TOBACCO CONTROL RESOURCE CENTER

Trial Update:

USA v. Philip Morris USA et al.

United States District Court for the District of Columbia
No: 99-CV-02496-GK
Kessler, J.

Issued: June 17, 2005

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On September 22, 1999, the United States Department of Justice ("DOJ" or "Government") filed a lawsuit against the major American cigarette manufacturers (collectively, the "industry" or "Defendants") in the United States District Court for the District of Columbia ("District Court").[1] Federal Judge Gladys Kessler began the trial in this case on September 21, 2004, nearly five years after it was filed.[2]

In its case in chief, DOJ alleged that Defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO")[3] by engaging in a massive conspiracy to defraud the public by knowingly producing dangerous and addictive products and misleading the public about the risks associated with these products. The RICO statute authorizes DOJ to pursue criminal and civil sanctions against individuals and organizations that are engaged in a conspiracy involving certain federal felonies (including mail and wire fraud).[4] DOJ is pursuing civil RICO sanctions in this lawsuit.[5]

A successful outcome for DOJ at trial will have a significant positive effect on the public health. Each year in the United States, cigarette smoking causes serious illnesses among an estimated 8.6 million persons, results in approximately 440,000 deaths, and costs $157 billion in health-related costs.[6] Despite this, neither the United States Food and Drug Administration nor the United States Consumer Product Safety Commission has the authority to regulate cigarettes, and the United States Federal Trade Commission has played a very passive role over the past two decades.[7] The result is a largely unregulated cigarette industry.

Where legislative and regulatory approaches have failed, litigation against the industry has served as a powerful and effective public health strategy.[8] Successful products liability lawsuits

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[1] *See U.S. v. Philip Morris, et al*., No. 99-CV-02496GK (U.S. Dist. Ct., D.C.) (Complaint for Damages and Injunctive and Declaratory Relief) (September 22, 1999) [hereinafter Complaint], available at: http://www.usdoj.gov/civil/cases/tobacco2/complain.pdf

The Defendants are: Altria Group, Inc.; Philip Morris USA, Inc.; R J Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation (now merged with RJR); British American Tobacco (Investments), Ltd (as the former parent company of Brown & Williamson); Lorillard Tobacco Company; The Liggett Group, Inc.; The Council for Tobacco Research-U.S.A., Inc.; and The Tobacco Institute. *See* Complaint, *supra*, at 1-2.

[2] *See* Michael Janofsky, *Tobacco Firms Face U.S. in High-Stakes Trial*, NEW YORK TIMES, Sept. 20, 2004, at A16. For a summary of the procedures Judge Kessler employed for the trial, see Appendix A, attached hereto.

[3] 18 U.S.C §§ 1961 *et seq*.

[4] *Id*.

[5] *See* Complaint, *supra* note 1.

[6] *See* Centers for Disease Control and Prevention, *State-Specific Prevalence of Current Cigarette Smoking Among Adults – United States, 2002*, 52 MORBIDITY & MORTALITY WKLY. REP. 1277, 1277 (2004), available at: http://www.cdc.gov/mmwr/PDF/wk/mm5253.pdf

[7] *See FDA v. Brown and Williamson Corp., et al*., 153 F.3d 155 (2000); Graham Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63-98 (1997).

[8] *See* Richard Daynard, *Why Tobacco Litigation*, 12 TOBACCO CONTROL 1-2 (2003).

have the potential to shift billions of dollars of health and productivity costs from families and third-party payers back to cigarette manufacturers, forcing increases in cigarette prices.[9] Such increases reduce smoking rates, especially among children and teenagers.[10] Indeed, the settlement of state lawsuits against the cigarette manufacturers in 1997 and 1998 has had exactly that effect. Additionally, lawsuits have highlighted smoking's dangerous nature and revealed to the public that the industry has been highly deceptive in its quest to acquire new smokers.[11]

This Trial Summary provides an overview of the DOJ lawsuit, with a specific focus on the remedies portion of the trial. Section I provides information on the case background and status. Section II reviews the liability portion of the trial, with a summary of DOJ's basic allegations against the Defendants. Section III details the remedies portion of the trial. Section IV discusses the possibility of case settlement.

I. CASE BACKGROUND AND STATUS

In its initial complaint, DOJ sought "to restrain defendants and their co-conspirators from engaging in fraud and other unlawful conduct in the future, and to compel defendants to disgorge the proceeds of their unlawful conduct."[12] In its Preliminary Proposed Findings of Fact, DOJ indicated that such proceeds amount to $289 billion.[13]

Defendants Seek to Dismiss Disgorgement Claim

Defendants sought partial summary judgment dismissing the disgorgement claim, arguing that this claim failed to meet the standard set forth in 18 U.S.C. § 1964(a) ("Section 1964(a)"), the provision of the RICO statute providing statutory remedies for violations.[14] In her opinion on Defendants' motion, Judge Kessler pointed out that Section 1964(a)'s text "explicitly limits the Court's jurisdiction to remedies that 'prevent and restrain' future RICO violations."[15] She also noted, "the three examples of permissible remedies set forth in Section 1964(a) – divestiture, restrictions on future activities, and dissolution/reorganization – are all forward looking and focus on the goal of preventing future RICO violations."[16]

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[9] *Id*.

[10] *See* Surgeon General David Satcher, *Reducing Tobacco Use: A Report of the Surgeon General*, U.S. Department of Health and Human Studies 322-37 (2000).

[11] *See* Richard Daynard, *Tobacco Liability Litigation as a Cancer Control Strategy*, 80 J. OF THE NAT'L CANCER INST. 9-13 (1988).

[12] *See* Complaint, *supra* note 1, at 2-3. DOJ also sought "to recover health care costs paid for and furnished, and to be paid for and furnished, by the federal government for lung cancer, heart disease, emphysema, and other tobacco-related illnesses caused by the fraudulent and tortious conduct of defendants," but Judge Kessler dismissed this claim upon Defendants' motion. *See U.S. v. Philip Morris, Inc.*, 116 F. Supp. 2d 131 (D.D.C. 2000), available at: http://www.usdoj.gov/civil/cases/tobacco2/opinion1.pdf

[13] *See U.S. v. Philip Morris USA*, 310 F. Supp. 2d 58, 62 (D.D.C. 2004), citing United States' Preliminary Proposed Findings of Fact at 14.

[14] *U.S. v. Philip Morris USA, Inc*., 321 F. Supp. 2d 72, 74 (D.D.C. 2004).

[15] *Id*. at 75.

[16] *Id*.

