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Payors, Players, and Proximate Cause

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NOTES

PAYORS, PLAYERS, AND PROXIMATE CAUSE

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INTRODUCTION

The price of one vial increased by 1000%. Acthar Gel rose from $40 per vial in 2001 to over $40,000 per vial in 2015.[1] Acthar is a prescription gel injection used to treat multiple sclerosis.[2] Law Enforcement Health Benefits (LEHB), a healthcare payor that insures over eight thousand police officers and their families, pays for it.[3] In May 2021, a class including LEHB sued Acthar's owners, manufacturers, and others under the Racketeer Influenced and Corrupt Organizations Act (RICO). The plaintiffs alleged that Acthar's manufacturer increased its price to "unconscionable levels" and unlawfully marketed Acthar for unapproved uses and doses.[4] These activities, they alleged, financially harmed payors like LEHB.[5] Now, the district court must determine whether these plaintiffs have successfully fulfilled the requirements of standing for a civil RICO claim to proceed.[6] If so, they could recover three times the damages they would in a regular class action.[7] This is not the first court to encounter this issue.

This Note discusses a two-sided, five-circuit split on the matter. At issue is whether pharmaceutical companies' allegedly misleading drug labels that providers rely upon when prescribing drugs to patients,

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1 Complaint ¶ 191, Law Enf't Health Benefits, Inc. v. Trudeau, No. 3:21-cv-50215, (N.D. Ill. filed May 26, 2021).

2 *Id.* ¶¶ 58, 313.

3 *Id.* ¶ 57.

4 *Id.* ¶¶ 2–3.

5 *Id.* ¶ 426.

6 *Id.*

7 *See id.* ¶ 557; 18 U.S.C. § 1964(c) (2018) (listing the statutory requirements for awarding successful civil RICO plaintiffs treble damages).

which plaintiffs classify as mail and wire fraud, are the proximate causes of third-party payors (TPPs) overpaying for medication, or enduring a financial injury, such that the TPPs fulfill RICO standing under 18 U.S.C. § 1964(c). Included in this issue are questions about whether the alleged RICO violations *directly* caused the TPPs' financial injuries such that plaintiffs meet the proximate cause requirements under § 1964(c) to state a valid claim. Presently, the First, Third, and Ninth Circuits agree that allegations of misleading drug labels fulfill the proximate cause requirement of a civil RICO claim.[8] The Second and Seventh Circuits disagree, explaining that it is too difficult to distinguish between doctors' independent prescribing practices and the degree to which they were influenced by a drug label to consider an allegedly misleading label a proximate cause.[9] In other words, the Seventh and Second Circuits hold that an allegedly misleading label is too attenuated from the plaintiff's injury to form a direct relationship required for standing under § 1964(c). This Note illustrates the main tensions and opportunities for factual variations in these cases, and those to come, that could influence a court's proximate cause analysis. If civil RICO plaintiffs satisfy proximate cause and meet the remaining elements of standing under § 1964(c), they can move to the next stage of their lawsuits. And these lawsuits have billions of dollars—treble billions—at stake.[10]

This Note argues that future courts should determine whether plaintiffs properly allege proximate cause in similar cases with the following two-step inquiry. First, courts should determine whether the pharmaceutical company's actions and the TPP's injury meet the directness "separation" requirement as set forth in *Hemi Group, LLC v. City of New York* (*Hemi*).[11] Second, if the allegations fail the *Hemi* separation test, the inquiry ends. If they meet it, courts should then ensure that imposing liability aligns with the policy reasons that *Holmes v. Securities Investor Protection Corp.* (*Holmes*)[12] gives for establishing a directness requirement in a proximate cause inquiry. When a court ensures that liability aligns with Holmes's policy reasons, it confirms

8 *See, e.g.*, Kaiser Found. Health Plan, Inc. v. Pfizer, Inc. (*In re* Neurontin Mktg. & Sales Pracs. Litig.), 712 F.3d 21, 39–40 (1st Cir. 2013); *In re* Avandia Mktg., Sales Pracs. & Prod. Liab. Litig., 804 F.3d 633, 644–45 (3d Cir. 2015); Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharms. Co., 943 F.3d 1243, 1257–59 (9th Cir. 2019).

9 *See, e.g.*, UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 134 (2d Cir. 2010); Sidney Hillman Health Ctr. of Rochester v. Abbott Lab'ys, 873 F.3d 574, 578 (7th Cir. 2017).

10 § 1964(c).

11 Hemi Grp., LLC v. City of New York, 559 U.S. 1, 11 (2010).

12 Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 269–70 (1992).

that the liability aligns with the goals of civil RICO claims. It also uncovers any sources of intervening cause or attenuation not recognized in the *Hemi* separation test. If plaintiffs properly allege directness and a court determines that imposing liability is proper under *Holmes*, they satisfy proximate cause. So far, the Second Circuit's reasoning most relies on *Hemi*'s separation test in the way this Note suggests courts should. But that court's outcome also relies on various elements of proximate cause that this Note argues should not weigh into the analysis until first establishing directness.

Part I of this Note discusses the background of civil RICO claims and the requirements of statutory standing under § 1964(c). Part II then examines the origin of the Supreme Court's "directness" perspective of proximate cause and the Court's application of directness in recent cases. It will also propose the following process for courts to evaluate proximate cause in the current split, based on the Supreme Court's precedent. First, courts should conduct a *Hemi* separation test to satisfy directness. Second, they should check that outcome against the *Holmes* policy reasons for instituting a directness requirement. Part III surveys the relationships between payors and players—pharmaceutical companies, TPPs, insurers, physicians, and patients—in the instant split, analyzes the circuits' reasonings and outcomes, and explains why the Second Circuit's reasoning most closely follows this Note's proposed inquiry. Finally, Part IV applies the proposed inquiry framework to hypothetical examples of proximate cause analyses that future courts might encounter.

I. BACKGROUND OF CIVIL RICO CLAIMS

A. Legislative Motives and Text

Prosecutors and citizens alike turn to the Racketeer Influenced and Corrupt Organizations title of the Organized Crime Control Act of 1970[13] for a solution to a timeless problem: organized crime.[14] In the late 1960s, the Senate determined that existing civil remedies for

13 Pub. L. No. 91-452, § 901, 84 Stat. 922, 941 (1970) (codified at 18 U.S.C. §§ 1961–68); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1011 (1980). G. Robert Blakey and Brian Gettings have noteworthy expertise in RICO's drafting. Mr. Blakey was the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures when the Organized Crime Control Act of 1970 was underway. *Id.* at 1009. Mr. Gettings was Counsel and Director of the House Republican Conference Task Force on Crime from 1967 to 1969, "when legislative predecessors to the Organized Crime Control Act were drafted and first considered." *Id.*

14 Blakey & Gettings, *supra* note 13, at 1013.

organized crime were "inadequate to remove criminal influences from legitimate endeavor organizations."[15] Existing remedies were actually not civil at all.[16] In fact, they included arresting, convicting, and imprisoning criminal enterprise leaders.[17] Those temporary solutions, although they prevented harmful individuals from further hurting the public, did not reach the root of the problem.[18] Their effectiveness also relied only on the government's enforcement ability.[19] Rather than remain hopeful that arresting organized crime leaders would control increasing crime and harm to the public, the Senate recognized a need to direct solutions toward the root of criminal operations.[20] Those solutions included giving courts the power to "impose intrusive, structural reforms" on criminal enterprises, such as dissolving them completely.[21] The Senate envisioned courts issuing equitable remedies between the public and criminal enterprises.[22] These remedies would, the Senate hoped, better deter criminal behavior than merely removing a sole leader from the enterprise.[23] Allowing members of the public to seek civil remedies for harms from organized crime also mirrored the remedies available in antitrust law at the time.[24] The threat of civilian enforcement, in addition to government enforcement, fulfills RICO's purposes of controlling organized crime through economic consequences.[25]

The meaning of "organized crime" varies with context.[26] Rather than adhering to a solely "Mafia"-like perception of organized crime while drafting RICO, congressional committees recognized that organized crime also exists in the world of legitimate businesses.[27] The executive branch, too, urged Congress to develop solutions for organized crime in legitimate business ventures.[28] According to President Lyndon B. Johnson's Commission on Law Enforcement and Administration of Justice (Commission), "[o]rganized crime is a

15 *See* U.S. DEP'T OF JUST., CIVIL RICO: A MANUAL FOR FEDERAL ATTORNEYS 17 (2007) (quoting S. REP. NO. 91-617, at 78 (1969)).

16 *See id.*

17 *Id.*

18 *Id.*

19 *See id.*

20 *See id.*

21 *Id.* at 18.

22 *Id.*

23 *Id.* at 20.

