FRAUD, FREE SPEECH AND FOSSIL FUEL:

LESSONS FROM BIG TOBACCO FOR BIG OIL

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I. Introduction

Recent investigations by InsideClimate News ("ICN")\(^1\) and the Los Angeles Times ("LA Times")\(^2\) revealed that ExxonMobil ("Exxon") carried out research beginning in the late 1970s indicating fossil fuel's dangerous role in global warming. However, rather than act on its ground-breaking research, and continue as a leader in the climate change field, Exxon chose a different path. For the next few decades, Exxon instead became a leader in climate change denial; stressing uncertainty, propagating misinformation, funding denial, and politicizing and undermining the expert consensus on anthropogenic climate change.

Exxon’s conduct invoked the tactics used by the tobacco industry years earlier; tactics which wound up the subject of a successful federal government lawsuit under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The parallels with the tobacco industry prompted legislators and environmentalists to call on the Department of Justice to use RICO again to hold the fossil fuel industry to account.

In this context, this article will consider: (1) the legal issues associated with bringing a claim under RICO, and the New York and California state equivalents, and (2) whether useful lessons can be drawn for climate litigation from experiences with tobacco litigation.

II. Overview of RICO

In the mid-twentieth century, the United States ("U.S.") found itself facing an organized crime epidemic. The Mafia presented unusual problems for law enforcement; the way in which the organization structured its activities made it impervious to conventional criminal prosecution. While individuals at the bottom of the organization were prosecuted,

\(^1\) Neela Banerjee et al., Exxon: The Road Not Taken, InsideClimate News, September 16, 2015, available at https://insideclimatenews.org/content/Exxon-The-Road-Not-Taken.
\(^2\) Sara Jerving et al., What Exxon knew about the Earth's melting Arctic, Los Angeles Times, October 9, 2015, available at http://graphics.latimes.com/exxon-arctic/.
the Mafia family who reigned over them remained untouched. Concerned that organized crime was weakening the U.S. economy, harming investors and competing businesses, interfering with competition, and undermining citizens’ welfare, Congress enacted RICO on October 15, 1970. Congress intended RICO as a tool that would target not only individuals, but the “economic base through which they threatened the nation.” In the years since its enactment, in accordance with congressional mandate, courts have interpreted RICO liberally, extending its reach beyond organized crime to apply to legitimate businesses.

RICO provides for both civil and criminal remedies, the key difference between the two being the standard of proof required for a finding of guilt. RICO’s civil provision permits both the federal government and private litigants to bring suit for RICO violations. This article is concerned primarily with the civil RICO action available to the federal government. However, at Part IV Section E below I will briefly discuss some requirements for, and challenges associated with, a civil RICO action brought by a private litigant.

III. Overview of Tobacco Epidemic and Litigation in the U.S.

A. The U.S. Tobacco Epidemic

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5 S. Rep. No. 91-617 at 79, 80-81.
6 Organized Crime Control Act § 904(a), 84 Stat. at 947 (advising that RICO "be liberally construed to effectuate its remedial purposes").
10 For a criminal claim, the plaintiff must satisfy the high "beyond a reasonable doubt" standard, whereas civil claims are governed by the "preponderance of the evidence" standard.
The cigarette occupied an iconic position in mid-century America; a position exploited and fomented by the tobacco industry through innovations in marketing and product design. Though research into the harmful effects of smoking had begun to emerge in the first quarter of the twentieth century, it was not until the early 1950s that scientific opinion converged.\textsuperscript{13} In 1953, when cigarettes were categorically linked to lung cancer, the tobacco industry faced a “crisis of cataclysmic proportions.”\textsuperscript{14} Its response was immediate and unparalleled. In December 1953, tobacco industry executives gathered at the Plaza Hotel in New York City. There, they developed a strategy, buttressed by a public relations campaign, whereby aggressive advertising would be bolstered by a full-frontal assault on the scientific domain. For the next forty-five years, the tobacco industry would work to undermine the science that threatened to devastate sales of their highly lucrative product; engineering scientific knowledge to counteract what had become known.\textsuperscript{15}

B. \textbf{United States v. Philip Morris}

Over the next few decades, attempts to regulate cigarettes were repeatedly thwarted. When public health advocates failed to breach the ramparts of Washington politics, they turned to the courtroom. The history of tobacco litigation is commonly referred to as occurring in three separate waves; each involving different legal strategies and theories.\textsuperscript{16} The first wave of litigation was based primarily on theories of breach of warranty and negligence, the second on tort liability, and the third involved primarily state government actions for reimbursement of Medicaid funds, and class actions.

\textsuperscript{15} Id., at 64.
The tobacco industry adopted a number of different strategies in response to each wave, however two of the notable trial defenses included alleging lack of causation and assumption of risk. The causation attack was twofold; first challenging the plaintiff and their lifestyle, and second the 1964 landmark Surgeon General’s Report on Smoking, on the basis that the underlying research was unscientific and deficient. This strategy was successful, with the result that many juries did not believe smoking to be the legal cause of plaintiffs’ injuries. The assumption of risk theory was conversely based on the argument that the public knew that smoking was potentially harmful, but chose to do it anyway. Towards the end of the second wave, the tobacco industry was able to proclaim that, after nearly four decades of litigation, it had not paid out a penny in damages. The tables turned during the third wave of litigation, at which point plaintiffs benefitted from an armoury of internal tobacco industry documents that had been disclosed during prior litigation.

At that time, RICO’s potential did not go unnoticed. For a number of years, hospitals, health and welfare funds, and even foreign governments, sought to utilize RICO’s broad reach to recover damages for the costs of treating tobacco-related illness. However, their claims were repeatedly unsuccessful; courts commonly finding either that plaintiffs lacked standing due to deficiencies in the alleged causation, or that the loss suffered was too remote.
In 1999, the U.S. government launched what was to be the first successful lawsuit brought against Big Tobacco under RICO.\(^\text{23}\) In its complaint, the government alleged that the tobacco industry had participated in a four-decade long conspiracy to “intentionally and willfully deceive and mislead the American public about, \textit{inter alia}, the harmful nature of tobacco products, the addictive nature of nicotine, and harmfulness of low tar cigarettes.”\(^\text{24}\)

In order to perpetuate this fraud, tobacco companies had made false and misleading statements about smoking and nicotine “in public, Congress, and in court;”\(^\text{25}\) created public relations bodies to ensure the circulation of misleading statements;\(^\text{26}\) engaged in deceptive marketing;\(^\text{27}\) suppressed and concealed documents;\(^\text{28}\) and limited research into the linkages between smoking and disease.\(^\text{29}\)

Pursuant to these allegations, the government sought injunctive relief and the disgorgement of around $280 billion in profits.

On August 17, 2006, the United States District Court for the District of Columbia handed down a historic opinion,\(^\text{30}\) marking the beginning of the end for the U.S. government’s unprecedented lawsuit. In an opinion spanning 1,672 pages, the court found the tobacco company defendants, and certain associated organizations, liable for fraud and

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22 This was the reasoning in the case of foreign governments bringing a claim under RICO. See, e.g., Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris, Inc., 249 F.3d 1068, 1072-73 (D.C. Cir. 2001). Another reason that foreign governments failed was due to the claim being held barred by the revenue rule, see, e.g., Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 106-07 (2d Cir. 2001).


24 The government’s lawsuit included four counts, two of which were brought under RICO. The RICO counts were considered controversial at the time as the lawsuit marked the first time that RICO had been used against an entire industry. See Barry Meier, \textit{Two Strategies at Work and Stiff Challenges Ahead in Federal Lawsuit}, \textit{N.Y. Times}, Sept. 23, 1999, at A22.

