

No. 99-16714

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONTEREY PLAZA HOTEL
LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v.

LOCAL 483 OF THE HOTEL
EMPLOYEES AND RESTAURANT
EMPLOYEES UNION, AFL-CIO,

Defendants-Appellees.

DC No. CV-97-20800-RMW
Northern California (San Jose)

BRIEF OF AMICUS CURIAE
GREENPEACE USA IN SUPPORT
OF APPELLEE HOTEL
EMPLOYEES AND RESTAURANT
EMPLOYEES,
LOCAL 483

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Greenpeace USA is a non-profit environmental activist organization and part of the global Greenpeace movement launched in 1971. It has a network of over one million supporters in the United States and more than five million worldwide.

Greenpeace USA has not issued shares, bonds or other securities.

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I. INTRODUCTION

Amicus curiae Greenpeace USA respectfully submits this brief in support of Defendant-Appellee Hotel Employees and Restaurant Employees Local 483, AFL-CIO, to address the scope of Hobbs Act extortion, 18 U.S.C. §1951(b)(2), as applied to protests against private business.

Although the District Court correctly dismissed the Appellant Monterey Plaza Hotel's action on other grounds, it wrongly accepted the suggestion that the Appellant could state an "extortion" claim by alleging petty torts against protestors. Greenpeace supports the position of Appellee Local 483 that the "extortion" claims are not sufficient to state a federal felony in the first place. The dismissal of this lawsuit should be affirmed on this ground.

II. STATEMENT OF INTEREST

Greenpeace USA is a non-profit environmental organization and part of the global Greenpeace movement launched in 1971. It

has a network of over one million supporters in the United States and more than five million worldwide. Greenpeace's mission is to raise public awareness of global environmental problems and to instigate changes that are essential to a green and peaceful future. Greenpeace has achieved many environmental victories, including bans on commercial whaling and on the use of large-scale drift nets.

The first step in achieving these victories has been creative, non-violent confrontation with environmental predators. In order to protect whales, Greenpeace activists have placed themselves in the path of harpoon ships. To stop logging companies from further depleting ancient forests, Greenpeace activists have stood between chainsaws and trees. Greenpeace has placed banners on oil tankers to condemn that industry's contribution to global warming. Greenpeace protestors have also demonstrated at the headquarters of a leading producer of genetically modified food to focus attention on the biological risks of this technology.

Greenpeace protestors have faced the same legal consequences as other social activists, like Martin Luther King, Jr., in this country's long tradition of civil disobedience. Misdemeanor prosecutions for trespass and nuisance are not uncommon for Greenpeace activists. However, the unwarranted and dramatic expansion of Hobbs Act extortion to misdemeanors, urged in this case, would add a poison arrow to the already well-stocked quivers of large corporations. RICO suits, fortified by felony convictions, treble damages and giant attorneys' fees, could be easily used to cripple activist groups like Greenpeace and drive any social interest campaign out of the public arena. Greenpeace has a deep interest in making certain that political protestors do not get treated as criminal extortionists.

III. SUMMARY OF ARGUMENT

The word "extortion" is now being employed by corporations to describe any interference by protestors with their business.

Remarkably, businesses are trying to describe protestors as felon extortionists even when they are not trying to obtain any pay-off from their protest--which is, of course, the heart of the offense of extortion.

This novel deployment of Hobbs Act extortion arises out of the judicial reaction to violent anti-abortion campaigns against health clinics, beginning principally with Northeast Women's Center v. McGonagle, 868 F.2d 1342, 1350 (3d Cir. 1989).

For many Americans who believe in the right of reproductive freedom (including many Greenpeace members), McGonagle undoubtedly reached a satisfying result. Taken as a general rule of law, however, McGonagle is not a decision about reproductive rights at all. It is a decision that labels any tort committed by a protestor against a business as federal felony extortion. This represents a radical and untenable expansion of the Hobbs Act which threatens to criminalize and federalize local political protest all over the United States.

