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The Supreme Court's Proximate Cause Analysis Under RICO: A Distinction Between Direct and Foreseeable Harm

By Michael C. Rakower

Proximate cause is rarely something that can be decided at the motion to dismiss stage. However, in the context of civil claims under the Racketeering Influenced Corrupt Organizations Act ("RICO"), the Supreme Court has issued rulings over the last several years that alter the traditional proximate cause inquiry, thereby limiting the scope of actionable conduct. The Court's decision in *Hemi Group, LLC v. City of New York*[1] (*"Hemi Group"*), reflects the evolution of its analysis as well as dissension among the Justices over the extent to which the scope of proximate cause in a civil RICO action should be constricted. In *Hemi Group*, a plurality formed by Chief Justice Roberts and Justices Scalia, Thomas and Alito drew stark contrast between two concepts of tort law that are ordinarily considered to be interrelated: directness and foreseeability of harm.[2] Dissenting, Justices Breyer, Stevens and Kennedy opposed the Court's treatment of foreseeability as it relates to RICO claims.[3] Justice Ginsburg wrote a concurring opinion in which she distanced herself from the Court's proximate cause analysis,[4] and Justice Sotomayor recused herself after having sat on a panel at the Second Circuit whose judgment led to the High Court's review and reversal.[5]

The following article reviews Supreme Court precedent to provide the reader with an understanding of the basis for the Justices' opposing analyses of RICO's proximate cause requirement. The article further examines two opinions from district courts applying *Hemi Group* in contradictory ways and shows why the dissent's view may live to see another day.

I. The Plurality's Reliance on Precedent to Enforce Hemi Group's Direct Harm Requirement

In *Hemi Group*, an online purveyor of cigarettes from New Mexico sold cigarettes to New York City (the "City") smokers without charging any use taxes on the sale, notwithstanding the fact that the City charged a per pack tax of $1.50 and New York State (the "State") charged a tax of $2.75 per pack.[6] Although New York required in-state sellers to charge, collect, and remit both the City's and State's cigarette taxes, the Commerce Clause barred any measure designed to compel an out-of-state seller to collect cigarette taxes.[7] Despite this, the Jenkins Act, a federal law, facilitated state tax collection efforts by requiring foreign vendors to provide each state with customer information related to cigarettes they sold to residents.[8] Armed with such information, local officials could attempt to collect taxes due by demanding payment from resident cigarette buyers.[9] The City possessed an information-sharing agreement with the State designed to maximize recovery of cigarette taxes.[10] When Hemi Group, LLC and Kai Gachupin (collectively, "Hemi") failed to provide New York State with purchaser information required by the Jenkins Act, the City seized upon this omission by bringing a RICO claim against Hemi.[11] The City alleged that Hemi's Jenkins Act violations constituted violations of mail and wire fraud, which led to the City's loss of tens, if not hundreds, of millions of dollars in tax revenue.[12] When the case was before the Second Circuit, Judge Straub was joined by then-Circuit Judge Sotomayor in holding that the City had stated a valid RICO claim.[13] Judge Winter, in a prescient dissent, concluded that the City had not met RICO's proximate cause requirement because the pleaded mail and wire fraud violations could not have been the proximate cause of the City's claimed injury.[14]

RICO provides a private cause of action for an injury in business or property "by reason of" a RICO violation.[15] The Supreme Court's review in *Hemi Group* turned on the meaning of the phrase "by reason of" as it relates to proximate cause. Chief Justice Roberts, who wrote the opinion for a plurality of the Court, framed the Court's analysis by instructing that proximate cause under RICO must be evaluated in light of its "common-law foundations."[16] The opinion looked to *Holmes v. Securities Investor Protection Corporation*[17] (*"Holmes"*), and *Anza v. Ideal Steel Supply Corp*[18] (*"Anza"*), for guidance.

