AGGREGATE RELIANCE AND OVERCHARGES: REMOVING HURDLES TO CLASS CERTIFICATION FOR VICTIMS OF MASS FRAUD

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Victims of consumer fraud often struggle to bring their claims as nationwide class actions under traditional state fraud laws due to (1) the application of many states' laws to potential class members' claims and (2) the fact that fraud claims generally raise a significant individual factual issue—whether the claimant personally relied on the defendant's misrepresentation. The civil remedy provisions in RICO offer an attractive alternative. RICO overcomes the first hurdle by providing plaintiffs with a single federal law under which to file suit. This Note demonstrates that RICO allows plaintiffs to overcome the second hurdle as well. Rather than showing that they incurred harm when they purchased products in reliance on a misrepresentation, plaintiffs can achieve class certification by framing their injury as a harm common to all purchasers of a product: specifically, an increase in the price of the product due to artificially increased demand. Recently, several classes have moved successfully for certification using this approach. This Note provides a theoretical framework to justify this method. Rather than committing the same error as most courts and commentators by viewing this approach as an extension of the fraud-on-the-market presumption of reliance from securities fraud cases, I argue that there is no need to presume reliance because the Supreme Court's holding in Bridge v. Phoenix Bond & Indemnity Co. *makes clear that individual, personal reliance is not necessary to prove causation in RICO claims. Instead, plaintiffs can satisfy RICO's causation element through statistical analyses that prove aggregate reliance—reliance on the fraud by a large enough number of individuals to increase the price of the product above the price that it would have been absent the fraud. As all purchasers of the product experience the same price differential, the statistical analyses provide common proof of causation of identical harm, eliminating problematic individual inquiries and opening the door to certification of nationwide consumer fraud class actions.*

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Introduction

Consider a hypothetical situation based loosely on the allegations in a recent complaint.[1] A pharmaceutical company distributes a drug that the FDA has approved to treat schizophrenia and bipolar disorder. These conditions afflict less than one percent of the population, and two similar drugs compete in the same market. The markets for other, more common psychiatric disorders, however, are far less saturated and offer much greater profit potential. The pharmaceutical company decides to enter these markets by pushing its drug as a treatment for a slew of disorders for which the FDA has not approved the drug and for which medical research has not shown the drug to be effective—including depression, anxiety, obsessive compulsive disorder, post-traumatic stress disorder, sleep disorders, and dementia. The company spends $250 million per year to convince family doctors that its drug can treat these disorders or, alternatively, that patients may suffer from bipolar disorder even if a psychiatrist has not diagnosed them. The campaign is successful; the drug, which the FDA approved for only two rare conditions, becomes one of the ten most prescribed drugs in the nation. In addition to revenues generated by the additional prescriptions, the pharmaceutical company profits as the price per prescription increases by $75 because of the inflated demand for the drug.

When the pharmaceutical company's fraud comes to light, what legal remedies are available to the drug purchasers? An individual patient might claim that she would not have purchased the drug had she known the truth, but the costs of litigation against a titanic pharmaceutical company dwarf any potential payout from this claim.[2] When the cost of suing exceeds the potential payout, a class action can often provide a solution.[3] But for two reasons, federal courts categorically deny class treatment for claims of common law fraud.[4] First, state fraud laws generally require individual factual inquiries to determine whether each plaintiff justifiably relied on the fraud in her purchasing

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1 What follows is a simplification of the plaintiffs' allegations in *In re Zyprexa Products Liability Litigation*, 253 F.R.D. 69 (E.D.N.Y. 2008).

2 *Id.* at 199 (explaining how costs of individual litigation against pharmaceutical manufacturer are impractical, "even for some of the largest funds").

3 *See* 2 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 5.7 (4th ed. 2002) ("A class action may represent the only means for judicial relief when . . . the costs incurred to bring each claim individually would exceed the potential individual recovery."); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.").

4 *See infra* Part I.B (discussing impediments to class certification in common law fraud cases).

decision. Second, absent a national fraud law, the fraud laws of fifty different states govern any attempt to certify a nationwide class of drug purchasers. The differences between plaintiffs and between the state laws to which they are subject make class treatment inappropriate, potentially allowing the pharmaceutical company to avoid facing repercussions for its actions because of the negative value of individual suits.

This Note demonstrates that the Racketeer Influenced and Corrupt Organizations Act (RICO) provides both a common federal standard under which a national class can unite and a fraud-based cause of action for which plaintiffs can establish causation without individual inquiries into reliance. I argue that certification of a class under this single federal law, RICO, ensures that common questions of law predominate.[5] My proposed solution also permits the potential class to avoid the problems of establishing each plaintiff's personal reliance by instead proving that the price of the product sold, like that of the drug in the hypothetical, increased as a result of the demand created by the misrepresentation. When a sufficiently large group of consumers relies on a fraudulent statement so that their demand drives up the price of the defrauder's product, plaintiffs can prove causation on a classwide basis, a phenomenon I refer to as "aggregate reliance."[6]

In the Eastern District of New York, Judge Jack Weinstein has broken new ground by certifying civil RICO classes that sought not a full refund of the purchase price but a refund of that part of the price that was attributable to fraud—namely, the difference between the price paid and the price that consumers would have paid absent the improperly increased demand.[7] One can determine the price differential in these cases by using economic and statistical models, which, Judge Weinstein reasoned, permit a presumption that each plaintiff relied on the fraud and open the way for class certification.[8] This presumption of reliance—termed "fraud on the market"—is a staple in

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5 *See infra* Part I.C (explaining that RICO overcomes diversity-of-state-law obstacle without imposing insurmountable additional requirements).

6 *See infra* Part III (detailing theory of aggregate reliance and demonstrating its application to RICO class actions).

7 *See* Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1019, 1023–24 (E.D.N.Y. 2006) (certifying class of light cigarette smokers seeking damages in form of price deferential in RICO action), *rev'd sub nom.* McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008); *Zyprexa*, 253 F.R.D. at 209–10 (certifying class of drug purchasers seeking damages in form of price deferential in RICO action).

8 *See infra* notes 171–72 and accompanying text (discussing Judge Weinstein's application of fraud-on-the-market theory to aggregate reliance cases).

securities fraud cases.[9] I argue, however, that it has no place in fraud-based RICO claims and that, although Judge Weinstein's decisions to certify were correct, his use of fraud on the market as a theoretical underpinning was mistaken.[10] I propose an alternate legal theory. These statistical models do not allow the court to presume reliance. Rather, they provide an alternate form of proof of causation—they prove that some group *did* rely on the fraud, causing harm in the form of a price increase that affected the entire class, regardless of class members' personal reliance on the fraud. The models show aggregate reliance on the fraud.[11]

In Part I of this Note, I explain the two obstacles that potential classes face in attempting to achieve certification when the cause of action sounds in fraud: diversity of state laws and the personal reliance requirement. These obstacles make certification of claims under state fraud laws nearly impossible. I then show that bringing claims instead under the federal RICO statute avoids the hurdle that multiple states' laws impose on the predominance aspect of the certification inquiry. In Part II, I address the second obstacle: the inextricability of personal reliance from the causation inquiry in common law fraud. A 2008 Supreme Court case, *Bridge v. Phoenix Bond & Indemnity Co.*,[12] resolved a prior circuit split, clarifying that a plaintiff bringing a RICO claim need not establish her personal reliance on the fraudulent misrepresentation in order to prove causation. As Part II explains, this decision obviates the need for individual inquiries into, or a presumption of, personal reliance, which some classes and courts had previously attempted to create through an analogy to securities fraud's fraud-on-the-market theory. This, then, opened the door for classwide proof of causation.

In Part III, I explain the role that reliance continues to play in the causation element of fraud-based RICO claims. Instead of presuming personal reliance, plaintiff classes should prove aggregate reliance—that is, prove that enough of the plaintiffs or some other group relied on the misrepresentation to increase the price of the defendant's product. This increase in price becomes the harm for which plaintiffs seek redress. One can determine the existence and magnitude of a price increase caused by fraud through the use of statistical tools that antitrust plaintiffs have utilized for decades. I argue that the applica-

[9] *See infra* Part II.B.2 (discussing fraud-on-the-market presumption of reliance in securities cases and attempts to apply presumption in RICO class actions).

[10] *See infra* Part III.C.2 (discussing inaccuracy of application of fraud on the market to RICO claims and adverse effects of such application).

[11] *See infra* Part III.A (introducing aggregate reliance).

[12] 128 S. Ct. 2131 (2008).

tion of these tools to RICO claims is appropriate because of the relationship between RICO and antitrust and because of the amenability of aggregate reliance to statistical proof. I conclude by applying this framework to a recent case, the facts of which I recited at the beginning of this Note. I show how the theory of aggregate reliance justifies the certification of the plaintiff class in that case and avoids the problems that would arise if the class relied instead on fraud on the market as its theoretical framework.

I
Obstacles to the Certification of a Class of Mass Fraud Victims

For plaintiffs to bring a fraud claim as a damages class action under Federal Rule of Civil Procedure 23(b)(3), they must meet certain procedural requirements, including demonstrating that common questions of law and fact predominate. Difficulty in meeting these requirements ensures that courts will not certify national class actions under state fraud laws, creating a need for some alternative cause of action to vindicate harms to fraud victims. A fraud-based civil RICO claim is one such alternative.

A. The Role of Predominance in Class Actions

Federal Rule of Civil Procedure 23 governs federal class actions.[13] In addition to the Rule 23(a) requirements governing all class actions,[14] a court will certify a Rule 23(b)(3) class[15] seeking monetary relief only if it finds that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"—requirements often referred to as predominance and superiority,

13 Fed. R. Civ. P. 23. The rules of civil procedure of the several states govern state class actions. Because the topic of this Note is the availability of a federal cause of action, the application of state rules of civil procedure is beyond the scope of this Note. While state courts have concurrent jurisdiction over civil RICO claims, *Tafflin v. Levitt*, 493 U.S. 455, 467 (1990), any such action would be removable to a federal court. *See* 28 U.S.C. § 1441(a)–(b) (2006) (permitting removal of any civil action brought in state court that originally could have been brought in federal court).

14 These are numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a).

15 Class actions certified under Rule 23(b)(3) are those concerning monetary damages (as opposed to injunctive or declaratory relief) where individual plaintiffs are given the opportunity to affirmatively exclude themselves—or "opt out"—from the class. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614–15 (1997).

respectively.[16] Predominance, and to some degree superiority, turn on the relationship between questions common to the entire class and those that require individual inquiries.[17]

In determining whether individual issues will predominate at trial and effectively transform the class proceeding into individual trials, a court must look at the presence of common questions and the potential for a common corpus of evidence to yield common answers.[18] A plaintiff class must thus overcome what I call "questions of law" and "questions of fact" hurdles to certification. For the questions of fact prong of predominance, common answers are those answers derived from evidence that applies to, and is common to, the class as a whole and that proves an element of the claim for all members simultaneously.[19] It is no wonder that class certification turns not only on the framing of the legal and factual questions but also on the type of evidence available and whether it applies to all class members or is unique to the individual. Both common legal questions and common factual evidence must predominate in order for a court to certify a class.

B. Why Courts Rarely Certify Fraud-Based Classes

In national fraud-based class actions, variations in the laws governing and the facts surrounding individual plaintiffs' claims over-

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16 FED. R. CIV. P. 23(b)(3).

17 As one commentator has noted, the prevalence of classwide issues over individual issues is at the heart of all but one of the Rule 23(a) requirements and both of the Rule 23(b)(3) requirements. *See* Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 877–78 (2005) (explaining how individual issues can foil typicality, adequacy of representation, commonality, predominance, and superiority).

18 Professor Richard A. Nagareda clarified the importance of common evidence in modern class actions:

> The existence of common "questions" does not form the crux of the class certification inquiry . . . . Any competently crafted class complaint literally raises common "questions." What matters to class certification, however, is not the raising of common "questions"—even in droves—but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 (2009).

19 The Eleventh Circuit has developed a rule of thumb to determine when such common evidence is sufficient to satisfy Rule 23(b)(3)'s predominance requirement:

> [I]f the addition of more plaintiffs to a class requires the presentation of significant amounts of new evidence, that strongly suggests that individual issues . . . are important. . . . If, on the other hand, the addition of more plaintiffs leaves the quantum of evidence introduced by the plaintiffs as a whole relatively undisturbed, then common issues are likely to predominate.

