Legal Opinion Letter

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DOJ ERRONEOUSLY EXPANDS REACH OF RICO LAW

by
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The Federal RICO statute, along with the False Claims Act, has become the predominant lever for both government and private parties to encourage judicial "legislation" against unpopular, though entirely legitimate, businesses. Most recently, both the tobacco industry and health maintenance organizations have been subjected to RICO claims that stretch the terms of this already-intimidating statute far beyond the legislative perimeter that Congress defined. Especially given the massive tobacco case settlement with the states, the payment for which is to be supported by what in essence is a national tax, the Justice Department's suit against the tobacco companies exudes a political motivation to encourage a judicial supersession of legislative prerogatives, particularly regarding the RICO law.

If one recent decision permitting a union welfare fund's lawsuit against tobacco defendants to proceed is any indicator, the government may be confident about its chances in the case. *See Service Employees' International Union Health and Welfare Fund v. Philip Morris, Inc.*, D.D.C. No. 98-704 (Memorandum Opinion filed Dec. 21, 1999). However, if the presiding judge cannot conform to the ample legal precedents supporting the tobacco companies' pending motion to dismiss the government's untenable RICO claims, as well as the novel but unmeritorious theories of liability under the Medical Care Recovery Act and the Medicare Secondary Payer provisions, the D.C. Circuit should join the four other federal appeals courts that have rejected similar RICO actions and reverse the ruling.

Notwithstanding the ample public literature about the harms of tobacco, particularly that generated by the government's own Surgeon General going back to the early 1960s, the government's characterization that the tobacco companies' self-serving public statements about smoking constituted "racketeering" activities strains credulity. However, even if DOJ could cross this problematic factual threshold, the equitable remedies that it seeks are simply unavailable under the law. An injunction is unwarranted because the precise activities complained of already have been enjoined under the Master Settlement Agreement with all the states, a fact that is tellingly ignored in DOJ's complaint. More importantly, the other RICO remedy DOJ seeks — disgorgement of all profits from the companies — is not allowable under the *civil* RICO provisions.

Most RICO actions are brought by plaintiffs under 18 U.S.C. § 1964(c) seeking damages for injury to their property; suits for personal injuries are not authorized under RICO. The courts have consistently held that those third parties who commonly pay for health insurance or care may not recover the costs of treating smokers' personal injuries under § 1964(c). *See, e.g., Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 932-34 (3d Cir. 1999); *International Brotherhood of Teamsters,*

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et al. v. Philip Morris, Inc., 1999 WL 1034711 (7th Cir. Nov. 15, 1999); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 1999 WL 639865 (2d Cir. 1999).[1]

Accordingly, DOJ has filed suit under the equitable provisions of RICO, 18 U.S.C. §§ 1964(a) and (b) rather than the damages provision of § 1964(c). Those equitable provisions are expressly designed to "prevent or restrain" future violations, not to punish for past conduct or wrongdoing. Thus, the remedies available under § 1964(a) include injunctive relief as well as orders requiring "any person to divest himself of any interest * * * in any enterprise; imposing reasonable restrictions on the future activities or investments of any person * * * or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." Congress intended that this divestiture provision would be directed at organized crime which used ill-gotten funds to infiltrate or control otherwise legitimate businesses. By ordering a divestiture of the defendant's interest in those companies, the racketeer would not be able to continue in the *future* to exercise control of the business for illegitimate purposes.

DOJ's complaint, however, is bereft of any specific allegations that the companies would likely continue the activities that DOJ finds objectionable. Nor does DOJ seek divestiture, presumably because the tobacco companies are publicly traded and owned by millions of shareholders. Rather, DOJ seeks a "disgorgement" of all profits from the companies as a result of their alleged "racketeering" activities consisting principally of public statements regarding the companies' views on the dangers of smoking.

So where did DOJ get the notion that RICO permitted disgorgement of profits? It can only be from RICO's *criminal* provision, which provides for disgorgement or forfeiture of unlawful profits from racketeering activity. But on the very day that DOJ announced the filing of this civil lawsuit, Attorney General Janet Reno also announced that after five years of investigation, it was not bringing any criminal charges against the tobacco companies or their executives. Apparently frustrated with their lack of evidence of any criminality, DOJ is trying to impose the same criminal penalties through the back door via civil RICO, but without all the constitutional safeguards provided in criminal proceedings.

As the Supreme Court has made very clear, disgorgement or forfeiture of "assets derived from [a defendant's] prior racketeering offenses" is "not a prior restraint on [future conduct], but a punishment for past criminal conduct." *Alexander v. United States*, 50 U.S. 544, 550-53 (1993). Most tellingly, even DOJ's U.S. Attorney's Manual recognizes the difference between equitable divestiture and punitive disgorgement: "equitable relief [in a civil RICO case] can include an order of divestiture that requires a defendant to sell his interest in an enterprise, *but cannot include the uncompensated forfeiture of assets* that can result from a RICO prosecution." DOJ Manual §9-110A,100 at 186-87 (emphasis added). The U.S. District Court for the District of Columbia also made this point clear recently in *FTC v. Mylan Labs, Inc.*, 62 F. Supp. 2d 25, 40-42 (D.D.C. 1999), when it stated that disgorgement is not a permissible remedy under the Clayton Act (whose remedial provisions are analogous to RICO's), because it is inherently retrospective rather than a remedy against "threatened loss or damage."

Finally, it should be remembered that the Master Settlement Agreement already requires the tobacco companies to pay hundreds of billions of dollars, ostensibly to compensate in significant measure for health care costs derived from smoking. The government's current RICO litigation efforts — inherently weak as a matter of substantive law — smack of "piling on." RICO, which is written in general terms, reflective of the diffuse nature of the organized criminal enterprises that it was intended to combat, is susceptible to judicial manipulation. However, if the government were to succeed in this current form of politics by other means, there is substantial risk of setting a precedent that is potentially damaging to a host of legitimate private interests. So far, RICO has been correctly interpreted by the appellate courts with regard to tobacco matters (and also health insurance). The recent DOJ case poses yet another challenge to the just application of an extremely powerful legal instrument.

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[1]A similar theory has been advanced in the massive class-action suits brought against managed health care organizations. In a recent opinion, a federal court judge in Philadelphia ordered dismissal of the RICO claim brought against a large HMO because the plaintiffs were unable to allege the kind of damages cognizable under the statute. *Maio v. Aetna Inc.*, 1999 WL 800315 (E.D. Pa. Sept. 29, 1994).

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