New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 261—NO. 89
WEDNESDAY, MAY 22, 2019

Outside Counsel

Expert Analysis

Remembering the Bill Cosby Extortion Case, in the Time of Avenatti

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On March 24, 2019, the U.S. Attorney's Office for the Southern District of New York charged Michael Avenatti—lawyer to presidential accuser Stephanie Clifford (a/k/a Stormy Daniels)—with federal extortion and conspiracy charges. According to the DOJ, Avenatti threatened to expose Nike's involvement in a college basketball corruption scheme akin to the Adidas-related scheme that, in Fall 2017, resulted in federal indictments of 10 coaches, shoe company executives and player advisers.

The criminal complaint against Avenatti charges that he threatened to make certain damaging revelations about Nike on the eve of Nike's quarterly earnings call and the annual NCAA basketball tournament, which he predicted would severely injure Nike's reputation (and its stock price). According to the complaint, Avenatti promised to refrain from holding a press conference disclosing this damaging information if Nike paid Avenatti's client (a high school basketball coach) $1.5 million, and also agreed to hire Avenatti to conduct an internal investigation of Nike for a preset fee of many millions more.

> The last time the Second Circuit deeply wrestled with this type of extortion charge was in the high profile case of 'United States v. Jackson'.

The alleged details of Avenatti's profanity-laced demands (caught on tape by the FBI) grabbed headlines, but questions remain as to whether Avenatti's alleged conduct, even if proven, can constitute extortion under federal law. The Southern District's charges are premised on threats not of physical harm to the victim, but rather, of reputational (and related economic) damage that would result from the publication of negative information. Such a theory presents unique proof challenges for the government.

The last time the Second Circuit deeply wrestled with this type of extortion charge was in the high profile case of *United States v. Jackson*, 180 F.3d 55 (2d Cir. 1999). There, the SDNY tried and convicted Autumn Jackson for her attempt to extort celebrity actor/comedian Bill Cosby by threatening to expose that she was his illegitimate daughter. This article revisits the Second Circuit's holding in *Jackson* and examines how its analysis might apply to Avenatti's case.

In *Jackson*, the defendant had made a demand for a $40 million payment from Cosby, or she would tell her story to the tabloids. In her defense, Jackson claimed that her demand was not baseless: She had been told all her life by her mother and grandmother that Cosby was her true father, and in fact, Cosby had provided her with varying levels of financial support throughout her life and into adulthood. 180 F.3d 59-61. But when she communicated her threats to, among others, the television network running Cosby's hit sitcom, she was charged with the same extortion crime (among others)

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with which Avenatti is now charged: 18 U.S.C. §875(d). Id. at 60-64.

Following her conviction at trial, Jackson argued on appeal that the jury had been erroneously instructed on the elements of §875(d), because the trial court failed to say that, in order to convict, the jury was required to find that her threat to injure Cosby's reputation was "wrongful." Id. at 64-65. By contrast with §875's other subsections (covering threats of kidnapping or physical injury), Jackson contended that the trial court's view that "threatening someone's reputation for money or a thing of value is inherently wrongful" was incorrect. Id. at 68.

The Second Circuit agreed, and vacated the verdict, explaining: "plainly not all threats to engage in speech that will have the effect of damaging another person's reputation, even if a forbearance from speaking is conditioned on the payment of money, are wrongful." Id. at 67. The court provided examples of reputational threats not criminalized by §875(d):

> For example, the purchaser of an allegedly defective product may threaten to complain to a consumer protection agency or to bring suit in a public forum if the manufacturer does not make good on the warranty. Or she may threaten to enlist the aid of a television "on-the-side-of-the-consumer" program. Or a private club may threaten to post a list of the club members who have not yet paid their dues. We doubt that Congress intended §875(d) to criminalize acts such as these.

Id. Although the word "wrongful" does not appear in §875(d), the court reviewed definitions of "extort" elsewhere throughout the Criminal Code, as well as the legislative history of §875(d) itself, and concluded that it was not Congress's intent to obviate a wrongfulness element in §875(d). *Jackson* held that wrongfulness is an implied requirement. Id. at 67-68.

As 'Jackson' explained, whether a threat to damage another's reputation is "wrongful" turns on whether the threat has a nexus to a claim of right.

As *Jackson* explained, whether a threat to damage another's reputation is "wrongful" turns on whether the threat has a nexus to a claim of right. Id. at 70. "[W]here a threat of harm to a person's reputation seeks money or property to which the threatener does not have, and cannot reasonably believe she has, a claim of right, or where the threat has no nexus to a plausible claim of right, the threat is inherently wrongful." Id. at 71. The court explained the differences between, on the one hand, consumer complaints and nonpayment of dues, to which the threatener has a plausible claim of right, versus disclosures of, for example, sexual indiscretions that have no nexus with any plausible claim of right. Whereas in the first category, disclosure would have the potential for causing payment of the money demanded; in the latter category, only *the threat* has the potential of causing payment, but once the threat is carried out, the publication "would frustrate the prospect of payment." Id. at 70.

