No. 03-1559

IN THE

Supreme Court of the United States

BANK OF CHINA, NEW YORK BRANCH,
Petitioner,
v.

NBM L.L.C., *et al.,*
Respondents.

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

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

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: October 31, 2005

QUESTION PRESENTED

In order to establish that they are people "injured by reason of a violation" of 18 U.S.C. § 1962 (within the meaning of 18 U.S.C. § 1964(c)), must civil RICO plaintiffs alleging mail and wire fraud as predicate acts establish "reasonable reliance" on the defendant's misrepresentations?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Statutes:

Miscellaneous:

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

To that end, WLF has appeared before this Court as well as other federal and State courts to argue against overly expansive theories of tort liability and excessive punitive damages. Of particular relevance to this case, WLF has appeared in this Court to argue against an overly expansive interpretation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq. See, e.g., Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella v. Wood*, 528 U.S. 549 (2000); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); *H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229 (1989).

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

WLF is filing this brief because of its interest in promoting the welfare of the business community and the public at large; it has no other interest, financial or other, in the outcome of this lawsuit. WLF is filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioner Bank of China, New York Branch lent large sums of money to various of the Respondents. When those loans were not repaid, Bank of China filed this RICO action, claiming that Respondents obtained their loans by providing false financial records intended to lead the Bank to believe that Respondents' companies had more assets and income than was actually the case. Respondents principal defense was that the bank's employees and officers were fully aware of Respondents' true financial position and did not rely on any of the false financial records in deciding to make the loans. Instead, Respondents contend, the Bank of China made the loans because it wanted to earn the millions of dollars in fees and interest generated by the loans and was willing to assume the known risks that the loans would not be repaid if Respondents' companies failed.

RICO creates criminal penalties for a broad range of conduct; but it also authorizes "[a]ny person injured in his business or property by reason of a violation" of RICO's criminal provisions to bring a civil suit to recover treble damages plus the costs of the suit. 18 U.S.C. § 1964(c). The Bank of China alleges in its civil RICO action that the actions undertaken by Respondents to obtain the loans violated three federal criminal statutes: 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), and 18 U.S.C. § 1344 (bank fraud). Acts that violate any of those three statutes can constitute predicate offenses for purposes of establishing a violation of RICO's criminal provisions.[2] The issue in this

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[2] Under RICO, it is "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern (continued...)

case is what evidence a civil RICO plaintiff must present to establish that he has been injured in his business or property "*by reason of*" a violation of RICO's criminal provisions, where the predicate acts upon which the suit is based are mail fraud and wire fraud.

Respondents contended at trial that the Bank of China's injuries could not have been incurred "by reason of" their alleged misrepresentations, because even if the misrepresentations constituted RICO predicate acts (*e.g.*, mail fraud, wire fraud, or bank fraud), the Bank had not relied on them in making the loans. The district court rejected that construction of RICO. Pet. App. 6. In charging the jury, the court did not instruct the jury that RICO liability was contingent on a finding that the Bank had relied on the alleged misrepresentations; instead, the court simply instructed the jury that the Bank was required to prove that its injury was "proximately caused by defendants in violation of RICO." *Id.* 105. The court instructed that this standard required the Bank to show that "a wrongful act played a substantial part in bringing about or actually causing injury or damage" and that "injury or damage was either a direct result or a reasonably probable consequence of the act." *Id.*

The jury found for the Bank on the civil RICO counts as well as various state-law causes of action. In September 2002, the district court entered judgment for $106.4 million in favor of the Bank against all the defendants – an amount computed

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[2](…continued)
of racketeering activity." 18 U.S.C. § 1962(c). RICO includes within the definition of "racketeering activity" conduct that violates any of a large number of state and federal crimes (often referred to as "predicate acts"), including those federal crimes listed in the text. 18 U.S.C. § 1961(1)(B).

by trebling (pursuant to 18 U.S.C. § 1964(c)) the jury's compensatory damages award. *Id.* 31-34.

