An Overview of Federal RICO Law in Civil Cases

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Introduction

Congress passed the Racketeer Influenced and Corrupt Organizations Act (“RICO”) as Title IX of the Organized Crime Control Act of 1970, a comprehensive legislative package aimed at combating the influence of organized crime on interstate commerce. The broad scope of the RICO statute has allowed it to be applied far beyond organized crime to reach nearly any circumstance that involves long-term criminal or fraudulent conduct. For example, on May 22, 2009, the United States Court of Appeals for the District of Columbia Circuit affirmed a finding of liability in a case where the federal government successfully applied the civil provisions of the RICO statute against the tobacco industry for its fraudulent concealment of the hazards of smoking. United States v. Philip Morris USA, Inc.1

Section 1962 of RICO2 generally outlaws four types of conduct involving a pattern of racketeering activity: Section 1962(a) prohibits a person from investing in an enterprise any income derived from a pattern of racketeering activity. Section 1962(b) prohibits a person from acquiring or maintaining control over an enterprise through a pattern of racketeering activity. Section 1962(c) prohibits a person from knowingly operating or managing the affairs of a separate enterprise through a pattern of racketeering activity. Section 1962(d) prohibits a person from conspiring to participate in an endeavor or scheme that, if completed, would constitute a violation of Sections 1962(a), (b), or (c).

Most civil RICO claims are brought under Section 1962(c), which requires the plaintiff to prove by a preponderance of the evidence that (a) the defendant is a culpable “person” who willfully or knowingly (b) operated or managed the affairs of an “enterprise” or “association-in-fact enterprise” (c) to commit a “pattern” of (d) “racketeering activity.” Under Section 1964(c), a civil plaintiff may recover triple damages for injury to its business or property “by reason of” a violation of Sections 1962(a), (b), (c), or (d). The plaintiff must bring its RICO claim within four years from when it discovers, or with reasonable diligence should have discovered, its injury.3 These elements and issues are discussed in more detail below.

The ‘Culpable Person’ Requirement

A plaintiff cannot prove a RICO violation simply by “lumping” all of the defendants together as a group and claiming that the group collectively violated RICO. Instead, the plaintiff must establish by a preponderance of the evidence that each individual defendant qualifies as a culpable “person” who willfully or with actual knowledge violated or conspired to violate RICO.4 Section 1961(3) defines a culpable “person” as an “entity capable of holding a legal or beneficial interest in property.”5

In general, a corporate employer cannot be liable under a theory of vicarious liability (such as “respondeat superior”) unless the evidence proves that the employer benefited from, and was a central figure or aggressor in the alleged RICO scheme, and also that the employee’s acts were (1) related to and committed within the course of his employment, (2) committed in furtherance of the corporation’s business, and (3) authorized or acquiesced to by the corporation.6 Even if these elements are satisfied, the employer being sued under 1962(c) cannot be liable on a theory of

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Published by Bloomberg Finance L.P in the Vol. 1, No. 1 edition of the
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vicarious liability if the employer also is the RICO “enterprise.” That would violate the required “person/enterprise” distinction discussed in Section III below.

The RICO ‘Enterprise’

The hallmark of a Section 1962(c) violation is the defendant’s use of a separate enterprise to commit a pattern of racketeering. To establish a violation of Section 1962(c), a RICO plaintiff must prove that each defendant participated in the operation or management of a separate entity or associated group that qualifies as a RICO “enterprise” or “association-in-fact” enterprise.

For a group to qualify as an association-in-fact enterprise, courts generally require (1) a common or shared purpose among the members of the group, (2) a continuity of structure and personnel, and (3) an ascertainable structure distinct from merely joining together to commit a pattern of racketeering. The extent to which an “association in fact” must have a structure apart from an agreement to commit a pattern of racketeering was decided on June 8, 2009 by the United States Supreme Court in Boyle v. United States, in which the Supreme Court held that a separate structure beyond that inherent in the pattern of racketeering activity was not required.

