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Civil RICO Claims And Immigration Law Violations

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Can a U.S. corporation and agents acting on its behalf constitute an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1969 (RICO)? If the answer is yes, U.S. corporations which use outside entities to carry out any of their business functions could find themselves liable under RICO for a broader range of corporate conduct than ever before, which would almost certainly have a chilling effect on U.S. business activities. So far, the Courts of Appeals have split when addressing this question. However, as is customary when there is a conflict in the Circuits on an important federal issue, the U.S. Supreme Court recently agreed to resolve this conflict in *Mohawk Industries, Inc. v. Shirley Williams et al.*, No. 05-465, *cert granted* (12/12/2005), and will soon provide much-needed guidance.

Mohawk is one of several recent cases in which private parties have sought to hold employers liable for RICO violations where the employers allegedly, in conjunction with recruiters and staffing agencies, knowingly hired undocumented foreign workers. How did RICO, enacted in 1970 and designed to provide the government with a tool to eliminate the negative impact of organized crime on the nation's economy, come to be used as a civil tool for private parties seeking to enforce U.S. immigration laws? The answer lies in a little-noticed 1996 amendment to the RICO Act which opened the civil-action door for parties concerned about the growing dependence of certain sectors of the U.S. economy on low-skilled foreign labor and frustrated by the U.S. government's inefficient enforcement of its immigration laws. The expansion of civil RICO actions to include violations of immigration law has significant implications for all corporations and businesses, and not just those that must rely on a low-skilled and low-paid workforce. Employers who do not have, and follow, a comprehensive company immigration plan to ensure that their policies, contract terms, and communications with their employees and agents comply with current immigration and employment laws can find themselves at significantly greater risk not only of government sanctions, but also of the harsh financial penalties resulting from civil RICO liability.

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A Broad Mandate by Congress

In passing the RICO Act in 1970, Congress wanted to provide the government with a powerful civil and criminal enforcement tool against organized crime, and also provide a civil remedy for private parties against defendants engaging in patterns of racketeering. RICO was enacted, in large part, as a Congressional response to organized crime's infiltration of legitimate business operations that affect interstate commerce. Congress incorporated expansive language in the Act, along with the express admonition that RICO be liberally construed to effectuate its remedial purposes. (Pub. Law No. 91-452 §904(a), 84 Stat. 947 (1970)) RICO makes no mention of "organized crime," but instead targets "racketeering activity."

Throughout the 1970s, RICO was seldom used outside the context of organized crime and civil RICO claims were rarely brought. Over time, however, the harsh penalties imposed for civil RICO violations, and the resulting windfall for plaintiffs' attorneys, namely judgments in the amount of three times the plaintiffs' actual damages, plus costs and attorneys' fees (the holy grail of litigation), inspired the creativity of plaintiffs' lawyers. By the late 1980s, civil RICO claims had become so common that Chief Justice William Rehnquist, in a 1989 address at the Brookings Institution, urged Congress to narrow the scope of the law. Congress has, however, so far failed to restrict the RICO Act in any substantial way.

Proving a RICO Claim

Perhaps Congress intended to deter potential plaintiffs from seeking relief under RICO through the high standard of proof required for a RICO claim. To be liable for a criminal or civil RICO violation, a plaintiff must establish that: 1) the *defendant* was employed by or associated with an *enterprise* that engaged in or affected interstate commerce; 2) the defendant *operated* or *managed* the enterprise through a *pattern of racketeering activity*; 3) the plaintiff sustained an *injury* to its business or property; and 4) the pattern of racketeering activity *caused* the injury. 18 U.S.C. 1964(c).

"Racketeering activity" is defined to include numerous federal, and certain state, crimes, or "predicate acts" identified in the RICO Act, 18 U.S.C. 1961(1). To establish the requisite "pattern of racketeering activity," plaintiffs must demonstrate that the predicate acts are related or have the same or similar results, participants, victims, or methods of commission, and are not isolated events.

