[ORAL ARGUMENT NOT YET SCHEDULED]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5267 (Consolidated With Nos. 06-5268, 06-5269, 06-5270, 06-5271, 06-5272, 06-5332, 06-5367, 07-5102, and 07-5103)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

TOBACCO-FREE KIDS ACTION FUND, *et al.*,

Intervenors,

v.

PHILIP MORRIS USA INC., *et al.*,

Defendants-Appellants.

On Appeal From the United States District Court for the District of Columbia

---

PROOF BRIEF FOR DEFENDANT-APPELLANT ALTRIA GROUP, INC.

Murray R. Garnick
David S. Eggert
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Guy Miller Struve
Charles S. Duggan
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4192
Facsimile: (212) 450-3192

Attorneys for Defendant-Appellant Altria Group, Inc.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Joint Brief for Defendants-Appellants ("Joint Defense Brief").

B. Rulings Under Review. References to the rulings under review appear in the Joint Defense Brief.

C. Related Cases. All related cases are identified in the Joint Defense Brief.

D. Certificate Pursuant to Circuit Rule 26.1. Altria Group, Inc. ("Altria") has no parent company, and no publicly held company has a 10% or greater ownership interest in it. Altria is a holding company which does not manufacture, sell, or distribute cigarettes or any other product.

STATEMENT REGARDING ORAL ARGUMENT

Altria respectfully requests oral argument.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

GLOSSARY vi

JURISDICTIONAL STATEMENT 1

ISSUES PRESENTED 1

STATUTES 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

POINT I – The Government Failed to Introduce Legally Sufficient Evidence That Altria – a Holding Company Which Does Not Manufacture, Sell, or Distribute Cigarettes – Violated the RICO Statute 3

A. The Government Failed to Introduce Legally Sufficient Evidence of the Nine Predicate Acts of Mail Fraud That It Alleged Against Altria 3

B. The Government's Proof as to Other Elements of Its Claim Against Altria Was Also Insufficient 6

POINT II – The Government Cannot Repair the Gap in Its Proof by Arguing That Altria Is Liable for Alleged RICO Violations by PMUSA 7

A. A Parent Company Is Not Liable for Alleged RICO Violations of a Subsidiary Absent Piercing of the Corporate Veil 8

PAGE

B. There Is No Evidence to Support a Finding of Domination Sufficient to Pierce the Corporate Veil. 9

POINT III – There Is No Reasonable Likelihood That Altria Will Violate RICO in the Future. 11

CONCLUSION. 12

TABLE OF AUTHORITIES

PAGE

Cases

Association of American Physicians and Surgeons, Inc. v. Clinton, 187 F.3d 655 (D.C. Cir. 1999) 4

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) 8

*De Jesus v. Sears, Roebuck & Co., 87 F.3d 65 (2d Cir.), cert. denied, 519 U.S. 1007 (1996) 8, 10

Holbrook v. Reno, 196 F.3d 255 (D.C. Cir. 1999) 4

Lowell Staats Mining Co. v. Pioneer Uravan, Inc., 878 F.2d 1259 (10th Cir. 1989) 10-11

*Morin v. Trupin, 711 F. Supp. 97 (S.D.N.Y. 1989) 4, 5

*Nolan v. Galaxy Scientific Corp., 269 F. Supp. 2d 635 (E.D. Pa. 2003) 4, 6

*Paul S. Mullin & Assocs., Inc. v. Bassett, 632 F. Supp. 532 (D. Del. 1986) 4, 5

Red Lake Band of Chippewa Indians v. United States, 936 F.2d 1320 (D.C. Cir. 1991) 4

*Reves v. Ernst & Young, 507 U.S. 170 (1993) 7

*Spiegel v. Continental Illinois Nat'l Bank, 609 F. Supp. 1083 (N.D. Ill. 1985), aff'd, 790 F.2d 638 (7th Cir.), cert. denied, 479 U.S. 987 (1986) 4

---

* Authorities upon which we chiefly rely are marked with asterisks.

PAGE

*United States v. Bestfoods, 524 U.S. 51 (1998) 8-9, 10

United States v. Dale, 991 F.2d 819 (D.C. Cir. 1993) 7

United States v. Lo, 231 F.3d 471 (9th Cir. 2000) 7

*United States v. Pendergraft, 297 F.3d 1198 (11th Cir. 2002) 4

Statutes and Rules

18 U.S.C. § 1341 7

18 U.S.C. § 1962(c) 7

P.L. 103-322, § 250006, 108 Stat. 1796, 2087 (1994) 7

Other Authorities

Manual for Complex Litigation (Fourth) (2004) 5

GLOSSARY

The abbreviations used in this brief are defined in the Glossary to the Joint Defense Brief.

