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Small Claim Mass Fraud Actions: A Proposal for Aggregate Litigation Under RICO

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NOTES

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INTRODUCTION

Assume that, tomorrow, a large company advertises a "miracle pill" that it claims will cure all forms of cancer. The company uses a sophisticated national marketing campaign to convey a strong health assurance message, which it tailors to specific audiences: women with

breast cancer, men with prostate cancer, older adults with intestinal cancer, and children with leukemia. In response to the national campaign, consumers across the country purchase the pill, which costs $10. Only then do consumers discover that the pill is worthless and that the company intentionally defrauded them.

The Racketeer Influenced and Corrupt Organizations ("RICO") statute provides a basis for prosecution of the hypothetical company. In essence, RICO prohibits securing control of an economic enterprise through a pattern of racketeering.[1] RICO defines "racketeering activity" to include mail and wire fraud;[2] thus, it would encompass the hypothetical miracle pill fraud perpetrated through a national advertising campaign. RICO's central statutory objective is to *deter* the unlawful racketeering conduct it proscribes, and to support this objective, the statute authorizes dual enforcement: in addition to providing for public prosecution under § 1964(a), the statute authorizes private lawsuits by the injured consumers under § 1964(c).

The decision in *U.S. v. Phillip Morris U.S.A., Inc.*,[3] however, has significantly weakened public prosecution under RICO of the hypothetical miracle pill company. In *Phillip Morris*, the United States Court of Appeals for the District of Columbia held that the government may not seek the disgorgement of a RICO defendant's illegitimate profits, including profits acquired by defrauding consumers.[4] Other federal courts have adopted rules similar to *Phillip Morris U.S.A.*[5] Without the disgorgement remedy, the government in a civil RICO case can request only limited equitable relief under § 1964(a).[6] Thus, private enforcement under § 1964(c)—which is not restricted to prospective relief—is the more effective vehicle to vindicate the statute's deterrence objective. Only under § 1964(c) will perpetrators of mass fraud, such as the company that marketed the

1. Randy M. Mastro et al., *Private Plaintiffs' Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions*, 24 U. MICH. J.L. REFORM 571, 575 (1991).

2. 18 U.S.C. §§ 1341, 1343 (2000 & Supp. II 2002); *id.* § 1961(1)(B) (2006).

3. 396 F.3d 1190 (D.C. Cir. 2005).

4. United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1202 (D.C. Cir. 2005). Disgorgement seeks to extract "all of a defendant's profits resulting from an unfair practice without regard to whether there is a particular victim to whom the unjust profits should be paid." Stan Karas, *The Role of Fluid Recovery in Consumer Protection Litigation:* Kraus v. Trinity Management Services, 90 CAL. L. REV. 959, 976 (2002).

5. *See, e.g.*, Meghrig v. KFC Western, Inc., 516 U.S. 479, 484 (1996) (stating that the word "restrain" in the injunctive provision of the Resources Conservation and Recovery Act prevents the court from authorizing disgorgement relief because it is not forward looking); United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995) (finding that disgorgement is only permissible if designed to restrain and prevent future conduct).

6. *Philip Morris USA, Inc.*, 396 F.3d at 1200.

miracle pill, face a real threat of litigation commensurate with their harmful behavior.

Economic considerations, however, currently cripple private enforcement of the type of fraud illustrated in the miracle pill hypothetical. The hypothetical presents "small claim mass fraud": mass fraud that results in injuries where "the claim of any individual class member for harm done is too small to provide any rational justification to the individual for incurring the costs of litigation."[7] For example, the miracle pill campaign harmed millions of consumers. But each claimant lost only $10. With a potential recovery of only $10, no individual has incentive to seek redress in the legal system. Even if a claimant purchased multiple pills over a given time period, litigating a case against a large company that has defrauded millions of consumers requires a substantial investment, one that completely eclipses a paltry individual recovery of $10. Accordingly, no rational consumer will seek to vindicate his individual claim against the miracle pill company.

However, where the uniformity of the defendant's conduct defines the contours of the lawsuit, and where an individual's stake in the case is too low to make private enforcement viable, claim aggregation by way of a class action under Federal Rule of Civil Procedure 23 ("Rule 23") offers an efficient mechanism to facilitate private enforcement. While an individual's $10 miracle pill claim is unmarketable, combining it with the claims of similarly defrauded miracle pill consumers can make a suit sufficiently attractive for entrepreneurial attorneys to justify the investment necessary to pursue the claims in court.

Despite the practical reality that these small claims will be pursued only in the aggregate, courts repeatedly have rejected class certification of small claim mass fraud actions brought under RICO.[8]

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7. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 923-24 (1998).

8. Sikes v. Teleline, Inc., 281 F.3d 1350, 1362, 1366 (11th Cir. 2002) (requiring each member of the proposed class in a RICO claim sounding in fraud to prove that they *individually relied* upon the misrepresentations, stating that "[t]hese claims will involve extensive individualized inquiries on the issues of injury and damages—so much so that a class action is not sustainable" (emphasis added)); Torres v. CareerCom Corp., No. 91-3587, 1992 WL 245923, at *4 (E.D. Pa. Sept. 18, 1992) ("The 'by reason of' language of § 1964(c) requires a showing of proximate cause regardless of the requirements for proof of the underlying predicate acts. Thus, to sustain a § 1964(c) claim, *proof of individual causation and reliance is required*. . . . While proof of individual questions of fact does not automatically doom a 23(b)(3) class certification, in this case the individual questions predominate over the common ones." (emphasis added) (internal citations omitted)); Rosenstein v. CPC Int'l, Inc., No. 90-4970, 1991 WL 1783, at *3 (E.D. Pa. Jan 8, 1991) ("Since § 1964(c) requires a showing of actual injury, plaintiffs must show that all recovering members of the class reasonably relied upon the alleged fraudulent acts.

These courts interpret RICO to require that each member of the proposed class present individualized proof of reliance in order to establish liability, an interpretation that means individualized questions will typically predominate over common issues, thereby defeating class certification.

This Note argues that effective enforcement of RICO is necessary to vindicate the statute's central deterrence objective. Given that public enforcement of small claim mass fraud under RICO is relatively ineffective because the government cannot seek disgorgement, private enforcement can serve as a valuable complement. But, for consumers to play *any* role in deterring mass fraud where the harm is far-reaching and the individual stake is low, claim aggregation by way of class actions must be available. This Note therefore proposes that victims of mass fraud whose individual claims are small, but whose shared claims are significant, should be allowed to proceed as a class under RICO, assuming that their claims are legitimate and that the class satisfies Rule 23's requirements. To overcome the barrier to class certification posed by the current judicial interpretation of RICO (that individualized proof of reliance is required to establish liability), this Note suggests re-conceptualizing the way RICO treats the harm resulting from mass consumer fraud. Courts interpreting RICO should conceptualize small claim mass fraud as a cohesive consumer-wide injury, rather than as the sum of individual injuries. Consistent with this view, courts should allow class plaintiffs to prove liability at the consumer-wide level, using aggregate proof. Permitting RICO plaintiffs to prove liability using aggregate proof achieves the statute's overarching deterrence objective. It removes the current barrier to class certification—the requirement of individualized proof—and thereby ensures that perpetrators of mass fraud face a risk of litigation that truly corresponds to the harm they caused.

Reliance must be proved on an *individual basis*, because, as both sides recognize, not all class members purchased Mazola in reliance of CPC's claim that Mazola consumption could lower their serum cholesterol level." (emphasis added)); Strain v. Nutri/System, Inc., No. 90-2772, 1990 WL 209325, at *5 (E.D. Pa. Dec. 12, 1990) ("Establishing the causal relationship between the alleged § 1962 violation and the 1964(c) injury requires proof of reliance. This individualized proof necessary to establish the 'reliance' from each member of the proposed class presents the stumbling block to class certification because individual questions would predominate for purposes of 23(b)(3)."). For a discussion of the class certification problem in a bankruptcy case, see *In re* Woldcom Inc., 343 B.R. 412, 424-25 (Bankr. S.D.N.Y. 2006), in which the court responds to the plaintiff's allegation "that the Debtors engaged in fraudulent or misleading advertising regarding distinct aspects of the Everyday Plan. As discussed, this requires the Court to make an *individualized determination* of reliance for each Class member" (emphasis added).

Part I of this Note summarizes the RICO statute. Part II discusses the problem: courts are denying class certification for small claim mass fraud actions based on the current judicial interpretation of RICO. Part III proposes a solution: a re-conceptualization of mass harm as consumer-wide harm, such that in a small claim mass fraud action, aggregate proof of RICO's constituent elements can establish liability and result in an enforceable damage award. This Part also explains that when courts allow plaintiffs to prove liability under RICO at the consumer-wide level, using aggregate proof, they effectuate the statute's primary objective: deterring fraudulent conduct. Part IV addresses likely due process objections to proposals incorporating aggregate liability.

I. BACKGROUND: THE RICO STATUTE

RICO has become one of the primary bases for pursuing small claim mass fraud actions because it provides a federal hook for complaints that otherwise would be brought as state law tort actions. Pursuing these claims under a federal statute like RICO is preferable because it eliminates the choice-of-law problems that plagued earlier state law-based class actions, such as those against the tobacco industry.[9] When evaluating whether to certify a multi-state class action, a court must consider how variations in state law affect the class. For example, with fraud claims, while some states require justifiable reliance on a misrepresentation,[10] other states require only reasonable reliance.[11] Substantial variations of this nature can magnify pre-existing class differences and override the common issues supporting certification.[12] In contrast, "[b]y its nature, RICO allows the bringing of a lawsuit that presents a full picture of a criminal enterprise."[13] RICO enables class certification of mass fraud that transcends state boundaries, without having to address the complication of divergent state laws.

