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CASE BRIEF:

SCHEIDLER V. NATIONAL ORGANIZATION FOR WOMEN, INC.

Amee Lakhani

In a recent case, *Scheidler v. National Organization for Women, Inc.*, the United States Supreme Court established the inapplicability of RICO actions in the protestor context, and this decision will significantly impact the legal options clinics have to ensure their clients access to legal and safe abortions.¹ The Racketeering Influenced and Corrupt Organizations Act (RICO)² has recently become the preferred legal vehicle for establishing civil and criminal liability in a number of situations involving allegedly extortionate conduct.³ RICO was initially enacted to combat against organized crime enterprises.⁴ Increasingly, RICO has been applied more expansively, most notably as a tool for alleging extortion against pro-life protesters who block access to abortion clinics.⁵ In an opinion written by Justice Breyer, the Supreme Court in *Scheidler* held that threats of violence, standing alone and not in furtherance of robbery or extortion plots, do not qualify as an offense under RICO.⁶ The Court's 2006 decision put an end to over twenty years of litigation over the applicability of RICO to abortion protestors.

¹ *Scheidler v. Nat'l Org. for Women, Inc.*, 126 S. Ct. 1264 (2006).

² See 18 U.S.C. §§ 1961-1968.

³ Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 661 (1987). "One of the most controversial statutes in the federal criminal code is that entitled 'Racketeer-Influenced and Corrupt Organizations,' known familiarly by its acronym, RICO. Passed in 1970 as title IX of the Organized Crime Control Act of 1970, RICO has attracted much attention because of its draconian penalties, including innovative forfeiture provisions; its broad draftsmanship, which has left it open to a wide range of applications, not all of which were foreseen or intended by the Congress that enacted it; and the sometimes draconian prosecutions that have been brought in its name." *Id.*

⁴ *Id.*; see 18 U.S.C. §§ 1961-1968 (2000).

⁵ See generally *Feminist Women's Health Ctr. v. Codispoti*, 63 F.3d 863 (9th Cir. 1995) (reversing judgment for abortion clinic that filed civil action for extortion under RICO against abortion protestors); *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989) (affirming judgment for abortion clinic that brought action for extortion under RICO against antiabortion activists); *Town of Brookline v. Operation Rescue*, 762 F. Supp. 1521 (D. Mass. 1991) (granting pro-life advocates' motion to dismiss town's action for alleged racketeering and extortion under RICO).

⁶ *Scheidler*, 126 S. Ct. at 1273.

The respondents in *Scheidler*, the National Organization for Women and Reproductive Health Clinics, brought an action under RICO asserting that some pro-life individuals and organizations had engaged in physically violent anti-abortion activities that were intended to disrupt activities at abortion clinics, and that these activities violated RICO because they amounted to extortion under the Hobbs Act.⁷ The Supreme Court, in a unanimous decision, determined that the Hobbs Act criminalizes violent acts performed in furtherance of robbery or extortion, or in an attempt or conspiracy to commit robbery or extortion.⁸ The Court held that the language of the Hobbs Act does not define a stand-alone offense for acts of violence.⁹ The Court also found that Congress' intent was not to criminalize acts of violence, standing alone, under the Hobbs Act.¹⁰ This decision will likely have a significant impact on cases brought against abortion protesters under RICO and the Hobbs Act going forward. Given the Court's narrowing of what constitutes extortion for purposes of the Hobbs Act, the predicate offense most commonly used to support RICO claims against abortion protesters, it will be essentially impossible for plaintiffs bringing cases on these grounds to succeed.¹¹

I. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

Although RICO was originally enacted to combat against organized crime, the courts have expanded RICO's applicability to a wide variety of situations.¹² Plaintiffs are the biggest proponent for the expansion of RICO because the law permits private civil suits for RICO violations with remedies including treble damages and reasonable attorney's fees.¹³ RICO prohibits the use or investment of any income derived from racketeering activity or through collection of an unlawful debt;¹⁴

⁷ *Id.* at 1269.

⁸ *Scheidler*, *supra* note 6.

⁹ *Id.* see 18 U.S.C.S. § 1951 (2000).

¹⁰ *Scheidler*, *supra* note 6; see 18 U.S.C.S. § 1951 (2000).

¹¹ Andrew H. Nelson, *An Offer They Couldn't Refuse: Rolling Back RICO Through a Direct Interpretation of Hobbs Act Extortion*, 82 N.C. L. REV. 1239, 1241 (2004).

¹² Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L. J. 819, 819 (1996). "RICO suits have gone beyond the underworld of organized crime and have become common in areas such as common commercial fraud, securities fraud, and antitrust violations." *Id.*

¹³ 18 U.S.C. § 1964 (2000).

