

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ROBERT G. HOLMES, Petitioner, v. SECURITIES
INVESTOR PROTECTION CORPORATION, ET AL.

CASE NO: 90-727

PLACE: Washington, D.C.

DATE: Wednesday, November 13, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ROBERT G. HOLMES, JR., :

4 Petitioner :

5 v. : No. 90-727

6 SECURITIES INVESTOR PROTECTION :

7 CORPORATION, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, November 13, 1991

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 12:59 p.m.

14 APPEARANCES:

15 JACK I. SAMET, ESQ., Los Angeles, California; on behalf of
16 the Petitioner.

17 G. ROBERT BLAKEY, ESQ., Notre Dame, Indiana; on behalf of
18 the Respondents.

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1 P R O C E E D I N G S

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 90-727, Robert G. Holmes v. The Securities
5 Investor Protection Corporation.

6 Mr. Samet.

7 ORAL ARGUMENT OF JACK I. SAMET

8 ON BEHALF OF THE PETITIONER

9 MR. SAMET: Chief Justice, and may it please the
10 Court:

11 The question this case presents is whether a
12 party, which was neither a purchaser nor seller of
13 securities, and for that reason lacks standing to sue for
14 securities fraud under the Exchange Act, section 10(b) and
15 rule 10b-5, may nevertheless sue for the same conduct --
16 security-based fraud in the sale of securities -- as a
17 predicate act of racketeering activity under RICO.

18 In order to answer this question, the Court will
19 be called upon to construe section 1964 --

20 QUESTION: Did you say predicate act?

21 MR. SAMET: Yes, a predicate act of racketeering
22 activity.

23 QUESTION: Not a predicate crime, is that it?

24 MR. SAMET: Well, I think they're pretty
25 much --

1 QUESTION: Or a predicate violation of law?

2 MR. SAMET: Well, I would prefer the term
3 "predicate act" because it's neutral. As you'll see in my
4 argument, I don't think necessarily all of these things
5 are crimes, although I believe the overwhelming import in
6 the criminal portion of RICO is to delineate crimes.

7 I think when we're talking about --

8 QUESTION: This is civil?

9 MR. SAMET: -- civil RICO, we're not speaking
10 about crimes. I think we're speaking about a crime only
11 in so far as it a -- as it is a component of an element of
12 a civil cause of action. I think it makes a difference,
13 and I'll try to get to that.

14 But I do agree that RICO is a criminal act, and
15 that it purports to delineate crimes, but it also purports
16 to delineate acts more generally.

17 QUESTION: Yeah, but you're going to be -- I
18 suppose you're going to be arguing that if this conduct
19 wasn't a violation of the securities law, it can't be a
20 predicate act.

21 MR. SAMET: You're absolutely correct. That is
22 exactly --

23 QUESTION: But aren't you arguing then that the
24 act has to be a violation of the securities law?

25 MR. SAMET: The act -- well, there are different

1 schools of thought as to what --

2 QUESTION: Well, you go ahead. I'm sorry I
3 interrupted.

4 MR. SAMET: No, there are different schools of
5 thought as to exactly what the nature of the conduct is
6 that defines the RICO predicate acts. In any event, this
7 Court will be called upon to construe the following three
8 key phrases. Section 1964(c) states, any person injured
9 in his business or property -- and the Court will be
10 called upon to construe the meaning of "injured in his
11 business or property" -- by reason of -- and the Court
12 will be called upon to construe the meaning of the phrase
13 "by reason of" -- a violation of section 1962. And that,
14 Justice White, gets into your question about what is a
15 violation of 1962.

16 I think the RICO Act means 1962 defines certain
17 wrongful acts or crimes, whatever you like, and it then
18 incorporates -- it says you cannot commit a pattern of
19 racketeering activity with respect to these crimes or
20 acts. And then the definition of racketeering activity in
21 section 1961 lists about 36 crimes or acts, and one of
22 them is fraud in the sale of securities. That's the one
23 we'll be talking about today.

24 QUESTION: May I just interrupt there?

25 MR. SAMET: Sure.

1 QUESTION: Do you not assume for purpose of your
2 argument that such a fraud actually occurred, that there
3 was a predicate act. You just challenge the causal
4 connection between it and your client.

5 MR. SAMET: I must assume it in this posture of
6 the case because we're here on a motion for summary
7 judgment. At trial we'll contest it, but I do agree that
8 for purpose of this argument we assume there was a fraud
9 because it --

10 QUESTION: And therefore -- and also a predicate
11 act.

12 MR. SAMET: Well, no, I think not. Because
13 there was no standing. I think, absent standing,
14 there --

15 QUESTION: Well, but standing doesn't affect
16 whether the act occurred, does it? Because -- it affects
17 whether --

18 MR. SAMET: Well, I think it does the way -- I'm
19 sorry. Go ahead.

20 QUESTION: Well, I can understand your argument
21 that there's no standing here, no causal connection and
22 all, but if the violation of 10b occurred, and that's a
23 predicate act within the statute, I don't understand why
24 you don't concede there was a predicate act, but merely
25 argue that it didn't have the necessary causal connection.

1 MR. SAMET: Because I think -- well, I do make
2 those additional arguments, but I think standing is an
3 element of the cause of the civil cause of action, which
4 is what I think RICO intends to incorporate when it talks
5 about fraud in the sale of securities.

6 QUESTION: Do you think Blue Chip holds that in
7 10b-5, that there's no 10b-5 violation at all?

8 MR. SAMET: No, but I think that the Blue Chip
9 means that there's no 10b violation for which anyone can
10 sue if there's no standing. And RICO is intended, I
11 believe, to incorporate the wisdom of Blue Chip. So I
12 think they are related to each other.

13 I think -- I think that the restatement of the
14 question here essentially is, is the Securities Investor
15 Protection Corporation, SIPC, a person or a party that was
16 injured by reason of this alleged fraud in the sale of
17 securities.

18 QUESTION: Isn't it agreed that SIPC is simply
19 here standing in the shoes of investors who themselves
20 could not have met the Birnbaum test?

21 MR. SAMET: Not at all, Your Honor. Not at all,
22 Chief Justice. For the reason that I believe that the
23 record shows and the law is that SIPC is not subrogated to
24 any of those claims. There are two -- SIPC essentially
25 paid out money to two categories of investors, people who

1 were customers of the failed brokerage firm. They paid
2 out money to investors who bought and sold the allegedly
3 manipulated securities, and they paid out money to people
4 who didn't.

5 Now, as to the people who did buy and sell the
6 allegedly manipulated securities, they commenced a class
7 action. It was settled. They got their recovery. So
8 SIPC can't be subrogated to their claim, because it's
9 already been exercised. As to the people who didn't buy
10 or sell the allegedly manipulated securities, SIPC can't
11 be subrogated to their claim because they, like SIPC, are
12 too remote from the event to have a claim in the first
13 place.

14 Furthermore, the Ninth Circuit held that the
15 only way SIPC can acquire a subrogation right -- and this
16 is in an earlier case. This is the third time this case
17 has reached the Ninth Circuit. In an earlier case, which
18 is in the record, the Ninth Circuit held that SIPC is
19 subrogated to any fraud claims if and only if the brokers
20 who SIPC came in to pay out exercised unauthorized use of
21 customer funds to buy the manipulated securities. That
22 didn't happen. Discovery has established that didn't
23 happen, so there's no fraud claim for SIPC to be
24 subrogated to.

