

Private Enforcement of Immigration Law: Expanded Definitions Under RICO and the Immigration and Nationality Act

*“It has become increasingly evident that the H-1B program is being utilized by some as the basis for building businesses which are dependent on the labors of foreign workers, in some cases in unfair competition with U.S. workers and those U.S. businesses that employ mostly domestic workers.”*¹

I. INTRODUCTION

The United States has long toed the line between enforcing its immigration laws and importing the requisite amount of foreign labor needed to keep its economy running.² The immigration balancing act took center stage following the terrorist attacks of September 11, 2001, as much of the country demanded the government hole up its borders and expel illegal residents. While the public outcry focused primarily on ridding the nation of terrorists, factions of the private sector had economic reasons for demanding a crackdown. Generally, companies employing illegal aliens can minimize operating costs and underbid competitors that hire only legally documented workers.³ Higher labor costs handicap employers who play by the rules. Large scale employment of illegal aliens also drives down the average wages of legally documented employees.⁴ Until recently, employers and employees seeking redress have been limited in their legal options. Courts have held that both companies and employees lack standing and direct injury, preferring the government, rather than the private sector, to enforce its immigration laws. As a result, injured parties must air their concerns to the federal government and hope that eventually their grievances are taken seriously.

An obscure amendment to the Racketeer Influenced and Corrupt

1. *Testimony before the Subcommittee on Immigration of the Senate Judiciary Committee*, U.S. Senate Hearing (Sept. 28, 1995) (testimony of Robert B. Reich, Secretary of U.S. Department of Labor).

2. See Alexei Izyumov et al., *Immigration to the Louisville Metropolitan Area: Recent Trends, Policy Recommendations*, 40 BRANDEIS L.J. 909, 912 (2002) (stating immigrant flow by end of 1990s reached nearly 1.2 million); Sylvia R. Lazos Vargas, *Globalization or Global Subordination?: How LatCrit Links the Local to Global and the Global to the Local*, 33 U.C. DAVIS L. REV. 1429, 1434 (2000) (citing need for nation state to engage in lax immigration enforcement). Of the estimated 1.2 million immigrants entering the country annually in the late 1990s, an estimated twenty to thirty percent came illegally. Izyumov, *supra*, at 912.

3. See *Commercial Cleaning Servs., LLC, v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 383 (2d Cir. 2001) (stating plaintiff could present valid claim of injury suffered when competing company employed illegal aliens).

4. See *id.* at 374 (analyzing claim cleaning company underbid competitors by employment of illegal aliens).

Organizations Act (RICO) potentially provides private parties with a stake in immigration enforcement.⁵ For citizens angry at the government for its dereliction in enforcing the immigration code, the amendments are a perfect remedy to remove discretionary enforcement from government bureaucracy.⁶ For large companies that rely on illegal foreign labor, the recent trend could mean higher employee wages and operating costs.⁷ Conversely, for the thousands of workers who risk hazardous passage and assume illegal status to earn money they cannot earn at home, the privatization of immigration enforcement in the United States could spell disaster.

By qualifying certain violations of the Immigration and Nationality Act (INA) as “predicate offenses” under RICO, law enforcement acquired a valuable new tool in enforcing immigration laws and maintaining level economic playing fields.⁸ The 1996 amendments, for the first time, brought immigration law within the scope of RICO.⁹ Acts that now qualify as predicate offenses include knowingly employing illegal aliens and encouraging illegal immigration.¹⁰

RICO carries a broad statutory mandate that the law be construed liberally in favor of an expansive scope.¹¹ Although private enforcement of immigration law through RICO presents an innovative method for tightening borders, its economic impact on industries in the United States may be harmful. This Note examines recent statutory and case law developments involving RICO and the INA that have the potential to alter the face of immigration enforcement in this country. Part II briefly examines the history of civil RICO and what led to its use as a tool to combat illegal immigration.¹² This section discusses the cases, both pending and decided, including elements required for recovery and treble damages. Part III analyzes the prospect of success for RICO in immigration cases against competing businesses and employers, and some of the obstacles facing plaintiffs in this emerging area of tort law.¹³

5. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1971) (amended 1996).

6. James Fulford, *Illegals' Employers Meet RICO Doomsday Machine* (Apr. 10, 2002), at <http://www.vdare.com/fulford/lawsuit.htm> (citing developments in RICO immigration case law as positive).

7. Micah King, Center for Immigration Studies, *RICO: A New Tool for Immigration Law Enforcement*, (Aug. 2003), available at <http://www.cis.org/articles/2003/back1103.html> (detailing new RICO immigration developments and implications for businesses and tax payers).

8. *See id.* (including “encouraging illegal immigration” as predicate offense).

9. Immigration and Nationality Act (INA), 8 U.S.C. § 1324 (2005).

10. *Id.*

11. *United States v. Pepe*, 747 F.2d 632, 659 (11th Cir. 1984) (stating RICO covers broad range of conduct).

12. *Infra* Part II.

13. *Infra* Part III.

II. HISTORY

From its inception in 1970, prosecutors and private plaintiffs used RICO expansively to combat organized crime from gangster violence to insider trading.¹⁴ Only recently have private parties contemplated using the statute to enforce immigration policy.¹⁵ In 1996, Congress expanded the scope of RICO to include various immigration related offenses.¹⁶ The expansion of RICO's predicate offense requirement opened up several new fronts for private parties' enforcement of immigration law.¹⁷ At least two circuits have recently held that a valid cause of action under the federal racketeering law exists for businesses or laborers who were harmed by competitors' or employers' use of illegal immigrant labor.¹⁸ In 2000, the Second Circuit Court of Appeals held that a consortium of office cleaning companies had standing to bring suit against a competitor that was underbidding them by hiring illegal aliens.¹⁹ In one of the first suits of its kind, the consortium alleged that the defendant competitor engaged in a "pattern of racketeering activity by hiring undocumented aliens for profit" in violation of the INA.²⁰

Initial attempts at enforcement of immigration law through civil RICO suits have not been limited to businesses suing competitors.²¹ Legally documented employees have also filed suit against their employers, in what amounts to an opening shot in the privatization of immigration enforcement in the agriculture industry.²² By holding that a group of employees had standing to bring suit against their fruit company employer, the Ninth Circuit Court of Appeals placed the agriculture industry directly in the crosshairs of plaintiff's attorneys. This decision gave standing to legal employees harmed by suppressed wages resulting from their employer's practice of knowingly hiring illegal immigrants.²³ The trend of privatization of immigration enforcement could spell disaster for fruit companies because they rely heavily on cheap foreign

14. See *United States v. Irizarry*, 341 F.3d 273, 288 (3d Cir. 2003) (detailing government prosecution for conspiracy as members of organization called "La Cosa Nostra"); *United States v. Shwayder*, 312 F.3d 1109, 1113 (9th Cir. 2002) (detailing government prosecution for conspiracy under RICO, including insider trading).

15. See INA, 8 U.S.C. § 1101 (2005) (qualifying certain offenses under the INA as predicate offenses for purposes of RICO).

16. RICO, 18 U.S.C. §§ 1961-1968 (2004) (expanding definition of "predicate offense" to include immigration crimes).

17. See *King*, *supra* note 7 (explaining possible new enforcement methods).

18. *Commercial Cleaning Servs., LCC v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 378 (2d Cir. 2001) (detailing plaintiff's RICO immigration claim against competitor).

19. *Id.* (holding plaintiff had standing).

20. *Id.* (stating plaintiff's claim).

21. See *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1166 (9th Cir. 2002) (describing employee's suit against employer for wage suppression).