18 U.S.C. 1961(4) defines "enterprise" to include any individual, or legal entity, such as a partnership, corporation, association, or any union or group of individuals or enti-

ties associated in fact, although not a legal entity. The latter groups are referred to as "association-in-fact" enterprises under the Act, and it is these types of enterprises which are most commonly alleged in RICO claims and which are the most difficult to understand analytically. Courts, so far, have held that these enterprises must consist of more than just a corporate entity and its agents conducting their regular business. Plaintiffs must be able to show that the enterprise has some continuity of structure and personnel, a common or shared purpose, and an ascertainable structure distinct from that inherent in the pattern of racketeering. Additionally, the corporate defendant charged with racketeering activity cannot be in itself the RICO enterprise. The relationship between RICO defendants and the RICO enterprise has been described as that of "spoke-and-hub," with the RICO defendants being the spokes and the RICO enterprise being the hub. Most of the civil RICO claims involving violations of immigration law have alleged an "association-in-fact" enterprise: The corporate defendant that is alleged to knowingly employ undocumented workers and the outside entities acting on its behalf to recruit the workers are characterized as separate spokes; these spokes come together through a common purpose to form a hub, the RICO enterprise which has allegedly violated immigration laws.

Immigration Violations Included in RICO

Section 274 of the Immigration and Nationality Act (INA), 8 U.S.C. §1324, enacted in 1952, prohibits the bringing in and harboring of certain aliens in the United States, and also provides that any person who knowingly hires at least 10 individuals within a 1-year period, with actual knowledge that the individuals are illegal aliens, shall be fined or imprisoned for not more than 5 years, or both. Therefore, any company or person that knowingly hires, within any 12-month period, at least 10 illegal aliens, commits a criminal violation under INA §274. In 1996, Congress amended RICO to expand the list of crimes identified as predicate acts under RICO to include violations of INA §274. Congress buried the RICO amendments deep in legislation, stimulated in part by the bombings in Oklahoma City and the World Trade Center: the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, §434, 110 Stat. 1214 (1996). In so amending RICO, Congress effectively opened the door for civil RICO claims against employers who knowingly employ illegal aliens in violation of the INA.

A New Weapon for Plaintiffs Seeking to Enforce Immigration Laws

Although they received little attention when enacted, the 1996 amendments quickly made a civil RICO claim a valuable weapon in the arsenal of plaintiffs frustrated by what they saw as the federal government's inefficient and spotty enforcement of existing immigration laws, such as those requiring employers to verify the employment authorization of all their employees. In the last 5 years, cases alleging violations of immigration law by employers have been brought in the Second, Ninth, Sixth, Seventh, and Eleventh Circuits. The Second, Ninth, and Sixth Circuits did not reach the merits of the plaintiffs' RICO claims, but reversed rulings by the district courts that the plaintiffs lacked standing because the alleged connection between the defendants' hiring practices and the plaintiffs' injuries were too speculative. The Seventh and Eleventh Circuit Courts of Appeals went beyond the jurisdictional questions and split on the merits of whether plaintiffs successfully alleged the existence of a RICO enterprise.

Civil RICO suits allowing private parties to enforce immigration laws provide plaintiffs with what has been described as … "the litigation equivalent of a thermonuclear device."

In *Commercial Cleaning Services, LLC v. Colin Service Systems, Inc.,* 271 F.3d 374 (2d Cir. 2001), Commercial Cleaning Services, a small cleaning company, claimed that Colin Service Systems, a much larger company performing similar janitorial services, had engaged in a pattern of racketeering by knowingly hiring hundreds of illegal immigrants at low wages. The district court dismissed the claim, finding Commercial lacked standing because it failed to allege direct injury proximately caused by Colin's conduct. The Second Circuit Court of Appeals reversed, however, holding that Commercial had standing because it had suffered direct injury which was proximately caused by Colin's ability to underbid them in a price-sensitive market. The Court of Appeals did not address the other requirements of a RICO claim and remanded the case for further proceedings. In July 2002, Commercial declined to pursue the case and the parties entered into a stipulated dismissal.