Judge Kessler concluded that Section 1964(a)'s plain language "requires a showing of a reasonable likelihood of future RICO violations before a court may order disgorgement."[17]

Judge Kessler then noted that the scope of disgorgement permitted under Section 1964(a) was a matter of first impression in the D.C. Circuit (only the Second and Fifth Circuits had considered the question).[18] Defendants argued that the court should follow the standard set in the Second Circuit's decision, *U.S. v. Carson*, which required "that disgorgement under Section 1964(a) be limited to those ill-gotten gains 'being used to fund or promote the illegal conduct, or constitute capital available for that purpose.'"[19] DOJ argued that this limitation on disgorgement's scope "is overly-restrictive and contrary to the text of RICO and the purposes of RICO disgorgement."[20]

Judge Kessler agreed with DOJ, finding *Carson*'s limitation on the scope of disgorgement to be "inconsistent with the text of Section 1964(a)"[21] and "inconsistent with the purposes of RICO."[22] Kessler concluded that she did "not find persuasive *Carson*'s rationale for limiting disgorgement under Section 1964(a) to funds that 'are being used to fund or promote the illegal conduct, or constitute capital available for that purpose,'"[23] and thus refused to "engraft onto a broad remedial statute such as RICO that narrow limitation."[24] As a result, she denied Defendants' motion for summary judgment, allowing DOJ's disgorgement claim to move forward.[25]

Defendants Appeal Judge Kessler's Decision on Disgorgement

Defendants appealed Judge Kessler's decision to a three judge panel of the U.S. Court of Appeals for the District of Columbia Circuit ("appeals court"). That court, in a 2-1 decision, ruled that RICO's civil provisions allow sanctions to prevent future fraudulent acts only, not ones that undo past harm.[26] Like Judge Kessler, the court found that Section 1964(a)'s plain language "provides jurisdiction to issue a variety of orders 'to prevent and restrain' RICO violations," and that this jurisdiction is "limited to forward-looking remedies that are aimed at future

[17] *Id*.

[18] *Id*. at 76, citing *U.S. v. Carson*, 52 F.3d 1173 (2nd Cir. 1995) and *Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345 (5th Cir. 2003).

[19] *Id*.

[20] *Id*.

[21] *Id*. at 77.

[22] *Id*. at 79.

[23] *Id*. at 81, quoting *Carson*, 52 F.3d at 1182.

[24] *Id*.

[25] *Id*. at 82. Defendants also had sought dismissal of the disgorgement claim "on the ground that its economic model fails to meet the standards for disgorgement under Section 1964(a)." *Id*. at 81. Judge Kessler found, however, that summary judgment was inappropriate on this basis because "a determination of whether the Government's economic model is accurate, adequate, or appropriate under Section 1964(a) is a fact-intensive inquiry that can only be resolved at trial." *Id*. at 82.

[26] *See U.S. v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005), available at http://pacer.cadc.uscourts.gov/docs/common/opinions/200502/04-5252a.pdf

violations."[27] However, unlike Judge Kessler, the court found that disgorgement "is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo," and that it is "measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future. Thus it is both aimed at and measured by *past* conduct."[28] Finding that the District Court "erred when it found that disgorgement was an available remedy under 18 U.S.C. § 1964(a)," the appeals court reversed Judge Kessler and granted summary judgment in Defendants' favor as to DOJ's disgorgement claim.[29]

On April 20, 2005, the appeals court rejected DOJ's petition for a rehearing[30] as well as its petition for a rehearing en banc (i.e., a full court rehearing).[31] DOJ has until July 20, 2005 to appeal the issue to the U.S. Supreme Court, but has not yet indicated whether it will do so.[32]

Post-Appeals Court Decision Developments

In a brief filed with the District Court on February 16, 2005, DOJ stated that the appeals court's disgorgement ruling "has, at least temporarily, fundamentally changed the law that has governed this case for the past four and a half years."[33] Therefore, DOJ continued, it was forced "to substantially revise and alter its remedies presentation," thereby justifying a postponement of "the presentation of all remedies-specific evidence until after Defendants present their defense to liability."[34]

On February 28, 2005, Judge Kessler issued Order #886.[35] In this order, Kessler stated that the appeals court's ruling "as this court reads it, simply does not permit non-disgorgement remedies to prevent and restrain the effects of past violations of RICO."[36] Judge Kessler warned that "[i]n fashioning its remedies testimony, the Government must be mindful of the plain, explicit language of [the appeals court's] 2-1 Opinion."[37] However, finding it "premature for the Court, at this point, to rule out as a matter of law the non-disgorgement remedies which the Government has identified," she split the liability and remedies phases of the trial to allow DOJ "an opportunity to present evidence that will meet the new appellate standard."[38]

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[27] *Id*. at 1198.

[28] *Id*.

[29] *Id*. at 1202.

[30] *U.S. v. Philip Morris USA Inc.*, 2005 U.S. App. LEXIS 6733 (D.C. Cir., 2005).

[31] *U.S. v. Philip Morris USA Inc.*, 2005 U.S. App. LEXIS 6734 (D.C. Cir., 2005).

[32] *See* Myron Levin, *U.S.' Years-Long Battle With Tobacco Firms Nears and End*, L.A. TIMES (June 7, 2005).

[33] See *U.S. v. Philip Morris, et al*., No. 99-CV-02496GK (U.S. Dist. Ct., D.C.) (United States' Memorandum Regarding Non-Disgorgement Equitable Remedies Pursuant to Order #875) (February 16, 2005) at 1 [hereinafter DOJ Remedies Brief].

[34] *Id*. at 2.

[35] *See U.S. v. Philip Morris, et al*., No. 99-CV-02496GK (U.S. Dist. Ct., D.C.) (Order #886) (Feb. 28, 2005), available at http://www.tobacco-on-trial.com/files/050228_886delay.pdf

[36] *Id*. at 5.

[37] *Id*.

The liability phase of the trial began on September 21, 2004, and the remedies phase began on May 2, 2005.[39] The trial concluded on June 2, 2005, and Judge Kessler heard closing arguments June 7 through 9, 2005.[40] All told, the case involved 45,000 pages of testimony, more than 240 witnesses, and approximately 15,000 exhibits.[41] Judge Kessler's decision, which could take weeks or even months, is pending.[42]

II. LIABILITY PHASE OF TRIAL

DOJ produced dozens of witnesses and reams of documents in support of its claims that Defendants' wrongful acts violate the RICO statute. Stated broadly, these claims allege that Defendants: (1) purposely misled the public regarding smoking's dangers; (2) misled, and continue to mislead, the public on the dangers of secondhand smoke; (3) misrepresented nicotine's addictiveness and manipulated nicotine delivery in cigarettes; (4) deceptively marketed "light" and "low tar" cigarettes to exploit smokers' desire for less hazardous products; (5) targeted the youth market; and (6) conspired not to research or produce safer cigarettes.[43] The following section summarizes each of these claims.[44]

A. DEFENDANTS PURPOSELY MISLED THE PUBLIC REGARDING SMOKING'S DANGERS

Summary of DOJ's Claim[45]

"[S]ubstantial evidence exists that Defendants have engaged in and executed – and continue to engage in and execute – a massive 50-year scheme to defraud the public, including consumers of cigarettes, in violation of RICO."[46]

In 1954, the tobacco companies issued the "Frank Statement to Cigarette Smokers," a full page document published in 448 newspapers across the United States.[47] The Frank Statement included "two representations that would lie at the heart of Defendants' fraudulent scheme."[48] First, that "there was insufficient scientific and medical

[38] *Id*.

[39] See Campaign for Tobacco-Free Kids, *Timeline in USA v. Philip Morris USA, Inc., et al*., available at: http://www/tobaccofreekids.org/reports/doj/timeline

[40] *Id*.

[41] *See* Levin, *supra* note 32.

[42] *Id*.

[43] See United States' Final Proposed Findings of Facts, Executive Summary [hereinafter DOJ Executive Summary], available at: http://www.usdoj.gov/civil/cases/tobacco2/U.S.%20Final%20PFOF%20Exec%20Summary.pdf

[44] For a summary of witness testimony and supporting documents on these claims, see Tobacco Control Resource Center, *Trial Update* (Feb. 4, 2005), available at: http://tobacco.neu.edu/litigation/cases/DOJ/doj_mid_trial_summary_2-4-05.pdf

[45] *See* DOJ Executive Summary, *supra* note 43, at 1-7 for DOJ's complete summary of this claim.