25 And therefore, SIPC cannot come here as a

1 subrogee. We must look at SIPC only as SIPC and ensure,
2 if you will, that paid out monies, and not as a subrogee,
3 because there is no subrogation.

4 In addition, Your Honor -- I'm sorry, Chief
5 Justice --

6 QUESTION: Can I interrupt for -- right there?

7 MR. SAMET: Sure.

8 QUESTION: As to the category of customers who
9 purchased or sold the manipulated securities, and who had
10 their own class action and recovered some of their own
11 money, did that recovery not reduce the obligation of SIPC
12 to pay to them their losses?

13 MR. SAMET: I don't think it worked that way.
14 It probably should have --

15 QUESTION: So they got a double recovery, in
16 effect?

17 MR. SAMET: That's the problem. That's -- you
18 have hit, Justice Stevens, on exactly the problem of
19 allowing SIPC a recovery here. There would be a double
20 recovery, and since it's RICO, it would be a sextuple
21 recovery.

22 QUESTION: Well, we didn't grant certiorari to
23 review SIPC's separate standing. We thought we were
24 taking a case that simply involved a question of, for
25 instance, posed in section 2 of the questions presented,

1 whether a person has standing under RICO when they
2 wouldn't have if they were just going under a straight
3 Securities Act claim. Why do we need to get into all of
4 these ramifications of what SIPC did or didn't do?

5 MR. SAMET: I don't think you do. SIPC's brief
6 raises them, and therefore, I'm responding to the
7 questions from the Court and anticipating them in SIPC's
8 position. But I will tell you, totally apart from the
9 uniqueness of SIPC -- and I agree, that's not the larger,
10 more interesting question. The larger, more interesting
11 question is do we have -- you're looking at SIPC as SIPC,
12 not as a subrogee -- do we have a situation in which SIPC
13 was injured by reason of the alleged violation.

14 And I'd like to get into the facts and show why
15 I think we do not have such a situation.

16 QUESTION: Well, let me just ask you one
17 question. I think it's related to what we've granted
18 certiorari.

19 Supposing there had been no lawsuit by the
20 customers of these firms that had purchased and sold
21 securities, that they lost their money when the brokerage
22 firm went bankrupt. And the amount paid by SIPC to them
23 was precisely the amount that they lost in making
24 purchases and sales of the manipulated securities. Would
25 you say, then, that there was no standing on the part of

1 SIPC to reimburse?

2 MR. SAMET: No. If in fact it was a valid
3 subrogation to people who had a claim, who were themselves
4 purchasers and sellers of securities, there would be a --
5 there would be standing, and I wouldn't be able to make
6 the argument I'm making.

7 I'm making the argument --

8 QUESTION: So doesn't our answer in this case
9 depend on the extent to which there is subrogation of
10 claims of purchasers or -- the extent to which SIPC
11 reimbursed persons who had valid claims?

12 MR. SAMET: Unfortunately, in part, it does.
13 This is not a case that purely raises the purchaser-seller
14 issue. It does raise these related questions of who SIPC
15 is and what it did. But I'm trying to address, and I
16 think the Court is most interested in, the pure question.
17 Unfortunately, the question of less general interest comes
18 from this record and cannot be avoided.

19 But discussing the pure general question of do
20 we have here -- is SIPC, in its own capacity, a purchaser
21 or seller of securities, which it clearly was not, and
22 therefore, does it have standing, I'd like to ask the
23 Court to look at the key phrases in RICO. First, "the
24 injured in his business or property" phrase. What that
25 has come to mean in the decisions of this Court and other

1 courts is essentially that a person must be directly
2 injured in their business or property.

3 If, for example, a corporation is the target of
4 a racketeering act, a shareholder cannot sue for injury to
5 the corporation because the shareholder was not the direct
6 victim; the corporation was. Cases have held that if a
7 union is the target of racketeering activity, the union
8 member may not sue for RICO because it was not the
9 directly injured victim; the union was.

10 Well, here --

11 QUESTION: So that argument is the same whether
12 or not it's a securities violation, which is the alleged
13 predicate act, or any other violation?

14 MR. SAMET: Absolutely. That's absolutely
15 correct. And here -- indeed, I think the purchase or
16 seller implication in the doctrine of standing comes
17 directly from the general principals of RICO. You don't
18 have to focus on securities law to reach the same
19 conclusion. I completely agree with you, Justice Kennedy,
20 that looking at the general concept of RICO, SIPC here is
21 not a person who was directly injured. The direct victims
22 --

23 QUESTION: But your argument depends on our
24 looking first to find out in what capacity SIPC brought
25 the suit, whether it was subrogee for purchasers of

1 manipulated securities or something else.

2 MR. SAMET: It doesn't matter, Justice O'Connor.
3 You reach the same result either way because, on this
4 record, there is nothing for SIPC to be subrogated to, and
5 therefore, this Court is faced with a pure question.

6 If there were a viable argument that SIPC is
7 subrogated to a claim, then you could go off on a
8 subrogation issue. But there isn't. SIPC isn't
9 subrogated to anything. I'm addressing that because SIPC
10 talks about it. But if one accepts the notion that SIPC
11 isn't subrogated to anything, then one reaches the general
12 question. And I think that's this case.

13 I think SIPC is subrogated to nothing, and we
14 reach the general question. And the general
15 question -- the first proposition on the general question
16 is that we do not have a party that was directly injured.
17 SIPC was not directly injured. If there were direct
18 victims, it were the purchasers and sellers of these
19 allegedly manipulated securities, not SIPC.

20 The second important point, I believe, is that
21 any injury to SIPC was not by reason of the alleged fraud
22 in -- of the sale of securities. And what I mean by that
23 is that this Court has said in *Sedima*, "by reason of"
24 requires the showing of a proximate causal connection
25 between the harm complained of -- here the alleged

1 securities violation -- and the actual injury: SIPC
2 paying out money.

3 Here there were many, many intervening events.
4 The harm complained of operated on the purchasers and
5 sellers of securities. Now, in addition, for that to
6 happen, it had to be the case that these two brokerage
7 firms took a large position in the allegedly manipulated
8 securities. And it had to be the case that the brokerage
9 firms were otherwise in precarious financial condition,
10 and therefore, taking this position and these securities
11 caused their financial demise.

12 It had to be the case that SIPC comes in and
13 says, well, let's make the failure of these brokerage
14 firms subject to SIPA. And it had to be the case that the
15 composition of the assets of the defunct brokerage firms
16 was such that they could not pay out or simply give to the
17 customers of the brokerage firms their securities. All of
18 those events, none of which were intended or foreseen by
19 the persons that allegedly committed the securities fraud,
20 had to occur before SIPC would sustain the loss that it
21 sustained.

22 This is causation run rampant, attenuated
23 causation, the kind of speculation in causation that goes
24 way beyond the bounds of proximate cause and should not be
25 tolerated.

