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RICO and Abortion Clinic Protests in the Supreme Court: *Scheidler v. NOW*

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Summary

The Supreme Court has ruled that the National Organization for Women (NOW) and two abortion clinics may not sue anti-abortion protesters under the federal Racketeer Influence and Corrupt Organizations (RICO) provisions based solely upon allegations that the protesters' efforts to shut down the clinics constituted extortion, *Scheidler v. NOW*, 123 S.Ct. 1057 (2003). The majority opinion by Chief Justice Rehnquist, joined by seven other justices noted that RICO requires the commission of a pattern of racketeering activity. Racketeering activity is defined to include extortion under the Hobbs Act, the Travel Act or state law. Yet extortion requires the acquisition of property from the victim by threat or force. In the eyes of the Court the protesters obtained no property. Consequently no crime of extortion occurred. Without extortion, no RICO violation occurred. Because the Court found there had been no RICO violation, it became unnecessary to decide whether NOW would have been entitled to injunctive relief had there been a RICO violation.

Justices Ginsburg, in a concurrence joined by Justice Breyer, pointed out that the principal consequence of the decision is its interpretation of what constitutes extortion for purposes of the Hobbs Act and RICO. After the events that gave rise to the case, Congress outlawed the misconduct at issue in the Free Access to Clinic Entrances Act (FACE) and provided for both criminal penalties and civil remedies. Justice Stevens, in dissent, objected to the difficulties of applying the majority's opinion to cases involving extorted intangible property.

Related CRS Reports include CRS Report 96-950, *RICO: A Brief Sketch*; and CRS Report RS21214, *RICO: Legislative Activity in the 107th Congress.*

Background

NOW and two health care centers sued anti-abortion protesters under the federal Racketeer Influenced and Corrupt Organizations (RICO) provisions, 18 U.S.C. 1961-1968, alleging "a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity including extortion in violation of the Hobbs Act," *NOW v.*

Scheidler, 510 U.S. 249, 253 (1994). The defendants sought unsuccessfully to have the RICO suit dismissed for want of a commercial motive on the part of the defendants, *Id.*

Following a subsequent trial, the jury concluded that the defendants had committed numerous state and federal extortion offenses including multiple violations of the Hobbs Act and the Travel Act and returned a RICO verdict in favor of the plaintiffs. The court awarded the plaintiffs treble damages and enjoined the defendants from blockading abortion clinics, damaging or trespassing on clinic property, or committing other acts of violence there, *NOW v. Scheidler*, 267 F.3d 687, 695 (7th Cir. 2001).

On appeal, the Seventh Circuit rejected the defendants' contentions that private RICO litigants could not be granted injunctive relief and that their conduct did not constitute extortion for RICO purposes, *Id.* at 710. The defendants filed two petitions for review with the Supreme Court, *Scheidler v. NOW*, No.01-1118, and *Operation Rescue v. NOW*, No. 01-1119, which the Court granted and consolidated, 535 U.S. 1016 (2002).

The Supreme Court reversed holding that the misconduct alleged did not constitute extortion under the Hobbs Act, the Travel Act, or state law, *Scheidler v. NOW*, 123 S.Ct. 1057, 1061, 1068-69. Without the extortion predicates, the plaintiff's RICO case could not survive. In the absence of a RICO cause of action, the Court felt no need to address the issue of whether private plaintiffs are eligible for injunctive relief, 123 S.Ct. at 1062.

RICO, the underlying cause of action, prohibits the patterned commission of any of a series of federal or state crimes (predicate offenses) in order to conduct the affairs of an enterprise whose activities affect interstate or foreign commerce; it also prohibits conspiracy to commit a RICO violation. 18 U.S.C. 1961-1968.[1] Offenders are subject to both criminal and civil liability, 18 U.S.C. 1963, 1964. Here the plaintiffs' civil action was based on alleged extortion under the Hobbs Act, the Travel Act, and state law, 18 U.S.C. 1961, 1951, 1952.

The Hobbs Act outlaws obstructing interstate or foreign commerce by robbery or extortion.[2] Extortion for purposes of the Hobbs Act is defined as "the *obtaining* of *property* from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right," 18 U.S.C. 1961(b)(2)(emphasis

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[1] "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. 1962(c).

"It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section," 18 U.S.C. 1962(d).

[2] "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both," 18 U.S.C. 1951(a).

added). Among other things, the Travel Act condemns interstate travel to conduct unlawful activity, which the Act defines to include extortion.[3]

Scheidler

The Supreme Court concluded that the defendants' conduct could not be considered extortion for purposes of the Hobbs Act, the Travel Act, or state law. Chief Justice Rehnquist, joined by the entire Court other than Justice Stevens, noted that the history of the Hobbs Act makes it clear that its extortion proscription must include both an element of relinquishing property under threat and an element of acquiring property under threat, 123 S.Ct. at 1063-68. The roots of the Hobbs Act can be traced back through the Anti-Racketeering Act of 1934, and the New York Penal Code, to the Field Code.

