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# RICO: A NEW WAY TO ENFORCE IMMIGRATION LAW

*by* HOWARD FOSTER

The problem of illegal immigration ranks as one of the three most important domestic issues in the presidential campaign.<sup>1</sup> In the last two years Congress took up, but did not pass, controversial immigration reform legislation.<sup>2</sup> And many states have enacted laws imposing penalties on employers who hire illegal immigrants.<sup>3</sup> Arizona has gone so far as to enact a law which hits employers of illegal immigrants with a series of sanctions including revocation of their business licenses.<sup>4</sup> But these legislative and political debates have a dissonant ring to them. For there are already federal laws sanctioning employers for employing illegal immigrants, making it a felony to use or accept a bogus identification document from a perspective employee, and to assist persons from illegally entering the United States.<sup>5</sup> Then, one might wonder, why the heated debates? Hasn't all of this been decided long ago? The answer is

“yes,” but the laws are not being enforced.<sup>6</sup> So illegal immigrants continue to enter the United States largely undisturbed by federal officials, primarily for employment—the “magnet” that lures them here.<sup>7</sup> And as their numbers have expanded to upwards of 20 million, the problem of what to do about them grows.

One of these problems is wage depression. Although it is not commonly reported in the media, the economic effects of illegal immigration are widespread and significant.<sup>8</sup> In 1976 the Supreme Court stated, without citation to any authority as if the proposition was beyond dispute, that the employment of illegal immigrants “can seriously depress wage scales and working conditions” of legally employed workers.<sup>9</sup> The Court went on to uphold the constitutionality of a California statute, since repealed, which made it illegal for employers to hire illegal immigrants.<sup>10</sup> And one legitimate reason for doing so, the Court held, was to protect the wages of legal workers.<sup>11</sup>

The *DeCanas* case was the first and the last time the Supreme Court addressed the question of wage depression caused by illegal immigration. Not until 1986 did Congress prohibit the employment of illegal immigrants.<sup>12</sup> And not until the 1990s did Congress create a legal cause of action for U.S. workers to actually sue to redress wage depression caused by illegal immigration.<sup>13</sup> It did so in an amendment to the Racketeer Influenced and Corrupt Organizations (RICO) Act, which made it possible for persons who have been damaged by a pattern of such conduct to sue the employer hiring the illegal workers.<sup>14</sup> The legislative record is sparse as to what Congress intended with this amendment to RICO, but it certainly reflected a desire to turn up the heat on employers of illegal immigrants. As the Eleventh Circuit held, “Congress, however, criminalized the employment of illegal workers in part to protect legal workers.”<sup>15</sup>

Shortly after the 1996 amendment to RICO, a small cleaning company in Connecticut contacted me. The owner complained of losing business to a large competitor, which, she contended, had underbid her firm for a lucrative contract to clean a huge engine factory near Hartford. The complaint was that her firm was underbid because the competitor’s labor costs were unusually low as it hired many illegal immigrants at depressed wages. The result was a decision from the Second Circuit Court of Appeals and a front page story in the *Wall Street Journal*.<sup>16</sup> Needless to say, both the decision and the article, coming just after 9/11, heightened the interest in illegal immigration and sparked

great interest in such lawsuits across the country. I was inundated with potential clients.

Since then, I have filed class actions on behalf of legal workers in the agriculture, poultry processing and carpet manufacturing industries—all notorious for hiring illegal immigrants.<sup>17</sup> I am seeking back pay for my clients to compensate them for the depression of their wage rates below what they would be paid in a market free of illegal hiring. As expected, these cases have been fiercely defended by well-qualified lawyers schooled in the nuances of employment, immigration, class action and antitrust law, all of which are implicated to varying degrees.

The results thus far are decidedly mixed. *Mendoza* and *Tyson* were certified as class actions.<sup>18</sup> However, two years later the *Tyson* case was thrown out at the summary judgment stage.<sup>19</sup> But other plaintiffs' lawyers are beginning to file similar cases in other states.<sup>20</sup> Given that federal enforcement of immigration laws is inconsistent at best, I believe these RICO class actions are going to stay with us for the long term. Not only will these cases continue, but they could proliferate and become the next important subset of the vast enterprise known under the rubric of "employment law."

