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DOJ'S USE OF RICO IN TOBACCO SUIT IS WRONG

by
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The recently filed U.S. Department of Justice lawsuit against the tobacco industry includes 116 counts of "racketeering." This abuse of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C § 1961 ("RICO"), allows the government to attack legitimate commercial activity of the tobacco industry from nearly five decades ago and seek treble damages and forfeiture of assets. While the idea of the Department of Justice' unprecedented attempt to brand an entire industry as racketeers is offensive, the Justice Department's RICO allegations fail to establish many of the statutory requirements of the act and ignore nearly thirty years of RICO jurisprudence.

RICO was intended to prevent racketeers from investing in and infiltrating legitimate business with their ill-gotten gain. Because the word "racketeer" was never linked directly to mobsters, the Act's original and intended beneficiaries — legitimate businesses — have been tarred with this broad and sticky brush. The law requires plaintiffs to demonstrate a pattern of racketeering activity and prove that an injury occurred because of that pattern. A pattern is the commission of two or more predicate offenses, such as extortion or transporting stolen goods across state lines, over a ten year period. The Department of Justice asserts that the tobacco industry engaged in a pattern of mail fraud and wire fraud since the 1950s to fraudulently conceal the risks associated with smoking. Mail and wire fraud require the use of the mails or wires to obtain property "by means of false pretenses."

In this case, the government asserts that the tobacco industry misled the American public about the dangers of smoking and used the mails, wires, and airwaves to communicate false information.
The United States Supreme Court has held that RICO claims must establish proximate cause in the form of "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Securities Investor Protection Corp*., 503 U.S. 258, 268 (1992). Thus, the Department of Justice must demonstrate that the alleged misrepresentations *caused* the injuries asserted. Federal courts have already addressed the use of RICO against tobacco defendants. Recently, the United States Court of Appeals for the Third Circuit affirmed a district court opinion dismissing a RICO action filed by labor union's health and welfare trust funds in Pennsylvania. In *Steamfitters Local Union No. 420 v. Philip Morris et al*, 171 F.3d 912 (3d Cir. 1999), the funds asserted that the cigarette industry conspired to suppress research, defrauded health care providers, and caused smokers to become ill through a campaign to conceal the risk of smoking. In affirming the dismissal of the RICO counts, the Third Circuit found that the causal links between any industry action and the costs incurred by the funds were "not proximate enough" to satisfy RICO's standing requirements. The court held that the plaintiff would have to demonstrate a chain of causation showing that: the industry conspired to suppress information and withheld products from the market; that funds were prevented from informing their members about the dangers of smoking; that smokers continued to smoke

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products that they would not have otherwise; that smokers contracted more smoking-related illnesses; and that the funds suffered increased expenses due to their reimbursement of smoker's health care costs.

The Third Circuit stated "the tortured path that one must follow from the tobacco companies' alleged wrongdoing to the Fund's increased expenditures demonstrates that plaintiff's claims are precisely the type of indirect claims that the proximate cause requirement is intended to weed out." Last April, a federal district court in Minnesota reached the same conclusion and dismissed civil racketeering claims against tobacco companies in a similar action by health funds. In *Lyons et al. v. Philip Morris Inc. et al.*, No. 98-515 (D. Mn., Apr. 29, 1999), the court held that the health funds' alleged RICO injuries were too remote from any alleged wrongdoing of the cigarette industry. The court held, "Plaintiffs' alleged damages hinge on the medical expenses they paid for their members and dependants. Had these members not smoked and subsequently suffered from smoking-related illnesses, Plaintiffs would have no injuries to assert. Thus, Plaintiffs' injuries are completely contingent on injuries to third parties."

Other courts have reached similar conclusions. Recently in *Laborers' and Operating Engineers' Utility Agreement Health & Welfare Trust Fund for Arizona v. Philip Morris, et al*, 42 F. Supp. 2d 943 (D. Ariz. 1999), the court dismissed a RICO claim against the tobacco industry filed by a union pension fund. The fund sought to recover funds expended on behalf of members' alleged smoking-related illnesses. The court dismissed the RICO action, holding that the allegations that the tobacco industry misled the government and public regarding the dangers of cigarette smoking were insufficient to establish the industry was the proximate cause of the funds' damages. The court determined that the funds' alleged injury was too remote to be supported under the RICO act.

In *Laborers*, the court recognized that in cases where health "funds allege direct injury, RICO claims are only able to recover that segregable percentage of medical costs which would have been saved had the funds been able to deter tobacco use." This point is particularly important in light of the hypocrisy of the federal RICO action. The federal government has required warnings on cigarettes since 1964 and continued to give free cigarettes to military personnel until 1972. How can the federal government claim that it would have been able to save money by deterring smoking when it not only knew of the risks but had the risks disclosed and still supported the smoking by its own military?

Another fundamental flaw with the RICO claim in the federal cigarette suit is that RICO does not allow parties to recover for physical injuries. In the instant case, the federal government is trying to recover for the costs of physical injuries incurred by smokers. If the smoker cannot recover for physical injuries under RICO, the federal government as health care provider should not be allowed to recover expenditures made on behalf of smokers.

In light of the flaws with the RICO counts there is only one reason why they were included — RICO can be used to coerce the industry into settlement. The spectre of treble damages and the ability to complain about behavior forty-five years in the past make RICO an attractive act to abuse. By using RICO, the Department of Justice can threaten damages "larger than the total assets of the industry," according to G. Robert Blakey of Notre Dame University Law School. *Cigarette Makers Sued by U.S. Justice Department*, BLOOMBERG NEWS, Sept. 23, 1999. Professor Blakey has stated that for the tobacco industry, the stakes "are just too high to risk going to trial." Wendy Koch and Kevin Johnson, *Government says cover-up lasted 45 years*, USA TODAY, Sept. 23, 1999, at A1. This type of extortion makes it clear who the real racketeers are.

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