

RICO—Remedies**Some Tobacco Disclosures In,
Others Out in Long-Running Civil RICO Suit**

Tobacco companies may soon be forced to start making some disclosures about the dangers of cigarette smoking but won't be required to say they deliberately deceived consumers after a May 22 decision of the U.S. Court of Appeals for the D.C. Circuit (*United States v. Philip Morris USA, Inc.*, 2015 BL 161900, D.C. Cir., No. 13-5028, 5/22/15).

The decision—the latest in a long line of district and circuit court opinions stretching back to 2004—held that companies could be forced to disclose that they designed cigarettes to ensure addiction and that “low tar” and light cigarette smokers inhale essentially the same amount of tobacco.

However, they couldn't be forced to say in prefatory statements that they had “deliberately deceived the American public,” the appeals court said.

“Given our earlier decisions in the case,” the cigarette companies' objection to the former disclosures “is both waived and foreclosed,” but in ordering the “deliberately deceived” disclosure, the district court “exceeded its authority under RICO to craft remedies that ‘prevent and restrain’ future violations,” Judge David S. Tatel wrote for the court.

“We are disappointed that the court will not require the prefatory statement, which would have provided consumers with a much-needed piece of information: the industry manipulated its products to make them more dangerous and deadly, and deliberately and deceitfully withheld that information from the American public for over half a century,” Maggie Mahoney, deputy director of the Tobacco Control Legal Consortium, said in a May 22 e-mail to Bloomberg BNA. The TCLC was an amicus curiae in support of the government in the case.

“However, we are thrilled that, after all of the industry defendants' attempts to avoid having to tell the truth about its deadly products, the court has ruled that the corrective statements can be implemented,” Mahoney said.

Richard Samp, chief counsel for the Washington Legal Foundation, Washington, called the decision “a major victory in efforts to prevent the government from forcing individuals to engage in Maoist-style self-

criticism” in a May 22 press release. The WLF participated as an amicus curiae in support of the tobacco companies.

Law of the Case. The United States filed this suit in 2000, alleging that the tobacco companies had violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968, by engaging in a conspiracy to deceive the American public about the health consequences and addictiveness of smoking, the court said.

The trial court entered final judgment against the tobacco companies in 2006, finding they had operated an illegal racketeering enterprise and that many of them, unless enjoined, were likely to commit future RICO violations. As a partial remedy, the court ordered the companies to make corrective disclosures about, among other things, the adverse health effects of cigarette smoking and the addictiveness of smoking and nicotine.

These remedial measures were largely affirmed by a different panel of the D.C. Circuit in *United States v. Philip Morris USA Inc.*, 566 F.3d 1095 (D.C. Cir. 2009) (77 U.S.L.W. 1737, 6/2/09).

That panel rejected the companies' RICO challenge, holding that the disclosures would “prevent and restrain” future RICO violations “because the manufacturers would be ‘impaired in making false and misleading assurances’ about cigarettes if simultaneously required to tell the truth.”

It also held that the disclosures were commercial speech designed to prevent defendants from misleading consumers, and therefore permitted by the First Amendment. It then remanded to the district court to draft the required disclosures.

Those disclosures included bullet-point statements such as “Cigarette companies intentionally designed cigarettes with enough nicotine to create and sustain addiction,” and “‘Low tar’ and [light] cigarette smokers inhale essentially the same amount of tar and nicotine as they would from regular cigarettes.”

These statements also came with preambles stating that tobacco companies “deliberately deceived the American public about the health effects of smoking.”

The court held that the bullet-point statements were permissible, but that the prefatory statements were not.

Bullets Hit the Mark. Regarding the bullet-point statements, the court held that the tobacco companies had waived the right to object to them because “they raised no specific objection to the requirement that they disclose their ‘manipulation of the physical and chemical design of their cigarettes,’” the court said, quoting the 2006 district court opinion.

The 2009 court “approved those topics across the board,” the court said, and “[h]aving thus decided the issue in the earlier appeal, we will not revisit it here.”

Though the statements had not been drafted before the 2009 opinion, “the manufacturers have identified no way in which” they go beyond the defendants’ manipulation of cigarette design, “and none is apparent to us,” the court said.

The companies’ First Amendment challenge was likewise waived by failure to assert it in 2009, the court said.

Conduct, Not Products. The prefatory statements that the companies had “deliberately deceived the American public,” however, “were nowhere presaged in the district court’s 2006 remedial order,” and neither were they before this court in 2009, the court said.

Though the approved disclosures required defendants to reveal previously hidden information about their products, the prefatory statements “reveal nothing about cigarettes; instead, they disclose defendants’ prior deceptive *conduct*,” the court said.

Such disclosures focus “not on restraining the RICO violator, but on safeguarding *consumers* against RICO violations,” the court said.

“The preamble might provide an effective—perhaps even the very best—means of curing consumer misconception and preventing consumer deception going forward,” the court said.

Civil RICO, however, allows courts to issue injunctions “only to ‘prevent and restrain’ RICO violations, not to *discourage* such violations through” remedies that inflict “pain,” the court said.

Judges Harry T. Edwards and A. Raymond Randolph joined the opinion.

Gibson, Dunn & Crutcher LLP, Washington, and Winston & Strawn LLP, Chicago, represented Philip Morris USA Inc. and Altria Group, Inc. Jones Day, Washington, represented R. J. Reynolds Tobacco Company and Brown & Williamson Tobacco Corporation. Thompson Coburn LLP, St. Louis, represented Lorillard Tobacco Company. Kirkland & Ellis LLP, Washington, represented American Tobacco Company. Covington & Burling LLP, Washington, represented British American Tobacco PLC and The Tobacco Institute, Inc. Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, Washington, represented British American Tobacco (Investments) Ltd. Debevoise & Plimpton LLP, Washington, represented the Council for Tobacco Research-USA, Inc. Holland & Knight LLP, Washington, represented GlaxoSmithkline entities. Dechert, LLP, Washington, represented Pharmacia Corp. Buc & Beardsley, LLP, Washington, represented Elan Corporation, PLC. Morgan, Lewis & Bockius LLP, Washington, represented Pfizer Inc. Arent Fox LLP, Washington, represented IMPAX Laboratories, Inc.

Meyer Glitzenstein & Crystal, Washington, represented various amici for the government, including the TCLC.

Attorneys from the Department of Justice, Washington, represented the government.

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