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## Third Circuit Review

SAY HELLO TO MY LITTLE FRIEND CIVIL RICO: THE THIRD  
CIRCUIT GREEN LIGHTS INSURANCE SHAKEDOWN OF BIG  
PHARMA WITH *IN RE AVANDIA*

MARIE BUSSEY-GARZA\*

“[W]hatever [RICO’s] motives to begin with, we will end up with cases involving all kinds of things not intended to be covered, and a potpourri of language by which you can parade all kinds of horrible examples of overreach.”

- Representative Abner J. Mivka<sup>1</sup>

### I. CIVIL RICO: AN INTRODUCTION TO A FRIEND OF OURS

RICO—an acronym that traditionally struck fear in the criminal’s heart—has, in recent years, morphed into the dread of every *legitimate* corporate defense attorney.<sup>2</sup> Short for the Racketeer Influenced and Corrupt

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*Author’s Note:* This Casebrief’s title was inspired by the classic mobster film *SCARFACE* (Universal Pictures 1983). Some scholars claim the Racketeer Influenced and Corrupt Organizations (RICO) Act was named after Enrico “Rico” Bandello, the lead character in the 1938 classic Mafia film *LITTLE CAESAR* (Warner Bros. 1931). See NATE HENDLEY, *THE MAFIA: A GUIDE TO AN AMERICAN SUBCULTURE* 161 (2013). In keeping with this Mafia-naming theme, the headings used throughout this Casebrief employ Mafia slang. See *GODMOTHER’S MAFIA DICTIONARY*, <http://www.performancetwo.com/mobspeak.htm> [<https://perma.cc/R8L2-MQL6>] (last visited Oct. 13, 2016); *AM. MAFIA*, <http://www.onewal.com/maf-glos.html> [<https://perma.cc/95K6-ZM8G>] (last visited Feb. 15, 2016).

1. 116 CONG. REC. 35204 (1970) (statement of Rep. Mikva) (discussing implications of Organized Crime Control Act of 1970).

2. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2012) (providing text of RICO); Sara E. Kropf, *Civil RICO Class Actions: A New Bridge to the Courthouse?*, 21 A.B.A. CLASS ACTION & DERIVATIVE SUITS

Organizations Act, today's RICO is a far cry from the law a notorious Boston mob boss once said "was *only* written for people like [him]."<sup>3</sup> While his comment succinctly and accurately describes RICO's legislative intent—to combat mob activity—RICO today is most often used to target legitimate businesses accused of so-called "garden variety" fraud.<sup>4</sup>

The Third Circuit recently considered one such civil RICO case: *In re Avandia Marketing, Sales Practices & Product Liability Litigation*.<sup>5</sup> In *Avandia*, the Third Circuit held that a class of third-party payers (TPPs) had sufficiently alleged injury and causation within the meaning of RICO and could proceed with a class action against a major pharmaceutical company

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REP. 9, 9 (2011) ("Civil [RICO] class actions are one of the most significant litigation liabilities a modern corporation can face."). For a discussion of reasons plaintiffs love—and defendants dread—civil RICO, see *infra* notes 30–37 and accompanying text.

3. See *Proposed RICO Reform Legislation: Hearing on S. 1523 Before the S. Comm. on the Judiciary*, 100th Cong. 35 (1989) (statement of William F. Feld, Assistant Attorney General, Criminal Division) (emphasis added) (quoting Gennaro Angiulo, former Boston mob underboss). American Mafia figure Gennaro Angiulo reportedly made this statement to other members of his crime family while being surveilled by the Federal Bureau of Investigations. See *id.*; see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985) ("We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."); PAUL BATISTA, CIVIL RICO PRACTICE MANUAL § 2.04[G] (2d ed. 2015) ("[I]f the clarity (and bias) of the Hruska–McClellan themes had prevailed, banks, securities firms, accountants, and the corporate managers of today's world would never have had any real concern about RICO."); William Rehnquist, *Get RICO Cases out of My Courtroom*, WALL ST. J., May 19, 1989, at A14, available at ProQuest Central, Document No. 398092521 ("[C]ivil RICO is now being used in ways that Congress never intended.").

4. See *Sedima*, 473 U.S. at 526 (Powell, J., dissenting) ("[RICO] has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the statute."); see also JONATHAN SHELDON, FEDERAL DECEPTION LAW § 7.1.5, at 139–40 (1st ed. 2012) ("[C]ivil RICO has been used far more often against 'legitimate' businesses than against 'the archetypal, intimidating gangster.'" (quoting *Sedima*, 473 U.S. at 499)); Lee Coppola & Nicholas DeMarco, *Civil RICO: How Ambiguity Allowed the Racketeer Influenced and Corrupt Organizations Act to Expand Beyond Its Intended Purpose*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 254 (2012) ("RICO is rarely used in today's world against the traditional enemy that Congress sought to eradicate by its enactment, the American Mafia."); John M. Nonna & Melissa P. Corrado, *RICO Reform: "Weeding out" Garden Variety Disputes Under the Racketeer Influenced and Corrupt Organizations Act*, 64 ST. JOHN'S L. REV. 825, 825 (1990) (citation omitted) (discussing RICO reform efforts to "curtail[ ] the statute as a weapon in 'garden variety' lawsuits against legitimate businesses"); Pamela Bucy Pierson, *RICO Trends: From Gangsters to Class Actions*, 65 S.C. L. REV. 213, 215 (2013) ("Criminal RICO's time has come and gone; civil RICO's time has not yet arrived."). The term "garden variety" is often used to describe traditional state fraud claims. See, e.g., Rehnquist, *supra* note 3 (noting most "civil suits filed under [civil RICO] have nothing to do with organized crime" but rather "are garden-variety civil fraud cases of the type traditionally litigated in state courts"). For a discussion of RICO's legislative intent, see *infra* notes 12–19 and accompanying text.

5. 804 F.3d 633 (3d Cir. 2015), cert. denied sub nom. GlaxoSmithKline LLC v. Allied Servs. Div. Welfare Fund, 136 S. Ct. 2409 (2016).

accused of fraud.<sup>6</sup> This Casebrief asserts that *Avandia* aligns with the modern trend of shifting RICO away from targeting organized crime, but the opinion departs significantly from the Third Circuit's own precedent.<sup>7</sup> Part II examines RICO's evolution from a law targeting the Italian-American Mafia into something much broader, focusing particularly on recent claims by TPPs against drug manufacturers.<sup>8</sup> Parts III and IV discuss and critique the *Avandia* decision, highlighting the court's divergence from its own prior precedent.<sup>9</sup> Part V offers practical guidance for practitioners, cautioning plaintiff's counsel to employ restraint and urging defense attorneys to call for legislative reform.<sup>10</sup> Finally, Part VI briefly considers the big-picture implications of *Avandia*.<sup>11</sup>

## II. CRIMINAL BACKGROUND CHECK: RICO'S PAST

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970 for the purpose of "eradicat[ing] *organized crime*."<sup>12</sup> To that end, RICO created "new remedies to deal with the unlawful activities of those engaged in *organized crime*."<sup>13</sup> One such new remedy was a private civil right of action, available to "[a]ny person injured in his business or property by reason of a [RICO violation]."<sup>14</sup> Virtually ignored in the dec-

6. See *id.* at 645 ("We conclude therefore that plaintiffs' alleged injury is sufficiently direct to satisfy the RICO proximate cause requirement at this stage."). For a discussion and critique of the *Avandia* decision, see *infra* notes 100–38 and accompanying text.

7. See *infra* notes 29–42 and accompanying text for a discussion of civil RICO's evolution from a weapon against organized crime into a much broader statute. See *infra* notes 100–38 and accompanying text for a discussion of the Third Circuit's divergence from prior precedent in *Avandia*.

8. See *infra* notes 12–99 and accompanying text for a discussion of RICO's legislative and judicial history.

9. See *infra* notes 100–38 and accompanying text for an analysis of the Third Circuit's *Avandia* decision.

10. See *infra* notes 140–78 and accompanying text for a discussion of the *Avandia* decision's practical implications for practitioners.

11. See *infra* notes 179–82 and accompanying text for a discussion of the far-reaching implications of *Avandia*.

12. See Pub. L. No. 91–452, 84 Stat. 922, 922–23 (1970) (codified at 18 U.S.C. §§ 1961–68 (2012)) (emphasis added) (describing impetus for and purpose of act); REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 70 (1985) [hereinafter ABA REPORT] (discussing intent of RICO to target organized crime). For further discussion of the legislative history of civil RICO, see *infra* notes 17–22 and accompanying text.

13. See 84 Stat. at 923 (emphasis added) (describing new "legal tools" for combating organized crime); see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985) ("RICO was an aggressive initiative to . . . develop new methods for fighting crime."); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013 (1980) ("RICO was the end product of a long process of legislative effort to develop new legal remedies to deal with an old problem: 'organized crime.'"). For a discussion of Congress's intent in creating RICO, see *infra* notes 17–22 and accompanying text.

14. See 18 U.S.C. § 1964(c) (defining private civil right of action).

ade after its enactment, civil RICO gained popularity with plaintiffs in the 1980s, and its scope and use have continued to expand ever since.<sup>15</sup> With that expansion, courts have struggled to define the meaning and limits of RICO's language.<sup>16</sup>

A. *Goodbye Golden Age, Hello RICO: Purpose and Text*

Congress's expressed purpose in enacting RICO was to keep organized crime from infiltrating legitimate businesses.<sup>17</sup> This unprecedented law resulted from decades of congressional research on organized crime that identified such infiltration as a widespread problem.<sup>18</sup> Congress's research culminated in the 1967 Katzenbach Commission Report, which defined organized crime as a national crime syndicate comprised mostly of Italian-American men and known as "the Mafia" or "La Cosa Nostra."<sup>19</sup>

In drafting legislation, however, Congress realized a law targeting a specific ethnic group would not pass constitutional muster.<sup>20</sup> Conse-

15. See *infra* notes 29–42 and accompanying text for a discussion of the increasing scope of civil RICO.

16. See *infra* notes 43–138 and accompanying text for a discussion of judicial struggles to apply civil RICO.

17. See 84 Stat. at 922–23 (explaining need to target widespread and highly-sophisticated organized crime that was "increasingly used to infiltrate and corrupt legitimate business" in America); *United States v. Turkette*, 452 U.S. 576, 591 (1981) ("[T]he major purpose of [RICO] is to address the infiltration of legitimate business by organized crime."); BATISTA, *supra* note 3, § 2.04 (describing RICO's purpose); ABA REPORT, *supra* note 12, at 70 ("Congress' principal aim in enacting RICO in 1970 was to thwart the infiltration of organized crime into legitimate business."); Blakey & Gettings, *supra* note 13, at 1014–15 (describing RICO's legislative history).

18. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 192 (1967) [hereinafter KATZENBACH REPORT] (describing results of congressional research on organized crime); BATISTA, *supra* note 3, § 2.04 (describing legislative history of RICO); Blakey & Gettings, *supra* note 13, at 1014–15 (describing same). While committee reports dating back to the 1950s served as a backdrop for the Organized Crime Control Act of 1970, the Katzenbach Report served as the direct impetus for enactment of the new law. See BATISTA, *supra* note 3, § 2.04. As early as 1951, the Kefauver Committee—"the first modern group to study organized crime in a systematic fashion"—reported to the Senate that organized crime was systematically infiltrating legitimate business enterprises. See *id.* By 1960, the McClellan Committee had added to the developing body of knowledge on organized crime—identifying the Italian Mafia, or La Cosa Nostra, as the national organized crime syndicate infiltrating both legitimate businesses and labor unions. See Blakey & Gettings, *supra* note 13, at 1014–15 (detailing investigation that "exposed the structure of the national syndicate of organized crime known as the Mafia or La Cosa Nostra").