JURISDICTIONAL STATEMENT

Altria adopts the Jurisdictional Statement in the Joint Defense Brief.

ISSUES PRESENTED

Altria adopts by reference the arguments in the Joint Defense Brief. In addition, Altria presents the following issues:

1. Did the government introduce evidence legally sufficient to support a finding that Altria – a holding company which does not manufacture, sell, or distribute cigarettes – violated RICO by committing the nine predicate acts of mail fraud pleaded by the government?

2. Can the judgment against Altria be upheld on the ground that Altria "controlled" PMUSA, where the government both disavowed any attempt and introduced no evidence to meet the legal standard necessary to pierce the corporate veil?

3. Is there any evidence that Altria is reasonably likely to violate the RICO statute in the future?

STATUTES

Pertinent statutes are set forth in the Joint Defense Brief.

STATEMENT OF FACTS

Altria (formed in 1985 and formerly known as Philip Morris Companies Inc.) is a publicly-owned holding company with only 35 to 40 employees. Op. at 323 n.13, TT 11184-85. Altria does not manufacture, sell, or distribute cigarettes or any other product. Id.

Although Altria owns the shares of PMUSA as well as other companies, it does not manage the day-to-day affairs of PMUSA and supervises PMUSA in a manner that is typical for a holding company. TT 11188-93. PMUSA has its own separate board of directors and senior management team, which make business decisions on its behalf. TT 11189-91.

SUMMARY OF ARGUMENT

1. RICO does not apply to a lawyer's efforts on behalf of a client unless the lawyer acted with specific intent to defraud. Here, the nine predicate acts alleged against Altria involved lawyers representing their clients, and there was no evidence or finding that any lawyer had a specific intent to defraud.

2. Altria cannot be held liable based on "control" of PMUSA because there is no evidence or finding sufficient to meet the legal standard for piercing the corporate veil – a standard which the government avowedly did not try to meet.

3. The district court did not find any ongoing RICO violations by Altria and there is no evidence of a reasonable likelihood of future violations.

ARGUMENT

POINT I

The Government Failed to Introduce Legally Sufficient Evidence That Altria – a Holding Company Which Does Not Manufacture, Sell, or Distribute Cigarettes – Violated the RICO Statute.

A. The Government Failed to Introduce Legally Sufficient Evidence of the Nine Predicate Acts of Mail Fraud That It Alleged Against Altria

Of the 148 RICO predicate acts pleaded by the government, only nine were alleged against Altria. When the government belatedly tried to add 650 additional predicate acts (see Jt. Def. Br. at 7-8), none was alleged against Altria. The case against Altria must be dismissed because the government failed to introduce legally sufficient evidence of the nine predicate acts it alleged against Altria, both on the critical issue of specific intent to defraud

and on the other issues discussed in Point I.B below.[1]

The nine predicate acts alleged against Altria were all statements by lawyers. None of them was made to the public or to consumers. RICO does not apply to a lawyer's efforts on behalf of a client unless the lawyer acted with specific intent to defraud. See, e.g., United States v. Pendergraft, 297 F.3d 1198, 1205, 1208 (11th Cir. 2002); Nolan v. Galaxy Scientific Corp., 269 F. Supp. 2d 635, 643 (E.D. Pa. 2003); Morin v. Trupin, 711 F. Supp. 97, 105-06 (S.D.N.Y. 1989); Paul S. Mullin & Assocs., Inc. v. Bassett, 632 F. Supp. 532, 540 (D. Del. 1986); Spiegel v. Continental Illinois Nat'l Bank, 609 F. Supp. 1083, 1088-90 (N.D. Ill. 1985), aff'd on other grounds, 790 F.2d 638, 649 n.11 (7th Cir.), cert. denied, 479 U.S. 987 (1986). Any other rule "would chill an attorney's efforts and duty to represent his or her client in the course of pending litigation." Spiegel, 609 F. Supp. at 1089.

