In the Supreme Court of the United States

SABRE GROUP, LLC, *et al.*,
Petitioners,

v.

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

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff asserting a civil RICO claim predicated on acts of mail fraud must plead and prove reliance on alleged misrepresentations by the defendant?

PARTIES TO THE PROCEEDINGS

Petitioners are Sabre Group, LLC; Barrett Rochman; and John Bridge. Other parties in the court of appeals were Plaintiffs-Appellants Phoenix Bond & Indemnity Co. and BCS Services, Inc. and Defendants-Appellees Robert Jensen; Joseph Varan; Jeffrey Bridge; Francis Alexander; Jesse Rochman; Douglas Nash; Cronus Projects, LLC; Gregory Ellis; GJ Venture, LLC; L.C.C. Venture, LLC; Regal One, LLC; Jason Baumbach; Optimum Financial, Inc.; Carpus Investments, LLC; DRN II, Inc.; Jeshay, LLC; Mud Cats Real Estate, LLC; Georgetown Investors, LLC; Corinne Rochman; Christopher Rochman; BRB Investments, LLC; and CCJ Investments, LLC.

The court of appeals dismissed Plaintiff-Appellant Oak Park Investments, Inc. as a party.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Sabre Group, LLC has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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Petitioners, by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-8a) is reported at 477 F.3d 928. The opinion of the district court (App. B, 9a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. On April 17, 2007, the court of appeals denied petitioners' request for rehearing *en banc*. App. C,

22a-23a. On July 3, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

> As used in this chapter—(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . .

18 U.S.C. § 1961 (1988).

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . .

18 U.S.C. § 1964(c) (1995).

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341 (2002).

STATEMENT OF THE CASE

When property owners in Cook County, Illinois do not timely pay their real estate taxes, the County acquires a tax lien on the property involved. Cook County sells these tax liens to third parties at auction. The winning bidder pays the delinquent taxes to the County and has the right to collect the amount of the taxes paid, plus interest and a penalty, from the property owner. The auction award goes to the bidder who is willing to accept the smallest percentage penalty on top of the tax lien. App. 1a. If the property owner is unable to pay, the lien holder may obtain a tax deed and become the new owner of the property.

The auctions for tax liens in Cook County are highly competitive. Many bidders submit offers at the statutorily imposed minimum of a 0% penalty. When the County receives multiple bids at 0%, it allocates the tax liens among the low bidders.

The tax liens auctions are administered by the County Treasurer. Among the procedures the Treasurer has implemented for conducting the auctions is the Single, Simultaneous Bidder Rule ("SSB Rule"), requiring bidders to declare that they are not related to any other entity that participates in the auction. App. 2a.

On July 15, 2005, Phoenix Bond & Indemnity Co. and BCS Services, Inc. ("Plaintiffs") filed this action in the United States District Court for the Northern District of Illinois. They alleged that petitioners and several other defendants violated the SSB Rule by agreeing to participate in the auctions and later to transfer the liens they were awarded to a single entity. Defendants allegedly did so while representing to the County that they were complying with the SSB Rule. Plaintiffs alleged that, as a result of this arrangement, they received less than the share of liens they would have been awarded if defendants had complied with the SSB Rule.

Plaintiffs alleged that defendants had engaged in the operation of an enterprise through a pattern of racketeering activity (namely, mail fraud), in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"). The only mailings alleged by plaintiffs were routine notices mailed by the County to notify property owners of tax lien sales. These mailings did not go to plaintiffs and are not even alleged to have contained any misrepresentations. Plaintiffs did not and could not allege that they ever received any fraudulent misrepresentations from defendants, much less that they relied on any such misrepresentations. Plaintiffs filed their action under 18 U.S.C. § 1964, the civil provision of the RICO statute, which authorizes persons injured in their business or property "by reason of" a criminal RICO violation to recover treble damages and attorneys' fees.

The district court dismissed the complaint under Rule 12(b) for lack of standing and absence of federal jurisdiction. App. 18a. The court of appeals reversed and remanded, holding that Plaintiffs were not required to plead and prove reliance on alleged misrepresentations by defendants as a prerequisite for pursuing a civil RICO claim predicated on alleged acts of mail fraud. App. 8a.

