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Corrupt Conciliations: Federal Blackmail & Extortion Cases on the Rise

By Luke V. Cass & Simon J. Cataldo[1]

From the recent conviction of Michael Avenatti for a scheme to extort Nike for a $25 million "settlement,"[2] to disgruntled former employees threatening to release confidential information,[3] to anonymous ransomware attacks demanding payment in cryptocurrency due to the Coronavirus Pandemic,[4] to public officials' alleged efforts to pressure companies to employ union workers in order to secure permits, the terms "blackmail" and "extortion" are increasingly prevalent in boardrooms, courtrooms, and elsewhere.[5]

But when do hardball tactics involving so-called blackmail and extortion run afoul of federal criminal law? This article examines this type of conduct in the context of five federal statutes, the scope of conduct covered by them, and the circumstances in which they are being charged.

I. Blackmail

The term "blackmail" is often used interchangeably to describe myriad offense conduct, including intimidation, coercion, theft, or stealing. But while blackmail may be used colloquially to describe these general categories of coercive conduct, at the federal level it's specific and limited to circumstances involving the payment of hush money — "pay me this sum and I will not report or testify about this federal offense."[6]

Blackmail is a singularly unique criminal offense. It is one of the only statutes that makes the combination of two independently legal acts criminal.[7] The federal blackmail statute, 18 U.S.C. § 873,[8] requires the government to prove: (1) the defendant demanded money or other thing of value from the victim; (2) under the threat of informing or consideration for not informing against a violation of any law of the United States; and (3) the defendant had knowledge relating to illegal activity and offered to withhold the information.[9] Section 873 "reaches those who would evade their responsibility to inform the authorities about a violation of the law by exchanging the promise to forebear from giving such information for some benefit."[10] It is irrelevant whether the defendant had a claim of right to the benefits, rather, it is "the use of the information in this manner" that "Congress sought to penalize."[11] An important limitation to § 873 is that the statute, by its terms, reaches only threats involving the disclosure or non-disclosure of violations of federal law.[12] Therefore, threats to reveal lurid or embarrassing, but non-criminal, conduct—such as an extramarital affair—will not, standing alone, amount to a violation of § 873.

The case of *United States v. Kuruzovich*[13] is a good example of a typical blackmail scheme. Kuruzovich worked for a company until he was fired for performance issues and unprofessional conduct.[14] Immediately prior to, and shortly after his termination, Kuruzovich began emailing demands for payment of benefits, commissions, severance, and other monies from the company and threatened that, if his demands were not met, he would report allegations of insider trading and other illicit activity by the company to various government authorities.[15] He further reported

such allegations to two company clients, one of which did not renew its service subscription.[16] Kuruzovich also took proprietary information from the company's confidential database and was subsequently charged with violating § 873.[17]

Federal blackmail is a demand for consideration in exchange for silence about federal offenses. Extortion, on the other hand, covers nearly any other crime where threats are wrongfully used to gain an advantage or to induce someone to do something.

II. Extortion

Generally understood, extortion is the "[t]he act or practice of obtaining something or compelling some action by illegal means, as by force or coercion."[18] Like blackmail, the definition of extortion under criminal statutes is more complicated and nuanced than the word's colloquial meaning.

The seminal federal extortion statute is the Hobbs Act.[19] The Hobbs Act forbids extortionate conduct that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce" and covers actual extortion, attempts, or conspiracies to do so.[20] "Extortion is defined in the Hobbs Act as 'the obtaining of property from another, with his consent, induced by *wrongful* use of actual or threatened force, violence, or fear, or under color of official right.'"[21] The "property" at issue in a Hobbs Act extortion violation must be "something of value from the victim that can be exercised, transferred, or sold."[22]

Courts have held that "[t]o affect commerce for purposes of the Hobbs Act, it is not necessary that the charged crime be soaked in the stream of commerce."[23] All that is required to be proven by the government for an "affect" is a "realistic probability of a *de minimis* effect on interstate commerce."[24] Proof that the defendant's criminal activity caused or created the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce is sufficient[25] and amounts as little as $1,500 to $5,000 have been found to be sufficient effects on interstate commerce.[26]