Holmes concerned a RICO action brought by the Securities Investor Protection Corporation ("SIPC") against alleged stock manipulators.[19] When the defendants' stock manipulation scheme was discovered, SIPC alleged, stock prices collapsed and two broker-dealers were unable to meet their obligations to customers.[20] SIPC, as an insurer of customer accounts, was obliged to pay those customers approximately $13 million in reimbursement for lost funds.[21] As a consequence, SIPC sought to hold the defendants, alleged stock manipulators, liable under RICO for its reimbursement payments to customers.[22] Unfortunately for SIPC, the Court declared that a RICO claim requires "'some direct relation between the injury asserted and the injurious conduct alleged.'"[23] Consequently, the Court held, the conspiracy alleged by SIPC directly harmed broker-dealers, not SIPC, and SIPC's injury therefore was a contingent result of that harm for which RICO did not provide a remedy.[24]

Comparing the facts alleged in *Hemi Group* to those alleged in *Holmes*, the Court concluded that the damages

theory pleaded in *Hemi* Group was "far more attenuated" than the one rejected in *Holmes*.[25] It summarized the City's theory as follows:

> According to the City, Hemi committed fraud by selling cigarettes to city residents and failing to submit the required customer information to the State. Without the reports from Hemi, the State could not pass on the information to the City, even if it had been so inclined. Some of the customers legally obligated to pay the cigarette tax to the City failed to do so. Because the City did not receive the customer information, the City could not determine which customers had failed to pay the tax. The City thus could not pursue those customers for payment. The City thereby was injured in the amount of the portion of back taxes that were never collected.[26]

As depicted in this excerpt, the Court viewed the City's harm as being more than one step removed from the conduct.[27]

Having set the analytical stage with its review of *Holmes'* direct harm framework, the Court then turned to *Anza* to discuss its application of the direct harm requirement in that case.[28] In *Anza*, the plaintiff, a New York State hardware store, alleged that its competitor neglected to charge sales tax, enabling the competitor to charge lower prices and gain market share.[29] Backed by *Holmes*, the Court held that New York was the direct victim because the immediate consequence of the defendant's alleged scheme was to deny the State its tax revenue.[30] The Court perceived the cause of the plaintiff's alleged injury to be "'a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State).'"[31]

As in *Anza*, the plurality's opinion in *Hemi Group* found a disconnect between the conduct alleged and the pleaded harm. In *Hemi Group*, Justice Roberts wrote that "the conduct directly responsible for the City's harm was the customers' failure to pay their taxes. And the conduct constituting the alleged fraud was Hemi's failure to file Jenkins Act requests." *Id.* The following excerpt highlights the plurality's perception of a gulf between the harm pled and the conduct alleged:

> It bears remembering what this case is about. It is about the RICO liability of a company for lost taxes it had no obligation to collect, remit, or pay, which harmed a party to whom it owed no duty. It is about imposing such liability to substitute for or complement a governing body's uncertain ability or desire to collect taxes directly from those who owe them. And it is about the fact that the liability comes with treble damages and attorney's fees attached. This Court has interpreted RICO broadly, consistent with its terms, but we have also held that its reach is limited by the "requirement of a direct causal connection" between the predicate wrong and the harm.[32] The City's injuries here were not caused directly by the alleged fraud, and thus were not caused "by reason of" it. The City, therefore, has no RICO claim.[33]

II. The Dissent's Attempt to Revive a Foreseeability Standard

In contrast to the majority's "directness of relationship" test, the dissent in *Hemi Group* argued that RICO's proximate cause determination ought to be guided by a foreseeability standard. Relying on its legal conclusion that Hemi's intentional concealment of purchaser information constituted a misrepresentation that Hemi did not have customers in New York City,[34] the dissent concluded that Hemi intentionally enriched itself by harming the City.[35] Hence, the dissent concluded that Hemi proximately caused the City's alleged harm.[36] The dissent reasoned as follows:

> Hemi misrepresented the relevant facts *in order to* bring about New York City's relevant loss. It knew the loss would occur; it *intended the* loss to occur; one might even say it *desired* the loss to occur. It is difficult to find common-law cases denying liability for a wrongdoer's intended consequences, particularly where the consequences are also foreseeable.[37]

The dissent's analysis was powered by its opposition to the plurality's excision of foreseeability as a factor in the proximate cause inquiry. According to the dissent, a directness of harm standard has traditionally been used in tort law to *expand* the scope of liability beyond the sphere of foreseeability to reach those whose conduct directly caused unforeseeable harm.[38] In the dissent's view, the plurality misapplied a legal concept designed to expand proximate cause by utilizing it to limit liability.[39]

