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*A Law Synopsis by the Tobacco Control Legal Consortium*



## The United States Government's Racketeering Lawsuit against the Cigarette Industry

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Mark Gottlieb, Edward Sweda, Jr., and Sara D. Guardino

Cigarettes manufactured by fewer than half a dozen domestic companies cause approximately 440,000 deaths and \$155 billion in medical and lost productivity costs each year in the United States.<sup>1</sup> Despite this toll, Congress has not authorized the United States Food and Drug Administration to regulate cigarette design or marketing.<sup>2</sup> Likewise, the United States Consumer Product Safety Commission cannot regulate cigarettes<sup>3</sup> and the United States Federal Trade Commission has played a relatively passive role over the past two decades.<sup>4</sup> In essence, the cigarette industry remains largely unregulated.

Where legislative and regulatory approaches fail, courts successfully have offered an alternative means of addressing the harm caused by cigarette manufacturers.<sup>5</sup> Successful products liability lawsuits against cigarette manufacturers shift health and productivity costs of smoking from families and third-party payers back to cigarette companies, forcing increases in cigarette prices.<sup>6</sup> These price increases reduce smoking rates, especially among children and teenagers.<sup>7</sup> Litigation thus has proven to be an effective public health strategy for reducing smoking.<sup>8</sup>

On September 22, 1999, the United States Department of Justice ("DOJ") filed a lawsuit against the leading domestic cigarette manufacturers (collectively, "Defendants")<sup>9</sup> in the United States District Court for the District of Columbia.<sup>10</sup> DOJ is seeking to stop the Defendants' alleged decades-long misrepresentations and other fraudulent conduct under the Racketeer Influenced Corrupt Organizations Act ("RICO").<sup>11</sup> RICO 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.<sup>12</sup> DOJ is pursuing RICO's civil sanctions only in this lawsuit.<sup>13</sup>

On September 21, 2004, almost five years after DOJ filed its lawsuit, Federal Judge Gladys Kessler began the trial (there is no jury).<sup>14</sup> During the intervening years, hundreds of pretrial motions were heard, hundreds of depositions of experts and witnesses were taken, and tens of millions of documents were produced in discovery.<sup>15</sup> While Defendants have asserted the lawsuit is baseless,<sup>16</sup> Judge Kessler decided that there was sufficient evidence of wrongdoing to warrant a trial.<sup>17</sup> If it proceeds in its entirety, the trial will last approximately nine months, ending sometime in the spring of 2005. Appeals are likely to follow any possible verdict, and would carry on for several years. Alternatively, the case could settle before its conclusion. The case's outcome, whatever it is, will have an impact on tobacco control for better or worse.

This Law Synopsis provides an overview of the lawsuit and its possible outcomes. Section I reviews the basic allegations against Defendants and their responses. Section II reviews the remedies DOJ seeks. Section III covers important events during the litigation's pre-trial phase. Section IV summarizes the manner in which the trial will proceed and reports some key testimony provided thus far. Finally, Section V discusses the impact of possible outcomes.

## Section I — DOJ's Basic Allegations against Defendants and Defendants' Responses to these Allegations

### A. DOJ's Basic Claims against Defendants

Stated broadly, DOJ alleges 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.<sup>18</sup> The following summarizes DOJ's position on each of these claims.

#### 1. Claim: Defendants purposely misled the public regarding smoking's dangers<sup>19</sup>

DOJ claims that Defendants have purposely and fraudulently misled the public as to the risks and dangers of cigarette smoking, alleging "Defendants have engaged in and executed — and continue to engage in and execute — a 50-year scheme to defraud the public, including consumers of cigarettes, in violation of RICO."<sup>20</sup> This scheme began in December 1953 when the major United States cigarette manufacturers met and launched a coordinated plan to counter the growing body of scientific evidence indicating that cigarettes are harmful with a highly orchestrated public relations campaign, even though the companies' own research confirmed the link between smoking and disease.<sup>21</sup> This campaign was aimed at maximizing the number of smokers and profits while avoiding adverse liability judgments and bad publicity.<sup>22</sup>

This synopsis is provided for educational purposes only and is not to be construed as a legal opinion or as a substitute for obtaining legal advice from an attorney. Laws cited are current as of April 1, 2005. The Tobacco Control Legal Consortium provides legal information and education about tobacco and health, but does not provide legal representation. Readers with questions about the application of the law to specific facts are encouraged to consult legal counsel familiar with the laws of their jurisdictions.

