No. 07-210

In The
Supreme Court of the United States

JOHN BRIDGE, *et al.*,

Petitioners

v.

PHOENIX BOND & INDEMNITY CO., *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF MCKESSON CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a plaintiff asserting a civil RICO claim predicated on acts of mail fraud must plead and prove that it relied on the alleged misrepresentations by the defendant to its detriment.

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BRIEF OF McKESSON CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

McKesson Corporation respectfully submits this brief as *amicus curiae* in support of the petition for a writ of *certiorari*.[1]

INTEREST OF THE *AMICUS CURIAE*

McKesson Corporation is the nation's leading health care and information technology company, and is the largest pharmaceutical distributor in North America. McKesson is responsible for the distribution of one-third of the medicines used in North America, and supplies more than 25,000 U.S. healthcare locations, ranging from Wal-Mart to the Department of Veterans Affairs to community pharmacies. McKesson employs 30,000 people, and is among the Global Fortune 500.

McKesson, and numerous other businesses in its industry, recognize the importance of the Racketeer Influenced and Corrupt Organizations Act (RICO) to deter and remedy actual wrongdoing prohibited by the statute, but also understand that deterrence requires consistent and disciplined application of the law.

The application of RICO has suffered from misuse against businesses and other organizations because of the statute's treble damages provision. The court of appeals' holding in this case, that a plaintiff alleging injury "by reason of" a defendant's misrepresentation need *not* allege reliance on that misrepresentation, obviates an important check against abuse and unnecessarily expands the scope of liability under the statute, particularly in the context of

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae* or their counsel made such a monetary contribution to the preparation or submission of this brief.

class actions, where the threat of treble damages on a class-wide basis often leads to unwarranted settlements, irrespective of the merits of the underlying claims.

This unnecessary expansion of civil RICO has led to costly litigation and the potential for billions of dollars of liability, particularly in the context of class actions, where class certification often terminates cases, even where defendants have meritorious defenses, because the looming litigation costs and possible consequences compel the defendant to settle. Businesses within McKesson's industry have been the targets of these actions, and have learned that the inconsistent approach taken by the courts on the question presented by this case has led to the certification of massive nationwide classes in some jurisdictions and the denial of certification in others. Plaintiffs are also aware of this anomaly, so that forums with less stringent civil RICO standards are becoming havens for these suits. Accordingly, McKesson has a substantial interest in encouraging this Court to review and reverse the decision below.

SUMMARY OF ARGUMENT

A. The question in this case concerns the provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) that permit a party alleging mail or wire fraud to raise a civil RICO claim based on a pattern of racketeering activity predicated on such fraud and to recover treble damages. 18 U.S.C. § 1964(c). Specifically, RICO makes it unlawful, under Section 1962(c), for a person employed or associated with an enterprise to conduct the enterprise's affairs through a pattern of racketeering activity. Racketeering activity is defined by RICO to include acts that can be charged under the federal mail and wire fraud statutes. *Id.* § 1961(1)(B). In order to bring a civil action under RICO to recover treble damages, costs, and attorneys' fees, a person must have been "injured in his business or property *by reason of a* violation of section 1962." *Id.* § 1964(c) (emphasis added).

The courts of appeals are divided on whether a plaintiff alleging a violation of mail or wire fraud in a RICO civil action must plead and prove that he relied on the alleged fraud or misrepresentation. Five courts of appeals have held (correctly in our view) that a plaintiff must allege he detrimentally relied on the fraud; two courts of appeals (including the court below) have held that it is enough that the complaint allege that *someone*, even if not the plaintiff, relied on the fraud; and one court of appeal, in *dicta*, has expressed the view that no reliance at all is required.

This question warrants resolution by this Court to ensure evenhanded application of RICO across the country. Indeed, the Court has twice granted *certiorari* in separate attempts to resolve the issue, but was unable to reach the question in either case. This case is an ideal vehicle in which to resolve the circuit conflict.

B. Class action litigation throughout the country is particularly susceptible to abusive suits under RICO, and, in light of this conflict, the outcome of such litigation is becoming increasingly dependent on the choice of jurisdiction. Civil RICO has become a favorite tool of plaintiffs filing class actions—cases that often settle upon certification or disappear upon the denial of it.

