

THE NUREMBERG RULE IN THE WORKPLACE: AN OBSERVATION

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ABSTRACT

Several paradoxes appear in federal law requiring "responsible persons" to remit money held in trust to the Internal Revenue Service (the "100 percent penalty rule"): An employer may fire a person who acts as required by law without any adequate legal remedy for the aggrieved employee.

Under other circumstances that seem similar, courts have found duress, extortion, and conspiracy to support criminal convictions of senior officials under the Hobbs Act and RICO in employment settings. However, in several reported "100 percent penalty" cases the weaker, poorer, subordinate employee is prosecuted by the United States and the stronger, richer, senior executive who ordered the misconduct is ignored. Thus, an employed person is presented two choices: break the law, or be fired without legal protection and probably never work again in a remotely similar position.

Proposals modeled on European law actually make things worse by making wrongful conduct cheap. A possible civil remedy is discussed and related to this pattern of facts.

SCENARIO

Mr. Leon Howard was director, minority shareholder, treasurer, and executive vice president on Eden Marketing Corporation when he was ordered by Paul Jennings, the majority shareholder/chief executive officer, to pay other creditors

before remitting withholding taxes to the Internal Revenue Service (IRS) [1]. He had partially paid previously collected taxes, been suspended from corporate duty for several weeks, reported the problem to a “senior IRS official,” and resigned in protest, but not fast enough to avoid an IRS claim of more than \$30,000 for unremitted withholding taxes. No claim was made against Jennings. In discussing Howard’s claim of “superior orders” the Fifth Circuit Court of Appeals wrote:

. . . The fact that Jennings might well have fired Howard had he disobeyed Jennings’ instructions and paid the taxes does not make Howard any less responsible. . . . Had Jennings fired Howard. . . . Howard would have at least fulfilled his legal obligations. . . . Howard had a choice. He could have paid the taxes, accepted the consequences, and thus avoided the penalty . . . [1, pp. 729, 734-735].

BACKGROUND

At the conclusion of World War II many people were tried for various war crimes by United Nations tribunals, some of the most notable at Nuremberg, Germany. A substantial number admitted their commission of the acts as charged, but argued they were acting under the orders of superiors, who were “state officials.” Therefore, the crimes charged were “state actions,” giving rise to personal immunity prior to the *ex post facto* London Charter signed August 8, 1945 [2]. Thus the “Nuremberg Rule” is that one may not act as part of a conspiracy without legal responsibility, simply because of compliance with the orders of superior authority, whether the authority is public or private. The foundation of the claim “I was acting under orders!” is that the accused lacked intent to act criminally and acted only under duress. Considering the brutality of Axis regimes toward their own civilians, a person in government service could reasonably expect immediate execution for refusing an order. United States law may have been changed as a result of the U.S. ratification of the United Nations treaty, because Article 6 Clause 2 of the United States Constitution says:

. . . [A]ll Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby . . .

PURPOSE OF DISCUSSION

The “100 percent penalty rule,” which is the foundation of the *Howard* case, is well-established in federal law. The rule applies to people who are involved in failing to deliver money held in trust for the Internal Revenue Service and has been reviewed extensively in the congress and courts. However harsh it is, no mercy is shown by the legal system. It is a vivid illustration of the bind in which an employed person can be caught: either violate the law or be fired; and, if fired,

probably never work again in a professional capacity. Under “Wood’s Rule” in the absence of a statute to the contrary, a person can be fired for a good reason, a bad reason, or no reason at all [3]. In fact, a particularly egregious Alabama case held a man could be fired because his wife refused the overtures of his supervisor [4]. Further, management employees frequently serve under “at will” contracts or terms of employment that deprive them of any legal remedy in the event they are terminated [5].

