Personal versus Property Harm and Civil RICO Standing

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INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (RICO)[1] was created to combat the anticompetitive invasion of legitimate business interests by organized crime.[2] As part of its legislative scheme to battle racketeers, Congress established criminal[3] and civil penalties[4] for RICO violations. Section 1964, the civil penalties section of RICO, permits both the government[5] and private citizens[6] to bring federal causes of action for RICO violations. Subsection § 1964(c) provides that a private citizen may file suit for treble damages when he is "injured in his business or property."[7] This "business or property" clause has generally been construed as a standing requirement, limiting the availability of RICO claims for potential plaintiffs. A personal injury that does not affect a business or property interest—emotional distress, for example—does not give rise to standing under § 1964(c).[8]

Courts have not always found it easy to characterize a harm as either solely personal or proprietary in nature. For example, plaintiffs filing suit for wrongful death often claim damages for both pain and suffering (personal harms) and for loss of wages or employment (harms often deemed proprietary in nature). The Eleventh, Seventh, and Ninth circuits are currently split as to whether civil RICO grants standing to those who have suffered a property harm derived from a personal injury.

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1 18 USC §§ 1961–1968 (2000).

2 See Statement of Findings and Purpose, Pub L No 91-452, 84 Stat 922, 923 (1970) ("It is the purpose of this Act to seek the eradication of organized crime in the United States.").

3 See 18 USC § 1963.

4 See id § 1964.

5 See id § 1964(b) ("The Attorney General may institute proceedings under this section.").

6 See id § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit.").

7 Id.

8 See *Doe v Roe*, 958 F2d 763, 767–68 (7th Cir 1992) ("[A]ll other courts construing this language have likewise concluded that a civil RICO action cannot be premised solely upon personal or emotional injuries.").

This Comment offers a solution to this circuit split, proposing that a plain language interpretation of the statute requires courts to acknowledge standing for derivative property harms. Part I offers a brief introduction to civil RICO. Part II explains the different opinions that have given rise to the current split. Part III argues that, under a plain language interpretation of § 1964(c), a plaintiff has standing for a property harm even when it derives from a personal injury. Finally, Part IV examines the purpose and legislative history of § 1964(c) to see whether there is, as the Eleventh Circuit seemingly assumed, clear evidence of a legislative intent to override the plain language. The Comment concludes that there is insufficient evidence to justify interpreting § 1964(c) against its plain language, and therefore courts should recognize standing in civil RICO suits for any property harm.

I. A BRIEF OVERVIEW OF CIVIL RICO

RICO defines various acts, including murder, kidnapping, wire fraud, and mail fraud, as "racketeering activities."[9] The statute also states that two or more racketeering activities occurring within ten years of each other constitute a "pattern of racketeering activity."[10] RICO prohibits individuals who have engaged in a pattern of racketeering activity from participating in certain conduct related to an "enterprise engaged in . . . interstate or foreign commerce."[11] Specifically, RICO makes it unlawful to invest money derived from a pattern of racketeering activity in such an enterprise,[12] to use such money to acquire an enterprise,[13] to conduct an enterprise's affairs through a pattern of racketeering activity,[14] or to conspire to do any of these forbidden activities.[15] Finally, § 1964 permits civil actions for damages that result from any of these violations. Section 1964(c) allows an individual to bring suit for treble damages against RICO violators when he has been injured "in his business or property by reason of a violation of [RICO]."[16]

Section 1964(c) does not merely permit plaintiffs to seek treble damages—it makes an award of treble damages to a successful civil RICO litigant compulsory.[17] The treble damages provision, combined

9 18 USC § 1961(1).
10 Id § 1961(5).
11 Id § 1962.
12 Id § 1962(a).
13 Id § 1962(b).
14 Id § 1962(c).
15 Id § 1962(d).
16 Id § 1964(c).
17 See *Gentry v Resolution Trust Corp*, 937 F2d 899, 906 (3d Cir 1991).

with a broad definition of "racketeering activities," has made civil RICO an extremely attractive tool for prospective plaintiffs. Since it was enacted, numerous litigants have filed RICO suits for damages that, while consistent with the definition of racketeering activities, are wholly unrelated to the actions of organized crime, the original target of RICO.[18] The result has been termed a "civil RICO explosion."[19]

The present circuit split represents only the most recent skirmish in a long-contested and often-heated debate over the boundaries of civil RICO standing. Despite widespread judicial animosity to the pervasive use of civil RICO,[20] the Supreme Court has rebuffed past attempts to restrict standing for civil RICO claims, noting that the wide application of the statute is "inherent in the statute as written, and its correction must lie with Congress."[21] Because Congress has not deigned to change the requirements for civil RICO standing—despite prominent calls to do so[22]—plaintiffs continue to file standard fraud claims as lucrative federal suits for treble damages.[23]

II. THE CURRENT CIRCUIT SPLIT REGARDING § 1964(C) STANDING

The Ninth Circuit recently interpreted § 1964(c)'s "business or property" clause to confer standing on individuals who have suffered a property harm derived from an underlying personal injury. This decision conflicts with previous opinions by the Eleventh and Seventh circuits, which have more narrowly interpreted § 1964(c)'s standing requirement.

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18 See, for example, Elizabeth Anne Fuerstman, *Trying (Quasi) Criminal Cases in Civil Courts: The Need for Constitutional Safeguards in Civil RICO Litigation*, 24 Colum J L & Soc Probs 169, 170 (1991) (noting the existence of novel civil RICO claims filed against defendants unassociated with organized crime, such as investment banks, former spouses, and restaurants).

19 See Douglas E. Abrams, *The Law of Civil RICO* §§ 1.1–1.2 (Little, Brown 1991 & Supp 2001) (describing the growth of civil RICO claims and the judicial response thereto).

20 See, for example, *Sedima, SPRL v Imrex Co, Inc*, 741 F2d 482, 487 (2d Cir 1984), revd 473 US 479 (1985) (stating that the exploitation of private civil RICO is "extraordinary, if not outrageous"). See also *In re The Dow Co "Sarabond" Products Liability Litigation*, 666 F Supp 1466, 1470–71 (D Colo 1987) (decrying civil RICO as "a recurring nightmare" and "a rather sloppily thought out kind of way to get the Mafia that everybody jumps on so they can have more fun with fraud").

21 See *Sedima*, 473 US at 499 (reversing a Second Circuit decision limiting standing under § 1964(c) to only those plaintiffs who had suffered a RICO-type injury).

22 See, for example, *Rehnquist: Cut Jurisdiction*, 75 ABA J 22 (April 1989) (noting Chief Justice Rehnquist's call for congressional action to limit RICO jurisdiction).

23 But see Abrams, *The Law of Civil RICO* §1.2 at 10–11 (cited in note 19) (noting that "some evidence suggests that growing numbers of civil RICO claims are resolved against claimants at the pleading stage").

