**Issue Focus**

**Smoke and Subterfuge: A Look at Tobacco Industry Tactics**

It’s been close to fifty years since the first Surgeon General’s Report on Smoking and Health announced that cigarette smoking causes cancer and other serious diseases. It’s been seven years since U.S. District Court Judge Gladys Kessler issued a decision in *U.S. v. Philip Morris* (known as “the DOJ tobacco case”), finding that several major tobacco companies violated federal racketeering laws by fraudulently covering up the health risks associated with smoking. And it’s been more than four years since the enactment of the Family Smoking Prevention and Tobacco Control Act of 2009, which granted the U.S. Food and Drug Administration (FDA) the authority to regulate tobacco products.

With each event raising even more public awareness of the dangers of tobacco, the deception and civil racketeering activities of the tobacco industry, and the importance of regulating tobacco products to protect public health — one thing has remained constant. The tobacco industry has continued to exercise remarkable ingenuity in diverting attention from the public health impact of its products — products that result in nicotine addiction and a global epidemic of tobacco-related disease, disability and death.

This *Legal Update* focuses on the tobacco industry and its past and current behavior in countering public health and influencing the tobacco product regulatory process. We include resources on legal challenges that disclose decades of deceptive practices by the tobacco industry, and we feature profiles of public health champions who have worked for years to expose these practices and to promote tobacco control policies based on scientific evidence. We also include information on the important role the public health community plays in the local and federal tobacco regulatory process.
Latest Consortium Resources

The Consortium has just released two new publications that throw into relief tobacco industry behavior in undermining public health over the last several decades. Both publications are available on the Public Health Law Center’s website at www.publichealthlawcenter.org.

Our first publication, *Racketeers at the Table: How the Tobacco Industry is Subverting the Public Health Purpose of Tobacco Regulation*, is a law synopsis written by Consortium attorney Desmond Jenson. This publication describes the tobacco industry’s long history of misleading the public about the dangers of its products and explains how the industry’s interests and behavior prevent any meaningful participation in the regulation of its products. It provides numerous examples of how tobacco companies have attempted to manipulate the regulatory process in the past, and suggests steps the FDA and the public health community can take to counter and prevent tobacco industry subversion.

» Read *Racketeers at the Table: How the Tobacco Industry is Subverting the Public Health Purpose of Tobacco Regulation* (2013).

Our second publication is a brief overview of the historic civil racketeering lawsuit, *U.S. v. Philip Morris* — one of the seminal events in the history of tobacco control. It’s been seven years since Judge Gladys Kessler of the U.S. District Court of the District of Columbia issued her landmark decision, finding the defendant cigarette manufacturers engaged in a massive 50-year conspiracy to defraud the public, including consumers of cigarettes, about the addictive and deadly properties of their products. In the intervening years, the tobacco industry has unsuccessfully sought to appeal this ruling and even today continues to attempt to block remedies from being enforced. Our new publication provides a quick look back at this historic case, and an update on the current status of the litigation.

» Read *Everything You Ever Wanted to Know About U.S. v. Philip Morris but Were Afraid to Ask* (2013).

Visit our website for more information about *U.S. v. Philip Morris*, including our popular compilation of select quotes from the 1,700-page long Opinion – *The Verdict Is In: Findings from United States v. Philip Morris*. Also check out an archived Public Health Law Center video presentation of Sharon Eubanks, lead counsel representing the Department of Justice in *U.S. v. Philip Morris USA*, et al., who describes her experiences litigating this historic case.

Other Tobacco Industry-Related Resources

For those interested in additional information about the tobacco industry’s behavior and related issues, check out these other resources:

- **University of California, San Francisco Tobacco Control Archives**: Vast collection of tobacco industry documents, including —
  
  » The **Legacy Tobacco Documents Library**, which contains more than 14 million documents created by major tobacco companies related to their advertising,
Q “The tobacco industry seems to be deeply involved in the FDA’s regulation of tobacco products. Why can’t the FDA just ignore the industry’s input?”

A This is a question on the minds of many tobacco control professionals in light of the industry’s history of deceiving the public, promoting junk science, and employing scorched-earth litigation tactics to preserve its profits at the expense of public health. The short answer is that the FDA can’t ignore the tobacco industry because it has a legal obligation to allow everyone to participate in the regulatory process. Federal agencies, like the FDA, are required to let everyone weigh in on their formal decision making. The Administrative Procedure Act, which governs federal administrative rulemaking, requires a federal agency to allow the public to provide comments on a rule before it is finalized. As a part of that process, agencies need to review and consider every comment they receive during the public comment period. So, for example, when the FDA establishes a new tobacco product regulation, the agency must read and consider everything the tobacco industry submits as part of that process. The regulatory system tries to put everyone on equal footing when it comes to commenting on regulations.