19. See KATZENBACH REPORT, *supra* note 18, at 192 (describing organized crime in America). The Katzenbach Report defined organized crime as a nationwide criminal organization whose "membership [was] exclusively Italian." See *id.* The Report also "indicate[d] that the organization as a whole [had] changed its name from the Mafia to La Cosa Nostra." *Id.*

20. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 525 (1985) (Powell, J., dissenting) ("The legislative history reveals that Congress did not state explicitly that the statute would reach only members of the Mafia because it believed there

quently, Congress enacted legislation explicitly aimed at organized crime that never actually defines “organized crime.”<sup>21</sup> Rather, Congress employed broad language that critics lament as “notoriously ambiguous.”<sup>22</sup>

Although RICO is primarily a criminal statute, the law also creates a civil remedy enforceable by either the government or a private party.<sup>23</sup> This civil remedy mandates treble damages and attorney’s fees for a successful plaintiff.<sup>24</sup> Under RICO’s broad language, “any person” can bring a civil RICO claim in federal court by showing (1) a business injury (2) caused “by reason of” (3) a RICO violation.<sup>25</sup>

The statute defines a RICO violation as investing, acquiring an interest in, or conducting the affairs of an enterprise “through a pattern of racketeering activity.”<sup>26</sup> “Racketeering activity,” in turn, is defined as “any

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were constitutional problems with establishing such a specific status offense.” (citing 116 CONG. REC. 35343–44 (remarks of Rep. Celler); *id.* at 35344 (remarks of Rep. Poff)); DOUGLAS E. ABRAMS, *THE LAW OF CIVIL RICO* § 1.1, at 10 (1991) (“[A]n express organized crime prohibition might have led courts to strike down RICO for creating an unconstitutional status offense.” (footnote omitted)); BATISTA, *supra* note 3, § 2.04[G] (explaining constitutional problems with “identifying specific crime families by national origin”); ABA REPORT, *supra* note 12, at 71 (“[T]o ensure the constitutionality of the statute, Congress made the central proscription of the statute the use of a ‘pattern of racketeering activities’ in connection with an ‘enterprise,’ rather than merely outlawing membership in the Mafia, La Cosa Nostra, or other organized criminal syndicates.”).

21. See 18 U.S.C. §§ 1961–68 (2012) (lacking definition of organized crime); see also BATISTA, *supra* note 3, § 2.04 (explaining reasons for omitting definition of organized crime). For further discussion on the impetus for omitting a definition of organized crime, see *supra* note 20 and accompanying text.

22. See BATISTA, *supra* note 3, § 1.02 (discussing broad language of RICO); see also Coppola & DeMarco, *supra* note 4, at 241 (“One of the principal reasons for the unforeseen and unprecedented expansion of RICO, especially in civil cases, is the broad and ambiguous language of the statute.”).

23. See 18 U.S.C. § 1964 (describing civil remedy). Section 1964(b) provides that “[t]he Attorney General may institute proceedings under this section.” *Id.* § 1964(b). Section 1964(c) provides that “[a]ny person injured in his business or property by reason of a violation of [S]ection 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.” *Id.* § 1964(c).

24. See *id.* § 1964(c) (mandating treble damages and attorney’s fees).

25. See *id.* (defining civil cause of action).

26. See *id.* § 1962 (defining RICO violation). Section 1962(a) makes it “unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . to use or invest . . . such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise” engaged in interstate or foreign commerce. See *id.* § 1962(a). Section 1962(b) makes it “unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.” See *id.* § 1962(b). Section 1962(c) makes it “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” *Id.* § 1962(c). Section 1962(d) makes it “unlawful for any person to conspire to vio-

act which is indictable under” a long list of state and federal crimes, including the catch-all provisions for mail and wire fraud.<sup>27</sup> Additionally, RICO broadly defines a “pattern of racketeering activity” as “at least two acts of racketeering activity” within a ten-year period.<sup>28</sup>

### B. *A Made Man: The Rise of Civil RICO*

After a decade of dormancy, RICO emerged in the 1980s as “the weapon of choice for civil plaintiffs who perceived [its] broad language [as] a means for articulating novel or creative claims.”<sup>29</sup> Besides its malleable language, civil RICO attracts private plaintiffs for three key reasons: (1) mandatory treble damages and attorney’s fees; (2) access to federal courts; and (3) broad judicial discretion.<sup>30</sup>

First and foremost, the statute mandates treble damages and attorney’s fees for the successful plaintiff.<sup>31</sup> This risk of high-stakes damages

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late any of the provisions of subsection (a), (b), or (c) of this section.” *Id.* § 1962(d).

27. *See id.* § 1961(1) (listing RICO predicate acts). Section 1961(1)(A) defines “racketeering activity” as “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance.” *Id.* § 1961(1)(A). Section 1961(1)(B) further defines “racketeering activity” as “any act which is indictable under any of the following provisions of [T]itle 18, United States Code: . . .” *Id.* § 1961(1)(B). The statute then lists more than one hundred sections of the United States Code. *See id.* Despite this long list of predicate acts, “only a few of the specifically designated offenses have gained a dominant role in actual civil litigations” such as “mail fraud [and] wire fraud.” *See* BATISTA, *supra* note 3, § 2.02.

28. *See* 18 U.S.C. § 1961(5) (stating that “‘pattern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity”).

29. *See* BATISTA, *supra* note 3, § 1.01 (describing civil RICO’s emergence in 1980s, “tentatively” at first “and then, by 1985, in a torrent that has not abated over the last several decades”); *see also* ABRAMS, *supra* note 20, § 1.1, at 5 (“Civil RICO went virtually unnoticed for a decade.” (footnote omitted)); Nonna & Corrado, *supra* note 4, at 825 (“In the early 1980’s, the plaintiffs’ bar began to use RICO as a weapon ‘against defendants who carried portfolios instead of pistols.’” (quoting Martha Bridegam, *Business Targets Aim Back at Racketeering Law*, 45 CONG. Q. WKLY. REP. 2130, 2130 (1987))); Rehnquist, *supra* note 3 (discussing widespread use of civil RICO in 1980s for state fraud claims).

30. *See infra* notes 31–37 and accompanying text for a discussion of RICO’s plaintiff-friendly qualities.

31. *See* 18 U.S.C. § 1964(c) (“Any person injured in his business or property by reason of a violation of section 1962 . . . shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee . . .”). According to former Justice Thurgood Marshall, “private litigants . . . lured by the prospect of treble damages and attorney’s fees, have a strong incentive to invoke RICO’s provisions.” *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 504 (1985) (Marshall, J., dissenting). Additionally, former Chief Justice William Rehnquist explained, “RICO’s treble damages provisions create a powerful incentive for attorneys to attempt to bring facts traditionally thought to establish other causes of action within the ambit of the statute.” Rehnquist, *supra* note 3.

creates what one RICO scholar terms an “*in terrorem* effect,” ironically arming plaintiffs for mob-like, strong-arm tactics.<sup>32</sup> Not surprisingly, the threat of treble damages causes most civil RICO claims to settle before trial.<sup>33</sup> Second, RICO permits private plaintiffs to bring suit in federal court.<sup>34</sup> Thus, a plaintiff with a mere garden variety state fraud claim may gain access to the federal courts by demonstrating the alleged fraud occurred on at least two occasions within a ten-year period and involved at least one of the many predicate acts enumerated in the statute.<sup>35</sup> Third, the statute grants federal courts broad discretion to “prevent and restrain” RICO violations.<sup>36</sup> This broad discretion permits the court to restrict the activities of an enterprise or even order its dissolution, which could effectively put a successful plaintiff’s competitor out of business.<sup>37</sup>

The expansive use of civil RICO in the 1980s elicited calls for legislative reform from scholars concerned about misuse and abuse.<sup>38</sup> Ever re-

32. See BATISTA, *supra* note 3, § 1.02 (describing RICO’s *in terrorem* effect). Batista describes civil RICO’s *in terrorem* effect, noting “RICO became the weapon of choice for civil plaintiffs who perceived . . . a means for . . . escalating the potential for the litigation equivalent of terror—the availability of treble damages.” See *id.* § 1.01; see also *Pelletier v. Zweifel*, 921 F.2d 1465, 1522 (11th Cir. 1991) (“When used improperly . . . [civil RICO] allow[s] a complainant to *shake down* his opponent and, given the expense of defending a RICO charge, to *extort* a settlement.” (emphasis added)).

33. See BATISTA, *supra* note 3, § 1.02 (discussing risks to defendants of civil RICO litigation). According to Batista, “[t]he vast majority of civil RICO battles are waged and concluded at the pretrial stage . . . since the risks of full litigation are often perceived as too great.” *Id.* Justice Marshall also acknowledged this concern in his *Sedima* dissent, explaining “the [civil RICO] defendant, facing a tremendous financial exposure in addition to the threat of being labeled a ‘racketeer,’ will have a strong interest in settling the dispute.” See *Sedima*, 473 U.S. at 504 (Marshall, J., dissenting).

34. See 18 U.S.C. § 1964(c) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . .”); see also Coppola & DeMarco, *supra* note 4, at 253 (“Because of the Court’s expanding interpretation of civil RICO, private litigants have been lured by the prospect of treble damages and a *federal courtroom*.” (emphasis added)). Former Chief Justice William Rehnquist explained, “if treble damages are available in federal court, but not in state court, the cases will gravitate to the former.” See Rehnquist, *supra* note 3.

35. See *supra* notes 25–28 and accompanying text for a discussion of the statute’s requirements.

36. See 18 U.S.C. § 1964(a) (granting courts broad discretion). Section 1964(a) gives “district courts of the United States . . . jurisdiction to prevent and restrain violations of section 1962 of [RICO] by issuing appropriate orders.” *Id.* The statute defines appropriate orders as “including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person; . . . or ordering dissolution or reorganization of any enterprise.” *Id.*

37. See *id.* (granting courts broad powers to enforce RICO).

38. See BATISTA, *supra* note 3, § 2.10 (noting “decades of lobbyist and other opposition” to civil RICO); ABA REPORT, *supra* note 12, at 1 (calling for legislative reform of civil RICO); William J. Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639, 640 (1990) (describing congressional discussions of RICO reform). In its Summary of Recommendations, the ABA Task Force on civil RICO



luctant to appear soft on crime, Congress has enacted only one substantial civil RICO reform to date—the “elimination of securities fraud as a predicate act.”<sup>39</sup> In the absence of legislative reform, many critics have called for use of Rule 11 of the Federal Rules of Civil Procedure to deter civil RICO abuse.<sup>40</sup> Rule 11 grants federal judges broad discretion to sanction attorneys and law firms for bringing frivolous claims.<sup>41</sup> Despite these criti-

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reform described “a demonstrated need for legislative amendment of the private civil treble damages provision” of RICO. See ABA REPORT, *supra* note 12, at 1. According to the Task Force, civil RICO’s application was “grossly overbroad, encompassing business transactions that could not have been foreseen or intended by Congress.” See *id.* According to Congressman Hughes, “prominent organizations that have petitioned Congress to amend civil RICO” include “the American Bar Association, National Association of Manufacturers, American Civil Liberties Union, United States Chamber of Commerce, AFL–CIO, American Institute of Certified Public Accountants, Securities Industry Association,” and many others. See Hughes, *supra* note 38, at 640.

