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NOW v. Scheidler, Round Two

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In 1994, the Supreme Court decided *National Organization of Women v. Scheidler.*[1] The case arose from a civil RICO suit filed by N.O.W. and several abortion clinics against a coalition of anti-abortion groups (known as the Pro-Life Action Network or PLAN) led by Joeseph Scheidler. Plaintiffs asserted that PLAN had used a pattern of racketeering activity to cause abortion clinics to shut down. The complaint loosely alleged numerous criminal acts by the defendants, but the only crimes advanced as the basis for the RICO claim were extortion, and conspiracy to commit extortion. Specifically, plaintiffs asserted that defendants had conspired to use threatened or actual force, violence or fear to induce clinic employees, doctors and patients to forego treatment, give up their jobs, etc., in violation of the Hobbs Act and state laws forbidding extortion.[2]

The case was dismissed by the District Court on the ground that political action groups who did not seek economic benefit from their activities could not be a proper subject of a RICO case.[3] The Seventh Circuit affirmed.[4]

The Supreme Court reversed the courts below and unanimously held that Congress has not, either in the definition section or in the operative language, required that an enterprise in 1962(c) have an economic motive.[5] As the Court noted, the enterprises to which the RICO statute applies could have been limited by Congress to individuals or groups that had an economic motive, but was not.[6] Rather, as 1961(4) declares, enterprise includes any "individual . . .or group of individuals." The Court further observed that, while the statute may have had organized

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1. N.O.W. v. Scheidler, 510 U.S. 249 (1994).

2. *Id* at 253. Thus, in terms of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962 (c) (1988 & Supp. I 1989) they alleged that defendants had operated their anti-abortion enterprise through a pattern of extortionate activities. They also alleged a conspiracy to do this under §18 U.S.C. 1962 (d). Organized Crime Control Act of 1970, Title IX, Pub. L. No. 91-452, 84 Stat. 9222 (codified as amended as Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1988 & Supp. I 1989))[hereinafter RICO].

3. National Organization of Women v. Scheidler, 765 F. Supp. 937, 943 (N.D. Ill., 1991)

4. National Organization of Women v. Scheidler, 968 F.2d 612 (7th Cir. 1992).

5. 510 U.S. at 261.

6. *Id. at* 260-61.

crime as its focus, (it) was not limited in its application to organized crime,[7] contrary to the view of the Seventh Circuit. Finally, the Court noted that it is not necessary to be a profit-seeking organization in order to affect interstate commerce under the statute.[8]

Justice Souter, joined by Justice Stevens, concurred, but expressed some concern about possible First Amendment problems in prosecuting or suing a political advocacy group under RICO. As he pointed out, in agreeing with the Court's decision, "an economic-motive requirement would prove too much with respect to First Amendment interests, since it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling."[9] However, he stressed that "nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case."[10]

Following the Court's reinstatement of NOW's lawsuit, I published an article in the Supreme Court Review agreeing with the Court's RICO analysis, but pointing out what I considered to be some serious problems with the plaintiffs' case,[11] concerning both whether the plaintiffs had adequately alleged a RICO violation and whether their cause of action violated the First Amendment. I concluded that their complaint, as written, did not adequately set forth a pattern of extortionate conduct amounting to a RICO violation and that their lawsuit, as filed, would intrude on the defendants' First Amendment rights. However, I further concluded that they might well be able to make out a case that did violate RICO and did not violate the First Amendment if they could allege and prove extortion as that term is generally understood. Meanwhile, the plaintiffs pursued their case in the District Court in Illinois, and, on April 14, 1998, a jury returned a verdict for plaintiffs in the amount of approximately $86,000. The jury concluded that the defendants had committed 21 acts of extortion in violation of federal law, 25 acts of extortion under (unspecified) state laws and 4 acts or threats of violence to any people or property.[12] Plaintiffs are seeking to have these damages trebled, as RICO provides, and are also demanding costs and counsel fees to be paid by defendants.

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7. *Id.* (quoting H. J., Inc. v. Nothwestern Bell Telephone Co., 492 U.S. 229, 248 (1989)).

8. *Scheidler*, 510 U.S. at 259.

9. *Id.* at. 263-64.

10. *Id.* at 264 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 917 (1982)).

11. Craig Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 SUP. COURT REV 129 (1995).

12. Special Interrogatories and Verdict Form, at 49-51, N.O.W. v. Scheidler, Nos. 99-3076, 99-3336, 99-3891, 99-3892 (appeal pending in 7th Cir.) (unpublished document on file with the author).

