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A Law Synopsis by the Tobacco Control Resource Center

USA v. Philip Morris USA, Inc., et al.:
Analysis of Judge Kessler's Final Opinion and Order

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INTRODUCTION

Ignoring everything but the goal of selling as many cigarettes as possible, the major American cigarette manufacturers (the “industry” or “Defendants”) designed and implemented one of the most extensive disinformation campaigns in this country’s history. This campaign, aimed at convincing the public that smoking’s link to disease was an “open controversy” despite the industry’s knowledge to the contrary, was carried out “with a single-minded focus on [the industry’s] financial success, and without regard for the human tragedy or social costs that success exacted.”¹

After seven years of litigation, the United States Department of Justice (“DOJ”) has proven that Defendants – which manufacture and market over 90% of the cigarettes sold in the United States – are racketeers. One of the most significant findings DOJ has proven is that the cigarette industry is likely to continue its wrongdoing if steps are not taken to substantially change the manner in which the industry is overseen. Although Judge Gladys Kessler, who presided over the trial, ordered some important remedies, she also was legally constrained from implementing other key remedies that would, in her own words, “unquestionably serve the public interest.” Further action, therefore, is needed to ensure that the industry’s misconduct does not continue.

This synopsis will: (1) provide a succinct background on the case, including its current status; (2) summarize Judge Kessler’s final opinion, with a focus on her findings regarding “light/low tar” cigarettes and youth marketing; (3) summarize the remedies section of the opinion as well as the remedial order, including an examination of

those remedies that Judge Kessler ordered and those that were not awarded because of substantial limits imposed on her by the court of appeals; and (4) analyze the case’s implications for public health and how it is a call to action.

I. CASE BACKGROUND AND STATUS

On September 22, 1999, DOJ filed a complaint against Defendants in the United States District Court for the District of Columbia (“District Court”).² DOJ originally sought recovery of the Federal Government’s tobacco-related medical costs, but this part of the case was dismissed in 2000.³ What remained was a pure law enforcement action. DOJ alleged that Defendants violated the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (“RICO”)⁴ 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. DOJ sought remedies including disgorgement of the industry’s ill-gotten gains, protecting the public from the continuing consequences of the conspiracy, and preventing the industry from continuing its wrongdoing. An appellate court ruling in 2005,⁵ which may yet be appealed to the U.S. Supreme Court, restricted the possible remedies to restraining further wrongdoing. Judge Kessler began the trial in this case on September 21, 2004, nearly five years after it was filed.⁶

The trial was split into two phases: the liability phase began on September 21, 2004, and the remedies phase began on May 2, 2005.⁷ Testimony concluded on June 2, 2005, and closing arguments were heard

June 7 through 9, 2005.⁸ Judge Kessler issued her Final Opinion (“Opinion”)⁹ and Final Judgment and Remedial Order (“Order”)¹⁰ on August 17, 2006. All told, the case involved “the exchange of millions of documents, the entry of more than 1,000 Orders, and a trial which lasted approximately nine months with 84 witnesses testifying in open court.”¹¹ Both Defendants and DOJ have filed Notices of Appeal to the United States Court of Appeals for the District of Columbia Circuit (“Court of Appeals”).¹² Defendants have moved to stay enforcement of the remedies ordered by Judge Kessler. Judge Kessler denied their motion to stay,¹³ but the Court of Appeals granted a stay.¹⁴

II. FINDINGS OF FACT¹⁵

Judge Kessler began her Opinion by describing Defendants’ “enterprise” as an “intricate, interlocking, and overlapping web of national and international organizations, committees, affiliations, conferences, research laboratories, funding mechanisms, and repositories for smoking and health information which Defendants established, staffed, and funded.” Defendants established this enterprise, according to Judge Kessler, “to accomplish the following goals: counter the growing scientific evidence that smoking causes cancer and other illnesses, avoid liability verdicts in the growing number of plaintiffs’ personal injury lawsuits against Defendants, and ensure the future economic viability of the industry.”

A. Defendants Devised and Executed a Scheme to Defraud

The following are quotes from Judge Kessler regarding Defendants’ scheme to defraud the public, with special emphasis on the most egregious findings on the marketing of light/low tar cigarettes and the targeting of youth.¹⁶

*Smoking’s adverse health consequences*¹⁷
“Cigarette smoking causes disease, suffering, and death. Despite internal

recognition of this fact, Defendants have publicly denied, distorted, and minimized the hazards of smoking for decades. The scientific and medical community’s knowledge of the relationship of smoking and disease evolved through the 1950s and achieved consensus in 1964. However, even after 1964, Defendants continued to deny both the existence of such consensus and the overwhelming evidence on which it was based.”

