



Vol. 16 No. 4

February 9, 2001

GOVERNMENT ABUSE OF RICO LAW THREATENS BUSINESS CIVIL LIBERTIES

by

Barry B. Drenfeld and Melanie Carr

At a time when government use of the Racketeer Influenced and Corrupt Organizations Act ("RICO") against corporations and trade associations is coming under increased public scrutiny, Judge Gladys Kessler's decision in *U.S. v. Philip Morris Inc.*, No. CIV.A.99-2496 GK (D.D.C. 2000), serves as further ammunition for those who believe that the RICO law is being abused by the Department of Justice ("DOJ") to intimidate legitimate businesses. This decision is a dose of reality for those who believed, incorrectly, that the courts would serve as an adequate safeguard against inappropriate RICO lawsuits. It is particularly troubling because the goal of the government in such suits is often not to reach a decision on the merits, but rather to use the extraordinary remedies available under RICO as leverage to force defendants to settle. By denying the tobacco industry defendants' motions to dismiss the RICO counts, Judge Kessler permits the government to use the civil RICO suit as a huge bargaining chip to force the industry to either settle or bear the costs and risks of defending the suit to judgment. Although reasonable people can and do disagree regarding the scientific evidence and economic arguments surrounding tobacco industry regulation, that disagreement cannot justify the Justice Department's use of RICO lawsuits to limit meaningful public policy debate.

The RICO Claim. DOJ's complaint included one count alleging that the tobacco industry manufacturers, trade association, and related research organization, violated the RICO statute, and a second count alleging that the parties conspired to violate the RICO statute. It claimed that the tobacco industry as a whole constituted an "enterprise" that "conspired" to perform various activities to further the manufacturing and sale of tobacco products over the last forty years. As relief, the complaint requested disclosure of tobacco industry documents, funding for anti-smoking educational campaigns, and disgorgement of all proceeds the tobacco industry derived from any RICO violations.

The defendants filed motions to dismiss both of the government's RICO counts. The industry argued that the government failed to adequately allege a threat of future violations as required for monetaryV

Barry B. Drenfeld heads the Government Affairs practice group in the Washington, D.C. office of the law firm Swidler Berlin Shereff Friedman, LLP. He served previously as lead counsel for the Business Coalition for Civil RICO Reform, a diverse coalition devoted to enacting legislation to curtail abuses of the civil RICO law. **Melanie Carr** is an associate in the firm's Washington, D.C. office.

relief in a civil RICO lawsuit. The defendants explained that all of the DOJ allegations of misconduct by the industry were based on activities conducted prior to 1995 and that the DOJ presented no explanation for its claim that after reaching a settlement agreement with several states, the industry 'violations' alleged were likely to occur in the future. The industry defendants argued that the 1998 Master Settlement Agreement ("MSA"), entered into between the tobacco industry and the states, provides sufficient injunctive and monetary relief as well as enforcement mechanisms for noncompliance. Finally, the industry argued that disgorgement is not a permissible form of relief under RICO's civil provisions, which allow for relief to prevent and restrain future violations.

The Court's Opinion. In a decision that effectively sanctioned the government's use of RICO to intimidate manufacturers and trade associations, Judge Kessler denied the tobacco industry's motions to dismiss both counts. She stated that the government adequately alleged both the necessary elements of the RICO violations and the threat of future RICO violations, which could warrant the large-scale disgorgement relief sought. Furthermore, she stated that the MSA between the tobacco industry and the states did not preclude the government's action in this case. Kessler argued that the court cannot assume that the industry defendants will comply with the MSA, or that the MSA has adequate enforcement mechanisms.

Judge Kessler's opinion held that the DOJ complaint sufficiently alleged a "reasonable likelihood" of future violations by the industry defendants, which could warrant equitable relief under RICO's civil provisions. Kessler relied heavily on the third prong of the 'reasonable likelihood' test: "whether the defendant's business will present opportunities to violate the law in the future." The Judge found that the industry defendants had such opportunities simply by continuing to manufacture and sell tobacco products. She made this finding despite many provisions of the MSA that overtly prohibit the types of RICO violations the defendants allegedly committed. Under this relaxed standard by Judge Kessler, no company charged with RICO violations for disseminating media information on the debatable risks of their products would ever be free from civil RICO surveillance so long as they persisted in their otherwise legitimate businesses.