The “intangible rights” theory of extortion revives abstract Lochner-era notions of absolute property rights. Under this theory, any transgression against a business by a public opponent-- including trespass, nuisance, noise or civil disobedience--becomes a federal felony. This magical transformation of torts that happen in the course of anti-business protest into federal crimes stretches the Hobbs Act beyond its breaking point.

The first and fundamental error in McGonagle is that it creates out of thin air a federal common law of intangible property rights that is radically more expansive than the law recognizes in any other context. “Obtaining property” illegally as extortion has to mean something more than simply interfering with or affecting another’s exercise of his property rights. The intangible right not to have a business affected by outside influence is not--and would not--be recognized as “property” under the Fifth Amendment Takings Clause, environmental law, bankruptcy law, the common law of conversion, or RICO’s “enterprise” requirement.

Second, courts must scrupulously enforce the boundaries of the Hobbs Act to avoid constitutional problems. The law lapses into viewpoint discrimination where a protestor and a business manager can commit the exact same tort against each other--say, throwing a penny at the other--but the Hobbs Act singles out the protestor only as a federal felon because he was the one motivated by an anti-business grievance. R.A.V. v. St. Paul, 505 U.S. 377, 392 (1992). This result cuts against First Amendment law. Courts should also avoid an interpretation of federal law that would federalize state tort law wherever a business is the plaintiff, by creating an intangible federal property right that state law would treat as only an interest in tort. See Patterson v. McLean Credit Union, 491 U.S. 164, 183 (1989).

Third, it is important to see that this dramatic expansion of the Hobbs Act is, by definition, only relevant where the protestor's tort is minimal. When a defendant's bad acts are punishable by more than a year's imprisonment under any other law, the RICO

plaintiff need not rely on the Hobbs Act. The intangible-rights theory is only necessary when the protestor's conduct is not otherwise a RICO predicate act. This doctrine thus changes civil RICO from society's protection against organized crime into a one-sided weapon for businesses against any political opponent. The threat of mandatory attorneys' fees for even nominal damages, 18 U.S.C. §1964(c) will give businesses a vehicle to litigate protestors out of the public arena, even if its charges turn out to be minimal or baseless. This expansion of "property" is dangerously one-sided and should be rejected by this Court.

IV. ARGUMENT

A. The Law Consistently Rejects the Theory That an Outsider "Obtains Property" by Influencing its Use.

The Hobbs Act defines "extortion" 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. §1951(b)(2). McGonagle defines the

“obtaining of property” as protestors’ deprivation of the business’ right to operate free of interference. 868 F.2d at 1350. But the protestors have not “obtained” anything unless it is the business’ imagined “property” in its abstract right not to be interfered with by political opponents. But this hopelessly circular definition of “property” would transform all simple torts at the state level into federal extortion. It is a doctrinal move of breathtaking dimension that would be rejected in every other area of the law.

1. “Property” under the Takings Clause

McGonagle’s notion that an outsider “takes” property whenever she influences a business’s decisions is the same theory of absolute property rights espoused in Lochner v. New York, 198 U.S. 45, 63-64 (1905). In Lochner, the Court held that a law restricting a business’ ability to operate a business’ right to operate as it saw fit was a deprivation of a constitutionally protected business right without substantive due process.

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Lochner is no longer the law. When government restricts how a business may conduct its affairs, this restriction is not a “taking of property” unless the owner has been substantially dispossessed of his land. See Nollan v. California Coastal Comm’n, 483 U.S. 825, 834 (1987) and cases cited therein. Even though the regulation may remove one stick in the business’s bundle of rights, it is not a “taking of property,” even if the business’s prohibited conduct was not inherently blameworthy or noxious. See Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 130-131, 133 n.30 (1978). Penn Central recognized that the 19th century regime of absolute property rights is over. Businesses are influenced by a multitude of pressures, including government regulation and outside protest. This does not mean that the business has been dispossessed of its property every time it experiences outside influence.