Although Hobbs Act extortion is focused mainly on property interests, its scope also covers reputational harm.[27] In what the U.S. Attorney for the Southern District of New York termed an "old fashioned shakedown,"[28] Michael Avenatti threatened Nike with economic and reputational harm by stating that he would hold a press conference on the eve of the company's quarterly earnings call and the start of the annual NCAA men's basketball tournament to announce allegations of misconduct by Nike employees unless the company paid Avenatti's client $1.5 million and agreed to "retain" Avenatti to conduct an "internal investigation" — which Nike never requested — for payment, at a minimum, between $15 and $25 million earned upon receipt.[29] Alternatively, and in lieu of such a retainer agreement, Avenatti demanded a total payment of $22.5 million from Nike to resolve any claims that his client might have and buy Avenatti's silence.[30] The U.S. Attorney for the Western District of Virginia recently brought similar extortion charges against two attorneys, resulting in a June guilty plea.[31] There, the attorney-defendants admitted that they had threatened to make public accusations against a chemical company and initiate damaging lawsuits unless the company entered into a $200 million "consulting arrangement" with a shell corporation that the attorneys created for purposes of the extortion scheme.[32]

Unlike blackmail, whether the defendant has a right to the property could matter.[33] A recent case in Boston involved two city officials, Kenneth Brissette and Timothy Sullivan, who were charged with Hobbs Act extortion for allegedly forcing a production company to hire union workers as a prerequisite before issuing necessary permits.[34] The defendants moved to dismiss the indictment by arguing that they did not "obtain" any property within the meaning of the Hobbs Act, which went to the union employees.[35] In reversing the district court's dismissal order, the First Circuit held that the "obtaining property" element of Hobbs Act extortion "may be satisfied by evidence showing that the defendants induced the victim's consent to transfer property to third parties the defendants identified, even where the defendants do not incur any personal benefit from the transfer and even where the transfer takes the form of wages paid for real rather than fictitious work."[36] Therefore, the reach of Hobbs Act extortion extends to those that act on behalf of third parties regardless of whether they personally benefited.

The *Brissette* case was tried upon remand, and following a guilty verdict the district court took the extraordinary step of overturning the jury's decision and entering a judgment of acquittal. The court's accompanying opinion emphasized that, with regard to fear of economic harm extortion, "[t]hreats of financial harm are not inherently 'wrongful'" because "fear of such harm is a part of many legitimate business transactions."[37] Several circuits have stated that an economic threat to obtain "property is 'wrongful' under the Hobbs Act only if the defendant has no claim of right to that property and knew as much."[38] This aspect of extortion law could be acutely relevant for practitioners and their clients who are engaged in settlement talks or other high-stakes business negotiations.

Certain interstate communications may also qualify as extortion. Section 875 prohibits the interstate or foreign transmission of threats: (1) to extort money or things of value; (2) to injure the property or reputation of the addressee or of another; (3) the reputation of a deceased person; or (4) any threat to accuse the addressee or any other person of a crime.[39] Section 1030 similarly prohibits the interstate or foreign transmission of threats to: (1) extort money or things of value to cause damage to a protected computer; (2) obtain information from a protected computer without authorization or in excess of authorization; (3) impair the confidentiality of information obtained from a protected computer without authorization or by exceeding authorized access; or (4) demand or request for money or other thing of value in relation to damage to a protected computer, where such damage was caused to facilitate the extortion.[40] This statute was intended to cover "computer-age blackmail" involving any "interstate or international transmissions of threats against computers, computer networks, and their data and programs whether the threat is received by mail, a telephone call, electronic mail, or through a computerized messaging service."[41]

Neither statute defines "extortion," but courts have relied on the Hobbs Act definition of extortion in § 875 prosecutions[42] and model jury instructions track this language for the definition of "intent to extort" in § 1030(a)(7) offenses.[43]

III. Travel Act

The Travel Act was passed in 1961 at the behest of Attorney General Robert F. Kennedy to combat the prevalence of organized crime and racketeering syndicates. The House of

Representatives report that accompanied the introduction of the Travel Act stated that "[t]he interstate tentacles of this octopus known as 'organized crime' . . . can only be cut by making it a Federal offense to use the facilities of interstate commerce in the carrying on of nefarious activities."[44]

The Travel Act makes it a crime for an individual "to travel in interstate or foreign commerce or use the mail or any facility in interstate or foreign commerce, with the intent to: (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity" and then perform or attempt to perform that activity.[45]

"Unlawful activity" has several different meanings, including extortion, bribery, or arson in violation of the laws of the State in which it was committed or of the United States.[46] The Travel Act, therefore, allows a state extortion statute to be brought into federal court if any facilities of interstate commerce, like email or SMS, were used even when those laws contain more expansive definitions of the crimes than those found at common law.[47]

