



## LEGAL POLICY PRIORITIES FOR THE NEW JUSTICE DEPARTMENT

by

**Stuart M. Gerson**

Several events at the end of President Clinton's term in office, including his plea bargain and a highly questionable pardon to a notorious fugitive given outside the normal Department of Justice ("DOJ") pardoning process, echoed the shattering of public and congressional confidence in the justice process over the past eight years. While the former president, acting essentially as his own chief legal officer, was surpassingly skillful politically, he created significant difficulties, not only for his own attorney general but for his successor's as well.

It is that new Attorney General, John Ashcroft, who will be called upon to restore his department's independence and the public sense that difficult legal judgments are being made on the merits, free from concern about political consequences. In doing so, several of the core issues will involve the criminal law, e.g., the reorganization of the Criminal Division and the definition of the relationship of Main Justice with the United States Attorneys, the standards for the prosecution of environmental crimes, and the certain calls for revisitation of the now-expired Independent Counsel Statute. However, there will be many issues that require his attention on the civil side as well.

***Assuring Independent Legal Judgment in Agency Legal Advice.*** President Clinton's White House Counsel's Office was approximately twice as large as his predecessor's. A significant reason for that expansion was its assumption of much of the agency-advice-giving function that by tradition and law belongs in the Justice Department's Office of Legal Counsel ("OLC"). The fact that former heads of OLC have become Supreme Court Justices and Attorney General underscores the significance of the office and the quality of its occupants. More frequently in the past, the role of White House Counsel has been indirect and limited while OLC has been the primary counselor to the general counsels and other officials of the departments of the Executive branch. The hallmarks of such advice must be legal accuracy and precedential consistency, factors of paramount importance in an age of regulatory proliferation and faddish response to political outcries, e.g. for the increasing federalization of law.

- ***What will be the role of the Department of Justice with respect to the White House, and will the next head of OLC be invested with sufficient stature and support to restore independent advice***

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## ***to the Executive Branch?***

***Moderating the Excesses of our Litigious Society.*** It is a fact of life in contemporary American society that we are faced with trial lawyers who have commodotized litigation and created what operates as a de facto super legislature, assigning ruinous responsibility to industries that are fashionable to target, be it tobacco, prepaid health insurance or whatever comes next. This is the most extreme manifestation of the fact that we are an overly litigious society. Moreover, the over reliance on or abuse of litigation is not limited to the private sector; the government itself has succumbed.

**The Reach of the Civil RICO Law.** The Racketeer Influenced and Corrupt Organizations Act ("RICO") has, since the Supreme Court's lenient interpretation in *Sedima S.P.R.L. v. Imrex Co., Inc.*, become a common cause of action in suits by consumer and citizens groups against businesses. The Court noted that the law was intended to deputize corporations and individuals as "private attorneys general" to fill in prosecutorial gaps and, with its provisions for treble damages, attorneys' fees, and the stigma inherent in being tagged as a racketeer, it has become a popular, but often overused, weapon — and the government has become an agent of this overuse.

Although the courts generally held that those third parties who commonly pay for health insurance or care may not recover the costs of treating smokers' personal injuries under RICO, the previous administration decided to push the RICO envelope further by initiating its own RICO suit against the same tobacco companies that are the parties to a national master settlement. *Service Employees' International Union Health and Welfare Fund v. Philip Morris, Inc.*, DDC No. 98-704.

This suit has been widely criticized as a misuse of RICO's equitable remedies, given the national settlement agreement, and an unnecessary, politically motivated litigation against an unpopular industry. One need not be an apologist for tobacco companies to note that the government's effort to stretch the terms of an already intimidating statute far beyond what Congress intended has encouraged other RICO treble damages cases against unpopular but entirely legitimate managed health care organizations. So far, these actions have not produced the results that the tobacco-settlement-rich plaintiffs attorneys have sought, but the threat of adverse judgments is contributing to an increase in health insurance premiums at a time when expanded health care is a national goal. Clearly the abandonment of unmeritorious litigation will serve both as a useful boundary marker for an abused statute and as an impetus to controlling health care costs.