The dissent cited the Supreme Court's decision in *Bridge v. Phoenix Bond & Indem. Co.*,[40] ("*Bridge*"), in support of its position that foreseeability has an important place in RICO's proximate cause analysis. In *Bridge*, the High Court unanimously held that proximate cause was present notwithstanding the fact that the alleged RICO scheme involved two distinct parts. In that case, the Court

observed that the harm pled was a "foreseeable and natural consequence of [the defendants'] scheme."[41]

III. The Court's Prior Use of a Foreseeability Standard

Bridge concerned multiple bidders for municipal property who routinely submitted the lowest permissible bid, causing the municipality to establish a system whereby winners were selected on a rotational basis.[42] To preserve the integrity of the rotational system, the municipality required each bidder to provide a sworn statement certifying that it would submit only one bid, inclusive of any submissions by agents, employees and related entities.[43] One frequent bidder brought a RICO action against its competitor, claiming that the competitor provided false certifications when it made use of related entities to win more bids than its permissible share under the rotational system.[44] In furtherance of this purported scheme, the defendant bidder allegedly used the mails to send numerous notices required by state law to nonparties about the properties it had won at auction.[45] The plaintiff alleged that each of these notices, incident to the overall scheme, constituted mail fraud, and, collectively, showed a pattern of racketeering activity under RICO.[46]

Because the municipality allegedly received fraudulent sworn statements and harm was pled by a competing bidder, the Court considered whether a RICO claim predicated on mail fraud required "first-party" reliance (*i.e.*, reliance by the aggrieved party).[47] To the surprise of many practitioners, a unanimous court held that the plaintiff had pled a valid RICO claim based on the harm rendered to it (lost auctions) notwithstanding the fact that the predicate acts concerned the submission of false certifications to the municipality presiding over the auction.[48] Essentially, the Court perceived the two parts of the alleged scheme to be inextricably bound. This struck many as a divergence from *Holmes* and *Anza*, where the Court perceived the alleged schemes to involve two unrelated parts. Justice Thomas summarized the Court's view as follows:

> Nor is first-party reliance necessary to ensure that there is a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury to satisfy the proximate-cause principles articulated in *Holmes* and *Anza*. Again, this is a case in point. Respondents' alleged injury—the loss of valuable liens—is the direct result of petitioners' fraud. It was a foreseeable and natural consequence of petitioners' scheme to obtain more liens for themselves that other bidders would obtain fewer liens. And here, unlike in *Holmes* and *Anza*, there are no independent factors that account for respondents' injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue. Indeed, both the District Court and the Court of Appeals concluded that respondents and other losing bidders were the *only* parties injured by petitioners' misrepresentations.[49]

A careful reading of this excerpt shows that the Court made use of the fact that the harm pled was foreseeable to support its conclusion that the harm was direct. Thus, just as the dissent in *Hemi Group* had described, the Court used foreseeability in *Bridge* to expand RICO liability to include within its scope the perpetrator of a two-part scheme whose conduct toward one entity led to harm against another.

IV. Proximate Cause Analysis After *Hemi Group*

In *Hope For Families & Community Service, Inc. v. Warren*[50] ("*Hope for Families*"), a district court in Alabama considered the viability of RICO claims arising from a dispute concerning the provision of licenses to operate charitable bingo establishments in Macon County, Georgia.

In 2003, the Alabama legislature authorized a constitutional amendment permitting charitable bingo in Macon County, and vested the county sheriff with responsibility for writing and enforcing regulations associated with the provision of bingo services.[51] The sheriff understood "charitable bingo" to refer to "electronic bingo," and the regulations he drafted concerned the provision of electronic bingo licenses to charities and operator's licenses to electronic bingo establishments. [52] He took to his task with verve, producing regulations within 31 days and granting an operator's license to "VictoryLand" within 13 days thereafter.[53] Electronic bingo proved profitable from the start, and VictoryLand's profits grew at a voracious pace.[54] VictoryLand's gross profits soared from approximately $408,481 in 2003 to approximately $125,860,684 in 2008. In 2004, envious of VictoryLand's profits, Lucky Palace, Inc. ("Lucky Palace") sought to obtain an operator's license from Macon County's sheriff so that it could compete with VictoryLand.[55] The sheriff subsequently entered rule changes that appeared to be designed to frustrate Lucky Palace's efforts, and, indeed, Lucky Palace could not persuade the sheriff to grant it an operator's license.[56] Similarly, charities that supported Lucky Palace could not succeed in securing bingo licenses for themselves.[57]

