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An Analysis of Recent Developments & Trends

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RICO/IMMIGRATION or ANTITRUST/ IMMIGRATION Lawsuits?

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Summary: Developments over the last year may invigorate the recent wave of RICO/IMMIGRATION test lawsuits blaming employers for attracting large numbers of illegal workers into an area: a January $1.3 million settlement in Washington, a new Supreme Court decision on the "direct harm" requirement of RICO, and an expansion of the attack beyond RICO to antitrust accusations. Employee class actions and competitor attacks are also looking to creatively craft predicate RICO acts and antitrust restraints out of not only criminal immigration acts, but also alleged wage and hour violations in the payment of illegal workers by employers and their labor suppliers.

The recent wave of RICO/IMMIGRATION lawsuits has had a tumultuous year.[1] At times, the tide seemed to swing significantly toward the plaintiffs in these cases alleging that employers had violated the federal RICO statute through multiple immigration law violations. Plaintiffs survived a motion to dismiss at the trial court and in an appeal to the Eleventh Circuit in *Williams v. Mohawk*.[2] A new breed of lawsuit was brought in Idaho by a county governmental entity against local employers accused of immigration violations.[3] And most importantly, the first of these lawsuits to survive all the way through discovery and summary judgment motions almost reached a jury trial; but was settled on the brink of trial in Washington state for a reported $1.3 million.[4] This substantial recovery was the first widely reported plaintiffs' recovery and seemed to portend that a rising tide of additional lawsuits would be filed against employers around the country.

However, the tide appeared to change when the plaintiff in the Idaho case lost on a motion to dismiss.[5] The tide further appeared to completely shift toward employers with the U.S. Supreme Court's *Anza v. Ideal Steel Supply Corp.* decision on June 5, 2006,[6] and that Court's subsequent remand of the *Mohawk* case for further proceedings.[7] The Supreme Court's decision in *Anza* may prove to be the fatal blow to such class actions brought under the federal RICO statute as the Court set an apparently high bar for the type of direct causation required to prove that the plaintiff was directly harmed by the alleged RICO enterprise's violation of the immigration statute.

However, the tide may now be changing again. In *Global Horizons v. Mungher Brothers*,[8] a new, creative use of state antitrust laws instead of the federal RICO statute are beginning to be asserted in light of the *Anza* obstacles to employee RICO lawsuits. In *Global Horizons*, the plaintiff accused an employer and its labor suppliers of conspiring to violate both the immigration laws and wage and hour requirements.

Plaintiffs Must Show "Direct Harm: in RICO Claims

The U.S. Supreme Court's decision in *Anza* did not involve an employment dispute, but the ruling rests on

[1] *See* earlier Insight: Don Benson and Jamie Kitces "New Wave or Flash Flood: 11th Circuit Allows RICO/Immigration Lawsuit to Proceed" (July 2005)

[2] *Williams v. Mohawk Indus., Inc.*, 411 F. 3d 1252 (11th Cir. 2005), *cert. granted, Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 830 U.S. 2005), *vacated and remanded by Mohawk Indus., Inc. v. Williams*, 2006 U.S. LEXIS 4507 (June 5, 2006).

[3] *Canyon County v. Syngenta Seeds, Inc., et al.*, No-05-306 (D. Idaho filed July 27, 2005).

[4] *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002).

[5] *Canyon County v. Syngenta Seeds, Inc, .et al.*, No-05-306 (D. Idaho Dec. 13, 2005) (order dismissing case). Defendants won at the trial court level on a motion to dismiss based on the RICO defense that a municipality can not recover for providing services that it ordinarily provides. This "municipal cost recovery rule" was successfully asserted by Littler Mendelson on behalf of one of the defendants.

[6] *Anza v. Ideal Steel Supply Corp.*, No. 04-433, 126 (U.S.S.Ct. 1991 (June 5, 2006)).

[7] *Mohawk Indus., Inc. v. Williams*, No. 05-465, 2006 (U.S. LEXIS 4507 (U.S.S.Ct. June 5, 2006)).

[8] *Global Horizons, Inc. v. Mungher Brothers Inc.*, No. S-15---cv-258904-SEC (Kern County Superior Court, State of California, filed Aug. 21, 2006).