For Section 1962(c) claims, a RICO plaintiff must prove that the enterprise is an entity or group that is different from each defendant. This is known as the person/enterprise distinction. The key point here is that the defendant is using a separate enterprise to commit the pattern of racketeering. The enterprise is not itself the wrongdoer; often it is the plaintiff-victim.

Besides establishing the existence of a separate enterprise, a RICO plaintiff must prove that each defendant participated in the operation or management of the enterprise. Simply performing services for the enterprise, even with knowledge of illicit activity, usually is not enough to establish liability under Section 1962(c); instead, a RICO plaintiff must prove that each defendant actually participated in the operation or management of the enterprise.

The Pattern Requirement

To prove its RICO claim, the plaintiff also must prove that each defendant used the enterprise to commit a “pattern” of racketeering. To prove a pattern of racketeering, a RICO plaintiff must show that each defendant engaged in long-term criminal conduct that was both related and continuous. Most litigation relating to the pattern requirement addresses whether the asserted pattern of racketeering activity has sufficient “closed-ended” or “open-ended” continuity. A “closed-ended” pattern is one in which a long-term series of predicate acts have concluded. An “open ended” pattern is one in which a lawsuit is brought before a long-term, closed-ended sequence of acts can be shown, but where the plaintiff can prove that the scheme poses a threat of continuity that “by its nature projects into the future with a threat of repetition.”

To determine whether the conduct constituted a closed-ended pattern, a court or jury may consider a variety of factors, including (1) the length of time over which the predicate acts were committed, (2) the number of predicate acts, (3) the variety of predicate acts, (4) the number of participants, (5) the number of victims, (6) the presence of separate schemes, and (7) the occurrence of distinct injuries. Of these, the duration of the conduct is a key factor, and courts repeatedly have rejected RICO claims where the alleged acts occurred over the span of less than a year or even two years. The “collection of an unlawful debt” is itself a RICO violation even without a “pattern” of “racketeering activity.”

Racketeering Activity

A RICO plaintiff also must prove by a preponderance of the evidence that each defendant willfully or with actual knowledge committed a pattern of “racketeering activity.” Section 1961 defines “racketeering activity” to include a long list of state and federal crimes as potential RICO “predicate acts.” The Private Securities Litigation Reform Act of 1995 eliminated securities fraud
as a RICO predicate act unless the defendant has been criminally convicted of the securities fraud.18

Mail and wire fraud are the most common RICO predicate acts. To prove a RICO claim based on mail or wire fraud in violation of 18 U.S.C. §§ 1341 and 1343, a RICO plaintiff must prove that each defendant intentionally engaged in a scheme to defraud and used the interstate mails or wires to further that scheme. A scheme to defraud encompasses “acts of artifice or deceit which are intended to deprive an owner of his property or money.”19 When pled as RICO predicate acts, the elements of mail or wire fraud have been identified as (1) a plan or scheme to defraud, (2) intent to defraud, (3) reasonable foreseeability that the mail or wires will be used, and (4) actual use of the mail or wires to further the scheme.20 The mailings and wire communications need not be fraudulent in and of themselves; innocuous or “innocent” mailings and wirings are sufficient RICO predicates as long as they further a fraudulent scheme.21 This is because the crux of mail and wire fraud is a scheme to defraud; the mails or wires need only be used to carry out the scheme.

Under Bell Atlantic v. Twombly,22 RICO plaintiffs must allege sufficient facts to suggest a plausible RICO scheme.23 In addition, Federal Rule of Civil Procedure 9(b), which requires that fraud allegations be pled with particularity, applies to civil claims under RICO for which fraud is the predicate act. This requires a plaintiff alleging RICO based on mail or wire fraud to allege the time, place, content of, and parties to the fraudulent communications.24 If a plaintiff fails to plead fraudulent acts with specificity, the court might not consider those acts for purposes of establishing a pattern of racketeering.25

