

913 F.2d 1390, 1990-2 Trade Cases P 69,176, RICO Bus.Disp.Guide 7561
(Cite as: 913 F.2d 1390)

United States Court of Appeals,
Ninth Circuit.
Lowell MUSICK and Sharlene Musick, et al., Plain-
tiffs-Appellants,
v.
Gene BURKE, Burke Vending and Catering Corpo-
ration, et al., Defendants-Appellees.

No. 89-55310.
Argued and Submitted May 10, 1990.
Decided Sept. 7, 1990.

JENSEN, District Judge:

In this action alleging federal antitrust and rack-
eteering law violations and pendent state law tort
claims, the individual plaintiffs [FN1](#) appeal the grant of
summary judgment in favor of defendants [FN2](#) (collec-
tively referred to as "Burke Vending") and dismissal
of the pendent state law claims for lack of jurisdiction
in the district court. The issues are (1) whether plain-
tiffs have demonstrated that Burke Vending's activi-
ties have an effect upon interstate commerce sufficient
to come within the scope of either federal antitrust
laws or the Racketeer Influenced and Corrupt Organ-
izations Act, [18 U.S.C. § 1961](#) et seq. ("RICO"); (2)
whether even if such effect were demonstrated, defen-
dants possess *1392 sufficient market power to
render their activities unlawful under the antitrust rule
of reason; and (3) whether the district court erred in
finding that defendants had committed no acts of
extortion or intimidation against plaintiffs as compet-
itors or prospective witnesses. We affirm the judg-
ment.

[FN1](#). The plaintiffs are Lowell Musick and
Sharlene Musick, dba Chow Biz; Tom Ma-
nus; Cheryl Tombaugh; and George Parlee.
All are citizens of California engaged in the
business of commercial catering in the Santa
Clarita Valley area of Los Angeles County.

[FN2](#). The named defendants are Gene Burke,
president and major shareholder of corporate
defendant Burke Vending and Catering
Corporation, a California corporation; David

C. Smith; Lafayette Smith; Phil Smith; Ra-
fael Espinoza; Barry Cisneros; David Man-
ning; Don Ternario; Don Wheeler; Orlando
Rivas; Peter Limon; Marco Lefferman; Ed-
ward Corner; John Sheehy; Steve Sanchez;
Jane Collier; Mark Sullivan; and Derrick
Kroll. Corporate defendant Michael's Cater-
ing is alleged to be a California corporation
but is identified by defendants as a dba of
Burke Vending and Catering Corporation.
The individual defendants are alleged to be
agents or employees of each other.

I. FACTS AND PROCEDURAL HISTORY

A. *The Complaint*

This dispute concerns alleged antitrust and rack-
eteering law violations in claimed acts of violence and
extortion by Burke Vending against its competitors,
plaintiffs/appellants, in the mobile catering service
industry in the Santa Clarita Valley area of Los An-
geles, California. Plaintiffs allege that during the pe-
riod from 1985 to 1988 each of them was threatened
and harassed by employees or agents of Burke
Vending while attempting to serve customers at var-
ious business locations throughout the Santa Clarita
Valley area, and that Burke Vending engaged in price
discrimination and entered into agreements to sell
goods on the basis of refusal to use goods of its
competitors.

The Complaint alleges that the purpose of this
harassment, unlawful price discrimination, and
agreement not to use goods of competitors was to
restrain competition in the market area and obtain a
monopoly, all in violation of the Sherman Act, [15
U.S.C. §§ 1, 2](#); the Wilson Tariff Act, [15 U.S.C. § 8](#)
et seq.; the Clayton Act, [15 U.S.C. §§ 14, 15](#); and the
Robinson-Patman Price Discrimination Act, [15
U.S.C. § 13](#) et seq. The threats and harassment were
further alleged to have amounted to a pattern of rack-
eteering activity conducted for the benefit of defen-
dant Gene Burke's mobile catering business, [FN3](#) in
violation of Racketeer Influenced and Corrupt Or-
ganizations Act, [18 U.S.C. § 1961](#) ("RICO"). Pendent
state law tort claims were also asserted for interference
with business advantage, assault and battery, and
intentional infliction of emotional distress.

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FN3. Burke Vending and Michael's Catering are alleged to be the enterprises benefitting from the pattern of racketeering activity alleged in the RICO claim.

B. Disposition in the District Court

In the district court, defendants brought motions for summary judgment against each of the federal claims asserting lack of jurisdiction, in that defendants' activities were neither in commerce nor had an effect on interstate commerce as required under the statutes. Defendants also moved for dismissal of the state law claims for lack of pendent jurisdiction, should summary judgment be granted.

The district court granted the motions for summary judgment on the federal law claims and adopted defendants' proposed findings of fact as uncontroverted facts of the action. The district court found that defendants' activities were wholly local, without effect on interstate commerce; and that even if federal jurisdiction existed, defendants did not have sufficient market power to render their conduct unlawful under the rule of reason.

As to the RICO claim, the district court found that Burke Vending's activities were local and had only an incidental effect on interstate commerce. The district court further found that even if the jurisdictional effect on interstate commerce existed, plaintiffs had failed to show evidence of any predicate acts for purposes of establishing RICO liability. Although it was not a necessary basis of summary judgment, the district court found that no employee or lessee of Burke Vending had engaged in extortion, intimidation or retaliation against plaintiffs or their witnesses. Finally, having granted summary judgment for defendants on the federal claims, the district court dismissed the state law claims for lack of pendent jurisdiction, without prejudice to bringing these claims in state court.

For the reasons set forth below, the panel affirms the grant of summary judgment and dismissal of the pendent state law claims for lack of jurisdiction.