Because certification requires that common issues of law or fact predominate over individual ones, courts that have obviated the requirement that plaintiffs have actually relied upon the fraud—an individualized inquiry—to satisfy Section 1964(c)'s "by reason of" requirement have become a haven for civil RICO class actions. These cases are proliferating against some of the most important industries in the national economy, and almost always involve aggregated claims for staggering sums (all of which would be trebled). This intolerable result subjects defendants to significant forum shopping where out-of-state corporations are hailed into distant courts in nationwide class actions, and which party wins often depends upon where the action is filed.

C. Requiring that a plaintiff plead and prove detrimental reliance is consistent with Section 1964(c)'s "by reason of" requirement and this Court's prior proximate cause precedent. This Court held that Congress intended to incorporate common law in its "by reason of" requirement, and under the common law, civil fraud requires that a plaintiff must have been misled to his detriment.

ARGUMENT

REVIEW IS NECESSARY TO RESOLVE AN ENTRENCHED CIRCUIT SPLIT ON WHETHER A PLAINTIFF IN A CIVIL RICO ACTION PREDICATED ON MAIL OR WIRE FRAUD CAN SOMEHOW MEET RICO'S "BY REASON OF" REQUIREMENT WITHOUT PROOF THAT HE RELIED ON THE FRAUD TO HIS DETRIMENT

A. This Case Presents An Issue Already Recognized To Warrant Review And Is An Appropriate Vehicle For Resolution Of The Issue

There can be no doubt that the petition presents a question worthy of this Court's plenary review because the Court previously granted review on the question, but did not ultimately decide it. The disagreement in the lower courts continues unabated and this case is an appropriate vehicle for resolution of the question.

1. This Court has twice granted *certiorari* on the precise issue presented, but has not yet resolved it

Twice in the past three years this Court has attempted to resolve the conflict between the federal courts of appeals as to whether, or to what extent, a plaintiff must prove that he detrimentally relied upon alleged mail or wire fraud in order to meet the "by reason of" requirement to maintain a civil RICO action predicated on such fraud.

In *Bank of China, New York Branch v. NBM L.L.C.*, the Court granted review in a case arising from the Second Circuit. *See* 545 U.S. 1138 (2005) (granting *certiorari* to review 359 F.3d 171 (2d Cir. 2004)). Although the petition in *Bank of China* presented two questions for review, the Court limited *certiorari* to a single question of its own creation that is virtually identical to the one at issue in the instant case. The Court's question asked whether the court of appeals erred "when it held that civil RICO plaintiffs alleging mail and wire fraud as predicate acts must establish 'reasonable reliance' under 18 U.S.C. § 1964(c)?" *Ibid.* The Court did not decide the question, however, because after briefing, but prior to oral argument, the case was dismissed pursuant to this Court's Rule 46. *See* 546 U.S. 1026 (2005).

Thirteen days later, this Court granted *certiorari* in *Anza v. Ideal Steel Supply Corp.*, *see* 546 U.S. 1029 (2005), which again presented essentially the same question, *i.e.*, "Whether a competitor is 'injured in his business or property by reason of a violation'" of RICO "where the alleged predicate acts of racketeering activity were mail fraud but the competitor was not the party defrauded and did not rely on the alleged fraudulent behavior." Pet. for *Cert.*, at i, *Anza v. Ideal Steel Supply Corp.*, No. 04-433 (filed Sept. 29, 2004).

But *Anza* proved to be an inadequate vehicle to resolve that question presented. The plaintiffs and defendant were competing businesses and, according to the plaintiffs, the defendant had cheated on its taxes and submitted false statements to the State of New York regarding certain taxes it was not collecting, which gave it a competitive advantage over the plaintiffs (*i.e.*, the ability to charge its customers less). The court of appeals had reasoned that, even though the plaintiffs had not relied on the alleged false statements by defendants in their tax documents, it was enough that *someone* relied upon those misstatements (*i.e.*, the State). *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004) ("This Court has not held that the civil-RICO plaintiff who alleges mail fraud or wire fraud must have been the entity that relied on the

fraud."). These facts, however, raised a proximate cause issue that the Court could not overlook.