The sheriff, it turned out, did not draft and redraft the bingo licensing regulations himself.[58] Rather, he left such

work to his lawyer, who happened to be the son and law partner of VictoryLand's lawyer, and VictoryLand's lawyer happened to be a minority shareholder in VictoryLand.[59] Further, when faced with the daunting task of drafting the county's bingo regulations alone, the sheriff's lawyer accepted an offer by VictoryLand to make use of its lawyers to assist him in drafting the regulations.[60] In light of the seeming conflict arising from VictoryLand's involvement in drafting a regulatory scheme that effectively barred competition, Lucky Palace and certain unlicensed charities brought suit, seeking damages for, among other things, RICO violations premised upon allegations that VictoryLand corruptly influenced the enactment of Macon County's bingo licensing regulations.[61]

Examining the issue through the prism of *Holmes*, *Anza* and *Hemi Group*, the district court characterized the plaintiffs' complaint as having alleged two separate two-part schemes, each with the effect of improperly precluding the plaintiffs from participating in Macon County's lucrative charitable bingo trade.[62] In one scheme, VictoryLand and its owner purportedly defrauded the citizens of Macon County and the sheriff of their intangible right to receive honest services by ghostwriting bingo regulations favorable to VictoryLand and bribing the sheriff's lawyer to advise the sheriff to adopt those regulations.[63] The court held that, in connection with that alleged scheme, the citizens of Macon County and the sheriff were the direct victims of the alleged fraud.[64] In another scheme, the sheriff allegedly defrauded the citizens of Macon County of their intangible right to receive honest services by remaining willfully blind to the conflicts of interest arising from his lawyer's involvement and the involvement of VictoryLand's owner in the regulations-drafting process.[65] The court concluded that the victims of this alleged scheme were the citizens, who incurred damages in the form of lower quality products and services, fewer jobs and a less developed infrastructure.[66] Concerning the second alleged scheme, the court held that the sheriff was the direct victim of honest services fraud by his lawyer.[67]

The district court considered the implications of *Bridge*, which it characterized as standing for the proposition that a RICO claim predicated on mail fraud does not require a showing that the plaintiff relied on the misrepresentation giving rise to the fraud.[68] Nonetheless, the court held that "the conduct directly responsible for Plaintiffs' harm was the promulgation of Rules that had the effect of precluding Plaintiffs' entry into the Macon County electronic bingo market[, whereas [t]he] conduct constituting the alleged fraud was Defendants' failure to provide honest services to Macon County citizens and Sheriff Warren."[69] Hence, similar to *Holmes*, *Anza* and *Hemi Group*, the court held that proximate cause was lacking because the conduct causing the alleged harm was distinct from the conduct giving rise to the alleged fraud.[70] Accordingly, the Court ruled that Lucky Palace and its cohort charities lacked standing to pursue RICO claims against the alleged defrauders because the claimed injuries were collateral to the honest services schemes alleged.[71]

Taking a contrary position in a case of comparable facts, a district court in Pennsylvania held in *Clark v. Conahan*[72] that the distinctness between the conduct causing harm in an alleged two-part scheme and the conduct causing fraud was not so great as to prevent a finding of proximate cause under RICO. *Clark* concerned an alleged scheme, widely reported in the media, between certain juvenile court judges, a private attorney, juvenile probation staff, and the owner of a construction company, among others, to divert juvenile offenders to a privately owned detention facility in exchange for kickbacks.[73] The case included RICO claims brought by parents of a juvenile for damages arising from their payment of incarceration and probation fees to Luzerne County, Pennsylvania for their son.[74] Echoing *Hope for Families*, the *Clark* defendants argued that, because they were alleged to have committed honest services fraud, the direct victims of such fraud were not the plaintiffs but instead were the Commonwealth of Pennsylvania and the citizens of Luzerne County.[75]