39. See BATISTA, *supra* note 3, § 2.10 (describing elimination of predicate offense of securities fraud as “only substantive amendment to RICO even after decades of lobbyist and other opposition”); Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMU L. REV. 33, 76 (1996) (explaining difficulty of reforming civil RICO because “[c]orrection . . . [is] politically unpalatable because only the hardest legislators care to risk appearing ‘soft on crime’”); Stephan E. Oestreicher, Scheidler Meets Morrison (*at the Entrance to a Health Clinic*), 35 CREIGHTON L. REV. 693, 718 (2002) (attributing failure of annual efforts to reform civil RICO to congressional fear of looking “soft on crime”).

40. See Adam H. Bloomenstein, *Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, 21 AKRON L. REV. 289, 307–08 (1998) (suggesting that “filing of frivolous RICO claims deserves a heightened sense of scrutiny under Rule 11”); Petra J. Rodrigues, *The Civil RICO Racket: Fighting Back with Federal Rule of Civil Procedure 11*, 64 ST. JOHN’S L. REV. 931, 949–51 (1990) (encouraging courts to utilize Rule 11 sanctions to deter civil RICO abuse); Nicholas L. Nybo, Note, *A Three–Ring Circus: The Exploitation of Civil Rico, How Treble Damages Caused It, and Whether Rule 11 Can Remedy the Abuse*, 18 ROGER WILLIAMS U. L. REV. 19, 35–51 (2013) (describing “deterrence under Rule 11” and encouraging courts to “levy harsh [Rule 11] sanctions against fraudulent RICO claimants”); see also *Curtis & Assocs. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 183 (E.D.N.Y. 2010) (warning “plaintiffs that further efforts to convert garden–variety pleadings and litigation correspondence into racketeering acts . . . may leave the court with no choice but to impose [Rule 11] sanctions”); *Katzman v. Victoria’s Secret Catalogue*, 167 F.R.D. 649, 660 (S.D.N.Y. 1996) (“Rule 11’s deterrence value is particularly important in the RICO context, as the commencement of a civil RICO action has ‘an almost inevitable stigmatizing effect’ on those named as defendants.” (quoting *Figuroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990))); *Asbeka Indus. v. Travelers Indem. Co.*, 831 F. Supp. 74, 90–91 (E.D.N.Y. 1993) (“To stem the rising tide of RICO suits commenced without thoughtful attention to fundamental principles attendant upon that cause of action, the imposition of Rule 11 sanctions may serve the salutary purpose of discouraging such thoughtless litigation . . .”).

41. See FED. R. CIV. P. 11 (“If . . . the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule . . .”). Under Rule 11(b), an attorney must certify that a pleading “is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation” and that “the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending . . . law.” See *id.* Rule 11(c) grants

cisms and some imposition of Rule 11 sanctions, civil RICO's use and scope have continued to grow.<sup>42</sup>

C. *Supreme Court Beefs: High Court Struggles with RICO*

During congressional debates, one congressman astutely predicted that RICO would “subject the courts . . . to incredible burdens and problems in trying to decipher, administer, and uphold [its] provisions.”<sup>43</sup> Not surprisingly, courts have struggled to decipher, among other things, whether civil RICO requires a prior criminal conviction, whether a separate racketeering injury is needed, how to define “enterprise,” how to measure the duration and accrual of the statute of limitations, whether an economic motive is required, and whether but-for or proximate cause is needed.<sup>44</sup> In general, the Supreme Court has consistently taken an ex-

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the court broad discretion to “impose an appropriate sanction on any attorney, law firm, or party that violated [Rule 11(b)].” *See id.* The court may issue sanctions sua sponte or on motion from opposing counsel. *See id.*

42. *See, e.g.,* Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991) (imposing sanctions in excess of one million dollars for RICO claims brought by journalists claiming injury from bombing allegedly caused by racketeering activity of CIA operatives, military personnel, and mercenaries); Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir. 1991) (imposing sanctions in RICO action brought against attorney); Ryan v. Clemente, 901 F.2d 177 (1st Cir. 1990) (imposing sanctions against plaintiff's attorney in RICO action alleging state officials failed to investigate police examination cheating scandal); O'Malley v. N.Y.C. Transit Auth., 896 F.2d 704 (2d Cir. 1990) (imposing sanctions in frivolous RICO claim brought by former employee against former employer); Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750 (7th Cir. 1988) (imposing sanctions against plaintiff's attorney in RICO claim over construction dispute); Drobny v. JP Morgan Chase Bank, 929 F. Supp. 2d 839 (N.D. Ill. 2013) (reminding plaintiffs of “the strictures of Rule 11”); *Curtis & Assocs.*, 758 F. Supp. 2d at 182 (warning plaintiffs of possible Rule 11 sanctions); *Katzman*, 167 F.R.D. at 653, 659–61 (imposing sanctions against attorneys of plaintiffs alleging Victoria's Secret's “pricing structures with respect to catalogues mailed to different recipients constitute[d] a [RICO] violation”); *Binghamton Masonic Temple, Inc. v. Bares*, 168 F.R.D. 121, 127 (N.D.N.Y. 1996) (imposing sanctions in civil RICO action brought against non-profit by former president); *Asbeka*, 831 F. Supp. at 88–91 (E.D.N.Y. 1993) (imposing sanctions in RICO action brought by insureds against insurers). For a discussion of civil RICO's explosive growth beginning in the 1980s, see *supra* note 29 and accompanying text.

43. *See* 116 CONG. REC. 35,205 (1970) (statement of Rep. Mikva) (discussing implications of Organized Crime Control Act of 1970).

44. *See, e.g.,* Hemi Grp., LLC v. City of New York, 559 U.S. 1 (2010) (addressing proximate cause); *Boyle v. United States*, 556 U.S. 938 (2009) (addressing definition of enterprise); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) (rejecting first-party reliance requirement); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (addressing proximate cause); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (discussing definition of enterprise); *Rotella v. Wood*, 528 U.S. 549 (2000) (eliminating injury and pattern discovery rule for determining accrual of statute of limitations); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (eliminating last predicate act rule for determining accrual of statute of limitations); *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249 (1994) (rejecting economic motive requirement); *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258 (1992) (establishing proximate cause requirement); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987) (establishing four-year statute of limitations but

pansive view of civil RICO, while lower courts have sought to limit RICO's use.<sup>45</sup>

Although the Supreme Court has generally construed civil RICO liberally, the Court has taken a more constricted view of causation, and lower courts have especially struggled with this elusive element.<sup>46</sup> Between 1992 and 2010, the High Court considered civil RICO causation four times and found causation lacking *all but once*.<sup>47</sup> In *Holmes v. Securities Investor Protection Corp.*,<sup>48</sup> the first in this line of cases, the Supreme Court considered the meaning of RICO's requirement that an injury occur "by reason of" a RICO violation.<sup>49</sup> The Court acknowledged that a literal reading would require only *but-for* causation, but rejected this interpretation and concluded that Congress intended to require *proximate* cause.<sup>50</sup>

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not reaching issue of accrual); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (rejecting requirement of prior criminal conviction or separate racketeering injury).

45. See BATISTA, *supra* note 3, § 2.05[T] (describing "the Supreme Court's generally expansive and liberal interpretation of the civil applications of RICO and the lower courts' consistent efforts to develop narrow applications of the statute"); SHELDON, *supra* note 4, § 7.1.5, at 139 ("[T]he Supreme Court has rebuffed several lower court efforts to limit [civil RICO's] scope, supporting an expansive construction." (citing *Sedima*, 473 U.S. at 497–99; *United States v. Turkette*, 452 U.S. 576, 586–87 (1981))). Despite acknowledging that civil RICO's use has stretched beyond its original intent, the Supreme Court has been hesitant to constrict the statute, pointing to the statute's explicit call for a liberal construction. See, e.g., *Sedima*, 473 U.S. at 498–500 ("RICO is to 'be liberally construed to effectuate its remedial purposes.'" (quoting Organized Crime Control Act of 1970, Pub. L. 91–452, § 904(a), 84 Stat. 922, 947 (1970))). The divergent approaches of the Supreme Court and lower courts are exemplified by *Sedima*, the seminal civil RICO decision in which the Court rejected the lower court's requirements of a prior conviction and separate racketeering injury. See *id.* at 522. *Sedima* involved a civil RICO dispute between two joint venturers, one of whom accused the other of fraud. See *id.* at 483–84. The lower court dismissed the case because the defendant had not been criminally convicted of any predicate act, and the plaintiff alleged only a traditional fraud injury. See *id.* at 484–85. The Supreme Court reversed, finding that neither a prior criminal conviction nor a separate "racketeering injury" was needed. See *id.* at 522. Despite acknowledging "concern over the consequences of an unbridled reading of the statute," the Supreme Court rejected the limitations and has consistently taken a liberal approach ever since. See *id.* at 481.

46. See *infra* notes 47–138 and accompanying text for a discussion of civil RICO's causation element.

47. See *infra* notes 48–67 and accompanying text for a discussion of Supreme Court cases on RICO causation.

48. 503 U.S. 258 (1992).

49. See *id.* at 265–66 (interpreting "by reason of").

50. See *id.* (interpreting RICO's causation element). The Court acknowledged that, under a plain reading of the civil RICO statute, a plaintiff could recover "simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury," but rejected "[t]his construction [as] hardly compelled." See *id.* Rather, the Court noted, "Congress modeled § 1964(c) on . . . § 4 of the Clayton Act," and "Congress enacted § 4 in 1914 with language borrowed from § 7 of the Sherman Act," which undoubtedly incorporated the common law principle of proximate causation. See *id.* at 267–68. The Court explained that "[b]efore 1914, lower federal courts had

In *Holmes*, the defendant defrauded several broker-dealers and caused their insolvency, which in turn caused the broker-dealers' customers to incur losses.<sup>51</sup> The broker-dealers' insurer alleged injury from paying the customers' claims.<sup>52</sup> The Court found proximate cause lacking because the defendant's fraud against a third party (the broker-dealers) was not the direct cause of the plaintiff-insurer's injury.<sup>53</sup> The Court reasoned the fraud directly caused the broker-dealers' failure, but only indirectly caused the insurer's losses.<sup>54</sup> As it did in *Holmes*, the Court typically bars recovery where the plaintiff's injury results from fraud on a third party.<sup>55</sup>

In two similar cases, *Anza v. Ideal Steel Supply Corp.*<sup>56</sup> and *Hemi Group, LLC v. City of New York*,<sup>57</sup> the Court found proximate cause lacking because at least one step separated the fraudulent conduct from the conduct that directly caused the injuries.<sup>58</sup> In *Anza*, the plaintiff-business alleged injury from a competitor that kept prices low by fraudulently withholding tax payments from the state.<sup>59</sup> The Court concluded the plaintiff's injury

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read § 7 [of the Sherman Act] to incorporate common-law principles of proximate causation." *See id.* at 267. Therefore, the Court concluded, because Congress "used the same words" as it had in the Clayton and Sherman Acts, it was appropriate to "assume [Congress] intended them to have the same meaning that courts had already given them." *See id.* at 268. The Court explicitly held that "[p]roximate cause is thus required." *See id.*

51. *See id.* at 261–63 (discussing facts of case). *Holmes* involved a stock manipulation scheme, which directly caused several broker-dealers to become unable to satisfy financial obligations to their customers. *See id.* at 262–63. The broker-dealers were members of the Securities Investor Protection Corporation (SIPC), a non-profit organization that exists to protect the interests of the customers of SIPC's member broker-dealers. *See id.* at 261–62. In carrying out its role, SIPC advanced \$13 million to cover claims asserted by the broker-dealers' customers. *See id.* at 263. Subsequently, SIPC brought a civil RICO claim against the alleged stock manipulator. *See id.* at 262–63.