This Court held in *Anza* that "[t]he direct victim of this conduct was the State of New York, not [the plaintiffs]. It was the State that was being defrauded and the State that lost tax revenue as a result." *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1997 (2006). The Court further explained, with respect to the plaintiffs' claim, that, "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Id.* at 1998. The Court found that the alleged fraud did *not* lead directly to the plaintiff's injuries. *Ibid.* As such, the plaintiffs' "injury was not the direct result of a RICO violation" and proximate cause was lacking. *Ibid.*

Because the case was resolved on the absence of proximate cause, this Court had "no occasion to address the substantial question whether a showing of reliance is required." *Ibid.*

2. This case does not suffer from the proximate cause defect in *Anza v. Ideal Steel Supply Corp.*

The *certiorari* petition in the instant case provides the first meaningful opportunity for this Court to decide this oft-granted but still unresolved question. Indeed, the decision below is an ideal vehicle because, after applying *Anza*, the court of appeals ruled that proximate cause existed even though the plaintiff did not rely upon petitioner's alleged misrepresentation. As such, the decision below provides this Court with the opportunity to address not only the question of *whether* reliance is required at all but, if it is, also the question of *what* degree of reliance is necessary.

The instant case involves the auction of property where there was a tax lien (for unpaid property taxes). The county sells such liens at auction, where there is a fierce competition to buy the liens. The winner is determined by whoever bids to impose the lowest

surcharge on the owner (which ranges between 0 and 18%). The purchasers of the tax liens expect to make their profits from reselling the property of owners who do not pay (for more than the value of the lien), and do not expect to make their profit by charging surcharges from the owners. Thus, most parcels attract a bid of 0% surcharge.

Because there are often multiple 0% bids, the county awards the liens in accordance with the following allocation system: "If X bids 0% on ten parcels, and each parcel attracts five bids at that penalty rate, then the County awards X two of the ten parcels." Pet. App. 2a. This system encourages a bidder to submit multiple bids, including through agents, but the county prohibits such agent bidding and requires that, "[b]efore each auction, every potential bidder must furnish the County with an affidavit that no agent or other related entity will participate in that auction." *Id.* at 3a.

According to plaintiffs (respondents, here), petitioners submitted false affidavits and in fact bid multiple times on single properties, in violation of county law. The county, of course, was not injured by these multiple submissions because it got paid in full irrespective of who won or what the bid was. Respondents, however, claim injury because they, as competing bidders, received less than their pro rata share of properties. For example, if X bids five times on each of 10 parcels (instead of bidding a single time on ten parcels as the law allows), and each parcel attracts 10 bids, X would be awarded 5 of the 10 parcels.

The Seventh Circuit ruled that these facts satisfy the proximate cause requirement of *Anza* because the direct victims of petitioners' alleged fraud were the respondents themselves. Pet. App. 5a (noting that the county "did not lose even a penny" and that "[t]he *only* injured parties are the losing bidders, who acquire fewer tax liens than they would" absent the fraud). Having determined there was proximate cause, something this Court in *Anza* could not do, the court of appeals then rejected petitioner's argument that respondents, as plaintiffs, had to prove that the false statements were made to them and that they

relied on them. Pet. App. 7a. The Seventh Circuit disagreed because, in that court's view, "the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements." *Ibid.*

3. The division amongst the courts of appeals is widespread and entrenched

The decision below highlights the irreconcilable nature of the division amongst the courts of appeals on the question presented. The Seventh Circuit, in deciding that reliance by a third party is sufficient to satisfy a plaintiff's need to prove injury "by reason of" a defendant's civil RICO fraud conduct, stated that three other courts of appeals agree with its conclusion, Pet. App. 7a, and that two courts of appeals disagree because they require that plaintiffs actually rely upon the misrepresentation, *id.* at 7a-8a. Because the division is so deep, the court of appeals specifically determined that it made no sense for it to attempt to minimize the disagreement because "[c]hanging sides could not eliminate the conflict." *Id.* at 8a.

The court of appeals is correct that the circuit conflict cannot be resolved by the courts of appeals changing sides on their own (indeed, the Seventh Circuit denied petitioners' petition for rehearing *en banc*, *see* Pet. App. 23a). Moreover, we submit that the division among the circuits is even deeper than described by the court below.