After acknowledging RICO's direct harm requirement, the *Clark* court sidestepped a strict application of the directness of harm test by seizing upon the Supreme Court's statement in *Bridge*, itself an affirmation of prior statements by the Court, that proximate cause is a "'flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case.'"[76] Given this flexibility, the *Clark* court discussed three underlying principles affecting a directness of harm analysis:

(1) difficulty in calculating the amount of a plaintiff's damages attributable to remote violations;

(2) avoiding the need to apportion damages amongst different "levels" of plaintiffs and to avoid multiple recoveries; and

(3) the general interest in deterrence is already served where other plaintiffs with more direct injuries may assert claims.[77]

Summarizing *Anza*, *Bridge* and *Hemi Group* with these factors in mind, the court compared the facts of those cases with the facts before it. The court held that "the underlying justifications for the proximate cause requirement do not compel a finding that [plaintiffs'] injuries were not proximately caused by Defendants' alleged RICO violations."[78] Distinguishing the facts in *Clark* from those in *Anza* and *Hemi Group*, the court noted that the injuries alleged in *Clark* were easily determinable, as the parents had pled a precise amount in

damages.[79] Because no other group had suffered the same economic harm as the plaintiff parents, the court saw no complication that could arise from a need to apportion damages.[80] Indeed, the public was not alleged to have been harmed economically; instead it was alleged to have lost its intangible right of honest services and therefore was not in a position to sue.[81] Accordingly, the court held that RICO's deterrent value would be furthered only if the parents' alleged injury was recognized as having been proximately caused by defendants' scheme.[82] Specifically, the court wrote, "In order to serve the deterrence goals articulated in the Supreme Court's proximate cause jurisprudence, it would be imprudent to hold that the only group whose injuries were proximately caused by honest services fraud is a group that suffered no tangible injury and is not in a position to bring suit."[83]

Conclusion

The plurality's opinion in *Hemi Group* seeks to close the door on RICO's proximate cause debate by purporting to serve as a cap on a string of cases that bar RICO liability for schemes other than those that directly harm a plaintiff, irrespective of whether the harm alleged was foreseeable. The dissent's opinion, however, highlights the fact that this debate continues to simmer amidst the Justices of our highest court.

Undoubtedly, some courts will interpret *Hemi Group* consistent with Alabama's district court in *Hope for Families* and apply a rigorous proximate cause analysis that will bar nearly all claims arising from a two-part scheme. But if the reasoning utilized in *Clark* gains traction, then the factors permitting exceptions to a rigid application of the direct harm approach could lead courts toward decisions that will swallow the rule that *Hemi Group*'s plurality sought to strengthen. This is not merely a theoretical possibility, given that the Court's jurisprudence includes language that invites debate. Indeed, *Clark* relied upon language in *Bridge* for permission to apply a more liberal proximate cause analysis.

Moreover, it is not yet absolutely certain that the *Hemi Group* dissenters—Justices Breyer, Stevens and Kennedy—have forever lost their argument that foreseeability should be used as a factor in the proximate cause analysis. Contrary to the plurality's interpretation of *Anza*, the dissenters in *Hemi Group* argue that *Anza* did not foreclose using foreseeability as a factor in the proximate cause analysis. The dissent's interpretation ought to be given a level of deference because Justice Kennedy wrote the *Anza* opinion. Indeed, the Court's unanimous decision in *Bridge*, which highlighted the foreseeability of the injury alleged to have been caused by the defendant, suggests that a majority of the Justices may not actually believe that a foreseeability test is without value. Justice Ginsburg, after all, joined the three *Hemi Group* dissenters in refusing to adopt the plurality's restrictive view of proximate cause.[84]

Thus, the spotlight may ultimately turn to Justice Sotomayor, who recused herself from *Hemi Group* after having joined Judge Straub in *Smokes-Spirits*, the progenitor of *Hemi Group*, at a time when she sat on the Second Circuit. Of course, it is possible that the reasoning laid out by the plurality in *Hemi Group* has altered Justice Sotomayor's perception of the proper boundaries of RICO's proximate cause analysis. Yet, in light of the fact that she was not persuaded by Judge Winter's dissent, it appears likely that Justice Sotomayor will continue to press a more expansive view of proximate cause than that which was adopted by the *Hemi Group*'s plurality unless and until a consensus on the Court soundly rejects her view.