9. Castano v. Am. Tobacco Co., 84 F.3d 734, 749-50 (5th Cir. 1996).

10. *See* Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 171 (5th Cir. 1996).

11. *See* Parks v. Morris Homes Corp., 141 S.E.2d 129, 132 (S.C. 1965).

12. *See* Georgine v. Amchem Prod., 83 F.3d 610, 618 (3d Cir. 1996), *aff'd*, Amchem Prod. v. Windsor, 521 U.S. 591 (1997) (decertifying the class because the legal and factual differences in the plaintiffs' claims, "when exponentially magnified by choice of law considerations, eclipse any common issues in this case").

13. *Oversight on Civil RICO Suits: Hearings Before the Comm. on the Judiciary*, 99th Cong. 411, 709-10 (1986) (statement of Daniel H. Bookin, Esq.).

Congress's announced objective in enacting RICO was to combat organized crime's expansion into legitimate business.[14] RICO makes up one title in a larger crime fighting statute, the Organized Crime Control Act of 1970.[15] RICO's enactment was motivated partially by the 1967 Report of the President's Commission on Law Enforcement and Administration of Justice, which revealed a movement within organized crime away from established revenue raising activities, such as gambling and prostitution, and toward legitimate business ventures.[16] This infiltration alarmed Congress because the Commission believed that

> "[c]riminal cartels can undermine free competition" through unfair tactics like price cutting financed by tax evasion and cash reserves from illegal business, labor corruption, and violent coercion of suppliers and customers. Moreover, acquisition of legitimate enterprises gives organized criminals the opportunity to engage in new types of ("white collar") crime, such as bankruptcy fraud.[17]

RICO provided prosecutors with considerably stronger criminal and civil penalties with which to combat organized crime's expansion into the sphere of legitimate business.[18] As the Supreme Court noted, "the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[19] The enhanced penalties reflected the need to improve past enforcement practices that had been ineffective in dismantling crime organizations.[20] In fact, Congress emphasized the statute's intentionally broad scope when it explicitly directed that RICO be construed liberally "to effectuate its remedial purpose."[21] RICO provides that under § 1964(a), the government can request that the courts "prevent and restrain" violations of the statute by issuing appropriate orders, which include, but are not limited to, the examples listed in the provision.[22]

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14. "[The purpose of the Act was] to seek the eradication of organized crime in the United States." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Congressional Statement of Findings and Purpose).

15. *Id.*

16. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 189-91 (1967) [hereinafter COMMISSION REPORT]; Iannelli v. United States, 420 U.S. 770, 787 n.19 (1975).

17. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 670 (1987) (quoting COMMISSION REPORT, *supra* note 16, at 190).

18. Robert K. Rasmussen, *Reforming RICO: Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 624 (1990).

19. Russello v. United States, 464 U.S. 16, 26 (1983).

20. Mastro et al., *supra* note 1, at 574-75.

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

22. 18 U.S.C. § 1964(a) (2000).

Furthermore, to supplement the redoubled public enforcement effort, Congress also included a "private attorneys general" provision encouraging private citizens to assist the government in achieving the statute's overall deterrence objective.[23] Under § 1964(c), "[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."[24] Modeled after a similar provision in the Antitrust Laws,[25] RICO's private attorneys general provision authorizes citizens to bring civil suits for injuries to business or property resulting from racketeering. Moreover, successful private plaintiffs are entitled to recover treble damages and reasonable attorney's fees.[26]

Put simply, § 1962 of RICO prohibits securing control of an economic enterprise through a pattern of racketeering.[27] While one of the statute's specific purposes was to deter racketeering within organized crime, RICO's application has extended far beyond this paradigm. The government has invoked the statute to pursue claims of fraud, product defect, and breach of contract involving *legitimate* businesses.[28] This extensive application is a product of the statute's broad language,[29] which reveals that while the fundamental prohibitions of RICO include the statute's overt goal of targeting

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23. *Id.* § 1964(c).

24. *Id.*

25. The Supreme Court has remarked on how civil RICO was patterned after the Clayton Act:

> The Clayton Act provides: "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 of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney's fee." 15 U. S. C. § 15(a). RICO's civil enforcement provision provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U. S. C. § 1964(c). Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages.

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150-51 (1987).

26. *Id.*

27. 18 U.S.C. § 1962(a).

28. Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 499 (1985) ("It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress."); Rasmussen, *supra* note 18.

29. Rasmussen, *supra* note 18.

organized crime, the statute sweeps far beyond that particular problem.[30]

For example, the RICO statute does not define its proposed target either as the monolithic Mafia paradigm or more generally as any criminal operation of a legitimate business.[31] Instead, RICO defines its target functionally.[32] RICO's target is anyone who performs the criminal acts proscribed under the statute. The list of what constitutes a "pattern of racketeering activity" is expansive.[33] As Professor Robert Rasmussen explained, "almost any connection between a pattern of racketeering activity and an enterprise engaged in interstate commerce constitutes a RICO violation . . . . While section 1961 purports to define 'pattern of racketeering activity,' in reality it only places modest constraints on the term's outer limits."[34] RICO identifies myriad racketeering activities that qualify as predicate offenses, including general proscriptions against the use of mail and wire to perpetrate fraud.[35] Yet despite its intentionally broad language, RICO has been read narrowly when applied to small claim mass fraud actions.

II. THE PROBLEM: UNDER THE CURRENT JUDICIAL INTERPRETATION OF RICO, PRIVATE LITIGANTS IN SMALL CLAIM MASS FRAUD ACTIONS ARE BEING DENIED CLASS CERTIFICATION

RICO has proven an ineffective vehicle for redressing small claim mass fraud because courts have denied consumer-plaintiffs class certification under the statute. Mass consumer fraud is the deception of a large number of people by means of consumer transactions. Significantly, the growth of mass production combined with mass marketing has increased substantially the scale of harm caused by

30. Lynch, *supra* note 17, at 680.

31. *Id.* at 683.

32. *Id.*

33. 18 U.S.C. § 1961(5) (2006).

34. Rasmussen, *supra* note 18, at 625.

35. *Id.* at 625-26. The inclusion of mail and wire fraud as predicate offenses is a major reason why RICO applies so broadly:

> [B]ecause RICO requires only two acts of mail or wire fraud to establish a violation, and because each mailing or wire use in furtherance of a fraudulent scheme, whether or not pursuant to the same scheme, constitutes a separate offense, a private right of action for treble damages is available for violation of section 1962 in virtually every case of commercial mail and wire fraud.

Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1104 (1982).

even a single, uniform deception, resulting in a considerable increase in mass consumer fraud.[36]

A. "Small Claim" Mass Fraud Actions Defined

This Note focuses specifically on small claim mass fraud actions. As previously stated, small claim mass fraud presents a recurring problem: individual plaintiffs lack sufficient economic incentives to pursue their small claims as individuals. Moreover, the substantial costs of litigating *complex* mass fraud claims further exacerbate this obstacle.[37] In an article written on group litigation, Professor Samuel Issacharoff expounds on the collective action barriers to private enforcement of consumer fraud.[38] As he aptly articulates, the problem afflicting small claim mass fraud is that "[e]ven if the odds of winning were one hundred percent—a highly unlikely occurrence—no individual would invest more than the potential claim to pursue the case."[39]

Schwab v. Philip Morris USA Inc., a recent case filed on behalf of a nationwide class of consumers who purchased "light" cigarettes, exemplifies this type of small claim action.[40] The plaintiff consumers in *Schwab* alleged that the major cigarette manufacturers fraudulently marketed "light" cigarettes by claiming that they were safer than regular cigarettes when the manufacturers knew that "light" cigarettes delivered the same amount of nicotine. In effect, the plaintiffs claim that the cigarette manufacturers conspired to deceive the public. The consumers brought their claims under RICO because, in reliance on this deceptive advertising, they bought "light" cigarettes at a price greater than they allegedly would have paid had they known the truth. They argued that they paid a premium for a safer, and therefore more valuable, cigarette but got one that was just as harmful as a regular-priced cigarette. Moreover, by focusing their claims on the cigarette's loss of economic value, the plaintiffs avoided the classic problem that has plagued past cigarette litigation: human diversity (that individuals start and stop smoking, choose between

36. Schwab v. Philip Morris U.S. Inc., 449 F. Supp. 2d 992, 1253 (2006) ("In today's 'complex modern economic system,' a single harmful act may have an adverse effect on large numbers of consumers." (citing Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965))).

37. *Id.* at 1240.

38. Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 142-46 (1999).

39. *Id.* at 145.

40. For the relevant facts of this case, see 449 F. Supp. 2d 992, 1018-20 (E.D.N.Y. 2006).

various cigarette brands, and fall ill for individualized reasons).[41] For example, the *Castano* court de-certified a class action against the American Tobacco Company based on human diversity problems:

> The *Castano* class suffers from many of the difficulties that the *Georgine* court found dispositive. The class members were exposed to nicotine through different products, for different amounts of time, and over different time periods. Each class member's knowledge about the effects of smoking differs, and each plaintiff began smoking for different reasons. Each of these factual differences impacts the application of legal rules such as causation, reliance, comparative fault, and other affirmative defenses.[42]

While the *Schwab* plaintiffs' focus on loss of economic value may have avoided these diversity issues, the case presents a different problem, one that plagues small claim mass fraud actions. If courts require consumers to litigate these types of claims as individuals, consumers will never proceed with a suit, as the costs of bringing their claims eclipse their potential individual recoveries.