On appeal, the Second Circuit vacated the judgment and remanded for a new trial. *Id.* 1-23. The appeals court held, contrary to the district court, that:

> [I]n order to prevail in a civil RICO action predicated on any type of fraud, including bank fraud, the plaintiff must establish "reasonable reliance" on the defendants' purported misrepresentations or omissions. Thus Bank of China was required to prove that it reasonably relied on defendants' purported misrepresentations – *i.e.,* the representations that the defendants made to the Bank in order to obtain the loans.

Id. 12. The appeals court held that the jury instructions were erroneous and required reversal of the judgment because they allowed the jury to impose damages on Respondents under RICO without finding that the Bank had reasonably relied on the alleged misrepresentations in making the loans to Respondents. *Id.* 12-17.

Although the Second Circuit overturned the verdict in its entirety, the Bank's certiorari petition sought review on two questions only: whether civil RICO plaintiffs must establish "reasonable reliance" with respect to mail or wire fraud claims, and whether they must establish "reasonable reliance" with respect to bank fraud claims. The Court granted review on the first question only.

SUMMARY OF ARGUMENT

The Court held in *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258 (1992), that § 1964(c)'s "by reason of" language imposes a "proximate cause" requirement on civil RICO claimants. It is not enough for a claimant to demonstrate that the defendant's actions were simply a but-for cause of his injury. When the claimant alleges that the defendant's actions consist of misrepresentations in violation of the federal mail fraud and wire fraud statutes, it is a straightforward application of *Holmes*'s proximate cause requirement to preclude civil RICO recovery if neither the claimant nor anyone else relied on the misrepresentations. Accordingly, the Second Circuit acted properly in overturning a verdict where the jury was permitted to find for the Bank even without finding that the Bank relied on Respondents' alleged misrepresentations. Under the facts of this case, the Court need not decide whether RICO permits imposition of liability where the claimant has relied on the misrepresentation but that reliance was not reasonable.

The Bank argues that *Holmes* mandates adoption of a "flexible" approach to determining the contours of proximate cause. The Bank is obviously correct that what constitutes proximate cause can vary considerably depending on the type of RICO claim presented. But the Second Circuit was addressing a very specific type of RICO claim that federal courts face routinely: a RICO claim in which the defendant is alleged to have defrauded the plaintiff by making misleading statements to the plaintiff, and in which the alleged predicate acts are mail fraud and wire fraud. Despite its pleas for flexibility in defining proximate cause, nowhere in its brief does the Bank suggest how such a plaintiff could demonstrate proximate cause without showing that he relied on the misleading statements. Under those circumstances, the Second

Circuit acted totally appropriately in establishing a reliance requirement in all such cases, rather than leaving it to the imagination of individual juries to decide whether a misrepresentation to which a plaintiff paid no attention nonetheless somehow proximately caused the plaintiff's injuries.

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

ARGUMENT

I. A Reliance Requirement in Fraud Cases of This Type Is a Straightforward Application of *Holmes*'s Proximate Cause Requirement

This Court held more than a decade ago that a civil RICO plaintiff bears the burden of demonstrating that the defendant's racketeering activity proximately caused the injury of which he complains. The Second Circuit corrected concluded that where the alleged racketeering activity consists of fraudulent misrepresentations made to the plaintiff, the plaintiff cannot demonstrate that the defendant's actions proximately caused his injuries unless he can demonstrate that he relied on those misrepresentations.

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

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

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

Congress intended to incorporate traditional notions of proximate cause into civil RICO claims. *Id.* at 268.[3]

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

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

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

The Court stated that "'the infinite variety of claims that may arise make it virtually impossible to announce a blackletter rule that will dictate the result in every case'"

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[3] *Holmes* went on to conclude that the plaintiff could not demonstrate that its injury was proximately caused by the defendant's alleged racketeering activity (stock manipulation) because the link between the stock manipulation and its injury was "too remote" – the harm only arose because the stock manipulation caused harm to third parties who were thereby rendered insolvent and thus unable to meet their obligations to individuals in whose shoes the plaintiff claimed to stand. *Id.* at 271.

regarding whether an injury was "proximately caused" by the defendant's actions. *Id.* at 272 n.20 (quoting *Associated General Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 536 (1983)). Nonetheless, the Court provided some general guidelines for use in making that determination:

> Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984).