A. The Eleventh Circuit: The "Most Properly Understood as Part Of" Test

In 1988, the Eleventh Circuit established its test for determining standing under § 1964(c) for derivative property harm. In *Grogan v Platt*,[24] the estates of two deceased FBI agents and six surviving agents brought RICO claims against criminal conspirators for damages, including lost wages, resulting from the agents' injuries or deaths.[25] The district court dismissed the RICO claims, stating that physical injury and death did not meet § 1964(c)'s limitation on injury to business or property.[26] The Eleventh Circuit affirmed, holding that a plaintiff could not recover under § 1964(c) those losses "that are most properly understood as part of a personal injury claim."[27] Although the plaintiffs had suffered a property loss, because the loss derived from the infliction of a personal injury, the property loss was rendered unrecoverable under civil RICO.

In reaching its conclusion, the court acknowledged the potential difficulty in determining civil RICO standing for personal injury claims that include elements of both personal loss and of property harm.[28] Nonetheless, the Eleventh Circuit refused to separate the personal and property harms derived from a personal injury.[29] The circuit court reasoned that both Congress[30] and the Supreme Court[31] understood § 1964(c)'s "business or property" language to impose *some* limits on damages recoverable by a private plaintiff under civil RICO. The court reasoned that this limiting intent was inconsistent with a damage-splitting approach that would, in effect, create RICO-actionable claims out of many (or perhaps most) quintessentially personal injuries.[32] The

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24 835 F2d 844 (11th Cir 1988).

25 Id at 845.

26 See id ("To this date no court has found that physical injury or death is included in the term 'business or property.'").

27 Id at 848.

28 Id at 846 (noting that claims for wrongful death served to compensate not just pain and suffering, but also surviving family members for the economic harm resulting from the lack of support and lost wages).

29 Id at 847 ("[T]he pecuniary and non-pecuniary aspects of personal injury claims are not so separated as the appellants would have us accept; [they] are often to be found, intertwined, in the same claim for relief.").

30 Id at 846 (noting that Congress could have enacted different language had it "intended for the victims of [RICO] to recover for all types of injuries suffered").

31 Id, citing *Sedima, SPRL v Imrex Co*, 473 US 479, 497 (1985) (noting that the Supreme Court, while reversing attempts to restrict the reach of RICO, still held that only "*recoverable* damages," and not *all* damages, were permitted under a § 1964(c) claim) (emphasis added).

32 *Grogan*, 835 F2d at 847, quoting *Morrison v Syntex Laboratories*, 101 FRD 743, 744 (DDC 1984) ("[H]ad Congress intended to create a federal treble damages remedy for [personal injuries], *all of which will cause some financial loss*, it could have enacted a statute referring to injury generally, without any restrictive language.").

court was reassured in its conclusion by the fact that the Clayton Act—on which Congress modeled the language of § 1964(c)—also does not allow recovery for injuries that are personal in nature.[33]

B. The Seventh Circuit Weighs In: *Doe v Roe*

Four years after the Eleventh Circuit's decision in *Grogan*, the Seventh Circuit in *Doe v Roe*,[34] confronted the same issue of standing under § 1964(c) for property damage derived from a personal injury. Doe claimed that Roe, her divorce lawyer, had physically and emotionally threatened her, and that he had convinced her to pay his attorney's fees in sexual favors.[35] Doe filed suit against Roe under § 1964(c), claiming she had suffered various property harms. Doe argued that (1) Roe's actions resulted in sundry economic losses, including lost earnings, the cost of a security system, and the cost of a new lawyer, and (2) Roe defrauded her of property—specifically her property right in sexual labor.[36]

The court was unreceptive to Doe's argument that the various pecuniary losses caused by a personal injury—in this case, emotional distress—constituted property loss actionable under § 1964(c). After finding that these pecuniary losses were "plainly derivative[]" of Doe's personal injuries,[37] the court refused to separate the resultant property harms from the underlying personal injuries, a task it derided as "metaphysical speculation."[38] The court refrained from undertaking its own in-depth analysis of the civil RICO standing provision, choosing instead to rely on the Eleventh Circuit's proposition that § 1964(c) did not recognize standing for such harms.[39] Adopting the *Grogan* standard, the court denied compensation for losses that "[were] more properly understood as part of a personal injury claim."[40]

Although the Seventh Circuit was more responsive to Doe's claim that she was defrauded of her property interest in sexual labor,

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33 See *Grogan*, 835 F2d at 847–48 & n 7, citing *Reiter v Sonotone Corp*, 442 US 330, 339 (1979) (noting that the Clayton Act's standing provision, on which § 1964(c) was based, excludes personal injuries). The court's reliance on *Reiter* is discussed in depth in Part IV.C.

34 958 F2d 763 (7th Cir 1992).

35 Id at 765–67.

36 Id at 768. Doe also claimed that Roe breached his fiduciary duty and withheld confidential and proprietary information owed to her under their attorney-client relationship. The court found that Roe had not withheld any information owed to Doe, and that any information he may have withheld did not result in harm, either economic or proprietary.

37 Id at 770.

38 Id (noting that "such . . . a task [is] best left to philosophers, not the federal judiciary").

39 See id at 767, 770 ("The terms 'business or property' are, of course, words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom."), citing *Rylewicz v Beaton Services*, 888 F2d 1175, 1180 (7th Cir 1989) and *Grogan*, 835 F2d at 847.

40 *Doe*, 958 F2d at 770, citing *Grogan*, 835 F2d at 847.

this claim also failed. The court construed this as a claim for injury to property that did not derive from a personal injury.[41] Were the property interest legitimate, this claim would have given rise to standing under § 1964(c). However, the court concluded that sexual labor was not a valid property interest under applicable Illinois law and dismissed the claim.[42]

C. The Ninth Circuit: A Willingness to Separate Personal and Property Harms

In *Diaz v Gates*,[43] the Ninth Circuit diverged from the previous analyses of the Eleventh and Ninth circuits. Diaz had brought a RICO claim against the city of Los Angeles and its police department, seeking damages for lost employment and lost wages incurred when he "was rendered unable to pursue gainful employment . . . while unjustly incarcerated."[44] The district court dismissed his claim for failure to state a property interest, noting that "all of the injuries alleged by Plaintiff flow directly from his false arrest and imprisonment[, which] constitute injury to the person, not to business or property."[45] Relying on the rationales of *Grogan* and *Doe*, the district court stated that Diaz's "secondary financial losses flowing from his personal injuries [do] not transform his losses into business or property."[46]

On appeal, the Ninth Circuit reversed. It found that Diaz had pled an injury to a valid property interest, generally understood as a right to employment.[47] The court allowed this claim to proceed even

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41 Unlike her other economic losses, which derived from an underlying personal injury of emotional distress, Doe's deprivation of sexual services had no underlying cause other than Roe's "fraudulent inducement of their sexual activity" and "demands for payment in sexual favors rather than in money." See *Doe*, 958 F2d at 768.

