RJReynolds

The following case backgrounder provides a summary of this case as of September 17, 2004.

United States of America

Plaintiff

vs.

PHILIP MORRIS USA INC., formerly known as PHILIP MORRIS INCORPORATED, ALTRIA GROUP, INC. formerly known as PHILIP MORRIS COMPANIES INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, directly and as successor by merger to AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, THE LIGGETT GROUP, directly and as parent to LIGGETT & MYERS, INC., AMERICAN TOBACCO COMPANY, directly and as successor to the tobacco interests of AMERICAN BRANDS, INC., BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD., directly and as successor to BRITISH-AMERICAN TOBACCO COMPANY, LTD., THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and THE TOBACCO INSTITUTE, INC.,

Defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF Columbia

Case No. 99•CV•2496

September 17, 2004

BACKGROUNDER

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PURPOSE

This backgrounder has been prepared by some of the defendants to provide a concise reference document on the case of *United States v. Philip Morris USA Inc., et al.*, No. 99•CV•2496. It is not a court document.

THE PLAINTIFF

The plaintiff, the United States, filed this lawsuit on Sept. 22, 1999, in the U. S. District Court for the District of Columbia, pursuant to the Medical Care Recovery Act (MCRA), 42 U.S.C. §§ 2651, *et seq.*, and the Medicare Secondary Payer provisions (MSP), 42 U.S.C. § 1395y(b)(2)(B)(ii) & (iii), to recover health-care expenditures that the government has allegedly paid or will pay to treat tobacco-related illnesses allegedly caused by fraudulent and unlawful conduct of the defendants. Additionally, pursuant to the civil provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964, the plaintiff asks the court to enjoin the defendants from engaging in fraud and other unlawful conduct in the future,

to require the defendants to disgorge $280 billion in proceeds acquired through their allegedly unlawful conduct, and to order other various measures of equitable relief. The court dismissed the claims under both the MCRA and the MSP on July 21, 2000. Consequently, only the plaintiff's claims under RICO remain.

The plaintiff is represented principally by Sharon Y. Eubanks, director of the Tobacco Litigation Team of the Department of Justice (DOJ); Stephen D. Brody, deputy director of the DOJ's Tobacco Litigation Team; and Renée Brooker, the team's assistant director. In addition, more than 30 DOJ lawyers have been assigned to the pre•trial and trial tasks of this case.

ALL DEFENDANTS

British American Tobacco (Investments) Ltd. (BATCo)

BATCo, a British company, is a subsidiary of British American Tobacco, p.l. c., the second-largest tobacco group in the world.

BATCo is represented by Bruce Sheffler, David L. Wallace and Jessica L. Zellner of the New York office of Chadbourne & Parke LLP.

Brown & Williamson Tobacco Corporation (B&W)

B&W was the third-largest U.S. cigarette company until July 30, 2004, when B&W's U.S. operations were merged with R.J. Reynolds Tobacco Company (see below). B&W's major brands included KOOL, Lucky Strike, GPC, Viceroy, Capri, Barclay, Pall Mall, Carlton and Tareyton. B&W was also successor by merger to The American Tobacco Company.

B&W is represented by Kenneth N. Bass of the Washington, D.C., office of Kirkland & Ellis LLP, and by David M. Bernick of the firm's Chicago office.

The American Tobacco Company

No longer in existence. *See Brown & Williamson Tobacco Corporation.*

Liggett Group Inc. (Liggett)

Liggett, headquartered in Durham, N.C., manufactures a variety of cigarette brands including Eve, Jade and Pyramid.

Liggett is represented by Aaron Marks and Leonard A. Feiwus of the New York office of Kasowitz, Benson, Torres & Friedman LLP.

Lorillard Tobacco Company (Lorillard)

Lorillard is now the nation's third-largest manufacturer of cigarettes. Headquartered in Greensboro, N.C., it is an indirect subsidiary of the Loews Corporation. Its brands include Newport, Old Gold, Maverick, Kent, True, Satin, Max and Triumph.

Lorillard is represented by J. William Newbold, Michael B. Minton and Richard P. Cassetta of Thompson Coburn LLP in St. Louis, and Gene E. Voigts and Richard L. Gray of Shook, Hardy & Bacon LLP in Kansas City, Mo.

