

15-949
No. _____

Supreme Court, U.S.
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**In The
Supreme Court of the United States**

—◆—
MICHAEL KENT PLAMBECK, D.C., *ET AL.*,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY, *ET AL.*,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
PETER MICHAEL JUNG
Counsel of Record
STRASBURGER & PRICE, LLP
4400 Bank of America Plaza
901 Main Street
Dallas, Texas 75202
(214) 651-4724
michael.jung@strasburger.com

QUESTION PRESENTED

The petition presents a question left open in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008):

When, if ever, can the plaintiff in a civil RICO case predicated on mail and wire fraud establish proximate causation without showing that someone – the plaintiff or a third party – relied on the defendants’ misrepresentations to the plaintiff’s detriment?¹

¹ The Court’s resolution of that question will require the courts below to reassess not only the binary question of proximate causation of injury to the plaintiffs, but also the extent to which the damages found by the jury were proximately caused by the RICO violation.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioners are Michael Kent Plambeck, D.C.; Michael Capobianco, D.C.; Paul Grindstaff, D.C.; Douglas Friedman; Jennifer Giessner; Charles Mora; Chiropractic Strategies Group, Inc.; Media Placement Services, Inc.; Dove Point Chiropractic Clinic, Inc.; El Paso Chiropractic Clinic, LLC; WTC Chiropractic Clinic, LLC; Harlingen Chiropractic Clinic, Inc.; Wolfen Chiropractic Clinic, LLC; 11th Street Chiropractic Clinic, LLC; Mainland Chiropractic Clinic, LLC; Bergstrom Chiropractic Clinic, Inc.; Laredo Chiropractic Clinic, LLC; SA Chiropractic Clinic, LLC; N. Carrier Chiropractic Clinic, Inc.; Buckner 30 Chiropractic Clinic, Inc.; Hampton Chiropractic Clinic, Inc.; Haltom City Chiropractic Clinic, Inc.; Brownsville Chiropractic Clinic, Inc.; Congressional Chiropractic Health Center, Inc.; Arlington Chiropractic, Inc., d/b/a Akron Square Chiropractic, Inc.; East Broad Chiropractic, Inc.; Dayton Chiropractic, Inc.; Shaker Square Chiropractic, Inc.; Shoreway Chiropractic, LLC; Vernon Place Chiropractic Health Center, Inc.; West Broad Chiropractic, Inc.; West Tusc Chiropractic, LLC; Youngstown Chiropractic, Inc.; American Chiropractic, Inc.; Pearl Road Chiropractic, Inc.; Mobile Spine & Rehab Center on the Loop, Inc.; and Five Points Chiropractic, Inc.

The respondents are Allstate Insurance Company; Allstate Indemnity Company; Allstate Property &

**LIST OF PARTIES AND
RULE 29.6 STATEMENT – Continued**

Casualty Insurance Company; and Allstate County Mutual Insurance Company.

None of the corporate petitioners has a parent company or publicly-owned company that owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 802 F.3d 665 (5th Cir. 2015). It is reprinted in the appendix to this petition at App. 1-23.

The memorandum opinion and order of the United States District Court for the Northern District of Texas is unreported. It is reprinted in the appendix to this petition at App. 32-55.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 2015. A timely petition for rehearing *en banc* was denied by order entered on October 26, 2015.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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 in any

appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1961(1)(B) provides, in pertinent part:

As used in this chapter –

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . . sections 2314 and 2315 (relating to interstate transportation of stolen property), ...

STATEMENT OF THE CASE

This is a civil RICO suit based on the settlement of 390 third-party personal-injury claims arising from vehicle accidents. The respondent liability insurance

carriers (collectively “Allstate”) alleged that bills for chiropractic services, submitted to them as part of the claim settlement process, made implicit misrepresentations that the services reflected in the bills were reasonable and necessary. Allstate alleged that the submission of the bills constituted a pattern of racketeering activity involving predicate acts of mail fraud and wire fraud.²

Allstate further alleged that it had been injured in its business or property by reason of this pattern of activity. In particular, it alleged that it had relied on the bills as evidencing the reasonableness and necessity of the care provided. At trial, however, Allstate’s proof of reliance was extremely limited: only four adjusters (out of hundreds) testified, and only as to 28 of the 390 claims in question. None of the four witnesses testified that he or she actually relied on a representation by the petitioners that the chiropractic care was reasonable and necessary.