22. See *id.* (summarizing employee's RICO complaint against employer for knowingly hiring illegal aliens).

23. See *id.* at 1174 (holding employees satisfy constitutional and statutory standing requirements).

labor.²⁴ Many United States agriculture companies rely heavily on laborers from foreign nations, many of whom reside in the country illegally.²⁵ These companies provide seasonal work for willing and able migrants who form the backbone of the agriculture industry in the United States.²⁶ Foreign workers take farming jobs that might otherwise go unfilled because of the extreme and often mundane conditions that accompany the harvest.²⁷ The privatization of immigration enforcement through the courts poses a potentially lethal obstacle to the codependent relationship of farmer and illegal farmhand because both sides depend on each other for their livelihood.²⁸

Illegal aliens are also getting involved in litigation. Following several high-profile raids on Wal-Mart stores in October 2003, a group of nine undocumented aliens filed suit against the retail chain for violations of state and federal labor laws, including RICO.²⁹

A. Low-Skilled Labor in the United States

In 2000, the United States Census Bureau estimated 8.7 million illegal aliens resided in the country.³⁰ The Federation for American Immigration Reform estimates this number increases by 500,000 per year.³¹ Despite outrage over inefficient enforcement, various sectors of the American economy depend heavily on undocumented work forces. The most glaring example of dependence on low-skilled foreign labor is the United States agricultural industry, which annually generates over \$1 billion in revenue.³² Orchard work often attracts low-skilled labor from foreign countries because fruit growers try to keep overhead costs low.³³ In general, employers of immigrant labor benefit

24. Mark J. Russo, Note, *The Tension Between the Need and Exploitation of Migrant Workers: Using MSAWPA's Legislative Intent to Find a Balanced Remedy*, 7 MICH. J. RACE & L. 197, 198 (2001) (noting dependence of farming industry on transient workers).

25. See *id.* (noting dependence of farm workers on seasonal work).

26. See Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 577-78 (2001) (describing migrant farm labor as "physically taxing").

27. See *id.* at 578 (noting difficult nature and lack of appeal of farm labor).

28. See *id.* at 579 (explaining extraordinarily high demand for temporary human labor by farm industry).

29. Sarah Paoletti, *Should Illegal Aliens Be Able to Sue U.S. Employers for Labor Racketeering? Yes*, INSIGHT ON THE NEWS, Jan. 6, 2004, at 46 (discussing Wal-Mart raids and subsequent suit by illegal aliens). Authorities raided sixty-one stores in twenty-one states, resulting in the detention of 250 janitors. *Id.*

30. United States Census Bureau, *Population Estimates* (Dec. 22, 2004), available at <http://eire.census.gov/popest/estimates.php>.

31. Federation For American Immigration Reform, *How Many Illegal Aliens?* (Feb. 2005), available at <http://www.fairus.org/ImmigrationIssueCenters/ImmigrationIssueCenters.cfm?ID=1183&c=13> (estimating that population of illegal aliens increases annually). The article notes the difficulty that the Census Bureau encounters with such estimates because of the illegal nature of undocumented residents. *Id.*

32. See Russo, *supra* note 24, at 198-203 (noting dependence of agriculture industry on farm workers).

33. See *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1166 (9th Cir. 2002) (providing background of Washington agricultural industry). The United States economy relies heavily on low-skilled foreign labor in agriculture, construction, and service and labor intensive fields. Kevin R. Johnson, *Open Borders?*, 51 UCLA

from increased profits resulting from a rise in production and a decrease in employee wages.³⁴ As employer profits increase, so does investment opportunities and incentives for people to become employers.³⁵ The impact of immigration on wages results from the basic economic theory of supply and demand.³⁶

The United States economy is not the only beneficiary of immigrant labor.³⁷ Each year, foreign economies of countries such as Mexico receive millions of dollars in remittances sent home from workers in the United States.³⁸ Additionally, large numbers of immigrant workers create a greater demand for goods and services, which leads to a greater demand for locally-supplied labor.³⁹ Possibly in recognition of this codependence, efforts to stop the flow of undocumented workers from gaining employment have been largely ineffective, and the government has not actively enforced punishment of employers.⁴⁰

B. RICO and Immigration

As part of the Organized Crime Control Act of 1970,⁴¹ Congress enacted RICO with the mandate that it be construed broadly.⁴² This interpretation

L. REV. 193, 243 (2003).

34. See Larry J. Obhof, *The Irrationality of Enforcement? An Economic Analysis of U.S. Immigration Law*, 12 KAN. J.L. & PUB. POL'Y 163, 166 (2002) (explaining economic benefits accruing to employers of immigrant labor).

35. *Id.* (analyzing benefits to immigrant labor increasing country's capital stock). Immigrant laborers spend earned wages on other goods and services in host nations, thereby increasing demand and creating new jobs. *Id.* Nearly seventy-five percent of illegal aliens have taxes deducted from their paychecks, and few file for a refund. *Id.* at 175. The effectiveness of United States immigration enforcement is also questionable. See *id.* at 176 (noting many citizens employ illegal aliens and Congress frequently grants large scale amnesties).

36. FERNANDO BASTOS DE AVILA, *ECONOMIC IMPACTS OF IMMIGRATION: THE BRAZILIAN IMMIGRATION PROBLEM 67-69* (Greenwood Press Publishers 1970) (1954). Unskilled immigrants generally arrive with a strong desire for work and the willingness to do so for wages below the average of the host nation, but higher than the average of their own country. *Id.* at 67.

37. Johnson, *supra* note 33, at 243 (noting both Mexican and American economies benefit heavily from immigrant labor). Professor Johnson also notes moral justifications for open immigration, including the prevention of increasingly common border crossing deaths. *Id.* at 221.

38. Johnson, *supra* note 33, at 221. (stating Mexican economy benefits annually from remittances sent home from Mexican workers). Professor Johnson notes that Mexico has much to gain by solidifying a durable immigration status with access to jobs for illegal aliens, while the United States needs low-wage labor. *Id.*

39. Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions As Employment Discrimination*, 78 CHI-KENT L. REV. 291, 305 (2003) (noting additional benefits of immigrant labor pool). Empirical evidence indicates that immigrants are not perfect substitutes for natives and therefore do not compete for the same jobs. *Id.* at 306.

40. *Id.* at 305 (citing report from General Accounting Office on immigration reform).

41. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

42. RICO, Pub. L. No. 91-452, § 904(a), 84 Stat. 942 (1970); *Rusello v. United States*, 464 U.S. 16, 27 (1983) (noting Congress' directive to construe RICO liberally to effectuate its remedial purpose); *United States v. Turkette*, 452 U.S. 576, 587 (1981) (noting RICO made intentionally broad by Congress); Artie Jones et al., *Racketeer Influenced and Corrupt Organizations*, 39 AM. CRIM. L. REV. 977, 978 (2002) (stating Congress' mandate to construe statute broadly). *But see* *Reves v. Ernst & Young*, 507 U.S. 170, 183-84 (1993) (declaring

stems from Congress' use of expansive language and the "express admonition that RICO . . . be liberally construed to effectuate its remedial purposes."⁴³ In addition to providing the government with a civil and criminal enforcement tool against organized crime, RICO provides a civil remedy for private parties against defendants engaging in patterns of racketeering.⁴⁴ Congress initially viewed the controversial law as a tool for keeping organized crime from infiltrating legitimate business enterprises.⁴⁵ Over time, however, civil RICO has been applied in cases far exceeding organized crime in the context of machine gun-toting gangsters and La Cosa Nostra.⁴⁶ By the late 1980s, litigants had brought civil RICO claims in cases involving "divorce, trespass, legal and accounting malpractice, inheritance among family members, employment benefits and sexual harassment by a union."⁴⁷ As a result, critics argue, the statute has exceeded traditional notions of organized crime and public understanding of such enterprises.⁴⁸

To recover under federal racketeering law, businesses and employees must satisfy the high standards of proof RICO requires.⁴⁹ RICO gives statutory standing to "any person injured in his business or property by reason of a violation of section 1962"⁵⁰ RICO standing breaks down into three elements: violation of a RICO predicate act through a pattern of racketeering, injury to business or property, and proximate causation of the alleged injury by

clause should not invite overly broad reading of RICO). The Supreme Court noted in *Reves* that the clause requiring a broad interpretation of RICO does not invite the application of the statute to new purposes that "Congress never intended." *Id.* at 183. The Court further stated the clause did not help in determining what purposes Congress had in mind. *Id.* at 183-84.

43. *Baisch v. Gallina*, 346 F.3d 366, 372 (2d Cir. 2003) (stating dual reasons for broad construction of RICO).

44. See Raymond P. Green, *The Application of RICO to Labor-Management and Employment Disputes*, 7 ST. THOMAS L. REV. 309, 311 (1995) (describing private remedy for parties under RICO).

45. Gerard E. Lynch, *RICO: The Crime of Being Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 662 (1987) (stating Congress' original view of RICO).

