

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN BRIDGE, ET AL., :

4 Petitioners :

5 v. : No. 07-210

6 PHOENIX BOND & INDEMNITY :

7 CO., ET AL. :

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9 Washington, D.C.

10 Monday, April 14, 2008

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12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 11:10 a.m.

15 APPEARANCES:

16 THEODORE M. BECKER, ESQ., Chicago, Ill.; on behalf  
17 of the Petitioners.

18 DAVID W. DeBRUIN, ESQ., Washington, D.C.; on behalf  
19 of the Respondents.

20 ERIC D. MILLER, ESQ., Assistant to the Solicitor  
21 General, Department of Justice, Washington, D.C.;  
22 on behalf of the United States, as amicus curiae,  
23 supporting the Respondents.

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-210, Bridge versus Phoenix Bond & Indemnity.

Mr. Becker.

ORAL ARGUMENT OF THEODORE M. BECKER

ON BEHALF OF THE PETITIONERS

MR. BECKER: Thank you, Mr. Chief Justice, and may it please the Court:

Both parts of the question presented in this case should be answered "yes." For a treble damage civil RICO claim based on fraud, someone must rely on the alleged misrepresentation, and that someone must be the plaintiff. But that's the very nature of a fraud claim. Plaintiffs here claim that they were injured by reason of a RICO violation, the predicate acts of which involved a scheme or artifice to defraud.

But no one in this case is arguing that a civil RICO claim based on fraud can proceed without someone relying. So some reliance is required; the only question is who must rely? And we submit that the natural answer is the plaintiff.

A plaintiff who hasn't relied to his detriment on an alleged misrepresentation hasn't been

1 defrauded; he hasn't been injured by reason of a scheme  
2 to defraud. Plaintiffs here haven't alleged that they  
3 relied on any misrepresentation; they haven't even  
4 alleged that they received a misrepresentation.

5 JUSTICE GINSBURG: So what about a case,  
6 say, you've got organized crime wants to get rid of --  
7 an organized crime enterprise wants to get rid of  
8 rivals, so it makes misrepresentations about those  
9 rivals to customers and suppliers, not to the -- to the  
10 rival. So there was no -- there is no misrepresentation  
11 made to the plaintiff but to the plaintiff's customers  
12 and suppliers.

13 So on your theory, is there no RICO claim  
14 because the misrepresentation was made to someone other  
15 than the plaintiff?

16 MR. BECKER: Yes, that's correct, Justice  
17 Ginsburg. There would be a criminal RICO prosecution  
18 because, under the Neder case, we know that reliance,  
19 justifiable reliance, and injury is not required.

20 JUSTICE GINSBURG: But no civil case in  
21 that -- in that situation?

22 MR. BECKER: That's correct, Justice  
23 Ginsburg.

24 JUSTICE SCALIA: But that doesn't even  
25 comport with common-law civil cases. I mean, for a long

1 time courts have allowed someone who's been euchred by a  
2 competitor's misrepresentations to his customers. An  
3 old New York case that was discussed in the briefs that  
4 I used to teach in contracts class, where he told  
5 somebody that the horse was no longer for sale and it  
6 was still for sale, and the person who wanted to sell  
7 the horse at the higher price should have -- to buy the  
8 horse should have had a cause of action, even though the  
9 representation was not made to him.

10 MR. BECKER: Justice Scalia, those cases as  
11 well as the Rice versus Manley New York case, the cheese  
12 buyer's case, similar situation, do exist, but they are  
13 really tortious interference with business expectancy  
14 cases. And we believe that the law makes that clear.

15 When RICO was enacted in 1970, the law even  
16 in New York, as we point out in our reply brief, had  
17 evolved to the extent where -- where there were some  
18 references to fraud in those early cases in the 19th  
19 century.

20 JUSTICE KENNEDY: Suppose in a tortious  
21 interference case, the two tort -- there are two tort  
22 feasons, and they communicate with each other by mail.  
23 Is that a violation of the mail fraud statute?

24 MR. BECKER: It would be a violation of the  
25 mail fraud statutes. But I will say, Justice Kennedy,

1 that the government's position here seeks to extend the  
2 mail fraud statute far beyond what this Court did in  
3 Neder. As a matter of fact, the government made the  
4 exact same argument in Neder as it did to this Court,  
5 and the Court --

6 JUSTICE KENNEDY: In my -- in my  
7 hypothetical, there was no -- there was no reliance on  
8 anything said. It was just used to facilitate the  
9 scheme. And I assume the plaintiff could recover.

10 MR. BECKER: I think that in criminal mail  
11 fraud, reliance is not required, Justice Kennedy. And  
12 that's what the Neder Court held. But in doing so, it  
13 looked to the common law and imposed a materiality  
14 requirement. And the only reason that the Neder case  
15 ruled that it's not required in criminal mail fraud is  
16 because no one has to be injured; there does not have to  
17 be a completed scheme.

18 Civil -- there is, of course, no private  
19 right of action in mail fraud. And when we look to  
20 whether or not someone has a civil claim under RICO  
21 through the predicate act of mail fraud, we have to go  
22 through 1964(c), the "injured by reason of" requirement.  
23 As this Court found in Holmes, the common-law  
24 requirement of proximate cause applies, we submit so  
25 does the common-law element of reliance, justifiable

1 reliance, apply in a civil RICO case predicated on mail  
2 fraud.

3 JUSTICE SOUTER: Well, isn't -- isn't the  
4 difference that, in Holmes, it was the textual basis "by  
5 reason of" through which the -- as we read it -- the  
6 proximate cause standard was -- was brought into the  
7 statute. Here, in fact, there -- there isn't any text,  
8 it seems to me, that you can -- can rely on.

9 The fact of fraud itself doesn't do it  
10 because the statute speaks in terms of an offense for  
11 which an individual should be prosecuted. So it's  
12 looking to the criminal rather than the civil model.  
13 And isn't that the distinction, in effect, a textual  
14 distinction, between Holmes as a means for importing  
15 proximate cause and the statute in this case as a means  
16 for importing first-party reliance?

17 MR. BECKER: Well, Justice Souter, of  
18 course, in Holmes the Court was looking at the "injured  
19 by reason of" language and looked to the Clayton Act and  
20 looked to the Sherman Act before it, where Congress used  
21 precisely the same language. Certainly RICO doesn't  
22 have proximate cause in its text at all.

23 The reason -- the very reason that the  
24 common law does apply when you are construing a mail  
25 fraud predicate act through a civil RICO claim is

1 because Congress has not told us what "defraud" means.  
2 It has not defined "scheme to defraud," and of course  
3 that's --

4 JUSTICE SOUTER: Why hasn't it done so  
5 simply or sufficiently done so by referring to the -- in  
6 effect -- the criminal mail fraud violation?

