It's not Reliance; It's Proximate Cause - Use of Proximate Cause to Contain Liability for Claims based upon RICO

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I. Introduction

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1960 – 1968, was originally signed into law by Richard Nixon in 1970 as a measure for dealing with organized crime. Over the past few decades, to the delight of plaintiffs and the dismay of defendants, RICO has been expanded and applied to other situations. As Justice White, writing for the majority of the Supreme Court, has said, "RICO is to be read broadly." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497, 105 S.Ct. 3275, 3285, 87 L.Ed.2d. 346 (1985).

RICO has since been used in a variety of circumstances from ponzi schemes to failure to pay state sales tax. RICO claims may become more prevalent as a result from recent bank failures, investment scams and reports of banking and mortgage fraud, all of which lend themselves to RICO liability.

RICO is a heavy-handed statute that bears tell-tale signs of its original purpose of bringing down criminal organizations, which is certainly an area where you might expect Congress to stack the deck in favor of a RICO plaintiff. In many ways, RICO, at least on its surface, is very plaintiff-friendly. Most notably, it provides for mandatory treble damages, court costs and attorneys' fees to a successful plaintiff. 18 U.S.C. § 1964(c). The reach of RICO back into time is much longer than a typical fraud case. In addition to a four-year statute of limitations, the RICO scheme alleged is permitted to span up to ten years. Federal jurisdiction, a variety of options of venue and ease of summoning defendants and witnesses into court are other attractive features of RICO. Clearly RICO offers plaintiffs a large upside.

Despite these pro-plaintiff features of RICO, or perhaps because of them, RICO claims are extremely complex, difficult to plead and difficult to prove. Lower courts continue to be conservative in applying RICO even as the Supreme Court continues to emphasize the statute's breadth. Including a RICO claim in a Complaint is an invitation for a motion to dismiss. This is true for a couple of reasons, not the least of which is the stigma that accompanies being named as a defendant in a RICO case. Another reason RICO claims invite so many motions to dismiss is that they are so complex; there are many parts of a RICO claim and therefore many parts that may be subject to attack. And, of course, the elevated standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (an anti-trust, not a RICO case), which requires a complaint to be "plausible on its face," will lead to more successful motions to dismiss in all areas, including RICO.

This article is overview of the complexities of RICO, whether as counsel for plaintiff or defendant. This article also analyzes a recent Supreme Court decision that eliminated reliance as a separate element of RICO claims based on

fraud, but discusses the continued necessity of reliance to prove causation under RICO.

II. Overview of Civil RICO Claims

RICO claims are obviously based in statute, 18 U.S.C. §§1960 – 1968, but the language of the statutes involved is often deceptively simple. For the most part, we must rely on courts' (and often the Supreme Court's) interpretation to uncover the most basic aspects of RICO. Below are answers to the basic "reporter questions" of RICO: (A) **WHO** can sue; (B) For **WHAT** bad acts; (C) **WHEN** can a plaintiff bring suit? (D) **WHERE** can a plaintiff bring suit? and (E) **WHY** (i.e. what's in it for the plaintiff?). The answers to these questions are not as simple as the questions themselves indicate.

A. Who can sue under RICO?

The language of the RICO statute that answers this question is not surprising: **"Any person injured in his business or property by reason of a violation of § 1962 of this chapter may sue therefor . . ."** 18 U.S.C. § 1964(c). That sounds easy. It captures the basic principle that someone who is injured by wrongdoing can sue over it. But to unpack the full meaning of this little phrase, practitioners should look at it word by word.

Person. RICO actually defines "person." "Person includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). Other than providing that a person under RICO includes both individuals and entities, this definition is largely tautological. Of course a "person" must be able to hold a legal or beneficial interest in property if the "person" can be injured in its property, a requirement for bringing suit.

Injured. The concept of injury is a familiar one, but in the RICO context, the injury to business or property must be a "concrete financial loss, and not mere injury to a valuable intangible property interest." *Oscar v. Univ. Students Co-Operative Ass'n*, 965 F.2d 783, 785 (9th Cir.1992) (en banc) (internal quotation marks omitted). For claims alleging conspiracy under § 1962(d), the plaintiff still must have been injured by an overt act of racketeering, not just any act in furtherance of the conspiracy. *Beck v. Prupis*, 529 U.S. 494, 505, 120 S.Ct. 1608, 1616, 146 L.Ed.2d 561 (2000).

