

No. 07-210

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IN THE  
*Supreme Court of the United States*

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JOHN BRIDGE, *et al.*,

*Petitioners,*

v.

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

*Respondents.*

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

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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## **QUESTION PRESENTED**

Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the Plaintiff.

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
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**INTERESTS OF *AMICUS CURIAE***

The Washington Legal Foundation<sup>1</sup> is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

To that end, WLF has appeared before this Court as well as other federal and State courts to argue against overly expansive theories of tort liability and excessive punitive damages. Of particular relevance to this case, WLF has appeared in this Court to argue against an overly expansive interpretation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* See, e.g., *Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella v. Wood*, 528 U.S. 549 (2000); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). WLF also filed a brief in *Bank of China v. NBM L.L.C.*, No. 03-1559, a case that raised issues substantially similar to the issues in this case but that was settled by the parties before the Court rendered a decision.

WLF is concerned that the reflexive invocation of

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief; WLF has lodged letters of consent with the clerk.

RICO by civil litigants engaged in otherwise garden-variety commercial disputes does violence to the original purpose of RICO and unnecessarily burdens our federal judicial system. While Congress adopted RICO as a tool to fight organized crime, civil RICO is now all too often invoked in “everyday fraud cases brought against respected and legitimate enterprises.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). While such use of RICO is at times a reflection of the statute’s expansive language, WLF is concerned that much of the time RICO is invoked inappropriately by opportunistic plaintiffs seeking to force the settlement of doubtful claims by defendants unable to cope with the threat of treble damages and the unfavorable publicity that arises anytime one is labeled a “racketeer.”

WLF is filing this brief because of its interest in promoting the welfare of the business community and the public at large; it has no other interest, financial or other, in the outcome of this lawsuit.

### **STATEMENT OF THE CASE**

The parties to this proceeding are all regular bidders at auctions conducted annually by the Treasurer’s Office in Cook County, Illinois, during which the County auctions off tax liens on real property whose owners have failed to pay property tax. Respondents Phoenix Bond & Indemnity Co., *et al.* (collectively, “Phoenix Bond”), contend that Petitioners John Bridge, *et al.* (collectively, “Bridge”), made fraudulent statements to the Treasurer’s Office in connection with the auctions and that the Treasurer’s Office relied on those statements in allowing Bridge to submit bids. Phoenix Bond contends that Cook County

was not injured by Bridge's alleged fraud: it received the same proceeds from the auctions that it would have received even in the absence of fraud. However, Phoenix Bond alleges that it was injured by the fraud; it contends that the Treasurer's Office declared Phoenix Bond the winning bidder on fewer tax liens than would have been the case had Bridge not engaged in fraud and had the Treasurer's Office not relied on that fraud. Phoenix Bond does not contend that it acted in reliance on the allegedly fraudulent statements, or that it even heard the statements.

Phoenix Bond filed this action in July 2005, alleging *inter alia* that Bridge had participated in the affairs of an enterprise through a pattern of "racketeering activity," and had conspired to do so, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) and (d). The "racketeering activity" alleged by Phoenix Bond was mail fraud, 18 U.S.C. § 1341; the complaint alleged that the defendants used the U.S. Mail as part of their scheme to defraud the Treasurer's Office regarding the nature of their auction bids.

The district court granted Bridge's motion to dismiss in December 2005. Pet. App. 9a-20a. The court held that Phoenix Bond lacked prudential standing to bring its RICO claim, reasoning that the plaintiffs were "not within the 'zone of interests' that the RICO statute protects" because they were not the recipients of any of Bridge's fraudulent communications. *Id.* 18a.

The Seventh Circuit reversed and remanded in February 2007. *Id.* 1a-8a. Without directly addressing prudential standing, it held that Phoenix Bond had

established its standing by adequately alleging injury-in-fact (a reduction in the number of tax liens it was awarded) that was directly traceable to Bridge's alleged misconduct. *Id.* 3a-4a. It went on to hold that the complaint had adequately alleged that Bridge's fraud was the "proximate cause" of Phoenix Bond's injuries. While conceding that the federal appeals courts are split on the issue, it held that proximate cause can be established in a RICO action based on mail or wire fraud even when the defendant's misleading statements are neither made to nor relied upon by the plaintiff, so long as the plaintiff's "injury is not derivative of someone else's." *Id.* 7a.