7 MR. BECKER: Because in other cases where  
8 this Court has looked at the same type of situation, the  
9 Neder case, Field versus Mans, for example, where there  
10 is not a definition of a term such as fraud, the Court  
11 has looked to the common law to define that term.

12 JUSTICE SOUTER: Yes, but we didn't have --  
13 I don't think we had in those cases the phrase that  
14 occurs here. I think the phrase here is "could be  
15 prosecuted or indicted" for something -- I think it was  
16 prosecution -- which tends to narrow it down to the  
17 criminal model, rather than allowing us to roam into the  
18 civil field.

19 MR. BECKER: Except, Justice Souter, that  
20 the -- the requirement that there need to be an  
21 indictable offense is not enough to make out a civil  
22 fraud because criminal law recognizes a -- an  
23 uncompleted fraud, simply a scheme, where here, if  
24 you're talking about a completed fraud, for someone to  
25 be injured by reason of a fraud, it has to be completed



1 and someone has had to rely on it.

2 JUSTICE SOUTER: Okay. Well, that means  
3 that to that extent the criminal -- in effect -- the  
4 criminal cause of action is narrowed down. It doesn't  
5 follow from that that the statute contemplated adopting  
6 a civil model regardless.

7 MR. BECKER: I -- we -- we believe it does.  
8 If Your Honor will contrast the Salinas case with the  
9 Beck versus Prupis case, we believe it's the similar --

10 JUSTICE SOUTER: You're going to have to  
11 help me do that.

12 MR. BECKER: All right. I will. In the  
13 Salinas case, which was a criminal RICO case, the Court  
14 ruled that it was not necessary to have a wrongful overt  
15 act in order to make out a criminal cause of action for  
16 conspiracy under the RICO statute. And the reason was  
17 because all you need is the agreement and any acts.

18 This was a situation where a sheriff  
19 actually was the wrongdoer, but the deputy sheriff took  
20 some innocent acts that were in furtherance of  
21 conspiracy. The Court said that's conspiracy.

22 However, in the Beck versus Prupis case, the  
23 Court said that for civil RICO cause of action based on  
24 conspiracy, you need to look at the combination between  
25 1964(c), the "injured by reason of" language, and the

1 actual statutory language. And since conspiracy is not  
2 defined in the RICO statute, the Court looked to the  
3 common law, and the common law requires that there needs  
4 to be an unlawful overt act or tortious act in order to  
5 make out a common-law cause of action for conspiracy.  
6 And the Court ruled that that was necessary.

7 We think it's the exact same relationship  
8 Salinas is to Beck as Neder is to this case.

9 JUSTICE GINSBURG: Well, why --

10 JUSTICE SOUTER: No, but --

11 JUSTICE GINSBURG: Why isn't it -- there is  
12 reliance on their allegations by the county. The county  
13 thinks that each bidder is putting in only one bid. So  
14 the county has been deceived, and the plaintiff suffers  
15 the effect of that deception. Why doesn't that qualify?

16 MR. BECKER: Because no representation has  
17 been made to the plaintiff, and the plaintiff hasn't  
18 relied on the misrepresentation that was made to the  
19 county.

20 JUSTICE KENNEDY: But without the mail fraud  
21 violation -- let's assume -- the tort would have been  
22 unsuccessful. It would not have been complete.

23 MR. BECKER: Without the misrepresentation  
24 to the county, Justice Kennedy?

25 JUSTICE KENNEDY: Yes. Yes. Let's assume

1 that. And it was directed at this class of persons and  
2 it was relied upon by the county. It seems to me that  
3 that's certainly sufficient under the -- it's a mail  
4 fraud violation.

5 MR. BECKER: Well, I think this --

6 JUSTICE KENNEDY: I mean, refer to the mail  
7 -- the civil RICO refers to whether it's a mail fraud  
8 violation. You want to assume this additional reliance  
9 requirement.

10 MR. BECKER: We think it's necessary, Your  
11 Honor. The other aspect, of course, in the hypothetical  
12 is that there needs to be some direct injury, and we  
13 don't believe that a direct injury is presented here.

14 In order to -- in Anza and, of course,  
15 before in Holmes, the Court set forth three basic  
16 guidelines in order to determine whether there was  
17 sufficient proximate cause to bring a cause of action  
18 under civil RICO, and in Anza under mail fraud. We  
19 don't think those three are enough in this kind of a  
20 situation.

21 JUSTICE SOUTER: But isn't the problem with  
22 your argument that if this isn't direct enough, there is  
23 no injury at all? The county isn't hurt by this. The  
24 county has got its rotational scheme basically to avoid  
25 favoring particular bidders who appear in multiple

1    guises, but the county isn't getting hurt.  So that if  
2    it's not direct enough for -- for the Plaintiffs in this  
3    case to sue, then nobody has a direct enough interest or  
4    can show direct enough causation for RICO.

5                   MR. BECKER:  Well, Justice Souter, first, we  
6    disagree that the rotational allocation is well pled  
7    fact.  As we pointed out in our reply brief toward the  
8    last several pages and in footnote 7, the actual sale  
9    and the bidding is nothing like the concept of  
10   rotational allocations.

11                   But putting that aside for a moment, the  
12   county certainly could be a victim.  First of all, the  
13   county -- this is a violation of an administrative rule.  
14   That's what is at the heart of this case, an alleged  
15   violation.  The county has made the rule possibly for  
16   the purpose that Your Honor just articulated, although  
17   there is nothing in the record to let us know that.

18                   But what we do know is that these types of  
19   rules exist for the benefit of the property owners, and  
20   that's because the Illinois Supreme Court in -- the same  
21   plaintiff brought a case challenging a very, very  
22   similar rule.

23                   JUSTICE SOUTER:  But how could the property  
24   owner be hurt if there is -- if we are dealing in a  
25   situation here in -- in which the penalty is zero

1 percent, and everybody is bidding zero percent, then  
2 this is a situation in which the property owner isn't  
3 going to get hurt no matter who ends up with it.

4 MR. BECKER: Justice Souter, zero percent is  
5 by no means guaranteed. That's only been the last three  
6 years. In fact, in the 2000 case before the Illinois  
7 Supreme Court --

8 JUSTICE SOUTER: Yes, but that's the --  
9 that's the case here. So if your direct-injury  
10 requirement, as you construe it, applies here, I think  
11 we are still left with a situation in which on these  
12 facts, nobody would be injured, because nobody -- or  
13 nobody would be -- be able to prove injury by a  
14 sufficient direct route to establish causation.