Id. at 268. The Court then proceeded to look to common law for guidance regarding the specific proximate cause question (described at Note 3, *supra*) at issue in the case. *Id.* (noting the "many shapes [the] concept [of proximate cause] took at *common law*") (emphasis added).[4]

Any resort to the common law for guidance is fatal to the Bank's position. There can be no serious dispute that a plaintiff seeking to recover for a fraudulent misrepresentation at common law has long been required to demonstrate reasonable reliance on the misrepresentation. *See, e.g., Field v. Manns,* 516 U.S. 59, 70 (1995) (at common law, "fraudulent

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

misrepresentation" requires "both actual and justifiable reliance"). Given the teaching of *Holmes* and *Beck* that the contours of "proximate cause" in RICO cases involving alleged fraudulent misrepresentations made to the plaintiff should be determined by reference to the common law (because Congress is likely to have legislated with those common-law notions of proximate cause in mind), § 1964(c) bars recovery unless the plaintiff can demonstrate reliance on the misrepresentation.

That conclusion is also supported by a common-sense interpretation of § 1964(c)'s proximate cause requirement. If a civil RICO plaintiff acts with knowledge that representations being made to him are false, it is difficult to understand how those representations can be said to be the cause – proximate or otherwise – of subsequent injuries. The same is true if the plaintiff does not know that the representations are false, but he would have acted as he did regardless whether those representations had been made. The Bank insists that civil RICO plaintiffs should not be limited to a single method of demonstrating that fraudulent misrepresentations proximately caused their injuries. Pet. Br. 14. However, the Bank's brief provides no clue regarding how else it proposes that proximate cause be proven, and no plausible alternatives are readily apparent. Under those circumstances, there can be no basis for allowing juries to determine that proximate cause exists even in the absence of reliance.

Neither the mail fraud statute (18 U.S.C. § 1341) nor the wire fraud statute (18 U.S.C. § 1343) includes a reliance requirement; prosecutors can obtain convictions under those criminal statutes without being required to demonstrate that anyone relied on the defendant's fraud. Based on that fact, the Bank insists that the Second Circuit's decision improperly incorporates into the mail and wire fraud statutes a

requirement not contemplated by Congress. Pet. Br. 26-28. The appeals court has done no such thing. Its decision does not make it any more difficult for civil RICO plaintiffs to demonstrate that the defendants have committed predicate acts (and thus that they have engaged in "a pattern of racketeering activity"). All the appeals court has done is to require those plaintiffs to demonstrate that any such pattern of racketeering activity was the proximate cause of their injuries.[5]

It bears mentioning that the federal appeals court have unanimously and repeatedly denied efforts to recognize implied private rights of action under both the mail fraud and the wire fraud statutes. *See Sedima*, 473 U.S. at 501 (Marshall, J. dissenting). The appeals court have viewed

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[5] WLF does not understand the Second Circuit to have required *all* civil RICO plaintiffs alleging mail and wire fraud to demonstrate reliance. As the Bank points out, some crimes that can be prosecuted under the mail and wire fraud statutes (*e.g.,* embezzlement) do not require the defendant to have made representations to anyone. Obviously, if the alleged "pattern of racketeering activity" does not involve any misrepresentations, then a plaintiff need not show that he relied on those nonexistent misrepresentations in order to establish proximate cause. WLF understands the appeals court to have limited its ruling to those mail and wire fraud RICO cases in which (as here) a misrepresentation is the alleged cause of the plaintiff's injury. *See* Pet. App. 12 ("We therefore now hold that . . . the plaintiff must establish 'reasonable reliance' on *the defendants' purported misrepresentations or omissions*.") (emphasis added).

The district court permitted the jury to impose liability in the absence of *any* finding of reliance. The foregoing analysis demonstrates that the Second Circuit was correct in determining that that jury instruction required reversal of the judgment entered against Respondents. Accordingly, this Court may affirm the judgment below without the need to address the additional question of whether, as the Second Circuit determined, a civil RICO plaintiff who relies on a defendant's fraudulent misrepresentations fails to demonstrate proximate cause if the reliance was not reasonable.