[46] *Id*. at 1.

[47] *Id*. at 4.

[48] *Id*.

evidence that smoking was a cause of any disease," and second, that "the industry would jointly sponsor and disclose the results of 'independent' research designed to uncover the health effects of smoking."[49] Both claims were untrue. By late 1953, there had been "at least five published epidemiologic investigations, as well as others identifying and examining carcinogenic components in tobacco smoke and their effects."[50] The result was a "categorical understanding of the link between smoking and lung cancer."[51]

To support its fraud, the industry founded the Tobacco Industry Research Committee ("TIRC"), later renamed the Council for Tobacco Research ("CTR"), as a "sophisticated public relations apparatus . . . to deny the harms of smoking and to reassure the public."[52] This involved "the essential strategy of generating 'controversy' surrounding the scientific findings linking smoking to disease" – an approach "Defendants stuck to . . . without wavering, for the next half-century."[53]

B. DEFENDANTS MISLED, AND CONTINUE TO MISLEAD, THE PUBLIC ON THE DANGERS OF SECONDHAND SMOKE

Summary of DOJ's Claim[54]

Since the 1970s, evidence has grown regarding the dangers of secondhand smoke, also known as environmental tobacco smoke ("ETS").[55] There now is significant evidence linking ETS to adverse health outcomes, including lung cancer and heart disease in adults and respiratory ailments in infants and children.[56] Despite this evidence, Defendants have misled the public about ETS's health effects in an effort to quell restrictions on where and when people can smoke.[57]

Defendants have viewed concerns about ETS's health effects "as a threat to the 'number of smokers & number of cigarettes they smoke.'"[58] Although they promised publicly to "seek answers" through research, these promises were intended only to hoodwink the public into believing that ETS's link to disease was still an open controversy.[59] To that end, "Defendants designed a sophisticated public relations and research strategy to attempt to 'alter public perception that ETS is damaging'" – despite their own knowledge that there was a "[l]ack of objective science" to support this campaign.[60]

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[49] *Id*.

[50] *Id*. at 2.

[51] *Id*.

[52] *Id*. at 4.

[53] *Id*.

[54] *See id*. at 11-14 for DOJ's complete summary of this claim.

[55] *Id*. at 11.

[56] *Id*. at 12.

[57] *Id*. at 11.

[58] *Id*. at 12.

[59] *Id*.

[60] *Id*. at 12-13.

Part of Defendants' strategy involved the creation in 1988 of the Center for Indoor Air Research ("CIAR").[61] CIAR acted "as a coordinating organization for Defendants' efforts to fraudulently mislead the American public about the health effects of ETS exposure."[62] Additionally, to extend their domestic initiative to "counter ever-mounting evidence implicating secondhand smoke as a cause of disease and other health problems," Defendants formed the international ETS Consultancy Program.[63] Overall, Defendants' "goal was to 'keep the controversy alive' and forestall legislation and any restrictions on public or workplace smoking."[64]

C. DEFENDANTS MISREPRESENTED NICOTINE'S ADDICTIVENESS AND MANIPULATED NICOTINE DELIVERY IN CIGARETTES

Summary of DOJ's Claim[65]

"Cigarette smoking is an addictive behavior, a dependency characterized by drug craving, compulsive use, tolerance, withdrawal symptoms, and relapse after withdrawal. Underlying the smoking behavior and its remarkable intractability to cessation is the drug nicotine. Nicotine is the primary component of cigarettes that creates and sustains addiction to cigarettes."[66]

Since the 1950s, Defendants have studied nicotine and have characterized its effects as "addictive," "dependence" producing or "habituating."[67] Industry documents "demonstrate unequivocally that defendants understood the central role nicotine plays in keeping smokers smoking, and thus its critical importance to the success of their industry."[68] Additionally, company documents reveal that "Defendants purposefully designed and sold products that delivered a pharmacologically effective dose of nicotine in order to create and sustain nicotine addiction in smokers."[69]

However, similar to their denial regarding smoking's link to disease, Defendants "consistently and publicly denied that smoking is addictive . . . intentionally maintain[ing] and coordinate[ing] their fraudulent position on addiction and nicotine as an important part of their overall efforts to influence public opinion and persuade people that smoking was not dangerous" and that "smoking is a free choice."[70] Defendants also have "publicly and fraudulently denied that they manipulate nicotine."[71] "Through these and other false statements, Defendants have furthered their common efforts to

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[61] *Id*. at 13.

[62] *Id*.

[63] *Id*. at 14.

[64] *Id*.

[65] *See id*. at 14-18 for DOJ's complete summary of this claim.

[66] *Id*. at 15.

[67] *Id*.

[68] *Id*.

[69] *Id*. at 15. For several examples of these documents, see *id*. at 15-16.

[70] *Id*. at 16.

[71] *Id*. at 17.

deceive the public regarding their use and manipulation of nicotine."[72]

D. DEFENDANTS DECEPTIVELY MARKETED "LIGHT" AND "LOW TAR" CIGARETTES TO EXPLOIT SMOKERS' DESIRE FOR LESS HAZARDOUS PRODUCTS

Summary of DOJ's Claim[73]

Another central component of Defendants' scheme to defraud is "the design and marketing of so-called 'low tar/low nicotine' cigarettes."[74] As public awareness and concern about smoking's dangers started to grow in the early 1950s, Defendants "began developing cigarettes they referred to internally as 'health reassurance' brands in an effort to keep smokers in the market."[75] Defendants initially made explicit claims that these brands were safer as the result of an added filter; later, Defendants switched to making implied health claims in an effort to avoid suggesting to consumers that any cigarettes were harmful.[76]

For years, the tobacco companies have marketed and promoted their so-called "low tar/nicotine" cigarettes with brand names such as "Light," "Ultralight," "Mild" and "Medium" – suggesting to consumers that these products are safer than regular cigarettes – and have continued to "make health benefit claims regarding filtered and low tar cigarettes."[77] Defendants, however, have been aware since the late 1960s/early 1970s that such cigarettes are unlikely to be any healthier than regular cigarettes.[78] Moreover, Defendants have known for decades that "light/low tar" cigarettes do not actually deliver lower levels of tar and nicotine.[79] This is because smokers of these cigarettes tend to modify their smoking behavior to obtain the amount of nicotine sufficient to satisfy their addiction.[80] Defendants have gone so far as to design "light/low tar" cigarettes that facilitate a smoker's ability to gain adequate nicotine delivery to create and sustain addiction.[81] Despite their knowledge of this information, however, Defendants have withheld and suppressed it from public dissemination.[82]

Defendants' "campaign of deception" has impacted Americans' decisions to smoke by leading many smokers to perceive "light/low" tar cigarettes as "an acceptable alternative to quitting smoking."[83] In fact, smokers

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[72] *Id*. at 18.

[73] *See id*. at 18-21 for DOJ's complete summary of this claim.

[74] *Id*. at 18.

[75] *Id*.

[76] *Id*.

[77] *Id*. at 18-19.

[78] *Id*. at 19.

[79] *Id*.

[80] *Id*. Smokers may accomplish this by inhaling smoke more deeply, holding the smoke in their lungs longer, covering the cigarette ventilation holes with their fingers or lips, or smoking more cigarettes.

[81] *Id*. at 20.

[82] *Id*.