NOW's pleadings and proof are not substantially different from the original complaint that had been the subject of the Supreme Court decision. Consequently, this case should be reversed on appeal because plaintiffs have not established that the crime of extortion was committed and because their RICO suit, as proved, violated the First Amendment.[13]

Defendants are members of an unpopular political advocacy group. While their general anti-abortion position is shared by many Americans, the tactics that they employ—blockading clinics, harassing patients and staff, etc.— are widely condemned. Nor are these defendants necessarily innocent of all criminal activity. There is ample evidence in the record in this case suggesting violations of state trespassing, and perhaps other laws and the Federal Access to Clinic Entrances (FACE) statute, 18 U.S.C. §248 (a),[14] as well as evidence of a few acts and threats of violence.[15] Certainly no one has the right to forcibly block access to clinics or to threaten staff or patients with violence.

However, violation of these statutes does not constitute a violation of RICO because neither FACE, trespassing, nor acts or threats of violence are among the listed predicate crimes necessary to constitute a RICO violation.[16] Indeed, the reason that the FACE statute was demanded by pro-choice advocates was because existing federal and state laws (including, presumably, RICO and extortion) were inadequate.[17] And, although plaintiffs' complaint makes references to such crimes as murder, arson and kidnapping committed by certain anti-abortion zealots, there was no proof of any such crimes having been committed by

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13. Although I disagree with appellant's anti-choice position, I filed an amicus brief on their behalf because of my belief that their acts did not violate RICO and that the lawsuit infringed on their First Amendment rights. Unfortunately, counsel for defendants did not file this brief on time, and it was rejected by the court as untimely.

14. Under the Federal Access to Clinic Entrances Act [FACE], 18 U.S.C. §248 (a) (1999), an individual may be subject to civil or criminal penalties if he:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been , or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;...
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> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services...."

15. Verdict Form at 49, *supra* note 12 (The jury found four (unspecified) acts or threats of physical violence by defendants.).

16. *See* 18 U.S.C. § 1961 setting forth a lengthy list of RICO predicate crimes.

17. Attorney General Reno testified that "existing Federal laws, while perhaps applicable in some instances, (are) inadequate." *Hearing Before the Senate Committee on Labor and Human Resources*, 103rd Cong. 1st Sess., May 12, 1993 at 8. Likewise, Rep. Charles Schumer, Chairman of the House Subcommittee considering the Bill opined that "[t]he state laws are inadequate to deal with the problem." *Hearings Before the House Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary*, 103rd Cong. 1st Sess., Apr. 1 and June 10, 1993, at 2.

the defendants in this case, and these claims were summarily dismissed.[18] Accordingly, the jury's RICO verdict against defendants was based entirely on violations of the Hobbs Act, under federal law, and extortion under state law.[19] However, just what acts or threats the jury might have been referring to in this verdict are not specified.

Even more fundamentally, the judgement against these defendants under RICO, and especially the imposition of treble damages, violates the First Amendment, as the Supreme Court made clear in *NAACP v. Claiborne Hardware*.[20] Reservations about subjecting such defendants to civil RICO were expressed by Justice Souter, concurring in *NOW v. Scheidler*.[21] He noted that "[c]onduct alleged to be Hobbs Act extortion may turn out to be fully protected First Amendment activity. . . . And even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaged in protected expression."[22] There follows a discussion of why RICO is inappropriate in this case.

I. Treble Damages and Counsel Fees May Not Be Levied Against a Political Advocacy Organization.

Claiborne holds that when political protest, which this unquestionably is, is subjected to a damage suit, damages must be limited to the "direct consequences of (violent) conduct" and "may not be award[ed] . . . for the consequences of nonviolent protected activity."[23] Thus, even if the plaintiffs established that their clients suffered financial injury in the amounts found in the jury verdict, they would have to establish that these were all due to those limited aspects of the defendants' behavior that were violent. Even conduct that is illegal, such as trespassing and interfering with access to clinics through non-violent behavior, may not, under Claiborne be subject to damages. Nor, of course, may the legitimate aspects of defendants' behavior. (One issue that remains unclear after Claiborne is what exactly does violence mean? There may be some degree of jostling or shoving that is part of sit-in type protests that occurred at some clinics that is still protected expression.) Treble damages

18. Judge Coar's Order of Sept. 19, 1997 at 40 (Unpublished Memorandum Opinion and Order, on file with the author).

19. *See* Special Interrogatories and Verdict form, *supra* note 12 (finding 25 violations of state extortion laws and 21 violations of federal extortion law. The form does not specify whether any of these extortion crimes were related to the four acts or threats of violence also found by the jury).

