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First-Party Reliance Not Needed for Mail-Fraud RICO

Hopes that the Supreme Court might rein in a potentially expansive use of mail- and wire-fraud-based civil RICO claims by imposing strict reliance requirements¹ were dashed by the Court's June 9 ruling in *Bridge v. Phoenix Bond & Indemnity Co.*²

Bridge resolved a circuit split³ by unanimously rejecting the contention that "a plaintiff asserting a RICO claim predicated on mail fraud must plead and prove that it relied on the defendant's alleged misrepresentations."⁴ Instead, the Supreme Court held that "a showing of first-party reliance is not required" and is not "an element of a civil RICO claim predicated on mail fraud."⁵

Thus, while the RICO plaintiff may need to show "that *someone* relied on the defendant's misrepresentations" in order to satisfy the causation element of a civil RICO claim, under appropriate facts "third-party reliance" can suffice for that purpose.⁶ *Bridge* reconfirmed the need to show a proximate causal link between the alleged mail fraud and the plaintiff's claimed injuries but rejected the suggestion that this requirement could only be met by showing that the plaintiff had relied on fraudulent misrepresentations in the underlying mailing.

Bridge thus clarifies that civil RICO remedies may be available in a broader range of circumstances than some had hoped. It also lessens defendants' ability to dispose of certain mail- and wire-fraud-based RICO claims easily at the pleading stage by a simple mechanical rule. Challenges to RICO causation may still be possible when it was not the RICO plaintiff but rather someone else who relied on the defendant's fraudulent communications, but such challenges are likely to present a more fact-intensive inquiry that may ultimately have to be left to the trier of fact.

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The Basics of a Civil RICO Claim

The RICO statute⁷ defines a laundry list of crimes as acts of "racketeering activity."⁸ Predicate acts of racketeering activity that are of a sufficient nature, number and duration will be deemed to amount to a "pattern of racketeering activity."⁹ Under 18 U.S.C. §1962(c), it is unlawful to conduct or to participate in the conduct of an "enterprise" (which could be a business or a criminal organization)¹⁰ through a pattern of racketeering activity.¹¹ Under 18 U.S.C. §1964(c), RICO's private right of action provision, a person injured in his business or property "by reason of" such a violation may bring a civil suit against the wrongdoer for treble damages and attorney's fees.¹²

The compensable injury in such a civil suit consists of "the harm caused by predicate acts [which] constitute [the] pattern."¹³ The "by reason of" language in RICO's private right of action requires a showing "that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well."¹⁴

In civil RICO contexts, the predicate acts are almost always alleged to be mail and wire fraud. The mail and wire fraud statutes define those crimes to consist of using the mails or interstate/foreign wire communication in furtherance of a "scheme or artifice to defraud."¹⁵ There is no requirement that the fraud be "completed" or that the scheme to defraud succeed.¹⁶ Moreover,

the communication in question need not be made directly by the perpetrator to the intended victim, and need not be fraudulent in and of itself, so long as it furthers the overall scheme to defraud.¹⁷

The Alleged Fraud in 'Bridge'

Bridge presented a situation where the RICO plaintiff was not the target or recipient of the defendant's allegedly fraudulent mailings but claimed to have suffered an injury directly resulting from what happened when the third party which received those mailings relied on them. The parties in *Bridge* were competing bidders in county tax lien auctions.¹⁸ County rules provided that if the number of bidders willing to accept the lowest possible bid exceeded the number of available liens, the liens would be distributed by lot. To avoid gamesmanship and achieve distributional equity, bidders were forbidden from submitting multiple bids, including under other names or through related parties, and had to submit an affidavit to that effect. The plaintiffs in *Bridge* alleged that the defendants violated these rules by submitting multiple bids and false affidavits, thus unfairly diminishing the number of parcels on which the plaintiffs were the winning bidders.

Because the mails were used to submit the false affidavits, and/or to notify owners that their tax liens had been sold to the winning bidder, the plaintiffs sued the defendants under RICO for damages they allegedly sustained from this pattern of mail fraud activity.¹⁹ The defendants moved to dismiss, arguing that since the plaintiffs themselves had not relied on the cited mailings, they could not have been injured by them, and thus the RICO claim must fail. The Supreme Court, like the U.S. Court of Appeals for the Seventh Circuit below, disagreed.

Statutory Text and Public Policy

Based on its review of the structure of a mail-fraud-based civil RICO claim and the requirements of the mail fraud statute, the

Supreme Court characterized the defendants' "proposed requirement of first-party reliance [as] seem[ing] to come out of nowhere," stating that "[n]othing on the face of the relevant statutory provisions imposes such a requirement."²⁰ The Court stated that since "no showing of reliance is required to establish that a person has violated §1962(c) by conducting the affairs of an enterprise through a pattern of racketeering activity consisting of acts of mail fraud," any supposed reliance requirement "must be by virtue of §1964(c), which provides the right of action. But it is difficult to derive a first-party reliance requirement from §1964(c)," inasmuch as that provision uses very broad general terms in defining where the RICO private right of action will be available.²¹

Rather, the Court concluded, "a person can be injured 'by reason of' a pattern of mail fraud even if he has not relied on any misrepresentations."²² It cited the allegations of *Bridge* as a "a case in point," holding that under those alleged facts "respondents clearly were injured by petitioners' scheme."²³

