A Law Synopsis by the Public Health Advocacy Institute

The Weakening of RICO's Remedies Provision: Analysis of the Appeals Court's Decision in *USA v. Philip Morris USA, Inc., et al.*

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January 22, 2008

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This publication was made possible by a Substance Abuse Policy Research Program grant from the Robert Wood Johnson Foundation.

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Introduction

On September 22, 1999, the United States Department of Justice ("DOJ") filed a lawsuit in the U.S. District Court for the District of Columbia against the major American cigarette manufacturers and two research and public relations organizations ("Defendants"). The suit originally contained four counts. Two counts, both seeking monetary recoupment, were dismissed immediately.[1] The two remaining counts, brought under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[2] were upheld and allowed to proceed to a bench trial before D.C. District Court Judge Gladys Kessler. The racketeering counts contained allegations that the tobacco companies have for decades conspired to deceive the American public about the health effects of smoking; repeatedly and consistently denied that cigarettes are addictive even though they long have understood and intentionally exploited the addictive properties of nicotine; marketed their products to underage smokers; and deceptively marketed their lower tar and nicotine cigarettes as posing less harm to smokers.[3] Among the equitable remedies the DOJ requested were the disgorgement of $280 billion dollars of the tobacco industry's ill-gotten gains, as well as certain other remedies that would have required the tobacco industry to alter its methods of doing business.

The Defendants moved to dismiss the disgorgement claim. Judge Kessler denied this motion, finding disgorgement to be an appropriate remedy.[4] Her decision later was reversed by an interlocutory appeal decided by the D.C. Circuit Court of Appeals, which found disgorgement to be a backward-looking remedy that does not serve to "prevent and restrain" future bad behavior (as the equitable relief provision of RICO requires).[5] Judge Kessler thus was prohibited from awarding disgorgement or any other remedy that appeared not to be strictly forward-looking.[6] The D.C. Circuit Court denied the DOJ's requests for rehearing[7] and the U.S. Supreme Court denied *certiorari*, leaving a split among appellate circuit courts regarding the propriety of disgorgement in civil RICO suits.[8] In her final decision after a lengthy trial, Judge Kessler not only denied the disgorgement remedy, but also declined to order many of the DOJ's other proposed remedies.[9]

This paper will trace the judicial proceedings as they pertain to Judge Kessler's initial judgment that disgorgement was an appropriate remedy under RICO and will analyze the appellate decision reversing that decision. The precedent established thus far in this case has implications for both current tobacco control policy and the DOJ's ability to address other threats to public health in the future under RICO. In addition to causing uncertainty in the federal courts as to which remedies are available under RICO, this case very well may allow companies to be adjudicated racketeers and nevertheless continue business as before with only a few relatively minor changes.

This paper will argue that the relatively meager remedies Judge Kessler ultimately ordered against the tobacco Defendants, and her comments regarding those remedies she did not order, show that the force of the civil provisions of RICO have been chilled as a result of the appeals court's decision. Finally, it will make recommendations on how to clarify and strengthen RICO's civil provisions in the wake of that decision.

Section I: The DOJ's Request for Disgorgement

A. BACKGROUND

RICO's equitable relief provision ("Section 1964(a)")[i] provides jurisdiction:

> to prevent and restrain violations of section 1962 of this chapter [18 USCS] by issuing appropriate orders, *including, but not limited to:* ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.[10]

The DOJ sought, among other remedies, equitable relief in the form of disgorgement of proceeds from the tobacco Defendants' ill-gotten gains – an estimated $280 billion. The DOJ calculated this estimate based on the proceeds of the tobacco industry's cigarette sales to what the DOJ alleged to be the "youth addicted population" between 1971 and 2001.[ii, 11]

B. JUDGE KESSLER'S RULING

The tobacco industry Defendants moved to dismiss the disgorgement claim, arguing that this remedy is not available under RICO because it is backward-looking and therefore not in keeping with precedent set in *United States v. Carson*.[12] Judge Kessler denied the Defendants' motion, declining to adopt the *Carson* court's limitations on the scope of Section 1964(a).

In *Carson*, the Second Circuit denied disgorgement of a corrupt former union official's past wages because it was not a forward-looking remedy that helped "prevent and restrain" RICO violations. The *Carson* court found that such a remedy would be based on punishing past conduct and did "not see how it serves any civil RICO purpose to order disgorgement of gains ill-gotten long ago by a retiree."[13] The decision, however, did not deny the possibility of disgorgement entirely under Section 164(a), but rather limited the remedy to cases where there is a finding "that the gains [currently] are being used to fund or promote the illegal conduct, or constitute capital available for that purpose."[14]

Judge Kessler gave three reasons why she believed the *Carson* court "offered virtually no support for its rewriting of Section 1964(a), a rewriting which cannot be reconciled with the text of the provision."[15] First, she found that the plain text of Section 1964(a) does not support the *Carson* court's limitation.[16] She called that decision a "narrow interpretation of Section 1964(a) [that] cannot be squared with Congress's intention that this provision be read

[i] RICO's civil remedies section also contains a provision allowing for a private party "injured in his business or property by reason of a [RICO] violation" to seek treble damages. RICO § 164(c). Although this is the more commonly pursued remedy under RICO, the DOJ sought only equitable relief in this case.

[ii] This population includes "all smokers who became addicted before the age of 21, as measured by those who were smoking at least 5 cigarettes a day at that age." *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d 1190, 1193 (D.C. Circuit 2005).

broadly."[17] She cited RICO's legislative history, which states, "RICO provides the courts with the authority to 'craft equitable relief broad enough to do all that is necessary.'"[18]

Second, Judge Kessler noted the U.S. Supreme Court's conclusion that "the full scope of a court's equitable jurisdiction must be recognized and applied except where 'a statute in so many words, *or by a necessary and inescapable inference*, restricts the court's jurisdiction' or where there is a 'clear and valid legislative command' limiting jurisdiction."[19] Finding that "the statutory phrase 'prevent and restrain' encompasses no 'clear legislative command' to limit the scope of disgorgement to exclude deterrence" and that "there is no language in the statute specifically limiting disgorgement to funds that are being used or remain available to fund future RICO violations," Judge Kessler found any inference of a limitation on disgorgement not "necessary and inescapable."[20]

Last, Judge Kessler asserted that the *Carson* court's interpretation of the statute's "prevent and restrain" language was inconsistent with other federal courts' interpretations of similarly-worded statutes containing equitable relief provisions, such as the Securities and Exchange Act and the Commodity Exchange Act.[21]

Having found that disgorgement was a permissible remedy (at least conceptually) under the civil RICO statute, Judge Kessler next considered whether the DOJ's proposed calculation for disgorgement was appropriate. The DOJ argued that its model needed only to be a "reasonable approximation of ill-gotten gains."[22] The Defendants countered that the DOJ made improper calculations in its estimate and, more importantly, that its model was not tailored to seek amounts necessary to "prevent and restrain" future RICO violations.[23] Judge Kessler found that this was a question of fact to be determined at trial and declined to grant summary judgment on this issue.[24]

