

The tobacco cases: A primer

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Lyle Denniston

Analysis

When President Bill Clinton stood up to deliver his State of the Union message before Congress on January 19, 1999, a surprise awaited the assembled lawmakers and the listening nation, a planned announcement not included in his prepared text that had been handed out in advance. At a dramatic point in the delivery, as he lamented the health and dollar costs of smoking, the President dropped in this remark: "Tonight, I announce that the Justice Department is preparing a litigation plan to take the tobacco companies to court, and with the funds we recover, to strengthen Medicare." Now, eleven-and-a-half years later, the government is still pursuing those funds — \$280 billion in total — and the tobacco companies are still resisting, with all of their considerable might and with a platoon of prominent legal talent.

By the time Clinton spoke, the government had spent years attempting to gain broad regulatory power over the manufacturers of cigarettes and other tobacco products, but had been thwarted in Congress and the courts. And, at that time, a long-running federal criminal investigation of the industry had begun to lose its ardor. Clinton, then, was announcing what might have been considered Option C — a massive lawsuit, perhaps the biggest civil case the federal government had ever filed, in any court.

That fight is back in the Supreme Court now, five years after the Court had passed up its first chance to consider the government's plea that the industry be forced to surrender scores of billions of dollars in profits taken in since 1971. But the case — actually, there are seven cases in the group before the Court — reaches well beyond the government's \$280 billion "disgorgement" demand, and the final outcome could make over the industry, fundamentally reshape its commercial message, and — perhaps — change the nation's smoking habit.

The cases reach the Court in a form that means the Court need not hear any of them. That is the issue the Court will ask itself when it considers the cases next week, at its June 24 private Conference. The petitions are requests to review a D.C. Circuit Court decision made thirteen months

ago (as well as an earlier one by the Circuit Court in 2005), and the Court could simply deny review of all of the pleas, if it wished. And the Court could narrow its task somewhat — and that of the lawyers — if it simply agreed, at this point, to decide one question: did the tobacco companies break any law at all? If they didn't, that would be the end of this marathon lawsuit.

The companies insist that they did not break any law. And, they argue, the law that mainly was used against them — the sweeping anti-racketeering law that Congress passed in 1970 (the Racketeer Influenced and Corrupt Organizations Act, or RICO) was pulled completely out of shape to try to make it cover a half-century of corporate conduct.

But even the question of whether the companies acted illegally is far from simple. It is implicated in many of the eighteen separate questions that the petitions raise, and the core question of illegality is itself a complex one. That issue is whether RICO, when it forbids a conspiracy to operate a racketeering “enterprise,” means only a group of plotting individuals, or whether it can also embrace an “association” of competing companies in virtually an entire industry.

When the case was first filed, eight months after President Clinton's revelation that it was in the works (and on the same day that officials announced the end of the criminal grand jury probe with no charges being filed), the civil lawsuit focused on three federal laws — RICO and two laws dealing with federal funding of medical care and Social Security. Those other two laws dropped out of the case, leaving it as purely a RICO lawsuit.

Here is the way the federal trial judge, U.S. District Judge Gladys Kessler, would later describe what the government was pursuing: “The Government seeks injunctive relief and disgorgement of 280 billion dollars of ill-gotten gains for what it alleges to be Defendants' unlawful conspiracy to deceive the American public. The Government's Amended Complaint describes a four-decade long conspiracy, dating from at least 1953, to intentionally and willfully deceive and mislead the American public about, among other things, the harmful nature of tobacco products, the addictive nature of nicotine, and the possibility of manufacturing safer and less addictive tobacco products.”

The “disgorgement” issue — the plea to surrender all the profits the nine companies involved had made since the RICO law was enacted — brought the first major battle in the case. The industry tried to get Judge Kessler to rule out any such order as part of any remedy that would

follow a finding that RICO had been violated, but she refused to do so in 2004. The judge, however, cleared the way for the Justice Department to take that specific issue to the D.C. Circuit Court.

In a divided ruling in February 2005, the Circuit Court decided that remedies under RICO could only be "forward-looking," and that the government's plea for disgorgement of profits was an attempt to collect money for past conduct. The Justice Department tried to persuade the Supreme Court to take on that issue, but the Justices turned aside the plea on October 17, 2005, with no noted dissents. (The denial of review set no precedent, and it did not bar the government from raising the issue again, after the case had been tried.)

The case then proceeded before Judge Kessler (without a jury), running for nine months, with live testimony from 84 witnesses, written testimony from 162, and nearly 14,000 exhibits. The judge, in a 1,600-page decision in August 2006, ruled that the nine companies and two trade groups had engaged in a scheme to defraud smokers and potential smokers by falsely denying smoking's health hazards, its addictive nature, the industry's manipulation of cigarettes to assure more nicotine delivery, the intentional marketing of cigarettes to youth, and second-hand smoke as a cause of diseases. She also found that the companies had falsely promoted "light" and "low tar" cigarettes as healthier than regular cigarettes.