*Nicotine’s addictive properties*¹⁸

“Notwithstanding the understanding and acceptance of each Defendant that smoking and nicotine are addictive, Defendants have publicly denied and distorted the truth as to the addictive nature of their products for several decades. Defendants have publicly denied that nicotine is addictive, have suppressed research showing its addictiveness, and have repeatedly used misleading statistics as to the number of smokers who have quit voluntarily and without professional help.”

*Nicotine “manipulation”*¹⁹

“Defendants have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction. At the same time, Defendants have concealed much of their nicotine-related research, and have continuously and vigorously denied their efforts to control nicotine levels and delivery.”

*Light/low tar cigarettes*²⁰

“For several decades, Defendants have marketed and promoted their low tar brands as being less harmful than conventional cigarettes. That claim is false, as these Findings of Fact demonstrate. By making these false claims, Defendants have given smokers an acceptable alternative to quitting smoking, as well as an excuse for not quitting.”

“Even as they engaged in a campaign to market and promote filtered and low tar cigarettes as less harmful than conventional ones, Defendants either lacked evidence to substantiate their claims or knew them to be false.”

“Defendants’ conduct relating to low tar cigarettes was intended to further their overarching economic goal: to keep smokers smoking; to stop smokers from quitting; to encourage people, especially young people, to start smoking; and to maintain or increase corporate profits.”

*Youth marketing*²¹

“In internal documents, Defendants admit that stimulating youth smoking initiation and retaining and increasing their share of the youth market is crucial to the success of their businesses.”

“Cigarette marketing, which includes both advertising and promotion, is designed to play a key role in the process of recruiting young, new smokers by exposing young people to massive amounts of imagery associating positive qualities with cigarette smoking.”

“Defendants spent enormous resources tracking the behaviors and preferences of youth under twenty-one, and especially those under eighteen. . . . Despite their denials that they used such information for marketing purposes, the evidence indicates that Defendants tracked youth in order to determine how best to induce them to start, and continue, smoking cigarettes.”

“Defendants recognize that youth and young adults are more responsive to increases in cigarette and other tobacco prices, and will not try smoking or continue to smoke if cigarette prices rise. Despite that recognition, Defendants continue to use price-based marketing efforts as a key marketing strategy.”

“The evidence is clear and convincing – and beyond any reasonable doubt – that Defendants have marketed to young people twenty-one and under while consistently, publicly, and falsely, denying they do so.”

*Environmental tobacco smoke (“ETS” or “passive smoking”)*²²

“Defendants crafted and implemented a broad strategy to undermine and distort the evidence indicting passive smoke as a health hazard. Defendants’ initiatives and public statements with respect to passive smoking attempted to deceive the public, distort the scientific record, avoid adverse findings by government agencies, and forestall indoor air restrictions. Defendants’ conduct with respect to passive smoking continues to this day, when currently no Defendant publicly admits that passive exposure to cigarette smoke causes disease or other adverse health effects.”

*Research suppression/document destruction*²³

“Defendants attempted to and, at times, did prevent/stop ongoing research, hide existing research, and destroy sensitive documents in order to protect their public positions on smoking and health, avoid or limit liability for smoking and health related claims in litigation, and prevent regulatory limitations on the cigarette industry.”

B. The Master Settlement Agreement (“MSA”) Has Not Prevented Defendants’ Scheme to Defraud the Public²⁴

Defendants often assert to juries and in the media that as a result of the MSA, they have transformed themselves into new, more responsible companies. Judge Kessler found this assertion “simply not accurate.”

Entered into in 1998 by most Defendants in this case and most states, the MSA settled state medical reimbursement lawsuits brought against Defendants in the 1990s to

recover public healthcare expenses incurred in caring for sick and dying smokers. The MSA also established some marketing restrictions and settlement payments to the states.

Judge Kessler concluded that despite diligent enforcement, the MSA simply does not require Defendants to make corrective statements regarding health risks of smoking and nicotine addiction, to fund cessation programs, or to continue disclosing internal industry documents to the public beyond the next four years.²⁵ Furthermore, Judge Kessler found that Defendants' youth smoking prevention programs, which were established pursuant to the MSA, "are not designed to effectively prevent youth smoking." Instead, Defendants have demonstrated a "total failure to hire persons with skills relevant to identifying and developing effective, empirically validated programs to prevent youth smoking."