C. INTERLOCUTORY APPELLATE REVIEW

After issuing her decision, Judge Kessler certified for interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit ("Appeals Court") the issue of whether disgorgement is a permissible remedy under Section 1964(a). Agreeing to hear the appeal, a three-judge panel considered the case and reversed Judge Kessler's decision in a two-to-one decision.[25]

Regarding disgorgement's availability under Section 1964(a), the DOJ argued, first, that a district court judge has a wider authority to grant equitable relief than merely what the statute says, and, second, that RICO can be construed as not excluding disgorgement as a remedy. Conversely, the Defendants argued, first, that disgorgement is "categorically unavailable" under Section 1964(a)[iii] and, second, that even if it were available, the DOJ is not entitled to disgorgement because its claim "does not even pretend to be aimed at preventing and restraining future offenses."[26]

The Appeals Court ruled in favor of the Defendants, holding that Section 1964(a)'s language, as well as RICO's comprehensive remedial scheme, precludes disgorgement as a possible remedy. The court held, "in this case the text and structure of the statute provides just such a restriction [on the district court's equitable powers]."[27] The court reasoned that although federal courts have powers of equitable jurisdiction, they are still limited in part by the language of the statute in question as well as canons of

[iii] This argument stands in conflict with the Second Circuit's decision in *Carson*, which allowed for disgorgement under some circumstances.

legislative interpretation. The court argued that the DOJ was asking it to expand the District Court's equitable powers far beyond those available explicitly in the statute.[28]

Although the court acknowledged that "[t]he words 'including, but not limited to' in Section 1964(a) introduce a non-exhaustive list that sets out specific examples of a general principle" in RICO, it still did not find that the statute on its face permits disgorgement as a remedy.[29] The court said it would expand the list of remedies explicitly granted in Section 1964(a) only with remedies that are "similar in nature to those enumerated" in that section.[30] It reasoned that all of the remedies explicitly granted in the statute were "directed toward future conduct and separating the criminal from the RICO enterprise to prevent future violations"[31] and found that "[d]isgorgement is a very different type of remedy aimed at separating the criminal from his prior ill-gotten gains and thus may not be properly inferred from Section 1964(a)."[32]

The court concluded that the statutory language limits courts' ability to fashion equitable remedies. It saw the language as having a "comprehensive and reticulated" remedial scheme that did not allow for authorization of additional remedies under RICO's equitable relief provision.[33] The court asserted that RICO already provides for a comprehensive set of remedies and said that where Congress had intended to remedy past harms as well as future ones, it had provided for such remedies within the act's criminal remedies section, which allows a court to force a defendant to forfeit his interest in the RICO enterprise and unlawfully acquired proceeds, and to be punished with fines, imprisonment for up to twenty years, or both.[34] Further, a different portion of the statute's civil remedies section empowers individuals harmed by a RICO violation to seek treble damages.[iv, 35] The court concluded that the existence of clear remedies available to rectify past harms in other sections of RICO, combined with three remedies clearly enumerated RICO's civil remedies provisions, satisfies the standard set in *Porter v. Warner Holding Co.* that there is a "necessary and inescapable inference" that Congress intended to limit relief under civil RICO to forward-looking orders.[36]

Furthermore, the court was not swayed by a reference in the legislative history stating that RICO "shall be liberally construed to effectuate its remedial purposes," declaring that this reference does not create a "structural inference" that Section 1964(a) should be read broadly.[37] It interpreted this statement as a warning against "taking an overly narrow view of the statute" but echoed language from another decision in which the Supreme Court stated that "it is not an invitation to apply RICO to new purposes Congress never intended."[38] The court found that "the text and structure of RICO indicate that those remedial purposes do not extend to disgorgement in civil cases."[39]

The court acknowledged that its decision would cause a split among Circuit Courts that have interpreted this issue, noting that courts in the Second and Fifth Circuits have allowed for the possibility of disgorgement under civil RICO,[40] while its own decision rules oppositely. The court admitted that the Second Circuit Court's *Carson* decision, while denying disgorgement for its particular parties, did not deny the possibility of disgorgement entirely under Section 164(a).[41] The court noted that the Fifth Circuit also has adopted, in *Richard v. Hoechst Celanese Chemical Group*, the *Carson* court's interpretation finding

[iv] These other parts of the RICO statute require a higher burden of proof or have tighter statutes of limitation. *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d 1190, 1201 (D.C. Circuit 2005).

disgorgement inappropriately punitive under the circumstances but agreeing that it is an available remedy in other cases involving civil RICO.[42, 43] Nevertheless, the court held firm, stating:

> While we avoid creating circuit splits when possible, in this case we can find no justification for considering any order of disgorgement to be forward-looking as required by Section 1964(a). The language of the statute explicitly provides three alternative ways to deprive RICO defendants of control over the enterprise and protect against future violations: divestment, injunction, and dissolution. We need not twist the language to create a new remedy not contemplated by the statute.[44]

After the Appeals Court ruled as a three-member panel,[v] the DOJ appealed, requesting that the panel reconsider its decision. This motion was denied, with the original dissenting judge voting in the DOJ's favor.[45] The DOJ also requested that the Appeals Court reconsider the case *en banc*, but this petition was also denied.[vi, 46] The DOJ next filed a petition for a writ of *certiorari* from the United States Supreme Court, which was denied without comment.[47] Thus, Judge Kessler had no choice but to render her final judgment in light of the Appeals Court's decision.

Section II: Appellate Decision's Effect on Remedies

In her final judgment issued on August 17, 2006, Judge Kessler acknowledged the Appeals Court's interlocutory opinion and explained how it had affected her decision as to which remedies to grant and which to deny. As a preliminary matter, she refuted the Defendants' argument that the decision left leeway for her to issue only a "standard injunction restraining future RICO violations."[48] Judge Kessler pointed out that "unless a specific remedy would countermand statutory guidance from Congress, a court must take into account the public interest when considering whether its imposition is justified."[49] Thus, she found that the she was not precluded from considering the public interest when deciding on the appropriateness of remedies.[50]

A. Remedies Not Ordered

Judge Kessler made it clear that while she approved of most of the "significant remedies" that the DOJ proposed, she "unfortunately" felt restricted by the narrow confines of the Appeals Court's opinion and therefore could not order many of them.[51] For example, the DOJ requested adoption of a national smoking cessation program as well as a public education and counter-marketing campaign. The national cessation program would have included: (1) a national tobacco quitline network providing access to evidence-based counseling and medications for tobacco cessation; (2) an extensive paid media campaign to encourage smokers to seek assistance to quit smoking; and (3) a research agenda to achieve future improvements in the reach, effectiveness

[v] Two out of three judges voted in favor of overturning Judge Kessler's decision. A summary of the dissenting judge's opinion can be found in Appendix B. Additionally, the opinions of various commentators – both in support of and in opposition to the Appeals Court's ppinion – can be found in Appendix C. The dissenting and commentators' opinions can be instructive to those wishing for a complete understanding of the differing ways that RICO's remedies provision can be interpreted.