Plaintiffs claiming violations of the INA in both the Ninth and the Sixth Circuits quickly jumped on the RICO bandwagon. In *Mendoza v. Zirkle Fruit Co.,* 301 F.3d 1163 (9th Cir. 2002), documented agricultural workers in Washington State's fruit industry claimed their employer knowingly hired illegal aliens recruited by its employment agency in order to depress wages below the levels the employer would be required to pay documented workers. The district court initially dismissed the case, finding that the plaintiffs lacked standing, but the Ninth Circuit Court of Appeals remanded the case in 2002 and followed the Second Circuit in specifically finding that the workers had alleged a sufficient connection between their damages and the defendants' conduct to sue under RICO. In January 2006, Zirkle agreed to pay $1.3 million to settle out of court. This unprecedented move on Zirkle's part, along with its payment of plaintiff's attorney's fees, may well give rise to a spate of RICO-based lawsuits against other large employers with deep pockets who allegedly "low ball" wages by hiring illegal aliens.

The Ninth Circuit in *Zirkle* declined to address the issue of whether the fruit growers and their employment agency had engaged in a RICO enterprise, as did the Sixth Circuit in *Trollinger v. Tyson Foods, Inc.,* 370 F.3d 602 (6th Cir. 2004). In *Trollinger*, a class of employees, this time former employees of a poultry processing plant, sued their employer for conspiring with recruiters and employment agencies to depress their wages by hiring illegal aliens. *Trollinger* came on the heels of an extensive undercover investigation of Tyson Foods by the legacy Immigration and Naturalization Service (INS) in which INS tracked 150 illegal aliens from the border to a Tyson processing plant. The former Tyson employees claimed that Tyson used recruiters and temporary employment agencies to coach illegal immigrants to deny that they were smuggled into the United States. The Sixth Circuit reversed the decision of the district court that the plaintiffs lacked standing because they had failed to show a rational connection between the hiring of illegal aliens and wage suppression, stating that the legal employees might be able to prove a direct injury, and remanded the case to the district court. The circuit court noted, however, that the plaintiffs might have to establish something more than an "attenuated" relationship between the acts complained of

and the lowered wages to survive a motion for summary judgment.

A Split in the Circuits

The Seventh Circuit directly addressed the question of whether a RICO enterprise existed in *Baker v. IBP, Inc.,* 357 F.3d 685 (7th Cir. 2004). In *Baker*, unlike the Second, Ninth, and Sixth Circuits, the Seventh Circuit affirmed the lower court's dismissal of a class action suit brought by former employees of an Illinois meat-processing plant against IBP, Inc., who contended that their wages were depressed because IBP allegedly conspired with recruiters and a Chinese aid group to hire illegal workers. The Seventh Circuit held that IBP could not be said to operate or manage a separate and distinct criminal enterprise for RICO purposes because recruitment and hiring are *intrinsic* to its normal operations as an employer. The court went on to hold that an enterprise did not exist; the alleged members were not an "association-in-fact" because they did not have a common purpose. IBP wanted to pay lower wages; the recruiter wanted to make as much as possible for supplying workers, and the aid group wanted to help Chinese immigrants. Such three distinct entities, each with its own agenda, could not constitute an enterprise for RICO purposes. In other words, the defendant "spokes" did not come together to form a RICO enterprise "hub."