Property. If there is a question about whether something is "property," it is governed by state law. *Diaz v. Gates,* 420 F.3d 897, 899 (9th Cir. 2005) (per curiam) (citing *Doe v. Roe*, 958 F.2d 763, 768 (7th Cir.1992)).

By reason of. "Plaintiff must establish proximate cause in order to show injury 'by reason of' a RICO violation." *Bridge v. Phoenix Bond & Indemnity Co.*, --- U.S. ---, 128 S.Ct. 2131, 2141, 170 L.Ed.2d 1012 (affirming *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 112 S.Ct. 1311, 117

L.Ed.2d 532 (1992) and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006)).

Defining who *cannot* sue under RICO is equally important. Generally, a bad actor cannot be a civil RICO plaintiff. In many Circuits, *in pari delicto* is a cognizable defense to a civil RICO claim. *See, e.g., Rogers v. McDorman*, 521 F.3d 381 (5th Cir. 2008); *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145 (11th Cir. 2006). That is not true in every Circuit. For example, the First Circuit does not recognize the defense. *See Roma Construction Co. v. aRusso*, 96 F.3d 566 (1st Cir. 1996). Even where *in pari delicto* is a viable defense, a corporate RICO plaintiff whose principal is a bad actor is not necessarily barred. A natural person's bad acts are not necessarily imputed to that person's company. *Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339 (11th Cir. 2008).

Based on this additional gloss on the language of § 1964(c), a more complete answer to the question of who can sue under RICO is: Any individual or entity that suffers a concrete financial loss in its business or property proximately caused by a RICO defendant's violation of § 1962.

B. For what bad acts can a RICO plaintiff seek redress?

Section 1962 contains a list of "Prohibited Activities" that form the foundation of any RICO claim. The list is broken into four sections (a) – (d). Sections (c) and, to some extent (d), are the sections most used in civil RICO.

Section (a) deals with the use or investment of racketeering income. This section prohibits the use of racketeering income to acquire an interest in an enterprise affecting interstate or foreign commerce. The section reads in relevant part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

18 U.S.C. § 1962(a). The remainder of the section carves out an exception for the purchase of securities for investment under certain circumstances. *Id.*

Section (b) is related to section (a) in that it prohibits use of a pattern of racketeering activity in "acquiring or maintaining" control of an enterprise affecting interstate or foreign commerce:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(b).

The section most often relied upon in civil RICO pleadings is § 1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities or which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18. U.S.C. § 1962(c).

Section 1962(d) is the conspiracy section. It is unlawful under section (d) "to conspire to violate any of the provisions of (a), (b), or (c) of this section." This provision expands the breadth of RICO to include defendants who have not themselves violated any of the substantive provisions of RICO. A conspirator need only "intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *Salinas v. United States*, 522 U.S. 52, 65, 118 S.Ct. 469, 477, 139 L.Ed.2d 352 (1997). For example, a RICO defendant may be liable under § 1962(d) for facilitating acts leading to a substantive offense. While the RICO conspirator may be liable under § 1962(d) without violating a substantive provision of § 1962, a claim under § 1962(d) generally will not survive unless a claim under one of the other sections also survives. Even in a suit based on conspiracy, the RICO plaintiff still must show that a substantive violation is the cause of the plaintiff's injury. *Beck v. Prupis*, 529 U.S. 494, 505, 120 S.Ct. 1608, 1616, 146 L.Ed.2d 561 (2000).

As it was for the section providing a private right of action under RICO, it is instructive to walk through the language of the statute outlining bad acts, and particularly the commonly used § 1962(c), in order to understand what acts give rise to a RICO claim.