Klay v. Humana, Inc., 382 F.3d 1241, 1255 (11th Cir. 2004).

shadow both prongs of predominance—common questions of law and common questions of fact. Given the presence of different applicable state laws and the need for individual factual inquiries, courts are likely to deny certification on predominance grounds.

1. Diverse Questions of Law: State Law Variations

Despite the increasingly national economy, there is no national fraud law, as fraud prevention is a traditional part of the states' police power and is governed by the states' various laws.[20] Federal courts are reluctant to allow class actions to proceed when different state laws govern different class members.[21] In the mid-1990s, several circuits established a precedent of decertifying nationwide mass tort classes, in part because of unmanageable variations in state law.[22]

These cases culminated with the Fifth Circuit's decision in *Castano v. American Tobacco Co.*,[23] a landmark case that set a precedent against certifying national classes involving state fraud laws.[24] The Fifth Circuit recognized that a court must squarely consider variations in state laws before certifying a nationwide class under Rule 23(b)(3).[25] The *Castano* court held that the district court had failed to address the effects of differing standards for reliance and for the mandatory disclosure of facts in the multiple state fraud laws at issue.[26] The Fifth Circuit decertified the class and ordered dismissal of the class complaint.[27] After *Castano*, the message to fraud claimants was clear: "In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."[28] Class certifi-

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[20] *Cf. In re* Simon II Litig., 211 F.R.D. 86, 141 (E.D.N.Y. 2002) ("[P]laintiff's claims involve a subject at the heart of the states' traditional police powers—fraud and conspiracy . . . .").

[21] Genevieve G. York-Erwin, Note, *Solving the Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. Rev. 1793, 1802–04 (2009).

[22] *See, e.g.*, *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996) (decertifying class of recipients of defective penile prostheses for this reason); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 618, 627 (3d Cir. 1996) (decertifying class of people exposed to asbestos and their spouses for same reason), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300–02 (7th Cir. 1995) (decertifying class of hemophiliacs who contracted HIV from tainted blood on several grounds, including variation in state law).

[23] 84 F.3d 734 (5th Cir. 1996).

[24] *Id.* at 737, 752. The class certified by the trial court consisted of all cigarette purchasers addicted to nicotine, their estates, and their survivors. *Id.* at 737. The suit, for compensatory and punitive damages, was brought under a variety of state laws, including state fraud laws. *Id.* at 737–38.

[25] *Id.* at 741.

[26] *Id.* at 742–43 & n.15.

[27] *Id.* at 752.

[28] *Id.* at 741. One piece of student scholarship notes that "an overwhelming number of federal courts have denied certification of nationwide state-law class actions [and m]ost

cation will almost certainly be unavailable absent a single body of law applicable to all class members.[29]

2. *Diverse Questions of Fact: The Personal Reliance Requirement*

In addition to diverse questions of law, class actions under state fraud laws are destined to suffer from the predominance of individual questions of fact. The core of a traditional fraud claim is the plaintiff's justifiable reliance on the defendant's misrepresentation.[30] The *raison d'être* of the tort is to make good a loss suffered by a party whom the

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state courts have reached the same result." Rory Ryan, Comment, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 BAYLOR L. REV. 467, 470–71 & nn.5–6 (2002) (listing significant number of such decisions).

[29] *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.05(b) (Proposed Final Draft, 2009) (permitting court to allow aggregate treatment of claims where single body of law or substantially similar bodies of law govern all claims). There are three basic ways to ensure that a single body of law governs all claims. *See generally* RICHARD A. NAGAREDA, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 140 (2009) (outlining "three major strategies" used "to seek the certification of a nationwide class"). First, a potential class can limit itself to plaintiffs of a single forum, bringing the claim either in a single state or under a federal cause of action. Alternatively, it can attempt to convince a judge that the differences between the applicable states' laws are negligible, so that there is, in effect, only a single body of law or a small number of distinct laws, amenable to subclassing, applicable to class members. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.05(b)(2); *see, e.g.*, Cole v. Gen. Motors Corp., 484 F.3d 717, 724–30 (5th Cir. 2007) (denying certification to potential class despite class's argument that similarity in states' laws due to widespread statutory adoption of Article 2 of U.C.C. satisfied predominance inquiry).

Finally, the class can try to invoke the law of a single forum. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.05(b)(1) (asserting that court may allow aggregate treatment of claims when "a single body of law applies to all such claims"). I focus on this solution. There are two routes that classes may take in invoking a single forum's law. One is to argue that choice-of-law principles point to the applicability of the law of a single state, such as the state where the defendant has its headquarters. *See, e.g.*, *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018, 1020–21 (7th Cir. 2002) (rejecting potential class's argument that law of defendant's home state applied to all class members and therefore denying certification); Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618, 624–27 (Okla. 2003) (finding that under Oklahoma choice-of-law principles, law of state in which defendant was headquartered applied to all class members' warranty claims, but that variations in applicable law defeated certification for fraud claims). The other, more consistently successful route is to identify a single federal law under which a plaintiff class can bring its claim. RICO is one such law. Randy D. Gordon, *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims Under 18 U.S.C. § 1962(c)*, 39 U.S.F. L. REV. 319, 335 (2005); *see also infra* Part I.C (discussing potential for RICO as means of overcoming difficulties that diverse state laws present).

[30] *See* RESTATEMENT (SECOND) OF TORTS § 537 (1977) (requiring actual and justifiable reliance for fraud claim); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105 (5th ed. 1984) (listing plaintiff's justifiable reliance on misrepresentation as element of tort of fraud).

defendant induced into acting in a way she would not have acted absent the misrepresentation.[31]

Reliance is an element of fraud that is unique to each class member. The question may be uniform across the class—did the class member rely on the fraudulent statement?—but the evidence necessary to answer the question requires an individualized inquiry. Although a class, in theory, may be able to meet this burden,[32] classwide evidence of personal reliance is rarely accepted in practice.[33] In most cases, a court will not certify a class whose members are bringing claims that depend on personal reliance, such as fraud.[34] The individual questions of fact simply overwhelm any common questions of law or fact.

C. Civil RICO Overcomes the Diversity-of-State-Law Problem

One solution to the problem of the applicability of multiple states' laws to a class is to bring an action under a single federal law. After *Castano*, plaintiffs began "to cast about for a federal law" under which to bring a nationwide class action.[35] RICO provides just that.

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31 *See* John C.P. Goldberg et al., *The Place of Reliance in Fraud*, 48 Ariz. L. Rev. 1001, 1011–12 (2006) (defining fraud as inducement of transactional decision through use of knowing misrepresentation to detriment of defrauded party).

32 For a rare example of a class successfully establishing individual reliance through classwide proof, see Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004). In *Klay*, the physician-plaintiffs brought a RICO mail/wire fraud suit against HMOs for systematic underpayment. *Id.* at 1246, 1252. In order to prove the then-necessary element of personal reliance, the plaintiff class provided evidence establishing a systemwide, uniform campaign of fraud, and the court found a reasonable jury could infer that physician-plaintiffs, when entering into contracts with the HMO-defendants, relied upon these identical misrepresentations because the misrepresentations concerned reimbursement, the central focus of the agreements. *Id.* at 1257–59. By contrast, the court held that the predominance requirement had not been met for most of the plaintiffs' state law claims and decertified the class with regard to all the state law claims but one, a subclass of California plaintiffs that the defendants failed to contest. *Id.* at 1261–68, 1276.

33 *See, e.g.*, Poulos v. Caesars World, Inc., 379 F.3d 654, 664–66 (9th Cir. 2004) (rejecting plaintiffs' argument that evidence that video poker and electronic slot machines were deceptively advertised as games of chance sufficed as classwide proof of individual reliance, on basis that gamblers use such machines for variety of individualized reasons); Ormond v. Anthem, Inc., No. 1:05-cv-1908-DFH-TAB, 2009 U.S. Dist. LEXIS 90837, at *25 n.6 (S.D. Ind. Sept. 29, 2009) (rejecting plaintiffs' argument that evidence establishing that insurance company wrongly advised policyholders that payments were taxable income sufficed as classwide proof of individual reliance, on basis that individuals make decisions on how much tax to pay for many reasons); *In re* Grand Theft Auto Video Game Consumer Litig. (No. II), 251 F.R.D. 139, 155–57 (S.D.N.Y. 2008) (rejecting plaintiffs' argument that evidence of single misrepresentation to entire class in form of video game rating was sufficient to establish that class members relied on rating's representation of game's content in making purchase).

34 *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996) (holding that "a fraud class action cannot be certified when individual reliance will be an issue").

35 Gordon, *supra* note 29, at 335.

By bringing a civil claim under RICO, a plaintiff class may claim relief under a single body of law. In turn, the plaintiffs incur the additional requirements of establishing that the fraudulent representations were part of a racketeering enterprise,[36] and that the defendant used the mails or the wires in the enterprise.[37] The use of RICO allows a plaintiff class to overcome the nearly insurmountable obstacle to certification that exists under state law.

Congress enacted RICO as part of the Organized Crime Control Act of 1970 in response to public outcry against the widespread influence of organized crime syndicates.[38] While the statute has had sweeping effects as a criminal tool for prosecutors,[39] the civil arm of RICO is more commonly utilized.[40] Of the possible claims created by RICO, plaintiffs most commonly pursue the fraud-based claims: claims where the underlying predicate acts are mail or wire fraud.[41]

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36 *See* 18 U.S.C. § 1962(c) (2006) (prohibiting any person from conducting "enterprise's affairs through a pattern of racketeering activity").

37 The statutory structure of a fraud-based RICO claim is a complicated series of statutes referring to other statutes, which one federal judge has compared to Russian nesting dolls. Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1032 (E.D.N.Y. 2006). The syllabus to a recent Supreme Court opinion distilled the relationship among these statutes in the following manner:

> In 18 U.S.C. § 1964(c), RICO provides a private right of action for treble damages to "[a]ny person injured in his business or property by reason of a violation," as pertinent here, of § 1962(c), which makes it "unlawful for any person employed by or associated with" a qualifying enterprise "to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity," including [according to 18 U.S.C. § 1961(1)(B)] "mail fraud" . . . . Mail fraud [as defined by 18 U.S.C. § 1341], . . . occurs whenever a person, "having devised or intending to devise any scheme or artifice to defraud," uses the mail "for the purpose of executing such scheme or artifice." . . . The gravamen of the offense is the scheme to defraud, and any "'mailing . . . incident to an essential part of the scheme' . . . satisfies the mailing element,". . . even if the mailing "contain[s] no false information."

Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2133 (2008) (quoting Schmuck v. United States, 489 U.S. 705, 712, 715 (1989)).

38 Gregory Zarin, *The New Direct Proximate Cause: How the United States Supreme Court Has Attempted To Limit Civil RICO in a Manner Congress Aimed To Protect*, 5 DARTMOUTH L.J. 283, 286 (2007).

39 *See, e.g.*, JAMES B. JACOBS ET AL., GOTHAM UNBOUND 131–32 (1999) (claiming that "practically every significant organized-crime prosecution [once federal prosecutors began using RICO] was brought under the statute"); JAMES O. FINCKENAUER, NAT'L INST. OF JUSTICE, LA COSA NOSTRA IN THE UNITED STATES 4, http://www.ncjrs.gov/pdffiles1/nij/218555.pdf (last visited Feb. 8, 2010) ("The RICO statute has clearly been the single most powerful tool against the [La Cosa Nostra crime syndicate].").

40 *See* Brian Goodwin, *Civil Versus Criminal RICO and the Eradication of La Cosa Nostra*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279, 312 (2002) (defining RICO as "a predominantly civil and remedial tool" and "*not* primarily a criminal and punitive statute").

41 Kenneth M. Block & Jeffrey B. Steiner, *RICO Claims: Lenders Must Show Actual Damages in Actions*, N.Y. L.J., May 21, 2003, at 5.

In order to establish a claim of fraud under civil RICO, a plaintiff must establish that: (1) in the course of a scheme to defraud, the defendant used the mail,[42] a commercial courier,[43] the telephone,[44] or the internet[45] for the purpose of executing the scheme; (2) the defendant's fraudulent scheme constituted a pattern and was not an isolated incident;[46] (3) the plaintiff sustained injury to business or property;[47] and (4) the scheme to defraud caused the injury.[48]

Despite RICO's origins as a mob-busting statute, Section 1964 is rarely, if ever, used to initiate civil suits against "true" organized crime, such as drug lords or the mafia.[49] Instead, civil RICO "has become a tool for everyday fraud cases brought against respected and legitimate enterprises."[50] The Supreme Court has recognized that suing otherwise legitimate businesses that engage in a pattern of

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42 *See* 18 U.S.C. § 1961(1)(B) (2006) (defining "racketeering activity" to include acts indictable under 18 U.S.C. § 1341, federal law prohibiting mail fraud).