The Takings Clause is a good litmus test for the phrase “obtain-ing property.” If the government ordered the Monterey

Plaza Hotel to recognize the Hotel Workers or to change its employment practices, the Hotel would not have a “taking of property” claim. Similarly, if the government ordered the plaintiff health clinics in McGonagle to stop performing abortions, those clinics would have no “taking of property” claims under the Fifth Amendment (although they might have First and Fourth Amendment claims under Roe v. Wade.)

McGonagle’s standard for “obtaining property” under the Hobbs Act is inconsistent with the “taking of property” standard under the Fifth Amendment. If the government had restrained a business in the way protestors allegedly attempt to do, the business would not have a Takings claim. It is inconsistent to find a property taking under the Hobbs Act for the exercise of much less powerful influence by private parties.

2. “Property” in Environmental Law

The intangible right to influence a business’ conduct is not recognized as “property” under environmental law. For example,

citizens who claim a right to restrain a business's toxic dumping are held not to have any "property" right over the offending business that would entitle them to the extra remedies of RICO. See Genty v. Resolution Trust Corp., 937 F.2d 899, 918 (3d Cir. 1991) (unlawful toxic dumping not remediable under RICO) and Drake v. B.F. Goodrich Co., 782 F.2d 638, 644 (6th Cir. 1986) (same) cited in Oscar v. University Students Co-op Ass'n, 965 F.2d 783, 786 (9th Cir. 1992) (en banc). If McGonagle applied consistently, neighbors of a polluting business would have an intangible property interest in the offending business, simply because they claim a legal power to restrain the business's conduct of its affairs. If a legal action to control a business' toxic dumping does not confer "property" on environmentalists under RICO, then RICO cannot consistently label protestors as extortion-ists seizing an "intangible property right" when they maintain an unruly picket line.

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3. “Property” in Bankruptcy Law

A business’s promise to modify its conduct is only a contractual obligation, not a property interest of the promisees. For example, a business’s obligation to clean up toxic wastes does not make the affected neighbors into secured lienholders in its property if the business goes bankrupt. People affected by a business’ toxic waste have no secured property right over the business. A bankrupt business may normally liquidate its clean-up obligations and discharge them as an unsecured claim in bankruptcy. See Ohio v. Kovacs, 469 U.S. 274, 282 (1985); In re Jensen, 995 F.2d 925, 929-931 (9th Cir. 1993).

This fact shows the inconsistency in McGonagle’s intangible rights theory of property. If environmentalists succeed in compelling a business to change its conduct (e.g., by signing a code of clean business conduct,) they have not obtained a secured property right (like a lien) that would be recognized in bankruptcy proceedings. If a labor union forces a business to sign a collective

bargaining agreement, that agreement is not a secured property right, even though it restricts how the business conducts its affairs. The bankrupt business may reject those agreements under certain conditions, see 15 U.S.C. §1113, as it could not with a property lien held by a secured creditor. Yet McGonagle holds that protestors who seek to induce such concessions are “obtaining property” in violation of the Hobbs Act if they commit any civil wrong in their protests. This is an inconsistent doctrine.

4. “Property” in the Common Law of Conversion

The common law distinguishes between an injury to a business (i.e., nuisance or trespass) and an outright taking:

The action for conversion properly lies only where there is some substantial interference with possession or the right thereto, and the plaintiff in a conversion suit recovers the full value of the property, in effect forcing the defendant to buy it. Where the act does not amount to a dispossession, but consists of intermeddling with or damage to the use of or damage to the property, the normal action will be for trespass, in which the plaintiff recovers only the actual damages suffered by the impairment of the property or loss of its use.

