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CONSUMER NEWS

By Jeremy LaMarche*

Court Turns Lights Out on “Light” Cigarette Packaging

In a recent decision, Judge Gladys Kessler of the U.S. District Court for the District of Columbia recognized the “immeasurable amount of human suffering” that the deceptive labeling practices of the tobacco industry have caused.¹ Judge Kessler found that several tobacco companies had misled consumers by designating certain products as “light,” “ultra light,” and “low tar.”² Judge Kessler ordered these companies to buy newspaper ads describing the negative effects of smoking as well as to stop using labels such as “light,” “ultra light,” or “low tar” or any other label that implies that one type of cigarette is healthier than another.³ Despite the judicial scolding, tobacco companies, as well as analysts on Wall Street, were claiming a victory for the tobacco industry due to the court’s failure to award financial damages.⁴ However, the tobacco industry’s celebration may have come too soon, as the decision has sent tobacco companies scrambling to maintain the ability to sell cigarettes labeled “light.”

Despite the tobacco industry’s violation of the federal racketeering law known as RICO, Judge Kessler held that she was legally unable to impose large financial damages against the tobacco industry.⁵ Judge Kessler cited a decision from February of 2005 where a

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¹ Shenon, Philip, *Judge Rips Tobacco Firms, Bans ‘Light’ Brands*, N.Y. Times, Aug. 18, 2006.

² *Id.*

³ *Judge Finds Tobacco Racketeering*, CNN, <http://edition.cnn.com/2006/BUSINESS/08/17/tobacco.ruling/> (last visited on October 23, 2006).

⁴ Shenon, *supra* note 2.

⁵ *Id.*

federal appellate court held that the U.S. government could not seek disgorgement in the Department of Justice's suit against the tobacco industry.⁶ That court noted that the goal of RICO is to prevent or restrain future violations whereas disgorgement "is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo."⁷ As a result, Judge Kessler noted that the \$289 billion in disgorgement sought by the Department of Justice was unavailable as a remedy against the tobacco companies.⁸ Consequently, Kessler could only take remedial action with respect to the future prevention of potentially misleading labeling on cigarette packaging.

Accordingly, financial experts did not believe that the decision would have much of an economic effect on the industry in general.⁹ In fact, several financial analysts stated the ruling would have little to no effect on the major companies due to the lack of a court ordered financial payout.¹⁰ Even the Department of Justice was skeptical about Judge Kessler's decision stating, "[W]e are pleased with the court's findings of liability on the part of the defendants, but disappointed that the court did not impose all of the remedies sought by the government."¹¹

However, despite the sense of optimism from financial analysts, some tobacco industry members moved to minimize the damage caused by Judge Kessler's ruling on "light" cigarette packaging.¹² The tobacco companies immediately filed a motion to stay the final judgment and remedial order pending an appeal.¹³ The companies wanted the opportunity to sell cigarettes with the "light" labels until their appeal was settled.¹⁴ Among other things, the tobacco companies claimed that they would suffer irreparable harm if the stay was

⁶ U.S. v. Philip Morris USA, Inc., 396 F.3d 1190, 1200 (D.C. Cir. 2005) (*noting* that Congress has expressly stated its intended civil remedies under RICO. Under the provision that allows for government action, there is no mention of disgorgement, only a remedy to prevent and restrain future violations).

⁷ *Id.* at 1198.

⁸ U.S. v. Philip Morris USA, Inc., 2006 WL 2380622 (D.D.C.).

⁹ Shenon, *supra* note 2.

¹⁰ *Id.* (*noting* David Adelman, an analyst at Morgan Stanley stated, "[T]here's nothing in this rule that is going to hurt the profitability of the businesses.")

¹¹ *Judge Finds Tobacco Racketeering, supra* note 4.

¹² U.S. v. Philip Morris USA, Inc., 2006 WL 2793174, *1 (D.D.C.).

¹³ *Id.*

¹⁴ *Id.*

not granted because of lost business to smaller tobacco companies not affected by the suit.¹⁵ Judge Kessler stated that the public interest is best served by disallowing the companies to market “light” cigarettes while the appeal is pending and therefore denied the motion.¹⁶ Kessler noted that the potential harm to the public, including impressionable youth, outweighed the tobacco companies’ purely economic concerns.¹⁷ The tobacco industry will now have to await the appeal of Judge Kessler’s earlier decision regarding “light” labeling on cigarette packages, although the tobacco companies still have the option of asking an appeals court to put the ruling on hold.