Here, there was no evidence or finding that any of the lawyers involved had a specific intent to defraud. Four of the alleged predicate acts –

---

[1] Findings based upon legally insufficient evidence or legal error are clearly erroneous, e.g., Association of American Physicians and Surgeons, Inc. v. Clinton, 187 F.3d 655, 660-61 (D.C. Cir. 1999); Red Lake Band of Chippewa Indians v. United States, 936 F.2d 1320, 1324-25 (D.C. Cir. 1991), and this Court reviews the sufficiency issue de novo. E.g., Holbrook v. Reno, 196 F.3d 255, 259 (D.C. Cir. 1999).

69, 78, 80, and 95 – related to Altria in-house attorneys' review of scientific research funded for litigation purposes. Op. App. III at 16, 18-19, 22. It is not unusual for scientific research to be performed for possible use in litigation. See, e.g., Manual for Complex Litigation (Fourth) § 23.274 (2004). There is no evidence or finding that any of the Altria lawyers believed the research projects were fraudulent or scientifically unsound. The record is to the contrary. See, e.g., US Ex. 75,121 at 2015002947 ("Dr. Sterling and colleagues have published 24 scientific papers in respected research journals."). Indeed, articles by two of the three researchers were cited in Surgeon General reports. See Ex. JD-090124 at 19, 46, 52.

Predicate acts 71, 72, 74, and 75 consisted of letters written by an in-house employment lawyer, Eric Taussig, to two former PMUSA scientists, demanding that they comply with confidentiality agreements with PMUSA. Op. App. III at 17-18; see US Exs. 21,916, 22,772, 44,603. "[T]he threat by an attorney to bring a lawsuit," however, "is not a predicate RICO act." Morin, 711 F. Supp. at 106; see also, e.g., Paul S. Mullin & Assocs., 632 F. Supp. at 540 ("The Court finds absurd plaintiffs' apparent suggestion that a lawyer's act in posting a letter which states a client's legal position in a dispute can constitute mail fraud."). This is particularly true here because it

is undisputed that the confidentiality agreements were valid and binding, and there is no evidence or finding that Taussig acted with any intent to defraud. See TT 9035-37.

Predicate act 92 was a 1991 letter from Altria attorney Charles Wall to counsel for various European tobacco companies discussing the use of the term "risk factor" to convey that cigarette smoking had a statistical association with lung cancer, although a biological mechanism of causation had yet to be determined. Op. App. III at 21; see US Ex. 22,725. Such discussions of positions among counsel do not constitute RICO predicate acts. See, e.g., Nolan, 269 F. Supp. 2d at 643 ("This court is unwilling to expand RICO liability for mail fraud in such a dramatic fashion as to include litigation papers and pre-litigation statements of legal position."). There is no evidence or finding that Wall intended to defraud anyone; indeed, his letter emphasized that "[a]nyone using the ['risk factor'] language must be prepared to explain its meaning and scientifically support its usage." US Ex. 22,725 at 2023235512.

B. The Government's Proof as to Other Elements of Its Claim Against Altria Was Also Insufficient

No Proof of Mailing. For predicate acts 69, 78, 80, 92, and 95, the government failed to introduce any evidence that the letters in question were

sent by mail (as opposed to pouch or courier, which were not then covered by the mail fraud statute, see P.L. 103-322, § 250006, 108 Stat. 1796, 2087 (1994), amending 18 U.S.C. § 1341). Absent such proof, these predicate acts must fall. See, e.g., United States v. Lo, 231 F.3d 471, 476-77 (9th Cir. 2000).

No Proof of Operation or Management. The alleged predicate acts involved lawyers acting as lawyers, not persons engaged in the operation or management of an enterprise, as Section 1962(c) requires. See Reves v. Ernst & Young, 507 U.S. 170, 177-79 (1993).

No Proof of Conspiracy. On its RICO conspiracy claim, the government failed to introduce the required evidence that Altria knowingly joined the alleged conspiracy with the specific intent to defraud. See, e.g., United States v. Dale, 991 F.2d 819, 851 (D.C. Cir. 1993).

POINT II

The Government Cannot Repair the Gap in Its Proof by Arguing That Altria Is Liable for Alleged RICO Violations by PMUSA.

The government and the district court disavowed any attempt to pierce the corporate veil between Altria and its subsidiary, PMUSA. Op. at 1547 n.22 ("The United States does not seek to pierce Altria's corporate veil or to

hold Altria liable under some form of agency theory."). To the extent that the district court relied on some theory of "control,"[2] it erred because (1) as a matter of law, a parent company is not subject to RICO liability for acts of a subsidiary absent proof meeting the high standard for piercing the corporate veil, and (2) there is no such proof here.