15 MR. BECKER: Including the bidders and the  
16 Plaintiffs, Your Honor.

17 JUSTICE SOUTER: Yeah. Right.

18 MR. BECKER: Well, I think that they  
19 certainly could not prove injury as a matter of proof.  
20 The problem with that, of course, is in a RICO case it  
21 takes five years to get there. And someone can artfully  
22 plead -- use two words with no elaboration at all,  
23 "rotational allocation."

24 JUSTICE GINSBURG: Yes, but that's a  
25 different point, the point that you made in your reply

1 brief, that maybe there isn't this rotational system,  
2 and maybe they can't prove that they were -- that they  
3 were injured; that they would have gotten a greater  
4 share. But your case is about -- it doesn't matter even  
5 if you -- you have to accept the allegations of their  
6 complaint as true, even if everything they say in the  
7 complaint is true, they have no claim. They have no  
8 RICO claim.

9 MR. BECKER: That's correct, Justice  
10 Ginsburg.

11 JUSTICE GINSBURG: So we have to assume what  
12 they say about the rotational system is right and -- but  
13 -- but you are hanging your hat on no misrepresentation  
14 was made to them.

15 MR. BECKER: That's correct, Justice. We --  
16 we are -- we have raised below, but not in this Court,  
17 that there was not sufficient injury, directness of  
18 injury; and it can't be proved in this Court. I think  
19 it comes into play in the reliance concept under  
20 proximate causation.

21 And what we are asking the Court to do is to  
22 recognize that, in the context of a civil RICO claim  
23 based on fraud, that there is -- there is nothing that  
24 is -- that is revolutionary about finding that a  
25 reliance requirement should be applied. This case, as

1 the Court knows, was originally dismissed by Chief Judge  
2 Holderman on that very basis.

3           If we have -- if we were to accept -- if the  
4 Court were to accept our opponents' position, a  
5 remarkable array of lawsuits could be brought as RICO  
6 actions: Competitor versus competitor for harm that  
7 allegedly is caused by false statements to customers,  
8 suppliers, distributors, marketing agencies, government  
9 entities; consumer or end user versus manufacturer for  
10 harm allegedly resulting from false statements to the  
11 first buyer in a distribution chain.

12           And the circuit court cases in the Fifth --  
13 Fourth and Fifth and Sixth and Eighth and Eleventh  
14 circuits have recognized this, and they require reliance  
15 as a part of proximate causation, and we believe this  
16 Court should do the same.

17           I also wanted to make the point that to  
18 elaborate, in the Neder case, the Government -- and this  
19 is a case where the Government ostensibly argues that it  
20 wants us not to restrict civil RICO claims. But in the  
21 Neder case the Government made the very same argument in  
22 trying to expand mail fraud claims under the criminal  
23 statutes.

24           And I think that's -- that's a sub rosa  
25 issue in this case. The Court nine years ago

1 specifically said in a unanimous opinion, with Chief  
2 Justice Rehnquist writing for the Court, that the Court  
3 disagreed that mail fraud was moored to the common law  
4 of fraud, and it is not unmoored in the Neder case.  
5 They said it was moored, and even in a criminal  
6 prosecution materiality is required. And although  
7 justifiable reliance and injury is not required in a  
8 criminal prosecution, to unmoor the mail fraud statute  
9 in a civil RICO context and to then make the argument  
10 that all sorts of other claims can -- can also be  
11 included such as tortious interference -- because at its  
12 heart this is a tortious interference case. We know  
13 that because the Plaintiffs pled it in their complaint.  
14 That's their pendant State court action. And that's  
15 where this case should be. It should be a tortious  
16 interference case.

17           If they can prove that case and if they have  
18 pled it, then they have a remedy. If they can't, they  
19 don't. But the problem is that to give the civil RICO  
20 tool, to call "racketeers" -- to call your competitor a  
21 "racketeer" and to seek treble damages and attorney's  
22 fees in this kind of such an attenuated situation,  
23 should not be something that the Court condones.

24           And it's different; if you Google my  
25 clients, you'll come up -- they will come up as



1 racketeers now, and -- and that's the problem that we  
2 have. If there were a reliance requirement, you could  
3 immediately tell if this was a situation where the  
4 common law --

5 JUSTICE GINSBURG: May I just go back to a  
6 statement you made? I thought you -- you conceded that  
7 on their allegations your client would be indictable for  
8 mail fraud?

9 MR. BECKER: Well, I didn't concede that my  
10 client would be indictable for mail fraud. I think that  
11 there would have to be -- we'd have to take a careful  
12 look at the indictment, certainly. But I will say that  
13 -- that I do -- I do say that the mail fraud statute  
14 does not require justifiable reliance or injury.

15 I think the problem is when you ask the  
16 direct -- my client hasn't been indicted for mail fraud,  
17 and I don't think it's any -- it's any oversight because  
18 this has been a very well known case in Cook County. I  
19 think the reason, if one were to ask me why my client  
20 hasn't been indicted for mail fraud, is because they  
21 didn't commit it, because the county in its own rule --  
22 the treasurer wrote the rule and expressly says in the  
23 rule that she has the exclusive discretion to determine  
24 whether or not there has been a violation of the rule.  
25 She has not so determined. And this case has been

1 pending now for close to over three years. The  
2 treasurer is aware of it, and we know that, and she  
3 still has not determined that there has been a  
4 violation. So if there hasn't been a violation of the  
5 rule, there is no criminal mail fraud violation either.

6 JUSTICE SOUTER: Is your client still  
7 bidding on -- on these --

8 MR. BECKER: Yes, Justice Souter, and also  
9 all of the -- all of the plaintiffs -- the Respondents  
10 are still bidding, which I think is an interesting fact.  
11 And it's not -- it's in the record because they have an  
12 amended complaint where they have pled subsequent sales.  
13 That's how far afield from the law of fraud this is  
14 going.

15 CHIEF JUSTICE ROBERTS: Are all the shell  
16 corporations still bidding?

17 MR. BECKER: Mr. Justice -- Mr. Chief  
18 Justice, if all of them aren't, it's simply because  
19 there may be new corporations that are, and they are  
20 formed not for the purpose of defrauding anybody, but  
21 for tax purposes.

22 If there are no further questions, I'd --  
23 I'd like to reserve the rest of my time for rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 Mr. Becker.