25 Complaint for Damages and Injunctive and Declaratory Relief, supra note 23, at 49.

26 Id., at 21.

27 Id., at 36.

28 Id., at 47.

29 Id., at 23.

conspiracy under RICO, for false and misleading representations made to the public about the devastating health effects of smoking.\(^{31}\)

The court ordered several remedies, including: a ban on cigarette descriptors conveying health claims;\(^{32}\) corrective statements about, \textit{inter alia}, nicotine addiction and the adverse health effects of smoking;\(^{33}\) facilitating public access to certain internal industry documents;\(^{34}\) and an injunction from making false or misleading public statements about cigarettes.\(^{35}\) The court rejected certain other remedies proposed by the government, notably corporate structural changes,\(^{36}\) disgorgement of profits,\(^{37}\) a smoking-cessation program, and the implementation of a campaign educating the public about the hazards of public,\(^{38}\) on the basis that they exceeded the government’s authority under RICO.

IV. Overview of Climate Change in the U.S., and the Possibility of Bringing a RICO Claim

A. Climate Change: A Brief History and What Exxon Knew

In 1896, Swedish scientist, Svante Arrhenius, made a bold claim: fossil fuel combustion was leading to increased levels of carbon dioxide in the Earth’s atmosphere, which, in time, would cause the Earth’s average temperature to rise.\(^{39}\) Arrhenius calculated

\(^{31}\) United States v. Philip Morris, 449 F. Supp. 2d at 27 (holding that “[T]he Government has established that Defendants (1) have conspired together to violate the substantive provisions of RICO, pursuant to 18 U.S.C. § 1962(d) and (2) have in fact violated those provisions of the statute, pursuant to 18 U.S.C. § 1962(c)”).

\(^{32}\) Id., at 1630

\(^{33}\) Id., at 1635. The corrective statements were ordered to appear on company websites, cigarette packages, prime-time network television advertisements, and in newspaper advertisements.

\(^{34}\) Id., at 1636

\(^{35}\) Id., at 1644.

\(^{36}\) Id., at 1647.

\(^{37}\) Id., at 1623 (hold that the court did not have authority order disgorgement as it was limited to “such remedies as are designed to “prevent and restrain” Defendants from committing future RICO violations by separating them from the RICO enterprise”).

\(^{38}\) Id., at 1651.

that, should humans double the amount of carbon dioxide in the air through burning fossil fuels, the Earth’s average temperature would increase by around five or six degrees Celsius.\textsuperscript{40}

Arrhenius’s calculation turned out to be somewhat high. However, by the 1970s climate curiosity had turned to concern, and many climate scientists had become convinced that climate change posed a threat.\textsuperscript{41} Despite converging consensus in the world of science, by the end of the decade, public concern as a whole was tepid. Most considered climate change a somewhat interesting issue, though much less pressing than others.\textsuperscript{42} Around the same time, however, Exxon’s all-powerful Management Committee received some bad news: “there is general scientific agreement that the most likely manner in which mankind is influencing the global climate is through carbon dioxide release from the burning of fossil fuels.”\textsuperscript{43} Moreover, “man has a time window of five to ten years before the need for hard decisions regarding changes in energy strategies might become critical.”\textsuperscript{44}

This stark warning prompted Exxon to launch extensive research into fossil fuel combustion and its impact on the Earth. Exxon’s research culminated in an internal briefing on the greenhouse effect, which confirmed prior concerns raised by company scientists.\textsuperscript{45} The briefing anticipated that mitigating the greenhouse effect would require “major
reductions in fossil fuel combustion,46 and, though the timeframe was uncertain, “once the effects [become] measurable, they might not be reversible.”47

In the summer of 1988, then the hottest on record, climate awareness was also on the rise. An international gathering of scientists cautioned that the world should be proactive in reducing greenhouse gas emissions,48 and the United Nations formed the Intergovernmental Panel on Climate Change (“IPCC”) shortly after. Just as the IPCC published its first report in 1990,49 confirming past and likely future global warming, Exxon turned away from its own research and the international scientific consensus, choosing instead a path of uncertainty and deceit. Since then, the certainty of climate change has compounded year after year,50 and today there is an overwhelming scientific consensus that anthropogenic emissions of GHGs are impacting the Earth’s climate.51 Though climate change is expected to affect different regions in different ways, evidence indicates that, taken as a whole, the net costs are likely to be substantial, and to escalate over time.52

B. Could the Department of Justice Bring a Claim Against Big Oil for Climate Change Fraud Under RICO?

46 Id., at 5.
47 Id.
49 IPCC First Assessment Report, Climate Change: The IPCC Scientific Assessment, xi (Cambridge, Cambridge University Press Online 1990) (noting that the Earth had been warming, and would likely continue to warm.
51 Edward W Maibach and Sander L van der Linden, Consensus on consensus: a synthesis of consensus estimates on human-caused global warming, Environmental Research Letters Vol. 11 No. 4 1, 6 (2016) (noting a scientific consensus range of between 90% and 100%).
52 IPCC Fourth Assessment Report, supra note 40, at 17.
This section of the article will consider the viability of a government civil RICO action for climate change fraud, addressing each of the violations that were at issue in Philip Morris, namely (1) using an enterprise to conduct a pattern of racketeering under section 1962(c), and (2) conspiracy to undertake such conduct under section 1962(d).

1. Section 1962(c): Conduct Through a RICO Enterprise

In order to bring a successful claim under section 1962(c), the plaintiff must show, by a preponderance of the evidence, that (a) the defendants comprised an enterprise, and (b) that each defendant participated in the conduct, management and operation of the enterprise (c) through a pattern of racketeering activity. The plaintiff must also show a reasonable likelihood of future RICO violations occurring, which may be inferred from a pattern of past conduct.

  a) Enterprise

RICO defines ‘enterprise’ as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact." The enterprise must be an entity (formal or informal) distinct from the defendants; it is not enough that the defendants merely acted together to commit the wrong. It is not necessary that the enterprise have a hierarchical structure or chain of command, regular meetings, regulations or procedures, or defined roles, however a RICO complaint requires more than a “string of entities that assertedly make up an ‘association in fact.’” The Philip Morris enterprise was found to be comprised of individuals and corporations associated-in-fact, together with their

54 United States v. Philip Morris, 449 F. Supp. 2d. at 1621.
58 Richmond v. Nationwide Cassel, L.P., 52 F.3d 640, 644 (7th Cir. 1995).
agents and employees. The way in which the fossil fuel industry organized its climate change strategy looks very similar to the tobacco industry; including, for example, the use of front groups to coordinate research, manage PR campaigns, and engage in lobbying. As such, the Phillip Morris analysis provides a useful analogy, and it is likely that the enterprise would similarly be found to be comprised of various persons, companies, and trade organizations “associated-in-fact.” Showing an associated-in-fact enterprise requires three elements: (i) proof of a common purpose, (ii) relationships among associates, and (iii) longevity sufficient to permit the associates to pursue the enterprise’s purpose. The law defining the test for an associated-in-fact enterprise has changed slightly since Philip Morris, though the elements remain notionally similar.