46. See *supra* note 14 and accompanying text (noting application of RICO to insider trading case); see, e.g., *Alexander v. United States*, 509 U.S. 544, 546 (1993) (evaluating RICO prosecution of adult entertainment business owner); *United States v. Turkette*, 452 U.S. 576, 579 (1981) (stating RICO extends to illegitimate enterprises such as distribution of controlled substances); *United States v. Dock*, 293 F. Supp. 2d 704, 712 (E.D. Tex. 2003) (applying RICO to truck drivers smuggling illegal aliens over Mexican border).

47. See *infra* note 60 and accompanying text (explaining broad reach of civil RICO as of 1989).

48. See *infra* note 60 and accompanying text (noting Chief Justice Rehnquist's hostility towards expanding use of civil RICO); see also Lynch, *supra* note 45, at 664 (concluding later uses of RICO inconsistent with traditional notions of organized crime). Lynch does not argue that the extended applications were necessarily abuses of the statutory mandate; rather, he argues that they warranted further review of the statute. Lynch, *supra* note 45, at 664.

49. Nancy Cleeland, *New Angle in Fight Against Hiring Illegal Immigrants*, L.A. TIMES, Apr. 3, 2002, at C1 (noting obstacles to recovery and high standard of proof required by RICO). Cleeland notes that if the bar of proof can be satisfied, RICO's treble damages provision could make employers "think hard" before hiring illegal aliens. *Id.*

50. 18 U.S.C. § 1964(c) (2003) (stating RICO's statutory standing requirements). The statute provides that "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." *Id.* § 1961(3).

the defendant.⁵¹ Furthermore, section 1964(c) provides that a victim suffering injury to a business interest may recover “threefold the damages he sustains.”⁵² RICO’s treble damages provision remains one of its most controversial, often imposing harsh penalties on businesses lacking any involvement in the type of crime Congress intended to combat.⁵³ Compounding the harsh nature of section 1964(c), an award of reasonable attorney’s fees is mandatory where a plaintiff wins treble damages.⁵⁴ The treble damages provision could prove a powerful deterrent to the employment of undocumented workers should private RICO immigration enforcement cases be successful.⁵⁵

Early use of RICO was almost exclusively criminal, focusing primarily on criminal gangs in an organized crime context.⁵⁶ Civil RICO and its broad range of equitable remedies went virtually unnoticed by private parties in the first ten years of the statute’s existence.⁵⁷ The 1980s produced a surge in civil RICO cases as private litigants began testing the boundaries of the statute. The increasingly broad use of RICO was accompanied in some jurisdictions by judicial hostility towards the onslaught of claims brought in federal court.⁵⁸ In

51. *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992) (stating elements required for civil RICO claim).

52. 18 U.S.C. § 1964(c) (stating RICO’s treble damages provision); *see also* *Baisch v. Galina*, 346 F.3d 366, 372 (2d Cir. 2003) (summarizing RICO’s standing and treble damage requirements).

53. Morgan Cloud, *Organized Crime, RICO and the European Union*, 27 SYRACUSE J. INT’L L. & COM. 243, 252-53 (2000) (noting controversial nature of RICO’s treble damages provision). RICO imposes criminal liability under section 1963 and several equitable remedies under section 1964(a), including orders of divestiture, dissolution, and re-structuring of an enterprise. Teresa Bryan et al., *Racketeer Influenced and Corrupt Organizations*, 40 AM. CRIM. L. REV. 987, 1027-28 (2003) (listing civil penalties under RICO). Despite criticism, RICO forfeiture provisions have survived constitutional challenges that the remedies are overly-broad and violate certain Constitutional guarantees. *See Alexander v. United States*, 509 U.S. 544, 548-49 (1993) (holding RICO forfeiture provisions do not constitute unconstitutional restraint on speech).

54. DOUGLAS E. ABRAMS, *THE LAW OF CIVIL RICO* 168 (1991) (explaining mandatory award of attorney’s fees with violation treble damages award).

55. *See* John O’Sullivan, Editorial, *Immigration Fight Strategy All Wrong: Congressman Must Switch Focus From Student’s Woes to Problem of Porous Borders*, CHI. SUN-TIMES, Oct. 1, 2002, at 29 (noting RICO cases threaten to bankrupt employers of illegal aliens with “limitless fines”).

56. *See, e.g.*, *United States v. Gotti*, 794 F.2d 773, 779 (2d Cir. 1986) (discussing prosecution of head of Gambino crime family); *United States v. Ruggiero*, 726 F.2d 913, 915 (2d Cir. 1984) (detailing conviction of defendants under RICO for conspiracy to commit murder and various drug offenses); *United States v. Gambale*, 610 F. Supp. 1515, 1520 (D. Mass. 1985) (charging defendants with operating illegal gambling operation); *see also* Brian Goodwin, Note, *Civil Versus Criminal RICO and the “Eradication” of La Cosa Nostra*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279, 301-06 (2002) (detailing criminal RICO prosecution of organized crime families).

57. *See* Robert Wood, *Civil RICO—Limitations in Limbo*, 21 WILLAMETTE L. REV. 683, 684 (1985) (noting civil RICO went largely unnoticed by private litigants in its first ten years). “Only two reported civil RICO cases appeared before 1979.” *Id.* n.6. A possible reason for the early use of criminal RICO is the assumption that the law was originally considered exclusively a criminal statute. *Id.* at 684. A 1983 Presidential committee on organized crime found that the labor-management provisions of RICO and certain union decertification laws had been underutilized. ROBERT J. KELLY, *THE UPPER WORLD AND THE UNDERWORLD* 59 (Phillip John Stead ed., 1999).

58. *See* ABRAMS, *supra* note 54, at 11-14 (noting anger of several federal circuit court judges towards increasing number of civil RICO claims). Abrams cites several examples of judicial hostility, including one

1985 and 1986, fifty percent of all civil RICO claims were dismissed, and an additional six percent of the cases were partially dismissed.⁵⁹ In 1989, the inundation of civil RICO prompted Chief Justice Rehnquist to urge Congress to narrow the scope of the law, noting most civil suits filed under the statute had “nothing to do with organized crime.”⁶⁰ Justice Rehnquist stated that “prosecutorial discretion” was non-existent with civil RICO, and “any good lawyer” who could satisfy its statutory requirements would sue under RICO in federal court because of the prospect of treble damages and attorney’s fees.⁶¹ Despite repeated requests for revision and clarification, Congress has failed to substantially modify the statute.⁶²

Despite the civil RICO explosion, employment of illegal aliens did not qualify as a predicate offense for purposes of RICO prosecution until the mid-1990s.⁶³ The 1996 RICO amendments expanded the predicate offense requirement thereby further broadening the scope of an already broad statute, and placed employers of illegal aliens squarely in RICO’s crosshairs.⁶⁴

The amended RICO definitions added a violation of section 274 of the INA—codified in 8 U.S.C. § 1324—to the list of prohibited conduct qualifying as a predicate offense under 18 U.S.C. § 1961.⁶⁵ Under the expanded

district judge who refers to RICO as a “Flying Dutchman” that “refuses to be put to rest.” *Id.* at 13; *see also* Thomas P. Heed, Comment, *Misappropriation of Trade Secrets: The Last Civil RICO Cause of Action That Works*, 30 J. MARSHALL L. REV. 207, 222 (1996) (noting judicial hostility towards civil RICO and mounting racketeering cases). The author attributes judicial hostility to the mounting number of cases claiming RICO fraud injuries arising out of basic business disputes, as well as “large scale federalization of state tort actions.” Heed, *supra*, at 222.

59. *See* Heed, *supra* note 58, at 220-23 (citing judicial activism limiting number of redressable actions under civil RICO).

60. William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY’S L.J. 5, 9 (1989) (noting influx in civil RICO claims and urging Congress to narrow its scope). Addressing the Brookings Institute, Chief Justice Rehnquist commented that as of 1989, civil RICO claims had increased “more than eight-fold” since 1984 to almost 1,000 cases in 1988. *Id.* Chief Justice Rehnquist further noted “[v]irtually everyone who has addressed the question agrees that civil RICO is now being used in ways Congress never intended when it enacted the statute in 1970.” *Id.*

61. *Id.* at 10 (questioning whether civil RICO should be modified). Chief Justice Rehnquist’s speech provided a brief explanation of the legislative history of RICO, noting that although the Act originated in the senate, several additions, including the controversial treble damages provision, were added by the House. *Id.* at 10-11.