1 MR. BECKER: Thank you, Mr. Chief Justice.

2 CHIEF JUSTICE ROBERTS: Mr. DeBruin.

3 ORAL ARGUMENT OF DAVID W. DeBRUIN

4 ON BEHALF OF THE RESPONDENTS

5 MR. DeBRUIN: Mr. Chief Justice, and may it  
6 please the Court:

7 It is presumed true in this case that  
8 Petitioners submitted false affidavits, filled the  
9 auction room with related entities, and obtained  
10 thousands of liens that would have been awarded to  
11 Respondents and other bidders, causing them injury in  
12 fact. I submit the central issue in this case is  
13 whether on those facts Respondents can establish  
14 proximate cause, and specifically whether in order to do  
15 so they must establish that they personally received and  
16 relied upon the false statements at issue.

17 I submit that this Court already has  
18 established in its decisions in Holmes and in Anza the  
19 proper test for proximate cause. And no claim has been  
20 made in this case, at least not until perhaps briefly  
21 this morning, that the Respondents cannot establish  
22 proximate cause under the standards set forth in those  
23 cases. Moreover, no argument is made that the standards  
24 articulated in Holmes and in Anza are insufficient to  
25 ferret out the appropriate cases that can go forward;

1 that those cases produce anomalous results either here  
2 or in any other case that has been decided.

3 JUSTICE KENNEDY: Is -- is it your view that  
4 assume -- assuming there is a State law cause of action  
5 for tortious interference, that if that tortious  
6 interference was effected through the use of the mails  
7 by the co-tort features, that that automatically invokes  
8 the RICO statute?

9 MR. DeBRUIN: Your Honor, all of the  
10 elements of RICO would have to be established. There  
11 would have to be predicate acts of mail fraud.

12 JUSTICE KENNEDY: That -- that there are  
13 predicate acts, yes.

14 MR. DeBRUIN: And they would have to form a  
15 pattern and all the other requirements that were  
16 significant would have to be met, but yes.

17 And I submit in this case there is no  
18 serious dispute but that the allegations over the course  
19 of many years of the complaint established indictable  
20 mail fraud. The issue is not whether the fact pattern  
21 is under the common law tortious interference or some  
22 other common-law tort.

23 The question is: Do the facts as alleged  
24 make out indictable mail fraud? There is no question  
25 but the mail fraud statute is broad. It prohibits any

1 scheme or artifice to defraud; and I believe that if the  
2 facts here were proved, the submission of false  
3 affidavits to the county on a regular basis, there is no  
4 need under mail fraud to prove reliance.

5 JUSTICE GINSBURG: But those -- those  
6 weren't mailed, or at least that's not what you're  
7 relying on. You're not relying on the affidavits that  
8 make the misrepresentation using the mails. I thought  
9 your reliance on the mails is only the tail end of this  
10 transaction, the notices that get sent to the property  
11 owners.

12 MR. DeBRUIN: That's correct, Justice  
13 Ginsburg. The mails here are an essential component to  
14 allow this fraud to have any effect. If it weren't for  
15 the use of the mail, the Petitioners could never realize  
16 the economic value of the liens that they obtained  
17 through the fraud. And in that sense the use of the  
18 mails are essential to the scheme. And that's what this  
19 Court held in the Schmuck decision: That the mails,  
20 themselves, don't have to be false so long as the use of  
21 the mails is essential to the scheme.

22 Here it clearly is. Absent the notices  
23 given to property owners, there would be no way for the  
24 Petitioners to realize the value of the liens and obtain  
25 the benefit of the fraud by -- by making the false

1 statements to the county and literally obtaining  
2 thousands of additional liens that otherwise would have  
3 gone to other entities.

4 CHIEF JUSTICE ROBERTS: Counsel, what --  
5 would your position be different if the county were, in  
6 fact, injured; we didn't have the zero-percent situation  
7 but different percentages? Your client would not be  
8 able to sue them, right?

9 MR. DeBRUIN: Mr. Chief Justice, I believe  
10 the Court has already addressed that in Anza and has  
11 made clear that if in an appropriate case the government  
12 had been harmed and was in fact -- could be expected to  
13 sue, as it was in Anza -- in that case the claim was  
14 that the defendant had not paid its taxes to the State  
15 of New York. And the Court found that New York was the  
16 directly injured party, could be expected to sue, and  
17 under Anza there was no proximate cause. We accept that  
18 test.

19 CHIEF JUSTICE ROBERTS: Well, what does that  
20 do to your statutory argument? In other words under  
21 your statutory argument, you still could sue; but  
22 because of other considerations you can't?

23 MR. DeBRUIN: Well, we have to establish  
24 predicate acts of mail fraud, but we also have to  
25 establish proximate cause. And under Anza the failure

1 was an inability to prove proximate cause. In this case  
2 it has not been seriously disputed that we satisfy the  
3 factors set forth in Anza. The county was not harmed.

4 CHIEF JUSTICE ROBERTS: Well, what happens  
5 -- what happens if some of the bids were more than zero,  
6 and some weren't? You get to sue for part of the  
7 damages, and the county gets to sue for the rest? Or  
8 how do you divvy that up?

9 MR. DeBRUIN: Well, the only time that the  
10 affidavits and the representations in this case have  
11 effect is if all the bids are zero. The county, in  
12 order to protect itself from property owners, provides  
13 that if there are multiple bids above zero, the county  
14 will not issue the lien. It holds the lien itself.

15 The only time that this rule comes into  
16 effect where there is a rotational award is if the  
17 county is paid its taxes in full, and there are multiple  
18 bidders at zero percent.

19 CHIEF JUSTICE ROBERTS: Well, but I suppose  
20 since we are talking about a rotational rule, you could  
21 have -- what are these, monthly or annually -- one,  
22 possibly, cycle where it's all zero percent, and then  
23 others where it isn't, and then another where it is.  
24 And that would affect the rotation in a way that would  
25 injure your client but would also injure the county.

1 MR. DeBRUIN: Not the way the county  
2 administers these auctions. If that happened -- and it  
3 certainly could happen -- that the bidding process that  
4 takes the penalty down stopped at five percent or two  
5 percent, the county rules under the program at issue  
6 provide the county will not apply the rotational system.  
7 It won't award the lien at all.

8 The rotational rule only applies when there  
9 are multiple, zero-percent bids. And Respondents will  
10 show, as this case goes forward, that they can identify  
11 the specific properties on which there were multiple  
12 bids; that the Petitioners and the related entities,  
13 which they will prove are related, received liens and  
14 thereby increased to the thousands the number of  
15 valuable liens that the Petitioners got, leaving the  
16 Respondents essentially with hundreds of liens.

