Holmes v. Securities Investor Protection Corporation: Proximate Cause Dims the Bright-Lines of RICO Standing

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The Racketeering Influenced Corrupt Organization Act, generally known as RICO, permits persons injured "by reason of" violations of the prohibitions therein to "recover threefold the damages" sustained. Because of RICO's broad prohibitions, limitations on this hefty express remedy were sought. Several such limitations proved successful at the federal circuit level, but did not survive United States Supreme Court scrutiny. Although RICO has recently been significantly limited by the "pattern requirement" expressed in *H.J. Inc. v. Northwestern Bell Telephone Co.*, it remains subject to further limitation. Recent attempts to limit the civil RICO action resemble prior unsuccessful attempts in that they focus on the nature or cause of the injury to determine standing. These recent attempts to limit RICO through narrow standing requirements use easily administered rules, or bright-line tests which permit courts to stop civil RICO actions at the outset. A recent example of such a bright-line standing test was the importation into RICO of the 10b-5 securities fraud "purchaser/seller rule" established in *Birnbaum v. Newport Steel Corp.* and endorsed by the United States Supreme Court in *Blue Chip Stamps v. Manor Drug Stores.* This rule requires that securities fraud plaintiffs be purchasers or sellers to have standing. Although superficially the rule does not appear to deal with the nature or cause of the injury, in practice it has...
served as a proximate cause test disallowing recovery to derivatively injured plaintiffs.\(^8\)

In 1991, the United States Supreme Court granted certiorari for *Holmes v. Securities Investor Protection Corp.*\(^9\) to determine whether every RICO securities fraud plaintiff must be a purchaser or seller of the manipulated securities to have standing to maintain a claim.\(^10\) This question has divided the federal circuits, some holding that civil RICO securities fraud claims\(^11\) require purchaser/seller standing, and others holding that they do not.\(^12\) However, an application to civil RICO of bright-line standing rules concerning the type of injury claimed is inconsistent with the legislative origin of these claims, United States Supreme Court jurisprudence, and Congress' instruction to construe the statute liberally.\(^13\) The purposes of RICO, though arguably too broad, require a standing analysis touching policy considerations, the nature of the injury, and other relevant factors concerning the relation between the plaintiff, the plaintiff's injury, the alleged wrongdoer, and RICO.\(^14\)

Refusing to address the bright-line rule of purchaser/seller status, the majority analyzed factors it considered crucial in *Holmes* to determine standing. The majority's refusal to address a bright-line rule concerning the relation of plaintiff to the alleged wrongdoer and the alleged wrongful act is significant in that it recognizes the inappropriateness of bright-line rules concerning injury in the civil RICO context. The proper vehicle for such analysis is proximate cause, and through it the majority denied standing to the indirectly, or—more precisely stated—derivatively injured plaintiff in the case. *Holmes* is the most recent and significant treatment of RICO standing, and the proximate cause analysis required by the Court deserves examination in light of its effect on the purchaser/seller requirement and two evolving RICO standing tests: (1) the "investment injury" requirement and (2) the "direct injury" requirement.\(^15\)

First, by taking the standing inquiry, previously phrased in terms of the purchaser/seller requirement, and placing it in its correct theoretical category—proximate cause—*Holmes* has illuminated an existing division among the circuits concerning RICO standing and the requisite relation of the RICO violation and the injury claimed under section 1962(a). Several circuits require civil RICO plaintiffs who sue under section 1962(a) to show that their injuries were the result

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8. See infra part III.
10. Id. at 1322 (O'Connor, J., concurring).
14. See infra note 97.
15. See discussion infra part IV.
"of the use or investment of racketeering income."16 This difficult task will rarely be accomplished and does not comport with the legislative intent of RICO.17 Although the Court in *Holmes* did not explicitly address this division, its reasoning offers an approach which implicitly resolves the conflict against the "investment injury" requirement.18

Second, in its proximate cause analysis the majority emphasized directness as a "central element"19 to the RICO proximate cause inquiry, but in so doing merely imported derivative lawsuit standing requirements into RICO standing requirements. Directness of the injury is a factor in any proximate cause analysis. Likewise, because derivative lawsuits require the suit to be brought on behalf of the entity injured, the necessarily indirect nature of a shareholder's injury is clearly important in those cases as well. Thus, because directness has its place in both areas, its use is inevitable in proximate cause analyses involving shareholders and analogous plaintiffs. However, absent a derivative injury, *Holmes* should not be misread to stand for (nor endorse) any type of bright-line test requiring a "direct injury" for RICO standing. Such an interpretation is inconsistent with both the broad language of RICO and the majority's pointed refusal to address the bright-line rule involving the plaintiff's status as a purchaser or seller.

This note examines the proximate cause/standing test of *Holmes*, suggests that proximate cause is the model for future RICO standing analysis,20 and concludes that bright-line tests are therefore inappropriate in the RICO standing context. First, the note gives the facts, reasoning, and holding of *Holmes*. Second, it contrasts the courts' experience in limiting the private 10b-5 action with the courts' experience in limiting the civil RICO action and summarizes the arguments against the recent attempt by the courts to limit RICO by applying the 10b-5 purchaser/seller requirement to civil RICO actions. Third, the note suggests that the Supreme Court has dealt wisely with issues that the lower courts had been handling as purchaser/seller questions to preclude standing to plaintiffs whose injuries were "purely contingent" on a third party's injury. By addressing only the issues that arose from the facts, however, the Court did not deny standing to other types of non-purchaser plaintiffs whose positions had never really been considered by the courts but whose RICO suits would have been precluded under a blanket purchaser/seller rule. While the standing of these remaining non-derivative, non-purchasing plaintiffs has not yet been decided, at least the correct analytical

18. *Holmes* offers an approach which, unlike the presently evolving bright-line tests for RICO standing, is consistent with the language and policy of RICO. *Holmes* v. SIPC, 112 S. Ct. 1311 (1992).
19. Id. at 1318.
20. See infra note 97.
framework has been established. These cases are to be governed by general principles of common-law proximate cause. Ironically, the considerations which gave rise to the purchaser/seller rule will likely drive the new RICO standing analysis (proximate cause) to a denial of standing to plaintiffs whose injuries are solely speculative.21 Lastly, this note examines the two evolving standing tests in the lower courts that, like the purchaser/seller requirement, have been used as simple means to deny plaintiffs standing. The note suggests that the proponents of the new tests misread Holmes and that the correct standing analysis under Holmes is, again, one of proximate cause. The note concludes that directness is dispositive only in derivative-type civil RICO actions and that the so-called “investment injury” division should be resolved in favor of the minority view.