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a principle of causation that may prove fatal to the RICO/IMMIGRATION actions. In *Anza*, the plaintiff, Ideal Steel, was a competitor of National Steel Supply, Inc. The defendant owners of National Steel, Joseph and Vincent Anza, allegedly ran National as a criminal RICO enterprise by refusing to charge sales tax to its cash customers, and using the money to lower its prices to gain a competitive advantage. The Court found that the criminal mail and wire fraud committed in submitting National's bogus tax filings could provide the criminal predicate acts to support a RICO action; but that the direct victim of these alleged RICO violations was the State of New York who lost tax revenue, and not Ideal Steel. The RICO violations did not proximately cause harm to Ideal Steel because its competitive injury was not sufficiently "direct." Although Ideal Steel might be able to prove that it lost sales due to National's decreased prices, National could have reduced prices for multiple reasons and a court would need to determine which portion of the price decrease was due to the RICO violations, a process so speculative that it could not constitute the "direct relation between the injury and the injurious conduct" required to show proximate cause under RICO.

How Are Plaintiffs Directly Harmed Under RICO?

On the same date, the Court remanded *Mohawk* for further proceedings in light of its Anza opinion, clearly indicating that the Eleventh Circuit's earlier decision finding that the class of actual employees could sue Mohawk for driving down wages by bringing in illegal workers into the area, must be re-examined to see if the causal connection between the employer's alleged RICO violations of the immigration laws would be a "direct harm" to the current employees. It is not obvious that the employee plaintiffs in Mohawk are directly harmed even if the employer or its agents knowingly accepted false identification, or helped to harbor and transport illegal workers. If the employer accepts a fake identification knowing it to be false, this may violate the immigration statute, but it does not directly harm the current employee who already has a job at Mohawk. The employee does not lose his job, is not required to lower his pay, or to submit more identification. The employee's alleged injury would appear to be the indirect, economic depression of wages in the area because there are more available workers. However, wages could be reduced by Mohawk for a variety of reasons, just like National Steel in *Anza* could have reduced its prices for a variety of reasons. A trail of dueling economic experts and evidence over prevailing economic factors affecting wages in North Georgia would seem to subject the *Mohawk* court to the same type of speculative proof that the Court rejected in *Anza*. "Indirectly lowered wages" sure sounds a lot like "indirectly lowered prices." It remains to be seen whether the plaintiffs in *Mohawk* can distinguish their alleged harm and the causation issues from the lowered prices that proved fatal to the plaintiff in *Anza*.[9]

The first reported case to address the issue after *Anza* granted the employer's motion to dismiss finding that the employee plaintiffs were not "directly harmed" and could not state a cause of action under the RICO Act.[10]

New Lawsuits

In response to the *Anza* decision, we expect plaintiffs to consider whether the use of state RICO statutes might yield a less strict "cause" standard, whether other plaintiffs such as competing companies might more easily show direct harm, and/or whether different immigration violations might be more appropriate predicate RICO acts.

Global Horizons v. Mungher Brothers is one example of how plaintiffs may try to creatively plead their case to get around the strict *Anza* and RICO causation standards. In that case Global Horizons, a California temporary employment agency who supplies farm workers, filed a lawsuit in the Kern County, California, Superior Court on August 21, 2006, against a grower and two competing employment agencies. *Global Horizons* involves the agricultural industry and the relationships between growers and labor suppliers similar to those involved in the *Mendoza* case, where the plaintiffs obtained the $1.3 million settlement. However, Global Horizons chose to proceed under California's antitrust statute commonly known as the Cartwright Act[11] instead of RICO. California's Cartwright Act in many ways parallels and is interpreted in accordance with federal precedent under the Sherman Act. The *Global Horizons* lawsuit alleges that an antitrust violation occurred when companies cooperated to achieve an antitrust objective of fixing prices or allocating customers and markets, through violations of the immigration laws.[12] It seeks to avoid the "direct harm" standard articulated by the U.S. Supreme Court for RICO cases by relying on the Cartwright Act's stat-

[9] *Mohawk* is currently back in the Eleventh Circuit and the parties are in the process of filing supplemental briefs addressing the Supreme Court's *Anza* decision. The Sixth Circuit case was reversed in favor of the plaintiffs and proceeds with discovery in the trial court in the Eastern District of Tennessee, *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6thCir. 2004), No. 4:02-cv-23 (E.D.Tenn.). The Ninth Circuit case out of Idaho, *Canyon County*, is currently on appeal to the Ninth Circuit.