17 The key is, the central question is, whether  
18 Petitioners can show proximate cause under the standards  
19 in Holmes and Anza. And under Anza what this Court held  
20 is the central question for proximate cause is the  
21 directness between the violation alleged and the injury.  
22 And in this case there is a direct relation between the  
23 violation of mail fraud alleged, the predicate acts, and  
24 the injury that Respondents have incurred.

25 JUSTICE ALITO: Would you explain why your



1 argument is consistent with Beck versus Prupis? In that  
2 case, couldn't the plaintiff show that it was injured by  
3 reason of the criminal violation that was alleged, the  
4 RICO conspiracy; and, yet, the Court said something more  
5 was required, taking an additional requirement from the  
6 law of civil conspiracy? How is your argument here  
7 consistent with that?

8 MR. DeBRUIN: Justice Alito, Beck was a  
9 completely different case. The issue in Beck was --  
10 section 1964(c) says that the plaintiff must prove  
11 injury by reason of a violation of the act. And the  
12 violation of the act at issue in Beck was 1962(d), which  
13 is a conspiracy to violate the other provisions. And so  
14 what the Court was looking at was the word "conspiracy,"  
15 which was not defined in the statute. And the Court  
16 applied the accepted rule that where a word is not  
17 defined, the Court can assume that Congress intended its  
18 ordinary meaning.

19 JUSTICE ALITO: But -- well, the meaning of  
20 a RICO conspiracy in the criminal context is very well  
21 known. I don't know why it matters whether it is  
22 defined in the statute or not; and there is no  
23 requirement in that that anybody be injured by virtue of  
24 an unlawful, overt act.

25 MR. DeBRUIN: But the Court looked to --

1 JUSTICE ALITO: Why is it appropriate there  
2 to look to the law of civil conspiracy and yet  
3 inappropriate here to look to the law of civil fraud?

4 MR. DeBRUIN: Well, it looked to conspiracy  
5 to make up the elements of the civil cause of action  
6 there. But here the relevant provision that is relied  
7 upon is 1962(c), which is a violation of RICO. And we  
8 also alleged 16, 1962(c). But in (c) the violation of  
9 RICO is to conduct the affairs of an enterprise through  
10 a pattern of racketeering activity.

11 None of those words, "conducting the affairs  
12 of an enterprise", are words that Petitioners contend  
13 you look to the common law to define. There could be a  
14 pattern of racketeering activity that would consist of  
15 fraud, of violence, of bribery all together.

16 JUSTICE SCALIA: Am I -- am I reading these  
17 provisions wrong? I thought you were proceeding in a  
18 1961, and that the conspiracy -- the conspiracy  
19 provision is 1962(c).

20 MR. DeBRUIN: 1961 is the definitions. We  
21 allege a violation of both 1962(c) and 1962(d).

22 JUSTICE SCALIA: That's the conspiracy  
23 provision.

24 MR. DeBRUIN: 1962(d) is the conspiracy. We  
25 allege a violation of that. We also allege a violation

1 of 1962(c).

2 JUSTICE SCALIA: I'm looking on page 2 of  
3 the Petitioner's brief. Have I -- have I been  
4 misinformed?

5 The blue brief, page 2, maybe that's wrong,  
6 but that's what it says. It says 1962(c), it shall be  
7 unlawful for any person to conspire to violate any of  
8 the provisions of subsections (a), (b) or (c).

9 MR. DeBRUIN: Your Honor, the citation  
10 appears at the bottom of the quote, the way it's set  
11 forth on page 2.

12 JUSTICE SCALIA: All right. I understand.

13 MR. DeBRUIN: So if you look at the very  
14 first quotation, you'll see where it follows.

15 JUSTICE SCALIA: Oh, I see, I see, I see.  
16 Okay.

17 MR. DeBRUIN: So in this case, we allege  
18 both a violation of 1962(c) and (d). 1962(c) prohibits  
19 conducting the affairs of an enterprise through a  
20 pattern of racketeering activity. That pattern may  
21 consist of fraud, violence, bribery --

22 JUSTICE ALITO: No, I understand that, but  
23 when the pattern of racketeering activity consists of  
24 predicate acts of mail fraud, why isn't -- why does not  
25 Beck point you to the word "fraud," which like

1 "conspiracy," I don't believe is defined in the RICO  
2 statute? So why if you look to civil conspiracy to  
3 understand what "conspiracy" means in the RICO statute,  
4 why do you not look to "civil fraud" to find out what  
5 the word "fraud" means in the RICO statute?

6 MR. DeBRUIN: I would say two things:  
7 First, what that argument would do would make  
8 essentially common-law fraud the predicate act under  
9 RICO, when instead it is indictable mail fraud, not  
10 common-law fraud. And --

11 JUSTICE ALITO: But you can say the same in  
12 Beck. It would make civil conspiracy the predicate act  
13 in RICO, rather than -- the RICO violation, rather than  
14 criminal conspiracy.

15 MR. DeBRUIN: Well, the Court, again, in  
16 Beck, was looking to the common-law word "conspiracy" to  
17 apply it in different contexts. There is not a  
18 common-law fraud that is actionable under RICO.

19 But secondly, even if you accept that test,  
20 Justice Alito, under the common law of fraud, there is  
21 no doubt that claims like ours were actionable and were  
22 actionable as fraud. The case that Justice Scalia  
23 referenced to, the common-law cases involving the buyer  
24 of cheese and other facts, those were actionable as  
25 fraud where --

1 JUSTICE GINSBURG: Mr. Becker says they were  
2 interference with a business relationship, not fraud.

3 MR. DeBRUIN: Well, under the law of torts  
4 as it has evolved, there are different labels that are  
5 applied. But what was critical is that that conduct,  
6 the interference through fraud with a contract of  
7 another, was actionable at the common law. The  
8 plaintiff could make out a claim and recover damages,  
9 even though the plaintiff had not received the statement  
10 at issue and had not relied on the statement at issue.  
11 So that even if, under RICO, you were to look for civil  
12 purposes to a common-law analogue, the common law made  
13 clear that these kinds of claims were actionable,  
14 whatever label might be applied to them today in terms  
15 of the nature of the -- of the tort.

16 JUSTICE GINSBURG: One concern, because RICO  
17 can be a very broad statute, is that if you are right,  
18 then any unsuccessful bidder could look through a  
19 rival's submission, find a false statement, and sue  
20 under RICO.

21 MR. DeBRUIN: Your Honor, I believe that is  
22 not true for the reasons this Court set forth in Anza.  
23 The standards set forth in Holmes and in Anza are very  
24 rigorous tests to establish proximate cause. So the  
25 merely assertion of falsity by a competitor -- I mean,

1 Anza involved a competitor situation. There the claim  
2 was that had been mail fraud that caused the competitor  
3 harm.