Philip Morris USA Inc. (formerly known as Philip Morris Incorporated) (Philip Morris)

Philip Morris is the nation's largest manufacturer of cigarettes. Headquartered in Richmond, Va., Philip Morris is a wholly owned subsidiary of Altria Group Inc. (formerly known as Philip Morris Companies Inc.). Its major brands include Marlboro, Virginia Slims, Parliament and Basic.

Philip Morris and Altria Group, Inc. are represented by Dan K. Webb and Thomas J. Frederick of the Chicago office of Winston & Strawn LLP, Theodore V. Wells, Jr. and James L. Brochin of Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York, and Altria is also represented by Robert Wise at Davis, Polk & Wardwell in New York.

Altria Group Inc. (formerly known as Philip Morris Companies Inc.) (Altria)

See Philip Morris USA Inc. Altria Group Inc. is the ultimate parent company of Philip Morris USA Inc. It does not manufacture, market or sell cigarettes.

R.J. Reynolds Tobacco Company (Reynolds Tobacco)

Reynolds Tobacco is the nation's second-largest manufacturer of cigarettes. Headquartered in Winston•Salem, N.C., it is a wholly owned subsidiary of Reynolds American Inc. The company's major brands include Camel, Winston, KOOL, Salem and Doral.

Reynolds Tobacco is represented by Robert F. McDermott, Jr., Peter J. Biersteker, Jonathan M. Redgrave and Geoffrey K. Beach of the Washington, D.C., office of Jones Day, and by David B. Alden of Jones Day's Cleveland office.

The Council for Tobacco Research•U.S.A., Inc. (CTR)

CTR was a not-for-profit research-funding organization that was dissolved in 1998 as a consequence of the Master Settlement Agreement (MSA) between the states and major tobacco companies. Furthermore, the MSA prevents CTR from being reconstituted in any form.

The Tobacco Institute, Inc. (TI)

TI was a trade organization that was disbanded in 2000 under the terms of the Master Settlement Agreement.

TRIAL SITE

The trial is being held in Washington, D.C., in the U.S. District Court for the District of Columbia.

JUDGE

The case is to be tried as a bench trial before District Court Judge Gladys Kessler of the U.S. District Court for the District of Columbia. The court

has ruled that the nature of the claims to be tried does not confer the right to a jury trial.

EXPECTED DURATION

The trial is scheduled to begin Sept. 21, 2004, and is expected to last six to eight months (including interim summations, the plaintiff's rebuttal case and holidays). The court has entered an order limiting each side to 265 hours of time to present their examinations, arguments and summaries. The judge has indicated that court will not be in session on Fridays during the course of the trial.

PLAINTIFF'S CASE

With the dismissal of the claims concerning the MCR and the MSP,[1] all that remain are the civil RICO claims in which the plaintiff alleges that the defendants have, for more than 50 years, engaged in a conspiracy to deceive the American public. Specifically, the government alleges (1) that the defendants conducted a RICO enterprise through a pattern of racketeering in order to perpetrate a fraud on the American public, thus materially influencing the public to purchase cigarettes, and (2) that the defendants conspired to violate the RICO statute.

The plaintiff alleges that the overall scheme to defraud consists of seven subschemes: (1) fraudulent statements and acts regarding causation and disease with respect to mainstream smoke; (2) fraudulent statements and acts regarding the allegedly addictive properties of nicotine; (3) fraudulent statements and acts regarding the alleged manipulation of nicotine in cigarette design and production; (4) fraudulent denials of marketing to youth and alleged marketing to youth; (5) fraudulent statements and acts regarding causation and disease with respect to environmental tobacco smoke;[2] (6) fraudulent statements and acts regarding the alleged failure to develop a less-hazardous cigarette; and (7) fraudulent statements and acts regarding the advertising, marketing and promotion of low "tar" cigarettes.

The government asks the court to order the defendants to disgorge $280 billion, which it contends are the "ill-gotten gains." Moreover, the government seeks to enjoin the defendants from engaging in future RICO violations and for the court to order sweeping injunctive relief addressing virtually all aspects of the research, development, marketing, promotion and sale of cigarettes by the manufacturing defendants.

THE DEFENDANTS' CASE

The defendants deny all of the government's claims and believe that the RICO allegations are a misuse of a statute that was intended to protect legitimate businesses from the influence of organized crime, and not a tactical hammer to prosecute legitimate businesses because they are unpopular. The government's lawsuit — and the relief it seeks — also conflicts in many ways with the existing legislative scheme regarding tobacco.