I. THE FACTS OF HOLMES

Securities Investor Protection Corporation (SIPC) is a nonprofit corporation formed pursuant to the authority of the Securities Investor Protection Act.22 SIPC’s purpose is to disburse securities and cash to customers of failed broker-dealers. To the extent that the pool of customers’ property is inadequate, SIPC must advance up to $500,000 per customer.23

In Holmes, SIPC alleged that seventy-five defendants engaged in a fraudulent scheme of stock manipulation of six companies that ultimately caused the failure of two broker-dealers.24 SIPC consequently had to pay over $13 million to cover the claims for securities and cash owed the customers of these firms.25

Because the customers who had purchased the manipulated securities had brought their own suit against the conspirators, SIPC had only the non-purchasing customers as a link to the wrongdoers. SIPC brought its suit as subrogee of these customers.26 The district court held that SIPC’s claim failed because the parties

21. Id.
23. “With respect to a customer’s cash on deposit with the broker-dealer, SIPC is not obligated to advance more than $100,000 per customer.” 15 U.S.C. § 78fff-3(a)(1) (1970). Holmes, 112 S. Ct. at 1314 n.2.
24. Holmes allegedly participated in the fraud by making false statements about prospects of one of the six companies of which he was an officer, director, and majority shareholder. SIPC v. Vigman, 908 F.2d 1461, 1464 (9th Cir. 1990).
25. The Court stated:
   [T]he allegations were that, from 1964 through July 1981, the defendants manipulated stock of six companies by making unduly optimistic statements about their prospects and by continually selling small numbers of shares to create the appearance of a liquid market; that the broker-dealers bought substantial amounts of the stock with their own funds; that the market’s perception of the fraud in July 1981 sent the stocks plummeting; that this decline caused the broker-dealers’ financial difficulties resulting in their eventual liquidation and SIPC’s advance of nearly $13 million to cover their customers’ claims. Holmes, 112 S. Ct. at 1315.
26. Because SIPC argued that it was subrogor to these non-purchasing customers, the purchaser/seller requirement of 10b-5 became the central standing issue. See id. at 1319.
to whom SIPC claimed subrogation rights were not purchasers or sellers of the manipulated securities. Because SIPC had only the rights of its subrogor and its subrogor lacked standing, SIPC also lacked standing. The Ninth Circuit Court of Appeals, however, reversed that decision and held that there is no purchaser/seller requirement for civil RICO securities fraud claims. Therefore, the non-purchasing customers had standing to sue the conspirators, and SIPC as subrogee to the customers likewise had standing to sue the wrongdoers.

The Supreme Court granted certiorari to determine whether SIPC could maintain its action against the wrongdoers based on the non-purchasers’ injuries. Without resolving the division among the circuits centering on the purchaser/seller requirement, the majority reasoned (in a manner analogous to a dismissal of a derivative lawsuit) that the indirectly injured customers lacked standing. However, the reasoning used by the majority differed from a dismissal of a derivatively injured plaintiff’s suit in one important way. Instead of focusing on the plaintiff’s mere ownership interest in the first injury, the Court based dismissal on want of a proximately caused injury.

27. In Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S. Ct. 1917 (1975), the U.S. Supreme Court held that only purchasers and/or sellers have standing to maintain a private 10b-5 securities fraud action. The district court in Holmes applied the Blue Chip Stamps purchaser/seller requirement to this security fraud claim even though this claim was also brought under RICO. See SIPC v. Vigman, 764 F.2d 1309 (9th Cir. 1985).

28. In response to the lower courts’ reason for granting summary judgment against SIPC—no proximate causation—the appellate court held that the crucial causal link is between the conspirators and SIPC’s injury. Vigman III, 908 F.2d 1461 (1990).

29. Black’s Law Dictionary 399 (5th ed. 1979) provides that “[a]n action is a derivative action when the action is based upon a primary right of the corporation, but is asserted on its behalf by the stockholder because of the corporation’s failure, deliberate or otherwise, to act upon the primary right.” (citing Lehrman v. Godchaux Sugars, 138 N.Y.S.2d 163, 166 (1955)).

30. A derivatively injured plaintiff suing on his own behalf is dismissed because his injury exists only to the extent of his ownership interest in the primary injury, and he should therefore not be permitted to recover personally for the injury of another person (or entity). See Dayton Monetary Assocs. v. Donaldson, Lufkin & Jenrette Securities Corp., 1995 W.L. 410503 (S.D.N.Y. 1993); Attick v. Valeria Assocs., 1992 W.L. 58868 at *4 (S.D.N.Y. 1992); Rand v. Anaconda-Ericson, Inc., 794 F.2d 843, 849 (2d Cir.), cert. denied, 479 U.S. 987, 107 S. Ct. 579 (1986). For instance, a shareholder wants to sue a person who has harmed a corporation in which he holds stock on the grounds that the wrongdoer caused the value of the shareholder’s stock to decrease. Although the shareholder may have suffered loss, the corporation was the entity that suffered the whole injury. The derivative plaintiff has only a fraction interest in that whole injury. Whereas derivative plaintiff dismissal focuses on the ownership interest in the injury, proximate cause deals with causation, foreseeability, directness of injury, and other various policy considerations. Although the field of derivative lawsuits arose in response to the corporate entity, the purpose of the doctrine resembles the purpose of proximate cause—to determine through an analysis of causation, injury, and various policy considerations, the legal limits of an actor’s liability to various plaintiffs for a particular wrongful act. In derivative lawsuits, however, the most crucial factor in determining the plaintiff’s ability (or inability) to recover is the identity of the plaintiff. This factor is also the focal point of all proximate cause factors, e.g., directness, foreseeability, causation. In addition, the derivative lawsuit amplifies other policy considerations that less frequently determine the outcome of proximate cause inquiries, e.g., priority of claims, circumvention of others’ claims and of corporate managerial...
Specifically, the Court in *Holmes* held that a person lacked standing to sue under RICO based on the theory that a RICO violation inflicted injury on a third party, which injury in turn caused injury to the plaintiff. Quoting Justice Holmes, Justice Souter emphasized that “[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.”

In support of this holding, the Court traced the proximate cause element of RICO to its legislative origin. Section 1964(c) (allowing civil RICO action) was modeled on section 4 of the Clayton Act, which was itself based on section 7 of the Sherman Act, which had been read to “incorporate common law [sic] principles of proximate causation.” Justice Souter emphasized “directness” as a central factor in RICO proximate cause as applied to the derivatively injured plaintiffs in *Holmes*:

> [A]mong the many shapes [proximate cause] took at common law, was a demand for some *direct relation* between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover . . . . Although such directness of relationship is not the sole requirement of Clayton Act causation, it has been one of its central elements.

The Court emphasized “directness” for a variety of reasons, all of which address the concerns of victims who hold the primary right to the central injury; in *Holmes*, the broker-dealers were these victims. First, the less direct an injury is, the more difficult it becomes to ascertain the quantum of damages attributable to the violation. Second, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury to obviate the risk of multiple recoveries. Third, directly injured victims will generally “vindicate the law as private attorneys general, without any problems attendant upon suits by plaintiffs injured more remotely.” Fourth, attempts by indirectly injured victims could be an attempt to circumvent the relative priority its claim would have in the directly injured victim’s liquidation proceedings. Lastly, the Court noted that “[a]llowing suits by those injured only indirectly would open the door to ‘massive and complex

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33. *Id.* at 1318 (emphasis added) (citations omitted).
34. *Id.* at 1318-22.
35. *Id.*
36. *Id.*
37. *Id.* at 1321. See generally *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1336 (7th Cir. 1989).
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damages litigation which would not only burden the courts, but also undermine the effectiveness of treble damages suit.'