### **SUMMARY OF ARGUMENT**

RICO creates criminal penalties for a broad range of conduct and also authorizes any person injured in his business or property "by reason of" a violation of RICO's criminal provisions to bring a civil suit to recover treble damages plus the costs of the suit. 18 U.S.C. § 1964(c). The Court held in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), that § 1964(c)'s "by reason of" language imposes a "proximate cause" requirement on civil RICO claimants. It is not enough for a claimant to demonstrate that the defendant's actions were simply a but-for cause of his injury.

When the claimant alleges that the defendant's predicate actions consist of misrepresentations in violation of the federal mail fraud statute, it is a straightforward application of *Holmes's* proximate cause requirement to preclude civil RICO recovery if, as here, the claimant did not rely on those misrepresentations.

Phoenix Bond asserts that its injuries were a virtually certain consequence of Bridge's misrepresentations, but that assertion does little more than demonstrate but-for causation. In this context, proximate cause requires a close relationship between the parties of the sort that is wholly absent in this case.

*Holmes* held that because § 1964(c)'s "by reason of" language is taken from antitrust statutes, courts should look to those statutes for assistance in discerning Congress's intent in adopting that language. *Holmes*, 503 U.S. at 267-268. The Court has routinely interpreted the Clayton Act and the Sherman Act as incorporating a strict proximate causation requirement, such that "[t]he general tendency of the law, in regards to damages at least, is not to go beyond the first step." *Assoc. General Contractors of Calif., Inc. v. Carpenters*, 503 U.S. 258, 271 (1992) (quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)). In the antitrust context, the "first step" limitation has generally been understood to mean limiting damage awards to those having a direct relationship with the defendant. Applying that limitation to this case is fatal to Phoenix Bond's claim. In the absence of any assertion that it had a direct relationship with Bridge – either by virtue of having relied on Bridge's misrepresentations or of an allegation that it was Bridge's intended victim – Phoenix Bond cannot meet that strict proximate cause requirement.

Phoenix Bond asserts that it has adequately alleged proximate cause by alleging facts demonstrating that Bridge's misrepresentations are the only possible cause of its injuries. But demonstrating a strong but-for causal relationship in a specific case has never been

deemed sufficient to establish proximate cause. Indeed, in the antitrust context, the Court has strongly cautioned against creating exceptions to “first step” proximate cause rules based on the facts of particular cases. The Court has explained that creating such exceptions would undermine the basic rule by encouraging repeated attempts by plaintiffs to invoke the exceptions.

The Court should be particularly wary of recognizing such exceptions when, as here, the RICO claim is being asserted by a business competitor of the defendant. It will not take much encouragement from the Court to induce large numbers of disappointed contract bidders to accuse successful bidders of RICO “racketeering.” It would not be very difficult, for example, to find fault with the manner in which a successful bidder touted his business acumen. Bridge is accused of having engaged in business activity that would generally be deemed pro-competitive – because aggressive bidding in a public auction almost always inures to the benefit of the party conducting the auction. When employed by disappointed bidders, RICO is too heavy-handed a tool to effectively ferret out the few instances where (as Phoenix Bond alleges to be true here) aggressive bidding is actually harming the auction. The Cook County Treasurer’s Office created the bidding rules at issue here and thus is better situated than Phoenix Bond to decide whether Bridge’s actions have harmed the auctions and merit initiation of sanction proceedings.

A reliance requirement in cases of this sort is particularly important in light of the well-recognized tendency of RICO to turn garden-variety tort suits into

treble-damage federal racketeering claims. The steady stream of RICO claims against legitimate businesses is likely to become a flood if the Court eliminates the reliance requirement in RICO fraud cases – a requirement that has been recognized to at least some extent by every federal appeals court that has addressed the issue. This Court has correctly recognized that it is not the role of the courts to re-write RICO, that any deficiencies in the statute should be corrected by Congress instead of the courts. But the reliance requirement is not a judicial invention; it is deeply rooted in the concept of proximate cause mandated by Congress when it adopted RICO. In light of the significant commercial disruptions likely to arise from elimination of the reliance requirement, the Court should be particularly hesitant to adopt the Phoenix Bond’s reading of RICO, a reading most certainly not self-evidently required by the statutory language.

