

Post-Trial Brief of the Plaintiff-Intervenors Concerning the Remedies that the Court Should Impose in this Case – Summary of Proposed Remedies

The brief filed by the public health Intervenors argues that broad, comprehensive remedies are needed to prevent and restrain future wrongdoing by the tobacco company defendants because the unique nature of defendants' business and deadly, addictive products create a propensity to engage in future wrongdoing and the defendants have a long history of circumventing and evading specific restrictions on their conduct. The brief argues that defendants have a propensity to engage in future fraud and deception because 1) nearly all of their new customers are children too young to purchase cigarettes legally, creating a strong incentive for the defendants to market to these new users and then lie about it, and 2) the vast majority of defendants' customers want to quit using their products, providing a strong incentive for defendants to engage in deceptive marketing intended to deter them from quitting.

Because of these unique factors, the brief argues that narrow, specific prohibitions on defendants' conduct are not sufficient to prevent and restrain future wrongdoing. Instead, the Court should impose a comprehensive remedy that includes: 1) general and specific prohibitions on defendants' conduct; 2) economic incentives for the industry to change its wrongful conduct; and 3) strict monitoring and enforcement of the Court's order to prevent the industry from circumventing and evading the remedies as it has done in the past.

Prohibited Practices

The brief proposes a long list of general and specific prohibitions on the practices of tobacco company defendants. In addition to a general prohibition on future acts of racketeering, the defendants would be prohibited from:

- making false, misleading or deceptive statements regarding cigarettes or secondhand smoke and health or regarding the effectiveness of cessation programs and other tobacco control strategies;
- distorting or misrepresenting the conclusions of reports of the Surgeon General;
- failing to publicly disclose any information on the health or safety of smoking or secondhand smoke;
- explicitly or implicitly representing that any cigarette brand reduces the adverse health effects of smoking or exposure to secondhand smoke. The brief calls for prohibiting all such health descriptors, including but not limited to terms like "light," "mild" and "low-tar";
- engaging in any marketing activities that appeal to youth, including, but not limited to prohibitions on engaging in price promotions for the top five youth cigarette brands (price promotions now make up the bulk of cigarette marketing, according to the FTC); selling kiddie packs; engaging in motor sport or other brand name sponsorships that result in exposure to youth; and selling flavored cigarettes;
- engaging in any advertising in publications with large youth readership (more than two million youth readers or more than 15 percent youth readership) or in any retail outlet open to youth unless that advertising is limited to black text on white background;
- including or continuing to include information on youth in their consumer databases or collecting any data or records about youth in the future;

- using third parties to circumvent these orders; and
- obstructing or interfering with the activities and duties of the officers appointed by the court to enforce any remedies imposed in this case, including the cessation and education programs.

This section broadens and strengthens many of the specific prohibitions proposed by the government and adds some new ones not proposed by the government. For example, the government did not propose prohibiting the defendants from making false, misleading or deceptive statements regarding tobacco control measures; limited its proposed sponsorship restriction to motor sports; and had a less inclusive restriction on making health claims. The government also did not propose limiting advertising in youth-oriented publications and in stores to black and white-text only or the prohibition on including information about youth in consumer databases.

Smoking Cessation

The tobacco company defendants would be required to pay \$4.8 billion annually to fund a smoking cessation program. The cessation remedy would be administered by an independent Cessation Administrative Organization and provide:

- \$3.2 billion annually for a nationwide cessation “quitline” that would provide comprehensive tobacco use cessation guidance, assistance, therapy and treatment for all smokers who want to quit;
- \$1 billion annually for clinical research to develop new smoking cessation therapies, and for training, education, and other support of clinicians who administer cessation therapies;
- \$600 million annually for a national media and outreach campaign to build awareness of the cessation program, educate smokers about the benefits of quitting and provide guidance on how to quit successfully;

The \$4.8 billion a year cessation program would automatically continue until less than 10 percent of smokers they want or intend to quit (currently about 70 percent of the nation’s 45.4 million adult smokers say they want to quit. After 10 years, and every two years thereafter, the tobacco companies could petition the Independent Investigations Officer (IO) established to enforce the remedies to reduce the amount paid for the cessation program, and the IO could do so after determining that reduced amounts could achieve the goal of less than 10 percent of smokers saying they want or intend to quit. However, a defendant tobacco company’s payments would continue automatically for another five years if the IO finds the defendant has engaged in a practice prohibited by the Court’s order. Payments would also be adjusted annually for inflation.

This proposal is consistent with the recommendations of the government’s expert witness on tobacco cessation, Dr. Michael Fiore, who recommended a 25-year, \$130 billion smoking cessation program. One difference is that Dr. Fiore called for spending \$1 billion a year on the public education component. Our brief recommends \$600 million a year for the cessation public education campaign, plus an additional \$600 million for other public education campaigns (see next item – Public Education and Countermarketing), because all expert witness testimony in the case provided support for spending a total of \$1.2 billion a year on public education and countermarketing. In addition, our brief argues that the appropriate goal to prevent future

industry wrongdoing is not to establish a program for a set period of years, but to establish goals for significantly reducing the number of smokers who want to quit and would be susceptible to misleading industry marketing intended to deter them from doing so. Achieving that goal could take more or less than the 25 years recommended by Dr. Fiore.