As Judge Weinstein stated in *Schwab*:

> If each smoker must be considered separately [under RICO], as defendants suggest is the case, it would be impossible to proceed with a suit of this nature even if it were absolutely clear that each plaintiff had been damaged in the manner plaintiffs allege. The transactional costs and the relatively small recovery for the difference in value between what an individual smoker paid for and what he received would result in

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41. The plaintiffs argue that they can avoid the human diversity problem:

> first, by the equivalent of statistical averaging and, second, should the jury determine total damages to the class, division of the damages based on claims of smokers for the relative number of cigarettes they bought during the applicable liability period, with unclaimed proceeds to be distinguished on a cy pres basis.

Id. The importance of using statistical averaging as a method of overcoming issues of human diversity is that it concedes that all consumers have not relied and, as such, simply attempts to estimate how many did or did not. In this way, statistical averaging (aggregate proof) avoids individualized assessments, such as why an individual chose a particular brand, focusing instead on estimating how a class of consumers in the aggregate makes their decisions. *See* Miles v. Philip Morris Companies, No. 00 L 0112, 2001 WL 34366710, at *1 (Ill. Cir. Feb. 3, 2001) ("The Court does not believe that the issue of causation requires a determination as to why each class member smoked light cigarettes. The gist of Plaintiffs' claims is that these light cigarettes are by nature of their design not significantly lighter than regular cigarettes and that any person who purchased defendants' light cigarettes did not get what the defendants purported to sell; i.e., a 'light' cigarette actually containing significantly lower tar and nicotine than regular cigarettes. This determination may be made without individual proofs as to why each class member smoked light cigarettes."); Craft v. Philip Morris Co., No. 002-00406A, 2003 WL 23355745, at *8 (Mo. Cir. Dec. 31, 2003) ("As the Court sees it, however, whether the product is jewelry or a pack of light cigarettes, it simply doesn't matter what reason or motivation individual class members may have had for choosing to purchase the product. They purchased a product that was misrepresented and that, if Plaintiff's allegations here are to be believed, would have had greater economic value if the false representations had been true. That is consumer fraud if the allegations are true, and is compensable under the benefit-of-the-bargain rule.").

42. Castano v. Am. Tobacco Co., 84 F.3d 734, 743 n.15 (1996).

damages measured in tens or hundreds of dollars. The huge costs in bringing this action could not be supported by such individual adjudications.[43]

Thus, given the substantial investment required to litigate a complex fraud claim, if courts limit litigation of small claim mass fraud to individualized litigation, a rational plaintiff will never assert her claim.

B. Obstacles to Private Litigation of Small Claim Mass Fraud by Class Action

Claim aggregation by way of class action provides an efficient method by which private parties can seek to redress numerous small claim harms arising from uniform fraudulent conduct. While the legal system prefers that everyone litigate in the conventional sense—on his own behalf—Rule 23 authorizes the use of class actions in specific circumstances. The class action is "a procedural device developed in equity, in which the named plaintiffs act as representatives for themselves and for a class of similarly-situated others in pursuing a remedy."[44] Its historical objective was to adjudicate questions common to the class in a single proceeding, rather than requiring consecutive repetitive proceedings.[45]

To justify a deviation from conventional litigation and to proceed as a class under Rule 23, plaintiffs must meet certain threshold requirements specified in Rule 23(a): typicality, numerosity, commonality, and adequate representation.[46] In addition, Rule 23 requires that plaintiffs propose a class under one of three subsections of Rule 23(b).[47] This Note will focus specifically on opt-out class actions pursued under Rule 23(b)(3), which applies when the relief requested is exclusively or predominantly money damages. In order to certify an opt-out class under Rule 23(b)(3), the court must find both 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

43. *Schwab*, 449 F. Supp. 2d at 1022.

44. Debra Lyn Bassett, *Constructing Class Action Reality*, 2006 BYU L. REV. 1415, 1431-32 (2006); *see* Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948) ("The class action was an invention of equity, mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs." (citation omitted)).

45. Bassett, *supra* note 44, at 1432.

46. FED. R. CIV. PROC. 23(a).

47. *Id.* at 23(b).

adjudicating the controversy."[48] Thus, for a class to be certified under Rule 23(b)(3), plaintiffs must establish typicality, numerosity, commonality, adequate representation, predominance, and superiority.

Class actions are an indispensable mechanism for redressing claims where the individual stake is low and the uniformity of the defendant's conduct is high.[49] As the Supreme Court has articulated, class actions "permit the plaintiffs to pool claims which would be uneconomical to litigate individually. . . . [M]ost of the plaintiffs would have no realistic day in court if a class action were not available."[50] While each class member's share of recovery alone cannot support litigation, the collective shares of all the class members can cover the attorneys' and experts' fees, and transform a lawsuit into one that is marketable for the class attorney.

For individual claimants, the efficiencies of aggregation include the ability to redress harms that otherwise would be unmarketable, the sharing of resources and information with other similar claimants, and the reduction in legal costs because one lead counsel assumes responsibility for the case.[51] The Advisory Committee Notes accompanying the 1966 version of Rule 23 state that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class."[52] Claim aggregation thus provides a method to resolve a mass fraud in a single proceeding that exerts far less pressure on the judiciary than the alternative—scores of similar, individual adjudications.[53]

Despite the advantages of aggregating small claim mass fraud actions brought under RICO, courts generally have rejected such requests for class certification. Courts ground these rejections on their interpretation of RICO as requiring individualized proof of reliance

48. *Id.* at 23(b)(3) (emphasis added).

49. Issacharoff, *supra* note 38, at 149.

50. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (stating the importance of a class action where each individual plaintiff's claim was approximately only $100); *see also* Abelson v. Strong, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) P P93,365 (D. Mass. July 30, 1987) ("[O]ne purpose of the class action device is to permit the aggregation of claims where the size of those claims individually might otherwise be too small to merit bringing suit.").

51. Shapiro, *supra* note 7, at 928.

52. FED. R. CIV. P. 23 advisory committee's note on 1966 amendment.

53. *Id.* at 933.

from each member of the proposed class.[54] Courts reason that to sustain a RICO claim under § 1964(c), a plaintiff is required to demonstrate that she was injured "by reason of" a pattern of racketeering.[55] This proximate cause requirement ensures that defendants are not held liable for injuries unrelated to their specific RICO violations. However, courts have read RICO's "by reason of" constraint narrowly to mandate that each *individual* plaintiff demonstrate his or her particular reliance on the fraud, which resulted in injury.[56] Put simply, courts have read the proximate cause constraint to require individualized proof of reliance from each member of the proposed class in order to establish liability under RICO. This individualized burden forecloses treatment of mass fraud as a class action. Under such a reading, courts generally hold that Rule 23(b)(3)'s threshold requirements of superiority and predominance[57] cannot be met because individualized questions always will predominate over common issues.[58]

For example, assume that the consumers defrauded by the miracle pill company seek certification as a class to redress their harms. If the trial court requires proof that each member of the class individually relied on the miracle pill fraud in order to establish liability under RICO, these individualized inquiries likely will negate the efficiency of adjudicating the common factual issues (such as the uniform, national marketing campaign used to perpetrate the fraud) on a class-wide basis. In effect, courts deny certification in such situations because they recognize that in practice, where individual issues predominate, the class action inevitably will degenerate into a multitude of individual lawsuits.[59] Therefore, courts hold that the plaintiffs cannot meet the predominance requirement of Rule 23.[60] Moreover, the predominance of individual questions of reliance and

54. *See supra* note 8.

55. *See* 18 U.S.C. § 1964(c) (2000); *supra* note 8.

56. *See supra* note 8.

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

58. *See, e.g.*, Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 211 (5th Cir. 2003) (holding that "[RICO] actions that require proof of individual reliance cannot be certified as Fed. R. Civ. P. 23(b)(3) class actions because individual, rather than common, issues will predominate").

59. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.19 (5th Cir. 1996) ("The greater the number of individual issues, the less likely superiority can be established. . . . A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions . . . would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.' " (quoting FED. R. CIV. P. 23 advisory committee's note)).

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

injury also defeats the superiority requirement of Rule 23, as the class action device is not the superior method of adjudicating these claims, given the inefficiencies previously articulated.[61] As the Eleventh Circuit stated, "[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 (made relevant only through the inclusion of these new members) are important."[62]

In sum, the current judicial interpretation of RICO, which requires individualized proof of reliance, generally precludes class certification. It forces individualized adjudications that will never occur. Victims never will pursue their individual $10 claims. Thus, the paradoxical result of these courts' interpretation of RICO is the clear recognition of a private right of action under § 1964(c) and the denial of any practical remedy. While the class action mechanism is designed specifically to overcome the problem that pervades small claim mass fraud—"that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights,"[63]—courts are unwilling to permit its use. Thus, harmed consumers are left with no practical avenue by which to redress their wrongs.