A clear majority (five) of the federal courts of appeals that have addressed the question have held, correctly in our view, that civil RICO's requirement that a plaintiff have been "injured in his business or property *by reason of* a violation of section 1962," 18 U.S.C. § 1964(c) (emphasis added), means that a plaintiff alleging mail or wire fraud as the RICO violation must prove that he relied on the fraud to his detriment. *See, e.g.*, *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996) (civil RICO plaintiffs must "allege both that they detrimentally relied in some way on the fraudulent mailing and that the

mailing was a proximate cause of the alleged injury to their business or property") (internal citation omitted);[2] *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001) (each member of putative RICO class action "must then prove reliance upon * * * alleged fraud"); *VanDenBroeck v. CommonPoint Mortg. Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (alleged misrepresentation must have been "calculated or intended to deceive persons of reasonable prudence and comprehension, and must also show that plaintiffs in fact relied upon that material misrepresentation"); *Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994) ("In order to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts."); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360 (11th Cir.) ("when a plaintiff brings a civil RICO case predicated upon mail or wire fraud, he must prove that he was a target of the scheme to defraud and that he relied to his detriment on misrepresentations made in furtherance of that scheme") (internal quotations omitted), *cert. denied*, 537 U.S. 884 (2002).

Two other circuits have held, however, that the "by reason of" requirement of Section 1964(c) can be satisfied

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[2] Citing to *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994), the Seventh Circuit stated that the Fourth Circuit permits the reliance requirement to be satisfied by a third party. That is not so. The Fourth Circuit's *subsequent* decision in *Chisolm* makes clear that direct reliance by a plaintiff is required by that court (a rule that was in place both *before* and *after* the anomalous *Mid Atlantic Telecom* decision). Moreover, *Mid Atlantic Telecom* is no longer good law because that fact pattern (unlike the one in the instant case) clearly could not survive application of *Anza*. In *Mid Atlantic Telecom*, a competitor sued a rival company on the ground that the rival had defrauded customers (by claiming to offer lower prices for telephone services when it was in fact not offering them) which took customers away from its competitors. Just as in *Anza*, however, there can be no proximate cause because the customers were the direct victims of the fraud and the plaintiff competitor's injuries were highly speculative. *Anza*, 126 S. Ct. at 1998.

in a civil RICO action predicated upon mail or wire fraud so long as the plaintiff shows that any third party, no matter who, relied on the alleged misrepresentation. In addition to the court below, Pet. App. 7a-8a, the Second Circuit has long required only third-party reliance. *See Ideal Steel Supply Corp. v. Anza*, 373 F.3d at 262-263 (reciting Second Circuit's long line of precedents requiring that only a third party rely upon the fraud), *rev'd on other grounds*, 126 S. Ct. 1991 (2006).

The First Circuit, standing alone, has explained, in *dicta* no less, that no reliance at all need be shown. *See Systems Mgmt., Inc. v. Loiselle*, 303 F.3d 100 (1st Cir. 2002).[3] The First Circuit stated that "[t]here is no good reason * * * to depart from RICO's literal language by importing a reliance requirement into RICO." *Id.* at 104.

Finally, district courts throughout the country have concluded (either relying on a broad reading of *Systems Management* or on their own accord) that no reliance is required in civil RICO actions. Although further division in the district courts ordinarily does not support this Court's discretionary review, it should for the instant issue.

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[3] Although the First Circuit in *Systems Management* found that reliance by the plaintiffs was not required, it reversed the judgment for the plaintiffs on other grounds. 303 F.3d at 104-106. Its analysis of the reliance issue was, therefore, *dicta*. As discussed below, courts applying *Systems Management* have read the First Circuit's exposition as providing that no reliance is needed and the First Circuit has not revisited the issue.

Systems Management could, in fact, be read as requiring third-party reliance because there the plaintiffs were underpaid employees suing their employer who had misrepresented its compliance with minimum wage law to the college with which it had a contract. Thus, the college was defrauded and could satisfy a third-party standard. 303 F.3d at 104. Even giving *Systems Management* such a reading does not eliminate, however, the division amongst the courts of appeals (it becomes five-to-three rather than five-to-two-to-one).

B. The Circuit Split Adversely Affects Class Action Rulings In The District Courts, Which Often Evade Appellate Review

This intolerable circuit conflict on RICO has led to confusion, forum shopping, and anomalous results in some of the most significant corporate cases before the federal courts.