However, the tobacco industry involvement in the regulatory process is not limited to submitting public comments on proposed rules. The tobacco industry also holds three non-voting seats of the twelve seats on the FDA’s Tobacco Products Scientific Advisory Committee (one representative from manufacturers, one representative from small business manufacturers, and one representative from tobacco growers). Because Congress set the committee structure with the Family Smoking Prevention and Tobacco Control Act, only Congress — not the FDA — can change the structure. Remember, however, that those three seats are non-voting, so while the tobacco industry can participate in the committee meetings, industry representatives can’t directly affect the outcome of the committee’s final decision. Congress also attempted to reduce the chance that the remaining nine members of the committee would be influenced by the tobacco industry by disqualifying from membership anyone who received compensation from a tobacco manufacturer over the preceding eighteen months.

Similar to the process of commenting on regulations, the legal structure governing informal engagement with the FDA doesn’t attempt to favor any particular group.

“[T]he public health community has a huge opportunity and responsibility to present information to the FDA that will counter the deception and junk science proffered by the tobacco industry.” — DESMOND JENSON
Ask A Lawyer

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Other than an ambiguous mandate to engage all stakeholders, the agency has no legal obligation to reach out either to the tobacco industry or to the public health community. This should theoretically strike an even balance in terms of access to the FDA and participation in the process. In practice, however, the difference in resources between the tobacco industry and the public health community and the FDA’s reluctance to make its processes more open and transparent creates a massive divide in actual access to the agency and participation in the regulatory process.

Since the creation of the Center for Tobacco Products, the FDA has been reluctant to hold meetings outside the Washington D.C. area. Less than a third of the Center Director’s official meetings and none of the Tobacco Products Scientific Advisory Committee hearings (the only hearings held by the Center thus far) have been held outside the capital. These limitations mean that a significant segment of the public health community is prevented from participating in an important part of the FDA’s process. The FDA has the power to level the playing field by allowing for remote participation in these meetings, but the FDA is concerned that this might favor the tobacco industry. This fear is speculative and unfounded. Surprisingly, FDA staff members have gone so far as to suggest that those who can’t fly to Washington for meetings can simply ask other public health groups to testify on their behalf or perhaps schedule family vacations around the FDA’s meeting calendar. These are unacceptable suggestions that fail to improve public health access to the FDA’s regulatory process.

The Consortium will continue to press the FDA to hold more public hearings, allow for remote participation in meetings, and hold meetings outside the D.C. area. However, the best way the public health community can reduce the effect of the tobacco industry’s presence in the regulatory process is to make the public health community a bigger presence than the industry. Because the regulatory process is open to anyone, the public health community has a huge opportunity and responsibility to present information to the FDA that will counter the deception and junk science proffered by the tobacco industry. There is only one federal regulatory process for tobacco products; the public health community only has this one opportunity to make its voice heard. If the public health community doesn’t participate, we know the tobacco industry will dominate the process. And there could be nothing worse for tobacco regulation than having only racketeers at the table.

Tobacco Industry Practices Abroad

Below are a few select resources on tobacco industry activities around the world:

- Tobacco Industry Interference with Tobacco Control, World Health Organization (2009). International report describing tobacco industry practices that interfere with tobacco control, including the industry’s use of its economic power, lobbying and marketing machinery to discredit scientific research and influence governments to increase the sale and distribution of its products. The report also highlights the industry’s use of large philanthropic contributions into social programs worldwide to create a positive public image under the guise of corporate social responsibility.


- The Vector of the Tobacco Epidemic: Tobacco Industry Practices in Low and Middle-Income Countries, Sungkyu Lee et al., 23 CANCER CAUSES CONTROL 117-29 (2012). Systematic review of published research on tobacco industry activities to promote tobacco use and oppose tobacco control policies in low and middle-income countries.
Ruth Malone, RN, PhD, FAAN, is one of the world’s foremost authorities on the tobacco industry and its strategic efforts to undermine public health. A professor of nursing and health policy at the University of California, San Francisco, Dr. Malone has won numerous awards for her research and scholarship, as well as academic honors for her teaching. In addition, since 2009, she has served as editor-in-chief of the international journal Tobacco Control and, since 2004, she has led the Nightingales, a volunteer nursing education and advocacy group she co-founded which has over 100 members throughout the U.S. and Canada. Despite this daunting schedule, Dr. Malone still manages to produce a prodigious number of peer-reviewed public health and tobacco control publications each year.

