May 1991).
[36] *Herbst*, *supra* note 25, at 1130-31 (citing John L. Koenig, *What Have They Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering*, 35 AM. U. L. REV. 821, 829 n.34 (1986) (explaining that in defining racketeering activity, Congress created a "functional legal concept" rather than attempting to define organized crime or attach a specific connection to it).
[37] During hearings before the House Judiciary Committee, Representative Steiger proposed the addition of a private treble-damages action and stated "[those] who have been wronged by organized crime should at least be given access to a legal remedy." The Committee approved the amendment. *See* S. No. 30, before Subcommittee No. 5, 91st Cong., 2d Sess. (1970).

addition"[38] to encourage private parties in assisting with "the eradication of organized crime in the United States."[39] "While RICO is designed to combat the infiltration into and corruption of America's legitimate business community by organized crime, it is only occasionally put to these ends in civil cases today."[40] The remedy of treble damages as well as attorneys' fees and costs has drawn numerous plaintiffs who would have otherwise file state tort claims into federal courts.[41]

Federal courts have struggled with the broad congressional mandate to broadly construe RICO. It is arguably this liberal construction clause that allowed RICO's application to first expand beyond its initial intended scope.[42] Although the Supreme Court has historically been "overtly cautious so as not to overstep the boundaries of judicial review,"[43] its recent decision in *Anza* is a transparent attempt to restrict civil RICO's private use beyond those harmed by organized criminal activity. This is true even though it has been utilized such a manner for more than two decades.

RICO defines racketeering activity as (1) any act "'chargeable' under several generically described state criminal laws; (2) any act 'indictable' under numerous specific federal criminal law provisions, including mail and wire fraud; (3) and any 'offense' involving narcotics or bankruptcy or securities fraud 'punishable' under federal law."[44] The use of income derived from a 'pattern of racketeering activity' in relation to an 'enterprise' engaged in or affecting interstate commerce is explicitly prohibited by civil RICO.[45] At least two actions of racketeering activity constitute the requisite pattern of racketeering.[46]

To determine whether a plaintiff has statutory standing to bring a RICO claim, the plaintiff must satisfy three pleading requirements: "(1) a violation of [a prohibited activity as provided in] section 1962;[47] (2) injury to business or property; and (3) causation of the injury by the violation."[48] With regard to the aforementioned causation requirement, a RICO plaintiff lacks standing absent a direct relationship between the injury alleged and the predicate RICO offense.[49] A critical limitation on this causation requirement, first purported in the Supreme

---

[38] GREGORY P. JOSEPH, CIVIL RICO A DEFINITIVE GUIDE, ch. 1, § 2 (2000) (citing Kurzweil, *Criminal & Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 60 (1996)).
[39] Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970), *as reprinted in* 1970 U.S.C.C.A.N 1073.
[40] JOSEPH, *supra* note 38 (citing Pub. L. No. 91-452, 84 Stat. at 943 (1970)).
[41] Rehnquist, *supra* note 31, at 9; *see also Herbst*, *supra* note 25, at 1134.
[42] *Herbst*, *supra* note 25, at 1134.
[43] *Id.*
[44] Religious Tech. Ctr. & Church of Scientology Int'l, Inc. v. Wollersheim, 796 F.2d 1076, 1080 (9th Cir. 1986) (citing 18 U.S.C. §§ 1961-1962).
[45] *Id.* (quoting 18 U.S.C. § 1965(5)).
[46] *Id.* (citing 18 U.S.C. § 1964).
[47] "A violation of § 1962(c) requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity [and while] [t]he plaintiff must, of course, allege each of these elements to state a claim . . . the statute requires no more than this." *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97 (1985).
[48] First Nationwide Bank v. Gelt Funding Corp. 27 F. 3d 763, 767 (2d Cir. 1994).
[49] *Id.* at 769.

Court decision of *Holmes*,[50] is that a defendant's RICO violation "was the "but-for" [cause] of the [the plaintiff's] injury,"[51] in addition to the legal or proximate cause.[52]

B. Developments in Civil RICO Application

The purpose of civil RICO was "not merely to compensate victims, but to turn them into prosecutors, or 'private attorneys general,' dedicated to eliminating racketeering activity."[53] The unintended consequence of Congress' broad construction clause provided "plaintiffs with an avenue to bring actions in the federal courts against defendants who were not associated with [the mafia or] organized crime."

In *United States v. Turkette*, the Supreme Court found that RICO applies to legitimate enterprises, including individuals or corporations.[54] At issue in *Turkette* was the definition of the term 'enterprise' as applied under RICO.[55] Some lower courts had, up at this point, limited civil RICO to criminal, illegitimate (or racketeering) enterprises.[56] Now, "[g]iven the ruling in *Turkette*, RICO could be used not only against the mafia and other criminal organizations, but [also] . . . be used against corporations, political protest groups, [and] labor unions."[57] This early interpretation by the Supreme Court was arguably the first time application of civil RICO went beyond its initial legislative purpose.[58]

Because "the term 'enterprise' includes *legitimate* and illegitimate organizations [or corporations], and given that a RICO claim can be based on violations of the [overbroad] mail or wire fraud statutes . . . [and now violations of the INA]," RICO can be used in an unlimited number of factual scenarios.[59] Although a violation cannot exist in the absence of long-term criminal activity, RICO's favorable remedies and ambiguity have directed many legitimate state claims into federal court.[60]

If a statute has drafting errors, which make it impermissively ambiguous, or courts have stepped beyond their judicial bounds, Congress is clearly the proper branch to limit or clarify the statute.[61] In this case, however, Congress has not enacted any substantial restrictive amendments

---

[50] Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992).
[51] *Gelt Funding Corp*. 27 F. 3d at 769.
[52] *See id.* Proximate cause is "an event sufficiently related to a legally recognizable injury to be held the cause of that injury. *See* Proximate Cause, WIKIPEDIA (2007). Many courts, however, improperly define proximate cause as the "but-for" test (i.e., but-for the rain, the car would not have crashed). Proximate cause is actually a limitation on the "but-for" causation test because it requires that the action be "close enough to a harm in a chain of events to be a legally culpable cause of the harm." *Id.*
[53] Rotella v. Wood, 528 U.S. 549 (2000); *see also* Attorney General of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103 (2d Cir. 2001).
[54] United States v. Turkette, 452 U.S. 576, 585 (1981) ("The aim [of civil RICO] is to divest the association of the fruits of its ill-gotten gains.").
[55] *See id.*
[56] *See id.*
[57] *See* Ricoact.com, http://www.ricoact.com/ricoact/faq.asp (last visited Jan. 26, 2007) (RICO claims can be based upon the activities of any group or organization whose members pursue a common goal).
[58] Frequently Asked Questions RicoAct.com, http://www.ricoact.com/ricoact/faq.asp (last visited Jan. 26, 2007).
[59] *Id.*
[60] *See* RicoAct.com, http://www.ricoact.com/ricoact/index.asp (last visited Jan. 26, 2007).
[61] *See generally* Amanda Frost, *Certifying Questions to Congress*, BERKELEY ELECTRONIC PRESS (2006)

to change the statute. Only once, as part of the Private Securities Litigation Reform Act of 1995, has Congress enacted a RICO amendment that could be viewed as limiting.[62] The securities litigation reform movement amended RICO to require that a defendant be criminally convicted of securities fraud before the defendant was subject to a civil RICO claim, thus virtually removing securities fraud as a predicate offense.[63]

At the time, Congress chose to limit civil RICO claims against securities fraud defendants "because securities laws generally provide adequate remedies for those injured by securities fraud, [and Congress believed] it [was] both unnecessary and unfair to expose defendants in securities cases to the threat of treble damages and other extraordinary remedies provided by RICO."[64] However, following the securities fraud purported through Enron's practices, the 1995 securities fraud amendment to RICO has been widely criticized by some legal commentators who have recommended that Congress repeal this restriction.[65]

In 1996, Congress further expanded RICO's predicate offenses even though it was unquestionably aware of federal courts' twenty-year struggle in interpreting the statute. This expansion of civil RICO promoted private assistance to the limited resources of U.S. immigration law enforcement agencies that faced millions of undocumented residents working illegally in the United States.[66] Indeed, Congress signed three major pieces of legislation into law in 1996 that affected all immigrants, including a sweeping reform to U.S. immigration enforcement policies.[67]

RICO, as amended in 1996, added a violation of Section 274 of the INA[68] to the list of prohibited conduct qualifying as a predicate offense under 18 U.S.C. § 1961.[69] This expanded racketeering activity for purposes of RICO to include "any act which is indictable under the [INA], section 274 (relating to bringing in and harboring certain aliens)."[70] "In contrast, section 274A is entitled 'Unlawful Employment of Aliens' and qualifies several prohibitions on

---

[62] *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995). This Securities Litigation Reform Act was designed to curtail class action lawsuits by the plaintiffs bar. *See* Adam C. Pritchard, *Should Congress Repeal Securities Class Action Reform?*, SOC. SCI. RESEARCH NETWORK (Mar. 2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=389561.

[63] *See* Statement of the Honorable Orrin Hatch, U.S. Senator, S. Hearing, Feb. 6, 2002.

[64] *Id.* (quoting former Securities and Exchange Commission Chairman Arthur Levitt).

[65] *See e.g.,* Goldsmith, *supra* note 9, at 305 ("[T]he Private Securities Litigation Reform Act of 1995 stands as the most formidable obstacle to Enron victims and others similarly situated. . . . Congress should repeal RICO's securities exemption. Further, this repeal should operate retroactively so that injured investors could sue for relief. Retroactive application would be fully constitutional.") (citation omitted).

[66] Micah King, *supra* note 2 (citing 18 U.S.C. §§ 1961 - 1968).

[67] *Immigration and Welfare Changes*, 3 RURAL MIGRATION NEWS 4 (Oct. 1996), *available at* http://migration.ucdavis.edu/rmn/more.php?id=155_0_4_0.

[68] As codified in 8 U.S.C. 1324.

[69] Homicz, *supra* note 22, at 623.