C. Inadequacy of Public Prosecution Alone as a Deterrent

RICO authorizes both private and public enforcement.[64] Indeed, Congress intended private enforcement through civil action to *supplement* public enforcement of RICO violations.[65] However, the recent decision in *United States v. Philip Morris USA, Inc.*, which restricted the government to seeking limited equitable relief, has rendered public enforcement of small claim mass fraud an ineffective vehicle for deterring mass fraud against consumers.[66] In *Phillip Morris*, the Department of Justice, as plaintiff, requested that the court disgorge the corporate defendant of the illegitimate profits gained through fraud.[67] The Court of Appeals for the District of Columbia denied this request, holding that the government may not

61. *Id.*

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

63. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

64. 18 U.S.C. §§ 1963(a), 1964(c) (2000).

65. *See* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987) (noting that civil RICO was designed to "bring to bear the pressure of 'private attorneys' general on a serious national problem for which public prosecutorial resources are deemed inadequate").

66. 396 F.3d 1190, 1200-01 (D.C. Cir. 2005).

67. *Id.* at 1192.

recover disgorged profits in a RICO action because disgorgement (1) is not a forward-looking remedy and (2) does not serve to "prevent and restrain" future conduct as required under § 1964(a).[68] As mentioned previously, § 1964(a) authorizes the government to request court orders that are designed to prevent and restrain violations of conduct deemed unlawful under RICO.

In denying the disgorgement relief, the *Philip Morris* court reasoned that allowing the government's disgorgement request might lead to duplicative recoveries, as disgorgement would allow the government to seek similar damages to those available to private plaintiffs under § 1964(c):

> [T]he Government's view [is that] it can collect sums paralleling-perhaps exactly-the damages available to individual victims under § 1964(c). Not only would the resulting overlap allow the Government to escape a statute of limitations that would restrict private parties seeking essentially identical remedies, but it raises issues of duplicative recovery of exactly the sort that the Supreme Court said in *Holmes v. Securities Investor Protection Corp.*, constituted a basis for refusing to infer a cause of action not specified by the statute. Permitting disgorgement under § 1964(a) would therefore thwart Congress' intent in creating RICO's elaborate remedial scheme.[69]

In essence, the court denied the government's request for disgorgement relief in reliance on the effectiveness of private suits under § 1964(c) to recover the same sums from the defendants. The plain language of § 1964(c) does not limit private plaintiffs to prospective remedies designed to "prevent and restrain" future conduct. Instead, the remedial scheme available under a private right of action is manifestly broader.

Given the current obstacle to effective public enforcement, private enforcement must be available to facilitate redress of small claim mass fraud in support of RICO's deterrence objective. The economic barriers inhibiting private enforcement of these claims must be overcome. Because class actions can transform these otherwise unmarketable individual fraud claims into viable law suits (facilitating effective private enforcement and vindicating RICO's deterrence objective), the best solution is to allow victims of mass fraud whose individual claims are small, but whose shared claims are significant, to proceed as a class when their claims satisfy the requirements of Rule 23.

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68. *Id.*

69. *Id.* at 1201 (internal citations omitted).

III. THE SOLUTION: ALLOWING PRIVATE LITIGANTS TO PROVE RICO'S CONSTITUENT ELEMENTS USING AGGREGATE PROOF

In response to the rise in mass injury claims and courts' attempts to negotiate the certification decision, some commentators argued that Congress needed to reform Rule 23.[70] This Note, however, proposes an alternative solution, one that would not require a change to Rule 23, nor circumvent Rule 23's requirements for class certification. Any class seeking to aggregate its claims still would have to satisfy Rule 23's fundamental procedural hurdles of commonality, numerosity, typicality, adequate representation, predominance, and superiority.[71] However, courts should interpret RICO as conceptualizing *small claim* mass fraud as a cohesive consumer-wide injury, rather than a sum of individual injuries. Consistent with this interpretation, courts should allow consumer-plaintiffs to prove liability at the consumer-wide level, using aggregate proof where individualized proof of reliance and liability has been required.

This approach is preferable to one focused on reforming Rule 23. Confining the solution to a new interpretation of RICO applicable to specific claims avoids problems inherent in proposing broad changes to Rule 23's generally applicable concepts. Trans-substantive procedural changes can play out in undesirable and unexpected ways under different substantive regimes.[72] Moreover, federal courts have significant interpretive flexibility in construing open-ended, general statutes like RICO. In addition, this Note's proposed reading of RICO is limited to fraud claims pursued under the statute because fraud actions include a crucial impediment to over-deterrence: the requirement of a specific intent *mens rea*. Unlike with products liability and mass tort claims, civil RICO suits predicated on mail or wire fraud require the *mens rea* of specific intent. Both the mail and wire fraud statutes[73] require proof that a person "(1) intentionally participate[d] in a scheme to defraud another of money or property and (2) use[d] the mails or wires in furtherance of that scheme."[74] To this end, even if the solution advanced in this Note enhanced private enforcement by facilitating class certification, devastating increases in defendant liability and over-deterrence would not result because a

70. *See* ABA Section of Litig., Report and Recommendations of the Special Committee on Class Action Improvements, 110 F.R.D. 195, 196 (1986).

71. FED. R. CIV. P. 23.

72. *E.g.*, Stephen C. Yeazell, The Misunderstood Consequences of Modern Civil Process, 1994 WIS. L. REV. 631 (1994).

73. 18 U.S.C. §§ 1341, 1343 (2000 & Supp. II 2002).

74. Pelletier v. Zweifel, 921 F.2d 1465, 1498 (11th Cir. 1991).

class still would have to prove that the defendants *intended* to defraud it. Thus, this Note's solution is limited to the fraud context, where there is a built-in obstacle to over-deterrence: the requirement of a specific intent *mens rea*.

Finally, this Note's solution argues that courts should interpret the substantive law of RICO in light of the procedural avenues for its enforcement.[75] The current judicial interpretation of RICO's substantive law (requiring individualized assessments of reliance for each member of the proposed class) effectively forecloses class certification of small claim mass fraud actions, defeating these claims before they ever reach the courthouse. In contrast, if courts interpret RICO to allow a showing of aggregate liability to result in an enforceable damage award, perpetrators of mass fraud face a real threat of liability. How courts interpret RICO's substantive law dictates whether small action fraud claims *can* be certified as class actions procedurally and, in turn, whether the fraud will be deterred.

Conceptualizing consumer-wide harm as harm in the aggregate has scholarly support, in the form of an article about punitive damages written by Professor Catherine Sharkey.[76] Furthermore, small claim mass harm, arguably, may be perceived best by focusing on the aggregate unit rather than harm to the individual. But most importantly, permitting RICO plaintiffs to prove liability at the consumer-wide level, using aggregate proof, faithfully achieves the statute's overarching deterrence objective. It removes the current barrier to class certification—the requirement of individualized proof—and thereby ensures that legitimate claims have a chance to be redressed so that threatened tort liability corresponds to harm caused.

A. Conceptualizing "Mass Harm" as Aggregate Harm

One might understand small claim mass fraud as harm to numerous distinct individuals. But this Note argues that it is better to conceptualize such harm as consumer-wide harm in the aggregate. The nature of small claim mass fraud is inherently different from the usual type of fraud that occurs in a one-on-one contractual relationship. As articulated in *Schwab*, "sophisticated, broad-based fraudulent schemes by their very nature are likely to be designed to distort the entire body of public knowledge rather than to individually

75. Generally, substantive law and procedure are treated as independent concepts. This Note, however, argues that substantive law should be informed by its procedural implications.

76. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003).

mislead millions of people."[77] Mass fraud is directed at the aggregate unit; therefore, there are no individual issues. For example, in my hypothetical, the defendants perpetrated the miracle pill fraud by using mass marketing that focused on the public, as comprised of multiple aggregate units, rather than as a sum of individuals. As such, it is particularly appropriate that the miracle pill plaintiffs be permitted to rely on aggregate theories of proof to redress their harm. Moreover, *small claim* mass fraud is profitable only when it has an aggregate impact. The miracle pill company does not profit from a single $10 purchase, but from millions of $10 purchases. Thus, when evaluating small claim mass fraud, it is arguably more appropriate to look at the harm in the aggregate. Accordingly, courts should interpret RICO, as applied to small claim mass fraud actions, in a manner consistent with the inherent aggregate nature of this type of fraud. Courts should read RICO to permit aggregate proof of its constituent elements to establish liability for small claim fraud, rather than to require that each member of the proposed class present individualized proof, which blocks any possibility of class certification.

Beyond small claim mass fraud's aggregate nature, conceptualizing mass harm as consumer-wide harm has some basis in other scholarship. In an article on the law of punitive damages that seeks to characterize punitive awards as societal damages, Professor Catherine Sharkey focuses on a recurring paradigm in the practice of awarding punitive damages: "a single or multi-plaintiff case in which, in effect, 'class-wide' punitive damages are assessed on a statewide or nationwide scale."[78] Juries award plaintiffs large punitive damages to punish defendants for the harm they caused both to the plaintiffs and to other individuals not party to the suit.[79] In effect, individual plaintiffs injured by a mass harm are receiving class-wide damages.[80] For example, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, plaintiffs' counsel incorrectly instructed Utah jurors that they were "going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable *for what it's doing across the country*, which is the purpose of punitive damages."[81] Professor Sharkey's solution to this recurring problem is a re-conceptualization of punitive damages that explicitly recognizes a new category of

77. 449 F. Supp. 2d 992, 1047 (E.D.N.Y. 2006).