[83] *Id*.

of these cigarettes are less likely to quit smoking than are smokers of regular cigarettes.[84] Additionally, many of these smokers actually consume more cigarettes than do smokers of regular cigarettes.[85] "In short, Defendants' concerted campaign of deception regarding low tar cigarettes has been a calculated – and extremely successful – scheme to increase their profits at the expense of the health of the American public."[86]

E. DEFENDANTS TARGETED THE YOUTH MARKET

Summary of DOJ's Claim[87]

Simply put, Defendants have "intentionally marketed cigarettes to youth under the legal smoking age while falsely denying that they have done and continue to do so."[88] This is especially egregious because "cigarette smoking, particularly that begun by young people, continues to be the leading cause of preventable disease and premature mortality in the United States. Of children and adolescents who are regular smokers, one out of three will die of smoking-related disease."[89]

Defendants' own documents demonstrate that their continued financial viability depends upon new smokers taking up the habit to replace current smokers who either die from smoking-related diseases or quit.[90] Industry documents also demonstrate that Defendants have known that "an overwhelming majority of regular smokers begin smoking before age eighteen," and that youth develop brand loyalty, are highly susceptible to advertising, and are very likely to remain lifetime smokers.[91]

Although Defendants pledged voluntarily in 1966 to refrain from marketing to youth, they did so only in the face of threatened federal advertising restrictions.[92] And, despite this pledge, Defendants "continued unabated their efforts to capture as much of the youth market as possible . . . designing advertising themes, marketing campaigns, and promotional activities known to resonate with adolescents."[93] Specifically, Defendants' marketing campaigns have used themes such as "independence, liberation, attractiveness, adventurousness, sophistication, glamour, athleticism, social inclusion, sexual attractiveness, thinness, popularity, rebelliousness and being 'cool'" to exploit adolescents' vulnerability.[94] Moreover, Defendants continue to:

> advertise in youth-oriented publications; employ imagery and

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[84] *Id*.

[85] *Id*. at 20-21.

[86] *Id*. at 21.

[87] *See id*. at 21-27 for DOJ's complete summary of this claim.

[88] *Id*. at 21.

[89] *Id*.

[90] *Id*.

[91] *Id*. at 21, 22. For numerous examples of these documents, *see id*. at 22-23.

[92] *Id*. at 21.

[93] *Id*. at 22. For several examples of documents discussing the Defendants' marketing efforts, *see id*. at 23.

[94] *Id*. at 24.

> messages that they know are appealing to teenagers; increasingly concentrate their marketing in places where they know youths will frequent such as convenience stores; engage in strategic pricing to attract youths; increase their marketing at point-of-sale locations with promotions, self-service displays, and other materials; sponsor sporting and entertainment events, many of which are televised or otherwise broadcast and draw large youth audiences; and engage in a host of other activities which are designed to attract youths to begin and continue smoking.[95]

> Defendants, however, still deny that they intentionally appeal to youth.[96]

F. DEFENDANTS CONSPIRED NOT TO RESEARCH OR PRODUCE SAFER CIGARETTES

Summary of DOJ's Claim[97]

Although Defendants "recognized that there was a substantial market for a cigarette that could be marketed as potentially less hazardous," they jointly agreed not to develop such products.[98] The Defendants entered this agreement, known as the "Gentlemen's Agreement," because producing a safer cigarette would "jeopardize the public relations position at the core of the scheme to defraud: the denial that any commercially sold cigarettes were a proven cause of disease."[99] Thus, if a company designed a safer cigarette, it purposely "limited the types of information that it provided to consumers in marketing such products . . . because such information carried the obvious implication that cigarettes were harmful."[100] Despite privately entering into the Gentlemen's Agreement, Defendants publicly "proclaim[ed] their commitment – and ability – to develop potentially less hazardous cigarettes, but indicated that such actions were unnecessary unless and until cigarettes were proven to cause disease."[101]

Evidence suggests that Defendants also jointly agreed to limit their own biological research "because they did not want to generate internal evidence to suggest that the companies believed there was any need to examine whether a causative link existed between smoking and disease, let alone create scientific information that demonstrated

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[95] *Id*. at 24.

[96] *Id*.

[97] *See id* at 8-11 for DOJ's complete summary of this claim.

[98] *Id*. at 8.

[99] *Id*.

[100] *Id*. at 10.

[101] *Id*. at 8. For a number of examples of tobacco industry executives' public statements to this effect, see *id*. at 8-9.

such a link."[102] Additionally, substantial evidence suggests that research the companies did conduct yielded certain design features and processes that were likely to reduce smoking's hazards, were technically feasible, and were acceptable to smokers – yet the companies chose not to incorporate them into their products.[103] "In short, Defendants' conduct in this area is powerful evidence of Defendants' well documented agreement not to compete on smoking and health issues."[104]

IV. REMEDIES PHASE OF TRIAL

Although the U.S. Court of Appeals for the District of Columbia Circuit has ruled against allowing DOJ to pursue disgorgement as a remedy, there are many non-disgorgement remedies available to help correct the effects of Defendants' conspiracy to defraud the public by lying about smoking's dangers. This section focuses on the remedies DOJ presented during phase two of the trial.[105]

On February 16, 2005, DOJ filed a brief ("Remedies Brief") with the District Court addressing, among other things, the non-disgorgement equitable remedies that it seeks.[106] The brief states, "all of the non-disgorgement remedies sought here are forward-looking," and therefore permissible under civil RICO.[107] DOJ requests, first, "a permanent injunction with several components, each of which relates directly to the United States' interest in preventing and restraining Defendants from engaging in the fraudulent and unlawful course of conduct alleged and proven by the United States in this case."[108] DOJ then lists certain aspects of this injunctive relief: (1) "an order requiring Defendants to fund sustained smoking cessation programs that have been scientifically proven effective";[109] (2) "an order requiring Defendants to fund a sustained public education campaign, administered and controlled by an independent third party, relating to adverse health effects of smoking, nicotine addiction, 'light' cigarettes, and ETS";[110] and (3) "the requirement that Defendants fund a long-term, sustained youth prevention campaign including communications and other programs."[111]

Second, DOJ states in the brief that it "may also seek an injunction aimed at preventing and restraining Defendants' continued marketing to young people, including those under 21."[112] At trial, DOJ put forth an additional remedy that would require

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[102] *Id*. at 10.

[103] *Id*. at 11.

[104] *Id*.

[105] For a complete summary of the remedies that DOJ indicated in a 2002 court filing it would seek, see *Trial Update*, *supra* note 44. *See also* John R. Wilke, *Demand Marks Departure for Bush Administration; Outlook is Uncertain*, WALL STREET JOURNAL (March 11, 2002) at A3 (discussing various potential remedies).

[106] *See* DOJ Remedies Brief, *supra* note 33.

[107] *Id*. at 8.

[108] *Id*.

[109] *Id*. at 9.

[110] *Id*. at 11.

[111] *Id*.

[112] *Id*. at 12.

court-ordered industry monitors with the power to, among other things, fire tobacco industry executives.[113]

The following is a summary of each of these remedies, including arguments from DOJ's Remedies Brief, as well as testimony from both DOJ and defense witnesses.