43 18 U.S.C. §§ 1341, 1961(1)(B); *cf.* United States v. Gray, 367 F.3d 1263 (11th Cir. 2004) (affirming conviction of mail fraud for use of FedEx in scheme to defraud).

44 *See* 18 U.S.C. § 1961(1)(B) (defining "racketeering activity" to include acts indictable under 18 U.S.C. § 1343, federal law prohibiting wire fraud).

45 *See id.* The federal wire fraud statute, which mirrors the language of the mail fraud statute, was passed to be a corollary to the mail fraud statute, S. Rep. No. 82-44, at 14 (1951), and is subject to the same interpretation given the mail fraud statute. *See* United States v. Castillo, 829 F.2d 1194, 1198 (1st Cir. 1987) (concluding that Sections 1341 and 1343 have consistently been considered "as being *in pari passu*," and applying mail fraud case law in analyzing wire fraud case at bar). For the purposes of this Note, I will not distinguish between civil RICO claims brought on these two predicate acts and refer to them jointly as "fraud-based civil RICO."

46 RICO explains that a "pattern of racketeering activity" must involve "at least two acts of racketeering activity, . . . the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (2006). The Supreme Court has determined that this is not a definition but a prerequisite. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 237 (1989). A plaintiff must show that the predicate acts bore some relationship to one another—such as serving a common purpose—and that they were continuous parts of an overall scheme, not simply "widely separated and isolated criminal offenses." *Id.* at 237–41 (quoting 116 Cong. Rec. 18,940 (1970) (statement of Sen. McClellan)).

47 *See* 18 U.S.C. § 1964(c) (2006) (granting civil remedy to any person so injured).

48 *See id.* (providing civil remedy where injury is "by reason of" RICO violation). This causation requirement is the subject of Part II, *infra*.

49 *See* James B. Jacobs & Lauryn P. Gouldin, *Cosa Nostra: The Final Chapter?*, 25 Crime & Just. 129, 169 (1999) ("The [RICO] provision that gives private victims the right to sue racketeers for treble damages has not been used against organized crime, although it has become very popular (and controversial) in commercial litigation."); *see also* Gerald E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 Vand. L. Rev. 769, 798 n.62 (1990) (describing, in reference to personal injury provision, practical limit on ability of individuals to file civil suits against organized crime based on danger inherent in angering violent crime syndicates).

50 Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (internal quotation marks omitted) (quoting Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984)).

racketeering activity is within the broad scope of Congress's intent in enacting RICO.[51]

Victims of fraud can use RICO as a cause of action when the defendant has used the mail or wires enough times in conducting its fraudulent activity so as to constitute a pattern of racketeering activity.[52] Thus, RICO allows potential classes to overcome the first hurdle to certifying a class action predicated on fraud by providing a federal statute to unify otherwise fractured questions of law among plaintiffs. As the following Part explains, RICO also allows plaintiffs to overcome the questions-of-fact hurdle created by the individualized personal reliance inquiry.

II
Causation and Predominance in Fraud-Based Civil RICO Classes

This Part examines the standard of causation for civil RICO claims and explains how class actions that are not amenable to certification as state law claims may proceed under RICO. As shown in Part I, civil RICO provides a solution to the problem of diverse questions of law normally associated with fraud-based class actions. Diverse questions of law, however, are only half of the predominance problem. Plaintiffs in traditional fraud claims must also prove causation on an individual level by showing personal reliance on the misrepresentation. In *Bridge v. Phoenix Bond & Indemnity Co.*,[53] however, the Supreme Court held that personal reliance is not a necessary element of civil RICO and opened the door for plaintiffs to prove causation on a classwide basis in fraud cases.[54] Proving causation on a classwide basis permits class certification and relieves plaintiffs and courts of the need to resort to an unsuitable analogy—security law's fraud-on-the-market theory—to justify the use of statistical analysis to prove classwide causation.

A. Causation in RICO Claims

The language of RICO provides little guidance as to the necessary showing of causation in a fraud-based RICO claim. The civil provision of RICO, found in Section 1964 of the U.S. Criminal Code, affords a remedy to "[a]ny person injured in his business or property

51 *Id.*
52 *See supra* note 46 (explaining "pattern" requirement).
53 128 S. Ct. 2131 (2008).
54 *Id.* at 2139–45.

by reason of a [RICO] violation."[55] Taken alone, this language requires only that the RICO violation be the reason for, or the factual cause of, the injury. So long as a plaintiff can prove that but for the predicate RICO act,[56] she would not have suffered the injury, causation is satisfied.

In addition, because they outline criminal offenses, the mail and wire fraud statutes do not define or even require causation; causation of harm by the offense is irrelevant to criminal liability.[57] There is no mention of reliance in either RICO or the mail and wire fraud statutes.[58] Any causation requirement beyond factual causation must derive from a source outside the statutory text.

The Supreme Court went beyond the text in setting a standard greater than simple factual causation for civil RICO claims. In *Holmes v. Securities Investor Protection Corp.*,[59] the Court looked to Congress's intent in crafting the statute and held that the private right of action created in RICO requires proximate, not merely factual, causation. The Court noted that Congress modeled Section 1964(c) of RICO after the private right of action created by the Clayton Antitrust Act.[60] At the time of RICO's enactment, it was settled law that, despite the lack of any statutory language to this effect, civil actions under the Clayton Act required that plaintiffs establish proximate causation.[61] The Supreme Court "credit[ed] the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4" and "assume[d] it intended [these words] to have the same meaning that courts had already given them [in antitrust cases]."[62]

Holmes did not establish any "black-letter rule" or test for establishing proximate cause.[63] Instead, the Court asserted that there must be "some direct relation between the injury asserted and the injurious conduct alleged"[64] in order to meet three essential policy concerns: (1)

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55 18 U.S.C. § 1964(c) (2006) (emphasis added).

56 RICO punishes, civilly and criminally, "racketeering activity," which is defined by reference to several predicate criminal acts, listed at 18 U.S.C. § 1961(1) (2006).

57 *See* 18 U.S.C. §§ 1341, 1343 (2006).

58 *See* 18 U.S.C. §§ 1961–1968 (2006); 18 U.S.C. § 1341; 18 U.S.C. § 1343.

59 503 U.S. 258 (1992).

60 *Id.* at 267; *see also infra* Part III.B.1 (discussing roots of RICO in Clayton Act).

61 *Holmes*, 503 U.S. at 267–68.

62 *Id.* at 268.

63 *Id.* at 272 n.20 (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983)); *see also* Gordon, *supra* note 29, at 331 (explaining that *Holmes* "declined to articulate a specific test for determining proximate cause" and focused instead on policy rationales for proximate causation).

64 *Holmes*, 503 U.S. at 268.

the need to easily ascertain the portion of injury attributable to the defendant's misconduct;[65] (2) the fear of multiple recoveries against a defendant;[66] and (3) the sufficient deterrence of RICO violations by allowing only those more directly injured to sue the violators.[67] These factors have become a de facto test: If allowing standing would not raise the policy concerns outlined in *Holmes*, a court is likely to find proximate cause.[68]

Because consumers are the most directly harmed victims of a company's fraud in the sale of a product, proof of harm, such as a price increase, and proof of factual causation is sufficient to satisfy the *Holmes* test. There is little concern for multiple recoveries because the group bringing suit is not a group tangentially related to the transaction, but rather consists of those who paid for the product.[69] There is

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[65] *Id.* at 269 ("[T]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." (citing *Associated Gen. Contractors*, 459 U.S. at 542–43)).

[66] *Id.* ("[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." (citing *Associated Gen. Contractors*, 459 U.S. at 543–44)).

[67] *Id.* ("[T]he need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." (citing *Associated Gen. Contractors*, 459 U.S. at 541–42)).

[68] *See, e.g.*, Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374, 380–82 (2d Cir. 2001) (looking to *Holmes*'s policy considerations to guide "direct relation test" to find proximate cause); Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris Inc., 249 F.3d 1068, 1072–74 (D.C. Cir. 2001) (describing *Holmes* as creating directness test and describing policy considerations in *Holmes* as underlying test); Bivens Gardens Office Bldg. v. Barnett Banks of Fla., Inc., 140 F.3d 898, 908 (11th Cir. 1998) (describing *Holmes* as laying out directness test).

[69] Although it is conceivable that multiple suits could be brought by both the class of all purchasers of a product (for the recoupment of an increased purchase price) and the class of those purchasers who would not have purchased the product but for the fraud (for the recoupment of the total price), the plaintiffs in the latter category would logically be in the former. For this reason, double recovery is unlikely. The latter class is a subclass of the former and members of this subclass would be precluded from seeking additional damages if the former suit was filed first, or would be excluded from the former suit if they had already recovered their full purchase price in previous litigation. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 18–19 (1982) (outlining merger and bar rules of claim preclusion); *id.* § 24 (defining rights extinguished by claim preclusion as any further remedies against defendant arising out of transaction from which original action arose). Any plaintiff who wished to maintain her right to bring a suit for the full purchase price at a later time would be able to opt out of the overcharge class action.

This scenario stands in stark contrast to situations where the two groups suing for recovery on the same transaction are completely separate groups, such as direct and indirect purchasers. When direct and indirect purchasers both sue for statutory damages arising out of the same prohibited activity—an antitrust violation, for example—courts are hesitant to allow both groups to recover, for fear of overlapping recovery. *See, e.g.*, also no better group to enforce RICO's aims than the purchasers of the product. Due to the likely negative value of the claims in fraud-based RICO suits, only a class of consumers has the economic incentive necessary to enforce RICO (and other fraud laws) through private litigation. The most obviously harmed parties—those who would not have purchased the product but for the fraud—lack the financial incentive to bring individual suits, as well as the procedural ability to bring an aggregate suit for this loss. Thus, a more certifiable class consisting of all consumers is best suited to vindicate the aims of RICO.[70] Finally, as Part III explains, statistical methods are adept at ferreting out the percentage of price increases attributable to different factors.[71] Thus, in fraud-based RICO cases brought by a class of consumers of a product about which a company made fraudulent misrepresentations, proximate causation will not be a stumbling block. The principle concern should be factual causation: But for the defendant's violations, would the harm have occurred? If not, the plaintiffs have established that they were injured "by reason of" the RICO violations.

B. A Personal Reliance Element in Fraud-Based Civil RICO Claims?

The causation element—both factual and proximate—is the same for all civil claims brought under RICO. But historically, fraud-based RICO claims have been entangled in a more complex causal analysis than others. As discussed above, a hallmark of common law fraud is the need for each plaintiff to establish that she personally relied on

Associated Gen. Contractors, 459 U.S. at 543–44 (noting risk of multiple liability and administrative complexity); Ill. Brick Co. v. Illinois, 431 U.S. 720, 737–38 (1977) (same). It was to this antitrust jurisprudence of direct/indirect purchasers that the Supreme Court looked in defining proximate cause in the RICO context. *See Holmes*, 503 U.S. at 271–74 (noting that reasons to limit recovery to direct purchasers in antitrust cases also apply in RICO context); *see also* Stasia Mosesso, Note, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War*, 76 Notre Dame L. Rev. 257, 301 (2000) ("[T]he analytical framework [in *Holmes*] is the same [as that in *Associated General Contractors*].").

70 *See* Stephen Scallan, *Proximate Cause Under RICO*, 20 S. Ill. U. L.J. 455, 470 (1996) ("[I]f the more directly injured parties did not incur significant financial harm, a third party may be the only party with an incentive to bring suit; in this instance standing should exist.").

71 Damages would most likely be determined in the aggregate and then distributed individually. Because the damages are calculated as an increase in price, the amount awarded to each plaintiff can be calculated simply by reference to the quantity of product purchased, with little difficulty in apportionment. *Cf. In re* Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 699 (S.D. Fla. 2004) (discussing econometric models used to distill formula that allocates damages to individual class members from damages calculated in aggregate).

the fraudulent statement in order to recover.[72] Courts have struggled with whether this requirement should be incorporated into fraud-based civil RICO claims. To be sure, a fraudulent misrepresentation cannot cause harm to anyone if no one relies on it, and proof that a plaintiff personally relied on the misrepresentation is the simplest way to establish that her harm resulted from the fraud. Some courts, however, have held that this is the *only* way to establish the necessary causal link between mail or wire fraud and a RICO plaintiff's injury. Under such a rule, courts have often decertified classes that otherwise might have been able to prove causation.