Conspiracy

RICO plaintiffs often add a claim under Section 1962(d) for conspiracy to violate Section 1962(a), (b), or (c). To prove a conspiracy claim under Section 1962(d), a RICO plaintiff must prove by a preponderance of the evidence that each defendant knowingly agreed to facilitate or participate in an endeavor or scheme that, if completed, would constitute a violation of the RICO statute.26 It follows that if a RICO plaintiff alleges a conspiracy involving completed conduct, if that conduct cannot sustain a violation of Section 1962(a), (b), or (c), then the Section 1962(d) conspiracy claim should fail.27 Note that a defendant can be liable as long as it agreed to participate in the alleged conspiracy with knowledge of the essential nature of the scheme, even if the defendant did not know all the details of the scheme or commit any acts in furtherance of the scheme.28

Establishing Injury and Proximate Cause

For a plaintiff to have standing to sue for treble damages under RICO, the plaintiff must be able to prove that it was injured in its “business or property” (personal injuries or injuries to intangible assets are not typically recoverable),29 and also that its injury was caused “by reason of” the defendant’s violation of Section 1962(a), (b), (c), or (d).30 To have standing to recover damages under Section 1962(a) or (b), the plaintiff must show that its injury flows from the investment of racketeering proceeds or the takeover of the enterprise, as opposed to the commission of the underlying predicate acts, which is the basis for a claim under Section 1962(c). To have standing to sue for a RICO conspiracy under Section 1962(d), the plaintiff must show that its injury was caused by an overt act of racketeering committed in furtherance of the conspiracy.31

To have standing under Section 1962(c), the plaintiff must show that its injury was caused “by reason of” the defendant’s commission of the alleged RICO predicate act. In Holmes v. Securities Investor Protection Corp., the Supreme Court ruled that RICO’s “by reason of” language requires a plaintiff to show “but for” causation and “proximate cause,” which depends primarily on the directness and foreseeability of the injury.32 In Holmes, the Court ruled that this requires a court to consider the “direct relation between the injury asserted and the injurious conduct alleged.”33
In the wake of *Holmes*, courts had attempted to apply traditional proximate cause tests by looking to whether the plaintiff was a target, competitor, or customer of the racketeering enterprise, and whether the injuries were the “preconceived purpose,” the “specifically intended consequence,” the “necessary result” or the “foreseeable consequence” of the defendants’ predicate acts.34

In *Anza v. Ideal Steel Supply Corp.*, the Supreme Court again addressed proximate cause. In *Anza*, the plaintiff sued its competitor for submitting false state sales tax returns to New York tax regulators as part of a scheme to avoid paying sales tax and thereby giving it lower costs and an unfair competitive advantage. The district court dismissed the complaint for failure to allege reasonable reliance.35 The Second Circuit reversed and ruled that the case could proceed without allegations of reliance, reasoning that the defendants’ fraudulent conduct “was intended to and did give the defendant a competitive advantage over the plaintiff, [and] the complaint adequately pleads proximate cause . . . even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.”36

Even though the Second Circuit applied what appeared to be traditional proximate cause principles, the Supreme Court reversed, based on the view that the plaintiff’s injury was too indirect, and that the direct victim—namely, the State of New York—was in a better position to sue for the alleged tax fraud.37 The Court ruled that when evaluating whether there is sufficient proximate cause, courts should consider the “motivating principle[s]” behind the doctrine, such as the difficulty of ascertaining damages caused by a remote action and the risk of duplicative recoveries.38 In dissent, Justice Thomas argued that the Second Circuit had applied the correct test for proximate cause, and noted that the Court’s ruling would allow “a defendant to evade liability for harms that are not only foreseeable, but the intended consequences of the defendant’s unlawful behavior.”39

Now when a court evaluates proximate cause under *Anza*, “the central question [and perhaps the only question] it must ask is whether the alleged violation led directly to the plaintiff’s injuries.”40 If the answer is no, the plaintiff will not be able to establish proximate cause.

