

certification when in doubt, and in many circumstances offering plaintiffs a presumption of common proof of impact.<sup>7</sup> This began to change in the early part of the decade with a panel decision in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, in which the court acknowledged that in “reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action.”<sup>8</sup> Later decisions, however, called the *Newton* language into doubt. With *Hydrogen Peroxide*, the Third Circuit firmly and clearly breaks from its past and joins a growing majority of courts that require heightened standards of review for class certification.<sup>9</sup>

### Early Attempts to Develop Certification Standards and Resulting Confusion

Damages plaintiffs must satisfy each of the Rule 23(a) factors: numerosity, commonality, typicality, and adequacy; as well as the twin requirements of

predominance and superiority under Rule 23(b)(3).<sup>10</sup> The party moving for certification bears the burden of establishing that all the requirements of the Federal Rules are met; however, the Rules supply little guidance as to the proper standard of “proof” for class certification.<sup>11</sup>

The Supreme Court attempted to define the burden of proof and the scope of inquiry for class certification in a trio of prominent opinions between 1974 and 1982: *Eisen v. Carlisle & Jacquelin*, *Coopers & Lybrand v. Livesay*, and *General Telephone Co. of the Southwest v. Falcon*. The first, *Eisen*, dealt with a district court decision about whether the plaintiffs or defendant should have to pay for class notice under Rule 23(e). The lower court resolved the issue by holding a mini-trial and finding that the defendants were more likely going to lose the case. As a result, the district court judge reasoned that the defendant

*continued page 15*

## After *Bridge* : RICO Class Actions at a Crossing

Last summer, it appeared as though the U.S. Supreme Court potentially had lifted the gates for a flood of class actions alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68. In June 2008, the Court decided *Bridge v. Phoenix Bond & Indemnity Company*, in which it held that a plaintiff need not prove that he or she actually relied on the defendant’s allegedly false statement in making a complaint based on predicate acts of mail fraud.<sup>1</sup> Specifically, the Court stated: “[n]o showing of reliance is required to establish that a person has violated § 1962(c) by conducting the affairs of an enterprise through a pattern of racketeering activity consisting of acts of mail fraud.”<sup>2</sup>

In the abstract, such a broad statement could lead practitioners to conclude that rejection of the first-party reliance requirement would inundate the courts with new class RICO claims predicated on mail fraud. The requirement of proof of reliance by individual plaintiffs historically had been one of the class action defense bar’s strongest weapons in showing that individual questions would predominate a class case, thus destroying the efficiencies class litigation is intended to foster.<sup>3</sup> Indeed, prior to *Bridge*, one of the leading class action treatises concluded that “RICO claims typically are inappropriate for class treatment” in part because of “the statutory

*by Karl E. Neudorfer & Erika Birg*

requirement that each plaintiff establish...reliance.”<sup>4</sup> By eliminating the first-party reliance requirement, *Bridge* appeared to create the potential for a significant increase in the number of class RICO claims being filed.

However, *Bridge* is not without boundaries. RICO’s civil action provision gives a private right of action only to persons injured in their business or property “by reason of” a predicate RICO violation.<sup>5</sup> Drawing on the Court’s earlier RICO jurisprudence,<sup>6</sup> *Bridge* explained that this phrase continues to require proof of both “but for” causation and proximate causation:<sup>7</sup>

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.<sup>8</sup>

In other words, while *Bridge* may have eliminated the requirement that RICO plaintiffs show first-party reliance as a substantive element of a RICO claim predicated on mail fraud, RICO’s “by reason of” language continues to require proof of proximate cause—and proof of reliance generally will be needed to show proximate cause.

Not quite a year has passed since *Bridge* was decided. There are only a handful of cases that evaluate Rule 23's prerequisites to class certification in light of the *Bridge* opinion, and those cases are not models of consistency. However, the lower court class decisions that have been handed down since *Bridge* suggest that the opinion may not have opened the door to unbridled RICO class litigation, as *Bridge's* elimination of the first-party reliance requirement potentially suggested.