1. *Importing the Personal Reliance Element from Common Law Fraud Into Civil RICO*

Prior to 2008, circuit courts were divided as to whether a plaintiff in a fraud-based civil RICO action must establish personal reliance on the fraudulent misrepresentation.[73] Some circuits recognized that individuals harmed by a pattern of mail or wire fraud could bring a claim under RICO, even if a lack of personal reliance meant that the plaintiff had no claim under common law fraud. Generally, this situation occurred when the plaintiff proved third-party reliance—reliance on the misrepresentation by some other person or body that resulted in harm to the plaintiff.[74] Some circuits, however, required a fraud-based RICO plaintiff to prove that she relied on the alleged misrepresentation herself.[75] These circuits rarely certified fraud-based RICO classes—determining whether each class member relied on a fraudu-

[72] *See supra* Part I.B.2 (discussing role of reliance in fraud claims).

[73] Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2137 (2008). *Compare* Sys. Mgmt., Inc. v. Loiselle, 303 F.3d 100, 104 (1st Cir. 2002) ("There is no good reason here to depart from RICO's literal language by importing a reliance requirement into RICO."), *with* Sikes v. Teleline, Inc., 281 F.3d 1350, 1360 (11th Cir. 2002) ("[W]hen a plaintiff brings a civil RICO case predicated upon mail or wire fraud, he must prove that he was 'a target of the scheme to defraud' and that he 'relied to his detriment on misrepresentations made in furtherance of that scheme.'" (quoting Pelletier v. Zweifel, 921 F.2d 1465, 1499–1500 (11th Cir. 1991))).

[74] *See, e.g.*, *Loiselle*, 303 F.3d at 103–04 (accepting that company's fraud caused its employees harm for purposes of RICO claim when company fraudulently represented to client that employees were paid minimum wage in order to retain contract); Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc., 18 F.3d 260, 263–64 (4th Cir. 1994) (finding causation of harm to competitor where company defrauded competitor's customers into leaving competitor).

[75] *E.g.*, *Sikes*, 281 F.3d at 1360; *see also* Appletree Square I, L.P. v. W.R. Grace & Co., 29 F.3d 1283, 1287 (8th Cir. 1994) (requiring plaintiff to have relied on misrepresentation in order to establish proximate causation and, subsequently, RICO standing); Cent. Distrib. of Beer, Inc. v. Conn, 5 F.3d 181, 184 (6th Cir. 1993) ("Thus, the defendant must make a false statement or omission of fact *to the plaintiff* to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim.").

lent statement demanded too individualized an inquiry for courts to find a predominance of common questions.[76]

For an example of how a class may present evidence proving causation without proving that each plaintiff relied on the fraudulent misrepresentation—and of how a court may refuse to consider such evidence—consider *McLaughlin v. American Tobacco Co.*[77] In *McLaughlin*, the Second Circuit reversed the certification of a class of smokers of light cigarettes who alleged that misrepresentations by the tobacco industry led them to believe that light cigarettes were healthier than full-flavored cigarettes.[78] Judge Jack Weinstein of the Eastern District of New York had certified the plaintiff class in the case below, *Schwab v. Philip Morris USA, Inc.*,[79] based on an innovative framing of the alleged harm: The plaintiffs argued "that defendants' misrepresentation that Lights were healthier led to an increased market demand for light cigarettes, which drove up the price of Lights."[80] The plaintiffs did not seek a full refund of the price of the light cigarettes purchased; rather, they sought only a refund of that portion of the price resulting from the artificial inflation of demand due to the fraudulent campaign.[81]

The plaintiffs' experts provided statistical proof that the defendants' fraud caused an overcharge in the price of light cigarettes.[82] This evidence, if credible, would have established factual causation. Despite the existence of such evidence, the Second Circuit decertified the class because of its then-existing requirement that plaintiffs demonstrate causation in fraud-based RICO claims through individualized proof of reliance,[83] and explained that this "reliance on the misrepresentation[ ] cannot be the subject of general proof."[84] For this reason, the court found class treatment inappropriate.[85]

If proof of personal reliance is necessary for a fraud-based RICO claim—in addition to or as the exclusive means of proving causation—then there must be common evidence proving personal reliance in

76 *See, e.g.*, Poulos v. Caesars World, Inc., 379 F.3d 654, 664–68 (9th Cir. 2004) (concluding that individual reliance as proof of causation would predominate over issues common to class); *Sikes*, 281 F.3d at 1364–66 (same).

77 522 F.3d 215 (2d Cir. 2008).

78 *Id.* at 220–21.

79 449 F. Supp. 2d 992 (E.D.N.Y. 2006), *rev'd sub nom. McLaughlin*, 522 F.3d 215.

80 *McLaughlin*, 522 F.3d at 226.

81 *Id.* at 227 (holding that acceptable measure of injury is out-of-pocket damages, not difference in cigarette price due to defendants' misrepresentation and resulting artificial inflation of demand).

82 *Schwab*, 449 F. Supp. 2d at 1058.

83 *McLaughlin*, 522 F.3d at 222.

84 *Id.* at 223.

85 *Id.* at 224–25, 234.

order for a class to achieve certification. Occasionally, circumstantial evidence that applies equally to all plaintiffs can prove that all plaintiffs personally relied on a misrepresentation.[86] More likely, it cannot.[87]

2. *Fraud on the Market*

In an attempt to avoid the obstacle of proving personal reliance through individual inquiries, some plaintiff classes bringing fraud-based RICO claims have attempted to invoke the securities doctrine of fraud on the market, which creates a presumption of reliance for uniform mass misrepresentations.[88] However, such efforts were unsuccessful. Although plaintiffs' attorneys quickly adjusted their argument, many courts and commentators continue to misconstrue efforts to use aggregate evidence of causation as an attempt to extend the fraud-on-the-market doctrine to RICO.[89]

The Supreme Court embraced the fraud-on-the-market theory for securities fraud cases in *Basic Inc. v. Levinson*.[90] Under the theory outlined in *Basic*, plaintiff-investors enjoy a rebuttable presumption that they relied on the "integrity" of a stock price when buying it, on the premise that a stock's purchase price will accurately reflect all publicly available material information when traded in an efficient market.[91] This presumption is necessary for any securities fraud class action to go forward because plaintiffs in these actions must prove that they personally relied on the fraudulent statement.[92] As I have

86 *See, e.g.*, Klay v. Humana, Inc., 382 F.3d 1241, 1257–59 (11th Cir. 2004) (accepting evidence of uniform representations made to all plaintiffs in class as classwide proof of personal reliance). See *supra* note 32 for a more comprehensive explanation of the evidence successfully presented in *Klay*.

87 See *supra* note 33 for examples of cases in which the court rejected common circumstantial evidence as proof of reliance.

88 *See, e.g.*, Poulos v. Caesars World, Inc., 379 F.3d 654, 666 (9th Cir. 2004) (refusing to address plaintiffs' request to extend presumption of reliance).

89 *See, e.g.*, *McLaughlin*, 522 F.3d at 224 & n.5 (claiming plaintiffs' arguments "invoke[d] the fraud-on-the-market presumption" even though plaintiffs contended "that they are not advocating the same fraud-on-the-market presumption applicable in a securities case" (internal quotation marks omitted) (quoting Brief for Plaintiffs-Appellees at 25 n.19, *McLaughlin*, 522 F.3d 215 (No. 06-4666-cv))); Nagareda, *supra* note 18, at 143–49 (describing civil RICO claims like that in *McLaughlin* as "efforts to import the fraud-on-the-market doctrine from securities law into [an]other area[ ] that share[s] a focus on fraudulent misconduct").

90 485 U.S. 224 (1988).

91 *Id.* at 245–47; *see also* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.45(5)(a)(iv)(B) (3d ed. 2009) (describing fraud-on-the-market theory in securities law as based on assumption that material misrepresentations affect stock price in open and developed stock market).

92 *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206 (1976) (noting that in securities fraud cases, "the burden is on the plaintiff to show the violation or the fact that the state-

shown in the context of RICO, a personal reliance requirement makes class certification nearly impossible due to the need for individual inquiries, but a classwide presumption of reliance would eliminate this hurdle.

Analogizing price-increase RICO claims to securities fraud claims involving fraud on the market is enticing but inappropriate. True, the causation element in securities fraud claims is similar to that in the type of RICO claims analyzed in this Note: Because a group of people relied on the defendant's uniform mass misrepresentations, the price of a good was artificially inflated, causing harm to the plaintiffs. But despite any facial similarities, the fraud-on-the-market analogy for fraud-based civil RICO claims does not survive more than the most superficial scrutiny. The presumption of reliance in fraud-on-the-market doctrine rests on the premise that securities markets are efficient vehicles of trade.[93] As both judges and commentators are quick to note, markets for tangible goods are not efficient.[94] This difference is so pertinent that plaintiffs rarely raise this analogy themselves; however, courts and commentators often attribute this argument to plaintiffs to set up a straw man to strike down as a reason to deny certification of a class of fraud victims.[95]

Returning to the light cigarette case, *McLaughlin*, the Second Circuit claimed—over the objections of the plaintiffs in the case[96]—that the plaintiffs were attempting to invoke the fraud-on-the-market doctrine.[97] After bringing fraud on the market into play, the Second Circuit used the differences between civil RICO fraud and securities fraud to discount the plaintiffs' use of classwide proof of causation.[98] The court held that in inefficient markets, such as the market for cigarettes, "[courts] cannot assume that, regardless of whether individual [consumers] were aware of defendants' misrepresentation, the market at large internalize[s] the misrepresentation to such an extent that all plaintiffs can be said to have relied on it."[99]

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ment was false or misleading, and that he relied thereon to his damage" (quoting S. Rep. No. 73-792, at 13 (1934))).

93 *Basic*, 485 U.S. at 248.

94 *See, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 224 (2d Cir. 2008) ("[T]he market for consumer goods . . . is anything but efficient . . . ."); Nagareda, *supra* note 18, at 147 ("Neither the market for IPOs nor the market for light cigarettes exhibits features of an efficient market . . . .").

95 *E.g.*, *McLaughlin*, 522 F.3d at 224; Se. Laborers Health & Welfare Fund v. Bayer Corp., No. 08-1928-MD-MIDDLEBROOKS/JOHNSON, 2009 U.S. Dist. LEXIS 70491, at *101–04 (S.D. Fla. July 30, 2009).

96 Brief for Plaintiffs-Appellees, *supra* note 89, at 25 n.19.

97 *McLaughlin*, 522 F.3d at 224.

98 *Id.*

99 *Id.*

The Second Circuit did not err in pointing out the differences between fraud on the market and the causation theory raised by the light cigarette smoker class. The court erred in using such an inept analogy in the first place. The court's invocation of fraud on the market was the result of two misunderstandings. First, the court misunderstood the purpose of the evidence presented by the class: The class did not attempt to presume reliance; it attempted to prove causation. Second, the court misunderstood the causation element necessary in fraud-based civil RICO claims by holding that the plaintiffs needed to prove that every individual plaintiff personally relied on the fraud. Because of this second misunderstanding, the court naturally assumed that the plaintiffs were asking the court to *presume* that each and every plaintiff had done so because the evidence presented certainly did not *prove* so. It only proved that many or most, not all, of the plaintiffs had relied on the fraud.[100] This second misunderstanding—that individualized proof of personal reliance was necessary in civil RICO cases—was cleared up only months after the *McLaughlin* court handed down its decision.

C. Bridge *Changes Everything*

In *Bridge v. Phoenix Bond & Indemnity Co.*,[101] the Supreme Court addressed the uncertainty surrounding the standard of causation required in fraud-based RICO claims. Properly understood, the holding in *Bridge* permits certain classes to establish the causation element of their claim through common proof of causation—in the form of proof that some group relied on the misrepresentations such that the price of the good increased for all class members—instead of through individualized proof of personal reliance.