**Is Reliance Required?**

In *Bridge v. Phoenix Bond & Indemnity Co.*,41 the Supreme Court resolved a long-running judicial debate by holding that a plaintiff asserting a RICO claim predicated on mail fraud can satisfy the proximate cause requirement without establishing that it relied on the defendant’s fraudulent misrepresentations.42 Before the Supreme Court’s opinion in *Bridge*, there was disagreement among the courts concerning whether a civil RICO plaintiff asserting predicate acts of mail or wire fraud must show that the plaintiff detrimentally relied on the defendant’s fraudulent acts. The confusion arose in part because in a criminal RICO case, in which different standards apply, the government need not show that the intended victim was actually deceived or injured.43

In *Bridge*, the plaintiff sued its competitor, alleging that its false statements to the county gave it an unfair advantage in auctions for tax liens. Even though the false statements were in affidavits submitted to the county treasurer’s office, the county (unlike the State of New York in *Anza*) was not injured by the fraud. The plaintiff was the only party injured, and therefore was the party best positioned to bring a claim. The Supreme Court therefore affirmed the Seventh Circuit’s holding that “the direct victim may recover through RICO whether or not it is the direct recipient of the false statements.”44

In evaluating proximate cause, the Court found that the alleged injury—the loss of valuable tax liens—was the “direct result of petitioners’ fraud” and a “foreseeable and natural consequence” of petitioners’ illegal scheme.45 Furthermore, the Court noted that “no more immediate victim is better situated to sue” because “respondents and other losing bidders were the only parties injured by petitioners’ misrepresentations.”46
As to the issue of reliance, the Supreme Court held that “a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant’s alleged misrepresentations.” The Court ruled that a showing of “first-party reliance” is not necessary to ensure that there is a “sufficiently direct relationship between the defendant’s wrongful conduct and the plaintiff’s injury to satisfy the proximate-cause principles articulated in *Holmes* and *Anza*.”

The Court noted that proof of a plaintiff’s reliance on the defendant’s misrepresentations “may in some cases be sufficient to establish proximate cause . . . [however] there is no sound reason to conclude that such proof is always necessary.” According to the Court, “[a] contrary holding would ignore *Holmes*’ instruction that proximate cause is generally not amenable to bright-line rules.” Still, the Court did not hold that a plaintiff can prevail in a RICO action without showing that someone relied on the defendant’s misrepresentations. Indeed, the Court noted that a plaintiff generally will not be able to establish for the required “but-for” causation if no one relied on the misrepresentation. The complete lack of reliance may prevent the plaintiff from establishing proximate cause. For instance, “if the county knew petitioners’ attestations were false but nonetheless permitted them to participate in the auction, then arguably the county’s actions would constitute an intervening cause breaking the chain of causation.”

The bottom line is that in most fraud cases where a plaintiff bases its RICO claim on fraud directed at others, a civil RICO plaintiff need not show first-party reliance on a fraudulent act (though it still must show that it was directly injured). The more attenuated or indirect the plaintiff’s injury, the more difficult it will be for the plaintiff to establish that its loss was proximately caused “by reason of” the defendant’s conduct.

**RICO Class Actions**

In appropriate circumstances, RICO cases may be pursued as class actions. Most plaintiffs have pursued RICO class actions under Rule 23(b)(3), which provides that an action may be maintained as a class action if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”

Plaintiffs in RICO actions have had mixed results in attempting to have their RICO claims certified in a class action. The question generally depends on whether the alleged injuries were caused by a common set of misrepresentations (usually written), as opposed to a variety of disparate misrepresentations (often oral). Cases where the same or similar misrepresentations were made to the named plaintiffs and class members are more likely to be certified. On the other hand, courts that have denied class certification usually have done so based on a finding that individualized issues of reliance or causation “predominate” over common issues.

The Supreme Court decision in *Bridge v. Phoenix Bond & Indemnity Co.* (discussed above), may open the door to the certification of more RICO class actions. In *Bridge*, a RICO case that did not involve a class action, the Court held that a plaintiff asserting a RICO claim predicated on mail fraud may be able to establish proximate cause without showing that the plaintiff relied on the alleged misrepresentations. Although an argument can be made under *Bridge* that individual issues of reliance should no longer predominate over other common issues, it remains true that individual questions of proximate cause may still predominate to defeat class certification, particularly where not all proposed class members were allegedly victimized by the same misrepresentations.