The portion of Judge Kessler's decision that endowed the Justice Department with the largest amount of bargaining power was the portion declaring disgorgement to be an appropriate form of relief under RICO's civil provisions. Kessler finds that any proceeds the industry defendants obtained in the past forty years could potentially go towards supporting future RICO violations and, therefore, disgorgement would be an appropriate remedy should the Justice Department prove its case. The defendants argued that the civil RICO provisions were intentionally distinguished from the criminal RICO provisions in terms of the types of relief available for violations of the law. Specifically, they stated that the extraordinary civil RICO remedies were intended to prevent and discourage future RICO violations, whereas the criminal remedies were intended to be punitive for past violations.

The Ruling's Broader Implications. Judge Kessler followed a Second Circuit opinion stating that disgorgement is an appropriate civil RICO remedy where there is "a finding that the gains [sought to be disgorged] are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *U.S. v. Carson*, No. 514, Docket 94-6044, (2d Cir. 1994). This view has not been completely established in the judiciary and is difficult to reconcile with the Supreme Court language in *Alexander v. U.S.*, No. 91-1526 (1993), which states that a disgorgement-type forfeiture in a criminal RICO action is punishment for past criminal conduct and not a "prior-restraint" on future violations. This portion of Judge Kessler's ruling has dangerous implications for public policy and the debate regarding public health. By permitting the Justice Department to seek potentially unlimited damages in the form of the disgorgement of past profits, Judge Kessler provides a disincentive for members of industries where debated risks may become actual risks, through time or research, to participate in public debate, to participate in trade association activities, or to reach any MSA-type settlement agreements. This reluctance to enter settlement agreements may result because the agreements will not necessarily preclude the government from seeking redundant relief under RICO.

According to Judge Kessler's ruling, in order to survive a motion to dismiss, the government does not need to be particularly precise in their pleadings of the "enterprise" element of a RICO claim in terms of the enterprise's operation, leadership structure, or internal decision making processes. Kessler states that an enterprise can be an "amoeba-like infrastructure" controlling a "secret criminal network." She follows the minority view of the District of Columbia, Second, and Eleventh Circuits that the government does not need to establish the elements of a RICO claim — (1) an 'enterprise', and (2) a 'pattern of racketeering'— based on separate evidence. By following this minority view, Judge Kessler makes it easier for the government to plead a RICO violation. In effect, the government can look at the business activities within an industry and from that, infer the existence of an industry "enterprise" conspiring to violate the RICO law. It is with this relaxed standard that the court allows the government to look at the alleged acts of the tobacco industry and from those acts infer the existence of an enterprise comprised of tobacco industry manufacturers, trade associations, and research organizations.

Judge Kessler's decision has serious implications for current and future RICO prosecutions of other businesses and industries. The court's decision allows the Justice Department to continue to persecute industry members for participating in public policy debates and exercising their First Amendment freedom to disagree with the government regarding scientific conclusions and risk assessments. The Justice Department should not be allowed to use the enormous force of civil RICO provisions to exact a desired policy outcome without public debate, but should be required to express its legitimate public policy concerns regarding the tobacco industry in legislative and regulatory forums. Furthermore, by permitting the DOJ to seek huge disgorgement amounts, the court may increase the "chilling effect" of potential civil RICO liability, thereby dissuading manufacturers from participating in the scientific, regulatory, legislative, and general public debates that are necessary to achieve effective health and economic policies. Judge Kessler's decision has broad ramifications beyond the tobacco manufacturers. Apart from one's view of the alleged liability of manufacturers for RICO violations, Kessler's decision gives credence to the government's use of the tremendous enforcement mechanisms available under RICO as a weapon to intimidate industry-related trade associations and research organizations from participating in vital public policy debates.

The Justice Department named as defendants not just the cigarette manufacturers and their parent manufacturers, but also the industry's trade association ("Tobacco Institute" or "TI") and its research arm ("Council on Tobacco Research" or "CTR"). The government claimed that the trade association violated RICO and participated in the "racketeering enterprise" by participating in traditional trade association activities, such as mailing press releases and sending letters seeking witnesses to testify before Congress. In fact, 23 of the 26 acts alleged to constitute racketeering by TI were acts of mailing press releases to the media. The remaining three acts consisted of distributing reprints of a news article, placing an advertisement in a newspaper and publishing a document entitled "Fact or Fancy" about the risks of smoking. The Justice Department also charges the CTR with RICO violations for typical industry advocacy — such as mailing letters seeking witnesses to testify before Congress and sending out press releases.