### *Bridge* and its Predecessors in the Supreme Court's RICO Jurisprudence

*Bridge* arose out of a program run by the Cook County, Illinois Treasurer's Office under which the county sold tax liens it had acquired on properties owned by delinquent taxpayers. Sales of the liens were made through public auction. But instead of making cash bids, prospective buyers bid in percentages of the penalties delinquent property owners would be required to pay in order to clear the liens. The bidder willing to accept the lowest penalty would win the auction, thus obtaining the right to purchase the lien in exchange for payment of the delinquent taxes. If the property owner did not redeem the property during the statutory redemption

period, then the auction-winning lienholder effectively would have purchased the property for the cost of the delinquent taxes.<sup>9</sup>

Because the subject properties could be obtained at such a low cost, the auctions typically attracted a number of bidders willing to accept a zero percent penalty from property owners. A number of auctions thus resulted in a tie among zero-percent bidders. To ensure that parcels would be distributed fairly among all zero-percent bidders, the county began allocating parcels on a "rotational" basis. However, problems arose when some zero-percent bidders bid on certain parcels themselves and on other parcels through an agent, resulting in those bidders ultimately being awarded a disproportionately large number of properties.<sup>10</sup>

The county instituted a "Single, Simultaneous Bidder Rule" to prevent this sort of manipulation. Under the rule, bidders were required to submit bids in their own name rather than in the name of an agent or employee, and to submit an affidavit swearing that the bid was in compliance with the rule. *Bridge* arose when one group of bidders alleged that another group repeatedly violated the Single, Simultaneous Bidder Rule by submitting bids

*continued page 24*

## Second Circuit Affirms Dismissal of "Foreign-Cubed" Securities Class Action

*by George T. Conway III*

In recent years, with increasing frequency, the securities plaintiffs' bar has been filing what have been called "foreign-cubed" or "f-cubed" class actions in American courts—litigation so named because the plaintiffs are *foreign* investors who seek damages from *foreign* issuers to recover losses from purchases the investors made on *foreign* exchanges. Although many of these cases have been dismissed, the plaintiffs' bar has nonetheless achieved significant success in prosecuting some f-cubed class actions. The fundamental question of whether these cases can be brought at all has divided federal district judges, and the securities plaintiffs' bar has taken full advantage of the resulting confusion to obtain billions of dollars in settlements from foreign issuers.<sup>1</sup> The proliferation of f-cubed class actions has accelerated during the ongoing global financial crisis, as plaintiffs' lawyers and their clients have targeted foreign financial institutions that have suffered significant losses on mortgage-related and other investments in the U.S.<sup>2</sup>

Late last year, however, the Second Circuit issued a decision that significantly clarified the law governing f-cubed class actions. *Morrison v. National Australia Bank Ltd.*<sup>3</sup> affirmed the dismissal of an f-cubed case and carefully circumscribed the ability of the plaintiffs' bar to bring similar suits in the future. The case was closely watched by the securities industry and by trade organizations, and a number of amici curiae, including the Securities Industry and Financial Markets Association, the U.S. Chamber of Commerce, the Association Française des Entreprises Privées, the Association of Corporate Counsel, and the Washington Legal Foundation, filed or joined briefs supporting the defendants. The court of appeals invited the Securities and Exchange Commission to weigh in, and the SEC did so, with a brief supporting the plaintiffs.

The decision's importance arises from the similarity of its fact pattern with those of many other f-cubed securities class actions. The pattern goes something like

# After *Bridge*: RICO Class Actions at a Crossing

*Continued from page 5*

through agents or employees. The plaintiffs claimed RICO violations predicated upon mail fraud, alleging the defendants had used mail transmissions in submitting fraudulent affidavits that falsely attested that the bids in issue were submitted solely in their own names. According to the plaintiffs, this “scheme to defraud” allowed the defendants to obtain a greater number of liens than if they had submitted the bids individually, thus cheating the plaintiffs out of a number of liens and violating RICO in the process.<sup>11</sup>