[vi] Only six of the nine judges voted on the petition – three in favor of the petition and three against it. Because three judges did not vote, the petition did not gain majority support and thus was denied. *United States v. Philip Morris USA, Inc., et al.*, 2005 U.S. App. LEXIS 6734 (April 19, 2005).

and adoption of tobacco dependence interventions and physician and clinician training and education.[52] The public education and countermarketing campaign would have been funded by the Defendants and would have been long term, extensive, and culturally-competent.[53] The campaign would have had two primary purposes: (1) educating youth and adults about the hazards of smoking and exposure to secondhand smoke and; (2) informing youth that the Defendants are marketing to them and attempting to manipulate them.[54] Overall, this remedy would have been "aimed at diluting both the impact of the Defendants' fraudulent statements and at undermining the efficacy of Defendants' marketing towards youth."[55]

Judge Kessler stated that both these programs "would unquestionably serve the public interest."[56] The countermarketing campaign, according to Judge Kessler, would "combat the Defendants' seductive appeals to the youth market."[57] However, she found that under the narrow standard of the Appeals Court's opinion, she could not enter these remedies because they are "not specifically aimed at preventing and restraining future RICO violations."[58]

Notably, Judge Kessler ordered none of the DOJ's proposed remedies regarding youth smoking. The DOJ had requested that the Defendants meet pre-set goals for reducing youth smoking rates or face monetary penalties. To prevent related RICO violations, the DOJ asked the court to require the Defendants to reduce youth smoking by 6% per year between 2007 and 2013.[59] This remedy could have provided a total reduction in smoking of 42% by 2013 among individuals between twelve and twenty years old, measured against a 2003 baseline year.[60] Under the DOJ's plan, if the Defendants failed to meet their annual targets, they would be assessed $3,000 for each youth above the target who continues to smoke.[61] Judge Kessler said that although this remedy "is forward-looking, could prevent future RICO violations, and would unquestionably serve the public interest," it is "not sufficiently narrowly tailored to meet the standard articulated by our Appeals Court."[62] Similarly, although she found that the DOJ's request for a specific injunction against the Defendants' ongoing and future youth marketing "would certainly serve the public interest," Judge Kessler denied the remedy, pointing again to the Appeals Court's opinion.[63]

Additionally, regarding the DOJ's request that "the Defendants be ordered to produce and make public all 'health and safety risk information' in their own files relating to their products,"[64] Judge Kessler agreed that the disclosure of such information would "obviously serve the public interest,"[65] but found the DOJ's request to be "far too broad and not narrowly tailored enough to include as a remedy."[66] This language echoed the Appeals Court's language, of which Judge Kessler was keenly mindful.[vii]

B. Remedies Ordered

Although the Appeals Court's decision limited the remedies that Judge Kessler felt she could order, she did find it "exceedingly clear" that the "Defendants have not . . . ceased their wrongdoing or . . . undertaken fundamental or permanent institutional change" and that "[t]here is a reasonable likelihood that Defendants' RICO violations will continue in most of the areas in which they have committed violations in the

[vii] One remedy that Judge Kessler denied that was not influenced by the Appeals Court's decision was the DOJ's request for corporate structural changes of the Defendant entities. Judge Kessler found that although this remedy "might conceivably prevent and restrain Defendants' future RICO violations," she could not order it because "it would require delegation of substantial judicial powers to non-judicial personnel in violation of Article III of the Constitution" – something she had "no authority to order." *See United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp.2d 1, 934-935 (D.D.C. 2006).

past."[67] Judge Kessler noted that "[w]hile the MSA has made significant strides towards preventing Defendants' fraudulent activities, for several reasons it alone cannot remove the reasonable likelihood of Defendants' future RICO violations."[68] Judge Kessler therefore ordered four major remedies that she felt were permissible in light of the Appeals Court's decision: (1) prohibition of certain brand descriptors; (2) corrective statements; (3) disclosure of documents and disaggregated marketing data; and (4) general injunctive provisions. A full description of these remedies can be found in Appendix A.

C. The Ongoing Appeal

Both the Defendants and the DOJ have filed notices of appeal to the United States Court of Appeals for the District of Columbia Circuit (the "Appeals Court," as discussed above). Because Judge Kessler's decision on remedies necessarily involved careful consideration of the Appeals Court's decision regarding disgorgement and its mandate that all remedies be "forward-looking," a successful DOJ appeal has the potential to change the entire landscape of remedies in this case. In the meantime, however, the Appeals Court has granted the Defendants' motion to stay enforcement of the remedies that Judge Kessler ordered pending resolution of the appeals process.[69] This delay, which is expected to continue for at least two years, means that the industry's racketeering conduct will continue unabated for the immediate future.

Section III: Implications and Analysis

The precedent established thus far in this case may undercut future DOJ efforts to address threats to the public health. In her final opinion in this case, Judge Kessler meticulously documents in nearly 1,500 pages the tobacco industry's past and ongoing racketeering activities. For example, she devotes over 235 pages to a detailed description of the tobacco industry's youth marketing activities.

Despite these findings of fact, very little could be done because the Appeals Court significantly narrowed the requirements for ordering remedies under civil RICO. In essence, this case has diluted what it means to be an adjudicated racketeer. It is possible, perhaps even probable, that the tobacco industry Defendants will emerge from this case and carry on with business as usual.

Indeed, only two tangible remedies were ordered, both of which are being appealed. The first is the prohibition on brand name descriptors that imply that cigarettes are less harmful than other brands. For example, most people believe that light cigarettes brands are less harmful.[70] The term "light" and other similar words thus would be prohibited. The second remedy that may provide some relief is the issuance of corrective statements. Yet, corrective statements have never been used to remediate the breadth and depth of the wrongful conduct revealed in this case. Legitimate questions exists as to whether corrective statements can correct the deeply ingrained impressions engineered by the industry to sell cigarettes in an unfettered manner. No remedies were ordered that contain specific instructions on ending cigarette marketing to youth. Nor was any remedy ordered that provides relief to smokers who tried cigarettes and became addicted to nicotine as a result of industry malfeasance.

In short, a major effect of this case is that RICO's equitable relief provision has much less scope and power than was believed to be the case prior to the Appeals Court's decision and Judge Kessler's subsequent ruling. This effect extends beyond just tobacco; DOJ attorneys may be reticent to go after other threats to the public's health because this provision has been weakened.