24 *Id.*

25 *Id.* at 19.

26 *See* Blakey & Gettings, *supra* note 13, at 1013 n.15.

27 *Id.* at 1014–15.

28 *Id.*

society that seeks to operate outside the control of the American people and their governments. . . . [It] is also extensively and deeply involved in legitimate business . . . [and] employs illegitimate methods—monopolization, terrorism, extortion, tax evasion—to . . . exact illegal profits from the public."[29] A 1969 Senate bill, based on some of the Commission's recommendations for combatting organized crime, eventually developed into RICO's predecessor.[30] Legislators' concept of organized crime—uncontrollable businesses focused on exacting illegal profits from innocent citizens—underlies RICO's remedies.

RICO is not just a tool for government control over organized crime. It is also a remedial statute for civil matters.[31] It "authorize[s] . . . criminal or civil remedies on conduct already criminal, when performed in a specified fashion" as delineated by the statute.[32] Section 1962 provides civil remedies for four types of conduct:

> (1) using income derived from a pattern of racketeering activity[33] to acquire an interest in an enterprise;
>
> (2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity;
>
> (3) conducting the affairs of an enterprise through a pattern of racketeering activity; and
>
> (4) conspiring to commit any of these offenses.[34]

Today, Congress urges courts to construe RICO liberally from the "perspective of the victim, not the perpetrator."[35] A private civil right of action in § 1964 provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue."[36] Notably, a successful plaintiff under § 1964 is entitled to treble

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29 PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 187 (1967).

30 Blakey & Gettings, *supra* note 13, at 1017.

31 *Id.* at 1021 n.71 (quoting Pub. L. No. 91–452, § 904(a), 84 Stat. 922, 947 (1970)); *see also* 18 U.S.C. § 1964 (2018).

32 Blakey & Gettings, *supra* note 13, at 1032.

33 "[R]acketeering activity" is defined, in relevant part, as "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)." § 1961(1).

34 Blakey & Gettings, *supra* note 13, at 1021–22 (footnotes omitted) (citing 18 U.S.C. § 1962(a)–(d)). For an explanation of how courts have interpreted "person," "enterprise," and "pattern of racketeering activity," see *id.* at 1022–31.

35 *Id.* at 1032–33; § 1961 (liberal construction provision) ("The provisions of this title . . . shall be liberally construed to effectuate its remedial purposes.").

36 § 1964(c).

damages and the cost of the suit, including attorney fees.[37] The threat of treble damages encourages plaintiffs to bring claims and discourages entities from engaging in illegal activities.

Although encouraging plaintiffs to bring claims under § 1964 supplements law enforcement's prosecutorial efforts,[38] it also offers a potential for abuse.[39] Among the potential types of abuse are stigma resulting from meritless claims, reputational damage, and an inappropriately broad application of RICO.[40] Courts must navigate the tension between Congress's mandate to construe RICO liberally and ensuring they do not create precedents that open doors to abuse. Judicial interpretations of standing requirements under § 1964 are one tool for this dilemma.[41] Courts impose extra-statutory requirements on the standing text in § 1964 that limit the amount of successful claimants and, therefore, limit defendants' potential liability for treble damages.

B. Statutory Standing Under § 1964(c)

To satisfy statutory standing in the civil RICO context, a plaintiff must show (1) injury to "business or property" and (2) that the injury was "by reason of" a RICO violation.[42] Courts adhere to the idea that Congress modeled this language closely after the Clayton Act, a statute that creates private rights of action for citizens to allege antitrust violations.[43]

In *Sedima, S.P.R.L. v. Imrex Co.* (*Sedima*),[44] the Supreme Court considered the boundaries of the first requirement for statutory

37 *Id.*

38 *See* PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., *supra* note 29, at 208 ("Government at various levels has not explored the regulatory devices available to thwart the activities of criminal groups, especially in the area of infiltration of legitimate business. . . . Civil proceedings could stop unfair trade practices and antitrust violations by organized crime businesses. Trade associations could alert companies to organized crime's presence and tactics and stimulate action by private business.").

39 *See* Robert Taylor Hawkes, Note, *The Conflict Over RICO's Private Treble Damages Action*, 70 CORNELL L. REV. 902, 916–19 (1985).

40 *See id.*

41 *See* Blakey & Gettings, *supra* note 13, at 1040–42.

42 § 1964(c).

43 15 U.S.C. § 15 (1976) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."); *see* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 267–68 (1992) ("We have repeatedly observed that Congress modeled § 1964(c) [of RICO] on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act . . . .").

44 473 U.S. 479 (1985).

standing: injury to "business or property." In that case, Sedima and Imrex entered into an agreement to split the net proceeds from ordering, obtaining, and shipping parts for a Belgian corporation.[45] Imrex was tasked with shipping the parts to Belgium.[46] During their relationship, Sedima suspected that Imrex was charging Sedima for nonexistent expenses, thereby inflating its own proceeds at Sedima's expense.[47] Sedima's claims at the district court level included RICO claims against Imrex. The alleged injury was $175,000 in overbilling, or mail and wire fraud.[48] The Court reversed a Second Circuit decision reasoning that because the Clayton Act requires plaintiffs to allege a particular "antitrust injury," RICO plaintiffs must allege a "racketeering injury."[49] The Second Circuit envisioned this "racketeering injury" as one that was "not simply caused by the predicate [racketeering] acts, but also caused by an activity which RICO was designed to deter."[50] In the Second Circuit's view, Sedima's injury was not a result of the certain types of organized crime that Congress envisioned RICO deterring.[51] Rather, it was already compensable through other means.[52] The Court disagreed.[53] Section 1964(c)'s language does not call for a plaintiff to allege a particular "racketeering injury" as an element to state a claim.[54] Unlike the requirements for alleging an "antitrust" injury under the Clayton Act, for RICO, as long as the plaintiff was injured—regardless of the type—by the defendant's racketeering activity, that plaintiff's claim does not fail for lack of a "racketeering injury."[55] Eight years later, the Court affirmed this lack of a requirement for a "racketeering injury" in *Holmes v. Securities Investor Protection Corp.* (*Holmes*).[56] On its face, it may seem that *Sedima* broadened the Court's conception of recovery under RICO by allowing plaintiffs to allege any injury. However,

45 *Id.* at 483–84.

46 *Id.*

47 *Id.* at 484.

48 *Id.*

49 *Id.* at 481, 485 (quoting Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 496 (2d Cir. 1984)).

50 *Id.* (quoting *Sedima*, 741 F.2d at 496).

51 *See id.*

52 *See id.*

53 *Id.* at 495 ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement.").

54 *Id.* at 495–96.

55 *See id.* at 496.

56 *See* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 269 n.15 (1992).

plaintiffs must still meet the second requirement of statutory standing to bring a valid claim: whether they were injured by reason of the alleged racketeering activity.[57] The instant split's disagreements center around this second requirement—what does *by reason of* mean?

In *Holmes*, the Court evaluated the second part of statutory standing under § 1964(c)—that the injury must be "by reason of" a RICO violation.[58] Despite the *Sedima* Court's departure from precedent that relies on the Clayton Act to interpret RICO injuries, the Court continues to derive RICO's meaning from the Clayton Act for the second part of the statutory standing requirement.[59] In *Holmes*, the Court determined that "by reason of" means that plaintiffs must establish that a defendant's alleged RICO violation *proximately caused* their injuries.[60] This determination imposed an additional burden on plaintiffs seeking to use civil RICO as a means of redress. Since the 1992 *Holmes* decision, the Court has further elaborated on the purpose and its characterization of extraconstitutional standing requirements such as those *Holmes* requires for § 1964(c).[61]

II. PROXIMATE CAUSATION

A. Holmes *and § 1964(c)*

In addition to imposing a general proximate cause requirement on plaintiffs bringing claims under § 1964(c), *Holmes* set forth the elements of a § 1964(c) proximate cause analysis. Courts have since interpreted and followed them in determining civil RICO standing in contexts different from *Holmes*.[62] The plaintiff in *Holmes*, the Securities Investor Protection Corporation (SIPC), claimed a financial injury

57 18 U.S.C. § 1964(c) (2018).

58 *Id.*

59 *See Holmes*, 503 U.S. at 267–68. The "by reason of" language also appears in the Clayton Act. *Id.* at 267. The Court supported its reasoning with analogies to the Clayton Act, stating, "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Id.* "[W]e held that a plaintiff's right to sue under § 4 required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Id.* at 268. *But see* Patrick Wackerly, Note, *Personal Versus Property Harm and Civil RICO Standing*, 73 U. CHI. L. REV. 1513, 1529 (2006) ("The *Sedima* holding marks an end to the usefulness of Clayton Act jurisprudence in determining the present RICO standing question. . . . Supreme Court precedent on civil antitrust standing cannot bind interpretations of § 1964(c), even in the presence of a general Congressional purpose to adopt antitrust remedies for civil RICO actions.").