42 Id, citing *Hewitt v Hewitt*, 77 Ill 2d 49, 394 NE2d 1204 (1979) ("'[S]exual labor' has no legal value in Illinois."). Although the court noted that the definition of property was generally a question of state law, see *Doe*, 958 F2d at 768, citing *Logan v Zimmerman Brush Co*, 455 US 422, 430 (1982), the Seventh Circuit stated that congressional intention could trump a state law interpretation of property for § 1964(c) purposes. See *Doe*, 958 F2d at 768 ("[W]e are not required to adopt a state interpretation of 'business or property' if it would contravene Congress' intent in enacting RICO."), citing *Reconstruction Finance Corp v Beaver County*, 328 US 204, 209–10 (1946). The Fifth Circuit, however, has taken the opposite stance. See *Leach v FDIC*, 860 F2d 1266, 1274 n 14 (5th Cir 1988) (stating that, despite a lack of uniformity, property should be defined at the state, not federal, level), citing *Reconstruction Finance Corp*, 328 US 204.

43 420 F3d 897 (9th Cir 2005).

44 Id at 898.

45 Order Granting Defendant's Motion to Dismiss, *Diaz v Gates*, No 01-06400, *5 (CD Cal Aug 8, 2002) (internal citations omitted).

46 Id at *6–7.

47 *Diaz*, 420 F3d at 899, citing *Mendoza v Zirkle Fruit Co*, 301 F3d 1163, 1168 n 4 (9th Cir 2002) (finding that a property right existed in the "entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes").

though the property loss derived from false imprisonment, a personal injury.[48] In ruling, the *Diaz* majority criticized the approach of the Eleventh Circuit in *Grogan*.[49] In the Ninth Circuit's view, it was necessary to separate Diaz's personal injury of false imprisonment from the resulting "property injury of interference with current or prospective contractual relations."[50] The court found that Diaz had pled all the requirements of a viable civil RICO claim—a property injury, the existence of an enterprise, and the conduct of a series of acts meeting the definition of a pattern of racketeering activity.[51] After noting that the "broad" civil RICO statute had no further "additional, amorphous [standing] requirements,"[52] the court let Diaz's claim for harm to property move forward while dismissing his claim for personal harm. In the court's opinion, treating these two claims separately was "both analytically cleaner and truer" to the broad language of civil RICO than applying the Eleventh Circuit's "most properly understood as part of" test.[53]

D. Are These Opinions Reconcilable?

Despite facially dissimilar results, the Ninth Circuit believed that its opinion in *Diaz* was consistent with *Doe*[54] and possibly reconcilable with *Grogan*.[55] As the Ninth Circuit noted, the *Grogan* opinion did not explicitly address whether the plaintiffs' claims were dismissed because they failed to plead a valid property interest or because the property harm was derivative of a personal injury.[56] The text of the *Grogan* opinion, however, holds clues about the Eleventh Circuit's thinking. In discussing the dual nature of wrongful death suits, the court noted that one treatise contained "cases describing wrongful death action as one for *injury to property*."[57] The court also cited the Restatement of Torts (Second) for the proposition that a party injured in tort may seek damages for both personal harms *and* property

48 See, for example, Restatement (Second) of Torts § 35 (1965).

49 As discussed below, the court first entertained the possibility that the *Grogan* plaintiffs had simply failed to plead an injury to property as recognized under state law. See *Diaz*, 420 F3d at 902.

50 Id.

51 Id.

52 Id at 901.

53 Id at 902. The Ninth Circuit did not mention (or else failed to realize) that the "most properly understood as part of" test had also been employed by the Seventh Circuit in *Doe*.

54 See id at 900 ("We agree with the Seventh Circuit. Without a harm to a specific business or property interest . . . there is no injury to business or property within the meaning of RICO.").

55 See id at 902 n 2 ("It is entirely possible that the plaintiffs in *Grogan*, unlike Diaz, failed to allege a right to employment that was recognized as property under state law. . . . If so, *Grogan* is consistent with our approach.").

56 Id ("[T]he Eleventh Circuit does not tell us how the claim for lost employment opportunities was raised in *Grogan*.").

57 *Grogan*, 835 F2d at 846, citing 22 Am Jur 2d §§ 12, 17 (1965) (emphasis added).

losses.[58] From its reliance on these cited texts, it is evident the Eleventh Circuit was aware that personal injuries often give rise to property injuries. Nonetheless, the court concluded that property claims in general were excludable under civil RICO if they derived from a personal injury. The Eleventh Circuit's unwillingness to separate property and personal harms marks a clear rift between *Grogan* and *Diaz*.[59]

And what of the Seventh Circuit? The *Diaz* court believed it had distinguished its opinion from *Doe*, stating that Diaz had claimed a valid property interest while Doe had not.[60] But as the Seventh Circuit has acknowledged, its jurisprudence conflicts with *Diaz*.[61] Although the *Doe* court was willing to allow a nonderivative property claim to proceed under § 1964(c) (had sexual labor only been a valid property right), the court adopted the Eleventh Circuit's position denying standing for derivative property injuries. Despite the Ninth Circuit's claims to the contrary, the courts are clearly divided on this issue. The remainder of this Comment proposes a solution to this circuit split, arguing that any property harm, even when derived from a personal injury, supports standing under § 1964(c).

III. THE PLAIN LANGUAGE OF CIVIL RICO

As the Supreme Court has stated, statutory interpretation should begin with an examination of the statute's language.[62] The relevant portion of § 1964(c) reads that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit."[63] Notably, there are no restrictions placed on the words "injured in his

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58 *Grogan*, 835 F2d at 846, citing Restatement (Second) of Torts § 924.

59 In a recent decision, *Williams v Mohawk Industries, Inc*, 411 F3d 1252 (11th Cir 2005), the Eleventh Circuit cited approvingly to the Ninth Circuit's decision in *Mendoza*, on which *Diaz* relied. See *Williams*, 411 F3d at 1260, citing *Mendoza*, 301 F3d at 1168 n 4. Despite this reliance on Ninth Circuit precedent, the *Williams* decision has not brought the two circuits any closer together on the issue of derivative property loss. *Williams* read *Mendoza* to say that the right to lost wages was a *business*, not property, interest, thereby avoiding the question of derivative property loss. See *Williams*, 411 F3d at 1260. *William*'s interpretation differs from the construction given the same footnote by *Diaz*, which held that *Mendoza* created a *property* right in lost wages. See *Diaz*, 420 F3d at 899.

60 *Diaz*, 420 F3d at 900 ("Doe . . . failed to allege harm to any property interest valid under state law. Diaz, on the other hand, has alleged [ ] the property interest.").

61 See *Evans v City of Chicago*, 434 F3d 916, 928, 930 n 26 (7th Cir 2006) (reaffirming *Doe* and stating that "our decision today is at odds with that of the United States Court of Appeals for the Ninth Circuit in *Diaz v. Gates*").