In 1954, the tobacco companies issued the “Frank Statement to Cigarette Smokers,” a full page document published in 448 newspapers across the United States.<sup>23</sup> The Frank Statement included “two representations that would lie at the heart of Defendants’ fraudulent scheme”: first, that “there was insufficient scientific and medical 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.”<sup>24</sup> 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.”<sup>25</sup> The result was a “categorical understanding of the link between smoking and lung cancer.”<sup>26</sup>

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.”<sup>27</sup> 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.”<sup>28</sup>

**2. Claim: Defendants misled, and continue to mislead, the public on the dangers of secondhand smoke<sup>29</sup>**

Since the 1970s, evidence has grown regarding the dangers of secondhand smoke, also known as environmental tobacco smoke (“ETS”).<sup>30</sup> 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.<sup>31</sup> Despite this evidence, Defendants misled, and continue to mislead, the public on the dangers of secondhand smoke.<sup>32</sup>

The goal of this deception is to frustrate the passage of clean indoor air laws, which prevent or limit smoking in public places.<sup>33</sup> The more smoke-free places exist, the fewer cigarettes will be smoked and the less sales and profits the products’ manufacturers will reap.<sup>34</sup> As with the dangers of direct smoking, Defendants engaged in denial, misleading statements, and manipulated science regarding ETS’s health effects. Defendants promised to find the truth about

ETS’s dangers by conducting independent research, but industry documents show that Defendants’ goal instead was to “keep the controversy alive” so that the implementation of clean indoor air laws and other policies that lead to a reduction in smoking would be delayed.<sup>35</sup>

**3. Claim: Defendants misrepresented nicotine’s addictiveness and manipulated nicotine delivery in cigarettes<sup>36</sup>**

Internal tobacco 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.”<sup>37</sup> Additionally, industry 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.”<sup>38</sup>

However, 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.”<sup>39</sup> Defendants also have “publicly and fraudulently denied that they manipulate nicotine.”<sup>40</sup> “Through these and other false statements, Defendants have furthered their common efforts to deceive the public regarding their use and manipulation of nicotine.”<sup>41</sup>

**4. Claim: Defendants deceptively marketed “light” and “low tar” cigarettes to exploit smokers’ desire for less hazardous products<sup>42</sup>**

For years, Defendants 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.”<sup>43</sup> Defendants, however, have been aware since the late 1960s/early 1970s that such cigarettes are unlikely to be any healthier than regular cigarettes.<sup>44</sup> Moreover, Defendants have known for decades that “light/low tar” cigarettes do not actually deliver lower levels of tar and nicotine.<sup>45</sup> In fact, smokers of these cigarettes tend to modify their smoking behavior to obtain the

amount of nicotine sufficient to satisfy their addiction, and Defendants have designed the cigarettes to deliver enough nicotine to create and sustain addiction.<sup>46</sup> Despite their knowledge of this information, however, Defendants have withheld and suppressed it from public dissemination.<sup>47</sup>

#### 5. Claim: Defendants targeted the youth market<sup>48</sup>

Defendants have “intentionally marketed cigarettes to youth under the legal smoking age while falsely denying that they have done and continue to do so.”<sup>49</sup> Defendants’ own documents demonstrate that their continued financial viability depends upon new smokers taking up the habit to replace current smokers who die from smoking-related diseases or quit.<sup>50</sup> 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.<sup>51</sup>

Although Defendants pledged voluntarily in 1966 to refrain from marketing to youth, they did so only in the face of threatened federal advertising restrictions.<sup>52</sup> And, despite this pledge, Defendants continue to “advertise in youth oriented publications; employ imagery and messages that they know are appealing to teenagers; increasingly concentrate their marketing in places where they know youth will frequent such as convenience stores; and engage in strategic pricing to attract youth.”<sup>53</sup>

#### 6. Claim: Defendants conspired not to research or produce safer cigarettes<sup>54</sup>

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.<sup>55</sup> 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.”<sup>56</sup> Defendants, however, 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.”<sup>57</sup>

Evidence suggests that Defendants also agreed jointly 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 such a link.”<sup>58</sup> Additionally, although substantial evidence suggests that Defendants knew that certain design features and processes were likely to reduce smoking’s hazards, were technically feasible, and were acceptable to smokers, the companies chose not to incorporate them into their products.<sup>59</sup>

### B. The Cigarette Manufacturers’ Defenses

#### 1. Defense: DOJ’s allegations are untrue

Defendants have responded in two ways to DOJ’s allegations against them.<sup>60</sup> First, Defendants deny the allegations are true.<sup>61</sup> For example, Brown & Williamson attorney David M. Bernick denied that the tobacco executives who met in December 1953 had any actual intent to defraud anybody.<sup>62</sup> He also claimed that the cigarette manufacturers’ position in the 1960s on the issue of causation of smoking-related disease (i.e., denying that smoking’s link to disease had been proven) was a reasonable one.<sup>63</sup> Mr. Bernick also claimed that Defendants are “not deceiving anybody today” and that DOJ’s case “is all about money and disorgement [of company profits].”<sup>64</sup>

R.J. Reynolds Tobacco Company attorney Peter Biersteker claimed that DOJ does not have a case regarding Defendants’ conduct on the issue of seeking a less hazardous cigarette.<sup>65</sup> Defendants conducted research and “put potentially safer cigarettes on the market,” he said.