In particular, the defendants' case will demonstrate that the government's charges are fundamentally unfounded and untrue. The defendants will show that there is no historical or ongoing conspiracy; the actions of the individual manufacturers and their now disbanded trade and research organizations were legal; and the manufacturing defendants continue to responsibly manufacture, sell and market tobacco products to adults. The evidence also will show that, in the context of government policies, pronouncements and actions, the defendants' actions were understandable, legitimate and certainly cannot be characterized as (much less proven to be) criminal acts of mail or wire fraud. As to many of the charges, there are also significant defenses to liability such as the First Amendment rights to free speech and to petition the government. In addition, the evidence will show that the cigarette industry is intensely competitive and that the government's conspiracy theories are inconsistent with reality. The defendants will also demonstrate that they have reacted responsibly to the changing legal and policy environments, often voluntarily implementing measures to modify products or change marketing practices.

The government's picture of a vast conspiracy that threatens the country

centers on two organizations that *no longer exist*—The Council for Tobacco Research•USA, Inc. (CTR) and The Tobacco Institute Inc. (TI). As to the historic allegations, CTR and TI were legitimate organizations. CTR scientists were world-renowned and highly respected. CTR provided more than $300 million in grants for independent research on smoking and health, and its grantees published approximately 6,400 scientific papers — nearly two•thirds of which were also funded by government agencies — that acknowledged the funding by CTR. Indeed, many of these papers implicated cigarettes as the cause of disease and discussed the effects of nicotine. Similarly, TI was a legally constituted and legitimate trade association, formed by some of the defendants to advocate the tobacco industries' positions on public policy matters that affected the industry; it was no different than any other industry's trade association. Regarding the recent past and future, both organizations were disbanded as part of the 1998 MSA with the states, and no successor organization of such types can be formed without the direct oversight and approval of the states' attorneys general.

The defendants believe the government will be unable to demonstrate that there is any reasonable likelihood of ongoing or future RICO misconduct — a necessary condition for the court to enter any relief whatsoever. Aside from the lack of any proof of ongoing RICO violations, the defendants will demonstrate that the current federal and state regulatory scheme effectively addresses any legitimate area of concern regarding the allegations raised by the government. The landmark 1998 MSA between the states and the original participating manufacturers (including the manufacturing defendants in this case) covers many of the same areas of alleged conduct and concern, and provides a wide array of injunctive relief, as well payments in perpetuity to the states of billions of dollars. In the past six years, the states' attorneys general have demonstrated constant oversight and tenacious enforcement of the MSA's provisions, both formally and informally.

In addition, the U.S. Federal Trade Commission (FTC) has a continuous oversight mission regarding tobacco advertising, marketing and promotion. The FTC has authority over claims of "youth targeting" or unfounded health claims, which would include jurisdiction to address attacks on advertising,

marketing and promotion of “low-tar” cigarettes and alternative cigarettes. Other government agencies and subdivisions, such as the National Cancer Institute, the Centers for Disease Control, the Office of the Surgeon General, and the Department of Health and Human Services also continue to be involved in the direct and indirect oversight of the cigarette industry. The government will not be able to demonstrate that this regulatory scheme is deficient, or that the proposed changes, such as requiring the defendants to eliminate the use of the terms light, ultra light and low “tar,” requiring the defendants to fund a public health agency to conduct ongoing consumer testing of awareness and fatigue of revised labeling and health-warning systems, and requiring the defendants to fund a system of unannounced compliance checks by federal or state officials, with all retailers being checked at least once a year, would be effective or even feasible.

Regarding the subschemes alleged by the plaintiff, the defendants deny liability under each:

- Smoking and Health: The evidence will show that: the defendants’ positions over the years were developed in good faith; the defendants did not deny that cigarette smoking was statistically associated with lung cancer and, consequently, posed a risk factor for disease; and the defendants’ advocacy of the traditional view that scientific “causation” could not be proven absent toxicological proof or knowledge of the mechanism does not constitute criminal fraud. Moreover, the hazards of smoking have been well-known for decades, and thus the defendants could not, and did not, mislead the public, and their statements regarding disease causation could not have materially influenced smokers’ decisions about smoking.