Additionally, as a result of the Appeals Court's decision to deny disgorgement as a remedy, there now exists a split among appellate circuits on this point. Because the U.S. Supreme Court has denied *certiorari*,[71] the split will remain unless the Supreme Court, following the Appeals Court's decision on the omnibus appeals filed by both the DOJ and the Defendants in response to Judge Kessler's final memorandum and order, takes up the point of whether disgorgement is permissible.

APPENDIX A

REMEDIES JUDGE KESSLER GRANTED

The following is a complete summary of the four remedies that Judge Kessler ordered: (1) prohibition of brand descriptors; (2) corrective statements; (3) disclosure of documents and disaggregated marketing data; and (4) general injunctive provisions.

1. Prohibition of Brand Descriptors[viii, 72]

Judge Kessler stated that since the 1970s, "Defendants also have used so-called brand descriptors such as 'light' and 'ultra light' to communicate reassuring messages that these are healthier cigarettes and to suggest that smoking low tar cigarettes is an acceptable alternative to quitting."[73] She noted that even as data have emerged establishing that such cigarettes "are at least as harmful as 'full-flavor' brands, Defendants have developed new descriptors to convey implied health reassurance messages."[74] She thus found that "the only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, potential smokers, and the American public about 'light' and 'low tar' cigarettes"[75] is to permanently enjoin them from "conveying any express or implied health message or health descriptor for any cigarette brand either in the brand name or on any packaging, advertising or other promotional, informational or other material."[76] Such forbidden health descriptors include the words "low tar," "light," "ultra light," "mild," "natural," and "any other words which reasonably could be expected to result in a consumer believing that smoking the cigarette brand using that descriptor may result in a lower risk of disease or be less hazardous to health than smoking other brands of cigarettes."[77] Judge Kessler also prohibited the Defendants from "representing directly, indirectly, or by implication, in advertising, promotional, informational or other material, public statements or by any other means, that low-tar, light, ultra light, mild, natural, or low-nicotine cigarettes may result in a lower risk of disease or are less hazardous to health than other brands of cigarettes."[78] In keeping with the Appeals Court's opinion, Judge Kessler noted that this remedy is "forward looking and narrowly tailored to prevent and restrain their future fraudulent conduct relating to the marketing of low tar cigarettes."[79]

2. Corrective Statements[80]

Judge Kessler found that the trial record "amply demonstrates that Defendants have made false, deceptive, and misleading public statements about cigarettes and smoking from at least January 1954, when the Frank Statement was published up until the present."[81] The Frank Statement was a 1954 marketing campaign, in which the industry promised to examine the health effects of cigarette smoking in order to protect the public. [82] The real purpose of the Frank Statement was to allay the public's health concerns without doing anything to protect the public's health.[83] She also found ample evidence in the record "that certain of Defendants' public statements communicating their positions on smoking and health issues continue to omit material information or present information in a misleading and incomplete fashion."[84] She refuted the Defendants' argument that the First Amendment precludes corrective statements, stating that they are "appropriate and necessary to prevent and restrain them from making fraudulent public statements on smoking and health matters in the future."[85] She reasoned that "[t]he injunctive relief sought here is narrowly tailored to prevent Defendants from continuing to disseminate fraudulent public statements and marketing messages by requiring them to issue truthful corrective communications."[86]

[viii] Although this remedy appeared as one of four "General Injunctive Relief" provisions in the Order, it is discussed separately here. The other three "General Injunctive Relief" provisions are discussed together, below in section 4.

Judge Kessler held that "the evidence identifies the various venues in which Defendants have made their fraudulent public statements about cigarettes, including, but not limited to, newspapers, television, magazines, onsets, and Internet websites.[87] She thus ruled that the Defendants must publish court-approved corrective statements in newspapers and disseminate them through television, advertisements, cigarette packaging onsets, in retail displays, and on their corporate websites. She called the venues for the corrective statements "the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages,"[88] and through which they "continue to make affirmative statements on smoking and health issues that are fraudulent."[89] The Order outlined a schedule for dissemination and publication of the corrective statements.

Such corrective statements are to address:

- addiction (that both nicotine and cigarette smoking are addictive);
- the adverse health effects of smoking (all the diseases that smoking has been proven to cause);
- the adverse health effects of exposure to environmental tobacco smoke (all the diseases that exposure to ETS has been proven to cause);
- Defendants' manipulation of the physical and chemical design of cigarettes (that Defendants manipulate the design of cigarettes to enhance the delivery of nicotine); and
- light and low tar cigarettes (that they are no less hazardous than full-flavor cigarettes).[90]

The judge ordered no corrective communications regarding youth marketing or research suppression/document destruction.

3. Disclosure of documents and disaggregated marketing data[91]

Finding that "Defendants' suppression and concealment of information has been integral to the Enterprise's overarching scheme to defraud," [92] and that "[n]ot only have Defendants failed to publicly disclose all the information they internally held about their cigarettes, but they have also created false controversies about the existence of such information,"[93] Judge Kessler felt that an order containing disclosure requirements will "act as a powerful restraint on Defendants' future fraudulent conduct."[94] Judge Kessler noted: "Indeed, this remedy is exactly what Judge Williams, in his concurrence in the [Appeals Court's] disgorgement opinion, recommends that the District Court do under [RICO]: 'impose transparency requirements so that future violations will be quickly and easily identified.'" [95] Judge Kessler also noted that the Supreme Court "has recognized, in numerous other contexts over the past century, that compelled disclosures of information can prevent and restrain future frauds"[96] and "has authorized injunctive relief requiring defendants who have been found to have engaged in past fraud to make ongoing public disclosures to prevent similar fraudulent conduct in the future."[97]

Document Depositories and Websites

Under the MSA, the Defendants had been required to maintain document depositories in Minnesota and Guildford, England, as well as websites containing the same documents. Noting that the MSA's public disclosure requirements will end between 2008 and 2010, Judge Kessler stated: "[e]xtending those obligations, and subjecting all Defendants to similar, ongoing disclosure obligations, will work to prevent and restrain them from engaging in future frauds."[98] She explained that maintaining the document

depositories is a "first step towards preventing and restraining Defendants from engaging in future fraudulent activities."[99] She further asserted that "[d]ocument depositories will provide hard copies of documents to the public and thus will reduce Defendants' ability to suppress, conceal, or remove those documents from public access."[100]

Judge Kessler thus ordered the Defendants to continue maintaining their Minnesota and Guildford Depository obligations for an additional fifteen years – until September 1, 2021 – and to provide "meaningful tools to identify and analyze those documents" kept at these depositories.[101] "To that end," Kessler wrote, "both document depositories must include databases which search individual documents (rather than files) by multiple bibliographic fields, such as Bates number, date, author, title, etc. Defendants are to employ the twenty-nine bibliographic fields specified in the MSA."[102] The Defendants also must allow greater access to the Guildford Depository than that which is currently available.[103] She also ordered the Defendants to maintain "Internet Document Websites" at their expense until September 1, 2021.[104] The Defendants must update these websites with all current and future litigation-related documents and provide (and make the documents searchable by) bibliographic information for each document if it is not apparent on the document's face.[105]