60 *Holmes*, 503 U.S. at 267–68.

61 *See* Daniel Yablon, Note, *Proximate Cause in Statutory Standing and the Genesis of Federal Common Law*, 107 CALIF. L. REV. 1609, 1620–22 (2019).

62 *See infra* Section II.B.

against the defendant Holmes, an officer, director, and major shareholder of a company.[63] SIPC was an insurance-like nonprofit corporation responsible for insuring securities who must reimburse their customers' claims.[64] SIPC alleged that Holmes engaged in a fraudulent scheme by making overly optimistic statements about his company's future.[65] These misleading statements, SIPC purported, caused perception of market fraud, caused stock prices to fall, and resulted in SIPC's clients paying out claims.[66] SIPC eventually provided almost $13 million to its clients.[67] Allegations that Holmes committed mail and wire fraud[68] brought SIPC's claims within the realm of civil RICO. The Court's task, therefore, was to determine if SIPC was injured "by reason of" the alleged mail and wire fraud.[69]

Ultimately, the Court determined that to fulfill the "by reason of" requirement in § 1964(c), SIPC had to establish that the mail and wire fraud conduct proximately caused its $13 million loss.[70] The Court first entertained the idea that when a plaintiff is injured "by reason of" a RICO violation, the plaintiff fulfills the statutory standing requirement as long as the injury would not have occurred "but for" the defendant's RICO violation.[71] Yet, the Court quickly dismissed such a broad reading of the statutory standing requirements.[72] Before even interpreting the meaning of § 1964(c), the Court noted that Congress almost certainly did not intend for all "factually injured plaintiffs to recover" in civil RICO suits.[73] Rather, there must be a mechanism somewhere in the statute to limit liability.[74] At the time, multiple circuits had determined that plaintiffs must allege not only "but for" cause, but also proximate cause to fulfill statutory standing under § 1964(c).[75] These prior interpretations persuaded the Court's decision.

The Court also searched statutory history for the meaning of "by reason of."[76] It noted Congress's reliance on the Clayton Act of 1914

63 *Holmes*, 503 U.S. at 261–63.
64 *Id.* at 261–62.
65 *Id.* at 262.
66 *Id.* at 262–63.
67 *Id.* at 263.
68 18 U.S.C. §§ 1341, 1343 (2018).
69 *Id.* § 1964(c).
70 *See Holmes*, 503 U.S. at 266–70.
71 *Id.* at 265–66.
72 *Id.* at 266.
73 *Id.*
74 *Id.* at 266 n.10.
75 *Id.* at 266 n.11.
76 *Id.* at 267.

for modeling the statutory standing requirement under § 1964(c).[77] The Court further noted that the Clayton Act's "by reason of" language was the same as and modeled after the Sherman Act of 1890.[78] The Court had previously interpreted both antitrust sections to require that plaintiffs fulfill "common-law principles of proximate causation" to recover.[79] Congress passed RICO with knowledge of the Court's prior interpretations of the Clayton and Sherman Acts' statutory standing provisions.[80] Therefore, *Holmes* concluded that Congress intended to give the "by reason of" language in § 1964(c) the same meaning it had in the Sherman and Clayton Acts.[81] Accordingly, the Court concluded that SIPC must allege proximate cause to fulfill statutory standing under § 1964(c).[82]

Holmes did not provide a formula for determining proximate cause. In fact, the Court refused to provide one. The Court noted that "proximate cause" is actually a term used to describe the "judicial tools used to limit a person's responsibility for the consequences of that person's own acts."[83] The outcome and opinion in *Holmes* relied on common-law principles of proximate causation characteristic of the Sherman Act, Clayton Act, and § 1964(c). Those principles revolved around a "*direct* relation between the injury asserted and the injurious conduct alleged."[84] The Court provided three additional reasons, apart from adherence to common-law principles, to bolster its conclusion that directness is one of the central elements of Clayton Act—and therefore RICO—causation.[85] "First, the less *direct* an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other,

77 *Id.*

78 *Id.*

79 *Id.* at 267–68 (quoting and citing Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 532–34 (1983) ("Before 1914, lower federal courts had read [the Sherman Act] to incorporate common-law principles of proximate causation, and we reasoned, as many lower federal courts had done before us, that congressional use of the [Sherman Act] language in [the Clayton Act] presumably carried the intention to adopt 'the judicial gloss that avoided a simple literal interpretation.' Thus, we held that a plaintiff's right to sue under [the Clayton Act] required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." (citations omitted) (quoting *Associated Gen. Contractors of Cal., Inc.*, 459 U.S. at 534)).

80 *Id.* at 268.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.* (emphasis added).

85 *Id.* at 269.

independent, factors."[86] "Second, . . . recognizing claims of the in*direct*ly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries."[87] "[F]inally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since *directly* injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."[88]

These three reasons for focusing on a directness aspect of proximate cause may be abbreviated as: (1) difficulty in ascertaining damages, (2) judicial obstacles to preventing multiple recoveries for indirect injuries, and (3) directly-injured victims are in the best position to act as private attorneys general. Essentially, the requirement that plaintiffs properly allege proximate causation to satisfy § 1964(c) ensures that those suing and benefitting from treble damages are the "proper plaintiffs."[89]

In *Holmes*, SIPC's complaint did not satisfy proximate cause.[90] It therefore failed to attain standing under § 1964(c).[91] SIPC's harm, the Court explained, was too remote from the alleged mail fraud, wire fraud, and stock manipulation.[92] Indeed, SIPC's harm was "*purely contingent* on the harm suffered by" SIPC's own clients, the securities brokers.[93] Because those brokers could not pay the claims of the stockholders, they drew money from SIPC.[94] That was the only connection SIPC, a general creditor, had to the alleged RICO violations.[95] After establishing that the relationship between the conduct and injury was not direct, the Court then explained that this outcome aligned with the three reasons it gave for imposing a directness requirement itself: (1) it would be very difficult to determine the extent to which the financial injury resulted from the actual RICO conduct, (2) the court would face great obstacles in determining how to apportion the damages so as to prevent multiple recoveries, and (3) the actual brokers—the more directly injured

86 *Id.* (emphasis added).

87 *Id.* (emphasis added).

88 *Id.* at 269–70 (emphasis added).

89 *Id.* at 274; 18 U.S.C. § 1964(c) (2018) (awarding successful civil RICO plaintiffs treble damages).

90 *Holmes*, 503 U.S. at 274.

91 *Id.*

92 *Id.* at 271.

93 *Id.* (emphasis added).

94 *Id.*

95 *Id.*

party—could bring civil RICO claims instead of SIPC, ensuring an alternate path for justice.[96] Moreover, the Court clarified that even if RICO might be the correct remedy for Holmes's alleged violations, SIPC was not the correct plaintiff.[97] In *Holmes*, finding a lack of proximate cause actually advanced the congressional mandate to construe RICO claims liberally, because it suggested that other plaintiffs would have more probable, proper success.[98] By preventing indirectly injured plaintiffs from burdening courts with complicated litigation, the Court preserved remedies for the proper types of plaintiffs.[99]

Holmes's three reasons for the importance of maintaining a directness requirement in a § 1964(c) proximate causation analysis are not positive driving factors upon which an analysis should be based. Rather, they explain *why* the Court emphasizes the importance of a direct relationship requirement between an injury and the defendants' acts. It would be incorrect for a court after *Holmes* to establish proximate cause between alleged conduct and an injury on the sole basis that, for example, in the case before it, (1) it would not be too difficult to ascertain damages, (2) there are judicial mechanisms for preventing multiple recoveries, or (3) there are not more directly injured victims in a better position to bring a civil suit. To justify proximate cause because it satisfies the "reasons" for the directness requirement is to ignore what the "directness" requirement actually is in the first place. The three reasons to view proximate cause as a matter of directness serve as a confirmation—or a check—on the court that the correct plaintiff is bringing the civil RICO claim.[100]

Indeed, the *Holmes* Court limited its proximate cause analysis to the facts before it. In a footnote, the Court explained, "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case."[101] Moreover, "the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text."[102] The *Holmes* Court did not intend to

96 *See id.* at 272–73.

97 *See id.* at 274.

98 *See id.*

99 *See id.*

100 *See id.* (holding "not that RICO cannot serve to right the conspirators' wrongs, but merely that the nonpurchasing customers, or SIPC in their stead, are not proper plaintiffs").

101 *Id.* at 272 n.20 (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983)).