The defendants argued that plaintiffs’ RICO claims failed because they could not prove the predicate acts of mail fraud. Specifically, the defendants asserted that even if the plaintiffs’ allegations were true, they had alleged only that defendants made misrepresentations to the county in submitting false affidavits, and had not made any misrepresentations to the plaintiffs themselves. The defendants argued that as a result, the plaintiffs could not have relied upon any alleged misrepresentations by the defendants, even if the county did so rely. According to the defendants, in the absence of any such first-party reliance, the plaintiffs could not establish the predicate RICO violation of mail fraud.<sup>12</sup> After the case worked its way through the lower courts, the Supreme Court granted certiorari to resolve “the substantial question” of “whether first party reliance is an element of a civil RICO claim predicated on mail fraud.”<sup>13</sup>

The Court answered that question in the negative. It 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.”<sup>14</sup> The Court reached this result largely on the basis of a textual analysis, finding nothing in the language of the mail fraud statute or in RICO’s civil action provision that would require a finding of reliance: “Nothing on the face of the relevant statutory provisions imposes such a requirement. Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentation.”<sup>15</sup> Based on the absence of any reliance requirement in the statute, *Bridge* concludes that a plaintiff need not establish reliance as a substantive element of a RICO claim predicated on mail fraud.

Abbott Labs., No. 03-cv-120, 2008 WL 3849696 (D. Del. 2008) (providing that court should look to whether the plaintiffs’ submitted methodology can be used across the class and deciding that the plaintiffs’ submission of economic articles, data and government studies was enough).

42 *Hydrogen Peroxide I*, 240 F.R.D. 163, 167 n.3 (E.D. Pa. 2007).

43 *Id.* at 166.

44 *Id.*

45 *In re Hydrogen Peroxide Antitrust Litig.*, 401 F. Supp. 2d 451, 455-56 (E.D. Pa. 2005) (denying motion to dismiss).

46 *Hydrogen Peroxide I*, 240 F.R.D. at 167.

47 *Id.* at 168-69.

48 *Id.*

49 *Id.* at 167-68.

50 *Id.* at 169-70.

51 *Id.* at 170.

52 *Id.* at 174.

53 *Id.* (quotation marks omitted). Note that the Court applied this reasoning to the defendants’ motion to strike the expert testimony of Dr. Beyer, plaintiffs’ testifier. “We are not permitted, in addressing defendants’ *Daubert* motion, to weigh the relative credibility of the parties’ experts.” *Id.* at 171.

54 *Id.* at 173-74.

55 *Id.* at 174.

56 *Id.* at 175.

57 *Id.* at 170 n.6.

58 *Id.*

59 *Hydrogen Peroxide II*, 552 F.3d at 307.

60 *Id.* at 307, 326-27.

61 *Id.* at 321-22 (quoting *Amchem*, 521 U.S. at 625).

62 *Id.* at 318.

63 *Id.* at 321.

64 *Id.* at 316-17 (citing *Newton*, 259 F.3d at 166).

65 *Id.* at 320.

66 *Id.*

67 *Id.* at 318.

68 *Id.*

69 *Id.* at 323-25.

70 *Id.* at 323.

71 *Id.*

72 *Id.* at 318 (quoting *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004)).

73 *Id.* at 325-27.

74 *Id.* at 326.

However, *Bridge* does not dispense with RICO's proximate cause requirement. Notwithstanding that RICO plaintiffs need not show reliance to prove predicate acts of mail fraud, they still must show the defendants' fraudulent statements were both the "but for" cause and the proximate cause of their injuries.<sup>16</sup> That is, RICO plaintiffs still must prove a "sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury" to satisfy the proximate cause requirements articulated in the Court's earlier RICO decisions.<sup>17</sup> That point is significant because, as *Bridge* recognizes, a RICO plaintiff generally will prove proximate cause by showing reliance.<sup>18</sup>

RICO provides a private right of action to "any person" injured "by reason of" a RICO violation. But in its prior RICO opinions, the Court had recognized that RICO's provision of a private right of action to "any person injured... by reason of" a RICO violation does not in fact allow "any" injured person to sue, irrespective of how tenuous the connection between that person's injury and the defendant's conduct.<sup>19</sup> Instead, the Court determined that RICO's "by reason of" language imposes a proximate cause requirement upon RICO plaintiffs, with proximate cause characterized as a "generic[] label" for "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."<sup>20</sup>