Turning, then, to remedies, Judge Kessler expressed some disappointment that the Circuit Court had taken off the table the "disgorgement" remedy, and she found that the Circuit Court ruling also had kept her from requiring the industry to carry on a national program to encourage people to stop smoking, and a public education campaign and counter-marketing program to discourage people from starting to smoke, as well as a specific plan to reduce youth smoking and to penalize the industry if the rates of youth smoking did not go down annually. She also refused to name a "tobacco czar" to help restructure the industry, saying that would intrude on Article III judicial power.

Even with those items left out, Kessler's sweeping injunction against seven companies (it did not reach the two trade groups, because they were going out of business, or Liggett, because it had changed its ways) would impose a multitude of obligations on the companies. They are barred, for example, from making any health claims for cigarettes (including any references to "light" or "low tar" claims), they must make public statements in the media to correct their past denials of such things as the health hazards of smoking, the addictive nature of nicotine, and

the hazards of second-hand smoke, and engaging in any of the kinds of conduct that she found was illegal in the past.

Both sides appealed to the D.C. Circuit, and a panel of that Court in May of last year upheld almost all parts of Judge Kessler's findings about industry violations of RICO, and virtually all of her remedy provisions. The Circuit Court refused en banc review, and both sides then took their cases on to the Supreme Court in February. (None of the remedies will take effect until after the case are concluded, one way or the other, in the Supreme Court; the Circuit Court put them on hold.)

Aside from the specific questions raised in the seven petitions, the two sides each appear to be pursuing broader agendas.

The industry is seeking to get new restrictions on what RICO covers in general, and on the kinds of remedies that can be imposed for RICO violations. It is also seeking to raise hard questions about the government's basic motives, suggesting that the lawsuit was politically driven and arguing that the Justice Department opted to forgo criminal cases in order to keep the industry from having the case go before a jury on a reasonable doubt standard of guilt. And the companies are seeking to persuade the Court that the government is using the court system to try to bring about an onerous regulatory regime that it could not get from Congress (although Congress has since put the industry under new controls by the federal government).

For its part, the federal government, joined by the six anti-smoking, or public health, groups, is seeking to use the case as a sweeping indictment of smoking as a cultural phenomenon, marshaling all of the data about how many people die or get sick each year from smoking-related illnesses, insisting that the restrictions imposed on RICO remedies will threaten ultimate success for the anti-smoking campaign, and arguing that the power of federal judges to restrain illegal conduct is severely threatened by the Circuit Court's interpretation of courts' authority to issue remedial injunctions.

As the cases reached the Court, the specific questions they raised range from historic constitutional issues to questions of workaday legal procedures for sorting out evidence and finding remedies for perceived wrongdoing. Although there is some overlap among the issues in the seven cases, the Court — if it grants review of any — may have to grant all of them if it is inclined to reach all of the issues and their nuanced variations. The constitutional questions turn on the First Amendment — specifically, the free speech clause and the petitioning-the-government

clause — and the Due Process Clause of the Fifth Amendment, but there is also a strong intimation of a separation-of-powers argument, in the use of the judiciary to establish a regulatory regime that may threaten the existence of an entire industry, without any endorsement by Congress.

The questions under federal statutes are all keyed to RICO or to the long-standing federal laws against wire and mail fraud. The industry, on its side, raises such specific issues as whether the fraud laws can reach corporate speech that the companies insist was either statements of opinion uttered in a public debate over smoking and health, or pleas to the government for protection from regulation, whether RICO reaches overseas conduct of a foreign company (British American Tobacco), whether it demands specific proof of a clear intent to break the law, and whether intent to engage in wrongdoing can be found in collective activities of an entire industry or only of individual companies' officers and staff.

From the government's side (and that of its supporting group of six private organizations), the issues of law raise the core question of just how far a judge, using the broad powers of "equity," can go to remedy legal wrongdoing. Specifically, that side contends that the cases test whether, when a federal law gives a federal judge power to "restrain" a violation of law, the authority encompasses all of the powers of remedy that the court ordinarily has — including remedies for past misconduct, as well as prevention of future wrongdoing.