20. NAACP v. Claiborne Hardware, 458 US 886 (1982).

21. *Scheidler*, 510 US at 263.

22. *Id.* at 264.

23. *Claiborne*, 458 US at 918 (emphasis added).

and counsel fees under RICO, even if RICO is applicable, are clearly not allowed. RICO was designed to destroy the organizations to which it was applied, in part through the use of the treble damage remedy.[24] Such destruction is inappropriate as to a First Amendment protest organization. Damages limited to direct consequence of violent conduct do not include treble, or other punitive, damages, costs or counsel fees.

II. The Damages in this Case Were Not Limited to Losses Proximately Caused By Unlawful Conduct.

It seems clear, based on both the majority and concurring opinions in *NOW v. Scheidler*, as well as *Claiborne Hardware*, that a political advocacy group that engages in acts of violence may be subjected to both prosecution and civil suit under RICO, (but not treble damages). For example, as Justice Souter noted, "we need not fear chilling ideological groups whose members commit acts of violence."[25] However, in *Claiborne Hardware*, which involved a mostly non-violent boycott of white merchants by the NAACP but which also involved some acts and threats of violence, the Court addressed itself to advocacy groups that may commits such acts:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence or threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, precision of regulation is demanded[26]. . ..Only those losses proximately caused by unlawful conduct may be recovered.[27]
> [Furthermore] the First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another. . . [B]lanket prohibition of association with a group having both legal and illegal aims would present a real danger that legitimate political expression or association would be impaired. . ..To punish association with such a group there must be clear proof that a defendant specifically intends to accomplish the aims of the organization by resorting to violence. . . This intent must be judged according to strictest law, for otherwise there is a danger that one in sympathy with the legitimate aims of such a group, but not specifically intending to

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24. *Hearings on Measures Relating to Organized Crime Before the Subcommittee on Criminal Laws and Procedures of the Sen. Comm. of the Judiciary,* 91st Cong. 1st Sess. 449 (1969) (President's message on Organized Crime) ("The arrest, conviction, and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those in jail."). *See generally* Craig Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 Iowa L.R. 837 (1980) for an early, and relatively succinct, analysis of RICO's provisions.

25. *Scheidler*, 510 U.S. at 264.

26. *Claiborne Hardware*, 458 US at 916.

27. *Id.* at 918.

> accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes. . ..[28]

Yet, at this trial, as Judge Coar found in his opinion following the verdict, the jury did not state which defendants did these acts or when they occurred, only the total number of acts.[29] Indeed, he refused to require any specificity of proof despite the objection of the defense attorney that such specificity was necessary to adequately defend this case.[30] In order to hold members of an advocacy group responsible for acts of violence the evidence must show which defendant did what at what time. It is not enough to show that there were violent acts committed by anti-abortion protestors, as cited by Judge Coar,[31] without tying them to particular acts of these defendants.[32] This violates the precision of regulation required by Claiborne, set forth above. Indeed, many of the acts cited by the plaintiffs in their complaint were not committed by any of the named defendants, or by people who were associated with their organizations.

III. None of the Acts Alleged in the Complaint Constitute Violations of the Hobbs Act, or Extortion Under State Law and the Jury Verdict Was Inadequate as to These Crimes.

A. The jury verdict is based on violations of the Hobbs Act[33] and extortion under state law both of which are pattern crimes under RICO.

However, as the Hobbs Act provides, and as is the case with most

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28. *Id.* at 918-919.

29. Judge Coar's Order of July 16, 1999 at 18 (unpublished Memorandum Opinion and Order, on file with the author).

30. Counsel for Defendants: "Your honor. . .we urge that the plaintiff should list in the special interrogatories each particular incident they allege to constitute an act of force, threat or violence sufficient to be extortion." The Court: "Absolutely not." Trial Translation at 4495 (on file with the author).

31. Judge Coar's Order of July 16, 1999, *supra* note 29, at 2-3.

32. The burden of demonstrating that (the taint of violence) which colored some acts, colored the entire effort. . .is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts." *Claiborne*, 458 U.S. at 933.