The point is illustrated by *Holmes v. Securities Investor Protection Corporation*.<sup>21</sup> There, the Court considered RICO claims brought by SIPC, a private corporation obligated to reimburse customers of securities brokers who had become unable to meet their financial obligations. SIPC alleged that the defendants manipulated various stock prices, causing the stocks' value to plummet and, consequently, certain brokers to go out of business. As a result, SIPC was required to make millions of dollars in reimbursement payments to the customers of the now-defunct brokers. The Court concluded that SIPC could not maintain RICO claims against the alleged stock manipulators, because its injury was too remote from the defendants' alleged wrongdoing. SIPC's RICO claims thus failed for a lack of proximate cause.<sup>22</sup>

The Court reached a similar result in *Anza v. Ideal Steel Supply Corporation*.<sup>23</sup> *Anza* arose out of a steel supplier's allegations that its principal competitor fraudulently failed to charge sales tax, thus enabling the competitor to charge lower prices and improperly obtain a larger percentage of the market share. The *Anza* plaintiff asserted RICO claims based on this allegedly fraudulent scheme, but again the Court determined that the RICO claims failed for a lack of proximate cause.

The plaintiff's injury was too far removed in the chain of causation from the defendant's alleged wrongdoing.<sup>24</sup>

In both *Anza* and *Holmes*, the plaintiffs' RICO claims failed because an intervening factor between the alleged misrepresentation and the injury precluded the plaintiffs from showing reliance on the misrepresentations, and in turn from satisfying RICO's proximate cause element. In *Holmes*, even when SIPC was subrogated to the rights of the brokers' customers, its injury remained "contingent on the harm suffered by the broker dealers" and whether the brokers' harm was the result of stock manipulation. Because the brokers could have gone out of business as a result of a variety of factors unrelated to the defendants' stock manipulation, SIPC could not show the brokers' reliance upon the misrepresentations at issue was the proximate cause of its (SIPC's) injuries. Therefore, "the link is too remote between the stock manipulation alleged and the customers' harm."<sup>25</sup>

The link between the decrease in the *Anza* plaintiff's market share and the defendant's alleged misrepresentations to state taxing authorities likewise was too attenuated. The decline in the *Anza* plaintiff's market share could have been attributable to any number of factors not related to the defendant's conduct; the plaintiffs thus could not show that anyone's reliance on the alleged misrepresentation caused it to lose market share.<sup>26</sup> In view of these intervening events between the defendant's alleged wrongdoing and the plaintiff's injury, the *Holmes* and *Anza* plaintiffs' RICO claims failed due to a lack of proximate cause.<sup>27</sup>

After considering these precedents, *Bridge* reached the opposite result. It determined that the plaintiff lien purchasers had shown their injuries were proximately caused by the defendants' fraudulent affidavits to the county, even if the plaintiffs themselves had not relied upon the defendants' misrepresentations. The Court reasoned that the plaintiffs' injuries (the loss of certain liens) could not have been caused by anything other than the defendants' false affidavits, and that the plaintiffs were the only parties likely to sue considering that they were the only ones that had suffered an injury. Accordingly, the *Bridge* plaintiffs had shown an injury sufficiently related to the defendants' conduct to satisfy the proximate cause requirement of RICO's "by reason of" language.<sup>28</sup>

In reaching this conclusion, *Bridge* makes plain that reliance is *not* a substantive element of a RICO claim predicated upon mail fraud, but proximate cause is. Therefore, proximate cause still must be shown, but it can be established in the absence of reliance. And while reliance often is used as a *method* of proving proximate

causation, it is not the exclusive means of doing so. Under *Bridge*, reliance thus becomes a mode of proof of the substantive element of proximate causation, but is not, in and of itself, a substantive element of a RICO claim.<sup>29</sup>

However, despite what appears to have been the elimination of a substantial hurdle to making out a RICO claim, *Bridge* has not created in an influx of new RICO class action matters being filed. Arguably, this result is attributable in large part to the continuing requirement that RICO plaintiffs prove proximate causation. In many (if not most) cases, the only available method for making that showing will be to prove reliance. The cases described below illustrate the point, demonstrating that reliance will not be absent from RICO jurisprudence notwithstanding *Bridge*.