¹⁴ 18 U.S.C. § 1962(a) (2000).

makes it unlawful for anyone to acquire or maintain interest in, or control of, an enterprise engaged in interstate or foreign commerce through racketeering activity;¹⁵ and unlawful to conduct an enterprise through racketeering activity.¹⁶ Furthermore, RICO makes it unlawful for anyone to conspire to violate any of these provisions.¹⁷ Accordingly, a plaintiff must demonstrate that the defendant was involved in “racketeering” as a predicate to a RICO violation. “Racketeering” requires that the defendant commit certain illegal predicate acts.¹⁸ In cases where RICO has been used against abortion protesters, plaintiffs have brought their claims using extortion under the Hobbs Act as the predicate offense.¹⁹ The Hobbs Act makes it a crime to obstruct, delay, or affect commerce by robbery or extortion, or to conspire to do so, and also makes it a crime to commit or threaten physical violence to anyone or anything in furtherance of a plan to violate the section.²⁰ Until *Scheidler*, some courts had interpreted both RICO and the Hobbs Act extortion broadly and awarded injunctions and damages against abortion protesters.²¹

II. SCHEIDLER LITIGATION HISTORY

In 1986, the National Organization for Women (National Organization) and Reproductive Health Clinics brought a lawsuit against Operation Rescue for its violent activities in obstructing access to reproductive health clinics.²² Operation Rescue extremists “vowed to stop at nothing to prevent abortions from being performed,”²³ and applied violent tactics including blockades and kidnapping.²⁴ Among the protestors were Joseph Scheidler, Andrew Scholberg, and Timothy Murphy, who together formed the Pro-Life Action Network (PLAN) in the 1980’s as

¹⁵ 18 U.S.C. § 1962(b) (2000).

¹⁶ 18 U.S.C. § 1962(c) (2000).

¹⁷ 18 U.S.C. § 1964(a) (2000).

¹⁸ 18 U.S.C. § 1961(1)(b) (2000). A predicate act is defined as any act which is indictable under the provisions of Title 18 of the United States Code, including, but not limited to, bribery, counterfeiting, theft, embezzlement, extortion, fraud, and obstruction of justice. *Id.*

¹⁹ Parker, *supra* note 12, at 820.

²⁰ 18 U.S.C. § 1951(a) (2000).

²¹ Parker, *supra* note 12, at 822.

²² Nat’l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 256-62 (1994).

²³ Fay Clayton & Sara N. Love, *NOW v. Scheidler: Protecting Women’s Access to Reproductive Health Services*, 62 ALB. L. REV. 967, 969 (1999).

²⁴ *Id.* at 969-72.

a nationwide organizational tool to promote anti-abortion beliefs.²⁵ PLAN wrote and distributed anti-abortion manuals and held conventions throughout the country to encourage protestors to assist in closing abortion clinics by interfering with their operation.²⁶ In an attempt to terminate PLAN's assault on abortion clinics, the National Organization filed suit in the Northern District of Illinois alleging that PLAN encouraged and committed unlawful activities in order to interfere with the business operations of reproductive health clinics.²⁷ The National Organization alleged that these activities were in violation of RICO, the Sherman Antitrust Act, as well as a variety of state laws, and that the purpose of these activities was to put reproductive health clinics out of business.²⁸ The District court dismissed the antitrust claim on the grounds that the defendants were not acting based on an economic motive, but rather acting in attempt to influence government action.²⁹ The court also dismissed the plaintiffs' RICO claim due to the fact that PLAN's activities were politically motivated and that the defendants' actions towards reproductive health clinics were not aimed at obtaining money, but rather at furthering the anti-abortion cause by limiting the availability of abortion services.³⁰ The court held that defendants' lacked the requisite economic motive "to the extent that some profit-generating purpose must be alleged" for RICO to be applicable.³¹

III. NOW I

The National Organization appealed this dismissal first to the Seventh Circuit, which affirmed the lower court's ruling,³² and then again to the United States Supreme Court, which reversed the judgment of the lower court regarding the RICO claim in an opinion that is now known as NOW I.³³ The Supreme Court held that an enterprise for purposes of RICO did not require an economic motive, and that as a result, the fact that PLAN intended to effectuate a political change as opposed to gain

²⁵ *Id.* at 974-75.

²⁶ *Id.*

²⁷ *Clayton, supra* note 23 at 979.; *Nat'l Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 615 (7th Cir. 1992).

²⁸ *Id.*

²⁹ *Nat'l Org. for Women, Inc. v. Scheidler*, 765 F. Supp. 937, 940 (N.D. Ill. 1991).

³⁰ *Id.* at 943.

³¹ *Id.*

³² *Nat'l Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 630-31 (7th Cir. 1992).