62 See *Reiter v Sonotone Corp*, 442 US 330, 337 (1979) ("As is true in every case involving the construction of a statute, our starting point must be the language employed by Congress.").

63 18 USC § 1964(c).

. . . property." The statute does not limit standing to those "*directly* injured in his property," or "injured *only* in his property," readings effectively given to the statute by *Grogan* and *Diaz*. To the contrary, the language reads that "any" injured party has standing to sue. Giving the words of § 1964(c) a plain reading, the meaning of this section would seem to be that *anyone* who suffers a property injury because of a RICO violation has standing to sue for damages.[64]

While § 1964(c)'s text was given little attention by the courts in *Doe* and *Diaz*,[65] the Eleventh Circuit in *Grogan* did undertake its own textual analysis. Despite the apparent plain meaning of the text of § 1964(c), the *Grogan* court came to a conclusion opposite that presented above, ruling that "the ordinary meaning of the phrase 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom."[66] Notably, the Eleventh Circuit did not examine the plain text language of § 1964(c) on its own. Instead, the court compared the text to an alternative statutory construction of the court's own formulation. The court reasoned that had Congress intended for derivative property losses to be recoverable under civil RICO it "could have enacted a statute referring to injury generally, without any restrictive language."[67]

As a general rule, "[if a] statute's language is plain, the sole function of the courts is to enforce it according to its terms."[68] However, this duty to enforce a statute only according to its terms may yield if

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64 An alternative interpretation of the text exists. Note that § 1964(c) reads that "[a]ny person *injured* in his business or property . . . shall recover threefold the *damages* he sustains" (emphasis added). It is possible that the term "injury," used in contrast to the term "damages," might refer to the *act* of hurting a person or their interest. See, for example, *Black's Law Dictionary* 801 (West 8th ed 2004) ("Some authorities distinguish *harm* from *injury*, holding that while *harm* denotes any personal loss or detriment, *injury* involves an actionable invasion of a legally protected interest."). Were civil RICO read accordingly, the phrase "injured in his business or property" would in fact grant standing only when an invasive act was committed against a business or property. This argument is logical and consistent; nonetheless, courts are generally reticent to construe statutes according to highly technical interpretations of commonly used words. See generally, for example, *Nix v Hedden*, 149 US 304 (1893) (holding that a tariff on "vegetables in their natural state" applied to tomatoes, which are technically fruits but commonly understood as vegetables).

65 *Doe* did not conduct its own investigation of the language of the statute, instead relying on *Grogan*'s analysis. See *Doe*, 958 F2d at 770 (basing its reasoning on *Grogan* and *Rylewicz v Beaton Services*, 698 F Supp 1391, 1396 (ND Ill 1988), which also relied on *Grogan*). *Diaz* did not offer a plain language interpretation of its own, noting only that the separation of injuries was "cleaner and truer to the language of the statute." *Diaz*, 420 F3d at 902.

66 *Grogan*, 835 F2d at 847.

67 Id, quoting *Morrison v Syntex Laboratories*, 101 FRD 743, 744 (DDC 1984).

68 *United States v Ron Pair Enterprises, Inc*, 489 US 235, 241 (1989) (internal quotation marks omitted).

there is "clear evidence" of a contrary legislative intent.[69] *Grogan* reasoned that the availability of alternative language provided sufficient evidence to overcome the plain language of the text. However, the logic behind this reasoning is tenuous. Certainly Congress *could* have enacted § 1964(c) without any restrictive language, in which case it would have been evident that derivative property injury would be recoverable under civil RICO. However, absent evidence that Congress intentionally avoided such an alternate construction—clear evidence of a contrary legislative intent—the possibility of alternative language should not alter the interpretation given the plain text of § 1964(c) that exists. The *Grogan*, *Doe*, and *Diaz* courts did not review the legislative record. Therefore, the question remains whether there is sufficient "clear evidence," from either legislative history or statutory purpose, that Congress intended § 1964(c) to be construed against its plain text.

IV. AN EXAMINATION OF THE PURPOSE AND HISTORY OF CIVIL RICO

Despite continuing debates over the propriety of using legislative history in statutory interpretation,[70] RICO's liberal construction clause, which states that RICO "shall be liberally construed to effectuate its remedial purposes,"[71] makes § 1964(c) a prime—if not mandatory—candidate for looking beyond the strict confines of the plain text to an examination of legislative purpose. Of course RICO's construction clause is not a blanket invitation for courts to reject the plain language of the statute in favor of alternative interpretations.[72] The liberal construction clause dictates that to resolve ambiguities in RICO, such as the conflicting plain language interpretations set forth above, a court must attempt to discern the purpose of the statute and rule in accordance. As one of RICO's drafters has stated, when "the language [of RICO] is ambiguous, that construction which would 'effectuate its remedial purposes' . . . ought to be adopted. Strict con-

69 See *Bread Political Action Committee v FEC*, 455 US 577, 581 (1982) ("[T]he plain language of [a statute] controls its construction, at least in the absence of 'clear evidence' of a 'clearly expressed legislative intention to the contrary.'") (internal citations omitted).

70 See, for example, *Koons Buick Pontiac GMC, Inc v Nigh*, 543 US 50, 65 (2004) (Stevens concurring):

> In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product.

71 Pub L No 91-452, § 904(a), 84 Stat 922, 947 (1970).

72 See *Sedima, SPRL v Imrex Co, Inc*, 473 US 479, 492 n 10 (1985) (stating that the liberal construction clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one").

struction, therefore, should not play any part in the interpretation of RICO."[73] The remainder of this Comment investigates various sources of legislative interpretation in an attempt to determine the purpose of § 1964(c)'s "business or property" clause, ultimately concluding that there is not clear evidence of legislative purpose sufficient to override the plain language interpretation offered in Part III.

A. The General Stated Purpose of RICO

RICO was enacted for the stated purpose of eradicating racketeering and organized crime.[74] However, the purpose behind § 1964(c)'s standing restriction must be more nuanced than simply the broad eradication of racketeers. Had Congress wanted to best effectuate such a broad anticrime goal, it could have granted standing under §1964(c) to anyone injured by racketeering activity, regardless of whether their injury was proprietary or personal. Yet it is uncontested that § 1964(c) does not permit suits for solely personal injuries. This discrepancy is evidence that § 1964(c) has a different or more nuanced purpose than that of the statute as a whole. In an attempt to ascertain what this purpose may be, this Comment looks next to the legislative history of the statute.

B. The Legislative History of § 1964(c)

Upon review, the legislative record reveals little in the way of "clear evidence" of the statutory purpose of § 1964(c). Instead, it becomes readily apparent that neither chamber of Congress paid significant attention to the language in question.