[70] *Id.* at 629. The addition of INA violations to RICO was came within the Anti-Terrorism and Effective Death Penalty Act of 1996. S. Rep. No. 104-179 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 924. These amendments were part of much broader legislation aimed at combating the economic and personal costs of rising crime in the United States. *See* also *id.* at 629 (citing S. Rep. No. 104-179, at 17 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 924, 930).

employment of illegal aliens in the United States."[71] The new INA predicate offenses made it unlawful to encourage illegal immigration or employ illegal immigrants.[72] Although private enforcement of the INA is prohibited, adding this predicate offense to RICO provided an outlet for private immigration enforcement, albeit through indirect means. At the very least, it would impact corporations that lowered their costs by systematically employing undocumented immigrants.

It is entirely possible that Congress viewed illegal immigration as large a national issue as organized crime in the late 1960s and 1970s. Illegal immigrants' ease at finding employment in the United States was (and still is) a large reason behind the surge of illegal immigration into the United States.[73] In 2006, it was estimated that there are more than twelve million undocumented workers in the United States.[74] Congress, by adding INA offenses to RICO, addressed a large, national issue that necessitated resources far beyond those available to state and federal law enforcement agencies. If the United States government is able to limit the employment of undocumented workers, it is likely that the flow of illegal immigrants into this country would subside.

Congress did not believe the mafia was involved in the employment of undocumented workers, yet it decided to once again expand civil RICO. This illustrates that Congress views the remedial statute as an effective measure to eliminate large national problems that are beyond the bounds of governmental law enforcement agencies. Nevertheless, Congress, aware of courts and attorneys' struggle over the last twenty years in interpreting (and restricting) civil RICO, it also showed its approval a continued expansion of RICO's ability to curb widespread unlawful practices.

III. THE MODERN APPLICATION OF CIVIL RICO

Even by the early 1990s, it was clear that RICO's application had spread far beyond its original congressional purpose.[75] RICO was utilized primarily by private plaintiffs to target a "garden-variety fraud and ordinary commercial disputes."[76] There were clear problems with this type of RICO application, including how to interpret what many legal scholars argue is a poorly

---

[71] *See id.* (quoting 8 U.S.C.§ 1324(a) (codifying section 274(a)). "8 U.S.C.§ 1324a(a) provides that it is unlawful for a person or other entity to 'hire, or to recruit or reer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment." *Id.* (quoting 8 U.S.C. § 1324a(a)(1)(A)).

[72] *See* King, *supra* note 2.

[73] *See* Karin Rives, *Illegal Immigration – Who Profits, Who Pays: Jobs Lure Immigrants to State*, THE NEWS & OBSERVER (Feb. 26, 2006) ("Four hundred thousand strong . . . [immigrants are] drawn by the jobs that North Carolina employers eagerly offer . . . .").

[74] Stephen Ohlemacher, *Number of Illegal Immigrants Hits 12M*, ASSOCIATED PRESS (Mar. 7, 2006), *available at* http://www.breitbart.com/news/2006/03/07/D8G6U2KO8.html ("The number of illegal immigrants in the United States has grown to as many as 12 million, and they now account for about one in every 20 workers.").

[75] *See* Clarkin, Catherine M., *Reves v. Ernst & Young: The Elimination of Professional Liability Under RICO*, 43 Cath U.L. Rev. 1025, 1028 (1994).

[76] *See id.* (citing A.B.A., Sec. Corp. Banking & Businesss Law, Report of the Ad Hoc Civil RICO Task Force 57 (1985) (reporting that out of the 270 civil RICO actions surveyed, 40% alleged securities fraud, 37% alleged common law fraud in a commercial setting, and only 9% alleged 'criminal activity of a type generally associated with professional criminals"); *see also* Susan Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 678 (1990).

drafted statute,[77] a massive federal court docket increase,[78] and most importantly, unpredictable and conflicting civil RICO requirements.[79] Several judges, including former Chief Justice William H. Rehnquist, pleaded to Congress for an amendment to restrict civil RICO, although Congress denied that request.[80] Congressional action over the past twenty years into account shows (at least implicitly) that Congress has acquiesced with RICO's broad application in the judicial system.

RICO is one of the most sophisticated and complicated federal statutes,[81] and the Supreme Court at least initially resisted any temptation to place specific limits on its statutory scope.[82] Over time, however, the Supreme Court has provided restrictive guidelines in effort to provide lower courts guidance in uniformly interpreting RICO's statutory provisions. Nevertheless, federal courts have continued to struggle with RICO's standing requirements, which results in conflicting and often perplexing decisions. While there are policy arguments in favor of a more restrictive interpretation, such as the adverse economic impact of widespread RICO application and the proverbial 'floodgate' argument,[83] it is beyond judicial powers to create these boundaries.[84] Yet, it seems that the Supreme Court has again attempted to restrict civil RICO in its 2006 term without any congressional support or amendments to the statute.[85]

Section A of this section analyzes the Supreme Court's opinion in *Holmes*, decided in its 1992 term.[86] In *Holmes*, the Supreme Court placed a relatively narrow standing restriction on civil RICO when it created a "direct proximate cause" limitation.[87] This would clearly have an impact in reducing the number of available private plaintiffs that have standing to bring a RICO claim. It is worth noting that *Holmes* was decided prior to RICO's 1996 legislative amendments that further expanded RICO. Section B begins by discussing the case of *Commercial Cleaning Servs. v. Colin Service Systems, Inc.* ("*Commercial Cleaning*") decided in 2001, and further discussed new applications of civil RICO following the 1996 amendments.[88] Section C discusses the impact the Supreme Court's *Anza* decision, which expands the *Holmes* standing limitations.

---

[77] *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249 (1989) (asserting that "RICO [is] a poorly drafted statute.").
[78] *See* Rehnquist, *supra* note 31.
[79] Laurence A. Steckman, *RICO Section 1962(c) Enterprises and the Present Status of the "Distinctness Requirement in the Second, Third, and Seventh Circuits*, 21 Touro L. Rev. 1083, 1093 (2006) (noting that different circuits have adopted different interpretations and tests in applying the RICO statute).
[80] *See* Rehnquist, *supra* note 31, at 9.
[81] *See* United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980) (noting that the statutory language in RICO is particularly complicated, however, the Court believed it to be a "a carefully crafted piece of legislation").
[82] *See* Clarkin, Catherine M., *Reves v. Ernst & Young: The Elimination of Professional Liability Under RICO*, 43 CATH. U.L. REV. 1025, 1040 (1994).
[83] *See* Darby Dickerson, *Curtailing Civil RICO's Long Reach: Establishing New Boundaries for Venue and Personal Jurisdiction Under 18 U.S.C. § 1965*, 75 NEB. L. REV. 476, 486-90 (1996) (stating that beginning in the 1980s, "the proverbial floodgates appeared to open and private attorneys began filing nearly 1000 civil RICO actions a year") (citing William J. Hughes, *RICO Reform: How Much is Needed?*, 43 Vand. L. Rev. 639, 644 (1990)).
[84] *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249 (1989).
[85] *See* Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991 (June 5, 2006)
[86] Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992).
[87] *See id.*
[88] *See* Commercial Cleaning Servs. v. Colin Serv. Systems, Inc., 271 F. 3d 374 (2001).

A. The Holmes "Direct Proximate Cause" Limitation to Civil RICO

Holmes directly addressed an issue that plagued civil RICO since its inception, which was *who* has statutory standing to bring a claim against defendants that have violated one of RICO's predicate offenses.[89] The issue is one of statutory construction. The pertinent facts of *Holmes* were as follows: (1) The Securities Investor Protection Corporation ("SIPA"), a private corporation,[90] initiated suit against an investor, Robert G. Holmes (the "investor"), who conspired in a stock-manipulation scheme that "disabled two broker-dealers from meeting obligations to customers, thus triggering SIPC's statutory duty to advance funds to reimburse the defrauded customers[;]"[91] (2) SIPC sought to recover this money from the investor utilizing civil RICO, which would provide treble damages as well as attorney's fees and costs;[92] (3) the district court found that SIPC had *not satisfied the proximate cause requirement under RICO.*[93]

The Ninth Circuit United States Court of Appeals reversed,[94] and, as pertinent to the proximate cause deficiency, held that the district court's decision finding

> no proximate cause to be error, [as it] . . . mistaken[ly] focus[ed] on the causal relation between SIPC's injury and the acts of [the investor] alone. [Because] he could be held responsible for the acts of all his co-conspirators, . . . the district court should have looked to the causal relation between SIPC's injury and the acts *of all conspirators.*[95]

The Supreme Court granted certiorari, certifying the question of whether the investor could be held responsible for the actions of his co-conspirators, which directed the Court to an examination of *who* has statutory standing under civil RICO to bring a claim under the statute.[96]

Justice Souter wrote for the Court's majority and found that a literal interpretation of civil RICO *could* be read to mean that under Section 1964, any plaintiff could recover by reason of civil RICO simply by showing that (1) the defendant violated a RICO predicate act(s) under section 1962; (2) the plaintiff was injured; (3) and the defendant's violation was a "but for" cause

---

[89] *Holmes*, 503 U.S. at 268.
[9090] SIPC provides investor protection by "[r]estoring funds to investors with assetsin the hands of bankrupt and otherwise financially troubled brokerage firms." *See* SIPC, http://www.sipc.org/who/whysipc.cfm (last visited Jan. 4 2007). "Though created by the Securities Investor Protection Act (15 U.S.C. §78aaa et seq., as amended), SIPC is neither a governmental agency nor a regulatory authority. It is a nonprofit membership corporation, funded by its member securities broker-dealers." *Id.* at http://www.sipc.org/who/statute.cfm (last visited Jan. 4, 2006).
[91] *Id.*
[92] *Id.*
[93] *Holmes*, 908 F.2d 1461 (9th Cir. 1990) (entering summary judgment for Holmes on the RICO claim, and ruling that SIPC "does not meet the 'purchaser-seller' requirements for standing to assert RICO claims")
[94] *See* Securities Investor Protection Corp. v. Vigman, 908 F. 2d 1461 (1990).
[95] *Id.*
[96] *Holmes,* 503 U.S. at 268.

of plaintiff's injury.[97] Justice Souter, however, explicitly rejected this construction under an "assumption" that Congress never meant to allow standing by all directly injured plaintiffs.[98]