102 *Id.* at 273 n.20.

use the term "direct" like prior courts, and using it did not suggest anything about those courts' results.[103] While *Holmes* clarifies the legal requirements of statutory standing in the civil RICO context, the Court indicates that each case requires a fact-specific proximate cause analysis.[104] Yet, *Holmes* indicates that a proximate cause determination must focus on the directness between conduct and an injury before turning to the three reasons for the directness itself or before considering other intervening causes that could relieve a defendant of liability. Three Supreme Court cases after *Holmes*—*Anza*, *Bridge*, and *Hemi*—interpret and apply *Holmes*'s proximate cause analysis under § 1964(c) with different facts. Circuits involved in the instant split analyze and use these three cases to support their arguments. Accordingly, those analyses reflect the circuits' interpretations of *Holmes* itself.

B. Holmes*'s Proximate Cause Progeny*

1. *Anza v. Ideal Steel Supply Corp.* (2006)

Over twenty years after *Holmes* in 2006, *Anza v. Ideal Steel Supply Corp.* (*Anza*)[105] held that a plaintiff's injury did not satisfy the § 1964(c) requirement of proximate causation.[106] Ideal Steel Supply, a New York corporation, offered steel mill products, services, and supplies. The Anzas owned National Steel Supply, Ideal's main competitor.[107] Ideal sued the Anzas, alleging two RICO claims: (1) that the Anzas committed mail and wire fraud by submitting false tax returns[108] and (2) that the Anzas had used or invested income derived from a pattern of racketeering activity.[109] The first alleged RICO violation, Ideal argued, resulted from National failing to charge customers the proper New York State sales tax to certain customers and thereby giving National a competitive advantage.[110] The second RICO violation, as alleged by Ideal, allowed the Anzas to open another facility.[111] Ideal's injury from this new facility was a negative impact on its business and market share.[112]

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103 *Id.*
104 *See id.* at 272 n.20.
105 547 U.S. 451 (2006).
106 *Id.* at 461.
107 *Id.* at 453–54.
108 *Id.* at 454–55; *see* 18 U.S.C. §§ 1341, 1343 (2018).
109 *Anza*, 547 U.S. at 455; *see also* § 1962(a).
110 *Anza*, 547 U.S. at 454–55.
111 *Id.* at 455.
112 *Id.*

The *Anza* Court interpreted *Holmes*'s proximate cause requirements for § 1964(c) as: "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led *directly* to the plaintiff's injuries."[113] It reaffirmed the importance of a directness requirement for a proximate cause determination. The Anzas' alleged violations did not *directly* lead to Ideal's injuries for two reasons. First, the "direct victim of [the Anzas' alleged mail and wire fraud] conduct was the State of New York, not Ideal."[114] Because the State of New York experienced the decreased tax revenue, the State of New York was the directly injured party of such fraud.[115] The *direct* cause of Ideal's alleged injury was National's reduced prices that drew away Ideal's customers.[116] National's lower, more attractive prices were "entirely distinct from the alleged RICO violation (defrauding the State)."[117] Moreover, while in *Holmes* the alleged violations did not satisfy the directness requirement because the injuries were contingent on other parties' actions, *Anza*'s holding relies on a lack of fit between Ideal's injury and the RICO violation. Lower prices injured Ideal. Wire and mail fraud did not. *Anza* added an additional, tangible layer to the Supreme Court's interpretation of directness for proximate cause satisfactory for § 1964(c). Not only does directness call for the absence of the sort of third party "contingency" present in *Holmes*, but it also calls for the presence of a "fit" between the injury and the RICO conduct itself. Accordingly, the presence of contingency or absence of "fit" undermines directness and, therefore, liability.

Second, *Anza*'s outcome agreed with *Holmes*'s three reasons for requiring directness. Regarding the first reason, difficulty in ascertaining damages, the *Anza* Court held that Ideal's reduced business could have resulted from myriad factors besides the alleged RICO violations.[118] To determine the amount of lost sales, a court would have to connect the defendant's lower prices to an effect on the plaintiff's income and sales.[119] For the second reason, judicial obstacles to preventing multiple recoveries, the Court recognized that this risk was low in this context.[120] However, the *Anza* Court emphasized the persuasive presence of the third reason for a directness requirement,

113 *Id.* at 461 (emphasis added).
114 *Id.* at 458.
115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.* at 459.
119 *Id.*
120 *See id.*

ensuring vindication through directly injured victims acting as private attorneys general.[121] Because Ideal accused the Anzas of defrauding the State of New York, the State was well within its power and ability to pursue remedies as it deemed appropriate[122] (as the actual attorney general, to boot). Moreover, if the State brought suit, its damages of lost tax revenue would be easier for courts to calculate than Ideal's injury of lost business.[123] The *Anza* court explained that *Holmes*'s proximate cause requirement functions to prevent just these types of issues—"uncertain inquiries"—from dominating civil RICO claims.[124] The following case from the Supreme Court on this topic, *Bridge*, affirmed this format of reasoning.

2. *Bridge v. Phoenix Bond & Indemnity Co.* (2008)

After *Bridge v. Phoenix Bond & Indemnity Co.* (*Bridge*),[125] a plaintiff need not prove reliance on a defendant's alleged RICO violations in order to establish proximate cause for statutory standing under § 1964(c). In *Bridge*, both the plaintiffs and defendants were bidders in a public auction of tax liens a city acquires from delinquent taxpayers.[126] Both plaintiffs and defendants had potential to profit from purchasing the debt, so all bidders aimed to obtain liens for the lowest prices possible.[127] Various rules prohibited bidders from using agents to submit simultaneous bids for the same lien, to prevent fraudulent bidding.[128] The plaintiffs alleged that defendants committed mail fraud in furtherance of a racketeering scheme to violate the bidding rules.[129] The alleged injury was plaintiffs' deprivation of a fair share of low-priced liens and the resulting profit.[130] Accordingly, they argued that this injury to business was "by reason of" the defendant's alleged mail fraud and racketeering activity.[131] The issue in *Bridge* was whether plaintiffs had to prove *reliance* on the defendant's alleged

121 *See id.* at 460.
122 *See id.*
123 *See id.*
124 *Id.*
125 553 U.S. 639 (2008).
126 *Id.* at 642–43.
127 *Id.*
128 *Id.* at 643.
129 *Id.* at 643–46.
130 *Id.* at 644.
131 *Id.* at 648.

RICO violations in order to fulfill proximate causation.[132] The answer: no.[133]

The Court refused to make reliance a requirement of proximate causation necessary to fulfill standing under § 1964(c). The Court reasoned first that Congress did not intend to create a reliance requirement in § 1964(c) from the language "by reason of."[134] Requiring reliance would narrow the instances in which a party could establish standing, but a party might be injured by racketeering activity even though it had not relied on any illegal RICO activity.[135] Next, the Court reasoned that this result was consistent with the directness principles in *Holmes* and *Anza*: "[F]irst-party reliance [is not] necessary to ensure that there is a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury to satisfy the proximate-cause principles articulated in *Holmes* and *Anza*."[136] However, "[p]roof that the plaintiff relied on the defendant's misrepresentations may in some cases be sufficient to establish proximate cause, but there is no sound reason to conclude that such proof is always necessary."[137] Additionally, "the absence of first-party reliance may in some cases tend to show that an injury was not sufficiently direct."[138] Consequently, a court need not determine whether a plaintiff relied on an alleged RICO violation, but courts may use reliance as evidence that establishes directness. With a reliance requirement disposed of, the Court analyzed proximate cause in the case similarly to the *Anza* analysis: determine directness or lack thereof, then check the conclusion with the *Holmes* policy reasons for directness.

Bridge further confirmed that the "directness" of the relationship between the injury and the alleged RICO violation was the key element of whether proximate cause existed.[139] For the *Bridge* Court, the plaintiff's injury *directly* resulted from the alleged RICO conduct when plaintiffs were the "*only* parties injured by [defendants'] misrepresentations" and there were no other independent, or contingent, factors that could have accounted for the plaintiffs' injuries.[140] As a result, *Bridge* added an additional element to a directness analysis: whether the plaintiffs were the *only* parties injured

132 *See id.* at 641–42.
133 *Id.* at 659.
134 *See id.* at 649–50 (quoting 18 U.S.C. § 1964(c) (2018)).
135 *See id.*
136 *Id.* at 657–58.
137 *Id.* at 659.
138 *Id.*
139 *See id.*
140 *Id.* at 658; *see also* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 271 (1992).

by the misrepresentations. This element, though, blends into the *Holmes* policy reasons for requiring directness. Unsurprisingly, the court turned to those reasons to justify its decision that the relationship between conduct and injury was sufficiently direct.