1 QUESTION: Mr. Samet --

2 QUESTION: May I interrupt there? You've put in
3 an awful lot of events. Supposing that all that was
4 involved is that the brokerage firm itself had taken a
5 large position in manipulated securities and there -- and
6 that was the only thing that caused it to fail. And as a
7 result of the failure, SIPC had to pay a lot of money to
8 its customers.

9 MR. SAMET: Well, we have an even clearer case
10 here because the brokerage firm -- the trustees of the
11 brokerage firm are themselves parties to the action, the
12 brokerage firm did take a position in the securities, and
13 we're not challenging the trustees' standing. We're
14 challenging SIPC's standing. So I agree with the
15 implication of your question that if the brokerage firm
16 was itself a purchaser or seller, we wouldn't have the
17 argument we have.

18 But it's SIPC that's coming in, and they're not
19 a purchaser or seller, and therefore, we have the argument
20 on standing that we wouldn't if the brokerage firm were
21 the only plaintiff, or the trustees were the only
22 plaintiffs.

23 QUESTION: I'm still not sure what your answer
24 is. If the record showed that the only reason the firm
25 failed was because it made purchases of the manipulated

1 securities, and that's the only reason SIPC paid any money
2 to the firm, would there be sufficient direct causation?

3 MR. SAMET: That would be a closer, harder
4 question. It's not the question we now have --

5 QUESTION: Well, what's the answer to that
6 question?

7 MR. SAMET: Well, that's the one you don't have
8 to write an opinion on. I would --

9 QUESTION: Well, but I think you're general
10 approach to it might decide that case.

11 MR. SAMET: I don't think so.

12 QUESTION: Because you said, as I understand
13 you, that unless SIPC itself were a purchaser or seller of
14 securities, it has no RICO claim.

15 MR. SAMET: Well, I think the logic of the
16 general approach, and I agree you presented a tougher case
17 than the one we have here today, but the logic of the
18 general approach is that if you ain't a purchaser or
19 seller, you ain't got standing.

20 QUESTION: I'm surprised you found that a hard
21 question, Mr. Samet. I -- given your approach, I would
22 think that's an easy question.

23 MR. SAMET: Well, I think any question this
24 Court poses, I recognize is a hard question.

25 QUESTION: Well, unless you think that somehow,

1 simply because you are 'a but for -- a but-for cause is a
2 direct cause.

3 MR. SAMET: No, a but-for cause is not a --

4 QUESTION: All that the question showed is a
5 clear but-for cause. Is there no difference between a
6 but-for cause and a direct cause?

7 MR. SAMET: Well, are you using direct cause in
8 the sense of proximate cause or not in your question?

9 QUESTION: That's the way you're using it, isn't
10 it? I'm using it the way you're using it. I thought you
11 meant proximate cause.

12 MR. SAMET: I do. I do.

13 QUESTION: Well, one could be a but-for cause
14 without being a proximate cause.

15 MR. SAMET: Absolutely. Absolutely. And that's
16 what we have --

17 QUESTION: So then why was it a hard question?

18 MR. SAMET: That's what we -- as I say, I'm
19 trying to be polite and respectful. I think I've answered
20 the question, I didn't find it that hard to do.

21 QUESTION: (Inaudible) anyway.

22 MR. SAMET: Maybe it wasn't that hard, but in
23 any event --

24 QUESTION: Then again, what is the answer?

25 (Laughter.)

1 MR. SAMET: The answer is, in my view, if you
2 are not a purchaser or seller you are not causally
3 connected, proximate cause, by reason of the alleged harm.
4 That's my answer. But again, I can see where you're
5 coming from, and I think I can --

6 QUESTION: Even though -- even though but for
7 the illegal conduct, the SIPC would not have had to pay
8 any money.

9 MR. SAMET: Yes. And that's Justice Scalia --
10 that's the point in Justice Scalia's question. There's a
11 difference between but-for causation and proximate
12 causation, and I do want to be clear about that, if I
13 wasn't clear about anything else. But-for causation is
14 not enough to establish the by reason of requirement to be
15 satisfied. It's got to be proximate causation.

16 I don't think there is proximate causation if
17 you're not a purchaser or seller of securities. I don't
18 think you can get that causal connection.

19 QUESTION: Now what if the predicate acts relied
20 on are wire fraud or mail fraud? Does that alter the
21 analysis in some way?

22 MR. SAMET: I'm very glad you raised that
23 question. I don't think it alters the analysis at all.
24 And indeed, what has happened in litigation generally, and
25 in this litigation, is people with a simple turn of

1 phrase -- and that's what SIPC did in this complaint, they
2 pled alternatively securities fraud and/or wire and mail
3 fraud. But the analysis is exactly the same.

4 QUESTION: Well, of course, for wire fraud or
5 for mail fraud, do you still have to -- you say there
6 still has to be a purchaser or seller?

7 MR. SAMET: Yes, for the reason that the
8 provisions of 1964(c), the requirement that injury be to a
9 person's business or property, meaning direct injury, and
10 that the injury be by reason of, meaning proximate causal
11 connection, those two requirements come from 1964(c),
12 which applies to all predicate acts. And therefore, they
13 apply whether you're talking wire/mail fraud, or whether
14 you're talking securities fraud.

15 QUESTION: Well, then as presented so far, your
16 argument doesn't depend on our opinion in Blue Chip
17 Stamps. It's an interpretation of the RICO section
18 itself.

19 MR. SAMET: That's absolutely true, Mr. Chief
20 Justice, but you were correct in saying as presented so
21 far. I've not gotten to the point yet, as I'm about to,
22 to discuss Blue Chip.

23 QUESTION: You're getting to the third point,
24 are you?

25 MR. SAMET: I've got at least three, yes.

1 Three, and I'll go more if I'm permitted.

2 QUESTION: You might think of more on the way,
3 is that it?

4 MR. SAMET: I will keep going as long as I can.

5 QUESTION: All right.

6 QUESTION: Well, anyway, you've gotten -- you've
7 got through two of them.

8 MR. SAMET: Yes. And the third -- the third one
9 has to do with in effect, Blue Chip, and that is this:
10 that the RICO predicate act is defined as fraud in the
11 sale of securities. And that's a very interesting
12 definition of a predicate act, it contrasts with the other
13 predicate acts in the statute. All the other predicate
14 acts define crimes as crimes, for example, murder,
15 kidnappings, State crimes -- and also Federal crimes by
16 citation to Federal statutes.

17 If there was going to be a parallel
18 incorporation of a securities crime, it should have said,
19 for example, any violation of section 32 of the Securities
20 Exchange Act, which is what criminalizes securities law
21 violations. It doesn't say that. It says something much
22 more narrow. It says fraud in the sale of securities. It
23 also doesn't say any fraud in connection with securities.
24 That would be fraud.

25 But no, this predicate act is more narrowly

1 drafted. Fraud in the sale of securities. That makes the
2 concept of sale central. And that brings us, in my view,
3 to the Chief Justice's excellent opinion when he was an
4 associate justice in Blue Chip Stamp, which spoke about
5 what the requirements were for standing with respect to
6 fraud in the sale of securities. And those
7 principles -- that decision in 1975, was based upon, and
8 involved from a principal of law back in the Birnbaum
9 case, dating back to 1952, a Second Circuit case. And
10 those principles were accepted ever since 1952, even
11 earlier, really. They've existed in securities law for 40
12 years, and when RICO was passed in 1970, Congress
13 reflected no intention to overrule, subvert, circumvent,
14 do away with, existing securities laws, principles, and
15 decisions.