- Nicotine and Addiction: The defendants argue that the government confuses scientific dissent with fraud. The traditional definition of addiction (as adopted in the 1964 Surgeon General’s report) defined cigarettes as “habituating,” rather than “addicting,” because cigarette smoking does not result in intoxication — a definition shared by the government and by the industry for decades. However, in 1988, the surgeon general redefined the term

"addiction" by eliminating the intoxication requirement, thus redefining smoking as an addiction, similar to the addiction to heroin or cocaine. The evidence will further show that this change was not based on any new scientific information concerning "addiction," but rather, was recommended to stigmatize smoking. The defendants' reaction to this change — including the 1994 congressional testimony of tobacco company chief executives — was not fraudulent, but rather a legitimate effort to explain the basis for the industry's continued support of the 1964 Surgeon General's approach. Although the defendants lost in the court of public opinion — where the public overwhelmingly believes smoking is addictive, as that term is commonly understood — the advocacy of the historic definition and subsequent changes in positions by various defendants simply cannot support a finding of RICO liability.

- Nicotine Manipulation: The defendants have not made any fraudulent statements or acts regarding cigarette design and alleged nicotine manipulation. The government's own experts concede that the defendants do not increase the levels of nicotine above the levels that naturally occur in tobacco.

- Fraudulent Denial of Youth Marketing: The government contends that the defendants fraudulently denied marketing to youth. The defendants' denials of youth marketing are based on fact and have been made in good faith and in the context of public debate. For years, the defendants have implemented marketing policies and practices to help reduce any "spill-over" effect where marketing materials aimed at adults might also result in some exposure to youth. Moreover, the government itself, through the FTC, and the states' attorneys general (who are vested with authority to enforce the MSA's advertising and marketing restrictions) closely monitor the defendants' advertising and marketing. Further, the defendant companies have sponsored and implemented industrywide and company-specific initiatives to prevent youth smoking, such as the "We Card" program that helps retailers enforce cigarette minimum-purchase-age laws. Lastly, a great weight of authority has found that,

in fact, peer and family attitudes and behavior greatly influence the initiation of smoking in the youth population — and the marketing practices of the defendants have little, if any, effect on smoking initiation.

- Environmental Tobacco Smoke: The evidence will show that the defendants' statements regarding the relationship between ETS exposure and disease represent good-faith opinions and legitimate, credible interpretations of scientific data and literature. Moreover, while the government claims that the defendants have conducted fraudulent scientific research concerning ETS, none of the government's experts attacked the scientific integrity of the ETS research. Additionally, the plaintiff, itself, has often affirmatively recognized the defendants' contributions to the scientific community and relied upon or cited to studies funded by the defendants.

- Less Hazardous Cigarettes: The defendants have not made any fraudulent statements and acts regarding the alleged failure to develop a less-hazardous cigarette. In fact, the defendants, during the past 50 years, have aggressively and independently pursued the development and marketing of potentially less-hazardous cigarettes. These efforts have resulted in a dramatic reduction in sales-weighted "tar" and nicotine yields. Further, the defendants maintain that the federal government, itself, has hindered their efforts to develop and market a potentially less-hazardous cigarette. For instance, the plaintiff's failure to recognize and accept scientific criteria for measuring the safety of cigarettes, coupled with governmental restrictions that severely limit the advertisement of health claims, have essentially crippled the defendants' ability to effectively market potentially less-hazardous cigarettes.

- Low "Tar" Cigarettes: The government's seventh alleged subscheme of fraud, regards allegations that the defendants' marketing of "low-tar" cigarettes implied that "low-tar" cigarettes were healthier. The defendants will demonstrate that: at all times, the marketing of low-"tar" cigarettes has been subject to governmental

oversight and regulation; the government, through the FTC, helped define descriptors such as “light”; and the government required the reporting of "tar" and nicotine yields, measured by the federally-mandated FTC testing method, in advertisements. Indeed, the government and public-health community based upon the belief that low-"tar" cigarettes were less hazardous, supported the development and marketing of light cigarettes and encouraged smokers to switch to lower-"tar" cigarettes. Further, the plaintiff contends that light cigarettes are no less hazardous due to the phenomenon of compensation (the act of taking longer, deeper puffs of lower-"tar" products to "compensate" for the fact that they have lower yields than the product from which the smoker is switching). The limitations of the FTC "tar" and nicotine testing method — the inability to replicate human smoking (*i.e.* compensation) — have been known and acknowledged by the government since the inception of the FTC method. Nonetheless, the government, itself, encouraged the use of lower-"tar" cigarettes, and although the FTC method was modified to include CO yields, the FTC has failed to make any other modification despite various petitions and requests, including submissions from some of the defendants. Lastly, evidence demonstrates that compensatory smoking behavior is generally temporary and incomplete, and that on average, even with compensation, lower-"tar" cigarettes deliver less “tar” to smokers. The evidence will demonstrate that the defendants have acted responsibly and lawfully in developing and marketing low-"tar” or “light” cigarettes.