The Court connected the case before it to the *Holmes* reasons: "[(1)] there are no independent factors that account for respondents' injury [that would make it difficult to determine damages], [(2)] there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and [(3)] no more immediate victim is better situated to sue."[141] Like *Anza*'s structure of analysis, this too suggests that the *Holmes* three "factors" do not drive the directness analysis. Rather, they serve as additional considerations to distinguish facts from case to case.

Instead of imposing a reliance requirement in a proximate cause analysis, *Bridge* affirmed that the main inquiry for proximate cause is whether there is a "sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury."[142] Although an injury due to a plaintiff's reliance on the alleged RICO violation is evidence of proximate cause, reliance is not an "indispensable requisite of proximate causation."[143] By eliminating a reliance requirement altogether, though, the Court honed the proximate cause analysis into one of directness. *Bridge* does not contribute any new factors or methods to the directness requirement apart from affirming it as the correct approach for analyzing proximate cause. Instead, it compared the facts before it to *Holmes* and *Anza* to prevent inconsistent results within the triad of cases.[144] A fourth case, *Hemi*, further illuminated the directness approach that is most consistent with the Court's § 1964(c) proximate cause jurisprudence thus far and that courts in this split should adopt as a format of analysis in the future.

3. *Hemi Group, LLC v. City of New York* (2010)

Hemi Group, LLC v. City of New York (*Hemi*)[145] clarifies the approach courts should take to analyzing directness in the instant split. In *Hemi*, the City of New York alleged that Hemi Group, an online cigarette retailer, committed mail and wire fraud under § 1961 by failing to provide required excise cigarette tax information to the State of New

141 *Bridge*, 533 U.S. at 658.
142 *Id.* at 657.
143 *Id.* at 659.
144 *See id.* at 657–58.
145 559 U.S. 1 (2010).

York.[146] The City's alleged injury was tens of millions of dollars of lost tax revenue "by reason of" Hemi Group's alleged mail and wire fraud.[147] Ultimately, the Court determined that the City of New York could not show that its lost tax revenue was "by reason of" Hemi Group's alleged mail and wire fraud.[148]

Similar to the *Bridge* Court, *Hemi* expressly defined the focus of proximate cause in the RICO context: "Our precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm."[149] Notably, the Court relied on *Anza*'s reasoning, where there was no proximate cause when "conduct directly causing the harm was distinct from the conduct giving rise to the fraud."[150] In *Hemi*, the City of New York's harm resulted from reduced tax revenue from customers not purchasing cigarettes; Hemi's alleged RICO violation was mail and wire fraud.[151] The parties and injuries were too separate to impose liability.[152] Chief Justice Roberts, writing for the majority, asserted that these "separate *actions* . . . carried out by separate *parties*" did not establish the requisite allegations for standing under § 1964(c).[153]

Separate *actions* + separate *parties* = not direct. This is *Hemi*'s method of determining directness, and it is consistent with the Court's prior analyses in *Holmes*, *Anza*, and *Bridge*. Indeed, *Hemi* illuminates those cases' reasoning. Plaintiff SIPC in *Holmes* did not satisfy directness because its injury actually resulted from the brokers' (parties) inability to pay claims to customers (actions)—not defendant Holmes's (party) mail and wire fraud (action).[154] In *Anza*, plaintiff Ideal's injury resulted from customers (parties) taking their business elsewhere (action)—not defendant National's (party) alleged mail and wire fraud (action).[155] Finally, *Bridge* did not provide as complete a directness analysis as *Holmes* and *Anza*, likely because the main question presented was whether a plaintiff had to prove reliance on

146 *Id.* at 6–7.

147 *Id.*

148 *Id.* at 4–5, 8.

149 *Id.* at 12.

150 *Id.* at 11 (citing Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 458 (2006)).

151 *Id.* at 11 ("Put simply, Hemi's obligation was to file the [tax] reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi.").

152 *See id.*

153 *Id.* at 11. To arrive at this conclusion, Chief Justice Roberts relied on *Anza*'s clear proposition that "the compensable injury flowing from a [RICO] violation . . . 'necessarily is the harm caused by [the] predicate acts.'" *Id.* at 13 (alterations in original) (quoting *Anza*, 547 U.S. at 459).

154 *See* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 271 (1992).

155 *See Anza*, 547 U.S. at 458.

the alleged RICO conduct to establish proximate causation under § 1964(c) (recall that the answer was no).[156] Nevertheless, plaintiff bidders' injury of lost profits could also have resulted from merely not receiving the lowest-priced tax liens at the auction (action), perhaps from other bidders altogether (parties)—not necessarily from the defendant bidders' (parties) alleged RICO violations (actions).[157] Therefore, this "separation" analysis serves as a core directness analysis in these lines of cases. Failure to meet the separation test means failure to meet directness. No liability would result.

After establishing the lack of directness between Hemi's conduct and the City of New York's injury through the "separation" analysis, the Court bolstered its finding by asserting its compliance with the third *Holmes* reason for a directness requirement, that other plaintiffs are in better positions to sue.[158] In *Hemi*, the State of New York was in a better position to enact justice than the City of New York.[159] After all, Hemi allegedly failed to file state taxes, not city taxes.[160] *Hemi* followed a similar pattern of reasoning to *Holmes*, *Anza*, and *Bridge*: determine directness or lack thereof, then check the conclusion against the *Holmes* policy reasons for directness.

C. A Proposed Proximate Cause Inquiry

An inquiry for evaluating whether plaintiffs properly allege proximate cause under § 1964(c) lies within *Holmes*, *Anza*, *Bridge*, and *Hemi* themselves. First, courts should use a *Hemi* separation test to analyze whether a defendant's alleged conduct directly caused the plaintiff's injury. If the plaintiff's injury resulted more directly from separate *parties* performing separate *actions*, directness fails and plaintiffs have not properly alleged proximate cause. If plaintiffs pass the separation test, courts may then evaluate whether the result complies with *Holmes*'s reasons for having a directness requirement: (1) difficulty in ascertaining damages, (2) judicial obstacles to preventing multiple recoveries for indirect injuries, and (3) directly injured victims are in the best position to act as private attorneys general.[161] At this second stage, courts may uncover factors such as contingent actions of third parties, intervening actions, or other sources of attenuation that would prompt them to further inquire

156 *See* Bridge v. Phx. Bond & Indem. Co., 533 U.S. 639, 658–59 (2008).
157 *See id.*
158 *Hemi Grp.*, 559 U.S. at 11–12.
159 *Id.*
160 *Id.*
161 *See* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 269–70 (1992).

about facts that would or would not establish proximate cause under § 1964(c). The key within the precedent so far, however, is that if separation exists between the parties, their actions, and the plaintiff's injury, directness and proximate cause fail. No liability would result. Although circuits involved in the instant split consider these overall elements in their analyses of proximate cause, none considers this more consistent, methodical inquiry framework.

The remainder of this Note will provide background information about the instant split and explain current circuits' approaches and outcomes. It will also argue why this proposed framework provides the best understanding of the problem with respect to the Supreme Court's precedent, the current facts, and future facts courts might encounter in the world of pharmaceutical companies, providers, patients, and payors that could change the analysis.

III. THE SPLIT

A. The Payors and Players

Pharmaceutical companies research, develop, market, and sell drugs. Drug research and development is expensive—companies in the United States spent $83 billion on just those activities alone in 2019.[162] High expenditures, however, come with high returns for companies and for the public. Companies' willingness to invest in researching and developing new drugs is driven by the profit they eventually expect from the drugs themselves.[163] Over the past decade, the amount of newly developed drugs approved for market sale increased by 60%.[164]

Pharmaceutical companies in the United States set their own drug prices.[165] The Government does not directly oversee or regulate pricing.[166] If the companies cannot expect to profit from the drugs they invest in developing, they lack incentive to bring new drugs to market that the public demands and from which it would benefit.[167] Companies use expected prices, popularity, patient populations, and markets around the world to predict profit that results from new

162 CONG. BUDGET OFF., RESEARCH AND DEVELOPMENT IN THE PHARMACEUTICAL INDUSTRY 3 (2021).

163 *See id.* at 11.

164 *Id.* at 5.

165 Jamison Chung, Aaron Kaufman & Brianna Rauenzahn, *Regulating Prescription Drug Costs*, REGUL. REV. (Oct. 17, 2020), https://www.theregreview.org/2020/10/17/saturday-seminar-regulating-prescription-drug-costs/ [https://perma.cc/3NFC-HW6N].