(i) “Common Purpose”

A common purpose may be shown by direct and circumstantial evidence, including financial relations, coordination of activities, a community of interests and aims, and the overlapping nature of the wrongful conduct. In Philip Morris, the defendants’ common purpose was identified as the maximization of profits, achieved through protecting and enhancing the cigarette market. This purpose could be identified from internal documents

60 The tobacco industry formed the Tobacco Industry Research Committee, which was succeeded by the Council for Tobacco Research. The fossil fuel industry similarly formed the Global Climate Coalition.
62 The Philip Morris court used the test laid down in United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982), which required (1) a common purpose, (2) organization, and (3) continuity.
63 See, e.g., United States v. Owens, 167 F.3d 739, 751 (1st Cir. 1999) (individual members of the enterprise provided other members with financial support and coordinated transportation of drugs); United States v. Perholtz, 842 F.2d 343, 355 (D.C. Cir. 1988) (noting that “The interlocking nature of the schemes and the overlapping nature of the wrongdoing provides sufficient evidence for the jury to conclude that this was a single enterprise”); United States v. Davidson, 122 F.3d 531, 535 (8th Cir. 1997) (noting that “The length of these associations, the number and variety of crimes the group jointly committed, and Davidson’s financial support of his underlings demonstrates an ongoing association with a common purpose...rather than a series of ad hoc relationships”); United States v. Qaoud, 777 F.2d 1105, 1116-17 (6th Cir. 1985) (the court held that the existence of the alleged association-in-fact enterprise could be inferred from the “coordinated nature of the defendants’ activity” and that the defendants’ racketeering acts were facilitated by their nexus to the enterprise”).
in which the defendants recognized that they would benefit from working together on their ‘common problem’. A similar purpose might be assigned to the fossil fuel industry; inferred, for example, from the American Petroleum Institute’s (“API”) draft Global Climate Science Communication Action Plan, which that “Victory will be achieved when: average citizens “understand” (recognize) uncertainties in climate science…[the] Media “understands” (recognizes) uncertainties in climate science…[and] those promoting the Kyoto treaty on the basis of extant science appear to be out of touch with reality.”

Financial ties may be inferred, for example, from the industry’s join financing of the Global Climate Coalition (“GCC”), a group representing the interests of the fossil fuel industry much like the Council for Tobacco Research (“CTR”) represented those of the tobacco industry.

(ii) “Relationships”

In Philip Morris, the court found that the tobacco enterprise operated through both formal and informal organization, evidenced by the formation and activities of trade organizations, including CTR and the Tobacco Institute. As noted above, the fossil fuel industry similarly organized its climate activities though trade organizations which represented its interested, including the GCC. Though the GCC was disbanded in 2002, the Philip Morris court found that the fact that an organization had been dissolved some time prior to the litigation did not affect the existence of the enterprise, or the organizations inclusion in it, as such organization could be resurrected at the defendants’ behest.

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65 Id., at 1531.
66 Whose members included representatives from nearly every major U.S. and international fossil fuel company, including Amoco, Exxon, Philips, Shell, Sunoco, Sohio, Texaco, and Chevron (then Standard Oil of California and Gulf Oil).
70 Id., at 1532.
71 Id., at 1534.
Longevity requires that the enterprise function as a continuous unit and remain in existence long enough to pursue the relevant purpose. This requirement will be met even by “spurs of activity punctuated by periods of quiescence.” In Philip Morris, the equivalent test was “continuity,” and this was demonstrated by communication between the defendants relating to the enterprise, the joint funding and directing of various organizations, and the maintenance of the defendants’ position over the relevant period. On the basis of this analysis, and the foregoing discussion, longevity should not be a significant hurdle in the context of climate litigation.

Effect on Interstate and Foreign Commerce

The enterprise must have some nexus to interstate commerce. An enterprise has a nexus to interstate commerce when it is “directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce.” This requirement will be satisfied if either the enterprise or the racketeering activity affect interstate commerce. In Philip Morris, the fact that the defendants, collectively, had bought and sold over one trillion dollars of goods and services in interstate and foreign commerce since 1954, constituted the requisite effect on interstate commerce. Between 2010 and 2015 alone, revenues of the oil and gas industry in the U.S. are estimated to be in excess of one trillion dollars. Thus, on the basis of the reasoning in Philip Morris, an effect on interstate ad foreign commerce would readily be shown.

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72 Boyle v. United States, 556 U.S. at 948.
73 Id., at 948
74 United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 1535.
76 DeFalco v. Bernas, 244 F.3d 286, 309 (2d Cir. 2001); Bunker Ramo Corp. v. United Bus. Forms, Inc., 713 F.2d 1272, 1289 (7th Cir. 1983).
b) Conduct

Each defendant must have participated in directing the affairs or management of the enterprise, not merely its own affairs.\textsuperscript{79} A defendant may be deemed to have “participated,” even if he did not have significant control over the enterprise’s affairs\textsuperscript{80} or a formal position in the enterprise. Further, there is no requirement that he know all the details, or even the other members;\textsuperscript{81} it is sufficient that he “[knew] the general nature of the enterprise and [knew] that the enterprise [extended] beyond his individual role.”\textsuperscript{82}

In Philip Morris, the bar to establishing “participation’ was set relatively low. Participation was found by each defendant’s involvement in trade organizations, supporting the enterprise’s objective, coordinating and causing the public dissemination of fraudulent statements in furtherance of the common purpose,\textsuperscript{83} and the regular meetings and correspondence between defendants.\textsuperscript{84}

c) Pattern of racketeering activity

As in the tobacco litigation, it is likely that the relevant racketeering activity for the fossil fuel industry would be mail or wire fraud under under 18 U.S.C. § 1341 or 1343. To establish mail or wire fraud, the plaintiff must show that the defendant: (i) devised or intended to devise a scheme for obtaining money or property, (ii) by means of material false or fraudulent statements, (iii) used the mail, telephone, or other electronic communication, for the purpose of furthering the scheme, and (iii) acted with specific intent to deceive or defraud.\textsuperscript{85}

\textsuperscript{80} United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 1543.
\textsuperscript{81} Id.
\textsuperscript{82} United States v. Rastelli, 870 F.2d 822, 828 (2d Cir. 1989).
\textsuperscript{83} United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 1545
\textsuperscript{84} United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 1547.
Unlike common law fraud, the mail and wire fraud provisions require neither reliance by, nor injury to, the alleged victim,\textsuperscript{86} though it must be shown that the schemer contemplated some harm or injury to occur as a result of the scheme.\textsuperscript{87} The statute’s purpose is to punish the scheme, not its success.\textsuperscript{88} As such, in a government civil RICO claim, the key element to establish is not actual fraud,\textsuperscript{89} but rather a scheme aimed at inducing reliance on a known misrepresentation.\textsuperscript{90} This aligns with the remedies available to the federal government, which aim to prevent or restrain future violations, rather than compensate for past conduct.\textsuperscript{91} Courts have typically interpreted the “scheme to defraud” requirement broadly, finding the existence of a scheme to defraud where there has been any “trickery, deceit, half-truth, concealment of material facts, or affirmative misrepresentation.”\textsuperscript{92}

In Philip Morris, the tobacco industry had repeatedly made public statements that smoking was neither harmful\textsuperscript{93} nor addictive,\textsuperscript{94} flying the the face of internal and external...
scientific research which emphatically stated the opposite. The scheme to defraud was accordingly found to be comprised of fraudulent statements in several areas, including misrepresenting and concealing the adverse effects of smoking, maintaining that there was an “open question” as to the adverse effects of smoking, despite knowing otherwise, and ensuring that research and development, and marketing, efforts, remained consistent with the defendants’ chosen public position.

Parallels can readily be drawn between the tobacco companies’ behaviour, and that of Exxon, as disclosed in the ICN and LA Times investigations. However, the climate change issue is less clear-cut than that of smoking, particularly as regards timing and magnitude, and this was only more true 40 years ago. These uncertainties present challenges of nuance when it comes to statements made in the climate change context, though, on the basis of courts’ liberal interpretation of “scheme to defraud,” this should not bar a finding of deceit. To illustrate the point, in 1996, Exxon’s then CEO, Lee Raymond, observed that “currently, the scientific evidence is inconclusive as to whether human activities are having a significant effect on the global climate.” If “inconclusive” is a synonym for “uncertain,” then in some sense Raymond was right. At that time in particular, the ability to quantify the human influence on global climate was limited by uncertainties in key areas, including natural variability and land surface changes. However, “inconclusive” is the wrong lens through which to view climate change; it says nothing of degree. Raymond was framing climate change as a glass one third empty, as opposed to a glass two thirds full. His statement was a “half-truth.” Internal and external understanding at the time reflected the well-
established scientific consensus that humans were likely having a significant impact on the global climate.