The Second Circuit granted Jackson and her co-defendant a new trial on the basis that the original jury was instructed incorrectly because "to find defendants guilty of violating [§875(d)] on the premise that any and every threat to reputation in order to obtain money is inherently wrongful." Id. at 71-72.

The case did not end happily for the *Jackson* defendants however, for five months later, the government was granted rehearing on the basis of the Supreme Court's harmless-error analysis, announced the day after the Second Circuit ruled in *Jackson*. See *Neder v. United States*, 271 U.S. 1 (1999). On rehearing, the Second Circuit reversed itself on the grounds that no rational jury, even had it had been properly instructed, could have found that Jackson had a plausible basis for a claim of right to a $40 million payment from Cosby. *United States v. Jackson*, 196 F.3d 383, 388-89 (2d Cir. 1999), cert. denied, 530 U.S. 1267 (2000). Accordingly, the trial convictions were affirmed.

Nonetheless, applying the *Jackson* analysis to the case against Avenatti highlights complications the government may face. The government alleges that Avenatti's threats were based on purported evidence that his client possessed regarding Nike employees authorizing and funding illicit inducement payments to families of top college basketball prospects. In exchange for Avenatti's promised forbearance from publicizing that

evidence at a vulnerable time for Nike, Avenatti allegedly made two distinct but related demands: (1) a payment of $1.5 million to compensate his client for the failure of his employer (which received financial backing from Nike) to renew the coach's contract, and (2) a requirement that Nike retain Avenatti to conduct an internal investigation of Nike itself, at a cost of between $15 and $25 million, paid and largely "deemed earned" up front.

Avenatti will surely argue, in his defense, that *both* "demands" were properly related to legitimate claims of right (or at least ones that Avenatti in good faith believed were legitimate). He will contend that his demand for a $1.5 payment to his coach client was an appropriate attempt to obtain deserved compensation for the premature termination of his employment, for lost income and related damages. While the amount of this demand might appear on the high side for a coach whose annual salary had been $72,000, nevertheless, and consistent with the *Jackson* analysis, the basis for this claim would appear to have some viability even post "disclosure" of Nike's purported misconduct. Among other things, if Avenatti actually exposed the alleged payoff scheme, that would not necessarily frustrate his client's wrongful termination claim—suggesting the threat may fall into the first of the two *Jackson* categories.

The more contentious battleground at Avenatti's trial would likely be whether his other demand—that he be retained as Nike's high-priced internal investigator—could conceivably have a nexus to a claim of right. Avenatti may argue the both his demands were linked to his client's wrongful termination. But the government will surely contend that this second demand was designed solely for Avenatti's personal benefit, unconnected to any legitimate claim of his client. In its favor here, the government will point to recorded conversations in which Nike offered Avenatti the opportunity to de-link the two demands, but which Avenatti, allegedly, declined.

Avenatti will also argue that Nike did, in fact, have a corruption problem within its ranks (and he may seek to prove its existence, which will itself create tricky discovery and evidentiary issues); that Nike did legitimately need to conduct an internal investigation to ferret it out; and that he is no less qualified for the role of internal investigator than any number of other lawyers. Such investigations do often cost many tens, if not hundreds, of millions of dollars in legal fees, so the size of the fee demand can be seen as rational given the scope of the proposed retention. In short, Avenatti will assert that he legitimately sought to be retained at a reasonable rate for a necessary assignment. While the government may highlight Avenatti's reference to billions of dollars in potential damage to Nike's stock price, Avenatti did not seek billions in exchange for silence. To draw a parallel to *Jackson's* analysis, Avenatti would likely argue as well that, even after the negative publicity that would flow from his threatened press conference, Nike would still need to conduct an internal investigation, potentially demonstrating that the "claim" was not "wrongful."

To counter this last point, the government, for its part, will likely respond that any chance of *Avenatti* actually being retained by Nike would evaporate if he went ahead with his press conference, thus demonstrating the lack of any nexus between his demands and anyone's true claim of right.

These are only some of the issues raised by the complaint's factual allegations, as they pertain to the *Jackson* factors. It should also be noted that, while the government also charged Avenatti with extortion under 18 U.S.C. §1951, that section explicitly includes a "wrongfulness" requirement. See *Jackson,* 180 F.3d at 67-68; see also *G-I Holdings v. Baron & Budd*, 179 F. Supp. 2d 233, 259 (S.D.N.Y. 2001) (noting that reputational threats are not inherently wrongful under the Hobbs' Act, and requiring proof that the defendant has "no claim of right").

While Avenatti's subsequent arrest on unrelated tax charges may reduce the likelihood of a trial on his federal extortion case, *Jackson* and this case nevertheless serve to illustrate the challenges federal prosecutors face in trying to make reputational-threat based extortion charges stick.