62. John J. Lulejian, Comment, *Making Sense of the Kaleidoscope of Patterns: A Practitioner’s Guide to Understanding the Third Circuit’s Interpretation of Civil RICO’s “Pattern of Racketeering Activity”*, 69 TEMP. L. REV. 413, 417 (1996) (detailing expanding nature of civil RICO and use to get to federal court).

63. *See supra* note 16-17 and accompanying text (citing expanded definitions under statute).

64. *See* 8 U.S.C. § 1101 (2004) (expanding statute to include illegal alien in context of immigration). Congress enacted the INA changes in 1996 and the first suit to employ the new definitions targeting competing companies was filed in 2000. *See* *Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 374 (2d Cir. 2001) (citing date case argued before Second Circuit). The 1996 amendments to RICO were not Congress’ first attempt to stem the tide of illegal immigration by targeting employers. The Immigration Reform and Control Act of 1986 included sanctions and penalties for employers that knowingly hired illegal aliens. THEODORE B. GUNDERSON, *IMMIGRATION POLICY IN TURMOIL* ch. 2 (2002); JOYCE C. VIALET, *CONGRESSIONAL RESEARCH SERVICE, A BRIEF HISTORY OF U.S. IMMIGRATION POLICY* 27 (1991).

65. *Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.*, No. 3:99cv109, 2000 WL 545126, at *3

definitions, “racketeering activity” for purposes of a civil RICO suit includes “any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens).”⁶⁶ This section bears the title “Bringing in and harboring certain aliens” and appears targeted at people that smuggle or conceal aliens in the United States.⁶⁷ In contrast, section 274A is entitled “Unlawful employment of aliens” and qualifies several prohibitions on employment of illegal aliens in the United States.⁶⁸ The amendments opened the door for the use of federal racketeering law against companies that knowingly violate the INA.⁶⁹ Although relatively obscure, the amended definitions did not go unnoticed for long.⁷⁰

The RICO amendments referring to violations of the INA are well-hidden.⁷¹ Buried deep in the Anti-Terrorism and Effective Death Penalty Act of 1996,⁷² the amendments are part of much broader legislation aimed at combating the economic and personal costs of crime to the American people.⁷³

C. RICO Immigration Cases

The first successful enforcement of the expanded RICO predicate offense requirements came in a private lawsuit targeting a competing company that allegedly employed illegal aliens with full knowledge of their undocumented status.⁷⁴ In *Commercial Cleaning Services, LLC v. Colin Service Systems, Inc.*,⁷⁵ Commercial Cleaning Services (Commercial), a small Connecticut-based cleaning company, brought suit against a large company performing similar janitorial services.⁷⁶ Commercial argued that Colin Service Systems (Colin)

(D. Conn. Mar. 21, 2000) (explaining amended section of INA qualifying as RICO predicate act), *rev'd*, 271 F.3d 374 (2d Cir. 2000).

66. 18 U.S.C. § 1961(1)(F) (2004). The INA, codified in 8 U.S.C. § 1324, provides that “any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens . . . shall be fined under Title 18 or imprisoned for not more than 5 years.” 8 U.S.C. § 1324(3)(A) (2004).

67. 8 U.S.C. § 1324.

68. *Id.* § 1324(a) (codifying section 274(A)). 8 U.S.C. § 1324a(a) provides it is unlawful for a person or other entity to “hire, or to recruit or reer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment.” *Id.* § 1324a(a)(1)(A).

69. *See* 18 U.S.C. § 1961(1)(F) (including violation of INA as underlying predicate offense).

70. *See* King, *supra* note 7 (noting relative obscurity of expanded INA definitions within immigration code).

71. *See supra* note 65 and accompanying text (explaining location of 1996 RICO amendments).

72. S. REP. NO. 104-179 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924.

73. S. REP. NO. 104-179, at 17 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 930.

74. *See* Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc., 271 F.3d 374, 375 (2d Cir. 2001) (stating plaintiff’s allegations of defendant cleaning company’s conduct).

75. 271 F.3d 374 (2d Cir. 2001).

76. *Id.* at 378 (explaining background of parties to RICO class action complaint). Commercial’s complaint stated that Colin operated throughout the Eastern seaboard and was one of the nation’s largest corporations “engaged in the business of cleaning commercial facilities.” *Id.* Commercial bid competitively against Colin for janitorial service contracts in the Hartford area. *Id.* The specific cleaning contracts leading to the suit were for jet engine builder Pratt & Whitney’s Southington, Connecticut facility. *Id.* at 379.

engaged in a pattern of racketeering by “knowingly hiring ‘hundreds of illegal immigrants at low wages.’”⁷⁷ Consequently, Commercial claimed it suffered significant business disadvantage because Colin’s practices prevented competitive bidding for various cleaning contracts.⁷⁸

The United States District Court for the District of Connecticut dismissed the claim, finding Commercial lacked standing because it failed to allege direct injury proximately caused by Colin’s conduct.⁷⁹ The United States Court of Appeals for the Second Circuit reversed, holding Commercial suffered direct injury because Colin submitted significantly lower bids in a price-sensitive market.⁸⁰

Two similar cases followed shortly after *Commercial Cleaning*. In June 2002, legally documented agriculture laborers filed a class action lawsuit against their employers in the Eastern District of Washington.⁸¹ In *Mendoza v. Zirkle Fruit Co.*,⁸² legally documented workers claimed their employers knowingly hired workers of illegal status “‘for purposes of depressing employee wages below the levels they would otherwise be required to pay.’”⁸³ The plaintiffs alleged the defendant fruit growers knowingly hired at least fifty undocumented workers per year, exploiting their economic situation and fear of asserting their rights.⁸⁴

The district court dismissed the complaint on the grounds that the damages were too speculative and difficult to ascertain.⁸⁵ The Ninth Circuit Court of

77. *Id.* at 379 (summarizing Commercial’s complaint).

78. *Id.* at 379 (summarizing Commercial’s claimed injury). Commercial argued that Colin gained a “significant business advantage over other firms in the ‘highly competitive’ and price-sensitive cleaning industry.” *Id.* at 378-79. Commercial identified Colin’s conduct as an “‘illegal immigrant hiring scheme.’” *Id.* at 378. The complaint further alleged Colin paid undocumented workers below minimum wage and did not withhold or pay their federal and state income taxes. *Id.* at 379.

79. *See Commercial Cleaning*, 271 F.3d at 378 (explaining district court’s decision granting summary judgment). The court also held Commercial did not provide a detailed RICO case statement “as required by the Connecticut District Court’s Standing Order in Civil RICO Cases.” *Id.* Citing *Commercial Cleaning*, the Second Circuit noted in a subsequent case that it recognized standing where the plaintiff was a “less obvious target or intended victim, and where his or her injuries were arguably less direct.” *Baisch v. Gallina*, 346 F.3d 366, 375 (2d Cir. 2003).

80. *Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 383 (2d Cir. 2001) (stating court’s position for reversal of district court’s ruling on standing). The court more specifically stated that the violation of RICO was the proximate cause of Colin’s ability to underbid Commercial and take business away from them. *Id.*

81. *See generally Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002).

82. *See* 301 F.3d 1163 (9th Cir. 2002) (claiming damages against fruit growers under RICO).

83. *Id.* at 1166 (quoting complaint). The plaintiffs alleged injury in the form of wage suppression because illegal aliens were willing to work for less due to their economic and illegal status. *Id.*

84. *Mendoza v. Zirkle Fruit Co.*, No. CS-00-3024-FVS 2000 WL 33225470, at *2 (E.D. Wash. 2000) *rev’d*, 301 F.3d 1163 (9th Cir. 2002) (stating plaintiff’s allegations as outlined in complaint). The complaint also noted that defendant Matson had been audited by the INS in 1999, resulting in a finding that seventy-four percent of Matson’s workforce (493 of 661) were undocumented. *Id.* The second count of the complaint alleged that the defendants entered into a civil conspiracy with an employment agency to violate the INA. *Id.* at *1.