On the other hand, there was substantial evidence tending to negate reliance by Allstate. Upon receipt of a claim, Allstate investigated whether and how the accident occurred, whether and to what extent the claimant was injured, and whether and to

² Allstate also alleged a RICO violation consisting of transportation of stolen property across state lines. Since this allegation was derivative of Allstate’s fraud allegations, it does not alter the analysis of the role of reliance in establishing proximate causation in civil RICO cases involving mail fraud or wire fraud.

what extent the claimant received chiropractic treatment. It obtained and studied the pertinent accident reports, interviewed the claimant and other witnesses to the accident, and conducted internet searches to gather prior accident and injury histories on the claimants. Allstate audited every entry on every chiropractic bill through its computerized Medical Bill Review System, and ultimately rejected many of the charges on the bills.

An Allstate evaluation consultant candidly testified that Allstate's investigation and analysis

had the net effect of Allstate disbelieving the chiropractor's bills and records, and instead relying on its own judgment to determine what was reasonable and necessary

Following investigation, Allstate engaged in arms-length negotiations with the claimants or their attorneys. All of the claims in question were settled; Allstate paid a single lump-sum check to each claimant, representing compensation for all elements of the claim. No itemization of these elements appeared on the settlement checks, nor was there any written agreement allocating the settlement payment among the various elements of damages. And there was no proof that any claimant would have settled for less but for the petitioners' conduct.

Allstate ultimately sued the petitioners under RICO, the Ohio RICO statute, and various state-law causes of action; jurisdiction was based on 28 U.S.C. § 1331. Allstate had planned the suit almost 2½ years

while continuing to pay claims for which it later sought damages.

The case was tried to a jury, which was instructed that Allstate had to prove that it “made payments for specific chiropractic bills, in specific amounts as to each of the individual claims . . . because of a representation made by a Defendant that the bills were reasonable and necessary” when, in whole or in part, they were not, and that Allstate’s injury was a direct result of the representation. App. 58-60.

The jury found for Allstate on 390 of the 555 claims submitted to it. It awarded a total of \$945,593 in actual damages, representing 100% of what Allstate claimed it had paid for chiropractic services in connection with the settlement of the 390 claims. The district court awarded judgment for \$3,864,402.65 (including treble damages and attorneys’ fees), App. 26-31, and denied the petitioners’ motions for judgment as a matter of law, for new trial, or to modify the judgment.

On appeal to the Fifth Circuit, the petitioners challenged, among other things, the sufficiency of the evidence of RICO causation. They acknowledged that reliance is not itself an element under RICO, but argued that in light of the facts of the case and the jury instructions, Allstate could prove proximate cause only by proving that it relied on the petitioners’ representations.

The Fifth Circuit gave this argument short shrift:

Regardless of how proximate cause is sliced, Allstate proved it. There is no plausible argument that the insurers were unforeseeable victims or otherwise wronged by the caprice of chance. The objective of the enterprise was to collect from the insurance companies; the entire structure of the system, from the screening for not-at-fault victims to the factory-efficient issuance of demand letters, shows that Allstate's paying up was not just incidental but was the object of the collaboration. Allstate presented sufficient evidence to satisfy the unchallenged jury instruction regarding proximate cause.³

App. 15-16 (footnote in original). The court held that to require reliance, even as the sole available means of proving proximate cause, would be "to disregard *Bridge* and *St. Germain*."⁴ App. 14 (footnotes supplied). It accordingly affirmed the trial court's judgment.



³ It appears undisputed that the "but-for" causation requirement is satisfied as well.