Time will tell whether the Supreme Court will reinforce *Hemi Group* in a subsequent decision or whether *Anza* will be reinterpreted in a manner consistent with the dissent's view in that case. In the meantime, as evidenced by *Hope for Families* and *Clark*, the Court's prevailing view of RICO's proximate cause provides lower courts with latitude either to apply proximate cause doctrine rigidly or to utilize factors that would ameliorate this approach.

Endnotes

1. 130 S. Ct. 983 (2010).
2. *See id.*
3. *See id.* at 995-1002 (Breyer, J., dissenting).
4. *Id.* at 994-995 (Ginsburg, J., concurring).
5. *See City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008).
6. *See Hemi Group*, 130 S. Ct. at 987, 990.
7. *Id.* at 987 (citing *Smokes-Spirits.com*, 541 F.3d at 432-33).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* The RICO Act renders it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (2006). Hemi did not challenge the assertion that Jenkins Act violations constitute predicate offenses under RICO; the Supreme Court therefore assumed, without deciding, that they did. *Hemi Group*, 130 S. Ct. at 989.
13. *See generally City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008).
14. *Id.* at 458-61 (Winter, J., dissenting).
15. 18 U.S.C. § 1964(c) (2006). Although the Second Circuit held in *Smokes-Spirits* that lost tax revenue constituted a type of injury recognized by RICO, the Supreme Court declined to rule on this issue when it held that proximate cause was lacking in the City's claim. *See Hemi Group*, 130 S. Ct. at 988.

16. *Hemi Group*, 130 S. Ct. at 989.
17. 503 U.S. 258 (1992).
18. 547 U.S. 451 (2006).
19. *Hemi Group*, 130 S. Ct. at 988 (citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992)).
20. *Id.* at 989.
21. *Id.*
22. *Id.*
23. *Id.* (quoting *Holmes*, 503 U.S. at 268).
24. *Id.* (citing *Holmes*, 503 U.S. at 271).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 989-90.
29. *Id.*
30. *Id.* at 990 (citing *Anza*, 547 U.S. at 458).
31. *Id.* (quoting *Anza*, 547 U.S. at 458).
32. *Anza v. Ideal Supply Corp.*, 547 U.S. 5451, 460 (2006).
33. *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 994 (2010).
34. *Id.*
35. *Id.* at 996-97 (Stevens, J., dissenting).
36. *Id.* at 995.
37. *Id.* at 997 (emphasis in original).
38. *Id.* at 998.
39. *Id.*
40. 553 U.S. 639 (2008).
41. *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 1000 (2010) (dissenting opinion) (quoting in *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 638, 658 (2008)) (brackets inserted in Hemi Group).
42. *Bridge*, 553 U.S. at 643.
43. *Id.*
44. *Id.* at 644.
45. *Id.*
46. *Id.* at 647-648 (citing *Schmuck v. United States*, 489 U.S. 705, 712 (1989); 18 U.S.C. § 1962(c) (2006)).
47. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 638, 646 (2008).
48. *Id.* at 648-650.
49. *Bridge*, 553 U.S. at 657-58 (emphasis in original).
50. 721 F. Supp 2d 1079 (M.D. Ala. 2010).
51. *Id.* at 1087.
52. *Id.*
53. *Id.* at 1086.
54. *Id.* at 1087.
55. *Id.* at 1086.
56. *Id.* at 1087.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 1128-29.
63. *Id.* at 1129.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1130.
69. *Id.* at 1131.
70. *Id.* (citing *Hemi Group*, 130 S. Ct. at 990).
71. *See generally id.* at 1122-34.
72. 737 F. Supp. 2d 239 (M.D.Pa. 2010).
73. *Id.* at 249-50.
74. *Id.* at 251.
75. *Id.* at 268.
76. *Id.* at 265 (quoting *Bridge*, 553 U.S. at 639).
77. *Id.* at 265 (citing *Holmes*, 503 U.S. at 269-70).
78. *Id.* at 267.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 267-68.
83. *Id.* at 268.
84. *Id.* at 995 ("Without subscribing to the broader range of the Court's proximate cause analysis, I join the Court's opinion to the extent it is consistent with the above-stated view, and I concur in the Court's judgment.") (Ginsburg, J., concurring).

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