Further, justifying its inattention to the purchaser/seller requirement, the majority stated that all "the conflicting cases . . . could have been resolved on proximate-causation grounds, and . . . none involved litigants like those in Blue Chip Stamps v. Manor Drug Stores," i.e., plaintiffs who claim they "would have" purchased but for the defendant's act of securities fraud. Thus, the majority was unwilling to conclude on facts different from those presented in Blue Chip Stamps that there is no purchaser/seller requirement for civil RICO securities fraud claims. By refusing to address the purchaser/seller issue, the majority highlighted the need for a test susceptible of application in a variety of cases in which a bright-line rule such as the purchaser/seller requirement could lead to unwarranted results. Nonetheless, the Court's proximate cause test for RICO standing will deny most non-purchasers and non-sellers standing when those plaintiffs allege securities fraud as the defendant's predicate offense. Only through proximate cause, however, are the remaining non-purchasers and non-sellers protected from unjustifiable denial of their legislative remedy in RICO.

II. THE 10B-5 AND RICO PRIVATE ACTIONS: THE COURT'S EXPERIENCE WITH LIMITING IMPLIED AND EXPRESS ACTIONS

Rule 10b-5 prohibits (1) fraudulent devices and schemes, (2) misstatements and omissions of material facts, and (3) acts and practices that operate as a fraud or deceit. In 1946, a federal district court in Kardon v. National Gypsum Co. held that rule 10b-5 gives a private remedy to injured investors. Twenty-four years later, the United States Supreme Court gave informal approval to the implied remedy found in 10b-5 by the Kardon court. Because the private 10b-5
action was judicially created, the Supreme Court has limited the action as it has seen fit.

The first limitation of the implied 10b-5 private action occurred in Blue Chip Stamps v. Manor Drug Stores.\(^{46}\) The Blue Chip Stamps plaintiffs contended that they "would have" purchased a particular security but for the defendant's alleged misleading statements. The United States Supreme Court denied these would-be purchasers standing to maintain a 10b-5 action. The Court held that to maintain such an action, the plaintiff must be either a purchaser or seller of the manipulated securities. This conclusion was based on the difficulty of determining causation and injury and the policy against enhancing the settlement value of these types of suits.\(^{47}\) Although the purchaser/seller requirement arose from pure policy considerations, the Blue Chip Stamps limitation was entirely within the Court's authority. If the courts could create the implied right of action, the courts could also limit it.\(^{48}\) The judiciary did not (and does not) have the same liberty, however, with the legislatively created RICO private action.

RICO was designed to "eradicate . . . organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies."\(^{49}\) RICO prohibits the (1) investment of income derived from a pattern of racketeering, (2) the acquisition or maintenance of an interest in an enterprise through a pattern of racketeering, (3) conduct or participation of an enterprise through a pattern of racketeering, and (4) conspiracy to do any of the first three things.\(^{50}\) The acts, generally known as predicate acts, which, in appropriate combinations

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46. The Court articulated its misgivings regarding the development of 10b-5 actions as follows: "When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn . . . . [I]t would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to 10b-5." Blue Chip Stamps, 421 U.S. 723, 731, 95 S. Ct. 1917, 1923, reh'g denied, 423 U.S. 884, 96 S. Ct. 157 (1975) (approving of the purchaser/seller requirement created in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956, 72 S. Ct. 1051 (1952)).

47. These suits may have very little substantive value, but because of the complex issues of fact (i.e., whether the misrepresentations caused the party to forego the purchase), the suit is made more expensive by the day by day accumulation of attorney fees, etc. The continuation of the suit is sufficiently costly to encourage settlement even though both sides know the actual weakness of the claim. See Virginia Bankshares, Inc. v. Sandberg, 112 S. Ct. 2749, 2760 (1991).


50. 18 U.S.C. § 1961, 1962 (1988 ed. & Supp. 1989). A pattern of racketeering in the context of securities fraud is defined as at least two "offense[s] involving fraud . . . in the sales of securities . . . the last of which occurred within ten years (excluding any years of imprisonment) after the commission of a prior act of racketeering activity." Id. at § 1961(1) & (5).
over time, may constitute a pattern, include such offenses as securities fraud, wire fraud, mail fraud, murder, kidnapping, gambling, arson, robbery, and bribery. Essentially, the predicate acts are those criminal acts that may be associated with activities of organized crime. Although RICO was principally a criminal statute, Congress also provided attractive private remedies to persons injured by violations of RICO, permitting them to recover treble damages and litigation expenses including attorney’s fees.

RICO’s goal of “eradicating organized crime” is thus partially realized through the action of individuals injured by activity prohibited by the statute. Allowing individuals injured “by reason of” a violation of section 1962 to act as private attorneys general helps solve the “serious national problem for which public prosecutorial resources [were] deemed inadequate.” However, in providing for “enhanced sanctions and new remedies,” Congress gave the statute a broad reach susceptible to abuse in pursuit of the treble damages permitted by the statute. In response to what was considered misuse of civil RICO actions, many courts sought to limit RICO’s reach.

Several attempts to limit RICO were unsuccessful. One such attempt, rejected by an overwhelming majority of the courts, was the requirement that the defendants of a RICO action be associated with organized crime. Another unsuccessful limitation was the requirement that plaintiffs show an injury “different in kind from that occurring as a result of the predicate acts themselves” (the

52. Id.
54. 18 U.S.C. § 1964(c) provides that “[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover treble the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.” (emphasis added).
55. Although the Justice Department adopted formal guidelines to avoid abusive or excessive use of the broad language of RICO, private claimants invoking the broadly phrased statute have not shown the same discipline. Rather, inventive private lawyers seeking treble damages argued successfully for the most sweeping interpretation of RICO’s broad language. See generally Philip A. Lacovara and Geoffrey F. Aronow, The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO, 21 New Eng. L. Rev. 1, 2 (1985-1986).
58. Although allegations of misuse include the following: filing treble damage law suits in connection with ordinary business disputes; RICO claims being used to displace well-established federal remedial provisions; through the use of RICO claims, ordinary business people have been labeled as “racketeers”; and the threat or use of a RICO claim has given plaintiffs improper leverage to induce settlements. Norman Abrams, A New Proposal for Limiting Private Civil RICO, 37 UCLA L. Rev. 1, 4 n.9 (1989).
60. Id.
61. See Hazen, supra note 43, at 401 n.27.
"racketeering injury" requirement). This limitation was rejected in *Sedima, S.P.R.L. v. Imrex Co.* by the United States Supreme Court. There, the Court wrote that the judiciary's distress at the outrageous uses to which civil RICO had been put did not authorize the courts to "eliminate the private action in situations where Congress has provided it." The Court finally imposed a major limitation on RICO claims through the "pattern" requirement that the Court first mentioned in its 1985 *Sedima* decision and then approved in its 1989 decision in *H.J., Inc. v. Northwestern Bell Telephone Co.* In *H.J., Inc.*, the Court rejected the "multiple scheme" requirement, yet required RICO plaintiffs not only to show at least two related predicate acts, but also that those acts either constitute or threaten continued criminal activity. Thus, to maintain any RICO claim a plaintiff or prosecutor must show both relationship and continuity—that the racketeering predicates are related, and that they either constitute or threaten long-term criminal activity. This approach was less limiting than the approach used by the Eighth Circuit in *H.J., Inc.*, but has provided a strong limitation on RICO. Since *H.J. Inc.*, defendants in several reported cases have won on "no pattern" grounds.