The proposed issue is then whether the common law “Wood’s Rule,” and any corresponding contract or other employment terms, should be declared illegal and therefore unenforceable, and worthwhile protection given when an employee refuses to violate obligations that are part of the law or professional duties. A contract that violates federal rights is void [6]. A person has the right *AND DUTY* to refuse to participate in illegal conduct [7]. A state court cannot enforce a rule of law, either common or statutory, that violates federal rights, even in a suit between private parties [8]. In this setting “Wood’s Rule” is at least arguably such a rule; yet nobody recognizes any duty to the employee.

DURESS

A person ordered by superior authority to violate the law or professional duties is under duress. Duress has been described as “. . . any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition” [9]. It “. . . destroys the free assent necessary for entering into a contract and indeed prevents the formation of a binding contract” [10]. The United States Supreme Court has written that a person under duress has a choice of the lesser of two evils; the fact that a choice is made according to interest does not exclude duress [11]. The act threatened does not have to violate any criminal, tortious, or contractual duty [12]. If one is constrained by the lawful presentation of a choice between comparative evils such as inconvenience and resulting loss from detention, total loss, or compliance with an unconscionable demand, there has been duress [13].

EXTORTION

A crime related to duress is extortion, in which one consents to the loss of a property right under duress. The common law crime of extortion was committed by public officials taking money for the performance of duties under circumstances short of robbery [14]. Statutes have expanded the crime to include acts by private persons who take essentially anything of value by force, fear or threats [15]. The principal difference between robbery and extortion is that the consent of the victim is never obtained in robbery while it is in extortion [14, p. 5]. A threat is an expression of an intention to commit evil; the declaration of an evil, loss, or pain to come [14, p. 3]; of such a nature as to unsettle the mind and take away the

free voluntary action which constitutes consent [16]. According to the Restatement 2d, Contracts, a threat is improper when:

[Regardless of the fairness of the exchange]

- (a) What is threatened is a crime or a tort, or the threat itself would be a crime or tort if it resulted in obtaining property,
- (b) What is threatened is a criminal prosecution,
- (c) What is threatened is the use of civil process and the threat is made in bad faith, or
- (d) The threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

[Alternatively]

[If the resulting exchange is not on fair terms, and

- (a) The threatened act would harm the recipient and would not significantly benefit the party making the threat,
- (b) The effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
- (c) What is threatened is otherwise a use of power for illegitimate ends [17].

Applying the Restatement rules to Mr. Howard's situation: 1) he was threatened with discharge, which under Wood's Rule is perfectly lawful; 2) Jennings was avoiding criminal prosecution, not threatening Howard with it; 3) Jennings' last desire was to appear in court for any reason, so much so that he evaded service of process to appear in Howard's prosecution; and 4) there is no duty of good faith in an ordinary "at-will" employment contract. Jennings' threat to Howard was in essence "Obey the law and get fired; allow Jennings to illegally use the government's money and keep his job." At least in the minds of the prosecutor and courts this was a fair exchange, which defeats the last three Restatement arguments of impropriety. Could something be missing in the Restatement? Perhaps it is found in the Hobbs Act.

THE HOBBS ACT

Connecting the crime of extortion to the abuses of the workplace required legislation. Congress enacted the Hobbs Act to include employer-employee extortion in the ambit of the 1934 Anti-Racketeering Act after the Supreme Court had ruled such conduct was not prohibited by law [18]. The act was recodified and substantially reenacted in 1948 as 18 USC 1951. The basic prohibition is stated:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion, or attempts or conspires so to do . . . , shall be fined . . . , or imprisoned . . . , or both [19].

Two Mobile County, Alabama, officials learned the hard way about the Hobbs Act. One extorted payoffs from architects; the other from performers at the Municipal Auditorium. Former City Commissioner Gary Greenough is serving a prison term for:

... [C]onspiring with . . . others to violate the mail and wire fraud statutes . . . to defraud the City of Mobile, artists, performers and agents of monies due them [and] actively participat[ing] in an attempt to prevent an investigation . . . [2].