Privilege Claims

The tobacco industry traditionally has attempted to withhold documents from litigation through claims of privilege, frequently improperly or fraudulently.[106] As a more egregious example, Judge Kessler cited the suit Minnesota's Attorney General brought against the tobacco industry to recoup Medicare expenditures for smoking-related illnesses, in which the tobacco Defendants "withheld some 230,000 documents (estimated to contain over 1000,000 pages) on grounds of privilege or confidentiality because of proprietary interest."[107] Judge Kessler stated that "[t]he purpose of document disclosure will be substantially frustrated unless the Court requires Defendants to provide complete and accurate information about any documents they withhold on grounds of privilege or other protection, including confidentiality."[108] Therefore, "[i]n order to provide the public with a reasonable method to determine which documents Defendants withhold on such grounds,"[109] Judge Kessler ordered that the Defendants must provide full bibliographic information, as well as a summary of the basis for the privilege or confidentiality assertion.[110] She said this is the "only way to guarantee transparency and ensure that Defendants do not engage in similar egregious conduct in the future."[111]

Disaggregated Marketing Data

The DOJ requested a remedy ordering that the tobacco industry provide it with disaggregated marketing data, which is defined as "data broken down by type of marking, brand, geographical region, number of cigarettes sold, advertising in stores, and any other category of data collected and/or maintained by or on behalf of each Defendant regarding their cigarette marketing efforts."[112] Currently, the tobacco Defendants already provide such information to the Federal Trade Commission as a matter of law.[113] Judge Kessler ordered the Defendants "to provide their disaggregated marketing data to the DOJ according to the same schedule on which they provide it to the [Federal Trade Commission]" until August 17, 2016.[114] This order, Judge Kessler stated, will "ensure transparency of Defendants' marketing efforts, particularly those directed towards youth, and what effect such efforts are having."[115] She also predicted that "[d]isclosure of this data will prevent and restrain Defendants from continuing to make false denials about their youth marketing efforts and will enable the DOJ to monitor such activities."[116] She did not, however, grant the DOJ's request that this information be made public, noting that "[b]ecause such information is clearly proprietary . . . it will not be made public, as the DOJ requests. Instead, it will be disclosed only to the Department of Justice, the enforcing agent for this decree."[117]

4. General injunctive provisions[118]

In addition to specific remedies, Judge Kessler ordered several general injunctive remedies. First, she permanently enjoined the Defendants from "committing any act of racketeering, as defined in 18 USC Section 1961(1), relating in any way to manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States."[119] Next, she permanently enjoined the Defendants from participating in the management and/or control of any of the affairs of the Council for Tobacco Research, the Tobacco Institute, the Center for Indoor Air Research, or any successor entities (which acted as research and trade associations for the tobacco industry), and from reconstituting the form or function of these groups.[120] Finally, noting that "this is a case involving fraudulent statements about the devastating consequences of smoking,"[121] Judge Kessler permanently enjoined the Defendants from "making, or causing to be made in any way, any material, false, misleading or deceptive statement or representation concerning cigarettes that is disseminated in the United States."[122]

APPENDIX B

Dissenting Opinion

The dissent's view of the disgorgement issue – which is similar to Judge Kessler's – is instructive to those wishing for a complete understanding of the differing ways that RICO's remedies provision can be interpreted. Like the majority, the dissent considered the relevant case law, the rules of statutory interpretation, and congressional intent.

A. Case law

The dissent quoted from *United States v. Turkette*,[123] a U.S. Supreme Court case citing RICO's legislative history, which stated, "Congress passed the Organized Crime Control Act of 1970, which included RICO, 'to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.'"[124]

Another case the dissent found to be instructive (and that the DOJ relied upon in its brief) is *Mitchell v. DeMario Jewelry*.[125] In that case, the DOJ invoked the court's jurisdiction to restrain violations of a section of the Fair Labor Standards Act ("FLSA") of 1938 that makes it unlawful for a covered employer to discharge or discriminate against an employee who files a complaint or institutes a proceeding under the Act. The Supreme Court concluded that "make whole" reimbursement for lost wages was a permissible remedy under the Act and affirmed the Court's broad equitable jurisdiction, stating "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."[126]

While the majority distinguished *Mitchell* by saying that in the civil RICO statute Congress did not grant broad equitable powers or jurisdiction for the court to order disgorgement,[127] the dissent stated, "*Mitchell* reinforces the proposition that district courts may order any equitable powers brought by the DOJ."[128] For emphasis, the dissent cited a later D.C. Circuit case holding that district courts may order disgorgement under sections of the Security Exchange Act that provide district courts with "'jurisdiction to issue writs of mandamus, injunctions, and orders commanding' compliance with the act and regulations made under it."[129] Finally, the dissent pointed to a number of cases in various other appellate circuits where the courts reasoned similarly and relied on the Supreme Court's decision in *Porter v. Warner Holding Co.* in interpreting various other federal legislation with restitution remedies.[130]

The dissent disagreed with the Defendants' assertion that the only way to prevent future RICO violations is to issue injunctions, and with the concurring judge's assertion that it is "'almost inconceivable' that disgorgement can change the incentives governing a defendant's future behavior given RICO's other provisions."[131] Once again, the dissent pointed to *Porter*, which it felt "indicated that disgorgement may encourage guilty Defendants to obey the law in the future" and in which the Supreme Court "concluded that '[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains.'"[132]

B. Rules of Statutory Interpretation

In interpreting the meaning of the statute, the dissent focused on the definition of the words "prevent and restrain," referring to their definitions in *Webster's Dictionary*:[133]

> "Prevent" has many meanings. The first nonarchaic one listed in *Webster's Third New International Dictionary* (1961) is "to deprive of power or hope of acting, operating, or succeeding in a purpose." "Restrain" can mean "to hold (as a person) back from some action, procedure, or course: prevent from doing something (as by physical or moral force or social pressure)" and "to limit or restrict to or in respect to a particular action or course: keep within bounds or under control."[134]

The dissent called the majority opinion's reasons for interpreting the statute as not allowing disgorgement "unpersuasive."[135] In contrast to the majority's position that the court's equitable jurisdiction was limited to only those three remedies explicitly stated in the statute or to remedies similar in nature to them, the dissent read the rules of statutory interpretation much differently.[136] The dissent doubted whether the canons of legislative intent "even apply here at all,"[137] and cited instances where the Supreme Court declined to use the canons altogether in interpreting the power of a statute and instead applied a more expansive interpretation of the law based on a reading of the statute's legislative intent.[138] The dissent emphasized that Congress had instructed that RICO "shall be liberally construed to effectuate its remedial purposes."[139]