33. The Hobbs Act, 18 U.S.C. §1951 (1994), provides in pertinent part:

> (a) 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 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, etc.

state extortion laws,[34] an element of that crime is obtaining property. Yet in his instructions to the jury the judge specifically informed the jury that they could ignore this element: "[P]laintiffs must show that defendants. . .cause[d]. . .(various plaintiffs) to give up a property right. . . It does not matter whether or not the extortion provided an economic benefit to PLAN."[35] Thus, though the RICO concept of "enterprise" is not limited to those organizations that have an economic goal, as the Supreme Court held in this case, the crime of extortion does require, as the Hobbs Act states, that the defendant seek to "obtain property."

The crime of extortion, as exemplified by the Hobbs Act, is not committed by forcing someone to do something against their will. That is the crime of criminal coercion, which is not included among the pattern crimes of RICO. While the obtainment of intangible property can certainly satisfy the "obtaining property" element of the Hobbs Act,[36] it was an unjustified reading of that statute by the trial judge in this case to conclude that the element of obtaining property did not in fact require that the defendant actually obtain any property, but merely caused the plaintiff to forego a property right:

> The Hobbs Act was drawn from New York's Field Code. Under that code it was well-settled that extortion required an unlawful taking. As the New York cases cited by the Supreme Court in United States v. Enmons make clear, an accused could not be guilty of extortion unless he was actuated by the purpose of obtaining a financial benefit for himself. . .."[37]

It is true, that in a few states, extortion is not limited to "obtaining property" but may include "criminal coercion" as well.[38] However, since the jury did not specify which conduct constituted extortion under state law, much less what state this conduct occurred in, we have no way of knowing whether the extortion found by the jury occurred in those

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(b)(2) The term extortion *means the obtaining of property* [emphasis added] from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

34. It was not specified by the jury which state's extortion laws had been violated by the defendants.

35. Trial Transcript, *supra* note 31, at 4595 (emphasis added).

36. *See, e.g.*, Carpenter v. United States, 484 U.S. 19 (1987) holding that this will satisfy the implied property element obtainment in the mail fraud statute, 18 U.S.C. §1341.

37. Bradley, *supra* note 11, at 140 (quoting United States v. Enmons, 410 U.S. 396, 406 n.16 (1973)).

38. According to WAYNE R. LAFAVE AND AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW 460 (1986) the only such states are Alaska, Colorado, Kansas, New Mexico, Ohio, and Wyoming, though some other states may simply call extortion "criminal coercion." *See also* Bradley, *supra* note 11, at 144 n.82.

few states that do not limit extortion to obtainment of property by the defendant.

Furthermore, many of the threats issued by defendants were threats of demonstrations or harassment, not of violence, and thus cannot be the basis of a charge of extortion against a political advocacy organization.

B. In Richardson v. United States, *the Supreme Court considered the Continuing Criminal Enterprise statute (CCE).*[39]

CCE is an "enterprise" statute, similar to, and contemporaneous with RICO. It forbids any person from engaging in a continuing criminal enterprise involving a series of violations of drug statutes.[40] To find a violation of this statute, the Court held: "a jury. . .must unanimously agree, not only that the defendant committed some continuing series of violations but also that the defendant committed each of the individual violations necessary to make up that continuing series."[41]

Likewise, RICO requires proof of a "pattern of racketeering activities." Thus, applying Richardson, the jury verdict must specify precisely which of the many acts mentioned at the trial were the predicate acts of extortion that constituted the RICO pattern.[42] But the charge to the jury required no such proof.[43] Indeed, as noted above, the judge, over defense objection, flatly refused to require such a finding by the jury. Nor did the jury verdict specify which of the various acts of extortion that they found constituted the "pattern."[44] This is particularly crucial under RICO because, without knowing what conduct constituted the "21 acts of extortion under federal law" and "25 acts under state law" found by the jury, it is impossible to tell whether these crimes constituted the necessary "pattern," whether the enterprise was conducted "through" those crimes or even which defendant committed, and which "enterprise" was conducted, through all these crimes.

