St. John's Law Review

Volume 64, Fall 1990, Number 4 Article 9

RICO as a Remedy for Hazrdous Waste Victims: Can Plaintiffs Overcome the Problems of Causation?

John M. O'Reilly

RICO AS A REMEDY FOR HAZARDOUS WASTE VICTIMS: CAN PLAINTIFFS OVERCOME THE PROBLEMS OF CAUSATION?

American industry has generated vast quantities of hazardous waste[1] in the wake of rapid technological innovation with synthetic materials.[2] Unfortunately, industry has failed to develop safe and responsible methods of hazardous waste disposal.[3] As a result, haz-

---

[1] *See* Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6991 (1988). Hazardous waste is defined as:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may — (A) cause, or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Id. § 6903(5).

"More than 80 billion pounds of toxic waste are dumped in the United States each and every year, and the volume is steadily growing." Gore, *Foreword* to S. EPSTEIN, L. BROWN & C. POPE, HAZARDOUS WASTES IN AMERICA at ix (1982).

[2] *See* S. EPSTEIN, L. BROWN & C. POPE, HAZARDOUS WASTES IN AMERICA 22-23 (1982) [hereinafter S. EPSTEIN]. Production of synthetic organics increased from one billion pounds in 1941 to over 300 billion pounds in 1976, *id.*, with 50 chemicals alone accounting for 172 billion pounds. *See* Comment, *Hazardous Waste Liability and Compensation: Old Solutions, New Solutions, No Solutions*, 14 CONN. L. REV. 307, 309 n.11 (1982); *see also* S. REP. No. 849, 96th Cong. 2d Sess. 3 (1980) (347 billion pounds of hazardous chemicals produced in 1979). Production of hazardous waste has increased at an annual rate of 10% since the end of World War II. *See* S. EPSTEIN, *supra*, at 7.

[3] *See* ENVIRONMENTAL PROTECTION AGENCY, Pub. No. SW-826, EVERYBODY'S PROBLEM: HAZARDOUS WASTE 15 (1980). Environmental Protection Agency ("EPA") studies conclude that environmentally unsound methods have been used to dispose of 90% of hazardous wastes. *Id.* In 1979, the EPA estimated that as many as 30,000 to 50,000 inactive and uncontrolled waste sites existed, of which between 1,200 and 2,000 presented serious public health risks. *See* H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 18 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6120. In 1981, 115 sites were listed by the EPA as high priority sites which were eligible for remedial action under Superfund; 24 of these were considered more dangerous than New York's Love Canal. *See* S. EPSTEIN, *supra* note 2, at 448-49. For a listing of sites considered potentially hazardous by the EPA, see *id.* at 450-545.

In 1988, industrial plants released 4.5 billion pounds of poisonous chemicals into the nation's land, air, and water. *See* N.Y. Times, Apr. 20, 1990, at A11, col. 2. The Congressional Office of Technology Assessment estimates that the EPA's figures represent only a fraction of the total amount of toxic emissions created by industry. *Id.* at col. 3. In addition, many polluters are exempted from reporting requirements and not all toxic chemicals are

ardous waste mismanagement has led to widespread personal injury and real property damages.[4] The harm generated by hazardous waste mismanagement has alarmed the public[5] and spawned a complex scheme of federal and state environmental legislation.[6] Yet, hazardous waste victims are not adequately compensated under existing environmental statutory remedies.[7] Recently, the

---

subject to reporting requirements. *Id.* The industrial and chemical revolutions of the past 40 years provided the origin of the hazardous waste problem. *See* Comment, *supra* note 2, at 309-14. For an historical perspective of America's treatment of hazardous waste, see Melosi, *Hazardous Waste and Environmental Liability: An Historical Perspective*, 25 HOUS. L. REV. 741 (1988).

[4] *See* Comment, *Pursuing a Cause of Action in Hazardous Waste Pollution Cases*, 29 BUFFALO L. REV. 533, 534-37 (1980). Personal injury may result from contact with hazardous substances. *Id.* at 536. This contact can occur in a number of ways, including, but not limited to, exposure via food, water, or the air. *Id.* Hazardous substances can cause cancer, gene mutation, birth defects, and miscarriages. *Id.* at 537 nn.22 & 24. Property damage can occur from contact with gases in the air or liquids in the ground. *Id.* at 536. Contaminated water supplies and destruction of vegetation are among some of the known effects of contact. *Id.* at 536-37 nn.14 & 21.

One commentator has suggested that state import bans on hazardous waste may be contributing to the widespread illegal disposal of hazardous wastes. *See* Stone, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans*, 15 COLUM. J. ENVTL. L. 1, 2-4 (1990). State bans on foreign hazardous waste importation have been subjected to commerce clause scrutiny by the courts. *See id.* at 16-22. The consensus of this case law is that "such bans must only apply to government funded disposal facilities . . . [and] allow[] private facilities to accept foreign wastes" in order to be valid. *Id.* at 21-22 (footnote omitted).