78. Sharkey, *supra* note 76, at 350.

79. *Id.*

80. *Id.*

81. *Id.* at 349 (emphasis added) (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 420 (2003)).

damages to redress mass harm: compensatory societal damages.[82] She proposes understanding punitive damages as a form of "compensatory damages for harms to individuals other than the plaintiff before the court."[83] Pursuant to this theory, a jury, in awarding punitive damages, first would compensate the specific plaintiffs in the suit, then explicitly award "societal damages" to the state for the harm caused to those members of society not party to the suit. In effect, mass, societal harm would result in an explicit assignment of damages to society.

While the solution advanced in this Note does not propose a re-conceptualization as sweeping as Professor Sharkey's, both theories conceive of mass harm as "societal harm" rather than the sum of individualized harms. Professor Sharkey's solution proposes awarding "compensatory societal damages."[84] The solution in this Note focuses on proof. More specifically, it focuses on allowing aggregate, consumer-wide statistical evidence to prove the *constituent elements* of a consumer-wide harm under RICO. There is, however, another crucial difference between Professor Sharkey's proposal and this Note's solution. The latter does not propose an end run around Rule 23; instead, it requires that members of society participate directly, by joining a proposed class in litigation to redress consumer-wide harm. Arguably, this Note's solution is preferable to Professor Sharkey's because a proposed plaintiff class must meet the threshold requirements of Rule 23 to proceed as a class in redressing the small claim mass harm perpetrated against them. By contrast, under Professor Sharkey's theory, society need not establish standing to recover compensatory damages, and thus the defendant is not afforded the protections accorded to class action defendants (who have the opportunity to defend against all charges). However, beyond these differences, both theories recognize that mass harm has an inherent societal element, which should inform either how damages are awarded (societal compensatory damages) or how liability is established (aggregate proof).

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82. *Id.* at 389.

83. *Id.* at 350; *see* Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 980-81 (2001) ("Punitive damages stand as a civil penalty for transgression of the social compact . . . . to penalize conduct that violates the social contract and injures society."); John C. Coffee, Jr., *The Tobacco Wars: Peace in Our Time?*, N.Y. L.J., July 20, 2000, at 1 (advocating in favor of "put[ting] the [tobacco] industry's punishment [via punitive damages] to some socially useful purpose").

84. Sharkey, *supra* note 76, at 389.

B. Why Aggregate Proof Effectuates RICO's Essential Deterrence Objective

Deterrence is a crucial objective of the RICO statute. Congress modeled RICO after the antitrust laws, which have a clear public-protection rationale: to protect competition primarily, with the incidental result of protecting individual competitors.[85] As the Supreme Court articulated in *Rotella v. Wood*, both the antitrust and RICO statutes "share a common congressional objective of encouraging civil litigation to supplement Government efforts *to deter* and penalize the respectively prohibited practices."[86] Specifically, RICO's civil remedy provisions support the deterrence objective: by providing treble damage awards and reasonable attorneys' fees to successful plaintiffs, RICO enlists the assistance of private parties in deterring the conduct it prohibits.[87] As Professor Issacharoff notes, "[d]eterrence is the reason that the consumer protection laws enacted by most states provide for measures of recovery either double or triple the wrongdoing, as well as attorneys' fees. The aim is not merely to compensate but also to deter."[88] Compensating private parties harmed by conduct unlawful under RICO is an incidental result required to provide these individuals with the incentive to litigate.

Congress's decision to use broad language in RICO's civil remedy provision also indicates a deliberate policy choice: the statute's deterrence objective takes precedence over restrictive procedure. As the Seventh Circuit stated:

> Congress chose to provide civil remedies for an enormous variety of conduct, balancing the need to redress a broad social ill against the virtues of tight, but possibly overly astringent, legislative draftsmanship. . . . Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of

85. John C.P. Goldberg et al., *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1003 (2006).

86. 528 U.S. 549, 557 (2000) (emphasis added).

87. *Rotella*, 528 U.S. at 557 ("The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity."); Holmes v. Sec. Investors Prot. Corp., 503 U.S. 258, 283 (1992) (quoting Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987)).

88. Issacharoff, *supra* note 38, at 144; *see* Daniel Z. Herbst, Comment, *Injunctive Relief and Civil RICO: After* Scheidler v. National Organization for Women, Inc., *RICO's Scope and Remedies Require Reevaluation*, 53 CATH. U. L. REV. 1125, 1133 (2004) ("House proponents of the RICO civil action expected that the lower burden of proof in civil actions and the possibility of large damage awards would encourage parties to assist in the fight against organized crime." (citing John L. Koenig, Comment, *What Have They Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering*, 35 AM. U. L. REV. 821, 832 (1986))).

organized crime might crawl to freedom than to avoid making garden-variety frauds actionable.[89]

While RICO's overt focus originally was to deter illegal conduct by organized crime,[90] the plain language of the statute does not limit its applicability to this objective. As mentioned previously, RICO's language does not clearly define its target.[91] Instead, RICO proscribes specific conduct. Thus, without distorting the text of the statute, courts have read RICO's broad language to allow its application to legitimate businesses and rejected arguments that RICO applies only to defendants who are part of "organized crime."[92] As the Fourth Circuit stated, "[W]e do not believe it is normally a proper judicial function to try to cabin the plain language of a statute, even a criminal statute, by limiting its coverage to the *primary* activity Congress had in mind when it acted."[93] RICO's application to legitimate businesses is within the literal meaning of the statute, even if the statute's enactors did not specifically intend it to be so. There is no

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89. Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi., 747 F.2d 384, 390 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (citations and internal quotation marks omitted). In another case, the Supreme Court notes:

> [T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure. Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. . . . That Congress included within the definition of racketeering activities a number of state crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present. As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would "mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm." In the face of these objections, Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law. There is no argument that Congress acted beyond its power in so doing. That being the case, the courts are without authority to restrict the application of the statute.

United States v. Turkette, 452 U.S. 576, 586-87 (1981) (internal citations omitted).

90. The purpose of RICO is to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923.

91. *See supra* notes 31-32 and accompanying text.

92. *See, e.g.*, United States v. Romano, 736 F.2d 1432, 1441 (11th Cir. 1984), *vacated*, 755 F.2d 1401 (11th Cir. 1985) ("Defendants' contention that RICO is designed to apply only to organized crime participants is without merit."); United States v. Rubin, 559 F.2d 975, 991 n.15 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *rev'd in part on other grounds*, 591 F.2d 278 (5th Cir. 1979) ("While addressed to organized crime, [RICO] is not limited in application to members of that undertaking."); United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975) ("[RICO] makes unlawful such activities no matter who engages in them.").

93. United States v. LeFaivre, 507 F.2d 1288, 1295 (4th Cir. 1974).

definitional ambiguity about the meaning of RICO's terms.[94] As the Seventh Circuit said,

> We recognized that RICO's language extends beyond those concerns which were the immediate focus of the legislation, but we also recognized that Congress was fully aware of the extraordinary breadth of the language. Even though Congress might not have fully contemplated all the consequences or applications of those very broad terms, Congress nevertheless deliberately chose to use the broad terms to ensure that the criminal and civil provisions would be effective.[95]

Congress consciously refrained from defining RICO liability in terms limited to organized crime.[96] Congress also intentionally drafted a statute that would be broadly inclusive, understanding that it would be applied to garden variety fraud actions previously left to the states, because Congress was most concerned with ensuring that RICO be an effective tool.[97]

Just as courts have read RICO to apply to legitimate businesses based on the statute's plain language, RICO's original deterrence objective should guide how courts understand the statute as applied to small claim mass fraud actions against such legitimate businesses. Fraud presents enforcement problems similar to those exposed by RICO's announced target, organized crime. Before RICO's enactment, state and federal prosecutions of Mafia activity had addressed ineffectively the national problem of organized crime,[98] which was costing the country billions of dollars.[99] Like organized crime, fraud annually drains billions of dollars from the national economy.[100] Both problems also have national dimensions. With the

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94. Lynch, *supra* note 17, at 696.

95. Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi., 747 F.2d 384, 392 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

96. Lynch, *supra* note 17, at 697.

97. Legislative history reveals that Congress was aware that RICO would move "large substantive areas formerly totally within the police power of the State into the Federal realm." 116 CONG. REC. 35,217 (1970) (statement of Rep. Eckhardt); *see also id.* at 35,205 (statement of Rep. Mikva) ("What we have done in one fell swoop . . . is to incorporate as a part of the Federal law all of the offenses which heretofore have traditionally been treated as under State and local jurisdictions."); *id.* at 35,213 (statement of the American Civil Liberties Union) ("[RICO] creates federal law in an area where state laws have traditionally operated . . . .").

98. United States v. Turkette, 452 U.S. 576, 586 (1981) ("[T]he very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions.").

99. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922 ("The Congress finds that organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption.").

100. 1984 ATTORNEY GEN. ANNUAL REPORT 42 (estimating that fraud accounts for losses exceeding $200 billion annually); *see, e.g.*, U.S. CHAMBER OF COMMERCE, A HANDBOOK ON WHITE

growth of nationwide advertising and marketing, mass fraud frequently crosses state borders, rendering state laws ineffective in addressing these harms.[101]

Meritorious small claim mass fraud actions must be permitted to reach court in order to realize RICO's deterrence objective. As Professor Shapiro notes:

> [T]he small claim class action strikes me as one that serves the purpose not of compensating those harmed in any significant sense, or of providing them a sense of personal vindication, but rather, and perhaps entirely, the purpose of allowing a private attorney general to contribute to social welfare by bringing an action whose effect is to internalize to the wrongdoer the cost of the wrong. The purpose of the action, in other words, is solely to deter the kind of wrong that causes a small injury to a large number (just as the availability to an individual of a private civil action to recover for a substantial injury can serve to deter the wrongful conduct of those who would cause an equivalent social harm, but in the form of a large injury to only one victim).[102]

Collective action challenging small claim mass fraud is essential to deterring the type of harm that results in small injuries to a large number of people. Thus, RICO should facilitate, rather than preclude, such actions, which vindicate the statute's overarching objective.