4 The Court recognized in Anza that that case  
5 was different than Holmes. There was an allegation of a  
6 direct injury in Anza, but nevertheless the relation  
7 between the violation and the harm was far less direct  
8 than it is in this case, as Judge Easterbrook, Chief  
9 Judge Easterbrook explained.

10 JUSTICE SCALIA: Why -- why is it -- I  
11 really worry about adopting a rule which would produce  
12 the result that whenever anyone makes a false statement  
13 in an official form, someone who is deprived of a  
14 business opportunity, or at least can say so, can bring  
15 a RICO action.

16 MR. DeBRUIN: Justice Scalia, I would say  
17 two things: First of all, I think it's critical to  
18 realize that Congress enacted RICO to protect  
19 competitors. One of the principal motivations behind  
20 RICO was to protect legitimate businesses that are  
21 injured in their business or property by reason of a  
22 pattern of racketeering activity as defined under the  
23 statute. That's number one.

24 Number two, there are important restrictions  
25 that this Court repeatedly has recognized. It's not

1 enough that there be a single act. There must be  
2 predicate acts that are a pattern of activity.

3 "Pattern" doesn't just mean two. It means a continuing  
4 threat of continuing criminal activity. There must be  
5 proximate cause under Holmes and Anza. All of those  
6 restrictions exist. And only if the plaintiff can  
7 successfully navigate all of those things, proving not  
8 common-law fraud but indictable criminal activity,  
9 proving a pattern of continuing criminal activity,  
10 proving proximate cause, only then can the plaintiff  
11 make out a RICO violation.

12 CHIEF JUSTICE ROBERTS: I suppose that every  
13 other bidder in this situation is a viable plaintiff.

14 MR. DeBRUIN: In this case, we don't submit  
15 that we are the only potential plaintiffs. That there  
16 were other bidders -- the bidders at these auctions fall  
17 into perhaps two different categories. Many bidders --  
18 over 50 percent of all the registered bidders receive  
19 fewer than 10 liens. In other words, they are at the  
20 auction to bid on a specific property or small number of  
21 properties.

22 Then there are other what I would call  
23 professional tax buyers, who basically do research,  
24 identify the most attractive properties, and we will  
25 show, are essentially bidding on the same group of

1 properties. And those are the properties at issue.  
2 Those are the bidders at issue. It is more than just  
3 the Respondents, but it is a relatively small group --

4 CHIEF JUSTICE ROBERTS: Well, I suppose in  
5 other cases where if we adopt the rule you argue for,  
6 that wouldn't be confined at all. For example, in a  
7 situation where a competitor is defrauding a supplier,  
8 every competitor no matter how many there were, could  
9 bring a RICO action.

10 MR. DeBRUIN: Well, I think the Court --  
11 again, if you look to the Anza case, the Court has made  
12 clear that if a RICO defendant takes actions that simply  
13 enhance the defendant's own competitive position, which  
14 was the allegation in Anza, that that may not be enough  
15 to establish proximate cause. But whereas here the  
16 foreseeable and clear effect of defendant's actions is  
17 to work a direct injury on competitors and, in fact, on  
18 no one else, not on the county, not on the property  
19 owners, but only on competitors, that was within the  
20 ambit of what Congress sought to protect in RICO.

21 CHIEF JUSTICE ROBERTS: Regardless of how  
22 many competitors there are?

23 MR. DeBRUIN: Well, yes. As this Court  
24 recognized in Storey Parchment and Hazeltine, in  
25 antitrust cases as well as RICO cases, damage issues



1 have to be worked out. But the fact that there may be  
2 multiple bidders that you may have to award damages to a  
3 group does not defeat the claim. The defendant cannot  
4 come into court and say because damages here have to be  
5 allocated among a larger number of people, you can't  
6 establish a claim.

7 JUSTICE KENNEDY: Is it the law generally in  
8 the States that an unsuccessful bidder can sue the  
9 successful bidder if the successful bidder misstated  
10 qualification?

11 MR. DeBRUIN: Justice Kennedy, the  
12 common-law rule actually was, I believe, in 27 of 40  
13 States -- this unfortunately came up after the  
14 briefing -- that a disappointed bidder could bring an  
15 action at the common law if the allegation was one of  
16 fraud in the procurement. So that the common law did  
17 not provide an absolute bar to claims like this.

18 Now, again, the issue is: Will the claims  
19 satisfy Holmes and Anza? There is no argument here that  
20 that standard, the framework this Court established  
21 first in Holmes and then applied in Anza, that that  
22 framework is inadequate, that it produces an anomalous  
23 result here or will produce an anomalous result in other  
24 cases. It's a very rigorous test.

25 This Court looked at directness; it looked

1 to the suitability of other plaintiffs; it looked to  
2 whether the harm was derivative. That's a  
3 quintessential proximate cause analysis. Proximate  
4 cause is, historically through the common law, a very  
5 fact-based intensive test. But the Court has made clear  
6 that the ability of the RICO plaintiff to overcome that  
7 test, it's a significant showing that must be met.

8 Chief Judge Easterbrook, in this case, went  
9 through the Anza factors very methodically. He showed  
10 that, under each factor, proximate cause clearly can be  
11 met under the common law. The Respondents were directly  
12 injured in a significant and substantial way, and that  
13 is sufficient, I submit, to make out the elements of the  
14 RICO claim, assuming all the other elements are also  
15 met.

16 If there are no further questions, thank  
17 you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 Mr. DeBruin.

20 Mr. Miller?

21 ORAL ARGUMENT OF ERIC D. MILLER

22 ON BEHALF OF THE RESPONDENTS

23 MR. MILLER: Mr. Chief Justice, and may it  
24 please the Court:

25 RICO provides a cause of action to

1 plaintiffs who have suffered injuries by reason of, that  
2 is, proximately caused by, a RICO violation. Now, when  
3 the RICO violation is predicated on an act of mail  
4 fraud, the plaintiff ordinarily will need to show that  
5 somebody relied on the false statements in order to  
6 establish that the fraud was even a "but for" cause of  
7 injury.

8 A plaintiff who can establish that it was  
9 the one who relied on the false statements would be able  
10 to show proximate causation. But that's not the only  
11 way to establish proximate causation, and there is no  
12 basis for this -- for the imposition of a per se rule  
13 requiring that the plaintiff be the one who has relied.  
14 Instead when a defendant creates a scheme to defraud  
15 that induces reliance by one party in order to injure  
16 another party, the injured party should have a cause of  
17 action under --

18 CHIEF JUSTICE ROBERTS: What is the answer  
19 to Justice Kennedy's question with respect to Federal  
20 Government contracts?