[5] *See* Gore, *supra* note 1. A few years ago, the problems associated with hazardous waste were not recognized by most Americans. *Id.* They have, however, "climbed to the top of the public opinion polls" as a serious concern to the American people. *Id.*; *see* White, *Economizing on the Sins of Our Past: Cleaning Up Our Hazardous Wastes*, 25 HOUS. L. REV. 899, 899-900 (1988). Four major incidents focused national attention on the threat of hazardous waste: (1) the kepone contamination of the James River; (2) the polychlorinated biphenyl (PCB) contamination of the Hudson River; (3) the polybrominated bihenyl (PBB) contamination of Michigan livestock; and (4) the Love Canal incident. *Id.* One commentator has suggested that America's environmental awakening was first stirred by Rachel Carson's *Silent Spring*, which was concerned with the dangerous side effects of toxic chemicals. *See* Udall, *Toxic Wastes: Reflections on the Evolution of Environmental Law*, 25 HOUS. L. REV. 729, 732-34 (1988).

[6] *See* RCRA, 42 U.S.C. §§ 6901-6987 (1988); Comprehensive Environmental, Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9657 (1988); The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1279 (1988). In 1986, Congress amended CERCLA in the Superfund Amendments and Reauthorization Act ("SARA"), providing for a doubling of both the amount of time and the dollar amount authorized as an initial response from the fund to a release or threatened release of hazardous substances. SARA, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (current version in scattered sections of 42 U.S.C. §§ 9601-9675 and at 26 U.S.C. §§ 59A, 4611-4612, 4661-4662, 4671-4672, 9507-9509 (1988)); *see also* State Environmental Quality Review Act ("SEQRA"), N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984).

[7] *See* S. EPSTEIN, *supra* note 2, at 275-92 (discussing difficulties of litigating hazardous

Racketeer Influenced and Corrupt Organizations Act[8] ("RICO") has been used with some success to bolster existing remedies.[9]

---

waste claims); Comment, *supra* note 4, at 540 (arguing that present tort law and statutory regulation "must be adapted to the nontraditional nature of hazardous waste" cases); *see also* Binder, *The Potential Application of RICO in the Natural Resources/Environmental Law Context*, 63 DEN. U.L. REV. 535, 560-62 (1986) (discussing use of RICO for actions under CERCLA). The author noted:

> [t]he private cause of action [under CERCLA] is exceedingly narrow, being limited to "response costs," which are part of a "clean up" or response to a hazardous waste problem. Thus, investigative costs and attorney's fees are not recoverable as "response costs." Only once a party has begun to implement a government-authorized clean up program can "response costs" be recovered. Consequently, a private cause of action for only damages is unavailable under CERCLA.

Id. at 560-61.

Common law remedies, such as nuisance, negligence, trespass, and strict liability are particularly unsuitable to fairly compensate hazardous waste victims, primarily because of the expiration of the statute of limitations and the difficulty of proving causation. *See* Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1222-28 (1987) (statute of limitations and establishing link between defendant and release of substance major barriers); Note, *The Applicability of Civil RICO to Toxic Waste Polluters*, 62 IND. L.J. 451, 452-57 (1987) [hereinafter *Polluters*] (rules developed to compensate individualized wrongs do not work applied to toxic injury); Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, *passim* (1983) (differences between toxic injuries and individualized wrongs create incongruity with tort system). *But see* Nelson & Fransen, *Playing With A Full Deck: State Use of Common Law Theories to Complement Relief Available Through CERCLA*, 25 IDAHO L. REV. 493, 508-17 (1989) (contending that common law remedies can effectively bolster inadequacies of relief under CERCLA).

[8] 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990). *See generally* Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 249-80 (1982) [hereinafter *Reflections*] (discussion and review of RICO legislative history); Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wollersheim: *Will Civil RICO be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526 (1987) [hereinafter *Equitable Relief*] (discussing civil RICO and criticizing narrow reading given by Ninth Circuit in principal case); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980) [hereinafter *Basic Concepts*]; Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655 (1981) [hereinafter *Everybody's Darling*] (discussing civil RICO generally).

Recently, RICO has been widely scorned and scrutinized by business groups, members of Congress, and judges. *See* S. REP. No. 269, 101st Cong., 2d Sess. 2-4 (1990) [hereinafter SENATE REPORT]. The Senate Judiciary Committee stated that RICO "was designed primarily to be a potent criminal statute aimed at eradicating organized crime syndicates." *Id.* at 2. The committee also lamented that RICO's expansive language has "given rise to civil RICO claims ranging far afield from Congress' original purpose in enacting RICO." *Id.* The Senate Report accompanied a recent bill to amend RICO which was introduced in the 101st Congress. *See* S. 438, 101st Cong., 1st Sess. (1989). The bill was designed to reduce the availability of the treble damages remedy in RICO suits. *See* SENATE REPORT, *supra*, at 5. However, under the proposed bill "[n]o cause of action under RICO, with the exception of non-violent free speech, [was] eliminated." *Id.* at 7.