Finally, the defendants contend that, based on fact and as a matter of law, the government is not entitled to disgorgement or any other equitable relief:

- While the government maintains that it is entitled to $280 billion of disgorged proceeds acquired by the defendants through their allegedly fraudulent and unlawful activities, the defendants assert, as they do on interlocutory appeal for Order #550, [3] that (1) there is no disgorgement remedy available under RICO, and (2) even if there were, the calculation utilized by the government to arrive at such amount is inaccurate and inappropriate. Indeed,

assuming that disgorgement is available as a remedy, under *United States* v. *Carson*, 52 F.3d 1173 (2d. Cir. 1995), the plaintiff could only disgorge ill-gotten gains that are available to the defendants or that are being used by the defendants to fund or promote future unlawful activity. In this case, the government seeks disgorgement of all profits, irrespective of whether they are available to fund future violations or whether they are proven to be ill-gotten. Indeed, the plaintiff's model for the calculation of disgorgement, fails to make any attempt to distinguish ill-gotten gains, which may be subject to a disgorgement remedy (if recognized under RICO), from legally gotten gains which cannot be disgorged.

- Additionally, the defendants argue that the plaintiff is not entitled to the litany of equitable remedies it seeks, such as the funding of a corrective public educational program, because the plaintiff cannot meet its burden of proof. First, there must be a causal connection between the relief requested and the defendants' alleged RICO violations, which the plaintiff is unable to establish. Second, the scope of the government's requested remedial relief must be reasonably related to the harm caused by the defendants' past alleged RICO violations; however, the plaintiff cannot demonstrate this requirement either. The plaintiff also cannot demonstrate that the requested relief is necessary, effective or even feasible.

PROCEDURAL BACKGROUND

The plaintiff filed this lawsuit in the U.S. District Court for the District of Columbia on Sept. 22, 1999. The complaint named Philip Morris USA Inc. (formerly known as Philip Morris Incorporated), R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, The Liggett Group Inc., The American Tobacco Company, Altria Group Inc. (formerly known as Philip Morris Companies Inc.), British American Tobacco, p.l.c., British American Tobacco (Investments) Ltd., The Council for Tobacco Research•USA, Inc., and The Tobacco Institute, Inc. On Dec. 20, 1999, the court dismissed, without prejudice, British American Tobacco, p.l.c., and substituted British American Tobacco Industries, p.l.c.

as a defendant. On Sept. 8, 2000 Judge Kessler granted British American Tobacco Industries' motion to dismiss for lack of personal jurisdiction.

The defendants filed their motions to dismiss on Dec. 27, 1999. On Sept. 28, 2000, the court dismissed the Medical Care Recovery Act (MCRA) and the Medicare Secondary Payer (MSP) claims,[4]however, the court denied the defendants' motions to dismiss the RICO claims. Furthermore, Judge Kessler denied the defendants' motions to dismiss for failure to state a claim.

On Dec. 22, 2000, the court appointed Richard A. Levie, a former District of Columbia superior court judge, as special master to this case. The court and special master have ruled on literally hundreds of discovery motions in the past four years.

From May 31, 2002, through Oct. 8, 2003, the parties filed the following summary judgment motions:

- On May 31, 2002, the defendants filed their *Motion for Partial Summary Judgment on Advertising, Marketing, Promotion and Warning Claims*, based on the exclusive jurisdiction of the Federal Trade Commission (FTC). The plaintiff filed a cross-motion for *Partial Summary Judgment on Affirmative Defenses* on July 25, 2002. Ultimately, on May 23, 2003, the court denied the defendants' motion and granted in part and denied in part the plaintiff's cross-motion, dismissing the defendants' affirmative defenses premised upon the FTC's purportedly exclusive jurisdiction.