## **ARGUMENT**

### **I. A RELIANCE REQUIREMENT IN MAIL FRAUD CASES OF THIS TYPE IS A STRAIGHT-FORWARD APPLICATION OF *HOLMES’S* PROXIMATE CAUSE REQUIREMENT**

This Court held more than 15 years ago that a civil RICO plaintiff bears the burden of demonstrating that the defendant’s racketeering activity proximately caused the injury of which he complains. The Seventh Circuit correctly concluded that where the alleged racketeering activity consists of fraudulent misrepresentations that result in injury, reliance on those misrepresentation is a required element of the

claim. The appeals court erred, however, when it concluded that the plaintiff can establish that the defendant proximately caused his injuries based on a demonstration that *someone else* relied on those misrepresentations.

The statute creating a private right of action for violations of RICO, 18 U.S.C. § 1964(c), provides:

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

In *Holmes*, the Court considered the meaning of § 1964(c)'s "by reason of" language. The Court conceded that the language could be read to mean that a plaintiff demonstrates injury, and therefore may recover damages, "simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injuries." *Holmes*, 503 U.S. at 265. But the Court rejected that interpretation, based largely on its view that it was "very unlikel[y]" that Congress meant to permit such broad-based recovery. *Id.* Instead, the Court concluded that Congress intended to incorporate traditional notions of proximate cause into civil RICO claims. *Id.* at 268.

In reaching that conclusion, the Court looked to the Clayton Act for guidance. *Id.* at 267. The Court observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the

Clayton Act, which reads in relevant part:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

15 U.S.C. § 15. Noting that it had previously ruled that § 4 of the Clayton Act incorporated a proximate cause requirement, the Court concluded that the reasoning of its prior ruling “applie[d] just as readily to § 1964(c). [Congress] used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.” *Holmes* 503 U.S. at 268.

The Court stated that “the infinite variety of claims that may arise make it virtually impossible to announce a blackletter rule that will dictate the result in every case” regarding whether an injury was “proximately caused” by the defendant’s actions. *Id.* at 272 n.20 (quoting *Assoc. General Contractors*, 459 U.S. at 536). Nonetheless, the Court provided some general guidelines for use in making that determination:

Here we use “proximate cause” to label generically the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts. At bottom, the notion of proximate cause reflects “ideas of what justice demands, or of what is administratively possible and convenient.” W. Keeton, D. Dobbs, R.

Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984).

*Id.* at 268. The Court then proceeded to look to common law for guidance regarding the proximate cause question it faced (whether the defendant’s stock manipulation could be deemed the proximate cause of the plaintiff’s injury). *Id.* (noting the “many shapes [the] concept [of proximate cause] took at *common law*”) (emphasis added).<sup>2</sup>

Any resort to the common law for guidance is fatal to Phoenix Bond’s position. There can be no serious dispute that a plaintiff seeking to recover for a fraudulent misrepresentation at common law has long been required to demonstrate his or her reasonable reliance on the misrepresentation. *See, e.g., Field v. Manns*, 516 U.S. 59, 70 (1995) (at common law, “fraudulent misrepresentation” requires “both actual and justifiable reliance”). Given the teaching of *Holmes* and *Beck* that the contours of “proximate cause” in RICO cases involving allegations of fraudulent misrepresentations should be determined by reference to the common law (because Congress is likely to have legislated with those common-law notions of proximate cause in mind), § 1964(c) bars recovery unless the plaintiff can demonstrate reliance on the

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<sup>2</sup> In *Beck v. Prupis*, 529 U.S. 494, 500 (2000), the Court similarly looked to common law principles for assistance in discerning congressional intent with respect to the meaning of RICO: “To determine what it means to be ‘injured . . . by reason of’ a ‘conspiracy,’ we turn to the well-established common law of civil conspiracy.” *Beck*, 529 U.S. at 500 (quoting 18 U.S.C. § 1962(d)).

misrepresentation.