[9] *See infra* notes 49-81 and accompanying text. RICO has been used with some success

Section 1962 of RICO prohibits any person from using money derived from a pattern of racketeering activity to invest in an enterprise;[10] acquire control of an enterprise through a pattern of racketeering;[11] conduct an enterprise through a pattern of racketeering;[12] or conspire to engage in any of the prohibited acts outlined above.[13] After establishing a section 1962 violation, a plaintiff may recover treble damages and attorneys' fees if he demonstrates that his business or property damage was caused "by reason of" such a violation.[14]

This Note will discuss why proof of causation has emerged as a primary obstacle to recovery in RICO-based hazardous waste claims. Part I will analyze civil RICO's causation requirement. Part II will discuss several representative RICO-based hazardous waste decisions and demonstrate that, for at least one class of hazardous waste plaintiffs, the causation requirement may present an insurmountable barrier to recovery.

I. RICO CAUSATION

In the majority of RICO-based hazardous waste suits, and indeed in the overwhelming majority of all civil RICO suits, it is alleged that the defendant conducted business through a pattern of racketeering activity in violation of section 1962(c).[15] After proving a section 1962(c) violation, a plaintiff must demonstrate that his business or property damage was caused either by the commission of predicate acts of racketeering or by an unlawful competitive advantage the defendant gained through the commission of predicate acts of racketeering.[16] Because violations of federal environmental

---

in many other cases involving environmental matters. *See, e.g.*, Beauford v. Helmsley, 865 F.2d 1386, 1391-92 (2d Cir.) (en banc) (condominium conversion prospectus fraudulently concealed presence of asbestos), *cert. denied*, 110 S. Ct. 539 (1989); Cincinnati Gas & Elec. Co. v. General Elec. Co., 656 F. Supp. 49, 74-88 (S.D. Ohio 1986) (scheme by manufacturer of nuclear reactor to defraud utility), *aff'd*, 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989).

[10] 18 U.S.C. § 1962(a) (1988).

[11] *Id.* § 1962(b).

[12] *Id.* § 1962(c).

[13] *Id.* § 1962(d).

[14] *Id.* § 1964(c).

[15] *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985) (§ 1962(c) given less restrictive reading than rest of statute as to activities RICO designed to deter).

[16] *Id.* at 494-97. *Sedima* overruled several circuit court decisions which held that injury from predicate acts alone under section 1962(c) was not compensable. *Id.* at 497.

The *Sedima* Court also noted that recoverable damages under section 1962(c) "include,

statutes do not of themselves constitute racketeering activity, victims of hazardous waste mismanagement instead base their RICO claims on alleged acts of mail or wire fraud.[17] However, predicating a RICO claim on mail and wire fraud in hazardous waste suits introduces significant causation obstacles.[18]

Courts generally agree that neither a plain meaning analysis[19] nor a review of legislative history aids in interpreting the "by reason of" causation requirement of section 1964(c).[20] While the legislative history addresses section 1964(c) as a whole, it does not specifically address the intent behind the "by reason of" terminology.[21] Traditionally, the federal statutory "by reason of" language has created a common law tort causation requirement.[22]

---

but are not limited to, the sort of competitive injury for which the dissenters would allow recovery." *Sedima*, 473 U.S. at 497 n.15. The majority agreed in part with a dissenting Justice Marshall who argued that "racketeers do not engage in predicate acts *as ends in themselves* . . . . Congress' concern was . . . for the competitors and investors whose businesses and interests are harmed or destroyed by racketeers, or whose competitive positions decline because of infiltration in the relevant market." *Id.* at 519 (Marshall, J., dissenting) (emphasis in original); *see also Reflections*, *supra* note 8, at 280 ("*[b]oth* immediate victims of racketeering activity *and* competing organizations were contemplated as civil plaintiffs") (emphasis in original).

[17] *See* 18 U.S.C. § 1961(1) (1988). Mail or wire fraud is alleged in the overwhelming majority of RICO complaints. *See Report of the Ad Hoc Civil RICO Task Force*, ABA SEC. CORP., BANKING & BUS. LAW 55, 55-56 (1985). *See generally* Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 *passim* (1980). Mail and wire fraud are useful predicate offenses in RICO based hazardous waste suits. *See Polluters*, *supra* note 7, at 474-79. Businesses engaged in hazardous waste disposal have extensive mail and wire communications with private and public entities, and such communications can expose fraudulent schemes. *See id.* at 474-78. Indeed, companies dealing with hazardous waste are required under RCRA to document everything that happens to their waste. *See* RCRA, 42 U.S.C. §§ 6922-6974 (1988).

[18] *See infra* notes 49-81 and accompanying text.

[19] *See Equitable Relief*, *supra* note 8, at 580. Judicial hostility to RICO has led lower courts to avoid application of the plain meaning rule which would compel a liberal construction of the statute. *Id.*; *see also* United States v. Turkette, 452 U.S. 576, 587 (1981) (Congress calls for liberal construction of RICO in § 904(a)); *Reflections*, *supra* note 8, at 240-41 n.13 (noting that Supreme Court consistently admonishes lower courts to interpret RICO according to its plain meaning, to effectuate its remedial purpose).