- ***Will the Civil Division seek to dismiss the government's remaining RICO claims against the tobacco companies and otherwise to establish a consistent civil base line for the measurement of RICO damages?***

**Civil Justice Reform.** The administration of President George H.W. Bush devoted considerable effort in attempting to achieve national tort reform, particularly as to products liability, and, more broadly, the larger issue of reform of the entire civil justice system. Because President Bush was not reelected, much of this effort was unavailing, although the Private Securities Litigation Reform Act of 1995 represented part of its legacy. While Governor of Texas, President George W. Bush achieved notable success in tort reform and restricting plaintiff forum shopping and, during his campaign for the presidency, vowed that he would seek to curb litigation abuse. Indeed, there is a likely legislative matter that directly implicates legal reform

There seems to be bipartisan consensus that Congress should enact a so-called Patients' Bill of Rights and that this bill should include, as a matter of national law, a provision that subscribers could sue managed care providers for medical malpractice. Then-Governor Bush supported such a law in Texas and is likely to sign a congressional enactment now that he is president. However, such a bill would be entirely infeasible unless it contains, inter alia, compensatory and punitive damages limits. This issue would be a good point of departure for a civil justice reform agenda.

- ***Will DOJ take the lead in formulating an appropriate civil justice reform agenda and, if so, will the Department support limitations on compensatory and punitive damages, limited fee shifting, and other measures designed to control runaway litigation?***

**Class Action Reform.** Related to the issue of civil justice reform generally is that of class actions specifically. This mechanism was a logical servant of judicial economy in cases where plaintiffs could allege that they suffered a common injury and that the legal issues in their cases substantially predominated over factual ones. However, as noted earlier, in recent months, some of the most prominent plaintiffs' firms in the country have filed class actions against all the major managed care providers in the health industry, challenging the very essence of managed care, including cost containment mechanisms like physician incentives, and threatening unacceptable increases in the cost and availability of health insurance.

These suits are characteristic of many recent class actions where plaintiffs might have similar claims but where their specific entitlements to damages necessarily depend upon claimant-specific facts. The Supreme Court recently opined that certification of a class simply for the sake of judicial economy — in that case for the purposes of facilitating settlement — cannot negate the typicality and commonality requirements of the Federal Rules. However, such suits persist and sometimes the government is a defendant. While there have been recent efforts to update and limit the scope of Federal Rule of Civil Procedure 23, the previous administration was not committed to reform. The new administration could make a significant contribution.

- ***Will the Deputy Attorney General and Assistant Attorney General for the Civil Division be allowed to take a proactive role in the federal civil rules advisory process with the specific aim of, inter alia, further clarifying class-action prerequisites?***

**The False Claims Act.** The federal False Claims Act is the government's principal enforcement tool in fighting fraud. Annual recoveries from FCA cases brought directly by the government or, in the name of the government, by *qui tam* relators now exceed \$1 billion annually. In fact a hospital chain recently settled litigation with the government for approximately that amount in its own cases alone. Given the indisputable fact that the FCA and its controversial *qui tam* provisions are producing substantial litigation successes and savings to the treasury, the Department of Justice will vigorously support it. Nevertheless, where litigation becomes the substitute for legislation, there can be significant excesses and we have seen a ratcheting up of what formerly were administrative claims into full scale litigations with the threat of treble damages, additional administrative penalties and debarment from government programs.

In response to complaints about overreaching in FCA cases in the health care industry, the Department of Justice and the Department of Health and Human Services Office of Inspector General issued national guidelines regarding the pursuit of health care enforcement matters. These guidelines have value, but there are many cases not involving national initiatives that are not governed by the guidelines that mandate avoiding rigid approaches that fail to account for the particular facts and for alternate administrative avenues for overpayment recoupment.