As a second example, a 1998 Exxon pamphlet entitled, “Global Climate Change Everyone’s Debate,”\(^\text{101}\) stated that “[n]early all CO2 emissions come from natural sources. Only a small amount comes from burning fossil fuels…Does the tiny portion of greenhouse gases caused by burning fossil fuels have a measurable effect on worldwide climate? No one knows for sure.”\(^\text{102}\) While this statement is, in part, correct, taken in isolation it is misleading. The amount of carbon dioxide emitted by natural sources is almost perfectly balanced with the amount taken out of the atmosphere by plants. While C02 derived from fossil fuel combustion does form a small part of the global carbon cycle, that small part has a large impact, as the natural carbon exchange cannot absorb all the additional C02. That was known in 1998. Furthermore, as early as 1990 the IPCC was “certain” that, “Emissions resulting from human activities [were] substantially increasing the atmospheric concentrations of greenhouse gases… resulting on average in an increase in global warming.”\(^\text{103}\)

Some statements made were categorically false. For example, speaking in 1997, the warmest year on record,\(^\text{104}\) Exxon’s former CEO, Lee Raymond, observed that, "satellite measurements have shown no warming trend since the late 1970s. “In fact,” he resolved, 

\(^\text{100}^\) http://www.ucsusa.org/sites/default/files/attach/2015/07/Climate-Deception-Dossier-7_GCC-Climate-Primer.pdf
\(^\text{101}^\) IPCC Second Assessment, supra note 50, at 39 (noting that “the balance of evidence suggests that there is a discernible human influence on global climate.”
\(^\text{103}^\) Id., at 5.
\(^\text{104}^\) IPCC First Assessment Report, supra note 50
“the Earth is cooler today than it was 20 years ago.”105  Wrong. The Earth’s surface temperature had in fact been rising during that period, as acknowledged both internally by the GCC,106 and externally, by the IPCC and the National Oceanic and Atmospheric Administration, among others.107  Categorically false or not, the mail and wire fraud statutes cover a variety of fraudulent or misleading statements, including those that are literally true but deceptive in the context in which they are made.108  The examples discussed above would seem to fit the bill regardless.

Finally, of paramount significance for finding a scheme to defraud in Philip Morris, was the fact that the defendants’ internal documents “openly acknowledge[d] the purpose of their public relations strategy.”109  Again, parallels may be drawn with the fossil fuel industry here. For example, an internal Exxon briefing, acknowledging that “the greenhouse effect may be one of the most significant environmental issues for the 1990s,” stated that, despite that issue, the corporation’s strategy was to “emphasize the uncertainty” of the scientific data supporting the existence of climate change.110  The API’s Global Climate Science Communication Action Plan,111 discussed above, stated that its campaign would achieve

106 GCC, Primer on Climate Change Science, supra note 99, at 15.
107 National Oceanic and Atmospheric Administration, supra note 104; IPCC Second Assessment Report, supra note 50, at 4 (noting that “[t]he mean global surface temperature has increased by about 0.3° to 0.6°C since the late 19th century, and by about 0.2° to 0.3°C over the last 40 years”).
108 See, e.g., Emery v. Am. Gen. Fin., Inc., 71 F.3d 1343, 1348 (7th Cir. 1995) (“A half-truth, or what is usually the same thing a misleading omission, is actionable as fraud, including mail fraud if the mails are used to further it, if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled”); United States v. Townley, 665 F.2d 579, 585 (5th Cir. 1982) (holding that misleading newspaper ads and letters which were mailed “need not be false or fraudulent on their face, and the accused need not misrepresent any fact” since “it is just as unlawful to speak ‘half-truths’ or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading”).
111 API, supra note 67. The group that drew up the plan included representatives from Exxon, Chevron, and other representatives from several front groups and think tanks that have a history of campaigning against climate science, all of whom have received funding from Exxon and other companies within the fossil fuel industry.
“victory” when “average citizens ‘understand’ uncertainties in climate science.”

The API’s proposed plan involved “a national media relations programme to inform the media about uncertainties in climate science” and the coordination of “scientific critique of the IPCC research and its conclusions.” In order to execute this plan, the API sought to recruit scientists “without a long history of visibility in the climate debate” so as to amplify “scientific” views consistent with theirs. The API also aimed to target teachers and students in order to obstruct the imposition of “Kyoto-like measures” in the future.

(ii) Material False or Fraudulent Statements

Materiality is a key element of the mail and wire fraud statutes. A statement will be considered material if it has the capacity or natural tendency to influence a decision; if it carries some “probative weight” for a person in reaching a decision. In Philip Morris, the court emphasized the definition of materiality found in the Second Restatement of Torts, which holds that a matter will be material if: (1) a reasonable person would attach importance to it in determining their course of action, and (2) the representor knows or has reason to know that the recipient is likely to regard the matter as important in determining their course of action, even though a reasonable person would not.

Given the stakes involved in climate change, it is unlikely that materiality should pose much of a hurdle here. It is difficult to imagine that a “reasonable person,” when assessing the costs and benefits of continued fossil fuel use, would not consider the catastrophic

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112 Id., at 2.
113 Id., at 5.
114 Id., at 4.
115 Id., at 7.
118 United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1122 (D.C.C. 2009) (quoting United States v. Weinstock, 231 F.2d 699, 701 (D.C. Cir. 1956) (noting that (holding that the materiality requirement will met if the issue is “of importance to a reasonable person in making a decision about a particular matter or transaction”).
119 Restatement (Second) of Torts, § 538(2)(a)-(b) (1977).
environmental impacts predicted to occur as a result material. Further, there can be no doubt that statements made by the world’s biggest oil company, and one of the world’s largest corporations, denying the effects of climate change, would carry particular weight, with both consumers and politicians. However, we need not rely on conjecture. In a June 2001 briefing memorandum, a State Department official is recorded as thanking the GCC, as President Bush "rejected the Kyoto Protocol in part, based on input from [the GCC].”

Further, studies have confirmed the significant influence that private funding has had on the misinformation and the polarization of the climate change issue in the U.S.

Though materiality should not pose much of an obstacle, a couple of arguments advanced in *Philip Morris* warrant discussion here, as it could reasonably be anticipated that they might arise during hypothetical climate litigation. First, the tobacco defendants argued that the fact that there existed in the public domain information contrary to their representations meant that no “reasonable consumer” would have relied on those representations. That argument, in the court’s words, “strains credulity.” In reaching this conclusion, the court was struck by the fact that the defendants were a primary source of information on smoking and tobacco, and that the public health community had both a less sophisticated understanding, and less resources to disseminate information than the tobacco industry. This is relevant to the climate change context, as during the period in which the fossil fuel industry was perpetuating its deceit, contrary information did indeed exist in the public domain. However, the reasoning in *Philip Morris* suggests that this may not render misleading statements deemed immaterial. More particularly, the cutting-edge research that

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123 *Id.*
Exxon carried out during the 1970s and 1980s confirms that it was, and could have been, a trailblazer in the climate change field. This, together with its status as the world’s biggest energy company, left Exxon well-positioned as an authority on energy matters, and its word of importance to many. Further, the Philip Morris court noted that the defendants’ definition of materiality, which focused only on the first limb of the Second Restatement test, was insufficient, and the huge amounts spent on advertising each year was indicative of the importance the defendants believed recipients attached to their representations. A similar question might be asked of the fossil fuel industry: why invest so much in advertising, PR, and lobbying, if it was considered that politicians and citizens would not consider the message material?