Lorillard Tobacco attorney William Newbold said that his company “has no intent to defraud smokers” and did not spike cigarettes with nicotine.<sup>66</sup> He also claimed that Defendants’ statements on the issue of ETS’s effects on human health “have been made in good faith.”<sup>67</sup> Newbold said Defendants were concerned about the “unjustified regulation of public smoking” and made an “honest judgment” as to whether science justified the imposition of smoking bans.<sup>68</sup>

Defendants claim that their marketing has had no effect on youth smoking rates, arguing instead that peer pressure and family influence are key factors regarding

youth smoking.<sup>69</sup> Defendants also assert cigarette advertising is aimed at persuading adult smokers to switch brands, not to persuade nonsmokers (whether adults or children) to take up smoking in the first place.<sup>70</sup>

## 2. Defense: The 1998 Master Settlement Agreement and laws will prevent Defendants from future RICO violations

Defendants' second general response to DOJ's allegations is that they have reformed themselves after entering into the 1998 Master Settlement ("MSA") with the state attorneys general.<sup>71</sup> The MSA, which involved forty-six states and six other jurisdictions, ended years of litigation brought by the states to recover Medicaid and other similar public expenditures incurred in treating tobacco-related diseases.<sup>72</sup> In exchange for ending the lawsuits, the companies agreed to pay states billions of dollars and abide by new marketing restrictions on cigarettes.<sup>73</sup> These marketing restrictions, according to Philip Morris attorney Dan Webb, constitute "enormous restrictions on the tobacco companies" and act to prohibit essentially the same wrongdoing DOJ alleges in the current lawsuit.<sup>74</sup>

Defendants' lawyers have contended that the tobacco industry's behavior has undergone such "profound and fundamental change" in the past few years that "no likelihood of future RICO violations" remains.<sup>75</sup> Philip Morris attorney Theodore Wells contrasted the industry's past conduct with a more recent "period of profound change" sparked by four key developments: 1) public and media outcry against the industry's conduct; 2) Congressional pressure; 3) massive litigation, especially the lawsuits brought in the 1990s by state attorneys general; and 4) a new generation of management at the companies.<sup>76</sup> He also stated that the Tobacco Institute and the Council for Tobacco Research, key players in the 50-year scheme to defraud the public that DOJ alleges, no longer exist.<sup>77</sup> Defendants also point to their "responsible communications with the public regarding tobacco issues, including smoking and disease causation; smoking and addiction; smoking and pregnancy; smoking and low-tar cigarettes; secondhand smoke; and quitting smoking."<sup>78</sup>

## Section II — Remedies DOJ seeks

DOJ requested that the court require Defendants to give up an estimated \$280 billion of allegedly ill-gotten revenues from sales made during the course of the alleged conspiracy.<sup>79</sup> This equitable remedy, known as "disgorgement," requires a person or organization that commits fraud to give up the ill-gotten gains of that fraud. Defendants argued that if a wrongdoer does not use the ill-gotten gains for *future* bad actions or in furtherance of the conspiracy, then the wrongdoer does not have to return the wrongfully attained money.<sup>80</sup> Judge Kessler, however, reasoned that the disgorgement is not limited by the wrongdoer's plans for the ill-gotten gains, and ruled that DOJ may pursue this remedy.<sup>81</sup> According to her opinion, it would be counter-intuitive for the court to prevent disgorgement simply because the wrongdoer already has laundered the money successfully.<sup>82</sup>

Defendants appealed Judge Kessler's ruling to the United States Court of Appeals for the District of Columbia Circuit, where a three-judge panel reversed in a 2-to-1 decision on February 4, 2005.<sup>83</sup> That court found that RICO "is limited to forward-looking remedies that are aimed at future violations."<sup>84</sup> It held, therefore, that Judge Kessler had "erred when [she] found that disgorgement was an available remedy," as disgorgement is only "aimed at past violations."<sup>85</sup>

Following the appeals court's decision, DOJ asked Judge Kessler to postpone its presentation of evidence on remedies until after the close of its and Defendants' presentations on liability. On February 10, 2005, Judge Kessler asked the parties to file briefs addressing this request, as well as their positions on "the scope and meaning of the Court of Appeals' decision."<sup>86</sup>

In its brief, filed on February 16, 2005, DOJ asked Judge Kessler to consider various types of equitable remedies.<sup>87</sup> The first major remedy DOJ discussed is an order requiring Defendants to fund sustained smoking cessation programs, thus "depriv[ing] Defendants of the incentive to continue their approach to the design and marketing of 'light' cigarettes, and thereby . . . prevent future unlawful conduct."<sup>88</sup>