C. Judge Kessler's Conclusions

After making the above findings of fact, Judge Kessler held that Defendants violated RICO by participating in the conduct, management, and operation of an enterprise through a pattern of racketeering activity.²⁶ Judge Kessler also found Defendants liable under RICO's conspiracy provision by agreeing to commit racketeering acts with the "knowledge and intent" that other members of the enterprise would do the same.²⁷

In addition to finding Defendants to be racketeers, Judge Kessler made a point of addressing the role of cigarette industry lawyers in their clients' "fifty-year history of deceiving smokers, potential smokers, and the American public about the hazards of smoking and second hand smoke, and the addictiveness of nicotine." She found that lawyers "[a]t every stage . . . played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes."²⁸ She lamented: "What a sad and disquieting

chapter in the history of an honorable and often courageous profession."

III. REMEDIES

A. Restraint on Remedies Imposed by the Court of Appeals

DOJ's initial complaint sought "to restrain [D]efendants and their co-conspirators from engaging in fraud and other unlawful conduct in the future."²⁹ It also asked the court to "compel [D]efendants to disgorge the proceeds of their unlawful conduct"³⁰ – specifically, to surrender "all of [their] proceeds from cigarettes smoked between 1971 and 2000 by persons who have been included within the Government-defined 'youth addicted population,'" an amount that DOJ calculated to be \$280 billion.³¹

Defendants moved for partial summary judgment dismissing the disgorgement claim.³² Judge Kessler denied the motion, allowing DOJ's the claim to move forward.³³ However, Defendants then appealed to a three-judge panel of the Circuit Court of Appeals for the District of Columbia Circuit ("Court of Appeals").³⁴ The Court of Appeals interpreted RICO's remedy provision to authorize only "forward-looking" remedies that "prevent and restrain" Defendants from engaging in future RICO violations. Finding disgorgement to be "a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo," the Court of Appeals, in a 2-1 decision, reversed Judge Kessler and granted Defendants' partial summary judgment motion. On April 20, 2005, the Court of Appeals rejected DOJ's petition for a rehearing³⁵ as well as its petition for a rehearing before a full panel of appellate judges.³⁶ The United States Supreme Court also declined to hear an appeal.³⁷

However, in its recent Notice of Appeal of Judge Kessler's decision, DOJ included a statement indicating its appeal includes the Court of Appeals's decision on the

disgorgement claim.³⁸ DOJ's appeal could provide the Court of Appeals or United States Supreme Court an opportunity to revisit which types of remedies are available under RICO.

B. Remedies Denied³⁹

Judge Kessler made it clear that while she approved of most of the "significant remedies" that DOJ proposed, she "unfortunately" felt restricted by the narrow confines of the Court of Appeals's opinion and therefore could not order many of them.⁴⁰ For example, DOJ requested adoption of a national smoking cessation program as well as a public education and counter marketing campaign. Judge Kessler stated that both programs "would unquestionably serve the public interest." The counter marketing campaign, according to Judge Kessler, would "combat Defendants' seductive appeals to the youth market." However, she found that under the narrow standard of the Court of Appeals's opinion, she could not enter these remedies because they are "not specifically aimed at preventing and restraining future RICO violations."

Notably, Judge Kessler ordered none of DOJ's proposed remedies regarding youth smoking. DOJ had requested that Defendants meet pre-set goals for reducing youth smoking rates or face monetary penalties. Judge Kessler said that although this remedy "is forward-looking, could prevent future RICO violations, and would unquestionably serve the public interest," it is "not sufficiently narrowly tailored to meet the standard articulated by our Court of Appeals." Similarly, although she found that DOJ's request for a specific injunction against Defendants' ongoing and future youth marketing "would certainly serve the public interest," Judge Kessler denied the remedy, pointing again to the Court of Appeals's opinion.

C. Remedies Ordered⁴¹

Judge Kessler was restrained by the "narrow standard" articulated in the Court of Appeals's opinion, which limited remedies to those "preventing and restraining future RICO violations." It is significant therefore that Judge Kessler found it "exceedingly clear" that "Defendants have not . . . ceased their wrongdoing or . . . undertaken fundamental or permanent institutional change" and that "[t]here is a reasonable likelihood that *Defendants' RICO violations will continue* in most of the areas in which they have committed violations in the past."⁴² Judge Kessler ordered the following four major remedies, all of which seek to prevent and restrain Defendants' future RICO violations.