16 And so that standing limitation that comes from
17 Blue Chip should be carried forward when looking at RICO.
18 And RICO talks about fraud in the sale of securities
19 because that's a piece of learning, basic learning, about
20 what fraud in the sale of securities is and involved, and
21 it's a settled, litigated matter at the Supreme Court
22 level, that is a decision that there was no objection to
23 at all anywhere in the congressional history of RICO.

24 So it seems to me we have here all but an
25 incorporation by reference in the listing of predicate

1 acts of this decision in Blue Chip, and the whole
2 developed notions of securities law and standing
3 surrounding it. And they carry with it certain principles
4 of standing.

5 Congress didn't intend to overrule those
6 principles. They should be carried forward into RICO when
7 RICO incorporates fraud in the sale of securities as a
8 predicate act.

9 So those are the principal reasons why I think
10 essentially we have a situation where the very language of
11 section 1964(c) in its three component parts, "injured in
12 his business or property," "by reason of," and the
13 definition of "racketeering act," all, as far to the sale
14 of securities, all lead to the same conclusion -- namely,
15 the requirement of civil law with regard to standing in
16 securities laws is -- applies in RICO either because of
17 the way RICO was drafted or because of what RICO
18 incorporates by reference. But either way, one reaches
19 the same result.

20 Now, there are a couple of arguments that I've
21 seen in SIPC's brief, and I'm sure that the Court has
22 looked at them and has considered them, and I'd like to
23 comment on them for a moment. One has to do with the
24 principle of broad construction. SIPC says RICO is to be
25 construed broadly. True enough. RICO is to be construed

1 broadly. But broad construction does not mean
2 construction in contradiction of the plain meaning of the
3 words of the statute.

4 And what we are arguing here --

5 QUESTION: Well, why is RICO to be construed
6 broadly? Is that something this Court has said?

7 MR. SAMET: This statute says it.

8 QUESTION: The statute says it.

9 MR. SAMET: The statute says it. And also, I
10 think that this Court has managed to decide cases by not
11 viewing the statutory mandate to construe RICO broadly as
12 central to this Court's decision. I think that's a
13 correct approach. I don't think --

14 QUESTION: What does the statute say?

15 MR. SAMET: The statute at some point says -- I
16 don't have the section offhand -- says that RICO is to be
17 construed liberally to effectuate its remedial purposes.
18 That's in the RICO statute. That's a statutory mandate.

19 I don't think that statutory mandate need or
20 should govern or even applies to your decision, but SIPC
21 thinks it does. It's in their brief, so I'm raising it to
22 talk about. I think that all "broad meaning" means is
23 that you should look at the plain meaning of the words,
24 apply them fairly. And when one does that here, one
25 reaches a conclusion, I believe, that there's no standing.

1 So I don't think the requirement that RICO be construed
2 broadly, if it is a requirement, need dictate your
3 decision.

4 The second argument that SIPC has raised, which
5 I think should not persuade this Court -- and I'd like to
6 deal with it just to be sure, if there are any questions
7 on it -- has to do with the express and implied limitation
8 or differentiation. SIPC says, pointing back to the Blue
9 Chip decision -- which SIPC -- by the way, SIPC doesn't
10 even recognize it's bound by Blue Chip. In one of it's
11 footnotes, SIPC suggests that Blue Chip, unfortunately
12 precludes SIPC from recovering. Blue Chip -- it's not
13 unfortunate, it's correct law.

14 But in any event, Blue Chip evolved from section
15 10(b) and rule 10b-5, and judicially implied causes of
16 action. RICO, of course, is express. The Ninth Circuit
17 and SIPC have tended to put significance of that and have
18 said that because RICO is express and Blue Chip is dealing
19 with implied remedy, somehow the construction of them
20 should be different, or the construction of RICO should be
21 more broad because one is dealing with an express statute.
22 But if one looks at what it is that's expressed in
23 1964(c), what the express -- statute expresses, it has the
24 very limitations on it that we are arguing for -- namely,
25 that the injury must be by reason of, and it must be

1 injury to the business or property of the claimant.

2 Now there is another aspect of the case, which
3 again is unique to SIPC, does not involve the general
4 principal, but I think it needs to be address only because
5 I think this Court should deal with the general principal,
6 and it would be unfortunate -- unfortunate, I think, for
7 the case law in general -- if the Court focuses only on
8 the nature of SIPC, so I would like to briefly address
9 that for a second.

10 Because SIPC argues that they have a special
11 status, and somehow, whatever the general rule is should
12 not apply to them. That's in SIPC's brief. I'd like to
13 make clear, in the event it isn't already so, that SIPC is
14 not a Government agency, that SIPC is not a successor in
15 interest to the brokerage firm. That's the trustees. And
16 the trustee standing is undisputed. They've got standing.
17 They're in the case.

18 That SIPC is not an agency trained in
19 prosecutorial discretion. SIPC is not the Department of
20 Justice; SIPC is not the Securities and Exchange
21 Commission. Though SIPC is statutorily mandated, it is
22 essentially mandated, it is a private system of mandatory
23 assessments against securities brokerage firms.

24 So I don't think that SIPC deserves that the
25 special status that would be accorded the Department of

1 Justice in a criminal prosecution. This isn't the
2 Department of Justice; it isn't the criminal prosecution.

3 QUESTION: Can you tell me whether the record
4 shows the extent to which SIPC -- when it makes payments
5 like they made here, some, I don't know, \$12 million or
6 whatever it was -- to what extent are they subrogated to
7 the rights of the person to whom they made the payment?
8 Does the record tell us?

9 MR. SAMET: That's a matter of dispute. I would
10 say that we could look at the record and argue about it.
11 But SIPC would say that they are subrogated. We would say
12 that they are subrogated only to claims against the
13 brokers and not necessarily to all third-party claims.
14 And we would say the Ninth Circuit said in this case that
15 they're not subrogated to claims against -- to fraud
16 claims against third parties. And SIPC did not appeal
17 that determination.

18 QUESTION: So you would take the position
19 they're not subrogated.

20 MR. SAMET: That's correct.

21 QUESTION: It would seem to me it would help you
22 to take the position they were subrogated in order to
23 avoid your client's risk of double recovery.

24 MR. SAMET: No, I think if I take the position
25 they're subrogated, then maybe they can -- they can

1 acquire the claim of a purchaser of seller. If I take the
2 position they're not subrogated, they can't get near a
3 purchaser or seller.