85. *Mendoza*, 301 F.3d at 1167 (stating reasons for lower court’s dismissal). The district court noted that

Appeals reversed, holding the employers intended the alleged scheme to give them a business advantage at the expense of the documented workers.⁸⁶ The court discussed a string of cases starting in the antitrust context, and later extending to RICO cases, where the court denied standing to parties suffering “passed on” third party derivative injury, but ultimately decided the employee’s injury here was not passed on.⁸⁷ Most significantly, the court affirmed the district court’s finding that the laborers properly alleged a violation of a predicate RICO act by claiming the growers violated the relevant provisions of the INA.⁸⁸

In a similar case, former employees of a poultry processing plant sued their employer for hiring illegal aliens and suppressing wages.⁸⁹ In *Trollinger v. Tyson Foods, Inc.*,⁹⁰ the Eastern District of Tennessee dismissed the employees’ claim, finding the plaintiffs failed to show a rational connection between the hiring of illegal aliens and wage suppression.⁹¹ Citing *Mendoza*, the court stated that suppression of wages could not be solely attributed to the hiring of illegal aliens because several factors linked to wage determination in the poultry industry.⁹² Specifically, the court noted that because a collective bargaining agreement governed wage rates, plaintiffs could not demonstrate

“the employees pled a direct injury because there was no intervening third party from whom their injury was derived.” *Id.* The district court, however, dismissed for lack of concrete injury and proximate causation. *Id.*

86. *Id.* at 1170 (summarizing court’s reasoning regarding direct injury). The court rejected the growers’ argument that the employees needed to show an adversely affected property interest. *Id.* at 1168 n.4. The employees need only show a “legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes.” *Id.*

87. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168-70 (9th Cir. 2002) (stating test for determining statutory standing under RICO). The court did not consider that the employee’s injury passed on because the court could not identify a more direct victim of the alleged illegal conduct. *Id.* at 1170. The passed on test incorporates antitrust law and can be applied offensively or defensively. *ABRAMS*, *supra* note 54, at 144-45. Offensive pass-on, as asserted by the plaintiffs in *Mendoza*, alleges injury to a legally cognizable interest because a party “passed loss on.” *Id.* at 144. Generally, when proof of such injury is precluded, courts hold indirect victims may not recover as a matter of law. *Id.* at 145.

88. *See Mendoza*, 301 F.3d at 1168 (affirming district court’s decision regarding predicate offense); *see also* INA, 8 U.S.C. § 1324 (2004).

89. *See generally* *Trollinger v. Tyson Foods, Inc.*, 214 F. Supp. 2d 840 (E.D. Tenn. 2002) (asserting claim by employees against former employer), *rev’d*, 370 F.3d 602 (6th Cir. 2004).

90. 214 F. Supp. 2d 840 (E.D. Tenn. 2002), *rev’d*, 370 F.3d 602 (6th Cir. 2004). *Trollinger* came on the heels of an extensive undercover investigation of Tyson Foods, Inc., by the Immigration and Naturalization Service (INS). *See United States v. Tyson Foods, Inc.*, No. 4:01CR061, 2003 WL 21095580, at *1 (E.D. Tenn. Jan. 28, 2003). The INS tracked 150 illegal aliens from the border to a Tyson processing plant. *Id.* In the civil case, employees alleged Tyson used recruiters and temporary employment agencies to coach illegal immigrants to deny being smuggled into the United States. *Trollinger*, 214 F. Supp. 2d at 842.

91. *Trollinger*, 214 F. Supp. 2d at 844 (stating court’s reasoning for dismissing claim). As the court noted, Tyson Foods is one of the largest vendors of poultry in the world. *Id.* at 841. The plaintiffs were hourly wage employees of Tyson’s Shelbyville, Tennessee facility since 1996 and the AFL-CIO represented them in a collective bargaining agreement. *Id.*

92. *See id.* at 843 (noting court’s reasoning regarding direct injury suffered by plaintiffs). The court relied on the district court’s decision in *Mendoza*; however, the Ninth Circuit later reversed that decision. *Mendoza*, 301 F.3d at 1175.

that wage suppression occurred as a result of “the presence of alleged illegal aliens in the work force.”⁹³

As a result of RICO requiring a pattern of racketeering, a minimum of two acts are needed to support a civil RICO claim.⁹⁴ Although a pattern does not require “multiple schemes,” courts have repeatedly held that the acts must be related and constitute or pose a threat of continued criminal activity.⁹⁵ Isolated acts of racketeering may not be sufficient to constitute a pattern.⁹⁶ The RICO immigration cases filed to date attempt to satisfy this requirement by claiming an individual violation of the INA occurred with each hiring of at least ten illegal aliens.⁹⁷ The INA considers the hiring of at least ten illegal aliens in a twelve-month period a predicate act for purposes of RICO.⁹⁸ Under RICO, a pattern of racketeering can therefore be properly alleged in situations where a business employs at least twenty illegal aliens in any twelve-month period.⁹⁹

A plaintiff may also attempt to establish a pattern of racketeering by alleging the hiring of illegal aliens coupled with a different violation of the INA. One alleged predicate act arising in an immigration RICO suit is the transporting and harboring of illegal aliens.¹⁰⁰ Another predicate act alleged is participation in a mail fraud scheme.¹⁰¹ “The mail fraud statute prohibits the use of the mails

93. *Trollinger*, 214 F. Supp. 2d at 843 (citing collective bargaining agreement as determining factor for laborers’ wages). The terms of the collective bargaining agreement gave Tyson the right to use 200 temporary employees at the Shelbyville plant at any time. *Id.* at 841. The court determined that “sheer speculation” was required to conclude that hiring of illegal aliens resulted in lower wages for documented employees. *Id.*

94. *See* *Sys. Mgmt., Inc. v. Loisel*, 91 F. Supp. 2d 401, 407 (D. Mass. 2000) (stating RICO requires more than one predicate act to form pattern of racketeering).

95. *See* *H.J. Inc., v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238 (1989) (analyzing statutory language: “pattern of racketeering activity itself”). The Court noted that it would be reasonable to infer that Congress intended a flexible approach when analyzing the interrelation between predicate offenses. *Id.*; *see also* *Fleischhauer v. Feltner*, 879 F.2d 1290, 1298 (6th Cir. 1989) (rejecting contention multiple schemes required for claim).

96. *See* *Green*, *supra* note 44, at 312 (noting legislative history indicates two isolated acts do not constitute racketeering). The article cites RICO’s senate report indicating that sporadic activity is not RICO’s target. *Id.*

97. *Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.*, No. 3:99cv109, 2000 WL 545126, at *2 (D. Conn. Mar. 21, 2000) (alleging defendant engaged in violation of INA by hiring illegal aliens every year since 1996), *rev’d*, 271 F.3d 374 (2d Cir. 2001). The court noted that the plaintiff alleged multiple violations of 8 U.S.C. § 1324(a)(3), and that to be successful on such a claim, the plaintiff must prove the defendant knowingly hired at least ten illegal aliens during any twelve-month period, that it knew were unauthorized, and that illegal aliens had been transported or concealed as described in the INA. *Id.*

98. 8 U.S.C. § 1324(a)(3)(a) (2004) (stating twelve-month time period required for violation of INA for immigration violations). A violation is punishable by fine or imprisonment of not more than five years or both. *Id.*

99. *See* *Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 381 (2d Cir. 2001) (stating Commercial properly alleged RICO offense).

100. *See* *Trollinger v. Tyson Foods, Inc.*, 214 F. Supp. 2d 840, 842 (E.D. Tenn. 2002) (alleging recruiters work for Tyson transporting illegal aliens to and from food processing plant), *rev’d*, 370 F.3d 602 (6th Cir. 2004).

101. *See* *Mendoza v. Zirkle Fruit Co.*, No. CS-00-3024-FVS, 2000 WL 33225470, at *2 (E.D. Wash. Sept. 27, 2000) (stating plaintiff’s allegation of I-9 mail fraud scheme in pattern of racketeering), *rev’d*, 301 F.3d 1163 (9th Cir. 2002). The mail fraud allegation in *Mendoza* claimed that the defendants sent I-9 forms to the

to obtain money or property from the one who is deceived.”¹⁰²

In the current cases, the plaintiffs allege the defendants engaged in patterns of racketeering by knowingly hiring illegal aliens and encouraging illegal immigration.¹⁰³ The Second and Ninth Circuits have held that such a claim properly alleged a predicate offense through violation of the INA.¹⁰⁴ While these complaints are sufficient to survive the pleadings stage, the plaintiffs must also prove at trial that the defendant companies knowingly engaged in a pattern of racketeering.