Although reliance is not an issue in antitrust litigation, the Court has adopted analogous limitations on the availability of damages to antitrust plaintiffs. In applying proximate cause standards to such plaintiffs, the Court has required them to demonstrate a direct relationship with the defendant, noting that “[t]he general tendency of the law, in regards to damages at least, is not to go beyond the first step.” *Assoc. General Contractors of Calif., Inc.*, 503 U.S. at 271. Thus, for example, in price fixing cases the court has limited recovery of damages to those who purchased directly from one of the conspirators. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Recovery is denied to indirect purchasers, no matter how strong their showing that the conspiracy caused them to pay enhanced prices for their goods. *Id.* at 737-38.

The Seventh Circuit rejected Bridge’s analogous claim that a plaintiff, in order to establish proximate cause in a RICO mail fraud action, must demonstrate that the plaintiff himself (and not some third party) relied on the defendant’s fraudulent misstatements. The appeals court held, “A scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO *if the injury is not derivative of someone else’s.*” Pet. App. 7a (emphasis added). A principal difficulty with the appeals court’s standard is that it provides little or no guidance regarding what constitutes a noncompensable “derivative” injury. Presumably, the court had in mind the types of claims at issue in *Holmes*: the plaintiff’s injury arose solely because the plaintiff was required to cover the debts of others driven into insolvency by their

detrimental reliance on fraudulent misstatements. But if that is the only limitation on damage awards the appeals court had in mind, its standard comes very close to being a but-for causation standard of the type condemned by *Holmes*. It is quite plausible under the appeals court's standard that someone 16 steps down the supply chain would not be deemed to have suffered a "derivative" injury so long as he is the only one injured by the defendants' alleged RICO violations – the first 15 suppliers having avoided any loss by charging the next supplier a price high enough to fully recover his inflated costs.

If the Seventh Circuit *did* have such remote purchasers in mind when it referred to noncompensable "derivative" injuries, then it has failed to explain why Phoenix Bond's injury is not similarly "derivative." Phoenix Bond does not, after all, allege any direct relationship with Bridge; its only direct relationship was with the Treasurer's Office, from whom it hoped to obtain tax liens. It alleges that the Treasurer's Office managed to avoid being injured by Bridge's fraud and instead passed along the injury to Phoenix Bond (in the form of a reduced allocation of tax liens). It appears that the only real distinction that the Seventh Circuit could make between Phoenix Bond and an entity even more remotely removed from contact with Bridge was one of degree: because Phoenix Bond is only one degree of separation away from Bridge (*i.e.*, although unrelated to one another, they both have a relationship with the Treasurer's Office), the causation theory asserted by Phoenix Bond is more plausible than the assertions of an even more remotely situated claimant would be.

A rule that is much more faithful to the

proximate cause requirement mandated by Congress is the rule adopted by a majority of federal appeals courts: in order to establish proximate cause in a RICO action based on mail or wire fraud, a plaintiff must demonstrate that (s)he relied on the defendant's misrepresentations and was injured thereby.<sup>3</sup> That rule also has the advantage of clarity so obviously lacking in the Seventh Circuit's "derivative" injury standard.

Although Phoenix Bond has no direct relationship with Bridge, it makes out a quite plausible case that, if its allegations are proven accurate at trial, its injuries were caused by Bridge's bidding scheme. But in an analogous antitrust context, the Court has refused to grant exceptions to its *Illinois Brick* rule simply because the plaintiff has demonstrated that his case avoids the evidentiary difficulties that caused the Court to adopt the rule in the first instance. In *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), gas pipeline companies were alleged to have kept wholesale natural gas prices artificially high through a price fixing scheme. A public utility that purchased gas from the pipeline companies filed a suit seeking damages under § 4 of the Clayton Act, 15 U.S.C. § 15. The States of Kansas and Missouri tried to join the suit on behalf of consumers in their States, on the theory that consumers – not the public utility – were the real injured parties, because the public utility had simply passed along all costs to the

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<sup>3</sup> WLF also submits that proximate cause can be demonstrated if the RICO plaintiff was directly targeted for injury by the plaintiff. For example, if A embezzles money from B by means of wire fraud, B can establish proximate cause in a RICO action even though, as a victim of embezzlement, he obviously did not *rely* on the embezzlers' actions.

consumers.