4 QUESTION: No, but the purchaser or seller's
5 going to sue. Well, I don't understand. I'm sorry.

6 MR. SAMET: I'm sorrier.

7 Thank you. I'd like to reserve my remaining
8 time for rebuttal.

9 QUESTION: Very well, Mr. Samet.

10 Mr. Blakey, we'll hear from you.

11 ORAL ARGUMENT OF G. ROBERT BLAKEY

12 ON BEHALF OF THE RESPONDENTS

13 MR. BLAKEY: Chief Justice Rehnquist, may it
14 please the Court:

15 Must every person injured in his business or
16 property by reason of a violation of the Racketeer
17 Influenced and Corrupt Organizations Act, when the
18 predicate offenses are securities fraud, mail fraud, and
19 wire fraud, be a purchaser and seller -- or seller to have
20 a claim for relief?

21 Mr. Holmes says yes. Securities Investor
22 Protection Corporation says no. SIPC's arguments may be
23 summarized in three words and three short paragraphs:
24 text, text, text. RICO expressly incorporates by
25 reference the express criminal provisions of the

1 Securities and Exchange Act of 1934. It does not
2 incorporate the '34 act's judicially implied civil claim
3 for relief. As such, the purchaser-seller limitations on
4 the implied private enforcement mechanism of the 1934 act,
5 recognized by this Court in 1975 in Blue Chip, are simply
6 not relevant under RICO's expressed private enforcement
7 act.

8 QUESTION: Is there some questions, though,
9 about how direct the injury must be for purposes of a RICO
10 claim? There's some discussion of that in some lower
11 court cases, I take it, dealing with shareholders of
12 corporations and union members and the like.

13 MR. BLAKEY: There is indeed. The phrase
14 "injured in his business or property" has been
15 understood -- and properly, I think -- in the context of
16 corporations to exclude shareholders, in the context of
17 unions to exclude members, in the context of counties to
18 exclude taxpayers.

19 QUESTION: Well, the argument is made here that
20 SIPC similarly stands in an indirect relationship to this
21 claim.

22 MR. BLAKEY: Well, if the relationship between a
23 broker and his customers, which is the relationship we
24 deal here, has as its best common law analogue,
25 bailor-bailee, and the classic position has been between

1 bailor-bailee, that either has the ability to sue for
2 injury to the property. I would suggest to you, Justice
3 O'Connor, however, that this relationship is not the
4 common law relationship of bailor-bailee, but the
5 peculiarly statutory relationship of a customer and a
6 broker-dealer.

7 QUESTION: Would you explain to me, if you
8 would, please, the capacity in which SIPC's suit is before
9 us here? Are you subrogated? Is SIPC suing as a subrogee
10 of anybody who had bought manipulated securities?

11 MR. BLAKEY: It is suing in several capacities
12 for several claims. It is not suing for, at this time, as
13 a subrogee of any of the customers that had a
14 purchaser-seller 10b-5 claim. That's a separate claim and
15 a separate cause of action. And this record indicates
16 that SIPC was unable to show that any of the customers on
17 behalf -- it's speaking --

18 QUESTION: And you still won the case.

19 MR. BLAKEY: We still won the case, Justice
20 White, because we are suing as a subrogee of customers who
21 were not purchaser-sellers. And under the peculiar
22 provisions of SIPA, we are a real party in entrance in all
23 matters growing out of liquidations, and thus, we have a -
24 - are entitled to be heard for all claims that can be
25 asserted by the trustee. And we are, in addition,

1 subrogated to the trustees' claims insofar as we have paid
2 him or advanced him money.

3 So we are here, not in our own right. We do not
4 stand in our own shoes; we stand in the shoes of customers
5 who are not purchaser-seller, who were nonetheless
6 injured.

7 And we stand in parallel shoes, statutorily,
8 with the trustee itself.

9 QUESTION: Was that the theory of the court of
10 appeals?

11 MR. BLAKEY: Your Honor, what's happened
12 between --

13 QUESTION: Well, was it or not?

14 MR. BLAKEY: No. The only issue faced --

15 QUESTION: What -- are you defending the court
16 of appeals rationale?

17 MR. BLAKEY: I am -- yes.

18 QUESTION: That isn't the rationale you just
19 stated.

20 MR. BLAKEY: Justice White, I'm -- an
21 interesting thing happened between the court of appeals
22 and the Supreme Court.

23 QUESTION: That's not strange.

24 (Laughter.)

25 MR. BLAKEY: The argument that was presented in

1 the court of appeals was basically an interpretation of
2 the phrase "any person." And we took the not unusual
3 position that "any person" didn't mean any purchaser and
4 seller.

5 And what's happened between the court of appeals
6 and the Supreme Court is my good friend has moved off to
7 the right a little bit and is trying to get the
8 purchaser-seller limitations in through the back door.
9 Having failed to get it in through any person, he's
10 attempting to insert it in through "injury to business or
11 property" or "by reason of."

12 And we raised in the brief that this is perhaps
13 not within the petition for cert. Nevertheless, I am
14 perfectly willing to discuss that with the Court since you
15 surely have discretion to hear anything that you want. To
16 the degree that he's challenged my "in my business or
17 property" standing, to degrees that he has challenged my
18 "injury by reason of," I have felt duty bound to answer
19 those arguments. I need not answer them to support the
20 court of appeals. Nevertheless, the court of appeals is
21 equally supported in its own terms in arguments that I
22 have made here today.

23 QUESTION: May I ask you a question at this
24 point? You point out there are three categories of
25 claims: those by the individuals and sellers who are

1 suing on their own, and you're not subrogated as to them;
2 the intermediate non-purchaser or seller-customer claims;
3 and third, the firm claims themselves, where you are
4 subrogated.

5 MR. BLAKEY: That's correct.

6 QUESTION: Now, my question is this. Supposing
7 that the combination of recoveries in the first and third
8 categories exceeds or equals the amount of damage done by
9 the defendants. Are you still entitled to recover
10 something additional for the second category of claims?

11 MR. BLAKEY: Well, I have to kind of go back
12 through and figure it out. The way it works out, there's
13 no double recovery. If the parties themselves -- if the
14 purchaser-seller customers recover --

15 QUESTION: 100 cents on the dollar.

16 MR. BLAKEY: 100 cents on a dollar, and we did
17 not reimburse any of them, that takes care --

18 QUESTION: Oh, so they would not be -- okay.

19 MR. BLAKEY: That's not taking any -- take care
20 of --

21 QUESTION: All right. Then there's a category
22 of nonpurchaser-seller customers whom you did reimburse.

23 MR. BLAKEY: That's correct. We now stand in
24 their shoes.

25 QUESTION: And assume that the wrongdoers have

1 paid the firm everything it tortiously took from this
2 firm, and the other customers, everything that they lost.
3 Are you still entitled to recover for the --

4 MR. BLAKEY: If everybody has been paid off
5 everything --

6 QUESTION: Well, not the category that you've
7 had to reimburse, because they were presumably hurt by
8 other -- you know, this is not the sole cause of the
9 failure of this firm.

10 MR. BLAKEY: Well, Your Honor, I think it's
11 really appropriate to talk about how this firm went under.
12 This firm did not go under simply by a fraud in the
13 purchase and sale of security. The underlying challenge
14 here is to have schemed to defraud. And in the scheme to
15 defraud, we had factually a situation where -- and maybe I
16 should explain the record here.

17 Mr. Holmes' co-conspirator, Mr. Lugo, took stock
18 out of proprietary account in First State, and moved it
19 into Mr. Holmes' account. And the reason he did that is
20 he would avoid his liquidity crisis that would come from
21 the discount for the stock in the proprietary account.