1. The Senate never deliberated on the language of § 1964(c).

Even though RICO originated in the Senate chamber, the Senate never formally considered the language of § 1964(c)'s standing restriction. RICO originated in 1969 as S 1861[75] and was eventually incorporated into a larger bill, S 30, the Organized Crime Control Act,[76] as a separate title. In creating a penalties section for racketeering injuries, the drafters of S 1861, at the suggestion of the American Bar Associa-

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73 G. Robert Blakely, *The RICO Civil Fraud Action in Context: Reflections on* Bennet v. Berg, 58 Notre Dame L Rev 237, 290 n 150 (1982).

74 Statement of Findings and Purpose, 84 Stat at 924 (cited in note 2) ("It is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.").

75 See S 1861, 91st Cong, 1st Sess (Apr 18, 1969), in 115 Cong Rec S 9512, 9568–71 (Apr 18, 1969).

76 See S 30, 91st Cong, 1st Sess (Jan 15, 1969), in 115 Cong Rec S 769, 829–32 (Jan 15, 1969).

tion, included select language from antitrust statutes—specifically from § 4 of the Clayton Act[77]—providing for criminal sanctions and equitable relief. However, the drafters of S 1861 excluded the Clayton Act's provision for private causes of action.[78] Therefore, when S 30 was approved by the Senate, it did not contain a provision for private remedies.[79] When S 30 returned from the House with the language of § 1964(c) inserted, the Senate did not seek to reconcile the bill in a conference committee, forgoing the opportunity to formally deliberate on the language of § 1964(c).[80] Instead, pressured by pending national elections and the looming end of the congressional session,[81] the Senate voted to adopt the bill passed by the House without changes.[82]

2. The House lacked any specific purpose in choosing the language of § 1964(c).

But what then of the House? Despite being the chamber responsible for § 1964(c) and its "injured in his business or injury" clause, it also paid little attention to the choice of language. When S 30 was reported to the House Judiciary Committee, it lacked the section that would eventually become § 1964(c).[83] At hearings before the Judiciary Committee, both Representative Steiger and the American Bar Association, respectively, recommended the creation of private causes of action "similar to the … remedy found in the antitrust laws,"[84] or "based upon the concept of Section 4 of the Clayton Act."[85] Notably, Representative Steiger presumed that this remedy would be available

77 15 USC § 15 (2000) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor … and shall recover threefold the damages by him sustained.").

78 A forerunner to S 1861 authorized treble damage suits to private individuals injured in their "business or property." See S 1623, 91st Cong, 1st Sess (Mar 20, 1969), in 115 Cong Rec S 6925, 6995–96 (Mar 20, 1969). However, according to the drafters of civil RICO, this provision was omitted from S 1861 in order to "streamline [the bill] and sidestep a variety of complex legal issues [and] political problems." G. Robert Blakely and Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temple L Q 1009, 1017 (1980).

79 See 91st Cong, 2d Sess, in 116 Cong Rec S 963–72 (Jan 23, 1970).

80 Senator McClellan, the Senate sponsor of S 30, recorded his approval for a private treble damage cause of action while the House considered the bill. See 91st Cong, 2d Sess, in 116 Cong Rec S 25190–91 (July 21, 1970) (approving the American Bar Association's recommendation of "civil damage suits based upon the concept of section 4 of the Clayton Antitrust Act").

81 See Abrams, *The Law of Civil RICO* at 32 (cited in note 19).

82 See 91st Cong, 2d Sess, in 116 Cong Rec S 36, 294–96 (Oct 12, 1970) (agreeing not to seek a reconciliation conference with the House because "some of the house amendments were good [ ] and constructive, and we have no objection to them").

83 House Hearings on S 30 and Related Proposals, Before Subcommittee No 5 of the House Committee on the Judiciary, 91st Cong, 2d Sess 57–58 (1970).

84 Id at 520 (Rep Steiger).

85 Id at 543–44.

to "businessm[e]n." He made no indication that he intended this provision to be available to individuals outside of the business world.[86] The version of S 30 approved by the committee contained the language of § 1964(c). However, the committee report on the bill fails to provide any enlightenment as to the intended interpretation of § 1964(c).[87]

During floor debates, there were no discussions or amendments relating to the "injured in his business or property" clause of civil RICO.[88] In the few statements made relating to the proposed civil remedies provision, the bill's House sponsor described this language as "an adaptation of the machinery used in the antitrust field to redress violations," and as "the antitrust remedy being adapted for use against organized criminality."[89] In the end, S 30 was approved by the House without any significant public discussion as to the language of § 1964(c).

As shown above, the legislative history of civil RICO from both chambers is largely silent regarding the purpose of § 1964(c). Representative Steiger's proposal for a civil remedy that would protect the rights of businessmen may provide some support for the notion that civil RICO was intended to cover only business and property claims, thereby excluding suits derived from a personal injury. However, considering the attenuated relationship between the statute and his proposal—there is no evidence that § 1964(c) was drafted to respond specifically to Representative Steiger's comment to the Judiciary Committee—a court should be hesitant to draw much significance from Representative Steiger's remark.

C. Clayton Act Jurisprudence

The legislative history seems to indicate that, if either chamber had any immediate purpose or intent in enacting § 1964(c), it was to borrow the system of private remedies in place under the antitrust laws. Accordingly, courts—including the Eleventh Circuit in *Grogan*—

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86 Id at 520 (Rep Steiger) ("Not every businessman, of course, will wish to take advantage of such a remedy, but those who have been wronged by organized crime should at least be given access to a legal remedy.").

87 See Organized Crime Control Act of 1970, HR Rep No 91-1549, 91st Cong, 2d Sess 58 (1970) (noting only that "[s]ubsection (c) provides for the recovery of treble damages by any person injured in his business or property by reason of the violation of section 1962").

88 The closest the House came to a discussion of the "business or property" clause occurred when a representative offered an amendment that would create a separate cause of action for frivolous RICO claims. This amendment contained a variant on the language of § 1964(c), allowing suits "for *injury to the defendant*, or to his business or property." See 91st Cong, 2d Sess, in 116 Cong Rec H 35342 (Oct 7, 1970) (Rep Mikva) (emphasis added). This amendment was defeated without prompting any discussion on the original language of § 1964(c). See id at 35343.

89 See id at 35295 (Oct 7, 1970) (Rep Poff).

have used Clayton Act precedent as a tool for interpreting § 1964(c). However, despite Congress's apparent purpose, Clayton Act jurisprudence is inapplicable to the present question of civil RICO standing.

Even upon a causal reading, the similarities between civil RICO and § 4 of the Clayton Act are obvious. Civil RICO states that "[a]ny person injured in his business or property by reason of a violation of [RICO] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit."[90] Similarly, the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of suit."[91] This similar language, combined with significant legislative history indicating Congress's purpose to appropriate preexisting antitrust remedies for RICO enforcement,[92] seems to mandate that courts interpret civil RICO standing consistently with private antitrust standing. Such an approach would comport with the Supreme Court's holding that Congressional incorporation of selected provisions of predecessor statutes indicates that, "but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the [original statute]."[93]

The *Grogan* court relied on Supreme Court antitrust precedent, *Reiter v Sonotone*,[94] to support the proposition that a derivative property harm is not sufficient to grant a plaintiff standing under § 1964(c). However, despite Congress's purpose to generally adopt antitrust remedies for civil RICO, any reliance on *Reiter* or other Clayton Act jurisprudence to resolve the current civil RICO standing question is misplaced. Not only does *Reiter* not address the question at hand, but differences between civil RICO and Clayton Act jurisprudence, as developed by the courts, make any such comparison inapplicable.