(iii) “Use of Mailings and Wires in Furtherance of the Scheme”

In our modern world, establishing mail or wire communications across state lines is not a high threshold to meet; almost all commercial activity will involve remote communication. The plaintiff need only show a causal relationship between the mailing, or use of the wires, and the scheme to defraud; in other words, the transmissions themselves need not be fraudulent. Further, the mail or wire transmissions may be incidental to the scheme; they need not form an essential part of the scheme in themselves. In Philip Morris, the court found that the defendants fulfilled this requirement by virtue of their use of U.S. mail, as well as their use of fax machines, the Internet, television, and email, to transmit

125 *Id.* The court queried “why Defendants were spending millions upon millions of dollars in advertising every year if they thought no one -- smoker, potential smoker, or member of the public -- was going to believe it and rely on it.”
126 Pereira, 347 U.S. at 8 (“It is not necessary that the scheme contemplate the use of the mails as an essential element”); United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 1550 (D.D.C. 2006) (quoting United States v. Reid, 533 F.2d 1255 (D.C. Cir. 1976), aff’d 566 F.3d 1095 (D.C. Cir. 2009) (“it is not necessary that the individual mailing relied upon by the prosecution be shown to be in any way false or inaccurate, if the matter mailed is utilized in furtherance of or pursuant to the scheme to defraud”).
127 United States v. Mann, 884 F.2d 532, 536 (10th Cir. 1984); Pereira, 347 U.S. at 8 (noting that “It is not necessary that the scheme contemplate the use of the mails as an essential element”).
documents or statements. Where a defendant publishes advertisements and press releases in newspapers, which are then disseminated via U.S. mail, or where a statement is broadcast on television or published on the internet, this requirement will be met.

In addition to showing the use of mails or wires, it must be shown that the defendant caused those transmissions. In this respect, “Where one does an act with knowledge that the use of the mails [or wires] will follow in the ordinary course of business, or where such use can reasonably be foreseen even though not actually intended, then [the defendant] ‘causes’ the mails to be used.” In *Phillip Morris*, it was found reasonably foreseeable that the defendants’ representatives’ statements would be broadcast to the public in light of their routine mailing practices. This is not a high threshold to meet.

(iv) “Specific Intent to Defraud or Deceive”

Mail and wire fraud are specific intent offenses. As the statute does not require actual fraud, proof of fraudulent intent is key. Specific intent in this context means intent to defraud, rather than intent to violate a statute. Fraudulent intent may be inferred from a “material misstatement of fact made with reckless disregard for the truth,” or, from the

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129 Id., at 1555 – 1557. Mobil made a number of “advocacy advertisements” which appeared in major newspapers around the world, though now unavailable through Exxon’s website, are discussed in Ian H Rowlands, *Beauty and the beast? BP’s and Exxon’s positions on global climate change*, Environment and Planning C: Government and Policy, Vol. 18, 339, 344 (2009).
133 United States v. Diggs, 613 F.2d 988, 997 (D.C. Cir. 1979) (where the court noted that “proof of fraudulent intent is critical” for the establishment of an offence under the mail or wire fraud statute, as the plaintiff is required to show only a “‘scheme to defraud,’ rather than actual fraud”).
134 United States v. Porcelli, 865 F.2d 1352, 1358 (2d Cir.) (“The specific intent required under the mail fraud statute is the intent to defraud…and not the intent to violate a statute”).
135 United States v. Hannigan, 27 F.3d 890, 892 at n.1 (3d Cir. 1994) (where the court found that “The specific intent element may be found from a material misstatement of fact made with reckless disregard for the truth”); United States v. Munoz, 233 F.3d 1117, 1136 (9th Cir. 2000) (noting that “reckless indifference to the truth or falsity of a statement satisfies the specific intent requirement in a mail fraud case”); and United States v. Bryant, 655 F.3d 232 (3d Cir. 2011) (where the court found sufficient evidence of fraudulent intent in light of the defendant’s efforts to conceal the fraudulent scheme).
scheme itself, where the necessary result of the scheme is to injure others. Courts have generally found that fraudulent intent is rarely susceptible of direct proof, and therefore may be inferred from the circumstances. Thus, in *Philip Morris*, the court held that the requisite intent was established by “statements which were directly contrary to the internal, collective knowledge of each individual Defendant and the Enterprise as a whole.” Where statements were made by individuals, the court held that the doctrine of respondeat superior applied, and thus the defendants’ specific intent was established by the collective knowledge of their officers, employees and agents. As discussed above, specific intent may fairly be inferred from internal documents discussing climate change PR strategy, and from incongruity between internal research, and external statements and publications.

Lastly, good faith is a complete defense to mail and wire fraud charges. Thus, if a person believes that the information included in communication is true, then specific intent will not be found. Distinguishing good faith from reckless disregard is the topic of the next section of this article.

(v) *First Amendment Issues*

In a letter last year, thirteen Attorneys General observed that “a vigorous debate exists in this country regarding the risks of climate change and the appropriate response to those

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136 United States v. D’Amato, 39 F.3d 1249, 1257 (2d Cir. 1994) (when the “necessary result’ of the actor’s scheme is to injure others, fraudulent intent may be inferred from the scheme itself”).
137 United States v. William E. Sullivan, 406 F.2d 180 (2d Cir. 1969) (noting that “The presence of a fraudulent intent…must instead be established by legitimate inferences from circumstantial evidence. These inferences are based on the common knowledge of the motives and intentions of men in like circumstances”).
140 For example, the API’s Communication Plan, supra note 67.
141 See, e.g., United States v. Regan, 937 F.2d 823, 827 (2d Cir. 1991); United States v. Rochester, 898 F.2d 971 (5th Cir. 1990); United States v. Dunn, 961 F.2d 648 (7th Cir. 1992).
142 Steiger v. United States, 373 U.S. 133 (10th Cir. 1967) (noting that good faith defense "is a complete defense"); Coleman v. United States, 167 F.2d 837, 839 (5th Cir. 1948) (finding that intent is critical as good faith is a complete defense).
In the letter, the signatories urged their fellow Attorneys General: “stop policing viewpoints.” Robust and uninhibited public debate is indeed the cornerstone of the First Amendment. Furthermore, there is nothing per se improper about self-interested speech and commercially-interested research. However, in Philip Morris the court denied the defendants’ argument that their public statements were simply “statements of opinion held in good faith.” This begs the question: where is the line between statements of opinion and statements constituting fraud? The court in Philip Morris noted several factors that differentiated the two types of speech. First, the court held that, in light of what the enterprise as a whole and individual defendants knew, it was absurd to believe that they were not aware that their public statements were false. Second, the fact that the relevant statements were at odds with the internal knowledge and practice of the defendants. Finally, in circumstances where objective data exists to prove that a statement was misleading at the time it was made, the making of that statement may constitute fraud. In this respect, the court drew an analogy with securities fraud, where it is generally held that a statement will be one “of belief” where it is shown that: “(1) that the statement is genuinely believed; (2) that there is [a] reasonable basis for that belief; and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement.” Considering the statements made by Exxon representatives discussed above in light of the foregoing criteria, it seems unlikely that they would be considered opinions held

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144 Id.
146 United States v. Philip Morris, 449 F. Supp. 2d at 1502
148 Id.
149 Id.
150 Id., at 1504.
in good faith, or “viewpoints. And on this point the court in Philip Morris couldn’t have been clearer: "[T]he First Amendment does not shield fraud."\(^{151}\)

There is one exception to this rule: statements made in the course of petitioning the government may warrant First Amendment protection under the Noerr-Pennington doctrine.\(^{152}\) Thus, while statements made when lobbying the government may merit Noerr-Pennington protection, and thus would not be actionable, “advocacy advertisements” made to the public would not.\(^{153}\)

(vi) “Pattern”

There must be a pattern of racketeering activity. “Pattern” is defined as two or more acts of racketeering activity committed within a ten-year period of each other.\(^{154}\) This requirement relates to the scheme as a whole, as opposed to each of the discrete activities which form its component parts.\(^{155}\) Though showing two acts is a prerequisite to finding a violation, that, on its own, may not be sufficient;\(^{156}\) the acts must additionally be both "related" and "continuous."\(^{157}\) Individual racketeering acts will be deemed “related” where they share a similar purpose, method of commission, results, participants, or are considered not isolated events.\(^{158}\) “Continuity” is similarly flexible, and may be established where the acts are a regular way of the defendant conducting his legitimate business, or of his

