



IS THERE A FLOOD OF RICO/IMMIGRATION LAWSUITS COMING?

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Three recent key developments may have opened the flood gates for a new wave of RICO/Immigration lawsuits against employers.

The RICO/Immigration litigation alleges that a large pool of illegal immigrants migrate to an area because an employer, unconcerned about liability, blithely accepts a series of bogus identification documents from workers. By using the Racketeer Influenced Corrupt Organizations Act (RICO) statute, plaintiffs are trying to prove that an illegal criminal enterprise often composed of employers, recruiters, and staffing companies are together benefiting from the increased illegal population brought to the area through the criminal acts of some members of the enterprise. If successful, these large class actions would create a whole new source of potential liability for employers struggling to deal with the current patchwork of immigration and Social Security laws.

A. LARGE MONETARY SETTLEMENT IN MOHAWK.

Mohawk Carpet, Inc. reportedly settled its RICO/Immigration lawsuit for \$18 million.¹ After extensive litigation since 2005, and multiple appeals to the U.S. Supreme Court, the shocking settlement amount has two elements that will concern all employers.

First, the sheer size of the settlement dwarfs the next highest reported \$1.3 million settlement in the Zirkle Fruit case out of the State of Washington.² After almost a decade of such litigation,³ where employers initially won motions to dismiss and then Plaintiffs became better and better at alleging facts sufficient to withstand such early resolution, this higher settlement amount will undoubtedly encourage more RICO/Immigration litigation against employers.

Second, reportedly \$13 million of that \$18 million amount was contributed by an insurance carrier. If some insurance will cover defense of a RICO conspiracy, many scenarios will involve a second deep pocket

for the plaintiffs to pursue. Perhaps most importantly, the costs of defense may become a deciding factor in resolution of many cases, further encouraging plaintiffs' counsel to invest their time and efforts in such causes of action.

B. RESTAURANTS AS TARGETS.

The Eleventh Circuit Court of Appeals has allowed a RICO/Immigration case to proceed against multiple corporate defendants connected to a Ruth's Chris restaurant in Alabama.⁴ This case may prove to be an important precedent for several reasons.

First, the restaurant industry employs large numbers of non-English speaking workers and workers with foreign work authorizations. Many employers in this industry will unfortunately become attractive targets for such RICO/Immigration litigation. Prior RICO/Immigration cases often involved much larger agricultural, food processing, and manufacturer employers.

Second, the factual allegations in the

Amended Complaint are of a type that many restaurants might have problems disproving. Local restaurant employees allegedly:

- Gave illegal employees extra time to submit required I-9 documentation;
- Provided illegal employees with the names and social security numbers of former, legal workers;
- Asked illegal workers to recommend other illegal workers;
- Paid illegal workers in cash in order to help hide them.

Third, the above alleged conduct, if true, was held by the Court of Appeals to be sufficient to state a claim for violations of the immigration statutes and serve as predicate criminal acts for purposes of the RICO statute. Although the Court of Appeals decision rests on highly specific, technical wording of the immigration statute; allegedly providing false names and social security numbers was sufficient to state a cause of action against the employer for encouraging or inducing illegal aliens to reside in the U.S. "The meat of the matter is that the amended complaint adequately pleads that the defendants encouraged or induced an alien to reside in the United States, and either knew or recklessly disregarded the fact that the alien's residence here was illegal, in violation of § 1324(a)(1)(A)(iv)."⁵

Although you have to love a court that talks about "the meat of the matter" against a steak house, this troubling ruling may practically make it much easier for plaintiffs to prove the "knowledge element" of the immigration violation by merely presenting evidence that an employer helped an applicant present false documentation in the I-9 application process. Subsequent rulings and litigation may well clarify the actual standards to be applied in finding ultimate violations of the immigration statute provisions.