In rejecting the States' effort to carve out an exception to the *Illinois Brick* rule, the Court did not contest the States' contention that all the reasons for adopting the *Illinois Brick* rule (*e.g.*, avoiding difficulties regarding apportionment of damages among multiple claimants, the risk of multiple recoveries, and the risk of diminution of incentives for private enforcement) were inapplicable to their case. Indeed, the States asserted that by using public utility records, they could "prove the exact injury to the residential customers." 497 U.S. at 208. The Court nonetheless held that the purposes of the rule against awarding antitrust damages to indirect purchasers were best served by making no exceptions to the rule: "[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *Utilicorp United*, 497 U.S. at 217. The Court explained, "The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.* at 216.

Similarly, there is no reason to exempt Phoenix Bond from normally applicable proximate cause requirements simply because, if its allegations turn out to be credible, it may have an easier time establishing but-for causation than would normally be the case in suits of this type.<sup>4</sup> As *Utilicorp United* cogently

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<sup>4</sup> The unique bidding system allegedly employed by the Treasurer's Office means that one can accurately predict how tax liens will be allocated among bidders based on an examination of

explains, any effort to exempt Phoenix Bond from normally applicable proximate cause requirements (including a requirement that RICO plaintiffs demonstrate that they relied to their detriment on the defendants' misrepresentations) would merely prompt more exemption requests and could ultimately undermine the rule itself.

## **II. A RELIANCE REQUIREMENT HELPS ENSURE THAT RICO IS NOT USED TO DISCOURAGE COMPETITION**

Civil RICO claims are subject to the same types of abuses that have beguiled civil antitrust claims. Both RICO and the antitrust laws were adopted in order to ensure fair business practices and thereby promote the healthy competition that is good for consumers. Thus, it is axiomatic that the laws are intended to protect competition, not competitors. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). Yet experience has shown that businesses have a strong tendency to use both laws to protect themselves from competition, thereby subverting congressional purpose. *See, e.g., William J. Baumol and Janusz Ordover, Use of Antitrust to Subvert Competition*, 28 J.L. ECON. 248, 252 (1985).

Accordingly, the Court should be wary of any proposed proximate cause rule that encourage businesses to file RICO suits against their competitors in order to stifle competition. WLF is not familiar with

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all bids, with allocation allegedly based on the number of bidders submitting identical bids rather than on any subjective evaluation of bids.

the day-to-day workings of the Cook County Treasurer's Office and thus has no independent basis for evaluating whether Petitioners have employed a bidding system that is inconsistent with the best interests of the county's taxpayers. Nonetheless, it is worth pausing to ponder two salient facts: (1) the parties to this action are long-time competitors; and (2) while it may be true that Bridge's bidding system injured Phoenix Bond, the activities of which Bridge stands accused – submitting as many bids as possible (too many, by Phoenix Bond's calculations) – would be viewed by most neutral observers as a pro-competitive activity. That is so because, in general, the more bids Cook County receives, the more likely it is to maximize revenues from tax lien sales.

Justice Breyer has warned against allowing civil RICO suits to stifle competition. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, \_\_\_, 126 S. Ct. 1991, 2008-2013 (2006) (Breyer, J., concurring in part and dissenting in part). He asserts that RICO “does not cover claims of injury by one competitor where the legitimate pro-competitive activity of another competitor immediately causes that injury.” *Id.* at 2008-09. It remains to be seen whether Bridge's bidding system can properly be characterized as pro-competitive. But given at least a possibility that suits of this sort tend to stifle pro-competitive activity, at the very least the Court should insist that suits of this sort not proceed past the pleadings stage unless the plaintiff can establish proximate cause.

Dismissing Phoenix Bond's RICO claims will not create a gap in the law, nor will it leave Phoenix Bond without remedies. It is free if it so chooses to file suit in

state court, claiming interference with prospective economic advantage, a cause of action recognized in Illinois. *See, e.g., Voyles v. Sandia Mortgage Group*, 196 Ill.2d 288, 300 (2001). All that would be lost to Phoenix Bond in such a suit would be the opportunity to brand one's competitor as a "racketeer" and to seek treble damages and fees.

Moreover, dismissing the RICO claims will allow Cook County to play a larger role in overseeing its tax lien auction proceedings. Because the bidding rules at issue were promulgated by the Treasurer's Office, it is most appropriate that that office – not the federal courts – take the lead role in interpreting those rules. Bidders found to have violated the rules can be subjected to sanctions of Cook County's devising, including exclusion from future auctions. Alternatively, even if Cook County determines that Bridge violated its bidding rules, it should be free to decide that those violations did not harm the county and imposition of a sanction would be inappropriate.