1. *Reiter* as construed by *Grogan* does not address the exact question at hand.

Grogan noted that in *Reiter* "[t]he Supreme Court [ ] indicated that personal injuries lie outside the scope of recovery permitted by

90 18 USC § 1964(c).

91 15 USC § 15.

92 See Part IV.B.

93 *Lorillard v Pons*, 434 US 575, 582 (1978) (applying the remedial procedures of a predecessor statute, the Fair Labor Standards Act, to the subsequently enacted Age Discrimination in Employment Act). See also *Smith v City of Jackson*, 544 US 228, 233 (2005) (looking to Title VII in interpreting the Age Discrimination in Employment Act).

94 442 US 330 (1979).

the Clayton Act."[95] According to *Grogan*, the Court's holding, although issued in an antitrust case, was applicable to RICO because the Court had "rel[ied] on principles of statutory construction [to] indicate[] that *personal injuries* lay outside the scope of injury to 'business or property.'"[96] Unfortunately for the present debate, this holding does not break any new ground. That § 4 of the Clayton Act precludes standing for personal injuries is generally accepted. Similarly, the fact that § 1964(c) of civil RICO generally precludes personal injuries is not controversial—such a rule was recognized even by the *Grogan* plaintiffs.[97] The pertinent question is whether civil RICO precludes standing for property harms derived from a personal injury.

2. Differences in civil RICO and antitrust jurisprudence make *Reiter* and other antitrust precedent inapplicable to the question as hand.

Reiter does appear at first consideration to offer some insight on the narrower question underlying the circuit split. *Reiter* cited positively (albeit in passing) to *Hamman v United States*[98] as a proper exclusion of personal damages under the language of the Clayton Act.[99] *Hamman* and *Grogan* have very similar fact patterns: in both cases, the estates of decedents claimed damages for loss of consortium (which were conceded to be potentially valid property rights[100]) under the applicable civil remedy statutes—§ 1964(c) of RICO and § 4 of the Clayton Act.[101] The district court in *Hamman* dismissed the plaintiffs' Clayton Act claims for lack of standing.[102] The Supreme Court's subsequent approval of *Hamman* could be read to entail approval of the *Grogan* court's dismissal in a parallel civil RICO context. However, differences in civil RICO and antitrust jurisprudence make *Hamman* inapplicable.

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95 *Grogan*, 835 F2d at 847, citing *Reiter*, 442 US at 339.

96 *Grogan*, 835 F2d at 847–48 n 7 (emphasis added).

97 Id at 846 ("[A]ppellants do not dispute that some aspects of damages normally recoverable for personal injuries . . . fall outside the rubric of 'business or property.'").

98 267 F Supp 420 (D Mont 1967).

99 *Reiter*, 442 US at 339 ("The phrase 'business or property' also retains restrictive significance. It would, for example, exclude personal injuries suffered. *E.g. Hamman v. United States*.")

100 *Grogan*, 835 F2d at 846 (conceding that the argument that loss of consortium is a property right "has some merit"); *Hamman*, 267 F Supp at 432 (conceding that "it may be true that the right of consortium is a 'property' right in Montana").

101 See *Hamman*, 267 F Supp at 430 (describing plaintiffs' Clayton Act loss of consortium claims for deaths caused by reason of violations of §§ 1 and 2 of the Sherman Act, 15 USC § 1 et seq). See also *Grogan*, 835 F2d at 845.

102 See *Hamman*, 267 F Supp at 432 ("The property right sought to be protected is not one encompassed by the antitrust laws. . . . Rather, any injuries were collateral to and not proximately caused by the alleged violation.").

For a private party to recover in a civil suit brought under § 4 of the Clayton Act, the plaintiff must prove the existence of an "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[103] A plaintiff is not granted standing under § 4 "merely by showing 'injury causally linked to an illegal presence in the market,'"[104] or by showing "that they are in a worse position than they would have been had [a defendant] not [violated antitrust laws]."[105] Instead, the injury must be "attributable to an anti-competitive aspect of the practice under scrutiny."[106] Under this rubric, courts have denied § 4 standing to plaintiffs, when, for example, their injury would have resulted from either anticompetitive or procompetitive business practices.[107]

The ruling in *Hamman* is an application of the antitrust injury requirement as understood at the time of its decision.[108] According to *Hamman*, the alleged injuries—the deaths of construction workers and the resulting losses of consortium—were not the sort of harm that the antitrust law was intended to remedy.[109] The *Hamman* court cited existing precedent for the notion that a § 4 plaintiff must be injured by reason of "a breakdown of competitive conditions in a particular industry,"[110] and that a compensable injury must "result[] proximately from the acts of the defendant which constitute violation of the antitrust laws."[111] In other words, the plaintiffs failed to pass the antitrust injury requirement for § 4 standing.[112]

In contrast to antitrust precedent, the Supreme Court has rejected the notion that a viable civil RICO claim requires a racketeering-type injury. In *Sedima, SPRL v Imrex Co, Inc*,[113] the Court reversed a Second Circuit decision limiting civil RICO standing to those who

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103 *Brunswick Corp v Pueblo Bowl-O-Mat, Inc*, 429 US 477, 489 (1977).

104 *Atlantic Richfield Co v USA Petroleum Co*, 495 US 328, 334 (1990), quoting *Brunswick*, 429 US at 489.

105 *Brunswick*, 429 US at 486–87.

106 *Atlantic Richfield*, 495 US at 334.

107 See generally *Brunswick*, 429 US 477 (denying standing under § 4 for financial loss stemming from the allegedly anticompetitive acquisition of bowling centers when such loss would have resulted from *any* acquisition of the bowling centers, anticompetitive or not).

108 Note that *Hamman* predates both *Brunswick* and *Atlantic Ritchfield*.

109 *Hamman*, 267 F Supp at 432 ("[I]n no case has it been held that the antitrust laws were intended to protect a property right of this nature.").

110 Id at 431, quoting *Conference of Studio Unions v Loew's Inc*, 193 F2d 51, 55 (9th Cir 1951).

111 *Hamman*, 267 F Supp at 432, quoting *Tepler v Frick*, 112 F Supp 245, 245 (SDNY 1952).

112 Even more, it is difficult to imagine any personal injury that would constitute an anticompetitive business injury and meet the antitrust injury requirement of § 4, which may be the basis for the Court's broad admonition in *Reiter* against standing for personal injuries in antitrust civil actions. See *Reiter*, 442 US at 339 ("The phrase 'business or property' . . . would, for example, exclude personal injuries suffered.").

