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UNITED STATES v. PHILIP MORRIS:
HIGH COURT REVIEW DENIAL
SIGNALS DEMISE OF DOJ'S SUIT

by
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When the U.S. Supreme Court on October 17, 2005 declined the federal government's request to review an appeals court decision that threw out most of the government's damage claims against the cigarette industry, the Court in essence ended the government's efforts to strike a major blow at the industry. While the suit continues and the trial judge may yet enter a judgment against major cigarette manufacturers for violations of RICO (the federal Racketeer Influenced and Corrupt Organizations Act), the government's loss at the Supreme Court means that any judgment she enters is unlikely to have a significant impact on the industry.

What is most surprising about the case is that the Justice Department persisted for as long as it did with its theory that it was entitled to a \$280 billion "disgorgement" remedy for violations of RICO, far greater than the net worth of all the defendants combined. The government asserted that the industry defrauded consumers for many years by concealing the dangers of cigarette smoking. It asserted that tobacco companies should be required to "disgorge" (i.e., pay back) the proceeds of all cigarette sales between 1971 and 2000 to a "youth-addicted population" — meaning everyone who started smoking before they turned 21. How government lawyers arrived at a \$280 billion figure has always been somewhat of a mystery, and even those lawyers admit that the bulk of that figure consists of interest on sales proceeds.

According to the U.S. Court of Appeals for the District of Columbia Circuit, there was one problem with the government's theory: courts are not permitted to award disgorgement to plaintiffs in civil RICO actions. In its February 2005 ruling, the D.C. Circuit held that the relevant RICO provision, 18 U.S.C. § 1964(a), limits courts to issuing orders "to prevent and restrain" violations of RICO. The court concluded that the terms "prevent" and "restrain" connote forward-looking remedies, while disgorgement "is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo." So much for the government's disgorgement theory.

In seeking Supreme Court review of the case, the government argued that the circuit courts were split regarding the availability of a disgorgement remedy in RICO cases. There are several reasons why the Supreme Court may have denied review, but one likely reason is that the government's circuit-split

argument was faulty: there is no relevant split among the circuits. The Second Circuit held that disgorgement may be available in a very limited number of RICO cases. But the court made clear that any disgorgement must be limited to proceeds of racketeering obtained in *the very recent past*, and only then if the proceeds are likely to be used to promote continued wrongdoing. *United States v. Carson*, 52 F.3d 1173 (1995). Given that all of the cigarette industry misconduct on which the government relies occurred a decade or more ago, there is little doubt that the government would lose even under the more lenient *Carson* standard. Indeed, the trial judge allowed the case to get this far only because she refused to accept even the *Carson* standard. In the absence of a relevant circuit split, there is little likelihood that the Supreme Court will ever agree to hear this case, even after the lower courts have entered a final judgment.

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