A. A Parent Company Is Not Liable for Alleged RICO Violations of a Subsidiary Absent Piercing of the Corporate Veil

As a matter of law, a parent company is subject to RICO liability for the acts of a subsidiary only on a showing of domination sufficient to pierce the corporate veil. De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 69-70 (2d Cir.), cert. denied, 519 U.S. 1007 (1996). Since the Government introduced no evidence sufficient to pierce the corporate veil, Altria cannot be liable based on PMUSA's alleged violations. See also, e.g., Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001).

In United States v. Bestfoods, 524 U.S. 51, 61, 62 (1998), the Supreme Court stated: "It is a general principle of corporate law deeply ingrained in

---

[2] The district court's opinion was ambiguous on this point: it stated that "Altria's liability in this case stands on its own" (Op. at 1599), but also suggested that Altria's "control" made it liable for unspecified RICO violations by PMUSA. See Op. at 1545, 1546, 1547 n.22, 1601.

our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries [absent piercing the corporate veil] . . . . [N]othing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible." (Citations and quotation marks omitted.) The same is true of RICO.

B. There Is No Evidence to Support a Finding of Domination Sufficient to Pierce the Corporate Veil

There is no evidence to support a finding (even if one had been made) of domination of PMUSA by Altria sufficient to pierce the corporate veil. Moreover, there is no evidence linking any "control" by Altria to any alleged RICO violations by PMUSA.

The district court's assertions that Altria controlled the policies and statements of PMUSA on smoking and health (Op. at 1546, 1599) are not supported by its record citations (see, e.g., 5/23/02 Berlind Dep. at 8-10, 5/30/03 John Hoel Dep. at 60-63, 67, 166-67) and are refuted by the uncontradicted testimony in the record. See, e.g., Parrish WD at 9, 6/13/02 Szymanczyk Dep. at 163-64. The district court referred to two intercompany committees (the Scientific Research Review Committee and Worldwide Scientific Affairs) (Op. at 1545-47), but these committees had no Altria members, and none of the evidence cited by the district court referred to

Altria. The district court also mentioned the Worldwide Regulatory Affairs group (Op. at 1547), but cited no evidence that it had anything to do with any alleged RICO violations.

The district court said that former Altria CEO Geoffrey Bible testified that he was the "ultimate authority" on subsidiaries' statements on smoking and health (Op. at 478-79, 1600), but in fact Bible's testimony was that Altria had the ultimate (albeit unexercised) power to remove officers of the subsidiaries (8/22/02 Bible Dep. at 83-86) – a power that any parent company has and that does not render the parent liable for the acts of its subsidiaries. E.g., De Jesus, 87 F.3d at 69 ("Actual domination, rather than the opportunity to exercise control, must be shown." (Citations and quotation marks omitted)).

Similarly, the district court said that Altria "controlled" the services rendered by its service subsidiary Altria Corporate Services, Inc. to PMUSA and other operating subsidiaries "through the reporting relationship" (Op. at 1599; see also id. at 323 n.13, 1546), but reporting relationships (or even overlapping officers and employees) do not justify disregarding separate corporate entities. E.g., Bestfoods, 524 U.S. at 68-70; Lowell Staats Mining

Co. v. Pioneer Uravan, Inc., 878 F.2d 1259, 1263-64 (10th Cir. 1989).[3]

POINT III

There Is No Reasonable Likelihood That Altria Will Violate RICO in the Future.

There is also no basis for a finding that Altria is reasonably likely to violate RICO in the future. The section of the district court's opinion devoted to this issue does not even mention Altria. See Op. at 1601-08. There is no evidence or finding that Altria today – a holding company with only 35 to 40 employees – is associated with any RICO enterprise, is making any fraudulent statements, or is committing any RICO violations.

Nor can the district court's statements elsewhere in its opinion supply the missing evidence. The district court noted that Altria is not a signatory to the MSA, and (without any legally sufficient evidence) attributed to Altria a motor car racing sponsorship by its subsidiary Philip Morris International,

---

[3] The district court's intimation that Altria might be liable based on the past activities of TI and CTR (Op. at 1600-01) is also unsupportable. As alleged in the government's pleadings and as listed in Appendix III to the district court's Final Opinion, only the cigarette manufacturers – not Altria – were alleged to be liable for the alleged racketeering acts of TI and CTR. The district court's finding of liability for the acts of TI and CTR was likewise limited to "the cigarette company Defendants." Op. at 1561.