5 Witkin, Summary of California Law, Torts, §610 (9th ed. 1988)

(emphasis in original.) The state courts refuse to extend the property theory of conversion to deprivations that are already adequately protected by tort law. See Moore v. Regents of the University of California, 271 Cal.Rptr. 146, 160-164, 51 Cal.3d 120, 142-147 (Cal. 1990) (refusing to treat unauthorized taking of patient’s blood and tissue samples as “conversion,” in part because tort law already protected patient’s interests without extending property rights to blood and tissue.) “Courts have traditionally refused to recognize as conversion the unauthorized taking of intangible interests that are not merged in, or reflected in, something tangible. [citing cases] And Dean Prosser has cautioned against scuttling conversion’s tangibility requirement altogether, recommending instead the use of other remedies to protect intangible interests.” Thrifty-Tel Inc., v. Bezenek, 54 Cal.Rptr.2d 468, 472, 46 Cal.App.4th 1559, 1565 (Cal.App. 1996).

If courts allowed any claim of interference to state a claim for conversion, then all tort claims would be transformed into claims

for “conversion” of the intangible property right to be free of torts. The California courts resist expanding state property law this way. If the federal courts create a federal common law of “intangible property rights,” they would be expanding the notion of property in ways that the state courts would never permit.

5. RICO on “Enterprise”

The Supreme Court implicitly rejected an “intangible property” theory in deciding when outsiders can be said to “conduct[] or participat[e], directly or indirectly, in the conduct of an enterprise” in Reves v. Ernst & Young, 507 U.S. 170, 184-185 (1993). Reves held that outsiders who harm a business cannot be said to “conduct or participate,” even indirectly, in the conduct of the business’ affairs within the meaning of RICO, 18 U.S.C. §1962(c). Only actual insiders meet that test. See 507 U.S. at 185.

Reves’ interpretation of 18 U.S.C. §1962(c) cannot be ignored in construing the Hobbs Act, 18 U.S.C. §1951(b)(2). The statutes involve the same concept: when does a tort-feasor obtain the

business that she harms? If the intangible-rights theory of extortion were valid, the Supreme Court could not have rejected the plaintiff's theory of "enterprise" in Reves. Harming a business would have been the same as obtaining an intangible ownership of the business. This theory was rejected in Reves, yet it is exactly the theory of "obtaining property" revived here.

B. The Hobbs Act Must Be Read to Avoid Unconstitutional Outcomes.

1. Viewpoint Neutrality

No crime is protected by the First Amendment. But the law may not punish a crime more severely because its message offends powerful interests. Fighting words may be punished, but the law may not single out certain categories of fighting words for more severe punishment because they are motivated by a politically incorrect impulse or animus. R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992). McGonagle's theory of extortion would do just that, because it looks to the protestor's anti-business viewpoint as a necessary element of the offense.

If a protestor and a business owner shove each other on a picket line, McGonagle would single out the protestor as an extortionist because he was motivated by an anti-business viewpoint. The business owner's identical tort against the protestor (like the Monterey Plaza Hotel's threats against pro-union workers) would escape the Hobbs Act only because the tortfeasor's agenda is pro-business rather than anti-business. This is the type of viewpoint-based discrimination Justice Scalia condemned in R.A.V.: "[The government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." 505 U.S. at 392.

This problem does not arise if the phrase "obtaining of property" is limited to outright expropriation of tangible property. If a politicized robber steals money or property, it does not matter that she intends to use the money for a good cause; the taking of the tangible property is illegal without referring to the offender's grievance. But when the intangible "right to be free from torts" is

deemed a property right possessed only by businesses, the only thing that distinguishes an anti-business “extortionist” from a pro-business tort-feasor is their respective ideological viewpoints. See Note, When Protestors Become Racketeers, RICO Runs Afoul of the First Amendment, 64 St. John’s L. Rev. 899, 904-916 (1990). The Hobbs Act should be interpreted to avoid this unconstitutional result.