1. Civil RICO is a favorite plaintiff claim in complex, multi-billion dollar class actions

The split among the circuits on the showing required for a civil RICO action predicated on mail and wire fraud creates divergent results in high-stakes, multiparty litigation that affects almost every American business and often evades appellate review. Numerous Fortune 500 companies, including the instant *amicus*, have become targets of plaintiffs who transform any fraud allegation into a civil RICO action because of the unusual relief of treble damages and attorneys' fees. Although businesses often prevail on the merits against individual fraud claims, or even those brought by a small group of plaintiffs, the stakes change significantly when plaintiffs attempt to certify a class under Rule 23 of the Federal Rules of Civil Procedure.

The threat of class-wide damages, particularly when they would be trebled under 18 U.S.C. § 1964(c), often forces legitimate businesses to forgo the possibility of defending the claim rather than face potentially staggering liability, substantial litigation expenses, and the attendant risk of being associated with a federal law claim of "racketeering." This Court has recognized that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Indeed, the empirical evidence demonstrates that class actions that are certified almost always settle. *See* Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys'*

Choice of Forum in Class Action Litigation 48 (Federal Judicial Center 2005) ("It is often said that most or even all class actions settle. Data from the current study as well as the earlier [1996] FJC study reveal an important qualification for this statement: Almost all *certified* class actions settle.") (emphasis in original).

Rule 23(f) of the Federal Rules of Civil Procedure provides a possible avenue to interlocutory review of class certification, but courts of appeals do not grant these requests with any regularity, even though they universally recognize that certification "places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits." *Regents of Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 379 (5th Cir. 2007), *pet. for cert. filed*, No. 06-1341 (Apr. 5, 2007). Courts of appeal have imposed stringent standards on Rule 23(f) petitions, so that economic pressure and the fact that the decision might otherwise evade review are but some of many components in the decisionmaking process. *See, e.g.*, *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) (focusing on criteria other than the fact that defendant may succumb to settlement demands); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999) (same). Indeed, courts of appeals have admonished that they "intend to exercise [their] discretion judiciously" because appellate review of certification orders "are disruptive, time-consuming, and expensive." *Mowbray*, 208 F.3d at 294.[4]

[4] Businesses also are often compelled to settle large multidistrict litigation (MDL) actions when thousands of cases are transferred to a single judge pursuant to 28 U.S.C. § 1407. That one judge determines all pre-trial rulings and a single adverse ruling (with no chance for review) often can be dispositive in a MDL; indeed, MDLs almost always settle prior to being transferred back for trial to the court where they originated.

2. Class certification is easier to obtain in civil RICO fraud cases filed in district courts that do not require a showing of reliance

The question of whether and to what degree a plaintiff must demonstrate reliance on a defendant's alleged fraud in order to support a civil RICO fraud action is a particularly important question in class actions. Class actions certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure require "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." In light of that requirement, a class is almost never certified when plaintiffs must prove detrimental reliance. *See Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344 (11th Cir. 2006) ("In a variety of contexts, we have held that the reliance element of a class claim presents problems of individualized proof that preclude class certification."); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 435 (4th Cir. 2003) ("the reliance element of * * * fraud and negligent misrepresentation claims is not readily susceptible to class-wide proof") (citation omitted).

This is particularly the case in fraud-based civil RICO actions because courts have explicitly held that the need for class members to individually prove their own reliance on the underlying fraud effectively precludes the certification of a civil RICO class. *See Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220 (5th Cir.) ("A [RICO] class cannot be certified when evidence of individual reliance will be necessary."), *cert. denied*, 540 U.S. 819 (2003); *Patterson*, 241 F.3d at 419 (the individualized reliance findings required in a civil RICO action precluded certification); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000) ("the individual findings of reliance necessary to establish RICO liability and damages preclude not only (b)(2) certification of this class under RICO, but (b)(3) certification as well."); *Sikes*, 281 F.3d at 1364 (because RICO class members needed to demonstrate reliance, "[i]ndividual issues will therefore predominate over common issues.").