52. *See id.* at 261, 263 ("Respondent Securities Investor Protection Corporation (SIPC) [insurer] alleges that petitioner Robert G. Holmes, Jr., 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 customers.").

53. *See id.* at 271 ("[T]he link is too remote between the stock manipulation scheme alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers.").

54. *See id.* ("[T]he conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers.").

55. *See infra* notes 56–62 and accompanying text for a discussion of post-*Holmes* jurisprudence barring recovery in cases involving fraud on a third party.

56. 547 U.S. 451 (2006).

57. 559 U.S. 1 (2010).

58. *See infra* notes 59–62 and accompanying text for a discussion of *Anza* and *Hemi Grp.*

59. *See Anza*, 547 U.S. at 453–55 (discussing plaintiff's claims). In *Anza*, a mill company with locations in Queens and the Bronx brought a RICO claim against a competing business. *See id.* at 453–54. The plaintiff alleged the competitor had defrauded the government by failing to remit sales tax from cash-paying customers and had committed mail and wire fraud by submitting fraudulent tax returns to

was not sufficiently direct because it resulted from the defendant's decision to offer lower prices, an act "distinct from the alleged RICO violation (defrauding the State)."<sup>60</sup> Similarly, in *Hemi Group*, the city of New York alleged financial harm when an out-of-state cigarette vendor failed to file a required report listing sales to New York State customers.<sup>61</sup> The Court found proximate cause lacking, noting "the [c]ity's harm was directly caused by the [customers'] failure to pay taxes to the city, not by the defendant's failure to file the report with the state."<sup>62</sup>

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conceal the illegal conduct. *See id.* at 454. According to the plaintiff, the competitor kept prices low through this fraudulent scheme and used the fraudulently-obtained excess revenue to open a Bronx location. *See id.* at 455. The plaintiff alleged financial harm as a result of the competitor's ability to acquire a significant percent of plaintiff's market share with these low prices and new location. *See id.*

60. *See id.* at 458 (explaining holding and reasoning). Notably, the Second Circuit had held that where a complaint alleges "that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause." *See Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004). The Second Circuit further concluded that such a pleading was adequate "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *See id.* The Supreme Court disagreed, finding proximate cause lacking because "[t]he direct victim of [the defendant's fraudulent] conduct was the State of New York," not the plaintiff, and the alleged injury resulted from the defendant's decision to offer lower prices, an act "entirely distinct from the alleged RICO violation (defrauding the State)." *See Anza*, 547 U.S. at 458. The Court explained its conclusion could be "confirmed by considering the directness requirement's underlying premises." *See id.* Specifically, the Court noted the difficulty of assessing damages and the risk of duplicative recoveries increase with the remoteness of an injury. *See id.* at 458–60 (explaining Court's reasoning). In *Anza*, the Court reasoned, "[b]usinesses lose and gain customers for many reasons," multiple factors other than the defendant's fraudulent activity could have contributed to the plaintiff's lost sales, and it would be difficult to determine what portion of the loss was due to the fraudulent scheme. *See id.* at 459 (discussing remoteness of injury). Additionally, the Court noted, the state was better-suited to recover because it would be relatively simple to determine the amount of tax revenue the defendant had fraudulently withheld. *See id.* at 460 (explaining reasoning).

61. *See Hemi Grp.*, 559 U.S. at 4 (describing facts). The court explained, "[t]he City of New York taxes the possession of cigarettes." *See id.* Out-of-state vendors may sell cigarettes to New York City residents, and "[n]either state nor city law requires [the out-of-state vendors] to charge, collect, or remit the [New York City] tax." *See id.* "Federal law, however, requires out-of-state vendors . . . to submit customer information to the States into which they ship the cigarettes." *Id.* The City of New York brought a RICO claim against one such vendor, alleging the vendor's failure to file the required report "constitute[d] . . . fraud, which caused [the City] to lose tens of millions of dollars in unrecovered cigarette taxes." *See id.*

62. *See id.* at 11 (discussing causation). The Supreme Court noted "the disconnect between the asserted injury and the alleged fraud in this case [was] even sharper than in *Anza*" because there were multiple steps between the alleged fraud (failure to file the required report) and the alleged injury (lost tax revenue). *See id.* Specifically, the Court explained, "the defendant's fraud on [a] third party (the State) [ ] made it easier for a fourth party (the taxpayer) to cause harm to the plaintiff (the City)." *Id.*

Just as in *Anza* and *Hemi Group*, the plaintiffs in *Bridge v. Phoenix Bond & Indemnity Co.*<sup>63</sup> alleged harm that resulted from fraud on a third party, but in *Bridge*, the Court found the plaintiffs had sufficiently pled proximate cause.<sup>64</sup> The *Bridge* plaintiffs alleged that, by defrauding the county, the defendants secured “a disproportionate share of [property] liens,” thereby causing the plaintiffs to “[lose] valuable liens they otherwise would have been awarded.”<sup>65</sup> Finding it irrelevant that the plaintiffs had not relied on the defendants’ misrepresentations, the Court explained that proximate cause was satisfied because the “alleged injury—the loss of valuable liens—[was] the direct result” of the alleged fraudulent scheme against the county.<sup>66</sup> The Court emphasized that, “unlike in *Holmes* and *Anza*,” in the present case, there were no other factors that might account for the injury, there was “no risk of duplicative recoveries,” and no other “victim [was] better situated to sue.”<sup>67</sup>

#### D. *Family Dispute: Circuits Split on Injury and Causation*

Despite the Supreme Court’s extensive consideration of RICO proximate cause, lower courts continue to struggle with the concept.<sup>68</sup> As the *Holmes* Court recognized, determining RICO proximate cause requires assessing the “directness of [the] relationship” between the alleged fraudulent conduct and the asserted injury.<sup>69</sup> Accordingly, courts address the issues of injury and causation in tandem, and in cases like *Avandia*, two

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63. 553 U.S. 639 (2008).

64. See *supra* notes 58–62 and accompanying text for a discussion of *Anza* and *Hemi Grp.* and *infra* notes 65–67 and accompanying text for a discussion of *Bridge*.

65. See *Bridge*, 553 U.S. at 643–44, 649. The dispute in *Bridge* arose over an annual auction in which the county “sells tax liens it has acquired on the property of delinquent taxpayers.” See *id.* at 642. “[B]ids are stated as percentage penalties the property owner must pay the winning bidder in order to clear the lien,” and “[t]he bidder willing to accept the lowest penalty wins the auction and obtains the right to purchase the lien in exchange for paying the outstanding taxes on the property.” *Id.* Consequently, all bidders bid zero percent (0%), and the auction always results in a tie. See *id.* (explaining bidding process). To address this dilemma, the county “allocate[s] parcels ‘on a rotational basis’ in order to ensure that liens are apportioned fairly among 0% bidders.” See *id.* at 643. To ensure fairness, the county “requires each ‘tax buying entity’ to submit bids in its own name and prohibits it from using ‘apparent agents, employees, or related entities’ to submit simultaneous bids for the same parcel.” See *id.* The *Bridge* plaintiffs alleged the defendants violated this rule and sent “hundreds of mailings in furtherance of [a] scheme” to defraud the county into awarding the defendants “a disproportionate share of liens,” thereby causing the plaintiffs to “[lose] valuable liens they otherwise would have been awarded.” See *id.* at 644, 649.

66. See *id.* at 655–58 (noting lack of “common-law principle holding that a fraudulent misrepresentation can cause legal injury only to those who rely on it”).

67. See *id.* at 658.

68. See *infra* notes 69–138 and accompanying text for a discussion of attempts by circuit courts to apply the Supreme Court’s proximate cause standard.

69. See *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 269 (1992) (discussing RICO causation element).

theories of injury have emerged: the “excess price” and the “quantity effect” theories.<sup>70</sup>

Under the excess price theory, a plaintiff alleges paying a *higher price* for a good or service than it would have, absent the defendant’s misrepresentations.<sup>71</sup> Under the quantity effect theory, a plaintiff alleges paying for a *greater quantity* of a product or service than it would have, absent the defendant’s fraud.<sup>72</sup> Both the Second and Third Circuits have historically rejected both theories, while the First Circuit has embraced them.<sup>73</sup>

Claims brought under the excess price or quantity effect theory tend to fail because the plaintiff cannot show actual—as opposed to theoretical—harm.<sup>74</sup> For example, in *Maio v. Aetna, Inc.*,<sup>75</sup> decided fifteen years before *Avandia*, the Third Circuit considered a class action brought by a group of insured individuals against their insurer.<sup>76</sup> The insureds alleged that they had overpaid for insurance plans because their insurer fraudulently misrepresented certain qualities of the plans.<sup>77</sup> The Third Circuit rejected the excess price theory, reasoning that in order to show the plans were actually less valuable than the price paid, the insureds had to prove

70. See *infra* notes 71–72 and accompanying text for a description of the excess price and quantity effect theories of injury.

71. See, e.g., *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 129 (2d Cir. 2010) (explaining excess price injury as “the monetary difference between what the plaintiff class was allegedly led to believe [a drug] was worth and the actual economic value of [the drug], taking into account the lesser efficacy and greater harmful side effects allegedly hidden or misrepresented by [the manufacturer]”).

72. See, e.g., *id.* (explaining quantity effect injury allegedly incurred “by paying for [a drug] that would not have been prescribed but for” manufacturer’s misrepresentations).

73. See *infra* notes 75–99 and accompanying text for a discussion of excess price and quantity effect theories of damages in civil RICO claims.

74. See *infra* notes 75–92 and accompanying text for a discussion of cases where the excess price and/or quantity effect theories failed.

75. 221 F.3d 472 (3d Cir. 2000).

76. See *id.* at 474 (explaining plaintiffs brought class action against insurer Aetna for alleged RICO violations).

77. See *id.* at 474–75, 484 (describing plaintiffs’ claims). The insureds alleged that Aetna violated RICO through a “massive nationwide fraudulent advertising campaign designed to induce” them to enroll in Aetna’s health management organization (HMO) plan. See *id.* at 474. The insureds claimed they paid the HMO’s premium in reliance on Aetna’s false representation that the plan had certain qualities such as financial incentives for physicians to provide high quality care. See *id.* at 474–75 (“[The insureds] also assert that Aetna represented that HMO members would receive high quality health care . . .”). In reality, the insureds alleged, the plan lacked many of the valuable qualities and benefits promised and was, therefore, less valuable than the price paid. See *id.* (describing allegations by insureds that “in reality Aetna’s internal policies restrict[ed] the physicians’ ability to provide the high quality health care that [the insureds] [had] been promised”). The court explained the insureds’ theory of damages as follows: “[A]ppellants’ argument with respect to the damage element of their RICO claims is that they have standing under RICO because they paid too much in their premium dollars for the health insurance they received from Aetna.” *Id.* at 484.