Next, DOJ requested an order "requiring Defendants to fund a sustained public education campaign, administered by a third party, relating to the adverse health effects of smoking, nicotine addiction, 'light' cigarettes, and ETS."<sup>89</sup> This order, DOJ noted,

would “tend to prevent the public from being adversely affected by any future fraudulent or misleading public relations efforts by Defendants.”<sup>90</sup>

The third remedy DOJ discussed “is the requirement that Defendants fund a long-term, sustained youth smoking prevention campaign including communications and other programs.”<sup>91</sup> DOJ also noted that it “may seek an injunction aimed at preventing and restraining Defendants’ continued marketing to young people, including those under 21,” with the court “monitor[ing] and evaluat[ing] Defendants’ conduct . . .”<sup>92</sup>

DOJ deemed all its requested remedies as “forward-looking relief that the Court has full equitable authority to impose,” and asked the court to allow it to introduce evidence in support of these remedies after Defendants conclude their evidence on the liability issue.<sup>93</sup> In its opposing brief filed on February 22, 2005, however, Defendants claimed that “[t]he bulk of specific non-disgorgement remedies discussed in the Government’s brief does not satisfy the holding of the D.C. Circuit in this case” and that the “specific remedies identified by the Government are not designed to prevent and restrain future violations.”<sup>94</sup>

On February 28, 2005, after reviewing both sides’ briefs, Judge Kessler issued an order.<sup>95</sup> Although she recognized that the appeals court’s opinion “simply does not permit non-disgorgement remedies to prevent and restrain the effects of past violations of RICO,” she felt it “would be premature for the Court, at this point, to rule out as a matter of law the non-disgorgement remedies which the Government has identified” in its brief.<sup>96</sup> She ordered: (1) that Defendants commence their evidence on liability on Monday, March 7, 2005; (2) that DOJ is to present its evidence on non-disgorgement remedies after Defendants complete their evidence on liability; and (3) that Defendants thereafter are to present their evidence on non-disgorgement remedies.<sup>97</sup>

The availability of disgorgement as a remedy may not be off the table entirely. On March 4, 2005, DOJ petitioned the full U.S. Court of Appeals for the District of Columbia to reconsider the three-judge panel’s decision on this issue.<sup>98</sup> On March 8, 2005, the court ordered Defendants to file a joint response to DOJ’s petition.<sup>99</sup> The court’s decision as to whether it will reconsider the issue is pending.

## Section III — Pre-trial Developments

Soon after DOJ filed the lawsuit on September 22, 1999, Defendants initiated pre-trial strategies to dismiss as much of the case as possible, if not the entire case. Some of these strategies were successful and some were not. This section reviews the highlights from the pretrial phase of the litigation.

On December 27, 1999, Defendants filed various motions to dismiss DOJ’s claims.<sup>100</sup> These motions were partly successful. In addition to the RICO claims, DOJ initially had sought reimbursement for tobacco-related disease medical expenses paid as Medicare requires.<sup>101</sup> DOJ’s theory was similar to the one that state Attorneys General pursued against the tobacco industry for Medicaid reimbursement in the 1990s. In that litigation, the states had argued that smoking rates, and consequently the Medicaid expenditures the states incurred in treating sick and dying smokers, would have been much lower had the industry been honest with the public about the dangers caused by smoking and not committed numerous other wrongful acts orchestrated to create the highest possible number of smokers.<sup>102</sup> According to DOJ, the industry’s wrongful conduct similarly increased Medicare expenditures, and therefore was recoverable under the Federal Medical Recovery Act<sup>103</sup> and the Medicare Secondary Payer provisions.<sup>104</sup> Judge Kessler found, however, that these statutes did not permit DOJ to recover damages, and she granted the Defendants’ motion to dismiss the Medicare-related claims prior to trial.<sup>105</sup> Judge Kessler allowed the RICO claims to go forward, however, and these claims have become central to the case at trial.

Both sides’ various summary judgment motions also were important in the pre-trial phase.<sup>106</sup> For example, Defendants argued that the Federal Trade Commission has exclusive jurisdiction over cigarette advertising, marketing, promotion, and health warnings, thereby barring those RICO claims related in any way to cigarette advertising, marketing, promotion, and health warnings.<sup>107</sup> Defendants also argued that DOJ had insufficient evidence to proceed with a trial as to the targeting of cigarette promotion at children, and contended that even if such evidence were found, the MSA’s marketing restrictions would prevent any reasonable likelihood of future RICO violations by Defendants.<sup>108</sup> Judge Kessler ruled in

DOJ's favor on these motions, determining that a complete examination of the evidence at trial was warranted.