***Prohibition of brand descriptors*⁴³**

Judge Kessler stated that since the 1970s, "Defendants also have used so-called brand descriptors such as 'light' and 'ultra light' to communicate reassuring messages that these are healthier cigarettes and to suggest that smoking low tar cigarettes is an acceptable alternative to quitting." She noted that even as data have emerged establishing that such cigarettes "are at least as harmful as 'full-flavor' brands, Defendants have developed new descriptors to convey implied health reassurance messages." She thus found that "the only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, potential smokers, and the American public about 'light' and 'low tar' cigarettes" is to permanently enjoin them from "conveying any express or implied health message or health descriptor for any cigarette brand either in the brand name or on any packaging, advertising or other promotional, informational or other material." Such forbidden health descriptors include the words "low tar," "light," "ultra light," "mild," "natural," and "any other words which reasonably could be expected to result in a consumer believing that smoking the cigarette brand using that descriptor may

result in a lower risk of disease or be less hazardous to health than smoking other brands of cigarettes.” Judge Kessler also prohibited Defendants from “representing directly, indirectly, or by implication, in advertising, promotional, informational or other material, public statements or by any other means, that low-tar, light, ultra light, mild, natural, or low-nicotine cigarettes may result in a lower risk of disease or are less hazardous to health than other brands of cigarettes.”⁴⁴

Defendants moved for clarification on this issue, asking Judge Kessler to state that the injunction be applied only to Defendants’ statements made, and cigarettes sold, within the United States. Judge Kessler applied the “effects test,” under which “RICO has extra-territorial effect where illegal activity abroad causes a ‘substantial effect’ within the United States.” Finding that Defendants’ extensive fraudulent activities abroad were “part of [their] scheme to defraud the American public about the adverse health effects of smoking and environmental tobacco smoke,” Judge Kessler concluded that the prohibition of the use of express or implied health messages or descriptors *does* apply to Defendants’ actions abroad.⁴⁵

Corrective statements⁴⁶

Judge Kessler found that the trial record “amply demonstrates that Defendants have made false, deceptive, and misleading public statements about cigarettes and smoking from at least January 1954, when the Frank Statement was published up until the present.”⁴⁷ She also found ample evidence in the record “that certain of Defendants’ public statements communicating their positions on smoking and health issues continue to omit material information or present information in a misleading and incomplete fashion.” Judge Kessler thus stated that Defendants must publish court-approved⁴⁸ corrective statements in newspapers and disseminate them through television, advertisements, cigarette packaging onsets, in retail displays, and on their

corporate websites.⁴⁹ Such corrective statements are to address:

- addiction (that both nicotine and cigarette smoking are addictive);
- the adverse health effects of smoking (all the diseases that smoking has been proven to cause);
- the adverse health effects of exposure to environmental tobacco smoke (all the diseases that exposure to ETS has been proven to cause);
- Defendants’ manipulation of the physical and chemical design of cigarettes (that Defendants manipulate the design of cigarettes to enhance the delivery of nicotine); and
- light and low tar cigarettes (that they are no less hazardous than full-flavor cigarettes).⁵⁰

She ordered no corrective communications regarding youth marketing or research suppression/document destruction.

Disclosure of documents and disaggregated marketing data⁵¹

Finding that “Defendants’ suppression and concealment of information has been integral to the Enterprise’s overarching scheme to defraud,” Judge Kessler felt that disclosure requirements will “act as a powerful restraint on Defendants’ future fraudulent conduct.”⁵² Noting that the MSA’s public disclosure requirements will end between 2008 and 2010, Judge Kessler stated: “[e]xtending those obligations, and subjecting all Defendants to similar, ongoing disclosure obligations, will work to prevent and restrain them from engaging in future frauds.”

Judge Kessler thus ordered Defendants to continue maintaining their Minnesota and

Guildford Depository⁵³ obligations for an additional fifteen years – until September 1, 2021 – and to provide “meaningful tools to identify and analyze those documents” kept at these depositories.⁵⁴ She also ordered Defendants to maintain “Internet Document Websites” at their expense until September 1, 2021.⁵⁵ Defendants must update these websites with all current and future litigation-related documents and provide (and make the documents searchable by) bibliographic information for each document if it is not apparent on the document’s face. For all documents withheld for privilege or confidentiality, Defendants must provide full bibliographic information, as well as a summary of the basis for the privilege or confidentiality assertion.⁵⁶

Judge Kessler also ordered Defendants “to provide their disaggregated marketing data to the Government according to the same schedule on which they provide it to the [Federal Trade Commission]” until August 17, 2016. This order, Judge Kessler stated, will “ensure transparency of Defendants’ marketing efforts, particularly those directed towards youth, and what effect such efforts are having.”