A brief shopping list of crimes was charged and successfully prosecuted: aiding and abetting [21], mail fraud [22], wire fraud [23], conspiracy [24], and the Hobbs Act [25], Greenough contended he never threatened anyone. The court wrote:

Proof of threat, fear or duress is not required where a public official is involved, because “[t]he coercive nature of the official office itself provides that necessary inducement, taking the place of fear, duress or threat. . . . There is no need for a showing of fear in order to sustain a conviction of extortion by a public official . . . [20, p. 1096].

Greenough also claimed the government failed to establish a *quid pro quo* between the conspirators. The court observed:

Defendant’s claim that no quid pro quo was involved . . . is also without merit. The obvious quid pro quo, assuming one is necessary . . . , is that Greenough got money for his election campaigns and personal benefit, and [the coconspirators] received peace of mind, future security in their jobs, the ability to carry on their skimming operation, and protection from Greenough . . . [20, p. 1096].

On appeal the 11th Circuit noted the testimony of two subordinates of Greenough and commented:

[The court quoting from trial transcripts:] “I have seen what has occurred with some other employees who have not done what the Commissioner wanted done. I never put myself in the position where I had not done what he wanted done and I did not want to test the waters. . . . Some of his political enemies [employed by the city] have not been treated as well as they should have been. . . . [If the second witness had not complied with Greenough’s demands] . . . life could have been extremely uncomfortable for all of us . . . I’m sure we probably would have been terminated.” If quid pro quo is required . . . the testimony of these two employees provided it [26].

The Supreme Court has determined that Hobbs Act extortion does not require direct or indirect personal benefit to the extortionist: The essence of the crime is loss to the victim [27]. Clearly, the use of the power of the state enforcing the law of “fire at will” to coerce a person into actions s/he would not otherwise

voluntarily take is extortion. Such nebulous, hard to define or measure benefits as peace of mind, future security in employment, and the ability to continue an enterprise are sufficient consideration or things of value to establish that element, if it is required. And, addressing the aiding and abetting, and mail and wire fraud charges, the court wrote:

In order to be convicted of aiding and abetting, a defendant must associate himself with the venture, participate in it as something he wishes to bring about, and seek by this action to make it successful [28].

. . . [W]here a defendant has conspired in a scheme to defraud others, a jury could find that he expected and encouraged the individual communications which constituted the substantive offenses, and would make the defendant an aider and abettor under the substantive counts [20, p. 1095].

Thus Greenough set the stage for communications through the mail and over interstate wire that are criminal even if s/he never spoke on the telephone. The court's comments on conspiracy are brief and devastating:

It is well establish that [t]he elements of a conspiracy . . . are: (1) an agreement between two or more persons, (2) an unlawful purpose, and (3) an overt act committed by one of the conspirators in furtherance of the conspiracy. . . . The existence of a conspiracy can be proved by inference evidence. . . . Direct evidence of an agreement to join a criminal conspiracy is rare, so a defendant's assent can be inferred from acts furthering the conspiracy's purpose. The government is not required to prove that each alleged conspirator knew all the details of the conspiracy; it is enough to establish that a defendant knew the essentials of the conspiracy . . . that the defendant intended to join or associate himself with the objective of the conspiracy . . . even if he did not join it until after its inception, and even if he played only a minor role in total scheme [20, pp. 1093-94].

From this court's perspective then, one does not join a conspiracy under duress or by accident. Just as an agreement for a legal purpose, a contract, must be voluntarily entered to be enforced, an agreement for an illegal purpose, a conspiracy, must be voluntarily entered to be punished. The remaining element of a Hobbs Act prosecution is that the crime must in some way affect interstate commerce.