- On July 1, 2003, the plaintiff filed its *Motion for Partial Summary Judgment Regarding Defendants' Affirmative Defenses Asserting Violations of the Eighth Amendment and the Ex Post Facto Clause of the United States' Constitution and that the Decision in* United States v. Carson *Controls the Scope of Disgorgement in this Case*. The court granted and denied in part this motion. It denied without prejudice the plaintiff's motion for partial summary judgment as to the defendants' affirmative defense asserting violations of the

Eighth Amendment, as well as to the defendants' affirmative defense asserting that *United States v. Carson* controls the scope of disgorgement. However, the court did grant the plaintiff's motion as to the defendants' affirmative defense asserting violations of the e*x post facto* clause of the U.S. Constitution.

- On July 1, 2003, the plaintiff filed a *Motion for Partial Summary Judgment on Defendants' Equitable Defenses of Waiver, Equitable Estoppel, Laches, Unclean Hands, and in Pari Delicto,*[5] as well as a *Motion for Partial Summary Judgment Regarding Defendants' Affirmative Defenses That the RICO Claims and Sought Relief Are Prohibited by the Tenth Amendment and Separation of Powers and That Defendants are Not Jointly and Severally Liable for Any Disgorgement Ordered by the Court*. On Jan. 23, 2004 and May 6, 2004, respectively, the court granted the plaintiff's motions, thus striking these affirmative defenses of the defendants.

- On Aug. 1, 2003, the defendants filed a *Motion for Summary Judgment on the Grounds that There is No Reasonable Likelihood of Future RICO Violations*, a *Motion for Partial Summary judgment Dismissing the Government's Disgorgement Claim,*[6] a *Motion for Partial Summary Judgment on Claims that Defendants Advertised, Marketed and Promoted Cigarettes to Youth and Fraudulently Denied Such Conduct*, and *Joint Motion for Summary Judgment by Defendants the Council for Tobacco Research•U.S.A., Inc. and The Tobacco Institute, Inc.* Ultimately, the court denied these motions on May 6, 2004, May 21, 2004, February 24, 2004, and May 21, 2004, respectively.

- On Oct. 8, 2003, the defendants filed separate motions for summary judgment on the following issues: (1) issues regarding the government's RICO claims and violation of separation of powers, (2) the defendants' alleged suppression of the development of potentially less hazardous cigarettes; and (3) the government's allegations concerning nicotine manipulation and addiction. In addition, Liggett and BATCo each filed a motion for summary

judgment on Oct. 8, 2003. The court denied these motions on March 17, 2004, July 9, 2004, July 8, 2004, April 7, 2004, and May 28, 2004, respectively.

- Also, on Oct. 8, 2003, the plaintiff filed three motions for partial summary judgment on the following issues: (1) alleging that the defendants have caused mailings and wire transmissions;[1][1][7] (2) alleging that each defendant is distinct from the RICO enterprise, that a defendant's liability for RICO conspiracy does not require that a defendant participate in the operation or management of the enterprise, and that RICO liability extends to aiders and abettors; and (3) dismissing the defendants' affirmative defenses asserting *res judicata*, collateral estoppel, release, accord and satisfaction, and mootness.[8] On May 6, 2004, the court denied the plaintiff's *Motion for Partial Summary Judgment on Element That Defendants Have Caused Mailings and Wire Transmissions*, and on July 7, 2004, granted the plaintiff's *Motion for Partial Summary Judgment Dismissing Defendants' Affirmative Defenses Asserting* Res Judicata, *Collateral Estoppel, Release, Accord and Satisfaction, and Mootness*. Thereafter on July 15, 2004, the court denied in part and granted in part the plaintiff's *Motion for Partial Summary Judgment That Each Defendant is Distinct from the RICO, That a Defendant's Liability for RICO Conspiracy Does Not Require That Defendant Participate in the Operation or Management of the Enterprise, and That RICO Liability Extends to Aiders and Abettors*. The Court concluded that the plaintiff was entitled to partial summary judgment as to the fact that each defendant is distinct from the alleged RICO enterprise and that a defendants' liability does not require proof that a defendant participated in the operation or management of the alleged enterprise. However, the court denied the government's motion as to the issue of whether liability extends to aiders and abettors.

Beginning in April 2004, all of the parties filed various motions *in limine* to exclude certain witnesses, evidence and exhibits, the majority of which the court has ruled upon and denied. These motions will be ruled upon on a rolling basis.