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4 See *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 180-81 (2d Cir. 2004) (affirming dismissal of claims that lacked detail regarding requisite intent); *Gerstenfeld v. Nitsberg*, 190 F.R.D. 127 (S.D.N.Y. 1999) (dismissing RICO claims because the complaint failed to allege facts giving rise to a strong inference of fraudulent intent).

5 18 U.S.C. §1961(3). See also *United States v. Bonanno Organized Crime Family*, 879 F.2d 20, 23 (2d Cir. 1989) (discussing the culpable person requirement and ruling that an organized crime family was not a legal “entity capable of holding a legal or beneficial interest in property”); *Jund v. Town of Hempstead*, 941 F.2d 1271, 1282 (2d Cir. 1991) (ruling that unincorporated association may be a RICO “person”); *Lancaster Cnty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991) (affirming dismissal of RICO claim because government entities are incapable of forming the requisite criminal intent to violate RICO); *Pelfresne v. Vill. of Rosemont*, 22 F. Supp. 2d 756, 761 (N.D. Ill. 1999) (noting municipal corporations cannot be culpable persons); *Nu-Life Constr. Corp. v. Board of Ed.*, 779 F. Supp. 248, 252 (E.D.N.Y. 1991) (although board of education qualified as a “person,” it was not capable of forming the necessary criminal intent to violate RICO).

6 See, e.g., *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1406-07 (11th Cir. 1994) (holding that respondeat superior liability may be assessed under §1962(c) where the corporate employer benefits from the acts of its employee and the acts were (1) related to and committed within the course of employment; (2) committed in furtherance of the corporation’s business; and (3) authorized or acquiesced in by the corporation), modified on other grounds, 30 F.3d 1347 (11th Cir. 1994); but see *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 968 (7th Cir. 1988) (holding corporation could not be vicariously liable for civil RICO violation under doctrine of respondeat superior).

7 *United States v. Turkette*, 452 U.S. 576, 583 (1981) (ruling that a RICO “enterprise” must be proved by evidence of an ongoing association that functions as a continuing unit, and not merely by proof of the acts of racketeering); compare *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (inclusion of party that did not share common purpose defeated existence of association-in-fact) with *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1284 (11th Cir. 2006) (disagreeing with Seventh Circuit’s common purpose rule and holding that although the members of the associated group must share a common purpose, it need not be the sole common purpose).


10 *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993); *Goren v. New Vision Int’l*, Inc., 156 F.3d 721, 727 (7th Cir. 1998) (“mere participation in the activities of the enterprise is insufficient; the defendant must participate in the operation or management of the enterprise”).


12 Id. at 242.

13 Id. at 241; see also *First Capital, supra*, at 181.

14 See *GICC Capital Corp. v. Tech Fin. Group*, 67 F.3d 463, 466-68 (2d Cir. 1995); *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516, 522-24 (7th Cir. 1995).

15 See *Spool v. World Child Int’l Adoption Agency*, 520 F.3d 178, 184-85 (2d Cir. 2008) (stating that “although we have not viewed two years as a bright-line requirement, it will be rare that conduct persisting for a shorter period of time establishes closed-ended continuity”); *Roger Whitmore’s Auto. Servs., Inc. v. Lake County, Illinois*, 424 F.3d 659, 673 (7th Cir. 2005) (period of two years does not satisfy durational requirement where the plaintiff alleged a single scheme with a small number of victims); *Vicom, Inc. v.*
Harbridge Merchant Servs., Inc., 20 F.3d 771 at 780-81 (period of nine months does not satisfy durational aspect of close-ended continuity).