Bridge provides a simple example of a defendant defrauding one party in order to cheat a different party out of an economic interest. The Cook County, Illinois, Treasurer's Office annually auctions tax liens on property held by delinquent taxpayers.[102] In order to discourage gamesmanship in the bidding process, each bidder must submit an affidavit affirming that he is not collaborating with other parties in order to submit multiple, simultaneous bids.[103] Both the plaintiffs and defendants in *Bridge* were in the business of purchasing these liens in order to resell the property at a profit.[104] The plaintiffs

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100 Attributing aggregate evidence to individuals in the group is a common demographic fallacy, explained in *infra* note 129.

101 128 S. Ct. 2131 (2008).

102 *Id.* at 2135.

103 *Id.*

104 *Id.*

alleged that, in order to secure a disproportionate percentage of tax liens from these auctions, defendants submitted false affidavits and engaged in simultaneous multiple bidding.[105] The treasurer's office relied on these false affidavits, and as a result, plaintiffs claim they failed to receive their fair share of liens from the auctions.[106] The plaintiffs filed suit under civil RICO's mail fraud provision.[107]

The Northern District of Illinois dismissed the claim for lack of standing because the plaintiffs were not the direct recipients of the fraudulent statements, and thus, they had not themselves relied on the misrepresentations.[108] Rather, the county had relied, and the plaintiffs had incurred harm as a result. The Seventh Circuit reversed, and the Supreme Court granted certiorari "to resolve the conflict among the Courts of Appeals on 'the substantial question' . . . [of] whether first-party reliance is an element of a civil RICO claim predicated on mail fraud."[109] The Court held that a civil plaintiff in a mail-fraud RICO action need not show first-person reliance, neither as an element of the RICO claim nor to establish proximate causation.[110] *Bridge* does not hold that proof of reliance is *never* necessary to prove causation—unless someone relies on a misrepresentation, it cannot cause harm. But it does hold that those harmed by mail fraud can point to another party's reliance on the defendant's fraud in order to establish that the fraud caused their injury. A plaintiff is not required to prove that she *personally* relied on the fraud.[111]

The Supreme Court's decision in *Bridge* distinguishes fraud-based civil RICO claims from both common law fraud and fraud on the market. As noted above, common law fraud is meant to protect parties from entering into a deceptive transaction to their detriment and to make them whole when they justifiably do so.[112] Common law fraud, as enforced by the states, primarily focuses on protecting the plaintiff. RICO's primary focus is on eliminating the illegal actions of the defendant.[113] While fraud as a tort seeks to protect, RICO, even in its civil form, seeks to punish.[114] In *Bridge*, the Supreme Court clari-

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105 *Id.* at 2136.
106 *Id.*
107 *Id*.
108 *Id*.
109 *Id.* at 2136–37 (quoting Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006)).
110 *Id.* at 2145.
111 *Id.* at 2144.
112 *See supra* note 31 and accompanying text (discussing purpose of common law fraud).
113 *See* S. Rep. No. 91-617, at 76 (1969) (declaring purpose of RICO to be "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce").
114 This distinction is further underscored by the awarding of treble damages to RICO plaintiffs, as opposed to purely compensatory damages in cases of common law fraud. *See*

fied that Congress's intent in creating a private action in RICO was not to mirror the common law of fraud and that the purposes of the two laws should not be conflated.[115]

After the Supreme Court's decision in *Bridge*, any further attempt to extend fraud-on-the-market doctrine to fraud-based RICO claims is unnecessary. In securities fraud cases, usually brought under Section 10(b) of the Securities Exchange Act of 1934,[116] personal reliance is a necessary element to establish a claim.[117] Due to this requirement, a presumption of reliance is essential for securities class actions. The fraud-on-the-market presumption allows the class to establish that each plaintiff relied on the misrepresentation without delving into individualized inquiries.

When courts, like the Second Circuit in *McLaughlin*, accuse plaintiffs of implicitly attempting to expand the fraud-on-the-market doctrine to civil RICO, they are suggesting that plaintiffs are seeking a presumption of personal reliance to satisfy an element of their claim that would otherwise be predominated by individual inquiries. No such presumption is necessary, however, since civil RICO, unlike securities fraud, does not require personal reliance.[118] Without a need to prove that each plaintiff relied on the misrepresentation, there is no need to allege a theory by which to presume it. It is enough that the class can prove that someone relied on the misrepresentation and, due

18 U.S.C. § 1964(c) (2006) (awarding treble damages to victims). RICO's punitive nature might explain why the standards of causation are less formalistic than those under tort law. Exclusively punitive laws, such as many criminal statutes, often have no causation requirement at all; it is the action, not the harm that is the focus of the statute. *See* George P. Fletcher, Basic Concepts of Criminal Law 60–62 (1998) (discussing difference between crimes of harmful consequence, which have causal element, and crimes of harmful action, which do not). I will not attempt to categorize all the possible crimes on which a civil RICO claim can be predicated, but I will note that fraud is a conduct-based, not a consequence-based, crime. *Id.* at 62.

115 *Bridge*, 128 S. Ct. at 2140.

116 15 U.S.C. § 78j(b) (2006); *see also* 17 C.F.R. § 240.10b-5 (2008) (prohibiting employment of manipulative and deceptive devices in trading of securities).

117 *See* Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988) (holding that reliance is element of Rule 10b-5 cause of action) (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206 (1976)); *see also* Moore et al., *supra* note 91, at § 23.45(5)(a)(iv) (outlining requirement that each class member in securities fraud class action have personally relied on fraudulent conduct); A.C. Pritchard, Stoneridge Investment Partners v. Scientific-Atlanta: *The Political Economy of Securities Class Action Reform*, 2007–2008 Cato Sup. Ct. Rev. 217, 221 ("The [fraud-on-the-market] presumption allows plaintiffs to skip the step of alleging personal reliance on the misstatement, instead allowing them to allege that the *market* relied on the misrepresentation in valuing the security.").

118 *Bridge*, 128 S. Ct. at 2145. When the Second Circuit decided *McLaughlin*, however, the Supreme Court had not yet clarified the role of reliance in RICO. McLaughlin was decided April 3, 2008, and *Bridge* was decided two months later on June 9, 2008.

to this reliance, the misrepresentation caused the class members' harm.

III
Establishing Causation Through Aggregate Reliance

With *Bridge*, the Supreme Court broke the shackles binding fraud-based civil RICO to the state law requirement of personal reliance. *Bridge* did not involve a class action, however, and the Supreme Court did not outline how its holding would affect the certification of classes bringing fraud-based RICO claims. In this Part, I argue that, through the lens of *Bridge*, plaintiff classes have a theoretical framework for using RICO to overcome not only the questions-of-law hurdle to certification by providing a common federal cause of action, but also the questions-of-fact hurdle created by the need to establish individual personal reliance under the common law of fraud. By proving that some group in the aggregate relied on a misrepresentation to a degree sufficient to drive up the price of a commodity, which I term "aggregate reliance," a class of consumers can establish causation without individual inquiries. This Part also addresses how a class can provide such proof using statistical methods already commonly applied in antitrust cases. Finally, I apply this model to a recently decided case in which plaintiffs brought fraud-based RICO claims and used antitrust-type methods to argue successfully for class treatment. The demonstration of aggregate reliance as the theoretical basis for certification in that case provides a blueprint for how future courts should justify their decisions to certify RICO classes in price-increase cases.

A. Aggregate Reliance Explained

After *Bridge*, questions of reliance in civil RICO fraud claims properly shift to general questions of causation.[119] In the context of certification decisions, courts must determine whether the class of RICO plaintiffs will be able to establish causation through classwide means, making certification appropriate, or whether the plaintiffs will have to produce individualized proof of (personal or third-party) reliance, warranting the denial of certification.

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119 *See* Nagareda, *supra* note 18, at 148 ("With the would-be reliance element no longer a potential tripping point for class certification [after *Bridge*], all the more pressure is likely to build on the proximate causation element."); *cf.* Poulos v. Caesars World, Inc., 379 F.3d 654, 664 (9th Cir. 2004) (asserting, before *Bridge*, that "[c]ausation lies at the heart of a civil RICO claim"). *See generally* Gordon, *supra* note 29 (arguing that courts too often focused on applicability of reliance, obscuring proper nature of civil RICO causation).

Although *Bridge* released plaintiffs from having to prove personal reliance, it did not eliminate the need to prove causation, which as a de facto matter still requires proving reliance in some form. Post-*Bridge*, plaintiffs no longer need to prove personal reliance, but fraud—including mail fraud—cannot cause injury unless *someone* relies on the misrepresentation.[120] Although *Bridge* establishes that third-person reliance can provide a sufficient basis for the causal element in a RICO claim, the Court did not expound on the implications of its holding for class actions. Multiple individualized inquiries into whether third parties relied on a misrepresentation would be just as detrimental to a class seeking certification as multiple individualized inquiries into plaintiffs' personal reliance.[121] Attempting to prove causation through proof of third-party reliance is thus unlikely to facilitate class certification unless all plaintiffs can point to a single person or group whose reliance resulted in harm to the entire class.

Aggregate reliance, therefore, is a necessary development for *Bridge* to open the door to class certification by providing a classwide means of proving causation. Aggregate reliance is the reliance of enough people—whether within the class or without—on the fraud so as to cause an increase in the demand for, and subsequently the price of, a good. Unlike a true third-party reliance case, such as *Bridge*, plaintiffs alleging aggregate reliance would not point to any named third-party's reliance on the fraud as the source of their harm. Instead, plaintiffs would use proof of price inflation to show that some group of people relied on the fraud. Even if the precise contours of this group are unidentifiable, the existence of a price increase resulting from the fraud, and not from other factors, establishes the existence of the group. It is likely that any given plaintiff—as a consumer—is part of the unidentifiable group of "reliers." But no plaintiff has to prove that she is part of that group; the reliance of any one individual is irrelevant. It is the reliance of the consumer body (or, in unusual cases

[120] In *Bridge*, even as the Court clarified that personal reliance was unnecessary in civil RICO, it noted:

> Of course, none of this is to say that a RICO plaintiff who alleges injury "by reason of" a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations. . . . In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation.

Bridge, 128 S. Ct. at 2144.

[121] This limitation on *Bridge* as a panacea for the plaintiffs' bar was recognized recently by a district court. *See* Ironworkers Local Union No. 68 v. Astrazeneca Pharms. LP, 585 F. Supp. 2d 1339, 1344 (M.D. Fla. 2008) (noting, in case involving alleged defrauding of prescribing doctors resulting in unnecessary purchase of drugs by consumers, necessity of individual interviews to establish each doctor's reliance and prove that fraud in fact caused plaintiffs' harm).

discussed below, of some other group) as a whole that drives up the price.

The class points to this faceless mass of consumers as the third party whose reliance caused the classwide injury. While each individual class member must still prove that she suffered an injury (in the form of a price increase) caused by the fraud, aggregate reliance obviates the need to establish that each individual plaintiff relied on the misrepresentation. The class will have shown that some group *did* rely on it, causing harm to all of the plaintiff class members.

The "reliers" are not necessarily a subset of the proposed class. While generally consumers both set demand and pay for products, for some products, individuals other than consumers set the demand. For example, doctors determine demand for pharmaceuticals by writing prescriptions. If a defendant's conduct sufficiently deceives the group that sets the demand for a product, driving up the price for consumer-plaintiffs, then the plaintiffs can use this price increase as common proof of harm caused by the defendant's RICO violation. Instead of requiring each plaintiff to prove that her doctor relied on the fraud in prescribing a drug, the class of plaintiffs need only provide proof of aggregate reliance—reliance by a sufficiently large group of unidentified doctors to impact the price of the drug. Proof of aggregate reliance thus allows a plaintiff class to demonstrate reliance-based causation without necessitating individual questions of reliance, regardless of whether the group relying on the fraud was a subset of the plaintiff class or some other body.

For an example of aggregate reliance in action, we need only to return to *McLaughlin*, the light cigarette smoker case.[122] The *McLaughlin* plaintiffs' experts proposed a model using multiple regression analysis to determine the impact of the defendants' fraud on the price of cigarettes while accounting for a multitude of other variables affecting cigarette sales.[123] In addition to this econometric analysis, the proposed class also produced evidence in the form of a survey showing overwhelming reliance by consumers on the defendants' misrepresentations.[124] The plaintiff class essentially claimed that, while not all light cigarette smokers relied on the defendants' fraudulent statements and omissions, a large enough number of them had relied to increase the price of cigarettes for all light cigarette

[122] 522 F.3d 215; *see also supra* notes 77–85 and accompanying text (describing case).