Plaintiffs' lawyers should, accordingly, be on the lookout for clients who work in industries that are rife with illegal immigrants, some of which I have identified. Suppose a potential client with a worker's compensation or personal injury claim shows up in your law office. The client works for a firm in the business of cleaning office buildings at night. Her lawyer may not think to ask about the presence of illegal workers in the labor pool, but if the client has come to you, there is no ethical prohibition from asking the client such questions. You may be performing a valuable service by informing your client of her right to assert a claim for wage depression (assuming the client is legally employed), and you may find yourself learning a great deal about this subject matter. Since the employment of illegal immigrants is so widespread, immigration laws so sparsely enforced, and Congress's actions are encouraging lawsuits like this one by lawyers serving as "private attorneys general," such litigation is something to be desired.

## NOTES

- 1 NBC NEWS/WALL STREET JOURNAL, Study # 6079, Jan. 20-22, 2008, *available at* <http://online.wsj.com/public/resources/documents/WSJpoll-20080124.pdf#page=16>.
- 2 *Immigration Bill Suffers Major Defeat in Senate*, ASSOCIATED PRESS, June 28, 2007, *available at* <http://www.msnbc.msn.com/id/19475868/>.
- 3 Darryl Fears, *Illegal Immigrants Targeted by States*, WASH. POST, June 25, 2007, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/24/AR2007062401662.html>.
- 4 *Arizona Contractors Assn., Inc. v. Candelaria*, 534 F. Supp2d 1036 (D.Ariz. 2008) (denying injunction to halt enforcement of the law).
- 5 The Immigration Reform and Control Act, 8 U.S.C. § 1324a (see full cite below); 18 U.S.C. § 1546 (making it a felony to use or accept bogus documents to obtain employment).
- 6 *Developments in the Law- Jobs and Borders: IV. Legal Protections for Illegal Workers*, 118 HARV. L. REV. 2224 at 2235 (May 2005) (“From 1997 to 2003, the number of arrests resulting from employer investigations [for hiring illegal immigrants] fell in every successive year, from 17,554 arrests in 1997 to only 445 nationwide in 2003”).
- 7 *See, e.g., Affordable Housing Found. v. Silva*, 469 F.3d 219, 231 (2d Cir. 2006) (“Congress concluded that the most humane, credible and effective way to respond to the problem was to penalize those employers who hired illegal aliens. Employment is the magnet that attracts aliens here illegally. . .”) (internal quotations and citation omitted).
- 8 Randy Forbes, *Illegal Immigration: A Case Study*, *available at* <http://forbes.house.gov/issues/immigrationcasestudy.htm>.
- 9 *DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976).
- 10 *Id* at 364-65.
- 11 *Id* at 357.
- 12 The Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3360 (1986), codified at 8 U.S.C. § 1324a *et seq.*
- 13 Prior to that there was no legal theory that would enable a U.S. worker to sue for the effects of illegal immigration on his or her wages. *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975) (noting that Congress did not create a private right of action for enforcement of the immigration laws).
- 14 RICO is codified at 18 U.S.C. § 1961 *et seq.* The law’s long list of “racketeering activity,” 18 U.S.C. § 1961, was amended in 1996 to add provision (1)(F), (making violations of § 274 of the Immigration and Nationality Act, employing ten or more illegal immigrants per year).
- 15 *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277, 1289 (11th Cir. 2006).
- 16 *Commercial Cleaning Services, Inc. v. Colin Service Systems, L.L.C.*, 271 F.3d 374 (2d Cir. 2001) (holding this unfair competition RICO claim was improperly dismissed).
- 17 *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) (*Mendoza*), *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004) (*Tyson*).
- 18 *Tyson*, 2006 U.S. Dist. LEXIS (E.D. Tenn. 2006); *Mendoza*, 222 F.R.D. 439 (E.D. Wash. 2004).
- 19 *Tyson*, 2008 U.S. Dist. LEXIS 11243 (E.D. Tenn. 2008).
- 20 *See, e.g., Hager v. ABX Air, Inc.*, 2008 U.S. Dist. LEXIS 23486 (S.D. Ohio 2008).