To satisfy the predicate offense requirement, the plaintiff must prove the defendant knew of the illegal status of the employees.¹⁰⁵ Ideally, a plaintiff could use testimony from illegal employees to prove the employer had direct knowledge.¹⁰⁶ Such testimony, however, is rarely volunteered in civil cases due to the illegal nature of undocumented workers and fear of deportation.¹⁰⁷ In the absence of available testimony, plaintiff’s counsel must improvise.¹⁰⁸

The INA imposes several employment verification requirements on employers.¹⁰⁹ Generally, employers can satisfy the verification requirements if they inspect certain identification documents that facially appear genuine.¹¹⁰ In

INS through the mail, which falsely stated that their employees’ eligibility to work in the United States had been verified. *Id.*; *Sys. Mgmt., Inc. v. Loisel*, 91 F. Supp. 2d 401, 404 (D. Mass. 2000) (outlining plaintiff’s allegation of mail fraud as part of racketeering pattern). The plaintiffs also alleged the employer knowingly transported illegal aliens in furtherance of their illegal presence in the United States. *Sys. Mgmt.*, 91 F. Supp. 2d at 404.

102. *Mendoza*, 2000 WL 33225470, at *5 (explaining requirements for violation of mail fraud statute). The court outlined three elements needed to violate the statute. *Id.* First, the defendants must have formed a scheme to defraud. *Id.* Second, the defendants must have used the United States Mail to further the scheme. *Id.* Third, the defendants must have had intent to deceive or defraud. *Id.* at *6. The court found the plaintiffs did not adequately allege the elements of a mail fraud claim. *Id.*

103. *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1166 (9th Cir. 2002) (stating plaintiffs allege defendant knowingly hired undocumented workers); *Commercial Cleaning*, 271 F.3d at 378-79 (alleging pattern of racketeering by defendant cleaning company to underbid competitors); *Trollinger*, 214 F. Supp. 2d at 841 (stating plaintiff’s allege defendant hired illegal aliens to suppress wages).

104. *See Mendoza*, 301 F.3d at 1168 (holding plaintiff properly alleged predicate act of knowingly hiring undocumented workers); *Commercial Cleaning*, 271 F.3d at 377 (affirming lower court’s decision).

105. 8 U.S.C. § 1324(a)(3)(A) (2004) (stating knowledge requirement for immigration related offenses under RICO).

106. *See Garcia v. Martin*, No. EP-91-CA-389-B, 1992 WL 553664, at *6 (W.D. Tex. Sept. 18, 1992) (citing testimony of two illegal aliens against employer to prove knowledge).

107. *Gabriela Robin, Hoffman Plastic Compounds Inc. v. National Labor Relations Board: A Step Backwards for all Workers in the United States*, 9 NEW ENG. J. INT’L & COMP. L. 679, 689-90 (2003) (noting reluctance of illegal aliens to exercise rights against employers due to retribution).

108. *See generally King, supra note 7* (discussing knowledge requirement for civil RICO immigration claims). King offers an innovative approach to proving knowledge in RICO immigration cases. *Id.* King argues employers may satisfy the knowledge requirement by accepting foreign identification documents such as the “matricula consular” issued by the Mexican government. *Id.* Because all legal immigrants and foreign visitors have access to United States issued identification, King argues that only illegal aliens rely on the “matricula consular” card to establish identity for an employer. *Id.* Employers, banks, municipalities and other entities accepting such cards therefore are encouraging illegal immigration as proscribed by the INA. *Id.*

109. 8 U.S.C. § 1324a(b)(1) (stating requirements of employment eligibility verification system).

110. 8 U.S.C. § 1324a(b)(1) (stating employer satisfies requirement if documents appear genuine on face).

System Management Inc. v. Loiselle,¹¹¹ the District Court for the District of Massachusetts dismissed a RICO claim brought on the grounds of employment of aliens because the plaintiffs failed to allege knowledge by the employer.¹¹² In recent cases, plaintiffs have attempted to satisfy the knowledge requirement in several different ways. In *Commercial Cleaning*, the plaintiffs attempted to satisfy the knowledge requirement by showing the employers accepted false Social Security numbers and failed to verify their authenticity.¹¹³ In *Collins Foods International Inc. v. United States Immigration and Naturalization Service*,¹¹⁴ the Ninth Circuit reversed the decision of an Administrative Law Judge (ALJ) who had attributed knowledge to the employer of the illegal status of its employee.¹¹⁵ In reversing the ALJ, the court held that the employer satisfied the statutory requirements of the INA by examining the alien's false Social Security card and genuine driver's license.¹¹⁶ The court refused to hold that the employer knowingly hired an illegal alien because the documents appeared facially genuine.¹¹⁷ The court also noted that the legislative history of section 1324(a) indicated congressional intent to "minimize the burden and the risk placed on the employer in the verification process."¹¹⁸ In *Mendoza*, the

Acceptable documents under the INA include passports, Social Security cards and driver's licenses. *Id.*

111. 91 F. Supp. 2d 401 (D. Mass. 2000) (dismissing plaintiff's RICO claim for lack of knowledge by employer).

112. *Id.* at 408 (discussing plaintiff's complaint and applicable RICO provisions as relating to INA). The court noted the distinction between sections 274 and 274A, stating that the plaintiffs could not use 274A as a predicate act under RICO. *Id.* at 409. The plaintiffs also attempted to use section 274 of the INA as a predicate act by alleging that the employer unlawfully transported the aliens in violation of 8 U.S.C. § 1324a(a)(1)(A)(ii). *Id.* at 408-10.

113. See King, *supra* note 7 (detailing plaintiff's attempts to show defendant companies knowingly accepted false identification cards). King states that the knowledge requirement would be satisfied if the social security numbers were invalid or unverified. *Id.*

114. 948 F.2d 549 (9th Cir. 1991) (reversing INS' Administrative Law Judge's determination of constructive knowledge of employee's illegal status).

115. See *id.* at 551 (holding INS ALJ's criteria for determining knowledge improper).

116. *Id.* at 554 (noting employer examined both forms of identification and both appeared genuine). The court noted that the employer satisfied the statutory verification requirements of 8 U.S.C. § 1324a(b)(1)(A) by "examining a document which 'reasonably appears on its face to be genuine.'" *Id.*

117. *Id.* (noting employer examined identification documents appearing genuine). The INS argued that the employer failed to satisfy the statutory verification requirements in the INA by not comparing the back of the employee's Social Security card to the INS handbook. *Id.* at 553-54. The court noted that even if the employer verified the back of the Social Security card with the INS manual, several versions of the card exist and the employer still might not have discovered the discrepancy. *Id.* at 554. Another factor contributing to the difficulty of proving employer knowledge is the relative ease with which illegal aliens can obtain authentic and false forms of identification. The terrorist attacks of September 11, 2001, highlighted this fact when authorities discovered that the majority of hijackers owned legitimate drivers licenses and state identification cards from several states, including Arizona, Florida, Maryland and Virginia. MICHELLE MALKIN, *INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES* 34 (2002).