If the tobacco industry trade association is subjected to the threat of civil RICO penalties for its participation in policy debates regarding any sources of potential liability in their industries, then other industries' associations face similar danger, particularly those industries that are politically unpopular. Furthermore, permitting the DOJ to take action against the CTR, a research organization, as a member of an alleged RICO violating "enterprise," may provide a disincentive for industry members to support research into the health and safety risks of their various products, which would be detrimental to consumers.

Beyond Congress' Intent. The RICO statute was drafted as part of the Organized Crime Control Act of 1970, Pub. L. 91-452 (1970), which Congress enacted to eradicate organized crime in the United States.

The Statement of Findings and Purpose of the Organized Crime Control Act includes Congressional findings regarding the complex nature of organized crime in America, which "derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics, and other forms of social exploitation." *Statement of Findings and Purpose*, Organized Crime Control Act of 1970, Pub. L. 91-452 (1970). Furthermore, Congress explicitly states that the purpose of the law is:

To seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. *Statement of Findings and Purpose*, Pub. L. 91-452 (1970).

RICO was originally drafted to give law enforcement agencies stronger weapons to combat organized crime, which was difficult to prosecute due to its inherently secretive operations. Since the organized crime world was so difficult for law enforcement to penetrate, the RICO law was enacted as a powerful weapon both to punish those few they did prosecute and to deter others from illegal activities.

The Justice Department's application of RICO to tobacco and other industries runs far afield of Congress' original intent. The DOJ is using RICO to prosecute businesses in the course of their normal business operations and interaction with other members of their industry in the course of public debate. The enormous punitive effect of RICO remedies and the related monetary damages available, make the its application to legitimate businesses and trade associations both inappropriate and abusive. The DOJ should not wield the enormous weapon of RICO's civil remedies as a tool to exact settlement from tobacco manufacturers. Furthermore, it is particularly invidious to invoke RICO's substantial penalties against trade associations because of the potential chilling effect RICO abuse can have on their rightful participation in public debate and advocacy.

Conclusion. Advocates of RICO reform are hopeful that the new administration will carefully review the merits of cases such as *U.S. v. Philip Morris* and recognize the disturbing public policy implications of these cases. Allowing the DOJ to use the RICO law as a weapon to effectively discourage businesses from exercising their First Amendment rights and from participating in critical public debates about health and safety for fear of enormous RICO penalties represents a dangerous public policy precedent.

This case provides a compelling argument for reform of the RICO statute to prevent such heavy-handed use of the RICO statute by the Justice Department, particularly against trade association and research organizations who rightfully participated in public debates about the health risks of their industry. Although the Justice Department may fail to meet its evidentiary burden at trial, Judge Kessler's decision ensures that, in the meantime, the government will be able to subject the defendants to the costly trial process and potentially force a settlement. Although the policy goals of the Justice Department regarding the tobacco industry may be justifiable, they should be achieved through legitimate policy debates conducted in Congress and the appropriate regulatory agencies.

Allowing the Justice Department to use civil RICO lawsuits to dictate policy outcomes in otherwise regulated industries has dangerous consequences beyond the tobacco industry. For example, in the current public policy debate surrounding the actual risk of cancer from using cellular phones, manufacturers and trade associations face potential exposure to enormous RICO penalties under this precedent. An industry trade association or research organization that conducts a study or testifies to the fact that the risk levels for cellular phones are "acceptable" is vulnerable to a future RICO charge. Furthermore, *U.S. v. Philip Morris* indicates that those associations would also face the threat of civil RICO penalties for preparing press releases or soliciting witnesses for congressional hearings, which are traditional industry association activities.

This case makes it clear that the risk for trade associations posed by RICO abuse is real and could significantly diminish their willingness to participate in public policy debates. The Justice Department's abuse of the civil RICO statute to discourage industry members, trade associations, and research organizations in potentially unpopular industries from participating in public debates regarding public health and safety should not be tolerated.