IV. The Coronavirus Pandemic

The Coronavirus Pandemic has created new opportunities for scammers and vulnerabilities for potential victims of blackmail and extortion schemes. The FBI has warned that online extortion and blackmail scams have increased during the Coronavirus Pandemic.[48] Federal criminal trade secret cases likewise continue to rise.[49] While that conduct is separately charged under a different statute,[50] it may also involve extortion where disgruntled employees seek to leverage confidential or proprietary information for additional severance or benefits following dismissal.[51]

Moreover, the widespread use of federal monies by private companies and mass layoffs, coupled with the rising volume of information that companies maintain, may result in an increase in blackmail and extortion. For attorneys, threatening criminal action in the context of civil litigation could violate the Model Rules of Professional Conduct and can lead to disciplinary action, or even prosecution.[52] Executives and employees, for their part, must stay alert to the boundary between business negotiation and criminal conduct.

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[2] https://www.law360.com/articles/1243435/michael-avenatti-found-guilty-of-extorting-nike

[3] https://www.law360.com/articles/1266347/agency-says-atty-used-virus-to-blackmail-toyota-wilmerhale

[4] https://www.law360.com/articles/1231841/ransomware-s-year-end-thank-you-note-to-bitcoin
https://www.fbi.gov/news/pressrel/press-releases/fbi-expects-a-rise-in-scams-involving-cryptocurrency-related-to-the-covid-19-pandemic

[5] United States v. Brissette, 919 F.3d 670 (1st Cir. 2019).

[6] Statutes outside of federal purview may cover a broader range of conduct. For example, in Washington, D.C., the blackmail statute covers (1) criminal accusations; (2) the exposure of a secret or publicizing an asserted fact, whether true or false, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation; (3) impairing the reputation of another person, including a deceased person; (4) distributing a photograph, video, or audio recording, whether authentic or inauthentic, tending to subject another person to hatred, contempt,

ridicule, embarrassment, or other injury to reputation; or (5) notifying a federal, state, or local government agency or official of, or publicizing, another person's immigration or citizenship status. D.C. Code § 22-3252.
[7] This is dubbed the "Blackmail Paradox." See United States v. Valenzeno, 123 F.3d 365, 372 n. 3 (6th Cir.1997) (Moore, J., concurring) (noting extensive literature regarding the "paradox in the law of blackmail").
[8] "Whoever, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing, shall be fined under this title or imprisoned not more than one year, or both."
[9] United States v. Totoro, No. CR 15-291, 2017 WL 3189216, at *11 (E.D. Pa. July 27, 2017).
[10] United States v. Coyle, 63 F.3d 1239, 1250 (3d Cir. 1995).
[11] Id.
[12] 18 U.S.C. § 873.
[13] No. 09-CR-824 DC, 2012 WL 1319805, at *1 (S.D.N.Y. Apr. 13, 2012), case abated, 541 F. App'x 124 (2d Cir. 2013).
[14] Id.
[15] Id.
[16] Id.
[17] Id.
[18] Jordan v. Aramark, No. 1:06-CV-192-R, 2007 WL 1175050, at *2 (W.D. Ky. Apr. 20, 2007) (quoting Black's Law Dictionary, 266 (2d. Pocket ed. 2001)).
[19] 18 U.S.C. § 1951(a).
[20] Id.
[21] United States v. Villalobos, 748 F.3d 953, 955 (9th Cir. 2014) (citing 18 U.S.C. § 1951(b)(2)) (emphasis supplied).
[22] United States v. Silver, 864 F.3d 102, 114 (2d Cir. 2017) (quoting Sekhar v. United States, 133 S.Ct. 2720, 2724, (2013)).
[23] United States v. Tkhilaishvili, 926 F.3d 1, 11 (1st Cir. 2019).
[24] United States v. Capozzi, 486 F.3d 711, 725-26 (1st Cir. 2007).
[25] United States v. Collins, 40 F.3d 95, 100 (5th Cir. 1994); see also United States v. Devin, 918 F.2d 280, 293 (1st Cir. 1990) (finding de minimis standard satisfied where individual was president and proprietor of business operating in interstate commerce).
[26] United States v. Rivera Rangel, 396 F.3d 476, 483 (1st Cir. 2005) (holding that evidence of $1,500 to $5,000 payments "alone was sufficient to establish extortion induced by fear of economic loss.").
[27] United States v. Brank, 724 F. App'x 527, 529 (9th Cir.), cert. denied, 139 S. Ct. 232 (2018); see also United States v. Nardello, 393 U.S. 286, 296 (1969) (holding that extortion encompassed threats to injure a victim's reputation); Cf. United States v. Koziol, No. 2:18-CR-00022-CAS, 2019 WL 2109639, at *2 (C.D. Cal. May 13, 2019) (observing that whether Hobbs Act extortion covers threats to reputation may raise a "fairly debatable" question.)
[28] https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-verdict-trial-michael-avenatti
[29] https://www.justice.gov/usao-sdny/pr/us-attorney-announces-arrest-michael-avenatti-engaging-scheme-extort-public-company
[30] Id. On September 3, the U.S. Attorney's Office for the Southern District of New York brought yet another extortion charge against an attorney, this one working on behalf of the hedge fund he founded. The defendant, Daniel Kamensky, is alleged to have extorted a bidder for Neiman Marcus, which had earlier filed for bankruptcy. The complaint alleges that Kamensky threatened to use his role as co-chair of an unsecured creditors committee to block the bid, and that his hedge fund would stop doing business with the bidder unless the bid was withdrawn. https://www.justice.gov/usao-sdny/pr/new-york-hedge-fund-founder-arrested-and-charged-fraud-extortion-and-obstruction
[31] https://www.justice.gov/opa/pr/virginia-attorneys-plead-guilty-orchestrating-200-million-extortion-scheme-targeting
[32] Id.
[33] United States v. Sturm, 870 F.2d 769, 773 (1st Cir. 1989) ("We therefore hold that for purposes of the Hobbs Act, the use of legitimate economic threats to obtain property is wrongful only if the defendant has no claim of right to that property.").
[34] Brissette, 919 F.3d at 672.
[35] Id.
[36] Id. at 685–86.