§§ 1341 and 1343 solely as penal statutes that are not intended to benefit fraud victims. *Ryan v. Ohio Edison Co.,* 611 F.2d 1170, 1178-79 (6th Cir. 1979) (mail fraud); *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634 (5th Cir. 1974), *cert. denied*, 423 U.S. 837 (1975) (wire fraud). That view held true even in the 1960s, when federal courts were regularly discovering implied private rights of action under other criminal statutes, on behalf of the victims of those crimes. *See, e.g., Oppenheim v. Sterling,* 368 F.3d 516, 519 (1966), *cert. denied*, 386 U.S. 1011 (1967) (mail fraud). Accordingly, although it is true that the government may prosecute violators of mail fraud and wire fraud statutes without having to prove reliance, Congress never intended thereby to allow individuals to use those statutes to press fraud claims free of the traditional common-law reliance requirement. The Bank is correct that when Congress adopted RICO, it intended to strengthen the legal arsenal of those combating racketeering activity; but the Bank has presented *no* evidence that Congress intended such a dramatic expansion of the civil remedies available against those alleged to have engaged in bank or wire fraud. Given the historic unavailability of such remedies under either state or federal law, one might suppose that Congress would have said so explicitly if it had intended such a dramatic expansion.

The Bank of China contends that *Holmes* "advanced three policy reasons for finding that a civil RICO plaintiff must demonstrate proximate causation." Pet. Br. 35. To the extent that the Bank is suggesting that the Court intended to create a "three-part analysis" (*id.* 36) to be used in determining proximate causation requirements, it has misread *Holmes*. The referenced discussion focused on the factual setting within which *Holmes* arose, a setting that did not involve bank and wire fraud allegations and did not involve injury arising from alleged fraudulent misrepresentation. The Court was

attempting to explain why "directness of relationship" (between the defendant and the plaintiff claiming injury) is an important factor in determining proximate causation in Clayton Act cases and why the same should be true in RICO cases. *Holmes*, 503 U.S. at 269. The "directness of relationship" is not at issue here; the Bank and Respondents dealt directly with one another, and thus no one contends that they were too remotely situated from one another to allow for proximate causation. Accordingly, this section of *Holmes* is of very little relevance to the issue of whether the Bank can demonstrate proximate causation without demonstrating reliance on Respondents' alleged misrepresentations.[6]

In sum, the Bank's argument amounts to little more than a plea that every jury should be allowed to decide for itself whether a civil RICO plaintiff has demonstrated that the defendant's pattern of racketeering activity proximately caused the plaintiff's injury. But given the difficulty that courts have encountered in applying proximate cause requirements to the multitude of factual settings in which that issue can arise, it is too much to ask that jurors hearing a single case could effectively engage in that exercise on their own. When (as here) courts have learned through experience how best to handle proximate cause issues in recurring factual situations,

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[6] To the extent that it has *any* relevance, it supports Respondents. The Court noted, in connection with its discussion of "directness of relationship," that "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors," and thus the greater the reason to find that proximate cause is lacking. *Holmes*, 503 U.S. at 270. Similarly, the less clear it is that the Bank actually relied on Respondents' misrepresentations, the less clear it is that the Bank's injuries were proximately caused by Respondents' alleged misrepresentations, as opposed to other possible causes (such as the Bank's desire to earn interest and fees on Respondents' loans).

it is wholly appropriate for the courts to impart their knowledge to juries by setting down categorical rules that are consistent with the common law and, accordingly, consistent with congressional intent.

II. Vigorous Enforcement of RICO's Proximate Cause Requirements Is Particularly Important in Light of the Potential for Abuse of the Statute

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

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

actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those actions RICO violations.").

