Legal Backgrounder

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HIGH COURT HAS NO GROUNDS TO REVIEW RULING IN FEDERAL TOBACCO SUIT

by

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This past February, the United States Court of Appeals for the District of Columbia Circuit reviewed a key issue in the Department of Justice's (DOJ) suit against the tobacco industry involving the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964, better known as RICO. The issue was whether civil RICO allowed the United States to seek disgorgement of the past profits garnered by tobacco companies which allegedly engaged in false advertising and other duplicity in withholding material health risk information from the public. The court properly focused on the plain language of the statute and answered in the negative. *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d 1190 (D.C. Cir. 2005).

The court noted that the section of RICO the government invoked, 18 U.S.C. § 1964(a), empowers a district judge to enter orders of divestiture and other reasonable restrictions on the future actions and investments of persons found to have participated in unlawful enterprises, but may do so only insofar as these orders "prevent and restrain" violations of the Act. Because disgorgement, the particular remedy sought by the government, is aimed at past violations, it does not prevent or restrain anything. Thus, the court ruled against the government.

This decision was met with a hailstorm of criticism by interest groups and legislators. This criticism only intensified when the government drastically reduced the damages (from a staggering $280 billion to a maximum of $20 million) that it was seeking in the district court, a reduction that the Justice Department said was necessitated by the Court of Appeals having rejected disgorgement of past profits as a remedy. Some time thereafter, the Solicitor General petitioned the Supreme

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Court to review the case, and the name of the highly-respected senior DOJ political official who apparently made the decision to reduce the damages demand is absent from the government's papers. If the Supreme Court applies its normal criteria, it would seem likely that this petition will be rejected, especially because the clear language of the statute is inconsistent with the government's position, and because the factual allegations levied in the case cannot adequately support the need for injunctive relief. The latter is especially true considering that misconduct of the sort DOJ alleges is already enjoined as part of the tobacco companies' master settlement of class actions brought by various States, and that the federal complaint is entirely retrospective, making no allegation of any likelihood of recidivism.

The Petition Contradicts Administration Policy as to the Role of the Judiciary. Consistent with its respect for separation of powers and limited government — two essential features of our constitutional government and among the most prominent factors in the durability of our institutions — the current administration has strongly emphasized that its judicial nominees must be interpreters of the law, not politicians in robes. Thus, one expects that in upcoming Supreme Court nomination hearings, we will hear administration supporters condemning "judicial activism," *i.e.*, legislation from the bench, and praising strict construction, *i.e.*, originalism in constitutional interpretation and adherence to the plain meaning of the law as written by the legislature.

The government's petition for Supreme Court review of the decision denying the disgorgement remedy is a startling contradiction to this tableau. The petition strongly reflects that a political judgment was made to make a statement about the tobacco industry. No matter how the government might view tobacco usage and the industry's conduct, this effort is misplaced.

Overlooking the clear fact that the RICO statute grew out of a desire to combat organized criminals' business enterprises, the government has characterized its petition as among the most important cases ever brought by the Justice Department under federal racketeering law. It seeks review of the question of whether a federal court's equitable jurisdiction to issue "appropriate orders" to "prevent and restrain" violations of the RICO law encompasses the *remedial* authority to order disgorgement of illegally-obtained proceeds.

For starters, it is difficult to consider how a court could determine what precisely constitutes the illegal "proceeds" of commerce in a product which, despite the contradictory nature of the legal and regulatory regimes that govern it, can lawfully be sold in America. Putting that aside, however, the exact legal question presented in the petition is a simple and easily disposed of issue. Indeed, the Supreme Court has previously held, in an analogous context, that 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).

And while a hypothetically-persuasive case might be made for a legal remedy attacking profits gained by civil misconduct (as opposed to a *criminal* RICO case, rejected by the government here, where such a remedy indeed is available), that is a matter for the legislature, not the courts. Instead, the federal government is attempting to make a political case in a judicial forum and the shallowness of its analysis reflects this clearly.

