Legal Backgrounder

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JUSTICE DEPARTMENT SUIT ATTACKS CORPORATE SPEECH RIGHTS

by

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The Justice Department's lawsuit against the tobacco companies raises three novel theories of liability: the Medical Care Recovery Act, the Medicare Secondary Payer provision of the Social Security Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO). While none of these statutes remotely provide the Justice Department with legal authority to bring this case or obtain the remedies it seeks, the RICO issues raise serious First Amendment questions that have larger implications for the business community. If DOJ succeeds in its efforts to use oblique theories of recovery using essentially non-relevant statutes, it may create a template for future actions empowering the Executive Branch of the government to eclipse the authority of Congress to engineer political policies.

In its complaint, the Justice Department alleges that the tobacco companies are liable under the civil portions of RICO, 18 U.S.C. § 1962(c). Among the 116 racketeering acts alleged by the government, the complaint claims that "in order to conceal the health risks of cigarette smoking and the addictiveness of nicotine, defendants and their co-conspirators would and did make false representations and misleading statements in national publications," that "defendants communicated to the public nationwide in newspapers, magazines, and other periodicals that were distributed through the mails, as well as through the broadcast media, to deceive the public" and that "defendants and their co-conspirators would mail and otherwise distribute press releases and other public statements addressing public health concerns and commenting on particular research issues." DOJ Complaint at 77-79. As a remedy, in addition to seeking disgorgement of all profits from the companies (a form of relief plainly unavailable under the civil RICO provisions), the Department seeks an order compelling the defendants to fund an anti-tobacco public relations campaign as a form of corrective advertising.

Despite the fact that the Justice Department has failed to identify a single smoker who was unaware of the danger of smoking and was "defrauded" by these public statements, the RICO allegations and the requested corrective advertising remedy raise substantial constitutional questions. For instance, does the First Amendment protection of free speech provide a defense against the RICO claims based upon public statements involving a controversial topic such as smoking? Or, does the First Amendment provide protection that would not compel engaging in speech with which the party disagrees, in this case a forced advertising campaign? Even tobacco's foes would have to answer both in the affirmative.

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DOJ'S RICO Allegations Violate the First Amendment

The Supreme Court has consistently reiterated the well-known principles animating the First Amendment's guarantee that "Congress shall make no law . . . abridging the freedom of speech":

> This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." . . . "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." . . . There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open."

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As Justice Jackson long ago recognized, "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). In *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994), the U.S. Supreme Court expressly left open the First Amendment defense in that RICO suit by NOW against antiabortion protestors. As Justice Souter explained in his concurring opinion:

> [I]t is important to stress that nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case. Conduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis. . . . And even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression.

Id. (citations omitted). Thus, RICO defendants have two potential First Amendment defenses. They may assert the First Amendment as a reason to dismiss the RICO claim, on the ground that the statute as applied infringes on protected speech. They may also assert the First Amendment as a defense to a particular remedy, on the ground that it would infringe on otherwise protected expression. In this case, the First Amendment is violated by both the RICO allegations and certain relief sought by the government, namely, the funding of corrective speech.

The government's RICO claims violate these well-established First Amendment principles by labeling acts of public advocacy as acts of racketeering. Out of 116 racketeering acts of mail and wire fraud alleged by the government, at least forty-eight acts involve expressive activities of one kind or another. Twenty four "racketeering acts" were press releases issued to the news media. Fifteen were advertisements placed in newspapers and magazines. One was an article reprint mailed to physicians and civic leaders, one was a document entitled "Fact or Fancy," which was mailed to newspapers and news media. One occurred in the form of statements made on the TV program *Face the Nation*. Five took the form of statements made during a televised hearing of the House Subcommittee on Health and the Environment. Because these statements were aired on television, even though the defendants had no control over their transmission, the Justice Department charged them with wire fraud.

Three allegations in particular are representative of the range of First Amendment issues that the government wants to target as racketeering acts. First, the government alleges that the following qualifies as an act of racketeering, or mail fraud under 18 U.S.C. § 1341: "On or about March 17,

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1983, defendants . . . did knowingly cause a press release to be sent and delivered by the United States mails to newspapers and news outlets. This press release contained statements disputing the addictiveness of cigarette smoking." True, the tobacco companies have taken issue with the government's shifting definitions of addiction. Yet the defendants' public refusal to accept the government's conviction that cigarettes are addictive falls within the ambit of First Amendment protection, since it represents merely an expression of opinion on a public issue. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). As such, it "rest[s] on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980).