\(^{151}\) Id., at 1564.
\(^{152}\) The Noerr-Pennington doctrine has its roots in two Supreme Court decisions decided the 1960s, relating to antitrust litigation, in which the Court recognized a defence to a suit under antitrust laws, based on the First Amendment right to petition the government. Id. at 1562.
\(^{153}\) Id. at 1563 (quoting Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (“racketeering acts comprising press releases or advertisements do not constitute efforts to persuade the legislature”).
\(^{155}\) United States v. Philip Morris, 449 F. Supp. 2d at 1566.
\(^{156}\) H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 238 (1989) (the court found that though § 1961(5) suggests that Congress imagined circumstances where two acts would be enough to form a pattern, in certain circumstances two acts may not be enough).
\(^{157}\) Id., at 240.
\(^{158}\) United States v. Philip Morris, 449 F. Supp. 2d at 1568.
conducting or participating in an ongoing RICO "enterprise." Given the extent to which climate change denial was woven into the fossil fuel industry’s business activities over the last four decades, if a scheme to defraud were to be shown, it is unlikely that “pattern” would prove a difficult element to show.

2. **Section 1962(d): Conspiracy**

RICO’s conspiracy provision makes it an offense to conspire to violate any of RICO’s substantive provisions under Sections 1962(a)-(c). Where it is shown that the defendants committed acts prohibited by RICO, there will be an inference that they had an agreement to do so. On the flipside, courts are split on whether a plaintiff can bring a standalone conspiracy claim absent an actionable claim under §§ 1962(a)-(c). For these reasons, the focus of this article is on § 1962(c), and I will not address RICO’s conspiracy action in great detail here.

The focus of a RICO conspiracy claim is on the agreement to participate in the conspiracy, rather than on the individual predicate acts. Thus, in addition to showing an enterprise and an effect on interstate commerce, the plaintiff must show that each defendant knowingly agreed to commit two predicate acts, or to participate in the conduct of the enterprise with the knowledge and intent that others would. There is no requirement that

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160 United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978); United States v. Ashman, 979 F.2d 469, 492 (7th Cir. 1992).
161 For examples of cases where a standalone conspiracy claim was deemed permissible, see United States v. Browne, 505 F.3d 1229, 1264 (11th Cir. 2007) (recognizing that a defendant can be guilty of conspiracy even if he did not commit the substantive acts that would constitute violations of Sections 1962(a), (b), or (c)); In re Motel 6 Securities Litigation, 161 F. Supp. 2d 227, 237 (S.D.N.Y. 2001) (“It is not necessary that plaintiffs allege a substantive RICO violation in order to prove liability for conspiracy”). However, for an opposing view, see Efron v. Embassy Suites (Puerto Rico), Inc., 223 F.3d 12, 21 (1st Cir. 2000) (ruling that if pleadings do not state a substantive RICO claim, then the conspiracy claim will fail); Tal v. Hogan, 453 F.3d 1244, 1270 (10th Cir. 2006) (“If a plaintiff has no viable claim under § 1962(a), (b) or (c), then its subsection (d) conspiracy claim fails as a matter of law”).
162 United States v. Starrett, 55 F.3d 1525, 1544 (11th Cir. 1995).
163 United States v. Nguyen, 255 F.3d 1335, 1341 (11th Cir. 2001)
an individual conspirator have committed a RICO violation. A conspiracy may still be found where the membership fluctuates over time, as would likely be the case in climate litigation, and a conspirator may be liable for acts committed by others prior to his membership.

Much of the discussion above relating to the establishment of a scheme to defraud is relevant here. For example, in *Philip Morris*, in finding a conspiracy the court again focused on the tobacco industries’ agreement to form and fund front groups, and coordinate public relation campaigns, and marketing activity, in furtherance of their common purpose. Given the analogous analysis, I will not address this again here.

C. **Section 1964(c): Private Civil RICO**

Section 1964(c) of RICO creates a private cause of action for any “person” who has suffered a compensable injury to recover treble damages. Private civil RICO presents one major obstacle over government civil RICO, which may prove difficult to surmount in the climate change context. A private plaintiff must allege and prove that he has been “injured in his business or property by reason of the conduct constituting the relevant [RICO] violation.” This is essentially a “standing” requirement, and courts as a general rule limit standing to persons whose injuries were both factually and proximately caused by the alleged...

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164 Salinas v. United States, 522 U.S. 52, 63 (1997); CGC Holding Co., LLC v. Broad and Cassel, 773 F.3d 1076, 1088 (10th Cir. 2014) (one conspires to violate RICO by adopting the goal of furthering the enterprise, “even if the conspirator does not commit a predicate act”); United States v. Godwin, 765 F.3d 1306, 1324 (11th Cir. 2014) (when the government seeks to bring an action for conspiracy under RICO, it does not need to prove that each conspirator knew of his fellow conspirators, agreed with his fellow conspirators, had knowledge of all of the details of the conspiracy, or contemplated participating in the same related crime”).

165 See, e.g., United States v. Garcia, 785 F.2d 214, 225 (8th Cir. 1986) (“An agreement may include the performance of many transactions, and new parties may join or old parties terminate their relationship with the conspiracy at any time.”); United States v. Kelley, 849 F.2d 999, 1003 (6th Cir. 1988) (single conspiracy can be found even where “the cast of characters changed over the course of the enterprise”)

166 Salinas v. United States, 522 U.S. 52, 63-64 (1997)


169 *Id.*
RICO violation;\textsuperscript{170} in other words, there must be some direct relation between the injury asserted, which must be concrete economic loss,\textsuperscript{171} and the alleged conduct.\textsuperscript{172} Thought reliance is not a requirement under private civil RICO,\textsuperscript{173} in most fraud-based RICO cases “but-for” causation will prove hard to establish where the plaintiff cannot show reliance on the relevant misrepresentation.\textsuperscript{174}

Causation is often cited as one of the biggest hurdles to bringing a successful climate change damages claim.\textsuperscript{175} And indeed, this is reflected in the record of climate change litigation to date. There are two cases worth mentioning in this respect. In \textit{Native Village of Kivalina v. ExxonMobil Corp.},\textsuperscript{176} the plaintiffs alleged that the public had relied on the defendant companies’ misrepresentations about climate change, those misrepresentations had induced the government into not regulating, and the public into continuing to burn, fossil fuels, the loss of the Arctic sea ice protecting the village from winter storms, and that the resulting erosion had threatened the habitability of the plaintiffs’ village. The case was ultimately dismissed; the court finding that the plaintiff’s claim [presented such a complex question of causation that it evaded judicially manageable standards of reaching a reasoned