Phoenix Bond argues that the Treasurer's Office cannot suffer any injury as a result of Bridge's alleged misconduct and thus lacks any incentive to police the bidding system. WLF is highly skeptical on both points. Cook County will be injured if it develops a reputation for conducting biased tax lien auctions; such a reputation could well lead to a reduction in the number of bidders and possible reduction in revenues generated at auctions. Thus, Cook County has a strong incentive to ensure that all bidders are treated fairly.

In sum, dismissing Phoenix Bond's RICO complaint based on failure to allege reliance/proximate

cause will not prevent Appellees and Cook County from pursuing appropriate remedies, and it might well prevent competitors from using the courts to stifle competition.

### **III. A RELIANCE REQUIREMENT WILL HELP ENSURE THAT RICO DOES NOT SWALLOW UP STATE TORT LAW**

Although RICO was adopted for the purpose of providing new tools with which to fight organized crime, all agree that the civil RICO provision, 18 U.S.C. § 1964(c), has never been used for that purpose. Instead, the ever-increasing number of civil RICO suits filed each year for the most part target large, on-going concerns that would not fit most people's definition of racketeers.

The attractiveness of RICO as a vehicle for plaintiffs and the plaintiffs' bar is easy to discern. It promises recovery of costs, including attorney fees, to prevailing plaintiffs. Prevailing plaintiffs are also entitled to treble damages. They can threaten to use the provocative portion of RICO's title (racketeering) to coerce settlements from companies who may fear the loss of goodwill that may accompany a public disclosure that the company has been accused of "racketeering activity." Because RICO is drafted broadly, plaintiffs' attorneys can now file as RICO claims in federal court a large percentage of the commercial disputes that formerly were filed in state courts. *See, e.g.,* Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 626 (1990) ("Taking section 1961's definitions and reading them back into § 1962's substantive

prohibitions, it becomes readily apparent that RICO is indeed a statute that covers an immense range of activity. Once a clever lawyer can characterize an opponent's actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those actions RICO violations.”).

WLF does not mean to suggest that the Court ought to read RICO in a crabbed manner for the purpose of restricting the range of its coverage. To the contrary, WLF recognizes that it is not the role of the Court to re-write RICO, that any deficiencies in the statute should be corrected by Congress instead of the courts. As the Court held in *Sedima*:

It is true that private civil actions under [RICO] are being brought almost exclusively against [respected and legitimate enterprises], rather than against the archetypical, intimidating mobster. Yet this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.

*Sedima*, 473 U.S. at 499-500 (footnote omitted).

Nonetheless, the elimination of a reliance requirement would be such a dramatic expansion of mail and wire fraud actions under RICO that the Court

should carefully consider whether Congress could really have intended that result.

*Summit Properties Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), is a good example of the RICO-ized product liability suit one can expect to migrate from state to federal court if reliance requirements are eliminated in fraud suits. In *Summit*, the Fifth Circuit dismissed for lack of reliance a RICO suit filed against manufacturers of polybutylene plumbing and components. The plaintiffs alleged that the product was defective and damaged real estate in which it was installed, but they had never had any dealings with the manufacturers and thus never had occasion to hear, let alone rely on, any misrepresentations the defendants may have uttered. Judge Higginbotham began his opinion for the appeals court as follows:

Today we are invited to read RICO as establishing a federal products liability scheme complete with treble damages and attorney fees for the benefit of end-users of defective products who never relied on manufacturers' alleged misrepresentations of product quality. We are unpersuaded that RICO can be extended so far by such a marriage of distinct duties and liability regimes.

*Summit*, 214 F.3d at 557. But if the Court affirms the Seventh Circuit, the federal courts will need to prepare for such a marriage. If the reliance requirement for plaintiffs is eliminated in mail and wire fraud cases, nationwide RICO class actions will abound (reliance

requirements are often the principal impediment to certification because they generally preclude a Rule 23(b)(3) finding that common issues of fact and law predominate) and businesses will be accused of defrauding millions of consumers whom they never have met or even contacted.

### CONCLUSION

*Amicus curiae* Washington Legal Foundation respectfully requests that the Court reverse the judgment of the court of appeals.

Respectfully submitted,

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