Justice Souter turned to a statutory interpretation analysis by looking at RICO's development and history. The Court found that section 1964's borrowed its language from the federal anti-trust act, section 4 of the Clayton Act,[99] which had in turn borrowed its structure from section 7 of the Sherman Act.[100] Accordingly, Justice Souter held that a plaintiff's right to sue under section 4 of the Clayton Act required a showing that the defendant's violation not only was the 'but-for' cause of his injury, but the proximate cause as well (but-for causation limitation it be close enough to the harm looking at the chain of events).[101] In recognizing the mirrored language between statutes, Justice Souter held that "we can only *assume* it intended them [section 4 of the Clayton Act and Section 1964(c) of civil RICO] to have the same meaning that courts had already given them."[102] Thus, direct proximate cause was required in establishing liability under civil RICO.[103]

"A plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover."[104] It is also true that the less direct an injury, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation as distinct from other, independent, factors.[105] Accordingly, Justice Souter asserted that 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."[106] Consequently, the Supreme Court decided to outright rejected the argument that those *not most* directly injured can act as a deterrent because those *most* directly injured can generally be counted on to vindicate the law.[107]

In applying this judicially created interpretation of what it labeled "direct proximate cause," Justice Souter ultimately found SIPA too removed from the investor's fraudulent scheme, as those directly injured were the broker-dealers who were victims of fraud (although these broker-dealers were repaid their lost money by SIPA). Moreover, although SIPC argued that Congress placed a liberal construction clause to RICO, Justice Souter rejected that his

---

[97] *See id.* (citing 18 U.S.C. § 1964(c) ("[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover [damages] . . .").
[98] *See id.* at 268 (internal citations omitted).
[99] Section 4 of the Clayton Act reads in pertinent part that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . ." 15 U.S.C. § 15.
[100] Section 7 of the Sherman Act read, in pertinent part when the Clayton Act was passed that "[a]ny person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue . . . " 26 Stat. 210.
[101] *Holmes*, 503 U.S. at 268 (citing Assoc. General Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 534 (1983); *see also* discussion *supra* at note 43.
[102] *Id.* (emphasis added).
[103] *See id.*
[104] *Id.* (citing 1 J. SUTHERLAND, LAW OF DAMAGES 55-56 (1882)).
[105] *See id.* (citing Assoc. General Contractors, 459 U.S. at 540).
[106] *Id.*
[107] *See id.*

analysis conflicted with that broad mandate.[108] Rather, the Supreme Court found that if it permitted suits by those "indirectly" injured, it would "open the door to 'massive and complex damages litigation, [which would] not only burden the courts, but [would] also undermine the effectiveness of treble-damages suits.'"[109]

This rationale by Justice Souter illustrates the heart of RICO statutory standing confusion. Although it reached its conclusion through a rationale that is unusual under the RICO statute (e.g., comparing it to other statutory counterparts and thereby further complicating its already intricate application),[110] the crux of this whole debate is whether a plaintiff must be the "most directly injured" or merely "directly injured" by the actions of the defendant. While the most directly injured application, as applied in *Holmes* and later in the Supreme Court's *Anza* decision, may assist lower courts in creating bright line rules to limit RICO's statutory scope, it also closes the door to many other potential (and proper) private plaintiffs, which also would restrict civil class actions that give "teeth" to civil RICO.

Justice Scalia, in his *Holmes* concurrence, pointedly stated that "[o]ne of the usual elements of statutory standing is proximate causality."[111] Justice Scalia, however, rejected Justice Souter's holding that proximate causality is required in RICO because of its similar language with the Clayton and Sherman Acts. Instead, Justice Scalia held:

> [B]ecause it has always been the practice of common-law courts to require as a condition of recovery . . . . Life is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith.[112]

Justice Scalia assumed that proximate causality existed in RICO, and did not further the discussion of how and where that line should be drawn.

While the Supreme Court clearly established a causation link (direct proximate cause) in civil RICO claims, it failed to explain exactly how plaintiffs should show this connection with regard to the many different types of predicate offenses under the statute.[113] In fact, *Holmes* resulted in numerous standards of proximate cause imposed by lower courts, with some even requiring plaintiffs to "demonstrate that the defendant's misreprentations were relied on."[114] However, reliance has never been a requisite element under *Holmes*.[115] In fact, there has been

---

[108] *See id.*
[109] *Id.* (quoting Assoc. General Contractors, 459 U.S. at 545).
[110] *See* Wackerly, *supra* note 13, at 1526 (stating that "despite Congress's apparent purpose, Clayton Act jurisprudence is inapplicable to the present question of civil RICO standing").
[111] *Id.* (Scalia, J. concurring).
[112] *Id.* (Scalia, J. concurring) (quoting Assoc. General Contractors, 459 U.S. at 519).
[113] *See* Randy D. Gordon, *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud*, 39 UNIV. OF SAN FRAN. L. REV. 319, 332 (2005)
[114] Metromedia Co. v. Fugazy, 983 F.2d 350, 368 (2d Cir. 1992) (citing County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311 (2d Cir. 1992)); *see also* Ryan C. Morris, *Proximate Cause and Civil RICO Standing: The Narrowly Restrictive and Mechanical Approach in Lerner v. Fleet Bank and Baisch v. Gallina*, 2004 B.Y.U. L. REV. 739, 764 (2004).
[115] Matthew M. Neumeier & Brian D. Hansen, *Navigating the Remedial Scheme Under Civil RICO*, THE NAT'L L. J. (2006).

criticism that this reliance standard goes far beyond the construct of the "tripartite analysis" in *Holmes*.[116] In actuality, [n]o one has credibly argued that strict causation standards (often stated in terms of reliance) have proved an impediment to otherwise meritorious individual suits."[117] *Holmes*' direct proximate causation is clearly the "lynchpin of any civil RICO case"[118] and a court's unpredictable interpretation can make or break a civil RICO claim.

B. Applying Civil RICO to Acts Unrelated to Organized Crime

Even before RICO's INA predicate offense amendments in 1996, private parties attempted to utilize civil RICO in various types of labor-management disputes.[119] Although this practice was criticized in the early 1990s,[120] Congress continued expanding RICO's predicate acts to assist law enforcement by allowing private parties to enforce provisions of immigration statutes by the suit of private attorneys general.[121] Consequently, three different groups of RICO plaintiffs have commenced actions as result of the addition of the INA provision of civil RICO.

The first instance is where a plaintiff corporation brings suit against a competitor corporation that allegedly employed undocumented workers in violation of the INA to gain a competitive advantage.[122] These plaintiff corporations often lose lucrative contracts and customers to competitors that can lower costs due to unlawfully employing undocumented immigrants.[123] The second instance is where lawfully employed workers bring a class action civil RICO claim against an employer that allegedly hired illegal immigrants, which consequently depress wages and produce otherwise unnecessary layoffs.[124] Third, and possibly the most innovative use civil RICO, is where undocumented workers themselves initiate a RICO suit against their employer to enforce existing labor laws that protect them from exploitation.[125]

It is clear that these "schemes" were never a part of a more elaborate organized crime scheme of hiring undocumented workers. The dilemma, at risk of oversimplification, is whether civil RICO is proper to assist directly injured private parties in enforcing laws against those profiting from unlawful practices. Although Congress has certainly expanded RICO far beyond the sphere of organized crime, courts have generally been equally resistant to allow these types of suits to reach past dispositive motions. That leaves the following question: is it for the courts to decide the breadth and scope of civil RICO or Congress?

---

[116] *See* Morris, *supra* note 114, at 764 (quoting Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance,* 59 WASH. & LEE L. REV. 83, 110-11 (2002)).
[117] Gordon, *supra* note 113, at 332.
[118] *Id.*
[119] *See* Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers, 286 U.S. App. D.C. 182 (D.C. Dist. Ct. App. 1990).
[120] Raymond P. Green, *The Application of RICO to Labor-Management and Employment Disputes,* 7 St. THOMAS L. REV. 309 (1995) (stating that the ability of private parties to bring RICO suits in labor-management disputes is disruptive of the relationship).
[121] *See* Sweeney Yu, *supra* note 17.
[122] *Commercial Cleaning*, 271 F. 3d at 374.
[123] *Id.* at 378-79.
[124] *See* Sweeney Yu, *supra* note 17, at 946.
[125] *See* Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295 (D.N.J. 2005).

1. Corporations Have Utilized Civil RICO to Sue Competitors that Systematically and Unlawfully Employ Undocumented Immigrants to Gain a Competitive Advantage

Although the INA amendment to RICO was enacted in 1996, it was not until 2000 that the new offenses were asserted in a civil RICO suit.[126] Commercial Cleaning Services ("Commercial") brought the lawsuit for damages against its direct competitor, Colin Service Systems ("Colin").[127] Commercial alleged that Colin engaged in a pattern of racketeering activity by hiring undocumented workers for profit in violation of Section 274 of the INA.[128] The district court dismissed the case based upon its belief that Commercial had no standing to bring suit because "its injury did not bear a 'direct relation' to Colin's racketeering activity as required by *Holmes.*[129]

Failing the *Homes* direct proximate cause requirement "precludes recovery by a party who simply complains of injury which flows from the misfortunes visited upon a third person by the defendant's acts."[130] Commercial's injury, according to the district court, was simply too far removed to substantiate a RICO claim.[131] But if Commercial was not directly injured by Colin's illegal hiring of the undocumented workers, it is difficult to imagine who was more directly injured. It was established and undisputed that Commercial and Colin were direct competitors and that Colin's lower employee wages, avoidance of employment taxes, and workers' compensation insurance resulted in substantially lower contacts bids than Commercial could provide.

The district court's opinion failed to properly discuss the 1996 amendments to RICO's predicate offenses. It held that *even if* the defendant violated the INA, the Immigration and Naturalization Service ("INS") bore the responsibility to deter those activities. As illustrated earlier in this article, civil RICO can be, and according to the Legislature should be, used to assist in private enforcement against parties that unlawfully benefit through the utilization of illegal racketeering schemes. The district court's interpretation would virtually always require the proper plaintiff to be a government law enforcement agency.