[123] Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1058, 1138–46 (E.D.N.Y. 2006). For a brief explanation of multiple regression, see *infra* notes 154–55 and accompanying text.

[124] *Schwab*, 449 F. Supp. 2d at 1166–70.

smokers.[125] Thus, "by reason of" the tobacco manufacturers' fraud, all of these smokers suffered financial injury.[126] Importantly, the regression analysis was evidence that applied to all plaintiff class members in the same way—common evidence of causation that would predominate over any individual questions of fact and permit class certification.

The Second Circuit did not accept this model of aggregate reliance, instead requiring proof of each plaintiff's individual reasons for purchasing light cigarettes.[127] Without addressing the plaintiffs' expert's proposal to account for other variables through multiple regression, the court decided that the possibility of different variables that could affect the decision to purchase light cigarettes made generalized proof untenable.[128]

Notwithstanding the holding in *McLaughlin*, the facts of the case exemplify how plaintiff class members can prove reliance in the aggregate. While plaintiffs cannot use aggregate proof of reliance to impute personal reliance to all putative class members,[129] they can use it to

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[125] While the class only included smokers of light cigarettes, the report by the plaintiffs' expert suggested that by increasing the market for smoking in general, the defendants' misrepresentations could have driven up the prices of all cigarettes. *Id.* at 1139.

[126] 18 U.S.C. § 1964(c) (2006).

[127] *McLaughlin*, 522 F.3d at 226–27.

[128] *Id.* at 226–27, 230. The Second Circuit may have based its refusal to accept aggregate proof of causation more on the substantive merits of the case than on an evaluation of the propriety of aggregate proof. The Second Circuit declared that the price-increase model failed as a matter of law because the evidence so strongly pointed to the fact that there was no price increase as a result of the fraud:

> Lights have always been priced the same as full-flavored cigarettes. Furthermore, if plaintiffs' theory . . . were correct, one would have expected demand to drop following the publication of Monograph 13[, a report published by the National Cancer Institute concluding that light cigarettes produced no health benefit,] as people returned to smoking regular cigarettes or quit smoking altogether and, correspondingly, prices to fall. But nothing of the sort happened; the market did not shift appreciably following the publication of Monograph 13. *Id.* at 230. The Second Circuit exceeded the scope of a class-certification inquiry by making such a determination on the merits, despite the fact that the court ostensibly based its decision on an inquiry into predominance.

Id. at 224.

As Professor Nagareda has noted, the court in *McLaughlin* did not decertify the class because the aggregate proof was insufficient to show that common questions predominated. Rather, the court decertified the class because the common evidence answered the common question of whether any class member at all had paid an increased price for cigarettes in the negative and not in the positive, as the plaintiffs had claimed. *See* Nagareda, *supra* note 18, at 148–49 (arguing that *McLaughlin* court found "fatal similarity" between class members). Thus, in denouncing the plaintiffs' attempt at using aggregate proof of causation, the court relied on its own aggregate proof of (a lack of) injury.

[129] Aggregate data about a population cannot be accurately attributed to any individual in the population. *See generally* W.S. Robinson, *Ecological Correlations and the Behavior of Individuals*, 15 AM. SOC. REV. 351 (1950) (establishing that analytical data about popu-

establish that each class member suffered a harm—the increased price—factually and proximately caused by the defendants' racketeering activity. Under civil RICO, especially after the Supreme Court's clarification in *Bridge* of the role of reliance and causation, this economic injury is enough to warrant recovery.[130] In fact, only by pleading injury in the form of an increased price—an injury that affects all purchasers of a product in the same way, regardless of their reliance—can the class be certified.[131]

B. Adopting Methods of Proof from Antitrust To Prove Aggregate Reliance

Even with the proper theoretical framework in place, courts might still hesitate to accept proof of aggregate reliance in a price-increase RICO case because the approach is novel.[132] The question remains: How does a plaintiff class prove that the RICO violation

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lations cannot be attributed to single individuals in population). To use aggregate data in such a manner is to commit an error termed the "ecological fallacy." Jones v. Lubbock, 730 F.2d 233, 235 (5th Cir. 1984) ("This is termed the 'ecological fallacy,' meaning the use of aggregate data in an attempt to explain the actual behavior of individuals."). Any given plaintiff attempting to use aggregate statistical evidence to prove that she, individually, relied on a misrepresentation would be guilty of the ecological fallacy.

[130] *See* 18 U.S.C. § 1964(c) (2006) (providing civil remedy for "[a]ny person injured in his business or property by reason of a [RICO] violation"); *see also supra* Part II.B–C (discussing *Bridge* and causation element of civil RICO fraud claims).

[131] *See, e.g.*, *In re* Neurontin Mktg. & Sale Practices Litig., 244 F.R.D. 89, 113–14 (D. Mass. 2007) (recognizing, in case similar to *Zyprexa*, 253 F.R.D. 69 (E.D.N.Y. 2008), that class certification was not appropriate, but acknowledging that had plaintiffs pled injury in form of price increase, relief might have been available).

In determining the presence or absence of aggregate reliance, courts will necessarily have to look at the statistical evidence purporting to show that group reliance on fraud resulted in a price increase. This will require courts to conduct a rather extensive analysis of whether the element of reliance is actually met. Only if there is evidence that the supposed "reliers" *did* rely on the misrepresentation does the plaintiff class overcome the hurdles posed by individualized reliance inquiries otherwise required by the causation inquiry. Actual reliance by some group is a prerequisite for aggregate reliance. *Cf.* Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 268–69 (5th Cir. 2007) (holding that loss causation is prerequisite for fraud on the market and that, when class certification turns on fraud-on-the-market presumption of reliance, loss causation must be established before certification is granted). This overlapping of the reliance question at the certification stage and the same question in the eventual trial on the merits does not excuse the court from making the determination of whether or not aggregate reliance is present. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982) ("[Classes] may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 40–41 (2d Cir. 2006) (requiring that courts make "definitive assessment" that all elements of Rule 23 are met before certifying class).

[132] In a denial of a renewed motion for certification in the *Neurontin* case discussed in note 131 *supra*, the court argued that the novelty of proving causation through statistical analysis was so great that it warranted a stricter examination of the expert's testimony at the class certification stage. *In re* Neurontin Mktg., Sales Practices & Prods. Liab. Litig.,

caused the price increase that it has identified as its injury? Litigants and courts in antitrust cases have already grappled with this question and settled on several methods. Litigants in antitrust cases, with the court's blessing, often establish whether an antitrust violation affected the price of a commodity through classwide, statistical proof.[133] Expert witnesses employ certain quantitative methods to ferret out the causes of a price increase and rule out other possible explanations.[134] Once plaintiffs establish causation in antitrust litigation surrounding price fixing, "a court is likely to find class-action treatment to be appropriate even though individual issues remain concerning damages."[135] This is because changes in price affect all members of the class in the same manner.[136] The use of statistical methods to determine price increases resulting from antitrust violations is so well respected that it has received Congress's express blessing via amendment to the Clayton Act.[137]

The statistical methods employed in antitrust cases translate well to price-increase RICO claims and can serve as a model for litigants filing such claims. Moreover, the widespread acceptance of these methods in antitrust cases should assuage courts' concerns about accepting a novel theory in the RICO context.

1. The Propriety of Looking to Antitrust Litigation for a Model

When plaintiffs present the harm caused by an illegal activity as a uniform price increase that is attributable to that activity and affects the entire class, courts should apply the same model regardless of

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257 F.R.D. 315, 327 (D. Mass. 2009) (citing *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 26 (1st Cir. 2008)).

133 *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 153–55 (3d Cir. 2002) (approving certification of class where experts used multiple regression analysis to show classwide impact of antitrust violation); Paper Sys. Inc. v. Mitsubishi Corp., 193 F.R.D. 601, 612–16 (E.D. Wis. 2000) (certifying class of sellers of thermal paper for fax machines based on predominance of common question of fact of whether antitrust violations caused injury, something that could be established using multiple regression analysis); *In re* Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 689–92 (N.D. Ga. 1991) (certifying class of purchasers of airline tickets based on common evidence of injury provided by multiple regression analysis establishing that price of tickets was higher than would have been absent antitrust violation).

134 *See generally* Herbert Hovenkamp, Federal Antitrust Policy 670–78 (3d ed. 2005) (discussing econometric techniques for determining price increases caused by antitrust violations); Michael O. Finkelstein & Hans Levenbach, *Regression Estimates of Damages in Price-Fixing Cases*, 46 Law & Contemp. Probs. 145 (1983) (same); Daniel L. Rubinfeld & Peter O. Steiner, *Quantitative Methods in Antitrust Litigation*, 46 Law & Contemp. Probs. 69 (1983) (same).

135 Moore et al., *supra* note 91, § 23.45(5)(c)(i).

136 *Id.*

137 15 U.S.C. § 15d (2006) (allowing damages to "be proved and assessed in the aggregate by statistical or sampling methods [and] by the computation of illegal overcharges").

whether the violation sounds in antitrust or in racketeering. The extension of this method is particularly appropriate in the context of RICO. The Clayton Antitrust Act and RICO share a common lineage, and courts have often referred to the Clayton Act when interpreting RICO. More importantly, the standards for causation are the same under the Clayton Act and RICO. It is thus no leap for a court to recognize that RICO plaintiffs can use statistical proof, in the form of a price differential, as easily as antitrust plaintiffs to show that the cause of a uniform injury is provable and that, therefore, common questions predominate over individual ones.

When Congress created a private remedy in RICO, it modeled that remedy after the one available to private parties harmed by violations of the Clayton Antitrust Act.[138] The association between civil RICO and antitrust law was so strong at one point that the Supreme Court had to clarify, in *Sedima, S.P.R.L. v. Imrex Co.*, that substantive antitrust law should not limit civil RICO.[139] Justice Marshall, though dissenting in *Sedima*, noted the prominent place that antitrust laws played in the development of civil RICO but concluded that many courts had "read far too much into the antitrust analogy."[140] While Justice Marshall concluded that Congress never intended civil RICO "to adopt substantive antitrust doctrine,"[141] he rejected the position that a court could not draw any analogy between RICO and antitrust laws.[142]

Indeed, a majority of the Supreme Court returned to the Clayton Antitrust Act more than a decade after *Sedima* when it needed to determine whether proximate cause was an element of civil RICO. In *Holmes v. Securities Investor Protection Corp.*, the Supreme Court based its adoption of a proximate causation requirement in RICO on the equivalent requirement that courts had interpreted into the Clayton Act.[143] The causation requirements for the two causes of action are identical.[144] It thus follows that evidence sufficient to prove causation in antitrust should also be sufficient to prove causation for a RICO claim.

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[138] *See* 18 U.S.C. § 1964(c) (2006) (stating that plaintiffs may recover threefold damages sustained and cost of suit); 15 U.S.C. § 15(a) (2006) (same).

[139] *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 485–86 (1985) (rejecting creation of analogue in civil RICO claims to antitrust law's limitation of recovery to only harm caused by "antitrust injury").

[140] *Id.* at 510–13 (Marshall, J., dissenting).

[141] *Id.* at 513.

[142] *Id.* at 512.

[143] 503 U.S. 258, 267–68 (1992).

[144] *Cf.* Mark Sobel, Note, *Prime-Rate Fraud Under RICO*, 72 GEO. L.J. 1885, 1898 (1984) (describing standing requirements of civil RICO as "antitrust-like").

If anything, Congress's intent behind RICO demands that it be more expansive than antitrust statutes by being more accommodating to plaintiffs and less protective of potential defendants.[145] RICO punishes criminal behavior, not just regulatory violations.[146] Victims of RICO violations have a clearer path to recovery because "the need to require the wrongdoer to 'make amends' is all the more compelling in the case of inherently corrupt activities" such as those prohibited by RICO.[147] In fact, although courts, like the *Holmes* Court, often look to similarities between antitrust and RICO,[148] they have refused to do so when a defendant wishes to use an antitrust limitation to foreclose the possibility of recovery for a RICO plaintiff.[149]

Given civil RICO's roots modeling after antitrust, the similarity in the type of causation necessary for the two claims, and the more expansive and punitive intent behind RICO, statistical evidence that is sufficient to prove that an antitrust violation caused a uniform harm should also be sufficient to prove that a RICO violation caused such a harm.

