IN THE SUPREME COURT OF THE UNITED STATES

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JOHN BRIDGE, ET AL., :

Petitioners :

v. : No. 07-210

PHOENIX BOND & INDEMNITY :

CO., ET AL. :

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Washington, D.C.

Monday, April 14, 2008

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

APPEARANCES:

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

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

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

C O N T E N T S

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and someone has had to rely on it.

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: Well, why --

JUSTICE SOUTER: No, but --

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

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

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

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

JUSTICE KENNEDY: Yes. Yes. Let's assume

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

MR. BECKER: Well, I think this --

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Yeah. Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Becker.

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

CHIEF JUSTICE ROBERTS: Mr. DeBruin.

ORAL ARGUMENT OF DAVID W. DeBRUIN

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: Would you explain why your

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

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

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

MR. DeBRUIN: But the Court looked to --

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

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

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

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

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

JUSTICE SCALIA: That's the conspiracy provision.

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

of 1962(c).

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

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

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

JUSTICE SCALIA: All right. I understand.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

enough that there be a single act. There must be predicate acts that are a pattern of activity. "Pattern" doesn't just mean two. It means a continuing threat of continuing criminal activity. There must be proximate cause under Holmes and Anza. All of those restrictions exist. And only if the plaintiff can successfully navigate all of those things, proving not common-law fraud but indictable criminal activity, proving a pattern of continuing criminal activity, proving proximate cause, only then can the plaintiff make out a RICO violation.

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

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

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

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

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

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

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

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

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

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

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

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

This Court looked at directness; it looked

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

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

If there are no further questions, thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. DeBruin.

Mr. Miller?

ORAL ARGUMENT OF ERIC D. MILLER

ON BEHALF OF THE RESPONDENTS

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

RICO provides a cause of action to

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

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

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

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

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

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

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

JUSTICE SCALIA: Wait.

MR. MILLER: -- is somewhat usual.

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

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

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

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

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

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

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

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

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

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

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

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

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

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Miller.

Mr. Becker, 10 minutes remaining.

REBUTTAL ARGUMENT OF THEODORE M. BECKER
ON BEHALF OF THE PETITIONERS

MR. BECKER: Thank you.

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

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

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

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

way you treated the conspiracy standing alone in Beck.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If there are no further questions.

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

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