The district court supported its decision by citing to three cases that held violations of federal law is too remote for a private party to claim damages under RICO.[132] However, each of

---

[126] *See* Commercial Cleaning Servs. v. Colin Serv. Systems, Inc, No. Civ.A. 3:99CV109, 2000 WL 545126, at *1 (D. Conn. Mar. 21, 2000).
[127] *See* Commercial Cleaning Servs. v. Colin Serv. Systems, Inc., 271 F. 3d 374 (2001).
[128] *See id.*
[129] *Commercial Cleaning*, 2000 WL 545126, at *7-8.
[130] *Id.* at *3.
[131] *See id.* at *7.
[132] *Id.*; *see also* Medgar Evers Tenants Ass'n v. Medgar Evers Houses Associates, L.P., 25 F. Supp 2.d 116 (E.D.N.Y. 1998) (dismissing RICO suit from tenants against a housing project association for injuries sustained as a result false and misleading statements to the U.S. Dept. of Housing and Urban Dev. ("HUD")); Barr Lab., Inc. v. Quantum Pharmics, Inc., 827 F. Supp 111 (S.D.N.Y. 1993) (dismissing RICO action from plaintiff drug manufacturer against a competitor when it learned it filed false applications with the Food and Drug Administration); Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd., 792 F. Supp. 1566 (S.D. Fla. 1992) (dismissing RICO action against plaintiff tenant association against owners and managers of its housing complex because it filed multiple false applications for HUD funds and subsequently misused the obtained funds).

these cases were decided prior to 1996 or dealt with direct private enforcement of the INA statute, which is explicitly not permitted. Conversely, this was not a case that required private enforcement of the INA, but rather it was the INA violations that established civil RICO standing under its predicate offenses provision. Even assuming that Colin committed the alleged acts, the district court held that "[RICO's] predicate offenses are aimed at avoiding compliance with the immigration laws and detection of those activities by the INS" and the plaintiff's injuries were merely incidental to the defendants illegal activity.[133]

Finally, and most damaging to Commercial's position, the district court found that a jury would be required to make an impossible deduction in order to satisfy the *Homes* direct relation test.[134] Specifically, it would be required to determine whether the plaintiff's lost profits was primarily caused by lost lucrative contracts as a result of the Colin's illegal hiring practices or because of other more removed reasons such as comparative quality, business reputations, fluctuations in demand, among other possible causes.

Although the Second Circuit Court of Appeals reversed the lower court's dismissal of the case, it did so without directly addressing many of the contentious issues.[135] The appellate court found that in viewing Commercial's complaint, Commercial adequately stated a proximate relationship between its injury and Colin's pattern of alleged racketeering.[136] The court turned directly to the language of the statute and took a bright line, formalistic RICO interpretation.[137] The decision recognized the difficulty in determining whether Commercial's damages were 'directly' caused by Colin's unlawful practices.[138] *Holmes* "expressly warned against applying a mechanical test detached from the policy considerations associated with the proximate cause analysis at play in the case."[139] Therefore, the court turned to the *Holmes* policy considerations in its analysis.[140]

Reading the allegations in a light most favorable to the plaintiff,[141] the Second Circuit Court of Appeals found that Commercial adequately stated a direct proximate relationship between its injury and Colin's pattern of racketeering activity.[142] In applying *its* version of the *Holmes* proximate cause test, the court found that the central factor of the district court's dismissal was the difficulty for a jury in determining the cause of damages to the plaintiff.[143] It rejected this as a proper reason for dismissal, citing the difficulty to determine exact cause of damages insufficient to dismiss this case.[144] With more questions left unanswered than

---

[133] *See Commercial Cleaning*, 2000 WL 545126, at *7.
[134] *See id.* at *5-7.
[135] *See Commercial Cleaning*, 271 F. 3d at 374.
[136] *See id.*
[137] *See id.*
[138] *See id.* (citing Holmes v. Securities Investor Protection Corp. 503 U.S. 258, 272 n.20 (1992) (stressing the difficulty of achieving precision in creating a test for determining whether a plaintiff's injury was sufficiently "direct" to permit standing under RICO).
[139] *Id.* (citing *Holmes*, 503 U.S. at 258).
[140] *See id.*
[141] *See* McLaughlin v. Anderson, 962 F. 2d 187, 189 (2d Cir. 1992).
[142] *See Commercial Cleaning*, 271 F. 3d at 374.
[143] *See id.*
[144] *See id.*; *see also* Firestone v. Galbreath, 976 F.2d 279 (C.A. 6th 1992).

answered, Colin swiftly settled the case for an undisclosed amount of money due to the risk of treble damages plus attorneys' fees and costs.[145]

The *Commercial Cleaning* district court applied *Holmes* to limit standing for nearly every private plaintiff against a competitor that uses an illegal scheme to damage the plaintiff. As illustrated *infra*, this analysis is ultimately the position of the Supreme Court in *Anza*.[146] Yet this interpretation severely limits the application of civil RICO in ways that Congress did not intend. *Commercial Cleaning* is based on nearly identical allegations those in *Anza*, except for the type of predicate offense. Both situations provide facts that, on their face, fall squarely under the RICO statute.

2. Legally Employed Workers Terminated Because of Their Employer's Unlawful Employment of Undocumented Workers Can Utilize Civil RICO to Recover Damages and Lost Wages

In *Mendoza v. Zirkle Fruit Co.* ("*Mendoza v. Zirkle*"), decided only a few months after *Commercial Cleaning*,[147] the Ninth Circuit Court of Appeals held that allegations of illegal immigrant hiring is appropriately plead as a predicate offense for a RICO claim.[148] After *Commercial Cleaning*, it was clear that its decision "told people [that] are competitively injured by the abuse of the immigration system" have a remedy under civil RICO.[149] Plaintiff class representatives Olivia Mendoza and Juana Mendiola (collectively "Mendoza") were lawfully employed by the defendants, Zirkle Fruit Company, Matson Fruit Company and Selective Employment Agency, Inc. (collectively "Zirkle").[150]

Mendoza alleged that Zirkle was engaged in two related illegal schemes to depress employee wages in violation of RICO.[151] Like the district court in *Commercial Cleaning*, the district court in *Mendoza v. Zirkle* dismissed this suit because, in pertinent part, Mendoza lacked standing to pursue a claim under RICO.[152] It found that although Mendoza properly alleged violation of federal immigration laws, Mendoza's injury was "simply too speculative to survive the motion."[153]

The facts in the record were as follows: (1) beginning in 1996, Zirkle knowingly hired at least fifty undocumented workers per year as part of a scheme to depress employee wages; (2) Zirkle exploited these workers' economic situation and fear of asserting their rights to drive the wage rate for both documented and undocumented workers to a level lower than it would be if defendants did not hire the undocumented workers; (3) the Immigration and Naturalization Service ("INS") made findings that the majority of Zirkle and Matson's workforce was

[145] *See* King, *supra* note 2.
[146] *See* discussion *infra* Part III.C.2.
[147] Mendoza v. Zirkle Fruit Co., 301 F. 3d 1163 (9th Cir. 2002).
[148] *See* Kathleen Harvey & Mira Mdivani, *A Tough Balancing Act for Employers: RICO-Enhanced Liability Versus Discrimination Issues with the Noncitizen Worker*, 73-DEC JKSBA 28, 29 (2004).
[149] *See* King, *supra* note 2 (quoting G. Robert Blakey, *in* NATIONAL L.J. (2001)).
[150] *See* Mendoza v. Zirkle Fruit Co., 2001 WL 33225470 (E.D. Wash Sept. 27, 2000).
[151] *See id.* (citing 18 U.S.C. § 1961 *et seq.*).
[152] *See id.*
[153] *Id.*

undocumented.[154] Mendoza consequently argued that they were harmed by the lower wages paid from Zirkle because of their illegal immigrant hiring scheme.[155]

As to whether Mendoza had standing to bring a RICO claim, Zirkle argued that "the plaintiffs lack[ed] standing to bring a RICO claim because they ha[d] not been injured by the defendants' practices . . . ,"[156] therefore they failed to satisfy 18 U.S.C § 1964(c).[157] Zirkle asserted that the alleged injury did not confer standing because "(1) the injury was not proximately caused by the defendants' alleged violations and (2) the claimed injury [was] not sufficiently concrete."[158]

The district court found this case to appear "superficially" similar to cases where plaintiffs allege predicate acts of making "false statements to, or otherwise misleading, governmental agencies."[159] In each of those cases, district courts found the plaintiffs to be merely indirect victims with the governmental agency as the direct proximately injured party.[160] Zirkle thus argued that it was the INS who was the directly injured victim because Zirkle filed false I-9 forms.[161]

Yet those situations are clearly distinguishable from *Mendoza v. Zirkle*, under simple theories of economics.[162] It was not the defendant's misleading or false statements to the government that led to depressed wages, but rather Zirkle's illegal hiring scheme that allowed it to save on the cost of labor. Through the hiring of undocumented workers, Zirkle was able to increase the supply of cheap labor and decrease the demand for expensive, but legal, employees. The result thus used unlawful means to depress wages. The distinct court agreed and further distinguished this case because the illegal hiring scheme alleged did not depend on any intervening action of a governmental agency or other third party.[163] The district court thus found that Mendoza was *a direct victim* of Zirkle's illegal hiring scheme.[164]

However, the district court ultimately dismissed the case because of its belief that damages were impossible to calculate beyond sheer speculation.[165] It stated that the plaintiff would have extremely difficultly in proving, "with the required specificity[,] what impact

---

[154] *Id.* at *2 ("The INS found that in 1998 74 % of Matson's workforce (493 of 661 workers) was undocumented, and had been hired with false papers. The INS has made similar findings in the past against [] Zirkle.").
[155] *See id.*
[156] *Id.* at *7.
[157] *See id.* ("RICO provides a private cause of action for damages only to those individuals "injured in [their] business or property by reason of" a violation of the law's substantive provisions.") (citing 18 U.S.C. § 1964(c)).
[158] *Id.*
[159] *Id.* at *8.
[160] *See* Mendoza, 2001 WL 33225470 (citing Medgar Evers House Tenants Ass'n v. Medgar Evers Houses Assoc., L.P., 25 F. Supp. 2d 116, 121 (E.D.N.Y. 1998)).
[161] *See id.*
[162] *See e.g.*, Phillip L. Martin, *The Economics of Immigration*, FACTSNET.ORG, Apr. 23, 1996, http://www.facsnet.org/tools/nbgs/a_thru_h/e/ecnimmigr.php3; Ruben Navarrette Jr., *Economic Realities of Immigration*, S.F. CHRON., Apr. 5, 2006, *available at* http://www.sfgate.com/cgi bin/article.cgi?file=/chronicle/archive/2006/04/05/EDGNSGUANP1.DTL.
[163] *See* Mendoza, 2001 WL 33225470.
[164] *See id.* at *10
[165] *See id.*; *see also Commercial Cleaning*, 2000 WL 545126, at *7 (finding the plaintiffs damages too speculative).