166 *Id.*

167 *See id.*

drugs.[168] These companies' profits and drug prices, however, are difficult to determine.[169] Insurers, pharmacies, distributers, pharmacy benefit managers, and other payors each negotiate contracts with companies to set prices and discounts for certain drugs.[170] Additionally, certain government programs such as Medicaid and Veterans Affairs programs receive the lowest commercially negotiated prices possible via federal mandate.[171] Because of the different payors and required discounts, companies receive different compensation for the same drug. Not only do pharmaceutical companies work with payors to determine prices and plans, but they also market their drugs directly to providers for their patients.[172] These structures complicate a determination of how much a payor owes a company for a particular patient's drug consumption.

Rather than marketing prescription drugs directly to patients, which is illegal, companies market their products to healthcare providers such as prescribing physicians.[173] Physicians determine both what their patients need and, therefore, what their patients will submit to payors for reimbursement or direct payment.[174] Although drugs have listed uses and purposes,[175] physicians might prescribe drugs for patient uses not listed on the drug label.[176] This practice is known as "off-label prescribing."[177] Because companies know that physicians prescribe drugs for off-label uses in some instances, they sometimes market their products "aggressively."[178] This "aggressive" marketing, however, includes activities such as advertising them in scientific and professional journals, sponsoring medical education events, paying medical opinion leaders to market their products to other doctors, and "detailing."[179]

168 CONG. BUDGET OFF., *supra* note 162, at 10–12.

169 Mitchell A. Psotka et al., *Challenges and Potential Improvements to Patient Access to Pharmaceuticals*, 142 CIRCULATION 790, 791 (2020).

170 *Id.*

171 *Id.*

172 *See* Timothy Stoltzfus Jost, *Oversight of Marketing Relationships Between Physicians and the Drug and Device Industry: A Comparative Study*, 36 AM. J.L. & MEDICINE 326, 327–34 (2010).

173 *Id.* at 331.

174 *See id.*

175 *See* Val Jones, *How to Read a Drug Facts Label*, KNOWYOUROTCS, https://www.knowyourotcs.org/how-to-read-a-drug-facts-label/ [https://perma.cc/9E88-SHZM].

176 *See Off-Label Drug Use*, AM. CANCER SOC. (Mar. 17, 2015), https://www.cancer.org/treatment/treatments-and-side-effects/treatment-types/off-label-drug-use.html [https://perma.cc/HX7G-DEQ8].

177 Jost, *supra* note 172, at 331.

178 *Id.* at 332.

179 *Id.* at 332–33.

Detailing is a more intimate method of marketing drugs to physicians, where pharmaceutical company representatives—detailers—"personally contact physicians or their offices to distribute information about drugs."[180] Detailers typically offer physicians gifts ranging from pens to tickets to entertainment events.[181] United States law does not place limits on gifts that physicians can accept from company detailers, but it does require companies to disclose all "[p]ayments or other transfers of value" that they make to providers in a public database.[182] Scholars debate the actual effect these practices have on physicians' prescribing practices. On the one hand, doctors are sophisticated professionals dedicated to a prestigious profession.[183] In fact, many factors influence providers' prescribing practices: cost to patients, patient preference, physician experience, and peers, to name a few.[184] Society should not assume that any gift will automatically warp their judgments about what is best for their patients' health. On the other hand, they are humans with individual financial interests that might affect their judgment.[185] The extent these practices might influence provider behavior are worth careful consideration, especially with patients' well-beings on the line.

Once a provider prescribes a drug to a patient, somebody must pay for the drug. In the United States, those payments come from payors (or third party payors (TPPs)) such as insurance companies or government programs.[186] Instead of the government regulating prices, payors will negotiate with companies to purchase drugs at certain prices, which influences how much patients will pay in premiums or out-of-pocket.[187] Pharmacy benefit managers (PBMs) manage prescription drug benefits on behalf of payors.[188] They control the amount payors spend on prescription drugs by negotiating prices with

180 *Id.* at 333.

181 *Id.*

182 *Id.* at 338 (quoting Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6002, 124 Stat. 119, 689 (2010) (codified in scattered sections of 42 U.S.C.)). The governing legislation is the Patient Protection and Affordable Care Act. *Id.*

183 *See id.* at 328.

184 Andrew S. Gallan, *Factors That Influence Physicians' Prescribing of Pharmaceuticals: A Literature Review*, 4 J. PHARM. MKTG. & MGMT. 3, 16, 28–29, 32 (2004).

185 *See generally id.*

186 *See* Psotka et al., supra note 169, at 792 fig.1.

187 *See* Chung et al., *supra* note 165.

188 *Pharmacy Benefit Managers and Their Role in Drug Spending*, COMMONWEALTH FUND (Apr. 22, 2019), https://www.commonwealthfund.org/publications/explainer/2019/apr/pharmacy-benefit-managers-and-their-role-drug-spending [https://perma.cc/JBB9-9DF5].

drug companies and pharmacies.[189] At bottom, drug manufacturers and pharmacies negotiate directly with PBMs, who manage payors' drug benefits.[190]

Drug companies often give PBMs (acting for the payors) discounts in the form of rebates.[191] The PBMs and payors split these rebates to compensate PBMs for their services, calculated as a portion of the company's list price.[192] The ultimate payor price that PBMs negotiate with companies ultimately impacts patients' out-of-pocket costs or premium, depending on their payer and plan.[193] In recent years, PBMs have lowered drug prices by negotiating rebates.[194] But they also have incentives to make deals between payors and companies for more expensive drugs.[195] PBMs often receive larger rebates for more expensive drugs, because the rebate is a percentage of the original list price.[196] This results in PBMs causing payors to cover more expensive drugs.[197] When payors have more expenses, those costs are passed onto patients through premiums or direct out-of-pocket costs.[198] Although PBMs are agents that help payors navigate the pharmaceutical market, ideally in the payors' best interests, the system is not flawless.

Indeed, this game has many players. To summarize the above, companies set prices based on their predicted profits and negotiate those prices with PBMs, who split the savings with payors.[199] Meanwhile, companies also market their products to providers.[200] Those providers prescribe drugs to patients based on their own experience, patient preference, and the ultimate cost to patients.[201] At a basic level, the payors involved in this split allege that higher drug prices—a financial injury to them—are "by reason of" companies' allegedly misleading drug labels, a mail and wire fraud violation under RICO. Although the facts of each case are different, the overall issue in this split is whether the alleged RICO violations proximately caused these financial injuries.

189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.*
193 *See* Psotka et al., *supra* note 169, at 791–92.
194 *Pharmacy Benefit Managers and Their Role in Drug Spending*, *supra* note 188.
195 *Id.*
196 *Id.*
197 *See id.*
198 *See id.*
199 *See supra* notes 165–72, 191–98 and accompanying text.
200 *See supra* notes 173–85 and accompanying text.
201 *See supra* notes 183–85 and accompanying text.

B. Cases Where Plaintiffs Fail Proximate Cause

The Second and Seventh Circuits found that similar RICO allegations did not proximately cause the similar injuries alleged in each case. The First, Third, and Ninth Circuits found that RICO allegations did proximately cause injuries in cases with similar facts. The Second Circuit's reasoning most closely follows this Note's proposed process of conducting a "separation" analysis for directness under *Hemi* before checking the result against the *Holmes* policy reasons for a directness requirement.

1. Second Circuit

The Second Circuit decided the first case in this split in 2010. In *UFCW Local 1776 v. Eli Lilly & Co.* (*UFCW Local*),[202] plaintiffs were TPPs who alleged that Eli Lilly developed a schizophrenia drug, placed it on the market, was aware of harmful side effects of the drug, and did not disclose those side effects to patients.[203] Plaintiffs also alleged that Eli Lilly fraudulently claimed the drug was more effective than other schizophrenia drugs on the market.[204] Evidence suggested that Eli Lilly marketed the drug to primary care physicians.[205] The drug was marketed for treating isolated symptoms of anxiety and irritability, rather than the drug's approved on-label diagnoses of schizophrenia and bipolar disorder.[206] As a result, one year into marketing, about two-thirds of the drug's prescriptions were for off-label (not schizophrenia or bipolar disorder) uses, including dementia.[207] To fulfill proximate cause under § 1964(c), plaintiffs alleged that the omitted side effect information and false information resulted in higher prices and demand for the drug than would have existed if Eli Lilly presented accurate information about efficacy and risks. Thus, the TPPs had to pay more. Their theory of causation was, essentially, that "[Eli] Lilly distributes misinformation about [the drug], physicians rely upon that misinformation and prescribe [it] for their patients, and then the TPPs overpay."[208]

The court disagreed. The TPPs failed to allege proximate cause to satisfy standing under § 1964(c).[209] In fact, it reframed the chain of