“each appellant suffered negative medical consequences.”<sup>78</sup> Without proving “diminished benefits or care,” the insureds “simply [could not] establish . . . that they received anything less than what they bargained for.”<sup>79</sup>

The Third Circuit expressed total confidence in its holding.<sup>80</sup> Specifically, the court emphasized it had no doubt about its resolution regarding the “damages theory.”<sup>81</sup> Moreover, the court stressed that allowing the plaintiffs’ excess price claims to proceed would mean “expanding the concept of RICO injury *beyond the boundaries of reason*.”<sup>82</sup>

More than a decade later, the Third Circuit reaffirmed its utmost confidence in *Maio* when it decided *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*.<sup>83</sup> In *Schering*, a class of TPPs brought a RICO claim against a drug manufacturer, alleging injury because the drug company fraudulently induced physicians to prescribe certain medications for off-label uses.<sup>84</sup> The court dismissed the claims on other grounds but noted, in dictum, that “the TPP Complaint did not allege a concrete injury” because there was no evidence that “the drugs . . . were *actually ineffective or otherwise worth less than what they paid for them*.”<sup>85</sup>

Presented with nearly identical facts in *UFCW Local 1776 v. Eli Lilly & Co.*<sup>86</sup> and *Sergeants Benevolent Ass’n Health & Welfare Fund v. Sanofi-Aventis*

78. *See id.* at 474, 487–88 (explaining Court’s reasoning). The court affirmed the complaint’s dismissal because “appellants [had] not alleged an injury to business or property cognizable under RICO.” *See id.* at 474. The Court explained, “that unless appellants claim[ed] that Aetna failed to provide sufficient health insurance coverage to the members of their HMO plan in the sense that such individuals were denied medically necessary benefits, received inadequate, inferior or delayed medical treatment, or even worse, suffered personal injuries,” then there was no “factual basis for appellants’ conclusory allegation that they have been injured in their ‘property’ because the health insurance they actually received was inferior and therefore ‘worth less’ than what they paid for it.” *Id.* at 488.

79. *See id.* at 494.

80. *See id.* at 496 (noting there was not “any doubt concerning the result”).

81. *See id.* (asserting no “doubt concerning the result . . . with respect to the message underlying appellants’ damages theory”).

82. *See id.* at 495–96 (emphasis added).

83. 678 F.3d 235 (3d Cir. 2012).

84. *See id.* at 241–42 (describing plaintiffs’ claims). The plaintiffs claimed “that Schering’s unlawful marketing practices caused physicians to prescribe the Subject Drugs for off-label uses instead of equally effective alternative treatments that were approved for the prescribed uses.” *Id.* at 242. The plaintiffs “assert[ed] that these marketing techniques led to a significant increase in prescriptions of the Subject Drugs for off-label uses, and contend[ed] that this caused the Plaintiffs ‘ascertainable loss’ because they paid ‘hundreds of millions, if not billions, of dollars for the Subject Drugs that they otherwise would not have paid.’” *Id.* An “off-label” use of a prescription medication occurs when a physician prescribes the drug for a use other than an FDA-approved use. *See UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 127 (2d Cir. 2010) (explaining off-label use). Although “off-label prescriptions are permitted within a physician’s discretion, drug manufacturers are prohibited from promoting off-label uses.” *Id.*

85. *See Schering*, 678 F.3d at 246 (emphasis added).

86. 620 F.3d 121 (2d Cir. 2010).



*U.S. LLP*,<sup>87</sup> the Second Circuit also rejected both an excess price and a quantity effect theory of damages.<sup>88</sup> In both cases, a class of TPPs alleged injury due to a manufacturer's misrepresentations about the safety of a particular drug.<sup>89</sup> In considering the excess price theory, the court described the long causal chain as follows: (1) the manufacturer allegedly distributed misinformation; (2) in reliance on this misinformation, the Pharmacy Benefit Managers (PBMs) recommended the TPPs place the drug on their formularies; (3) the TPPs placed the drug on their formularies in reliance on the PBMs' advice; (4) physicians prescribed the drug in reliance on the manufacturer's misrepresentations; and (5) the TPPs consequently overpaid.<sup>90</sup> The court concluded proximate cause was lacking under *Hemi Group*, noting the TPPs' "theory of liability rest[ed] on the independent actions of third and even fourth parties" and was thus too attenuated.<sup>91</sup> Likewise, under the quantity effect theory, the court held "the independent actions of prescribing physicians" interrupted the causal chain and "thwart[ed] any attempt to show proximate cause."<sup>92</sup>

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87. 806 F.3d 71 (2d Cir. 2015).

88. See *infra* notes 89–92 and accompanying text for a discussion of *Sergeants* and *UFCW*.

89. See *Sergeants*, 806 F.3d at 74 ("Plaintiffs–Appellants are three health–benefit plans [ ] that brought suit under [RICO] . . . claiming that Defendants–Appellees . . . engaged in a pattern of mail fraud by failing to disclose the true risks of the antibiotic drug telithromycin, marketed as 'Ketek.'"); *UFCW*, 620 F.3d at 123 ("Plaintiffs–appellees . . . ('TPPs') who underwrite the purchase of prescription drugs by their members or insureds, brought this putative class action against Eli Lilly and Company ('Lilly'), manufacturer of the drug Zyprexa, alleging that Lilly had misrepresented Zyprexa's efficacy and side effects to physicians.").

90. *UFCW*, 620 F.3d at 134 (describing "attenuated link between the alleged misrepresentations made to doctors and the ultimate injury to the TPPs"). The court noted that the drug manufacturer, physicians, TPPs, PBMs, and PBM Pharmacy and Therapeutics Committees all had a role in the chain of causation. See *id.* (describing chain of causation). The court explained, "TPPs typically pay for a prescribed medication only if the drug is authorized under their formulary, a list of medications approved for payment." *Id.* "The formulary is usually managed by a Pharmacy Benefit Manager ('PBM')." *Id.* "Drugs placed on a formulary are approved by the PBM's Pharmacy and Therapeutics Committee, made up of physicians and clinical pharmacists." *Id.* "PBMs maintain their formulary based upon publicly available clinical information, which is . . . produced and disseminated by the drug manufacturers themselves." *Id.*

91. See *id.* (quoting *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 14 (2010)) (internal quotation marks omitted).

92. See *id.* at 135 (discussing causation). In rejecting the quantity effect theory in *Sergeants*, the court reasoned the alleged injury required proof that doctors prescribed the drug in reliance on the manufacturer's non-disclosure of the drug's true risks. See *Sergeants*, 806 F.3d at 91 (discussing required showing under quantity effect theory). The Second Circuit applied its *UFCW* precedent, explaining that, in *UFCW*, the court "held that this generalized proof—which showed a simple correlation between the safety disclosure and the decline in prescriptions—was not enough for the plaintiffs to prove that each class member was injured by [the] alleged misrepresentations, in light of the multifaceted and individualized nature of physicians' prescribing decisions." See *id.* at 92. The court determined the same logic applied in *Sergeants*, noting "Ketek's declining sales may have been

While the Second and Third Circuits have approached injury and causation conservatively, the First Circuit has embraced a more expansive view.<sup>93</sup> Under facts similar to those of *Maio*, *Schering*, *UFCW*, and *Sergeants*, the First Circuit readily accepted the quantity effect theory.<sup>94</sup> In *In re Neurontin Marketing & Sales Practices Litigation*,<sup>95</sup> a TPP alleged a drug company's fraud caused more prescriptions to be written—and paid for by the TPP—than would have been, absent the fraud.<sup>96</sup> The drug manufacturer argued that, as a matter of law, the TPP failed to meet the *Holmes* “proximate cause ‘direct relation’ requirement” because “the causal relationship [involved] at least four steps.”<sup>97</sup> The court rejected this attenuated chain argument, finding proximate cause was met under *Bridge*.<sup>98</sup> The court reasoned that, like the competing bidders in *Bridge*, here, the TPP was the “primary and intended victim [ ] of [the manufacturer’s] scheme to de-

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correlated with the issuance of the FDA’s public health advisory and with Ketek’s label revisions, but mere correlation does not demonstrate causation.” *See id.*

93. *See supra* notes 75–92 and accompanying text for a discussion of Second and Third Circuit precedent. For a discussion of First Circuit precedent, see *infra* notes 94–99 and accompanying text.

94. *See infra* notes 95–99 and accompanying text for a discussion of the First Circuit’s acceptance of the quantity effect theory of injury in a civil RICO case. Note that the relevant First Circuit case, *In re Neurontin Marketing & Sales Practices Litigation*, was decided prior to *Sergeants*. Compare *Sergeants*, 806 F.3d 71 (rendering holding in 2015), with *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21 (1st Cir. 2013) (rendering holding two years prior to *Sergeants*). The Second Circuit distinguished *Sergeants* from *Neurontin*, noting that *Neurontin* did not involve class certification and the *Neurontin* plaintiffs presented expert testimony of sophisticated regression analysis that supported a reasonable finding of “a causal effect” between the drug company’s off-label promotional activities and “prescribing behaviors” of individual physicians. *See Sergeants*, 806 F.3d at 96 (quoting *Neurontin*, 712 F.3d at 45). The Second Circuit expressly reserved ruling on whether aggregated regression analysis would ever be sufficient to prove proximate cause in a RICO claim involving a *class of plaintiffs*, but found the proffered causation evidence in *Sergeants* “akin to the simplistic proof introduced by the [*UFCW*] plaintiffs” and insufficient for proximate cause. *See id.* at 97 (finding “RICO causation” lacking).

95. 712 F.3d 21 (1st Cir. 2013).

96. *See id.* at 25 (“This is an appeal from verdicts of over \$140 million, reached by both a jury and a court, compensating Kaiser . . . for the injury Kaiser suffered by its payment for four categories of off-label Neurontin prescriptions . . . induced by a fraudulent scheme by Pfizer, the manufacturer of Neurontin.”).

97. *See id.* at 38. The court explained Pfizer’s characterization of the causal chain as follows: “Pfizer communicating tainted information about Neurontin to Kaiser’s DIS; the DIS producing monographs that rely on the misrepresentations; those monographs influencing the PMGs in their formulary decisions; and the prescribing physicians (who exercise independent medical judgment) acting within the formulary to issue the prescriptions.” *See id.* DIS stands for Drug Information Service, and PMG stands for Permanente Medical Groups (regional physician groups that “have exclusive contractual relationships with Kaiser”). *See id.* at 28–29.