*General injunctive provisions*⁵⁷

In addition to specific remedies, Judge Kessler ordered several general injunctive remedies. First, she permanently enjoined Defendants from “committing any act of racketeering, as defined in 18 USC §1961(1), relating in any way to manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States.” Next, she permanently enjoined Defendants from participating in the management and/or control of any of the affairs of the Council for Tobacco Research, the Tobacco Institute, the Center for Indoor Air Research, or any successor entities and from reconstituting the form or function of these groups. Finally, noting that “this is a case involving fraudulent statements about the devastating consequences of smoking,” Judge Kessler permanently enjoined

Defendants from “making, or causing to be made in any way, any material, false, misleading or deceptive statement or representation concerning cigarettes that is disseminated in the United States.”⁵⁸

IV. ANALYSIS: NEW DIRECTIONS FOR TOBACCO CONTROL

In short, Judge Kessler found that Defendants are racketeers and likely will continue to be racketeers in the future. Although she ordered certain key remedies aimed at limiting future racketeering, these remedies do not begin to provide sufficient tools to ensure that the industry’s misconduct does not continue. Further action is essential to ensure that Defendants’ racketeering conduct finally comes to an end.

First, certain of Judge Kessler’s findings of fact appear to establish violations of the MSA. For example, the MSA states: “No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State.”⁵⁹ Despite this requirement, and Defendants’ assertion that they do not market to youth, Judge Kessler found “overwhelming evidence” that Defendants “historically, as well as currently, . . . do market to young people, including those under twenty-one, as well as those under eighteen.”

Judge Kessler herself highlighted another example. She noted that despite the MSA’s general prohibition “precluding those Defendants who are a party to it from making any ‘material misrepresentation of fact regarding the health consequences of using any Tobacco Product,’ Defendants continue to make affirmative statements on smoking and health issues that are fraudulent.”⁶⁰ For example, Judge Kessler found that Defendants “continue to

disseminate false and misleading public statements regarding their true intent in marketing low tar cigarettes” and “continue to make false and fraudulent statements about the addictiveness of nicotine and smoking.”

These and many other probable MSA violations are well-documented in Judge Kessler’s opinion. The state attorneys general, who are responsible for enforcing the MSA, should institute actions against Defendants for such violations. In addition, state authorities should review the licenses and certifications issued to Defendants to determine whether they are in violation of applicable requirements and should have their licenses or certifications suspended or even revoked. States should not issue business licenses to, or otherwise endorse the conduct of, adjudicated racketeers without at least some assurances that the conduct in question will not harm the citizens of that state. Through vigorous MSA enforcement and other state responses, Defendants will be forced to change their behavior in ways that Judge Kessler could not order due to the restraints of the Court of Appeals’s decision.

Next, although Judge Kessler found Defendants to be racketeers and made it clear that many of DOJ’s proposed remedies would benefit the public health, she was restrained from ordering them by the Court of Appeals’s narrow reading of RICO. Importantly, other federal appeals courts differ and might have allowed much broader remedies under RICO.⁶¹ The split among courts suggests that the U.S. Supreme Court might well hear an appeal in this case if DOJ were to seek review. Either Congress or courts hearing appeals in this case should clarify the remedies available under RICO to assure the industry’s wrongdoing is corrected adequately and to preserve RICO’s deterrent value for use in future law enforcement efforts.

Finally, the individuals who were harmed directly by Defendants’ conduct now have a

blueprint for recovering damages. Whether bringing a case on behalf of an individual victim with lung cancer, a class of “light” cigarette smokers, or a passive smoking victim, Judge Kessler’s Opinion details many of the elements of legal causation that would need to be proven at trial.⁶² Even in the absence of an expansion of remedies after an appeal or Congressional action, Judge Kessler’s extraordinarily detailed Opinion documenting the industry’s wrongdoing will likely serve as a powerful catalyst for holding these companies liable for the misconduct under our civil justice system, and well as for political action to constrain cigarette marketing and protect nonsmokers from exposure to secondhand smoke.