### **Prevailing Defendants in Putative RICO Class Litigation**

In an early case employing *Bridge*, Judge Conway in the Middle District of Florida tackled the issue of whether “third-party reliance is sufficient to establish proximate cause” under RICO.<sup>30</sup> Specifically, in *Ironworkers Local Union No. 68 v. Astrazeneca Pharmaceuticals L.P.*, the plaintiffs alleged that defendants promoted a drug for a number of uses, including off-label uses through misrepresentations. They further alleged that, as a result of these misrepresentations, “they were duped into paying hundreds of millions of dollars for [the drug,] both to treat conditions for which the drug was not approved and where less expensive, and equally safe and effective, alternative treatments existed.”<sup>31</sup> The defendants filed a motion to dismiss, arguing that the plaintiffs’ claims failed because they could not satisfy RICO’s proximate cause requirement. In response, the plaintiffs argued that the physicians’ reliance on the misrepresentations in prescribing the drug satisfied the requirement of proximate cause.<sup>32</sup>

The court rejected the plaintiffs’ argument. It found that the prescribing physicians used “their independent medical judgment to decide... the best treatment for a given patient.”<sup>33</sup> And, although the court was not addressing the class certification question, it went on to note that questions of fact would exist as to the reasons why each individual physician prescribed the drug, requiring an “individualized inquiry.”<sup>34</sup> Tying that back to the proximate cause analysis, the court reasoned that the introduction of such evidence rendered the causal nexus between the defendants’ alleged misrepresentations and the plaintiffs’ alleged injury too attenuated to satisfy the demands of proximate cause.<sup>35</sup>

The Eastern District of New York reached a similar conclusion in *Calabrese v. CSC Holdings, Inc.*<sup>36</sup> *Calabrese* denied class certification based on a lack of numerosity. The lack of a sufficient number of class members followed from the court’s conclusion that a portion of the putative class could not satisfy RICO’s proximate cause requirement because its members could not demonstrate reliance.<sup>37</sup>

*Calabrese* arose out of a cable television provider’s efforts to prevent the use of “pirate” decoder devices to gain access to cable television programming that otherwise would have resulted in a fee to the viewer. The *Calabrese* plaintiffs alleged that CSC violated RICO by threatening frivolous litigation over the possession or use of the devices as a means of exacting settlement payments.<sup>38</sup> The plaintiffs claimed they were injured when they made such payments in an effort to avoid litigation. They brought suit on behalf of themselves and every other person who had made settlement payments to CSC.

In considering the plaintiffs’ class certification motion, the court began by confronting the issue of whether the plaintiffs would be required to show reliance in order to establish proximate cause. It determined that they would, because the only misrepresentations alleged to have been made were those purportedly made to the plaintiffs. Unlike *Bridge*, the *Calabrese* plaintiffs did not claim that the defendants had made representations to any third party. Therefore, “[u]nder the circumstances of this case, where the only misrepresentations at issue are those the defendants made directly to each victim of the alleged scheme, a putative plaintiff cannot establish that his injury was proximately caused by the RICO violation if he cannot allege and prove that he personally relied on the misrepresentations.”<sup>39</sup> And if the plaintiffs were required to prove reliance, they also would be required to show that their reliance was reasonable.<sup>40</sup>

Based on that premise, *Calabrese* concluded the plaintiffs’ claims were not suitable for class treatment. It assumed without deciding that CSC had made false representations to the plaintiffs about the legality of possession or use of the decoder devices.<sup>41</sup> The court then divided the plaintiffs into two groups: (1) those who relied only upon CSC’s allegedly false representation that mere possession of the device was illegal; and (2) those who relied upon CSC’s allegedly false representation that use of the device was illegal, while at the same time asserting in affidavits filed in support of the class certification motion that they had not used the device.