Enterprise. "Enterprise" is defined in RICO only so far as it "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18

U.S.C. § 1961(4). The Circuits are split about whether an enterprise can be further defined by reference to its activity. Some Circuits hold that the enterprise must be "structurally separate" from the pattern of activity complained of. *See, e.g. Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003); *United States v. Sanders*, 928 F.2d 940, 944 (10th Cir. 1991); *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983). Other Circuits believe that the enterprise can be defined by its pattern of activity and do not require structural separation between the enterprise and the pattern of activity. *Odom v. Microsoft Corp.*, 486 F.3d 541, 550 (9th Cir. 2007); *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001); *United States v. Rogers*, 89 F.3d 1326, 1337-38 (7th Cir. 1996); *United States v. Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988); *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983); *United States v. Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983), *abrogated on other grounds by Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994).

Person. The same definition for "person" applies for § 1962(c) as for § 1964(c). Both individuals and entities can violate RICO.

It used to be a common defense to a RICO claim to assert that the RICO defendant and the enterprise are, in reality or for practical purposes, one in the same and, therefore, the RICO claim fails. That defense is no longer a cognizable one. The person and the enterprise need not be separate in reality, so long as they are distinct as a matter of legal fiction. In other words, "The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. . . . [N]othing in the statute . . . requires more separateness than that." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 121 S.Ct. 2087, 2091, 150 L.Ed.2d 198 (2001).

Racketeering Activity. "Racketeering activity" is defined by a long list of bad acts with reference to other sections of the U.S. Code. 18 U.S.C. § 1961(1). The "racketeering activities" most relied upon when RICO is used in business litigation are mail fraud, wire fraud, money laundering and extortion.

Pattern. A "pattern" of racketeering activity can be as few as two acts of racketeering activity within ten years. 18 U.S.C. § 1961(5). However, two acts is a minimum requirement; the existence of two predicate acts is not necessarily sufficient. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Moreover, there is no requirement that there be a certain number of predicate acts per injured RICO plaintiff. *Brown v. Cassens Transport Co.*, 546 F.3d 347, 353 (6th Cir. 2008).

The two (or more) predicate acts must also be (1) related and (2) "amount to or pose a threat of continued criminal activity." *H.J. Inc.* 492 U.S. at 293, 109 S.Ct. 2893. This inquiry to determine whether a pattern exists has been called a "Relationship/Continuity Test." The requisite relationship is established where

the predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc.* at 240, 109 S.Ct. 2893. This is a flexible and broad test of relatedness.

Continuity can also be shown in many ways. The two categories of continuity are "closed-ended" and "open-ended." These categories refer "either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J. Inc.,* 492 U.S. at 241, 109 S.Ct. 2893. Establishing closed-ended continuity is more straightforward. To show close-ended continuity, a RICO plaintiff must "prov[e] a series of related predicates extending over a substantial period of time." *Id.* at 242, 109 S.Ct. 2893.

On the other hand, "open-ended" continuity requires an in depth analysis of the facts of the case to determine whether the related predicate acts "involve a distinct threat of long-term racketeering activity, either implicit or explicit." *H.J. Inc.*, at 242, 109 S.Ct. 2893. The RICO plaintiff attempting to establish a pattern by showing "open-ended" continuity is well-served by focusing on the threat of continuity, whether by pointing to a "specific threat of repetition indefinitely into the future" or showing that the predicate acts "are part of the ongoing entity's regular way of doing business." *H.J. Inc.*, at 242, 109 S.Ct. 2893.

Under either kind of continuity, the predicate acts must span a period of time, probably more than just a few months. *Brown v. Cassens Transport Co.*, 546 F.3d 347, 353 (6th Cir. 2008); (citing *H.J. Inc.*, 492 U.S. at 242, 109 S.Ct. 2893 ("Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement")).

Conduct. This word is used twice in § 1962(c), both as a noun and verb. The Supreme Court pointed to this double use as a basis for finding that an element of direction is implied. *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S.Ct. 1163, 1172, 122 L.Ed.2d 525 (1993). This conclusion led to the "Operation/Management Test," the general principle of which is that "[o]ne is not liable under §1962(c) unless one has participated in the operation or management of the enterprise itself." *Id.*

Unlawful debt. RICO helpfully defines the term "unlawful debt." 18 U.S.C. § 1961(6). "Unlawful debt" is defined as:

> A debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is un-enforceable under the State or federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the

> business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where usurious rate is at least twice the enforceable rate.