⁴ *St. Germain v. Howard*, 556 F.3d 261 (5th Cir.), *cert. denied*, 557 U.S. 920 (2009). There, the Fifth Circuit overruled its prior precedents requiring first-party reliance to the extent inconsistent with *Bridge*.

REASONS FOR GRANTING THE WRIT

The question presented here is a simple but important one: does *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), justify disregard of the reliance issue in a civil RICO case based on mail fraud or wire fraud, where proximate cause cannot be proven any other way? The Fifth Circuit, departing from the approach taken by most other courts, answered the question “yes.”

I. *Bridge v. Phoenix Bond & Indemnity Co.*

In *Bridge*, this Court addressed the question of whether first-party reliance is required in a civil RICO case. There, bidders at tax sales had submitted fraudulent certifications that they were not separately bidding through agents, employees, or affiliates, to the detriment of other, honest bidders. The county tax authorities had relied on the certifications, but the honest bidder-plaintiffs had not.

Resolving a circuit split, this Court held that first-party reliance is not an element of the civil RICO cause of action for mail fraud or wire fraud. It found no textual basis for such an element, 553 U.S. at 648-50, and no reason to import such an element from the common-law fraud cause of action, *id.* at 650-53. Though acknowledging that civil RICO requires proximate causation,⁵ the Court declined to

⁵ See *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

require that RICO proximate causation be proven exclusively through first-party reliance, *id.* at 653-58.

But the Court then carefully circumscribed its holding, noting the often-pivotal role of reliance in proof of causation:

Of course, none of this is to say that a RICO plaintiff who alleges injury “by reason of” a pattern of mail fraud can prevail without showing that *someone* relied on the defendant’s misrepresentations. In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation. . . . In addition, the complete absence of reliance may prevent the plaintiff from establishing proximate cause. . . .

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. . . .

553 U.S. at 659 (emphasis in original).

Since the taxing authorities’ third-party reliance in *Bridge* was sufficient to establish proximate causation, the Court left the precise relationship of reliance to causation in civil RICO cases to another day. The petitioners submit that that day has come.

II. The Lower Courts' Treatment of Reliance After *Bridge*.

As might be expected, the lower courts' treatment of the reliance/causation relationship after *Bridge* has been case-dependent. All courts follow *Bridge*, of course, in holding that first-party reliance is not an element of a civil RICO claim. Some have found sufficient allegations or proof of causation through first-party or third-party reliance,⁶ and thus have not addressed the necessity of such allegations or proof to establish causation. Others have addressed that question, with mixed results.

A. Courts That Recognize the Proper Role of Reliance in Establishing Causation.

A number of courts have thoughtfully explored the interrelationship between reliance and causation; the Second Circuit leads by example. In *Catholic Health Care West v. US Foodservice*, 729 F.3d 108 (2d Cir. 2013), a class of institutional food purchasers sued a wholesale food distributor under RICO, alleging a complex fraudulent scheme whereby the defendant inflated the prices charged under "cost-plus" contracts. The court, acknowledging *Bridge*'s holding that first-party reliance is not an element,

⁶ See, e.g., *In re Avandia Marketing*, 804 F.3d 633 (3d Cir. 2015) (third-party reliance); *West Hills Farms, LLC v. ClassicStar Farms, Inc.*, 727 F.3d 473 (6th Cir. 2013) (first-party reliance).

nevertheless held that the plaintiff class had to show classwide reliance because it was a necessary part of the class's causation theory. 729 F.3d at 119 & n.6.

The court's *Catholic Health Care* echoed its earlier decision in *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2d Cir. 2010). There, the court described the need for at least generalized classwide proof of reliance:

while reliance may not be an element of the cause of action, there is no question that in this case [where the plaintiffs alleged an injury caused by physicians' prescribing of a drug in reliance on the manufacturer's misrepresentations] the plaintiffs allege, and must prove, third-party reliance as part of their chain of causation.