All three proscribed both extortion and coercion. Coercion was a separate crime that essentially consisted of extortion without the element of obtaining property, *i.e.,* the use of threat or fear to unlawfully induce another to do or refrain doing something the victim was otherwise free to do. The Court concluded that the Congressional decision to outlaw extortion but not coercion in the Hobbs Act precluded reading the "obtaining property" element out of the Hobbs Act, 123 S.Ct. at 1067.

With regard to extortion under the Travel Act and under state law, the Court explained that "extortion" referred to the term as generically understood; under the Model Penal Code and the laws of most jurisdictions extortion includes an "obtaining" element, 123 S.Ct. at 1068-69. Thus, the result was the same as extortion under the Hobbs Act. Unless the property relinquished under threat or fear is obtained by another there is no generic crime of extortion, 123 S.Ct. at 1069.

Justices Ginsburg and Breyer added a separate concurring opinion in which they agreed with the Court's refusal to read RICO expansively and observed that the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. 248, addresses the concerns that gave rise to the case, 123 S.Ct. at 1069.

Justice Stevens in his dissent objected that "[t]he Court's murky opinion seems to hold that this phrase ['obtaining the property of another'] covers nothing more than the acquisition of tangible property, 123 S.Ct. at 1069-72.

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[3] (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to – (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform – (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

"(b) As used in this section (i) 'unlawful activity' means . . . (2) extortion . . . in violation of the laws of the State in which committed or of the United States . . ." 18 U.S.C. 1952 .

Injunctive Relief

The Court left for another day the issue of whether private plaintiffs are entitled to injunctive relief under RICO. The dispute centers around the language of section 1964 and its legislative history. The section has three relevant parts. The first part authorizes federal district courts to exercise their equitable powers to prevent and restrain RICO violations.[4] The second part permits the Attorney General to request the courts to do so.[5] The third part allows anyone injured by a RICO violation to sue for treble damages and attorneys' fees.[6]

Until the Seventh Circuit's decision in this case, federal appellate courts had either rejected or expressed serious doubts over whether private RICO litigants could claim the benefit of the courts' injunctive and other equitable powers.[7] The Seventh Circuit sees

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[4] "The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons," 18 U.S.C. 1964(a).

[5] "The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper," 18 U.S.C. 1964(b).

[6] "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final," 18 U.S.C. 1964(c). A fourth part bars convicted defendants from contesting the criminal allegations against them in a subsequent civil action by the United States, 18 U.S.C. 1964(d).

[7] *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1089 (9th Cir. 1986)("while, on balance, it may well have been desirable for Congress to have extended to private parties the right to injunctive relief under civil RICO, we are convinced that Congress chose not to do so, and we must respect and follow that judgment"); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 509 (2d Cir. 1984)("It thus seems altogether likely that §1964(c) as it now stands was not intended to provide private parties injunctive relief"), *rev'd on other grounds*, 473 U.S. 479 (1985); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977n.42 (5th Cir. 2000)("There is considerable doubt that injunctive relief is available to private plaintiffs under RICO"); *Johnson v. Collins Entertainment Co., Inc.*, 199 F.3d 710, 726 (4th Cir. 1999)("there is substantial doubt whether RICO grants private parties a cause of action for equitable relief"); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990)("it is not clear whether injunctive or other equitable relief is available at all in private civil RICO actions"); *but see, Bennett v. Berg*, 710 F.2d 1361, 1365 (8th Cir. 1983)(McMillian, J. concurring in part and dissenting in part)("I would also reach the question whether equitable relief is available to private parties under RICO, a question left undecided by the majority en banc opinion, and answer that question affirmatively").

authority in the text of the section; other circuits find a different answer in the legislative history of the section.

RICO began in the Senate where it passed without the private cause of action language now found in 1964(c). The House Judiciary Committee added subsection (c) to section 1964 with little commentary, H.Rep.No. 91-1549 (1970). The subsection, however, was a mirror image of the language then found in section 4 of the Clayton Act (15 U.S.C. 15 (1970 ed.). Yet, it had no provision comparable to section 16 of the Clayton Act which authorized injunctive relief for the benefit of private parties, 15 U.S.C. 26 (1970 ed.). A specific amendment for injunctive relief was offered during debate on the House floor along with several procedural adjustments, but the amendment was withdrawn, apparently to allow the Judiciary Committee time to study its implications, 116 *Cong.Rec.* 35346-347 (1970). The following Congress, Senator McClellan, RICO's original sponsor, proposed a private injunctive relief amendment that likewise never received full Congressional approval, 117 *Cong.Rec.* 268 (1971); *see also*, S.Rep.No. 92-1070 (1972).

This is thought to suggest that Congress never intended to establish a private cause of action for injunctive relief, a suggestion confirmed by subsequent efforts to provide specific authorization. The argument to the contrary is easily stated:

Subsection 1964(a) grants federal courts broad equitable powers, available to all comers. Subsection 1964(b) permits the Attorney General to seek pre-trial restraining orders and performance bonds. Subsection 1964(c) permits RICO victims to sue for treble damages and attorneys' fees. Neither subsections 1964(b) nor 1964(c) preclude the Attorney General or private parties from seeking the relief made available under subsection 1964(a) without regard to plaintiff status, *NOW v. Scheidler*, 267 F.3d at 697.

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