18 U.S.C. § 1961(6). At first blush, the subsections of this definition appear redundant. Subsection (A) indicates that an unlawful debt is one incurred in illegal gambling activity or under usurious circumstances. Subsection (B) adds a second, slightly nuanced requirement that must be met before a debt is considered an "unlawful debt": the creditor must have been *in the business of* illegal gambling or lending money. In the case of a usury claim, subsection (B) adds a third requirement as well: that the usurious rate of interest be at least twice the enforceable rate under state law.

C. When can a RICO plaintiff sue?

A four-year statute of limitations applies to claims under RICO. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156, 107 S.Ct. 2759, 2767, 97 L.Ed.2d 121 (1987).

When the four years begins to run has not been clearly decided, but the Supreme Court has provided guidance on this question by eliminating two possibilities. The Supreme Court has rejected the theory that the four year clock starts coincident with the last predicate act. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997). The Supreme Court has also rejected the theory that the clock starts when the RICO plaintiff discovers both the injury and the pattern of racketeering that caused the injury. *Rotella v. Wood*, 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000). The two options that remain are: (1) the "injury discovery" rule and (2) the "injury occurrence" rule. *Rotella v. Wood*, 528 U.S. at 554 and n. 2, 120 S.Ct. at 1080. The "injury discovery" rule, which is the more conventional rule remaining, would start the four-year clock when the RICO plaintiff discovered its injury. *Id.* The "injury occurrence" rule would start the clock at the instance of injury. *Id.* Under either remaining accrual rule, these are early dates in the complex fact pattern that leads to civil RICO litigation. Mitigating some of the unfairness to RICO plaintiffs that these early accrual dates may inflict, the *Rotella* Court acknowledged equitable tolling in the case of fraudulent concealment. *Rotella v. Wood*, 528 U.S. at 560-61, 120 S.Ct. at 1084.

In addition to a four-year statute of limitations, RICO also has a ten-year "tail." The factual allegations in a RICO case can reach back into time over a period of up to ten years to establish the requisite pattern of racketeering. 18 U.S.C. § 1961(5). The proof in a RICO case, even under an injury occurrence rule, could encompass events that occurred up to fourteen years prior to the initiation of the lawsuit. *Rotella v. Wood*, 528 U.S. at 554, 120 S.Ct. at 1080.

D. Where can a RICO plaintiff sue?

RICO is very permissive in where claims may be brought. A RICO plaintiff can bring her claim in any federal court "in which [a defendant] resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a).

A federal court can also summon parties to appear in any venue if "the ends of justice require." 18 U.S.C. § 1965(b). This provision has been read to apply to "other" defendants, meaning that a RICO plaintiff might sue one or more defendants in a venue appropriate under subsection (a) and then reach other defendants via the nationwide service of process permitted in subsection (b). *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226 (10th Cir. 2006).

This permissiveness regarding forum does not eliminate a *forum non conveniens* challenge or defense. The defense applies to RICO in the same manner as it does to other cases; there is no special treatment for RICO cases. *See Alfadda v. Fenn*, 159 F.3d 41 (2d Cir. 1998) (dismissing RICO claim, not because of lack of personal jurisdiction, but because France was more convenient forum).

E. Why would a plaintiff pursue a RICO claim (i.e. what's in it for the plaintiff)?

In the same sentence that RICO provides a private right of action, it also entitles plaintiffs to treble damages and attorneys' fees. "[Plaintiff] shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorneys' fee . . .." 18 U.S.C. § 1964(c). By the use of "shall," Congress made clear that trebling is not discretionary under RICO.

This provision is not a two-way attorneys' fees provision for any successful party; it raises the stakes for RICO defendants, but not for the plaintiff. *Sullivan v. Hunt*, 350 F.3d 664 (7th Cir. 2003). That said, plaintiffs should not pursue a RICO claim on a lark. RICO plaintiffs face possible sanctions if their RICO theories are too thin. Creativity may be sanctionable, especially if it appears that the RICO theory is a stretch and the RICO claim forms the only basis for federal jurisdiction. *See e.g. Williams v. Aztar Indiana Gaming Corp.*, 351 F.3d 294 (2d Cir. 2003).