The Court went on to reject alternative arguments for imposing a first-party reliance rule based on common-law rules or public policy. The Court rejected the suggestion that doing so was required by "the common-law meaning of civil fraud," pointing out that RICO's §1962(c) does not use the term "fraud," and the RICO predicate act of mail fraud was tied to the criminal statute under which "the indictable act... is not the fraudulent misrepresentation, but rather the use of the mails with the purpose of executing or attempting to execute a scheme to defraud."²⁴

The Court also rejected the argument that a first-party reliance requirement was necessitated by the proximate cause element of a private civil RICO claim, describing proximate cause as "a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case."²⁵ "Having rejected petitioners' argument that reliance is an element of a civil RICO claim based on mail fraud, we see no reason to let that argument in through the backdoor by holding that the proximate-cause analysis under RICO must precisely track the proximate-cause analysis of a common-law fraud claim," particularly since "there is no general common-law principle holding that a fraudulent misrepresentation can cause legal injury only to those who rely on it."²⁶

The Court then rejected the argument that a first-party reliance requirement is "necessary to ensure that there is a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury to satisfy [RICO] proximate-cause principles," citing the facts of *Bridge* as a case in point which showed otherwise.²⁷ Lastly, the court declined to impose any first-party reliance requirement so as "to avoid the 'over-federalization' of traditional state-law claims" via RICO, holding that whatever the policy merits of the defendants' arguments might be, "we are not at liberty to rewrite RICO to reflect their—or our—views of good policy."²⁸

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Conclusion

Throughout its history, civil RICO has often proved to be the statute of unforeseen consequences, at least from the standpoint of certain RICO litigants. *Bridge* is just the latest in a series of Supreme Court decisions where the Court has "repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe."²⁹ In *Bridge*, as in those earlier cases, the Court admonished that if its interpretation of the statutory text "leads to the undue proliferation of RICO suits, the correction must lie with Congress," because "[i]t is not for the judiciary to eliminate the private action in situations where Congress has provided it."³⁰

While Congress has on occasion adjusted RICO to modestly curtail some of its more expansive uses,³¹ for decades Congress has mostly left alone the RICO provisions that have made the statute an often surprisingly broad and available tool in private civil litigation. *Bridge* thus seems to reconfirm yet again what earlier Supreme Court RICO cases

have shown—that those who would seek to rein in the statute would be better served by focusing their persuasive efforts not on courts through the inventive arguments of counsel, but rather on lobbying and the legislative process. The attempt to seek judge-made relief in civil RICO litigation has proved yet again to be just "a *Bridge* to nowhere."

1. See generally R. Schwinger, "Plaintiff's Reliance Needed for Mail Fraud-Based RICO?," New York Law Journal, March 6, 2008, at 4.

2. 553 U.S. ___, 128 S.Ct. 2131 (U.S. June 9, 2008).

3. See id. at 2137.

4. Id. at 2134.

5. Id. at 2134, 2141.

6. Id. at 2144 (emphasis in original).

7. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-68.

8. Id. §1961(1).

9. Id. §1961(5); see generally, *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236-43 (1989).

10. See 18 U.S.C. §1961(4); *United States v. Turkette*, 452 U.S. 576, 583 (1981).

11. 18 U.S.C. §1962(c).

12. Id. §1964(c).

13. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985).

14. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

15. 18 U.S.C. §§1341, 1343.

16. *Neder v. United States*, 527 U.S. 1, 25 (1999).

17. See, e.g., *Schmuck v. United States*, 489 U.S. 705, 714-15 (1989); *Pereira v. United States*, 347 U.S. 1, 8-9 (1954); 2 L. Sand, et al., "Modern Federal Jury Instructions-Criminal, Instr." 44-6 (Matthew Bender 2007 rev.).

18. In a tax lien auction, a state or local government auctions off to private parties the right to enforce the government's tax lien against parcels of real property, which often results in the winning bidder's acquiring ownership of the property. In return for this right, the winning bidder pays the delinquent taxes to the government. See *Bridge*, 128 S.Ct. at 2135.

19. Id. at 2135-36.

20. Id. at 2138.

21. Id. at 2139.

22. Id.

23. Id.

24. Id. at 2140.

25. Id. at 2142 (quotations and citations omitted).

26. Id. at 2142-43.

27. Id. at 2144 (distinguishing *Holmes*, and *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), because "there are no independent factors that account for respondents' injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue.")

28. Id. at 2145.

29. Id. (citing *National Organization for Women Inc. v. Scheidler*, 510 U.S. 249, 252 (1994); *H.J. Inc.*, 492 U.S. at 244; and *Sedima*, 473 U.S. at 481).

30. Id. (quotations and citations omitted).

31. In 1995, for example, §107 of the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995), commonly known as the "RICO Amendment," amended the RICO private right of action provision in 18 U.S.C. §1964(c) to eliminate private civil RICO actions based on conduct that would have been actionable as securities fraud, even if pled under other theories such as mail or wire fraud, absent a criminal conviction therefor. See, e.g., *Bald Eagle Area School Dist. v. Keystone Financial Inc.*, 189 F.3d 321, 327 (3d Cir. 1999).

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