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RICO: A New Tool for Employers Facing Union Corporate Campaigns?

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On Oct. 27, 2008, Judge Robert E. Payne approved and filed under seal a settlement agreement that marked the end of Smithfield Foods' precedent-setting civil racketeering suit against the United Food and Commercial Workers' Union (UFCW) and several related defendants. The case, which was pending in the Eastern District of Virginia's "rocket docket," would have been the first civil racketeering action of its kind to proceed to a jury trial. Despite settling literally on the eve of trial, the case spawned critically important legal precedent that blazes a new trail for employers who are in search of litigation options for responding to non-traditional union organizing methods.

The Nature of Union Corporate Campaigns

The case was born out of the UFCW's lengthy struggle to organize Smithfield's Tar Heel, NC, pork processing plant. After attempting for over a decade to organize the plant through traditional methods, the UFCW opted to pursue an aggressive, non-traditional organizing strategy: the corporate pressure campaign. This rapidly emerging union tactic is designed to circumvent the NLRB's secret ballot election process, the traditionally accepted means of organizing employees. Union officials have made no secret of the fact that the corporate campaign is a coordinated, negative publicity effort intended to place unbearable financial, legal and social pressure on a targeted employer in order to convince that employer to forego its NLRB rights and agree to the union's organizing demands.

Typical campaigns include publication of inflammatory accusations against the target company (such as claims that the target company is racist or anti-immigrant, that it operates a dangerous workplace, makes unsafe products, or violates environmental laws); filing of frivolous legal and regulatory actions; calls for government investigations of alleged violations of state and federal laws; demands for consumer boycotts of company products or services; demonstrations at annual shareholder meetings; attempts to pass shareholder resolutions critical of company management; and even contacts with the investment community designed to deflate the target employer's stock price. All of this conduct is designed to swarm the target company with attacks that keep it distracted from its core business endeavors, drain its resources and threaten its business relationships and community standing. In the face of such an assault, many companies conclude that it is easier to agree to the union's demands (and end the corporate campaign) than it is to resist.

The UFCW's corporate campaign against Smithfield included all of these components. The company's legal response included bringing claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), the federal racketeering statute used to combat organized crime. In order to recover under RICO, a plaintiff must prove that the defendant engaged in a "pattern of racketeering activity," which means the commission by the defendant of at least two or more acts of racketeering within a ten-year period. Smithfield alleged that the UFCW's corporate campaign was tantamount to extortion (an enumerated racketeering act) in that the union threatened to

continue its campaign until the company agreed to recognize the UFCW without an NLRB election.

This novel theory presented a host of complex legal questions, many of which had not yet been fully answered by the federal courts. The defendants raised defenses that implicated several of these questions in a consolidated motion for summary judgment filed at the close of discovery in August, 2008. The district court's Oct. 14, 2008 opinion denying the defendants' motion answers many and provides the most comprehensive analysis to date of the application of civil RICO to union corporate campaigns.

Is Union Recognition Extortable Property?

The defendants argued based on the U.S. Supreme Court's decision in Scheidler v. NOW, Inc., 537 U.S. 393 (2003) that a company's right to refuse a union demand for recognition was not property and therefore not capable of being extorted. In Scheidler, the Supreme Court held that anti-abortion activists did not commit extortion by seeking to close down abortion clinics and prevent individuals from having abortions. Although these activities may have deprived abortion supporters of their right to have an abortion, the court ruled that the activists never sought to obtain anything for themselves and instead merely interfered with the property rights of others. That was not extortion.

The Virginia court ruled that, unlike in Scheidler, the Smithfield case did involve an attempt by the UFCW to obtain something for itself: the right to represent the employees at Smithfield's Tar Heel plant and to bargain a labor contract on their behalf. The court noted that the right to recognize (or not) a labor union does constitute a valuable property right and that a union's attempt to take that right from an employer could indeed constitute extortion under RICO. Significantly, the court also ruled that it does not matter whether a union automatically acquires the property right at issue, and held that all that is required to commit extortion under Scheidler is that a union cause the property right of recognition to be acquired by someone else (such as the employees of the targeted employer).

Can a Union Corporate Campaign Constitute a 'Pattern Of Racketeering Activity'?

The defendants also argued that the facts of the case demonstrated, at best, multiple acts in pursuit of a single extortionate scheme, as opposed to multiple, separate acts of extortion. As such, defendants claimed that Smithfield could not establish a "pattern of racketeering activity" under RICO. The court rejected this argument, ruling that Smithfield had alleged that the defendants engaged in numerous acts, involving different groups and persons in different states, at different times, over a two-year period, and that the company could establish at trial that two or more of those acts were separately chargeable acts of extortion for purposes of establishing a RICO pattern. The defendants also claimed that Smithfield could not prove a RICO pattern because the campaign to organize the Tar Heel plant had a "built-in ending point" and therefore that there was no threat of long-term extortionate activity, another pattern requirement under RICO. The court likewise rejected this argument, noting that if the defendants' campaign were successful, it would create a long-term relationship between Smithfield and the UFCW that could lead to future extortionate conduct on the part of the UFCW.