2. *The Use of Economic and Statistical Analyses in Antitrust*

In many civil antitrust suits, a private party seeks damages as recompense for the payment of a supracompetitive price.[150] The alleged injury is the difference between the inflated price paid for the commodity and the price that would have been paid but for the antitrust violation.[151] Plaintiffs must establish this but-for price by referencing a point of comparison unaffected by the anticompetitive behavior.

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145 *See* G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1042–43 (1980) (explaining policy rationales behind antitrust and RICO statutes and need for temperance in encouraging ruinous antitrust litigation, but no such need in RICO litigation).

146 Sobel, *supra* note 144, at 1899–900.

147 *Id.* at 1903.

148 *See supra* text accompanying note 143 (discussing *Holmes* Court's reliance on antitrust analogy).

149 One example was the defense bar's repeated attempts to incorporate a "competitive injury" requirement into RICO claims, like the "competitive" or "antitrust injury" requirement in antitrust. Many courts, including ultimately the Supreme Court, rejected this limitation. *E.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 484–86 (1985); Schacht v. Brown, 711 F.2d 1343, 1356–58 (7th Cir. 1983); Bennett v. Berg, 685 F.2d 1053, 1058–59 (8th Cir. 1982).

150 *See* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396–97 (1906) (affirming antitrust suit where alleged damages consisted of difference between price paid and competitive price). Overcharge is the most common form of damages, although damages can also be sought for lost profits. Brendan Sweeney, *The Role of Damages in Regulating Horizontal Price-Fixing: Comparing the Situation in the United States, Europe, and Australia*, 30 MELB. U. L. REV. 837, 860 (2006).

151 HOVENKAMP, *supra* note 134, at 670.

There are two primary methods for doing this. First, a plaintiff may compare the supracompetitive price to the price when the market for the product was competitive—called the "before and after" approach.[152] Second, the plaintiff may adopt the "yardstick" approach, which compares the supracompetitive price to the price paid during the same time period for a similar product or for the same product in a similar but competitive market.[153] Whether using the before-and-after or yardstick approach, litigants can employ econometric and statistical models, such as multiple regression analysis,[154] that allow experts to determine whether any specific factor—like an antitrust or RICO violation—affected the price, what the impact was, and what the price would have been had the influencing factor been different.[155]

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152 *See In re* NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 521 (S.D.N.Y. 1996) ("The 'before and after' theory compares . . . the prices [plaintiff] paid during the period the violation continued with . . . prices paid prior to the beginning of the violation or after its termination." (quoting 1 ABA Antitrust Section, Antitrust Law Developments 669–73 (3d ed. 1992))).

153 *See id.* ("The 'yardstick' approach compares profits earned or prices paid by the plaintiff with the corresponding data for a firm or in a market unaffected by the violation." (quoting 1 ABA Antitrust Section, Antitrust Law Developments 669–73 (3d ed. 1992))). Both the before-and-after and yardstick approaches require experts to make some judgments about the economic markets in which the violations took place. John M. Connor, *Forensic Economics: An Introduction with Special Emphasis on Price Fixing*, 4 J. Competition L. & Econ. 31, 46–49 (2008).

154 Hovenkamp, *supra* note 134, at 674. Multiple regression analysis is a statistical tool used to analyze the effect of multiple factors on a single dependant variable. Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, *in* Reference Manual on Scientific Evidence 179, 181–83 (Fed. Judicial Ctr. ed., 2d ed. 2000). In a regression analysis, all major factors that could impact a dependant variable—like price—are identified, and a statistician analyzes the effects each factor has on the variable, holding other factors constant. Franklin M. Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 705–06 (1980).

155 Rubinfeld, *supra* note 154, at 181–82. Regression analyses are "particularly well suited to answering 'but for' questions," such as what a price would have been had the defendant not engaged in illegal behavior. Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 Colum. L. Rev. 1048, 1087 (1985). This feature has led to widespread use of regression in price-fixing cases, including in motions for class certification. *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 153–55 (3d Cir. 2002) (approving certification of class where multiple regression analysis was used to show classwide impact of antitrust violation); Sun Microsys., Inc. v. Hynix Semiconductor Inc., 608 F. Supp. 2d 1166, 1199–204 (N.D. Cal. 2009) (approving multiple regression as possible means of determining and calculating effect of antitrust violation on price of computer component); Paper Sys. Inc. v. Mitsubishi Corp., 193 F.R.D. 601, 612–16 (E.D. Wis. 2000) (certifying class of sellers of thermal fax machine paper where proof that antitrust violations caused classwide injury would be established through use of multiple regression analysis); *In re* Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 689–92 (N.D. Ga. 1991) (certifying class of airline ticket purchasers based on common evidence of injury provided by multiple regression analysis establishing that ticket price was higher than would have been absent antitrust violation).

Determining that the price differential was caused by the illegal behavior is equally feasible in RICO litigation. RICO plaintiffs must show that they suffered an economic injury and that the RICO violation caused it. A price increase resulting from the fraud meets both of these requirements. Proving this increase through techniques often used in antitrust cases allows courts to permit the introduction of statistical proof of causation through well-tested means, which should help alleviate the anxiety of adopting a novel approach to fraud-based RICO claims.

C. *Applying the Model:* In re Zyprexa

Here, I apply these principles to a concrete example. In the following case, the elements necessary for proving aggregate reliance—causation of a uniform injury in the form of a price increase provable through economic methods adopted from antitrust—were present and certification of the class was proper. Below, I show how aggregate reliance provides a theoretical framework justifying such a certification.

In *In re Zyprexa*,[156] Judge Jack Weinstein—the same judge who certified the class of light cigarette smokers in *Schwab*[157]—certified a class of third-party payors for the drug Zyprexa in a civil action under RICO.[158] The plaintiffs in the class alleged that the manufacturer of

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[156] 253 F.R.D. 69 (E.D.N.Y. 2008); *see supra* note 1 and accompanying text (summarizing facts of this case).

[157] 449 F. Supp. 2d 992 (E.D.N.Y. 2006). There are many similarities between the two cases. For the discussion of aggregate reliance, in both cases, statistical analyses presented a fair means of calculating whether or not there had been a price increase as a result of a RICO violation, causing a uniform harm to all plaintiffs. However, there is a significant difference between *Schwab* and *Zyprexa*: In *Zyprexa*, the presence of transactional records (receipts of pharmaceutical sales) would facilitate the calculation of individual damages, but similar records were unlikely to exist in *Schwab*. *Compare id.* at 1129 (noting low likelihood that individual smokers retained receipts of purchases), *with Zyprexa*, 253 F.R.D. at 199 (holding that court could easily compute individual damages through available payment records).

The Second Circuit in reviewing *Schwab* in *McLaughlin* accurately spotted this problem of the distribution of any settlement or award. McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231–33 (2d Cir. 2008). Even if the court correctly recognized the possibility of proving both the injury to light cigarette smokers and causation through aggregate means, there would have been no manageable way to distribute the damages—an issue the court discussed in its consideration of predominance. *Id.* at 231. Any class action would have devolved into multiple individual trials at the damages stage in order to determine how the fund should be distributed. In the *Schwab* case, then, class treatment would not have been superior to separate trials and individual issues might have predominated over common ones. For this reason, while certification was appropriate in *Zyprexa*, it was not in *Schwab*.

[158] *Zyprexa*, 253 F.R.D. at 209–10. Third-party payors are institutional parties "such as pension funds, labor unions, and insurance companies" that "cover members' health benefits." *Id.* at 75. Judge Weinstein refused to certify a potential subclass of direct consumers of Zyprexa due to concerns that the representative class members could not adequately represent the class as they were involved in personal injury suits against the defendant, and

Zyprexa, Eli Lilly, systematically disseminated misinformation regarding the safety and efficacy of Zyprexa while simultaneously marketing the drug to primary care physicians for off-label use.[159] These general practitioners lacked the specialization necessary to make informed prescription decisions concerning Zyprexa.[160] Eli Lilly exploited this lack of expertise by marketing Zyprexa as a treatment for common mood disorders that the drug had not been shown to treat, or worse, that the drug had been shown to exacerbate.[161] This campaign, the plaintiffs claimed, resulted in an inflated price for Zyprexa.[162] The class sought certification in an attempt to recover the amount that they had overpaid for Zyprexa.[163]

1. Proof of Injury and Causation Similar to Antitrust

The plaintiffs offered multiple theories to establish damages and causation. The two most viable were proof of a surplus of prescriptions that resulted from the fraudulent campaign, the "excess prescription theory," and an increase in price that resulted from this increased demand, the "excess price theory."[164] The excess prescription theory established causation and harm that were not uniform as to all class members—the fraud caused harm only to those who would not have received a prescription or purchased Zyprexa had doctors known the truth. It is not, therefore, an acceptable basis for aggregate reliance and cannot serve as a basis for class certification. The evidence of overprescription itself only shows that some plaintiffs sustained harm

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there was the potential for them to place their own interests above those of the class in coming to a settlement in the personal injury litigation. *Id.* at 75–76. The judge also expressed some concern that there might not be sufficient payment data to award damages to the consumers. *Id.*

The defendant drug manufacturer, Eli Lilly, appealed the certification, and the Second Circuit has agreed to hear the appeal. Eli Lilly & Co. v. UFCW Local 1776, No. 08-4685-mv (2d Cir. Jan. 15, 2009) (order granting leave to appeal class certification).

159 *Zyprexa*, 253 F.R.D. at 78, 123–25. An off-label use of a prescription drug is any use of a drug other than that for which the Food and Drug Administration approved it. Stephanie Greene, *False Claims Act Liability for Off-Label Promotion of Pharmaceutical Products*, 110 PENN. ST. L. REV. 41, 45–46 (2005). These include prescriptions to treat conditions different than those indicated, at different doses than labeled, or to a different population than that approved (such as prescribing a drug approved for adults to a child). *Zyprexa*, 253 F.R.D. at 99.

160 *Zyprexa*, 253 F.R.D. at 123.

161 *Id.* at 123–25.

162 *Id.* at 78.

163 *Id.* The total excess amount paid was estimated to be between $3.998 billion and $7.675 billion. *Id.*

164 *Id.* at 158–65. Another theory, too abstract for consideration in this Note, was the "loss of value theory." This theory does not look for a difference between the actual price and the but-for price; instead it represents the difference between what the purchaser paid and the value to the purchaser of what she received. *Id.* at 159–62.

as a result of the RICO violation. The excess price theory, on the other hand, essentially looked for proof that *enough* doctors relied on Eli Lilly's misrepresentations so as to drive up the price of Zyprexa for *all* members of the class. This price differential is the type of harm necessary to prove aggregate reliance. And it was this damages model that Judge Weinstein adopted in certifying the class.[165]

One of the plaintiffs' experts used the yardstick approach to calculate the difference between the price of Zyprexa during Eli Lilly's illegal campaign and the price of its principal competitor drugs.[166] The court also considered a before-and-after model, but the plaintiffs' experts and the court disregarded this technique due to eccentricities in the pharmaceutical market.[167]

One of the defendant's experts called for more "detailed, quantitative empirical work" to determine the cause and size of any price increase, claiming that many potential independent variables were absent from the plaintiffs' experts' analyses.[168] This expert, however, had not performed such an analysis because his client, the defendant, forbade him from doing so.[169] While different statistical premises might have provided a better tool for determining whether the misrepresentations had caused a price increase, the defendant's call for such an analysis only strengthened the argument for class certification. Either the plaintiffs had a model that showed that all class members paid an inflated price, or the defendant had one that showed that none did. In either case, the proof would have been common to all members of the class, making certification appropriate.[170]

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[165] *Id.* at 195.

[166] *Id.* at 162–65.

[167] *Id.* at 102, 181–82, 207.

[168] *Id.* at 182–84.

[169] *Id.* at 182. This move appears to have cost the defendants some credibility with the court. *See id.* ("[B]ecause he had been instructed not to perform any calculations in order to determine whether or not his criticisms of [plaintiffs' experts] supported Lilly's position, his opinion (that different results might be reached with the tweaks he suggests) is speculative.").

[170] The defendant's argument against class certification was similar to the fallacy committed by the Second Circuit in *McLaughlin*. In *McLaughlin*, the court disproved the plaintiffs' multiple regression analysis based on a simple before-and-after model. *See supra* note 128 (explaining how Second Circuit used lack of price shift after fraud was publicized as reason to doubt regression). In *Zyprexa*, the defendant's expert threatened to disprove plaintiffs' analyses with more complicated econometric models. In either case, these actions only prove that there is some method available to establish or negate causation on a classwide basis.