[20] *See* Sperber v. Boesky, 849 F.2d 60, 63 (2d Cir. 1988) (finding little legislative history, but noting Congress' "expansive language" and "express admonition" to construe RICO liberally).

[21] *See* Bastian v. Petren Resources Corp., 699 F. Supp. 161 (N.D. Ill. 1988), *aff'd*, 892 F.2d 680 (7th Cir.), *cert. denied*, 110 S. Ct. 2590 (1990). *See generally Reflections*, *supra* note 8 (detailed discussion of RICO's legislative history).

[22] *See, e.g.*, Zepick v. Tidewater Midwest, Inc., 856 F.2d 936, 942 (7th Cir. 1988) (interpreting § 23 of Consumer Products Safety Act); *see also* Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535-37 (1983) ("by reason of" imposes proximate cause requirement on Clayton Act treble damages claims); Brandenburg v. Seidel,

The lack of background comment on section 1964(c) suggests that Congress did not intend to depart from this traditional common-law analysis.[23] Consequently, courts have searched elsewhere for guidance in establishing RICO causation.

The courts, for example, have analogized RICO causation to the causation requirements under the antitrust laws. In *Carter v. Berger*,[24] the plaintiff alleged that its taxes rose due to an unwarranted decrease in the defendant's taxes after the defendant had bribed government officials.[25] The court held that the plaintiff lacked standing under RICO because the Clayton Act[26] bars a plaintiff from recovering damages "passed on" from the directly injured party, which in this case was the government.[27] The court reasoned that some antitrust principles "should apply to RICO cases, not the least because the damage provision in section 1964(c) [of RICO] is practically verbatim the damages provision in the antitrust laws."[28] Indeed, Congress modeled RICO's private cause of action after section 4 of the Clayton Act.[29] However, a

---

859 F.2d 1179, 1189 n.11 (4th Cir. 1988) (following *Sedima* which found normal proximate cause inquiry appropriate). *But see Reflections*, *supra* note 8, at 255 n.52 (questioning adoption of proximate cause in civil RICO suits); *Everybody's Darling*, *supra* note 8, at 694 (proposing that cause-in-fact sufficiently supports RICO standing). *See generally Equitable Relief*, *supra* note 8, at 589 n.238 ("use of 'by reason of' to indicate causal connection is a feature found in a number of other federal statutes").

[23] *See Brandenburg*, 859 F.2d at 1189. In *Brandenburg*, the court noted that "Civil RICO is of course a statutory tort remedy." *Id.* "Causation principles generally applicable to tort liability must be considered applicable [to civil RICO]." *Id.* Causation is a question of law decided by judges. *See id.*

[24] 777 F.2d 1173 (7th Cir. 1985).

[25] *Id.* at 1176.

[26] 15 U.S.C. §§ 12-27 (1988). Antitrust laws are designed to assure a competitive economy based on the belief that through competition, producers will strive to satisfy consumer wants at the lowest prices while sacrificing the fewest resources. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

[27] *Carter*, 777 F.2d at 1176. Causal relationship, improper motive, nature of the injury, and directness of the injury are factors to consider during Clayton Act standing analysis. *See* Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 537-38 (1983). The directness of the injury appears to be the dominant factor. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720, 740 (1977) ("allowing indirect purchasers to recover using pass-on theories . . . would transform treble-damages actions into massive multiparty litigations"); *see also* Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1081-83 (6th Cir. 1983) (overview of standing tests under Clayton Act, including "direct injury" and "target area" tests).

[28] *Carter*, 777 F.2d at 1175-76. The court further maintained that concentrating the full amount of RICO recovery in the hands of the direct victim promotes deterrence. *Id.* Moreover, a direct victim is most privy to the essential facts necessary to make out a RICO violation. *Id.*

[29] *See Everybody's Darling*, *supra* note 8, at 689. "In creating RICO, Congress was

majority of courts and commentators have rejected the antitrust causation analogy, primarily because although RICO originally was conceived as an amendment to the antitrust laws,[30] it subsequently was drafted outside the antitrust laws in part to avoid their rigid standing requirements.[31] Accordingly, it is submitted that antitrust standing requirements are not appropriate in RICO suits.

Other hazardous waste cases have focused on the question of whether the injury in question was the direct or indirect result of the alleged predicate acts. In *Sedima, S.P.R.L v. Imrex Co.*,[32] for example, the Court stated that "the compensable injury necessarily is the harm caused by the predicate acts."[33] In the wake of *Sedima*, several courts have held that compensable injury must be directly caused by the predicate acts.[34] Proponents of a direct injury requirement also have argued that a victim who suffers indirect injury as a result of racketeering activity is not the real party in interest.[35] The majority of courts, however, have characterized

---

consciously adopting the enforcement mechanisms . . . proven effective in . . . antitrust law." *Id.* at 688-89.

[30] *See id.* at 702.