118. *Collins Foods, Int'l, Inc. v. U.S. INS*, 948 F.2d 549, 554 (9th Cir. 1991) (citing congressional intent as support for reversal of INS ALJ). The statute's judiciary committee report states that Congress did not intend for employers to turn themselves into experts in examining a prospective employee's employment documents. See H.R. REP. NO. 99-682, pt. 1, at 62 (1986). The Report expressly requires the use of a "reasonable man"

plaintiffs alleged the employers had “actual knowledge” that each undocumented employee was “either smuggled into the [United States], or harbored once in the [United States].”¹¹⁹

A plaintiff may also attempt to show constructive knowledge. In *Collins Foods*, the Ninth Circuit overruled an ALJ who found constructive knowledge based on the employer’s offer of employment absent documentation of citizenship.¹²⁰ In a similar case, the Ninth Circuit held an employer had constructive knowledge of several employees’ illegal status where the INS gave the employer specific information that directly referred to such status.¹²¹ In a prosecution for transporting illegal aliens within the United States, the government argued in *United States v. Guerra-Garcia*,¹²² that the combination of several circumstances was sufficient to impute knowledge of an alien’s legal status to the defendant.¹²³ The court noted that while one factor in evidence standing alone “might not itself be proof of knowledge,” the combination would be sufficient.¹²⁴

D. Causation

Causation is the next obstacle plaintiffs must overcome before recovering against companies under federal racketeering law.¹²⁵ To emphasize the importance of causation in RICO immigration cases, the court in *Commercial Cleaning*, stated the plaintiff’s appeal turned “on whether its complaint satisfie[d] the causation requirement.”¹²⁶

Plaintiffs will only have standing in a civil RICO case if the claimed harm was both factually and proximately caused by the defendant’s action.¹²⁷ In

standard in the provision’s implementation, emphasizing that documents that “reasonably appear to be genuine should be accepted by employers without requiring further investigation of those documents.” *Id.*

119. *Mendoza v. Zirkle Fruit Co.*, No. CS-00-3024-FVS, 2000 WL 33225470, at *2 (E.D. Wash. Sept. 27, 2000) (explaining plaintiff’s claim of actual knowledge of illegal status), *rev’d*, 301 F.3d 1163 (9th Cir. 2002).

120. *Collins Foods*, 948 F.2d at 551 (stating reasons behind ALJ’s decision and Ninth Circuit’s reversal).

121. *See Mester Mfg. Co. v. U.S. INS*, 879 F.2d 561, 566-67 (9th Cir. 1989) (rejecting defendant’s argument of lack of knowledge of employee’s illegal status). The court noted that the employer was on notice that three aliens were suspected of green card fraud and failed to take the appropriate action. *Id.* The INS ALJ found that Mester was on notice as to the alien’s suspect work status and unreasonably continued his employment. *Id.* at 566.

122. 336 F.3d 19 (1st Cir. 2003).

123. *Id.* at 25 (stating sum of evidence showed defendant employer knew of illegal status).

124. *Id.* (rejecting defendant’s argument denying knowledge of alien’s illegal status). The factors pointing towards knowledge included evidence that the defendant met the passenger in a border town, the passenger spoke no English and had no bus ticket, bags or money. *Id.* at 24-25.

125. *See Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001) (discussing proximate cause requirement of plaintiff’s RICO claim).

126. *Id.* (stressing importance of causation in RICO immigration claim).

127. *Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 446-47 (8th Cir. 2000) (setting forth black letter requirements for standing in civil RICO cases). The court noted the concept of proximate cause is “imported from tort law into RICO jurisprudence by way of the antitrust laws.” *Id.* at 447. The court cited three grounds for justification of the proximate cause requirement. *Id.* First, it reduces the need for apportioning between

determining causation, the Second Circuit required a “direct relation” between the alleged harm and the defendant’s actions.¹²⁸ Similarly, the Ninth Circuit, citing *Commercial Cleaning*, spoke of direct injury, focusing on whether a more direct victim could be ascertained.¹²⁹ In analyzing proximate cause under RICO, the Second Circuit refers to a two-part test identified in *Lerner v. Fleet Bank*.¹³⁰ Under the first prong, the court asks whether the RICO violation directly or indirectly caused the injury.¹³¹ Under the second prong, the court asks whether the direct injury was foreseeable by the defendant.¹³² It is argued that a plain reading of RICO’s legislative history leads to the inference that Congress intended something more than simple injury from a predicate act.¹³³

E. Damages

Another concern of the courts is the speculative nature of damages, specifically in light of RICO’s treble damages multiplier.¹³⁴ To qualify for recovery, damages must be computed on “competent proof, not based on mere speculation and surmise.”¹³⁵ In *Mendoza*, the court held that although determination of lost wages depended on many different factors, the plaintiffs should not be forced to prove them at the pleadings stage.¹³⁶ The Second Circuit also held for the plaintiff in *Commercial Cleaning*, stating that in

damages caused by the defendant’s actions and intervening factors. Second, it prevents multiple recovery by the same party. *Id.* Third, deterrence is achieved by granting recovery to more directly injured parties. *Id.* The administrative law concept of standing as affecting a “zone of interest” was helpful to the court as it evaluated standing. *Id.*

128. *Commercial Cleaning*, 271 F.3d at 381 (stating plaintiff’s complaint adequately alleged direct proximate relationship between injury and defendant’s conduct).

129. See *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1170 (9th Cir. 2002) (detailing court’s causation analysis). The *Mendoza* appeals court noted that the district court focused primarily on cause-in-fact, rather than proximate cause. *Id.* at 1171. In *Terre Du Lac Ass’n, Inc. v. Terre Du Lac, Inc.*, the Eight Circuit held that the plaintiffs alleged sufficient injury in a claim against a developer for failure to complete several jobs in a subdivision. 772 F.2d 467, 472-73 (8th Cir. 1985). The property owners claimed the developer failed to pave the roads with asphalt, complete the sewer and water systems, and provide free use of amenities such as golf courses and the club house. *Id.* The defendant argued the alleged injury was only indirectly related to the defendant’s conduct, therefore the plaintiff lacked standing. *Id.* at 472. The court rejected this argument, citing cases granting standing even where the plaintiff alleged only indirect injury. *Id.*

130. 318 F.3d 113, 123 (2d Cir. 2003) (stating two-pronged proximate cause test).

131. *Id.* at 123.

132. *Id.*

133. See Faisal Shah, Note, *Broadening the Scope of Civil RICO: Sedima S.P.R.L. v. IMREX Co.*, 20 U.S.F. L. REV. 339, 353 (1986) (arguing Supreme Court distorted plain meaning of statute by imposing interpretation where Congress remained silent). Shah argued that if Congress intended the direct source of injury to stem from predicate acts, RICO would have required injury “by reason of Section 1961.” *Id.*

134. See *Mendoza*, 301 F.3d at 1170 (stating court’s concern over speculative nature of damages).

135. *Trollinger v. Tyson Foods, Inc.*, 214 F. Supp. 2d 843, 843 (E.D. Tenn. 2002) (quoting *Fleschhauer v. Feltnier*, 879 F.2d 1290, 1299 (6th Cir. 1989)) (stating requirements for recovery of damages under RICO’s treble multiplier), *rev’d*, 370 F.3d 602 (6th Cir. 2004).

136. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1171 (9th Cir. 2002) (stating plaintiff need not calculate lost wages with specificity at pleadings stage).

situations of competitive bidding, damages could be ascertained by showing the plaintiffs “lost contracts directly because of the cost savings defendant realized through its scheme to employ illegal workers.”¹³⁷

III. ANALYSIS

If civil RICO suits gain momentum as a remedial device for immigration enforcement, the statute’s 1996 amendments could potentially alter the face of immigration policy in the United States.¹³⁸ In the face of increasingly ineffective INS border enforcement, the transition from government to private standing has the potential to deter illegal immigration by attacking businesses’ profits.¹³⁹ RICO’s provisions awarding treble damages and attorney’s fees could make racketeering claims a powerful deterrent to companies employing, or intending to employ, illegal aliens.¹⁴⁰ The question remains, however, whether employers of illegal aliens are merely the next victims of what many consider a run-away law.¹⁴¹

The use of RICO as an immigration enforcement tool is consistent with Congress’ intent to provide a remedy to businesses suffering harm from illegal competition.¹⁴² The most obvious evidence of this is the amendment itself, which explicitly brings immigration within reach of the statute.¹⁴³ In addition to businesses’ use of RICO, documented workers claiming wage suppression can use RICO as a path to higher wages by forcing employers to play by the rules. Although one argument proposes that the nation’s overall economic health may be better served by prohibiting application of RICO in an immigration context, there is little doubt that such suits can provide adequate

137. *Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 382 (2d Cir. 2001) (holding plaintiff’s damages were not unascertainable). The court did not deny the difficulty of determining lost business resulting from the defendants’ actions, but the court maintained that Colin was directly injured as a result of Commercial’s conduct. *Id.*

138. *See Obhof, supra* note 34, at 166 (citing benefits in form of tax, employment, and profits as benefits received by the host nation of immigrant laborers).

139. *See Izyumov, supra* note 2, at 912 (noting estimated number of illegal aliens in United States). The effect of mass tort attacks on foreign labor-dependent businesses could also be disastrous for alien workers and their families. *See Johnson, supra* notes 33, at 221 (noting Mexican workers send millions of dollars in remittances each year).