Given the Supreme Court's endorsement of the *qui tam* system, these cases are not going to diminish in number or scope. However, especially because these cases are characterized by multi-agency involvement, with exclusion and administrative penalties coming within the purview not of DOJ, but of the contracting agencies, there is an increasing need for earlier, consolidated consideration of FCA issues. Where, as often is the case, there is no evidence of specific corporate intention to defraud, alternative dispute resolution mechanisms such as mediation, and administrative claims resolution could usefully be applied to address many alleged false claims in a fairer and more economical way.

- ***While the False Claims Act will continue to be the government's main tool in fighting fraud, will the Department be amenable to mediated solutions, without multiplier penalties in appropriate cases where there is no intent to defraud?***

**Oversight of Regulations.** In its waning days, the Clinton administration imposed a number of complex and troubling regulations and orders on the environment, land use, and health record privacy. The standards undergirding these edicts are subject to serious question. The costs of compliance and lost economic opportunity are not. For example, hastily imposed emissions standards are likely to increase already-rising energy costs and threaten the larger economy. Similarly, although health care costs also are rising in an alarming fashion, the new privacy regulations mandate the addition of a costly compliance infrastructure. Final regulations gain legal effect when they are published in the Federal Register. In an attempt to forestall as many of these edicts as possible, the incoming White House Chief of Staff ordered a moratorium on printing of pending regulations.

As to those midnight regulations that became effective, it is unlikely that congressional majorities necessary to repeal them can be constructed. Accordingly, some unilateral actions on the part of the Chief Executive will be subject to legal challenge and the Department of Justice will be called upon to respond.

- ***Will the Department take an active role in the review of suspended Clinton regulations and argue that courts must engage in cost-benefit analysis in evaluating them?***

**Microsoft and Antitrust Policy.** Because of the scope and intensity of the Microsoft case, and to some degree because of cases like the ongoing investigation of airline hub conduct, the Antitrust Division has been cast as significantly more vigorous than in past administrations. Actually, most of the Division's cases reflect a high degree of continuity with historical initiatives. To the extent that there has been a significant increase in federal antitrust enforcement and litigation, it has largely come in the area of international cartels. This expansion began more than ten years ago and is not very controversial. Nor is the trend towards more criminal prosecutions. On the civil side, merger review has been augmented, but that is largely the result of conditions in the larger economy. And, non-merger-related civil cases actually have declined.

However, at the end of the day, the Microsoft case dominates the landscape and, given its emphasis, we should consider how, as a matter of policy, or even whether, we attempt to regulate the "new economy" in a manner consistent with the "old," or whether a faster-paced economy permits greater governmental restraint. The government is committed to defending the trial court's diffuse opinion in the appeals court. But, the holdings concerning abuse of monopoly power are arguably more logically defensible than is the unusual breakup remedy, imposed without a particularized hearing or creation of an evidentiary record.

Given the fact that it is highly questionable that the remedy imposed bears a necessary relationship to the violations found, it is reasonable to expect the appeals court at least to reverse and remand the case for reconsideration of the remedy. At that point it would also be reasonable to expect the Antitrust Division to reopen settlement discussions and attempt to fashion a conduct remedy involving, inter alia, code sharing and developer monitoring. The potential problem: the state attorneys general who were the co-plaintiffs with the federal government. Can the Justice Department lead them to an agreement?

- ***While the Department will defend the District Court's Microsoft judgment on appeal, is it amenable to a negotiated resolution that will not involve a corporate breakup if the D.C. Circuit reverses as to the remedy imposed?***

**The Protection of Intellectual and Tangible Personal Property.** Finally, we note that, in an area where former Vice President Gore was given considerable sway, the Clinton administration showed a significantly greater interest in extending the broad federal regulation of the environment than in assuring due process and just compensation for the property owners whose interests were limited by such regulation. Similarly, with respect to the natural tension between intellectual property rights (a hallmark of the new economy) and antitrust regulation and enforcement, the Clinton administration again came down far more strongly in favor of government than the individual.

- ***Will the Department support property owners' rights to just compensation where expansive environmental and other laws restrict expected usage, and how will it conduct antitrust policy that affects intellectual property interests?***