Does the NLRA 'Preempt' RICO and Related State Causes of Action?

Defendants also argued that the RICO claims were preempted by the federal labor laws. Asserting the doctrine of "Machinists preemption" articulated by the U.S. Supreme Court in International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), defendants claimed that Congress chose not to address economic pressure campaigns when it passed the NLRA and therefore intended that such actions be unregulated and left to the "free play of contending market forces." The court rejected the defendants' preemption argument, finding that Congress did intend that RICO be given application in the labor context. Notably, the court observed that if it were to accept the defendants' argument: "labor unions would be permitted to engage in extortion so long as their objective was labor related. Neither RICO nor any decision on which the Defendants rely provides for license of that sort."

In addition to its federal RICO claims, Smithfield brought several related state law causes of action, including a claim for tortious interference with business relations. The court ruled that Smithfield's state law causes of action were not subject to preemption because the Machinists doctrine did not bar states from enforcing "neutral laws of general application" that do not invade the field of labor regulation.

Does the First Amendment Protect Union Corporate Campaigns?

The most important question in the case in terms of its potential impact on future union organizing campaigns was whether the First Amendment acts as a liability shield behind which labor unions may safely carry on negative publicity campaigns against employers. The defendants argued that their pressure campaign consisted entirely of speech and petitioning activities, such as peaceful protesting and publication of negative information. They also claimed that the motive of the campaign was only to change Smithfield's behavior and not to take away property rights. As such, the defendants claimed they were protected under the First Amendment because they were exercising their right to free speech.

Acknowledging that the U.S. Supreme Court has yet to define the "exact interplay" between RICO extortion and the First Amendment, the court noted the obvious fact that "some inconvenience to speech is caused by all laws" and that extortionate conduct is not protected under the First Amendment just because it contains an element of expressive content. Thus, the court ruled as an initial matter that, regardless whether the defendants' actions consisted entirely of speech-based activism, "the First Amendment [simply] does not protect extortion." The court concluded that trial was necessary to determine whether the defendants' motive was extortionate or, as they asserted, simply to cause Smithfield to change its behavior. If the defendants' motive was the former, the First Amendment would provide no refuge from RICO liability.

Combating Corporate Campaigns: Is RICO the New Alternative to a Traditional Public Relations Response?

So what is the significance of this precedent for other employers facing similar union attacks? Some believe that the passage of a version of the Employee Free Choice Act (EFCA) will result in a decrease in non-traditional union organizing activity. After all, card-check legislation would render employer cooperation less critical to a successful organizing drive. This view is probably inaccurate. In fact, the passage of EFCA in any form will embolden labor unions to become more aggressive. And the corporate campaign is likely to be an important component in drives to organize such employers. Picture a union smear campaign of the corporate parent of a fast-food franchisor, where the goal of the campaign is to force the parent to accept a uniform collective bargaining agreement for all successfully organized franchisees, or a campaign to force a manufacturer with a massive production facility in a right-to-work state to remain neutral during a card-signing drive at that facility.

Whether or not EFCA becomes a reality, corporate campaigns are likely to remain a powerful union organizing tool. As the Smithfield case demonstrates, courts are willing to accept civil RICO claims as one of the means of response, provided they are supported by the facts. Although the case was not completely unprecedented, few employers have been willing to combat union corporate campaigns with large-scale litigation responses. The conventional wisdom is that big cases can be time consuming, distracting to top executives and counsel, and very costly. In addition, they can be difficult to prove, as the recent dismissals of civil RICO actions brought by Wackenhut and Cintas (both against international labor unions engaged in corporate campaigns) demonstrate. These cases involved somewhat different facts, which led to different results. The dismissals of these cases highlight the critical importance of the need for extensive analysis of the facts related to the campaign at issue, as well as the manner in which the RICO claims are presented in the complaint.

While large-scale RICO litigation can be draining, the alternative of doing nothing, or simply responding with a traditional public relations strategy, can often be worse. Having to deal with the political, public and financial fallout caused by years of brutal union attacks can be every bit as distracting, unsettling, damaging and costly as any litigation. And while a coordinated public relations campaign is often effective as a day-to-day, tactical response, it may not have a strategic impact on a union's willingness to discontinue its corporate campaign. Something more may be required. By having the courage to pursue its groundbreaking claims to the brink of trial, Smithfield established that RICO can be an answer for other employers facing similar union campaigns.