22 He did that for one purpose and one purpose
23 only, to hide the fact that he had a net capital
24 deficiency. Because he was able to hide the fact that he
25 had a net capital deficiency, he was able to stay in

1 business for a longer period of time. And not only did he
2 go under, and had he not done it, he would have gone under
3 for about \$700,000 -- he -- not only he went under, but he
4 took in Sebag in California. He hid that, not from
5 purchaser-sellers. He hid that from the regulatory
6 system. And we are part and parcel of the regulatory
7 system.

8 The scheme to defraud that did in these two
9 broker-dealers is a scheme that transcends fraud on
10 individual purchaser and sellers who were customers. It's
11 a fraud against the broker-dealer and it's a fraud against
12 the regulatory system as well.

13 Let me give it to you as a practical example.
14 Suppose a terrorist group wanted to engage in fundraising
15 activities and they decided to work a life insurance scam
16 involving some of its own members. And they blow up an
17 airplane to collect the life insurance on those two member
18 passengers. Clearly the insurance company, if it pays
19 off, will be subrogated to the estates in their claims.

20 The issue here, though, is whether there is an
21 injury in the business or property and a proximate cause
22 relationship to the injury also done to the other
23 passengers and to the airlines. And that's precisely what
24 we have here. This is not a fraud directed to just some
25 purchasers. It was a fraud that in its scheme took in the

1 broker-dealers and all of the customers who were there.

2 Accordingly, we suggest that there is a -- SIPC
3 is a proper party plaintiff to bring it because it stands
4 in --

5 QUESTION: But as you describe it, let's be sure
6 I understand, as you describe it, I would think my second
7 category would also have a cause of action against these
8 people.

9 MR. BLAKEY: Oh, I think they do. I think the
10 other customers have a category and a claim.
11 Interestingly enough, if we've paid them off --

12 QUESTION: Even though they are not purchasers
13 or sellers.

14 MR. BLAKEY: That's correct. Well, they may
15 have it under the security statutes, too. What we would
16 suggest to you is, and now I'm not really arguing
17 securities. I'm arguing injury to business or property,
18 and I'm arguing injury by reason of, which has nothing to
19 do, as he's presented it, with the fact that it's
20 underlying security.

21 QUESTION: I don't know any other statute where
22 there is not some proximity requirement placed upon the
23 ability to recover. I mean, really what you're saying is
24 if by reason of this fraud somehow somebody's uncle got
25 mad and cut them out of the will, they would have a cause

1 of action under RICO so long as they could establish that
2 causality.

3 MR. BLAKEY: No. But let me give you a slightly
4 different example from the common law. It is standard
5 Hornbook law that if I defrauded a testator into leaving
6 to me property, and Justice White would have been the
7 person to whom the request goes, he has a claim for relief
8 against me, even though he's not the immediate target
9 because he's within the intended sphere.

10 Let me give you another example -- is if a group
11 of corporations undertake a pattern of fraud to cheat the
12 Government, clearly the Government can sue, but what about
13 the next honest bidder who would have obtained the bid but
14 for? I think that next honest bidder has a claim for
15 relief. And on this issue, which is the proximate cause
16 question, there was a summary judgment below.

17 QUESTION: Do you have any cases on that? That
18 surprises me.

19 MR. BLAKEY: Yes.

20 QUESTION: The defrauded bidder would have --

21 MR. BLAKEY: Yes.

22 QUESTION: I mean the bidder who would have
23 gotten it but for the fraud?

24 MR. BLAKEY: Yes. The Environmental Tectonics
25 v. --

1 QUESTION: On the basis of defrauding or on the
2 basis of unfair business practices?

3 MR. BLAKEY: No. Environmental Tectonics v.
4 Kirpatrick, which is both an antitrust case and a
5 securities -- I mean and a RICO case -- 847 F.2d 1052
6 1007, in the Third Circuit, affirmed on other grounds by
7 this Court.

8 My reference to the defrauded testator is
9 supported by Bohannon v. Wachovia Bank and Trust Company,
10 210 North Carolina 679.

11 My illustration of the terrorist in the
12 airplane, slightly modified, is reflected in Judge
13 Posner's RICO decision in the Seventh Circuit in the
14 matter of E.D.C.

15 QUESTION: But the terrorist in the airplane is
16 different. These are other people who are harmed
17 proximately by the same act, although they are not the
18 persons who have the cause of action for the fraud. But
19 they are proximately harmed by the same act.

20 Here you have a person who is further down the
21 line. Every time you harm somebody you harm other people
22 who are dependent on that somebody. And that's what
23 occurred here.

24 MR. BLAKEY: Your Honor, no, we're not arguing
25 that the mother, the brother, the uncle, of any of the

1 purchasers, or the landlord of one of the customers who
2 now, because the customer was defrauded, can't continue to
3 maintain his rent.

4 QUESTION: What about the employees of Sebag?

5 MR. BLAKEY: No.

6 QUESTION: Why not?

7 MR. BLAKEY: The injury there is precisely to
8 injury -- to -- this is the corporate analogy. The injury
9 is to Sebag. Sebag has the claim for relief. The
10 customer -- the customers were not injured in their
11 business and property within the meaning of RICO, injured
12 in their business or property.

13 But we sue here for the injury to the customers.
14 The causal relationship between their illegal conduct and
15 the injury to the customers is the same, whether it is a
16 purchaser-seller customer, or whether it is a
17 nonpurchaser-seller customer.

18 QUESTION: Could I ask the question in another
19 way? Some courts have spoken of it in terms of a direct
20 injury requirement. Is it your position that if there is
21 such a requirement for a RICO cause of action, that the
22 customers who were not purchasers of the manipulated
23 securities were nonetheless directly injured?

24 MR. BLAKEY: Yes. This is a question of
25 proximate causation, and it's a question as to which we

1 raised in the court below, a material question of fact, as
2 so found by Judge Toshima. It is a question that the
3 defendant below defended on the grounds that there was no
4 proximate relationship between his personal conduct and
5 the fraud and the collapse. That was accepted by Judge
6 Toshima, and it was reversed by the Ninth Circuit on the
7 grounds that he was equally responsible with his co-
8 conspirators' conduct.

9 QUESTION: May I ask this, Mr. Blakey? This
10 intermediate group of customers who did not themselves buy
11 or sell, under your view of RICO I take it they would have
12 been able to sue under RICO?

13 MR. BLAKEY: Clearly under RICO, and a minimum,
14 the predicate offense is mail fraud or wire fraud. And we
15 think they could just as easily sue using a fraud -- the
16 Securities Act because this does not incorporate 10b-5.

17 QUESTION: How could they sue? What money was
18 obtained from them?

19 MR. BLAKEY: It's the loss that they suffered.
20 As soon -- what happened here --

21 QUESTION: Anyone that is caused a loss by the
22 deceiving of someone else has a cause of action for fraud?

23 MR. BLAKEY: Well, Your Honor, part of the
24 problem here is that scheme to defraud is not equivalent
25 to common law deceit. As this Court has recognized, for

1 example, in Carpenter, it extends to misappropriation.
2 This Court has not limited scheme to defraud to the common
3 law meaning. It included chicanery and overreaching. And
4 the chicanery and overreaching in this situation caused
5 this broker-dealer to go under. When that broker-dealer
6 went under, it took out the business and it took out the
7 property that the broker-dealer had in its hands.

