RICO to the Rescue?

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When a successful trial verdict was obtained in 2006, the Department of Justice's civil RICO[1] claims against Big Tobacco became a driving force for changing the cigarette industry. The ruling was a painful one for the purveyors of a seductive habit that brought years of addiction and horrific health consequences. The U.S. District Court Judge in Washington, D.C. found that the industry had violated RICO by coordinating their public relations, research, and marketing efforts to falsely deny the adverse health effects of smoking, the addictiveness of nicotine, their manipulation of the nicotine content of cigarettes, and their marketing that targeted youth as new smokers. The court also found that Philip Morris and associated companies had suppressed information about the dangers of smoking in order to maximize profit and enhance the market for cigarettes, and they had pursued this strategy for as long as 50 years. But it was the pretrial discovery process, during the pursuit of those civil claims, that transformed an innovative theory of liability into compelling evidence to support near universal condemnation of Big Tobacco's callous pursuit of profit at the expense of customer health. Internal documents obtained during the discovery process proved that the defendants knew of the health risks of smoking while issuing completely contradictory public statements. We may be about to witness a similar reckoning with regards to Big Tobacco's modern cousin, electronic cigarettes.

The class-action litigation against e-cigarette manufacturer JUUL Labs, Inc. ("JUUL"), specifically the various directors and officers of JUUL and of Altria, a nicotine supplier that was also part of the historic Philip Morris case, has been proceeding through the U.S. District Court in San Francisco. On Tuesday, U.S. District Judge William H. Orrick, III denied the defendants' motion to dismiss the RICO claim for failing to sufficiently state a claim. The denial is noteworthy because civil RICO claims are generally held to a very high burden when it comes to the court's "gatekeeping" role on a motion to dismiss (i.e., dismissing weak or frivolous claims). This is primarily because the proof of a criminal enterprise is surprisingly difficult to establish, and the treble damages offered by a successful civil RICO claim is a siren's song for misplaced conspiracy theories and desperate attempts to elevate routine fraud allegations into an organized crime story. Sensational, but unproven, civil RICO claims are common to the point of giving federal judges a quite jaundiced view of the claims in general. Ultimately, a very high proportion of civil RICO claims do not survive the Federal Rule of Civil Procedure 12(b)(6) motion for dismissal that is typically brought early into the litigation, prior to any meaningful exchange of discovery.

Motions to dismiss RICO claims tend to focus on the sufficiency of the "criminal enterprise," whether underlying predicate crimes can be established, and how the allegations really only amount to a "routine fraud" case, rather than something akin to an organized crime prosecution. Not too long ago a U.S. District Court Judge in Manhattan explored the data of RICO dismissals, ultimately referring to RICO treble damage cases as a "mirage" in most instances:

[1] Racketeering Influenced Corrupt Organizations

> A survey of 145 appellate decisions nationwide rendered from 1999 to 2001 in connection with RICO civil actions … revealed that about 70 percent of the cases were finally disposed of on defendants' motions to dismiss or for summary judgment, and that in about 80 percent of those in which the appellate Court resolved a RICO issue the ruling was favorable to defendants. Of the 9.6 percent of the suits in which plaintiffs obtained a favorable verdict after a jury trial, only 25 percent of the judgments were affirmed on appeal. In consequence, plaintiffs achieved a final victory in only three of 145 cases—a final success rate of a mere two percent…
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> This Court conducted a rough survey of the 145 cases filed in the Southern District of New York from 2004 through 2007 in which the complaints asserted civil RICO claims. The study revealed that of the 36 cases that to date have been resolved on the merits, all resulted in judgments against the plaintiffs. Thirty were dismissed on defendants' motions pursuant to Fed.R.Civ.P. 12(b)(6), three dismissed by the district court *sua sponte* for lack of merit, and three dismissed on summary judgment for the defendants.[2]

The denial of the motion to dismiss in the JUUL case has serious practical implications. The survival of the claim means the parties soon will engage in the discovery process. This is the potential gold-mine moment for the plaintiffs, not unlike the Big Tobacco litigation of yesteryear. The current claim is that directors and other officials took a very hands-on approach to marketing decisions by JUUL. This includes responding to concerns that JUUL was targeting children and misleading the public in general about the potency and addictive nature of the nicotine component of e-cigarettes. If, and it is a big "if," the discovery process turns up callous admissions of the health consequences and/or heartless ploys to attract and hook teenagers to their product, then this litigation may morph into something very similar to the Philip Morris case. While DOJ's success was more about forcing disclosures (like warning labels) and industry transparency about health risks, the Court's findings—and the discovery-produced documents in support thereof—spawned years of successful private litigation against the cigarette industry. The JUUL litigation is more like those follow-up cases, seeking damages not declarations.

The discovery obtained by JUUL from the various plaintiffs may be tactically helpful – it can raise causation issues for the individual complainants, explore the extent of harm they have suffered, and determine whether inconsistent statements exist that can be used to impeach the credibility of the plaintiffs. The discovery that the plaintiffs can get from JUUL, however, has the potential to be a strategic earthquake—forcing the defense to consider a devastating settlement figure if internal communications approach the level of Philip Morris executives in the RICO case. If executives from JUUL or Altria left a paper trail of deception and profiteering, while hooking minors to vaping their flavored smoke e-cigarettes, expect either plaintiff filings that grab the headlines or a quiet, but lucrative, settlement being pitched by the defendants. Either way, the ongoing RICO claim is one to watch.

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[2] *Gross v. Waywell*, 628 F.Supp.2d 475 (S.D.N.Y. 2009)(internal citations omitted).