In response to the Defendants' assertion that only injunctions provide the appropriate relief under Section 1964(a), the dissent said this "cuts against the statute's plain language – Congress would hardly have included divestment in its list of sample remedies if it thought injunctions alone would be adequate," and said that the Defendants' argument "ignores the equitable flexibility the statute was designed to preserve."[140] Alternatively, the dissent suggested that "[s]ometimes injunctive relief alone will make the most sense; other times, different equitable remedies or combinations of equitable remedies, perhaps including disgorgement, might prove as or more effective."[141] Ultimately, the decision as to whether disgorgement as a remedy is appropriate in this case is an issue of fact, not statutory interpretation, argued the dissent, echoing Judge Kessler's initial finding.[142] The dissent claimed "[f]or these determinations, we must rely in the first instance not on what we appellate judges can or cannot imagine will 'prevent or restrain,' but on tried and true methods of fact-finding before district courts – including cross-examination and presentation of contrary evidence."[143]

C. Congressional Intent

The dissent addressed the majority's concerns regarding the fact that other parts of RICO require a higher burden of proof or have a tighter statute of limitation than the civil RICO provisions – resulting in possible duplicative recovery. Stating that these concerns are relevant, the dissent nevertheless disagreed, stating that such concerns should not "stop a court from issuing equitable orders that accomplish the express statutory purpose of preventing and restraining RICO violations, whether the remedies are specifically listed in section 1964(a), e.g., divestment, or available as other 'appropriate orders.'"[144]

APPENDIX C

Commentators' Views on Key Issues

From the Appeals Court's Decision

Several commentators have weighed in on the appropriateness of the Appeals Court's decision limiting Judge Kessler's equitable powers under civil RICO to order disgorgement as an appropriate remedy. They also have examined the issue of statutory language interpretation in general as well as Congress's specific intent when it passed the RICO statute. Similar to an examination of the dissent's opinion, the commentators' opinions can be instructive to those wishing for a complete understanding of the differing ways that RICO's remedies provision can be interpreted.

A. Breadth of Courts' Equitable Powers to Fashion Remedies

In Favor of the Appeals Court's Decision: Matthew Spitzer

Commentator Matthew Spitzer expressed concern with disgorgement as a remedy for several reasons.[145] First, he felt that courts should not be allowed unfettered discretion to fashion remedies despite what appeared to him as clear limitations presented by the statute's language.[146] Spitzer argued that the court had no equitable power to order disgorgement under RICO because the DOJ in this case could not demonstrate a causal link between the harms it alleged and the relief it sought.[147] In other words, he felt that the DOJ was just pursuing the Defendants' ill-gotten gains as a pretext for fining them, which is not permissible under civil RICO, and stated that "the DOJ may not use RICO as a pretext to pursue broad quests for repayment in the name of public service."[148] Note that in sharp contrast to this commentator's opinion, Judge Kessler made clear in her final memorandum and order that the public interest overrides most concerns when it comes to the application of RICO and its remedies.[149]

Second, Spitzer asserted that "[w]ith RICO, using civil disgorgement as an enforcement tactic, though arguably a deterrent, causes more harm than good," because of three policy reasons: (1) it harms innocent parties; (2) it is too penalizing; and (3) there are better deterrents.[150] Spitzer's main concern was for the survival of those invested in the business itself, including the stakeholders, investors, and creditors.[151] Judge Kessler's findings of fact, however, make it clear that she considered none of the individual executives, board members, employees or tobacco industry lawyers blameless in the tobacco industry's extremely sophisticated scheme to defraud its customers. She stated, "[i]n short, Defendants have marketed and sold their lethal products with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted."[152]

Against the Appeals Court's Decision: Christopher McCall

Commentator Christopher McCall, on the other hand, argued that RICO Section 1964(a) "grants district courts the full range of their equitable authority – authority which includes the power to disgorge RICO defendants of ill-gotten gains."[153] McCall pointed to the Supreme Court precedent set in *Porter*[154] as well as the Second and Fifth Circuits in *Carson*[155] and *Richard*[156] respectively, all of which construed the statute as containing the possibility for disgorgement under the right circumstances.[157] McCall argued that Section 1964(a) "contains neither a 'clear and valid legislative command' nor a 'necessary and inescapable inference' restricting a district court's 'inherent equitable powers."[158] He expressed concern equal with that of Judge Kessler for the public interest in determining the scope of a court's equitable powers, stating, "bearing in mind the Supreme Court's admonition in *Porter* that, where the public interest is implicated – as it undoubtedly is in the DOJ's case against the tobacco companies – district courts' 'equitable powers assume an even broader and more flexible character.'"[159] Any argument that circumvents the public interest and attempts to place a narrow construction on the statute's "prevent and restrain" language "simply cannot carry the day," McCall argued.[160]

B. Interpretation of Legislation and Legislative Intent

In Favor of the Appeals Court's Decision: Matthew Spitzer

Spitzer argued for a strict statutory interpretation and said that although it is recognized that federal courts have broad equitable jurisdiction, it "must be founded upon specific language granted within statutory language."[161] His analysis followed the Appeals Court's example by ignoring the words "including, but not limited to" that appear twice in the statute's text.[162] In the RICO provision at issue, Spitzer claimed that the opportunity to fill in loopholes is limited to remedies that share similar goals (those which "prevent and restrain") to those enumerated.[163]

Against the Appeals Court's Decision: Christopher McCall, Ted Murphy & David Dobin

The place to look for Congress's intent in interpreting legislation is the statute's legislative history.[164] Regarding Congress's specific intent for the application of the remedies provisions under RICO, McCall argued that disgorgement can be a permissible remedy under an expansive reading of the statute because Congress stated that the statute "shall be liberally construed to effectuate its broad remedial purposes."[165] He asserted that district courts should have the authority under RICO to "craft equitable relief broad enough to do all that is necessary,"[166] and claimed that "[t]here is simply no evidence . . . that Congress intended to withhold or limit a district court's equitable jurisdiction in § 1964(a)."[167] On the contrary, McCall found a "'clear and valid legislative command' that Congress intended to grant district courts full equitable jurisdiction, not restrict it."[168] Analyzing the statute's specific language, McCall felt that the Appeals Court majority opinion reads all meaning out of the statutory provision that grants courts jurisdiction to issue "appropriate orders, including but not limited to" those three example enumerated in the statute.[169] He concluded that "[u]nless the words 'including but not limited to' are superfluous, then additional remedies beyond those enumerated must be permissible under 1964(a)."[170]