202 620 F.3d 121 (2d Cir. 2010).
203 *Id.* at 124.
204 *Id.*
205 *Id.* at 127–28.
206 *Id.* at 128.
207 *Id.*
208 *Id.* at 134.
209 *Id.*

causation based on the party's own factual allegations: "[Eli] Lilly distributes misinformation about [the drug], physicians rely upon the misinformation and prescribe [it], TPPs relying on the advice of PBMs . . . place [it] on their formularies as approved drugs, TPPs fail to negotiate the price . . . and TPPs overpay for [it]."[210] Under *Hemi* precedent, "the conduct [namely, TPPs failing to negotiate, which] directly caus[ed] the harm [of TPPs overpaying] was distinct from the conduct giving rise to the fraud [namely, Eli Lilly's alleged misrepresentations to physicians]."[211] In other words, proximate cause cannot be established with separate *actions* performed by separate *parties*.[212] Moreover, the court reasoned that other independent actions from uninvolved parties weakened the causal chain.[213] The main force of the Second Circuit's argument, though, resulted from the *Hemi* separation test. The allegations of proximate causation were too general to impose liability.[214]

Despite *Bridge*'s holding that statutory standing under § 1964(c) does not require any reliance on the alleged fraud,[215] the Second Circuit noted that the TPPs failed to allege that they relied on the misrepresentations to physicians at issue.[216] However, the court need not have reached this discussion. It sufficed to reason that the requirements of directness were not met when separate parties performed separate actions that severed the injury from the alleged RICO violation. Once this was met, there was no need to approach questions of reliance. Yet, the court included reliance in its total mix of factors that establish proximate cause.

Moreover, the Second Circuit did not perform an analysis of the *Holmes* reasons like circuits after it did. However, to do so and reach a consistent result with the rest of its reasoning, it would have had to determine that: (1) there would be difficulty in ascertaining damages, (2) there would be judicial obstacles to preventing multiple recoveries for indirect injuries, and (3) there are more directly injured victims in better positions to act as private attorneys general.[217]

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210 *Id.*
211 *Id.* (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 990 (2010)).
212 *See* Hemi Grp., LLC v. City of New York, 559 U.S. 1, 11 (2010).
213 *See UFCW Local 1776*, 620 F.3d at 134.
214 *See id.*
215 Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 661 (2008).
216 *UFCW Local 1776*, 620 F.3d at 134.
217 *See* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 269–70 (1992).

2. Seventh Circuit

When presented with an analogous fact pattern, the Seventh Circuit agreed with the Second Circuit's outcome in *UFCW Local*, but not necessarily with the reasoning. Plaintiffs in *Sidney Hillman Health Center of Rochester v. Abbott Laboratories* (*Sidney Hillman*)[218] argued that Abbott Laboratories' unlawful sales and drug marketing tactics directly injured them as TPPs, rather than injuring doctors who prescribed the drugs.[219] The Seventh Circuit disagreed. Similar to the argument in *Bridge*, where plaintiffs were the "*only* parties injured by [defendants'] misrepresentations,"[220] the Seventh Circuit reasoned that the TPPs were *not* the only parties injured by Abbott's misrepresentations.[221] Instead, both patients and physicians suffered from misleading information.[222] In fact, the misleading information most immediately affected *physicians*.[223] Other sources of attenuation between the injury and the alleged RICO violations were: the possibility that not all off-label uses were improper for patients, the multitude of factors in physicians' prescribing practices, the difficulty of calculating damages at all points in the causal chain, and the volume of independent decisionmakers in the causal chain between misleading drug labels and the TPPs' financial losses.[224] In essence, the Seventh Circuit determined that the plaintiff's injures were too far removed to establish proximate cause.[225]

The Seventh Circuit did not formally use *Hemi*'s "separate *actions* . . . carried out by separate *parties*"[226] test to determine directness before turning to considerations more similar to the three *Holmes* factors. Rather, the Seventh Circuit considered all the parties who could be injured by the RICO violations and compared the degrees of directness between injury and conduct among them.[227] This proximate cause analysis approach blends the directness inquiry with the three *Holmes* policy reasons for requiring directness. Although a blended approach produced the same result that the Second Circuit reached with a more specific emphasis on *Hemi*'s reasoning, the Seventh Circuit's reasoning permits more judicial discretion. Instead

218 873 F.3d 574 (7th Cir. 2017).
219 *Id.* at 575.
220 *Bridge*, 553 U.S. at 658.
221 *Sidney Hillman*, 873 F.3d at 576.
222 *Id.*
223 *Id.* at 578.
224 *Id.* at 577.
225 *Id.* at 578.
226 *See* Hemi Grp., LLC v. City of New York, 559 U.S. 1, 11 (2010).
227 *See Sidney Hillman*, 873 F.3d at 576.

of first affirmatively establishing a direct relationship between the action and injury, the Seventh Circuit accounted for variables that could both impose and relieve liability depending on a party's argument. Thus, a court could use those variables to support whichever result it favored. Indeed, this type of reasoning leads to issues of never-ending debates about liability that *Holmes*, *Anza*, *Bridge*, and *Hemi* sought to prevent.[228]

C. Cases Where Plaintiffs Satisfy Proximate Cause

The First, Third, and Ninth Circuits did find that alleged injuries were "by reason of" alleged RICO violations. They diverge mainly in their treatment of directness, analyzing it through a lens of factors that do not break the causal chain instead of affirmatively establishing that there is one in the first place. Some also use the *Holmes* factors to drive the proximate cause analysis, rather than using them to check the result of a directness requirement. The separation analysis is one method to affirmatively establish a causal chain. The facts in the First, Third, and Ninth Circuits and overall issues are similar to those described above with the Second and Seventh Circuits. Instead of reciting similar scenarios, their analyses will focus on the methods of reasoning and use of precedent that influence their conclusions.

1. First Circuit

The First Circuit found that plaintiffs properly alleged proximate causation in 2013 in *In re Neutronin*.[229] Although the court acknowledged that directness and *Holmes*'s three policy reasons were the core of a proximate cause requirement, it allowed the three reasons to drive the analysis.[230] The court treated the *Holmes* reasons as requirements for proximate cause, rather than a method to check a court's determination that directness has been met.

The court distinguished *Hemi* from the case before it on the facts.[231] By differentiating *Hemi* because of a "policy problem not at issue here"—namely, allowing RICO to become a "tax collection statute"—the court concluded that the injured payors were actually the appropriate parties to "vindicate the law as private attorneys

228 *See supra* Sections II.A–B.

229 Kaiser Found. Health Plan, Inc. v. Pfizer, Inc. (*In re* Neurontin Mktg. & Sales Pracs. Litig.), 712 F.3d 21, 40 (1st Cir. 2013).

230 *See id.* at 35–38 (using the three reasons and analogy to *Bridge* in support of establishing proximate cause).

231 *Id.* at 38 n.12.

general."[232] Therefore, RICO's policy aims were met by concluding that proximate cause was met. This argument uses the *Holmes* factors to drive the outcome rather than using them to check the result of a directness analysis.

2. Third Circuit

Shortly after the First Circuit's decision, the Third Circuit reached a similar conclusion in 2015 in *In re Avandia Marketing*.[233] There, unlike in *In re Neutronin*, the court acknowledged that the *Holmes* reasons were actually *reasons* for a directness requirement instead of factors of an analysis.[234] It also recognized the Supreme Court's precedent that there is a lack of directness when separate *parties* and separate *actions* from the RICO violation cause the alleged injuries.[235] Nevertheless, the Third Circuit decided that "[they] view[ed] the case before [them] as more akin to *Bridge*" than the other controlling precedent.[236] In doing do, however, they ignored the consistency that *Bridge* has with the rest of the precedent.[237]

Furthermore, although the court defined the *Holmes* reasons as reasons, it treated them as driving factors for a proximate cause analysis. After declaring the case before it the most "akin to *Bridge*," the court continued to state that "this case does not present any of the three fundamental causation concerns expressed in *Holmes*," all in support of establishing directness.[238] The opinion, however, never makes an explicit determination on whether the injury was "direct" until the end of its analysis.[239] Instead, it discusses proximate cause in general terms without defining the actions or facts that create the "direct" relationship. This is not as consistent as it could be with the reasoning from *Holmes*, *Anza*, *Bridge*, and *Hemi*. *Of course* each proximate cause determination will be different on the facts—they

232 *Id.* (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 16 n.2 (2010); and then quoting Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 269–70 (1992)).

233 *In re* Avandia Mktg., Sales Pracs. & Prod. Liab. Litig., 804 F.3d 633 (3d Cir. 2015).

234 *See id.* at 642.

235 *Id.* at 643 ("The Court in *Holmes*, *Anza*, and *Hemi* was concerned that the conduct causing plaintiffs' injuries was different than the conduct allegedly constituting a RICO violation.").

236 *Id.*

237 *See supra* Section II.B.