The court concluded the second group could not be members of the class because they could not reasonably have relied on CSC's alleged misrepresentations. As the court saw matters, it was unreasonable for the members of this group of plaintiffs to rely upon CSC's allegedly false claim that they would suffer adverse legal consequences as the result of their use of the decoder device at the same time that they swore they had never used the device.<sup>42</sup>

Because any reliance by these putative class members' upon CSC's alleged misrepresentations could not be considered reasonable, this group could not establish RICO's proximate cause element. And without this portion of the putative class, the named plaintiffs could not satisfy Rule 23's numerosity requirement. Accordingly, *Calabrese* denied the plaintiffs' class certification motion.<sup>43</sup>

*Calabrese*, *CSC*, and *Ironworkers Local* thus demonstrate that other than the first-party reliance requirement, *Bridge* does not disturb any of the substantive requirements RICO plaintiffs must meet to make out a RICO claim. The same can be said of procedural and pleading requirements. The point was illustrated most recently in *In re Managed Care Litigation*.<sup>44</sup> In that case, a putative class of physicians alleged that the defendant health insurance providers violated RICO by conspiring to inflate profits through the delay, denial, or reduction of claims payments. The plaintiffs argued that *Bridge* eliminated the heightened pleading standard of Federal Rule of Civil Procedure 9(b) for claims of mail fraud as a predicate RICO violation. The court rejected that contention, concluding that elimination of the reliance requirement did not do away with the obligation to plead fraud with particularity. "Nowhere in [*Bridge*] did the Court hold, or even imply, that allegations of RICO mail and wire fraud do not need to comply with the 'who, what, when, where, and how' requirements mandated by Rule 9(b)." <sup>45</sup> Because the plaintiffs had failed to plead any predicate acts of fraud with the requisite particularity, the court dismissed their complaint.

A district court in the Third Circuit likewise has rejected a putative class plaintiff's attempt to use *Bridge* as a way to avoid the Third Circuit's "direct purchaser" rule. The direct purchaser rule is a standing doctrine. It limits those persons or entities permitted to sue a manufacturer for charging inflated prices to the person or entity that purchased the goods directly from the manufacturer. Purchasers farther down the chain of distribution do not have standing. This rule is designed in part to prevent manufacturers from being subjected to multiple suits for the same alleged wrongdoing, one

brought by every purchaser in the chain of distribution. Originally developed in the antitrust context, the Third Circuit recognizes that the direct purchaser rule also should be applied to RICO claims.<sup>46</sup>

In *Hale v. Stryker Orthopaedics*, the District of New Jersey rejected plaintiffs' attempt to use *Bridge* as a means to avoid application of the direct purchaser rule in a RICO case.<sup>47</sup> The *Stryker* plaintiffs alleged that the manufacturers of replacement surgical joints charged inflated prices to the physicians who implanted them in the plaintiff patients. The plaintiff patients claimed they ultimately bore the artificially inflated costs of the joints in the form of increased insurance premiums. They alleged RICO violations and various state law claims.

The defendant joint manufacturers sought dismissal of the RICO claims based on the direct purchaser rule, arguing that the plaintiffs were not the direct purchasers of the replacement joints. The plaintiffs responded by claiming *Bridge* foreclosed that assertion, on grounds that the direct purchaser rule effectively placed a reliance requirement upon them that *Bridge* had eliminated.<sup>48</sup>

The court rejected the plaintiffs' argument. It held that *Bridge* has no bearing on the direct purchaser rule. As indirect purchasers, the *Stryker* plaintiffs' reliance upon the defendants' alleged misstatements was not at issue, and thus *Bridge* was inapplicable. Accordingly, the court granted the defendants' motions to dismiss.<sup>49</sup>

These decisions demonstrate that in many of the putative class cases considered after *Bridge*, the lack of a reliance requirement has not necessarily translated into a lowering of the barriers to class certification. However, *Bridge* has played a part in decisions to certify a class in other matters, as shown in the cases discussed below.