Endnotes

- ¹ See *U.S. v. Philip Morris USA, Inc., et al.*, No. 99-CV-02496GK (U.S. Dist. Ct., D.C.) (hereinafter, “U.S. v. Philip Morris”) (Final Opinion) (August 17, 2006), available at: <http://www.tplp.org/doj>.
- ² See *U.S. v. Philip Morris* (Complaint for Damages and Injunctive and Declaratory Relief) (September 22, 1999), available at: <http://www.usdoj.gov/civil/cases/tobacco2/complain.pdf>.
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 at 1-2.
- ³ See *U.S. v. Philip Morris*, 116 F. Supp. 2d 131 (D.D.C. 2000), available at: <http://www.usdoj.gov/civil/cases/tobacco2/opinion1.pdf>.
- ⁴ 18 U.S.C §§ 1961 *et seq.*
- ⁵ See *U.S. v. Philip Morris*, 396 F.3d 1190 (D.C. Cir. 2005), available at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200502/04-5252a.pdf>. This ruling is discussed in more detail beginning on page 5.
- ⁶ 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>.
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ See *U.S. v. Philip Morris* (Final Opinion) (August 17, 2006) (hereinafter, “Opinion”), available at: <http://www.tplp.org/doj>.
- ¹⁰ See *U.S. v. Philip Morris* (Order #1015 – Final Judgment and Remedial Order) (August 17, 2006) (hereinafter, “Order”), available at: <http://www.tplp.org/doj>.
- ¹¹ Opinion at 3.
- ¹² See *U.S. v. Philip Morris* (Notice of Appeal) (October 16, 2006), available at: <http://www.tobacco-on-trial.com/2006/10/18/doj-files-notice-of-appeal>.
- ¹³ See *U.S. v. Philip Morris*, Order #1022 (Judge Kessler’s denial of Certain Defendants’ Motion to Stay), available at: <http://www.tobacco-on-trial.com/2006/09/29/kessler-refuses-defense-motion-to-stay>.
- ¹⁴ *U.S. v. Philip Morris*, Nos. 06-5267 (D.C. Cir.) (Oct. 31, 2006) (Order Granting Defendants’ Emergency Motion to Stay).
- ¹⁵ All references herein to Judge Kessler’s rulings are taken from either the Opinion or the Order.
- ¹⁶ As to one of DOJ’s arguments – that Defendants chose not to create safer cigarettes in order to insulate their existing brands from competition and reduce their litigation exposure – Judge Kessler found that it did not prove its case. See Opinion, pp. 655-740.
- ¹⁷ See *id.*, pp. 219-332.
- ¹⁸ See *id.*, pp. 332-515.
- ¹⁹ See *id.*, pp. 515-655.
- ²⁰ See *id.*, pp. 740-972.
- ²¹ See *id.*, pp. 972-1210.
- ²² See *id.*, pp. 1210-1407.
- ²³ See *id.*, pp. 1407-1478.
- ²⁴ See *id.*, pp. 1478-1498.
- ²⁵ Judge Kessler also mentioned the fact that the MSA requires only its original participating manufacturers to maintain websites providing public access to internal industry documents, and that this requirement expires on June 30, 2010. According to the MSA, the “Original Participating Manufactures” are Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated, and R.J. Reynolds Tobacco Company, and their respective successors. See MSA, Section II(hh).
- ²⁶ See 18 U.S.C. § 1962(c). Specifically, as required by this statute, Judge Kessler found that each Defendant “committed at least two acts of racketeering within 10 years of one another” and that these acts “constitute a pattern of racketeering activity.”
- ²⁷ See 18 USC § 1962(d). Specifically, as required by this statute, Judge Kessler found that each Defendant “individually agreed to commit at least two Racketeering Acts” and “agreed to participate in the conduct of the Enterprise with the knowledge and intent that other members of the conspiracy would also commit at least two predicate acts in furtherance of the Enterprise.” Judge Kessler also found that Liggett withdrew from the conspiracy in 1997, but stated that the withdrawal “does not preclude its liability under 18 U.S.C. §1962(c) for the substantive mail and wire fraud offenses that underlie the civil RICO lawsuit for equitable relief brought by the United States.”
- ²⁸ Specifically, Judge Kessler noted that lawyers:
 - “devised and coordinated both national and international strategy”;
 - “directed scientists as to what research they should and should not undertake”;

- “vetted scientific research papers and reports as well as public relations materials to ensure that the interests of the Enterprise would be protected”;
- “identified ‘friendly’ scientific witnesses, subsidized them with grants from the Center for Tobacco Research and the Center for Indoor Air Research, paid them enormous fees, and often hid the relationship between those witnesses and the industry”; and
- “devised and carried out document destruction policies and took shelter behind baseless assertions of the attorney client privilege.”

29 See Complaint at 2-3.

30 *Id.* at 3.

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

32 Defendants argued that DOJ’s disgorgement claim failed to meet the standard set forth in 18 U.S.C. § 1964(a), the RICO provision providing statutory remedies for violations. *Id.*

33 *Id.* at 82. Although Judge Kessler noted that RICO’s remedies provision “explicitly limits the Court’s jurisdiction to remedies that ‘prevent and restrain’ future RICO violations,” she did not agree with Defendants’ argument that disgorgement be “limited to those ill-gotten gains ‘being used to fund or promote the illegal conduct, or constitute capital available for that purpose.’” *Id.* at 75-76.