³³ *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262 (1994).

a monetary benefit, did not bar the National Organization from pursuing a RICO claim.³⁴ The Court held, however, that the National Organization was required to show that PLAN engaged in a “pattern of racketeering” in order to successfully bring a RICO claim.³⁵ As a predicate to proving a RICO violation, the National Organization had the burden of proving that PLAN had violated the Hobbs Act.³⁶ The Court remanded the case for further proceedings, and in 1998, a jury in Chicago found PLAN and its leaders guilty of 21 counts of extortion under the Hobbs Act.³⁷

IV. NOW II

Following the 1998 jury decision, PLAN appealed to the Seventh Circuit on the grounds that the National Organization had failed to prove the predicate to the RICO claim; that PLAN had in fact violated the Hobbs Act.³⁸ PLAN asserted that extortion, as defined by the Hobbs Act, is “the obtaining of property from another, without his consent, induced by wrongful use of actual or threatened force, violence, or fear,” and that PLAN had not obtained any such property.³⁹ The Seventh Circuit rejected the argument on the basis that the legislative history of the Hobbs Act indicated that the Act did not require that the extortionist actually receive property.⁴⁰ PLAN subsequently appealed the ruling of the Seventh Circuit to the United States Supreme Court. Chief Justice Rehnquist’s opinion, referred to as NOW II, went against a long line of precedent in holding that PLAN did not commit extortion under the Hobbs Act because it did not “obtain” property.⁴¹ Instead, PLAN merely deprived the plaintiffs of their property without actually acquiring it for itself.⁴² The Court concluded that when a defendant merely deprives a plaintiff of property without actually acquiring it, he is not an extortionist. Therefore, in order for PLAN to be liable, the Supreme Court said it must actually acquire the property of the

³⁴ *Id.* at 259.

³⁵ *Id.* at 262.

³⁶ *Id.*

³⁷ *Nat’l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 695 (7th Cir. 2001).

³⁸ *Id.* at 709.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Scheidler v. Nat’l Org. for Women*, 537 U.S. 393, 409 (2003).

⁴² *Id.* at 404-05.

National Organization, not merely deprive the Organization of the use of its own property or the exercise of its own rights.⁴³

V. NOW III

Pursuant to the Supreme Court's decision in NOW II, the National Organization raised new arguments that PLAN's actions were indeed within RICO's reach, and the Supreme Court again granted certiorari in 2005. The National Organization argued that the jury in the 1998 trial had found "4 acts or threats of physical violence to person and property," and that these four acts were also violations of the Hobbs Act, independent of extortion, and therefore the four acts satisfied the predicate requirement to a RICO claim.⁴⁴

On February 28, 2006, the Supreme Court's decision ended the tumultuous twenty-year litigation.⁴⁵ The Court rejected the National Organization's argument that the Hobbs Act prohibits freestanding acts of violence by holding that "physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act."⁴⁶ In order to reach this decision, the Court interpreted the wording of the Hobbs Act under a restrictive reading.⁴⁷

Some critics are of the view that the Court's narrow interpretation of the Hobbs Act is "inconsistent with the construction of the Act by federal courts during the last forty years."⁴⁸ Critics of the Court's decision also argue that the Court's interpretation of the Hobbs Act would have prevented past successful prosecutions of organized crime members, had it previously been interpreted so narrowly.⁴⁹ Critics feel that the Court's reading of the Hobbs Act will serve only to

⁴³ *Id.* at 409.

⁴⁴ Nat'l Org. for Women v. Scheidler, 396 F.3d 807, 809 (7th Cir. 2005).

⁴⁵ Scheidler v. Nat'l Org. for Women, 126 S. Ct. 1264 (2006).

⁴⁶ *Id.* at 1270.

⁴⁷ *Id.* Specifically at issue in NOW III was the interpretation of the phrase that modifies "physical violence": "in furtherance of a plan or purpose to do anything in violation of the Hobbs Act." *Id.*

⁴⁸ Mary Hamm, *Torts-RICO-Predicate Crime of Extortion Requires that the Defendant Obtain or Attempt to Obtain Property*, 71 TENN. L. REV. 365, 380 (2004).

⁴⁹ Matthew T. Grady, *Extortion May No Longer Mean Extortion After Scheidler v. National Organization for Women, Inc.*, 81 N. DAK. L. REV. 33, 60 (2005).

undermine the effectiveness of the Act as a tool for law enforcement and prosecution of organized crime.⁵⁰

VI. IMPLICATIONS OF SCHEIDLER

As a result of this decision, reproductive health clinics must look to legal alternatives to RICO to ensure their clients access to legal and safe abortions. Reproductive health clinics are afforded legal protection from abortion protestors through two primary routes: state statutes and the Freedom of Access to Clinic Entrances Act of 1994 (FACE).⁵¹ However, critics of *Scheidler* feel that neither of these routes sufficiently protect reproductive health clinics and their employees because they do not address many of the activities undertaken by abortion protestors.