Less far reaching, though still important, was the recent attempt by courts to limit civil RICO actions by applying the purchaser/seller requirement of 10b-5 to RICO securities fraud claims. The Fourth, Sixth, and Tenth Circuits, all held that the purchaser/seller standing requirement of 10b-5 piggybacks that rule whenever it is the predicate action for a civil RICO claim. On the other hand, the

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64. Id. at 499-500, 105 S. Ct. at 3287.
67. "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." Id. at 230, 109 S. Ct. at 2896.
69. The Eighth Circuit had held that for a pattern to exist there had to be more than one scheme. *H.J. Inc v. Northwestern Bell Telephone Co.*, Inc., 829 F.2d 648, 650 (8th Cir. 1987).
70. See Apparel Art Int'l v. Jacobson, 967 F.2d 720 (1st Cir. 1992); Polsby v. Chase, 970 F.2d 1360 (4th Cir. 1992); Religious Technology Ctr. v. Wollersheim, 971 F.2d 364 (9th Cir. 1992); Feinstein v. R.T.C., 942 F.2d 34 (1st Cir. 1991); Lange v. Hooker, 940 F.2d 359 (8th Cir. 1991); Marshall-Silver Constr. Co., Inc. v. Mendel, 894 F.2d 593 (3d Cir. 1990); American Eagle Credit Corp. v. Gaskins, 920 F.2d 352 (6th Cir. 1990); Hartz v. Friedman, 919 F.2d 469 (7th Cir. 1990); SIL-FLO, Inc. v. S.F.H.C. Inc., 917 F.2d 1507 (10th Cir. 1990); Johnston v. Wilbourne, 760 F. Supp. 578 (S.D. Miss. 1991); Hutchinson v. Wickes Cos., Inc., 726 F. Supp. 1315 (N.D. Ga. 1989).
Ninth\textsuperscript{74} and Eleventh\textsuperscript{75} Circuits have held that a civil RICO securities action is independent of the 10b-5 purchaser/seller requirement. The Supreme Court granted writs in *Holmes* to decide the question.

The majority opinion, however, declined even to consider the purchaser/seller question. It resolved the case on proximate cause grounds, leaving the purchaser/seller argument to the four concurring justices. Justice O'Connor's concurring opinion is therefore important in illustrating what points the majority opinion pointedly refused to make. Believing that the Court should have "first consider[ed] the standing question that was decided below, and briefed and argued here, and which was the only clearly articulated question on which we granted certiorari,"\textsuperscript{76} Justice O'Connor, joined by Justices White and Stevens, offered several reasons for upholding the Ninth Circuit's (lower court in *Holmes*) position that a plaintiff need not be a purchaser or a seller to assert RICO claims predicated by violations of fraud in the sale of securities. There, the court had reasoned that because RICO contained no purchaser/seller requirement, no such requirement existed; the civil RICO action, unlike the private 10b-5 action, was created by Congress and can only be limited by Congress; and RICO is to be liberally construed to effectuate its remedial purposes. Thus, the Ninth Circuit concluded that under RICO there is no purchaser/seller requirement.\textsuperscript{77}

First, Justice O'Connor walked through the Ninth Circuit's analysis, approved of all the steps, and reinforced them with quotes from *Sedima, S.P.R.L. v. Imrex Co., Inc.*\textsuperscript{78} and *Mobile Oil Exploration & Producing Southeast, Inc. v. United Distribution Co.*\textsuperscript{79} She then compared securities fraud to the other predicate acts under RICO to illustrate the problem of referring to the predicate offenses to determine standing. She pointed out that "a private RICO plaintiff could not allege as predicates many of the acts that constitute the definition of racketeering activity. The great majority of acts listed in § 1961(1) are criminal offenses for which only a State or the Federal Government is the proper party to bring suit."\textsuperscript{80} Private parties had no standing of any kind under many of these predicate offenses, regardless of their status as a purchaser or seller.

Additionally, Justice O'Connor did not accept the contention that an exception should be made for "'fraud in the sale of securities' simply because it is well established that a plaintiff in a civil action under § 10(b) and Rule 10b-5 must be

\textsuperscript{74} Vigman III, 908 F.2d 1461, 1465-67 (9th Cir. 1990).

\textsuperscript{75} Warner v. Alexander Grant & Co., 828 F.2d 1528, 1530 (11th Cir. 1987).

\textsuperscript{76} *Holmes v. SIPC*, 112 S. Ct. 1311, 1322 (1992) (O'Connor, J., concurring).

\textsuperscript{77} Vigman III, 908 F.2d 1461, 1465-67.

\textsuperscript{78} Quoting, "'If the defendant engages in a pattern of racketeering activity in a manner forbidden by [RICO's] provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964 (c).'" *Holmes*, 112 S. Ct. at 1323 (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 US 479, 495, 105 S. Ct. 3275, 3284 (1985)).

\textsuperscript{79} *Holmes*, 112 S. Ct. at 1323 (citing Mobile Oil Exploration & Producing, Southeast Inc. v. United Distribution Cos., 111 S. Ct. 615, 623 (1991), which held that "'any' encompasses 'all'" for purposes of interpreting the phrase "any person who is injured by reason of" a RICO violation.).