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.

34 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>.

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

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

37 *U.S. v. Philip Morris USA Inc.*, 126 S.Ct. 478 (Mem) (2005).

38 See *U.S. v. Philip Morris* (Notice of Appeal) (October 16, 2006), available at: <http://www.tobacco-on-trial.com/2006/10/18/doj-files-notice-of-appeal>, which states:

Appeal from this judgment includes any and all orders antecedent and ancillary thereto, including any and all interlocutory judgments, decrees, decisions, rulings, and opinions that merged into and became part of the judgment, that shaped the judgment, that are related to the judgment, and upon which the judgment is based.

39 See Opinion, pp. 1644-1651.

40 Judge Kessler did base her denial of certain of DOJ’s requested remedies on reasons *other* than the constraints of the Court of Appeals’s decision. As to DOJ’s request that Defendants make corporate structural changes, Judge Kessler felt that such a remedy “would require delegation of substantial judicial powers to non-judicial personnel in violation of Article III of the Constitution,” which the court has “no authority to order.” Additionally, Judge Kessler denied DOJ’s request “that Defendants be ordered to produce and make public all ‘health and safety risk information’ in their own files relating to their products,” finding such request “far too broad and not narrowly tailored enough to include as a remedy.”

41 Judge Kessler ordered two miscellaneous remedies not discussed in this summary. These are: (1) costs (Defendants are to pay DOJ’s appropriate costs, which Defendants have declared to be \$1,930,981.97); and (2) restrictions on the transfer of tobacco brands or businesses.

42 *Emphasis added.* Judge Kessler noted that “[w]hile the MSA has made significant strides towards preventing Defendants’ fraudulent activities, for several reasons it alone cannot remove the reasonable likelihood of Defendants’ future RICO violations.” She did find, however, that there is not a reasonable likelihood of future violations by Defendants Center for Tobacco Research, the Tobacco Institute, both of which have now been disbanded, and by Liggett.

43 See Opinion, pp. 1627-1631; Order, pp. 3-4. Although this remedy appeared as one of four “General Injunctive Relief” provisions in the Order, it is discussed separately here. The other three “General Injunctive Relief” provisions are discussed together on page 8 herein.

44 In keeping with the Court of Appeals’s opinion, Judge Kessler noted that this remedy is “forward looking and narrowly tailored to prevent and restrain their future fraudulent conduct relating to the marketing of low tar cigarettes.”

45 *U.S. v. Philip Morris*, Order # 1028 (March 16, 2007).

46 See Opinion, pp. 1631-1636; Order, pp. 4-9.

47 The Frank Statement was a 1954 marketing campaign, in which the industry promised to examine the health effects of cigarette smoking in order to protect the public. The real purpose of the Frank Statement was to allay the public’s health concerns without doing anything to protect the public’s health.

48 Judge Kessler stated that within sixty days of the issuance of her Opinion and Order, both parties are to submit a proposal for the exact wording of the corrective statements. She will then approve particular statements for publication.

49 Judge Kessler called these venues “the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages.” The Order outlined a schedule for dissemination and publication of the corrective statements. Corrective statements on cigarette packaging and in countertop displays and header displays were to commence by February 2007 and continue for a two-year period. Television advertisements with corrective statements also were to commence by February 2007 and must appear for one year. Statements in newspapers must occur only once, but must contain all corrective statements and must appear in full-page advertisements in the first section of the Sunday edition (or the Friday edition, if no Sunday edition exists) of major U.S. newspapers. The Order assigned Defendants different newspaper publication dates ranging from the 16th Sunday following the date of the Order to the 36th Sunday following the Order date. Additionally, all corrective statements must be placed on Defendants’ websites “for the duration” of the Order.

50 In keeping with the Court of Appeals’s opinion, Judge Kessler noted that the corrective statements remedy is “appropriate and necessary to prevent and restrain them from making fraudulent public statements on smoking and health matters in the future.” Additionally, she stated that “[c]ontrary to Defendants’ arguments, the First Amendment does not preclude corrective statements where necessary to prevent consumers from being confused or misled.”