A. INDUSTRY-FUNDED CESSATION, PUBLIC EDUCATION, AND YOUTH SMOKING PREVENTION CAMPAIGNS

Excerpts from DOJ's Remedies Brief[114]

Industry-Funded Cessation Programs

- Evidence from both fact and expert witnesses shows "that Defendants have designed and marketed 'light' cigarettes to keep smokers smoking and to discourage quit attempts . . . and that substantial percentages of smokers perceive brands with such descriptors to be 'safer' or an acceptable alternative to quitting . . . , in large part because Defendants have implicitly marketed them as such. Defendants continue to market 'light' cigarettes, even though, as Defendants have long known, including from their internal research, 'light' cigarettes provide smokers no meaningful reduction in adverse health consequences relative to their full flavor counterparts."

- Therefore, "[r]equiring Defendants to fund expanded access to smoking cessation programs that have proven to be effective will deprive Defendants of the incentive to continue their approach to the design and marketing of 'light' cigarettes, and thereby tend to prevent future unlawful conduct."

- Furthermore, "improving the ability of smokers to quit successfully will reduce the economic benefit to Defendants from continuing to engage in the types of fraudulent marketing of light and low tar cigarettes alleged and proven by the United States in this case. And it will help cure the ongoing and future untoward consequences of Defendants' unlawful conduct, which was aimed at keeping smokers using cigarettes by designing and marketing cigarettes that maintained smoking addiction, even as Defendants publicly denied for decades that smoking was addictive or proven to cause any disease at all."

- "In short, this remedy is intended to, and will, prevent and restrain future violations by Defendants, as well as contribute to the eradication of the ongoing and future ill effects of their unlawful conduct."

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[113] *See* Written Direct Examination of Max H. Bazerman, Ph.D. [hereinafter Bazerman Testimony], available at: http://www.usdoj.gov/civil/cases/tobacco2/01_Bazerman.042705.nmk1.pdf, summarized in Section V(C), below. Judge Kessler also has wide discretion to fashion further remedies that fit Defendants' RICO violations.

[114] For DOJ's complete summary of these arguments, s*ee* DOJ Remedies Brief, *supra* note 33.

Industry-Funded Public Education Campaign

- "Extensive testimony . . . showing that Defendants continue even today in their public statements – including on websites, package inserts, and other communications – to purposefully avoid informing smokers what they have known for decades: that smoking is addictive primarily because cigarettes deliver the drug nicotine. Similarly, Defendants continue to publicly equivocate about whether ETS is a proven cause of harm to nonsmokers."

- Requiring Defendants to fund a sustained public education campaign is important "because it will tend to prevent the public from being adversely affected by any future fraudulent or misleading public relations efforts by Defendants."

Industry Funded Youth Smoking Prevention Campaign

- "[S]ome multifaceted counter-marketing campaigns have proven effective at changing attitudes, norms, and behavior toward tobacco use."

- "The youth smoking prevention campaign would address Defendants' marketing to adolescents and counter Defendants' marketing aimed at people under age 21."

DOJ Witness

Michael C. Fiore, M.D., M.P.H.[115]

Michael Fiore is a Professor of Medicine and the Director of the Center for Tobacco Research and Intervention at the University of Wisconsin Medical School in Madison, Wisconsin. Fiore outlined a remedy requiring Defendants to fund as smoking- cessation programs, advertising and training, as follows:

- "The key components of a comprehensive, evidence-based cessation program are:

  (1) a national tobacco quitline network that will provide universal, barrier-free access to evidence-based counseling and medications for tobacco cessation;

  (2) an extensive paid media campaign to encourage all smokers in the United States to quit using tobacco;

  (3) a new, broad, and balanced research agenda (basic, clinical, public health, translational, dissemination) to achieve future improvements in the reach, effectiveness and adoption of tobacco dependence interventions across both individuals and populations; and

  (4) training and education to ensure that all clinicians in the United

[115] *See* United States' Written Direct Examination of Michael C. Fiore, M.D., M.P.H. [hereinafter Fiore Testimony], available at: http://www.usdoj.gov/civil/cases/tobacco2/02_20050509%20Written%20Direct%20-%20Fiore.pdf

States have the knowledge, skills and support systems necessary to help their patients quit tobacco use."

- "A comprehensive cessation program should also:

  (5) mobilize health systems to implement system-level changes that result in effective utilization of tobacco dependence treatments;

  (6) mobilize national quality assurance and accreditation organizations, clinicians, health systems, and others to establish and measure the treatment of tobacco dependence as part of the standard of care; and

  (7) mobilize communities to ensure that policies and programs are in place to increase demand for services and to ensure access to such services."

- "A comprehensive cessation initiative should be sustained over time and securely funded. The best-designed initiative has little likelihood of being implemented and having sustained impact without a secure, ongoing funding source. Secure and sustained funding is also important to permit both short- and long-term evaluation of such initiatives to ascertain whether they are having their intended effect on the population."

- "[A] comprehensive cessation program should be funded at the level of $5.2 billion annually."

- "Given the current size of the smoking population – about 45 million people, about 30 million of who tell us they want to quit – it is reasonable to expect that it will take as many as 25 or more years to allow every smoker in America who wants to quit to do so successfully."

- "With a full range of treatment options and a program that reaches all smokers, we can help at least 1 million new smokers quit the use of tobacco successfully each year. And if the program exists for at least 25 years, we can work to help all smokers who wish to quit but are unable to do so."[116]

Defense Witnesses

Donald B. Rubin, Ph.D.[117]

Harvard University statistics professor Donald Rubin testified for the Defendants as follows:[118]

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[116] $5.2 billion a year for 25 years yields a total of $130 billion for the entire cessation program. In closing arguments on June 7, 2005, however, DOJ lawyers "drastically reduced" this figure to $10 billion. *See* Levin, *supra* note 32. For more information on this topic, see Appendix B, attached hereto.

[117] *See* Written Direct Examination of Donald B. Rubin, Ph.D., available at: http://www.altria.com/download/pdf/DOJ%20Direct%20Rubin.pdf

[118] Rubin reportedly was asked on cross-examination "if he was paid more than $2,000,000 by the tobacco industry in the last five years." He allegedly answered, "maybe… that sounds correct." Tobacco on Trial, *Rubin Slams Fiore Cessation Plan*, May 25, 2005,

- "Defendants' alleged information-based RICO violations – their alleged suppression and misrepresentations of the health risks of smoking, including addiction – had essentially no causal effect on either adolescent smoking initiation or smoking cessation."

- "The evidence is very strong that providing additional, incremental truthful information about the health risks of smoking makes essentially no difference to youth smoking initiation. Providing adolescents with additional information about the long-term health risks of smoking, above and beyond that which was already available, has been shown to be ineffective in reducing smoking initiation."

- Rubin contradicted Fiore's testimony. Although Rubin admitted that "[i]t is possible to estimate the costs of the proposed national cessation program in a statistically valid and reliable way, using actual world data, particularly data from already-established state quitlines, coupled with explicit assumptions," he alleged, "the costs of the components of the national cessation program proposed by Dr. Fiore are not based on statistically valid or reliable analyses of data."

available at: http://www.tobacco-on-trial.com/archives/2005/05/25/tue-day-108-rubin-slams-fiore-cessation-plan

Roman L. Weil. Ph.D.[119]

University of Chicago accounting professor Roman Weil also testified for Defendants as follows:

- Criticized proposed industry payments to fund a smoking cessation campaign and anti-smoking advertising as "unconditional." "Defendants would have to pay the approximately $5.5 billion each year whether they violate RICO in the future [or not]. No change in Defendants' future conduct would allow the Defendants to avoid these unconditional payments."