98. *See id.* at 38–39 (“[T]he causal chain in this case is anything but attenuated.”).

fraud” and “there [was] no risk of multiple recoveries due to a suit by another [party].”<sup>99</sup>

### III. THE THIRD CIRCUIT FLIPS: AVANDIA OVERVIEW & ANALYSIS

Presented with facts much like those in *Maio*, *Schering*, *UFCW*, *Sergeants*, and *Neurontin*, the Third Circuit changed course in *Avandia* and abandoned its conservative civil RICO precedent.<sup>100</sup> As in *Maio* and *Schering*, the court focused its analysis on injury and proximate cause.<sup>101</sup> Despite the highly similar facts and damages, however, the *Avandia* court was not concerned about “expanding the concept of RICO injury *beyond the boundaries of reason*.”<sup>102</sup> Rather, the court relied on general language from a prior *antitrust* decision to conclude the plaintiffs had alleged a concrete injury.<sup>103</sup> Furthermore, like the First Circuit in *Neurontin*, the Third Circuit relied on *Bridge* to find proximate cause in *Avandia*.<sup>104</sup>

99. See *id.* at 37 (footnote omitted).

100. See *supra* notes 75–99 and accompanying text for a discussion of *Maio*, *Schering*, *UFCW*, *Sergeants*, and *Neurontin*. For a discussion and critical analysis of *Avandia*, see *infra* notes 101–38 and accompanying text. See also James M. Beck, “*Destroying Things Is Much Easier Than Making Them*”—*The Worst Prescription Drug/Medical Device Decisions of 2015*, LEXOLOGY (Dec. 24, 2015), <http://www.lexology.com/library/detail.aspx?g=96e8999a-2586-4dd4-ba69-7e81691f61b5> [https://perma.cc/X5ZQ-G3HD] (criticizing Third Circuit’s *Avandia* decision). Mr. Beck, Counsel Resident at Reed Smith in Philadelphia, lamented that “[u]ntil [the *Avandia*] decision, we thought the Third Circuit was one of the better places to litigate third-party payer economic loss cases.” See *id.* He went on to explain that “[i]n all prior Third Circuit decisions of this type, the patient-specific decisions of independent professional physicians had precluded resort to aggregated statistical proof of injury and causation,” but “[n]ot this time.” *Id.* In a related blog, John J. Sullivan, a commercial litigator at Cozen O’Connor in Philadelphia, elaborated on the matter, explaining that the Third Circuit had previously “resisted [the] trend” of “awkwardly extending [RICO’s] civil reach into areas and transactions for which RICO was seemingly never intended.” See John J. Sullivan, *The Third Circuit Does an About-Face on RICO Claims*, DRUG AND DEVICE LAW (Dec. 7, 2015), <https://www.druganddevicelawblog.com/2015/12/the-third-circuit-does-about-face-on.html> [https://perma.cc/68EF-X3AN]. According to Mr. Sullivan, with its *Avandia* decision, “the Third Circuit scuttled its previous good work and stretched RICO’s arms all the way out to reach consumer disputes with pharmaceutical manufacturers.” See *id.*

101. See *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 804 F.3d 633, 638–46 (3d Cir. 2015) (“In addition to cognizable injury, a RICO plaintiff must satisfy RICO’s proximate causation requirements.”), *cert. denied sub nom.* GlaxoSmithKline LLC v. Allied Servs. Div. Welfare Fund, 136 S. Ct. 2409 (2016).

102. See *Maio v. Aetna, Inc.*, 221 F.3d 472, 495–96 (3d Cir. 2000) (emphasis added); *Avandia*, 804 F.3d at 640 (“[U]nlike the injury suffered by plaintiffs in *Maio*, the injury suffered by the TPPs here is not contingent on future events.”).

103. See *Avandia*, 804 F.3d at 640–41 (finding concrete injury in reliance on *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 531 (3d Cir. 2004)).

104. See *id.* at 644 (“[W]e view the case before us as more akin to *Bridge* than to *Holmes*, *Anza*, or *Hemi*.”). For a discussion of the First Circuit’s *Neurontin* decision, see *supra* notes 94–99 and accompanying text.

A. *Let's Take a Walk: Facts and Procedural History*

In *Avandia*, a class of TPPs brought civil RICO claims against pharmaceutical behemoth GlaxoSmithKline (GSK), alleging GSK fraudulently misrepresented the safety of its drug Avandia.<sup>105</sup> The TPPs asserted both excess price and quantity effect theories.<sup>106</sup> GSK filed a motion to dismiss, claiming the TPPs lacked standing because they had not sufficiently pled either (1) an injury to business or property or (2) proximate cause.<sup>107</sup>

The district court rejected both arguments, finding the TPPs “plausibly alleged . . . a concrete economic injury based on the substantial savings they would have experienced had they covered cheaper alternatives to Avandia.”<sup>108</sup> The lower court also concluded the TPPs’ economic injury existed “regardless of whether any beneficiary who had ingested Avandia became ill.”<sup>109</sup> Additionally, the district court found the TPPs had adequately pled proximate cause, but noted causation may be difficult to prove “at the next litigation stage.”<sup>110</sup>

The Third Circuit entertained review on interlocutory appeal, addressing three questions: (1) whether the district court erred in applying *Maio*; (2) whether the TPPs sufficiently pled a concrete injury; and (3) whether “the independent judgment of doctors . . . who wrote the prescriptions for Avandia render[ed] the causal chain too attenuated to state a claim.”<sup>111</sup>

B. *GSK Gets Pinched: A Narrative Analysis*

The court rejected GSK’s argument that, under *Maio*, the TPPs failed to allege a concrete “injury to business or property.”<sup>112</sup> According to the court, *Maio* was easily distinguishable.<sup>113</sup> In *Maio*, the court explained, the insureds could not prove overpayment for their insurance plans without

105. See *Avandia*, 804 F.3d at 634 (“This interlocutory appeal involves claims brought against GlaxoSmithKline LLC (GSK) by third-party payors (TPPs), based on GSK’s alleged misrepresentation and concealment of the significant safety risks associated with use of Avandia.”).

106. See *id.* at 636 (describing plaintiffs’ claim “that Avandia was worth less than the favorable rates at which they covered it (their ‘excess price’ theory)” and “that physicians relied on GSK’s misrepresentations in deciding to prescribe Avandia and would have prescribed Avandia to fewer patients had GSK not concealed Avandia’s risks (their ‘quantity effect’ theory)”).

107. See *id.* at 637 (describing procedural history).

108. See *id.* (discussing district court’s holding).

109. See *id.* (discussing district court’s finding of plausible allegation of concrete economic injury).

110. See *id.* (“The District Court noted, however, that plaintiffs may have difficulty in proving causation at the next litigation stage . . .”).

111. See *id.* (listing questions certified for review).

112. See *id.* at 638–41 (rejecting defendant’s claim that plaintiff failed to plead concrete injury).

113. See *id.* at 640 (“*Maio* is distinguishable in one crucial respect: unlike the injury suffered by plaintiffs in *Maio*, the injury suffered by the TPPs here is *not* contingent on future events.”).

showing they actually received subpar medical care.<sup>114</sup> By contrast, the *Avandia* court concluded that the TPPs in this case did not need to show the drug was actually ineffective or less safe in order to prove overpayment.<sup>115</sup>

In reaching this conclusion, the court disregarded *Maio* and relied instead on general language from an *antitrust* case, *In re Warfarin Sodium Antitrust Litigation*.<sup>116</sup> In *Warfarin*, the Third Circuit concluded that TPPs suffer “direct economic harm” when anticompetitive behavior induces them to buy more expensive brand name drugs instead of lower-priced generics.<sup>117</sup> Thus, the *Avandia* court concluded, “if allegedly anticompetitive behavior that leads to overpayment establishes a concrete injury, then so should allegedly fraudulent behavior that leads to overpayment.”<sup>118</sup>

The court then summarily dismissed *Schering*, merely noting the relevant findings in that case were dicta.<sup>119</sup> Notably, the *Schering* court determined “the plaintiffs lacked standing to assert . . . injury because they failed to allege that any consumers or beneficiaries received inadequate drugs.”<sup>120</sup> Because this conclusion was in dictum, the *Avandia* court determined any reliance on it would be “misplaced.”<sup>121</sup>

The court next turned to the issue of causation and concluded that, unlike *Holmes*, *Anza*, and *Hemi Group*—cases in which proximate cause was

114. *See id.* at 639–40 (explaining *Maio* holding). The court explained that in *Maio*, it “found that the insured parties had suffered no injury absent allegations that they had received ‘inadequate, inferior delayed care, personal injuries resulting therefrom, or [the] denial of benefits due under the insurance arrangement.’” *Id.* at 639.

115. *See id.* at 640 (“The TPPs’ damages do not depend on the effectiveness of the *Avandia* that they purchased, but rather on the inflationary effect that GSK’s allegedly fraudulent behavior had on the price of *Avandia*.”).

116. *See id.* at 639–40 (“We agree with the TPPs that *Warfarin* [an antitrust case] offers the closest analogy to the facts of this case and that GSK’s reliance on *Maio* is distinguishable . . .” (relying on *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004))).

117. *See id.* (applying *Warfarin*, 391 F.3d at 531). *Warfarin* involved antitrust claims against DuPont, the maker of Coumadin (the brand name version of warfarin). *See Warfarin*, 391 F.3d at 521 (discussing plaintiffs’ claims). The plaintiffs “allege[d] that DuPont’s anticompetitive behavior . . . caused them to purchase the higher-priced Coumadin instead of the generic product.” *Id.* The case consolidated a class of consumers and a class of TPPs. *See id.* at 523 (describing procedural history of case). In considering an objection to the inclusion of the TPPs in the class, the court explained that “TPPs, like individual consumers, suffered direct economic harm when, as a result of DuPont’s alleged misrepresentations, they paid supracompetitive prices for Coumadin instead of purchasing lower-priced generic warfarin sodium.” *See id.* at 531.

118. *See Avandia*, 804 F.3d at 640.

119. *See id.* (citing *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 246 (3d Cir. 2012)) (“To the extent we agreed with the District Court’s injury analysis in [*Schering*], we did so in dictum, not in binding precedent.”).

120. *See id.* (emphasis added) (describing reasoning in *Schering*).

121. *See id.* (rejecting reliance on *Schering*).

lacking because the alleged harm was too attenuated—the TPPs in this case had alleged a direct injury analogous to that alleged in *Bridge*.<sup>122</sup> The court dismissed the argument that the causal chain was broken by the decisions of prescribing physicians.<sup>123</sup> Rather, the court reasoned, “*Bridge* preclude[d] that argument” because, just as in *Bridge*, the plaintiffs here “were the ‘primary and intended victims of the scheme to defraud.’”<sup>124</sup> The court held that because the success of the fraudulent scheme depended on the TPPs’ paying for Avandia, the alleged injury was “sufficiently direct to satisfy the RICO proximate cause requirement.”<sup>125</sup>

Having concluded the plaintiffs adequately pled injury and proximate cause, the Third Circuit rejected GSK’s motion to dismiss.<sup>126</sup> Interestingly, the court reserved “opin[ing] on the likelihood of plaintiffs’ [future] success,” noting “these issues [would] resurface” at later stages of litigation.<sup>127</sup>

#### IV. MUCKED UP HIT? ANALYSIS OF THE COURT’S REASONING

The *Avandia* court made several missteps in what one group of litigators deemed the third worst legal decision of 2015.<sup>128</sup> First, the court provided a lengthy attempt to distinguish *Avandia* from *Maio*.<sup>129</sup> After describing two identical fact patterns, however, the court somehow con-

122. *See id.* at 643–44 (“The conduct that allegedly caused plaintiffs’ injuries is the same conduct forming the basis of the RICO scheme alleged in the complaint—the misrepresentation of the heart-related risks of taking Avandia that caused TPPs and PBMs to place Avandia in the formulary.”).

123. *See id.* at 644 (rejecting argument that “the presence of intermediaries—physicians and patients” broke causal chain).

124. *See id.* at 645 (quoting *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 650 (2008)).

125. *See id.* (citing *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 37–38 (1st Cir. 2013)) (finding proximate cause requirement satisfied due to “sufficiently direct” relationship).

126. *See id.* at 646 (“Plaintiffs have plausibly alleged the elements of RICO standing, and GSK has not offered a valid justification for limiting the claims at this stage of the litigation. . . . We simply hold that it would be premature to dismiss plaintiffs’ well-pled RICO allegations at this juncture.”).

127. *See id.* The court’s apparent reservations about the plaintiffs’ future ability to prove injury and proximate cause stand in stark contrast to the utmost certainty the court expressed in its *Maio* holding. For a discussion of the court’s opinion in *Maio*, see *supra* notes 80–82 and accompanying text.