\textsuperscript{80} *Holmes*, 112 S. Ct. at 1324 (emphasis added).
either a purchaser or seller of securities."\textsuperscript{81} Her rejection of that exception was based on the language of RICO: "any offense" and "punishable under any law of the United States." This language, together with other key language in RICO, indicates that when the other elements of the RICO action are satisfied "any person injured by reason of . . . fraud in the sale of securities . . . may recover threefold his damages and a reasonable attorney fee."\textsuperscript{82} The above construction, she argued, is based upon RICO's creation of private remedies out of conduct which was previously subject only to criminal sanctions. Therefore, "the relevant predicate is defined not by § 10(b) itself, but rather by" the statute\textsuperscript{83} "which authorizes criminal sanctions against any person who willfully violates the Act or rules promulgated thereunder."\textsuperscript{84} She concluded that because the purchaser/seller requirement is of no import in criminal prosecutions for willful violations of those provisions, it is likewise inapplicable in Holmes.\textsuperscript{85} Simply stated,

If the defendant engages in a pattern of racketeering activity in a manner forbidden by [RICO's] 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 . . . requirement.\textsuperscript{86}

\textsuperscript{81.} Id.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

\textsuperscript{84.} \textit{Holmes}, 112 S. Ct. at 1324 (O'Connor, J. concurring).
\textsuperscript{85.} Id.
\textsuperscript{86.} Id. at 1323, (quoting Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479, 495, 105 S. Ct. 3275, 3284 (1985)).
Justice O'Connor next reasoned that because the Court could not divine from the language of section 10(b) the express "intent of Congress" as to the contours of a private cause of action under Rule 10b-5, the purchaser/seller standing limitation in Rule 10b-5 damages actions was not a result of the phrase "in connection with the purchase or sale of any security." Rather, she concluded, the purchaser/seller requirement rests on 10b-5's "relationship with the other provisions of the securities laws, and the practical difficulties in granting standing in the absence of an executed transaction, neither of which are relevant in the RICO context." In response to an argument that RICO securities fraud is narrower than 10b-5, she lastly argues that although the RICO securities fraud action arises out of the language "in the sale of securities," the word "in," rather than limiting the class of RICO plaintiffs to those who were parties to a sale, merely confines the "class of defendants to those proximately responsible for the plaintiff's injury and excluding those only tangentially 'connect[ed] with' it." The strength of Justice O'Connor's reasoning compels a conclusion that the 10b-5 purchaser/seller rule should not apply to civil RICO securities fraud actions. More importantly, however, the reasons supporting that conclusion likewise support the majority's requirement of proximate cause and this note's conclusion—proximate cause is the sole test for standing. Whereas the purchaser/seller requirement could be employed by the courts as a bright-line rule for securities fraud "proximate cause," an actual proximate cause analysis better serves the purposes of RICO by not denying standing to all non-purchasing or non-selling victims of securities fraud. An examination of the proximate cause function of the purchaser/seller rule of 10b-5 in light of the remedial purposes of RICO illustrates the rationale of the majority's focus on proximate cause. While only Justice O'Connor and three other justices argued that RICO does not import the purchaser/seller requirement from 10b-5, none disagreed with the result in the case or with the majority's requiring proximate cause independently of the purchaser/seller requirement. What is striking about the opinion, therefore, is that five justices refused to gloss over the distinction between Holmes' derivative lawsuit version of the purchaser/seller rule and the Blue Chip Stamps rule that merely prospective buyers had no standing to bring a 10b-5 claim. By restricting Blue Chip Stamps to its facts and consequently not applying the rule therein to Holmes, the majority refused to use the purchaser/seller rule as had lower courts that had employed the rule to deny standing to derivative-type plaintiffs. Without a "would-be" purchaser/seller-plaintiff, the majority was unwilling to

87. *Id.* at 1326 (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737, 95 S. Ct. 1917, 1926 (1975)). 88. *Id.* (citations omitted) 89. *Id.* (emphasis added). 90. See infra note 97. 91. Justice Scalia offered a "zone of interest" variation to the proximate cause inquiry required to determine RICO standing. *Holmes v. SIPC,* *Id.* at 1328 (Scalia, J., concurring).
address the purchaser/seller requirement as such. Ironically, the majority’s refusal to apply the purchaser/seller rule outside the facts of *Blue Chip Stamps* sharply contrasts with the lower courts’ traditional use of the rule—as a substitute for a proximate cause analysis. In fact, the rule has rarely been used to deny standing to “would be” purchasers or sellers; it was usually employed to deny standing to those plaintiffs far removed from the injury. Despite the majority’s refusal to address a question—the purchaser/seller requirement—that did not arise from the facts, the Court’s consensus on proximate causation as the proper analysis does settle most so-called purchaser/seller disputes.

### III. **The Function of the Purchaser/Seller Requirement and Holmes’ Proximate Cause: The Better Approach for RICO Standing**

The policy considerations employed by the Court in *Blue Chip Stamps* have rarely driven the application of the purchaser/seller rule in actual cases. Rather, the purchaser/seller rule has served as a bright-line test denying standing to large classes of plaintiffs, most of whose injuries would have failed also under a more sophisticated proximate cause analysis. A few of these plaintiffs might have been denied standing under a proximate cause analysis, but those results could be defended as a reasonable cost of an easily administered judicial rule. Having created the 10b-5 private action in the first place, the Court certainly had the power to control it. Under RICO, on the other hand, such an arbitrary limitation on the express action provided therein could not and cannot be justified by the text of the legislation.

Although the blanket purchaser/seller rule cannot be imposed on RICO, its function is performed by the proximate cause analysis required in *Holmes*. The purchaser/seller rule was frequently applied to deny standing to plaintiffs whose claims could have been dismissed under a derivative lawsuit analysis. The *Blue Chip Stamps* purchaser/seller requirement served as a simpler path to the same

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92. See infra note 93.

93. In no case in which the *Blue Chip Stamps* rule was applied was there a plaintiff like the one in *Blue Chip Stamps*. The purchaser/seller requirement has only been used to prevent indirectly, remotely, or non-proximately injured parties from maintaining their 10b-5 actions. Specifically, the rule has been used in an overwhelming majority of cases involving shareholder-type plaintiffs to prevent these plaintiffs from bringing suit personally. However, the Court cited *Blue Chip Stamps* extensively in *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749 (1991), and applied the reasoning of *Blue Chip Stamps* to reject the possibility of resting an “otherwise nonexistent § 14(a) action on psychological enquiry alone” because such “would threaten just the sort of strike suits and attrition by discovery that Blue Chip Stamps sought to discourage.” *Id.* at 2760.

94. In fact, very few 10b-5 cases have even been brought by prospective purchasers or sellers. The rule has been applied to deny standing only in cases involving RICO actions to deny shareholder-type plaintiffs from bringing suit. See generally H. E. Brannan v. Eisenstein, 804 F.2d 1041 (8th Cir. 1986). The reasoning for the purchaser/seller requirement of *Blue Chip Stamps* has also been used without the requirement itself to deny standing on the basis of insufficient proof of causality. *Id.* at 1045-46.
result by allowing courts an additional and easily applied reason to deny standing to non-purchaser and non-sellers injured only derivatively by injury to an entity that itself was a purchaser or seller. Thus, the purchaser/seller requirement has actually functioned as a quick reference test for determining whether proximate cause exists, and consequently whether the plaintiff lacks standing. Holmes therefore revisits the origin of the 10b-5 purchaser/seller requirement by focusing on policy considerations to determine requisite causality—an exercise that closely resembles the shorthand (and practical) function of the purchaser/seller requirement and most proximate cause inquiries.95