[31] *See In re* Catanella, 583 F. Supp 1388, 1432 (E.D. Pa. 1984). The *Catanella* court observed that "the majority of courts have either rejected the [antitrust competitive inquiry] requirement . . . or abandoned it in favor of another approach." *Id.* at 1431-32 (citations omitted). One commentator notes that placing antitrust limitations on RICO actions "flies in the face of the very consideration that led to the drafting of RICO as a separate statute." *See Reflections, supra* note 8, at 255 n.52; *see also Equitable Relief, supra* note 8, at 554 (antitrust analogy inappropriate).

[32] 473 U.S. 479 (1985).

[33] *Id.* at 497.

[34] *See, e.g.*, Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1268 (3d Cir. 1987) (plaintiff not directly injured by bribes); Morast v. Lance, 807 F.2d 926, 933 (11th Cir. 1987) (employee discharge did not directly flow from commission of predicate acts); *Carter*, 777 F.2d at 1175 (only directly injured plaintiffs get full recovery); *see also In re* Forty-Eight Insulations, Inc., 63 Bankr. 415, 418-19 (N.D. Ill. 1986) (law firm's injuries in not receiving fees too indirect although defendants fraudulently prevented clients from receiving personal injury settlements); *cf.* Warren v. Manufacturers Nat'l Bank, 759 F.2d 542, 544 (6th Cir. 1985) (shareholder and creditor of corporation had no standing to bring RICO action for corporate injury).

[35] *See* City of Milwaukee v. Universal Mortgage Corp., 692 F. Supp. 992, 996-97 (E.D. Wis. 1988). In *Universal Mortgage*, the City of Milwaukee alleged that it incurred damages as a result of the defendant's scheme to defraud the Department of Housing and Urban Development. *Id.* at 993-96. The court held that RICO plaintiffs must allege "injuries that establish plaintiffs as the real parties in interest; that is, that the plaintiffs are parties that suffered direct rather than indirect injuries at the hands of the defendants." *Id.* at 998; *see also* Bass v. Campagnone, 838 F.2d 10, 12-13 (1st Cir. 1988) (union itself, rather than union members, was real party in interest).

Rule 17(a) of the Federal Rules of Civil Procedure provides: "Every action shall be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a). A litigant has a

the "direct injury" requirement as overly restrictive and contrary to the language of *Sedima*.[36] In *Sedima*, the Court noted that "recoverable damages . . . flow from the commission of the predicate acts."[37] These courts hold that the word "flow" connotes a liberal causal nexus standard that is consistent with RICO's remedial purposes.[38] In addition, the *Sedima* Court would allow recovery for "competitive injury,"[39] which may fairly be classified as an indirect injury.[40] Therefore, it is submitted that the direct injury requirement should be rejected in favor of a more flexible test of causation consistent with RICO's liberal construction clause.[41]

Other courts have applied a traditional tort causation analysis, holding that a plaintiff is harmed "by reason of" a RICO violation if the predicate acts constitute the factual cause and the legal or proximate cause of the alleged injury.[42] Factual causation asks whether the plaintiff would have been injured "but for" the defendant's RICO violation.[43] Questions relevant to a proximate

---

reasonable time to join or substitute the real party in interest. *Id.* Rule 17(a) enables the defendant to present defenses he has against the real party in interest, protects the defendant against a subsequent action by a party actually entitled to relief, and ensures that a judgment will have the proper res judicata effect. *See* Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 84 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974). The rule enforces the principle that "the action must be brought by a person who possesses the right to enforce the claim and who has a signifigant interest in the litigation." *Id.* at 83 (footnote omitted).

[36] *See* Zervas v. Faulkner, 861 F.2d 823, 833 (5th Cir. 1988) ("damages are those which '*flow* from the commission of the predicate acts' " (quoting *Sedima*, 473 U.S. at 497 (emphasis added) (footnote omitted))); *see also* Sperber v. Boesky, 849 F.2d 60, 64 (2d Cir. 1988) (both direct and indirect injuries contemplated by *Sedima*).

[37] *Sedima*, 473 U.S. at 497.

[38] *See* Ocean Energy II v. Alexander & Alexander, Inc., 868 F.2d 740, 744 (5th Cir. 1989); *Sperber*, 849 F.2d at 64; Brandenburg v. Seidel, 859 F.2d 1179, 1189 (4th Cir. 1988).

[39] *See Sedima*, 473 U.S. at 497 n.15.

[40] *See Sperber*, 849 F.2d at 63.

[41] *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). *See generally* Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980) (comprehensive analysis of background and rationale of liberal construction clause).

[42] *Ocean Energy II*, 868 F.2d at 744. "The Supreme Court has explained these injury and causation requirements as aspects of standing, rather than elements of the civil RICO plaintiff's prima facie case." *Brandenburg*, 859 F.2d at 1187.

[43] *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984) [hereinafter PROSSER & KEETON]. An act or omission is not regarded as a cause of an event if the particular event would have occurred without it. *See id.* Thus, the omission of crossing signals at a railroad intersection is irrelevant when an automobile collides with the 68th car. *See id.* (citing Sullivan v. Boone, 205 Minn. 437, 440 286 N.W. 350, 351-52 (1939)).