### A Few Wins for Plaintiffs

In *Spencer v. Hartford Fin. Services Group*, the plaintiffs alleged that defendants engaged in the fraudulent practice of systematically retaining "a portion of an amount subject to a structured settlement, leaving the plaintiff with less than what they bargained for."<sup>50</sup> The plaintiffs sought class certification, and the defendants predictably attacked the proposed class on grounds of predominance. However, defendants' efforts were unsuccessful.<sup>51</sup>

Defendants opposed plaintiffs' class certification motion by arguing, in part, that common issues did not predominate. Plaintiffs rebutted the defendants' position, arguing that *Bridge* made clear that individualized personal reliance was unnecessary. The court agreed, explaining:

A material misrepresentation still must be made, however, in order to establish a “scheme to defraud,” and there must be proof that the material misrepresentation was made *in the case of* each class member, in order to make that person a part of the class.<sup>52</sup>

Indeed, the court determined that plaintiffs had to allege and prove that defendants made “standardized misrepresentations.”<sup>53</sup>

*Spencer* nevertheless concluded the plaintiffs had met that burden. It found that there was some evidence that the defendants had made standardized misrepresentations to the plaintiffs, and noted that the plaintiffs limited their proposed class definition to those persons who had received the allegedly misleading representation. Accordingly, the court concluded the plaintiffs would be able to show that the injury allegedly suffered was capable of class-wide proof on the issue of proximate cause. Based on those findings, the court certified the class (but recognized that defendants ultimately might succeed at trial on the merits).<sup>54</sup>

The District of Maryland reached a similar result in *Robinson v. Fountainhead Title Group*.<sup>55</sup> There, the plaintiff alleged that he and the other putative class members were charged fees for sham title work in connection with home purchases. The plaintiffs claimed that putative class members each received a mailing containing a title policy and cover letter, and that these mailings were a critical component of the defendant’s overall fraudulent scheme. The defendants argued that plaintiffs’ claims failed because plaintiffs had not alleged any misrepresentations in the mailing itself. The court rejected defendants’ argument as “irrelevant.” Specifically, it noted that “[i]n *Bridge*, the predicate act mailings directed to non-parties took place after fraudulent scheme was implemented and even after the injury occurred, but the Supreme Court still found them sufficient to satisfy the mailing predicate act requirement of a RICO claim based on mail fraud.”<sup>56</sup> The court thus granted the plaintiffs’ request for reconsideration of their class certification motion, based on its conclusion that even if the mailing itself did not contain a fraudulent statement, it was nonetheless an essential part of the overall scheme to defraud.<sup>57</sup>

## CONCLUSION

An argument certainly can be made that *Bridge* worked a substantial change in RICO jurisprudence by eliminating the requirement that plaintiffs plead and prove first-party reliance in making RICO claims predicated on acts of mail fraud. However, *Bridge* may not necessarily cause the tide of RICO class litigation to

rise significantly. Although there are a handful of cases that have allowed class certification at least in part as a result of *Bridge*, RICO plaintiffs still must overcome a number of hurdles before they can prosecute a RICO claim on behalf of a class. In addition to the heightened pleading and other procedural requirements that remain intact, RICO plaintiffs still must prove proximate cause as a substantive element of their case. In many if not most instances, making that showing will continue to require proof of reliance. Thus, while reliance may no longer be an absolute requirement, it will continue to play a significant role in class action RICO litigation.

*\* Karl Neudorfer is an attorney in the Houston office of Seyfarth Shaw LLP and a member of the Firm’s Commercial Class Action Defense Group. The views and opinions expressed in this article are solely those of the authors and do not reflect the views of Seyfarth Shaw LLP, its other attorneys, or its clients. Erika Birg is a partner in the Atlanta office of Seyfarth Shaw LLP and a member of the Firm’s Commercial Litigation Group, handling complex litigation including fraud and federal and state RICO claims.*

## Endnotes

1 *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. \_\_\_, 128 S. Ct. 2131 (2008).

2 *Id.*

3 Fed. R. Civ. P. 23(b)(3) (prerequisite to damages class action is finding that “the questions of law or fact common to the class members predominate over any questions affecting only individual members”).