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\item \textsuperscript{170} See, e.g., Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23 (2d Cir. 1990) (factual causation alone is not sufficient); Brandenburg v. Seidel, 859 F.2d 1179, 1189 (4th Cir. 1988) (rejecting RICO claim where plaintiff established factual cause but failed to establish proximate cause).
\item \textsuperscript{171} See, e.g., In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 155 F. Supp. 2d 1069, 1090 (S.D. Ind. 2001).
\item \textsuperscript{172} Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 271 (1992); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 932-33 (3d Cir. 1999) (concluding that health fund plaintiffs lacked standing to sue tobacco companies for the costs associated with treating smoking-related illnesses as the chain of causation between the harmful effects of smoking and the actions of the tobacco companies’ actions was “too speculative and attenuated”).
\item \textsuperscript{173} Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 661 (2008) (holding that “nothing on the statute’s face imposes [a requirement of reliance]” and that a person may be found liable under RICO “even if no one relied on any misrepresentation”).
\item \textsuperscript{174} \textit{Id.}, at 659 (2008) (noting that “the complete absence of reliance may prevent the plaintiff from establishing proximate cause”).
\item \textsuperscript{175} For a discussion of the reasons why causation presents such a challenge in the climate change context, see Michael B. Gerrard, \textit{What Litigation of a Climate Nuisance Suit Might Look Like}, 121 YALE L.J. 135, 139 (2011). See also Andrew Gage and Margaretha Wewerinke, \textit{Taking Climate Justice into Our Own Hands: A Model Climate Compensation Act}, West Coast Environmental Law and the Vanuatu Environmental Law Association, 31 (December, 2015), available at \url{http://wcel.org/resources/publication/taking-climate-justice-our-own-hands}.
\item \textsuperscript{176} Native Village of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Cal. 2008).
\end{enumerate}
resolution and presented threshold political questions that would be better addressed by Congress. More specifically, the court found, given our long history of greenhouse gas emissions, "there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person and any group at any particular point and time."\textsuperscript{177}

In \textit{Comer v. Murphy Oil},\textsuperscript{178} inhabitants of the Mississippi Gulf coast filed suit against various fossil fuel and energy companies, in the wake of the destruction caused by Hurricane Katrina. The plaintiffs alleged that the defendants had contributed to global warming through greenhouse gas emissions, which had resulted in the unprecedented force of Hurricane Katrina. The court held that the plaintiffs lacked standing as they could not show that their alleged injuries were "fairly traceable" to the defendants' activities. In particular, "[t]he assertion that the defendants’ emissions combined over a period of decades or centuries with other natural and man-made gases to cause or strengthen a hurricane and damage personal property is precisely the type of remote, improbable, and extraordinary occurrence that is excluded from liability."\textsuperscript{179}

Though much depends on the specific injury being alleged, most anticipated impacts from climate change are likely to present a complex causal picture for two key reasons. First, many climate-related harms occur to a certain extent absent anthropogenic global warming, thus under rules of causation, plaintiffs would need to establish the degree to which anthropogenic emissions increased the risk that the alleged injury would occur. Second, the huge number of greenhouse gas emitters complicates causation further; what amount of emissions is “too small” to make a difference? These questions, among others, will present

\textsuperscript{177} Id., at 20.

\textsuperscript{178} Comer v. Murphy Oil, 2007 WL 6942285 (S.D. Miss. 2007), rev’d, 585 F.3d 855 (5th Cir. 2009), vacated on reh’g en banc, 607 F.3d 1049 (2010).

\textsuperscript{179} Comer v. Murphy Oil USA, Inc., 839 F.Supp.2d 849 1, 35 (S.D. Miss. 2012).
challenges for a private party looking to litigate climate change under private RICO, in much the same way as it did in *Kivalina* and *Comer*.

D. Would a Claim Be Better Brought at the State Level under “little RICO” statutes?

1. New York’s Organized Crime Control Act

   Though New York had struggled for some time with organized crime, state legislators were concerned that federal RICO went too far in its breadth.\(^{180}\) As such, when it came to adopting New York’s RICO counterpart, the Organized Crime Control Act of 1986 (“OCCA”), New York legislators drafted the crime of “enterprise corruption” to apply to a narrower range of activities and persons than its federal counterpart. OCCA applies “to persons employed by or associated with criminal enterprises,” only to the extent that they participate “in a pattern of criminal activity.”\(^{181}\) OCCA was drafted with individuals in mind, not corporations. As such, the enterprise itself is not subject to prosecution.\(^{182}\)

   OCCA was intended as a prosecutorial tool, and as such does not provide for a private cause of action. Furthermore, the government is limited to criminal remedies,\(^{183}\) which are limited to imprisonment, forfeiture, and fines.\(^{184}\) OCCA incorporates a broad range of offenses under New York law, including, relevantly, schemes to defraud\(^{185}\) and false statements.\(^{186}\) A conspiracy or an attempt to commit any felony will also constitute a criminal act under OCCA.

   \(^{180}\) See, e.g., Letter from Melvin H. Miller, Chairman, N.Y. State Assembly Comm. on Codes, to Evan A. Davis, Counsel to the Governor 2-3 (July 16, 1986).

   \(^{181}\) N.Y. PENAL LAW §§ 460.20(1) and 460.20(1)(a).

   \(^{182}\) N.Y. PENAL LAW §§ 460.00 and 460.20.

   \(^{183}\) Though civil remedies may be sought incidentally to forfeiture proceedings, they are not set out under OCCA, and are not available in the absence of a criminal conviction.

   \(^{184}\) N.Y. PENAL LAW § 460.30(5).

   \(^{185}\) N.Y. PENAL LAW §§ 460.10(1)(a) and 190.65.

   \(^{186}\) N.Y. PENAL LAW §§ 460.10(1)(a), 175.10, 175.25, 175.35, 175.40 and 210.40.
Two factors point to the conclusion that OCCA would not be a valuable tool to bring a claim against Big Oil. First, as it provides for a criminal cause of action only, it requires a higher burden of proof than civil RICO. Second, its focus on individuals, over corporations or associations of both, means that it would likely not be suited to the objectives of possible climate litigation, and its more limited scope means that greater protection is afforded to defendants than by its federal counterpart.

2. California’s California Control of Profits and Organized Crime Act

The California Control of Profits and Organized Crime Act (“CPOCA”)\(^{187}\) is unusual among “little RICO” statutes in that it provides neither a criminal nor civil cause of action; the only remedy it offers is forfeiture of assets derived from unlawful activities.\(^{188}\) CPOCA will be triggered when a person engages in a pattern of criminal profiteering activity,\(^{189}\) and is convicted of the underlying offense.\(^ {190}\) The definition of “criminal profiteering activity” and “organized crime” are much narrower than their federal counterparts.\(^{191}\) “Criminal profiteering activity” is defined by reference to certain enumerated acts. Though fraud does feature twice, the fraudulent acts relate specifically to welfare\(^ {192}\) and insurance claims,\(^ {193}\) rather than to fraudulent activities more broadly. As such, CPOCA would likely not prove useful for possible climate litigation.

V. Even if legally feasible, is a government civil RICO action the best way to hold oil companies accountable?

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\(^{188}\) Cal. Penal Code § 186.3.
\(^{189}\) Cal. Penal Code § 186.2.
\(^{190}\) AMERICAN BAR ASSOCIATION, RICO: THE ULTIMATE WEAPON IN BUSINESS AND COMMERCIAL LITIGATION, Volume 1, Tab G-1, 16 (1983).
\(^{191}\) The relevant counterparts being “racketeering” and “enterprise,” respectively. See Cal. Penal Code § 186.2.
\(^{192}\) Cal. Penal Code § 186.2(21) and California Welfare and Institutions Code §14107.
\(^{193}\) Cal. Penal Code §§ 186.2(20) and 550.
A government civil RICO action offers a number of advantages over private civil RICO, California and New York “little RICO,” and criminal RICO actions. It also has an advantage over climate change tort litigation, discussed above in the context of private civil RICO. However, being preferable and feasible does not necessarily render a particular path a good one to take. That being so, this section of the article aims to synthesise the foregoing discussion, and consider some of the overall benefits of a government civil RICO claim, including whether such a claim would be successful in holding the fossil fuel industry to account.

A. ISSUE 1: Remedies

The Philip Morris litigation made it clear that relief available to the federal government under section 1964(a) is limited to forward-looking remedies that prevent and restrain – not those that “prevent, restrain and discourage” – future violations of RICO.\(^{194}\) Remedies aimed at punishing or correcting the effects of past conduct are not available.\(^{195}\) This then begs the question: what forward-looking remedies would be effective in holding the fossil fuel industry to account? Several of the remedies ordered in the tobacco litigation seem relevant. For example, one could imagine corrective statements about the adverse effects of fossil fuel combustion, enjoining the fossil fuel industry from making any false or misleading public statement about climate change, and enabling public access to industry documents being viable.