The "but for" test is replaced by the "substantial factor" test when concurrent causes

cause analysis include: (1) If the RICO claim is based on mail or wire fraud, did the plaintiff or a third party rely on such fraud?[44] (2) Is a finding of legal causation consistent with RICO's design?[45] (3) Were plaintiff's injuries foreseeable, and were superseding or intervening causes present?[46] (4) Are less drastic forms of relief available?[47] (5) Should liability extend further due to intentional

---

are implicated. *See id.* at 267 (citing Anderson v. Minneapolis, St. P. & S. S. M. Ry., 146 Minn. 430, 440, 179 N.W. 45, 48-49 (1920), *overruled on other grounds by* 183 N.W. 521 (1921)); *see also* RESTATEMENT (SECOND) OF TORTS §§ 431, 433 (1965) (adopting substantial factor rule).

[44] *See* County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311 (2d Cir. 1990). In *Long Island Lighting*, the court held that the plaintiff failed to prove detrimental reliance on the alleged mail and wire fraud, thereby severing the causal nexus. *See id.* at 1311-12; *see also Brandenburg*, 859 F.2d at 1188 n.10; Shaw v. Rolex Watch U.S.A., Inc., 726 F. Supp. 969, 972-73 (S.D.N.Y. 1989) ("injury . . . must result from reliance on . . . fraud in order to meet the causation requirements of Section 1964(c)").

Some courts also have held that the causal nexus is severed if a third party, rather than the plaintiff, has relied on the mail or wire fraud. *See Rolex Watch*, 726 F. Supp. at 972-73. The *Rolex Watch* court would allow "recovery to a plaintiff who was proximately injured by defendants' deception of a third party." *Id.* at 973. It is submitted that the above reliance rules should not apply in RICO cases in which the plaintiff alleges a competitive injury, rather than an injury caused by the commission of predicate acts such as mail or wire fraud. *See supra* note 16 and accompanying text.

[45] *See Equitable Relief*, *supra* note 8, at 529.

[46] *See Brandenburg*, 859 F.2d at 1189. A proximate or "legal cause determination [under RICO] is properly one of law for the court, taking into consideration such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection." *Id.*

Several courts have held that foreseeability of a RICO injury alone is insufficient to establish proximate cause. *See* Zervas v. Faulkner, 861 F.2d 823, 834 (5th Cir. 1988); *Sperber*, 849 F.2d at 65-66. In *Sperber*, the plaintiffs alleged that the defendant's illegal trading practices inflated certain stocks which the plaintiffs had purchased at the inflated price. *Id.* at 62. The plaintiffs claimed that after the defendant's manipulation became public, the stocks plummeted in value, causing the plaintiffs to suffer heavy losses. *Id.* The court held that while it was foreseeable that the defendant's schemes could have caused plaintiffs' losses, the causal nexus was too attenuated and the injuries too remote from the defendant's wrongdoing. *Id.* at 65-66.

Intervening causes can sever the causal nexus. *See* PROSSER & KEETON, *supra* note 43, at 301-19. For instance, in Seawell v. Miller Brewing Co., 576 F. Supp. 424 (M.D.N.C. 1983), it was held that any causal link between the employer's alleged collusive hiring agreement and injury to the employees was severed by an intervening collective bargaining agreement between the employer and the employees' union representatives. *Id.* at 430. In Warner Communications, Inc. v. Murdoch, 581 F. Supp. 1482 (D. Del. 1984), it was held that a firm involved in a takeover could not claim that it was injured by prior fraudulent acts of the target firm's management because the previous concealment of those acts was cured by intervening regulatory disclosures and attendant publicity. *See id.* at 1490-92.

[47] *See Sedima*, 473 U.S. at 504 (Marshall, J., dissenting). Justice Marshall recognized that a civil RICO defendant faces "a tremendous financial exposure in addition to the threat of being labeled a 'racketeer.'" *Id.* (Marshall, J., dissenting) Justice Marshall also noted that "[m]any a prudent defendant, facing ruinous exposure, will decide to settle even a case

conduct?[48]

II. RICO-BASED HAZARDOUS WASTE CASES

Several recent RICO-based hazardous waste cases illustrate the difficulties hazardous waste victims face in satisfying RICO's causation element. In *Standard Equipment, Inc. v. Boeing Co.*,[49] a predicate act injury case, the plaintiff brought a RICO claim against the operator of a hazardous waste storage site, as well as generators and transporters of hazardous waste.[50] The plaintiff alleged that its property had been contaminated by hazardous waste that had migrated through the soil from a neighboring storage site.[51] The plaintiff further alleged that the operator of the storage site engaged in fraudulent mail and wire communications with government officials and that the other generators and transporters were aware or should have been aware of the fraudulent conduct.[52]

---

with no merit." *Id.* at 506 (Marshall, J., dissenting). Further, RICO "cases take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels." *Id.* at 520 (Marshall, J., dissenting).