[37] United States v. Brissette, No. 16-cr-10137-LTS, 2020 WL 718294, at *20 n.43 (D. Mass. Feb. 12, 2020) (quoting United States v. Burhoe, 871 F.3d 1, 9 (1st Cir. 2017)); see also Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 503, 509 (3d Cir. 1998); United States v. Kattar, 840 F.2d 118, 123 (1st Cir. 1988).
[38] Burhoe, 871 F.3d at 9 (internal quotation marks omitted); Brokerage Concepts, Inc., 140 F.3d at 523; United States v. Capo, 791 F.2d 1054, 1062 (2d Cir. 1986) (stating that the Hobbs Act only reaches the use of economic fear "in order to obtain property to which the exploiter is not entitled").
[39] 18 U.S.C. § 875(b),(d).
[40] 18 U.S.C. § 1030(a)(7)(A)-(C).
[41] S. Rep. No. 104-357, at 12, 1996 WL 492169, at *29 (1996).
[42] United States v. Cohen, 738 F.2d 287, 289 (8th Cir. 1984) (in case charged under 18 U.S.C. § 875(d), court borrowed the definition of "extortion" found in the Hobbs Act, defining "intent to extort" as meaning "an intent to get the property of another with his consent, induced by wrongful use of actual or threatened force, violence or fear").
[43] Model Crim. Jury Instr. 8th Cir. 6.18.1030I (2020).
[44] H.R. Rep. No. 87–966 (1961).
[45] 18 U.S.C. § 1952(a)(3).
[46] 18 U.S.C. § 1952(b); United States v. Culbert, 435 U.S. 371, 378 (1978) ("As Representative Hobbs noted, the words robbery and extortion "have been construed a thousand times by the courts. Everybody knows what they mean.") (citing 91 Cong. Rec. 11912 (1945)).
[47] United States v. Manzo, 851 F. Supp. 2d 797, 804 (D.N.J. 2012).
[48] http://image.communications.cyber.nj.gov/lib/fe3e15707564047c7c1270/m/2/FBI+PSA+-+4.20.2020.pdf
[49] https://www.justice.gov/opa/pr/former-ge-engineer-and-chinese-businessman-charged-economic-espionage-and-theft-ge-s-trade
[50] 18 U.S.C. § 1832 (criminalizing the theft of trade secrets).
[51] https://www.fbi.gov/contact-us/field-offices/seattle/news/press-releases/kentucky-man-convicted-of-theft-of-trade-secrets-sentenced-in-yakima-federal-court
[52] ABA Formal Op. 92-363; see also ABA Model Rules 4.1, 4.4.