128. *See Beck*, *supra* note 100 (“For taking safety, effectiveness, and concrete injury out of the RICO equation, after years of getting this right, the Third Circuit’s *Avandia* decision nails down the #3 spot on our bottom ten.”).

129. *See In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 804 F.3d 633, 639–40 (3d Cir. 2015) (distinguishing *Maio*), *cert. denied sub nom. GlaxoSmithKline LLC v. Allied Servs. Div. Welfare Fund*, 136 S. Ct. 2409 (2016). According to the court, “[t]he TPPs’ damages do not depend on the effectiveness of the Avandia that they purchased, but rather on the inflationary effect that GSK’s allegedly fraudulent behavior had on the price of Avandia.” *Id.* at 640. “By contrast,” the court explained, “the damages suffered by the plaintiffs in *Maio* were entirely dependent on the quality of the health care they received.” *Id.*

cluded the plaintiffs in *Maio* could have shown injury only by proving they received less than they bargained for, while no similar showing was required in *Avandia*.<sup>130</sup> Perhaps finding this manufactured distinction insufficient, the court then shirked its own civil RICO precedent and relied instead on general language from antitrust litigation to arrive at its cursory conclusion that concrete injury had been alleged.<sup>131</sup>

Turning to proximate cause, the court determined *Bridge* was controlling, readily dismissing *Holmes*, *Anza*, and *Hemi Group*.<sup>132</sup> The court's reliance on *Bridge*, however, belies two key distinctions.<sup>133</sup> The court erroneously concluded that, like the *Bridge* plaintiffs, the *Avandia* plaintiffs were the primary intended victims of the fraudulent scheme and the only group harmed and positioned to sue.<sup>134</sup> In fact, several additional victims are readily-identifiable.<sup>135</sup> For example, patients who took Avandia undoubtedly paid a higher co-pay than they would have, absent the fraud.<sup>136</sup> Additionally, the manufacturers of competing drugs were harmed when physicians prescribed Avandia over their own drugs.<sup>137</sup> In short, the al-

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130. See *id.* (distinguishing *Avandia* from *Maio* despite similar facts and concluding that “*Warfarin* offers the closest analogy to the facts of this case”). One group of legal scholars explained the insufficiency of the Third Circuit’s attempt to distinguish *Avandia* from *Maio*, noting they “[understood] the words that the court wrote” but simply did not “get the distinction.” See Sullivan, *supra* note 100 (criticizing reasoning in *Avandia* decision). According to Mr. Sullivan and his colleagues, in the same way “the *Maio* plaintiffs’ RICO damages depended entirely on the quality of the healthcare that they [ultimately] received,” the “*Avandia* plaintiffs’ RICO damages also depended entirely on the quality—effectiveness and safety—of the Avandia that they received.” See *id.* “In each case, the plaintiffs claimed that the alleged misrepresentations inflated the price of the product or service that they received.” *Id.* Under the *Maio* reasoning then, “in each case, if they received what was represented to them, they were not damaged.” See *id.* Thus, “just as the *Maio* plaintiffs had to show that they got lesser care than promised to show a concrete injury, the *Avandia* plaintiffs should have been required to show that the Avandia they received performed less safely and effectively than promised.” *Id.*

131. See *Avandia*, 804 F.3d at 638–41 (relying on general language from antitrust litigation rather than civil RICO precedent).

132. See *supra* notes 122–25 and accompanying text for a discussion of the *Avandia* court’s proximate cause analysis.

133. See *infra* notes 134–37 and accompanying text for a discussion of key distinctions between *Bridge* and *Avandia* not addressed by the court.

134. See *infra* notes 136–37 and accompanying text for examples of other victims who could potentially sue.

135. See *infra* notes 136–37 and accompanying text for a discussion of readily-identifiable victims.

136. See *Avandia*, 804 F.3d at 636 (“A one-month supply of Avandia has sold for \$90 to \$220, with the TPP covering between \$135 and \$140 per prescription and the *patient paying the balance.*” (emphasis added)).

137. See, e.g., *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 649–50 (2008) (describing injury to competitor by fraud on third-party). In *Bridge*, the Court held that a plaintiff need not show reliance on the defendant’s misrepresentations in order to recover. See *id.* at 648 (accepting third-party reliance). The Court provided an example to explain its reasoning, suggesting that a business, “want[ing] to get rid of rival businesses” might “mail[ ] misrepresentations about

leged scheme had many identifiable victims, and the risk of duplicative recoveries was high—two key factors absent in *Bridge* and critical reasons proximate cause was found lacking in *Holmes, Anza, and Hemi Group*.<sup>138</sup>

#### V. A CONSIGLIERE’S PRACTICAL GUIDANCE FOR ATTORNEYS

At first glance, the *Avandia* decision reads like an absolute win for plaintiffs and an utter defeat for defendants.<sup>139</sup> However, a closer examination suggests plaintiffs should proceed cautiously with *Avandia*-type RICO claims, while defendants should not give up the fight.<sup>140</sup> *Avandia* raises unique considerations for plaintiffs and defendants, but all litigators should be mindful of Rule 11 and proximate cause as two weapons at the forefront of this ongoing battle.<sup>141</sup>

##### A. *Don’t Eat Alone: Guidance for Plaintiffs’ Counsel*

For plaintiffs’ attorneys, the *Avandia* decision provides strong precedent for expansive use of civil RICO, but responsible attorneys should be mindful of (1) the ethical implications of pushing civil RICO too far beyond its intended bounds; (2) the possibility of Rule 11 sanctions; and (3) strong injury and causation arguments that opposing counsel may still advance.<sup>142</sup>

Although *Avandia* opens the door to plaintiffs asserting all manner of “novel and creative” claims, plaintiffs’ attorneys should—in the words of the Eleventh Circuit—“*stop and think* before filing them.”<sup>143</sup> In *Maio*, the Third Circuit rejected the plaintiffs’ theory of injury as “expanding the

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them to their customers and suppliers, but not to the rivals themselves.” *See id.* at 648–50. According to the Court, “[i]f the rival businesses lose money as a result of the misrepresentations, it would certainly seem that they were injured in their business ‘by reason of’ a pattern of mail fraud, even though they never received, and therefore never relied on, the fraudulent mailings.” *Id.* at 649–50.

138. *See supra* notes 48–67 and accompanying text for a discussion of the Court’s handling of proximate cause in *Holmes, Anza, Hemi Group*, and *Bridge*.

139. *See supra* notes 112–38 and accompanying text for an analysis of the *Avandia* decision.

140. *See infra* notes 142–78 and accompanying text for a discussion of practical considerations for litigators in light of the *Avandia* decision.

141. *See infra* notes 142–78 and accompanying text for a discussion of the practical implications of the *Avandia* decision for both plaintiffs’ and defense attorneys.

142. *See infra* notes 143–58 and accompanying text for a discussion of practical implications of *Avandia* for plaintiffs’ attorneys.

143. *See Pelletier v. Zweifel*, 921 F.2d 1465, 1522 (11th Cir. 1991) (imposing Rule 11 sanctions for “baseless” civil RICO claim); *see also* MODEL RULES OF PROF’L CONDUCT r. 3.1 (2013) (prohibiting frivolous claims). In relevant part, Model Rule 3.1 provides, “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is *not frivolous*, which includes a *good faith argument for an extension, modification or reversal of existing law*.” *Id.* (emphasis added).



concept of RICO injury *beyond the boundaries of reason*.<sup>144</sup> Although the court accepted a nearly-identical theory in *Avandia*, this issue should give ethically-minded attorneys reason to pause.<sup>145</sup> With its promise of treble damages, attorney's fees, and access to federal court, civil RICO presents a "powerful incentive . . . to bring facts traditionally thought to establish other causes of action within the ambit of the statute."<sup>146</sup> Many courts have cautioned attorneys to beware of the "powerful, if not [irresistible], temptation to bring civil suits under RICO."<sup>147</sup> Litigators should heed this advice and consider their ethical obligations before advancing creative and expansive RICO claims.<sup>148</sup>

Of course, ethics tend to be personal and subject to fluid interpretation, so plaintiffs' counsel should also beware of Rule 11 sanctions lurking in the background.<sup>149</sup> Many civil RICO critics have advocated increased use of Rule 11 to deter civil RICO abuse, and a number of courts have answered this call.<sup>150</sup> For example, the Eleventh Circuit upheld Rule 11 sanctions against attorneys representing journalists who were injured when a press meeting was bombed, allegedly due to the racketeering activity of the Central Intelligence Agency.<sup>151</sup> Less dramatic examples include sanctions against attorneys for customers unhappy with Victoria's Secret's pricing structure, employees distraught with former employers, and a board member estranged from a non-profit group.<sup>152</sup> If the number of

144. See *Maio v. Aetna, Inc.*, 221 F.3d 472, 495–96 (3d Cir. 2000) (emphasis added).

145. See *supra* notes 129–30 and accompanying text for a critique of the court's attempt to distinguish *Avandia* from *Maio* despite nearly identical theories of injury.

146. See Rehnquist, *supra* note 3; see also *Pelletier*, 921 F.2d at 1522 ("[W]ith regard to civil RICO claims, plaintiffs must stop and think before filing them. . . . When used improperly . . . [civil RICO] provisions allow a complainant to shake down his opponent and . . . extort a settlement.").

147. See, e.g., *Gramercy 222 Residents Corp. v. Gramercy Realty Assocs.*, 591 F. Supp. 1408, 1413 (S.D.N.Y. 1984) ("Obviously, the potential for treble damages and attorneys' fees is a powerful, if not [irresistible], temptation to bring civil suits under RICO."); see also *Chapman & Cole v. ITEL Container Int'l B.V.*, 865 F.2d 676, 685 (5th Cir. 1989) ("Given the resulting proliferation of civil RICO claims and the potential for frivolous suits in search of treble damages, greater responsibility will be placed on the bar to inquire into the factual and legal bases of potential claims or defenses . . . or risk sanctions for failing to do so." (quoting Black & Magenheim, *Using the RICO Act in Civil Cases*, 22 Hous. Law. 20, 24–25 (1984) (internal quotation marks omitted))).

148. See *supra* notes 143–47 and accompanying text for a discussion of ethical reasons to proceed cautiously with novel or creative civil RICO claims.

149. See FED. R. CIV. P. 11 (granting courts broad discretion to impose sanctions for frivolous claims).

150. For a discussion of critics calling for increased use of Rule 11 sanctions to deter civil RICO abuse, see *supra* note 40 and accompanying text.

151. See *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991) ("On this record, we have no difficulty in finding that these appellants unreasonably and vexatiously multiplied these proceedings.").