While the issue has not be explicitly decided, the treble damages available under RICO are probably not considered punitive damages for the purposes of application of state caps on punitive awards. *Humana, Inc. v. Forsyth*, 525 U.S. 299, 313 119 S.Ct. 710, 718, 142 L.Ed.2d. 753 (1999) (assuming without discussion that trebling under RICO is not punitive). Indeed, punitive damages have been awarded in some cases in addition to the statutory treble damages. *See Kemp v. Am. Telephone & Telegraph Co.*, 393 F.3d 1354 (11th Cir. 2004) (upholding a jury's punitive damages award, although reducing the amount, where Plaintiff's compensatory damages was also automatically trebled).

III. The Elimination of First-Party Reliance as an Element of a RICO Claim Based on Fraud

In *Bridge v. Phoenix Bond Indemnity Co. et al.*, --- U.S. ---, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008), the Supreme Court resolved a split among the Circuits by eliminating first-party reliance as an element of the RICO claim. In doing so, the Supreme Court distanced a RICO claim based upon fraud from a common law fraud. The Court made clear, however, that reliance still has a place in a RICO claim as a likely requirement necessary for a RICO plaintiff to prove causation.

The facts behind *Bridge* are rather mundane, but not simple. Plaintiffs and defendants were all regular bidders at annual auctions of tax liens in Cook County, Illinois from 2002 to 2005. A winning bidder at such an auction was the bidder willing to pay the amount of the tax lien and accept the lowest penalty from the property owner. The lowest penalty permitted was no penalty, or zero percent. Because the winner is, in essence, the low bidder, the auctions became a race to zero. And, because the auction could so easily result in a tie, the County developed a system of awarding the tax lien to zero-penalty bidders on a rotation. This meant that a bidder using agents or otherwise bidding multiple times on the same properties would win a disproportionate number of these zero-penalty bids. Aware of this problem, the County enforced a "single simultaneous bidder" rule that prohibited any bidder from submitting multiple bids for a single property, including by use of an agent or associated bidder. The County also required all bidders to submit to the County an affidavit swearing compliance with the single simultaneous bidder rule.

Given the rules of the auction, the *Bridge* defendants' alleged scheme is predictable. The defendants were accused of violating the single simultaneous bidder rule, which the plaintiffs complained injured them by depriving them of the chance to win more of the tax liens at auction. So how does chicanery at a county tax auction become an issue for a federal lawsuit? The plaintiffs cleverly found a RICO hook in these facts. The RICO predicate act? Mail fraud. Mail fraud, an enumerated predicate act, is defined in 18 U.S.C § 1341 as occurring whenever a person "having devised or intending to devise any scheme or artifice to defraud" uses the mail "for the purpose of executing such scheme or artifice or attempting so to do." Plaintiffs asserted that the defendants devised a scheme to win more than their fair share of zero-bids and that the defendants used the mail to carry out their scheme by sending notices to property owners and by misrepresenting to the County their compliance with the single simultaneous bidder rule. The plaintiffs asserted that defendants' scheme was conducted in relation to at least three annual auctions, thus properly pleading the continuity aspect of the pattern of racketeering.

The *Bridge* case is typical of a civil RICO action. Not surprisingly, the *Bridge* defendants moved to dismiss the RICO claim. The basis for the motion was lack of standing since the plaintiffs asserting the mail fraud did not

themselves receive or rely on any misrepresentations by the defendants. Indeed, the RICO plaintiffs had not received or relied upon the attestations that constituted the alleged mail fraud; rather, the County received the allegedly false compliance attestations. The RICO plaintiffs did not even allege that they relied upon the false attestations. The District Court, predictably hostile to civil RICO claims, granted the motion to dismiss on that basis and declined to exercise jurisdiction over the pendent state law claim for tortious interference. The "no reliance" defense in cases involving mail fraud was hardly novel. District courts all over the country had dismissed similar cases on the same basis and Circuit Courts were split over the question of whether reliance was a requirement in RICO cases predicated on mail fraud.