19 See Vicom Inc., supra.
20 See Wisdom v. First Midwest Bank, 167 F.3d 402, 406 (8th Cir. 1999). See also In re Sumitomo Copper Litig., 995 F. Supp. 451, 455 (S.D.N.Y. 1998) (noting that elements of mail fraud are more broadly defined than elements of common law fraud).
24 See, e.g., Lum v. Bank of America, 361 F.3d 217, 223-26 (3d Cir. 2004) (affirming dismissal); Chisholm v. Transouth Fin. Corp., 95 F.3d 331, 336-37 (4th Cir. 1996); Tel-Phonic Servs., Inc. v. TBS Int'l Inc., 975 F.2d 1134, 1138-39 (5th Cir. 1992) (affirming dismissal where alleged wrongs were not pleaded with sufficient particularity to constitute the RICO predicate act of wire fraud or mail fraud); Lachmund v. ADM Investor Services, Inc., 191 F.3d 777, 783-84 (7th Cir. 1999) (affirming dismissal; heightened pleading requirements of Fed. R. of Civ. P. 9(b) apply to allegations of fraud in a civil RICO complaint); Goren v. New Vision Int'l, Inc., 156 F.3d 721, 729 (7th Cir. 1998) (affirming dismissal); Emery v. Am. Gen. Fin., Inc., 71 F.3d 1343, 1348 (7th Cir. 1995); Jepson, Inc. v. Makita Corp., 34 F.3d 1321, 1328 (7th Cir. 1994) ("[L]oose references to mailings and telephone calls in furtherance of a purported scheme to do fraud will not do."); In the Matter of EDC, Inc., 930 F.2d 1275, 1281 (7th Cir. 1991); Murr Plumbing, Inc. v. Scherer Bros. Fin. Serv. Inc., 48 F.3d 1066, 1069 (8th Cir. 1995); Mostowfi v. I2 Telecom Int'l, Inc., 629 F. App'x 621, 623-25 (9th Cir. 2008); Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1362 (10th Cir. 1989) (collecting cases).
25 Giuliano v. Fulton, 399 F.3d 381, 387-89 (1st Cir. 2005) ("We will not read into the amended complaint the mail or wire connection where it is not alleged specifically.").
27 See Allen v. New World Coffee, Inc., No. 00 CIV 2610 (AGS), 2002 WL 432685 at *6 (S.D.N.Y. 2002) ("The dismissal of all of plaintiffs RICO claims leaves the conspiracy cause of action without a leg to stand on."); but see Gagan v. Am. Cablevision, Inc., 77 F.3d 951, 964-65 (7th Cir. 1996) (To prevail, "a plaintiff need only prove that defendants agreed to fulfill the commission of at least two predicate acts, not success at commission of those acts").
28 See Salinas, supra, at 65-66; Frost Nat'l Bank v. Midwest Autohaus, Inc., 241 F.3d 862, 869-70 (7th Cir. 2001) (the defendant must "knowingly agree to facilitate the activities of those who operate or manage a criminal enterprise").
29 See Evans v. City of Chicago, 434 F.3d 916, 925-31 (7th Cir. 2006) (false imprisonment, attorneys' fees, and loss of employment were personal injuries that did not constitute injury to plaintiff's business or property).
33 Id. at 268.
34 Compare In re Am. Express Co. S'tholder Litig., 39 F.3d 395, 400 (2d Cir. 1994) (holding injury to American Express shareholders was neither the "preconceived purpose" nor the "specifically intended consequence" of American Express's scheme to discredit competitor that was intended to benefit American Express), with Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., 985 F.2d 102, 104-05 (2d Cir. 1993) (proximate cause found where plaintiffs were the foreseeable, direct target of the fraudulent scheme), and Commercial Cleaning Services LLC v. Colin Service Systems, Inc., 271 F.3d 374, 380-84 (2d Cir. 2001) (reversing dismissal of RICO claims by cleaning firm that lost business when undercut by its direct competitor that hired illegal aliens to help it underbid for jobs; plaintiff was direct target of the scheme, so injuries were proximately caused by competitor's illegal hiring practices).
36 373 F.3d at 263.
38 Id.
39 Id. at 470 (emphasis in original).
40 Id. at 461.
42 Id. at 2142.
44 477 F.3d 928, 932 (7th Cir. 2007) (emphasis in original).
45 Bridge, supra, at 2144.
46 Id. (emphasis in original). The Court rejected the petitioners’ assertion that the county would be injured “if the taint of fraud deterred potential bidders from participating in the auction” because “that eventuality, in contrast to respondents’ direct financial injury, seems speculative and remote.”