## Section IV — Highlights from the Trial

The trial started on September 21, 2004 and is expected to last into early spring 2005 based on the sheer volume of evidence that the parties expect to present to Judge Kessler. There is no jury.<sup>109</sup> Instead, Judge Kessler makes all factual determinations. Before calling any witness, the party presenting that witness must submit to the court that witness's direct testimony in writing, in question and answer form.<sup>110</sup> On the stand, the witness may adopt all or part of his or written testimony, and the parties have the opportunity for cross and redirect examinations.<sup>111</sup> DOJ has concluded its case in chief on the liability issue, and Defendants began their witness presentations on March 7, 2005. Some of DOJ's key witness testimony is highlighted here.

### Gregory Wolchin<sup>112</sup>

Gregory Wolchin was a field technician from 1988 to 1993 for Healthy Buildings International ("HBI"), an organization that performed numerous indoor air quality tests for the Center for Indoor Air Research ("CIAR").<sup>113</sup> Mr. Wolchin's primary job responsibility at HBI was to inspect buildings for indoor air quality problems. He testified regarding evidence of the industry and its allies allegedly altering ETS test data. For example, Wolchin discussed an ETS test form that he submitted to HBI reporting the results of tests for levels of smoke in two sections of one room. He "recorded high levels of particulates in both [the smoking and non-smoking] sections of the room." In the HBI report to CIAR, however, Wolchin stated that "the two tests . . . are listed and tabulated as if they were inspections conducted in separate rooms." Wolchin stated that his "experience with HBI data, as well as [his] review of HBI reports, [led him] to conclude that HBI's data contain unexplained entries that raise serious questions about the integrity of its studies."

### Neal Benowitz, M.D.<sup>114</sup>

University of California Professor Neal Benowitz, M.D., testified as an expert witness regarding nicotine addiction. Dr. Benowitz testified that the nicotine in cigarettes quickly addicts smokers. According to Dr. Benowitz, youth are exposed to substantial levels of nicotine from cigarette smoking and become addicted to nicotine while still in their adolescence. Once addicted, people who try to quit smoking are almost as likely to fail as those trying to give up hard drugs such as heroin and cocaine, according to Dr. Benowitz.

### Paul C. Mele, Ph.D.<sup>115</sup>

Paul C. Mele, Ph.D., who previously was a scientist in the Behavioral Pharmacology Laboratory at Philip Morris, testified that he along with other Philip Morris colleagues studied the addictiveness of nicotine and tried to develop nicotine alternatives (nicotine analogues) that also were addictive. Dr. Mele also testified that Philip Morris prohibited him from publishing his findings while he was an employee and tried to stop publication of his findings after he left the company.

### William Farone, Ph.D.<sup>116</sup>

William Farone, Ph.D., was Philip Morris' Director of Applied Research between 1976 and 1984. Dr. Farone testified that even during the time that the major tobacco companies publicly denied smoking's link to disease, the companies recognized "that the evidence linking smoking and disease was sufficient to conclude scientifically that inhaling cigarette smoke was a cause of disease." Dr. Farone also testified that cigarettes Defendants marketed as "light" and "low tar" offer no meaningful reduction in harm. In fact, Farone testified, "at least some design features as used in 'light' cigarettes make the smoke more toxic than the smoke from their 'full flavor' versions."

Dr. Farone also testified as to his personal involvement in conducting research into how people smoke cigarettes of varying nicotine levels. He testified, "[w]e were aware that if we adjusted the design to reduce the nicotine delivery, or if people were given a cigarette of lower nicotine delivery than their usual brand, smokers would 'compensate' — change how they smoked — to get the amount of nicotine they need." Additionally, Farone testified regarding the companies' "agreement not to compete

against each other in the marketing of cigarettes by claiming that their products were potentially any safer than other cigarettes” and “not to perform certain biological research on commercially marketed cigarettes in their domestic facilities.” Farone stated that this “Gentleman’s Agreement” was aimed at protecting the industry from lawsuits, and that it supported Defendants’ “basic position that no cigarettes were scientifically proven to cause any disease.” “If they had competed on health issues, and told the public that this brand is safer or potentially delivers less carcinogens than other brands,” Farone continued, “it would have implicitly acknowledged that the other brands — the ones with higher delivery of carcinogens or more potent carcinogens — were less safe.” As a result of the agreement, “Defendants in fact knew of and have developed technologies that reduced or eliminated harmful agents from smoke that were technically and commercially feasible, but did not meaningfully test them, did not incorporate them into marketed products in meaningful fashion, and did not assess how cigarettes with these features performed on standard toxicological tests as compared to commercially sold brands.”