Due to Kessler’s ruling, the tobacco industry is feeling pressure from other ends of the political spectrum as well.¹⁸ Notably, Senator Frank R. Lautenberg, a Democrat from New Jersey, recently introduced legislation which would ban the use of deceiving labels in cigarette packaging.¹⁹ The newly introduced legislation known as The Truth in Cigarette Labeling Act would provide Judge Kessler’s decision with statutory backing.²⁰ Senator Lautenberg introduced this legislation in case Judge Kessler’s ruling is overturned on appeal.²¹ However, the legislation has yet to attract any Republican co-sponsors and will likely have a difficult time doing so.²²

Although the Department of Justice’s action was successful under Justice Kessler, an avalanche of individual lawsuits seems unlikely. Under RICO, any individual who wanted to sue the tobacco industry for defrauding and deceiving him or her could only recover for economic injuries.²³ Therefore, without being afforded the right to recover for personal injury, there would not be much of an incentive for an individual to sue under RICO despite being a lifetime “light” cigarette smoker.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ U.S. v. Philip Morris USA, Inc., 2006 WL 2793174, *3 (D.D.C.).

¹⁸ *Lautenberg Urges Laws on Cigarette Mislabeling*, North Jersey Media Group, <http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjcxN2Y3dnFIZUVFeXkyJMzN2YmVsN2Y3dnFIZUVFeXk2OTg5NDU0> (Sep. 8, 2006)

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USCA § 1964(c) (West 2006).

In the future, the biggest financial threat to the tobacco industry might actually come from a possible class action suit involving “light” cigarette smokers.²⁴ After Judge Kessler’s decision regarding light cigarettes came down, U.S. District Court Judge Jack Weinstein certified a class action lawsuit for “light” cigarette smokers against the tobacco companies in the U.S. District Court in New York.²⁵ The crux of the class action alleges that the tobacco industry intentionally misled consumers into believing that light cigarettes were actually healthier and safer than regular cigarettes.²⁶ The class includes anyone who has purchased “light” cigarettes since 1970, the date “light” cigarettes were first sold.²⁷

However, Judge Weinstein’s decision to certify a class against the tobacco industry might be called into question on appeal.²⁸ Under RICO, a potential plaintiff must prove, among other things that he relied on the defendant’s deceitful misrepresentation.²⁹ In a large class action tobacco lawsuit, it may be difficult to prove that each individual class member relied on the fact that the companies were marketing the product as light when he or she chose to purchase it over a regular cigarette.³⁰ The U.S. Court of Appeals has been split as to whether a class as a whole can demonstrate reliance or whether it has to be proven on an individual level.³¹ The Fifth Circuit held that reliance can never be proven for a class in a class action lawsuit.³² The Seventh Circuit has held that a RICO class may be certified and reliance accepted on a class-wide basis.³³ However, when calculating damages the Seventh Circuit held that the issue of each individual

²⁴ Jansen, Jaime, *Federal Judge Certifies class of ‘Light’ Cigarette Consumers in Tobacco Suit*, Jurist Legal News & Research, <http://jurist.law.pitt.edu/paperchase/2006/09/federal-judge-certifies-class-of-light.php> (September 25, 2006).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Sebok, Anthony, *A New York Federal Judge Certifies a Nationwide RICO Class Action Against Big Tobacco: An Aggressive Decision that Pushed Legal Limits*, Findlaw for Legal Professionals, <http://writ.lp.findlaw.com/sebok/20060927.html> (Sept. 27, 2006).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Supra* note 28.

class members' reliance had to be litigated separately.³⁴

Ultimately, the tobacco industry may have cause to celebrate despite the ruling on "light" cigarettes. With the federal courts powerless to impose a large financial remedy and the threat of class action tempered due to the difficulties in certifying a class, tobacco companies may not be in danger of losing future profits. However, Judge Kessler's decision regarding the labeling of cigarette packaging will likely be at issue for years to come.

McDonald's Ordered to Respond to 'Fat' Complaint

On September 16, 2006, McDonald's motion to dismiss a class action lawsuit alleging obesity as a result of deceptive advertising failed.³⁵ The plaintiffs claim that McDonald's, by promoting its food products as nutritionally beneficial and part of a healthy lifestyle if consumed daily, violated New York General Business Law § 349.³⁶ Furthermore, the plaintiffs allege that McDonald's failed to adequately disclose its use of additives and that McDonald's food processing rendered some of its food less healthy than represented.³⁷ Finally, the plaintiffs allege that McDonald's falsely claimed that it would make available nutritional information to its New York customers while failing to provide such information at the majority of its store locations.³⁸

The lawsuit was originally filed in 2002 by the parents of two teenage girls on behalf of their daughters.³⁹ Ashley Pelman and Jazlyn Bradley were teenagers who claimed to be "regular McDonald's customers."⁴⁰ Parents of the two girls filed suit against McDon-

³⁴ *Id.*

³⁵ *Pelman v. McDonald's Corp.*, 2006 WL 2663214, *17 (S.D.N.Y. 2006)

³⁶ *Pelman*, 2006 WL 2663214 at *4.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at *2.

⁴⁰ Weiser, Benjamin, *Big Macs Can Make You Fat? No Kidding, a Judge Rules*, N. Y. Times, <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9E0DE7DA1E30F930A15752C0A9659C8B63> (Jan. 23, 2003).