Because the purchaser/seller requirement has been used as a bright-line rule to deny standing to derivatively injured plaintiffs, and because such plaintiffs will also be denied standing under the reasoning in Holmes, the purchaser/seller issue is for most, if not for all, purposes resolved. The first type of plaintiff, a non-purchaser whose injury is merely derivative of the actual purchasing entity's injury, is denied standing under both Holmes and the purchaser/seller requirement. The second type of plaintiff, one who purchases manipulated securities, however, is injured "by reason of" securities fraud. This plaintiff therefore has an injury distinct from any corporate injury and a claim that will likely survive a proximate cause inquiry as well.96 The third type of plaintiff, however, is the Blue Chip Stamps prospective purchaser. This plaintiff's injury is not merely the result of his interest in the collective injury of any corporation, nor is he a purchaser or seller of the manipulated securities. This question was left open in Holmes because the case did not involve that type of plaintiff; rather, it involved the first type. Nonetheless, the prospective purchaser or seller will lack standing because this plaintiff's injury is frequently speculative; this factor has been fatal to many RICO claims at the proximate-cause stage of analysis.97 In addition to the Blue Chip Stamps plaintiff,

95. Justice Souter, in Virginia Bankshares, commented on the role and origin of limitations on implied actions as related to the "requisite causality" between the statement and the injury. Further, citing Blue Chip Stamps as the example for such analyses he wrote:

Blue Chip Stamps set an example worth recalling as a preface to specific policy analysis of the consequences of recognizing respondents' first theory, that a desire to avoid minority shareholders' illwill should suffice to justify recognizing the requisite causality of a proxy statement needed to garner that minority support.

Virginia Bankshares, 111 S. Ct. at 2764-65.


97. See Forsyth v. Humana Inc., 62 U.S.L.W. 2100 (D. Neb. 1993); Barr Laboratories, Inc. v. Quantum Pharmics, Inc., 1993 WL 262625, *3 (E.D.N.Y. 1993); Shepard v. American Honda Motor Co., Inc., 822 F.Supp. 625, 627-29 (N.D. Cal. 1993); Imagineering Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1310 (9th Cir. 1992). The speculative injury renders difficult and plays a role in an examination of the link between that injury and the wrongful act. For RICO standing purposes, however, perhaps the standard of proof for a claimed injury should be lower allowing a showing of protection by the prohibition of the alleged predicate act to permit these plaintiffs access to the courts. Once in court the issue of damages, if questionable, will surely be litigated. However, the RICO standing standard of proof for injury has actually been elevated, potentially motivating much litigation at the threshold of every civil RICO action. In Shepard v. American Honda Motor Co.,
the last type of plaintiff may include a wide variety of victims whose injuries were non-derivative and indirect, yet still contemplated by Congress as compensable under RICO. The standing of these plaintiffs should be determined through the common-law proximate cause analysis suggested in Holmes. However, if these plaintiffs' injuries are also purely speculative, it is unlikely that they were "proximately caused" by the wrongful act. So, if Holmes and the purchaser/seller requirement render nearly identical results in those cases involving non-purchasers or non-sellers, what is the significance of the Court's refusal to apply the purchaser/seller rule and its insistence on a proximate cause analysis? Through Holmes, the Court adopts a flexible RICO standing analysis—proximate cause—that applies to all civil RICO actions, regardless of the predicate acts alleged.

IV. PROXIMATE CAUSE IS THE PROPER ANALYSIS FOR RICO STANDING

Because the majority in Holmes thought it necessary to provide an analytically sound approach to RICO standing, that is the approach that should be utilized by
lower courts.\textsuperscript{99} Simpler approaches, like the purchaser/seller rule, that do not involve a thorough proximate cause analysis, but are concerned only with categorization of the injury, are, in light of \textit{Holmes}, insufficient means to dismiss civil RICO actions. Two such "simple" approaches that should be examined in light of the \textit{Holmes} decision are the direct injury requirement and the "investment injury" requirement.

The direct injury requirement for RICO standing has recently received both judicial acceptance\textsuperscript{100} and academic criticism.\textsuperscript{101} A recent law review comment criticized the direct injury requirement for being result-oriented, and consequently inappropriate in the civil RICO jurisprudence.\textsuperscript{102} That comment correctly argued that proximate cause is the sounder approach.

Fortunately, \textit{Holmes} embraces proximate cause as the proper analysis. Indeed, quoting \textit{Associated General Contractors}, Justice Souter clarifies his emphasis on the word "direct":

"\[T\]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."\textsuperscript{103} Thus, \textit{our use of 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. \textit{We do not necessarily use it in the same sense as courts before us have, and intimate no opinion on results they have reached.}\textsuperscript{104}

Although the majority made no express rejection of the direct injury requirement, by adopting proximate cause as the standard in the context of an action analogous to a shareholder suit, the opinion stands for the proposition that directness is only part of the proximate cause inquiry—sometimes determinative (in shareholder or creditor suits) and sometimes merely considered.

The advantage of \textit{Holmes} is that it provides an analytical framework within which derivatively injured plaintiffs lack standing, while others may, depending on

\begin{enumerate}
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{101} \textit{Eric W. McNiel, Civil RICO Standing: Direct/Indirect Distinction Should Not be Taken Sitting Down}, 64 Tul. L. Rev. 1239 (1990).
\item \textsuperscript{102} \textit{Id.} at 1239.
\item \textsuperscript{103} \textit{Holmes v. SIPC}, 112 S. Ct. 1311, 1320 n.20 (1992) (quoting \textit{Associated General Contractors of Cal., Inc. v. Carpenters}, 459 U.S. 519, 536, 103 S. Ct. 897, 908 (1983)).
\item \textsuperscript{104} \textit{Holmes}, 112 S. Ct. at 1320 n.20 (citations omitted) (emphasis added) (referring to \textit{Ocean Energy II v. Alexander}, 868 F.2d 744-47 (5th Cir. 1989), where the Fifth Circuit Court of Appeals held that "a person will be considered injured 'by reason of' a RICO violation if the predicate acts constitute (1) factual (but for) causation and (2) legal (proximate) causation of the alleged injury." The \textit{Ocean Energy} court pointed out that direct/indirect injury is only determinative in cases involving shareholder or creditor actions. \textit{Id.} at 744-45.).
\end{enumerate}
the specific circumstances of each case, be allowed to maintain their RICO action. Therefore, the Court’s emphasis on directness is relevant only in cases involving an injury that merely arises out of the plaintiff’s interest in another person’s injury. If the plaintiff’s injury is purely contingent on another’s injury, in the sense that his injury is merely derivative of the injury suffered by an entity in which he has some interest as an owner or creditor, then he lacks standing under Holmes. He has suffered no injury distinct from the injury suffered by the entity. But it does not follow that a plaintiff lacks standing under Holmes merely because his injury happened to occur as a result of two causal steps rather than one. The standing of these plaintiffs should be determined on the basis of all of the common-law principles of proximate cause—not directness alone. Unfortunately, however, Holmes is being read to reinforce the erroneous direct injury standing requirement. Specifically, courts are applying Holmes as if it advocated a bright-line test based on “directness” of the injury.

In Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware, the court, although correct in its conclusion, referred to the emphasis on directness in Holmes to deny standing to an intended victim of the predicate offense. In Lifschultz, the plaintiff alleged that in the mid-1960’s, the teamsters president, Jimmy Hoffa, decided that concentration of the “Less than Truckload” market in a small number of trucking companies would be in the best interest of the Teamsters. The plaintiff asserted that in order “to create a price squeeze to reduce or eliminate the profits of their competitors,” defendants provided false information to the rate bureaus who developed tariffs based upon this information. Ultimately, these allegedly deflated rates diminished the plaintiff’s (defendants’ competitors) ability to profit.

Because (1) any harm from the alleged conspiracy would be “purely contingent on how the rate bureau and the ICC acted based on the alleged predicate acts” and (2) the “general tendency of the law is to not go beyond the first step,” the court held that the injury was not proximately caused by the defendant’s conduct. The court wrote, “Lifschultz is, at best, the second step from the alleged predicate acts, and more probably is best described as three or four steps removed from the alleged predicate acts.” The court concluded that because the plaintiff’s position in relation to the act was indirect, it lacked standing. Thus, the court in Lifschultz used Holmes’ emphasis on directness outside the context of a derivative injury case.

105. Justice Scalia’s zone-of-interest test provides particular guidance for the proximate cause analysis conducted for purposes of standing. See supra note 97.

106. In the most recent supplement to Thomas L. Hazen, Treatise on the Law of Securities Regulation (2d ed. 1990), the author states, “Principles of proximate cause limit the range of potential plaintiffs in private RICO actions. Accordingly, secondary victims do not have standing to bring RICO actions.” Id. at 109 (citing Holmes v. SIPC, 112 S. Ct. 1311 (1992)) (emphasis added).


108. Id. at 1281.

109. Id. at 1281-1282.

110. Id. at 1291.

111. Id.
Despite the court's reference to "steps" in the chain of causation as determinative of the standing issue, the position of the plaintiff (i.e., first, second, or third step) in relation to the predicate act and other parties' injuries is only dispositive in derivative injury cases. A pure proximate cause inquiry should have been conducted without such reliance on directness. A more thorough inquiry would have avoided the possibility of confusing Holmes' use of the term "direct" with the Court's adoption of an absolute direct injury requirement.

The Court of Appeals for the Ninth Circuit also has read RICO proximate cause under the holding in Holmes to require an injury not causally dependent on an injury of a third person in Imagineering, Inc. v. Kiewit Pacific Co. In Imagineering the plaintiffs alleged that the defendants, prime contractors, used a scheme to avoid complying with state regulations designed to assist minority and woman-owned business enterprises (MWBE). The scheme allegedly involved the defendants' use of certified MWBEs to act as "conduits," "fronts," or "pass throughs." The plaintiffs alleged that this administrative use of the MWBEs caused actual MWBEs to lose profits. The court held that like the plaintiff's injuries in Holmes, the plaintiffs' alleged injuries in Imagineering depended solely upon the intervening injury of a third party. In Imagineering the court found that the prime contractors' inability to secure the contracts was the direct cause of the plaintiffs' injuries, and such causal dependence amounted to an intervening cause. "Under Holmes, the . . . plaintiffs are missing the direct relationship needed to show Kiewit proximately caused their injuries." Furthermore, the court referred to the direct injury requirement under Holmes' proximate cause test as being so crucial to the determination of standing that indirect injuries may alone preclude suits for otherwise proximately caused injuries. The court specifically rejected the plaintiffs' argument that an indirect injury may nonetheless be proximately caused for purposes of civil RICO standing: "[T]he Supreme Court agreed that our circuit properly interpreted § 1964(c) to require proximate causation. It did not agree, however, that the link between the defendant's conduct and the plaintiff's loss could satisfy the direct injury requirement." This statement, although true as applied to derivative injuries, should not be applied to cases where the plaintiff's injuries are merely caused by injuries to third parties, as opposed to injuries that exist only to the extent of the plaintiff's interest in the primary victim's independent loss.

In Imagineering, the MWBEs losses depended on the injuries to the prime contractors, but that dependence was causal dependence, not mere interest in the first injury. The MWBEs injuries were their own injuries, even though the losses they suffered would not have occurred "but for" the losses suffered by the prime contractors. Confusing this subtle distinction between the Court's use of directness

112. 976 F.2d 1303 (9th Cir. 1992).
113. Id. at 1305
114. Id. at 1312 (emphasis added).
115. Id. at 1311-12 (citations omitted) (emphasis added).
in the context of derivative lawsuits and its requiring common-law proximate cause will lead to faulty analysis and denial of standing to plaintiffs whose injuries are merely "beyond the first step." Such a restriction was neither intended by Congress to apply to RICO nor intended by the majority in Holmes in its application of proximate cause.

Another simple method of disimissing civil RICO actions, the "investment injury" requirement, divides the federal circuits. The majority view is that to have standing to sue for violations of section 1962(a), which prohibits use or investment of income derived "from a pattern of racketeering activity" in an enterprise engaged in interstate commerce, a plaintiff must show injury by reason of the use or investment of racketeering income rather than the predicate acts themselves. However, for reasons forwarded in Sedima, S.P.R.L. v. Imrex Co., Inc., American Nat'l Bank & Trust Co. of Chicago v. Haroco, Inc., Busby v. Crown Supply, Inc., and by Justice O'Connor in her argument against the arbitrary imposition of the purchaser/seller requirement on civil RICO, this trend should be reversed.

Holmes' proximate cause requirement arises under RICO's causation language, "by reason of." This language is from section 1964(c) which, alone, permits the civil RICO action. To recover damages in a civil suit through section 1964(c) for a violation of section 1962(a), a plaintiff must show (1) receipt of income (2) from a pattern of racketeering activity, (3) the use or investment of this income in an enterprise, and after Holmes, (4) proximate cause. For the "investment injury" requirement to survive Holmes, therefore, proximate cause must be required not only between the alleged predicate acts and the injury, but between the investment and the injury. Nothing in section 1964(c), however, requires that the proximate cause "link" be between the investment (as opposed to a predicate act)

117. 18 U.S.C. § 1962 (1988). Subsection (a) of this statute provides:
   (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
118. See, e.g., Glessner v. Kenny, 952 F.2d 702 (3d Cir. 1991); Ouaknine v. MacFarlane, 897 F.2d 75 (2d Cir. 1990); Craighed v. E.F. Hutton & Co., Inc., 899 F.2d 485 (6th Cir. 1990).
120. 896 F.2d 833 (4th Cir. 1990).
and the alleged injury. Moreover, nothing in section 1964(c) limits the compensable racketeering injuries to those caused after and by the investment and/or use of the income.  

Holmes’ proximate cause for RICO standing does not require additional causation between the prohibited acts under section 1962 and the alleged injury. It is well-settled that injuries flowing from the predicate acts listed in section 1961 are compensable under RICO. In Sedima, recall that the United States Supreme Court rejected the “racketeering injury” requirement. Specifically, the Court wrote:

[W]e perceive no distinct “racketeering injury” requirement. Given that “racketeering activity” consists of no more and no less than commission of a predicate act, § 1961(1), we are initially doubtful about a requirement of a “racketeering injury” separate from the harm from the predicate acts. A reading of the statute belies any such requirement. . . . If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).  