620 F.3d at 133.

Other circuit courts have likewise recognized that reliance may be the sole means of establishing causation on the facts of a particular case. *See Biggs v. Eaglewood Mortgage, LLC*, 353 F. App'x 864, 866-67 (4th Cir. 2009) (criticizing lower court for treating reliance as element, but affirming summary judgment because plaintiffs were not misled by defendant bank's behavior); *Hoffman v. Zenith Insurance Co.*, 487 F. App'x 365, 365 (9th Cir. 2012) (proof of reliance necessary where integral to plaintiff's causation theory); *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1088-89 (10th Cir. 2014) (analyzing amenability

of reliance to classwide proof because reliance was integral to plaintiffs' causation theory).

District courts have similarly required reliance where the plaintiff's causation theory required it. *See, e.g., Bridgewater v. Double Diamond-Delaware, Inc.*, No. 3:09-CV-1758-B, 2011 U.S. Dist. LEXIS 47248, *39-44 (N.D. Tex. Apr. 29, 2011); *OSF Healthcare System v. Banno*, No. 08-1096, 2008 U.S. Dist. LEXIS 100230 (C.D. Ill. Dec. 10, 2008); *G&G TIC, LLC v. Alabama Controls, Inc.*, No. 4:07-CV-162(CDL), 2008 U.S. Dist. LEXIS 75269, *13 (M.D. Ga. Sept. 29, 2008).⁷

The Georgia courts have employed similar analysis under the Georgia RICO statute. *Vernon v. Assurance Forensic Accounting, LLC*, 333 Ga. App. 377, 392-93, 774 S.E.2d 197, 210-11 (Ct. App. 2015); *Pollman v. Swan*, 314 Ga. App. 5, 6-8, 723 S.E.2d 290, 291-93 (Ct. App. 2011), *cert. denied*, 2012 Ga. LEXIS 810 (2012).

B. Courts That Mistakenly Ignore Reliance Altogether.

Against this backdrop of a majority of courts that balance *Bridge's* primary holding with its caution

⁷ *See also Montoya v. PNC Bank, N.A.*, 94 F. Supp. 3d 1293, 1308-10 (S.D. Fla. 2015) (allegation of proximate cause suffices, but plaintiff may not be able to prove proximate cause without proving reliance); *Ozbakir v. Scotti*, 764 F. Supp. 2d 556, 574 n.4 (W.D.N.Y. 2011) (similar).

that reliance is often required to show causation, there are at least two outliers. Both the Fifth Circuit (in this case) and the Sixth Circuit have failed to recognize the pivotal role that reliance usually plays in but-for causation.

1. The Fifth Circuit.

In the instant case, the Fifth Circuit overread *Bridge* to such an extent that it eschewed any analysis of reliance whatsoever. It chose instead to focus on the foreseeability⁸ and directness of Allstate's alleged injury. App. 15. Directness of injury was necessary, of course,⁹ but was by no means a substitute for but-for causation.

The petitioners' causation argument on appeal was quite simple: that there was no evidence that their conduct had caused Allstate any injury whatsoever. This was an issue of but-for causation. Thus the Fifth Circuit's footnote statement that "[i]t appears undisputed that the 'but-for' causation requirement is satisfied as well," App. 16, was profoundly wrong.

On the facts of the case, and under the jury instructions, there was one and only one way for Allstate to prove but-for causation: by proving its own

⁸ In focusing on foreseeability, the court erred. *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 12 (2010).

⁹ *Hemi Group*, 559 U.S. at 8-12; *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006); *Holmes*, 503 U.S. at 271, 274.

first-party reliance on the chiropractic bills as implied representations of reasonableness and necessity. There was no allegation or proof of third-party reliance, nor of any circumstance whereby the mere existence of the bills had caused Allstate to pay.

The Fifth Circuit acknowledged the petitioners' contention "that reliance is the only causal mechanism potentially at issue and thus should still be the proper metric." App. 14. But it boldly labeled that contention an "invitation to disregard *Bridge*" and declined to analyze the evidence of reliance. *Id.* It thus put itself at odds with this Court's caveat in *Bridge* and with the circuit and district courts that have acknowledged and applied that caveat.