21 MR. MILLER: My understanding is that the  
22 case has established that they can. Again, since this  
23 came up after the briefing, one illustrative example is  
24 in the Eighth Circuit, Iconco against Jensen  
25 Construction Company, which is 622 F.2d 1291. In that

1 case, it was a contract that was set aside for small  
2 businesses, and the company got the contract by falsely  
3 claiming to be a small business. And then in a  
4 diversity case applying Iowa law, the Eighth Circuit  
5 held that the disappointed bidder could bring an action  
6 for fraud and unjust enrichment against the successful  
7 bidder. So I think that -- and that's of a piece with  
8 the long common-law tradition, going back to cases like  
9 Rice against Manley, where --

10 CHIEF JUSTICE ROBERTS: But what if there  
11 are 50 disappointed bidders?

12 MR. MILLER: Well, it would be the burden of  
13 the plaintiff to establish that, but for the fraud, it  
14 would have gotten the contract. So in most cases of  
15 contracting, that's going to be very difficult for a  
16 plaintiff to show. This --

17 JUSTICE SCALIA: Wait.

18 MR. MILLER: -- is somewhat usual.

19 JUSTICE SCALIA: Why couldn't you show --  
20 why couldn't -- that's like the situation where a  
21 company runs a -- runs a lottery and in fact  
22 misrepresents what the odds are. And then you mean the  
23 people can't recover because they couldn't show that  
24 they would have won? It seems to me you can calculate  
25 the difference in the odds or something and place some

1 value on that. Is it really painless to say, you know,  
2 I'm running a lottery and your chances of winning are  
3 one in a thousand, and everybody buys a ticket on that  
4 basis, and it turns out that really your chances are one  
5 in a million? Nobody has a cause of action because  
6 nobody can prove he would have won?

7 MR. MILLER: No, the participants in the  
8 lottery in that case would have a cause of action  
9 because they have paid money to the person running the  
10 lottery.

11 JUSTICE SCALIA: That's all they can get?  
12 Just what they paid for the ticket?

13 MR. MILLER: I think -- I think the -- the  
14 common-law measure of damages would be -- would be what  
15 they paid in that situation. But certainly the recovery  
16 for disappointed bidders in cases like this, does have a  
17 long common-law tradition, and with the more modern  
18 elaboration of tort law, as demonstrated by the  
19 secondary statement, it has sometimes been given a  
20 different label, and that is either "injurious  
21 falsehood" or "intentional interference with a  
22 prospective contractual relation," but at its heart, the  
23 action that's at issue here is one that's for fraud.

24 But I would like to say in response to some  
25 of Justice Alito's questions that, with respect to the

1 Beck case and the relevance of it, that ultimately in  
2 our view it doesn't really matter whether the common law  
3 would have allowed recovery in this case, and that's  
4 because, unlike in Beck where the Court had to consider  
5 what is the meaning of -- what does it mean to be  
6 injured by reason of a conspiracy? And the Court  
7 answered that question by looking at the common law of  
8 civil conspiracy. That mode of analysis would be  
9 appropriate here if the relevant predicate under 1961  
10 were fraud or any conduct involving fraud or otherwise  
11 made reference to common-law fraud. But, of course,  
12 1961 does not say that; it says "any act which is  
13 indictable under section 1341," the mail fraud statute.  
14 So under -- given the structure of the statute, the only  
15 inquiry is: Is the injury incurred by reason of an act  
16 which is indictable under 1341?

17 JUSTICE ALITO: But the RICO statute doesn't  
18 say you can recover if you're injured by reason of  
19 conspiracy, without any elaboration. It says "by reason  
20 of a violation of this statute." And therefore you look  
21 to 1962(d), which tells you what the violation is. It's  
22 a RICO -- it's a criminal RICO conspiracy. So I just  
23 don't see how that argument works.

24 MR. MILLER: Well, 1964(c) refers you, as  
25 you noted, to 1962, which simply says "conspiracy." And

1 so the Court in Beck explained that to figure out how  
2 you tell when someone has been injured by civil  
3 conspiracy, there is a body of law, the common law, that  
4 answers that question. There is no corresponding  
5 common-law principle of what it means to be injured by  
6 an act of mail fraud because there is no common law of  
7 mail fraud per se; it's a statutory creation. And so  
8 the relevant inquiry is simply: Did the conduct violate  
9 the mail fraud statute, section 1341? Not was it common  
10 law fraud?

11 JUSTICE BREYER: Well, I don't think it's  
12 because there's no common-law equivalent. I think it's  
13 simply because the word "conspiracy" is a -- the  
14 substantive violation under 19 -- under 1962(c). "It  
15 shall be unlawful for any person to conspire." And we  
16 have to interpret the word "conspire," and we say we  
17 give it its common-law meaning; whereas, for a violation  
18 of the general racketeering statute, there's -- there's  
19 no equivalent reference to a word that we have to give  
20 content to. It just says -- unless it's the word  
21 "indictable."

22 MR. MILLER: No. I think that's right. And  
23 certainly the "by reason of" requirement in 1964, it  
24 does refer to the common-law requirements of proximate  
25 cause. But that -- that language -- "by reason of" --

1 does not contain a reliance requirement because it  
2 applies to any number of predicate acts, all of the  
3 predicate acts under 1961. And in the context of many  
4 of those acts, reliance would be completely  
5 inappropriate. I would also like to point out that I  
6 think the conduct that is alleged here really does go to  
7 the core of what RICO is intended to redress. Congress  
8 made clear, in the finding that accompanied the statute,  
9 that one of its principal concerns was that criminal  
10 enterprises could use illegal means to compete unfairly  
11 with legitimate businesses. And so if a business -- a  
12 criminal business were to use threats of violence  
13 directed at its competitor's customers to get them to  
14 switch their business to it, the competitor would have a  
15 cause of action for that. And then the same should be  
16 true, we submit, if the business uses fraud directed at  
17 its competitor's customers to induce them to switch  
18 their business.

19 If there are no further questions.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 Mr. Miller.

22 Mr. Becker, 10 minutes remaining.

23 REBUTTAL ARGUMENT OF THEODORE M. BECKER

24 ON BEHALF OF THE PETITIONERS

25 MR. BECKER: Thank you.



1           The difference between this case and what  
2 Congress intended is that, yes, in the comments to the  
3 enactment of RICO, Congress did say that it was trying  
4 to protect legitimate competitors from illegitimate  
5 conduct or unlawful conduct. This case has now morphed  
6 into a situation where competitors are using RICO as an  
7 anticompetitive device, and that's what we believe the  
8 reliance requirement will -- will at least rein in,  
9 totally consistent with the common law.