Recognizing the importance of deterrence in the tort context, Professor David Rosenberg recently championed a proposal endorsing aggregate liability. He proposed splitting mass tort adjudication into two separate phases.[103] The first would determine the defendant's liability and damages at the class-wide level.[104] The second would address how to distribute these damages within the class.[105] Professor Rosenberg's proposal proceeds from the argument that deterrence is a crucial policy priority that the current legal system disregards.[106] Law should strive to achieve "optimal tort deterrence," where the law threatens liability equal to the harm caused.[107] Short of reaching this "optimal" level, incentives to take reasonable precautions are

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COLLAR CRIME, EVERYONE'S PROBLEM, EVERYONE'S LOSS 6 (1974) (economic cost of fraud exceeds $41 billion per year).

101. Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827, 844-45 (1987).

102. Shapiro, *supra* note 7, at 924.

103. David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1875-76 (2002).

104. *Id.* at 1876.

105. *Id.*

106. *Id.* at 1873-74.

107. *Id.* at 1874 ("[The c]lass action is indispensable to achieving the social objective of minimizing the sum of accident costs through tort deterrence (prevention of unreasonable risk) . . . and consequently to enhancing everyone's well-being.").

distorted, thereby harming society.[108] Professor Rosenberg argues that aggregate adjudication of tort liability is essential to realizing this optimal deterrence: "Because the mass producer's decision regarding precautions inevitably and indivisibly affects a population-wide level of safety, all that matters for optimal deterrence is that the judgment or settlement accounts for the total aggregate tortious harm, not how or whether it distributes damages among claimants."[109] Rosenberg's article supports this Note's premise that aggregate liability can effectuate deterrence. The very threat of litigation can alter behavior, as this risk is something parties must factor into their decisions.[110] Absent aggregate liability in small claim mass fraud actions, the risk that litigation will result is small; therefore, wrongdoers can continue to realize significant gains by harming many individuals in small amounts. As in the mass torts context, where mass production decisions are made at a population-wide level, mass fraud is focused on the aggregate unit. Just as Professor Rosenberg argues that aggregate liability helps realize optimal deterrence in the tort context, aggregate liability can help realize optimal deterrence in the mass fraud context.

The prevailing judicial interpretation of RICO subverts optimal deterrence because threatened tort liability falls far below the actual harm caused. Thus, under the current judicial reading, the law is not deterring the perpetrators of small claim mass fraud from future unlawful behavior that causes a small injury to a large number of people.

Reinterpreting RICO's substantive law would remove the barrier to class certification and facilitate enforcement consistent with the statute's core deterrence objective. RICO's legislative history establishes that Congress intended RICO to attack and deter fraudulent conduct. Congress did not envision restrictive enforcement procedures; on the contrary, it contemplated flexible procedures in support of the statute's deterrence goal. This deterrence objective should inform how the statute is understood with respect to claims brought against both illegitimate and legitimate businesses, as both are encompassed within the literal meaning of the statute. The prevailing judicial interpretation of reliance under RICO obstructs the statute's primary deterrence purpose. For effective deterrence of

108. *Id.* at 1880.

109. *Id.* at 1892-93 ("[T]he crucial value of class action [is] in removing the systemic bias that enables defendants to more fully exploit the scale economies of mass production tort litigation than can plaintiffs and courts.").

110. William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U. MO. KAN. CITY L. REV. 709, 724 (2006).

fraudulent conduct, defendants must face a threat of liability accompanied by a real financial penalty.[111] Permitting private RICO plaintiffs to prove liability at the consumer-wide level by using aggregate proof will strengthen private enforcement of small claim mass fraud (thereby strengthening deterrence) because it will facilitate class certification of claims that plaintiffs otherwise never would bring to court. In this way, whether redress is possible will no longer be determined by the cost of gathering information, but by the merit of the underlying claims.

C. Aggregate Liability In Practice

1. Aggregate Proof

This Note proposes a single, aggregate proceeding to replace a multitude of individualized trials—trials that, under the current interpretation of RICO, are economically impractical and thus nonexistent. The aggregate proceeding would consist of adversarial litigation over proof affecting the entire class as one indivisible whole and would result in an enforceable judgment, absent any individualized inquiry or follow-on litigation to determine if each member of the class was harmed individually.

Aggregate proof consists of an assessment of harm as it affects the class as an indivisible whole. For example, instead of evaluating a particular individual's reliance on a fraudulent advertisement, aggregate proof examines the reliance of a class of individuals, averaging any differences across the class. Such aggregate assessments are demonstrated through statistical models. Given that mass fraud aims to affect mass public behavior, aggregating the millions of injuries resulting from such fraud arguably yields a more

111. A recent article substantiates the contention, through several empirical studies, that threatened tort liability can and does deter parties from engaging in wrongdoing, including negligence. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994). For example, malpractice liability has deterred certain extreme forms of malpractice, and landlord liability based on failure to provide invitees with reasonable security has led to increased hiring of security guards. *Id.* at 423. While Professor Schwartz rejects an exact one-to-one relationship between the incentives created by threatened liability and an individual's rational conduct, liability does provide a degree of deterrence that varies depending on the particular area of law. *Id.* at 425-27. Small claim fraud actions brought under RICO are predicated on the "racketeering activities" of federal mail and wire fraud. Because Professor Schwartz concluded that the threat of liability can deter even *negligent* conduct, *id.* at 385-86, it would seem to follow logically that deterrence value could be even greater with regard to claims based on federal mail and wire fraud, both of which require *intentional* wrongdoing. 18 U.S.C. §§ 1341, 1343 (2000 & Supp. II 2002).

accurate estimate of overall reliance and harm, because the conclusions drawn rely on a large statistical base, which reduces the scale of possible error.

Individualized proof, by contrast, is tied to the traditional notion of a "day in court" ideal, meaning that each person has access to a means of adjudication that allows her to tell her own individual story.[112] The implicit assumption that pervades this ideal is that each story is unique to that individual and, therefore, one that only she can tell.[113] Put simply, individualized proof consists of presenting evidence unique to each claimant and claim.

The solution offered in this Note entails reinterpreting the substantive law of RICO so that its constituent elements are capable of proof in the aggregate. Class-wide proof of RICO's elements, alone, could result in liability. Moreover, adversarial litigation over plaintiffs' and defendants' aggregate proof would occur at trial and not in the context of a motion for class certification. This difference is particularly important because at least one court has recognized the right to a jury trial in RICO civil suits.[114] Therefore, under this proposal, a jury—and not a judge who makes class certification rulings—would assess the credibility of the parties' aggregate models. As Judge Weinstein of the Eastern District of New York noted, "The federal petty civil jury provides the ultimate focus group of the law."[115] From an institutional perspective, this adjustment is appropriate, as it is traditionally the province of the jury to balance evidence where reasonable minds can differ as to liability.

Furthermore, the recent decision in *In re Initial Public Offering Securities Litigation* ("*IPO Securities*") should ease concerns that endorsing this Note's theory of aggregate liability under RICO will result in devastating liability because juries will have the opportunity to find defendants guilty based on weak statistical evidence.[116] Under this Note's solution, any class seeking to aggregate its claims must satisfy Rule 23. To satisfy the class certification requirements prescribed in *IPO Securities*, plaintiffs' and defendants' aggregate models must be scrutinized to ensure that Rule 23's requirements are met.[117] This scrutiny also will ensure that purely speculative aggregate models are withheld from the jury and that frivolous

112. Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1514-15 (1992).

113. *Id.*

114. *See* NSC Int'l. Corp. v. Ryan, 531 F. Supp. 362, 363-64 (N.D. Ill. 1981).

115. Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1021 (E.D.N.Y. 2006).

116. 471 F.3d 24 (2d Cir. 2006).

117. *Id.* at 41.

lawsuits never proceed past certification towards trial. Thus, even if we assume that many large class actions will settle before they reach trial, and that class certification is a pivotal point of litigation, truly frivolous aggregate claims never will satisfy the requirements of *IPO Securities*; therefore, this Note's solution will not result in unreasonable settlement pressure.[118] Only claims that have satisfied the rigorous requirements of *IPO Securities* will be able to threaten the type of trial endorsed by this Note's solution.

Plaintiffs already have used aggregate evidence in various cases. In *In re Simon II*, Judge Weinstein allowed plaintiffs to present surveys, expert testimony, and statistical proof demonstrating the ways in which the defendant's mass misrepresentation harmed the nationwide class of plaintiffs seeking certification in a cigarette case.[119] As Judge Weinstein reasoned, "[m]odern adjudicatory tools must be adapted to allow the fair, efficient, effective, and responsive resolution of the claims of these aggrieved masses."[120] Increased mass production of goods for consumption by millions, combined with mass marketing, has substantially increased the potential for large scale injury. Methods of adjudication must adapt to this reality. Several commentators and courts have accepted that "tools for aggregation are especially helpful in the context of consumer fraud, when the relatively low value of specific claims or the litigation advantages of a well-financed defendant can discourage individuals from pressing their claims in court."[121] To reject aggregate proof (in all class action contexts) in favor of rigid requirements that each member of a proposed class present individualized proof would shield many wrongdoers from liability by foreclosing judicial remedy.