[10] *Zavala v. Wal-Mart Stores, Inc.*, No. 03-5309 (JAG) (D.N.J., Order Aug. 28, 2006) (plaintiffs alleged that immigration predicate RICO acts caused plaintiffs to have immigrant status and secondarily, to be vulnerable to economic exploitation through underpayment of wages).

[11] Cal. Business & Professions Code §§ 16700-58.

[12] *See, e.g., Mailand v. Burckle*, 20 Cal.3d 367 (1978); *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709 (1982); *Rosack v. Volvo Corp. of Am.*, 131 Cal. App. 3d 741 (1982).

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utory language which allows any person who is injured by a forbidden act to file a claim "regardless of whether such injured person dealt directly or indirectly with the defendant."[13] This statutory language appears to have been interpreted broadly by California courts as covering "all who are made victims of the forbidden practices by whomever they may be perpetrated."[14]

Perhaps just as creative as its use of the Cartwright Act instead of RICO, the plaintiff in *Global Horizons* alleges not only the immigration violations that were previously identified in earlier RICO/IMMIGRATION cases, but it also alleges that the grower was aware of the labor suppliers' repeated violations of the California wage and hour requirements. Global Horizons claims that its contract with the grower was terminated by the grower when the grower successfully conspired with other labor providers to avoid the expense of relocating workers and obtaining the necessary visa approvals and to provide cheaper labor by violating the wage and hour restrictions on breaks, working off the clock and overtime. Because the grower terminated its contract with Global Horizons for failure to meet performance standards in order to use a cheaper supplier whose illegal workers may have suffered wage and hour violations, Global Horizon may have suffered a "direct harm" by the termination of its contract, raising some unique factual issues that were not present in the mere competitor's "direct harm" rejected by the U.S. Supreme Court in *Anza*.

Employer Prevention

It remains to be seen whether the *Anza* decision will present an insurmountable obstacle to the RICO/IMMIGRATION class actions. The recent filing in California state court under the state antitrust may be an indication that plaintiffs have not given up on litigation against employers as a method for challenging the immigration influx into their communities. We can expect further exploration by plaintiffs of state RICO statutes and creative re-casting of the named plaintiffs, the predicate criminal acts, and the type of harm in order to overcome these causation obstacles.

Employers would be well advised to continue to monitor the RICO/IMMIGRATION cases, to start gathering evidence to support their wage decisions, and to conduct periodic reviews of their immigration and wage and hour compliance procedures. Even lower level supervisors who may hear rumors of immigration and wage and hour violations by the company or its vendors must be trained how to respond to and report such allegations. Because many of the RICO/IMMIGRATION and antitrust cases allege that an employer conspired with those outside of the company such as recruiters or temporary worker agencies to violate the immigration laws, merely looking the other way and adopting a "don't ask and don't tell" policy with the vendors who procure employee candidates and temporary workers may be a costly mistake. Employers should continually review their contracts with vendors and the vendor's representations about compliance.

Unfortunately, even after another year of heated litigation, the RICO/IMMIGRATION cases are still at the initial stages and courts are sorting through which claims are legally cognizable, and have not yet reached the tough questions raised in our prior advice. Employers located in areas with growing immigrant worker pools may be potential targets for these types of class actions or actions brought by unsuccessful vendors. Clearly, the activities of staffing agencies and recruiters one or two stages removed from the employer may still be alleged to constitute the criminal acts of a RICO or antitrust enterprise directed by the employer. Employers who work with reputable staffing and recruiting firms may be somewhat reassured. However, the development of these cases will be watched closely to see if employers can benefit from becoming more closely informed by those involved in the recruitment and staffing process, or whether further involvement merely makes it easier for plaintiff classes to allege conspiratorial actions. In all likelihood, employers will be forced to counter this new assault by exploring proactive dialogue with their vendors to establish the type of policies, contract terms and communications that can be used as evidence that the employer and staffing agencies are doing everything possible to abide by the immigration and wage and hour laws.

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[13] Cal. Business & Professions Code § 16750(a).

[14] See Cellular Plus, Inc. v. Superior Court, 14 Cal. App. 4th 1224, 1233 (1993) (internal citations omitted).