[48] Only criminal intent satisfies RICO's mental culpability requirement. *See* Albanese v. City Fed. Sav. & Loan Ass'n, 710 F. Supp. 563, 566-67 (D.N.J. 1989) (municipality cannot have requisite criminal intent to violate RICO's substantive provisions). Thus, it may be appropriate in some circumstances to widen RICO's scope of liability, unless an overriding statutory policy mandates otherwise. *See* Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 547-49 (1983) (Marshall, J., dissenting). In a case involving section 4 of the Clayton Act, Justice Marshall noted that an antitrust violation is essentially a statutory tort, and explained:

> Although many legal battles have been fought over the extent of tort liability for remote consequences of *negligent* conduct, it has always been assumed that the victim of an *intentional* tort can recover from the tortfeasor if he proves that the tortious conduct was a cause-in-fact of his injuries. An inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors. For example, if one party makes false representations to another, intending them to be communicated to a third party and acted upon to his detriment, the third party can bring an action for misrepresentation against the originator of the false information if he suffers injury as a result. Indeed, in many situations the common law holds an intentional tortfeasor liable even for the unforeseeable consequences of his conduct.

Id. at 547-49 (Marshall, J., dissenting) (emphasis in original) (footnotes omitted). Justice Marshall indicated that only overriding statutory policy should alter these common law rules. *See id.* at 549-52. (Marshall, J., dissenting) Since RICO is also a statutory tort, *see supra* note 23, it would appear that Justice Marshall's concerns are equally relevant to RICO.

[49] 16 Envtl. L. Rep. 20,246 (Envtl. L. Inst.) (W.D. Wash. 1985).

[50] *Id.*

[51] *Id.* at 20,247.

[52] *Id.*

In light of the plaintiff's argument that it was unable to refinance loans due to property devaluation caused by the contamination,[53] the court held that the plaintiff had sufficiently alleged that its injuries were proximately caused by the RICO enterprise's commission of mail and wire fraud.[54] However, the court failed to explain exactly how the causation requirement was met.

In a second predicate act injury case, *Huntsman-Christensen Corp. v. Mountain Fuel Supply Co.*,[55] the plaintiff had entered a lease and purchase agreement with the defendant for a parcel of land.[56] In its RICO claim, the plaintiff alleged that prior to the agreement the defendant disposed of hazardous wastes on the leased site.[57] The plaintiff also alleged that the defendant had engaged in fraudulent wire and mail communications with government officials concerning its illegal hazardous waste disposal practices, and that "but for" those fraudulent communications the plaintiff would have known of the contamination and would not have entered into the agreement.[58] Rejecting the result reached in *Standard Equipment*, the court in *Mountain Fuel* held that while the plaintiff adequately alleged cause-in-fact, those "injuries that were the indirect and incidental consequence . . . [of fraud were] not proximate and outside the scope of RICO."[59]

It is submitted that the *Standard Equipment* and *Mountain Fuel* courts approached the causation element unsatisfactorily. Cause-in-fact cannot be established if the damage complained of (pollution of property) occurred prior to the alleged cause (mail and wire fraud).[60] The facts in neither case clarify whether the plaintiff's damages were incurred after the alleged pattern of mail or wire fraud. Also, since the mail fraud and the unsafe disposal of hazardous waste were concurrent causes, the substantial factor test shows that the unsafe disposal and not the alleged mail fraud was the substantial cause of each plaintiff's property damage.[61] More-

---

[53] *Id.* at 20,246.

[54] *Id.* at 20,247-48.

[55] No. C86-530G (D. Utah Nov. 24, 1986) (LEXIS, Genfed Library, Dist file).

[56] *Id.* at 3.

[57] *Id.*

[58] *Id.* at 4, 11.

[59] *Id.* at 16.

[60] *See* Kann v. United States, 323 U.S. 88, 94-95 (1944). In *Kann*, the Court held that mail posted subsequent to the execution of the scheme to defraud would not support a conviction. *Id.* at 95.

[61] *See* Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1168 (3d Cir. 1989). In

over, neither court adequately analyzed proximate cause. First, in each case, the court did not determine whether the plaintiff or a third party relied on the alleged mail and wire fraud.[62] Without such reliance, the causal nexus between the plaintiff's injuries and the RICO violation is severed.[63] Second, in both cases, a finding of proximate cause was not consistent with RICO's purposes. RICO was designed to eradicate organized crime and to prevent its infiltration into legitimate businesses.[64] It was not meant to eradicate hazardous waste mismanagement. While legitimate businesses also are subject to RICO prosecution,[65] courts are urged to consider RICO's express purposes as part of the proximate cause analysis. Third, the Comprehensive Environmental, Response, Compensation and Liability Act ("CERCLA"),[66] notwithstanding its weaknesses as a remedy for private plaintiffs,[67] was enacted with the clear purpose of compensating hazardous waste victims and RICO should not supersede CERCLA's remedial function.[68] Finally, each plaintiff's injuries were foreseeable consequences of waste mismanagement, rather than acts of mail fraud.[69]

In *Southwest Marine, Inc. v. Triple A Machine Shop, Inc.*,[70] a competitive injury case, a toxic waste transporter alleged that a

---

Shearin, a company officer was discharged for her failure to participate in a racketeering scheme against customers. *Id.* at 1164. The court held that the act of firing, not the racketeering activity, was the substantial cause of her pecuniary loss. *Id.* at 1168.