C. FOLLOWING THE MONEY.

On April 1, 2010, plaintiffs' counsel announced a new RICO/Immigration lawsuit filed in the United States District Court for the Middle District of Alabama Southern

Division, on behalf of all hourly-paid workers legally authorized to be employed in the United States who are or have been employed by Perdue Farms, Inc. since March 2006 at sixteen poultry processing facilities.⁶ Again, the defendant is a large food processor with plants in rural areas where sentiment against perceived illegal workers may be attractive to the plaintiffs: Accomac, Virginia; Bridgewater, Virginia; Concord, North Carolina; Cromwell, Kentucky; Dillon, South Carolina; Dothan, Alabama; Fayetteville, North Carolina; Georgetown, Delaware; Lewistown, North Carolina; Milford, Delaware; Monterey, Tennessee; Perry, Georgia; Rockingham, North Carolina; Salisbury, Maryland; Showell, Maryland; and Washington, Indiana. In that sense, the Perdue lawsuit fits the pattern of several earlier lawsuits filed by attorneys of Foster, P.C.

What is of particular note is that the Foster firm is joined in this lawsuit in the Middle District of Alabama by two well-known, nationally successful, and assumedly well-financed, plaintiffs' firms: "Motley Rice LLC, one of the nation's largest plaintiffs' litigation firms, along with Jacoby & Meyers LLC."⁷ RICO/Immigration litigation to date has often evolved into expensive and protracted cases involving large plaintiff classes composed of present and former employees, battles over voluminous document productions, expensive experts opining on the cause and effects of large groups of new workers on the local labor market, and big damages claims. Perhaps no better indication exists that the new RICO/Immigration litigation is increasingly attractive to the plaintiffs' bar than that the Perdue lawsuit involves two well-financed law firms typically representing plaintiffs in some of the traditionally most expensive and high-dollar-recovery types of cases in American torts.

PRECAUTIONS AND CONCLUSIONS.

Employers of all types will be concerned about such RICO/Immigration lawsuits who have facilities in areas where there has been a recent increase in non-English speaking workers. Restaurant and hospital-

ity industry employers may be likely targets given the make-up of their workforces. Particular attention to I-9 training for supervisors can create increased compliance and facts around which to build a defense. Employers who use leasing companies or temporary worker companies should reconfirm that they are using only reliable, immigration-compliant labor suppliers. Employers should devote additional training to make sure that employees have procedures and an anonymous way to report alleged immigration violations. Supervisors must report any complaints and the company must be able to show that it investigates any alleged immigration violations.

Finally, in today's anti-immigrant climate, it is understandable that employers are worried about the risk of greater ICE enforcement and RICO/Immigration lawsuits. However, employers cannot lose sight that there is also the risk of lawsuits from the other side of immigration law obligations. National origin or race discrimination claims can be brought if the employer is overly zealous against non-English speaking applicants, or if the employer does not strictly follow the I-9 regulations about the types and forms of acceptable employee identification and work authorization.⁸



Donald W. Benson is a member of the employment and immigration practice groups of HBSS. Don is a frequent author and speaker on RICO/Immigration litigation and has been interviewed by NPR, The New York Times and U.S. World & News Report on the subject.



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FOOTNOTES

- 1 "Mohawk Settlement Could Lead to Spate of Illegal Worker Lawsuits," Peralte C. Paul, *Atlanta Journal Constitution*, April 23, 2010.
- 2 *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002). See also, Donald W. Benson, *Little INSIGHT*, "New Wave or Flash Flood: 11th Circuit Allows RICO/Immigration Lawsuit to Proceed," July, 2005.
- 3 Donald W. Benson, *Little INSIGHT*, "RICO/IMMIGRATION or ANTITRUST/IMMIGRATION Lawsuits?" September, 2006; Executive Counsel, "RICO Charges Are Newest Wrinkle In Immigrant Labor Issue," July/August 2006, vol. 3, num. 4, pp. 13-14.
- 4 *Edwards v. Prime, Inc.*, No. 09-11699, Eleventh Circuit Court of Appeals (April 9, 2010). <http://www.ca11.uscourts.gov/opinions/ops/200911699.pdf>.
- 5 *Id.*, pp. 29-30.
- 6 "Many Perdue Farms, Inc. personnel facing lawsuits involving alleged immigration violations," Motley Rice, <http://www.motleyrice.com/news/view/lawsuit-filed-against-plant-managers-and-human-resource-personnel-of-perdue-farms-inc-for-alleged-im>.
- 7 *Id.*
- 8 HBSS clients may consider a three hour I-9 train-the-trainer course developed by its employment practices and immigration practice groups focusing on specific forms of foreign identification, work authorization forms and self-audit procedures.