The plaintiffs' statistical evidence in *Schwab v. Philip Morris USA, Inc.* illustrates the type of aggregate proof that, were it to persuade the factfinder, would result in an enforceable judgment against a defendant under this Note's solution. In *Schwab*, the plaintiff-consumers offered evidence to establish that the major cigarette manufacturers fraudulently marketed "light" cigarettes to the public by claiming that they were safer than regular cigarettes

118. Judge Friendly coined settlements induced by a small probability of an immense judgment in a class action "blackmail settlements." *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995). The Seventh Circuit in *In re Rhone-Poulenc* decertified a large class action because it was concerned that the defendant, facing billions in potential liability on the outcome of a single jury trial, would be under intense pressure to settle the case even though the Court believed the plaintiffs' claims lacked legal merit. 51 F.3d 1293.

119. *In re* Simon II Litig., 211 F.R.D. 86, 127-29, 146-52 (E.D.N.Y. 2002), *vacated on other grounds*, 407 F.3d 125 (2d Cir. 2005).

120. *Schwab*, 449 F. Supp. 2d at 1245.

121. *In re Simon II Litig.*, 211 F.R.D. at 151.

when the manufacturers knew that "light" cigarettes, when smoked, would deliver the same amount of nicotine.[122] The plaintiffs sought to prove that, in reliance on the defendants' deceptive advertising, they bought "light" cigarettes at a price greater than they would have paid had they known the truth. [123] As a result, they were entitled to damages.

To prove their claim, the plaintiffs offered aggregate evidence in the form of statistical models that purported to prove class-wide reliance and damages.[124] The statistical evidence included an expert report by Dr. Hauser[125] that used conjoint analysis—a recognized method of measuring consumer preferences—to assess the proportion of "light" cigarette smokers who purchased these cigarettes for health reasons.[126] Dr. Hauser concluded that for 90.1 percent of "light" cigarette consumers, reduced health risk was a positive reason for their purchasing decisions, greater than all other tested factors, including taste and packaging.[127] In essence, Dr. Hauser's finding purports to estimate how *the class* of cigarette plaintiffs relied on the health assurance messages, as distinct from drawing generalized conclusions about the class' reliance from a sample of *individuals.* While Judge Weinstein conceded that the plaintiffs needed to further tailor their class-wide evidence to the particular class of light cigarette consumers seeking damages, he admitted these aggregate statistics as evidence.[128] Using that evidence, another expert in *Schwab*, Dr. Harris,[129] assessed, on a per cigarette basis, the difference between the

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122. *Id.* at 1018.

123. *Id.* at 1019-20.

124. *Id.* at 1022.

125. Dr. Hauser is an expert in marketing management, consumer satisfaction, and marketing research:

> He has served as an expert witness in connection with a range of disputes. Most of his expert testimony has involved surveys and other market research to measure consumers' attitudes, beliefs, and intentions. He has been called upon to project what consumers would have done in different market scenarios, to measure the importance of product features, to measure the impact of rumors, to evaluate marketing research with respect to advertising claims, and to investigate the potential for consumer confusion.

Id. at 1166-67.

126. *Id.* at 1167.

127. *Id.* at 1168.

128. *Id.* at 1170.

129. Dr. Jeffrey Harris is an economics professor at the Massachusetts Institute of Technology. *Id.* at 1163. He was an expert witness in *Falise v. American Tobacco Co.*, 107 F. Supp. 2d 200 (E.D.N.Y. 2000), and in *Blue Cross & Blue Shield of New Jersey v. Philip Morris*, 141 F. Supp. 2d 320 (E.D.N.Y. 2001). *Id.* He also testified in *United States v. Philip Morris* on the economics of collusion. *Id.* In *Schwab*, he was called as an economic expert to testify with regard

prices consumers paid for light cigarettes represented as being healthier and the price consumers would have paid had the cigarettes offered no greater health benefits, as was the case.[130] Using a "benefit of the bargain" measure of damages, Dr. Harris' findings purport to establish class damages in the aggregate.[131] In essence, both Dr. Hauser and Dr. Harris constructed models that estimated actual reliance and damages at the aggregate, class-wide level. Under the solution offered in this Note, this aggregate proof *could* result in an enforceable judgment against Philip Morris. Proof of harm at the entity level could result in an aggregate class-wide damage award.

Furthermore, as mentioned previously, the decision in *IPO Securities* should alleviate concerns that allowing aggregate liability under RICO will result in devastating liability to defendants based on frivolous statistical evidence.[132] In *IPO Securities*, the Second Circuit, clarifying the standard governing motions for class certification under Rule 23, held that class certification cannot occur until a judge has ruled definitively that each of the Rule 23 requirements has been met.[133] This inquiry is required even if it entails some analysis of the merits of plaintiffs' overall case.[134] Moreover, in resolving the issue, the judge must assess all the evidence concerning Rule 23, including that of the defendants.[135]

The solution proposed in this Note does not circumvent Rule 23's requirements for class certification. Any class seeking to aggregate its claims still needs to satisfy Rule 23's fundamental procedural hurdles of commonality, numerosity, typicality, adequate representation, predominance, and superiority.[136] Under this Note's solution, however, the aggregate nature of small claim mass harm would not be at issue at the certification stage, as this is a question of law dependant on courts' interpretation of RICO. Still, plaintiffs' and defendants' aggregate models proving injury would be tested at the class certification stage in order to satisfy the standard established by *IPO Securities*. The accuracy of the parties' models would determine whether Rule 23's requirements are satisfied definitively. For example, plaintiffs' aggregate models would be offered to establish

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to "two specific economic methodologies that could be used to compute class-wide damages in the event that the proposed class is certified and the suit goes to trial." *Id.*

130. *Id.* at 1163-64.

131. *Id.* at 1057, 1163-64.

132. For the relevant facts of this case, see 471 F.3d 24, 41 (2d. Cir. 2006).

133. *Id.* at 41.

134. *Id.*

135. *Id.*

136. FED. R. CIV. P. 23.

that common issues predominate over individual ones, as well as whether injury has been proven. Moreover, the credibility of plaintiffs' models would be scrutinized, as *IPO Securities* requires that the court also evaluate defendants' models in determining whether Rule 23's requirements are satisfied. Put simply, the scrutiny required by *IPO Securities* at class certification ensures that purely speculative aggregate models are withheld from the jury. Therefore, even if settlement is likely once a large class is certified, this Note's solution does not create unreasonable settlement pressure, because the decision in *IPO Securities* ensures that only strong claims can threaten trial.

2. Damages

Damage awards resulting from the aggregate proceeding proposed in this Note are a type of hybrid remedy: an indivisible monetary award. Unlike an injunction, the classic indivisible remedy, this award purports to measure the actual harm to consumers in the aggregate. Yet, unlike a typical monetary judgment, this award is indivisible because, as a practical matter, courts would award relief to the class as a collective entity, and the award does not represent the sum of individual judgments that can be distributed easily.

In terms of how this aggregate award will be *distributed* among the class, *Schwab* presents a potential model. In *Schwab*, the plaintiffs proposed distributing total damages on a shareholder-like basis, based on the number of cigarettes class members purchased during the applicable liability period.[137] This scheme allows individual class members to recover their share of the total damages through a streamlined claim procedure, as opposed to a cumbersome, formal mini-trial. This type of distribution is called a "fluid recovery," meaning there is no individualized determination of damages.[138]

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137. 449 F. Supp. 2d 992, 1019-20 (E.D.N.Y. 2006); *see* Craft v. Philip Morris Co., No. 002-00406A, 2003 WL 23355745 (Mo. Cir. Dec 31, 2003). In this cigarette case, a Missouri court endorsed Plaintiffs' plan to divide the total damage award based on the quantity of cigarettes each class member consumed. *Id.* at *9-10. The court stated that it "believe[d] that under the 'fluid recovery doctrine,' it is possible that a common fund may be created, and proof of damages may be handled through a streamlined administrative claims process without the requirement for individual trials on damages." *Id.* at *10 (internal citation omitted). The court conceded that "at least to some extent, proof and apportionment of class damages will require some individual proof, given that it will hinge in large part on how many packs of Marlboro Lights a person has purchased". *Id.*

138. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1010 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974).