152. See, e.g., *O'Malley v. N.Y.C. Transit Auth.*, 896 F.2d 704 (2d Cir. 1990) (imposing sanctions in frivolous civil RICO claim by former employee against for-

civil RICO cases continues to climb, more judges—many of whom detest civil RICO—will likely follow suit in granting sanctions.<sup>153</sup>

Finally, plaintiffs' attorneys should not rest on their laurels given that *Avandia* failed to foreclose the lack-of-proximate-cause argument entirely, and the Supreme Court has yet to address the circuit split on this issue.<sup>154</sup> In fact, the district court in the *Avandia* case expressly stated that the TPPs may have difficulty proving proximate cause at trial.<sup>155</sup> More importantly, however, the Supreme Court granted certiorari three times in five years, most recently in 2010, to address civil RICO issues relating to proximate cause.<sup>156</sup> In total, the High Court has addressed civil RICO proximate cause on four occasions, and only once has it found proximate cause sufficiently established.<sup>157</sup> If the Court again entertains the proximate cause issue, and the Court's prior trend continues, *Avandia*- and *Neurontin*-type RICO claims will be quashed.<sup>158</sup>

### B. *Go to the Mattresses: Guidance for Defense Counsel*

Although *Avandia* should rightfully give defense attorneys nightmares, all hope is not lost.<sup>159</sup> Third Circuit defense counselors—particularly those who represent big pharmaceutical companies—should take several actions in response to this case: (1) counsel clients on the implications of *Avandia* and urge them to advocate for legislative reform; (2) if faced with similar litigation, focus on lack of proximate cause and be pre-

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mer employer); *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649 (S.D.N.Y. 1996) (imposing sanctions against plaintiffs alleging Victoria's Secret's "pricing structures with respect to catalogues mailed to different recipients constitute[d] a [RICO] violation"); *Binghamton Masonic Temple, Inc. v. Bares*, 168 F.R.D. 121, 127 (N.D.N.Y. 1996) (imposing sanctions in civil RICO action brought against non-profit by former president).

153. See *ABRAMS*, *supra* note 20, § 1.2, at 11–14 (discussing judicial hostility towards civil RICO); *BATISTA*, *supra* note 3, § 1.02 (“[M]any federal judges have a distaste for civil racketeering actions.”); *SHELDON*, *supra* note 4, § 7.1.5, at 139 (“Many federal courts initially reacted with hostility to civil RICO.”).

154. See *supra* notes 100–38 and accompanying text for a discussion of the Third Circuit's *Avandia* decision. For a discussion of the circuit split on the issues of injury and proximate cause, see *supra* notes 68–99 and accompanying text.

155. See *supra* note 110 and accompanying text for a discussion of the district court's assertion that proximate cause may be difficult to prove in later litigation stages.

156. See *supra* notes 48–67 and accompanying text for a discussion of the Supreme Court's consideration of RICO proximate cause.

157. See *supra* notes 48–67 and accompanying text for a discussion of Supreme Court jurisprudence on civil RICO proximate cause.

158. See *supra* notes 48–67 and accompanying text for a discussion of Supreme Court jurisprudence on civil RICO proximate cause. Also, see *supra* notes 95–99 and accompanying text for a discussion of the *Neurontin* decision and *supra* notes 100–38 and accompanying text for a discussion of the *Avandia* decision.

159. See *infra* notes 160–78 and accompanying text for a discussion of practical implications of the *Avandia* decision for defense attorneys.

pared to seek certiorari to resolve the circuit split; and (3) call for Rule 11 sanctions.<sup>160</sup>

First and foremost, attorneys representing pharmaceutical companies should counsel clients on the implications of *Avandia* and urge clients to seek legislative reform.<sup>161</sup> Clients should be encouraged to enact procedural safeguards to prevent the type of fraudulent activities at issue in *Avandia*.<sup>162</sup> Perhaps more importantly, attorneys should advise pharmaceutical clients to mobilize their powerful lobby to drive civil RICO reform—advocating for a return to RICO’s roots of combating *organized crime*.<sup>163</sup> To date, only the financial industry has been successful in achieving RICO reform, but like the financial lobby, Big Pharma carries weight in Washington.<sup>164</sup>

Historically, however, Congress has resisted RICO reform for fear of looking soft on crime.<sup>165</sup> Given that this trend will likely continue, pharmaceutical defendants will most likely have to fight their civil RICO battles in court.<sup>166</sup> With its fluid and elusive definition, proximate cause should be the defense attorney’s primary weapon in waging that war.<sup>167</sup> Notably, the *Avandia* court accepted the TPPs’ pleading of proximate cause as sufficient to survive a motion to dismiss, but acknowledged the plaintiffs may have difficulty proving causation at trial.<sup>168</sup>

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160. See *infra* notes 161–78 and accompanying text for a discussion of actions defense attorneys should take in light of the *Avandia* decision.

161. See MODEL RULES OF PROF’L CONDUCT r. 2.1 (2013) (“In representing a client, a lawyer shall . . . render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).

162. See *id.* (describing nature of advice attorneys should provide to clients).

163. See CENTER FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/lobby/top.php?indexType=i> [<https://perma.cc/B6UK-LKDS>] (last visited Feb. 3, 2016) (reporting “Pharmaceuticals/Health Products” as top lobbying industry in Washington, DC). For a discussion of RICO’s intended use against organized crime, see *supra* notes 17–22 and accompanying text.

164. See BATISTA, *supra* note 3, § 2.07 (“Despite decades of lobbying efforts by business groups and others, RICO has been amended only once. Enacted over President Clinton’s veto, the Private Securities Litigation Reform Act of 1995 (PSLRA) amended RICO to eliminate securities fraud as a predicate racketeering offense.”); CENTER FOR RESPONSIVE POLITICS, *supra* note 163 (reporting “Pharmaceuticals/Health Products” and “Securities & Investment” among top lobbying industries in Washington, DC).

165. See *supra* note 39 and accompanying text for a discussion of Congress’s reluctance to amend RICO for fear of looking soft on crime.

166. See BATISTA, *supra* note 3, § 2.07 (noting only one substantive change to civil RICO despite lobbying).

167. See *supra* notes 48–67 and accompanying text for a discussion of the Supreme Court’s efforts to define RICO proximate cause.

168. For further discussion of the *Avandia* court’s reservations about the plaintiffs’ future ability to prove causation at trial, see *supra* note 127 and accompanying text.

Significantly, both the *Avandia* and *Neurontin* courts relied on *Bridge* to find proximate cause in the facts before them.<sup>169</sup> Applying *Bridge*, both courts focused on the notion that the plaintiffs were the “primary and intended victims of the scheme to defraud” and that there was “no risk of duplicative recover[y].”<sup>170</sup> Given these same facts, however, a competent attorney could, and should, argue that there are multiple risks for duplicative recovery.<sup>171</sup>

For example, although TPPs pay a significant percent of the cost of a drug, insured individuals typically pay the balance and are thus directly harmed when a pharmaceutical company engages in the type of fraudulent scheme described in *Avandia* and *Neurontin*.<sup>172</sup> Additionally, uninsured individuals are faced with the entire cost of a fraudulently-overpriced medication—an issue the *Neurontin* court dismissed in a footnote as not presently before it.<sup>173</sup> Finally, and perhaps most significantly, manufacturers of competing drugs are financially harmed when a fraudulent scheme causes physicians to disproportionately prescribe a competitor’s drug over their own—a scenario precisely analogous to the hypothetical facts described in *Bridge*.<sup>174</sup> Focusing on this risk of duplicative recoveries may help to undermine application of *Bridge*, where the Court specifically relied on the fact that *only* the plaintiffs were injured and no others stood to recover.<sup>175</sup>

Finally, defense attorneys faced with traditional state fraud claims cloaked in civil RICO’s clothing should call for Rule 11 sanctions.<sup>176</sup> In the same way an athlete asking for the foul often gets the call, defense

169. See *supra* notes 95–99 and accompanying text for a discussion of the *Neurontin* court’s reliance on *Bridge* and *supra* notes 122–25 and accompanying text for a discussion of the *Avandia* court’s similar reliance.

170. See *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 650, 658 (2008) (identifying factors favorable to meeting proximate causation requirement under civil RICO). For further discussion of the *Neurontin* court’s reliance on *Bridge*, see *supra* notes 95–99 and accompanying text. For a discussion of the *Avandia* court’s similar reliance on *Bridge*, see *supra* notes 122–25 and accompanying text.

171. See *infra* notes 172–75 and accompanying text for a discussion of the risks of duplicative recoveries in *Avandia*.

172. For further discussion of the potential parties harmed by the fraudulent schemes at issue in *Neurontin* and *Avandia*, see *supra* note 136 and accompanying text.

173. See *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 38 n.11 (1st Cir. 2013) (“Pfizer raised the possibility that premium payers might also sue as victims of Pfizer’s scheme, but the question of whether any injury to such payers was proximately caused by this scheme is not before us.”).

174. See *supra* note 137 and accompanying text for a discussion of the analogous case provided in *Bridge*, under which competing drug companies may be positioned to claim injury and sue under the facts of *Avandia*.

175. See *supra* notes 63–67 and accompanying text for a discussion of the Court’s reasoning in *Bridge*.

176. See *supra* note 40 and accompanying text for a discussion of calls for increased use of Rule 11 sanctions to deter civil RICO abuse.

attorneys applying this same tactic may be pleased with the results.<sup>177</sup> Countless legal scholars have called for use of Rule 11 sanctions to deter civil RICO abuse, and perhaps if defense attorneys join the call to action, increased sanctions will flow and will act as a check on civil RICO's irresistible allure of treble damages and attorney's fees.<sup>178</sup>

## VI. MORE HITS COMING: WHAT'S NEXT FOR CIVIL RICO?

Whether civil RICO cases today represent "horrible examples of overreach" is a matter of opinion, but it seems undeniably clear that this law has evolved from specifically targeting organized crime into something much broader.<sup>179</sup> The Third Circuit's *Avandia* decision represents yet another expansion of RICO's scope, but the decision's ultimate implications remain to be seen.<sup>180</sup> With so many Big Pharma companies concentrated in the Third Circuit's jurisdiction, additional *Avandia*-type claims will likely follow.<sup>181</sup> As courts continue their struggle to "decipher, administer, and uphold" civil RICO, plaintiffs' attorneys should exercise ethical restraint, while defense lawyers should advocate reform aimed at putting organized crime back in RICO's crosshairs.<sup>182</sup>

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177. See *supra* note 40 and accompanying text for a discussion of calls for increased use of Rule 11 sanctions to deter civil RICO abuse.

178. For a discussion of scholars and others suggesting use of Rule 11 sanctions as a means to curb civil RICO abuse, see *supra* note 40 and accompanying text.

179. See 116 CONG. REC. 35,204 (1970) (statement of Rep. Mikva) ("[W]hatever [RICO's] motives to begin with, we will end up with cases involving all kinds of things not intended to be covered, and a potpourri of language by which you can parade all kinds of horrible examples of overreach."); see also *supra* notes 1–42 and accompanying text for a discussion of RICO's evolution from a law aimed at the Italian-American Mafia into a statute used to bring garden variety fraud claims against businesses.

180. See *supra* notes 100–38 and accompanying text for a discussion of the *Avandia* case and *supra* notes 139–78 and accompanying text for a discussion the case's practical implications.

181. See, e.g., STATE OF N.J. BUS. PORTAL, <http://www.nj.gov/njbusiness/industry/pharmaceutical> [<https://perma.cc/ET5E-3GMZ>] (last visited Feb. 15, 2016) (noting fourteen of twenty largest pharmaceutical companies are located in New Jersey); see also John George, *Pennsylvania Bio CEO: Shire Move a Wake-up Call*, PHILA. BUS. J. (Nov. 20, 2014, 11:30 AM), <http://www.bizjournals.com/philadelphia/blog/health-care/2014/11/pennsylvania-bio-ceo-shire-move-a-wake-up-call.html> [<https://perma.cc/FV8D-VFQ2>] (noting concentration of pharmaceutical companies in Pennsylvania).

182. See *supra* notes 139–78 and accompanying text for a discussion of practical suggestions for litigators post-*Avandia*.