- Claimed such payments would hurt "third parties" such as shareholders, creditors, employees and retirees (those whose pensions are underfunded).

- "From an accounting and economics perspective, a remedy prevents the future commission of particular conduct either (a) by prohibiting it, or (b) by reducing or eliminating Defendants' economic incentives to engage in that conduct. Unconditional remedy payments . . . do neither, except to the extent that the payments are so large as to put Defendants out of business so

[119] *See* Written Direct Examination of Roman L. Weil, Ph.D. [hereinafter Weil Testimony], available at: http://www.altria.com/download/pdf/media_doj_livewitness_weil_05232005.pdf

that they engage in no future conduct at all."

- "In particular, Defendants' future conduct can affect neither the proposed payment nor its amount. Because the proposed payments are fixed and unavoidable, they do not make the commission of future RICO violations either more or less attractive economically."

B. PENALTIES FOR MISSING YOUTH-SMOKING TARGETS

Excerpts from DOJ's Remedies Brief[120]

- "Under [this] remedy, the Court would order specific reductions in youth smoking on a pre-determined schedule. The Court would monitor and evaluate Defendants' conduct in complying with the Court's injunction and impose appropriate sanctions, including monetary sanctions, should the goals not be met and should the Court determine that Defendants' conduct was inadequate in complying with the injunction."

- "This remedy would establish an economic disincentive for Defendants to continue their wrongful conduct of marketing cigarettes to young people and publicly denying that they do so and publicly denying that their marketing has any effect on youth smoking behavior."

DOJ Witness

Jonathan Gruber, Ph.D.[121]

MIT economics professor Jonathan Gruber put forth DOJ's plan for penalties for missed youth smoking rate reduction targets. He testified as follows:

- "I was asked to develop a forward-looking remedy to reduce the incentive for the defendants to engage in future RICO violations that make their brands appealing to young people. Broadly speaking, the remedy is an outcome-based remedy that imposes financial assessment on the defendants if, and only if, they fail to meet targeted reductions in smoking by 12-20 year olds."

- "The proposed remedy would not impose any financial assessment on defendants if they meet targeted reductions in youth smoking. Each individual defendant will be assessed $3,000 per youth by which the defendant exceeds its target levels of youth smoking. The targets themselves involve reductions in youth smoking of 6%

[120] For DOJ's complete summary of these arguments, s*ee* DOJ Remedies Brief, *supra* note 33.

[121] *See* United States' Written Direct Examination of Jonathan Gruber, Ph.D., available at: http://www.usdoj.gov/civil/cases/tobacco2/01_GruberWrittenDirect0502051.pdf

per year between 2007 and 2013, for a total reduction of 42%. "

- "The $3,000 assessment represents an estimate of the upper limit on the lifetime proceeds that a defendant would earn from making their brands appealing to young people."

- "The goal of this remedy is to ensure that defendants have no financial incentive to make their brands appealing to young people beyond the targeted levels. Only by choosing a financial assessment that is an upper limit on the amount that a defendant would earn by making their brands appealing to young people, do we remove that financial incentive."

- "[B]ecause the defendants themselves have the best knowledge about how to make their brands appealing to young people, [this type of] remedy allows the defendants to choose the avenue of youth smoking reduction that is most efficient and effective."

- This approach "directly measure[es] the results of defendants' actions to make their brands appealing to young people, rather than attempting to restrict each individual action."

- "This outcome-based remedy is forward-looking in two senses. First, most directly, assessments are based on future actions that the defendants take to make their brands appealing to young people. Second, more indirectly, the incentives for defendants (or other tobacco manufacturers) to commit future RICO violations will depend on the expected net returns from such violations. If this remedy is put in place, it will raise the defendants' assessment of the likelihood that future violations will result in similar remedies. This will have a 'chilling' effect on the willingness of any tobacco manufacturer to engage in such future violations."

Defense Witness

Roman L. Weil, Ph.D.[122]

- Criticized this remedy, claiming that "innocent" third parties would be harmed, and claimed that Dr. Gruber "made . . fundamental mistakes in providing a $3,000 ceiling for the present value of future gains earned per youth smoker."

- Said that Dr. Gruber's proposal "does not directly relate to the future commission of RICO violations by those Defendants. Rather, it relates to whether youth smoking levels reach targeted reduction goals. The payments do not depend on why a given manufacturer fails to meet the targeted reduction level. Accordingly, a Defendant cigarette manufacturer may pay an assessment even though it commits no RICO violations whatsoever in

[122] *See* Weil Testimony, *supra* note 119.

the future. Or, a Defendant may avoid paying an assessment even though it commits RICO violations in the future."

C. INDUSTRY MONITORS WITH THE POWER TO FIRE TOBACCO EXECUTIVES

DOJ Witness

Max H. Bazerman, Ph.D.[123]

Harvard Business School Professor Max Bazerman testified regarding the implementation of court-appointed industry monitors as a possible remedy:[124]

- Bazerman said he did not recommend specific structural changes to Defendants' businesses, but rather recommended "that the Court appoint monitors who will have the authority, with the utilization of outside experts as needed, to review all aspects of defendants' businesses and make particularized and specific recommendations for structural changes, or with a mandate from the Court to implement structural changes, such as those that I have identified, that address the incentives and biases that in my opinion will likely cause misconduct to continue."

- "To be clear, I am recommending a process involving court-appointed monitors. These monitors would assist the Court in implementing appropriate structural changes for defendant companies that include:

  (a) eliminating economic incentives for defendants to sell cigarettes to young people;

  (b) changing compensation and promotion policies for managers and executives to produce outcomes inconsistent with misconduct;

  (c) removing senior management;

  (d) requiring subcontracting of all research to private companies monitored by the Court; and

  (e) requiring the defendants to sell, intact, their research and development, current product development activities, and all other relevant material regarding safer

  cigarettes so that safer cigarettes can be brought to the marketplace."

- "I would defer to the monitors and Court to determine who should be removed, if that is a structural change that the monitors recommend. I think at the least the

[123] *See* Bazerman Testimony, *supra* note 113.

[124] Defendants filed numerous objections to Bazerman's testimony. *See* Suzanne Lazarus, Tobacco on Trial, *Bazerman on the Biases of Corporations, Executives, Plaintiffs and Witnesses*, May 5, 2005, available at: http://www.tobacco-on-trial.com/archives/2005/05/05/wed-day-100-bazerman-on-the-biases-of-corporations-executives-plaintiffs-and-witnesses. Judge Kessler overruled these objections "but reiterated her strong reservations about the witness, whose qualifications she deemed 'troubling on many grounds.'" *Id*.

CEO and the executives who directly report to the CEO should be considered for removal. In the case of Philip Morris, this would include their senior team."

- Bazerman also recommend that "the Court consider interventions that include:

  (a) educating managers in such a way to address bias in decision making;

  (b) creating internal mechanisms for employees to report misconduct without fear of retribution;

  (c) changing oversight and reporting arrangements;

  (d) requiring the disclosure of any information concerning an actual or potential

  health or safety risk with which a consumer of cigarettes would be concerned;

  (e) requiring the discontinuance of or change to advertising and promotional campaigns or practices;

  (f) severe monetary fines for participation in or association with individuals or organizations engaged in activities that constitute or will reasonably result in corporate or individual misconduct; and

  (g) requiring defendants to fund cessation programs and counter-marketing programs that affect consumer demand for their products."