Inc. Op. at 1610, 1612. But there is nothing surprising in the fact that Altria – which does not manufacture, sell, or distribute cigarettes – is not a party to the MSA, and a racing sponsorship (even if it were correctly attributed to Altria) is not a RICO violation.

CONCLUSION

The judgment against Altria Group, Inc. should be vacated and the action against it dismissed.

Dated: August 10, 2007

Respectfully submitted,

Murray R. Garnick
David S. Eggert
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Guy Miller Struve
Charles S. Duggan
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4192
Facsimile: (212) 450-3192

Attorneys for Defendant-Appellant Altria Group, Inc.

CERTIFICATE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C)(i)

I hereby certify that this brief contains 2,403 words (exclusive of the certificate as to parties, rulings, and related cases, the table of contents, the table of authorities, the glossary, and this certificate), and that the brief (taken together with the other briefs for Defendants-Appellants) therefore complies with the word limit set forth in this Court's scheduling order.

Guy Miller Struve

CERTIFICATE OF SERVICE

The foregoing Proof Brief for Defendant-Appellant Altria Group, Inc. was served on counsel for the United States of America and the Intervenors on August 10, 2007 by hand delivery to the following:

Mark R. Freeman
Appellate Staff, Civil Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7228
Washington, D.C. 20530
(202) 514-5714

Attorney for the United States of America

Katherine A. Meyer
Howard M. Crystal
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009
(202) 558-5206

Attorneys for Intervenors

and was served on August 10, 2007 by U.S. Mail to the following:

Murray R. Garnick
David S. Eggert
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for Defendant-Appellant
Philip Morris USA Inc.

Robert F. McDermott, Jr.
Michael A. Carvin
Peter J. Biersteker
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939

Attorneys for Defendant-Appellant
R. J. Reynolds Tobacco Company

David E. Mendelson
Kirkland & Ellis LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 879-5000

David M. Bernick
Stephen R. Patton
Renee D. Honigberg
Kirkland & Ellis LLP
200 East Randolph Drive, Suite 5900
Chicago, Illinois 60601
(312) 861-2000

Attorneys for Defendant-Appellant
Brown & Williamson Holdings, Inc.

Michael B. Minton
Bruce D. Ryder
Thompson Coburn LLP
One US Bank Plaza, Suite 3500
St. Louis, Missouri 63101-1693
(314) 552-6000

Gene E. Voigts
Shook, Hardy & Bacon
2555 Grand Boulevard
Kansas City, Missouri 64108-2613
(816) 474-6550

Attorneys for Defendant-Appellant
Lorillard Tobacco Company

Bruce G. Sheffler
Chadbourne & Parke LLP
30 Rockefeller Plaza, 34th Floor
New York, New York 10112-0219
(212) 408-5100

Alan E. Untereiner
Robbins, Russell, Englert, Orseck
& Untereiner
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

Attorneys for Defendant-Appellant
British American Tobacco (Investments) Limited

Deborah J. Israel
Womble Carlyle Sandridge & Rice
1401 Eye Street, N.W.
Seventh Floor
Washington, D.C. 20005
(202) 467-6900

Attorneys for Defendant-Appellant
The Council for Tobacco Research-USA, Inc.

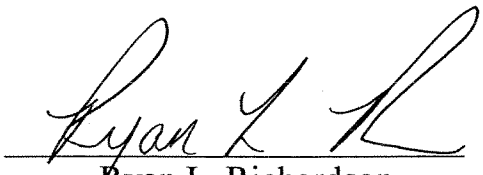
Keith Allan Teel
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20001-2401
(202) 662-6000

Attorneys for Defendant-Appellant
The Tobacco Institute, Inc.

Peter A. Woolson
Robinson Woolson O'Connell
217 East Redwood Street
Suite 1500
Baltimore, Maryland 21202
(410) 625-0000

Leonard A. Feiwus
Kasowitz, Benson, Torres & Friedman
1633 Broadway
New York, New York 10019
(212) 506-1700

Attorneys for Defendant Liggett Group, Inc.



Ryan L. Richardson