However, it is not clear that the corrective statements or misleading statements remedies would be appropriate in climate change litigation. When ordering the remedy in Philip Morris, the court noted that, despite “steps forward,” the defendants’ public statements

\(^{194}\) United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1200 (D.C. Cir. 2005) (noting that “if general deterrence were a permissible objective, “the phrase ‘prevent and restrain’ would read ‘prevent, restrain, and discourage,’ and would allow any remedy that inflicts pain”).

\(^{195}\) Id., at 11.
“[continued] to omit material information or present information in a misleading and incomplete fashion.”196 However, Exxon, for example, has changed its tune over the last few years. Its website contains a clear acknowledgment of climate change,197 and, in a letter to the White House last month, Exxon urged President Trump to stick with the Paris Agreement, heralding the agreement as “an effective framework for addressing the risks of climate change.”198 Whether this change of tack be political manoeuvring or not,199 in these two examples, at least, there is limited evidence of continuing fraud.

The third remedy pertaining to document disclosure is more promising. The defendants in Philip Morris were ordered to create and maintain document depositaries and websites containing a wealth of internal documents.200 Doing so, the court held, would allow the public to monitor what the defendants were doing internally, and assess the accuracy of future information about their products and operations.201 Such a remedy could be a similarly “powerful restraint” on the fossil fuel industry. Moreover, the value of document disclosure and transparency doesn’t begin with the remedy. A key lesson to be gleaned from the tobacco litigation, is that the litigation process forced the tobacco industry to reveal its internal corporate strategies.202 Internal documents proved central to “[shifting] the focus of litigation away from a battle of the experts over the science of disease causation and toward

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201 Id., at 1637.
an investigation of the industry’s conduct.” In this respect, RICO’s civil investigative demand (“CID”) provision would allow the government to compel document production prior to commencing an investigation.

B. ISSUE 2: Impact

Last year marked the 50th anniversary of the U.S. Surgeon General’s report linking smoking with disease, and over a decade since Philip Morris. Yet the struggle for tobacco control continues to this day. Over 35 million Americans smoke, more than 16 million live with smoking-related disease, and smoking remains the number one cause of preventable death in the U.S., with around 480,000 people dying prematurely from smoking each year. Did the tobacco litigation achieve anything? What are the implications for climate change litigation? If people continue to smoke in the knowledge that it kills, will they continue to use fossil fuels in full knowledge of the resultant environmental and human costs? Both issues suffer from a tragedy of the horizon of sorts; harm from smoking is generally not felt until later in life, and, for the majority of people, the effects of climate change are more likely to be felt by children and grandchildren.

Though the smoking statistics are dispiriting, progress has been made. When the Surgeon General issued his report in 1953, 45 percent of the population smoked; today this figure stands at 15 percent. Further, in the wake of Philip Morris, President Obama signed into law legislation bringing tobacco under the remit of the Food and Drug Administration (“FDA”). Up to then, the FDA lacked jurisdiction due to a Supreme Court decision holding

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204 18 U.S.C. §1968. Under RICO’s civil investigative demand process, the Attorney General may order the production of documentary evidence prior to the initiation of a civil or criminal investigation where there is “reason to believe” that any person or enterprise may have “documents” relevant to a racketeering investigation. 18 U.S.C. §1968. Under RICO’s civil investigative demand process, the Attorney General may order the production of documentary evidence prior to the initiation of a civil or criminal investigation where there is “reason to believe” that any person or enterprise may have “documents” relevant to a racketeering investigation.

205Centers for Disease Control and Prevention, *Current Cigarette Smoking Among Adults in the United States*, available at https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/

206 Id.
that the regulation of tobacco required express legislative approval; appetite for which was until that point absent.\footnote{207 FDA v. Brown & Williamson Tobacco Corp., et al. No. 98-1152, 529 U.S. 120 (2000).} Moreover, dealing with climate change denial before the judicial, as opposed to political, branches of government, may prove more impactful given judges’ role as arbiters of fact and fiction, and courtroom rules relating to evidence and expert testimony.\footnote{208 Courtroom procedures may be contrasted with the rules for congressional hearings, which are generally much less formal. See, e.g., Valerie Heitshusen, Congressional Research Service, Senate Committee Hearings: Arranging Witnesses (March 12, 2015).} These factors leave the courts well placed to depoliticise the climate change issue, at least to some degree. A decision in favour of the government under RICO would furthermore put additional pressure on the political branches of government to take action, and may cause individuals to change their mind on the climate change issue.\footnote{209 For an interesting discussion of what causes people to change their minds on the climate change issue, see Karin Kirk, \textit{Changing minds on a changing climate}, Yale Climate Connections (April 4, 2017), available at \url{https://www.yaleclimateconnections.org/2017/04/changing-minds-on-a-changing-climate/} (most relevantly for this article, two of the most influential factors include learning about the science behind climate change and the fact that climate change deniers appear untrustworthy. A judgment in favor of the government would only enhance the impact of these factors).} Government civil RICO seems to offer a promising way to get the climate change issue before the courts, circumventing some of the tricky causation issues that have so far caused courts to consider climate change a political matter.\footnote{210 See, e.g., Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863, 876 (N.D. Cal. 2008) (where the court found that the plaintiff’s claim presented such a complex question of causation that it evaded judicially manageable standards and presented political questions better addressed by Congress).}

C. ISSUE 3: Politics

The government, with all its predilections and preferences, is transitory, and therefore relevant only to the extent of its tenure. However, it is relevant nonetheless, and, under the current administration, there is likely to be little appetite to bring the type of claim envisaged in this article.

The inclinations of the current government notwithstanding, two advantages afforded to the U.S. government when it appears as plaintiff include an exemption from the defense of
laches, and, where there is no applicable limitation provision in the relevant federal statute, no time limitation on the bringing of the relevant cause of action. RICO itself does not contain any time limitation. Consequently, and in accordance with RICO’s legislative history, courts have repeatedly held that the government is not bound by a statute of limitations when it brings suit in its sovereign capacity to protect the public interest. Thus, it appears that RICO remains available for use by an interested government further down the line.

VI. Conclusion

RICO was enacted in response to activity that weakened the U.S. economy, harmed investors and competing businesses, undercut competition, and undermined citizens’ welfare. Through its campaign of deceit, the fossil fuel industry obstructed national and international regulation, and prolonged consumption of, and reliance on, a product, the burning of which is the foremost contributor to global warming. Today, we face changes to our planet that threaten the welfare of economies and peoples around the world. Though, for some, the leap from the Mafia, to tobacco, to fossil fuel, may seem like a stretch, the conduct identified by ICN and the LA Times, and its impact, fits both the purpose, and scheme, of RICO. Though the issues are complex, the case is not. This is about an industry that

211 U.S. Congress, Senate Committee on the Judiciary, Organized Crime Control Act of 1969, report to accompany S. 30, 91st Congress, 1st Session, December 16, 1969, Senate Report 91-617, 160 (“there is no general statute of limitations applicable to civil suits brought by the United States to enforce public policy, nor is the doctrine of laches applicable”). Further, RICO’s legislative history suggests that it was Congress’ intent that such a limitation should not be included. Both the House and Senate had the opportunity to include, and discussed including, a statute of limitations. However, no proposal ended up forming part of the bill or the statute. See, e.g., 116 CONG. REC. 35, 346 (1970) (Representative Steiger’s proposed amendment); 116 CONG. REC. 31,914 (1970) (Representative Poff proposed a five-year statute of limitations); and 118 CONG. REC. 29,615 (1972) (Senators McClellan and Hruska proposed an amendment including a statute of limitations, however this was never considered by the House).


213 See discussion at supra note 3.
marketed and sold its product “with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.”²¹⁴