- Bazerman stated that the most important piece of information that he wanted the Court to take away from his testimony was that "the Court needs to consider structural changes to defendant companies that defendants are unable to make themselves."

Defense Witness

Daniel R. Fischel[125]

University of Chicago Law School Professor Daniel Fischel was called to rebut Bazerman's testimony, as follows:[126]

- "Dr. Bazerman's predictions about the likely future behavior of existing managers are neither robust nor reliable."

[125] *See* Written Direct Examination of Daniel R. Fischel, available at: http://www.altria.com/download/pdf/DOJ%20Direct%20Fischel.pdf

[126] Reportedly, "[i]n its lengthy cross-examination, the DOJ cleverly chiseled away at Mr. Fischel's credibility, first by establishing that Mr. Fischel had only 'skimmed' Dr. Bazerman's testimony and the few other court documents he had examined, and then by establishing him as a biased witness for whom the tobacco industry had been a source of income on numerous occasions. [DOJ] also established lengthy ties between the tobacco industry and Mr. Fischel's company, Lexecon." *See* Tobacco on Trial, *U of Chicago Professor Dismisses DOJ's Behavioral Research Testimony as 'Too Simplistic,'* June 2, 2005, available at: http://www.tobacco-on-trial.com/archives/2005/06/02/u-of-chicago-professor-dismisses-dojs-behavioral-research-testimony-as-too-simplistic#more-287

- "Future managers will face the same alleged incentives to increase market share and profits and to avoid misconduct as do current managers. As a result, Dr. Bazerman does not show that removal of senior managers will prevent future unlawful conduct."

- "If the managers are hired exclusively from inexperienced candidates, this would greatly increase the social costs of imposing this remedy because the new managers may know little or nothing about running a tobacco company. This could have devastating results not only for the companies' employees and shareholders, but also for the public, as doing away with those managers with particular experience and knowledge regarding safer cigarette research may delay or completely prevent the development and marketing of such cigarettes."

- "[T]here is no reason to assume that the defendant companies or their current management will fail to follow the directions of the court. In addition, numerous mechanisms already exist to give managers incentives to act lawfully."

- "Dr. Bazerman fails to provide any specificity regarding who the monitors will be, the scope of their work, the information they will be allowed to gather or use, the way in which they will interact with the Court, or the limits on their authority. As a result, there are many potential problems that depend on the particular process that is implemented."

V. SETTLEMENT

According to a on March 22, 2005 *Wall Street Journal* article, Judge Kessler "privately urged" the parties to meet with court-appointed mediator Eric Green, who hammered out the Microsoft Corp. antitrust case settlement.[127] People "close to the case" reported that the two sides have met with Green at least once since the appeals court's ruling on the disgorgement issue.[128] However, neither Green nor the parties have confirmed that talks have occurred or, if they have, whether they were productive.[129]

There are indicators that both DOJ and Philip Morris may be interested in settling before Judge Kessler issues her decision. Altria, Philip Morris' parent company, may be looking to settle due to its reported plans "for a huge spinoff of its Kraft Foods unit to shareholders."[130] As for DOJ's perspective on settlement, the *Wall Street Journal* reports that President Bush "is thought to have reservations" about the case, which was filed by the Clinton Administration, and that in the wake of the appeals' court ruling on the disgorgement issue "the White House may now be looking for a way to end the case against the companies, which have

[127] *See* John R. Wilke & Vanessa O'Connell, *Cigarette Makers and U.S. Seek Deal*, WALL STREET JOURNAL, (March 22, 2005) at A3.

[128] *Id*.

[129] *See* Levin, *supra* note 32.

[130] Wilke & O'Connell, *supra* note 127.

been major contributors to the Republican Party."[131]

However, the Campaign for Tobacco-Free Kids has urged DOJ to "continue to pursue the case aggressively with the goal of achieving . . . important public health remedies," and has said that DOJ "should reject any effort by the tobacco industry to get off the hook with a weak settlement . . . . that allows the industry to continue business as usual."[132] Similarly, in a June 15, 2005 letter to Attorney General Alberto Gonzalez, 50 Democratic senators and representatives "strongly urged" against DOJ entering into a settlement "based on the unreasonable weak demands made by the government last week."[133]

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[131] *Id*.

[132] Press Release, Vince Willmore, Communications Director, Campaign for Tobacco-Free Kids, *Justice Department Should Aggressively Pursue Tobacco Lawsuit and Reject Any Weak Settlement* (March 22, 2005), available at: http://tobaccofree kids.org/Script/DisplayPressRelease.php3?Displ ay=82.

[133] *Democrats Wary of Any Tobacco Case Settlement*, REUTERS, June 15, 2005. The authors apparently were referring to DOJ's drastic reduction in the amount of money it requested for cessation programs during closing arguments.

Appendix A

THE TRIAL'S PROCEDURAL PROCESS

Judge Kessler has issued rulings to manage this complex, lengthy case. These rulings include time management rules and an unusual, but not unprecedented, requirement to submit witness testimony in writing one week before the witness appears. In Orders #471[134] and #471A, [135] Judge Kessler laid out the procedures "which will govern the trial of this case." Relevant parts of these orders include:

Time Allocation

- The Government is allocated 50% of the trial time and Defendants, as a group, are allocated 50%.

- Each party has a limited number of hours within which it may conduct all live witness examinations, including direct, cross and redirect.

Witnesses

- Counsel must provide the court and the other parties with written notice of the witnesses and exhibits that they intend to present during the following week of trial.

Direct Examination (of non-adverse witnesses)

- The direct testimony of all witnesses must be presented to the court in writing.

- By 5:00 p.m. on the Monday preceding a week of trial the written direct examination testimony of those witnesses who are planned for presentation during the following week must be served upon the court and opposing counsel. Counsel are to present the written direct examination testimony in "question and answer" format just as if the witness was testifying in open court.

Adoption of Written Direct Examination

- When a witness is called for direct testimony, he or she must adopt all or part of his or her written testimony under oath in open court.

Adverse Witnesses (and any other witnesses for whom a written direct examination cannot be obtained)

- A party offering an adverse witness is expected to provide a "proposed" written direct examination of that witness where possible, created through "prior trial or deposition testimony (written or videotaped)."

- Proposed direct testimony must be served on the opposing party and the adverse witness by 5:00 p.m. on the Monday preceding the week in which such witness is scheduled to testify.

[134] Order #471 is available at: http://www.usdoj.gov/civil/cases/tobacco2/Order_471.pdf

[135] Order #471A is available at: http://www.usdoj.gov/civil/cases/tobacco2/Order_471A.pdf

- By noon on the Friday following that Monday, the adverse witness must file and serve his or her "corrected" written direct testimony. In the corrected testimony, "any proposed testimony that was subsequently corrected" (i.e., deleted) must be shaded, and any "corrections" (i.e., additions) must be *italicized*.

Cross-Examination

- All parties have the right to cross-examination, which is to be held live.

Redirect Examination

- Redirect examination is to be held live. For redirect examination of a defense witness, only the party presenting the direct examination of that witness may conduct redirect.

Government's Rebuttal Case

- The Government will have the opportunity to present rebuttal evidence after the close of Defendants' case. There will be a two week hiatus between the close of Defendants' case and the rebuttal case.

- Once the court determines the number of total hours to be allowed for rebuttal, the Government will be allocated 50% of those hours and Defendants, as a group, will be allocated 50% of those hours.

Appendix B

The following recaps DOJ's drastic reduction, put forth in its closing arguments, of the amount of money it seeks from the industry to fund smoking cessation programs.