10           We are not asking this Court to impose any  
11 requirement on RICO that does not already exist by  
12 reason of the common-law meaning rule. Actually, we  
13 believe our opponents and the S.G. are asking this  
14 Court to expand RICO by unmooring it from the common  
15 law. We believe that Beck versus Prubis is exactly the  
16 same situation and the same analysis. Although 1962(d),  
17 which is a substantive conspiracy violation of RICO, was  
18 at issue in Beck versus Prupis, you get to the same  
19 situation just as an extra step. Here's the -- here's  
20 the analysis. You look to 19 -- they have a conspiracy  
21 count of course. But you look to 1962(c), and it says  
22 that "any person injured by reason of" -- if you read in  
23 1964(c) to it -- by reason of a RICO violation or a --  
24 or a racketeering activity "shall have a cause of  
25 action."

1                   Now, you look to racketeering activity in  
2 1961, and that has a hundred and something predicate  
3 acts, one of which is mail fraud. You look at mail  
4 fraud, and it says "a scheme to defraud." It uses the  
5 word "defraud." What does that mean? It's the same  
6 place; you just -- you just need to take one more step  
7 to get there, but it's the same place the Court found  
8 itself, we submit, in Beck versus Prupis. If criminal  
9 conspiracy means the same thing as civil conspiracy,  
10 Beck versus Prupis would not -- the Court would not have  
11 held what it did in Beck versus Prupis. And if mail  
12 fraud only means an indictable offense and nothing more  
13 under the criminal law, it should be the same as the  
14 civil law, then there would be no common-law meaning  
15 rule. To apply the common-law --

16                   JUSTICE SOUTER: Isn't -- isn't the weakness  
17 of the argument that you're, in effect, dividing mail  
18 and fraud? You're saying there are two requirements,  
19 and therefore, fraud here is just like conspiracy in  
20 Beck. But in fact, mail fraud is -- is a single term of  
21 art. It refers simply to a criminal violation for which  
22 there -- there is no exact civil counterpart. And so,  
23 if you take mail fraud as being a unified term of art,  
24 then it seems to me that your argument falls apart,  
25 because you can't treat the fraud in the mail fraud the

1 way you treated the conspiracy standing alone in Beck.

2 MR. BECKER: Justice Souter, we respectfully  
3 disagree and refer the Court to Field versus Mans, where  
4 it was bankruptcy fraud. And I believe -- the exact  
5 same thing. What does bankruptcy mean? What does mail  
6 fraud mean? Well, they looked to -- the Court looked to  
7 the common law meaning rule, and looked to the elements  
8 you need for fraud in order to determine what has to be  
9 proved for bankruptcy fraud.

10 JUSTICE SOUTER: But there was no definition  
11 of bankruptcy fraud as a separate definition, was there?  
12 Whereas in mail fraud, we know what it means.

13 MR. BECKER: Not from the statute we don't,  
14 Justice Souter. There is no definition of mail fraud in  
15 the statute. The only reason we know what it means is  
16 because the Court has construed it over the years. In  
17 order to construe it now in a civil context, we are  
18 asking the Court to apply the common law meaning rule  
19 because that's -- the analog is fraud; that's the  
20 obvious source to look to the common law.

21 If I may I'd like to make a few other  
22 points.

23 First of all, I cannot leave this podium and  
24 leave this Court under the impression that there is  
25 directness of injury. There are 195 bidders. The

1 plaintiffs themselves alleged this in paragraph 46, our  
2 joint appendix 20 and 21. Without belaboring it, the  
3 last few pages of our reply brief show all of the things  
4 that would have to be shown in order to have even --  
5 even a remote directness of injury in this case.

6 So the -- we have not -- we have not in any  
7 way conceded that the requirements of Anza or Holmes  
8 have been met. And -- but I think our brief adequately  
9 deals with that.

10 I'd also like to point out that RICO and  
11 mail fraud don't reach everything actionable at common  
12 law. I mean, if there was an argument, that would mean  
13 that civil RICO in every case involving a false  
14 statement -- every case involving a false statement, no  
15 matter to whom it's made, would be a civil RICO case.

16 The general idea of protecting competitors  
17 doesn't mean that Congress provided that anything that  
18 anyone says to anybody violates civil RICO. That's not  
19 the way that this Court interprets statutes; and there  
20 is no allegation in the complaint at all as -- that the  
21 rotational basis applies only when bids are at zero  
22 percent.

23 In the year 2000 the Illinois Supreme Court  
24 confronted the same plaintiff in this case, Phoenix  
25 Bond, challenging a very similar rule because at that

1 point in time there was collusion including the same  
2 plaintiff to keep the penalty rate at 18 percent. And  
3 the Illinois Supreme Court said the rule will -- is  
4 something that the treasurer has the right to make to  
5 try to regulate the bids, and the treasurer certainly  
6 can be a victim of this situation. If the bid is not  
7 perceived as fair, the treasurer will not have enough  
8 bidders in order to sell all the bids, and therefore,  
9 the county will not be paid the unpaid taxes.

10 If the treasurer thought that there really  
11 was a misrepresentation here made by the Petitioners,  
12 the treasurer would have a very great incentive and a  
13 very great state in enforcing this rule; and the  
14 treasurer did not, we believe because the treasurer  
15 doesn't believe there is any violation.

16 The -- the other ways that the county could  
17 be injured are that if the -- if the penalty rate goes  
18 up beyond zero percent, there is no guarantee that the  
19 same number of bidders will -- will come to the sale.

20 There -- I also want to refer the Court to  
21 other -- this is not new. In Safeco Insurance just  
22 recently, last term, the Court asked -- was asked to  
23 define the term "willfulness" in a civil liability  
24 provision of the Fair Credit Reporting Act, and the  
25 Court observed that there is different meanings in the

1 civil and criminal law to the term "willfulness." In  
2 Farmer versus Brennan the Court recognized different  
3 uses of the term "recklessness" in the civil and  
4 criminal contexts.

5 So once again we are asking this Court to  
6 rule consistent with the common law meaning rule that  
7 the -- a civil RICO action predicated on mail fraud,  
8 where one is -- it has to fulfill the requirement that  
9 you have been -- the plaintiff has been injured by  
10 reason of mail fraud or racketeering activity. The  
11 plaintiff must rely on a misrepresentation or the fraud  
12 directly, because that's the essence of civil fraud.

13 If there are no further questions.

14 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
15 The case is submitted.

16 (Whereupon, at 12:05 p.m., the case in the  
17 above-entitled matter was submitted.)

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