113 473 US 479 (1985).

had suffered a "racketeering injury," a harm "not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter."[114] According to the Court:

> If [a] defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.[115]

The *Sedima* holding marks an end to the usefulness of Clayton Act jurisprudence in determining the present RICO standing question. The *Hamman* claims were dismissed, not because their injury fell outside the scope of an injury "to business or property," but because the harm was not the sort the antitrust laws aimed to prevent. Because the antitrust injury requirement still exists in Clayton Act jurisprudence, *Hamman* is still good law, and was cited by the Supreme Court in *Reiter* as a proper example of the exclusion of personal injuries from a § 4 suit. However, *Sedima* has overruled the idea that such restrictions apply to civil RICO standing. Had the *Hamman* plaintiffs brought their claims under § 1964(c) for a violation of RICO, they would not have been dismissed for not being the sort of injury the statute was designed to eliminate. Because of these jurisprudential differences, and despite the *Grogan* court's statement to the contrary, Supreme Court precedent on civil antitrust standing cannot bind interpretations of § 1964(c), even in the presence of a general Congressional purpose to adopt antitrust remedies for civil RICO actions.

D. Examining the Purpose of § 1964(c) through a Comparison to the Economic Loss Rule of Torts

Although Clayton Act jurisprudence as developed by the courts is inapplicable in determining a resolution for the current civil RICO circuit split, the possibility remains that the RICO drafters originally intended for § 1964(c) to serve a purpose similar to that of § 4. If so, such a purpose may give clear evidence to guide the interpretation of § 1964(c). However, the purpose of § 4 is not readily apparent. As the Supreme Court noted:

> [T]he respective legislative histories of § 4 of the Clayton Act and § 7 of the Sherman Act, its predecessor, shed no light on Congress' original understanding of the terms "business or property."

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114 Id at 485, revg 741 F2d 482 (2d Cir 1984).

115 *Sedima*, 473 US at 495.

> Nowhere in the legislative record is specific reference made to the intended scope of those terms.[116]

In the absence of any clearly stated Congressional purpose, this Comment argues that the "business or property" standing restriction as originally implemented in civil antitrust legislation can be seen as a logical response to the economic loss rule, and that the boundaries of antitrust standing may be interpreted accordingly. The question then becomes whether this same purpose can be ascribed to § 1964(c); this Comment concludes that it cannot.

1. An introduction to the economic loss rule.

The economic loss rule states that a plaintiff may not usually recover in tort for purely economic losses caused by a harm inflicted against a third party.[117] This doctrine is rooted in the common law of England.[118] As explained by the Supreme Court, the economic loss rule means that "as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong."[119] Contemporary case law has held that the term "economic loss" includes not only monetary loss, but interference with rights to property and the loss of employment.[120]

Historically there were several common law exceptions to the economic loss rule. For example, an employer could bring suit for damages when a servant or employee was negligently injured,[121] an exception that has generally waned over time.[122] Notably, however, some courts con-

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116 *Reiter*, 442 US at 342–43.

117 See Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U Chi L Rev 61, 73 (1982):

> Thus, if TP committed a battery on A or falsely imprisoned A, and B suffered economic loss as a result of the tort, B generally was unable to recover, at least under battery or false imprisonment doctrine. . . . As a policy matter, courts regarded B's loss as too indirect to permit recovery.

118 See generally *Cattle v Stockton Waterworks Co*, 10 QB 453 (1875) (holding that lost wages resulting from damage to an employer's mine that stopped work were not recoverable by employees).

119 *Robbins Dry Dock & Repair Co v Flint*, 275 US 303, 309 (1927).

120 See *Calcagno v Personalcare Health Management Inc*, 207 Ill App 3d 493, 565 NE 2d 1330, 1339 (1991) ("Economic losses encompass objectively verifiable monetary losses, including loss of use of property, costs of repair or replacement, loss of employment, and loss of business or employment opportunities.").

121 See, for example, *Hall v Hollander*, 107 Eng Rep 1206, 1207 (KB 1825) ("It is a principle of the common law that a master may maintain an action for a loss of service, sustained by the tortious act of another, whether the servant be a child or not.").

122 See *Myrurgia Perfumes, Inc v American Airlines, Inc*, 68 Misc 2d 712, 327 NY S2d 861, 862 (1971) (noting that the master-servant exception to the economic loss rule "is an absurdity in today's urban world").

tinue to allow for recovery by an employer when the harm to the employee is intentional.[123] Another exception to the economic loss rule continues to be enforced—an exception for "the fortuitous occurrence of physical harm or property damage, however slight."[124] In essence, the presence of any physical harm removes the injury from the realm of economic loss to that of a recoverable tort. As a general principle of tort law, once a plaintiff suffers some noneconomic harm, she may recover all damages caused by the defendant, economic or not, to the extent of proximate cause.[125]

2. The Clayton Act and the economic loss rule.

The antitrust laws were enacted with the general purpose of protecting consumers harmed by businesses' illegal anticompetitive behavior against other businesses.[126] Because of a default rule prohibiting recovery for purely economic loss, Congress would have needed to create a special cause of action in order for these individuals to recover for antitrust injuries. For example, imagine that a firm uses tortious anticompetitive measures (such as interference with a contract) to attain an unlawful monopoly; the firm then exercises its market power and raises prices.[127] Because of these proscribed actions, consumers suffer a monetary loss. This loss is wholly economic and unrecoverable without a special grant of standing. The consumer has no recourse against the monopolist in contract, since no agreement between the consumer and the monopolist exists. Despite the presence of tortious conduct towards other parties (the competing firms), the economic loss rule would deny the consumer recovery in tort.[128] Ac-

123 See William L. Prosser, *Handbook of the Law of Torts* § 125 at 938–43 (West 4th ed 1971).

124 *People Express Airlines, Inc v Consolidated Rail Corp*, 100 NJ 246, 495 A2d 107, 109 (1985).

125 Id ("It is well-accepted that a defendant who negligently injures a plaintiff or his property may be liable for all proximately caused harm, including economic losses.").

126 See *Allied General Contractors of California, Inc v California State Council of Carpenters*, 459 US 519, 530 (1983).

127 Unlawful monopolies are proscribed by § 2 of the Sherman Act, 15 USC § 2. This analysis would also apply to an unlawful restraint of trade amongst competitors, which is proscribed under § 1 of the Sherman Act, 15 USC § 1.