[Zirkle's] alleged wrongdoing has had in the context of the whole labor market."[166] Consequently, the district court dismissed on Mendoza's failure to allege "a sufficiently non-speculative" financial loss as a result of Zirkle's wrongdoing.[167]

The Ninth Circuit Court of Appeals disagreed with the dismissal due to the "speculative" nature of the damages.[168] It, like the district court, first found that Zirkle's alleged scheme was intended to give the employer a contract advantage at the expense of the legal workers. The court also noted that that the undocumented workers cannot "be counted on to bring suit for the law's vindication."[169] Therefore, both the district court and court of appeals found that the Mendoza plaintiffs *were the direct victims of the alleged scheme*.[170]

The Ninth Circuit Court of Appeals, though, reversed the district court's decision as to the speculative nature of Mendoza's damages.[171] It held that Mendoza "singularly [has] the ability to define wages in this labor market. . . ,"[172] and found that the Mendoza plaintiffs *must* be allowed to make their case through the presentation of evidence.[173] The amount of damages is a factual question that is proper for a jury, not a question of law to be decided at the summary judgment stage of the case.[174] The Ninth Circuit distinguished between uncertainty in the fact of damage and in the amount of damages.[175] Indeed, Zirkle does not argue any risk of multiple fiscal recovery.[176] Even if that were the case, lawsuits with multiple potential plaintiffs who can recover for the "alleged illegal hiring scheme would not threaten multiple recovery of passed-on harm."[177]

Immediately following this decision, Mendoza settled with Zirkle for $1.3 million, the first settlement of an illegal immigrant wage depression suit in United States history.[178] Additionally, the class members and legal workers also received back pay for each hour worked in the company's warehouse and fruit orchards from 1999 to 2004.[179] Although Zirkle did not

---

[166] *See* Mendoza, 2001 WL 33225470.
[167] *Id.*
[168] Mendoza v. Zirkle Fruit Co., 301 F. 3d 1163 (9th Cir. 2002)
[169] *Id.* (citing *Holmes*, 503 U.S. at 273; *cf.* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (holding that undocumented workers are not entitled to backpay wrongfully withheld in a labor dispute). *But see* Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295 (D.N.J. 2005) (holding that undocumented workers may bring a RICO violation claim).
[170] This position is now arguably in conflict with the Supreme Court's *Anza* decision, discussed *supra* in Part III.C.1. It is supported, however, by the position of the Eleventh Circuit's *Mohawk* decision, discussed *supra* in Part III.C.2.
[171] *See* Mendoza, 301 F. 3d at 1163.
[172] *Id.* at 1170-71.
[173] *See id.* at 1171.
[174] *See id.*
[175] *Id.* (citing Knutson v. Daily Review, Inc., 548 F. 2d 795, 811 (9th Cir. 1976) ("Different standards govern proof of the fact and proof of the amount of damages.").
[176] *Id.* at 1171 (9th Cir. 2002).
[177] *Id.* (citing *Commercial Cleaning*, 271 F. 3d at 383-84) ("Suits with different classes of plaintiffs, each of which suffered a different concrete injury, proximately caused by the violation" are not barred).
[178] *See* Leah Beth Ward, *Zirkle Settles Job Suit*, YAKIMA HERALD-REPUBLIC (WASH.), Dec. 30, 2005, *available at* http://www.amren.com/mtnews/archives/2005/12/zirkle_settles_job_suit.php.
[179] *See Orchardist to Pay $1.3 Million to Settle Undocumented Hiring Class Action*, 35 FARM EMPLOYERS LABOR SERV. MON. NEWSLETTER 3, *available at* http://www.fels.org/news/News0603.htm.

admit any guilt of wrongdoing, it cited the risk of treble damages plus attorneys' fees and costs as the motivating factor to settle.[180]

This line of reasoning in *Mendoza v. Zirkle* was also adopted by the sixth circuit in *Trollinger v. Tyson Foods* ("*Trollinger v. Tyson*").[181] In *Trollinger v. Tyson*, the plaintiffs class representatives (collectively "Trollinger") brought a civil RICO action against the defendant ("Tyson") due to a wage-related dispute.[182] "On behalf of themselves and a putative class of similarly-situated workers, the four employees allege that Tyson violated RICO by engaging in a scheme with several employment agencies to depress the wages of Tyson's hourly employees by hiring illegal immigrants."[183]

Trollinger v. Tyson was initially dismissed by the district court due to a *Holmes* direct proximate cause attack where Tyson argued that the employee's union was the appropriate plaintiff. Tyson also argued that Trollinger could not establish a "'direct relation between the injury asserted and the injurious conduct alleged.'"[184] The Sixth Circuit Court of Appeals reversed the district court stating that dismissal in this stage of the proceedings was not proper "[g]iven the unadorned allegations in the complaint, given the requirement that we must assume plaintiffs will be able to prove them, and given the absence of any discovery (or expert reports)."[185]

3. Undocumented Workers Can Sue Employers that Profit from Systematically Employing, Harboring, and Trafficking Them in Order to Gain an Unfair Competitive Advantage

Possibly the most innovative approach taken in bringing a civil RICO claim related to an INA offense occurred *Zavala v. Wal-Mart* ("*Wal-Mart*").[186] This case stemmed from a sting by the United States Immigration and Customs Enforcement against janitors and their respective contractors at Wal-Mart. As part of "Operation Rollback," federal agents arrested hundreds of janitors, including twelve of the plaintiffs (collectively "Zavala") in this action for immigration violations.[187] This was not the first time that a Wal-Mart contractor was alleged to have participated in immigration-related offenses,[188] although Wal-Mart denied having any knowledge of any use of that company's undocumented labor.[189] "Because of this alleged pattern of conduct, Wal-Mart ha[d] been under investigation by federal law enforcement authorities for over five years."[190]

---

[180] *See id.*
[181] Trollinger v. Tyson Foods, Inc., 370 F. 3d 602 (6th Cir. 2004).
[182] *See id.*
[183] *Id.*
[184] *Id.* (quoting *Holmes,* 503 U.S. at 268) ("As the wage rates were the product of collective bargaining, [Trollinger] cannot demonstrate that those rates were ultimately depressed by the presence of alleged illegal aliens in the work force.") (quoting Trollinger v. Tyson, 214 F. Supp. 2d 840 (E.D. Tenn 2003)
[185] *Id.* at 619.
[186] Zavala v. Wal-Mart Stores, Inc., 393 F. Supp 2d 295 (D.N.J. 2005).
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*

Zavala alleged that Wal-Mart systematically employed, harbored, and trafficked in the labor of immigrants, aided and abetted violation of the immigration laws, failed to pay their wages and overtime and benefits as required, and concealed their profits and practices from detection.[191] The exploitation by Wal-Mart occurred in a number of different ways including obligating them to work in excess of the statutory maximum number of hours, every day of the week, denying them of lawful pay and benefits under the FLSA, as well as time for sick leave, meals or breaks, and paying them in cash without withholding payroll taxes.[192] Wal-Mart also "easily could, and did, hide them from law enforcement authorities, by threatening them with deportation or locking them into the stores for the duration of their shifts."[193]

Wal-Mart provided the potential for undocumented workers to recover treble damages with attorney's fees and costs for their substantial injuries. This case ultimately failed under the predicate offenses and "racketeering activity" requirements under the statute, yet the court's opinion did not find issue with these plaintiffs under a direct proximate cause analysis. It is quite clear that the *Zavala* plaintiffs did not benefit from the illegal actions of the defendant, as purported by Wal-Mart. These workers were exploited, locked in janitor's closets, lacked any benefits, worked seven days a week, and were paid minimum wage. However, *Wal-Mart* was dismissed due to the lack of proper pleading under RICO, not due to any direct proximate cause limitation. Therefore, under a different set of facts or with proper pleading, this case may have resulted in a favorable award for the undocumented workers.

C. Statutory Interpretation and Court's Various Methods of Analyzing and Applying Civil RICO

As noted throughout this article, there has been long-standing and "widespread judicial animosity" towards the pervasive utilization of civil RICO.[194] And although Congress has been keenly aware of the many issues courts have expressed with the statute since at least the early 1980s, it has continued to expand, not limit, RICO beyond its mafia fighting roots. As mentioned *supra*, even former Chief Justice Rehnquist pled to Congress to limit civil RICO jurisdiction without avail.[195] In the beginning, however, the Supreme Court "rebuffed [] attempts to restrict standing for civil RICO claims, noting that the wide application of the statute is 'inherent in the statute as written, and its correction must lie with Congress.'"[196]

Because RICO requires a congressionally mandated broad application and the possibility of treble damages as well as attorneys' fees and costs, the statute was clearly subject to misuse.

---

[191] *See id.*
[192] *See id.*
[193] *Id.*
[194] Patrick Wackerly, *Personal Versus Property Harm and Civil RICO Standing*, 73 UNIV. OF CHI. L. REV. 1513, 1515 (2006) (citing Sedima, SPRL v. Imrex Co., Inc., 741 F.2d 482, 287 (2d Cir. 1984), rev'd 473 U.S. 479 (1985) (stating that the exploitation of private civil RICO is "extraordinary, if not outrageous)); *see also* In re The Dow Co. "Sarabond" Products Liability Lit., 666 F. Supp 1466, 1470-70 (D. Colo. 1987) (declaring civil RICO as "a recurring nightmare" and "a rather sloppily thought out kind of way to get the Mafia that everybody jumps on so they can have more fun with fraud").
[195] *See* Rehnquist, *supra* note 31; *see also* Rehnquist: Cut Jurisdiction, 75 A.B.A.J. 22 (Apr. 1989).
[196] Wackerly, *supra* note 231 (citing *Sedima*, 473 U.S. 499 (reversing the Second Circuit's decision that limited standing under section 1964(c))).