Dr. Malone’s research into the activities of the tobacco industry has made the world sit up and take notice since 2000, when she served as lead author of a study describing research methods for using the tobacco industry documents databases. More than a decade later, Tobacco Industry Documents: Treasure Trove or Quagmire?, co-authored with Dr. Edith Balbach and published in Tobacco Control, is considered a classic and is one of the most cited papers in the field, helping new scholars plan their approaches to the massive tobacco industry documents database housed at www.legacy.library.ucsf.edu.

Dr. Malone is known internationally for exploring what she calls the “the public relations aspects of the tobacco epidemic.” One of her key interests is researching how the tobacco industry develops and sustains its social legitimacy as it counters public health. For example, with her research team, she has published studies examining the tobacco industry’s targeting of marginalized groups through product advertising and corporate activities, and a tobacco company’s fruitless internal struggle to identify its own social value. Over her career she has often led in exploring new areas of tobacco control – particularly those related to tobacco industry influences on health and health policy, both nationally and internationally, and strategic messaging to help support policy and social norm change. Her

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Once described as the Ralph Nader of the tobacco control movement, Stan Glantz is a legendary figure in the public health community.

Stan Glantz: A Legend in Tobacco Control

Stan Glantz: Brilliant, blunt, pugnacious. Scholar, advocate, seasoned veteran of the tobacco wars. The internationally known tobacco control leader the industry loves to hate.

It's hard to overestimate Dr. Stanton Glantz's impact on tobacco control. For decades, Dr. Glantz, professor of medicine and director of the Center for Tobacco Control Research and Education at the University of California, San Francisco (UCSF) School of Medicine, has been a leading voice on scientific and policy issues related to clean indoor air, effective tobacco control strategies, and tobacco product regulation, while serving as a public health thorn in the side of the tobacco industry.

Initially trained as an aerospace engineer, Dr. Glantz took postdoctoral positions in cardiology at Stanford University and in cardiovascular research at USCF, where he has taught for almost four decades. Since the 1970s, Dr. Glantz, the American Legacy Foundation Distinguished Professor of Tobacco Control, has conducted research on issues related to the health effects of secondhand smoke, as well as smoke-free policies and politics and the tobacco industry’s efforts to fight tobacco control programs. He has written five books, including the widely used Primer of Biostatistics (McGraw-Hill), and nearly 400 scientific papers, including the landmark July 19, 1995 issue of JAMA, based on the Brown and Williamson documents, showing that the tobacco industry knew nicotine was addictive and that smoking caused cancer. His research on the effects of secondhand smoke on blood and blood vessels helped explain why, in terms of heart disease, secondhand smoke effects are nearly as significant as smoking. In fact, the American Heart Association identified his work in this area as one of the “top research advances for 2005.”

Dr. Glantz serves as Principal Investigator for the $20 million 5-year Tobacco Center of Regulatory Science “Improved Models to Inform Tobacco Product Regulation,” funded in September 2013 as part of a first-of-its-kind tobacco science regulatory program by the U.S. Food and Drug Administration and the National Institutes of Health. The Center’s focus is the development of improved tobacco product regulatory strategies that integrate economic impacts of tobacco use on health costs; risk perceptions, perceived acceptability, consumer responses to pro-tobacco marketing and anti-tobacco messages and other social determinants of tobacco use; and rapid changes in risk

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Lorillard pays $79 Million to Settle Historic Cigarette Personal Injury Case

After close to a decade of litigation, last month Lorillard Tobacco Co. paid $79 million in compensatory damages and interest to settle a Massachusetts individual smoking personal injury case that once exposed the Newport brand maker to one of the largest such verdicts on record. The settlement resulted in the dismissal of all claims from the estate of Marie Evans, a long-time smoker who died of lung cancer at age 54. In 2004, Marie’s son sued Lorillard for wrongful death, accusing the tobacco company of providing Marie with free samples of Newport cigarettes near the playground of a housing project in Boston in the late 1950s. At first, she traded the menthol-flavored cigarettes for candy, but by the time she was 13, she began smoking them, starting a lifelong addiction that ended with her death of lung cancer at 54.