128 See, for example, *Alcorn v BP Products North America Inc*, 2004 US Dist LEXIS 15061, *9–10 (D Minn) (dismissing under a state economic loss rule the plaintiff's common law claim for tortious interference through price discrimination, but allowing a similar claim to proceed under state antitrust law and the Robinson-Patman Act, 15 USC § 13(a)). See also Mauro Bussani, Vernon Valentine Palmer, and Francesco Parisi, *Liability for Pure Financial Loss in Europe: An Economic Restatement*, 51 Am J Comp Law 113, 155–56 (2003) (explaining that the protection afforded "pure economic losses that derive from the infringement of antitrust law" "represent exceptions to the [economic loss] rule, and . . . should be correctly understood within such policy context").

cordingly, a statutory grant of standing—namely § 4 of the Clayton Act—was necessary to give a potential plaintiff a cause of action.[129]

The standing requirement of § 4, therefore, filled a gap in the common law that prevented injured consumers from bringing suit against antitrust violators. The question is whether § 4 should be understood to fill only the limits of this gap—providing federal standing only for harms that lack a personal injury component—or whether § 4 should be interpreted to extend further, granting federal standing for economic damages derived from a personal injury. The limits of § 4's standing provision may, in turn, provide insight on the proper construction of its successor § 1964(c).

The Supreme Court has stated that the intended scope of § 4 is unknown.[130] However, Court precedent regarding statutory interpretation mandates that § 4's "business or property" clause be construed as a narrow grant of standing, filling only the gap in standing created by the economic loss rule and leaving jurisdiction for mixed personal and property injuries to the states. To hold otherwise would be inconsistent with the Supreme Court's presumption against the expansion of federal court jurisdiction that "would siphon cases away from state courts,"[131] as well as precedent stating that judges should not infer grants of a federal cause of action when (among other considerations) that cause of action is one traditionally left to state law.[132] Therefore, it should be presumed that the purpose of § 4 was only to fill the gap in causes of action left open by the economic loss rule. To hold otherwise, and extend the scope of § 4 to allow for the recovery of claims also

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129 Of course, a competing firm directly injured by a tortious antitrust violation also has standing under § 4 of the Clayton Act. However, protecting such firms was not the primary purpose of the antitrust laws as originally enacted. The Sherman Act was "primarily interested in creating an effective remedy for *consumers* who were forced to pay excessive prices." *Allied General Contractors*, 459 US at 530 (1983) (emphasis added); Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 66 (Free Press 1978) (noting that the Sherman Act was "presented and debated as a *consumer* welfare prescription") (emphasis added).

130 See note 115 and accompanying text.

131 See William N. Eskridge, Jr and Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 Harv L Rev 26, 102–03 (1994), citing *Kokkonen v Guardian Life Insurance Company of America*, 511 US 375, 377 (1994) and *Finley v United States*, 490 US 545, 552–54 (1989) (noting also the existence of a "[p]resumption against 'implying' causes of action into federal statutes"). See also *Sedima*, 473 US at 507 (Marshall dissenting) ("[W]e do not impute lightly a congressional intention to upset the federal-state balance in the provision of civil remedies.").

132 See, for example, *Merrell Dow Pharmaceuticals Inc v Thompson*, 478 US 804, 810–11 (1986) (noting that a traditional relegation of a cause of action to state courts is consistent with finding no implied grant of a federal cause of action).

recognized under state law would create the siphoning of claims that the Court has presumed against.[133]

3. Civil RICO and the economic loss rule.

It has been argued that civil RICO was similarly enacted for the purpose of filling a gap in remedies available to private plaintiffs.[134] Like antitrust law, civil RICO was intended to provide relief to consumers indirectly injured by illegal actions taking place in the market. Therefore, also like antitrust law, § 1964(c) serves (at least in part) to fill a gap in standing created by the economic loss rule. If interpreted in accordance with the Court's presumptions against expansive grants of federal jurisdiction discussed above, § 1964(c)'s standing grant should be narrowly construed to cover only that gap. Such a construction would be consistent with the interpretation of § 1964(c) offered by *Grogan* and *Doe*, which limited RICO standing to purely economic harms.[135] However, unlike antitrust law, evaluating RICO's civil standing requirement in light of the gap left by the economic loss rule does not make sense.

Unlike requisite antitrust harms, RICO's predicate acts include various harms that are common law exceptions to the economic loss rule, such as intentional harm (murder or kidnapping) to an employee. An employer who suffers a purely economic loss due to a pattern of intentional kidnapping or murder of an employee could recover not only in RICO, but also in state court on traditional tort claims. Therefore, since it was enacted, RICO jurisdiction has overlapped with state jurisdiction. There can be no doubt that RICO siphons cases away from the state judiciaries. Moreover, Congress clearly knew that it was creating federal causes of action for situations where plaintiffs could already maintain state law claims. Therefore, there is no way to argue that § 1964(c) was enacted only to fill a gap in standing caused by the economic loss rule.[136] Accordingly, courts are left without clear evi-

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133 Notably, construing this grant of standing to only economic injuries aligns with precedent limiting standing under § 4 to only individuals who have suffered an antitrust-type injury. See Part III.C.2.

134 See *Sedima*, 473 US at 514 (Marshall dissenting) ("To this end, Congress *sought to fill a gap* in the civil and criminal laws and to provide new remedies broader than those already available to private or government antitrust plaintiffs, *different from those available to government and private citizens under state and federal laws*.") (emphasis added).

135 See Part III.

136 Additionally, civil RICO claims are now frequently brought by the direct targets of racketeering harms, as was the case in *Grogan*, *Doe*, and *Diaz*. As direct targets of harm, these RICO plaintiffs would also fall outside the confines of the economic loss exclusion. While the same situation occurs under the Clayton Act, as discussed in note 129 above, there is an important difference: the Clayton Act was intended primarily to protect consumers, who are by nature

dence of purpose or intent behind Congress's restriction on civil RICO standing. Whatever purpose Congress had in enacting this restriction is uncertain, and not sufficiently discernable to overrule the plain language interpretation of § 1964(c), which would grant standing for any property injury caused by a RICO violation.

CONCLUSION

The Eleventh Circuit's decision in *Grogan* and the Seventh Circuit's in *Doe* effectively overruled the plain language interpretation of § 1964(c), even though they failed to provide "clear evidence" of legislative intent to justify doing so. Having examined the legislative history and purpose of § 1964(c), this Comment concludes that there is not sufficient clear evidence to justify interpreting § 1964(c) contrary to its plain text. Accordingly, courts should interpret the statute to grant standing for all property losses, including losses derived from personal injury.

The conclusion offered by this Comment is not a perfect solution. The principal concern is the same found in previous RICO debates—that if accepted, this interpretation would create a large influx of federal lawsuits brought under civil RICO and further exacerbate the "civil RICO explosion." Although such an outcome may be unfortunate, there is insufficient evidence in the legislative record to prove that Congress intended a different result. The Supreme Court has already stated that the problems of civil RICO are for Congress, and not the courts, to fix.[137]

the indirect targets of anticompetitive injury. See note 129. Alternatively, civil RICO was not created for consumer protection, but as a weapon to be wielded in the fight against crime. See Statement of Findings and Purpose, 84 Stat at 923 (cited in note 2).

137 See *Sedima*, 473 US at 499 (noting that potential standing problems are "inherent in the statute as written, and [their] correction must lie with Congress").