**Jeffrey E. Harris, M.D., Ph.D.**<sup>117</sup>

Another important witness for DOJ was Jeffrey E. Harris, M.D., Ph.D., an economist, physician and professor at the Massachusetts Institute of Technology. Based on his economic analysis, Dr. Harris testified that cigarette manufacturers’ conduct with respect to smoking and health was collusive in nature, meaning there was a sustained cooperative arrangement among the cigarette manufacturers, in which they have jointly denied that smoking caused disease, jointly refrained from making comparative health claims about each others’ products, and jointly withheld potential risk-reducing alternatives from the marketplace. Under normal business conditions, according to Dr. Harris, the cigarette manufacturers would have competed and produced safer cigarettes shortly after science started to reveal the adverse health effects of tobacco use. Dr. Harris discussed several internal documents supporting his expert opinion.

**Jeffrey Wigand, Ph.D.**<sup>118</sup>

Jeffrey Wigand, Ph.D., worked for Brown & Williamson from 1989 to 1993, first as its Vice President of Research and Development, then as Vice President

of Research and Development/Environmental. Dr. Wigand testified that “the BAT Group of companies needed to maintain a public and legal position that causation had not been proven,” and maintained that company lawyers instructed him “that the evidence in the public health domain had not satisfactorily proven causation . . . that studies that demonstrated a link between smoking and cancer were fraught with errors . . . [and] that epidemiology could not be relied upon because it was just statisticians doing guess work.” Dr. Wigand also testified that company lawyers “vetted” scientific documents “to prevent or remove” “contentious” and “sensitive” information — that is, “anything that could be discovered during any kind of liability action and then used against the company in that litigation. Broadly speaking these words were referring to causation and addiction.”

## Section V — Possible Outcomes

At the time of this writing, there are many possible ways that the trial could conclude. Whatever the conclusion, there are several lasting contributions to public health that the litigation will have made:

- Tens of millions of previously secret internal cigarette company documents have been made available to the public under provisions of prior settlements in state cases. The documents are available on the internet and in a depository in Minnesota. What is more, this case has caused other previously private industry documents to be made available to the public, either when they are admitted into evidence, and thus put in the public domain, or when the tobacco companies post them on their websites. Depending on the outcome of the case, a great many other secret tobacco industry documents could be released.
- Media coverage of the cigarette manufacturers’ activities has provided the public with greater insight into the inner workings of these corporations and their claims.
- Many witnesses, some of whom are tobacco company whistleblowers and industry insiders, have provided testimony under oath in the case. Their statements, along with the documentary evidence, help paint a vivid picture of the tobacco industry’s inner workings.

- New evidence from this case may be harnessed by other lawyers who bring suit against the tobacco industry, as well as federal policy makers who seek to regulate it.

## Settlement

A settlement is a distinct possibility. As this publication goes to press, news reports suggest that representatives of the parties have met with a court-appointed mediator to discuss settlement possibilities, and that these discussions are expected to continue. To be acceptable to DOJ and a consensus of the public health community, the settlement would need to have a lasting positive effect on public health with dedicated funding for prevention and cessation into the future, as well as oversight of the tobacco industry's behavior to prevent it from engaging in similar actions in the future.

## Industry-wide Changes

The RICO lawsuit has the capacity to profoundly change the way the tobacco industry conducts business in the United States and also could bolster prevention and regulatory efforts depending on what remedies, if any, the court ultimately awards. However, many factors (including rulings or verdicts adverse to DOJ and an inadequate settlement) could limit the litigation's impact. The timeline to determine the trial's impact could be anywhere from a few months, in the event of a settlement, to many years should either side pursue an appeal as far as the United States Supreme Court.

## About the Authors

The authors are Staff Attorneys at the Tobacco Control Resource Center at Northeastern University School of Law in Boston, Massachusetts. Portions of this synopsis are taken from previous reports written by the authors.