REASONS FOR GRANTING THE PETITION

This case presents an important issue regarding the breadth of the civil RICO statute and the relationship between federal criminal law and traditional state law claims. This Court already has acknowledged the importance of the question presented. Last year, in *Anza v. Ideal Steel Supply Corp.*, ___ U.S. ___, 126 S. Ct. 1991, 1998 (2006), this Court observed that there is a "substantial question" whether a plaintiff is required to show reliance on an alleged misrepresentation in civil RICO cases where the underlying "racketeering activity"

is based on fraud. The federal courts of appeals have divided sharply on this question, and this Court should now resolve it.

The court of appeals in this case acknowledged the circuit conflict (although it did not agree with petitioners as to how each of the circuits should be classified). As we read the cases, five circuits require a plaintiff to plead and prove reliance on an alleged misrepresentation to satisfy the standing requirements of civil RICO. Three other circuits reject this position, holding that reliance is not a necessary element for a civil RICO case. In these circuits, plaintiffs may pursue treble damages and attorneys' fees under RICO, even though their RICO claims would be dismissed for lack of standing in many other places in the country. This Court's intervention is needed to bring uniformity to the law and to confine civil RICO fraud claims within proper bounds. There is no reasonable prospect that further litigation in the lower courts will resolve the conflict or contribute to this Court's consideration of the issue.

Absent this Court's intervention, prospective plaintiffs will have a significant incentive to forum-shop, and to file civil RICO claims in federal jurisdictions that do not require any showing of reliance as a precondition for treble damage recoveries. Review by this Court is needed not merely to establish consistent elements for civil RICO claims, but also to limit such claims to appropriate circumstances. Permitting plaintiffs to pursue civil RICO claims predicated on fraud without any allegation or showing of reliance on an alleged misrepresentation eliminates a crucial element of common law fraud and does so in the context of a statute that permits treble damage recoveries.

The government, of course, need not establish standing to pursue criminal RICO charges, but, at the same time, the government can exercise prosecutorial discretion to determine which RICO cases to pursue. No such check limits civil RICO claims. A reliance requirement would impose proper

restrictions on the situations in which private plaintiffs can use alleged misstatements to public officials as a basis for a civil RICO claim.

I. THE FEDERAL COURTS OF APPEALS ARE DIVIDED AS TO WHETHER A PLAINTIFF MUST DEMONSTRATE RELIANCE TO BRING A CIVIL RICO CLAIM.

Acknowledging the conflict among the circuits, the court of appeals in this case stated: "The box score is thus four circuits on one side and two on the other [on the question of reliance for civil RICO plaintiffs]; we shall adhere to the majority position. (Changing sides could not eliminate the conflict.)" App. 7a. The court of appeals was correct in recognizing the conflict, although not in identifying which side of the conflict represents the majority rule.

A majority of the circuits that have addressed the question have held that a plaintiff must plead and prove reliance to sustain a civil RICO claim predicated on acts of mail fraud. Early on, for example, the Eleventh Circuit adopted the more "restrictive view," that a plaintiff who brings a RICO claim predicated on mail fraud "must have relied to his detriment on misrepresentations made in furtherance of that scheme." *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991). Four other courts of appeals have agreed. In *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*, 319 F.3d 205 (5th Cir. 2003), the Fifth Circuit concluded that plaintiffs who were unable to show reliance on any alleged misrepresentation were, as a result, unable to sustain a civil RICO action. *Id.* at 218. The Fourth, Sixth, and Eighth Circuits similarly require a showing of reliance by the plaintiff in a civil RICO case predicated on mail fraud. *See Chisholm v. Transouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Vandenbroeck v. Commonpoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000); *Appletree Square I,*

Ltd. P'ship v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994).

The courts of appeals that have determined that reliance is required in civil RICO cases have reached that conclusion despite acknowledging that the mail fraud statute does not require, as a prerequisite for a *criminal* conviction, any showing that the alleged victim relied on a fraudulent representation. *See Brown v. Cassens Transp. Co.*, No. 05-2089, 2007 WL 1975974, at *2 (6th Cir. July 10, 2007) (observing that this Court held that reliance is not necessary to establish mail fraud in *Neder v. United States*, 527 U.S. 1, 24 (1999)).