In *Bridge*, the Seventh Circuit reversed the District Court, holding that a RICO plaintiff's failure to personally rely on misrepresentations by a RICO defendant is not detrimental to a RICO case predicated on mail fraud. The Supreme Court granted certiorari to resolve the Circuit split and affirmed the Seventh Circuit.

Justice Thomas wrote the opinion for the unanimous Court, often citing to his own opinion (concurring in part and dissenting in part) in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006). In the *Bridge* opinion, which removed a commonly used arrow from RICO defense counsel's quiver, Justice Thomas reiterated the Supreme Court's intention and obligation to read RICO broadly and apply it liberally. The Supreme Court specifically rejected arguments against the "over-federalization" of state-law claims, arguments that are typically fare better at the trial court level.

In the opinion, Justice Thomas stated the "substantial question" the Court was addressing as "whether first-party reliance is an element of a civil RICO claim predicated on mail fraud." 128 S.Ct. at 2137. Justice Thomas noted that the Court previously had concluded that proximate cause is a condition of recovery under 18 U.S.C. § 1964(c) in *Anza*, but had left unresolved the question presented in *Bridge.*

The Court rejected the requirement that a RICO plaintiff alleging mail fraud plead and prove first-party reliance. The Court relied upon the plain language of the applicable statutes, stating "Nothing on the face of the relevant statutory provisions imposes such a requirement." *Id.* at 2138. In support of its conclusion that the statutory provisions do not require first-party reliance, the Court relied upon the language of § 1964(c), which provides a private right of action to "[a]ny person" injured by a RICO violation, explaining that this language provided a "breadth of coverage not easily reconciled with an implicit requirement that the plaintiff show reliance in addition to injury in his business or property." *Id.* at 2139. The Court then dismissed the defendants' claim that common-law fraud provided the requirement of first-party reliance.

The Court then addressed the need for first-party reliance in the context of proving causation in light of its earlier conclusion that proximate cause is required to recover under § 1964(c). The Court concluded that first-party reliance is not required to prove proximate causation under § 1964(c), explaining that "we see no reason to let that argument in through the back door by holding that the proximate-cause analysis under RICO must precisely track the proximate-cause analysis of common law fraud." *Id.* at 2142.

Despite appearing to completely dismiss reliance as a prerequisite to proving a RICO claim based upon mail fraud, the Court explained that some form of reliance is likely required to prove such a claim. The Court explained:

> Of course, none of this is to say that a RICO plaintiff who alleges injury "by reason of" a pattern of mail fraud can prevail without showing that *someone* relied on defendant's misrepresentations. (citation omitted). In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation. . . . In addition, the complete absence of reliance may prevent the plaintiff from establishing proximate cause. Thus, for example, if the county knew the petitioners' attestations were false but nonetheless permitted them to participate in the auction, then arguably the county's actions would constitute an intervening cause breaking the chain of causation between petitioners' misrepresentations and respondents' injury.
>
> Accordingly, it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to prove causation. . . . [T]he absence of first-party reliance may in some cases tend to show that an injury was not sufficiently direct to satisfy § 1964(c)'s proximate cause requirement, but it is not in and of itself dispositive.

Id. at 2144 (emphasis in original).

Based upon the Court's explanation of the likely need for reliance to prove causation, RICO defendants should continue to pursue the absence of first-party and third-party reliance as a defense. Though the absence of reliance is not "dispostive," in many cases, it may still provide a solid defense to RICO defendants that is well worth exploring in discovery. For instance, if a third-party is alleged to have relied upon the misrepresentation, the RICO defendant should

depose the third-party to determine, if that person or entity relied on the misrepresentation.

CONCLUSION

Claims under civil RICO are alive and well. Indeed, the recent news of securities and other types of fraud indicates that the number of RICO claims may explode. In defending a RICO claim, the RICO defendants should closely scrutinize and attack each element and, in light of the Court's explanation of the impact of reliance in *Bridge,* continue focus on reliance in defending causation.