Commentators Ted Murphy and David Dobin took a more direct line to the source of Congress's intent in establishing the remedies available under RICO. They recounted testimony from one of the statute's original authors, G. Robert Blakey, Chief Counsel of the Subcommittee on Criminal Laws and Procedures of the United States Senate at the time of enactment.[171] Blakey is known as the "father of RICO."[172] On September 5, 2001, Blakey testified before the Senate Judiciary Committee on the topic of "RICO and Tobacco," and told the committee that "the legislative history indicates that [Section 1964(a)'s] language was not intended to confine the courts to purely forward-looking remedies."[173] This broad interpretation of RICO matches that of the Appeals Court dissent. In his testimony, Blakey further declared that the *Carson* case was "a sadly mistaken and misguided decision" that put unnecessary fetters upon disgorgement as a remedy.[174] Blakey stated that even if correctly decided, *Carson* was distinguishable with the DOJ's case against the tobacco industry because

> *Carson* involved a retiree who was not in a position to commit any more RICO predicate offenses. In the tobacco context, however, the predicate offenses and the RICO enterprise are still ongoing. . . *Carson*, moreover, is poorly reasoned; and it is, in fact, wrongly decided. Disgorgement is a well-settled remedy of traditional equitable powers. The legislative history of RICO indicates that its authors intended to grant courts at least as much authority as they possessed under antitrust statutes. . . . While § 1964(a) contains the phrase "prevent and restrain," the legislative history indicates that this language was not intended to confine the court to purely forward-looking remedies. The list is "illustrative, not exhaustive."[175]

Murphy and Dobin concluded that "[g]iven this history, some form of disgorgement should be available under civil RICO law." They contended that the Appeals Court's majority opinion "does not withstand scrutiny" because evidence demonstrated that the DOJ could have shown that the tobacco Defendants

were using past ill-gotten gains to finance future RICO violations and was likely to continue this pattern of behavior.[176]

About the Public Health Advocacy Institute

The Public Health Advocacy Institute (PHAI) is a public health law research and advocacy organization. PHAI is dedicated to protecting the health of the public. Our goal is to support and enhance public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law.

Endnotes

[1] *United States v. Philip Morris USA, Inc., et al.*, 116 F. Supp. 2d 131 (D.D.C. 2000).
[2] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (statute as a whole); § 1964(a) (equitable relief provision) (2000).
[3] Second Amended Complaint in *United States v. Philip Morris USA, Inc., et al.*, available at http://www.usdoj.gov/civil/cases/tobacco2/DOJ%20Web%20-%20Amended%20Complaint.pdf.
[4] *United States v. Philip Morris USA, Inc., et al.*, 321 F.Supp.2d 72, 77 (D.D.C. 2004).
[5] 18 U.S.C. § 1964(a).
[6] *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d 1190 (D.C. Circuit 2005).
[7] *United States v. Philip Morris USA, Inc., et al.*, 2005 U.S. App. LEXIS 6733 (April 19, 2005); *United States v. Philip Morris USA, Inc., et al.*, 2005 U.S. App. LEXIS 6734 (April 19, 2005).
[8] *United States v. Philip Morris USA, Inc., et al.* 546 U.S. 960 (2005).
[9] *United States v. Philip Morris USA, Inc., et al.* 449 F.Supp.2d 1 (D.D.C. 2006).
[10] 18 U.S.C. § 1964(a) (emphasis added).
[11] *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d 1190, 1193 (D.C. Circuit 2005).
[12] *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995).
[13] *Id*. at 1182.
[14] *Id*.
[15] *United States v. Philip Morris USA, Inc., et al.*, 321 F.Supp.2d 72, 77 (D.D.C. 2004).
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id.* at 78, *quoting Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946) (emphasis added).
[20] *Id.*
[21] *Id.*
[22] *Id*. at 81.
[23] *Id*.
[24] *Id*. at 82.
[25] *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d 1190 (D.C. Circuit 2005).
[26] *See U.S. v. Philip Morris USA, Inc.*, 2004 WL 2075685 (Sept. 16, 2004) (Appellants' Reply Brief).
[27] *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d at 1197.
[28] *Id.* at 1198.
[29] *Id.* at 1200.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*, *citing* 18 U.S.C. § 1963(a).
[35] *Id., citing* 18 U.S.C. § 1964(c).
[36] *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).
[37] *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d 1190, 1201 (D.C. Circuit 2005).
[38] *Id., citing Reves v. Ernst & Young,* 507 U.S. 170 (1993).
[39] *Id.*
[40] *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995); *Richard v. Hoechst Celanese Chemical Group*, 355 F.3d 345, 355 (5th Cir. 2003).
[41] *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d at 1201, *quoting Carson*, 53 F.3d at 1182.
[42] *Id., quoting Richard v. Hoechst*, 355 F.3d at 355.
[43] For a discussion of the court's reasoning in *Richard v. Hoechst*, see Christopher L. McCall, *Equity Up In Smoke: Civil RICO, Disgorgement, and United States v. Philip Morris*, 74 FORDHAM L. REV. 2461, 2487-88 (2006).
[44] *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d 1190, 1201 (D.C. Circuit 2005).
[45] *United States v. Philip Morris USA, Inc., et al.*, 2005 U.S. App. LEXIS 6733 (April 19, 2005).
[46] *United States v. Philip Morris USA, Inc., et al.*, 2005 U.S. App. LEXIS 6734 (April 19, 2005).
[47] *United States v. Philip Morris USA, Inc., et al.*, 546 U.S. 960 (2005).
[48] *United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp. 2d 1, 921 (D.D. C. 2006).
[49] *Id.*
[50] *Id* .at 921-22.
[51] *Id.* at 28.
[52] *Id*. at 933.
[53] *United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp. 2d at 936.
[54] *Id.*