2. The Sixth Circuit.

In *Brown v. Cassens Transportation Co.*, 546 F.3d 347 (6th Cir. 2008), *cert. denied*, 558 U.S. 1085 (2009), the plaintiffs were employees who sued their employer and others under RICO, alleging a scheme to deny them workers' compensation benefits through "fraudulent" medical opinions by incompetent doctors.

Similarly to the Fifth Circuit's approach here, the Sixth Circuit held that, under *Bridge*, it was not necessary for the plaintiffs to plead reliance, and then focused on directness and foreseeability to the exclusion of but-for causation. 546 F.3d at 356-57. The court concluded that "the defendants' fraudulent acts were a 'substantial and foreseeable cause' of" the deprivation of the plaintiffs' benefits. It did not

analyze whether anyone had relied on the medical opinions, nor articulate how they could have been the but-for cause of the denial of benefits absent reliance.

III. This Court Should Address the Proper Role of Reliance in the Analysis of But-for Causation in Civil RICO Cases Based on Mail Fraud or Wire Fraud.

Two lines of post-*Bridge* cases have thus emerged, one in which the potential essentiality of reliance to but-for causation is acknowledged and analyzed, and one in which it is not. This Court should grant the writ in this case and endorse the majority view that reliance (first-party or third-party) must, at least usually, be proven in order to establish that the defendant's mail fraud or wire fraud proximately caused injury to the plaintiff.

Are there any circumstances where reliance need not be shown? That is a question to be more fully explored if the Court takes up the merits, but the petitioners submit that, as hinted in *Bridge*, there may indeed be unusual circumstances where reliance is unnecessary.

The statute requires that the plaintiff be injured "by reason of" a RICO violation. 18 U.S.C. § 1964(c). Where the violation consists of mail fraud or wire fraud, reliance by the plaintiff or a third party on the fraudulent misrepresentation will be the most common source of injury. But the mere fact of a misrepresentation could conceivably cause injury, whether

anyone believes it or not. *See, e.g., Buyers & Renters United to Save Harlem v. Pinnacle Group N.Y. LLC*, 575 F. Supp. 2d 499, 509 (S.D.N.Y. 2008) (fraudulent eviction notices required plaintiffs to lose work and spend money on litigation).

Any such exception would be narrowly circumscribed. The mail fraud and wire fraud statutes require a “scheme or artifice to defraud,” 18 U.S.C. §§ 1341, 1343; this requires the plaintiff to show intent to deceive.¹⁰ Thus the universe of reliance-free civil RICO cases based on mail fraud or wire fraud will be limited to cases where the defendant tried but failed to deceive someone and the plaintiff was injured by the attempt itself.

Last Term, the Court held, reminiscently of *Bridge*, that knowledge of the need for a religious accommodation is not an element of a Title VII claim for refusal to hire based on that need, while noting that it may be impossible to prove the element of motive absent at least employer suspicion. *EEOC v. Abercrombie & Fitch Stores, Inc.*, ___ U.S. ___, 135 S. Ct. 2028, 2031-34 & n.3 (2015). It is too early to tell whether the lower courts will afford knowledge its proper role in the analysis of motive in such cases. Seven years of experience under *Bridge*, on the other hand, suggests that it is time for this Court to apply a

¹⁰ *E.g., United States v. Brown*, 147 F.3d 477, 483 (6th Cir. 1998) (mail fraud); *United States v. Keller*, 14 F.3d 1051, 1056 (5th Cir. 1994) (wire fraud).

mid-course correction to the role of reliance in the analysis of RICO causation in mail fraud and wire fraud cases.



CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case. The judgment of the Court of Appeals should be reversed and the case should be remanded to that court for further proceedings.

Respectfully submitted,

PETER MICHAEL JUNG

Counsel of Record

STRASBURGER & PRICE, LLP

4400 Bank of America Plaza

901 Main Street

Dallas, Texas 75202

(214) 651-4724

michael.jung@strasburger.com

Counsel for Petitioners