Rejecting the approach of these courts, the First, Second, and Seventh Circuits have concluded that reliance is not a necessary element for a plaintiff asserting a civil RICO claim predicated on mail fraud. The First Circuit declared that the RICO statute "says nothing about reliance as a requirement either for civil liability or for proof of damages." *Systems Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 103 (1st Cir. 2002); *see also id.* at 103-04 (recognizing that "at common law a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception, and some courts have imported this requirement into RICO actions where the predicate acts comprise mail or wire fraud"). But because the language of RICO's civil action provision does not expressly establish a reliance element, the First Circuit declined to "depart from RICO's literal language by importing a reliance requirement into RICO." *Id.* at 104. The Second Circuit concluded that civil RICO standing is established as long as *someone* allegedly relied on the fraudulent statement; the relying person or entity need not be the plaintiff. In the Second Circuit's view, as long as the plaintiff is able to show that there was a pattern of racketeering activity as defined by the RICO statute, then the plaintiff has standing, even if "the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *Ideal*

Steel Supply Corp. v. Anza, 373 F.3d 251, 263 (2d Cir. 2004), *rev'd on other grounds*, 126 S. Ct. 1991 (2006).

II. THE RELIANCE QUESTION IS DIRECTLY AT ISSUE IN THIS CASE.

As the present case demonstrates, the conflict among the circuits presents a significant and recurring problem. Adopting the majority approach, the district court in this case determined that the Plaintiffs did not have standing because they could not allege or prove reliance. "The plaintiffs here were not recipients of the alleged misrepresentations and, at best were indirect victims of the alleged fraud. . . . Consequently, the court holds that plaintiffs lack standing to bring the alleged RICO claims." App. 18a. The court of appeals, however, reversed, not because it thought Plaintiffs could allege and prove reliance, but because it held that Plaintiffs need not make any such showing to sustain their civil RICO claim. App. 7a. This case thus squarely presents the legal issue on which the circuits are in conflict.

III. REQUIRING A SHOWING OF RELIANCE IS CONSISTENT WITH THE CIVIL RICO REMEDY.

A. Applying the common law element of reliance is consistent with previous applications of common law concepts to civil RICO.

This Court has recognized that well-established common law concepts should and do apply to civil RICO claims. In *Beck v. Prupis*, this Court held that a plaintiff could not bring a civil RICO claim predicated on § 1962(d) (conspiracy) "for injuries caused by an overt act that is not an act of racketeering or otherwise unlawful under the statute." 529 U.S. 494, 507 (2000). In that case, the plaintiff filed a civil RICO suit against his former employers for dismissing him because he alerted regulators that the employers were en-

gaged in racketeering activities. *Id.* at 498. The plaintiff claimed that his injury was "proximately caused by an overt act—namely, the termination of his employment—done in furtherance of respondents' conspiracy, and that § 1964(c) therefore provided a cause of action." *Id.* at 499. The Court rejected this argument, looking to common law principles of civil conspiracy to support its holding. Specifically, the Court stated that "by the time of RICO's enactment in 1970, it was widely accepted that a plaintiff could bring suit for a civil conspiracy only if he had been injured by an act that was itself tortious." *Id.* at 501. The Court also rejected the plaintiff's argument that the interpretation of the elements for a civil RICO claim should be limited to criminal principles:

> We have turned to the common law of criminal conspiracy to define what constitutes a violation of § 1962(d), a mere violation being all that is necessary for criminal liability. This case, however, does not present simply the question of what constitutes a violation of § 1962(d), but rather the *meaning of a civil cause of action for private injury* by reason of such a violation. In other words, our task is to interpret §§ 1964(c) and 1962(d) in conjunction, rather than § 1962(d) standing alone. The obvious source in the common law for the combined meaning of these provisions is the law of civil conspiracy.

Id. at 501 n.6 (emphasis added). The Court thus distinguished between criminal and civil liability under RICO and ruled that, in the latter context, it is appropriate to look to common law principles in determining the statute's proper reach. Likewise here, it is appropriate to use the common law reliance requirement as a means of setting appropriate bounds for civil RICO liability.