51 See Opinion, pp. 1636-1643; Order, pp. 10-17.

52 Judge Kessler noted: “Indeed, this remedy is exactly what Judge Williams, in his concurrence in the [Court of Appeals’s] disgorgement opinion, recommends that the District Court do under [RICO]: ‘impose transparency requirements so that future violations will be quickly and easily identified.’” (*Citing* 396 F.3d at 1203 (Williams, J., concurring)). Judge Kessler also noted that the Supreme Court “has recognized, in numerous other contexts over the past century, that compelled disclosures of information can prevent and restrain future frauds” and “has authorized injunctive relief requiring defendants who have been found to have engaged in past fraud to make ongoing public disclosures to prevent similar fraudulent conduct in the future.”

53 Document depositories in Guildford, England and in Minnesota were established pursuant to the settlement agreement in *Minnesota ex rel. Humphrey v. Philip Morris, Inc.*, No. C1-94-8565, 1998 WL 394331 (Minn. Dist. Ct. May 8, 1998) (Consent Judgment) (requiring public access to the Minnesota and Guildford document depositories).

54 “To that end,” Kessler wrote, “both document depositories must include databases which search individual documents (rather than files) by multiple bibliographic fields, such as Bates number, date, author, title, etc. Defendants are to employ the twenty-nine bibliographic fields specified in the MSA.” Defendants also must allow greater access to the Guildford Depository than that which is currently available.

55 Defendants Philip Morris, R. J. Reynolds, Lorillard, and Brown & Williamson have existing Internet Document Websites that they must continue to maintain; Defendant BATCo, which does not currently maintain such a website, must create and maintain one by January 1, 2007.

56 Judge Kessler said this is “only way to guarantee transparency and ensure that Defendants do not engage in similar egregious conduct in the future.”

57 See Opinion, pp. 1643-1644; Order, pp. 2-3.

58 In addition to their motion for clarification regarding the prohibition of brand descriptors, Defendants also moved for clarification regarding two of these general injunctive relief provisions. Judge Kessler denied this motion. As to one of the appealed provisions (prohibiting any future act of racketeering), Judge Kessler noted that a general prohibition against racketeering activity has been upheld “in numerous cases.” As to the second appealed provision (prohibiting material false, misleading, or deceptive statement or representations), she stated that “in light of the extensive Findings of Fact and lengthy Conclusions of Law,” the trial record, and the “complexity of the scheme to defraud” that was outlined in the Findings, Defendants have “more than sufficient notice” of conduct prohibited by the injunction. She noted, furthermore, that “it would be impossible to foresee what the ingenuity and creativity of Defendants’ cadre of sophisticated lawyers could ‘think of next.’” See *U.S. v. Philip Morris*, Order # 1028 (March 16, 2007).

59 MSA § III(a).

60 See MSA § III(r).

61 Judge Kessler noted that there is a split among federal Circuits on this issue, stating that contrary to the D.C. Circuit, “both the Fifth and Second Circuits have adopted a standard of relief that permits disgorgement where it will prevent and restrain future RICO violations.”

62 Under the doctrine of collateral estoppel, which precludes a defendant from relitigating an issue that it has previously litigated unsuccessfully against another plaintiff, Defendants may be foreclosed from denying Judge Kessler’s findings of fact in future cases. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). However, in the only case to date that has considered the collateral estoppel effects of this litigation, the judge decided not to apply the doctrine. See *Schwab v. Philip Morris USA, Inc. et al.*, No. 04-CV-1945 (JBW) (Sept. 2006) (certifying a class of light cigarette purchasers in New York).

About Us

The Tobacco Control Resource Center (“TCRC”), founded in 1979 by doctors, academics, and attorneys, serves as an umbrella organization that implements tobacco control projects. These projects are funded through grants from institutions such as the National Cancer Institute, the Robert Wood Johnson Foundation, the American Legacy Foundation and other key organizations. Through these grants, TCRC is able to work with tobacco control professionals to combat the tobacco industry’s strategies that undermine public health.

TCRC pioneers creative tobacco control measures and is continually engaged in analyzing and drafting legislation locally, nationally and internationally. TCRC works closely with tobacco control advocates, policy makers and attorneys to ensure that new regulations will withstand challenges from the tobacco industry. One of TCRC’s major contributions to the public health arena is the Tobacco Products Liability Project (“TPLP”), which uses litigation against the tobacco industry as a public health strategy. TCRC is a division of the Public Health Advocacy Institute.

The Public Health Advocacy Institute (“PHAI”) is an interdisciplinary project created with three goals: To promote the law in common cause with public health; to provide research and education pertaining to public health, public health law, and the public health implications of legal decisions; and to advocate for public awareness and understanding of the impact of legal decisions upon public health and the importance of public health to law