When the acts in question are part of a political protest, this defect is even more acute, as *Claiborne Hardware* makes clear. The jury's finding of 21 acts of extortion under federal and 25 under state law must be specific. That is, the verdict must state which defendant committed which extortionate threat or act of violence. The failure to be specific shows that the jury, like the complaint, did not carefully consider which acts were committed by these defendants and which acts may have been

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39. Richardson v. United States, 119 S.Ct. 1707 (1999).
40. 21 U.S.C. § 848(a) and (c) (1999).
41. *Richardson,* 119 S.Ct. at 1709.
42. Trial Transcript, *supra* note 31, at 4943-44.
43. Trial Transcript, *supra* note 31, at 4943-48.
44. Special Interrogatories and Verdict Form, *supra* note 12.

committed by other pro-life activists. (The complaint is full of references to acts committed by anti-abortion activist who were not parties to the lawsuit). Nor, it appears, did the jury separate acts and threats of violence, for which damages may be awarded, from acts or threats of barricading and political demonstration, for which damages are inappropriate. There simply are not 25 acts that are even arguably "extortionate threats" nor 21 acts that are arguably Hobbs Act violations, proved in this case. Had such lawsuits been allowed to succeed in the 1960's, they would have shut down the Civil Rights Movement.

C. The amended complaint does adopt the suggestion in my article that the Hobbs Act may be proved in a different way than through an allegation of either "robbery" or "extortion."[45]

The Hobbs Act contains an additional passage that has gone unnoticed. In addition to forbidding interference with commerce by robbery or extortion, it further criminalizes one who "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."[46] This can be read as covering interference with commerce by threats or violence whether or not property is obtained, such as terrorists blowing up bridges. This is consistent with Congress' apparent purpose to use the Hobbs Act as a means of deterring and punishing wartime sabotage that did not involve either robbery or extortion. Thus, although "extortion" requires obtainment of property, this long unnoticed passage in the Hobbs Act does not.

However, this reading of the Hobbs Act, while it could be the basis of a suit such as this one, has not been satisfied by the plaintiffs in this case. The complaint makes no effort to distinguish between such illegal threats and the constitutionally protected protest activities that were admittedly designed to close down or interfere with these clinics. Thus, Scheidler's threat of "reprisals"(on page 46 of the complaint) is far too vague to suffice. No effort is made in the complaint to tie the acts specified there to any specific interference with commerce. We have no idea whether the jury based its findings of "extortion" on illegal threats of violence or protected threats of demonstrations and picketing.

Moreover, the mere use of the telephone or traveling interstate is not enough of a connection to commerce to qualify under this suggested

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45. Bradley, *supra* note 11, at 142-44. See Third Amended Complaint at 2 (unpublished transcript on file with the author.)

46. 18 U.S.C. §1951 (1994). The purposes of this bill are "(1) to prevent interference with interstate commerce by robbery or extortion, as defined in the bill, and (2) to prevent interference with the transportation of troops, munitions, war supplies, or mail in interstate or foreign commerce." HR No. 238, 79th Cong., 1st Sess. (Feb. 27, 1945) at 1. (submitted by Cong. Hobbs).

approach to the Hobbs Act. The protected party in robbery and extortion is the victim of the robbery or extortion. Therefore, it is sufficient under the Act that the defendant's behavior only "affect commerce." On the other hand, the "victim" under my approach is commerce itself. Thus, if a person is charged, not with obtaining property through robbery or extortion, but with "committing or threatening physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section," that must be, as Congress clearly intended, a plan or purpose to damage commerce (eg. by blowing up bridges). Mere incidental "effect" on the facilities of interstate commerce, though enough to make out a Hobbs Act violation under the robbery and extortion provisions of the Hobbs Act, is not such a plan or purpose in violation of this provision. But the judge's instructions[47] do not require the jury to find any such interference. If illegal threats were employed, however, driving abortion clinics out of business would certainly be a sufficient effect on commerce.

In conclusion, plaintiffs have made out violations of the FACE statute and state trespassing laws, and enforcement of these laws should be adequate to allow abortion clinics to operate effectively. It is not necessary to invoke the stringent provisions of RICO, which were designed to put criminal enterprises out of business, against anti-abortion protesters. In order to do so, plaintiffs would have to show that a particular anti-abortion "enterprise" was operated through a pattern of racketeering activities, in this case extortion. But plaintiffs have failed to do this. They have not proved that extortion, as opposed to criminal coercion, occurred in that they have shown no obtainment of property. Nor have they shown that defendants sought to damage commerce under my alternative reading of the Hobbs Act. They have not attributed particular acts or threats of violence to particular defendants, nor have they shown a "pattern" as required by RICO. Finally, applying RICO to this case, without attributing damages to specific acts or threats of violence by named defendants, violates the First Amendment, as will the imposition of treble damages and counsel fees. Just because, plaintiff's cause may be just, does not mean that they can ignore the strictures of the First Amendment in advancing it.

47. Trial Transcript, *supra* note 31, at 4943-4842.