47 128 S. Ct. at 2145.
48 Id. at 2144; see also Grange Mut. Cas. Co. v. Mack, 2008 BL 192230 (6th Cir. 2008) (following Bridge).
49 Id. (“By the same token, the absence of first-party reliance may in some cases tend to show that an injury was not sufficiently direct to satisfy § 1964(c)’s proximate-cause requirement, but it is not in and of itself dispositive”).
50 Id. at 2144-45.
51 Id. at 2144 (emphasis in original) (“Accordingly, it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to prove causation”).
52 Id.
53 Id.
54 Holmes, supra, at 268-69.
56 See, e.g., Klay v. Humana, Inc., 382 F.3d 1241, 1247-49 (11th Cir. 2004) (ruling that standard misrepresentation justified class certification); Eisenberg v. Gagnon, 766 F.2d 770, 786-87 (3d Cir. 1985) (ruling that class should have been certified where named plaintiffs, and presumably class members, relied on virtually identical offering materials); Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (disagreeing with Fifth Circuit’s presumption against reliance in Sandwich Chef and noting ways to address individual issues of recovery); In re Zyprexa Products Liability Litigation, 2008 BL 227191 (E.D.N.Y. 2008) (holding that common issues predominated over individualized issues); Chisolm v. TranSouth Financial Corp., 184 F.R.D. 556, 564 (E.D. Va. 1999) (“churning” scheme used to sell, repossess, and resell used cars utilized uniform documents and a single plan to support typicality requirement); Dornberger v. Metropolitan Life Insurance Co., 182 F.R.D. 72, 81 (S.D.N.Y. 1998) (uniform insurance sales manual used by Metropolitan agents in Europe constitutes a written device for the perpetration of fraud similar to the way a prospectus creates a unifying device in a securities fraud case); Rohlfing v. Manor Care, Inc., 172 F.R.D. 330, 338 (N.D. Ill. 1997) (collecting cases illustrating that courts have adopted two different approaches to the reliance requirement in RICO class action suits based on fraud).
57 See, e.g., McLaughlin v. American Tobacco Co., 522 F.3d 215, 222-30 (2d Cir. 2008) (reversing class certification and holding that individual issues of causation and injury predominated); Poulos v. Caesars World, Inc., 379 F.3d 654, 664-67 (9th Cir. 2004) (affirming denial of class certification because of individualized issues of causation); Sandwich Chef of Texas, Inc. v. Reliance Nat’l Indemnity Ins. Co., 319 F.3d 205, 219 (5th Cir. 2003) (applying presumption against class certification in case involving individual questions of reliance); Johnston v. HBO Film Management, Inc., 265 F.3d 178, 190-94 (3d Cir. 2001) (class certification denied because alleged oral misrepresentation would require individual review and present “insurmountable manageability problems”); Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 675-76 (7th Cir. 2001) (remanding case because district court should have made “whatever factual and legal inquiries” were necessary to determine whether class should have been certified and should not have assumed that the plaintiff’s account was true, especially as oral representations suggested that class should not be certified).
58 Bridge, supra.
59 Id. at 2145.
60 Compare In re Zyprexa Products Liability Litigation, supra (noting that, after Bridge, plaintiffs need not show first-party reliance, holding that common issues predominated over individualized issues, and certifying a plaintiffs’ class in a RICO class action), with Ironworkers Local Union No. 68 v. AstraZeneca Pharmaceuticals LP, 585 F. Supp. 2d 1339 (M.D. Fla. 2008) (dismissing RICO claims in a class action case and holding that the alleged third-party reliance was insufficient to establish proximate cause because the alleged harm to the plaintiffs was too remote).
But see Williams v. Mohawk Industries, Inc., 2009 BL 114319 (11th Cir. May 28, 2009) (reversing the district court’s denial of class certification and remanding for a more rigorous analysis of predominance and superiority under Fed. R. Civ. Proc. 23(b)(3)).