## Endnotes

- <sup>1</sup> See Centers for Disease Control and Prevention, *Annual Smoking – Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States, 1995 – 1999*, 51 MORBIDITY & MORTALITY WEEKLY REPORTER 297, 300 (2002).
- <sup>2</sup> See *FDA v. Brown and Williamson Corp.*, 153 F.3d 155 (2000).
- <sup>3</sup> *Id.*
- <sup>4</sup> See 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).
- <sup>5</sup> See Richard Daynard, *Why Tobacco Litigation?*, 12 TOBACCO CONTROL 1-2 (2003).
- <sup>6</sup> *Id.*
- <sup>7</sup> 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).
- <sup>8</sup> *Id.*
- <sup>9</sup> Defendants are the major cigarette companies in the United States including 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 *U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), Complaint for Damages and Injunctive and Declaratory Relief (September 22, 1999) [hereinafter “Complaint”].
- <sup>10</sup> *Id.*
- <sup>11</sup> *Id.*
- <sup>12</sup> 18 U.S.C. §§ 1961 *et seq.*
- <sup>13</sup> See Complaint, *supra* note 10.
- <sup>14</sup> See Michael Janofsky, *Tobacco Firms Face U.S. in High-Stakes Trial*, NEW YORK TIMES (Sept. 20, 2004) at Section A.
- <sup>15</sup> See *U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), Order #230 (Tenth Case Management Order) (Oct. 1, 2002).
- <sup>16</sup> See *Philip Morris Vows to Fight a U.S. Department of Justice Lawsuit Filed Against Tobacco Companies*, available at: [http://www.philipmorrisusa.com/en/pressroom/content/press\\_release/articles/PR\\_September\\_22\\_1999\\_PMVTFUSDOJLFATC.asp](http://www.philipmorrisusa.com/en/pressroom/content/press_release/articles/PR_September_22_1999_PMVTFUSDOJLFATC.asp)
- <sup>17</sup> See *infra* Section III.
- <sup>18</sup> See DOJ Final Proposed Findings of Facts Executive Summary (July 1, 2004) [hereinafter “DOJ Executive Summary”], available at: <http://www.usdoj.gov/civil/cases/tobacco2/U.S.%20Final%20PFOF%20Exec%20Summary.pdf>
- <sup>19</sup> For DOJ’s complete summary of this claim, see DOJ Executive Summary at 1-7.
- <sup>20</sup> *Id.* at 1.
- <sup>21</sup> See Michael Cummings et al., *Failed Promises of the Cigarette Industry and Its Effects on Consumer Misperceptions about the Health Risks of Smoking*, 11(Supp. 1) TOBACCO CONTROL i110-i117 (2002).
- <sup>22</sup> *Id.*
- <sup>23</sup> See DOJ Executive Summary at 4.
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id.* at 2.
- <sup>26</sup> *Id.*
- <sup>27</sup> *Id.* at 4.
- <sup>28</sup> *Id.*
- <sup>29</sup> For DOJ’s complete summary of this claim, see DOJ Executive Summary at 11-14.
- <sup>30</sup> *Id.* at 11.
- <sup>31</sup> *Id.* at 12.
- <sup>32</sup> *Id.* at 11-14.
- <sup>33</sup> *Id.*
- <sup>34</sup> *Id.*
- <sup>35</sup> *Id.*
- <sup>36</sup> For DOJ’s complete summary of this claim, see DOJ Executive Summary at 14-18.
- <sup>37</sup> *Id.* at 15.
- <sup>38</sup> *Id.* Several examples of these can be found at DOJ Executive Summary at 15-16.
- <sup>39</sup> *Id.* at 16.
- <sup>40</sup> *Id.* at 17.
- <sup>41</sup> *Id.* at 18.
- <sup>42</sup> For DOJ’s complete summary of this claim, see DOJ Executive Summary at 18-21.
- <sup>43</sup> *Id.* at 18-19.
- <sup>44</sup> *Id.* at 19.
- <sup>45</sup> *Id.*
- <sup>46</sup> *Id.* at 19-20.
- <sup>47</sup> *Id.*
- <sup>48</sup> For DOJ’s complete summary of this claim, see DOJ Executive Summary at 21-27.

<sup>49</sup> *Id.* at 21.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 21, 22. Numerous examples of these documents can be found at DOJ Executive Summary, 22-23.

<sup>52</sup> *Id.* at 21.

<sup>53</sup> *Id.* at 24.

<sup>54</sup> For DOJ's complete summary of this claim, see DOJ Executive Summary at 8-11.

<sup>55</sup> *Id.* at 8.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* For a number of examples of tobacco industry executives' public statements to this effect, see DOJ Executive Summary at 8-9.

<sup>58</sup> *Id.* at 10.

<sup>59</sup> *Id.* at 11.

<sup>60</sup> *See U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), Answers of Philip Morris, et al. (Oct. 30-31, 2000).

<sup>61</sup> *Id.*

<sup>62</sup> *See U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), Defendants' Opening Statements (as monitored by Edward Sweda, Senior Staff Attorney of the Tobacco Control Resource Center) (September 2004) [hereinafter "Opening Statements"].

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See, e.g., Injunctive Relief Sought by Government Compared to 1998 Master Settlement Agreement (MSA) Provisions*, available at: [http://www.altria.com/download/pdf/media\\_DOJ\\_sidebyside.pdf](http://www.altria.com/download/pdf/media_DOJ_sidebyside.pdf)

<sup>72</sup> *See* Dennis Eckhart, California Assistant Attorney General, *The Tobacco Master Settlement Agreement Enforcement of Marketing Restrictions*, Tobacco Control Legal Consortium (April 2004).

<sup>73</sup> *Id.*

<sup>74</sup> *See* Opening Statements, *supra* note 63.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *See* John R. Wilke, *Demand Marks Departure for Bush Administration; Outlook is Uncertain*, WALL STREET JOURNAL (March 11, 2002) at A3.

<sup>80</sup> *Id.*

<sup>81</sup> *See U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), Order #550 (Memorandum Opinion) (May 21, 2004), *citing SEC v. Banner Fund Int'l*, 211 F.3d 602 (D.C. Cir. 2000).