Evans v. Lorillard was the first case to claim the cigarette manufacturer targeted minorities, including young children, with samples of Newport menthol-flavored cigarettes. In late 2010, a jury found Lorillard liable for Evans’ death and awarded $81 million in punitive damages. The punitive damages award, designed to punish bad conduct and deter future bad conduct, was in addition to $71 million in compensatory damages that the jury also awarded the estate, bringing the total liability in the trial to $152 million — the largest verdict to date in an individual smoking and health case. On June 8, 2012, Defendant Lorillard filed an appeal with the Supreme Judicial Court for the Commonwealth of Massachusetts. In November 2013, the Tobacco Control Legal Consortium submitted an amicus curiae brief urging the Supreme Judicial Court to affirm the trial court’s decision. Our brief asked the Court to uphold the District Court’s adoption of specific findings from the watershed decision in U.S. v. Philip Morris, as well as Engle v. Liggett Group, Inc. — particularly with respect to the tobacco industry’s failure to disclose information about its products and its attempts to avoid responsibility for marketing to children — in the Court’s decision in Evans. (Visit our website for more information on U.S. v. Philip Morris.)

On appeal, the Massachusetts Supreme Judicial Court upheld the finding of wrongful death based on Lorillard’s breach of the implied warranty of merchantability. The court concluded it was reasonable for a jury to find that Newport cigarettes were dangerous (known as a “design defect”) and that Lorillard failed to provide adequate warning about the health hazards and addictiveness of Newport cigarettes prior to 1970 (known as a “warning defect”). Although the court upheld the $35 million compensatory and statutory interest damages dating to the suit’s 2004 filing, it vacated the jury’s $81 million punitive damages award, which was based on a claim for negligence. The court sent back to the lower court the issue of whether Lorillard was liable for punitive damages based on violation of Massachusetts’ wrongful death law. The settlement of this case not only averts a looming retrial on punitive damages, but positions Massachusetts as a highly favorable state for litigation against cigarette manufacturers.

» Read Historic $79 Million Cigarette Settlement Signifies Beginning of Wave of Tobacco Cases in Massachusetts.
» Read the Consortium’s amicus brief in Evans v. Lorillard (2012).

NATO Opposes Tobacco Restrictions Across U.S.

Many tobacco control advocates may be familiar with the National Association of Tobacco Outlets, Inc. (NATO) as the lead plaintiff in the recent unsuccessful legal challenge to Providence, Rhode Island’s 2012 ordinances prohibiting retailers from selling flavored non-cigarette tobacco products and from offering certain pricing discounts for tobacco products. NATO is a national trade association organized to “enhance
innovative work using tobacco industry documents to expose tobacco company tactics to attract and addict smokers has been a tremendous resource for public health advocates around the world.

Dr. Malone’s research has been published in *American Journal of Public Health*, *Tobacco Control, Journal of Epidemiology and Community Health, Academic Medicine, Nicotine & Tobacco Research, Social Science & Medicine*, and other major peer-reviewed journals. She has also served as a consultant on tobacco industry activities for the U.S. Department of Justice, the Centers for Disease Control and Prevention Office on Smoking and Health, and the World Health Organization Tobacco Free Initiative. Her current research includes projects on the tobacco industry’s corporate social responsibility initiatives, industry influences on military tobacco control, the emerging trend of businesses establishing voluntary tobacco control policies, and the issues around tobacco control “endgame” strategic planning.

An indefatigable scholar, Dr. Malone continues to work on multiple research projects and studies, with a constant focus on the nation’s most pressing and significant issues in tobacco control. The Consortium salutes this prolific international leader and her ongoing research on the vector of the tobacco epidemic.

Stan Glantz

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due to tobacco use and secondhand smoke exposure as manifest in cardiovascular and pulmonary dysfunction.

Involved in the nonsmokers’ rights movement since 1978, Dr. Glantz was one of the founders of *Americans for Nonsmokers’ Rights*. His most recent research interests include two educational projects, *SmokeFreeMovies.ucsf.edu*, which is focused on ending the use of movies to promote tobacco, and *TobaccoScam.ucsf.edu*, which counters tobacco industry efforts to coopt the hospitality industry. He also works with the *University of California, San Francisco Library* helping make over 80 million pages of previously secret tobacco industry documents available online and creating a whole new area of scientific investigation based on these materials.

Once described as the Ralph Nader of the tobacco control movement, Stan Glantz is a legendary figure in the public health community. For all he has done over the decades to advance research on the health effects of tobacco and secondhand smoke, to increase our understanding of the effect of tobacco industry and tobacco control advocacy at local and state levels, and to raise our awareness of tobacco industry strategies and what public health authorities and advocates can do to anticipate and counter them — the public health community owes Stan Glantz a huge debt of gratitude.