In 2005, the Eleventh Circuit Court of Appeals concurred with the Second, Sixth, and Ninth Circuit Courts of Appeals in finding that the plaintiffs in a civil RICO claim alleging immigration violations had standing. In *Shirley Williams et al. v. Mohawk Industries, Inc.,* 411 F.3d 1252 (11th Cir. 2005), former and current hourly employees of Mohawk Industries, Inc., one of the nation's largest carpet and rug manufacturers, filed a class action lawsuit. Plaintiffs claimed that Mohawk drove down wages by conspiring with recruiters and temporary agencies to recruit illegal aliens along the Mexican border of the United States and encouraged and aided them in relocating to Northern Georgia, where Mohawk subsequently hired them, knowing them to be without U.S. employment authorization. Mohawk filed a motion to dismiss, asserting that the complaint failed to allege the existence of an enterprise distinct from the operations of the corporation, as required under RICO. The district court found the employees' claims survived Mohawk's motion to dismiss, and the Eleventh Circuit Court of Appeals affirmed the denial of Mohawk's motion to dismiss and held that a corporation and its recruiters and staffing agencies acting on its behalf *can* constitute an "enterprise" for purposes of liability under RICO. The Court of Appeals found that Mohawk and the third-party recruiters constituted "distinct entities" for purposes of alleging a RICO claim, but allowed the claim anyway, acknowledging that its decision conflicted with the conclusion reached by the Seventh Circuit in *Baker*. The court noted that, although *Baker* involved materially similar circumstances, there was evidence in the present case that Mohawk and the recruiters worked *together* to recruit illegal aliens and that, therefore, these two entities had the "common purpose" of providing illegal workers so that Mohawk could reduce costs and increase profits. The Eleventh Circuit acknowledged that it may often be the case that different members of a RICO enterprise will enjoy different benefits from the commission of predicate acts, but maintained that all that is required for a viable RICO claim is that the enterprise have a common purpose.

Mohawk argued in its petition for certiorari that the Eleventh Circuit's ruling impermissibly relaxed the limitations Congress placed on the imposition of RICO's harsh penalties when Congress, in 18 U.S.C. §1962(c), required that a defendant participate in the operation or management of an "enterprise" that is different from the defendant alone. Mohawk argued that since a corporation can only operate through its agents, the corporation could not be a RICO defendant simply because it used agents to "perform a corporate function."

The respondents, in their opposition brief, contended that there was no conflict because, they asserted, the Eleventh Circuit, like the district court, merely concluded that the plaintiffs' allegation of an association-in-fact enterprise consisting of a corporation and distinct third parties comes within the statutory definition of an enterprise.

The case has not yet been scheduled for oral argument.

Conclusion

Civil RICO suits allowing private parties to enforce immigration laws provide plaintiffs with what has been described as "an unusually potent weapon — the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Employers located in areas with a large immigrant worker population (which exist throughout the country) may be potential targets for civil RICO class actions. The impact of the civil RICO cases alleging violations of immigration laws has yet to be fully felt, but the settlement of *Zirkle* and the Supreme Court's determination in *Mohawk* could potentially have a significant impact on the practices of all corporations and businesses that use third parties to carry out their business functions, including recruitment of employees. Defending an employment class action lawsuit is a daunting prospect for any employer due to the diversion of management resources over an extended period of time, not to mention the cost, both financial and in public relations. Employers concerned about potential liability from a civil RICO lawsuit involving violation of the immigration laws should be aware that actual knowledge of unauthorized employment is not required and may be inferred where circumstances could lead one to believe that the employer should have known that certain of its employees lacked authorization to work in the United States. Therefore, it would be prudent for employers to explore proactive means by which they can establish policies, contract terms, and communications to provide evidence that they and their agents are consistently doing everything possible to abide by the law when recruiting and hiring workers. A comprehensive company immigration compliance plan, drafted with the assistance of immigration law experts, and that takes into account the fine line which must be drawn between compliance with immigration laws and violation of federal and state antidiscrimination laws, can go far to protect employers from sanctions by the government, as well as liability from civil RICO suits. In today's increasingly litigious environment over competitive advantages created by the violation of immigration laws, where the federal courts have given employees a potentially substantial weapon, employers who do not have and follow a carefully drafted immigration compliance plan, ignore this new risk.

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