HOBBS ACT—PROOF OF IMPACT ON INTERSTATE COMMERCE

In *United States v. Dan Alexander* [29], a Mobile County School Board member Dan Alexander participated in a scheme to extort kickbacks from architects. He was convicted of mail fraud [22], Hobbs Act [19], and Racketeer-Influenced

Corrupt Organizations Act (RICO) [30] violations. The 11th Circuit Court of Appeals wrote:

The Supreme Court has stated: “[The Hobbs] Act speaks in broad language, manifesting a purpose to use all constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference ‘in any way or degree.’” . . . The reach of Congress’ power under the Commerce Clause is, of course, extensive. Therefore, the government only show a minimal effect on interstate commerce to sustain jurisdiction under the Hobbs Act.

. . . In attempting to establish a link with interstate commerce the government relied on the “depletion of assets” theory. “Under that theory, ‘commerce is affected when an enterprise, whether it is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim’s potential as a purchaser of such goods.’” . . . In the present case the extortion scheme clearly reduced the assets of the architects. . . . It is clear that the architects were not the only victims of the extortion. [The] depletion of the school board’s assets, combined with the board’s activity in interstate commerce, [additionally] establishes the minimal effect on interstate commerce required under the Hobbs Act [29, pp. 1500, 1503-04].

The Hobbs Act includes a fine and up to twenty years in prison for extortion in the workplace. The United States attorney has the authority to prosecute or not prosecute entirely as a matter of discretion. Arguing at the same time, even in different cases and courts, that a “responsible person” in a “100 percent penalty” case was also a victim of extortion under the Hobbs Act would place a prosecutor in an ethically intolerable paradox [31]. But could one indeed be both in fact even though a prosecutor could never admit it?

RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT (RICO)

The significance of RICO to this discussion is the statutory authorization of injured private citizens to enforce criminal statutes. RICO “strikes against all who threaten the integrity of the marketplace—at one end of the spectrum mobsters and organized criminals in their illegitimate enterprises, and at the opposite pole otherwise law abiding businesspeople in their respected and legitimate enterprises” [32]. “Racketeering activity” is defined by enumerating specific state and federal offenses which when twice violated by an “enterprise” invoke the civil and criminal remedies of the statute” [33]. “Enterprise” includes “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity” [34]. No connection with traditional organized crime is required for either civil or criminal RICO actions [35]. RICO has been used against professionals and individuals

“associated” with an enterprise even though they neither owned nor operated it [36].

The most likely statutes of the many enumerated that could be relevant to the employment setting are:

1. Bribery [37]
2. Mail Fraud [22]
3. Wire Fraud [23]
4. Obstruction of Justice [38]
5. Obstruction of Criminal Investigation [39]
6. Obstruction of State or Local Law Enforcement [40]
7. Interference with Commerce, Bribery, or Extortion (Hobbs Act) [25]
8. State Law Extortion and Bribery [41]

Incredibly, Congress did not include in the list of predicate crimes 18 USC 1505, 1512, and 1513, which protect victims and witnesses in all federal administrative, judicial, and congressional proceedings. Thus as long as the victim is not on the way to a pending court action, under the coverage of 18 USC 1503 no civil RICO action is available for violation of these statutes. But, since the wire and mail fraud, and Hobbs Act statutes are incredibly broad in their coverage, a back door to civil RICO claims could exist. Again, only the U.S. attorney can decide who is the victim s/he wishes to protect; and those who are not subject to his/her favor could be left without remedy in any court unless they have truly massive resources behind them [42].

RICO includes the right of a person injured in his/her business or property to sue in United States District Court for damages sustained, with the aware of treble damages and attorney fees upon a judgment [43]. The Supreme Court has ruled in favor of broad use of civil RICO in response to the language and overall approach taken by Congress. There is no requirement of a criminal conviction for a RICO violation or any predicate offense to sustain a civil claim [44]. Loss of employment and the expense, delay, and inconvenience of prosecuting a lawsuit have been held RICO injuries to business or property [45].