But the cases grow even more complex when they move from the scope of the alleged illegality in the industry, to the multi-faceted question of what to do about it — that is, what remedies RICO allows a judge to impose. The industry questions whether RICO permits a judge to issue a sweeping injunction that more or less simply tracks the language of what RICO forbids, whether any remedy can be imposed absent clear-cut proof of specific illegal intent by corporate executives, whether courts may compel companies to speak out — including in non-commercial forums — to correct past statements they have made to the public, and whether courts may regulate what companies say in their commercial speech, if those messages have had government approval in the past. The companies also are contending that the new regulatory regime recently imposed by Congress removes the need for some parts of the remedy order, including the ban on use of "light" and "low tar" promotions. They also contend that the settlement of the 45 states' sweeping lawsuits against the industry in 1998 has resulted in mandates

for the companies to obey the law, thus removing any need for a RICO order to command obedience to law.

The government and its allies continue to pursue the recovery of \$280 billion in tobacco company profits, attempting to persuade the Justices that that is, after all, a “forward-looking” remedy because it has to do with the availability of funds to continue to pay for illegal marketing activity. And, they are asking the Court to liberate judges anew to issue broad remedial injunctions to curb wrongdoing, and in the process are pleading for the revival of a smoking-cessation campaign, an anti-smoking educational campaign, and a targeted program of reducing smoking rates among youths.

If the Court does take on some or all of these cases, it very likely would do so with only an eight-member bench. Justice-nominee Elena Kagan filed the government’s appeal as U.S. Solicitor General, and thus surely would take herself out of any consideration of granting and deciding the cases. (Kagan gets a brief mention in one of the tobacco company petitions, for a remark she made in a 2001 academic paper, impliedly criticizing presidential pressure on the Justice Department to bring lawsuits such as this one targeting tobacco. She raised “serious questions about presidential direction of decisions to file suit against discrete entities such as Microsoft or the tobacco industry, even given that such suits raise important public policy issues.”) Whether the prospect of a Kagan recusal would influence the Court in deciding whether to hear the case is unclear. A 4-4 split on the merits in the cases, of course, would result in upholding the Circuit Court ruling in its entirety without an opinion.

The sheer bulk of the case also may pose a scheduling challenge for the Court. The Justices have not had a case of this complexity or girth since 2003, when they dealt with multiple appeals on the constitutionality of a 2002 federal campaign finance law. The Court probably would schedule more than a single hour of argument, since it would be next to impossible to address both liability and remedy issues in the course of an argument with 30 minutes allowed on each side.

Because the cases come before the Justices at their final scheduled Conference next Thursday, it is likely that an announcement of their decision whether or not to hear the dispute would be released on Monday, June 28. If some or all are granted, any hearing or hearings would not occur until the next Term starting in October.

NOTE:

The five industry petitions are Philip Morris USA v. U.S., 09-976; R.J. Reynolds Tobacco, et al., v. U.S., 09-977; Altria Group v. U.S., 09-979; British American Tobacco v. U.S., 09-980, and Lorillard Tobacco v. U.S., 09-1012. The government appeal is U.S. v. Philip Morris USA, et al., 09-978, and the anti-smoking groups petition is Tobacco-Free Kids Action Fund, et al., v. Philip Morris USA, et al., 09-994.

Docket sheets: 09-976; 09-977; 09-978; 09-979; 09-980; 09-994; 09-1012

Issues (partially overlapping among the petitions):

(1) Whether a group of corporations can constitute an association-in-fact enterprise under RICO.

(2) Whether a corporation can be found to have the necessary specific intent to defraud in a RICO case without evidence that any particular individual in the corporation had such specific intent.

(3) Whether the fraud statutes, the First Amendment, and due process permit speech to be deemed fraudulent when (a) the speech addressed important public controversies and potential regulation, rather than being designed to deprive consumers of money or property, (b) there was no evidence or finding that the speech was material to a reasonable consumer, (c) the speech constituted opinions regarding ongoing scientific disputes or statements that were undisputedly true under at least one reasonable interpretation, (d) there was no allegation or finding that any individual associated with the defendants said anything he believed to be false or intended to defraud, and (e) much of the speech is subject to immunity under antitrust laws.

(4) Whether 18 U.S.C. § 1964(a) of RICO categorically bars a district court from ordering disgorgement of ill-gotten gains as well as other equitable relief, such as smoking cessation and public-education remedies, designed to redress the continuing consequences of RICO violations.

(5) Whether federal courts may exercise injunctive jurisdiction under RICO and Article III of the Constitution when there is no statutory "enterprise" and any reasonable likelihood of future violations has been

extinguished by, among other things, extensive federal tobacco legislation.

(6) Whether a court of appeals is required under the First Amendment to undertake independent appellate review when a district court has found that speech is not constitutionally protected because it is fraudulent.

(7) Whether the traditional presumption against extraterritoriality is relevant to determining whether Congress intends a statute to reach the wholly foreign conduct of a foreign corporation, if such foreign conduct is alleged to have had a direct and substantial effect within the United States; and whether the D.C. Circuit properly adopted the "effects" test from antitrust and securities law to determine the extraterritorial limits of RICO.