In contrast, the government has proposed a cessation remedy that would require the industry pay \$2 billion a year for five years, for a total of only \$10 billion. Funding would be extended if the IO found that any defendant has continued to engage in prohibited conduct.

Public Education and Countermarketing

The tobacco company defendants would be required to pay \$600 million a year to fund public education and countermarketing campaigns that would be run by the American Legacy Foundation. As the government proposed, there would be three separate campaigns with the goals of:

- reducing youth tobacco use.
- educating consumers about light, low-tar and other cigarettes for which there is an explicit or implicit claim of reduced risk.
- educating the public about the disease risks and other harms associated with secondhand smoke.

These \$600 million a year payments would last for a minimum of 10 years (\$6 billion over 10 years) and, after that, would automatically continue until set public health goals are met (the payments would continue until youth smoking rates are reduced to below five percent and until 90 percent of the public is informed about the risks of tobacco products and secondhand smoke). As with the cessation public education campaign, a defendant tobacco company's payments would continue automatically for another five years if the IO finds the defendant has engaged in a practice prohibited by the Court's order. Payments would be adjusted annually for inflation.

In contrast, the government has proposed requiring the tobacco companies to pay \$400 million a year for 10 years to fund public education and countermarketing campaigns, with no opportunity for extension beyond 10 years.

Youth Smoking Reduction Targets and Penalties

The government in its proposed remedies established the general framework of an effective remedy that would set annual targets for reducing youth smoking rates and financial penalties if defendants fail to meet these targets. Our brief would strengthen the government's proposal in several ways in order to better prevent and restrain the defendants from marketing to youth in the future. These changes would:

- Employ a shorter timeframe for achieving the targets. The government proposed a 42 percent reduction from 2003 by 2013. Our brief proposes that the 42 percent reduction be achieved by 2010.
- Use a measure of 30-day youth smoking rather than daily youth smoking. This would penalize the tobacco companies for seeking to increase both youth smoking initiation and progression to more regular smoking.
- Increase the financial penalty when targets are missed.

Document Disclosure

The government's proposed remedies included several document disclosure provisions that would:

- Extend to 2030 the tobacco companies' document disclosure requirements under the state tobacco settlements;
- Extend the disclosure requirement to include all documents produced in this case and in future litigation in the United States;
- Require the defendants to disclose "disaggregated marketing data", that is marketing data broken down by type of marketing, brand, geographical region, and other categories.

Our brief strongly endorses these disclosure remedies and proposes that they be extended in include:

- All documents produced by the defendants in foreign courts or administrative proceedings.
- Payments and support to third parties that promote defendants' interests and goals.

Compliance and Enforcement

Like the government did, our brief calls for court appointment of an Independent Investigations Officer (IO) with the authority and duty to supervise the implementation of the remedies ordered by the court. But our brief significantly strengthens the authority of the IO in several critical aspects, including:

- Requiring that the IO and other court-appointed officers be independent of tobacco industry ties and influence.
- Creating a procedure by which comments from the public and other concerned parties regarding defendants' activities are submitted to the IO. The government did not propose such a procedure.
- Requiring defendants to educate employees regarding whistleblower protections for reporting a violation of the court's order or other misconduct. The IO would also have the authority to establish an anonymous reporting system for such violations and misconduct.

Our brief also calls for assuring that the IO actively monitors and requires changes in a significantly broader range of defendants' practices than proposed by the government. While the government focused largely on defendants' marketing practices, our brief would extend the IO's active monitoring to:

- any contributions, grants, contracts or other payments with third parties to carry out activities that defendants are prohibited from undertaking;
- any efforts by the defendants to use international affiliates to undertake prohibited activities;
- internal company business practices regarding compliance with youth smoking reduction targets;
- any activity designed to undermine the smoking cessation program or the public education/countermarketing program.

Our brief endorses the government's view that the IO should have broad authority to access defendants' books, records and other documents; interview current and former employees of defendants; recommend removal of defendants' officers and employees complicit in future RICO

violations or violations of the Court's order; and impose fines and other sanctions for violating the Court's order.

Other Remedies Proposed by the Government

Our brief does not propose any changes to other remedies recommended by the government, including:

- Requiring each defendant to make corrective communications regarding the adverse health effects of smoking; the addictiveness of smoking and nicotine; "low tar" cigarettes; the advertise health effects of exposure to secondhand smoke; and the impact of tobacco marketing on youth.
- Granting the Independent Investigations Officer the authority to review the business policies, practices and operations of each defendant and to recommend changes to accomplish the goals of the Court's order.