The Tobacco Case Does not Meet Supreme Court Criteria for Review. There are several criteria generally employed by the Supreme Court as part of its determination as to whether to grant a petition for *certiorari*. The first of these is whether the case presents an important question of

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federal law. This is not a question of "importance" in the abstract, *i.e.*, whether the petitioner can make out a case for the political desirability of the result; instead, it is a question of whether there is a necessity to interpret the particular legal provision that is presented in the given case. The requisite judicial importance is absent here.

Congressional intent embodied in the "prevent or restrain" language of 18 U.S.C. § 1964(a) is especially clear in view of the connection between its provision for injunctive relief and its provision allowing orders of divestiture which Congress meant to be directed at organized criminals who use ill-gotten funds to infiltrate or control otherwise legitimate businesses. By ordering a divestiture of a defendant's interest in such companies, the racketeer could not continue to exercise control of the business for illegitimate purposes in the future. But that is not even remotely what the government seeks here. On the contrary, the Department of Justice is seeking to employ the punitive disgorgement remedy that Congress actually authorized in the *criminal* RICO law, a statute that DOJ years ago decided should not be applied to the tobacco defendants. By its own words, the government is not seeking to prevent anything. This is a misemployment of the statute as written and intended and does not present the type of question that the Supreme Court should resolve.

A second important criterion for determining a case's worthiness for *certiorari* is whether its resolution is necessary to resolve a split among the opinions of the circuit courts of appeals. In arguing this point in the tobacco litigation, the government is notably disingenuous. While it argues accurately that the law on whether a court may order disgorgement under the civil RICO statute has not been analyzed consistently, it glosses over the fact that the case law that is arguably different from that of the D.C. Circuit would not logically produce a different result if it were applied to the *Philip Morris* case.

As noted, the District of Columbia Circuit rejected the government's claim for disgorgement because, while the civil RICO statute contains an equitable provision — 18 U.S.C. § 1964(a) — empowering district courts to provide injunctive and other relief aimed at preventing future violations, a disgorgement order could only be premised on addressing past violations and the statute in question had no provision for such a remedy. The Solicitor General argues that this ruling is inconsistent with several other civil RICO cases, namely them the Second Circuit case of *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995).

The Second Circuit indeed was more liberal than the D.C. Circuit in considering whether disgorgement was an available remedy, holding that it might be appropriate to prevent or restrain future violations, although doing no more than ordering a remand to consider whether disgorgement might be required somehow to protect against future RICO misconduct. Even then, however, the *Carson* court went on to observe that it did not see how it would advance "any civil RICO purpose to order disgorgement of gains ill-gotten long ago . . . ." *Id.* at 1182.

Thus, the Second Circuit did no more than hold that disgorgement *might* "serve the goal of 'preventing and restraining' future violations," but could not be ordered at all "unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Id.* The D.C. Circuit would not go nearly so far, instead holding to a plain-meaning reading of the statutory provision that is inconsistent with a retrospective result. That approach is entirely consistent with Supreme Court teachings such as *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 373, 377 (1994), which held that "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree."

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But would the Second Circuit's more-elastic analysis, if applied to the tobacco litigation in the D.C. Circuit, change the result? It should not, for two important reasons. First, there is no evidence that, whatever the alleged misconduct of the tobacco companies might have been in the past, they are likely to replicate it in the future. The government's pleadings themselves are devoid of any such charge. The sole justification offered for seeking disgorgement is to deprive the tobacco companies of past profits. Second, to the extent that tobacco advertising has not been materially restricted by subsequent federal regulation, the settlement agreement in the state tobacco class actions already contains an injunction against the very conduct of which the federal government more lately complains.

In sum, there is no cognizable probability of future misconduct against which disgorgement could be directed, even if it was an available remedy. Thus, any difference in the views of the circuits can be left for another case and another day.

Conclusion. Congress has demonstrated that it is able to consider circumstances under which disgorgement might be a necessary remedy. There is no barrier to doing this in revisiting the civil RICO statute within the context of the already controversial tobacco industry or otherwise. However, if it does so, Congress should be cautious of potential unintended consequences in allowing enhanced remedies to be applied under a statute already stretched far beyond its original purposes into industries such as health care, where an overbearing approach could threaten public well-being. As for the administration, it should remain faithful to its pronouncements that legislation belongs in the legislature, not in the judiciary.

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