Second, the government alleges that defendant Brown & Williamson committed a racketeering act, in the form of wire fraud in violation of 18 U.S.C. §§ 1343 and 1342, when it posted a document on its Internet website that, once again, disputed the government's conviction that cigarettes are addictive. There, Brown & Williamson conceded that "by some definitions, including that of the Surgeon General in 1988, cigarette smoking would be classified as addictive." However, the company went on to frame the question of addictiveness in different terms, admittedly more favorable to its own position:

> Brown & Williamson believes that the relevant issue should not be how or whether one chooses to define cigarette smoking as addictive based on an analysis of all definitions available. Rather, the issue should be whether consumers are aware that smoking may be difficult to quit (which they are) and whether there is anything in cigarette smoke that impairs smokers from reaching and implementing a decision to quit (which we believe there is not).

Id. Here Brown & Williamson's statement not only qualifies as protected speech, it qualifies as fairly reasonable and measured protected speech. If this statement can be construed as a racketeering act under RICO, all legitimate discussion of any product disfavored by the government can be targeted as a racketeering act. It would be difficult to find a clearer or more current example of the sort of "debate on public issues," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), which according to the Supreme Court's reading of the First Amendment "should be uninhibited, robust, and wide-open." *Id.* The only interest the government could conceivably have in characterizing Brown & Williamson's statement as a racketeering act, and thereby to punish the company for making it, is to do what the First Amendment forbids by "assuming a guardianship of the public mind through regulating . . . speech . . . ." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

Third, the government alleges that defendants Phillip Morris, Reynolds, Lorillard, Liggett, and American Tobacco committed acts of racketeering when their chief executive officers appeared before "a televised hearing of the House Subcommittee on Health and the Environment," and "denied that nicotine is addictive." As the U.S. Court of Appeals for the Seventh Circuit recently pointed out, attempting to make the defendants liable for statements made before Congress runs afoul of the First Amendment's guarantee of the right "to petition the government for a redress of grievances." "To the extent the manufacturers' statements were designed to influence Congress — to get favorable laws and ward off unfavorable ones — they cannot be a source of liability directly under the Noerr-Pennington doctrine. . . . (Although the Noerr-Pennington doctrine originated in antitrust law, its rationale is equally applicable to RICO suits.)" *International Brotherhood of Teamsters, et al. v. Philip Morris Incorporated, et al.*, 1999 WL 1034711, at *7 (7th Cir. Nov. 15, 1999) (citations omitted); *accord Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965).

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Forced Funding of Corrective Advertising Violates the First Amendment

As part of its RICO remedy, the government demands that the court order defendants to fund a "corrective public education campaign." This remedy clearly violates the First Amendment. The proper standard for determining the lawfulness of governmental orders *compelling* speech — even speech that is arguably of a commercial nature — is the traditional First Amendment "strict scrutiny" test. That test requires the government to show that an order directly serves a compelling government interest and is narrowly tailored to that objective. *See Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 19 (1986). The order demanded by the government fails that test. Nowhere in its complaint does the government identify any compelling interest supporting the imposition of an order requiring defendants to fund speech sponsored by the government. Moreover, even if the government could articulate such an interest, it cannot show that an order compelling defendants to speak is narrowly tailored to achieve its legitimate purposes. At least one court has ruled that such corrective advertising runs afoul of the First Amendment. *In re Tobacco Cases II*, No. JCCP 4042 (Cal. Super. Ct. Oct. 27, 1999).

The government may argue that its demand for an order requiring the defendants to fund a corrective advertising campaign raises no cognizable First Amendment concerns, since the order would direct the defendants to pay money, not to speak a particular message. However, that argument holds no water since the Supreme Court has emphasized that "speech does not lose its First Amendment protection because money is spent to project it." *Virginia Pharm. Bd. v. Virginia Consumer Council*, 425 U.S. 748, 761 (1976) (citing *Buckley v. Valeo*, 424 U.S. 1, 35-59 (1976); *accord Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977). In any event, the government's pursuit of this remedy is unnecessary: the tobacco defendants have already voluntarily agreed in the Master Settlement Agreement with all the states to fund an independent foundation to educate the public regarding smoking-related diseases in an amount that may exceed $1 billion.

Conclusion

In effect, the Justice Department is attempting to transform RICO into a new Alien and Sedition Act which, like the original, promises to supply a handy and lethal weapon in the perpetual war for public opinion. If the government succeeds, it will have constructed an effective engine for the suppression of unpopular views. And make no mistake: "Big Tobacco" will be only the first victim, not the last.

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