In addition to general state laws, some states have passed statutes that specifically attempt to prevent violence towards reproductive health clinics. The intent of these statutes is to provide reproductive health clinics, their employees, and their patients, protection against threats of violence, destruction of property, and trespass.⁵² In spite of these state laws, health clinics are still faced with situations in which state laws are not enforced, causing them to seek federal intervention.⁵³ There are a number of reasons why state statutes fall short of their goals to protect health clinics, their employees, and their patients. Abortion providers and seekers have found, and may continue to find, local authorities unwilling to enforce clinic or patient rights because local police and prosecutors support the protestors' cause.⁵⁴ Another situation in which state statutes fail to protect clinics and their affiliates is when the police are simply unable to control the sheer number of protestors.⁵⁵ In addition to a lack of manpower, local governments may be precluded from assisting clinics simply because of a lack of allocated resources.⁵⁶ Even in cases where state governments

⁵⁰ *Id.* at 35.

⁵¹ 18 U.S.C. § 248 (2000).

⁵² These states include, but are not limited to: Colorado, *Colo. Rev. Stat. Ann.* 18-9-122 (West 2004); Kansas, *Kan. Stat. Ann.* 21-3721(2) (1995 & Supp. 2005); Maryland, *Md. Code. Ann., Crim. Law.* 10-201 (LexisNexis 2002); North Carolina, *N.C. Gen. Stat.* 14-277.2 (2005).

⁵³ Nona LaPlante, *Clinic Blockades: What is the Problem? What is the Harm? What is the Solution?*, 3 CIRCLES: BUFF. WOMEN'S J. L. & SOC. POL'Y 15, 21 (1995).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 22-23.

are able to intercede on behalf of clinics, “the possible criminal punishments faced by the perpetrators under state law are remarkably slight.”⁵⁷

Congress passed FACE in 1994 in order to protect clinics, abortion providers, as well as women seeking abortions from the acts of protestors.⁵⁸ FACE prohibits the use of “force or threat of force or physical obstruction to intentionally injure, intimidate, or interfere with a person obtaining or providing health services.”⁵⁹ FACE also prohibits “intentional damage or destruction of the property of a facility.”⁶⁰ Although FACE seeks to protect abortion providers and abortion patients, the statute is only applicable to a limited group of people. The statute sets forth that “only a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility can bring a suit for force, threats of force, or physical obstruction.”⁶¹ The wording of the statute indicates that there must be actual force, threats of force, or physical obstruction combined with actual or attempted intentional injury, intimidation, or interference, or an intentional destruction motivated by the facility’s services, in order to provide a cause of action.⁶² As a result, FACE is not able to provide comprehensive protection to clinics, and those who seek to obtain or provide abortions. Specifically, FACE cannot be used to protect clinics from economic attack by anti-abortion groups seeking to put clinics out of business.⁶³ Additionally, FACE does not apply to the anti-abortion groups and protestors who coordinate attacks, and is limited only to protestors who actually participate in the attacks.⁶⁴ FACE provides clinics, their employees, and their clients only a limited amount of protection.⁶⁵

As a result of the Supreme Court’s decision in *Scheidler v. National Organization for Women, Inc.*, in addition to the current state of the law with regard to the limitations placed on abortion protestors, reproductive health clinics and their affiliates are afforded less protections for their rights. The *Scheidler* decision, as well as the

⁵⁷ Grady, *supra* note 49, at 35-36.

⁵⁸ 18 U.S.C. § 248 (2000).

⁵⁹ 18 U.S.C. § 248(a)(1) (2000).

⁶⁰ 18 U.S.C. § 248(a)(3) (2000).

⁶¹ 18 U.S.C. § 248(c)(1)(A) (2000).

⁶² *Id.*

⁶³ Audra K. Hamilton, *RICO, the Unexpected Protector Unveiled in National Organization for Women, Inc. v. Scheidler*, 48 ARK. L. REV. 851, 874-75 (1995).

⁶⁴ Hamm, *supra* note 48, at 379.

⁶⁵ *Id.*

deficiencies in the current legislation, will allow anti-abortion organizations to continue to economically terrorize reproductive health clinics without facing liability. The repercussions of this case affect not only the rights afforded to anti-abortion activists, but also serve to erode the availability of low-cost gynecologic and obstetric care because many of these clinics are not limited solely to abortion services. As a result of the current state of the law and the lack of protection afforded to such clinics, affordable prenatal care, contraceptives, and HIV/AIDS testing could become more difficult to obtain.⁶⁶

⁶⁶ S. REP. NO. 103-117, at 5 (1993).