8 QUESTION: They are all subsequent consequences
9 of the fraud. They are not themselves a defrauding.

10 MR. BLAKEY: Well, but in this context, the
11 defrauding was of the broker-dealership itself. For
12 example, if you sink a boat, it sinks all passengers.

13 QUESTION: Yes, it's called a sinking, though.
14 It's not called fraud. Fraud means obtaining money or
15 property from someone. It doesn't mean tricking someone
16 and --

17 MR. BLAKEY: That's what common law deceit
18 meant. Mail fraud says scheme to defraud and scheme to
19 defraud has never been limited to common-law deceit. If
20 Congress had meant common-law deceit in 1972 when it
21 enacted the mail fraud statute, it would have said deceit.

22 QUESTION: I'm not saying it means common-law
23 deceit. I am saying that it means obtaining money or
24 property from someone. And your claim here is not based
25 upon -- even on this other category of persons, is not

1 based on obtaining any money or property from them. They
2 are consequentially injured because of the wrongful
3 obtaining of property and money from somebody else. It's
4 just one of the ripples that --

5 MR. BLAKEY: The issue here is -- can be put in
6 terms of what is the target of the fraud. If you focus
7 the target only to obtain the property from the meaning
8 person, your answer is obviously correct.

9 But all -- but the problem with target in that
10 context, it's a rubber-band word. You can narrow it that
11 way or you can extend it to ask what were the means by
12 which the property was done in? And if the means included
13 destroying someone else's property, as you got there, that
14 person is part of the intended scope of the fraud. And he
15 equally ought to have a claim for relief as the person who
16 is the primary target.

17 You can be an intended target and not be the
18 primary target. That's the airplane example. My intended
19 target was my two people and the insurance company, but I
20 took out the whole airplane. My intended target was
21 cheating the people who were buying and selling the stock,
22 but my impact of it was to take out the entire broker-
23 dealership.

24 QUESTION: You took them down directly. When
25 you took the plane down, you took them down directly.

1 They didn't go down as a result of the other people going
2 down. The analog to your plane incident is the business
3 run by the person who was bombed fails because he's no
4 longer managing it. That's the analog to what's going on
5 here

6 MR. BLAKEY: Justice Scalia, this is a
7 fact-specific question that was raised in the trial court
8 and the held -- the holding below is that we raised a
9 material question of fact on that question. And I think
10 that it is in one sense not in the grant of cert., but if
11 it is in the grant of cert., we have to deal with the
12 facts as argued and found below, the facts as --

13 QUESTION: What fact? What fact is found below
14 that I am contradicting?

15 MR. BLAKEY: Well, if you take a look at the
16 Bunnington Park. When property was taken out of one
17 account and put into another, to keep the broker-
18 dealership alive, that is part of the scheme to defraud.
19 And it was only because it was kept alive for a period of
20 time that when it did collapse it took out not only the
21 property of the immediate target of the fraud. It took
22 out all the other customers' property as well.

23 QUESTION: Mr. Blakey, you're speaking as if it
24 were a trial below. But as I understand it -- and you
25 talk about facts that were found below. The district

1 court granted summary judgment, did it not?

2 MR. BLAKEY: It granted summary judgment only on
3 the issue is we were not a purchaser-seller.

4 QUESTION: Were other issues actually tried?

5 MR. BLAKEY: All the other issues were raised.

6 QUESTION: Well, I didn't ask you whether they
7 were raised; I asked you whether they were tried.

8 MR. BLAKEY: They were posed in a motion for --

9 QUESTION: I didn't --

10 MR. BLAKEY: No, they were not tried.

11 QUESTION: Okay. Then answer the question
12 briefly, if you will. They were not tried. Is that
13 correct?

14 MR. BLAKEY: Correct.

15 QUESTION: And then the Ninth Circuit reviewed
16 the -- reversed the grant of summary judgment. There were
17 no factual findings made in the sense you're talking
18 about. Both courts were dealing with motions for summary
19 judgment.

20 MR. BLAKEY: Perhaps I misspoke. What I should
21 --

22 QUESTION: I think you did.

23 MR. BLAKEY: And I withdraw what I said, and
24 would like to rephrase it.

25 For the purposes of the summary judgment, the

1 lower court found that we had raised a material question
2 of fact on each of these other issues, that there was an
3 enterprise that we were employed and associated by, that
4 there was a pattern, and that there was a nexus, a
5 proximate cause nexus between the wrongdoer's conduct and
6 the injuries sustained.

7 QUESTION: The court found that in a summary
8 judgment proceeding?

9 MR. BLAKEY: It found that we had raised --

10 QUESTION: You had raised that?

11 MR. BLAKEY: -- a material question of fact as
12 to it. And therefore, we were entitled to a trial on that
13 question. And what we -- but having found that, it then
14 dismissed it on the grounds that we lack purchaser-seller
15 standing.

16 The difficulty with purchaser-seller standing
17 is that it is a concept that can be used in several
18 different senses. It can be used in the sense of
19 describing the class you may sue. It can be, as he's
20 using it, describing the nature of the injury or
21 causation. What he has done with Blue Chip is take what
22 pleases him from it. There is in Blue Chip a clear
23 indication that the purchaser-seller limitations are
24 somewhat arbitrary and that they deny some deserving
25 plaintiffs of an opportunity to sue. It is mitigated,

1 however, this Court said, by the fact that there can be
2 claims for relief under other bodies of law.

3 The example given in the footnote, footnote 9,
4 comes from loss on securities. And it points to the fact
5 that in the Birnbaum case itself, a subsequent suit was
6 brought for an accounting. And in that suit for the
7 accounting, nonpurchaser-sellers were able to establish a
8 wrong, injury, and causation and recover on the same
9 facts. What we are here with RICO is another claim for
10 relief. We are not suing under 10b-5 and its implied claim
11 for relief. We're suing under the standard.

12 QUESTION: No, but you are claiming that you
13 have been injured in your business or property. And I
14 suppose the antitrust laws say that a person injured in
15 his business or property can recover treble damages if
16 it's by reason of an antitrust violation. And yet we say
17 that -- we say that only those people who are directly
18 injured can recover. An indirect purchaser cannot.

19 MR. BLAKEY: I think --

20 QUESTION: This is not a very popular decision
21 among plaintiffs' lawyers.

22 MR. BLAKEY: I think my case does not rest on
23 the legislative history, and I'm willing to stick with the
24 text. Nevertheless, in the legislative history it's very
25 clear, as this Court pointed out in Sedima, that one of

1 the reasons RICO was not drafted as an amendment to the
2 Antitrust Act, but rather as a freestanding statute was to
3 avoid precisely narrow standing limitations of antitrust
4 and proximate cause --

5 QUESTION: I know, but it used that language
6 "anybody injured in his business or property." And the
7 antitrust laws, you're not injured in your business or
8 property, within the meaning of the antitrust laws, if
9 you're an indirect purchaser rather than a direct one.