On June 1, 2004, the defendants filed a *Motion to Certify Order #550 for Interlocutory Appeal*; in Order #550, the court denied the defendants' *Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim*. The court granted the defendants' *Motion to Certify* on June 25, 2004. Consequently, on July 6, 2004, the defendants filed an *Emergency Petition Under 28 U.S.C. § 1292(b) for Permission to Appeal an Order by the United States District Court for the District of Columbia and an Emergency Motion for Expedited Appeal*. On July 25, 2004, the U.S. Court of Appeals for the District of Columbia Circuit granted permission to appeal and assigned this appeal general docket number 04•5252. Oral argument is scheduled to be heard on Nov. 17, 2004. The defendants maintain that (1) disgorgement is not an available remedy under RICO, and (2) if it is a permissible remedy under RICO, the standards set by the Second Circuit in *United States v. Carson* should be followed. This would limit the amount of any disgorgement to only those ill•gotten gains that are available to the defendants to fund or promote future unlawful activity. Further, because the plaintiff failed to have its experts determine the amount of ill•gotten gains available to the defendants to fund or promote unlawful conduct, the defendants assert that the plaintiff ultimately would be entitled to no disgorgement even it were determined to be an available form of relief under RICO.

On July 1, 2004, the parties filed their respective *Final Pre•Trial Proposed Findings of Fact and Conclusions of Law*.

On Sept. 1, 2004, the defendants asked the court for a continuance of the trial date to align the trial date with a date closer to that of the expected resolution of the certified question by the Court of Appeals. The court denied the motion on Sept. 4, 2004.

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[1] In dismissing the MCRA claim, the court reasoned that the act was not intended to be used to recover Medicare or Federal Employees Health Benefits Act costs. As for the MSP claim, the court concluded that, while the MSP allows the government to bring suit against

non-insurance entities required to pay for health-care costs under a"self-insured plan," the plaintiff's complaint did not contain any allegation that the defendants had at any time maintained a "self-insured plan." The court also found that Congress did not intend the MSP to be used as an "across-the-board" mechanism for suing tortfeasors.

[2] The plaintiff's complaint did not include any substantial allegations regarding environmental tobacco smoke (ETS), but the court has allowed the government to proceed on this theory.

[3] *See* the Procedural Background section of this document.

[4] On Feb. 23, 2001, the plaintiff filed its *First Amended Complaint*, repleading the MSP claim that the court had dismissed. On March 30, 2001, the defendants filed a motion to dismiss, which the court granted, dismissing with prejudice the MSP claim.

[5] Generally, these defenses apply equitable principles of fairness to preclude claims in light of the circumstances (*i.e.* the defenses sought would have barred the plaintiff's claims as a matter of law). However, these defenses are rarely applied against the government. Furthermore, although the defenses were stricken, the underlying facts (documents and testimony) remain relevant to the issues of liability and remedy.

[6] In the plaintiff's *Opposition to Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim*, the government conceded that due to corrections made to their calculation, the amount that the government actually seeks in disgorgement is $280 billion, as opposed to the $289 billion initially identified in its *Preliminary Proposed Findings of Fact and Conclusions of Law*.

On Feb. 2, 2004, the defendants filed *Defendants' Notice of Supplemental Authority in Connection with Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim and The United States' Motion for Partial Summary Judgment Regarding Defendants' Affirmative Defenses Asserting Violations of the Eighth Amendment and the Ex Post Facto Clause of the United States Constitution and that the Decision in United States v. Carson Controls the Scope of Disgorgement in this Case.*

[7] In this motion, the plaintiff referenced an additional 650 racketeering acts for the first time. Accordingly, on Oct. 20, 2003, the defendants filed an *Emergency Motion to Prohibit Plaintiff's Untimely Addition of 650 New Racketeering Acts to the Case*. On Feb. 2, 2004, the court granted in part the defendants' motion. It granted the defendants' request to strike the 650 racketeering acts but denied the defendants' request to exclude the use of the evidence at trial.

[8] These technical defenses basically relate to the notion that other events, such as the MSA, had long ago overtaken the government's claims and requests for relief. Like other defenses that have been stricken, the striking of these defenses (which would bar the plaintiff's claims as a legal matter) does not affect the relevance of the underlying facts to issues of liability and remedy.