A number of major class actions (many of them nationwide) alleging violations of civil RICO based upon mail and wire fraud have been certified, however, because plaintiffs have brought their actions in circuits where a plaintiff is not required to rely upon the misrepresentation, such as in the First, Second, and Seventh Circuits. For example, the Seventh Circuit, where district courts are bound by that court's rule reaffirmed in the decision below, has become a haven for some of these large suits. *See, e.g.*, *In re Synthroid Mkt. Litig.*, 188 F.R.D. 295 (N.D. Ill. 1999) (certifying nationwide civil RICO class action without analyzing question of reliance). And, even in the few circuits where courts of appeals have not yet decided on which side of the legal divide they fall, district courts have certified civil RICO class actions without any showing of reliance. *See, e.g., Grider v. Keystone Health Plan Central, Inc.*, No. 2001-CV-05641, 2006 U.S. Dist. LEXIS 93085, at *63-*64 (E.D. Pa. Dec. 21, 2006). When faced with such class actions, these courts are more likely to certify the class because, by disregarding the reliance issue, they do not need to analyze with any significant detail whether a class action is truly the superior method of adjudicating the dispute—namely whether Rule 23(b)(3)'s predominance and superiority requirements are met. And, as discussed above, class certification is almost always case dispositive, even though there might be meritorious defenses.

These class actions are a burden on the national economy. They have been filed, for example, against some of the nation's most important sectors, such as against health care companies like *amicus curiae*, health maintenance organizations, financial services companies, and ordinary businesses, all in cases where there was no showing of reliance. *See, e.g.*, *Grider*, 2006 U.S. Dist. LEXIS 93085 (class of thousands of doctors against health maintenance organization); *In re Synthroid Mkt. Litig.*, 188 F.R.D. at 295 (nationwide class certified against pharmaceutical industry); *Johnson v. Aronson Furniture Co.*, No. 96 C 117, 1998 U.S. Dist. LEXIS 14454 (N.D. Ill. Sept. 10, 1998) (class of all retail customers); *Peterson v. H&R Block Tax Servs., Inc.*, 174 F.R.D. 78 (N.D. Ill. 1997)

(statewide class against tax preparer); *Leff v. Olympic Fed. Sav. & Loan Ass'n*, No. 86c3026, 1987 WL 12921 (N.D. Ill. June 19, 1987) (statewide class certified against lender).

Absent review by this Court, these costly and complex class actions will continue to proliferate and will yield the intolerable result that class certification depends, in significant part, not on the merits of the underlying case but on where it is filed. Plaintiffs in nationwide class actions can engage in forum shopping by filing in circuits (such as the Seventh Circuit) that have relaxed the requirements for civil RICO and have thus diminished the requirements of Rule 23(b)(3). This is especially disconcerting because of the high stakes involved—often billions of dollars—and the absence of meaningful judicial review due to the coercive effect of certification.

C. The Ruling Below Is Contrary To This Court's Civil RICO Jurisprudence, Which Dictates That A Plaintiff Demonstrate That He Relied On The Defendant's Fraud To His Detriment To Meet RICO's "By Reason Of" Requirement

This Court's well-established precedent demonstrates that detrimental reliance must be a necessary component of proximate cause in a civil RICO cause of action like this one.

In *Holmes v. Security Investor Protection Corp.*, 503 U.S. 258 (1992), this Court construed the phrase "by reason of" in RICO to require that a plaintiff prove proximate cause rather than mere "but for" causation. The Court did so by relying upon the common law, and the fact that Congress intended to incorporate the common law in the "by reason of" requirement. Accordingly, this Court explained that, "among the many shapes this concept [of proximate cause] took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268 (citation omitted).

The elements of federal mail and wire fraud, of course, are also derived from the common law. *Holmes*, 503 U.S. at 267-268. And under the common law, civil fraud requires that a plaintiff "must have been misled to his prejudice or

injury." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 203, at 227 (13th ed. 1886). The fact that the government, in a *criminal* prosecution for mail and wire fraud, is relieved of such proof is of no moment, because it does not need to satisfy the *civil* standard of Section 1964(c). *Cf. United States v. Rowe*, 56 F.2d 747, 749 (2d. Cir.) (L. Hand, J.) ("Civilly of course the action would fail without proof of damage, but that has no application to criminal liability."), *cert. denied*, 286 U.S. 554 (1932). Section 1964(c) plainly requires more in civil actions for treble damages, *viz.*, an injury "by reason of" the enterprise's racketeering activity. *Anza*, 126 S. Ct. at 1995-1998; *Holmes*, 503 U.S. at 266-268.

A reliance requirement helps to effectuate the proximate cause limitations imposed by this Court in *Holmes* and again in *Anza*.

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

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