[62] *See supra* note 44 and accompanying text.

[63] *See id.*

[64] Evidence suggests that organized crime has infiltrated the hazardous waste disposal business, resulting in environmental abuses and a decrease in competition within that industry. *See* Profile of Organized Crime, 98th Cong., 1st Sess. (1983) (details evidence of such organized crime activity in New York and New Jersey); Organized Crime and Hazardous Waste Disposal, 96th Cong., 2d Sess. (1980) (overview of investigations into such organized crime activity). *See generally* A. BLOCK & F. SCARPITTI, POISONING FOR PROFIT: THE MAFIA AND TOXIC WASTE IN AMERICA *passim* (1985) (illegal disposal of toxic waste and organized crime's contribution to such hazardous pollution in light of its heavy influence and control of American waste disposal).

[65] *See* United States v. Turkette, 452 U.S. 576, 580 (1981) (definition of "enterprise" in 18 U.S.C. § 1962(c) "appears to include both legitimate and illegitimate enterprises within its scope").

[66] CERCLA, 42 U.S.C. §§ 9601-9657 (1988).

[67] *See supra* note 7 and accompanying text.

[68] *Cf. Sedima*, 473 U.S. at 507 (Marshall, J., dissenting). Justice Marshall argued that "with respect to effects on the federal securities laws and other federal regulatory statutes, we should be reluctant to displace the well-entrenched federal remedial schemes absent clear direction from Congress." *Id.* (Marshall, J., dissenting)

[69] *Cf.* Sperber v. Boesky, 849 F.2d 60, 65 (2d Cir. 1988).

[70] 720 F. Supp. 805 (N.D. Cal. 1989).

competitor had gained an unlawful competitive advantage in securing Navy contracts by making fraudulent mail and wire communications with the Navy concerning its compliance with environmental laws and regulations.[71] The plaintiff argued that "but for defendants' wrongful conduct, contracts awarded to them by the Navy would have been awarded to the plaintiff."[72] The court, without explaining its reasoning, found that the plaintiff had standing on its RICO claim.[73]

In *Waste Conversion, Inc. v. Rollins Environmental Services, Inc.*,[74] also a competitive injury case, a transporter brought a RICO claim against a waste generator, alleging that through the use of the mails, the generator intentionally had misrepresented the contents of its hazardous waste to various landfill operators.[75] The plaintiff alleged that it had been injured in its business and property in that it lost an exclusive landfill contract and incurred costs from an official investigation of its waste disposal activities.[76] The court held that the plaintiff had not adequately established causation, primarily because plaintiff's failure to notify the landfill owner of the wrongdoing once he became aware of it, constituted a superseding cause of its damages.[77]

In *Southwest Marine*, it would seem that the court's finding of proximate cause was warranted. First, holding the competitor transporter liable was consistent with RICO's purposes in that while the defendant may not have been a member of organized crime, the defendant was using racketeering activity to infiltrate and acquire an interest in the legitimate industry of hazardous waste disposal.[78] Second, the plaintiff's injuries were a natural and foreseeable consequence of the defendant's competitive advantage gained from racketeering activity.[79] Third, no superseding or intervening cause lessens the effect of mail or wire fraud on government officials.[80]

It is submitted that the court in *Waste Conversion* also ap-

---

[71] *Id.* at 803.
[72] *Id.*
[73] *Id.*
[74] No. 88-7792 (E.D. Pa. March 31, 1989) (LEXIS, Genfed Library, Dist file).
[75] *Id.* at 2, 4.
[76] *Id.* at 3-4.
[77] *Id.* at 17-18.
[78] *See supra* notes 8 & 65 and accompanying text.
[79] *See supra* note 46 and accompanying text.
[80] *See supra* notes 76-77 and accompanying text.

proached causation satisfactorily. The court correctly found that the defendant's violation of RICO was not the proximate cause of the expense incurred by the plaintiff as a result of the official investigation of its disposal activities, since the plaintiff's own fraudulent communications with the landfill operator had acted as a superseding cause of his business damages and consequent loss of competitiveness.[81]

CONCLUSION

RICO acts as a powerful deterrent to those who seek to infiltrate a legitimate industry through racketeering activity. In RICO-based hazardous waste disputes, however, reliance on mail and wire fraud as predicate offenses effectively prevents at least one class of injured plaintiffs from recovering property damages. Fortunately, in the competitive injury context, RICO does serve as an appropriate remedy to cleanse the hazardous waste disposal industry of racketeers who force law-abiding transporters out of business.

John M. O'Reilly

[81] *Id.*