<sup>82</sup> *Id.*

<sup>83</sup> *See U.S. v. Philip Morris*, No. 99-CV-02496GK, slip op. (D.D.C. Feb. 4, 2005), available at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200502/04-5252a.pdf>

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), Order #886 (February 28, 2005), referring to Order #875 (February 10, 2005).

<sup>87</sup> *See U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), United States' Memorandum Regarding Non-Disgorgement Equitable Remedies Pursuant to Order #875 (February 16, 2005).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *See U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), Defendants' Memorandum Regarding Non-Disgorgement Remedies Pursuant to Order #875 (February 22, 2005).

<sup>95</sup> *See U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), Order #886 (February 28, 2005).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *See U.S. v. Philip Morris*, No. 04-5252 (D.C. Cir.), Petition for Rehearing (March 4, 2005).

<sup>99</sup> *Id.*, Clerk's Order (March 8, 2005).

- <sup>100</sup> *U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), Certain Defendants' Memorandum of Law in Support of Motion to Dismiss (Dec. 27, 1999).
- <sup>101</sup> See Complaint, *supra* note 10.
- <sup>102</sup> See *Engle v. Liggett Group, Inc.*, # SC03-1856 (Fla.) (Amicus Brief of Tobacco Control Legal Consortium) (June 2004) at Section II.
- <sup>103</sup> 42 U.S.C. §§ 2651-2653.
- <sup>104</sup> See, e.g., 42 U.S.C. §1395y(b)(2).
- <sup>105</sup> *U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), Memorandum Opinion (September 28, 2000).
- <sup>106</sup> In all, Defendants filed ten summary judgment motions, all of which were denied, and DOJ filed six Summary Judgment motions, several of which were granted in whole or in part. See *United States Department of Justice, Litigation Against Tobacco Companies*, available at: <http://www.usdoj.gov/civil/cases/tobacco2>
- <sup>107</sup> See *U.S. v. Philip Morris*, 263 F. Supp. 2d 72 (D.D.C. 2003) (denying Defendants' motion).
- <sup>108</sup> See *U.S. v. Philip Morris*, 304 F. Supp. 2d 60 (D.D.C. 2004) (denying Defendants' motion).
- <sup>109</sup> There is no jury because DOJ seeks only equitable relief, which is the relief that is granted by judges. Broadly speaking, equitable remedies seek to undo the harm caused by the wrongdoers' acts as opposed to compensating victims with money.
- <sup>110</sup> See *U.S. v. Philip Morris*, No. 99-CV-02496GK (D.D.C.), Order #471 (Trial Procedures); Order #471A (Additional Trial Procedures).
- <sup>111</sup> *Id.*
- <sup>112</sup> See Testimony of Gregory A. Wulchin, available at: [http://www.usdoj.gov/civil/cases/tobacco2/01\\_Wulchin%20Direct%20Testimony.pdf](http://www.usdoj.gov/civil/cases/tobacco2/01_Wulchin%20Direct%20Testimony.pdf)
- <sup>113</sup> According to DOJ, CIAR acted "as a coordinating organization for Defendants' efforts to fraudulently mislead the American public about the health effects of ETS exposure." DOJ Executive Summary at 13.
- <sup>114</sup> See United States' Written Direct Examination of Neal Benowitz, M.D., available at: <http://www.usdoj.gov/civil/cases/tobacco2/Written%20Direct%20of%20Dr.%20Neal%20Benowitz.pdf>
- <sup>115</sup> See Direct Testimony of Paul C. Mele, Ph.D., available at: [http://www.usdoj.gov/civil/cases/tobacco2/01\\_Mele%20Written%20Direct.pdf](http://www.usdoj.gov/civil/cases/tobacco2/01_Mele%20Written%20Direct.pdf)
- <sup>116</sup> See United States' Written Direct Testimony of William A. Farone, Ph.D., available at: <http://www.usdoj.gov/civil/cases/tobacco2/20040929%20Written%20Direct%20Testimony%20for%20William%20Farone%20PhD.pdf>
- <sup>117</sup> See Written Direct Testimony of Jeffrey E. Harris, M.D., Ph.D., available at: <http://www.usdoj.gov/civil/cases/tobacco2/Written%20Direct%20of%20Dr.%20Jeffrey%20E.%20Harris.pdf>
- <sup>118</sup> See Written Examination of Jeffrey Wigand, Ph.D., available at: [http://www.usdoj.gov/civil/cases/tobacco2/Wigand\\_Written%20Direct%20Testimony.pdf](http://www.usdoj.gov/civil/cases/tobacco2/Wigand_Written%20Direct%20Testimony.pdf)



## About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a national network of legal programs supporting tobacco control policy change by giving advocates better access to legal expertise. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement.

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