Dan Alexander demonstrated how easy it is to be convicted under RICO. He and codefendant Norman Grider were convicted of mail fraud and Hobbs Act conspiracy. Alexander, but not Grider, was also convicted of Hobbs Act extortion. The mail fraud conviction was reversed on appeal because of a defective jury instruction. The trial court instructed that “. . . fraudulently depriv[ing] the citizens of a county of their right to have the county’s business conducted honestly, impartially, and free from corruption, bias, and official misconduct . . .” without also finding a pecuniary motive was sufficient for a conviction on mail fraud, a view subsequently overturned in another case by the Supreme Court [46]. Since a Hobbs Act conspiracy and Hobbs Act extortion are distinct offenses that do not require the seeking of gain by the extortionist, but loss to the victim, his

RICO conviction was sustained in spite of the reversal of the mail fraud convictions on a defective jury instruction [29, pp. 1500, 1506].

CONCLUSION

Most executives are too cowardly to risk the unpredictable results they might receive from the use of force. Therefore, the preferred instrument of extortion in the office is threats to employment and reputation. The threat of firing and its execution can be more devastating to a family than outright murder. At least the victim of an attempted murder has a chance to avoid the shot and to shoot back; and even if the attempt is successful, family wealth and resources are intact for rebuilding whether or not anyone is prosecuted. Rarely would a direct murder attempt be made upon an employee's family because the public outrage at a mass murder would force an investigation and prosecution. Yet an indirect, silent massacre using paper bullets and bad references fades into *prosecutorially* acceptable noise of our violent society. A trained group of professional supervisory assassins can with a "pink slip" take a person's job, home, and wealth; and thereby destroy a family more effectively than with any other weapon. The threat of slow-motion economic murder, which presently can be carried out with the full support of the legal and professional community, is the most credible threat an employer can make. Surely constitutional rights of due process, protection from cruel and unusual punishment, deprivation of property without just compensation, free speech, and obedience to the law are rendered meaningless unless then can be enforced. A terminated employee has no resources to resist the massive strength of his former employer and the United States government.

Where an employer has committed a criminal act in discharging an employee, that crime should be as vigorously prosecuted as any other. Prosecutorial discretion to arbitrarily select who is the victim and who the criminal invites the exercise of political influence to totally corrupt the legal process. Combined with Wood's Rule, which denies redress for wrongful discharge, the constitutional right to pursue a lawful trade, profession, or occupation is rendered pointless.

A proposal endorsed by the National Conference of Commissioners for Uniform State Laws to replace Wood's Rule with arbitration and paltry relief in the form of reinstatement plus one week's salary per year of service is in fact worse: No employee would be retained long enough to accumulate a claim large enough to pay for its prosecution. And reinstatement in a management position is wholly incompatible with the accepted view blindly supporting internal harmony whatever the injustice or cost. Any adequate remedy must be readily available to the wronged employee, effective in restoring his wealth and employment opportunities to the *status quo ante*, as though the wrong had never happened, and expensive enough to deter any employer from future wrongs. A policy decision is required: Are innocent people to be sacrificed on the altar of business corruption to promote "business at any price"? or, should be *demand* that *all* enterprises

operate within the law, closing all those which do not and penalizing corruption wherever it is found? Which is better? Recent events in Eastern Europe testify to the ultimate economically disastrous effects of general corruption and "business at any price." Our Founding Fathers must have intended better. Whether or not they did, we should demand better for the future.

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ENDNOTES

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22. 18 USC 1341.
23. 18 USC 1343.
24. 18 USC 371.
25. 18 USC 1951 et seq.
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31. See, e.g. Rules 1.2(d-e), 3.1(a), 3.3, 3.4, and 3.8(1)(a), Alabama Rules of Professional Conduct.
32. See 31A Am Jur 2d, Extortion, Blackmail and Threats, 128 et seq. quoting *Cianci v. Superior Court*, 710 P2d 375 (Cal. 1985) (which also holds that concurrent federal and state jurisdiction exists for civil RICO actions between private parties).
33. 18 USC 1961(1), (4), (5).
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