C. Facts

The parties to this action are each engaged in the business of commercial mobile *1393 catering in the Santa Clarita Valley area of Los Angeles County. Their operations include driving catering trucks to businesses and construction locations throughout the

area to sell a variety of prepared food or food products, snacks, drinks, and other products to employees at those business or construction sites. The products are purchased wholesale from local distributors who obtain many products from out-of-state manufacturers and suppliers, and are then resold at retail prices to the employee-consumers. The catering trucks the businesses use are assembled and customized from standard parts, some of which are manufactured outside of California.

Defendant Burke Vending owns 18 catering trucks, 3 of which are driven by employees and 15 of which are leased to independent operators who also purchase their products from Burke Vending for resale. Plaintiff Lowell Musick operates four to five catering trucks in the Santa Clarita Valley area, with a total annual business volume of approximately \$800,000. Musick asserts that \$500,000 of his annual sales volume is derived from sales of products imported from out-of-state. Burke Vending asserts that all of its products are purchased from local distributors. No figures are available for the volume of business Burke Vending does per year, nor the amount of that business that is derived from products shipped in interstate commerce. Plaintiffs also offer no figures for the number of catering trucks or volume of business operated by the other individual plaintiffs.

While the Santa Clarita market area is approximately 25 miles from the nearest sizeable city, there are no geographic barriers to competition from outside the area. Within the market area there are in addition to catering trucks, fast food restaurants and convenience stores which offer substantially the same products as are offered by the parties' mobile catering services. The only difference among these businesses is that the mobile catering services deliver the products directly to the customers' worksites, while employees would have to leave their worksites to reach the fixed distribution outlets. Plaintiffs assert that it is impossible for these employees to leave their worksites during the day but offer no supporting evidence on this point.

In a series of declarations submitted in opposition to the motions for summary judgment, plaintiffs allege that certain Burke Vending agents, defendants Lafayette Smith, David Smith and Don Wheeler, would follow them to worksites and forcibly interfere with their attempts to serve customers. This forcible inter-

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ference included verbal threats and orders to leave, blocking customer access to plaintiffs' trucks with their own vehicles, throwing nails and other debris in the paths of plaintiffs' trucks, and at least one incident of physical assault. Non-forcible interference was also described, in the form of following plaintiffs to worksites and giving food and other products away to undercut plaintiffs' sales at those sites. Plaintiffs allege that they and their customers were placed in fear by the nature and manner of defendants' activities. Their declarations also support an inference that defendants suggested this harassment would cease if plaintiffs abandoned their attempts to service the locations at which the incidents occurred. At least three of the plaintiffs state in their declarations that they abandoned one or more service locations as a result of the harassment activities.

Defendant Gene Burke stated in his declaration in support of the motions for summary judgment that he had no knowledge of acts of violence or intimidation by his employees, and that such acts would be contrary to Burke Vending policies.

* * * *

III. JURISDICTION UNDER RICO

To prevail on a claim under the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C. § 1962](#) ("RICO"), plaintiffs must demonstrate that the enterprise which is involved in or benefits from the racketeering activity is one engaged in, or having an effect on, interstate commerce. [United States v. Rone](#), 598 F.2d 564, 573 (9th Cir.1979), cert. denied sub nom. [Little v. U.S.](#), 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980); [18 U.S.C. § 1962\(c\)](#). This nexus may be "minimal," but constitutes part of plaintiffs' burden to prevail in this action. *Id.* Specifically, the effect on commerce must be shown. [United States v. Bagnariol](#), 665 F.2d 877, 892 (9th Cir.1981), cert. denied sub nom. [Walgren v. U.S.](#), 456 U.S. 962, 102 S.Ct. 2040, 72 L.Ed.2d 487 (1982). It is not necessary for plaintiffs to demonstrate that the predicate acts themselves had an interstate effect. [Rone](#), 598 F.2d at 573; [Bagnariol](#), 665 F.2d at 892.

As discussed above, the jurisdictional reach of the Sherman Antitrust Act extends to the constitutional limits of Congress' power to regulate interstate commerce. [United States v. South-Eastern Underwriters Ass'n](#), 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944); [Western Waste](#), supra, 616 F.2d at 1096. Therefore, we are persuaded that a "minimal" inter-

state nexus to establish jurisdiction under RICO can be no less than that required for the Sherman Act. That is to say, RICO jurisdiction ends where local activities have incidental effects on interstate commerce, exactly at the point where Sherman Act jurisdiction ends.

The evidence of interstate effect of the Burke Vending enterprise that appellants offer for their RICO claim is identical to that offered for their anti-trust claims. Even accepting that the parties all offer out-of-state goods in the amounts asserted by appellant Lowell Musick, there is no basis on which to conclude that these sales create RICO jurisdiction where they are insufficient as a matter of law to create federal jurisdiction under the antitrust statutes.

For this reason, the district court properly found that appellants had failed to raise a genuine issue of material fact that Burke Vending's activities affected interstate commerce sufficiently to invoke RICO jurisdiction, and summary judgment for appellees*1399 on the Sixth Cause of Action is affirmed.

* * * *

V. CONCLUSION

The district court's finding that federal jurisdiction did not exist over appellants' antitrust and RICO claims was proper, because the record fails to provide sufficient evidence of a substantial effect on interstate commerce of either Burke Vending's anticompetitive activities or its commercial activities as a whole. Therefore dismissal of the pendent state law claims was also proper. The findings and conclusions of the district court bearing on the merits of the controversy are of no legal or precedential effect.

AFFIRMED.

C.A.9 (Cal.),1990.
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