Instead, the jury awards a bulk sum to the class as a whole, which the court then determines how to distribute.[139]

However, a fluid recovery is not always an appropriate method of distributing damages; its suitability depends on the objectives of the underlying substantive law.[140] For instance, the court in *Simer v. Rios* noted that fluid recovery is particularly appropriate to deter illegal conduct when the statute underlying the claim is "intended to regulate socially opprobrious conduct such as that reflected in the antitrust or securities laws."[141] Fluid recovery is appropriate in the context of a RICO claim based on fraud because civil RICO's primary policy objective, like that of the antitrust laws, is deterrence, as demonstrated by its private attorney general provision and legislative history. Precluding fluid recovery in small action fraud claims under RICO would subvert the statute's underlying policy objective because, without this relief, plaintiffs would not bring legitimate claims to court, and as a result, defendants would continue to engage in the conduct RICO proscribes. As a California court noted:

> Absent the use of fluid class recovery, some class actions, those where proof of individual claims is impractical, would neither compensate nor deter, for "to allow the defendant to insist upon proof of individual claims will enable it to benefit from the cumbersome nature of legal proceedings and the lack of sophistication and indolence of the consumer, and will reward his foresight in stealing from the multitude in small amounts."[142]

Moreover, even when fluid recovery is appropriate, such a scheme involves a risk of overcompensating certain class members and undercompensating others. For example, in *Schwab*, while the expert evidence used to establish liability purports to prove the class's aggregate reliance on the assumption that only some of the class members relied on the fraud, the class proposes to distribute the aggregate damage award based on the quantity of cigarettes each class member consumed, irrespective of the individual member's actual reliance.[143] The advantages of such an equitable pro rata

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139. *Id.*

140. *Schwab*, 449 F. Supp. 2d at 1255 ("Whether or not fluid recovery should be employed in a particular class action is determined by reference to the need to vindicate the substantive law at issue." (citing Simer v. Rios, 661 F.2d 655, 676-78 (7th Cir. 1981))); Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1525-26 (1976) (stating that courts should determine the appropriateness of fluid recovery in reference to the underlying substantive law).

141. *Simer*, 661 F.2d at 676-77; California v. Levi Strauss & Co., 41 Cal. 3d 460, 472 (1986) ("Without fluid recovery, defendants may be permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.").

142. Bruno v. Superior Court, 179 Cal. Rptr. 342, 345-46 (Ct. App. 1981) (quoting Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 868 (1974).

143. 449 F. Supp. 2d at 1019-20.

scheme of distributing an aggregate damage award lie in the accuracy of the claims submitted by class members. To this effect, a limited individualized inquiry prior to a pro rata division of damages may be the ideal method of ensuring the accuracy of the distribution and curbing the frivolous submission of claims.

In *Schwab*, Judge Weinstein recommended adopting such a twofold strategy. Weinstein suggested that the court require "claimants to submit affidavits regarding their understanding of the health issues surrounding 'light' cigarettes and their reliance on the 'lights' descriptor in addition to information regarding their cigarette purchases" to alleviate concerns that the quantity-based recovery scheme might over- or undercompensate certain class members.[144] Carrying out such a limited individualized inquiry would operate as a check on the submission of fraudulent claims so that a later pro rata division of damages would distribute damages *fairly* among the class members. In sum, one way to distribute an aggregate award rendered under this Note's solution would be to provide for a fluid class recovery and require a limited individualized inquiry in order to check frivolous submissions.

IV. WHY AGGREGATE LIABILITY DOES NOT VIOLATE DUE PROCESS

Some critics may contend that allowing aggregate liability violates defendants' due process rights, as averaging entails a risk that unharmed claims will be compensated. They may argue that defendants have a due process interest in compensating each plaintiff only for the exact amount of harm sustained. However, this argument lacks merit because the possibility of error in aggregate valuation lies in the distribution of damages *among* plaintiffs. While this potential error may be relevant to individual plaintiffs, from the defendant's perspective, only the accuracy of the total amount of damages assessed against it should be relevant.[145] To that end, there is no reason to assume that aggregate valuation of total damages will not be

144. *Id.* at 1269.

145. *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 288-89 (S.D.N.Y. 1971). In this case, Defendants alleged that denying them the opportunity to assess whether each consumer can prove individual harm violated their due process rights. *Id.* at 280. The court rejected this contention, stating "that the defendants are [not] constitutionally entitled to compel a parade of individual plaintiffs to establish damages." *Id.* at 289. Their due process rights relate only to the accuracy of the total damages assessed against them. *Id.*; *see also In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 839 (E.D.N.Y. 1984) ("No matter what system is used the purpose is to hold a defendant liable for no more than the aggregate loss fairly attributable to its . . . conduct. As long as that goal is met a defendant can have no valid objection that its rights have been violated.").

reasonably accurate.[146] Indeed, any overcompensation of certain plaintiffs likely will be offset by undercompensation of others, resulting in an aggregate award that correlates with the aggregate loss of the plaintiffs.

Furthermore, individual adjudications do not guarantee a correlation between the sum of settlements awarded and actual harm.[147] The arbitrary nature of jury awards produces a variety of outcomes that overcompensate certain plaintiffs while undercompensating others: "no one with a modicum of trial experience will imagine that the traditional common-law trial, the jury trial especially, is an instrument of fact-finding precision."[148] Moreover, because small claim actions will not be redressed absent claim aggregation, aggregate valuation might provide a truer measure of the harm inflicted on consumers than would the sum of damage awards from individual adjudications. While defendants may prefer a system that forces individualized adjudication of small claim mass fraud actions because it would (1) deter plaintiffs from bringing small, unmarketable claims to court and (2) allow defendants to take advantage of economies of scale by overpowering individual claimants with superior resources, such a preference does not implicate constitutional due process.[149]

Due process involves a balancing of many interests. As Professor David Shapiro notes,

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146. *In re Antibiotic Antitrust Actions*, 333 F. Supp. at 288-89 ("Most important management decisions in the business world in which these defendants operate are made through the intelligent application of statistical and computer techniques and these class members should be entitled to use the same techniques in proving the elements of their cause of action. The court is confident that they can be successfully utilized in the courtroom and that their application will allow the consumers to protect their rights while freeing the court and the defendants of the specter of unmanageability."); Cicelski v. Sears, Roebuck & Co., 348 N.W.2d 685, 690 (Mich. Ct. App. 1984) ("[Defendants] hardly seem[] prejudiced by being restricted to only one hearing on common issues. Even though the calculation of damages might involve issues on which a hearing would . . . be required[,] . . . it has never been thought that due process required multiple hearings when there was one full and fair adjudication of the merits." (quoting Note, *supra* note 140, at 1524-25); Robinson & Abraham, *supra* note 112, at 1504.

147. Shapiro, *supra* note 7, at 932. This is particularly true when a mass fraud inflicts only a small amount of harm on many individuals: "When the individual claims are small, 'traditional methods of proof [may not be] worthwhile,' since many consumers are unlikely to 'retain records of small purchases for long periods of time.' " Schwab, 449 F. Supp. 2d at 1253 (citing California v. Levi Strauss & Co., 41 Cal. 3d 460, 472 (1986)).

148. Robinson & Abraham, *supra* note 112, at 1504; *see also* Christopher J. Roche, Note, *A Litigation Association Model to Aggregate Mass Tort Claims for Adjudication*, 91 VA. L. REV. 1463, 1506 (2005) (citing Professors Saks and Blanck as cautioning against an over-emphasis on individualized adjudication, noting that, in such adjudications, a verdict is really "only a sample from a wider population of possible outcomes").

149. Robinson & Abraham, *supra* note 112, at 1505.

> [N]otions of individual choice, autonomy, and participation—and their resonance in the constitutional guarantee of due process—are not so rigid that they cannot yield to practical arguments about the nature of the case, the character of the wrong complained of, and the individual interests at stake, as well as the countervailing interests and preference of others.[150]

In effect, given the practical reality that requiring individualized proof from each member of the proposed class will block claim aggregation and, in doing so, defeat these claims before they are brought to court, due process should be understood in the small claim mass fraud context to permit aggregate valuation in place of the traditional procedure of individualized proof. As Judge Weinstein articulated, while defendants have an interest in compensating each plaintiff only for the exact amount of harm caused, an interest arguably best protected by requiring individual adjudication, "practical considerations temper the weight of [that interest]."[151]

VI. CONCLUSION

The solution offered in this Note would allow the consumers injured by the miracle pill fraud to form a class (provided they meet Rule 23's threshold requirements) to redress their harms collectively, thereby restoring the necessary economic incentive to bring their legitimate claims to court. While $10 claims are unmarketable individually, an aggregate claim of billions of dollars of damages represents an economically viable lawsuit that will threaten the producers of the miracle pill with liability approximating the nationwide harm caused.

Under the prevailing interpretation of RICO, which requires individualized proof of reliance and injury, the miracle pill consumers face certain denial of class certification based on Rule 23's predominance requirement, and this denial, in turn, defeats these claims before they ever reach the courthouse. In contrast, allowing aggregate proof to establish liability under RICO would give these consumers a real opportunity to seek redress. Moreover, if the court certifies the miracle pill class under Rule 23, under this Note's solution, the class will present its aggregate proof at trial, and if the factfinders are persuaded, a monetary judgment will be entered against the miracle pill company. Reinterpreting the prevailing understanding of RICO's substantive law so as to facilitate such a

150. Shapiro, *supra* note 7, at 925; *see* Mathews v. Eldridge, 424 U.S. 319, 334-48 (1976) (describing the balance required in procedural due process).

151. *In re* Simon II Litig., 211 F.R.D. 86, 153 (E.D.N.Y, 2002), *vacated*, 407 F.3d 125 (2d Cir. 2005).

damage award, which threatens a company with liability that corresponds to the harm it caused, serves RICO's primary statutory purpose: deterrence. In creating the RICO statute, Congress did not envision restrictive enforcement procedures; on the contrary, it contemplated flexible procedures in support of the statute's deterrence goal. Under this Note's solution, companies planning to perpetrate mass fraud like that of the miracle pill will have to factor the risk of litigation into their decisionmaking, as such fraud no longer escapes liability merely because it causes a small injury to many individuals. The solution advanced in this Note removes a major barrier preventing consumers harmed by small claim mass fraud from seeking relief and replaces this obstacle with a practical solution for redress.

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