140. *See* 18 U.S.C. § 1964(c) (2003) (providing for treble damages); *see also Baisch v. Galina*, 346 F.3d 366, 372 (2d Cir. 2003) (explaining RICO’s treble damages provision and legislative history). Several of the RICO immigration cases have been class action suits against large corporations such as Tyson Foods, implying treble damage awards could be very large. *See supra* notes 29, 91 and accompanying text (noting large size of defendant corporations in RICO immigration cases).

141. *See supra* notes 58-61 and accompanying text (noting judicial activism and hostility, including that of Chief Justice Rehnquist).

142. *See Bryan, supra* note 53, at 989 (citing Supreme Court decision allowing application of RICO to otherwise legitimate businesses). The clearest indications that Congress intended such a use of the statute are the 1996 amendments themselves. *See supra* note 64 and accompanying text.

143. *See* 18 U.S.C. § 1961(1)(F) (2004) (including violation of INA as predicate act under RICO).

remedies for businesses and employees.¹⁴⁴ Successful application of RICO to immigration may also halt the perpetual exploitation of illegal workers and accompanying poverty by providing standing for those aliens to sue their employers.¹⁴⁵ Beyond businesses and legally documented employees, these illegal aliens exploited by businesses will presumably have standing to sue under racketeering laws.¹⁴⁶

Despite the innovative application of RICO to immigration issues, the application of treble damages may prove to be difficult.¹⁴⁷ From a practical standpoint, businesses and employees must overcome judicial hostility towards the seemingly endless expansion of civil RICO.¹⁴⁸ Judges and juries may also be hesitant to brand otherwise legitimate businesses as organized criminal enterprises. Concern over the slippery slope of RICO and immigration, however, may be unfounded. In the eight years since the 1996 amendments, appellate courts have considered only two cases, and companies employing illegal workers on a significant scale appear to remain unscathed.¹⁴⁹ The small number of successful civil RICO claims also indicates that recovery may be difficult.¹⁵⁰ Significant procedural hurdles also remain, and courts have voiced several concerns over the emerging use of RICO in the immigration context.¹⁵¹ Although viewed as victories by immigration enforcement advocates, *Commercial Cleaning* and *Mendoza* have yet to yield a dime to their respective plaintiffs.¹⁵² Despite significant attention in the legal community, both cases have only established standing, and their outcomes on remand are yet to be determined.¹⁵³

Plaintiffs must also satisfy RICO's high standard of proof. One of the most significant obstacles to recovery will likely be proof of causation because of the

144. See King, *supra* note 7 (arguing RICO provides adequate remedy for documented agriculture employee).

145. See King, *supra* note 7 (noting employment of illegal workers exploits aliens and harms legally documented workers); see also Paoletti, *supra* note 29, at 46 (discussing civil racketeering suit by janitors against employer Wal-Mart).

146. See *supra* note 29 and accompanying text (discussing RICO suit by illegal aliens detained in Wal-Mart raids).

147. See *supra* note 49 and accompanying text (noting high standard of proof required by RICO).

148. See *supra* note 60 and accompanying text (noting Chief Justice Rehnquist's hostile view on civil RICO use).

149. See *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1170 (9th Cir. 2002); *Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 382 (2d Cir. 2001).

150. See Heed, *supra* note 58, at 222 (noting fifty percent of civil RICO claims dismissed in 1985 and 1986).

151. See *supra* notes 134-137 and accompanying text (pointing out courts' concern over speculative nature of damages in competing business context); see also *supra* note 79 and accompanying text (explaining dismissal of claim for lack of rational connection between plaintiff's conduct and injury alleged).

152. See Fulford, *supra* note 6 (praising RICO suits by businesses against competitors employing illegal aliens). But see *supra* notes 19, 23 (citing successful appeals in Second and Ninth Circuits for immigration racketeering claims).

153. See *supra* note 149 (noting only two cases reviewed by appellate courts).

thin connection between employers' conduct and the harm alleged in these cases.¹⁵⁴ Still, the Second and Ninth Circuits have held that a sufficient causal connections exist. Similarly, the Fifth Circuit is currently considering the district court's dismissal of *Trollinger* in 2001.¹⁵⁵

Another obstacle lies in establishing employers' knowledge of the illegal status of alien employees.¹⁵⁶ The INA's relaxed employee verification requirements and the wide array of fraudulent identification documents available create minimal standards for employers to prove ignorance of their employees' status.¹⁵⁷ If actual knowledge is too difficult to prove, a plaintiff may attempt to establish an employer's constructive knowledge.¹⁵⁸ As plaintiffs' attorneys become better versed in the emerging area of racketeering and immigration law, the knowledge barrier will certainly become more vulnerable.¹⁵⁹

Racketeering laws may also deter illegal immigration as a whole.¹⁶⁰ Companies forced to pay large damages might hesitate to employ large numbers of illegal aliens. Decreased opportunities for jobs would reduce incentives to cross the border for employment or economic reasons. The detrimental impact of this emerging line of cases on unskilled, labor-dependent industries, however, could be significant.¹⁶¹ If successful, racketeering claims may spread to other industries that rely heavily on an illegal workforce, dealing a severe blow to the economy and leaving thousands of low-skilled labor jobs vacant.¹⁶²

IV. CONCLUSION

Expansion of civil RICO into the realm of immigration enforcement is an innovative new frontier for plaintiffs' attorneys that poses serious threats to employers and businesses employing illegal aliens. If successful, such cases could trigger a significant transfer of enforcement power from government

154. See *supra* notes 125-126 and accompanying text (explaining causation requirement for RICO claim).

155. See *Trollinger v. Tyson Foods, Inc.*, 214 F. Supp. 2d 840, 840 (E.D. Tenn. 2002) (discussing procedural posture of civil RICO case), *rev'd*, 370 F.3d 602 (6th Cir. 2004).

156. See *supra* note 105 and accompanying text (noting knowledge requirement for successful prosecution of claim).

157. See *supra* notes 109-110 and accompanying text (explaining employee verification requirements of INA regarding review of identification documents)

158. See *Collins Foods Int'l, Inc. v. U.S. INS*, 948 F.2d 549, 551 (9th Cir. 1991) (reviewing ALJ's determination of constructive knowledge by employer).

159. See *King*, *supra* note 7 (suggesting possible method of proving knowledge by businesses).

160. See *supra* note 60 and accompanying text (noting many RICO cases have nothing to do with organized crime as envisioned by Congress).

161. See *supra* note 24-25 and accompanying text (noting agriculture industry's dependence on unskilled, low-wage labor).

162. Cleland, *supra* note 49, at C1 (quoting immigration attorney on implications of successful outcome in RICO immigration suits); *cf. supra* note 24 and accompanying text (noting dependence of industry on low skill foreign labor).

bureaucracies like the INS to private parties with standing.

Procedural and practical obstacles stand in the way of successful recovery for immigration claims under RICO. For example, plaintiffs must establish standing, knowledge, and a pattern of racketeering under RICO's stringent causation requirements to recover. As a practical matter, plaintiffs must also contend with mounting judicial hostility towards a civil statute that many judges believe has far exceeded its legislative mandate.

From an immigration enforcement perspective, the impact of the emerging line of civil RICO cases is questionable. Tort and racketeering law has the potential to strong-arm businesses into hiring exclusively documented workers, decreasing economic incentives to cross the border. RICO's treble damages provision could be an incredibly persuasive tool for forcing large companies to hire only domestic workers. Economically, however, the resulting rise in wages could leave many low-skilled labor jobs vacant, trigger a rise in the cost of goods and services, and have a detrimental impact on industries such as agriculture.

Regardless of the unanswered questions accompanying this emerging line of cases, the fact remains that Congress explicitly included immigration-related offenses in the 1996 RICO amendments, indicating lawmakers' intent to broaden the statute. Eight years later, however, very few cases have been brought using the INA/RICO formula as plaintiffs' attorneys patiently watch their pioneering peers test the waters. Still, those that understand the explosive potential of these cases are watching closely as the cases wind their way through the courts, fully aware of the possibility that civil RICO may change the face of immigration enforcement in this country.

Adam J. Homicz