Before this issue reached the Supreme Court for the first time, "[a] number of courts recognized the potential for abuse . . . and created limitations to narrow [civil RICO's] reach."[197] Although these courts in the early 1980s experienced much of the same issues that still persist today with civil RICO, the Supreme Court's holding in *Sedima S.P.R.L. v. Imrex Co.* was clear to defer the policy issue of RICO's seemingly limitless application to Congress.[198]

Although similar standing issues that plagued civil RICO decades ago still remain today, the context is entirely different. In the 1970s and 1980s, it was clear that Congress enacted RICO to combat *organized crime*. Therefore, if courts were to interpret the words of civil RICO in light of its congressional intent back then, it is understandable that some courts interpreted RICO as "directed at the archetypal, intimidating mobster."[199] Even back in the 1980s, however, the Supreme Court chose not to read beyond the plain text of the statute and found that civil RICO permitted broad application to even *ordinary* fraud cases.[200]

Today, civil RICO application is much more complicated. Because the statute has been amended numerous times in a manner that expands the statute beyond organized crime, and because the mafia has a significantly less impact on today's society, it is unreasonable to argue that the statute should only be applicable to those affected by mafia related crimes. In fact, civil RICO's primary use for the past decade, at least, has not against the mafia. These facts should promote the Supreme Court's continued 'plain language' statutory interpretation of the statue instead of deferring to the statutes original purpose. RICO was seemingly effective against fighting organized crime, why should the Court interject a narrowing application against illegal immigration or fraud? Both of these issues greatly affect the United State's economy as much, or even more, than organized crime in the late 1970s and early 1980s.

1. The Supreme Court Should Interpret Statutes Using its "Plain Language" Unless the Language is Ambiguous or the Result Would be Absurd

As the Supreme Court recently stated, the starting point discerning congressional intent is the existing statutory text,[201] and not the predecessor statutes.[202] "It is well established that 'when the statute's language is plain, the sole function of the courts-at least where disposition required by the text is not absurd-is to enforce it according to its terms.'"[203] Additionally, the Supreme Court can "construe the language so as to give effect to the intent of Congress."[204] Yet, there "is no invariable rule of the discovery of that intention. To take a few words from their context . . . isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute . . . ."[205] It is only when that

---

[197] Faisal Shah, *Broadening the Scope of Civil RICO: Sedima S.P.R.L. v. Imrex Co.*, 20 U.S.F. L. REV. 339, 342 (1986). *See, e.g.*, Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 643 (C.D. Cal. 1983) (requiring some connection to organized crime); Harper v. New Japan Secs. Int'l Inc., 545 F. Supp. 1002, 1007 (C.D. Cal. 1982) (requiring injury by a RICO violation, not by the predicate acts).
[198] *See Sedima*, 473 U.S. 479 (1985).
[199] Shaih, *supra* note 234, at 354.
[200] *See id.*
[201] *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999).
[202] *See* Lamie v. U.S. Trustee, 540 U.S. 526 (2004).
[203] *Id.*; *see also* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000).
[204] U.S. v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940).
[205] *Id.*

meaning "has led to absurd or futile results, however, that [the Supreme Court] has looked beyond the words to the purpose of the Act.[206]

This statutory construction employed by the Supreme Court has not substantially changed since *Minor v. Mechanics' Bank of Alexandria*[207] in 1828. Thus, when the language of a statute is unambiguous, the Court should presume that Congress "said what it meant and meant what it said."[208] Only in the "rare cases [in which] the literal application of a statute will produce a result demonstrably *at odds* with the intentions of its drafters . . . [should] the intention of the drafters, rather than the strict language, control[]."[209]

Statutory interpretation is almost never as straightforward as it seems, and interpreting the RICO statute is no exception. RICO has been declared one of the most complicated federal laws and its interpretation is therefore exceedingly more difficult than most other laws.[210] However, difficulty in interpretation as to the scope of the statute is a matter for Congress to amend if it so intends and not for Supreme Court.

2. The Supreme Court Has Historically Deferred Policy Issues to Congress Regarding Civil RICO's Broad Application

The "Civil remedies" provision of RICO asserts that "[a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue . . . ."[211] The language of this provision is clear and unambiguous, therefore the Supreme Court should provide a 'plain meaning' interpretation unless the result is be absurd.[212] RICO's broad mandate to liberally construe the statute illustrates congressional intent not narrowly tailor it in the best interest of the judiciary.

In *Sedima*, the Supreme Court "rejected a restrictive interpretation of § 1964(c) that would have made it a condition for maintaining a civil RICO action both that the defendant had already been convicted of a predicate racketeering act or of a RICO violation. . . "[213] Even in 1989, the Supreme Court "acknowledged concern . . . over civil RICO's use against 'legitimate' businesses, as well as 'mobsters and organized criminals.'"[214] Yet, in *Sedima*, the case was exceedingly more difficult to figure out what constituted a "pattern of racketeering activities," as proscribed in the statute.[215] The Supreme Court, first in *Holmes*, and now in *Anza*, had to determine *who* had standing to sue under the language of 18 U.S.C. 1964(c).

---

[206] *Id.*
[207] 26 U.S. 48 (1828).
[208] United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998).
[209] Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).
[210] *See* United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980)
[211] 18 U.S.C. 1964(c) (emphasis added).
[212] *See Lamie*, 540 U.S. at 526.
[213] *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 236 (1989) (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)).
[214] *Id.*
[215] *Id.*

Nothing in the language of the statute suggests that "by reason of" equals "most directly affected." But, as illustrated *supra* in both Part I.B and Part II.B, Congress, the Supreme Court, and lower courts have different standards as to how far civil RICO's standing boundaries can reach. Lower courts even disagree with each other as to what are the important factors to determine whether a plaintiff has standing to sue. This has led to conflicting, confusing, and unpredictable decisions that can consume six years to litigate with two, possibly three reversals.

3. The Competing RICO Interpretations by District Courts, Circuit Courts of Appeal, and the Supreme Court

The pattern of each of these civil RICO cases is strikingly similar. District courts, which have long voiced concern with the far-reaching scope of civil RICO, have uniformly dismissed each of the aforementioned lawsuits for either lack of sufficient direct proximate cause or speculative damages. The appellate court's decisions all reversed the district courts, holding that Congress intended a broad application of RICO so long as the requisite elements are sufficiently plead. Additionally, the 'speculative nature' of alleged damages should be a question of fact left for a jury to decide and should not lead to dismissal of the claim. In the middle of the two sides is the Supreme Court, which has, up until *Anza*, taken the approach that permit most civil RICO claims to proceed and defers the policy issues with the statute to Congress.

The RICO statute, although unpopular in the judiciary system because of its difficult and broad application, has seemingly been used successfully in curbing many unlawful schemes used by individuals and corporations to achieve a competitive advantage. Profiting on illegal activity such as systematic fraud or violations of the INA can be controlled through the use of the powerful, broad sweeping statute of civil RICO. There are protective measures built into the statute, such as a 'By reason of' element and a requisite pattern of unlawful activity, as well as related damages suffered, which protect courts from unsubstantiated claims. However, *Anza* has essentially eliminated the civil RICO cause of action by any party other than a governmental law enforcement agency. This goes against the legislative intent that civil RICO be available to allow 'private attorneys general' in holding those who violate the law liable for their actions.

It is clear that there are two areas that courts most commonly disagree that influence the outcome in most civil RICO cases. First, a court must decide whether it believes "By reason of" must be the "most directly injured" party to the defendant's actions, or whether merely showing "direct injury" is enough. Private plaintiffs argue that the most directly injured party will always be a government plaintiff because it is always an illegal act that permits a RICO claim. This would therefore frustrate congressional intent, as the enforcement agency with the power of enforcing that illicit action would be the only proper plaintiff in a RICO suit. As stated *supra* in Part I.A. and I.B., Congress added a civil form of RICO to assist law enforcement in allowing private parties the ability to become a "private attorney general" to recover its damages and reduce illicit activity (i.e. a predicate offense of RICO).

Yet, courts that seek to restrict the broad reach of civil RICO can limit these claims by holding that only the most directly injured party can bring suit. Incidentally, this has also limited unpopular class actions civil RICO lawsuits, which usually have several millions of dollars at

stake.[216] While this may be a desirable result for the judiciary, courts are not allowed to legislate from the bench where Congress has had the opportunity to limit civil RICO for thirty years and has failed to do so.

Second, and mostly beyond the scope of this article but still important to standing in RICO claims, is the issue of damages. On the one hand, restrictive courts find that any party that cannot show concrete damages, but rather what it calls speculative damages, must lead to the dismissal of a RICO claim. This is especially true in RICO actions related to employment law at issue because concrete damages for depressed wages would be very difficult to illustrate absent expert testimony or detailed evidence that may not be available to the plaintiffs. Therefore, dismissal for speculative damages at the summary judgment phase of a RICO claim ultimately limits the statutory scope of civil RICO, albeit through indirect means. However, other courts counter this problem with two answers. First, even though it may be difficult to calculate damages in some civil RICO claims, difficulty of calculation is not a sufficient reason for dismissal. Second, damages are most commonly a question of fact and not law; therefore it is proper for a jury, not a judge, to decide this question.

D. The New "Direct Proximate Cause" Limitation to RICO

The expansion of civil RICO in *Commercial Cleaning* and its subsequent line of RICO cases did not go unnoticed by the United States Supreme Court. In its 2006 term, the Supreme Court granted certiorari to two civil RICO cases, *Anza*[217] and *Mohawk Industries v. Williams* ("*Mohawk Industries*"), in what turned out to be a disguised effort to restrict the direct proximate cause limitation first purported in *Holmes*.[218] However, the tension between Congress, the United States Supreme Court, and various circuits will not end here.