*Tobacco in the Courts*

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the common business interests of all tobacco retailers and to monitor and assist members in responding to tobacco-related legislation on the local, state and federal levels.”

The Providence measures are not the only local retail tobacco-related initiatives that NATO has opposed recently. In the first six months of 2013 alone, NATO monitored and/or opposed 63 local tobacco-related ordinances in California, Colorado, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, New York, North Carolina, Pennsylvania, Virginia, Washington D.C., West Virginia, and Wisconsin. In fact, back in 2012 NATO launched a special project to respond to local retail tobacco restrictions throughout the U.S. NATO is directed by a former Tobacco Institute lobbyist once described by the *Minneapolis Star Tribune* as part of the tobacco industry’s “smoke-and-mirrors lobbying effort” for his role in fighting tobacco control measures in the name of retail associations backed by the industry.

For more information about NATO, how its members organize to oppose tobacco control, and whether your community’s tobacco control efforts may be targeted, check out the NATO website.
**Resource Roundup**

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- Manufacturing, marketing, sales, and scientific research activities
  
- Research into the Tobacco Industry Activity, which includes analytic reports on tobacco industry behavior

- **FDA Tobacco Action Center**: The Consortium’s website features information and resources to help mobilize the public health community to improve and support FDA regulation of tobacco.

- **Campaign for Tobacco-Free Kids**: The Campaign’s website includes many resources on tobacco industry activities, including factsheets on U.S. and global industry marketing to kids and industry involvement in youth prevention programs and campaigns.

- **ALEC and the Tobacco Industry**, Anne Landman, Center for Media and Democracy’s PR Watch (2011). Analysis of ongoing relationship between the tobacco industry and the American Legislative Exchange Council (ALEC), which has served as a front group and public relations conduit for the industry since 1979.

Below are other tobacco industry-related Consortium resources:


- **Online Resources for Researching Individuals and Organizations** (2013): List of resources and websites that could be helpful in researching individuals and organizations, including front groups, allies, lobbyists, politicians, and others associated with or supported by the tobacco industry.

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**Job Openings**

**Policy Fellowship Opportunity**
The Ohio State University Center of Excellence in Regulatory Tobacco Science (OSU-CERTS) has an opening for a post-graduate research fellow in tobacco regulatory policy. OSU-CERTS, located in Columbus, Ohio, is one of fourteen Tobacco Centers of Regulatory Science established by the National Institutes of Health and U.S. Food and Drug Administration. The fourteen Centers conduct research needed to ensure that U.S. tobacco regulatory actions are based on sound and relevant scientific evidence.

» Learn more about this position.

**Advisor on Health-Related Legislation**
The Pan American Health Organization (PAHO) has an opening for an advisor and legal counsel to PAHO/World Health Organization’s governing bodies, executive management, PAHO/WHO Representations (PWRs), Centers, and Country Offices in all legal matters.

» Learn more about this position.

**Job Opportunities in Federal Tobacco Regulation**

» Check out the U.S. Food and Drug Administration’s Center for Tobacco Products website for opportunities in federal tobacco regulation.

**Tobacco Control-Related Positions**

» Check out the Tobacco Control Network’s list of list of job openings.
Upcoming Events

Community Anti-Drug Coalitions of America Forum
February 3–6, 2014, National Harbor, MD

The Community Anti-Drug Coalitions of America (CADCA) is holding its 24th National Leadership Forum in conjunction with Substance Abuse and Mental Health Services Administration (SAMHSA)’s 10th annual Prevention Day. This forum is the largest training conference for community-based substance abuse prevention professionals, coalition leaders and prevention and addiction researchers in the U.S. Presenters will include a Consortium attorney who will speak on policy options and challenges in regulating menthol in tobacco products and other non-cigarette tobacco products.

» Read more about the CADCA National Leadership Forum.

Society for Research in Nicotine and Tobacco Annual Meeting
February 5–8, 2014, Seattle, WA

The Society for Research in Nicotine and Tobacco (SRNT) is holding its 20th annual meeting on pressing transdisciplinary research and policy issues in nicotine and tobacco. Online registration is now available; the Rapid Response Abstract Submission deadline is January 3, 2014. Consortium attorneys will present at a pre-conference workshop on enhancing science to inform FDA regulation of tobacco, and in a panel symposium covering policy options for regulating menthol in tobacco products.

» Read more about the Society for Research in Nicotine and Tobacco conference.

Please visit the Public Health Law Center’s website at WWW.PUBLICHEALTHLAWCENTER.ORG for news on upcoming Consortium webinars and archived recordings of past webinars.