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

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

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

Nonetheless, the elimination of a reliance requirement would be such a dramatic expansion of mail and wire fraud actions under RICO that the Court should carefully consider whether Congress could really have intended that result. Freed of a reliance requirement, plaintiffs' lawyers would be able to bring virtually *every* products liability action as a federal tort action. Allegations in a state court tort suit that the product did not perform as well as the manufacturer had warranted can easily morph into a federal RICO claim that the manufacturer fraudulently concealed the product's defective

nature. The one item of proof that often deters the filing of RICO claims is reliance; a plaintiff who may have a valid state-law products liability claim may not be able to establish a RICO claim if he either never heard the manufacturer's allegedly fraudulent statements or took no action in reliance on them. But if the Bank prevails, that last hurdle will be surmounted, and product liability suits – repackaged as RICO suits – will begin flooding the federal courts. RICO claims then would have the added "bonus" of facilitating the certification of plaintiff classes; reliance is always an issue that must be examined class-member-by- class-member, but once reliance is eliminated as an issue, courts are far more likely to find (pursuant to Fed.R.Civ.P. 23(b)(3)) that common issues of fact and law predominate over individual issues.

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

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

> be extended so far by such a marriage of distinct duties and liability regimes.

Summit, 214 F.3d at 557. But if the Court reverses the Second Circuit, the federal courts will need to prepare for such a marriage.

Additional RICO suits one can expect to see in vastly increased numbers if the decision below is reversed are suits alleging that a manufacturers' product advertising injured the plaintiff by causing him to engage in knowingly self-destructive behavior. For example, fast-food restaurant chains have recently begun being sued for running advertisements that allegedly over-glamorize the purchase of their food. Plaintiffs typically allege that the advertisements induced them to eat more fast food than was healthy for them, with the result that they gained excessive weight. *Pelman v. McDonald's Corp.,* 396 F.3d 508 (2d Cir. 2005). A substantial defense in all such suits is lack of reliance; the plaintiff will often have a hard time demonstrating that he would not have eaten as much unhealthy food but for the defendant's advertisements. Eliminating the reliance requirement in RICO actions based on mail and wire fraud is likely to lead to a flood of RICO suits challenging the advertising of fast food and similar products.

Yet another area for concern is securities fraud litigation. The courts of appeals are divided regarding whether a RICO plaintiff alleging securities fraud as a predicate offense must have purchased or sold a security. *See Holmes*, 503 U.S. at 275-76 (recognizing split but declining to resolve the issue); *id.* at 276-86 (O'Connor, J., joined by White, J., and Stevens, J., concurring in part and concurring in the judgment) (would hold that RICO plaintiff need not have purchased or sold a security); *id*. at 286-90 (Scalia, J., concurring in the judgment) (same). One who is not a purchaser or seller of a security may

not sue under the *federal securities laws* for injuries incurred as a result of a misrepresentation, even if one relied on the misrepresentation in deciding to forgo securities transactions. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). If the Court rules in favor of the Bank and makes its ruling applicable to all fraud provisions, including securities fraud, one can expect a sharp increase in RICO securities fraud litigation by those seeking to avoid the *Blue Chip Stamps* limitations.

In likely recognition of the practical difficulties that eliminating the reliance requirement in RICO mail and wire fraud cases would entail, all of the federal appeals courts have preserved the reliance requirement in at least some form. The Bank asserted in its certiorari petition that the Second Circuit's decision conflicted with decisions of the First, Third, Seventh, and Ninth Circuit's. Pet. 13. As the brief for the United States demonstrates, no such conflict exists; the decisions on which the Bank relied either imposed some variant of the reliance requirement or did not address the issue at all. U.S. Br. (May 2005) at 14-18. Accordingly, it is emphatically not the case that litigants in some portions of the country have already been living under a no-reliance-requirement regime, and thus we simply have no basis for predicting how significant the spike in RICO litigation will be if the Court reverses the Second Circuit.

Despite all those potential impacts, eliminating the reliance requirement would be warranted if it were in some way mandated by RICO's statutory language. But in light of § 1964(c)'s "by reason of" language, there is a strong textual basis for finding that a plaintiff in a RICO case based on mail and wire fraud fails to demonstrate proximate cause if he fails to demonstrate that he relied on the defendants' fraudulent misrepresentations that form the basis for his suit.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the judgment of the Second Circuit be affirmed.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: October 31, 2005