This section will first analyze the Supreme Court's analysis of *Anza* and its efforts to limit future use of civil RICO in private plaintiff lawsuits between corporations such as those in *Commercial Cleaning, Trollinger v. Tyson,* and *Mendoza*. Although this was a clear attempt to restrict civil RICO claims under a statutory standing analysis, it will ultimately fail to limit these claims under a literal reading of the statute, as illustrated in the remanded decision by the Eleventh Circuit in *Mohawk Industries*, published on September 27, 2006.[219] The next section will analyze this most recent Eleventh Circuit *Mohawk Industries* decision to determine what impact, if any, the decision in *Anza* has on future competitor claims under civil RICO. The final section will discuss the current issues and conflicts with the Supreme Court and lower courts' interpretations of RICO

1. The Supreme Court in *Anza* Directly Impacted Private Plaintiffs' Ability to Bring a Claim By Further Narrowing the *Holmes'* Direct Proximate Cause Limitation in Civil RICO

---

[216] *See* Gordon, *supra* note 113, at 332 ("The elephant in the room during many discussions of RICO causation is the context in which the standards" for proving causation matters most: class actions).
[217] Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991 (June 5, 2006)
[218] *See id.*; Mohawk Indus. v. Williams, 126 S. Ct. 2016 (June 5, 2006).
[219] *See* Williams v. Mohawk Indus., 465 F.3d 1277 (11th Cir. 2006).

Anza's facts look similar to those in *Commercial Cleaning*, with the primary difference being the type of predicate offense under civil RICO.[220] Ideal Steel Supply Corporation ("Ideal") sold "steel mill products along with related supplies and services [and] operate[d] two store locations in New York."[221] Ideal had only one principal competitor, National Steel Supply ("National"), owned by Joseph and Vincent Anza, which offered similar products and services in its two New York stores.

The scheme in *Anza* is relatively simple compared to those in most RICO cases. Ideal claimed that National "engaged in an unlawful racketeering scheme aimed at 'gain[ing] sales and market share at Ideal's expense.'"[222] National allegedly did not charge sales tax to its cash-paying customers on transactions that were not exempt from sales tax under New York state law.[223] This allowed National to reduce its prices without affecting its profit margin, and as a result, National had to file fraudulent tax returns to the New York State Department of Taxation and Finance in an effort to conceal this conduct.[224]

This last fact led to severe consequences for the *Anza* plaintiffs. The Supreme Court confused National's tax return actions with Ideal's alleged injury. Where in fact, Ideal never alleged that the actual filing of the fraudulent tax forms caused injury to Ideal, but rather National's fraudulent *tax fraud scheme* allowed National to lower its costs than Ideal could afford. Ideal's complaint asserted "that [National's] goal, which they achieved, was to give National a competitive advantage over Ideal."[225] Consequently, the illegal actions of National (tax fraud) and injury to Ideal (lost customers and unlawful competitive advantage) should have been adequate to satisfy a civil RICO pleading requirements.

Yet, the Supreme Court disagreed. According to the Court, its analysis "beg[an]-and [] largely end[ed] - with *Holmes*."[226] By alleging that the tax and mail fraud activities of National were the basis for the predicate offenses under RICO, the Supreme Court opened the door to a direct proximate cause restriction. In its own words:

> Ideal's theory is that [National] harmed it by defrauding the New York tax authority and using the proceeds from the fraud to offer lower prices designed to attract more customers. The RICO violation alleged by Ideal is that [National's owners] conducted National's affairs through a pattern of mail fraud and wire fraud. The direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue as a result.[227]

---

[220] *Compare Anza*, 126 S. Ct. 1991 (alleging tax fraud), *with* Commercial Cleaning Servs. v. Colin Serv. Systems, Inc., 271 F. 3d 374 (2001) (alleging violations of the INA).
[221] *Anza*, 126 S. Ct. at 1994.
[222] *Id.*
[223] *See id.*
[224] Ideal alleged that "[National] submit[ed] [] fraudulent tax returns, [and] committed various acts of mail fraud and wire fraud," which are proper forms of racketeering activity for purposes of RICO because "the fraudulent returns were submitted on an ongoing and regular basis." *Id.*; *see also* 18 U.S.C. § 1961(1)(B).
[225] *Anza*, 126 S. Ct. at 1995.
[226] *Id.*
[227] *Id.* at 1997.

This remarkable quote was fatal to Ideal's case. The Supreme Court, however, inadvertently limited itself to a narrow holding. Rather than looking to National's offense and the injury sustained to Ideal by National's acts, the Court decided this case on a technicality using a formalistic interpretation of Ideal's pleadings.

This decision by Supreme Court is an attempt to limit civil RICO in an unprecedented manner. As pointedly (and properly) stated by Justice Thomas in his dissent:

> The Court today limit[ed] the lawsuits that may be brought under the civil enforcement provision of [RICO] by adopting a theory of proximate causation that is supported neither by the Act nor by our decision in [*Holmes*], on which the Court principally relies. . . . [The Court's] stringent proximate-causation requirement succeeds in precluding recovery . . . for plaintiffs whose injuries are precisely those that Congress aimed to remedy through the authorization of civil RICO suits.[228]

It is clearly within the facts of *Anza* that Ideal was directly and proximately injured by the unlawful acts by National, which were predicate acts under the RICO statute. The decision of the Majority goes against the broad congressional mandate to liberally construe RICO.[229] The *Anza* majority distorted facts in *who* was directly injured in a manner that is largely outcome determinative. Ideal never alleged that it was injured because the State of New York did not receive taxes, as purported by the Supreme Court majority.

Rather, it was National's practice of not charging tax to cash-paying customers that permitted National to undercut Ideal's prices and steal its customers. Whereas New York would seek only payment of back taxes and any associated penalties, Ideal is seeking to remedy itself, not with the taxes that National saved, but on Ideal's lost business and profits due to National's unlawful activity.

This misinterpretation of damages allowed the Court to find a separation between the alleged predicate acts, and the damages sustained by Ideal. As such, Justice Thomas noted that:

> It is not fair to require a plaintiff to prove that the tort caused the lower of prices at the motion to dismiss stage. . . . The allegation that . . . National was able to charge a lower price after tax because of its fraud suffices to permit Ideal to survive a motion to dismiss on the question whether the prices were lowered due to the fraud, as opposed to other factors.[230]

Most importantly, "[t]he Court . . . permits a defendant to evade liability for harms that are not only foreseeable, but the *intended* consequences of the defendant's unlawful behavior."[231] This allows a defendant, which "is plainly morally responsible" for acts to an easily identifiable

---

[228] *Id.*
[229] *Id.* at 2000.
[230] *Id.* at 2003 n.5.
[231] *Id.* at 2004.

plaintiff to avoid punishment where there is "no basis in the RICO statute, in common-law tort, or in *Holmes* for reaching this result."[232]

The Supreme Court's decision in *Anza* is likely a result of the widespread "[j]udicial sentiment that civil RICO's evolution is undesirable."[233] For these reasons, courts can now preclude precisely the claims the Congress aimed to protect.[234] At this stage of the lawsuit, it is not for the court to decide the merits of the claim, but whether Ideal had properly plead the elements under RICO. After the Supreme Court decided *Anza*, the decision was cited in more than fifteen decisions within three months to support dismissal of a RICO claim based on a direct proximate cause analysis.

2. The Eleventh Circuit Distinguished *Mohawk* From *Anza* Although it is Unclear Whether the Eleventh Circuit's Decision Was Correctly Decided in Light of the Supreme Court's Decision

Anza was one of two civil RICO cases that the Supreme Court granted certiorari to in 2006. While the Supreme Court originally granted writ to *Mohawk Industries* on the certified question of "[w]hether a defendant corporation and its agents can constitute an "enterprise" under [RICO], in light of the settled rule that a RICO defendant must "conduct" or "participate in" the affairs of some larger enterprise and not just its own affairs,"[235] the Court would never answer this question. Rather, certiorari was "dismissed as improvidently granted" in light of *Anza* and remanded the case down to the Eleventh Circuit "for further consideration."[236]

It is no stretch to infer from the Supreme Court's *Anza* decision that it believed that *Mohawk Industries* should be dismissed for lack of direct proximate cause. Otherwise, the Supreme Court would have viewed *Mohawk Industries*' deficiencies as unique from those in *Anza* and subsequently answer the certified question. Despite this, the Eleventh Circuit chose to distinguish *Mohawk Industries* from *Anza*.

The facts of *Mohawk Industries* are as follows: 1) Mohawk Industries is the second largest carpet and rug manufacturer in the United States;[237] 2) allegedly Mohawk, with its recruiting agencies, hired and harbored undocumented workers in an effort to depress wages;[238] 3) the plaintiffs (collectively "Williams") alleged that in addition to recruiting employees at the United States–Mexican border, Mowhak concealed its efforts to hire illegal immigrants by destroying documents and in assisting illegal workers in evading detection by law enforcement;[239] 4) this, in turn, permitted Mohawk in lowering labor costs by reducing the

[232] *Id.*
[233] *Id.* ("Numerous justices have expressed dissatisfaction with either the breadth of RICO's application . . . or its general vagueness at outlining the conduct it is intended to prohibit.")
[234] *See id.*
[235] Mohawk Indus. v. Williams, No. 05-465, 2005 WL 2566486, at *i (Oct. 7, 2005).
[236] Mohawk Indus. v. Williams, 126 S. Ct. 2016 (June 5, 2006).
[237] Williams v. Mohawk Indus., 465 F.3d 1277, 1285 (11th Cir. 2006)
[238] *See id.*
[239] *See id.*

number of legal workers it must hire, which consequently depressed the wages it pays legal hourly workers.[240]

The facts of *Mohawk* look most similar to those in *Mendoza v. Zirkle*, where the defendant unlawfully depressed wages through a scheme to hire illegal immigrants. In *Mendoza v. Zirkle*, both the district court and Ninth Circuit Court of Appeals believed that the Mendoza plaintiffs were the most directly injured by its employer's illegal hiring scheme. Both the district court and the court of appeals in *Mendoza v. Zirkle* believed that immigration enforcement officers or another governmental agency (like the IRS) were most directly injured by Zirkle's unlawful acts. In that case, it was the speculation of damages and whether Mendoza could illustrate actual damages that both courts struggled to determine. Ultimately, the Ninth Circuit found that Mendoza's case should be allowed to go forward and both parties subsequently settled.