2. *Moving from Fraud on the Market to Aggregate Reliance*

While *Zyprexa* provides a model for the manner in which statistical proof of a price increase can justify class certification under fraud-based civil RICO, it also demonstrates that neither the plaintiffs nor the courts had yet developed a workable framework to understand this type of claim. Judge Weinstein, though accepting statistical proof that the fraud had caused a price increase, continued to cling to the failed analogy to fraud on the market and its presumption of reliance.[171] Judge Weinstein mirrored the mistake that he made in *Schwab*—the other major fraud-based RICO case in which he permitted statistical methods to establish causation of harm in the form of price increase. In *Schwab*, Judge Weinstein rightfully saw the potential in allowing smokers to prove whether the fraudulent "light" label caused the price of light cigarettes to increase, but the judge mistakenly believed that this proof supported a presumption of reliance, like that arising in securities fraud claims.[172] The Second Circuit properly held that a presumption of reliance was inappropriate.[173]

As discussed in Part II, fraud on the market is an inapt theory to rely upon in fraud-based RICO claims involving consumer goods. Because its factual premise is not true in the civil RICO context,[174] relying on the analogy is harmful to plaintiff classes for two reasons. First, when the use of econometric methods to prove causation is framed as an expansion of fraud on the market, the legitimacy of the methods is called into question. The fraud-on-the-market approach is so clearly erroneous in RICO claims that any class certified under this approach is in danger of decertification on appeal,[175] and even if not reversed, will not be treated as valid precedent by other courts because of its flawed reasoning.[176]

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171 *Zyprexa*, 253 F.R.D. at 193–95 (recognizing Second Circuit's criticism of fraud-on-the-market-type presumption of reliance in *McLaughlin*, but arguing such presumption was more appropriate in present case because increase in price for Zyprexa had greater similarity to price increases in securities fraud claims).

172 Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1115–18 (E.D.N.Y. 2006).

173 *See supra* text accompanying notes 96–100 (discussing Second Circuit's *McLaughlin* decision).

174 *See supra* Part II.B.2 (discussing attempts to extend fraud on the market to RICO and explaining problems with such extension).

175 *See* McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 223–26 (2d Cir. 2008) (decertifying class in part because of flaws in fraud-on-the-market comparison).

176 At least one district court has already latched onto the use of the fraud-on-the-market framework in *Zyprexa* as a reason to reject plaintiffs' invocation of the case to support their own request for certification. Se. Laborers Health & Welfare Fund v. Bayer Corp., No. 08-1928-MD-MIDDLEBROOKS/JOHNSON, 2009 U.S. Dist. LEXIS 70491, at *98–104 (S.D. Fla. July 30, 2009) (declining to follow *Zyprexa* because "the *Zyprexa*

Second, once a court draws the fraud-on-the-market comparison, it may unnecessarily impose requirements unique to securities claims onto the RICO claims. Courts that compare fraud-based RICO claims to securities law fraud-on-the-market claims—at the request of the plaintiffs or sua sponte—invite confusion as to what plaintiffs must prove in order to succeed in a RICO case.[177] For example, when the Second Circuit decided *McLaughlin*, the court relied on the notion of "loss causation" in decertifying the class because "factors other than defendant's misrepresentation" affected the price of cigarettes.[178] While the Second Circuit has required loss causation in civil RICO law for a decade,[179] originally, the requirement was just a name given to the inquiry into proximate causation.[180]

By contrast, in the securities fraud context, loss causation reflects a difficulty inherent in the complex nature of securities transactions. As the Supreme Court explained in *Dura Pharmaceuticals, Inc. v. Broudo*, when someone purchases a share of stock at an inflated price, there is no immediate economic harm because the purchaser could subsequently sell the share at the inflated price, sustaining no harm.[181] With a commodity—like a security—that is "normally purchased with an eye toward a later sale," special care must be taken to ensure that the purchase at an inflated price actually resulted in an economic harm.[182] Even if the shares are later sold at a loss after the misrepresentation is made public, it is difficult to account for how much of the loss is the result of the misrepresentation and how much is the result of the many other factors that affect the market price of a stock.[183] Thus, in the fraud-on-the-market cases contemplated by *Dura*, "an inflated purchase price will not itself constitute or proximately cause the relevant economic loss."[184]

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court's reliance on this type of fraud on the market theory of damages and/or causation is simply misplaced").

177 *See* Nagareda, *supra* note 18, at 148 ("RICO case law sometimes denotes [the] element [of proximate causation of economic injury] in precisely the same terms—'loss causation'—as its counterpart in securities law." (citing *McLaughlin*, 522 F.3d at 226)).

178 *McLaughlin*, 522 F.3d at 226–27.

179 *See* Moore v. PaineWebber, Inc., 189 F.3d 165, 169–70 (2d Cir. 1999) (establishing two-pronged causation requirement for civil RICO claims based on fraud: (1) proof that misrepresentation caused plaintiffs to enter into agreement (transaction causation), and (2) proof that misrepresentation caused economic harm suffered by plaintiffs (loss causation)).

180 *Id.* at 177–78 (Calabresi, J., concurring) (noting that elements of loss causation in fraud-based RICO claims are wholly within requirements for proximate cause and that loss causation label is used "perhaps unnecessarily" simply because of heritage of fraud claims).

181 544 U.S. 336, 342 (2005).

182 *Id.* at 342–43.

183 *Id.*

184 *Id.* at 342.

When RICO plaintiffs (or judges) inject some fraud-on-the-market elements into a claim, they risk exacerbating confusion over what it means to establish loss causation in a RICO case. Of course, any RICO plaintiff must prove a loss proximately caused by the defendant's actions,[185] and thus must prove loss causation, when that term is used as a pure synonym for proximate causation. However, when loss causation is used in cases alleging fraud on the market, the more searching causal inquiry often applied to fraud affecting securities or other investments could be imported into fraud-based RICO. This is an error, however, as the framework for analyzing these cases for loss causation—whether the investment turned out to be a "losing one"[186]—is inapplicable to purchases made by end consumers who have no intention of reselling the product.

Any requirement of loss causation, as something over and above proximate causation, almost surely results from the confusion caused by importing securities law jargon into fraud-based RICO law.[187] The *McLaughlin* court took this approach, requiring more than a simple demonstration of proximate causation as the result of associating the causal analysis for a fraudulent misrepresentation concerning a consumer good with the corresponding analysis in complex securities cases. Instead of determining whether the plaintiffs had established evidence sufficient to prove that the money lost as increased price was a proximately caused loss, the court instead expressed concern that the price might have been affected by many variables. Even though many factors can lead to an increase in the price of a tangible good (such as a prescription drug), these factors are not as complicated, as numerous, or as volatile as the factors affecting stock prices.[188] More-

185 *See* 18 U.S.C. § 1964(c) (2006) (providing civil remedy for RICO violation only if such violation caused injury to plaintiff's business or property); *supra* Part II.A (explaining requirement of proximate causation under RICO).

186 Moore v. PaineWebber, Inc., 189 F.3d 165, 172 (2d Cir. 1999) (quoting First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 769 (2d Cir. 1994)).

187 In *Moore*, the case in which the Second Circuit introduced the "loss causation" element into fraud-based RICO, the plaintiffs alleged fraudulent inducement to invest funds in insurance policies marketed as IRAs. *Id.* at 167–69. Thus, a proper proximate cause inquiry required the court to determine whether the plaintiffs pled that the insurance investments had been "losing one[s]." *Id.* at 172 (quoting First Nationwide Bank, 27 F.3d at 769) (alteration in original). The court held that this had been sufficiently pled. *Id.* at 172.

188 *Cf.* Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342–43 (2005) (describing unique "tangle of factors affecting price" for "[s]hares . . . purchased with an eye toward a later sale"). Unlike securities purchased exclusively for the purpose of resale at a later time, consumer goods—such as cigarettes or prescription drugs—are almost never resold by consumers. The goods are either entirely consumed—cigarettes are smoked, medication is taken—or they depreciate in value as a result of use or time. Thus, a consumer's ability to resell the product at the same price and recoup her purchase price is irrelevant in determining the loss she suffered.

over, these price shifts are more amenable to calculation through statistical methods such as multiple regression analysis.[189] Examining RICO through the lens of fraud on the market unfairly handicaps a RICO class seeking certification by unnecessarily importing securities law complexities into civil RICO law. *Bridge* makes this conflation, and the accompanying burden it imposes, obsolete.

The certification in *Zyprexa* was proper,[190] but using fraud on the market as the theoretical justification was both inaccurate and harmful to the plaintiffs. Aggregate reliance provides a better theoretical justification. Judge Weinstein actually noted that the plaintiffs' evidence was sufficient to establish that enough doctors relied on the claims made during the fraudulent campaign to affect the market for Zyprexa.[191] It was this aggregate reliance that drove up the price of Zyprexa, harming all purchasers of the drug.[192] By pointing to the reliance of some indeterminate group of doctors who had a determinable effect on the price of Zyprexa, each individual purchaser is able to rely on the same classwide evidence to meet the RICO standard for causation.

Unlike purchasers of overvalued securities, who suffer a loss at the time the security is resold at its true market price, purchasers of overvalued consumer goods suffer a loss at the time the good is purchased. In calculating loss in consumer overcharge cases, an expert need only account for those variables affecting this initial purchase price. While the ability to do so accurately will vary with the nuances of the market for each particular good, doing so will almost never be as difficult as accounting for all the variables affecting the ever-shifting price of a publicly traded security. Courts remain empowered to address an individual expert's ability to account for the particular elements of the market for a good through pre-trial proceedings. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592–93 (1993) (requiring federal judges to evaluate expert scientific testimony for sound methodology and applicability to case at bar).

[189] The more variables that might have a major effect on the price, the more likely it is that the expert might omit one of these variables, rendering any regression analysis inconclusive. *See* Rubinfeld, *supra* note 154, at 188–89 (noting that failure to include possible variable may cause effect on dependent variable to be incorrectly assigned to different factor); *cf.* David Tabak & Frederick Dunbar, *Materiality and Magnitude: Event Studies in the Courtroom* 26–28 (Nat'l Econ. Research Assocs., Inc., Working Paper No. 34, 1999), *available at* http://ssrn.com/abstract=166408 (identifying difficulties—such as stock volatility and speculative bubbles—in accurately using regression analyses to determine effects of events on stock, although ultimately concluding these difficulties are surmountable).

[190] However, the Second Circuit was correct in decertifying the *Schwab* class for reasons that I explain in note 157 *supra*.

[191] *See* In re Zyprexa Prods. Liab. Litig., 253 F.R.D. 69, 193 (E.D.N.Y. 2008) ("There is ample evidence that doctors' reliance on the misrepresentation in prescribing Zyprexa supported the excessive price.").

[192] While in *Schwab* the class of smokers depended on the aggregate reliance of a subclass of itself to establish causation, Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1046–49 (E.D.N.Y. 2006), *rev'd sub nom.* McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008), the *Zyprexa* class based causation on the aggregate reliance of the doctors prescribing the drug. *Zyprexa*, 253 F.R.D. at 193.

The evidence produced in *Zyprexa* and *Schwab* does not show the propriety of a presumption of reliance; instead, the evidence *proves* reliance. It establishes that, in the aggregate, enough people relied on the fraud to drive up the price, causing injury to all purchasers. With this understanding, any given individual consumer-plaintiff can point to the reliance of some indeterminate group of people who had a determinable effect on the price of a product to show the source of her injury, just as the plaintiffs in *Bridge* could point to the reliance of the county treasurer as the source of their injury.[193] It is aggregate reliance, not fraud on the market, that provides the proper framework for adopting statistical and economic methods of proving price increases in fraud-based civil RICO claims.

Conclusion

With an understanding of aggregate reliance, groups of fraud victims can band together as classes and take advantage of the opportunities that class certification provides. The hurdle created by the diversity of state laws dissipates when all plaintiffs use RICO as a common legal basis. The questions-of-fact hurdle vanishes with the elimination of the personal reliance element that pervades fraud claims at common law. Without a personal reliance requirement fracturing a class's unity by demanding individualized inquiries or forcing the class to resort to the false analogy of fraud-on-the-market's presumption of reliance, the class can use classwide evidence of causation of a price increase and a solid doctrinal footing to acquire certification and, if its claim is meritorious, vindication.

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193 *See supra* text accompanying notes 101–11 (discussing Supreme Court's acceptance of third-party reliance in proving causation in *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008)).