10 MR. BLAKEY: The same word in different contexts
11 will have different meanings. The meaning that it ought
12 to have in this context is a function of the purpose that
13 it serves in this statute. In order to avoid precisely
14 those narrow standing limitations and proximate cause
15 limitations, RICO was drafted outside of the antitrust
16 acts, and its liberal construction was enjoined.

17 If his argument is plausible and my argument is
18 plausible, that is to say it's a genuine ambiguity, the
19 statute suggests that this Court ought to take that
20 construction of the statute that enhances its remedial
21 purposes and not --

22 QUESTION: You seem to say -- you seem to
23 concede that surely there are some kinds of injuries that
24 will be -- that would be caused by a securities fraud that
25 would not be recoverable under RICO. Some can be too

1 remote.

2 MR. BLAKEY: Well, absolutely.

3 QUESTION: And the claim here is that any --
4 anybody injured except the purchaser or seller is just too
5 remote from the fraud to --

6 MR. BLAKEY: But the purchaser-seller limitation
7 deals with the class who consume, not the nature of the
8 injury or the causation relationship. If it were
9 otherwise, footnote 9 in the Court's opinion in Blue Chip
10 would no longer have meaning.

11 Let me refer to one other case. The language,
12 "purchase or sale," that appears in the 1934 act is
13 squarely interpreted by this Court in National
14 Securities -- SEC v. National Security -- to refer to
15 coverage -- that is, the wrongdoer's conduct, and not to
16 the status of the plaintiff. It is precisely that
17 language in 1969 that was incorporated into RICO.

18 Since 1970, this Court has decided 10 RICO
19 appeals. Each time, properly, it has declined to add
20 language to the statute that was not there: not organized
21 crime, not legitimate, not racketeering, not competitive.
22 Indeed, the failure to add racketeering and competitive in
23 Sedima would seem a fortiori to dictate the result in this
24 case.

25 Not in an enterprise in Rusello, not only in

1 Tafflin, and it is not subtracted from property legal
2 fees. We think that this Court in this case ought not to
3 depart from that well-reasoned line -- unbroken line of
4 decisions, and add purchaser-seller to RICO.

5 QUESTION: I thought you were going to say the
6 odds are against you this time.

7 (Laughter.)

8 MR. BLAKEY: Well, I teach at Notre Dame, and we
9 from time to time act when the odds are against us,
10 unfortunately, not always successfully, as last weekend
11 shows.

12 QUESTION: Not last weekend.

13 MR. BLAKEY: Thank you.

14 QUESTION: Thank you, Mr. Blakey.

15 Mr. Samet, you have 4 minutes remaining.

16 REBUTTAL ARGUMENT OF JACK I. SAMET

17 ON BEHALF OF THE PETITIONER

18 MR. SAMET: I don't intend to use them all
19 unless there are questions from the Court. But just two
20 or three brief points.

21 First, it became clear during Professor Blakey's
22 remarks that SIPC is here as a subrogee. And I'd like to
23 make two comments about their position as a subrogee.

24 First, that the concept of subrogation is
25 limited to get reimbursement for what you paid. SIPC

1 isn't seeking reimbursement for what they paid. They're
2 seeking treble damages under RICO. So the whole idea of
3 subrogation and RICO are inconsistent because RICO,
4 1964(c), mandates treble damages. It says, any person
5 injured in his business or property by reason of a
6 violation, shall sue and shall recover threefold the
7 damages. That's not subrogation. That's an entirely
8 different notion.

9 So the concept of RICO --

10 QUESTION: You say wouldn't be suing under RICO
11 if you were just suing for subrogation.

12 MR. SAMET: Exactly. That's point 1.

13 Point 2, SIPC says it's here as a real partied
14 interest in the liquidation proceedings. The fact of the
15 matter is this isn't a liquidation proceeding. The SIPA
16 statute gives SIPC power to appear as a real party in
17 liquidation proceedings. But this is a RICO action, not a
18 liquidation proceeding.

19 QUESTION: Well, I know, but they did liquidate
20 them.

21 MR. SAMET: Yes, but --

22 QUESTION: And they paid out millions of dollars
23 in claims.

24 MR. SAMET: But that doesn't give them standing.
25 For example, SIPC wouldn't have --

1 QUESTION: I didn't say it did.

2 MR. SAMET: Okay.

3 QUESTION: I didn't say it did, but it was a
4 liquidation.

5 MR. SAMET: But this is the claim that we're
6 discussing: SIPC's power to assert. It's as though SIPC
7 came into that terrorist airplane crash, having nothing to
8 do with it, and say, well, we're a party to all
9 proceedings. We have the power to get in here.

10 SIPC must show it has the standing on a specific
11 case basis and its authorization to appear as a real party
12 in liquidation proceedings doesn't give it standing here.

13 QUESTION: Like an insurance company coming in.

14 MR. SAMET: Yes, that is exactly correct, Mr.
15 Justice White.

16 But third of all, we think that the Blue Chip
17 case was right as it applied to securities law, and is
18 even more right, even though it didn't address RICO,
19 because didn't -- it wasn't before the Court at that time.

20 QUESTION: Of course, the Blue Chip case, you
21 know, cuts against you in a way because that opinion
22 assumed there were classes of investors other than
23 purchasers or sellers who could be directly injured. But
24 they nevertheless followed the old Birnbaum rule and
25 limited standing to purchasers and sellers. So the

1 premise of that decision was that there are a category of
2 people directly harmed by the wrongdoing.

3 MR. SAMET: Well, of course we all know the
4 author of that decision sits on this Court and is best --
5 in the best position to describe what the decision meant.
6 But I don't read it that way.

7 QUESTION: That's what he said in the opinion.
8 He discusses the three classes of harmed persons and said
9 they don't have standing

10 MR. SAMET: I'm sure he would make very clear
11 what he means, but let me tell you what I think he meant,
12 to be corrected, I'm sure, by him.

13 (Laughter.)

14 MR. SAMET: I think that the policy
15 considerations in Blue Chip, the concept of vexatious
16 litigation, the concept of strikes, the concept of
17 bludgeoning settlements are all the more egregious in RICO
18 than they were in the securities law because the stakes
19 are three times as high.

20 And it's interesting, in the amicus here, it's
21 interesting to see who the amici are. They are a group of
22 plaintiffs' attorneys. And what has happened here is
23 there has been massive abuse of civil RICO.

24 President Bush, in his Civil Justice Reform Act,
25 just the other day, was talking about the excesses of

1 civil litigation. In today's Wall Street Journal, there's
2 an article about the SEC is saying they're concerned about
3 the excesses of RICO civil abuse. And I think what has
4 happened is the very concerns that were soundly described
5 in Blue Chip are even more egregious in the RICO area.
6 And hopefully this Court will put a stop to it.

7 Thank you.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Samet.

9 The case is submitted.

10 (Whereupon, at 1:57 p.m., the case in the
11 above-entitled matter was submitted.)
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90-727 ROBERT G. HOLMES, JR., Petitioner v. SECURITIES
INVESTOR PROTECTION CORPORATION, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Michelle Sander

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