The case of *Mohawk Industries* illustrates the clash between direct proximate cause and damages. Under nearly identical facts as *Mendoza v. Zirkle*, the Supreme Court viewed the weakness in this case as one of direct proximate cause. Now, with *Anza* recently decided, RICO's new direct proximate cause limitation potentially restricted the scope of *all private plaintiffs* injured in a matter that could conceivably be indirect (e.g., the governmental enforcement agency is the most directly injured). Here, like in *Anza*, the injuries sustained by Williams could be due to several factors other than the employment of undocumented workers. Mohawk Industries never paid the workers below minimum wage, although the wages were below other similar businesses in the city (e.g., speculation of damages argument). Mohawk, being one of the largest carpet and rug manufacturer in the world, has considerable influence and flexibility of the wages it pays employees.

Unlike *Anza*, however, Williams did not allege any tax or mail fraud conspiracies (e.g., the hiring of undocumented workers led to lower wage taxes or benefit compensation). It is reasonable, under the formalistic approach by the Supreme Court, that immigration enforcement agencies may be the most directly injured by Mohawks unlawful labor practice. This would be analogous the Court's *Anza* decision where the New York State Department of Taxation was the most directly affected by Ideal's tax fraud scheme.

Fortunately for the plaintiffs in *Mohawk Industries*, the Eleventh Circuit distinguished the Supreme Court's *Anza* decision. In point of fact, instead of a "direct proximate cause" analysis (which the Supreme Court analogized to the most directly and proximately injured), the Eleventh Circuit labeled its *Holmes* analysis "'By Reason Of' (or a broad interpretation of "direct proximate cause") the substantive RICO violations."[241] The Eleventh Circuit cited *Trollinger v. Tyson* for its "by reason of" test[242] where the plaintiffs must show: (1) a sufficiently direct injury so that a plaintiff has standing to sue; and (2) proximate cause.[243] Making this distinction is important because it removes the level of directness required under *Anza* and has a lower burden of directness of the injury sustained by the plaintiff.

---

[240] *See id.*
[241] *Id.* at 1287 ("We now turn to the 'by reasons of' requirement contained in § 1964(c).").
[242] *See* Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 613 (6th Cir. 2004).
[243] Williams, 465 F.3d at 1285 (citing *Trollinger,* 370 F. 3d at 612).

The Supreme Court was likely asserting that the proper RICO plaintiff would be the governmental law enforcement agency (in this case Immigration and Customs Enforcement) affected by the defendant's illegal actions. Whereas, the Eleventh Circuit's subtle difference allows multiple proper RICO plaintiffs so long as the injury was a *direct* and proximate result of the defendant's actions. This limitation difference is critical in a RICO standing analysis and continues to be the factor most commonly used to limit civil RICO claims.

The *Mohawk Industries* court was able to reconcile its decision under *Holmes* and *Anza* by asserting that *Holmes* allowed "directly injured victims . . . to vindicate the law as 'private attorneys general,' without any of the problems attendant upon suits by plaintiffs injured more remotely."[244] The court looked at the Williams plaintiffs' allegations as true in Mohawk's motion to dismiss and was able to conclude sufficient proximate cause. The court also rejected Mohawk's claims that other economic factors contributed to Williams' alleged wage depression ('speculative damages' argument).[245] The Eleventh Circuit's decision dealt with both limitations in civil RICO. It found direct proximate cause under the *Holmes* and *Anza* standard can include *private* plaintiffs and not just governmental enforcement agencies; and it found that even difficult to calculate damages are a question of fact proper for a jury and not an appropriate limitation at the summary judgment stage.

The Eleventh Circuit found that concerns in *Holmes* and *Anza*, where there may have been a more directly injured party, simply did not apply in this case. The court explicitly stated that

> *[t]here is no more direct injured party who could bring suit*. Mohawk posits the United States as the only other victim because of its interest in enforcing immigration laws. But as plaintiffs aptly point out, the United States is responsible for all federal criminal laws, which includes RICO's other predicate acts. *Under Mohawk's theory, the United States would arguably be the most direct victim of all RICO predicate, criminal acts.* Congress, however, criminalized the employment of illegal workers in part to protect legal workers. It is consistent with civil RICO's purposes – to expand enforcement beyond federal prosecutors with limited public resources – to turn victims (here, Mohawk's legal workers) into prosecutors as private attorneys general seeking to eliminate illegal hiring activity by their own employer.[246]

This statement precisely describes the tension between the United States Supreme Court and Congress. While the Supreme Court has limited civil RICO's statutory scope, Congress, like Eleventh Circuit, never intended such limitations. Now, depending on a court's statutory interpretation, civil RICO will continue to produce unpredictable, and often conflicting, decisions without reliable means of predictability.

---

[244] *Id.* (citing *Holmes*, 503 U.S. at 269-270).
[245] *Id.* at 1289.
[246] *Id.* at 1290

In response to the Eleventh Circuit's decision, which mostly circumvented the Supreme Court's *Anza* decision, the Mohawk defendants have again filed for certiorari to the Supreme Court on December 19, 2006.[247] In its petition, Mohawk argues that "[t]he Eleventh Circuit's ratification of [Williams' theory of a RICO offense] is at odds with [the Supreme Court's holding] . . . in *Anza*."[248] It further alleged that the "Eleventh Circuit ignored the central holding of *Anza*–that RICO civil plaintiffs must plead an injury directly caused by the RICO predicate acts and not by another 'set of actions . . . entirely distinct from the alleged RICO violation."[249] Instead, Mohawk alleged that "the Eleventh Circuit fundamentally misread *Anza* to hold that it is enough for civil RICO standing where there is some 'correlation' between the predicate act (illegal hiring) and the asserted injury (depressed wage levels)."[250] Mohawk asserted that "[t]he instant case [*Mohawk Industries*] has identical defects [to *Anza*] which are patently apparent."[251]

This creates a complicated problem for the Supreme Court. On the one hand, it is fairly clear that the Eleventh Circuit's decision in *Mohawk Industries* contradicts the Supreme Court's decision in *Anza*. The Supreme Court had previously vacated a similar Eleventh Circuit decision in *Mohawk Industries* before *Anza*, and remanded the case in light of its *Anza* decision. The Eleventh Circuit's second decision was similar to its first, ignoring much of *Anza* outside its particular facts. On the other hand, if the Supreme Court grants certiorari to *Mohawk Industries* again, it will be forced to answer an immensely difficult decision that has the potential to run against the legislative intent of civil RICO. As it stands, the plaintiffs in Mohawk have applied for class action status, which would put potentially hundreds of millions of dollars in damages, attorney's fees and costs, and bad publicity at stake. Like *Trollinger v. Tyson*, *Wal-Mart*, and *Commercial Cleaners*, *Mohawk Industries* will likely settle this lawsuit with a lucrative payout if the Supreme Court does not take the case.

IV. CONCLUSION

RICO has been a controversial statute since its enactment more than thirty years ago. Congress created the remedial statute to address the undesirable organized crime and mafia presence in the United States and the inability for law enforcement to effectively resolve the problem. Regardless of its initial purpose, RICO has developed, with the support of Congress, into a broadly interpreted statute that holds those liable of clearly defined predicate offenses liable to competitors, business partners, and most recently, employees for injuries sustained by these criminal acts. This development has created widespread criticism of civil RICO's application to vulnerable deep pocket corporations where the damages easily swell into the tens of millions of dollars. Civil RICO defendants consistently argue that the scope of liability under RICO extends only to those involved in organized crime, as originally intended under the statute. Nevertheless, congressional expansion of several predicate offenses through the late twentieth century has shown legislative approval of broad application of civil RICO to private plaintiffs that are injured by the defined criminal acts of the defendants that often go undetected by or surpass the resources of governmental law enforcement agencies.

---

[247] Mohawk v. Williams, 2006 WL 3846526, *1 (Dec. 19, 2006).
[248] *Id.*
[249] *Id.* (quoting Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991, 1997 (2006)).
[250] *Id.* (citing *Anza*, Pet. App. at 18a).
[251] *Id.*

Although the civil application of RICO can potentially open a litigation floodgate because of its treble damages remedy as well as attorney's fees and costs, this risk is unsubstantiated. The statute includes a 'by reason of" requirement, when applied as Congress intended and in *Mohawk Industries*, that filters out inappropriate civil RICO suits with plaintiffs outside the intended directness under the statute. The U.S. Supreme Court's "direct proximate cause" requirement in *Anza*, however, goes far beyond Congress's intended limitations under its liberal construction clause and RICO's statutory development over the past twenty years. If followed broadly, *Anza*'s decision would most likely eliminate virtually every civil RICO lawsuit brought by a party other than the enforcement agency in charge of criminally prosecuting the applicable predicate offense. This interpretation would frustrate the legislative intent to allow private parties to act as "private attorneys general" to assist law enforcement in eradicating illegal conspiracies that provide an unfair advantage over the injured party.

Civil RICO does not apply to the most directly affected party of the unlawful conspiracy. Rather, civil RICO is intended to allow private parties to hold competitors, debtors, and employers, among others, liable for unlawfully benefiting or profiting from a criminal act that gave it an illicit competitive advantage. These private parties still are required to be *directly and proximately injured* by the racketeering offense of the alleged conspiracy, but not the *most directly injured* party.

To prevent limitless conflicting court decisions that usually take upwards to six years to litigate, Congress should amend RICO to address the manner in which the statute has developed in modern times. The amendment should address two key points most controversial during litigation. First, it should clearly define who has statutory standing to bring a civil RICO claim. The primary issue being whether it is the one most directly injured (*Anza* and *Holmes* direct proximate cause) or a lesser requirement where the plaintiff only must show it was directly injured (by reason of) from the unlawful activity. Second, although beyond the analytical scope of this article, Congress should clearly define who could be sued under RICO to further limit lawsuits that are beyond its scope. These amendments will simplify the civil RICO statutory standing and direct proximate cause requirements, thereby permitting claims that assist in the private enforcement of unlawful acts that are beyond the scope of law enforcement resources and conversely eliminate claims that are beyond the statutory scope of the statute.