238 *In re Avandia*, 804 F.3d at 643, 646.

239 *Id.* ("At least for the purposes of this motion to dismiss, the injury is sufficiently direct.").

should be.[240] To distinguish proximate cause issues on their facts and varying policy implications would ignore the underlying principles the Supreme Court has set forth to avoid such a dilemma. Accordingly, a more formulated process of determining "directness" through a *Hemi* separation test and conformance with the *Holmes* policy reasons provides a preferable approach.

3. Ninth Circuit

Most recently in 2019, the Ninth Circuit found that plaintiffs properly alleged the proximate cause of their RICO injuries in *Painters & Allied Trades v. Takeda Pharmaceuticals* (*Takeda*).[241] Because the Ninth Circuit decided a similar issue after four other circuits before it, it recited and interpreted those circuits.[242] It characterized "the central dispute between the Second and Seventh Circuits and the First and Third Circuits [as] whether the decisions of prescribing physicians and [PBMs] constitute intervening causes that sever the chain of proximate cause between the drug manufacturer and TPP."[243] The Ninth Circuit eventually agreed with the First and Third Circuits, holding that the "Plaintiffs' damages are not too far removed from Defendants' alleged omissions and misrepresentations to satisfy RICO's proximate cause requirement."[244] However, the court did not phrase this determination in terms of "directness," nor did it rely on the body of directness principles in *Holmes*, *Anza*, *Bridge*, and *Hemi* in support of its decision. Instead, it relied primarily on *Bridge*: "Under the Supreme Court's *Bridge* precedent alone, we think Plaintiffs' allegations satisfy the Supreme Court's direct relation requirement."[245]

To its credit, the Ninth Circuit did not use the *Holmes* policy reasons as driving factors in its proximate cause analysis. On the contrary, it does exactly what this Note argues is the correct method: first, determine directness; second, determine whether the result complies with the *Holmes* policy factors.[246] Although it did not apply a particular *Hemi* "separation" analysis as this Note proposes, it did

240 *See* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 272 n.20 (1992) ("[T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983))).

241 Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharms. Co., 943 F.3d 1243 (9th Cir. 2019).

242 *See id.* at 1252–59.

243 *Id.* at 1257.

244 *Id.* at 1259.

245 *Id.* at 1251.

246 *See id.*

establish the reasons for directness before bolstering its conclusions with the three *Holmes* reasons.[247] Ultimately, the Ninth Circuit considers but does not utilize key concepts from *Hemi* in its reasoning. A stronger conclusion of proximate cause and the potential for liability would comport with *Hemi*'s separation analysis as well as the three *Holmes* reasons.

IV. APPLYING THE PROPOSED INQUIRY FRAMEWORK

Recall this Note's proposed framework in Section II.C for analyzing whether a plaintiff fulfills proximate cause under § 1964(c):

> First, courts should use a *Hemi* separation test to analyze whether a defendant's alleged conduct directly caused the plaintiff's injury. If the plaintiff's injury resulted more directly from separate *parties* performing separate *actions*, directness fails and plaintiffs have not properly alleged proximate cause. If plaintiffs pass the separation test, courts may then evaluate whether the result complies with *Holmes*'s reasons for having a directness requirement: (1) difficulty in ascertaining damages, (2) judicial obstacles to preventing multiple recoveries for indirect injuries, and (3) directly injured victims are in the best position to act as private attorneys general.[248] At this second stage, courts may uncover factors such as contingent actions of third parties, intervening actions, or other sources of attenuation that would prompt them to further inquire about facts that would or would not establish proximate cause under § 1964(c). The key within the precedent so far, however, is that if separation exists between the parties, their actions, and the plaintiff's injury, directness and proximate cause fail. No liability would result.[249]

Consider the following hypothetical for an example application of this proposed inquiry framework. A plaintiff payor pays $200 million more than it did the previous year in prescription drug costs. It alleges that this additional expense resulted from an increased number of prescriptions of the brand-name drug HypoDrug, manufactured and sold by the company HypoCo. There is some evidence that HypoCo might have misled providers while marketing HypoDrug to them, which the payor could allege is illegal mail or wire fraud activity. The payor would like to sue HypoDrug under § 1964(c) because of the potential to recover treble damages. At this point, the payor has alleged a financial injury and a RICO violation against HypoCo. A district court must determine on the pleadings whether the alleged RICO violation proximately caused the alleged injury such that the plaintiff has standing under § 1964(c).

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247 *See id.*

248 *See* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 269–70 (1992).

249 *Supra* Section II.C.

First, the court will use *Hemi*'s separation test to determine whether the injury was sufficiently direct. In other words, the court will determine whether the payor's injury is a result of separate *parties* performing separate *actions* from the alleged RICO violation. In this case, the payor's injury is financial loss. The success of a separation argument lies in how the payor situates its arguments. For example, if the complaint alleges that HypoCo misled providers with detailing activities, rather than misleading the payor itself during price negotiations, the separation test fails. Because HypoCo's alleged RICO violation would be activity toward *providers* and not the *payor*, the payor's injury would have to come from elsewhere. This scenario would fail the separation test. Therefore, a court would find that the alleged RICO violations did not proximately cause the payor's injury. The court would dismiss the case for lack of standing under § 1964(c).

Alternatively, consider a different set of hypothetical facts where the plaintiff payor's financial injury is an increase in cost for the drug HypoDrug and the complaint alleges that HypoCo engaged in misleading negotiations with PBMs, the plaintiff payor's agent. First, the court will conduct a *Hemi* separation test. This set of facts has a greater chance of passing this test. Because HypoCo's alleged RICO violations would be activity toward PBMs, or payors, the injury would not arise out of a separate party performing a separate activity than a RICO violation. If a court determines that there are no separation issues in the directness analysis, it could then turn to the second step in the inquiry.

At the second step, the court would evaluate whether the result complies with *Holmes*'s reasons for having a directness requirement. First, one can imagine it would be quite difficult for a judge to assess damages separately for the payor's increased payments that resulted from the RICO violation itself. Second, there is a good argument that there would be obstacles to preventing double recoveries, because the payor could sue PBMs in addition to the companies themselves for the amount they lost as a result of the alleged RICO violation. Finally, in this hypothetical, the directly injured party from the mail and wire fraud might actually be patients who can allege misleading advertising by way of RICO violations and, therefore, increased out-of-pocket costs or higher premiums. A court would need more specific facts for the situation before it to determine whether it is consistent with *Holmes* to impose liability on HypoCo in this instance. Although the plaintiff payor's complaint might pass the *Hemi* separation test, it could succeed or fail at the second step of the inquiry.

CONCLUSION

Every proximate cause inquiry requires a unique, fact-intensive analysis. Nevertheless, establishing a more formal inquiry framework for analyzing proximate cause under § 1964(c) will promote consistency in the courts and assist in finding the correct plaintiffs for future similar RICO violations.[250]

This Note proposes one possible inquiry framework that courts can use as a starting point for analogous proximate cause determinations. Although circuits that have approached this issue encountered distinct facts, interpreted binding and persuasive precedent differently, and reached different conclusions, one thing is constant: the relationship between the injury and the alleged violation must be direct. *Hemi*'s separation test for directness provides a platform for such an analysis. Turning to *Holmes*'s three reasons for imposing a directness requirement only after an initial determination of directness will encourage courts to check their work. Presently, each court facing this issue analyzes proximate cause according to its interpretations of *Holmes*, *Anza*, *Bridge*, *Hemi*, and whatever facts a plaintiff includes in a complaint. This Note's proposed inquiry framework provides a starting place that is consistent not only with the Supreme Court's precedent regarding civil RICO standing, but also with the ultimate aims of civil RICO.

In these cases, the stakes are high. They are sure to rise as lawsuits related to the opioid epidemic and everyday pharmaceuticals, like Acthar Gel, make their way to court.[251] Only time will tell if courts adopt a more consistent proximate cause analysis for civil RICO claims. Otherwise, courts will continue to perform ad hoc proximate cause analyses in cases with billions of dollars on the line.

250 *See Holmes*, 503 U.S. at 274.

251 *See, e.g.*, Complaint ¶ 1, District Council 37 Benefits Fund Tr. v. McKinsey & Co., No. 3:21-cv-06274 (N.D. Cal. filed Aug. 13, 2021) (bringing class action against McKinsey & Co. for its involvement in reimbursing its members and retirees for prescription opioids); Complaint ¶¶ 1–11, Law Enf't Health Benefits, Inc. v. Trudeau, No. 3:21-cv-50215 (N.D. Ill. filed May 26, 2021) (bringing class action against various defendants, including pharmaceutical companies, for fraudulent marketing and distribution of Acthar Gel, resulting in increased prices of the drug for payors).