During the remedies phase of the trial, DOJ witness Michael Fiore outlined a remedy that would require Defendants to spend $5.2 billion a year for 25 years (for a total of $130 billion) on smoking- cessation programs, advertising and training.[136] In closing arguments on June 7, 2005, however, DOJ lawyers "drastically reduced" this figure from $130 billion to $10 billion.[137] An anonymous source "familiar with the situation" reportedly said this change was "forced on the tobacco team by higher-level, politically appointed officials of the Justice Department," including Associate Attorney General Robert McCallum, who oversees DOJ's civil division.[138]

On June 8, 2005, Judge Kessler stated that the reduction "[p]erhaps . . . suggests that there some additional influences being brought to bear on the government's position in this case."[139] That same day, McCallum stated in a USA Today Op/Ed column that although "[c]ritics have questioned the motives behind the government's cessation program proposal," the proposal's "form and structure are dictated by the law."[140] He called the cessation remedy "but one element of a comprehensive and coordinated array of solutions to prevent and restrain future frauds" and said that the remedy "does not abandon, but rather embraces, the costing methodology the government has presented with expert testimony, and then applies that methodology – as the appellate decision requires – to future frauds rather than past acts."[141]

In closing rebuttal remarks on June 9, 2005, DOJ lawyer Sharon Eubanks "explained the new $10 billion figure assumes tobacco companies will commit fraud in the first year following judgment against them by Kessler."[142] If the fraud is ongoing, Eubanks reportedly continued, "this program could exceed the $130 billion . . . it all depends on the defendants' future conduct."[143]

Since the trial ended, new evidence on this issue has come to light. A June 16, 2005 *New York Times* article alleges that "internal documents and interviews" show "Senior Justice Department officials overrode the objections of career lawyers running the government's tobacco racketeering trial and ordered them to reduce the penalties sought at the close of the nine-month trial by $120 billion . . .."[144] The trial team, according to the article, "argued that the [reduction] would be seen as

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[136] *See* Fiore Testimony, *supra* note 115.

[137] *See* Levin, *supra* note 32.

[138] *Id*.

[139] *See Judge Queries Tobacco Remedy Cut Reasons*, REUTERS, June 8, 2005.

[140] Robert McCallum, Op-Ed., *Remedy is 'Forward-looking'*, USA TODAY (June 8, 2005).

[141] *Id*.

[142] *See* Brian Blackstone, *Blame it on RICO as Tobacco Case Ends in Chaos*, Dow Jones, June 9, 2005.

[143] *Id*.

[144] Eric Lichtblau, *Lawyers Fought U.S. Move to Curb Tobacco Penalty*, NEW YORK TIMES, June 16, 2005.

politically motivated and legally groundless."[145]

The article discusses a May 30, 2005 memorandum written by the trial team's two top attorneys, Sharon Eubanks and Stephen Brody, to Associate Attorney General Robert McCallum,[146] that allegedly states, "[w]e do not want politics to be perceived as the underlying motivation, and that is certainly a risk if we make adjustments in our remedies presentation that are not based on evidence."[147] The memorandum reportedly also states that the lower penalty recommendation would weaken DOJ's settlement position and "create an incentive for defendants to engage in future misconduct by making the misconduct profitable."[148] According to the article, DOJ did not dispute the memorandum's authenticity but "declined to make Mr. McCallum or other lawyers available to discuss it."[149]

Additionally, a June 17, 2005 *Los Angeles Times* article reports that senior DOJ officials "had pushed for even deeper cuts" than were made.[150] According to the article, which cites sources "close to the situation," DOJ lawyers originally planned to propose a reduction to $16 billion, yet on June 7 – the day of DOJ's summation – were "told to cut the demand still further, to $6 billion."[151] The final $10 billion amount, the article reports, was agreed on only after "a heated lunch-hour meeting" at which DOJ lawyers "told senior staff they couldn't credibly pose $6 billion."[152]

Calls for DOJ to explain its motivations for the reduction have come from several sources. The Tobacco Products Liability Project ("TPLP") issued a press release stating that it was preparing a Freedom of Information Act Request to DOJ "to determine whether improper political interference is occurring in last stages of the government's racketeering trial against the cigarette industry."[153] On June 15, 2005, TPLP made this request, asking for "all written or electronic communications including e-mails, correspondence, memoranda, or notes" evidencing DOJ requests that witnesses change the substance of their written testimony, those that pertain to the

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[145] *Id*.

[146] Regarding McCallum, the article states, "Mr. McCallum, No. 3 at [DOJ], is a close friend of President Bush from their days as Skull & Bones members at Yale, and he was also a partner at an Atlanta law firm, Alston & Bird, that has done legal work for R.J. Reynolds Tobacco, part of Reynolds American, a defendant in the case." *Id*.

[147] *Id*. The article remarks that Eubanks and Brody "gave no direct evidence to show that the decision was politically motivated," yet "[s]till, the disclosure that career lawyers strongly objected [to the decision] is highly likely to provoke further accusations by antismoking advocates and Congressional Democrats."

[148] *Id*.

[149] *Id*.

[150] *See* Myron Levin, *Deeper Cuts Had Been Sought in Tobacco Case*, L.A. TIMES, June 17, 2005.

[151] *Id*.

[152] *Id*.

[153] *See* Press Release, Tobacco Products Liability Project, *TPLP To Issue A Freedom Of Information Act Request To US Department Of Justice Over Dramatic Retreat In Tobacco Rico Trial* (June 8, 2005), available at: http://tobacco.neu.edu/litigation/cases/pressreleases/foia.htm

remedies phase of the trial, and those "between Robert McCallum or [Attorney General Gonzalez's Chief of Staff] Theodore Ullyot or [Attorney General Gonzalez's Chief Counsel] Raul Yanes and Mr. Karl Rove, Assistant to President G.W. Bush or Mr. Rove's Assistant, Ms. Susan Ralston pertaining to the above-referenced case."[154]

Democratic lawmakers likewise have "questioned how prosecutors decided to slash the $130 billion, 25-year national stop-smoking program suggested by one of their own witnesses, . . . Michael C. Fiore."[155] DOJ has agreed to look into whether political influence was involved in the decision, and its chief inspector general turned the lawmakers' requests over to H. Marshall Jarrett, head of DOJ's Office of Professional Responsibility.[156] One of the lawmakers, Frank Lautenberg, D-N.J., reportedly said, "[t]he administration's cave-in to the tobacco lobby was nothing short or legal malpractice. I'm glad [DOJ] will investigate this sellout of the American people."[157]

[154] *See* Letter from Mark Gottlieb, Executive Director, Tobacco Control Resource Center, to James M. Kovakas, Freedom of Information/Privacy Act Office, Civil Division, Department of Justice (June 15, 2005), available at: http://tobacco.neu.edu/litigation/cases/supportdocs/dojfoia1.pdf

[155] Hilary Roxe, *Justice to Probe Tobacco Trial Complaint*, ASSOCIATED PRESS (June 13, 2005). The lawmakers are: Sens. Frank Lautenberg, D-N.J., Edward Kennedy, D-Mass., Richard Durbin, D-Ill., Tom Harkin, D-Iowa, Bill Nelson, D-Fla., and Ron Wyden, D-Ore., as well as Reps. Martin Meehan, D-Mass. and Henry Waxman, D-Cal. *Id*.

[156] *Id*.

[157] *Id*.