4 1 Joseph J. McLaughlin, *McLaughlin on Class Actions* § 5:74 (5th ed. 2008).

5 18 U.S.C. § 1964(c).

6 *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457–58, 126 S. Ct. 1991, 1996–97 (2006); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265–66, 112 S. Ct. 1311, 1316–17 (1992).

7 *Bridge*, 553 U.S. \_\_\_, 128 S. Ct. 2131, 2135 (2008).

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* at 2136–37.

12 *Id.* at 1237.

13 *Id.*

14 *Id.* at 2145.

15 *Id.* at 2138 (citing *Neder v. United States*, 527 U.S. 1, 24–25, 119 S. Ct. 1827 1839 (1999) (“The common-law requiremen[t] of ‘justifiable reliance’... plainly ha[s] no place in the [mail, wire, or bank] fraud statutes.”)).

- 16 *Id.* at 2144–45.
- 17 *Id.* at 2144.
- 18 *Id.* (“In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation.... 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.”).
- 19 *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265–66, 112 S. Ct. 1311, 1316–17 (1992).
- 20 *Id.* at 268, 112 S. Ct. at 1318.
- 21 503 U.S. 258, 265–66, 112 S. Ct. 1311, 1316–17 (1992).
- 22 *Id.* at 266, 112 S. Ct. at 1311.
- 23 547 U.S. 451, 457–58, 126 S. Ct. 1991, 1996–97 (2006).
- 24 *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457–58, 126 S. Ct. 1991, 1996–97 (2006).
- 25 *Holmes*, 503 U.S. at 271, 112 S. Ct. at 1311.
- 26 *Anza*, 547 U.S. at 457, 126 S. Ct. at 1996.
- 27 *Id.* at 458–59, 126 S. Ct. at 1997.
- 28 *Bridge*, 553 U.S. at \_\_\_\_, 128 S. Ct. at 2144.
- 29 *Id.*, 128 S. Ct. at 2144 (“[T]he fact that proof of reliance is often used to prove an element of the plaintiff’s cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action.... Nor does it transform first-party reliance into an indispensable requisite of proximate causation.” (citation and internal quotation marks omitted)).
- 30 *Ironworkers Local Union No. 68 v. Astrazeneca Pharmaceuticals L.P.*, 585 F. Supp. 2d 1339, 1341–42 (M.D. Fla. 2008).
- 31 *Id.* at 1342.
- 32 *Id.*
- 33 *Id.* at 1344.
- 34 *Id.*
- 35 *Id.*
- 36 No. 02-CV-5171 (DLI) (JO), 2009 WL 425879 (E.D.N.Y. Feb. 19, 2009) (order adopting Magistrate Judge’s Report & Recommendation).
- 37 *Id.* at \*13–14.
- 38 *Id.* at \*1.
- 39 *Id.* at \*12.
- 40 *Id.* at \*12.
- 41 *Id.* at \*13.
- 42 *Id.* at \*13–14.
- 43 *Id.* at \*1.
- 44 Nos. 00-1334-MD and 03-21296-CIV, 2009 WL 812257 (S.D. Fla. Mar. 26, 2009) (order adopting Magistrate Judge’s Report & Recommendation).
- 45 *Id.* at \* 8.
- 46 *McCarthy v. Recordex Servs. Inc.*, 80 F.3d 842, 855 (3d Cir. 1996).
- 47 No. 08-3367 (WJM), 2009 WL 321579 (D. N.J. Feb. 9, 2009).
- 48 *Id.* at \*4.
- 49 *Id.*
- 50 *Spencer v. Hartford Fin. Servs. Group*, No. 3:05-CV-1681(JCH), 2009 WL 637676, at \*1 (D. Conn. Mar. 10, 2009).
- 51 *Id.*
- 52 *Id.* at \*12.
- 53 *Id.*
- 54 *Id.* at \*13.
- 55 No. WMN-03-3106, 2009 WL 539882 (D. Md. Mar. 3, 2009).
- 56 *Id.* at \*2.
- 57 *Id.*