To cite another example, in *Holmes v. Securities Investor Protection Corp.*, this Court applied civil common law principles of proximate cause to civil RICO claims. 503 U.S. 258 (1992). The Court there considered the statutory phrase "by

reason of" in RICO's civil liability provision, § 1964(c), and determined that it required a showing of proximate cause. 503 U.S. at 266. The Court looked not only to statutory history to discern the congressional intent in using the phrase "by reason of," but also to common law principles associated with proximate cause, or the "judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Id.* at 268. The Court recognized that "at common law," proximate cause represented "a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* Accordingly, the Court concluded that the "by reason of" language in § 1964(c) incorporated the common law concepts of proximate cause. *Id.* at 276.

This Court thus has recognized that resort to well-established common law principles is an appropriate means of interpreting the reach of the civil RICO statute. In both *Beck* and *Holmes*, the Court specifically identified the common law as persuasive authority in analyzing the standing elements for a civil RICO plaintiff. Indeed in *Beck*, the Court described the common law as an "obvious source" of relevant authority. 529 U.S. at 501 n.6. At the same time, the Court rejected the argument that criminal law concepts are the exclusive source of interpreting the requirements for a civil RICO claim. *Id.* The courts of appeals that have looked solely to criminal law principles in determining whether reliance is a required element of a civil RICO claim predicated on fraud thus have not followed the approach of this Court. *See, e.g., Systems Mgmt.* 303 F.3d at 104 (First Circuit states that "criminal fraud under the federal statute does not require 'reliance' by anyone" and concludes on that basis that reliance is not required of a civil RICO plaintiff either.)

B. Reliance is a well-established principle of common law fraud.

A showing of the plaintiff's reliance on a fraudulent misrepresentation is a longstanding requirement of common law fraud. *See, e.g., Systems Mgmt.*, 303 F.3d at 103 ("At common law a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception."); *Chisholm*, 95 F.3d at 337 ("where fraud is alleged as a proximate cause of the injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation."); Restatement (Second) of Torts § 546 (1977) ("The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably *relies upon the truth of the matter misrepresented*, if his reliance is a substantial factor in determining the course of conduct that results in his loss.") (emphasis added).

This showing of reliance is not an incidental one. As the Fifth Circuit has observed, the distinct character of fraud is that it "addresses the liability between persons with direct relationships." *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000). Indirect relationships do not have a place in federal civil RICO claims: "Allowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble-damages suits.'" *Holmes*, 503 U.S. at 274 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 545 (1983)) (alteration in original). Because the reliance element ensures that only direct relationships form the basis of a fraud claim, it should be applied to civil RICO claims predicated on fraudulent activity.

IV. A RELIANCE REQUIREMENT IS AN APPROPRIATE LIMITATION OF THE APPLICATION OF THE CIVIL RICO STATUTE.

This Court has noted that Section 1964 was not intended to expand federal jurisdiction into common law fraud without limitation; rather, "private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S 479, 493 (1985). The predicate crimes of the RICO statute, however, cover a broad range of conduct, and civil RICO plaintiffs are not constrained by prosecutorial discretion. "The reach of [the mail and wire fraud statutes] exists against a backdrop of prosecutorial discretion . . . which, if sensitively exercised, operates as a check on improvident exertion of federal power." *Schreiber Dist. Co. v. Serv-well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J. concurring). Prospective civil plaintiffs are unchecked, however, when determining whether to assert a civil RICO claim in a given situation. As then-Judge Kennedy noted, "A company eager to weaken an offending competitor obeys no constraints when it strikes with the sword of [RICO]." *Id.*

The requirement of reliance serves as a "commonsense liability limitation," helping prevent plaintiffs from wielding the threat of treble damages and attorneys' fees in federal court wherever fraud is alleged. *See Summit Props.*, 214 F.3d at 562 ("To hold [that reliance is not required] would allow the threat of treble damages and attorney fees to infiltrate garden variety products liability cases . . . even if no plaintiff relied on those misrepresentations.") As the Fifth Circuit observed, "We are not persuaded that by its 'by reason of' phrase Congress intended such a federalization and escalation of the states' laws of product liability [or other common law claims]." *Id.* Unless civil RICO plaintiffs claiming fraud are required to show reliance on alleged misrepresentations, civil

RICO suits can be expected to over-federalize fraud claims, including claims that would not survive in state court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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