By rejecting the “racketeering injury” requirement, the Sedima Court announced that a civil RICO plaintiff need only prove causation between a predicate act and the injuries alleged. This announcement was amplified in Haroco when the Court held that injuries from the predicate acts alone are compensable under RICO. There the Court wrote:

The submission that the injury must flow not from the predicate acts themselves but from the fact that they were performed as part of the conduct of an enterprise suffers from the same defects as the amorphous and unfounded restrictions on the RICO private action we rejected in [Sedima].  

Justice O’Connor’s concurring opinion in Holmes also supports RICO compensation for injuries that result from predicate acts. She based her rejection of the purchaser/seller requirement for civil RICO security fraud actions on the fact that “the relevant predicate is defined not by § 10(b) itself, but rather by” the statute “which authorizes criminal sanctions against any person who willfully violates the Act or rules promulgated thereunder.” Because RICO creates private remedies out of actions that were previously subject only to criminal sanctions, and the majority of those illegal actions defined in RICO are the

121. In Busby, the court correctly argued that the investment injury rule is not consistent with the language or the purpose of RICO. Busby, 896 F.2d at 836-40.

122. Sedima, 473 U.S. at 495, 105 S.Ct. at 3284 (footnote omitted) (emphasis added).


125. Id.
predicate acts in section 1961, the only necessary proximate cause link lies between those acts and the injury. Holmes' proximate cause requirement for civil RICO standing refines the causation requirement implied in Sedima and Haroco; namely, there need only be a causal link between any of the predicate acts and the injury. After Holmes, that single causal link must be sufficient to constitute a proximate cause. Additionally, given Sedima and Haroco, lower courts are restricted from requiring a similar and additional causation requirement between the investment and the injury. The test for civil RICO standing, as stated in Holmes, is proximate cause between a predicate act and an injury. Because the nature of the injury is defined by its cause, and cause sufficient for RICO standing purposes is proximate cause between a predicate act and an injury, the "investment injury" requirement must fall.

In summary, (1) "investment injury" requires an injury caused by an investment; (2) RICO's language addressing causation, "by reason of," was interpreted in Holmes to require proximate cause between the securities fraud (a predicate act) and the injury; (3) Sedima and Haroco prohibit additional (or plural) causation requirements for civil RICO standing; (4) because "investment injury" is, for all practical purposes, an additional causation requirement, it is replaced by Holmes' general requirement of proximate cause.

The leading case against the "investment injury" requirement is Busby v. Crown Supply, Inc.126 In Busby, Judge Winter writing for the Court of Appeals for the Fourth Circuit rejected the "investment injury" requirement on grounds similar to those argued above. Citing Sedima and Haroco, he found it clear "that the Supreme Court was referring to § 1962 as a whole in both cases."127 Additionally, Judge Winter offered several practical reasons for rejecting the "investment injury" requirement.128

Although the other circuits were in error by requiring an investment injury for section 1962(a) actions, they were correct in recognizing that such injuries may be compensable under RICO. However, if the direct injury requirement criticized

126. 896 F.2d 833 (4th Cir. 1990).
127. Id. at 839.
128. Where a corporation is the "person" that commits the racketeering acts and benefits from them, that corporation causes injury to several entities at different stages of the racketeering activity. . . . Some courts that have followed the "investment use" rule assume, without analysis, that the victims of corporate racketeering activity are not injured in the process of the corporation's receipt and use of the illegally obtained income. . . . If the rule advocated by defendant is followed, however, corporate liability under RICO will be eviscerated. Given that the named "person" and the named "enterprise" must be separate for § 1962(c) purposes, plaintiffs injured by corporate racketeering have only § 1962(a) to turn to for relief. Invoking the "investment use" rule would close this avenue off, as it is virtually impossible to prove that the invested income caused the alleged injury.

above maintains the momentum it has gained since *Holmes,* no "investment injuries" will be compensable because nearly all such injuries flow *indirectly* from the predicate acts. Only in the odd instance where a victim has been injured solely by an investment would there be no threat of the injury being categorized as "indirect." But, ironically, these plaintiffs, like the ones in *Blue Chip Stamps,* would bear the nearly impossible burden of proving a speculative economic injury. Thus, if the "direct injury" requirement becomes the rule, injuries that were once required to maintain section 1962(a) standing will be altogether removed from the list of compensable injuries under RICO. 129

On the other hand, if the "direct injury" requirement and the "investment injury" requirement are now two rules for RICO standing, there can never be a section 1962(a) plaintiff. Specifically, if Justice Souter's emphasis on directness is applied dispositively to situations not analogous to derivative lawsuits to deny plaintiffs standing, and the "investment injury" requirement for section 1962(a) remains in force, the only plaintiffs *with* standing under that interpretation of *Holmes* are *denied* standing because their injury is by nature not the indirect result of an "investment"—not an investment injury! Hence, these two judicially created bright-line rules jointly and impermissibly yank a legislatively created remedy out of the statutes.

The best solution is to treat *Holmes*’ proximate cause as the sole test for RICO standing. 130 Through proximate cause, all of the concerns previously expressed via bright-line rules may be addressed without offense to the legislative remedies of RICO.

**CONCLUSION**

Congress does not create implicitly self-destructing remedies, and an interpretation that leads to such a result is simply a judicial repeal of legislation—a practice not permitted in a government of separate powers. This absurd result reflects the competing interests between the correct and incorrect interpretation of *Holmes* and the "investment injury" requirement. The possibility of conflicting tests is elevated by applying only one test for RICO standing—proximate cause. 131

*Holmes v. SIPC* affects RICO standing in several ways. The Court's opinion merges the primary purpose of derivative lawsuit standing requirements with RICO standing requirements, and as a result of such merger, *Holmes* substitutes a better analytical framework for the previous function of the purchaser/seller rule. By addressing only the question that arose in *Holmes*—whether plaintiffs suffering

129. For a similar observation concerning the direct injury requirement and the racketeering injury requirement, see McNeil, *supra* note 101, at 1254. With the "investment injury" requirement, however, there is now actual tension between two RICO standing tests existing in the jurisprudence.

130. Justice Scalia's brand of proximate cause is perhaps the best approach for the standing stage of analysis. See *supra* note 97.

131. *Id.*
injuries purely derivative of injuries to third parties may bring a civil RICO action—the Court provided much-needed guidance for determining civil RICO standing. Such guidance, if closely followed, will clarify not only the purchaser/seller issue, but prevent further distortion of RICO standing by limited bright-line tests. In short, the new analysis for RICO standing guides courts away from simplistic bright-line tests such as the direct injury requirement and the "investment injury" requirement. Because Holmes directs lower courts to conduct proximate cause inquiries to determine RICO standing, it should not be read as a test forestalling such analysis.

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