2. Federalization of Tort Law

The federal courts should not interpret a federal statute to take over and swallow up an entire field of state regulation absent explicit Congressional direction. See Patterson v. McLean Credit Union, 491 U.S. 164, 183 (1989) (42 U.S.C. §1981 will not be read to cover all claims for breach of contract involving racial animus, since this would federalize state law without clear Congressional authority and direction.) This reasoning applies equally here. Even the most minimal torts--such as the ones alleged in this case--would become federal felonies if they were committed against a

business, since such conduct would deprive the business of “the intangible right to operate free of disruption.” The federal courts should not read a federal statute this broadly without clear authority from Congress.

C. The Intangible-Rights Theory of “Extortion” Will Deter Public Opposition to Businesses.

1. Intangible-Rights Theory Only Makes A Difference Where Protestors’ Torts are Minimal.

McGonagle’s expansion of the Hobbs Act makes a difference only when the challenged conduct is not otherwise a RICO predicate act. When a defendant commits crimes that are independently punishable by more than a year’s imprisonment, see 18 U.S.C. §1961(1), the RICO plaintiff does not need to rely on the Hobbs Act to claim them as predicate acts. The expanded use of “extortion” theories will only be relevant when the alleged misconduct is too minimal to trigger RICO on any other ground.

The Hobbs Act does not define any minimum threshold for “extortion.” Before civil RICO, courts tried to contain the

application of the Hobbs Act by admonishing prosecutors to invoke it only for serious offenses. See, e.g., United States v. Brecht, 540 F.2d 45, 52 n.14 (2d Cir. 1976) (instructing U.S. Attorney to “exercise careful judgment” in deciding whether to commence a federal prosecution for conduct so close to a state-law misdemeanor.) This was only a plea for moderation, not a rule of law. After the explosion of civil RICO, courts can no longer count on neutral prosecutors to keep the Hobbs Act within reasonable limits. Unlike U.S. Attorneys, private businesses suing their adversaries under civil RICO have no public duty to confine their extortion charges to “really serious” conduct.

2. RICO as a One-sided Weapon

Businesses that want to rid themselves of activists like Greenpeace will have every incentive to make out “extortion” claims against them, even for minimal or non-existent wrongs. Because RICO provides for mandatory attorneys’ fees to a prevailing plaintiff, 18 U.S.C. §1964(c), proof of even nominal

damages will impose a ruinous attorneys' fee liability on the protestor to pay the business' corporate lawyers. There is no similar provision for fees to prevailing RICO defendants if the suit turns out to be baseless.

This means that businesses can use intangible-rights extortion charges to drive their opponents out of the public arena. "It is not difficult to imagine what impact RICO would have had on Dr. King's Southern Christian Leadership Council. Segregationist forces could have used the extraordinary damages provision to cut the financial legs out from under the movement." Note, Stretching RICO to the Limit and Beyond, 45 Duke L.J. 819, 821 (1996). The activist organization does not have an equivalent RICO remedy for the business's crimes and torts, because ordinary citizens have no RICO-enforced "intangible property rights" against wrongs committed for pro-business (and anti-union or anti-environmental) motives. See Oscar, 965 F.2d at 785-786.

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This outcome is not Congress' fault. So long as the courts stick to the plain meaning of the phrase "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," the Hobbs Act does not lend itself to the suppression of social activism. This language addresses something more than interference with a business -- it requires the outright expropriation of property from a victim, with the victim's coerced consent. No other area of the law would accept the outrageous "intangible rights" theory of property advanced here, which is nothing less than the criminal-law ghost of Lochner.

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CONCLUSION

The Court should affirm the dismissal of Appellant's RICO action. The Court should affirm on the ground that the Appellant's extortion allegations fail to state a claim for the "obtaining of property" under the Hobbs Act.

DATED: January ___, 2000 Respectfully submitted,

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CERTIFICATION OF LENGTH OF BRIEF

I certify that:

Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, case No. 99-16714, the attached Brief of Amicus Curiae Greenpeace USA in Support of Appellee is proportionately spaced, has a typeface of 14 points or more and contains 3560 words.

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CERTIFICATE OF SERVICE

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