[55] *Id.*
[56] *Id.* at 933, 936.
[57] *Id.* at 28.
[58] *Id*. at 933, 937.
[59] *Id.* at 933.
[60] *Id.* at 933-934.
[61] *Id.* at 934. The DOJ based its figure on the fact that $3,000 is the upper limit on the lifetime proceeds a Defendant could expect to earn from making its brands appealing to an individual within the demographic target. *Id.*
[62] *Id.*
[63] *Id.* at 932.
[64] *Id.* at 929.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 910-11.
[68] *Id.* at 913.
[69] *U.S. v. Philip Morris*, Nos. 06-5267 (D.C. Cir.) (Oct. 31, 2006) (Order Granting Defendants' Emergency Motion to Stay).
[70] See American Cancer Society, *Smokers Confused About Effect of Nicotine, "Light" Cigarettes*, Nov. 17, 2005, available at http://www.cancer.org/docroot/NWS/content/NWS_2_1x_Smokers_Confused_About_Effect_of_Nicotine_Light_Cigarettes.asp.
[71] *United States v. Philip Morris USA, Inc., et al.*, 546 U.S. 960 (2005).
[72] *See U.S. v. Philip Morris USA, Inc., et al*., No. 99-CV-02496GK (U.S. Dist. Ct., D.C.) (August 17, 2006), Final Opinion [hereinafter *Opinion*] at pp. 1627-1631; Final Judgment and Remedial Order [hereinafter *Order*] at pp. 3-4.
[73] *United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp. 2d 1, 430 (D.D.C. 2006).
[74] *Id.* at 924.
[75] *Id.* at 925.
[76] *Id.* at 938.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 925.
[80] *See* Opinion, *supra* note 72, pp. 1631-1636; Order, *supra* note 72, pp. 4-9.
[81] *United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp. 2d 1, 925 (D.D.C. 2006).
[82] *See* Allan M. Brandt, THE CIGARETTE CENTURY, 170-172 (2007).
[83] *Id.*
[84] *United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp. 2d at 925-26.
[85] *Id.* at 926.
[86] *Id.* at 927.
[87] *Id.*
[88] *Id.* at 928.
[89] *Id.* at 926.
[90] *Id.* at 928.
[91] *See* Opinion, *supra* note 72, pp. 1636-1643; Order, *supra* note 72, pp. 10-17.
[92] *United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp. 2d 1, 929 (D.D.C. 2006).
[93] *Id.*
[94] *Id.* at 928-29.
[95] *Id.* at 929, c*iting United States v. Philip Morris USA, Inc., et al.*, 396 F.3d 1190, 1203 (D.C. Circuit 2005) (Williams, J., concurring).
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 929-30.
[101] *Id.* at 930.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 930-31.
[105] *Id.*
[106] *See* Stanton A. Glantz, et al., THE CIGARETTE PAPERS, chapters 7 & 8 (1998).
[107] *United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp. 2d 1, 931 (D.D.C. 2006), *citing State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 682 (Minn. Ct. App. 2000). *See also* Michael V. Ciresi, Roberta B.

Walburn & Tara D. Sutton, *Decades Of Deceit: Document Discovery In The Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999) (summarizing the tobacco industry's historic approach to litigation and withholding documents, as well as the Minnesota litigation team's successful approach to discovery).
[108] *United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp. 2d at 931.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 932.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *See* Opinion, *supra* note 72, pp. 1643-1644; Order, *supra* note 72, pp. 2-3.
[119] *United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp. 2d 1, 938 (D.D.C. 2006).
[120] *Id.*
[121] *Id.* at 933.
[122] *Id* .at 932-33.
[123] *U.S. v. Turkette*, 452 U.S. 576, 589 (1981).
[124] *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d 1190, 1207 (D.C. Circuit 2005), *quoting* U.S. v. *Turkette,* 452 U.S. at 576, which in turn was quoting Pub.L. No. 91-452, 84 Stat. 922, 923 (1970).
[125] *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960).
[126] *Id*.
[127] *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d at 1199.
[128] *Id.* at 1219.
[129] *Id.*, *quoting SEC v. First City Financial Corp.*, 890 F.2d 1215 (D.C.Cir. 1989).
[130] *Id.* (citations omitted).
[131] *Id.* at 1225 (citing concurring opinion at 1204).
[132] *Id.*, *quoting Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946).
[133] *Id.* at 1222.
[134] *Id.*, *quoting Webster's Third New International Dictionary* (1961).
[135] *Id.* at 1223.
[136] *Id.*
[137] *Id.* at 1224.
[138] *Id.* (citations omitted).
[139] *Id.*
[140] *Id.* at 1225.
[141] *Id.* at 1226.
[142] *Id.*
[143] *Id.*
[144] *Id.* at 1224.
[145] Matthew Spitzer, *What's All the Racket?: The Use of RICO Disgorgement, the Circuit Split it Caused, and its Impropriety*, 21 ST. JOHN'S J. LEGAL COMMENT 837 (2007).
[146] *Id*. at 854 (stating, "[t]he last moor of jurisprudential interpretation is that there must be a firm causal link between the party being sued and the injury for an award of damages).
[147] *Id.* at 854-855.
[148] *Id.* at 855.
[149] *United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp. 2d 1, 921, 922 (D.D.C. 2006).
[150] Spitzer, *supra* note 145, at 859-60.
[151] *Id.* at 861.
[152] *United States v. Philip Morris USA, Inc., et al.*, 449 F. Supp.2d at 28.
[153] McCall, *supra* note 43, at 2487-88.
[154] *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).
[155] *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995).
[156] *Richard v. Hoechst Celanese Chemical Group*, 355 F.3d 345, 355 (5th Cir. 2003).
[157] McCall, *supra* note 43, at 2503-2504.
[158] *Id.* at 2504, *quoting United States v. Philip Morris USA, Inc., et al.*, 396 F.3d 1190 (D.C. Cir. 2005).
[159] *Id.* at 2505-06, *quoting Porter*, 328 U.S. at 398.
[160] *Id.* at 2506.
[161] Spitzer, *supra* note 145, at 853.
[162] 18 U.S.C. § 1964(a).

[163] Spitzer, *supra* note 145, at 850.
[164] McCall, *supra* note 43, at 2504.
[165] *Id.* at 2506 and n. 346, *quoting* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 947 (codified as amended in scattered sections of 18 U.S.C.).
[166] *Id.* at 2504 and n. 347, *quoting United States v. Philip Morris USA, Inc., et al.*, 321 F. Supp.2d 72, 77 (D.D.C. 2004) (citing S. Rep. No. 91-617, at 160 (1969).
[167] *Id.* at 2504.
[168] *Id.*, *citing Sedima, S.P.R.L. v. Imrex Co*., 473 U.S. 479, 497-98 (1985).
[169] *Id.*
[170] *Id.* at 2505.
[171] Ted Murphy and David Dobin, *Disgorgement Review: The D.C. Circuit's Decision in United States v. Philip Morris*, 74 GEO. WASH. L. REV. 660, 673-74 (2006).
[172] *Id.* at 674, *citing* Marcia Coyle, RICO Trial Decision Looms, High Court Action and Settlement Talks Cloud Picture, Nat'l L.J., Aug. 8, 2005, at 1, 17.
[173] *Id.*, *quoting* Statement of G. Robert Blakey, RICO and Tobacco: Hearing on Department of Justice Oversight of Tobacco Litigation Before the S. Comm. On Judiciary, 107th Cong. (2001), 2001 WL 1013862, [hereinafter Blakey], available at http://judiciary.senate.gov/oldsite/te090501f-blakey.htm.
[174] Blakely, *supra* note 173, at Section (c) ("Remedies: Disgorgement").
[175] *Id.*, *citing* RICO legislative history at 115 Cong. Rec. 9567 (1969) and S. Rep. No. 91-617 at 160.
[176] Murphy and Dobin, *supra* note 171, at 674.